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## **The P.R.I.M.E. Finance Foundation: Dispute Resolution in Global Financial Markets**

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Traditionell standen Banken und Finanzinstitute der Schiedsgerichtsbarkeit eher skeptisch gegenüber und haben staatliche Gerichte als Mittel zur Erledigung internationaler Streitigkeiten bevorzugt. In jüngerer Zeit ist jedoch die Akzeptanz gegenüber der Schiedsgerichtsbarkeit gewachsen. Am 16. Januar 2012 wurde eine neue Schiedsinstitution – Panel of Recognized International Market Experts in Finance («P.R.I.M.E. Finance») – bei einer Eröffnungskonferenz im Friedenspalast in Den Haag ins Leben gerufen. P.R.I.M.E. Finance wurde gegründet, um die Rechtspflege bei der Beilegung von Streitigkeiten über komplexe Finanztransaktionen zu unterstützen. (sk)

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Rechtsgebiet(e): Arbeitsrecht

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## 1. Introduction

[Rz 1] On 16 January 2012, a new arbitral institution – Panel of Recognized International Market Experts in Finance («P.R.I.M.E. Finance») – was launched at an inaugural conference held at the Peace Palace in The Hague. P.R.I.M.E. Finance has been established to assist judicial systems in the settlement of disputes on complex financial transactions.<sup>1</sup>

[Rz 2] Traditionally, banks and financial institutions have looked rather sceptically towards arbitration and have favoured litigation over arbitration as the means of resolving international disputes. However, more recently there has been a growing acceptance of arbitration.

[Rz 3] P.R.I.M.E. Finance's idea is essentially to offer mediation and arbitration services for resolving disputes between private entities (such as banks, insurance firms, and pension funds) and institutions (such as clearinghouses, exchanges, and regulators), and possibly even customers.<sup>2</sup> However, a guiding principle of the organization is independence – which will distinguish it from industry associations and other financial market participants.<sup>3</sup>

[Rz 4] This brief article first indicates the reasons often given for the reluctance of the financial sector to use arbitration (see section 2.), then underlines the changing attitude of the financial sector towards arbitration (see section 3.) and gives an overview of the birth and development of the

P.R.I.M.E. Finance Foundation's idea (see section 4.). Finally, P.R.I.M.E. Finance arbitration (see section 5.) is discussed and P.R.I.M.E. Finance mediation (see section 6.) mentioned.

## 2. The traditional reluctance of the financial sector against arbitration

[Rz 5] Banks and financial institutions have traditionally favoured litigation over arbitration as the means of resolving international disputes. It has been underlined that the reasons often given include:

- i. «financial disputes typically involve straightforward payment claims and do not involve complex legal questions or fact finding, with the latter more suited for arbitration;
- ii. arbitration does not provide for the possibility of default judgments or summary judgments, and as a result arbitration is not as efficient and cost effective as court proceedings;
- iii. disputes about the tribunal's jurisdiction may lead to unnecessary delays;
- iv. arbitrators tend to render more equitable decisions than judges;
- v. the flexibility of the arbitral process creates legal uncertainty;
- vi. banks appreciate control of decisions by higher courts on appeal;
- vii. arbitration can permit unnecessarily extensive document production (particularly compared with civil law courts);
- viii. arbitration is problematic in multi-party disputes;
- ix. arbitral confidentiality means that proceedings cause less embarrassment to the debtor; and
- x. awards have limited precedential value.»<sup>4</sup>

[Rz 6] In the past major banks have had sufficient bargaining power in international transactions to insist upon the governing law of their choice (very often New York law or English law) and upon the jurisdiction of their choice (very often New York courts or English courts).<sup>5</sup> Such jurisdictions are considered bank-friendly, in that they uphold the sanctity

<sup>1</sup> <http://www.primefinancedisputes.org/index.php/about-us>.

<sup>2</sup> Eric De Brabandere, P.R.I.M.E. Finance: The Role and Function of the New Arbitral Institution for the Settlement of Financial Disputes in The Hague, Insights (American Society of International Law), 8 February 2011, available at <http://www.asil.org/pdfs/insights/insight120208.pdf> (hereinafter cited De Brabandere).

<sup>3</sup> <http://www.primefinancedisputes.org/index.php/about-us>. See e.g. the International Swaps and Derivatives Association (ISDA).

<sup>4</sup> Audley Sheppard, Arbitration of International Financial Disputes, Kluwer Arbitration Blog, 19 March 2009, available at <http://klowerarbitrationblog.com/blog/2009/03/19/arbitration-of-international-financial-disputes/> (hereinafter cited Sheppard). See also Klaus Peter Berger, The aftermath of the financial crisis: why arbitration makes sense for banks and financial institutions, Law and Financial Markets Review, January 2009, pp. 54 et seq.

<sup>5</sup> Sheppard, *supra* footnote 4.

of contract and permit very few defences to non-performing debtors.<sup>6</sup>

### 3. The changing attitude of the financial sector towards arbitration

[Rz 7] For banks it may generally be more difficult to enforce a New York judgment outside the U.S. or an English judgment outside the European Community than to enforce arbitral awards.<sup>7</sup> The big advantage in the enforcement of arbitral awards is indeed given by the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards («New York Convention»)<sup>8</sup>.

[Rz 8] With an increasing number of transactions taking place with counterparties in South America, Russia and the CIS, Middle East and Asia, that do not have assets in the U.S. or the E.C., banks have realized that it could be preferable to include arbitration clauses in such agreements.<sup>9</sup> Nevertheless, even then, banks very often prefer to keep their options open and conclude unilateral arbitration clauses.<sup>10</sup>

[Rz 9] In international loan agreements concluded in London it is common to provide that disputes be referred to the English courts, with an option – exercisable by the bank once the dispute arises – to refer the dispute to arbitration instead.<sup>11</sup> Such an option has been held to be valid by New York<sup>12</sup> and English<sup>13</sup> courts.<sup>14</sup> However, prescribing arbitration only as an alternative to litigation may make the agreement to arbitrate, or any resulting award, unenforceable in some jurisdictions.<sup>15</sup>

### 4. The P.R.I.M.E. Finance Foundation: overview of birth and development of the idea

[Rz 10] P.R.I.M.E. Finance is registered as a foundation under Dutch law and offers dispute resolution services in the area of complex financial services. The institution was established with the aim of facilitating dispute settlement, reducing legal uncertainty and fostering stability in the global financial markets.

[Rz 11] The idea grew from an individual initiative by Jeffrey Golden,<sup>16</sup> a Visiting Professor at the Department of Law of the London School of Economics and a former Senior Partner in a major international law firm's global derivatives practice, who first proposed the establishment of a specialized financial arbitral institution in 2008.<sup>17</sup> His arguments essentially were:

- «that national judges are not best equipped to settle disputes regarding the complex and transnational international financial transactions and that *ad hoc* arbitration is not optimal either because of its decentralized character and the lack of predictability or an authoritative body of law;
- that there is a certain «public interest» in settling complex financial disputes efficiently, especially since «the market could have a greater interest in the outcome of a case than two private parties who are litigating it.»<sup>18</sup>

[Rz 12] Supported by the Dutch Government and the Dutch Central Bank, Golden's idea was further discussed and refined in a series of meetings with representatives from, *inter alia*, the European Central Bank, the U.S. Securities and Exchange Commission, the New York Federal Reserve, and among finance and financial law experts from the United States, Europe, Asia, Australia, and New Zealand, hosted by the World Legal Forum,<sup>19</sup> a Hague-based non-profit organization.<sup>20</sup>

[Rz 13] In October 2010 an Experts' Roundtable was organized at the Peace Palace in The Hague and chaired by Lord Woolf of Barnes,<sup>21</sup> former Lord Chief Justice of England and Wales. Some 60 representatives from high courts, commercial banks, regulators, supervisors, private practice,

<sup>6</sup> Ibid.

<sup>7</sup> Ibid.

<sup>8</sup> On the New York Convention see e.g. Emmanuel Gaillard, Domenico Di Pietro (eds.), *Enforcement of arbitration agreements and international arbitral awards, The New York Convention in practice*, (2008), London, Cameron May Ltd.; Herbert Kronke, Patricia Nacimiento, Dirk Otto, Nicola Christine Port (eds.), *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention*, (2010), The Hague, Kluwer Law International.

<sup>9</sup> Sheppard, *supra* footnote 4.

<sup>10</sup> On unilateral arbitration clauses in the financial sector, see William W. Park, *Making Sense of Financial Arbitration*, in *Arbitration, Finance and Insurance – Special Supplement 2000*, ICC International Court of Arbitration Bulletin, pp. 11 et seq. On unilateral arbitration clauses more in general see e.g. Laurent A. Niddam, *Unilateral Arbitration Clauses in Commercial Arbitration*, 1996, ADRLJ, 147.

<sup>11</sup> Sheppard, *supra* footnote 4.

<sup>12</sup> See e.g. *Sablosky v. Edward S. Gordon Co.*, 535 N.E.2d 643 (N.Y. 1989).

<sup>13</sup> See e.g. *Law Debenture Trust Corp. plc v. Elektrim Finance BV* [2005] EWHC 1412 (Ch.).

<sup>14</sup> Sheppard, *supra* footnote 4.

<sup>15</sup> E.g., Russia. Ibid.

<sup>16</sup> Chairman of the P.R.I.M.E. Finance Management Board. (<http://www.primefinancedisputes.org/index.php/about-us/prime-finance-management-board>).

<sup>17</sup> De Brabandere, *supra* footnote 2.

<sup>18</sup> Ibid.

<sup>19</sup> <http://www.worldlegalforum.org/cms/>.

<sup>20</sup> De Brabandere, *supra* footnote 2.

<sup>21</sup> Member of the P.R.I.M.E. Finance Advisory Board (<http://www.primefinancedisputes.org/index.php/about-us/prime-finance-advisory-board>).

academia, and government institutions were present.<sup>22</sup> During this meeting, the idea to create a Panel of Recognized International Market Experts in Finance: P.R.I.M.E. Finance gained widespread support.<sup>23</sup>

[Rz 14] The date of the formal opening and characteristics of P.R.I.M.E. Finance were formally announced on 29 June 2011 in The Hague, when the first P.R.I.M.E. Finance Board meeting took place. The P.R.I.M.E. Finance dispute resolution services and its Arbitration and Mediation Rules were then launched at the opening conference of P.R.I.M.E. Finance at the Peace Palace in The Hague on 16 January 2012.<sup>24</sup>

## 5. P.R.I.M.E. Finance Arbitration

### 5.1. Arbitration clause

[Rz 15] Two options of model arbitration clause for contracts are suggested. Option 1 (see section 5.1.1.) includes an express option for mediation, whereas option 2 (see section 5.1.2.) is without such inclusion. Moreover, in both options optional provisions (see section 5.1.3.) can be added. Finally a possible waiver statement is proposed (see section 5.1.4.).

#### 5.1.1. Option 1 (including an express option for mediation)

[Rz 16] The wording of the first option is:

Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be submitted to mediation in accordance with the P.R.I.M.E. Finance Mediation Rules. Any mediation shall take place in [town & country] and be administered by P.R.I.M.E. Finance.

Subject to Articles 18<sup>25</sup> and 19<sup>26</sup> of the P.R.I.M.E.

<sup>22</sup> <http://www.primefinancedisputes.org/index.php/about-us/history>.

<sup>23</sup> *Ibid.*

<sup>24</sup> See <http://www.primefinancedisputes.org/index.php/news-blog>.

<sup>25</sup> Article 18

The mediation proceedings are terminated:

- a. By the signing of the settlement agreement by the parties, on the date of the agreement; or
- b. By a written declaration of the mediator, after consultation with the parties, to the effect that further efforts at mediation are no longer justified, on the date of the declaration; or
- c. By a written declaration of the parties addressed to the mediator to the effect that the mediation proceedings are terminated, on the date of the declaration; or
- d. By a written declaration of a party to the other party and the mediator to the effect that the mediation proceedings are terminated, on the date of the declaration.

<sup>26</sup> Article 19

The parties undertake not to initiate, or continue during the mediation proceedings, any arbitral or judicial proceedings in respect of a dispute that is the subject of the mediation proceedings, except that a party may initiate arbitral or judicial proceedings where, in its opinion, such proceedings are

Finance Mediation Rules, a party may commence arbitration proceedings administered by P.R.I.M.E. Finance in accordance with the P.R.I.M.E. Finance Arbitration Rules:

- a. The number of arbitrators shall be [one or three], and [this/these] arbitrators shall be selected from P.R.I.M.E. Finance's list of approved arbitrators.
- b. [Where there will be three arbitrators] Each party shall appoint one arbitrator from P.R.I.M.E. Finance's list of approved arbitrators, and the Chairman shall be selected in line with article 9(1)<sup>27</sup> of the P.R.I.M.E. Finance Arbitration Rules.
- c. Where necessary, the Secretary-General of the Permanent Court of Arbitration shall act as the appointing authority, and shall appoint from P.R.I.M.E. Finance's list of approved arbitrators, to which list the parties herewith agree as the basis for the appointment of the arbitrators.
- d. The place of arbitration shall be [town & country];
- e. The language to be used in the arbitral proceedings shall be [...]; and<sup>28</sup>

#### 5.1.2. Option 2 (not including an express option for mediation)

[Rz 17] Whereas the wording of the second option is:

*Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be resolved by arbitration administered by P.R.I.M.E. Finance in accordance with the P.R.I.M.E. Finance Arbitration Rules.*

- a. *The number of arbitrators shall be [one or three], and [this/these] arbitrators shall be selected from P.R.I.M.E. Finance's list of approved arbitrators.*
- b. [Where there will be three arbitrators] Each party shall appoint one arbitrator from P.R.I.M.E. Finance's list of approved arbitrators, and the Chairman shall be selected in line with article 9(1)<sup>29</sup> of the P.R.I.M.E. Finance Arbitration Rules.
- c. *Where necessary, the Secretary-General of the Permanent Court of Arbitration shall act as the*

necessary for preserving its rights or as required by a court.

<sup>27</sup> Article 9

1. If three arbitrators are to be appointed, each party shall appoint one arbitrator from P.R.I.M.E. Finance's list of approved arbitrators. The two arbitrators thus appointed shall choose the third arbitrator from P.R.I.M.E. Finance's list of approved arbitrators, which third arbitrator will act as the presiding arbitrator of the arbitral tribunal.

<sup>28</sup> [http://www.primefinancedisputes.org/images/pdf/Model\\_clause.pdf](http://www.primefinancedisputes.org/images/pdf/Model_clause.pdf)

<sup>29</sup> See *supra* footnote 27.

*appointing authority, and shall appoint from P.R.I.M.E. Finance's list of approved arbitrators, to which list the parties herewith agree as the basis for the appointment of the arbitrators.*

- d. *The place of arbitration shall be [town & country];*
- e. *The language to be used in the arbitral proceedings shall be [...]; and<sup>30</sup>*

### 5.1.3. Optional provisions for arbitration clauses

[Rz 18] In both options the parties have the possibility to opt-out from the Emergency Arbitration Rules:

*f. The Emergency Arbitration Rules as set out in ANNEX C to the P.R.I.M.E. Finance Arbitration Rules shall not apply.<sup>31</sup>*

[Rz 19] Moreover the parties can opt-in to the Referee Arbitration Rules and/or the calculation of the administrative costs in accordance to Article 3 of Annex E to the P.R.I.M.E. Finance Arbitration Rules:

*g. The Referee Arbitration Rules as set out in ANNEX D to the P.R.I.M.E. Finance Arbitration Rules shall apply.*

*h. The administrative costs of P.R.I.M.E. Finance shall be calculated in accordance with article 3 of Annex E to the P.R.I.M.E. Finance Arbitration Rules.<sup>32</sup>*

[Rz 20] The option to opt-in to the Referee Arbitration Rules (lit. g) is only open in cases where the place of arbitration is located in The Netherlands.

### 5.1.4. Proposal of possible waiver statement

[Rz 21] A proposal has also been made for the situation where the parties wish to exclude recourse against the arbitral award that may be available under the applicable law. The suggested waiver statement reads:

*The parties hereby waive their right to any form of recourse against an award to any court or other competent authority, insofar as such waiver can validly be made under the applicable law.<sup>33</sup>*

[Rz 22] However, the effectiveness and conditions of such an exclusion depend on the applicable law. For arbitral tribunals that have their seat in Switzerland a waiver is possible under the conditions of Article 192 of the Swiss Private International Law Act:<sup>34</sup>

- 1. *If none of the parties have their domicile, their habitual residence, or a business establishment in*

*Switzerland, they may, by an express statement in the arbitration agreement, or in a subsequent written agreement, waive all setting aside proceedings, or limit such proceedings to one or more of the grounds listed in Article 190(2).*

- 2. *If the parties have waived all setting aside proceedings and if the awards are to be enforced in Switzerland, the New York Convention of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards applies by analogy.*

## 5.2. Arbitration rules

### 5.2.1. Based on the UNCITRAL Arbitration Rules

[Rz 23] The P.R.I.M.E. Finance Arbitration Rules<sup>35</sup> are based on the UNCITRAL Arbitration Rules (as revised in 2010<sup>36</sup>). However, in order to «institutionalize» the UNCITRAL Arbitration Rules, P.R.I.M.E. Finance was built in as the body administering the arbitral proceedings.<sup>37</sup>

[Rz 24] In preparing the rules deviations from the original text have been kept to a minimum, both with a view to the role of the Permanent Court of Arbitration and in order to ensure that, in the case of any ambiguities, reference may easily be made to the commentaries on the UNCITRAL Arbitration Rules 2010.<sup>38</sup>

### 5.2.2. Arbitrators

#### 5.2.2.1. Appointing authority

[Rz 25] While Article 6(1) of the UNCITRAL Arbitration Rules provides for a variety of options to agree on an appointing authority,<sup>39</sup> Article 6(1) of the P.R.I.M.E. Finance Arbitration Rules provides that:

*If the parties have not otherwise agreed on the choice of an appointing authority by the time of commencement of the arbitration, any party may request the Secretary-General of the PCA to act as the appointing authority.*

#### 5.2.2.2. Eligibility

[Rz 26] In principle, only persons listed on the P.R.I.M.E. Finance's list of approved arbitrators are eligible for

<sup>30</sup> [http://www.primefinancedisputes.org/images/pdf/Model\\_clause.pdf](http://www.primefinancedisputes.org/images/pdf/Model_clause.pdf)

<sup>31</sup> Ibid.

<sup>32</sup> Ibid.

<sup>33</sup> Ibid.

<sup>34</sup> SR 291.

<sup>35</sup> <http://www.primefinancedisputes.org/images/pdf/arbitration%20rules%20-%20prime%20format%20-.pdf>.

<sup>36</sup> [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/2010Arbitration\\_rules.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2010Arbitration_rules.html).

<sup>37</sup> <http://www.primefinancedisputes.org/index.php/arbitration>.

<sup>38</sup> Ibid.

<sup>39</sup> «Unless the parties have already agreed on the choice of an appointing authority, a party may at any time propose the name or names of one or more institutions or persons, including the Secretary-General of the Permanent Court of Arbitration at The Hague (hereinafter called the «PCA»), one of whom would serve as appointing authority.»

appointment as arbitrators. To this end, two lists of experts have been drafted and made public: a list of «Finance Experts»<sup>40</sup> and a list of «Dispute Resolution Experts».<sup>41</sup> Among the panel members are retired and sitting judges, central bankers, regulators, representatives from private practice, and derivative market participants (both dealer and buy side).<sup>42</sup> Geographically the great majority of the panel members are from the United Kingdom and the United States of America. Switzerland is represented by two very distinguished members.<sup>43</sup>

[Rz 27] As in traditional commercial arbitrations, parties can opt for a procedure to be overseen by a sole arbitrator (Article 8<sup>44</sup>), who is appointed by agreement between the parties, or a three member arbitral tribunal (Article 9<sup>45</sup>). In the latter case,

<sup>40</sup> <http://www.primefinancedisputes.org/index.php/expert-list/financial-experts>.

<sup>41</sup> <http://www.primefinancedisputes.org/index.php/expert-list/arbitrationmediation-experts>.

<sup>42</sup> Daniella Strik, Launch of P.R.I.M.E. Finance Arbitration Rules: dispute resolution in global financial markets, Kluwer Arbitration Blog, 17 January 2012, available at <http://kluwerarbitrationblog.com/blog/2012/01/17/launch-of-p-r-i-m-e-finance-arbitration-rules-dispute-resolution-in-global-financial-markets/>.

<sup>43</sup> Professor Gabrielle Kaufmann-Kohler as a Dispute Resolution Expert and Dr. Thomas Werlen as a Finance Expert.

<sup>44</sup> *Article 8* 1. If the parties have agreed that a sole arbitrator is to be appointed, the sole arbitrator shall be jointly appointed by the parties from P.R.I.M.E. Finance's list of approved arbitrators. If, within 30 days after receipt by all other parties, and P.R.I.M.E. Finance, 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.

<sup>45</sup> *Article 9* 1. If three arbitrators are to be appointed, each party shall appoint one arbitrator from P.R.I.M.E. Finance's list of approved arbitrators. The two arbitrators thus appointed shall choose the third arbitrator from P.R.I.M.E. Finance's list of approved arbitrators, which third arbitrator 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 from P.R.I.M.E. Finance's list of approved arbitrators. 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

each party will appoint one arbitrator, and the party-appointed arbitrators will then appoint a presiding arbitrator from the list of approved arbitrators. In both scenarios, if there is no agreement between the parties, the PCA Secretary-General will appoint the presiding arbitrator.

### 5.2.2.3. Disclosures by and challenge of arbitrators

[Rz 28] The P.R.I.M.E. Finance Arbitration Rules oblige a candidate arbitrator, pursuant to Article 11,<sup>46</sup> to disclose any circumstances likely to give rise to justifiable doubts as to his/her impartiality, independence, or availability.<sup>47</sup> By making reference to «availability» the provision should contribute to an efficient and speedy arbitration process.

[Rz 29] Any arbitrator may be challenged pursuant to Articles 12<sup>48</sup> and 13<sup>49</sup> of the P.R.I.M.E. Finance Arbitration Rules if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence.

### 5.2.3. Making public and publications of awards or orders

[Rz 30] Article 34(5), first sentence, of the P.R.I.M.E. Finance

the same way as a sole arbitrator would be appointed under article 8.

<sup>46</sup> *Article 11* When a person is approached in connection with his or her possible appointment as an arbitrator, he or she shall disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality, independence or availability. An arbitrator, from the time of his or her appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties and the other arbitrators unless they have already been informed by him or her of these circumstances.

<sup>47</sup> See also the «Model statements of independence pursuant to article 11 of the P.R.I.M.E. Finance Rules» (Annex B).

<sup>48</sup> *Article 12* 1. Any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence. 2. A party may challenge the arbitrator appointed by it only for reasons of which it becomes aware after the appointment has been made. 3. In the event that an arbitrator fails to act or in the event of the de jure or de facto impossibility of his or her performing his or her functions, the procedure in respect of the challenge of an arbitrator as provided in article 13 shall apply.

<sup>49</sup> *Article 13* 1. A party that intends to challenge an arbitrator shall send notice of its challenge within 15 days after it has been notified of the appointment of the challenged arbitrator, or within 15 days after the circumstances mentioned in articles 11 and 12 became known to that party. 2. The notice of challenge shall be communicated to all other parties, to P.R.I.M.E. Finance, to the arbitrator who is challenged and to the other arbitrators. The notice of challenge shall state the reasons for the challenge. 3. When an arbitrator has been challenged by a party, all parties may agree to the challenge. The arbitrator may also, after the challenge, withdraw from his or her office. In neither case does this imply acceptance of the validity of the grounds for the challenge. 4. If, within 15 days from the date of the notice of challenge, all parties do not agree to the challenge or the challenged arbitrator does not withdraw, the party making the challenge may elect to pursue it. In that case, within 30 days from the date of the notice of challenge, it shall seek a decision on the challenge by the appointing authority.

Arbitration Rules, which reflects Article 34(5) of the UNCITRAL Arbitration Rules (2010), provides that:

*An award may be made public with the consent of all parties or where and to the extent disclosure is required of a party or of P.R.I.M.E. Finance by legal duty, to protect or pursue a legal right or in relation to legal proceedings before a court or other competent authority.*

[Rz 31] Awards may therefore in principle be made public with the consent of all parties. However, Article 34(5) of the P.R.I.M.E. Finance Arbitration Rules also permits excerpts of an award to be published without the consent of the parties. This is in line with the need for predictability and stability of the financial markets and the goal of P.R.I.M.E. Finance to create a body of law in this area.<sup>50</sup> In particular, P.R.I.M.E. Finance has the right to publish an award if it has a legal duty to do so.<sup>51</sup>

[Rz 32] Further, Article 34(5) of the P.R.I.M.E. Finance Arbitration Rules reads:

*P.R.I.M.E. Finance may include in its publications excerpts of the arbitral award or an order in anonymised form. P.R.I.M.E. Finance may publish an award or an order in its entirety, in anonymised form, under the condition that no party objects to such publication within one month after receipt of the award.*

[Rz 33] The publication of awards is a relative novelty in international arbitration. Two exceptions are awards rendered under the International Convention on the Settlement of Investment Disputes («ICSID») and awards rendered by the Court of Arbitration for Sport («CAS»), which are regularly published. In ICSID investment arbitrations Article 48(5) of the ICSID Convention<sup>52</sup> provides that «the Centre shall not publish the award without the consent of the parties», and in the case of sports arbitration the relevant part of Article R59 of the CAS Code<sup>53</sup> provides that in the appeal arbitration procedure «the award, a summary and/or a press release setting forth the results of the proceedings shall be made public by the CAS, unless both parties agree that they should remain confidential».

[Rz 34] On the other hand international commercial arbitration is usually confidential.<sup>54</sup> This is precisely one of the reasons why parties traditionally choose arbitration over regular court proceedings. While it remains to be seen whether parties will agree to the publication of awards of proceedings conducted under the P.R.I.M.E. Finance Arbitration Rules, the publication of awards, or at least the relevant excerpts of an award, is

crucial if the new institution is to develop a consistent body of law and ensure predictability.<sup>55</sup> Arbitrators can only use and refer to previous awards if they are available to them.<sup>56</sup>

#### 5.2.4. Speed and urgency

[Rz 35] The general provision for expedited proceedings is set out in Article 2a of the P.R.I.M.E. Finance Arbitration Rules,<sup>57</sup> according to which the parties may agree to shorten time lines.

[Rz 36] Article 26 of the P.R.I.M.E. Finance Arbitration Rules<sup>58</sup> provides that the arbitral tribunal may, at the request of a party, grant interim measures if it finds that it has *prima facie*

<sup>55</sup> De Brabandere, *supra* footnote 2.

<sup>56</sup> *Ibid.*

<sup>57</sup> *Article 2a* The parties may agree to shorten time lines set out in these Rules. If the parties have agreed upon shortened time lines, the shortened time lines shall only become effective after approval by the arbitral tribunal. The arbitral tribunal will communicate its approval, or refusal thereof, within 7 days of the parties' submissions, notwithstanding the arbitral tribunal's inherent discretion to suggest reasonable modifications of the parties' agreed time line.

<sup>58</sup> *Article 26* 1. The arbitral tribunal may, at the request of a party, grant interim measures if it finds that it has *prima facie* jurisdiction to decide the claim. 2. An interim measure is any temporary measure by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party, for example and without limitation, to: a. Maintain or restore the status quo pending determination of the dispute; b. Take action that would prevent, or refrain from taking action that is likely to cause, (i) current or imminent harm or (ii) prejudice to the arbitral process itself; c. Provide a means of preserving assets out of which a subsequent award may be satisfied; or d. Preserve evidence that may be relevant and material to the resolution of the dispute. 3. The party requesting an interim measure under paragraphs 2 (a) to (c) shall satisfy the arbitral tribunal that: a. Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and b. There is a reasonable possibility that the requesting party will succeed on the merits of the claim. The determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination. 4. With regard to a request for an interim measure under paragraph 2 (d), the requirements in paragraphs 3 (a) and (b) shall apply only to the extent the arbitral tribunal considers appropriate. 5. The arbitral tribunal may modify, suspend or terminate an interim measure it has granted, upon application of any party or, in exceptional circumstances and upon prior notice to the parties, on the arbitral tribunal's own initiative. 6. The arbitral tribunal may require the party requesting an interim measure to provide appropriate security in connection with the measure. 7. The arbitral tribunal may require any party promptly to disclose any material change in the circumstances on the basis of which the interim measure was requested or granted. 8. The party requesting an interim measure may be liable for any costs and damages caused by the measure to any party if the arbitral tribunal later determines that, in the circumstances then prevailing, the measure should not have been granted. The arbitral tribunal may award such costs and damages at any point during the proceedings. 9. A request for interim measures addressed by any party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of that agreement.

<sup>50</sup> De Brabandere, *supra* footnote 2.

<sup>51</sup> *Ibid.*

<sup>52</sup> <http://icsid.worldbank.org/ICSID/ICSID/RulesMain.jsp>.

<sup>53</sup> <http://www.tas-cas.org/rules>.

<sup>54</sup> On confidentiality see Ileana M. Smeureanu, Confidentiality in International Commercial Arbitration, International Arbitration Law Library, Volume 22 (Kluwer Law International 2011).

jurisdiction to decide the claim.<sup>59</sup> On the other hand a request for interim measures may also be addressed by any party to a judicial authority. In this case such a request shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of that agreement.<sup>60</sup>

[Rz 37] However, a party in need of urgent provisional measures that cannot await the constitution of the arbitral tribunal may also make an application for such measures to be rendered by an emergency arbitrator in the form of an order under Article 26a<sup>61</sup> and the Emergency Arbitration Rules attached to the P.R.I.M.E. Finance Arbitration Rules (Annex C<sup>62</sup>). Such an order shall not bind the arbitral tribunal with respect to any question, issue or dispute determined in the order, and shall in no way prejudice a final decision of the arbitral tribunal on the merits of the case.<sup>63</sup>

[Rz 38] In addition, parties may make an application for provisional measures in referee arbitral proceedings, as referred to in Article 1051(1) Dutch Code of Civil Procedure.<sup>64</sup>

The referee arbitral proceedings in Article 26b<sup>65</sup> and Annex

D<sup>66</sup> to the P.R.I.M.E. Finance Arbitration Rules allow for fast track proceedings which result in an enforceable award within 30 to 60 days.<sup>67</sup> However, this particular fast track option is only open to parties which have agreed that the seat of the arbitration shall be in the Netherlands.<sup>68</sup> The referee arbitral award shall in no way prejudice a final decision of an arbitral tribunal on the merits of the case.<sup>69</sup>

## 6. P.R.I.M.E. Finance Mediation

[Rz 39] The P.R.I.M.E. Finance Mediation Rules<sup>70</sup> are based on the commonly used UNCITRAL Conciliation Rules 1980.<sup>71</sup> However, due to the awareness of the many developments in mediation techniques and trends, some refinements have been made to the UNCITRAL Conciliation Rules in order to both build in the P.R.I.M.E. Finance Secretariat and to introduce some more updated features.<sup>72</sup> Nevertheless, as a general principle, in the preparation of the rules deviations from the original text have been kept to a minimum, in order to enable reference to the commentaries on the UNCITRAL Conciliation Rules, where needed by users.<sup>73</sup>

<sup>59</sup> Article 26(1) of the P.R.I.M.E. Finance Arbitration Rules.

<sup>60</sup> Article 26(9) of the P.R.I.M.E. Finance Arbitration Rules.

<sup>61</sup> *Article 26a* 1. A party in need of (an) urgent provisional measure(s) that cannot await the constitution of the arbitral tribunal pursuant to section II may make an application for such measure(s) in accordance with the present provision and the emergency arbitration rules as set out in Annex C to these Rules (the «Emergency Arbitration Rules»). 2. The decision on (the) emergency measure(s) shall be rendered by the emergency arbitrator in the form of an order (the «Order»). The parties undertake to comply with any Order made by the emergency arbitrator. 3. The Order shall not bind the arbitral tribunal with respect to any question, issue or dispute determined in the Order, and shall in no way prejudice a final decision of the arbitral tribunal on the merits of the case. 4. The arbitral tribunal shall decide upon any party's requests or claims related to the emergency arbitral proceedings, including the reallocation of the costs of such proceedings as set out in article 11 of the Emergency Arbitration Rules and any claims arising out of or in connection with the compliance or noncompliance with the Order. 5. The Emergency Arbitration Rules shall not apply if the parties have agreed to opt out of the Emergency Arbitration Rules. 6. By submitting to these Rules, the parties do not waive any right that they may have under the relevant applicable laws to submit a request for interim measures to a judicial authority. Article 26 paragraph 9 applies accordingly.

<sup>62</sup> [http://www.primefinancedisputes.org/images/pdf/Emergency\\_arbitral\\_proceedings.pdf](http://www.primefinancedisputes.org/images/pdf/Emergency_arbitral_proceedings.pdf).

<sup>63</sup> Article 26a(3) of the P.R.I.M.E. Finance Arbitration Rules.

<sup>64</sup> «The parties may agree to empower the arbitral tribunal or its chairman to render an award in summary proceedings, within the limits imposed by article 289(1).»

<sup>65</sup> *Article 26b* 1. Any party in need of (an) urgent provisional measure(s) may make an application for such measure(s) in referee arbitral proceedings, as referred to in article 1051 paragraph 1 Dutch Code of Civil Procedure, in accordance with the present provision and the referee arbitral proceedings rules as set out in Annex D (the «Referee Arbitration Rules»). Article 26b and the Referee Arbitration Rules shall apply only if: i. the parties have agreed that the Referee Arbitration Rules shall apply; and ii. the place of arbitration is situated in the Netherlands. 2. The parties undertake to comply with any decision made by the referee arbitral tribunal. 3. The referee arbitral award is an arbitral award as referred to in article

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1051 paragraph 3 of the Dutch Code of Civil Procedure. It shall in no way prejudice a final decision of an arbitral tribunal on the merits of the case. 4. By submitting to these Rules, the parties do not waive any right that they may have under the relevant applicable laws to submit a request for interim measures to a judicial authority. Article 26 paragraph 9 applies accordingly.

<sup>66</sup> [http://www.primefinancedisputes.org/images/pdf/Referee\\_arbitral\\_proceedings.pdf](http://www.primefinancedisputes.org/images/pdf/Referee_arbitral_proceedings.pdf).

<sup>67</sup> <http://www.primefinancedisputes.org/index.php/arbitration>.

<sup>68</sup> Article 26b(2)(ii) of the P.R.I.M.E. Finance Arbitration Rules.

<sup>69</sup> Article 26b(4) of the P.R.I.M.E. Finance Arbitration Rules.

<sup>70</sup> <http://www.primefinancedisputes.org/images/pdf/mediation%20rules%20-%20prime%20format%20-.pdf>.

<sup>71</sup> [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/1980Conciliation\\_rules.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1980Conciliation_rules.html).

<sup>72</sup> <http://www.primefinancedisputes.org/index.php/mediation>.

<sup>73</sup> Ibid.