WIPO 仲裁中心之機制（二）

徐盛國 撰

2 WIPO 仲裁中心之運作

2.4 仲裁人

2.4.1 仲裁人之公正與獨立

仲裁人之公正與獨立，乃是仲裁制度之靈魂，爲宣示仲裁人之公正與中立之重要，WIPO 仲裁規則第二十二條(a)項規定：「仲裁人皆須公正而獨立。」抑且，若仲裁人無法取得當事人之信任，則仲裁之效果亦將大打折扣。職是，該規則於同條(b)、(c)兩項分別規定：「任一未來仲裁人於接受選任前，應將任何足以令人懷疑其公正性與獨立性之情事向兩造當事人、仲裁中心或其他已選定之仲裁人揭露（disclose），或以書面證實並無該情事存在。」、「於仲裁程序各階段，若有任何新發生之情事足生對仲裁人公正性與獨立性之懷疑，仲裁人應立即將該等情事向兩造、仲裁中心及其他仲裁人揭露。」使仲裁人負有向兩造當事人、仲裁中心或其他已選定之仲裁人揭露任何足以令人懷疑其公正性與獨立性之情事之義務。

另外，爲徹底落實仲裁人公正與獨立之要求，WIPO 仲裁規則於第二十一條及第四十五條亦分別規定：「任一造或其代理人均不得於事前與仲裁候選人有任何交涉，但係爲討論仲裁候選人之資格、出任之意願或其獨立性者，不在此限。」、「除非本規則另有規定或經仲裁庭允許，任一造或其代理人均不得與仲裁人事前聯繫任何與仲裁有關之事宜。但單純組織性事務，如硬體設備、審理的地點、期日、時間等之聯繫，不在此限。」使仲裁人在接受選任前及仲裁開始後，除一般事務性之接觸外，均不得與當事人就系爭案件有私下之往來，俾所有之關係均透明化，以昭公信。

事實上，此種規定並非 WIPO 仲裁規則所獨有，UNCITRAL 第九條、AAA 第十八條之規定亦均要求仲裁人須揭露所有可能導致或增加當事人對仲裁人公正性之質疑之事項。蓋關於仲裁人是否存有足以導致當事人質疑之情狀乙節，無人比仲裁人更爲清楚，所以課以仲裁人儘早揭露之義務。甚且，此一義

※WIPO 仲裁規則原文見文末附錄

務於其被選定爲仲裁人前即已存在[23]，亦足資吾人參照。

從另一角度言，若果眞存在有足以對仲裁人公正性與獨立性懷疑之情事（僅足以令人對仲裁人公正性與獨立性產生懷疑即可，是否果眞有其事，在所不問），依 WIPO 仲裁規則第二十四條之規定，任一造均得對仲裁人提出拒卻之主張。惟除非該足以對仲裁人公正性與獨立性懷疑之情事係於指定仲裁人後始爲其所知悉，否則當事人不得對其所指定或同意指定之仲裁人主張拒卻。以免當事人出爾反爾，延滯仲裁程序之進行。又爲避免此一拒卻之主張令仲裁程序懸而不決，該規則第二十五條規定，主張拒卻者應於十五日內向仲裁中心、仲裁庭及對造敘明理由。而對造在獲悉此一拒卻之主張後，依該規則第二十六條之規定，亦應於十五日內表示意見，俾仲裁庭得就此拒卻之主張加以處理，而於愼重考慮後決定暫停或繼續仲裁程序（第二十七條）。

在此情況下，若他造對拒卻表示認同，或仲裁人主動辭卻職務，縱使該拒卻無正當理由，仲裁人亦應被替換（二十八條）。若他造不認同該拒卻，受拒卻之仲裁人亦不迴避，仲裁中心即應依其內部程序就該拒卻之主張作出決定。此決定乃行政類事務，且爲最終之決定，仲裁中心毋庸就該決定敘明理由。此乃爲均衡兩造當事人之權益與仲裁人公信力之維護所設之規定，一方面尊重當事人之自主性，二方面亦兼顧當事人之程序利益，使有關對仲裁人拒卻之爭議得迅速落幕，並保持仲裁人之公信力。

2.4.2 仲裁人之選任

一、仲裁人之國籍

仲裁程序既以當事人自主爲原則，則有關仲裁人之國籍乙節，首應探究者，即爲當事人之約定。是以，WIPO 仲裁規則第二十條(a)項規定：「兩造有關仲裁人國籍之合意，應予尊重。」惟若兩造就此並無約定時，應如何處理恐生紛爭，是以該規則於同條(b)項規定：「除非有特殊情況，例如指定之仲裁人須有特定資格，否則在兩造未曾就獨任或主任仲裁人之國籍達成協議之情況下，獨任或主任仲裁人之國籍應異於兩造之國籍。」，蓋獨任或主任仲裁人對仲裁判斷之結果，往往具有決定性之影響力，若其國籍與

23 JACOMIJN J. VAN HOF, COMMENTARY ON THE UNCITRAL ARBITRATION RULES, at 58.(1991)

當事人之一方相同，易使人有偏頗之疑慮；惟於當事人間就仲裁人之資格有特殊需求時，若仍限制主任仲裁人之國籍，亦將有窒礙難行或增加程序時間、費用之虞，爲均衡此二不兩立之要求，WIPO 仲裁規則乃爲此一規定。

二、仲裁人之人數

有關仲裁人之人數， WIPO 仲裁規則第十四條規定：「(a)仲裁庭之人數須依兩造之仲裁合意定之。(b)兩造未指定人數時，應以獨任仲裁人任之。但仲裁中心盱衡一切情境後，亦得指定三位仲裁人。」可知其原則上亦以當事人之合意爲首要尊重之點，於當事人無合意時，則以採行獨任制爲原則，例外於仲裁中心盱衡一切情境後，認爲有必要時，始得指定三位仲裁人。自表面看來，此等規定似乎予人產生獨任仲裁人是否能堪大任之質疑，惟事實上此等立法方式早已蔚爲潮流。ICC 仲裁規則第六條第二項即規定：「當事人對仲裁人之人數未達成協議者，仲裁庭應指定獨任仲裁人....。」其他如 AAA 商務仲裁規則、米蘭國際仲裁庭之仲裁規則等均有類似規定[24]。其立法原由乃基於仲裁人之素質才是仲裁品質之保證，仲裁人之人數多未必有助於品質之提昇，反倒會增加仲裁人之費用及選任之時間，對當事人未必有利。或有反對意見，認爲獨任仲裁判斷過於武斷，喪失合議制交換意見之優點。然對此亦有主張此疑義可經仲裁人與當事人間建設性對話程序來避免，在積極參與討論之過程中，仲裁人與當事人可充分交換意見，表達見解，而非傳統式消極旁聽當事人意見後，秘密而主觀的作成判斷[25]。抑且，有學者更指出，一個有經驗的獨任仲裁人，只要研讀檔案摘要五十小時，其所做之仲裁判斷有百分之九十之機率與三人合意庭花費一千個小時所作出之判斷結論一致，當事人是否願意花費數倍之時間以修正這百分之十的錯誤，亦甚可議[26]。

三、三位仲裁人之選任

有關仲裁人之選任方法，一般而言爲尊重當事人之自主性，在當事人對於仲裁人有所約定或對仲裁人

24 陳煥文，世界智慧財產權組織快速仲裁規則評釋，蒐載商務仲裁論著彙編（四）智慧財產權篇（1），中華民國商務仲裁協會，1998 年 7 月，78 頁。

25 同前註，79 頁。

26 同前註。

應如何選定有所訂明時，依其約定；於當事人無合意（約定或訂明）時，在立法例上，有委諸第三人代爲選任者，例如，英國一九七九年仲裁法第六條第四項第(a)款、印度一九四〇年仲裁法第四條、法國民事訴訟法第一四五五條均是。我國商務仲裁條例第六條規定：「當事人得約定，由仲裁協會代爲選定仲裁人；未經約定者，得商請仲裁協會代爲選定」，亦是一例；在立法例上，於有三名仲裁人之情形，有規定爲當事人各選一名仲裁人，二名仲裁人再共推另一名仲裁人者。例如，加拿大商事仲裁法第十一條第(3)(a)條、瑞典仲裁法第六條等[27]；我國仲裁法第九條第一項規定：「仲裁協議，未約定仲裁人及其選定方法者，應由雙方當事人各選一仲裁人，再由雙方選定之仲裁人共推第三仲裁人爲主任仲裁人，並由仲裁庭以書面通知當事人。」亦爲適例。

WIPO 仲裁規則亦採前述法制，依該規則第十五條(a)項及第十七條(a)項之規定：「若兩造曾就選任仲裁人之程序達成協議，則該程序即應優先於第十六條至第二十條之規定而適用。」、「於三位仲裁人尚未被指定且兩造未就指定程序達成協議之情況，仲裁人應依本條規定指定之。」可知，於當事人有協議時即應依當事人所定選任仲裁人之程序選定仲裁人。

相反的，若當事人未曾就選任仲裁人之程序達成任何協議，則須依該規則第十五條(b)項及第十七條(a)、(b)項之規定：「若仲裁庭未於兩造協議之期間或兩造無協議時未於仲裁開始後四十五天內成立時，仲裁庭應視情況依本規則第十九條之規定成立之。」、「(a)於三位仲裁人尚未被指定且兩造未就指定程序達成協議之情況，仲裁人應依本條規定指定之。(b)聲請人聲請仲裁時應指定一仲裁人，相對人於收受仲裁聲請狀後三十日內應指定另一仲裁人，二位仲裁人於第二位仲裁人產生後二十日內應共推一主任仲裁人。」申言之，爲免仲裁人之選任延宕不決，遲滯仲裁程序之進行，WIPO 仲裁規則乃分別規定聲請人及相對人應選定仲裁人之時限。

27 林俊益，我國商務仲裁制度之檢討，法務部商務仲裁制度研討會實錄，行政院法務部，1994 年 6 月，62 頁。

惟於當事人未約定仲裁人人數之情形，在仲裁庭決定仲裁人之人數

以前，聲請人及相對人選任仲裁人之方式無法確定，該規則乃於同條(c)項規定：「聲請人接獲仲裁中心依第十四條（b）項之規定決定要組織三人仲裁庭之通知後十五日內，應指定一名仲裁人。相對人於接獲前述通知後三十日內亦應指定一名仲裁人。兩位仲裁人於第二位仲裁人產生後二十日內，應共推第三位仲裁人爲主任仲裁人。」

若當事人於上述各規定之時限內仍未選定仲裁人，爲謀迅速確定仲裁人，同條(d)項則規定：「若仲裁人之指定未能於前述各期間內完成，仲裁人之產生應依第十九條之規定定之。」而該規則第十九條(a)項則規定：「若一造未能依本規則第十五條、十七條或十八條規定之要求指定仲裁人，仲裁中心應立即代爲指定仲裁人。」，可知無論何種情況，仲裁人均得以選定。又若當事人仍未能依前揭程序規定選出主任仲裁人時，依十九條(b)、(c)項之規定，獨任或主任仲裁人未能依本規則第十五、十六、十七或十八條之規定指定時，其指定之程序如下：

（1）仲裁中心應提供候選仲裁人之名單予兩造，該名單應包含至少三名候選仲裁人之姓名，且應按字母順序排列，該名單應併載各候選仲裁人資格之簡要說明。若兩造曾就仲裁人之特定資格達成協議，則該名單應僅列具符合該項資格之候選仲裁人之姓名。

（2）任一造均有權將其反對之候選仲裁人刪除，並將剩餘之候選仲裁人，按其偏好序列之。

（3）任一造均應於收受名單後二十日內，將註記之名單送還仲裁中心，逾期將視爲認可名單上所列所有候選仲裁人。

（4）仲裁中心於接到當事人送還之名單後，或未收到名單時，應儘速依兩造所偏好或拒卻之人選，自名單中指定獨任或主任仲裁人。

（5）若送還仲裁中心之名單，並未顯示出兩造均接受之仲裁人，仲裁中心應有權指定獨任或主任仲裁人。仲裁中心指定之人選不能或不願出任獨任或主任仲裁人，或存在其他事由使其不能出任獨任或主任仲裁人，而名單上已無其他兩造同時願意接受之仲裁人時，亦同。

（6）前述各點之規定於仲裁中心審慎評估後，認爲不宜適用於某案件時，仲裁中心有權逕自指

定獨任或主任仲裁人（參同條C項）。

WIPO 仲裁規則之所以爲如此詳細之規定，乃因主任或獨任仲裁人之選定，攸關當事人對仲裁之信任至深且鉅，爲確使任何情況下，仲裁人均能順利產生以故。

四、獨任仲裁人之選定

與一般仲裁人之選任相同，獨任仲裁人之選任亦可依當事人是否曾就其選任方法達成協議，而異其處理。詳言之，依 WIPO 仲裁規則第十六條(a)項之規定，於應指定獨任仲裁人之情形，若當事人有指定程序之約定，則依其約定；若當事人未有指定程序之約定，則獨任仲裁人應由當事人共同指定。惟若獨任仲裁人未於兩造協議之期間指定者；或兩造無協議而未於仲裁開始後三十天內指定者，依該規則第十六條（b）項之規定，獨任仲裁人即應依前述第十九條之規定定之。

五、聲請人或相對人爲複數時，仲裁人之選定：

聲請人或相對人爲複數時，爲杜紛爭，使複雜之仲裁人選定程序得以明確，WIPO 仲裁規則乃首創聲請人或相對人爲複數時仲裁人之選定規則，以下乃依應選定仲裁人之人數爲一人或三人，分別析述其程序：

（一）仲裁人爲一人時：

WIPO 仲裁規則第十六條規定：「(a)於應指定獨任仲裁人之情況下，若當事人未有指定程序之約定，則獨任仲裁人應由當事人共同指定。(b)若獨任仲裁人未於兩造協議之期間指定者；或兩造無協議而未於仲裁開始後三十天內指定者，獨任仲裁人應依本規則第十九條之規定定之。」職是，仲裁人爲一人時，該仲裁人之選任，應依 WIPO 仲裁規則第十六條所定之程序選任之，換言之，除非當事人另有協議，否則其選任程序與聲請人及相對人均爲單一之情形並無不同。

（二）仲裁人爲三人時：

依當事人之約定應選定三名仲裁人時，尚可依當事人間是否已就仲裁人之選定程序達成協議，而區分兩種不同之狀況。在當事人間未曾就仲裁人之選定達成協議之情形，依 WIPO 仲裁規則第十八條（a）、（b）項之規定：「聲請人應共同指定一仲裁人。至於第二名仲裁人及主任仲裁人之指定，於本條文（b）項之情形，應依第十七條（b）、（c）項之規定定之。」、「相對人應共同指定一仲裁人，若相對人未能於接獲仲裁聲請書後三十日內指定仲裁人，不論原因爲何，聲請人先前指定之仲裁人應視爲

無效，仲裁中心應另行指定二仲裁人，再由二位仲裁人於第二位仲裁人產生後三十日內共同推選第三位仲裁人，並以之爲主任仲裁人。」

另一方面，在當事人間曾就仲裁人之選定達成協議之情形，依 WIPO 仲裁規則第十八條(ｃ)項之規定：「....除非兩造於仲裁協議約款中明示排除本條文之適用，否則本條文（ａ)、（ｂ)項之規定應優先於第十五條(ａ)項之規定而適用。」職是，除非當事人明白表示排除該規則第十八條之適用，否則第十八條（ａ)、(ｂ)兩項規定應優先於當事人之約定。換言之，除非當事人明白表示排除該規則第十八條之適用，否則當事人間有關仲裁人選任之程序約定，與該規則第十八條規定抵觸者即形同無效，當事人自主原則在此係受限制者。

WIPO 仲裁規則第十八條規定之主要目的，是在任命程序中建立並澄清當事人平等原則之意義。起草條文主要是對一九九二年一月七日在法國卡遜 DUTCO 控告 BKMI 乙案判決有所因應。在其判決中，法院裁定 ICC 於要求二名被告共同提名一名候選人一事上，違反任命程序中當事人平等原則，而該原則只可於爭端起後由一方當事人宣佈放棄援用才行[28]。

六、仲裁人之受任

WIPO 仲裁規則第二十三條規定：「(a)仲裁人於接受選任後，應被視爲有足夠的時間勝任此工作，並促使仲裁程序迅速進行與完成。(b)仲裁人接受選任時應以書面爲之，並應將接受選任之情事通知仲裁中心。(c)仲裁中心應將仲裁庭成立之情事通知兩造。」此一規定之目的乃在使當事人與仲裁人間之選任契約關係明確化，俾使仲裁中心、仲裁庭及兩造均得以知所因應，節省程序之稽延。

綜合上述各項可歸納 WIPO 仲裁規則關於仲裁人之選任有三個原則：(１) 當事人合意優先於規則之適用；(２) WIPO 仲裁規則僅具補充性功能；(３) 力求詳備之立法趨向[29]。

28 陳煥文，世界智慧財產權組織快速仲裁規則評釋，蒐載商務仲裁論著彙編（四）智慧財產權篇（1)，中華民國商務仲裁協會，1998 年 7 月，92 頁。

29 同前註，90 頁。

2.4.3 仲裁人之解任

仲裁人選定後，爲使仲裁程序之程序安定性得以確保，仲裁人實不宜任由當事人解任， WIPO 仲裁規則乃視狀況之不同，分別規定不同之程序，使仲裁人之解任有一定之規則可

資遵循，以下乃分別討論之：

一、仲裁人主動要求之情形：

依 WIPO 仲裁規則第三十條之規定：「在仲裁人本身之請求下，仲裁人於經兩造或仲裁中心同意後，得解除仲裁人之職務。」

二、兩造共同解任之情形：

WIPO 仲裁規則第三十一條規定：「在不考慮仲裁人之請求下，兩造亦得共同解任仲裁人。兩造應儘速將解任之情事通知仲裁中心。」誠如前述，仲裁人乃仲裁程序之靈魂所在，若兩造均有意將某仲裁人解任，則一定有其原因，爲尊重當事人自主並增強當事人對仲裁之信任，縱被解任之仲裁人不願意，當事人仍得解任該仲裁人。惟爲使仲裁中心得以順利應付此一變局，當事人應儘速將解任之情事通知仲裁中心。

三、仲裁人有事實上或法律上之原因無法出任仲裁人之情形：

依 WIPO 仲裁規則第三十二條之規定：「若仲裁人因事實上或法律上之理由無法實際、有效地善盡仲裁人之職責，仲裁中心得基於一造之聲請或依職權將仲裁人予以解任。在此情況下兩造對此應被賦予表達意見之機會，而第二十六條至第二十九條之規定於此情形準用之。」在此情況下，仲裁人既已無法善盡其仲裁人之職責，爲求程序之順利進行，只得將其解任。又此等仲裁人之解任無論係因當事人之聲請而發動，抑或仲裁中心依職權所爲，均對選定其爲仲裁人之當事人影響重大，而此與當事人之一方對仲裁人主張拒卻之情形，性質雖不相同，然所需處理之狀況（如他造意見之徵詢、選定之當事人意見之徵詢等）卻屬類似，是乃規定準用第二十六條至第二十九條之規定。

2.4.4 仲裁人之替換

關於仲裁人之替換，WIPO 仲裁規則在第三十三條及三十四條分別加以規定，謹依仲裁人替換之原因、仲裁人替換之程序、仲裁人替換後程序之處置三方面加以析述如後：

一、仲裁人替換之原因：

原則上於仲裁人有出缺之狀況時，即會有替換之問題。是以，不論仲裁人係依該規則第三十條（仲裁人主動要求）、第三十一條（兩造共同解任）、三十二條（仲裁人有事實上或法律上之原因無法出任仲裁人）、第三十五條（b）項（第三仲裁人未參與仲裁）之規定而解任或遭當事人拒卻（第二十八條、第二十九條）而解任，原則上均生仲裁人替換之問題。

二、仲裁人替換之程序：

依該規則第三十三條(a)項之規

定：「於有必要時，替代之仲裁人應依照第十五條至第十九條所定程序指定之。」可知仲裁人之替換程序原則上與仲裁人之選任程序相同。惟依同條(b)項之規定，於一造所指定之仲裁人爲他造以該一造於選任時已知或可得而知之理由成功地因拒卻或依第三十二條之規定解任時，仲裁中心有權拒絕該造重新指定仲裁人，但仲裁中心應指定一替代仲裁人。蓋此二種情形皆可歸責於選定該仲裁人之當事人，爲免其故技重施，干擾仲裁程序之進行，乃例外規定由仲裁中心秉公另行指定之。

三、仲裁人替換前、後之處置：

仲裁人替換前，爲維護選定解任或遭拒卻仲裁人之當事人一方之權益，WIPO 仲裁規則第三十三條(c)項前段規定：「仲裁人之替換未決定前，仲裁程序應暫停進行」，惟此既係爲當事人之利益而設，若當事人權衡利弊得失後，於替任之仲裁人決定前，若仍欲繼續進行仲裁程序，亦無禁止之必要，是乃於同條項後段規定：「但兩造合意繼續進行者，不在此限。」

另一方面，仲裁人替換後，新任仲裁人對案件之進行，勢必不如其他仲裁人，若其係透過其他仲裁人之意見來認識、熟悉繫屬之案件，恐會爲其他仲裁人所影響，而失其客觀性，爲維護當事人之權益，實有予以更新審理之必要。惟爲維持仲裁程序之流暢，避免程序之稽延，若當事人認爲無全部重新審理之必要時，基於當事人自主及程序處分權之法理，亦無不許之理。職是，該規則第三十四條乃規定：「當替任之仲裁人選定後，仲裁庭應視兩造之意見，決定先前審理之一部或全部是否應重新進行。」

2.4.5 截略仲裁庭（Truncated Tribunal）

實務上，許多由當事人任命之不肖仲裁人，發現選任他的當事人可能敗訴時，乃惡意不參與仲裁事務，使仲裁期限過期，以利荐舉其之當事人[30]。爲避免仲裁人接受選任後怠於行使職務，WIPO 仲裁規則第三十五條(a)項即規定：「若三位仲裁人之仲裁庭中，有一位仲裁人未能參與仲裁庭之運作，縱未即時通知且無正當理由，其餘二位仲裁人仍得逕自決定繼續仲裁程序或爲任何判斷、命令或決定（除非當事人之一造有依第三十二條之規定提出申請），毋庸考慮第三位仲裁人無法參與仲裁之情事。在仲裁人之一無法參與時，其餘

二位仲裁人於決定是否繼續仲裁程序或提出任何判斷、命令或決定時，應考慮仲裁之階段、第三位仲裁人無法參與之理由及其認爲其他應予顧及之情事。」可知依此規定，縱仲裁人實際上只有二人執行其職務，仲裁庭在一定條件下仍得繼續運作。此時仲裁庭之仲裁人數既有欠缺，乃以截略仲裁庭稱之。

惟截略仲裁庭究竟並非仲裁庭正常應有之狀態，是以，在第三仲裁人未參與仲裁之情況若其他二位仲裁人決定不繼續仲裁程序，且仲裁中心亦已證實仲裁人無法參與仲裁庭之運作時，爲補足仲裁人，同條（b）項乃要求除非兩造另有協議，否則仲裁中心應將仲裁人有職位空缺之情事予以公布，並依第三十三條之規定主動指定替任之仲裁人。

2.4.6 仲裁人責任之豁免

關於仲裁人可否基於「準法官」之地位，主張除犯刑事上之罪外，享有仲裁豁免權此一爭論，一九六五年解決投資爭端公約（華盛頓公約）第二十一條第一項即明文規定：「仲裁人對於執行職務之行爲，享有豁免法律訴訟之權利。」一九八五年聯合國仲裁模範法對仲裁豁免雖無明文規定，但亦曾在"First Secretariat Note「Possible Features of a Model Law」，A/CN 9/207(14 May 1981)"文件中對是否賦予仲裁人豁免權之議題作深入討論[31]。蓋此一問題於各國均有不同之見解，爲促進仲裁之發展，實有形成共識之迫切需要。

在日本，有關仲裁人契約上或非契約上責任之豁免問題，尚未見諸法律規定，法院判例亦未嘗論及於此。或謂日本現行法對於審判者之豁免，僅限於法官，故仲裁人不得享有豁免責任之權利。然亦有主張仲裁人於仲裁程序中對當事人所應負之契約上或非契約上之責任，仍應予儘量限縮解釋[32]，以維護仲裁人所扮演準司法功能之獨立性[33]。

在美國，持否定論者認爲，仲裁人享有豁免權，恐將使仲裁人爲判斷時更流於草率而不正確，且仲裁人對仲裁當事人所應負之契約上義務，不應被忽視[34]，蓋法官受國家之監督、

30 陳煥文，世界智慧財產權組織快速仲裁規則評釋，蒐載商務仲裁論著彙編（四）智慧財產權篇（1），中華民國商務仲裁協會，1998 年 7 月，96 頁。

31 陳煥文，仲裁人之法律地位與仲裁豁免，萬國法律雙月刊，89 期，1996 年 10 月 1 日，22 頁。

懲戒、彈劾，如因法官不當行爲致當事人受有損害，可請求國家賠償；仲裁人並無正式監督機構，若享有豁免權，則受害當事人將投訴無門[35]。持肯定論者則主張，仲裁人之豁免並非僅爲保護仲裁人

32 關於仲裁人與當事人間法律關係之定性，學說上之討論甚多，有委任契約說、特殊契約說準契約關係說及特定身分關係說等不一而足。84 年度法律決字第 13315 號函嘗謂：「按民法第五百四十八條規定：『受任人應受報酬者，除契約另有訂定外，非於委任關係終止及爲明確報告顛末後，不得請求付。委任關係，因非可歸責於受任人之事由，於事務處理未完畢前已終止者，受任人得就已處理之部分，請求報酬。』又受任人因處理委任事務，支出之必要費用，委任人應償還之，並付自支出時之利息，同法第五百四十六條第一項亦定有明文。本件中華民法商務仲裁協會與當事人間之法律關係似爲委任關係，如因法院駁回選任仲裁人之聲請，致不能開始仲裁程序，因係非可歸責於受任人事由而委任關係終止者，自得適用上開規定辦理，即仲裁協會對於已處理完畢之委任事務之報酬請求權，不因終止而被排除，故對於當事人已預繳之仲裁費用中百分之四十部分，自得於扣除上開已處理部分之報酬及必要費用後，將餘額返還之。至有關應與仲裁人之百分之六十部分，因仲裁程序既未開始，故仲裁人似無報酬請求權可言，從而，仲裁協會似應將此部分全數併同上揭額返還當事人。』似乎採委任契約說。法務部法規諮詢意見彙編（三），73-74 頁。

33 KAZUO IWASAKI, Immunity of Arbitrators under Japanese Law,in: JULIAN D.M.LEW, THE IMMUNITY OF ARBITRATORS ,at 57.(1990)

34 Antonio R. Parra,Immunity of Arbitrators under United States Law,in: JULIAN D.M.LEW, THE IMMUNITY OF ARBITRATORS ,at 95.(1990)

35 陳煥文，仲裁人之法律地位與仲裁豁免，萬國法律雙月刊，89 期，1996 年 10 月 1 日，32 頁。

，更主要的是在保護並促進仲裁程序之進行，使仲裁人不至於因恐懼所爲之判斷會爲自己惹來麻煩而躊躇於是否接受選任或應爲如何之判斷。美國聯邦上訴巡迴法院於 Wasyl ,Inc. v. First Boston Corp. 乙案 [813F.2d 1579,1582（9th Cir .1987）]中即採肯定論之見解而指出：「爲保護裁判者免於不正當之影響，及對判斷結果不滿意之當事人之報復，仲裁之豁免係重要的。蓋聯邦之政策在鼓勵仲裁，而仲裁人在實現此一政策上復扮演重要之角色，故而將審判者之豁免延伸含括至仲裁人所負之責任及審判

行爲係合宜的。」[36]。

對此，WIPO 仲裁規則於第七十七條規定：「除非係出於故意之不法行爲，仲裁人、WIPO 及仲裁中心無須對當事人就有關仲裁之行爲或疏忽負責。」，顯然亦採取肯定論之觀點，僅要求仲裁人對其故意行爲負責。

2.5 機密之揭露

2.5.1 機密之定義與範圍

雖然大多數仲裁機構之仲裁規則或道德規範均未對仲裁機密之處理予以足夠之關注[37]，惟爲維護仲裁程序之機密性，AAA 專利仲裁規則第三十三條、AAA 商務仲裁規則第三十四條及 WIPO 仲裁規則第五十二條乃設有機密揭露之相關規定[38]。依照 WIPO 仲裁規則第五十二條(a)項之規定，其所稱機密資訊，無論其表現型態爲何，應包含下列各項資訊：(1)一造所擁有之資訊；(2)非公衆易接近之資訊；(3)商業上、財務上或產業上之重要資訊；(4)一造所持有並視爲機密之資訊。是只要爲前述各款資訊，不問其係文件資料、影像資料、電腦資料甚或當事人口述其腦中之記憶或策略等，均爲該規則所稱之機密資訊。

除前述各款之資訊外，該規則第七十四條(a)項前段亦規定：「除本規則第五十二條所列舉者外，任何當事人或證人於仲裁程序所提出之文件或其他證據，於其所描述者非屬公開資料之範圍內，皆應被視爲機密者，....」可知任何當事人或證人於仲裁程序所提出之文件或其他證據，只要其並非屬公開資料之範圍者，亦均視爲機密。

2.5.2 資訊機密性之認定

依 WIPO 仲裁規則第五十二條（b）項之規定，於仲裁程序進行中，若一造主張其欲取得之資訊或依仲裁程序（包含其所指定專家之要求）

36 Antonio R. Parra, Immunity of Arbitrators under United States Law,in: JULIAN D.M.LEW, THE IMMUNITY OF ARBITRATORS ,at 86.(1990)

37 Charles S. Baldwin, IV, Protecting Confidential and Proprietary Commercial Information in International Arbitration, 31 TEX. INT'L L. J. 451,454(Summer, 1996).

38 David W. Plant, Drafting for Confidentility, Arbitrability, and Enforceability in Intellectual Property Agreements(with Form) , June 1997 ALI-ABA COURSE MATERIALS J. 51, 53.

須提出之資訊具機密性者，應通知仲裁庭其聲請將該資訊列爲機密資訊，並將繕本送達予對造。該當事人應於通知中敘明其認爲該資訊具機密性之理由，惟毋庸揭露該資訊之內容，以便在維持資訊機密性之前提下，讓對造有表達意見之機會，並使仲裁庭得據爲判定資訊之機密等級。

承前揭規定，同條(c)項前段進一步要求仲裁庭應決定是否將該資訊列爲機密等級，及於缺乏保護措施之程序中資訊之分級是否會對主張該資訊具機密性之當事人造成重大損害。抑且，於例外情況下，仲裁庭於決定某資訊應否列爲機密等級，及於缺乏保護措施之程序中資訊之分級是否會對主張該資訊具機密性之當事人造成重大損害時，得應當事人之請求或依職權，於徵詢當事人之意見後，指定具公信力之顧問決定該資訊是否應被列爲機密等級，並進而決定在何情況下、對何人得將資訊之一部或全部予以揭露（同條 d 項前段參照）。以期仲裁庭於認定資訊之機密等級時，能更爲慎重其事。蓋仲裁程序中出現之資訊自表面上看來，有時似乎僅爲一普通原理或簡單配方之應用資訊，惟往往關係當事人之權益甚大，若不顧及當事人於揭露資訊後所可能蒙受之風險或損害，而草率評定其機密等級並進而任意揭露之，不僅使仲裁制度秘密性之特質爲之蕩然，更有負當事人之所託。

2.5.3 機密之揭露

爲保障在仲裁程序中所出現機密資訊之秘密性，WIPO 仲裁規則第五十二條（c）項規定：「仲裁庭應將該資訊應否列爲機密等級，及於缺乏保護措施之程序中資訊之分級是否會對主張該資訊具機密性之當事人造成重大損害。若仲裁庭採肯定見解，則其應決定於何情況下、對何人得將資訊之一部或全部予以揭露，並得要求該機密資訊揭露之對象適當地具結保證保密。」可知當資訊被評定爲機密資訊時，仲裁庭應決定於何情況下、對何人得將資訊之一部或全部予以揭露，並得要求該機密資訊揭露之對象適當地具結保證保密。另外，仲裁庭應當事人之請求或依職權，亦得指定具公信力之顧問爲該規則第五十五條所稱之專家，以使其在機密資訊上，就仲裁庭所指明之個別爭點，於不向非持有該機密資訊之當事人或仲裁庭揭露該資訊之情況下，向仲裁庭提出報告（同條ｅ項參照）。以盡量減少機密揭露之範圍、洩漏機密之機會並得藉此避免當事人利用仲裁程序窺視對造之機密資訊。

2.5.4 參與者之保密義務

爲確實保護仲裁程序中所有資訊之秘密性（特別是機密資訊），WIPO 仲裁規則乃課以所有參與仲裁程序者保密之義務，以下乃分別從保密義務之事的範圍、當事人之保密義務、仲裁中心與仲裁人之保密義務及其他參與者之保密義務，分別介紹如下：

一、保密義務之事的範圍

有關保密義務之範圍，大凡可以從仲裁之存在、仲裁程序過程中所有之相關資訊及仲裁判斷之內容三部分來加以說明：

（一）仲裁之存在

WIPO 仲裁規則第七十三條(a)項規定：「除有向法院提出異議或執行仲裁判斷之行爲外，一造不得片面向第三人揭露有關現正進行仲裁之資訊，但依法律或有權主體之要求，及下列各項情形而爲揭露者，不在此限：

（1）揭露尚未逾越法律上之要求，且

（2）若該揭露發生於仲裁過程中，其須向仲裁庭及對造提出揭露之細節及其理由；

（3）若該揭露發生於仲裁終結後，其僅須向對造提出揭露之細節及其理由。」

同條(b)項亦規定：「當事人爲盡其對第三人所應負之誠信或說明義務，縱無前項所定之情形，其仍得向第三人揭露有關仲裁當事人之姓名及請求之賠償。」

申言之，有關仲裁之存在之資訊亦爲保密之標的，原則上除符合前揭條文各款之狀況外，不得向外揭露。蓋進行仲裁程序一事，不論其是否牽涉勝負，均有可能對當事人之聲譽造成影響，爲維護當事人之權益，並仲裁程序之程序特質，爰有予以保密之必要。

（二）仲裁過程中所有相關資訊

依 WIPO 仲裁規則第五十三條(c)項規定：「所有仲裁程序均應秘密進行，但兩造另有協議者，不在此限。」第七十四條(a)項又規定：「除本規則第五十二條所列舉者外，任何當事人或證人於仲裁程序所提出之文件或其他證據，於其所描述者非屬公開資料之範圍內，皆應被視爲機密者，在無當事人同意或有管轄權法院之命令下，任何因參與仲裁程序始得接觸該資料之當事人，不問其參與仲裁之目的爲何，均不得使用該資料或向第三人揭露該資料。」可知，除該規則第五十二條所規定應視爲機密之資訊外，仲裁程序之進行及任何當事人或證人於仲裁程序所提出之文

件或其他證據，於其所描述者非屬公開資料之情形下，均屬保密義務之範圍。

（三）仲裁判斷之內容

仲裁判斷之內容往往涉及當事人間之權利義務關係，特別是在附有理由之仲裁判斷，更是如此，實有予以保密之必要。職是，WIPO 仲裁規則第七十五條乃規定當事人應將仲裁判斷視爲具機密性者，並僅得於下述範圍內，向第三人揭露之：

（1）經當事人之同意；或

（2）其因於內國法庭或其他主管機關前之訴訟，而屬於公共領域之範疇；

（3）爲遵守法律所強加於當事人之要求，或爲行使或防衛當事人對第三人之正當權利，而必須揭露該資料者。

二、當事人之保密義務

當事人之保密義務主要表現在 WIPO 仲裁規則第七十三條(a)項、第七十四條及第七十五條之規定。特別應注意者爲第七十四條（b）項之規定：「在本條文之規範意旨下，當事人所傳喚之證人不應視爲第三人。於證人接觸仲裁程序中所取得之證據或其他資訊，目的係爲其證言做準備之範圍內，傳喚該證人之當事人，應爲證人維持等同他造所要求機密性之程度負責。」基此而視，當事人本身對仲裁之存在、仲裁程序過程中所有之相關資訊及仲裁判斷之內容固應負有保密義務，在仲裁程序過程中，於其所傳喚證人所有接觸相關資訊或證據之範圍內，當事人亦應爲該證人之保密義務負責。

三、仲裁中心與仲裁人之保密義務

除非當事人同意，於仲裁中心及仲裁人描述者非屬公開資料之範圍內，仲裁中心及仲裁人應維護仲裁程序、仲裁判斷及仲裁程序進行中所揭露之文件或其他證據資料之機密性，惟若係基於與仲裁判斷有關之法院行動或其他法律要求之相關必要範圍內者，則例外得允許之（第七十六條 a 項參照）。

另外，爲顧慮仲裁中心推廣仲裁制度或學術上研究之需要，往往有出版與實務相關之統計資料之情形。職是，WIPO 仲裁規則乃於第七十六條（b）項規定：「倘若仲裁中心所出版任何有關仲裁之統計資料或活動，並無助於當事人或爭議之特別狀況之指明，仲裁中心得不受前項規定之限制，而使用此等資料。」，使當事人之權益亦得以兼顧。

四、其他參與者之保密義務

依據 WIPO 仲裁規則第七十四

條(a)項之規定：「除本規則第五十二條所列舉者外，任何當事人或證人於仲裁程序所提出之文件或其他證據，於其所描述者非屬公開資料之範圍內，皆應被視爲機密者，在無當事人同意或有管轄權法院之命令下，任何因參與仲裁程序始得接觸該資料之當事人，不問其參與仲裁之目的爲何，均不得使用該資料或向第三人揭露該資料。」又該規則第五十二條(ｃ)項後段及同條（ｄ）項後段復均要求參與仲裁程序者不論其爲專家顧問、鑑定人、證人或其他關係人均應對其所接觸之機密資訊具結保密，可知參與仲裁者，縱非與該案有利害關係，亦負有保密之義務。

（作者任職台中永信聯合律師事務所）

WIPO 仲裁規則原文附錄

Article 14

(a) The Tribunal shall consist of such number of arbitrators as has been agreed by the parties.

(b) Where the parties have not agreed on the number of arbitrators, the Tribunal shall consist of a sole arbitrator, except where the Center in its discretion determines that, in view of all the circumstances of the case, a Tribunal composed of three members is appropriate.

Article 15

(a) If the parties have agreed on a procedure of appointing the arbitrator or arbitrators other than as envisaged in Articles 16 to 20, that procedure shall be followed.

(b) If the Tribunal has not been established pursuant to such procedure within the period of time agreed upon by the parties or, in the absence of such an agreed period of time, within 45 days after the commencement of the arbitration, the Tribunal shall be established or completed, as the case may be, in accordance with Article 19.

Article 16

(a) Where a sole arbitrator is to be appointed and the parties have not agreed on a procedure of appointment, the sole arbitrator shall be appointed jointly by the parties.

(b) If the appointment of the sole arbitrator is not made within the period of time agreed upon by the parties or, in the absence of such an agreed period of time, within 30 days after the commencement of the arbitration, the sole arbitrator shall be appointed in accordance with Article 19.

Article 17

(a) Where three arbitrators are to be appointed and the parties have not agreed upon a procedure of appointment, the arbitrators shall be appointed in accordance with this Article.

(b) The Claimant shall appoint an arbitrator in its Request for Arbitration. The Respondent shall appoint an arbitrator within 30 days from the date on which it receives the Request for Arbitration. The two arbitrators thus appointed shall, within 20 days after the appointment of the second arbitrator, appoint a third arbitrator, who shall be the presiding arbitrator.
(c) Notwithstanding paragraph (b), where three arbitrators are to be appointed as a result of the exercise of the discretion of the Center under Article 14(b), the Claimant shall, by notice to the Center and to the Respondent, appoint an arbitrator within 15 days after the receipt by it of notification by the Center that the Tribunal is to be composed of three arbitrators. The Respondent shall appoint an arbitrator within 30 days after the receipt by it of the said notification. The two arbitrators thus appointed shall, within 20 days after the appointment of the second arbitrator, appoint a third arbitrator, who shall be the presiding arbitrator.
(d) If the appointment of any arbitrator is not made within the applicable period of time referred to in the preceding paragraphs, that arbitrator shall be appointed in accordance with Article 19.

Article 18

(a) Where
(i) three arbitrators are to be appointed,
(ii) the parties have not agreed on a procedure of appointment, and
(iii) the Request for Arbitration names more than one Claimant,
the Claimants shall make a joint appointment of an arbitrator in their Request for Arbitration. The appointment of the second arbitrator and the presiding arbitrator shall, subject to paragraph (b) of this Article, take place in accordance with Article 17(b), (c) or (d), as the case may be.
(b) Where
(i) three arbitrators are to be appointed,
(ii) the parties have not agreed on a procedure of appointment, and
(iii) the Request for Arbitration names more than one Respondent,
the Respondents shall jointly appoint an arbitrator. If, for whatever reason, the

Respondents do not make a joint appointment of an arbitrator within 30 days after receiving the Request for Arbitration, any appointment of the arbitrator previously made by the Claimant or Claimants shall be considered void and two arbitrators shall be appointed by the Center. The two arbitrators thus appointed shall, within 30 days after the appointment of the second arbitrator, appoint a third arbitrator, who shall be the presiding arbitrator.

(c) Where

(i) three arbitrators are to be appointed,

(ii) the parties have agreed upon a procedure of appointment, and

(iii) the Request for Arbitration names more than one Claimant or more than one Respondent,

paragraphs (a) and (b) of this Article shall, notwithstanding Article 15(a), apply irrespective of any contractual provisions in the Arbitration Agreement with respect to the procedure of appointment, unless those provisions have expressly excluded the application of this Article.

Article 19

(a) If a party has failed to appoint an arbitrator as required under Articles 15, 17 or 18, the Center shall, in lieu of that party, forthwith make the appointment.

(b) If the sole or presiding arbitrator has not been appointed as required under Articles 15, 16, 17 or 18, the appointment shall take place in accordance with the following procedure:

(i) The Center shall send to each party an identical list of candidates. The list shall comprise the names of at least three candidates in alphabetical order. The list shall include or be accompanied by a brief statement of each candidate's qualifications. If the parties have agreed on any particular qualifications, the list shall contain only the names of candidates that satisfy those qualifications.

(ii) Each party shall have the right to delete the name of any candidate or candidates to whose appointment it objects and shall number any remaining candidates in order of preference.

(iii) Each party shall return the marked list to the Center within 20 days after the

date on which the list is received by it. Any party failing to return a marked list within that period of time shall be deemed to have assented to all candidates appearing on the list.

(iv) As soon as possible after receipt by it of the lists from the parties, or failing this, after the expiration of the period of time specified in the previous sub-paragraph, the Center shall, taking into account the preferences and objections expressed by the parties, invite a person from the list to be the sole or presiding arbitrator.

(v) If the lists which have been returned do not show a person who is acceptable as arbitrator to both parties, the Center shall be authorized to appoint the sole or presiding arbitrator. The Center shall similarly be authorized to do so if a person is not able or does not wish to accept the Center's invitation to be the sole or presiding arbitrator, or if there appear to be other reasons precluding that person from being the sole or presiding arbitrator, and there does not remain on the lists a person who is acceptable as arbitrator to both parties.

(c) Notwithstanding the provisions of paragraph (b), the Center shall be authorized to appoint the sole or presiding arbitrator if it determines in its discretion that the procedure described in that paragraph is not appropriate for the case.

Article 20

(a) An agreement of the parties concerning the nationality of arbitrators shall be respected.

(b) If the parties have not agreed on the nationality of the sole or presiding arbitrator, such arbitrator shall, in the absence of special circumstances such as the need to appoint a person having particular qualifications, be a national of a country other than the countries of the parties.

Article 21

No party or anyone acting on its behalf shall have any ex parte communication with any candidate for appointment as arbitrator except to discuss the candidate's qualifications, availability or independence in relation to the parties.

Article 22

(a) Each arbitrator shall be impartial and independent.

(b) Each prospective arbitrator shall, before accepting appointment, disclose to the parties, the Center and any other arbitrator who has already been appointed any circumstances that might give rise to justifiable doubt as to the arbitrator's impartiality or independence, or confirm in writing that no such circumstances exist.

(c) If, at any stage during the arbitration, new circumstances arise that might give rise to justifiable doubt as to any arbitrator's impartiality or independence, the arbitrator shall promptly disclose such circumstances to the parties, the Center and the other arbitrators.

Article 23

(a) Each arbitrator shall, by accepting appointment, be deemed to have undertaken to make available sufficient time to enable the arbitration to be conducted and completed expeditiously.

(b) Each prospective arbitrator shall accept appointment in writing and shall communicate such acceptance to the Center.

(c) The Center shall notify the parties of the establishment of the Tribunal.

Article 24

(a) Any arbitrator may be challenged by a party if circumstances exist that give rise to justifiable doubt as to the arbitrator's impartiality or independence.

(b) A party may challenge an arbitrator whom it has appointed or in whose appointment it concurred only for reasons of which it becomes aware after the appointment has been made.

Article 25

A party challenging an arbitrator shall send notice to the Center, the Tribunal and the other party, stating the reasons for the challenge, within 15 days after being notified of that arbitrator's appointment or after becoming aware of the circumstances that it considers give rise to justifiable doubt as to that arbitrator's impartiality or independence.

Article 26

When an arbitrator has been challenged by a party, the other party shall have the right to respond to the challenge and shall, if it exercises this right, send, within 15 days after receipt of the notice referred to in Article 25, a copy of its response to the Center, the party making the challenge and the arbitrators.

Article 27

The Tribunal may, in its discretion, suspend or continue the arbitral proceedings during the pendency of the challenge.

Article 28

The other party may agree to the challenge or the arbitrator may voluntarily withdraw. In either case, the arbitrator shall be replaced without any implication that the grounds for the challenge are valid.

Article 29

If the other party does not agree to the challenge and the challenged arbitrator does not withdraw, the decision on the challenge shall be made by the Center in accordance with its internal procedures. Such a decision is of an administrative nature and shall be final. The Center shall not be required to state reasons for its decision.

Article 30

At the arbitrator's own request, an arbitrator may be released from appointment as arbitrator either with the consent of the parties or by the Center.

Article 31

Irrespective of any request by the arbitrator, the parties may jointly release the arbitrator from appointment as arbitrator. The parties shall promptly notify the Center of such release.

Article 32

At the request of a party or on its own motion, the Center may release an arbitrator from appointment as arbitrator if the arbitrator has become de jure or de facto unable to fulfill, or fails to fulfill, the duties of an arbitrator. In such a case,

the parties shall be offered the opportunity to express their views thereon and the provisions of Articles 26 to 29 shall apply mutatis mutandis.

Article 33

(a) Whenever necessary, a substitute arbitrator shall be appointed pursuant to the procedure provided for in Articles 15 to 19 that was applicable to the appointment of the arbitrator being replaced.

(b) In the event that an arbitrator appointed by a party has either been successfully challenged on grounds which were known or should have been known to that party at the time of appointment, or has been released from appointment as arbitrator in accordance with Article 32, the Center shall have the discretion not to permit that party to make a new appointment. If it chooses to exercise this discretion, the Center shall make the substitute appointment.

(c) Pending the replacement, the arbitral proceedings shall be suspended, unless otherwise agreed by the parties.

Article 34

Whenever a substitute arbitrator is appointed, the Tribunal shall, having regard to any observations of the parties, determine in its sole discretion whether all or part of any prior hearings are to be repeated.

Article 35

(a) If an arbitrator on a three-person Tribunal, though duly notified and without good cause, fails to participate in the work of the Tribunal, the two other arbitrators shall, unless a party has made an application under Article 32, have the power in their sole discretion to continue the arbitration and to make any award, order or other decision, notwithstanding the failure of the third arbitrator to participate. In determining whether to continue the arbitration or to render any award, order or other decision without the participation of an arbitrator, the two other arbitrators shall take into account the stage of the arbitration, the reason, if any, expressed by the third arbitrator for such non-participation, and such other matters as they consider appropriate in the circumstances of the case.

(b) In the event that the two other arbitrators determine not to continue the

arbitration without the participation of a third arbitrator, the Center shall, on proof satisfactory to it of the failure of the arbitrator to participate in the work of the Tribunal, declare the office vacant, and a substitute arbitrator shall be appointed by the Center in the exercise of the discretion defined in Article 33, unless the parties agree otherwise.

Article 45

Except as otherwise provided in these Rules or permitted by the Tribunal, no party or anyone acting on its behalf may have any ex parte communication with any arbitrator with respect to any matter of substance relating to the arbitration, it being understood that nothing in this paragraph shall prohibit ex parte communications which concern matters of a purely organizational nature, such as the physical facilities, place, date or time of the hearings.

Article 52

(a)For the purposes of this Article, confidential information shall mean any information, regardless of the medium in which it is expressed, which is

(i) in the possession of a party,

(ii) not accessible to the public,

(iii) of commercial, financial or industrial significance, and

(iv) treated as confidential by the party possessing it.

(c) The Tribunal shall determine whether the information is to be classified as confidential and of such a nature that the absence of special measures of protection in the proceedings would be likely to cause serious harm to the party invoking its confidentiality. If the Tribunal so determines, it shall decide under which conditions and to whom the confidential information may in part or in whole be disclosed and shall require any person to whom the confidential information is to be disclosed to sign an appropriate confidentiality undertaking.

(d) In exceptional circumstances, in lieu of itself determining whether the information is to be classified as confidential and of such nature that the absence of special measures of protection in the proceedings would be likely to cause serious harm to the party invoking its confidentiality, the Tribunal may, at the

request of a party or on its own motion and after consultation with the parties, designate a confidentiality advisor who will determine whether the information is to be so classified, and, if so, decide under which conditions and to whom it may in part or in whole be disclosed. Any such confidentiality advisor shall be required to sign an appropriate confidentiality undertaking.

(e) The Tribunal may also, at the request of a party or on its own motion, appoint the confidentiality advisor as an expert in accordance with Article 55 in order to report to it, on the basis of the confidential information, on specific issues designated by the Tribunal without disclosing the confidential information either to the party from whom the confidential information does not originate or to the Tribunal.

Article 53

(a) If either party so requests, the Tribunal shall hold a hearing for the presentation of evidence by witnesses, including expert witnesses, or for oral argument or for both. In the absence of a request, the Tribunal shall decide whether to hold such a hearing or hearings. If no hearings are held, the proceedings shall be conducted on the basis of documents and other materials alone.

(b) In the event of a hearing, the Tribunal shall give the parties adequate advance notice of the date, time and place thereof.

(c) Unless the parties agree otherwise, all hearings shall be in private.

(d) The Tribunal shall determine whether and, if so, in what form a record shall be made of any hearing.

Article 55

(a) The Tribunal may, after consultation with the parties, appoint one or more independent experts to report to it on specific issues designated by the Tribunal. A copy of the expert's terms of reference, established by the Tribunal, having regard to any observations of the parties, shall be communicated to the parties. Any such expert shall be required to sign an appropriate confidentiality undertaking.

(b) Subject to Article 52, upon receipt of the expert's report, the Tribunal shall communicate a copy of the report to the parties, which shall be given the opportunity to express, in writing, their opinion on the report. A party may, subject to Article 52, examine any document on which the expert has relied in such a report.

(c) At the request of a party, the parties shall be given the opportunity to question the expert at a hearing. At this hearing, the parties may present expert witnesses to testify on the points at issue.

(d) The opinion of any expert on the issue or issues submitted to the expert shall be subject to the Tribunal's power of assessment of those issues in the context of all the circumstances of the case, unless the parties have agreed that the expert's determination shall be conclusive in respect of any specific issue.

Article 73

(a) Except to the extent necessary in connection with a court challenge to the arbitration or an action for enforcement of an award, no information concerning the existence of an arbitration may be unilaterally disclosed by a party to any third party unless it is required to do so by law or by a competent regulatory body, and then only

(i) by disclosing no more than what is legally required, and

(ii) by furnishing to the Tribunal and to the other party, if the disclosure takes place during the arbitration, or to the other party alone, if the disclosure takes place after the termination of the arbitration, details of the disclosure and an explanation of the reason for it.

(b) Notwithstanding paragraph (a), a party may disclose to a third party the names of the parties to the arbitration and the relief requested for the purpose of satisfying any obligation of good faith or candor owed to that third party.

Article 74

(a) In addition to any specific measures that may be available under Article 52, any documentary or other evidence given by a party or a witness in the arbitration shall be treated as confidential and, to the extent that such evidence

describes information that is not in the public domain, shall not be used or disclosed to any third party by a party whose access to that information arises exclusively as a result of its participation in the arbitration for any purpose without the consent of the parties or order of a court having jurisdiction.

(b) For the purposes of this Article, a witness called by a party shall not be considered to be a third party. To the extent that a witness is given access to evidence or other information obtained in the arbitration in order to prepare the witness's testimony, the party calling such witness shall be responsible for the maintenance by the witness of the same degree of confidentiality as that required of the party.

Article 75

The award shall be treated as confidential by the parties and may only be disclosed to a third party if and to the extent that

(i) the parties consent, or

(ii) it falls into the public domain as a result of an action before a national court or other competent authority, or

(iii) it must be disclosed in order to comply with a legal requirement imposed on a party or in order to establish or protect a party's legal rights against a third party.

Article 76

(a) Unless the parties agree otherwise, the Center and the arbitrator shall maintain the confidentiality of the arbitration, the award and, to the extent that they describe information that is not in the public domain, any documentary or other evidence disclosed during the arbitration, except to the extent necessary in connection with a court action relating to the award, or as otherwise required by law.

(b) Notwithstanding paragraph (a), the Center may include information concerning the arbitration in any aggregate statistical data that it publishes concerning its activities, provided that such information does not enable the parties or the particular circumstances of the dispute to be identified.

Article 77

Except in respect of deliberate wrongdoing, the arbitrator or arbitrators, WIPO and the Center shall not be liable to a party for any act or omission in connection with the arbitration.