

The ICC's pre-arbitral referee procedure

How valuable is it?



Ian Meredith and Marcus Birch explain how the International Chamber of Commerce's pre-arbitral referee procedure works, and consider its value for contracting parties.

The publication in 1990 of the International Chamber of Commerce (ICC) Rules for a Pre-Arbitral Referee Procedure (the Rules) created a new alternative for con-

tracting parties envisaging an application for provisional or protective measures in the context of a dispute. Before this, parties had the choice between:

- Applying to the court for orders in support of the arbitration. Using the courts has obvious drawbacks in terms of increasing the costs, delay and proce-

The ICC's pre-arbitral referee procedure: referee's powers

Article 2 of the International Chamber of Commerce (ICC) Rules for a Pre-Arbitral Referee Procedure (Rules) provides as follows:

- 2.1 The powers of the Referee are:
 - a) to order any conservatory measures or any measures of restoration that are urgently necessary to prevent either immediate damage or irreparable loss and so to safeguard any of the rights or property of one of the parties;
 - b) to order a party to make to any other party or to another person any payment which ought to be made;
 - c) to order a party to take any step which ought to be taken according to the contract between the parties, including the signing or delivery of any document or the procuring by a party of the signature or delivery of a document;
 - d) to order any measures necessary to preserve or establish evidence.
- 2.1.1 These powers may be altered by express written agreement between the parties.
- 2.2 The Referee shall not have power to make any Order other than that requested by any party in accordance with Article 3.
- 2.3 Unless the parties otherwise agree in writing, a Referee appointed in accordance with these Rules shall not act as arbitrator in any subsequent proceedings between those parties or in any other proceedings in which there is any issue or question that is the same as or connected with any raised in the proceedings before the Referee.
- 2.4 If the Competent Authority becomes seized of the case after the appointment of the Referee, the Referee shall nevertheless retain the power to make an Order within the time provided by Article 6.2, unless the parties otherwise agree or the Competent Authority orders otherwise.
- 2.4.1 Except as provided in Article 2.4 above or by the relevant rules of the Competent Authority, once the Competent Authority becomes seized of the case it alone may order any further provisional or conservatory measures that it considers necessary. For such purpose the Competent Authority, if its rules so permit, shall be deemed to have been authorized by the parties to exercise the powers conferred on the Referee by Article 2.1.

dural complexity involved in obtaining a decision on provisional measures. In addition, in cases involving governments, state bodies, or companies associated with the interests of a state, using state courts is perceived to be to the disadvantage of the other side.

- Applying to the arbitral tribunal (for example, under Article 23 of the ICC Rules of Arbitration, or Article 25 of the LCIA Arbitration Rules). However, it may not be possible to apply to the tribunal since one may not yet have been appointed. Even once that hurdle is overcome, asking the tribunal to decide on provisional relief may involve an unwelcome aspect of prejudging the merits of the case.

The ICC's pre-arbitral referee procedure is intended to operate as a "third way", independent of court and arbitral tribunal, to enable the parties to have rapid recourse to a person empowered to make an order to meet an urgent problem. The rationale behind such an order is that it may provide a temporary resolution to a dispute and lay

the foundations for its final settlement (*Preamble to the Rules*).

Against this background, this article:

- Summarises the key elements of the referee procedure.
- Reviews issues that have arisen to date out of cases in which the procedure has been used.
- Considers the status of the referee's order and the value of the procedure for contracting parties.

Key elements of the procedure

The referee procedure can only be used where there is express agreement to it, in addition to an arbitration provision. The procedure involves:

- A party sending a request to the ICC Secretariat, together with a fee of US\$5,000 (about EUR3,425) (half being the filing fee, and half being an advance on the fees and expenses of the referee and any expert) (*Articles 3.2.1 and B1*).

- The other party filing an answer within eight days of receiving the request (*Article 3.4*).

- The Chairman of the ICC Court of Arbitration appointing the referee within eight days of the request (unless the parties agree on an appointee) (*Article 4.2*).

After this, the process is managed and run by the referee, who has power to take decisions as to his own jurisdiction (*Article 5.2*) and on procedural matters such as the obtaining of an expert report, the holding of hearings and the provision of documents (*Article 5.3*).

The basic time limit for the making of an order is 30 days from the referee's receipt of the file (*Article 6.2*). The Chairman of the ICC Court can extend this but it seems that referees are aware of the importance of speed in such a procedure and orders are typically granted within, or very shortly outside, the 30-day time limit.

The Rules do not provide for disclosure of documents between the parties. However,

Rule 5.4 states: “In agreeing to these Rules the parties undertake to provide the Referee with every facility to implement his terms of reference and, in particular, to make available to him all documents which he may consider necessary and also to grant free access to any place for the purpose of any investigation or inquiry. The information given to the Referee shall remain confidential between the parties and the Referee.”

Issues to date

Despite the procedure’s attractiveness as a resource for contracting parties, it was slow to take off. Sources indicate that it has been used only nine times since 1990. The proceedings are of course confidential, but in two cases the referee’s decision has given rise to litigation, and other cases have been discussed in open fora (notably the IAI conference, available at www.iaiparis.com/pdf/actes_colloque.pdf).

Key issues in the early applications of the referee procedure have concerned the:

- Scope of the referee’s powers.
- Availability of annulment proceedings against orders.

Scope of the referee’s powers

The referee’s powers are contained in Article 2 of the Rules (see box, *The ICC’s pre-arbitral referee procedure: referee’s powers*). In this regard, issues have arisen regarding:

- The scope of the referee’s power to order any “urgently necessary” measures to prevent “irreparable loss” (under Article 2.1(a)).
- The referee’s power to grant declarations.
- Attempts to restrict the referee’s powers by contractual provision.

The scope of the referee’s powers to order any “urgently necessary” measures to prevent “irreparable loss”. This issue arose in *Societe Nationale des Petroles du Congo and Republic of Congo v TEP Congo* (extracts available in *Revue Libanaise de l’Arbitrage*, 25 (2003) 17, and English translations at www.iaiparis.com).

In this case, the parties had entered into an agreement under which TEP Congo

would buy crude oil from the Republic of Congo by refinancing debts the state owed. The agreement provided for resort to the referee procedure. In the first months of the agreement, the Republic of Congo defaulted on its obligations and TEP Congo started the referee procedure, requesting an order obliging the Republic to fulfil them. The Republic of Congo argued that the referee did not have jurisdiction to grant the measures requested since they were not “urgently necessary”.

The referee looked to the circumstances of the case, noting that TEP Congo’s business depended on the Republic’s performance of its obligations, finding that it would be unreasonable to expect TEP Congo to carry out its business with the constant threat of legal complications, and concluding that this sufficed for a finding of “urgent necessity”. The referee added that the parties had provided for recourse to the referee procedure precisely for the purpose of making such measures available.

A second argument was that because TEP Congo could always seek damages for breach, it would not suffer “irreparable harm” in the absence of an order. That argument mirrors the issue in applications before English courts for interim injunctions as to whether damages would be an adequate remedy for the applicant (see *Shelfer v City of London Electric Lighting Company* [1895] 1 Ch 287 as recently approved in *Regan v Paul Properties Ltd* [2006] EWCA Civ 1391). The referee decided that this argument ran contrary to the interests of international commerce and to basic contractual principles; to accept it would allow any party to abandon its contractual obligations and leave the other party with no other option but to initiate proceedings.

The approach taken in the *Congo* case applies a low threshold for the jurisdiction of the referee. The requirement of “urgency” is reduced to one of “reasonableness”, and the requirement for “irreparable harm” is explained away by reference to general policy considerations as to the desirability of encouraging performance of contractual obligations. Although this does some harm to the strict words of Article 2.1(a), such an approach is in keeping with the purpose of the procedure and calculated to avoid excessively “technical” objections to the jurisdiction of the referee.



It is worth noting that the requirement that measures be “urgently necessary” only applies to “conservatory measures or measures of restoration” under Article 2.1(a) (see box, *The ICC’s pre-arbitral referee procedure: referee’s powers*). There is no requirement of urgent necessity to obtain other orders, for example, that one party make a payment or that evidence be preserved, under Article 2.1(b), (c), or (d) (see Gaillard & Pinsolle, “*The ICC Pre-Arbitral Referee: First Practical Experiences*”, *Arbitration International*, vol 20 no 1 (2004) 1-19).

Power to grant declarations. One of the measures sought in the *Congo* case was a declaration that the claimant had a *prima facie* right under the contract. The respondents argued that the referee had no jurisdiction to grant a declaration because such a power is not contained in Article 2.1. The referee agreed that he had no such power, especially given that the existence of the right was the very subject-matter of the dispute submitted to arbitration, but commented that he was not prevented from verifying the existence of such a right for the purposes of deciding whether the claimant should be granted the measures he sought. So, while the respondents won the argument, it did not prevent the measures from being ordered.

Restricting powers by contractual provision. In another case (commented in *Gaillard & Pinsolle*, see above), an attempt was made to limit the powers of the referee by relying on Article 2.1.1 and the specific words of the contractual clause that provided for recourse to the procedure. The referee rejected the argument because:

- On the one hand, the clause expressly referred to the Rules, with the effect of globally incorporating their contents, in-



cluding Article 2.1, and granted the referee “exclusive” jurisdiction.

■ On the other hand, the terminology in the contract clause relied on to limit the referee’s powers was unhelpfully vague, and to decide that it could restrict a referee’s powers would lead to endless difficulties in distinguishing between types of measures.

The effect is that while parties can amend Article 2.1 by agreement, they must do so extremely clearly.

Although the decision in the *Congo* case as to declarations might suggest that Article 2.1 is to be interpreted narrowly, the ultimate result taken together with that in the second case suggests otherwise. While referees have only attributed powers, being those contained in Article 2.1 (subject to any amendment by the parties under Article 2.2), to date they have taken a broad approach to the definition of their

powers, and have attempted to give effect to the intention of the parties and the purpose of the procedure. Only in clear cases will a technical argument on jurisdiction make any difference to the result.

Availability of annulment proceedings against orders

In the *Congo* case, following its defeat in the referee proceedings, the Republic of Congo brought an action to annul the referee’s order under Article 1504 of the French New Code of Civil Procedure, which provides for an action for annulment of arbitral awards (*sentences arbitrales*) made in France in international matters on grounds of, among other things, lack of jurisdiction or failure to respect due process. TEP Congo argued that since the order was not a final decision in the case, it was not an “award”, and so was not subject to review under Article 1504 (see, for example, Article 6.3: “The Referee’s Order does not pre-judge the substance of the case nor shall it bind any Competent Authority [i.e. arbitral tribunal or national court with jurisdiction to hear the case]...”).

The Paris Court of Appeal held that the proceedings were inadmissible, but did not follow TEP Congo’s reasoning based on the distinction between interim “orders” and final “awards”. Instead it reasoned that:

■ The Rules did not characterise the proceedings as “arbitration” and the referee had not acted as an arbitrator in deciding the parties’ dispute.

■ The order was based on a contractual mechanism so, in spite of the name given to it, had only the binding effect of contract. Accordingly, the Article 1504 proceeding against “arbitral awards” was not available.

Although the reasoning of the Paris Court of Appeal was based on a civil law interpretation of a specific provision of the French Code, it seems likely that courts in other jurisdictions will arrive at a similar conclusion and refuse to entertain actions to review or annul orders made under the referee procedure. The provisional nature of the measures ordered will be influential in this regard. Such measures are clearly to be distinguished from “partial final awards” or “summary awards”, recognised in some jurisdictions as equivalent to a full award (see, for example, Article 1051, *Dutch Code of Civil Procedure (CPC)*).

Status of the referee’s order and value of the procedure

The issue addressed by the Paris Court of Appeal in the *Congo* case goes to the heart of the fundamental problem of the referee procedure, that is, what the status of a referee’s order is, and how it can be challenged and enforced.

A referee’s order is not an arbitral award. It is purely a creature of contract, and is functionally closer to the outcome of an expert determination process. As such, the order lacks the supportive legal framework of the law of the seat. Being a pre-ar-

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bitral process, it is literally not arbitration and, as a result, there is no seat. In addition, for recognition and enforcement purposes it falls outside the framework of the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention).

This may explain the limited use of the procedure to date. Parties who need strong, enforceable decisions on interim remedies must still go to court. Those who can still rely on enforcement by consent have an array of forms of structured alternative dispute resolution methods open to them, including mediation and expert determination. It seems that, in that context, the referee procedure provides a meaningful and valuable alternative in relatively rare circumstances.

That is not to condemn the procedure. It is worth underlining its practical usefulness in avoiding the complexity and other challenges inherent in applications for preliminary measures from state courts or arbitral tribunals. That said, although one of the stated advantages of the procedure is speed, it cannot compete with the courts of some jurisdictions when truly immediate action is needed. It is not the procedure to use when an overnight injunction is needed.

But it may well be appropriate where contracting parties have run into dispute and need to get over that dispute and get on with their business. Certainly a party concerned about getting caught up in disputes, and not eager to resort to the courts in such a circumstance, should consider suggesting it as part of a dispute resolution clause.

The problem of status and the absence of a supportive treaty and legislative framework is a real one. A major issue that has arisen in the context of the review of the UNCITRAL Arbitration Rules is the proposal to grant a tribunal the power to grant interim *ex parte* injunctions. Whether such an injunction would constitute an "award" and would therefore be supported by national legislation and the New York Convention is crucial to the prospects of such a revision to the UNCITRAL Arbitration Rules grant-

ing arbitral tribunals additional powers with real teeth.

Some national legal systems have enacted the power for arbitral tribunals to order preliminary measures (for example, Switzerland (*article 187, Private International Law Act of 18 December 1987*)), and others have provided structures for a referee procedure to be incorporated into the arbitral procedure itself (for example, France (*article 13, AFA Regulation*) and The Netherlands (*article 1051, CPC*)). These are welcome developments. As long as parties agree to submit to such structures, it is desirable that arbitral or pre-arbitral methods of ordering preliminary measures be given a formal, preferably legislative, reinforcement. It is only with such reinforcement that procedures such as the ICC referee procedure will gain the currency that their drafters desired.



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