

INTERNATIONAL ARBITRATION LAW

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ICC Pre-Arbitral Referee: A Procedure Into Its Stride

After it entered into force on Jan. 1, 1990, the ICC Pre-Arbitral Referee Procedure, which enables the parties to a contract to seek urgent measures prior to the referral of their dispute to arbitration, remained dormant for more than 10 years.

The first proceeding was initiated in 2001, with a first series of decisions rendered in October and November 2001 (on these decisions and on the procedure itself, see E. Gaillard, "First Int'l Chamber of Commerce Pre-Arbitral Referee Decision," *New York Law Journal*, Feb. 7, 2002).

A Fully Operative Procedure

Since 2001, parties have availed themselves of the procedure at a somewhat accelerating pace. A total of six separate proceedings have so far been initiated and disposed of.

The first proceeding initiated in 2001 resulted in three orders rendered by Mr. Bernard Hanotiau in October 2001, November 2001 and January 2002. A new proceeding between the same parties was filed in December 2002 after a final award was rendered on the merits of the dispute in September 2002, and resulted in a new order in January 2003. Another proceeding regarding the performance of an agreement in the oil and gas industry was filed in 2002 and resulted in an order by Mr. Pierre Tercier, which was subsequently challenged by the respondent before the Paris Court of Appeals (see E. Gaillard, "First Court Decision on Pre-Arbitral Referee," *NYLJ*, June 5, 2003; E. Gaillard, P. Pinsolle, "The ICC Pre-Arbitral Referee: First Practical Experiences," 20(1) *ARB. INT'L* 13 (2004); see also the order rendered by P. Tercier, reproduced in 22 *ASA BULL.* 531 (2004)). A fourth proceeding between a Dutch company and a Portuguese company, filed in 2002, was settled and the agreement between the parties was incorporated into the decision that was subsequently rendered.

The two latest decisions have been rendered recently.¹ The latest proceeding was initiated by a North African public company against a European company to obtain the setting up of a guarantee on first demand. The chairman of the ICC International Court of Arbitration appointed Mr. André Faurès, a renowned Belgian arbitrator, who dismissed the claimant's request by an order dated Feb. 9, 2006 (ICC Case No. 14128).

An earlier proceeding was initiated in August 2005 concerning the performance of a long-term supply contract between a European company and the European subsidiary of a major U.S. company. The dispute related to the price determination of the product supplied under the relevant supply agreements. The parties agreed to the appointment of Dr. Laurent Lévy, a prominent Swiss arbitrator, who rendered an order on Sept. 27, 2005 dismissing the claimant's request (ICC Case No. 13974). This



order (order) is of particular interest as it sheds new light on the nature of the prearbitral referee procedure and the powers of the referee (on these questions, see also E. Gaillard, "First Court Decision on Pre-Arbitral Referee," *op. cit.*).

Applicable Principles

In the latter case, the claimant was relying on the urgency of the situation and the manifest nature of its contractual right while the respondent generally argued that the question brought before the referee would be more properly dealt with by the arbitral tribunal having jurisdiction over the merits of the dispute.

Against that background, the referee carefully emphasized the principles applicable to the prearbitral referee procedure:

As results from the ICC Introduction to the Rules, the ICC set out the Pre-Arbitral Referee Procedure in order to enable parties to have rapid recourse to a referee empowered to make an order designed to meet the urgent problem at issue. The order should therefore provide a temporary resolution of the dispute and may lay the foundations for its final settlement either by agreement or otherwise. However, the Pre-Arbitral Referee Procedure should not usurp the jurisdiction of any entity that is ultimately responsible for deciding the merits of any underlying dispute. It follows that: (1) there must be urgency; (2) the order should provide temporary rather than final resolution of the dispute; (3) the referee should meet such requirements and, for instance, order conservatory measures or measures of restoration, order a party to make a payment which ought to be made or any other step which ought to be taken according to the contract (non exhaustive list of the Powers of the Referee under Article 2 ICC Rules).

These criteria are outlined in reference to the powers of the referee, as set out at Article 2(1) of the Rules for a Pre-Arbitral Referee Procedure: "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."

After a careful distinction between Article 2(1)(a), which "requires urgency for the conservatory measures and refers to 'immediate damage' or 'irreparable loss'" and Article 2(1)(b), which empowers the referee to order "any payment 'which ought to be made,'" that is, it does not state any condition other than "a proof that the payment ought to be made," the referee further determined the relevant factors for a prearbitral order:

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The Pre-Arbitral Referee aims at obtaining urgently from a neutral third party a response to certain problem arising in the course of contracts, especially long-term transactions (ICC Rules, Introduction, paragraph 1). Emphasis is on an immediate answer to a problem which excludes any in-depth fact finding or, for that matter, legal research and reasoning.

The order should provide a temporary resolution of the dispute and may lay the foundations for its final settlement. The emphasis is on 'temporary' and, ideally, paving the way for a final solution (ICC Rules, Introduction, paragraph 2).

The Pre-Arbitral Referee Procedure will not usurp the jurisdiction of any entity that is responsible for deciding the merits of any underlying dispute. The emphasis is this time that the Referee will not go into the merits of the underlying dispute (ICC Rules, Introduction, paragraph 3). In this connection, interestingly, the Referee is not in the same position as an arbitrator who would hand down a conservatory or interim measure under Article 23 ICC Rules of Arbitration. The difference is that the Referee will not subsequently have to address the merits of the dispute (Article 2.3 ICC Rules).

In light of these considerations, the referee considered whether granting the claimant's relief would be appropriate, bearing in mind three different viewpoints: whether there is any "urgency," whether the order would entail a "risk of prejudgment" and the "balance of inconvenience with a view to a long-term transaction."

Requirement of Urgency

The referee noted that it was common ground between the parties that urgency is a requirement for conservatory measures and measures of restoration which, under Article 2(1)(a) of the rules, are necessary to prevent either immediate damage or irreparable loss. The parties disagreed, however, on the requirement of urgency under Articles 2(1)(b) and (c) of the rules, the respondent drawing a distinction between urgency under Article 2(1)(a) and a manifest entitlement to interim relief under Articles 2(1)(b) and (c) (a distinction also made, under the French rules of civil procedure relating to the referee procedure, between the "juge de l'urgence" and the "juge de l'évidence").

Noting that the matter is fact-oriented and difficult to determine in general terms, the referee held that "[t]he whole prearbitral referee procedure is time-oriented....Such summary proceeding, an immediate decision without full knowledge of the factual matrix and of the applicable legal provisions are acceptable only if the claim is manifestly grounded or there is urgency. In practice, as in the case at bar, the situation will often be in between, the two standards being satisfied to a certain extent, so that the referee has to balance the inconvenience."

Against that background, the referee determined the requirement of urgency as entailing two different meanings. On the one hand, and to the extent the procedure "is an exception to the ordinary jurisdiction of the arbitrators," "[i]f the prearbitral referee makes decisions that should render an arbitration unnecessary, the exception may become the rule and summary determination exclude the normal process. In this sense, urgency is always required...." On the other hand, urgency may mean the "risk of 'impending injury.'" On this issue, there may be a debate whether such condition does exist when it comes to ordering the payment of an obligation that may not be seriously disputed, i.e., when the applicant is able to show a manifestly (or patently) wrongful breach."

In the case at hand, the referee determined that there was no urgency, as neither the claimant's cash flow nor its survival were at issue. Further, no specific performance was requested by the claimant, only the "setting of pricing for such deliveries and adjustments of such prices in the future." Finally, the referee found that the situation had existed since November 2004 and was, therefore, not new and that it had taken the claimant eight months to decide that such situation was becoming intolerable. As a result, the referee did not find the claimant to have shown an actual full-fledged degree of urgency.

Manifest Entitlement

The necessity to avoid prejudging the case without a full-fledged investigation into the factual matrix and the legal applicable rules is a word of caution repeatedly given by the referee:

In fact, when parties enter into a pre-referee agreement, they do agree to a summary resolution of certain disputes but do not intend to exclude the jurisdiction of the ordinary courts or arbitrators (article 6.3 ICC Rules).

There are two aspects to this prohibition of prejudgment.

On the substantive level, the referee should not purport to hand down a simplified summary award. The order will be temporary (article 6.3 ICC Rules) and may not discuss in-depth the very preliminary cases of the parties.

On the procedural level, considerations of due process (right to be heard in an adversarial proceeding, *principe du contradictoire*) will prevent granting relief if there is no manifest entitlement, or at least a strong *prima facie* case.

In this instance, the referee found the parties' respective positions and the interpretation of the relevant provisions of the agreement to give rise to sufficient ambiguity on the determination of the price of the product being supplied under the supply agreements so that it would not be possible to determine such issues without a proper investigation into the facts of the dispute and proper interpretation of the contractual provisions in dispute under the law applicable to the merits.

Balance of Inconvenience

This view was confirmed by the final determining factor, namely the balance of inconvenience in light of long-term transactions. The referee decided that such balance did not favor an exceptional and temporary remedy when there was no "immediate danger for [the claimant's] business, far less for its survival." Having noted the respondent's commitment to facilitate a swift resolution of the dispute by a fast-track arbitration, the referee concluded, to the contrary, that "granting claimant's request for relief may escalate the dispute," something that would "jeopardize the perpetuation of a long-term transaction."

In light of this decision, a notable feature of the order is the guidance provided by the referee to the parties for the final resolution of their dispute, by way of negotiation or arbitration. Such guidance must be viewed in the more general context of the long-term transaction at issue, as well as the unity of the dispute between the parties, the prearbitral referee procedure providing only limited and exceptional remedy available to the parties pending the final resolution of their dispute on the merits. In that sense, the Order of Sept. 27, 2005 contributes significantly to the definition of the boundaries of the prearbitral referee, a valuable procedure that has now gotten into its stride.

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1. Disclosure: Shearman & Sterling LLP represented the respondent in these two proceedings.