INTERNATIONAL ARBITRATION LAW

BY EMMANUEL GAILLARD

First Court Decision on Pre-Arbitral Referee

TRADITIONALLY, the options available to contracting parties seeking provisional or protective relief during the course of arbitration proceedings extend to measures ordered by domestic courts or by the arbitral tribunal. Other mechanisms may also come into play, in particular, an application to a neutral referee appointed under the ICC (International Chamber of Commerce) Pre-Arbitral Referee Procedure.

This mechanism has recently taken a great leap forward and appears to be a true alternative regarding provisional and protective measures (see E. Gaillard, "First Int'l Chamber of Commerce Pre-Arbitral Referee Decision," The New York Law Journal, Feb. 7, 2002). As any other newly tested mechanism, however, it raises a few central and unsettled issues, one of which is whether the referee's decision is an order for provisional or protective relief or whether it may qualify as an award.

Major consequences flow from the distinction between "award" and "order" as applied to the ICC Pre-Arbitral Referee Procedure. If not an award, a referee's decision cannot be the subject of an action to set aside at the place the decision was rendered or benefit from the 1958 New York Convention on the recognition and enforcement of arbitral awards.

Although the rules themselves refer to the referee's decision as an "order" (see Article 6 of the rules), this terminology is not, in itself, of decisive importance. The characterization of a decision as an "award" does not depend on the appellation given to the decision or on the terminology employed by the arbitrators, but on the nature of that decision itself. Such characterization depends on other more relevant criteria, i.e., whether the decision under consideration was rendered by an arbitrator empowered to decide the parties' dispute, whether the decision actually resolves a dispute (wholly or in part) and whether the decision is binding (see Fouchard Gaillard Goldman on International Commercial Arbitration, 1999, paras. 1349 et seq.).

Point of Contention

The nature of the decision rendered by the referee was recently a point of contention before the Paris Court of Appeal in *Société Nationale des Pétroles du Congo and République du Congo v. TotalFinaElf E&P Congo*, on the Republic of Congo's motion to seek the annulment of a pre-arbitral order rendered against it. This case is the first ever heard before a domestic court concerning the effects of a decision rendered on the basis of the ICC Pre-Arbitral Referee Procedure (the Court of Appeal's decision is public and will be published shortly in Revue de l'Arbitrage with a commentary by Charles Jarrosson).

In an agreement entered into on Sept. 10, 2001, the Republic of Congo and the Société Nationale des Pétroles du Congo (together, the Republic of Congo) on the one hand and TotalFinaElf E & P Congo (TEP Congo) on the other, provided in part that TEP Congo would refinance debts owed by the Republic of Congo in exchange for a certain quantity of crude oil (the agreement).

The agreement contained a specific provision regarding provisional and protective measures, which referred to the ICC Pre-Arbitral Referee Procedure. In accordance with this provision, TEP Congo initiated pre-arbitral proceedings on Dec. 26, 2001 and requested measures, which would, in part, oblige the Republic of Congo to respect its contractual obligations under the agreement.

Professor Pierre Tercier, who was nominated as referee, issued an order in favor of TEP Congo on Feb. 6, 2002, within the 30-day time limit imposed by Article 6.2 of the rules.

The Referee's Order

The referee considered several issues, including the questions of whether there was an urgent need for the measures requested by TEP Congo and whether a failure to order such measures would cause irreparable harm to TEP Congo.

On the issue of urgency, the referee held that, under the circumstances of the case, it would be unreasonable to expect TEP Congo to carry out its business, which depended to a great extent on the performance of the agreement by the Republic of Congo, with the constant threat of legal complications hanging over it and that, as such, this created the urgent need to grant conservatory measures. The referee further observed that the parties had contractually provided for recourse to the Pre-Arbitral Referee Procedure precisely for the purpose of obtaining such conservatory measures.

On the question of whether a failure to order measures would cause irreparable harm to TEP Congo, the Republic of Congo argued that TEP Congo did not run such a risk because it could always seek damages for non-performance of the contract in the future if it chose to pursue such action. Crucially, however, the referee decided that this view ran contrary to the interests of international commerce and to basic contractual principles. The referee noted that to uphold such a view would be to authorize any contracting party to unilaterally abandon its contractual obligations, subject to the option for the other party to initiate proceedings (bearing in mind that such possibility, even when existing, may impose the additional difficulty of being lengthy or not result in full compensation).

As a result, the referee ordered the Republic of Congo to respect its contractual obligations under the agreement (extracts from the referee's decision have been published in the Revue Libanaise de l'Arbitrage, no 25 (2003), page 17; the English translation is available on the Web site of

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the International Arbitration Institute, www.iaiparis.com).

After the referee's order was issued, the Republic of Congo initiated annulment proceedings before the Paris Court of Appeal. The justification for this motion was that the order amounted in fact to an arbitral award capable of being set aside by the French courts. On the basis of the grounds for the setting aside of foreign awards set out at Article 1504 of the French New Code of Civil Procedure, the Republic of Congo then argued that the referee had failed to act in accordance with the powers conferred to it by the parties and that the referee did not comply with due process, namely the principle of adversarial proceedings.

TEP Congo, the defendant in the proceedings before the Paris Court of Appeal, argued that the referee's order did not amount to an arbitral award for a number of reasons, mainly because it did not represent a final solution on the merits. This position was in line with Article 6.3 of the rules, which provides that: "The Referee's order does not pre-judge the substance of the case nor shall it bind any competent jurisdiction which may hear any question, issue or dispute in respect of which the order has been made."

Decision of the Court

In a decision rendered on April 29, 2003, the Paris Court of Appeal held that the motion for annulment was inadmissible. The court decided that it should not begin by determining whether the referee's decision amounted to an order or to an award, implying that to do so would require it to assume that the referee was, in fact, empowered to render both types of decisions. Rather, the court held that before reaching the key question of whether or not the order actually amounted to an arbitral award, it had to decide whether the referee had acted as an arbitrator in order to decide the parties' dispute. In other words, if it were the case that the referee did in fact hold the same brief as that of an arbitral tribunal, then, and only then, could the court enter into the issue of whether or not the order amounted to an arbitral award.

In this respect, the court referred to the foreword to the rules, which state in relevant part that the Pre-Arbitral Referee Procedure has provided

> the business world with a new procedure through which rapid action may be taken when certain difficulties arise in the course of a contractual relationship. These Rules are designed to meet a specific need: that of having recourse at very short notice to a third person — the 'Referee' — who is empowered to order provisional measures needed as a matter of urgency.

On this basis, the court decided that any characterization in terms of "arbitration" had been precluded by the rules. In the case at hand, the Paris court further emphasized that the decision rendered by the referee had merely prohibited the state party from obstructing the performance of the agreement and referred the parties, regarding the merits of their dispute, to the arbitral tribunal provided for under the arbitration clause.

The court further pointed out that the binding nature of the decision derived form the parties' agreement, which Article 10 had given exclusive jurisdiction to the referee to order any provisional or protective measures. On this basis, the court held that the referee's decision, which was rendered in the context of a contractual mechanism, had no more binding effect than contractual provisions, as opposed to the binding effect of a decision having res judicata [first in French and then in English]:

> *([...] l'ordonnance du 6 février 2002, rendue d'après un mécanisme contractuel qui repose sur la coopération des parties, a, malgré son appellation, une nature conventionnelle, qu'elle n'a d'autorité que celle de la chose convenue, qu'en conséquence, est irrecevable le recours en annulation ouvert contre les sentences).*
>
> ([...] despite its appellation, the order dated Feb. 6, 2002, rendered in accordance with a contractual mechanism that is based on the cooperation of the parties, has a contractual nature, that it merely has the authority of an agreement, [and] as a result, that a request for annulment, permissible against awards, is inadmissible [in this case] (Unofficial translation)).

Such an interpretation is in line with Article 6.6 of the Rules, which provides that, "The parties agree to carry out the Referee's order without delay and waive their right to all means of appeal or recourse or opposition to a request to a Court or to any other authority to implement the order, insofar as such waiver can validly be made."

Conclusion

The decision rendered by the Paris Court of Appeal represents a first precedent in international arbitration regarding the nature of orders rendered by ICC Pre-Arbitral Referees. It remains to be seen whether other actions, in other countries, may be taken by parties to have a future order enforced or set aside (For the characterization of a provisional measure as an order, not an award, see Supreme Court of Queensland, *Resort Condominiums International Inc. (Indiana, US) v. Ray Bolwell (Australia) and Resort Condominiums (Australia) Pty. Ltd. (Australia)*, Oct. 29, 1993, Yearbook Commercial Arbitration 1995.628). In this respect, it does not come as a surprise that the rules (as opposed, for example, to Article 14 of the ICC Rules of Arbitration) do not refer to any seat where the decision is rendered, which is in line with other provisions of the rules precluding the definition of the mechanism as an arbitration proceeding. On the same basis, although the Paris Court of Appeal was not called upon to resolve the issue of whether the place where the decision was rendered may be considered as a "seat," it follows from its decision that, since the referee is not sitting as an "arbitrator," there is no arbitration and therefore no seat.

New York Law Journal

"First Court Decision on Pre-Arbitral Referee", *New York Law Journal*, June 5, 2003.