

The ICC Pre-Arbitral Referee: First Practical Experiences

by EMMANUEL GAILLARD* AND PHILIPPE PINSOLLE**

THE ICC Rules for the pre-arbitral referee were issued in 1990.¹ According to the ICC, its intention was to provide the business community with a procedure allowing the parties to apply to a ‘referee’ for urgent provisional measures. The Foreword to the Rules insists that:

The Pre-arbitral Referee procedure provides 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.

These Rules require the inclusion of a special provision in the contract, in addition to the usual arbitration agreement.

* Professor of Law, Avocat à la Cour, Head of Shearman & Sterling LLP International Arbitration Practice.

** Avocat à la Cour, Barrister, Partner Shearman & Sterling LLP.

¹ ICC Pre-Arbitral Referee Procedure (ICC Publication No. 482, 1990); (1990) 1(1) *ICC Bulletin* 19; Yves Derains and Eric A. Schwartz, *A Guide to the New ICC Rules of Arbitration* (Kluwer, 1998), app. 10; see www.iccwbo.org/court/english/pre_arbitral/all_topics.asp. On the preliminary draft, see Yves Derains, ‘Expertise technique et référé arbitral’ in (1982) *Rev. Arb.* 239. For a commentary see IAI Seminar, 31 May 2002, ‘Les premières applications du Règlement de référé pré-arbitral de la CCI’ in (2003) 25 *Lebanese Rev. of Arab and Int’l Arb.* 8; Jean-Jacques Arnaldez and Erik Schäfer, ‘Le règlement de référé pré-arbitral de la Chambre de Commerce Internationale (en vigueur depuis le 1er janvier 1990)’ in (1990) *Rev. Arb.* 835; Jan Paulsson, ‘An Introduction to the 1990 ICC Rules for a Pre-Arbitral Referee Procedure’ in (1990) 5 *Int’l Arb. Rep.* 18. See also Chr. Hausmaninger, ‘The ICC Rules for a Pre-arbitral Referee Procedure: a Step Towards Solving the Problem of Provisional Relief in International Arbitration?’ in (1992) 7 *ICSID Rev. – Foreign Investment LJ* 82; M. Pryles, ‘Interlocutory Orders and Convention Awards, The Case of *Resort Condominium v. Bolwell*’ in (1994) 10 *Arb. Int’l* 385; W. Laurence Craig, William W. Park and Jan Paulsson, *International Chamber of Commerce International* (3rd edn, Oceana Publications/ICC Publishing, 2000), § 38.03; E. Gaillard and J. Savage (eds), *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer, 1999), no. 1321; Alexandre Hory, ‘Mesures d’instruction in futurum et arbitrage’ (1996) *Rev. Arb.* 191; Benjamin Davis, ‘The ICC Pre-arbitral Referee Procedure in Context with Technical Expertise, Conciliation and Arbitration’ in (1992) *Int’l Const. Law Rev.* 218; Eric Loquin in (2003) *RTD Com.* (July/September) 482; Hans Smit, ‘Provisional Relief in International Arbitration: the ICC and Other Proposed Rules’ in (1990) 1(3) *Am. Rev. Int’l Arb.* 388. On the *référé arbitral* or award in summary proceedings in national law, see art. 1051 of the Netherlands Code of Civil Procedure (Law of 2 July 1986), P. Sanders and A.J. van den Berg, *The Netherlands Arbitration Act 1986* (Kluwer, 1987), p. 81; compare art. 183 of the Swiss Federal Law on Private International Law, 18 December 1987 (www.amin.ch/ch/f/rs/291/a183.html).

Such special provisions were included in certain contracts, but it took more than 10 years for them to be applied in two different cases. One subsequently became public as a result of ensuing annulment proceedings before the Paris Court of Appeal. This attracted the immediate attention of the arbitration community and the international arbitration institute organized a well-attended conference in Paris on 31 May 2002, where the counsel for the parties in these proceedings, the individuals appointed by the ICC as referees (Prof. Bernard Hanotiau² and Prof. Pierre Tercier), and certain practitioners with insider knowledge of the institution were invited to discuss their respective experience.³

The authors of this article were counsel to the claimants in the first two cases, and in the subsequent annulment proceedings, as well as in the fourth case. Now that the Paris Court of Appeal has handed down its decision (attached as Appendix 2), holding that the decisions of referees are not arbitral awards, it is probably useful to draw preliminary conclusions from the first two cases as to the type of measures that may be obtained. The decision of the Paris Court also deserves some comments. Finally, some consideration will be given to the use of this institution/procedure, which proved to be a welcome addition to the means usually available on an interim basis for parties engaged in a transnational commercial dispute.

I. MEASURES WHICH CAN BE OBTAINED FROM A PRE-ARBITRAL REFEREE

The first question is what type of measures can be obtained from a referee. The Rules themselves give the referee a wide range of powers. According to article 2.1:

Article 2.1 Powers of the Referee 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.

(a) Whether Urgency Needed?

As is readily apparent, urgency is required only when the measures described in sub-paragraph (a) are sought. The requirement of urgency has been the subject of

² Bernard Hanotiau, 'The ICC Rules for a Pre-arbitral Referee Procedure' in (2003) *Int'l Arb. Law Rev.* 75.

³ Proceedings available at www.iaiparis.com/pdf/actes_colloque.pdf.

debate in the first two cases. In the first case, the referee concluded, albeit indirectly, that the measures provided by sub-paragraphs (b), (c) and (d) could be obtained without the need for demonstrating urgency. For its part, the second referee simply observed that there was an emergency requiring the measure requested without specifically deciding whether that measure would have been obtained in the absence of urgency.⁴

(b) Scope of the Powers of the Referee

Another contested question was whether the powers of the referee provided by article 2.1 should be interpreted restrictively and whether the provisional measures ordered should fall squarely within the wording of that article. Article 2.2 provides that the powers of the referee can be altered by agreement of the parties, thereby implying that the referee has no authority to modify his power in the absence of such an agreement. That does not explain, however, how the powers granted by article 2.1 should be interpreted. In both cases, it was thus argued by each respondent that the referee's powers were strictly limited by the terms of article 2.1. In both cases, the answer was that, although the referee cannot go beyond the measures provided by article 2.1 in the absence of an agreement of the parties, this article, which is broadly drafted, should not be interpreted in a restrictive manner.

In the first case, the respondent objected that one of the measures requested, the declaration that the claimant had a *prima facie* right under the contract, was not within the powers of the referee. This was formulated as a jurisdictional objection. The respondent contended that the referee had no jurisdiction, on the basis of the provision of article 2.1, to declare that the claimant had a *prima facie* right under the disputed contract. The existence and scope of the right in question were, in fact, the subject matter of the parallel arbitration on the merits between the parties. By careful reasoning, the referee concluded that, under article 2.1 of the Rules, he was indeed not entitled to declare that one party had a *prima facie* right, especially when the right in question was the subject of the dispute between the parties, but that he nonetheless had jurisdiction to verify the existence of a *prima facie* right, which could be a pre-condition necessary to grant one of the measures described in article 2.1. In our opinion, the distinction drawn by the referee is entirely justified. The Rules limit the measures that can be obtained, but place no limitation as to what type of issues should be examined by the referee prior to granting such measures.

In the second case, the referee held that his power should not be construed narrowly, but in accordance with the standard meaning of article 2.1, which is very broad. The referee was therefore able to conclude that he was not strictly limited by

⁴ Excerpt of the order at IAI Seminar, 31 May 2002, 'Les premières applications du Règlement de référé pré-arbitral de la CCI' in (2003) 25 *Lebanese Rev. of Arab and Int'l Arb.* 8. Translation attached at App 1: see §16 of the pre-arbitral referee order dated 6 February 2002 rendered in Pre-Arbitral Referee Procedure ICC No. 11904/DB.

the measures described in article 2.1, provided that the measure granted could be connected sufficiently with any of the measures described in any of the sub-paragraphs of article 2.1. As stated at § 9:

It is not disputed that Art. [...] contains an express cross-reference to the *Referee Rules*. During the pleadings, Counsel for the Respondents put forth the argument that the wording of the contractual clause is restrictive and would not cover all of the orders that a Referee would have the right to make under the Referee Rules. The Referee considers, as does the Claimant, that this interpretation is excessively narrow. The Parties made express reference to the Referee Rules, the result of which was to globally incorporate their contents. The actual terms used in the clause are even less significant since there is, both in academic writing and case law, a certain amount of vagueness in the terminology. Furthermore, the spirit of the clause contradicts the Respondents' line of reasoning, since it gives the Referee 'exclusive' jurisdiction. To consider otherwise would amount to depriving a party of the possibility of requesting other provisional measures. It would also lead to endless difficulties in distinguishing one definition from another, which the Parties could only have wished to avoid by signing the ... Therefore, the Referee considers that the said clause and the Referee Rules cover the submissions.⁵

On the whole, both orders adopted the same reasoning: the referee cannot extend the powers expressly granted to him by article 2.1, but this article should not be construed too literally. In addition, the referee is not limited in the exercise of its jurisdiction in order to grant one of the measures envisaged by article 2.1.

(c) Can the Claimant Modify its Request During the Course of the Proceeding?

A related objection, albeit different in nature, arose in the second case. The respondent argued that the claimant was bound by the terms of its initial request and could not modify them in the course of the proceeding to take into account a modification of the factual circumstances of the case. This argument was based on article 2.2 which provides that 'the Referee shall not have power to make any order other than that requested by any party in accordance with Article 3'.

Given that article 3 refers only to the initial request and the initial answer, the respondent submitted that the terms 'in accordance with article 3', if they were to be given effect, should be understood as limiting the powers of the referee to the measures requested in the initial request. Accordingly, the claimant should not be

⁵ Unofficial translation. Original:

Il n'est pas contesté que l'art. [...] contient un renvoi explicite *au Règlement-Référé*. En plaidoirie, le conseil des défenderesses a invoqué le fait que la formulation de la clause contractuelle serait limitative et ne couvrirait pas l'ensemble des mesures que serait en droit de prendre un Tiers selon le *Règlement-Référé*. Le Tiers considère, avec la Demanderesse, que cette interprétation est excessivement restrictive. Les Parties ont effectué un renvoi explicite au *Règlement-Référé*, dont le contenu est ainsi globalement intégré. Les termes utilisés dans la clause sont d'autant moins déterminants que règne en la matière, en doctrine et jurisprudence, un certain flou des terminologies. L'esprit de la clause est d'ailleurs contraire à la thèse des Défenderesses puisqu'il donne au Tiers une compétence «exclusive», qui reviendrait sinon à priver une partie de la possibilité de demander d'autres mesures provisionnelles. Elle conduirait en outre à des difficultés de délimitations sans fin, que les Parties n'ont pu que souhaiter éviter en concluant le

entitled to amend its request subsequently. This approach was squarely rejected by the referee at §11 as being ‘far too formalistic’:

Such an interpretation of the Referee Rules is far too formalistic. The general premise, common to all procedures, is that the Referee may not make decisions ‘*ultra petita*’; this is obviously not so in the present case if he accepts the new wording of the request for relief adopted by the Claimant, in light of circumstances that have arisen in the meantime. Furthermore, it would go against the spirit of a procedure of this kind to prohibit the Parties from modifying, even adding to their requests for relief, especially when, as in the present case, certain events have come about between the filing of the Request and the closing of proceedings. It would perhaps be different if the new requests for relief went completely beyond the scope of the Request and required new proceedings, which is obviously not the case in the present situation. A solution to the contrary would be absurd and unworkable as it would require the Claimant to introduce a new Request for each new request for relief, such new Request, which may, at least in theory, be brought before a different Referee.⁶

This approach is commendable. It would seem quite illogical, in the matter of provisional measures, not to allow the parties to make the necessary adjustments in their respective requests to take into account the evolution of the factual situation.

(d) Examples of Provisional Measures Granted

The merits of the first two cases were complex, both factually and legally. As a result, the measures requested were commensurate with this complexity. The Rules, as drafted, allowed the parties to obtain a wide range of remedies on a provisional basis. We will limit our description to two measures, which are of general interest.

A first measure ordered was the obligation for the respondent to continue the performance of the contract pending resolution of the dispute on the merits. The contract in question was a complex petroleum contract restructuring the relationship between a host state, the Republic of Congo, and an oil company, Total E & P Congo (“TEP Congo”). Among other things, the company was under the obligation to make a down payment of US\$198 million to certain creditors of the state, and the state was to reimburse the company by delivering oil quantities over a certain period of time. After the down payment was made, the state contended that the contract was void for lack of consent and suspended its performance.

⁶ Unofficial translation. Original:

Une telle interprétation du Règlement-Référé est formaliste à l’excès. l’idée générale, commune à toutes les procédures, est que le Tiers ne peut prendre des décisions “*ultra petita*”; ce n’est évidemment pas le cas en l’espèce s’il accepte la nouvelle formulation de la conclusion prise par la Demanderesse, au vu des circonstances intervenues dans l’intervalle. Qui plus est, il serait contraire à l’esprit d’une procédure de ce type que l’on fasse interdiction aux Parties de modifier, voire de compléter leurs conclusions, surtout lorsque, comme en l’espèce, des événements sont survenus entre la Demande et la clôture de la procédure. Il en irait peut-être différemment si les conclusions nouvelles sortaient totalement du cadre de la Demande et exigeaient une instruction nouvelle, ce qui n’est à l’évidence pas le cas en l’espèce. La solution contraire serait absurde et impraticable, qui obligerait la Demanderesse à introduire pour chaque nouvelle conclusion une nouvelle Demande, laquelle pourrait être, théoriquement du moins, soumise à un autre Tiers.

The referee granted the request on the basis of article 2.1(a) and (c). In relation to sub-paragraph (a), the referee specifically rejected the objection made by the respondent according to which the potential loss was not irreparable because it could be compensated by monetary damages. The reasoning of the referee, which emphasizes at §17 the importance of the performance of contracts in accordance with their terms in international commerce, is worth quoting here:

Such a line of reasoning is fundamentally in contradiction with the spirit and standards of international trade and that of the Contract. To allow the contrary would amount to authorising any contracting party to depart from any given contract, at any given time, unilaterally, by sending the other party away with damages. Contracts are made to be performed and the normal way of forcing the party who intends to elude a contract to comply with such contract is specific performance. It is an acknowledged fact that granting damages, even if in all probability they can be awarded, often only comes into play at the end of more or less lengthy proceedings and that they do not always cover the entire actual loss that a Party may incur. And, even if they are awarded, other problems may remain, particularly in connection with the potential insolvency of the other Party. In the present case, the situation is all the more critical since the Claimant has ... Moreover, the requested order is in harmony with the spirit of international trade, which requires that relations [between Parties] be well defined.⁷

A second measure ordered on the basis of article 2.1(a) was to the effect of forbidding any modification by the respondent of a number of related contracts which could, if modified, put the parties in a situation of '*fait accompli*', such that even if the claimant was to succeed on the merits, it would be too late, given the changes made in those contracts. The situation was somewhat similar to that of a party unduly calling a performance bond, and the basis for granting the request was the same: the preservation of the *status quo ante* and the duty of the parties not to aggravate the dispute.⁸

7 Unofficial translation. Original:

Une telle construction est fondamentalement contraire à l'esprit et aux exigences du commerce international et du Contrat. Admettre le contraire reviendrait à autoriser n'importe quel contractant à se départir d'un contrat, unilatéralement et en tout temps, en renvoyant l'autre partie à des dommages-intérêts, même si ceux-ci peuvent sans doute être alloués, n'intervient souvent qu'au terme d'une procédure plus ou moins longue et ne couvre pas toujours l'intégralité des préjudices véritables que peut subir une Partie. Et même s'ils sont octroyés, il peut subsister d'autres problèmes, notamment liés à l'insolvabilité éventuelle de l'autre Partie. En l'espèce, la situation est d'autant plus critique que la Demanderesse a ... La mesure requise est en outre conforme à l'esprit du commerce international qui exige des relations claires.

8 Paul Friedland, 'Provisional Measures and ICSID Arbitration' in (1986) *Arb. Int'l* 335; Andreas Reiner, 'Les mesures provisoires et conservatoires et l'Arbitrage International, notamment l'Arbitrage CCI' in (1998) *JDI* 853; Mauro Rubino-Sanmartano, *International Arbitration Law and Practice* (Kluwer Law International, 2001), pp. 640-644; Sigvard Jarvin, 'L'obligation de coopérer de bonne foi, exemples d'application au plan de l'arbitrage international', Seminar, 7 and 8 April 1986, CCI, p. 157; Didier de Montmollin, 'Les mesures provisionnelles et conservatoires dans l'arbitrage' in (1994) *Bulletin ASA* 139; orders of the International Court of Justice dated 5 July 1951 in *Anglo-Iranian Co.*, CIJ Rec. 1951, pp. 89, 94 and 15 December 1979 in *United States Diplomatic and Consular Staff in Tehran* (1980) ILM 139, 145; ICC award no. 3896 rendered in 1982, (1983) *JDI* 914-917 and award no. 4126 rendered in 1984, (1984) *JDI* 934-935 and transcript taken on 21 December 1994 in ICC case no. 8238, (1996) *JDI* 1963; decision on the interim measures of 9 December 1983 in *CIRDI Amco Asia Corporation and others v. Indonesia* (1985) ILM 365, 368; interim measures of the Iran-United States Claims Tribunal no. 159 dated 4 June 1984, (1985) *ICCA Yearbook* 308 and no. 382 dated 21 June 1985, (1986) *ICCA Yearbook* 349-355; Cour d'appel de Rennes (2e chambre), 26 October 1984, (1984) *JDI* 925-933.

Interestingly enough, and, it is submitted, rightly, there was no debate as to the jurisdiction of the referee to order such measure, which concerned related contracts. In English construction practice, certain practitioners have suggested that an arbitrator acting under the arbitration agreement of the main construction contract would have no jurisdiction to order a party to a dispute not to call a performance bond, because that performance bond would be subject to a dispute resolution clause distinct from that of the main contract giving rise to the dispute. This objection is misconceived. It is based on a confusion between jurisdiction *ratione materiae* and jurisdiction *ratione personae*. It is undisputed that the arbitral tribunal has jurisdiction over the parties to the main dispute, one of which also happens to be the beneficiary of the bond. However, an arbitral tribunal ordering this party not to call the performance bond does not thereby assume jurisdiction over that bond. There is no dispute about the bond or the fact that its beneficiary can enforce it. It is precisely because it can be enforced by its beneficiary that an order from the arbitral tribunal may be necessary to prevent it. In other words, the bond is no more than an external fact to the arbitral tribunal adjudicating the dispute under the main contract. The tribunal's order, in the event that it forbids the calling of the bond, does not prejudice the rights under the bond. The order simply requests the beneficiary not to enforce those rights. This is quite different from ruling upon the existence, the scope or the enforceability of those rights, even on an interim basis.⁹ International arbitration practice shows that such measures are regularly granted by arbitrators in major construction disputes. Very often, the reason advanced is the preservation of the *status quo ante* or the duty of the parties not to aggravate the dispute.¹⁰

Accordingly, the referee was able to order one party not to modify certain contracts, because the projected modification would have created an irreparable situation and would have aggravated the dispute.

(e) How are Orders Enforced?

A central question relates to the means available for enforcing orders made by referees. The Rules provide in this regard 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' (article 6.6).

In all the cases so far, the orders made by referees have been complied with on a voluntary basis. One case was even settled. This shows that these orders do perform

⁹ As early as 1980, it was suggested that the pre-arbitral referee could constitute an appropriate forum for granting interim measures in disputes arising out of performance bonds themselves, as distinct from the main contract: Yves Derains in (1980) *JDI* 970–978.

¹⁰ Compare ICC award no. 3896 rendered in 1982 (bank guarantee), commented by Sigvard Jarvin in (1983) *JDI* 914; *Recueil des sentences arbitrales de la CCI 1974–1985*, p. 481.

a useful prophylactic function regardless of what means are available to enforce them, if need be.

However, the Rules are not silent on the consequences of the failure to comply with an order. They provide that ‘The competent jurisdiction may determine whether any party who refuses or fails to carry out an order of the Referee is liable to any other party for loss or damage caused by such refusal’ (article 6.8.1). Unsurprisingly, the Rules do not indicate what the ‘competent jurisdiction’ is. They simply suggest a hint, in the sense that such jurisdiction is a jurisdiction empowered with the task of allowing damages for non-compliance with the order, which is provisional in nature. In other words, the Rules do not seem to envisage the direct enforcement of the order, but appear to limit the consequences of non-compliance to the allocation of damages. As such, it is arguable that the ‘competent jurisdiction’ to allow such damages would be the jurisdiction competent to hear the merits of the case, generally arbitration.

This discussion leads to a major question: what is the legal nature of these orders? In particular, do they constitute arbitral awards under the New York Convention?

II. LEGAL NATURE OF ORDERS MADE UNDER THE PRE-ARBITRAL REFEREE RULES

The question of the legal nature of the referee’s order, and in particular whether that order could constitute an arbitral award, was left open in the Rules. The history of the drafting of the Rules indicates that the drafters carefully avoided the word ‘arbitration’ in them, thus leaving open the question of the legal characterization of the referee’s mission.¹¹ The consequences of the characterization of the referee’s orders as awards would be significant. The order would benefit from the New York Convention, but could, conversely, be subject to an action to set aside before the courts of the seat, provided that such courts can be identified.

The Court of Appeal of Paris was the first to be called upon to decide this issue.

(a) Annulment Proceedings Before the French Courts

The second case gave rise to annulment proceedings before the Court of Appeal of Paris. The Republic of Congo, which initiated annulment proceedings against the order, contended that the order amounted in fact to an arbitral award capable of

¹¹ Derains and Schwartz, *supra* n. 1 at p. 275; IAI Seminar, 31 May 2002, *supra* n. 1; Alexis Mourre, ‘Référé pré-arbitral de la CCI: To Be or Not to Be a Judge’ in (2003) *Gaz. Pal.* (28–29 May) 5, 7; *see also* Loquin, *supra* n. 1 at p. 484; Jan Paulsson, ‘An Introduction to the 1990 ICC Rules for a Pre-Arbitral Referee Procedure’ in (1990) *Int’l Arb. Rep.* 20.

being set aside by the French courts. This was a condition to the admissibility of its action.

As far as the substance of its claim was concerned, the Republic of Congo argued that the referee had failed to act in accordance with the powers conferred on it by the parties, and that the referee did not comply with due process, each of these grounds providing a basis for annulment under article 1504 of the French New Code of Civil Procedure.

TEP Congo, the claimant in the pre-arbitral referee process, but the respondent in the annulment proceedings, replied that the referee's order was not an arbitral award, mainly because it was not rendering a final decision on the merits, given that it could always be challenged before an arbitral tribunal constituted in accordance with the arbitration agreement of the contract. This proposition was consistent 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'.

(b) The Decision of the Court

In a decision rendered on 29 April 2003, the Paris Court of Appeal held that the action to set aside initiated by the Republic of Congo was not admissible because the order was not an arbitral award.

To reach this conclusion, the court noted that it should not begin by determining whether the referee's decision should be characterized as an order or as an award. This reasoning would assume that the referee was in fact empowered to render both types of decision. Rather, the court held that it should first determine whether the referee had acted as an arbitrator in order to decide on the parties' dispute. If the referee's mandate was of a nature similar to that of an arbitrator, then, and only then, could the court address the issue as to whether the disputed decision could be characterized as an arbitral award, as distinct from a procedural order.

The court therefore turned to the Foreword of the Rules, which states, in pertinent part, that the Pre-Arbitral Referee Procedure was intended to provide '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'. The court then noted that the use of the term 'arbitration' had been carefully avoided by the drafters of the Rules.

Going back to the specifics of the case, the court further pointed out that the order had merely prohibited the state party from obstructing the performance of the agreement. As far as the merits of the dispute were concerned, the order directed the parties to the arbitral tribunal to be constituted in accordance with the arbitration agreement of the contract.

The court also held that the binding nature of the order derived solely from the parties' agreement. On this basis, the court held that the order had no more binding effect than that of a contractual provision and was deprived of the binding effect of a decision being *res judicata*: 'despite its appellation, the order dated February 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]'.¹²

On the basis of these findings, the Court of Appeal of Paris concluded that the referee was not acting in the capacity of an arbitrator, that therefore his decisions were not arbitral awards and, accordingly, that they could not be subject to an action to set aside.

Overall, we do not necessarily disagree with the result reached by the Paris Court of Appeal, which denies the characterization as an award, even though we would have welcomed more detailed reasons supporting it. The brevity of these reasons, admittedly familiar to French courts, has led to criticisms.¹³

In fact, there is an implicit part of the reasoning which should have been made explicit: it is not only because the procedure is contractual in nature that it does not lead to a jurisdictional decision. Arbitration is also contractual in nature, but nevertheless undoubtedly leads to a jurisdictional decision. In our view, the referee does render a jurisdictional decision unlike, for example, an expert. This view is shared by many French authors.¹⁴

What is certain, however, is that the decision is provisional in nature. As a result, it arguably does not pass the test set out by French courts to be characterized as an arbitral award.¹⁵ The requirement of finality is a generally accepted test for the characterization of a decision as an arbitral award. That being said, the requirement may be applied differently in different legal systems.¹⁶

In any event, it would probably have been more appropriate for the Paris Court of Appeal not to insist too much on the contractual nature of the referee's mandate, but to focus on the absence of finality of his decision.

¹² Unofficial translation. Original:

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.

¹³ Mourre, *supra* n. 11.

¹⁴ Loquin, *supra* n. 1; Mourre, *supra* n. 11.

¹⁵ Cour d'appel de Paris (1ère Ch. C.) *Société Sardisud*, 25 March 1994, comment by Charles Jarrosson in (1994) *Rev. Arb.* 391; see also Cour d'appel de Paris (1ère Ch. C.) *Guignier ès qualité c/ SA HRA Europe*, 25 May 2000, comment by Philippe Pinsolle in (2001) *Rev. Arb.* 199.

¹⁶ *Compare Publicis v. The North Communications*, US Court of Appeals, Seventh Circuit, 14 March 2000: (2000) *ICCA Yearbook* 1152; comment by Philippe Pinsolle in (2000) *Rev. Arb.* 657; compare also MOT no. 389, Supreme Court of Queensland, 29 October 1993, (1995) *ICCA Yearbook* 628, commented on in Pryles, *supra* n. 1.

The fact that the order rendered by the referee was not considered an award by French courts does not diminish the interest of having recourse to this procedure. The fact that all the orders rendered have been complied with on a voluntary basis is extremely telling in this regard.

III. FINAL CONSIDERATIONS

Overall, the pre-arbitral referee has proved to be a useful institution. It does not replace interim relief that can be obtained before state courts, but it clearly supplements it by offering other advantages.

(i) In general, the pre-arbitral referee does not replace interim relief that can be obtained before state courts. A pre-arbitral referee is not a panacea. In particular, when there is absolute urgency, state courts are probably more appropriate. Selecting a referee and obtaining an order takes a matter of days, not hours. Sometimes a decision is required in a matter of hours. In such a case, there is no substitute for state courts. It is true, however, that international commerce does not often give rise to situations where a decision is needed in a matter of hours.

Another advantage of state court justice is that the decision is immediately enforceable, at least within the territorial limits of the state in question.¹⁷ For reasons explained above, an order by a referee is not enforceable as such before a state court. It must be confirmed by a subsequent arbitral award. This may explain that the rules, wisely, do not provide that the pre-arbitral referee procedure excludes the possibility of seeking interim relief before state courts.

(ii) The pre-arbitral referee offers advantages that supplement state court justice. The main advantage of the pre-arbitral referee is flexibility. This flexibility comes into play at different levels. First, the pre-arbitral referee is not limited as to the types of measure that may be obtained. National legal systems very often limit the type of measures available on an interim basis (for example, injunctive relief may not always be available). This is not so with the pre-arbitral referee, where the rules allow the referee to order virtually any type of interim measures possible.

Secondly, the conditions for obtaining the measures are not too strict. For example, as discussed above, urgency is required only in certain circumstances.

Thirdly, and this is paradoxical, orders issued by the referee are likely to be enforced on a voluntary basis (perhaps even more than state court orders) even if directed against states or state entities. This may be so because the party against whom the order is directed knows that failure to comply with it may put them at a disadvantage in the forthcoming arbitration on the merits. This may also be due, in the cases

¹⁷ See, for another view, Gilles Cuniberti, *Les mesures conservatoires portant sur des biens situés à l'étranger* (thesis, LGDJ, Paris, 2000).

described here, to the excellent quality of the reasoning of the orders (some of which are 20 pages long), which explain at length to the parties why the order has been rendered. In one case, the two parties were so satisfied with the work of the referee that a year later, for a related dispute between them, they agreed to the same person acting again as referee.

Overall, the institution allows the parties to obtain hand-made justice on an interim basis. With the acceleration of the pace of the world economy, this possibility is welcome.

One modification may perhaps be suggested to the current system. Instead of being a separate set of rules requiring a specific provision distinct from the arbitration agreement, the Rules for the pre-arbitral referee should be directly integrated into the ICC Rules. In other words, the ICC Rules should be modified to incorporate by reference the pre-arbitral referee Rules. This would allow the parties that have entered an ICC arbitration agreement to benefit from this process. Other major institutions should also consider revising their rules to provide for such an additional service to the parties.

(iii) In contracts involving state parties, private parties should consider making the pre-arbitral referee the exclusive remedy. It is interesting to note that in the matter between the Republic of Congo and TEP Congo, the pre-arbitral referee procedure was provided in the contract to be exclusive of any other remedy. Leaving aside the question of the enforcement of this exclusivity provision, this feature can be explained by the fact that the underlying agreement was entered into between an investor and a host state, and was to be performed essentially within the host state's territory. As a result, the prospect of obtaining satisfactory relief on an interim basis before the courts of the host state was, rightly or wrongly, perceived as rather remote by the investor. This probably prompted the decision by the investor to grant exclusive jurisdiction to a neutral forum, the pre-arbitral referee. This faculty to make the pre-arbitral referee exclusive of any other forum is an interesting feature of the pre-arbitral referee in the context of the relationship with sovereign states or state-owned entities.

Whether justified or not, it is true that there is a feeling among investors that state court justice is less attractive when dealing with a state, the courts of which will be called upon to order interim measures. Resorting to foreign courts is conceivable in theory (provided that the immunity of jurisdiction has been waived), but in practice an order issued by a foreign court is likely to produce little effect if directed against the state party.

Rendering the pre-arbitral referee exclusive of any other remedy may be an answer to this concern. In the case of TEP Congo, the clause was drafted as follows:

[6] Each party may request interim or conservatory measures in application of the Pre-arbitral Referee Procedure Rules of the International Chamber of Commerce, the referee, acting under the said Rules, having exclusive jurisdiction to take such measures. [7] The Parties hereby irrevocably

waive the right to avail themselves of any immunity during any proceedings concerning both the enforcement of any interim or conservatory measure ordered by a referee in application of the above Rules, as well as any arbitral award rendered by an arbitral tribunal constituted in accordance with this clause, including any immunity related to the serving of notice, any immunity from jurisdiction or any immunity from execution with regards to its assets.

During the IAI seminar, Andreas Reiner suggested the following language:¹⁸ ‘The parties give exclusive jurisdiction to the referee and waive their right to have recourse to State courts’. Both provisions seem effective. What matters in our view is that the exclusive nature of the pre-arbitral referee be expressed with sufficient clarity to dispel any doubt as to the intention of the parties.

APPENDIX 1

Pre-Arbitral Referee Procedure ICC No. 11904/DB
Pre-Arbitral Referee Order dated February 6, 2002
REFEREE: Pierre Tercier, Professor at the University of Fribourg
SEAT: Paris
In the Dispute Between [...] Claimant and [...] Respondents
The Referee having established

(A) The Facts¹

I The Parties

1. The Claimant [...]
2. The Respondents are: [...]
3. Although it is not a party to the proceedings, one should make reference to the company [...], which has played a part in developing business relations between the Parties. This company is affiliated to [...].

II The [Contract]

[...]

III The Background of the Dispute

[...]

¹⁸ www.iaiparis.com/pdf/actes_colloque.pdf.

IV The Pre-arbitral Referee Procedure

23. On December 26, 2001, [...] filed a Request for a Pre-arbitral Referee (hereafter: the Request) with the International Court of Arbitration of the International Chamber of Commerce, pursuant to the Rules for a Pre-arbitral Referee Procedure of January 1, 1990 (hereafter: the Referee Rules), according to which the requesting party sought to obtain ‘the appointment of a Referee by the Secretariat of the International Chamber of Commerce’ in order for him to render a decision on two main issues (*see* below, The Law ch. 7a).

24. The same day, the Request was notified to [...] in accordance with Article 3.2.2(f) of the Referee Rules (Claimant’s Exhibit 12).

25. On January 8, 2002, [...] submitted an Answer to the Request (hereafter: the Answer), essentially requesting that the Claimant’s demands be dismissed (*see* below, The Law ch. 7b).

26. On January 10, 2002, the Chairman of the International Court of Arbitration appointed Professor Pierre TERCIER as Referee, in accordance with the provisions of Article 4.2 of the Referee Rules.

27. On January 11, 2002, the Referee received the file, sent to him by the International Court of Arbitration.

28. On January 21, 2002, [...] Claimant filed new submissions and produced four new exhibits]

29. On January 22, 2002, Counsel for [...] informed the Referee that he sought to dismiss the new request for relief put forth by [...], as well as the exhibits attached to the letter of January 21, 2002. In his opinion, the submission by [...], the day before the hearing, of correspondence exchanged between the Parties on December 26, 2001 and January 4, 2002, would be a breach of the principle of [the right to be heard in an] adversarial procedure [*principe du contradictoire*] and, moreover, would be beyond the Referee’s powers, as set out in Article 2.2 of the Referee Rules, to rule on the new order requested by the Claimant as well as on the corresponding exhibits attached to that request.

30. On January 23, 2002, the Referee held a meeting in Paris in the presence of the representatives of the parties and their counsel. He took the opportunity to ask them certain questions and heard their oral presentation of the grounds on which their claims were based. Since no additional requests were made, the Referee closed the proceedings (*see* Minutes of the hearing of January 23, 2002).

*(B) The Law**I [In general]*

1 THE CONTRACTUAL CLAUSE

1. The [...] signed by the Parties contains at Art. [...] the following provision, entitled ‘Applicable Law – Arbitration’:

[1] The present Agreement shall be governed and interpreted according to French law.[2] All disputes arising in connection with the Agreement, which are not settled amicably within three months following notification of the said dispute by one of the Parties to the other Party, shall be finally settled according to the Rules of Arbitration of the International Chamber of Commerce by three arbitrators appointed in accordance with the said Rules.[3] The President of the Court shall be a jurist.[4] The arbitration shall take place in Paris.[5] The language to be used in the arbitral proceedings shall be French.[6] Each party may request interim or conservatory measures in application of the Pre-arbitral Referee Procedure Rules of the International Chamber of Commerce, the referee, acting under the said Rules, having exclusive jurisdiction to take such measures.[7] The Parties hereby irrevocably waive the right to avail themselves of any immunity during any proceedings concerning both the enforcement of any interim or conservatory measure ordered by a referee in application of the above Rules, as well as any arbitral award rendered by an arbitral tribunal constituted in accordance with this clause, including any immunity related to the serving of notice, any immunity from jurisdiction or any immunity from execution with regards to its assets.[8] The Parties will maintain the utmost secrecy regarding the contents of the arbitral proceedings.¹⁹ [...]

2 JURISDICTION AND PROCEEDINGS

3. The Referee was appointed by the Chairman of the International Court of Arbitration on January 10, 2002 (see above, The Facts, ch. 26). No objection was made as to the Referee's jurisdiction.

4.

- (a) The proceedings were initiated by the filing of the Request for a Pre-arbitral Referee on December 26, 2001 (see above, The Facts ch. 23); the Respondents had the opportunity to state their position in their Answer (see above, The Facts ch. 25). A number of exhibits was attached to the Request, though none was attached to the Answer.
- (b) After the Request was filed, by way of a letter dated January 21, 2002 (see above, The Facts ch. 28), the Claimant submitted *four new exhibits* (Claimant's Exhibits 13 to 16) that the Respondents asked the Referee to exclude from the proceedings (see above, The Facts ch. 29). In their opinion, allowing these exhibits would be a breach of the principle of [the right to be heard in an] adversarial procedure [*principe du contradictoire*], since they would not have had the time to become familiar with such evidence, nor to state their position;

¹⁹ [1] Le présent Accord sera régi et interprété selon le droit français. [2] Tous les différends découlant de l'Accord, qui ne seraient pas résolus à l'amiable dans les trois mois suivant la notification par l'une des Parties à l'autre dudit différend, seront tranchés définitivement suivant le Règlement d'arbitrage de la Chambre de Commerce International par trois arbitres nommés conformément à ce Règlement. [3] Le Président du Tribunal sera un juriste. [4] l'arbitrage aura lieu à Paris. [5] La langue à utiliser pour la procédure d'arbitrage sera le français. [6] Chaque partie pourra solliciter des mesures provisoires ou conservatoires en application du Règlement de référé pré-arbitral de la Chambre de Commerce International, le tiers statuant en référé en application de ce Règlement ayant compétence exclusive à cet effet. [7] Les Parties renoncent irrévocablement par les présentes à se prévaloir de toute immunité lors de toute procédure relative à l'exécution tant de toute mesure provisoire ou conservatoire ordonnée par un tiers en application du règlement ci-dessus que de toute sentence arbitrale rendue par un tribunal constitué conformément à la présente clause, y compris toute immunité concernant les significations, toute immunité de juridiction et toute immunité d'exécution quant à ses biens. [8] Les Parties maintiendront un strict secret sur le contenu de la procédure d'arbitrage.

admitting these exhibits would also be contrary to the Referee Rules, which require that all exhibits be contained in the request to institute proceedings. The Referee allows the Claimant to submit Exhibits 13 to 16 for the following reasons: the procedure established by the Referee Rules is a summary procedure, which must result in a prompt decision. It is not governed by a strict framework, in any case not in relation to the submission of exhibits. The documents submitted by the Claimant were known to the Respondents before the hearing and had been transmitted to them; they could have therefore responded either in writing or during the hearing, or even, if need be, they could have requested an extension of the time limit and a postponement of the hearing, all of which they did not do. In any event, it is in accordance with the Referee Rules that the Referee may carry out further investigations pursuant to the powers vested in him by Art. 5.3; he could have therefore asked for further information on his own initiative, which he did for that matter during the hearing held with the Parties (*see above*, The Facts ch. 30). Lastly, it is normal that the Referee should rely on all documents that could be useful to the decision-making process in view of the importance of such a measure, particularly letters that may have been exchanged between the Parties after the Request was filed.

- (c) The Referee held a *hearing* in the presence of the Parties. The latter had the opportunity to provide him with further explanations that he required. They confirmed that they did not have any new claim with regard to the proceedings and that they also had the opportunity to present their case orally.

5. Since the case file was submitted to the Referee on January 11, 2002 (*see above*, The Facts ch. 27), the decision he rendered on February 6, 2002 respects the 30-day time limit set out by Art. 6.2 of the Referee Rules.

6. Consequently: the Referee affirms that he has jurisdiction to validly render this Order, subject to questions pertaining to the admissibility of the submissions which will be dealt with later on.

3 THE ISSUES

[...]

4 THE GROUNDS

9. It is not disputed that Art. [...] contains an express cross-reference *to the Referee Rules*. During the pleadings, Counsel for the Respondents put forth the argument that the wording of the contractual clause is restrictive and would not cover all of the orders that a Referee would have the right to make under the Referee Rules.

The Referee considers, as does the Claimant, that this interpretation is excessively narrow. The Parties made express reference to the Referee Rules, the result of which was to globally incorporate their contents. The actual terms used in the clause

are even less significant since there is, both in academic writing and case law, a certain amount of vagueness in the terminology. Furthermore, the spirit of the clause contradicts the Respondents' line of reasoning, since it gives the Referee "exclusive" jurisdiction. To consider otherwise would amount to depriving a party of the possibility of requesting other provisional measures. It would also lead to endless difficulties in distinguishing one definition from another, which the Parties could only have wished to avoid by signing the [...].

Therefore, the Referee considers that the said clause and the Referee Rules cover the submissions.

10. Even though an established practice regarding the Referee Rules hardly exists at the moment, the Referee considers himself entitled to interpret the Rules *in the same light as conservatory measures*, as the latter have been applied by national courts and arbitral tribunals in international trade for a long time. The objective is to obtain a prompt decision, justified by urgency and in light of the existence of a *prima facie* case, without pre-judging the merits of the case.

II Claims Relating to the Performance of the Contract

1 CONTENT AND ADMISSIBILITY

11. In its Request, the Claimant requested that the Referee [...] In a letter dated January 21, [the Claimant] informed the Referee that [...] For this reason, [the Claimant] asked the Referee, 'to ensure the protection of its rights [...]' (letter dated January 21, 2002, p. 2).

In a letter dated January 22, 2002, the Respondents considered that 'the new order requested by [...] should [be excluded] from the proceedings, the Referee having no power to hear such matters'. In fact, Art. 2.2 of the Referee Rules provides that 'the Referee shall not have power to make any order other than that requested by any party in accordance with Article 3'. The latter article actually states that 'the orders requested by the party requesting a pre-arbitral referee procedure must be set out in the instrument instituting proceedings, that is to say, the request sent to the Secretariat of the International Chamber of Commerce and to the respondent'.

The Referee considers that he has jurisdiction to rule on *the order as it was eventually formulated by the Claimant*:

- The alleged new order does not radically differ from the one that was submitted in the Request. In the first text, the Referee was asked 'to prohibit [...]', and in the second, he was asked 'to pronounce a prohibition [...]'. The orders are linked to one another, one formulating positively what the other expresses negatively; in both cases, the Referee is asked to prohibit the Respondents from hindering the performance of the contract; the wording used is not decisive.
- It is true that the first request for relief referred to the contract of [...]. This precision, which relates to the first deed of performance of the said contract,

does not modify the request for relief, which is generally aimed at the respect of [...]. The fact that [...] does not have any consequences on the Respondents' position, who still consider that they are no longer bound, at least temporarily, by the [...].

- According to the Respondents, the Referee is bound by the wording of the request for relief set out in the Request; he would act in violation of Art. 2.2 of the Referee Rules if he accepted requests for relief 'other than [those] requested by any party in accordance with Article 3'. Such an interpretation of the Referee Rules is far too formalistic. The general premise, common to all procedures, is that the Referee may not make decisions '*ultra petita*'; this is obviously not so in the present case if he accepts the new wording of the request for relief adopted by the Claimant, in light of circumstances that have arisen in the meantime. Furthermore, it would go against the spirit of a procedure of this kind to prohibit the Parties from modifying, even adding to their requests for relief, especially when, as in the present case, certain events have come about between the filing of the Request and the closing of proceedings. It would perhaps be different if the new requests for relief went completely beyond the scope of the Request and required new proceedings, which is obviously not the case in the present situation. A solution to the contrary would be absurd and unworkable as it would require the Claimant to introduce a new Request for each new request for relief, such new Request, which may, at least in theory, be brought before a different Referee.

12. In addition, the Respondents consider that the Claimant is not *entitled to ask for* the order requested because [...]

This objection has no substance for the following reasons: [...]

2 THE GROUNDS FOR THE REQUEST

13. In order that the Request be allowed, it must fulfil a certain number of requirements:

- the first concerns the Claimant's *locus standi* to request this order;
- the second, the existence of a *prima facie* right;
- thirdly, urgency; and
- fourthly, the threat of an irreparable loss.

a. Locus Standi

14. The Claimant would be able to, on January 9, 2002, [...]

b. The existence of a prima facie case

15. [...] *The breach of contract.* [...]

c. Urgency

16. The Respondents consider that the order is not urgent at all. To the contrary, the Referee considers, as does the Claimant, that the legal uncertainty created by the situation calls for a prompt decision. In international trade and, evidently, in

that of [...], transactions follow a steady and regular rhythm; consequently, they must be able to rely on clear legal situations. It is likely, even if this has not been formerly established, that the Claimant, through its affiliated companies, has already commercialised [...]. One cannot reasonably compel the Claimant to continue such trade with a permanent threat of legal complications. Moreover, the Parties were apparently convinced of the necessity of being able to rapidly clarify matters, if need be, since they have precisely incorporated into their contract the Referee Rules, the objective of which is also to allow for the urgent clarification of the situation.

d. The prevention of an irreparable loss

17. The Respondents contend that the Claimant risks no irreparable loss since it would still be possible for it to request damages for non performance if the Respondents should prove to be in breach of contract. The Referee considers that one cannot reason in this manner:

Such a line of reasoning is fundamentally in contradiction with the spirit and standards of international trade and that of the Contract. To allow the contrary would amount to authorising any contracting party to depart from any given contract, at any given time, unilaterally, by sending the other party away with damages. Contracts are made to be performed and the normal way of forcing the party who intends to elude a contract to comply with such contract is specific performance. It is an acknowledged fact that granting damages, even if in all probability they can be awarded, often only comes into play at the end of more or less lengthy proceedings and that they do not always cover the entire actual loss that a Party may incur. And, even if they are awarded, other problems may remain, particularly in connection with the potential insolvency of the other Party. In the present case, the situation is all the more critical since the Claimant has [...]. Moreover, the requested order is in harmony with the spirit of international trade, which requires that relations [between Parties] be well defined. The Respondents do not run any risk, since [...]

3 THE REQUESTED ORDER

18. According to [Article 2.1] of the Referee Rules, the Referee has the power:

(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; [...](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; [...]

In the present case, [...]

4 FIRST CONCLUSION

19. In light of the above analysis, *it is* [...] The Referee does not have to rule on the *consequences of his decision*. It is probable that, in keeping with international practices, the prohibition will have an adequately dissuasive effect on the Respondents' behaviour.

III Costs

1 IN GENERAL

20. The Claimant put forth a request for relief concerning costs during the hearing of January 23, 2002 (Minutes of January 23, 2002, p. 3), limiting it, however, to the request that the other Party bear the costs of the procedure. It expressly waived the possibility of asking for additional damages and the reimbursement of counsel's fees. Counsel for the Respondents considered that this request for relief was late, since it was not set out in the Request; they invited the Referee to declare it inadmissible (Minutes of January 23, 2002, p. 3).

The Referee recalls that the procedure set out by the Referee Rules are not strictly formalistic; it is true that the procedure is initiated by a request that must lay down the framework of the orders sought that will be made and the main requests for relief, but, in line with what has already been decided above, nothing prohibits a Party from adding to its request for relief when such addition is connected to the initial request. This request does not have the same formal character as the type of request one finds in judicial proceedings. The procedure calls for simple acts; being rapid in nature, it cannot put up with rigorous formalism that would call into question its usefulness. Moreover, the request for relief concerns a standard aspect of the procedure and, in any event, it would not have required that the Respondents specifically state their position in writing beforehand.

Consequently, the Referee considers that the Claimant's request for relief is admissible.

2 THE FIXING AND DISTRIBUTION OF COSTS

21. Article 7.1 of the Referee Rules deals with the question of costs:

The costs of the Pre-arbitral Referee Procedure comprise:

- (a) an administrative charge as set out in the Appendix to these Rules,
- (b) the fees and expenses of the Referee to be determined as set out in the Appendix and
- (c) the costs of any expert.

The Referee's order shall state who shall bear the costs of the Pre-arbitral Referee Procedure and in what proportion. A party who made an advance or other payment in respect of costs which it was not liable to have made under the Referee's order shall be entitled to recover the amount paid from the party who ought to have made the payment.

22. By a decision of February 5, 2002, the Secretary General of the Court fixed the amount of the Pre arbitral referee [proceedings'] costs at *USD 30,000*, in accordance with the aforementioned provision. This amount corresponds to that advanced by the Claimant at the Secretariat's invitation.

It is for the Referee to fix the proportions in which this amount shall be divided, according to his assessment [of the situation]. [In theory], he could order the Respondents to pay all the costs since the main request for relief of the Claimant is upheld. However, he considers that it is equitable to make each Party bear *half these costs*. This share corresponds to a method of division which has been used for a long

time and which is still often used in international arbitration; it takes into consideration the fact that, apart from the cases where the behaviour of one party is obviously abusive, disputes of this kind are inherent to the development of commercial relations. In addition, the relations between the Parties, even if they are troubled, have not yet given rise to contentious proceedings and the order made by the Referee is also in the Claimant's interest since it can obtain a prompt decision, albeit temporary, through this medium.

Thus, each of the Parties will pay the sum of *USD 15,000*. Considering the advance on costs made by the Claimant, the Respondents must reimburse the sum of USD 15,000 to the Claimant.

3 OTHER AMOUNTS?

23. With regard to the surplus, the Referee considers that it is also in line with the spirit of the procedure and the apportionment of costs that each Party pay the *fees for its own Counsel*. It is, therefore, not necessary to rule on the issue, brought up during the pleadings, as to whether the terms of Art. 7.1 of the Referee Rules does or does not formally exclude the possibility of obtaining the reimbursement of all or part of [Counsel's] fees incurred by the other party.

24. In addition, the Referee considers that the Respondents' request for relief pertaining to *the awarding of damages* up to the amount of 100,000 euros must be dismissed since the fact that the Claimant's request has been allowed precludes the possibility of its being abusive.

25. In light of the above analysis,

- the costs of the pre-arbitral procedure have been fixed at USD 30,000;
- each Party will pay half this amount, *i.e.* USD 15,000;
- the Respondents will reimburse the amount of USD 15,000 to the Claimant within 30 days following the communication of the present order.

On these grounds, Orders [...]

APPENDIX 2

COURT OF APPEAL OF PARIS First Chamber, section C

Judgment of 29 April 2003

Docket number: 2002 / 05147

No joinder

APPEAL FOR ANNULMENT of an order rendered by a pre-arbitral Referee (ICC 11904/DB) on 6 February 2002 at Paris by Mr. Pierre Tercier, Referee appointed by the President of the International Court of Arbitration of the International Chamber of Commerce.

Date of closing order: 30 January 2003

Nature of the decision: **JUDGMENT RENDERED AFTER DULY HEARING THE PARTIES**

Decision: **APPEAL INADMISSIBLE**

CLAIMANTS TO THE APPEAL FOR ANNULMENT: Société Nationale des Pétroles du Congo, A company established under the laws of Congo represented by its legal representatives having its seat at BP 188, Brazaville (Republic of Congo)

REPUBLIC OF CONGO, Represented by the Minister for Economy, Finance and Budget and by the Minister for Hydrocarbon having its seat at BP 2120, Brazaville (Republic of Congo) Represented by the Professional Partnership of Bernabe-Chardin-Cheviller, Solicitors, Assisted by Mr. Garaud Jean-Yves, of the law firm Cleary Gottlieb Steen & Hamilton, Advocate admitted to the Paris Bar, J21

RESPONDENTS TO THE APPEAL FOR ANNULMENT: Société TOTAL FINA ELF E&P Congo Represented by its legal representatives Having its seat at BP 761, Pointe Noire (Republic of Congo) Represented by the Professional Partnership of Duboscq–Pellerin, Solicitors Assisted by Mr. Emmanuel Gaillard of the law firm Shearman & Sterling, Advocate admitted to the Paris Bar, J006

MEMBERS OF THE COURT: During the hearings and deliberation

Presiding Judge: Mr. PÉRIÉ

Judge: Mr. MATET

Judge: Mr. HASCHER

CLERK: During the hearings and pronouncement of the judgment

Ms. FERRIE

PROCEEDINGS: At the public hearing of 13 March 2003

JUDGMENT: RENDERED AFTER DULY HEARING THE PARTIES

Publicly pronounced by Mr. Périé, Presiding Judge, who signed the original draft with Ms. Ferrie, Clerk

The Republic of Congo and the Société Nationale des Pétroles du Congo (SNCP) have filed an appeal for annulment of an order rendered on 6 February 2002 by Mr. Tercier, a Referee appointed within the institutional framework of the International Chamber of Commerce (ICC) Pre-Arbitral Referee Procedure. The general protocol of agreement was entered into on 10 September 2001 with the company Total Fina Elf E&P Congo (TEP Congo) and contains an undertaking as to the methods of execution relating to the payment for amounts of crude oil to refinance the debts of the Republic of Congo. Article 10 of the Protocol makes reference to the pre-arbitral Referee procedure:

Each party can seek the relief of provisional or conservatory measures in application of the Rules of the ICC Pre-Arbitral Referee Procedure, the Referee having exclusive competence to this effect, in keeping with the Rules;

The Republic of Congo and SNCP begin by explaining that the order of the pre-arbitral Referee was rendered at the instance of TEP Congo, which informed the Referee of its intention to terminate the protocol due to, notably, a controversy regarding the wording of the certificates delivered to the Republic of Congo by TEP Congo in its capacity as an operator of oil terminals. They plead that, this order, which:

- prevents them from blocking the execution of the contract entered into by the parties for the sale of oil, and thus from unilaterally suspending or interrupting the execution, as long as the competent arbitral tribunal does not decide on the merits,
- limits the expenses of the pre-arbitral Referee procedure to US\$ 30 000, each party bearing half the cost, or US\$ 15 000, with the respondents reimbursing US\$ 15 000 to the claimant within thirty days following the communication of the order,
- rejects all other requests for relief,

is in reality an award because it settles the dispute submitted to the Referee, vested with a jurisdictional power to this effect.

They add that Article 6.6 of the Rules of the Pre-Arbitral Referee Procedure, requiring the parties to carry out the Referee's order without delay and to waive their right, insofar as such waiver can validly be made, to all means of appeal or recourse or opposition to a request to a Court or to any other authority to implement the order, does not prevent the filing of an appeal for annulment, which is always possible against an award rendered in France on a matter of international arbitration, notwithstanding any clause to the contrary.

They then plead for the annulment of the order for two reasons – a) the Referee's failure to respect his task (art. 1502 3° of the New Code of Civil Procedure) - he views himself competent to render an award on claims made outside the competence of a Referee; these claims aimed at preventing them from blocking the execution of the contract for the sale of oil on the basis of which a first delivery of hydrocarbon and a written response to it were to be made on 9 January 2002 – and b) his failure to adhere to the principle of the right to be heard in an adversarial procedure (*principe du contradictoire*) (art. 1502-4° of the New Code of Civil Procedure) - the Referee prevented them from discussing the evidence submitted by TEP Congo the day before the hearing to support its new claim, concerning, this time, the whole protocol and its object – the transfer and rescheduling of debts. They argue that the object of such a claim is larger than that of a simple contract for the sale of oil, whose assignment is nothing but a method of execution. They contend that they were also not able to respond to this claim. The Republic of Congo and SNCP petition the Court to order TEP Congo to pay each of them, in addition to costs, a sum of 10 000 Euros, based on article 700 of the New Code of Civil Procedure.

TEP Congo begins by pleading that the appeal is inadmissible. It argues that the pre-arbitral Referee procedure does not amount to rules of arbitration. Thus, orders rendered in this framework are not arbitral awards as they lack a final character. TEP Congo then pleads rejecting the appeal, explaining that the appellants actually criticize the merits of the Referee's decision by reproaching him for having admitted the necessity of modifying the wording of the claim to take into account the evolution of the factual situation of the file since the foreseen delivery of 9 January was finally made. They argue, moreover, that, being a matter of urgency, there is nothing shocking in admitting to the proceedings, two days before the hearing, four letters exchanged between the parties since the filing of the request for a pre-arbitral Referee. TEP Congo finally pleads that the Republic of Congo and SNPC be sentenced *in solidum*, in addition to costs, to pay it a sum of 20 000 Euros, based on article 700 of the New Code of Civil Procedure.

HENCE, THE COURT:

Considering that, the Republic of Congo and SNPC affirm, in order to have their appeal declared admissible, that the order of the pre-arbitral Referee is, despite its title, an arbitral award because it settles the dispute submitted to the Referee, vested with a jurisdictional power to this effect;

Considering that, the admissibility of the appeal for annulment of the Referee's decision does not put into question the description of the decision rendered as an award likely to be appealed against on account of article 1504 of the New Code of Civil Procedure, or as an order, unlikely to be appealed against - which already implies admitting the similarity between a Referee and an arbitrator - but puts into question the Referee's task because, as TEP Congo has remarked, the pre-arbitral Referee procedure does not amount to rules of arbitration;

Considering that, according to the preamble of the ICC Rules for Pre-Arbitral Referee Procedure adopted by the parties, the Rules 'provide 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';

That it is evident that the term arbitration has been carefully avoided by erasing any reference to expressions invoking such a term;

Considering that the relief granted by the order of 6 February 2002, prohibiting the Republic of Congo and SNPC from blocking the execution of the sale of oil contract entered into with TEP Congo as long as the merits are not ruled upon by the competent arbitral tribunal, does not prejudge the merits, nor change the position of the parties or the arbitral tribunal (the latter's intervention being foreseen by the arbitration clause of the general protocol of the agreement) nor pronounce on the merits;

Considering that the Republic of Congo, SNCP and TEP Congo entrusted Mr. Tercier with the task of rendering a decision, which the parties contractually, and in advance, agreed to execute according to Article 6.6 of the ICC Rules for Pre-Arbitral Referee Procedure which provides that, 'the parties agree to carry out the Referee's order without delay';

Considering that the order of 6 February 2002, rendered according to a contractual mechanism founded on the cooperation of the parties, has, despite its designation, a contractual nature in the sense that it derives its authority from the agreement, and that, consequently, an appeal for annulment filed against an award is inadmissible;

Considering that it does not seem inequitable to let TEP Congo bear the expenses it sets out and which are not included in the costs, given that the Republic of Congo and SNCP cannot claim to reimburse such expenses as they bear the costs;

ON THESE GROUNDS:

Declares inadmissible the appeal for annulment of the order of the pre-arbitral Referee rendered on 6 February 2002,

Dismisses all claims of the parties,

Orders the Republic of Congo and the Société Nationale des Pétroles du Congo to pay the costs *in solidum* and grants to SCP Duboscq and Pellerin, Solicitors, the benefit of the right to avail of Article 699 of the New Code of Civil Procedure.