

## **Pre-Arbitral referee**

During the course of many contracts, especially those made for long-term transactions, problems can arise which require an urgent response. It is frequently not possible to obtain in the time required a final decision from an arbitral tribunal or from a court.

Accordingly, the International Chamber of Commerce (ICC) has set out the following Rules for a Pre-Arbitral Referee Procedure in order to enable parties that have so agreed to have rapid recourse to a person (called a "Referee") empowered to make an order designed to meet the urgent problem in issue, including the power to order the preservation or recording of evidence. 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.

Use of the Pre-Arbitral Referee Procedure does not usurp the jurisdiction of any entity (whether arbitral tribunal or national court) that is ultimately responsible for deciding the merits of any underlying dispute.

In force since 1990, the ICC Rules established for this procedure allow parties to apply to a "referee" for urgent provisional measures in relation to a dispute. The parties themselves may select the referee, who, failing that is appointed by the Chairman of the International Court of Arbitration. Measures the referee orders are binding until decided otherwise by a court or Arbitral Tribunal. Application of the ICC Pre-Arbitral Referee Procedure requires written agreement between the parties, concluded either as part of the relevant contract or later.

## **Model clause**

The standard clause recommended by ICC states:

*"Any party to this contract shall have the right to have recourse to and shall be bound by the Pre-Arbitral Referee Procedure of the International Chamber of Commerce in accordance with its Rules for a Pre-Arbitral Referee Procedure."*

## Rules

### **RULES FOR A PRE-ARBITRAL REFEREE PROCEDURE**

(in force as from 1 January 1990)

#### Article 1

##### Definitions

###### 1.1.

These Rules concern a procedure called the "Pre-Arbitral Referee Procedure" which provides for the immediate appointment of a person (the "Referee") who has the power to make certain Orders prior to the arbitral tribunal or national court competent to deal with the case (the "Competent Authority") being seized of it.

###### 1.2.

The Secretariat of the ICC International Court of Arbitration (the "Secretariat") shall act as the Secretariat of the Pre-Arbitral Referee Procedure.

###### 1.3.

- (a) In these Rules any reference to a party includes a party's employees or agents.
- (b) Any reference to the "Chairman" means the Chairman of the ICC International Court of Arbitration and includes, in his absence, a Vice-Chairman.

#### Article 2

##### Powers of the Referee

###### 2.1.

The powers of the Referee are:

- (a) to order any conservatory measures or any measures of restoration that are urgently necessary to prevent either immediate damage or irreparable loss and so to safeguard any of the rights or property of one of the parties;
- (b) to order a party to make to any other party or to another person any payment which ought to be made;
- (c) to order a party to take any step which ought to be taken according to the contract between the parties, including the signing or delivery of any document or the procuring by a party of the signature or delivery of a document;
- (d) to order any measures necessary to preserve or establish evidence.

###### 2.1.1.

These powers may be altered by express written agreement between the parties.

###### 2.2.

The Referee shall not have power to make any Order other than that requested by any party in accordance with Article 3.

###### 2.3.

Unless the parties otherwise agree in writing, a Referee appointed in accordance with these Rules shall not act as arbitrator in any subsequent proceedings between those parties or in any other proceedings in which there is any issue or question, that is the same as or connected with any raised in the proceedings before the Referee.

###### 2.4.

If the competent Authority becomes seized of the case after the appointment of the Referee, the

Referee shall nevertheless retain the power to make an Order within the time provided by Article 6.2, unless the parties otherwise agree or the Competent Authority orders otherwise.

2.4.1.

Except as provided in Article 2.4 above, once the Competent Authority becomes seized of the case it alone may order, under the rules applicable to it, any further provisional or conservatory measures that it considers necessary. For such purpose the Competent Authority, if its rules so permit, shall be deemed to have been authorized by the parties to exercise the powers conferred on the Referee by

Article 2.1.

Article 3

Request for Referee and Answer

3.1.

An agreement to use the Pre-Arbitral Referee Procedure must be in writing.

3.2.

A party requiring the appointment of a Referee must send two copies of its Request and of any annexed documents to the Secretariat. Such party must at the same time notify the other party or parties of the Request by the quickest method of delivery available, including telefax.

3.2.1.

Each such Request must be accompanied by the amount required to open the file, as set out in Article B.1 of the Appendix to these Rules.

3.2.2.

The Request must be drawn up in whatever language may have been agreed upon in writing by the parties or, in the absence of any such agreement, in the same language as the agreement to use the Pre-Arbitral Referee Procedure. If this language is not English, French or German, a translation of the Request into one of these languages must accompany the Request. The annexed documents may be submitted in their original language without translation except where it is necessary in order to understand the Request. The Request shall be in writing and shall contain in particular:

- (a) the names and addresses of the parties to the agreement together with a brief description of the legal relationships between the parties;
- (b) a copy of the agreement on which the Request is based;
- (c) the Order or Orders requested and an explanation of the grounds relied on so as to show that the Request falls within Article 2.1;
- (d) as the case may be, the name of the Referee chosen by agreement of the parties;
- (e) any information concerning the choice of the Referee required to be appointed, including, as appropriate, technical or professional qualifications, nationality and language requirements;
- (f) confirmation that the request has been sent to every other party, stating the means by which this has been done and enclosing proof of transmission, such as postal registration form, receipt from a private courier, or telefax receipt.

3.3.

The requesting party shall, if required by the Secretariat, establish when a copy of the Request was received by each party to whom it was sent or when it should be treated as having been received by said party.

3.4.

The other party or parties must submit to the Secretariat in writing an Answer to the Request within eight days from receipt of the copy of the Request sent in accordance with Article 3.2 above, and

must send at the same time a copy to the requesting party and to any other party, using the quickest method of delivery available, including telefax. The Answer must state any Order requested by that party or parties.

#### Article 4

##### Appointment of the Referee and Transmission of the File

###### 4.1.

The Referee may be chosen by the parties by agreement before or after a Request is made pursuant to Article 3, in which case the name and address of the Referee shall be sent immediately to the Secretariat. Upon receipt of the Answer or, at the latest, upon the expiry of the time limit set out in Article 3.4, and having verified the prima facie existence of the agreement of the parties, the Chairman shall promptly appoint the Referee agreed upon.

###### 4.2.

If a Referee is to be appointed under Article 3.2.2 (e), the Chairman shall, upon the expiry of the time limit set out in Article 3.4, appoint the Referee in the shortest time possible, taking account of his technical or professional qualifications, nationality, residence, other relationships with the countries in which the parties are established or with which they are otherwise connected, and any submissions of any party concerning the choice of a Referee.

###### 4.3.

Once the Referee has been appointed, the Secretariat shall so notify the parties and shall transmit the file to him. Thereafter, all documentation from the parties must be sent directly to the Referee with a copy to the Secretariat. All documentation from the Referee to the parties must be copied to the Secretariat.

###### 4.4.

Any party may challenge a Referee appointed under Article 4.2. In such case the Chairman, after giving the other party and the Referee an opportunity to comment, shall take within the shortest time possible a final decision as to the validity of the challenge. His decision shall be within his sole discretion and shall not itself be subject to challenge or appeal by any party.

###### 4.5.

Another person shall be appointed (a) where a Referee dies or is prevented or unable to carry out his functions, or (b) it is decided under Article 4.4. that a challenge is valid or (c) if the Chairman decides, after giving the Referee an opportunity to comment, that he is not fulfilling his functions in accordance with the Rules or within any applicable time limit. Such an appointment shall be made in accordance with Article 4.2 (but subject to Article 4.4). In such case the new Referee shall proceed afresh.

###### 4.6.

The reasons for any decision about an appointment, challenge or replacement of any Referee shall not be disclosed.

#### Article 5

##### The Proceedings

###### 5.1.

If any party has not presented an Answer by the time the file is transmitted to the Referee, the requesting party may be required by the Referee to establish to his satisfaction that a copy of the Request was received or should be treated as having been received by that party before he proceeds further. If the Referee is not so satisfied he shall notify the relevant party of its right to submit an

Answer and shall set a time limit within which the Answer shall be submitted. Any such action by the Referee shall not affect the validity of his appointment.

5.2.

Any decision as to the Referee's jurisdiction shall be taken by the Referee.

5.3.

Within the limits of the powers conferred on him by Article 2.1. and subject to any agreement of the parties, the Referee shall conduct the proceedings in the manner which he considers appropriate for the purpose for which he was appointed including:

\* considering the written documents submitted by the parties,

\* informing the parties of any further investigation or inquiry that he may consider necessary,

\* making such further investigation or inquiry, which may include his visiting any place where the contract is being carried out, or the premises of the parties, or any other relevant place; obtaining the report of an expert; and hearing any person he chooses in connection with the dispute, either in the presence of the parties or, if they have been duly convened, in their absence. The results of these investigations and inquiries shall be communicated to the parties for comment.

5.4.

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

5.5.

The Referee may convene the parties to appear before him within the shortest time limit possible on a date and at a place fixed by him.

5.6.

If one of the parties fails to make a submission or to comment or appear as required by the Referee, and the Referee is satisfied that the party concerned has received or should have received the relevant communication, he may nonetheless continue with the proceedings and may make his Order.

## Article 6

### The Order

6.1.

The decisions taken by the Referee shall be sent by him to the Secretariat in the form of an Order giving reasons.

6.2.

The Referee shall make and send the Order within 30 days from the date on which the file was transmitted to him. This time limit may be extended by the Chairman upon a reasoned request from the Referee or on his own initiative if he thinks it is necessary to do so.

6.3.

The Referee's Order does not pre-judge the substance of the case, nor shall it bind any Competent Authority, which may hear any question, issue or dispute in respect of which the Order has been made. The Order of the Referee shall however remain in force unless and until the Referee or the Competent Authority has decided otherwise.

6.4.

The Referee may make the carrying out of his Order subject to such conditions as he thinks fit including (a) that a party shall commence proceedings before the Competent Authority on the substance of the case within a specified period, (b) that a party for whose benefit an Order is made shall provide adequate security.

6.5.

The Secretariat shall notify the parties of the Order of the Referee provided it has received the full amount of the advance on costs fixed by the Secretariat. Only Orders so notified are binding upon the parties.

6.6.

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.

6.7.

Unless otherwise agreed between the parties and subject to any mandatory order, any submissions, communications or documents (other than the Order) established or made solely for the purposes of the Pre-Arbitral Referee Procedure shall be confidential and shall not be given to the Competent Authority.

6.8.

The Referee shall not be obliged to explain or give further additional reasons for any Order after it has been notified by the Secretariat under Article 6.5. Neither the ICC nor any of its employees or persons acting as Chairman or Vice-Chairman, nor any person acting as Referee shall be liable to any person for any loss or damage arising out of any act or omission in connection with the Rules, except that the Referee may be liable for the consequences of conscious and deliberate wrongdoing.

6.8.1.

The Competent Authority may determine whether any party that 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 or failure.

6.8.2.

The Competent Authority may determine whether a party that requested the Referee to issue an Order, the carrying out of which caused damage to another party, is liable to such other party.

## Article 7

### Costs

7.1.

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 that made an advance or other payment in respect of costs for which it was not liable, under the Referee's Order shall be entitled to recover the amount paid from the party that ought to have made the payment.

7.2.

The costs of and payment for any procedure under these Rules are as set out in the Appendix hereto.

## APPENDIX COSTS AND PAYMENT FOR A PRE-ARBITRAL REFEREE PROCEDURE

#### A. Costs

1.

An administrative charge of US\$ 2,500 is payable by the requesting party in respect of each Request made to the ICC to appoint a Referee or to administer a Pre-Arbitral Referee Procedure.

The charge covers all services rendered by the ICC that may be required by the Rules, but not any services required by alterations to or extensions of the Pre-Arbitral Referee Procedure. The administrative charge is not refundable and becomes the property of the ICC.

2.

The amount of the fees and expenses of the Referee shall be fixed by the Secretary General of the ICC International Court of Arbitration. The amount shall be reasonable, taking into consideration the time spent, the complexity of the matter and any other relevant circumstances.

3.

The costs of the procedure shall also include any fees and expenses of any expert.

#### B. Payment

1.

The amount required to open the file (Article 3.2.1 of the Rules) is US\$ 5,000, of which US\$ 2,500 constitutes the administrative charge as set out above and US\$ 2,500 constitutes an advance on the fees and expenses of the Referee and any expert. No request for the appointment of a Referee or for the administration of an ICC Pre-Arbitral Referee Procedure will be entertained unless accompanied by this amount.

2.

As soon as possible after the file has been sent to the Referee and after such consultation as is possible with the Referee and the parties, the Secretariat shall fix an advance on costs to cover the estimated costs of the Pre-Arbitral Referee Procedure (Article 7.1 of the Rules). Such advance on costs is subject to readjustment by the Secretariat.

The requesting party shall pay the whole of this advance on costs, except insofar as the Secretariat may request the other party or parties to contribute to the advance on costs in the light of any request for an Order by the Referee which any other party may have made.

3.

No Order of the Referee shall be notified by the Secretariat or be valid unless the advance on costs has been received (Article 6.5 of the Rules). Where two or more parties have been asked to contribute to the advance on costs and have not paid their contribution, only the Order requested by the party or parties that have fully paid the advance or contribution shall be notified and be valid.