

# A Bid for Strong Arbitrators

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**Discussions of arbitrators' powers have riveted the international arbitration community. Practitioners increasingly face situations where arbitrators seem cautious and reluctant to rule on procedural issues.**

While such a careful approach may be advisable where arbitrators prudently avoid overstepping their powers, it may, at times, also frustrate parties and practitioners alike.

This phenomenon has fostered endeavours to clarify, codify, and expand the powers of arbitrators; for if arbitrators were certain of their powers, they would feel free to exercise them.

On closer inspection, however, many of the decisions carefully dodged by arbitrators seem to be evidently within their powers. So why not exercise them, and decide?

In light of the perceived increase in arbitrator softness, this piece intends to both, encourage ongoing codification efforts as they reassure arbitrators of their powers, and emphasise the importance of arbitrators exercising these powers firmly.

Two coinciding developments have fostered the discussion about arbitrators' powers:

For one, the number of arbitrations, in particular high-stake cases, has increased; and with it, the necessity for strong arbitrators to guide counsel through efficient proceedings, and to reign in attempts to obstruct or delay.

At the same time, an exponential increase in rules, case law, and soft law may present confusing and diverging answers as to which powers an arbitrator shall assert to perform this function efficiently.

Faced with litigious counsel threatening a challenge in every single discussion of procedural issues, no matter how trivial, arbitrators may prefer to err on the side of cautious restraint, permit deviations from set procedures, and extend deadlines.

This has prompted the community to analyse and push for more arbitrators' powers: arbitrators may well exercise their authority to shape the proceedings more firmly, if they have certainty and clarity on which powers this actually entails.

Endeavouring to clarify arbitrators' powers, the International Law Association's Committee on International Commercial Arbitration issued a Report that distinguishes between implied and inherent powers:

Implied powers, according to the ILA Report, stem from the arbitration agreement, applicable rules, or discretionary powers granted to the arbitrators. Inherent powers, on the other hand, derive from the

nature of arbitration, and the arbitrator's function and mandate.

These powers enable arbitrators to safeguard the integrity of the proceedings, and to properly fulfil their mandate as an adjudicatory body.

The General Guidelines for the Parties' Legal Representatives, attached to the latest LCIA Rules, codify arbitrators' powers when faced with counsel misconduct. By increasing express and implied powers, the LCIA endeavours to minimise situations in which arbitrators would base their decisions on the 'grey area' of inherent powers.

These attempts to clarify and codify arbitrators' powers help create more certainty. They provide guidelines that further shape an understanding of a proper international standard.

Clarification and codification, however, may only remedy a cautious arbitrator's reluctance to rule if the same truly stemmed from a lack of certainty as to whether he or she may.

Yet, more often than not, arbitrators likely have the authority to rule on whichever procedural issue may arise. The ILA Report reasons that this is necessary for the arbitrators' adjudicatory function: the parties cannot be expected to have anticipated every possible contingency in their arbitration agreement; instead, they task the arbitrators with managing and deciding their case, including procedural issues.

And indeed, thanks to recent codification efforts, arbitrators' powers have become more evident and less controversial. This begs the question: where arbitrators clearly have the power to make firm decisions, why wouldn't they?

Some argue that arbitrators may try to please the parties: in pursuing a more harmonious approach, they seek to facilitate a compromise on each emerging issue, rather than to strictly enforce set deadlines and procedures.

Other more cynical voices in the community point out that an arbitrator's conduct of current proceedings, may also be affected by the issue of their reputation and reappointment.

And of course, despite all attempts to clarify the scope of their powers, arbitrators may still fear to overstep their mandate on minor issues, risking a challenge or even annulment on the subject matter of the entire dispute.

Whatever the reasons, there may be important considerations that speak for strong arbitrators who firmly manage their proceedings, within the parameters of their mandate:

An arbitrator's mandate is to render a just award within a reasonable time, by way of fair and efficient proceedings.

This is best achieved if arbitrators are fair and firm with both parties and counsel; ensuring adherence to agreed deadlines, rules of conduct, and procedures.

Otherwise, particularly litigious counsel may be tempted to take advantage of arbitrators who were softer; generously granted exceptions; always sought to achieve a compromise in lieu of simply deciding, and so allowed counsel to disregard set deadlines and procedures with impunity.

This, however, might increase the potential for inefficiencies and sly practices, resulting in increased party costs. Particularly soft arbitrators may thus inadvertently trade in their desire for harmony and compromise for the predictability and fairness of the proceedings, and so, possibly, even for a just

outcome of the dispute.

Such unintended promotion of gamesmanship may, in the long run, even affect the integrity and reputation of arbitration itself. Counsel abuse of a soft and lenient approach may result in increased costs, inefficiencies, unfair proceedings, and, at the worst, an unjust outcome. This, in turn, might jeopardise the integrity of arbitration as a legitimate means to create a just solution to a dispute, worthy of global recognition and enforcement under the NY Convention.

And so, one of the key clarifications in the discussion on arbitrators' powers may not be defining these powers' outer scope; but emphasising the importance of firmly exercising at least those powers which arbitrators have long been accepted to have.

Arbitrators are thus, invited to safeguard the integrity of the proceedings, and to fulfil their mandate by exercising their powers fairly, efficiently, and firmly.