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The Growth of Arbitrator Power to Control Counsel Conduct

Margaret Moses (Loyola University Chicago School of Law) · Wednesday, November 12th, 2014 · Institute for Transnational Arbitration (ITA), Academic Council

There have been increasing calls over the past few years for an international code of conduct for counsel in international commercial arbitration, and for arbitrators to have more power to control counsel conduct. The growing concern is related to significant changes that have taken place in international arbitration practice. Arbitration is no longer controlled by an elite group of arbitrators whose judgment, neutrality and expertise were rarely questioned and who resolved disputes with a minimum of acrimony between the parties. Today, international commercial arbitration differs in significant ways from the days of the "Grand Old Men." In the modern global arena, arbitrators are themselves more diverse, and must deal with a far more complex, contentious and diverse practice.

These changes mean that arbitrators confront many situations in which there is no clear rule to follow. The issues that come before arbitrators today are no longer simply contract disputes and related issues, but also complex statutory issues that may involve the public interest, such as issues of anti-trust law. Arbitrators may be faced with questions of fraud and corruption, which could involve collusion of the parties. The parties themselves come from increasingly diverse backgrounds, with different legal standards and ethical traditions. Arbitration clauses, rules and laws do not typically spell out for arbitrators the scope of their power to act in many of these situations.

Moreover, as commercial arbitration has grown to involve very high stakes disputes, there are increasing complaints about guerilla tactics, where counsel deliberately impede or obstruct the arbitral process. A tribunal's failure to be able to control counsel prevents effective and efficient resolution of the dispute. Given their obligation to try to issue an enforceable an arbitral award and their duty to ensure a fair procedure, arbitrators need to be armed with sufficient power to rein in improper conduct, to level the playing field, and to prevent the undermining of the entire process.

Nonetheless, there is a risk that if arbitrators assume an authority to which they are not clearly entitled, their award may be vacated on the ground that they have exceeded the scope of their power. This dilemma has refocused attention on what is meant by the "inherent" power of arbitrators. To what extent can an arbitrator be deemed to have the proper power to act in situations where no express power is available?

The International Law Association's Committee on International Commercial Arbitration has issued a helpful Report on the concepts of inherent and implied powers of arbitrators ("ILA Report"). The ILA Report does not put forth specific definitions in light of the highly contextual nature of the proper application of such powers. However, it suggests a generally workable

framework for understanding the terms. Basically, it views implied powers as those that can be implied from the text of the arbitration agreement or rules, or which are included within specific discretionary powers expressly provided to the tribunal. Such powers tend to be those that an arbitrator needs to move the arbitration forward. Inherent powers, on the other hand, tend to be called upon when novel or controversial situations arise, for which no express or implied rule appears to apply. These powers are deemed to derive from the nature and function of the tribunal. In recent times, arbitrators have assumed many of the same obligations and duties of a court, and like a court, have an obligation to ensure a fair process for the parties. In functioning as an adjudicatory body, the tribunal must have the power to safeguard the integrity of the arbitral process.

Although inherent powers may at times be necessary, they are not unlimited. Arbitrators cannot, for example, assert an inherent power if there are specific provisions in the law or applicable rules that prohibit that power. In addition, arbitrators must be able to establish that the inherent power is necessary for the tribunal to fulfill its proper adjudicatory function. Finally, in light of their obligation to try to render an enforceable award, arbitrators must not exercise an inherent power in a manner that could lead to non-enforcement. Because the parameters of inherent powers are still somewhat indistinct, arbitrators must struggle to determine when such powers can be properly applied.

There is help in sight, however. Effective October 1, 2014, the new London Court of International Arbitration Rules (LCIA Rules), by giving arbitrators more extensive express and implied powers to deal with the conduct of counsel, contribute to shrinking the conceptual space where the dilemma of inherent power resides. An Annex to the LCIA Rules, entitled *General Guidelines for the Parties' Legal Representatives*, deals directly with arbitrator power to control attorney conduct. The Guidelines address the issue of guerilla tactics by prohibiting obstructionist activities and unfounded challenges to the arbitrator's appointment or jurisdiction. The Guidelines also prohibit the legal representatives from presentation of false evidence, from the knowing concealment of documents required to be produced, and from ex parte contact with any member of the tribunal or the LCIA Court (excluding the Registrar). Importantly, the Guidelines give the tribunal specific power under Article 18.6 of the Arbitration Rules to impose sanctions for any violation by a legal representative.

The sanctions that an arbitrator can impose under Article 18.6 include any measure necessary to fulfill the arbitrator's general duties under Article 14.4(i) and (ii). These provisions describe the general duties of the tribunal, which include a duty to act fairly and impartially as between all parties, to adopt suitable procedures, to avoid unnecessary delay and expense, and to provide a fair, efficient and expeditious means to resolve the parties' dispute. In essence, these Rules provide arbitrators with the powers necessary to discharge their adjudicatory function. Even if these powers are considered to be implied, because not every potential sanction is enumerated, nonetheless the ability to control counsel is based on broad powers under the LCIA Rules, and not on inherent powers.

Two other sections of the LCIA Rules require that a party must receive the tribunal's approval to appoint new counsel once the tribunal has been constituted (Article 18.3), and that the tribunal can withhold approval where such change could compromise the tribunal or the award (Article 18.4). This makes express a power that had been considered inherent in two widely cited investment arbitration cases — *Hvratska Elektopriveda v. Slovenia*, where a counsel who was added at the last minute was disqualified by the tribunal, and *Rompetrol v. Romania*, where a challenged counsel

was not disqualified. The use of inherent power to disqualify counsel in this kind of situation, much discussed by the tribunals in these two cases, becomes a non-issue in commercial arbitrations under the LCIA Rules.

The LCIA Rules bind those parties who choose them. Similar Guidelines on Party Representation, adopted earlier by the International Bar Association (May 2013), will apply if parties agree, or if the tribunal decides the Guidelines are appropriate, after having determined it has the power to apply them. Thus, if the parties do not choose to apply the Guidelines, any tribunal who wants to apply them must first consider whether it has the power to do so. This may slow down their specific use or application by arbitrators, who may be cautious about their authority to apply Guidelines not agreed to by the parties. Nonetheless, like the successful IBA Guidelines on Taking of Evidence and on Conflicts of Interest, these Guidelines may influence thinking about what constitutes a proper international standard.

Like the LCIA Rules, the IBA Guidelines prohibit false representations of fact or evidence, knowing concealment of documents, and ex-parte communications with the tribunal. They also permit the tribunal to exclude a party representative appointed after the constitution of the tribunal if such an appointment would create a conflict. Finally, arbitrators have broad power to impose sanctions for misconduct of a party representative.

To the extent that the kinds of powers exercised by arbitrators under these Rules and Guidelines are seen as express or implied rather than inherent, they are less likely to be viewed as novel or controversial. They may influence arbitrators who are not subject to the same rules to nonetheless call upon similar powers, which, even though inherent, increasingly appear to be both non-controversial and necessary to carry out their adjudicatory function.

There has been some negative response to the IBA Guidelines, particularly to Guideline 12, which requires a party representative, in a situation where document production is likely to be required, to inform the client that it needs to preserve documents. This has been described as simply providing "an opportunity to waste time and money on procedural skirmishes" (See Michael Schneider, *President's Message* in 31 ASA Bulletin 3/2013 (September)). The Swiss Arbitration Association (ASA) has criticized the approach of both the IBA and the LCIA because it believes a better solution to developing international ethical standards would be to create a "truly transnational" independent body with power to enforce ethical standards in arbitration (Out-Law.com, 10/21/2014). However, the development of such a body, assuming an agreement to do so could be widely accepted and implemented in the international community, would probably take a number of years. In the meantime, the use of the IBA Guidelines and the LCIA Rules may well help develop a global standard for the conduct of Party Representatives.

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