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Inherent Powers in International Commercial Arbitration: What Happens When They Become Explicit Powers?

Tadas Varapnickas (Ellex Valiunas) · Friday, March 22nd, 2024

Arbitral tribunals all over the world face different procedural issues such as deciding on the seat or naming the exact location of the hearing absent the parties' agreement, considering the application of interim measures and, most importantly, ruling on the jurisdiction. In most of the cases these decisions are made with a precise knowledge on where the tribunal's power to rule on these issues comes from – normally this power comes directly from the applicable *lex arbitri*, arbitration rules or the arbitration agreement. Put differently, the arbitrators have clear statutory or contractual basis to decide on the procedural issues in question.

However, there may be certain situations where the arbitrators are left with no clear guidance in either of the above-mentioned sources, for example when the arbitrators have to decide if to change the place of the hearing or to organize an online hearing in the event of parties' disagreement. This is where inherent powers come into play. Although inherent powers are not something faced everyday in international commercial arbitration, their definition and use create obvious uncertainties and challenges to both the arbitrators and the parties making it necessary to pay more attention to this very specific tool in international arbitration.

Probably, one of the most notable recent examples of this uncertainty concerned the already legendary ICC case between Crescent Petroleum and National Iran Oil Company (NIOC). In this case the tribunal scheduled a hearing over the national holiday in Iran without consulting the parties. While the tribunal obviously has to schedule a hearing even if the parties disagree on the dates, is the tribunal's power in this regard unlimited? If not, where are the limits? In the said case it was eventually concluded that the tribunal overstepped those limits and it all ended with the chairman's disqualification from the case.

But would it all have ended differently if the applicable laws or the arbitration agreement provided for the tribunal's power to schedule the hearing even if the hearing dates coincide with the national holidays in one of the parties' domicile? Apparently, this leads to another question – what inherent powers the tribunals have and how should they be categorized, particularly, when the rules in different jurisdictions differ and it is not a given that an explicit power in one jurisdiction would necessarily be explicit in another.

This blog post, therefore, tries to shed some light on this very specific issue. Firstly, it tries to define the inherent powers and to explain the main issues of their application. Secondly, the blog post focuses on those inherent powers that were made explicit and asks if the nature of those

powers also changed and what consequences does that create for the arbitrators and the parties.

Challenges in Defining Inherent Powers

Describing inherent powers is not an easy task. As defined by the International Law Association in its well-known work on inherent powers, "within the arbitration community there appears to be a general, albeit diffuse, understanding that arbitrators in international commercial cases – in addition to their expressly enumerated and defined powers – enjoy some measure of inherent or implied powers." To conceptualize, inherent powers are powers that are not listed in any of the applicable legal instruments but nevertheless exist for the arbitrators to be able to ensure and safeguard the integrity of the arbitral process. In other words, in cases where arbitrators lack clear legal basis to decide on a particular issue, they may turn to their inherent powers as the sufficient source for adopting a certain decision. For instance, if the parties disagree on the hearing date, the tribunal itself should have a right to set the dates even if there is no clear applicable rule for that.

The concept of inherent powers is not something exclusive to the international commercial arbitration. On the contrary, this concept derived from the English common law tradition centuries ago and is used by both domestic courts and international tribunals.

However, although inherent powers are often quoted by both international courts and arbitral tribunals this notion remains somewhat unclear and is not well-defined. This should not be particularly surprising when the matter concerns international commercial arbitration. As noted by the International Law Commission, "insofar as every commercial arbitration is a unique product of series of choices, each of which separately shapes the rules and laws that govern the conduct of proceedings, it is impossible to produce a universal catalogue of inherent and implied powers, with clear instructions on when they may be properly employed."

From a purely linguistic perspective, the term 'inherent' means something 'existing as a natural or basic part of something.' In turn, if put in a legal framework, the concept of inherent powers would naturally mean that those should be the powers that necessarily exist due to the very nature of the legal proceeding. In other words, if the procedure is legal (adjudicatory), the decision-maker such as an arbitrator should necessarily enjoy inherent powers. Otherwise, the proceeding cannot be called adjudicatory.

The real issue, however, is not the description of the notion of inherent powers but rather – what powers should be considered inherent, *i.e.*, is it possible to provide a comprehensive list of inherent powers and what are the limits of those powers.

From the first glance, this question may seem as merely theoretical. However, the practice shows that it is extremely difficult to determine both the existence of a certain inherent power and its limits. The above-mentioned case of *Crescent Petroleum v NIOC* is a good example – the tribunal has a power to schedule the hearing but what circumstances should the tribunal take into account in the event of parties' disagreement?

Even more, failure to determine the limits of arbitrators' powers that are not explicit may lead to even more unexpected outcome. For instance, in the well-known *Sulu heirs v. Malaysia* case the sole arbitrator decided to move the arbitration seat from Spain to France after the Spanish courts annulled his appointment. It all ended with that arbitrator being convicted by the Spanish courts

and his award being annulled by the *Paris Cour d'appel*.

Therefore, while the doctrine of inherent powers is known for centuries, it nevertheless raises the questions of the concept and the limits of these powers, particularly in international arbitration which primarily relies on the agreement to arbitrate between the parties.

Inherent Powers that Were Made Explicit: Did Their Nature Change?

If inherent powers are normally those that are necessary for the arbitral tribunal to safeguard the integrity of the arbitral process when there is no available instrument in the applicable laws or contracts, what happens when the inherent power becomes explicit? In other words, when the lawmaker or the parties themselves explicitly include a historically inherent power in the applicable regulations, does it lose its inherent nature?

One of the best examples in this regard is the tribunal's right to rule on their competence, *i.e.*, the *competence-competence* principle. By its nature the doctrine of *competence-competence* is an inherent power which is essential for international tribunals (arbitral or not) to ensure the integrity of the proceedings. Yet, this inherent power is nowadays made explicit in all or at least most jurisdictions around the world as well as in Article 16 of the UNCITRAL Model Law. The same with other historically inherent powers, for instance, the right to apply interim measures – while inherent in its nature, this power is now made explicit in most jurisdictions.

What happens when the inherent power is made explicit? Does it lose its inherent characteristics? Making it more difficult – what would happen if *competence-competence* was suddenly deleted from the applicable arbitration laws: would the tribunal lose the right to rule on its jurisdiction or could it nevertheless turn again to the doctrine of inherent powers and rule on its jurisdiction on this basis?

Opinions in this respect apparently are not unanimous – for some, inherent powers are necessarily only those that are not expressly provided. For others – the issue of inherent/explicit nature is only an issue of a formal expression.

The latter view, in the authors' opinion, is more convincing and making sense in the hierarchy of explicit and inherent powers. Indeed, one can expect that the tribunal will have to rely on its inherent powers where there is no statutory or contractual basis for its decision. In those cases, the arbitrators will be relying completely on their inherent powers.

However, the fact that some historically inherent-treated powers are now established in the laws, does not make them not-inherent – this is a matter of form and not a question of the nature of the particular power. It follows that when the power is established explicitly in the law, arbitration agreement or institutional rules, the arbitrators do not have to look for additional substantiation as to why they have the right to rely on that power. In that situation, they are relying on an explicit source giving them this power, for instance, *competence-competence*.

By the decision of the lawmaker this inherent power is now considered to be explicit too. However, if it were suddenly deleted from the laws, it should not mean that the arbitrators would immediately lose their right to decide on their jurisdiction: they would simply lack a statutory basis and would need once again to rely on their inherent powers (unless the lawmaker had prohibited

the invocation of this right at all) and to explain in their award why the tribunal has this inherent power and is in a position to use it.

Conclusion

In practice, however, the real issue lies with those inherent powers which have no explicit or implicit legal basis because the existence and limits of those powers are not clear, and it is up to the arbitrators to determine that. The example of *Crescent Petroleum v NIOC* is a good example of this complexity – there is no dispute that the tribunal had a right to set the hearing date. Maybe it did not even have to consult the parties. But the limits of the tribunal's decision were clearly overstepped when the tribunal did not take into account the national holiday in Iran and refused to reconsider the hearing date after the respondent's request. To paraphrase Reed, inherent powers impose inherent obligations. Clearly, the risks are much lower when the inherent powers are made explicit even if those new explicit powers do not actually lose their inherent character.

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