

RESOLUTION No.4/2016

INTERNATIONAL COMMERCIAL ARBITRATION

The 77th Conference of the International Law Association, held in Johannesburg, South Africa, 7 - 11 August, 2016:

HAVING CONSIDERED the Report on Inherent and Implied Powers of Arbitral Tribunals by the Committee on International Commercial Arbitration submitted to and discussed at the 76th Conference of the International Law Association held in Washington D.C., United States of America, 7 - 12 April, 2014;

RECOGNISING that powers of arbitral tribunals are an important aspect of the arbitral process in international arbitration but rarely have been analysed as to non-enumerated inherent and implied powers;

ADOPTS the Recommendations annexed to this Resolution;

COMMENDS the Recommendations to parties, arbitral tribunals and domestic courts considering the use of inherent and implied powers by arbitral tribunals;

REQUESTS the Secretary-General of the International Law Association to forward a copy of this Resolution to the Secretary-General of the United Nations Commission on International Trade Law and other appropriate international and regional organisations and circulate it widely amongst the community of international lawyers, in particular expert bodies in the field of international commercial arbitration;

WELCOMES the willingness of members of the present Committee to continue their activities;

RECOMMENDS to the Executive Council to extend the mandate of the International Commercial Arbitration Committee.

ANNEX TO RESOLUTION NO. 4/2016

INTERNATIONAL LAW ASSOCIATION

COMMITTEE ON INTERNATIONAL COMMERCIAL ARBITRATION

INHERENT AND IMPLIED POWERS OF INTERNATIONAL ARBITRAL TRIBUNALS

RECOMMENDATIONS

Considering the following Findings of the Committee's Report:

1. In addition to the powers expressly conferred by the parties' agreement and by the laws and rules governing the arbitration, international arbitral tribunals ("arbitral tribunals") have powers that are inherent and implied.
2. There exists no universal or closed catalogue of such powers, nor any fixed rules governing their invocation. Instead, the powers available and the use to which they may be employed depend substantially on the particular circumstances of the case.
3. Arbitral tribunals have invoked inherent and implied powers in varied situations, involving, *inter alia*, arbitral procedure, interim relief, decision-making, sanctions regarding alleged misconduct and impropriety, and revision of earlier decisions.
4. The arbitral rules and laws that apply to the arbitration constrain the powers that arbitral tribunals may exercise, and meaningful limits on those powers can be expressed by party agreement.
5. Inherent and implied powers have grown in recognition over time, and the historical context in which arbitral tribunals are operating is relevant. Actions that were once considered novel and contentious to take, absent express powers to do so, have now become part of the fabric of international arbitration.
6. The recognition and development of inherent and implied powers have proceeded in tandem with the proliferation of international arbitration, fostering and contributing to its creative development.
7. Inherent and implied powers may be assigned to three potentially overlapping categories:
 - a. Powers implied by the parties' agreement and the rules and laws governing the arbitration,
 - b. Discretionary powers over procedure, which are related conceptually to both implied and inherent powers, and
 - c. Inherent powers necessary to preserve jurisdiction, maintain the integrity of proceedings, and render an enforceable award.
8. Implied and discretionary powers typically stem from and remain subordinate to party agreement.

9. Inherent powers are powers that would be expected to exist absent the clearest agreement, or provision of the *lex arbitri*, to the contrary.
10. Inherent powers will by their nature only arise for use in limited circumstances. They are to be read narrowly and used proportionately and only so far as necessary to meet the exigencies of the particular situation.
11. Categorising powers as implied, discretionary, or inherent helps ascertain the scope of powers that arbitral tribunals enjoy and assists in rendering orders and awards that withstand review.

The Committee recommends as follows:

1. *To Parties:*

- (a) Parties should understand that arbitral tribunals have inherent and implied powers.
- (b) Should parties wish to confirm, expand, or constrict arbitral powers, they should do so by agreement. However, it would be unusual and would at least require the clearest provision if arbitral powers were to be restricted in a manner that undermines an arbitral tribunal's jurisdiction, damages the integrity of its proceedings, or might result in an award liable to setting aside or unenforceability.

2. *To Arbitral Tribunals:*

- (a) In assessing the scope of their powers in any given situation, arbitral tribunals should first look to the arbitration agreement, the rules governing proceedings, and any relevant law.
- (b) If those sources do not adequately resolve the issue presented, arbitral tribunals should consider whether they can act on the basis of their implied, discretionary, or inherent power.
 - (i) *Implied power:* Arbitral tribunals should examine the text of the parties' agreement and the other instruments governing the arbitration to determine if that text implies the power to resolve the particular issue.
 - (ii) *Discretionary power:* Arbitral tribunals should assess whether the issue raised is a procedural question that, in the absence of contrary instruction, they would normally have the discretion to address.
 - (iii) *Inherent power:* Arbitral tribunals should consider whether the issue before them risks undermining their jurisdiction, impugning the integrity of proceedings, or leading to their issuing an unenforceable award.
- (c) In proper deference to party autonomy, arbitral tribunals should undertake the analysis in this section sequentially, first determining whether they have the implied power to act, then whether they may exercise discretion, and finally whether they are to exercise an inherent power.

- (i) Arbitral tribunals may determine that the power to act is supported by more than one type of power. Where there are multiple bases for acting, tribunals should feel more comfortable in exercising power.
 - (ii) Arbitral tribunals should feel safer in acting on the basis of implied or discretionary power than in acting on the basis of inherent power.
 - (iii) When arbitral tribunals act solely pursuant to their inherent power, they must satisfy themselves that there is a compelling duty to act in order to preserve jurisdiction, maintain the integrity of proceedings, or render an enforceable award.
- (d) Before acting on the basis of any of these powers, arbitral tribunals should give the parties a reasonable opportunity to express their views and provide assistance to fashion the most appropriate solution in the circumstances before them. In doing so, the tribunal should also take into account the following:
- (i) The legal background of the parties, and the legal systems under which the parties have chosen to arbitrate. Where the law governing the arbitration speaks clearly as to the permissibility of the exercise of a certain implied or inherent power, that determination must of course govern.
 - (ii) The appropriate scope of arbitral action, given the interests that a proposed measure might serve or put at risk. The remedy fashioned should be proportionate to the power being exercised and narrowly tailored to the situation presented.
- (e) Arbitral tribunals should provide their reasoning for exercising implied, discretionary, or inherent powers, invoking such powers in a deliberate and thoughtful manner that will assist the award or decision in withstanding review at enforcement or set-aside proceedings.

3. *To Courts:*

Courts should appreciate that arbitral tribunals have inherent power as well as power conferred expressly or impliedly, as more fully described in paragraph 2 (b) and (c) above.