INTERNATIONAL LAW ASSOCIATION

WASHINGTON CONFERENCE (2014)

INTERNATIONAL COMMERCIAL ARBITRATION

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REPORT FOR THE BIENNIAL CONFERENCE IN WASHINGTON D.C. APRIL 2014

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I. INTRODUCTION

At the International Law Association's Biennial Conference in The Hague in 2010, the Committee on International Commercial Arbitration was mandated to study the topic of the inherent powers of arbitrators in international commercial arbitration. As the project developed and expanded, the Committee felt it appropriate to consider also the notion of implied powers and its relation to inherent authority, as well as arbitral discretion. Hence, reference will be made to inherent and implied powers throughout this Report. The Committee presented on this topic at the Biennial Conference in Sofia in August 2012, with an aim to present a final report and recommendations at the Biennial Conference in Washington, D.C., in April 2014. This is the final Report prepared under this mandate.

A. General Description of the Topic

Party agreement to arbitrate is the foundation of every international commercial arbitration. However, arbitrators are sometimes confronted with situations that are not addressed by either the parties' arbitration agreement or the applicable curial law and rules. What, if any, powers do the arbitrators have to deal with those situations? What is the source of those powers? What is the limit of them?

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. Parties cannot be expected to have anticipated every possible contingency in their arbitration agreement. After all, arbitration agreements are typically prepared long before a particular dispute crystallized; indeed, they are most often adopted at the time of contracting, when possible future disputes may seem unlikely and remote. Moreover, it would not be sensible, efficient, or commercial to require parties to attempt to provide express directives for every possible contingency that might arise in arbitration; the arbitration clause would become so complex and unwieldy that parties would hardly ever agree to arbitrate at all.

Instead, the parties typically draw the contours of the arbitral procedure and otherwise leave it up to the arbitrators and counsel to fill in much of the detail when a dispute has arisen. The arbitration laws of many countries, as well as various sets of rules commonly used in international commercial arbitration, recognize this and expressly afford arbitrators discretion over procedural questions not otherwise decided by the parties. Arbitrators acting in such jurisdictions or operating under such rules may cite this general grant of the discretionary power as giving them the authority necessary to flesh out procedural lacunae. But few would contend that arbitrators would be hamstrung in the absence of such provisions, unable to make the procedural judgment calls necessary to fulfill their adjudicative mandate. Instead, when faced with a situation for which the arbitration agreement and rules do not provide an answer, arbitrators might act on the basis of some power that is inherent or implied.

To take a very modest example, the parties typically will not empower the arbitrators to conduct a hearing on a day that is a public holiday at the seat of the arbitration, but most people would agree that the arbitrators have the power to do so. In this sense, arbitrators routinely exercise a form of inherent or implied authority. They make concrete decisions based on only a general and imprecise grant of power. They fill in the gaps. That is what parties largely expect arbitrators to do: to exercise the authority implied by their mandate to enable them to manage and decide a dispute within the parameters provided.

Actions taken in the absence of explicit authority, however, carry a greater risk of running afoul of the parties' expectations when they extend beyond procedural questions, to more challenging and controversial matters that may fundamentally affect the outcome of the dispute. Indeed, the doctrine of inherent powers is invoked most often to deal not with routine matters of procedure but with challenging and unforeseen circumstances that implicate the integrity of the arbitral process itself. For example, in recent international investment cases, arbitrators have invoked such powers to exclude counsel chosen by a party from appearing at a hearing and to impose the costs of arbitration on a party found to have acted in bad faith where the parties' agreement provided for the sharing of costs.

Defining the scope of arbitrators' non-enumerated powers—or, at a minimum, developing a framework for understanding when they may be properly employed—is essential because a wrongful exercise of authority can have harmful consequences to the success and finality of arbitral proceedings. Arbitrators presented with novel problems that they resolve via recourse to implied or inherent powers may be challenged for bias by a disadvantaged or losing party. An exercise of authority attacked as improper at the setting aside or enforcement stage of proceedings risks imperiling the fate of a tribunal's award, if it is deemed to constitute a violation of due process or an act beyond the tribunal's jurisdiction.[1] These concerns, however, beg the question, insofar as it remains uncertain how, in the absence of a coherent jurisprudence on inherent powers, a reviewing court should determine whether arbitrators have exercised a power they inherently possess or have overstepped the bounds of their authority.

Despite the evident importance of understanding the proper limits of a tribunal's authority, the definition of and conceptual basis for inherent and implied powers, and the principles that may at once animate and constrain them, has not been carefully developed in the context of international commercial arbitration. Though regrettable, this is not surprising given the difficulty of such an analysis: insofar as every commercial arbitration is a unique product of a 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. The non-public nature of many arbitral awards adds to this challenge. Moreover, when challenged before national courts, commercial awards are more often criticized as falling outside of a tribunal's jurisdiction rather than as evidencing an improper exercise of implied or inherent powers *per se*.

While understandable, the absence of clear guidance on the topic risks leaving parties and arbitrators adrift when confronted with difficult situations for which the parties' agreement or the arbitral rules provide no roadmap. In this Report, the Committee attempts more systematically to explore the notion of inherent and implied powers and to offer some guidance for their exercise in the international commercial arbitration context. In doing so, the Report raises a number of potentially controversial questions about the potential scope of a tribunal's power and the manner in which its implied or inherent powers might be exercised. Such questions are intended not to encourage or discourage invocation of implied or inherent powers but to prompt careful thought and consideration about the types of difficult issues tribunals might face. It is hoped that the Report will provide a conceptually satisfactory yet practical framework for thinking about inherent and implied powers, which will in turn assist parties in structuring their arbitration agreements, arbitrators in addressing problems for which the textual sources before them offer no pre-determined solution, and courts in reviewing arbitral awards.

B. Outline of the Report

Section II begins with an overview of the origin of inherent and implied powers, as they developed principally in the common law legal tradition and then migrated into international arbitration. The Report then discusses the various situations and circumstances where such powers may be relevant to international commercial arbitration, based on analogues drawn primarily from the investment dispute context. In Section III, the Committee proposes definitions and classifications regarding inherent and implied powers of arbitral

[1] For example, the New York Convention contemplates that it is proper to refuse recognition and enforcement of all or part of an award upon proof that "[t]he award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration." Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958), Art. V(1)(c); *see also, e.g.*, UNCITRAL Model Law on International Commercial Arbitration (2006) ("UNCITRAL Model Law"), Art. 36 (circumscribing the grounds for refusing the recognition or enforcement of an award).

tribunals as well as a framework for analyzing these powers in international commercial arbitration. Finally, Section IV sets out the Committee's findings and recommendations on the topic.

The Committee held six meetings to discuss the preparation of this Report and Recommendations.[2] It has widely surveyed the relevant literature and has received reports from several Committee members on the topic.[3] This Report expresses the consensus of the Committee; it does not necessarily and in all respects reflect the personal views of the chair, the rapporteurs, the individual members of the Committee, or the other lawyers who participated in the preparation of this text.

II. THE PRACTICE OF INHERENT AND IMPLIED POWERS

A. The Origin of Inherent and Implied Powers

The notion of inherent and implied powers has its origin in domestic common law courts, where its emergence can be traced back several centuries. The concept of inherent powers as a source of judicial power emerged first in England, where early judges, serving as the king's personal representatives, enjoyed substantial discretion in exercising the royal prerogative to do justice.[4] Over time, as courts gradually developed greater autonomy and "judges' allegiance shifted from the king to the law, certain powers that had originated in the royal prerogative came to be seen as inherent characteristics of a 'court.'"[5]

Initially, the powers asserted as "inherent" were most often tied to the court's need to punish misconduct, protect against the abuse of process, and ensure its jurisdiction. As early as 1885, such authority was already well-established, as observed by Lord Blackburn when he commented that "from early times (I rather think, though I have not looked at it enough to say, from the earliest times) the court had inherently in its power the right to see that its process was not abused by a proceeding without reasonable grounds."[6] Pursuant to their inherent powers, courts have also long punished contempt, arranged the conduct of court business, and fashioned informal rules to regulate their proceedings.[7]

With the spread of the English common law system also spread the notion of inherent and implied powers. In the United States, courts saw their powers constricted in the immediate aftermath of the Revolutionary War,[8] but the federal judiciary established under the new Constitution quickly reasserted its authority as a judicial body to exercise power by implication. In the seminal 1803 case of *Marbury v. Madison*,[9] the United States Supreme Court inferred that it possessed the power to override laws it deemed unconstitutional.[10] Reasoning that it was the "very essence of judicial duty" to assess which rule should govern when two conflict,[11] the Court concluded that it could not, via a grant of statutory authority, exercise jurisdiction beyond the limits set by the Constitution.[12] The Court's determination that it possessed the power of judicial review, implied from the existence of a written Constitution that the judiciary was sworn to uphold, has had profound implications on the U.S. constitutional system. It was not until nearly a decade later, however, that the Court first made explicit reference to the judiciary having implied powers, when it observed, in *dicta*, that "[c]ertain implied powers must necessarily result to our Courts of justice from the nature of their institution."[13] It found such "necessary" powers to include the authority to fine for contempt, imprison for contumacy, and to enforce its orders.[14]

Over time, common law courts began to invoke a wider breadth of authority under the mantel of inherent or implied powers. Today, inherent powers are routinely referenced to support a variety of claimed powers throughout numerous jurisdictions, including Australia, Canada, Singapore, and New Zealand, in addition to the

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2 Committee meetings on this project were held in Geneva in May 2011; Dubai in November 2011; Stockholm in March 2012; and Paris in May 2012, May 2013, and February 2014. The Chairman and Rapporteurs are grateful to all those members who contributed to the Committee's work, attended the meetings, and submitted comments.

3 Country reports were received from Committee members on the laws of Australia, Austria, Brazil, Canada, England, France, Hong Kong, Italy, Portugal, Sweden, and Switzerland.

4 See the seminal article of I.H. Jacob, "The inherent jurisdiction of the Court", [1970] CLP 23 ff. and Robert J. Pushaw, Jr., "The Inherent Powers of Federal Courts and the Structural Constitution," *Iowa Law Review*, Vol. 86, 799–806 (2001).

5 *Id.* at 810.

6 *Metropolitan Bank Ltd. v Pooley*, (1885) 10 App. Cas. 210, 220–21 (Lord Blackburn).

7 Pushaw, *supra* note 4, at 810–13.

8 *Id.* at 821–22 (discussing the "weak and dependent" courts established under the Articles of Confederation).

9 5 U.S. (1 Cranch) 137 (1803).

10 *Id.* at 178.

11 *Id.*

12 *Id.* at 176–79.

13 *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 34 (1812).

14 *Id.*

United States and the United Kingdom.[15] "These courts have variously invoked inherent powers to make rules of court and practice directions, to prevent abuse of the court's process, to remand cases involving pendent claims, to stay proceedings, to correct any injustice caused by an earlier order, . . . to allow the admission of evidence," and in myriad other situations.[16]

In recent decades, the notion of inherent powers has migrated from the common law tradition into the practice of international courts and tribunals, where they are conceived of in a manner that largely mirrors the domestic context. The Iran-U.S. Claims Tribunal, for example, has defined the inherent powers of arbitral tribunals as "those powers that are not explicitly granted to the tribunal but must be seen as a necessary consequence of the parties' fundamental intent to create an institution with a judicial nature."[17] Similarly, inherent powers may be viewed as the "logical corollary of the judicial nature of such organs and of their duty to ensure a sound administration of justice."[18] The source of this authority has been traced to international courts' need to safeguard their jurisdiction, conserve the rights of the parties, and fulfill their functions as adjudicative bodies.[19]

International tribunals today are widely recognized to possess inherent and implied powers. Indeed, their acceptance is so common that, for example, "there have been no challenges to the appropriateness of inherent powers *per se* in ICSID arbitration."[20] Given the sparse nature of these bodies' constitutive instruments relative to the more elaborate laws and procedural rules of domestic courts, inherent and implied powers arguably have greater relevance in the international context,[21] and it is not surprising that they have been used in a broad variety of circumstances.

The limited availability of published jurisprudence from international commercial arbitrations makes it difficult to trace the degree to which inherent or implied powers have been called upon in that specific context. However, the widespread diffusion of national arbitration laws that give arbitrators substantial discretion over proceedings suggests that there exists a general recognition that arbitrators cannot carry out their mandate absent some authority to fill in gaps left unaddressed by party agreement. Indeed, common law and civil law jurisdictions alike have enacted national arbitration laws that afford arbitrators considerable flexibility in overseeing arbitral procedure.[22] These laws echo the approach embraced in the UNCITRAL Model Law, which confers upon parties the right to agree on arbitral procedure but otherwise gives the tribunal discretion to "conduct the arbitration in such manner as it considers appropriate."[23]

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15 Chester Brown, "The Inherent Powers of International Courts and Tribunals," *British Yearbook of International Law*, Vol. 76, No. 1, 195, 205 (2005). A similar doctrine of inherent powers does not exist, as such, in the civil law tradition. In civil law jurisdictions, procedural law derives primarily from constitutional law and statutes. However, "the exercise by courts of jurisdictional powers which are not expressively provided for in legislation or statutory rules is not unknown in civil law countries." *Id*. at 206 & n.71.

16 *Id.* at 205–06.

17 *Islamic Republic of Iran v. United States of America*, IUSCT Cases Nos. A3, A8, A9, A14 and B61, Decision No. DEC 134-A3/A8/A9/A14/B61-FT, ¶ 59 (1 July 2011) (quoting David D. Caron, et al., *The UNCITRAL Arbitration Rules – A Commentary*, 915 (Oxford 2006) (internal quotation marks omitted)).

18 Paola Gaeta, "Inherent Powers of International Courts and Tribunals," in Lal Chand Vohrah, et al. (eds.), *Man's Inhumanity to Man: Essays on International Law in Honour of Antonio Cassese*, 353, 364–65 (Kluwer 2003).

19 *See Islamic Republic of Iran*, *supra* note 17, ¶ 59 (citing Brown, *supra* note 15, at 228; *E-Systems, Inc. v. Iran*, IUSCT Case No. 388, Award No. ITM 13-388-FT (4 Feb. 1983).

20 Martin Paparinskis, "Inherent Powers of ICSID Tribunals: Broad and Rightly So," in Ian Laird and Todd Weiler (eds.), *Investment Treaty Arbitration and International Law*, 9 (Juris Publishing 2012). For the view that inherent powers are also established in the international commercial arbitration context, see Robert Wachter, "Chapter II: The Arbitrator and the Arbitration Procedure: On the Inherent Powers of Arbitral Tribunals in International Commercial Arbitration," in Christian Klausegger, et al. (eds.), *Austrian Yearbook on International Arbitration*, 65–83 (Manz'sche Verlags – und Universitätsbuchhanlung 2012).

21 *See* Abba Kolo, "Witness Intimidation, Tampering and Other Related Abuses of Process in Investment Arbitration: Possible Remedies Available to the Arbitral Tribunal," in *Arbitration International*, Vol. 26, No. 1, 61 (LCIA 2010) ("Indeed, the possession of inherent powers is more pertinent with respect to international courts and tribunals, which operation in a 'decentralised legal system', lacking a law-making body and judicial precedent, as obtained in the domestic legal systems."). *Cf.* Gaeta, *supra* note 18, at 365 (observing that the doctrine of inherent jurisdiction of the Court originated in common law countries in order to supplement the paucity of statutory provisions on procedural matters).

22 Reports from the Committee members practicing in jurisdictions as diverse as Austria, Australia, Brazil, Canada, England, France, Hong Kong, Italy, Portugal, and Sweden have confirmed that, under the laws of those jurisdictions, arbitrators enjoy fairly broad discretion over arbitral proceedings. The enactment, in civil law jurisdictions, of provisions that explicitly endow arbitrators with discretion may be seen as reflecting an accommodation between the civil law notion, from the Rechtsstaat theory of law, that any legitimate exercise of state power must be grounded in a legal provision and the practical need for flexibility in arbitration.

23 UNCITRAL Model Law, *supra* note 1, Art. 19.

As the general authority of arbitrators to oversee proceedings has gained greater recognition, parties have come to view as routine actions by arbitral tribunals that, just decades ago, would likely have sparked debate or controversy. Before interim relief and document production were widely embraced by international arbitration, for example, few would venture to argue that arbitrators possessed a general power to grant provisional measures or order the production of documents. Today such authority is likely to be assumed, even if not explicitly provided for by the underlying arbitration agreement or applicable arbitral rules. To take another salient example, the *competence-competence* doctrine, now considered a central tenet of international commercial arbitration, did not historically enjoy universal recognition. In the early days of international arbitral practice, parties may have disputed the notion that a tribunal could assess its own jurisdiction on the basis of its inherent or implied authority.

Somewhat paradoxically, as certain arbitral powers have become so common in modern arbitration practice that they might now be considered inherent or implied, they have also increasingly found concrete expression in arbitral laws or rules and have, thereby, become explicit powers. As noted above, many national jurisdictions have passed laws that confirm that arbitrators enjoy a general authority to shape proceedings. Similarly, the principle of *competence-competence* has been enshrined in arbitration rules,[24] and the arbitration community has developed opt-in rules for document production.[25] As such practices become more common and accepted through the spread of laws and rules, they are increasingly viewed as naturally falling within the scope of arbitral power.

Arbitrators who creatively employ inherent or implied powers to achieve efficient and successful outcomes may take some comfort from the fact that actions previously perceived as novel have now become integral to the fabric of international commercial arbitration, and have even been given express incorporation into arbitral rules. However, when tribunals justify contentious decisions by mere reference to implied or inherent authority, they risk acting beyond the scope of the parties' agreement, to the potential detriment of the arbitral process. The use of inherent and implied powers in international arbitration thus merits reflection and examination.

B. The Diverse Application of Inherent and Implied Powers

When asked by the parties to act or intervene on a particular issue, an international commercial arbitral tribunal's first point of reference must always be the relevant sources governing the arbitration, namely the arbitration agreement, any arbitration rules, and the applicable curial law. A tribunal is uniquely shaped by the circumstances under which it is constituted, and the inherent or implied powers it may properly exercise will depend upon the distinct configuration of direction and autonomy produced by the parties' choices. While a tribunal overseeing a dispute governed by sophisticated arbitral rules and detailed curial law may find textual support for a particular action it sees fit to take during the course of an arbitration, another tribunal—operating without similar instruction and guidance in the same measure—might need to predicate the very same action on its implied or inherent authority. A third tribunal, by contrast, may find that same action prohibited by the parties' arbitration agreement or the set of rules governing its arbitration. It is thus neither possible nor useful to compile a universal list of inherent or implied powers to which parties or arbitrators may turn for guidance.

In order to gain a thorough understanding of the potential utility and outward limits of inherent and implied powers, the Committee has thus considered in what circumstances an international commercial arbitral tribunal—if not otherwise advised or constrained—might be permitted to act on the basis of its inherent or implied authority, and has sought to categorize these powers based on the function or objective that they serve to achieve.

Recognizing that the decisions of each tribunal are highly contextual and may not be applied mechanically in superficially analogous situations, the Committee has nonetheless found it helpful to examine and reflect upon the reasoning employed in various publicly-available awards rendered on the subject. It has drawn, in particular, from the decisions of international investment tribunals, the International Court of Justice, and ad hoc arbitral bodies.[26] The confidential nature of most international commercial arbitrations makes the "jurisprudence" developed by such cases inaccessible. The public decisions of other international tribunals are the best available proxy for studying the application of inherent and implied powers in international disputes. While there are important differences between commercial arbitration and other international fora, the differences—at least those between commercial arbitrations and investment arbitrations—by and large do not appear to be material to the present inquiry. At a basic level, all of these processes offer a consent-based form

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[24] *See, e.g.*, UNCITRAL Arbitration Rules (1976), Art. 21.

[25] IBA Rules on the Taking of Evidence in International Arbitration (2010), Art. 3.

[26] The Committee has also drawn from decisions of reviewing courts, where available.

of binding dispute resolution achieved via an adjudicatory process. Whether it involves the adjudication of an investor-State dispute under a treaty and governed by international law or an international commercial dispute under a contract and governed by the law of a particular state, arbitration represents a consensual process whereby the parties' elections afford jurisdiction and define its contours.

In extrapolating from examples that have arisen in the investment context to think about what issues may arise in a commercial context, however, there is one caveat to keep in mind. Arbitrators in commercial settings will likely be presented with more concrete and well-developed law than are arbitrators adjudging investment disputes. Commercial arbitrators must, therefore, be carefully attuned to any limits that the substantive law of the dispute, or the law of the place of arbitration or likely enforcement, may place on their exercise of inherent or implied powers, which may vary from those outlined below.

1. *Powers Relating to Procedure*

Tribunals routinely make decisions relating to the conduct of procedure that— where not explicitly contemplated or prohibited by the arbitral rules or curial laws before them—might be permissible exercises of their implied or inherent authority as quasi-judicial actors. These include determining the seat of arbitration, allowing *ex parte* proceedings,[27] bifurcating proceedings,[28] and facilitating or mediating settlement. Depending on the circumstances, arbitrators may have the inherent or implied authority to establish rules for the conduct of hearings and to fix the forms of argument permitted (i.e., written or oral). Such exercises of authority, readily viewed as incidental to the adjudicatory function of tribunals, are often exercised without debate or serious question.

Arbitrators also have a degree of discretion with regard to the admission, exclusion, and consideration of evidence. Arbitral rules often explicitly provide for the exercise of judgment by arbitrators in deciding what evidence they are to credit. However, "[e]ven when inherent powers are not invoked expressly to deal with evidentiary matters, reliance on comparative and functional analysis to flesh out necessary procedural powers supports the view that the intellectual operation that the Tribunals are engaged in relates to inherent powers."[29] For example, in *Methanex Corporation v. United States of America*,[30] the tribunal made reference to the UNCITRAL Rules and the discretion they afford over evidentiary matters in deeming inadmissible documents that Methanex had obtained via trespass onto private property and rummaging through dumpsters.[31] But the tribunal's analysis gave equally significant or greater weight to considerations of good faith, the duty of which it noted was "incumbent on all who participate in international arbitration, without which it cannot operate."[32] Thus, although that tribunal did not need to justify its conduct by reference to inherent or implied authority, its reasoning suggests that another tribunal, operating without the benefit of the UNCITRAL Rules, might be able to reach the same conclusion on that basis.

It has also been argued that tribunals have an inherent power to permit non-party participation in arbitration. In *Aguas Provinciales v. The Argentine Republic*,[33] the tribunal denied the request of a would-be *amicus curiae* to attend arbitral proceedings where the request was predicated on the tribunal's inherent powers over procedure. Agreeing with the petitioner that the tribunal possessed "certain inherent powers with respect to arbitral procedure," it concluded that "it had no authority to exercise such power in opposition to a clear directive in the Arbitration Rules, which both Claimants and Respondent have agreed will govern the procedure in this case."[34] ICSID Arbitration Rule 32(2) conditioned the arbitrator's discretion over the attendance of non-parties on the consent of the parties, which was absent in that case.[35]

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27 In the Australian case of *Benedetti v Sasvary* [1967] 2 N.S.W.R. 792, for example, the court found that the nature of the office of the arbitrator authorizes arbitrators to proceed *ex parte* for good cause and that it was in the arbitrator's discretion to decide whether they had cause for doing so. *Id.* at 799.

28 *See, e.g.*, Massimo Benedettelli, "To Bifurcate or Not to Bifurcate? That is the (Ambiguous) Question," *Arbitration International*, Vol. 29, No. 3, 505 (LCIA 2013) ("Even where not expressly mentioned, the power to split the proceedings in different phases, each finalized to the rendering of a decision on a discrete matter, may be considered 'inherent' to the judicial function performed by the arbitral tribunal."). However, as Benedettelli acknowledges, *id.* at 505 n.40, enforcement of an award has been refused where bifurcated proceedings, not provided for in the applicable arbitration rules and unacceptable to one of the parties, were found not to accord with the parties' agreement. *See* A.J. van deen Berg, "Why Are Some Awards Not Enforceable?," in A.J. van den Berg (ed.), *New Horizons in International Commercial Arbitration and Beyond*, ICCA Congress Series, Vol. 12, 302–03 (Kluwer Law International 2005).

29 Paparinskis, *supra* note 20, at 23.

30 *Methanex Corporation v. United States of America*, Final Award of the Tribunal on Jurisdiction and Merits (3 Aug. 2005).

31 *Id.*, Part II, Chapter I, ¶¶ 53–60.

32 *Id.*, Part II, Chapter I, ¶ 58.

33 *Aguas Provinciales de Santa Fe S.A., Suez Sociedad General de Aguas de Barcelona S.A. and InterAguas Servicios Integrales del Agua S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/17, Order in Response to a Petition for Participation as *Amicus Curiae* (17 Mar. 2006).

34 *Id.* ¶ 7.

35 *Id.* ¶¶ 6–7.

Interestingly, however, the tribunal considered the would-be *amicus*'s petition to submit a "friend of the court" brief over Claimant's objection.[36] In doing so, the tribunal referenced its grant of residual power under Article 44 of the ICSID Convention, which directs a tribunal to decide any question of procedure that arises outside of the agreed-upon rules of the arbitration and has been described as "provid[ing] explicit legal basis for the exercise of inherent powers that have not been already spelled out."[37] Using a multi-factor test drawn from its review of the practices of other jurisdictions and fora, the tribunal determined that the conditions for admission of the brief were not met in the circumstances of the case.[38] While the tribunal did not, therefore, admit the brief over a party's opposition, it did raise the prospect of such an eventuality. One wonders if, under the mantle of such "residual" or inherent power, a tribunal might determine, in a different context, that an amicus brief should be admitted over the objections of both parties. Would such a decision align with the concept of party autonomy? If this is a possibility, what other powers might a tribunal elect to exercise on the basis of its inherent powers of procedure?

2. *Power to Issue Interim Relief*

Tribunals have long maintained their inherent or implied authority to grant interim relief in order to protect their jurisdiction, even though the arbitral rules often expressly provide for such authority. In 1963, Judge Sir Gerald Fitzmaurice observed, in his separate concurring opinion in *Case Concerning the Northern Cameroons*[39] that the Court possesses a "preliminary or 'incidental' jurisdiction" to decree interim measures of protection, admit counterclaims or third party-interventions, and take similar actions that "it can exercise in advance of any determination of its basic jurisdiction as to the ultimate merits."[40] Such authority was noted to inhere in the court's judicial nature:

> Although much (though not all) of this incidental jurisdiction is specifically provided for in the Court's Statute, or in the rules of Court which the Statute empowers the Court to make, it is really an inherent jurisdiction, the power to exercise which is a necessary condition of the Court—or of any court of law—being able to function at all.[41]

In cases following this *dictum*, tribunals have repeatedly cited their inherent powers to justify grants of interim relief, often in the context of addressing a party's out-of-court conduct that has the potential to interfere with arbitral proceedings.

In a case before the Iran-U.S. Claims Tribunal, *E-Systems, Inc. v. Iran*,[42] the claimant filed a motion to compel dismissal or a stay of proceedings that had been initiated in an Iranian court. After determining that Iran was free to initiate the subject claims in a domestic forum even though it could have brought them as arbitration counterclaims, the tribunal requested that Iran seek a stay of the Iranian case pending completion of arbitral proceedings. It based its authority for such action on its "inherent power to issue such orders as may be necessary to conserve the respective rights of the Parties and to ensure that this Tribunal's jurisdiction and authority are made fully effective."[43] Noting that its award would prevail over inconsistent decisions rendered by the domestic courts of Iran or the United States, the tribunal resolved that a stay of proceedings was necessary in order "to ensure the full effectiveness of the Tribunal's decisions."[44] Relying in part on that decision, the tribunal in *RCA Globcom v. Iran*[45] similarly found a stay of domestic proceedings to be an appropriate form of interim relief, notwithstanding respondent Ministry of Defense's contention that it was beyond the scope of discretion afforded the tribunal under the applicable rules.[46]

Tribunals constituted under the ICSID Rules have similarly relied on their inherent powers to grant interim relief, often in contexts touching on a concern for the integrity of some aspect of proceedings. In *Quiborax S.A.*

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36 *See id.* ¶¶ 9–34.
37 Paparinskis, *supra* note 20, at 9.
38 *Aguas Provinciales*, *supra* note 33, ¶ 34.
39 *Case Concerning the Northern Cameroons (Cameroon v. United Kingdom)*, 1963 I.C.J. 15 (2 Dec. 1963).
40 *Id.* at 103.
41 *Id.*
42 *E-Systems, Inc.*, *supra* note 19.
43 *Id.*
44 *Id.*
45 *RCA Globcom Communications, Inc. v. Iran*, IUSCT Case No. 160, Award No. ITM 29-160-1, Interim Award (3 Oct. 1983).
46 *Id.*

v. Bolivia,[47] the tribunal issued an interim measure to stop criminal proceedings threatening the claimant's right to present its case by obstructing access to potential witnesses and documentary evidence. The tribunal had "no doubt that it [possessed] the power to grant provisional measures to preserve the procedural integrity of the ICSID proceedings, in particular the access to and integrity of evidence."[48] In *EDF v. Romania*,[49] the tribunal banned, among other actions, the unauthorized disclosure of documents produced during the proceedings.[50] It based its order on the power conferred by applicable arbitration rules and "the inherent power of the Tribunal to take steps to prevent the exacerbation of the dispute and to maintain the integrity of the arbitral process."[51] Similarly, in *Biwater Gauff v. Tanzania*,[52] the tribunal issued an interim measure forbidding the parties from disclosing to third parties documents concerning the arbitration. It predicated this action on its responsibility to "ensur[e] that the proceedings will be conducted . . . in a regular, fair and orderly manner (including by issuing and enforcing procedural directions to that effect)."[53]

These decisions impose restrictions on parties' actions that may be justified based on their having consented to arbitration, a process that entails certain rules and an obligation to participate in good faith. But at what point does a tribunal's interim order risk unduly infringing on the autonomy of parties to act beyond the boundaries of the arbitration? For example, where the parties' agreement provides for full publication of all arbitral briefs and decisions, could a tribunal override that condition on the basis of its inherent powers, if it determines that the integrity of proceedings might be jeopardized by the risk of potential media frenzy?

3. *Powers Related to Decision-Making*

In relation to the decision of the dispute, the notion of implied or inherent powers may come into play in the context of a tribunal's deciding its jurisdiction, deeming certain issues as irrelevant or moot at interim stages of the arbitration, awarding declaratory or injunctive relief,[54] applying the law, investigating or taking of evidence *ex officio*, or summarily dismissing a case. In *Rio Grande Irrigation and Land Company, Limited (Great Britain) v. United States*,[55] the United States-United Kingdom Mixed Claims Commission considered, over an objection, a motion to dismiss on grounds that, as a matter of law, the claimant had no valid interest on which to predicate its claim. The claimant objected to the motion on the basis that "a preliminary motion of this character was not contemplated by or provided by the rules or any of the instruments controlling the Tribunal."[56] Viewing the issue as one of jurisdiction, the tribunal held that, "[w]hatever the proper construction of the instruments controlling the Tribunal or of the rules of procedure, there is inherent in this and every legal Tribunal a power, and indeed a duty, to entertain, and, in proper cases, to raise for themselves, preliminary points going to their jurisdiction to entertain the claim."[57] It observed that this power "is inseparable from and indispensable to the proper conduct of business" and granted the motion.[58] Similarly, the ICSID tribunal in *Siag v. Egypt*[59] entertained new challenges to jurisdiction after having already issued an award on the matter, under its inherent power "to deal with any issues necessary for the conduct of matters falling within its jurisdiction."[60] It found this power to exist "independently of any statutory reference" and to be a broader expression of the tribunal's "inherent power to take measures to preserve the integrity of the proceedings."[61] In order to ensure continuity and fairness, however, the tribunal did not suspend its proceedings pending its consideration of the objections.[62]

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[47] *Quiborax S.A., Non Metallic Minerals S.A. and Alla Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Provisional Measures (26 Feb. 2010).
[48] *Id.* ¶ 141.
[49] *EDF (Services) Limited v. Romania,* ICSID Case No. ARB/05/13, Procedural Order No. 2 (30 May 2008).
[50] *Id.* ¶ 54.
[51] *Id.*
[52] *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/02/22, Procedural Order No. 3 (29 Sept. 2006).
[53] *Id.* ¶ 145.
[54] Courts in Australia have found that arbitrators enjoy an implied power to order declaratory and injunctive relief under the same circumstances that it might be available in a court. *See Cufone v Cruse* [2000] SASC 304; *Electra Air Conditioning BV v Seeley International Pty Ltd* [2008] FCAFC 169.
[55] *Rio Grande Irrigation and Land Company Limited (Great Britain) v. United States*, Award (28 Nov. 1923), *reprinted in* 1990(IV) RIAA 131.
[56] *Id.* at 135.
[57] *Id.* at 135–36.
[58] *Id.* at 136, 138.
[59] *Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award (1 June 2009).
[60] *Id.* ¶ 366.
[61] *Id.*
[62] *Id.*

Inherent powers may also be pertinent to arbitrators' ability to grant relief, award damages, and apportion costs. For example, the tribunal in the *Case Concerning the Rainbow Warrior Affair*[63] stated that "[t]he authority to issue an order for the cessation or discontinuance of a wrongful act or omission results from the inherent powers of a competent tribunal which is confronted with the continuous breach of an international obligation which is in force and which continues to be in force."[64] With respect to damages, the Iran-US Claims Tribunal noted nearly thirty years ago that it was already "customary for arbitral tribunals to award interest as part of an award for damages."[65] It found the power to award interest "inherent in the Tribunal's authority to decide claims," such that "the exclusion of such power could only be established by express provision."[66] The tribunal in *Vivendi v. Argentina*[67] confirmed that liability for interest remains "an accepted legal principle."[68]

It does not appear, however, that arbitrators possess the inherent power to issue binding arbitrator fee awards, enforceable against parties who do not pay. Assessing an interim award issued by an arbitral tribunal constituted under the Swiss Rules of International Arbitration, the Swiss Supreme Court expressly determined that the weight of scholarly opinion was against the position that arbitral tribunals have the power to issue a binding decision on fees owed under the arbitrators' agreement. It found the outcome justified "by the fact that claims arising from the relationship between the parties and the arbitrators do not arise under the arbitration agreement" and the determination that "it would represent an unacceptable situation in which the arbitrators were judges in their own cause."[69]

4. *Powers to Safeguard Against Misconduct and Perceived Improprieties*

As already touched upon in the context of interim orders, arbitrators sometimes turn to inherent powers when deciding how to address party behavior that poses a threat to the integrity of arbitral proceedings or the success of the tribunal's adjudicative mandate. While tribunals have shown a substantial degree of comfort with granting provisional measures to accomplish these goals, they have been hesitant to use inherent powers to grant dispositive relief as a remedy for party misconduct. In *Waste Management v. Mexico*,[70] the tribunal denied the respondent's request that the tribunal exercise its inherent powers to dismiss a claim on abuse of process grounds. The tribunal found it unnecessary to determine whether such an inherent power existed because there was no evidence of bad faith on claimant's part; however, it "inferred that if such a power exists, it would only be for the purpose of protecting the integrity of the tribunal's processes or dealing with genuinely vexatious claims."[71] Similarly, the annulment committee in *Commerce Group Corp. & San Sebastian Gold Mines, Inc. v. El Salvador*[72] observed that, in extreme circumstances, it could use its inherent powers to order security for costs "[a]s the guardian of the integrity of the proceeding."[73] In contrast, the Australian courts have held that arbitrators do not have the authority to order security for costs if the arbitration agreement does not confer the power to do so.[74]

In *Libananco v. Turkey*,[75] the tribunal was presented with an allegation by the claimant that the Turkish authorities were holding claimant's legal representatives and potential witnesses under surveillance, leading

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63 *Case Concerning the Rainbow Warrior Affair (New Zealand v. France)*, Award, (30 Apr. 1990), *reprinted in* 1990 RIAA 217.

64 *Id.* ¶ 144. In that case, however, the tribunal declined to extend the desired relief because the order requested sought discontinuance of conduct that was no longer illegal.

65 *Islamic Republic of Iran v. United States of America*, IUSCT Case No. A19, Decision (30 Sept. 1987).

66 *Id.*

67 *Vivendi v. Argentina*, ICSID Case No. ARB/97/3, Award (20 Aug. 2007).

68 *Id.* ¶ 9.2.1. Similarly, in Australia, the power to award interest has been found by courts to flow from the arbitrators' implied authority and duty to follow the ordinary rules of law. *Government Insurance Office of N.S.W. v. Atkinson-Leighton Joint Venture* (1981) 146 CLR 206.

69 *See* Christopher Koch, "The Limits of Arbitrators' Powers to Adjudicate Fees and Expenses—Commentary on the Swiss Supreme Court Decision 136 III 597 of 10 November 2010," *Arbitration International,* Vol. 27, No. 2, 239 (LCIA 2011) (quoting the Supreme Court's holding).

70 *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Decision of the Tribunal on Mexico's Preliminary Objections concerning the Previous Proceedings (2 June 2001).

71 *Id.* ¶ 49.

72 *Commerce Group Corp. & San Sebastian Gold Mines, Inc. v. Republic of El Salvador*, ICSID Case No. ARB/09/17 (Annulment Proceeding), Decision on El Salvador's Application for Security for Costs (20 Sept. 2012).

73 *Id.* ¶ 45. The committee opined that such circumstances might include situations "where abuse or serious misconduct has been evidenced." *Id.*

74 *See, e.g.*, *McKensey v Hewitt* [2002] NSWSC 145, ¶ 29.

75 *Libananco Holdings Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8, Decision on Preliminary Issues (23 June 2008).

claimant's legal expert to refuse to testify for fear of government reprisal.[76] The claimant, having adduced *prima facie* documentary evidence that respondent had intercepted its counsel's email communications, sought to exclude respondent from participating in the "current phase of the arbitral process."[77] Recognizing the serious nature of the allegations at issue and the principles affected by them, the tribunal commented:

> Nor does the Tribunal doubt for a moment that, like any other international tribunal, it must be regarded as endowed with the inherent powers required to preserve the integrity of its own process – even if the remedies open to it are necessarily different from those that might be available to a domestic court of law in an ICSID member state. The Tribunal would express the principle as being that parties have an obligation to arbitrate fairly and in good faith and that an arbitral tribunal has the inherent jurisdiction to ensure that this obligation is complied with; this principle applies in all arbitration[.][78]

However, the tribunal declined to grant the "extreme form of relief" requested, finding such relief unwarranted in the circumstances, where the issue of possible prejudice remained largely a matter of allegation and counter-allegation.[79] Instead, it ordered measures targeted at preventing concrete, future harm and warned that it could "consider other remedies available apart from the exclusion of improperly obtained evidence" if respondent wrongfully used information obtained through surveillance.[80] One wonders what "other remedies" the tribunal might have considered had it had occasion to do so: would sufficiently egregious behavior have permitted the tribunal to bar respondent from presenting its defense?

In international arbitration, the arbitration rules often provide for the tribunal to determine the proper allocation of fees as part of its award, and arbitrators have cited such authority to impose costs on parties whose participation has been marked by bad faith.[81] In some contexts, inherent powers have been cited as providing authority to sanction parties for misbehavior or improper conduct. In *ReliaStar Life Insurance Company of New York v. EMC National Life Company*,[82] a tribunal awarded attorneys' and arbitrators' fees to sanction the bad faith conduct of the losing party to the arbitration. The tribunal did so despite a provision in the parties' arbitration agreement explicitly providing that each party shall bear its own costs and share the expenses of the third arbitrator. The United States Court of Appeals for the Second Circuit determined that an arbitral panel had not exceeded the scope of its authority. The court reasoned that the parties' arbitration clause was a broad one of the sort that "confers inherent authority on arbitrators to sanction a party that participates in the arbitration in bad faith and that may include an award of . . . fees."[83] It characterized the contractual fee provision as a general statement of the American rule on fee sharing and found nothing therein "signal[ing] the parties' intent to limit the arbitrator's inherent authority to sanction *bad faith* participation in the arbitration," given the comprehensive arbitral authority expressly conferred on the arbitrators.[84] The Court noted that, should contracting parties wish "to limit the . . . sanction authority to exclude attorney's fees or arbitrator's awards," they would need to do so "explicitly and clearly" as part of their agreement to arbitrate.[85]

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[76] *Id.* ¶ 72.

[77] *Id.* ¶ 73.

[78] *Id.* ¶ 78. It would not, however, appear permissible for a tribunal to invoke similar authority as a basis to annul an award. An ICSID *ad hoc* annulment committee, invited by a claimant to investigate bribery allegations as an exercise of the committee's inherent jurisdiction, found such an inquiry to lie outside of its narrowly defined jurisdictional mandate. The committee, viewing the explicit grounds for annulment provided in the ICSID convention as exhaustive, stated that "there are limitations on the exercise of inherent powers, including that such powers cannot be inconsistent with the terms of the relevant constitutive instrument of the international court or tribunal." It noted that tribunals "can only exercise [inherent] powers where those powers are necessary to ensure the performance of functions that have been expressly conferred." *RSM Production Corporation v. Grenada*, ICSID Case No. ARB/05/14 (Annulment Proceeding), Decision on RSM Production Corporation's Application for a Preliminary Ruling, ¶ 20 (7 Dec. 2009).

[79] *Id.* ¶¶ 80–81.

[80] *Id.*

[81] *See, e.g.*, *Liberian East Timber Corp. v. Republic of Liberia*, ICSID Case No. ARB/83/2, Award (31 Mar. 1986), *reprinted in* 2 ICSID Rep. 343 (awarding arbitration costs and legal fees to LETCO, under Article 62(2) of the ICSID Convention, "based largely on Liberia's procedural bad faith").

[82] 564 F.3d 81 (2d Cir. 2009).

[83] *Id.* at 86.

[84] *Id.* at 88.

[85] *Id.* at 89.

Although the case did not involve allegations of bad faith or professional misconduct, one tribunal, in *Hrvatska Elektroprivreda v. Slovenia*,[86] has invoked the concept of inherent powers to rule that a party's chosen counsel could not participate in arbitration proceedings. The excluded counsel's appearance in the case was disclosed only shortly before the merits hearing. That counsel was a member of the same London Chambers at which the tribunal's president was a "door tenant." [87] The opposing party, who was unfamiliar with the English legal system's "split profession" of solicitors and barristers, objected that the participation created an "appearance of impropriety."[88] In determining that counsel's participation would be inappropriate, the tribunal cited its "inherent power to take measures to preserve the integrity of its proceedings."[89] It noted that this power found "a textual foothold" in Article 44 of the ICSID Convention, which grants discretion on procedural issues, and observed that, more broadly, international courts possess an inherent power, independent of statutory reference, "to deal with any issues necessary for the conduct of matters falling within [their] jurisdiction."[90]

In the Canadian arbitration context, an arbitrator has deemed "well established" the power to entertain motions to disqualify counsel based on alleged conflicts of interest as "a necessarily implied adjunct to the power of any tribunal to control its own process," a power "clearly recognized and established by all provincial arbitration statutes."[91]

Is disqualification of counsel a general inherent power of arbitrators, and, if so, how much control may arbitrators properly exert over the decisions of parties with respect to their counsel? In reaching its decision, the *Hrvatska* tribunal was careful to emphasize the particular distinguishing circumstances of the case that justified its course of conduct, including the party's disclosure of counsel's participation "only at an extremely late stage of proceedings," suggesting that such power should be used sparingly.[92] When asked by the respondent in *The Rompetrol Group N.V. v. Romania*[93] to exclude counsel who had previously been employed by a law firm of which one of the arbitrators was a member, the tribunal distinguished the circumstances present in *Hrvatska* and opined that the decision "might be better seen as an *ad hoc* sanction for the failure to make proper disclosure in good time than as a holding of more general scope."[94] The tribunal denied the respondent's request and took a highly skeptical view of whether the inherent power to preserve the integrity and effectiveness of proceedings extended to the exclusion of counsel. Observing that the power to exclude counsel was a power for which one would expect the relevant legal texts to provide, the tribunal commented that "[a]bsent express provision, the only justification for the tribunal to award itself the power by extrapolation would be an overriding and undeniable need to safeguard the essential integrity of the entire arbitral process."[95] It hypothesized that such control would be exercised rarely and only in compelling circumstances.[96]

If the power to exclude counsel is to be reserved only for compelling circumstances necessary to safeguard the essential integrity of the arbitral process, what might those circumstances be? More generally, what is the breadth of tribunals' inherent power to protect proceedings and is it possible to develop a principle to provide guidance on when that power may be employed? Could arbitrators terminate proceedings if they determine the underlying dispute to be characterized by bad faith conduct or infected with corruption? What remedies are available to punish contempt of a tribunal's decisions?

5. *Powers of Revision*

The decisions of international tribunals also indicate that commercial arbitrators might, in limited circumstances, possess the inherent or implied authority to revise their decisions, so long as they are still seized of a matter and

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86 *Hrvatska v. Elektroprivreda, d.d. v. Republic of Slovenia*, ICSID Case No. ARB/05/24, Order Concerning the Participation of a Counsel (6 May 2008). Issues raised in this and subsequent cases are now addressed by the IBA Guidelines on Party Representation in International Arbitration adopted by the IBA Council on May 22, 2013.

87 *Id.* ¶ 3.

88 *Id.* ¶¶ 7, 21.

89 *Id.* ¶¶ 33–34.

90 *Id.* ¶ 33 (internal quotation marks and citations omitted).

91 William G. Horton, "Note on Canadian Cases: The Jurisdiction of Tribunals to Control Counsel Conduct and Disqualify Counsel based on Conflicts of Interest," *Canadian Arbitration and Mediation Journal*, Vol. 22, No. 1, 18 (2013).

92 *Id.* ¶¶ 28, 34–35. Moreover, having ascertained that the excluded counsel was retained in relation to damages issue only, it bifurcated the proceedings and adjourned all damages questions for later determination when substitute counsel could be utilized by the respondent.

93 *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Decision on the Participation of a Counsel (14 Jan. 2010).

94 *Id.* ¶ 25.

95 *Id.* ¶ 16.

96 *Id.*

are not yet *functus officio*. The U.S.-Iran Claims Tribunal expressly declined to hold that it has such an inherent power of revision, opining that a remedy of revision could only be established through the formal modification of its rules, but it left open the possibility of making an exception in cases of fraud or perjury.[97] In the *Sabotage Cases*,[98] the U.S.-Germany Mixed Claims Commission held that "[e]very tribunal has inherent power to reopen and to revise a decision induced by fraud," and took the firm view that "[n]o tribunal worthy its name or of any respect may allow its decision to stand" if confronted with well-founded allegations of perjury, collusion, and suppression."[99] Similarly, a tribunal proceeding under the UNCITRAL Arbitration Rules has held that tribunals and courts have the

> inherent power to take cognizance of credible evidence, timely placed before it, that its previous determinations were the product of false testimony, forged documents, or other egregious "fraud on the tribunal" . . . . Certainly if such corruption or fraud in the evidence would justify an international or a national court in voiding or refusing to enforce the award, this Tribunal also, so long as it still has jurisdiction over the dispute, can take necessary corrective action.[100]

These cases suggest that it may be within a still-sitting tribunal's inherent power to modify or even withdraw a prior decision that rewarded a party's misconduct. But under what circumstances might a tribunal actually do so? If a witness gives inconsistent testimony in a second case, would the tribunal in the first case have the authority to consider whether the inconsistency affected its view of the witness's credibility?

The recent decision and dissenting opinion on a request for reconsideration in *ConocoPhillips v. Venezuela*[101] confirm that the answer to this question is far from straightforward. In that case, Venezuela asked the tribunal to revisit a portion of its award on jurisdiction and the merits, based on new evidence revealed by Wikileaks, before proceeding to the quantum phase of proceedings. The majority rejected this request, concluding that its earlier decision was not of an "interim" nature but meant to be final, with *res judicata* effect.[102] It reasoned that the overall structure and the detailed provisions of the ICSID Convention precluded the exercise of a power of review under Article 44's gap-filling authority because there was "no gap to be filled by the power proposed" and nothing in the Convention's provisions on explicit powers "even hinting at such a power."[103]

In a sharply-worded dissent, arbitrator Georges Abi-Saab rejected the majority's reasoning and contended that it was in the tribunal's inherent jurisdiction to correct a material error made in an interlocutory decision:

> [I]n certain contingencies which put or risk putting the credibility and integrity of the tribunal into question – such as its becoming aware that it had omitted an error in interpreting evidence or in establishing the facts that led it astray in its legal findings; that the decision did not follow from the facts as determined; that new credible evidence demonstrate[s] that the facts as established by the tribunal were based on wrong premises; or that changed circumstances have rendered the decision otherwise untenable – inherent jurisdiction empowers and even mandate[s] the tribunal to reconsider the prior decision.[104]

The dissent found such power to exist within the "inherent jurisdiction [that] accrues to any body or organ by the mere fact of it[s] being possessed of the adjudicative function."[105] According to the dissent, such jurisdiction "brings with it powers as well as duties and responsibilities," including the duty of "safeguarding the credibility and integrity of its adjudicative function."[106] Professor Abi-Saab opined that no self-respecting

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97 *Islamic Republic of Iran v. United States of America*, IUSCT Cases Nos. A3, A8, A9, A14 & B61, Decision No. DEC 134-A3/A8/A9/A14 & B61, ¶ 64 & n.105 (1 July 2011); *see Riahi v. Iran*, IUSCT Case No. 485, Decision No. DEC 133-485-1, ¶¶ 32–57 (17 Nov. 2004). However, its prior jurisprudence confirms that revision of a decision induced by fraud would only be available, if at all, upon the discovery of a new fact of a decisive nature that upsets the conclusions earlier drawn by the tribunal. *See Ram International v. Air Force of Iran*, IUSCT Case No. 148, Decision No. DEC 118-148-2, ¶ 20 (28 Dec. 1993).

98 *Lehigh Valley Railroad Company, Agency of Canadian Car and Foundry Company, Limited, and Various Underwriters (United States) v. Germany (Sabotage Cases)*, Decision (15 Dec. 1933), *reprinted in* VII RIAA 160.

99 *Id.* at 190.

100 *Antoine Biloune v. Ghana Investments Centre*, Award on Damages and Costs, ¶ 33 (30 June 1990), *reprinted in* 95 ILR 211.

101 *ConocoPhillips Petrozuata B.V., et al. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on Respondent's Request for Reconsideration and Dissenting Opinion of Georges Abi-Saab (10 March 2014).

102 *Id.*, Decision, ¶¶ 20–21.

103 *Id.*, Decision, ¶¶ 22–23.

104 *Id.*, Dissent, ¶ 61.

105 *Id.*, Dissent, ¶ 56.

106 *Id.*, Dissent, ¶¶ 56–57.

tribunal that took seriously its "overriding legal and moral task of seeking the truth and dispensing justice according to the law on that basis" could turn a blind eye to newly discovered evidence that severely contested its prior findings.[107]

III. A FRAMEWORK OF ARBITRAL POWER

As seen from the examples discussed above, the range in which inherent and implied powers have and potentially could be employed is broad and diverse, and the ability to invoke different powers will change depending on the stages and circumstances of a given arbitration. In the commercial arbitration context, the parties' choices—embodied in the arbitration agreement, the arrangements governing their relationship with the arbitrators, and the rules and curial law of the arbitration—are likely to produce significant variances in procedure from one arbitration to the next. At one end of the spectrum, a tribunal may find itself presented with a terse arbitration agreement providing for the ad hoc arbitration of any dispute arising out of the parties' contract and designating the seat of arbitration as a country with a minimally-developed national arbitration law. At the opposite end of the spectrum, arbitrators may be faced with an elaborate arbitration agreement providing for an institutional arbitration seated in a country with a detailed arbitration law that has generated extensive precedent. The express powers of the arbitrators will differ considerably in the two cases, as will the authority they can permissibly exercise as a matter of discretion and implication.

The context-dependent nature of international commercial arbitration renders difficult any attempt to develop a coherent framework for the use of arbitral power. In particular, the notion that one tribunal might be barred from exercising power that another justifies as "inherent" is conceptually problematic: if such powers are inherent—and, by definition, exist "in something as a permanent attribute or quality"[108]—how can they be said to vary based on the peculiarities of the case? One could respond that the inherent powers are those essential powers common to all tribunals and that all others are implied, but such a response is also intellectually unsatisfying. What qualifies as an "essential" power? By what exactly are other powers implied? Where a particular rule or provision of the parties' agreement implies the existence of a discrete power, deeming that power "implied" may be proper, but where a power appears to be implied from the nature and function of the tribunal as constituted, the power at issue seems more properly labeled "inherent" to that tribunal. These conceptual difficulties are compounded by the fact that the terms "inherent" and "implied" are often treated as fungible words, by arbitrators and practitioners, and may carry different meanings and understandings in the jurisprudence of different national legal orders. For that reason, the Committee refrains from formulating definitions as to the concepts of inherent and implied powers of arbitral tribunals and prefers to present a framework under which these powers can be further discussed and analyzed.

Despite these challenges, the Committee considers that it seems possible to divide a tribunal's non-enumerated powers into three different and somewhat overlapping categories, or conceptions, that may be instructive to arbitrators and parties in thinking about the scope of power that arbitrators may permissibly employ. *First*, beyond the express powers of arbitrators, there exist powers implied by the provisions of the parties' arbitration agreement and the other sources selected to govern the arbitration. *Second*, there is a general discretionary power over procedure that arbitrators enjoy in the absence of contrary instruction. *Third*, there exists a limited authority to exercise truly inherent powers, which arbitrators may employ only if presented with compelling circumstances that risk undermining a tribunal's integrity or compromising the enforceability of its award. Each of these categories and their implications are discussed in turn. This discussion is to be read against the background of each particular case where the applicable statutory framework at the seat of the arbitration, the applicable arbitration rules and the parties' arbitration agreement will provide the context of the arbitral tribunal's express, inherent or implied powers.

A. Powers Implied by Textual Sources: Powers Particular to the Parties' Agreement

A first category of non-enumerated powers may be said to consist of powers implied by express provisions contained in the sources governing a particular arbitration. As arbitrators' authority and jurisdiction fundamentally stems from the consent of the parties, arbitrators seeking to exercise authority must always look first to the text of the parties' agreement and the applicable arbitration rules, as well as the law chosen to govern the arbitration, to assess the permissible scope of action they may take. When these sources do not speak directly on a specific question, they may nonetheless imply some corollary authority to take action to effectuate the parties' agreement. For example, an arbitration agreement requiring that any dispute be decided "on the basis of law," and little else, might be read to imply that the tribunal is empowered to ask the parties to submit

[107] *Id.*, Dissent, ¶ 66.
[108] Oxford English Dictionary, "Inherent" 3(a), http://www.oed.com/view/Entry/95945.

legal briefing or research the issue on its own. Similarly, to the degree that arbitral laws and rules assign various objectives or duties to arbitrators, such provisions may also be fairly interpreted as implying the authority to advance those prescribed goals. For instance, a provision saying the arbitration shall be conducted efficiently might give an arbitrator the implied authority to bifurcate proceedings or limit the scope of document production.

Because implied powers track closely with the selections made by parties in agreeing to arbitrate, they may permit arbitrators to make decisions that would otherwise be questionable absent explicit authorization. For instance, if the parties' agreement refers to U.S. Federal Rules of Evidence, an implied power to exclude expert witnesses based on qualifications established in American jurisprudence[109] is much more likely to withstand challenge than would a tribunal's decision to impose such requirements absent any such textual referent.

To the degree that arbitrators are able to justify contested decisions on the basis of implied powers, their actions are more likely to be viewed as falling within the reasonable contemplation of the parties' agreement to arbitrate. When properly used, implied powers permit arbitrators to implement the parties' choices and may thus be seen as promoting party autonomy. To arbitrators and parties with civil law backgrounds, their use is less likely to prompt the discomfort that the exercise of purely inherent authority—untied to any textual provision—might elicit.

B. Discretionary Powers of Procedure: The Right to Oversee Proceedings

It is possible to discern a second category of powers consisting of a tribunal's discretionary powers over procedure. These powers may include, among other things, the authority to hold evidentiary hearings, admit and weigh evidence, determine the order and method of witness examinations, and apportion costs. Insofar as they may be seen as broadly implied by the practical necessities of rendering an enforceable award, the powers in this category share some relation to implied powers, and it may be possible to find a textual foothold from which to imply the power to take a particular action that could also be justified as an exercise of a tribunal's discretion over procedure. These discretionary powers also resonate, however, as having an "inherent" quality, as arbitrators are widely understood to have some inherent degree of control over the efficient conduct of procedure. Indeed, the discretion "to determine the arbitral procedure, in the absence of agreement by the parties on such matters, is a[] foundation of the international arbitral process."[110]

In arbitrations governed by developed national arbitration laws or institutional rules, the authority to exercise such discretion will usually be confirmed by provisions that reserve to tribunals a significant degree of flexibility over procedure. For example, Article 17 of the UNCITRAL Arbitration Rules provides:

> Subject to these rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that an appropriate stage of the proceeding each party is given a reasonable opportunity of presenting its case. The arbitral tribunal, in exercising its discretion, shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute.[111]

In the same vein, the arbitration rules of the International Chamber of Commerce empower a tribunal to "proceed within as short a time as possible to establish the facts of the case by all appropriate means."[112] Following the widespread adoption of the UNCITRAL Model Law, the curial law of many states similarly

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109 *See, e.g.*, *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993) (articulating the standard for admitting expert testimony in U.S. federal courts).

110 Gary B. Born, *International Arbitration: Law and Practice*, 148–49 (Kluwer Law International 2012). A former Chief Justice of the High Court of Australia has observed in this regard that "[i]t is well settled that when parties submit their dispute to a private arbitral tribunal of choice, in the absence of some manifestation of a contrary intention, they confer upon that tribunal a discretion as to the procedure to be adopted in reaching its decision. . . . No doubt the conferral of that power upon the tribunal is incidental to the power which it is given to determine the dispute submitted to the Tribunal." *Esso Australia Resources Ltd v Plowman* [1995] 183 CLR 10, 26–27.

111 UNCITRAL Arbitration Rules (2010), Art. 17(1).

112 ICC Rules of Arbitration (2012), Art. 25(1). Similarly, the London Court of International Arbitration Rules provide that, unless otherwise agreed by the parties, "the Arbitral Tribunal shall have the widest discretion to discharge its duties allowed under such law(s) or rules of law as the Arbitral Tribunal may determine to be applicable." LCIA Arbitration Rules (1998), Art. 14.2.

confirms that arbitrators enjoy broad discretion over procedure.[113] However, while provisions confirming a tribunal's discretion over procedure serve the useful function of articulating the existence of gap-filling authority, and arbitrators acting with the benefit of such rules or laws should make reference to them, such provisions should not be seen as the exclusive source of a tribunal's power in this regard. A tribunal proceeding without the advantage of such a provision cannot be said to lack the practical power to carry its mandate to completion.

As the institutional rules provide and acknowledge, discretionary authority gives arbitrators the right to make procedural decisions in the absence of contrary instruction or constraints. As such, they may be seen as a default or background authority that the parties' elections may supersede. Given the reality that "parties in practice often do not agree in advance on detailed procedural rules," however, arbitrators often exercise considerable power in determining the manner in which proceedings will be conducted, subject of course to certain due process requirements.[114]

While arbitrators will generally feel comfortable exercising such discretion where both parties acquiesce, a harder case is presented when one party opposes a proposed course of action. While a tribunal's discretionary powers typically do not permit arbitrators to take actions that override party agreement, they may permit a tribunal to authorize non-conventional and creative approaches to procedure that may not enjoy the universal support of the parties. For instance, should a party seek to preserve the testimony of a witness through a subpoenaed deposition procedure available in the witness's home country, a tribunal might determine it is proper to authorize the procedure, even if it is one previously unknown to the litigating parties, would not have been contemplated at the time of contracting, and is opposed by the party to whom the witness's testimony presumably would be adverse.

To pose a more difficult example, might arbitrators have the power to order consolidation of related arbitrations over the objection of one party? In permitting the mass claims of roughly 60,000 claimants to proceed in *Abaclat and Others v. Argentine Republic*,[115] the majority there determined the "the silence of the ICSID convention concerning collective proceedings" constituted a gap in the existing rules that it had the power to fill, by virtue of the discretionary power over procedure afforded by Article 44 of the ICSID Convention and ICSID Rule 19. The arbitrators characterized these provisions as "the mere expression of the inherent power of any tribunal to resolve procedural questions in the event of a lacunae."[116]

While this decision would indicate that a tribunal might have the power to order consolidation of parallel proceedings pursuant to its discretionary authority over procedure, the decision in *Ambiente Ufficio S.p.A v. Argentine Republic*,[117] which permitted a multiparty action composed of ninety claimants to proceed, suggests that joinder lies beyond arbitral discretion. The tribunal there noted the case before it involved the original submission of a claim by a plurality of claimants in a single proceeding, and not the "*ex post* joinder or consolidation of proceedings," which would "no doubt" be "subject to the specific consent of the Parties."[118] Nonetheless, depending on the circumstances and the evolution of arbitral procedure, it is conceivable that another tribunal might one day come to a different conclusion—finding that a respondent's consent is not required for joinder, as that is a procedural issue over which the tribunal has discretion.

Arbitrators can expect to be presented with these and similar challenges in the future. As these examples suggest, a tribunal must initially determine, as a prerequisite to exercising its discretionary powers, that the action under consideration is strictly procedural in nature, and does not implicate substantive rights. In then

113 *See* UNCITRAL Model Law, *supra* note 1, Art. 19 (giving a tribunal discretion to "conduct the arbitration in such manner as it considers appropriate" in the absence of party agreement).

114 Born, *supra* note 110, at 148.

115 *Abaclat and Others (Case formerly known as Giovanna a Beccara and Others) v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (4 Aug. 2011).

116 *Id.* ¶¶ 521–26. In *Abaclat*, the tribunal found it would be contrary to the purpose of the underlying treaty and the spirit of ICSID "to require in addition to the consent to ICSID arbitration in general, a supplementary express consent to the form of such arbitration" and declined to find that the ICSID Convention's silence on collective proceedings prohibited them. *Id.* ¶¶ 518–19. U.S. jurisprudence views the issue as one of contract interpretation, and an arbitral award will withstand a motion for vacatur where an arbitrator's decision to permit class certification is based on an interpretation of the parties' intent. *See Oxford Health Plans LLC v. Sutter*, 133 S.Ct. 2064 (2013).

117 *Ambiente Ufficio S.p.A. v. Argentine Republic,* ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility (8 Feb. 2013).

118 *Id.* ¶¶ 123–25. U.S. courts likewise express considerable skepticism towards the permissibility of consolidating arbitral proceedings absent party consent. Martin Domke, et al., *Domke on Commercial Arbitration*, § 32.28 (Clark Boardman Callaghan, 3d ed. 2013).

assessing the breadth of its discretionary power, a tribunal must always first look to the arbitration agreement, the arbitral rules, and any other consensual agreement reached by the parties. If one of these sources provides an answer to the procedural question posed, that should generally end the inquiry because, on a matter of process not affecting the integrity of proceedings, a tribunal typically may not override the parties' agreement under the guise of its "inherent" authority. However, to the degree that those sources are silent, leave room for interpretation, or—in some cases—affirmatively endow the tribunal with discretion, the tribunal may properly employ its power of judgment to render a decision. It is through this exercise of judgment that the evolution of arbitral procedure often occurs.

C. Inherent Powers: The Duties of Arbitrators to Protect the Integrity of Proceedings and Render an Enforceable Award

Given the broad range of actions that may be justified on the basis of implied or discretionary power, arbitrators are unlikely to be presented—in the average international commercial arbitration—with circumstances that require action for which they truly cannot find any authority to act. However, as the examples from international investment cases demonstrate, tribunals could be faced with challenges that risk undermining the ultimate enforceability of their awards and for which the rules are of no assistance.

It is in such situations that a third and final category of non-enumerated powers becomes relevant, encompassing that authority which can be said to be truly inherent, namely those powers necessary to safeguard a tribunal's jurisdiction and the integrity of its proceedings. Stated differently, these powers are those required to decide a legal dispute fairly and in a manner consistent with at least the minimal requisites of due process and public policy. They trace their roots most clearly to the original notion of inherent powers as protecting jurisdiction and curtailing procedural abuses, and their exercise may justify overriding party preferences.

Because such powers are key to ensuring that a tribunal obtains a final and enforceable award via procedures that are viewed as both fair and neutral, permitting their limitation by party agreement would threaten to undermine the arbitral process itself. Such powers are so core to the function of arbitration that they might be more properly termed arbitral duties, the fulfillment of which is a necessary function of serving as a competent arbitrator. The LCIA Arbitration rules, for example, recognize that arbitral procedure is subject to certain due process constraints that arbitrators are bound to enforce. To that end, Article 14 subordinates party autonomy over arbitral proceedings to the Arbitral Tribunal's general duties "to act fairly and impartially as between all parties, giving each a reasonable opportunity of putting its case and dealing with that of its opponent" and "to adopt procedures suitable to the circumstances of the arbitration, avoiding unnecessary delay or expense, so as to provide a fair and efficient means for the final resolution of the parties' dispute."[119]

Insofar as a tribunal's inherent authority stems from the need to protect the fundamental integrity of the arbitral process it is overseeing, it is an authority properly exercised in markedly limited situations; as "an extraordinary control," it "is to be resorted to only in compelling circumstances."[120] These powers may, depending on the context, permit a tribunal to issue interim relief to prevent the exacerbation of a dispute, to investigate or enjoin behavior constituting fraud or an abuse of process, and to take prudential action to ensure that its proceedings are fair. As seen from the cases discussed above, international investment tribunals have exercised powers in this category to stay domestic litigation impinging upon their jurisdiction and to enjoin party misbehavior that may undermine the fairness of proceedings.[121]

A hypothetical example is illustrative of other instances in which these powers, particularly in the international commercial arbitration context, might come into play. If presented with a request by parties for a consent award[122] in circumstances that reasonably indicate that the arbitration is being used as a vehicle to facilitate money laundering or reward corruption, a tribunal probably could—over the objection of both parties—conduct an inquiry to assure itself that the underlying settlement is lawful. In such a situation, arbitrators are not merely

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119 LCIA Arbitration Rules, *supra* note 112, Art. 14.1.

120 *Commerce Group Corp.*, *supra* note 72, ¶ 44.

121 It is noteworthy that a tribunal's authority to order such remedies may not necessarily be matched with the power to enforce them.

122 *See, e.g.*, LCIA Arbitration Rules, *supra* note 112, Art. 26.8 ("In the event of a settlement of the parties' dispute, the Arbitral Tribunal may render an award recording the settlement if the parties so request in writing ('a Consent Award'), provided always that such award contains an express statement that it is an award made by the parties' consent. A Consent Award need not contain reasons.").

service providers but also play a role as "guardians of international public policy."[123] As a number of commentators have noted, enforceability problems could arise if arbitrators disregard such concerns and render an award that, when challenged before national courts, might be deemed invalid on public policy grounds.[124] Thus, it appears that arbitrators faced with such a situation could reasonably point to their inherent authority to protect the integrity of proceedings as a basis for undertaking a *sua sponte* investigation into evidence of corruption or money laundering.[125]

Inherent powers may also be implicated where arbitrators face competing duties that cannot be simultaneously satisfied. For instance, if an arbitration agreement provides for a hearing to take place in a particular location that is subsequently rendered inaccessible due to conflict and one of the parties insists on the original agreement with the goal of upsetting proceedings, a tribunal might cite its inherent power as providing the authority to move the place of the hearings. In that instance, the arbitrators' duty to render an award, pursuant to the parties' overall agreement, would be frustrated if it were unable to change one of the agreement's arguably less critical terms. So long as the arbitrators can determine that the condition of meeting in the designated city was not a fundamental element on which the parties' consent to arbitrate was predicated, invocation of inherent powers might offer a tenable exit from the seemingly irreconcilable dilemma the tribunal would otherwise face.

Because inherent powers of this type are a necessary correlate of a successful and functional arbitral system, they should be available to arbitrators operating under a variety of different arbitral rules and national jurisdictions, so long as compelling circumstances justifying action exist. However, as emphasized repeatedly in this Report, context remains important: any action taken should be carefully calibrated to respond proportionately to the exigencies of the circumstances and to align with the particular notions of fairness and due process that animate the legal culture from which the parties originate and under which they have decided to submit their dispute.[126] Such an approach strikes a proper balance between the notion of arbitration as a party-driven process and the imperative to respect due process, the disregard of which could give reason not to enforce an award.[127]

Although the context of international commercial arbitration affords parties considerable leeway in defining and constraining the manner in which their disputes are arbitrated, that control cannot be viewed as absolute, and arbitrators that blindly follow party elections notwithstanding their effect on the integrity of proceedings or the legality of the outcome risk abdicating their duties as adjudicators. While international commercial arbitration is a service-oriented process that seeks to satisfy the party-consumers, it also a legal process that results in an internationally enforceable award and should provide a just and fair result. As one commentator has noted, the "conforming notions of equality, fairness and reasonable cooperation in dispute resolution can be seen" as features common to both judicial and arbitral power, which "derive from the essence of the process and the task required: the civil resolution of disputes."[128] In deciding to arbitrate, parties consent to a legal process involving certain minimum standards of due process and fairness upon which they should not be able, consistent with that agreement, to renege. Arbitrators should be seen as having the authority to enforce these standards.[129]

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[123] Bernard Hanotiau, "Misdeeds, Wrongful Conduct and Illegality in Arbitral Proceedings," in Albert Jan van den Berg (ed.), *International Commercial Arbitration: Important Contemporary Questions*, 285 (Kluwer Law International 2003).

[124] *See* Michael Hwang S.C. and Kevin Lim, "Corruption in Arbitration – Law and Reality" (expanded version of Herbert Smith-SMU Asian Arbitration Lecture, delivered 4 Aug. 2011), ¶ 16, *available at* http://www.arbitration-icca.org/articles.html; Allan Philip, "Arbitration – money laundering, corruption and fraud: The role of the tribunals," in Kristine Karsten and Andrew Berkeley (eds.), *Arbitration- Money Laundering, Corruption and Fraud* (ICC Institute of World Business Law 2003).

[125] Arbitrators may also be able to find other bases on which to substantiate such action. As argued by Hwang and Lim, issues of corruption may be deemed to fall within the mandate of the tribunal when those issues are relevant to the dispute under consideration. Hwang and Lim, *supra* note 124, ¶¶17–23. Philip has asserted that ICC tribunals are obliged to investigate and decide issues of corruption and money laundering by virtue of the duties under the ICC Rules to make every effort to render an enforceable award and to establish the facts of the case by all appropriate means. Philip, *supra* note 124, at 153.

[126] Indeed, as the Honorable James Allsop, former Chief Justice of the Federal Court of Australia, has observed: "[T]he authority of the arbitrator can be enhanced and buttressed by the legal culture of the supervising authority." James Allsop, "The Authority of the Arbitrator" (Clayton Utz International Arbitration Lecture, University of Sydney, delivered 29 Oct. 2013), *available at*: http://www.claytonutz.com/ialecture/2013/speech_2013.html.

[127] *See* Wachter, *supra* note 20, at 73–75 (observing that "the outer boundaries of the tribunal's authority solely as a matter of contract interpretation will probably remain unanswered" in light of the statutory due process requirements imposed by the New York Convention and modern arbitration statutes).

[128] Allsop, *supra* note 126.

[129] *Id.*

Thus, when faced with a challenge that risks undermining the very mandate they are empowered to carry out, arbitrators have the authority to depart from the parties' elections, or—if not able to do so within the bounds of due process and other considerations—to resign.

D. Exercising Inherent and Implied Powers

The first category above by and large does not generate major problems as to how an arbitral tribunal is to exercise its powers as they relate directly or indirectly to powers already embedded in the *lex arbitri*, the applicable arbitration rules and the arbitration agreement. The procedural discretionary powers of an arbitral tribunal referred to in the second category also will not often raise problems as the very nature of discretionary powers is that they give wide latitude to arbitral tribunals in making use of such powers provided these powers are respectful of procedural arrangements agreed upon by the parties and due process and are not used in an arbitrary way. As referred to above, it is the third category of inherent powers which intend to protect the integrity of the arbitral process that requires most attention as to how these powers are to be exercised. In addition to the requirement that the parties are to be heard as to how the arbitral tribunal intends to exercise its inherent powers, any orders the arbitral tribunal issues ought to be necessary to safeguard the integrity of the arbitral process and to enable the arbitral tribunal to proceed to an award which implies that the arbitral tribunal should consider not taking any measure if not strictly required to achieve that objective. Any anticipated order should also be proportionate to the aims it intends to achieve and, thus, should consider alternatives to achieve the intended objective and account is to be had to less intrusive measures meeting such objective.

In making use of an arbitral tribunal's inherent and implied powers, an arbitral tribunal is finally to consider the impact of any of its measures in relation to possible intervention of domestic courts pending the arbitration proceedings and, after an award is rendered, in the course of setting aside and enforcement proceedings. Although the exercise of inherent and implied powers is not specifically addressed in the New York Convention nor in the UNCITRAL Model Law and – save for violations of due process – ought not to come within the scope of these instruments, arbitral tribunals may well be advised to check the *lex arbitri* to verify whether their exercise of inherent and implied powers may not come within the purview of local standards of annulment using standards such as excess of authority, excess of powers or excess of mandate.

E. Conclusion

Although the boundaries between the conceptions above of implied, discretionary, and inherent powers are imprecise and a tribunal's exercise of a particular power may fall into more than one category, it is hoped that this conceptual framework will assist arbitrators in deciding whether to take a particular course of action and in explaining their justifications for doing so, and courts when reviewing the actions of arbitrators. Arbitrators are most secure in exercising non-enumerated powers when the authority to act may be implied by a specific textual source governing the arbitration or when their action reflects a routine exercise of discretion over the conduct of proceedings. The use of inherent authority alone to overcome an impasse in proceedings, however, requires a considered determination that the arbitrators have a duty to act. Where arbitrators are unable to find a justification for a particular action within this conceptual framework, they should be hesitant to proceed.

It is hoped that locating the source of arbitral authority within one or more of these categories will enable arbitrators to describe more clearly and coherently the parameters and limitations of the powers they seek to exercise. The process may prompt deeper discussions among arbitrators regarding the decisions they reach or inspire them to initiate dialogue with the parties before acting, which could lead to an outcome more consonant with the parties' visions of the arbitral process. To the degree that it results in decisions that are more consistent and defensible, it carries the potential to strengthen arbitration as a means of achieving the efficient, binding, and fair resolution of international commercial disputes.

IV. FINDINGS AND RECOMMENDATIONS

A. Findings

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.

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