Inherent Powers of Arbitrators

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This article examines inherent powers in international commercial arbitration – powers that arbitrators possess beyond those explicitly granted in arbitration agreement or lex arbitri to ensure the integrity and efficiency of proceedings. The author argues that inherent powers should be defined by their nature rather than their explicit designation. In the author's view, inherent powers are primarily procedural and should only be invoked where no explicit or implicit authority exists, with arbitrators required to seek parties' views first and provide detailed reasoning to avoid challenges during enforcement or annulment proceedings.

INTRODUCTION

Upon their appointment, arbitrators are tasked with resolving the dispute put before them under the rules established by the arbitration agreement, *lex arbitri*, institutional rules, general principles of law and any other sources that the parties may agree on.

"The authority [of the arbitrators] to hear the parties and make an award exists only through the agreement of the parties. It stems from a voluntary act. The arbitrator's authority is no broader than that defined by the parties and some of his duties are defined by law. Not only national legislators set the limits inside which the arbitrator must act, but international customs, usages and conventions also play an important role."[1] In addition to that, Redfern and Hunter explained that *"[t]he powers of an arbitral tribunal are those conferred upon it by the parties within the limits allowed by the applicable law, together with any additional powers that may be conferred automatically by operation of law. These powers are established to enable the arbitral tribunal to carry out its task properly and effectively."*[2]

Indeed, when discussing the powers of arbitrators, it is widely considered that the primary source of arbitrators' powers is the arbitration agreement itself, normally accompanied by the applicable arbitration rules and *lex arbitri*.

Typically, these sources available to arbitrators leave little room for the tribunal to find its authority to resolve any issues during the proceedings. Yet arbitrators may sometimes find themselves in situations where there is no clear answer. For instance, can arbitrators, against the parties' wishes, set a hearing date during the national holidays in a country where the majority of witnesses and experts reside?[3] If so, on what basis? Inherent powers fill this grey area.

Inherent powers, as a source of arbitrators' authority, are rarely mentioned. Yet, it is generally agreed that such powers exist: *"[w]ithin the arbitration community there appears to be a general, albeit diffuse, understanding that arbitrators in international commercial cases – in addition to their*

[1] Sigvard Jarvin, 'The sources and limits of the arbitrator's powers' (1986) 2 Arb. Intl. 140.

[2] Nigel Blackaby *et al*, *Redfern and Hunter on International Arbitration. Student edition* (6th edn, OUP 2015) 306.

[3] This is what happened recently in the ICC case between *Crescent Petroleum v National Iranian Oil Company* when the tribunal scheduled a hearing over the national holiday in Iran (Nowruz) without consulting the parties. Eventually the chairman of the tribunal was disqualified from the case.

See Alison Ross, 'Aynès disqualified from Iranian gas case' (Global Arbitration Review, 27 March 2023) <https://globalarbitrationreview.com/article/aynes-disqualified-iranian-gas-case> accessed 26 May 2023.

expressly enumerated and defined powers – enjoy some measure of inherent or implied powers."[4]

The concept of inherent powers is not exclusive to international commercial arbitration. On the contrary, the notion of inherent powers was first introduced by the English courts centuries ago. Pushaw explains that *"English judges initially served as the king's personal representatives in exercising his prerogative to do justice. […] This bond with the executive branch was the source of the judiciary's deep well of powers – including those that gradually came to be known as 'inherent', such as contempt.*"[5] Eventually, in 1885 Lord Blackburn observed in *Metropolitan Bank Ltd. v Pooley* that *"from early times […] the court had inherently in its power the right to see that its process was not abused by a proceedings without reasonable grounds.*"[6] In later years, international courts also started to invoke inherent powers: in the *Nuclear Tests* case in 1976 the International Court of Justice explicitly held that *"the Court possesses an inherent jurisdiction enabling it to take such action as may be required, on the one hand, to ensure that the exercise of its jurisdiction over the merits, if and when established, shall not be frustrated, and on the other, to provide for the orderly settlement of all matters in dispute, to ensure the observance of the "inherent limitations on the exercise of the judicial function" of the Court, and to "maintain its judicial character.*"[7]

Although both international and domestic courts, as well as arbitral tribunals in commercial and investment cases, invoke inherent powers, the concept itself remains somewhat unclear. It is not well-defined what this concept actually entails and when an adjudicator has the right to invoke inherent powers.

This article, therefore, aims to define inherent powers and distinguish them from the explicit powers. It also explores the characteristics of inherent powers in international commercial arbitration. Finally, potential issues concerning the exercise of inherent powers are discussed.

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I. INHERENT v. EXPLICIT POWERS IN INTERNATIONAL COMMERCIAL ARBITRATION

There is no debate that the arbitrators enjoy inherent powers.[8] However, this clarity was not as prevalent just a few years ago: *"ten or fifteen years ago, arbitral tribunals were apt to enquire of a party asking them to take a procedural step or issue an interlocutory order: "Show us where in the Rules it says that we can do that. "Whereas now, tribunals are more likely to say: "Show us where in the Rules it says that we can't.*"[9]

Although different sources agree that arbitrators possess inherent powers, there is no clear answer as to the definition of those powers. The International Law Association noted in its Report on inherent powers in international commercial arbitration that *"the definition of and conceptual basis for inherent and implied powers, […] has not been carefully developed in the context of interna-*

[4] International Law Association, Committee on International Commercial Arbitration, Report for the Biennial Conference in Washington D.C. (2014) 2 <https://www.ila-hq.org/en/documents/conference-report-washington-dc-2010> accessed 26 May 2023.

[5] Robert J. Pushaw, 'The Inherent Powers of Federal Courts and the Structural Constitution' (2001) 86 Iowa L. Rew. 735, 805.

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

[7] *Nuclear Tests (Australia v. France)* (Judgment) [1974] ICJ Reports 1974 253, para 23.

[8] ILA Report (n 52) 2.

[9] Margaret L. Moses, 'Inherent Powers of Arbitrators to Deal with Ethical Issues' (2015) 8 Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2014 90.

tional 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 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."[10] Despite these challenges, when determining the sources of inherent powers, it is essential to first consider what those powers entail. Even if providing an exhaustive list of inherent powers is impossible, it should be possible to establish main principles defining inherent powers.

In 2010, the Appeals Chamber of the Special Tribunal for Lebanon explained that inherent is *"the power […] to determine incidental legal issues which arise as a direct consequence of the procedures of which the Tribunal is seized by reason of the matter falling under its primary jurisdiction. This inherent jurisdiction arises as from the moment the matter over which the Tribunal has primary jurisdiction is brought before an organ of the Tribunal. […] The inherent jurisdiction is thus ancillary or incidental to the primary jurisdiction and is rendered necessary to ensure a good and fair administration of justice. […]."*[11]

In other words, from the very commencement of the proceedings, adjudicators should possess special powers to address incidental legal issues arising during the proceedings, to ensure a smooth examination of the case.

The powers that international arbitrators possess can be either explicit, i.e., elaborated in the arbitration agreement, *lex arbitri*, institutional laws, or in the soft-law sources, or implicit, i.e., not explicitly established in the available sources but are implied from them.

The first issue that arises is to determine in which of these categories inherent powers fall, if at all. The situations faced by arbitrators can vary greatly. There may be cases where arbitration agreement is highly detailed, and the provisions of *lex arbitri* are very comprehensive. On the other hand, there might be situations where neither the arbitration agreement, nor *lex arbitri* and institutional rules provide for clarity.[12]

Therefore, the legal notion of inherent powers, whether in international dispute settlement in general or international commercial arbitration in particular, remains disputed: *"drafters have refrained from using the specific term "inherent powers" in treaties, agreements, and rules. This is unsurprising given they have traditionally been understood as non-enumerated powers, but it remains the case that there is no authoritative definition of the concept – not even in soft law instruments or in secondary sources of international law."*[13]

From a linguistic perspective, the term 'inherent' means something 'existing as a natural or basic part of something'.[14] This definition aligns with the one provided above by the Special Tribunal – inherent power is a power that necessarily exists due to the very nature of someone or something. For instance, the Cambridge Dictionary gives an example that *"there are dangers/risks inherent in almost every sport."* Indeed, every sport has inherent dangers or risks that cannot be avoided such as the risk of knee injury when playing basketball. It is simply a characteristic of the sports activities, whether one likes it or not, and the question is whether a person agrees to accept this risk. The same definition can be attributed to inherent powers in dispute settlement – the adjudicator has certain powers because of the very nature

[10] ILA Report (n 52) 3.

[11] Martins Paparinskis, 'Inherent Powers of ICSID Tribunals: Broad and Rightly So' in Ian A. Laird and Todd J. Weiller (eds), *Investment Treaty Arbitration and International Law* (Vol. 5, Juris Publishing 2011) 3.

[12] ILA Report (n 52) 14.

[13] Andrea Bjorklund, Jonathan Brosseau, 'Sources of Inherent Powers in International Adjudication' (2018) 6:2 Eur. Int'l Arb. Rev. 1, 5.

[14] Cambridge Dictionary <https://dictionary.cambridge.org/dictionary/english/inherent> accessed 25 May 2023.

of the adjudicatory process. It does not matter if those powers are set out explicitly or not – they nevertheless exist, otherwise, the process cannot be considered adjudicatory.

Indeed, it is possible that powers considered as inherent are actually clearly established by the laws. For example, contemporary arbitration theory would likely unanimously agree that arbitrators have the right to rule on their jurisdiction based on *competence-competence*. This power should be inherent to any international adjudicator. Brown, therefore, explains that "*[p]erhaps the most well-known example of an inherent power is the competence de la competence, or the power of international courts to determine the extent of their own jurisdiction. International tribunals have from the earliest days of modern international arbitration found that they have this power.*"[15] It is commonly agreed that the power to determine tribunal's own jurisdiction is inherent.[16] However, it is not disputed that tribunal's right to rule on its own jurisdiction in most of the jurisdictions became explicit either via legal regulation or the case-law. For example, Article 16 of the UNCITRAL Model Law enshrines this power explicitly.[17]

Therefore, how should those rights that historically were considered inherent be treated if they are explicitly included in the laws? This question is not merely hypothetical but, in the author's view, goes to the very core of the concept of inherent powers. For example, Moses claims that inherent power is *"a power not expressly provided in the arbitration agreement or in the laws or rules that govern the arbitration […]."*[18] Put differently, in her opinion, only those powers that are not established by laws (or arbitration agreement) would fall under the realm of inherent powers. This approach was supported by the Iran-U.S. Claims Tribunal which explained that inherent are 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."*[19] Meanwhile Paparinskis is of a different opinion. He claims that *"[i]n terms of taxonomy, the explicit legal basis does not make the powers exercised less inherent: as was suggest above, the inherent/non-inherent dichotomy relates to the nature of the powers, while the implied/explicit dichotomy goes to the very different issue of the manner of their exposition in the particular instrument."*[20] Thus, in Paparinskis' view, the explicit nature of a power is not a determining factor when considering if that power is inherent or not. Consequently, under one approach a power to rule on the tribunal's jurisdiction would be considered inherent (Paparinskis view), but under another approach, it would not (Moses' approach), with all the consequences that follow.

Competence-competence is just one example of powers that are inherent by nature but have become explicit through the lawmaker's decision. But there are many more, such as the power to order interim protection. Many national laws provide for arbitrators' authority to grant provisional measures.[21] However, in the United

[15] Chester Brown, 'The Inherent Powers of International Courts and Tribunals' (2006) 76(1) Br Y Int L 195, 212.

[16] *See*, for instance, Nadja Erk, *Parallel Proceedings in International Arbitration: A Comparative European Perspective* (Kluwer Law International 2014) 26.

[17] UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006.

[18] Moses (n 57) 90.

Notably, Moses is not the only academic to support this approach. For example, Obamuroh stated recently that inherent powers are those *"not granted by constitutive instruments but rather are necessary for an adjudicatory body to fulfil its functions. Therefore, inherent powers refer to those powers over and beyond those enumerated in the constitution or enabling statutes that can be reasonably implied from express grants."* (Tolu O. Obamuroh, 'Jurisdiction and admissibility: a case study' (2020) 36(3) Arb. Intl. 373, 381).

[19] *Islamic Republic of Iran v. United States of America* [2011] IUSCT, Cases Nos A3, A8, A9, A14 and B61, Decision No DEC 134-A3/A8/A9/A14/B61-FT, para 59.

[20] Paparinskis (n 59) 10.

[21] *See* Article 17 of the UNCITRAL Model Law. As previously noted, 86 states implemented this Law into their national legal systems.

States, the Federal Arbitration Act is silent on the issue. Nevertheless, the Supreme Judicial Court of Massachusetts ruled back in 1992 that arbitrators have inherent authority to order interim measures.[22]

This difference in interpretation may lead to undesirable results that can have an impact on annulment or enforcement stages. Therefore, in the author's opinion, the better view is to define inherent powers by their very nature as suggested by Paparinskis and not by their explicit or implicit form. Indeed, one can expect that usually the tribunal will have to rely on its inherent powers when there is no clear statutory or contractual basis for that, for example, when the tribunal has to decide if to hold a hearing in a location indicated in the arbitration agreement even if this location for some reason became inaccessible.[23] However, the fact that some historically inherent-treated powers are now established in the laws, does not make them not-inherent. If a national lawmaker suddenly decided to delete the provision on *competence-competence* from the national arbitration law, it would not mean that arbitrators cannot rule on their jurisdiction (unless the lawmaker would prohibit that explicitly). They would simply lack a statutory basis and would need to rely on their inherent powers once again.

However, if a power that by its nature is inherent is made explicit either in the arbitration agreement, institutional rules or *lex arbitri*, it means that the arbitrators do not have to look for an additional explanation as to why the tribunal has a particular power. In other words, when the tribunal is forced to rely on an inherent power that is not made explicit, the tribunal has to substantiate why it should be considered to have this power in general and why it should be allowed to use it in the particular situation. If this power is made explicit, there is no need for any additional explanations other than referring to the source.

In practice, the real issue with inherent powers lies with those powers that are not explicit or implicit. The International Law Association, when describing the problems of inherent powers, noted that *"[a]ctions 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 fundamentally affect the outcome of the dispute."*[24] Indeed, if a power (either inherent or not) is regulated in the sources applicable to arbitration, its subject-matter and limits are usually clear. With inherent powers that have no statutory or contractual basis it is different – the arbitrators themselves have to decide what are the limits of a particular inherent power and to be careful in applying that power. To paraphrase Reed, inherent powers also impose inherent obligations.[25]

To summarize the above, inherent powers should be determined by their nature, not by their explicit or implicit manner. However, if an inherent power is made explicit (or can be clearly implied), it is then implemented with the same characteristics as any other explicit power. In other words, it loses the natural characteristics of inherent powers that are not expressed in statutes or contracts. For this reason, when discussing the inherent powers of the arbitrators, the primary concern should be only those powers that are not explicitly enumerated.

II. CHARACTERISTICS OF INHERENT POWERS IN INTERNATIONAL COMMERCIAL ARBITRATION

As mentioned earlier, the most complicated aspect in discussing inherent powers is identifying which powers fall under this list. It is essential to differentiate between powers that are truly inherent and those that are inherent by nature but have been explicitly stated. As long as arbitrators

[22] *Charles Construction Co. v. Derderian* [1992] 586 N.E.2d 992 Mass.
[23] ILA Report (n 52) 18.
[24] ibid. 3.
[25] Lucy Reed, 'Ab(use) of due process: sword vs shield' (2017) 33(3) Arb. Intl. 361, 367.

can rely on the explicit powers (even if they are inherent by nature), the tribunal should not face the issues that usually are related to those powers that have no clear statutory or contractual basis. The previous category is, therefore, the most important: for the arbitrators to invoke truly inherent powers, they have to demonstrate the existence and the source of such a power.

Rather than attempting to create an exhaustive list of inherent powers, it is more important to determine the characteristics of those powers. Meanwhile, if a particular power is included in any source applicable to the arbitration, for the practical purposes, arbitrators should have no reason to consider that power as inherent but rather as an explicitly granted power with the limits provided by the said applicable source.

First, it is historically agreed that courts and tribunals should have inherent powers mainly in relation to the sound administration of justice.[26] According to the Report of the International Law Association, national courts in common law countries have relied on the doctrine of inherent powers for various purposes. These include establishing court rules and practice directions, preventing the abuse of court processes, remanding cases involving pendent claims, staying proceedings, rectifying any injustices resulting from previous orders, and allowing the admission of evidence.[27] Although these circumstances are different, they have one thing in common – they are all of a procedural nature.

Indeed, only the powers that are *"necessary to safeguard a tribunal's jurisdiction and the integrity of its proceedings"*[28] should fall in the category of inherent powers. In this respect the International Law Association determined three categories of powers that might potentially overlap: (i) implied powers, i.e., powers implied from specific textual provisions; (ii) discretionary powers, i.e., powers over procedure, which are related conceptually to both implied and inherent authority; and (iii) inherent powers, i.e., powers necessary to preserve jurisdiction, maintain the integrity of proceedings, and render an enforceable award.[29]

This categorization is helpful. Nevertheless, it does not solve the issue. Castagna claims that in the case of inherent and implied powers, *"there may be uncertainty over the meaning and existence of such powers."*[30] He adds that *"while inherent powers are a characteristic and essential element of the tribunal, implied powers instead are simply powers bestowed in an implied way. It may therefore be concluded that powers may be implied or explicit, and in both cases be inherent, too."*[31] In Paparinskis opinion that was discussed above, the concept of inherent powers relates to the nature of the powers and the notion of implicit powers explains the manner of their exposition in the particular instrument. Inherent powers may be, he says, either implied or expressly set out.[32] Therefore, the differentiation of the powers in the way suggested by the International Law Association should not be taken for granted – both implied powers and discretionary powers may be inherent at the same time. However, if the tribunal can find a source for the power implied in the documents governing the arbitration, the tribunal would find itself in a similar situation as the one with explicit powers – the tribunal would not need to test if the power it wants to rely on exists at all but rather to explain that this power exists implicitly in the applicable sources.

[26] *Nuclear Tests* (n 55) para 23.
[27] ILA Report (n 52) 5.
[28] ibid. 17.
[29] ibid. 14.
[30] Stefano Castagna, 'Inherent and Implied Powers of International Arbitral Tribunals: Characteristics and Limits' (2016) 82 Int'l J. of Arb. Med. & Disp. Man. 409.
[31] ibid 412.
[32] Paparinskis (n 59) 4.

Second, should the tribunal be faced with a situation where it has to consider invoking inherent powers, the question then is how and when the tribunal should do that. As it will be explained in the below section, the how and when question is of paramount importance when discussing the issues of the annulment and recognition of the award at the later stage.

To begin with the 'when' part of the question, the answer is rather simple if one agrees that the inherent powers are available only (or at least primarily) in situations where it is necessary to preserve the fair administration of dispute and tribunal's jurisdiction, i.e. when the tribunal has to take a procedural decision. If that is the case, the tribunal may need to consider relying on the inherent powers where: (i) there is a risk that the proceedings might be jeopardized; (ii) there is no clarity as to how to deal with this situation in either the arbitration agreement, institutional rules or *lex arbitri* as well as this clarity is not implied in one of the sources. Put differently, even if the proceedings are jeopardized for some reason, the arbitrators should only consider relying on the inherent powers if there is no explicit or at least implicit power to invoke.

This is so because of the nature of inherent powers. Indeed, *"recourse to inherent powers is necessary for the tribunal to ensure the effectiveness of its judicial function*".[33] However, the very idea of inherent powers is that those are the powers that are based on the principle and not on the black letter law. The debate around the concept and limits of the inherent powers demonstrate that it might be very difficult and even impossible to agree on one, unilateral list of inherent powers. Even if this happened, one should answer how the tribunal should act in a novel situation that does not fall in the list of inherent powers.

In terms of the procedure for invoking inherent powers, the recommendations provided by the International Law Association in its Report appear to be relevant and well-prepared. According to the Association's proposal, if faced with a situation where there may be a need to rely on the inherent powers, the arbitrators should nevertheless start with assessing if there is any authority in the arbitration agreement, institutional rules or *lex arbitri*.[34] In fact, even where a certain power is considered to be inherent, if it is provided in any source applicable to arbitration, the tribunal has to rely on that source and use that explicit power instead. The same goes with the implicit powers which the Association excludes from explicit or inherent powers – if there is an authority, even if implicit, there is no need to rely on the inherent authority. Also, the Association is right when stating that *"[a]rbitrators may determine that the authority 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 authority."*[35] However, in case of multiple bases, the tribunal should nevertheless rely on that base that provides for an explicit or at least implicit authority rather than inherent power.

Most importantly – since the arbitrators' general power to resolve the dispute put before them arises out of the agreement between the parties, before acting on their inherent powers *"arbitrators should elicit the parties' views and assistance to fashion the most appropriate solution in the circumstance before them."*[36] Certainly, granting the parties the right to provide their position is of a paramount importance. For example, Article 22(4) of the ICC Arbitration Rules foresees that in all cases the tribunal shall act fairly and impartially and ensure that each party has a reasonable opportunity to present

[33] Toby Thomas Landau and Romesh Weeramantry, 'A Pause for Thought' in Albert Jan van den Berg (ed), *International Arbitration: The Coming of a New Age?* (Kluwer Law International 2013) 518.

[34] ILA Report (n 52) 21.

[35] ILA Report (n 52) 21.

[36] ibid. 21.

its case.[37] The fact that the tribunal intends to rely on its inherent powers, cannot eliminate this principle. Besides, assuring that the parties provide their positions is also important in legitimizing the use of inherent powers in a particular situation.

On the same token, as per International Law Association's recommendations, *"[a]rbitrators should explain their reasoning for exercising implied, discretionary, or inherent powers, invoking such authority in a deliberate and thoughtful manner that will assist the award in withstanding review at enforcement or set aside proceedings."* [38] One of the main issues with the inherent powers is to determine their limits – if the inherent power is not made explicit by the parties or the lawmaker, the existence of a particular inherent power and its limits have to be determined by the tribunal itself taking into account the agreement of the parties, institutional rules and *lex arbitri*. Therefore, it is important for the arbitrators to explain in detail why they consider having the inherent power they intend to invoke, what are the limits of this power and why it is being used in a particular situation. Otherwise, the tribunal risks that the award made will be annulled or refused enforcement by national courts.

III. POTENTIAL ISSUES WHEN EXERCISING INHERENT POWERS DURING THE PROCEEDINGS AND POTENTIAL OUTCOMES THEREAFTER

Since inherent powers are, to some extent, in the grey area of international commercial arbitration, the issue that may arise when invoking those powers, is the excess of authority: *"[a] tribunal can have no inherent authority to issue an award deciding a matter that goes "beyond the scope" of the submission to arbitration. Likewise, an arbitral tribunal has no inherent authority to apply arbitral procedures that are "not in accordance with the agreement of the parties"."*[39]

After the arbitral tribunal makes the award, the parties, in general, have two options: (i) to request the award to be set aside at the seat of arbitration; (ii) if recognition of the award is sought in other jurisdiction, to request the application on recognition to be dismissed by the courts where the enforcement is sought.

Article 34(2)(a)(iv) of the UNCITRAL Model Law[40] foresees that an arbitral award may be set aside if the party proves that *"[…] the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this law […]"*. A very similar provision is provided in Article V(1)(d) of the New York Convention: recognition of the award may be refused if *"[…] the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place […]"*. [41] Born notes that *"[a] tribunal's failure to conduct the arbitral proceedings in accordance with the parties' arbitration agreement (or the procedural rules it incorporates) can*

[37] ICC Rules of Arbitration entered into force on 1 January 2021, Art. 22(4).

[38] ILA Report (n 52) 21.

[39] Robert Wachter, 'Chapter II: The Arbitrator and the Arbitration Procedure: On the Inherent Powers of Arbitral Tribunals in International Commercial Arbitration' (2012) Austrian Yearbook of Int'l Arb. 65, 77.

[40] The grounds for setting aside the award are governed by national arbitration laws and, therefore, may differ. For the purposes of this thesis, the provisions of UNCITRAL Model Law are discussed since the Model Law is implemented in more than 80 countries. Besides, although the wording may differ, the grounds established in the Model Law normally are also listed in those national laws that do not implement the Model Law.

In addition, Article 34(2)(a)(iii) of the Model Law provides for another ground to annul the award – when the award deals with matters beyond the scope of the submission to arbitration. From the first glance, this ground may also appear to be relevant in the context of inherent powers. However, it is primarily related to the issues of *ultra petita*, i.e., the substantial issues submitted before the tribunal. Meanwhile, inherent powers are those that are necessary to ensure the proper functioning of arbitrators' adjudicatory function and, therefore, procedural.

[41] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Art. V(1)(d).

provide grounds for annulling an award in most jurisdictions."[42]

The Commentary of the UNCITRAL Model Law starts the analysis of the above-quoted provision by emphasizing that the *"control over the fundamental aspects of the arbitration must ultimately rest with the disputants."*[43] In other words, the parties may set the ground rules for arbitrators to work with – if those rules are set, the arbitrators must comply with them. This is true even in case of inherent powers. For instance, if the parties chose a seat that prohibits arbitrators to rule on their own jurisdiction, arbitrators could not invoke either explicit or inherent power to rule on their jurisdiction because it would go against the applicable law chosen by the parties.

However, to the best of author's knowledge, there have been no cases where the national courts would annul the award or refuse to enforce it because the tribunal invoked the inherent powers contrary to the agreement of the parties. Indeed, Born explains that *"in practice, most arbitration agreements and institutional rules impose few specific procedural requirements, while granting the tribunal broad authority to conduct the proceedings. Thus, as a practical matter, it is unusual for an award to be annulled based upon the arbitrators' failure to comply with the agreed arbitral procedures. […] Departures from agreed arbitral procedures will often be countenanced unless they are both extreme and prejudicial."*[44]

On the same token, the Commentary of the UNCITRAL Model Law notes that most of the institutional rules provide for a wide margin of discretion in determining the procedure to be followed in arbitration. Therefore, *"situations where the procedural conduct of the arbitration is directly at odds with the agreement of the parties are relatively uncommon. To be sure, the exertion of the tribunal's powers to decide how the arbitration should be conducted must never result in violations of due process and of the disputants' right to present their case […]."*[45]

The latter direction is particularly important. As discussed above, when faced with a situation that calls for the invocation of inherent powers, arbitrators should first seek for the parties' opinion, if possible. If the parties are heard and have a chance to present their case on an equal basis, the tribunal's discretion to rule on the issues that are not explicitly or implicitly governed by the arbitration agreement, institutional rules or *lex arbitri* should be recognized. Otherwise, the proceedings may be stalemated. This wide discretion, usually granted to the tribunals either in the institutional rules or *lex arbitri*,[46] can only be overridden by the clear agreement of the parties – should the parties agreed on certain rules to be applied in the arbitration, arbitrators have to follow them unless they are in a contradiction with mandatory rules (as per Article 34(2)(a)(iv) of the Model Law). On the other hand, if the arbitrators would claim invoking their inherent powers without first hearing the parties, it could potentially lead to a challenge of the tribunal based on the lack of impartiality.

CONCLUSIONS

Arbitrators do possess inherent powers necessary to perform their functions. However, defining the scope or providing a comprehensive list of inherent powers has proven to be challenging. While it is widely agreed that inherent powers should ensure the integrity and efficiency of the proceedings, the specific powers vary depending on different factors. However, as a principle, arbitrators possess inherent powers, and this appears to be undisputed.

[42] Gary B. Born, *International Arbitration: Law and Practice* (Kluwer Law International 2012) 320.

[43] Ilias Bantekas, Pietro Ortolani, Shahla Ali, Manuel A. Gomez, Michael Polkinghorne, *UNCITRAL Model Law on International Commercial Arbitration: A Commentary* (CUP 2020) 883-884.

[44] Born (n 90) 321.

[45] Bantekas (n 90) 886.

[46] *See*, for instance, Article 19(2) of the UNCITRAL Model Law which grants a tribunal the right to conduct the arbitration in such manner as it considers appropriate.

Inherent powers can be explicit, implicit or truly inherent – the explicit or implicit designation of arbitrators' powers refers to how the powers are expressed rather than their nature. In other words, a power that is considered to be an inherent power, for instance, competence-competence, may become an explicit power if it is explicitly foreseen in *lex arbitri* or other applicable sources. In such cases arbitrators will be relying on the explicit or implicit powers rather than inherent powers although at the same time this power does not lose its inherent character.

Inherent powers as such only come into play in limited cases where there is no clear legal basis for arbitrators to make a decision. It follows that where it is possible to rely on explicit or implicit powers, priority should be given to avoid any confusion and dissatisfaction among the parties.