Arbitrator's Status as the Primary Source of Arbitral Tribunal's Inherent Powers

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This article examines whether the sui generis status of arbitrators – combining their roles as private service providers and quasi-judicial decision-makers – can serve as the primary source of inherent powers in international commercial arbitration. Drawing on Chester Brown's framework of four overlapping sources (general principles of law, implied powers, judicial identity, and functional justification), the author argues that the adjudicatory function embedded in the sui generis status provides a valid basis for arbitrators to claim inherent powers, much as judges derive such powers from their judicial office. However, the article concludes that this status cannot be the sole source, as the arbitration agreement – the cornerstone of commercial arbitration – and party autonomy also play a significant role in grounding and limiting those powers.

INTRODUCTION

The concept of inherent powers has long been debated in the context of international adjudication. National courts, particularly in common law traditions, have historically derived inherent powers from the royal prerogative to do justice, and over time these powers came to be regarded as essential attributes of judicial office. International courts and tribunals have similarly claimed inherent powers by claiming that the very existence of such a court as a judicial organ grants them inherent powers.

Yet the question of the source of inherent powers is still outstanding, particularly in international commercial arbitration. Unlike international courts established by treaty or national courts operating under constitutional mandates, arbitral tribunals owe their existence and authority to the agreement of private parties. Arbitrators are not judges and do not sit within a state's judicial hierarchy; yet they perform adjudicatory functions that culminate in awards carrying legal force comparable to court judgments. This dual character – private service provider and quasi-judicial decision-maker – has given rise to the widely accepted view that the arbitrator's status is *sui generis* – an approach that the author fully supports.

However, whether this hybrid status can independently ground the existence of inherent powers in international commercial arbitration has received little analysis. This article seeks to fill that gap. It examines whether the *sui generis* status of arbitrators can serve as the primary, or even the sole, source of their inherent powers in international commercial arbitration. Therefore, in the following sections, the author presents the sources for inherent powers and discusses whether the unique *sui generis* status of arbitrators can serve as the primary (or only) source for the existence of such powers.

This article is based on the author's LLM thesis 'Arbitrator's *sui generis* status as the main source of arbitrator's inherent powers' (supervisor prof. Gabrielle Kaufmann-Kohler) that was prepared as a part of the MIDS programme in 2023. It also closes the series of articles on arbitrator's status and inherent powers which the author presented in this journal in 2024 and 2025. Therefore, for a better understanding of the

author's views, it is suggested to analyse the two previous articles before starting with this one.

I. SOURCES OF INHERENT POWERS IN GENERAL

When discussing inherent powers of international tribunals established by international treaties, the starting point usually is the finding made by the International Court of Justice (ICJ) in the *Nuclear Tests* case where the Court explained that its jurisdiction derives from the mere existence of the Court as a judicial organ.[1] Brown notes that the latter part of the ICJ's finding *"does not sit comfortably with the idea of an 'inherent power', for if a power is 'inherent', then there is no need for any conferral."*[2] In his opinion, this lack of clarity *"reflects the uncertainty regarding the source of inherent powers of national courts."*[3]

Indeed, when the sources of inherent powers (either in arbitration or in general) are discussed, there is no agreement as to why and how those powers exist. Paparinskis is of an opinion that there is a multiplicity of partly overlapping legal rationales for the existence and exercise of inherent powers that lead to a variety of sources and authorities from which these powers may be drawn.[4] Despite this multiplicity, the most often quoted list of sources was provided by Brown – in his view, there are four possible but overlapping sources to explain the inherent powers in international adjudication. Those are: (i) the concept of general principles of law; (ii) the doctrine of implied powers; (iii) the identity of international courts as judicial bodies; (iv) functional justification.[5] These four categories are dealt with below to find out if any of them could serve as a source for inherent powers in international commercial arbitration.

First, with respect to *general principles of law*, Brown notes that some international courts as well as ICSID tribunals relied on general principles of law to invoke inherent powers. For example, a tribunal chaired by Pierre Lalive held that *"it is a principle generally accepted in matters of international judicial or arbitral dispute settlement that there is a power of the body seized to determine its own jurisdiction […]."*[6] Apparently, the tribunal found its power to rule on its own jurisdiction in the general principles of law. The same approach was also supported by Brower and Schill who wrote that the power of international courts and tribunals to act to preserve the integrity of proceedings is a general principle of law in the sense of Article 38(1) of the ICJ Statute, independent of whether such powers are conferred explicitly upon a court or tribunal.[7] The same approach was supported by other scholars.[8]

However, an idea that inherent powers are based on general principles of law seems dubious. On the one hand, the concept of general principles of law is too vague and often subject to debate. Therefore, it would not be acceptable to rely on the general principles of law in the context of inherent powers when they are also usually subject to debate. On the other hand, *"general principles of law are unlikely to provide a basis for all cases where international courts seek to exercise an inherent power […]."*[9] There-

[1] Nuclear Tests (Australia v. France) (Judgment) [1974] ICJ Rep 1974 253.
[2] Chester Brown, 'The Inherent Powers of International Courts and Tribunals' (2006) 76(1) Br Y Int L 195, 223.
[3] Brown (n 2) 223.
[4] 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) 6.
[5] Brown (n 2) 223.
[6] Victor Pey Casado and President Allende Foundation v. Republic of Chile (Decision on jurisdiction) ICSID Case No ARB/98/2 (8 May 2002).
[7] Charles N. Brower and Stephan W. Schill, 'Regulating Counsel Conduct before International Arbitral Tribunals' in Pieter H. F. Bekker, Rudolf Dolzer and Michael Waibel (eds), Making Transnational Law Work in the Global Economy: Essays in Honour of Detlev Vagts (CUP 2010) 499.
[8] Detlev Vagts, 'The International Legal Profession: A Need for More Governance?' (1996) 90 Am J Int Law 250, 253.

fore, although there may be situations (as the one presented above), where general principles of law could serve as a basis for the exercise of inherent powers, usually, this concept will be too broad and putting the arbitrators at risk in case the interpretation of the general principle went wrong.

Second, another source indicated by Brown is to rely on *implied powers* or to simply consider inherent powers as implied powers. Implied powers are different from inherent powers in the sense that although they are not explicit, they can still be implied from applicable laws and principles. However, Brown himself agrees that "*to regard inherent powers as identical with implied powers is not entirely accurate.*"[10] Indeed, it appears that international courts themselves do not consider inherent and implied powers to be identical as there is only one example recorded where this was the case.[11]

Furthermore, inherent and implied powers are different in that respect that the former concept relates to the nature of the powers and the latter explains the manner of their exposition in the particular instrument.[12] Put differently, if it was agreed that inherent powers are implied powers, the concept of inherent powers would be narrowed down by excluding those inherent powers that are neither explicit nor implicit. Therefore, Brown is right to conclude that *"while the basic methodology of implied powers might provide a solid basis for the exercise of inherent powers, it is not one that international courts often invoke.*"[13]

Third source discussed by Brown is to consider that inherent powers are derived from *the identity of courts as judicial bodies*. As a preliminary remark, there is no dispute that arbitral tribunals are not judicial bodies. Even if the jurisdictional theory is accepted without questioning, it does not make arbitration a court or judicial body. Therefore, and as discussed below, in the context of international commercial arbitration, this source cannot be upheld in full.

In general, this view is supported much more than the previous alternatives. For instance, Thirlway claims that *"[i]f states setting up an international body classify it as a court or tribunal, then there is no need for them to spell out in its constitutive document that it is under an obligation to hear both sides before deciding; by calling it a court they are already implicitly giving it that instruction.*"[14] However, Brown is not so optimistic. In his opinion, *"it is difficult to maintain that courts and tribunals, whether national or international, can exercise certain powers on the basis of their being called 'courts' or 'tribunals', simply because certain procedural powers, which are sought to be established as inherent powers, are the type of powers that courts usually have. To argue that a court has certain powers because it is called a 'court' is a circular argument"*.[15] Brown's position is certainly understandable, but accepting this view is not without its challenges. To remind, the notion of inherent powers originated in domestic common law courts when judges enjoyed discretion in exercising the royal prerogative to do justice. Over time, certain powers that had originated in the royal prerogative came to be seen as inherent characteristics of a 'court.'[16] In other words, judges had certain inherent powers because they were judges exer-

[9] Brown (n 2) 224.
[10] Brown (n 2) 226.
[11] Brown (n 2) 227.
[12] Paparinskis (n 4) 4.
[13] Brown (n 2) 227.
[14] Hugh Thirlway, 'Dilemma or Chimera? Admissibility of Illegally Obtained Evidence in International Adjudication' (1984) 78 AJIL 622, 626.
[15] Brown (n 2) 228.
[16] International Law Association, Committee on International Commercial Arbitration, Report for the Biennial Conference in Washington D.C. (2014) 4 <https://www.ila-hq.org/en/documents/conference-report-washington-dc-2010> accessed 26 May 2023.

cising justice on behalf of the crown. The very fact that someone is a judge granted that person inherent powers when exercising justice. In the contemporary times, when the states create judicial bodies, they have discretion to limit their powers in any way they wish. A good example of these limitations is the WTO Dispute Settlement Body which is not even called a court or tribunal because the states so preferred. Therefore, it is not the name of the body that matters but the idea and goals intended to achieve when creating an international body with judicial functions. For that body to perform the functions it was created to perform, it is essential to have certain inherent authority and it is natural – it is difficult to imagine a statute dealing with every possible procedural situation that may ever arise. It does not mean that other bodies that are not judicial may not have certain inherent powers in their field. Not at all. However, inherent powers of a judicial nature are attributable only to judicial tribunals. Therefore, in the author's opinion, the very fact that a body is identified as a judicial body, is an important characteristic to claim that this body possesses inherent powers.

The *fourth* category discussed by Brown is to consider that inherent powers are *necessary to ensure the fulfilment of the functions of international courts*. Under this approach, *"the source of the inherent powers of international courts is their need to ensure the fulfilment of their functions."*[17] This justification coincides with the approach of the ICJ in the *Nuclear Tests* case quoted above where the ICJ considered that the inherent powers are necessary to safeguard the Court's judicial functions. However, Brown goes even further and explains that inherent powers *"might be said to derive ultimately from the consent of states; for it is the states parties who, in framing from constitutive instruments of international courts, have conferred those functions upon them."*[18]

While this approach may appear appropriate, the author finds it somewhat ambiguous. On one hand, it is unclear how it differs from the viewpoint that the identity of a body as judicial authorizes it to perform inherent powers. It appears that these two approaches overlap, as the necessity for an international adjudication body to derive its inherent powers from the fulfilment of judicial functions requires it to be a judicial body in the first place. Therefore, attempting to separate these two perspectives seems somewhat evasive. On the other hand, a need to ensure the fulfilment of judicial functions is not a source but a reason for the international adjudicators to possess inherent powers. A reason cannot be the source – it needs additional justification to exist. Consequently, while the necessity to ensure the fulfilment of judicial functions provides a valid and convincing explanation within the concept of inherent powers, it cannot solely serve as a source for these inherent powers. Besides, as Brown himself notes, this approach raises the questions regarding the scope and the extent of inherent powers.[19]

To summarize, all these four categories of potential sources for the inherent powers have their own advantages and disadvantages. Therefore, one may agree with Paparinskis who believes that *"the multiplicity of partly overlapping legal rationales for the existence and exercise (of particular) inherent powers leads to a variety of sources and authorities from which these powers may be drawn and a variety of ways how they can be accommodated in the interpretative process."*[20]

From the perspective of international commercial arbitration, it becomes even more difficult to define what is the source of arbitrators' inherent powers. Indeed, arbitral tribunals are not courts and they do not perform judicial functions *stricto sensu*. General principles of law are also not a panacea since the interpretation

[17] Brown (n 2) 228.
[18] Brown (n 2) 229.
[19] Brown (n 2) 229.
[20] Paparinskis (n 4) 6.

of these principles may differ from jurisdiction to jurisdiction and arbitral tribunals would be too dependent on the law of the seat and its interpretation. This is where the arbitrator's status may come into play.

Notably, with respect to international commercial arbitration, the issue of the source of inherent powers may be resolved via the applicable laws. For example, Article 44 of the ICSID Convention provides for the tribunal's right to decide any question of procedure that is not covered by the Convention or the Arbitration Rules or any other rules agreed by the parties.[21] Paparinskis claims that this provision puts the exercise of inherent powers by ICSID tribunals *"on safe legal grounds by the explicit language in the constitutive instrument."*[22] While the ICSID Convention applies to investment arbitration, rules governing commercial arbitration procedures sometimes provide for a similar provision. For instance, Article 17(1) of the UNCITRAL Arbitration Rules provides for the tribunal's discretion to conduct the arbitration in such manner as it considers appropriate provided that the parties are treated equally and are given an opportunity to present its case.[23] Similar rules are also provided in Article 22 of the ICC Arbitration Rules and Article 23 of the SCC Rules. At the same time, Article 21 of the Swedish Arbitration Act obliges arbitrators to act in accordance with the decisions of the parties, unless they are impeded from doing so.[24]

Obviously, a provision in the ICSID Convention is much broader than that found in the institutional rules applicable to commercial arbitration. No surprise that in ICSID cases the tribunals held that Article 44 is a *"mere expression of the inherent power of any tribunal to resolve procedural questions in the event of a lacunae."*[25] However, it is dubious if a provision in the applicable statutes empowers arbitrators to rely on their inherent powers. In the ICSID context, Paparinskis states that *"[i]n terms of taxonomy, the explicit legal basis does not make the powers exercised less inherent […] The application of inherent powers in ICSID arbitration may be in fact less controversial than in any other adjudicatory context."*[26] Indeed, the very fact that the ICSID Convention provides for a legal ground to exercise inherent powers, is important but not a determining factor – even if there was no such rule in the ICSID Convention, the arbitrators would nevertheless have inherent powers although their exercise may be more complicated without a clear legal ground. Therefore, where the applicable law provides for arbitrators' right to invoke inherent powers, it only confirms what already exists. In turn, the statutory provisions should not be considered as a basis for inherent powers but rather as a confirmation that those powers exist.

II. INHERENT POWERS AND ARBITRATOR'S *SUI GENERIS* STATUS: A POTENTIAL CORRELATION?

Potential sources discussed by academics and indicated by the adjudicators themselves make it clear that for someone to be able to claim inherent powers, that someone must possess certain characteristics, i.e., it has to perform adjudicatory functions. It should not be significant whether the person performing those functions is referred to as a 'court' or 'tribunal'. What matter is their authorization to resolve disputes in legal and adjudicative manner. For instance, if a referee in a basketball game takes a decision that is not clearly

[21] Convention on the Settlement of Investment Disputes between States and Nationals of Other States (adopted 18 March 1965, entered into force 14 October 1966) UNTS 575.

[22] Paparinskis (n 4) 9.

[23] UNCITRAL Arbitration Rules 2021.

[24] The Swedish Arbitration Act 1999.

[25] Abaclat and Others v. Argentine Republic (Decision on Jurisdiction) ICSID Case No ARB/07/5 (4 August 2011).

[26] Paparinskis (n 4) 10.

described in the rules, it does not mean that this referee exercises inherent powers in the sense of judicial inherent powers. However, it also does not imply that the referee is not exercising inherent powers at all – other bodies or individuals may also possess powers that are called inherent. Yet, from an adjudicatory standpoint, the emphasis has to be put on the above characteristics – whether the person or body is adjudicating a dispute on the basis of the law.

Here international commercial arbitration comes into play. Unlike international courts and tribunals, which are typically established by an international treaty or national courts that act in the realm of national constitutions, arbitral tribunals in international commercial arbitration derive the power to resolve a dispute from the agreement of the parties.

As the author has already discussed in his article a few years ago,[27] arbitrators are service providers. On the other hand, the service provided by the arbitrators and its end result mirrors (at least to some extent) the functions performed by national and international judges. It is not, therefore, surprising that *"it appears that the status of the arbitrator and the nature of his mandate are more of a "hybrid" nature, half jurisdictional and half contractual. This approach seems to be the only acceptable one since both theories are relevant and inseparable. […] the only valid way to define the arbitrator's status and the nature of his mandate is to take into account both the jurisdictional and the contractual theory."*[28]

Therefore, the question that this thesis asks is if this "hybrid" or *sui generis* status of arbitrators entitles the tribunal to invoke the inherent powers. Put differently, is the status of arbitrators the source of arbitrators' inherent powers.

First, Brown found the identity of a court as a potential source for inherent powers. Another approach he identified was a necessity to ensure the fulfilment of judicial functions. These two approaches were considered primarily from the perspective of international adjudication involving states. Nevertheless, he explained that *"[a]n 'inherent power' might thus be said to be one that derives from an office, position, or status; an inherent power of a court might, then, derive 'from its nature as a court of law'."*[29]

International commercial arbitral tribunal is not a court of law. However, as the International Law Commission argues in its Report, *"[w]hile international commercial arbitration is a service-orientated process that seeks to satisfy the party-consumers, it [is] also a legal process that results in an internationally enforceable award and should provide a just and fair result."*[30] Although the International Law Commission does not name it explicitly, it is clear that the Commission treats arbitrators' nature as *sui generis*.

Considering the *sui generis* status of arbitrators, which involves the adjudicatory function, it is possible to argue that the source of arbitrators' inherent powers lies in this unique status. While international or national judges derive their inherent powers in the identity of the judicial body and/or the functions they perform, the arbitrators must find additional justification to argue that they should be treated similarly. The *sui generis* status does exactly that by combining the private and public functions of commercial arbitrators.

In other words, the scheme is the following: (i) judges possess inherent powers due to their status as judges (first explanation) or the function they perform (second explanation); (ii) arbitrators, although not judges, provide adjudicatory services in a legal process that result in the award having the same or similar legal value as the court judgement; (iii) therefore,

[27] Tadas Varapnickas, 'Issues of Arbitrator's Legal Status: Who is the Arbitrator?' (2024) X Arbitražas: teorija ir praktika, 34-43.

[28] Nadia Smahi, 'The Arbitrator's Liability and Immunity Under Swiss Rules – Part I' (2016) 34(4) ASA Bulletin, 876, 882.

[29] Brown (n 2) 205.

[30] International Law Association (n 16) 18.

arbitrators should also possess inherent powers as judges do.

Although Moses does not name it, it appears she agrees with this position: *"the fact that arbitrators have the duty to carry out a fair and impartial arbitral process, resulting in an award that is not tainted in any way and not offensive to public policy means that they must have the power to prevent conduct that would endanger the integrity of the process or the enforceability of the award. Although various commentators have noted different possible sources of an arbitrator's inherent powers, in effect, the most logical and necessary source is simply that an arbitrator must have adequate power to properly carry out her adjudicatory mandate."*[31]

Mourre also explains that, for example, French case-law *"consistently held that the power to issue injunctions and order penalties in order to ensure their enforcement is part of the jurisdictional power of arbitral tribunals."*[32] He adds that although most jurisdictions are silent on the issue, two theories can be used: *"that of the inherent jurisdictional powers of the arbitral tribunal and that of the parties' implicit or explicit consent."*[33] In other words, where there is no consent of the parties, the tribunal could rely on its inherent jurisdiction to issue injunctions because of the jurisdictional power of the tribunal.

However, in its Report the International Law Commission noted that the powers of arbitrators differ: *"[t]he 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" – how can they be said to vary based on the peculiarities of the case?"*[34] Therefore, *"[o]ne 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."*[35]

Certainly, it would be over simplistic to assert that all arbitral tribunals possess the same inherent powers regardless of the context. At the same time, there must be a justification for arbitrators' inherent powers, despite the jurisdiction they perform their duties in. For example, it has been previously discussed that the right to rule on its own jurisdiction is an inherent power explicitly recognized by most, if not all, lawmakers worldwide. But what if a country A does not explicitly address this right? In such case, the tribunal could claim that there is an inherent instead of explicit power to rule on its own jurisdiction. However, if the same lawmaker in country A prohibits arbitrators from ruling on their own jurisdiction, or if the parties explicitly agree that arbitrators do not possess this right, those arbitrators would be bound to follow the instructions of the parties as well as the mandatory rules of the seat. If it was stated that arbitrators derive their inherent powers from, for instance, general principles of law, the arbitrators should nevertheless possess a right to rule on their own jurisdiction – general principles of law are principles existing among the majority of nations and, therefore, they should not be limited. However, if it was agreed that the *sui generis* status of arbitrators is the source for arbitrators' inherent powers, the case would be solved easier – being both service providers and quasi-adjudicators, arbitrators are obliged to follow the instructions of the parties (unless

[31] 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, 96.

[32] Alexis Mourre, 'Chapter 2. Judicial Penalties and Specific Performance in International Arbitration' in Filip J. M. De Ly and Lauren Lévy (eds), Interest, Auxiliary and Alternative Remedies in International Arbitration, Dossiers of the ICC Institute of World Business Law (Vol. 5, Kluwer Law International 2008) 57.

[33] Mourre (n 32) 57.

[34] International Law Association (n 16) 14.

[35] International Law Association (n 16) 14.

they are clearly unlawful) and to respect the laws of the seat whether they like it or not.

In addition, despite variations in principles and procedures across different jurisdictions, the essence of arbitration lies in the arbitrators' responsibility to resolve the dispute between the parties. Therefore, despite any potential differences, arbitrator's *sui generis* status is not dependent on the particular jurisdiction, it is rather universal despite potential differences in the line of argumentation. Consequently, any arbitrator in any jurisdiction should be entitled to turn to the *sui generis* status to explain why it is possible that an arbitrator possesses a power that is not explicitly or implicitly indicated in the applicable laws. It is so exactly because the arbitrators are requested to provide an adjudicatory service that is equal to the functions performed by the state judge. If the judge may rely on functional justification and/or the identity of the tribunal as a 'court' so should be able the arbitrators.

The issue when relying on the *sui generis* status is, however, twofold. On one hand, although the *sui generis* or 'hybrid' theory dominates in the contemporary theory of arbitration, it is not unanimous. Therefore, it is possible that some of the players involved in the arbitration (parties, arbitrators or the courts) would consider arbitrator's status to be different. In that case, there is a risk that either the arbitrators would not agree to invoke their inherent powers, or the parties and courts would not support this use. Therefore, in more difficult situations the tribunal, likely, should explain in detail that it is entitled to inherent powers because of the adjudicatory function arbitrators possess. On the other hand, there is no unanimous agreement on the source of the inherent powers in general. The above section confirms that those approaches, although they overlap, they differ. Therefore, while the status theory may appear as a strong indication of the arbitrators' inherent powers, other approaches should not be easily dismissed. Indeed, there may be situations where arbitrators should better turn to other justifications for their inherent powers instead of relying only on their *sui generis* status. This is particularly so in less developed jurisdictions or jurisdictions that go clearly against the *sui generis* theory. Here again Brown's conclusion, although in a bit different context, is important: "*[o]nce the states parties to the dispute have consented to the creation of the international court and the referral of the dispute to that body, it is then up to that body to decide how it is to fulfil its functions.*"[36]

Nevertheless, the above discussion skips one key detail – the arbitration agreement. It is often discussed that it is the arbitration agreement that gives arbitrators their authority and sets the limits: "*[i]n commercial arbitration, the arbitration agreement is the only source from which the arbitrators may derive their jurisdiction.*"[37] In the context of inherent powers, Wachter also claims that the sole (or at least main) source of arbitrators' authority is the arbitration agreement and that the idea of the necessity to perform adjudicatory functions is misguided.[38]

Certainly, the importance of the arbitration agreement cannot be denied. After all, it is the cornerstone of any commercial arbitration proceedings.[39] Arbitration agreement gives arbitrators the authority to decide the dispute brought before them. It may be very broad and contain no directions to the arbitrators, but it may also be very detailed with very specific instructions. Considering these differences, does it mean that arbitrators would have (almost) unlimited powers in the first scenario while in the second scenario they could perform only the

[36] Brown (n 2) 208-209.

[37] Daniel Girsberger and Nathalie Voser, International Arbitration in Switzerland (2nd edn, Schulthess 2012) 76.

[38] 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, 78.

[39] Katharina Plavec, 'The Law Applicable to the Interpretation of Arbitration Agreements Revisited' (2020) 4 University of Vienna Law Review 82, 84.

tasks listed in the arbitration agreement? While this may be the case, it is a better view to see the arbitration agreement as providing arbitrators with the jurisdiction and power to resolve the dispute brought to them by the parties. In that respect arbitration agreement is the source for any power in arbitration, either explicit, implicit or inherent – without the arbitration agreement none of these powers would exist since there would be no arbitration in the first place. In turn, arbitration agreement creates the ground for a private individual appointed via the agreed method to enter into *sui generis* arbitrator's contract with the parties. Put differently, without the arbitration agreement an individual would not have the *sui generis* arbitrator's status and there could be no discussion whether this status serves as a ground for arbitrators' inherent powers. However, the arbitration agreement cannot be the only explanation for those powers to exist. Otherwise, national and international courts and tribunals would not possess any inherent powers because they do not act on the basis of arbitration agreements.

Consequently, as a foundation of arbitration, the arbitration agreement provides arbitrators with the jurisdiction and power to resolve a dispute in general. However, the existence of inherent powers does not solely arise from the arbitration agreement but also from the adjudicatory functions that the arbitration agreement and arbitrator's contract entitle arbitrators to perform. This is important because arbitrators' inherent powers should be those that are necessary to ensure the effectiveness of the proceedings. There is no final list of those powers, and this is one of the key issues in this regard. However, based on arbitration agreement the parties are free to limit any power of the arbitrators, including inherent powers. For instance, it has been discussed that arbitrators have the inherent power to remove counsel if it is necessary *"to preserve the integrity of [the] proceedings."*[40] Yet, if the parties agreed that arbitrators do not possess the power to exclude counsel, the arbitral tribunal would not have this right. In other words, although the arbitrators derive their inherent powers from their *sui generis* status and adjudicatory function arising thereof, the parties nevertheless keep the autonomy of arbitration and remain the masters of the proceedings.

On the other hand, what arbitrators should do if, for example, the parties agree that the arbitrators are not entitled to raise the question of corruption. Notably, arbitrators have an obligation to investigate and rule upon the existence and consequences of corruption.[41] In the author's opinion, in this case the direction from the parties would target not the inherent powers as such but the legality of the proceedings and would put in question the award if it was adopted. In every case where the legality of the proceedings is put in jeopardy the arbitrators should either resign or ignore the instruction of the parties. Hence, even though the parties are free to limit the powers of the tribunal as well as to make certain inherent powers explicit, the limitations of the parties cannot go beyond the legality of the proceedings.

To summarize the above, arbitrators in international commercial arbitration cases possess inherent powers. The potential sources for the existence of inherent powers may differ in the context of international law. However, it is generally agreed that the identity of the court as a 'court' or the functions it performs can serve as a basis for international (and national) judges to exercise their inherent powers when it is necessary to effectuate the jurisdiction and the proceedings. Arbitrators, while not being 'courts', do perform functions (provide services) that are of an adjudicatory nature. This is inherent to the arbitrators' *sui generis* status. Consequently, this *sui generis* status can also be the main if not the only source, to explain why private individuals called upon to resolve a private dispute should

[40] Hrvatska Elektroprivreda, d.d. v. Slovenia (Ruling on the Participation of a Counsel) ICSID Case No ARB/05/24 (6 May 2008).

[41] Michael Hwang S.C. and Kevin Lim, 'Corruption and Arbitration – Law and Reality' (2012) 8 Asian Int'l Arb. J. 1, 14.

also possess inherent powers typically granted to national or international judges. In this context, the arbitration agreement is also of a particular importance because it creates the arbitral jurisdiction without which the arbitrators would not possess any powers. Yet, while arbitration agreement is a source for arbitral power, it cannot be a sole basis to explain the notion of inherent powers. Other means are necessary, and this is where the *sui generis* status steps in.

III. INHERENT POWERS AND OTHER APPROACHES TO ARBITRATOR'S STATUS

The theory that arbitrator's status is *sui generis* is dominant but not the only one. Two other major approaches exist – contractual and jurisdictional. For the hypothesis that the *sui generis* status serves as a basis for arbitrators' inherent powers to be proved it is necessary to examine if the two other theories also provide the basis for arbitrators' inherent powers. If this was the case, then the assumption regarding the *sui generis* status would fail because any status theory would lead to the same result.

Starting with the contractual approach, it appears from the very beginning that it could not serve as a basis for arbitrators' inherent powers. The contractual theory sees arbitrators as mere agents or service providers. Under this approach, arbitration is a contractual mechanism with no sophisticated judicial element.

If the contractual theory is accepted, the arbitrator should be treated as an agent or, more often, as a service provider under a contract with the parties (*receptum arbitrii*). Consequently, arbitrators should only have the powers granted to them under the arbitrator's contract and the arbitration agreement including the law of the seat and institutional rules because they should be either indicated in the arbitration agreement or arbitrators allowed to determine the seat. The agency or provision of services approach does not incorporate a judicial element, which is crucial for considering the arbitrator's status as a foundation for inherent powers of the tribunal. This is exactly why the *sui generis* approach could potentially serve as a basis for the existence of inherent powers, albeit in conjunction with other elements such as the arbitration agreement.

Even more, if this theory is accepted, could arbitrators have inherent powers at all? If arbitration is merely contractual, the arbitrators should follow the instructions of the parties without crossing the limits set by them. For example, Lewis and Nankerville summarized the early approach to arbitrators' inherent powers in the USA in the following way: *"Arbitration is simply a matter of contract between the parties; […] an arbitrator's authority to impose sanctions is completely dependent on – and thus may be readily limited by – the arbitration agreement. It follows then that if the agreement is silent as to sanctions, the arbitrator may not impose them."*[42] Meanwhile, the very essence of inherent powers is that they exist without any explicit statutory or contractual ground. This is the reason why judges, arbitrators and the academia are discussing potential sources for those powers.

In this case, the only source for the inherent powers to exist would be the arbitration agreement itself with the boundaries set in the law of the seat and the New York Convention. As explained by Wachter, arbitrators' *"authority necessarily comes from the arbitration agreement, and the purpose of the law is to ensure the enforceability of that agreement and the resulting award. Yet because the arbitration law and the New York Convention determine when an award might be set aside or denied enforcement, they still operate as an effective boundary on the arbitral tribunal's inherent authority. […] if an arbitral tribunal's controversial action does not rise to the level that a party can set aside the award or successfully challenge its enforcement, that is the final conclusive evidence that the arbitral tribunal*

[42] Timothy K. Lewis and Bradley A. Nankerville, 'Redefining Inherent Power: Belated Thoughts on the Second Circuit's Decision in Reliastar' (2015) 7 Y.B. Arb. & Mediation 66, 66-67.

acted within the scope of its authority."[43]

However, if the arbitrators' authority is derived from the arbitration agreement, the situation becomes twofold. On one hand, any power that the arbitrators have should be either explicit or implicit. In other words, the tribunal should limit itself only with the explicit and implicit powers and avoid referring to inherent powers. In this scenario implicit powers should be interchangeable with the inherent powers. On the other hand, arbitrators could refer to inherent powers if there was a provision in the applicable arbitration law, institutional rules or the arbitration agreement itself similar to the one in Article 44 of the ICSID Convention. In the latter scenario arbitrators would be entitled to make a decision on any question of procedure that is not covered by simply referring to the statutory/contractual ground and, thus, avoiding the lengthy discussion on the source of inherent powers from the practical perspective.[44]

As regards the jurisdictional theory, the answer appears to be completely different. To remind, the jurisdictional theory sees arbitrators as *"exercising a public function and possessing a quasi-judicial status entitling them to the immunity enjoyed by ordinary judges."*[45] In other words, this theory perceives arbitrator as an alter ego of a national judge. If this was the case and it was agreed that judges must possess inherent powers because of their office or the functions performed, inevitably the same conclusion must be made with respect to arbitrators. If arbitrators are quasi-judges, they are responsible for the performance of judicial functions and, where necessary, may turn to inherent powers to ensure that those functions are performed. Hence, the arbitrators should have the same rights with respect to the exercise of their functions and, therefore, the same justifications for inherent powers would exist as in the case of judges.

Indeed, if jurisdictional theory was accepted, it would mean that the arbitrators could justify the exercise of inherent powers in the same way as ordinary judges do by relying on either the general principles of law, the judicial office or the functions performed. Put differently, the quasi-judicial status of arbitrators would be important in as much as it is necessary to get access to the sources of inherent powers employed by the judges, i.e., the scheme would be the following: (i) arbitrators are quasi-judges; (ii) judges possess inherent powers based on one of the above-mentioned approaches; (iii) since arbitrators are quasi-judges, they should possess the same powers on the same basis.

In this framework, the status of an arbitrator plays the key role. Similar to the *sui generis* status, the emphasis here is on the adjudicatory functions performed by the arbitrator. The difference between the two is that in the first scenario supporters see arbitrators only as quasi-judges while in the second scenario the contractual and jurisdictional theories are mixed making the arbitrator's status 'hybrid'. However, this 'hybrid' status contains the judicial functions coming from the jurisdictional theory.

The question then arises whether the jurisdictional approach denies the hypothesis that arbitrator's *sui generis* status is the source for arbitrators' inherent powers. In the author's opinion, the answer is negative. This is because the *sui generis* status was not created in a vacuum. Rather, it merges the two approaches to arbitration – contractual and jurisdictional. This is why this status is the result of the 'mixed' theory of arbitration. The *sui generis* status inherits the approach to judicial functions of arbitrators from the jurisdictional theory and this is why it can be claimed that *sui generis* status can also be a source for inherent powers.

Differently from the jurisdictional approach to arbitrator's status that is not accepted broadly,

[43] Wachter, (n 38) 78.
[44] Paparinskis (n 4) 9.
[45] Ilias Bantekas, An Introduction to International Arbitration (CUP 2015), 2.

sui generis approach is dominating. Therefore, the hypothesis that *sui generis* status is the source for arbitrators' inherent powers remains unaffected even if the jurisdictional approach to arbitrators could serve as a basis for the existence of inherent powers. On the basis of above discussion this hypothesis remains possible as long as the *sui generis* approach to arbitrator's status is dominant.

To summarize, the two other approaches to arbitrator's status that are the ground for the 'hybrid' theory provides for two different solutions – while the contractual approach could not serve as a basis for the existence of inherent powers, the jurisdictional theory confirms that arbitrators should possess inherent powers the same way national judges do. Arbitrator's *sui generis* status attempts to mix these two approaches and this attempt is successful – *sui generis* approach is widely accepted in the contemporary theory of arbitration. Since the *sui generis* approach contains the adjudicatory functions *per se*, it allows to claim that *sui generis* status is the ground for arbitrators' inherent powers.

IV. ISSUES THAT MAY ARISE WHEN EXPLAINING ARBITRAL TRIBUNAL'S INHERENT POWERS THROUGH ARBITRATOR'S *SUI GENERIS* STATUS

It is difficult and maybe even impossible to provide a final list of inherent powers: every situation may require employing a different power that was not invoked before. This uncertainty requires arbitral tribunals to interpret the inherent powers as narrowly as possible to avoid potential arbitrariness.[46]

When the existence of inherent powers in international commercial arbitration is explained via arbitrator's *sui generis* status, it may also create uncertainty and put the proceedings at risk. This is particularly so when, it appears, there has been no detailed attempt to explain the concept of inherent powers via the status approach. Therefore, in the author's opinion, the following risks and limitations should be considered in this context.

First, the emphasis in the above discussion was put on the fact that the *sui generis* status contains adjudicatory functions. This was the reason why the status itself could potentially be a source to employ inherent powers in commercial arbitration. However, one must not forget that the *sui generis* status is also based on the contractual theory that was discussed in the previous section. Since the *sui generis* status is twofold, the contractual part of this status should not be ignored. Being the masters of the proceedings, the parties should always be able to limit the powers of the tribunal, either explicit, implicit or inherent. They can do that either in the arbitration agreement or to choose rules that provide for those limitations.[47] For example, in *Vivendi*, the Tribunal held that *"[a]lthough the Tribunal […] does have certain inherent powers with respect to arbitral procedure, it has no authority to exercise such power in opposition to a clear directive in the Arbitration Rules."*[48]

Consequently, since the parties should normally have the right to limit the powers of adjudicators, this is even so if the *sui generis* approach is accepted. Otherwise, the contractual part of the *sui generis* status would be ignored making the *sui generis* status closer to the jurisdictional approach rather than 'hybrid'. Yet, as indicated to some extent above, should the parties attempt to limit the arbitrators' powers in a way that might make the legality of the proceedings questionable, the arbitrators should either be able to overturn the directions of the parties, or to resign. Besides, the limitations introduced

[46] Andrea Bjorklund, Jonathan Brosseau, 'Sources of Inherent Powers in International Adjudication' (2018) 6:2 Eur. Int'l Arb. Rev. 1, 33.

[47] Paparinskis (n 4) 7-8.

[48] Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. (formerly Aguas Argentinas, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A.) v. Argentine Republic (II) (Order in response to a Petition for Participation as Amicus Curiae) ICSID Case No ARB/03/19 (19 May 2005).

by the parties should be clear – Moses gives an example where the parties thought they limited the ability of the tribunal to allocate the costs by stating in the arbitration agreement that the parties are required to pay their own costs and fees. Eventually, the courts in the USA disagreed that this limitation should have applied in case involving a party's bad faith.[49]

Second, Brown distinguishes another limitation that applies to *sui generis* approach – *"[a]n international court cannot claim to possess an inherent power if that power is not necessary for the fulfilment of its particular functions."*[50] The International Law Association adds that inherent powers must be exercised only in compelling circumstances.[51] This is a logical implication – in most of the cases the arbitrators would not have to turn to the inherent powers at all – being powers necessary to ensure the integrity of the proceedings, they are required in those cases where one or both parties act in a way that jeopardizes the effectiveness of the process. If this is not the case, there is no need to employ inherent powers. This is a general implication that is not linked to the *sui generis* approach only.

Third and finally, as regards specific limitations that would be relevant only in case of *sui generis* approach to inherent powers, it appears that there are no such particular limitations. This is so because the approach that arbitrators' inherent powers can be derived from arbitrator's *sui generis* status is based not on the uniqueness of this status but rather on the fact that it contains the adjudicatory function. Therefore, any limitations – including those discussed above and any others – are based primarily on limitations that apply to inherent powers in international adjudication in general. The discussed approach does not create some new limitations but rather ensures that arbitrators – private individuals entrusted with an adjudicatory task – can employ inherent powers without having to worry if they possess those powers at all. This is the main added value of this approach in the context of inherent powers.

CONCLUSIONS

Opinions on the source of inherent powers in international adjudication vary. The most widely accepted approach is that inherent powers are derived either from the necessity to ensure the fulfilment of the functions of international courts or from the identity of courts as judicial bodies. Although these two approaches differ, they are interrelated. Arbitrators are not international judges and, therefore, they do not have the identity of courts. Their responsibility does not extend to ensuring the fulfilment of the functions of international courts. This places arbitrators in a challenging position when determining the source of their inherent powers. Here, the *sui generis* status of arbitrators may come into play. Since the *sui generis* status contains the adjudicatory function and acknowledges that arbitrators provide a highly specific service comparable to the functions performed by national judges, it can serve as a basis for explaining why arbitrators should possess inherent powers.

However, this raises two challenges. *First*, accepting the jurisdictional approach to the arbitrator's status would yield the same result, indicating that the *sui generis* approach is not the only possible explanation. *Second*, the impact of the arbitration agreement cannot be disregarded. Private individuals become arbitrators solely based on the arbitration agreement, which is the cornerstone of international commercial arbitration. Consequently, while the status theory appears to provide a valid explanation of arbitrators' inherent powers, the arbitration agreement also plays a significant role due to its specific place in the realm of international commercial arbitration. Therefore, arbitrator's *sui generis* status may be one of the sources, but not the sole source, of arbitrators' inherent powers in international commercial arbitration.

[49] Moses (n 31) 104.
[50] Brown (n 2) 44.
[51] International Law Association (n 16) 17.