Inherent Powers of Arbitrators to Deal with Ethical Issues

Margaret L. Moses

Today, there is an increasing focus on the use of inherent powers by arbitrators in international commercial arbitration, particularly when there is a need to deal with ethical conduct by parties or their counsel. Moreover, arbitrators themselves seem more willing now than in prior times to exercise powers that may be considered inherent. John Beechey, the President of the ICC Court of International Arbitration, made the following comment recently in the context of the expansive drafting of the ICC’s latest Rules of Arbitration. He said that 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.”

However, arbitrators are nonetheless well aware that their power in a commercial arbitration comes from the agreement of the parties. Thus, they are also cognizant of a line, even if blurred or indistinct, that exists between their exercise of an inherent power—that is, a power not expressly provided in the arbitration agreement or in the laws or rules that govern the arbitration—and the expressed scope of their powers. The arbitrators’ dilemma is to carry out their mandate to take whatever steps are necessary to protect the integrity of the arbitral process, and yet still fulfill their duty to render an enforceable award, which could be set aside or refused enforcement if they exceed their powers.

This article will focus on the reasons that support a greater need today for arbitrators to exercise inherent powers to deal with ethical issues. It will also consider the source of those powers, as well as the limitations on them, and the evolving understanding of the framework for their use.

The reasons that arbitrators need to be able to rely on inherent powers are quite diverse. First, the issues that come before arbitrators today are increasingly similar to those that come before courts. In international commercial...
Inherent Powers of Arbitrators to Deal with Ethical Issues

Arbitration, arbitrators no longer deal only with commercial contracts and related issues, but may be called upon to resolve statutory issues involving public interest, such as violations of anti-trust law. The scope of the arbitrator’s power to deal with various aspects of such issues is not likely to be spelled out in the arbitration agreement, or in the pertinent arbitration law, or any rules chosen by the parties.

Second, today there are more diverse participants in arbitration. As international business has expanded, so has international arbitration as the method of choice for dispute resolution. The parties come from very different backgrounds with respect to their culture and their legal and ethical traditions. There is a lack of clear guidance on what ethical standards may apply to various kinds of conduct and procedures. Nonetheless, arbitrators have the obligation to ensure a level playing field, in order to reach an equitable resolution of the parties’ dispute.

Third, as arbitration has expanded and involved many more high stakes disputes, there are complaints that guerilla tactics are being used to deliberately obstruct and impede an effective and efficient arbitral process. No longer is arbitration centered on an elite and highly respected group of arbitrators able to bring about resolutions with a minimum of hostility or acrimony between the parties.

---

2 See, e.g., W. Laurence Craig, The Arbitrator’s Mission and The Application of Law in International Commercial Arbitration, 21 American Review of International Arbitration 243, 277–278 (2010) (“Some years ago, an arbitrator would have been justified to believe that his mission would be limited to determining the rights and obligations under the law applicable to the contract.... Subsequent case law in the United States and the European Union not only finds that mandatory law issues are arbitrable, but that the arbitrators have a duty to examine the effect of mandatory law on contractual obligations.”); Margaret L. Moses, The Principles and Practice of International Commercial Arbitration, 81–82 (2012) (“Although tribunals have usually seen their responsibility as primarily to the parties appearing before them, and have not generally assumed a duty to enforce the public interest, the duty to render an enforceable award in a case involving statutory and regulatory claims appears to impose new responsibilities.”).


4 See id. at 362 (“For an adjudication to be fair, the tribunal must approach the case from an unbiased perspective and the parties must have equal opportunities to present their case and persuade the decisionmaker.”).


6 See Horvath, supra note 5, at 297–298 (“In its youth, international arbitration was run by a small group of professionals. Ethical conflicts were rare because of the importance of