POWER SHIFT IN INTERNATIONAL COMMERCIAL ARBITRATION PROCEEDINGS

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Introduction

There appears to be a gradual shift of procedural power from disputing parties to the arbitral tribunal, along with the timing of this shift in international commercial arbitration proceeding. This shift may have occurred because of a perceived need to empower the arbitral tribunal early on in the proceedings for better case management with implications of speed and cost.[1] This article seeks to practically demonstrate this shift in procedural power and give an insight into its probable causes.

A close examination of various arbitration laws and Institutional arbitration rules show a greater empowerment of the international arbitrator.[2] This article identifies the rights and powers (and their sources) granted to and exercisable by the main participants in international commercial arbitration. It explores the movement and balance of these rights and powers between the arbitral tribunal, the disputing parties and arbitration institutions. It also identifies the controller of the different stages of the arbitral process. This article argues that in current arbitral practice, control over the conduct of the proceedings has shifted and remains with the international arbitrator.[3]

Outline

This article raises and answers two questions. The first identifies the main participants (and their role) in the international arbitral process in section A. The second determines the main powers/rights available to be exercised by the main participants in section B. It analyzes the sources of and identifies these rights and powers by describing a standard institutional arbitration procedure involving these participants. This exercise aptly identifies the power shifts at various stages of the arbitral process. The article concludes with an assertion that the international arbitrator presently enjoys (and rightly so) more powers over the arbitral process than ever before.[4]

A. Main Participants

The main participants discussed in this article are the disputing parties, arbitrators and arbitration institutions.[5] The arbitral process revolves around the disputing parties. They exercise the power conferred on them by law to opt out of litigation into consensual arbitration by concluding an arbitration agreement. The conclusion of the

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[1] David Hacking, "The Effective Arbitrator", 1 *Int. A.L.R.* 237 (1998) asserts that the timely revision of the rules of the AAA, ICC, and LCIA, "have all given greater focus on the arbitrator taking an active role for the efficient conduct of the arbitration."

[2] See David Hacking, ibid, where he gave an account of this empowerment.

[3] Thomas H. Webster in, "Party Control in International Arbitration" 19(2) *Arb Int* 119 (2003) argues for parties to retain control.

[4] Prof. Julian Lew in a Lecture titled "Autonomy of International Arbitration Procedure" in the Sir Roy Goode Lecture Series (31 March 2004) claimed that it is the '*duty and responsibility*' of the arbitrator to decide the procedure where the parties have not.

[5] These are the participants directly involved in the arbitral process. There are other participants who assist the process but not directly involved in its outcome. These include the advisers to the parties, the tribunal secretary, witnesses of fact and opinion, transcribers, interpreters and stenographers.

arbitration agreement is a prerequisite of the arbitral process. Every other participant becomes involved in the arbitral process to fulfill the essence of the arbitration agreement.

Once a dispute covered by the arbitration agreement eventuates, in ad hoc proceedings, the disputing parties form the arbitral tribunal by appointing arbitrator(s). The disputing parties make an offer to the proposed arbitrator who upon acceptance, is appointed by the parties to make a final and binding decision over their dispute for a fee.[6] It is generally accepted that the relationship between the arbitrators and the disputing parties is contractual in nature with rights and duties flowing from it.[7] The arbitrator works within certain agreed legal framework in discharging his obligations. He is conferred with certain powers for the effective discharge of the obligations. Prof. Philippe Fouchard regards this contract as the source of the arbitrator's powers.[8]

Under institutional arbitration, the disputing parties by virtue of their arbitration agreement opt into the arbitration rules of a particular institution. Arbitration institutions publish particular arbitration rules to the public (this can be construed as a tender).[9] When a party files a request for arbitration (pursuant to the arbitration agreement) with the arbitration institution, an offer to administer the arbitration under its rules is thereby made to the institution. The institution can accept or reject the offer.[10] In most cases, the institution accepts the offer to administer the arbitration in accordance with its arbitration rules for a fee.[11]

By opting to arbitrate under the arbitration rules of a particular institution, the disputing parties automatically incorporate these rules into their arbitration agreement. These rules and any other expressly agreed terms constitute the arbitration agreement between the disputing parties. The ensuing contractual relationship between the parties and the administering institution is therefore based on the arbitration agreement as supplemented by the relevant arbitration rules.

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[6] See generally, Klaus Lionnet, "The Arbitrator's Contract", 15(2) *Arb Int.* 161 (1999); P.M.M. Lane, "The Appointment of an Arbitrator – Contract or Status", 3 *ADRLJ* 91; Emmanuel Gaillard & John Savage (eds.) *Fouchard, Gaillard & Goldman on International Commercial Arbitration* from para.1103 (Kluwer Law Int'l, 1999); Patrik Scholdstrom, *The Arbitrator's Mandate* (Elanders Gotab, 1998);; Rubino-Sammartano Mauro, *International Arbitration Law & Practice*, from p.307 (2nd ed. Kluwer Law Int'l 2001); Lew J.D.M, Mistelis L.A. & Kroll S.M., *Comparative International Commercial Arbitration*, p.71-97 (Kluwer Law Int'l 2003)

[7] There is another school of thought promoted by Lord Mustill and Stephen Boyd which argued that this relationship is status based. See M. Mustill & S. Boyd, Law of Arbitration, 202 (2nd ed., Butterworths, 1998); See generally, Lew J.D.M., *Applicable Law in International Commercial Arbitration*, (Dobbs Ferry 1978)

[8] See Philippe Fouchard, "Relationship Between the Arbitrator and the Parties and the Arbitration Institution", ICC Bull. Special Suppl. 12 at 14 (May 1996)

[9] See Melis Werner, "Function and Responsibility of Arbitral Institution", 13 *CLYb Int. Bus*. 107 at 109 (1991)

[10] The AAA on its website immediately under the list of its various rules says, "We reserve the right to refuse service of any case at any time." See www.adr.org/index2.1,jsp?JSPssid=15747> last visited 19/03/04

[11] Legal commentators agree on the contractual nature of this relationship however there is no agreement on its mode of formation. This is the author's analysis. For a contrary analysis see: Melis Werner, "Function and Responsibility of Arbitral Institution", 13 *CLYb Int. Bus*. 107 at 114 (1991); *Fouchard Gaillard & Goldman* at para. 1110

The arbitration institution operates under its own arbitration rules. Under those rules it assumes a managerial/administrative responsibility over the arbitral process. Various rights and obligations are conferred on the disputing parties, arbitrators and arbitration institutions under these various contracts. These emanate from three principal sources.[12] These are the arbitration agreement between the disputing parties, the agreed arbitration rules, and the mandatory provisions of the law of the seat of arbitration.[13]

B. Main Powers and Rights

Words and Phrases Legally Defined defines ' power' as, "a term of art, denoting an authority vested in a person, called 'the donee' to deal with or dispose of property not his own…(It) is an individual personal capacity of the donee of the power to do something".[14] *Black's* defines it as, "an ability on the part of a person to produce a change in a given legal relation by doing or not doing a given act"[15]. The general concept of 'power' is the fact that it is 'granted' or 'donated' to a person to exercise while a 'right' is given. *Blacks Law Dictionary* further defines a 'right' as, "a power, privilege, faculty, or demand, inherent in one person and incident upon another."[16] A power is therefore the authority vested in somebody (legal or physical person) by another (including the State) to do something or fulfil a duty. Power and right are in this article used interchangeably.

Sources of Arbitral Powers[17]

I. National law and International Conventions

The source of the primary power to enter into an arbitration agreement (conferred on the disputing parties) is national laws or international conventions. This fact raises the issue of the juridical nature of international arbitration. The fact that an arbitration can only take place because the relevant State permits the parties to opt out of litigation, within certain parameters becomes very evident. This reminds us of the relevance of the jurisdictional, concessional and hybrid theories of the juridical nature of arbitration.[18] These theories basically subscribe to the relevance or importance of the law of the place of arbitration in international arbitration proceedings[19] (supported by

[12] Prof Lew, in his Roy Goode lecture maintains that, "where these rules (applicable arbitration rules) are silent, we fall back on arbitrators autonomy: they must use their residuary discretion to determine and fix the procedures, in accordance with what they believe is right." It is suggested that even this 'arbitrator autonomy' must conform to the principal sources of arbitral power identified in this article.

[13] It is acknowledged that parties cannot contract out of mandatory provisions of a relevant national law on grounds of public policy. This is a limitation on party autonomy.

[14] *Words and Phrases Legally Defined*, p. 406-408 (vol.3 Butterworths 1989)

[15] *Blacks Law Dictionary*, 6th edition at 1169

[16] At page 1324

[17] See Jarvin Sigvard, "The Sources and Limits of the Arbitrator's Powers", in J.D.M Lew, (ed.) *Contemporary Problems in International Commercial Arbitration*, 50 (QMC, 1986); Bernard G. Poznanski, "The Nature and Extent of an Arbitrator's Powers in International Commercial Arbitration", 4(3) *JIA* 71 (1987)

[18] See J.D.M.Lew, *Applicable Law in International Commercial Arbitration* (Oceana 1978); Yu Hong-Lin & Sauzier Eric, "From Arbitrator's Immunity to the Fifth Theory of International Commercial Arbitration" 3(4) *Int. A.L.R.* 114 (2000)

[19] See F.A. Mann, "Lex Facit Arbitrum", reproduced in 2(3) *Arb Int* 241 (1986) where he argued in favour of the jurisdictional theory.

the New York Convention)[20] in opposition to the complete autonomy of the arbitral process from such law.[21] The State permits arbitration over certain defined subject matters (subjective arbitrability). However, consensual arbitration can only come into existence when and where the parties choose to exercise the power granted by the law (the essence of the hybrid theory). The concession theorists also draw inspiration from the fact that the parties can only arbitrate matters clearly conceded by the State (or States in the case of international conventions) to be arbitrated.[22] International, regional, multilateral and bilateral conventions and treaties are another possible source under this category. These international instruments mandate parties to resolve disputes emanating from its implementation by arbitration. Under some instruments, the particular body of arbitration rules to be applied is stipulated.[23]

Various States in pursuit of their policy of supporting international arbitration, not only empower the parties to enter into an arbitration agreement. They further make provisions for effective arbitral proceedings as evidence of their supportive role. The relevant State uses the opportunity to detail mandatory rules that parties arbitrating within its territorial jurisdiction cannot derogate from.[24] This shows that though the State permits and supports arbitration, its desire to ensure that its basic notions of justice are protected and observed in any judicial proceeding within its territory is preserved.

The State makes non-mandatory default procedural rules from which the parties can derogate. These act as 'fall-back' provisions in circumstances where the parties have not made any. It follows therefore that the parties can, in the arbitration agreement (and any attendant rules incorporated) curtail non-mandatory powers granted the arbitrator(s) under the *lex loci arbitri*.

II. Arbitration Agreement and Arbitration Rules

Another source of the powers of arbitrators (and arbitration institutions) is the arbitration agreement between the parties. The arbitration agreement emanates from the parties. It can therefore be argued that the parties themselves are the source. The

[20] This can be contrasted with the theory of delocalisation. This generally implies that international arbitration has no connections to any place until the enforcement of the award is sought, at which point the award crystallizes and attaches to the place where enforcement is sought. Thus making the law of the place of arbitration of little or no relevance. On this see Jan Paulsson, "Arbitration Unbound: Award Detached from the Law of its Country of Origin" 30 *ICLQ* 358 (1981). Arbitrations conducted under ICSID (the International Convention for Investment Disputes, Washington 1965) Arbitration Rules can be said to be delocalised since it operates a closed system and there is no recourse to any national courts even for enforcement. See the Convention for details.

[21] As propounded by commentators under the contractual and autonomous theories- See references in fn 6

[22] See Hong-Lin Yu & Laurence Shore, "Independence, Impartiality and Immunity of Arbitrators –US and English Perspectives" 52 *ICLQ* 935 in which they applied the Concession theory in explaining the relationship between the parties and the arbitrators.

[23] Most bilateral investment treaties and investment agreements between States (or their agencies) and Multinational Enterprises refer disputes to ICSID either under its Arbitration Rules or under its Additional Facility Arbitration Rules (as amended) 2003; The Energy Charter Treaty makes reference to the SCC Rules as well. See also Chapter 11 of NAFTA; See, Mark Kantor, "The New Draft Model U.S. BIT: Noteworthy Developments", 21 (4) *JIA* 383 (2004)

[24] A very good example is S. 4 (1) referring to Schedule 1 English Arbitration Act

relevant law empowers the parties to conclude an arbitration agreement.[25] The arbitrators are appointed pursuant to the arbitration agreement to fulfil its purpose, of resolving the dispute between the parties.[26] Various arbitration laws and rules empower the disputing parties to make provisions regulating the arbitral procedure in their arbitration agreement. The inclusion of a set of arbitration rules in the arbitration agreement fulfils this empowerment. In ad hoc arbitral proceedings the arbitration law of the seat of arbitration applies by default.

Four distinct sources have been identified as conferring the various powers and rights exercised by parties, arbitrators and arbitration institutions in international commercial arbitral proceedings. The question that arises then is, 'Are these sources complimentary or is there any hierarchy between them?' I will suggest that as regards provisions where they all agree, they compliment each other. As regards non-mandatory provisions of the national law or convention, the agreement of the parties would prevail. However the mandatory provisions of the national law or convention take precedence over the agreement of the disputing parties.

As regards arbitral proceedings and the various powers exercisable therein, where the mandatory provisions impart on these procedural powers, the national law or convention becomes the primary source of the powers. In all other instances the arbitration agreement (and relevant arbitration rules) would be the source of the powers.

Power Shift in a Standard Arbitral Proceeding

Our hypothetical arbitral procedure is divided into four stages in which the various powers/rights of the main participants are tracked and examined. These stages are pre-commencement, post-commencement, post hearing, and enforcement.

1. Pre-commencement.

These powers are exclusively exercisable by the parties to whom the right is conferred by the relevant law. The parties can also delegate the exercise of some of these powers to a national court, appointing authority or an arbitration institution.[27] The parties primarily exercise these powers to assert the arbitration agreement and constitute the arbitral tribunal. The parties have the power (and right conferred by law) to enter into a valid arbitration agreement for the final resolution of the disputes that have arisen or that may arise between them regarding a defined legal relationship.[28] This power extends to the assertion of the existence and validity of the arbitration agreement by parties to it.[29]

[25] The arbitration agreement must be capable of being evidenced in writing as evidence of the parties exercise of their will to opt into arbitration. See article II New York Convention; Section 5 English Arbitration Act; Article 7 Model Law

[26] Mauro Rubino-Sammartano, supra, at 324 sees the appointment (and acceptance) of an arbitrator as, "the essential requirements for the arbitration agreement to become operational".

[27] An example is articles 1683 (3) and 1684 Belgian Arbitration Law 1998

[28] See article III New York Convention. This power cannot be delegated because of the consensual nature of arbitration.

[29] Article II (1) (3) New York Convention mandates the courts of its Contracting States to recognize an arbitration agreement as defined in the Convention and refer parties to it to arbitration except where the agreement is 'null and void, inoperative or incapable of being performed'.

The parties have the power to agree on the number of arbitrators to be appointed,[30] mode of appointment,[31] challenge procedure,[32] qualifications and any other prerequisites to be fulfilled by the proposed arbitrators.[33] The parties can empower the arbitral tribunal to decide as *amiable compositeur*,[34] adapt or revise their contract.[35] They can also decide on the termination of the arbitrator's mandate[36] and the arbitral proceedings.[37] The parties decide on the applicable substantive law by exercising their right to make an express choice of law.[38] The parties have the right and power to choose to arbitrate under the rules of an arbitration institution or ad hoc.

The parties have the right conferred by various laws to make procedural decisions. These include, deciding the place or seat of the arbitration[39] to which the arbitral tribunal or arbitration institutions are bound,[40] the language in which the arbitration proceedings will be held,[41] if translations of documents will be made, which of them would bear the cost of such translation, and if the translated texts are authoritative versions.[42]They can also agree on the procedure to be adopted by the arbitral tribunal,[43] nature of the hearing,[44] commencement date of the arbitration,[45] time for and mode of (and extension) submission of documents,[46]

These are all powers exercisable by the parties prior to the commencement of the arbitration and the formation of the arbitral tribunal. The parties may neglect deciding on one or more of these issues. Some of the powers necessary to be exercised in the appointment of the arbitral tribunal would then be exercised by the relevant national court or appointing authority (in ad hoc arbitration) and by the relevant arbitration institution (in institutional arbitration). These authorities exercise the power necessary to constitute the arbitral tribunal only. This is because the arbitral tribunal is equally empowered to exercise all other procedural powers exercisable by the parties, a question of concurrent jurisdiction.

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[30] Article 10 Model Law
[31] Article 11(2) Model Law
[32] Article 13(1) Model Law
[33] See section 15 English Arbitration Act 1996; article 1454 French NCCP 1981; section 11 Indian Arbitration Ordinance 1996; article 13 New Brazilian Arbitration Law 1996
[34] See article 28 (3) Model Law; article 17 (3) ICC Rules.
[35] See Klaus Peter Berger, "Power of Arbitrators to Fill Gaps and Revise Contracts to make Sense" 17 (1) *Arb Int*. 1 at 4 (2001); article 1020 (4) (c) Netherlands Arbitration Act 1986; article 1 (2) Swedish Arbitration Act 1999; Article 22(g) LCIA Rules
[36] Article 14(1) Model Law
[37] Article 25 Model Law
[38] Article 28(1) Model Law
[39] See article 20(1) Model Law; article 1693 Belgian Judicial Code; section 3 English Arbitration Act lists all the possible designatees of the place of arbitration. These include the parties, arbitration institution, appointing authority, arbitral tribunal, and impliedly having regard to all the circumstances.
[40] In default, the ICC (International Chamber of Commerce) Court would choose the place and not the arbitral tribunal, under article 14 .1 of the ICC Rules 1998
[41] Article 22 Model Law
[42] See article 17 UNCITRAL Arbitration Rules which empowers the arbitral tribunal, subject to the agreement of the parties to determine the language; article 17, LCIA Arbitration Rules empowers the parties to agree in writing on the language failing which the LCIA court or the arbitral tribunal would decide; article 16, ICC Arbitration Rules empowers the parties to decide failing which the arbitral tribunal would decide.
[43] Article 19(1) Model Law
[44] Article 24(1) Model Law
[45] Article 21 Model Law
[46] Article 23(1) Model Law

In institutional arbitration, the parties by electing to arbitrate under the rules of the particular arbitration institution delegate some of their powers (for example, to appoint the arbitrators and choose the place of arbitration[47]) to the relevant institution. In ad hoc arbitration, an appointing authority (if any) or the court may appoint the arbitrators. The relevant court, appointing authority, arbitration institution and arbitral tribunal would exercise these powers taking the views of the parties (if any) into consideration.

This mechanism of delegating parties' powers under arbitration laws and rules ensure that one party does not frustrate the commencement of the arbitration or the proceedings. Once the arbitrators accept their appointment and the arbitral tribunal has been constituted, so that a valid arbitral tribunal has been composed, then the arbitral tribunal can exercise the powers conferred on it by the parties, various relevant arbitration rules and national laws.

2. Post-commencement.
Upon commencement of the arbitration and constitution of the arbitral tribunal, the bulk of the powers that fall to be exercised in international arbitral proceedings devolve unto the arbitral tribunal. Thus a power shift occurs at this stage from the disputing parties to the arbitral tribunal. The arbitral tribunal is generally given very wide powers in conducting the arbitration proceedings. The UNCITRAL Arbitration Rules put it succinctly thus, "subject to this Rules, the arbitral tribunal may conduct the arbitration in such a manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a *full opportunity* of presenting his case." [48] (Italics added for emphasis and comparison with other Rules in the footnote)

Most arbitration rules adopt the same or similar wordings. The arbitral tribunal is imbued with very wide discretionary powers for the effective, efficient and speedy conduct of the arbitration proceedings.[49] These powers are generally subject to the rules of natural justice and due process, with some rules providing for the parties to have a *full*,[50] *reasonable*[51] or *an*[52] opportunity of presenting their case. These various formulae are directed towards achieving a balance in ensuring that the arbitral tribunal is guided by the rules of due process or fair hearing and equal treatment of the parties in the exercise of its discretionary powers in the conduct of the proceedings, on the one hand, and that the parties do not frustrate the proceedings at will, on the other hand.

The importance of ensuring a fair hearing in the conduct of the proceedings by the arbitral tribunal is evidenced by the provision in the New York Convention, in its

[47] See article 14.1, ICC Rules; article 16.1, LCIA Rules; article 35 CIETAC (China International Economic and Trade Arbitration Commission) Arbitration Rules 2000; under article 13 of the AAA (American Arbitration Association) International Arbitration Rules 2003, the AAA administrator may determine the place of arbitration subject to the power of the arbitral tribunal to so determine.
[48] Article 15 (1); see also article 15.2 ICC Rules (reasonable opportunity); articles 14.1 and 14.2 LCIA (reasonable opportunity); article 16 AAA Rules (fair opportunity)
[49] See Section 33 (1) (b) English Arbitration Act
[50] Article 18 Model Law
[51] Section 33 (1) (a) English Arbitration Act
[52] Article 1694 (1) Belgian Judicial Code

article V (1) (b), making it a ground on which an award can be set aside, where a party can prove lack of fair hearing or equal treatment. It equally has bearings on allegations of lack of impartiality and independence of the arbitrator(s) and its knock-on effects.[53] UNCITRAL in explaining why the arbitral tribunal is given broad discretion and flexibility in the conduct of the proceedings states, "This is useful in that it enables the arbitral tribunal to take decisions on the organization of proceedings that take into account the circumstances of the case, the expectations of the parties and of the members of the arbitral tribunal, and the need for a just and cost efficient resolution of the dispute."[54]

The arbitral tribunal aside from making any default decisions as discussed above, enjoy the exclusive power of admitting evidence, deciding on its materiality and relevance, and the weight to attach to such evidence.[55] The IBA Rules on the Taking of Evidence in International Commercial Arbitration in article 8 state that, "the Arbitral Tribunal shall at all times have *complete control* over the Evidentiary Hearing." (Italics added for emphasis). This again emphasizes the importance of conferring on the arbitral tribunal such wide powers for the conduct of the proceedings. It also reveals the similarities between court and arbitral procedures highlighting the judicial role of the arbitrator. The arbitral tribunal's award must be its own decision.[56] Giving the arbitral tribunal power over admission, interpretation and allocation of weight to the evidence enhances the independent decision-making process.

The arbitral tribunal is empowered to fix the date, time and physical place of any meetings and hearings, give the parties adequate or reasonable notice thereof, fix and extend time limits.[57] The arbitral tribunal can hear witnesses of fact[58] and expert witnesses,[59] inspect property, site, goods and documents,[60] and order interim measures of protection, as appropriate.[61] The various Rules on arbitration make provisions on the powers exercisable by arbitral tribunals sitting under it.[62] The IBA Rules quoted above and the UNCITRAL Notes give useful guides regarding various stages of the proceedings.

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[53] These include challenge proceedings, replacement of arbitrators, problems associated with truncated tribunals.

[54] Paragraph 4 of the UNCITRAL Notes on Organizing Arbitral Proceedings finalised in New York in June 1996 (UNCITRAL Notes)

[55] See article 25.6 UNCITRAL Rules; article 22.1 (f) LCIA Rules; article 9 IBA (International Bar Association) Rules on the Taking of Evidence in International Commercial Arbitration 1999

[56] See the Italian case where the award of the arbitrators (who were not lawyers) was set aside because it had been drafted by a lawyer, who was not a member of the tribunal: *Sacheri v Roberto* XVI YBCA 156 (1991)

[57] See article 19 LCIA Rules; articles 15.2, 25 UNCITRAL Rules;

[58] See article 4 IBA Rules on Taking of Evidence; article 25.5 UNCITRAL Rules; article 15.4 Chamber of Commerce Milan International Arbitration Rules; article 20 LCIA Rules

[59] See articles 5 and 6 IBA Rules on Taking of Evidence; article 27 UNCITRAL Rules; article 15.5 Chamber of Commerce Milan International Arbitration Rules; article 21 LCIA Rules

[60] See article 22.1 (d) LCIA Rules; article 7 IBA Rules on the Taking of Evidence

[61] See article 26 UNCITRAL Rules; article 23 ICC Rules; article 25 LCIA Rules; article 21 AAA IA Rules

[62] See article 22 LCIA Rules which lists additional powers of the arbitral tribunal to allow amendment of pleadings, deal with time limits, act inquisitorially, inspection of property, production of documents, correction of the contract, join third parties, among others.

The disputing parties have the exclusive power of challenging an arbitrator. Where either party becomes aware of any disqualifying factor regarding any member of the arbitral tribunal, at any time before the final award is made, the party can raise the issue in a challenge proceeding. Various arbitration laws and rules provide as one of the grounds for the challenge of arbitrators either their impartiality[63] or lack of independence[64] or both.[65]At this stage power shifts back to the disputing parties. The procedure for the challenge and who decides the challenge is also provided in the laws and rules. Once an application for challenge is lodged, power shifts to the arbitration institution, arbitral tribunal, appointing authority[66] or national court. Generally, under institutional arbitrations, power to decide the challenge shifts to the institution. [67] Under ad hoc arbitration, some laws require the arbitral tribunal to decide on the challenge question first before the courts decide.[68] Ultimately, the relevant courts with supervisory jurisdiction over international arbitration finally decide the issue.[69] This is irrespective of the provision in various rules that the decision of the institution on such matters would be final.[70]

In most laws, this challenge can be made during the proceedings. This has the effect of truncating the proceedings for some time. In some other laws the challenge proceeding will be taken in a nullification proceeding.[71] Thus the arbitral proceeding is not stultified but continues with the party reserving its position to raise the disqualifying factor as a ground for nullifying the award. The question of which is a better model may be debated but the relevant point here is the fact that at this stage, power shifts back to the parties to commence the challenge proceedings and to the institution, arbitral tribunal, appointing authority or national courts to decide.

Upon a decision being made sustaining the challenge, the relevant arbitrator is removed and replaced. The arbitration then proceeds. If the challenging factors arise after the award has been made, at which point the arbitral tribunal has become *functus officio,* it would be made in the form of an application to set aside or nullify the award. Arbitration laws make different provisions regarding proceedings by truncated arbitral tribunal. Some laws provide for the truncated tribunal to continue and render a valid award recognizable and enforceable.[72] This has a deterring effect on any party wishing to frustrate the proceedings. Some laws provide for the arbitrator to be replaced by another arbitrator to be appointed not by the party but either by the institution, an appointing authority or the courts.[73] This tries to preserve the right of the party to appoint its arbitrator while at the same time 'punishing' it for appointing

[63] See Section 24(1)(a) English Arbitration Act.
[64] See Article 11(1) ICC Rules which provides for, "lack of independence or otherwise."
[65] Most laws and rules provide for lack of impartiality and independence. An example is article 12(2) Model Law.
[66] Article 12 (1) (a) UNCITRAL Rules
[67] Article 8 AAA IAR (the administrator); Article 30 CIETAC Rules (the Chairman of the Arbitration Commission); Article 11(3) ICC (the ICC Court of Arbitration); Article 10(4) LCIA (LCIA Court); Article 18(4) SCC Rules (the SCC Institute); Article 25 WIPO (the WIPO Centre); Article 7(1) CNIA Milan, Rules (the Arbitral Council of its Secretariat)
[68] An example is article 747 (1) NCCCP Argentina
[69] See *AT&T & Lucent Tech. Inc. v Saudi Cable Co*, 23 May 2000 The Times, where the ICC court decided the challenge before the English courts.
[70] An example is article 29 (1) LCIA Rules
[71] See section 10(a) (2) FAA, 1925 (USA)
[72] An example is Article 26(1) AAA IAR
[73] See Article 13(2) UNCITRAL Rules

an 'unsuitable' arbitrator. The determining factor here is the time at which the arbitrator fails to participate (or is prevented from participating) in the deliberations of the arbitral tribunal.[74]

Stephen Schwebel commenting on the *Himpurna* arbitration concluded that,

"The awards (comprising of four final awards and two interim awards) confirmed the view that an international arbitral tribunal that has been truncated can proceed and render a valid award; the extraordinary circumstances of the absence of Prof. Priyatna appointed by the Indonesian government lends credence to the fundamental principle that a party should not be enabled to take advantage of its wrong to defeat the rights of the other party."[75] Thus challenge proceedings briefly interrupt the regular shift and flow of arbitral powers between the parties and arbitral tribunal.

3. Post hearing

Every international arbitration proceeding (barring settlement or termination by the parties in the course of the proceedings) terminates in the arbitral tribunal reaching a decision on the law and facts (or in accordance with the arbitration agreement) and publishing its decision reflected in the final award to the parties. The arbitral tribunal is empowered to make interim, interlocutory or partial awards, in addition to the final award.[76] This power is exclusive to the arbitral tribunal and is non delegable.

Arbitration laws stipulate the form of the award. The award should generally be in writing, give reasons, signed and dated, stating the place where it was made, state the reason for the absence of the signature of a member of an arbitral tribunal, forward copies to the parties and register the award where required.[77]

Under the ICC Rules, the arbitral tribunal must submit its award for scrutiny and approval by the ICC court before signing it. This is not a delegation of the powers of the arbitral tribunal to the ICC court whose scrutiny goes to the form of the award only.[78] Under CIETAC arbitrations as well, the arbitral tribunal is required to submit the draft award to the Arbitration Commission before signing the award, again for scrutiny as to form.[79]

The arbitral tribunal is also empowered to make awards on agreed terms or consent awards on the terms of settlement agreed upon by the parties.[80] The arbitral tribunal,

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[74] The party-appointed arbitrator in the *Himpurna Californian Energy Ltd (Bermuda) v PT (Persero) Perushaan Listruik Negara (Indonesia)* YBCA (2000) was forcibly prevented from continuing in the deliberations of the arbitral tribunal. The truncated tribunal proceeded and rendered its award (against Indonesia)

[75] Stephen M. Schwebel, "Injunction of Arbitral Proceedings and Truncation of the Tribunal" 18(4) *Mealey's IAR* 33 at (April 2003)

[76] See article 32.1 UNCITRAL Rules;

[77] See article 32 UNCITRAL Arbitration Rules; article 26 LCIA Rules (the LCIA court shall transmit the award to the parties as is the practice with most arbitration institutions); articles 25, 28 ICC Rules (notification and deposit done by its secretariat)

[78] See Yves Derains & Eric Schwartz, *Guide to the New ICC Rules of Arbitration* (Kluwer 1998) on article 27 ICC Rules.

[79] See article 56 CIETAC Arbitration Rules

[80] Article 30 Model Law; article 34.1 UNCITRAL Rules (the arbitral tribunal is not obliged to give reasons for such award); article29.1 AAA IA Rules; article 26 ICC Rules; article 26.8 LCIA; article 49 CIETAC Rules (amicable settlement reached through conciliatory efforts of the arbitral tribunal)

after rendering its final award is empowered to make interpretations of the award if so requested by either party, and such interpretation shall form part of the award.[81] The arbitral tribunal is also empowered to, "correct in the award any errors in computation, any clerical or typographical errors, or errors of a similar nature."[82]

4. Enforcement

Upon the rendering of the final award or the termination or conclusion of the proceedings, the arbitral tribunal becomes *functus officio*, (having completed their mandate) and entitled to their fees and reimbursable expenses. At this stage arbitral power shifts back to the disputing parties. Enforcement of the resultant award is outside the control of the arbitral tribunal.[83] The losing party can either voluntarily perform the award, or refuse to perform it. The winning party can then exercise its power by applying for enforcement (or recognition) of the award in the competent court within the territory where the defaulting party owns assets on which execution can be levied to satisfy the award.

The defaulting party can oppose the recognition and enforcement of the award under any of the grounds listed in article V (1) (2) of the New York Convention[84] if the assets are within a Convention State. The grounds for refusal of enforcement of an award contained in the New York Convention are exhaustive.[85] The grounds for refusal of enforcement or setting aside an award vary under some laws. An example is France whose laws do not contain provisions similar to article V (1)(e) ground of the New York Convention.[86]

Findings

The parties are empowered by law to enter into arbitration agreements over a defined legal relationship. Their arbitration agreement empowers them to appoint arbitrators to form the arbitral tribunal. The parties through their arbitration agreement as empowered by various laws confer on the arbitral tribunal the power to conduct the arbitral proceedings.

Arbitrators are empowered by the arbitration agreement subject to any relevant mandatory law to take control of the arbitral proceedings. The arbitral tribunal retains this control until it renders a final award and becomes *functus officio*. This is with the exception of where there are arbitrator-challenge hiccups.

[81] See article 35 UNCITRAL Rules; article 29.2 ICC Rules

[82] See article 36 UNCITRAL Rules; article 27 LCIA Rules; article 29.1 ICC Rules; article 30 AAA IA Rules

[83] See Lew, Mistelis and Kroll, *Comparative International Commercial Arbitration,* at 689

[84] The same grounds are listed in Part III English Arbitration Act.

[85] It is important to confirm the grounds for setting aside in the law of the place where enforcement is sought. This is because of the decisions in cases like: *Hilmarton v Omnium de Traitement et de Valorisation (OTV)* (1995) XX YBCA 663 (French decision); *Chromalloy Aeroservices Inc (USA) v The Arab Republic of Egypt* 939 F Supp 907, (1997) XXII YBCA 1001 hinged on article VII NYC (USA decision); *Kajo-Erzeugnisse Essenzen GmbH (Austria) v DO Zdravilisce Radenska (Slovenia)* (1999) XXIV YBCA (applied the European Convention as a more favourable law)

[86] Article 1502 French CCP; Article IX European Convention on International Commercial Arbitration 1961; Article 34 (2) (a) Model Law

Arbitration institutions are empowered by the arbitration agreement to administer and manage the arbitration in accordance with its arbitration rules incorporated into the arbitration agreement.

Upon the rendering of a valid award, arbitral power shifts back to the disputing parties to enforce or challenge the final award of the arbitrators. In all of these, the presence of the State looms in the background. The State allows arbitrations to be held (under certain conditions and over certain subject matters) by its citizens and foreigners within its territory and supports the enforcement of a valid resultant award.

Thomas H. Webster conceded in his article on parties retaining control that, "clients are practical. They tend to understand that arbitration like any form of dispute resolution results in a gradual shifting of control away from the parties and to the tribunal for what is after all the adjudication of a dispute."[87] In agreeing with this concession, I must observe that this gradual erosion of party power (and not party autonomy) and transference of it to the arbitral tribunal appears to enable the tribunal fulfil its mandate (given by the parties) as evidenced in the arbitration agreement. The goal of achieving this mandate in the arbitral process would continue to dictate the scale of power shift in international arbitration proceedings.

Conclusion

It has been shown that international arbitration laws, rules and practice seek to strike a balance in the powers exercisable by the disputing parties and the arbitral tribunal. This is geared towards achieving the goals of party autonomy. This goal, in this context, being the publication of a valid, binding, recognizable and enforceable award finally disposing of the dispute between the parties as mandated by the arbitration agreement. It can be concluded that arbitration laws and rules empower the parties, in the spirit of party autonomy, to agree on applicable procedural rules. Where the parties fail or ignore to utilize this great power granted them, then the laws and rules transfer these powers to the arbitral tribunal to determine and exercise in its absolute discretion. This being the case, it is clear that the arbitral tribunal exercises as much powers as the parties (through their arbitration agreement and addenda) grant them, even if it is by default. The parties, it appears prefer to grant procedural powers to the arbitrators who are considered masters of their own procedure within the limits of public policy.

[87] Thomas H. Webster, "Party Control in International Arbitration" 19(2) *Arb Int.* 119 at 142 (2003)