

The Power of an Arbitral Tribunal to Determine Its Own Jurisdiction in International Commercial Arbitration

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Abstract

This article discusses the powers of an arbitral tribunal to determine its own jurisdiction. The determination of the question of the jurisdiction of a tribunal lies in its own domain at least in the first instance by virtue of the principle of competence-competence. The principle enables a tribunal to test its own jurisdiction and confirm the extent of its power. This is one of the pillars of arbitration as it promotes party autonomy. The positive aspect of this power of the tribunal is that it cures the excesses of jurisdiction or any lack of it by granting an objecting party with immediate remedy thereby saving costs and time. The downside of this power is that an objecting party may still be permitted under the English Act and the Model Law to revert to court during the proceedings if he is not happy. However, time is of the essence. The article rests on an accumulation of case law, current and secondary literature. It takes cognizance of the fact that parties to an arbitration agreement have, by virtue of their autonomy a choice of subjecting the arbitration proceedings to rules of arbitration. As such, this article uses the ICC Rules of Arbitration and the UNCITRAL Rules of Arbitration as reference sets of rules. An arbitral tribunal's power to rule on its own jurisdiction is unique in the sense that it is a test of its jurisdiction. It is indeed an exceptional power as it helps define the extent a tribunal's powers and therefore becomes its own judge when queried. This power is important as it enables the arbitration proceedings to progress as scheduled.

Keywords

Arbitration Agreement, Jurisdiction, Competence-Competence, Power, Party Autonomy

1. Introduction

The essence of this article is to analyze an arbitral tribunal's power to determine its own jurisdiction in international commercial arbitration. The first factor worth noting is the existence of an international commercial contract between the parties. By virtue of the parties' agreeing to have a defined legal contract, a party may seek the protection of an agreed legal system when his rights are infringed or in the event of non-performance by the other party. It is from the need to establish the parties' rights and obligations emanating from their contract that leads to the need to draw an arbitration agreement. The voluntary nature of arbitration is seen from the parties' willingness and consent to subject their disputes to be resolved using the process of arbitration in a private manner.

The subject matter in dispute ought to be clear and precise in the arbitration agreement in order for an arbitral tribunal to know the kind of dispute that it is to deal with.

By virtue of their consent to arbitrate, the parties become bound to the terms of the agreement and may not depart from them unilaterally. By submitting to the process of arbitration, the parties must be understood to have put in place a mechanism for the appointment of an arbitral tribunal to resolve their disputes and determine their rights and obligations. The tribunal that is formed is given the sole responsibility of steering the arbitration to its conclusion. It determines the parties' bone of contention, deliberates, deals with the issues in dispute, collects evidence, and makes an arbitral award that is in essence final and binding. It is the fundamental duty of an arbitral tribunal to be able to interpret the parties' contract including issues relating to the validity of the contract. In doing so, the arbitral tribunal must be alive to the separate nature of the arbitration agreement from the parties' contract, which enables the two instruments to be measured using different benchmarks. In the case of *Ferris & Anor v. Plaister & Anor and Stap & Anor v. Plaister & Anor* [(1994) BLC 417; CLOUT], the court decided that an arbitration clause in a contract was separate and therefore severable from the main contract.

The objective of this article is to determine how an arbitral tribunal that already has conduct of the arbitration would be competent to address a challenge against it by the same parties whose dispute it is resolving. In addressing this objective, the study has adopted an analytical legal research methodology that is qualitative in nature. This descriptive form of inquiry will help to obtain a detailed analysis of case law, applicable statutes and regulations. In addition, the doctrinal legal research methodology will help guide this study in understanding and appreciating why parties are able to empower an arbitral tribunal to determine its own jurisdiction in the first instance. Primary and secondary sources will be used. The arbitration process marks the scope of this investigation.

1.1. The Tribunal's Obligations

An arbitral tribunal's assumption of office and its observance of its fundamental

obligations are two sides of the same coin. The decision that an arbitrator makes to accept an appointment to serve as arbitrator in essence binds him to his fundamental obligations to exercise procedural justice in the conduct of the arbitration proceedings. One cannot exist without the other. An arbitrator that accepts an appointment places himself under an obligation to disclose any material facts that may in any way infringe upon his work to the parties. This responsibility is on-going and disclosure has to be made as the issues arise.

An arbitral tribunal is obliged to remain impartial and independent throughout its mandate. A case in point is the case of *Weissfisch v. Julius and others* [(2006)2 All ER (Comm) 504]. The tribunal must also ensure that it maintains confidentiality to the extent that is expected of the parties to the arbitration agreement. These fundamental obligations arise from the fact that the parties expect to be treated fairly by a tribunal that conducts itself in an independent, impartial and juridical manner. The principle of openness and fair dealing between parties to an arbitration process was discussed in the case of *Athletic Union of Constantinople v. National Basketball Association* [(2002) 1 Lloyd's Report 305].

An arbitral tribunal owes the parties to an arbitration agreement an obligation to disclose. This obligation exists throughout the tribunal's mandate. An arbitrator whose name is being floated for possible appointment owes the parties to an arbitration agreement a general duty of disclosure (Binder, 2010). At the time that an arbitrator accepts his appointment, he is obliged to make a statement of disclosure to the parties. [*Metal Distributors (UK) Ltd v. ZCCM Investment Holdings Plc*] [(2005) 2 Lloyd's Law Reports 37]. A statement of disclosure amounts to an assurance by the arbitrator to the parties that he has laid bare any issues that are likely to be regarded as influencing his decision making process. These issues may relate to any previous business dealings or relations that the arbitrator may currently have or may have had in the past with any of the parties.

An arbitrator's duty is to make a statement of disclosure to the parties stating that he has previously dealt with or worked for either one or both of them. Thereafter, it is up to the parties to decide whether the disclosed statement is likely to infringe upon an arbitrator's determination of their rights and obligations in that particular arbitration.

The duty to disclose is an on-going obligation that an arbitrator should uphold throughout his term of office as the case progresses. This is because fresh evidence in the case and fresh witness statements may reveal information that may not have been previously available to the arbitrator. For example, the arbitrator may discover that one of the witnesses that a party is calling is the arbitrator's business partner. In such a case, the arbitrator should immediately make a declaration to that effect and it is up to the parties to decide whether they believe that the issues raised in the statement of disclosure place the arbitrator in a compromising position or not.

If an arbitration agreement adopts rules of an arbitration institution to govern the arbitration proceedings, the arbitrator may not only owe the parties a duty of

disclosure but the institute as well as the other members of the arbitration team [ICC Rules, SCC Arbitration Rules, 1999 and the AAA International Arbitration Rules, 2001]. Article 17(2) of the SCC Arbitration Rules, places an obligation on an arbitral tribunal to exercise its general duty of disclosure (*The SCC Rules of Arbitration*). An arbitrator owes the parties to an arbitration process this ethical (*IBA Ethics for International Arbitrators, 1987*) and fiduciary duty of care (*IBA Guidelines on Conflicts of Interest in International Arbitration, 2004*).

The duty of disclosure may be summed up as being a promise made by an arbitrator to the parties to the effect that having accepted to conduct the arbitration proceedings, he is obliged to conduct himself fairly, with diligence and skill (*The Law Reform (Miscellaneous Provisions) (Scotland) Act, LR(MP)(S) Act, 1990*). The promise to be impartial and independent is one way of giving an assurance of fairness without a compromise on his professionalism.

The arbitral tribunal must be capable of being able to identify the issues in dispute between the parties and in this way be able to determine the extent of its jurisdiction. These attributes are essential as they assist in defining the scope of the arbitration agreement and the extent of the jurisdiction within which an arbitral tribunal is to function. Further the attributes also show that parties to a contract are able to draw a number of arbitration agreements with different sets of tribunals assigned to deal with different aspects of a dispute between the parties at any given time. The parties are obliged to ensure that the arbitration agreements that they draw conform to the legal system that they wish to subject their arbitration to if the validity of the agreements is to be assured.

Each arbitrator is under an obligation to ensure that it reaches the threshold of the standard of behaviour befitting of a person conducting juridical duties. This obligation may be achieved by a party upholding the principles and attributes of disclosure, impartiality, independence and maintaining confidentiality to the extent required by the parties. This is fundamental as the arbitrator exercises his procedural duties. The adherence to these principles prevents personal challenges on the arbitrator by a party.

1.2. The Objective Test of Impartiality & Independence of the Tribunal

An arbitral tribunal is mandated to work within the limits of its jurisdiction and in accordance with the fundamental principles of fair play, impartiality and independence (*IBA Guidelines on Conflicts of Interest in International Arbitration*).

Systems of law and rules of arbitration place an obligation on the arbitral tribunal to be independent and impartial. The Model Law demands that an arbitral tribunal treats the parties with equality and give each one of them an opportunity to present their case. This is a fundamental obligation that may not be derogated from. Judge Lax when sitting in the Ontario Superior Court of Justice in the case of *Corporacion Transnacional de Inversiones, S.A. de C.V., et al. v. STET International, S.p.A. and STET International Netherlands, N.V.*, CLOUT (1999) stated

that the purpose of Article 18 of the Model Law was aimed at protecting a party from egregious and injudicious conduct by an arbitral tribunal ([The UNCITRAL Model Law on ICA](#)).

The English Arbitration Act under Section 33 also places a mandatory responsibility on the tribunal to “act fairly and impartially as between the parties.” ([The English Arbitration Act of 1996](#)). Eminent authors have defined impartiality and independence in the context of arbitration ([Binder, 2010](#)).

Impartiality is a fluid principle in that it relates to a person’s attitude of mind and behaviour. Independence on the other hand “is a necessary external manifestation of what is required as a prerequisite of that attitude and is an objective examination into the relationship between the parties and appointed arbitrators” ([Yu and Shore, 2003](#)). The objective test of impartiality is whether a reasonable man could conclude that the actions of an arbitral tribunal are biased or not. This test was alluded to in the case of *Porter v. Magill* [(2001) UKHL67] by Lord Hope of Craighead. His Lordship’s test was whether a fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased. Bias in this case may arise in circumstances where an arbitral tribunal holds a private meeting in chambers with one of the parties in the absence of another. The party that is absent may portray such an action as bias on the part of the tribunal.

[The Swedish Arbitration Act \(2019\)](#) is a non-Model Law instrument that provides instances that may point to an arbitral tribunal being partial. These include:

- That the arbitrator or anyone closely affiliated with him is a party or otherwise may expect benefit or detriment as a result of the outcome of the dispute;
- That the arbitrator or anyone closely affiliated to him is a member of the board of a company or any other association which is a party or in any other way represents a party or anyone that may expect benefit or detriment as a result of the outcome of the dispute;
- That the arbitrator, acting as an expert or otherwise, has taken a position in the dispute or has assisted a party in the preparation or conduct of his case; or
- That the arbitrator has received or demanded compensation in violation of the Act ([Bagner and Rosengren, 2006](#)).

An arbitral tribunal will be considered as being partial if it loses its independence. In the case of *Porter v. Magill* [(2001) UKHL 67], Lord Hope of Craighead referred to the close relationship of independence to impartiality as was stated by the European Court in the case of *Findlay v. United Kingdom* [(1997)24 EHRR 21]. In order to be impartial and independent an arbitral tribunal must exercise fairness in its attitude towards all parties. A failure by an arbitral tribunal to abide by this obligation could lead to a party raising a personal challenge against an arbitral tribunal.

2. Reasons & Time Frames of Raising Objections

A jurisdictional challenge is essential in curing the excess of jurisdiction or lack

of jurisdiction of an arbitral tribunal. The lack of jurisdiction or the excess of jurisdiction amounts to a violation of jurisdiction that an arbitral tribunal has under an arbitration agreement. It is this violation that a party may wish to halt when making an application for a jurisdictional challenge against an arbitral tribunal. An arbitral tribunal's exercise of power outside its jurisdiction may amount to a ground for a jurisdictional challenge if not acquiesced to by the parties to an arbitration agreement. It is common for a respondent to challenge the jurisdiction of an arbitral tribunal although it is not unusual for a claimant to raise the objection. For instance, in the case of *Primetrade AG v. Ythan Ltd (The Ythan)* [(2006) 1 All ER (Comm) 157], the claimant applied to challenge the jurisdiction of the arbitral tribunal.

The ICC Rules and the UNCITRAL Rules like the instruments referred to above also make available to an arbitral tribunal the power to rule on its own jurisdiction. Under the ICC Rules for instance, an arbitrator who accepts an appointment undertakes to abide by the ICC Rules in conducting its functions. It is possible for an arbitrator to be faced with a situation where by whilst the claim that he is faced with is within his jurisdiction, a respondent raises issues in its counterclaim which are beyond his mandate. It is obvious that the arbitrator in such a case should only deal with the issues that he is allowed to deal with under his jurisdiction. It is up to the parties to acquiescence to extend his jurisdiction if they wish that the same arbitrator should deal with the dispute in whole. If an arbitrator disregards the fact that he has got no jurisdiction to decide an issue and still proceeds with it, any of the parties may challenge his jurisdiction.

The UNCITRAL Rules under Article 21 (3) and (4) requires that a plea for jurisdiction be raised not later than the filing of a defence (*The UNCITRAL Arbitration Rules*); or with respect to a counter-claim, in the reply to the counter-claim. Under Article 11 of the ICC Rules, the reasons for an objection to an arbitral tribunal's jurisdiction should be submitted in writing to the Secretariat within a prescribed period of time. Although the arbitral tribunal may join the issue of the jurisdictional objection to the merits of the disputes and make one ruling in the final award, it is encouraged to treat the question of jurisdiction as a preliminary issue to which a ruling may be made before the final award. The most usual manner to pursue these objections is for a challenging party to raise an objection immediately it becomes aware of the grounds for the objection. Undue delay could lead to abuse of the arbitral process by the party who knows that the award will eventually be against him.

An arbitral tribunal has a duty to act within the confines of its jurisdiction (English Arbitration Act of 1996, section 33). The fact that the parties wish the arbitral tribunal to establish certain rights and obligations on their behalf does not imply that the arbitral tribunal's jurisdiction is open ended. There must be limits as to what subject matter the arbitral tribunal is allowed to deal with and what it cannot deal with (*Glencore v. Agros* [(1999)2 Lloyd's Rep. 410]). In the event of a party perceiving that an arbitral tribunal does not have jurisdiction, that party has got the prerogative to immediately raise an objection. The case of

Margulead Ltd v. Exide Technologies [(2005) 1 Lloyd's Law Report 324] is instructive here.

The failure by a party to promptly challenge an arbitral tribunal may result in a party's waiver of his rights (Webster and Buhler, 2014). In the case of *Rustal Trading Ltd v. Gill & Duffus SA* [(2000) 1 Lloyd's Rep. 14], Judge Moore-Bick drew attention to the function of section 73(1) of the English Arbitration Act that requires a party with grounds for objection to the constitution of the tribunal or the conduct of the proceedings to raise the objection as soon as he is, or ought reasonably to be aware of it (The English Arbitration Act of 1996).

Section 31(2) of the English Arbitration Act shows that the most appropriate time to raise a challenge is as soon as the pleader realizes that an arbitral tribunal has acted beyond its powers. The English Arbitration Act requires that a challenge before an arbitral tribunal in relation to its excess of jurisdiction be raised as soon as a party becomes aware of the anomaly. The English Arbitration Act gives wide discretionary latitude to an arbitral tribunal to be able to alter the time within which an objection can be made under section 31(1) and (2). This power is enshrined in section 31(3). By virtue of this section an arbitral tribunal is at liberty to use its discretion, depending on the circumstances of each case to allow a jurisdictional challenge to be raised outside the prescribed period of time.

The ICC Rules empower an arbitral tribunal under Article 18 to draw up its own Terms of Reference that could include the subject matter which the arbitral tribunal may be dealing with. Given this scenario, one is led to assume that the arbitral tribunal's jurisdiction will be known at this early stage. Therefore any challenge to the jurisdiction of the arbitral tribunal as enshrined in the Terms of Reference should be raised at the earliest opportunity at least before the Terms of Reference are signed by the parties.

The tribunal may determine the question of its jurisdiction at this stage of the proceedings in the first instance but not finally by virtue of the principle of *competence-competence* (Binder, 2010). The principle of *competence-competence* is a French illustration of the power of an arbitral tribunal to rule on its own jurisdiction (Redfern & Hunter, 2015). *Competence/competence* that literally means jurisdiction concerning jurisdiction is aimed at delaying court intervention in the arbitration process until after the arbitral tribunal has made its decision on the challenge (Park, 2012). This power of an arbitral tribunal is also often referred to in practice using the German illustration of *Kompetenz/Kompetenz* that may be interpreted as meaning "jurisdiction to decide jurisdiction."

Article 13 (1) & (2) of the Model Law provides a limited time frame within which a party may raise a personal challenge against an arbitrator before an arbitral tribunal. The limitation on time within which an arbitral tribunal may entertain a personal challenge is a procedural safeguard that prevents the waste of time, and thus helps the tribunal to work within its set time limits. Further, the Model Law permits a double action at this stage of the proceedings and this

enables the arbitral tribunal to get on with its work with minimum delay. The arbitral tribunal is able to continue with the arbitration proceedings whilst the application against the arbitral tribunal proceeds in court. The fact that the Model Law specifies the time frame within which to challenge the decision of the arbitral tribunal promotes finality in the arbitration process. Article 4 of the Model Law shows that a party that fails to abide by the prescribed time factor may be considered as having waived his rights to challenge the arbitral tribunal's decision (*The UNCITRAL Model Law on ICA*).

Section 31 of the English Arbitration Act, provides the procedure for challenging the jurisdiction of an arbitral tribunal. A jurisdictional challenge could be made even before a statement of claim is filed. This is the most appropriate stage at which the objection to the arbitral tribunal's jurisdiction may be made and if the challenge is successful, it will stop the process before it even begins. This is fair to all the parties as time and money are saved. In dealing with an objection to its jurisdiction, an arbitral tribunal may under section 30(4) of the English Act, choose to make an award as to jurisdiction, or deal with the objection in its award on the merits. What matters is whether the tribunal has answered all the issues that the parties have raised. It is up to the arbitral tribunal only to give weight to evidence that it considers relevant. It is not obliged to consider all the submitted evidence

Rix J identified three options available under the English Arbitration Act to a party raising a challenge against an arbitral tribunal's jurisdiction in the case of *Azov Shipping Co. v. Baltic Shipping Co.* [(1999) 1 All ER 476] Rix J stated that:

Where a challenge to an arbitrator's substantive jurisdiction is made, the party that challenges the jurisdiction has a number of options under the Act. It may agree to participate in the argument before the arbitrator of the question of his competence and jurisdiction: see s. 30 of the Act. It may do so while reserving its right to challenge the arbitrator's award as to his own competence.

Alternatively, it may seek, without arguing the matter before the arbitrator, to promote the determination of the preliminary point of jurisdiction by the court under s.32.

The third option of someone disputing an arbitrator's jurisdiction is to stand aloof and question the status of the arbitration by proceedings in court for a declaration, injunction or other appropriate relief under s.72 of the Act. In such a case he is in the same position as a party to arbitral proceedings who challenges an award under s.67 on the ground that there was no substantive jurisdiction (*Azov Shipping case*).

Amongst the three options that Rix J identified in the *Azov Shipping case*, the first option is the one that is commonly applied in practice. The second option is usually adopted more as an exception than the norm. The third option of standing aloof, in essence denies the party challenging the arbitral tribunal's jurisdiction an opportunity of presenting his arguments before the tribunal. The first option of taking part in the arbitration proceedings and raising a challenge be-

fore the tribunal is a method that gives the tribunal the opportunity of ruling on its own jurisdiction in the first instance. The arbitral tribunal must be given the opportunity to address the issues pertaining to the challenge and make a decision accordingly.

3. Findings

The power of an arbitral tribunal to determine its own jurisdiction is supported by both case law and statutory legislation. Article 1458 of the *Nouveau code de procedure civile* (NCPC) requires a court to declare itself incapable of dealing with an objection against an arbitral tribunal's jurisdiction once the tribunal starts to deal with the issue. The Swiss position embedded in Articles 186 of the *Loi federale sur le droit international prive* (LDIP), permits an arbitral tribunal to rule on its own jurisdiction through an interlocutory decision. The arbitral tribunal will in dealing with an objection against its jurisdiction that is raised in the course of the arbitration proceedings be governed by the *lex arbitri*.

From the analysis made in this article, a finding is made that the doctrine of the power of an arbitral tribunal to determine its own jurisdiction has received worldwide acceptance and recognition in both Model Law and non-Model Law jurisdictions (Binder, 2010). It is clear from the discussion that the doctrine of *competence/competence* is key here. The English Arbitration Act [section 30(1)] and the Model Law [Article 16(1)] permit the question of jurisdiction to be raised before an arbitral tribunal itself in the first instance whilst the arbitration proceedings are in progress. In this way, an arbitral tribunal is able to investigate its own jurisdictional powers whilst the proceedings are on-going thus expediting the arbitration proceedings and saving the parties costs and time. A decision that an arbitral tribunal makes in relation to a challenge against its jurisdiction will remain final and binding on the parties unless an objection is raised by a party (Tweeddale & Tweeddale, 2007). Most legal systems that support international commercial arbitration as well as some arbitration rules recognize the competence of an arbitral tribunal to rule on its own jurisdiction, at least in the first instance [UNCITRAL Rules, ICC Rules & the LCIA Rules (The LCIA Arbitration Rules of 2014)]. In order for this power of an arbitral tribunal to be established, the parties to an arbitration agreement must clearly and precisely intend for the tribunal to possess such power.

An arbitral tribunal has got the option of dealing with a challenge immediately it is raised as a preliminary issue or, it may deal with it with the main case and include it in its final decision. Article 16(1) of the Model Law supports the position that an arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. In the case of *Rio Algom Inc. v. Sammi Steel Co.* CLOUT (1991) (Case No. 18), the Ontario Court of Justice held that an arbitral tribunal had jurisdiction in the first instance to determine its own jurisdiction and the scope of its authority under Article 16 of the Model Law.

The English Arbitration Act in section 30 gives power to an arbitral tribunal to make a preliminary award when deciding its own jurisdiction. Section 30(1) of the English Arbitration Act gives competence to an arbitral tribunal to rule on its own jurisdiction and its decision is final unless appealed against or reviewed by a court (*The English Arbitration Act of 1996*). Switzerland does not permit a party to question an arbitrator on the power he possesses to deal with an issue unless the issue was unknown to the said party prior to the appointment (*Swiss Private International Law Act, 1987*). Unlike the Swiss law, the English law provides for any of the parties to challenge an arbitral tribunal's jurisdiction even though that party participated in nominating the tribunal. Whilst the Swiss Law gives guidance on the law that the arbitral tribunal should apply when faced with a jurisdictional issue which is the parties' chosen law or the rules of law with which the dispute has the closest connection, the Model Law leaves open the question of the applicable law (*Binder, 2010*).

Under the Model Law, an arbitral tribunal may apply the law of the seat of arbitration when determining its own jurisdiction. This is because the tribunal's power that is embedded in Article 16(1) is a territorial provision (Article 1(2) of the Model Law). In order for Article 16(1) of the Model Law to be operative, there has to be a valid arbitration agreement in place to hold the parties to their bargain. Article 16(1) permits the arbitral tribunal to determine a jurisdictional objection. In the case of *Dalimpex Ltd v. Janicki; Agros Trading Spolka Z.O.O. v. Dalimpex Ltd* [(2003) 64 Ontario Reports (3d) 737] the Court of Appeal in Ontario held that in cases where it is not clear, it may be preferable to leave any issue related to the existence or validity of the arbitration agreement for the arbitral tribunal to determine in the first instance under article 16(1) of the Model Law.

An arbitral tribunal may be construed as lacking jurisdiction if it functions in the absence of a valid arbitration agreement. An arbitral tribunal may be acting outside its jurisdiction if it purports to establish the rights and obligations of a non-party to the arbitration agreement; or if it deals with a dispute that the parties have not agreed should be dealt with by the tribunal. Further, an arbitral tribunal that fails to abide by the prescribed time limits including the time within which to make an award risks being challenged for lack of jurisdiction.

An arbitral tribunal that functions outside the limits of its jurisdiction may invite an objection from a party aimed at rectifying the position (*Tweeddale & Tweeddale, 2007*). An arbitral tribunal owes the parties a responsibility to be certain of the limits of its mission. It cannot deliberately ignore its mandate in pursuance of the interests of one party (*ICC Case No. 1776*). Such exercise of its duties would be tantamount to acting in bad faith. Some countries such as England, Canada, Australia and New Zealand may hold such an arbitral tribunal personally liable for such action. There are cases where the arbitrator has no intentions of ignoring his mandate but is forcefully made to do so by the appointing party. A case in point is *Himpurna California Energy Ltd and The Republic*

of Indonesia [(2000 Yearbook Commercial Arbitration, Volume XXV-2000)].

It may therefore be seen that an arbitral tribunal's power to rule on its own jurisdiction is different from its other powers in the sense that whilst those powers are exercised in order to resolve the dispute between the parties, this power is a test of its jurisdiction. It questions whether the tribunal is on the right track or not. It may therefore be described as an exceptional power in the sense that it helps the tribunal to define the extent of its powers and therefore becomes its own judge when queried. This power is important as it enables the arbitration proceedings to progress as scheduled in the sense that an arbitral tribunal is able to determine its own jurisdiction whilst continuing with the arbitration proceedings. Further, it promotes the independence of the process of international commercial arbitration as questions pertaining to its jurisdiction are answered in-house. By raising a jurisdictional challenge before the arbitral tribunal a party is able to obtain immediate remedy and in the process save costs and time.

4. Conclusion

Whenever a question that touches on the jurisdiction of an arbitral tribunal is raised during the course of the arbitration proceedings, the tribunal deals with it in the first instance. In this way, the arbitral tribunal is able to check and determine its own jurisdiction. This is a test of its jurisdiction. It is exceptional in that it is done without interfering in the work of an arbitral tribunal. It is also inevitable in the sense that it is made available in instances when an arbitral tribunal lacks power; is challenged or when the interpretation, maintenance or enforcement of the parties' agreement is required.

This article has discussed the background from which an arbitral tribunal's powers arise. It has also dealt with the basic standards of conduct required of an arbitral tribunal. It therefore marks the foundation of the tribunal's powers to determine its own jurisdiction as well as the way in which it is expected to conduct itself during the duration of the arbitration. The arbitration agreement is recognized in this article as one of the pillars upon which the process of international commercial arbitration rests. The whole structural framework of arbitration is designed by the agreement of the parties. The parties have got an independent controlling power over how they would wish the disputes arising between them in their international commercial contracts to be resolved, and by whom. It is evident that the parties' ability to privately design their own dispute resolution mechanism is one of the attractive features of arbitration.

An arbitral tribunal has a duty when questioned to determine whether it is functioning within the scope of its authority or not (*Tweeddale & Tweeddale, 2007*). It does this by examining its very existence where a doubt is raised. The power of an arbitral tribunal to rule on its own jurisdiction, like party autonomy forms the cornerstone of the process of international commercial arbitration in the sense that it establishes the independence and autonomy of the process of international commercial arbitration.

Whenever a question that touches on the jurisdiction of an arbitral tribunal is raised during the course of the arbitration proceedings, the tribunal deals with it in the first instance. In this way, the arbitral tribunal is able to check and determine its own jurisdiction without delaying the proceedings and in so doing promoting and validating the process of arbitration.

Conflicts of Interest

The author declares no conflicts of interest regarding the publication of this paper.

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