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With this thought, we hereby present to you

W H I T E B L A C K
L E G A L

**NAVIGATING POLICE POWERS AND DUE
PROCESS IN INTERNATIONAL ARBITRATION:
UPHOLDING FAIRNESS, INTEGRITY, AND
ENFORCEMENT.**

AUTHORED BY-TANISHQ JUGAL

ABSTRACT

The doctrine of police powers empowers governments and administrative entities to control behaviour to safeguard the public welfare. In arbitration, arbitrators have similar authorities to ensure fair and orderly processes. However, such authority must be exercised in accordance with due process guidelines to ensure fairness and honesty. The paper investigates the connection between police powers and due process in arbitral processes, concentrating on their application across different jurisdictions, specifically India. It investigates how tribunals execute procedural orders and apply punishments for failure to comply, drawing on legal frameworks such as the 'UNCITRAL Model Law' and related statutes, while adhering to fairness requirements. It explains the scope of tribunals' inherent powers as well as the restrictions imposed by due process requirements through case law analysis and doctrinal investigation. Finally, the study emphasises the importance of balancing police powers with procedural fairness to maintain the validity and effectiveness of arbitral rulings.

INTRODUCTION

The doctrine of police powers is a legal concept that grants governments the authority to regulate the behaviour and activities of individuals and entities within their jurisdiction to protect public health, safety, morals, and welfare. The word 'police' in this context refers to 'policy' or 'polity'¹. The authority of the government to impose such restraint is called police power.² This power can also be exercised by administrative agencies and tribunals in carrying out their regulatory functions. Pursuant to this right, States may regulate their political, economic, and social affairs and adopt laws to protect matters of public interest.³ Although, considering police power in line with the powers of courts and tribunals, it confers authority on the adjudicating body to rightfully adopt measures linked to the interests and expectations of the individuals subjected to it. Its power stems from legal constitutions or agreements that are responsible towards the adjudicating body. In the context of arbitral proceedings, tribunals may exercise police powers to ensure that the proceedings are conducted in a fair and orderly manner, and that the awards rendered are enforced. For example, a tribunal may have the control to issue forth orders to compel the attendance of witnesses, the production of documents, or to preserve evidence. In addition to exercising police powers during the proceedings, the tribunal may also have the power to enforce its own orders and awards. This may include the power to issue writs of execution to enforce the award, or to impose penalties for non-compliance. Basically, doctrine of police powers allows tribunals to effectively regulate arbitral proceedings and ensure that the parties are held accountable for their conduct while also protecting the integrity and finality of the award which has been/or is to be rendered.

The Role of Due Process in International Commercial Arbitration

The police powers doctrine provides that a State possesses an inherent right to regulate in protection of the public interest and does not act wrongfully when, pursuant to this power, it enacts bona fide, non-discriminatory, and proportionate regulations in accordance with due process⁴.

¹ Santiago Legarre, 'The Historical Background of the Police Power' (2006) 9 University of Pennsylvania Journal of Constitutional Law 745, 761.

² Tiedeman, C.G., A Treatise on the Limitations of Police Power in the United States Considered from Both a Civil and Criminal Standpoint, 1-2 (F.H. Thomas Law Book Co., St. Louis, 1886).

³ Rahim Moloo and Justin Jacinto, 'Standards of Review and Reviewing Standards: Public Interest Regulation in International Investment Law' in Karl P Sauvart (ed), Yearbook of International Investment Law and Policy 2011-2012 (Oxford University Press 2013) 550.

⁴ Osman Alice, 'Police Powers Doctrine' (Jus Mundi, December 2022)

<https://jusmundi.com/en/document/publication/en-police-powers-doctrine#:~:text=The%20police%20powers%20doctrine%20provides,in%20accordance%20with%20due%20process> accessed 31 March 2023.

Although, the obligation lies in ensuring that this authority is used correctly and without creating liabilities; Nevertheless, before delving into the regulating components of the Tribunal's Police Powers and subsequent implementation of decisions by the Tribunal, it is necessary to outline the method through which these powers should be used. Powers shall be used fairly without any biases and with pure justice. For which comes into the picture of **'due process'**. Due process is a legal concept that refers to the principle that individuals must be treated fairly by the legal system. It is a fundamental right enshrined in many legal systems around the world, including the US Constitution and the Universal Declaration of Human Rights. In Indian law, the concept of Due Process is not explicitly defined in legislation or legal precedents. However, it is understood to be a part of the broader principles of Procedural Fairness, as it is connected to various international instruments, conventions, and domestic statutes related to Arbitration. Therefore, the New York Convention specifically provides for the concept of 'recognition and enforcement of a foreign award' and even though it does not talk about the existence of due process unswervingly, there does exist the effect of the same in regards with the procedures and awards.

While due process plays an important role in ensuring the fairness and integrity of the arbitral process, A regulatory measure must be enacted in accordance with due process in order to constitute a legitimate exercise of police powers.⁵ The purpose of due process is to set a limit in the process of rendering an award, it is so that the tribunal is not able to succeed excess power. In relation to this- UNCITRAL Model Law⁶ on International Commercial Arbitration contains provisions related to due process that ensure that parties to an arbitration receive a fair hearing which talks about 'equal treatment of parties' under Article 18⁷ which provides that both parties must be given a complete opportunity to present its case and to respond to the case presented by the other party. While Article 12⁸ of the Model Law requires that arbitrators be neutral and fair throughout the arbitration process. Due process in challenging arbitral awards, Article 34⁹ of the 'Model Law' provides that a party may challenge an arbitral award if it was

⁵ Mitchell, K., 'Accommodating the Public Interest in International Investment Treaties: Police Powers, Expropriation and Treaty Interpretation' (MPhil thesis resubmission, University of Oxford, Faculty of Law, Magdalen College, 2014).

⁶ UNCITRAL, 'UNCITRAL Model Law on International Commercial Arbitration' (as amended in 2006), UN Doc A/40/17, annex I (1985).

⁷ UNCITRAL Model Law on International Commercial Arbitration, art 18.

⁸ *ibid*, art 12.

⁹ *ibid*, art 34.

not given proper notice or an opportunity to present its case, or if the award was obtained through fraud or corruption; Such provisions aim to ensure that parties to an international commercial arbitration are afforded due process and receive a fair hearing. Some jurisdictions interpret due process guarantees more broadly than what is outlined in the UNCITRAL Model Law and provide the arbitral tribunal with more discretion in this regard such as the equal treatment and adversarial principle adopted by Switzerland¹⁰

In the context of arbitration, non-compliance with police powers can have implications for the enforceability of arbitration awards. When the Tribunal issues a procedural Order and parties don't comply with it, this omission shall be without adequate reason. This means that the Tribunal is obligated to give the failing party a chance to explain why they are not in compliance. Here, section 33¹¹ requires the Tribunal to meet its responsibility of ensuring procedural fairness. The parties are provided with the necessary means of being heard and represented but in case they fail to put forward a sufficient reason of non-compliance, then they have to comply with what the tribunal decides for them. The tribunal also have the power to impose sanctions upon its discretion, although, the tribunal must act reasonably with a bona-fide objective and full the necessary requirements for a fair and just procedure. Although, while the use of police power in imposing punishments is obvious, it is supported by Due-Process, which restricts the arbitral tribunal's authority overall.

TRIBUNALS POWER ON IMPOSING SANCTIONS AND THE INHERENT POWERS

Following Section 17¹², the Tribunal can provide Temporary Relief even during Arbitral Process, and the order of the Tribunal is equated with the order of the Court, pursuant to sub-clause (2). Interim Measures are sometimes necessary under the Arbitration framework in order for the remedy sought via merits to be granted. This Temporary Measure is obtained not only through the Court, but also through the Arbitral Tribunal in most jurisdictions. Both the Courts and the Arbitral Tribunal have the authority to provide Temporary Relief under the Arbitration and Conciliation Act of 1996¹³. Nevertheless, the Court can only guarantee this before the

¹⁰ *ibid*

¹¹ Arbitration Act(1996), s.33(1).

¹² Arbitration Act (1996), s.17

¹³ Arbitration and Conciliation Act 1996 (India).

Arbitral Tribunal is formed and after the award is made in line with Section 9¹⁴. The parties are required to either file an appeal under Section 37 clause 5¹⁵ or adhere to the orders issued if they choose not to appeal. When the parties do not adhere to the orders issued by the Arbitral Tribunal, problems arise. In such situations, it may become necessary to impose sanctions as per the applicable laws and establish the payment process.

The Tribunal possesses inherent powers that serve to maintain the fairness of its proceedings and protect its jurisdiction over the parties involved. Supreme Court in the case of 'Alka Chandewar V. Shamshul Ishar Khan' held that the court has the power to penalize for the contempt of order made by an arbitral tribunal. The orders passed by the arbitral tribunal are enforceable just like orders of the court under CPC.¹⁶ These powers are derived from the will of the parties and applicable laws. While the Arbitration Agreement may establish specific guidelines for the Tribunal, its inherent powers grant it discretion in cases where instructions are not clear. The power of the Tribunal may include explicitly stated or implied powers based on the existence of the Arbitration Agreement. Hence the Tribunals are able to provide and effective discretion between their expressed powers and powers that are not provided explicitly in their Arbitration Agreement yet mandates their functioning. The Tribunals are able to provide effective discretion between their expressed powers and powers that are not provided explicitly in their Arbitration Agreement. For example, a tribunal may have the power to issue procedural orders to ensure the fair and efficient conduct of the arbitration, even if such powers are not expressly provided for in the arbitration agreement. Similarly, a tribunal may have the power to interpret the parties' agreement and applicable laws to determine the scope of its jurisdiction, even if the agreement does not explicitly grant such power. The position where the arbitrators are supposed to protect the integrity of the arbitral award and its smooth functioning by sticking to its process and rules but at the same time pass an award. Since, Arbitration is characterized by the maintenance of equitable standards as parties may have varying legal backgrounds. Therefore, even if not expressly stated, arbitrators possess inherent powers to take actions during proceedings in order to accomplish the purpose of the arbitration and meet the legitimate expectations of the parties. Arbitrators can also utilize these powers to enforce sanctions and regulate proceedings in cases where one party fails to comply with procedural orders, to ensure

¹⁴ *ibid*, at s.9.

¹⁵ *ibid*, at s.37(5)

¹⁶ Alka Chandewar V. Shamshul Ishar Khan, (2017) 16 SCC 119.

that any irregularities do not hinder the impact of the final award. The same can be seen in the article 7.4.2 of the UNIDROIT principles¹⁷ which basically states that when the party involved in an arbitration agreement accepts that they will be penalized if they do not follow the specific orders issued by the Arbitral Tribunal, as stated in the Procedural Law. Essentially, if they fail to comply with the Tribunal's instructions, they will be subject to punishment.

In the case of *Shri Krishan v. Anand*¹⁸, the High Court of Delhi gave about a general power to the tribunal under section 27(5)¹⁹ which talks about the imposition of sanctions and "Making any other default" in the jurisdiction of the Tribunal now incorporates non-compliance with the orders of the Tribunal under Section 17²⁰ of the Act. Such non-compliance can result in the parties being bound in contempt of the Tribunal's arbitral proceedings, as per the 2015 Amendment. The Arbitration Act in India grants the Tribunal the authority to impose penalties when there is non-compliance with its orders. The sanctions will be determined based on the fact that the Tribunal's orders are treated as Court orders, and therefore, the Civil Court and Contempt Act will be applicable. Consequently, the Tribunal's power to determine the magnitude of the sanctions is aligned with the regulations stated in the relevant statutes. As mentioned above, the due process requirement of proportionality ought not be forgotten. *Order XXXIX Rule 1 and 227* specifically states consequences for breach or disobedience for the Court's order and hence a purposive interpretation must be applied in determining the consequence so as to the parties are not able to avert from the brunt of law. The law clearly states the specifications regarding it. Further, in maintaining the due process or procedural fairness, every attempt has to be made in remedying and rectifying the things done in non-compliance with the orders as stated in *Mohd. Idris & Anr. v. Rustam Babuji & Ors.*²¹

CONCLUSION

The arbitral tribunal is empowered to operate in compliance with the provisions of an agreement or instrument, and this power is permanent. However, in order to ensure fairness and equality between the parties, the tribunal may need to exercise its power to impose appropriate measures

¹⁷ UNIDROIT Principles of International Commercial contracts(2010), art. 7.4.2

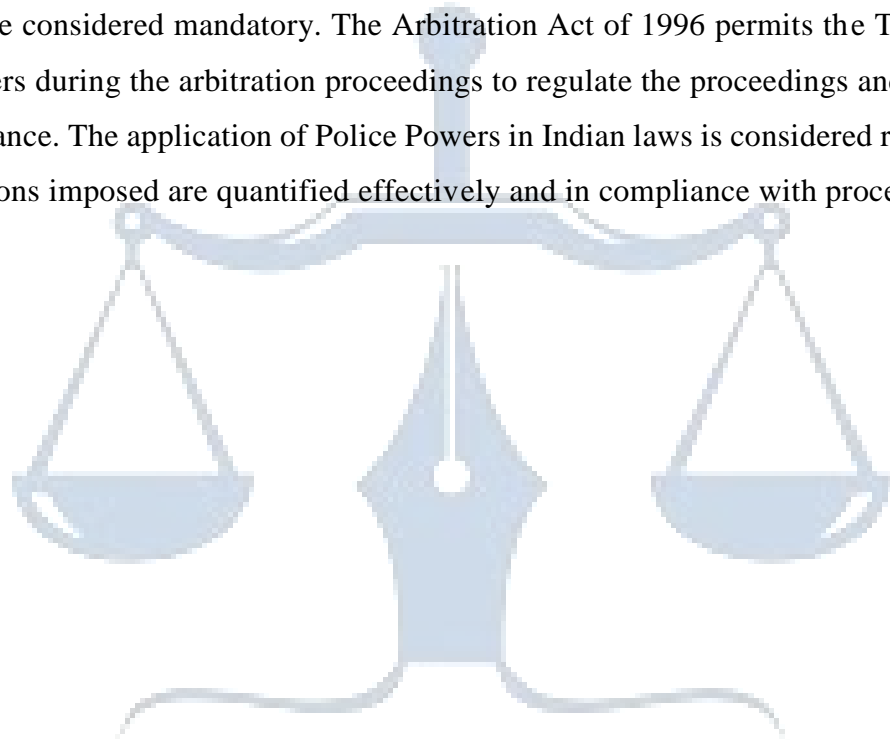
¹⁸ *Shri Krishan v. Anand* (2009) 112 Dtrj 657

¹⁹ Arbitration Act (1996), s.27(5)

²⁰ Arbitration and Conciliation (Amendment) Act, 2015. s. 17.

²¹ *Mohd. Idris & Anr. v. Rustam fehangit Babuji & Ors.*,(1984) 4 SCC 2 1 .

to facilitate the proceedings and ultimately issue an enforceable award. This exercise of power falls within the scope of police power and can be demonstrated in various forms, such as the imposition of sanctions. The power is therefore employed for both the regulation of proceedings and the enforcement of orders. The key is to use this power in a manner that does not infringe upon the requirements of due process and procedural fairness. When a Tribunal issues an Interim Order under Section 17 and it is not complied with, the Tribunal has the power to impose penalties as a form of sanctions. This power is within the inherent authority of the Tribunal and its orders are considered mandatory. The Arbitration Act of 1996 permits the Tribunal to pass interim orders during the arbitration proceedings to regulate the proceedings and overlook any non-compliance. The application of Police Powers in Indian laws is considered reasonable only if the sanctions imposed are quantified effectively and in compliance with procedural fairness.



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