LEXOLOGY

The Fine Line Between Strategy and Ethics: Guerrilla Tactics in Arbitration

MRP Advisory

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INTRODUCTION

In contemporary legal practice, arbitration is widely regarded as the most effective and efficient method for resolving commercial disputes, offering parties an expedited process while preserving party autonomy. However, ensuring that arbitral awards are rendered fairly and impartially remains a significant challenge for tribunals, particularly due to the lack of a uniform regulatory framework governing the ethical conduct of parties and counsel. This regulatory gap can lead to procedural abuse and manipulation, with parties employing strategies commonly termed as "Guerrilla Tactics" that, while not necessarily being illegal, have the effect of obstructing or delaying proceedings. Such tactics undermine the integrity, fairness, and efficiency of the arbitration process, ultimately compromising its fundamental objectives.

DEFINING GUERRILLA TACTICS

The term "Guerrilla Warfare" originated after the Spanish *Guerra de la Independencia* and is traditionally associated with surprise attacks on vulnerable targets[1]. In arbitration, the concept was first articulated by Dr. Michael Hwang SC, who introduced the notion of "Arbitration Guerrillas" to describe individuals who exploit procedural aspects of arbitration for their own interests, thereby undermining the integrity of the process[2]. Such tactics may include undue adjournment requests, anti-arbitration injunctions, witness tampering, frivolous objections, challenges to arbitrator impartiality, unwarranted delays, ex parte communications, and even witness intimidation or harassment.

CLASSIFICATION

Guerrilla tactics in arbitration can be broadly classified into three categories:

1. **Common forms**, are generally perceived as unethical but not illegal, involving procedural violations such as frivolous adjournment requests or baseless challenges to the tribunal's impartiality. Although not unlawful, these tactics disrupt the arbitration process and, according to a survey, are encountered by 68% of arbitrators and counsel. An example includes inundating the opposing party with an excessive volume of documents at the last minute, hindering their ability to respond adequately.[3]
2. **Extreme forms,** are highly unethical and often illegal, involving criminal activities such as corruption, fraud, or wiretapping of witnesses. These tactics can result in awards being set aside by state courts and may lead to criminal prosecution, as highlighted in *ICSID Case No. ARB/06/8*[4], wherein the tribunal recognized its limited authority over such criminal actions, necessitating state court intervention.
3. **Rough-riding forms,** involve conduct that breaches professional norms, such as aggressive and disruptive strategies designed to obstruct proceedings through multiple frivolous motions, making it challenging to address effectively due to the subjective context in which they are deployed.

PARTY AUTONOMY AND ITS IMPLICATIONS ON GUERILLA TACTICS

The principle of party autonomy is a fundamental aspect of arbitration, distinguishing it from litigation by granting parties significant control over key elements of the proceedings, such as the choice of arbitrators, applicable laws, language, and procedural rules. While this flexibility enhances the efficiency and appeal of arbitration, it can also be exploited by counsel through the use of guerrilla tactics. Such conduct is seen as a breach of the arbitration agreement, as affirmed by the Singapore High Court in *China Machine New Energy Corp v. Jaguar Energy Guatemala LLC & Anr*[5], where it was held that arbitration agreements inherently impose a duty to cooperate and act in good faith.

With the increasing reliance on arbitration for resolving commercial disputes, the involvement of legal professionals from diverse jurisdictions has become more common[6]. This cultural diversity can further complicate matters, as varying ethical standards across jurisdictions which may lead to differing perceptions of acceptable conduct. For instance, under English law, witness preparation is prohibited, whereas it is permissible under American law.

Such discrepancies can create confusion and be exploited by counsel to manipulate proceedings in their favour. Furthermore, procedural rules intended to ensure fairness, such as those for challenging arbitrator appointments, can be misused through frivolous challenges designed solely to delay proceedings, undermining the effectiveness and integrity of arbitration.

THE ROLE OF ARBITRAL TRIBUNALS

The arbitral tribunal is duty-bound to ensure ethical conduct in arbitration proceedings and to prevent any misconduct by counsel. In the absence of a uniform code of conduct regulating the ethical behaviour of parties and counsel in international arbitration, tribunals are tasked with identifying and addressing guerrilla tactics employed by counsel. Arbitrators, who possess a comprehensive understanding of the dispute and the parties involved, are best placed to evaluate the conduct of parties and detect unethical strategies. Once identified, the tribunal's ability to act is constrained by the arbitration agreement or institutional rules.

Notably, in *ICSID Case No. ARB/05/24*[7], the ICSID tribunal affirmed its authority to take measures ensuring the integrity of the proceedings. This approach was later refined in *ICSID Case No. ARB/06/3*[8], where it was held that such authority should be exercised only in exceptional circumstances.

ETHICAL CONSIDERATIONS

Guerrilla tactics can range from overtly unlawful (extreme tactics) to lawful but unethical strategies (common tactics) or tactics that may reflect cultural differences (rough-riding tactics). The tribunal must assess the ethicality of these tactics by considering the circumstances, intent, and impact on the proceedings, while upholding principles of fairness and impartiality, as mandated by Article 18 of the UNCITRAL Model Law or Article V(1)(a) of the New York Convention.

The tribunal’s assessment should also consider the context in which the tactic was used, including cultural and ethical standards of the parties' jurisdictions and any applicable rules. For instance, delays may be perceived as disruptive in certain jurisdictions but acceptable in others where time is viewed more flexibly. The intent behind a tactic whether it serves as self-defence or aims to unethically disadvantage the opponent is also crucial. Furthermore, the potential harm to the proceedings must be evaluated.

While tactics affecting the process can raise ethical concerns, they should not be deemed as guerrilla tactics without a thorough analysis of their impact and legitimacy under the relevant rules and standards.

DENOUMENT

Determining the ethics of guerrilla tactics in international arbitration is not straightforward, given the diverse ethical standards of practitioners from various jurisdictions. While strategies like extreme forms are criminal in nature are clearly unethical, other tactics require a nuanced evaluation based on context, intent, cultural considerations, and the overarching principles of public policy.

The use of guerrilla tactics in arbitration, though not always unethical (except in extreme cases), can challenge tribunals in delivering enforceable awards by pushing the boundaries of acceptable conduct. Evaluating the ethicality of such tactics requires careful consideration of the circumstances, factual context, and cultural differences among counsel and arbitrators to ensure a fair and context-sensitive outcome.

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