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# Guerrilla Tactics in Arbitration vis-a-vis International Arbitration

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## ABSTRACT

*In the instant article, the author seeks to examine the lacunae in the existing framework guiding the International Commercial Arbitration which provide the attorneys/parties the opportunity to exercise Guerrilla tactics or any other activity that defy the very objective of resorting to the arbitration i.e. expeditious disposal of the dispute. Further, the author discusses the practical difficulties in formulating the global code for regulating the conduct of the parties and their attorneys. Lastly, the author provide a solution to combat the Guerrilla tactics played by the parties and the attorneys in the course of arbitration.*

**Keywords:** *International Commercial Arbitration, Guerrilla tactics, Disposal*

## I. INTRODUCTION

With the international communities coming together and the advancement in commerce and technology, the need for the legal system to enhance the alternative dispute mechanism to settle the disputes continues to grow. The popularity of the Alternative Disputes Resolution methods is evident from the volume of cases being handled by the arbitral tribunals.

The disposal of the dispute by arbitration is prominent in the recent times and is preferred over the litigation primarily because of the advantages offered by the arbitration proceedings i.e. expeditious disposal of the disputes, substantial autonomy of the parties and control of the parties over the process used to resolve the dispute submitted to arbitration.<sup>2</sup> However, a lack of uniform ethical regulations and the poor jurisdictional framework make it effortless for the parties' attorney to engage in the guerrilla tactics which hinder the conventional way of conducting the arbitration proceedings and thereby, defies the very objective<sup>3</sup> of resorting to

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<sup>2</sup> Fatih Serbest, *Is there Scope for the Wider Application of Fast-Track Arbitrations in the Resolution of International Commercial Disputes*, Available at [https://www.researchgate.net/publication/259822929\\_Is\\_there\\_scope\\_for\\_the\\_wider\\_application\\_of\\_fast-track\\_arbitrations\\_in\\_the\\_resolution\\_of\\_international\\_commercial\\_disputes](https://www.researchgate.net/publication/259822929_Is_there_scope_for_the_wider_application_of_fast-track_arbitrations_in_the_resolution_of_international_commercial_disputes) (Last accessed on Nov. 8, 2020).

<sup>3</sup> Om Prakash Gautam & Syamantak Sen, *Guerrilla Tactics in International Arbitration: Use of Party Appointed Experts*, Available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3558341](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3558341) (Last accessed on Nov. 8, 2020).

the arbitration proceedings at the first place.

Though, there exist ethical problems and conflicts yet, they are limited to the cosy confines of fraternity as the reputations of individuals are at stake. Irrespective of the strength of the legal claim the success of the arbitration lies in the counsel's ability to present his case. This is the stage where the guerrilla tactics are usually exercised. In course of arguments the party has two options either to win or make other party lose. The former approach is ethical as is generally deployed by the parties with the stronger claim while the latter approach is deployed by the party incapable of making strong case and thereby, foregoes ethics and employs tactics of little war.<sup>4</sup> These tactics generally involves attempting to avoid or delay the legal confrontation, wearing down the arbitral tribunal etc.

## II. GUERRILLA TACTICS: EXPLAINED

Guerrilla tactics in arbitration is all about behaviour and involves strategies that are ethical violations, criminal acts, underhand manoeuvres etc. These tactics are blatant measures which digress from the conventional scope of law and ethics, though these tactics are always unethical yet may not amount in every occurrence violation of laws and rules.<sup>5</sup> Thus, the improper conduct by the parties and the attorneys may sometimes be legal and bad but notwithstanding whether the measure is unethical or illegal such behaviour constitutes an obstruction to the arbitral proceedings and ultimately obstruction to justice.<sup>6</sup>

Guerrilla tactics begins when the party to the dispute use the safeguards provided to protect the sanctity of the arbitration not as a shield but as a weapon to assault the integrity of the arbitral proceedings.<sup>7</sup> The essential elements of these tactics are intent and deviance i.e. the party's deliberate engagement with the action in question. For example, frivolous challenges to the impartiality of the arbitrator, a heated argument either between the parties or the counsels resulting in the assault or injury could in certain circumstances due to the deliberate actions.<sup>8</sup>

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<sup>4</sup> Oberoi Preet Singh, *Understanding Guerrilla Tactics in International Arbitration*, Available at <http://journals.christuniversity.in/index.php/culj/article/view/482> (Last accessed on Nov. 8, 2020).

<sup>5</sup> Gunther J Horvath & Amanda Neil, *Guerrilla Tactics in International Arbitration*, Available at <https://kluwerlawonline.com/journalarticle/Asian+Dispute+Review/19.3/ADR2017025> (Last accessed on Nov. 8, 2020).

<sup>6</sup> Caio Cesar Rocha, *Guerrilla tactics: breaking ethical patterns in international arbitration?*, Available at [https://www.academia.edu/38238968/Guerrilla\\_tactics\\_breaking\\_ethical\\_patterns\\_in\\_international\\_arbitration](https://www.academia.edu/38238968/Guerrilla_tactics_breaking_ethical_patterns_in_international_arbitration) (Last accessed on Nov. 9, 2020).

<sup>7</sup> Maximilian Clasmeier, *Singapore High Court Upholds Multi-Million Dollar ICC Award Relating to a Power Plant in Project in Guatemala*, Available at <http://arbitrationblog.kluwerarbitration.com/2018/11/06/singapore-high-court-upholds-multi-million-dollar-icc-award-relating-power-plant-project-guatemala/> (Last accessed on Nov. 9, 2020).

<sup>8</sup> Agla Eir Vilhjalmsdottir, *Combating Dilatory Tactics in international Arbitration and the Impact of Due Process Paranoia on Efficiency*, Available at <https://skemman.is/bitstream/1946/33134/1/ML%20Ritger%C3%B0%20AEV.pdf> (Last accessed on Nov. 9, 2020).

It is the strategic employment of the tactics such as ambushes, arbitrariness etc. by the stakeholders to evoke from their topic and calling for an effective means in the name of protecting the sanctity and integrity of the International Arbitration.

A party who refers to the rules not to expedite the disposal but to obstruct, delay, derail and sabotage the arbitral proceedings, and ultimately hampering in the course of justice to obtain the justice is a real ‘guerrilla’. What actions constitute guerrilla tactics in arbitration is a matter of facts however, the following behaviour may be identified as guerrilla tactics in arbitration:

- Witness tampering;
- Raising challenges on the impartiality and independence of the arbitrator;
- Raising frivolous objections;
- Adjourning the proceedings;
- Unwarranted delay tactics;
- Creating conflicts by changing the counsel mid-proceedings;
- Ex-parte communications;
- Absurdly unethical requests for document disclosure or production; and
- Anti-arbitration injunctions etc.<sup>9</sup>

The Singapore High Court in the case of *China Machine New Energy Corp v. Jaguar Energy Guatemala LLC & Anr*<sup>10</sup>, observed that “All arbitration agreements include a duty to cooperate and act in a good faith in the arbitral process” yet despite the intention of the judicial authorities the ethical concerns prevalent in the International Arbitration are numerous ranging from dishonesty, conflict of interest to making improper arrangements of legal representation to vitiate the arbitration proceedings. It is the no man’s land bizarre character of the International Arbitration that makes it an ideal avenue for exercising the guerrilla tactics.

### **III. INTERPLAY BETWEEN GUERRILLA TACTICS AND INTERNATIONAL ARBITRATION**

Economic globalisation in the society has led to the development of International Commercial Arbitration, being a private, reliable, impartial and judicial form of dispute resolution. The absence of transnational courts having universal jurisdiction empowers the parties to refer their dispute to the International Commercial Arbitration, wherein parties can submit their dispute

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<sup>9</sup> Prof. Fabian Ajogwu, *Dealing with Guerrilla Tactics in International Arbitration: Which tools for Counsel and Arbitrators?*, Available at [https://kennapartners.com/wp-content/uploads/2019/08/Dealing-with-Guerilla-Tactics-in-International-Arbitration-which-tools-for-Counsel-and-Arbitrators\\_.pdf](https://kennapartners.com/wp-content/uploads/2019/08/Dealing-with-Guerilla-Tactics-in-International-Arbitration-which-tools-for-Counsel-and-Arbitrators_.pdf) (Last accessed on Nov. 9, 2020).

<sup>10</sup> *China Machine New Energy Corp. v. Jaguar Energy Guatemala LLC and Another*, [2020] SGCA 12 (Singapore).

to a non-national tribunal<sup>11</sup>.

Precisely, International Arbitration is a proceeding which the parties to dispute used to settle their dispute before an independent and impartial tribunal appointed by a commonly agreed method. As per [Article 1\(3\) of UNCITRAL Model of International Arbitration](#)<sup>12</sup>, arbitration is considered as international, if: “

- *The place of business of parties to an arbitration agreement at the time of conclusion of an agreement is in different states; or*
- *The matter subjected to arbitration is related to more than one country; or*
- *The place of arbitration or any place where the part of commercial relationship obligation is performed is outside the place of the business of the parties to the agreement.”*

Arbitration has been preferred from a long time over litigation due to the speed and economy it offers but the commercial advantages it offers are disappearing as many cases of International Arbitration become prey to the guerrilla tactics, such as repeated attempt of questioning the integrity of arbitrator, witness tampering etc., exercised by the parties to the dispute and hence, leading to the slow disposal of disputes and proving expensive to the parties. Guerrilla tactics sabotage the entire arbitral proceedings and thereby, obstructs and hinder the process of timely disposal of the dispute subjected to the arbitration.

#### **IV. INTERNATIONAL ARBITRATION ASPECTS THAT TRIGGERS GUERRILLA TACTICS**

Guerrilla tactics in arbitration is all about the behaviour of the parties, ranging from underhand manoeuvres to more blatant measures which may sometimes be illegal. The factors that are responsible for the increase in the use of the Guerrilla tactics by the parties in the International Arbitration are:

##### **1. ETHICAL CONUNDRUM**

The ethical conundrum in the disputes of International Arbitration carved out a special space that the entire future of the International arbitration hinges largely on the procedural and ethical viability. Since in a dispute referred to International Commercial Arbitration, the parties/legal practitioners come from the different jurisdictions, having different legal culture etc., the

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<sup>11</sup> *International Commercial Arbitration: Law and Recent Developments in India*, (Nov. 9, 2020, 10:05AM) [http://www.nishithdesai.com/fileadmin/user\\_upload/pdfs/Research\\_Papers/International\\_Commercial\\_Arbitration.pdf](http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research_Papers/International_Commercial_Arbitration.pdf)

<sup>12</sup> G. A. Res. 40/72, Article 1(3), UNCITRAL Model Law on International Commercial Arbitration.

International Commercial Arbitration is inevitably associated with the potentiality of conflicts and misunderstandings.<sup>13</sup> For instance, it is unlawful in Britain to prepare a witness before giving his testimony as per the Code of Professional Responsibilities (1970) but the same rehearsal of witness is in vogue in United States. Hence, it would be of no surprise that a conduct identified by one attorney as an act to sabotage the arbitral proceedings would be identified by another attorney as a legitimate strategy.

The arbitral tribunal to make the arbitral proceedings fair and just recognize the cultural differences, values and legal background of the counsellor and tries to accommodate the attitude of the parties and attorneys, particularly requests for the extension of deadlines. However, the parties taking advantage of this accommodating attitude of the tribunal resort to the malpractices to hinder the timely disposal of the disputes.<sup>14</sup> Thus, the provisions stipulated to ensure the fair proceedings in a dispute results in obstructing the dispute resolution process and, thereby defying the object of referring the dispute to the arbitration. For example, provision of challenging the arbitrator provided for maintaining the sanctity of the arbitration, is abused by the attorneys/parties to delay the proceedings or use as a weapon to make the proceedings onerous for the other party.

## 2. LACK OF DISCIPLINARY MECHANISM

Unlike International arbitration, every state has the prescribed set punishments or fine for the violation of set codes or rules of legal profession. As stated above, there is no set of uniform ethical conduct that guide the conduct of the attorneys in the International Arbitration, thus there is also no chance of prosecuting or punishing the counsel for adopting Guerrilla tactics as a weapon in the arbitration proceedings.<sup>15</sup> Thus, the erring counsel in the absence of any disciplinary mechanism in the International Arbitration can resort to any sort of Guerrilla tactics which serve their self-interest and interest of their parties without being subjected to any punishment and thereby, getting scot-free.

## 3. CONFIDENTIALITY OF PROCEEDINGS

The confidentiality of arbitral proceeding which is the valuable characteristic of any arbitration proceedings, when taken too far becomes sufficient to hamper the arbitral proceedings. The

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<sup>13</sup> Catherine Rogers, *Guerrilla Tactics and Ethical Regulations*, Available at [https://shop.americanbar.org/PersonifyImages/ProductFiles/187204082/ArbitCrisis\\_combo.pdf](https://shop.americanbar.org/PersonifyImages/ProductFiles/187204082/ArbitCrisis_combo.pdf) (Last visited on Nov. 9, 2020).

<sup>14</sup> Michael Hwang et al., *Defining the Indefinable: Practical Problems of Confidentiality in Arbitration*, Selected Essays on International Arbitration, 2013, Available at [https://www.transnational-dispute-management.com/downloads/mh\\_selected-essays\\_on\\_ia.pdf](https://www.transnational-dispute-management.com/downloads/mh_selected-essays_on_ia.pdf) (Last visited Nov. 8, 2020).

<sup>15</sup> Catherine Rogers, *Guerrilla Tactics in International Arbitration: Ethics, Practice and, Remedies*, Available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2260568](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2260568) (Last visited on Nov. 2020).

guerrillas under the wave of confidentiality thrive simply as the crimes are better naturalized under the wave of confidentiality.

#### 4. POOR REGULATORY FRAMEWORK

Guerrilla tactics begins when the party to the dispute use the provisions, which are meant to be protecting the sanctity of the arbitration, not as a shield but as a weapon to assault the other party. Thus, the provisions that are embedded for creating the unprejudiced and just opportunity for dispute resolution, are widely deployed for hampering the dispute resolution process<sup>16</sup> such as undue adjournments to delay the proceedings, frivolous and mala-fide challenges on the arbitrator etc.

### V. COMBATING THE GUERRILLA TACTICS IN INTERNATIONAL ARBITRATION

Although adoption of guerrilla tactics by the parties have been recognized long time ago yet no major change that can accommodate the ethical overhaul has been observed. As stated above, it is the ethical conundrum which carved out the space about the future of International Commercial arbitration. Notably, dozens of efforts has spawned for ethical guidance in the International Arbitration such as International Code of Ethics, the Council of Bars and Law Societies of the European Community, more recently IBA General Principles of Legal Profession (2006), etc. which imbibe provisions of ethical values such as honesty, integrity, independency of lawyers etc., yet there is no effective mechanism that regulates the ethical ambiguity in the International Arbitration because of the non-availability of enforceable ethical standards and scanty powers in the hands of the arbitral institutions to deal effectively with the problems that may arise.

In view of the present regime, it is advisable that the Institutional Arbitration should be the preferred mode of arbitration than the ad-hoc arbitration as the Institutional Arbitration offers certain advantages that reduce the potentiality of the parties to exercise the Guerrilla tactics and hamper the arbitral proceedings.<sup>17</sup> In an Institutional Arbitration, the parties to the arbitration agreement submit their disputes to the arbitral institution and agree to be governed by the rule of procedure of the institution. The Rules of procedure provides for a clear set of arbitration rules, appointment of arbitrators from the panel of arbitrators, timeline for the conduct of arbitration, guidelines to be followed in the process of arbitration, Supervision over

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<sup>16</sup> Alban Dautaj, *The Ethical paradox Put to Play by Guerrilla Tacticians*, Available at <http://arbitrationblog.kluwerarbitration.com/2018/11/04/the-ethical-paradox-put-to-play-by-guerrilla-tacticians/> (Last accessed on Nov. 9, 2020).

<sup>17</sup> Nikita Vadrevu, *The Concept of the Institutional Arbitration – Need for the Hour*, Available at <https://legaldesire.com/concept-institutional-arbitration-need-hour/> (last visited Nov. 8, 2020).

the behavior of the parties in form of scrutiny of awards etc. The procedural rules are not a panacea for all the tactics yet they have the potentiality of reducing frivolous challenges that sabotage the arbitral proceedings such as unreasonable challenge on independency of arbitrators and remove the ethical conundrum by providing guidelines to be followed during arbitration by the parties and their respective attorneys. Besides these prerogatives, the tribunal has the power to make necessary orders to preserve the integrity of the proceedings.

Recently, the International Centre for Settlement of Investment Disputes (ICSID) in a case before it, observed that the tribunal has an inherent power to take measures to preserve the integrity of proceedings<sup>18</sup> but such inherent power could only be exercised in the rarest of the rarest circumstances.<sup>19</sup> Though, the powers of the arbitral institution is of limited extent but they have the ability to take actions as are necessary for maintaining the integrity of arbitration proceedings as it is evident from the *Hrvatska Electro Privreda D.D. v. Republic of Slovenia* case<sup>20</sup>, where the ICSID ordered to remove the newly appointed counsel in the middle of proceedings as it was merely a tactic of the party to challenge the independency of arbitrators as the arbitrator and counsel used to work at the same chambers.

Further, a legally binding effective global code that guides the actions of the parties during the process of arbitration and the one which clearly demarcates what is right and what is wrong with respect to the behavior of the arbitration functionaries would serve the need of an hour and help in achieving the idea behind submitting the dispute to the arbitration i.e. timely disposal of the dispute. The lack of clarity of the ethical rules and their applicability combined with the increase in the size of the proceedings aggravated the defect in the arbitration and give the guerillas a wide scope to exercise unethical tactics which ultimately leads to lack of public confidence in the arbitral proceedings. Hence, a code of conduct having clarity and ability to ensure transparency can gauge the public confidence in the arbitral proceedings and help in getting away with the problem of malpractices by the guerillas.

Further, judicialization of the arbitration can also be the solution to the problems associated with the arbitration due to the informal nature and ethical clashes of the parties. The submerging of the arbitration into the judicial system and putting the arbitration in the control and authority of the judges would serve as a bulwark to the arbitration from the attacks of the guerrilla tactics by the practitioners.

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<sup>18</sup> Hrvatska Elektroprivreda d.d. [HEP] v. Slovenia, (ICSID Case No. ARB/05/24), Tribunal's Ruling Regarding the Participation of David Mildon QC in Further Stages of the Proceedings, Award (May 6, 2008).

<sup>19</sup> Rompetrol Group v. Romania, (ICSID Case No. ARB/06/3) Award (May 6, 2013).

<sup>20</sup> Hrvatska Elektroprivreda d.d. [HEP] v. Slovenia, (ICSID Case No. ARB/05/24), Tribunal's Ruling Regarding the Participation of David Mildon QC in Further Stages of the Proceedings, Award (May 6, 2008).

Though the malpractice of the guerrilla tactics by the practitioners has been recognized long ago yet there has not been effective mechanism because of the accommodating attitude of the tribunals. The guerrillas under the garb of difference in ethics and legal culture thrive effortlessly and sabotage the arbitral proceedings. Thus, it is high time to make a shift from the accommodating attitude of the tribunals and make the guerrillas liable for their unethical attempts to sabotage the objective of the arbitration.

## **VI. CONCLUSION**

There cannot be a straitjacket formula which can be provided to solve the problem of the guerrilla tactics as sometimes such tactics are exercised under the garb of the legal provision. Thus, no direct solution is possible to prevent the guerrilla tactics and it is dependent largely upon the wisdom of the arbitrator as such tactics are to be determined from the surrounding circumstances and facts of each case.

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