
Possibilities of Arbitral Tribunals to Sanction ‘Guerrilla Tactics’ by Counsel in the Absence of a Respective Agreement by the Parties.

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I. Introduction

1. The matter I chose for this paper caught my attention because I participated in a panel at the annual get-together conference of the Swiss, Austrian and Liechtenstein Arbitration Associations on 1 September 2017 in Zürich. The concrete subject matter of this panel was called “Criteria for the reimbursement of costs”. One of the questions discussed during this panel related to the term “guerrilla tactics” in arbitration which immediately attracted my attention.
2. When gathering and reviewing the relevant literature on “guerrilla tactics”, I noticed that the matter attracted substantial attention within the international arbitration community throughout the last years. It appears that the issue made it to the agendas of various arbitration conferences and subsequently became the subject matter of various publications at the beginning of the 2010 years.
3. While consensus prevails among practitioners that “guerrilla tactics” pose a problem to international arbitration and its reputation, proposals on how to tackle the issue are diverse. There are practitioners who advocate the creation of new rules, but others are not overly convinced that the introduction of new rules will solve the issue (‘judicialisation of arbitration’).
4. Furthermore, it seems to be common ground that the most effective tool to sanction ethical misconduct within the armoury of arbitral tribunals is to take eventual ethical misconduct in consideration when apportioning the costs of the arbitration. Interestingly, there are already possibilities to prevent and deter ethical misconduct from happening during the arbitration proceedings and therefore prior to the rendering of the award.
5. This paper is structured in three sections: In a **first section**, an analysis of the **meaning** of “guerrilla tactics” shall be provided, in particular whether it is possible to categorize them, what the notional range is - from mere aggressive tactics (“hardball”) used by counsel up to criminal behaviour (e.g. threat or even use of violence). In a **second section**, reasons will be examined **why** “guerrilla tactics” became an issue at all in the field of international arbitration and why the issue seems to be more difficult to deal with than in state

court litigation. In the **third and last section** I will analyse specific proposals on how to deal with “guerrilla tactics” by counsel during the arbitration proceeding. Finally, the enquiry shall be closed by a statement on which possibilities seem to be most appropriate to counter (and prevent) and - if not possible - to sanction ethical misconduct.

6. On an introductory note I would like to stress that the title of the paper explicitly refers to possibilities of sanctions at the disposal of an arbitral tribunal in the absence of agreement. This refers to the fact that arbitration clauses, which are always at the origin of arbitration proceedings in practice do not provide an agreement on specific rules how the arbitration proceedings shall be handled from an ethical point of view. Therefore the question arises how an arbitral tribunal shall deal with such conduct without having recourse to specific rules.

II. What are “Guerrilla Tactics”? – An Attempt to confine a vague Term

A. Definitions in Legal Writing

7. While the term “guerrilla” literally means “little war” in Spanish, “guerrilla warfare” has come to mean a form of irregular warfare and refers to conflicts in which a small group of combatants, including but not limited to, armed civilians (or irregulars) use tactics such as ambush, raids and the element of surprise to harass a traditional army¹.
8. One explanation of the term was introduced by *Michael Hwang* in 2005. *Hwang* considers that the term described those whose aim was ‘to exploit the procedural rules for their own advantage, seeking to delay the hearing and (if they get any opportunity) ultimately to derail the arbitration to that it becomes abortive or ineffective’.²

¹ SUSSMAN / EBERE, p.611 et seq.; the paper also contains an overview over the History of ethics proposals.

² HWANG, p. 401.

9. Another source³ explains that the term “guerrilla tactic” is often used to describe those actions which are perceived as more hostile practices displayed by parties and/or counsel in arbitration in an attempt to gain a better advantage over the opposing party. The list of what constitutes “guerrilla tactics” in international arbitration is long and sometimes can hardly be distinguished from bad behaviour by parties or counsel representing them.
10. In 2010, *Edna Sussman* and *Solomon Ebere* conducted a survey among 81 international arbitration practitioners and submitted two questions to them asking whether they had seen - be it as counsel or arbitrator - one or both parties engaging in what they would call “guerrilla tactics” whether technically unethical or not. A second question related to a request for a brief description of such tactic eventually regarded as “guerrilla tactic”⁴.
11. This survey seems to be on the outset of the intensive discussion amongst practitioners, since it tried - obviously for the first time - to shed light on an issue which usually does not attract any public attention and takes place “behind closed doors”. Much of the literature reviewed in connection with this paper refers to this survey and it should therefore be given the necessary attention since it grants a good overview over the entire issue.
12. Interestingly, *Sussman/Ebere* do not provide a specific definition of how such a tactics would be defined. They do not claim statistical validity - the aim was rather to get insight to reflections of 81 arbitration practitioners from around the world involved in arbitration as arbitrators or counsel.
13. The survey showed that 55 out of the 81 asked practitioners had witnessed the use of “guerrilla tactics” in cases in which they were involved. The following tactics were identified by *Sussman/Ebere* (in brackets the amount of interviewees who confirmed the respective tactic out of the overall amount of 81)⁵:
 - i. Document production/disclosure issues (“leave no stone unturned”; 55 /81);
 - ii. Delay tactics (9/81);
 - iii. Creating conflicts – changes of counsel during arbitration (7/81);
 - iv. frivolous challenges of the arbitrators (8/81);

³ AJOGWU, p.1

⁴ SUSSMAN / EBERE, p. 612.

⁵ *ibid* p.613 – 615.

- v. last minute surprises (e.g. introduction of important arguments or affidavits for the first time on the eve of the hearing; 18/81);
 - vi. anti-arbitration injunction and other approaches to courts aimed at impeding the arbitration (12/81);
 - vii. Ex-parte communications (5/81);
 - viii. witness tampering (7/81);
 - ix. Lack of respect/courtesy towards tribunal and opposing counsel (17/81);
 - x. Frustrating and Orderly and Fair hearing (25/81);
14. For *Sussman/Ebere* this sums up to strategies, methods and tactics, ranging from poor behaviour to egregious and even criminal conduct, albeit relating to different levels of reprehensibility.
15. Whilst this does not provide a comprehensive definition of what “guerrilla tactics” are, the survey gives a good impression from a practical perspective. It is noteworthy that 32% of the interviewees reported that they had not seen such tactics in their practice at all. *Sussman* interprets this in a sense “that the international arbitration bar is perhaps, generally speaking, quite civilised and ethical bar”. We shall find out more as we progress.
16. *Horvath/Wilske*, seemingly the leading authority in the matter of guerrilla tactics⁶ states that a single definition of the term does not exist. Rather, the term is comprised of several distinct types of behaviour. They range from blatantly illegal, unethical conduct to more subtle, underhand manoeuvres. Due to the types of eventual behaviour to be characterised as “guerrilla tactics”, *Horvath/Wilske* rather propose to categorise several types of strategies which are to be considered as “guerrilla tactics”. According to the nature and the gravity of the conduct, the following types of practices can be distinguished:

⁶ HORVATH/WILSKE/NETTLAU/LEINWATHER, p.3,4; WILSKE, pp. 315et sequ. WILSKE refers to SAM LUTRELL, an Australian arbitration practitioner who introduced the term “*Black Arts*” in order to describe the same phenomenon; LUTRELL sees the rise of the Black Arts in connection with the global financial crisis which drives parties to push lawyers to use all kinds of procedural tricks in order to buy time. As example LUTRELL mentions a case in which 14 (fourteen!) challenges were made against all arbitrators, “the last challenge made on the rather daring argument that after 13 challenges the three arbitrators meanwhile must be biased against the challenging party”.

- (i) the most common forms of “guerrilla tactics”, which amount to obvious misconduct: bribery, intimidation and harassment, wiretapping and other surveillance methods, fraud, frivolous challenges, guerrilla tactics within the tribunal;
 - (ii) extreme “guerrilla tactics”: severe criminal acts and blatant abuse of state authority: violence, threats of violence and other severe criminal acts, blatant abuse of state authority;
 - (iii) so-called “rough riding”, which cannot be categorised as guerrilla tactic at all; withholding evidence, introducing evidence through witnesses, etc;
17. In my opinion, the various types of practices mentioned in the preceding paragraph highlight another problem when attempting to define the term “guerrilla tactics”: Since international arbitration operates mainly in what has been called an ethical “no man’s land”⁷, counsel representing parties in international arbitration usually come from different regulatory backgrounds with respect to laws that govern their professional conduct. A famous example on how these uneven levels of ethical rules may play out is the following⁸:
- An Australian lawyer felt that from his perspective it would be unethical to prepare a witness; a Canadian lawyer said it would be illegal and an American lawyers view was that not to prepare a witness would be malpractice.
18. This has a direct impact when defining “guerrilla tactics”. The example illustrates that whilst a behaviour might be considered unethical in one jurisdiction, the same behaviour might be fully compliant with the code of conduct for counsel in another jurisdiction. However, this would (according to the categorisation mentioned above) probably only be the case for what is called “rough riding”. The latter is characterised⁹ as being ‘technically still legal, if not taken too far. Lacking one or more of the characteristic elements¹⁰ of a guerrilla tactic, it cannot feasibly be categorised as one. It violates the very spirit of international arbitration, basic rules of professional courtesy and even fair play.’

⁷ CATHERINE ROGERS, pp. 313 et seq.

⁸ Ibid 317; with reference to experiences of lawyers from different jurisdictions working with the International criminal Tribunal for the former Yugoslavia in the Hague;

⁹ HORVATH/WILSKE/NETTLAU/LEINWATHER, p. 14.

¹⁰ Such as obstruction, delaying, derailing and/or sabotaging the arbitral proceedings.

B. Definitions and Approaches in Arbitral Soft Law Norms

1. The IBA Guidelines on Party Representation

19. It does not come as a surprise that discussions on “guerrilla tactics” on an international level sooner or later resulted in the adoption of new rules countering guerrilla tactics in international arbitration. One of the results which should be mentioned here are the *IBA Guidelines on Party Representation in International Arbitration*¹¹. Those guidelines were adopted by resolution of the IBA Council on 25 May 2013. The rules are to be considered as soft law and although they set an institutional framework aimed at reconciling various distinct ethical traditions in regard to party representation, they will only apply if so agreed by the parties. It is explicitly mentioned in the preamble that the ‘guidelines are not intended to limit the flexibility that is inherent in and a considerable advantage of international arbitration’.
20. Subject of the Guidelines are descriptions of fair conduct in the areas of party representation (Guidelines 4-6)¹², communications with arbitrators (guidelines 7-8), submissions to the arbitral tribunal (Guidelines 9-11), information exchange and disclosure (guidelines 12-17) and witnesses and experts.
21. These are the main areas where eventual misconduct may occur. Guideline 26 specifically deals with the remedies for misconduct available to the arbitral tribunal. They comprise admonishing counsel, drawing inferences in assessing the evidence relied upon by counsel and take counsel misconduct into consideration when apportioning the costs of arbitration. The purpose is to preserve or restore the fairness and integrity of the arbitration.

¹¹ IBA guidelines on party representation in international arbitration, International bar Association 25 May 2013 available at https://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx.

¹² Guideline 6 provides for the possibility to exclude a new party representative from participating in all or part of the arbitral proceeding in order to safeguard the integrity of the proceeding; this is considered as one of the main differences to the 2014 LCIA Rules (discussed below).

22. Misconduct is defined as a breach of the guidelines or any other conduct that the arbitral tribunal determines to be contrary to the duties of a party representative. The list of remedies is non- exhaustive. The possibilities are seen to be extremely useful additions to the arbitral tribunal's armoury in cases of most extreme Taliban tactics¹³.
23. Although it is technically not a matter of definition of the term "guerrilla tactics", it should be mentioned here that the IBA Rules aimed at mitigating and preventing the application of guerrilla tactics in international arbitration were not entirely well perceived within the arbitration community. Especially in regard to Guideline 26, the argument¹⁴ was raised that it is not the task of an arbitral tribunal to investigate and sanction counsel conduct than rather to keep the proceedings on track. Another prominent voice¹⁵ from Switzerland comes to the conclusion that the IBA guidelines are definitely the wrong answer to regulate the conduct of party representatives and should therefore never be applied.
24. In this context it is interesting that the Association Suisse de l'Arbitrage (ASA) set up a working group on counsel ethics in late 2015 with the aim to assess whether a so-called "Global Arbitration Ethics Council" should be created¹⁶. The idea was to set up an institution which should be formed of delegates of the major arbitration associations with the task to decide on ethical issues arising in international arbitration. The idea was to create a separate body (aside from the arbitral tribunal) which independently from the arbitration proceedings should take care of those issues. The ASA working group came to the conclusion that the real problem is not the lack of ethical rules but

¹³ HACKING/BERRY, p. 319.

¹⁴ DASSER, p. 85.

¹⁵ SCHNEIDER, p. 497; Schneider quite substantially criticises the entire Guidelines: '(...) it must be said that the Guidelines, while presented as the solution to what in reality appears only as a marginal problem, risk becoming a major source of procedural motions and disruption. (...)'; see also MOSK, 'Attorney Ethics in International Arbitration' (2010) 5 Berkley Journal of International Law Publicist 32, p.37 – who prior to serious discussions within the IBA, who sees the impracticability of a uniform code of ethics but recognizes that it has promise for guiding arbitrators in dealing with counsel.

¹⁶ Anne Carole Cremades, 'the creation of a global arbitration ethics Council: a truly global solution to a global problem', Kluwer Arbitration Blog, 24 November 2015, <http://arbitrationblog.kluwerarbitration.com/2015/11/24/the-creation-of-a-global-arbitration-ethics-council-a-truly-global-solution-to-a-global-problem/>

the fact that arbitrators may still be reluctant to exercise their powers sufficiently. The conclusion was that the creation of the global arbitration ethics Council was an idea whose time has not yet come¹⁷.

2. The 2014 LCIA Rules

25. The first arbitral institution to introduce a code of conduct in the form of general guidelines for the party’s legal representatives was the London Court of International arbitration (LCIA)¹⁸ which entered into force on 1 October 2014. It contains an annex with six paragraphs which describe the standards of behaviour which are expected from party representatives under LCIA proceedings. The rules refer to (i) the prevention of obstruction of arbitral proceedings, (ii) the duty to abstain from repeated challenges to an arbitrator’s appointment known to be unfounded, (iii) the duty not to engage in knowingly false statements and/or evidence, (iv) the duty to knowingly conceal documents whose production is ordered by the tribunal and (v) finally the duty to abstain from ex- parte communications with the arbitrators and/or the LCIA Court.
26. Although the types of behaviour which shall be prevented are not expressly defined as guerrilla tactics, one may deduce from the Annex to the LCIA Guidelines that such behaviour is seen as unacceptable and it may therefore be considered as “guerrilla tactics” for the present purposes.
27. In order to achieve formal applicability of the LCIA Guidelines, Article 18.5 of the LCIA Rules provides that the parties have to ensure that their representatives agree to comply with the Guidelines as a condition of for representation¹⁹. Article 18.6 of the LCIA Rules provides for the possibility to bring a complaint against a party representative with the arbitral tribunal for breach of the guideline. In case the party representative is held to have violated its duties, the tribunal can sanction the legal representative either by (i) way of

¹⁷ <http://www.arbitration-ch.org/en/asa/asa-news/details/993.asa-working-group-on-counsel-ethics-releases-latest-findings.html>

¹⁸ See http://www.lcia.org/dispute_resolution_services/lcia-arbitration-rules-2014.aspx

¹⁹ HORST, p. 73

written reprimand, (ii) written caution as to future conduct in the arbitration and (iii) by any other measure necessary to fulfil the general duties²⁰.

28. When comparing the IBA Guidelines on Party Representation against the Annex to the LCIA Rules, two differences can be identified:
- a. The LCIA Rules explicitly identify dilatory tactics as unfair behaviour, i.e. misconduct²¹. In contrast the IBA Guidelines define misconduct as a breach of the Guidelines “*or any other conduct that the arbitral tribunal determines to be contrary to the duties of a party representative*”. It seems that the LCIA Rules by explicitly addressing the fact that obstructive behaviour is not acceptable, might be more effective when it comes to prevent dilatory tactics than the IBA Rules in this respect because counsel’s responsibility in this respect is specifically addressed.
 - b. Guideline no 6 of the IBA Rules specifically provides for the possibility of the arbitral tribunal to exclude a new party representative from participating in all or part of the arbitral proceedings, in case this is considered as misconduct. As stated before, the LCIA Rules do not explicitly provide for this type of sanction. However, the issue of putting the integrity and the functioning of the arbitral tribunal in jeopardy through appointing new party representatives and thereby creating eventual conflicts of interest is being addressed in Articles 18.3 and 18.4 LCIA Rules. In such a case the intended change or addition shall only take effect in the arbitration subject to the approval of the arbitral tribunal. The arbitral tribunal may withhold approval of intended changes or additions to parties’ legal representatives in case a change or addition could compromise the composition of the arbitral tribunal or the finality of the award. Hence, the LCIA’s approach is more proactive in that regard since it gives tribunals more control over who appears before them.²²

²⁰ Always taking into account the tribunal’s duty to act fairly and impartially between all parties and to conduct the arbitration proceeding in an expeditious and efficient manner

²¹ General Guidelines for the party’s legal representatives (Annex to the 2014 LCIA Rules), paragraph 2: “*A legal representative should not engage in activities intended unfairly to obstruct the arbitration or to jeopardise the finality of any award, including repeated challenges to an arbitrator’s appointment or to the jurisdiction or authority of the Arbitral Tribunal known to be unfounded by that legal representative.*”

²² HACKING /BERRY, 13.23.

C. Conclusion

29. The analysis shows that there is no coherent and precise definition of the term “guerrilla tactics” in relation to international arbitration. What can be deduced from the above is that “guerrilla tactics” are to be considered as any type of manoeuvres applied by counsel and/or parties which are directly or indirectly aimed at (i) impeding, (ii) derailing or at least (iii) to unduly interfere in the arbitration proceeding in the broadest sense. Thus, one can also conclude that a good part of what is being described as guerrilla tactics consists in dilatory measures in practice.
30. When it comes to reports of severe criminal behaviour, the conclusion is that such guerrilla tactics seem to be witnessed on a less frequent basis. This is also reflected by the fact that the referred IBA Rules and the Guidelines in the Annex to the LCIA Rules do not specifically address such severe misconduct. It can furthermore be deduced from the fields governed by the two soft law norms discussed above that the matters addressed by them seem to be the focus on what may be considered the most common guerrilla tactics.

III. Factors Responsible for the Rise in the Use of “Guerrilla Tactics” in International Arbitration

A. The Appearance of so-called “New Entrants”

31. Observers agree that one of the reasons for the rise in guerrilla tactics in international arbitration throughout the last years is to be seen in the fact that practitioners from a multitude of jurisdictions have flocked the realm of international arbitration.²³ Also, it is argued that in its early days, international arbitration was run by a small group of professionals and the use of aggressive tactics would have been detrimental to the reputation of the arbitration practitioners. Besides, the circle of participants and players in international arbitration was relatively restricted. Therefore the probability to come across with other practitioners again against whom aggressive tactics were used in

²³ HACKING/BERRY 13.01

the first place was relatively high and the community of arbitration practitioners expected strict professionalism from its peers²⁴.

32. Wilske²⁵ asks whether indeed the responsibility for ethical misconduct and deployment of guerrilla tactics rests solely with the new entrants. In this connection, the question is raised whether other factors to be taken into account are increasingly high-stakes, increasing competition and the fact that the chance of meeting the same arbitral tribunal and the same opposing counsel in another case are rather limited. This opinion is confirmed by Hacking/Berry²⁶, who come to the result that the claims coming to arbitration are more valuable²⁷ and more complex and ‘in an expanded community of arbitration practitioners, there is less incentive to preserve one’s professional reputation and a lower consensus as to what constitutes acceptable or ethical behaviour.’

B. Different Regulatory Backgrounds / The Absence of Meaningful Ethical Regulation of Counsel Conduct

33. The issue arises from the fact that arbitration is sometimes characterized as “a-national”²⁸ in legal writing. Additionally, as stated above²⁹ arbitration is said to take place in an “ethical no man’s land”.
34. Counsel representing parties in international arbitration usually come from different regulatory backgrounds with respect to laws that govern their professional conduct. One of the questions that arises in this context is whether party representatives are bound by their professional rules of their home country or by those applicable in the jurisdiction where the arbitration is taking place. Usually rules of professional conduct do not extend to other forms of dispute resolution such as arbitration³⁰.

²⁴ HORVATH, Austrian Yearbook, p. 298.

²⁵ WILSKE, Kluwer Arbitration Blog.

²⁶ HACKING/BERRY, (n 23).

²⁷ PFEIFFER / WILSKE, p. 16 et sequ (PFEIFFER/WILSKE speak of ‘High stakes on moral low ground’ and conclude that higher stakes have instigated a greater urgency to delay or avert detrimental awards by any means, especially in times of crisis’ page 20).

²⁸ HORVATH, N 24.

²⁹ See paragraph 15.

³⁰ However, the Council of Bars and Law Societies of Europe (CCBE) Rules governing a

35. Besides, erring counsel cannot be subjected to any forum of state disciplinary system or mechanism since there is no uniform code of conduct that binds³¹ counsel in international arbitration. For instance every State has prescribed punishment or sanctions for counsel that violates the code or rules of conduct of legal profession unlike in international arbitration³².
36. Therefore the issue here is how to create a level playing field in order to prevent a situation in which various counsel in the same proceedings are subject to diverging or even contradicting ethical standards³³ (“bridging the deontological gap”). In order to create a level playing field regarding ethics in international arbitration various voices³⁴ in the community advocated the creation of a global ethics standard. This led in recent years to the aforementioned IBA Rules on Party Representation (2013) as well as to the inclusion of ethically inspired guidelines to the Annex of the 2014 LCIA Rules.³⁵
37. Views on whether such new soft law norms indeed contribute to solve the problem of the use of guerrilla tactics are divided³⁶.

C. Lack of Coercive Powers of Arbitral Tribunals

38. Arbitral tribunals are characterized by the fact that they are private bodies based on an arbitration agreement concluded between the parties. They do therefore not enjoy authoritative powers which are inherent to public authorities³⁷. This is usually illustrated by referencing to the question whether an arbitral tribunal has the power to enforce its own order³⁸. Under Swiss law, (which shall serve as an example) the prevailing view is that an arbitral tribunal cannot combine an order with threat of criminal sanctions in case of non-

lawyer’s relation with the courts are also applicable to relations with arbitrators and other person exercising judicial or quasi - judicial functions (cf. Rule 4.5 CCBE)

³¹ Apart from the case in which the LCIA Rules and their Annex apply.

³² AJOGWU, p. 5, N 3.

³³ DASSER, N 16.

³⁴ WILSKE, p. 31, N.116 providing an extensive overview about the various discussion proposals in that regard - even referring to philosophical views of Rolling Stones guitarist Keith Richards.

³⁵ Only to mention the initiatives which found their way into specific soft law norms.

³⁶ Cf. paragraph 20.

³⁷ GIRSBERGER/VOSER, para. 158.

³⁸ BOOG, p. 121.

compliance. In turn it is undecided whether and under which conditions an arbitral tribunal is entitled to order private sanctions such as so-called ‘astreintes’.³⁹

39. In addition the powers of arbitral tribunals are defined by the agreement based on which the arbitrators were appointed. The party representatives hardly ever submit themselves personally to the jurisdiction of the arbitral tribunal. They are not a party to the proceedings and cannot be made a party to (side-) proceedings without their consent and probably also those of the parties as masters of the arbitration agreement⁴⁰. Therefore the lack of “personal jurisdiction” over party representatives is to be seen as another factor which obviously encouraged some players to disregard rules to which they would have been bound in their home jurisdiction.
40. In contrast parties and their representatives are subject to the jurisdiction of state courts and may therefore be sanctioned for eventual application of guerrilla tactics. A private tribunal established by contract of the parties cannot claim the same authority⁴¹, unless parties explicitly submit to it.
41. Interestingly the discussion seems to be somehow different in investor-state arbitration cases. For example in *Hrvatska Elektroprivreda v. Republic of Slovenia* the ICSID tribunal had to address the question whether to accept a counsel newly disclosed a few days prior to the first substantive hearing, while the new counsel was a member of the same barristers’ chambers as the tribunal’s president. In the absence of meaningful ethical standards applicable to the case, the tribunal held⁴² that ‘it is compelled to preserve the integrity of the proceedings and, ultimately, it’s [i.e. the Tribunal’s] award and therefore excluded (i.e. did not admit) new counsel.

³⁹ Ibid, para 26; however, HORVATH/WILSKE/LEINWATHER, p. 45 propose that ‘the fact that arbitral tribunals cannot enforce their interim measures is insignificant. The lack of coercive powers by an arbitral tribunal is compensated by its persuasive powers and ability to draw negative inferences from non-compliance with orders and/or take a party’s actions into consideration in the cost award.’

⁴⁰ DASSER, p. 85.

⁴¹ Ibid.

⁴² *Hrvatska Elektroprivreda v. Republic of Slovenia*, ICSID Case No. ARB/05/24 (ruling regarding the participation of David Milton QC in further stages in the proceedings, 6 May 2008) para. 30; see also *Rompotrol Group N.V. v. Romania* (ICSID Case No. ARB/06/3), decision on the participation of counsel (January 14, 2010).

42. Coming back to the starting point of this chapter - the purported lack of coercive powers of the arbitral tribunal - in these ICSID cases, the tribunal was of the opinion that there ‘is an inherent power in a tribunal to take measures to preserve the integrity of its proceedings’.
43. However, one observation has to be made: ICSID tribunal referred to Article 44 of the ICSID convention which authorizes the tribunal to decide any question of procedure not expressly dealt with in the convention, the respective ICSID, the arbitration rules or any rule agreed by the parties. Hence, the question arises whether such case law might be applicable to international commercial arbitration⁴³.

D. Conclusion

44. The analysis shows that the main drivers for the rise of “guerilla tactics” in international commercial arbitration is linked to direct and/or indirect impacts of globalization. Whereas in the early days of commercial arbitration, the circle of practitioners was quite restricted and obviously resembled more a gentleman’s club, the rise in international trade, led to what is being described as ‘new entrants’ to the arbitration scene who did not care as much about the implicit rules of the gentleman’s club. The financial crisis after 2008 added additional pressure to the industry in that values at stake rose and counsel often received instruction to delay arbitrations from progressing as much as possible. Besides, the absence of meaningful and applicable ethical rules in international arbitration together with an obvious reticence of arbitral tribunals to address “guerrilla tactics” caused a situation in which the call for action became louder.

⁴³ HACKING/BERRY, para. 13.14; it is proposed that arbitration tribunals dealing with commercial matters should be encouraged to follow their ICSID counterparts and exercise such powers to combat serious misconduct; sharing the approach: HORVATH/WILSKE/JENG, p. 287, “(...) These similarities should make *Hrvatska v. Slovenia*’s impact extend beyond ICSID cases into the realm of commercial arbitration”.

IV. Possibilities to Counter “Guerilla Tactics”

45. Chapters II and III served to define the term “guerrilla tactics” and to explain why those tactics became a phenomenon that provoked (i) a substantial amount of legal writing, (ii) diverse opinions by arbitration practitioners how to tackle the problem and (iii) finally led to the creation of arbitration soft law norms.
46. The present chapter addresses the central question of this paper and describes tools and methods how to curtail and sanction guerrilla tactics. We have already seen those sanctions provided for in the IBA Rules on Party Representation and the 2014 LCIA Rules (as examples). A prominent voice⁴⁴ in legal writing on this matter states that *‘it is the arbitral tribunal which is in the first line of ethical regulation in international arbitration and an experienced tribunal is the most effective weapon against arbitration guerrillas.’*
47. This means that countering guerrilla tactics is first and foremost a task which has to be performed by the arbitral tribunal. The various tools will be discussed below followed by a personal appreciation. The following overview is largely inspired by *LUCY REED*’s⁴⁵ experiences and recommendations on how to deal with guerrilla tactics.
48. A distinction will be made between measures available to the arbitral tribunal during the proceeding and possibilities to sanction undue behaviour in the final award.

⁴⁴ HORVATH, p. 303 N 24; with further references;

⁴⁵ The ensuing overview over the most effective means of countering guerrilla tactics is based on REED, pp. 93 et seq.; a review of all sources used for this paper shows that her summary provides a broad set of pro-active ideas which seem to be inspired by substantial experience in the matter. Interestingly she also states that the tools proposed by her largely address ‘normal’ guerrilla tactics, i.e. not such tactics which have been described above as criminal behaviour or Taliban tactics. In such cases extreme sanctions such as dismissal or summary judgement of a case are discussed (WILSKE, p. 326).

A. Dealing with “Guerrilla Tactics” during Arbitral Proceedings

49. The first approach to deal with guerrilla tactics is to try to prevent them from the outset of arbitral proceedings. *REED* explains that it is the special role of the chairperson to apply ‘unwavering attention’ from the beginning of the proceedings in order to anticipate potential undue behaviour at an early stage. Attention should especially be given to the first submissions by party representatives from which an experienced arbitrator might already spot different levels of advocacy styles. This has the potential to further result in a mismatch between counsel teams and thus provoke unethical conduct. Also the importance of paying attention to the body language of involved persons is highlighted (which could be observed during a case management conference for example). It is assumed that eventual observations could raise awareness of eventual trouble further down the road.
50. Another method to counter “guerrilla tactics” before they even materialize is to include a code of conduct section in an early procedural order. In this context *REED* refers to *CYRUS BENSON*⁴⁶ who suggests that arbitrators should require counsel to provide a checklist containing the duties perceived by them. This shall serve to anticipate potential for conflicts eventually resulting in “guerrilla tactics”. Shared standards by both sides should be reflected in an early procedural order. To give effectiveness to such a code of conduct, the latter should already provide for consequences in case of non-compliance⁴⁷.
51. *REED* recommends that the arbitral tribunal takes a firm approach once the line to unacceptable behaviour is crossed by counsel. It is especially necessary for the tribunal to immediately react to undue behaviour. The earlier the chairperson observes undue behaviour, the quicker and firmer the reaction should be. Only inexperienced arbitral tribunals would tolerate undue behaviour by counsel hoping that the latter comes to his/her senses and will desist from such behaviour. This approach applies to both, written submissions which voices arguments in an overly aggressive manner as well as to undue behaviour in the hearing room.
52. In order to curtail undue behaviour in the hearing room, *Reed* proposes an escalation scenario which starts with mild warnings. If such warnings are

⁴⁶ *REED*, note 223

⁴⁷ It is not explained how that shall be achieved.

ineffective, and the tribunal is faced with further abusive tactics the next step is to call a break, and to meet with counsel in private. Such meeting shall serve to admonish counsel and to make clear that in case there is no change in behaviour, warnings will be issued by the tribunal in the hearing room (i.e. in front of the parties and on the record). Additionally, warnings as to reimbursement of costs in connection with the disruption may be delivered.

53. The idea of ‘public shaming’⁴⁸ seems to point into the same direction as to what is known in the US judicial system as a ‘bench slap’⁴⁹. Whereas the deterrent effect of such bench slaps in the US is drawn from the fact of its public nature, the question arises how to achieve a similar effectiveness in international arbitration. The idea is that shaming sanctions in arbitration are indeed effective through the humiliating act itself and the reputational damage through spreading gossip⁵⁰ among the concerned person’s peers.
54. In the event that those measures prove to be ineffective, arbitral tribunals should consider more powerful tools such as interim measures. Looking at representative arbitration rules⁵¹, we see that arbitral tribunals may at any stage of the arbitration proceedings implement - at the request of a party - some form of interim measures. In the present case, an interim measure ordering a security for costs may prove as a helpful tool. However, in such circumstances, the arbitral tribunal would require a respective application by one of the parties. In practice, it is quite conceivable that the party suffering from undue behaviour by its opponent, might, after a respective hint⁵² by the arbitral tribunal, apply for such a measure.
55. If for example⁵³ one party requests a last-minute procedural measure such as the postponement of a week-long hearing scheduled long time in advance or

⁴⁸ Although ‘the public’ in international arbitration is usually restricted to direct participants of the arbitration itself and therefore the effects of such shaming might be questionable.

⁴⁹ HORVATH/WILSKÉ/JENG, p. 283; one example for such a ‘bench slap’ was a Texan judge who ordered two attorneys to attend a kindergarten party at the courthouse because of overly combative behaviour between the attorneys.

⁵⁰ Ibid.

⁵¹ Article 28 ICC Rules, Article 26 Swiss Rules, Article 17 Liechtenstein Rules, Article 33 VIAC Rules, Article 25 LCIA Rules

⁵² Such hint from the tribunal would not only be an incentive to effectively apply for such an interim measure but would also give the impression to the party applying for it that the arbitral tribunal is amenable to render such an interim measure.

⁵³ Example taken from HORVATH/WILSKÉ/LEINWATHER, p. 43.

the change of location of the hearing (for whatever reason is given) the other party might apply to the arbitral tribunal for an interim measure ordering the party requesting e.g. the postponement to provide a security for the costs entailing the last-minute change. This is being justified that guerrilla tactics should come with a price-tag. However, the common shared view in regard thereto is that such security for costs orders shall only be permissible in ‘exceptional circumstances’⁵⁴. Horvath⁵⁵ proposes that a previous refusal to obey interim orders issued by the tribunal could be an ‘exceptional circumstance’ that will justify an order for security for costs.

56. Another tool which already points at sanctioning “guerrilla tactics” is to advert the parties in advance that misconduct aimed at slowing down the procedure and rendering it cost ineffective will be taken into account in the cost decision in the final award. To this end, the tribunal could start running a balance sheet of anticipated cost assessments which are regularly updated and reported consequently to the parties. The use of such a balance sheet would not be aimed at punishing such tactics in the first place but rather to serve as a tool to deter ongoing misconduct.

B. Sanctioning of “Guerrilla Tactics” in the Final Award

57. The foregoing remarks already show that at the end of the day, the decision on costs in a final award is the ultimate possibility for an arbitral tribunal to sanction misconduct. However, this means that the tribunal was not in a position to deter or stop guerrilla tactics (i.e. the tools and techniques described before were not successful or not applied) so that the tribunal needs to resort to formal sanctions. Such sanctions should however be preceded by ‘an appropriate crescendo of warnings’⁵⁶ in order to ensure transparency of tribunal expectations. Arbitrators should also put such warnings into record with a view to prevent a situation in which they might eventually appear arbitrary and/or to be infringing the right of due process of the parties. That being said, one has to recognise that penalising guerrilla tactics through cost in a final award (may be combined with a written reprimand of specific behaviour leading to the cost sanction) is the most powerful tool of an arbitral tribunal to deal with guerrilla tactics.

⁵⁴ VEIT, p. 116-118.

⁵⁵ HORVATH, p. 308

⁵⁶ REED, p. 100.

58. A review of recently amended arbitration rules⁵⁷ shows that there is concurrence in that the arbitral tribunal has the possibility to take into consideration, when apportioning the costs of arbitration, the parties' conduct and whether or not they contributed to straightforward and cost-effective proceedings (as well as other relevant circumstances). This is to be seen as an impact of the discussion how to deal with misconduct on an institutional basis.
59. Usually the allocation of cost of the arbitration - taking into consideration cost sanctions - is done with either the percentage of the allocation or specific amounts being attributable to one of the parties and acceptable behaviour.
60. The fact that improper conduct/bad faith of the parties indeed is being taken into consideration when arbitral tribunals allocate costs is shown by an ICC commission report⁵⁸. This report lists various types of misconduct (similar to what has been described previously in chapter II) and confirms that such behaviour is being taken into account in practice.

C. How an Arbitral Tribunal Apportions Costs in Practice when Taking Cost Sanctions into Consideration

61. Now, the question arises how do arbitral tribunals apply cost sanctions in final awards in practice. Fortunately, the author is in possession of a recent final award⁵⁹ which deals explicitly with the allocation of cost taking into consideration multiple reproaches of dilatory tactics brought forward by both parties. The author thinks that it adds flavour to the present paper to refer to a concrete example in which an arbitral tribunal dealt with the subject matter of this paper in a stringent and straightforward way. Prior to entering into to the analysis the following points need to be made:

⁵⁷ Article 38 (5) 2017 ICC Rules; Article 38 (2) 2018 VIAC Rules; Article 33.3 2018 DIS Rules; Article 28.4 2017 LCIA Rules; Article 49 (6) 2017 SCC Rules;

⁵⁸ ICC Commission Report, Decision on Costs in International Arbitration, Offprint from ICC Dispute Resolution Bulletin 2015, Issue 2, 14 et seq.

⁵⁹ International Court of Arbitration of the ICC, Arbitration Case No. 19042/MCP, final award dated 11 January 2018.

62. Since the request for arbitration was filed on 29 October 2012 with the Secretariat of the ICC International Court of Arbitration, the 2012 ICC rules (effective as of 1 January 2012) were applicable to this arbitration.
63. The 2012 ICC Rules contained in Article 37 (5) the same rule which is now stipulated in Article 38 (5) of the 2017 ICC rules. In other words, the rule is the same.
64. In order to better understand the final award, it is necessary to point out that claimant was entirely successful with its claim amounting to a three digit million Euro amount.
65. In its costs decision, the arbitral tribunal summarises the respective reliefs for costs submitted by each party in their latest written submissions. Basically claimant asked for respondent to pay all costs, fees and expenses incurred in pursuing this arbitration, including the share of the ICC arbitration costs together with compound interest (...). Respondent asked the tribunal to order claimant to reimburse all costs in respect of the arbitration, including counsel fees and related costs such as to fees of experts etc. including interest. In the alternative that the arbitral tribunal came to the conclusion that respondent infringed a substantial clause of the contract in question (which respondent did), respondent requested to allocate the costs between the parties after consideration of all relevant circumstances.
66. Claimant filed a statement of costs in which it enumerated 10 reproaches relating to concealment of relevant relationships to 3rd parties, ignoring the duty to preserve documents, changing legal opinions in the course of the proceedings, raising objections that were later abandoned, introducing legal opinions in regard to witness statements which were already filed three years earlier, bringing two new experts in the rejoinder, as well as other purported acts in bad faith.
67. Respondent also made reproaches to claimant in the same context, i.e. claiming that the arbitration was not administered in an expeditious and cost efficient manner and increased respondent's costs. Specifically the following reproaches were made: waiting too long to file the request for arbitration, thereby provoking a situation in which relevant information and documents from respondent were not available at a later stage; claimant could have applied with the local courts to secure any documents if deemed useful; instead of pursuing the present claim, claimant initiated and participated in various criminal and international mutual legal assistance proceedings without the respondent's knowledge; commencing arbitration in 2012 despite having obtained the evidence it relies on in 2005; exhibiting other disloyal procedural conduct specifically explained in the respective submission.

68. In respondent's statement of costs, it is furthermore explained why specific actions such as pleadings and offering of evidence could only take place at the later stage. Respondent especially pointed out that its management team over the 1998 - 2002 period left the company and that it was not reasonable to expect that respondents employees keep their archives for more than 20 years after the conclusion of the relevant contract.
69. The arbitral tribunal refers to Article 37 (5) of 2012 ICC Rules and explains its discretion when allocating the cost of arbitration and which parameters it will take into consideration.
70. In a first step the arbitral tribunal allocates the costs of the arbitration (fees and expenses of the arbitrators and the ICC administrative expenses).
71. The tribunal comes to the conclusion that the reproach of concealment of relevant information in regard to a relationship to a third-party is accurate and made it difficult for claimants to obtain relevant evidence. However, the tribunal also points out that claimant largely contributed to these difficulties by only initiating the arbitral proceedings at the end of October 2012 even though it had access to the relevant evidence since 2005. A significant reason why the proceedings became more difficult and time-consuming is to be seen that in the fact that the tribunal had to decide on events that took place more than 20 years ago. The tribunal also voices understanding that respondent was no longer in possession of relevant documents. The tribunal considers that Respondent should not bear the costs relating to the difficulties to obtain evidence in the present arbitration alone and comes to the following conclusion:
- “Therefore these arbitration proceedings might have been resolved in a quicker and more cost efficient manner had claimant introduced its claim earlier. Respondent might still have relevant documents in its possession, which could have rendered the discussion on admissibility less relevant or could have lessened the need for extensive forensic expert analysis”.*
72. In regard to a reproach in connection with the belated presentation of evidence, the tribunal holds that claimant produced those documents belatedly which results in the opinion of the tribunal that respondent's request for reconsideration of a specific procedural order addressing this issue was not belated.
73. Concerning expert reports and witness statements submitted by respondent together with its rejoinder, the tribunal holds that Respondent provided a reasonable explanation why it had to change its expert when asked. The tri-

bunal comes to the conclusion that this move by did not result in an increase of costs for claimant.

74. It is quite impressive to see how the arbitration tribunal discusses and weighs all arguments and counter-arguments in regard to possible dilatory tactics of the parties. On balance, the tribunal comes to the conclusion that respondent shall bear 70% and claimant 30% of the cost of the arbitration.
75. In a final step, the tribunal determines and allocates the parties' costs.
76. First the tribunal defines which costs it find substantiated and reasonable. It concludes, taking into account the length, complexity and importance of the dispute that the parties' costs are general reasonable and that their amount is in the same range. However, the tribunal excludes 28,244 hours of internal costs of claimant since those activities were largely non-legal and carried out the personnel other than in-house counsel. Respondent should not bear costs of claimant's internal organisation. Finally, the tribunal excludes cost from being recoverable which relate to activities prior to the commencing of the arbitration proceedings as well as to a period of time in which settlement discussions between the parties took place.
77. The tribunal considered that based on the same circumstances already set out in relation to the arbitral costs, respondent should bear 70% of claimant costs in addition to its own costs.

D. Appreciation

78. The tribunal clearly identifies the alleged really a tactics being reproached by both sides against each other. It is interesting to see how the tribunal deals with the various reproaches and finds some founded and others are unfounded. Since claimant was 100% successful, the cost decision normally would have been fully in favour of claimant.
79. When analysing the cost decision of this final award, the tribunal does not explain in detail how it comes to the 70/30 split. It can only be assumed that the tribunal weighed the 10 reproaches made against each other and might have found that 3 out of the 10 were unfounded and thus concluded the 70/30 split to be appropriate.
80. It does not derive from the cost decision whether any other circumstances, eventual interim/partial awards won by respondent might have influenced the costs decision. When analysing the cost decision, the tribunal only gave attention to the behaviour of the parties throughout the proceedings.

E. Conclusion

81. In my view, there are the following lessons to be learned for arbitrators confronted with guerrilla tactics:
- a. Guerrilla tactics are a fact in today's arbitration industry;
 - b. The type of misconduct that seems to be employed most in international arbitration is aimed at delaying the arbitration proceedings.
 - c. What has been explained above as "Taliban tactics" is not on the agenda of an average arbitration proceeding.
 - d. In order to prevent guerrilla tactics from being used, a tribunal and especially a chairperson is required with respective experience and ability to detect hints that one or both party representatives or even the parties themselves tend to engage in such tactics from the outset;
 - e. Once such hints for guerrilla tactics are detected, immediate and firm response from the tribunal is required;
 - f. It makes sense for the arbitral tribunal to try to find common ground on which type of behaviour is accepted in the arbitral proceedings and to put that into a procedural order.
 - g. It is doubtful whether interim measures for security of costs is the appropriate means of effectively stopping respectively deterring parties/councils engaging in guerrilla tactics. It depends on the arbitration friendliness of the concerned jurisdiction whether such interim measures can be enforced in court. I am not convinced that an interim measure per se produces enough persuasive power so that the concerned party voluntarily abides by it.
 - h. Although arbitral tribunals should remain in control of the arbitration proceedings by employing the requisite tools, the most powerful tool is to penalise misconduct when awarding costs.
 - i. In case an arbitral tribunal intends to penalise procedural misconduct by counsel/parties in the cost section of the final award, such measure should be preceded by an appropriate crescendo of warnings.

V. Concluding Remarks

82. Although there is no precise definition of the term “guerrilla tactics”, the arbitration community has a firm understanding of what is meant by it. The term has a notional range and goes from admissible aggressive behaviour (“rough riding”) up to serious criminal behaviour. While there are examples for such behaviour (going up to even “Taliban Tactics”) being mentioned in legal writing, consensus prevails that such extreme examples misconduct are not on the agenda of an average international commercial arbitration case.
83. Rather, dilatory tactics and an overly aggressive advocacy style in oral hearings and submissions seem to be of the main concern to the industry.
84. There are several reasons for the emergence of guerrilla tactics in the last 20 years. While the circle of arbitration practitioners used to resemble a gentleman’s club, globalisation, the expansion of international trade and consequently the rise in international arbitration cases led to so-called ‘new entrants’. They were basically told that there are ‘no rules in international arbitration’ and therefore ethical rules of the home jurisdictions of party representatives lost their grip on regulating counsel behaviour in international arbitration. Other reasons for the rise of “guerrilla tactics” in international arbitration are to be seen in the different regulatory backgrounds in regard to ethical regulation of counsel conduct and in the fact that arbitral tribunals lack coercive powers.
85. This led to the call for action to create a universal ethics standard. One of the main results of this discussion are the IBA Rules on Party Representation. Their aim is to set a global ethical standard to be respected by participants of international arbitration proceedings. However, those IBA Rules are to be considered as soft law and do only apply in case they are explicitly agreed upon. Besides, the Rules have been partly criticised by arbitration practitioners. The current state of the discussion is characterised by the fact that the idea of the creation of a Global Arbitration Ethics Council was dropped for the time being.
86. When it comes to effective possibilities to counter guerrilla tactics, the analysis is that an experienced arbitrator should be in a position to detect those tactics even before they are employed. It is questionable whether that plays out in practice as is being proposed by *Lucy Reed*. It is noteworthy that the IBA Rules on Party Representation and the Guidelines in the Annex to the 2017 LCIA Rules very much resemble to what is being proposed by Lucy Reed as appropriate means to counter “Guerrilla Tactics” from the very beginning in an arbitral proceeding. The basic idea here is to employ an escala-

tion strategy always aimed providing an appropriate response to undue behaviour by counsel. A tribunal's reaction should be adequate to counsel or party behaviour and should leave no doubt on the determination of the tribunal to preserve the integrity and continuation of the arbitral proceedings.

87. Finally, it is undisputed that the most powerful tool of arbitration tribunals to sanction/penalise unethical conduct by counsel is to allocate costs taking into consideration eventual misconduct. It was shown that arbitral tribunals do sanction such behaviour in practice. An increasing amount of arbitral institutions provide in their respective rules the possibility to take party/counsel behaviour into consideration when apportioning costs in the cost section of the final award. Arbitral tribunals are therefore encouraged to make more use of this effective possibility.