



ULČAR & PARTNERJI

**Joint UNCITRAL-LAC Conference
on Dispute Settlement**

Tackling Guerrilla Tactics

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Guerilla Tactics

Guerrilla warfare is a form of irregular warfare in which a small group of combatants [...] use *irregular* military tactics [...] to fight a larger and less-mobile traditional military.

Arbitration guerillas will try to exploit the procedural rules, or lack thereof, for their own advantage, seeking to delay the process and (if given an opportunity) ultimately derail the arbitration so that it becomes abortive or ineffective.

(M. Hwang)

Guerilla tactics may not always be ethical and/or procedural violations, but are almost always a hindrance to the arbitral process. (G. J. Horvath)



Boer guerillas during the Second Boer War in South Africa

The idea behind Guerrilla Tactics

- the respondent knows that it has breached/failed to perform its obligations
- the respondent knows that the arbitration proceedings will sooner or later come to an end, and most likely, the award will be against the respondent
- therefore, the respondent uses various techniques which, from the standpoint of the international arbitration community, are impermissible and aimed either at getting the positive (for the respondent) arbitral award, or making it impossible to enforce the negative arbitral award
(V. Khvalei)

Hard vs. Soft type of Guerilla Tactics

Inherent and Implied Powers

- the role of the arbitral tribunal ⇒ to allow both parties to develop their cases and to ensure due process
 - ⇒ to ensure fair, smooth and efficient arbitration
- inherent powers derive from the nature and function of the tribunal
- implied powers can be implied from the text of the arbitration agreement or rules
- tendency to include general ethical guidelines into the arbitration rules (see Annex to the LCIA Arbitration Rules 2014)

Anticipation and Prevention

prevention is better than cure approach

- check-lists / battle plan / procedural orders
- agreement on a code of conduct
 - A code of conduct is an agreement between the parties that distinguishes acceptable from non-acceptable behavior. (G. J. Horvath)
 - individualized v. general code of conduct (IBA Guidelines)
- case management / procedural timetable / remedies in case of default

Addressing Guerilla Tactics during the Proceedings

Sometimes even the best preparation can not prevent determined counsel, or party, from using tactics or measures that are inappropriate, offensive, unethical and that may result in the proceedings being derailed.

- Step-by-Step Approach – measured discipline
- interim (procedural) measures (preserving of the documents, delivery of the requested documents, security for costs)
- negative or adverse inferences (e.g. negative assesment of the behavior at the evidence stage)

When Prevention Fails

If all counter measures fail, the ultimate possibility is to penalize the guerilla warfare after the proceedings.

- cost sanctions – „*a day late and a dollar short*“
- reporting unethical behavior to arbitral institutions or bar associations
- ex-parte awards
- exclusion of abusive counsel
- dismissal of the entire case !?!

**“Arbitration
is only as good as
its arbitrator(s).”**

(J.F. Lalive)



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