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# Guerrilla Tactics in International Arbitration

Problems and Possible Solutions

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**LEGAL  
UPDATE**

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Arbitration is now considered a cultural mainstay of transnational commerce. However, the efficiencies of arbitration are sometimes unfortunately undermined by certain tactics adopted by arbitrating parties aimed at frustrating or hindering arbitration proceedings.

This article highlights some of the tactics employed by “arbitration guerrillas” and discusses how we may deal with them.

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## INTRODUCTION

Given that arbitration empowers commercial parties to resolve their commercial disputes in a neutral, private and reliably enforceable way outside the boundaries of the judicial system, it should be no surprise that arbitration is now considered a cultural mainstay of transnational commerce.

Notably, the Singapore International Arbitration Centre (“**SIAC**”) announced on 31 March 2021 that 2020 saw SIAC set a new record of 1,080 new case filings involving parties from 60 jurisdictions.

However, the efficiencies of arbitration are sometimes unfortunately undermined by certain tactics adopted by arbitrating parties aimed at frustrating or hindering the proceedings. Such uncooperative parties are known as “arbitration guerrillas”. It has also been observed that arbitration guerrillas are more likely to be respondents than claimants.

What are some of the tactics employed by the arbitration guerrillas, and how do we deal with them?

## GUERRILLA TACTICS

In *China Machine New Energy Corp v Jaguar Energy Guatemala LLC and another* [2018] SGHC 101, the Singapore High Court expressly considered the issue of dealing with guerrilla tactics in arbitration for the first time. The applicant argued that an arbitral award ought to be set aside by the Court on various grounds including Article 34(2)(b)(ii) of the UNCITRAL Model Law on International Commercial Arbitration because the respondent’s alleged guerrilla tactics rendered the award in conflict with Singapore’s public policy.

While the Court eventually rejected the allegations that the respondent employed guerrilla tactics because there was insufficient evidence that the complained acts were carried out with the aim of undermining the arbitration, it made several interesting observations regarding the concept of “*guerrilla tactics*”.

First, the Court held that the critical characteristic of any guerrilla tactic is the conscious and tactical employment of illegal or unethical means specifically in order to obstruct, delay or sabotage an arbitration.

Second, the Court observed that guerrilla tactics exist on a spectrum. “Extreme tactics” may involve severe criminal acts involving violence or threats of violence on parties related to the arbitration. “Common” tactics are those which amount to obvious misconduct, including bribery, intimidation and harassment of arbitrators and witnesses, but notably also include fraud, delay tactics and frivolous challenges in the arbitration.

Finally, there are also tactics which although not guerrilla tactics, nonetheless violate the spirit of international arbitration. These include withholding evidence and ambushing opposing parties in international arbitration with evidence.

Third, the Court noted that certain “extreme” or “common” guerrilla tactics may amount to grounds upon which an arbitral award may be set aside.

## NAVIGATING THE WAY AHEAD

Fortunately, arbitrating parties which are at the receiving end of such unconstructive conduct are not without recourse. Arbitral tribunals are equipped with wide-ranging powers to assist the discharge of their fundamental duty to hear the arbitration proceedings fairly and diligently and to resolve the dispute by rendering an enforceable award. Such powers may be exercised in two main ways in order to counter any guerrilla tactics employed by an arbitrating party.

First, an arbitral tribunal should make it clear to all arbitrating parties that it is entitled to draw adverse inferences against any party who engages in guerrilla tactics pertaining to document production, witness statements as well as other filings in the arbitration. An adverse inference is a detrimental conclusion which a tribunal may draw from a party’s failure to produce evidence that is within its control.

It is generally accepted that tribunals may draw adverse inferences in appropriate circumstances. For SIAC arbitrations, Rule 27(l) of the SIAC Arbitration Rules 2016 (“**SIAC Rules**”) expressly provides that unless parties agree otherwise, a tribunal shall have the power to impose such sanctions as it deems appropriate in relation to any party’s failure to comply with the SIAC Rules or with its order or directions. This broad power may be construed to include a power to draw adverse inferences.

Second, the option of issuing interim costs awards in response to objectionable conduct by an arbitrating party especially if significant delays result from such conduct may be available to an arbitral tribunal.

As with the power to draw adverse inferences, all of most widely used arbitration rules confer tribunals the power to decide the costs of arbitration as between the parties. For SIAC arbitrations, Rule 35.1 of the SIAC Rules expressly provides that unless parties agree otherwise, the tribunal shall determine the apportionment of the costs of the arbitration among the parties. Further, Rule 30.1 of the SIAC Rules empowers a tribunal to grant any interim relief sought by a party which it deems appropriate.

In this connection, it is also noteworthy that the Chartered Institute of Arbitrators’ guidelines on the cost aspect of drafting arbitral awards generally recognise that “*advancing spurious arguments or making unreasonable applications for interim measures as a delaying tactic*”

constitutes obstructive conduct by a party which may attract adverse cost consequences.

As a matter of practice, where a party takes the position that the other party's obstructive conduct ought to be addressed by way of costs, sufficient particulars of such conduct as well as its specific effect on the conduct of the arbitration should be included in the first party's costs submissions. This assists the tribunal in determining the proper allocation of the costs of the arbitration between the parties in the circumstances and also provides a useful starting point for the tribunal's preparation of the costs award for the arbitration.

## **FURTHER COMMENTS**

As an observation, arbitrators who clearly set out their expectations regarding the conduct of the arbitration at its very outset enjoy greater success in curbing unconstructive conduct on the part of the arbitrating parties.

Together with the other case management measures employed by proactive arbitrators, the power to draw adverse inferences and to make interim cost orders may go some distance in deterring guerrilla tactics in international arbitration.

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