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by O.E. Browne and R. Price

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Saving Time and Money by Sanctioning Bad Behaviour

Oliver Browne and Robert Price[1]

Abstract

It is well-established that arbitrators possess powers to preserve the integrity of the arbitral process. However, it is often considered that arbitrators' sanctioning powers are too limited to ensure that parties and counsel conduct proceedings in an efficient manner. This article examines the range of powers available to arbitrators and considers their effectiveness. It concludes that whilst costs sanctioning is a well-established and widely used method of policing the behaviour of parties and counsel, arbitrators have traditionally been reluctant to use the full range of their powers for fear of rendering their awards open to challenge. This article also provides some suggestions on how to broaden the use of arbitrators' powers in practice to ensure a more efficient process (saving time and costs) that is less susceptible to guerrilla tactics.

Introduction

In an important article published in the Journal of International Arbitration in 1989, Lord Mustill observed that "*commercial arbitration* [had] *come far from its former roots*".[2] In his view, arbitration had become "*a service industry, and a very profitable one at that*".[3] He noted a growing concern amongst practitioners that arbitration was no longer the quick and cheap method of dispute resolution that it had once been.

That concern is even more acute today than it was 28 years ago. Speed and value for money are no longer areas that arbitration can claim as particular strengths. The process of arbitration has become increasingly like domestic court litigation, with both parties often inclined to fight every point to the bitter end and to seek to break their opponent's resolve through the use underhand procedural devices (so-called guerrilla tactics). This is of course not the picture in every case, but, particularly in large, high-value arbitrations, it is a picture that many practitioners will recognise.

In some respects, the lengthy, hard fought battles that characterise high stakes cases are a testament to arbitration's popularity. Commercial arbitration is no longer confined to the smaller cases that were the subject of Lord Mustill's nostalgia, "*where the parties and the arbitrators get on with the dispute in a reasonably cordial atmosphere at reasonable cost and speed, and where the loser pays up with a semblance of good grace*".[4] In the larger cases, the procedure is increasingly formal, lengthy and expensive. Multinational companies are drawn to arbitration because of other perceived advantages, such as the ability to select arbitrators,

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[2] Michael John Mustill, "Arbitration: History and Background", Journal of International Arbitration, (Kluwer Law International 1989, Volume 6 Issue 2), pp. 43 – 56, 55.

[3] *ibid*.

[4] *ibid* at 54.

confidentiality, and above all, the ease of enforcement under the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "**New York Convention**").

It is perhaps no longer feasible, given the complexities of modern commercial relationships, for arbitration to return completely to its roots, as they were identified by Lord Mustill. But if arbitration is to maintain its popularity, tribunals need to be more robust in protecting it from the abuses that increase time and costs.

This article takes the view that, much of the time, tribunals already possess important powers to ensure that arbitration is conducted appropriately and to sanction parties that do not comply with their orders. Indeed, tribunals have a positive duty to prevent one party from hijacking an arbitration with sustained guerrilla tactics. That duty is set out in many national arbitration laws, and in institutional rules and, importantly, national courts will support arbitrators that take a robust approach to procedural issues by penalising the party at fault. Therefore, much can already be done by resolute tribunals to curtail delaying and other guerrilla tactics whilst remaining sensitive to genuine due process concerns.

This article also explores other innovative approaches that might be used to win the battle against guerrilla tactics. Some of these approaches might require explicit changes to institutional rules to give tribunals confidence in their sanctioning powers. Others perhaps require the arbitration community to learn from the procedures of national courts. In the most extreme circumstances, national courts themselves can be a useful ally.

This article uses the UK Arbitration Act 1996 (the "**Arbitration Act**") and English case law as a starting point for the consideration of the conceptual issues highlighted herein, but the approaches taken in other jurisdictions (particularly common law jurisdictions) are also considered.

What Are Guerrilla Tactics and Are They Becoming More Prevalent?

Guerrilla tactics take many forms and therefore a definition of the term can prove elusive. As Günther Horvath and Stephen Wilske have noted:

> "*A definition of the term 'guerrilla tactics' is fundamental to its understanding. However, in the quest for such a definition, it becomes apparent that a single definition of the term does not exist. Rather, the term is comprised of several distinct types of behaviour*".[5]

Some arbitrations have been blighted by "blatantly illegal" tactics, such as attempts to bribe the tribunal, intimidation of parties, witnesses and counsel, and forging of documents. These types of activities attract criminal consequences under most national laws. However, an arbitral tribunal cannot satisfactorily deal with matters that may require the exercise of regulatory or police powers. The exercise of such powers is properly the domain of national courts and other

[5] Günther J. Horvath, Stephan Wilske, et al., 'Chapter 1, §1.02: Categories of Guerrilla Tactics', in Günther J. Horvath and Stephan Wilske (eds), Guerrilla Tactics in International Arbitration, International Arbitration Law Library, Volume 28 (Kluwer Law International 2013) pp. 3 – 16, 3.

state institutions. These extreme sorts of guerrilla tactics are rarely encountered in practice and are therefore beyond the scope of this article.[6]

However, "inappropriate and unethical conduct" that falls short of criminal behaviour is very much the responsibility of arbitral tribunals to police. Examples of this type of conduct include: failing to produce documents in accordance with the tribunal's orders (either late production or the more serious withholding of documents), introducing evidence for the first time at a hearing in order to ambush opposing counsel, excessive document requests, late filing of submissions, and failure to pay advances on costs.

These types of tactics lead to dissatisfaction on the part of users of international arbitration. Respondents to the 2015 International Arbitration Survey conducted by the Queen Mary University of London (the "**Queen Mary Survey**") lamented the "*lack of effective sanctions during the arbitral process*", which inadequately incentivised parties and their representatives to act efficiently.[7] This is an implicit acknowledgement of the prevalence of guerrilla tactics in arbitration. The Queen Mary Survey found that the lack of effective sanctions was the second worst feature of arbitration (46% of respondents), behind the perennial and closely linked problem of excessive costs (68% of respondents).[8]

Evidence from other studies adds to the sense that the use of guerrilla tactics is on the rise, and it follows that costs and delays will only increase unless action is taken to deal with the problem.[9] Furthermore, users of arbitration expect tribunals to deal with the problem and believe that they already possess the sanctioning powers to do the job. Some respondents to the Queen Mary Survey suggested that the reluctance of tribunals effectively to use the powers at their disposal is a consequence of a fear that their award will be challenged for lack of due process. The users ultimately raise an important point: tribunals should be more mindful of the rights of the parties suffering the consequences of guerrilla tactics than the potential for the guerrillas to challenge the award on due process grounds.

The Tribunal's Fundamental Duties

Tribunals and national courts have held on many occasions that arbitrators have broad powers to regulate the arbitration procedure. The source of those powers can be found firstly in the parties' arbitration agreement, which will often incorporate the rules of an arbitral institution. Secondly, the tribunal derives power from the law of the seat of the arbitration.[10] As Lord Mance explained during his recent debate with Professor Gaillard, the powers of arbitrators

[6] See generally, Victoria Orlowski, 'Chapter 2, §2.02: The Perspective of Arbitral Institutions: Upping the Arsenal – Using the ICC Rules to Counteract Guerilla Tactics', in Günther J. Horvath and Stephan Wilske (eds), Guerrilla Tactics in International Arbitration, International Arbitration Law Library, Volume 28 (Kluwer Law International 2013) pp. 54 - 69.

[7] Queen Mary University of London, 2015 International Arbitration Survey: *Improvements and Innovations in International Arbitration*, *School International Arbitration*, p. 7.

[8] *ibid*. "Lack of speed" in the procedure was considered the fourth worst feature of arbitration (at page 7).

[9] See for example, Edna Sussman and Solomon Ebere, "All's Fair in Love and War – Or Is It? Reflections on Ethical Standards for Counsel in International Arbitration" (The American Review of International Arbitration, Vol. 22, No. 4, 2011), p. 613. See also Lucy Reed and James Freda, Maxwell Lecture: "After ICCA Singapore, After ICCA Miami: The Next Questions", ICSID Review - Foreign Investment Law Journal, Volume 30, Issue 1 (2015), pp. 10-20.

[10] Provided it has been chosen – though arbitrators are quite capable of choosing the seat themselves if necessary.

"*find their source in the agreement of the parties*", and those "*powers must also be consistent with the law that governs the arbitration, … be it the law of the seat or otherwise*".[11]

All institutional arbitration rules impose duties and obligations on both the arbitrators and the parties with regard to the conduct of the proceedings. The problem that many arbitrators feel that they face is a tension between two key duties. On the one hand, arbitrators must give each party a reasonable opportunity to present its case and to deal with the case of its opponent. On the other hand, arbitrators must provide a fair means of resolving the dispute between the parties and avoiding delays and unnecessary costs.

Taking as an example the position in the England and Wales, these duties are set out together in section 33(1) of the Arbitration Act. The section is entitled the "General duty of the tribunal", under the terms of which it must:

> "*(a) act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent, and*
>
> *(b) adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined.*"

Arbitrators must balance these two competing requirements, but they should be careful not to allow their adherence to one to overshadow the other. Section 33(1)(a) of the Arbitration Act should not be interpreted as an absolute right for a party to present its case as it wishes. Guerrillas seize on these sorts of due process provisions, which are found in the UNCITRAL Model Law and the rules of the major arbitral institutions.[12] They then use allegations of due process violations to threaten challenges to the award if the tribunal penalises their inappropriate behaviour.[13] The problem identified by respondents to the Queen Mary Survey is that too many tribunals capitulate at the first sign of due process being used as a threat.

There is no basis for a tribunal to do anything other than to stick to its guns. Provisions such as section 33(1)(a) of the Arbitration Act are one side of the due process coin, and should properly be seen as facilitating access to justice. Each party has a "*reasonable*" opportunity to present its case and reply to that of their opponent. As such, the right is circumscribed and not absolute. The UNCITRAL Model Law takes the slightly different approach that each party should have a "*full opportunity*" to present its case, but interestingly, the latest revision to the UNCITRAL Arbitration Rules has seen the adoption of "*reasonable opportunity*", in line with other arbitral institutions. This means that where a party is delaying the procedure through spurious applications to the tribunal, failing to file documents or submissions on time, or adopting other delaying tactics, once the tribunal has given the party at fault a reasonable chance to use the processes of the arbitration to present its case the duty will have been fulfilled.

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[11] 'Le grand débat: Lord Mance and Gaillard clash in Paris' (Global Arbitration Review, 19 January 2017) <http://globalarbitrationreview.com/article/1080201/le-grand-debat-lord-mance-and-gaillard-clash-in-paris> accessed 4 April 2018.

[12] LCIA Rules, Art 14.4; ICC Rules, Art 22(4); UNCITRAL Model Law, Art 18. Note the change in the UNCITRAL Arbitration Rules from "full" to "reasonable".

[13] Lucy Reed has described this phenomenon in its most extreme form as the "abuse of due process". Parties use alleged violations of their right to a fair procedure as a sword to attack their opponent and influence the tribunal. See Lucy Reed, "Ab(use) of due process: sword vs shield", Arbitration International, Volume 33, Issue 3, p. 364.

The other side of the due process coin is that tribunals must adopt suitable procedures in order to provide a fair means to resolve the dispute, in accordance with section 33(1)(b) of the Arbitration Act. This duty is specifically designed to guard against unnecessary delays and expense, and its existence should be viewed as empowering the tribunal to take a robust approach to guerrilla tactics. The equivalent provision in Article 18 of the UNCITRAL Model Law requires that the parties should be treated with "equality". It is worth noting that both the ICC and LCIA Rules include references to fairness and do not require that the parties be treated in exactly the same way.

In the context of guerrilla tactics, the tribunal's two fundamental duties must operate to permit the party engaging in inappropriate tactics reasonable access to justice, provided that the opportunity afforded to that party does not lead to serious inefficiencies in terms of delays and extra costs. To permit such a situation would not be fair to the innocent party. Under section 34 of the Arbitration Act, the tribunal has discretion to manage the procedure of the arbitration as it sees fit,[14] and it should use those broad powers to curtail unacceptable tactics. Taking a tough line with recalcitrant parties to minimise disruption and excessive costs is itself a measure of fairness. It is not merely desirable, but necessary for the tribunal to comply with its duty under section 33(1)(b) of the Arbitration Act.

National courts will almost always support tribunals that use their case management powers to curb guerrilla tactics in the quest for a fair process. The English courts will very rarely set aside an arbitration award on due process grounds as the threshold for a due process challenge is set deliberately high. Section 68 of the Arbitration Act provides that an arbitral award can only be challenged where there was "*serious irregularity*" causing "*substantial injustice*", which the Departmental Advisory Committee on Arbitration has clarified as being circumstances in which "*the tribunal has gone so wrong in its conduct of the arbitration that justice calls out for it to be corrected*".[15] Definitive statistics on the success rate of section 68 challenges are not readily available, but it is generally acknowledged that the success rate is very low.[16] Sir Bernard Eder has suggested that over the five-year period from 2012 to 2016, at least 5,000 awards would have been made in England, during which only 39 awards were challenged in the English courts on the basis of section 68 of the Arbitration Act, and only 4 of those challenges were successful.[17]

The English courts have also supported tribunals when they have been challenged on due process grounds in other contexts. Parties engaging in guerrilla tactics may seek to remove arbitrators that do not let them have their way. The most common grounds for seeking removal of arbitrators under section 24 of the Arbitration Act are that "*circumstances exist that give rise to justifiable doubts as to* [the Arbitrator's] *impartiality*", or that the Arbitrator has failed

[14] Subject to the rights of the parties to agree any procedural matter.

[15] Lord Justice Saville, Departmental Advisory Committee on Arbitration Law 1996 Report on the Arbitration Bill, Arbitration International, Volume 13, Issue 3, pp. 275–316, at [280], approved in numerous cases, including by the House of Lords in *Lesotho Highlands Development Authority v. Impregilo SpA and others* [2005] UKHL 43, at [27].

[16] Blair J noted that in 2015, 25.7% of the cases dealt with by the Commercial Court in London were arbitration-related claims, of which only one of these claims was a successful challenge to an arbitration award brought under section 68 of the Arbitration Act. See 'Ditch the arms race, says UK judge' (Global Arbitration Review, 17 November 2016) <http://globalarbitrationreview.com/article/1076365/ditch-the-arms-race-says-uk-judge> accessed 4 April 2018.

[17] 'Award challenges under England's 1996 Act analysed in Sydney' (Global Arbitration Review, 13 October 2017) <http://globalarbitrationreview.com/article/1148934/award-challenges-under-englands-1996-act-analysed-in-sydney> accessed 4 April 2018.

"*properly to conduct the proceedings*". Both grounds require the court to consider whether the arbitrator has complied with his / her duties under section 33(1) of the Arbitration Act. *Goel v Amega* provides a good example of a sole arbitrator pushing forward with an arbitration in the face of a party that consistently disregarded his orders and eventually sought the arbitrator's removal.[18] The English court supported the arbitrator's case management decisions and rejected out of hand the application to remove him.[19]

In *Goel v Amega*, the respondents in the arbitration frustrated its early stages. They failed to participate in the process by which the arbitrator was appointed and then announced that they would not attend the first preliminary meeting the day before. The arbitrator subsequently went ahead with the meeting and drew up a draft procedural timetable on which he invited comments from both sides. The respondents informed the institution administering the arbitration (failing to copy both the arbitrator and the opposing party) that they had changed solicitors and objected to the draft procedural timetable. The claimant filed its pleading outlining its claim and the respondents requested an extension of time to file their response given their change of legal representation. This extension was granted by the arbitrator, but shortly before the revised deadline the respondents intimated that the deadline would not be met.

In an attempt to minimise delays and proceed with the case, the arbitrator proposed a further procedural conference, an offer which was unsurprisingly rejected by the respondents, who demanded a stay of the proceedings. Excerpts of the arbitrator's reply to this request are instructive and are grounded in the arbitrator's awareness of the proper scope of his duties under section 33(1) of the Arbitration Act:

> "*… I consider that I have given the respondent every reasonable opportunity to engage in the setting of the proceedings in this arbitration and they have failed to avail themselves of this opportunity. Furthermore, as I have made clear in my orders, the respondent is at liberty to make any other application that it likes to me, but has chosen not to.*
>
> *My duty in this matter is particularly governed by section 33 of the Arbitration Act 1996. In this I am to adopt procedures suitable to the circumstances of the case, avoiding unnecessary delay or expense whilst acting fairly and impartially between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent. I consider that in setting the respondent's date for compliance with the directions within order for directions No. 2 to serve its defence and counterclaim by today, 30th June, I have fulfilled that duty.*"[20]

The respondents had been given a reasonable opportunity to present their case, but the arbitrator was also required to adopt procedures designed to minimise delay and expense, and this aspect of his duty necessitated his decision to compel compliance with his previous procedural orders and to proceed with the case.[21]

[18] *Drs. G, M. Goel v Amega Limited* [2010] EWHC 2454 (TCC).
[19] *ibid* at [55].
[20] *ibid* at [11].
[21] *ibid*.

On the application to the High Court to remove the arbitrator on the grounds of bias, Coulson J gave the respondents short shrift:

> "*I am in no doubt that the case management decisions that he made were fair and reasonable. They do not begin to demonstrate a case of apparent bias in accordance with the principles that I have already set out.*"[22]
>
> …
>
> *A fair-minded observer would conclude that there is no suggestion of bias on the part of the arbitrator and that he had conducted himself properly in the face of what I consider to be considerable provocation.*"[23]

Another attempt to a remove an arbitrator on the grounds of bias occurred in the recent case of *T v V, W and A*.[24] The case involved an arbitration between accountants in two accountancy partnerships. V and W alleged that on his departure, T made misrepresentations as to the state of his health and his intention to work following his departure. Their case was that T misled them into allowing him to retire on favourable terms and that he had secretly intended to take clients of the partnership for his own account. T counterclaimed for unlawful expulsion from the partnership following an illness.

T's illness caused considerable delays and other procedural difficulties throughout the arbitration. The agreed timetable provided that after the close of pleadings, each side would disclose the documents on which they relied. Before disclosure could be completed, T's illness took a serious turn and he was admitted to hospital for a liver transplant.[25] Proceedings were stayed whilst T recovered, but after a few days the arbitrator reverted to the parties proposing a new date for disclosure, ten days after T's discharge from hospital. T's solicitors were directed to keep the arbitrator updated as to his progress.

Over the next few months, the arbitrator and the solicitors for V and W continued to press T's solicitors for progress reports on T's health. The correspondence between the parties and between T and the arbitrator became more hostile as the date for disclosure was increasingly delayed. The arbitrator was not prepared simply to accept the evidence of T's solicitors that T was unable to assist them with the disclosure process, and demanded updates from T's doctors. T provided an update from a senior doctor that was not part of his regular surgical team, which concluded that T was unable to undertake any strenuous activities. However, the arbitrator considered that this evidence was unsatisfactory and contradicted the views of T's regular surgical team, which she contacted herself requesting an update. After granting a number of extended deadlines for disclosure which T did not meet, the arbitrator issued a peremptory order, failure to comply with which would mean that T could not rely on the documents he wished to disclose in the arbitration. Shortly after this, T applied to the High Court for the removal of the arbitrator.

The position under English law is that the court should not intervene in the arbitral process or decision-making purely on the grounds that it "*might have done things differently*".[26] This

[22] *ibid* at [55].
[23] *ibid* at [57].
[24] *T v V, W, and A* [2017] EWHC 565 (Comm).
[25] *ibid at* [27].
[26] *ABB Ag v Hochtief Airport GmbH* [2006] EWHC 388 at [67]

approach was echoed by Popplewell J in *T v V*, where he explained that the court's role in considering whether the arbitrator had handled proceedings properly in accordance with her section 33(1) duty was to judge whether the arbitrator's decision was in the range of case management decisions open to her:

> "*Where, as in this case, there is no question of an arbitrator having committed any error in the way he or she has gone about the decision-making process, what must be shown is that no reasonable arbitrator could have made the decision which the arbitrator made consistently with the duties imposed by s. 33 of the Act. Where a discretion is being exercised, as it is when considering an extension of time in relation to disclosure of documents, there may be a range of responses which may reasonably be adopted. The burden on the Claimant in the context of the present application is a burden to show that the response was outside the range of responses which could reasonably have been adopted in fulfilling the duty to deal with the proceedings with fairness and impartiality towards the Claimant as well as to the other parties.*"[27]

Notably, Popplewell J also considered that the arbitrator "*was entitled, and indeed required, to have in mind the imperative of speedy and efficient finality in arbitration which is embodied in s.33(1)(b) and s.1(a) of the Act*".[28] On that basis, the arbitrator's conduct was reasonable, and fell within the ambit of her case management discretion.

The decision in *T v V* shows that the English courts will approach case management decisions in a similar way to judicial review of administrative decisions in public law. Provided the arbitrator has acted within the parameters of what a reasonable arbitrator might decide, that the court might have come to a slightly different decision if it had been managing the arbitration will not provide grounds to challenge the award.[29]

Decisions of other national courts suggest a similar and fairly uniform approach to challenges to arbitral awards on due process grounds. In *Globe Nuclear Services and Supply GNSS, Limited v AO Techsnabexport*, the Svea Court of Appeal refused to set aside an SCC award on procedural grounds, including that the tribunal had been deficient in its case management.[30] The decision of the Hong Kong Court of Appeal in *Pacific China Holdings Ltd v Grand Pacific Holdings Ltd*[31] is also well known. In that case, the Court of Appeal overturned a decision of the Court of First Instance which had set aside an ICC award on the grounds that the tribunal's decision to change the agreed procedural timetable after the late filing of evidence on Taiwanese law by Pacific China Holdings ("**PCH**"), and its refusal to admit additional

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[27] *ibid* at [96].
[28] *ibid* at [98].
[29] As a postscript, the arbitration resumed after the judgment of Popplewell J, and T later returned to court to challenge an award made pursuant to a peremptory order, on the basis that he had been denied the right to a hearing. Males J rejected the application on the basis that a tribunal is entitled to "proceed to an award on the basis of such materials as have been properly provided to it" under section 41(7)(c) of the Arbitration Act, and that in such circumstances a defaulting party has no automatic right to a hearing. Interesting, Males J also observed that "[i]f it had not been for the peremptory order, it would appear that the effect of Article 19 of the LCIA Rules is that a party has a right to a hearing" (see T v V and W [2018] EWHC 1492 (Comm), paragraph 30). This observation points to the limits of the tribunal's power, and that as the Arbitration Act currently stands, a true default judgment (as exists in English litigation) is not permissible. The pre-Arbitration Act case of *Modern Trading v Swale Building and Construction* (1990) 24 Con. L.R. 59 also suggests that a hearing should be the norm in the vast majority of cases. See the section on "Dismissal of the case" later in this article.
[30] *Globe Nuclear Services and Supply GNSS, Limited v AO Techsnabexport*, Case No. T 5883-07.
[31] *Pacific China Holdings Ltd v. Grand Pacific Holdings Ltd*, CACV 136/2011.

Taiwanese authorities relied on by PCH, had led to a situation whereby PCH had been unable to present its case. The Court of Appeal held that the tribunal's duty to avoid unnecessary delay and expense so as to provide a fair means for resolving the dispute gave it considerable flexibility in case management. It quoted with approval a passage from a leading textbook on ICC arbitration:

> "*As the learned authors in Craig, Park and Paulsson in International Chamber of Commerce Arbitration, 3rd edn put it at 16.04 when dealing with Article 15(2)[17] of ICC Rules:*
>
> *'Except in the most egregious cases, the wide discretion of arbitrators and the flexibility of the arbitral process have been confined by national courts which quite regularly reject the procedural arguments of disappointed parties.'*"[32]

On the issue of the inadmissibility of the Taiwanese authorities, the Court of Appeal took an even stronger line in support of the arbitrators, almost suggesting that the reviewing courts could never second-guess the tribunal's case management decisions:

> "*The learned judge concluded at para 129 that the refusal to receive and consider the additional authorities prevented PCH from presenting its case and therefore a violation of Article 34(2)(a)(ii) has been established. With respect, I cannot agree with Saunders J. I do not believe he was entitled to interfere with a case management decision, which was fully within the discretion of the Tribunal to make.*"[33]

It might be argued that the provisions of Article 18 of the UNCITRAL Model Law requiring the tribunal to provide equal treatment and a "*full opportunity*" for a party to present its case leaves the process somewhat hostage to the arbitration guerrillas.[34] However, the term "*full*" in Article 18 is not generally understood to mean that an arbitral tribunal "*must sacrifice all efficiency in order to accommodate unreasonable demands by a party*".[35] Indeed, Article 18 "*does not entitle a party to obstruct the proceedings by dilatory tactics and, for example, present any objections, amendments, or evidence only on the eve of the award.*"[36] National courts have tended to interpret this wording restrictively so that, for example, equal treatment does not require that the parties be given identical time limits to file submissions or evidence.[37]

The provisions of national arbitration laws and institutional rules that empower tribunals interlink with Article V of the New York Convention. There is considerable overlap between

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[32] *ibid* at [55].
[33] *ibid* at [68].
[34] Klaus Peter Berger and J. Ole Jensen, "Due process paranoia and the procedural judgment rule: a safe harbour for procedural management decisions by international arbitrators", Arbitration International, Volume 32, Issue 3, pp. 420 - 421.
[35] Howard M. Holtzmann and Joseph E. Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (Kluwer Law International 1989), p. 551.
[36] Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration, 25 March 1985, UN Doc A/CN.9/264, p. 46.
[37] See, for example, the Paris Court of Appeal in *La société Bombardier Transportation Switzerland v La société Siemens AG*, 23 June 2005, JurisData: 2005-287132. Note also that the Hong Kong Court of Appeal in *Pacific Grand Holdings* used the terms "*full opportunity*" and "*reasonable opportunity*" with a degree of interchangeability: *Pacific China Holdings Ltd v. Grand Pacific Holdings Ltd*, CACV 136/2011 at [96] and [105], and the more detailed discussion at [95].

the grounds for setting aside an award and the grounds for refusing enforcement in Article V.[38] The supportive approach of the courts of the seat of arbitration is mirrored by many courts around the world at the enforcement stage. Articles V(1)(b) and (d) of the New York Convention contain two "due process" grounds on which a court may refuse enforcement:

> "*(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or*
>
> …
>
> *"(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place;*"[39]

Both these grounds have generally been interpreted narrowly. As noted by Professor van den Berg in his overview of the New York Convention:

> "*… the grounds for refusal of enforcement … as enumerated in Article V … are to be construed narrowly. … it means that their existence is accepted in serious cases only*
>
> …
>
> *The courts appear to accept a violation of due process in serious cases only, thereby applying the general rule of interpretation of Article V that the grounds for refusal of enforcement are to be construed narrowly. …*
>
> ...
>
> *The proper notice for the appointment of the arbitrator and the arbitration proceedings can be considered as specific categories of the general principle that a party must have been able to present its case. Again, the test is whether a party was in fact precluded from presenting its case in arbitration. The defence of the inability of presenting the case was rarely successful.*"[40]

It is therefore clear that the courts in most jurisdictions are sensitive to the negative consequences of due process paranoia. They recognise, as the Singapore High Court put it in *Triulzi Cesare SRL v XinyiGroup (Glass) Co Ltd*, that "*the right of each party to be heard does not mean that the Tribunal must 'sacrifice all efficiency in order to accommodate unreasonable*

[38] See the decision of the Ontario Supreme Court in *Corporacion Transnacional de Inversiones SA de CV v STET International SpA* (1999) 45 O.R. (3d) 183 (Ont. S.C.J.), at [26].
[39] Articles V(1)(b) and V(1)(d) of the New York Convention.
[40] See Albert Jan van den Berg, "The New York Convention of 1958: An Overview", in Gaillard and Di Pietro and Professor van den Berg's *Enforcement of Arbitration Agreements and International Arbitral Awards, The New York Convention in Practice*, pp. 56-58, referred to approvingly by the Hong Kong Court of Appeal in *Pacific China Holdings* at [91].

procedural demands by a party"".[41] The default position in most jurisdictions will be for the courts to support the case management decisions of the arbitrators.[42] This should give tribunals confidence that they can take a tough line on guerrilla tactics.

Case Management Tactics

The previous section established that there is a strong presumption in favour of upholding the case management decisions of tribunals. Therefore, the starting point for tribunals is that they can have confidence in their ability to deploy the full range of sanctioning powers available to them.

But before dealing with specific sanctioning powers, it is worth considering what preventive tools the tribunal has at its disposal. Are there effective ways of preventing the emergence of guerrilla tactics and therefore the very need for sanctions?

Anecdotal evidence suggests that a fully engaged tribunal that actively monitors all stages of the arbitration will often be enough to stop guerrilla tactics from the outset. If difficult parties are of the impression that the tribunal is alive to underhand manoeuvres and is willing to apply sanctions, this acts as a deterrent.

Active case management also assists in managing the expectations of the parties as to the procedural standards expected. An early case management conference is now the norm in most arbitration procedures.[43] A number of useful things can be agreed at this first conference, including a procedural timetable which forces the parties and their representatives to commit to an efficient process.

At the first case management conference, the tribunal should emphasise the importance of efficiency and good faith throughout the proceedings and inform the parties that certain conduct will not be tolerated. In support of this approach, some commentators have suggested that tribunals or arbitral institutions should draft standard sanctions agreements to be submitted for parties' agreement at the case management conference.[44] Again, this approach can provide arbitrators with a more explicit power to discipline parties and counsel who, later, in breach of their commitments, use guerrilla tactics.[45]

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[41] *Triulzi Cesare SRL v XinyiGroup (Glass) Co Ltd* [2014] SGHC 151, p. 151, citing Howard M. Holtzmann and Joseph E. Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (Kluwer Law International 1989), p. 551.

[42] Klaus Peter Berger and J. Ole Jensen refer to this deference as the "procedural judgment rule". See, "Due process paranoia and the procedural judgment rule: a safe harbour for procedural management decisions by international arbitrators", Arbitration International, Volume 32, Issue 3, p. 426. There are wide parameters within which arbitrators have case management discretion. Within those parameters, reasonable arbitrators and judges might legitimately differ in their approaches to case management. The court's role is merely to ascertain those parameters and decide whether a case management decision is within the reasonable range of possible decisions, as explained by Popplewell J in *T v V, W, and A* [2017] EWHC 565 (Comm).

[43] Article 24 of the ICC Rules sets out an obligation to conduct a case management conference and Appendix IV then sets out some case management techniques to help the parties and arbitrators combat unnecessary delays and excessive costs.

[44] Steven Bennett, "Who Is Responsible for Ethical Behavior by Counsel in Arbitration", Dispute Resolution Journal, Volume 63, Issue 2, p. 43.

[45] Cyrus Benson, "Can Professional Ethics Wait? The Need for Transparency in International Arbitration", Dispute Resolution International, Volume 3, p. 78. Cyrus Benson's proposed Checklist of Ethical Standards for Counsel in International Arbitration is a similar tool, which he has described as "*an ethical checklist that might*

Costs Sanctions

The tribunal's most common sanctioning power is the costs award. It is uncontroversial that tribunals possess the power to apportion between the parties the costs of the arbitration, including the legal and other professional fees incurred by each side and the costs of the tribunal and institution (if any).

The rules of most institutions give the tribunal considerable discretion in costs allocation. It is broadly accepted that this discretion permits the tribunal to use costs awards to reflect the relative success and failure of parties and their conduct in the arbitration. Many institutional rules now expressly adopt this approach. Article 28.4 of the LCIA Rules, for example, stipulates the "*general principle that costs should reflect the parties' relative success and failure in the award or arbitration.*" A similar approach is reflected in the UNCITRAL Arbitration Rules[46] and the Swedish Chamber of Commerce (SCC) Rules.[47]

The 2012 ICC Commission Report on Controlling Time and Costs in Arbitration (the "**ICC Commission Report**") explains that "[t]*he allocation of costs can be a useful tool to encourage efficient behaviour and discourage unreasonable behaviour*".[48]

Some arbitration rules go further and draw an express link between the party's behaviour and cost allocation. For example, Article 38(5) of the ICC Rules provides that "[i]*n making decisions as to costs, the Arbitral Tribunal may take into account such circumstances as it considers relevant, including the extent to which each party has conducted the arbitration in an expeditious and cost-effective manner*".

Other arbitration rules expressly link the allocation of costs to the parties' obligation to conduct the proceedings in "good faith". For example, Article 15(7) of the Swiss Rules of International Arbitration provides that "[a]*ll participants in the arbitral proceedings shall act in good faith, and make every effort to contribute to the efficient conduct of the proceedings and to avoid unnecessary costs and delays.*" Likewise, Rule 29 of the JAMS Comprehensive Arbitration Rules states that:

> "[t]*he Arbitrator may order appropriate sanctions for failure of a Party to comply with its obligations under any of these Rules. These sanctions may include, but are not limited to, assessment of Arbitration fees and Arbitrator compensation and expenses; assessment of any other costs occasioned by the actionable conduct, including reasonable attorneys' fees…*".

As to the type of behaviour which could result in costs sanctions, the ICC Commission Report provides useful, if also non-exhaustive, examples. It states:

> "*Unreasonable conduct could include: excessive document requests, excessive legal argument, excessive cross-examination, dilatory tactics, exaggerated claims,*

be employed at the outset of a case to ensure that the parties, their counsel and the tribunal are on the same page insofar as ethical standards are concerned" (at p. 85).

[46] UNCITRAL Rules, Art. 42(1).

[47] SCC Rules. Art. 44.

[48] ICC Commission Report on Controlling Time and Costs in Arbitration (2012), para. 82.

failure to comply with procedural orders, unjustified applications for interim relief, and unjustified failure to comply with the procedural timetable."[49]

Tribunals in reported ICC cases have frequently used costs to penalise parties for the types of conduct identified by the ICC Commission in its report. In ICC Case No. 7453 of 1994,[50] the tribunal noted that the first defendant's conduct was "*dilatory from the beginning until the end of the proceedings and that conduct was obstructive, and it was calculated to be obstructive, of the Tribunal in carrying out its task.*"[51] The defendant's poor conduct persuaded the tribunal that the claimant should recover its full costs without any reductions in relation to the issues on which the defendant had succeeded.[52]

The tribunal in ICC Case No. 8486 of 1996 was forced to deal with more egregious misconduct.[53] In that case, the defendant's litany of delaying tactics included failing to make payment of the advances on costs, failing to file its counterclaim on time, refusing to sign the terms of reference (which had even been modified in accordance with its wishes), and failing to participate in oral hearings despite being given sufficient notice. Unsurprisingly, the tribunal ordered the defendant to pay the costs of the arbitration and the claimant's legal fees in their entirety. Tribunals in investment arbitrations have also used the allocation of costs to penalise guerrilla tactics.[54]

In many cases, the costs of the arbitration together with each party's legal costs can be very significant, sometimes representing a high percentage of the value of the claim on the merits. In those circumstances, there is no doubt that the possibility that a party may be ordered to pay the full amount of the costs as well as the opposing side's legal fees is a strong deterrent against engaging in guerrilla tactics.

However, there are limits to the effectiveness of adverse costs awards.[55] In "bet the company" cases where the stakes are considerable, the consequences of losing may be so serious that a party will consider it worthwhile obtaining every advantage possible. If costs are only used as a sanction in the final award, they can only ever act as a deterrent, albeit one that will not deter all parties in all circumstances. The costs award punishes conduct after the event via a monetary penalty. It cannot compel a party to change its behaviour at the time, and the penalty will often be treated as an occupational hazard by multinationals fighting high value claims.

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[49] *ibid*.
[50] ICC Case No. 7453 of 1994, Collection of ICC Arbitral Awards (Vol. 4, 1996-2000), Kluwer Law International, pp. 94-111.
[51] *ibid* at p. 111.
[52] The tribunal did, however, make a "*reasonable reduction*" to reflect the legal costs in respect of the issues on which the defendant had succeeded.
[53] ICC Case No. 8486 of 1996, Collection of ICC Arbitral Awards (Vol 4, 1996-2000), Kluwer Law International, pp. 321-332.
[54] See for example, *ADC v Hungary*, ICSID Case No. ARB/03/16, Award of the Tribunal, 2 October 2006, where the respondent was held unreasonably to have contested every conceivable issue, changed experts and counsel at the last minute, and sought to adjourn the hearing date. The tribunal awarded the claimant its full costs.
[55] There is also perhaps a limit to the ability of costs to act as a deterrent tool when both sides are determined to behave inappropriately. In ICC Case No. 6955 of 1993, Collection of ICC Arbitral Awards (Vol 4, 1996-2000), Kluwer Law International, pp. 267-299, the tribunal noted that "[n]*either party has contributed in any way to lessening the number or complexity of the issues to be resolved by the tribunal*" and that "*each has contributed to inflate this arbitration in particular by raising numerous procedural matters*" (at p. 299). Each party was ordered to bear its own costs and an equal share of the costs of the arbitration.

One possible means of improving the utility of costs awards would be for tribunals to penalise abusive conduct with a costs award as soon as it occurs. A specific partial award on costs would be an immediate and effective method of penalising guerrilla tactics. There is of course an issue as to whether such awards would be enforceable, but enforcement concerns aside, it is likely that many parties would pay such a costs award, mindful of the need to keep the tribunal well-disposed towards them. In the case of misconduct by a claimant or a defendant asserting a counterclaim, the tribunal could also consider making the satisfaction of the costs award a condition precedent of the tribunal continuing to hear that claim.[56]

Drawing Adverse Inferences

Whilst costs allocation has its place as a tool that may deter guerrilla tactics in general, other sanctions may be better-suited to dealing with specific types of abuses. The ability to draw adverse inferences is one such sanction.

When a party refuses to disclose documents or to produce a witness at a hearing for cross-examination, the tribunal can infer from such non-compliance that the content of the document or the testimony of the witness would not have been favourable to that party. The punishment in the form of adverse inferences is therefore directly linked to the tribunal's substantive decision on the merits of the case. This is a reasonable and proportionate approach to a particular form of guerrilla tactics that, if left unchecked, could disadvantage the innocent party and affect the outcome of the dispute. The punishment is made to fit the crime.

Adverse inferences are an important tool in arbitration where tribunals lack the coercive powers of national courts. Section 41(7)(b) of the Arbitration Act explicitly permits a tribunal to draw adverse inferences if a party has failed to comply with a peremptory order. The power is also included in the IBA Rules on the Taking of Evidence in International Arbitration, which are now widely accepted as a reflection of normative international arbitration practice even when they are not specifically adopted for a particular case.[57] Article 9(5) of the 2010 IBA Rules relates to a party's failure to produce documents:

> "*If a Party fails without satisfactory explanation to produce any Document requested in a Request to Produce to which it has not objected in due time or fails to produce any Document ordered to be produced by the Arbitral Tribunal, the Arbitral Tribunal may infer that such document would be adverse to the interests of that Party.*"

Article 9(6) relates to other evidence:

> "*If a Party fails without satisfactory explanation to make available any other relevant evidence, including testimony, sought by one Party to which the Party to whom the request was addressed has not objected in due time or fails to make available any evidence, including testimony, ordered by the Arbitral Tribunal to be*

[56] The ICC Rules give tribunals the power to make "decisions on costs" at any time during the arbitration. ICC Rules, Art. 38(3).
[57] Simon Greenberg and Felix Lautenschlager, "Adverse Inferences in International Arbitral Practice", in Stefan Michael Kröll , Loukas A. Mistelis, et al., *International Arbitration and International Commercial Law: Synergy, Convergence and Evolution* (Kluwer Law International 2011) 179 – 205, 187.

produced, the Arbitral Tribunal may infer that such evidence would be adverse to the interests of that Party."

If adverse inferences are used by the tribunal in the context suggested at the beginning of this section then there should be no *prima facie* due process concerns. In any event, these concerns all but disappear provided that the tribunal gives the defaulting party the opportunity to produce the document or witness in question, warning that party that adverse inferences will be drawn if there is a failure to comply with the tribunal's order. In taking this approach, the tribunal in an English-seated arbitration is grounding its case management decision in the duty set out in section 33(1)(a) of the Arbitration Act. Once a reasonable opportunity has been given, the tribunal has complied with its duty and can apply the sanction.

If the guerrilla tactics adopted are designed to secure a direct advantage in the substantive dispute, the sanction should aim to neutralise that unfair advantage. Although a party cannot win a case on an adverse inference alone,[58] the drawing of such inferences can play a vital role in enabling a party to meet its burden of proof.[59] It is suggested that, in many circumstances, this sanction is far more beneficial to an innocent party than a favourable costs order. A party cannot be adequately compensated through costs for losing its case on the basis that the other party refused to provide important evidence during proceedings.

It may be that adverse inferences are not often determinative of the final outcome in the case, but the critical point is that the tribunal will have acted to level the playing field as best it can. Costs can be awarded on top of drawing adverse inferences to recognise that withholding evidence is a procedural default as well as an attempt to obtain an advantage of substance.

Refusal to Admit Evidence or Submissions

A refusal to admit evidence is another type of sanction that targets a very specific type of misconduct. Arbitration can be plagued by delays if parties fail to file evidence on time, or in the context of expert evidence, deliberately file reports and exhibits that go far beyond the scope of what was permitted by the tribunal. These types of guerrilla tactics are well known and have the objective of increasing costs and putting the opposing party's legal team under severe time pressure. In some cases, this increased pressure is sufficient to force parties to the negotiating table to settle for less than they might otherwise reasonably have expected to obtain in a final award.

The additional costs of such tactics can be compensated by the tribunal in the final award. However, as explained above, such an award does not provide any immediate relief for the innocent party. Therefore, in certain circumstances, it will be appropriate for the tribunal to refuse to admit evidence or submissions.

Arguably a refusal to admit evidence or submissions is more severe than drawing adverse inferences. Whilst both sanctions will have an impact on the substantive dispute, if evidence or pleadings are disregarded, the defaulting party suffers an immediate and substantial

[58] Vera van Houtte, "Adverse Inferences in International Arbitration", in Teresa Giovannini and Alexis Mourre, *Written Evidence and Discovery in International Arbitration: New Issues and Tendencies, Dossiers of the ICC Institute of World Business Law, Volume 6* (ICC 2009) 195 – 217, 205.
[59] Simon Greenberg and Felix Lautenschlager, "Adverse Inferences in International Arbitral Practice", in Stefan Michael Kröll , Loukas A. Mistelis, et al., *International Arbitration and International Commercial Law: Synergy, Convergence and Evolution* (Kluwer Law International 2011) 179 – 205, 186.

penalty.[60] Therefore this power should be used with particular caution as it is designed to severely curtail a party's right to be heard. The question of whether the sanction is justified will depend on whether the tribunal has given the defaulting party sufficient warning that the sanction will be applied and a reasonable opportunity to comply with the tribunal's original order.

Given the extreme consequences for the defaulting party, the current consensus amongst practitioners and academics is that a tribunal should not be quick to refuse admission of documents or evidence on to the record. The frameworks of institutional rules and national arbitration laws support this position. Tribunals are encouraged to bear in mind the extent of the unfairness to the innocent party and whether that unfairness can be remedied by sanctions that stop short of curtailing the defaulting party's right to be heard. In many circumstances this will be possible. For example, if a party serves a large amount of evidence after a procedural deadline, the disadvantage might be remedied by granting an extension of time to the innocent party to respond, and costs can be used to penalise the failure to comply with the timetable. A similar result may be reached with the late filing of a pleading.

However, in some situations, there may not be sufficient flexibility within the timetable and the late filing could jeopardise a hearing date or another important procedural deadline. This is a more delicate situation. If the evidence or submission is admitted, the hearing date must be vacated, causing considerable delay. The innocent party might legitimately argue that the tribunal is not upholding its duty to adopt procedures that minimise delay and expense and that the defaulting party is behaving unfairly. As explained in the discussion on the duties of the tribunal, long delays are rightly recognised by institutional rules and national arbitration laws as an intrinsic unfairness. There is the additional question of whether a tougher approach to non-compliance with deadlines is required in any event, without tribunals having regard to the extent of the prejudice suffered by the innocent party.

Despite the serious nature of the sanction, the decisions of some national courts suggest that in clear-cut cases of abusive behaviour, the courts will uphold a tribunal's case management discretion to refuse to admit evidence or submissions. US courts in particular have been prepared to support tribunals that take such an approach. In *Hamstein Cumberland Music Group v. Estate of Williams*,[61] the arbitrator imposed a fine on a party that failed to comply with discovery orders and barred them from offering evidence on certain issues. The court noted that an arbitrator has "*inherent authority to police the arbitration process and fashion appropriate remedies to effectuate this authority*".[62] Similarly, in *Seagate Technology LLC v Western Digital Corp*,[63], the court affirmed the decision of the tribunal to bar the respondents from offering evidence or a defence to certain issues to punish the respondents for fabricating evidence.

The difficult decisions lie in situations where procedural deadlines are jeopardised by a one-off ambush, particularly where vast quantities of tangential evidence or submissions are deposited on to the record. If the filing has been made in accordance with the agreed timetable, the tribunal will not have been able to prepare the ground with intermediate directions and warnings on which it can base its refusal to admit the new material.

[60] By contrast, adverse inferences may not ultimately affect the overall outcome of the case.
[61] No. 05-51666, 2013 WL 3227536 (Court of Appeals for the Fifth Circuit, May 10, 2013).
[62] *ibid* at page 4.
[63] 834 NW2d 555 (Court of Appeals of Minnesota, July 22, 2013).

In these more difficult scenarios, a tribunal will be greatly assisted if it has taken an active role in case management and has carefully defined, with the agreement of the parties, the scope of the evidence and submissions permitted at each stage of the timetable. For example, before expert reports are produced, it is often helpful for the parties and tribunal to prepare a short memorandum setting out the points to be addressed by the experts. If one party then proceeds to file an expert report that addresses points beyond the agreed issues without permission, the tribunal will be in a stronger position to disregard the section of the report which is not within the agreed scope. The memorandum on expert evidence (which can also be adopted by the tribunal as a procedural order) stands as advance warning of the behaviour expected by the parties and can be used to justify the use of powerful sanctions by the tribunal if the parties deviate from the agreed standard of behaviour.

In more borderline cases, the authorities tend to show that tribunals have erred on the side of caution. In *Pacific China Holdings*, the procedural timetable required that "*No later than 18 September 2007 the parties should advise the Tribunal and the opposing party of any intention to call expert witnesses and, if so, the field of expertise and general subject matter on which testimony will be offered by any proposed expert*".[64] When the parties came to exchange expert reports on 16 October 2007, the respondent filed a report on Taiwanese law, which until that point had not been in issue and which it appears had not been notified to the tribunal as a potential subject of expert testimony.

Despite the considerable strain that this late submission placed upon the timetable given that the hearing was due to start on 3 December 2007, the tribunal adjusted the timetable as best it could to enable both parties to make submissions on the admissibility and relevance of the new expert report. The eventual outcome was that the report was admitted on to the record, but the respondent was not given the same amount of time as the claimant to prepare further written submissions on the issue of Taiwanese law. The tribunal was able to find a solution that avoided vacating the hearing and therefore, even at a very late stage of the proceedings, it was not prepared to strike out the expert report.

It would have been interesting to see what approach the tribunal might have adopted if the hearing date had been placed in jeopardy. In the post-hearing phase, the tribunal refused to permit the respondent to rely on three Taiwanese legal authorities which had been introduced in breach of the agreed procedure.[65] This perhaps suggests that the further proceedings are advanced the more a tribunal feels that a party has had a reasonable opportunity to be heard, and there is more scope for a hard line to be taken on the submission of material that was either not invited by the tribunal or beyond the scope of the agreed procedure. Furthermore, as explained previously, the Hong Kong Court of Appeal considered that the reviewing court had little or no scope to interfere with the tribunal's case management decisions, which suggests that if circumstances had been slightly different and the tribunal had found it necessary to strike out the expert report on Taiwanese law, the Hong Kong courts would have supported that decision.

There is a considerable difference between the approach of some national courts and arbitrators when it comes to striking out submissions and evidence. Tribunals consider such a sanction to be a last resort, to be used where other sanctions cannot remedy the harm that has been caused. The English courts, by contrast, particularly in light of the Jackson reforms, are quite prepared

[64] *Pacific China Holdings Ltd v. Grand Pacific Holdings Ltd*, CACV 136/2011 at [21].
[65] *ibid* at [64].

to use the strike-out sanction at any stage of a case.[66] The recent case of *Okpabi v Royal Dutch Shell Plc*,[67] is a good example of this difference of approach. In the preliminary jurisdictional phase of the case, the claimants sought to rely on evidence relating to the corporate structure of the defendants. Fraser J noted that the court had specified that the parties could rely on "*two expert witnesses in total in relation to issues of Nigerian law and the Nigerian legal system*", and "[t]*heir expert evidence shall be limited to the issues of Nigerian law and issues relating to the Nigerian legal system*".[68] As a result, the evidence relied upon by the claimants could not "*remotely be said to fall within the permission granted by the court*",[69] and the decision to rule it inadmissible was held to be straightforward.

The typical approach in arbitration perhaps elevates the access to justice duty at the expense of the duty to minimise costs and delays. There are few examples in which the English courts have upheld tribunal decisions refusing to permit a party to rely on particular evidence or submissions. *T v V,* is one example, in which the court clearly considered the arbitrator's decision to be fair in circumstances in which considerable delay had been caused by the defaulting party. In *Milan Nigeria Ltd v Angeliki B Maritime Co* [2011] EWHC 892 (Comm), Gloster J appeared to accept that the tribunal would have been within its rights to refuse to consider new arguments advanced after a certain cut-off date.[70] But in practice, most tribunals will admit new evidence and submissions throughout the proceedings, and they will almost never take the step of striking out pleadings, witness statements or expert reports. It is submitted that arbitration needs to move towards the more inflexible position on admissibility of submissions and evidence that occurs in a small number of arbitrations but which is increasingly adopted by the English courts.

Dismissal of the Case

If refusing to admit evidence or striking out a pleading is considered a draconian sanction, immediate dismissal would appear to be right at the extreme end of a tribunal's powers. This section deals with the possibility of a tribunal dismissing a case due to a party's procedural defaults. The equivalent situation in national litigation is a default judgment. In English litigation, a default judgment simply records that judgment has been obtained due to a procedural default, not that the court has found in favour of one party in relation to the matters it has pleaded.

Section 41(3) of the Arbitration Act permits a tribunal to make an award dismissing a claim where there has been "*inordinate and inexcusable delay*" in pursuing it, provided certain conditions have been satisfied.[71] First, the delay must give rise or be likely to give rise to a substantial risk that it is not possible to have a fair resolution of the issues in the claim. Second, the delay must have caused, or be likely to cause, serious prejudice to the respondent.

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[66] The English courts are particularly mindful of the necessity to save time and costs and to ensure that the procedural rules are obeyed. These duties are enshrined in Part 1 of the Civil Procedure Rules as the "Overriding Objective".
[67] *Okpabi v Royal Dutch Shell Plc* [2017] EWHC 89 (TCC).
[68] *ibid* at [23].
[69] *ibid* at [25].
[70] *Milan Nigeria Ltd v Angeliki B Maritime Co* [2011] EWHC 892 (Comm)) at [39], "*I have no doubt that if the Tribunal had for a moment thought that a new point was being raised, or that Owners were genuinely being faced for the first time with a genuinely new point, they would not have allowed Milan to rely on COGSA.*"
[71] In addition, the tribunal may dismiss a claim if a claimant fails to comply with a peremptory order of the tribunal to provide security for costs.

Aside from situations where there has been lengthy delay, section 41(4) of the Arbitration Act implies that tribunals do not have the power to issue an award in similar terms to a default judgment.[72] The most serious types of procedural default include the failure to file submissions or attend a hearing as ordered by a tribunal. In these circumstances, section 41(4) permits the tribunal to proceed to an award on the basis of the evidence before it. Section 41(7) provides in similar terms after a party has failed to comply with a peremptory order.

Ultimately, the existence of the power to dismiss a case due to procedural defaults may depend on the law of the seat of the arbitration. Some commentators consider that an arbitrator may have the power to dismiss a case based on a party's misconduct, and this view finds support in the decisions of US courts.[73] In *Tesco Corp v Weatherford International Inc*,[74] the court dismissed the case due to misrepresentations made by a party and its counsel. In reaching its decision, the court held that "*the conduct is serious and has had significant and costly ramifications to the Court and Defendants*".[75] Likewise, in *First Preservation Capital Inc v Smith Barney, Harris Upham & Co*,[76] the court held that inappropriate contact with the opposing party's clients in the middle of the arbitration hearing "*was so egregious and outside the realm of the rules of the arbitration proceedings that dismissal was a rational response on the part of the Panel*."[77]

Immediate dismissal of a claim due to procedural defaults or sustained guerrilla tactics may be available as a remedy where such a power is expressly reserved to the tribunal by the agreed rules or under the legal framework applicable to the arbitration. Given the fact that a key feature of arbitration is the very limited right to appeal the final award, dismissal for procedural default is likely to be seen as a risky undertaking. But given the concerns of users about guerrilla tactics, practitioners might need to consider whether it is now appropriate to re-visit the idea of default awards in arbitration.

Sanctioning a Party's Legal Representatives

An important question to consider is where blame really lies for the use of guerrilla tactics. Does improper conduct stem from the parties themselves, or is it driven by counsel seeking to gain a competitive edge over their peers?

[72] A default award is different to a summary award, which is more equivalent to summary judgment in English litigation. The latter appears to be considered a power available to a tribunal only in very exceptional circumstances. The pre-Arbitration Act case of *Modern Trading v Swale Building and Construction* (1990) 24 Con. L.R. 59 suggests that a hearing should be the norm in the vast majority of cases. The situation may be different depending on whether the relevant arbitration rules or national arbitration law expressly permit summary awards. Some arbitral institutions, notably the SCC, have recently incorporated express summary procedures into their arbitration rules.

[73] Stephan Wilske, "Arbitration Guerrillas at the Gate: Preserving the Civility of Arbitral Proceedings when the Going Gets (Extremely) Tough", in Klausegger et al., *Austrian Yearbook on International Arbitration 2011*, 315, 326-327 (Manz, C Beck, Stämpfli 2011); Abba Kolo, "Witness Intimidation, Tampering and Other Related Abuses of Process in Investment Arbitration: Possible Remedies Available to the Arbitral Tribunal", (2010) 26 Arb. Int'l 43, 73–79.

[74] No. H-08-2531, 2014 U.S. Dist. Lexis 118427 (S.D. Tex. Aug. 25, 2014)

[75] *ibid* at page 7.

[76] 939 F Supp 1559 (S.D. Fla. 1996).

[77] *ibid* at 1564.

Ethical misconduct by counsel is certainly of growing concern.[78] As one commentator described it, guerrilla tactics by counsel "*is not only a subject of scholarly writings and a subject of international arbitration conferences, but also an unfortunate phenomenon of arbitration reality*".[79] Parties understandably rely on the advice of their legal representatives as to how best to conduct an arbitration. It can therefore be assumed that counsel bear some responsibility for the prevalence of guerrilla tactics, but without more evidence it is difficult to say whether counsel are the prime-movers in this area. Further research would certainly be useful. Nevertheless, if counsel have some degree of culpability, the imposition of direct sanctions against counsel is perhaps another tool at a tribunal's disposal and may have beneficial effects.

The traditional view amongst commentators is that such a tool is not available to an arbitral tribunal.[80] The basis for that position is that the tribunal's authority is to a large degree contractual, emanating from the arbitration agreement between the parties. Therefore the tribunal may only regulate those parties that have voluntarily agreed to submit to its jurisdiction. Although instructed by parties that must obey the tribunal, counsel are not parties to the arbitration agreement in their own right and therefore have the same status as third parties over which the tribunal has no power.

However, in recent times, the consensus appears to have shifted to a view that arbitral tribunals do in fact have authority to regulate counsel.[81] As noted above, counsel are inextricably linked to the arbitration process. This status is increasingly being addressed in the rules of arbitral institutions which now commonly make reference to standards of behaviour that are expected of the parties' legal representatives.[82] Some commentators have also argued that it is part of the inherent powers of an arbitral tribunal to preserve the integrity of its own process to sanction counsel in appropriate circumstances.[83] By participating in arbitral proceedings, counsel submits to and accepts such inherent powers of the tribunal.[84] In support of this view, the California Court of Appeal in *Linda Bak v MCL Financial Group, Inc*[85] stated:

> "*We conclude that, by voluntarily appearing for defendants in the arbitration proceedings, which included conducting prehearing discovery, and in responding to plaintiffs' claim that some of the documents they produced were privileged material, objector subjected himself to jurisdiction of the arbitration panel and was subject to its rulings.*"[86]

[78] See Carlos Gonzalez-Bueno, "Arbitral tribunals' decisions on costs sanctioning the parties for counsel behaviour: A phenomenon expected to increase?" (Kluwer Arbitration Blog, 16 April 2014).
[79] Stephan Wilske, "Sanctions against counsel in international arbitration – possible, desirable or conceptual confusion", (2015) 8(2) Contemp. Asia Arb. J. 141, 144.
[80] Gary Born, *International Commercial Arbitration*, (2nd edn, Vol 2, Kluwer Law International 2014), 3196.
[81] Catherine Rogers, *Ethics In International Arbitration* (OUP, 2014), 264.

[82] See, for example, Article 44.1 of the DIS Arbitration Rules which stipulates that: "the parties and their outside counsel, the arbitrators, the DIS employees, and any other persons associated with the DIS who are involved in the arbitration shall not disclose to anyone any information concerning the arbitration".
[83] Drawing from the decision in *Libananco Holdings Co. Limited v Republic of Turkey*, ICSID Case No. ARB/06/8, Decision on Preliminary Issues, 23 June 2008, at [78].
[84] Günther Horvath, Stephan Wilske and Niamh Leinwather, "Countering Guerrilla Tactics at the Outset, Throughout and at the Conclusion of the Arbitral Proceedings", in Günther Horvath and Stephan Wilske, *Guerrilla Tactics in International Arbitration* (Kluwer Law International 2013) 32, 33.
[85] 88 Cal. Rptr. 3d 800 (Cal. Ct. App. 2009).
[86] *ibid* at 804.

The most common means by which tribunals criticise and punish counsel for their abusive behaviour is through the allocation of costs. Guideline 26 of the International Bar Association (IBA) Guidelines on Party Representation in International Arbitration (IBA Guidelines) expressly provides tribunals with the discretionary power to take into account counsel's misconduct when apportioning the costs of the arbitration. Although the costs sanction is imposed on the parties, it works as an indirect means of penalising their representatives,[87] and many commentators consider that the Guidelines have proved a useful tool.[88]

In the US, however, tribunals have been prepared to penalise counsel more directly, and US courts have upheld these costs orders. In *Superradio Limited Partnership v Winstar Radio Productions LLC*,[89] the county court of Massachusetts held that

> "*To give arbitrators control over discovery and discovery disputes without the authority to impose monetary sanctions for discovery violations and noncompliance with appropriate discovery orders, would impede the arbitrators' ability to adjudicate claims effectively in the manner contemplated by the arbitration process.*"[90]

Similarly, in *Polin v Kellwood Co*,[91] the tribunal penalised counsel for his misconduct and contempt of the tribunal and awarded the opposing party half of the arbitration costs to be paid directly by counsel.[92]

The US cases cited above demonstrate that some tribunals are prepared to adopt highly punitive sanctions that act as a serious deterrent. Requiring the parties' legal representatives to pay some of the opposing parties' costs is similar to the concept of a "wasted costs" order in English litigation.[93] The threat of a wasted costs order helps moderate the behaviour of legal representatives in English litigation and it is an approach to case management that the arbitration community needs to consider more closely.

Arbitrators also have authority to impose other sanctions on misbehaving counsel. The LCIA recently amended its rules to enable tribunals to issue counsel a formal written reprimand, a caution as to their future conduct in the arbitration, or take any other measure necessary to fulfil its general duties.[94]

As some commentators have noted, these sanctions might be described as somewhat "*muted*".[95] Previous drafts of the LCIA Rules had envisaged more robust sanctions that might have publicised counsel's misconduct, such as excluding the legal representatives or reporting them to their professional regulatory bodies. The fact that these revisions could not be agreed is

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[87] As stated by the tribunal in *Pope & Talbot v Canada*, UNCITRAL Arbitration Rules, Decision on Confidentiality (27 September 2000), at [11]-[12].
[88] Klaus-Peter Berger, "The In-House Counsel Who Went Astray: Ex-parte Communications with Party-appointed Arbitrators", in *Stories From The Hearing Room: Experience From Arbitral Practice: Essays In Honour Of Michael E. Schneider* (Bernd Ehle & Domitille Baizeau eds, 2015) 7, 14.
[89] 446 Mass. 330 (Mar. 28, 2006).
[90] *ibid* at 339.
[91] 103 F. Supp. 2d 238, (SDNY 2000).
[92] *ibid* at 247.
[93] See section 51(6) of the Senior Courts Act 1981 and CPR Part 48.
[94] LCIA Rules, Art. 18.6, and Annex.
[95] Shai Wade, Philip Clifford and James Clanchy, *Commentary on the LCIA Arbitration Rules 2014* (Sweet & Maxwell, 2015), para 18-029.

testament to the inherent difficulties that there are in establishing which ethical standards apply to counsel in the particular circumstances of a case, short of counsel agreeing to abide by a uniform code similar to the IBA Rules.[96] The use of punitive sanctions, such as wasted costs orders against legal representatives, appears to be more a feature of US domestic arbitration than international arbitration. In many domestic arbitrations, there is a much higher likelihood that all legal representatives will be subject to the same ethical standards. Until the difficulty of varying ethical standards is addressed, it seems unlikely that tribunals will be comfortable imposing direct sanctions against counsel in international arbitration.

Peremptory Orders

As has been shown, tribunals already possess a broad range of powers that can deal with most types of guerrilla tactics. However, the efficacy of those powers depends on active case management coupled with the appropriate use of a range of sanctions to deal with different types of misconduct. Tribunals that are most engaged with the procedure tend to be the most effective at curtailing guerrilla tactics, setting agreed standards of conduct as early as possible, and therefore being able to fall back on earlier procedural warnings as the basis for robust sanctions at the first hint of guerrilla tactics.

An important component of the tribunal's sanctioning power is the peremptory order. This is an order that specifies that a particular sanction will follow in the event of non-compliance with a procedural direction. Peremptory orders are the tribunal's final threat before it proceeds to a sanction. In practice, such an order, which is similar to an "unless" order in English litigation, is best used as a threat, and often the threat is enough to cause a defaulting party to comply with the tribunal's original order.

Peremptory orders are dealt with in sections 41(5) to 41(7) of the Arbitration Act. If a party disobeys a peremptory order, section 41(7) entitles the tribunal to do any of the following:

> "*(a) direct that the party in default shall not be entitled to rely upon any allegation or material which was the subject matter of the order;*
> *(b) draw such adverse inferences from the act of non-compliance as the circumstances justify;*
> *(c) proceed to an award on the basis of such materials as have been properly provided to it;*
> *(d) make such order as it thinks fit as to the payment of costs of the arbitration incurred in consequence of the non-compliance.*"

These sanctions for non-compliance have already been dealt with elsewhere in the article. The peremptory order is a means of arriving at these sanctions having given the defaulting party a reasonable opportunity to comply with the tribunal's original order. The only situation that permits a tribunal to issue an award dismissing the claim is if a peremptory order to provide security for costs is not complied with, which is the closest equivalent to a default award in the Arbitration Act.[97]

It is generally accepted that a peremptory order is not an absolute requirement for the tribunal to use these sanctions. For example, a tribunal is perfectly entitled to allocate costs against one

[96] IBA Rules on Taking Evidence in International Arbitration 2010
[97] See section 41(6) of the Arbitration Act and the consequences set out in section 41(7).

party at the end of proceedings regardless of whether that party was at some point the target of a peremptory order. However, other sanctions, such as preventing a party from relying on allegations or material, or proceeding to an award on the basis of the materials already presented, can have very serious consequences and need to be the subject of prior warnings, and some sort of final or peremptory order before the sanction takes effect.

The arbitration proceedings in *Goel* are a good example of the way non-compliance with procedural orders eventually leads to a peremptory order and the threat of a severe sanction. Having failed to file a sufficiently particularised defence and counterclaim within the time limit specified by the arbitrator, the respondent then refused to attend a procedural conference at which this initial default was to be discussed. The original deadline of 19 June 2010 for this document to be filed had been extended to 30 June 2010. On 5 July 2010, the arbitrator issued an order requiring its service by 19 July 2010. At this point the application was made to remove the arbitrator for alleged bias:

> "*Subsequently, the arbitrator refused a yet further application to stay the arbitration whilst the application was resolved, and he made a peremptory order for the service of a fully particularised defence and counterclaim by 19th August 2010. This was two months after the original date ordered for the service of that pleading. A pleading was served by that date. It was not settled by counsel. Although ultimately it will be a matter for the arbitrator, it seems to me plain on a perusal of that pleading that it is not the fully particularised pleading that he ordered. In particular, the counterclaim is a wholly deficient vehicle for the setting out of specific allegations of breach against Amega.*"[98]

The judgment does not specify what sanction would have applied in the event that the 19 August 2010 deadline was missed. However, there can be no doubt that the respondent had been given a more than reasonable period of time to serve a properly particularised pleading. Fairness to the claimant should have dictated that the arbitrator should proceed to an award on the basis of the materials before him. In the absence of a defence or a counterclaim from the respondent, the only remaining question would have been whether the claimant had met its burden of proof.

In a small number of cases it is appropriate for the peremptory order to be enforced by the court.[99] Some situations require that the defaulting party is compelled to comply with an order, usually an interim measure to preserve property or produce vital evidence. Failure to obey the court's order exposes the defaulting party to the sanctions for contempt of court, such as committal to prison or sequestration of assets.

In the recent case of *Pearl Petroleum Co Ltd v Kurdistan Regional Government of Iraq,*[100] a peremptory order requiring the respondents to resume interim payments for oil was enforced by the High Court. However, there are few authorities on the involvement of the court in the enforcement of peremptory orders and the assistance of the court is unlikely to be useful in typical cases of procedural non-compliance such as the failure to serve evidence or submissions on time.

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[98] *Drs. G, M. Goel v Amega Limited* [2010] EWHC 2454 (TCC) at [19].
[99] See section 42 of the Arbitration Act.
[100] *Pearl Petroleum Co Ltd v Kurdistan Regional Government of Iraq* [2015] EWHC 3361 (Comm).

Litigation v Arbitration

An interesting contrast to the model handling of the arbitration in *Goel*, is the High Court's review of another construction dispute in *RC Pillar & Sons v Edwards and another*.[101] In that case, the arbitrator failed to take a firm grip on proceedings. Both parties proceeded to file extensive, complicated submissions and evidence and the hearing of a relatively straightforward dispute took a full 10 days. The court held that the arbitrator's failure to control time and costs was so egregious that he had breached his duty under section 33(1)(b):

> "*The pleadings that were actually produced were prolix and diffuse and the schedules, which were not Scott Schedules, failed to consolidate and reduce into a composite pleading all aspects of each disputed work item. No agreed lists of items about which they agreed about and disagreed about were produced and they failed to agree any figures as figures. The result of these failures was a significant increase in the costs of each party and a failure to produce a coherent list of issues for resolution by the arbitrator in a form that would have enabled an award to be drafted which dealt with all remaining disputes without mistake, error or omission.*
>
> *Overall, the arbitrator should have detected the failings that I have identified and should then have directed the parties to put them right. In not doing so, the arbitrator was in breach of section 33 of the Act.*
>
> …
>
> *The hearing took 10 working days when a much shorter hearing could and should have taken place. The length of the hearing was the result of: the number of witnesses giving expert evidence, the failure of the parties and the experts to define and reduce the number of issues and the absence of time-limited cross-examination.*"[102]

This is not an edifying picture. It might be argued that lower value disputes such as this are often beset by procedural drama, whatever the forum. But the evidence of arbitration users seems to be that similar situations also occur in high-value commercial arbitration, and this is a serious weakness of the system.

The more difficult and pressing question for practitioners is, if the fairly robust and expeditious handling of a very difficult party in *Goel* represents an example of good practice, whether that is sufficient to allow arbitration to compete with the hardline approach that is increasingly seen in the courts?

In *Goel*, the arbitration was beset by delays caused by a party that had made its intention very clear from the outset that it would not play by the rules. Should the arbitrator have been able to step in earlier and cut short the excuses and game-playing from the recalcitrant party?

If the same circumstances had been before the English courts, there is little doubt that the respondents' counterclaim would have been struck out after a failure to comply with the

[101] *RC Pillar & Sons v Edwards and another* [2001] All ER (D) 232.
[102] *ibid* at [79], [80] and [83].

deadline in the agreed timetable and an "unless" order.[103] A judge would not have humoured the respondents by organising procedural conferences to give them a further opportunity to explain their actions.[104]

Traditionally, there has always been a difference in terms of the approach to procedural non-compliance between court proceedings in England and Wales and international arbitration. At the time the Arbitration Act came in to force in 1996, the civil justice system was undergoing a major overhaul through the Woolf Reforms, which led in 1999 to the advent of the Civil Procedure Rules ("**CPR**").

The CPR were introduced to end the situation whereby persistent non-compliance with court orders would almost never lead to the dismissal of a claim or the striking out of a defence. Various judgments from the era just prior to the introduction of the CPR had held that if a party disobeyed an "unless" order it was unable to proceed with its claim. However, if the party later chose to comply with the order and a fair trial was still possible, then trial should proceed and the claim be disposed of, however belatedly this occurred.[105]

It is submitted that there is a touch of pre-CPR litigation about arbitration today. The determined guerrilla will provide excuses for previous breaches of orders. It can take a while before the tribunal feels that a number of clear and inexcusable breaches have occurred and it can reach for the peremptory order. In practice, tribunals are loath to issue peremptory orders and are often quite happy to rescind them if the defaulting party can explain its actions. The CIArb Guidelines for Arbitrators on how to approach an application for a peremptory and "unless" orders suggest that arbitrators should take a cautious approach to peremptory orders and specify that a particular consequence "may" follow in the event of non-compliance, rather than a particular consequence "shall" follow. It appears that there is always time for the defaulting party to step back from the edge of the cliff.

The CPR changed this approach to procedure in civil litigation by recognising that the excessive delays caused by failures to abide by deadlines were unacceptable. The overriding objective in CPR Part 1 notes the importance of resolving disputes in a quick and cost efficient manner, recognising that justice delayed is really justice denied. As Professor Zuckermann noted in an important article in Civil Justice Quarterly in 2001, fairness in a due process context is a multi-faceted concept:

> *"… at the basis of the view, that dismissal for non-complaisance with an order of the court is never justified except where it has harmed the prospects of fair trial, lies a misconception about what is meant by a fair trial. On* [one] *view fairness has just one dimension: the correct application of the law to the true facts or rectitude of decision. It follows from this view that as long as it is still possible to determine*

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[103] See also *Lakhani v Mahmud* [2017] EWHC 1713 (Ch) in the slightly less critical context of costs budgeting. The High Court held that the defendants were not entitled to relief from sanctions where they had filed their costs budget one day late. The sanction was automatic and did not require an "unless" order as a trigger. The consequence of the sanction was that the defendants could not recover any more than their court costs if they were successful (e.g. they could not recover their legal fees).

[104] Amongst all the arbitration cases cited in this article, perhaps only the handling of *T v V, W, and A* [2017] EWHC 565 (Comm)shows signs of judicial levels of robustness. Many arbitrators would have permitted endless delays to the disclosure phase in the face of a party's serious illness. The active and persistent case management of the arbitrator in that case is to be commended.

[105] See, for example, the judgment of Laddie J in *Re Swaptronics* [1998] All ER (D) 407.

> *the true facts, the possibility of a fair trial remains open. Only where the conduct of a party has foreclosed this possibility (due to the destruction of crucial evidence, for instance), would it be justified to deny the party the opportunity to proceed. But as the new Rules of Civil Procedure recognise, there are other dimensions to justice: a temporal dimension and a cost dimension. A court resolution of a dispute cannot be regarded as just or fair if it is delayed for so long that by the time it takes place it can do no good."*[106]

Zuckermann went on to note the imbalance in the fact that the object of the duty of fairness always appeared to be the defaulting party:

> "[this] *view is one dimensional in another sense too. It focuses on the fairness to the defaulting litigant and ignores unfairness to the law-abiding litigant. A litigant who fulfils his procedural obligations is entitled to demand that the process should be conducted according to the rules, and insist that it would be unfair to allow the opponent to change the playing field by simply ignoring the rules."*[107]

The management of civil litigation is now guided by the broad concept of fairness advocated by Zuckermann. In arbitration, however, the imbalance that he complained of and which Lord Woolf sought to reform is still very much present.

It is time for the arbitration community to provide a robust response to this imbalance. At present, institutional rules raise efficiency and cost-effectiveness as general considerations, and in practice, tribunals tend only to consider them in any detail when apportioning costs. A more determined approach is required. The arbitration community must learn the lessons from recent surveys and become less tolerant of delays and procedural non-compliance. Institutions must issue guidelines to tribunals reminding them of the full ambit of their powers and that both institutions and courts will support them in the exercise of those powers. Tribunals have considerable discretion in their case management. They need to use this discretion to act more decisively and more creatively. In the authors' view, it would be no bad thing for aspects of court litigation, such as 'unless' orders, wasted costs orders and orders to strike-out, to become features of arbitration. Such a culture shift could go some way to restoring arbitration's reputation as the speedy alternative to the courts without requiring major changes to its normative framework.

But ultimately, institutional rules and national arbitration laws may also need to support such a culture shift. If part of the process means that they must incorporate wording similar to Part 1 of the CPR, so that these issues are front and centre of every stage of the arbitration process, then that should be considered. This more robust language would not only *allow* the tribunal to take active steps to ensure cases are dealt with expeditiously, but would *require* it to do so when significant costs and delays are being unduly caused by the fault of one or more of the parties. It might even lead to applications to remove arbitrators that are said to take too tolerant an approach to guerrilla tactics!

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[106] Adrian Zuckerman, "Dismissal for disobedience of peremptory orders – an imperative of fair trial" (2001) CJQ 12, 15-16.
[107] *ibid* at 16.

Other more detailed changes, such as those that prescribe particular sanctions, need to be considered very carefully. The LCIA Rules, for example, would become considerably less attractive if they became as lengthy and prescriptive as the CPR. Ironically, the express inclusion in section 41(7) of the Arbitration Act of specific sanctions that may follow if a party disobeys a peremptory order may have served only to narrow a tribunal's sanctioning options, as many tribunals are unwilling to operate beyond the express powers set out in that section. If the arbitration community wishes to see real innovation in tribunal case management, provisions such as this may require reform. Either tribunals should have an express general power that is worded in more categorical terms, or more sub-sections will be required to list individual sanctioning powers. One might think that the former solution would be more in keeping with arbitration's traditional reputation for brevity and flexibility, than the latter.

Conclusion

Lord Mustill's premonitions in 1989 now appear almost prophetic. Almost thirty years' ago he was asking whether arbitration proceedings "*have all the elephantine laboriousness of an action in court, without the saving grace of the exasperated judge's power to bang together the heads of recalcitrant parties?*".[108] Users of arbitration are making it very clear (at least when they are not immersed in their own arbitrations) that arbitrators need to start banging heads together to force proceedings forward. Although the topic of time and costs is at the forefront of current debate in arbitral institutions, a wider cultural shift throughout the arbitration world is necessary.

If progress is not made, then arbitration might find itself on the wrong end of another of Lord Mustill's colourful predictions:

> "*Nobody has yet discovered why the dinosaurs became extinct, but it is a reasonable surmise that their bulk was a significant factor. It would be a pity if arbitration went the same way. This is unlikely to happen, but it is at least worth asking whether a course of slimming might be in order. On the horizon as competitors are mediation, mini-trials and other forms of alternative dispute resolution and even (mirabile dictu) the courts themselves.*"[109]

The courts have certainly picked up the gauntlet laid down in this passage and have moved further towards procedures that demand strict adherence to deadlines and compliance with procedural orders. The introduction of the Jackson Reforms in 2013 has widened the gulf between case management in court and in arbitration, perhaps to its greatest extent in the last thirty years. It is clear that the more robust process offered by the courts is appealing.

Of course, arbitration is not the same as litigation, and there will always be limits on the extent to which an arbitrator can use a powerful sanction, such as striking out evidence, when there is no realistic means of appeal. But if civil litigation has taken two steps away from arbitration with the Woolf and Jackson Reforms, perhaps arbitration needs to take even a half step in the same direction to redress the balance. In doing so, as this article has hopefully demonstrated, they will find that the courts are willing allies in supporting their decisions.

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[108] Michael Lord Mustill, "Arbitration: History and Background", Journal of International Arbitration, (Kluwer Law International 1989, Volume 6 Issue 2), 43, 55.
[109] ibid.