A collision of two heads

Oliver Browne and Robert Price analyse the future direction of arbitration

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'Tribunals should be more mindful of the rights of parties suffering the consequences of guerrilla tactics than the potential for guerrillas to challenge the award.'

In 1989, Lord Mustill commented that 'commercial arbitration [had] come far from its former roots' but that it had become 'a service industry, and a very profitable one at that'. He noted a growing concern among practitioners that arbitration was no longer a quick and cheap method of dispute resolution. Indeed, the 'triple constraint' project management concept has frequently been applied to arbitration: 'fast, cheap, good – pick two'.

These concerns remain. Speed and value for money are no longer areas that arbitration can always claim as strengths. Quality is under threat. Arbitration can be like domestic court litigation – with parties fighting every point and using 'guerrilla tactics' to pressure their opponents – but with arbitrators that are more timid than judges.

It is no longer feasible, given modern commercial relationships, for arbitration to return to its roots. If arbitration is to maintain its utility, tribunals need to be more robust and active. The 2018 Prague Rules on Efficient Conduct of Proceedings in International Arbitration are one solution among many, but they are untried and untested. This article suggests instead that tribunals already possess powers to ensure that arbitration is conducted appropriately and to sanction badly behaved parties.

Rise of guerrilla tactics

Guerrilla tactics in arbitration take many forms, including:

- attempts to bribe tribunals, intimidation of parties, witnesses and counsel, and forging of documents; and
- inappropriate and unethical conduct including failing to produce documents in accordance with a tribunal's orders, introducing evidence for the first time at a hearing, excessive document requests, late filing of submissions, and failure to pay deposits/advances on costs.

The issues in the first bullet point above are beyond the scope of tribunals (and are rarely encountered). The issues in the second are for tribunals to address. However, that rarely happens: respondents to the 2015 International Arbitration Survey conducted by the Queen Mary University of London lamented the 'lack of effective sanctions during the arbitral process'. The Queen Mary survey found that this was the second worst feature of arbitration (46% of respondents), behind the linked problem of excessive costs (68% of respondents).

Users of arbitration expect tribunals to deal with these issues. Some respondents to the Queen Mary survey suggested that tribunals are reluctant effectively to use their powers for fear that their awards will be challenged. But users highlight an important point: tribunals should be more mindful of the rights of parties suffering the consequences of guerrilla tactics than the potential for guerrillas to challenge the award.

Tribunals' duties

Tribunals have broad powers to regulate arbitration procedures. The source of those powers comes from the parties' arbitration agreement, which will often incorporate the rules of an arbitral institution, and from the law of the seat of the arbitration.

All institutional arbitration rules impose duties and obligations on both

tribunals and the parties with regard to the conduct of the proceedings. The problem that many tribunals feel that they face is a tension between two key duties: tribunals must give parties a reasonable opportunity to present their case and deal with the case of their opponents but must also provide a fair means of resolving the dispute – avoiding delays and unnecessary costs.

Tribunals 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 UK Arbitration Act 1996, ie:

> The tribunal shall (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...

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 also found in the United Nations Commission on International Trade Law (UNCITRAL) Model Law and the rules of the major arbitral institutions (London Court of International Arbitration (LCIA) Rules, Art 14.4; International Chamber of Commerce (ICC) Rules, Art 22(4)), and use allegations of due process violations to threaten challenges to awards if tribunals penalise inappropriate behaviour.

However, provisions such as s33(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 its opponent. As such, the right is circumscribed and not absolute. 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 s33(1)(b) of the Arbitration Act:

> The tribunal shall... (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.

This duty is designed to guard against unnecessary delays and expense, and its existence should be viewed as empowering tribunals to take a robust approach to guerrilla tactics.

National courts will almost always support tribunals that use their case management powers to curb guerrilla tactics. The English courts will very rarely set aside an arbitration award on due process grounds: 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 is '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' (a statement approved in numerous cases).

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English courts have also supported tribunals when they have been challenged on due process grounds in other contexts. The most common grounds for seeking removal of arbitrators under s24 of the Arbitration Act are that 'circumstances exist that give rise to justifiable doubts as to [the arbitrator's] impartiality', or that an arbitrator has failed 'properly to conduct the proceedings'. Both grounds require courts to consider whether the arbitrator has complied with his/her duties under s33(1) of the Arbitration Act. The case of *Goel v Amega Ltd* [2010] 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: the court supported the arbitrator's case management decisions and rejected out of hand the application to remove him. Decisions of other national courts suggest a similar and uniform approach to challenges to arbitral awards on due process grounds.

The provisions of national arbitration laws and institutional rules that empower tribunals interlink with Art V of the New York Convention. 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, but both of these grounds have generally been interpreted narrowly.

It is therefore clear that courts in most jurisdictions are sensitive to the negative consequences of due process paranoia. The courts recognise, as the Singapore High Court phrased it, that:

> ... the right of each party to be heard does not mean that the Tribunal must 'sacrifice all efficiency in order to accommodate unreasonable procedural demands by a party'...

(*Triulzi Cesare SRL v Xinyi Group (Glass) Co Ltd* [2014], p151). This should give tribunals confidence that they can take a tough line on guerrilla tactics.

Case management

It is worth noting that a fully engaged tribunal actively monitoring all stages of the arbitration will often be enough to stop guerrilla tactics being used. Difficult parties will be deterred if they perceive that tribunals are alive to underhand manoeuvres and are willing to apply sanctions. 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. Tribunals should emphasise, at that point, 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, it has been suggested that tribunals or arbitral institutions should draft standard sanctions agreements to be agreed at the outset.

This can provide tribunals with a more explicit power to discipline parties and counsel who, later, in breach of their commitments, use guerrilla tactics.

Costs sanctions

A tribunal's most common sanctioning power is the costs award. It is widely accepted that tribunals possess the power to apportion the costs of the arbitration between the parties, 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 tribunals considerable discretion in costs allocation. It is broadly accepted that this discretion permits tribunals 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 Art 42(1) of the UNCITRAL Arbitration Rules and Art 44 of the Swedish Chamber of Commerce (SCC) Rules. 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.

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.

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.

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. Such awards may not be enforceable but, enforcement concerns aside, many parties likely would pay such a costs award, mindful of the need to keep tribunals well-disposed towards them. In the case of misconduct by a claimant or a defendant asserting a counterclaim, tribunals could also consider making the satisfaction of the costs award a condition precedent of the tribunal continuing to hear that claim.

Drawing adverse inferences

While costs sanctions have their place, 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, tribunals 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. Punishment in the form of adverse inferences is therefore directly linked to a tribunal's eventual substantive decision on the merits. This is a reasonable and proportionate approach to a particular form of guerrilla tactic that, if left unchecked, could disadvantage innocent parties considerably.

Section 41(7)(b) of the Arbitration Act explicitly permits tribunals 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. These rules are now widely accepted as a reflection of normative international arbitration practice, even when they are not specifically adopted for a particular case.

If tribunals use adverse inferences 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 tribunals give

the defaulting party the opportunity to produce the document or witness in question, warning the party that adverse inferences will be drawn if they fail to comply with a tribunal's order.

Refusal to admit

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. 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.

Tribunals can address the additional costs of such tactics in the final award. However, such an award does not provide any immediate relief for the innocent party. Therefore, in certain circumstances, it will be appropriate for tribunals to refuse to admit evidence or submissions.

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

Dismissal

If refusing to admit evidence or striking out a pleading is considered a draconian sanction, immediate dismissal is positioned at the extreme end of a tribunal's powers. 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. 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.

Aside from situations in which there has been lengthy delay, s41(4) of the Arbitration Act implies that tribunals do not have the power to issue an award in similar terms to a default judgment. The most serious types of procedural default include the failure to file submissions or attend a hearing as ordered. In these circumstances, s41(4) permits tribunals to proceed to an award on the basis of the evidence before it.

Immediate dismissal of a claim due to procedural defaults or sustained guerrilla tactics may be available as a remedy if such a power is expressly reserved to tribunals by the agreed rules or under the legal framework applicable to the arbitration. Given 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 risky. But given users' concerns about guerrilla tactics, practitioners might need to consider whether revisiting the idea of default awards in arbitration is now appropriate.

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Sanctioning counsel

Ethical misconduct by counsel is a growing concern. Parties understandably rely on the advice of their legal representatives as to how best to conduct an arbitration. Counsel therefore bear some responsibility for guerrilla tactics. If counsel indeed have some degree of culpability, the imposition of direct sanctions against them is another tool at a tribunal's disposal.

The traditional view among commentators was that such a tool was not available to tribunals. However, in recent times, the consensus appears to have shifted to a view that tribunals do have the ability to regulate counsel. This is being addressed in the rules of some arbitral institutions which reference to standards of behaviour that are expected of the parties' legal representatives. The LCIA, for example, recently amended its rules to enable tribunals to issue counsel a formal written reprimand, issue a caution as to their future conduct in the arbitration, or take any other measure necessary to fulfil its general duties (LCIA Rules, Art 18.6, and Annex). Institutions can and should go further in this regard.

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 Guidelines on Party Representation in International Arbitration 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.

Conclusion

Lord Mustill's premonitions in 1989 now appear almost prophetic. Almost 30 years ago he questioned 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?

Users of arbitration are clearly demonstrating that tribunals 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. ■

Goel & anor v Amega Ltd [2010] EWHC 2454 (TCC)
Triulzi Cesare SRL v Xinyi Group (Glass) Co Ltd [2014] SGHC 220