



Understanding Guerrilla Tactics in International Arbitration

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Abstract

This paper delves into some of the major inconveniences caused to the parties engaging in arbitration and seeks to analyze the causes of guerrilla tactics in particular, in order to devise the necessary framework required to control it. Arbitration for dispute resolution has become prominent in the recent times. However, a number of leading arbitrators and practitioners have described the continuing lack of ethical regulation as a potential crisis that threatens the legitimacy of international arbitration. This paper looks at how arbitration can be developed as a means of dispute resolution by providing a level playing field to its parties, thereby restoring its lost credibility. The paper also highlights the need to have an internationally approved code of conduct like the recent International Bar Association (IBA) guidelines, to curb guerrilla tactics in international arbitration.

Keywords: Arbitration Proceedings, Guerrilla Tactics, International Arbitration, Regulatory Mechanisms, State Court Interventions

Introduction

Guerrilla tactics in arbitration continues to be an exception to the conventional means of conducting arbitration proceedings. Arbitrations are often high stake adjudications requiring immense procedural sensitivity. Parties expend exorbitant amount of resources on arbitrations expecting, at the very least, a level playing

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field. But the guerrillas of modern arbitrations hinder this. Hence, the lack of ethical norms in adjudication is becoming blatant in this method of dispute resolution as well. The subject matter of this paper involves matters concerning state court interventions which are inimical to the arbitral process, particularly such interventions brought about at the behest of a state which is a party to the arbitration. The author in this article seeks to examine the concept of guerrillas in arbitration, the issues involved and the mechanisms regulating the same.

Every generation has seen deviations either from the traditional social norms or prescribed laws of the land. One instance of such a deviation i.e. guerrilla warfare/tactics was the Scythian's swift attacks and equally prompt retreats which expelled the invading Persian troops of Darius I in 512 B.C.¹ An interesting proponent of such tactics is 'Attila the Hun'; who was known and feared for his ruthless war manoeuvres which consisted of 'fury, surprise, elusiveness, cunning nature and mobility'.² Thereafter, this has been a consistent phenomenon that has found its way through history. Contemporary guerrillas include the guerrilla wars waged by African liberation movements seeking independence, such as in Algeria and Eritrea.³ Their objectives, however, have often differed, ranging from an ideology to an unanswered grievance.

The concept as it stands today has been filtered through positive assertions and approaches. The lasting impact has been the result of audacious approaches, against all odds, corresponding with Mao Tse-Tung's assertion that 'all guerrilla units start from nothing and

¹ ANTHONY JAMES JOES, *GUERRILLA WARFARE* 3 (Robin Highamed., Westport: Greenwood Press, 1996).

² JOHN FREDERICK CHARLES FULLER, *A MILITARY HISTORY OF THE WESTERN WORLD: FROM THE EARLIEST TIMES TO THE BATTLE OF LEPANTO VOL. I* 288 (Cambridge: Da Capo Press, 1987).

³ Christopher Clapham, Introduction: Analyzing African Insurgencies, in *AFRICAN GUERRILLAS* 2 (Christopher Clapham ed., Oxford: James Currey, 1998); David Pool, The Eritrean People's Liberation Front, in *AFRICAN GUERRILLAS* 19 (Christopher Clapham ed., Oxford: James Currey, 1998).

grow'⁴ and Ernesto 'Ché' Guevara's 'inevitable conclusion that the guerrilla fighter is a social reformer [...] responding to the angry protest of the people against their oppressors'.⁵ From a fight to gain social acceptability, this term has now obtained a marketable appeal. Most notably, the single photograph by Alberto Korda from 1960, which has been reproduced on millions of T shirts and posters ever since, and has immortalized the 'guerrilla' as popular culture icon. Enjoying such a rich historical heritage, the term guerrilla is nowadays increasingly employed in a fashionable manner, labelling unconventional methods in myriad disciplines, ranging from 'guerrilla gardening' to 'guerrilla marketing'.⁶

The romanticisation of such tactics has encouraged the guerrillas to a great extent. In turn, they have reduced international processes, including international arbitration, to a game of mere one-upmanship. The truth about such tactics was unveiled to a large extent during the peninsular war, where the Spanish guerrillas caused 'scenes of [...] utmost cruelty' evinced by 'reports of men being stoned to death, boiled in oil, sawn in half or buried up to their necks in the ground and left to die of thirst'.⁷ Likewise, Ché's casual diary entry, describing his execution of a peasant and traitor demonstrates that guerrilla warfare is not to be mistaken with civil disobedience.

The Concept of Arbitration

Arbitration is a private system of adjudication. The intention of the parties is to resolve their dispute outside the boundaries of the existing judicial system. Generally, arbitration proceedings are

⁴ MAO TSE-TUNG, ON GUERRILLA WARFARE 96 (Samuel B. Griffith II trans. Champaign: Illinois University Press, 1961).

⁵ CHÉ GUEVARA, GUERRILLA WARFARE 10 (New York : Monthly Review Press 1961).

⁶ RICHARD REYNOLDS, ON GUERRILLA GARDENING (London : Bloomsbury, 2008); JAY CONRAD LEVINSON, GUERRILLA MARKETING (New York: Houghton Mifflin Books, 2007).

⁷ CHARLES J. ESDAILE, FIGHTING NAPOLEON – GUERRILLAS, BANDITS AND ADVENTURES IN SPAIN, 1808-1814, 31(New Haven : Yale University Press, 2004).

followed by an award i.e. a final and binding decision enforceable in a court of law. The arbitrators (judges) are usually one or three in number or and are chosen by the parties. There are two mechanisms that can be adopted in arbitration. The first is institutional arbitration which involves specific institutions dedicated to Alternate Dispute Resolution (ADR) and the other being ad hoc arbitration, without any institutional involvement. The applicable rules are those of the arbitral institution, or alternatively other rules chosen by the parties. In addition to choosing the arbitrators and the rules, parties may also choose the place of arbitration and the language of arbitration.

Arbitration is preferred over domestic litigation primarily because of party autonomy. Arbitration gives the parties substantial autonomy and control over the process that will be used to resolve their disputes. This is important because there is always an apprehension, of the other party's 'home court advantage'. Arbitration offers a more neutral forum, wherein each side believes that they will have a fair hearing.

An important question to be considered at this juncture pertains to how guerrilla tactics relate to other tactics in international arbitration. However, a practical approach to international arbitration tells a different story. During the initial years, arbitration was a rather elite affair, confined to a few professionals. The ethical problems and conflicts, then, were limited to the cosy confines of the fraternity because their individual reputations were at stake. However, with the forces of globalization fuelling the explosive growth in international arbitration over the last several decades, the number of players at the international arbitral table has increased beyond what could have been reasonably expected. This has largely been a boon to the efficient, judicious and fair resolution of international commercial disputes. However, several issues have arisen in respect of the 'ethical' behaviour in the conduct of such arbitrations.

The success of arbitration, irrespective of the strength of the legal claim, lies in a counsel's ability to present his case. Here is where the concept of guerrilla tactics arises. While arguing, a party has two options available i.e. either to win or to make the other party lose. The former is an ethical approach generally deployed by the

party with a stronger case. In such cases, presenting one's case involves a favourable representation of facts and substantive arguments which form a legal basis for such arguments. The latter, however, generally foregoes the ethical lines and thus employs the tactics of the 'little war'.⁸ These tactics are generally deployed by a party incapable of presenting a strong case which includes tactics like attempting to avoid or delay theupfront legal confrontation by gradually, deceitfully and viciously wearing down the other party, the opposing counsel, or the arbitral tribunal. These are the patent forms of guerrilla tactics in international arbitration. This approach basically intends to undermine the mechanisms envisaged in the conventional arbitration. A survey on this topic revealed that fifty five out of eighty one international arbitration practitioners had witnessed the use of guerrilla tactics in cases they were involved in.⁹

Despite the existence of such issues, there remains an absence of international mechanisms to regulate and reprimand such behaviour. There are diverse national ethical rules, which have led to an uneven playing field for the parties' legal representatives, and have seen the increased use of 'guerrilla tactics' by parties, counsels and in some cases, tribunal members in the course of international arbitration proceedings.

The Interplay between Arbitration and Guerrillas

A definition of any concept is fundamental to its understanding. Though many have attempted to define the term, 'guerrillas', however, the closest approximation to a working definition of 'guerrillas' is, 'not why they fight, [...] but how',¹⁰ thus, enabling them to survive or prevail, in spite of their inferior powers.

⁸ (The origin of the term guerrilla is Spanish and means a 'little war').

⁹ Edna Sussman, *All's Fair in Love and War - Or is It? The Call for Ethical Standards for Counsel in International Arbitration*, *for Ethical Standards for Counsel in International Arbitration*, 7(2) T.D.M. 2 (2010).

¹⁰ ANTHONY JAMES JOES, *GUERRILLA WARFARE*, 4(Robin Higham ed., Westport : Greenwood Press, 1996).

The term 'arbitration guerrilla' was coined by Michael Hwang in 2005. For him, the term described those whose aim was 'to exploit the procedural rules for their own advantage, seeking to delay the hearing and (if they get any opportunity) ultimately to derail the arbitration so that it becomes abortive or ineffective'.¹¹ Guerrilla tactics in arbitration aim at winning a case or even humiliating the other party.

Günther Horvath considers guerrilla tactics to involve 'strategies employed by parties to arbitration proceedings that are ethical violations, involving criminal acts, or ethically borderline practices'.¹² For Edna Sussman, the adoption of 'strategies, methods and tactics, ranging from poor behaviour to egregious and even criminal conduct'¹³ sum up guerrilla tactics. According to Sussman, the following behaviour may be identified as 'guerrilla' tactics in arbitration; unethical practices in document production/disclosure, unwarranted delay tactics, creating conflicts, frivolous challenges to the arbitrators, last minute surprises, and anti-arbitration injunctions. It also includes ex-parte communications, witness tampering, lack of respect or courtesy towards members of the tribunal and opposing counsel.

As is evident from the above, this concept, in so far as arbitration is concerned, is an amalgamation of various components which are too broad to be brought into one strict definition. Guerrilla tactics is all about behaviour, which may range from blatant measures involving illegal or unethical conduct to more subtle, underhand manoeuvres. Hence, in order to understand the behaviour, the essential elements of these tactics must be understood. These elements are deviance, tactics, and intent.

¹¹ MICHAEL HWANG, *Why is There Still Resistance to Arbitration in Asia?*, GLOBAL REFLECTIONS ON INTERNATIONAL LAW, COMMERCE AND DISPUTE RESOLUTION – LIBOR AMORICUM IN HONOUR OF ROBERT BRINER, 401 (Gerald Aksen et al. eds., ICC Publishing 2005).

¹² *Guerrilla Tactics in Arbitration, and Ethical Battle Field: Is There a Need For Universal Code of Ethics?* AUSTRIAN Y.B. INT'L ARB. 297-313 (Klausegger et al. eds. Manz, C.H. Beck, Stämpfli 2011).

¹³ Sussman, *supra* note 11.

Guerrilla tactics deviate from the conventional scope of law and ethics; while it is always unethical, it may not in every instance amount to a violation of law or written procedural rules. Nonetheless, such behaviour most often constitutes a hindrance to arbitral proceedings. The deviance may differ based on the rigidity of the norm in question. Accordingly, one can distinguish between these types of practices which are (1) 'common' forms of guerrilla tactics, which amount to obvious misconduct, (2) 'extreme' guerrilla tactics such as severe criminal acts and blatant abuse of state authority; and (3) 'rough riding' which cannot be categorized as guerrilla tactics at all.¹⁴ Where exactly the conduct in question falls may well be a matter of personal opinion.¹⁵ However, the proposition that is free of any ambiguity is that guerrilla tactics cannot exist in a vacuum, sans any deviance.

Another element of guerrilla tactics that deserves attention is the 'tactical' element, i.e., the party's deliberate engagement with the action in question, rather than the mere exploitation of coincidences or unforeseen developments. For instance, a heated argument at an evidentiary hearing that results in an assault, could in certain circumstances be regarded as 'tactical', if a party deliberately executes or provokes the assault.¹⁶ Presuming that the intent is the starting point and the deviance is the finishing line, then the 'tactical' element is a means to that end. The continuous and strategic employment of such tactics connotes guerrilla tactics.

Guerrilla tactics are chosen in cases where the sole intention is to obstruct the proceedings or to hinder the other party. Guerrilla tactics begin where a party no longer uses these safeguards as a shield, but as a weapon to assault the integrity of the arbitral proceedings. A real 'guerrilla' is a party who only refers to the rules when expedient but is otherwise intent on obstructing, delaying, derailing, and/or sabotaging the arbitral proceedings,

¹⁴See, Oprisan Fruth Despina, *Facing the Reality of Guerrilla Tactics in Romania*, 7(2) T.D.M. 3-5 (2010).

¹⁵*Id.* at 20.

¹⁶ Charles Toutant, *Arbitrator is Not Liable for Attorney's Alleged Assault of Party Court Says*, N.J.L.J. 1 (2008); *ICC Court Names New Secretary General*, 7(3) G.A.R. 2 (2012).

and ultimately attempting to pervert the course of justice in order to obtain the desired result. A continuous and systematic use of challenges to the arbitrator, such as requests for extension of time and the submission of excessive amounts of documents aimed solely at obstructing the arbitral proceedings can result in the rules being bent to their advantage, and their intended purpose being defeated. Therefore, the intent behind a party's action forms a large part of the guerrilla tactics.

While tracing the evolution of guerrilla tactics in arbitration, it is necessary to delve into the possible causes as well, though 'causation' in this instance is merely a better word for an excuse. The aim, however, is not to justify the acts but to rather explain them. The commercial world prefers arbitration for varied reasons such as autonomy, saving of time or even confidentiality. There are regulatory frameworks within which arbitration is conducted, which are established either by a contract or the arbitral institutions concerned. However, some parties do not wish to venture into the formal rules of arbitration and this renders them more susceptible to a hostile environment. The aim for any party to arbitration is to obtain the award in their favour. In cases of a 'last resort tactic', a party may attempt to follow the ethical practices at the initial stages and subsequently turn to guerrilla tactics. Hence, the initial intention of the party is to promote the spirit of arbitration and not otherwise.

Advocacy involves intricate skills such as witness preparation, docket creation, and ex-parte communication among others. These skills vary from one country to another. The practices relating to arbitration followed in multiple jurisdictions are also varied. For instance preparing a witness to the extent of rehearsing his testimony is unlawful in Britain; whereas in the United States, rehearsal of witness testimony by an advocate is in vogue.¹⁷ Thus, a practice regularly followed by an American attorney may be considered unethical or even 'guerrilla' by the British solicitor. In this scenario, both the parties intend to uphold the spirit of

¹⁷Günther Horvath, *How May Commercial Arbitral Tribunals Cope With and Sanction Guerrilla Tactics of the Parties/Their Counsel?*, 7 (2) T.D.M. 10 (Nov. 2010).

arbitration, but fail on account of the differences in their legal cultures. Though a uniform code as a solution to this problem may seem to be simple, the creation of such a framework would be at the expense of forsaking the state practices of the parties to the arbitration.

Factors that Trigger Guerilla Tactics in International Arbitration

Every party to arbitration makes use of all the resources available to it, financial or otherwise. The state has law enforcement agencies, intelligence agencies, and land among other things at its disposal which most states are not afraid to use. Though this is not the general practice, if guerrilla tactics were to be employed with these resources, it could be grave. The state can facilitate all this under the garb of 'exercise of sovereign power'.¹⁸The most susceptible to these tactics are the investment treaty disputes under the International Centre for Settlement of Investment Disputes (ICSID).

One of the most valuable features of an arbitration proceeding is confidentiality. However, when taken too far it becomes a sufficient drawback. The guerrillas thrive in these conditions simply because crimes are better effected under the wave of confidentiality. However, the importance of confidentiality is such that it eclipses any possible precaution in this regard.

Laws are seldom created which fulfil their intended purpose. The problem with arbitration is that sometimes the regulatory mechanism leads to the disruption of the system. The provisions stipulated for the purposes of creating a fair opportunity to resolve the dispute may in fact, result in the hampering of the process. For instance, the most widely deployed guerrilla tactic is the act of seeking undue adjournments to delay the resolution of disputes. These challenges reflect frivolity, lack of rationale and *mala fides*.

As these tactics evolve, they also gain a degree of professional acceptability. When a tactic is successfully applied to a particular

¹⁸ L. Malintoppi, *How May Investment Tribunals Cope With and Sanction Guerrilla Tactics of the Parties/their Counsel?*, 7(No. 2) T.D.M. 4 (Nov. 2010).

case, it enters the domain of innovation. At present, most counsels believe in a result oriented approach to advocacy, where innovation plays a significant role. If an act or omission consistently works in arbitral proceedings, it is bound to gain acceptability.

Justification for Guerilla Tactics in International Arbitration

Arbitration guerrillas know that the tribunals will be anxious to be seen as fair and properly appreciative of cultural differences, and they will therefore try and test this accommodating attitude to the maximum by asking for all kinds of indulgences, particularly in requests for an extension of deadlines. In local litigation, counsel for the other party can often comment on the validity of the reasons given in support of the applications for various procedural indulgences, and the local court itself judges the validity of these reasons. It is much more difficult for non Asian counsels and arbitrators to decide on the truth of the reasons advanced by Asian parties for their applications. Even if they have suspicions about the validity of these reasons and cannot substantiate those suspicions in a manner that can speak for itself in their award, they would still be fearful of a challenge or defence based on a breach of Article 18 of the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration or Article V(1)(a) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).¹⁹ Michael Hwang has pointed out that such a situation is particularly prevalent in arbitration proceedings in Asia.²⁰ It is these paradoxes that have worked to rationalise the

¹⁹ Convention on the Recognition and Enforcement of Foreign Arbitral Awards. 1959 330 UNTS 3.

²⁰ Michael Hwang, *Why is There Still Resistance to Arbitration in Asia?*, Selected essays on International Arbitration, 2013, 25 available at http://www.transnational-dispute-management.com/downloads/MH_Selected-Essays_on_IA.pdf (last visited 30 Jan. 2014).

guerrilla tactics, to a large extent, resulting in them gaining general acceptability.

However, Hwang points out that there are substantial number of local lawyers who do not wish to appear against foreign lawyers before a foreign arbitration tribunal.²¹ They do not intend to sabotage arbitration because their clients have no defence, but they sincerely believe that their clients will get a better outcome before a local court for the following reasons - they are inexperienced in international arbitration and are not conversant with the proceedings, they feel that their clients may be at greater risk of liability because they are less capable of predicting the outcome and they believe that their clients' witnesses may be better believed by a local court rather than a tribunal composed of at least a majority of foreigners.

Ethical Regulations in International Arbitration

Currently, there are no effective mechanisms for the regulation of ethics in international arbitration. This is due to two factors; the absence of enforceable ethical standards in international arbitration, and insufficient powers in the rules of many arbitral institutions to deal effectively with the problems as they arise.²² Hence, many jurists have raised concerns in this regard with a specific interest on the development of an effective global code or guidelines to clearly demarcate right and wrong with respect to the behaviour of functionaries in arbitration.

The first attempt to revamp the ethical regulations is traceable to the 1990s, when Jan Paulson, severely criticized the state of affairs during those times.²³ Arbitration, as a process, continued to prosper

²¹ Michael Hwang, *Why is There Still Resistance to Arbitration in Asia?*, Selected essays on International Arbitration, 2013, 27 available at http://www.transnational-dispute-management.com/downloads/MH_Selected-Essays_on_IA.pdf (last visited 30 Jan. 2014).

²² William W Park, *Arbitrations Discontent: Of Elephants and Pornography*, JOURNAL OF INT'L ARB. 263 (2001).

²³ Jan Paulsson, *Standards of Conduct for Counsel in International Arbitration*, MKM REV. INT'L ARB. 3 214 (1992).

despite such a drawback. People were, and still are, appreciative of the time effectiveness and autonomy attached to an arbitration proceeding. The globalised world has accepted arbitration with its ethical conundrums as long as the disputes have been resolved in a manner chosen by the parties. The problem has, however, aggravated since it was not addressed effectively, so much so that 'guerrillas' have now become a recognised defect in arbitration. Hence, the remedial measures have now come to the fore. Recently, Doak Bishop argued that the lack of clarity as to which ethical rules to apply, the existence of conflicting rules and obligations, the non transparency and the increased size of many proceedings, combined with greater public scrutiny, creates certain instability in the system that could result in a future crisis of confidence.²⁴ He further argued that the only way to gauge public confidence is through a code of conduct which is clear and binding.²⁵ Such a code must have some essentials, such as the ability to clarify the applicable rules and reduce ambiguity, the ability to create a level playing field, and the ability to provide greater transparency.

The above essentials clearly indicate a concern, though not an immediate one. The academicians and professionals should understand the threat such an act poses to the future of arbitration in the innovative and globalised world. According to Gary Born, a renowned expert in arbitration, the best resolution to such concerns would be the development of a uniform code of international rules of professional conduct, applicable to counsels in international arbitration proceedings.²⁶ The biggest question over such a proposition would be the enforcement of that international legal instrument. There are many institutions that may be able to perform such a task, efficiently or otherwise, such as bar associations, local courts, arbitral institutions or tribunals. It will

²⁴ R. Doak Bishop, *Advocacy and Ethics in International Arbitration: Ethics in International Arbitration, Arbitration Advocacy in Changing Times*, ICCA Congress Series No. 15 2010, Rio, 383-390 (Kluwer International Law 2011).

²⁵ *Id.*

²⁶ GARY BORN, *INTERNATIONAL COMMERCIAL ARBITRATION*, 2318-2319 (Alphen aan den Rijn; Kluwer Law International 2009).

almost certainly be the arbitral tribunals that will be the best equipped to take on such a responsibility.

The reason why arbitral tribunals would be the most preferred in formulating standards of ethical regulation is because of their hands on approach. Tribunals ought to reflect ethical regulations in international arbitration and unethical practices would often be noticed and condemned by the tribunals. However, the extent to which such tribunals may exercise their powers is a matter of great concern as the powers of the tribunals are decided by the guerrillas themselves i.e. the parties. In case of institutional arbitration this is largely controlled.

It is evident from the ICSID decision in *Hrvatska Elektroprivreda D.D. v. Republic of Slovenia*, in which the question was whether the tribunal's authority to bar a party selected counsel from appearing before it was based solely on supranational standards of conduct for counsel. The law that was established in this case was that there exists 'an inherent power [in a tribunal] to take measures to preserve the integrity of its proceedings'.²⁷ Based on the above, the tribunal disqualified a British barrister who was not only a member of the same chambers as the president of the tribunal, but was also added as the respondent's counsel well after the case had begun, and whose involvement was only disclosed before the final hearing.²⁸ This case, however, seems a bit too radical in its approach and if interpreted widely could lead to a lot of problems in the future. This position was slightly normalised in the case of *Rompertol Group v. Romania*,²⁹ where the court indicated that even if such powers exist, they are only to be exercised in exceptional and rare circumstances. Though we may have established that tribunals have the ability to exercise such powers, it is to a limited extent.

Even if the tribunals decide to exercise this power, they require an internationally accepted code of conduct. The world of arbitration

²⁷ *Hrvatska Elektroprivreda D.D. v. Republic of Slovenia*, ICSID Case No. ARB/05/24 (Tribunal's Ruling regarding the participation of David Mildon QC in further stages of the proceedings) ¶ 33 (May 6, 2008).

²⁸ *Id.*

²⁹ *Rompertol Group v. Romania*, (ICSID Case No. ARB/06/3) Award (May 6, 2013).

has been plagued with multifarious laws of multiple jurisdictions which cause a lot of confusion at times. Contrary to popular opinion, an internationally accepted code of conduct would help in having clarity. Ethics, as previously explained, has largely been an ignored area of arbitration. Therefore, an internationally accepted code of conduct would reflect a positive step in filling up this paucity.

An attempt in this regard has been made by the International Bar Association (IBA) in 2013.³⁰ They framed guidelines on the conduct of parties in international arbitration. In this, they have clearly demarcated the difference between the 'right' and the 'wrong' behaviour of parties and counsels in international arbitration. These guidelines are stimulated by the principle that party representatives should act with integrity and honesty and should not engage in activities designed to produce unnecessary delay or expense, including tactics aimed at obstructing the arbitration proceedings.³¹

The groundwork for these guidelines was laid down in 2010, when the IBA Task Force sent out a broad survey to arbitration practitioners concerning counsel ethics in international arbitration. The rationale behind the survey was to help in investigating the different and often contrasting ethical and cultural norms, standards and disciplinary rules that may apply to counsels in international arbitration. The survey was encouraged by the view that the lack of international guidelines and conflicting norms in counsel ethics undermines the fundamental protection of fairness and equality of treatment and the integrity of international arbitration proceedings.³² On the basis of the survey results, a

³⁰ IBA Guidelines on Party Representation in International Arbitration (2013) *available at* <http://www.ibanet.org/org/Document/Default.aspx?Documentuid=6FOC57D7-E7A0-43AF-B76E-714D9FE74D7F>.

³¹ IBA Guidelines on Party Representation in International Arbitration (2013) *available at* <http://www.ibanet.org/org/Document/Default.aspx?Documentuid=6FOC57D7-E7A0-43AF-B76E-714D9FE74D7F>.

³² IBA Arbitration Committee Survey (2010), *available at* [1.www.ibanet.org/Article/Detail.aspx?ArticleUid=610bbf6e-cf02-45-ae-8c3a-70dfdb2274a5](http://www.ibanet.org/Article/Detail.aspx?ArticleUid=610bbf6e-cf02-45-ae-8c3a-70dfdb2274a5).

working group of the Task Force produced a draft document, in the nature of guidelines. These draft guidelines were first reviewed by the IBA Arbitration Committee's Officers and later submitted to all members of the Arbitration Committee for consideration.³³ Finally, the IBA Council adopted their guidelines in a resolution on May 25, 2013.

Conclusion

The ethical conundrums have carved a special space in international disputes so much so that the entire future of arbitration depends largely on the ethical and procedural viability of the available checks and balances. This is due to the fact that such ethical issues determine the credibility of arbitral procedures. Just like any other service, the credibility establishes the longevity. Likewise, only if we produce an environment that is conducive to a fair process to both the parties, can we ensure a future for international arbitration.

Though the major opposition to arbitration comes because of the existing or perceived time and cost inefficiencies, another criticism that is to be levelled against arbitration is the perceived lack of transparency and legitimacy of the system as a whole. Further, we see that the recent global financial crisis has aggravated the tendency of dishonest parties to resort to unethical or illegal means of achieving their goals.³⁴

Although the guerrilla tactics in international arbitration have come to be recognized, we are yet to see a regulatory change that accommodates the ethical overhaul that is required to meet the changes in arbitration proceedings. We must concede, however, that in the arbitral community today, we have a substantial number

³³ IBA Arbitration Committee Survey (2010), available at [1.www.ibanet.org/Article/Detail.aspx?ArticleUid=610bbf6e-cf02-45-ae-8c3a-70dfdb2274a5](http://www.ibanet.org/Article/Detail.aspx?ArticleUid=610bbf6e-cf02-45-ae-8c3a-70dfdb2274a5) at 9.

³⁴ Cf. Michael Walzer, *Coda: Can the Good Guys Win?*, 24 EUR. J. INT'L L. 444 (2013): (who argues in the context of asymmetrical warfare that the rules, rightly understood, are consistent with military success but that it is important that public opinion is shaped by the right understanding so that just conduct is recognized and reinforced).

of elites who subscribe to the proposition that there is no rule in international arbitration.³⁵ It is evident, therefore, that the ethical organ of arbitration is yet to evolve and is presently in a period of transition. Though such behaviour is recognized and rightly condemned, the legal treatment of such a situation still remains controversial.

³⁵ Stephan Wilske & Martin Raible, *The Arbitrator as Guardian of International Public Policy? Should Arbitrators Go Beyond Solving Legal Issues?*, in *THE FUTURE OF INVESTMENT ARBITRATION*, 249, 263 (Catherine A. Rogers & Roger P. Alford eds., Oxford University Press, 2009).