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Guerrilla Tactics 101: How to Torpedo an Arbitration

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The use of "guerrilla tactics" is by no means a new phenomenon in the world of international arbitration. Indeed, such strategies have been the subject of a number of articles, scholarly discussions and even a four hundred-page book.

What is meant by this expression, in essence, is the use and abuse of the procedural rules governing and surrounding arbitral proceedings in such a way as to frustrate said proceedings to the fullest extent possible, resulting in the abandonment or deadlock of the arbitration or in the opposing party failing to fully make their case.

This article is the fruit of various occurrences witnessed first-hand by the authors in a number of recent arbitrations, the creativeness of which warrants some discussion. This article is by no means intended as an endorsement or not of the use of such tactics, but rather to help anticipate instances where the opposing party might resort to such manoeuvres and provide tips on how to respond.

Strategy No. 1: The Proof of Authority Conundrum

A number of jurisdictions, including Qatar and the UAE, require that party representatives in an arbitration have the legal authority not only to conclude an arbitration agreement but also to carry out their representative functions during arbitral proceedings. Most arbitration rules, including those of the ICC and the LCIA Rules, empower the tribunal and/or the arbitral institution to order a party to produce a "proof of authority" such as a power of attorney ("POA"). However, this power is discretionary and sometimes not exercised; it is therefore not uncommon for arbitral proceedings to reach the end without party representatives having submitted their proof of authority on record.

A party acting in bad faith could refrain from presenting proof of authority and, if they receive an unfavourable award, attempt to have the award annulled. Courts in the UAE have demonstrated willingness to annul arbitral awards on the basis of a party representative's lack of express authority to act in an arbitration, and also in cases where the party representative agrees to changes to the arbitration framework (such as granting the tribunal the authority to award costs) without having had the power to conclude an arbitration agreement in their POA.

The cunning of this tactic lies in the fact that it is a "back-pocket" strategy which may very well go unnoticed by the tribunal and the opposing party until after the award has been issued.

There is no clear solution to this conundrum; despite the tribunal's power to order production of

proof of authority, there is no obvious remedy if a party fails to comply. If the tribunal opts to halt the proceedings until the production of the proof of authority, it may prejudice the other party. If the tribunal opts to disregard submissions made by the unauthorised representative and proceed with the arbitration, it may open up other potential avenues for annulment.

The key takeaway is to develop the reflex of always requesting production of proof of authority from the opposing party and to explore every possible avenue to compel such production where proof of authority is not forthcoming. The request alone may force the opposing party's hand, for example, for fear of disciplinary action by their professional licensing authority. A showing of best efforts in order to obtain the proof of authority is also likely to reduce the odds of the ensuing award being annulled. Likewise, insisting that the legal representatives copy their clients in all correspondence can also mitigate the risk.

Strategy No. 2: The Advance on Costs and Jurisdictional Objections Cocktail

Most arbitral rules require parties, both claimant(s) and respondent(s) to post an advance on the estimated final costs of an arbitration in order for the proceedings to take place. It is therefore not an uncommon strategy for respondents (or claimants facing a counterclaim) to withhold payment of their portion of the advance on costs and force the claimant (or counterclaimant) to make a substitute payment if they want the dispute to proceed.

Some arbitral rules, such as those of the LCIA, expressly provide the non-defaulting party with the possibility to seek reimbursement of the substitute payment from the other party via an application made to the arbitral tribunal. Other rules, including those of the ICC, are silent on the matter, which has led to considerable debate and inconsistencies as to whether tribunals constituted under such rules have the power to order the defaulting party to reimburse the substitute payment to the non-defaulting party before the final award.

In any event, the tribunal's authority to issue an order compelling reimbursement by the defaulting party prior to the final award will be severely compromised when said party also makes jurisdictional objections. Indeed, if a determination regarding jurisdiction is pending, then the tribunal cannot make an order for reimbursement of the substitute payment without prejudging the issue of jurisdiction.

Ordinarily, the solution to this problem would be a bifurcation of the proceedings with an early decision on jurisdiction. However, in circumstances where the non-defaulting party is not able to make the substitute payment (whether in cash or by bank guarantee), this solution is not viable as the arbitral institution is likely to demand payment of the balance of the advance before bifurcation can even occur. This means that even a bad faith jurisdictional objection by a party who has not paid its share of the advance on costs can be sufficient to short-circuit an arbitration.

Ultimately, the solution lies with arbitral institutions: the first half of the advance on costs will normally be sufficient to cover bifurcation and a decision on jurisdictional objections. If the tribunal finds that it does have jurisdiction, it can then issue an interim order or award compelling the defaulting party to pay its portion of the advance.

Strategy No. 3: The Disappearing Witness Trick

Witness statements are often central to a party's case in an arbitration. This is particularly so when the witness in question was a main protagonist in the dispute, and even more so where the

opposing party is attempting to blemish the character of said witness and is concerned that the witness' testimony at the hearing could be particularly damaging.

Unscrupulous counterparties have been known to employ various means to dissuade witnesses from presenting their testimony in an arbitration. But even once a written witness statement has been submitted, all is not safe: if said witness is asked to appear at the hearing(s) (something the opposing party will certainly ask for if they have an ace up their sleeve) and fails to do so without a valid reason, the IBA Rules provide that their written testimony shall be disregarded. The LCIA rules contain a similar provision, whilst also suggesting that adverse inferences can be made by the Tribunal.

A desperate party can therefore use any means at their disposal to prevent the witness from attending the hearing, whether by way of intimidation, bribery or otherwise. If successful (and undiscovered), the party putting forward the witness will not only lose credibility, but may also face a setting aside of their witness' written testimony and/or adverse inferences.

In theory, a solution exists to this problem as most jurisdictions allow an arbitral tribunal to compel a witness to attend the hearing. However, this is often impractical, particularly when the witness' refusal or inability to appear only becomes known at the hearing and it becomes difficult (if not impossible) to postpone or reschedule the hearing in order to secure the witness' attendance. The process can also prove considerably more complicated if the witness is located in a jurisdiction other than that of the seat of the arbitration.

The authors have had to face this particular situation in a recent case in which a witness failed to appear on the day of testimony, despite having confirmed his availability one day prior. In this particular case the respondent had, during the written phase, made this witness' alleged unscrupulousness a central theme in its overall strategy. The respondent chose to drive its point home by volunteering that the witness was presently incarcerated, even providing an affidavit by the local police to that effect. This was of course the moment where the proverbial torpedo blew up in their faces.

When the authors pressed the opposing party as to the reason they were keeping track of this witness' whereabouts, and the tribunal followed suit with similar questions, the respondent had difficulty explaining. The opposing party's counsel, witnesses and CEO gave contradictory, or at least inconsistent, answers and ultimately the witness statement was maintained without the respondent being able to cross-examine the witness. Ironically, the Tribunal also ruled that the affidavit provided by the respondent constituted proof of a "valid reason" per the IBA Rules for the witness' failure to appear.

The takeaway is that there is no one-size-fits-all solution to this problem. The lesson to be learned, however, is to ask questions of the opposing party and their team and to look for any clues which may suggested some underhandedness is at play in order to make best of a bad situation.

Conclusion

The users of "guerrilla tactics" will continue to come up with novel tactics and strategies which may catch you unaware. The key is to remain vigilant and to immediately, or even anticipatorily, draw the tribunal's attention to such conduct. This will ensure that the tribunal can take the appropriate precautions to safeguard the integrity of the arbitration and, at times, may actually foil the other party's plans, especially if the tactic in play could open the doors to disciplinary action

and/or criminal liability.

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