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Chapter 5: Guerrilla Tactics and Ethical Regulation

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> … dumpster diving … 'convincing' an arbitrator to go home rather than attend deliberations … death threats!!! … changing counsel mid-proceedings to create a conflict with an arbitrator … wiretapping opposing counsel's meeting rooms … hiding damaging documents that were ordered to be disclosed … raising fourteen challenges to a single arbitral tribunal … physically assaulting the opposing party … raising excessive frivolous objections to 'run the clock' at an evidentiary hearing … threatening a witness that he would 'never work again' to dissuade him from testifying … absurdly excessive requests for document disclosure … hiring private detectives to follow and observe arbitrators … staging a car accident with opposing counsel to prevent attendance at a hearing …[1]

§5.01. Introduction

As various contributions in this volume attest, guerrilla tactics like those described above appear to be an increasingly common phenomenon in international arbitration.[2] In a recent survey, 68% of respondents reported that they had experienced what they page "313" believed were guerrilla tactics in international arbitration.[3] One of the most notable aspects of this study is that the authors did not seek to define the very topic they were investigating. Rather than a methodological misstep, the absence of a clear definition of 'guerrilla tactics' was an intentional decision. As the authors describe, 'what needed to be discovered is whether counsel and arbitrators felt such tactics were being used and to learn what kinds of tactics they felt deserved to be labelled "guerrilla tactics"'.[4] Given this starting point, it is perhaps not surprising that conduct identified by some attorneys as 'guerrilla tactics' would be defended by others as a legitimate strategy, or even as part of an attorney's obligation to diligently represent the client's interest.

One salient recent example of this ethical impasse is *Hrvatska Elektroprivreda d.d. [HEP] v. Slovenia*,[5] a now-seminal ICSID case on the topic. In *HEP*, a few days prior to the first substantive hearing, Slovenia disclosed new counsel, an English barrister who was a member of the same chambers as the tribunal's President.[6] Slovenia's UK-based counsel vigorously defended the move, contending that such counsel-arbitrator relations are 'by no means unusual' in international arbitration.[7] Slovenia characterized its

counsel's presence as a basic exercise of its right to have counsel of its choosing.

In response, HEP vehemently objected to what it considered a wholly improper ambush. Among its arguments, HEP fundamentally challenged existing practices that the English bar should govern. As HEP argued, 'what may not, apparently, be cause for concern in London may well be viewed very differently by a reasonable third person from Africa, Argentina, or Zagreb, Croatia'.[8] HEP insisted counsel's presence would create an unacceptable appearance of impropriety. Ultimately, the tribunal agreed with HEP and ruled to disqualify the new counsel from participating in the arbitral proceedings.[9]

HEP v. Slovenia is just one example of an ethical clash that one side characterizes as wholly improper, and the other defends as justified within established national practices. The thesis of this chapter is that one factor contributing to the circumstances in *HEP v. Slovenia*, and the rise of guerrilla tactics more generally, is the absence of meaningful ethical regulation of counsel conduct in international arbitration.[10] The absence of a common yardstick for evaluating attorneys' professional ethics, combined page "314" with the almost complete absence of effective sanctions or enforcement mechanisms, allows so-called guerrillas to escape consequences for misconduct. Arguably, the gap also encourages misconduct by facilitating unbounded creativity in pursuing client interests and, when called out, allows plausible deniability that particular conduct was unethical.

Guerrilla tactics and ethical clashes can take many forms[11] and, as already noted, defy easy definition. For the purposes of this Chapter, the term 'guerrilla tactics' shall be defined as per Stephan Wilske and Robert Pfeiffer in 'An Etymological and Historical Overview', Chapter 1, Section §1.01.[12]

The war metaphor invoked by the term guerrilla tactics is consistent with another metaphor that would aptly describe the state of attorney ethics in international arbitration – a no-man's land. Technically, a 'no-man's land' is a space between the formally occupied territories of two warring sovereigns.[13] The uncertain political status of a no-man's land means that it is unclear what rules or laws apply because the warring sovereigns each claim legal dominion. And of course, since no sovereign actually controls a no-man's land, the booby traps, land mines and barbed wire determine how and when soldiers manoeuvre in that space.

This Chapter assesses the reasons for the current status of counsel ethics in international arbitration, assesses recent developments and suggests future directions. Part I analyses the circumstances that give rise to an ethical no-man's land, which permits ethical conflicts and in some instances guerrilla tactics. Part II outlines current efforts made in establishing an international code of ethics and proposes the steps necessary for ethical standards to take hold in international arbitration. Part III describes enforcement for the international code of conduct.

§5.02. The Siege and Its Underlying Causes

The ethical ambiguity described in the introduction derives from the inability of traditional regulatory frameworks for legal ethics to effectively govern attorney conduct in international arbitration. Historically, attorneys have been subject to ethical rules created and enforced by national, and even more often sub-national, regulatory

authorities. In recent decades, law practice, and in particular dispute resolution, has page "315" globalized. Professional regulation of attorneys, however, never really adapted.[14] Lawyer regulation not only remains moored to national and sub-national authorities, but also how that regulation applies in international arbitration remains highly ambiguous.

As noted in the introduction, many attorneys are uncertain whether their home ethical rules apply in international arbitration. The reason is that ethical codes in most systems do not state expressly whether they extend extraterritorially, or whether they extend into international arbitral proceedings abroad.[15] This omission is not an accident. Fierce competition for lucrative arbitration business has arguably led to an ethical 'race to the bottom'.[16] Rather than exercising any role in regulating attorneys in international arbitral proceedings, in an effort to attract more international arbitration, many nations have instead legislated to constrain court review of awards from arbitrations taking place within their boundaries.[17] However, limiting or precluding foreign attorneys from appearing as counsel in international arbitrations makes a state less desirable as an arbitral seat (and is even seen as an act of hostility against international arbitration). The cumulative effect is that counsel in international arbitrations are almost systematically exempted from local professional regulation and out of reach of their home regulation.[18]

Even when an attorney is clearly bound by home state ethical rules, conduct that is considered appropriate under those rules may (and often does) conflict with the ethical practices and expectations of opposing counsel. As a result, attorneys from different jurisdictions participating in a single international proceeding may be abiding page "316" by conflicting ethical rules. In some instances, these conflicts can lead to structural and procedural unfairness.

The seminal example is with respect to conflicting national traditions about witness preparation. As one scholar recounts, lawyers from different jurisdictions working with the International Criminal Tribunal for the Former Yugoslavia (ICTY) in The Hague have starkly different opinions about pre-testimonial communication with witnesses:

> An Australian lawyer felt that from his perspective it would be unethical to prepare a witness; a Canadian lawyer said it would be illegal; and an American lawyer's view was that not to prepare a witness would be malpractice.[19]

Notably, Australian, Canadian and American attorneys are all from systems that evolved out of the same common law tradition. Ethical clashes are much more striking when one attorney hails from a system that is predicated on a common law tradition and the other attorney from a system predicated on a civil law tradition. In fact, the ubiquitous example of national differences in witness preparation most often contrasts the ethical perimeters of German practices with those in the United States.[20]

By now, conflicting traditions about pre-testimonial communication with witnesses have been largely resolved, such that this iconic example of conflict is no longer perceived as an example of guerrilla tactics. Certainly at one time, it would have been. Meanwhile, other ethical conflicts among lawyers are on the rise. As a result, arbitral tribunals are increasingly being pressed to resolve these conflicts, particularly when they elevate from common scrabble to allegations of guerrilla tactics.

Today, arbitral tribunals routinely resolve ethical conflicts on an ad hoc basis. Tribunals rule on these issues when ordering exchange of documents or resolving disputes about parties' compliance with such obligations; making evidentiary and privilege rulings;[21] ruling on claims of alleged conflicts of interest and asserted privileges; granting, denying or declining to consider requests for disqualification;[22] drawing, or refusing to draw adverse inferences based on alleged misconduct;[23] and page "317" awarding costs and fees.[24] In making these decisions, members of the tribunal inevitably assess allegations of misconduct against their own sense of what constitutes proper attorney conduct, based on their own home ethical rules. For example, a continental arbitrator faced with creative arguments by an American attorney may conclude that the American attorney is inherently untrustworthy and may discount or disregard arguments by that attorney.[25] That same arbitrator may find offensive certain forms of witness preparation that are consistent with prevailing practices in the United States.[26] The ultimate question is whether international arbitration can continue to operate with uncertain, unwritten and culturally variable assumptions about what constitutes proper conduct for attorneys.

The most obvious answer is a simple no. Attorneys need more guidance about what constitutes proper conduct. Parties need to understand better how to plan their legal representation and related case strategy. Arbitrators need more clear guidance and support in making rulings on ethical issues. And if national bar associations are to relinquish at least partial control over aspects of transnational practice, they need assurance that there is a reliable regime in place to protect client and societal interests implicated in attorney conduct.

The need for international ethical guidance has already been identified and has spawned dozens of efforts at international codes of ethics. Drafted in 1956 and 1977, respectively, the International Bar Association (IBA), International Code of Ethics, and the Council of Bars and Law Societies of the European Community (the 'CCBE') Declaration of Perugia on the Principles of Professional Conduct were among the first.[27] Remarkable for their prescience, they are most accurately described as professional notions rather than rules that provide any meaningful guidance.[28]

More recent efforts include the IBA 'Core Values' Resolution (1998) and the IBA General Principles of the Legal Profession (2006), for which a new commentary is currently being drafted.[29] In 2005, the Bar Association Presidents' Meeting developed page "318" a Statement of Core Principles, now adopted by over one hundred bar associations around the world. Meanwhile, the *Union Internationale des Avocats* (UIA) developed the Turin Principles in 2002.[30] While all laudable efforts, most operate at a level of abstraction that provides little meaningful guidance to the most salient issues that arise in international arbitral practice.[31]

Other modern international efforts within Europe have had a more tailored focus. The CCBE developed a Code of Conduct (1988; revised in 2006)[32] to provide guidance to attorneys engaged in cross-border activities in Europe. While the CCBE code is arguably the most advanced and successful international code of ethics to date,[33] it has little to say about international arbitration practice per se.

In another more recent effort, the Study Group of the International Law Association on the Practice and Procedure of International Courts and Tribunals published the ILA Hague Principles on Ethical Standards for Counsel appearing before International Courts and

Tribunals (the 'ILA Principles').[34] However, the ILA Principles only apply to arbitrations in which one party is a state, meaning they are expressly inapplicable to most international arbitrations. Like the CCBE Code and some of its international predecessors, the ILA Principles deal mostly in abstractions and fail to articulate its own relationship to national ethical rules, particularly when those rules conflict with the ILA Principles.[35]

The most important undertaking to date are Guidelines on the Professional Conduct of Counsel in International Arbitration (IBA Representative Guidelines) developed by an IBA Task Force that was originally constituted in 2008. The first few years' work for the Task Force was to hold a number of meetings 'to develop initial views on the threshold question of whether ethical issues arise in such a manner or with sufficient frequency that they required to be considered further'. Although the page "319" original mandate was to investigate the question, a detailed survey reflected broad support for development of further guidance, which necessarily broadened the Task Force's objectives.[36] On 25 May 2013, the IBA Taskforce published its 'Guidelines on Party Representation in International Arbitration'. While some had hoped, and others had feared, that they would impose extensive obligations on party representatives, they are instead more generally 'inspired 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'.[37] The first effort of the Task Force was to assess whether 'the lack of international guidelines and conflicting norms in counsel ethics undermines the fundamental protections of fairness and equality of treatment, and the integrity of international arbitration proceedings'.[38] The Task Force then held a number of meetings in 2009 and 2010 'to develop initial views on the threshold question of whether ethical issues arise in such a manner or with sufficient frequency that they required to be considered further'.[39] The Guidelines state explicitly that they are not intended to displace otherwise applicable mandatory laws, professional or disciplinary rules. Instead, they aim to provide a guide to conduct for representatives in international arbitral proceedings. To that end, parties may adopt the Guidelines in whole or in part by agreement, and arbitral Tribunals may also apply the Guidelines at their discretion after consultation with the parties.[40]

With regard to specific provisions, the Guidelines generally prohibit ex parte communications between a party representative and an arbitrator after the arbitrator has been appointed, with some narrow, generally accepted exceptions. The Guidelines also set out a principle of 'candour and honesty' in the presentation of evidence and submissions provided to the Tribunal. The Guidelines also seek to make document disclosure more reliable by obliging representatives to inform parties of their obligations to retain and disclose documents, by prohibiting the concealment of evidence from the Tribunal, and by specifying that counsel should not make any Request to Produce, or any objection to a Request to Produce, for an improper purpose, such as to harass or cause unnecessary delay.[41]

Another important contribution of the Guidelines is their clarification about the role of counsel in witness preparation, in Guideline 24, which states: page "320"

> A Party Representative may, consistent with the principle that the evidence given should reflect the Witness's own account of relevant facts, events or circumstances, or the Expert's own analysis or

> opinion, meet or interact with Witnesses or Experts in order to discuss and prepare their prospective testimony.

The Comment to Guideline 24 states that:

> As part of the preparation of testimony for the arbitration, a Party Representative may meet with Witnesses and Experts (or potential Witnesses and Experts) to discuss their prospective testimony. A Party Representative may also help a Witness in preparing his or her own Witness Statement or Expert Report. Further, a Party Representative may assist a Witness in preparing for their testimony in direct and cross-examination, including through practise questions and answers (Guideline 24). This preparation may include a review of the procedures through which testimony will be elicited and preparation of both direct testimony and cross-examination. Such contacts should however not alter the genuineness of the Witness or Expert evidence, which should always reflect the Witness's own account of relevant facts, events or circumstances, or the Expert's own analysis or opinion.

This approach may be more appealing to counsel and parties from common law traditions than from the civil law traditions. Moreover, the language arguably still leaves considerable grey area regarding some of the most contested practices, such as the rehearsal with witnesses of practice answers and questions and mock cross-examination. Whatever 'tilt' or remaining ambiguities, however, the Guideline and Comment undoubtedly provide an important starting point for Tribunals and counsel.

Even if the IBA Taskforce's work seems like a radical, long anticipated, development, it may soon have competition. As announced at the 2013 ICCA Congress, and referenced on several occasions since, the London Court of International Arbitration (LCIA) is working on its own code of ethics. According to sources, a newly revised version of the LCIA arbitral Rules will include an annex on the general duties of legal representatives appearing before LCIA tribunals. The precise content, however, is being reviewed by the LCIA Court and would not have general application, but would instead only apply to arbitrations under the LCIA Rules.

Developing a workable body of ethical standards or rules is not simply a drafting exercise. Numerous other critical issues still need to be worked out. What topics should ethics for international arbitration address? Should these ethics be articulated as general standards, advisory guidelines or clear rules? Who should undertake the task of promulgating international arbitration ethics?[42] How will new standards or rules interrelate with otherwise applicable national ethical rules? How would such standards or rules be enforced? What role would national regulatory authorities have? Meaningful answers to these questions are needed to overcome the sceptics who argue against page "321" formal ethical regulation in international arbitration.[43] While not all these questions can be answered in the space of this chapter, the next Part takes up the question of what topics ethical guidance is needed on, and the final Part considers potential enforcement mechanisms.

§5.03. The Content for International Ethical Standards or Rules

This Part surveys the most significant ethical conflicts that arise in international arbitration. While it does not exhaustively catalogue all the differences in national systems, it does attempt to cut through the superficial similarities and identify the most significant differences among systems. It is primarily these conflicts that ethical standards or rules for international arbitration will have to resolve.

[A]. Witness Communication, Improper Influence and Perjury

The paradigmatic example of conflicting national ethical rules in international arbitration is pre-testimonial communication with witnesses. The conflict is often distilled into a simple dichotomy: Civil law systems generally prohibit pre-testimonial communication; common law systems generally permit such communication. The differences, even among systems from the same legal tradition, are more subtle and complex,[(44)] but it is often said that the international arbitration community has reached consensus about an international rule that resolves these differences.

The current consensus is reflected in the 2010 IBA Rules on the Taking of Evidence in International Arbitration (IBA Evidence Rules). Article 4(3) provides that '[i]t shall not be improper for a Party, its officers, employees, legal advisors or other representatives to interview its witnesses or potential witnesses and to discuss their page "322" prospective testimony with them'.[(45)] Even if it seems like a great equalizer, the negative construction of Article 4(3) ('It shall not be improper … '.) reveals that this language is not an affirmative rule. Instead, it is only the removal; a prohibition. It does not, however, necessarily create a level playing field that many presume it should.

Simply removing (or attempting to remove)[(46)] national prohibitions against pre-testimonial contact leaves open several important questions about witness communication.[(47)] This ambiguity is implicitly acknowledged in the 2010 revisions to Article 4(3), which supplemented previous language that allowed for 'interviews' to add allowance for 'discuss[ion] of potential testimony'. While this is a seemingly broader permission, it is still too vague to resolve most of the difficult questions. As one commentator notes, '"discuss" is a broad concept'.[(48)]

Does this permission to engage in 'interviews' or 'discuss potential testimony' also allow 'preparation' of witnesses and 'rehearsal' of witness testimony?[(49)] Does it permit contact with former employees of an opposing party, or with individuals who hold confidential information about the opposing party?[(50)] What are the obligations of counsel when a witness they prepared then commits perjury? Are there limits to witness interviews if a witness is represented by counsel? Is it permissible to compensate a witness for time spent interviewing, preparing and testifying?

A poll of international arbitration practitioners from different systems would likely generate a range of different answers to these questions. Indeed, one well-known Belgian arbitrator, who is clearly aware of Article 4(3) and prevailing trends, still considers it 'a daring step' for continental practitioners to prepare their own client's page "323" witnesses, and 'beyond … imagination' and such 'flagrant misbehaviour' to contact an opposing party's witnesses.[(51)]

To address the seminal example of ethical conflicts – pre-testimonial communication with witnesses – any future ethical standards or rules for international arbitration must go beyond the basic dichotomy of whether such communication is permitted or not

permitted. They should provide guidance on the range of sub-issues implicated by the potential for such communication. The IBA Task Force has been contemplating these issues, and (as described above) has provided some guidance designed to elaborate and clarify application of the IBA Evidence Rules.

[B]. Information Disclosure and Document Exchange

Another area of ethical conflict that standards or rules will need to address is with respect to information disclosure or document exchange. One basic ethical obligation imposed on lawyers in legal systems that include procedures for document exchange is that they must comply with a valid document request, even if it requires turning over to adversary documents that are harmful to that attorney's client's case or interests.[52]

This ethical obligation is part of a larger duty that attorneys have to ensure that parties comply with valid document requests. For example, English procedural rules oblige solicitors 'to take positive steps to ensure that their clients appreciate … not only the duties of disclosure and inspection … but also the importance of not destroying documents which might possibly have to be disclosed' and taking steps to 'ensure that documents are preserved'.[53] In the United States, counsel have been sanctioned for failing to ensure a client's compliance with similar US ethical rules.[54] The practice of offshoring or outsourcing document management (meaning the sub-contracting of document review to legal service providers in, for example, India),[55] is generating new ethical issues relating to compliance, competence, conflicts of interest and protection of page "324" confidential information at outsourcing facilities.[56] Finally, because the practice of exchanging of documents creates a risk of inadvertent disclosure of privileged documents, many systems with such practices also generally impose on attorneys ethical obligations related to inadvertent disclosures.[57]

In other jurisdictions, no similar pre-trial disclosure process exists. Instead, each party generally presents to the court those documents in its possession that support its case. In certain narrow circumstances, a party may request that the court order an opposing party to produce a document, but the conditions under which such a request can be made are exceedingly narrow.

Not surprisingly, in systems following this approach to document disclosure, there are generally no express ethical rules relating directly to the process of document disclosure. There is simply no need to regulate attorneys' ethical conduct in pre-trial exchange of information in systems where that process does not exist. As a result, attorneys from those systems have no express ethical obligations to preserve or produce documents, to guide clients in complying with orders to produce, to produce page "325" documents that are harmful to a client's case or to respond to inadvertently produced confidential documents.

In recent years, these differences have had important consequences in international arbitration. The starting point is that some degree of document and information exchange has become a more normal practice in international arbitration. The scope and nature of such exchanges can vary considerably, depending on the identity of the arbitrators, parties and counsel.[58] It is fair to estimate, however, that conventional practice in international arbitration involves more document exchange than would be typically required in a German or French court proceeding[59] but less than permitted under English, Canadian or US procedural rules.[60]

Not surprisingly, international arbitration practice heightens the conflicting national ethical traditions regarding document exchange, and has led to allegations of guerrilla tactics. As one civil law trained commentator explains, a 'Latin American jurist … feel[s] legitimately proud of retaining those [documents] which in one way or another may harm him'.[61] Retaining those documents, however, is regarded by common-law-trained attorneys so egregious that it is as if 'parties or their counsel … commit[ted] perjury or otherwise ma[de] misrepresentations to the arbitrators'.[62] For these reasons, differences over ethical obligations regarding document exchanges would need to be addressed by ethical standards or rules developed for international arbitration.[63] In fact, as described above, this is another area in which the IBA Task Force has provided important guidance.

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[C]. Conflicts of Interest

Another area in which different national ethical standards collide in international arbitral proceedings is with regard to conflicts of interest. In this area, there is the now-familiar common law/civil law divide. In sum, US ethical rules impose extensive, detailed conflict of interest rules on attorneys.[64] The conventional approach in European and most other systems is to treat conflicts more flexibly and personal discretion for counsel and their clients.

In international arbitration, the most prominent examples have arisen with respect to conflicts with the tribunal, as in *HEP v. Slovenia*. Alleged conflicts of interest are not limited, however, to conflicts with members of the tribunal. For example, in *Fraport AG Frankfurt Airport Servs. Worldwide v. Philippines*, another ICSID case, one party sought to exclude counsel from proceedings for a conflict of interest arising from the contested prior representation of the Respondent in a related proceeding.[65] The tribunal concluded that it did not have any 'deontological responsibilities' and therefore 'ha[d] no power to rule on an allegation of misconduct under any such professional rules as may apply'.[66] Its conclusion was, in part, based on its determination that there was insufficient evidence to find a real risk of the disclosure of confidential information.[67] Interesting, however, the tribunal ruled on the issue to 'the fair conduct of the proceedings before it'[68] and determined that it had the 'power and obligation to make sure that generally recognized principles relating to conflict of interest and the protection of the confidentiality of information imparted by clients to their lawyers are complied with'.[69] Its reasoning, therefore, left open the potential that in other contexts, a tribunal could rule to disqualify counsel if the representation raised concerns about improper use of confidential information.

Outside the investment arbitration context, conflicts can also arise that highlight critical differences among national rules. Consider, for example, an arbitration seated in Mexico between a US-Mexican joint venture against the Mexican joint venture partner, where the Mexican party is represented by the same Mexican attorney who formerly represented the joint venture, and who continues to represent the Mexican party against the joint venture. Representation of one joint venture partner in a suit against a current joint venture client is generally prohibited, and dumping the joint venture partner is not considered an option. This same representation, however, would page "327" apparently be permitted under Mexican rules.[70] The American party would surely

want to enforce its right to conflict-free representation, but can it seek disqualification? If so, under what standard or rule?

This situation pits the American party's right to conflict-free representation, against the right to counsel of choice by the Mexican party. In the absence of an international standard or rule, this type of stand-off raises questions about the legitimacy of the proceedings and could consequently be a basis for challenging the enforceability of the award.

[D]. Confidentiality and Attorney-Client Privilege

Ethical standards or rules for international arbitration will also need to address confidentiality and related issues regarding attorney-client privilege. Here again, there are significant national differences. Confidentiality in civil law countries is both broader than and narrower than those of the United States. In most civil law countries, the concept of 'professional secret' protects information communicated by a client to an attorney, but not information communicated from the attorney to the client.[(71)] More problematically, from the US perspective, in many systems in-house attorneys are not regarded as having confidentiality obligations,[(72)] and thus do not enjoy the evidentiary privileges and protections that would normally accompany such an obligation. This difference has come as a rude awakening to many US firms doing business in Europe, even ones as large as Microsoft, which was obliged to turn over to the EU Competition Authorities information it had thought was covered by the attorney-client privilege.[(73)]

Another important distinction is that civil law attorneys are not necessarily obliged to maintain as secret, information they communicate to clients or communications they have with other attorneys. This potential limitation is usually a non-issue in domestic proceedings in civil law systems because the general absence of procedural opportunities to obtain such communications means they do not need specific protections. When, as in international arbitration, document disclosure is more broadly available, the differences in the nature and extent of protection for confidential  *page "328"* information (as well as the ethics of asserting such protections) are becoming a more significant area of conflict.

National legal systems also diverge in how they protect client confidences when client wrongdoing or potential wrongdoing is involved. Even among the ethical codes of the fifty states in the United States, there is significant disagreement about the extent of confidentiality obligations when a client has committed or is planning to commit criminal wrongdoing.[(74)]

Apart from the variances in the duty to maintain client confidences, many systems impose on attorneys other confidentiality requirements that either do not exist or are in tension with other ethical obligations in different systems. For instance, in many continental civil law systems, such as Italy, France and Portugal (though not Germany), as well as the United Kingdom, communications between opposing counsel can be regarded as confidential.[(75)] Upon receiving a communication marked 'confidential', or in French '*sous la foi du Palais*', the receiving attorney must maintain the communication as confidential and is even prohibited from sending copies to her own client.[(76)] In the United States, treating as confidential communications from opposing counsel could conflict with an attorney's obligations to keep clients informed, particularly if the communication involved refers to a potential settlement.

At an international level, the level of disagreement in the area of protection of client confidences has been described as the most significant threat to orderly transnational legal practice.[77] The nature and perimeters of confidential information, as well as counsel obligations to protect it, are often at the heart of parties' case strategy and planning. This is an area that requires specific guidance at an international level, and likely where the IBA Guidelines will be able to make an important contribution.

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[E]. Ex Parte Communications

The nature and extent of permissible ex parte communications between parties and arbitrators is another area of significant disagreement and resulting confusion.

In most civil law systems, it is not necessarily presumed that both parties will always be present during proceedings with the judge. If, for example, in some European systems, an attorney arrived at a hearing at which opposing counsel was either absent or late in arriving, it would be considered perfectly appropriate for the judge to discuss with the present attorney various aspects of the case.[78] In the US, the same conduct might well result in a motion to disqualify the judge and an ethics complaint against the lawyer. The US judicial and attorney ethics entail almost absolute restrictions against ex parte communications, except in very rare procedural contexts.[79] In an unexpected counterpunch, notwithstanding the stringent US rules prohibiting ex parte communications, domestic US arbitration rules permit parties to communicate throughout arbitral proceedings with their party-appointed arbitrators, even about crucial issues involving strategy.[80] While Chinese and continental systems tolerate some ex parte communication in adjudication, the approach adopted by US domestic arbitration extends well beyond that level.[81] In yet another apparent about-face, American attorneys have been known to challenge ex parte practices in the Chinese arbitration system, where the arbitrator, like the Chinese judge, will act as a mediator in the same case in which the person presides as ultimate arbiter.[82]

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Ex parte communication with arbitrators, because of its obvious potential to disrupt proceedings and taint results, is one area that has attracted a great deal of attention to the lack of ethical regulation for lawyers in international arbitration.[83] Many of the differences have been resolved through regulation of arbitrators. It is still important to address the attorney side of the equation. Clearer rules will reduce the likelihood that attorney efforts to communicate ex parte will put arbitrators in difficult situations that, when they arise, necessarily disrupt proceedings, raising costs and avoid the appearance of impropriety in arbitral proceedings.

Once again, these types of conflicts have been given a degree of clarification in the work of the IBA Task Force.

[F]. Attorney Fees

Another ethical issue of growing importance in international arbitration relates to how parties compensate their attorneys and pay for the costs of bringing their claims. Both contingency fees and funding by third parties allow a party who believes it has a meritorious claim, but has insufficient funds to pursue that claim, to

assert its rights by financing claims outside the traditional pay-as-you-go model for hourly attorney fees.[84]

Different legal systems have starkly disparate views on contingency fee arrangements (or 'conditional fees', as they are known in some jurisdictions) and the possibility of third-party financing. Most of the world has traditionally opposed such fee agreements. Within the EU, most systems are strongly opposed to contingent fee financing of cases.[85] In South Korea, contingent fee arrangements are similarly common, even in family and criminal cases.[86] And contingent-like fees have been permitted, though very limitedly, in other countries such as Australia, Canada, Denmark, France, Ireland, Japan, New Zealand, Portugal, Scotland and Thailand.[87] page "331" Proponents of contingency fees argue that, due to the high initial cost of bringing certain types of lawsuits (such as personal injury), contingent fees allow the less financially advantaged an opportunity to obtain justice.[88] Recently, many nations traditionally opposed to contingent arrangements have been loosening their restrictions. For one, in 2008, the German Parliament passed an amendment to the Federal Lawyers' Act authorizing lawyers and their clients to agree on contingency fees in specific situations.[89] Similarly, South Africa,[90] England, Wales[91] and Spain[92] have abolished prohibitions within the past fifteen years.

Though contingency fees are traditionally used in tort and employment cases,[93] their use by commercial organizations in international commercial disputes has grown in recent years.[94] The disparate approaches to contingency fees create two major problems in international arbitration. For one, contingency fee contracts made in countries having public policy objections to such arrangements may be unenforceable or illegal. And two, arbitral awards allocating costs and fees including contingent attorney fees may be set aside if such fees are contrary to the public policy of the law of the seat or country of enforcement.[95] As such, contingent fee arrangements and third-party funding are also areas that should be addressed in developing ethical standards or rules for international arbitration.

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[G]. Creativity, Aggressiveness and Bad Manners

For all the differences in specific ethical rules, the clashes most complained about by participants and commentators are usually referred to as a conflict between professional 'styles' or legal cultures, rather than professional ethics. Many types of alleged guerrilla conduct probably also falls into this general category.

American attorneys are often accused of interjecting excessive objections, bullying witnesses on cross-examination, concocting creative interpretations of legal rules and strategically jockeying for procedural advantages. To their European counterparts, the American approach to arbitration 'total warfare'[96] is disruptive and counterproductive. American attorneys are often regarded as 'ungentlemanly' if not barbaric.[97]

As Catherine Fox, general counsel for Alcatel Space Industries in France, complained, in one arbitration an American attorney 'constantly [said] "objection, objection, objection". Finally the Swiss president had to remind him he wasn't in a US court'. This conduct by Americans has led to a perceptible souring of in-house counsel to international arbitration generally. It is worth noting, however, that while European arbitration specialists are frustrated with American

excesses, they too are subject to criticism from Asian parties and attorneys for treating commercial disputes as a 'zero-sum game'[98] and brazenly inflexible in negotiation and mediation processes.[99]

These differences are usually considered to be matters of 'style' rather than questions of ethics. But local and national ethical rules are intimately related to, and establish the outer boundaries of, professional styles. Zealousness is considered a professional virtue and even an ethical obligation in the United States.[100] Vigorous cross-examination is not only regarded as an ethical obligation, but often elevated as a lawyer's highest ethical duty.[101] Similarly, with creative argumentation, under the Model Rules of Professional Conduct,[102] American attorneys are permitted 'to urge any possible construction of the law favorable to his client, without regard to his professional opinion as to the likelihood that the construction will ultimately prevail'. This ethically sanctioned room for creativity is bounded only by strategic considerations and the stricture against wholly frivolous arguments in Federal Rule of Civil Procedure 11.[103]

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In continental systems, as well as England, a similar degree of creativity would be considered professionally irresponsible, if not unethical. Zealousness is also regarded, not as a professional virtue, but as 'unbridled and ungentlemanly aggressivity and excess' by foreign attorneys.[104] Rather than zealousness, ethical values in systems other than the US usually emphasize the exercise of restraint and independent professional judgment. In an extreme example, English barristers are, and (until recently) attorneys in some civil law countries were, forbidden from forming law firms for fear that a partner's independent judgment could be stifled by those of other partners. The same argument was the justification for not allowing attorneys employed as in-house counsel to be considered practicing members of the bar – it would be impossible to remain professionally independent of a client who directly employs you.[105] This insistence on professional detachment also explains why most continental systems ethically prohibit contingency fee representation.[106]

These ethical prescriptions translate into professional protocols or styles, which often collide in international arbitration. As Doak Bishop explains, a typical compliment from a British judge may be that he acted 'admirably understated, as usual'.[107] To an attorney or arbitrator trained in that system, an American attorney's zeal during international arbitration proceedings would seem unseemly and improper. Similarly, an American attorney zealously 'attempting to obtain perceived procedural advantages might [be] viewed as unreasonable partly because it asks the arbitrator to rule in a manner inconsistent with the arbitrator's duty to treat the parties fairly and equally'.[108] The 'unreasonableness' of the request will likely not result in an adverse ruling on the immediate issue, but perhaps a deeper scepticism about the attorney's professional ethics, even though the offending conduct was inspired by the paramount American ethical virtue of loyal zeal for her client. This category of conduct is not often directly regulated through express ethical rules, even within national legal systems, except for the absolute outer boundaries.

To the extent, the absence of clear ethics creates an anything-goes atmosphere, it may encourage attorneys to follow their worst, rather than their best, professional page "334" instincts. Conversely, a body of clearer ethical standards will help develop a collective understanding of what constitutes proper conduct and development

and promotion of clearer shared notions of professional civility. While standards in this area are difficult to craft, guidance from the IBA Task Force, and from the LCIA, is certainly a welcome development.

§5.04. Enforcement of International Ethics

Based on the foregoing, the question of whether international arbitration will develop its own ethical standards or rules for counsel has been answered, and additional sources seem to be forthcoming from the LCIA. The mechanisms and legal justifications for enforcement of those standards or rules, however, remain subject to many open questions.

The most obvious sources for enforcement are arbitral tribunals that are charged with controlling the proceedings before them. There are, however, doctrinal and jurisdictional questions about whether arbitral tribunals even have the power to regulate or sanction counsel.(109) There are also questions about how such power for arbitral tribunals would interplay with existing mechanisms for regulating attorneys within domestic legal systems.

The historical view has been that neither international tribunals nor arbitral tribunals have the power to disqualify or sanction counsel. For example, in 1992, the Iran-US Claims Tribunal ruled that it 'does not have the power to impose sanctions or disciplinary measures for the presentation of false evidence' by counsel.(110) There are also domestic precedents, mostly in the United States, that provide conflicting answers. Courts in the District of Columbia and Rhode Island decided that arbitrators do have an inherent power to sanction counsel,(111) but some more prominent New York cases have adamantly refused to ratify any such power.(112)

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Based on these precedents, the conventional wisdom(113) is that for international arbitral tribunals, 'the consensual foundation of arbitration arguably militates against conferring authority on arbitrators to develop and enforce rules of professional conduct of counsel'.(114) One of the most vocal proponents of this view was Jan Paulsson: '[a]rbitrators are named to resolve disputes between parties, not to police the conduct of their representatives, and therefore do not rule on complaints of violations of codes of conduct'.(115) While undoubtedly an important voice, Paulsson's view from 1992 seems to have been eclipsed by modern developments, including the rise of guerrilla tactics. As a result, the conventional wisdom is perhaps no longer seen as a necessary convention, or very wise. The previously unthinkable prospect of tribunal-imposed sanctions for counsel is gaining traction, particularly among arbitrators frustrated with the procedural disruptions caused by misconduct and parties frustrated by the related increase in costs and delays.(116) The tension between a desire to redress directly counsel misconduct and jurisdictional limitations is perhaps best expressed in the North page "336" American Free Trade Agreement (NAFTA) case *Pope & Talbot v. Canada*.(117) In that case, the tribunal issued an order reprimanding counsel for a 'highly reprehensible' and either 'intentional' or reckless breach of a confidentiality order.(118) The tribunal did not consider itself as having jurisdictional power to directly sanction counsel, but did seek to impose punishments within the perceived limits of its authority. For example, it indicated that it 'assume[d] that [counsel] will make the present Decision public', which harshly criticized counsel for misconduct, a form of public shaming that in many contexts can be

regarded as a form of professional sanction.[119] The tribunal also imposed costs on the party whose attorney was responsible for the misconduct, and 'expresse[d] the wish that [counsel] will recognize that it is his conduct which has resulted in this [imposing on costs on his client] and, consequently, he will voluntarily personally assume those costs'.[120]

As already described in the introduction, the tribunal in *HEP v. Slovenia* took a very different approach. The tribunal in *HEP v. Slovenia* found that it did have jurisdiction to order directly remedies that the *Pope & Talbot v. Canada* tribunal believed it did not. Several possible explanations may account for this difference. On the one hand, the *HEP v. Slovenia* tribunal faced the question of disqualification of counsel from arbitral proceedings, when permitting counsel to remain could arguably have raised concerns about the enforceability of the award because of the alleged conflict with a member of the tribunal. In this vein, the remedy sought in *HEP v. Slovenia* seems much more closely tied to traditional notions of tribunals controlling proceedings, and their related obligation to produce an enforceable award, than remedial monetary sanctions against an attorney who is not a signatory to the arbitration agreement. Some reasons might well be increased concerns about ethical conflicts, and even the rise of guerrilla tactics. It might also be simply the passage of time, which has led to major changes in adjudication at the international level.

International arbitration lags behind international criminal law tribunals with regard to regulating counsel before them. Most criminal tribunals now not only have their own codes of conduct, but are also expressly conferred with the power to sanction and refer incidents of ethical misconduct to national bar authorities.[121] Moreover, narrow and formalist delineations of arbitral jurisdiction have fallen somewhat out of favour in more recent times. The most obvious example is the doctrine of competence-competence, which allows an exercise of arbitral decision-making power even when consent to such jurisdiction is itself being questioned. Furthermore, today arbitrators are deemed to have the power (and in some instances obligation) to apply mandatory page "337" law not selected by the parties, to undertake *sua sponte* inquiries when confronted with the prospect of bribery or corruption, to order directly interim relief and to supervise participation of amicus parties.[122] Each of these powers extend tribunal power beyond the early conceptualizations of arbitral jurisdiction as expressly limited by the four corners of the arbitration agreement. Despite compelling arguments in favour of these powers, the debate over tribunal power to enforce attorney ethics is still underway, and there is no consensus about the decision or analysis in *HEP v. Slovenia*.

That lag may soon be closed. As noted above, the IBA Task Force recently published, and the LCIA is on track to implement new standards to regulate and guide counsel conduct. Both these efforts attempt, in different ways, to address the enforcement issues.

Even before these reforms, there are other potential actions tribunals can take, apart from orders directed at attorneys to redress misconduct.[123] Opposing counsel or parties have on several occasions reported alleged misconduct to national bar authorities, seeking sanctions against an errant attorney.[124] Some commentators argue that, even being mindful of arbitrators' obligations of confidentiality, such reporting should be more readily undertaken by tribunals themselves.[125]

As noted above, there are a range of responses that arbitral tribunals already undertake in responding to apparent counsel

misconduct. These include making evidentiary rulings, drawing negative inferences, making final substantive conclusions, and allocating awarding costs and fees as between or among the parties.[126]

This last, the use of cost-shifting mechanisms, is perhaps the one with the greatest promise. Arguably, it provides the most transparent and express means of providing a remedy for counsel misconduct. For example, in *Generation Ukraine, Inc. v. Ukraine*, an ICSID Tribunal shifted the costs of the proceeding to the investor, and further ordered it to contribute USD 100,000 towards the Respondent's legal expenses for what it characterized as improperly 'convoluted, repetitive, and legally incoherent' written submissions and presenting facts in an 'unacceptably slanted' manner.[127]

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While shifting costs to the party whose counsel misbehaved may be superior to other sanctions that affect the merits, it is not a full solution. Unless the party actively participated in the misconduct or knowingly condoned it, the party may itself be a victim of attorney misconduct. Just as clearer ethical guidance on substance is needed, clearer, more transparent and more reliable enforcement is needed.

The IBA Guidelines take a relatively timid approach, largely confirming these powers. Simply by stating explicitly that these existing powers can be used to address counsel misconduct, however, the new IBA Guidelines undoubtedly provide meaningful support to arbitrators who attempt to sort these issues. In addition to the IBA Guidelines, the LCIA's proposed effort could go considerably further. It is reported that the LCIA Annex will provide for express sanctions for breach of duties. Those sanctions, which will include exclusion of representatives from arbitral hearings, will be exercisable by the LCIA tribunal. Providing arbitrators with effective tools to control against or remedy additional costs associated with guerrilla tactics may well enhance the legitimacy of the LCIA at a time when costs and unnecessary delay in international arbitration is under close scrutiny by corporate parties.

§5.05. Conclusion

Clearer and more effective regulation of attorneys in international arbitration will not be a panacea and will not magically banish all bad attorney conduct from the arena. It will, however, necessarily force attorneys to play by the same rules and make it easier to understand when one is improperly deviating. In this way, clearer rules will act as a deterrent because deviation will be more readily identifiable, and provide a basis for more meaningful redress when misconduct occurs.

A number of leading arbitrators and practitioners have described the current absence of ethical regulation as a potential crisis that can threaten the legitimacy of international arbitration.[128] As some commentators have noted, 'So far, international arbitration has largely escaped major ethical controversy, but this cannot be taken for granted in the future.'[129] The rise of guerrilla tactics so clearly illustrated in other page "339" Chapters in this volume may increase the risks of such a controversy. Effective standards and rules backed up by meaningful enforcement is the best way to prevent such an ethical controversy from leading to external efforts at the national level to control counsel conduct in international arbitration. To maintain its independence, legitimacy and

effectiveness, international arbitration needs to develop meaningful ethical regulation.

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[1] For these and other examples, see Stephan Wilske, 'Arbitration Guerrillas at the Gate – Preserving the Civility of Arbitral Proceedings when the Going Gets (Extremely) Tough', in *Austrian Yearbook on International Arbitration*, ed. Christian Klausegger et al. (Manz'sche Verlags- und Universitätsbuchhandlung, 2011), 315-319; Günther J. Horvath, 'Guerrilla Tactics in Arbitration, an Ethical Battle: Is There Need for a Universal Code of Ethics?', in *Austrian Yearbook on International Arbitration*, ed. Christian Klausegger et al. (2011), 297; Abba Kolo, 'Witness Intimidation, Tampering and Other Related Abuses of Process in Investment Arbitration: Possible Remedies Available to the Arbitral Tribunal', *Arbitration International*26 (2010): 46-47; Catherine A. Rogers, 'The Ethics of Advocacy in International Arbitration', in *The Art of Advocacy in International Arbitration*, ed. R. Doak Bishop & Edward G. Kehoe, 2nd ed. (2010) (citing various levels of arbitration guerrilla tactics).

[2] See Michael Hwang, 'Why is there Still Resistance to Arbitration in Asia', in *Global Reflections on International Law, Commerce and Dispute Resolution: Liber Amicororum in honour of Robert Briner*, ed. Gerald Aksen et al. (2005), 401-405; Stephan Wilske, 'Crisis? What Crisis?: The Development of International Arbitration in Tougher Times', *PLI/Lit* 818 (2010): 309.

[3] Edna Sussman & Solomon Ebere, 'All's Fair in Love and War – Or Is It? Reflections on Ethical Standards for Counsel in International Arbitration', *American Review of International Arbitration* 22 (2011): 612.

[4] See *ibid.*

[5] See *Hrvatska Elektroprivreda d.d. [HEP] v. Slovenia,* ICSID Case No. ARB/05/24, Tribunal's Ruling Regarding the Participation of David Mildon QC in Further Stages of the Proceedings, 6 May 2008.

[6] *Ibid.* para. 12.

[7] *Ibid.* para. 8.

[8] *Ibid.* para. 10.

[9] *Ibid.* para. 34.

[10] Notably, other tribunals faced with similar questions about counsel disqualification have refused to do so. See *Highbury International AVV v. Venezuela*, ICSID Case No. ARB/11/1, Decision on Disqualification of Counsel, 10 August 2011, para. 189, in *Challenge and Disqualification of Arbitrators in International Arbitration*, ed. Karel Daele (2012), 6-087; *Rompetrol Group NV v. Romania*, ICSID Case No ARB/06/3, Decision of the Tribunal on the Participation of a Counsel, 14 January 2010; S. Perry, 'ICSID Panel Declines to Disqualify Counsel', *Global Arbitration Review*, <www.globalarbitrationreview.com>, 15 August 2011.

[11] See Wilske, 'Arbitration Guerrillas', *supra* note 1.

[12] Michael Hwang, 'Why is there still resistance to arbitration in Asia?', in *Global Reflections on International Law, Commerce and Dispute Resolution – Liber Amicorum in honour of Robert Briner*, ed. Gerald Aksen et al. (2005), 401-411. See Horvath, 'Guerrilla Tactics', *supra* note 1, at 297; Wilske, 'Arbitration Guerrillas', *supra* note 1, at 315. One author has used the term 'black arts' to refer to a similar phenomenon, or at least a subset of conduct that is often identified as guerrilla tactics. Sam Luttrell, 'Opportunities for Australian Arbitration Practitioners in the "Global Financial Crisis"', *International Arbitration Mediation and Dispute Management* 75 (2009): 419.

[13] The earlier etymology of the term 'no-man's land' is a little more gruesome. It was first used for a wasteland outside of London where the rotting bodies of hanged, impaled, and beheaded criminals were left as a warning to potential lawbreakers. *Chroniques de Londres: depuis l'an 44 Hen. III. jusqu'à l'an 17 Edw. III*, ed. G. J. Aungier (Camden Society, 1844), 56. This area came to be known as *no-man's land* since no one would seek to claim this land for ownership. Only later did it obtain its modern connotation.

[14] See Ronald A. Brand, 'Professional Responsibility in a Transnational Transactions Practice', *Journal of Law and Commerce* 17 (1998): 335 (noting that a bar opinion permits parties to international arbitration to be represented by non-state-licensed attorneys); Toby S. Myerson, 'The Japanese System', in *Rights Liability and Ethics in International Legal Practice*, ed. Mary C. Daly & Roger J. Goebel (1994), 69 (noting that even traditionally restrictive Japanese law changed recently to permit non-Japanese-licensed attorneys to engage in international arbitrations in Japan).

[15] See Detlev Vagts, 'International Legal Ethics and Professional Responsibility', *American Society of International Law Proceedings* 92 (1998): 378 (noting that it is unclear whether the Model Rules apply in arbitration proceedings); Peter C. Thomas, 'Disqualifying Lawyers in Arbitrations: Do the Arbitrators Play Any Proper Role?', *American Review of International Arbitration* 1 (1990): 562 ('When an English barrister suggested a couple of years ago that an advocate in a private commercial arbitration was not bound by the same duties owed by counsel to a court, the immediate (near unanimous) response was shock and indignation.').

[16] A 'race to the bottom' is when, because of fierce competition between nations over a particular area of trade and production, countries are given increased incentive to dismantle currently existing regulatory standards. See e.g., *Louis K. Liggett Co. v. Lee*, 288 U.S. 517, 557-60 (1933) (Brandeis, J., dissenting) (describing a race to the bottom of US state corporate laws).

[17] The most prominent examples are Belgium (which prohibits national courts completely from overturning any international arbitral award even in the instance of arbitrator fraud) and Switzerland (which permits parties to elect such prohibition by agreement). See William W. Park, 'National Law and Commercial Justice: Safeguarding Procedural Integrity in International Arbitration', *Tulane Law Review*63 (1989): 649.

[18] See Catherine A. Rogers, 'Fit and Function in Legal Ethics: Developing A Code of Conduct for International Arbitration', *Michigan Journal of International Law* 23 (2002): 342; Ivo G. Caytas, *Transnational Legal Practice: Conflicts in Professional Responsibility* (1992), 3 ('[I]t is fairly rare that misconduct "abroad" results in all too serious consequences 'at home' (examples notwithstanding) … [S] anctions remain essentially local').

[19] K.L.K. Miller, 'Zip to Nil?: A Comparison of American and English Lawyers' Standards of Professional Conduct', *ALI-ABA* CA32 (1995): 199-223, 204.

[20] See, e.g., Brian Cooper, 'Ethics for Party Representatives in International Commercial Arbitration: Developing a Standard for Witness Preparation', *Georgetown Journal of Legal Ethics* 22 (2009), 781 ('The United States and Germany, in their respective legal traditions, offer what might be the two extremes regarding the rules related to witness preparation in national courts.').

[21] Klaus-Peter Berger, 'Evidentiary Privileges: Best Practice Standards versus/and Arbitral Discretion', *Arbitration International*22 (2006): 501.

[22] See Charles N. Brower & Stephan W. Schill, 'Regulating Counsel Conduct before International Arbitral Tribunals', in *Making Transnational Law Work in the Global Economy: Essays in Honour of Detlev Vagts*, ed. Peter H. F. Bekker et al. (2010), 491.

[23] Vera van Houtte et al., 'What's New in European Arbitration?', *Dispute Resolution Journal* 62 (January 2008): 12 (describing findings by Swiss federal tribunal that drawing negative inferences for a party's refusal to produce documents was an element of the arbitrator's assessment of the evidence); 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*, ed. Catherine A. Rogers & Roger P. Alford (2009), 269.

[24] See Brower & Schill, *supra* note 22, at 491; see also Stephan Schill, 'Arbitration Risk and Effective Compliance – Cost-Shifting in Investment Treaty Arbitration', *Journal of World Investment & Trade* 7 (2006), 653.

[25] This example has been identified as a recurring problem in international tribunals. See Detlev F. Vagts, 'The International Legal Profession: A Need for More Governance?',*American Journal of International Law* 90 (1996): 255, 260.

[26] See Hans Van Houtte, 'Counsel-Witness Relations and Professional Misconduct in Civil Law Systems', *Arbitration International* 19 (2003): 461 (referring to certain aspects of US practices of witness preparation as 'daring' others as 'flagrant misbehaviour').

[27] See Rogers, 'Fit and Function', *infra* note 18, at 396; M. McCary, 'Bridging Ethical Borders: International Legal Ethics with an Islamic Perspective', *Texas International Law Journal*35 (2000): 294.

[28] See The Declaration on the Principles of Professional Conduct of the Bars and Law Societies of the European Community (1977) [Perugia Principles]. The Perugia Principles contained only eight brief ethical pronouncements, which have been described as an obscure 'discourse on the function of a lawyer in society' and 'the nature of the rules of professional conduct'. Mary C. Daly, 'The Dichotomy Between Standards and Rules: A New Way of Understanding the Differences in Perceptions of Lawyer Codes of Conduct by U.S. and Foreign Lawyers', *Vanderbilt Journal of Transnational Law* 32 (1999): 1159.

[29] The 'Commentary on the General Principles of Conduct for the Legal Profession 2006' was circulated to all IBA member organizations in June 2010 for consultation. The resulting contributions and suggested amendments were discussed in Vancouver by the BIC Policy Committee, and a further revision is now being made. A first draft was to be submitted to the IBA Council for consideration in May 2011. See IBA, Bar Issues Commission Projects, <http://www.ibanet.org/barassociations/BIC_projects.aspx>, 29 June 2011; for the Principles, see Appendix I.

[30] For a detailed survey of reform efforts to date, see Laurel S. Terry, 'A "How To" Guide for Incorporating Global and Comparative Perspectives into the Required Professional Responsibility Course', *Saint Louis University Law Journal* 51 (2007): 1140-1146; for the Principles, see Appendix III.

[31] For example, the Statement of Core Principles provides such broad admonitions as: 'An independent legal profession, without which there is no rule of law or freedom for the people.' While obviously an important principle, absent a meaningful definition of what constitutes 'independent' or 'rule of law', the general principle provides little meaningful guidance. See H. W. Arthurs, 'A Global Code of Ethics for the Transnational Legal Field', *Legal Ethics* 2 (1999): 59 (discussing the difficulties of creating a universal or global code of ethics and criticizing such codes as ineffective).

[32] *Charter of Core Principles of the European Legal Profession and Code of Conduct for European Lawyers* (2006), [*CCBE Code of Conduct*],<http://www.ccbe.org/fileadmin/user_upload/NTCdocument/EN_Code_of_conductp1_1249308118.pd

[33] See Laurel S. Terry, 'An Introduction to the European Community's Legal Ethics Part I: An Analysis of the CCBE Code of Conduct', *Georgetown Journal of Legal Ethics* 7 (1993): 36-37.

[34] *Available at* <http://www.ila-hq.org/en/Others/document-summary.cfm/docid/BC922372-0E35-4E46-8DF149F0F5920E02>, 21 September 2011; see Appendix II.

[35] Article 2.4 of the CCBE Code provides: 'When practising cross-border, a lawyer from another Member State may be bound to comply with the professional rules of the Host Member State. Lawyers have a duty to inform themselves as to the rules which will affect them in the performance of any particular activity.' *CCBE Code of Conduct,* Art. 2.4.

[36] <http://www.ibanet.org/Article/Detail.aspx?ArticleUid=610bbf6e-cf02-45ae-8c3a-70dfdb2274a5>.

[37] <http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx#partyrep>. The change in title from the original name of the Task Force (which referenced 'Counsel Ethics') is in recognition that not all persons who represent parties in international arbitration are licensed attorneys. The fact that some representatives are not licensed anywhere, and hence subject to any rules of professional conduct, is yet another reason why internationally applicable guidelines are needed, for the guidelines, see Appendix V.

[38] <http://www.ibanet.org/Article/Detail.aspx?ArticleUid=610bbf6e-cf02-45ae-8c3a-70dfdb2274a5>.

[39] *Ibid*.

[40] See Guidelines 1 and 3.

[41] See Guidelines 12-17.

[42] The IBA is a professional association, not a bar association in the technical sense of the term. Accordingly, it cannot 'promulgate' rules in the formal sense of the term. Thus, while the Task Force's standards will provide essential guidance, and will be the first serious work aimed directly at international arbitration, they are unlikely to be the last word on the subject.

[43] See L. Malintoppi, 'How May Investment Tribunals Cope With and Sanction Guerrilla Tactics of the Parties/their Counsel?', *Transnational Dispute Management* 7 (2010), <www.transnationaldisputemanagement.com> para. 58 (expressing that the adoption of more non-binding codes, guidelines or new principles might risk making international legal ethics more complicated than they need be).

[44] Scholars and commentators often divide the world into systems deriving from the 'common law' and 'civil law' traditions. While a useful heuristic, these terms are very rough generalizations, which operate more as 'ideal types' (to borrow Mirjian Damaska's terminology) than nuanced descriptions of actual, existing legal systems. Mirjan R. Damaska, *The Faces of Justice and State Authority* (1986), 4 n.4. These categories can be misleading, however, because they suggest a degree of uniformity within each tradition that is not often present, and they fail to account for the fact that most systems of the world do not fit neatly into one category or other. In the context of witness communications, most national ethical rules in Latin American do not prohibit pre-testimonial communications, even if those countries are usually characterized as being part of the civil law tradition. On the recent spread of 'mixed' systems to Latin America, see Máximo Langer, 'Revolution in Latin American Criminal Procedure: Diffusion of Legal Ideas from the Periphery', *American Journal of Comparative Law* 55 (2007): 617.

[45] *IBA Rules on the Taking Evidence in International Arbitration* Art. 4.3 (29 May 2010) ('*IBA R. Evid.*'). Although it is designated to be a rule of evidence, its use of the word 'improper' reveals that it is effectively a rule aimed at finessing the ethical issue.

[46] Several national legal systems have similarly removed these prohibitions. See also *Bulletin du Bâttonnier* n. 9 du 4 Mars 2008 (France); Van Houtte, *supra* note 26, at 461 (citing Articles 5, 16.5, and 16.8 of the *Deontological Code of the Brussels Bar*). Other jurisdictions, such as Italy, have not adopted such formal exemptions, and informal interviews suggest that not all attorneys regard national ethical prohibitions as excused when attorneys are engaged in international arbitration proceedings. M. Rubino Sammartano, 'Italy', in *Practitioner's Handbook on International Arbitration*, ed. F.B. Weigand (2002).

[47] Lucy Reed & Jonathan Sutcliffe, 'The "Americanization" of International Arbitration?', *Mealey's International Arbitration Report* 16-4 (2001): 11 (suggesting that while some consensus has emerged about the possibility of preliminary communication with witnesses, there remains conflict as to the extent permitted).

[48] Peter Ashford, 'Rule Changes Affecting the International Arbitration Community', *American Review of International Arbitration* 22 (2011): 87, 101.

[49] In the United States, while the US has the most permissive rules, some forms of witness preparation or 'coaching' is subject to serious critiques even within the US system. See Roberta K. Flowers, 'Witness Preparation: Regulating the Profession's "Dirty Little Secret"', *Hastings Constitutional Law Quarterly* 38(2011): 1007.

[50] While US attorneys have wide latitude to interview witnesses, there are some important limitations, particularly with respect to former employees of opposing parties who may have confidential information. See Habib Hasrullah & Carolyn J. Fairless, 'Interviews with Former Employees: Strategies and Pitfalls', *Practical Litigator* 16, no. 2 (2005): 47; DC Bar Opinion 287, 'Ex Parte Contact with Former Employees of Party-Opponents', *available at* <http://www.dcbar.org/for_lawyers/ethics/legal_ethics/opinions/opinion287.cfm> (last visited 23 July 2013). See also James Castello & Catherine Rogers, 'Q&A: Is Arbitration an Ethical Wasteland?', *Global Arbitration Review* (17 June 2009).

[51] Van Houtte, *supra* note 26, at 460.

[52] In reality, the obligation to disclose harmful documents is implicit in general obligations to comply with procedures regarding document disclosure. It only becomes identified as an independent obligation when it is viewed in comparison to other systems (discussed below) in which counsel do not have an obligation to disclose documents that are contrary to a client's interests.

[53] *Civil Procedure Rules*, Rule 31.10.6 (England, 1998). Similarly, Article IX(15) of the Canadian Code of Professional Conduct requires that a lawyer 'explain to the client the necessity of making full disclosure of all documents relating to any matter in issue' and 'assist the client in fulfilling the obligation to make full disclosure'. *Canadian Bar Association, Code of Professional Conduct*, Art. IX (15).

[54] See *Play Visions, Inc. v. Dollar Tree Stores, Inc.*, 2011 WL 2292326 (W.D. Wash. 2011) (holding counsel 'jointly and severally' liable with his client for discovery sanctions where counsel 'fail[ed] to assist and guide his client's production of discovery responses').

[55] See Jayanth K. Krishnan, 'Outsourcing and the Globalizing Legal Profession', *William & Mary Law Review* 48 (2007): 2189, 2205-12 (discussing the benefits of outsourcing legal work to India). While India is currently the largest market of legal outsourcing, other countries are trying to get a piece of the outsourced legal services market. Mimi Samuel & Laurel Currie Oates, 'From Oppression to Outsourcing: New Opportunities for Uganda's Growing Number of Attorneys in Today's Flattening World', *Seattle Journal for Social* Justice 4 (2006): 835, 856-57.

[56] For analysis of the issue by US bar authorities, see *Florida Bar Association Professional Ethics Opinion* 07-2 (2008), *available at*

<http://www.floridabar.org/tfb/tfbetopin.nsf/SearchView/ETHICS,+OPINION+07-2?open document> (last visited 25 July 2013) (stating that when outsourcing, lawyers must be mindful of ethical obligations related to the unlicensed practice of law, supervision of nonlawyers, conflicts of interest, confidentiality, billing, and disclosure of sensitive information of opposing parties and third parties); *New York City Bar Association Committee on Professional and Judicial Ethics*, 'Outsourcing Legal Support Services Overseas, Avoiding Aiding a Non-Lawyer in the Unauthorized Practice of Law, Supervision of Non-Lawyers, Competent Representation, Preserving Client Confidences and Secrets, Conflicts Checking, Appropriate Billing, Client Consent', Formal Op. 2006-3 (2006), *available at* <http://www.nycbar.org/ethics/ethics-opinions-local/2006-opinions/807-outsourcing-legal-support-services-overseas> (last visited 25 July 2013) (surveying the main ethical challenges of outsourcing and providing guidance on US attorneys' compliance with ethical obligations in relation to outsourced work); *American Bar Association Standing Committee on Ethics & Professional Responsibility*, 'Lawyer's Obligations When Outsourcing Legal and Nonlegal Support Services', Formal Op. 08-451 (2008) (noting that the ABA Model Rules hold the outsourcing attorney responsible for ensuring that the other lawyer is competent, professional, and ethical). For an extended analysis of the ethical issues raised in these opinions and more generally in offshoring discovery and litigation document management, see *generally*, Joshua A. Bachrach, 'Offshore Outsourcing and Risk Management: Proposing Prospective Limitation of Liability Agreements Under Model Rule 1.8 (h)', *Georgetown Journal of Legal Ethics* 21 (2008): 631; Mary C. Daly & Carole Silver, 'Flattening The World of Legal Services? The Ethical and Liability Minefields of Offshoring Legal and Law-Related Services', *Georgetown Journal of Legal Ethics* 38 (2007): 401; Keith Woffinden, 'Surfing the Next Wave of Outsourcing: The Ethics of Sending Domestic Legal Work to Foreign Countries Under New York City Opinion 2006-3', *Brigham Young University Law Review* 2007 (2007): 483, 502; Deborah Roach Gaut & Barbara Crutchfield George, 'Offshore Outsourcing to India by U.S. and E.U. Companies: Legal and Cross-Cultural Issues that Affect Data Privacy Regulation in Business Legal Outsourcing', *UC Davis Business Law* Journal 6 (2006): 13, 26.

[57] Ethical rules in England, Australia and Canada, all require that an attorney receiving inadvertently produced confidential documents return or destroy the documents, generally prohibit them from using such documents, and sometimes require that the opposing counsel be notified. For example, Rules 31.1-31.2 of the *Australian Solicitors Conduct Rules* require 'a solicitor to whom material known or reasonably suspected to be confidential is disclosed … must not use the material and must … return, destroy or delete the material (as appropriate) immediately upon becoming aware that disclosure was inadvertent', take steps to prevent misuse of the material, and in certain circumstances notify opposing counsel.

[58] Bernardo M. Cremades, 'Overcoming the Clash of Legal Cultures: The Role of Interactive Arbitration', in *Conflicting Legal Cultures in Commercial Arbitration: Old Issues and New Trends*, eds. Stefan N. Frommel & Barry A.K. Rider (1999), 147, 161 (suggesting that arbitrators must distinguish the cultural background of parties in order to effectively preside over proceedings to which parties come with differing approaches to pre-testimonial communication with witnesses).

[59] Peter Leaver & Henry Forbes Smith, 'The British Perspective and Practice of Advocacy', in *The Art of Advocacy in International Arbitration*, eds. Doak Bishop & Edward G. Kehoe, 2d ed. (2010), 492 ('International arbitration often follows an approach by which parties may request production of categories of documents where this [level of disclosure] is proportionate to the case'); Horacio

Grigera Naon, 'Document Production in International Commercial Arbitration: a Latin American Perspective', *ICC Special Supplement* (2006), 15.

[60] Alan Scott Rau & Edward F. Sherman, 'Tradition and Innovation in International Arbitration Procedure', *Texas International Law Journal* 30 (1995): 89, 103 ('International arbitrators, in their discretion, often order discovery of critical documents, but generally will not allow broad US-style discovery requests').

[61] Bernardo M. Cremedas, 'Overcoming the Clash of Legal Cultures: The Role of Interactive Arbitration', *Journal of International Arbitration* 14 (1998): 164, 166.

[62] See, e.g., Steven A. Hammond, 'Spoliation in International Arbitration: Is it Time to Reconsider the "Dirty Wars" of the International Arbitral Process?', *Dispute Resolution International* 3:1 (2009): 5, 10 (decrying the 'negligent, reckless or willful destruction of evidence' in international arbitration).

[63] See *ibid.* at 10 ('[I]t is easy to see that the need for dispute resolution systems to protect against the willful destruction or withholding of evidence springs from the same policies that underlie these universal ethical norms of truthfulness and fairness').

[64] John Toulmin, 'A Worldwide Common Code of Professional Ethics?', *Fordham International Law Journal* 15 (1991/1992): 673, 681 ('[T]he rules of professional conduct in the United States relating to conflicts of interest and imputed disqualification are among the strictest in the world').

[65] *Fraport*, para. 36.

[66] *Fraport AG Frankfurt Airport Servs. Worldwide v. Philippines,* ICSID Case No. ARB/03/25*, Annulment Proceeding, Decision on Application for Disqualification of Counsel,* 18 September 2008, 18 para. 39.

[67] *Ibid.* at paras. 41, 54-55.

[68] *Ibid.* at paras. 38-39.

[69] *Ibid.* at para. 37.

[70] Mary C. Daly, 'The Cultural, Ethical and Legal Challenges in Lawyering for a Global Organization', *Emory Law Journal* 46 (1997): 1057, 1092.

[71] See Terry, *supra* note 33, at 37; Carsten R. Eggers & Tobias Trautner, 'An Exploration of the Difference Between the American Notion of "Attorney-Client Privilege" and the Obligations of "Professional Secrecy" in Germany', *Spring International Law Practicum* 7 (1994): 23.

[72] Some civil law systems do treat in-house counsel as lawyers, and accordingly impose obligations of confidentiality and make their communications subject to privileges. The European Court of Justice has determined, however, that at European Union level, in-house counsel will only be afforded those privileges recognized by all Member States. See Case C-550/07 P, *Akzo Nobel Chem. Ltd. v. Eur. Comm'n.,* 2010 ECR I-08301; Case 155/79, *AM & S Eur. Ltd. v. Comm'n,* 1982 ECR 01575; David S. Jones, 'The Privilege Stops at the Border, Even If A Communication Keeps Going', *South Carolina Journal of International Law & Business* 8 (2012): 297. Since not all Member States treat in-house counsel as attorneys, none can claim the privilege in proceedings at the European Union level.

[73] Triplett Mackintosh & Kristen M. Angus, 'Conflict in Confidentiality: How E.U. Laws Leave In-House Counsel Outside the Privilege', *International Law*38 (2004): 35.

[74] Take, for example, a lawyer who is licensed in both New Jersey and the District of Columbia and who discovers that a client has committed or intends to commit fraud. See Malini Majumdar, 'Ethics in the International Arena: The Need for Clarification', *Georgetown Journal of Legal Ethics* 8 (1995): 439-440. Under the rules of the District of Columbia, our hapless attorney is required to remain

silent, while the rules of New Jersey compel her to reveal the client's fraud. The choice-of-law provisions in Model Rule 8.5 attempt to resolve the problem, but even with regard to domestic practice, its solution has been called unsatisfactory and has prompted calls for national ethical rules that will apply in all jurisdictions. See Mary C. Daly, 'Resolving Ethical Conflicts in Multinational Practice – Is Model Rule 8.5 the Answer, an Answer or No Answer at All?', *Southern Texas Law Review* 36 (1995): 715, 720.

[75] John Leubsdorf, *Man in His Original Dignity: Legal Ethics in France* (2001), 20, 23 ('Even today, the English bar does not require its members to communicate with clients or follow their instructions.').

[76] Laurel S. Terry, 'An Introduction to the European Community's Legal Ethics Part 1: An Analysis of the CCBE Code of Conduct', *Georgetown Journal of Legal* Ethics 7 (1993): 1, 85.

[77] See Ivo G. Caytas, *Transnational Legal Practice: Conflicts in Professional Responsibility* (1992), 3 (surmising that 'transnational practice is most threatened by conflicting mandatory norms requesting or prohibiting with equal authority and determination [the] disclosure of client-related and therefore presumably confidential information'). See also *The Declaration of on the Principles of Professional Conduct of the Bars and Law Societies of the European Community* (1977) ('While there can be no doubt as to the essential principle of the duty of confidentiality, the Consultative Committee has found that there are significant differences between member countries as to the precise extent of lawyer's rights and duties.').

[78] See Terry, *supra* note 33, at 36 n.159, 37-38 n.158 (noting that in many European countries '*ex parte* contact with the court on "nonfundamental" issues is not prohibited').

[79] See, e.g., Charles F. Wolfram, *Modern Legal Ethics* (1986), section 11.3.3, 605-06.

[80] *Compare* Alan Redfern & Martin Hunter,*Law and Practice of International Commercial Arbitration* (1991), 225-26 (noting that 'it is not unusual for there to be discussions with just one of the parties in respect of procedural matters such as availability for future hearings'), *and Code of Ethics for Arbitrators in Commercial Disputes* Canons III(B)(I) (American Arbitration Ass'n 1977) (permitting ex parte communications with any member of the arbitral tribunal 'concerning such matters as setting the time and place of hearings or making other arrangements for the conduct of the proceedings'), *and Ibid*. Canon VII (permitting ex parte communications by party-appointed arbitrators as long as general disclosure is made), *with Rules of Ethics* r. 5.3 (International Bar Ass'n 2001) (prohibiting 'any unilateral communications regarding the case'). For extended discussion of these rules, see W. Lawrence Craig et al., *International Chamber of Commerce Arbitration*, 3d ed. (2000), section 13.07; M. Scott Donahey, 'The Independence and Neutrality of Arbitrators', *Journal of International Arbitration* 9(4) (1992): 31, 41-42.

[81] See, e.g., *Lifecare Int'l, Inc. v. CD Med., Inc.*, 68 F.3d 429 (11th Cir. 1995); *Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.*, 10 F.3d 753 (11th Cir. 1993) (finding no misconduct despite finding that party arbitrator met with representatives and witnesses of appointing party before arbitration to plan strategy). These cases involved domestic US arbitrations, which mean that these objections did not arise because of conflicting cultural perspectives on ex parte communication, but were challenges to the inherent fairness of proceedings when parties are communicating with arbitrators.

[82] Jun Ge, 'Mediation, Arbitration and Litigation: Dispute Resolution in the People's Republic of China', *UCLA Pacific Basin Law Journal* 15 (1996): 122, 127 (noting that the Chinese Civil Procedure Law requires judges to conduct mediation if the parties do not object).

This approach translates into arbitration rules in China and other Asian countries. See e.g., *China International Economic and Trade Arbitration Committee Arbitration Rules*, Arts. 46, 47 (1994); *Japan Commercial Arbitration Association Commercial Arbitration Rules*, r. 39 (1992); *Hong Kong Arbitration Ordinance*ss 2(A), 2(B), ch. 341, *Laws of Hong Kong*(H.K.), *cited in* Philip J. McConnaughay, 'Rethinking the Role of Law and Contracts in East-West Commercial Relationships', *Virginia Journal of International Law* 41 (2001): 427, 452 n.102.

[83] Detlev Vagts, 'International Legal Ethics and Professional Responsibility', *American Society of International Law Proceedings* 92 (1998): 378, 379 (reporting a panel discussion of a hypothetical case involving European and American lawyers in an arbitration in Geneva that was governed by Swiss law); Ambassador Malcolm Wilkey, 'The Practicalities of Cross-Cultural Arbitration', in *Conflicting Legal Cultures in Commercial Arbitration: Old Issues and New Trends*, ed. Stefan N. Frommel & Barry A.K. Rider (1999), 79, 86 (describing differing approaches to ex parte communication as a problem in international arbitration that must be overcome).

[84] Lawrence S. Schaner & Thomas G. Appleman, *The Rise of 3rd-Party Litigation Funding*, Law 360, 21 Jan. 2011, *available at* <http://www.jenner.com/files/tbl_s20Publications%5CRelatedDocumentsPDFs1252%5C3476%5CSchaner_Appleman_The_Rise_Of_3rd_Party_Litigation_Funding_Law360.pdf>.

[85] See *Executive summary and overview of the national report for Sweden* (2004), 4, *available at* <http://ec.europa.eu/competition/antitrust/actionsdamages/executive_summaries/sweden_en.pdf> (last visited 26 July 2013) (Within the framework of class action, the court may rule that contingency fees are set.).

[86] See Lee Gyooho, 'Cost and Fee Allocation Rules in Korean Civil Procedure', *Journal of Korean Law*10 (2010): 65, 85. In 2007, the Korean legislature rejected a bill that would have restricted contingency fees in criminal cases. See *Ibid*.

[87] See Kyung Hwan Baik & In-Gyu Kim, 'Contingent Fees Versus Legal Expenses Insurance', *International Review of Law & Economics* 27 (2007): 351, 352 n.1; W. Kent Davis, 'The International View of Attorney Fees in Civil Suits: Why Is the United States the "Odd Man Out" in How It Pays Its Lawyers?', *Arizona Journal of International & Comparative Law*16 (1999): 361, 383.

[88] See, e.g., *Liberty Mut. Ins. Co. v. Ameta & Co.*, 564 F.2d 1097, 1105 (4th Cir. 1977) ('[S]ound public policy favor[s] the contingent fee as a method for those less financially advantaged to vindicate their substantive rights'.).

[89] See *Bundesrechtsanwaltsordnung* [Federal Lawyers' Act], 12 June 2011, section 49b(2) (Ger.), *available at* <http://www.gesetze-im-internet.de/bundesrecht/brao/gesamt.pdf> (last visited 26 July 2013); *Gesetz zur Neuregelung des Verbots der Vereinbarung von Erfolgshonoraren* [Law Amending the Prohibition of the Agreement of Contingency Fees], 12 June 2008, BGBl. I 1000, *available at* <http://www.buzer.de/gesetz/8247/index.htm> (last visited 26 July 2013); Gerhard Wagner, 'Litigation Costs and Their Recovery: The German Experience', *Civil Justice Quarterly* 28 (2009): 367, 378-79 ('Contingency fees are permissible if, and only if, the client would otherwise be deterred from asserting his rights due to his financial situation and his attitude towards risk. Like any other agreement on remuneration which derogates from the statutory fee schedule, the agreement of a contingency fee must meet strict formal requirements'.).

[90] See K.G. Druker,*The Law of Contingency Fees in South Africa* (2007) (Contingency fees have been allowed in South Africa since 1997).

[91] See Ed Cartledge, 'Feast or Famine', *The European Lawyer* 29 (2003): 46. 47 ('The Conditional Fee Agreements Order 1998 and

the Access to Justice Act 1999, section 27, extend [contingent fee] application to most cases except criminal work and family disputes involving the welfare of children.').

[92] See Carlos Gómez Ligüerre & Carlos Alb. Ruiz García, 'Lawyers' Fees, Competition Law and Contingent Fees', *InDret*1 (2009), *available at* <http://ssrn.com/abstract=1368656> (last visited 26 July 2013) ('[O]n November 4th, 2008, the Spanish Supreme Court … quashed the prohibition [against contingency fees] under the reasoning that it affected competition by restricting the attorney and its client to freely set the price of the legal assistance and, therefore, imposing indirectly a minimum fee').

[93] See Catherine A. Rogers, 'Fit and Function', *supra* note 18, at 341, 366, n.116.

[94] See B.M. Cremades, Jr., 'Third Party Litigation Funding: Investing in Arbitration', *Transnational Dispute Management* 8(4) (2011): 2, *available at* <http://www.transnational-dispute-management.com.ezaccess.libraries.psu.edu/article.asp?key=1743>.

[95] See Ian Meredith & Sarah Aspinall, 'Do Alternative Fee Arrangements Have a Place in International Arbitration?', *Arbitration*72 (2006): 22.

[96] See Nicolas C. Ulmer, 'A Comment on "The 'Americanization' of International Arbitration?"', *Mealey's International Arbitration Report* 16-6 (2001): 19, 24 (quoting Stephen R. Bond, 'Meeting the Challenges of a Changing World', *Journal of International Arbitration* 3(3) (1986): 5, 6).

[97] See *ibid.*; Yves Dezalay & Bryant G. Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (1996) 18-21.

[98] J.D. Fine, 'Continuum or Chasm?: Can West Meet East?', *Journal of International Arbitration* 6(4) (1989): 27, 32.

[99] See *Ibid.* at 34.

[100] John Burkoff, 'Criminal Defense Ethics: Scope of Representation: Zealousness and Overzealousness', *Criminal Defense Ethics*, 2d ed. (2002), section 5:2.

[101] Tom Lininger, 'Bearing the Cross', *Fordham Law Review* 74 (2005): 1353.

[102] The Model Rules of Professional Conduct are a set of model rules promulgated and revised by the American Bar Association for adoption, often with modification, by state bar authorities.

[103] *Federal Rule of Civil Procedure* 11(b) forces attorneys to certify that all claims, defences and other legal contentions are warranted by existing law or by a 'nonfrivolous argument'. Georgene Vairo, 'Rule 11 and the Profession', *Fordham L. Rev.* 67 (1998): 589, 600 (showing how circuit courts have relied upon Rule 11 to attack unprofessional conduct); S. Burbank (ed.), 'American Judicature Society', *Report of the Third Circuit Task Force on Federal Rule of Civil Procedure* 11 (1989): 75-77 (citing successes of Rule 11 in curbing frivolous filings in the Third Circuit); Thomas E. Willging, 'The Rule 11 Sanctioning Process', *Federal Judicial Ctr.* (1988), 174 -75 (concluding Rule 11 changed the role of the attorney by establishing a threshold obligation to determine a factual basis and a plausible, arguable legal theory before proceeding).

[104] Nicholas C. Ulmer, 'A Comment on "The 'Americanization' of International Arbitration?"' *Mealey's International Arbitration Report* 16-6 (2001): 19.

[105] This rule applies in four EC Member States: Italy, France, Belgium and Luxembourg. Sally R. Weaver, 'Client Confidences in Disputes Between In-House Attorneys and Their Employer-Clients: Much Ado About Nothing – Or Something?', *UC Davis Law Review* 30 (1997): 483, 527.

[106] Virginia G. Maurer et al., 'Attorney Fee Arrangements: The U.S. and Western European Perspectives', *Northwestern Journal of International Law and Business* 19 (1999): 272, 320.

[107] Doak Bishop (ed.), *The Art Of Advocacy in International Arbitration* (Juris Publishing, Inc., 2004), 445.

[108] See *Ibid.* at 444.

[109] See Lucy Reed, 'Tools Available to the Arbitral Tribunal', Chapter 2, Section §2.04[A][2][c].

[110] *Norman Gabay v. Islamic Republic of Iran*, Case No. 771, Award (10 July 1991), 27 Iran-US C.T.R. (1992), 40-48. Notably, this decision was by a single Chamber of the Tribunal, which was arguably constrained by other areas of the Tribunal's jurisprudence that limit the inherent jurisdictional powers.

[111] A Court of Appeal in the District of Columbia held that arbitrators have authority to impose sanctions, including costs and fees, for misconduct such as discovery abuses. See *Pisciotta v. Shearson Lehman Bros, Inc.*, 629 A.2d 520 (D.C. 1993). Following the District of Columbia's lead and arguing by analogy to statutory judicial powers, a Rhode Island court found that arbitrators possess the power to award attorneys' fees for discovery misconduct. See *Terrace Group v. Vermont Castings, Inc.*, 753 A.2d 350 (R.I. 2000). This decision may have more limited application because it was based on a Vermont statute that expressly permits an award of attorneys' fees for bad-faith conduct.

[112] Only a few New York cases have squarely addressed the issue of arbitrator power to rule on issues of ethical misconduct. See *Bidermann Indus. Licensing, Inc. v. Avmar N.V.*, 173 A.D.2d 401, 570 N.Y.S.2d 33 (1991) (finding that issue of attorney disqualification involves both interpretation and application of attorney ethical codes as well as client's right to counsel and therefore cannot be left to determination of arbitrators); In re *Arbitration Between Erdheim & Selkowe*, 51 A.2d 705 (1976) ('[W]e find nothing in the record before us authorizing or empowering privately chosen arbitration board to censure members of the academy; and the power to censure attorneys as members of Bar is reserved to the Appellate Division of the Supreme Court in each department'.). Other cases have considered related matters, such as in which court motions for disqualification from an arbitration should be brought and whether attorney disqualification is a matter that a generally worded arbitration agreement can be interpreted as submitting to the arbitral tribunal. See In re *Erlanger & Erlanger*, 20 N.Y.2d 778 (N.Y. Ct. App. 1967) (holding that 'jurisdiction to discipline an attorney for misconduct is vested exclusively in the Appellate Division' and that motions for disqualification are matter to be resolved by court in which matter is pending, as opposed to other court); In re *Arbitration Between R3 Aerospace & Marshall of Cambridge Aerospace Ltd.*, 927 F.Supp. 121 (S.D.N.Y. 1996) (finding that issue of attorney disqualification from representation in arbitral proceedings is not arbitrable and does not 'relate' to arbitration agreement such that there was no federal jurisdiction under the New York Convention for dispute concerning disqualification of counsel in arbitration).

[113] The one partial exception may be the arbitral rules for the Center for Public Resources (CPR), which empower tribunals to 'impose any remedy it deems just, including an award on default, wherever a party materially fails to comply with the rules'. See Robert H. Smit & Nicholas J. Shaw, 'The Center for Public Resources Rules for Non-Administered Arbitration of International Disputes: A Critical and Comparative Commentary', *American Review of International Arbitration*8 (1997): 275. Notably, however, the power contemplated by the CPR rules seems to extend only over the parties, not their attorneys.

[114] Brower & Schill, *supra* note 22, at 495; see also Vagts, *supra* note 15, at 255 (observing that '[i]t appears that, while arbitrators have no authority to suspend or disbar attorneys, they could disqualify attorneys from appearing before them and could impose sanctions for attorney misbehavior when it came to assessing the costs of the arbitration').

[115] J. Paulsson, 'Standards of Conduct for Counsel in International Arbitration', *American Review of International Arbitration* 3 (1992): 214. See also W. Laurence Craig, William K. Park & Jan Paulsson,*International Chamber of Commerce Arbitration*, 3rd ed. (Oxford University Press, 2001), section 8.07 (concluding without explanation that arbitrators do not have the power to hold parties in contempt); *but* see Thomas E. Carbonneau, 'National Law and the "Judicialization" of Arbitration: Manifest Destiny, Manifest Disregard or Manifest Error', in *International Arbitration in the 21st Century: Towards 'Judicialization' and Uniformity?* ed. Richard B. Lillich & Charles N. Brower (1993), 129 (suggesting that arbitrators possess the inherent 'authority to sanction a party' for refusing to cooperate in good faith with the arbitral proceeding).

[116] See David Elward, 'ICC beats its chest over "guerrilla" tactics in arbitration', *Global Arbitration Review*, 13 August 2010 (quoting Philippe Cavalieros, head of international arbitration at French car company Renault as saying, 'The ICC system is quite strong, but there should be strengthened systems to apportion sanctions and costs where such tactics arise'.).

[117] *Pope & Talbot v. Canada*, UNCITRAL/NAFTA, Decision on Confidentiality of 27 September 2000, para. 6.

[118] *Ibid.* para. 8.

[119] *Ibid.* para. 13.

[120] *Ibid.* para. 12.

[121] See International Criminal Tribunal for the Former Yugoslavia, Code of Professional Conduct for Counsel Before the Tribunal, Art. 47 (22 July 2009), <http://www.icty.org/x/file/Legal% 20Library/Defence/defence_code_of_conduct_july2009_en.pdf>; International Criminal Court, Code of Professional Conduct for Counsel, Art. 42 (2 December 2005), <http://www.icc-cpi.int/NR/rdonlyres/BD397ECF-8CA8-44EF-92C6-AB4BEBD55BE2/140121/ICCASP432Res1_English.pdf>.

[122] Charles H. Brower, II, 'The Functions and Limits of Arbitration and Judicial Settlement under Private and Public International Law', *Duke Journal of International and Comparative Law* 18 (2008): 265-291.

[123] For guidance of how tribunals can manage proceedings to minimize attorney misconduct and its effects, see Stephan Wilske, 'Arbitration Guerrillas', *supra* note 1, at 320-331; Horvath, 'Guerrilla Tactics', *supra* note 1, at 303-311.

[124] Tom Toulson, 'Penalty recommended for lawyer accused of bribery in ICSID Case', *Global Arbitration Review*, 30 April 2010 (reporting that counsel voluntarily resigned from South African Bar Councils when summoned to disciplinary proceedings for attempting to secure a bribe in exchange for persuading his client to settle on favourable terms). Of course, not all allegations are made based on legitimate and well-founded concerns about misconduct. See Alison Ross & Tom Toulson, 'Freshfields facts complaint in US court', *Global Arbitration Review*, 31 March 2010.

[125] See Wilske, 'Arbitration Guerrillas', *supra* note 1, at 331-332.

[126] See *supra* notes 21-26, and accompanying text.

[127] *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award of 16 September 2003, paras. 24.2-24.7. Similarly, in *Link Trading Joint Stock Company v. Department for Customs Control of the Republic of Moldova*, UNCITRAL, Final Award of 18 April 2002, paras. 93 et seq., the cost decision requiring Claimant to bear the

costs of the proceedings and USD 22,000 for the Respondent's legal expenses appears to have been motivated in part by the Claimant's arbitration behaviour. See Brower & Schill, *supra* note 22, at 502 (analysing case and reasons for cost award).

[128] Brower & Schill, *supra* note 22, at 491-492 ('At issue may ultimately be the legitimacy of the international arbitral system as a whole, in particular inasmuch as … [uniform legal ethics for counsel] operate not only retrospectively …, but also prospectively as a mechanism of global governance.'); Address by Doak Bishop at the ICCA Congress on 26 May 2010 ('Although there have been no catastrophes to this point, the International Arbitration system is at least subject to reasonable criticism without its own transparent Code of Ethics, and we need to ensure the future integrity and legitimacy of the system.'); see also Carolyn B. Lamm et al., 'Has the Time Come for an ICSID Code of Ethics for Counsel?', in *2009-2010 Yearbook on International Investment Law and Policy*, ed. Karl Sauvant (2010) (answering the titular question in the positive); Cyrus Benson, 'Can Professional Ethics Wait? The Need for Transparency in International Arbitration', *Dispute Resolution International*3 (2009): 83 (answering the titular question in the negative).

[129] Doak Bishop & Margrete Stevens, 'Advocacy and Ethics in International Arbitration: The Compelling Need for a Code of Ethics in International Arbitration: Transparency, Integrity and Legitimacy', in *Arbitration Advocacy in Changing Times*, ed. Albert Jan van den Berg, ICCA Congress Series 15, (Kluwer Law International, 2011), 391-407.

Guerrilla Tactic in International Arbitration, Russian View

Vladimir Khvalei

I. Introduction

Recently the topic of Guerrilla Tactic in International Arbitration has been widely discussed in international arbitration circles. Articles[1]) have been written on this topic and conferences have been held[2]).

It seems that the term "Arbitration Guerrilla" was introduced by Michael Hwang, who defined arbitration guerrillas as those who "*will try to exploit the procedural rules for their own advantage, seeing to delay the hearing and (if they get any opportunity) ultimately to derail the arbitration so that it becomes abortive or ineffective*"[3]).

However, the term "guerrilla tactic" should not be limited to actions intended to delay an arbitration proceeding. The idea of guerrilla tactics usually consists of the following:

- the respondent knows that it has failed to performed its obligation;
- the respondent knows that the initiated arbitration proceedings will sooner or later come to an end, and most likely, the award will be against that respondent;
- therefore, the respondent uses various techniques which, from the standpoint of the international arbitration community, are impermissible and

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[1]) *See, e.g.*, Stephan Wilske, *Crisis? What Crisis? – The Development on International Arbitration in Tougher Times*, Contemporary Asia Arbitration Journal, November 2009, Number 2; Albert Jan van den Berg, *Preventing Delay and Disruption of Arbitration/Effective Proceedings in Construction Cases*, ICCA Congress Series, 1990 Stockholm Volume 5; Gary B. Born, *International Commercial Arbitration*, Kluwer Law International 1782–1873 (2009).

[2]) Vienna Arbitration days 2010 focused on "guerrilla tactics" *available at* (www.globalarbitrationreview.com/journal/article/28362/vienna-arbitration-days-focus-guerrilla-tactics/); in November 2010 ICC Austria held a conference "A fine line: how to counter – and employ Guerrilla Tactics in International Arbitration & Litigation" (www.icc-austria.org/ or www.globalarbitrationreview.com/news/article/28647/icc-beats-its-chest-guerrilla-tactics-arbitration-/).

[3]) Michael Hwang, *Why? is There Still Resistance to Arbitration in Asia?*, in Global Reflections on International Law, Commerce and Dispute Resolution – Liber Amicorum in Honour of Robert Briner 401 (Gerald Aksen et al. eds., 2005).

aimed either at getting a positive (for the respondent) arbitral award, or making it impossible to enforce the negative arbitral award (i.e. the award rendered in favor of the claimant).

This article will aim to discuss the main forms of guerilla tactics, taking into account mainly Russian case law experience. Also strategies are discussed on how to counter such guerilla tactics.

II. Hard and Soft Type of Guerilla Tactics

For illustrative purposes, the author has classified guerilla tactics into two categories: hard type guerilla tactics, found mostly in the criminal-law field, and soft type guerilla tactics, which stays within the confines of private law. The author will go on to give case law examples of these guerilla tactics in the following sections.

A. Hard Type of Guerrilla Tactics

Attempts at physically influencing the parties or arbitrators to cut short the arbitration should unconditionally be classified among the hard type of guerrilla tactic. Fortunately, this form of guerilla tactics is not often employed, however, one sometimes runs into them in practice. The following is a discussion of the mainly Russian related cases where such tactics were employed.

The case discussion is divided into three groups:

- Measures aimed foremost against a party to the arbitral proceeding;
- Measures aimed foremost against a party's counsel; and
- Measures aimed foremost against an arbitrator.

1. Measures aimed foremost against a party to the proceeding

The following three cases (Tomskneft, Znamensky, Raif) concern actions aimed first and foremost against a party to an arbitration proceeding.

a) Case Tomskneft

According to the Russian press, in 1999, after the Austrian company East Petroleum had launched arbitration proceedings under the Rules of the Vienna Center against the Russian company Tomskneft, a subsidiary of YUKOS, several attempts were made on the life of Yevgeni Rybin, the manager of the company (the claimant in arbitration)[4]:

[4] *Kommersant N. 36 (1680)*, Tuesday March 9, 1999, www.kommersant.ru/doc.aspx?DocsID=214442.

"An attempt was made in the Moscow Region on the life of Yevgeni Rybin, one of the heads of the Austrian company East Petroleum Handelsgas GmbH. Unknown persons opened fire on his car from a grenade launcher and submachine gun, killing the driver and heavily injuring two militiamen who were guarding the businessman. This is the second attempt on Rybin's life in the past three months. Rybin himself is inclined to lay the blame for these attacks on the YUKOS leadership. Representatives of that oil company deny any connection with the attempts on Rybin"

In April 2005, the General Prosecutor's office brought accusations against Mr. Pitchugin, the former head of YUKOS' security service, of organizing two assassination attempts on the businessman Rybin, and also of committing other crimes. In August 2006, the Moscow City Court sentenced Mr. Pitchugin to 24 years' incarceration. After the sentence was read out, Mr. Rybin declared that he was only partially satisfied, since the ones he named as organizers of the crimes, former YUKOS managers Leonid Nevzlin and Mikhail Khodorkovsky, "had not been punished for the bloodshed"[5].

b) Case Znamensky

Another case, also connected with Russia, dealt with an arbitration proceeding held under the Rules of the International Commercial Arbitration Court at the Russian Chamber of Commerce and Industry (known by its Russian acronym "MKAS") in a dispute between Canadian and Russian companies.

The facts of the case were as follows. Russian company Znamensky Selektsionno-Gibridny Center LLC ("Znamensky") signed a contract with Canadian supplier Donaldson International Livestock Ltd ("Donaldson") for delivery of 8,500 purebred pigs for over US$ 7 million[6].

Russian company made an advance, and Canadian supplier made a first delivery to Russia. However, some of the pigs were diseased and thus did not fit requirements of Russian quarantine rules. Znamensky refused to accept it and asked Donaldson for return of the advance payment, however, the latter refused.

The Russian company initiated arbitration under the MKAS Rules according to the arbitration clause in the contract. Donaldson sought an injunction in Ontario, prohibiting Znamensky from seeking any remedy against it by way of arbitration proceedings in Russia. Donaldson claimed that Znamensky representative made the death threats during a phone conversation to Donaldson executive. Because of that Donaldson officials were afraid of appearing in Russia and refused to participate as witnesses in arbitration under MKAS Rules in Moscow. As a result, Donaldson argued, the arbitration clause should be considered as null and void, and that enforcement of any MKAS award would be contrary to public policy.

[5] www.peoples.ru/undertake/hard/evgeniy_rybin/.

[6] *Znamensky Selektsionno-Gibridny Center LLC v. Donaldson International Livestock, (2009) OJ Number 4011.*

Znamensky in its turn argued that it would allow Donaldson and other witnesses to testify by alternate means which would not require traveling to Moscow (e.g., by telephone or video conference), or would agree to have the arbitration at a mutually agreeable location outside Russia, provided that Donaldson paid any extra costs. Donaldson did not take up these offers.

Ontario court found that Donaldson did not provide sufficient evidence that the threats were actually made, and rejected Donaldson's motion for injunction.

Nevertheless, Donaldson decided not to participate in the arbitration under MKAS Rules and two MKAS awards were issued against it ordering it to pay to Znamensky US$ 1.7 million.

Znamensky applied to the Ontario court to enforce the arbitral awards against Donaldson, however, the latter argued that enforcement should be denied unless and until there had been a full trial on the issue of the death threats.

In September 2009, in its judgment, the Ontario Superior Court found that Donaldson should have raised the death threats before the arbitral tribunal and, alternatively, that the proper time to make a request for a trial of the issues associated with the death threats was when the matter was first brought before the Ontario courts on the anti-arbitration injunction application. The court found that Donaldson was barred by issue estoppel from now trying to litigate the implications of the death threats and allowed enforcement of the MKAS awards.

However, on April 7, 2010 the Court of Appeal for Ontario set aside this judgment[7]). The appeal court found that the lower court had misunderstood the 2008 appeal ruling, the court was not precluded from deciding the issue of the death threats on the merits and should have considered and decided the death threats allegations.

The Court of Appeal also ruled that the offer of an alternative venue could not amount to a complete answer to Donaldson's concerns, as Znamensky had in fact only offered "to allow that part of the arbitration involving testimony by [Donaldson's] witnesses to be heard in a neutral location" and Donaldson "would still have had to go to Russia for all aspects of the arbitration except for the giving of its testimony".

c) Case Raif

In another case a Russian company tried to use arbitration proceedings as a weapon against party, which had not signed any contract with the claimant and did not even know about arbitration proceedings.

A citizen of Austria, Mr. Freddy Raif, held a 100 percent stake in the charter capital of the Russian company Kaeler SNG (Kaeler CIS). However, in August 2006, a certain Mr. Romanin, referring to his own alleged purchase of F. Raif's stake under an agreement dated July 10, 2006, formally dismissed him from his

[7]) 2010 ONCA 303.

position of general director of the company, appointed himself to that position, and made changes in the trade registry.

Consequently, in the course of a criminal case brought at Mr. Raif's initiative, it was established that this agreement had been forged, and in May 2007, the Tverskoy District Court of the City of Moscow made a decision reinstating Mr. Raif as the company's general director as of August 19, 2006. An entry of this was made in the register.

On July 6, 2007, a new entry was made in the state register, according to which a certain Mr. Schelkunov was appointed as the general director of the company, who dismissed F. Raif once again.

On August 31, 2007, the Tverskoy District Court of the city of Moscow again reinstated F. Raif to his previous job from July 2, 2007. The decision came into legal force and a writ of execution was issued on September 3, 2007.

Along with that, until the Tverskoy District Court of the city of Moscow pronounced the first decision to reinstate Mr. Raif to his position, the director of Kaeler SNG was formally Mr. Romanin, who on April 5, 2007 entered into an agreement for supply of equipment with the Russian company Time.

Since the allegedly ordered equipment was not paid for on time, the company Time started an arbitration under the Rules of the Permanent Court of Arbitration at the Non-Profit Partnership of Bankruptcy Receivers of the Central Federal District. Kaeler SNG's interests were represented in the arbitration by Mr.Shabrov, based on a power of attorney issued by Mr. Schelkunov.

On September 12, 2007, the arbitral tribunal issued an award to recover from Kaeler SNG 61,137,263.17 rubles (which is more than US$ 2,000,000) and later on the state court issued a writ of execution for the arbitral award, the cassation court upheld this judgment.

However, the Supreme Arbitrazh[8]) Court overturned decisions of the lower-ranking courts[9]) and referred the case for new trial to the court of first instance, which in the end refused to issue a writ of execution.[10])

2. Measures Aimed Against a Party's Counsel

In practice, one also comes across cases where the actions are also aimed against a party's counsel. In particular, the author is aware of at least one case where Russian law enforcement agencies, basing these actions on the necessity of investigating a related criminal case, took away the computers in a law office. This law office was representing a party in a high-profile arbitration proceeding against

[8]) The Russian word "arbitrazh" is not related to arbitration but originates from an old Soviet tradition, whereby disputes between state enterprises were heard before the so-called "state Arbitrazh". Today the system of commercial courts in Russia is called "state abritrazh courts".

[9]) Resolution of the Presidium of the RF Supreme Arbitrazh Court of February 25, 2009 in case No. 13848/08.

[10]) Ruling of the Vladimir Region Arbitrazh Court of June 11, 2009 in case No. A11-905/2008-K1-5/75.

a Russian state company. The fact that Russian law "On advocacy" explicitly forbids such actions, since the information contained in the computers fell under the category of advocate secrets protected by law, was not taken into account by the law enforcement agency. Incidentally, these actions did not turn out to be effective, and the arbitral award was handed down in favor of the party represented by the law office on which pressure was exerted.

Cases of pressure on lawyers, fortunately, are a rare occurrence, since even from the position of a party using a guerrilla tactic, actions against a lawyer will hardly bring about the desired result. Indeed, when pressure is exerted on a party's lawyer, the latter may simply withdraw from the case; instead, the party may hire another counsel whom it will be more difficult to pressure, for instance, due to that counsel's location in a safer jurisdiction. And the mere fact that pressure is exerted on a counsel will not evoke sympathy from the tribunal and at the end of the day will work against the party using the guerrilla tactic.

3. Measures Aimed Against Arbitrators

Undoubtedly, it can be much more effective from the standpoint of the final result to put pressure on the arbitrators. Such pressure can be exerted, for example, by a court passing an anti-suit injunction, prohibiting not only the parties from continuing an arbitration proceeding, but the arbitrators as well. Violation of this court order might be viewed as contempt of the court and result in criminal case against arbitrators.

The following cases discuss aspects of such guerilla tactics.

a) Case Dunkeld v. Belize

In response to the lodging of a suit in investment arbitration against Belize in connection with the nationalization of a telecom operator (*Dunkeld v. Belize*), the government of Belize proposed to make changes to legislation which would allow the court of Belize to limit arbitration proceedings in Belize or in another place, and correspondingly hand down an injunction. A person who violates a prohibition and "directly or indirectly, instigates, commands, counsels, procures, solicits, advises or in any manner whatsoever aids, facilities, or encourages the commission of an offence", can be sentenced for imprisonment for up to 10 years and also punished with a significant fine[11]).

Fortunately, similar draconian measures are usually applied by the courts of countries in which many practicing arbitrators are rarely visiting not only on business, but also as tourists, if they come to such places at all. Therefore, such measures are a rather efficient way of acting only on one of the arbitrators (nominated by the party of arbitration, national of this country), which however usually does not prevent the other two arbitrators from handing down an arbitral award[12]).

[11]) www.globalarbitrationreview.com/news/article/28264.

[12]) As to the legal grounds for ignoring the court injunctions, *see* Constantine Partasides, *Solutions offered by transnational rules in case of interference by the courts of the seat*, www.transnational-dispute-management.com/samples/freearticles/tv1-2-article204b.htm#_ftn1#_ftn1.

b) Case Himpurna v. Indonesia

In the case of *Himpurna v. Indonesia* the Jakarta court issued an injunction enjoining arbitration against Indonesia and imposing a monetary sanction for breach in amount of US$ 1 million per day that the arbitration proceeded. Moreover, two days before a deliberation session convened at the Hague, agents of the Republic of Indonesia intercepted one of the co-arbitrators, Professor Priyatna Abdurrasayid, at Schiphol airport in Amsterdam and prevailed upon him to return under escort to Jakarta. As a result professor Priyatna did not participate in the scheduled deliberations[13]). However, the truncated tribunal with the remaining two arbitrators signed the interim award and subsequently, the final award which explained that:

> *"Although the Republic of Indonesia's readiness to sabotage these proceedings gave rise to an extraordinary event, the Arbitral Tribunal has not found it necessary to innovate in order to ensure the fulfilment of its mandate under the Terms of Appointment. The weight of well-established international authority makes clear that an arbitral tribunal has not only the right, but the obligation, to proceed when, without valid excuse, one of its members fails to act, withdraws, or – although not the case here – even purports to resign … The Republic of Indonesia should not benefit from Professor Priyatna's absence. Finding that there is no valid excuse for it, the Arbitral Tribunal proceeds to fulfil its mandate and render this Final Award."*[14])

c) Case IPOC

For another example of an attempt to exert pressure on the arbitrators, one can mention a case which took place in Switzerland during an arbitration proceeding under ICC Rules.

In 2001 BVI company IV Finance and Bermudian company IPOC entered into two call option agreements with the ultimate goal to allow IPOC to acquire a 25% shareholding in MegaFon, one of the major Russian mobile telephone operator.[15]) When IPOC called the options in 2003, IV challenged the validity of the

[13]) More detailed summary of this case could be found in V.V. Veeder, *The Natural Limits to the Truncated Tribunal: The German Case of the Soviet Eggs and the Dutch Abduction of the Indonesian Arbitrator*, Law of International Business and Dispute Settlement in the 21st Century, Liber Amicorum Karl-Heinz Bockstiegel 802–805 (2001).

[14]) *Himpurna California Energy Ltd v. Republic of Indonesia*, Final Award (Oct 16, 1999), paras. 4–5, Yearbook Commercial Arbitration, vol. XXV, 11 *et seq.* (2000). *See also* "Arbitrator's War Story – Indonesian Arbitrator Explains Why He Didn't Sit for Sessions", Mealey's International Arbitration Report 18, no. 6, 3–4 (June 2003).

[15]) Matthias Scherer, *Introduction to the Case Law Section, ASAB Volume 27, issue 3, 2009, ASA Bulletin*, Kluwer Law International, Volume 27 Issue 3, 488–494 (2009).

two agreements and sold the shares to the Russian Alfa group. IPOC initiated two parallel arbitration proceedings.

At hearing the chairman of the tribunal informed the parties, that he and his family had been under surveillance by a detective agency over a period of weeks; that an attempt had been made to obtain information about his bank accounts, and police reported to him that they interrogated the private detective, who testified that he was hired by one of the parties to arbitration to obtain evidence of bribe allegedly paid to the chairman.[16]) The chairman requested the Respondent's representatives (*i.e.* LV Finance) to find out who had arranged for such surveillance, and why.

Ultimately, the final award was issued in favor of IPOC and LV Finance filed an action before the Swiss Federal Tribunal for setting aside the award, alleging, *inter alia*, that the chairman of the tribunal was biased. It argued that the chairman, without any detailed explanation, assumed that a particular party in the proceedings was behind the spying.

On December 14, 2004, the Swiss Federal Tribunal rejected these arguments and upheld the enforcement of the arbitral award[17]). The court found that the reaction of the chairman to the surveillance by a detective agency and the attempt to obtain information about his financial situation was, viewed objectively, appropriate and does not permit the drawing of a conclusion of bias against one of the parties[18]).

As can be seen from these examples, attempts to exert pressure on the arbitrators did not turn out to be a success, and the arbitral awards in these cases were given despite whatever obstructions arose.

4. The Russian Experience

In the subjective experience of the present author, a case where pressure is exerted on arbitrators in a manner similar to those cited above happens quite rarely in commercial arbitration[19]). More often, in practice one runs into cases

[16]) First Civil Division, Decision of December 14, 2004, 4P.208/2004 (translation), *ASA Bulletin*, Kluwer Law International, Volume 23 Issue 2, 345–346 (2005).

[17]) Docket No. 4P.208/2004.

[18]) It is interesting to note that this story did not finish here, as subsequently LV discovered new evidence on a point that it thought to be relevant to the outcome of the arbitration: perjury of a witness, a Danish lawyer who had testified that he was IPOC's ultimate beneficiary. In fact, the true beneficiary was the Russian telecommunication minister, Mr Reiman. LV challenged it again and succeeded in having the award set aside. *See* Scherer, *supra* note 15.

[19]) Abba Kolo in his article *Witness Intimidation, Tampering and Other Related Abuses of Process in Investment Arbitration: Possible Remedies Available to the Arbitral Tribunal* (Arbitration International, Kluwer Law International, Volume 26, Issue 1 [2010]) mentioned, inter alia, the cases of (a) the physical attack on a neutral member of the Iran-United States Claims Tribunal in 1984 by two Iranian-appointed members. The incident occurred in September 1984 at the tribunal's premises when two Iranian arbitrators physically attacked Judge Mangard, one of the neutral arbitrators, on the alleged ground that he was biased in favor of the Americans. Although the US government sought to disqualify the two Iranian arbitrators on the ground of their partiality and lack of independence, the challenge was dropped when Iran replaced the two arbitrators. However, the attack led to the resignation of Judge Mangard. C. Brower & J. Brueschke, *The Iran-U.S. Claims Tribunal*, Kluwer 169–171 (1998); S. Toope, *Mixed International Arbitration*, OUP 358–359 (1990); the shooting to death of an arbitrator (allegedly during an ethnic conflict) after returning home from Geneva, where he had attended an arbitral proceeding against his government in contravention of a local court order enjoining the tribunal from proceeding. One of the co-arbitrators has described suspicions that his colleague was killed because he was regarded as a "traitor".

where one finds either that the arbitrators are bribed, or for some reason are too loyal to one of the parties.

Nonetheless, one seldom finds in open sources mention of similar cases. This is explained by the fact that such cases rarely get as far as state courts, since the problems related to the absence of independence or impartiality of the arbitrators, if they are revealed, are usually solved at the arbitration stage by a challenge. In a situation where a party has proof that an arbitrator is not independent or impartial, such a challenge is either granted or the arbitrator resigns. Since arbitration institutions usually (especially in Russia) do not share publicly the practice of considering applications challenging arbitrators, similar cases remain concealed beneath the cover of confidentiality in the arbitration proceedings.

But in the event that a party does not challenge an arbitrator immediately after becoming aware of circumstances evidencing the arbitrator's lack of independence or impartiality, it is considered to have waived that right. Thus, the Russian Law "On International Commercial Arbitration", which follows the UNCITRAL Model Law, says that a party has to challenge to an arbitrator within 15 days (if a different term has not been set down in the arbitration agreement, including in the applicable rules) after it became aware that an arbitral tribunal had been constituted, or found out about any circumstances raising justified doubts regarding his impartiality or independence, or if he does not possess the qualification stipulated by agreement of the parties[20]). That said, most rules of Russian arbitration institutions indicate that a person who has not filed a challenge within the deadline are considered to have waived his right to make such a challenge[21]). State courts likewise follow this principle.

Thus, in one of the cases, the respondent, an American corporation, at the stage of enforcement of a Russian arbitral award in the state of New York, argued that confirmation of the arbitral award would be contrary to public policy of the U.S. because arbitration award was allegedly subject of corruption and fraud.

According to the American company, after arbitration proceedings were instituted against it under the MKAS rules, they decided to check how independent the tribunal could be. The American Company alleged that a translator from the company met with the MKAS secretary and asked if it was possible to "buy an arbitral tribunal". According to the translator's notes, the secretary of the arbitration

[20]) Art 13.2 of RF Law "On International Commercial Arbitration" No 5338-I of July 7, 1993.

[21]) *See, e.g.*, Sec 18.1 of the MKAS Rules at the RF Chamber of Commerce and Industry.

institute requested some time and at the next meeting wrote on a sheet of paper the amount which would be the price for fixing the tribunal. The American company did not take advantage of this proposal. The award was given in favor of the Russian company, and thereafter, at the enforcement stage, the American company stated in court that this fact was evidence that the arbitral tribunal was not independent. However, the court disagreed with the respondent, stating[22]):

> *"The settled law of this circuit precludes attacks on the qualifications of arbitrators on grounds previously known but not raised until after an award has been rendered."*

However, it should be noted that, from the point of view of obtaining a predictable result, an experienced guerrilla usually does not try to bribe an arbitral tribunal that has already been constituted, but instead strives to form an arbitral tribunal that is loyal to a certain party.

In a situation where an arbitral tribunal is formed by both parties to the dispute, it appears that something similar is impossible. Indeed, a guerrilla can appoint a partisan arbitrator, but at the end of the day the outcome of the hearing will depend on the chairman, who, as a general rule, is jointly appointed by the parties or by the party-appointed arbitrators.

However, what happens if the chairman of the arbitral tribunal or the sole arbitrator is not agreed on by the parties? In that case, the appointment is made by the arbitration institution which the parties have chosen. If a guerrilla has a connection with the persons in the arbitration institution who appoints the chairman, this allows him to ensure that the arbitral tribunal is "loyal" to him.

The liberal legislation existing today in Russia allows any person to create a permanent arbitration court. The creation of a court of arbitration is not subject to any special registration or any sort of monitoring; as a result of this, at present in Russia there are more than 280 permanent arbitration institutions[23]). Arbitration Courts are established by chambers of commerce, stock markets, business associations, and also major (and even middle size) companies.

Unfortunately, sometimes parties, when discussing a contract, pay little attention to the arbitration clause. Sometimes, resulting from the fact that a party has a weaker negotiating position, it is compelled to agree to a proposal from the stronger party insisting on a certain arbitration institute.

As a result, in practice one comes across cases when the dispute was referred for resolution to a tribunal which could hardly be recognized as independent. Here are a few examples.

[22]) *AAOT Foreign Econ. Ass'n (VO) Technostroyexport v. Int'l Dev. and Trade Serv., Inc.* ,23 March 1998 – United States Court of Appeals (Second Circuit), No. 97-9075 in Albert Jan van den Berg, *Yearbook Commercial Arbitration Volume XXIVa – 1999*, Volume XXIVa, Kluwer Law International 814 (1999).

[23]) www.arbitrage.spb.ru/sud/index.html.

On April 23, 2002 an arbitral tribunal acting under the Rules of the Arbitration Court at ZAO TPK[24]) made an award in favor of ZAO TPK.

On May 23, 2002 the Arbitrazh Court of Moscow enforced the award; however, the higher court reversed this judgment. The Court noted that the Rules of the Arbitration Court at ZAO TPK provided that all members of the arbitrators' panel shall be appointed by the Chairman of this Arbitration Court. The Chairman of the Arbitration Court under ZAO TPK had employment relationship with ZAO TPK, under which he received a compensation for functions performed as an employee. Thus, the state court noted that: *"therefore there are doubts about the impartiality of such chairman"*.

In another similar case the arbitration court established by a Russian law firm made an award in favor of this law firm against a client of the firm. Moreover, the head of the firm was also the Chairman of the court and the case was examined by a sole arbitrator appointed by the Chairman (who, by the way, also signed the statement of claim as a claimant's representative).

However, the award which was rendered in favor of the law firm, was subsequently set aside by state court[25]).

These cases are somewhat anecdotal in nature. Awards in similar cases have been set aside due to the obvious lack of independence of the arbitral tribunal. None the less, in practice cases occur when the arbitrators' lack of independence has not been quite so obvious.

From published cases one can point to a case when a dispute under a lease agreement was examined by the arbitral tribunal, where one of the arbitrators was a shareholder of one of the parties. Despite the objections of the other party such arbitrator was not withdrawn. The court has found that the founder of the company is a person interested in the outcome of the proceedings and set aside the award[26]).

In another case the Federal Arbitrazh Court of Moscow Region came to a conclusion that repeated appointment by the party of the same arbitrator casts reasonable doubts about such arbitrator's impartiality, which shall serve as the ground to set aside the award[27]).

Sometimes in arbitration involving Russian companies, one finds cases where written documents have been forged. Sometimes it can be explained by the fact that according to the existing practice in Russian courts, as a general rule only

[24]) ZAO is Russian abbreviation for Closed Joint Stock Company.

[25]) Ruling of Supreme Arbitrazh Court of the Russian Federation No. 10509/08, dated November 10, 2008.

[26]) Art 24 of the Information Letter by the Presidium of Supreme Arbitrazh Court of the Russian Federation No. 96 dated December 22, 2005 *"Review of arbitrazh court practice on recognition and enforcement of foreign courts decisions, challenging the arbitral awards or issuing enforcement orders to enforce arbitral awards"*.

[27]) Ruling of the Federal Arbitrazh Court of Moscow Region No. KG-40/9254-08, dated October 13, 2008.

original documents are accepted as evidence, documents transmitted by fax or e-mail are accepted as evidence only when the parties have agreed explicitly to this.

Therefore certain Russian lawyers, when they find out that one can also submit in arbitration a photocopy of a document as evidence, they also assume that it will be difficult to prove that the submitted photocopy is in fact forged. They underestimate the fact that even without forensic expertise of the document, the fact that it has been forged can be established by comparing and contrasting its contents with other documents, as well as on the basis of witness testimonies, the value of which is frequently underestimated by Russian lawyers.

Indeed, according to existing practice, witnesses are heard extremely rarely in Russian state arbitrazh courts. A decision to call witnesses is taken by a court only if the party can convince the judge that it is impossible to resolve a particular dispute without hearing a witness. But if the court does call a witness, he or she is basically interrogated by the court in typical "inquisitor manner"; cross-examination is never used. Therefore, some Russian lawyers, when they find out that in international arbitration a party itself determines whom to put forth as a witness, and that the witness bears no criminal liability for giving knowingly false testimony[28]), frequently put forth as witnesses persons who, for one reason or another, are trying to help the party that appointed them. This tactic rarely meets with success, since a good counsel familiar with cross-examination techniques will be able to demonstrate to the tribunal that the witness is not telling the truth. Furthermore, Russian arbitrators rarely found their decisions on witness testimonies, preferring written documents as much more solid evidence. Maybe because of this, current publications seldom mention cases where false testimony has been uncovered, or the exertion of pressure on a witness[29]).

B. Soft Type of Guerrilla Tactics

Despite the fact that each of the publicized cases of hard type guerrilla tactics is becoming an object of the most focused attention in the arbitration community, one should admit that such cases, fortunately, are rare.

Of greater relevance and of practical interest are not the so extreme forms of guerrilla tactics, such as the examples cited above, but the so called soft type of guerilla tactics. That is, such actions by a party which stay within the bounds of private law, but none the less are aimed at disruption the arbitration proceedings.

[28]) In the great majority of countries witness' perjury is not a crime. Switzerland is a rare exception.

[29]) An exception perhaps is formed by cases which took place in investment arbitration. For more detail, *see* Abba Kolo, *Witness Intimidation, Tampering and Other Related Abuses of Process in Investment Arbitration: Possible Remedies Available to the Arbitral Tribunal*. Arbitration International, Kluwer Law International Volume 26, Issue 1 (2010).

The goal of such tactics is either to delay the anticipated negative arbitral award, or to create grounds for setting aside the negative arbitral award or for refusing to recognize and enforce it.

The legal possibility for such tactics is found in the provisions of the New York Convention, in particular, those stating that recognition and enforcement of a foreign arbitral award may be refused if the party against whom such an award is invoked proves specifically that[30]):

- 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
- 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.

1. Russian Formalism – the "Notification Game"

Usually, experienced arbitrators pay quite a lot of attention to the issue of proper notice to the party which is not taking part in the arbitration proceeding.

Nonetheless, unfortunately, sometimes Russian courts display extreme formalism applied to the matter of serving notice of arbitration proceedings, acting by the analogy of serving notices while cases are being considered in state courts, and therefore the proof that a respondent has been notified that arbitrators consider sufficient might turn out to be insufficient for Russian courts.

a) Case Codest Engineering v. Most Group OOO

An example of such extreme formalism could be found in the case *Codest Engineering v. Most Group OOO (Russian Federation)*.

The consortium Codest Engineering applied to the Moscow City Arbitrazh Court for recognition and enforcement of the arbitral award issued under the Rules of the Arbitration Institute of the Stockholm Chamber of Commerce ("SCC Rules"). On December 15, 2003, the application was rejected by the court, which concluded that the applicant had failed to prove that the debtor had been duly notified of the place and time of the proceedings, *i.e.*, the hearings that had taken place on January 27–28, 2003 and April 25, 2003.

On February 19, 2004, the Cassation Court of the Moscow Region quashed the aforementioned judgment[31]), sending the case for retrial by the Moscow City Arbitrazh Court, because the latter had initially failed to duly assess certain evidence attached to the case file, namely: a letter from Mr. E., a representative of Most Group OOO, addressed to the presiding arbitrator and reporting that the

[30]) Art V (1) (b), (d).

[31]) Judgment by the Federal Commercial Court of the Moscow Circuit, dated February 19, 2004, in Case No. KG-A40/594-04.

transcripts of prior proceedings had been received on November 11, 2002. Meanwhile, that record contained the announcement that the final hearings were to be held on January 27–28, 2003. The case file also included a power of attorney for Mr. E., entitling him, as counsel for Most Group OOO, to receive documents relating to the arbitration from the arbitral tribunal, to study such documents, and to exercise the respondent's rights on behalf of his client. After being notified of the lawsuit filed against it, Most Group OOO duly appointed its arbitrator and submitted a statement of defense.

When taking up the case again, the Arbitrazh Court of City of Moscow once again refused to recognize and enforce the award in question by arguing that the respondent had not received proper notification of the proceedings and had been unable to present its case at the main hearings.

This time, however, the cassation authority on August 5, 2004 upheld the trial court's judgment.[32])

Its logic was as follows: by virtue of Clause 12 of the SCC Rules any notice or other communication from the Institute is to be delivered to the addressee's most recent known address. Pursuant to Paragraph 2.3 of the Procedural Order issued by the arbitral tribunal in the case, all communications attached to the case file were to be given to either party by courier, fax, or e-mail with a confirmation copy sent by mail simultaneously to the other party and to each of the arbitrators in accordance with an attached list of addressees.

This procedure was also to be followed in summoning the respondent to the hearings on January 27–28, 2003.

However, as was admitted in the award itself, Most Group OOO, as represented by Mr. E., was invited to the proceedings orally.

The award also stated that a letter accompanied by copies of all documents produced by the parties and a reminder of the forthcoming hearings on January 27–28, 2003 had been sent to the respondent's representative Mr. E. on November 12, 2002. The applicant had presented Mr. E.'s letter dated November 15, 2002 to the presiding arbitrator, as constituting due evidence that Most Group OOO had actually received the documents in question.

However, having examined Mr. E's letter of November 15, 2002 concerning the receipt of the record of proceedings at the hearing on November 11, 2002, the trial court determined that it could not serve as proof that the respondent had been duly notified of the time and place of the hearings. The letter had been sent by e-mail without being duly signed by Mr. E. and no confirmation copy had been mailed to the arbitral tribunal. Therefore, the latter had had no grounds for accepting that Most Group OOO had indeed received the above letter enclosing copies of all of the documents furnished by the parties and also containing a repeat notice of the hearings.

[32]) Judgment in Case No. KG-A40/6451-04-p, dated August 5, 2004.

Furthermore, Mr. E.'s power of attorney, as follows from the text of the latter, did not authorize him to participate in any judicial proceedings[33]). The arbitrators were aware of this circumstance, since they noted it in the award. This is why the notice should have been sent not to Mr. E., but directly to Most Group OOO at its registered address.

b) Case Limited Partnership P. Krücken GmbH and Co. KG v. Avtodor-Agro

Although in some similar cases, Russian courts did not take such a formal position, unfortunately in the recent case *Limited Partnership P. Krücken GmbH and Co. KG (Germany) v. Avtodor-Agro (Russia)* extreme formalism of this type was displayed once again[34]).

On December 9, 2005, Limited Partnership P. Krücken GmbH and Co. KG, of Cologne, Germany ("Partnership P. Krücken") initiated arbitration in London under FOSFA Rules against Avtodor-Agro, of Kaliningrad, Russia ("Avtodor-Agro LLC") and appointed an arbitrator.

[33]) It should be noted that in the case *GUP Zheldorfarmatsiya MPS Rossii v. ZAO NPK Katren*, the Moscow City Arbitrazh Court refused to issue an enforcement order for arbitral award and factually invalidated the arbitration agreement, since the power of attorney for signing the contract issued to a director of a branch of GUP Zheldorfarmatsiya MPS Rossii did not specify the powers to conclude an arbitration agreement. The higher court upheld this court decision (Resolution of the Moscow Circuit Federal Arbitrazh Court No. G-40/7824-07-P, dated Nov 2, 2007).

[34]) For the sake of fairness one should say that not only Russian courts sometimes take a too formalistic approach to the question of due notification of a respondent, as is seen from a recent decision made by Swedish courts. In 2004, the Russian company OAO Lenmorniiproekt ("LenMor") filed a claim against the Swedish company Arne Larsson & Partner Leasing ("ALPL") under the MKAS Rules. MKAS sent a notice to the Swedish company's address, mentioned in both the Statement of Claim and in the agreement between the parties, and received a receipt of delivery from the courier. The Tribunal thus found that the respondent was properly notified about the case. However, a notice regarding the date of the hearing, sent to the same address, was sent back with a note that the addressee was not found on the stated address. However, tribunal did not found it as an obstacle, apparently because the first notice was duly received by the respondent, and, under MKAS Rules, if the party changes its address it shall immediately notify MKAS about it. The proceedings went ahead, despite the Swedish company's absence, and in April 2004, the arbitral tribunal rendered its award. The Swedish Svea Court of Appeal refused recognition and enforcement of the award and agreed with ALPL that it was not properly notified about proceedings. It was discovered during the hearing in Sweden that ALPL had changed its address before LenMor initiated arbitration, although ALPL had failed to inform the claimants of this change. LenMor appealed this decision to the Supreme Court, however, on April 16, 2010, the Swedish Supreme Court (case Ö 13-09) upheld the Svea Court of Appeal's decision, and noted that unless it is clear from the arbitral award – or in any other way is clear – that the opposing party has received the notification, recognition and enforcement cannot take place. Nor can an award be recognized or enforced if the opposing party presents evidence that raises considerable doubt that the party has received the notification.

Avtodor-Agro LLC sent to Partnership P. Krücken a letter expressing disagreement with the claim on its merits and pointing to the lack of authority of the FOSFA to consider the dispute.

Partnership P. Krücken then sent a request in accordance with clause (1d) of the FOSFA Rules to appoint an arbitrator on behalf of Avtodor-Agro LLC.

In a letter of January 30, 2006 sent by fax and by post (international registered letter), the Federation proposed to Avtodor-Agro LLC to appoint an arbitrator by February 13, 2006 or to entrust appointment thereof to the Federation on behalf of Avtodor-Agro LLC.

On February 9, 2006, Avtodor-Agro LLC stated that it did not accept the competence of the Federation. On February 16, 2006, the Federation notified Avtodor-Agro LLC of the official appointment of an arbitrator on its behalf. This letter was also sent to Avtodor-Agro LLC by fax and post (international registered letter).

On November 6, 2006 the arbitral tribunal made a decision in favor of Partnership P. Krücken. However, on July 4, 2008, the Kaliningrad Region Arbitrazh Court refused to grant the application to enforce the award.[35])

The court stated that, as proof that Avtodor-Agro LLC had been notified of the appointment of the arbitrator, reports on the transmission of fax messages and notifications from the post office had been accepted, from which it followed that the notices to the Russian party were sent to the address 4 Ulitsa Magnitogorskaya, 10 Transportny Tupik, Kaliningrad, Russian Federation, and received under power of attorney by a person by the name of "Pavlovichev".

Along with that, it follows from the documents presented by the respondent that there was no employee named Pavlovichev in the company, no power of attorney to perform any actions (including receiving postal correspondence) had been issued by Avtodor-Agro LLC to Pavlovichev, and it was not clear to which of two addresses given in postal dispatches (4 Ulitsa Magnitogorskaya or 10 Transportny Tupik) the letters were delivered. In accordance with extracts from the personal account of a person insured as part of the state pension insurance system, it was clear that V.I. Pavlovichev was an employee of Avtodor CJSC, and then Avtodor-Terminal LLC, but not of Avtodor-Agro LLC.

As far as the transmission of letters via fax is concerned, the court noted that these faxes were sent to a phone which was the property of another organization, and transferred for the use of Avtodor CJSC.

The Federal Arbitrazh Court of the North-Western Circuit, upholding the decision of the court of first instance, stated:[36]) *"The doubts expressed in the course of a presentation at the cassation court session by representatives of the Partnership [P. Krücken] as to the unfair behavior of the Firm [Avtodor-Agro], denying the receipt of the notification on the appointment of an arbitrator and disputing the competence of the international commercial court of arbitration in London to consider this dispute, cannot be considered as sufficient ground to grant the cassation appeal."*

[35]) Ruling of the Kaliningrad Region Arbitrazh Court of July 4, 2008 in case No. A21-8346/2007.

[36]) Resolution of the Federal Arbitrazh Court of the North-Western District of December 2, 2008 in case No. A21-8346/2007.

2. A Recent Finding Moving Away From Extreme Russian Formalism

Nonetheless, it would be incorrect to say that such extreme formalism is displayed by Russian courts in all cases. Thus, in the recent case *VALARS S.A. (Switzerland) v. Agro-Holding LLC (RF)* the respondent, Agro-Holding LLC, also referred to the fact that it was not properly served under GAFTA rules.

In fact, Agro-Holding LLC employed almost the same arguments which were used in a previous case, *i.e.* it denied that documents sent by fax had been received, as the court had not investigated to whom the fax number which the messages were sent, belonged to at what address the fax machine was set up, whether any faxes from GAFTA were received at that number, and if received, how they were passed on to the holding. Proof of receipt of written correspondence from GAFTA was not presented by the claimant. The fax machine to which the messages were sent belonged to another organization and was not set up at the debtor's location. The debtor declared that only two messages had been received from GAFTA, which were passed on to the holding's director; no other messages arrived.

However, the cassation court and the highest court rejected the arguments of Agro-Holding LLC that it had not been duly notified of the arbitration proceeding, stating as follows:

> *"In accordance with clause 21:1 of the arbitration rules of GAFTA No. 125 (hereinafter the Rules), all notices and notifications transmitted under these Rules must be sent by post, telex, telegram or other means of transmission of written information … As follows form the contents of the case materials and the disputed judicial acts, notifications on the appointment of arbitrators, confirmation of the receipt of the debtor's reply and the claimant's clarifications, on the end of the hearings and the transition to the pronouncement of the award in the case, on the pronouncement of the award and the manner for submitting an appeal, were sent to the company by fax and e-mail. After the award was pronounced, the firm notified the company by fax of the intention to submit an appeal and carried out correspondence by e-mail with the arbitral tribunal on the procedure for submitting an appeal.*
>
> *These circumstances are evidence that the firm was notified in the course of the proceeding at the GAFTA arbitral tribunal and had the opportunity to present its explanations."*

3. The "Delay Game"

Besides playing "notification games", which Russian companies sometimes like to indulge in, since they know about the courts' extremely formal approach,

one sometimes finds the no less fascinating "delay game". As one of my Russian colleagues, who has much experience of trials in Russian courts, expresses it, "as long as the case is delayed, it isn't lost".

Indeed, if a party assumes that it will lose a case (and if, for instance, a borrower does not return a loan to the bank, it is not hard to forecast what would be the outcome of this case), it might strive to delay something undesirable. During that time, other events may occur; for example, a debtor might go bankrupt or transfer its assets to a third party, therefore a formal win in the case under arbitration will hardly be able to bring any real benefit to the claimant.

The arbitrators themselves, as a rule, are compelled to act with a certain loyalty to the party delaying the arbitration proceedings, since otherwise that party gains the opportunity to argue that it was not given an opportunity to present its case.

Techniques for dragging out an arbitration proceeding can be of all kinds. That said, each of these techniques, if looked at separately, does not have to be qualified as an action directed at dragging out an arbitration proceeding, but may be perceived by arbitrators as an exercise of the party's right to present its case.

The most innocent technique is to request an extension of the term for filing a submission. As a rule such requests are granted; however, repeated extension of the terms could lead to re-scheduling the previously agreed date of the final hearing, and that in its turn might lead to a serious delay in the proceedings.

It also happens that a party changes its legal counsel. Indeed, it is the right of the party to determine whether or not it likes this or that legal adviser; however, if the change in adviser occurs not long before the hearing, it is very likely to entail a re-scheduling of the hearing itself. Considering the work load of most arbitrators, this could cause a significant delay in the proceedings.

Furthermore, a party may appoint a so-called partisan arbitrator, who might also withdraw from the case, for example, not long before the hearing. That said, the reasons for such a resignation can be of all kinds: illness, lack of time, an exposed conflict of interests, and so forth. In that case hearings are hardly likely to take place if, of course, the party fails to appoint a new arbitrator before the hearings.

Thus, the ICC Rules stipulate that the ICC court may make a decision that a case will be reviewed and an award handed down by a truncated tribunal only if hearings in the case have taken place. Thus, if an arbitrator has resigned before hearings, another arbitrator should be selected or appointed to replace the one who has withdrawn, and only then is the hearing held[37]). What's more, the reconstituted tribunal in that case decides after consulting the parties whether the prior proceedings should be repeated and to what extent[38]).

The MKAS Rules contain a similar provision under which, if the question of changing the composition of the arbitral tribunal arises after the end of hearings

[37]) Art 12.5, ICC Rules.

[38]) Art 12.4, ICC Rules.

in a case, the Presidium of MKAS, taking into account the opinions of those members of the tribunal who have maintained their position and of the parties, and based on the circumstances of the case, may make a decision to finish the proceedings in the case using the remaining members of the tribunal[39]).

a) Case Sektor-1 LLC v. Open Society Institute Management Services Ltd.

Russian courts take a more conservative position on this matter. Thus, the Supreme Arbitrazh Court of the Russian Federation, in the recent case *Sektor-1 LLC v. Open Society Institute Management Services Ltd.*, stated that for the tribunal to take a decision "*without the participation of the arbitrator appointed by the company means his absolute inability to influence the decision making process of the arbitral tribunal, which is a breach of the principle of equality of the parties when resolving a dispute, and consequently of the fundamental principles of Russian law (public order)*"[40]).

The history of the case is as follows.

On December 1, 2008, a tribunal consisting of three arbitrators, acting under MKAS rules, held a hearing on a case; however later, on January 20, 2009, one of the arbitrators died. Despite the fact that the respondent twice made a request to hold a repeat hearing with the participation of a "reserve" arbitrator[41]), these petitions were not granted, and on April 6, 2009 the truncated tribunal handed down an award in the case.

On September 29, 2009, the Moscow City Arbitrazh Court granted the application of Sektor 1 LLC to overturn the MKAS award. And although the higher-ranking court overturned the decision of the lower-ranking court, the Supreme Arbitrazh Court upheld the correctness of the trial court decision, stating the following:

> "*where it is impossible for an arbitrator to participate in the course of an arbitration proceeding after the end of hearings in a case (in the present case, due to death), the award may be given by an incomplete arbitral tribunal only in exceptional cases, when it is obvious that the absent arbitrator took part in the deliberations, expressed his view and was able to make his position known to other arbitrators. Under these conditions, the principles of equal representation of the parties in the arbitral tribunal are observed, and therefore the fairness of the … proceedings and the equality of parties.*"

[39]) Clause 3 para. 20, ICAC Rules.

[40]) Resolution of Presidium of RF Supreme Arbitrazh Court No. 4325/10, July 20, 2010.

[41]) The MKAS Rules envisage that simultaneously with appointing the main arbitrator, a party shall appoint a "reserve" one. The "reserve" arbitrator shall enter the case if the main arbitrator for some reason cannot take part in the proceeding.

Further a rather widespread technique for dragging out a proceeding in Russian courts is filing a counter-claim. One should bear in mind that in accordance with the rules of the RF Arbitrazh Procedural Code, a counter-claim can be made at any stage of a proceeding[42]), and therefore it cannot be refused acceptance due to the fact that it was made late.

In fact the rules of most arbitration institutes, on the contrary, contain a rule allowing the arbitral tribunal not to permit submission of a counter-claim or a request for set-off if it was made at late a stage of the proceeding and might cause unjustified delay.

So, under the ICC Rules, after terms of reference are signed or approved by the Court, the parties may not file new claims or counter-claims which go beyond the bounds of the terms of reference, unless they will be allowed by the arbitral tribunal, which takes into account the nature of the new claims or counter-claims, the stage of arbitration proceedings and other circumstances relating to the case[43]).

Under MKAS Rules, an arbitral tribunal may not allow the submission of a counter-claim or request for set-off in the event of an ungrounded delay in submitting them[44]).

Due to the fact that Russian courts traditionally permit the submission of a counter-claim at any stage of proceedings, the failure to admit a counter-claim might be perceived by Russian judges as a breach of a fundamental principle of a trial, namely the opportunity of presenting party's case.

The Russian judges also take a view that if the parties were not given an opportunity to comment on a new claims introduced by the other party, it can be considered as denial of right to represent the party's case.

b) Case YUKOS Capital v. Rosneft

A good illustration of such an approach might be the case of *YUKOS Capital v. Rosneft*.

On September 19, 2006 tribunal acting under MKAS Rules made two awards in arbitrations initiated by YUKOS Capital Sarl ("YUKOS") against Yuganskneftegaz, whose successor was Rosneft NK OAO ("Rosneft"). On May 18, 2007 Moscow Arbitrazh court set aside both MKAS awards. One of the grounds for setting aside was the fact that in the court's opinion the arbitration procedure did not correspond to the parties' agreement (that is, the MKAS Rules).

In accordance with § 32 of the MKAS Rules either party, prior to closing of an oral hearing may, without unjustifiable delay, amend or supplement its claim. The court at first instance considered that this rule allows *amendment or supplement of the statement of claim and defence thereto, but does not allow new claims to be made.*

[42]) Art 132.1, RF Arbitrazh Procedural Code.

[43]) Art 19, ICC Rules.

[44]) § 13.1, ICAC Rules.

Since originally YUKOS made claims for interest on loan contracts, and also for interest for use of another's funds in consequence of failure to perform monetary obligations, and later submitted claims for termination of the loan contract and return of the loan sum, the later claims were essentially new claims (since they had a different subject-matter and different grounds), and thus could not be entertained in the same arbitration with the opinion of the court of first instance[45]).

Also, in this case, after the claimant had made new claims Rosneft made an application to the tribunal to adjourn the hearing of the case on the grounds that the claimant's request dated May 9, 2005 for new additional claims had not been submitted to the respondent in time, the claimant's legal position was vague and imprecise, and the respondent had no real possibility of preparing its legal position prior to the hearing (on May 18, 2006). The respondent's application was granted, and the hearing was adjourned until June 20, 2006.

During the second hearing the respondent once again made application for an adjournment because of the impossibility of submitting new evidence, but on this occasion its application was refused.

Moscow Arbitrazh court reached the conclusion (with which Moscow Region Federal Arbitrazh Court agreed), that refusal to grant the respondent's application to adjourn the hearing deprived it of the opportunity of adducing evidence and present its comments to the tribunal contrary to both Art 18 of the Law On International Commercial Arbitration, and also the MKAS Rules, which provide for equal treatment of the parties, each of whom is to be granted a fair opportunity to present their respective cases.

Thus, taking into account the position of Russian courts, particular attention should be paid to the observance of an agreed procedure and the rules, as a breach of such a procedure may be considered by a Russian court as a basis for refusing to recognize and enforce a foreign arbitral award, as specified by the New York Convention[46]).

A good example of such approach could be found in the case of *Duke Investments Limited vs. the Kaliningrad Region and the Regional Fund for the Development of the Kaliningrad Region.*

In accordance to the arbitration agreement disputes between the parties should be settled under the UNCITRAL Rules, two of the three arbitrators were to be appointed by the parties, and they were to appoint the third one. If however, the two arbitrators could not agree, then the third arbitrator was to be appointed by LCIA.

The claimant initiated arbitration and appointed an arbitrator, however, the respondent failed to appoint its arbitrator. Then LCIA appointed an arbitrator for

[45]) Judgment No. КГ-40/6616-07 of Moscow Region Federal Arbitrazh Court, dated August 13, 2007.

[46]) "*... 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*" *[emphasis added]*.

the respondent although the arbitration clause authorized ICIA to appoint only a chairman (in case the two arbitrators do not agree). The Russian Arbitrazh Court refused enforcement of the award, stating that the tribunal was constituted in breach of the procedure agreed by the parties[47]).

The author of this article would not like the reader to get an impression that Russian courts take an extremely hostile position in respect of arbitration. In fact, in many cases the courts adhere to a rather "pro-arbitration" position. None the less, since the decisions of Russian courts do not have the nature of a precedent[48]), it should be taken into account that when considering similar cases, courts might follow one or another approach, and in this way, an intelligent tactic of a Russian guerrilla might be crowned with success and, as a result, the arbitral award will not be enforced.

III. Combating Guerrilla Tactics

Due to the more frequent use of guerrilla tactics in arbitration, the question of how one can oppose such tactics is coming up more and more often.

Unfortunately, we should admit that there are hardly any effective private law methods of fighting the hard type of guerrilla tactic.

Actions cited above as an example of the hard type of guerrilla tactic can be found as a rule on the plane of criminal law; therefore measures of opposing such a tactic should also be found in that particular sphere. Indeed, without applying methods of criminal law, it is difficult to deal with a situation where an arbitrator is bribed, at least because without performing certain investigative actions (including those related to interrogation of witnesses, inspection of bank accounts and so on), as a rule it is impossible to prove that bribery has occurred. Arbitrators, just like other organizations involved in promotion of arbitration, do not and will not have the possibilities nor the powers possessed by the state law enforcement authorities[49]).

Therefore, it makes a little sense to add special articles to the relevant criminal codes introducing special liability for such actions, since from a formal point of view there are sufficient provisions in existing criminal codes to oppose the

[47]) Resolution of the Federal Arbitrazh Court of the North-Western District of May 3, 2006 in case No. A21-5758/2005.

[48]) Only some decisions of the Supreme Arbitrazh Court are precedents.

[49]) V.V. Veeder in his comments to the above mentioned Indonesian case made the following observation: "... *arbitration laws cannot take the place of criminal law. Arbitrators are not soldiers or policemen; and unlike FBI and other governmental agencies, an arbitration tribunal should not be required to administer an arbitrator-protection programme. Arbitrators are only private persons, and an arbitration agreement remains essentially a private law contract. It would also serve little purpose to make a statutory rule or international convention resolving an exceptional problem, however, serious, if it damaged the whole process of international arbitration.*" – see V.V. Veeder, *supra* note 12, at 804–805.

hard type of guerrilla tactic. However, such opposition must be done with the involvement of the law enforcement authorities.

In order to analyze potential civil law methods of combating guerrilla tactics, which are widely discussed[50]), the author would like to make use of the measures which were suggested by Abba Kolo with regard to combating guerilla tactics in investment arbitration[51]):

A. Interim Measure of Protection ("Cease and Desist" Order)
B. Contempt
C. Non-Admissibility of Evidence Procured by Improper Means
D. Costs Sanction
E. Drawing Adverse Inferences
F. Rules of Professional Ethic for International Arbitration

A. Interim Measure of Protection ("Cease and Desist" Order)

As one of the measures for combating guerrilla tactics, in particular when trying to exert pressure on witnesses from one of the parties to arbitration, it is proposed to issue a so-called Cease and Desist Order, prohibiting a party from committing certain actions.

Indeed, arbitral tribunals certainly have quite broad powers to invoke interim measures.If one of the parties, for instance, exerts pressure on witnesses, the arbitral tribunal may issue an order compelling the party to break off such actions.

However, an interim measure is effective when it can be enforced. The cases of witness intimidation referred to by Abba Kolo dealt with cases involving states[52]). Because of that, it is unlikely that the courts of a state against which such interim measures have been directed will support and enforce them.

In the event that state authorities do not fulfill the tribunal's order, such measures in and of themselves will turn out to be ineffective. The arbitral tribunal, of course, has the right to draw adverse inference to the interests of the party which ignored the procedural order, however, this issue will be analyzed below.

[50]) Albert Jan van den Berg, *Preventing Delay and Disruption of Arbitration/Effective Proceedings in Construction Cases*, ICCA Congress Series, 1990 Stockholm Volume 5, Kluwer Law International (1991); Wilske *supra* note 1; Lord Bingham, *The Problem of Delay in Arbitration*, in Arbitration International, Kluwer Law International, Volume 5 Issue 4) 333–347 (1989).

[51]) *See* Kolo, *supra* note 32, 64–84.

[52]) *See, Sempra v. Argentina* (2007), para. 31; *Enron v. Argentina* (2007), paras. 141, 142 C. Buckley, *Turkey and the ECHR* (July 2000), 98–101, 152–153; and Abba Kolo, *supra* note 32.

B. Contempt

One of the proposals is to consider guerilla tactic in arbitration as behavior similar to contempt of court. Thus, Abba Kolo suggested:

> *"Contempt of court is a common law principle that gives to the court wide powers to safeguard its authority. It can include fines, exclusion and even custody. To the extent that it overlaps with the principle of 'inherent powers', tribunals will have similar powers except that an arbitral tribunal cannot have all the powers enjoyed by a national court, i.e. an organ of government. Custody, for example, must be excluded, while exclusion is possible."*[53])

It is difficult to agree with such proposal, especially with regard to commercial arbitration. An arbitral tribunal is a private creature. It exists by virtue of a private agreement between parties. And a private agreement between parties cannot create something that is empowered with functions similar to those of a public establishment. Therefore, an arbitral tribunal may in theory have the powers to, for example, levy a fine for some procedural violation, but only if the parties have explicitly assigned tribunal with such authority. Taking into account that commercial arbitration is in essence an amicable method for solving disputes, it is unlikely that a situation will arise in which parties to an arbitration agreement or during arbitration proceedings will vest the tribunal with powers similar to a state court.

C. Non-Admissibility of Evidence Procured by Improper Means

In principle, the idea of excluding illegally obtained evidence is a right one.

First of all, it is completely within the competence of an arbitral tribunal, since it is up to the arbitrators to determine the rules for admissibility of evidence.

Second, when an arbitral tribunal hands down an order to the effect that illegally obtained evidence is inadmissible, it discourages the parties from resorting to illegal means[54]).

However, as a practical matter, the very fact that the evidence was obtained by using means usually becomes known after and not before such evidence was submitted.

Due to this, declaring some evidence not admissible will require jugment of the tribunal also justification for the inadmissability, and some times it is not so easy.

Furthermore, in certain countries, Sweden for example, as a matter of principle any evidence is admissible in arbitration.

[53]) *See* A. Kolo *supra* note 32 at 69.

[54]) Thus, in *Methanex* v. United States, a comparatively harmless case of "dumpstering" (search in a garbage container on private, but accessible premises) led to non-admissibility of the evidence discovered in this way – *see* A. Kolo *supra* note 32.

Therefore, it is much easier for arbitrators not to formally exclude evidence, but rather assign to it lesser evidential value (if any at all) if the source of such evidence raises doubts about the ways in which the evidence was produced.

D. Costs Sanction

It is widely accepted that the tribunal has a broad discretion in awarding the costs of arbitration.

Due to this, it can "punish" a guerrilla by directing it to pay all the costs and expenses of the other party.

However, in a situation when the guerrilla goes for broke (and a guerrilla rather often goes for broke, and is not going to pay at all by using all possible means), imposing on such a party the obligation to reimburse all the arbitration costs and expenses is hardly going to scare him away. Indeed, if a party drags out the proceedings with the intention, while the proceedings are still going on, to bankrupt the company and hide the assets, any increase in the possible sum of the arbitral award against such a party makes no difference. As was said by the hero of a popular Russian movie, it is hard to scare a person with potential criminal liability if he's already been given two life sentences.

E. Drawing Adverse Inferences

> *"Another sanction which might be used by an arbitral tribunal to punish and/or prevent witness intimidation is drawing adverse inferences from such misconduct, thereby confirming the innocent party's assertion or shifting the burden of proof to the wrongdoer. Apart from interim measures, the most frequently invoked principle is the power of arbitral tribunals to draw adverse inferences in case of a party's misconduct, e.g. non-compliance with discovery or other orders, concealment of evidence, fraud and forgery, lies, etc. It allows a tribunal to subtly threaten adverse results for the misbehaving party without the tribunal having to take more controversial measures such as exclusion or contempt of court"*[55]):

Indeed, arbitrators are entitled to use the adverse inference rule, as they are not bound by any rules of evidence and can establish any rules they want[56]), especially when they have grounds to believe that the evidence was obtained illegally, or a party has concealed evidence from the tribunal.

[55]) *See* A. Kolo, *ibid.*

[56]) Of course, without deviating from the main principles: to treat the parties equally and give each party a reasonable opportunity to present its case.

However, one ought to apply the adverse inference rule rather carefully, as in some cases it decrease the chances for enforcement of the award (as will be demonstrated below).

A broader application of "adverse inference rule" could include cases when a party receives a negative award not because it has a weaker legal position, or has not provided sufficient evidence, but because the tribunal punishes that party for improper conduct in the course of arbitration by rendering against it a negative award on the merits of the dispute.

Although until now such awards have not been considered by Russian courts, however, one should no exclude that Russian courts will deem this kind of approach absolutely unacceptable.

Thus, under a general rule it is believed that an arbitral award must not only be reasoned, but also founded on the contract or applicable law. The legislation of Russia does not consist of a principle whereby a breach of procedural rules entails negative consequences applicable to the merits of the case. If a party delays the proceedings, or commits other procedural breaches, such a party can be fined or be hit with procedural or other costs, but it is forbidden, for instance, to grant a claim only because a party behaved "incorrectly" in the proceedings.

Arbitrators, basing their award on the merits on the *adverse inference rule*, from Russian lawyer point of view in essence render the award *ex aequo at bono*, which is allowed only if the parties explicitly authorize them to do so[57]). Breaching this rule might lead to setting aside of the award or to refusal to enforce it.

The case Fertre S.r.l. v. Most Development LLP illustrates this very well:

On March 27, 2000, the Moscow City Court declined to enforce two arbitral awards issued under the SCC Rules in case *Fertre S.r.l. v. Most Development LLP* stating that enforcement of these awards would contradict the public order of the Russian Federation. On May 26, 2000, the Supreme Court of the Russian Federation upheld the trial court's judgment observing the following[58]):

> *"Under the contracts entered into by the parties, such contracts should be governed by the substantive laws of the Russian Federation, and hence by international treaties to which the Russian Federation was a party.*
>
> *Meanwhile, it can be seen from the materials of the case including the contents of the arbitral awards dated December 8, 1998 and December 22, 1998 made in Arbitration Case No. 34/1996 and Arbitration Case No. 35/1996 that in deciding the disputes between Fertre S.r.l. and Most Development LLP, the Arbitration Institute of the Stockholm Chamber of Commerce was guided in particular by the customs prevailing in the international construction business, corporate practice in that sector, views of Western lawyers, and reasonableness.*

[57]) *"The arbitral tribunal shall decide ex aequo et bono or as amiable compositeur only if the parties have expressly authorized it to do so"* – Art 28 (3) of the UNCITRAL Model Law.

[58]) Ruling handed down by the Supreme Court of Russia on May 26, 2000 in Case No. 5-G00-59.

> *As a result, the amounts to be recovered from the respondent, Most Development LLP, were determined on a random basis with reliance on the reasonableness of such amounts ...*
>
> *Under such circumstances, the court arrived at the right conclusion that enforcement of the awards made by the Arbitration Institute of the Stockholm Chamber of Commerce on December 8, 1998 and December 22, 1998 would contravene the fundamental principles of the legal order established by the laws of the Russian Federation, including the Constitution of Russia."*

F. Rules of Professional Ethic for International Arbitration

As one of the measures to combat the guerilla tactic it is proposed to introduce some supranational rules of professional ethics.

However, there are serious doubts that these rules will change the situation.

In order to enforce ethical rules, effective sanctions for their violations must exist. With national systems of legal practice, this involves bringing lawyers up on disciplinary charges, all the way up to disbarment. However, introducing such a principle in international arbitration will also require that only members of a certain international legal practice can engage in legal representation in international arbitration. In that case, failure by such "international arbitration lawyers" to abide by the ethical rules should entail exclusion from such legal practice.

However, it is unlikely that it can work for the following reasons.

First of all, restricting representation solely to members of a certain "international arbitration legal practice" contravenes the very principle of arbitration. Indeed, if an arbitrator does not need to be a lawyer, as is provided by the laws of many countries, then why can only a lawyer be a representative? And not just a lawyer at that, but one belonging to a certain "club"?

Secondly, the number of cases being looked at today in international arbitration is too small for creation of some kind of international arbitration bar. Indeed, there are a certain number of lawyers who mostly engage in international arbitration; that is, there exists a certain community whose activities can be regulated. Yet the members of this community, valuing their reputation, are hardly about to allowing guerrilla tactic techniques to be applied. Such techniques, as a rule, are used by lawyers who infrequently take part in international arbitration, and therefore throwing them out of the "club" is unlikely to be a painful experience for them.

Third, restricting representation in international arbitration solely to members of a certain "international arbitration bar" will create fertile soil for obstructing arbitration. Let's suppose that a respondent has appointed a counsel who does not belong to the "club," and for that reason the tribunal refused to allow this counsel to take part in the case. Such a circumstance fits in beautifully with the grounds for refusal to enforce a foreign arbitral award - the "impossibility for a party to present its case" – therefore guerrillas will only be happy that their counsel

was not admitted to the proceedings. To make such "inadmission" legitimate, it is required, at minimum, to make amendments to the New York Convention and arbitration rules, which rarely happens for the reasons stated here.

Fourth, proceeding from the above, ethical rules, even if they are worked out, can only have the nature of a recommendation; *i.e.* failure to put them into practice may lead to moral condemnation of a guerrilla by the arbitration community. Also, it will be difficult to condemn unlawful conduct of a counsel in any arbitration proceeding without breaching the confidentiality of the arbitration. It appears that preserving confidentiality isof a higher value that condemning a guerrilla.

Fifth, due to the existence of completely different procedural traditions, it will be rather difficult to set unified standards, the violation of which will be viewed as unacceptable conduct. So in the eyes of many lawyers from Russia and other CIS countries, where trial courts pronounce judgments within 2–3 months after proceedings get under way, a party's proposal to establish a procedural schedule lasting a year or a year and a half, with three exchanges of submissions before the hearing and then also the post-hearing briefs, will look like a blatant and obvious attempt to drag out arbitration – that is, manifestation of a guerrilla tactic. And although one should give due credit to the IBA Rules on Taking Evidence, as an attempt to set a certain standard in international arbitration, these rules are relevant in case of disputes between common-law and civil-law countries, as they represent a compromise between two legal systems. However, international arbitration is not limited to such type of cases. There exist a multitude of international arbitrations with their own regional traditions, where IBA Rules are totally out of place. Indeed, why one should use in arbitration among companies from CIS countries the rules on limited discovery as provided by the IBA Rules, if in none of these countries' procedural traditions discovery is used, neither in the limited nor in the fuller scope is an example of when the IBA-Rules may be out of place. And therefore setting up certain imperatives, some universal standards, will have a limited application.

Sixth, a sophisticated tactic, employed by Russian guerillas, is built on different standards applied by arbitrators and Russian courts. Arbitration is conducted by arbitrators loyal to it (by definition) and the major part of arbitrations happens in states with a state courts' friendly attitude to arbitration; by contrast, enforcement of arbitral awards more often than not is done in countries with courts which apply, to put it mildly, a more conservative approach. Therefore, some of a respondent's actions which might be perceived by arbitrators as a manifestation of a guerrilla tactic, in the eyes of, for instance, a Russian judge, will be perceived as exercise of the fundamental right to present its case to a judge of another country.

Since arbitrators should also consider the issue of enforceability of a future award[59]), they should bear in mind this factor. However, since the practice of national courts in enforcing foreign awards seriously differs, therefore it will be difficult to develop a certain unified standard which can be applied in all cases.

[59]) Thus, for example, ICC Rules explicitly state that the arbitrators and the Court should make all efforts to ensure that the award can be enforced; *see* Art 35 of ICC Rules.

IV. Conclusion

As shown above, most of the proposed measures for combating guerrilla tactics will hardly prove effective. Furthermore, use of certain methods of combating guerrilla tactics might lead to refusal of enforcement of the arbitral award.

Arbitrators are not counsels for the parties, therefore, at the end of the day it is a duty of the claimant's counsel to think about enforceability of the future arbitral award. At the same time the arbitrators must not disregard the claimant's comments and suggestions aimed at limiting the risk that the award will not be enforceable.

Unfortunately, some arbitrators believe that their job is to issue an award which shall stand in case of challenge at the place of arbitration only. If courts of certain country adhere to a position that is not pro-arbitrable, such arbitrators believe, that this is the problem of that country, and their "first-class from the standpoint of international standards arbitral award" can be enforced in any other country that is a party to the New York Convention.

Unfortunately, in practice, in 99 percent of international arbitration cases the respondent has property only in one country, and therefore a theoretical assumption on the possibility of enforcing an award in more than 140 countries that have signed the New York Convention remains a lovely theory.

Thus, summing up all of the foregoing, the following conclusions shall be made:

1. It is not likely that in the near future one will be able to work out any sort of effective mechanism to fight guerrilla tactics in international arbitration. Besides a limited use of the adverse inference rule, and assigning costs to the party using the guerrilla tactic, unfortunately, arbitrators lack effective ways to "punish" such a party.
2. In combating guerilla tactics the tribunal may reasonably avoid committing actions that might be seen by a court in the country where the award is to be enforced as grounds to refuse to recognize and enforce the arbitral award. That said, the task of defining such risks in any case rests with the claimant; the arbitrators, for their part, shall not disregard the claimant's comments and suggestions aimed at reducing the risk that the award will not be enforceable.