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TWENTY  
SEVEN

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C H A M B E R S



**Arbitrating with Guerrillas and Gorillas  
Ethics & Remedies**

**Shane Monks**

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## >> ***Case study 2: China Machine v Jaguar***

- *China Machine New Energy Corp v Jaguar Energy Guatemala LLC & Anor* [2018] SGHC 101 (Kannan Ramesh J)
- ICC Arbitration seated in Singapore, with 90 / 180 day expedition

## >> Guerrillas in Guatemala

- China Machine applied to set aside the Award. Singapore is a Model Law jurisdiction.
- Complaints about an Attorneys' Eyes Only regime put in place for disclosure.
- Guerrilla tactics alleged.
- Corruption allegations.

## >> **Attorney's Eyes Only**

- 'High tensions' between parties.
- Jaguar alleged China Machine had interfered with project completion.
- Offered money to suppliers and contractors not to work for Jaguar.
- Physical intimidation of Jaguar's contractors, suppliers and employees.

## >> Disclosure Upheld

- Tribunal expressed concern about possibility that disclosure may be used for ‘ulterior and quite improper purposes’.
- Had not concluded a view about risk; imposed order to minimise tensions, give comfort to parties, and ensure adequate opportunity to present their case
- Found not a breach of natural justice

## >> Guerrilla Tactics

Bases for setting aside award:

- Argued parties have an implied duty to arbitrate in good faith, which forms part of the agreed arbitral procedure.
- Breach of agreed arbitral procedure: Article 34(2)(a)(iv) of the Model Law.
- Breach of public policy: Article 34(2)(b)(ii) of the Model Law

## >> Guerrilla Tactics

Referred to the Horvarth and Wilske book's definition as deliberate violation or abuse of rules to obstruct, delay or sabotage.

- 'extreme' – severe criminal acts or blatant abuse of State authority
- 'common' – bribery, intimidation, delay
- 'rough riding' – withholding evidence, ambushing



## >> Guerrilla Tactic Not Found

Seizing construction area and terminating site access, seizing documents at site.

- Not done with the aim of undermining the arbitration as took place before arbitration commenced.
- If at early stage of arbitration, then complaint should have been made to the Tribunal.
- Tribunal found Jaguar's termination valid.

## >> Guerrilla Tactic Not Found

Disclosing documents in deliberately disordered and delayed manner.

- Pressure on parties and counsel due to expedited hearing.
- China Machine's delay in creating data room.
- Jaguar tried to solve problems – no bad faith.

## >> Attack Award

Assumed implied duty in arbitration agreement to arbitrate in good faith but did not decide (no Singapore authority):

- Guerrilla Tactics may be a breach of duty but questionable whether breach of agreed procedure.
- Some 'Common' or 'Extreme' guerrilla tactics may be breach of public policy or fraud.

## >> **Lawyers Conduct Guideline**

- IBA Guidelines on Party Representation
- Annex to LCIA Rules 2014
- SIArb Guidelines on Party-Representative Ethics 2018
- ICC Note to Parties 2019

## >> Guerrilla & Gorilla Sightings

- Pleading of fraud against original solicitors and barristers, then sought disclosure based on that pleading. New counsel team had to be retained. Cost and delay.
- Partisan arbitrator
- ‘The lawyer told me what I had to say’

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