DOI: 10.5433/2178-8189.2024v28n3.p171-187

COMBATTING UNETHICAL BEHAVIOR IN INTERNATIONAL COMMERCIAL ARBITRATION: HOW GAME THEORY CAN HELP TACKLE GUERRILLA TACTICS

COMBATENDO COMPORTAMENTOS ANTIÉTICOS NA ARBITRAGEM COMERCIAL INTERNACIONAL: COMO A TEORIA DOS JOGOS PODE AJUDAR A ENFRENTAR TÁTICAS DE GUERRILHA

Bruna Faria*

Eduardo Bueno Rodrigues**

Patrícia Ayub da Costa***

*Doutoranda em Direito Negocial (Universidade Estadual de Londrina - UEL)
Mestre em Direito Negocial (Universidade Estadual de Londrina - UEL)
Email: bf.brunafaria.bf@gmail.com
ORCID: https://orcid.org/0000-0001-5260-2570

**Doutorando em Direito Negocial (Universidade Estadual de Londrina - UEL)
Mestre em Direito Negocial (Universidade Estadual de Londrina - UEL)
Email: ebuenorod@gmail.com
ORCID: https://orcid.org/0000-0003-2198-4523

***Doutora em Direito (Universidade de São Paulo – USP)
Mestre em Direito Negocial (Universidade Estadual de Londrina - UEL)
Email: patricia.ayub@uel.br
ORCID: https://orcid.org/0000-0002-3135-961X

Como citar: **FARIA**, **Bruna**; **RODRIGUES**, **Eduardo Bueno; COSTA, Patrícia Ayub da**. Combatting unethical behavior in international commercial arbitration: how game theory can help tackle guerrilla tactics. **Scientia Iuris**, Londrina, v. 28, n. 3, p. 171-187, nov. 2024. DOI: 10.5433/2178-8189.2024v28n3p171-187. ISSN: 2178-8189.

Resumo: Esse artigo analisa a arbitragem comercial internacional e o fenômeno chamado 'táticas de guerrilha'. Essas condutas surgem em meio de uma mudança de paradigma dentro da arbitragem, partindo de um modelo cooperativo para um modelo mais litigioso, cuja causa é a entrada de novos jogadores no mundo da arbitragem. Em si, as táticas de guerrilha são condutas antiéticas que prejudicam ou frustram o procedimento arbitral. Para entendê-las, utiliza-se a 'teoria de cooperação' desenvolvido por Robert Axelrod, em que ele analisa jogos de soma não zero, em especial, o dilema dos prisioneiros. Segundo essa teoria, estas condutas podem ser consideradas como atos de não cooperação, que prejudicam os jogadores de alcançar os benefícios da arbitragem. Para solucionar esse problema, Axelrod entende que é fundamental modificar os valores da não cooperação para beneficiar o jogo em si. Na arbitragem, isso significa, principalmente, criar sanções para condutas não cooperativas e educar a nova geração sobre a prejudicialidade de táticas de guerrilha. O raciocínio utilizado era o dedutivo e a pesquisa foi desenvolvida a partir da revisão bibliográfica de livros, artigos e dados de instituições oficiais.

Palavras-chave: Arbitragem Comercial Internacional. Táticas de Guerrilha. Comportamento Antiético. Teoria dos Jogos. Cooperação.

Abstract: This study analyzes international commercial arbitration and the phenomenon known as 'guerrilla tactics.' These behaviors emerge amidst a paradigm shift within arbitration, moving from a cooperative model to a more litigious one, driven by the entry of new players into the arbitration world. Guerrilla tactics are unethical behaviors that harm or frustrate the arbitral procedure. To understand them, this paper utilizes Robert Axelrod's 'cooperation theory', in which he analyzes non-zero-sum games, specifically the prisoner's dilemma. According to his theory, these behaviors can be considered as acts of non-cooperation because they prevent players from benefitting from arbitration. To solve this problem, Axelrod understands that it is essential to change the values of the

DOI: 10.5433/2178-8189.2024v28n3.p171-187

game in order for the players to mutually benefit from cooperation. In arbitration, this primarily means creating sanctions for non-cooperative behaviors and educating the new generation about the harmfulness of guerrilla tactics. The reasoning used was deductive, and the research was developed through a bibliographic review of books, articles, and data from official institutions.

Keywords: International Commercial Arbitration. Guerrilla Tactics. Unethical Behavior. Game Theory. Cooperation

INTRODUCTION

The focus of this study is to examine guerilla tactics in international commercial arbitration and offer possible solutions from the perspective of game theory. To do this, this study will apply Robert Axelrod's "Theory of Cooperation" in order to understand why guerrilla tactics happen if they do not benefit arbitral proceedings, as it makes them less flexible, inefficient, and more expensive.

Initially, this paper hypothesizes that uncooperative acts, in certain cases, can be more beneficial to a party's strategy than being cooperative, and this might lead to an increase in these acts, which can harm arbitral proceedings and violate the principle of access to justice and due process. When employed, these actions can compromise the primary objectives of arbitration, including expedited procedures, flexibility, finality, and cost-effectiveness.

This study will be divided into three sections, the first will examine the concept and history of arbitration and why it's important for access to justice as an alternative dispute resolution mechanism (ADR). The second section will try to define and categorize guerilla tactics, whilst also pinpointing why they came into fruition. The third section will describe Robert Axelrod's "Theory of Cooperation", and how it applies to guerrilla tactics in order to find possible solutions.

In sum, this paper will try to offer a new perspective as to why guerilla tactics, which are acts of defection, form in what was a cooperative environment. This paper utilizes deductive reasoning, as it applies the theory of cooperation in the specific setting of international commercial arbitration. It also utilizes literature review of various academic studies regarding international commercial arbitration, guerilla tactics and cooperation theory.

1 ARBITRATION AND ACCESS TO JUSTICE: UNDERSTANDING ITS HISTORY AND IMPORTANCE AS AN ALTERNATIVE DISPUTE MECHANISM

Before examining international commercial arbitration, it's important to first understand what arbitration is and how it came to fruition. Arbitration – as a tool for conflict resolution – is not a modern invention. Frank D. Emerson traces arbitration back to the 10th century BCE, pointing to King Solomon as one of the earliest known arbitrators, and an account of his ruling is narrated by the Old Testament in I Kings, chapter 2 verses 16-38 (EMERSON, 1970, p. 155).

The story as narrated in the bible goes as follows: two women who lived in the same house had given birth on the same day, and one child died. The child was switched, and the mother who awoke with a dead child on her lap immediately knew that it wasn't hers. The two women fought and because they couldn't find mutual ground, went seeking Soloman's guidance. Soloman heard the two women's stories, in which both argued that the child was theirs.

Since there was no way of knowing which woman was the child's biological mother, he decided to get his sword and cut the child in half, this way both would get the child, even if in uni-

deal circumstances. Hearing his judgment, one of the women begged Soloman to leave the child with the other woman, as a means of ensuring the child's life, whilst the other accepted Soloman's ruling, understanding it as just. After hearing both women's reactions, Soloman gave the child to the woman who was willing to give up the child to ensure its safety. Over time, this story was utilized to demonstrate Soloman's wisdom – thought to be influenced by God's will (EMERSON, 1970, p. 156).

Other stories of arbitration can even be found in Greek mythology, such as in the 'Judgement of Paris', which is allegedly one of the causes that led to the Trojan War. The myth starts with the wedding of Peleus and Thetis where the uninvited Eris, goddess of discord, threw a golden apple, inscribed "To the fairest one". Hera, Athena, and Aphrodite were attending the wedding, and each believed the apple to be theirs, causing confusion and conflict. They asked Zeus to resolve the dispute by awarding the apple to the most beautiful goddess, but he refused and asked Paris of Troy to act in his stead.

Paris, noticing the beauty of each goddess, had a hard time choosing. The goddesses noted his difficulty, and each promised him a gift in exchange for selecting them. Hera offered him the continents of Europe and Asia, Athena promised wisdom and skill in war, and Aphrodite offered the world's most beautiful woman – Helen of Sparta, wife of the Greek king Menelaus. Ultimately, Paris accepted Aphrodite's proposal and awarded her the golden apple. This event led to Helen's, willful or unwilful, kidnapping, which caused the Greeks to invade Troy (CENTNER; FORD, 2019).

Historically and mythologically, arbitration has been used before the birth of the modern State in order to resolve disputes peacefully, thus avoiding possible actions that limit liberty or exterminate life, such as vengeance or war. Romesh Weeramantry (2021, p. 58) points out that arbitration is "the oldest method for the peaceful settlement of international disputes" between State's or State-like entities. He states that the oldest inter-State arbitration occurred in 2500 BCE when King Meslim of Kish was asked by the Mesopotamian City-States of Lagash and Umma to resolve peacefully a territorial dispute (WEERAMANTRY, 2021, p. 58). The ancient Greeks also utilized it to sometimes resolve property disputes between city-states to avoid going to war – e.g. the dispute between Athens and Megara for the possession of the island of Salamis, about 600 BCE, in which five arbitrators from Sparta awarded the island to Athens (EMERSON, 1970). Phoenician and Greek traders also submitted their commercial disputes to arbitration, and Marco Polo utilized it when journeying with desert caravans (CENTNER; FORD, 2019).

Since arbitration's first recorded mention, historical and mythological tales indicate a certain commonality between all past and present arbitration proceedings, which is that it is formed by conflicting parties, who by mutual consensus, nominate a third party to resolve their dispute; therefore, avoiding violence, vengeance, war, ADR tools or State jurisdiction as a means for dispute resolution.

Be it *ad hoc* or institutional, they all have these two characteristics: (a) mutual consensus rooted, theoretically, in Immanuel Kant's 'freedom of will' and (b) jurisdiction, which can be under-

stood as the power to resolve a conflict. Moreover, there are two consequences when parties choose arbitration over litigation: the first one, considered negative, is that it eliminates recourse to other ADR tools and litigation (i.e. competence-competence principle) and the other, considered positive, renders arbitration clauses binding, which is legitimized by the *bona fide* principle (good faith) and *pacta sunt servanda* (COSTA, 2023, p. 63).

Considering arbitrations' two inherent characteristics, a possible definition for it can be found in Tânia Lobo Muniz's work regarding arbitration in Brazil:

> In summary, we can conceptualize it as a private jurisdictional procedure for resolving conflicts, established on a contractual basis, but with legal force, with its own procedure, laws and judges established by the parties, and which removes the dispute from state jurisdiction. (MUNIZ,1999, p. 40, translated by the author).[1]

Arbitration throughout history has been used in various areas such as property law, commercial transactions, trusts and estates, labor and consumer law. Regarding trusts and estates, which has yet to be mentioned, George Washington included an arbitration clause in his will that was revealed on December 14, 1799, the day of his passing:

> My Will and direction expressly is, that all disputes (if unhappily any should arise) shall be decided by three impartial and intelligent men, known for their probity and good understanding; two to be chosen by the disputants—each having the choice of one—and the third by those two. Which three men thus chosen, shall, unfettered by Law, or legal constructions, declare their sense of the Testator's intention; and such decision is, to all intents and purposes to be as binding on the Parties as if it had been given in the Supreme Court of the United States. (NEW YORK STATE BAR ASSOCIATION, 2024)

Arbitration has also been vastly applied to labor disputes, such as in 1786 when it was used by the Chamber of Commerce of New York to resolve a wage dispute involving seamen (CENTNER; FORD, 2019). In current times, mandatory arbitration in labor law is being questioned in academic and legal circles because it can be more expensive than litigation,[2] thus thwarting access to justice, especially when one party is financially vulnerable. In the US, empirical studies have shown a bias towards employers – as employees in arbitration proceedings win less often and when they do win, they win smaller awards when compared to litigation (STERNLIGHT, 2015).

This is especially daunting when examining the percentage of the American population bound by mandatory arbitration in labor contracts, as illustrated by Alexander J.S. Colvin and Mark D. Gough:

> While 53.9% of all firms, covering 56.2% of the workforce, mandated arbitration procedures for employment disputes, adoption rates varied by workforce size.

1 Citation without translation: De forma sintética, podemos conceituá-la como procedimento jurisdicional privado para a solução de conflitos, instituido com base contratual, mas de força legal, com procedimento, leis e juízes próprios estabelecidos pelas partes, e que subtrai o litígio da Jurisdição estatal.

2 To this end, Queen Mary University of London's (2018, p. 2) Arbitration Survey highlights that cost is considered by its interviewees as arbitration's worst feature.

> Specifically, 49.8% of employers with fewer than 100 employees required arbitration, whereas 67.7% of employers with 5,000 or more employees required arbitration. This is consistent with the literature establishing that firm size is positively correlated with formalized human resource policies and access to more sophisticated legal strategies, like mandatory arbitration, to protect against legal liability. (COLVIN; GOUGH, 2023, p. 134).

Because of this, the Arbitration Fairness Act proposed in 2023 by Senator Blumenthal, Richard seeks to eliminate mandatory arbitration clauses in employment, consumer, and civil rights cases (USA, 2023). Therefore, allowing consumers and workers to choose between arbitration, other ADR mechanisms, and litigation only after the dispute occurs.

In Brazil, arbitration clauses were discouraged and generally disregarded by judges in labor disputes until the 2017 labor reform, which permits its use explicitly. However, with the introduction of article 507-A to the Consolidation of Brazilian Labor Laws (CLT)[3] it's now enforceable, albeit it has to respect at least one of two criteria: first, the arbitration clause will only be considered valid if the worker has a wage higher than twice the maximum limit established for the benefits of the Brazilian Social Security System[4] and that they want an arbitration clause or expressly accepts it when it's already present in the labor contract (BRASIL, 1943). At present, there aren't any studies in Brazil as seen in the US that can determine if arbitration is harming employees' rights, let alone any legislative proposal to modify the labor law, but Selma's Ferreira Lemes (2022, p. 8) research shows that Labor disputes are being submitted to Brazilian arbitration chambers and consist of 38% of CAMARB[5] rulings in 2022.

Arbitration can also be utilized in consumer law, and in Brazil it was also originally prohibited by the Law n. 8.078, i.e. Brazil's Code of Consumer Protection (CDC), article 51, VII. However, with the passing of Law n. 9,307, Brazil's arbitration law, inspired by the UNCITRAL[6] Model Law on International Commercial Arbitration, article 3, § 2º, established that arbitration clauses in adhesion contracts are permitted and enforceable only if the adherent takes the initiative or expressly agrees to its institution, provided that it is written and attached to a separate document or in bold letters, requiring a signature or an express authorization (BRASIL, 1996).

Currently, arbitration in consumer disputes is a highly debated topic, especially in countries that permit or have permitted its use. In France, for example, the 2016 statute named 'Justice of the 21st Century' altered the French Civil Code, redrafting article 2,061, limiting the enforceability of arbitration clauses against consumers (BORYSEWICZ; BOULMELH, 2018, p. 2). Its amendment establishes the 'option of jurisdiction', allowing the consumer to choose between arbitration proceedings or filing a claim before the national courts. However, this right is only applicable to domestic arbitration proceedings, because French courts have considered it unenforceable in inter-

3 In Portuguese it is referred as: *Consolidação das Leis do Trabalho.*

4 In Portuguese it is referred as: *Regime Geral de Previdência Social.*

5 Abbreviation for: *Câmara de Mediação e Arbitragem Empresarial.*

6 Abbreviation for: The United Nations Commission on International Trade Law.

national arbitration due to its interpretation of certain types of international agreements (consumer, employment agreements, etc.) (BORYSEWICZ; BOULMELH, 2018).

All in all, the enforceability of arbitration in the US in the context of consumer contracts is being challenged by the Arbitration Fairness Act, and in Brazil, Bill n. 3.514/2015, currently being reviewed by Congress, also prohibits the enforcement of arbitration clauses in consumer disputes, as proposed by article 101, § 1 (BRASIL, 2015). In a way, even if arbitration is being reevaluated as an effective ADR instrument in areas such as labor, consumer and civil rights – as it can restrict access to justice, because not everyone can afford it, even with the existence of third-party funding – it really does shine in commercial disputes, especially in the international arena, where it can help prevent forum shopping, reduce transaction costs and protect sensitive information and business secrets. The UNCITRAL Model Law on International Commercial Arbitration, provides the following definition for international arbitration:

> (3) An arbitration is international if: (a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or (b) one of the following places is situated outside the State in which the parties have their places of business: (i) the place of arbitration if determined in, or pursuant to, the arbitration agreement; (ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or (c) the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country. (UNCITRAL, 2006, p. 1-2).

Arbitration, when applied to international commercial disputes, allows the parties to choose their rule of law and procedures, tailoring the 'rules of the game' in accordance with their needs. Because of this, arbitration can be flexible, faster, and even more efficient than state litigation, especially when parties cooperate.

Moreover, the parties can choose highly specialized arbitrators, which theoretically can emit a more specialized decision than a non-specialized judge. However, when a party does not cooperate and actively hinders arbitration proceedings, these benefits can be rendered moot as their acts can cause a stalemate or even abandonment – effectively harming the other party's access to justice.

Contemporarily, arbitration is becoming more diverse, and this has been not without its problems, as it's not uncommon to see civil and common law practices clash, complicating and stunting the conflict's resolution. Moreso, acts of defection are commonplace, and some are even labeled as "guerrilla tactics", which will be analyzed in the next section.

2 GUERRILLA TACTICS: WHAT ARE THEY AND WHY DO THEY HARM ARBITRAL PROCEEDINGS?

With the rise of global commerce in the last century, more and more players have started utilizing arbitration, destabilizing what was an exclusive club made up of European lawyers, retired

judges, law professors, and researchers. At times, they acted as arbitrators, and at other times they represented the parties, but this changed with the rise in international arbitration disputes caused by the expansion of global trade (COSTA, 2023).

Arbitration, at least in the 20th century had a certain mystique, as only a few players had access to its tribunals that were mostly located in cities of economic prestige, such as Paris and London. These players were referred to as 'grand old men', which Patricia Ayub da Costa (2023, p. 121) characterizes as a restricted 'country club', an oligopoly of sorts, formed by an older generation of men of the European legal community, whose behavior was limited by social capital.

Entrance to this small group was difficult, so reputation for virtue was key – i.e. depending on a player's behavior, a specific case could either build or destroy a career instantly. Moreover, the Europeans had a tradition of tailoring conflicts to the party's needs, and since all of them knew and sometimes worked with each other, there was a willingness for cooperation (COSTA, 2023). Non-cooperation was equivalent to professional suicide (DEZALAY; GARTH, 1998, p. 57).

However, with the success of arbitration as a global dispute mechanism in commercial conflicts, new players, with somewhat diverse backgrounds, entered the scene. Yves Dezalay and Bryant G. Garth (1998, p. 10) labeled them as 'technocrats', formed by a younger generation, mostly men, yielding from a common law tradition, and whose playbook is transforming the informal and settlement-oriented system towards a more formalized and litigious system.

They explain that multinational US law firms, for example, focus on client's needs, sometimes even going against the principles of justice and good faith in order to maintain a client satisfied. In other words:

> The conflict specialists from the United States (or elsewhere) do not feel any responsibilities except to their client. Furthermore, they offer their clients the ability to operate for tactical reasons in many jurisdictions or types of proceedings at once. This "legal superarmament" of multiple attacks and forum shopping escalates the warfare considerably on behalf of clients able to afford it. And for various reasons, it is a service that was successful in building the power and success of U.S.-style litigation for corporate clients in the 1980s. The large law firms have tended to practice the very same strategy when handling international disputes. Yet this pragmatic and tactical approach is opposed to the tacit usages of the arbitration club. (DEZALAY; GARTH, 1998, p. 56)

With the introduction of new players, who value their positions in the social hierarchy of the law firm more than resolving the dispute, arbitration takes a backseat to client's needs Furthermore, the perception of arbitration as a useful mechanism for conflict resolution has become influenced, and sometimes overshadowed, by its potential as a growing market. For example, the ICC (2018) published its figures for 2018, and the average amount of awards were US$ 45 million, and the aggregate value of all pending disputes at the end of the year was US$ 203 billion.

With this growing market, which has opened the doors to new players, unprecedented behaviors thwart due process and complicates arbitral proceedings; thus, eliminating the biggest

advantages of arbitration – albeit flexibility, swiftness and cost-efficiency. Yves Dezalay and Bryant G. Garth explains that:

> […] where one group is obliged to be quasi-referential with respect to the dogmas and the customs upon which is reposed the collective faith in arbitration, the others have but one ambition-that is, winning a good result. To get that result, they are ready to exploit any procedural tactics and forums available to them. They are willing to create difficulties for their colleagues and the arbitral tribunal and even to damage the image of this justice-which had pretended to be rapid and less costly because informal. (Dezalay; Garth, 1998, p. 57)

Contemporarily, some behaviors that harm arbitration proceedings have been characterized as 'guerrilla tactics' – a term coined in 2010 by Barbara Helene Steindl (2010), who understands arbitration as a multiplayer game. She comprehends guerrilla tactics as a failure to play by the rules, sometimes resulting in an unplayable game. Michael S. C. Hwang (2013, p. 21) identifies players who resist arbitration as "terrorists or arbitration guerrillas" and defines them as:

> […] respondents who are not interested in playing the game by the rules, usually because they have a bad case. They will try and exploit the procedural rules for their own advantage, seeking to delay the hearing and (if they get any opportunity) ultimately to derail the arbitration so it becomes abortive or ineffective.

In sum, guerilla tactics are techniques that exploit procedural rules in arbitration for personal advantage. This is possible because of arbitration's flexible nature, which allows for speedier resolutions by sacrificing procedural formalism, present in litigation. This lack of procedural formalism, considered a virtue and not a problem when rules of conduct were informally established by 'grand old men', became arbitration's Achilles heel in the 21st century.

That said, some point to the "Americanization of arbitration" as one of the culprits for guerilla tactics' increasing usage, as Americans have a more aggressive form of advocacy than the continental Europeans. They also have a more law-oriented approach than their American counterparts, who are more fact-oriented (BERGSTEN, 2006, p. 294).

Furthermore, Americans simultaneously use litigation techniques in litigation and arbitration proceedings, whereas Europeans "tend to litigate before the courts and arbitrate before an arbitrator" (BERGSTEN, 2006, p. 300). This has not gone unnoticed, as Eric Bergsten (2006, p. 301) argues that the on-going trend in international arbitration is to move towards an American style of litigation, moreso as procedural disputes have multiplied, jurisdictional objections are commonplace, and cross-examination is prevalent.

Guerrilla tactics may happen before the arbitration proceedings with a jurisdictional challenge (anti-suit injunctions), a motion to question the validity of the arbitration clause or agreement and objections to the selection process and appointment of arbitrators (COSTA, 2023, p. 169-170). If any of these strategies fail to delay the arbitration hearing, the next step is to adopt "provocative measures designed to produce over-reaction by the tribunal, hoping that the tribunal will take one

or more missteps so that the subsequent award becomes capable of challenge, either in setting aside or enforcement proceedings" (HWANG, 2013, p. 21). Some common forms, are late or blatant refusal to file submissions, filing excessive documents and raising unwarranted bad-faith challenges.

There are also what Günther Horvath and Stephan Wilske (2013) label as extreme examples of guerrilla tactics that happen when councils withhold evidence until the last minute, provide inaccurate translations of important documents, and introduce new evidence. They also mention that some tactics can even cross the civil sphere and enter the criminal domain, when counsels threaten witnesses by use of intimidation, violence and/or harassment; wiretap witnesses and arbitrators, and bribe or forge documents (HORVATH; WILSKE, 2013).

All in all, noncooperation using guerrilla tactics harms the integrity of the arbitral procedure and can even result in its abandonment or deadlock. In this context, cooperation theory, which is based on game theory, can offer important insights as to why they happen and how to reduce or eliminate them.

3 ROBERT AXELROD'S THEORY OF COOPERATION: UNDERSTANDING GUERRILLA TACTICS IN GAME THEORY

Robert Axelrod explains the theory of cooperation through the prism of game theory, most notably with the prisoner's dilemma. In his book, "The Evolution of Cooperation", which is found on mathematical models of behavior and decision-making, he discusses the differences between zero-sum games and non-zero-sum games as a conduit for understanding how cooperation forms and sustains itself.

For instance, in zero-sum games, competitors only have one chance of winning, and winning means that someone will necessarily lose. An example is chess, where a competitor's win, is another one's loss. Yet in non-zero-sum games there isn't a clear-cut winner, and the sum can be more or less than zero, hence the name. Axelrod points to the prisoner's dilemma as a non-zero-sum game, where the line between winning and losing isn't so straightforward.

Figure 1: Prisoners Dilemma

		Prisoner 2 (P2)	
		Cooperate	Defect
Prisoner 1 (P1)	Cooperate	P1 = 3 P2 = 3	P1 = 5 P2 = 0
	Defect	P1 = 0 P2 = 5	P1 = 1 P2 = 1

Source: Axelrod (2006, p. 8)

Figure 1 demonstrates the Prisoner's Dilemma's three strategies: cooperation-cooperation, defection-cooperation, and defection-defection. If both players cooperate, they will each be rewarded 3 points. If one defects and the other cooperates, they will receive, respectively, 5 points and 0 points. Finally, if both defect, they will each receive 1 point. In this game, there are various strategies, which depend on whether you are playing it once or multiple times. In a single game, the best strategy for the highest number of points is defection. This also applies to when one player knows it is their last game, but the other does not. However, when both choose defection, the number of points scored by each is lower than if they both cooperate.

When parties play against each other in multiple rounds, the best strategy becomes mutual cooperation, which results in the biggest average. Axelrod points out that this doesn't mean that the best strategy is all or unconditional cooperation, because mathematically, in the face of exploitive strategies, it will always lose (AXELROD, 2006, p. 136). This strategy is also known as the 'golden rule': due unto others as you would have them do to you. From a moral standpoint, it can even be seen as Kantian, as the categorical imperative implicates that an individual should act in accordance with a morally and universally accepted standard. However, because this strategy "provides an incentive for the other player to exploit you", it will only work with other cooperative strategies (AXELROD, 2006, p. 136). Therefore, the best strategy identified by Axelrod is TIT-FOR-TAT, which basically means that the players should copy the other player's previous move. It's very simple, yet it is the strategy that can win the greatest number of points even against uncooperative strategies.

After exploring Axelrod's strategies and game explanations, two questions emerge: what is the relationship between game theory and arbitration, and what possible insights can game theory provide for guerrilla tactics? Firstly, arbitration is a game with rules and players. The substantial and procedural rules are chosen by the parties and, if institutional, need to follow the guidelines of arbitration chambers. Secondly, international commercial arbitration was successful for so long because the players were cooperative, and all knew each other. Moreover, they knew that they would be playing multiple times (i.e., as an arbitrator or as the party's counsel), and the cost of utilizing uncooperative strategies was their reputation and, therefore, their careers.

When new players emerged, such as Americans or technocrats, they didn't play by the same strategy because they had other goals.[7] Therefore, the weight of defection was lower for them than for the Europeans because these new players valued their clients' satisfaction over their reputation, and it was the party that financed the cost of the arbitration trial, not the law firm. Considering these new strategies, The Europeans where at a clear disadvantage, because as stated before, cooperative strategies are at a disadvantage in face of uncooperative strategies, unless they are TIT-FOR-TAT.

However, if TIT-FOR-TAT were to be applied to arbitration that would mean that both parties would be uncooperative, thus ending arbitral proceedings by deadlocking it. Thusly, a better solution explored by Axelrod would be to either modify the pay-off to make defection more costly,

7 Axelrod also explains that with the introduction of a defection strategy in a population where only a cooperative strategy exists, defection takes over, eliminating cooperation.

enlarge the shadow of the future, teach players to care about each other, and/or improve recognition capabilities (AXELROD, 2006).

Axelrod explains that payoffs can be changed to increase cooperation. This can happen by increasing the cost of non-cooperation or making the payoff of cooperation more attractive to players. In international arbitration, there does not appear to be hard law that punishes parties or counsel for unethical conduct, nor is there interest in establishing legal sanctions because it may harm the flexibility and informality of the institution. Moreover, national bar associations are reluctant to punish behavior that occurs in international courts, and arbitrators don't have the same coercive powers as national courts (COSTA, 2023). Thus, increasing costs can be difficult in arbitration but not impossible, as mentioned by Günther Horvath, Stephan Wilske, and Jeffery Jeng.:

> Although the lack of coercive authority and local bar association discipline significantly hamper arbitrators in their fight against guerrilla tactics, arbitrators and institutions are not powerless. Arbitrators may use creative shaming sanctions, cost sanctions, exclusions of counsel, or even dismissal of cases to discourage bad conduct. Institutions might play a supporting role through suspension of lawyers or by blacklisting these attorneys. With the shrewd use of litigation-inspired counter tactics, arbitrators and institutions are able to act as front-line defenders against guerrilla tactics. (HORVATH; WILSKE; JENG, 2013, p. 282-284).

Currently, the IBA[8] Guidelines on Party Representation in International Arbitration adopted by a resolution of the IBA Council on May 25, 2013, represent one of the biggest advances in addressing remedies for misconduct. Specifically, guidelines 26 and 27 establish possible sanctions:

> 26. If the Arbitral Tribunal, after giving the Parties notice and a reasonable opportunity to be heard, finds that a Party Representative has committed Misconduct, the Arbitral Tribunal, as appropriate, may: (a) admonish the Party Representative; (b) draw appropriate inferences in assessing the evidence relied upon, or the legal arguments advanced by, the Party Representative; (c) consider the Party Representative's Misconduct in apportioning the costs of the arbitration, indicating, if appropriate, how and in what amount the Party Representative's Misconduct leads the Tribunal to a different apportionment of costs; (d) take any other appropriate measure in order to preserve the fairness and integrity of the proceedings.
>
> 27. In addressing issues of Misconduct, the Arbitral Tribunal should take into account: (a) the need to preserve the integrity and fairness of the arbitral proceedings and the enforceability of the award; (b) the potential impact of a ruling regarding Misconduct on the rights of the Parties; (c) the nature and gravity of the Misconduct, including the extent to which the misconduct affects the conduct of the proceedings; (d) the good faith of the Party Representative; (e) relevant considerations of privilege and confidentiality; and (f) the extent to which the Party represented by the Party Representative knew of, condoned, directed, or participated in, the Misconduct. (IBA, 2013)

The IBA guidelines are non-binding, meaning that they are only applicable when parties have agreed to use them or when a tribunal considers them necessary. Moreover, these guidelines do not take precedence over or aim to compete with existing national law governing conduct.

8 Abbreviation for: International Bar Association.

In general, the international community has welcomed them. For example, the ICC's[9] Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration states that "parties and arbitral tribunals are encouraged, where appropriate, to adopt or otherwise be guided by the IBA Guidelines on Party Representation in International Arbitration" (ICC-b, 2021, p. 6). The Arbitration Rules of the Australian Centre for International Commercial Arbitration 2021, article 7.2, specifies that "each party shall use its best endeavours to ensure that its legal representatives comply with the International Bar Association Guidelines on Party Representation […]" (ACICA, 2021, p. 14) and the Lagos Chamber of Commerce Arbitration Rules 2016 also mentions the IBA Guidelines in Article 7(3) and Annex II (LACIAC, 2016).

Complementary to the IBA guidelines, the London Court of International Arbitration (LCIA) updated their Arbitration Rules in 2014 to ensure that legal representatives comply with the general guidelines contained in the Annex to the LCIA Rules, which establishes that party's legal representative should act in good and equal conduct – failure to do so can result in the sanctions stipulated by article 18.6: "(i) a written reprimand; (ii) a written caution as to future conduct in the arbitration; and (iii) any other measure necessary to fulfil within the arbitration the general duties required of the Arbitral Tribunal under Articles 14.4(i) and (ii)" (LCIA, 2014).

Another alternative that may stimulate cooperation by raising non-cooperation costs is sanctioning arbitration guerrillas monetarily by fining their behavior or distributing the costs of an arbitral proceeding based on the parties' behavior. An example of the second can be found in article 38(5) of the ICC's 2021 Arbitration Rules: "in making decisions as to costs, the arbitral tribunal may take into account such circumstances as it considers relevant, including the extent to which each party has conducted the arbitration in an expeditious and cost-effective manner" (ICC, 2021-a).

In the end, raising the cost of non-cooperative behavior may help thwart unethical actions, such as guerrilla tactics. Axelrod mentions that enlarging the shadow of the future and teaching players to care about each other can help encourage cooperative strategies. One option for promoting future interactions, thereby leading to cooperation due to repetitive interactions, is establishing a penalty in an arbitration agreement that is owed to the other party when one acts unethically in arbitral proceedings. Therefore, there will be value to be gained when a party cooperates in the face of defection.

Moreover, other tactics such as workshops and courses on conflict resolution can help the younger generation understand that unethical behavior, especially guerrilla tactics, doesn't pay off because it does not only harm due process or access to justice, but their reputation as well.

Finally, arbitrators need to learn to identify when guerrilla tactics are being used in order to quickly address the situation before possible challenges to their impartiality comes into question, as previously mentioned by Michael S. C. Hwang (2013, p. 26). Thereby, arbitrators need to be constantly on guard, aware of their language, and justify all decisions.

9 Abbreviation for: International Court of Arbitration.

FINAL CONSIDERATIONS

This paper examines arbitration and ethical behavior through the lens of game theory, as proposed by Robert Axelrod in his groundbreaking book 'The Evolution of Cooperation.' The first section explores the historical use of arbitration in areas such as labor, and consumer law, highlighting its controversial weaponization in disputes involving social and civil rights. In contrast, players dealing in global trade recognize arbitration as an exceptional instrument for dispute resolution, as it allows parties to choose their arbitrators, tribunal, and substantive and procedural law. Moreover, written history has recorded arbitration as a useful instrument for resolving commercial disputes for millennia and this view has not changed.

In the second section, this paper explored how global trade has pushed for more alternative forms of conflict resolution, especially arbitration, as a means to avoid forum shopping and reduce transactional costs. Furthermore, arbitration's significant benefits include informality, flexibility, speed, and efficiency, all grounded on consensus and trust in the tribunal. This section also analyzes the shift in arbitration culture from a cooperative model to a more polarized and formal procedure. The reason being that as arbitration became more diverse and technocrats and Americans competed for access to international tribunals, cooperation behavior diminished, and guerrilla tactics emerged.

The third section examines why unethical behavior, such as guerrilla tactics, occurs in cooperative environments. Utilizing Robert Axelrod's theory of cooperation, based on the Prisoner's Dilemma, this paper concludes that non-cooperative strategies exploit cooperative strategies like the golden rule, leading to the extinction of cooperation. To foster cooperation, it is essential to adjust payoffs, educate players on the importance of cooperation, and create more opportunities for interactions. Moreso, the arbitration community has taken notice of unethical behavior, which has resulted in the IBA guidelines and its acceptance by some tribunals. Finally, there is no hard law regulating unethical behavior or guerrilla tactics, and some argue that such regulations are unnecessary as they would undermine arbitration's benefits. All in all, this paper tried to demonstrate how game theory can be applied to and help understand a very real human phenomenon, that being, guerrilla tactics in arbitral proceedings.

REFERENCES

ACICA. Ar**bitration Rules of the Australian Centre for International Commercial Arbitration 2021**. Disponível em: https://acica.org.au/wp-content/uploads/2021/04/ACICA_Rules_2021-WFF3.pdf. Acesso em: 10 jun. 2024.

AXELROD, Robert. **The Evolution of Cooperation**. United States of America: Basic Books, 2006.

BERGSTEN, Eric. Americanization of International Arbitration. **Pace Int'l L. Rev**., United States, v. 18, 2006. Disponível em: https://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1081&context=pilr. Acesso em: 10 jun. 2024.

BORYSEWICZ, Eric; BOULMELH, Karim. **The Baker McKenzie International Arbitration Yearbook**: France, 2018. Disponível em: https://www.globalarbitrationnews.com/wp-content/uploads/sites/42/2018/03/France.pdf. Acesso em: 10 jun. 2024.

BRASIL. **Decreto-lei nº 5.452, de 1º de maio de 1943**. Disponível em: https://www.planalto.gov.br/ccivil_03/decreto-lei/del5452.htm. Acesso em: 10 jun. 2024.

BRASIL. **Lei nº 9.307, de 23 de setembro de 1996.** Disponível em: https://www.planalto.gov.br/ccivil_03/leis/l9307.htm. Acesso em: 10 jun. 2024.

BRASIL. **Projeto de Lei nº 3.514/2015.** Disponível em: https://www.camara.leg.br/proposicoesWeb/prop_mostrarintegra?codteor=1408274&filename=PL%203514/2015. Acesso em: 10 jun. 2024.

CENTNER, Daniel; FORD, Megan. **A Brief History of Arbitration**. American Bar Association, United States, 19 set. 2019. Disponível em: https://www.americanbar.org/groups/tort_trial_insurance_practice/publications/the_brief/2018-19/summer/a-brief-history-arbitration/. Acesso em: 10 jun. 2024.

COLVIN, Alexander J. S., GOUGH, Mark D. **Mandatory Employment Arbitration**. Annual Review of Law and Social Science, 2023. Disponível em: https://www.annualreviews.org/deliver/fulltext/lawsocsci/19/1/annurev-lawsocsci-120822-112007.pdf?itemId=/content/journals/10.1146/annurev-lawsocsci-120822-112007. Acesso em: 10 jun. 2024.

COSTA, Patrícia Ayub. **Táticas de Guerrilha na arbitragem internacional**: mecanismos de prevenção, controle e sanção. Londrina: Thoth, 2023.

DEZALAY; Yves; GARTH, Bryant G. **Dealing in Virtue**: International Commercial Arbitration and the Construction of a Transnational Legal Order. Chicago: University of Chicago Press, 1998,

EMERSON, Frank D. History of Arbitration Practice and Law. **Clev. St. L. Rev. 155**, Ohio, n. 1, v. 19, p. 155-164, 1970.

HORAVATH, Günther; WILSKE, Stephan. **Guerrilla Tactics in International Arbitration**. The Netherlands: Kluwer Law International, 2013.

HORVATH, Günther J.; WILSKE Stephan, JENG, Jeffrey. Lessons to Be Learned for International Arbitration? I. HORVATH, Gunther J.; WILSKE, Stephan. **Guerrilla Tactics in international arbitration.** The Netherlands: Kluwer Law, International, 2013.

HWANG, Michael S. C. **Selected Essays on International Arbitration**. Singapore: Academy Publishing, 2013.

IBA. **IBA Guidelines on Party Representation in International Arbitration**, 2013. Disponível em: https://www.ibanet.org/MediaHandler?id=6F0C57D7-E7A0-43AF-B76E-714D9FE74D7F. Acesso em: 10 jun. 2024.

ICC. 2021 **Arbitration Rules. 2021-a**. Disponível em: https://iccwbo.org/dispute-resolution/dispute-resolution-services/arbitration/rules-procedure/2021-arbitration-rules/#block-accordion-38. Acesso em: 10 jun. 2024.

ICC. **ICC Arbitration figures reveal new record for awards in 2018**, 2018. Disponível em: https://iccwbo.org/news-publications/news/icc-arbitration-figures-reveal-new-record-cases--awards-2018/. Acesso em: 10 jun. 2024.

ICC. **Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration**, 2021-b. Disponível em: https://iccwbo.org/news-publications/arbitration-adr-rules-and-tools/note-parties-arbitral-tribunals-conduct-arbitration/. Acesso em: 10 jun. 2024.

LACIAC. **The Lagos Chamber of Commerce Arbitration rules** (LACIAC Arbitration rules 2016). Disponível em: https://www.laciac.org/wp-content/uploads/2019/09/3926654-LACIAC-Rule-Book-2016.pdf. Acesso em: 10 jun. 2024.

LCIA. **LCIA Arbitration Rules (2014)**. Disponível em: https://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2014.aspx. Acesso em: 10 jun. 2024.

LEMES, Selma Ferreira. **Arbitragem em números**: pesquisa 2020/2021 realizada em 2022. Disponível em: https://www.migalhas.com.br/arquivos/2022/10/78B3FD4545063E_pesquisa-arbitragem.pdf. Acesso em: 10 jun. 2024.

MUNIZ, Tânia Lobo. **Arbitragem no Brasil** e a Lei 9.307/96. Curitiba: Juruá, 1999.

NEW YORK STATE BAR ASSOCIATION. **From George Washington's Will**. Disponível em: https://nysba.org/NYSBA/Sections/International/Seasonal%20Meetings/Tokyo%202019/Coursebook/5.%20Will%20of%20President%20George%20Washington.pdf. Acesso em: 10 jun. 2024.

QUEEN MARY UNIVERSITY OF LONDON. **2018 International Arbitration** Survey: The Evolution of International Arbitration, 2018. Disponível em: https://arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-(2).PDF. Acesso em: 10 jun. 2024.

STEINDL, Barbara Helene. **Procedural Tactics of a Guerrilla Nature & Suggestions for Counsel How to Counter & Employ (From the Perspective of Counsel Before Commercial Tribunals).** 2010. Disponível em: www.transnational-dispute-management.com/article.asp?key=1608. Acesso em: 10 jun. 2024.

STERNLIGHT, Jean R. Disarming Employees: How American Employers are Using Mandatory Arbitration to Deprive Workers of Legal Protection. **Brook. L. Rev**., New York, v. 19, 2015. Disponível em: https://brooklynworks.brooklaw.edu/blr/vol80/iss4/3/. Acesso em: 10 jun. 2024.

UNCITRAL. **UNCITRAL Model Law on International Commercial Arbitration**, 2006. Disponível em: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09955_e_ebook.pdf. Acesso em: 10 jun. 2024.

USA. **S.1376 - Forced Arbitration Injustice Repeal Act**, 2023. Disponível em: https://www.congress.gov/bill/118th-congress/senate-bill/1376. Acesso em: 10 jun. 2024.

WEERAMANTRY, Romesh. **From Giants to Gunboats**: The Evolution of State-State Arbitration. In: BANERJI, Gourab et. al. International Arbitration and the rule of Law: essays in honour of Fali Nariman, 2021.

Como citar: **FARIA**, **Bruna**; **RODRIGUES**, **Eduardo Bueno; COSTA, Patrícia Ayub da**. Combatting unethical behavior in international commercial arbitration: how game theory can help tackle guerrilla tactics. **Scientia Iuris**, Londrina, v. 28, n. 3, p. 171-187, nov. 2024. DOI: 10.5433/2178-8189.2024v28n3p171-187. ISSN: 2178-8189.

Recebido em: 21/08/2024
Aprovado em: 05/11/2024