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# *Tactics to obstruct the arbitral proceedings: What? When? And legal consequences?*

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# Guerrilla Tactics

- Definition
  - a label for a range of tactics that are intended to **delay or derail the arbitral process**
  - typically rely on the **exploitation** of procedural rules that otherwise ensure due process
  - seeking to ultimately derail the arbitration so that it becomes **abortive or ineffective**

# Guerrilla tactics on the rise?

A 2010 survey reveals

**66%**

have experienced guerrilla tactics

Why?

A 2015 survey reveals

**36%**

identify lack of speed from due process paranoia as the worst feature of arbitration

Clash of legal cultures

Flexibility of arbitration

Lack of enforcement by tribunal

# General examples of Guerrilla Tactics

## Pre-award phase

- Frivolous challenges – arbitration clause, jurisdiction, arbitrators
- Delay of procedural timelines
- Parallel proceedings

## Post-award phase

- Setting aside award on various grounds
- Avoidance of enforcement

# Countering Guerrilla Tactics – at the outset

## Drafting the arbitration agreement

- Validity
- Scope of disputes
- Precision as to procedure
- Conditions precedent
- Choice of procedural rules
- Choice of seat

# Countering Guerrilla Tactics – Initiating Arbitration

## Choice of arbitrator

- Avoiding challenges
- Willingness to order sanctions
- Stance against states

## Framework governing proceedings / Code of ethics

- Submission and admissibility of evidence
- Document production
- Adherence to procedural timetable and agreed consequences for failure
- Witnesses and their treatment

# Countering Guerrilla Tactics – During Arbitration

Party refuses to participate in proceedings?

Party impecunious?

# Countering Guerrilla Tactics – During Arbitration

## Production of evidence

Admissibility of evidence?

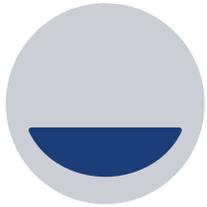
Fishing  
expedition?

Refusal to  
produce  
documents?

Delay in  
producing  
documents?

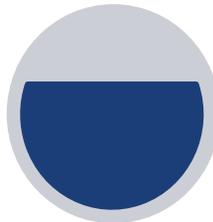
Dealing with  
witnesses?

# Countering Guerrilla Tactics – Cost Sanctions



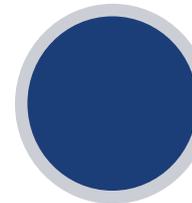
## **Interim cost awards**

Seeking costs after each unmeritorious application



## **Cost Sanctions for delays**

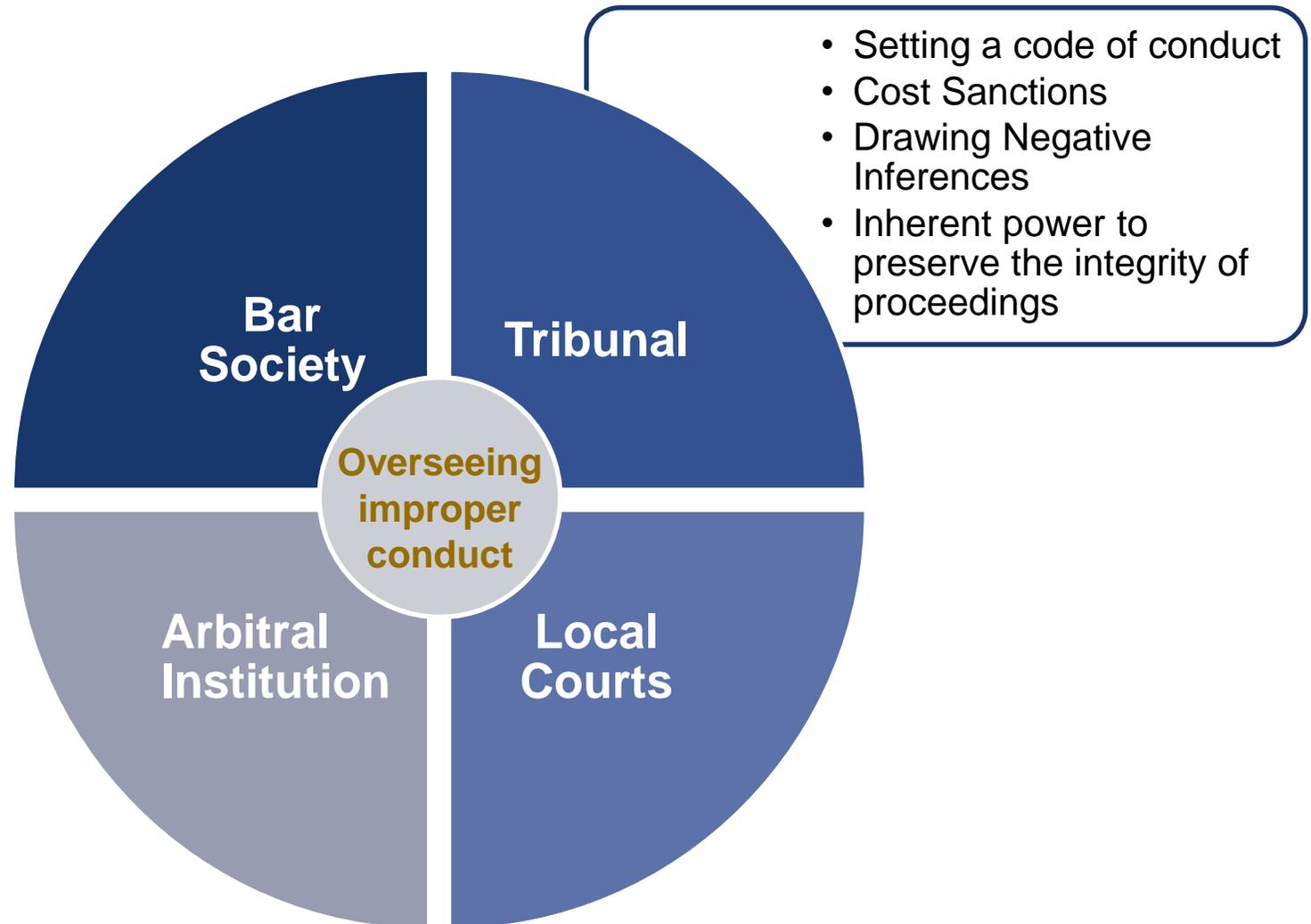
Seeking costs for each breach of the procedural timeline



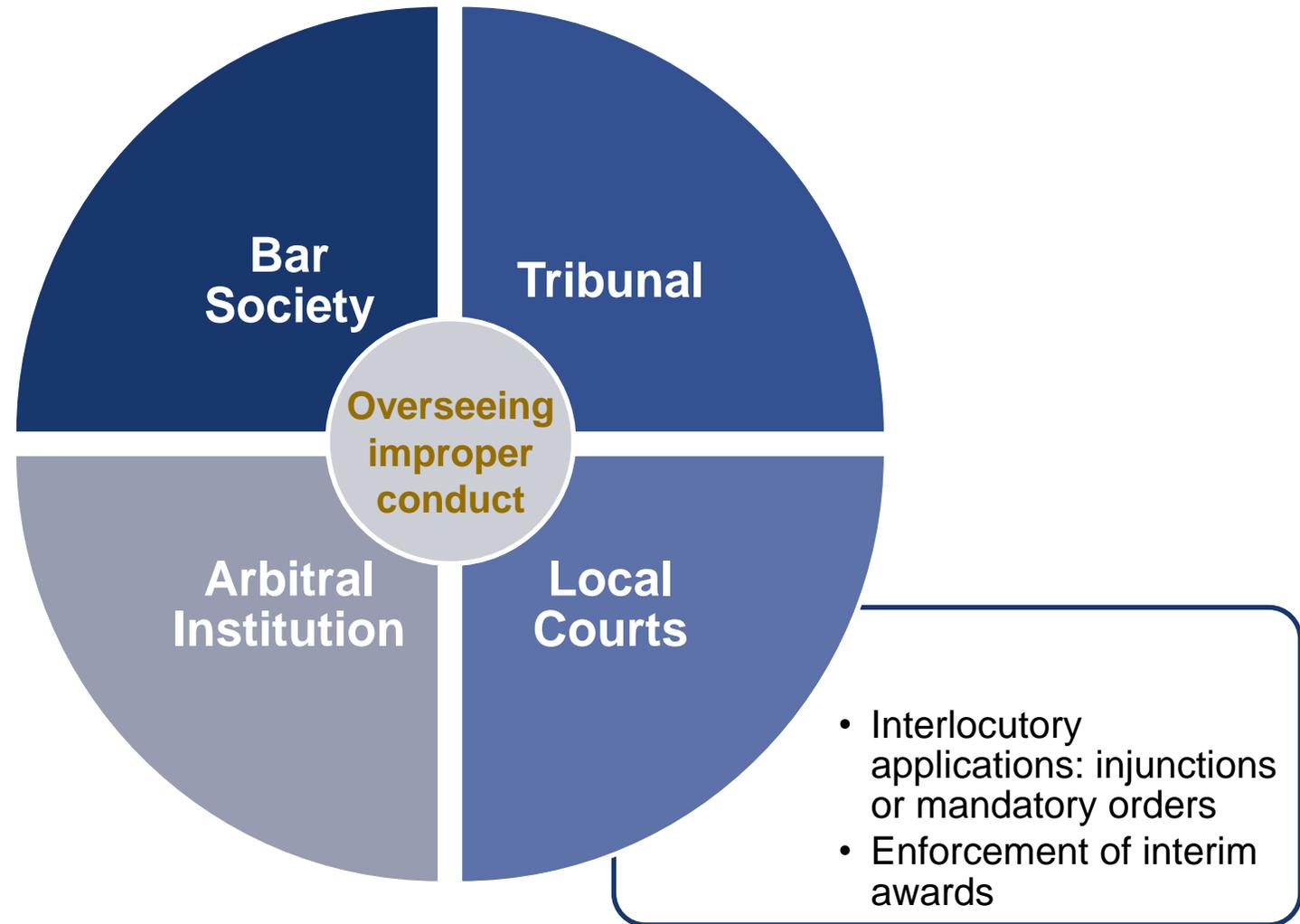
## **Cost submissions for final cost awards**

Seeking costs that reflect the parties' behaviour and penalises any guerrilla tactic

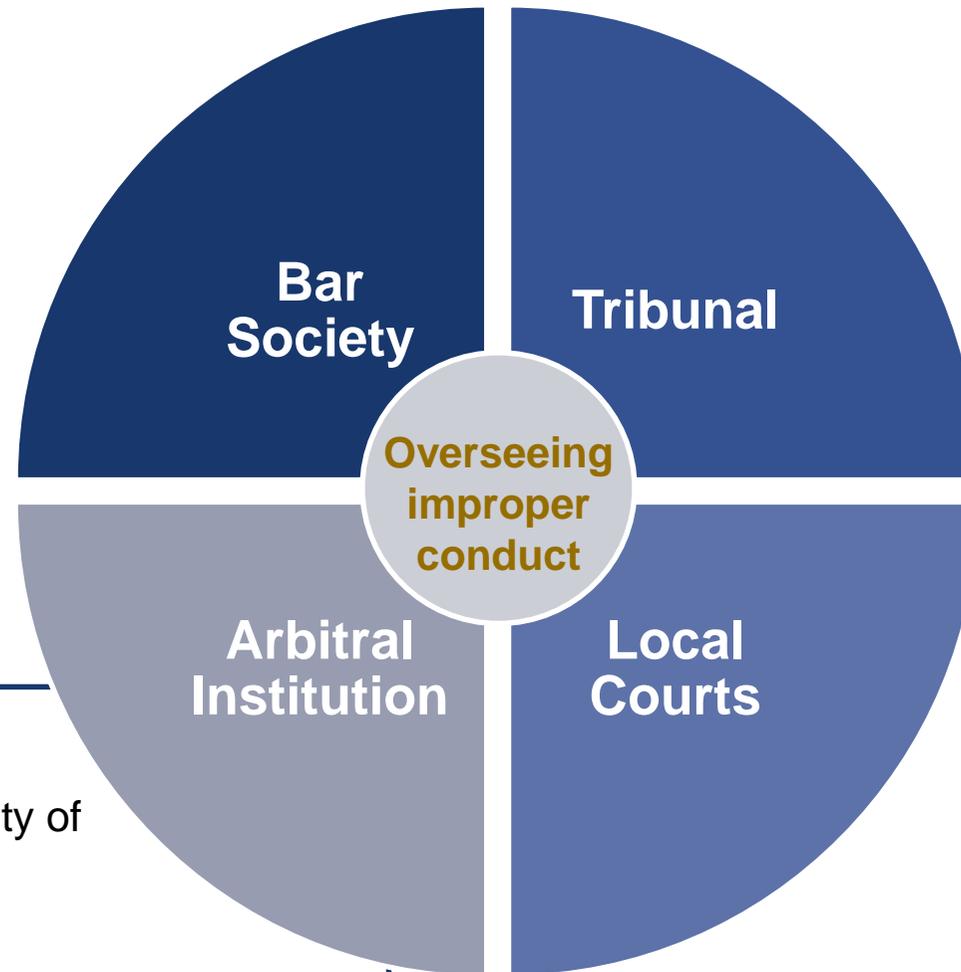
# Countering Guerrilla Tactics – Parties to Engage



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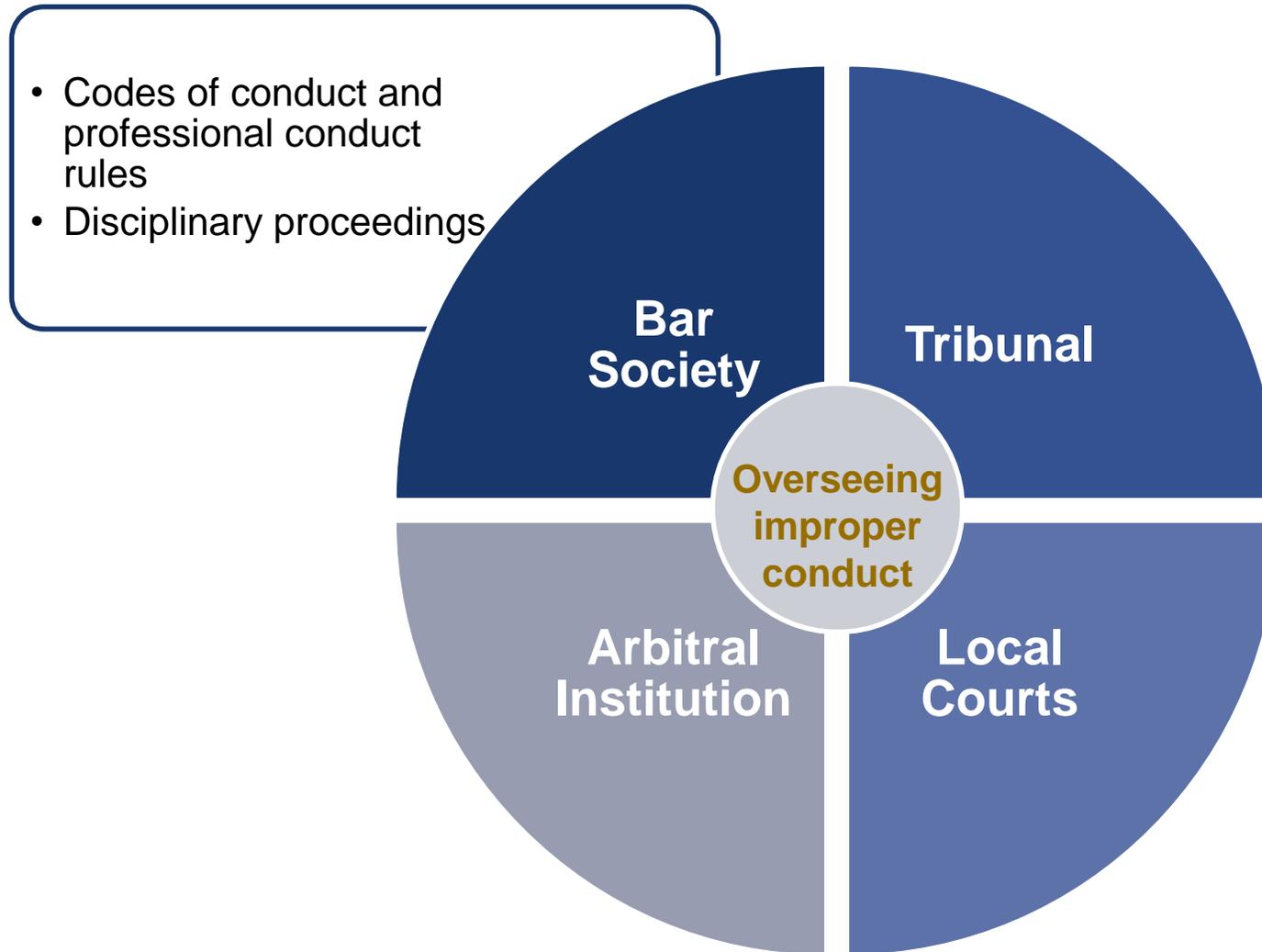


# Countering Guerrilla Tactics – Parties to Engage



- Rules on enforceability of awards
- Codes of conduct

# Countering Guerrilla Tactics – Parties to Engage



# Conclusion

- ❖ **There's a need to create a balance between flexibility/party autonomy and efficacy of arbitration.** While it is essential to protect the parties' autonomy, this should not be a pretext to allow unethical behaviour to develop in international arbitration.
- ❖ **The best way to combat guerrilla tactics is coordinated actions from all stakeholders** – parties, arbitrators, counsel, institutions and courts.
- ❖ **Menu of options** to combat guerrilla tactics – reliance on clauses, institutions and arbitrators is key.

# Suggested Reading List

- ❖ [Kluwer Arbitration Blog: \*The Ethical Paradox Put to Play by Guerilla Tacticians\*](#)
- ❖ [2015 Queen Mary International Arbitration Survey](#)
  - ❖ [and 2021 survey](#)
- ❖ [Chief Justice of Singapore, Sundaresh Menon key note address at the Chartered Institute of Arbitrators International Arbitration Conference, 2013](#)
  - ❖ [see also Kluwer Arbitration Blog discussing the same key note address: \*Responsibility for Ethical Misconduct and Deployment of Guerrilla Tactics in International Arbitration?\*](#)
- ❖ [\*Tomulgen Holdings Ltd v Silica Investors Ltd\* \[2015\] SGCA](#)
- ❖ [ICSID Case: \*Caratube International Oil Company LLP v Kazakhstan\*](#)
- ❖ [ICSID Case: \*Hrvatska Elektroprivreda, d.d. v Republic of Slovenia\*](#)
- ❖ [ICSID Case: \*Rompetrol Group v Romania\*](#)
- ❖ [The IBA guidelines on Party Representation in International Arbitration \(2013\)](#)
- ❖ [LCIA General Guideline for the Parties' Legal Representatives \(2014\)](#)