



**ADVOCACY SKILLS AND ETHICAL
CONSIDERATIONS:**

Position changes and new evidence –
ambush or justice?

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INTRODUCTION

- Increase of dilatory / unethical tactics in international arbitration?
- Two types of situations can raise problems in practice:
 - New evidence:
 - Position change

Just before or at the hearing

- Do not raise the same issues

WHOSE FAULT?

- Counsel?
 - Tactical choice
 - Lack of skills

- Parties?
 - Lack of resources and focus
 - Change of counsel

- Arbitrators?
 - Before: no clear rules where needed
 - When it happens: too flexible?

- Other reasons inherent to arbitration?
 - Short time frame
 - Cases evolve
 - Procedure

ISSUES (1)

- Ambush, justice or part of the game?
 - Same behaviour – different perception
 - Even if admissible, may feel like “ambush”

- Each case is different

- Test under arbitration laws and rules:
 - Discretion of the Tribunal in the conduct of the proceedings (and admissibility)
 - Duty of efficiency and speed
 - But mandatory principles:
 - Right to be heard and present one’s case (justice)
 - Equal treatment and procedural fairness (no ambush)

ISSUES (2)

- Always a balancing act
- In practice: flexible and liberal approach to admissibility
- Why?
 - Risk of challenge of the award?
 - Other considerations:
 - Reasons for late submission
 - Prejudice and remedy
 - Needs of the Tribunal
- But cultural and personal differences

NEW EVIDENCE

- Different situations
 - New document or documentss
 - New testimony evidence (may be admissible but feel like “ambush”)

- Relevant factors to decide on admissibility
 - Timing of production of evidence
 - Purpose of evidence:
 - Response to last submission
 - Response to intervening fact
 - Attack credibility
 - Fix one’s case
 - Nature of document
 - Relevance / usefulness

POSITION CHANGE

- Procedural fairness → knowledge of case
- But cases evolve & different legal cultures
→ claims frequently amended and supplemented
- May raise issues of admissibility and jurisdiction
- Different situations
 - New argument (admissible)
 - Amended claim / prayer for relief
 - New claim / cause of action
- Test of admissibility in arbitration laws and rules
 - Timing and prejudice caused by delay
 - Justification
 - “Other circumstances”

For counsel wishing to produce new evidence or change position

- Avoid it unless absolutely justified
- Early in the proceedings
 - Analyze your case fully (don't assume you will be able to)
 - Agree flexible rules and timetable
 - Reserve your rights (e.g. ToR)
 - Consider alternative claims, “catch all” prayer
- When it happens
 - Do it as soon as practicable
 - Show good reasons for delay
 - Insist on:
 - lack of prejudice / possible remedy
 - relevance / justice

For counsel on the receiving end

- Before the hearing
 - Analyze and prepare case as if you were the other side
 - Expect and be prepared for the unexpected

- Once it happens
 - Read your Tribunal – pick your fight
 - Object if real prejudice (you may need to do the same) - and explain the prejudice
 - Use it
 - Be cooperative - propose realistic solutions
 - Keep track of costs and seek costs
 - Reserve your rights always

For the arbitrators

- At the outset:
 - Read the parties
 - Investigate / discuss need for ground rules
 - Set a realistic timetable
 - Monitor the proceedings

- When it happens (you know the case):
 - Assess:
 - Relevance / need?
 - Tactical choice / failure / justified conduct?
 - Prejudice? Remedy?
 - Key:**
 1. Do not stop half way
 2. Avoid blanket rules – each case is unique
 3. Use cost sanctions

THANK YOU

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