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
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)
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 documents
- 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
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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