Counsel as Client’s First Enemy in Arbitration?

Ugo Draetta

JURIS
TABLE OF CONTENTS

ABOUT THE AUTHOR ............................................................. xi

INTRODUCTION ...........................................................................1

WHY THIS BOOK, AND FOR WHOM
IT IS INTENDED?

CHAPTER ONE ............................................................................9

COUNSEL RISKING AN ADVERSE DECISION BY THE
ARBITAL TRIBUNAL

I. The “All-or-Nothing” Approach.............................................9
   A. “All-or-nothing” approach with respect to the
      entitlement to multiple claims .....................................10
   B. “All-or-nothing” approach in the defense
      against claims...............................................................13
   C. “All-or-nothing” approach with respect to the
      quantum of the claims..................................................15

II. Disloyal or Dishonest Behavior by Counsel towards
    Arbitrators .............................................................................20
    A. Ex-parte communications and other impermissible
       attitudes towards the arbitrators ...................................20
    B. Providing false information to the arbitrators ..........26

III. Incompetent or Unprofessional Behavior by Counsel ......27
    A. Ignorance by counsel of substantive or procedural
       legal aspects ..................................................................28
    B. Inability to properly conduct cross-examinations
       of witnesses..................................................................31
    C. Unprofessional behavior by counsel at the
       hearings..........................................................................44
    D. Lack of preparedness by counsel in written
       or oral advocacy ...........................................................46
    E. Unnecessarily long submissions filed............................50
    F. Excessive amounts of documents produced ..53


## CHAPTER TWO  .................................................................59

**COUNSEL CAUSING INEFFICIENCIES IN THE ARBITRATION PROCEEDINGS**

I. Improper or Inefficient Handling by Counsel of the Document Production and Redfern Schedule Processes ......59  
   A. Assessing the need for document production in arbitration .................................................................59  
   B. Abuses or misuses of the document production and Redfern Schedule processes..............................65  

II. What Arbitrators Can Do to Secure an Efficient Document Production Process When Faced With Improper Behavior by Counsel.................................................................70  
   A. Not contemplating a document production or a Redfern Schedule process at all ..................................70  
   B. Being aware of the pitfalls of the provisions of the IBA Rules on document production ......................74  
   C. Reigning in the abuse or misuse by counsel of the document production and Redfern Schedule processes .................................................................81  

III. Obstructive or Dilatory Tactics by Counsel .........................87  
   A. Frivolous challenges to arbitrators’ appointments ......87  
   B. Frivolous objections or requests of a procedural Nature .........................................................................91  
   C. Counsel agreeing on lengthy terms for their submissions ...........................................................................96  

IV. Other Improper Behaviors by Counsel.................................97  
   A. Accepting improper appointments as a replacement or new counsel (the *Slovenia* case) ..........................97  
   B. Unnecessary aggressive attitudes in counsel’s Advocacy ........................................................................104  
   C. Unsolicited submissions and “the arbitration by correspondence” .........................................................107  
   D. Submitting inflated claims .................................................................108  
   E. Inability or unwillingness to catch settlement opportunities ........................................................................109  

## CHAPTER THREE .................................................................113
CONTENTS

CURING COUNSEL’S IMPROPER BEHAVIORS IN INTERNATIONAL ARBITRATION

I. The Role of Counsel’s Deontological (Ethical) Rules in International Arbitration .......................................113
II. Remedies Available to Arbitrators ............................................117

CONCLUSION .................................................................................125

THE EFFECTIVE LOYAL AND HONEST COUNSEL’S ROLE