

X CONFERÊNCIA INTERNACIONAL DE ARBITRAGEM DO RIO DE JANEIRO

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Painel 2 – Produção de Prova na Arbitragem

- 1) Witness and Expert Statements: How to draft them? Who should draft them? **JMJ**
- 2) Legal Experts: Do we need them? **Dietmar Prager**
- 3) Document Discovery: What are the typical problems that arise? What happens if one party is represented by common lawyer and the other by a civil lawyer? **Jonathan Hamilton**
- 4) Cross-examination: an art, a science or both? Do we really need it? **Julie Bedard**

Witness and Expert Statements: How to draft them? Who should draft them?

1. Thank you Jose Emilio and Pedro for this outstanding event, capacity of creating happiness out of arbitration!
2. This panel is about a new world, if we see it from the view point of our civil law litigation tradition;
3. If you don't move to the real world, the answers for the questions I was asked to provide are easy and evident:
 - a) First of all, Fact Witness Statement shall not exist (they must appear in front of the Tribunal with his/her secrets to surprise the other party, let alone the Tribunal)
 - b) Expert Witnesses shall not exist, as collegial expertise is the solution
 - c) If it is not possible to avoid this modern trend, Fact and Expert Witnesses shall draft as they think adequate, without any contact with counsel;
4. But in the real world, the one where you find due process, the rule of refusal of surprise, sophisticated advocacy and arbitrators preparing the hearings carefully, drafting WS is paramount for the Rule of Law and not the opposite.
5. Now some rules, coming from my experience as lawyer and arbitrator, for:
- 6. Drafting of fact witnesses statements:**

- a) Let the witness freely speak before receiving your input, albeit - when really necessary - placing some questions to focus, clarify and help the witness to dig deeper
- b) Prepare notes (even better transcripts) of the conversation and provide a draft of the issues you want the witness to clarify and answer
- c) Provide also the witness with documents that you consider adequate to support the statement and ask him/her to go beyond that and find those that you are not even aware of.
- d) Obtain from the witness a first draft of the WS and insist that it will be seen as a mere work in progress.
- e) Redraft – carefully and with the minimum intervention possible – the statement (mostly to avoid hearsay, irrelevant indirect knowledge, contradictions, lack of focus, open answers that will be a bonus for cross examination, words that will reflect too much partiality and bias, conflict with other witness.
- f) Obtain from the witness the final touch ... and wait for Expert Witness Statements to have the final touch to the WS made.

7. Drafting of expert witnesses statements:

- a) Avoid any kind of success fee or compensation related to the outcome of the case
- b) Define the scope for the expertise and explain carefully to the EW (i) what are the grounds of the case, (ii) the position of the parties, (iii) the main arguments that will be presented by you to win the case, (iv) the possible outcomes depending on evidence provided, (v) the different possible scenarios that you prefer to avoid the worst case;
- c) Be clear about what you want and don't allow it to "pursue their own rabbit trails and ideas without lawyer clearance" (Tracie Renfro). But admit that expert credibility is jeopardized if he is a clone of counsel
- d) Place this information into a text for the sake of clarification; assess the legal risk – in accordance the contract law and the procedural law of the seat – of a discovery proceeding related to these instructions and any other contacts not covered by privilege
- e) Assess the pros and cons of whether to annex documents to witness statements. Witness would not do that naturally, but may be induced to do so while working with counsels on their witness statements.

Pros: fleshes out and adds credibility to the story told by the witness. It may even be of great value-added to shed light on the untold, between the lines story of a document issued by the witness. It is also useful for counsels: as witnesses' memory may be partial, relying on hard evidence, gives you comfort that the witness will not be torn to pieces under cross examination.

Cons: adds an additional layer of work to both the witness and counsel. The more documents are annexed, the longer (and costlier) will the witness pre-hearing preparation be. If not properly prepared, put the witness at risk during cross examination.

Recommendation: should documents be annexed to a WS upon request of counsel, these documents should be made available to the witness along with the draft of its witness statement. Counsel should ensure that the witness is familiar with them.

- f) Provide him/her with a very carefully organized file with (i) the ToR, (ii) the other side statement (if you are the Respondent) and the documents, EW and Fact W statements pertinent to the requested Statement, (iii) the basic points of fact you expect the EX to rely on as they will also be the basis of your statement, (iv) documents not been used by the other side and some information about what you expect the Fact WS include, (v) available precedents of awards related to the matter at stake.
- g) Call the attention of the EW – if and when convenient to the case - to available information related with international, national, industry, regional, macro- and micro-economic aspects that may be relevant for the EW Statement. Provide him with research but ask him to rely also on his own research. Make also reference to legal, regulatory and contractual framework and provide when necessary or convenient the relevant texts.
- h) Clarify that you expect that EW will need more additional information and arrange a focal point in your team and the Client's to arrange and send asap all that it is requested.
- i) Ask for a first draft of the EW Statement based on the available information to be allowed to review and challenge the technical arguments (to see whether they make sense)
- j) Analyse carefully (i) whether all the EW assumptions are proofed by documents and/or might be object of WS to be arranged; (ii) are in accordance with the best practices or supported by authorities, (iii) corresponds mostly to the facts of the case, (iv) will survive and adapt to other scenarios than your more optimist one;
- k) See also whether the EW report (i) is coherent with the assumptions, (ii) has not contradictions and/or inconsistencies; (iii) will resist to cross examination, notably by not being too open to debate, based on incorrect aspects and too biased or partial;

- l) Then assess the draft with Fact W and documents, to arrange more evidence if necessary and clarify any doubts in relation to facts; and
- m) Send the comments to the EW for him/her to draft it independence and without any redraft by Counsel (the touch of the lawyer is quite often the disease that destroys many EW Statements).

8. Conclusions:

- a) Drafting of WS are more an art than science
- b) It is anyway and for sure fact specific, meaning that each situation has its specificities
- c) In any event, it is – together with cross examination – a litmus test for the quality of advocacy
- d) Good WS drafting is not enough to win a case. Poor drafting is for sure an instrument of failure
- e) To hope for success, counsel shall try to place himself as Earth is in relation to the Sun: closer you are burnt, far away you will be frozen

Thank you very much