



Panel 2: Taking of Evidence

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Presentation of the case

- International *ad hoc* arbitration seated in Paris.
- The case is in relation with the failure of pipes used in the construction of a power plant.

Presentation of the case

- **Bad Co. (Claimant)** is the main contractor on the project.
- **Evil Co. (Respondent)** is one of its sub-contractors.
- **Bad Co.** alleges that **Evil Co.** has provided improper pipes, causing years of delays and almost 200 million USD in losses.

Co-counselors for Claimant (Bad Co.)

Barbara Lautenschlager
(Switzerland)



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Co-Counselors for Respondent (Evil Co.)

Karen Ramm-Schmidt
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(France)



General Counsel (GC) of both Parties

Me



INTERNATIONAL ASSOCIATION OF YOUNG LAWYERS



Question 1

- The arbitral tribunal has just been constituted.
- Bad Co. would like to obtain a key internal document of Evil Co (“the Memo”).
- To take the upper hand in the proceedings, should Bad Co. seek an order for the communication of all documents (not only the Memo) in the possession of Evil Co.?

Question 2

- Evil Co. has not yet been ordered to disclose anything and is worried because some of its internal documents would ruin its defense if communicated.
- **What would be the risks if these documents disappear (it seems that the internal policy for the destruction of archives may apply to the said documents)?**

Question 3

- Evil Co. has been ordered to communicate the Memo, which it did not even know existed. It turns out that, if communicated, the Memo would ruin its defense.
- **Can the co-counsels of Evil Co., who received a copy of the Memo from their client, tell the arbitral tribunal that Evil Co. cannot find the document?**

Question 4

- Bad Co. would like to organize a site visit for the arbitral tribunal in one of Evil Co.'s facilities.
- Bad Co. wonders if a request to the arbitral tribunal to organise such visit can be made without informing Evil Co.
- What do Bad Co.'s co-counsels think about this?

Question 5

- **Alternatively, Bad Co.** wonders if it would be possible to call the arbitrator it has appointed (“it is our arbitrator after all!”) to suggest him a site visit in one of Evil Co.’s facilities would be very useful.
- **What do Bad Co.’s co-counsels think about this?**

Question 6

- Evil Co. has been informed that Bad Co. received a copy of the Memo before the pipe was used on the power plant.
- It knows that Bad Co.'s former commercial director, **Mrs. Vera Bad**, has a copy of this Memo with her comments on it.
- **Evil Co. wonders: could the communication of the document from Mrs. Vera Bad be requested without Bad Co. being informed?**

Question 7

- Evil Co. was not able to secure an order against Mrs. Vera Bad. Evil Co.'s GC asks its counsels:
 - whether/how they could contact Mrs. Vera Bad to see if she can testify that Bad Co. was informed of the Memo?
- if he, as Evil Co.'s GC, can do it himself?

Question 8

- **Mrs. Vera Bad** is going to spend 2 days on the case, preparing and drafting her witness statement, and attending the hearing.
- **Evil Co.**'s GC asks its counsels to organize the payment, through their professional account, of 250.000 USD to her, for her time spent on the case.
- **What do Evil Co.'s counsels think about this?**

Question 9

- It is time for **Mrs Vera Bad** to testify!
- Evil Co.'s counsels meet her in order to explain her the process of drafting a witness statement, and in particular:
 - Who will draft the statement?
 - Can it be reviewed/redrafted by the lawyers?
 - Can the lawyers prepare her for the hearing?

Question 9

- **Mrs. Vera Bad** will confirm that:

“We were informed of the durability issue. However, it was decided informally at that time to select that particular pipe because it was a lot cheaper.

Evil Co. promised to replace the pipe if there was any problem with it, and there is a paper in this respect that Bad Co. is unlikely to have for various reasons. She has copies of this document.”

- Discussions start between her, Evil Co.’s GC and the lawyers...

Question 9

- Evil Co.'s GC would like its lawyers to rephrase or delete the second paragraph. What do they suggest?
- Mrs. Vera Bad insists on keeping the said paragraph the way it is. What can the lawyers do?
- After a brief discussion with Evil Co.'s GC, Mrs Vera Bad declares that she has made a confusion with another contract and confirms that the second paragraph should be deleted. What do the lawyers do?

Question 10

- Bad Co. has been informed that the lawyer and/or the GC from Evil Co. has/have contacted its key witness, **Mrs. Sue Evil**, in order to know in advance what she intends to testify.
- **Bad Co. asks its lawyers if such behavior is acceptable.**

Question 11

- Bad Co. introduces its lawyers to **Mrs. Sue Evil**, former CFO of Evil Co., who is ready to testify that:

“In order to survive it was necessary for Evil Co. to secure the contract with bad Co. with these particular pipes. Another pipe could not be manufactured internally and Evil Co. did not have the money to order them.

Thus, Evil Co. decided to pay Mrs. Vera Bad 200.000 USD to approve the contract with the bad pipes.”

Question 11

- **Bad Co.'s** lawyers are suspicious with the witness. They have seen internal e-mails from Bad Co. that contradict **Mrs. Sue Evil. Do they confront her? How?**
- Despite the lawyers' reservation, **Bad Co's** GC. asks them to add the witness statement of **Mrs. Sue Evil** in their submission. **What do they do?**

Question 12

- Bad Co. asks its lawyers to confirm the payment of 10.000 USD and expenses for the troubles of Mrs. Sue Evil.
- What do Bad Co.'s lawyers answer?

Question 13

- Bad Co. has just concluded a confidential settlement agreement with the owner of the power plant, reducing the damages for the delay from 200 million USD to 50 million USD.
- However, **Bad Co.** would like to make some money out of the arbitration and its GC would like to keep the information secret.
- **How do Bad Co.'s lawyers react?**

Question 14

- Evil Co. claimed in its first memorial that part of **Bad Co.**'s claim is time barred because of a contractual warranty expired without a claim being filed.
- However, **Evil Co.**'s lawyers have found in a bunch of documents received from their client the cover e-mail for the claim which shows that it was filed in time.
- **Do they need to inform the arbitral tribunal?**

Thank you for your attention!

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