

IADC International Corporate Counsel College (Brussels, 14 October 2016)

Can I Lie About the Facts Before the Arbitral Tribunals in Light of the IBA Guidelines on Party Representation?

Mock Case Scenario

FACTS

A acquired from B 100% of the shares in X, an industrial company located in Belgium. The SPA contains a number of representations and warranties, including the following one:

5.17 Environmental Protection

(a) The Company X has all governmental or regulatory leases, licences, permits, certificates, approvals and authorizations (the "Environmental Permits") necessary as regards pollution and the protection of public health, public safety and environment, including laws, statutes, ordinances, rules, regulations, decrees, orders and codes relating to, among other things, emissions, discharges, releases or threatened releases of pollutants, contaminants, or hazardous or toxic materials or wastes into ambient air, surface water, ground water, or land, or otherwise relating to the manufacture, processing, distribution, use, treatment, storage, disposal, transport or handling of pollutants, contaminants or hazardous or toxic materials or wastes, which the absence of which would be Material (the "Environmental Laws").

(b) The Company is in compliance with all Material terms and conditions of such Environmental Permits and has complied with all Environmental Laws and related schedules and timetables contained in any regulation, code plan, order, decree, judgment, notice or demand letter issued, entered, promulgated or approved thereunder. [...]

Subsequently to A's acquisition of the shares in X, X was faced with an avalanche of lawsuits from former workers who alleged they had been exposed to and contaminated by asbestos while working in X factory, which resulted in X being ordered to pay substantial damages to the plaintiffs. A then started ICC arbitral proceedings against B, invoking a breach of Section 5.17 of the SPA and claiming compensation.

In the Answer to the Request for Arbitration, B stated that it had submitted to A, during the due diligence, all documents pertaining to the presence of asbestos in its factory and that A had thus decided to go ahead with the acquisition in full knowledge of the risk of possible asbestos-related litigation.

In its Request for Document Production (after the filing by B of its Statement of Defense), A requested "*the production by B of any and all internal correspondence, notes, mails, memoranda, addressing directly or indirectly the topic of the existence of asbestos in X Belgian factory*".

Ms. Y, who is B's Deputy General Counsel (and who wasn't working for B at the time of the acquisition), discovers that a very sensitive internal memorandum prepared for B's Executive Board by B's Chief Compliance Officer, Mr. Z, had not been disclosed during the due diligence, nor since the beginning of the arbitral proceedings. Mr. Z had already submitted a witness statement which B's attorneys produced together with B' Statement of Defense, in which Mr. Z did not mention the existence of this memo.

In his memo, issued two years before the acquisition, Mr. Z, who was also in charge of compliance by B's subsidiaries, including X, had complained about the fact that X had wilfully failed to solicit and obtain an environmental permit because of the large amount of investment that would have been necessary in order for X to obtain such permit, and insisted on the potentially devastating consequences of such failure in case of future asbestos-related litigation.

While the Arbitral Tribunal is yet to render its decision on the Request for Production of Documents, Ms. Y informs B's attorneys in the arbitration thereof and sends them a copy of Mr. Z's memo. Less than a week thereafter, the attorneys are informed by B's General Counsel that Ms. Y has submitted her resignation. He instructs them not to produce the memo transmitted by Ms. Y and not to refer thereto in any submission to the Arbitral Tribunal.

PROCEDURAL ORDER NR. 1 (EXCERPT)

12. Conduct of Party Representatives

12.1 The Party Representatives are expected to adopt and maintain throughout the proceedings a conduct up to the highest professional standards.

12.2 The Arbitral Tribunal shall take guidance in the IBA Guidelines on Party Representation in International Arbitration for any decision it should take concerning the conduct of a Party Representative during these proceedings.