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A WEEK WITH JOSÉ ASTIGARRAGA
AN INTERVIEW CONDUCTED VIA ITAFOR

Compiled, edited, and translated by Abel Quezada Garza & María Lilian Franco

I. INTRODUCTION

In August 2020, the ITA Latin American Arbitration Forum (ITAFOR) launched a series of interviews with the most prominent arbitration practitioners working in the region. The first of the series was with José Astigarraga, global head of Reed Smith's international arbitration practice.

José is a founder of ITAFOR and renowned in Latin American arbitration, being ranked by Chambers International as top band for Latin America as well as for the United States. He also serves on the International Chamber of Commerce's Commission on Arbitration and ADR and has chaired the IBA's Task Force on the Guidelines for Arbitrator Conflicts of Interest.[1]

The interview was moderated by Elina Mereminskaya, partner at Wagemann Lawyers & Engineers in Chile and co-managing editor of the *ITA Arbitration Report*. The interview lasted five days and was opened to all ITAFOR members.

The interview was originally conducted in Spanish. This is a compilation and translation on this fascinating interview.

II. THE INTERVIEW

ELINA MEREMINSKAYA: Members of ITAFOR, I welcome you all to a special activity that the forum has allowed us to develop: the series of interviews and interactions with leading arbitration practitioners.

José, thank you very much for accepting the invitation and being available to share with ITAFOR some of your experiences and thoughts. Let us get started then.

One of your favorite subjects is the art and science of persuasion. Why the interest?

[1] Int'l Bar Assoc., *Guidelines on Conflicts of Interest in International Arbitration*, https://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx (2014).

JOSÉ ASTIGARRAGA: Let me start with a thank you for this honor. I have great appreciation for ITAFOR and the value it brings to our arbitration community. I hope that my comments in the next few days will serve to raise ideas that are of interest to members of the community and motivate discussion.

To your question, in a sense my interest in persuasion stems from the fact that fundamentally we, trial attorneys, make a living trying to persuade—we want three arbitrators to see the world from the vantage of our clients. If a one-liter bottle contains half a liter of water, then depending on my client's situation, I will want to convince the tribunal that the bottle is half full and my opponent will want to convince them that it is half empty. If we understand how human reasoning works, we can be more effective in persuading.

However, my interest is not as superficial as just wanting to win more cases. My interest is also based on a desire to maximize the chances that decisions are fair. We suffer from errors that are programmed into our reasoning processes—our software—that sometimes lead us to wrong decisions without realizing. We all know that two plus two equals four. Why is it then that from time to time our brains tell us that two plus two equals five? It turns out we suffer from biases that cause our reasoning to fail. For instance, sometimes bias take the form of mental blinders that, without realizing, do not let us see what is there and cause us to only perceive something else.

I have experienced it myself. For example, arbitrators are affected by confirmatory bias, which leads them to perceive only the evidence that matches their understanding of the case and ignore what goes against it. Once that bias is triggered, a party faces the challenge of "un-convincing" the arbitrator of the point of view he or she has formed that does not allow assimilating the evidence objectively.

My message is simple: science validates that human reasoning is more imperfect than we thought. Read "Thinking, Fast and Slow" by Kahneman.[1] For an

[1] Daniel Kahneman, Thinking, Fast and Slow (2013).

arbitrator to fulfill its role of administering justice, we must work to eliminate the errors that plague the computer systems in our heads.

GUIDO TAWIL: Good afternoon, everyone. First, I congratulate ITAFOR for having this interview program and, particularly, for starting with José. They could not have chosen a better interviewee to start the series.

Those of us who know José know that he stands out for several qualities, many of which already manifested in his first response. José is also characterized by his humility. For those who do not know, José created this forum today known as ITAFOR. Several of us supported his initiative but without José's original idea and the decisive support of ITA, this project would not have existed.

José, you rightly mentioned the effort that attorneys must exert to convince arbitrators, who have developed their own opinion, to reverse their initial perception. The task of the lawyer is clear. My question is: what should arbitrators do when that perception is generated? It is easy to say, "you should keep an open mind" and we all certainly try, but how far is that possible? In theory, we could all say that we do not decide until we have studied all the factual and legal arguments, but is that true? Is it possible for an adjudicator to re-examine his or her judgment *de novo*?

JOSÉ ASTIGARRAGA: I begin with the premise that for now it is impossible to eliminate all the defects in our "computer programs." But, just as programmers gradually eliminate computer errors, there are measures we can take to reduce the effect of our biases.

For example, authority bias—that affects the movement to diversify arbitral tribunals with more women and younger practitioners—causes us to defer and place faith in figures who hold "authority." Authority can be defined by title, experience, reputation, etc. In a tribunal with an arbitrator with great reputation and many years of experience and another that is fully qualified yet without the same gravitas, the process can easily become unbalanced. If care is not taken, the statesman arbitrator can dominate the deliberations and process. And authority bias operates subconsciously, so as not with ill intention.

What can be done? The president must take rein and ensure that bias does not affect the process. For example, at partner meetings at Astigarraga Davis, partners expressed their views in reverse order of experience. That is, from the youngest to the most experienced. If we gave an opinion in order of experience (from most to least), the entire discussion would have already happened by the time the young members give their opinion. Likewise, it is incumbent on the president to ensure that all opinions and ideas are duly considered.

There are other techniques as well. I give you an analogy. When I started practicing, there was no autocorrect. The task of proofing long briefs was a tedious exercise. Depending on time and length, the moment came when you no longer could "see" the errors. One way to break that syndrome was to read the document from the "end"—starting with the last word. That made it easier to identify errors because our brains were not anticipating the meaning of the sentence and could focus on the individual words. I think that kind of idea can be applied to arbitration as with counterfactual thinking. In that process, one endeavors to imagine other ways in which the situation in question might have unfolded besides the one you believe occurred.

Counterfactual thinking is useful, for example, to resist hindsight bias. This bias occurs because knowing that a situation has already happened can cause us to foreclose the possibilities of what truly existed. Counterfactual thinking is the exercise of identifying other possibilities, which can help put the true probability of the occurrence in perspective.

Another technique is to evaluate the logical chain by which we reach a conclusion, link by link. Sometimes we discover that we missed a link because we had already formed the conclusion. Anyway, to put my comments in a current context, we do not have a vaccine against biases, but there are already some techniques—in effect, arbitral masks—that can help reduce chances of exposure.

ELINA MEREMINSKAYA: José, you have just led the ICC working group on how to improve the evidentiary value of testimonial evidence. What lessons can you share with us?

JOSÉ ASTIGARRAGA: I have two interesting points. The first is that the project starts from the principle that, for a dispute resolution system to serve its function and satisfy end users, the system must render decisions that are adequately based on the facts. In other words, the system will not be satisfactory if users feel the results do not align with the facts. In that sense, arbitrators are like archaeologists—they must determine what happened in the past using clues and information provided long after the event. If that information is wrong or does not reflect what actually happened, it creates a risk that the tribunal will reach an erroneous conclusion—erroneous for not being based on what actually occurred.

It turns out that the conventional way witness evidence is prepared in international arbitration today may weaken the value of that evidence; it increases the risk that the result (award) does not reflect what in fact happened. For example, we have psychological studies showing that information acquired after the fact can contaminate and change memory. There is a striking example: President George W. Bush said he saw on television when the first plane crashed into the World Trade Center.[2] But, of course, that is not true. September 11 started as a normal day, and no one was filming the tower when the first plane crashed. So, what happened? The overflow of information that he received in the months that followed contaminated his memory to the point he believed he had seen something that in fact he had not.

The same can happen in our proceedings. During interviews and meetings, especially joint meetings with various witnesses, we can contaminate their memories. That creates two risks. First, the tribunal does not get an accurate account of what happened. Second, if during cross-examination it is shown that the witness's testimony is false, the rest of the testimony loses value despite being true, or worse, it appears that the witness is lying. Along these lines, one of the observations of the report is that arbitrators should educate themselves on how memory works to better assess witness evidence. The working group presented a series of recommendations on how to improve the practice.

[2] *See* 911facts, https://www.911facts.dk/?p=7532&lang=en (providing a full discussion about President Bush's statements).

ELINA MEREMINSKAYA: And what is the second point?

JOSÉ ASTIGARRAGA: Elina, what struck me the most is that no matter how much we talk about the convergence of practices in international arbitration, there are still substantial differences. Members of the task force came from all over the world. We conducted a survey on their practices regarding witness evidence. Some members considered that testimony is necessary only if there is no documentary evidence or the testimony contradicts the content of a document.

In effect, they start from a premise that documentary evidence is worth more than witness evidence. However, I have had cases where the counterpart has sent letters to my client and my client, out of fear of enraging the counterpart (a state), has not answered them properly. Later, in the arbitration, he had to explain (through witness evidence) that what was stated in his responses was not true. In the school of thought I describe, witness evidence would be disregarded or discarded upfront. Other members argued that documents simply reflect the perceptions of the authors about the facts, and in some cases the "documents" have been prepared precisely in anticipation of arbitration. In this school of thought, documents are worth no more than witness evidence.

One of the working group's recommendations was that there should not be a predisposition that documents have more value than witness evidence. The key word here is "predisposition". This does not mean that, in a particular case, a document is not effectively more reliable than a witness statement.

Another discussion was whether to allow witness preparation. Some suggested that the value of testimonial evidence increases if attorneys prepare witnesses. Others believed that witness preparation should not be allowed. Others favored strict control of witness examination by the tribunal, and others preferred to minimize the role of the tribunal. It was challenging to reconcile the differences, but in the end, we generated a list of useful recommendations for all schools of thought.

ELINA MEREMINSKAYA: José, you pointed out that "arbitrators should educate themselves on how memory works to better assess witness evidence."

What were the main lessons for improving the probative value of witness evidence? This is a particular challenge in the world of civil law What can attorneys do from their side, to better transmit the value of witness evidence to the arbitral tribunal?

JOSÉ ASTIGARRAGA: Very good question. The group came up with a long list of tools and tips, and the ICC is scheduling an event for its launch, but here are a few:

First, interview witnesses individually if possible. I have had situations where I had to interview my clients' teams collectively. Sometimes the group leader is strong-willed and somewhat defensive about the incident in question. If we do not keep a tight grip, that leader can dominate the meeting and the perspectives of the rest of the team.

Second, ask questions in a neutral way. We have studies showing that the answers to questions depend on how the question is phrased. If we ask: "How fast was the car going when it hit the other one?" This formulation tends to give us a higher speed perception than if we ask: "How slow was the car going when it ran into the other one?"

Third, put witnesses at ease and encourage them to give an accurate account of the events. Sometimes witnesses feel they must testify in a certain way or that it is not advisable to express their genuine opinion. Explain to them that it is perfectly normal not to remember something or say you do not know. Otherwise, again, there is a risk that clients and lawyers do not have all the necessary information to assess the risks of the case adequately, a correct account does not reach the tribunal, or the witness testimony is impugned during cross-examination.

Fourth, take steps to minimize distortions to witness memory. In-house attorneys are often the "first responders" when a dispute arises and therefore can take steps to mitigate distortion by obtaining the witness' account as soon as possible.

There are many other tools, including some for arbitrators.

ELINA MEREMINSKAYA: José, you have been handling international cases in Latin America for years. At the same time, you also handle matters in the United

States. What have you learned while working in those two systems that may be relevant to the ITAFOR community?

JOSÉ ASTIGARRAGA: Perhaps the most interesting is the need to adjust the mental "chip" depending on the system. For example, I have an arbitration case of several hundred million dollars that is being held in a national arbitration center in a Latin American country with a very strong procedural tradition. It is a long-term contract and the dispute concerns whether the force majeure clause excuses the breach. My client is a US company with in-house lawyers trained in common law and there is local counsel assisting as well.

The two teams see the dispute in very different ways. Local counsel relies on and emphasizes technical and procedural legal arguments, affirming the importance of law and the manner in which local arbitrators will decide. The US team recognizes the importance of those arguments, but the difference—and it is a substantial difference, is one of emphasis. For them, the facts must prevail, and the main task is to demonstrate to the arbitrators that it would be unfair to decide against the company. Both teams recognize the importance of the other arguments but give them less importance, priority, and emphasis. The art is in knowing how to reconcile these two conflicting perspectives. That is just one example—I deal with these mental "software" differences regularly in the course of my practice.

Especially in international arbitration, where arbitrators come from different cultures and traditions, the technical and procedural legal arguments are very important, but it is also critical to establish the second "because." Not the second "why"—the second "because".

I studied with a very distinguished professor in the US, Soia Mentschikoff. She explained that important court decisions usually have two "because's." The first is the legal justification—the judge decides based on the law; she decides in your favor because the law supports your claim. But usually there is a second "because." The first "because" is the justification for the result, but the second "because" is what motivated the decision. That motivation can be the judge's sense of justice, or opinion about the effect the decision can have on society, or her philosophy of life, as well as,

sometimes, negative motivations such as biases and prejudice; the judge decides in your favor because it is also "right."

It is key to understand, and sometimes supply, the second "because." In my case, the US team seeks to satisfy the arbitrators of the second "because," arguing the injustice that would result for finding against the client given the parties' behavior. I believe the second "because" is key no matter the nature of the arbitration.

HENRY VEGA PRECIADO: Notwithstanding the difference between the two systems, I ask whether the "second because" is an appeal to equity (with the risk of imposing a subjective criterion).

JOSÉ ASTIGARRAGA: There is always that risk. Yesterday at a conference organized by Alfredo Bullard and Huascar Escurra, a participant asked if arbitrators allow themselves to be influenced by emotions. Huascar explained that he considers "fundamental to be able to cause that emotion in the tribunal because it is when you cause that emotion that you reach the tribunal's empathy for your client's story and get them to feel that your client's cause is the just cause that should prevail in the award." Arbitrators are humans with emotions. The "second because" is not simply an emotion. It can be a totally objective question (for example, the effect of the decision on society). However, in any case, remember that alongside the "second because" there is the "first because"—the legal justification that validates the result.

ELINA MEREMINSKAYA: For ten years you have been appointed as sole arbitrator, arbitrator, and president of arbitral tribunals. However, recently you have not accepted any more appointments. What was the motivation to stop serving as arbitrator?

JOSÉ ASTIGARRAGA: To a litigation attorney, the experience of serving as arbitrator is invaluable. You can see how arbitrators do their jobs. Even simple things, for instance, how to organize documents, how to reduce their workload, etc. Things that you do not think about until you are on the "other side of the table." But there are also more complex things, such as how the arguments are perceived, how to submit information in an effective manner, the relation between the tribunal and

witnesses, and the dynamic between the arbitrators. It was very useful being on that side of the table.

ELINA MEREMINSKAYA: But then why stop?

JOSÉ ASTIGARRAGA: It was more about what fulfilled me. During those years I was more focused on the biases and persuasiveness. I enjoyed the ability to apply the things I was discovering as an attorney. I taught courses about cross-examination. Basically, I wanted to be Messi and not the arbitrator of the game (I apologize to my Real Madrid friends).

Maybe you are aware that the slogan of my law firm was "the Power of Focus," and in accordance with that philosophy, I preferred to focus on my job as an attorney.

But now I am also interested in the developments that we can do "on the other side of the table." For instance, the ICC invited arbitrators to form a working group about memory performance. In Vienna, we presented a program about how arbitrators can tell if a witness is telling the truth and of course, how to control biases when you act as arbitrator.

ELINA MEREMINSKAYA: What do you think about "double hatting"?

JOSÉ ASTIGARRAGA: Your question is very appropriate. ICSID and UNCITRAL just published a draft code of conduct for adjudicators in investment arbitration.[3] Article 6 of the draft code seeks to limit arbitrators from acting as counsel and this provision will be mandatory for ICSID cases.[4]

Regarding double hatting, we must make a distinction between investment and commercial arbitration. In the commercial arbitration context, I do not see much of a problem with double hatting. In investment arbitration, many consider that both roles (counsel and arbitrator) are incompatible and create risks when performed at the same time.

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[3] *Draft Code of Conduct for Adjudicators in Investor-State Dispute Settlement*, https://icsid.worldbank.org/sites/default/files/Draft_Code_Conduct_Adjudicators_ISDS.pdf (hereinafter *Draft Code*).

[4] *ICSID and UNCITRAL Release Draft Code of Conduct for Adjudicators* ICSID (May 1, 2020), https://icsid.worldbank.org/news-and-events/news-releases/icsid-and-uncitral-release-draft-code-conduct-adjudicators.

For instance, in investment arbitration there are certain principles that are repeatedly addressed (expropriation, fair treatment, denial of justice, etc.). One fear is that a counsel acting as arbitrator in an investment case could solve the case with the aim of benefiting his client in another case.

Some people differ. Some weeks ago, our team presented a program on the code of conduct with Meg Kinnear, the ICSID Secretary-General, Juan Fernandez Armesto, Lucy Reed, and Tom Sikora, among others.[5] Both Juan and Lucy commented that there should be an absolute prohibition against "double hatting." Tom (by the way, the next president of the ITA), in-house counsel at Exxon, commented that the rule need not be absolute and advocated for a prohibition against acting as arbitrator and counsel simultaneously with regards to the same measure.

There are also other considerations involved. Prohibiting arbitrators from also practicing as counsel creates economic challenges for those who do not have enough work as arbitrator yet. In those cases, even if they are very experienced arbitrators, only those with enough workload will be able to accept appointments. Why does this matter? This affects the possibility of filling tribunals with more women and younger practitioners.

ELINA MEREMINSKAYA: José, what is your advice to the young practitioners on ITAFOR?

JOSÉ ASTIGARRAGA: I have two. First, do something you are passionate about. There is a quote: "Do something you love and you will never work a day in your life." Life is too short to do things that do not fulfill you. When I would interview young attorneys for a position at Astigarraga Davis, I told them the story of the three bricklayers:

> Once there were three bricklayers. Each one of them was asked what they were doing. The first man answered gruffly, 'I'm laying bricks.' The second man replied, 'I'm putting up a wall.' But the third man said enthusiastically and with pride,

[5] *Draft Code*, *supra* note 5, at 16 ("Adjudicators shall [refrain from acting]/[disclose that they act] as counsel, expert witness, judge, agent or in any other relevant role at the same time as they are [within X years of] acting on matters that involve the same parties, [the same facts] [and/ or] [the same treaty].").

'I'm building a cathedral.'[6]

I explained to the candidates that we were looking for cathedral builders. Find something that makes you feel like you are building cathedrals.

The second is be great lawyers. I am delighted that I started my career in the best law firm in Florida in those days. One of the main partners was an extraordinary business creator for the law firm. Young lawyers asked him for advice on how to attract clients. He said, "Become excellent lawyers." We felt disappointed and thought: who does not know we have to be excellent lawyers? But what Louis explained is that before we can speak of all the rest, of how to attract clients, you need to have domain of the law and "craft" of lawyering. Throughout the years I realized that he was right.

III. CONCLUSION

JOSÉ ASTIGARRAGA: I have enjoyed the exchange of ideas and the interventions of so many friends. Thank you for the opportunity to share this week with you.

Elina and ITAFOR--congratulations for the excellent work you have done so that our arbitration community can communicate with the aim of strengthening arbitration in our region.

ELINA MEREMINSKAYA: José, thank you very much for accepting the invitation to do the first interview of its kind in ITAFOR. Thank you, above all, for being with us throughout the five days, for sharing your ideas with such generosity, and for encouraging reflection at ITAFOR.

We express our infinite appreciation for José and thank the ITAFOR community and members for their participation in this initiative.

MARÍA LILIAN FRANCO focuses her practice on international arbitration and has experience on telecommunications, energy and corporate law as an associate at Aguilar Castillo Love. She holds an LL.M. in International law and foreign trade from ISDE Law and Business school in Spain and a law degree from Universidad Francisco Marroquin in Guatemala.

[6] Reed Smith LLP, *ICSID/UNICITRAL Draft Code of Conduct for Adjudicators in Investor-State Dispute Settlement*, YOUTUBE (July 27, 2020), https://www.youtube.com/watch?app=desktop&v=_9BkcA51aAw.

ABEL QUEZADA GARZA is a Mexican lawyer working as an associate at del Castillo & Castro Abogados in Monterrey. His practice area focuses on civil and commercial litigation, international arbitration matters and alternative dispute resolution methods. He has experience in domestic and international arbitration proceedings, under the Arbitration Rules of the International Chamber of Commerce (ICC) and the National Chamber of Commerce of Mexico City (CANACO).

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