Witness Preparation in International Arbitration – A Cross Cultural Minefield

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Commentary

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What is Meant by “Witness Preparation”

Whilst there is now a broad consensus that it is permissible for there to be contact between counsel and witnesses for the purpose of preparing witness evidence for admission in international arbitration, considerable differences continue to exist under both the ethical rules regulating the conduct of counsel and under the arbitration laws of different jurisdictions as to what constitutes permissible “witness preparation.”

For clarity we will utilise in this assessment three terms to denote different levels of contact, being: i) interviewing; ii) familiarisation; and iii) coaching.

The interviewing and recording of a witness’ evidence for the purpose of the production of a witness statement can be considered as being the lower end of the spectrum in terms of the degree that counsel can be said to influence the witness’s evidence. Witness familiarisation, focusing upon, inter alia, forms of cross examination technique that the witness may encounter at the evidentiary hearing and mock questioning based on a hypothetical set of facts to familiarise the witness with being cross-examined, but, significantly, without any questioning based upon the specific facts of the case, may be seen as in the middle of the spectrum. At the far end of the spectrum is coaching, which may involve a more intensive interaction between counsel and the witness and include a detailed exploration of the specific facts of the dispute so as to rehearse with the witness the answers to the questions that the witness may reasonably be expected to be asked by opposing counsel and/or the tribunal.

This article will discuss the ethical, legal, and other considerations that arise from the different levels of witness contact viewed as permissible across different jurisdictions and suggest ways that, in the absence of transnational standards, the tribunal may seek to deal with any asymmetry arising in the specific circumstances of a particular case.

The Different Ethical Standards Applicable to Counsel

The conduct of counsel is regulated by the applicable regulatory bodies to which they are associated. As long ago as 1992, the leading arbitrator Jan Paulsson noted that “[a]rbitrators are named to resolve disputes between parties, not to police the conduct of their representatives.”

The setting of rules and procedures by the tribunal as
advocated in this article would not, we submit, fall into the ambit of policing as described by Mr Paulsson, as the tribunal would be adhering to its duty to alleviate inequality and implementing a clear standard which is to be applied by all parties.

Many commentators have called for the development of transnational ethical standards for counsel engaged in international arbitration and there are ongoing initiatives in this area. For example, an important initiative titled ‘Task Force on Counsel Ethics in International Arbitration’ was announced at the 2011 International Bar Association International Arbitration Day in Seoul by Dr Guido Tawil. The task force was set up to investigate the different and often contrasting ethical and cultural norms, standards, and disciplinary rules that may apply to counsel in international arbitrations. At present the position is, generally speaking, that national standards prevail, with national ethical standards being driven by considerations of what is acceptable in national courts or to professional bodies (to extent different), rather than taking international arbitration into account.

Ethical standards have been set with court-based litigation at the forefront of the minds of the drafters and in common law jurisdictions they have been clarified by the judiciary through decisions in both civil and criminal cases. The authors submit that at the core of the challenges faced in certain jurisdictions is the failure of the ethical and professional conduct drafters to expressly take account of the different considerations at play in international arbitrations including, in particular, the scope that exists for there to be inequality of position between counsel from different jurisdictions.

In the United States, interviewing, familiarisation, and coaching of witnesses is commonplace with the use of mock cross-examination and rehearsals both being accepted elements of coaching. In the course of preparing a witness, U.S. counsel may suggest answers that the witness may use in response to questioning in order to achieve the best outcome for their client. When conducting such witness preparation, counsel should follow the American Bar Association’s Model Rules of Professional Conduct, which state that, “a lawyer shall not knowingly... offer evidence that the lawyer knows to be false. If a lawyer, the lawyer’s client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal” (Rule 3.3). Additionally, counsel should not, “falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law” (Rule 3.4).

There is a stark difference in the way witnesses are permitted to be prepared in the United States to the permissible methods allowed in England and Wales and in a number of other common law countries. The English position was clarified in the well-known cases of R v. Momodou and Limani, and Ultraframe (UK) Ltd v. Fielding & Others. The cases detailed the distinction between what the courts termed witness training or coaching, and witness familiarisation expressly stating that training or coaching is not permitted. The courts explained their decision on the basis that a witness should convey his or her own evidence uninfluenced by others.

At paragraph 22 of his judgment in Ultraframe, Mr Justice Lewison quoted paragraph 61 of the Momodou judgment, “an honest witness may alter the emphasis of his evidence to accommodate what he thinks may be a different, more accurate, or simply better remembered perception of events. A dishonest witness will very rapidly calculate how his testimony may be ‘improved’. These dangers are present in one-to-one witness training. Where, however, the witness is jointly trained with other witnesses to the same events, the dangers dramatically increase. Recollections change. Memories are contaminated. Witnesses may bring their respective accounts into what they believe to be better alignment with others. They may be encouraged to do so, consciously or unconsciously. They may collude deliberately. They may be inadvertently contaminated. Whether deliberately or inadvertently, the evidence may no longer be their own. Although none of this is inevitable, the risk that training or coaching may adversely affect the accuracy of the evidence of the individual witness is constant. So we repeat, witness training for criminal trials is prohibited.” Despite Momodou being a criminal case, the rule laid down with regard to witness preparation is also applicable to civil litigation in England and Wales. Furthermore, the codes of conduct for English Barristers and Solicitors reflect these principles with no express carve out relating to international arbitration and so English lawyers must adhere to them including when appearing in international arbitrations.
In terms of the ethical restrictions applicable to English lawyers, acceptable aspects of witness familiarisation may involve explanations of the format and layout of the hearing/court room, the likely sequence of events when the witness is giving evidence, and a balanced appraisal of the different responsibilities of the various participants. Straying much further may engage ethical restrictions. Mock questions can be used to assist the witness in understanding the techniques used in cross-examination but not to refine the evidence they will actually give at the hearing. Records of the individuals involved with and the materials used in witness familiarisation sessions should be retained.

This type of witness familiarisation technique may be followed in other Commonwealth jurisdictions; countries such as Australia and New Zealand have rules akin to the English position, with a prohibition on witness coaching.

In court cases in Belgium, France, Italy, and Switzerland, all contact with witnesses is prohibited. Each of these countries has, however, implemented specific carve outs to their national ethical codes to provide for the situation when counsel are engaged in international arbitration proceedings. For example, in France there is a standing prohibition against a counsel (avocat) discussing the case with a witness (témoign) prior to a hearing, but the Conseil de l’Ordre of the Ordre des Avocats de Paris passed a resolution in 2008 which allowed members of the Bar to prepare witnesses in international arbitrations9. In the same way in Switzerland, Article 7 of the Code Suisse de Deontologie10 permits contact with witnesses (contact avec les témoins).

Institutional Rules and Guidelines
The London Court of International Arbitration (LCIA) Rules11 are silent on the topic of witness training, but Article 20.6 of the rules states that, "subject to the mandatory provisions of any applicable law, it shall not be improper for any party or its legal representatives to interview any witness or potential witness for the purpose of presenting his testimony in written form or producing him as an oral witness."

Rule 22.5 of the Singapore International Arbitration Centre (SIAC)12 has very similar wording to that of the LCIA in allowing representatives to interview witnesses, subject to the mandatory provisions of any applicable law.

The ICGR, SCC, and current (1998) ICC rules are silent as to witness interviewing or preparation. It remains to be seen if the new ICC rules, effective 2012, due to be published in September 2011, deal with the issue13.

The International Bar Association (IBA) Rules on the Taking of Evidence14 in International Arbitration (rules which are not mandatory but are frequently adopted in international arbitrations) state, “…it shall not be improper for a Party, its officers, employees, legal advisors or other representatives to interview its witnesses or potential witnesses and to discuss their prospective testimony with them" (Article 4(3)).

Achieving Equality of Arms
Bar Associations and the international arbitral community
Many commentators feel there is a compelling need for the international arbitration community to come together in order to establish a supranational code of ethics for use in international arbitration to address currently conflicting and unclear ethical obligations witness preparation. The recently implemented IBA Task Force on Counsel Ethics has completed its survey and the results are currently being analysed. Other attempts have been made to create a transnational code. For example, the Council of the Bars and Law Societies of the European Community (CCBE)15 prepared draft ethical guidelines for lawyers serving in arbitration proceedings and Doak Bishop circulated draft guidelines at the ICCA conference in Rio 201016.

A starting point may be for the IBA to utilise the results of their survey in order to tailor the IBA Code of Ethics for use in international arbitration. Of course, this would still create the risk of conflicting ethical standards between national and international arbitration codes of conduct, but it could be the foundation to build upon in an attempt to level the playing field and may be used as a benchmark by clients, counsel and the tribunal. These rules could then also be adopted by arbitral institutions.

Existing supranational codes such as the CCBE Code of Conduct 2006 do not go far enough in addressing issues in international arbitration. Any transnational code will have little real force and effect, especially on counsel that are called in countries that take a more
restrictive approach unless its adoption serves to cause regulators in those countries to amend their national standards. Major Bar Associations might collaborate and harmonise their codes of conduct, devising carve outs as necessary for use solely in international arbitration, such as most recently in Belgium. Such collaboration between Bar Associations ought to eliminate ambiguity for their members in relation to their professional ethical duties. Achieving this may take some time and prove difficult given the different standards and interests at play, as illustrated by the experience with the CCBE draft guidelines for lawyers serving in arbitration proceedings which received a cool reception in many quarters. Whilst superficially attractive it is unrealistic to expect an early revision to the IBA Rules on the Taking of Evidence. In the event that further consensus develops on a transnational code of ethics for counsel, it may be possible to accommodate an expansion of the existing Article 4 in any further revision.

The Tribunal and Counsel

In line with the Article 4(3) of the IBA Rules on the Taking of Evidence, tribunals are increasingly including in their procedural orders permission for counsel to have contact with their witnesses of fact. This is a positive initial step but tribunals arguably should seek to go further and include wording to help maintain the equal-ity of arms with regard to witness preparation.

Until any supranational code is established, it is for the tribunal to set out which rules and procedures are applicable to the arbitration. The tribunal is not able to give permission to counsel to go against their professional obligations, but it can at least properly seek to equalise the position and create a case specific ecosystem depending on the backgrounds of counsel involved in the arbitration. Under such an approach, one party could be restrained from adopting procedures that might normally be used in certain national courts even if this means they are required to select counsel able to live under that regime. The tribunal would have to ensure that any procedural orders are compatible with the law of the seat and any other applicable laws keeping in mind that the main aim for international arbitration is to achieve an enforceable award; failing to comply with rules and regulations may expose an award to challenges and ultimately make it unenforceable. For example, in some New York Convention countries, witness coaching may be seen as being contrary to public policy.

Tribunals are already mindful to deal with the differences in legal professional privilege being afforded to documents, especially with regard to in-house documents which in certain jurisdictions are not considered attracting lawyer-client privilege. Tribunals in these types of cases are commonly implementing the “closest connection test” and levelling up the standard affording privilege to documents in the arbitration which would otherwise not be regarded as privileged by national courts, and thus creating a level playing field between parties. This is now an express feature of the new 2010 IBA rules (Article 9). Tribunals may seek to adopt a similar approach and use it for levelling the position on permissible contact with witnesses. This might be done, for example, by going beyond a simple provision in a procedural order stating that contact is allowed, and by setting out say that interviewing and familiarisation of a witness is permitted but coaching is not. Tribunals might, alternatively, without making a specific provision in a procedural order, make clear to counsel at the first organisational hearing — whilst discussions regarding the scheduling of witness evidence are taking place — their views on the appropriateness of contact with witness and coaching, or otherwise seek to encourage the parties to operate with greater equality.

Counsel themselves have a responsibility to be alive to any discrepancies between national ethical standards. The authors submit that counsel should raise any perceived unfair advantage with the tribunal at the earliest opportunity. By dealing with any potential unfair advantage at the outset, the tribunal would limit the risk of potential challenges and aid counsel by alleviating questions related to ethical standards and equality of arms. As a minimum, tribunals should be observant to counsel coming from differing jurisdictions and should consider the evidence put forward in light of the varying standards of witness preparation allowed from the respective counsel’s jurisdiction.

Endnotes

1. It is an increasingly dominant practice to use witness statements even across civil law countries. Article 4 of the IBA Rules on the Taking of Evidence stipulates how witness statements should be drafted and Article 4(4) states that the arbitral tribunal may order each
party to submit within a specified time witness statements by each witness whose testimony is relied upon.


13. The authors understand as of 8 September 2011 the draft rules do not deal with the issue of witness preparation.


19. Clearly tribunals will in any event seek to weigh the evidence, and in the event they discern that a witness has received extensive coaching, that may influence the weight they place upon that evidence.