Kluwer Arbitration Blog

Will the New Year Bring Resolution to the Recurring Ethical Dilemma of How Far to Go in Preparing Your Witnesses?

Claudia Ludwig (Herbert Smith Freehills LLP) · Friday, December 21st, 2012 · Herbert Smith Freehills

By Claudia Ludwig and Jennifer Hartzler

Whenever a hearing in an arbitration is on the horizon, the question of how far you can go in preparing your witnesses arises. Apart from particularly litigious clients, most clients will not have appeared as a witness in an arbitration or any other proceedings before. They are therefore regularly looking to be prepared for their 'big day in court'. At the same time, the advocate himself may wish to prepare the witness for his or her evidence in order to have the feeling of retaining at least some form of control over the oral evidence and to avoid too many unwelcome revelations at the hearing.

Witness preparation in international arbitration is usually seen as a matter of legal professional ethics. The exact ethical standards which have to be complied with in international arbitration are unclear, as there is no or very little guidance as to which professional rules bind counsel. Accordingly, international arbitration is considered by some to be an 'ethical no-man's land'. The result is that parties in an international arbitration are often represented by counsel from different jurisdictions, each operating according to their own understanding of their professional obligations. The authors of this blog post are Swiss/English and New York qualified. What ethical or professional rules must they consult when acting in an LCIA arbitration seated in Paris?

According to the professional rules of the Swiss Bar Association, a lawyer is not allowed to influence factual or expert witnesses in any way. However, this rule does not apply to international arbitration. The Swiss Rules of International Arbitration, as revised in June of this year, clarify that 'it is not improper for a party, its officers, employees, legal advisors, or counsel to interview witnesses, potential witnesses, or expert witnesses'.

A very similar provision can be found in the LCIA Rules. However, according to the English Solicitors' Code of Conduct and the Bar's Code of Conduct, only limited witness familiarisation (giving the witness a general 'introduction to the theory, practice and procedure of giving evidence' – *Ultraframe (UK) Ltd v Fielding and others* [2005] EWHC 1638 (Ch)) is permitted, whereas 'coaching' the witness by testing the witness about his or her evidence and possibly even suggesting answers is prohibited. This was recently highlighted in the press in relation to the Leveson inquiry where questions were raised as to the legitimacy of the 'legal tutoring' which David Cameron allegedly received prior to giving evidence (see the article 'Why lawyers can't coach witnesses' in the Guardian on 8 May 2012).

On the other end of the spectrum is the New York State Bar Association's New York Rules of Professional Conduct, which are silent on witness preparation/coaching. The New York Rules simply provide that counsel should not offer witness evidence which he or she knows is false and should not assist a witness in testifying falsely. The New York Rules are based on the American Bar Association's Model Rules of Professional Conduct, which form the basis of the conduct rules in many other US jurisdictions. Given that there is no prohibition on witness coaching in most US jurisdictions, it has become fairly common practice for US lawyers to 'coach' their witnesses through mock cross-examinations and discussion of suggested responses, among other things. To a certain extent, witnesses have come to expect their counsel to prepare them for giving testimony.

Finally, the Paris Bar seems to take a similar approach to the Swiss Bar in that it allows as an exception in international arbitration contact between the lawyer and the witness.

In international arbitrations, counsel (like the parties they represent) are often from different jurisdictions which have their own regulations regarding professional obligations. The party whose counsel has more freedom to communicate with and prepare his witnesses may be seen as having an advantage. It is this concern for equality between the parties – a fundamental principle of international arbitration – which has caused practitioners to advocate for the adoption of universal rules or guidelines which allow them to resolve the ethical dilemmas which international arbitration repeatedly brings about.

In 2008, the IBA Committee on Arbitration formed a Task Force with the mandate to develop guidelines on counsel conduct in international arbitration, including the issue of witness preparation. These guidelines were discussed at the IBA conference in Dublin earlier this year. The authors understand that the emerging view from these discussions was that counsel may meet with witnesses and discuss their prospective evidence and prepare them for cross-examination (including practice questions and answers). However, counsel may not try to influence the witness's evidence or invite a witness to give untruthful evidence.

It is expected that there will be a public consultation on the draft guidelines early in the New Year. 2013 may therefore bring counsel some assistance in resolving his or her ethical dilemmas in international arbitration. The IBA Guidelines on Counsel Conduct would be a welcome step forward in identifying some of the key ethical issues and reflecting some form of international consensus as to what is and what is not appropriate. However, the IBA Guidelines on Counsel Conduct would not displace national professional conduct rules which would otherwise apply to counsel. The authors will remain bound by Swiss, English, New York and arguably whatever ethical rules are applicable at the seat of the particular international arbitration they are involved in. There is therefore a clear limit as to how much the IBA guidelines, and any other codes of conduct to be adopted by the international arbitration community, can level the playing field between parties with counsel from different jurisdictions. As long as counsels' local professional conduct rules are not harmonised, the effect of such guidelines will be limited to raising the standards for counsel from jurisdictions with low ethical standards while counsel from jurisdictions which already have relatively high ethical standards such as England will remain bound by those higher home standards. Thus, while the guidelines will go somewhere to bridging the divide, they will not provide a complete answer.

It bears emphasis that the purpose of creating a common standard of conduct is not to somehow determine the one 'right' approach for witness preparation. Rather, it is about ensuring that as between parties in a particular international arbitration, the standard is the same, whether that

standard is considered to be high, low, or somewhere in between. Accordingly, perhaps the best way to level the witness preparation playing field between parties in international arbitration is to rely on the cornerstone of international arbitration: party autonomy. Given the international nature of arbitration proceedings, perhaps a better approach would be for the witness preparation debate to be led by an internal discussion between the parties about what is the appropriate approach for their witnesses in the particular arbitration at hand, rather than by the external forces of counsels' local ethical regulations. This would obviously require local legal ethics regulators to take a step back with respect to counsel's ethical obligations when acting in international arbitration.

The IBA Guidelines on Counsel Conduct could no doubt facilitate this process, in much the same way the IBA Rules on the Taking of Evidence in International Arbitration assist parties and tribunals in agreeing procedures for disclosure. It is unlikely that 2013 will be the year this contentious issue is put to rest. However, at the very least, the authors hope that such guidelines would be the impetus for parties and tribunals to discuss and agree a common standard for witness preparation early on, rather than leaving it until just before the hearing, or as is often the case, not addressing the point at all.

This entry was posted on Friday, December 21st, 2012 at 5:40 pm and is filed under Arbitrator Challenges
You can follow any responses to this entry through the Comments (RSS) feed. You can skip to the end and leave a response. Pinging is currently not allowed.