CHICAGO INTERNATIONAL ARBITRATION CENTER

Ethical Considerations in International Arbitration

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In the international arbitration world, as in the legal profession generally, it is widely agreed that there is a need for ethical rules to promote high standards of conduct and preserve professional integrity. Moreover, such rules are not supposed to be used to give one party a tactical or practical advantage over the other party. However, in international arbitration, it is often unclear what ethical rules apply.This essay will deal with ethical considerations for counsel, rather than ethical considerations for arbitrators.

A problem with respect to international arbitration is that there may be potentially three or four sets of ethical rules that could apply, and these rules may have different, or even conflicting requirements. The parties will likely be from two different jurisdictions, which may have different ethical rules, and the arbitration is likely to take place in a third country – the seat - which may have still other ethical rules. Finally, the tribunal may wish to apply its own ethical rules.

So what happens when different ethical rules conflict? The following are some situations where this can arise:

1. Each lawyer is governed by rules of its home jurisdiction. Problem: In this case, the parties could end up with an unlevel playing field, because the different rules may be more advantageous to one side than the other.

2. Both lawyers are subject to rules of the seat of arbitration. Problem: Ethical rules at the seat were likely adopted to deal with local lawyers practicing domestically, and may not be particularly appropriate for an international arbitration.

3. The Tribunal has adopted its own rules. Query: Does a tribunal have to power to override domestic ethical rules of the jurisdiction in which it sits?

To understand some of the problems, consider specific examples of clashes of ethical rules:

1. Attorney-client privilege does not exist for in-house counsel in some jurisdictions, but does in others.

2. The obligation to produce documents, required in some jurisdictions, is forbidden by blocking statutes in others.

3. In the U.S., an attorney is obliged to communicate any settlement proposal to a client, while in other jurisdictions, the attorney may be prohibited in certain circumstances from disclosing such information to a client.

4. An attorney from the U.S. may have an obligation to report client perjury to the tribunal, but attorneys from other jurisdictions may have an obligation *not* to disclose such information.

5. In the U.S., ex parte communications with a member of the Tribunal are prohibited, whereas in other jurisdictions, they may be permitted.

6. Some jurisdictions prohibit a party from being a witness.

7. In some jurisdictions there is an obligation on counsel not to present as fact to the tribunal statements not supported by any known evidence. In other jurisdictions, such presentations by counsel are permitted.

8. Finally, the preparation for witness testimony is precluded in some jurisdictions, but considered an obligation in others.

This short piece cannot deal with all of these issues, but additional sources that do provide more information about conflicts in ethical rules are referenced below. The focus here will be limited to the issue of witness preparation, and will consider the application of the American Bar Association's Model Rules of Professional Conduct to witness preparation in the international context. The ABA *Model Rules* serve as models for the ethics rules of most U.S. jurisdictions.

In the United States, lawyers spend a great deal of time, effort and energy preparing a witness to testify. An American attorney who did not prepare her witnesses carefully would be considered quite remiss. In other jurisdictions, however, an attorney may be prohibited from even interviewing a witness prior to that witness providing testimony. If each attorney follows the different rules of her home country, there could be substantial differences in the performances of the witnesses, likely giving an advantage to the side that had expended more effort to prepare the witness. If, on the other hand, the tribunal considers that the ethical rules of the seat of arbitration should govern, and those rules do not permit any interviews or preparation of

witnesses, an American attorney unaware of this prohibition would risk a violation of those ethical rules.

The rule in many countries that counsel cannot speak to the witness is changing. For example, the International Bar Association Rules on the Taking of Evidence in International Arbitration, which are widely accepted in international arbitrations, provide that "it shall not be improper to interview witnesses or potential witnesses and to discuss their prospective testimony with them." [1]

Thus, there is a growing consensus that some contact between counsel and witnesses should occur in an international arbitration proceeding. But it is not clear that the IBA Rules will necessarily prevail over contrary national rules that would prohibit such contact. Nor is it clear that if the national rules of the arbitration seat prohibit contact with witnesses, the carve-outs in an attorney's home country permitting such contact will prevail over the local rules.

So what rules of ethics govern according to the ABA Model Rules of Professional Conduct? Rule 8.5 first provides that "a lawyer admitted to practice in [the] jurisdiction is subject to the disciplinary action of that jurisdiction, regardless of where the lawyer's conduct occurs."[2] Therefore, an Illinois attorney is subject to disciplinary action in Illinois, for improper conduct occurring outside Illinois.

The Rule then goes on to state that "for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits are the rules to be applied [to the attorney's conduct], unless the rules of the tribunal provide otherwise."[3] This appears to impose the rules of the seat in most cases, unless the tribunal has its own rules.

Consider possible complications in the case of witness preparation. First, assume the tribunal sits in a country whose rule is that attorneys can have no contact with witnesses about their testimony, and no carve-outs exist for international arbitration. Thus, under the rules of the seat, the American attorney cannot meet with the witnesses for his client before they testify. However, Rule 8.5 states that the rules of

[1] IBA Rules, art 4(3). Available at www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx
[2] Model Rule 8.5 (a)
[3] Model Rule 8.5 (b)

the jurisdiction where the tribunal sits are applicable, unless the rules of the tribunal provide otherwise. So suppose that the parties and the tribunal have agreed that the IBA Rules on the Taking of Evidence apply. Remember that Rule 4(3) of the IBA Rules says it is not improper to interview witnesses and discuss their prospective testimony with them. Thus, from the American attorney's perspective, adoption of the IBA Rules is an improvement because they permit discussion with the witness. However, it is still not clear whether the tribunal in the particular jurisdiction, by adopting the IBA Rules, has the right to override a local ethical rule that says there can be no contact with witnesses. So the lawyer who decides to meet with a witness will be in accord with U.S. Rule 8.5, which permits application of the tribunal's rules, but may not be in compliance with the local jurisdiction's rule.

The question of the scope of proper contact with a witness is even more complicated. Assuming the IBA rule governs, can the interview properly include a full-blown American-style preparation of the witness, with extensive time in mock examination and cross-examination? The answer is that the American practice is probably much more extensive than what the IBA Rule envisions. Other jurisdictions generally do not engage in the same level of witness preparation.

The English, for example, permit attorneys to contact witnesses before they testify, but nonetheless do not permit the same kind of interaction with witnesses that American attorneys have in the normal course of their practice. English cases describe three kinds of interactions with witnesses: interviewing, familiarization and coaching. Interviewing is basically for the purpose of obtaining evidence needed to produce a witness statement. Familiarization consists of explaining the process, such as how examination and cross-examination work. The British will even permit mock cross-examination for the purpose of showing the witness how cross-examination works, but only on hypothetical facts. A mock cross-examination on the actual facts of the case at hand is prohibited, because that is considered coaching. Coaching, which is viewed as a detailed discussion of the specific facts in order to rehearse the witness with respect to questions likely to be asked and his appropriate responses, is prohibited. It is believed that such conduct taints the testimony of the witness. Thus, although English courts permit interviewing and familiarization, they have expressly stated that coaching is not permitted. They think a witness should testify without his testimony having been influenced by others, and particularly not by counsel. Other

countries such as Australia and New Zealand, have similar rules, including a specific prohibition on witness coaching.

So even if the tribunal and the parties agreed that the IBA rule applied, and that counsel was permitted to interview witnesses and discuss their testimony, if one attorney is British and another is American, their interpretation of the rule, based on their own practice experience, would likely be quite different. Moreover, it is not clear whether one of those interpretations might lead to an ethical violation.

In addition, in countries such as France and Switzerland, where there is a carve-out permitting contact with witnesses in an international arbitration, the proper level of interaction between attorney and witness is not spelled out. Therefore, attorneys from these countries do not have the same restraints found in the English system (no coaching allowed) or even in the U.S. system, in which the Model Rules of Professional Conduct impose certain restrictions.[4] Because the restrictions on witness contact vary greatly, and because now some countries have removed the restriction against speaking with witnesses but have not cabined this new freedom in any way, there remains an enormous variation in what different attorneys may perceive to be ethical conduct in dealing with witnesses.

The drafters of Model Rule 8.5 were trying to make the Rule simple and straightforward, but their concept of how things work internationally did not encompass the many complexities that arise from the convergence in arbitration of different legal norms and practices. For example, Comment 3 to Rule 8.5 states that the rule takes the approach that any particular conduct of a lawyer shall be subject to only one set of rules of professional conduct. That sounds good, but it is not that simple. For example, assume the arbitral tribunal is in the U.S., but a deposition must be taken in Brazil because a witness in Brazil cannot come to the U.S. for a hearing. In Brazil, a civil law country, the deposition will essentially be taken by a judge, and so there will be a matter pending before a tribunal in Brazil. Remember that the U.S. requirement under Rule 8.5 is that attorney conduct in connection with a matter pending before a tribunal is governed by the rules of the jurisdiction where the tribunal sits. In this case,

[4] Some restrictions include the following: Model Rule 3.3 (a)(3) provides that "a lawyer shall not knowingly…offer evidence that the lawyer knows to be false." Moreover, if a lawyer is aware that a witness has offered false material evidence he must take reasonable remedial measures, including, if necessary, disclosure to the tribunal (Rule 3.3(b)). In addition, an attorney must 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 (b)).

however, there will be both a matter pending in the U.S., where the arbitral hearings are, and a matter pending in Brazil, where the deposition is being taken under the auspices of a judge. It appears that ethical rules in each jurisdiction will apply, and may well be incompatible.

Scholars and practitioners have urged that a uniform, binding international code of ethics be developed for attorneys engaged in international arbitration. Such international rules should trump the ethical rules of the seat, which have likely been adopted with a view to domestic arbitration, and therefore tend to function in a totally different procedural and cultural context. Steps in the direction of developing international ethical rules are beginning to be taken. The LCIA, for example, has adopted an Annex called "General Guidelines for the Parties' Legal Representatives."[5] These guidelines provide some basic rules of conduct for attorneys, such as "A legal representative should not engage in activities intended unfairly to obstruct the arbitration or to jeopardise the finality of any award."[6] It further provides that "[a] legal representative should not knowingly conceal or assist in the concealment of any document (or any part thereof) which is ordered to be produced by the Arbitral Tribunal."[7]

More specific and comprehensive guidelines have been adopted by the IBA in "Guidelines on Party Representation in International Arbitration."[8] These Guidelines were met with mixed reviews, and criticized by some civil law lawyers who thought that certain obligations, such as the attorney being required to tell the client to preserve relevant documents, was an attempt to impose American discovery standards on the civil law system.

Although the LCIA Guidelines will be binding on parties who adopt the LCIA Rules, the IBA Guidelines are only binding if the parties agree to them, or if the tribunal "after consultation with the Parties, wishes to rely upon them after having determined that it has the authority to rule on matters of Party representation to ensure the integrity

[5] https://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2014.aspx#Annex
[6] General Guidelines for the Parties' Legal Representatives, para. 2.
[7] *Id.*, para. 5.
[8] IBA Guidelines on Party Representation in International Arbitration (2013),, available at https://www.ibanet.org/resources#:~:text=The%20IBA%20Guidelines%20on%20Party,at%20obstructing%20the%20arbitration%20proceedings.

and fairness of the arbitral proceedings."[9] So it is not clear that a tribunal has complete discretion to apply them.

Thus, because they are not binding, and depend largely on party agreement, the IBA Guidelines cannot achieve uniformity in terms of the proper conduct of attorneys in international arbitration. Nonetheless, they are important in contributing to a dialogue among participants. The focus on ethics encourages the participants in international arbitration to talk about the issues, recognize the problems, and try to come up with ways of putting all parties on a level playing field. The best way for parties to try to ensure there is transparency and even-handed application of the ethical rules is to have a forthright discussion among the parties and the tribunal at the very beginning of the arbitration to ascertain what ethical rules will govern, as well as the scope of those rules.

Additional sources:

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- Halprin, Peter and Wah, Stephen, *Ethics in International Arbitration*, Journal of Dispute Resolution (2018). *See* Part I for *Ethics Rules for Arbitrators*, pp. 88-101. *See* Part II for *Ethical Duties of Counsel*, pp. 101-108.

[9] *Id.*, para. 1.