WANTED: AN ETHICAL COMPASS

Lawyers from different traditions work under different ethical codes. Cy Benson, partner, and Charlie Lightfoot, associate, at White & Case in London explain how differences may lead to an uneven playing field

For advocates in the UK courts, the rules on witness coaching seem clear. A recent case put it thus: "There is no place for witness training in this country, we do not do it. It is unlawful." (*R v Momdou and others* 2005 [EWCA] Crim 177.)

The witness 'training' here consisted of a session on the "theory, practice and procedure of giving evidence" coupled with "practice cross-examination".

The *R v Momdou* instruction was in most respects consistent with the Bar Council of England and Wales' code of conduct. Part II, section 705(a) of this provides that a barrister must not "rehearse, practice or coach a witness in relation to his evidence". This code's guidance is extensively supplemented by a paper from the same council's professional standards committee (Guidance on Preparation of Witness Statements – Preparing Witness Statements for Use in Civil Proceedings – Dealings with Witnesses). The paper clarifies that counsel can give general advice to a witness (for example, to speak up, speak slowly, keep answers short, avoid guessing or speculating, etc); can test a witness's recollection; and can discuss the issues that may arise in cross-examination. But the paper makes clear that "[b]y contrast, mock cross-examinations or rehearsals of particular lines of questioning that Counsel proposes to follow are not permitted."

'So what?' an arbitration practitioner might ask, given that national court procedures are regarded, generally, as inapplicable to international arbitration. But the bigger issue is ethics and its place within international arbitration. Witness coaching illustrates the potential for lawyers from different cultures to 'play' by different rules (those of their legal tradition) and that in turn can lead at times to an uneven playing field, with various attendant complications. For example, in jurisdictions such as the United States, witness training, including mock cross-examinations and rehearsals, is not only lawful, but commonplace and accepted. In others, all contact with witnesses is prohibited. Belgium, France, Italy and Switzerland are in this category: each has had to create modifications to its national ethical codes to accommodate arbitration. International arbitration, for its part, exists in an ethical vacuum.

Into the abyss

Consider a hypothetical London Court of International Arbitration proceeding held in London but featuring counsel from the UK, US and France, where each is a member of their national bar. What obligation is on the UK practitioner regarding witness preparation? Article 20.6 of the London Court of International Arbitration's Rules provides: "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."

Based on this and similar provisions (among them article 4(3) of the International Bar Association's Rules on the Taking of Evidence in International Commercial Arbitration) Redfern and Hunter have commented that "it is well recognised that witnesses may be interviewed and prepared prior to giving their oral testimony."

But what does 'interviewed and prepared' actually mean? Is there a consensus, for example, that the lawyer may conduct mock cross-examination of his client's witnesses and rehearse potential lines of redirect examination? If there is, it is hard to find in the arbitration literature. Moreover, even if the London Court of International Arbitration or the International Bar Association's rules were intended to encompass these practices, would the UK lawyer be permitted to rely on them under the UK's ethics rules? Put another way: does the UK make mock cross-examination and rehearsals 'unlawful' only for proceedings before the English courts; or does the prohibition also cover arbitration proceedings in England? Or, even, does the obligation to refrain travel with UK practitioners like a passport, binding them wherever they go? An informal inquiry to the Law Society yielded no answer, the question apparently being untested.

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Section 34(1) of the Arbitration Act 1996 states: "It shall be for the tribunal to decide all procedural and evidential matters, subject to the right of the parties to agree any matter." Missing from this section is a statement on whether "procedural and evidential" includes 'ethical'.

The list of items included within the definition of procedural and evidential matters reflects this ambiguity, and includes the following: "(a) when and where any part of the proceedings is to be held;

(b) the language or languages to be used in the proceedings and whether translations of any relevant documents are to be supplied;

(c) whether any and if so what form of written statements of claim and defence are to be used, when these should be supplied and the extent to which such statements can be later amended;

(d) whether any and if so which documents or classes of documents should be disclosed between and produced by the parties and at what stage;

(e) whether any and if so what questions should be put to and answered by the respective parties and when and in what form this should be done;

(f) whether to apply strict rules of evidence (or any other rules) as to the admissibility, relevance or weight of any material (oral, written or other) sought to be tendered on any matters of fact or opinion, and the time, manner and form in which such material should be exchanged and presented;

(g) whether and to what extent the tribunal should itself take the initiative in ascertaining the facts and the law; and

(h) whether and to what extent there should be oral or written evidence or submissions."

Although section (f) seems to verge on letting the arbitrators decide questions of witness preparation, it stops short of quite doing so. At the very least, one could argue that the failure to mention ethical matters means that the Law Society and the English courts retain this authority.

So, the UK practitioner in our hypothetical faces a dilemma: he is certain his zealous American counterpart (no offence intended, one of the writers is a US citizen) will use every tool available to ensure witnesses are armed and ready for battle. Should he, then, do the same and risk a potential penalty by the Law Society (or by his own conscience)? Or should he refrain from the potentially 'illegal' conduct and so risk an uneven playing field? There is, unfortunately, no clear answer to this question.

The hypothetical French lawyer faces an additional complication. He must contend with the interplay of French ethical rules (not addressed here) and the Code of Conduct for Lawyers in the European Union. This code of conduct was adopted in 1998 by the Council of the Bars and Law Societies of the European Union, and applies to the cross-border activities of lawyers within the European Union and European Economic Area.

The code's article 4.1 (Applicable Rules of Conduct in Court) provides:

"A lawyer who appears, or takes part in a case before a court or tribunal in a Member State, must comply with the rules of conduct applied before that court or tribunal."

Article 4.5 (Extension to Arbitrators Etc) states:

"The Rules governing a lawyer's relations

with the courts apply also to his relations with arbitrators and any other persons exercising judicial or quasi-judicial functions, even on an occasional basis."

The interpretation of article 4 is far from straightforward, but at least one commentator considers the effect to be that "whenever the seat of the arbitration is within the European Union, the [ethical] standards of the seat of arbitration apply."(See Hans Van Houtte, 'Counsel–Witness Relations and Professional Misconduct in Civil Law Systems' Arbitration International.)

If so, it may be said that article 4.5 would extend the English court prohibition on "witness training" to the lawyer's "relations with arbitrators" meaning that the French lawyer would be covered by the English law's prohibition (assuming that the UK's prohibition were clear). At a minimum, the French lawyer would need to be cognisant of and honour applicable English rules of ethics (while possibly seeking to reconcile them with any applicable French rules).

A contrary view has been put forward that article 4 applies not to the ethical rules of the seat, but to the rules laid down by the tribunal (or agreed between the parties). As stated by V Veeder QC in the text of the 2001 Goff Lecture – 'The Lawyer's Duty to Arbitrate in Good Faith':

"This rule [article 4.1] is largely meaningless in the field of international arbitration because there are no 'rules of conduct' applied generally to lawyers before an international arbitration tribunal. The major institutional rules of arbitration, including the ICC and LCIA Rules, are silent as to the conduct of a party's legal representative."

As for the US counsel, ethically speaking, matters are simpler. The UK's Law Society and EU-wide code pose no threat, and his own tradition condones such preparation. What he needs to consider is the tribunal's reaction to such preparation, should it become known, together with the practical effect that too much preparation may have on witness credibility.

But that's not where the difficulties stop. It could be queried whether the tribunal's ultimate award might be placed at risk of challenge if counsel engage in a potentially 'illegal' practice. In all likelihood, the award would stand. That said, the possibility of a challenge in itself should give cause for thought.

Under the Arbitration Act 1996, the English court may allow an appeal of an arbitral award, inter alia, on the basis of a serious irregularity. "Serious irregularity" is defined to include:

"(a) failure by the tribunal to comply with section 33 (general duty of tribunal);
(b) the tribunal exceeding its powers (otherwise than by exceeding its substantive jurisdiction: see section 67);
(c) failure by the tribunal to conduct the proceedings in accordance with the procedure agreed by the parties;
(d) failure by the tribunal to deal with all the issues that were put to it;
(e) any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award exceeding its powers;
(f) uncertainty or ambiguity as to the effect of the award;
(g) the award being obtained by fraud or the award or the way in which it was procured being contrary to public policy;
(h) failure to comply with the requirements as to the form of the award; or
(i) any irregularity in the conduct of the proceedings or in the award which is admitted by the tribunal or by any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award."

The threshold for invoking section 68 (successfully) is high. The intention of the section is to allow court intervention only as a remedy to glaring irregularities causing injustice. So, in our hypothetical example, mock cross-examination or rehearsing with witnesses would be brought to the attention of the tribunal and testimony permitted to be heard and submitted into evidence without penalties being imposed on the party engaging in this conduct. On the wording of section 68, the losing side might argue that an award based on evidence tainted by unethical or illegal 'witness training' is either (i) contrary to English public policy or (ii) the product of a failure by the tribunal to act in accordance with the general duty contained in section 33.

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Unless mock cross examination or rehearsals are truly illegal (and we suspect the trial court in *R v Momodou* overstated the case), then, in our view, the possibility that an arbitral tribunal could differ from a court in how it views the boundaries regarding witness preparation and how it chooses to weigh the evidence from such a 'prepared witness' is best seen as an acceptable consequence of choosing arbitration. Indeed, the effect of section 34(2)(f) of the Arbitration Act 1996 is to give discretion on what weight to attach to evidence. (A useful case here is *Living Waters Christian Centres v Henry George Fetherstonaugh*, 27 April 1998, Court of Appeal (unreported).)

In Westcare Investments Inc v Jugoimport – SDPR Holding Co Ltd [1998] 2 Lloyd's Rep 111, the question of public policy in the context of enforcing foreign arbitral awards arose. As reported in 'Arbitration Law' by Robert Merkin (Lloyd's of London Press, 1st ed, 2004, page 836):

"In this case it was asserted in English enforcement proceedings that an ICC award had been obtained by means of perjured evidence, and the permission of the English court was sought for the introduction of evidence that the successful party's witnesses had been guilty of perjury in the arbitration on the basis that the New York Convention's exception to enforcement on public policy grounds extended to these circumstances. Coleman J, refusing to intervene on the facts before him, ruled that the English court should be slow to intervene, as this affected the finality of the award, amounted to a rehearing of the issues and potentially usurped the supervisory functions of the curial courts."

In *Westacre*, therefore, the UK courts declined to refuse enforcement on a public policy footing in a case of alleged witness perjury. It would seem unlikely that a different result would be obtained where arbitrators have allowed submission of evidence allegedly tainted by improper witness preparation or training.

A project?

At this point, it should be clear that counsel in international arbitrations face conflicting or unclear ethical obligations. Witness preparation is merely one example. Problematic hypotheticals abound when one factors in different permutations of counsel and situations. And yet when looking for guidance in the field, practitioners confront an ethical abyss. As a result, it seems, participants in international arbitration must run the risk of having an uneven playing field in particular proceedings. One lawyer may feel free to engage in conduct that his adversary deems out-of-bounds (or never considers at all). If international arbitration is to continue on its road toward being a truly autonomous legal system as described by Julian Lew QC in this year's 'Freshfields Lecture', the lack of ethical compass needs to be addressed.

It is beyond this article to propose a comprehensive solution; however, a logical starting point would be to duplicate, in ethics, the success of the International Bar Association's 'Rules on the Taking of Evidence'. It should be possible to identify those areas of ethical uncertainty that give rise to the risk of uneven playing fields or prejudice, and seek a consensus on ethical guidelines to address them. Although this would still leave the problem of conflicting domestic rules and their applicability to international arbitration, it would provide a degree of comfort to practitioners and clients alike, and so further enhance the reputation of international arbitration as a forum for fair and efficient dispute resolution. This, in turn, should help to reduce the scope for challenging arbitral awards. It might also mitigate the prospect of ethics becoming the next tactical arena for anyone seeking to delay or derail arbitral proceedings.