

Ethical Issues of Parties, Witnesses and Counsel In International Arbitration

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“Everybody lies. Cops lie. Lawyers lie. Witnesses lie. The victims lie. A trial is a contest of lies. And everybody in the courtroom knows this”

- Michael Connelly, *The Brass Verdict* (2008)

Ethics in Arbitration

- Focus on arbitrators: impartiality, conflicts of interest etc;
- Tools to deal with this issue throughout the proceedings;
- Large body of precedent on the issue.

What about other participants of the proceedings?

Parties, counsel and witnesses – are they free to do whatever they want?

Witnesses Ethics in Arbitration

- Role of witnesses is to provide evidence for the benefit of the Tribunal
- In theory, witnesses should be impartial and tell the truth, describing objective facts; experts should provide their honest professional opinion
- Witnesses/Experts normally are not under oath – what if they do not tell the truth?

Witnesses Ethics in Arbitration (Cont'd)

- The art of cross-examination: demonstrate that the witness is lying (undermining credibility). This does not always work
- Court assistance – testimony under oath in some countries
- Legal remedies: witness liability for perjury
- Civil or even criminal liability
- Depends on the law of place of arbitration

Liability of Witnesses in Arbitration (Examples)

- Switzerland (developments in 2011)
 - Possible criminal liability for false testimony in arbitration (Art. 307 of Swiss Criminal Code) if:
 - (i) The witness is warned about his/her duty to tell the truth by the Tribunal;
 - (ii) The witness is informed of any possible rights to refuse testimony (e.g. self-incriminating testimony);
 - (iii) The witness must be informed of the criminal consequences of perjury;
 - A party that has suffered from false testimony may complain to the prosecutor in Switzerland and a criminal case may be opened.

Liability of Witnesses in Arbitration (Examples)

- England
 - No explicit duty to tell the truth (unless under oath)
 - Criminal or civil liability may occur anyway, for example:
 - Preventing the course of justice
 - Fraud (e.g. false representation for the purpose of a gain)
 - Unlawful interference with business
- Austria
 - Perjury is not a criminal offense unless it amounts to another crime (fraud, defamation)

Consequences of Perjury for the Award

- Setting aside
 - Inconsistency with local laws (award procured by fraud)\
 - Public policy
- Refusal to enforce:
 - US court allowed enforcement of an award with evidence of false testimony
- **Ukraine: unregulated; provisions on perjury in court do not apply (Art. 384 of the Criminal Code)**

Ethical Issues of Counsel and Parties

- Tampering with evidence – witnesses, experts, documents, material evidence
- Specifically, destruction of evidence
- Creation of conflicts of interests
- Counsel's bar rules

THANK YOU
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