ARE UK WITNESSES AT A DISADVANTAGE IN INTERNATIONAL ARBITRATION?

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Extensive witness prepping is par for the course in the US but prohibited in the UK. Is it time the Bar Council levelled the playing field by revisiting the rules in respect of international arbitration?

In international arbitration, where the two sides are from different jurisdictions, one issue has the potential to put the two parties on an unequal footing: witness preparation.

In the UK, lawyers are bound by the Bar Standards Board (BSB) guidance, which prohibits any witness preparation beyond familiarisation with the procedure and roles of the participants in the hearing.

The strict limits on witness preparation were highlighted in R v Momodou in 2005. The Court of Appeal held that: "There is no place for witness training in our country, we do not do it. It is unlawful."

While Momodou was a criminal case, the BSB guidance states that the same rules apply to civil cases and, by extension, have been taken to apply to arbitration, although guidance on the subject from the International Bar Association (IBA), or other bodies overseeing international arbitration, is less prescriptive.

As such, in the UK witnesses must not be prepped in any way that affects the accuracy of evidence, by working on testimony, evidence, or facts similar to those of that witness's hearing. Conversely, US lawyers do mock cross-examine witnesses on their own evidence.

US Approach

Josh Rievman is the New-York-based founding partner of Dunning Rievman & MacDonald. He has 34 years of experience in international dispute resolution.

"Preparing witnesses primarily includes educating them about the procedure, ensuring that they know the issues of the case, the claims and defences, and familiarising them with the documents and other physical evidence," Rievman explains. "It can include rehearsing with the witness the answers to questions expected to be asked and conducting mock depositions or cross-examinations."

Whatever the extent of the preparation, he is emphatic that "it is essential to instruct the witnesses to always tell the truth and provide their own accurate and genuine recollection of the facts."

Solicitor advocate Paul Gilbert is a Bond Solon witness familiarisation trainer and believes, where international arbitration is concerned, the transatlantic differences can put witnesses from the UK at a disadvantage.

"Bond Solon's witness familiarisation training is conducted in accordance with the Bar Council BSB Handbook, and the note issued by the Ethics Committee of the Bar Council," Gilbert says. "It is a cornerstone of the training that we would never 'coach' a witness."

However, he points out that an international arbitration hearing is unlike a criminal trial. “In international arbitration the cross examination is on a written witness statement submitted prior to the hearing. In criminal proceedings the witness gives all their evidence orally at the trial, so it is arguably less of a concern or a risk that they may be ‘coached’ to misrepresent their evidence.”

Both Rievman and Gilbert agree that the current situation creates imbalances in international arbitration, and that a common cross-jurisdictional approach should be adopted.

Last year an updated note on witness preparation published by the Bar Council did hint at a review of the UK’s rules when it comes to international arbitration.

At paragraph 36, it said: “The BSB has said that it will in due course reconsider how far barristers can be involved in witness preparation for the purposes of international arbitration.”

Fail To Prepare…

Gilbert believes this brief acknowledgment of the issue “suggests there is a recognition by the Bar Council that international arbitration has unique features that would benefit from a proper consideration of whether the guidance should be different.”

In practice, Rievman has seen the approach of UK lawyers vary greatly in international arbitration. “Some will strictly abide by their ethic duties and limit the preparation of their witness to the minimum. Others will prefer to play by the rules generally accepted in international arbitration and prepare their witnesses”, he says.

Moreover, “some English lawyers might also engage foreign attorneys for the hearing or, when part of international law firms, let their non-UK lawyers handle the witness preparation to avoid doing it themselves and risk to not be in compliance with their ethic rules.”

Article 4 of the IBA rules state: “[I]t 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.” However, they do not define the extent of the interview or explicitly describe what is considered to be improper.

Rievman suggests it may be possible to level the playing field by setting ground rules from the start or seeking guidance from the arbitral tribunal, although doing so may be difficult in practice.

“On one side, English lawyers cannot exclude the application of their ethics rules for the purpose of one case. On the other side, it would be difficult to imagine US attorneys agreeing to limit their usual hearing preparation out of courtesy to their fellow English lawyers,” says Rievman.

“Perhaps the only way, then, would be to include such a requirement in the arbitration clause itself”, he adds. “However accomplished, we strongly recommend adaptation of concrete principles regarding the witness preparation to level the playing field between the parties from different jurisdiction.”

The Value of Familiarisation

While UK regulators may not yet be ready to overhaul the approach to witness preparation on the basis of international arbitration’s unique characteristics, Gilbert says US lawyers increasingly see the appeal of the witness familiarisation techniques he teaches.

“I have travelled to the US to do Bond Solon training, which I have always thought is interesting, because you might think they wouldn’t need it, or want it”, he says. “However, an attorney who sat in on the session, said to me, ‘You know what, I really like what you do as we just don’t focus enough on the way the witness is testifying or the concerns the witness has.’”

In the US, attorneys are focused on how the witness will answer the question, not on their familiarisation with the process or demeanour. Gilbert says that after doing cross-examination practice on an unrelated case study, he will ask: ‘How was that? What was going on in your head?’, because “it helps guide the witness to give evidence in a way that is right for them and be as effective as they are able to be”.

Josh Rievman’s comments were the joint product of Josh and his team, on whom Josh relies a great deal throughout his practice. His dispute resolution team is currently Gokce Onder, a dual-qualified New York and Turkish lawyer, who has five years of experience and Diane Caron-Laviolette, a dual-qualified New York and French lawyer, currently on secondment to Dunning Rievman from Teynier Pic in Paris.

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