

WITNESS PREPARATION IN INTERNATIONAL ARBITRATION: WHERE TO START AND WHERE TO STOP

- Jue Jun

There is now a broad consensus across the common and civil law divide that it is permissible in international arbitration for counsel to prepare a fact witness for the purpose of giving evidence to the arbitral tribunal. However, considerable differences still exist as to what constitutes permissible "witness preparation", under arbitration laws and within ethical rules of different jurisdictions. This post considers a number of legal, ethical and practical considerations that might influence practitioners' approaches to witness preparation in international arbitration.

Ethics: the English position

Witness preparation is generally thought to involve different levels of witness contact; therefore, a distinction is made frequently between witness familiarisation and witness coaching (or witness training). Witness familiarisation is designed to demystify the practice and procedure of giving evidence for the witness. This may involve explaining the layout of the hearing room and the likely order of events, and, perhaps, a mock cross-examination based on a hypothetical set of facts. Witness coaching, on the other hand, involves a detailed review of the specific facts of the dispute in question and seeks to rehearse with the witness their answers to anticipated questions on cross-examination.

For advocates practising in English courts, the law is clear. As stated by the Court of Appeal in *R v Momodou* [2005] EWCA Crim 177: "*There is no place for witness training in this country, we do not do it. It is unlawful*". In particular, the Court of Appeal confirmed that, whilst witness familiarisation is permitted, training or coaching is not permitted: a witness must convey his or her own evidence uninfluenced by others. Despite it being a criminal case, it has been held that the rules laid down in *Momodou* in relation to witness preparation are equally applicable to civil litigation in England and Wales (*Ultraframe (UK) Ltd v Fielding and others* [2005] EWHC 1638).

In line with the case law, the English Bar Standards Board's code of conduct prohibits a barrister from rehearsing, practising or coaching a witness in relation to his or her evidence. Similarly, under the Solicitors Regulation Authority's Code of Conduct, English solicitors are required to refrain from deceiving or knowingly misleading the court (or becoming complicit in others' doing so). Given that neither of these rules contains express carve-outs in relation to arbitration, English lawyers clearly must comply with their professional obligations, irrespective of whether they are acting in international arbitration or domestic litigation.

The boundaries in international arbitration

Notably, unlike the clear stance under English law, the majority of the institutional arbitration rules provide little guidance in relation to witness preparation. The London Court of International Arbitration (LCIA) Rules are silent on the topic of witness preparation, save for Article 20.5, which allows witness interviewing subject to the mandatory provisions of any applicable law, and the Singapore International Arbitration Centre (SIAC) Rules contain similar wording. The International Centre for Dispute Resolution (ICDR), Stockholm Chamber of Commerce (SCC) and International Chamber of Commerce (ICC) Rules are all silent as to witness interviewing or preparation.

Article 4(3) of the International Bar Association (IBA) Rules on the Taking of Evidence (which are

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frequently adopted in international arbitration) envisages some discussion with witnesses and potential witnesses in respect of their "prospective testimony". Guideline 24 of the IBA Guidelines on Party Representation in International Arbitration seems to go one step further, allowing counsel to meet and interact with witnesses in order to "*discuss and prepare their prospective testimony*".

Despite these provisions, it is still far from clear what witness preparation in international arbitration may involve. Given this lack of clear guidance, and in the absence of a supranational code of ethics for use in international arbitration, there is potential for lawyers from different jurisdictions to "play" by different rules. For example, whilst some Commonwealth jurisdictions (such as Australia and New Zealand) may have rules akin to the English position, with a prohibition on witness coaching, in jurisdictions such as the USA, witness coaching comprising mock cross-examinations and rehearsals is not only lawful and accepted, but common practice.

The danger is that these widely differing approaches to witness preparation could, in some cases, lead to an uneven playing field between the parties. Where this is the case, it is important for the parties to seek direction from the arbitral tribunal to clarify the position on permissible contact with witnesses. Whilst the tribunal is not able to direct counsel to go against their professional obligations, by addressing the issue at an early stage of the process, the tribunal can at least try to even up



the process by giving clear directions that take account of the background of the parties and their representatives. Adopting a pragmatic approach to witness preparation will allow the tribunal to consider the impact of the law of the seat (and any applicable laws), thus ensuring to the greatest extent possible the integrity of the arbitral process and the enforceability of the final award.

A fine balance

From a practical point of view, the process of witness preparation would ideally strike a balance between building the confidence of the witness so that he or she gives evidence in a compelling, convincing manner and, at the same time, preparing the witness for the rigours of the process. To this end, and given the fallibility of human memory, it is important to give the witness an opportunity to review (and if necessary, re-review) all the relevant materials before giving evidence. Depending on the experience of the witness, a role play exercise giving the witness some idea of the format of trial and the procedure of cross-examination may also be very helpful preparation for what might seem like a terrifying ordeal.

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Although the judge stopped short of blaming witness training for cultivating a particular style of giving evidence (which he deemed unhelpful and counter-productive), the potential downsides of witness preparation should not go unnoticed. As with all things, there are benefits to witness preparation, provided that parties have a clear idea of where to start and, perhaps more importantly, where to stop.

That said, it is worth bearing in mind that the effects of witness preparation can backfire, as illustrated in the recent case of *Energy Solutions EU Ltd v Nuclear Decommissioning Authority* [2016] EWHC 1988 (TCC). In that case, the judge openly criticised a number of Energy Solutions' witnesses for being too ready to follow a "pre-ordained script" of embarking on a prepared exposition of their side's case, and for avoiding giving clear answers to sensible questions on cross-examination.

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ABOUT THE AUTHOR

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Jue Jun specialises in complex, cross-border commercial dispute resolution, with a particular focus on international arbitration. She regularly acts in international commercial arbitrations administered under the rules of major arbitral institutions including the London Court of International Arbitration (LCIA), International Chamber of Commerce (ICC), Hong Kong International Arbitration Center (HKIAC), Singapore International Arbitration Centre (SIAC), and the London Maritime Arbitrators Association (LMAA), as well as in ad hoc arbitration proceedings under the rules of the United Nations Commission on International Trade Law (UNCITRAL). Jue Jun has advised clients from sectors as diverse as energy, mining, telecommunications, trade, construction, private equity and financial services.

