

Remote Expert Evidence: Can It Work Effectively?

PART II

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In Part I of our discussion of the case for remote expert evidence, we examined the nature of the expert witness' work. Whether in litigation or arbitration, expert witnesses often perform their pre-hearing duties effectively in a "virtual" capacity. The key issues, we find, arise during the hearing itself.

Expert Evidence at the Hearing

As mentioned at the beginning of this article, much has been said in recent times about the ability of courts and arbitral tribunals to hear cases remotely. We understand that in *National Bank of Kazakhstan*, the Court heard from all of four foreign law experts remotely from their home locations (one of whom required an interpreter). So does that mean that the full utility of expert evidence and assistance at trial can be captured remotely? Possibly, but possibly not.

The hearing itself remains the one phase of an expert's involvement where it is not (up until now, at least) common for an expert to perform their role remotely.

Of course, unprecedented circumstances such as those we are currently experiencing (and with the prospect of social distancing measures being with us for some time), clearly call for necessary measures to ensure the proper and timely administration of justice. Whilst it may be contested by the parties' legal teams, witnesses of fact do sometimes appear by video link for the purposes of a hearing and there is nothing, in a practical sense, that prevents an expert from using the same electronic tools and programs that would be used by a witness of fact to appear and give evidence remotely as well.



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One potential stumbling block to such an approach may be the technology available to the expert. The quality and robustness of an expert's technological set-up, including, importantly, the strength of the available internet signal are critical factors. It is important to ensure that time delays are minimised (so as to avoid the expert and counsel talking over each other) and that the prospect of the signal being lost and the picture freezing is avoided. (We have experience of one opposing expert using video conferencing technology to give evidence from a remote holiday location where numerous such problems arose.) It may also be wise (and might assist the Court/Tribunal) if the expert invests in a high-quality camera for the occasion.

Setting aside technological issues and while, as it stands, it is difficult to identify practical alternatives, is there any reason for courts or arbitral tribunals to hesitate before asking experts to provide evidence remotely? Before it becomes the 'new normal', it is worth airing a few cautionary notes about some possible downsides of remote expert testimony.

Firstly, it is increasingly common when appearing before international arbitral tribunals for experts to provide a short summary of their evidence by way of presentation prior to being cross-examined. While it is probably a minor risk in relative terms, it will be important in such circumstances to test the technology and software package(s) used to support such presentations. In particular, the expert and legal team will need to consider the hardware and software required to ensure that the Tribunal can see the expert as well as the presentation being delivered. They may also want to devise a system for ensuring that the expert is alerted if a member of the Tribunal wants to interrupt to ask a question.

Secondly, upon being cross-examined, an expert will usually appear on their own and without any

aids aside from a copy of their report(s) along with the relevant appendices/exhibits. Notwithstanding the protocols in place and assurances provided, in circumstances where the expert provides their evidence by video, what is to prevent a dishonest expert from having access to material that the opposing party/expert is unable to see (such as notes of meetings with their client or legal team) or, indeed, to be receiving and exchanging texts or instant messages with team members listening in, to assist with the process of giving evidence? Furthermore, it may also be more difficult to enforce any direction that the expert should not discuss their evidence with anyone during breaks. While not, perhaps, insurmountable, it is nevertheless very difficult for courts or tribunals to control the environment in which expert evidence is given from a distance. This inevitably increases the danger of misbehaviour, whether deliberate or otherwise. Farfetched and cynical, perhaps, and undoubtedly a clear breach of an expert's duty, but nevertheless, easier to execute without detection in a world of remote hearings and in the absence of observers.

The Seoul Protocol calls for observers to be present in the room from which video evidence is provided which, of course, mitigates these issues to a great extent. However, no such similar requirement exists in the *Protocol Regarding Remote Hearings* issued on 26 March 2020 by the Judiciary of England & Wales or Practice Direction 51Y. Nor more generally is there any explicit reference to such a requirement in the Commercial Court Guide or CPR Practice Direction 32 (which is referenced in the relevant passage of the Commercial Court Guide). Even if there were such guidance, how could it be effectively enforced during a period of social distancing in any event?

Thirdly, even in the absence of assistance from others in their team (and setting the possibility of technological difficulties and time delays

aside), most experts would probably consider the experience of giving video evidence to be more forgiving than an in person appearance before the court or arbitral tribunal, with all of the extra pressure generated by the close proximity of face-to-face cross-examination and the formality of the occasion. This may or may not be a good thing since more confident, experienced and composed witnesses, who are not fazed by the physical hearing environment, may provide more concise and useful evidence for the Court or Tribunal.

However, the Court or Tribunal may perceive value in the spontaneity of a face-to-face exchange with close proximity to Counsel and the Judge or Tribunal members. It may be valued, for instance, because the immediacy of a response and also the observable body language of an expert may reveal something of their opinion about the case (or allow for a better assessment of witness credibility). Further, expert witnesses are often trained to deliver their evidence to the Judge or Tribunal, even when being cross-examined by opposing counsel, by way of seeking to build a rapport with the determining authority. The benefits of all such factors will, to a degree, be lost as a consequence of the remoteness of video evidence.

Finally, it may be that nuances in an expert's response upon cross-examination are more difficult to detect from video evidence alone (making it more difficult for cross-examining counsel to be quick on their feet and/or for the Court or Tribunal to grasp the full meaning within an answer provided). Where there are more pauses, time delays, technological interference or other opportunities for the expert to exploit, it could be more difficult for counsel to get to the point of each line of cross-examination or, conversely, for the expert to make their points clearly and effectively.

Any loss of spontaneity and greater difficulty in assessing body language will equally affect the benefits to be drawn from 'hot tubbing' the experts in corresponding disciplines. In the current circumstances, it may be reasonable to think that Courts will seek to introduce 'hot tubbing' more often, so as to more quickly identify the distilled expert evidence (and thus assist in condensing the Court hearing). However, the use of hot tubbing in a remote environment is not without practical challenges and, further, Courts and tribunals may find it harder to assess the relative strengths of opposing experts' opinions once the physical proximity between them and the immediacy of each expert's response to the other's opinions is lost. Equally, however, some might argue that remoteness may serve to remedy some of the more common complaints around hot-tubbing (e.g. that it is as much a test of personality, than of opinion, and that experts with more overbearing personalities are likely to be perceived as having performed better than their counterparts).

In any event, the above considerations are likely to mean that courts and tribunals will need to be more proactive and "interventionist" than they may otherwise be in order to ensure that the evidence gathered is clear and tested appropriately.

Summary

Whether in litigation or arbitration, much of the work performed by an expert witness is already undertaken remotely. Whilst the necessity of social distancing may add some further complication in the case of those matters that would benefit from face-to-face interaction between the expert (and their team) and the others involved, such problems are clearly surmountable.

As has been shown in *National Bank of Kazakhstan* (where the experts dialled in to the hearing from

four separate locations), the remote provision of expert evidence can work acceptably well. In the UK courts, it might be anticipated that such measures will be supplemented by the courts making increased usage of powers to restrict expert evidence to only that which is strictly necessary and/or to take further steps to ensure issues are narrowed as far as possible in advance of any hearing. Courts may, perhaps, also make more use of hot tubbing (which allows for the Court to initiate questioning). These are all measures which might assist in distilling the expert evidence (and, therefore, shortening hearings).

There are, however, potentially significant drawbacks associated with having experts provide oral testimony by video link. These include the possible loss of spontaneity in an expert's response to questions, the diminished ability to assess body language as well as the (hopefully, much more remote) potential for abuse of the process.

These potential consequences should be weighed carefully alongside the other pros and cons, before the provision of remote expert evidence becomes the 'new normal'.

About the Authors

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