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Giving Expert Evidence at an ICC International Arbitration via Video Conferencing

In January this year, I was called to give expert evidence at an ICC International Arbitration on a major infrastructure dispute in Canada. The hearing was held at an Arbitration centre in Toronto. After having given expert evidence to the arbitral Tribunal in person on the claimant's claim, I was called back to give expert evidence on the defendant's counterclaim. However, for matters of proportionality of cost and time, it was agreed by the parties that this was to be conducted by video link from Toronto to London. The facilities arranged by the Arbitration centre in Toronto were excellent and all went well.

These are a few things that you may wish to consider when giving evidence online.

1. Time Zones

Consideration of time zone differences need to be taken into account, particularly when witnesses are based in different continents.

2. Online connections via Skype or Microsoft Teams

The importance of checking the online connection the day before giving evidence during the break or at the end of the previous day. This minimises any potential connection problems. Please note that if giving evidence from the office, it might be necessary for the local site (the court or arbitration room) to invite the 'office meeting room' to ensure an online connection. Otherwise, connection is maintained via the expert's laptop.

3. What would be the ideal setup at home?

It is suggested that a 'quiet space' is used when giving evidence. This may sound obvious, however, you need to minimise any potential distractions and disruptions, since full concentration is required for the whole time when giving evidence and more so since you are not present 'in the room'.

It is important to confirm with Counsel if anyone else is permitted to be present when giving evidence online, and then, similar to conference call etiquette, inform the Tribunal who is present.

4. The local site

It is important that the expert understands who is present in the room at the local site. This was slightly easier for me having already met the Arbitrator and Counsel in person when first giving evidence in person in Canada prior to being connected online for the second time.

5. Engagement

From my experience the view of the local site online was focussed on a central podium for Counsel. I could not see the Arbitrator when giving evidence online. This was a slight disadvantage in not being able to engage face-to-face with the Tribunal.

6. Administrating the oath or affirmation

It might be easier to affirm when giving evidence online.

7. Expert's role and duty

Prior to being examined by Counsel (evidence in chief), the Arbitrator asked me what my duty was in the hearing. The Arbitrator asked the same

question to all experts. It enforced the expert's understanding of his/her duty is to the Tribunal and to assist the Arbitrator.

8. Use of documents

The arbitration hearing included references to electronic documents ("e-documents") only and monitors were placed before the Tribunal, Counsel and the expert. Assistants from the Arbitration centre were present and helped with real-time transcription and uploading e-documents from the core bundle. This was no different when giving evidence online. It is worth requesting permission to have a clean hard copy of your expert reports and appendices to hand in case there is difficulty reading an excerpt from your report or appendices online on a laptop. This would allow easy access to your report and to all pages rather than being limited to the single page excerpt uploaded onto the screen.

9. Procedures during the hearing

The examination of the witness online followed the same procedures as if in person, introduction and examination in chief by Counsel, followed by cross examination by opposing Counsel and finally responding to questions from the Arbitrator.

10. Sound and picture quality

Sound and picture quality might depend on the available bandwidth. However, do not be put off by slight delays and time lags. It is important to take your time, speak clearly and a slightly slower pace than a normal conversation. Pause before answering the question from Counsel to avoid interrupting or speaking over the questioner. Don't rush and take each question in turn.

The online expert evidence experience worked well. However, the main disadvantage is not being present in person, seeing people's reactions and being able to engage face-to-face with the Tribunal.

The courts and particularly international arbitrations have been using video conferencing facilities in civil proceedings, for a number of years. The video conferencing protocol is set out at [Annex 3 to the Practice Direction, CPR Part 32 – Evidence](#).

Video conferencing may be a convenient way of dealing with any part of proceedings, involve considerable savings in time and cost and are now required as the new norm for continued access to justice in civil law disputes.

It is likely that expert witnesses will be required to give evidence online in current litigation and arbitral proceedings during this period of uncertainty following the worldwide pandemic of Covid-19.

We are now entering a period of change, a dispute resolution for the digital age and the development of e-Hearings. We must adapt and embrace this period of change to assist the courts and Tribunals in delivering continued access to justice and effective dispute resolution.

If you require any further information, please contact Emyr Evans at emyrevans@hka.com.