

How to Conduct an Effective Virtual Arbitration Hearing – 10 Tips from the Battlefield

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1

Cross-examination

It is a misconception that cross-examination would be more difficult in principle if conducted virtually. Not true. Different, for sure, but not more difficult per se. One of the advantages of virtual cross is that the witness's facial expressions and body language (to the extent captured on screen) are magnified, thus helping the tribunal to better assess demeanour. With most virtual hearing platforms, the speaker's image typically occupies the screen. Thus, when you are asking questions, the only image the witness (and other attendees) see is your face. When the witness answers, the only image you (and other attendees) see is the witness's face. The emotional connection between questioner and witness can thus be quite intense and, if deployed effectively, you can really 'corner' a witness who would find it difficult to avert their gaze when being asked a difficult question (c.f. with an in-person hearing, the witness could try to look at the tribunal, his/her own counsel, etc. to escape your steely glare).

2

Electronic Presentation of Evidence ('EPE')

Most virtual hearing providers (e.g. in Australia: Zoom and Microsoft Teams or in the UK: Epiq and Opus) have EPE systems that allow documents to be displayed to all attendees so as to obviate (in part or as a whole) the need for hard copy bundles. EPE, if used effectively, can be a very effective advocacy tool. Think of yourself as a film director – give specific instructions to the EPE operator, e.g. 'please give me 3 split screens, with the witness statement of Mr X on the left hand side, the email he sent at A12, p.5523 in the middle and highlight the opening para of the email in yellow, and finally his WeChat log for the same date at 21:57 and magnify that entry'). You have the power to present the evidence visually in exactly the way you want the tribunal and witness to see the evidence.



3

Lights, Camera, Action!

Remember to look into the camera when you are speaking. It is often said that eye contact is an important weapon in the advocacy armoury. Even more so for virtual hearings. If using printed notes, invest in a little stand (I bought an inexpensive one from John Lewis) which allows you to rest your notes at an angle that enables you to glance at them without breaking eye contact with the camera. In addition, try out different camera positions/angles so that not only your face but your shoulders and arms are captured on screen – if you are an expressive advocate like me who occasionally uses body posture (and hand gestures, including the occasional finger wagging...) as tools of advocacy, you will want to choose a camera position/angle that enables your upper body to be caught on screen. Also make sure the room you are in is well-lit – use downlights or uplighters rather than relying on natural lighting which, ahem, varies as the day wears on.

4

Good microphone is essential

Visual advocacy is important but so is oral advocacy. Invest in a good microphone – the quality and crispness of the audio is important. Even more so if you're the kind of advocate who enunciates your words clearly.

5

Virtual Hearing Protocol

It's the new Procedural Order No. 1. Draw up and seek to agree with the other side a Virtual Hearing Protocol that lays out the ground rules on how the virtual hearing is to be conducted including, but not limited to, what software/technology is to be used, what equipment is needed for each participant, when and how a test run of the system is to be conducted, what should happen when someone becomes disconnected, sitting hours, an indicative hearing timetable that takes account of the time zones of the various participants, when participants should mute their mics, etc.

6

Real-time transcription

It is useful to keep an eye on the real-time transcript to make sure: (a) what the witness says is captured on the transcript (bearing in mind that the court reporter could be in a different location from the witness and thus may not have heard everything that is said); and conversely (b) you don't miss what someone (e.g. a member of the tribunal) says which you may not have heard but which is caught on the transcript.

8

Translations

One of the features of the hearing I conducted is the fact that there were many documents in Chinese containing English translations (with quite a few of the translations disputed). Having an EPE system that allows the screen to be split meant that I was able to direct the EPE operator to call up the Chinese and English versions on the screen – I would then walk the witness through the Chinese original while the other attendees who prefer to read the English could follow my discourse with the witness using the English translation. Where there was a dispute about the translation of a word/phrase, I could tell the operator to highlight the relevant word/phrase in both languages before putting the proposition I wanted the witness to agree with and inviting the interpreter (who would have been following the exchange) to provide his/her neutral translation.

7

Bundle pagination

An easy one to overlook – ensure that the virtual hearing provider uses volume and tab numbers (or folder and sub-folder numbers) and consecutive pagination when compiling virtual hearing bundles. Makes it easier to call up the right document quickly.

9

Expert witness conferencing

Works just as well in a virtual hearing setting, save for one thing – we established a clear protocol as to which expert went first and when each counsel can intervene with questions and in what order. We had to be more disciplined in ensuring we stuck to this protocol than at an in-person hearing, given the very real risks of a seven-vehicle motorway pile-up (2 experts, 2 counsel, 3 arbitrators all speaking over one another) if we were not careful.

10

Equipment/devices

When virtual hearings started taking off, there were those who were recommending up to half a dozen screens/devices for the advocate. While it is ultimately a matter of personal choice, I did not find this helpful. Less is more, in my view. You need one screen/iPad to see the witness/whoever is speaking, one screen/iPad for the EPE and one screen for the real-time transcript. The idea that there would also be screens to enable you to see your opponent, another to watch the arbitrators and yet another for messages is, in my view, not feasible. It looks very cluttered and is unnecessary. It is possible to configure WhatsApp messages from your team to appear on one of the iPads so as to minimise the number of devices that are actually sitting on your desk.