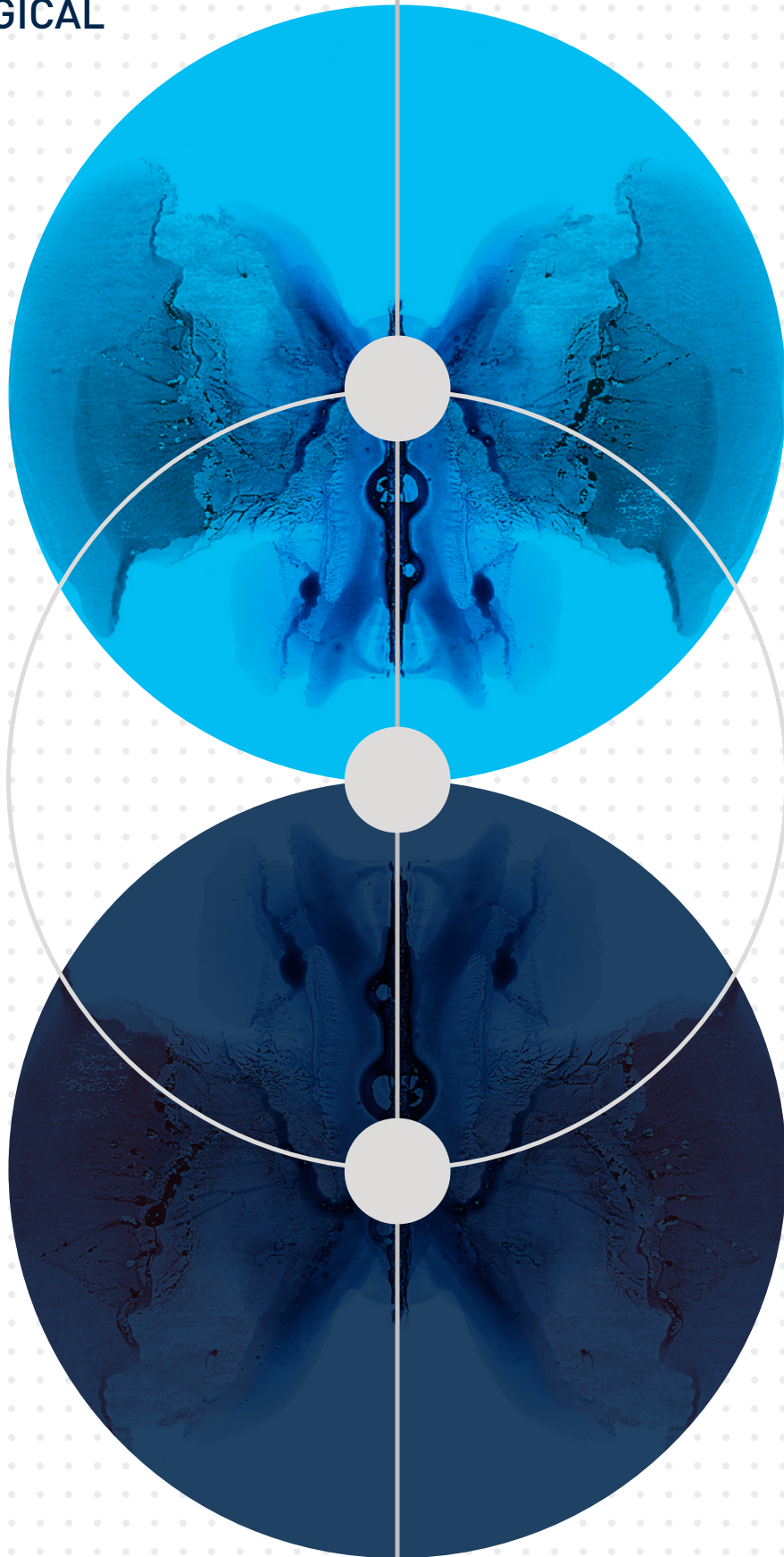
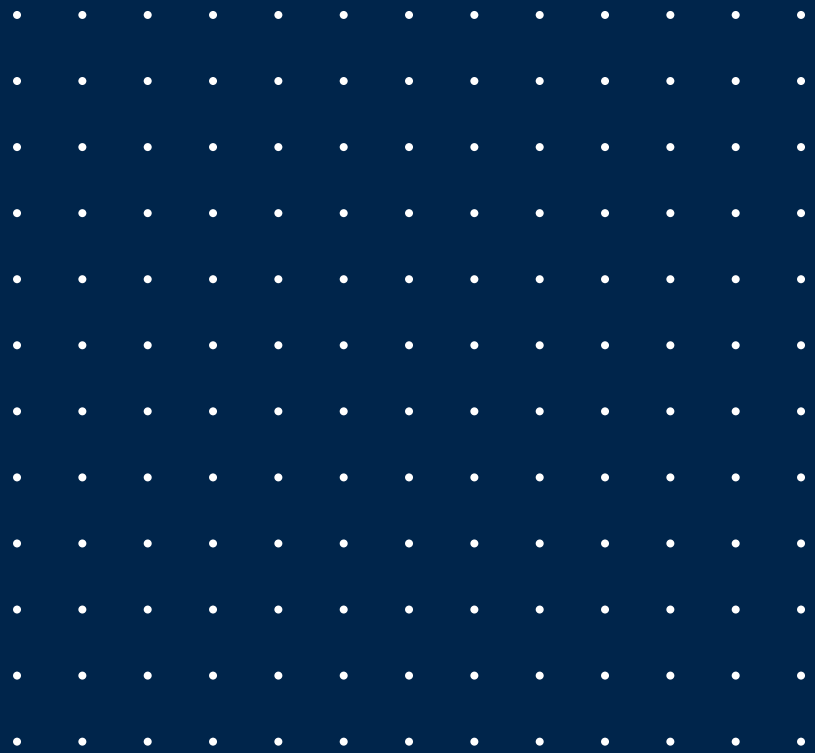


THE PSYCHOLOGICAL IMPACT OF REMOTE HEARINGS

SUMMER 2021





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Introduction

Following the widespread outbreak of Covid-19, more than one hundred countries had instituted either a full or partial lockdown by the end of March 2020, which subsequently forced most hearings and tribunals to be held remotely.

To better understand the experiences of lawyers, arbitrators and testifying experts around the world, as well as consider the possible psychological impact of different “hearing” environments, interviews were conducted with BRG testifying experts and the external contributors detailed below, whom we would like to thank for their time and insights.

As those interviewed demonstrate, the experience of remote hearings and tribunals has been largely positive and, in many cases, has exceeded expectations. At the same time, people involved in such hearings acknowledge the psychological impact of conducting proceedings remotely. The degree to which this has affected the outcome varies, although the overall consensus suggests it has not been strong enough to alter the expected results.

It is widely accepted that virtual hearings and tribunals are here to stay in some form. However, it's unlikely universal standards will be implemented.

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BRG EXPERTS:

The experience of remote hearings/tribunals has been largely positive

Overall, the experience of remote/virtual hearings and tribunals has been largely positive and, in many cases, has exceeded the expectations of those involved.

Given the challenging circumstances posed by the pandemic, remote hearings offered a practical and sensible solution that enabled the arbitration system to continue largely unimpeded.

“Overall, my experience has been great, better than expected. I’ve had a number of [remote] hearings and by and large they are working well”.



CHIANN BAO

Member, Arbitration Chambers

Prior to the pandemic, expert witnesses’ experience of remote hearings varied considerably: some had taken part in several remote depositions, often involving parties across state lines or international jurisdictions, while others had no practical experience. Unsurprisingly, the rapid shift to and reliance on relatively new technology was met initially with hesitation by some, including both expert witnesses and lawyers.

Almost everyone who participated in the research process reported some form of technical glitches or interruptions to proceedings during the initial phase of adoption in early 2020. However, courts and tribunals were largely sympathetic to those attempting to do their best under difficult conditions, and the impact was limited. Once firms had their remote-working teams up and running, most issues were overcome, and from this point onwards it was largely plain sailing from a technological perspective.

Everyone involved in the research acknowledged the efficiencies to be gained from using a remote system, namely eliminating the time and cost of flying teams of experts across a country to prepare with their legal teams and provide evidence in person. But opinion differs over whether these are in the best interests of the parties involved.

Another benefit from the use of technology was the easy sharing and reading of often large volumes of text which otherwise would have to be carried by individuals. In addition, technology allowed better communication amongst legal teams that usually would find themselves apart in a physical courtroom.

“I can understand the saving on costs but there comes a point when you have to decide, how important is this for you? This is your last chance to convince a tribunal that may not read your expert report”.



ANAMARIA POPESCU

Managing Director and expert witness at BRG

The lack of a physical courtroom/tribunal setting has a psychological impact

Impact on providing evidence

A large majority of people involved in remote hearings and tribunals acknowledge that the virtual courtroom setting can have a psychological impact, both positive and negative, although the extent varies considerably. Psychologists, for example, argue a virtual setting has a considerable impact, although it's likely this may not have registered with most participants at the time.

“Online hearings are a totally different experience. When we process other people’s speech and behaviour, we do not limit ourselves to conscious perception but also process everything that is going on at a subconscious level. This includes body language, intonations, or the delay between a question and answer”.



STEPAN PUCHKOV
Legal Psychologist

Our research shows that the positive response from expert witnesses to remote hearings and tribunals can clearly be attributed to the additional virtual barrier between the expert witness providing evidence and those tasked with cross-examination.

“Ultimately, you’re looking at a picture on a screen, so a lawyer could be as aggressive as they wanted during cross examination and it’s easier for me to stick with my answer”.



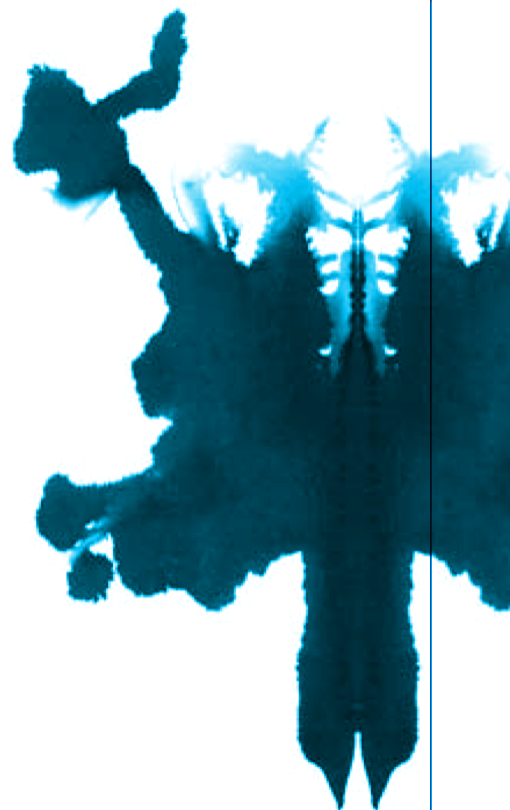
HENRY MILLER
Managing Director and expert witness at BRG

Expert witnesses who had undergone intensive cross-examination during the past year found traditional techniques deployed by barristers and other lawyers in an attempt to place pressure on and unnerve them during tribunals were significantly less effective in a virtual courtroom setting compared to in person.

“Aggressive cross examination is not that effective in a remote setting. If somebody’s trying to be aggressive with you, you can simply turn down the volume”.



MUSTAFA HADI
Managing Director and expert witness at BRG



In addition, the relaxed setting of familiar surroundings such as the home office has had a noticeable psychological impact on expert witnesses and placed them at ease, which in turn allows for more considerate answers to the benefit of the court.

“It’s easier to give evidence and, frankly, I think that’s probably of benefit to the process because you are likely to receive better answers from the expert, which should only help the tribunal understand the evidence. I think that’s a significant positive”.



DANIEL RYAN
Managing Director and
expert witness at BRG

However, the psychological impact of remote hearings has not been weighted wholly in one direction. Familiar settings can result in the witness being lulled into a false sense of security to the benefit of the opposing counsel when undergoing cross-examination, with some expert witnesses finding their exchanges with the opposition taking deposition becoming more conversational in style. Without the sights and sounds of the courtroom, some expert witnesses resorted to imagining the physical environment to prepare mentally for each question and maintain focus.

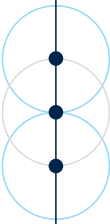
The lack of in-person preparation before entering proceedings was cited by many as a major drawback of remote hearings, and seen by some to have a negative impact on the performance of both the expert witness and wider legal team. Virtual preparations between the two have their limitations: they lack the intensity or anticipation associated with an in-person deposition which helps build confidence and ensures that everyone is on the same page. Combined with a lack of pre-tribunal team building, this can lead to miscommunication between counsel and expert witness.

Such is the psychological importance of the mental preparedness provided by engaging with their teams in a physical setting, expert witnesses would prefer to travel to conduct preparations in person, even if the hearing was itself to be conducted remotely.

“Preparing together as a team is a definite advantage, and I’d like that to continue”.



**EDWARD J.
BUTHUSIEM**
Managing Director at BRG



Impact on decision-making

While initial technical glitches may have disrupted the flow of proceedings, lawyers found that switching to remote hearings did not affect their ability to question or determine the validity of an expert witness's viewpoint. On the contrary, improving technology and the ability to zoom in on those undergoing cross-examination can heighten any telling facial expressions.

"You can see exactly where they stand and get a sense as to the veracity of the evidence provided through non-verbal cues alone".



CHIANN BAO
Member, Arbitration
Chambers

Equally, if proceedings are conducted with multiple people sharing the same camera, such as cases involving a bench, or if the expert witness is sitting back from the lens, this can negatively impact proceedings. This hinders the ability of the opposing counsel and decision makers to judge the reaction of expert witnesses to questioning and form a sense of the room.

"With too many people on a screen, whom do you focus on? Similarly, if you're not certain whom you have to convince, how do you engage properly?"



ANNA MASSER
Partner at Allen &
Overy

Psychologists point out that there is a case for withdrawing video from the equation altogether, thereby allowing decisions to be made based purely on speech and lessening the potential impact of unconscious bias from decision makers. They suggest the result would be a more equitable hearing or tribunal.

Psychologists also point out that judges and arbitrators are prone to less-rational decision-making on a subliminal level from a variety of environmental factors which ultimately affect the outcome of proceedings.

"When we communicate, we do not only perceive what is happening on a conscious level, but certain subliminal processes can kick in and sway our decision-making or perception of what is going on from a rational track to a less rational track".



STEPAN PUCHKOV
Legal Psychologist



Two examples are associating the frustration of technical issues with the expert witness who is providing evidence; or interpreting a delay in speech caused by the connection as hesitation in answering questions. Compounding the issue, arbitrators must focus more (some psychologists would argue the majority) of their mental capacity on managing an unnatural situation rather than carefully considering all aspects of the evidence provided.

Another potential influence on decision-making highlighted in the research is the onset of “Zoom fatigue”, a term which has become synonymous with the pandemic. While not limited to arbitrators or decision makers, staring at a screen for long periods of time, often in an observational capacity, is considerably less engaging than if the proceedings are taking place within the atmosphere of a physical courtroom. Expert witnesses reported juries, judges and arbitrators taking less interest in their testimonies and decisions being reached considerably more quickly compared to in-person hearings.

Removed from their natural position of authority in the physical courtroom, arbitrators and judges were less inclined to interject on procedural grounds, such as hectoring the witness. As highlighted above, hearings become considerably more relaxed, difficult to police at times and open to abuse.

“The expert witness on the other side was flirting with the arbitrator over Zoom and I just thought to myself, ‘That’s it. We’re screwed’. The decision ultimately went against us which really angered me because we had a very strong case and the other expert didn’t do any analysis”.

Psychological impact not significant enough to influence proceedings

As acknowledged in the previous section, remote or virtual hearings can have a psychological impact on the parties involved. However, the extent to which this is strong enough to influence proceedings is debated. The quote above from an expert witness explaining how the relaxed nature of virtual proceedings can be open to undue influence is concerning and supports the viewpoint of psychologists, who argue the change of environment has a considerable impact on the decision-making processes and abilities of those ruling on a case, and therefore the outcome of hearings.

However, the majority of participants interviewed as part of this research do not share this viewpoint. They argue that the outcome of proceedings is widely considered to have been the same as if they had taken place in person under normal circumstances. While some lawyers point to remote hearings not affecting the ability to question or determine the validity of an expert witness's viewpoint, the main reason cited for the limited impact is the professionalism and experience of expert witnesses.

This view is shared overwhelmingly by the expert witnesses themselves who, while recognising the noticeable differences in providing evidence and undergoing cross-examination via video link, believe the impact on the outcome of proceedings has been largely negligible. After all, expert witnesses are trained to deal with the additional anxiety and pressures which accompany the physical, and often unfamiliar, courtroom setting. Therefore, adjusting to the virtual environment has been relatively straightforward.

"If you're faced with a solid expert who's there to do their job professionally, then it won't trigger anything unusual for the arbitrator".



CHIANN BAO
Member, Arbitration
Chambers

"We've all made it work, the same way that other people are making adjustments to their jobs and kids to schoolwork. Ultimately, there's no difference".



SANTIAGO DELLEPIANE
Managing Director and
expert witness at BRG

It should be noted, however, that there are limitations in determining whether the outcome of proceedings would have been different if conducted in person under traditional circumstances, as highlighted by Hadi: ***"I've been successful in all cases, so it's difficult to say"***. With many cases still awaiting judgement, a clearer picture may appear further down the line, once the majority of hearings and tribunals have returned to being conducted in person.

Virtual hearings to remain in some form in the future

Looking ahead, it is widely accepted that virtual hearings and tribunals are here to stay in some form. The degree to which varies considerably, depending on one's own personal circumstances and factors such as geographical location. In the immediate future, in-person hearings likely will be limited as countries still battle the evolving pandemic, although the domestic arbitration system may see them return more quickly and frequently as particular regions lift restrictions.

For example, for those expert witnesses based in the US, the proportion of hearings expected to take place fully face-to-face over the next twelve months ranged from 0 percent to 90 percent. However, what is apparent is the desire for people to reconnect in person where possible and prepare as a team.

“For the most part, I’m seeing clients and lawyers as the ones who are trying to pull us back into a common [physical] location. They want that team mentality and energy back”.



SANTIAGO DELLEPIANE

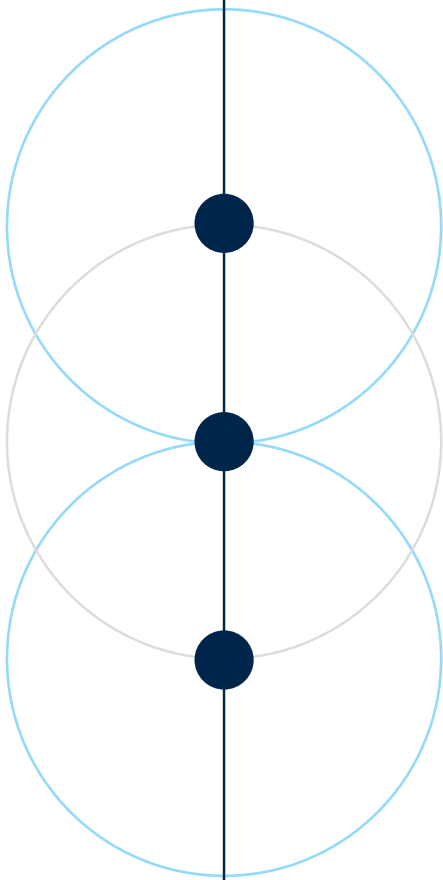
Managing Director and expert witness at BRG

Another factor noted was the sizable local economies supported by tribunal and meeting centres in states such as Texas. This feeling was mirrored in the UK, where it is expected that up to 70 percent of domestic arbitration cases could return to fully face-to-face settings as the vaccine programme continues at pace. The remainder will be split 20 percent/10 percent between hybrid and fully remote.

By contrast, in Asia, the range for hearings expected to be fully in person was much more concise at 5 percent to 25 percent, and as much as 80 percent of hearings were expected to remain fully remote over the next twelve months. In addition to the greater variation of jurisdictions in the region, the efficiencies of remote proceedings, and perhaps the opportunity for greater earnings for lawyers and arbitrators alike from shorter virtual cases, are strong influencers for maintaining the current setup.

One trend identified across jurisdictions was the preference for either fully remote or fully face-to-face hearings. Hybrid hearings, while entirely feasible, do not appear to be the preferred approach, which raises the question of whether a standard format for hearings and tribunals is required.

For those dispute cases which continue to be conducted remotely, opinion is split on whether to introduce some form of procedural rules or set standards to govern proceedings, as exists already in certain jurisdictions. However, given the limited impact many believe the factors mentioned above have had on the outcome of proceedings, and the need for flexibility in complex and particularly international arbitration, it's unlikely such universal standards will be implemented.



Conclusion

The positive experiences since the pandemic began mean that remote hearings and tribunals are here to stay for the foreseeable future in a variety of forms. The psychological impact of conducting proceedings remotely cannot be ignored, although the industry is confident that firms will not be overly penalised one way or another depending on the choice of setting, whether that be virtual, hybrid or in person.



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