



STUDY REVEALS HIDDEN PSYCHOLOGICAL IMPACT OF REMOTE HEARINGS

Authored by: Daniel Ryan - BRG

Following the exponential and global outbreak of Covid-19 in early 2020, more than 100 countries instituted either full or partial lockdowns which resulted in the majority of hearings and tribunals being held remotely.

Since then, a consensus has emerged that virtual hearings and tribunals are here to stay, at least in some form, for the foreseeable future. This was just one of the findings from a recent [BRG study](#) aimed at understanding better the experiences of remote hearings from the perspective of expert witnesses, lawyers and arbitrators from around the world, as well as to contemplate the possible psychological impact of different hearing environments.

As with other aspects of our professional lives since the start of the Covid-19 pandemic, a combination of resilience, innovation and flexibility have meant hearings have been able to continue efficiently and effectively across the globe. Nevertheless, the study also found that remote hearings

had an often-unobserved psychological impact, and one that cannot be simply ignored.

Through interviews conducted with expert witnesses, lawyers, as well as a psychologist from London to New York and Hong Kong, the cross-border report focused on ascertaining the psychological impact of conducting proceedings remotely and, importantly, the extent to which these had affected the outcome of hearings and tribunals.

The findings revealed that the virtual courtroom setting did indeed have a psychological impact, both positive and negative, to varying degrees, according to the majority of those who formed part of the report. For example, psychologists would argue a virtual setting has had a considerable impact on hearings, however, it's unlikely this would have registered with most participants at the time.

On one side, the majority of expert witnesses interviewed responded positively to being able to take part in proceedings from the familiarity

of their own homes. They said this virtual barrier during cross-examination rendered the traditional techniques deployed by lawyers as part of attempts to exert pressure and unnerve them during tribunals significantly less effective.

However, the psychological impact of remote hearings has not been weighted wholly in one direction. Familiar surroundings can also 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 also reportedly resorting to imagining the traditional physical courtroom environment to maintain focus and mentally prepare for each question.

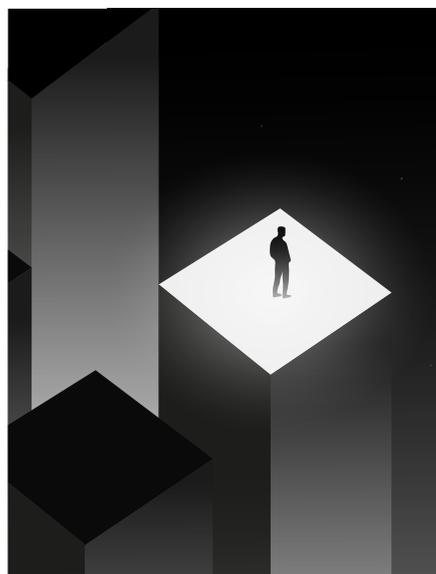
Preparation was a strong theme identified in the report. Virtual hearings and tribunals were found to lack the intensity and anticipation compared to in-person proceedings which helps to build confidence and make sure everyone is on the same page, a major drawback identified by the study. In

combination with a lack of pre-tribunal team building, this could sometimes lead to miscommunication between counsel and expert witnesses. Such was the importance placed on the psychological impact of the mental preparedness provided by engaging with their teams in a physical setting, expert witnesses stressed a clear preference for travelling to conduct arrangements in person, even if the hearing itself was to be conducted in a remote setting.

At the same time, once removed from their natural position of authority in the physical courtroom, both arbitrators and judges were seemingly less inclined to interject on procedural grounds, arguably detracting from the value of cross-examination to the tribunal as a whole. Hearings could become considerably more relaxed, difficult to police at times and open to abuse.

The psychological perspective also raised the subliminal processes that can affect decision-making, arguing that remote settings hinder 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. Crucially, several of the study's participants noted that juries, judges and arbitrators were taking less interest in their testimonies, with decisions being reached significantly quicker compared to in-person hearings.

One reasoning put forward was that decision makers were associating the frustration of technical issues with those providing evidence, or spending a greater proportion of their mental capacity managing an unnatural situation instead of carefully considering all aspects of the evidence provided as they would in the usual in-person environment.



Another potential influence on decision-making highlighted by the report is the onset of “Zoom fatigue”, a term now 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 noticeably less engaging than if the proceedings are taking place within the atmosphere of a physical courtroom.

Responding to this, a legal psychologist made the case for removing video from the equation altogether, thereby allowing decisions to be made based purely on speech and diminishing the potential impact of unconscious bias – an argument worthy of careful consideration.

Yet, the degree to which the points mentioned above were significant enough to influence proceedings is debated. Notwithstanding some notable individual examples of proceedings being open to undue influence, most outcomes are considered to have been the same as if they had taken place in person under traditional circumstances. While some lawyers interviewed pointed 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 experience and professionalism of expert witnesses. After all, expert witnesses are trained to cope with the heightened anxiety and pressures known to accompany the physical, and often unfamiliar, courtroom setting. Therefore, adjusting to the virtual setting has been relatively straightforward for the majority.

However, the report also accepted that there are limitations in establishing whether the outcome of proceedings would have been different if conducted in person under traditional circumstances. Continued success in cases for some expert witnesses interviewed meant they could not accurately evaluate the impact on proceedings and with a number of cases still awaiting judgement, the true extent of the impact could become clearer over time, aided by the benefit of hindsight.

Yet, what is clear is that the disputes system has been able to continue mainly unimpeded thanks to remote hearings and tribunals, and the BRG report raises some thought-provoking observations which may not have been obvious to begin with.

Opinions about the degree to which virtual hearings and tribunals are here



to stay vary greatly, depending on factors such as geographical location and one's own personal circumstances. For example, the proportion of hearings expected to take place fully face-to-face over the next 12 months ranged from 0 percent to 90 percent for those expert witnesses based in the US. At the same time, the range for hearings expected to be fully in person was much smaller for those based in Asia at 5 percent to 25 percent, with as many as 80 percent of hearings expected to stay fully remote over the next 12 months.

Opinion is also split on whether to introduce some form of procedural rules, or set standards to govern proceedings, as exists already in certain jurisdictions, for fully remote cases. Due to the need for flexibility in complex and particularly international arbitration, the report found it's unlikely such universal standards will be implemented. However, remote hearings do look set to stay in some form for the foreseeable future and the intriguing observations raised may require addressing to some degree in the interest of all.

[Read our full report here.](#)

Disclaimer: *The opinions expressed in this publication are those of the individual author and do not represent the opinions of BRG or its other employees and affiliates. The information provided in the publication is not intended to and does not render legal, accounting, tax, or other professional advice or services, and no client relationship is established with BRG by making any information available in this publication, or from you transmitting an email or other message to us. None of the information contained herein should be used as a substitute for consultation with competent advisors.*