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The Electronic Evidence in Trial Proceedings

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Abstract: This paper will consider theoretical and practical issues which arise in trial proceedings, throughout the virtual presence of persons involved. The EU Convention of 2000 provide the legal base for the use of video conference. In most jurisdictions, all forms of evidence is admissible, subject to rules relating to the exclusion of evidence because of improper actions or because the inclusion of the evidence would be unfair to the defendant. There is a difference between the admissibility of the evidence and laying the correct foundations before the evidence can be admitted.

Keywords: digital; admissibility; probative value; jurisdiction

1. The Admissibility of Electronic Evidence

Electronic evidence is not new: for instance, in the UK, Professor Colin Tapper wrote *Computers and the law* in 1973 and *Computer law* in 1978, and Alistair Kelman wrote *The computer in court: a guide to computer evidence for lawyers and computing professionals* in 1982. Although the discussion of the technical issues relating to electronic evidence was relatively slight in the early days, nevertheless electronic evidence (initially called computer evidence) has been adduced into legal proceedings for at least 40 years, if not 50 years. For this reason, the topic should not be anything new.

Investigators and prosecutors across the world have begun to deal with the identification, gathering, preservation and validation of digital evidence, including the chain of custody and ensuring that the evidence is transported and stored in such a way as not to alter or destroy the evidence. It is also necessary to analyze the evidence by using appropriate tools, and to provide a report that a judge and members of a jury (if a case is tried by a jury or a combination of judge and jury) understand.

Two important practical issues that must be addressed properly to ensure the evidence cannot be criticized by the defense are (i) the importance of gathering *all relevant evidence* – his includes physical items such as a keyboard for fingerprint and DNA samples and the mouse, because most mice now include advanced memory functions that track and record what it does, and (ii) to photograph the scene before removing any items, and video the actions of investigators if they are required to recover evidence from a device that is switched on.

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In most jurisdictions, all forms of evidence is admissible, subject to rules relating to the exclusion of evidence because of improper actions or because the inclusion of the evidence would be unfair to the defendant. There is a difference between the admissibility of the evidence and laying the correct foundations before the evidence can be admitted.

This point is illustrated by considering the jurisdiction of England and Wales. The provisions of section 117 of the Criminal Justice Act 2003 provide for the introduction of documents created in the course of a trade, business, profession or other occupation. The provisions of section 117 do not remove the requirement that the evidential foundations have to establish before the evidence can be admitted. Apparently, defense lawyers in England and Wales regularly agree to the inclusion of electronic evidence under this section. It seems that prosecutors are aware of the position, but defense lawyers seem not, in general, to appreciate this very important distinction.

2. Hearing by Videoconference

Article10: "If a person is in one Member State's territory and has to be heard as a witness or expert by the judicial authorities of another Member State, the latter may, where it is not desirable or possible for the person to be heard to appear in its territory in person, request that the hearing take place by videoconference, as provided for in paragraphs 2 to 8.

The requested Member State shall agree to the hearing by videoconference provided that the use of the videoconference is not contrary to fundamental principles of its law and on condition that it has the technical means to carry out the hearing. If the requested Member State has no access to the technical means for videoconferencing, such means may be made available to it by the requesting Member State by mutual agreement.

Requests for a hearing by videoconference shall contain, in addition to the information referred to in Article 14 of the European Mutual Assistance Convention and Article 37 of the Benelux Treaty, the reason why it is not desirable or possible for the witness or expert to attend in person, the name of the judicial authority and of the persons who will be conducting the hearing.

The judicial authority of the requested Member State shall summon the person concerned to appear in accordance with the forms laid down by its law.

3. The Role of Digital Evidence Specialists

The name given to an 'expert' witness is digital evidence specialist. This is because nobody can be an 'expert' in all aspects of digital evidence, because the field is so vast. At best, a digital evidence specialist can be well informed about a number of significant issues relating to electronic evidence, but not everything. It is important to that the digital evidence specialist will not have a comprehensive knowledge of every aspect of electronic evidence. Also, the specialist must not be seen to be partisan to either party – in most jurisdictions, the 'expert' witness is required to be neutral, regardless of which party pays them, and owes a duty to the court, no to either party.

The findings, and any conclusions made by the digital evidence specialist, are very important, and will be set out in a report. Whether prepared for criminal or civil proceedings, the report should include a range of information that is pertinent to the case, including, but not limited to: notes prepared during the examination phase of the investigation; details about the way in which the investigation was conducted; details about the chain of custody; the validity of the procedures used and details of what

was discovered. The report needs to reflect how the examination was conducted and what data were recovered, and essential to any report will be the conclusions reached by the specialist. Where an opinion is offered, the opinion should set out the basis of the evidence. Clarity of thought, language and analysis are essential criteria for any such report.

4. Obtaining Evidence from other Jurisdictions

There are wide variations between what happens in practice and how judges in different jurisdictions deal with obtaining evidence form other jurisdictions. In discussing this topic, consideration will mainly focus on the response by judges and organizations in the United States of America, which illustrates the nature of some of the problems that might be necessary to consider by means of an international convention or treaty.

In criminal matters, attempts are made to acquire evidence and obtain the cooperation of potential witnesses by agreement, to such an extent that the Crown Prosecution Service in the UK has a liaison officer in Washington expressly to facilitate the exchange of evidence and witnesses. The Global Prosecutors E-Crime Network was partly set up to develop a co-ordinated approach for dealing with electronic crime. More formal provisions include multilateral conventions (such as the 1959 European Convention on Mutual Assistance in Criminal Matters, and the Convention on Mutual Assistance in Criminal Matters between Member States of the European Union of 29th May 2000 (which supplements the 1959 convention), bilateral treaties between States (such as the 1994 Treaty Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America on Mutual Legal Assistance in Criminal Matters), other arrangements such as the Harare Scheme (currently being updated), that is relevant to Commonwealth countries, which is a voluntary Scheme Relating to Mutual Assistance in Criminal Matters, and memoranda of understandings. However, it is not always the case that an organization is willing to cooperate with the prosecuting authorities, as in the prosecution of Yahoo! in Belgium for refusing to provide e-mail correspondence to the Belgian investigating authorities in a case involving credit card fraud.

In civil matters, it is probably correct to infer that evidence and witness statements are generally obtained for inclusion in civil proceedings by agreement. However, the main international mechanism for the obtaining and taking of evidence is the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, which entered into force on 7 October 1972. Unfortunately, the obtaining of evidence by means of a Letter of Request can be time consuming. In addition, the Convention is not necessarily considered to be mandatory by every signatory, as expressed by the United States Supreme Court in *Société Nationale Industrielle Aérospatiale v. U.S. District Court for the Southern District of Iowa*, echoing the comments of Keenan, DJ in *Compagnie Francaise d'Assurance Pour le Commerce Exterieur v. Phillips Petroleum Company*, in which he observed, at 28, that the United States did not intend to abandon the practice of extraterritorial discovery when agreeing to comply with the Hague Convention, and indicated that the Hague procedures were neither exclusive or mandatory. In the European Union, Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters applies to all the Member States of the EU with the exception of Denmark (article 22), which has not participated in the Regulation, and is therefore not bound by it nor subject to its application. The Regulation provides for direct contact between the courts in the Member States. There is a standardized request form that is included in the annex to the Regulation.

It has to be noted that witnesses out with the jurisdiction cannot be compelled or required to attend and give evidence before the courts of another Member State. They may be requested to do so and a summons may be served directly to them. This can cause significant difficulty for the adjudication of the trial. If a crucial witness declines to attend to give evidence it may result in the accused being acquitted of the charge, in particular in common law jurisdictions. The public interest will not have been met.

It also requires to be noted that a fair trial must be secured even where the witness gives evidence by video conference. The national authorities in the requesting state must make it clear that the accused is agreeable to the use of video conference and that under the law of the requesting state the use of video conference is sufficient to ensure a fair trial compatible with article 6 of the European Convention on Human Rights is secured.

If the witness is to give oral evidence and if this has an impact on the ability of the court or jury to determine the witnesses credibility or reliability, is the presentation of the evidence best secured by video conference. Does the witness require to be shown evidence in the case and if so, how is that to be achieved? How is the fundamental principle of procedure to be achieved?

There is also an implied presumption the witness will attend and give evidence, as he requesting authority requires to explain why the witness will not attend. The practical issues which arise at the hearing include an interpreter but also that the requested authority be present. It ensures that the witness receives both the protection of national law when a witness gives evidence but also ensures that of the witness declines to give evidence or becomes difficult in the process.

Whether under national law the accused can give evidence by video conference. It may be possible and is permissible under the convention. The next step would be if the accused gives evidence from another state and is convicted. How is to be sentenced and how will, if sentenced to a period of imprisonment, be returned to serve that sentence.

5. Conclusions

The virtual presence in trial proceedings can be effective. However, it must be considered within the terms of national law rules on evidence. It requires careful consideration of theoretical and practical issues such as trial strategy, cost and the overriding need to secure a fair trial in the public interest. Video conference permits the witness to give evidence without travelling and giving evidence in a legal system with which they are unfamiliar.

Courts have to be physically adapted to allow the presentation of electronic evidence; otherwise it costs a great deal of money to print every electronic document on to paper for the proceedings.

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