# Canada / Netherlands / United Kingdom / United States / International

# International Association of Tax Judges Webinar: Obtaining Evidence from Witnesses Abroad

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**This report summarizes the webinar held on 21 April 2023 by the judges of the International Association of Tax Judges (IATJ) on the topic of obtaining evidence from witnesses abroad.**

## 1. Introduction

The session was chaired by Justice Henry Visser, Tax Court of Canada (CATC), Canada. He introduced the topic by noting that the subject was very topical and not new, but at the same time of great relevance in the aftermath of the COVID-19 pandemic. In many jurisdictions, the pandemic has changed how tax courts operate, including the adoption of the practice of remote hearings. If the witness in a remote hearing is located abroad, certain legal and diplomatic issues may arise. Across the globe, countries and their tax courts are not always aware of these issues. The purpose of the webinar was to highlight these issues and look at country experiences in Canada, the Netherlands, the United Kingdom and the United States.

The panel comprised Justice Alexander van der Voort Maarschalk, *Hoge Raad* (HR), the Netherlands; Judge Greg Sinfield, First-tier Tribunal (Tax Chamber) (UKFTT), United Kingdom; and Justice Kathleen Kerrigan, US Tax Court (USTC), United States.

## 2. Methods of Obtaining Evidence Abroad

Henry Visser started by explaining that there are three important types of evidence used in the tax courts. These are: (i) evidence by affidavit; (ii) pre-trial discovery evidence; and (iii) trial evidence. With regard to the methods of obtaining evidence abroad, these too are threefold, being: (i) in person evidence; (ii) virtually given evidence, which is given remotely by video; and (iii) in person or remotely given evidence from an embassy or consulate abroad. Visser observed that these types and methods are not new. The CATC uses in person evidence from time to time. At the USTC, the use of evidence given from an embassy or consulate abroad is not uncommon. Remote evidence by video link is also not new, but the volume of this method has increased significantly in recent years due to the pandemic. In the aftermath of the pandemic, remote video evidence is used, as the provider of evidence cannot attend the CATC because he is on holiday or to save the expense.

In Canada, the CATC relies extensively on pre-trial discovery evidence. Greg Sinfield noted that, in the United Kingdom, pre-trial discovery evidence in tax proceedings is restricted to the exchange of documents between parties. In the United States, at the USTC, parties usually agree to a stipulation of facts, which comes with an agreement determining the relevant documents. The pre-trial discovery phase is limited to the exchange of the listed documents. In the Netherlands, there is no pre-trail discovery phase in the court proceedings.

## 3. Legal Risk and Other Issues Relating to Obtaining Evidence Abroad

With regard to the use of evidence obtained abroad, Henry Visser noted that the starting point is the compliance with both the laws of the host jurisdiction and of the foreign jurisdiction. Given the number of countries that there are and the great number of combinations of pairs of countries, this potentially gives rise to a large number of different country setups to comply with. Furthermore, in case of a witness located outside the jurisdiction, a court theoretically does not have the power of compulsion to give evidence, unless there is a specific process to compel the person abroad. This is where the Hague Evidence Convention (1970)[1] and letters rogatory[2] become relevant.

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1. *Convention on the Taking of Evidence Abroad in Civil or Commercial Matters* (Concluded 18 March 1970), available at: https://assets.hcch.net/docs/dfed98c0-6749-42d2-a9be-3d41597734f1.pdf (accessed 30 Sept. 2023) [hereinafter the *Hague Evidence Convention* (1970)].
2. Letters rogatory or letters of request are a formal request from a court to a foreign court for some form of judicial assistance.

In many jurisdictions, issues may also arise regarding the requirement to administer the witness oath. The ability to administer an oath is usually non-existent if the witness is located in another jurisdiction. In Canada, the general rule is that testimony is given under oath. Greg Sinfield observed that in the United Kingdom, evidence under oath is common in tax procedures, but the oath is not a requirement to give evidence and can be dispensed with in case of difficulties, as in the case of remote proceedings. Administering the oath is relevant in practice if there are issues with the credibility of witnesses.

Sinfield noted that, in the United Kingdom, and in contrast to Canada, regardless of taking an oath or not, a witness lying deliberately while giving evidence to a court is guilty of contempt. The UKFTT, which is a first instance administrative court in the United Kingdom, does not have the power to punish for contempt of court. In case there are issues of contempt, the UKFTT has to refer the case to the UK Upper Tribunal (UKUT), which has the same powers as the UK High Court (UKHC) in relation to contempt. There is, however, a provision in UK law that permits a person who is giving evidence remotely from another country to be administered the oath. Nevertheless, if they give false evidence, they become liable to the offence of perjury even if located in another country. This is because the remote witness is deemed for the purpose of the offence to be giving evidence in the proceeding in the United Kingdom.

The concept of contempt of court is not manifest in the Netherlands. In the Netherlands, taking the oath is not a requirement to give evidence. In contrast to the United Kingdom, lying when not under oath does not give rise to perjury. However, in general, there is no strict rule or practice dictating that evidence under oath is stronger or more impactful than statements not taken under oath. The assessment of credibility is fully up to the judge.

In the United States, it is compulsory to administer the oath for a witness to give evidence. US courts must consider this when thinking of taking evidence from abroad. Judges holding witnesses in contempt is rare at the USTC.

For all countries, other issues concern costs and access to justice, which are party-related issues. Parties sometimes commission evidence from a person located abroad. However, there might be physical reasons why a person located abroad cannot travel to the jurisdiction to give evidence, such as health issues or other inability to enter a country because of the lack of an entry visa. Another separate issue is the fact that the witness abroad might be subject to an arrest warrant in an unrelated case if he or she enters the country of the trial. A separate, but related, issue is the potential for a diplomatic incident to arise in case foreign countries refuse their citizens to give testimony in relation to court proceedings in other countries, or *vice versa*, where a court takes evidence from abroad without permission or in violation of a prohibition by the foreign state.

# 4. Relevance of the Hague Evidence Convention (1970)

## 4.1. In general

Alexander van der Voort Maarschalk started by reminding the audience that the Hague Evidence Convention (1970) does not apply to administrative law, including tax law procedures. The Hague Evidence Convention (1970) only applies to the judiciary acting in civil and commercial matters.[3] As with the United Kingdom and the United States, the Netherlands is party to the Hague Evidence Convention (1970), but it does not have direct relevance in Dutch tax matters. In the United States, the application of the Hague Evidence Convention (1970) is viewed as optional by the USTC, and considered to be one of the tools in the tax judge's toolbox for guidance. Also in the United Kingdom, the Hague Evidence Convention (1970) does not have any application in tax matters. Its application is believed a question for the government and diplomats rather than a question for legal determination by the courts, and its application does not affect the validity of foreign evidence in court. Canada is not a party to the Hague Evidence Convention (1970). Van der Voort Maarschalk added that even without application in tax matters, the Hague Evidence Convention (1970) is relevant due to the simple fact that the tax judiciary in general has little guidance on how to deal with taking evidence from abroad. The Hague Evidence Convention (1970) does allow for sense of direction in this regard. In the case of Member States of the European Union, the same is true regarding Regulation (EU) 2020/1783[4] which, broadly speaking, copies the Hague Evidence Convention (1970) into EU law, the provisions of which also only apply in civil or commercial matters.

With regard to the provisions of the Hague Evidence Convention (1970), Van der Voort Maarschalk noted that signatory states can make a number of reservations. For instance, the Netherlands has opted out granting requests issued for the purpose of obtaining pre-trial discovery of documents, simply because, in contrast to Common Law countries, pre-trial discovery is not a part of the Dutch judicial procedure.[5] This might also have repercussions on requests in relation to judicial procedures in tax matters. The underlying system of the Hague Evidence Convention (1970) is that the receiving state applies its own rules but can accept foreign methods or procedures if requested by a foreign state. Under the Hague Evidence Convention (1970), there

3. Art. 1 *Hague Evidence Convention* (1970).
4. EU: Regulation (EU) 2020/1783 of the European Parliament and of the Council of 25 November 2020 on Cooperation Between the Courts of the Member States in the Taking of Evidence in Civil or Commercial Matters, OJ L 405 (2020) [hereinafter Regulation (EU) 2020/1783].
5. Art. 23 *Hague Evidence Convention* (1970).

are the following two ways of obtaining evidence from abroad: (i) a court can send a letter of request or letters rogatory;[6] or (ii), alternatively, evidence abroad can also be taken on request of the court of a state in hearings in the foreign state by diplomatic officers representing the requesting state.[7] In such a case, it is important to note that there is no compulsion of the foreign person to act as witness and evidence can only be given if permission has been given by the foreign state to hear its own or third country nationals.

The language of the Hague Evidence Convention (1970) does not expressly refer to virtual testimony simply because at the time of its drafting in the late 1960s, there were little technical possibilities for remote hearings. However, the Hague Evidence Convention (1970) does cover the traditional approach of a judge relying on other means to physically gather evidence within another jurisdiction. Van der Voort Maarschalk noted that, in Regulation (EU) 2020/1783, the possibility of courts taking evidence from abroad via videoconferencing is expressly noted.[8] As with the Hague Evidence Convention (1970), the host state of the witness must give approval and can set conditions and there cannot be compulsion to be a witness. Regulation (EU) 2020/1783 also only applies to courts acting in civil or commercial matters. Van der Voort Maarschalk believed that, for tax judges, the main take away from these instruments is the general principle that courts should respect the rules of the foreign jurisdiction if they want to obtain evidence from a person abroad.

### 4.2. Inbound versus outbound obtaining of evidence from witnesses abroad

Henry Visser noted that there are two aspects to the issue of obtaining evidence from witnesses abroad. First, there is the situation of the court asking for assistance to obtain evidence abroad. Second, there is the situation of a court that has been asked to assist a foreign court in obtaining evidence in their jurisdiction.

Visser noted that, in Canada, the CATC typically will not be asked to provide assistance. Most likely, inbound request will end up with the superior courts at provincial level. The same is true for the USTC in the United Staes and for the UKFTT in the United Kingdom. The reason is that inbound requests from a foreign (tax) court for evidence from local witnesses will probably be heard by the general civil courts, rather than a specialized tax court. In the United Kingdom and the Netherlands, inbound requests will most likely go through the diplomatic channels, rather than through the court system.

## 5. Other Potential Considerations

Henry Visser observed that additional complications can arise if countries allow the public to attend court sessions virtually and if people start doing so while physically located outside the jurisdiction. Some countries may not allow the virtual attendance of trials from outside the jurisdiction. Greg Sinfield noted that, in the United Kingdom, certain judicial proceedings are broadcast by television networks and online. No geo-restrictions were imposed on these broadcasts.

There are also other practical considerations that need to be considered in case of the contemporaneous remote giving of evidence from abroad. Visser referred to time zone differences, language barriers and translation requirements or the presentation of documentary evidence to virtual witnesses. These are all elements that may complicate the process. Both at the CATC and the USTC, these complications have led to the conclusion that testimony from abroad may involve a cost saving to the parties, but not necessarily for the courts, unless the taxpayer has sophisticated representation, and provides for the infrastructure to hear foreign witnesses.

As in many other countries, in the Netherlands, legislation was introduced during the COVID-19 pandemic that introduced virtual court sessions. As a rule, court hearings – except tax court hearings – are public in the Netherlands, but this did not mean virtual court sessions were open access. If the public wanted to attend a virtual hearing as audience, the interested party had to report to the court and request a link to the session. In Canada, similar registration requirements were introduced after one court encountered the flooding of a freely accessible online session by protesters. The massive attendance prevented one of the witnesses in the case joining the online session.

6. Id., at ch. 1.
7. Id., at ch. 2.
8. Art. 12(4) Regulation (EU) 2020/1783.

# 6. Country Perspectives

## 6.1. United Kingdom

### 6.1.1. Opening comments

Greg Sinfield presented two recent cases concerning the immigration and asylum tribunal (*see* sections 6.1.2. and 6.1.3.). Albeit not tax cases, these cases are relevant because, like the tax tribunals, the immigration and asylum tribunal is considered to be an administrative tribunal. The issue in these cases is a live issue that is relevant to all administrative tribunals.

### 6.1.2. *Secretary of State for the Home Department v. Agbabiaka* (2021)[9]

In *Agbabiaka* (2021), the Home Office (which deals with immigration matters in the United Kingdom) had objected to the hearing of an appeal by the UKFTT, as the appellant was giving oral evidence from Nigeria. The appellant had not demonstrated that the Nigerian authorities had agreed to him taking part in the UK court proceeding from Nigeria. Nevertheless, the hearing went ahead, with the UKFTT allowing the appellant's appeal.

The Home Office appealed to the UKUT and the latter took the opportunity to clarify issues around evidence and submissions in UK proceedings that were given from another jurisdiction. The UKUT held that courts and tribunals should not take oral evidence from a witness in another state without having permission to do so given by the other state. The UKUT explained that taking evidence without permission risks giving rise to a diplomatic incident and damaging the United Kingdom's diplomatic relations with other states, and, therefore, is contrary to the public interest and might harm the interests of justice. Any party seeking to rely on such evidence must ask the UK Foreign, Commonwealth and Development Office (UKFCDO) whether the foreign state has any objections.

Greg Sinfield noted that this decision caused a considerable stir at the administrative tribunals, as it was determined by the UKFCDO that the administrative tribunals are not covered by the Hague Evidence Convention (1970). For the tribunals, this interpretation of the status of the Hague Evidence Convention (1970) is determinative.

### 6.1.3. *Qasim Ali Raza v. Secretary of State for the Home Department* (2023)[10]

*Raza* (2023) concerned an appeal by an individual in an immigration case to the Court of Appeal (England and Wales), (CAEW), challenging a decision by the UKFTT on the grounds that the hearing of his case had been unlawful, as there was no adequate evidence that the authorities in Pakistan, where the witness was located, had consented to the witness giving evidence by video to the relevant tribunal in the United Kingdom. On the contrary, there was evidence that Pakistan objected to the giving of the evidence by video from its territory. In contrast to *Agbabiaka*, in *Raza*, it was the appellant who challenged the validity of the remote witness testimony.

The CAEW held that the taking of video evidence from abroad without the permission of the state concerned is not unlawful, and does not make the hearing a nullity. It added that, where permission to take evidence is not obtained, the sanctions for such conduct are diplomatic and not legal.

Greg Sinfield noted that the decision of the CAEW in *Raza* does not undermine the prior decision by the UKUT in *Agbabiaka*. In both cases, the problem of the lack of permission by the foreign state was identified as a diplomatic problem rather than a legal problem. This means that, if a judge is virtually hearing a witness and it suddenly appears that the witness is not physically located in the United Kingdom but in a foreign state, this does not invalidate the proceedings. There is, nevertheless, a risk of a diplomatic incident.

Henry Visser noted that, in Canada, the location of the witness must in any case be ascertained by the relevant Canadian court itself, as witnesses take the oath and the oath cannot be administered to a person not physically located in Canada. In the United Kingdom, administering the oath to a witness is not required, and courts do not tend to inquire where the witness is located in a virtual hearing. If the witness appears to be located abroad, this has little effects apart from the fact that a violation of the oath might not be fully enforceable.

### 6.1.4. Consequences of *Agbabiaka* and *Raza*

Greg Sinfield noted that based on the two decisions, it is clear that, in the United Kingdom, permission from the foreign state must be obtained through diplomatic channels in every case where a person will give oral evidence from outside the United Kingdom. This takes a considerable amount of time if done on an individual witness basis. For this reason, a specific "taking of evidence unit" was set up at the UKFCDO at the end of 2022. The unit reaches out to other countries and asks whether they

9. UK: UT, 26 Oct. 2021, *Secretary of State for the Home Department v. Agbabiaka (evidence from abroad, Nare guidance)*, [2021] UKUT 286 (IAC).
10. UK: CAEW, 15 Jan. 2023, *Qasim Ali Raza v. Secretary of State for the Home Department*, [2023] EWCA Civ 29.

generally object to the giving of evidence to UK courts from within their jurisdiction. If no permission is obtained, it is the UK government's problem, rather than the UK court. In reality, a tribunal would not simply ignore the United Kingdom's system of obtaining permission from foreign states.

It is not yet completely clear what would happen where a foreign state refused a request for permission for evidence to be given by video made by way of diplomatic channels. Sinfield speculated that, in practice, the court might use a workaround to deal with that evidence, such as making the witness travel to the United Kingdom or to a country that does allow the giving of evidence or convert the evidence into a written witness statement. If the witness is, in fact, the appellant in the appeal, the courts could opt to decide the matter on the papers only, i.e. by means of a fully written procedure.

Sinfield also noted that most foreign states have not given a definite answer when asked by UKFCDO whether they object to the giving of evidence by video from their territory. A number of countries have responded that they will only consider the question on a case-by-case basis, which will be a very time-consuming process. Relatively few countries have given blanket permission. Surprisingly perhaps, one of these countries is the United States.

Henry Visser observed that the United Kingdom's centralized system of collecting country positions for allowing the taking of evidence in administrative matters seems to be a unique practice, and is currently not adopted in Canada, the Netherlands and the United States. Under the Hague Evidence Convention (1970), the designation of a central authority to deal with evidence requests from a foreign judicial authority is mandatory,[11] but, as noted, most countries share the view that the Hague Evidence Convention (1970) typically does not apply in tax matters.

## 6.2. The Netherlands

Alexander van der Voort Maarschalk stated that there was little relevant jurisprudence on this matter in the Netherlands. In Dutch tax proceedings, witness hearings in general rarely take place. The emphasis in the Dutch tax procedure lays on the documents. Furthermore, hearings before the court are not compulsory. And if there is a hearing, there is little room to bring new elements.

As to the question raised in the UK courts regarding the status of evidence in local proceedings that was obtained from a witness abroad in violation of the foreign country's laws, Van de Voort Maarschalk believed that the evidence did not lose its validity. The Netherlands has a rule that the tax authorities cannot rely on evidence that is obtained in a way that goes against what can be expected from a reasonably operating public service. It is clear that tax authorities cannot use evidence they have obtained through theft. But from recent exchange of information jurisprudence, it can be concluded that data that was confirmed to be stolen (and, therefore, obtained in violation of foreign law) by local employees and subsequently exchanged with the Dutch tax authorities on the basis of the standard procedures for the exchange of information, could rightfully be used as evidence in Dutch tax proceedings.[12] So there is no clearcut division, and it depends on the nature of the foreign rule that has been violated.

With regard to inbound requests by foreign tax courts to hear witnesses located in the Netherlands, Van der Voort Maarschalk believed that, given there is no specific treaty basis, it would probably involve a foreign rogatory commission or a foreign diplomat located in the Netherlands, and the Netherlands would most likely allow this way of evidence collection on its territory.

## 6.3. United States

Kathleen Kerrigan believed the issue of foreign witness evidence was becoming more of an issue in recent times at the USTC. This is because before the COVID-19 pandemic, US courts carried out very few remote proceedings. Witness evidence taken by video conference occurred only sporadically, and only if there was an agreement between the parties. If the witness was located abroad, traditionally, courts would rely on the issuing of letters rogatory requesting assistance from a foreign court. Letters rogatory are typically transmitted by way of diplomatic channels, and can be inefficient.

Streamlined procedures under the Hague Evidence Convention (1970) may also be used to facilitate the taking of testimony abroad. The United States is a party to the Hague Evidence Convention (1970) and its benefit is that it provides a uniform framework of cooperation mechanisms. In practice, the first thing US courts will do in case of obtaining witness evidence from abroad is checking whether the other state is a party to the Hague Evidence Convention (1970). If so, the framework of the Hague Evidence Convention (1970) will most likely be relied on.

Kerrigan reiterated that the application of the Hague Evidence Convention (1970) is not perceived to be mandatory in the United States, and merely is seen as one of the methods of seeking evidence. US litigants may also use discovery devices

11. Art. 2 *Hague Evidence Convention* (1970).
12. *See*, for example, NL: HR, 2 Feb. 2018, Case No. 17/00057, ECLI:NL:PHR:2017:1134, Case Law IBFD.

provided by Federal Law to obtain discovery from a foreign party.[13] Alternatives, such as hiring a local attorney to petition a court directly to collect evidence, may also be available under the law of the foreign jurisdiction.

If the decision is made to use the Hague Evidence Convention (1970), a judicial authority in the United States issues a letter of request directed to the central authority of the foreign jurisdiction to request assistance in taking testimony for use in US judicial proceedings. The foreign judicial authority that executes the letter of request will apply its own law in the execution.

A US diplomatic officer or consular agent may take the consensual testimony of US nationals. The permission of the competent authority of the foreign jurisdiction may be required. With such a permission, the US diplomatic officer may take the consensual testimony of other nationals. The US diplomatic officer or consular agent applies the law of the court before which the testimony will be presented, unless incompatible with the law of the foreign jurisdiction in which the evidence is taken.

Kerrigan noted that, under the Federal Rules of Evidence,[14] applicable to the USTC, in order to testify truthfully, witnesses are required to take an oath that is supported by criminal penalties for perjury. A determination, therefore, must be made as to who – an official from the trial country or from the country of testimony – will administer the oath in the case of remote testimony, and hold the witness accountable for false testimony or refusal to answer a question.

USTC rules require testimony of a witness to be taken in open court but for good cause, the Court may permit testimony by contemporaneous transmission from a different location, including from abroad. Next, the USTC will consider the law of the country of testimony, in determining how its own rules on witness testimony are applied to the foreign testimony. It is for the party seeking testimony from abroad to determine the authority and requirements for obtaining the testimony in the foreign jurisdiction. Under US law, a witness giving direct consensual testimony to a US court can do so within US diplomatic or military premises and may be sworn in by diplomatic officials.

If a country does not allow a US official to administer the oath, the court must request, either according to the Hague Evidence Convention (1970) or letters rogatory, that the country of testimony can have its judicial official administer the oath. The US court will consider differences between the perjury statutes of the countries involved in accepting consensual testimony from abroad, and will consider the applicable law before holding a witness in contempt.

Kerrigan concluded that, before the COVID-19 pandemic, it was mostly witnesses that were abroad and called to testify. During the pandemic, the situation unfolded where the taxpayer had filed a petition while being in the United States, but was abroad and could not travel back for a hearing because of the COVID-19 travel restrictions. The case in question was settled outside the court. Kerrigan believed that, given the possibility to hold remote trials, situations of taxpayers being abroad during the proceedings will arise more often. Courts will have to consider whether there are legitimate reasons for allowing the taxpayer to stay abroad. Cases can also be decided by motion or by summary judgment, so a trial or taxpayer presence is not required.

## 7. Conclusions

Henry Visser concluded that this topic is an evolving subject. It appears that countries are at different stages of appreciation of the effect of the issues raised. When it comes to remotely gathering evidence from a witness located in a foreign jurisdiction, Canadian courts seem to approach the issue like they would approach the gathering of remote evidence of a person located in Canada, and without being fully unaware of the diplomatic incidents this can give rise to, or whether a formal process needs to be followed. In the past, courts and tribunals in the United Kingdom did the same, but since the decision in *Agbabiaka*, there is greater awareness of the danger of creating a diplomatic incident. Kathleen Kerrigan added that she believed this is essentially a procedural issue which parties do well to raise early and not on the day before a trial. When the issue is raised, it is for the judge to find the right procedure depending on the foreign country involved. The right procedure to be followed has to be determined on a country-by-country basis and can differ significantly across countries involved. With regard to the specific guidance for tax judges on this topic, Greg Sinfield noted that an obvious but important ground rule for remote witness hearings is that parties should notify the court if any witness is providing evidence from another country. This disclosure might not always happen in practice, but it is what is meant to happen. Visser added that in the absence of clear domestic laws or international or bilateral conventions, tax courts might want to consider developing practice directives on the matter. Practice directives might especially help with, or better, prevent last-minute requests by parties for foreign witnesses, as the obtaining of permission by the foreign country takes time.

Visser concluded the webinar. He stated that, in order to deal with the issue of remote evidence from abroad in tax cases in a more concerted manner, and to remove some of the current uncertainties, countries should consider adopting an international convention, like the Hague Evidence Convention (1970), that applies expressly to foreign evidence in tax procedures.

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13. *See*, for example, the decision of the US District Court (USDC) in US: USDC, 15 June 1987, *Societé Nationale Industrielle Aerospatiale v. U.S. District Court*, 482 U.S. 522.
14. US: Federal Rules of Evidence, Rule 603.