

# Remote Expert Evidence: Can It Work Effectively?

PART I

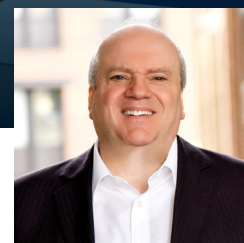
By David Stern, Neil Ashton and Daniel Langley of StoneTurn

Amongst all the effects of the ongoing coronavirus pandemic on our legal, financial and economic systems, the spotlight has landed upon the means by which our judicial systems can continue to function where hearings and meetings must take place remotely.

Much has been said about the ability and capacity of our courts and/or arbitral tribunals to work remotely and to use modern technology to conduct remote hearings. The Korean Commercial Arbitration Board released its 'Seoul Protocol on Video Conferencing in International Arbitration' in mid-March (which proved timely, in light of the pandemic). Little more than a week later, and as a direct result of the pandemic, the Civil Procedure Rules in England & Wales were supplemented with both Practice Direction 51Y which addresses 'Video or Audio Hearings During Coronavirus Pandemic' (and is intended to apply only for the duration of the outbreak) and the Judiciary of England & Wales' 'Civil Justice in England and Wales Protocol Regarding Remote Hearings'. Other national and local authorities have released their own guidance regarding the remote conduct of proceedings.

Further, the new systems and guidance, as well as the associated technology, have already been tested in real-life cases. Notably, the first UK Commercial Court trial to be conducted remotely—*National Bank of Kazakhstan and Anr -v- Bank of New York Mellon and Ors*—was recently completed and has attracted largely positive reaction.

Given our role in acting as quantum experts, we asked ourselves whether there are any particular points to bear in mind as regards the use of expert evidence in such circumstances? Are expert witnesses able to perform their roles adequately when



**David Stern**

Partner, StoneTurn  
dstern@stoneturn.com  
+44 (0)20 7427 0402



**Neil Ashton**

Partner, StoneTurn  
nashton@stoneturn.com  
+44 (0)20 7427 0403



**Daniel Langley**

Director, StoneTurn  
dlangley@stoneturn.com  
+44 (0)20 7427 0406

working entirely remotely? Are there any functions of an expert that require closer consideration?

## The Expert's Work

Much of an expert's work is already performed remotely and from the comfort of the expert's desk. After first being engaged by instructing solicitors, an expert will typically spend much of their time:

- Requesting, reviewing and analysing source documents and material;
- Producing calculations, models, plans and/or other technical material required to inform the opinion to be given;
- Liaising with their instructing legal teams;
- Liaising with relevant client staff members (such as the Finance team), albeit with instructing solicitors in attendance;
- Preparing one or more expert reports (along with the necessary appendices and exhibits etc); and
- Reviewing and critically assessing one or more opposing expert's reports.

All of this work, which will typically account for the majority of an expert's time and fees, would ordinarily be performed 'remotely'. Even where meetings might otherwise take place—especially meetings with the client's legal team intended to explain and understand the expert's findings and/or to pass on instruction or further clarification of the client's case—the necessity of such meetings has largely been eliminated over the years by the use of e-mails and conference calls. In other words, whilst, in ideal circumstances, meetings may remain the most time- and cost-efficient method, they are rarely, if ever, strictly necessary these days.

## Meetings of Experts

Over and above the day-to-day work, however, parties' expert witnesses are commonly ordered to meet, either before or after their reports have been exchanged, in order to identify points of agreement and disagreement between them, with a view to producing a Joint Statement of the common ground and remaining differences between the experts for the benefit of the Court or Tribunal. How can such meetings take place where social distancing is required by the government?

In truth, while, in our experience, face-to-face meetings of experts take place more often than not, there are numerous occasions where, even in pre-pandemic times, the 'meeting' instead takes place by means of one, or a series of, phone calls. Further, even where a face-to-face meeting does take place, it is unusual for each expert's position on all points of potential agreement and disagreement to be fully articulated during that meeting. In practice, the production of a Joint Statement identifying points of agreement and disagreement tends to become an iterative process. An initial meeting will typically be used to establish the broad outline of the Joint Statement, to identify those points that are readily agreed between the experts and to exchange views on the more salient areas of disagreement between them. Following the meeting, a draft Joint Statement may be exchanged by email between the experts on numerous occasions, while the intricacies of each expert's positions are supplemented and refined.

As such, just as with meetings with the client's legal team, it is difficult to conceive of circumstances that would fundamentally necessitate a face-to-face meeting between the experts for the production of a Joint Statement.

This is particularly the case in circumstances where professionals have, through the recent current lockdown period, developed familiarity with collaborative online tools which mean remote meetings can easily be held and information sources and documents can be shared on screen and considered together. There are, of course, circumstances that require more than the sharing and consideration of documents, such as building inspections or medical examinations—however, while it may be sub-optimal, there is no reason why the experts should not carry out their own separate procedures and compare notes remotely afterwards (perhaps with the benefit of photos and/or video evidence etc).

Therefore, in terms of preparing for a hearing, there may be little practical difference between an in-person or remote expert witness. The key issues, however, arise during the hearing itself.

*In Part II of our discussion of the case for remote expert evidence, we'll examine the potential drawbacks of having expert evidence delivered remotely and flag some issues to which legal teams may want to give some thought.*

## About the Authors

*David Stern, a Partner with StoneTurn in London, is a Fellow of the Institute of Chartered Accountants in England & Wales and has been instructed across a wide range of complex domestic and international litigation, and arbitration disputes. He has been regularly recognised by Who's Who Legal: Arbitration – Expert Witnesses and Consulting Experts and has given oral evidence under cross examination on numerous occasions before the UK courts and arbitral tribunals in Brussels, London, Lusaka, Miami and Paris.*

*Neil Ashton, a Partner with StoneTurn in London, acts in complex domestic and international litigation, arbitration and mediation. He has been recognised by Who's Who Legal: Arbitration – Expert Witnesses and Consulting Experts and has worked as an expert witness, adviser or expert determiner for clients across a wide range of industry sectors. He has given evidence in the UK court and before arbitral tribunals both in the UK and abroad.*

*Dan Langley, a Director with StoneTurn in London, has given evidence before International Chamber of Commerce (ICC) Tribunals in Paris and an LCIA Tribunal in London. He has more than 15 years of experience as a chartered accountant, and extensive experience working with clients involved in complex commercial disputes.*

## Leaving no stone unturned.

StoneTurn, a global advisory firm, assists companies, their counsel and government agencies on regulatory, risk and compliance issues, investigations and business disputes. We serve our clients from offices across the U.S., U.K. and in Germany, Brazil and South Africa, assisted by a network of senior advisers around the world.



[StoneTurn.com](https://www.stoneturn.com)