

## Pros And Cons Of Co-Testimony In International Arbitration

By Neil Ashton, Dan Langley and Emilia Drozda

(April 10, 2018, 12:52 PM EDT)

In many international jurisdictions, expert witness evidence is given by way of a written report, which is used to cross-examine the expert at a trial or hearing.

Many experts use a team to help assess the facts and formulate the opinions contained in their reports, especially in larger, more complex cases. Nevertheless, the expert is required to testify to every component of that report. There are instances in which a report can be co-authored by two experts, such as when one expert has more expertise in certain areas, or when another expert with similar expertise has been involved in the preparation of a large report.

In situations where there are co-testifying experts, which are seen increasingly in international arbitrations in particular, little guidance is available regarding what is and is not acceptable and, more importantly, there is limited discussion on the respective benefits and drawbacks of engaging co-testifying party experts in dispute resolution.

### Playing by the Rules

While international arbitration bodies provide guidance on the production of expert evidence, there is limited available information on co-testifying experts. Various arbitration rules, such as those governed by the London Court of International Arbitration, International Chamber of Commerce or Chartered Institute of Arbitrators, discuss expert evidence at a high level, but provide no specific guidelines on the preparation of co-authored reports, and consequently, the co-testimony of experts.

Looking elsewhere, Article 5.2(i) of the International Bar Association Rules on the Taking of Evidence in International Arbitration assumes the possibility of co-authored reports. It states that where an "Expert Report has been signed by more than one person, [the Expert Report must contain] an attribution of the entirety or specific parts of the Expert Report to each author." According to IBA working party commentary on the revised text of the 2010 IBA rules, this requirement is intended to aid the parties in determining which experts they wish to attend the evidentiary hearing, as well as in



Neil Ashton



Dan Langley



Emilia Drozda

preparing for the cross-examination of one or more of the co-authors.

### **Co-Testifying In Practice: Case Law and Practical Experience**

Given the limited guidance available on this topic, there are the following practical examples of co-testifying in international case law and first-hand experience from which to learn.

#### ***International Case Law***

In *Barker v. Valley Plaza*,<sup>[1]</sup> Barker argued that a lower court had erred by allowing the opposing experts to file a joint report. However, the judges found there was “no reason to think the practice always and inherently impermissible” and, although there was limited precedent, stated that “co-authored expert reports aren’t exactly uncommon.” Because both experts worked collaboratively to come to the same opinions in the report and were prepared to testify to those opinions, the judges saw “no reason why it would be inherently impermissible for them to file a joint report.” However, the court then noted that co-authored reports could be problematic, citing another case in which experts with complementary but different areas of expertise had co-authored a report and it was not possible to identify which expert was opining on which issues (i.e., a difficulty that might have been avoided by application of the IBA rule specified above).

In the Australian case *Holdsworth & Ellison v. RSPCA*,<sup>[2]</sup> the court noted there were significant contributions made to an expert report by a colleague of the expert witness who possessed experience in a certain field unfamiliar to the expert, according to his CV. His colleague co-signed an initial report, but did not co-sign supplementary reports that were subsequently produced. The court observed the following issues:

- The report did not describe which expert carried out which elements of work and whether any of this work was delegated to other staff members;
- The second expert did not provide oral evidence at trial despite the fact he had significant involvement in the preparation of the report; and
- Where other co-authored expert reports were presented during the trial, both authors had been available to give evidence.

Together, these cases highlight key issues for counsel to consider when introducing co-authored expert evidence.

#### ***Practical Experience***

We have seen co-authored expert reports on a number of occasions in international arbitrations — whether produced by opposing experts or those we have co-authored. To summarize what is often a complex range of factors, there appear to be two predominant drivers behind the production of co-authored reports:

1. The level of detail and/or complexity involved in a case make it desirable for more than one expert to be available to speak to all relevant issues in-depth; and

2. The co-authors have different areas of expertise (which can also overlap in certain instances), but it is preferable to submit one expert report rather than two (or more). This may be the case when different areas of expertise reside within one expert firm.

## **Pros and Cons**

There are potential benefits and drawbacks to the use of co-testifying experts, depending on the particular circumstances:

### ***Benefits***

- Having more than one expert on a large and complex case illustrates that there is not one all-knowing expert, thus allowing the court or tribunal to hear from other members of the team who may have a better grasp of an important detail than the expert;
- More effective and focused testimony with clear divisions in the detail of work performed enables experts to speak specifically to relevant points;
- For experts, there may be tactical advantages over a single expert, especially at hearing and during hot-tubbing; and
- Potential opportunity for more junior staff at expert firms to accumulate testifying experience.

### ***Drawbacks***

- Lack of clarity as to who holds what opinion and who will speak to particular areas of the report;
- Risk of a "junior," less experienced expert testifying; and
- Possible cost implications.

## **Conclusion: When Should Co-Testimony Be Used?**

Co-testifying and co-authoring expert reports can be useful in the right circumstances, especially if it assists the court or tribunal to provide further clarity on the issues addressed in the expert report. Experience has shown that it can be particularly beneficial in managing large, complex cases involving multiple distinct issues.

While co-testifying is still something of a grey area, it is increasingly being seen in international arbitrations due to the inherent flexibility offered by this route of dispute resolution. However, there seems no reason why it should not be considered in litigation should it assist the court in further benefiting from the expert evidence.

---

*Neil Ashton is a partner at StoneTurn in London. He has 20 years of experience working in practice, in industry, and in expert witness and litigation support work.*

*Dan Langley is a director at StoneTurn in London. He has 15 years of experience and currently focuses on complex commercial disputes.*

*Emilia Drozda is a manager at StoneTurn and also based in London. She focuses on financial investigations and complex commercial disputes.*

*The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.*

[1] *Barker v. Valley Plaza*, No. 12-4147, U.S. 10th Cir. 2013.

[2] *Holdsworth & Ellison v. RSPCA*, VCC 653, 2015.