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The Guide to Advocacy

General Editors
Stephen Jagusch QC and Philippe Pinsolle

Associate Editor
Alexander G Leventhal

Third Edition

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Contents

13

How to Mock Your Case Effectively

Yasmine Lahlou[1]

Even in cases where their client prevails, the most experienced counsel are often surprised by some of the tribunal's reactions at the hearing and their findings in the final award. The tribunal may dismiss an issue deemed critical by counsel as irrelevant (or *vice versa*), or the arbitrators may refuse to award certain types of damages due to the manner in which the argument was presented, rather than due to an insufficiency of evidence.

As a practical matter, in addition to potentially causing losses or reduced damages award, such discrepancies may result in preventing a party from recovering all of its arbitration costs. A tribunal may find that a party's damages claim was too high or that it did not prevail on all the issues it raised. More often than not, those issues can be avoided, either by withdrawing weak claims or bolstering a case in pre-hearing preparation to win them.

One means of addressing such issues in complex cases is to conduct a mock arbitration, which has been described as 'presenting an abbreviated version of the dispute in arbitration for feedback either before colleagues at the firm organizing the mock, or before selected individuals not associated with the firm'.[2]

Mock arbitrations are the younger cousins of mock trials. Mock trials began surfacing about six decades ago when social scientists sought to advise lawyers and litigants on how to tell and frame their cases in order to better resonate with juries. This practice has become widely used in the limited universe of cases that in fact go to trial, rather than settling. Recently, US and UK counsel from leading arbitration firms have been using this same tool in their complex and high-stakes cases.

Although the author had practised international arbitration for many years in Paris, she had not heard of mock arbitrations (or trials) until moving to New York in 2005. This

1 Yasmine Lahlou is a partner at Chaffetz Lindsey LLP in New York.

2 Edna Sussman, James Lawrence, 'A Mock Arbitration for Your Case: Optimizing Your Strategies and Maximizing Success', 41 *Fordham Int'l L.J.* 1017, 1018 ('Sussman & Lawrence').

is obviously primarily due to the fact that trials, and the critical importance of juries, are much more prevalent in common law than in civil law systems. However, as the practice of international arbitration has increasingly incorporated the common law features of a trial, the use of mock arbitration is now being increasingly considered worldwide.[3]

Such growing consideration, as well as the growing number of specialised consultants, can be explained in part by the fact that international arbitration is a growth area, attracting all sorts of players. Many professional arbitrators are also seeking to derive part of their income from such mock arbitrations. Moreover, it has now been widely accepted that even the most brilliant arbitrators' minds can fall victim to unconscious bias or other non-legal influences. In collaboration with the growing science aimed at understanding an arbitrator's psychology,[4] one means of taking those into account when preparing a case include organising a mock arbitration with individuals with some of the same characteristics as the actual arbitrators.

In this short article, we identify various practice pointers for a successful mock arbitration, including its proper scope, the right timing and the right team.

The subject matter of the mock arbitration

Counsel must first determine the purpose of the mock, which will define the scope, structure and duration of the process. As noted by two leading arbitration practitioners, the 'scope, subject matter and structure of a mock arbitration are often determined by the threshold question of resources.'[5] Those resources will determine how many mock arbitrators to use, and how much time they can dedicate in preparing for and attending the mock. These limitations will in turn determine whether counsel will focus on testing an opening argument, or also add further elements, such as a rebuttal, mock cross-examinations or a closing.[6]

Counsel must then identify what factual and legal issues, themes and evidence they must test. These will usually be the most substantively critical to the arbitration. Once those have been identified, counsel must prepare a presentation or cross-examination outline that is as thorough as if on the eve of the actual hearing. Counsel's level of preparedness for the mock hearing will likely have a direct impact on the amount of usable data obtained from the mock.

For some counsel, mock arbitrations have been critical in helping them manage the client's expectations and give them an advance warning of a potentially negative outcome.

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3 In fact, the survey conducted by Edna Sussman and James Lawrence indicates that 'mock arbitration appear to be spreading from the United States to International Arbitration[.]' Sussman & Lawrence at 1022.

4 Richard C. Waites and James E. Lawrence, 'Psychological Dynamics in International Arbitration Advocacy' in *The Art of Advocacy in International Arbitration* (D. Bishop, E. Kehoe Ed.) Juris 2010 69.

5 Claudia Salomon & Peter Durning, 'Making the Most of Mock Arbitrations, Do Not Enter: Rehearsal In Progress', *GAR News*, May 25, 2017, https://www.lw.com/thoughtLeadership/gar-making-the-most-of-mock-arbitrations (visited on July 31, 2018) ('Salomon & Durning').

6 Mock arbitration should be used to test the counsel's skills and the case, not the witness: 'the mock arbitrators' time is usually best spent evaluating counsel's presentation of the issues – not the performance of a witness or a mock adverse witness'. Claudia Salomon & Peter Durning, 'Making the Most of Mock Arbitrations, Do Not Enter: Rehearsal In Progress', *GAR News*, May 25, 2017, https://www.lw.com/thoughtLeadership/gar-making-the-most-of-mock-arbitrations (visited on July 31, 2018).

The right number of mock arbitrators

The lazy mind might assume that a mock arbitration (to make it realistic) should mimic the actual proceeding, and therefore be handled by three arbitrators. This is questionable. Since there are no unilaterally appointed mock arbitrators (and since each mock arbitrator should try to toughen the team by being fairly hostile), the ideal number may well be two – and a sole individual perfectly adequate. When there are three mock arbitrators, one or more of them may be tempted to underprepare in reliance on the others.

– Jan Paulsson, Three Crowns

That said, a mock arbitration's primary goal is not to predict the actual outcome on liability and damages, as the mock tribunal may lack the necessary elements to make that assessment – unless the scope and duration of the actual arbitration is limited. Thus, a leading arbitrator cited a case where his firm organised 'four mock arbitrations in the course of one day in order to assist them in identifying the quantum of damages to propose in a baseball arbitration'.[7] In essence, the process should assist counsel in identifying those themes and arguments that work and those that do not in order to calibrate their presentation at the hearing.

The right time for the mock arbitration

The timing of a mock arbitration largely depends on the goals assigned to the exercise. In general, the objective is usually 'improving the presentation, and developing substantive arguments', but the timing of when the utility is highest may depend on counsel's particular needs. According to Claudia Salomon and Peter Durning, '[a] mock arbitration that takes place after the submission of all briefing facilitates the preparation of counsel's advocacy while doing little to improve the substance of the arguments; by contrast, an earlier mock arbitration would be more helpful in developing points of substance but less valuable as a "dress rehearsal" for the real hearing.'[8] Counsel should certainly allow themselves sufficient time to analyse and incorporate feedback into their presentation before the actual hearing is to occur.

Test the worst-case scenario

According to users, the primary benefits of mock arbitrations, or mock trials, are to better understand the weaknesses and troubling aspects of the client's case, focus on the best legal theories, and perfect the narrative of the case.

As a result, it seems universally accepted that a mock arbitration is most useful when counsel 'stacks the deck' against its client. According to a consultant, 'It is better to mock

7 ('Sussman & Lawrence') at 1025 citing 'A Mock Arbitration for Your Case: Optimizing Your Strategies and Maximizing Success', Fordham University School of Law, at 15 (Nov. 17, 2017), http://law.fordham.edu/12thCIAMtranscript [https://perma.cc/LH2M-AEKP] (archived May 10, 2018) [hereinafter Transcript] (documenting the transcript of the proceedings at the XIIth Annual Fordham International Arbitration Conference).

8 Salomon & Durning.

lose than to mock win so you learn as much as possible to remedy while there's still time.'[9] Of course, counsel must ensure that its team understands the purpose of the mock exercise and does not lose confidence due to a difficult mock experience.

Pick the right team

Just like the scope and duration of the mock arbitration, its staffing will largely depend on the resources that the client is willing to dedicate to the process.

It seems most effective that the same team, including the lead counsel, that will argue the case in the hearing defends the same position during the mock arbitration, to test and improve their issues and arguments through practice.

If the team is large enough, some members should take the opposing counsel's role. In addition to providing a great opportunity for more junior lawyers to practise their trial skills, this will save resources and time as those lawyers know the case.

That said, depending on the budget and the team size, counsel should consider having a skilled advocate argue the other side's position, and focus on the most problematic and negative aspects of the client's case, including the most worrisome evidence.

Set the client's expectations

As discussed, mock arbitrations are best when counsel put themselves in the position of potentially losing the case so that the team can learn the crucial challenges it will face and how to overcome them. In doing so, it is important to make clear to the mock arbitrators or consultants that they are expected to share their unvarnished criticism about the case, as well as suggestions on improving it.

That said, as clients usually attend those sessions, it is critical that they be told the approach and methodology upfront so they understand the process and do not lose confidence in their counsel and their case.

Pick the right mock arbitrators and avoid the ego contest

Picking mock arbitrators from outside the counsel's firm may yield the best and most useful results. First, it enables counsel to maximise objectivity by not disclosing to the mock tribunal or mock sole arbitrator on which side they are appearing. It is almost impossible to withhold such information from one's law partners, who are much more likely to know the identity of the client. Second, when using external mock arbitrators, counsel can select individuals who have the same cultural and legal background as the actual arbitrators, which then increases the likelihood of having reactions and questions as close as possible to those of the real tribunal during the mock phase. It is now accepted that while complex to apprehend, 'cultural differences manifest themselves in particular in arbitration[.]'[10]

That said, this can be a costly investment as mock arbitrators will be paid not only for attending the mock exercise and providing their feedback, but also to review the underlying record.

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9 Laurie Kuslansky, 11 Problems with Mock Trials and How to Avoid Them.

10 Richard C. Waites and James E. Lawrence, 'Psychological Dynamics in International Arbitration Advocacy' in *The Art of Advocacy in International Arbitration* (D. Bishop, E. Kehoe Ed.) Juris 2010 69, 105.

As a result, many counsel and parties may find it easier to mock with their firm's colleagues. If the colleagues are properly briefed and prepared, this can yield effective results, especially where those partners also sit as arbitrators.

Whomever counsel picks, they must be careful to pick individuals whose judgement they respect and trust. Too often, some lawyers or arbitrators will see the mocking process as an 'ego contest', where they will seek an opportunity to first and foremost impress the client, instead of effectively helping counsel and the case.

How much to tell the mock arbitrators

To the extent possible, counsel should seek to keep arbitrators guessing on whose side they are to maximise the most objective return possible. In addition, it is essential that the arbitrators understand the crucial issues and themes being debated and, if at all possible, have a relevant background.

That said, mock arbitrators must know who the parties are, in order to conduct conflict checks for past, existing and future engagements. Any notion that arbitrators can be shielded by not knowing the names of the parties is illusory and dangerous.

In fact, when a partner at a law firm accepts an engagement to act as a mock arbitrator in a case, this can, at least for the duration of the engagement, create conflicts that potentially prevent that firm from acting for or against that party. Often, partners at large firms refuse engagements for those reasons.

Finally, as a good practice point, counsel must make sure to comply with any confidentiality or restraining order when disclosing information to the mock arbitrators and ensure that a strong confidentiality agreement is used with the mock arbitrators.

Obtaining the mock arbitrators' feedback the right way

Gathering the mock arbitrators' feedback is the principal purpose for conducting a mock arbitration.

According to Salomon and Durning, topics for general discussion with the mock arbitrators include: (1) the degree to which the mock arbitrators had made up their minds before the mock hearing; (2) the relative impacts of the written submissions versus the oral advocacy; (3) the equities and which party or witnesses come across as 'the good guy'; (4) the strongest (and weakest) issues and evidence for each party; (5) which issues remain open or undecided; and (6) what it would take to change a mock arbitrator's mind on a given issue.[11]

While counsel should typically prepare a set of written questions to ensure that all their concerns will be addressed, practitioners usually favour first receiving oral feedback from the mock tribunal, through either, or both, observing the arbitrators' deliberations and interviewing the arbitrators – who are likely to be more honest and forthcoming orally than in writing.

11 Salomon & Durning.

While some recommend allowing the arbitrators to deliberate before engaging in an extensive discussion session between the mock arbitrators and counsel,[12] it may be preferable to defer the deliberations because such collective discussions tend to influence an individual's original reactions and inhibit their ability to express their independent views.

Mock arbitrators' feedback can be useful to counsel in their preparation for the actual hearing in a number of highly concrete ways. Counsel can seek strategic advice on many facets of their preparation including: which theories to present and which theories to drop; the use of visual aids; how to present difficult facts; and which (and how) fact and expert witnesses are effective or not effective.

Counsel must devote substantial attention, preparation and time to getting the mock arbitrators' feedback in order to ensure that: (1) the mock tribunal will analyse those issues most critical to the case; and (2) the arbitrators will be prepared to dedicate all the debriefing time necessary for counsel to make the most of the process. Gathering the arbitrators' views may take as long as the mock arbitration itself.

12 Dr. Klaus Sachs & Dr. Nicolas Wiegand, 'Mock Arbitrations', in *Arbitrators' Insights: Essays In Honor Of Neil Kaplan* 339, 343 (Chiann Bao & Felix Lautenschlager eds., 2013).

Appendix 1

The Contributing Authors

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Yasmine Lahlou, who is fluent in English, French and Italian, brings a keen understanding of different legal systems and cultures to her work resolving cross-border disputes. For more than 15 years, she has represented clients in international arbitration and litigation in the Americas, Europe, Asia and Africa.

Initially trained in Paris and now based in New York for over 13 years, Yasmine works fluently and fluidly across civil and common law traditions.

Yasmine has conducted arbitrations and sat as an arbitrator under most arbitration rules, of arbitral tribunals including the ICC, ICDR, LCIA, UNCITRAL and SCC.

Before joining Chaffetz Lindsey, Yasmine practised at Clifford Chance in New York and at Castaldi Mourre & Partners in Paris.

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Appendix 2

The Contributing Arbitrators

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Jan Paulsson has been counsel and arbitrator in several hundred international arbitrations conducted under the rules of all major arbitral institutions. He has also been a member of the governing bodies of many of such institutions, and served as president of the London Court of International Arbitration and vice president of the ICC International Court of Arbitration in Paris. He holds law degrees from Yale and the University of Paris. His principal publications include the monographs *Denial of Justice In International Law* (Cambridge University Press, 2005) and *The Idea of Arbitration* (Oxford University Press, 2013).

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