Mock Arbitrations for Developing a Winning Case: Tips and Strategies

Edna Sussman/James Lawrence

I. Introduction

> *"The most useful scientific tool we have in preparing for an arbitration hearing is a mock arbitration panel study … Many, if not most, of the perceptions of the mock arbitrators will be close enough to those of the actual arbitration panel that the data will be valuable in developing recommendations for themes, case story, and other aspects of the actual presentation."*[1])

Others have confirmed the benefits of using a mock arbitration in case preparation. For example, Michael McIlwarth, Global Litigation Counsel at Baker Hughes a GE Company, reported "it's practically required in GE for significant cases. They ALWAYS shed light and sometimes we have done more than one, *i.e.* one early and another late in the case."[2]) Similarly, Neil Kaplan commented, "there is no better tool with which to prepare an arbitration case than a mock arbitration before a practicing arbitrator or someone who was familiar with the actual decision-making process of an arbitrator."[3]) Reciting the benefits, Lucy Reed stated, "what mock arbitration therefore does is to change the lawyers' biases about their own cases. It allows them to see whether what they think are the most important points to make are (or are not) as good as they think, and therefore whether their clients are likely to win (or not)."[4])

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[1]) Richard C. Waites & James E. Lawrence, *Psychological Dynamics in International Arbitration*, *in* The Art of Advocacy in International Arbitration 69, 116 (Doak Bishop & Edward G. Kehoe eds., 2010).

[2]) Email from Michael McIlwarth, Global Litigation Counsel, Baker Hughes a GE Company, to author (Jan. 30, 2018, 01:14 EST) (on file with author).

[3]) Neil Kaplan & Olga Boltenko, *A Secret Tool for Winning an Arbitration Case*, 17 Asian Disp. Rev. 116, 118 (2015).

[4]) Lucy Reed, *The Psychology of the Decision-Making Process; Comments on Conscious and Unconscious Bias, and on Mock Arbitration*, 18 Asian Disp. Rev. 205, 207 (2015).

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Notwithstanding the recognized advantages of conducting a mock arbitration by those who have considered it, a survey conducted by the authors indicates that mock arbitrations are not yet widely used in the arbitration preparation process. The reasons most frequently given by survey respondents were that they: "never thought of it" (42 %), "too costly" (24 %) and "I don't know much about them" (15 %). Over 80 % of the respondents said that if they had more information about mock arbitrations and their effectiveness they would be more likely to use the process and would find articles on the subject most helpful. This article responds to this expression of interest.

Grounded in the data collected in the survey and supplemented by comments made by the speakers at the XIIth Fordham International Arbitration Conference held in November 2017, this article explores the mock arbitration process, the different ways in which mock arbitrations can be structured, the benefits that they can offer, the costs that are incurred, and the pitfalls to avoid.

II. The Survey

The term "mock arbitration", as used in the Mock Arbitration Research Survey (the "Survey")[5]) and as used in this article, means 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. This article does not address an early neutral evaluation or mini-trial in which all parties to the dispute present their case and an evaluation is delivered to all parties to facilitate settlement. Nor is the subject of this article mock arbitrations in the sense of the moot competitions such as the annual Willem Vis-Moot Competition.

The Survey was distributed through the College of Commercial Arbitrators, the Chartered Institute of Arbitrators, smaller regional arbitration organizations, various bar associations, international arbitration practice associations, and list serves. There were 492 respondents to the survey request with the majority of the respondents hailing from the United States. The sample size is sufficient to conduct a trend analysis, draw some generalized conclusions, and set the stage for further research to be pursued through interviews with users and prospective users.

The Survey targeted three specific end-user groups: 1) counsel who have participated in a mock arbitration, 2) counsel/arbitrators who have served as mock arbitrators, and 3) counsel who have not participated in a mock arbitration. The Survey was designed to explore the degree of utilization of mock arbitration and to identify any factors that inhibit its use. The survey

[5]) Edna Sussman & James Lawrence, Mock Arbitration Research Survey [hereintafter *Survey*] (October/November, 2017) https://www.surveymonkey.com/r/mock arbitration.

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further sought to identify process designs utilized by counsel, and explore whether, and in what way, the process was found to be helpful. Since concern about cost was a factor which constrains use, the survey inquired as to the quantum of damages at stake that would justify a mock arbitration and obtained anecdotal evidence about the actual cost of conducting a mock arbitration.

III. The Genesis of Mock Arbitrations

The disciplines of the social sciences have long been applied to the resolution of disputes. Starting almost 40 years ago with the trial of the Harrisburg Seven in 1972, social scientists in the United States have been using their skills to help lawyers and litigants with juries in a trial environment.[6]) In preparing for trial, a "mock jury" is recruited and a mock trial is played out over a number of hours or several days. The lawyers have the advantage of observing the deliberation process and conducting interviews to see which arguments were persuasive and which were not. The information is used to refine the case presentation and to assist in the selection of the jurors.

As one of the leading jury and arbitration consultants explains, mock jury trials and mock arbitrations work because:

> Fundamentally people everywhere and across cultures generally make decisions in a relatively consistent manner by taking into account their own attitudes, principles, background, values, cultures and experiences gained during a lifetime and applying them to evaluate a set of facts and in which there is a dispute between two or more parties. By systematically studying and observing such human behavior, it is now very often possible to discern a pattern by which people will reach decisions in particular disputes and to make reasonable educated assumptions about those decisions and how they may be altered by what is presented and how it is presented. Whether your case is being heard by a jury, trial judge, an arbitrator, or is being mediated, people are people. Even "neutrals" striving to be fair-minded will have a world view, a cultural and legal frame of reference, biases, prejudices, and predispositions like everyone else.[7])

An understanding of the psychological influences on arbitrator decision-making is increasingly becoming known in the arbitral community[8]) and is a

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[6]) Philip K. Anthony & Les J. Weinstein, *The Social Science Edge in Arbitration and Mediation*, 5 N.Y. Disp. Resol. Law. No. 2, 17 (2012).

[7]) *Id.*

[8]) For a discussion of the unconscious psychological influences in arbitrator decision making, *see, e.g.*, Edna Sussman, *Arbitrator Decision-Making: Unconscious Psychological Influences and What You Can Do About Them*, 12 Am. Rev. Int'l Arb. 487 (2013); Doak Bishop, *The Quality of Arbitral Decision Making and Justification*,

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factor that counsel are beginning to consider. The survey results indicate that 33 % of the respondents acting as counsel had been "motivated to use mock arbitrations, in part, to understand how those unconscious influences may impact the actual arbitrators."[9])

IV. Mock Arbitrations Appear to be Spreading from the United States to International Arbitration

In each of the end-user groups, the majority of the respondents were from the United States.[10]) This trend is not surprising since mock trials are often used by counsel in the United States, especially in connection with jury trials, and are seen as an effective preparation tool. This preparation tool has become so useful and pervasive that not conducting this type of study may become equated with malpractice.[11]) Thus, it follows that mock arbitrations would be most common in the United States.

However, the data from the survey indicates that mock arbitrations are used in the international arbitration context. Even though the majority of the survey respondents were from the United States, the arbitration caseload mix of responding counsel who participated in a mock arbitration was overwhelmingly international.[12]) This usage trend was noted by Sachs and Wiegand who stated "as the popularity of arbitration has increased in the U.S., practitioners have sought to recreate this concept [mock trials] in the context of

6 (4) World Arb. & Med. Rev. 801 (2012); Susan D. Franck, Anne Van Aaken, James Freda, Chris Guthrie & Jeffrey Rachlinski, *Inside the Arbitrator's Mind*, 66 Emory L. J. 1115 (2017); The Role of Psychology in International Arbitration (Tony Cole ed. 2017); Shari S. Diamond, *The Psychology of the Decision-Making Process*, 18 Asian Disp. Rev. 197 (2015).

[9]) *Survey*, *supra* note 5, question at 32.

[10]) Counsel who had participated in a mock arbitration (71.9 % US), Counsel/Arbitrators who had served as a mock arbitrator (69.23 % US), and Counsel who had not participated in a mock arbitration (77.7 % US).

[11]) Dr. Klaus Sachs & Dr. Nicolas Wiegand, *Mock Arbitrations*, *in* Arbitrators' Insights: Essays in Honor of Neil Kaplan 339, 340 (Bao & Lautenschlager eds., 2013).

[12]) *See Survey*, *supra* note 5, at question 37 (finding 45 % of respondents stated that over 80 % of their arbitration practice was international and 25 % responded that about 60 % was international). The reason for the heavy weighting towards an international arbitration practice stems from the pool to whom the survey was addressed. There are numerous organizations which focus on international arbitration and serve the international arbitration community while typically counsel who conduct domestic arbitrations are often litigators who have a broad-based practice not focused on arbitration specifically and are accordingly more difficult to identify and access.

arbitration. Thus, the practice of mock arbitrations has begun to spread throughout the field of international arbitration."[13])

V. Mock Arbitrations are not a Widely Used Tool Even in the United States

Over 80 % of the survey respondents indicated they had not participated as counsel in a mock arbitration, and over 60 % of the respondents indicated they had not served as mock arbitrators in a mock arbitration. It is interesting to note that 30 % of counsel who had not participated in a mock arbitration had engaged the services of a jury consultant to assist them in a jury trial. Further, 28 % of that same respondent group engaged the services of a professional consultant to assist them in the presentation of a case for resolution by a judge. It seems that the concept and usage of mock jury studies has not yet translated broadly to the concept and usage of mock arbitrations.

In an effort to explore the reasons for this, Question 61 of the Survey gave respondents five choices as to why they had never conducted a mock arbitration. By far the most frequent answer was "I never thought of it" with 41.55 %; an additional 23.9 % responded that they did not conduct mock arbitrations because it was "too costly," and 15.5 % because they "don't know much about them."[14]) The data suggests that an information gap accounts for the lack of utilization of mock arbitrations. Indeed, that conclusion is supported by the survey results with 80 % of the respondents who had never served as counsel in the mock arbitration, responding that if they had more information about mock arbitrations and their effectiveness, they would be more likely to use the process.[15])

One comment by a respondent sheds another light on this question in stating, "the main reason for not using it [mock arbitrations] are cultural aspects. For most clients in our civil law jurisdiction (Germany) a mock arbitration would seem slightly over the top and too much like 'in the movies.'" But that same respondent added "I personally believe that it would help." As the practice of international arbitration is becoming increasingly harmonized, mock arbitrations may increasingly seem less like "in the movies" and more like a tool to be used in appropriate cases by counsel from non-U.S. legal cultures.

[13]) Sachs & Wiegand, *supra* note 11, at 240.

[14]) The other results for Question 61 are: 14 % "I didn't think it would be useful," 4.9 % "my client was resistant."

[15]) *Survey*, *supra* note 5, at question 62.

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VI. The Benefits of Conducting a Mock Arbitration

The mock arbitration survey examined, from two different perspectives, the helpful aspects of conducting a mock arbitration. First, from the perspective of counsel who participated in a mock arbitration, the survey offered respondents a choice of seventeen different "helpful" characteristics and respondents could choose as many as were applicable.[16]) The five most helpful aspects of conducting a mock arbitration were:

1. Improving understanding of the weaknesses of the case (78 %).
2. Focusing on the best legal theories (74 %).
3. Perfecting how to frame the case (72 %).
4. Improving the story of the case (70 %).
5. Identifying the more troublesome aspects of the case (56 %).

Second, from the perspective of respondents who served as mock arbitrators, the survey offered fourteen options for how the mock arbitrators believed they were most helpful to counsel and again, respondents could choose as many as were applicable.[17]) The top five aspects they thought were most helpful to counsel were:

1. Improving understanding of the weaknesses of the case (92 %).
2. Improving understanding of the strengths of the case (84 %).
3. Identifying the more troublesome factual aspects of the case (70 %).
4. Suggesting what's most appealing about the story (56 %).
5. Identifying the best legal theories for the case (51 %).

As Harrie Samaras summarized, "going outside your comfort group to hear objective feedback regarding your presentation can be an enlightening experience and can help improve your chances of actually winning."[18]) As a survey responder put it: "[we] ALWAYS change the presentation of the case as a result of the mock. Not once have we had a mock and just kept the approach we had going in without at least some modification. Sometimes huge."

Mock arbitrations can be used to address a variety of specific concerns in addition to testing legal arguments and presentations of the story. To give a few examples, while fewer respondents selected these choices many also found that mock arbitrations were useful in identifying helpful demonstratives to create, improving demonstratives, identifying portions of expert testimony that require further clarification, providing a realistic assessment for settlement,

[16]) *Survey*, *supra* note 5, at question 18.

[17]) *Id*., at question 51.

[18]) Harrie Samaras & Judy Weintraub, *Mock Arbitration; A Way to Fine-Tune Your Presentation*, The Legal Intelligencer (Oct. 29, 2013) https://www.law.com/thelegalintelligencer/almID/1202625504803/?slreturn=20170931195739.

assisting in discussions with clients about case value, and helping prepare witnesses and assessing witnesses.[19]) Mock arbitrations can be tailored to address issues unique to the case. For example, Doak Bishop recited one instance in which his firm conducted 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.[20])

Mock arbitrations can also be used to manage client expectations. As one commenter to the survey stated, in a situation that was described as having bad facts for the client, "The use of the mock arbitration allowed the client to see how the bad facts influence the arbitrator. This helped the in-house legal team to prepare the business for a bad result. In the end we did not do as bad[ly] as was expected and the mock arbitration helped to shield the in-house lawyers and my firm from a backlash due to unrealistic expectations. In fact it made the outcome seem more like a 'win' because liability was half of what the mock arbitrator awarded."

Only two respondents to the survey stated that they had used a mock arbitration to assist in the selection of the real arbitrators.[21]) Assistance in the selection of the jury by using a mock jury pool is one of the principal uses of mock juries. Attitudinal blinders influence all judgments, including those of arbitrators who, while called upon to be neutral, are human beings like everyone else.[22]) Thus, mock arbitration should be equally useful in the selection of the real arbitrators, if enough is known about the dispute so early in the process. In time, as the use of mock arbitration becomes more prevalent, users may find this to be another way that mock arbitrations can be useful, and consultants can help advocates identify likely predispositions and beliefs which may lead to the selection of an arbitrator who may view their case more favorably.[23])

Mock arbitrations can also be a tool for the selection of counsel. In one instance, forty FINRA (the U.S. Financial Industry Regulatory Authority) arbitrators were engaged for a single day to hear arguments in a case involving alleged security law violations in the sale of a structured financial product. The forty arbitrators were divided into groups of five and each group heard the arguments and deliberated in separate rooms in a facility with one-way mirrors. Different lawyers presented in each of the rooms. The client representatives watched the lawyers' presentations and the mock arbitrators' deliberations

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[19]) *Survey*, *supra* note 5, at question18.

[20]) *A Mock Arbitration for Your Case: Optimizing Your Strategies and Maximizing Success*, Fordham University School of Law (Nov. 17, 2017, 10:45 AM), http://law.fordham.edu/12thCIAMtranscript [hereinafter *Transcript*] (documenting the transcript of the proceedings at the XIIth Annual Fordham International Arbitration Conference) at 15.

[21]) *Survey*, *supra* note 5, at question 31.

[22]) Diamond, *supra* note 8, at 198, 204.

[23]) *See generally* Anthony & Weinstein, *supra* note 6, at 17.

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through the one-way mirrors. The mock arbitrations were used both to assess settlement value and to select the counsel who would represent the client in the arbitration.[24])

Again, it is critical to identify objectives, what it is hoped will be learned from the mock arbitration, and design the process to ensure that the objectives are met. However, mock arbitrations should not be looked to for reliable predictions of outcome. Because the arbitrators have more knowledge and experience than any mock juror would have, the trap in mock arbitrations is to assume that the mock arbitrators' knowledge and experience leads to an accurate prediction of the outcome. Commentators have noted that because mock arbitrators "decide questions of law as well as fact … mock arbitrations [are] a more comprehensive research vehicle than mock trials."[25]) However, it would be a mistake to make that assumption.[26]) As one of the Survey respondents commented in wondering why a mock arbitration can be viewed as predictive: "everyone is so unique." Doak Bishop advised that the point of the mock is more to test out arguments or answer other specific questions rather than to determine whether you are going to win or lose. He cautions that while mock arbitrations are very useful, they should not be viewed as reliably predictive.[27]) One commenter to the survey aptly summarized his experience: "The predictive value of mock arbitrations and trials turns out to be limited, in my experience. But the process of preparing for them is very valuable; it gets you ready earlier, it helps you see the case from the other side's perspective with more insight, and it focuses the client on the risks in a more concrete way."

VII. First Steps: Designing the Process

An effective mock arbitration requires careful attention to the objectives to be accomplished and the design of the process. "The most important thing to do is to clearly define your goals for the research."[28]) What is it that you want to accomplish? The answer can vary; it may be to test specific arguments or to

[24]) Edna Sussman, *Improving your Arbitration Presentation With a Mock Arbitration: Two Case Studies*, 5 N.Y. Disp. Resol. Law. No. 2, 15, 16 (2012).

[25]) *See* Amy Rothstein, *Mock Arbitrations: A New Kind of Jury Research*, N.Y. Law Journal (Sept. 10, 2009), http://www.law.com/newyorklawjournal/almID/1202433679158; *see also* Sachs & Wiegand, supra note 11, at 240. Both Rothstein, and Sachs and Wiegand, postulate that the results of a mock arbitration can be predictive.

[26]) As a professional consultant, I (Lawrence) note that it is difficult enough for lawyers to control the client's outcome bias. Adding in even the possibility of outcome prediction makes managing the client's outcome bias even more difficult, not to mention the issues that arise when the outcome of the real arbitration does not match that of the mock arbitration.

[27]) *See Transcript*, *supra* note 20, at 10–12.

[28]) Stephen Tuholski, *Mock Arbitrations; Getting the most Value for your Project,* 5 N.Y. Disp. Resol. Law., No. 2, 20 (2012).

obtain an appreciation of financial exposure or understand better what a favorable result would be in the arbitration. Focusing on a limited scope will be most valuable.[29])

As Doak Bishop stated, before embarking on the mock arbitration one must consider "what do you expect to get out of this mock arbitration? What are your goals, what are your objectives and what can you realistically expect?"[30]) Claudia Salomon echoes the importance of identifying "the big 'why'– the strategic goals of the exercise" and points out that there are various design decisions that must be considered to fit the objectives.[31]) "There is no one-size-fits-all approach to organizing a mock arbitration, but there are factors to consider – including who to place in the tribunal; what subject matter to cover; when to hold the hearing and how to incorporate feedback."[32])

VIII. Mock Arbitrations Do Not Have to be Very Costly

In an effort to obtain information about the circumstances in which users consider a mock arbitration to be appropriate, the survey inquired as to the "minimum amount at stake that justifies using a mock arbitrator from outside the firm," a process choice that drives up the cost of a mock arbitration. Perhaps surprisingly, the answer choices that gained the largest response were between one and five million, between five and ten million and a question of principle or precedent, each of which drew approximately 18 % of the responders.[33]) The remaining choices at higher damages numbers drew fewer respondents.[34]) These responses suggest that when counsel believes it would be a useful tool, mock arbitrations can be tailored so that the cost incurred is proportional to the amount at stake.

Anecdotal evidence suggests that this hypothesis is accurate. The comments provided by respondents to the Survey provided anecdotal evidence of cost varying from as little as $ 15,000 to as much as $ 300,000 for mock arbitrations. The authors' experience supports this range.

In one instance, three arbitrators, including a partner at a major law firm whose characteristics closely mimicked the actual arbitrators sitting on a

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[29]) *Id.*

[30]) *Transcript*, *supra* note 20, at 10.

[31]) Claudia Salomon & Peter Durning, *Do Not Enter: Rehearsal In Progress*, GAR News (May 25, 2017) https://www.lw.com/thoughtLeadership/gar-making-the-most-of-mock-arbitrations.

[32]) *Id.*

[33]) *Survey*, *supra* note 5, at question 8.

[34]) *Id.* The other responses were: 9.8 % for between 10 million and 25 million; 13.73 % for between 25 million and 50 million; 11.76 % over 50 million and 11.76 % for the bet the company.

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billion-dollar pharmaceutical case, were engaged to spend four hours in preparation and one day to hear arguments for a flat fee of $ 5,000 per mock arbitrator for a total of $ 15,000, plus any fees charged by the consultant retained to organize that mock arbitration.[35]) In another instance discussed above, the forty FINRA arbitrators were engaged for a single day to hear arguments with no advance preparation, for a flat fee of $ 4,000 per mock arbitrator for a total of $ 160,000, plus the fees charged by the consultant.[36])

Philip Anthony, the CEO of Decision Quest, a leading jury and arbitration consultant, reports that its services to organize a mock arbitration run between $ 15,000 to $ 40,000 US dollars. They find that the major expense is incurred in the retention of the arbitrators and generally depends on their hourly rate, and the number of hours they are called upon to devote to the matter.[37])

In order to reduce costs, respondents to the survey most frequently listed limiting the materials and time the mock arbitrators could spend in advance of the mock arbitration, by conducting the process without using outside consultants and by using lawyers within the firm as the mock arbitrators.[38])

IX. Using Consultants to Facilitate the Mock Arbitration

An important consideration in planning a mock arbitration is the question of whether to use a consultant to organize and conduct it. Of the counsel who have participated in a mock arbitration, 83.3 % indicated they had not engaged a professional consultant to assist in the mock arbitration.[39]) Further, 58 % of the respondents who had participated in a mock arbitration as an arbitrator indicated that, to their knowledge, a professional consultant was not utilized.[40]) However, of those counsel who had used a professional consultant, 89 % said they found it useful[41]) and of those who had served as a mock arbitrator, 80 % said they found a professional consultant helpful.[42])

Not utilizing a professional consultant is strongly correlated to respondents' answer to Survey Question 54, which inquired about how often the mock arbitrators were able to detect which party in the case the lawyers presenting actually represented. The respondents overwhelmingly indicated they were "always" or "usually" able to detect who had engaged their services. Clearly, "shielding" (see below), *i.e.* controlling the process for familiarity bias, has not

[35]) Sussman, *supra* note 24, at 16.
[36]) *Id.*
[37]) *Transcript*, *supra* note 20, at 55–56.
[38]) *Survey*, *supra* note 5, at question 9.
[39]) *Id.*, at question 26.
[40]) *Id.*, at question 44.
[41]) *Id.*, at question 27.
[42]) *Id.*, at question 46.