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NEWS

Making the most of mock arbitrations

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Increasingly, international arbitration practitioners are using mock arbitrations – like mock jury trials in the United States – as a valuable tool to assess the strengths and weaknesses of a party's position and develop an effective way to present their case in the real arbitration. **Claudia Salomon** and **Peter Durning** of Latham & Watkins highlight what must be considered to ensure the exercise is calibrated to the needs of the case.

There is no one-size-fits-all approach to organising a mock arbitration but there are factors to consider – including who to place on the tribunal; what subject matter cover; when to hold the hearing and how to incorporate feedback.

There's also the big "why" – the strategic goals of the exercise.

By carefully tailoring the mock arbitration to the needs of a specific case, counsel can make the most of it. Here's what we think they should consider.

WHO? Choosing your mock arbitrators

A mock arbitration is a predictive exercise and, when selecting mock arbitrators, the overriding goal is to enhance its predictive value. In arbitration, the real arbitrators' identities are known early in the proceeding, and the mock arbitrators are therefore selected to replicate the composition of the tribunal.

This process contrasts with mock jury trials in the US, in which the similarities and differences between the mock jurors and the real jurors cannot be assessed because the real jurors' identities are unknown before trial.

As a result, a mock arbitration can have greater predictive value than a mock jury exercise, provided the members of the tribunal are carefully matched to mock arbitrators with similar profiles.

In some cases, cost considerations make it impractical to retain an external group of mock arbitrators. To reduce costs, it is possible to create a tribunal in-house, using partners from one's own firm as the mock arbitrators, though this approach may result in a mock tribunal that is less candid and provides less critical feedback.

Overall, an exercise using in-house mock arbitrators is likely to provide a lower predictive value than an exercise in which mock arbitrators are selected based on closeness of fit with the real arbitrators.

When attempting to match a real arbitrator to a mock arbitrator with a similar profile, there are many factors to consider, including:

- Legal tradition and training;
- Nationality;
- Familiarity with cultural or business norms relevant to the case;
- Industry-specific expertise; and
- Age, gender, and language.

Typically, the candidate's legal tradition and training is the most important factor – in a predictive exercise, the way in which an arbitrator thinks about procedure, contracts, and the equities is often the most useful dimension to model.

However, in cases where the primary driver of the parties' dispute is a difference in cultural expectations (rather than legal opinions), a candidate's familiarity with cultural or business norms can be even more valuable than a shared legal tradition and training.

In some circumstances, it is possible to find a mock arbitrator who personally knows a member of the real tribunal and claims an ability to predict his or her reactions. But it is difficult to determine how much weight to give to a mock arbitrator's opinion based on a personal connection, just as it may be difficult to evaluate how well one person knows another. A close friend of a member of the real tribunal may have real insight into how the real arbitrator may approach issues. By contrast, a mere acquaintance is likely to have only limited predictive ability, unless he or she shares a similar profile with the real arbitrator or their connection includes service as co-arbitrators on a prior, similar case.

For these reasons, the most reliable course is to focus on similarities in the profiles of the mock arbitrator candidates and members of the real tribunal, rather than any personal connection between them.

The selection and retention of mock arbitrators raise certain practical questions: how should the mock arbitrator candidates be identified, approached, and retained? The process for identifying mock arbitrator candidates is similar to the process used to identify and nominate the members of the real tribunal, and involves consultations with one's internal and external network of arbitration practitioners. Additional candidates may be found by considering the real arbitrators' potential connections with former law partners or colleagues, former judges of the same court, or members of the same professional organisation or society.

When candidates cannot be found after an extensive search, it may be useful to seek the assistance of an outside company specialising in mock trials and arbitrations. These companies often can suggest candidates based on their own registries of practitioners. However, counsel must conduct their own diligence on those candidates, and should always personally contact candidates regarding service as a mock arbitrator rather than delegate that responsibility to an outside company.

Once the mock arbitrators have been selected, they must be formally retained. Counsel should structure the engagement letter so that the mock arbitrators are treated as "consultants" – a designation that may limit complications with disclosures the mock arbitrators may be required to make in future matters.

After the mock tribunal has been engaged, counsel should arrange for its members to meet to discuss the case between themselves in advance of the mock hearing.

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What? Subject matter and structure of the mock arbitration

The scope, subject matter, and structure of a mock arbitration are often determined by the threshold question of resources – a mock arbitration can be long and detailed or short and focused, depending on the amount of money and time available for preparing and conducting the exercise. Within those bounds, however, the subject matter and structure of the proceeding can vary substantially, depending primarily on the following:

- The issues, arguments, themes, and evidence that counsel wishes to test;
- The type of practice required, whether oral arguments of counsel or presentation of witnesses;
- The identity of the lawyers who will participate in the mock exercise and their anticipated role at the actual hearing; and
- The degree to which the mock arbitrators have been asked to prepare for the exercise by reviewing the parties' written submissions and the record in the case.

The relative importance of these factors depends on the needs of the case and the reasons for conducting the mock arbitration.

In most cases, counsel should focus on selecting the issues that are the most substantively important and creating a strong draft of the presentation to be delivered on those issues at the hearing. Counsel can test the overall strength of the case by delivering a mock opening statement that covers all material issues, or alternatively, make modular presentations on discrete issues.

In a lengthy mock exercise, counsel can combine a comprehensive opening statement with a modular approach, resulting in a mock arbitration that is both broad and deep.

In certain circumstances, where permitted by law and ethical requirements, the mock arbitration may focus on preparing the witnesses for the hearing. In such cases, the mock arbitration offers the added benefit of familiarising a witness with the hearing process.

Counsel also may find a mock arbitration an effective means to prepare for cross-examination with a mock adverse witness. Overall, however, 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.

Regardless of the substantive issues or type of presentation that counsel places at the centre of the mock arbitration, it is essential to present both sides of each argument, perhaps with a "blue team" representing the actual client, and a "red team" representing the adversary. Depending on the staffing, it may be helpful for the teams to work together or work in silos, more closely simulating an actual arbitration. In staffing these two teams, counsel should consider each lawyer's likely role at the hearing.

When possible, members of the "blue team" should have the same role in the mock arbitration that they will have at the real hearing. The "red team" can be a proving ground for the more junior lawyers who may be called upon as backup at the hearing; however, a robust presentation of the adversary's case should still be delivered so that counter-arguments and the mock arbitrators' feedback are both well developed. To that end, counsel may benefit from having one of the lead lawyers deliver the "red team's" presentation.

In structuring a mock arbitration, counsel must also consider what information to provide the mock arbitrators in advance, keeping in mind any confidentiality orders in the case. Generally, the parties' substantive briefing (including memorials and statements of claim or defence) should be provided, along with particularly important witness statements. To ensure that the mock arbitrators focus only on the most material submissions, counsel typically should not provide mock arbitrators with procedural orders, the terms of reference, or complete expert reports, unless the mock arbitration is focused on the particular issues for which these materials are relevant.

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WHEN? Timing of the mock arbitration

When scheduling a mock arbitration, counsel should take care to conduct the exercise neither too early (that is, before the written record sufficiently articulates the terms of the debate) nor too late (so close to the real hearing date that counsel does not have enough time to absorb the lessons of the mock arbitration). Within those limits, counsel have two principal options for the timing of a mock arbitration: before the completion of pre-hearing briefing, or after. Each option has advantages and disadvantages.

In an "early" mock exercise, the major advantage is the ability to incorporate the mock arbitrators' feedback into the next round of briefing – a significant benefit given the importance of written submissions in international arbitration. On the down side, an early mock arbitration is conducted on an incomplete record and subsequent written submissions can possibly give rise to new issues (or place greater focus on old issues) that the "early" mock arbitration left untested.

Even when no new issues arise in subsequent briefing, the mock arbitrators may discount some evidence and arguments, recognising that the record is incomplete and assuming that future submissions will contain counter arguments that muddy the waters.

In a "late" mock arbitration, the main advantage lies in the focus on preparing for the hearing. But this advantage comes at the expense of a chance to incorporate the mock arbitrators' insights into the briefs, and a stronger hearing performance may not matter if a party's written submissions fall short.

Ultimately, correct timing for a mock arbitration depends on the relative importance of the hearing versus the parties' written submissions, and on the reasons for conducting the mock arbitration within the specific circumstances of the case (which are typically a mix of improving presentation and refining substantive arguments).

HOW? Incorporating the feedback from a mock arbitration

The end result of a mock arbitration is the feedback and advice of the mock arbitrators, which can be collected in the following ways:

- observation of mock tribunal's deliberations;
- group interview of the mock tribunal;
- individual interviews of the mock tribunal's members;and/or
- written questionnaires.

To maximize the value of the feedback, counsel should encourage transparency and candour among mock arbitrators. To that end, conducting oral interviews or observing deliberations (which tend to be more open and freewheeling) are generally more useful ways to solicit feedback than soliciting answers to written questionnaires (which tend to be more cautious and self-censoring). In addition, mock arbitrators should not know which party counsel actually represents.

While counsel should give the mock arbitrators the opportunity to share their reactions in whatever order they prefer, preparing questions in advance can help ensure comprehensive feedback. Counsel may develop two kinds of prepared questions: general questions, and questions that are specific to the particular issues and evidence in the case. Topics for general discussion include:

- The degree to which the mock arbitrators had made up their minds before the mock hearing;
- The relative impacts of the written submissions versus the oral advocacy;
- The equities and which party or witnesses come across as "the good guy;"
- The strongest (and weakest) issues and evidence for each party;
- Which issues remain open or undecided;and
- What it would take to change a mock arbitrator's mind on a given issue.

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Once the mock arbitrators have addressed these and other topics, counsel must incorporate their feedback into the case. The process begins diagnostically, by isolating the common or unanimous points of agreement among a diverse panel of arbitrators, and determining the reasons for their agreement.

Counsel should be careful not to over-learn the lessons of the mock exercise, and to resist the impulse to radically reframe the case based on the mock arbitrators' reactions. Unexpectedly favourable reactions deserve particular caution – if the mock arbitrators believe that a minor backup argument is actually the best argument, or that a major vulnerability is a trifle, it is likely that the mock hearing simply did not convey the weaknesses of these points thoroughly. Counsel ignores those weaknesses at their peril.

Negative reactions, by contrast, deserve special attention. A negative reaction that is expected or unsurprising (for example, when the mock arbitrators disregard an objectively weak claim) should be viewed as an invitation for counsel to devote their energies to more fruitful areas of the case rather than waste time on longshot arguments.

As for a negative reaction that is unexpected – perhaps the most significant form of feedback a mock arbitration can provide – counsel must build into their case the antidote to that reaction. But such adjustments should remain measured pivots, not great leaps to fundamentally re-engineer the case.

WHY? Strategic goals of a mock arbitration

When considering the various options for organising a mock arbitration, parties should keep in mind the strategic goals they seek to achieve through the exercise.

A mock arbitration can serve two principal goals: improving the presentation, and developing substantive arguments. The relative importance of each goal varies depending on the case – for example, developing substantive points may have special importance when choosing between clashing case themes of relatively equal strength, simplifying themes in a highly technical case, or evaluating evidence that supports some themes but undermines others.

Although a party can pursue the goals of presentation and substance simultaneously, the degree to which a mock arbitration is likely to advance each goal depends on various factors, including the timing, content, and structure of the mock arbitration, and on the identities of the participating mock arbitrators. Some of these factors (such as the content and structure of the mock arbitration) serve the goals of presentation and substance complementarily. Others (such as timing) involve unavoidable trade-offs between presentation and substance.

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.

The selection of mock arbitrators could involve similar trade-offs between modelling the real tribunal's approach to substantive legal issues and modelling the personality and presence each real tribunal member is likely to bring into the hearing room.

For example, a mock arbitrator could be chosen to replicate the inquisitive style of a member of the real tribunal who is known to be an active questioner, or the mock tribunal could be constituted to reflect the gender or nationality balance of the real tribunal. Such selections would likely improve the verisimilitude of the mock arbitration, but may come at the expense of the selection of mock arbitrators whose thought processes more closely align with their counterparts on the real tribunal.

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