

Kluwer Arbitration Blog

“How Do You Get to Carnegie Hall?” The Unsung Benefits of Mock Arbitrations

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Mock arbitrations are an excellent way for clients and counsel to refine their hearing presentation and prepare witnesses to testify so the key arguments, evidence and themes resonate with the tribunal. Having served as both mock arbitrator and counsel in mock arbitrations, I have seen first-hand the positive impact that mock arbitrations can have on a party’s arbitration and/or settlement strategy. I have also observed that the counsel teams involved in mock arbitrations are increasingly diverse, with women playing a more substantial role in recent years, which is consistent with the increased representation of women generally as arbitrators and lead counsel.

Little has been written about mock arbitrations, in large part because confidentiality is a key feature of mocks. In my view, ways to maximize the usefulness of mock arbitrations are worthy of more discussion, while, of course, not revealing confidential information. It should be noted at the onset that when contemplating whether and how to plan a mock arbitration, it is important to first ensure that any of the potential mock components envisioned by counsel for a given case are permissible under applicable law. For example, in some jurisdictions there are limitations on the manner or extent of witness preparation. Mock arbitrations should be planned and conducted in a way that will not contravene such restrictions.

Some of key benefits of mock arbitrations, or partial mock arbitrations, include:

- **Preparing effective opening statements**

A mock arbitration is an opportunity for counsel to refine the key themes of their case, test the efficacy of the demonstratives and PowerPoint slides used in the opening, and – where two or more advocates will participate in the opening – ensure continuity and reduce duplication among the portions covered by each advocate. The opening statement at the merits hearing will be more concise and persuasive when counsel has had the opportunity to do a “dry run” before a mock tribunal and receive feedback from experienced arbitrators serving that role in the mock.

- **Preparing key witnesses for examination**

A mock practice cross-examination and redirect can be very helpful to witnesses, especially those who have never testified before and to an unfamiliar audience (the mock tribunal),

with the possibility of immediate feedback. Depending on the person, testifying can be far more stressful for witnesses than some counsel may appreciate; after a practice examination, one can do a second dry run incorporating the feedback of the mock tribunal. This can make a witness more comfortable testifying and best positioned to effectively present evidence. It is also a good opportunity for witnesses to practice being examined on certain key exhibits. It is common for arbitrators, as well as opposing counsel, to ask witnesses about key documents, so preparation for this is time well spent. Of course, as mentioned above, counsel's approach to preparing witnesses must be in accordance with applicable law; mocks are not "one size fits all" in arbitration or litigation.

- **Preparing expert witnesses for examination**

Unlike most fact witnesses in international arbitration, experts are often permitted or affirmatively asked by the arbitral tribunal to deliver a short "direct" presentation summarizing their analysis and findings that are often memorialized in lengthy expert reports with numerous exhibits. A dry run of an expert's presentation, followed by feedback from the mock tribunal and follow-up discussion, can improve the expert's direct testimony and refine the demonstratives and exhibits used for the expert's presentation. Also, a dry run of an aggressive cross-examination can help prepare the expert to best handle the most difficult areas of their testimony. Finally, a practice redirect on areas likely to come up on cross-examination and be fair game for questions on redirect is useful, particularly on the more difficult aspects of the expert analysis. Again, as mentioned above, counsel's approach to preparing expert witnesses must be in accordance with applicable law.

- **Refining demonstratives to be most effective at the evidentiary hearing**

Most high-stakes arbitrations involve complicated facts and issues that are conveyed more efficiently and persuasively by demonstratives. A substantial amount of time and effort is invested in preparing graphics and tables and images that convey key facts of a case. A demonstrative may illustrate visually the relationship of the various entities in the project. Sometimes a timeline is useful to highlight the sequence of certain events, or the time between events. A demonstrative may provide a high-level visual of the financial issues in the case. Site photos and other evidence can be used to create composite demonstratives that demonstrate more completely what could be discerned from review of the many individual photos or underlying source evidence alone. Testing the efficacy of hearing demonstratives is a useful aspect of mock arbitrations.

- **Allowing in-house counsel to partner more collaboratively with external counsel**

Often the helpful involvement and added value of in-house counsel is overlooked when a case goes to the merits hearing. The relationship between in-house counsel and external law firm counsel can be strained, given some of the roles in-house counsel may perform. For example, in-house counsel often act as intermediaries between the company witnesses and external counsel, which can be awkward depending on the circumstances, juggle multiple cases and therefore ask to receive draft submissions earlier than outside counsel would prefer to provide them, and deliver the collective comments of the client team on draft

submissions, not all of which may be well-received by external counsel. If there are two firms partnering to represent the client, in-house counsel may be involved in managing the co-counsel relationship. These are just a few of the circumstances that can cause tension between in-house counsel and the outside lawyers who will be presenting the case at the merits hearing.

However, mock arbitrations can facilitate a better unified team relationship between in-house counsel and the lawyers trying the case at a critical time just before the merits hearing. Mock arbitrations are most useful for high-stakes disputes once the evidence is fully developed. In-house counsel can pose questions to the mock arbitrators and open conversation on points that are important to the broader business of the client, as to which external counsel may be less familiar. In-house lawyers can observe the mock examinations and provide input. Together in-house counsel and external can process the “fresh eyes” impressions and feedback from the mock tribunal; together they can decide how to refine the case presentation in light of the feedback and follow up discussions. This ultimately can yield a more unified team approach to the evidentiary hearing and help foster a positive team spirit among counsel, client and witnesses. It also may foster the chances of a settlement or refine what would be appropriate settlement terms, depending on the mock arbitral tribunal’s feedback and follow-up discussions. Ultimately, a mock arbitration can enable the entire team to develop a cohesive strategy for presenting the key themes, addressing the issues as to which the facts or law are not great for the client’s position, and tackling how to convey the most complicated aspects to make them comprehensible to the arbitral tribunal. Mocks may also make it easier for in-house counsel to report internally to management on the strengths and weaknesses of a case when contemplating settlement possibilities.

In short, a successful arbitration evidentiary hearing is a complicated symphony performance that often calls for precise coordination of the counsel team, client representatives, fact witnesses, documentary evidence, experts, demonstratives, and more. Having served as a mock arbitrator, it is rewarding to be able to provide feedback that assists the team in perfecting their symphony performance, helps witnesses feel more at ease in testifying, and ideally fosters a closer relationship between the client and external counsel.

As a long-time faculty coach of student moot teams, I have learned how important it is to try to convey feedback in a constructive way that builds team unity and performance. Like a moot team, the entire arbitration team’s success may be compromised by one or more underperforming participants. It is important to have each section of the “arbitration orchestra” fully prepared for the evidentiary hearing. Mock arbitrations are opportunities to improve and refine the performance of all who have a role in the hearing. Mocks also may facilitate strategic choices as to what arguments and evidence to feature at the hearing as distinguished from arguments and evidence that may be better presented or explained more granularly in written submissions after the hearing. Mock arbitrations focus on making the most of oral advocacy, testimony, and documentary evidence at the hearing so that the orchestra performs optimally.

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The graphic features a black background with white text and a circular icon. The icon depicts a magnifying glass over a group of stylized human figures, representing a search or investigation process. The text is arranged in a clean, modern layout with horizontal lines above the main heading.

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