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A Mock Arbitration for Your Case: Optimizing Your Strategies and Maximizing Success

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ARTICLE

A MOCK ARBITRATION FOR YOUR CASE:

OPTIMIZING YOUR STRATEGIES AND MAXIMIZING SUCCESS

By Edna Sussman and 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]

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Many end users and experts 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, "[I]t'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]

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 eighty percent 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 12th Annual Fordham International Arbitration Conference held in November 2017, this Article explores the mock arbitration process, the different ways in

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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, 118-19 (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, 1:14 EST) (on file with authors).

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).

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 C. Vis International Commercial Arbitration Moot.[6]

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 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 that constrains use, the survey inquired as to the quantum of damages at stake that would justify a mock arbitration and obtained

5. Edna Sussman & James Lawrence, Mock Arbitration Research Survey (Oct./Nov. 2017) [hereinafter Survey], https://www.surveymonkey.com/r/mockarbitration [https://perma.cc/EK7M-EYU9]. The results of the survey are on file with the authors.

6. The Willem Vis Commercial Arbitration Moot is held in Vienna, Austria and Hong Kong. The competition is open to law students from around the world and the students write memoranda for Claimant and Respondent and then make oral submissions in a mock-hearing format.

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 forty 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.[7] 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.

An understanding of the psychological influences on arbitrator decision-making is increasingly becoming known in the arbitral community[8] and is a factor that counsel are beginning to consider. 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

7. Philip K. Anthony & Les J. Weinstein, *The Social Science Edge in Arbitration and Mediation*, 5 N.Y. DISP. RESOL. L. 17, 17 (2012).

8. For a discussion of the unconscious psychological influences in arbitrator decision making, *see generally* THE ROLE OF PSYCHOLOGY IN INTERNATIONAL ARBITRATION (Tony Cole ed. 2017); Doak Bishop, *Luncheon Presentation: The Quality of Arbitral Decision Making and Justification*, 6 WORLD ARB. & MED. REV. 801 (2012); Edna Sussman, *Arbitrator Decision-Making: Unconscious Psychological Influences and What You Can Do About Them*, 12 AM. REV. INT'L ARB. 487 (2013); Shari S. Diamond, *The Psychology of the Decision-Making Process*, 18 ASIAN DISP. REV. 197 (2015); Susan D. Franck, et al., *Inside the Arbitrator's Mind*, 66 EMORY L. J. 1117 (2017).

> 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.[9]

The survey results indicate that approximately 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."[10]

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.[11] 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.[12] 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 also 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.[13] This usage trend was noted by Sachs and Wiegand who stated, "as the popularity of arbitration has increased in the U.S., practitioners have

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9. Anthony & Weinstein, *supra* note 7, at 17.

10. Survey, *supra* note 5, at question 32.

11. Counsel who had participated in a mock arbitration (Question 38, 71.2% US), Counsel/Arbitrators who had served as a mock arbitrator (Question 59, 78.0% US), and Counsel who had not participated in a mock arbitration (Question 68, 69.2% US).

12. Dr. Klaus Sachs & Dr. Nicolas Wiegand, *Mock Arbitrations*, *in* ARBITRATORS' INSIGHTS: ESSAYS IN HONOR OF NEIL KAPLAN 339, 340 (Chiann Bao & Felix Lautenschlager eds., 2013).

13. *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 that 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.

sought to recreate this concept [mock trials] in the context of arbitration. Thus, the practice of mock arbitrations has begun to spread throughout the field of international arbitration."[14]

V. MOCK ARBITRATIONS ARE NOT WIDELY USED 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.[15] 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.[16] 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."[17] 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.[18]

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

14. Sachs & Wiegand, *supra* note 12, at 340.

15. Survey, *supra* note 5, at Question 65.

16. *Id.* at Question 66.

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

18. Survey, *supra* note 5, at question 62.

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 something "in the movies" and more like a tool to be used in appropriate cases by counsel from non-US legal cultures.

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.[19] 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.[20] 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

19. *Id.* at question 18.
20. *Id*. at question 51.

an enlightening experience and can help improve your chances of actually winning."[21] As a survey responder put it: "AWAYS changes 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, assisting in discussions with client about case value, and helping prepare witnesses and assessing witnesses.[22] 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.[23]

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 help 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.[24]

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21. Harrie Samaras & Judy Weintraub, *Mock Arbitration; A Way to Fine-Tune Your Presentation*, THE LEGAL INTELLIGENCER (Oct. 29, 2013) https://www.law.com/thelegal intelligencer/almID/1202625504803/?slreturn=20170931195739 [https://perma.cc/5VSL-UECA] (archived May 10, 2018).

22. Survey, *supra* note 5, at question 18.

23. *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).

24. Survey, *supra* note 5, at Question 35.

Only two respondents to the survey stated that they had used a mock arbitration to assist in the selection of the real arbitrators.[25] 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.[26] 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.[27]

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 argument 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 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.[28]

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 arbitrator's 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

25. *Id.* at question 31.

26. Diamond, *supra* note 8, at 201-02.

27. *See generally* Anthony & Weinstein, *supra* note 7, at 17.

28. Edna Sussman, *Improving your Arbitration Presentation With a Mock Arbitration: Two Case Studies*, 5 N.Y. DISP. RESOL. LAW. No. 2, 15, 16 (2012).

arbitrations [are] a more comprehensive research vehicle than mock trials."[29] However, it would be a mistake to make that assumption.[30] 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.[31] 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."[32] What is it that you want to accomplish? The answer can vary; it may be to test specific arguments or to 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.[33]

As Bishop stated, before embarking on the mock arbitration one must consider what is expected from this mock arbitration. What are the goals and objectives, and what can be realistically expected?[34]

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29. *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 [https://perma.cc/26QA-NXWG] (archived May 10, 2018); *see also* Sachs & Wiegand, *supra* note 12, at 240. Both Rothstein and Sachs and Wiegand, postulate that the results of a mock arbitration can be predictive.

30. 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.

31. *See* Transcript, *supra* note 23, at 10-12.

32. Stephen Tuholski, *Mock Arbitrations; Getting the most Value for your Project,* 5 N.Y. DISP. RESOL. L., NO. 2, 20 (2012).

33. *Id.*

34. Transcript, *supra* note 23, at 10.

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.[35] "There is no one-size-fits-all approach to organizing 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."[36]

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 choice in the process of a mock arbitration that drives up the cost.[37] 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 eighteen percent of the responders.[38] The remaining choices at higher damages numbers drew fewer respondents.[39]

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 US$15,000[40] to as much as US$300,000[41] 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 billion-dollar pharmaceutical case, were engaged to spend four hours

35. 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 [https://perma.cc/L48F-9TJE] (archived May 10, 2018).

36. *Id.*

37. Survey, *supra* note 5, at Question 8.

38. *Id.*

39. *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.

40. *Id.* at Question 57.

41. *Id.* at Question 35.

in preparation and one day to hear arguments. The mock arbitrators were paid a flat fee of US$5,000 per mock arbitrator for a total of US$15,000, plus any fees charged by the consultant retained to organize that mock arbitration.[42] In another instance discussed above, the forty FINRA arbitrators were engaged for a single day to hear arguments with no advance preparation. In this instance, the mock arbitrators were paid a flat fee of US$4,000 per mock arbitrator for a total of US$160,000, plus the fees charged by the consultant.[43]

Philip Anthony is the CEO of Decision Quest, a leading jury and arbitration consultant. He reports that its services to organize a mock arbitration run between US$15,000 to US$40,000 US dollars.[44] 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.[45]

Respondents to the survey most frequently listed several options for reducing the cost of a mock arbitration. First, limit the materials and time the mock arbitrators could spend in advance of the mock arbitration. Second, conduct the process without using outside consultants. And third, use lawyers within the firm as the mock arbitrators.[46]

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.[47] 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.[48] However, of those counsel who had used a professional consultant, 89% said they found it useful[49] and of those who had served as a

42. Substantiated by Authors based on personal experience.
43. *Id.*
44. Transcript, *supra* note 23, at 56.
45. *Id.*
46. Survey, *supra* note 5, at question 9.
47. *Id*. at question 26.
48. *Id*. at question 44.
49. *Id*. at question 27.

mock arbitrator, 80% said they found a professional consultant helpful.[50]

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 the presenting lawyers had actually represented. The respondents indicated they were "always" (56%) or "usually," which means "more than 70% of the time" able to detect who had engaged their services. Clearly, "shielding" (see below), i.e. controlling the process for familiarity bias, has not been incorporated into the mock arbitration process as completely as it has into the mock jury study process.

Where a professional consultant was utilized in the mock arbitration process, the survey results show that the use of a professional consultant was very helpful.[51] The primary reasons that counsel participating in a mock arbitration found a professional consultant to be helpful were: 1) assistance in finding mock arbitrators with characteristics similar to the actual arbitrators, 2) enabling a process which shielded the mock arbitrator from knowing which side of the case was conducting the mock arbitration, and 3) helpful advice on process and procedures.[52] For mock arbitrators, the use of a professional consultant was helpful because: 1) the process and procedure organized by the professional consultant were helpful, 2) it shielded the arbitrator from knowing which side of the case was conducting the mock arbitration, and 3) the feedback, without attribution, was helpful.[53]

Many practitioners feel that they know the universe of arbitrators or can find them through their networks and are able, on their own, to find appropriate arbitrators, even when they are looking for a match on multiple attributes. However, not all counsel have access to such a knowledge base, and even those who do sometimes cannot identify an appropriate candidate.[54] In such cases, the consultant can assist. Moreover, the consultant can give guidance as to some of the less obvious influences that should be considered in the selection of the mock arbitrators, influences that may not be readily apparent to those skilled as lawyers as opposed to those skilled as social scientists.

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50. *Id*. at question 46.
51. *Id.* at Question 27.
52. *Id.* at Question 28.
53. *Id.* at Question 47.
54. Salomon & Durning, *supra* note 35.

The consultants can offer useful guidance on how to structure the arbitration, the tools that can most effectively be used to debrief the mock arbitrators, the questions that are most meaningful to ask and, generally offer advice on how to use the mock arbitration for maximum effectiveness. The consultants can assist in talking through the objectives and advise as to what can realistically be accomplished within the time frame available and the cost constraints imposed on the process.

As these survey results demonstrate, it is an important aspect of the research design to control for recognition/familiarity bias (shielding) and the use of a consultant makes it much easier to accomplish. William H. Carey writes, "[Three] arbitrators were chosen by [the consultant] as neutrals to the proceedings. We did not know which party initiated the mock proceeding until it was finished and the final result of the arbitrators was known. This lack of knowledge really helped us to be truly neutral in our result."[55]

X. SHOULD MOCK ARBITRATORS FROM OUTSIDE THE INITIATING FIRM BE RETAINED?

The primary reason (78.9%) given for using mock arbitrators from outside the firm was because "[respondent] felt they were more neutral and objective if they were not associated with the firm."[56] Many respondents (60.5%) also checked off that it "seemed easier for somebody not associated with the firm to be more direct in pointing out weaknesses and offering criticism, especially if they did not know what side I was representing."[57] Also, an equal number of respondents (60.5%) indicated that it was easier "to find individuals more similar to the actual arbitrators" by going outside their firm.[58]

However, the second most frequent response in the survey for ***not*** conducting a mock arbitration is that the process is too costly.[59] It is reasonable, then, to infer that one reason the frequent use of the "same firm" approach is employed is cost saving. "There is no doubt

55. William H. Carey, *Mock Trials: A Novel Approach in the Arbitration Process*, MASSACHUSETTS LAWYERS WEEKLY, Mar. 13, 2006 http://masslawyersweekly.com/2006/03/13/mock-trials-a-novel-approach-in-the-arbitration-process/ [https://perma.cc/5QHA-83LQ] (archived May 10, 2018).

56. Survey, *supra* note 5, at question 11.

57. *Id.*

58. *Id.*

59. *Id.* at question 61 (finding the frequency of response at 24%).

that conducting a mock arbitration adds a further cost burden to what is already a very expensive process."[60]

As noted above, from a psychological perspective, it is considered important that the process is a "blind study" for the mock arbitrators; that should not know which side of the dispute retained their services. "Subject bias" means that if the mock arbitrator knows who retained his or her services, the "sponsor," this will likely impact the mock arbitrator subconsciously, and responses and evaluation will be filtered through that prism, resulting in a less accurate collection of responses. So the frequent use of one's own colleagues at the firm, who will inevitably know who the client is, can lead to false positives failing to deliver all of the benefits that can be provided utilizing social science techniques.[61]

Another key benefit to engaging mock arbitrators not affiliated with your firm is that it provides the ability to select mock arbitrators who have similar attributes to the actual arbitrators in the case. The survey respondents overwhelmingly (88.6%) identified "similar attributes" as important.[62] Similar attributes for mock arbitrators to the actual arbitrators are important because: 1) it gives a better sense of how to frame the case to appeal to the actual arbitrators (81%), and 2) their similarity to the real arbitrator creates confidence that their response was more reflective of what could be expected from the actual arbitrators (78%).[63] The similar attributes identified by lawyers who served as counsel in a mock arbitration were: 1) legal background (79%), and 2) professional background (74%).[64] These results have a strong correlation to the same question posted to those survey respondents who have served as a mock arbitrator. The similar attributes identified by this group of survey respondents were: 1) professional background (76%), legal issues subject matter expertise (64%), and 3) legal background (62%).[65]

The identification of legal background as the attribute most important to match by the greatest number of respondents reflects the very different perspectives that arbitrators from different legal cultures, especially in common-law versus civil law jurisdictions, may

60. Sachs & Wiegand, supra note 12, at 348.
61. ANTHONY & WEINSTEIN, *supra* note 7, at 17.
62. Survey, *supra* note 5, at Question 13.
63. *Id.* at question 11.
64. *Id*. at question 13.
65. *Id*.

have with respect to certain issues. For example, as discussed by Mohamed S. Abdel Wahab, the requirements of due process and the principle of *iura novit curia* (the court knows the law) can differ significantly depending on the arbitrator's background. Insights as to whether the law can be more persuasively presented through expert testimony or should be presented through legal pleading, or whether the documentary evidence will suffice or must be buttressed by extensive witness evidence, are all matters on which mock arbitrators can give insight, if they are products of the same legal culture as the real arbitrators.[66] Arbitrators may also be influenced by their legal tradition in the context of whether or not they are prone to a literal interpretation of contracts.[67] Mock arbitrations can assist counsel in understanding how those influences might impact the decision-maker and assist in devising ways to address such influences to best represent their client's interest.

One similar attribute that did not strongly correlate between the counsel group (those doing the "hiring") and the mock arbitrator group (those being "hired") is age. The counsel group listed age as the third most important attribute (59%), whereas the mock arbitrator group indicated that age was the fifth most important attribute (28%). Giving this attribute such weight seems counter-intuitive to the knowledge-based attributes that ranked first and second in importance. As the cadre of accomplished younger arbitration practitioners grows and becomes known, it is likely that this attribute will become less significant.

We must note that finding the "doppelgänger" may not be the best approach in all instances. Engaging a mock arbitrator with strong critical thinking skills who can provide incisive feedback on the arguments presented can be considered more useful.[68] Of course, one can often find mock arbitrators with these skills, who also provide a good match on other attributes. However, focusing on the objective to

66. *See* Transcript, *supra* note 23, at 34-41; *see also* Mohamed S, Abdel Wahab, *Iura Novit Arbiter in International Commercial Arbitration: The Known Unknown***,** *in* FROM THE ARAB WORLD TO THE GLOBALIZATION OF INTERNATIONAL LAW AND ARBITRATION (Mohamed Abdel Raouf et al. eds., 2015); Mohamed S. Abdel Wahab, *Globalizing Trends in Ascertaining the Content of the Applicable Law in International Arbitration – Beyond the Civil-Common Law Divide*, 11 N.Y. DISP. RESOL. L. NO. 1 (2018).

67. *See* Giuditta Cordero-Moss, *The Importance of Legal Culture for Contract Construction; Norwegian law, English law and International Arbitration*, 10 N.Y. DISP. RESOL. LAW. No.1, 39,(2017); *See also* Transcript, *supra* note 23, 39-40.

68. Transcript, *supra* note 23, at 73-74.

be achieved and what is most important to learn will help counsel determine what kind of mock arbitrator would be most helpful.

XI. WHEN TO CONDUCT THE MOCK ARBITRATION

If only one mock arbitration is conducted, when to hold it is a crucial decision. The greatest number of respondents to the Survey (47.92%) conducted the mock arbitration shortly before the hearing. However, the remaining 52% of the responses were dispersed between "before the arbitration is commenced" (21%), "close to the beginning of the arbitration" (10.5%), and "in the middle of the arbitration" (21%).[69] Interestingly, no respondents to the Survey conducted a mock arbitration "after the hearing with presentation of real evidence to assess settlement," another use to which mock arbitrations might productively be put.

Claudia Salomon suggests that the mock arbitration should not be conducted too early before enough is known about the case or too late when it is too late to incorporate the lessons learned. Accordingly, she states that there are two choices for when a mock arbitration should be conducted: either before the completion of pre-hearing briefing or after. The advantage of doing it before the final briefing is that it is possible to incorporate the mock arbitrator's feedback into the next round of briefing; but doing it at that stage may leave issues that arise subsequently untested. If the mock arbitration is conducted after the briefing is complete, the main focus is preparing for the hearing. But that, of course, comes at the expense of not being able to use the mock arbitrator's perspectives in drafting the briefs. Thus, the decision, in Salomon's view, should be made depending on the relative importance of the hearing, versus the parties' written submissions and on the reasons for conducting the mock arbitration in the first place.[70]

In some cases the matter warrants conducting multiple mock arbitrations. Of the survey respondents serving as counsel in mock arbitrations, 18% said that they had done so.[71] Of those respondents, 67% reported that they had conducted the mock "following a prior mock arbitration to present an adjusted presentation based on responses from the first mock arbitration" and 44% stated that they

69. *Survey*, *supra* note 5, at question 31.
70. SALOMON & DURNING, *supra* note 35.
71. Survey, *supra* note 5, at question 21.

had conducted more than one mock arbitration "with the same presentation before different arbitrators or panels of arbitrators to obtain a more robust response."[72] Another choice might be to conduct one mock arbitration at the beginning to inform the written submissions and the second before the hearing to inform the oral presentations.

Whether the matter justifies the expense of multiple mock arbitrations and whether there is something specific to be learned from conducting more than one mock arbitration is a matter for consideration and will be guided by the specifics of the case.

XII. RETENTION OF MOCK ARBITRATORS, DISCLOSURE OBLIGATIONS, AND CONFIDENTIALITY

Consideration must be given to ensuring the confidentiality and integrity of the process. Confidentiality orders may not be breached by sharing information with the mock arbitrator when there is a protective order in place. The mock arbitrator should sign any required documentation specified in the protective order. In the authors' experience, mock arbitrators sign rigorous nondisclosure agreements as part of their engagement. Many firms structure the engagement by having the law firm retain the mock arbitrators as consultants.[73]

Deciding whether to reveal the name of the client or not is the subject of some debate.[74] In order to enable the mock arbitrators to properly make their disclosures, both in the context of the mock arbitration and in any subsequent engagements, it would seem that they would need to know the name of the parties involved in the dispute before them.[75] This would also ensure that mock arbitrators do not find themselves appointed as the actual arbitrators in a matter on which they served in a mock arbitration (a situation reported at one conference as having actually taken place).

72. *Id*. at 22.
73. Transcript, *supra* note 23, at 24–25.
74. *Id*. at 40–47.
75. *Id*. at 57-58.

XIII. WHO REPRESENTS THE PARTIES IN THE MOCK ARBITRATION AND HOW THEY INTERACT?

To ensure reliable information is obtained from the mock arbitration, it is essential that both parties in the case are fully represented. The simplest, least costly path is to use lawyers from the firm to represent the opposing party. The survey results show that 75% of respondents used lawyers from within their firm to represent the opposing party.[76] There was variation across the respondent pool as to whether senior lawyers represented both sides, or junior lawyers represented one side or the other.[77] If using internal lawyers, it can be an extremely powerful educational tool to have lead counsel conduct the mock arbitration from the adversary's side as it "often results in the kinds of insights they would not get if they didn't have to walk a mile in opposing counsel's shoes."[78]

The survey results indicate that 64% of the time there is a close coordination between the two teams.[79] Communication is important so that both sides present on the same or similar issues. Absent such coordination, it is difficult for the mock arbitrators to give useful feedback.[80] However, while coordination as to the subjects to be covered is advisable, there is benefit to having separate preparation on the common issues so that there is some realistic element of surprise, and one can get a more real-life reaction from the mock arbitrators.[81]

XIV. SPECIAL CONSIDERATIONS FOR USING REAL WITNESSES

Over 50% of the respondent counsel said they had never required real witnesses to appear in their mock arbitrations. However, 31% of respondent counsel stated that real witnesses had been presented in more than 20% of their mock arbitrations.[82] Some counsel are of the view that presenting live witnesses enhances the usefulness of the mock arbitration process.[83] Others believe that presenting witnesses introduces the danger of cross examination at the hearing about this preparation exercise and thus, unnecessarily

76. Survey, *supra* note 5, at question 20.
77. *Id*. at question 21.
78. Tuholski, *supra* note 32, at 21.
79. Survey, *supra* note 5, at question 23.
80. Tuholski, *supra* note 32, at 21.
81. *Transcript*, *supra* note 23, at 27-28.
82. Survey, *supra* note 5, at question 22.
83. Tuholski, *supra* note 32, at 21.

exposes the witness to a setting that is potentially not protected by the attorney-client privilege.[84] Transcripts or videotapes of depositions, if they were held, are often used as a substitute, but are not viewed as equally effective.[85]

An overriding concern in the international arbitration context are the ethical constraints imposed in some jurisdictions on witness preparation, which may foreclose counsel from introducing live witnesses at a mock arbitration.[86] Given the limited time generally available, another view is that the time is best spent evaluating counsel's presentation of the issues and not the performance of a witness.[87] Since cost has been identified as a concern for conducting a mock arbitration[88], it is a reasonable inference that a secondary concern with presenting live witnesses during a mock arbitration would be the additional cost.

XV. HOW MUCH TIME SHOULD THE MOCK ARBITRATORS SPEND REVIEWING CASE MATERIALS?

How much time the mock arbitrators should spend in preparation and what materials they should review will depend in large part on cost considerations. The more material to be reviewed and the more time that is spent, the more expensive the process will be. Philip Anthony posited as a general rule of thumb that the mock arbitrators might devote twenty hours of time in preparation.[89] Those who responded to the survey as mock arbitrators overwhelmingly reported (89%) that they had been given sufficient materials to prepare adequately and were provided with useful guidance.[90]

However, while the more time that is allowed for preparation the better informed the mock arbitrations are, in some circumstances, mock arbitrations can be conducted productively with no or very limited preparation time.[91] Cost considerations often dictate such a process. Importantly then, the idea of conducting a mock arbitration

84. *See* Transcript, *supra* note 23, at 14-15.
85. Tuholski, *supra* note 32, at 20, *see also* Transcript *supra* note 23, at 45.
86. *See* Sachs & Wiegand, *supra* note 12, at 34-348.
87. Salomon & Durning, *supra* note 35.
88. Survey, *supra* note 5, at Question 61.
89. Transcript, *supra* note 23, at 22-23.
90. Survey, *supra* note 5, at question 53.
91. Sussman, *supra* note 28, at 16.

should not be abandoned simply because of the limitations on preparation that cost constraints require.

XVI. SHOULD THE CLIENT BE PRESENT AT THE MOCK ARBITRATION?

Determining whether to have the client present at the mock arbitration is another choice in the mock arbitration process that must be addressed. Half of the respondent counsel who conducted mock arbitrations had their clients present at the mock arbitration "always" or "more than seventy-five percent of the time."[92] Only 23.5% never had a client present.[93]

There are a few things to keep in mind if one elects to have the client present. As discussed above, it is important to shield the mock arbitrators from knowing which side has engaged them for the exercise. Care should be taken to ensure that it is not obvious. For example, it is advisable to not have the client always sit with the same side or have more than one client representative present so they can sit on both sides of the table.

It is also important to prepare the client carefully so they do not harbor unrealistic expectations about what can be gained from the mock arbitration and to control them from "result bias." As discussed above, once clients hear a certain result, it can be difficult to manage client expectations and to persuade them that the mock arbitration is a useful tool for improving the presentation of the case, but is not necessarily accurately predictive of case outcome. Thus, while the mock arbitration can be useful to assist in assessing settlement, the client should be reminded that the mock arbitration is not an infallible predictor of outcome.[94]

XVII. HOW IS FEEDBACK GATHERED FROM THE MOCK ARBITRATORS?

Gathering information is the principal purpose for conducting a mock arbitration. Sachs and Wiegand write:

> Following the deliberation (whether monitored or not), an extensive discussion session between the mock arbitrators and

92. *Survey*, *supra* note 5, at question 30.
93. *Id*.
94. *Transcript*, *supra* note 23, at 65.

> counsel should occur. At this stage, interviews with the individual arbitrators on the different issues of the case seem sensible, as well as joint sessions with the entire mock tribunal and counsel. The analysis of the mock hearing and the conclusions to be drawn therefrom may take as long as the mock hearing itself, and it should not be cut short as it is in this session that counsel can obtain the advice and learn the lessons they had sought by engaging in this exercise.[95]

Survey respondents selected "debriefing conversation" as the most frequently used methodology for gathering information (88%).[96] This process is time consuming, and careful planning and time management is needed to ensure that the debriefing time is not cut short by the "gotta catch a plane" problem. Rothstein states, "the post-presentation feedback session can last at least several hours."[97] Watching the mock arbitrator deliberate was also recorded by 40% of the respondents as a feedback mechanism employed.[98]

However, written responses from the mock arbitrators are also often elicited. Some mock arbitrations are structured so that the arbitrators record their impressions individually after they have read the materials, at the end of the mock presentations individually, and once more after deliberations with the other mock arbitrators.[99] The consultant can design a questionnaire from a social science perspective with a variety of questions, inquiring into the mock arbitrator's reaction to specific issues, general feelings about what is being presented, and the issues they might find confusing or most interesting.[100] In some instances the consultant prepares a report to synthesize the findings.

Eliciting individual responses with individual interviews before the arbitrators deliberate is a best practice. Once the mock arbitrators begin to interact they often defer to their fellow neutrals. The deliberation process then "becomes a collective decision making process rather than [the lawyers] learning what is really driving the individual."[101]

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95. Sachs & Wiegand, *supra* note 12, at 343.
96. *Survey*, *supra* note 5, at question 27.
97. *See* Rothstein, *supra* note 29.
98. Survey, *supra* note 5, at Question 27.
99. Transcript, *supra* note 23, at 30-31, 49; Survey, *supra* note 5, at question 31.
100. Transcript, *supra* note 23, at 49.
101. *Id*. at 53.

Salomon provides a useful outline of topics that could be included in the general debriefing discussion:

- 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 arbitrators mind on a given issue.[102]

XVIII. ARE THE COSTS OF THE MOCK ARBITRATION RECOVERABLE?

While the authors found no authorities addressing this issue, the prevailing view appears to be that the tribunal would be reluctant to allow recovery of mock arbitration costs from the losing party.[103] Bishop stated that, while the attorney time was likely included in the attorney's fees portion of the request for award of costs, he had never attempted to recover the costs of the mock arbitration from opposing counsel.[104] Whether mock arbitration costs could be appropriately included in the award of arbitration costs remains to be seen. That could change over time as mock arbitrations become more commonly used and are increasingly viewed as consultants.

IX. CONCLUSION

The survey results support the initial premise that mock arbitrations are effective as a tool in the arbitration process. The survey respondents were asked to indicate how helpful they found mock arbitrations to be.[105] The "helpfulness" was measured on a one-to-ten scale, with ten being "most helpful." 74% of survey respondents who served as counsel in a mock arbitration rated the

102. *See* Salomon & Durning, *supra* note 35.
103. Kaplan & Boltenko, *supra* note 3, at 120.
104. *Transcript*, *supra* note 23, at 44.
105. *Survey*, *supra* note 5, at question 17.

helpfulness of mock arbitration at seven or above (with eight being the most frequent rating).[106] 94% of survey respondents who served as mock arbitrators rated their helpfulness at seven or above (with eight being the most frequent rating).[107] While the disparity between the ratings for each group is significant, the underlying message, that mock arbitrations are helpful, holds true.

82% of the respondents to the survey said that they would be more likely to use mock arbitrations if they had more information about mock arbitrations and their effectiveness.[108] This Article serves to provide that information and lead to their greater utilization. As this author has written:

> The use of mock arbitrations to enhance successful outcomes in larger cases is likely to grow significantly in the coming years as those in the arbitration community become more familiar with the availability of these tools and their benefits. The globalization of commerce and the increased participation of arbitrators from many different cultures is likely to make such a process even more valuable as counsel seek tools to assess how best to persuade arbitrators with different backgrounds.[109]

Similarly, Wiegand and Sachs concluded that "the use of mock arbitrations in international arbitration is an emerging trend that will surely only become more and more popular as parties seek to find an all-important edge over their opponents."[110]

106. *Id.*
107. Survey, *supra* note 5, at Question 50.
108. *Id.* at question 62.
109. Sussman, *supra* note 28, at 15.
110. Sachs & Wiegand, *supra* note 12, at 351.