

# Asian Dispute Review

Since 1999

July 2015

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### *Asian Dispute Review* is sponsored by:

Hong Kong International Arbitration Centre  
Chartered Institute of Arbitrators, East Asia Branch  
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Hong Kong Mediation Council

Circulation: 7,500 copies

[www.asiandr.com](http://www.asiandr.com)

[asiandr-editor@hkiac.org](mailto:asiandr-editor@hkiac.org)

Cover image: Hamidreza Pirayesh

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# EDITORIAL

This third issue of *Asian Dispute Review* for 2015 covers a wide range of issues relating to the practice of arbitration in Asia. We commence with an article by **Neil Kaplan QC** and **Olga Boltenko**, who survey the potential of mock arbitrations or ‘in-house mini trials’ to help prepare for or defend an arbitration claim. Next, **Professor Neil Andrews** and **Dr Fan Yang** provide an overview of English arbitration law by reference to both English and Hong Kong law, which is relevant to most common law jurisdictions in Asia. Following this article, **Michael Dunmore** addresses the use of emergency arbitration provisions with a brief survey of the position in some major Asian jurisdictions, **Man Sing Yeung** describes the 2015 CIETAC Arbitration Rules and its *Guidelines on Evidence*, and **Mauro Rubino-Sammartano** and **Shahla Ali** explore internal review processes under the rules of international arbitral institutions in the second part of their article on whether internal appellate proceedings in arbitration have reached Asia. The In-House Counsel Focus article is by **John Molloy** on the consequences of expert evidence. This is based on an edited text of the 9th Annual Winnie Whittaker Memorial Lecture delivered at the HKIAC.

A case note by **Sheila Ahuja** and **Chantal du Toit** deals with the Hong Kong High Court decision in *Z v A*, which denied the challenge to an arbitral tribunal’s jurisdiction brought under Hong Kong’s equivalent of article 16 of the Model Law. Two book reviews follow, one by **Neil Kaplan QC** on *Construction Arbitration in Hong Kong: A Practical Guide* and the other by **Nils Eliasson** on *Enforcement of Investment Treaty Awards: A Global Guide*.

Finally, we take this opportunity to thank Michal Čáp for his generous and extremely helpful contribution as Editorial Assistant to the *Asian Dispute Review*. This is the last issue he will be working on before returning to the Czech Republic. We wish him well and are grateful for the considerable support he has given to this publication.

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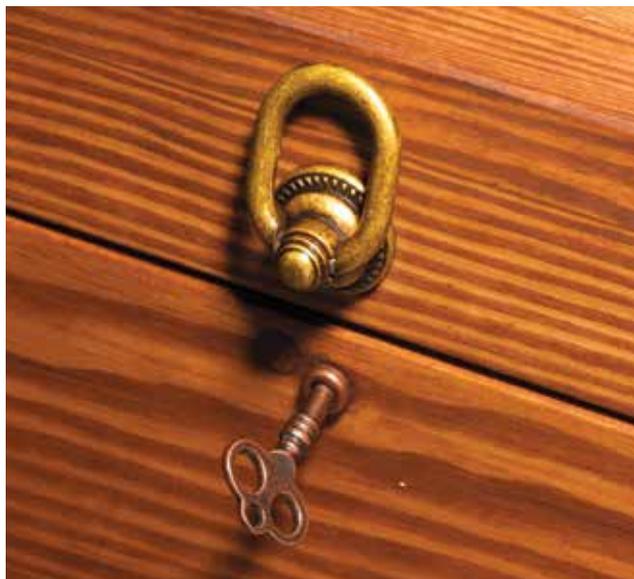
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# A Secret Tool for Winning an Arbitration Case

Neil Kaplan CBE QC SBS & Olga Boltenko

This article describes a known but yet remarkably neglected tool to prepare for and defend an arbitration case successfully: a mock arbitration, also known as an ‘in-house mini trial’. Mock arbitration is arguably rooted in a US litigation tradition of mock jury trials. This tradition is now being applied to arbitration practice by the most sophisticated counsel in the field. The pros and cons of this tool are explored and the authors offer a comprehensive guide to the use of mock arbitration in practice.<sup>1</sup>

### Introduction

What is experience? Is it any more than having been around long enough to have seen most things? As the Bible says, “What has been will be again, what has been done will be done again; there is nothing new under the sun”.<sup>2</sup> A precedent can be found for most human situations; so too with arbitration and litigation.

### Are American litigants leading the way?

There are many aspects of the United States legal system that are well known and unacceptable to an English, Hong Kong or Russian lawyer. The excesses of US-qualified counsel over document production, for example, would be anathema to most national legal systems. Indeed, even US judges themselves are

known to despair over the painful US brand of discovery. In 1989, Wayne E Alley, an Oklahoma judge, issued a procedural order dealing with document production issues in which he said:

“[i]f there is a hell to which disputatious, uncivil, vituperative lawyers go, let it be one in which the damned are eternally locked in discovery disputes with other lawyers of equally repugnant attributes.”<sup>3</sup>

In other areas, however, American-style precautions seem rather sensible. The Americans prefer not to leave too much to chance in dispute resolution and this approach proves successful on many occasions. For decades now, US litigants have been using mock jury trials. It is well known that juries

are used in the US for the determination of a wide range of civil disputes as well as for criminal trials. The purpose of a mock jury trial is to predict how an actual jury would react to a case. The mock jury is selected from the same community as that from which the actual jury would be selected. Counsel present their case to the mock jury and observe its deliberations and the processes used in reaching its decision(s).

“The purpose of a mock jury trial is to predict how an actual jury would react to a case. The mock jury is selected from the same community as that from which the actual jury would be selected. Counsel present their case to the mock jury and observe its deliberations and the processes used in reaching its decision(s).”

The mock jury test has become so successful in the US that it has spawned an entire legal services industry, offering multiple mock jury exercises to prepare counsel for jury trials. Various specialised firms advertise their scientific approach to selecting a mock jury that is tailored to counsel’s cases. Numerous efficiency statistics and success rates are produced and publicised on these firms’ websites.<sup>4</sup>

Arbitration is lagging behind these developments when it comes to the tools that arbitration practitioners use (or at least those of which they are aware) when selecting arbitrators or framing their arbitration strategy generally. The authors are, for example, aware of specialised firms that offer witness training services. Stepping into attorneys’ shoes, these firms explain to prospective witnesses what cross-examination is all about, how to behave, what to expect and how to react to questions coming from the panel and from opposing counsel. So far as

one can tell, however, arbitration practitioners are not making use of the in-house mini trial technique to test their legal or factual positions.

## From mock jurors in the US to civil litigation and international arbitration

In civil cases, particularly in the US, it is the authors’ understanding that practitioners will often try out their arguments before a mock judge (who may in fact be a retired judge). In relation to arbitration cases, Lucy Reed, in her Kaplan Lecture delivered in Hong Kong in December 2012 and entitled *Tribunal Decision-Making: Art, Science or Sport?*, suggested that, in order to convince an arbitrator, one must

“focus not so much on what may go on in an arbitrator’s head but more on how much can fit in an arbitrator’s head”.<sup>5</sup>

None of this is new: as Quintilian said in the first century AD/CE:

“we must not always burden the judge with all the arguments we have discovered, since by so doing we shall at once bore him and render him less inclined to believe us”.<sup>6</sup>

Presenting a complex case to a retired judge or a practising arbitrator at a mock arbitration allows counsel to assess whether the actual tribunal would be able to ‘fit’ the case in its collective head. In 2009, Amy Rothstein, a US-based arbitration practitioner, was one of the first practitioners to speak openly about mock arbitrations as useful tools for preparing an arbitration case. She connected the practice of mock arbitrations with the very US-focused practice of mock jury trials. She wrote that:

“the purpose of mock arbitrations is similar to that of mock trials: to obtain from a hypothetical adjudicator a likely decision and underlying reasoning, based on a presentation of the evidence and arguments that counsel expect to offer.”<sup>7</sup>

“Arbitration is lagging behind ... when it comes to the tools that arbitration practitioners use (or at least those of which they are aware) when selecting arbitrators or framing their arbitration strategy generally.”

In 2010, international arbitration commentators Doak Bishop and Edward Kehoe were the first to proclaim publicly that –

“the most useful scientific tool we have in preparing for an arbitration hearing is a mock arbitration panel study”.<sup>8</sup>

Then, in 2012, New York-based arbitrator Edna Sussman wrote that –

“the use of mock arbitrations to enhance the likelihood of 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.”<sup>9</sup>

In 2013, Dr Klaus Sachs and Dr Nicolas Wiegand added an interesting perspective to the debate, given especially that they come from a civil law background but with present experience in international arbitration.<sup>10</sup> They state that “[m]ock arbitrations represent a nascent but palpable trend.”<sup>11</sup>

### **A secret to winning?**

The authors agree with Edna Sussman and other leading practitioners in the field that there is no better tool with which to prepare an arbitration case than a mock arbitration before a practising arbitrator or someone who is familiar with the actual decision-making process of an arbitrator. They anticipate that in the years to come, larger law firms and other practitioners will increasingly resort to mock arbitrations in the preparation of their cases.

The structure of the mock arbitration process will certainly be adjusted in a manner commensurate with the actual arbitration and counsel’s capacity and needs. The authors predict that a typical mock arbitration case would run along the following lines.

At the outset of the mock arbitration process, the participating law firm would identify mock arbitrators with backgrounds similar to those arbitrators who sit on the actual arbitration case, or they would identify at least those who are familiar with the actual arbitrators and those who would be in the best position to assess the actual arbitrators’ views and decision-making processes.

Once the mock arbitrator(s) is/are ‘appointed’, the law firm would need to adapt and reduce its submissions so as to cover the key points at issue, thus making them suitable for a presentation before mock arbitrators. There is, of course, no need for lengthy written submissions, as these would have been prepared in the actual matter in any event. What is essential at this stage is for counsel to take the mock process seriously, so that it becomes a normal part of case preparation in appropriate cases. One or two members of the counsel team would stand in the shoes of the party against whom they act in the actual arbitration. The others would argue their client’s actual case before the mock arbitrator(s). The two teams would each prepare a concise memorandum for the mock arbitrator(s) in which they would set out the actual client’s position and that of the actual opposing party. A mock hearing would then be held before the mock arbitrator(s).

“... “[F]ocus not so much on what may go on in an arbitrator’s head but more on how much can fit in an arbitrator’s head.”  
– Lucy Reed, Kaplan Arbitration Lecture 2012.”

An interesting issue arises where the mock arbitration extends to the hearing of the witnesses. This might be an appropriate course of action in cases where witness testimony might be significant. But there are certain matters to be considered before going down this path. Drs Sachs and Wiegand remind us that there is a distinction between the US- and UK-based systems in relation to witness testimony.<sup>12</sup> In the US, as mock trials are common in the court system, there is a natural progression in conducting mock arbitration hearings; it is not contrary to the bar codes for there to be contact between counsel and witnesses and the training of witnesses is common. Cross-examination in a mock arbitration would not, therefore, be objectionable. In England & Wales, however, the situation is different. Under the Code of Conduct of the Bar of England & Wales –

“a barrister must not rehearse, practise or coach a witness in relation to his evidence”.<sup>13</sup>

Lawyers are, of course, allowed to familiarise witnesses with the likely procedure and the basic requirements for giving evidence, such as the need to speak slowly and to answer the question. The guiding rule is, however, that in discussions with witnesses –

“great care must be taken not to do or say anything which could be interpreted as suggesting what the witness should say, or how he or she should express himself or herself in the witness box”.<sup>14</sup>

The Code of Conduct in England and Wales applies to arbitration, so that English barristers must observe those rules when appearing in international arbitration.

The Bar Standards Board (England & Wales) draws a distinction between (i) close questioning of a witness in order to present full and accurate evidence, so as to test the reliability of the evidence, and (ii) questioning with a view to encouraging the witness “to alter, massage or obscure his real recollection”;<sup>15</sup> the latter is not permitted. Interestingly, the same guidance states that mock cross-examinations or rehearsals of particular lines of questioning that counsel proposes to follow are not permitted.



The position in Hong Kong is similar to that obtaining under the rules of conduct in England & Wales. While Principle 10.12 of the Law Society of Hong Kong’s guide to professional conduct permits interviewing witnesses and prospective witnesses,<sup>16</sup> it is not permissible in Hong Kong to “tamper with the evidence of a witness or attempt to suborn the witness into changing his evidence.”<sup>17</sup>

Thus, if English and Hong Kong barristers and solicitors are involved, it may be best to forego the mock cross-examination of witnesses, or at least to leave this to be done by a solicitor or foreign counsel not bound by the English or Hong Kong rules.

The crucial part of the mock exercise is feedback from the mock arbitrator(s) following the completion of the hearing. This feedback is, in fact, the whole point of the exercise. During the feedback session, which might conceivably take a day or two, depending on the case, the mock arbitrator(s) would comment on the merits of the case, advise counsel on their presentation techniques, recommend better ways to present the case, look into the strengths and weaknesses of the opposing party’s position, and perhaps even suggest better arguments than those presented to the mock tribunal.

### **Selecting the right mock arbitrator and deciding upon a mock arbitration**

Just as the actual arbitration is only as good as the arbitrators whom the parties appoint, it is conceivable that the mock arbitration is only as good as the mock arbitrator(s) selected. There are several criteria to take into account in considering both of these questions.

The first criterion is the knowledge of the actual arbitrators and of their decision-making process(es), and the similarity of their backgrounds.

The second criterion is the cost of the mock exercise. For many, this criterion would come first in order of importance. Whether or not spending extra fees on a mock arbitration is justified depends on (*inter alia*):

- (1) the nature and the complexity of the actual arbitration case;
- (2) the amount(s) at stake; and
- (3) the importance of the case to a client.

If a law firm is defending a government in an investment arbitration commenced by a distressed investor, and the amounts claimed exceed the government's annual case defence budget, then it is suggested that spending a bit extra on a serious mock arbitration exercise is both justified and justifiable to the client. On the other hand, if the case is before a sole arbitrator and concerns a modest breach of contract, it would admittedly be hard to convince a client to go through a full mock exercise.

The third criterion is whether the law firm has the willingness and ability to entertain a mock exercise in a serious manner. The disputes team of a law firm considering such an exercise may in fact be working flat out on tens of arbitration matters, while the disputes lawyers may not have the physical capacity to integrate a mock arbitration into their schedules.

Another issue is whether, if a mock arbitration is conducted, the costs of it can be recovered. The answer to this would depend on individual tribunals, though the authors think that most tribunals would be reluctant to allow these costs as recoverable from the losing party. The costs that a losing party has to pay must be reasonable. If that party itself used a mock tribunal, then most tribunals would be prepared to allow the costs. If, however, only the winning party did so and especially if it had deeper pockets, the authors believe that most tribunals would be reluctant to allow these costs. It must,



however, follow that there would be differences in approach, depending on the legal background of the tribunal making this decision.

### Conclusion

The advantages of the mock arbitration exercise have been admirably summarised by Drs Sach and Wiegand, who state:

“[B]eing able to discuss with professional arbitrators their thoughts and deliberation process can obviously be of enormous help to counsel in preparing for the real hearing. However, the use of mock arbitrations is also useful to give the client realistic expectations as to the outcome of the case and perhaps persuade a stubborn client to reconsider the possibility of reaching a settlement.”<sup>18</sup>

The authors believe that the mock arbitration system has a real role to play in arbitration in Asia, where a growing number of new firms and individuals are engaging in the process. The ability to be able to try out the substance and presentation of arguments before a mock arbitrator experienced in the region would turn out to be an invaluable tool in case presentation in the years to come. It should be budgeted for and used in appropriate cases. It would result in better presented cases with more streamlined submissions. It would introduce into the process what has been missing for some time, namely, arbitral triage. Finally, it would help eliminate the ‘kitchen sink’ approach that so greatly bedevils international and domestic arbitration today. ■

- 1 *Editorial note:* For further contextual discussion of a number of points raised in this article, see Neil Kaplan, *Keynote Speech: Mauritius Conference*, delivered at the Mauritius International Arbitration Conference, 15 December 2014, available at [http://www.arbitration-icca.org/media/3/14214091075490/kaplan\\_miackeynote\\_dec2014.pdf](http://www.arbitration-icca.org/media/3/14214091075490/kaplan_miackeynote_dec2014.pdf).
- 2 Ecclesiastes 1:9.
- 3 *Earvin J Krueger and Emma Melinda Krueger v Pelican Production Corporation*, No CIV-87-2385-A, 24 February 1989.
- 4 For example, <http://www.resolutionresearch.com/recruitment-mock-jury.html> (accessed 27 October 2014).
- 5 Lucy Reed, *Tribunal Decision-Making: Art, Science or Sport?* (2013) 30 J Int'l Arb 85; also available at <http://neil-kaplan.com/wp-content/uploads/2013/08/Lucy-Reed-2012.pdf> (accessed 23 February 2014) and at [http://www.arbitration-icca.org/AV\\_Library/Lucy\\_Reed-Kaplan-Lecture-2012-Hong\\_Kong.html](http://www.arbitration-icca.org/AV_Library/Lucy_Reed-Kaplan-Lecture-2012-Hong_Kong.html). *Editorial note:* Lucy Reed's paper is discussed on this point by James Freda, *Heuristics and Arbitral Decision-Making: A Brief Discussion on How Arbitrators Make Decisions* [2013] Asian DR 50 at 52.
- 6 Quintilian's *Institutes of Oratory*, Book V, Ch 12.8. The treatise on the art of oratory by Quintilian (Marcus Fabius Quintilianus, c 35-c 100 AD/CE) is an exhaustive analysis of Roman educational practices, treasured for centuries by Western scholars. Available online at <http://rhetoric.eserver.org/quintilian> (accessed 18 February 2014).
- 7 Amy Rothstein, *Mock Arbitrations: a New Kind of 'Jury' Research*, New York Law Journal, Vol 242, No 50 (10 September 2009), available at <http://www.doarlaw.com/pdf/9-10-09-NYLJ-A-New-Kind-of-Jury-Research.pdf>.
- 8 Richard Walters & James Lawrence, 'Psychological Dynamics in International Arbitration', in R Doak Bishop & Edward Kehoe (Eds), *The Art of Advocacy in International Arbitration*, 118 (2010, Juris), at 118.
- 9 Edna Sussman, *Improving your arbitration presentation with a mock arbitration: two case studies*, NYSBA New York Dispute Resolution Lawyer, Vol 5, No 2 (Fall 2012), pp 15-16, available at <http://www.sussmanadr.com/docs/Mock%20arbitrations%20fall%202012%20NYSBA.pdf>.
- 10 Dr Klaus Sachs & Dr Nicolas Wiegand, 'Mock Arbitrations', in *Arbitrators' Insights: Essays in Honour of Neil Kaplan*.
- 11 *Ibid*, p 339.
- 12 Dr Klaus Sachs & Dr Nicolas Wiegand, 'Mock Arbitrations', in Chiann Bao & Felix Lautenschlager (Eds), *Arbitrators' Insights: Essays in Honour of Neil Kaplan* (2012, Hong Kong: Sweet & Maxwell/Thomson Reuters), pp 344-348.
- 13 Bar Standards Board (England & Wales), Section 5, *Guidance on Witness Preparation*. See also section 705(a) of the Code of Conduct of the Bar of England & Wales.
- 14 *Ibid*, Section 12(2), n 9.
- 15 *Ibid*, Section 5.
- 16 The *Hong Kong Solicitors' Guide to Professional Conduct of the Law Society of Hong Kong* provides, at Chapter 10, Principle 10.12, that: "It is permissible for a solicitor acting for any party to interview and take statements from any witness or prospective witness at any stage in the proceedings, whether or not that witness has been interviewed or called as a witness by another party."
- 17 *Ibid*, commentary.
- 18 Sachs & Wiegand, *op cit* (note 12 above), p 343.

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