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In conversation with...

Sir Bernard Rix

Nigel Rawding QC

Mock tribunals: reflections on their use in international arbitration

Sir Bernard Rix and Nigel Rawding KC

In conversation with Sir Bernard Rix, fellow Twenty Essex arbitrator member Nigel Rawding KC explored Sir Bernard's recent experience of 'mock' arbitration hearings, whereby parties engage a stand-in tribunal as participants in a dress rehearsal for the real thing.

Video recordings of the conversation can be viewed below. What follows is an edited Q&A version.

Watch the recording – part one

Watch the recording – part two

Nigel Rawding KC (NR): How did you first become aware of the practice of conducting "mock" hearings and what was your involvement?

Bernard Rix (BR): I first heard of the growth of these 'practice' tribunals from friends who had experienced them, but my first experience was in 2019 when I was asked to sit on a mock tribunal. I have been involved in four tribunals, two oil and gas (pricing disputes) and two pharmaceutical cases (widespread issues of fact and a variety of laws).

NR: Without giving too much away, did you find out what happened afterwards?

BR: In all four cases I was a member of a three-person tribunal; Chairperson in one and three as co-arbitrator. I know that in one case, the dispute went to the final hearing and the 'real' tribunal came to the same result as the 'mock' tribunal, a further one settled before the final hearing and I do not know about the other two.

NR: Clearly cost is a key issue in arbitration and rightly so. Have you formed a view as to the type of case for which this sort of process is suitable?

BR: My experience was all in very big cases with a lot of people involved. The law firm establishing the mock tribunal has to present both sides of the case and therefore large numbers of lawyers can be involved. In one case the advocacy was divided on each side between a number of advocates but especially on the 'real' side the opening was conducted by many different advocates, some older and more experienced, some younger and less experienced. I was greatly impressed by the quality of the advocacy including from the least experienced. I also noted that the mock tribunals were attended by several client representatives both legal and non-legal and after one particular tribunal we received several questions from the clients, which were interesting to hear.

As to cost, my experiences have all been in large high-value cases and it is hard to say how much cost the mock hearing added to the overall cost of the case. With reading in for a day or two (the law firm can choose how much to send you to read) and a one day hearing the cost is unlikely to be significant in the context of large cases.

NR: Similarly, my experience has been in large oil and gas cases where I have represented a party in a mock setting but I have also sat as a mock tribunal member, testing submissions of former colleagues. In those cases, the mock arbitration process involved a relatively small additional cost and was certainly highly valuable. Of course, it is also a

good training tool for juniors and indeed advocates of whatever level.

NR: Cases involving third party funders are more and more frequent, and funders are often looking for different ways of stress-testing the likely return on their investment. Does the process lend itself to that kind of evaluation? Timing is obviously an issue.

BR: All my four mock arbitrations were conducted quite shortly before the final hearing so the process might be a bit late for funders using it as stress-testing. As to whether there is a "right" time for a mock arbitration hearing, I can understand that it is only quite close to the hearing when advocates would be in a position to present both sides of the argument to the mock tribunal in a mature and helpful way.

NR: There is a delicate equilibrium, isn't there? Mock hearings tend to be employed relatively shortly before the hearing itself, whilst leaving enough of a gap to learn some lessons from that process. That may be too late in the day for a funder deciding whether to invest in the case, although if settlement discussions are ongoing a re-evaluation of the prospects of success in the light of a dry-run presentation of the case and some feedback, may still be valuable.

NR: When the mock tribunal delivers its feedback, is there a particular form that works best? Does the tribunal give a composite view, or a series of individual observations? Do you comment on presentation as well as substance? How candid did you feel you could be?

BR: We did all of that and decided we would be candid – in one case a little bit of discussion where one of the tribunal felt we ought to be less candid but I pressed for us to be as candid as we felt we could politely be without upsetting anyone. We handled the feedback as a real tribunal would with a small amount of deliberation prior to the hearing then some deliberation after submissions. In the case where I was chair we decided I would begin the feedback as chairman with a joint view from the tribunal but we would all add our separate comments. In the cases where I was not chair we decided the order in which we would 'bat' and each gave our separate views. I feel that it was important and useful for each member of the tribunal to give their individual views because everyone came out with their own points and it was the combination of those points that was particularly useful. In every case the tribunal were all agreed on our overall view.

NR: You raised the question of candour and I want to dig into that a little more…

BR: In giving our feedback as a mock tribunal we performed many different roles – it was made clear to us in our briefing that we were at liberty to be candid in our feedback and the lawyers would like us to be so. We found that not only did the lawyers seek our prediction on the outcome of the matter, but also our views on the weighting, emphasis and prominence of arguments. In our feedback we were able to express the view, pretty unanimously, that some arguments given less importance were much more valuable than had been thought and should be given greater prominence. On matters of presentation, the lawyers and their clients have given thought and expense to this exercise so one has to be bit careful how to deliver the feedback. One issue that can sometimes arise is that of arrogance in presentation of the case – feedback should be given on this but of course in the right way. It takes quite considerable candour to say to an advocate that they have the wrong tone of voice!

NR: Of course there is nothing so important as a point that the tribunal thinks is important, but the manner of presentation is just as important - tribunals tend to have an allergic reaction to being told what they "must" or "must not" find.

BR: Noting of course not only the importance of tone to the tribunal, which is one aspect, but tone in what you say about your opponent.

NR: Are there aspects of cases other than legal arguments that could benefit from the mock tribunal process, for example expert witness evidence?

BR: I have doubts about how useful it would be, given the great issues of independence and impartiality that arise, in the context of preparing witnesses. Of course, there are IBA Guidelines on this topic but questions remain about what is legitimate. Thinking about mock tribunals for expert evidence, it would be difficult if the tribunal started making suggestions about the way presentations could come over as it could amount to giving guidance to the expert about how they should do their job and could trespass on their independence and impartiality.

NR: How important do you think it is for the composition of the mock tribunal to mirror the real tribunal?

BR: With the caveat that I have not been on the 'counsel/client' side of a mock tribunal, I understand that the mock tribunals I was on were designed to mirror the real tribunal which makes good sense to me. Each tribunal will have its own attributes and characteristics and if you can reproduce those in some way you will learn valuable lessons. When one considers that a tribunal may be, and indeed is likely to be, composed of arbitrators from different countries, legal backgrounds, common and civil law jurisdictions and be a mix of practitioners, ex-judges, and academics, they will all have their own way of looking at things.

NR: I agree that a mock tribunal should, so far as possible, mirror the tribunal. When I sat as mock arbitrator in a case involving Nigerian law, one of my co-arbitrators was a distinguished Nigerian practitioner, who sat alongside an English barrister and myself - and we understood this to be a pretty good 'mirror' for the real tribunal. If the exercise is to produce value one has got to anticipate questions and concerns that the real tribunal is going to have.

NR: What would you describe as the main benefits for clients and legal advisors?

BR: Again, with an element of caution as I have not been on other side and never had feedback either, I can imagine it is extremely useful to have a dry run – to go through the feedback as I've described it, have not only your arguments but your tone and weighting and prominence given to points addressed by a very experienced tribunal cannot be other than extremely useful. How that is used whether to settle or to revise a case etc, I am not sure but imagine it can be put to all these uses.

NR: Having lifted the curtain on parties' preparation of a case, do you take that knowledge forward with you when sitting as an arbitrator in future cases?

BR: In a way. As the arbitrator you are always worried about the argument that may not have been put and often ask a question about that – an argument you think might well have been put is usually explained in its absence by the fact there is something you don't know which makes that argument impossible and only the lawyer knows about the troublesome journeys through the maze where you get to a dead end – lawyers seek the centre of the maze or to climb over the hedges to get there!

I have very much enjoyed the mock arbitration work I have done, it is a concentrated form of work, with concentrated reading, a concentrated day of argument and you give your immediate reaction. It is great fun, a real challenge but great fun and I enjoyed them very much.

Sir Bernard Rix

Bernard retired in 2013 as a Lord Justice of Appeal with 20 years' experience in the Commercial Court and the Court of Appeal. Since 2013 he has accepted appointments as an arbitrator and mediator in a wide variety of settings, including oil and gas, shipping, insurance, sale of goods, and share purchase transactions. He has acted as an expert witness, mock arbitrator and special master in the US federal courts.

Read his online bio ›

Nigel Rawding KC

Nigel joined Twenty Essex as a full-time arbitratior in 2021 and has sat as arbitrator on ICC, LCIA and DIFC-LCIA tribunals. Nigel is recognised as a leading practitioner in international arbitration, having practised at Freshfields for many years. Nigel is based in London, having previously worked with Freshfields in New York and Hong Kong. He is a Director of the LCIA and a member of the ICC UK Commission on Arbitration.

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