Is the time ripe for disruption in the make-up of arbitrators being appointed on an arbitration panel?

By William Lye, OAM *

Aspiring arbitrators know that it is difficult, although not impossible, to break into the *arbitration club* and obtain a good flow of arbitration work.

It used to be that arbitrators were appointed because of their experience and reputation built over many years of practice, and not because they belong to a guild or two. Today, there are accredited courses one could enrol in to learn about the arbitration process and how to write an award. Becoming a *Fellow* of a recognised International Arbitration Institute can definitely help kick-start one's arbitration career. I am all for maintaining a high level of standard amongst arbitrators. But will it get you work with letters after your name?

During my time sitting as a member of a soccer tribunal, I gained much experience in conducting hearings with a panel of two other members of the tribunal, sometimes as the chair and other times as a member.

It taught me about the decision-making process, and the importance of conducting a fair hearing; how to maintain a neutral and impartial approach; how to control the proceedings and be firm yet fair and just; how to listen to witnesses and evaluate the evidence presented; how to respectfully debate the evidence and legal consequences with fellow members in order to arrive at a decision.

Conducting an arbitration hearing requires similar skills and a good understanding of the arbitral rules and procedures. In the end, it boils down to using *common sense* in conducting a fair hearing and properly applying the relevant law to the evidence presented.

But I have noticed, however, that there are fewer members with a diverse background on the list of members available to be called on to sit.

So, why is there a lack of diversity?

The response, which is what I hear often, is that people with a diverse background do not put their hands up for the opportunity as they consider themselves either too young, inexperienced, will not get appointed anyway, or simply do not fit the mould.

I believe that commercial arbitrations can be much more effective when there is a diverse panel of gender, age, sexuality, and cultural background that can bring their expertise and cultural intelligence to their deliberations prior to rendering the award.

Having a culturally diverse arbitration panel is a smart strategy

I am also familiar with the rare commercial arbitration, especially in South East Asia, conducted in two different languages (e.g. Mandarin and English) assisted by a common interpreter (e.g. Mandarin).

For example, it is not unusual for one party's lawyer to speak in the English language, and the other party's lawyers to speak in the Chinese language. Most arbitrators prefer a single language for the arbitration and the award to be rendered.

Given the increased number of commercial disputes in Australia between parties with Asian background (e.g. mainland Chinese), an arbitration panel with diverse background comprising of an Asian (e.g. Mainland Chinese) as the Chair of the panel, who could also speak and write in the English language, an Australian (by whom I refer to English or European), and an Asian Australian, could be a fresh approach to promote, for example, Melbourne, Australia as the seat of international commercial arbitration.

This is a *Three Culture One Panel Model* approach. This model recognises the need for a strategic form of cultural diversity but maintains the egalitarian Australian culture.

The recent Census 2016 data reveals that Australia is becoming more Asian than European. More than a quarter of Australian residents are now born overseas, and for the first time in our history, the majority of people born overseas are from Asia, not Europe.

I believe the time is ripe for positive disruption in the way arbitrators are being appointed to hear international commercial arbitration matters.

The old model of having English as the sole language of the arbitration in Australia, and appointing a panel of arbitrators with the same background (i.e. English or European) is likely to be no longer attractive for the parties.

A new and fresh paradigm is needed to cater for the changing demographics of the parties involved in commercial disputes in Australia. Lawyers putting forward arbitrators often chose a person they are familiar with, while Institutional Arbitration bodies could put forward a member from their list of qualified arbitrators who would complement the party's choice of arbitrators by balancing the diversity quotient.

The *Three Culture One Panel Model* could encourage parties in Australia or overseas to use more of the commercial arbitration process as the vehicle to resolve their commercial disputes against parties of similar or diverse background. The arbitration could be conducted by at least by one person who is fluent in an *Asian* language.

For example, the language of the arbitration could be in the Chinese language, but the award to be rendered could be in the English language (for enforcement purposes in an Australian court) with appropriate translation of the Award into the Chinese language.

Accredited Interpreters could be engaged to interpret from the Chinese language to the English language, and vice-versa. The *Three Culture One Panel Model* could easily apply to parties from Indonesia, Thailand, Japan, South Korea, India, Sri Lanka where there are predominantly two languages, i.e. English and the 'Asian' language.

Arbitration is not a cheaper process compared to litigation. The *Three Culture One Panel Model* could be, however, quicker because the parties are comfortable with the ability to use their own language yet recognising that the English language would still prevail in an Australian context.

As with all Awards, they would remain private to the parties thereby allowing them to save *face.* The parties, however, would have the comfort to know that they could rely on a stable and consistent arbitral jurisprudence in Australia, and seek the intervention of an Australian court should there be an appeal or enforcement of the Award in Australia.

The *Three Culture One Panel Model* is easily applied to ad-hoc arbitrations but could also work under an Institutional Arbitration regime. It remains, however, a work-in-progress for lawyers, parties, and Institutional Arbitration bodies to adopt a fresh and new paradigm.

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