

Kluwer Arbitration Blog

Culture and Advocacy in International Arbitration: ACICA45 Panel Discussion

Edwina Kwan, Domenico Cucinotta, Clarence Ma (King & Wood Mallesons) · Monday, October 2nd, 2023 · ACICA 45

The rapid growth of international arbitration in the Asia-Pacific has sparked many discussions about how different cultural practices and legal traditions impact advocacy in cross-border disputes (see, for example, Global Arbitration Review's *The Guide to Advocacy*). On 3 August 2023, ACICA45 and King & Wood Mallesons in Sydney hosted a session titled "*Clash of Cultures – Exploring the Impact of Culture on Advocacy in International Arbitration*".

The panel comprised The Hon James Allsop AC (Arbitrator, Atkin Chambers and Sydney Arbitration Chambers), Edwina Kwan (Partner, King & Wood Mallesons (Sydney)), Amanda Lees (Partner, King & Wood Mallesons (Singapore)) and Boxun Yin (Barrister, Banco Chambers). Domenico Cucinotta (Senior Associate, King & Wood Mallesons (Sydney)) moderated the session.

The event was well-attended by members of the Australian arbitration community and beyond. Insightful discussions took place about the impact of culture on arbitrator selection, witness evidence, advocacy styles, and witness interpretation.

Nomination of Arbitrators

Mr Cucinotta commenced the session by asking the panel about the relevance of cultural factors when considering arbitrator nominations. The panel noted that cultural factors are critical in three fundamental respects.

First, clients are interested in arbitrators' language capabilities. Ms Kwan highlighted that clients consider it important to nominate an arbitrator who is fluent in, or has a good working knowledge of, the language in which their witnesses might testify.

Second, arbitrators need to appreciate the business practices and nuances in the relevant jurisdictions to understand the context of documentary and oral evidence. Ms Kwan noted that cultural behaviour can impact the interpretation of evidence – for example, accounting information and sales in a post-M&A dispute which required knowledge of Chinese retail behaviour and cultural holidays when assessing accounting patterns over the Spring Festival period.

Third, having a culturally diverse tribunal facilitates a deeper understanding of the conduct of the

parties during the arbitration. Ms Lees provided a number of examples in her experience sitting as arbitrator where the cultural and legal background of a party influenced the way in which they presented their case, including the presentation of witness and documentary evidence.

For this reason, Ms Lees noted that it is beneficial to nominate an arbitrator who is aware of the cultural and legal environment of the relevant jurisdiction.

Mr Cucinotta then noted cultural differences regarding contact with potential arbitrators at the nomination stage. Concurring that lawyers from different legal traditions have different practices in this respect, Ms Lees noted that a prudent approach calls for all communications with potential arbitrator nominees to be in writing, so that such communications can be produced if required.

Evidence and Witness Preparation

The panel then discussed contrasting approaches to evidence and witness preparation. A key question was how one can navigate differences between legal traditions as to the acceptable limits of witness preparation and contact between witnesses and lawyers.

Mr Yin noted that most jurisdictions generally have consistent ethical standards. However, in some jurisdictions, there is a premium placed on acting assertively and vigorously on behalf of the client. He further noted that this could create natural justice concerns in an international context if one side is comfortable with zealous advocacy, but the other side is not. However, he added that not all tribunals appreciate an aggressive approach to witness preparation, and that such preparation can readily be exposed in cross-examination.

Mr Allsop raised the point that many witnesses are not interested in witness preparation, because for example: (i) they often do not work for the client anymore; and (ii) the relevant events could be some eight to ten years ago. He reiterated the importance of ensuring that the words in the witnesses' statements are their own, as witnesses will invariably be asked that question.

Ms Lees highlighted the lack of rules of evidence in international arbitration and that evidence sometimes reads like submissions. However, she affirmed that witness evidence remains important as certain matters are best explained by a witness, such as the context behind long WhatsApp conversations and the emojis used. Her example – that the “thumbs up” emoji is susceptible to many meanings – was particularly appreciated by the audience. Ms Lees also noted that because witness evidence is important in international arbitration, so too are bilingual lawyers who can speak the witness' language and explain to them the importance of their evidence.

Strident or Conversational Styles of Advocacy?

The panel discussed diversity in advocacy styles and its important positive effects on gender diversity and age diversity in arbitration. Mr Allsop recounted his observation from remote hearings that conversational advocacy gained prominence over strident advocacy, and that in his experience, female advocates and young advocates were able to use remote hearings to their advantage with a more conversational style of advocacy.

Witness Examination and Interpretation

Mr Cucinotta noted that witness examination is where there is greatest scope for cross-cultural interaction and miscommunication. In considering how to approach this area, the panel raised three key points.

First, lawyers need to take care in their questions. Mr Allsop noted that a carefully crafted question might not be the most apt, and that the primary consideration is to ensure the question is understood (especially when seeking to put something to the witness). Likewise, Mr Yin gave practical tips, such as drafting shorter questions, making sure concepts are translatable, and refraining from using too much idiom.

Second, lawyers need to know how to work in a streamlined manner with interpreters. For example, Mr Yin highlighted that in cases where translation was critical, he provided interpreters with document bundles and sought to agree with his opponents as to the translation of certain terms.

Third, the panel underscored the importance of bilingual lawyers. Ms Kwan highlighted that bilingual lawyers offer their teams significant advantages, such as: (i) understanding what is said in the hearing room; (ii) having unique capabilities in reviewing bilingual transcripts; and (iii) making timely objections to translations in real time during the hearing.

Conclusion

The session concluded with Ms Kwan drawing a parallel to the project visits and site visits on which tribunals embark to understand the technical background of disputes. She noted that a similar logic applies to cultural acumen and diversity; a proper determination of cross-border disputes is difficult without an understanding of the cultural background of the parties.

To make sure you do not miss out on regular updates from the Kluwer Arbitration Blog, please subscribe [here](#). To submit a proposal for a blog post, please consult our [Editorial Guidelines](#).

Profile Navigator and Relationship Indicator

Includes 7,300+ profiles of arbitrators, expert witnesses, counsels & 13,500+ relationships to uncover potential conflicts of interest.

Learn how **Kluwer Arbitration** can support you.

Learn more about the newly-updated *Profile Navigator and Relationship Indicator*



This entry was posted on Monday, October 2nd, 2023 at 8:19 am and is filed under [Advocacy](#), [Arbitration](#), [Arbitrator Selection](#), [Arbitrators](#), [Australia](#), [Culture](#), [Evidence](#), [Witness](#)

You can follow any responses to this entry through the [Comments \(RSS\)](#) feed. You can leave a response, or [trackback](#) from your own site.