NEW APPROACHES TO RESOLUTION OF DISPUTES IN THE ASIA/PACIFIC REGION IN THE CONTEXT OF TRADE AND COMMERCE

by

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The problem

1. Inevitably, disputes will arise in the course of international trade. Satisfactory methods of dispute resolution are essential for the maintenance of long-term trading relations.

2. International trade is ever increasing. Investment by Japan in other countries, very frequently in joint venture with a local partner, has been a feature of the past decade. Necessarily, the number of disputes will increase.

3. The disputes will be at two levels.

   (a) Bilateral disputes - directly between, for example, joint venture partners, a purchaser and vendor; manufacturer and distributor.

(b) Claims made by third parties - for example ultimate purchasers, consumers, whether of the actual goods, the subject of the initial bilateral transaction, or purchasers of articles into which those goods had been incorporated, or in the manufacture of which the goods were utilised. An outstanding example was the Asahi case in the United States Supreme Court where the person injured in an accident involving a motor cycle, sued the Taiwanese tyre tube manufacturer who, in turn, attempted to involve the Japanese manufacturer of valves which had been used in the tyres.

4. The existing systems of dispute resolution do not happily accommodate the legitimate needs of and cultural differences between the Japanese and foreign traders involved, be they Australians or any other traders in the Asia/Pacific Region. The methods most frequently employed of court proceedings, or arbitration, are both predicated on a prior breach.

5. Probably the most important difference between Japan and many of her trading partners is the Japanese perception of the nature of contracts, especially long-term contracts.

The alternatives in place

1. Court proceedings either in Australia or in Japan.

For fairly obvious reasons the Australian trader would not be comfortable in a Japanese court, the Japanese trader will be uncomfortable in an Australian court. In each case, the procedures are formal and unfamiliar, the principles of law unknown, the language is not the primary language of the party. The legal costs of major litigation are much too high and seldom cost effective. In Japan, delay in court hearings is forbidding. In addition, there is a dislike of court procedures by commercial people particularly by Japanese parties. The identity of the judge cannot be known and will be a matter of chance. There is the possibility of adverse publicity to one or both parties. The all or nothing result will, at the least, be harmful to or, at worst, destructive, of the business relationship.

2. Arbitration.

Arbitration does offer some advantages over court proceedings but still leaves a number of disadvantages. First, generally it is not available otherwise than in bilateral transactions. It can be brought about only by agreement between the parties, usually made before any dispute arises. It will be seldom, if ever, that a third party to the transaction will agree to submit a dispute to arbitration after it has arisen.

It has the advantage that the parties may choose the person who will determine the dispute who may well be expert in the field involved. The proceedings will be held in private. The parties may choose the location of the arbitration, the procedural rules and the substantive law that will govern the relationship and rights of the parties. The parties may agree that the arbitrator act as an amiable compositeur and decide the dispute otherwise than in strict accordance with the law and thereby avoid an all or nothing result. Beyond that, however, an arbitration tends to mimic court proceedings and has the other disadvantages commonly associated in the minds of parties of

court process. The decision will be imposed by a third party and similarly to court process, the range of remedies will be restricted.

3. Mediation and conciliation.

Once again, this process is available only by agreement between the parties. It is, of course, inappropriate where it is necessary to establish a legal precedent Only a court process will satisfy that need. It satisfies the urge for privacy and accommodates the Japanese belief in relationships and accords with the nation's cultural and legal heritage. It is antithetic to the Occidental drive for the enforcement of rights. As has often been said, an Occidental society is "right" driven and "right centred" whilst Japan is "duty" driven and "duty centred". An interesting, if somewhat simplistic illustration of the two contrasting approaches has been sought of all strange fields from the respective traffic laws. In Anglo Saxon legal systems, the law gives a car a "right of way". In Japan the prohibition is against a car impeding another car. The contrast between right and duty is stark.

The solution

We should borrow from the earlier days of international mercantile transactions. The disputes between traders at the great market fairs in Europe were resolved by the merchants themselves and expeditiously because the parties were moving on. Disputes between persons in the same craft or trade were determined by the Guild to which they belonged. Even today some of these traditions survive, although in a much more formalised way, in the lower commercial courts staffed by commercial people, for example, in France, and in the arbitrations, conducted by the various trade associations in England, for disposition of both domestic and international disputes.

Even after the courts of justice won supremacy and the procedures became somewhat ossified in formality, Lord Mansfield created the golden age of mercantile law in England. He used special juries of London merchants to create a whole new body of mercantile law which embodied what was then understood to be the customs of merchants in England. In some fields, for example, sea carriage of goods, this became the new lex mercatoria.

These concepts could be adopted to the needs of today. The challenge is to devise a system which:

(a) matches Japanese expectations and culture;
(b) gives the best of the tried and true from mercantile history and adapts it to the political, legal and social realities of today.

There should be created a panel of senior respected figures. Usually they would be senior businessmen. From the panel, a choice may be made of one or two persons uninvolved in the particular dispute and with the disputants. The person, or persons, would then work out a solution in consultation with the parties. It should not be thought that the person or persons selected would necessarily have to be from an existing panel. The parties may have confidence in an altogether different person. What is important is the concept.

The process would engage all the best features of consensual dispute settlement. The third party's task would be to persuade the parties to a solution but because of his stature in both communities, the person could bring considerable authority to this task. The person should be invested with the power of decision

making if the drive to consensus proves impractical. The decision should not be based exclusively on legal principles but rather on what is required by fairness to both parties.

One of the advantages of having such a system in place would be that it could be called in even prior to a dispute arising. It could be either a monitoring process or one that would extinguish any difficulty before it developed into a dispute.

Once again, the process would require the agreement of the parties. Its manifest advantages should secure this. Commercial disputes would remain where they should be with commercial people. If the process worked satisfactorily on a trial basis, the Governments may be persuaded to legislate to establish this method of dispute resolution as the appropriate one for international commercial disputes. No doubt the courts would remain as an avenue of last resort.

The bonus

1. If it is seen that this method is working, it could be enlarged to cover disputes arising between Japanese trading organisations, on the one hand, and other traders in the Asia/Pacific region, on the other.

Australia could be seen as a neutral, third country which would be able to provide the necessary panel of experienced, mature and persuasive persons who could be the third party members on a panel constituted by a Japanese member and a person from the country of the other party. Australia has all the other appropriate facilities for the resolution of commercial disputes. The availability of the procedure could well enhance the enlargement of Japanese trade with other countries in the Asia/Pacific region. In some courtries of the region, for one reason and another, Japanese investment and trade is still regarded with some apprehension. That feeling could be considerably alleviated if both parties had the comfort of knowing that, in the event of any disharmony, they could call on the assistance of one of a panel of respected, distinguished, knowledgeable and, most of all, independent persons in whom all sides had confidence.

2. Such an outcome would be helpful, from Australia's point of view, in two ways. It would more closely tie Australia as part of the region and it would also be a valuable source of foreign exchange for Australia. Dispute resolution is one of the major invisible earners of England.

3. The scheme could be a worthwhile adjunct to the current proposal, initiated by Australia, for an Asia/Pacific Economic Community.