

Judicial Exchange Between Australia and Japan

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The Governments of Australia and Japan designated 2006 as the Australia-Japan Year of Exchange in order to commemorate the 30th Anniversary of the signing of the 1976 Basic Treaty of Friendship and Co-operation between Australia and Japan. Prime Minister Howard and Prime Minister Koizumi announced that the aim of the year was to promote mutual understanding and co-operation between Australia and Japan through a series of bilateral exchanges. For personal reasons, to which I will refer, I organised a judicial delegation to visit Japan in July as part of this 2006 Year of Exchange.

The 1976 Basic Treaty is referred to as the NARA Treaty. This appears to be an acronym for its alternative title: the Nippon Australia Relations Agreement. That, however, is an ex post facto acronym, not truly reflecting the historical origins of the name.

In another life, some time last century, I served on the personal staff of the Prime Minister of Australia. In October of 1973 I was privileged to attend the second Australia-Japan Ministerial Committee meeting in Tokyo. One of the items on the agenda for that meeting was a suggestion for a broad based treaty between Australia and Japan.

The Ministerial Committee meeting was an event which I will long remember. The Japanese delegation was led by the then Prime Minister Tanaka and included two future Prime Ministers, Mr Ohira, then Foreign Minister, and Mr Nakasone, then the Minister of International Trade and Industry. All three were formidable men of considerable capacity and it was a privilege for a young 27 year old to see them at first hand.

In 1973 the core treaty arrangement between Australia and Japan was the Agreement on Commerce of 1957, an extraordinary achievement so soon after World War II. A number of other specific matters were dealt with in bilateral treaties, e.g. double taxation and visas. The increasingly close and rapidly developing relationship between the nations was not reflected in any formal arrangement.

Japanese treaty practice had long focused on a traditional form of treaty known as a Treaty of Friendship, Commerce and Navigation, with the acronym FCN. Such treaties played a role in the treaty practice of only the United States and of Japan.¹ A FCN treaty was very limited in scope, dealing with a range of quite practical matters and also

* Updated version of an address by the Chief Justice of New South Wales to the ANJeL (Australian Network for Japanese Law) conference, "War of the Worlds in Japanese Law?", UNSW, Sydney, 28 February 2006.

1 See eg the Treaty of Friendship, Commerce and Navigation between Japan and the United States of America signed at Tokyo on 2 April 1953, at http://tcc.export.gov/static/doc_exp_005539.asp; and other examples of FCN treaties available at <http://www.ioc.u-tokyo.ac.jp/~worldjpn/documents/indices/docs/index-ENG.html>.

having a symbolic value. FCN type treaties had a long history but were of particular significance in the 19th and early 20th century between colonial powers and independent nations for the purpose of safeguarding traders.

Notwithstanding the understandable wish of Japan to pursue the kind of treaty with which it was familiar, and which it had entered with a number of other nations, the history of Australian treaty practice did not allow for such a development. We had no such treaties. We had reservations about some of the usual provisions in a FCN treaty with a stronger economic power. The Australian position, as I recollect it, was that matters associated with the facilitation of trade and commerce were best implemented through multilateral agreements or by specific bilateral agreements focusing on particular issues.

The Australian response to the Japanese request for a FCN type treaty was to develop the concept of a treaty of Friendship and Co-operation (with an acronym not very different to the traditional FCN). Instead of the almost exclusively commercial focus of a traditional FCN treaty, the Australian proposal was for a more wide-ranging bilateral treaty covering political, cultural and social understanding and co-operation, albeit at a high level of generality, reflecting aspiration more than practical results.

This proposal was in many ways unique and, indeed, remains so. It was put forward at a time when the economic relations between the two nations were well established, but goodwill and mutual trust between the nations was only gradually developing. The generation in power in both nations still had acute memories which had to be overcome. On the Australian side, there were memories of the conflict of World War II and, on the Japanese side, memories of acts of discrimination against Japanese nationals, notably in the “White Australia Policy”.² A broad-ranging bilateral treaty was put forward by Australia to serve both a symbolic function and the practical role of promoting a higher level of co-operation, goodwill and trust than had hitherto existed.

My memory of October 1973 is that we left the Ministerial Committee talks in Tokyo at something of a standoff on the issue of the treaty. After the formal talks, the delegation visited the ancient imperial capital of Nara. On the first evening there was a formal dinner. It was at that dinner that Prime Minister Tanaka announced that Japan would enter into negotiations for a treaty of the character proposed by Australia and give up its long pressed idea of a FCN type of treaty. I recall that this announcement was greeted by the Australian delegation with considerable excitement.

The then Prime Minister, E. G. Whitlam, as I recall on the recommendation of his press secretary Graham Freudenberg, said immediately that the treaty ought to become known as the Treaty of Nara. It was to be named after the place of the announcement. Indeed it was referred to in that way during the subsequent negotiations. Much later,

² This term describes Australian policies favouring white over non-white immigration into Australia from 1830 until 1973, including the Immigration Restriction Act 1901 (Cth.), one of the first enactments of Australia’s newly founded federation.

a new name was thought up to provide an acronym: the Nippon-Australia Relations Agreement. However, the title had long preceded the acronym.³

It was my presence on this occasion that led me to initiate a judicial exchange after I learned of the agreement of the two governments to declare 2006 a Year of Exchange. Chief Justice Gleeson of the High Court of Australia encouraged me to pursue this project and Chief Justice Machida of the Supreme Court of Japan responded with warmth and enthusiasm.

I first met Chief Justice Machida when he visited Australia for the centenary of its High Court in 2003. Then, I was happy to accede to his request for the New South Wales Supreme Court to participate in a programme by which a Japanese judge would spend a period of twelve months based in Sydney familiarising himself or herself with the Australian system. A number of judges have now come to Sydney under that programme.⁴

In 2005 I met Chief Justice Machida on two occasions: in Australia and at a conference in China. Following our discussion on those occasions, he agreed to receive an Australian delegation as part of the 2006 Year of Exchange. The delegation visited Japan in July 2006. It comprised judges of the Supreme Courts of New South Wales, Victoria, Queensland, Western Australia and the Australian Capital Territory, and a judge of the Federal Court.⁵

Over the last decade or so a new sense of collegiality has emerged amongst judges on an international basis. The frequency and intensity of communications between judges from different systems has developed to a very considerable extent. The exchange between Australian and Japanese judges, exemplified by the judges who have taken up residency in Sydney and the delegation that I led to Japan, should be seen as part of this broader context in which Australian judges meet Japanese judges quite often in international judicial conferences.

3 This account, based on my recollection of events, has been challenged. Andrew Robertson has noted that, at a press conference the day after the formal dinner, Prime Minister Whitlam said that Nara “is an appropriate name for the Nippon-Australia Relations Agreement”, suggesting that the acronym and title arose at the same time: see A. ROBERTSON, *Whitlam, Fraser and Japan*, available at http://www.japan.org.au/e_web/Basic_Treaty.htm. Other scholars have confirmed that the name was suggested by the Australian delegation: see M. DEE, *Friendship and Co-operation: the 1976 Basic Treaty between Australia and Japan* (Canberra 2006) 12, 15; A. STOCKWIN, *Negotiating the Basic Treaty between Australia and Japan, 1973–1976*, in: *Japanese Studies* 24 (2004) 201 at 206.

4 Other Japanese judges have been sent to Melbourne, with ANJeL assisting in both programmes. There is also a growing number of shorter-term judicial visitors from Japan.

5 The delegation included Justice P. McClennan, Chief Judge of the Common Law Division (New South Wales) and Justice Bergin, judge in charge of the Commercial List (New South Wales), Justice C. Steytler, President of the Court of Appeal (Western Australia), Justice G. Nettle, Court of Appeal (Victoria), Justice R. French (Federal Court), Justice M. Wilson (Queensland), and Justice M. Grey (Australian Capital Territory).

The development of understanding between Australian and Japanese judges can be of broader significance. To the degree that the judges of each nation learn more about the principles, practices and institutions of each other, then the sometimes difficult legal issues which arise in cross-border disputes, will be more readily resolved on the basis of a sense of comity between the judicial systems. This is, potentially, of considerable practical significance, for example, in determining applications for anti-suit injunctions.

It was in just such a context that the High Court adopted the explanation of the principle of “comity” first advanced by the Supreme Court of the United States:

“ ‘Comity’, in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and goodwill, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its law.”⁶

The principle of comity is based on an enlightened self-interest, not on some form of internationalist perspective. At its core is the expectation of reciprocity: we will act in the way that our conduct will be treated by others.

In the broadest of terms, the Australian common law tradition has some features which would be regarded as alien to the civil law tradition adopted in Japan when the nation builders of the Meiji era turned primarily to the German Codes for inspiration. Having determined to select the best of what the West had to offer – modelling the army on that of Prussia and the navy on that of Great Britain – this choice of legal system was not a compliment to the common law. However, it is the nature of common law that it cannot be readily adopted, because it has grown and continues to grow organically. A code-type of system can be adapted virtually overnight, as we have seen most recently in the People’s Republic of China. In that regard the Meiji era choice can be seen to have been based on what system was feasible for Japan, rather on a judgment of what international model was best. At least we common lawyers would like to think that was so.

Over recent decades a major theme amongst comparative lawyers has been the idea of convergence between the common law systems and the civil systems. This approach has much to commend it and in that regard our two systems are able to learn from each other in a way that may not have been true in the past.

One of the topics for discussion in July was the new *saiban-in* system in Japan for lay participation in criminal justice. We would regard this as a system of lay assessors not directly comparable with our jury system. However, clearly the two approaches

⁶ *Hilton v Guyot*, United States Reports 159 (1895) 113 at 163-164 quoted in *CSR Ltd v Cigna Insurance Australia Ltd*, Commonwealth Law Reports 189 (1997) 345 at 395-396. Much Australian case law and legislation is freely available via <www.austlii.edu.au>.

respond to similar needs. This is a good example of convergence between systems. A lay assessor system has been adopted in a number of European nations and, recently, in China. Russia has adopted a jury system or, rather, reintroduced it because it had such a system in the 19th century, as readers of Fyodor Dostoevsky will know.⁷

As the multifaceted process, often referred to as globalisation, continues apace, the circumstances in which the judiciary of one nation has to have some level of understanding of the legal systems and the judiciary of another nation will expand. Private international law will become of increased significance. Circumstances which call for assistance between courts – service of documents, taking of evidence, enforcement of judgments, recognition of jurisdiction – will multiply.

International transactions are subject to a range of risks and to additional costs, which may impede international trade, commerce and investment. We will all be better off if those risks and costs are minimised. These issues of judicial assistance should be seen as part of an international microeconomic reform agenda to lower the transaction costs of international trade, commerce and investment. The risks, costs and delays of dispute resolution for cross border transactions can be reduced and international intercourse can be enhanced.⁸

Judges in both Australia and Japan have, for some decades, been concerned to reduce delays and costs associated with the resolution of domestic legal disputes. For cross-border disputes there is the additional burden of uncertainty and complexity to be overcome.

The solutions, in the form of multilateral or bilateral treaties and arrangements, are primarily a matter for government. Co-operation and enforcement occurs through a range of multilateral processes promoted by the likes of UNCITRAL, The Hague Conference on Private International Law and the International Institute for the Unification of Private Law, known as UNIDROIT. There are, after all, significant differences in the quality of different legal systems and dispute resolution processes which make multilateral and even regional arrangements problematic. For example, many nations – not including Australia and Japan – have a problem with judicial corruption, which it would not be polite to mention in multilateral negotiations. Bilateral treaties are likely, in many respects, to be more achievable, notably between two such well-established systems as those of Australia and Japan.

7 Crime and Punishment (London, New York 1911). Technically, Japan is also reintroducing lay participation in serious criminal trials, as it had inaugurated a system in the Taisho era. See generally eg K. ANDERSON / M. NOLAN, Lay Participation in the Japanese Justice System: A Few Preliminary Thoughts Regarding the Lay Assessor System (*Saiban-in Seido*) from Domestic Historical and International Psychological Perspectives, in: *Vanderbilt Journal of Transnational Law* 37 (2004) 935.

8 See further J.J. SPIGELMAN, Transaction Costs and International Litigation, in: *Australian Law Journal* 80 (2006) 438.

These matters were subject to a detailed report by the Australian Law Reform Commission in 1996.⁹ The report was really in the nature of a feasibility study suggesting lines of inquiry. Few of the recommendations of that report have been implemented or even followed up. A number of matters are worthy of further consideration.

Australia has successfully implemented the Hague Evidence Convention by a national uniform system of legislation.¹⁰ In this respect, Australia conforms to world best practice. The Hague Service Convention, however, has not been ratified by Australia. No doubt, our failure is based to some degree on the difficulties of our federal system. Japan has ratified the Convention. There is no bilateral arrangement between Australia and Japan in this respect. Such an arrangement exists only with South Korea and Thailand together with a colonial inheritance from our British Imperial past for some other nations. The recommendation of the Australian Law Reform Commission, that Australia pursue ratification of the Hague Service Convention, appears to have much to recommend it.

Justice Clifford Einstein, a judge who sits in the Commercial List of the New South Wales Supreme Court, together with the then Commercial List researcher, undertook a systematic study of the private international law position of Australian practice with respect to international commercial litigation, especially in the Commercial List of the Supreme Court.¹¹ His Honour and his co-author outlined the compatibility of Australian commercial practice, particularly from the perspective of the UNIDROIT/American Law Institute Principles of Transnational Civil Procedure, together with the private international law and statutory enforcement mechanisms of the Australian Foreign Judgments Act 1991 of the Commonwealth. They also discussed the desirability of further steps to be taken by way of harmonisation and the possibility of international or regional steps in these matters, along the lines of the Brussels and Lugano Conventions then applicable in Europe.¹² His Honour and his co-author also analysed the possibility of Australian law developing a more international focus along the lines of recent Canadian jurisprudence.¹³

9 See Legal Risk in International Transactions, Australian Law Reform Commission Report No 80, 1996. Also available via <<http://www.alrc.gov.au/publications/finalreps.htm>>.

10 I have had occasion to outline the history of this scheme in *British American Tobacco Australia Services Limited v Eubanks*, New South Wales Law Reports 60 (2004) 483 esp at [16]-[28].

11 See C.R. EINSTEIN / A. PHIPPS, The Principles and Rules of Transnational Civil Procedure and their Application in New South Wales, in: Uniform Law Review 2004, 815; C R EINSTEIN / A. PHIPPS, Trends in International Commercial Litigation in Australia Part 1: The Present State of Foreign Judgment Enforcement Law; Part 2: The Future of Foreign Judgment Enforcement Law, in: Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 2005, 273, 365. Also available on the Supreme Court website at: <www.lawlink.nsw.gov.au/sc> under speeches of Justice Einstein.

12 In 2000 the 1968 Brussels Convention was transformed into the so-called Brussels I Regulation.

13 See *Beals v Saldanha*, Supreme Court Reports 3 (2006) 416.

With respect to its foreign money judgments legislation, Australia has recognised Japan as a nation which affords reciprocity and, accordingly, Japanese money judgments can be enforced in Australia merely by registration with a court and, thereafter, are able to be enforced as if they were judgments of the Australian court.¹⁴

Generally, Japan is also considered to be quite generous in recognising and enforcing foreign judgements.¹⁵ The factual basis of a foreign judgment can be taken into consideration when examining whether it fulfills the conditions for the recognition of foreign judgments under article 118 of the Japanese Code of Civil Procedure, but otherwise Japanese courts are bound by the proscription against reviewing a foreign judgment on its merits. Because Australia recognises Japanese judgments under comparable conditions and regards Japan as a reciprocating nation, Australian judgments also fulfill the condition of reciprocity in Japan (art. 118 para. 4). They can be enforced once the Japanese Court confirms that Australia had international jurisdiction to adjudicate (para. 1), the defeated defendant was duly served with the documents to commence the procedure (para. 2), and the judgment in question does not contravene the substantive or procedural public policy of Japan (para. 3).

However, one article published almost a decade ago in a widely-read law journal in Australia was critical of a Tokyo District Court's decision eventually allowing enforcement of a Queensland judgment, the first formally to recognise Australia as a reciprocating nation. The author objected to the time taken by the Court and its apparent willingness to countenance arguments about the merits of the Queensland court's judgment. This case may be quite exceptional in that the Australian party in the Queensland proceeding was a receiver appointed following insolvency, and had succeeded in a summary judgment after the defendant failed to post considerable security for costs – later raising public policy concerns in the Tokyo District Court.¹⁶ Nonetheless, the case and

14 However, the Foreign Judgments Act 1991 (Cth.) adds that a foreign judgment may be set aside, under section 7(2)(a)(iv) if for example the original court lacked jurisdiction on grounds defined in section 7(3), (not necessarily consistent with the grounds for jurisdiction specified under Japanese law); or pursuant to section 7(2)(a)(xi) as contrary to public policy.

15 [Editors' note: see generally eg T. HATTORI / D.F. HENDERSON, *Civil Procedure in Japan* (2nd edition, New York 2002), § 14.03. Cf. also Japan's consistent enforcement of foreign arbitral awards: eg T. TATEISHI, *Recent Japanese Case Law in Relation to International Arbitration*, in: *Journal of International Arbitration* 17 (2000) 63 (and his further article cited at n. 15).]

16 See L. GAMERTSFELDER, *Cross Border Litigation: Exploring the Difficulties Associated with Enforcing Australian Money Judgments in Japan*, in: *Australian Bar Review* 17 (1998) 161 (citing the Japanese and Queensland judgments, respectively, at n. 67 and n. 70). [Editors' note: in a recent Case Note in Japan's leading law journal (in: *Jurisuto* 1283 (2005) 241-4) University of Tokyo Associate Professor Hisashi Harata presents a detailed analysis of this Tokyo District Court judgment, disagreeing with aspects of its reasoning but concurring in its result.] On Japan's renewed attempts to reduce persistent delays in civil proceedings generally, in the context of its civil law tradition and broader civil justice

its reporting does illustrate the need for more comprehensive understanding of each others' judicial practice, and for further attempts to harmonise the law on enforcement of judgments.

The Hague Conference's attempt to develop a multilateral convention on the enforcement of judgments has proven to be too ambitious. The substantial differences that exist in this respect amongst the different nations suggest that only bilateral arrangements are likely to be acceptable. Exorbitant claims to jurisdiction have traditionally been made by different nations, including common law nations which assume jurisdiction on the basis of mere service, even on the basis of quite transitory presence in a jurisdiction. However, common law nations are not alone in making claims for an exorbitant jurisdiction. Article 14 of the French Civil Code permits any French national to sue in a French court any foreigner with whom he or she has contracted, even with respect to contracts entirely connected with a foreign country and with no connection to France at all. Similarly, Article 23 of the German Code of Civil Procedure permits a German court to assume jurisdiction over a defendant who owns property in Germany, regardless of any other connection between that property and the subject matter of the dispute.¹⁷

The Hague Convention process narrowed its original ambitious plans and propounded a text with respect only to choice of court clauses – indeed, primarily, exclusive choice of court clauses. The Convention on Choice of Court Agreements, which was concluded on June 30, 2005, will ensure that national courts recognise and enforce such choice of court clauses in commercial arrangements.

Article 5 of the Convention affirms that the courts designated in an exclusive choice of court agreement have jurisdiction and should not decline to exercise jurisdiction. Courts in some common law countries, which may accede to this Convention, may need to revisit their doctrines of *forum non conveniens*. Article 6 provides that courts of nations other than a chosen court shall, save in defined circumstances, refuse to exercise jurisdiction. Article 8 provides that judgments of a chosen court shall be recognised and enforced in other contracting states, subject to a list of exceptions. Further, there shall be no review on the merits. If Japan accedes, some judges may need to take additional care not to trespass on this rule. However, Article 9(e) preserves the right of courts for example to refuse enforcement of judgments “manifestly incompatible with the public policy of the requested State, including situations where the specific proceedings leading to the judgment were incompatible with fundamental principles of procedural fairness of that State”.

reforms, see eg L. NOTTAGE, Civil Procedure Reforms in Japan: The Latest Round, in: *Ritsumeikan Law Review* 22 (2005) 81-86.

17 [Editors' Note: However, the German Federal Court of Justice (BGH) has interpreted this to require a “substantive connection to Germany”; BGH 2 July 1991, *Entscheidungen des Bundesgerichtshofes in Zivilsachen* 115, 90.]

This Convention is no doubt presently under review in both Australia and Japan for ratification. It appears to be a sensible measure and will go some way to ensuring that courts are able to implement the wishes of contracting parties in cross-border commercial arrangements in a manner which has not hitherto occurred.¹⁸

It is one of the great advantages of international commercial arbitration that the wishes of the parties for alternative dispute resolution in international commerce has been effectively implemented by the widespread acceptance of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. There is a close interrelationship between choice of court agreements and commercial arbitration agreements and it would be highly desirable for international commerce that both kinds of agreements are capable of proper enforcement throughout the commercial world. Choice of court provisions and arbitration agreements frequently co-exist, notably under ICSID – the 1965 Washington Convention on the Settlement of Investment Disputes.¹⁹

There is a range of international and bilateral mechanisms for minimising the legal risks and costs associated with international transactions. In my opinion, such mechanisms are appropriate to be considered as part of Free Trade Agreement discussions. No doubt issues of legal dispute resolution are part of the discussions underway between Australia and Japan, as they complete a Feasibility Study towards entering into a full-scale FTA, building on conventions such as the Nara Treaty.²⁰

In the event, however, the implementation of both the spirit as well as the letter of relevant bilateral and multilateral arrangements will be affected by judicial attitudes. The kind of interaction which has recently occurred between Australia and Japan, and which reflects the broader degree of interaction between the judiciaries of different nations, assists in this process.

Australian judges have been, and are, no less prone than other judges to treat with suspicion legal principles and practices which they do not understand. I am pleased to say that the Australian judiciary is less and less parochial. To a substantial extent this is based on increased contact with other nations, both as legal practitioners and as judges. It is now the case that in cross-border commercial disputes, Australian companies do not have a hometown advantage in most Australian courts.

Our ability to give due recognition to the law of other nations and to provide assistance to other courts in cross-border disputes is affected by how much we know and understand about other legal systems. The 2006 Year of Exchange was an appropriate time to take steps, however limited, to extend the mutual knowledge and understanding between Australian and Japanese judges. I hope that members of the Japanese judiciary will accept the invitation I issued on the occasion of the visit in July 2006, to organize a

18 See my comments in *Transaction Costs and International Litigation*, *supra* note 8, 450-1.

19 See A. SCHULZ, *The Future Convention on Exclusive Choice of Court Agreements and Arbitration*, accessible on the Hague Convention website <www.hcch.net>.

20 See <<http://www.dfat.gov.au/geo/japan/fta/>>.

return visit in the future. Conferences such as those organised by the Australian Network for Japanese Law also enhance this process and I look forward to reading papers that develop out of them.