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# The future role of Australian courts in the resolution of international disputes

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## Prospects for Australian dispute resolution systems

# The future role of Australian courts in the resolution of international disputes

*Justice Peter Blaxell*

### Introduction

From the beginnings of trade, commerce and intercourse among nations, there has always been a need for effective means of resolving international disputes. The courts within individual countries have done their best to meet this need, but have been hampered by the limits to their extra-territorial reach and the logistical difficulties faced by parties trying to conduct litigation from a distance. While courts such as the Admiralty jurisdiction in England have successfully attracted specialist business, the absence of any system of internationally mandated tribunals has meant that the void has been largely filled by arbitration.

The choice between these alternative methods of dispute resolution will vary depending on the particular needs of litigants. Court based litigation tends to offer greater certainty and perhaps reliability, given the independence of judges. Arbitration, on the other hand, offers privacy, informality and an appeal-free outcome.

Whichever of these choices is made, it is a matter of common experience that the parties to international litigation are rarely happy with the dispute resolution process. Whether a dispute is resolved by a court or by arbitration, the litigation is generally considered to be costly, cumbersome and time consuming.

Accordingly, the world of international trade and commerce would greatly welcome any new system which could offer a swift, simple and (most importantly) fair method of litigating disputes.

In the past, one of the greatest impediments to the efficient resolution of international disputes (whether by a court or by arbitration) has been the need to travel. It has almost always been necessary for some or all of the tribunal, counsel, witnesses or parties to travel to one particular geographical location in order for the proceeding to take place. This has inevitably involved time, inconvenience and expense to all concerned.

However, with the advent of modern technologies such as the internet and videoconferencing, there is no longer any need for travel or for proceedings to occur in one place. It is now possible for proceedings to be conducted in a virtual courtroom, with the tribunal, counsel, witnesses and parties each being in separate physical locations.

These modern tools now allow courts to offer a much better service to international litigants than they have in the past. As Australian courts are well equipped with the necessary technology and infrastructure, they are particularly well placed to take up this challenge. This article suggests the means by which this might occur, with ➤



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➤ particular reference to the issues from a Western Australian perspective.

### Available technology and infrastructure

There is now widespread use of video link technology by courts throughout Australia. The High Court took the lead approximately 15 years ago when it commenced hearing applications for special leave to appeal by video link from outlying States.

In Western Australia, all levels of the court system have had video link facilities for some years. In criminal matters, accused persons in custody regularly appear in court (and are sometimes sentenced) without leaving the prison. Secure telephone communications between the prison and the bar table enable such accused to instruct counsel during the course of the hearing. Sometimes this procedure avoids the need for either the prisoner or the court to travel thousands of kilometres.

It is also now an everyday experience for the evidence of witnesses to be adduced live in court by remote video link or, alternatively, by prerecorded video. This occurs most frequently with expert witnesses and with complainants in criminal cases involving allegations of a sexual nature. In one recent multi-party trial in Perth, evidence was taken from the towns of Geraldton and Kalgoorlie, as well as from Warnambool in Victoria. Twenty two of the witnesses, as well as one of the counsel, were heard from Victoria.

It has been generally found that the use of video evidence does not detract from the trial process, or affect the ability of the court to judge the credibility of the witness. In fact, the picture quality and camera angle often enhance the opportunity for the judge or jury to observe the facial expressions and demeanour of a witness.

As well as video link facilities, there has been a considerable upgrading of computer systems in Western Australian courts. This has culminated in the construction of four 'intelligent' courtrooms which are fitted with the latest digital technology. Judges, counsel and other participants can bring their own laptop computers into the courtroom and be connected to a specialised local area network and server, which holds all of the material needed for trial. Documents to be exhibited are lodged prior to trial and

scanned into a database, along with photographs of any non-documentary exhibits. As each electronic exhibit is admitted into evidence it is automatically assigned an exhibit number and added to the exhibit list for that case.

During the course of a trial in an intelligent courtroom, a touch screen on the associate's desk controls all audio-visual facilities. However, when necessary, master control can be easily passed to counsel or to the judge, and any information from a laptop computer can be projected onto large screens which are visible to all. This enables all participants in the trial (as well as members of the public at the back of the court) to simultaneously view the materials displayed. Exhibits on the screens can also be enlarged and examined in greater detail than would be apparent to the naked eye.

A digital recording system has replaced the traditional analogue cassette tapes, and dedicated microphones automatically record the name of a participant in a trial as he or she speaks. At regular intervals the digital recordings are electronically transmitted to an external transcription service, and then immediately transferred to each party's laptop in the courtroom.

At the present time documents required to be filed in Western Australian courts still need to be lodged in paper form. However by 2001 a further computer upgrade currently under way will allow litigants to file documents and pay fees electronically. It is also proposed to provide electronic 'kiosks' for members of the public and in person litigants.

These technological advances have been supplemented by major reforms to the rules of practice and procedure. There has also been a much greater emphasis on, and a higher level of resources devoted to, mediation. Consequently court hearings in Western Australia are now conducted much more swiftly and cost effectively.

### International co-mediation with Singapore

Since 1997 the District Court of Western Australia has had a 'strategic relationship' with the Singapore Subordinate Courts. This relationship is analogous to the sister city arrangements that exist between many municipalities around the world, and has ➤



➤ involved mutual visits, video conferences and exchanges of information.

During 1999 this relationship gained added substance when Singapore initiated a program called 'Court Disputes Resolution International', otherwise known as 'co-mediation'.

'Co-mediation' has involved a judge in Western Australia participating by video link, with a judge in Singapore, in the 'mediation' of disputes subject to litigation in that other court. The cases are confined to those involving issues of fact and involve the two mediation judges providing an early neutral evaluation of the strengths and weaknesses of each party's case.

The usual procedure is for parties and their representatives to attend before the host judge in Singapore. All of the participants are visible (either at once or alternately) on screen to the Western Australian judge, who in turn is visible on a screen in Singapore. Each party then outlines its case and indicates the basis on which it would be prepared to settle. Following these opening submissions the parties leave the Singapore courtroom and the two judges caucus privately in order to reach a common view of the case. The parties are then called back into the courtroom (either individually or together) and the factual issues and settlement options are further explored.

There had been six such 'co-mediations' by the end of 1999 and all of them resulted in settlement. The types of matters dealt with ranged from building disputes to alleged breaches of contracts for the sale of apartments in Indonesia. The conduct of proceedings was greatly facilitated by the fact that Singapore and Perth are in the same time zone. As the participation of the District Court has not to date imposed any great demand upon resources, the services of the Western Australian judge have been made available free of charge as a gesture of international goodwill.

### **Potential international role beyond mediation**

The Singapore co-mediation project provides a practical demonstration of the ease with which international proceedings can be conducted in a virtual courtroom with the participants being situated in

separate geographical locations. Provided that there are adequate video link facilities and everyone is connected to the same database, it does not matter where the judge, counsel, witnesses or exhibits are situated, because all evidence, documents and other materials are made available to the participants simultaneously.

Accordingly, and subject to the very important questions of sovereignty and jurisdiction, there is no reason why international trial hearings could not be conducted in this way.

Under the common law system as it operates in Australia, the jurisdiction of a court to deal with an extraterritorial matter typically comes about following a two stage process. There is firstly an application to serve notice of a writ out of the jurisdiction, which will only be granted if the plaintiff establishes that the matter falls into one of a number of categories as specified in the rules and the court exercises its discretion to grant leave. Secondly, if leave is granted and notice of the writ is served, then the defendant will frequently apply for a stay of proceedings on the ground that they have been commenced in an inappropriate forum. The court can decline to exercise jurisdiction at either of these two stages.

Obviously, leave to serve notice of a writ out of the jurisdiction can only be granted if there is at least one of a number of specified factors present which in some way connects the matter to the jurisdiction. However, even if this hurdle is overcome the defendant will be granted a stay if the court considers itself a 'clearly inappropriate forum'. In such circumstances the proceedings will be stayed in accordance with the general principle that it would be oppressive, vexatious or an abuse of process for them to continue (*Voth v Manildra Flour Mills Pty Ltd* (1990) 17 CLR 538).

In *Voth's* case the majority of the High Court made clear (at 554) that the mere fact that the balance of convenience favours another jurisdiction or that some other jurisdiction would provide a more appropriate forum does not justify the grant of a stay. However, the availability of relief in a foreign forum will always be a relevant factor in deciding whether or not the local forum is a clearly inappropriate one. ➤

'The Singapore co-mediation project provides a practical demonstration of the ease with which international proceedings can be conducted in a virtual courtroom with the participants being situated in separate geographical locations.'



➤ Other factors that will be taken into account include the availability of witnesses and the extent to which inconvenience or expense will be incurred in having the matter determined in the local forum (*Voith* at 565 and *Spillada Maritime Corp v Cansulex Ltd* [1987] AC 460, 477-8).

It is in this area of the court's consideration that the local availability of video link and electronic communications is likely to have its greatest impact. If by means of these modern technologies the court considering an application for a stay can greatly reduce the inconvenience and expense to the parties, then it is much less likely to consider itself a 'clearly inappropriate forum'. The fact that the court might also have an efficient mediation system and expedited trial procedures would assist it in coming to this view.

#### **Proposal for the international marketing of court services**

At the present time it is common commercial practice for international agreements to include provision for the resolution of disputes by arbitration. The effectiveness of international arbitration as a dispute resolution process has been enhanced by the adoption by many countries (including Australia) of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) and the UNICITRAL Model Law on International Commercial Arbitration (1985).

Nevertheless, the process of arbitration does not always offer a timely and cost effective remedy, and it is respectfully suggested that some Australian courts are currently in the position to offer a much better service to international litigants.

By way of example, the expedited list of the Supreme Court of Western Australia probably represents world's best practice for the timely and efficient resolution of commercial disputes. Matters in the expedited list which go to trial are typically determined within three months of commencement and sometimes within as short a period as three weeks. Subject to the availability of video link facilities and electronic communication, there is no reason why these performance standards could not be replicated in the trials of most

international disputes.

These are also performance standards which have potential to attract the custom of parties framing dispute resolution clauses in contracts who desire the most timely, cost effective and reliable of remedies. All other things being equal, many litigants would also prefer that a judge, rather than one or more arbitrators, determines their disputes.

Accordingly, if one looks at the availability of such court services from a commercial point of view, they are very much a marketable commodity. This is particularly so when regard is had to the reputation of the Australian court system for independence, impartiality and integrity. It follows that, subject to the questions of jurisdiction and sovereignty, there is considerable potential for Australia to 'export' its court services to parties likely to be involved in future international disputes (and particularly to parties transacting business in the same time zones as Australia).

The means by which this could be achieved would be to positively promote particular Australian courts as offering a suitable service for the speedy and cost effective mediation and/or resolution of contractual disputes. The parties to such contracts could be encouraged to include a standard clause referring such disputes to a particular Australian court, in much the same way as international contracts now contain arbitration clauses.

#### **Questions of jurisdiction and sovereignty**

In the event of an action being commenced in an Australian court pursuant to a contractual provision which refers disputes to that court, the existence of that term of the agreement can ground leave for service out of the jurisdiction. Presumably the defendant in such circumstances would usually be amenable to the jurisdiction of the court, but in the event of an application for a stay, the availability of video link and electronic facilities, as well as expedited proceedings, would tend to weigh against any finding that the court is a 'clearly inappropriate forum'. Accordingly, there would be reason to expect the court to exercise jurisdiction in the matter.

The exercise of jurisdiction will ➤

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➤ nevertheless be a prima facie breach of the sovereignty of the country in which notice of the writ is served, and there will also be the potential for difficulty in obtaining the co-operation of overseas witnesses during trial. It is not unknown for the governments of foreign countries to regard any attempt to gather evidence from within their territory as a breach of sovereignty unless it is done with the approval of the relevant authorities.

It is for this reason that Australia has bilateral treaties with approximately 30 countries relating to service and evidence (the provisions of which are reflected in the Rules of Court relating to overseas witnesses). The most recent treaty adopted was with the Republic of Korea, and it is hoped that this will become a precedent for a network of bilateral arrangements with other Asian countries.

The Korean treaty is significant because for the first time the courts in each country must co-operate in the taking of evidence by video link. There is also provision for the electronic transmission of documents. It is obviously to be hoped that there will be many more such treaties in the future.

### Some implications of the proposal

The notion that the Australian judicial system should be promoted and marketed overseas is contrary to traditional views as to the role of the courts in our society. Particular objections which spring to mind are that the courts would be compromising their independence by becoming involved in a business, and that the provision of services internationally would deplete the resources available to local litigants.

As to the first of these objections, it is

obviously inappropriate for a court to be in any way involved in the promotion or marketing of its own services. This is a role that would necessarily have to be taken on by the executive arm of government, and in Western Australia would most probably be administered by a unit of the Ministry of Justice. In the end, it would largely be a decision for government whether or not to embark upon the course proposed, although of course it would be the right of the courts affected to be properly consulted.

The second objection is a very real one in the political sense, because there are already problems in meeting the reasonable expectations of the Australian public for access to justice. Any proposal to export court services overseas will only be viable if it can be seen to bring positive benefits to the public. In this regard the likely benefits to the legal profession and to the local economy are probably not enough.

Accordingly, the proposed scheme would need to produce a significant financial benefit to the government administering it. The fees charged to international litigants would need to cover all costs attributable to the service provided (including imputed rent on court infrastructure and salaries and wages of judges and staff) as well as a reasonable return within the limit of what the market is willing to pay. It follows that the quantum of the net likely financial return would determine whether or not the proposal is viable.

It would also be the responsibility of government to ensure that sufficient additional resources are made available for international litigation as will enable the quality of service to local litigants to be ➤

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## Contributions

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'Any court providing an international dispute resolution service will operate in a competitive global environment in which the systems delivering the most efficient, cost effective and fairest outcomes will hold sway. This imperative to keep up with world's best practice would have a flow-on effect locally ...'

➤ maintained. Furthermore, it is to be hoped that the net financial gain from international dispute resolution would be used in a manner that directly benefits local litigants (such as by increasing the level of court resources generally, by funding legal aid or by reducing fees).

There are other potential long term benefits for local litigants. Any court providing an international dispute resolution service will operate in a competitive global environment in which the systems delivering the most efficient, cost effective and fairest outcomes will hold sway. This imperative to keep up with world's best practice would have a flow-on effect locally, and accordingly the Australian public could reasonably expect ever increasing efficiency and quality from their justice system.

**Marketing of court services within Australia**

The ability of a court to provide an immediate service to litigants, when viewed in a commercial way, is also a marketable commodity within Australia. During 1999 at least one Australian court had a listing delay of approximately four years for parties awaiting trial. At the same time another court of equivalent jurisdiction elsewhere in Australia was in the position to immediately list and hear any trial.

In these circumstances it would seem sensible for the various States and

Territories to reach agreement and make mutual legislative provision allowing for the transfer of actions and/or trials to other equivalent jurisdictions. If necessary, the parties opting to take this course could exercise rights of appeal back in their 'home' jurisdiction.

Obviously any jurisdictions taking on a transferred workload would need to be properly resourced to ensure that local litigants are not neglected. However a higher level of fees on such transferred business would provide the funds for these additional resources.

The benefits of such a scheme for litigants are obvious. Parties who otherwise would have to wait a long time for trial could have their cases swiftly heard by video link without having to leave their home State or engage alternative counsel. It can also be anticipated that a court losing business in this way would not be pleased to do so and would have an added incentive to improve the state of its lists. This in a sense would result in some competition among the courts of Australia, which in the long run would assist the process of greater efficiency and reform. ●

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