MOU between New York and New South Wales

An address by the Hon JJ Spigelman AC, delivered at the New York State Bar Association International Section Meeting, Sydney, 28 October 2010.

The chief judge of New York, Jonathan Lippman, who appears at this conference by web cast, and I have agreed on the terms of a memorandum of understanding to consult and co-operate on questions of law. We will sign this MOU at the end of our presentations to this plenary session.

The purpose of the MOU is to create an innovative mechanism for determining a question of law of one jurisdiction, which arises in legal proceedings in the other jurisdiction. The traditional mechanism for determining such issues is to treat the question of law as if it were a question of fact and to determine it on the basis of expert evidence. This method has numerous inadequacies, including cost and delay but, perhaps most significantly, will often lead to conclusions that are just plain wrong.

The mutual co-operation mechanism which we are announcing today, and which follows a similar MOU between the Supreme Court of New South Wales and the Supreme Court of Singapore announced in June, we are both convinced will serve as a model for adoption between additional jurisdictions. If that happens then the inadequacies of the present system can be ameliorated to a substantial degree.

The multifaceted process called globalisation has expanded the scope and range of cross-border legal issues which arise in the course of dispute resolution. There will be an increase in the number of cases in which a court will not decline jurisdiction on *forum non conveniens* grounds, even though a question of foreign law must be determined.

Let me illustrate the difficulties that arise in this respect by referring to the resolution of an Australian commercial dispute under a contract governed by New York law. Dr Louis Weeks, a United States geologist, advised BHP to search for oil off the southern coast of Australia. His advice was taken and the success of the exploration was the start of the process that has transformed a domestic steelmaker into the world's largest mining conglomerate. It led to the discovery of Australia's largest oil field and its major gas field for domestic use.

Dr Weeks was granted what was described as an

'overriding royalty' of two and a half percent of the gross value of all hydrocarbons produced and recovered by BHP and its successors in the relevant area. Originally, BHP acquired exploration permits which, over the course of the next forty years, were converted into different forms of title, some of which were surrendered and re-acquired. Dr Weeks's successors in title, a company called Oil Basins Ltd, contended that the words 'overriding royalty' were area based, and its rights depended only on the production and recovery of hydrocarbons in a relevant area. BHP contended that the words 'overriding royalty' had acquired a technical meaning in New York oil and gas law so that the overriding royalty did not extend to extraction from some of its titles.

Of central significance was a judgment in the Appellate Division of the Supreme Court of New York Court in which the words 'overriding royalty' had been interpreted. The parties relied on expert evidence, including two extremely experienced and accomplished jurists. They gave diametrically opposite evidence about the applicability of the New York judgment.

One expert for BHP was Judge Howard Levine, who had been a judge for some thirty years including a decade as an associate judge of the Court of Appeal. The expert called on behalf of Oil Basins was Judge Richard Simons, who also had some three decades experience as a judge, including fourteen years as an Associate Judge of the New York Court of Appeal. The tribunal preferred Judge Simons.

This was a commercial arbitration. The arbitral tribunal consisted of two retired Australian judges, who agreed in the result, and an American oil and gas lawyer who dissented. Accordingly, the conflicting opinions of two senior retired American judges had been adjudicated upon, as a finding of fact, by two senior retired Australian judges. The reason that this dispute is known to us, unlike the usual position with commercial arbitrations, is because there was a challenge to the arbitral award on the basis that the tribunal did not give adequate reasons.

The difficulty in expressing the reasons for choosing between the opinions of two equally qualified experts arose because, as a matter of substance, the retired judges on the arbitral tribunal decided the matter as lawyers rather, than as deciders of fact. That is to say, the two retired Australian judges decided the issue in the same way as they would decide a question of domestic law. To regard this process as some sort of factual determination is a fiction.

The example I have chosen involved commercial arbitration. I appreciate that the arrangement that we are announcing today does not extend to that form of dispute resolution. Indeed, in international commercial arbitration there is no such thing as 'foreign law'. International commercial arbitrations are required to decide the matter before them in accordance with the law applicable to the relevant dispute which will often not be the law with which the arbitrators are most familiar.

I am convinced that the kind of reference mechanism that we are initiating today can play a useful role even in the context of arbitration. One of the principal disadvantages that has emerged as a result of the dominance of international commercial arbitration is that the development of legal principles in the law chosen to govern the particular relationship is significantly impeded. Whether it is the law of England or the law of New York, both of which are frequently chosen as the law of international commercial contracts, the fact that so much of the law that is thrown up by contemporary commercial relationships is being determined in arbitral awards that remain confidential, is of concern because it prevents the development of commercial law.

The basis of international commercial arbitration is respect for the autonomy of the commercial parties who have chosen to submit their disputes to arbitration. In contexts where commercial law is still developing, it is quite likely that both parties to a particular arrangement will have a mutual interest in the further development of that law. Where that occurs, both parties may consensually wish to have the matter determined on an authoritative and public basis by the courts. It is perfectly consistent with the fundamental principles of international commercial arbitration that an arbitral tribunal can be empowered, at the request of both parties to a dispute, to refer a specific question of law for determination by the relevant court.

Even in the context of court proceedings, where public interest considerations are entitled to override the consensus of the parties, in New South Wales we have decided, at this stage, to proceed only on the basis of the agreement of the parties. This is reflected in the Rules of the Supreme Court of New South Wales which establish a procedure for ordering, with the consent of the parties, that proceedings be commenced in a foreign court in order to answer a question of foreign law that has been identified as being in dispute in proceedings in the NSW Supreme Court.

Often these issues arise when a party to proceedings in the NSW Supreme Court seeks a stay of proceedings on *forum non conveniens* grounds. In deciding such an application the fact that the whole or part of the proceedings is governed by foreign law is always a significant matter. However, it is not the only factor entitled to weight. It would be open to the court to reject the application for a stay on the condition that a discrete issue of foreign law is determined in the overseas jurisdiction pursuant to our rules.

There is a longstanding alternative mechanism employed in this state for referring the whole, or any part, of proceedings to a referee appointed by the court. The reports of such referees are brought back to the court to determine whether or not the court will adopt the reasons and orders proposed by the referee.

Our Rules now expressly contemplate the reference of a specific question of foreign law to such a referee.

I envisage that, in jurisdictions other than New York, a referee on a question of foreign law will probably be a senior retired judge from the relevant jurisdiction and will conduct proceedings in that jurisdiction, with the assistance of foreign lawyers appearing for the parties. Pursuant to the MOU and the Administrative Order proposed by Chief Judge Lippman, a member of the New York Panel of Referees could be appointed to act as a referee under our Rules.

The Rules of the Supreme Court of New South Wales expressly authorise the court to exercise its jurisdiction on an issue of Australian law in order to answer a question formulated by a foreign court, which arises in proceedings in that court. We believe that this is permissible under our existing legislation but, to put the matter beyond doubt, I have requested that express provision be made in either the Supreme Court Act or in the Civil Procedure Act to this effect. I understand that there are constitutional limitations upon courts in the United States in this regard and they will be addressed by Chief Judge Lippman.

Over recent decades an enhanced sense of international collegiality has developed amongst judges. There are many more opportunities for interaction at conferences and on visits by judicial delegations. This has considerably expanded the mutual understanding amongst judges of other legal systems. It has transformed the concept of judicial comity. Where two legal systems trust each other, the way Australian jurisdictions trust United States jurisdictions, the kind of interaction for which this MOU provides will be readily accepted. I hope, and I believe Chief Judge Lippman agrees, that our initiative will be taken up between each of our courts and other jurisdictions and beyond.

NY to Sydney: navigating currents in international law

The following is an abridged version of Chief Judge Jonathan Lippman's speech, delivered via videolink at the New York State Bar Association International Section Meeting, Sydney, 28 October 2010.

I had the privilege of meeting Chief Justice Spigelman when he was visiting New York City this Summer. We had a really interesting conversation based on our shared perspectives as the chief judges of states that are so influential within our respective countries, and we talked about the many problems and interests we have in common.

One of the topics we discussed was how the current financial crisis is affecting the court systems in New South Wales and in New York, recognising that this crisis is very much international in scope. Given the interconnected nature of our global economy, we are seeing, as a result of the global financial crises, an increasing amount of litigation involving foreign parties, cross-border legal issues, and the interpretation and application of foreign law.

It is increasingly common these days for a court adjudicating a dispute in one country to have to apply the substantive law of another country. But it can be particularly difficult for the adjudicating court to ascertain and apply another country's law due to language barriers or the lack of available sources about the other country's laws and legal systems. Even where the other country is a prominent one whose laws are readily available, there may not be a controlling precedent on point and the adjudicating court is put in the uncomfortable position of having to decide what the other country's law is. At times, this is little more than judicial guesswork.

It was interesting to hear the chief justice explain how the process for the determination of foreign law questions by Australian courts has been somewhat unsatisfactory, particularly the prevailing approach of relying on the parties' expert witnesses to explain what the applicable foreign law is and how it should be applied. As the chief justice noted, the experts' testimony routinely conflicts with each other, and so there is a feeling among the Australian Judiciary that they are not receiving sufficient or definitive guidance