# New York to Sydney: Navigating Currents in International Law[1]

## By Hon. Jonathan Lippman[2]

Good morning. I'm sorry that I can't be there in person with you, but I am delighted that through the wonders of technology I can still be a cyber presence today as we have this dialogue on what I believe will be some very interesting issues and developments involving Sydney, Australia and New York State.

First of all, let me start by thanking our terrific State Bar President, Steve Younger, who is a strong and progressive leader of our state's legal profession, and who has always been a steadfast supporter of our courts and judges.

I also want to thank your Section Chair, Carl Olaf Bouveng, of Stockholm, for graciously making me a part of your annual meeting. And I particularly want to thank your program co-chair, Andrew Otis, for all that he has done to facilitate my participation today.

Finally, I want to salute Chief Justice Spigelman, and the entire judiciary and bar of New South Wales and all of Australia. I have learned so much about your justice system, and I have been tremendously impressed by your dedication to improving the administration of justice, both domestically and around the globe.

I had the privilege of meeting Chief Justice Spigelman when he visited New York City this Summer. We had a very 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. Recognizing that the crisis is international in scope and that our global economy is intimately interconnected, we are seeing a marked increase in litigation involving foreign parties and cross-border legal issues. It is increasingly common these days for a court adjudicating a dispute in one country to have to determine and apply the substantive law of another country. It can be particularly difficult for the adjudicating court to ascertain and apply foreign law due to language barriers and/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. The Chief Justice noted that the experts' testimony routinely conflicts with each other, and there is a feeling among Australian judges that they are not receiving sufficient or

definitive guidance about the correct application of foreign law to an actual dispute. In particular, they often feel they are not in the best position to interpret close or open questions of foreign law or to exercise discretion in any kind of nuanced way in individual cases. He also pointed out that the use of expert witnesses results in foreign law being treated as a question of fact in Australia, and not of law.

There really should be a better way -- a mechanism whereby courts of different countries can communicate with each other so that the adjudicating court can receive reliable and neutral assistance in its efforts to correctly apply the law of the foreign nation.

What Chief Justice Spigelman proposed, and it immediately resonated with me, was that we work together to develop a protocol to facilitate mutual cooperation and assistance between our respective court systems. That made a lot of sense to me given New York City's status as the world's commercial, financial and legal center. Many of the leading lawyers and law firms specializing in international law are located here, and many deals and contracts are negotiated and finalized here, with New York law often governing. Clearly, New York's courts and judges have a strong interest in making sure that foreign courts determine and apply our law correctly in their decisions. This is also in the best interests of our sophisticated legal community and our state economy. Indeed, with the accelerating pace of globalization, courts all over the world will increasingly be called upon to decide cases involving the laws of foreign nations. Shouldn't we as bar leaders and judges be more proactive in recognizing this trend and taking steps now to advance the administration of justice internationally?

On a more practical level, cases involving the application of foreign law can be among the most challenging and time-consuming for domestic judges, who are not trained in or familiar with foreign law systems and/or foreign languages.

The current systems for ascertaining foreign law in the United States are far from perfect. This was made only too clear last month by the United States Court of Appeals for the Seventh Circuit in the case of Bodum USA, Inc. v La Cafetiere, Inc.,[3] which involved a contract dispute between a French firm and a British firm. The contract was written in French and the dispute was clearly governed by French substantive law. Judge Easterbrook wrote the majority opinion for the three-judge panel, all well known and influential jurists in the United States. All three judges agreed on how to interpret the contract, but Judges Posner and Wood filed separate concurring opinions that focused specifically on the practice of using expert witnesses to establish foreign law.

Federal Rule of Civil Procedure 44.1 provides that courts may consider expert testimony when deciding questions of foreign law. However, in Judge Easterbrook's view:

> "Trying to establish foreign law through experts' declarations not only is expensive (experts must be located and paid) but also adds an adversary's spin, which the court then must discount. Published sources such as treatises do not have the slant that characterizes the warring declarations presented in this case."[4]

Judge Posner in his concurrence not only agreed with that statement but went so far as to call the reliance on expert witnesses an "unsound judicial practice."[5] He wrote:

> "Lawyers who testify to the meaning of foreign law, whether they are practitioners or professors, are paid for their testimony and selected on the basis of the convergence of their views with the litigating position of the client, or their willingness to fall in with the views urged upon them by the client."[6]

According to Judge Posner, judges should, whenever possible, search through published materials and treatises as the better means of providing "neutral illumination" on issues of foreign law. In his view, the use of experts is excusable only when the foreign law is that of a country with an obscure or poorly developed legal system and no secondary published materials are available.

Judge Wood filed a concurring opinion vigorously defending the use of experts:

> "I am unpersuaded by my colleagues' assertion that expert testimony is categorically inferior to published English-language materials. Exercises in comparative law are notoriously difficult, because the U.S. reader is likely to miss nuances in the foreign law, to fail to appreciate the way in which one branch of the other country's law interacts with another, or to assume erroneously that the foreign law mirrors U.S. law when it does not."[7]

According to Judge Wood, the experts' views can be tested in court to guard against the possibility that they are acting as mere mouthpieces for the parties.

The Bodum case is quite relevant to the New York State courts. Proof of foreign law in New York is governed by CPLR 3016(e) and CPLR 4511(b), which require that foreign law be pleaded and that the parties furnish the court with sufficient information to enable it to comply with the request to take judicial notice of foreign law.

As a practical matter, New York judges are in the same position as their federal colleagues in terms of having to either rely on the parties' expert witnesses, appoint a special master to report back, or perform independent research. What my federal colleagues on the Seventh Circuit don't say in their opinions, but which I know to be true at the state level -- where our caseloads are just overwhelming, approaching nearly five million new filings annually -- is that our state courts are simply too busy to make independent determinations of foreign law. As a practical matter, they are constrained to rely on the experts produced by the parties.

What is also interesting about Bodum is the absence of any discussion about alternative approaches to ascertaining foreign law, approaches that might be more effective than judges doing their own research or relying on the testimony of expert witnesses. Is there a better way that we just are not talking about?

One such alternative is a system that would allow certification of questions of law between the courts of foreign countries. The certified question of law has a long history

in the English speaking world, going back to the British Law Ascertainment Act of 1859 and the Foreign Law Ascertainment Act of 1861. The first Act permitted a court in one part of the British Commonwealth to remit a case for an opinion on a question of law to a court in another part of the Commonwealth. The second Act allowed questions of law to be certified between British courts and courts of foreign countries, provided that each country was party to a convention governing such a procedure.

The United States has a shorter but extensive history with certification of questions of law, a history that arises from our separate state and federal judicial systems and that dates back to the U.S. Supreme Court's 1938 ruling, in Erie Railroad v. Tompkins, that there is no federal common law and that the law to be applied in any case is the law of the state, as declared by its Legislature in a statute or by its highest court in a decision.[8]

Since that time, every state except North Carolina has adopted a system, either by constitution, statute or court rule, that allows for certified questions of law from the federal courts.[9] Typically, the federal courts and/or the high courts of sister states may send unsettled questions of state law to the state's highest court for authoritative resolution, thereby eliminating the need for federal or other state courts to engage in speculation about the law of a particular state.

I can speak from personal experience in saying that this system has worked very effectively for many years in New York. The New York Court of Appeals is authorized under the State Constitution to answer certified questions of law from the U.S. Supreme Court, any U.S. Circuit Court of Appeals or the highest court of any state.[10] In a typical year, we receive anywhere from five to ten certified questions, predominantly from the Second Circuit Court of Appeals, but we have also answered questions from the Eleventh Circuit, the Third Circuit, and the Supreme Court of Delaware. All told, the Court of Appeals has answered almost 100 certified questions over the years.

From my discussions with my federal colleagues, there is no question that certification has become an increasingly important tool for federal courts seeking to ascertain New York law, particularly where the Court of Appeals has not previously spoken on a particular issue.

All of which brings me back to my conversation with Chief Justice Spigleman. I think we both felt that some kind of procedure along the lines of the certification model would be very helpful, and we both felt that our respective judicial systems should exercise leadership roles in pursuing workable mechanisms for international judicial assistance that would contribute to the fair, objective and expert application and resolution of questions of New York and Australian law.

Certainly, Chief Justice Spigelman has already been pursuing that objective at the international level. The innovative Memorandum of Understanding executed in June 2010 between the Supreme Courts of Singapore and New South Wales provides that if a contested legal issue in proceedings before one party is governed by the law of the other party, then each party can direct the litigants to take steps to have that legal issue determined by the courts of the party of the governing law.

While I was certainly interested in working with Chief Justice Spigelman to formalize cooperation between our respective judicial systems, having an Australian

court refer certified questions of law directly to the New York Court of Appeals for authoritative resolution does not appear possible under existing law. The 1985 State Constitutional amendment establishing New York's certified question procedure does not include the courts of foreign nations, and since the jurisdiction of the Court of Appeals is delineated very specifically under Article VI, § 3 of the State Constitution, the Court of Appeals could not assert jurisdiction over certified questions from foreign courts without a further constitutional amendment.

While I intend to propose just such an amendment in the future, amending the Constitution in New York is a difficult and uncertain multi-year process, requiring passage by two separately elected legislatures, followed by the approval of the State's voters at the ballot box. There were other concerns to grapple with in establishing a suitable protocol, including the restriction on courts issuing advisory opinions, the prohibition on judges accepting a public office or trust, and judicial ethics issues.[11]

What we came up with is a less formal arrangement than the Chief Justice initially contemplated, but I believe it will go a long way toward helping us achieve our mutual goal of facilitating cooperation between our respective court systems while making sure that New York's courts and judges do not exceed their powers. What we have devised is modeled on the judicial referee system common to the New York and Australian legal traditions. A standing panel of five judges -- one from the Court of Appeals and one justice each from our State's four Appellate Divisions -- will be asked to participate in this initiative based on their outstanding reputations and demonstrated experience and competence in international and commercial law matters.

These volunteer judicial referees will be available, not in their official adjudicative capacities but in their unofficial capacities, to offer responses to questions of New York law referred to them by the Supreme Court of New South Wales. Such questions would be referred with the consent of the litigants involved.

Pursuant to our Memorandum of Understanding, the terms of each referral must identify: (1) the precise question of New York law to be answered; (2) the facts or assumptions upon which the answer to the question is to be determined; and (3) whether and, if so, in what respects the referees may depart from the facts or assumptions and/or vary the question to be answered. In addition, the MOU makes clear that the question presented must be a substantial question of law so that the referee panel is not asked to expend time and resources addressing issues that are not central to the resolution of the Australian proceeding.

Of course, the Supreme Court of New South Wales would be available to provide reciprocal assistance to our appellate courts with regard to questions concerning the articulation and application of Australian law -- again with the litigants' consent. In New South Wales, Uniform Civil Procedure Law section 6.45 permits a party to a foreign proceeding to take out a summons for an answer to a question of Australian law. If such a summons is filed, a Justice of the New South Wales Supreme Court could issue a declaration of Australian law or the matter could be referred to a judge to act as a referee.

In New York, pursuant to an Administrative Order that I will issue shortly, the five judicial referees will be randomly assigned to work collegially in three-member panels.

They will be expected to issue joint writings no later than eight weeks after assignment or as expeditiously as circumstances may permit. Consistent with the general nature of any referee system, the Supreme Court of New South Wales would have the discretion to adopt, vary, or reject the referees' report in whole or in part.

Inasmuch as the judges in New York would not be acting as a court, or in their official adjudicative capacities, but rather as referees, we avoid the advisory opinion problem. In this regard, the referees' reports will contain a clear disclaimer that they are not intended to serve as official or binding articulations of New York law and do not carry precedential authority. Again, the Supreme Court of New South Wales will be free to give the reports whatever weight, if any, they deem appropriate, although we certainly anticipate that the referees' conclusions will enjoy a strong presumption of reliability.

This judicial referee protocol falls short of the ideal -- the kind of direct court-to court assistance embodied in the certified question procedure. Nonetheless, allowing experienced New York appellate judges to employ their collective expertise, best judgment and discretion to offer answers to questions of New York law still advances our goals significantly, because quite frankly, the Supreme Court of New South Wales can have great confidence that it is receiving a thorough, reliable report on the status of New York law as provided by a highly credible and neutral source.

It is unclear how frequently this procedure will be invoked. After all, we cannot answer questions of federal law such as bankruptcy and patent and trademark law. But what's important and newsworthy today is that our two judicial systems are committed to working together, in a spirit of comity, and for our mutual benefit, to assist each other in distilling and applying Australian and New York law so that we arrive at the correct and just result.

If nothing else, this agreement serves as a model for the future, and a model for the rest of the world, demonstrating the advantages of cooperation and comity in dealing with the growing number of transnational legal disputes. In the future, such cooperation will be essential to the fair administration of justice around the globe, to the continued growth of international commerce, and to the strengthening of ties between different legal systems and nations.

We should also explore international conventions governing certification of questions of foreign law. As I mentioned previously, there is precedent for such an approach in the British legal tradition. There is a relatively little known model that we can look to here in the United States, the Uniform Certification of Questions of Law Act, first promulgated in 1967 by the Uniform Law Commissioners, which has been helpful to a number of states that adopted certified question procedures.[12] In 1995, there was a little noticed amendment to the Act that expanded the types of courts that may certify a question of law to include the courts of Canada and Mexico. The intent of the amendment was to anticipate the increasingly global legal climate of the approaching 21st century, but as far as my research can determine, this amendment has not been adopted by any state.

I think it is incumbent upon all of us to be creative, and to explore any and all helpful models, including Memoranda of Understanding between individual judicial systems, like the one being signed today, that will allow the courts of different nations to

cooperate and assist each other in determining questions of foreign law in a more definitive, efficient and cost-effective manner.

Litigating in a foreign country can be extremely expensive and uncertain. Anything we can do to reduce delay and promote the ability of foreign courts to arrive at predictable results should be encouraged. If our judicial systems fail in achieving these objectives, there will be diminished confidence within the international business community, to the detriment of the global economic order, and certainly to the detriment of our domestic economies.

We all know that international legal disputes are increasing rapidly, and that businesses will continue to expand into foreign markets in order to compete in the global economy. I believe that our judicial systems have a responsibility to accept and respond to these trends so that we are well prepared to meet the changing needs and legitimate expectations of the global legal community.

I want to thank Jim Spigelman for his cooperation, support and flexibility in developing our Memorandum of Understanding. He has impressed me with his encyclopedic knowledge of these issues, and I credit him with raising my consciousness on a topic that I previously had not given enough thought to.

I am delighted to be with him and all of you -- if only by video -- to memorialize what I think will be recognized as an historic breakthrough in international collaboration between our judiciaries in New York and New South Wales. It is with great pleasure and anticipation that I look forward momentarily to signing the Memorandum of Understanding on behalf of the New York State Judiciary, with Chief Justice Spigelman representing the Supreme Court of New South Wales.

[1]. Remarks of Chief Judge Jonathan Lippman, delivered via video web cast at the NYSBA's International Section Seasonal Meeting in Sydney, Australia, October 27, 2010.

[2]. Jonathan Lippman is the Chief Judge of the State of New York and Chief Judge of the Court of Appeals.

[3]. Slip opinion no. 09-182, decided September 2, 2010.

[4]. Id. at 9.

[5]. Id. at 15.

[6]. Id. at 18-19.

[7]. Id. at 31.

[8]. 304 U.S. 64 (1938).

[9]. Eric Eisenberg, Note, *A Divine Comity: Certification (At Last) in North Carolina*, 58 Duke L.J. 69, 71 (2008).

[10]. N.Y. Const. art. VI, sec. 3(b).

[11]. See N.Y. Const. art. VI, sec. 20(b).

[12]. Available at http://www.law.upenn.edu/bll/archives/ulc/fnact99/1990s/ucqla95.pdf