MOU BETWEEN NEW YORK AND NEW SOUTH WALES

ADDRESS BY THE HONOURABLE J J SPIGELMAN AC

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NEW YORK STATE BAR ASSOCIATION

INTERNATIONAL SECTION MEETING

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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 a "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' 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.[1] 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.[2]

The difficulty in expressing the reasons for choosing between the opinions of two equally qualified experts[3] 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.

Perhaps somewhat perversely, the expansion of dialogue, interaction and understanding amongst the judges of different nations has reduced the willingness of judges to defer to colleagues overseas simply because of their status. That has

occurred as part of the same process as there has been an increase in the willingness to defer if the other jurisdiction is recognised for its ability and efficiency.

Judges have become more willing, generally at the request of parties in cross-border litigation, to assess the capacity of another legal system which could resolve the dispute. Judges are better placed to assess delays that arise in another jurisdiction and, with a higher degree of sensitivity, to assess the competence and the integrity of its judges. There are jurisdictions in which the level of corruption amongst the judiciary is known to be high and that is often accepted to be the case even by lawyers from such a jurisdiction.

Particularly in the context of commercial disputes with cross-border elements, judges in the jurisdictions with which I am most familiar, approach the issue of whether or not to assert or decline jurisdiction on the basis of serving the requirements of practical justice in the determination of a particular dispute. We no longer apply, in a technical manner, the rules of the conflicts of laws, let alone a concept of comity based only on national sovereignty. This trend should be encouraged.

The multiplication of legal disputes which have cross-border elements will require the judiciaries of different jurisdictions to co-operate to a degree that has never hitherto been the case, which I have addressed on earlier occasions.[4] This will encompass a range of forms of interaction between courts including:

- Assistance with service of process and evidence, particularly pursuant to the provisions of the *Hague Service Convention* 1965 and the *Hague Evidence Convention* 1970.
- Enforcement of judgments, particularly money judgments, pursuant to the existing patchwork quilt of national provisions of variable efficacy.
- Assistance to foreign litigation by the grant of freezing and search orders, to prevent assets from being dissipated and electronic records from being hidden.
- Assistance in the form of interim measures in support of international commercial arbitration, particularly pursuant to the 2006 Revision of the UNCITRAL *Model Law on International Commercial Arbitration*.
- Consideration of harmonious resolution of cross-border insolvency issues, particularly under the system of protocols for court to court communications developed pursuant to the

guidelines issued by the American Law Institute and the International Insolvency Institute.

- The harmonisation of procedure for commercial litigation amongst the major commercial jurisdictions, particularly by following the guidance provided by the Model Principles of Transnational Civil Procedure promulgated jointly by the American Law Institute and UNIDROIT, of which Principle 31 expressly calls for the provision of assistance between courts and which constitutes a workable compromise between the practices of common law and civil law jurisdictions.

There is nothing systematic about these various provisions for judicial co-operation. There is a real need for the development of bilateral and multilateral arrangements which will render it more effective.

The initiative we are announcing today may find wider favour with many jurisdictions that share our view as to the limitations of existing practice with respect to proof of foreign law. This is matter that could well be the subject of international treaties or conventions, whether bilateral or multilateral. In the case of Australia the most likely development of that character will be in

the continuing evolution of the treaty arrangements for judicial co-operation between Australia and New Zealand. By reason of our close relationship across the full range of legal interaction, that is the most likely first step to be taken by Australia in this regard. An important precedent exists in the *European Convention on Information on Foreign Law,* which makes express provision for requests for answers to legal questions from one judiciary to another within the European Union.

Pending the emergence of new international arrangements, across the full spectrum of matters to which I have referred, we are left with a complete disconnect between the willingness and ability of persons, particularly commercial corporations, to operate and interact across borders in a seamless manner, on the one hand, and the restrictions that are imposed upon public authorities, both regulatory and judicial, from acting in a similar manner. The freedom of commercial communication and transaction stands in marked contrast to the inhibitions upon communication and transaction between public authorities. Anything that can be interpreted as impacting upon the sovereignty of the nation, by reason of the intrusion of *any* manifestation of the sovereign power of another nation, is subject to restrictions that have been

abolished with respect to private actors, even extending to state-owned commercial actors.

One of the barriers to trade and investment, as significant as many of the tariff and non-tariff barriers that have been modified over recent decades, arises from the way the legal system impedes transnational trade and investment by imposing additional and distinctive burdens including:

- uncertainty about the ability to enforce legal rights;
- additional layers of complexity;
- additional costs of enforcement;
- risks arising from unfamiliarity with foreign legal process;
- risks arising from unknown and unpredictable legal exposure;
- risks arising from lower levels of professional competence, including judicial competence;
- risks arising from inefficiencies in the administration of justice and, in some cases, of corruption.

These additional transactions costs of international trade and investment are of a character which do not operate, or operate to a lesser degree, with respect to intra-national trade and investment. These increased transaction costs impede mutually beneficial exchange by means of trade and investment.

These problems may be ameliorated to a certain extent by the increased sense of collegiality amongst judges from different nations. Understandably, there remains some turf battle considerations between the judges, and their supporting legal professions, who wish to exercise their jurisdiction and keep the legal fees at home, at least in interesting cases. Like most international arrangements, this system will only be effective on the basis of true reciprocity.

The MOU we are entering today, even if it comes to be widely adopted, is a small step in ameliorating the disadvantages which the multiplicity of legal systems imposes on international intercourse. It is, I am convinced, a step in the right direction.

[1] See *Estate of Hatch v NYCO Minerals Inc* 245 AD 2d 746, 666 NYS 2d 296 (NW) App Div 1997.

[2] *BHP Limited v Oil Basins Limited* [2006] VSC 402; *Oil Basis Limited v BHP Billiton Limited* [2007] VSCA 255; (2007) 18 VR 346.

[3] This is not a novel difficulty. See, eg, *In re Duke of Wellington: Glentanar v Wellington* [1947] 1 Ch 506 and on appeal [1947] 1 Ch 118.

[4] See J J Spigelman "Transaction Costs and International Litigation" (2006) 80 *ALJ* 435; J J Spigelman "International Commercial Litigation: An Asian Perspective" (2007) 37 *Hong Kong Law Journal* 859 at 866-867; (2007) *Australian Business Law Review* 318, reprinted in Tim Castle (ed) (2008) *Speeches of a Chief Justice: James Spigelman 1998-2008*; J J Spigelman "Cross Border Insolvency: Cooperation or Conflict" (2009) 83 *ALJ* 44; J J Spigelman "The Hague Choice of Court Convention and International Commercial Litigation" (2009) 83 *ALJ* 386; J J Spigelman "Cross Border Issues for Commercial Courts: An Overview", Address to the Second Judicial Seminar on Commercial Litigation, Hong Kong, 13 January 2010; J J Spigelman "Freezing Orders in International Commercial Litigation" (2010) 22 *Singapore Academy of Law Journal* 490; J J Spigelman "The global financial crisis and Australian courts" (2010) 84 *Australian Law Journal* 615; J J Spigelman "Law and International Commerce: Between the Parochial and the Cosmopolitan" NSW Bar Association, Sydney, 22 June 2010. All of these addresses are accessible at Hwww.lawlink.nsw.gov.au/scH under "speeches".