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

about the correct application of foreign law to an actual dispute.

He also pointed out that this process results in foreign law being treated as a question of fact in Australia, and not of law, and that, as a result, the judges there very often don't feel that they are in the best position to interpret close or open questions of foreign law, or to exercise their discretion in any kind of nuanced way in individual cases.

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 he proposed to me, and it immediately resonated with me, was that we should try to work together to develop some kind of formal protocol to facilitate mutual cooperation and assistance between our respective court systems.

That made a lot of sense to me. New York City remains 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, the New York courts have a strong interest in assisting foreign courts in arriving at fair and correct decisions involving the determination and application of New York law. This is clearly in the best interests of our state economy, our sophisticated legal community and our own judicial system.

Moreover, with the accelerating pace of globalisation, courts all around the world will increasingly be called upon in the future 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 respond to it and advance the administration of justice internationally?

On a more practical level, the fact of the matter is that 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.

And the current systems for ascertaining foreign law in the United States are far from perfect. This was made clear only last month by the United States Court of Appeals for the 7th Circuit, in the case of *Bodum USA v La Cafeteire, Inc.*, 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 very well-known and influential jurists here in the Unites States.

All three judges were in clear agreement about how to interpret the contract. Yet Judge Posner and Judge Wood filed separate concurring opinions that focussed 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.

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.' 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.

According to Judge Posner, judges should, whenever possible, search through published materials and treatises because this is a better means of providing what he called 'neutral illumination' on issues of foreign law. In his view, the use of experts is excusable only when the foreign law is the law of a country with an obscure or poorly developed legal system where no secondary published materials are available. Judge Wood's filed a concurring opinion that passionately

defends the same system criticized by Easterbrook and Posner. According to Judge Wood:

> Exercises in comparative law are notoriously difficult, because the U.S. reader is likely to miss nuances in foreign law, to fail to appreciate the way in which one branch of the other country's law interacts with another . . . It will often be most efficient and useful for the judge to have before her an expert who can provide the needed precision on the spot, rather than have the judge wade through a number of secondary sources. . . . It is hard see why the expert's views cannot be tested in court, to guard against the possibility that he or she is just a mouthpiece for one party.

And by the way, this discussion is quite relevant to the New York State courts as well, where proof of foreign law is governed by CPLR 3016(e) and CPLR 4511(b). These provisions 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, or appointing a special master to report back, or having to do their own independent research. What my federal colleagues on the 7th 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 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's also quite interesting to me about the *Bodum* case 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.

Here in the United States, we have a shorter but now 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.'

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. 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 beautifully for many years in New York. The New York Court of Appeals is authorised under our state constitution to answer certified questions of law from the US Supreme Court, any US Circuit Court of Appeals or the highest court of any state. In a typical year, we receive anywhere from five to 10 certified questions, almost entirely 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, we have 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 a leadership role 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, as evidenced by the innovative agreement between the supreme courts of Singapore and New South Wales, which 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.

Now, while I was very much interested in working with Chief Justice Spigelman to formalise cooperation between our respective judicial systems, I also knew that what he really wanted – having an Australian court refer certified questions of New York law to the Court of Appeals for authoritative resolution was not possible under existing law.

Our certified question procedure was established pursuant to a state constitutional amendment back in 1985. Unfortunately, the language of that amendment did not include the courts of foreign nations. And because the jurisdiction of the Court of Appeals is delineated very specifically under Article VI, § 3 of the New York Constitution, the only way for the court to assert jurisdiction over certified questions from foreign courts would be to amend our constitution once again.

While I intend to propose just such an amendment in the future, amending the constitution here in New York is always a difficult and uncertain multi-year process, requiring approval by two separately elected legislatures, followed by the approval of the state's voters at the ballot box.

Aside from this problem, there were other concerns that we had to grapple with in trying to establish a suitable protocol, including the prohibition against courts issuing advisory opinions, judicial ethics concerns, and prohibitions on judges accepting a public office or trust. So it was clearly going to be a challenge to implement our shared goal of facilitating cooperation and consultation between our court systems.

What we came up with is certainly a more informal arrangement than I suppose the chief justice initially contemplated, but I very much believe that it will help accomplish our desired goals while making sure that New York's courts and judges do not exceed their powers or act inappropriately.

What we came up with, essentially, is something akin do a 'judicial referee system,' a standing panel of five judges – one from the Court of Appeals and one justice each from our state's four appellate divisions, our intermediate appellate court. Each one will be asked to serve on this panel based on their outstanding reputations and their demonstrated experience and interest in resolving international and commercial law matters.

These volunteer judicial referees will be available, not in their 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 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. But I'll let Chief Justice Spigelman explain the procedures in place in Australia.

Getting back to the New York procedure, the five judicial referees will be randomly assigned by me to work collegially in panels of three members. They will be expected to issue joint writings as expeditiously as possible – we hope in no more than a few weeks after receiving an assignment. 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.

Because the judges here 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, it will be necessary for the referees' reports to contain a clear disclaimer that their reports 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 hope and expect that the referees' conclusions will enjoy a strong presumption of validity.

This judicial referee protocol falls short of the ideal – the kind of direct court-to court assistance embodied in the certified question procedure. But even so, I do firmly believe that allowing these experienced New York judges to employ their collective expertise, best judgment and discretion to offer answers to questions of New York law still advances the ball tremendously, 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, a report that emanates from a neutral and highly credible source.

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.

And speaking of the future, I believe the great increase in global trade and transnational legal disputes requires us as judges, practitioners and citizens of different nation states to think very seriously about how we will go about making sure that our own judicial systems around the world are capable of rendering decisions that are fair and accurate, and that respect the law and legal systems of foreign nations.

In this regard, I really do believe the time has come for us in New York and the United States to consider adopting constitutional and statutory provisions that allow our domestic courts to accept certified questions from foreign courts.

We should also explore international conventions governing the certified questions of foreign law. As I mentioned previously, there is precedent for such an approach in the British legal tradition.

Here we are now in the twenty-first century, and we have been far too slow to recognize this new reality within our domestic judicial systems, and it is time to catch up. I think the time has come for our courts here in the United States, state and federal alike, to examine the Uniform Certification Act more closely, particularly with regard to expanding the use of certification in order to assist foreign courts that are in the position of having to adjudicate critical issues of US state and federal law. As I mentioned earlier, I for one will explore a constitutional amendment to that effect here in New York.

In the meantime, I think it's 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.