First Supplement to Memorandum 92-36

Subject: Study J-02.01/D-02.01 - Conflicts of Jurisdiction and Enforcement of Foreign Judgments (Comments of James Wawro and Professor Louise Teitz)

Exhibit 1 is a letter from Professor Louise Teitz, a member of the ABA subcommittee that drafted the Conflicts of Jurisdiction Model Act, making suggestions on the staff draft attached to the basic memo. Mr. Wawro, subcommittee chairman, also called the staff to comment. Their comments are discussed below.

Declaration of Public Policy

Section 1 of the Model Act provides:

> It is an important public policy of this state to encourage the early determination of the adjudicating forum for transnational civil disputes, to discourage vexatious litigation and to enforce only those foreign judgments which were not obtained in connection with vexatious litigation, parallel proceedings or litigation in inconvenient forums.

This section is not in the statute in the staff draft, but it is in the Comment to proposed Section 1720. Professor Teitz wants it in the statute to make clearer the strong public policy against duplicative litigation. The staff thinks the Comment is as good as a statutory provision for this purpose, but has no objection to including it in the statute.

Model Act Subject to Uniform Foreign Money-Judgments Recognition Act?

Like Section 2 of the Model Act, Section 1720 says judgments of the designated adjudicating forum are enforced under "ordinary rules for enforcement of judgments." The Comment says that for a foreign money judgment, this includes the Uniform Foreign Money-Judgments Recognition Act (Code Civ. Proc. §§ 1713-1713.9).

Under the UFMJRA, a foreign money judgment may be refused enforcement in California for various reasons, including that the foreign court did not provide an impartial tribunal or due process or lacked jurisdiction, or that the foreign judgment was obtained by extrinsic fraud or offends public policy of this state. Code Civ. Proc. § 1713.4. Under the Model Act, a court asked to designate an

adjudicating forum considers at that early stage the questions of public policy and the ability of the designated forum to get jurisdiction.

Professor Teitz is concerned about making the Model Act subject to the UFMJRA. The staff is not sure how she would revise the statute. In her law review article, she said that, if a judgment made in a designated adjudicating forum is subject to the UFMJRA,

> even a judgment in accord with the Model Act could be refused enforcement if the underlying cause of action is contrary to the forum's basic public policy. Since the success of the Model Act depends on the subsequent enforcement of a judgment, the use of public policy as a means of challenging enforcement is important and could weaken the Act's impact.

Teitz, *Taking Multiple Bites of the Apple: A Proposal to Resolve Conflicts of Jurisdiction and Multiple Proceedings*, 26 Int'l Law. 21, 51 (1992). The article concluded that if a Model Act judgment may be refused enforcement under the UFMJRA, the Model Act would provide "absolutely no benefit." *Id.* at 52.

In her letter (Exhibit 1), she takes a softer stand: "While I do not advocate (and did not in the article) ignoring the UFMJRA, the ability to avoid recognition . . . may create anomalous results." The staff is reluctant to take away the UFMJRA discretion of California courts to refuse to enforce a foreign judgment for lack of an impartial tribunal, lack due process, lack of jurisdiction, or that the foreign judgment was obtained by extrinsic fraud or offends public policy, whether or not the foreign judgment was made in a designated adjudicating forum. The staff would not revise the draft in this respect at this time. But the staff would like to discuss with Professor Teitz how she would accommodate the non-enforcement provisions of the UFMJRA to the enforcement provisions of the Model Act.

Designating Adjudicating Forum at Time of Enforcement of Judgment

Subdivision (d) of Section 1720 in the staff draft provides:

> (d) If no conclusive designation of an adjudicating forum has been made by another court as provided in this section, the court of this state requested to enforce the judgment shall designate the proper adjudicating forum as provided in this chapter.

The staff note after the section says subdivision (d) was not in the final version of the Model Act but was in two alternative versions considered by the ABA subcommittee, was included in Section 1720 to make the section clearer, and asked if it should be kept. Both Professor Teitz and Mr. Wawro would keep subdivision (d).

Limit to Case Where One Judgment was Made in Foreign Country?

The staff note after Section 1720 asks if the proposed statute should be limited to the case where one of the judgments was made in a foreign country, excluding the case where both judgments are in sister states. Mr. Wawro would not so limit the statute.

Professor Teitz is inclined to limit the statute for two reasons: (1) The full faith and credit clause of the U. S. Constitution supersedes the Model Act where a sister state judgment is being enforced; (2) if the statute applies to proceedings in several states, that may conflict with any federal complex litigation statute that may be developed, or with proposals resulting from the Complex Litigation Project of the American Law Institute.

The staff is persuaded by this, and recommends limiting the statute to the case where at least one of the multiple proceedings is in a foreign country. This would solve many, but not all, of the problems. It would still be possible two have two conflicting judgments, one in a foreign country and another in a sister state. The full faith and credit clause would appear to override the Model Act, and give priority to the sister state judgment, even though the foreign judgment was made in a designated adjudicating forum.

Perhaps the statute should be further restricted to apply only where one case is in California and the other is in a foreign country. We can raise this question in a note when we send the Tentative Recommendation out for comment.

Add Express "Good Faith" Requirement?

The Model Act comment says that among the factors the court may consider in designating an adjudicating forum is the "good faith of the litigants." There is no express good faith requirement in the Model Act itself or in the staff draft. The staff note after Section 1721

asks if good faith should be added to the list of factors in the section. Both Mr. Wawro and Professor Teitz would not add an express requirement of good faith. Mr. Wawro thinks it is too general a term, and that the specific factors listed in the section should govern. Professor Teitz thinks good faith is "implied under some of the other factors," such as the "interests of justice among the parties" and under the public policy declaration against vexatious litigation.

The staff would either remove "good faith" from the comment, or include it in the statute. Of these two choices, it is probably better to put it in the statute, since it broadens court discretion.

Weight Given to Plaintiff's Choice of Forum

The last factor in Section 1721 says "[p]laintiff's choice of forum should rarely be disturbed." Professor Teitz has reservations about this because the strong emphasis on plaintiff's choice of forum may cause a race to the courthouse, here or abroad. The staff thinks this is a good point. The staff recommends revising this factor to say the party challenging plaintiff's choice of forum has the burden of showing some other forum is preferable.

Effect of Forum Selection Clauses

Professor Teitz would include a provision on the effect of forum selection clauses in contracts. The staff thinks this is worth doing, but this will take some time to study and develop. If we can develop a suitable provision, we can ask for comments on it when the Tentative Recommendation is sent out.

Respectfully submitted,

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May 19, 1992

Law Revision Commission
RECEIVED

Mr. James Wawro
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801 South Grand Avenue
Los Angeles, California 90017-4615

File: _____

Key ~~Commission Proposal~~

Re: California Law Revision Commission Proposal on Conflicts of Jurisdiction and Enforcement of Foreign Judgments

Dear Jim:

You have asked for comments on the proposed California legislation adopting the substance of the Model Act. While I have not had time to consider all aspects of the proposed legislation, I do have a few comments. In my comments, I will refer to the Model Act in the form reprinted in your National Law Journal article of January 29, 1990 (and reprinted as Appendix I in 26 Int'l Law 21).

1. I would encourage California to include Section 1 from the Model Act in the proposed legislation. While I am aware that Connecticut did not include that section because of its statutory drafting policy, Section 1 of the Model Act may serve several important functions. First, by including the provision, the state's strong public policy against duplicative litigation will be clearer for Erie purposes. Second, I have some concern that a state that has adopted the Uniform Foreign Money-Judgments Recognition Act (UFMJRA) could, under certain circumstances, avoid the effect of the Model Act (see Louise Teitz, Taking Multiple Bites of the Apple: A Proposal to Resolve Conflicts of Jurisdiction and Multiple Proceedings, 26 Int'l Law. 21 (1992)). While I do not advocate (and did not in the article) ignoring the UFMJRA, the ability to avoid recognition because of public policy or contrary to a forum selection clause (see below), or in some states not including California, because of lack of reciprocity, may create anomalous results. For that reason, including the specific public policy of the Model Act under Section 1 would insure a meshing of the two statutes.

2. The inclusion of section (d) to section 1720 is a good idea. A similar section was included in the final version of the Model Act.

3. The Staff questioned the inclusion of "good faith" as a specific factor in section 1721. I do not believe that it should be included since it is implied under some of the other factors, such as (a), and also under Section 1, if adopted, which contains an expressed statement against vexatious litigation.

4. The inclusion of the last sentence of section 1722, concerning treating the determination of foreign law as one or law, accords with an earlier version of the Model Act. See 26 Int'l Law. 21, 47 n.103.

5. In connection with the specific factors in section 1721 or the proposed legislation, I still have some reservations about factor (n), that concerning the "plaintiff's choice" (I am not sure why the proposed legislation has dropped the Model Act's use of the phrase "realigned plaintiff"), especially since there is no definition of plaintiff for this purpose, and strong emphasis on this factor may lead to a race to the courthouse, here or abroad, to file suit. On the other hand, the factors were deliberately left "unweighted." See 26 Int'l Law. 21, 44-45.

6. I would encourage California to include a specific provision considering the effect of forum selection clauses on the proposed legislation and whether parties can create their own forum or oust the proper adjudicating forum. See 26 Int'l Law. 21, 53. I would recommend a specific statement since the treatment of forum selection clauses may also play a role in discretionary refusal to recognize foreign judgments under the UFMJRA. See Number 1 above.

7. I would encourage California to include some specific definitions or rules of construction (e.g., that terms will be interpreted to accord with state or federal rules of civil procedure). See 26 Int'l Law. 21, 54-55. In fact, one of the Staff's questions is whether the proposed legislation should be limited to a case where at least one of the proceedings has been in a foreign country. A definition could cover this issue. While I have not had time to consider thoroughly all aspects of the problem, I believe that the legislation could be so limited, especially since as a practical matter the full faith and credit clause would trump the Model Act. Certainly if a Pennsylvania judgment obtained without following the mechanisms of the Model Act were brought for enforcement in California, California would be bound to enforce the judgment. If one were to take a California judgment to Pennsylvania, Pennsylvania would have to accord the judgment the same preclusive effect that California would - and we would assume that California had followed the state statute. The more interesting question is how a federal court in Pennsylvania would treat the California judgment.

The inclusion of multiple U.S. proceedings, either state/state or federal/state, also is likely to conflict with any possible federal complex litigation statute (being considered) or statutory enactments resulting from the ALI's current (and still under consideration) Complex Litigation Project. (The reach of such a statute might be limited to mass torts which are probably not as large a part of the international parallel proceedings problem as are commercial disputes.)

I obviously believe that the Model Act offers a viable means of addressing the significant and increasing problem of parallel proceedings. Its value increases as more jurisdictions adopt it and California's support would no doubt lead to the initiation of legislation in several other states. Similarly, the hypothetical problems of coordinating the Model Act with the full faith and credit clause and concerns with the implications of the Erie doctrine on the Model Act decrease as more states within the United States enact legislation or if their action also encourages federal legislation or multinational treaties.

I would be interested in seeing and commenting on any changes made to the proposed legislation, as well as any other comments submitted to the Commission.

Sincerely,

Louise Ellen Teitz

Louise Ellen Teitz
Visiting Professor of Law