#J-02.01/D-02.01

rm360
10/28/92

First Supplement to Memorandum 92-65

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

Exhibits 1 and 2 are letters from Professor Louise Teitz and James Wawro, respectively. Both served on the ABA subcommittee that drafted the Conflicts of Jurisdiction Model Act.

The staff study attached to the basic memorandum proposes two alternatives. One alternative is to enact a new statute based on the Model Act. The other alternative is to amend the California Uniform Foreign Money-Judgments Recognition Act to say a foreign judgment need not be recognized in California if made in an inconvenient forum and California is not an inconvenient forum for trial of the action.

Both Professor Teitz and Mr. Wawro prefer the Model Act alternative. Professor Teitz says the Model Act is not biased in favor of California, and gives equal consideration to the policies of the foreign jurisdiction. She correctly points out that California forum non conveniens factors focus on California public policy, without balancing public policies of the competing foreign forum. This objection could be addressed in the second alternative by codifying Model Act factors for determining whether California should stay its action while the foreign action proceeds.

Professor Teitz says the second alternative is "protectionist," and lacks a global perspective. Both Professor Teitz and Mr. Wawro stress that the Model Act encourages determination of the adjudicating forum early in the litigation, thereby conserving resources and discouraging multiple litigation.

Mr. Wawro points out that under the second alternative, there is the possibility of deadlock, with the foreign court refusing to enforce a California judgment and the California court refusing to enforce the foreign judgment. He says it is "precisely this possibility of competing stays that the Model Act is designed to prevent."

Respectfully submitted,

Robert J. Murphy
Staff Counsel

EXHIBIT 1

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October 27, 1992

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Dear Mr. Murphy:

I appreciated the opportunity to participate in the Law Review Commission's meeting in September on the Conflicts of Jurisdiction Model Act and the continuing study of this legislation. I have reviewed Memorandum 92-65, covering the revised draft of the Model Act and the alternative proposal, and I have several comments. While I believe the Commission Staff has done an admirable job in creating another approach to some of the problems generated by multiple proceedings, I think that the Model Act offers a broader and more comprehensive means to deal with international litigation while accounting for global interests.

The Model Act and Alternative 2 seem to offer different approaches. The Model Act calls for a determination of the most appropriate forum among several for litigation to proceed. The determination is made from the perspective not merely of convenience of the designating forum but rather from the perspective of all possible forum. It therefore provides a more balanced, nonforum-biased determination which gives equal consideration to the policies and concerns of forum other than California. (It also accords with an approach taken by the Restatement (Second) of Conflicts section 6.) For example, when one applies the forum non conveniens analysis of California and some of the factors listed on the chart in Exhibit 1, factors 11 and 13 incorporate primarily the policies of the forum, California, without considering neutrally the policies of other forum. The forum non conveniens factor (11) is the "burden on this state's judicial resources;" the Model Act factor is the impact on judicial systems of courts. The forum non conveniens factor (13) is "this state's interest in providing a forum ... and the state's public interest;" the Model Act factor is "public policies of the countries having jurisdiction of the dispute, including the interest of affected courts in having the proceedings take place in their respective forums; the interests of worldwide justice." The focus of California's forum non conveniens analysis is inherently narrower, looking at California's interest as a convenient forum and the existence of an alternative forum, but not at what is the most appropriate forum. In addition, the Model Act factors, which must be considered in total in each determination, do offer a less

convenience-oriented analysis. Although I am not that familiar with California forum non conveniens law, which I assume is to be incorporated into the actual judgment part of alternative 2, I am not certain that all of the cases consider all of the factors listed in Exhibit 1. In fact, one of the benefits of the Model Act is the incorporation of all factors, unweighted, in the determination.

In addition, the Model Act accords more closely with the goal of discouraging parallel proceedings without infringing on the sovereignty of other nations. Alternative 2 appears to be a one-way street. It will refuse to enforce judgments from other forum where the other forum was inconvenient and California was not inconvenient-- although I don't read that as saying that any determination has been made that California is convenient. In contrast, the Model Act allows California to enforce a judgment from a proper adjudicating forum, not merely California,(see proposed section 1721(d)), thus offering California the opportunity to encourage and promote proceedings in accordance with the Model Act, rather than appearing to take a protectionist approach and one that does not accord with a global perspective.

One of the strong points of the Model Act is its early determination of the appropriate adjudicating forum as noted in the Commission Staff's Memorandum 92-51 at 3. In contrast, alternative 2 appears to operate only at the time of enforcement of a judgment from a foreign forum. While the Staff suggests that parties might seek an early determination in California that the action in California should be dismissed for forum non conveniens, I do not see any requirement or means by which this is implemented, especially since it appears that determinations of forum non conveniens can be made at any time throughout the proceedings. Nor is there any specific provision for a stay. In addition, that determination would be that California is not an inconvenient forum, but not that it is the most convenient or that necessarily another forum is inconvenient. Alternative 2 does not deal as directly or as early with the ultimate problem of discouraging parallel proceedings at the outset. The Model Act allows determination early in the proceedings, thereby conserving resources and discouraging continuation of multiple litigation.

The Model Act offers a more uniform approach with specific standards that courts are familiar with applying. Although I am not an expert on California law of forum non conveniens, it is my understanding that there is some inconsistency in the current California forum non conveniens caselaw, reflecting the substantial uncertainty of scholars about state and federal forum non conveniens doctrine. A model act, with specific factors, will lead to a more uniform determination and one which will also be in harmony in accord with other jurisdictions that have and will adopt the Model Act.

Finally, the Model Act, I believe, provides less chance of a conflict between state and federal courts and the potential for an Erie problem developing when a case is in federal court. This is helped by the inclusion in proposed section 1720 of the statement that the Model Act is a strong public policy of California. Otherwise, with alternative 2, I think that the determination of what is an inconvenient forum as part of a motion to dismiss will vary with whether the action is in federal or state court, and will lack the potential of the Model Act for uniformity if the Model Act is viewed as substantive in federal proceedings.

Although the Staff proposal addresses many of the problems, the Model Act offers several significant advantages: the conservation of judicial and party resources and at an early stage; the consistency and uniformity of a Model Act; the operation by the voluntary actions of the litigants without interfering with the sovereignty of other nations; and most importantly, a nonforum-biased perspective reflecting a global rather than local approach to the solution.

Thank you for the opportunity to comment.

Sincerely yours,

Louise Ellen Teitz

Louise Ellen Teitz
Visiting Associate Professor of Law

cc: James Wawro, Esq.

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BY TELECOPIER

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Re: Conflicts of Jurisdiction Model Act

Dear Bob:

Thank you for your October 1, 1992 letter inviting comments on Memorandum 92-65. Let me first say that the Memorandum is an excellent job in a difficult area. We agree with much of it.

In addition to the comments Professor Teitz is making, I wanted to note just a few items about "Alternative 2" suggested in the Memorandum:

1. Much of the Model Act deals with problems inherent in determining when a "cause of action or defense on which the judgment is based is the subject of an action pending in a court in this state involving the same parties." What issues are raised if the cause of action in the first forum is slightly different from the cause of action in the second forum? What issues are raised if there are some different parties in the two actions?

2. The timing on staying a foreign judgment until a result is reached in California and then denying enforcement to the foreign judgment on the grounds that a final, inconsistent California judgment has been reached is not in keeping with the parallel proceedings rule's principle that the first suit reaching judgment becomes res judicata for all

similar suits. This could lead to deadlock if a court in the foreign country decides to stay the application of any California judgment entered after a California court stayed the foreign judgment until California could rule. It is precisely this possibility of competing stays that the Model Act is designed to prevent.

3. Finally, one of the advantages of the Model Act is an early determination of the proper adjudicating forum. "Alternative 2" would not come into effect until a party was seeking to enforce a foreign judgment. This situation is fraught with all the post-judgment peril of national sovereignty, deadlock, anti-suit injunction and parallel proceedings.

As a practical matter, we believe that the Model Act better addresses the questions of parallel proceedings than does a stay approach.

Sincerely yours,

James Jawro

JW:tnk

cc: Professor Louise Ellen Teitz