

Second Supplement to Memorandum 92-65

Subject: Study J-02.01/D-02.01 - Conflicts of Jurisdiction and Enforcement of Foreign Judgments (Redraft of Alternative #2)

Professor Louise Teitz has pointed out (Exhibit 1 to First Supplement) that Alternative #2 attached to Memorandum 92-65 is flawed in relying on California forum non conveniens grounds to stay parallel proceedings in California. California forum non conveniens grounds focus on California public policy. See, e.g., *Stangvik v. Shiley Inc.*, 54 Cal. 3d 744, 760, 819 P.2d 14, 1 Cal. Rptr. 2d 556, 566 (1991) (policies of foreign jurisdiction considered "only in passing"). Factors drawn from the Model Act would be more even-handed.

Attached is a revised draft of Alternative #2 requiring a California court to use factors drawn from the Model Act to determine whether California or a foreign country is the most appropriate forum for litigating the dispute. The staff recommends the draft be circulated for comment after substituting the revised draft of Alternative #2 for the version in the draft attached to Memorandum 92-65.

Respectfully submitted,

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ALTERNATIVE # 2 --
STAY OF CALIFORNIA ACTION OR NON-ENFORCEMENT OF FOREIGN JUDGMENT

Another way to deal with the parallel proceedings problem is to permit the California court to determine whether California or the foreign court is a more appropriate forum for litigating the dispute on grounds drawn from the Conflicts of Jurisdiction Model Act. If the California court finds the foreign forum is preferable, it could stay the California action until the foreign action is decided.²² If the California court finds California is the preferable forum, it could refuse to recognize the foreign judgment, and refuse to give it res judicata effect in the California proceeding.²³

A party filing a foreign action hoping to enforce the foreign judgment in California would have an incentive to move the California court early in the proceeding²⁴ for a stay on the ground that the foreign court is a more appropriate forum. If the stay motion is denied and it appears the foreign judgment will have to be enforced in California to be efficacious, the moving party would have no incentive to continue parallel proceedings in the foreign court, and would be encouraged to accept resolution of the dispute in California.²⁵

22. The California court could also stay or dismiss the California action if the court finds that in the interest of substantial justice (e.g., that California is an inconvenient forum) the action should be heard in a forum outside this state. Code Civ. Proc. § 410.30.

23. A foreign judgment normally is res judicata in California if it has that effect in the country where rendered and meets the American standard of fair trial before a court of competent jurisdiction. 7 B. Witkin, *California Procedure Judgment* § 206, at 643 (3d ed. 1985).

24. The new procedure would be analogous to a motion for dismissal or stay on forum non conveniens grounds, which may be made at any time in the proceeding. 2 B. Witkin, *California Procedure Jurisdiction* § 307, at 721 (3d ed. 1985); 2 *California Civil Procedure Before Trial* § 29.13 (3d ed., Cal. Cont. Ed. Bar).

25. This depends on where defendant's assets are located. If all assets are in California and the California court declines to grant a stay to the party who filed the foreign action, that party would have no incentive to continue the foreign action. This would not be true if defendant has substantial assets in the foreign jurisdiction.

The Commission solicits comments on whether this alternative is preferable to adopting the Conflicts of Jurisdiction Model Act.

PROPOSED LEGISLATION -- ALTERNATIVE # 2 (REVISED DRAFT)

Code Civ. Proc. §§ 410.80-410.88 (added). Simultaneous Proceedings in This State and Foreign State

Article 4. Simultaneous Proceedings in This State and Foreign State

§ 410.80. "Foreign state"

410.80. As used in this article, "foreign state" means a governmental unit other than the following:

(a) The United States.

(b) Any state, district, commonwealth, territory, or insular possession of the United States.

(c) The Panama Canal Zone.

(d) The Trust Territory of the Pacific Islands.

Comment. Section 410.80 is drawn from Section 1713.1.

§ 410.82. Simultaneous proceedings; determination of most appropriate forum

410.82. If proceedings are pending in this state and in one or more foreign states arising out of the same transaction or occurrence and involving the same parties, the court in which the proceeding in this state is pending may, on motion of a party, determine which forum is most appropriate for litigating the dispute.

Comment. Section 410.82 is drawn from a portion of Section 2 of the Conflicts of Jurisdiction Model Act, recommended by the Conflicts of Jurisdiction Subcommittee of the International Law Section of International Law and Practice of the American Bar Association. In determining which forum is most appropriate for litigating the dispute under Section 410.82, the court must consider the factors in Section 410.86.

Section 410.82 supplements Section 410.30 (dismissal or stay for forum non conveniens). If the court dismisses the California proceeding under Section 410.30, Section 410.82 will not apply since there will no longer be a proceeding in this state.

§ 410.84. Stay

410.84. (a) If the court determines that a foreign state in which one of the proceedings is pending is the most appropriate forum for

litigating the dispute, the court may stay the proceeding in this state on any conditions that are just.

(b) If the court determines that this state is the most appropriate forum for litigating the dispute, the courts in this state may decline to recognize a judgment in any of the foreign proceedings, including declining to give the judgment res judicata effect.

Comment. Subdivision (a) of Section 410.84 is drawn from Section 410.30. Subdivision (b) is drawn from Section 2 of the Conflicts of Jurisdiction Model Act.

§ 410.86. Factors in determining most appropriate forum; burden of proof

410.86. (a) Subject to subdivision (b), in determining whether this state or a foreign state is the most appropriate forum for litigating the dispute under Section 410.82, the court shall consider all of the following factors:

- (1) The interests of justice among the parties.
- (2) The public policies of the foreign states having jurisdiction of the dispute, including the interest of the affected courts in having proceedings take place in their respective forums.
- (3) The place of the transaction or occurrence out of which the dispute arose, and the place of any effects of that transaction or occurrence.
- (4) The nationality of the parties.
- (5) The substantive law likely to apply and the relative familiarity of the affected courts with that law.
- (6) The availability of a remedy and the forum likely to afford the most complete relief.
- (7) The location of witnesses and availability of compulsory process.
- (8) The location of documents and other evidence, and the ease or difficulty in obtaining, reviewing, or transporting the evidence.
- (9) The place of first filing, how long the case has been pending in that place, and the connection of that place with the dispute.
- (10) Whether the foreign state has jurisdiction over the persons and property that are the subject of the proceeding.
- (11) Whether determining that a foreign state is the most

appropriate forum is preferable to having parallel proceedings in adjudicating the dispute.

(12) The nature and extent of past litigation over the dispute and whether determining that a foreign state is the most appropriate forum will unduly delay the adjudication or prejudice the rights of the original parties.

(b) The court shall determine the most appropriate forum as provided in any agreement between the parties specifying the forum in which the dispute is to be litigated, and need not consider the factors set out in subdivision (a), unless there is a showing that the agreement is unreasonable.

Comment. Subdivision (a) of Section 410.86 is drawn from Section 3 of the Conflicts of Jurisdiction Model Act. Factors considered by the court under Section 410.86 are comparable to those applied in forum non conveniens cases, except that they balance the public policies of California and the foreign state even-handedly, while California forum non conveniens factors tend to focus on California public policy. See, e.g., *Stangvik v. Shiley Inc.*, 54 Cal. 3d 744, 760, 819 P.2d 14, 1 Cal. Rptr. 2d 556, 566 (1991) (policies of foreign jurisdiction considered "only in passing").

Subdivision (b) is drawn from Section 1713.4(b)(5). It is generally consistent with California case law. See *Smith, Valentino & Smith, Inc. v. Superior Court*, 17 Cal. 3d 491, 551 P.2d 1206, 131 Cal. Rptr. 374 (1976); *Bos Material Handling, Inc. v. Crown Controls Corp.*, 137 Cal. App. 3d 99, 108, 186 Cal. Rptr. 740 (1982).

§ 410.88. Evidence

410.88. (a) In a determination under this article, the court may consider any evidence admissible in courts of this state or of the foreign state, including but not limited to the following:

- (1) Affidavits or declarations.
- (2) Treaties to which the government of either forum is a party.
- (3) Principles of customary international law.
- (4) Testimony, including testimony of expert witnesses.
- (5) Diplomatic notes or amicus submissions from the government of the United State or the foreign state.

(6) Statements of public policy by the government of this state, the United States, or the foreign state. Statements of public policy may be set forth in legislation, executive or administrative action, learned treatises, or by inter-governmental organizations in which the government participates.

(b) Reasonable written notice shall be given by a party seeking to raise a question of the law of a foreign state. In deciding questions of the law of a foreign state, the court may consider any relevant material or source, including testimony, whether or not admissible. The court's determination shall be treated as a ruling on a question of law.

Comment. Section 410.88 is the same in substance as Section 4 of the Conflicts of Jurisdictions Model Act.

CONFORMING REVISION

Code Civ. Proc. § 1713.4 (amended), Grounds for non-recognition of foreign judgment

1713.4. (a) A foreign judgment is not conclusive if any of the following conditions exist:

(1) The judgment was rendered under a system ~~which~~ that does not provide impartial tribunals or procedures compatible with the requirements of due process of law † .

(2) The foreign court did not have personal jurisdiction over the defendant†-e# .

(3) The foreign court did not have jurisdiction over the subject matter.

(b) A foreign judgment need not be recognized if any of the following conditions exist:

(1) The defendant in the proceedings in the foreign court did not receive notice of the proceedings in sufficient time to enable ~~him~~ the defendant to defend† .

(2) The judgment was obtained by extrinsic fraud† .

(3) The cause of action or defense on which the judgment is based is repugnant to the public policy of this state† .

(4) The judgment conflicts with another final and conclusive judgment† .

(5) The proceeding in the foreign court was contrary to an agreement between the parties under which the dispute in question was to be settled otherwise than by proceedings in that court†-e# .

(6) In the case of jurisdiction based only on personal service, the foreign court was a seriously inconvenient forum for the trial of the action.

(7) A court determined under Article 4 (commencing with Section 410.80) of Chapter 1 of Title 5 of Part 2 that this state is the most appropriate forum for litigating the dispute which is the subject of the foreign judgment.

Comment. Paragraph (7) is added to subdivision (b) of Section 1713.4 to cross-refer to the authority of the court to decline to recognize a foreign judgment under Section 410.84 (simultaneous proceedings in this state and foreign state).