#J-02.01/D-02.01 rm261
05/11/92

Memorandum 92-36

Subject: Study J-02.01/D-02.01 - Conflicts of Jurisdiction and Enforcement of Foreign Judgments (Model Act)

About a year ago, attorney James Wawro of Los Angeles wrote to suggest the Commission consider the Conflicts of Jurisdiction Model Act. The Model Act was recommended in 1989 by the Conflicts of Jurisdiction Subcommittee of the International Section of International Law and Practice of the American Bar Association. Mr. Wawro chaired the subcommittee.

The Commission took this up with other new topic suggestions at the April 1991 meeting. The Commission directed the staff to continue to focus on priority topics, but to work smaller items into the agenda as time permits.

Attached is a staff draft of a Tentative Recommendation entitled *Conflicts of Jurisdiction and Enforcement of Foreign Judgments* drawn from the Model Act. Also attached is a copy of Mr. Wawro's letter with the text of the Model Act (Exhibit 1). The Commission's authority to study this topic is included in its authority to study the law relating to creditors' remedies, including enforcement of judgments.

The Model Act purports to remedy the excesses of the "parallel proceedings" rule. Under this rule, if transnational litigation is commenced in federal or state court in the United States and a second action concerning the same transaction or occurrence is brought in another country, both actions may proceed simultaneously, even if the second action is vexatious. The Model Act allows the court where the action was first filed to decide whether or not it should be the preferred forum for deciding the case. A foreign judgment entered in contravention of the court's decision could be refused enforcement in that jurisdiction. The Model Act has been enacted in one state (Connecticut).

In seeking to avoid duplicative and sometimes vexatious transnational litigation, the Model Act expresses sound policy. If the Model Act were enacted in California, it appears it would govern enforcement of foreign judgments in diversity cases in federal courts

in California, as well as in California state courts. This is because recognition and enforcement of foreign judgments are treated as "substantive," and therefore governed by state law in federal diversity cases under *Erie Railroad Co. v. Tompkins*. See footnote 20 in the Tentative Recommendation.

The recommended version of the Model Act and two alternate drafts differed on the degree of court discretion to decline to enforce a foreign judgment:

Recommended version: Courts of this state "have discretion to refuse the enforcement of the judgments" of a foreign court "unless application for designation of an adjudicating forum was timely made."

Alternate 1: Courts of this state "shall enforce the judgments" of a foreign court "only if application for designation of an adjudicating forum was timely made."

Alternate 2: Foreign judgment "shall be enforced if it is first determined that the court which rendered the judgment was the appropriate adjudicating forum."

The staff prefers the recommended version. It gives presumptive, but not conclusive, validity to a foreign judgment made in a designated adjudicating forum. The Comment notes that enforcement of such judgments "should be relatively automatic." If the foreign judgment is not made in a designated adjudicating forum, the California court may refuse enforcement. Of the three versions, the recommended version appears to give the most discretion to the California court.

The staff recommends the Commission approve the Tentative Recommendation for distribution for comment.

Respectfully submitted,

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April 5, 1991

Forrest A. Plant, Esq.
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303

Re: Prevention of International Forum Shopping

Dear Mr. Plant:

In discussing the adoption of a Model Act on this subject with Mr. Huston Lowry, one of Connecticut's Law Revision members, it occurred to me to propose also the enclosed Model Act for adoption in California.

The Model Act arises from an anomaly in international law whereby courts, reluctant to issue anti-suit injunctions, allow for the simultaneous litigation of identical transnational disputes in separate forums. The Model Act is designed to eliminate this practice.

I offer the enclosed Model Act for your consideration and look forward to speaking with you about any questions you may have.

Sincerely yours,

James Wawro

JW:tnk
Enclosure

# CONFLICTS OF JURISDICTION MODEL ACT

Conflicts of Jurisdiction
Subcommittee
International Section of
International Law and Practice
American Bar Association

Presented at Los Angeles,
California

# CONFLICTS OF JURISDICTION MODEL ACT

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# CONFLICTS OF JURISDICTION MODEL ACT

Section 1. Declaration of Public Policy.

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.

## COMMENT

The growing economic interdependence of the world's nations, together with the co-extensive jurisdiction of many sovereign nations over typical transnational disputes, has led to the adoption in many countries of the "parallel proceedings" rule; that is, if two nations have valid jurisdiction in cases there involving the same dispute, each suit should proceed until judgment is reached in one of the suits. Then, all other jurisdictions should recognize and enforce the judgment reached through principles of res judicata and the rules of enforcement of judgments.

The disadvantages of the "parallel proceedings" rule include the fact that civil litigants have used this concession to comity to frustrate justice by making litigation in many forums inconvenient, expensive and vexatious. Courts in the United States have adopted the "parallel proceedings" rule (Laker Airways, Ltd. v. Sabena Belgian World Airlines, 731 F.2d 909 (D.C.Cir. 1984) and have held that the rule should be followed regardless of the vexatious nature of the parallel proceedings (China Trade and Development v. M.V. Choong Yong, 837 F.2d 33 (2d Cir. 1987).

This Model Act remedies the excesses of the "parallel proceedings" rule by using a forum-related device (enforcement of foreign judgments) and a recognized exception to the rule (an important forum public policy will override the "parallel proceedings" rule), without encroaching upon the sovereign jurisdiction of other forums. The mechanism used, discretionary withholding of enforcement of judgments obtained through vexatious litigation, puts the greatest penalty for engaging in vexatious litigation on the vexatious litigants, and not on the courts, the international system of comity, nor innocent litigants.

Section 2. Discretion to Enforce Judgments.

a. In cases where two or more proceedings arising out of the same transaction or occurrence were pending, the courts of this State shall have discretion to refuse the enforcement of the judgments of any of such courts unless application for designation of an adjudicating forum was timely made to the first known court of competent jurisdiction where a proceeding was commenced, or to the adjudicating forum after its selection, or to any court of competent jurisdiction if the foregoing courts are not courts of competent jurisdiction.

b. An application for designation of an adjudicating forum is timely if made within six months of reasonable notice of two such proceedings, or of reasonable notice of the selection of an adjudicating forum.

c. The determination of the adjudicating forum is binding for the purpose of enforcement of judgments in this State upon any person served with notice of an application to designate. The courts of this State shall enforce the judgments of the designated adjudicating forum pursuant to the ordinary rules for enforcement of judgments. The selection of the adjudicating forum shall be accorded presumptive validity in this State if the decision determining the adjudicating forum evaluated the factors set forth in the following section.

COMMENT

A workable device to discourage "parallel proceedings" must be strong enough to be effective, even against foreign litigants over whom the forum court may not have jurisdiction. However, the device should not be so strong that other sovereign jurisdictions view it as a usurpation of their jurisdiction and retaliate by antisuit injunction or refusal to enforce the judgments of the State employing the device.

The discretion granted by this Model Act to the court asked to enforce a judgment rendered in a "parallel proceeding" allows maximum flexibility for the court to consider, after the fact, the interplay of jurisdiction, public policy, comity, "parallel proceedings", the good faith of the litigants and all of the other Section 3 factors which the courts have traditionally considered in determining where a dispute should be adjudicated.

At the same time, the device must fairly apprise litigants that they risk refusal of enforcement of any judgment obtained through vexatious litigation. It is believed that this risk will be a strong encouragement to all litigants to present for enforcement in this State only those judgments not obtained through vexatious litigation.

For those foreign judgments procured in conformity with this Model Act, enforcement should be relatively automatic.

Section 3. Factors in Selection of Adjudicating Forum.

A determination of the adjudicating forum shall be made in consideration of the following factors:

a. the interests of justice among the parties and of world-wide justice;

b. the public policies of the countries having jurisdiction of the dispute, including the interest of the affected courts in having proceedings take place in their respective forums;

c. the place of occurrence, and of any effects, of the transaction or occurrence out of which the dispute arose;

d. the nationality of the parties;

e. substantive law likely to be applicable and the relative familiarity of the affected courts with that law;

f. the availability of a remedy and the forum likely to render the most complete relief;

g. the impact of the litigation on the judicial systems of the courts involved, and the likelihood of prompt adjudication in the court selected;

h. location of witnesses and availability of compulsory process;

i. location of documents and other evidence and ease or difficulty associated with obtaining, reviewing or transporting such evidence;

j. place of first filing and connection of such place to the dispute;

k. the ability of the designated forum to obtain jurisdiction over the persons and property that are the subject of the proceedings;

l. whether designation of an adjudicating forum is a superior method to parallel proceedings in adjudicating the dispute;

m. the nature and extent of litigation that has proceeded over the dispute and whether a designation of an adjudicating forum will unduly delay or prejudice the adjudication of the rights of the original parties; and

n. realigned plaintiff's choice of forum should rarely be disturbed.

COMMENT

The listed factors are those the courts have considered in ruling on proper venue (Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947); Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981)) and in determining whether an antisuit injunction should issue (Laker Airways v. Sabena, Belgium World Airlines, 731 F.2d 909 (1984)), although some courts have argued that these factors should not be mixed. China Trade and Development v. M.V. Choong Yong, 837 F.2d 33 (2d Cir. 1987); Laker Airways, supra. It is believed that the threat of discretionary refusal to enforce vexatious judgments so little offends the sovereign jurisdiction of other nations that the courts of this State should be free to determine where in fact a matter should have been adjudicated without fear of encroaching on foreign jurisdiction by applying forum non conveniens concerns. Since the reason for keeping these factors separate is thus inapplicable to this device, all of such factors may be considered.

Section 4. Evidence

In exercising the discretion granted it by this Act, the court may consider any evidence admissible in the adjudicating forum or other court of competent jurisdiction, including but not limited to:

a. affidavits or declarations;

b. treaties to which the state of either forum is a party;

c. principles of customary international law;

d. testimony of fact or expert witnesses;

e. diplomatic notes or amicus submissions from the state of the adjudicating forum or other court of competent jurisdiction;

f. statements of public policy by the state of the adjudicating forum or other court of competent jurisdiction set forth in legislation, executive or administrative action, learned treatises, or participation in inter-governmental organizations.

Reasonable written notice shall be given by any party seeking to raise an issue concerning the law of a forum of competent jurisdiction other than the adjudicating forum. In deciding questions of the law of another forum, 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

1. The selection of an adjudicating forum is intended to be an evidentiary proceeding based on a record developed in accordance with municipal rules of procedure. Development of an evidentiary record will be critical to ensure that the determination of an adjudicating forum is in accordance with the Model Act and to permit other forums to rely on the initial determination with confidence.

2. The forms of potential evidence to be offered in the determination of an adjudicating forum will require presentation of evidence regarding both the interests of the litigants and those of the various states where jurisdiction may lie. Persuasive advocacy will be required to go beyond the mere recitation of the availability of a cause of action in a particular forum or the invocation of general claims of sovereignty.

3. The determination of an adjudicating forum will be most difficult in crowded courts of general jurisdiction where the court may lack a background or interest in international law issues. The balancing of interests in the selection of an adjudicating forum may arise only a handful of times each year. The burden will fall on counsel to educate the court as to the types of factors to be considered, the weight to be given to such factors, the burden of proof, and the nature and evidence of international law to be presented. It is intended that the greatest possible variety of evidence be considered in the

selection of an adjudicating forum. Within the United States, counsel is urged to look to congressional hearings, testimony, and submissions, Freedom of Information Act materials, United States treaties, executive agreements, diplomatic correspondence, participation in international organizations such as United Nations and its various affiliated organizations, historical practice and custom in connection with the designation of an adjudicating forum.

4. The submission of governmental entities is welcome as an important source to be considered by the court. In accordance with principles of international law and the Act of State doctrine, submissions by a foreign government should be deemed conclusive as to matters of that state's domestic law, but would not be conclusive as to the legal effect of the foreign state's laws within the jurisdiction of the court selecting an adjudicating forum. United States v. Pink, 315 U.S. 203 (1962).

5. The proof of foreign law is modeled after Rule 44.1, Federal Rules of Civil Procedure which allows a proof of foreign law as a matter of fact. The portion of Rule 44.1 requiring de novo review of foreign law determinations by an appellate court has not been included in the Model Act as unduly interfering with the diverse appellate procedures of national legal systems. Appellate review of all aspects of the selection of an adjudicating forum would be in accordance with applicable municipal law.

#J-02.01/D-02.01

STATE OF CALIFORNIA

California Law Revision Commission

Staff Draft

TENTATIVE RECOMMENDATION

# CONFLICTS OF JURISDICTION AND ENFORCEMENT OF FOREIGN JUDGMENTS

May 1992

*This tentative recommendation is being distributed so that interested persons will be advised of the Commission's tentative conclusions and can make their views known to the Commission. Any comments sent to the Commission will be a part of the public record and will be considered at a public meeting when the Commission determines the provisions it will include in legislation the Commission plans to recommend to the Legislature. It is just as important to advise the Commission that you approve the tentative recommendation as it is to advise the Commission that you believe revisions should be made in the tentative recommendation.*

COMMENTS ON THIS TENTATIVE RECOMMENDATION SHOULD BE RECEIVED BY THE COMMISSION NOT LATER THAN August 15, 1992.

*The Commission often substantially revises tentative recommendations as a result of the comments it receives. Hence, this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.*

CALIFORNIA LAW REVISION COMMISSION
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

## SUMMARY OF RECOMMENDATION

This tentative recommendation proposes to enact the Conflicts of Jurisdiction Model Act to discourage simultaneous litigation in two or more countries concerning the same transaction or occurrence.

The Model Act permits the court where the action was first filed to determine where the case should most appropriately be litigated. If a litigant nonetheless goes forward to judgment in some other forum, California may decline to enforce the foreign judgment. Thus duplicative and vexatious litigation is minimized without infringing on the sovereignty of another country.

This tentative recommendation was prepared pursuant to Resolution Chapter 40 of the Statutes of 1983, continued in Resolution Chapter 33 of the Statutes of 1991.

rm258
5/11/92

# CONFLICTS OF JURISDICTION AND ENFORCEMENT OF FOREIGN JUDGMENTS

With the increase of transactions that cross international boundaries, litigants are increasingly likely to be involved in simultaneous contests in two or more countries.[1] If two actions arising from the same transaction or occurrence are pending, one in federal or state court in California and the other in a foreign country, the court in California is under no duty to stay its action[2] or to enjoin the parties from proceeding with the foreign action.[3] Both actions may proceed simultaneously. This is called the "parallel proceedings" rule, under which both actions proceed until judgment is

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1. Teitz, *Taking Multiple Bites of the Apple: A Proposal to Resolve Conflicts of Jurisdiction and Multiple Proceedings,* 26 Int'l Law. 21, 22 (1992).

2. Landis v. North American Co., 299 U.S. 248, 254 (1936); Pesquera del Pacifico v. Superior Court, 89 Cal. App. 2d 738, 740-41, 201 P.2d 553 (1949). See also 2 B. Witkin, California Procedure *Jurisdiction* § 341, at 761 (3d ed. 1985).

3. Injunctions restraining litigants from proceeding in courts of other countries are "rarely issued." Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 927 (D.C. Cir. 1984); *cf.* Pesquera del Pacifico v. Superior Court, 89 Cal. App. 2d 738, 740-41, 201 P.2d 553 (1949). Injunctions against foreign suits should be "used sparingly," United States v. Davis, 767 F.2d 1025, 1038 (2d Cir. 1985), and should be granted "only with care and great restraint," Canadian Filters (Harwick) v. Lear-Siegler, 412 F.2d 577, 578 (1st Cir. 1969). When a party is enjoined from proceeding in a state court in the United States by a court in another jurisdiction, some states hold its courts may allow or deny itself as a forum under flexible principles of comity. Other states, including California, apply a strict rule, and will not allow an action to proceed if a party has been enjoined in another jurisdiction from doing so. Smith v. Walter E. Heller & Co., 82 Cal. App. 3d 259, 271, 147 Cal. Rptr. 1 (1978). See generally Hartley, *Comity and the Use of Antisuit Injunctions in International Litigation,* 35 Am. J. Comp. L. 487 (1987); Note, *Antisuit Injunctions and International Comity,* 71 Va. L. Rev. 1039 (1985).

reached in one, without regard to whether either proceeding is vexatious.[4]

The parallel proceedings rule has been said to be in keeping with accepted notions of international comity by respecting multiple sovereignty in cases of concurrent jurisdiction.[5] But the rule has also been criticized as permitting a litigant to file a second action in a foreign court as a means of confusing, obfuscating, and complicating litigation already pending in this country[6] -- a "forum shopper's delight."[7]

In an illustrative case, a French bank filed suit against Khreich, a U. S. citizen, in federal district court in Texas to recover under an overdraft agreement.[8] Khreich then filed suit against the bank in Abu Dhabi, an Arab emirate, alleging the bank's breach of the agreement. Khreich moved to dismiss in federal court, alleging that Abu Dhabi law should apply and that Abu Dhabi was a more convenient forum. The federal court denied the motion to dismiss. Judgment in the Abu Dhabi action was entered in the bank's favor while the federal court action was pending. The bank sought recognition of the Abu Dhabi judgment in federal court. Khreich reversed position, arguing against recognition of the judgment in the foreign suit he had initiated. The federal court ruled for Khreich, refusing to recognize the Abu Dhabi judgment for lack of reciprocity.[9] The federal court ultimately gave judgment

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4. China Trade & Development Corp. v. M. V. Choong Yong, 837 F.2d 33 (2d Cir. 1987); Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909 (D.C. Cir. 1984).

5. Teitz, *supra* note 1, at 28.

6. China Trade & Development Corp. v. M.V. Choong Yong, 837 F.2d 33, 40 (2d Cir. 1987) (dissenting opinion). See also Teitz, *supra* note 1, at 21.

7. Teitz, *supra* note 1, at 29.

8. Banque Libanaise pour le Commerce v. Khreich, 915 F.2d 1000 (5th Cir. 1990).

9. Under the Texas version of the Uniform Foreign Money-Judgments Recognition Act, lack of reciprocity is a ground for refusing to recognize a foreign judgment. Tex. Civ. Prac. & Rem. Code Ann. §§ 36.001-36.008 (Vernon 1986 & Supp. 1991). Under the California version of the act (Code Civ. Proc. §§ 1713-1713.8), lack of reciprocity is not a ground for refusing to recognize a foreign judgment. See Code Civ. Proc. § 1713.4.

for Khreich, relying on the Texas usury statute. The bank appealed unsuccessfully. Allowing the Abu Dhabi action to proceed while the federal court case was pending served no useful purpose, and wasted judicial resources and time in both countries.[10]

In another case, a cargo of soybeans was lost en route from Tacoma, Washington, to China on a Korean-owned ship.[11] The cargo owner sued the ship owner in federal court in New York for damages to the ruined cargo. Two and a half years later and shortly before trial in New York, the ship owner filed a second suit in Korea involving the same parties and issues, but for declaratory relief. The cargo owner sought an injunction in New York to stop the Korean proceedings. The district court found the Korean action vexatious, noting the two and a half year delay in filing the Korean action and the failure of the ship owner to file an early motion in New York to dismiss for forum non conveniens. The district court enjoined the ship owner from proceeding with the Korean action, but the federal appeals court reversed, holding that "parallel proceedings are ordinarily tolerable."[12]

This kind of vexatious parallel litigation would be discouraged by the Conflicts of Jurisdiction Model Act, recommended in 1989 by a subcommittee of the American Bar Association.[13] The Model Act was adopted in Connecticut in 1991 with minor revisions.[14]

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10. Teitz, *supra* note 1, at 31.

11. China Trade & Development Corp. v. Choong Yong, 837 F.2d 33 (2d Cir. 1987); Teitz, *supra* note 1, at 37.

12. China Trade & Development Corp. v. Choong Yong, 837 F.2d 33, 36 (1987).

13. The Model Act was recommended by the Conflicts of Jurisdiction Subcommittee of the International Section of International Law and Practice of the American Bar Association.

14. Act Concerning International Obligations and Procedures, Public Act No. 91-324, 1991 Conn. Legis. Serv. P.A. 91-324 (H.B. 7364) (West).

The Model Act contemplates that the forum where the action was first filed will decide where the dispute should be litigated -- the "adjudicating forum" -- taking into account various factors, including convenience, judicial efficiency, and comity.[15] The Model Act also contemplates that the plaintiff's choice of forum -- the place where the action was first filed -- should "rarely be disturbed."[16] A determination by a foreign court[17] that it should be the adjudicating forum is presumptively valid in a United States jurisdiction that has enacted the Model Act, if the foreign court made the determination after evaluating the factors set out in the Model Act.[18]

If two actions concerning the same transaction or occurrence have been commenced, one in a United States jurisdiction where the Model Act has been enacted and the other in a foreign country,[19] and no application to designate an adjudicating forum has been made in the court where the action was first filed, the court in the Model Act

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15. See Teitz, *supra* note 1, at 25.

16. Conflicts of Jurisdiction Model Act § 3 (1989).

17. Although the Model Act was developed primarily to deal with forum shopping in multi-national litigation, it may be broad enough to apply to multi-forum litigation where one of the judgments sought to be enforced in California was made in another state of the United States. See Teitz, *supra* note 1, at 54 (judicial construction will determine "how broadly the Model Act reaches"). In such a case, the full faith and credit clause of the United States Constitution may override the act and require enforcement of the sister-state judgment.

18. Conflicts of Jurisdiction Model Act § 2 (1989).

19. The Model Act is broad enough to apply also to parallel litigation in two or more states of the United States. See *supra* note 17.

jurisdiction may decline to enforce the eventual foreign judgment.[20] In deciding whether or not to enforce the foreign judgment, the court in the Model Act jurisdiction may consider whether the party seeking enforcement has acted in good faith.[21] By not interfering directly with the foreign litigation, the Model Act discourages parallel proceedings without infringing the sovereignty of another nation.

The Commission recommends enactment in California of the substance of the Conflicts of Jurisdiction Model Act.

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20. If the Conflicts of Jurisdiction Model Act is enacted by state legislation, it will govern proceedings both in the courts of that state and in diversity cases in federal courts in that state. The enforcement of foreign judgments in the United States is largely a matter of state law. Teitz, *supra* note 1, at 23 n.11. Most suits in federal courts involving citizens of other countries are based on diversity jurisdiction. *Id.* In federal diversity cases, recognition and enforcement of foreign judgments are treated as "substantive," and therefore matters of state law under Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938). See Hunt v. B. P. Exploration Co. (Libya), 492 F. Supp. 885 (N.D. Tex. 1980); Sompotex Ltd. v. Philadelphia Chewing Gum Corp., 318 F. Supp. 161 (E.D. Pa. 1970), *aff'd,* 453 F.2d 435 (3d Cir. 1971), *cert. denied,* 405 U.S. 1017 (1972). See also Fed. R. Civ. P. 69 (except as provided by federal statute, state procedure for execution of judgment and supplementary proceedings apply in federal court).

21. Conflicts of Jurisdiction Model Act § 2, comment (1989).

RECOMMENDED LEGISLATION

Heading to Title 11 (commencing with Section 1710.10) of Part 3 (amended)

SISTER STATE AND FOREIGN ~~MONEY-JUDGMENTS~~ JUDGMENTS

Code Civ. Proc. §§ 1720-1722 (added). Conflicts of jurisdiction

Chapter 3. Conflicts of Jurisdiction

§ 1720. Enforcement of judgment in multiple proceedings

1720. (a) In cases where two or more proceedings arising out of the same transaction or occurrence were pending, the courts of this state may refuse to enforce the judgments in any of such proceedings unless application for designation of an adjudicating forum was timely made to the first known court of competent jurisdiction where one of the proceedings was commenced, or to the adjudicating forum after its selection, or to any court of competent jurisdiction if the foregoing courts are not courts of competent jurisdiction.

(b) An application for designation of an adjudicating forum is timely if made within either of the following times:

(1) Six months after reasonable notice that there were multiple proceedings arising out of the same transaction or occurrence.

(2) Six months after reasonable notice of the selection of an adjudicating forum.

(c) For the purpose of enforcement of judgments in this state, the designation of an adjudicating forum is binding on a person served with notice of the application to designate. The courts of this state shall enforce the judgments of the designated adjudicating forum pursuant to the ordinary rules for enforcement of judgments. The designation of an adjudicating forum is presumptively valid in this state if the decision designating the adjudicating forum shows that the court evaluated the substance of the factors in Section 1721.

(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.

**Comment.** Section 1720 is new. Sections 1720 to 1722 are drawn from the Conflicts of Jurisdiction Model Act, recommended by the Conflicts of Jurisdiction Subcommittee of the International Section of

International Law and Practice of the American Bar Association. The Model Act was enacted in Connecticut in 1991 with minor revisions. See Public Act 91-324, 1991 Conn. Legis. Serv. P.A. 91-324 (H.B. 7364) (West).

Under subdivision (c), California courts enforce judgments of the designated adjudicating forum under ordinary rules for enforcement of judgments. If the designated adjudicating forum is in a foreign country and its judgment is a money judgment, "ordinary rules for enforcement" of the judgment include the Uniform Foreign Money-Judgments Recognition Act (Sections 1713-1713.9).

If application to designate an adjudicating forum is made to a California court and the court designates another forum as the adjudicating forum, the California court will ordinarily stay or dismiss the California action on any conditions that may be just. Section 410.30(a).

The purpose of this chapter is to encourage early determination of an 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 an inconvenient forum.

This chapter gives discretion to the court asked to enforce a foreign judgment rendered in a parallel proceeding. This discretion allows maximum flexibility for the court to consider, after the fact, the interplay of jurisdiction, public policy, comity, the existence of parallel proceedings, the good faith of the litigants, and other factors in Section 1721 which courts have traditionally considered in determining where a transnational dispute should be adjudicated. For those foreign judgments obtained in conformity with this chapter, enforcement should be relatively automatic.

This chapter may also apply to enforcement in California of a judgment in another state of the United States in multi-forum proceedings. In such a case, the full faith and credit clause of the United States Constitution may override this chapter and require enforcement of the sister-state judgment.

*Note. Under subdivision (a), this chapter applies where two or more proceedings arising out of the same transaction or occurrence were pending. There is no requirement that at least one proceeding be in a foreign country. In this respect, subdivision (a) is the same as the Model Act. It is clear from explanatory material and comments that the Model Act was developed to deal with multiple proceedings where at least one is in a foreign country. But it is drafted broadly enough to apply to multiple proceedings in two or more states of the United States. If the judgment to be enforced in California was made in a sister state, the full faith and credit clause of the United States Constitution may control. Should subdivision (a) be limited to the case where at least one of the proceedings is in a foreign country? This would serve the main purpose of the act with minimum disruption of existing law on enforcement of sister state judgments. (The full faith and credit clause may apply if a judgment is made in a sister state and another is made in a foreign country. But to limit subdivision (a) in this way would reduce potential conflict between the Model Act and the full faith and credit clause.)*

*Under subdivision (c), enforcement of a foreign judgment made in a designated adjudicating forum is subject to "ordinary rules for enforcement of judgments." The Comment notes these rules include the Uniform Foreign Money-Judgments Recognition Act (Code Civ. Proc. § 1713-1713.9). Under that act, California may refuse to enforce the foreign judgment for various reasons, including that the foreign court did not provide an impartial tribunal or due process or lacked jurisdiction, the foreign judgment was obtained by extrinsic fraud or offends public policy of this state, or, if jurisdiction was based on personal service, the foreign court was a seriously inconvenient forum. Code Civ. Proc. § 1713.4. A member of the ABA subcommittee urged the Foreign Money-Judgments Recognition Act should not apply to a foreign money judgment obtained under the Model Act to avoid seriously undercutting the presumptive validity given to foreign judgments made in conformity with the act. Teitz,* Taking Multiple Bites of the Apple: A Proposal to Resolve Conflicts of Jurisdiction and Multiple Proceedings, *26 Int'l Law. 21, 52 (1992). The staff did not follow Ms. Teitz's suggestion, fearing that a litigant could obtain a foreign money judgment by fraud or collusion that would be given nearly conclusive effect if the non-enforcement provisions of the Uniform Foreign Money-Judgments Recognition Act did not apply.*

*Should "reasonable" be deleted from the two places where it appears in subdivision (b)? Notice in this context appears to mean actual or constructive notice. What constitutes constructive notice may depend on foreign law. The word "reasonable" in this context seems to permit a California court to hold that notice given in another country pursuant to its law is insufficient. If so, it may be a useful provision.*

*Subdivision (c) makes designation of an adjudicating forum binding on a person "served" with notice of the application. What does "served" mean? In the United States generally, personal jurisdiction over that person must first be obtained in the proceeding in which designation of an adjudicating forum will be made. Personal jurisdiction is obtained by personal service or by a constitutionally acceptable form of substituted service. The person served may default or make a general appearance. After a general appearance, mailed notice of further proceedings is sufficient. But if the application for designation of an adjudicating forum is made in a foreign court, that country's law will determine what kind of service is required. Thus it seems impossible to define "service" in subdivision (c) with greater precision.*

*Under subdivisions (c) and (d), a foreign judgment is enforced by "courts" of this state. This is consistent with the rule that states will not issue a writ of execution on a foreign judgment. 8 B. Witkin, California Procedure* Enforcement of Judgment *§ 402, at 342-43 (3d ed. 1985). Thus either an action on the foreign judgment must be brought in California to obtain a new judgment, 8 B. Witkin,* supra, *§ 402, at 343, § 421, at 356-57, or the foreign judgment must pleaded as res judicata in a pending California action.*

*Subdivision (d) was not in the final version of the Model Act. It was in two alternate versions considered by the ABA subcommittee. The staff included it because it seemed to make the section clearer. Should subdivision (d) be retained?*

§ 1721. Factors in designating adjudicating forum

1721. In designating an adjudicating forum, the court shall consider all of the following factors:

(a) The interests of justice among the parties and of worldwide justice.

(b) The public policies of the countries having jurisdiction of the dispute, including the interest of the affected courts in having proceedings take place in their respective forums.

(c) The place of the transaction or occurrence out of which the dispute arose, and the place of any effects of that transaction or occurrence.

(d) The nationality of the parties.

(e) The substantive law likely to apply and the relative familiarity of the affected courts with that law.

(f) The availability of a remedy and the forum likely to afford the most complete relief.

(g) The impact of the litigation on the judicial systems of the courts involved and the likelihood of prompt adjudication in the court designated as adjudicating forum.

(h) The location of witnesses and availability of compulsory process.

(i) The location of documents and other evidence, and the ease or difficulty in obtaining, reviewing, or transporting the evidence.

(j) The place of first filing and the connection of that place with the dispute.

(k) The ability of the designated forum to obtain jurisdiction over the persons and property that are the subject of the proceeding.

(l) Whether designating an adjudicating forum is preferable to having parallel proceedings in adjudicating the dispute.

(m) The nature and extent of past litigation over the dispute and whether designating an adjudicating forum will unduly delay the adjudication or prejudice the rights of the original parties.

(n) Plaintiff's choice of forum should rarely be disturbed.

**Comment.** Section 1721 is new and is the same in substance as Section 3 of the Conflicts of Jurisdictions Model Act. See also the Comment to Section 1720.

The factors listed in Section 1721 are those the federal courts have considered in ruling on proper venue (Gulf Oil Corp. v. Gilbert,

330 U.S. 501 (1957); Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981)), and in determining whether an anti-suit injunction should issue (Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909 (1984)). Some courts have said that venue factors should not be mixed with injunction factors. E.g., China Trade & Development Corp. v. M. V. Choong Yong, 837 F.2d 33 (2d Cir. 1987); Laker Airways Ltd. v. Sabena, Belgian World Airlines, *supra*. The threat of discretionary refusal to enforce vexatious judgments so little offends the sovereign jurisdiction of other nations that the courts of this state should be free to determine where a matter should have been adjudicated without fear of encroaching on foreign jurisdiction by applying forum non conveniens concerns. Since the reason for keeping these factors separate is thus inapplicable to this device, all such factors may be considered.

*Note. The Comment to Section 1721 is drawn from the comment to the Conflicts of Jurisdictions Model Act. The Model Act comment says that among the factors the court may consider is the "good faith of the litigants." There is no express good faith requirement in the Model Act or in this staff draft. Should good faith be added to the list of factors in Section 1721?*

§ 1722. Evidence

1722. (a) The court may consider any evidence admissible in the adjudicating forum or other court of competent jurisdiction, 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 adjudicating forum or other court of competent jurisdiction.

(6) Statements of public policy by the government of the adjudicating forum or other court of competent jurisdiction. Statements of public policy may be set forth in legislation, executive or administrative action, learned treatises, or by inter-governmental organizations in which any such government participates.

(b) Reasonable written notice shall be given by a party seeking to raise an issue concerning the law of a forum of competent jurisdiction other than the adjudicating forum. In deciding questions of the law of another forum, 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 1722 is new, and is the same in substance as Section 4 of the Conflicts of Jurisdictions Model Act. See also the Comment to Section 1720.

The selection of an adjudicating forum is intended to be an evidentiary proceeding based on a record developed in accordance with local rules of procedure. Development of an evidentiary record will be critical to ensure that the determination of an adjudicating forum is in accordance with the Model Act, and to permit other forums to rely on the initial determination with confidence.

The forms of potential evidence to be offered in the determination of an adjudicating forum will require presentation of evidence regarding both the interests of the litigants and those of the various states where jurisdiction may lie. Persuasive advocacy will be required to go beyond the mere recitation of the availability of a cause of action in a particular forum or the invocation of general claims of sovereignty.

The determination of an adjudicating forum will be most difficult in crowded courts of general jurisdiction where the court may lack a background or interest in international law issues. The balancing of interests in the selection of an adjudicating forum may arise only a handful of times each year. The burden will fall on counsel to educate the court as to the types of factors to be considered, the weight to be given such factors, the burden of proof, and the nature and evidence of international law to be presented. It is intended that the greatest possible variety of evidence be considered in the selection of an adjudicating forum. Within the United States, counsel is urged to look to congressional hearings, testimony, and submissions, Freedom of Information Act materials, United States treaties, executive agreements, diplomatic correspondence, participation in international organizations such as the United Nations and its various affiliated organizations, historical practice, and custom in connection with the designation of an adjudicating forum.

The submission of governmental entities is welcome as an important source to be considered by the court. In accordance with principles of international law and the act of state doctrine, submissions by a foreign government should be deemed conclusive as to matters of that state's domestic law, but would not be conclusive as to the legal effect of the foreign state's laws within the jurisdiction of the court selecting an adjudicating forum. United States v. Pink, 315 U.S. 203 (1962).

## CONFORMING REVISION

Code Civ. Proc. § 1713.3 (amended). Enforcement of foreign judgment

1713.3. Except as provided in Section 1713.4 ~~, a~~ and in Chapter 3 (commencing with Section 1720):

(a) A foreign judgment meeting the requirements of Section 1713.2 is conclusive between the parties to the extent that it grants or denies recovery of a sum of money.

(b) The foreign judgment is enforceable in the same manner as the judgment of a sister state which is entitled to full faith and credit, except that it may not be enforced pursuant to ~~the provisions of~~ Chapter 1 (commencing with Section 1710.10) ~~of this title~~ .

**Comment.** Section 1713.3 is amended to make clear that it is subject to Chapter 3 (commencing with Section 1720) (conflicts of jurisdiction).