#J-02.01/D-02.01

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07/17/92

Memorandum 92-51

Subject: Study J-02.01/D-02.01 - Conflicts of Jurisdiction and Enforcement of Foreign Judgments (Revised Tentative Recommendation)

Attached is a revised staff draft of a Tentative Recommendation, *Conflicts of Jurisdiction and Enforcement of Foreign Judgments*. It is 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, chaired by James Wawro.

Changes in Revised Staff Draft

The Commission considered an earlier draft at the May meeting. The attached draft makes four changes based on earlier comments and concerns:

(1) There was concern the provision that plaintiff's choice of forum should "rarely be disturbed" gives too much weight to the choice of the party who files first, and may encourage a race to the courthouse so the court where the action is first filed will be likely to designate itself as adjudicating forum. The attached draft says instead that the party challenging the choice of forum by the party first to file has the burden of showing another forum is preferable. See proposed Section 1722(b).

(2) Professor Louise Teitz, a member of the ABA subcommittee, recommended we include in our statute the declaration of public policy in the Model Act. The attached draft includes this declaration. See proposed Section 1720.

(3) The attached draft makes clear a Model Act judgment may be refused enforcement on most grounds in the Uniform Foreign Money-Judgments Recognition Act. But under the draft a Model Act judgment cannot be refused enforcement because it conflicts with another judgment or was made in an inconvenient forum. See discussion below.

(4) Professor Teitz suggested a provision on the effect of forum selection clauses in contracts. The attached draft does this by making a Model Act judgment subject to the UFMJRA provision that a foreign

judgment need not be enforced if contrary to an agreement between the parties (Code Civ. Proc. § 1713.4(b)(5), set out below), and by requiring the court to consider a forum selection clause along with other factors the court must consider in designating an adjudicating forum. See proposed Section 1721(a)(14).

Effect of Uniform Foreign Money-Judgments Recognition Act

Does UFMJRA make Model Act unnecessary? The view was expressed at the May meeting that the Model Act may be unnecessary because California has the Uniform Foreign Money-Judgments Recognition Act (Code Civ. Proc. §§ 1713-1713.8). Under Section 1713.4 of the Code of Civil Procedure, California may decline to enforce a foreign judgment. Section 1713.4 provides:

> 1713.4. (a) A foreign judgment is not conclusive if
> (1) The judgment was rendered under a system which 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; or
> (3) The foreign court did not have jurisdiction over the subject matter.
> (b) A foreign judgment need not be recognized if
> (1) The defendant in the proceedings in the foreign court did not receive notice of the proceedings in sufficient time to enable him 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; or
> (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.

Under this section, among the grounds for refusing to enforce a foreign judgment is that it conflicts with another judgment, or if jurisdiction was based only on personal service, the foreign court was a seriously inconvenient forum. (The inconvenient forum ground does not apply if jurisdiction was based on voluntary appearance, Bank of Nova Scotia v. Tschabold Equipment Ltd., 51 Wash. App. 749, 754 P.2d 1290 (1988), or doing business in the foreign country, Southern Bell Tel. & Tel. Co. v. Woodstock, Inc., 34 Ill. App. 3d 86, 339 N.E.2d 423

(1975).) So, under Section 1713.4 the California court may refuse to enforce a foreign judgment obtained in a parallel proceeding. The inconvenient forum ground is similar to some of the factors the court considers under the Model Act in deciding which forum should be designated as the adjudicating forum. See proposed Section 1722.

But the Model Act provides for forum selection early in the proceedings, rather than after judgment as under the UFMJRA. The Model Act is better than the UFMJRA in this respect, and will save time and expense to courts and litigants.

Draft makes Model Act subject to most of UFMJRA. Should a Model Act judgment made in the designated adjudicating forum still be subject to non-enforcement under the UFMJRA? Professor Teitz says if a Model Act judgment may be refused enforcement under the UFMJRA, the Model Act will provide "absolutely no benefit." 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 attached draft takes an intermediate position: A Model Act judgment may be refused enforcement on most grounds in the UFMJRA -- lack of due process or personal jurisdiction, extrinsic fraud, or repugnant to California public policy. See Code Civ. Proc. § 1713.4. But the attached draft excludes two grounds for non-enforcement under the UFMJRA: A Model Act judgment cannot be refused enforcement because it conflicts with another judgment or was made in an inconvenient forum. The purpose of the Model Act is to give a Model Act judgment precedence over other judgments. And the question of whether a forum is inconvenient should be determined early in the proceedings under the Model Act, not after judgment under the UFMJRA.

Other Concerns

We have invited Mr. Wawro, chairman of the ABA subcommittee, to attend the September meeting to express his views and to address the following concerns of the Commission:

(1) There was concern that if the Model Act is adopted in California but not in other states and countries, it will have a parochial, perhaps Balkanizing, effect. Litigants in jurisdictions that do not have the Model Act may be unfamiliar with the act and thus be at a disadvantage in California, either on the motion to designate

an adjudicating forum, or in trying to enforce a foreign judgment in California. The view was expressed that in international business transactions there are often two or more jurisdictions that would be equally appropriate as the adjudicating forum, and that to adopt the Model Act in California would be a trap for the unwary.

(2) There was concern that if an action is first filed in a foreign country and a parallel action is later filed in a Model Act jurisdiction, the foreign court may not have a procedure for designating an adjudicating forum. In that case, perhaps an application to designate an adjudicating forum should be permitted in the Model Act jurisdiction early in the proceedings, rather than when judgment is sought to be enforced in the Model Act jurisdiction. This could be done by revising subdivision (a) of Section 1721 as follows:

> (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 or do not have a procedure for designating an adjudicating forum.

(3) There was concern over the lack of reciprocity under the Model Act resulting from the discretion of a Model Act jurisdiction not to enforce a foreign judgment valid and conclusive in the country where it was made.

(4) The view was expressed that the Model Act scheme is too complicated.

(5) The view was expressed that perhaps we should not be eager to join Connecticut in enacting pioneering legislation in this area, but that we should wait to see if the Model Act is enacted in a significant number of other states.

Also, the staff raised questions in italicized notes after the sections in the draft.

Respectfully submitted,

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#J-02.01/D-02.01

STATE OF CALIFORNIA

California Law Revision Commission

Revised Staff Draft

TENTATIVE RECOMMENDATION

CONFLICTS OF JURISDICTION AND ENFORCEMENT OF FOREIGN JUDGMENTS

September 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 November 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
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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 72 of the Statutes of 1992.

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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 (2d Cir. 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] A determination by a foreign court[16] 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.[17]

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,[18] 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 jurisdiction may decline to enforce the eventual foreign judgment.[19]

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15. See Teitz, *supra* note 1, at 25. The Model Act also contemplates that the plaintiff's choice of forum -- the place where the action was first filed -- should "rarely be disturbed." Conflicts of Jurisdiction Model Act § 3. The Commission's recommended legislation revises this to say instead that the party challenging the choice of forum by the party first to file has the burden of showing some other forum is preferable.

16. 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. See 7 B. Witkin, California Procedure *Judgment* § 203, at 640-41 (3d ed. 1985).

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

18. The Model Act is broad enough to apply also to parallel litigation in two or more states of the United States. See *supra* note 16.

19. 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

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.[20] 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.[21]

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).

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

21. The recommended legislation makes minor substantive revisions to the Conflicts of Jurisdiction Model Act: It makes clear a foreign judgment made in the designated adjudicating forum may nonetheless be refused enforcement under the Uniform Foreign Money-Judgments Recognition Act (Code Civ. Proc. § 1713.4), except that it may not be refused enforcement because it conflicts with another judgment or was made in an inconvenient forum. The recommended legislation adds a factor to those the court must consider in designating an adjudicating forum -- whether the parties had a written agreement on forum selection. See also *supra* note 15 (burden of proof provision).

RECOMMENDED LEGISLATION

Heading to Title 11 (commencing with Section 1710.10) of Part 3 of the Code of Civil Procedure (amended)

TITLE 11. SISTER STATE AND FOREIGN ~~MONEY-JUDGMENTS~~ JUDGMENTS

Code Civ. Proc. §§ 1720-1723 (added). Conflicts of jurisdiction

Chapter 3. CONFLICTS OF JURISDICTION

§ 1720. Declaration of public policy

1720. It is the 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 that were not obtained in connection with vexatious litigation, parallel proceedings, or litigation in inconvenient forums.

Comment. Section 1720 is new. Sections 1720 to 1723 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. Section 1720 is substantially the same as Section 1 of the Model Act. 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).

The growing economic interdependence of the world's nations, together with the coextensive 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, and have held that the rule should be followed regardless of the vexatious nature of the parallel proceedings. Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909 (D.C. Cir. 1984); China Trade & Development Corp. v. Choong Yong, 837 F.2d 33 (2d Cir. 1987).

This chapter 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 on 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, or innocent litigants.

§ 1721. Enforcement of judgment in multiple proceedings

1721. (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. Except as provided in subdivision (c) of Section 1713.4, 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 1722.

(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 1721 is new, and is the same in substance as Section 2 of the Conflicts of Jurisdiction Model Act. See also the Comment to Section 1720.

Under subdivision (c), California courts generally 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), except as provided in subdivision (c) of Section 1713.4.

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).

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 chapter 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, the existence of parallel proceedings, the good faith of the litigants, and other factors in Section 1722 which courts have traditionally considered in determining where a transnational 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. This risk should 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 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.)

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 be 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?

§ 1722. Factors in designating adjudicating forum; burden of proof

1722. (a) Subject to subdivision (b), in designating an adjudicating forum, the court shall consider all of the following factors:

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

(2) 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.

(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 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.

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

(9) The location of documents and other evidence, and the ease or

difficulty in obtaining, reviewing, or transporting the evidence.

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

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

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

(13) 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.

(14) Any written agreement between the parties designating the forum for litigating the dispute.

(b) The party challenging the choice of forum by the party first to file has the burden of showing some other forum is preferable.

Comment. Section 1722 is new and, except for paragraph (14) of subdivision (a), is drawn from Section 3 of the Conflicts of Jurisdictions Model Act. See also the Comment to Section 1720.

The factors listed in subdivision (a) 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.

Subdivision (b) is drawn from the last factor in Section 3 of the Conflicts of Jurisdiction Model Act. Under the Model Act, plaintiff's choice of forum "should rarely be disturbed." Subdivision (b) recasts this language to put on the moving party the burden of persuading the court to designate an adjudicating forum other than the one where the action was first filed. This should give the court more latitude to consider the factors set out in subdivision (a), and to make a decision in the interests of justice without being unduly bound by the choice of forum made by the party first to file.

§ 1723. Evidence

1723. (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 1723 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. § 1713.4 (amended). Grounds for non-recognition of foreign judgment

1713.4. (a) A foreign judgment is not conclusive ~~if~~ under any of the following circumstances:

(1) The judgment was rendered under a system which 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~~;~~ ~~or~~ .

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

(b) A foreign judgment need not be recognized ~~if~~ under any of the following circumstances:

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

(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.

(c) A foreign judgment subject to Chapter 3 (commencing with Section 1720) may be refused recognition or enforcement under Chapter 3 (commencing with Section 1720) or under this chapter, except that a foreign judgment made in an adjudicating forum designated under Chapter 3 (commencing with Section 1720) shall not be refused recognition or enforcement on the ground that it conflicts with another judgment or was made in an inconvenient forum.

Comment. Section 1713.4 is amended to add subdivision (c). Under Section 1721(c), courts of this state enforce judgments of the designated adjudicating forum under ordinary rules for enforcement of judgments. Subdivision (c) limits this provision so a judgment of the designated adjucating forum shall not be refused enforcement on the ground that it conflicts with another judgment or was made in an inconvenient forum.