First Supplement to Memorandum 92-51

Subject: Study J-02.01/D-02.01 - Conflicts of Jurisdiction and Enforcement of Foreign Judgments

Commission's General Concerns

Exhibit 1 is a memorandum from James Wawro addressing the five concerns of the Commission at the May meeting and set out in the basic memorandum (Memo 92-51). Mr. Wawro will probably amplify his points orally at the meeting.

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

The staff note after Section 1721 asks if the proposed statute should be limited to the case where one of the judgments was made in a foreign country, excluding the case where both judgments are in sister states. Mr. Wawro told the staff by phone that he would not so limit the statute.

Professor Louise Teitz, a member of the ABA subcommittee that drafted the Conflicts of Jurisdiction Model Act, wrote us to comment on a prior draft. See Exhibit 1 to First Supplement to Memorandum 92-36. She is inclined to limit the statute for two reasons: (1) The full faith and credit clause of the U. S. Constitution supersedes the Model Act where a sister state judgment is being enforced; (2) if the statute applies to proceedings in several states, that may conflict with any federal complex litigation statute that may be developed, or with proposals resulting from the Complex Litigation Project of the American Law Institute.

The staff is persuaded by this, and recommends limiting the statute to the case where at least one of the multiple proceedings is in a foreign country by revising subdivision (a) of Section 1721 as follows:

> 1721. (a) In cases where two or more proceedings arising out of the same transaction or occurrence were pending, and at least one was in a foreign state as defined in Section 1713.1, 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.

Note. Section 1713.1 says "Foreign state means any governmental unit other than the United States, or any state, district, commonwealth, territory, insular possession thereof, or the Panama Canal Zone, or the Trust Territory of the Pacific Islands."

This would solve many, but not all, of the problems. It would still be possible two have two conflicting judgments, one in a foreign country and another in a sister state. The full faith and credit clause would appear to override the Model Act, and give priority to the sister state judgment, even though the foreign judgment was made in a designated adjudicating forum.

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

Respectfully submitted,

Robert J. Murphy
Staff Counsel

M E M O R A N D U M

To: California Law Revision Commission

From: James Wawro

Date: September 1, 1992

Subject: Conflicts of Jurisdiction and Enforcement of Foreign Judgments -- Comments on Memorandum 92-51

Why doesn't the world have the equivalent of a world-wide Full Faith and Credit Clause or a world-wide Judicial Panel on Multi-District Litigation? Is it because the world is an "international system of politically independent, socio-economically interdependent nation-states" (Laker Airways v. Sabena, Belgium World Airlines, 731 F.2d 909, 937 (D.C. Cir. 1984) unable to break the bonds of national sovereignty and compelled to promise every citizen on Earth the full reach of each nation's judicial jurisdiction? If so, we need new thinking to create a global system of civil and commercial justice.

And a new system, recognizing future realities, is badly needed. Earlier attempts by nation-states to agree upon a treaty for enforcement of judgments have ended in documents few nations would sign (like the 1966 Hague Convention on the Recognition and Enforcement of Foreign Judgments, signed by only Cyprus, The Netherlands and Portugal) or xenophobic agreements among a few European neighbors (like the Brussels and Lugano Conventions), which do little more than facilitate forum shopping. A current attempt at a dispute resolution treaty, the proposed North American Free Trade Agreement, adopts at least two systems for resolving different kinds of disputes among only three independent nation-states (both as to disputes which "could be brought under both GATT and NAFTA" and as to investment disputes resolvable, at the investor's option, "through binding investor-state arbitration or the remedies that are available in the host country's domestic courts"). Since every business, and a growing number of the world's people, must now "think globally," should we build upon the old, unsuccessful nation-state thinking about global enforcement of judgments, or should we shift our focus elsewhere to satisfy the growing need for effective global civil and commercial justice?

Civil and commercial lawsuits aren't filed by claimants. Lawsuits are filed by lawyers. Those lawsuits are filed where the lawyers think there is the best chance of (1) securing a favorable judgment which is (2) convertible into cash. (And defensive lawsuits are filed where defense lawyers think there is the best chance of avoiding the above results, as in China Trade and Development v. M.V. Choong Yong, 837 F.2d 33 (2d Cir. 1987).) Lawyers will avoid filing suits where there is a substantial risk that a judgment will not be obtained, or that, once obtained, will not be convertible into a judgment convertible into cash in a forum where the defendant has assets. Unfortunately, recent court decisions approving foreign antisuit injunctions "only in the most extreme cases" (Gau Shan Co. Ltd. v. Bankers Trust Co., 956 F.2d 1349, 1355 (6th Cir. 1992)) seem to encourage international lawyers to opt for the litigation advantages to be gained through "parallel proceedings" and international forum shopping.

The proposed Conflicts of Jurisdiction and Enforcement of Foreign Judgments Act closes this apparent crack in the international system of global civil justice by facilitating an early, inexpensive, pre-judgment selection of an adjudicating forum. This is accomplished by giving the courts in a State adopting the Act discretion to deny enforcement to judgments obtained in violation of the Act. The Act does not impinge upon national sovereignty; it is non-exclusive; no State adopting the Act gives up any jurisdiction; as States unilaterally adopt the Act, its principles can solidify into a new world-wide approach to global commercial justice; and the Act does all of this by working mainly on the discipline and self-government of the suit-filing decision maker, the lawyer, to encourage filing only in an appropriate forum.

There are virtually no risks to California in adopting the Act. The benefits to California from a statute safeguarding California assets from vexatious litigation should only enhance California's ability to conduct world trade and should, by example, lead the way for other States to contribute to global civil and commercial justice.

The staff recommendations on the Act made in Memorandum 92-51 all appropriately further the Act's purposes and we therefore endorse each of the staff's recommendations.

The text of the concerns about the Act raised by the Commission, listed at pages 3 and 4 of Memorandum 92-51, and our comments, are as follows:

> "(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."

COMMENT TO (1). Selecting an adjudicating forum early is better and cheaper than conducting "parallel proceedings" in two or more forums, each with legitimate jurisdictional bases. The Act, which operates on the litigants' lawyers and not on the jurisdictional sensitivities of the nations affected, provides a reasonable basis for making an early judicial selection of an adjudicating forum even if several forums could be appropriate. Any litigant unwittingly violating the Act has a chance to explain to the California court asked to enforce his judgment why his litigation was not vexatious. If the litigant acted in good faith, the court will enforce his judgment. If the litigant acted in bad faith, why should California enforce his judgment?

"(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. . . . [balance of paragraph deleted]."

COMMENT TO (2). Any civilized country, with or without the Model Act, will likely have some procedure for making an application in cases pending before its courts to rule on the effect in those pending cases of cases pending in other jurisdictions, with or without the Model Act, "arising out of the same transaction or occurrence." The Model Act enforces the resulting designation "if the decision designating the adjudicating forum shows that the court evaluated the substance of the factors in Section 1722." Section 1721 (c). In the event that no procedure exists for such an application in the forum of first filing, a catch-all provision is contained in Section 1721 (d) (in addition to the "any court of competent jurisdiction" catch-all provision of Section 1721 (a)) which provides that "the court of this state requested to enforce the judgment shall designate the proper adjudicating forum." In the event that later suits are filed after an adjudicating forum has been selected,

the litigants need only again apply pursuant to the Act to the forum (of first filing) which originally selected the adjudicating forum to designate that adjudicating forum as the forum for the later-filed suits. The Act then provides for automatic enforcement of the judgments of the adjudicating forum only.

"(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."

COMMENT TO (3). The reason that Section 1720 of the Act states that "the public policy of this state" is to discourage vexatious litigation is that virtually all cases and and treaties (including the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards) written on the issue provide that a foreign judgment which violates a forum state's important public policies need not be enforced in that forum state. Since any decision not to enforce a foreign judgment on forum public policy grounds refuses enforcement to a judgment valid and conclusive in the country where it was made, the Act simply elevates for California avoiding vexatious litigation into an internationally-recognized category of judgments that each nation-state has discretion not to enforce.

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

COMMENT TO (4). Although the Act may be complicated for forum shoppers, it requires of litigants attempting to simplify litigation only the making of a motion in the forum where the first action on a matter was filed. A single motion to select an adjudicating forum is simpler than defending "parallel proceedings" filed in different jurisdictions over the same matter or arguing to a California court which of two conflicting judgments rendered in "parallel proceedings" should be enforced.

"(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."

COMMENT TO (5). The Act has no identifiable drawbacks for California. The stiffest penalty is judicial discretion in California to refuse enforcement to

judgments acquired through vexatious litigation. The principal power of the Act is deterrence to the minds of international litigation lawyers and not, as in the failed international attempts of the past, agreements among nation-states over sovereignty and jurisdiction. The Act benefits California, litigants and the international system of justice. Adopting the Act signifies a commitment to global commercial justice that can only identify California as a leader in world commercial matters. Although the Act can fulfill its function even if only adopted by one state, it will work best as more and more states and nations adopt the concept. If it is the right approach, why not enact it now?

Thank you for your consideration of the Conflicts of Jurisdiction and Enforcement of Foreign Judgments Act.