Memorandum 92-65

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

Attached is a staff study on *Conflicts of Jurisdiction and Enforcement of Foreign Judgments*. As directed by the Commission at the last meeting, this study asks for comments on two alternative proposals:

Alternative # 1: To adopt a modified version of the Conflicts of Jurisdiction Model Act, permitting California to refuse to enforce a foreign judgment not made in the forum designated by an appropriate court to adjudicate the dispute.

Alternative # 2: To add to the California Uniform Foreign Money-Judgments Recognition Act a new ground of discretionary nonrecognition of a foreign judgment: If a California action is pending on the same dispute, that the foreign judgment was made in an inconvenient forum and California is not an inconvenient forum.

ALTERNATIVE # 1 (MODEL ACT)

As directed by the Commission, the staff has added two provisions to the Model Act alternative:

(1) An appearance solely to oppose an application to designate an adjudicating forum is not a general appearance. Section 1721(c).

(2) The nonenforcement provision is limited to a judgment made in a foreign country, and does not apply to a sister state judgment. Section 1721(a).

Effect of Forum Selection Clause

Under the previous draft, one factor the court was to consider in designating an adjudicating forum was any "agreement between the parties designating the forum for litigating the dispute." The Commission was concerned that making a forum selection clause merely a factor to be considered might undesirably weaken the effect of such a clause. The Commission asked the staff to consider whether this provision should be deleted, or whether there should be a separate provision in the draft on forum selection clauses.

The staff deleted the forum selection clause factor from those to be considered by the court under Section 1722 and added new subdivision

(c) to that section to make a forum selection clause controlling over all other factors if (1) there is no showing the clause is unreasonable and (2) the court in its discretion determines the clause should be enforced. This is consistent with California case law under which a forum selection clause is valid, but may be enforced only if there is no showing the clause is unreasonable and the court in its discretion determines the clause should be enforced. Smith, Valentino & Smith, Inc. v. Superior Court, 17 Cal. 3d 491, 496, 551 P.2d 1026, 131 Cal. Rptr. 374 (1976); Bos Material Handling, Inc. v. Crown Controls Corp., 137 Cal. App. 3d 99, 108, 186 Cal. Rptr. 740 (1982); 3 B. Witkin, California Procedure *Actions* § 553, at 580 (3d ed. 1985).

A conforming revision in the Model Act alternative provides that a judgment in the designated adjudicating forum cannot be refused enforcement under the UFMJRA on the ground that 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." Code Civ. Proc. § 1714.(b)(5). Thus alternative # 1 preserves the effect of forum selection clauses, and provides for a ruling on the effect of the clause early in the litigation when the adjudicating forum is being designated.

ALTERNATIVE # 2 (AMEND UFMJRA)

At the last meeting, the Commission was concerned that under the Model Act a foreign court might have to apply the California version of the act to rule on an application to designate an adjudicating forum, and that the foreign court might have difficulty doing so. The Commission asked the staff to develop an alternative proposal to be considered as a possible substitute for the Model Act. The Commission suggested the alternative proposal have two features:

(1) If the California court determines that another forum should be the adjudicating forum, the California court could stay the California action while the foreign action proceeds. Whether to stay would be based on the same factors as in the Model Act to determine an adjudicating forum.

(2) If the California court determines that California should be the adjudicating forum and a foreign judgment is obtained in a parallel proceeding, the California court could stay enforcement of the foreign

judgment while the California action proceeds. When judgment is obtained in California, the foreign judgment could be refused enforcement under Section 1713.4 as a conflicting judgment.

These two features are analyzed below.

Stay of California Action

Under existing law, a California court may stay a California action for forum non conveniens based on factors similar to Model Act factors. See Code Civ. Proc. § 410.30 and Comment. Factors to be considered in ruling on forum non conveniens are set out in the Judicial Council Comment to Section 410.30 and in cases. E.g., Holmes v. Syntex Laboratories, Inc., 156 Cal. App. 3d 372, 378 n.2, 202 Cal. Rptr. 773 (1984); Hemmelgarn v. Boeing Co., 106 Cal. App. 3d 576, 584-85, 165 Cal. Rptr. 190 (1980); Great Northern Railway Co. v. Superior Court, 12 Cal. App. 3d 105, 113-15, 90 Cal. Rptr. 461 (1970).

Exhibit 1 to this Memorandum compares California forum non conveniens factors to Model Act factors for designating an adjudicating forum. It is apparent from Exhibit 1 that they are closely similar. Model Act factors were taken from two federal forum non conveniens cases -- Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947), and Piper Aircraft Co. v. Reyno, 454 U.S. 253 (1984). See also Teitz, *Taking Multiple Bites of the Apple: A Proposal to Resolve Conflicts of Jurisdiction and Multiple Proceedings,* 26 Int'l Law. 21, 36 (1992) ("Model Act adopts some aspects of the analysis and policy of forum non conveniens doctrine").

Are Model Act factors really any different from California forum non conveniens factors? Professor Teitz seems to assume a California court will be more likely to designate a foreign court as adjudicating forum under the Model Act than to find that California is an inconvenient forum: "The overriding policy of the Model Act is to limit parallel proceedings, not merely those that are inconvenient." Teitz, *supra.*

But the two most important California forum non conveniens factors are that (1) plaintiff's choice of forum should rarely be disturbed, and (2) the action should not be dismissed unless a suitable alternate forum is available. Judicial Council Comment to Section 410.30; see Stangvik v. Shiley, Inc., 54 Cal. 3d 744, 752-53, 819 P.2d 14, 1 Cal. Rptr. 2d 556 (1991). The first of these two "most important" forum non

conveniens factors (plaintiff's choice of forum should rarely be disturbed) is similar to the provision in Section 1722 in alternative # 1 that the party challenging the choice of forum by the party first to file has the burden of showing some other forum is preferable. Thus if plaintiff files first in California, California would probably be no more likely to designate a foreign court as adjudicating forum under the Model Act than to find that California is an inconvenient forum.

The second "most important" forum non conveniens factor (suitable alternate forum) is similar to the factor in Section 1722 in alternate # 1 that the court should consider "the availability of a remedy and the forum likely to afford the most complete relief."

The staff concludes that under existing law the court may stay a California action on forum non conveniens grounds after considering factors essentially the same as those under the Model Act, and that therefore a new statute to do this is unnecessary.

Nonrecognition of Foreign Judgment in Pending California Action

If the same dispute is being litigated in California and a foreign country and the foreign action goes to judgment while the California action is pending, the prevailing party in the foreign action may ask the California court to give res judicata effect to the foreign judgment. A foreign judgment is res judicata in California if it has that effect in the country where rendered and satisfies the UFMJRA. 7 B. Witkin, California Procedure *Judgment* § 206, at 643 (3d ed. 1985).

The staff thinks the best way to achieve the Commission's goal of giving precedence to a California judgment over a foreign judgment where California is the preferred forum is to add a new ground for nonrecognition of a foreign judgment under the UFMJRA: if a California action is pending on the same dispute, that the foreign judgment was made in an inconvenient forum and California is not an inconvenient forum. This is set out in the attached draft as alternate # 2.

Respectfully submitted,

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Forum Non Conveniens Factors	Model Act Factors
Plaintiff's choice of forum should rarely be disturbed	Plaintiff's choice of forum should rarely be disturbed; place of first filing and the connection of that place with the dispute
Amenability of parties to personal jurisdiction in this state and in alternate forum	Ability of designated forum to obtain jurisdiction over persons and property that are subject of procding
Relative convenience to parties and witnesses of the competing forums	
Differences in conflict of law rules applicable in the competing forums	Substantive law likely to apply and relative familiarity of affected courts with that law
Defendant's principal place of business	
Extent to which the cause of action arose out of events related to this state	Place of transaction or occurrence out of which the dispute arose, and place of any effects of that transaction or occurrence
Selection of a convenient, reasonable, and fair place of trial; extent to which a party will be disadvantaged by trial in either forum; avoidance of multiplicity of actions and inconsistent adjudications; relative advantages and obstacles to fair trial	Interests of justice among the parties; 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
Relative enforceability of judgments rendered in this state or the alternative forum	Availability of a remedy and the forum likely to afford the most complete relief
Relative inconvenience to witnesses and relative expense to parties of proceeding in this state or the alternative forum; availability of compulsory process for attendance of witnesses	Location of witnesses and availability of compulsory process

Forum Non Conveniens Factors	Model Act Factors
Relative ease of access to sources of proof; significance and necessity of a view by the trier of fact of physical evidence not conveniently movable from the alternate forum	Location of documents and other evidence, and ease or difficulty in obtaining, reviewing, or transporting the evidence
Extent to which prosecution of the action in this state would place a burden on this state's judicial resources equitably disproportionate to the relationship of the parties or the cause of action to this state	Impact of the litigation on judicial systems of courts involved and likelihood of prompt adjudication in court designated as adjudicating forum
Extent to which the relationship of the moving party to this state obligates him or her to participate in judicial proceedings here	Nationality of the parties
This state's interest in providing a forum for some or all of the parties, and the state's public interest in the litigation	Public policies of the countries having jurisdiction of the dispute, including the interest of affected courts in having proceedings take place in their respective forums; the interests of worldwide justice
Burden on jurors, local court, and taxpayers of a jurisdiction having a minimal relation to the subject of the litigation	
Difficulties and inconveniences to defendant, court, and jurors incident to presentation of evidence by deposition	
Availability of the suggested forum	
Other practical considerations that make trial of a case convenient, expeditious, and inexpensive	

#J-02.01/D-02.01

STATE OF CALIFORNIA

California Law Revision Commission

STAFF STUDY

CONFLICTS OF JURISDICTION AND ENFORCEMENT OF FOREIGN JUDGMENTS

October 1992

This staff study is being distributed so interested persons can comment on a proposal being considered by the Commission. 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 (if any) it will include in legislation the Commission may recommend to the Legislature.

COMMENTS ON THIS STAFF STUDY SHOULD BE RECEIVED BY THE COMMISSION NOT LATER THAN **March 1, 1993.**

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

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SUMMARY OF STAFF STUDY

This staff study proposes to recommend one of two alternatives to discourage simultaneous litigation in two or more countries concerning the same transaction or occurrence:

(1) To adopt a modified version of the Conflicts of Jurisdiction Model Act to permit California to refuse to enforce a foreign judgment not made in the forum designated by an appropriate court to adjudicate the dispute.

(2) To add to the California Uniform Foreign Money-Judgments Recognition Act a new ground of discretionary nonrecognition of a foreign judgment: If a California action is pending on the same dispute, that the foreign judgment was made in an inconvenient forum and that California is not an inconvenient forum.

The Commission solicits comments as to which alternative better addresses the problem of duplicative and vexatious litigation in more than one country.

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 should be discouraged in California.

ALTERNATIVE # 1 -- CONFLICTS OF JURISDICTION MODEL ACT

One alternative is to adopt the Conflicts of Jurisdiction Model Act, recommended in 1989 by a subcommittee of the American Bar

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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).

Association.[13] The Model Act was adopted in Connecticut in 1991 with minor revisions.[14]

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

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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).

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. Alternative # 1 would revise 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.

jurisdiction may decline to enforce the eventual foreign judgment.[19] 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 solicits comments on whether the substance of the Conflicts of Jurisdiction Model Act should be enacted in California.[21]

ALTERNATIVE # 2 --
AMEND UNIFORM FOREIGN MONEY-JUDGMENTS RECOGNITION ACT

A second alternative would be to provide that a foreign judgment need not be recognized in California[22] if the cause of action or

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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 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 draft of alternative # 1 would make 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, was made in an inconvenient forum, or that 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. See also *supra* note 15 (burden of proof provision).

22. Existing provisions for nonrecognition of foreign judgments are in the Uniform Foreign Money-Judgments Recognition Act, Code Civ. Proc. § 1713.4. The recommended legislation would add a new ground of nonrecognition to Section 1713.4.

defense on which the foreign judgment is based is the subject of an action pending in a California court involving the same parties and the foreign court was, and the California court is not, an inconvenient forum for trial of the action.[23] If the party who filed the foreign action did so with the expectation of enforcing the judgment in California, that party would have an incentive to move the California court, early in the California proceedings,[24] for stay or dismissal on

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23. In ruling on forum non conveniens, the court considers the following factors: Amenability of the parties to personal jurisdiction in this state and in the alternative forum; relative convenience to parties and witnesses of the competing forums; differences in conflict of law rules applicable in the competing forums; selection of a convenient, reasonable, and fair place of trial; defendant's principal place of business; the extent to which the cause of action arose out of events related to this state; the extent to which a party will be substantially disadvantaged by trial in either forum; the relative enforceability of judgments rendered in this state or the alternative forum; the relative inconvenience to witnesses and relative expense to parties of proceeding in this state or the alternative forum; the significance and necessity of a view by the trier of fact of physical evidence not conveniently movable from the alternative forum; the extent to which prosecution of the action in this state would place a burden on this state's judicial resources equitably disproportionate to the relationship of the parties or the cause of action to this state; the extent to which the relationship of the moving party to this state obligates him or her to participate in judicial proceedings here; this state's interest in providing a forum for some or all of the parties; the state's public interest in the litigation; the avoidance of multiplicity of actions and inconsistent adjudications; the relative ease of access to sources of proof; the availability of compulsory process for attendance of witnesses; the relative advantages and obstacles to a fair trial; the burden on jurors, the local court, and taxpayers of a jurisdiction having a minimal relation to the subject of the litigation; the difficulties and inconveniences to defendant, the court, and jurors incident to the presentation of evidence by deposition; the availability of the suggested forum; other practical considerations that make trial of a case convenient, expeditious, and inexpensive. Holmes v. Syntex Laboratories, Inc., 156 Cal. App. 3d 372, 378 n.2, 202 Cal. Rptr. 773 (1984); Hemmelgarn v. Boeing Co., 106 Cal. App. 3d 576, 584-85, 165 Cal. Rptr. 190 (1980); Great Northern Railway Co. v. Superior Court, 12 Cal. App. 3d 105, 113-15, 90 Cal. Rptr. 461 (1970). See generally 2 California Civil Procedure Before Trial, § 29.5 (3d ed., Cal. Cont. Ed. Bar).

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

the grounds that the California court is an inconvenient forum. If that motion is unsuccessful, the moving party would have no incentive to continue the parallel proceeding in the foreign court, and would be encouraged to accept resolution of the dispute in the California action.

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

PROPOSED LEGISLATION -- ALTERNATIVE # 1 (MODEL ACT)

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. 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) Where two or more proceedings arising out of the same transaction or occurrence were pending, the courts of this state may refuse to enforce a judgment made in any such proceeding in a foreign state as defined in Section 1713.1, unless application for designation of an adjudicating forum was timely made to one of the following:

(1) The first known court of competent jurisdiction where one of the proceedings was commenced.

(2) The adjudicating forum after its selection.

(3) 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) An appearance solely to oppose an application for designation of an adjudicating forum is not a general appearance.

(d) 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.

(e) 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 the same in substance as Section 2 of the Conflicts of Jurisdiction Model Act, except that:

(1) Language has been added in subdivision (a) to limit the nonenforcement provision to a judgment made in a foreign country. See Section 1713.1(1).

(2) Subdivision (c) is added, and is drawn from Section 418.10(d).

Under subdivision (d), 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.

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

1722. (a) Subject to subdivisions (b) and (c), 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.

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

(c) The court shall designate the adjudicating forum as provided

in any agreement between the parties concerning the forum in which the dispute in question is to be settled, and need not consider the factors set out in subdivision (a), if both of the following conditions are satisfied:

(1) There is no showing that the agreement is unreasonable.

(2) The court in its discretion determines that the agreement should be enforced.

Comment. Section 1722 is drawn from Section 3 of the Conflicts of Jurisdictions Model Act. See also 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.

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

§ 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 the 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 the same in substance as Section 4 of the Conflicts of Jurisdictions Model Act. See also 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 (ALTERNATIVE # 1)

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~~ that does not provide impartial tribunals or procedures compatible with the requirements of due process of law ~~;~~ .

(2) The foreign court did not have personal jurisdiction over the defendant~~;~~ ~~or~~ .

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

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

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

(2) The judgment was obtained by extrinsic fraud~~;~~ .

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

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

(5) The proceeding in the foreign court was contrary to an agreement between the parties under which the dispute in question was to be settled otherwise than by proceedings in that court~~;~~ ~~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

or under this chapter, except that a foreign judgment made in an adjudicating forum designated under Chapter 3 shall not be refused recognition or enforcement on the ground that it conflicts with another judgment, was made in an inconvenient forum, or 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.

Comment. Section 1713.4 is amended to add subdivision (c). Under Section 1721(d), 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 adjudicating forum shall not be refused enforcement on the ground that it conflicts with another judgment, was made in an inconvenient forum, or was contrary to a forum selection clause. See also Section 1722(c).

Note. The language in subdivision (a) of Section 1713.4 that a foreign judgment is "not conclusive" refers to the mandatory grounds for withholding recognition; the language in subdivision (b) that a foreign judgment "need not be recognized" refers to the discretionary grounds for withholding recognition. See 7 B. Witkin, California Procedure Judgment § *206, at 643 (3d ed. 1985).*

PROPOSED LEGISLATION -- ALTERNATIVE # 2
(AMEND UNIFORM FOREIGN MONEY-JUDGMENTS ACT)

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

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

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

(2) The foreign court did not have personal jurisdiction over the defendant ~~.~~ ;~~or~~

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

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

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

(2) The judgment was obtained by extrinsic fraud ~~;~~ .

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

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

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

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

(7) The cause of action or defense on which the judgment is based is the subject of an action pending in a court in this state involving the same parties and the foreign court was, and the court in this state is not, an inconvenient forum for trial of the action.

Comment. Section 1713.4 is amended to add paragraph (7) to subdivision (b) to discourage parallel and vexatious litigation involving the same dispute from proceeding simultaneously in this state and in a foreign country.

Note. The language in subdivision (a) of Section 1713.4 that a foreign judgment is "not conclusive" refers to the mandatory grounds for withholding recognition; the language in subdivision (b) that a foreign judgment "need not be recognized" refers to the discretionary grounds for withholding recognition. See 7 B. Witkin, California Procedure Judgment § *206, at 643 (3d ed. 1985).*