

## Memorandum 93-37

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**Subject: Study J-02.01/D-02.01 — Conflicts of Jurisdiction and Enforcement of Foreign Judgments (Comments on Tentative Recommendation)**

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We received eight letters commenting on the staff draft of *Conflicts of Jurisdiction and Enforcement of Foreign Judgments* (January 1993). The draft proposes two alternative approaches to the parallel proceedings problem. Alternative 1 proposes the Conflicts of Jurisdiction Model Act under which determination of the adjudicating forum is made early in the proceedings. Alternative 2 proposes a modified Conflicts of Jurisdiction Model Act, does not make California law dependent on enactment of similar provisions in foreign countries, and provides for determining the most appropriate forum late in the proceedings when judgment is sought to be enforced in California. A copy of the draft is attached.

Of the eight commentators, one favors Alternative 1, one would enact both alternatives, two favor some version of Alternative 2, two are equivocal, and two oppose any legislation at all.

**Commentator Favoring Alternative 1 (Model Act)**

Professor William Reynolds, University of Maryland School of Law (Exhibit, pp. 1-2), says Alternative 1 "provides an elegant solution to the problem." Alternative 2 is "unacceptable" because (1) it provides for determining the most appropriate forum late in the proceedings after resources have been wasted, (2) gives the court discretion not to make a determination, and (3) does not promote uniformity because it is not a Model Act.

**Commentators Favoring Some Version of Alternative 2 (Modified Model Act)**

Attorney Cynthia Schaldenbrand of Irvine (Exhibit, pp. 3-25) prefers a modified version of Alternative 2. She likes Alternative 2 because it requires that the determination be made in a California court in the first instance. She finds Alternative 2 more workable and cohesive than Alternative 1. Because no foreign jurisdiction has enacted the Model Act, Alternative 1 means every determination of an adjudicating forum made by a foreign court would have to be reviewed de novo in a California court to determine its compliance with California law. She would revise Alternative 2 to require the California court to

recognize a foreign judgment rendered in a court determined to be the most appropriate forum, and to require the court to refuse to enforce a foreign judgment made in a court not determined to be the most appropriate forum, replacing the discretion in the draft. She would add a provision for awarding attorneys' fees as an additional sanction. She urges we consider codifying the grounds for an anti-suit injunction for use in cases where the recommended legislation is ineffectual in remedying vexatious parallel litigation. She concludes that forum selection clauses are the best and most effective means of controlling parallel proceedings.

Attorney Luther Avery of San Francisco (Exhibit, p. 26) favors Alternative 2 because it does not require enactment of similar legislation in foreign jurisdictions.

#### **Commentator Favoring Both Alternatives 1 and 2**

Attorney Mark Mazarella of San Diego (Exhibit, pp. 27-28) would enact both Alternatives 1 and 2. Alternative 1 would apply in cases where the foreign jurisdiction has enacted the Model Act. Alternative 2 would apply in cases where the foreign jurisdiction has not enacted the Model Act. He would add a provision applicable to both alternatives absolutely forbidding a plaintiff from using California courts if it does not recognize the California court's decision to assume exclusive jurisdiction over the dispute and dismiss its foreign litigation.

#### **Equivocal Responses**

Professor Joseph Dellapenna, Villanova Law School (Exhibit, pp. 29-39), opposes Alternative 2 because it claims unilateral authority to accommodate foreign and American litigants without any possibility of deference to foreign proceedings in which the same balancing might occur. He fears this would be "perceived abroad as the very sort of arrogance that so rankles when counter-suit injunctions are issued unilaterally." He finds Alternative 1 less troubling than Alternative 2 because California courts must accept similar balancing by foreign courts. But he finds the factors the California court must consider under Section 1722 too vague and amorphous. He would revise Alternative 1 to replace the factors with five rules drawn from choice of law theory. See Exhibit, pp. 37-38. Yet he is concerned that Alternative 1 encourages a race to the courthouse to be the first to file. He says these problems should be resolved by international treaty. He says the U. S. is working toward this goal by participating in the Hague Conference on Private International Law, but that this will probably not be completed for decades.

Attorney Gary Born of London (Exhibit, pp. 40-43) says if the proposed legislation is pursued, he would "greatly favor" Alternative 2. But he questions the need for any legislation. He thinks the proposed legislation compromises the ability of the United States and California to accomplish their public objectives and to protect private rights, and reduces the ability of private parties to avail themselves of the procedural and substantive protections of California and U. S. law. He thinks it creates new incentives that may impose greater costs than the admittedly imperfect existing situation. He says the first-to-file rule encourages races to the courthouse that may generate unnecessary litigation, impose new costs and reward unproductive conduct. He is concerned about the "fuzziness" of the factors in Section 1722. He is concerned the proposed legislation jeopardizes the enforceability of forum selection clauses.

#### **Commentators Opposed to Either Alternative**

Professor Arthur Rosett, UCLA Law School (Exhibit, pp. 44-46), does not find the staff draft persuasive on the need for the statute and recommends the Commission not rush to legislate. He says the parallel proceedings problem is not common or serious. He says troubling situations are rare and are usually well taken care of by the application of judicial common sense and the doctrine of forum non conveniens. He thinks the Model Act creates a race to the courthouse, and that the Model Act is "like swatting a fly with a howitzer." He thinks a better approach might be to divide the dispute so that aspects that belong in a particular jurisdiction will be heard there. He concludes that California's current policy (presumably referring to the Uniform Foreign Money-Judgments Recognition Act) is wise and is a desirable approach to maintain.

Professor Friedrich Juenger, U. C. Davis Law School (Exhibit, pp. 47-49), thinks the proposed legislation is ill-advised. He doubts foreign jurisdictions will enact the Model Act. He thinks the Model Act would be entirely unacceptable to such major civil law nations as France, Germany, and Japan. He says the Model Act requires determinations that judges in foreign legal systems are not prepared to make. He says:

the United States is currently engaged in discussing with foreign nations a convention on worldwide judgment recognition, and the American Bar Association has endorsed this initiative. . . . Adoption of the Model Act might well handicap those charged with the delicate task of negotiating this important multilateral treaty. . . . Moreover, adoption of the Model Act would undercut our Uniform Foreign Money Judgments Recognition Act.

Professor Juenger makes the same point as Professor Rosett that the Model Act's nonrecognition of noncomplying foreign judgments is an excessive sanction that is "at odds with both common sense and comity." He says parties can effectively evade the Model Act by seeking recognition of the foreign judgment in a state that has "wisely decided not to adopt the Act," and then seeking recognition of the sister-state judgment in California under the full faith and credit clause of the U. S. Constitution. Like Professor Dellapenna, Professor Juenger notes that the U. S. is working on a convention on worldwide judgment recognition. He says the American Bar Association has endorsed this initiative.

**Staff Recommendation**

We are reluctant to proceed without a consensus among academicians and practitioners that legislation is needed, and agreement on the approach. It appears that a consensus is lacking.

The staff recommends the Commission not try to develop legislation on this subject for the 1994 session of the Legislature. We can monitor experience under the Connecticut statute. We can also monitor progress on the negotiations on worldwide judgment recognition, but it appears this will not be completed soon. The staff can bring this back to the Commission at a more propitious time.

Respectfully submitted,

Robert J. Murphy  
Staff Counsel

UNIVERSITY OF MARYLAND  
AT BALTIMORE

June 22, 1993

File: \_\_\_\_\_

Re: \_\_\_\_\_

Robert J. Murphy  
California Law Review Commission  
4000 Middlefield Road, Suite D-2  
Palo Alto, California 94303

Dear Mr. Murphy,

Thank you for asking me to comment on the Law Revision Commission Staff proposals dealing with simultaneous litigation. The very serious problem presented by simultaneous litigation has long been a concern of mine, and I have recently written about it extensively.<sup>1</sup> It is a real pleasure to learn that California is grappling with the question. Certainly, the approach your state adopts will be enormously influential; of course, that also makes it more important that the best solution be adopted.

The rapid growth in parallel proceedings presents serious problems for litigants, judicial systems, and, indeed, even governmental relations. The stress to litigants and the justice system is easy to see: the use of parallel proceedings permits one party to harass another both financially and by imposing severe inconvenience. Judicial systems then become over-burdened with needless proceedings which take up time and energy. Finally, the possibility that cases can be heard in different places and that different results might be reached by those different forums placed undue stress on the relations among different sovereigns.

The doctrine of forum non conveniens, of course, provides a partial palliative. As that doctrine has developed in the federal system, courts try to find the proper "home" for litigation.<sup>2</sup> This also is the approach adopted by the California Supreme Court in Stanguites v. Shiley, Inc.<sup>3</sup> Forum non conveniens, however, is not a panacea. It is not used in all jurisdictions, and its use is less than uniform.<sup>4</sup>

The ABA Model Act (Alternative No. 1) provides an elegant solution to the problem. Its great strength lies in its purpose. The goal of the Model Act is to locate the most appropriate forum in which to conduct the litigation. Even better, this search for the most appropriate forum

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<sup>1</sup> See William L. Reynolds, The Proper Forum For a Suit: Transnational Forum Non Conveniens and Countersuit Injunctions in the Federal Courts, 70 Tex. L. Rev. 1663 (1992).

<sup>2</sup> See generally id.

<sup>3</sup> 54 Cal. 3d 744, 819 P.2d 14 (1991).

<sup>4</sup> See generally Allan R. Stein, Forum Non Conveniens and the Redundancy of Court-Access Doctrine, 133 U. Pa. L. Rev. 781 (1985).

Robert J. Murphy  
June 22, 1993  
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is a neutral one, to be made without in-state favoritism. The laudable goal of the Model Act is reinforced by excellent subsidiary provisions. The inquiry is to be made early in the litigation (thereby saving litigant and judicial resources); the Act lists the proper elements for the court to consider; these elements are familiar because of their similarity to forum non conveniens consideration; and a strong and easily applied enforcement mechanism has been selected.

The Alternative to the Model Act (the "Alternative") is unacceptable for three reasons. The first drawback to the Alternative involves timing. This is crucial. Because issues under that proposal will not arise until enforcement of a judgment is sought, parallel proceedings are likely to have proceeded with a concomitant waste of resources. The Model Act, in contrast, promises to save significant resources because it requires that the issue of the proper forum be raised at the beginning of the parallel proceedings. The Model Act, in short, is preferable because the parties must address the problem early in the litigation, thereby saving resources and eliminating uncertainty.

The second drawback is that the Alternative is discretionary. It does not require a court either to determine the most appropriate forum or to refuse to enforce foreign judgments even when California is the "most appropriate forum." Those "may" provisions serve no useful purpose; they will only encourage stonewalling and subsidiary litigation. The mandatory provisions of the Model Act are far preferable.

Finally, the Model Act should be adopted because it is a Model Act. Uniformity in legislation involving multi-jurisdictional problems should always be encouraged. Connecticut already has adopted the Model Act. Adoption by California could provide a powerful spur for other states to do the same.

California has long been a leader in law reform; that history along with the state's extraordinary commercial importance will ensure that any solution to the parallel proceeding problem adopted by California will be very influential. I strongly encourage the Commission to adopt the Model Act. By itself that would be good policy; in addition, adoption by California will surely encourage other jurisdictions to do the same.

I apologize for the delay in replying to your inquiry. I hope my comments are of some use. Please feel free to call me if you have any questions.

Sincerely,

A handwritten signature in dark ink, appearing to read "William L. Reynolds", with a long, sweeping horizontal stroke extending to the right.

William L. Reynolds  
Jacob A. France Professor of Judicial Process

/km

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Key: \_\_\_\_\_

RE: RESPONSE TO SOLICITED COMMENTS TO THE  
PUBLIC RECORD OF THE CALIFORNIA LAW  
REVISION COMMISSION, STAFF DRAFT OF  
CONFLICT OF JURISDICTION AND  
ENFORCEMENT OF FOREIGN JUDGMENTS

Dear Mr. Murphy:

In response to the request contained in your correspondence of March 2, 1993, addressed to Peter B. Prestley, I enclose for your consideration my comments and analysis of the proposed legislation concerning the Conflicts of Jurisdiction Model Act. Mr. Prestley asked me to respond as I have a similarity of interest and particular experience with California law and procedure. I am in active practice in California, representing the interests of The Travelers Insurance Company and its insureds.

Thank you for the opportunity to comment on this most interesting issue. We take an active interest in proposed and pending legislation in California, particularly in the areas of insurance regulation, tort law and civil procedure. If we may be of any further assistance to the Commission in this regard, please do not hesitate to contact us at any time.

Very truly yours,

FORD & SCHALDENBRAND

  
Cynthia B. Schaldenbrand

CBS/jls

IN RE THE MATTER OF THE PROPOSED LEGISLATION  
CONCERNING CONFLICTS OF JURISDICTION AND  
ENFORCEMENT OF FOREIGN JUDGMENTS, PENDING BEFORE  
THE LAW REVISION COMMISSION OF THE STATE OF  
CALIFORNIA; SOLICITED COMMENTS TO THE PUBLIC RECORD

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Comments Submitted: April 15, 1993

Public Hearing: May 13 & 14, 1993

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I.

INTRODUCTORY STATEMENT

A. BACKGROUND

The world is growing smaller. Expanding international trade has truly created an interdependent global market economy. This economic evolution has thrust upon the courts and legislatures new and challenging issues in the areas of Conflicts of International Jurisdiction. "Great change dominates the world, and unless we move with change we will become its victim."<sup>1</sup>

Although conflicts of international jurisdiction may at first seem to be a federal issue, there are several factors which combine to necessitate state legislation on this issue. Primarily, The United States government has declined to participate in any international jurisdiction treaties such as the Brussels Convention<sup>2</sup> and the Lugano Convention.<sup>3</sup> In addition, in federal diversity cases filed within California, the federal courts will look to California substantive law regarding the regulation and enforcement of foreign judgments.<sup>4</sup> These factors combined with California's national scale economy and its key role as The United States' link to the Pacific rim

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<sup>1</sup> Kennedy, Robert F., The New York Times, July 2, 1964 p.6C col. 1.

<sup>2</sup> Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, Sept. 27, 1968, 1978 O.J. (L 304) 77.

<sup>3</sup> Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Sept. 16, 1988, 1988 O.J. (L 319) 9.

<sup>4</sup> Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938); F.R.C.P. Rule 69.

international trade market, require that the California State Legislature consider the propriety for legislation in this area.

It is clear that the traditional procedural tools designed to control vexatious and duplicative litigation between the differing state courts, and the state and federal courts, are inadequate to deal with the perplexing problems created by conflicts of international jurisdiction.<sup>5</sup> The doctrine of Forum Non Conveniens may be used only to "stay or dismiss the action."<sup>6</sup> As such, this doctrine has no effect on vexatious litigation occurring in a foreign jurisdiction.

In order for a court to control vexatious litigation in a foreign jurisdiction, it must resort to the drastic remedy of an "anti-suit" injunction which, of course, poses a serious threat to international comity and an encroachment upon a foreign court's sovereignty.<sup>7</sup> Neither the California Sister State Money Judgment Act<sup>8</sup> nor the full faith and credit clause of The United States Constitution<sup>9</sup> apply to judgments rendered in foreign countries.

When viewed against this background, it is understandable how The United States' courts have developed the present

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<sup>5</sup> China Trade and Development Corp. v. M. V. Choong Yong 837 F.2d 33 (2d Cir. 1987); Banque Libanaise pour Le Commerce v. Khreich, 915 F.2d 1000 (5th Cir. 1990)

<sup>6</sup> California Code of Civil Procedure §410.30(a).

<sup>7</sup> See generally, Laker Airways v. SABENA, Belgian World Airlines, 731 F.2d 909 (1984); Pesquera del Pacifico v. Superior Court, 89 Cal.App.2d 738, 740-41, 201 P.2d 553 (1949).

<sup>8</sup> California Civil Code, §1710.10 et seq.

<sup>9</sup> United States Constitution, Article IV., Section 1.

"parallel proceedings" rule.<sup>10</sup> The parallel proceedings rule provides that where two courts of different nations have concurrent jurisdiction over actions arising out of the same transaction or occurrence, these "parallel proceedings," should ordinarily be allowed to proceed simultaneously, until judgment is reached in one, which can be pled as res judicata in the other. The "parallel proceedings" rule not only provides an almost irresistible opportunity for forum shopping and vexatious gamesmanship,<sup>11</sup> but moreover, insures a race to the courthouse and an "embarrassing race to judgment."<sup>12</sup>

California is one of twenty-two states that have adopted the Uniform Foreign Money-Judgments Recognition Act<sup>13</sup>, which vests the court with discretion to refuse to enforce certain foreign judgments. The approach of the Conflicts of Jurisdiction Model Act in providing the "adjudicating forum" with discretion to refuse to recognize a foreign judgment obtained in a vexatious parallel proceeding, or the "nonadjudicating forum," seems to solve many of the comity obstacles of traditional remedies. "By not interfering directly with the foreign litigation, the Model Act discourages parallel proceedings without infringing the sovereignty of another nation."<sup>12</sup>

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<sup>10</sup> Laker Airways v. SABENA, Belgian World Airlines, 731 F.2d 909 (1984)

<sup>11</sup> See footnote No. 5.

<sup>12</sup> Laker Airways v. SABENA, Belgian World Airways 731 F.2d 909, 928 (1984).

<sup>13</sup> California Code of Civil Procedure §§ 1713 et seq.

<sup>12</sup> California Law Revision Commission, Staff Draft, pg. 5.

B. OVERVIEW OF COMMENTS

In keeping with the Commission's request to comment upon those provisions of the proposed legislation of which we approve, as well as upon those of which we do not; the following commentary and analysis will address the perceived positive and negative attributes of each of the proposed alternatives separately and will also provide a comparative analysis.

The following commentary will also include several additional and alternative proposals which may further the expressed public policy of the Model Act to "enforce only those foreign judgments that were not obtained in connection with vexatious litigation, parallel proceedings or litigation in inconvenient forums."<sup>13</sup>

In conclusion, while legislation in this area may seem appropriate if the proposed legislation as adopted is not strong enough to be efficacious in achieving its desired goals, it should not be adopted. It would be a supreme irony if this act were able to be used as an additional weapon in a vexatious litigant's arsenal to further complicate and obfuscate international litigation.

As will be discussed in detail below, the fear of an unenforceable judgment would not deter the most vexatious of litigants, i.e., those who wish not to obtain and enforce a favorable judgment, but merely to delay, harass and cause additional expense. In view of this, this party would strongly urge the Commission to: (1) Remove language from the act that may result in multiple hearings on the same issues; (2) provide additional disincentives to vexatious parallel proceedings such as discretionary attorneys' fees or sanctions; and (3) support

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<sup>13</sup> The Conflict of Jurisdiction Model Act, Section 1, Declaration of Public Policy, see Forum Selection: Model Act Provides a Solution Nat'l. L. J., Jan. 29, 1990 at 17 Col. 1.

and advance the growing public policy in favor of forum selection clauses,<sup>14</sup> which appears to be the most effective means of avoiding duplicative proceedings in commercial transactions.

## II.

### COMMENTARY ON PROPOSED LEGISLATION - ALTERNATIVE #1 (MODEL ACT), AND CONFORMING REVISION (ALTERNATIVE #1)

#### A. PERCEIVED POSITIVE FACTORS

##### (1) Generally:

The vehicle of discretionary enforcement of foreign judgments seems to be the most effective means to discourage vexatious parallel proceedings, while respecting international comity.

##### (2) Burden of Proof:

This party strongly supports the Commission's departure from section three of the original Conflicts of Jurisdiction Model Act, which stated that the plaintiff's choice of forum "should rarely be disturbed." While shifting the burden of proof is preferable to creating a presumption of priority, this party strongly urges the Commission to render the proposed legislation free from any language which would confer an advantage to the first party to commence litigation. It is suggested that the language in proposed section 1722(b) which shifts the burden of proof from the "party first to file,"

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<sup>14</sup> Carnival Cruise Lines, Inc. v. Shute, 111 S.Ct. 1522 (1991)

should be altered to simply place the burden of proof on any party seeking to establish an "adjudicating forum."

(3) Expert Testimony:

Although most law and motion proceedings in California courts are considered on affidavits alone, in view of the fact that a court would have to decide issues concerning foreign public policies, laws, and court systems,<sup>15</sup> it would seem that expert testimony by those familiar with the laws of the foreign jurisdictions would be desired and necessary.

However, in the interest of judicial economy, it is recommended that this section be modified to reflect the current rule in California that oral testimony may only be given in law and motion hearings with prior approval of the court.<sup>16</sup>

(4) Forum Selection:

This party strongly supports the inclusion of Subsection (c) in Section 1722, which creates a presumption that a reasonable forum selection clause should determine the "adjudicating forum." It is respectfully suggested that Subsection (c)(2) be merged with Subsection (1) to underscore the fact that the court has discretion only to dishonor an "unreasonable" forum selection clause, as established by current law, and not a broad and unbridled discretion to fashion multiple exceptions to the general presumption.

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<sup>15</sup> Section 1722(a), (2), (3), (6), (7), (8)

<sup>16</sup> California Rules of Court, Rule 323.



## B. PERCEIVED NEGATIVE FACTORS

### (1) Lack of Reciprocal Enactment

Under the Model Act, a California court may be required to recognize a foreign court's determination of the "adjudicating forum." The Commission acknowledges that "The Conflicts of Jurisdiction Model Act appears not to have been enacted in any foreign country."<sup>17</sup> This would require that every determination of "adjudicating forum" made by a foreign court would have to be reviewed de novo in a California court to determine its compliance with the substance of the act. This duplicitous proceeding would seem to run counter to the intent of this legislation. Therefore, it would seem that the analogous provisions contained in Alternative #2 which requires the determination be made in a California court in the first instance would be preferable.

### (2) Discretionary Enforcement of "Adjudicating Forum" Judgment:

The language of proposed Section 1713.4(c) that a foreign judgment "may be refused recognition" would seem to confer discretion on a court to enforce a judgment from a foreign forum that was not deemed the "adjudicating forum." It seems apparent that the greater the certainty of nonenforcement of the judgment, the more effective the act would be as a whole.

By the same token, this discretionary language would seem to confer jurisdiction on a court to refuse to recognize a foreign judgment rendered in a foreign court that was determined to be an appropriate "adjudicating forum." Once again, this lack of certainty only sows confusion which seems

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<sup>17</sup> California Law Revision Commission Staff Draft, pg. 6, n. 25.

to defeat the stated intent of the act. This language could either be changed to mandatory language, or this entire section could be moved under Section 1713.4(a), which would provide for mandatory non-recognition of foreign judgments which were rendered in a "nonadjudicating forum."

It is understood that the court would have to make additional findings to determine that a foreign judgment would or would not be conclusively recognized. Refer to Section V.A., infra, concerning the possibility of an interlocutory order of recognition of the ultimate judgment in pending foreign proceedings.

**(3) Multiple Proceedings:**

Once again, the discretionary and nonconclusive language of the act could result in creating the very vexatious litigation it is intending to obviate. If California were to enact the Model Act in its present state, a vexatious litigant could attempt to litigate the same issues of inconvenient forum three times. First, in a motion for stay or dismissal under the Forum Non Conveniens statute; secondly, under a motion to establish an "adjudicating forum;" and lastly, if unsuccessful on the foregoing, a party could relitigate the issue when attempting to enforce a judgment made in a "nonadjudicating forum." It is respectfully suggested that care be taken to avoid duplicate hearings on the same issues.

**(4) Vague As To Location of "Pending Actions":**

The language in Section 1721(b), which defines the scope of the act as applying "where two or more proceedings arising out of the same transaction or occurrence were pending," seems somewhat vague. It is ambiguous as to whether this requires that one of the actions be pending in California; or whether if the parties involved in litigation in another state and a foreign country, must bring a motion in California prior to seeking enforcement of that judgment in California. This

language may be intentional, in light of the Commission's statement that "this chapter may also apply to enforcement in California of a judgment in another state."<sup>18</sup>

If it is the intent of the Commission that this act should apply to such judgments, it would seem this language could be easily included; however, if it is the intent to limit this act to actions pending only in California and a foreign jurisdiction, language similar to that used in Alternative Proposed Legislation #2 could be used, i.e., "if proceedings are pending in this state and in one or more foreign states."<sup>19</sup> It is this party's belief that the full faith and credit clause of The United States Constitution would require that California recognize any judgment entered in a sister state of the union, regardless of whether that state complied with the substance of the Conflicts of Jurisdiction Model Act as adopted in California.

In some instances it may be desirable to leave certain construction and interpretation to the courts; however, when the intent of proposed legislation is to avoid multiple proceedings, it would seem desirable to express a clear intent of the scope of the act so as to avoid multiple proceedings.

(5) Notice:

Section 1723(b) provides that "reasonable written notice" shall be given by a party seeking the determination of an "adjudicating forum." In light of the complex evidentiary hearing contemplated by the Model Act, it is submitted that an extended time period of thirty or forty-five days written notice be required by the act. In addition, to avoid being

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<sup>18</sup> California Law Revision Commission, Staff Draft, pg. 10

<sup>19</sup> Section 410.8(2).

used for delay and harassment, a reasonable cut-off prior to the trial of a matter is recommended. Specific time frames for oppositions, responses and orders shortening time would also seem advisable to avoid any confusion.

### III.

#### COMMENTS TO PROPOSED LEGISLATION - ALTERNATIVE #2 (MODIFIED MODEL ACT), AND CONFORMING REVISION (ALTERNATIVE #2)

##### A. PERCEIVED POSITIVE FACTORS

###### (1) Generally:

The vehicle of discretionary enforcement of foreign judgments seems to be the most effective means to discourage vexatious parallel proceedings, while respecting international comity.

###### (2) Statutory Scheme

The fact that Alternative #2 requires only simple amendments to the existing Forum Non Conveniens Act<sup>20</sup>, and the Uniform Foreign Money-Judgments Recognition Act<sup>21</sup>; rather than creating an entirely new act which must be interpreted consistent with both of these acts, seems to render a more workable, cohesive statutory scheme.

###### (3) Mandatory Stay:

The language of Section 410.84(a) requiring a mandatory stay of the domestic proceeding upon a finding that the foreign

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<sup>20</sup> California Code of Civil Procedure §410.30.

<sup>21</sup> California Code of Civil Procedure, §1713 et seq.

forum is the most appropriate, is desirable in that it is a clear, direct and effective means of avoiding simultaneous proceedings. Although similar to the granting of a motion to stay for Forum Non Conveniens, in view of the evidentiary proceedings envisioned by the act, the court is in a much better position to make informed rulings as to foreign public policy and effect of foreign laws.

(4) No Reciprocity Requirement:

Under Alternative #1, a California court may be required to recognize a foreign court's determination of the "adjudicating forum." The Commission acknowledges that "The Conflicts of Jurisdiction Model Act appears not to have been enacted in any foreign country."<sup>21</sup> This would require that every determination of "adjudicating forum" made by a foreign court would have to be reviewed de novo in a California court to determine its compliance with the substance of the act. These duplicitous proceedings seem to run counter to the intent of this legislation.

(5) Express Intent Language:

In general, the language of Alternative #2 is more clear, direct and specific, thus enabling courts to better ascertain the intent of the commission and legislature. As previously discussed, the scope of the statute is clearly defined as proceedings that are "pending in this state and one or more foreign states,"<sup>22</sup> and includes the specific requirement that the actions involve "the same parties."<sup>23</sup> This party strongly

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<sup>21</sup> California Law Revision Commission Staff Draft, pg. 6, n. 25.

<sup>22</sup> Section 410.8(2)

<sup>23</sup> Ibid.

supports the specific language which declines res judicata effect to all cases where enforcement of foreign judgment has been refused as a "nonadjudicating forum."<sup>24</sup>

**(6) Forum Selection:**

This party strongly supports the inclusion of Subsection (b) in Section 410.86, which creates a presumption that a reasonable forum selection clause should determine the "adjudicating forum."

**(7) No First To File Benefits:**

Notwithstanding the reference to "burden of proof" in the title to Section 410.86, it appears Alternative #2 is free from conferring any benefits to the party first to file, including the shifting of the burden of proof. This party strongly suggests that the act should discourage a race to file and a race to judgment.

**B. PERCEIVED NEGATIVE FACTORS**

**(1) Discretionary Enforcement of "Adjudicating Forum" Judgment:**

The language of proposed Section 1713.4(b) that a foreign judgment "need not be recognized" would seem to confer discretion on a court to enforce a judgment from a foreign forum that was not deemed the "adjudicating forum." It seems apparent that the greater the certainty of the nonenforcement of the judgment, the more effective the act would be as a whole. By the same token, this discretionary language would seem to confer jurisdiction to a court to refuse to recognize a foreign judgment rendered in a foreign court that was

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<sup>24</sup> Section 410.84(b), Staff Draft, pg. 16.

determined to be an appropriate "adjudicating forum." Once again, this lack of certainty only sows confusion which seems to defeat the stated intent of the act. This language could either be changed to mandatory language, or this entire section could be moved under Section 1713.4(a) which would provide for mandatory nonrecognition of foreign judgments which were rendered in a "nonadjudicating forum."

It is recognized that the court would have to make additional findings to determine that a foreign judgment would be conclusively recognized. Refer to Section V.A., infra, concerning an interlocutory order of recognition of the ultimate judgment in pending foreign proceedings.

**(2) Multiple Proceedings:**

Once again, the discretionary and nonconclusive language of the act could result in creating the very vexatious litigation it is intending to avoid. If California were to enact the Model Act in its present state, a vexatious litigant could attempt to litigate the same issues of inconvenient forum three times. First, in a motion for stay or dismissal under the Forum Non Conveniens statute; secondly, under a motion to establish an "adjudicating forum;" and lastly, if unsuccessful on the foregoing, could relitigate the issue when attempting to enforce a judgment made in a "nonadjudicating forum." It is respectfully suggested that care be taken to avoid duplicate hearings on the same issues. Refer to Section V.A., below.

**(3) Notice:**

Section 1723(b) provides that "reasonable written notice" shall be given by a party seeking the determination of an "adjudicating forum." In light of the complex evidentiary hearing contemplated by the Model Act, it is submitted that an extended time period of thirty or forty-five days written notice be required by the act. In addition, to avoid being used for delay and harassment, a reasonable cut-off prior to

the trial of a matter is recommended. Specific time frames for oppositions, responses and orders shortening time would also seem advisable to avoid any confusion.

#### IV.

#### COMPARATIVE ANALYSIS OF ALTERNATIVES #1 & #2

Both alternatives have the advantage of providing a vehicle to discourage vexatious parallel proceedings while respecting international comity. In addition, both alternatives share the same weakness in subjecting the litigants to multiple hearings on the same issues, and providing little disincentive to a purely vexatious litigant.

However, if this Commission is inclined to recommend one of these alternatives to the legislature, this party would recommend Alternative #2, for the following reasons:

- (1) Alternative #2 does not confer any benefits, including the shifting of the burden of proof, to the party who is first to file the action.
- (2) In light of the fact no other country has adopted the Model Act, Alternative #2 recognizes that these issues would ultimately have to be decided in a California court. This saves the parties the time and expense of readjudicating these issues in a foreign forum.
- (3) The mandatory stay provision of Alternative #2 insures that the California court will not be used as the forum for vexatious parallel proceedings.
- (4) The language of Alternative #2 is far more clear, certain and specific, thus providing the courts with a more sound



foundation upon which to construe and interpret the act. The specific language with respect to the scope and effect of the act is highly preferable. In addition, Alternative #2 seems to merge easier with the California statutory scheme concerning Forum Non Conveniens and the enforcement of foreign money judgments. This would also aid in judicial construction and interpretation of any proposed legislation.

V.

**PROPOSED ADDITIONS AND ALTERNATIVE MEASURES**

**A. Conclusive Interlocutory Determination of Enforceability of Foreign Judgment:**

As discussed, the common primary weakness of both proposed alternatives, is that even after a judgment has been made in a determined "adjudicating forum", it remains subject to mandatory or discretionary nonrecognition under the Uniform Foreign Money-Judgments Act.<sup>25</sup> The fact that the parties may be subject to further litigation, if and when a judgment is obtained and enforced, removes the major policy disincentives from the act.

This shortcoming could easily be remedied by allowing a court to make a conclusive preliminary order to the effect that the ultimate foreign judgment will or will not be recognized. This is in keeping with the expressed intent of the act that "by not interfering directly with the foreign litigation, the

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<sup>25</sup> California Code of Civil Procedure, §§ 1713 et seq.

Model Act discourages parallel proceedings without infringing the sovereignty of another nation."<sup>26</sup>

To make this preliminary determination, the court would consider those factors set forth in California Code of Civil Procedure §1713.4, which are not dissimilar to those thirteen policy factors which it must consider under §1722 in determining an "adjudicating forum." The court could easily determine whether the forum provided due process, and had personal and subject matter jurisdiction; and could therefore, conclusively order that the judgment is not subject to mandatory nonrecognition under §1713.4(a). Thus, forever closing the door on this issue.

With respect to discretionary nonrecognition under §1713.4(b), in view of the evidentiary nature of the hearing anticipated by the Model Act, it is submitted that the court could also make those findings under subsections one through six, with the possible exception of subsection two, "extrinsic fraud" occurring after the hearing. However, with or without this statutory authority, a court has inherent power to vacate or modify any foreign or domestic judgment which is rendered void by extrinsic fraud.<sup>27</sup>

In the alternative, this objective could similarly be accomplished by simply placing the new §1713.4(c), as an additional subsection to §1713.4(a). This would conclusively render a foreign judgment made in a "nonadjudicating forum" "not conclusive."

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<sup>26</sup> Law Review Commission Staff Draft, pg. 5

<sup>27</sup> United States v. Throckmorton, 98 U.S. 61, 65 (1878).

**B. Codification of Discretionary Anti-Suit Injunction to Protect Jurisdiction:**

The Model Act provides no disincentive to a truly vexatious litigant who does not anticipate having to enforce a judgment in California, either because the parallel proceeding is designed solely for the purpose of delay, or there are assets available in other jurisdictions.

While an anti-suit injunction does raise international comity concerns, comity does not impose an unremitting obligation upon any nation to enforce foreign interests fundamentally prejudiced to those in the domestic forum.<sup>28</sup> Where a party continues to advance a parallel proceeding in a foreign forum that has been determined to be a "nonadjudicating forum" under the Model Act, it is submitted that this may constitute a serious offense to the public policy of this state. The Commission may wish to consider codifying the recognized grounds for an anti-suit injunction to provide guidance to the courts as to when an anti-suit injunction may be necessary, such as when the procedure subscribed by the Model Act has been ineffectual in remedying vexatious parallel litigation.

Where a party continues a parallel proceeding in a "nonadjudicating forum" and the court finds that an injunction is required to: (1) prevent an irreparable miscarriage of justice, (2) protect the jurisdiction of the California court, or (3) prevent the evasion of an important public policy of the issuing forum,<sup>29</sup> a court would have discretion to issue an anti-suit injunction to bar the parties before it from participating in the vexatious parallel proceeding.

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<sup>28</sup> Laker Airways v. SABENA. Belgium World Airlines, 731 F.2d 909, 937 (1984)

<sup>29</sup> Id. at 926-930.

C. Award of Attorneys Fees as Costs or Sanctions for Pursuing Vexatious Parallel Litigation:

Once again, the Model Act in its present form does nothing to discourage a truly vexatious litigant who has no interest in enforcing a judgment in California. Both the federal system and California have statutes which provide the court with authority to award attorneys fees as costs or sanctions for frivolous actions or bad faith tactics.<sup>30</sup> A simple amendment could be made to the act which would provide attorneys fees as either sanctions for pursuing a vexatious parallel proceeding, or as additional costs of suit incurred by the prevailing party without separate action.<sup>31</sup>

This proposed amendment would provide that pursuing litigation in a forum that has been determined to be a "nonadjudicating forum" under the Model Act, would be presumed to be frivolous or vexatious, thus entitling the innocent party to sanctions<sup>32</sup>. It has been observed that the threat of large awards of attorneys fees has often been effective in controlling bad faith conduct of overzealous litigants, where less drastic measures have failed.

D. Binding Forum Selection Clauses in Nonconsumer International Commerce Transactions:

This party reiterates and reemphasizes its strong position supporting the use of forum selection clauses in international commercial transactions. It is therefore suggested that any legislation adopted in this area clearly express the intent of

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<sup>30</sup> Federal Rules of Civil Procedure, Rule 11; California Code of Civil Procedure, §128.5.

<sup>31</sup> California Code of Civil Procedure, §1021 et seq..

<sup>32</sup> California Code of Civil Procedure, §128.5.

the Commission and legislature that forum selection clauses are favored in international commercial transactions. This would seem to be the best and most effective means of controlling parallel proceedings. Language could be added to the act which would create a presumption of validity of a forum selection clause in any nonconsumer contract which necessarily involves international commerce.

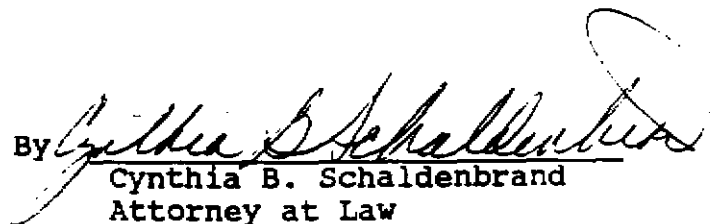
VI.

CONCLUSIONS AND RECOMMENDATIONS

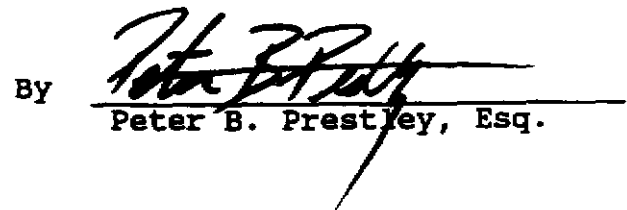
This party respectfully recommends that: the Commission approve Alternative #2, but only as modified to insure that (1) once an "adjudicating forum" is determined, that the judgment of that forum is and will remain conclusive; and (2) if a party is forced to continue litigation in a "nonadjudicating forum," that they be entitled to recover the additional costs and attorneys fees incurred in defending the vexatious parallel proceedings.

Respectfully submitted,

DATED: April 22, 1993

By   
Cynthia B. Schaldenbrand  
Attorney at Law

DATED: April 22, 1993

By   
Peter B. Prestley, Esq.

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April 5, 1993

Our File No. 9911.81-35

California Law Revision Commission  
4000 Middlefield Road, Suite D-2  
Palo Alto, California 94303-4739

Re: Conflict of Jurisdiction and  
Enforcement of Foreign Judgments  
Staff Draft January 1993

Law Revision Commission  
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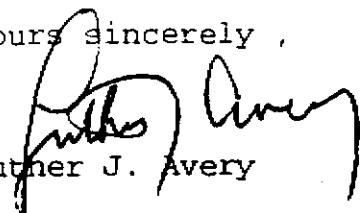
Gentlemen:

I recommend Alternative 2, not requiring enforcement of similar provisions in the foreign country. I was recently consulted by a California business that had sold assets to a nonresident alien operating a business in Hawaii. The assets were delivered to the buyer's place of business in Palau, a district in the Southwest Territories. The amount at issue was approximately \$25,000, an amount too small to justify suits in more than one jurisdiction. The basic problem was to collect a judgment in Palau when the buyer would claim the merchandise delivered did not conform to the order. Thus, suit in Palau was virtually required.

Suit in Palau eliminated the risk that suit in Hawaii or California would be met with a parallel vexatious suit in Palau. Suit in either California or Hawaii would have required reliance on a strong-arm statute to establish jurisdiction over the buyer.

It appears to me that the adoption of the Conflicts of Jurisdiction Model Act would permit collection of a Palau judgment in California if jurisdiction over the buyer were later obtained for purposes of enforcing the Palau judgment. However, in my opinion, Alternative 2 is preferable because the same benefit can be obtained but adoption of the Act in Palau would unnecessary.

Yours sincerely ,



Luther J. Avery

LJA cet

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March 18, 1993

Robert J. Murphy  
Staff Counsel  
California Law Revision Commission  
4000 Middlefield Road, Suite D-2  
Palo Alto, CA 94303-4739

Dear Mr. Murphy:

Thank you for your letter of March 2, 1993 soliciting my comments on the Law Review Commission's draft of the Conflicts of Jurisdiction Model Act. I have reviewed the materials with which you have provided me and have the following comments.

Where California law and the law of a foreign jurisdiction both recognize the same procedures and/or rights, the parties' opportunities to use California courts as a sword and foreign courts as a shield are limited at best. Initially, I am concerned about any rule applicable in California which is not applicable in foreign jurisdictions (whether defined as other states of the United States or other countries). Any legislation which would allow a party to secure the benefits of California law without incurring the obligations imposed under California law should be discouraged.

As a consequence, I thought the best procedure might be to utilize two different procedures depending upon whether or not the foreign jurisdiction subscribes to the Conflicts of Jurisdiction Model Act. If the foreign jurisdiction subscribes to the Conflicts of Jurisdiction Model Act, then alternative number one should be utilized in California. However, if the foreign jurisdiction does not subscribe to the Conflicts of Jurisdiction Model Act, alternative number two should be applicable. I see no reason why the two alternatives could not both exist, depending upon the status of the foreign jurisdiction's adoption of the Conflicts of Jurisdiction Model Act.

Even if a system incorporating this flexibility were utilized, there are still opportunities for abuse. For example, consider the following. Plaintiff files suit in both California and a foreign jurisdiction. The foreign jurisdiction does not subscribe to the Conflicts of Jurisdiction Model Act and therefore alternative number two is applicable. Assume the California court determines that it is the most appropriate forum and proceeds with the litigation. However, assume that the foreign court does not accept California's determination and also proceeds with the litigation.

Robert J. Murphy  
March 18, 1993  
Page 2

If the plaintiff is successful in the California court, the California court would enforce the judgment in California. Additionally, the foreign court might recognize the California court's decision and enforce the California court's decision in the foreign jurisdiction. However, if the plaintiff lost in the California courts, but was allowed to proceed in the foreign jurisdiction, and was successful, it could still enforce the judgment in the foreign court, even though the California courts would presumably deny enforcement in California.

Consequently, if alternative number two is utilized, whether in conjunction with alternative number one (the Conflicts of Jurisdiction Model Act) or as a stand-alone alternative, there should be a specific provision absolutely forbidding a plaintiff from availing itself to the California court system if it does not recognize the California court's decision to assume exclusive jurisdiction over the dispute and, as a consequence, to dismiss its foreign litigation. If it refused to dismiss its foreign litigation after the California court has decided that California is the appropriate venue, the case should be thrown out of the California courts.

Whichever system is adopted, it should clearly deny litigants the benefit of California law and procedure (and the ability to enforce a California judgment) if the party refuses to accept the California court's decision with regard to jurisdiction.

I hope these comments are of assistance to you. If you wish to discuss this with me further, I would be happy to do so.

Very truly yours,



Mark C. Mazzarella

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SCHOOL OF LAW

April 12, 1993

Robert J. Murphy  
Staff Counsel  
California Law Revision Commission  
4000 Middlefield Road, Suite D-2  
Palo Alto, CA 94303-4739

Dear Mr. Murphy:

Thank you for asking my comments on the staff draft you recently sent me. Here are some comments I have put together.

I am sorry I could not provide a more detailed analysis. I will be happy to work further with the Commission should that seem desirable.

I would welcome your reactions to the points I raise. I look forward to hearing from you.

Cordially,

Joseph W. Dellapenna

encl.

Comments on the Proposed  
CONFLICTS OF JURISDICTION AND  
ENFORCEMENT OF FOREIGN JUDGMENTS ACT  
before  
The California Law Revision Commission

by

Joseph W. Dellapenna

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In response to a request by Robert J. Murphy, Staff Counsel to the California Law Revision Commission, I have prepared the following comments on the proposed Conflicts of Jurisdiction and Enforcement of Foreign Judgments Act. In general, I am supportive of the goals of the proposed enactment: to compel litigation to be pursued in the most convenient forum and to deny enforcement to judgments obtained in another forum when a procedure exists to compel litigation in the most convenient forum. I have some reservations about the methods selected to achieve these desirable goals.

Traditionally, a party could seek to litigate a claim in any forum which was competent to hear the claim, which could establish personal jurisdiction over all necessary parties, and which did not voluntarily decline to hear the case on a basis that in the common law is captioned forum non conveniens. Such an approach is virtually compelled by the absence of any multinational mechanism to direct litigation towards the most convenient forum. Unfortunately, all too often it results in what is referred to as the "race for judgment" in which different parties file suit in different fora and each party seeks to delay (by any possible means) the proceedings in which it expects to have a less favorable outcome and to accelerate the proceeding in which it expects to achieve the most favorable outcome in the expectation that the first judgment to be entered will be honored in all fora. At the very least, this process doubles the cost of litigating a claim, and generally it succeeds in needlessly

complicating such litigation as each party multiplies motions in its effort to delay the less desired proceedings. Several well chosen examples appear in the Staff Draft Comments with which I was supplied along with the proposed enactments.

Occasionally, courts have sought to prevent such undesirable situations by "counter-suit injunctions," in which a court enjoins some or all of the parties before it from prosecuting the claim in other fora. Such injunctions are rarely granted both because each court fears that other fora will perceive such injunctions as disrespectful and will reciprocate in the same or other cases. There have been several prominent cases in which such reciprocal injunctions have issued, with the second injunction often reflecting not only a concern the issuing court judges itself to be the proper forum but also is offended by what it takes to be the arrogance of the first court in unilaterally asserting the right to cut-off proceedings in a foreign forum. As a result, the courts find themselves in an unseemly "Mexican stand-off" in which each court has enjoined the parties from proceeding before the other court. The only way such an impasse can be resolved is if one of the courts "backs down," something that both court might be unwilling to do. When one court does back down, the process at the least leaves some residue of ill-feeling between the courts and the legal professions. See, e.g., Laker Airways Ltd. v. SABENA, 731 F.2d 909 (D.C. Cir. 1984); British Airways Bd. v. Laker Airways, Ltd., [1984] 3 W.L.R. 413, [1985] A.C. 58 (H.L.).

The problems I have outlined were once rather rare when courts tended to be rather strictly territorial in their approach to the exercise of personal jurisdiction. The spread of what we call "long-arm jurisdiction" around the world has made the possibility of such competing proceedings all too general, and even the emergence of forum non conveniens theories around the world have not prevented the problem from becoming both common and serious. It is precisely in those courts in which the national sensibilities are most exposed that courts are most unlikely to decline to exercise their jurisdiction and thus to end up in a posture of direct opposition to another court through counter-suit injunctions. Even when, as in the Laker litigation, one of the courts eventually capitulates, the very sensitivity of the case is likely to make the confrontation rankle long after the particular litigation has been concluded.

The process described here thus seriously undermines the comity between nations on which the private international legal system depends, and, in extreme cases, can impinge on friendly relations at the highest level. In the Laker litigation, for example, the whole matter became an issue of negotiations between the President of the United States and the Prime Minister of the United Kingdom. See Geoffrey Smith, REAGAN AND THATCHER, 141-44, 164-65 (1991).

Ideally, problems such as these should be resolved through an international treaty. The State Department has just begun what will undoubtedly be a long drawn-out process to negotiate such a treaty through the Hague Conference on Private

International Law. See Public Notice 1784, Fed. Reg. 93-7276, March 30, 1993. Given the likelihood that this process will not be completed for decades, the states of the United States should proceed to deal constructively with the problem during the open-ended interim period.

Any legislation intended to remedy the present situation thus is to be welcomed, but only if it will serve to ameliorate rather than to exacerbate the confrontations that courts have had to confront with ever greater frequency. The second proposed alternative can be dismissed fairly out-of-hand precisely because it proclaims the California courts as the proper forum for resolving such disputes without express deference to the interest of other fora to decide the same question. Foreign jurists and lawyers have never been convinced that a court in the United States can appropriately balance such factors as are listed in proposed § 410.86 to arrive at an outcome that fairly accommodates the interests of foreign and American participants. See, e.g., Laker Airways Ltd. v. SABENA, 731 F.2d 909, 948-51 (D.C. Cir. 1984); A.V. Lowe, Blocking Extraterritorial Jurisdiction: The British Protection of Trading Interests Act, 1980, 75 AM. J. INT'L L. 257 (1981). A claim of unilateral authority to do so without any possibility of deference to foreign proceedings in which the same balancing processing might occur must be perceived abroad as the very sort of arrogance that so rankles when counter-suit injunctions are issued unilaterally.

Alternative # 1 (the proposal that follows the Model Act) is less troubling than the unilateral approach of alternative # 2, although several questions need to be considered carefully. I will begin by considering whether denying enforcement to an otherwise valid judgment is an appropriate remedy for a party who insists on litigating in an improper forum. I will follow by considering the questions posed by the balancing process proposed under alternative # 1, questions that are similar to the questions that arise regarding the balancing process as under alternative # 2.

The commentary in the Staff Draft quite correctly indicates that to have any hope of success the statute creating a process for selecting the proper adjudicating forum must carry an effective sanction, and no sanction could be more effective than to deny effect to a judgment procured in another forum. To threaten non-complying parties with fines or imprisonment puts us right back into the face off of the counter-suit injunction. Yet to deny effect to a judgment from a competent court without a showing the denial of a fair trial, fraud, or the like, remains a serious denial of the comity of nations.

Before such a serious step should be taken, one should be fairly certain that other nations will accept the legitimacy of the decision to deny enforcement. Only if this process gains international acceptance can the refusal to enforce judgments from other nations not embroil the state and the nation in ever more acrimonious international controversy. Thus, the critical

question remains the process whereby the proper adjudicating forum will be determined.

Foreign jurists and lawyers will perhaps be less put off by an American court balancing the national and private interests involved in determining what is the most convenient forum when they see that the American jurisdiction has committed itself to accepting the outcome of a similar balancing to be done by foreign courts. Nonetheless, such a balancing process remains troubling. Our experience with balancing under choice-of-law theory even between states of the United States has found the process to result in a rather consistent bias in favor of the law of the forum doing the balancing despite what appears to be consistent good faith by the jurists doing the balancing. Perhaps the most egregious example of this problem remains Lilienthal v. Kaufman, 395 P.2d 543 (Or. 1964).

We should not expect less bias in the context of the balancing called for in proposed § 1722, particularly given the differences in legal and cultural traditions between nations which are, of course, far greater than any such differences between states of the Union. At the very least, one can expect considerable uncertainty about which of several possible courts will be held to be the most proper adjudicating forum. This in turn, given the structure of proposed § 1721 which gives priority to determine the proper adjudicating forum to the competent court in which the first proceeding is filed and the predictable pro-forum bias, will induce a "race to sue" rather than a race to judgment in order to gain a litigation advantage. One should not



be surprised if the resulting dissatisfaction in the process leads to continuing attempts to subvert the aim of selecting the one and only proper adjudicating forum. For example, parties will press that the first court in which a suit was filed was not competent, and seek to have a California court make an alternative determination of where the adjudication should take place. See proposed § 1721(b)(3).

I would prefer to see the decision made, in so far as possible, on the basis of fairly certain rules rather than on the basis of a balancing of necessarily vague and amorphous "factors." The example I have in mind again comes from our experience with choice-of-law theory. While I have not worked out the details of such a proposal, I would suggest that we look to a model such as the rules in Neumeier v. Kuehner, 286 N.E.2d 454 (N.Y. 1972). Such rules would look something like this:

1. When the parties share a common citizenship, nationality, or domicile, the trial should be held within the country of their citizenship, nationality, domicile unless that forum would be so seriously inconvenient as to deprive one or both parties of the opportunity for a fair hearing.
2. When rule 1 does not apply but the major operative facts that give rise to the litigation took place within a single jurisdiction, the trial should be held within that jurisdiction unless that forum would be so

seriously inconvenient as to deprive one or both parties of the opportunity for a fair hearing.

3. When rules 1 and 2 do not apply but the litigation concerns property located within a particular country, the trial should be held within that jurisdiction unless that forum would be so seriously inconvenient as to deprive one or both parties of the opportunity for a fair hearing.
4. When rules 1, 2, and 3 do not apply, the trial should be held within the country whose substantive law should apply to the proceedings unless that forum would be so seriously inconvenient as to deprive one or both parties of the opportunity for a fair hearing.
5. When rules 1, 2, 3, and 4 do not apply, the trial should be held within the country selected by a balancing process as set out in proposed § 1722.

Now, the rules I have suggested could certainly be refined, and they also become increasingly vague as we move down the list. This latter feature is unavoidable when confronting the truly difficult case. These rules provide a considerable measure of certainty and largely remove the possibility of advantage to be gained by a race to sue. The rules also come fairly close to a truly neutral balancing of the factors usually relevant to selecting the most convenient forum without leaving so much leeway for manipulation that mars the overt balancing process.

For these reasons, such an approach might actually gain greater and quicker international recognition than yet another American imposed balancing process.

Thank you for soliciting these brief remarks. I hope the Commission and the California legislature find them helpful. I will be happy to assist further in some appropriate manner.

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20 April 1993

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File: \_\_\_\_\_  
Key: \_\_\_\_\_

Robert J. Murphy  
Staff Counsel  
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4000 Middlefield Road  
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Palo Alto, CA 94303-4739  
U.S.A.

Dear Mr. Murphy:

As requested, this letter briefly summarizes my comments on the Staff Draft, dated January 1993, of proposed legislation concerning "Conflicts of Jurisdiction and Enforcement of Foreign Judgments."

1. General Objectives -- The Staff Draft proposes two alternatives designed to "discourage simultaneous litigation in two or more countries concerning the same transaction or occurrence." At a general level, it is difficult to quarrel with the proposition that parallel proceedings impose significant costs on litigants and the legal system generally. See Gary B. Born & David Westin, International Civil Litigation in United States Courts 319-20 (2d ed. 1992).

But there are two very important caveats to this legitimate concern about the costs of simultaneous litigation. First, different countries provide very different procedural and substantive legal regimes for the resolution of the same dispute; those different legal regimes reflect important differences in national policies towards particular subjects, and they confer important rights on private individuals. An extreme example are the U.S. antitrust and securities laws (both federal and state), which take much stronger positions against anticompetitive or fraudulent conduct than the laws of many foreign states. But even "ordinary" commercial disputes will often involve product liability laws, warranty protections, attitudes towards good faith and fair dealing in contractual negotiations, discovery rights, fee-shifting rules, and the like, where U.S. legal rules are very different from those in foreign nations. These differences are not, of course, accidental, but reflect strongly held local laws and policies.

U.S. courts have long adhered to a so-called "parallel proceedings" rule, which permits

parties, with very few exceptions, to seek to vindicate their rights in the forum whose legal regime is most favorable, even if parallel litigation arising from the same facts is pending elsewhere. See Id. at 319, 337; Laker Airways v. Sabena, Belgian World Airlines, 731 F.2d 909, 926-27 (D.C. Cir. 1984). In seeking to "discourage simultaneous litigation," the Staff Draft necessarily compromises the ability of the United States and California, in at least some cases, to accomplish their public objectives and to protect private rights. The Staff Draft does so by enabling California courts more readily to dismiss California litigation in favor of pending foreign litigation concerning the same facts (Alternative 2) and by requiring California courts to dismiss California actions in deference to foreign determinations of "adjudicating forums" (Alternative 1). Such dismissals of California actions will, of course, reduce the expense of litigation; but it is important to appreciate that when this occurs, it necessarily reduces the ability of private parties to avail themselves of the procedural and substantive protections of California and U.S. law.

Second, assuming that one accepts the desirability of discouraging parallel proceedings, it is important that the cure not be worse than the disease. Many rules -- such as a first-to-file rule -- create new incentives that may impose greater costs than the admittedly imperfect existing situation. The first-to-file rule, for example, encourages races to the courthouse that may generate unnecessary litigation, impose new costs and reward unproductive conduct.

More specifically, Alternative 1 can be expected to encourage foreign litigants to rush to foreign courthouses so as to obtain foreign court adjudications that foreign forums (not California) are the appropriate adjudicating forum. For example, rational foreign manufacturers and others involved in disputes with California companies would be very well-advised to file preemptive action in their home jurisdictions, seeking among other things a determination that those home jurisdictions were the designated adjudicating forum. Under Alternative 1, a foreign court's decision to that effect would be presumptively valid and, given the "fuzziness" of the list of factors, it is unlikely to see how California courts could frequently be expected to overturn such determinations.

2. Need for Legislation -- There has not been any detailed examination of the need for the legislation nor the costs that it will impose. On the "need" side of the equation, has there been any effort to ascertain to what extent California state and federal courts are confronted with parallel proceedings? In cases of parallel litigation, what precisely are the costs to the state? Presumably the cost is the added burden on judicial resources (and hence taxpayer resources); but how significant is this. Beyond this, will the proposed legislation help reduce the costs (or will it be so complex that it actually places a yet greater burden on the courts)?
3. Forum Selection Agreements -- Private parties have for many decades sought to prevent parallel proceedings by negotiating "forum selection agreements" and including them in their contracts. G. Born & D. Westin, International Civil Litigation in United States Courts 223-74 (2d ed. 1992). Both federal and state courts have generally enforced such agreements in accordance with their terms -- thereby avoiding duplicative litigation. See The Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972); Carnival Cruise Lines, Inc. v. Shute, 111 S.Ct. 1522 (1991).

The proposed legislation jeopardizes the enforceability of forum selection clauses. It does so by permitting nonenforcement if (a) the agreement is "unreasonable" and (b) if the court "in its discretion" determines not to enforce the agreement. It is unwise to dilute the efficacy and enforceability of forum selection clauses in this fashion. Doing so not only undermines legitimate, bargained for rights and expectations, but it will encourage multiple litigation.

4. Federal and State Statutory Claims -- It is not clear to me whether the alternatives apply to statutory causes of action, such as antitrust, RICO, securities law, racial and sexual discrimination and similar claims. Perhaps they do, and contemplate that trial courts will have discretion to consider the various public policies underlying such statutes in making the multi-factor "adjudicating forum" designation. If so, I believe that this will raise significant issues of federal preemption: it is not clear to me, for example, that claims under Title VII or the Sherman Act could properly be dismissed under the proposed California legislation. Doing so would arguably compromise important federal

rights and would therefore arguably be preempted under federal law.

5. Application in Federal Courts -- It appears that federal courts would be expected to apply the California statute. See p. 5 n.19 of Staff Report. This may well be inconsistent with the forum non conveniens analysis set forth in Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981). The Supreme Court has left open the question whether or not the Piper analysis is a rule of federal common law. G. Born & D. Westin, International Civil Litigation in United States Courts 299-307 (2d ed. 1992). If it is a rule of federal law, then it would presumably preempt inconsistent rules of state law -- including statutes like that under proposal here.
6. Arbitration Awards -- I assume that the legislation is not intended to apply to arbitration awards; it might be desirable to say so expressly.
7. Choice Between Alternatives -- If the proposed legislation is pursued, I would greatly favor Alternative 2. Alternative 1 is unduly complex in its handling of what forum should be or may designate an adjudicating forum, and that will breed even more litigation. Alternative 1 will also create greater risks of races to foreign courthouses and dismissals of California actions that would serve to vindicate important interests.
8. Antisuit Injunctions -- U.S. courts have long exercised the power to grant antisuit injunctions. See G. Born & D. Westin, International Civil Litigation in United States Courts 321-41 (2d ed. 1992). It is not clear whether the legislation is intended to prohibit such injunctions.

I hope you find these comments useful. Of course, they reflect only my personal views and do not necessarily reflect those of my law firm, its partners or any of its clients.

Sincerely,



Gary Born

Law Revision Commission  
RECEIVED

MAR 16 1993

File: \_\_\_\_\_  
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March 16, 1993

Robert J. Murphy, Esq.  
California Law Revision Commission  
4000 Middlefield Road  
Palo Alto, CA 94303-4739

Dear Mr. Murphy:

Thank you for your letter of March 2, soliciting my comments on the Commission's study draft of the Conflict of Jurisdiction Model Act. I have read over the staff draft and reviewed once more Louise Ellen Teitz's article, which seems to be the foundation for much of the recent attention to the parallel proceedings situation.

Frankly, I do not find the staff draft persuasive on the need for the statute and would recommend that the Commission not rush to legislation in this matter. First, I am not aware that the problem as described by Prof Teitz and other proponents of the "model" act, is a common or serious problem. I have followed private international law as an academic and an arbitrator, although not as a practitioner, for more than twenty years. It seems to me that the troubling situations are rare and the problems that do arise are usually well taken care off by the application of judicial common sense and the doctrine of *forum non conveniens*.

There is a problem that international transactions between parties in different legal cultures are likely to span many miles and quite divergent values and attitudes. No one wants to travel halfway round the world to litigate a claim or to have to plead one's case in a forum dominated by foreign values. When a second suit is filed, the party that thought it would be litigating in a friendly forum is likely to find that it now must answer in a distinctly less friendly environment and that it now must travel far away. But the distances between the two fora are a given of the situation. It is no fairer to require one party to travel than to require the other. The difference in perspective between the "model" act's proponents and me may flow from their assumption



that whenever a party to a pending suit begins a related suit in another jurisdiction it is being "vexatious" "obfuscating" or "forum shopping". Such labels are the appropriate emotional response of a partisan advocate who finds his or her job complicated by the second suit, but I personally doubt whether most such suits, if there are many of them, are undertaken with such motivations. I would expect that most cases are like *Banque Libanaise v. Khreich*, cited in the staff report. There, the second suit was instituted because the bank thought that it would affect the outcome if the matter were heard in a jurisdiction other than Texas. When, as in that case, the laws of the respective jurisdictions embody different values and will produce different outcomes, a party seeking a more sympathetic forum is not being vexatious. That party merely is seeking a fair hearing of the controversy that is more likely to understand its perspective on justice. After all, *Khreich*, involved a Texas resident and citizen, but the transactions occurred before he ever came to the United States, they took place in Abu Dhabi, and presumably that is where the witnesses and evidence is located. Was it vexatious for the Bank to seek the rights arising from a judgment on these transactions awarded in the cultural and legal setting in which they took place?

Yet the proposed law will not balance these genuinely conflicting interests, but will invest the court in which suit is filed first with exclusive competence to determine that it is the appropriate forum. I do not wish to reply to one set of overblown labels with another, but there is some basis for fearing that the draft will motivate a "race to the courthouse" mentality, with the prize going to whomever is fastest to file. It seems to me that both courts are likely to have an interest in considering the values that might be sacrificed if exclusive jurisdiction is vested in the other. Consider the antitrust suits cited by Professor Teitz in footnote four of her article. Do we want the substantive issues of appropriate enforcement of competition laws to turn on the fortuity of where the first suit is filed?

Finally, I am troubled by the remedy of non-recognition of the foreign judgment. This seems like swatting a fly with a howitzer and will not reduce the judicial work in disposing of the whole dispute. The current approach looks to the parties to make their arguments at the early stages of the litigation to persuade one court or the other that the matter belongs elsewhere. That approach leads courts to transfer suits that are in an inappropriate forum, perhaps dividing the dispute so that aspects that belong in a particular jurisdiction will be heard there. That seems more productive to me than denying recognition to a foreign judgment, only to require the parties to again litigate the merits in the forum that considers itself the sole appropriate one.

The model act's approach may move us back in the unhappy direction

Robert J. Murphy, Esq.

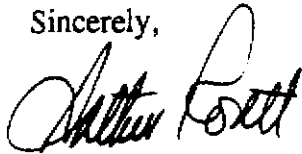
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March 16, 1993

of *exequatur* and other familiar procedures to review the merits of foreign judgments before granting them recognition. The world has been moving away from this approach in recent decades. I need not add that as applied to judgments from sister states, such an approach would raise very substantial Constitutional issues under the Full Faith and Credit Clause. California law, unlike the Texas law involved in *Khreich*, has long been quite open and hospitable for foreign judgments. Nor do I understand the Brussels and Lugano Conventions cited by Professor Teitz to apply so draconian a remedy. I think California's current policy is wise and is a desirable approach to maintain.

In short, I would urge the Commission to carefully consider whether there is a substantial problem here and whether the solution proposed will be more troublesome than the existing means available to deal with that problem. Please let me know if more detailed study or comments would be helpful to the Commission in its work.

Sincerely,

A handwritten signature in black ink, appearing to read "Arthur Rosett". The signature is fluid and cursive, with the first name "Arthur" being more prominent than the last name "Rosett".

Arthur Rosett  
Professor of Law

cc: Robert E. Lutz, II  
Daniel M. Kolkey



SCHOOL OF LAW

DAVIS, CALIFORNIA 95616-5201

April 9, 1993

Law Revision Commission  
RECEIVED

1993

File: \_\_\_\_\_  
Key: \_\_\_\_\_

Robert J. Murphy, Esq.  
Staff Counsel  
California Law Revision Commission  
4000 Middlefield Road, Suite D-2  
Palo Alto, CA 94303-4739

Dear Mr. Murphy:

Thank you for your letter of March 2 and the enclosed draft of a Conflict of Jurisdiction Model Act.

To state my conclusion first, I consider this piece of legislation ill-advised. First of all, as the Teitz article acknowledges, there is the problem of "integration." I seriously doubt whether any country within the civil law orbit could be induced to adopt provisions that are as typically American as those of the Model Act. In my opinion the draft statute's peculiar style and draftsmanship would be entirely unacceptable to such major civil law nations as France, Germany and Japan.

Specifically, the Model Act -- imposing yet another level of complexity on the already complex task of litigating international cases -- requires determinations that judges in foreign legal systems are simply not prepared to make. I doubt that anyone could ever persuade ordinary civil courts that their task is the vindication of sovereign prerogatives and "concerns of the international legal system," rather than dispensing justice to private parties.

Moreover, the open-ended provisions of § 1722, which call for the judicial assessment of an exceedingly wide range of factors, would be unpalatable to civilians, who reject even our far more modest forum non conveniens doctrine. In civil law countries the discretion to dismiss cases even though the court has jurisdiction is viewed as incompatible with the judge's role. Thus, when the United Kingdom joined the European Community's Convention on Jurisdiction and Recognition of Judgments (the so-called Brussels Convention), the British had to agree not to use the forum non conveniens doctrine in proceedings that come within the Convention's scope.

Accordingly, the hope for reciprocity, which inspired the Model Act, is bound to prove illusory. Should this Act be adopted here, California would put itself into a

minority position. Far from being compatible with foreign legal systems, as the Teitz article asserts, the Act will probably not even find takers in common law jurisdictions, since lawyers outside the United States tend not to worry about forum shopping. As Lord Denning once said:

No one who comes to . . . [English] courts asking for justice should come in vain. . . . This right to come here is not confined to Englishmen. It extends to any friendly foreigner. He can seek the aid of our courts if he desires to do so. You may call this "forum-shopping" if you please, but if the forum is England, it is a good place to shop in, both for the quality of the goods and the speed of service.

According to the leading English conflict of laws treatise, "there is a public interest in allowing trial in England of what are, in essence, foreign cases. When foreigners litigate in England this forms a valuable invisible export, and confirms judicial pride in the English legal system."

A number of other reasons as well militate against adoption of the Model Act. The Teitz article, in footnote 3, notes that "there has been no movement to draft an international treaty." But -- as you may know -- the United States is currently engaged in discussing with foreign nations a convention on worldwide judgment recognition, and the American Bar Association has endorsed this initiative. See 61 U.S.L.W. 2482-83 (Feb. 16, 1993). Adoption of the Model Act might well handicap those charged with the delicate task of negotiating this important multilateral treaty. Clearly, precipitous action on the state level would hinder, rather than help, any hoped-for international accommodation.

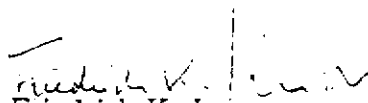
It also bears reiterating that the Brussels Convention, as the Teitz article points out, explicitly deals with the issue of parallel proceedings. While the United States may be able to negotiate jurisdictional and recognition rules with the Common Market countries, it would be naive to think that they would abandon their first-in-time rule. Rather, the European Community can be expected to resist any attempt to fiddle with the Brussels Convention (which has worked very well in practice for twenty years) to align its provisions with those of the Model Act.

In fact, the Teitz article vastly overstates the drawbacks of parallel proceedings. Far from making her point, the Laker case -- which she cites throughout -- illustrates certain positive aspects of forum shopping. I presume that the Model Act would have required Sir Freddie (or rather his estate in bankruptcy, into which the airlines cartel drove him) to sue in England, where he lacked the proverbial leg to stand on. To obtain a modicum of justice, he had to vindicate his rights in an American forum. In lifting the antisuit injunction the cartel had managed to obtain, the House of Lords implicitly acknowledged the propriety and wisdom of Sir Freddie's choice. In Lord Diplock's words, which Lord Scarman echoed, there was nothing "so unconscionable or unjust in Laker's conduct" as to warrant retaining the action in England.

Moreover, adoption of the Model Act would undercut our Uniform Foreign Money Judgments Recognition Act. This important statute, whose enactment was designed to promote the enforcement of California judgments abroad, has proven its worth in practical application. It should not be sacrificed to ward off perceived evils, which a California court can easily combat by invoking the forum non conveniens provision of our Civil Procedure Code or by issuing an antisuit injunction. The problem posed by the Khreich case, which supposedly demonstrates a need for the Model Act, cannot arise in this state. Our legislature has wisely decided not to embellish the Uniform Act with a reciprocity requirement, as the aberrational Texas version does.

In any event, the nonrecognition of foreign judgments as a punishment for not respecting the Model Act (of whose existence the parties may have been blissfully unaware) would amount to an excessive sanction that is at odds with both common sense and comity. I say "would" because the sanction is but a brutum fulmen: by first seeking recognition in a state that has wisely decided not to adopt the Act, whose judgment would then be entitled to full faith and credit, the parties can effectively evade that sanction. Finally, although the recognition of foreign country judgments is, as you point out, believed to be governed by Erie, the U.S. Supreme Court has ample power to decide otherwise. Problems created by the enactment of such improvident state legislation as the Model Act might prompt the Court to do just that.

Respectfully submitted,

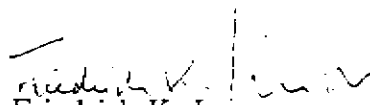
  
Friedrich K. Juenger  
Barrett Professor of Law

FKJ:pjb  
Enclosure

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Respectfully submitted,

  
Friedrich K. Juenger  
Barrett Professor of Law

FKJ:pjb  
Enclosure

STATE OF CALIFORNIA

California Law Revision Commission

STAFF DRAFT

CONFLICTS OF JURISDICTION AND  
ENFORCEMENT OF FOREIGN JUDGMENTS

January 1993

*This draft 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. It is just as important to advise the Commission that you approve the draft as it is to advise the Commission that you believe revisions should be made in the draft.*

COMMENTS ON THIS STAFF DRAFT SHOULD BE RECEIVED BY THE COMMISSION NOT LATER THAN April 15, 1993.

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

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

## SUMMARY OF STAFF DRAFT

This staff draft 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 the Conflicts of Jurisdiction Model Act. Under the act, if there are parallel proceedings in two or more countries involving the same transaction or occurrence, the court where the action is first filed may determine which forum is most appropriate for litigating the dispute. California courts could refuse to enforce a foreign judgment not made in the designated adjudicating forum. If the foreign judgment is made in the designated adjudicating forum, the grounds for non-recognition of the judgment would be limited to those that would amount to a denial of due process or be repugnant to the public policy of this state.

(2) To adopt essentially the same proposal as in alternative # 1, but not to make the California provisions dependent on enactment of similar provisions in foreign countries. Under this alternative, the California court would determine which forum is most appropriate. If it finds California is most appropriate, it may decline to recognize the foreign judgment. If the court finds the foreign forum is most appropriate, it must stay the California action.

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



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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.<sup>1</sup> 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<sup>2</sup> or to enjoin the parties from proceeding with the foreign action.<sup>3</sup> 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.<sup>4</sup>

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.<sup>5</sup> 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<sup>6</sup> -- a "forum shopper's delight."<sup>7</sup>

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.<sup>8</sup> 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.<sup>9</sup> 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.<sup>10</sup>

In another case, a cargo of soybeans was lost en route from Tacoma, Washington, to China on a Korean-owned ship.<sup>11</sup> 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."<sup>12</sup> 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.<sup>13</sup> The Model Act was adopted in Connecticut in 1991 with minor revisions.<sup>14</sup>

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.<sup>15</sup> A determination by a foreign court<sup>16</sup> 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.<sup>17</sup>

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,<sup>18</sup> 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.<sup>19</sup> 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.<sup>20</sup> 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.<sup>21</sup>

#### ALTERNATIVE # 2 — MODIFIED CONFLICTS OF JURISDICTION MODEL ACT

Another way to deal with the parallel proceedings problem is to adopt a modified version of the Conflicts of Jurisdiction Model Act<sup>22</sup> without the provisions which contemplate the adoption of similar

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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 under that act 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. See *supra* text accompanying notes 13-20.

provisions in other countries. Under this alternative, the California court would determine whether California or the foreign court is a more appropriate forum for litigating the dispute. If the California court finds the foreign forum is preferable, it must stay the California action until the foreign action is decided.<sup>23</sup> If the California court finds California is the preferable forum, it may refuse to recognize the foreign judgment, and refuse to give it res judicata effect in the California proceeding.<sup>24</sup> Under this alternative, the California court would not be required to recognize a foreign court's determination of the preferred adjudicating forum.<sup>25</sup>

A party filing a foreign action hoping to enforce the foreign judgment in California would have an incentive to move the California court early in the proceeding<sup>26</sup> for a stay on the ground that the foreign court is a more appropriate forum. If the stay motion is denied and it appears the foreign judgment will have to be enforced in California to be efficacious, the moving party would have no incentive

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

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

25. The Conflicts of Jurisdiction Model Act appears not to have been enacted in any foreign country. This second alternative recognizes that fact. This alternative may be subject to the criticism that it lacks a global perspective, and creates the possibility of deadlock with the foreign court refusing to enforce the California judgment and the California court refusing to enforce the foreign judgment. But until a significant number of foreign countries have enacted the substance of the Model Act, the same risks appear to exist if California enacts the Model Act with its deference to the foreign court's determination of the adjudicating forum.

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

to continue parallel proceedings in the foreign court, and would be encouraged to accept resolution of the dispute in California.<sup>27</sup>

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

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

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) As used in this section, "foreign judgment" and "foreign state" have the meaning given those terms in Section 1713.1.

(b) 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 foreign judgment made in any such proceeding, 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.

(c) 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.

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

(e) 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.

(f) 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 (b) to limit the

nonenforcement provision to a judgment made in a foreign country. See Section 1713.1(1).

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

Under subdivision (e), 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 Jurisdiction 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 Jurisdiction 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 under this chapter 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(e), 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 (MODIFIED MODEL ACT)

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

Article 4. Simultaneous Proceedings in This State  
and Foreign State

§ 410.80. "Foreign state"

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

- (a) The United States.
- (b) Any state, district, commonwealth, territory, or insular possession of the United States.
- (c) The Panama Canal Zone.
- (d) The Trust Territory of the Pacific Islands.

Comment. Section 410.80 is drawn from Section 1713.1.

§ 410.82. Simultaneous proceedings; determination of most appropriate forum

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

Comment. Section 410.82 is drawn from a portion of Section 2 of the Conflicts of Jurisdiction Model Act, recommended by the Conflicts of Jurisdiction Subcommittee of the International Law Section of International Law and Practice of the American Bar Association. In

determining which forum is most appropriate for litigating the dispute under Section 410.82, the court must consider the factors in Section 410.86.

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

§ 410.84. Stay

410.84. (a) If the court determines that a foreign state in which one of the proceedings is pending is the most appropriate forum for litigating the dispute, the court shall stay the proceeding in this state in whole or in part on any conditions that are just.

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

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

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

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

(1) The interests of justice among the parties.

(2) The public policies of the foreign states having jurisdiction of the dispute, ~~including the interest of the affected courts in having~~ proceedings take place in their respective forums.

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

(4) The nationality of the parties.

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

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



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

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

(9) The place of first filing, how long the case has been pending in that place, and the connection of that place with the dispute.

(10) Whether the foreign state has jurisdiction over the persons and property that are the subject of the proceeding.

(11) Whether determining that a foreign state is the most appropriate forum is preferable to having parallel proceedings in adjudicating the dispute.

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

(13) The presence of additional parties to any of the proceedings in the affected courts.

(b) Notwithstanding subdivision (a), if an agreement between the parties specifies the forum in which the dispute is to be litigated, the court shall determine that that forum is the most appropriate forum unless there is a showing that the agreement is unreasonable.

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

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

#### § 410.88. Evidence

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

(1) Affidavits or declarations.

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

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

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

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

#### CONFORMING REVISION (ALTERNATIVE #2)

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

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

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

(2) The foreign court did not have personal jurisdiction over the defendant~~+-of~~ .

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

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

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

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

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

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

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

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

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