

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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2/25/93CONFLICTS OF JURISDICTION AND
ENFORCEMENT OF FOREIGN JUDGMENTS

With the increase of transactions that cross international boundaries, litigants are increasingly likely to be involved in simultaneous contests in two or more countries.¹ If two actions arising from the same transaction or occurrence are pending, one in federal or state court in California and the other in a foreign country, the court in California is under no duty to stay its action² or to enjoin the parties from proceeding with the foreign action.³ Both actions may proceed simultaneously. This is called the "parallel proceedings" rule, under which both actions proceed until judgment is

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

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

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

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

The parallel proceedings rule has been said to be in keeping with accepted notions of international comity by respecting multiple sovereignty in cases of concurrent jurisdiction.⁵ But the rule has also been criticized as permitting a litigant to file a second action in a foreign court as a means of confusing, obfuscating, and complicating litigation already pending in this country⁶ -- a "forum shopper's delight."⁷

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

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

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

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

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

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

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

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

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

ALTERNATIVE # 1 -- CONFLICTS OF JURISDICTION MODEL ACT

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

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

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

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

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

The Model Act contemplates that the forum where the action was first filed will decide where the dispute should be litigated -- the "adjudicating forum" -- taking into account various factors, including convenience, judicial efficiency, and comity.¹⁵ A determination by a foreign court¹⁶ that it should be the adjudicating forum is presumptively valid in a United States jurisdiction that has enacted the Model Act, if the foreign court made the determination after evaluating the factors set out in the Model Act.¹⁷

If two actions concerning the same transaction or occurrence have been commenced, one in a United States jurisdiction where the Model Act has been enacted and the other in a foreign country,¹⁸ and no application to designate an adjudicating forum has been made in the court where the action was first filed, the court in the Model Act

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

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

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

16. Although the Model Act was developed primarily to deal with forum shopping in multi-national litigation, it may be broad enough to apply to multi-forum litigation where one of the judgments sought to be enforced in California was made in another state of the United States. See Teitz, *supra* note 1, at 54 (judicial construction will determine "how broadly the Model Act reaches"). In such a case, the full faith and credit clause of the United States Constitution may override the act and require enforcement of the sister-state judgment. See 7 B. Witkin, *California Procedure Judgment* § 203, at 640-41 (3d ed. 1985).

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

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

jurisdiction may decline to enforce the eventual foreign judgment.¹⁹ In deciding whether or not to enforce the foreign judgment, the court in the Model Act jurisdiction may consider whether the party seeking enforcement has acted in good faith.²⁰ By not interfering directly with the foreign litigation, the Model Act discourages parallel proceedings without infringing the sovereignty of another nation.

The Commission solicits comments on whether the substance of the Conflicts of Jurisdiction Model Act should be enacted in California.²¹

ALTERNATIVE # 2 -- 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 Act²² without the provisions which contemplate the adoption of similar

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.²³ 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.²⁴ Under this alternative, the California court would not be required to recognize a foreign court's determination of the preferred adjudicating forum.²⁵

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 proceeding²⁶ 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

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.²⁷

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

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†-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 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).