

Admin.

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04/09/91

Second Supplement to Memorandum 91-20

Subject: New Topic Suggestion (Conflicts of Jurisdiction Model Act)

We have just received another suggested topic for Commission study. Mr. James Wawro of Los Angeles proposes that the Commission consider the Conflicts of Jurisdiction Model Act (copy attached). This act was prepared by a committee of the American Bar Association. The Model Act attempts to inhibit vexatious, simultaneous litigation of transnational disputes by establishing judicial discretion to refuse to enforce such judgments.

A reading of the material supplied by Mr. Wawro suggests the need for such legislation. The staff has not had time to study the Model Act or consult other sources, but it also seems that this is much more than a state problem. While legislation in California would be important, it would only affect state courts, we assume.

The Commission has authority to study this proposal under its general authority to study creditors' remedies, including enforcement of judgments. It should not take too much staff or Commission time, since we have a basic draft in the form of the Model Act. It looks like an interesting issue that might provide a welcome variety on the Commission's menu.

Respectfully submitted,

Stan Ulrich
Staff Counsel

APR 08 1991

MORGAN, LEWIS & BOCKIUS

PHILADELPHIA
LOS ANGELES
MIAMI
LONDON
FRANKFURT

COUNSELORS AT LAW
801 SOUTH GRAND AVENUE
TWENTY-SECOND FLOOR
LOS ANGELES, CALIFORNIA 90017-4615
TELEPHONE: (213) 612-2500
FAX: (213) 612-2554

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WASHINGTON
NEW YORK
HARRISBURG
SAN DIEGO
BRUSSELS
TOKYO

JAMES WAWRO
DIAL DIRECT (213) 612-2698

April 5, 1991

Forrest A. Plant, Esq.
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303

Re: Prevention of International Forum Shopping

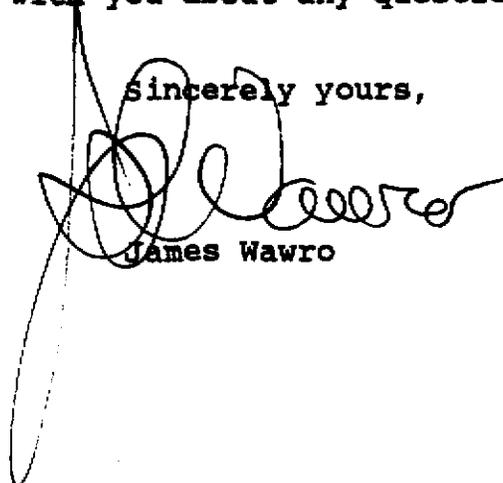
Dear Mr. Plant:

In discussing the adoption of a Model Act on this subject with Mr. Huston Lowry, one of Connecticut's Law Revision members, it occurred to me to propose also the enclosed Model Act for adoption in California.

The Model Act arises from an anomaly in international law whereby courts, reluctant to issue anti-suit injunctions, allow for the simultaneous litigation of identical transnational disputes in separate forums. The Model Act is designed to eliminate this practice.

I offer the enclosed Model Act for your consideration and look forward to speaking with you about any questions you may have.

Sincerely yours,



James Wawro

JW:tnk
Enclosure

CONFLICTS OF JURISDICTION MODEL ACT

Conflicts of Jurisdiction
Subcommittee
International Section of
International Law and Practice
American Bar Association

Presented at Los Angeles,
California

CONFLICTS OF JURISDICTION MODEL ACT

Conflicts of Jurisdiction Subcommittee

James Wawro, Esq.
Chairman
Morgan, Lewis & Bockius
801 So. Grand Avenue, Suite 2200
Los Angeles, California 90017
(213) 612-2698

Robert Brodegaard, Esq.
Thacher, Proffitt & Wood
Two World Trade Center, 39th Floor
New York, New York 10048
(212) 912-7681

James Niss, Esq.
Bragar & Wexler
900 Third Avenue
New York, New York 10022
(212) 308-5858

Louise Ellen Teitz, Esq.
Akin, Gump, Strauss, Hauer & Feld
1333 New Hampshire Avenue, Suite 500
Washington, D.C. 20036
(202) 887-4555

Spencer Weber Waller, Esq.
Freeborn & Peters
11 So. La Salle, Suite 1500
Chicago, Illinois 60603
(302) 750-9566

CONFLICTS OF JURISDICTION MODEL ACT

Section 1. Declaration of Public Policy.

It is an important 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 which were not obtained in connection with vexatious litigation, parallel proceedings or litigation in inconvenient forums.

COMMENT

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

This Model Act 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 upon 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, nor innocent litigants.

Section 2. Discretion to Enforce Judgments.

- a. In cases where two or more proceedings arising out of the same transaction or occurrence were pending, the courts of this State shall have discretion to refuse the enforcement of the judgments of any of such courts unless application for designation of an adjudicating forum was timely made to the first known court of competent jurisdiction where a proceeding was commenced, or to the adjudicating forum after its selection, or to any court of competent jurisdiction if the foregoing courts are not courts of competent jurisdiction.
- b. An application for designation of an adjudicating forum is timely if made within six months of reasonable notice of two such proceedings, or of reasonable notice of the selection of an adjudicating forum.
- c. The determination of the adjudicating forum is binding for the purpose of enforcement of judgments in this State upon any person served with notice of an application to designate. The courts of this State shall enforce the judgments of the designated adjudicating forum pursuant to the ordinary rules for enforcement of judgments. The selection of the adjudicating forum shall be accorded presumptive validity in this State if the decision determining the adjudicating forum evaluated the factors set forth in the following section.

COMMENT

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 Model Act 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, "parallel proceedings", the good faith of the litigants and all of the other Section 3 factors which the courts have traditionally considered in determining where a 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. It is believed that this risk will 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 procured in conformity with this Model Act, enforcement should be relatively automatic.

Section 3. Factors in Selection of Adjudicating Forum.

A determination of the adjudicating forum shall be made in consideration of the following factors:

- a. the interests of justice among the parties and of world-wide justice;
- b. 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;
- c. the place of occurrence, and of any effects, of the transaction or occurrence out of which the dispute arose;
- d. the nationality of the parties;
- e. substantive law likely to be applicable and the relative familiarity of the affected courts with that law;
- f. the availability of a remedy and the forum likely to render the most complete relief;
- g. the impact of the litigation on the judicial systems of the courts involved, and the likelihood of prompt adjudication in the court selected;
- h. location of witnesses and availability of compulsory process;
- i. location of documents and other evidence and ease or difficulty associated with obtaining, reviewing or transporting such evidence;
- j. place of first filing and connection of such place to the dispute;

- k. the ability of the designated forum to obtain jurisdiction over the persons and property that are the subject of the proceedings;
- l. whether designation of an adjudicating forum is a superior method to parallel proceedings in adjudicating the dispute;
- m. the nature and extent of litigation that has proceeded over the dispute and whether a designation of an adjudicating forum will unduly delay or prejudice the adjudication of the rights of the original parties; and
- n. realigned plaintiff's choice of forum should rarely be disturbed.

COMMENT

The listed factors are those the courts have considered in ruling on proper venue (Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947); Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981)) and in determining whether an antisuit injunction should issue (Laker Airways v. Sabena, Belgium World Airlines, 731 F.2d 909 (1984)), although some courts have argued that these factors should not be mixed. China Trade and Development v. M.V. Choong Yong, 837 F.2d 33 (2d Cir. 1987); Laker Airways, supra. It is believed that 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 in fact 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 of such factors may be considered.

Section 4. Evidence

In exercising the discretion granted it by this Act, the court may consider any evidence admissible in the adjudicating forum or other court of competent jurisdiction, including but not limited to:

- a. affidavits or declarations;
- b. treaties to which the state of either forum is a party;
- c. principles of customary international law;

- d. testimony of fact or expert witnesses;
- e. diplomatic notes or amicus submissions from the state of the adjudicating forum or other court of competent jurisdiction;
- f. statements of public policy by the state of the adjudicating forum or other court of competent jurisdiction set forth in legislation, executive or administrative action, learned treatises, or participation in inter-governmental organizations.

Reasonable written notice shall be given by any 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

1. The selection of an adjudicating forum is intended to be an evidentiary proceeding based on a record developed in accordance with municipal 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.

2. 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.

3. 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 to 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 United Nations and its various affiliated organizations, historical practice and custom in connection with the designation of an adjudicating forum.

4. 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).

5. The proof of foreign law is modeled after Rule 44.1, Federal Rules of Civil Procedure which allows a proof of foreign law as a matter of fact. The portion of Rule 44.1 requiring de novo review of foreign law determinations by an appellate court has not been included in the Model Act as unduly interfering with the diverse appellate procedures of national legal systems. Appellate review of all aspects of the selection of an adjudicating forum would be in accordance with applicable municipal law.