ARTICLES

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Taking Multiple Bites of the Apple: A Proposal to Resolve Conflicts of Jurisdiction and Multiple Proceedings

> It seems to me in this day of exceedingly high costs of litigation, where no comity principles between nations are at stake in resolving a piece of commercial litigation, courts have an affirmative duty to prevent a litigant from hopping halfway around the world to a foreign court as a means of confusing, obfuscating and complicating litigation already pending for trial in a court in this country.[1]

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1. China Trade & Dev. Corp. v. M.V. Choong Yong, 837 F.2d 33, 40 (2d Cir. 1987) (Bright, J., dissenting).

I. The Vexing Problem of Parallel Proceedings

The problem of parallel proceedings in multiple jurisdictions has received increasing attention within the United States, primarily under the rubric of complex litigation[2] and in connection with the overlap of state and federal systems.

The dilemma within the context of international litigation has received scant acknowledgment.[3] Most lawyers are familiar with the high profile parallel proceedings following the bankruptcy of Laker Airlines and the subsequent antitrust suits in both the United States and England[4] arising from the extraterritorial application of U.S. antitrust laws and the British response. The run-of-the-mill commercial dispute or admiralty action, although not creating openly fractious relations between sovereigns, may spawn a similar number of proceedings in several countries[5] and may impose substantial burdens both on the litigants and on the judicial systems that must devote resources to resolving not only the underlying substantive controversy but the collateral skirmishes over where the war should be fought. These subsidiary conflicts frequently take the form of actions by one party to enjoin proceedings in another forum or to stay or dismiss the pending actions[6] in favor of other actions. In a world where daily transactions routinely involve multiple countries, litigants are increasingly likely to find themselves embroiled in simultaneous contests in several theaters.

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2. The ALI began working in 1985 on its Complex Litigation Project to study multiforum, multiparty suits. This study considers the problems arising in lawsuits dispersed throughout the U.S. federal and state courts, but not that of transnational litigation. The project was designed in four stages, with the final phase scheduled for 1991 or 1992. ALI COMPLEX LITIGATION PROJECT (Tentative Draft No. 1, Apr. 14, 1989) ch. 1.

3. The integrally related issue of enforcement of foreign judgments has also received minimal attention on a national level. Although twenty states have currently adopted some version of the Uniform Foreign Money-Judgments Recognition Act, adopted by the National Conference of Commissioners on Uniform State Laws in 1962, there has been no movement to draft a multinational treaty. *See* UNIF. FOREIGN MONEY-JUDGMENTS RECOGNITION ACT, 13 U.L.A. 261 (1962) [hereinafter UFMJRA].

4. Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909 (D.C. Cir. 1984). The case itself provides a lengthy history of the litigation, *id.* at 917–21, as well as a description of proceedings in England. *See also* British Airways Bd. v. Laker Airways Ltd., [1984] 3 W.L.R. 413. *See generally* Gary B. Born, *Recent British Responses to the Extraterritorial Application of United States Law: The Midland Bank Decision and Retaliatory Legislation Involving Unitary Taxation*, 26 VA. J. INT'L L. 91 (1985); Aryeh S. Friedman, *Laker Airways: The Dilemma of Concurrent Jurisdiction and Conflicting National Policies*, 11 BROOKLYN J. INT'L L. 181 (1985); Daryl Libow, Note, *The Laker Antitrust Litigation: The Jurisdictional "Rule of Reason" Applied to Transnational Injunctive Relief*, 71 CORNELL L. REV. 645 (1986).

5. *See, e.g.*, Panama Processes, S.A. v. Cities Service Co., 796 P.2d 276 (Okla. 1990) (suits in Brazil and Oklahoma state court); Saipem v. Dredging, [1988] 2 Lloyd's Rep. 361 (C.A.) (admiralty case with proceedings in Rotterdam and England); SNI Aerospatiale v. Lee Kui Jak, 1987 App. Cas. 871 (P.C.) (appeal taken from Brunei) (helicopter crash resulting in proceedings in Brunei, France, and Texas).

6. Some U.S. federal courts have treated motions to stay pending foreign proceedings as equivalent to, or together with, motions to dismiss for forum non conveniens. *See, e.g.*, American Cyanamid Co. v. Picaso-Anstalt, 741 F. Supp. 1150, 1154 (D.N.J. 1990). The assumption that staying an action results in allowing the result in the foreign action to control is only partially correct since it does not take into consideration the ultimate issue of recognition and enforcement of judgments and the location of assets that might be used to satisfy judgment.

Nor is the situation likely to improve, given the expanding notions of jurisdiction,[7] both to prescribe[8] and to adjudicate (personal jurisdiction).[9] Concurrent jurisdiction begets concurrent litigation—either protective or reactive. So long as significant differences exist in procedural mechanisms available and types of damages recoverable,[10] parties will find it advantageous for tactical reasons to file parallel proceedings. In addition to blatant forum-shopping for the best substantive law, parties may jockey for position in anticipation of problems with enforcement of the court's decision. Indeed, the lack of uniform treatment for recognition and enforcement of foreign judgments, especially within the United States,[11] is responsible for at least a portion of duplicative actions. In one recent

7. *See* Gary B. Born, Parallel Proceedings and Antisuit Injunctions, Speech Before ABA Symposium on Frontiers of European Litigation: 1992 and Beyond, (May 16, 1991) (unpublished manuscript).

8. Jurisdiction to prescribe refers to "the authority of a state to make its law applicable to persons or activities." RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES pt. IV introductory note, at 231 (1987) [hereinafter RESTATEMENT (THIRD)]; *see id.* §§ 402–03. The extraterritorial exercise of jurisdiction to prescribe in regulating activities, especially anticompetitive conduct, has been the source of conflict in cases leading to antisuit injunctions, such as the *Laker* litigation. 731 F.2d at 909.

9. Jurisdiction to adjudicate refers to "the authority of a state to subject particular persons or things to its judicial process." RESTATEMENT (THIRD), *supra* note 8, pt. IV introductory note, at 231; *see id.* §§ 421–23. Within the United States, personal jurisdiction, the domestic concept of jurisdiction to adjudicate, is limited by the due process clause of the United States Constitution. *See* U.S. CONST. amend. V. The expansion of acceptable bases for personal jurisdiction is evident in recent Supreme Court cases. *See, e.g.*, Burnham v. Superior Court, 110 S. Ct. 2105 (1990) (upholding "tag" jurisdiction); Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102 (1987) (finding jurisdiction with very minimal contacts).

10. The procedural advantages (and abuses) available within the U.S. federal courts, especially in the form of discovery, are legendary and have spawned statutory counter-responses in several countries. *See* RESTATEMENT (THIRD), *supra* note 8, § 442 reporters' notes. For an example of the use of procedural and substantive differences in selecting a forum, see Friedrich K. Juenger, *Forum Shopping, Domestic and International,* 63 TUL. L. REV. 553, 560–64 (1989); David W. Robertson & Paula K. Speck, *Access to State Courts in Transnational Personal Injury Cases: Forum Non Conveniens and Antisuit Injunctions,* 68 TEX. L. REV. 937, 938 (1990) (footnotes omitted) ("Personal injury victims are virtually always better off suing in the United States, and defendants in transnational cases usually vigorously resist being sued here. The battle over where the litigation occurs is typically the hardest fought and most important issue in a transnational case . . . ."). A well-known example of this type of maneuvering over location, motivated by the differential in the amount and types of damages recoverable, is that resulting from the mass disaster in Bhopal, in which the Second Circuit affirmed the dismissal of litigation on the basis of forum non conveniens. *In re* Union Carbide Corp. Gas Plant Disaster at Bhopal, India, 809 F.2d 195 (2d Cir.), *cert. denied,* 484 U.S. 871 (1987). The British courts have best captured the magnetism of the U.S. courts to foreigners. "As a moth is drawn to the light, so is a litigant drawn to the United States." Smith Kline & French Laboratories Ltd. v. Bloch, [1983] 1 W.L.R. 730, 733 (C.A. 1982) (Lord Denning, M.R.).

11. The enforcement of foreign judgments within the United States is largely a matter of state law. Federal courts in diversity jurisdiction, generally the basis for suits involving foreign parties, apply the federal procedural law and the forum state's substantive law under the doctrine of Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938). Recognition and enforcement are treated as matters for state law under *Erie*. *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). There is no requirement for giving full faith and credit under the Constitution to a foreign judgment, as opposed to that of a sister state, nor a statute controlling foreign judgments. *See* full faith and credit clause, U.S. CONST. art.

case the U.S. court referred approvingly to the filing of multiple suits in different countries as a "prudential" means of ensuring enforceability of subsequent judgments.[12]

While certain countries, such as the members of the European Community (EC) and the European Free Trade Association (EFTA), have been working to reduce divergent treatment of jurisdiction and enforcement of judgments,[13] the situation within the United States promises additional confusion. As individual state courts become an increasingly popular forum[14] for disputes involving foreign corporations or nationals, they may apply their own separate doctrines of dismissal for inconvenient forum[15] and temper their recognition of foreign judgments with parochial notions of comity and forum public policy.[16] To avoid being

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IV, § 1; 28 U.S.C. § 1738 (1988). *See generally* GARY B. BORN & DAVID WESTIN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 561-604 (1989).

Similarly, there is no international convention or consensus on the treatment of foreign judgments. The Restatement (Third) summarizes the treatment of foreign country judgments, "state" here referring to another country or sovereign:

> In contrast to the principles governing jurisdiction to adjudicate . . . which, with minor variations, reflect international consensus, there are no agreed principles governing recognition and enforcement of foreign judgments, except that no state recognizes or enforces the judgment of another state rendered without jurisdiction over the judgment debtor.
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> . . . .
>
> State practice varies widely. Some states require a treaty or proof of reciprocity. . . . All states decline to recognize some judgments on the basis of conflict with their public policy or *ordre public*, but these terms have different meaning from state to state.

RESTATEMENT (THIRD), *supra* note 8, ch. 8, introductory note, at 591-92.

12. Herbstein v. Bruetman, 743 F. Supp. 184, 188 (S.D.N.Y. 1990).

13. *See* Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, Sept. 27, 1968, 1978 O.J. (L 304) 77 [hereinafter the Brussels Convention]. The consolidated and updated version of the Brussels Convention of 1968 and the Protocol of 1971 following the accession of Spain and Portugal in 1989 is reprinted in 29 I.L.M. 1413 (1990). *See also* Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Sept. 16, 1988, 1988 O.J. (L 319) 9, *reprinted in* 28 I.L.M. 620 (1989) [hereinafter the Lugano Convention]. The Lugano Convention extends the principles of the Brussels Convention to transactions between those EC and EFTA members that are parties to the Convention. It is part of the overall movement toward cooperation and integration between the two groups that culminated in an agreement signed by EC and EFTA members on October 22, 1991, to create the European Economic Area (EEA), a free trade area comprised of nineteen nations.

14. As the U.S. federal courts have become less receptive to tort claims involving foreign plaintiffs, plaintiffs have turned to state courts. *See* Robertson & Speck, *supra* note 10, at 939. The authors suggest that this movement reflects the change in federal forum non conveniens doctrine from "abuse-of-process" approach to "most-suitable-forum" doctrine. The movement toward state courts also may be as a reaction to other procedural changes within federal courts, including the tightening of summary judgment standards.

15. *See id.* at 950-52.

16. Since there is no international parallel to the full faith and credit provision or the statute requiring full faith and credit in federal courts for state court judgments, recognition and enforcement of foreign judgments is basically controlled by common law except in those states that have adopted the UFMJRA. The Act creates three grounds for mandatory nonrecognition (lack of: due process, personal jurisdiction, or subject matter jurisdiction) and six for discretionary nonrecognition (lack of notice, fraud in judgment, public policy, conflicting judgments, contrary to forum selection clause, "seriously inconvenient forum" based on personal service). Several of the adopting states have enacted variations to the Act, particularly allowing discretionary nonrecognition when reciprocity is lacking. *See* UFMJRA, *supra* note 3.

left without a forum or remedy, parties file "protective" parallel proceedings. These proceedings frequently generate injunctive actions, motions to dismiss, and motions to stay. After judgment, when recognition and enforcement are sought, they lead to actions challenging the initial judgment.

This article considers one response to parallel civil proceedings, the Conflict of Jurisdiction Model Act (the Model Act), included as Appendix I, which creates a presumption against parallel proceedings and establishes a basic approach to selecting a single forum. The Model Act, proposed by a subcommittee of the American Bar Association Section on International Law and Practice in 1989,[17] addresses the reverse problem of concurrent jurisdiction, that of subsequent recognition and enforcement of judgments, by tying these ultimately to prior determination of a single appropriate forum (the "adjudicating forum"). The Model Act creates a "supranational" stay of other proceedings in favor of allowing the parties to proceed in the most appropriate forum. In addition to providing some predictability for subsequent actions, the Model Act encourages conformity without challenging sovereign authority.[18] While seeking to accord with multiple legal systems, the Model Act offers a flexible but consistent rule for analyzing the problem, one not inherently biased in favor of the home forum.[19] Convenience, judicial efficiency, and comity are incorporated into the multiple factors used for selecting the appropriate forum.

By extending beyond mere contractual disputes and across geographical lines and legal systems, the Model Act provides a comprehensive approach tied neither to underlying substantive claims nor to underlying substantive law.[20] Equally important is its compatibility with many legal systems and with the approach taken in several existing multilateral conventions, such as the EC's Brussels Convention and the parallel Lugano Convention, both of which adopt a

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The Act is similar to the RESTATEMENT (THIRD), *supra* note 8, § 482, but adds the inconvenient forum basis for nonrecognition. This addition raises some question of consistency with the Conflict of Jurisdiction Model Act, *reprinted infra in* Appendix I [hereinafter Model Act]. *See infra* part III.

17. The subcommittee began studying the problem in 1987. The resulting Model Act was drafted in 1988/89. The Committee considered the possible forms that a proposal might take, such as a treaty or uniform act through the National Law Commissioners, but determined that the most practical approach would be a model act that could be adopted by an individual state or country.

The State of Connecticut has adopted the Model Act as part of the Act Concerning International Obligations and Procedures, Public Act No. 91-324, 1991 Conn. Legis. Serv. P.A. 91-324 (H.B. 7364) (West). The general policy, stated in section 1 of the Model Act, has been deleted. The Act was signed into law on June 25, 1991. Connecticut has been in the forefront of those states adopting model acts or conventions relating to international transactions and procedures. The State of California is also currently studying the Model Act.

18. *See infra* Appendix I, comment to § 1.

19. One of the major criticisms of resolving concurrent prescriptive jurisdiction through interest analysis is its bias for the forum. *See* Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 948–53 (D.C. Cir. 1984).

20. The Model Act differs from earlier attempts at contractual choice of forum acts by not relating the choice of law to the forum selected except as one of the fourteen factors in § 3, and even then, reflecting primarily a concern with familiarity with the law. *See infra* part III and Appendix I.

rule that jurisdiction rests with the court first obtaining jurisdiction or "first seised."[21] The Model Act ultimately amounts to a "supra choice of law," generally allowing the first forum with jurisdiction over a dispute to determine the appropriate treatment of subsequent parallel proceedings.

While the Model Act's flexibility is one of its strengths, that flexibility also gives rise to certain problems. Several issues remain unresolved, reflecting the difficulty of creating a universal panacea that can treat totally different systems alike. The Model Act may face obstacles in being integrated into individual systems. For example, the policy of abstention in the U.S. federal system may not mesh with the Model Act. Equally problematic is how to accommodate a forum's public policy concerns without sapping the Act of its vitality. Undefined phrases also may result in inconsistent interpretation, thus undermining attempts at uniformity.

The Model Act cannot and does not solve all problems, but it offers an opportunity to establish a policy of single proceedings and a means, through enforcement of judgments, of encouraging participants in international litigation voluntarily to reduce repetitive, unnecessary, and wasteful litigation. In the process it may help to lessen friction between different sovereigns and legal systems, especially in cases of concurrent overlapping jurisdiction.[22]

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21. The Brussels Convention provides a lis pendens once a court has jurisdiction:

> **Section 8**
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> Lis pendens - related actions
>
> *Article 21*
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> Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Contracting States, any court other than the court first seised shall of its own motion decline jurisdiction in favor of that court. A court which would be required to decline jurisdiction may stay its proceedings if the jurisdiction of the other court is contested.
>
> *Article 22*
>
> Where related actions are brought in the courts of different Contracting States, any court other than the court first seised may, while the actions are pending at first instance, stay its proceedings.
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> A court other than the court first seised may also, on the application of one of the parties, decline jurisdiction if the law of that court permits the consolidation of related actions and the court first seised has jurisdiction over both actions.
>
> For the purposes of this Article, actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.
>
> *Article 23*
>
> Where actions come within the exclusive jurisdiction of several courts, any court other than the court first seised shall decline jurisdiction in favour of that court.

The Brussels Convention, *supra* note 13, § 8, at 83. The Lugano Convention, *supra* note 13, has similar provisions.

22. *See Laker*, 731 F.2d at 945–55. The Model Act is not specifically limited to the problems of conflicting prescriptive jurisdiction which give rise to the type of situation in *Laker*. The problem has generally been addressed by the courts, at least in the anticompetition regulation area, by an interest analysis or balancing of the interests of the domestic forum with that of the foreign law. In keeping with the aims of the Model Act, this article does not treat the issue of extraterritorial application of law or assertions of jurisdiction. As discussed in more detail *infra* part III, the Model Act deliberately segregates choice of forum in parallel proceedings from choice of substantive law or jurisdiction. For that reason, the *Laker* case receives only cursory mention, as does interest analysis.

Interest analysis as a means of resolving extraterritorial application of law has been criticized extensively. *See, e.g.*, Harold G. Maier, *Interest Balancing and Extraterritorial Jurisdiction*, 31 AM. J. COMP. L. 579 (1983); Spencer Weber Waller, *Bringing Meaning to Interest Balancing in Transnational Litigation*, 23 VAND. J. TRANSNAT'L L. 925 (1991).

II. Different Rules of the Road: Causes and Responses to Parallel Proceedings

Varied circumstances can give rise to duplicative litigation in multiple forums, either in the form of concurrent or successive actions. The root of the problem is concurrent jurisdiction. Two or more courts may have jurisdiction over a dispute and the parties to that dispute, allowing more than one forum to exercise jurisdiction to prescribe or adjudicate or both. The response to overlapping jurisdiction may vary. For example, suppose that a party files Lawsuit 1 in Country A. Lawsuit 2 in Country B may be "reactive," seeking to enjoin the opposing parties (usually the plaintiff in the first-filed lawsuit) from proceeding in Lawsuit 1 in Country A. Lawsuit 2 may be a mirror image of Lawsuit 1, seeking declaratory relief, but exactly contrary to the affirmative relief sought in Lawsuit 1. Lawsuit 2 may be a counterclaim or crossclaim split from Lawsuit 1 and not mandatorily joined by mechanisms such as those employed in U.S. federal courts.[23] Lawsuit 2 may be "repetitive," a carbon copy of Lawsuit 1, motivated by the belief that the race to judgment can be won faster or with a more favorable result for the plaintiff in Country B. Lawsuit 2 may be designed primarily to avoid subsequent problems of enforcement of judgments where assets are located. Lawsuit 2 may also be motivated by valid practical, tactical decisions, including the usual components of any forum-shopping. Finally, Lawsuit 2 may be purely vexatious, intended to increase the burdens on the opponents and the cost of litigating.

The motivation for these multiple lawsuits and the form that they take raise different policy considerations. These concerns may implicate conflicting values incorporated within different legal systems. In addition, parallel proceedings have an impact not only on private interests, but also on governmental concerns, the extent of which may vary with the form of parallel proceeding. Convenience of the parties is but one of many considerations, inseparable from judicial efficiency and the policies of multiple judicial systems. Problems of sovereignty, including issues of extraterritorial application of law[24] and the relationship among foreign countries, may also be part of the equation.

Regardless of the original motivation for filing parallel proceedings, basically three responses are possible: (1) both courts[25] proceed; (2) one court defers to another and stays or dismisses its own proceedings; and (3) one court enjoins the

23. *See, e.g.*, Seattle Totems Hockey Club, Inc. v. National Hockey League, 652 F.2d 852 (9th Cir. 1981), *cert. denied*, 457 U.S. 1105 (1982) (enjoining proceeding in Canada and treating as compulsory counterclaim). The Federal Rules of Civil Procedure encourage joinder of claims and parties, and require joinder of certain counterclaims. *See* FED. R. CIV. P. 13, 14, 18, 19, 20, 23, and 24.

24. *See Laker*, 731 F.2d 909; *see also* RESTATEMENT (THIRD), *supra* note 8, § 403 cmts. a, d, e, & reporters' notes 1–7.

25. While the examples illustrate the simplest form of parallel proceedings, often the fact patterns involve more than two courts.

parties from continuing proceedings in front of another court. Often the analysis for responses (1) and (3) is intertwined. Response (1) can be viewed as the usual result when a request for response (3) is denied. Thus the rules for allowing parallel proceedings and issuing antisuit injunctions are reverse images. There are, of course, variations on these responses, both among countries and within the United States. For example, a court may dismiss an action rather than staying it. The response to a forum non conveniens motion in the United States is dismissal. In Britain, on the other hand, a court stays its own action in favor of a more convenient or natural forum.[26]

A. The Parallel Proceedings Rule

The general approach in U.S. courts to litigation in multiple forums is to allow parallel proceedings to continue simultaneously. "[P]arallel proceedings on the same in personam claim should ordinarily be allowed to proceed simultaneously, at least until a judgment is reached in one which can be pled as res judicata in the other."[27] International litigation dispersed in multiple countries is treated as analogous to lawsuits in different states within the United States. Actions in two states or in two countries cannot be consolidated without first departing from one system, either through dismissal or stay.[28] Once one suit has reached judgment, the prevailing party generally seeks to foreclose further action in the remaining suit. Within the United States full faith and credit to a sister state's judgment is constitutionally guaranteed. Bilateral and multilateral treaties, such as the Brussels Convention, produce similar results if both forum countries have subscribed to the treaty. Since there is no broadly based international equivalent,[29] the problem of multiple suits in the international arena is likely to recur when a party seeks to enforce the judgment from the first-finished suit in the second country.

The parallel proceedings rule is in keeping with accepted notions of international comity by respecting multiple sovereignty in cases of concurrent jurisdiction. At first blush, the parallel proceedings rule not only offers the line of least resistance in responding to multiple litigation, but also provides what superficially appears to be the most restrained approach, uninhibited by notions of strong sovereignty. In practice, however, the parallel proceedings rule has sub-

26. *See infra* note 42.

27. *Laker*, 731 F.2d at 926-27 (footnote omitted).

28. The equivalent under the U.S. federal system, at least for pretrial purposes, is multidistrict litigation under 28 U.S.C. § 1407(a) (1988), which allows consolidation for pretrial proceedings when "one or more common questions of fact are pending" in different districts and the transfers "will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions." *Id.* The statute provides for a panel of judges to administer the procedures of transfer, the judicial panel on multidistrict litigation. Also in progress are several proposals to formulate an equivalent procedure for consolidating matters pending in multiple states or in state and federal courts. *See supra* note 2.

29. *See supra* notes 11 & 13.

sequently spawned some of the most hostile injunctive litigation.[30] The rule promises to generate more of the same as prescriptive jurisdiction expands with transactions, especially in the area of antitrust. Even if the courts somehow manage to avoid friction in the initial proceedings, the rule merely defers battle to a later stage when a party seeks to enforce judgment—a "try now, pay later" approach. In cases of inconsistent judgment, with no international consensus on recognition and enforcement, who to pay (and in what currency) under which judgment becomes the focus of the next litigation.

The implications of uninhibited dual litigation, barely restrained by the thought of "rarely issued" injunctive relief,[31] are a forum-shopper's delight—and a court's nightmare. A party is free to select the best law, best remedy, most pleasing procedural system; obtain a quick judgment; and race to enforce it. Who says you get only one bite of the judicial apple? With parallel proceedings a party can have a full meal, and a "progressive dinner" at that, moving to different forums either concurrently or consecutively. If a party does not like what is being served, it can try the dismiss or restrain options; and if those options do not work, it can wait for judgment and challenge enforcement. True, one of the contributing factors to the possibility of forum-shopping through multiple proceedings is the lack of uniform treatment of foreign judgments, but even with a multinational treaty, the deference to public policy of the forum, a requirement of comity[32] and, inherently, of sovereignty will always leave open the potential to ignore one judgment in favor of a second judgment. Alternatively, a party can use the two-track approach to exhaust an adversary, or at the minimum, to make the race substantially more expensive.

A recent example of the procedural game is *Banque Libanaise pour le Commerce v. Khreich.*[33] This commercial transaction dispute arose between a French bank with a branch in Abu Dhabi and Khreich, a former resident of Abu Dhabi, now a U.S. citizen. The controversy involved an advance subject to a written overdraft agreement and, according to Khreich, was part of a sham transaction. The bank filed the first suit (July 1986) in federal district court in Texas to recover amounts owed under the agreement. Khreich filed the second suit, a "reverse" reactive suit, in Abu Dhabi against the bank for breaching part of the agreement.[34] Khreich then objected to the existence of parallel litigation—that

30. *See supra* note 4. *See generally* Trevor C. 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).

31. *Laker,* 731 F.2d at 927. *See generally* Note, *supra* note 30.

32. *See supra* note 11. "No nation is under an unremitting obligation to enforce foreign interests which are fundamentally prejudicial to those of the domestic forum. Thus, from the earliest times, authorities have recognized that the obligation of comity expires when the strong public policies of the forum are vitiated by the foreign act." *Laker,* 731 F.2d at 937 (footnote omitted).

33. 915 F.2d 1000 (5th Cir. 1990).

34. This second suit appears to have been what frequently becomes a counterclaim in a contract or commercial dispute, and would probably be a mandatory counterclaim under FED. R. CIV. P. 13.

he had created—by filing a motion to dismiss the bank's first-filed lawsuit in Texas federal court in favor of his Abu Dhabi action, alleging that Abu Dhabi law should apply and that Abu Dhabi was a more convenient forum. The federal court eventually denied the motion. Before the trial in Texas, the Abu Dhabi court entered judgment in Khreich's suit in favor of the bank. The bank then sought recognition in the pending federal case (the first-filed suit) of the Abu Dhabi judgment (from the second-filed suit). Not surprisingly, Khreich then argued against recognition of the judgment, a judgment in the suit that he had initiated and that he had argued should proceed in his earlier motion to dismiss the federal suit.

The federal court, applying Texas's Foreign Money-Judgments Recognition Act,[35] refused to recognize the bank's Abu Dhabi judgment facially on the grounds of lack of reciprocity, an option under the Texas statute. The unstated reason appears to have been the failure of the bank to prove reciprocity[36] under the law of Abu Dhabi, supposedly a question of law under U.S. federal court procedures.[37] The court also applied the law of the forum, Texas,[38] based ultimately on what it found to be poor lawyering, since "better evidence could and should have been made available to the district court."[39] The jury in the first-filed suit found for Khreich on the merits, relying on the Texas usury statute.

These inconsistencies have a certain symmetry. The plaintiff in each case lost on the merits and challenged the judgment. By ultimately upholding the second

35. TEX. CIV. PRAC. & REM. CODE ANN. §§ 36.001-.008 (Vernon 1986 & Supp. 1991). The Texas version of the UFMJRA includes a seventh ground for discretionary nonrecognition, lack of reciprocity:

> (b) A foreign country judgment need not be recognized if:
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> . . . .
>
> (7) it is established that the foreign country in which the judgment was rendered does not recognize judgments rendered in this state that, but for the fact that they are rendered in this state, conform to the definition of "foreign country judgment."

Id. § 36.005(b); *see supra* note 16.

36. The court stated that it placed the burden of proof on Khreich, but then rejected the bank's evidence of the law of Abu Dhabi to refute an affidavit of an American lawyer practicing in Abu Dhabi. *Khreich*, 915 F.2d at 1005–06. For a discussion of the role of trial and appellate courts in the determination of foreign law and the impact of failure of proof, see 9 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE §§ 2444, 2446, 2447 (1971). The authors suggest that on appeal a court is free to consider additional information of foreign law obtained either through its own research or through presentation by the parties *on appeal*. *Id.* § 2446.

37. FED. R. CIV. P. 44.1. The court seems to have ignored this aspect of the question of whether Abu Dhabi law would recognize a foreign judgment.

38. While the court correctly acknowledged that the issue of foreign law, here governing the rate of interest, was one of law under FED. R. CIV. P. 44.1, it then went on to reject the additional evidence offered by the bank since the bank had failed to meet its "burden of proof" on this issue of law. Only by refusing to review the mistake of law could the circuit court reach the result it sought, that of applying the law of the forum, Texas, rather than that of Abu Dhabi.

The court seems to have ignored the role of critical review for mistakes of law when it eloquently summarized its position and chastised the bank:

> It was the Bank's burden to provide the legal pigment and then paint the district court a clear portrait of the relevant Abu Dhabi law. The Bank failed to provide a pallet, a painter with a usable brush, and paint possessing distinct visibility. The resultant picture contains neither abstract nor realistic exposition. Given this state of the art, the district court was well within its discretionary realm to refuse to accept this virtually barren canvas when it was within the Bank's power to present a canvas upon which it had etched a clear and visible statement of the applicable Abu Dhabi law.

Khreich, 915 F.2d at 1007.

39. *Id.*

(federal court) judgment, the case clearly demonstrates the rewards of filing parallel proceedings—one can have several more bites at the apple, even if exactly contrary to earlier bites. Aside from the procedural inequity,[40] the waste of judicial resources and the imposition on the judicial systems cannot be ignored. Not only did the U.S. federal district court waste time on the forum non conveniens motions, it subsequently had to address—and thus waste more of its time on—the motion for summary judgment based on the judgment in Abu Dhabi and the subsequent dispute over recognition. Ultimately the Fifth Circuit had to review the matter, yet another waste of judicial resources and time.

Thus, even without the histrionic display of *Laker* and the attendant issues of extraterritorial application of substantive law, the parties and the multiple judicial systems are forced in a simple loan case such as *Khreich* to participate in unnecessary and unproductive litigation. In contrast to the multiforum, multiyear litigation, the Model Act, if adopted, would permit one lawsuit to proceed in the most appropriate forum, one that would likely be familiar with the law governing the case. The losing party would not be able to try again elsewhere.

B. Deferring to Another Forum

A second response to parallel proceedings is to defer to another forum. This reaction may take different forms: staying the pending action until an action in another forum is resolved, or dismissing the pending action, with or without conditions, in favor of an action pending in another forum. Generally, the basis for requesting a stay is the inconvenience (practical or financial) of litigating in several locations. In American practice parties often join the motion to dismiss for forum non conveniens with an alternative motion to stay.[41] The British approach of deferring to another convenient forum is similar.[42]

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40. The court failed to address the real issue of estoppel, making only minor mention of the issue in connection with dicta in Hilton v. Guyot, 159 U.S. 113 (1895), which it rejected as an exception to requiring reciprocity. *Khreich*, 915 F.2d at 1005.

41. *See infra* note 60.

42. By looking for the "natural forum," the British system utilizes an approach analogous to one that selects the forum providing the most relief, an approach incorporated as one aspect of the Model Act. The leading treatise on British law suggests a distinction in treatment of stays for actions begun by different parties in separate forums and for those begun by the same party, the court being more likely to intervene in the latter as illustrated by the following:

> The court will not stay English proceedings unless it is satisfied that the continuance of the action would be unjust to the defendant because it would be oppressive or vexatious to him, or would be an abuse of the court in some other way, and that a stay would not cause injustice to the plaintiff. The burden of proving these matters lies on the defendant.

8 Halsbury's Laws of England, *Conflict of Laws* para. 788 (Lord Hailsham et al. eds., 4th ed. 1974) (footnotes omitted). To justify a stay, the defendant must show that "there is another forum . . . in which justice can be done between the parties at substantially less inconvenience or expense, and . . . the stay must not deprive the plaintiff of a legitimate personal or juridical advantage which would be available . . . if he invoked the jurisdiction of the English court." MacShannon v. Rockware Glass Ltd., 1978 App. Cas. 795, 812 (appeal taken from Eng. C.A.) (Lord Diplock).

Although there has been some disagreement, the British courts have held that the test for *enjoining or restraining* proceedings in a foreign jurisdiction differs from that used to grant a stay of English proceedings in favor of a more appropriate foreign forum. The former requires not only that the

American courts frequently are unsure how to treat courts of other sovereigns. The difficulty arises in deciding whether parallel proceedings between a U.S. court and a foreign court fit the state/federal model, the state/state model, or the federal/federal model.[43] The problem of categorization is exacerbated when a federal court defers to another court by staying or dismissing its own proceedings. When the federal court has jurisdiction, but chooses not to exercise it in deference to another proceeding, usually that of a state, this discretionary refusal implicates the doctrine of abstention, discussed in more detail in part IV below. When the federal court defers to a court of another country, the argument is generally couched in terms of comity. The classic definition of comity within the U.S. system derives from *Hilton v. Guyot:*

> "Comity," in the legal sense, is neither a matter of absolute obligation . . . nor of mere courtesy and good will . . . . But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.[44]

While comity was initially considered in connection with recognition and enforcement of a foreign judgment, amounting to giving extraterritorial effect to another sovereign's laws, its use has been extended to a general concept of courtesy. Comity then becomes a basis for a federal court to abstain from acting (including refusing to enjoin parallel proceedings) and is intertwined with federal abstention cases.

Federal courts, ruling on motions to stay or dismiss in favor of a foreign court, have reached totally inconsistent results based on completely different theories. For example, one federal court,[45] discussing parallel admiralty proceedings in the Netherlands and Delaware, rejected not only forum non conveniens, but also comity as a basis for dismissing the Delaware action. The comity approach failed for two reasons. First, the court, reflecting the traditional approach to comity, found the doctrine inapplicable prior to a binding decision by the foreign court. "[I]f courts were as accommodating as the [defendant] urges them to be, no case

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English court is the "natural forum," but that it would be "vexatious or oppressive" to the defendant if the plaintiff were allowed to proceed, and that injustice to the defendant outweighs the injustice to plaintiff of not letting plaintiff proceed. *See* SNI Aerospatiale v. Lee Kui Jak, 1987 App. Cas. 871 (P.C.) (appeal taken from Brunei) (enjoining plaintiffs from suing in Texas a French company that did business in Texas, when plaintiffs also had proceedings pending in Brunei in connection with a helicopter crash in Brunei).

43. *Compare* Neuchatel Swiss Gen. Ins. Co. v. Lufthansa Airlines, 925 F.2d 1193 (9th Cir. 1991) (rejecting notion that a federal court owes greater deference to foreign courts than state courts) *with* Brinco Mining Ltd. v. Federal Ins. Co., 552 F. Supp. 1233 (D.D.C. 1982) (treating standard as same as between two federal courts). *See infra* text accompanying notes 109–14.

44. 159 U.S. 113, 163–64 (1895). *See generally* Joel R. Paul, *Comity in International Law,* 32 HARV. INT'L L.J. 1 (1991).

45. Cliffs-Neddrill Turnkey International-Oranjestad v. M/T Rich Duke, 734 F. Supp. 142 (D. Del. 1990).

would ever be heard if suits were filed in two or more countries.''[46] Second, the court interpreted the comity argument as one for a "first-filed rule," which it rejected under the usual circular logic that with two sovereigns, parallel proceedings was the rule.

A stay under federal law is discretionary and is based on the inherent power of the court to control its own docket.[47] The basis for a stay has often been tied explicitly to judicial efficiency and the impact on the system, at least in the case of abstention under the *Colorado River*[48] doctrine.

> Numerous factors bear on the propriety of staying litigation while a foreign proceeding is pending. They include pragmatic concerns such as the promotion of judicial efficiency and the related questions of whether the two actions have parties and issues in common and whether the alternative forum is likely to render a prompt disposition. Also relevant are considerations of fairness to all parties or possible prejudice to any of them. A third group of concerns relates to comity between nations. When as in this case the foreign action is pending rather than decided, comity counsels that priority generally goes to the suit first filed.[49]

In contrast to ruling on stays, U.S. federal courts, when dismissing for forum non conveniens, apply the test derived from *Gulf Oil Corp. v. Gilbert,*[50] (the source of federal forum non conveniens law), which was reaffirmed in *Piper Aircraft Co. v. Reyno.*[51] The analysis for forum non conveniens requires the court to determine if there is an alternative forum. If so, the inquiry specifically requires balancing of private and public factors: the former are basically convenience factors; the latter incorporate system-wide concerns.[52] *Reyno* establishes that while deference is given to a plaintiff's choice of forum, a foreign plaintiff's

46. *Id.* at 151 n.11.

47. Landis v. North Am. Co., 299 U.S. 248, 254 (1936).

48. Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976); *see infra* text accompanying notes 107–18. *See generally* Linda S. Mullenix, *A Branch Too Far: Pruning the Abstention Doctrine,* 75 GEO. L.J. 99 (1986).

49. Ronar, Inc. v. Wallace, 649 F. Supp. 310, 318 (S.D.N.Y. 1986) (citations omitted). Other cases have provided different formulations of the test for determining whether to grant a stay. *See, e.g.,* Continental Time Corp. v. Swiss Credit Bank, 543 F. Supp. 408 (S.D.N.Y. 1982) (adds temporal sequence to factors in I.J.A., Inc. v. Marine Holdings, Ltd., 524 F. Supp. 197 (E.D. Pa. 1981)).

50. 330 U.S. 501 (1947). The companion case, Koster v. (American) Lumbermens Mut. Casualty Co., 330 U.S. 518, 524 (1947) provided that when the chosen forum would result in "oppressiveness and vexation to a defendant . . . out of all proportion to plaintiff's convenience," a court could dismiss. So, too, could a court dismiss if the forum were "inappropriate because of considerations affecting the court's own administrative and legal problems." *Id.*

51. 454 U.S. 235 (1981).

52. The Court described the private interest factors as: "the relative access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises; . . . and all other practical problems . . . ." *Gulf Oil,* 330 U.S. at 508. The public interest factors included:

> The administrative difficulties flowing from court congestion; the "local interest in having localized controversies decided at home"; the interest in having the trial of a diversity case in a forum that is at home with the law that must govern the action; the avoidance of unnecessary problems in conflict of laws, or in the application of foreign law; and the unfairness of burdening citizens in an unrelated forum with jury duty.

Reyno, 454 U.S. at 241 n.6 (citing to *Gulf Oil,* 330 U.S. at 509).

choice receives less. In applying the test the convenience of the parties takes a secondary role to the interest of the judicial systems involved when determining if another forum is the more convenient. This type of interest analysis looks suspiciously like the balancing used to determine which forum has the "most significant relationship" to the lawsuit for choice of law purposes.[53]

In addition to the potential for forum non conveniens dismissal within the federal system, individual states have adopted their own approach to the issue.[54] Many have lifted the *Gulf Oil/Reyno* test without alteration. In those states that do not recognize the doctrine, forum non conveniens dismissals may not be available.[55] Even those states not subscribing to the doctrine often face similar issues in conjunction with determining if the assertion of personal jurisdiction comports with due process. For example, although Texas recently abolished the doctrine of forum non conveniens, cases that might have been dismissed under that doctrine still must satisfy the jurisdictional contacts test of "fair play and substantial justice." Many of the same factors considered in practical terms for the forum non conveniens determination are treated in broader perspective under the jurisdictional balancing test. In one such recent case, the Texas Supreme Court specifically differentiated between the component factors for international, as opposed to national, disputes. "Since this is an international dispute and not a dispute between coequal sovereigns in our federal system, we need not consider the interstate judicial system's interest in obtaining the most efficient resolution of controversies or the shared interest of the several states in furthering fundamental substantive social policies."[56] The state court would be free to proceed if it had personal jurisdiction even if the forum is inconvenient.[57]

The limitations of the doctrine of forum non conveniens are evident in *American Cyanamid Co. v. Picaso-Anstalt,*[58] a relatively straightforward licensing

53. The relationship of forum non conveniens with choice of law as well as jurisdiction has been noted by many scholars. *See generally* Allan R. Stein, *Forum Non Conveniens and the Redundancy of Court-Access Doctrine,* 133 U. PA. L. REV. 781 (1985). For a discussion of the "most significant relationship" test and the choice of law principles contained in § 6 of the Restatement (Second) of Conflict of Laws, see EUGENE F. SCOLES & PETER HAY, CONFLICT OF LAWS §§ 17.21-.25 (1982). *See infra* note 98 and accompanying text.

54. *See generally* Robertson & Speck, *supra* note 10, at 950–52 (detailing and categorizing state treatment of forum non conveniens doctrine). The authors indicate that transnational litigation has increased in those states without what they characterize as the "most-suitable-forum" approach used in federal forum non conveniens cases.

55. *See, e.g.,* Dow Chemical Co. v. Castro Alfaro, 786 S.W.2d 674 (Tex. 1990), *cert. denied,* 111 S. Ct. 671 (1991). In response to this case holding that Texas had abolished the doctrine of forum non conveniens, the Texas Legislature considered but failed to pass a bill reenacting the doctrine, Tex. H.B. 2247, 72d Leg., R.S. (1991), as an amendment to TEX. CIV. PRAC. & REM. CODE ANN. § 71.031 (Vernon 1986).

56. Guardian Royal Exch. Assurance, Ltd. v. English China Clays, P.L.C., No. C-8367, 1991 WL 22997, at *9 n.17 (Tex. Feb. 27, 1991).

57. Presumably, the state litigation, however, would be constrained by the overriding federal requirement for due process, which would require some connection with the forum. *See generally* Stein, *supra* note 53.

58. 741 F. Supp. 1150 (D.N.J. 1990).

dispute that spawned virtually simultaneous litigation in both the French Court of Commerce and the United States federal district court. As is typical in the suit/reactive suit situation, the defendant[59] in the U.S. litigation filed alternative motions to dismiss for forum non conveniens and to stay the pending U.S. action in favor of the foreign forum. The district court's ruling on both motions equates the two motions[60] as well as the two doctrines, forum non conveniens and comity. The court describes forum non conveniens as "a principle of *comity and efficiency* designed to prevent undue vexation and oppression of a defendant."[61] Equally disturbing is the district court's fragmenting of forum non conveniens factors, requiring that the defendant bear the burden on each such element without the benefit of tallying up the individual elements. The analysis amounts to giving equal weight to private and public factors rather than a balancing of competing and differently weighted factors. Finally, the court collapses the public interest analysis into a choice of law analysis and ultimately is convinced that the contractual choice of New York law could not be applied as "conveniently" in a French forum.[62]

This approach turns choice of law into an automatic choice of forum. It ignores *Reyno*'s minimizing of the impact of forum selection on choice of law and equates the conflict of law interest analysis with convenience such that the *most convenient* forum will always be that of the contractual choice of law.

> [I]n addressing the public interest factors, the Court must attempt to ensure that the resolution of the case takes place in a forum that "is at home with the law that must govern the case," and that there be an avoidance of the practical problems associated with the application of foreign law. . . .
>
> . . . It certainly would be both more convenient and practical for this Court to resolve a contract claim governed by the laws of New York than it would for a judge of the Court of Commerce to do so. Dismissal of the case in favor of the French action would require a court unschooled in our laws to apply statutory law and common law precepts in what would clearly be a cumbersome process requiring, as well, substantial translation services. . . .

59. The defendant in the second lawsuit is the one who files a motion for forum non conveniens dismissal, since the plaintiff has selected the original preferred location by filing suit.

60. While the court correctly perceives the relationship in practical impact between granting a stay or dismissing on the grounds of forum non conveniens, and assumes in either case the binding effect of any judgment, an assumption that will vary with the state in which enforcement is sought, the court incorrectly adopts the same analysis for both motions: "The factors informing the decision on *forum non conveniens* appear to be fully responsive to those informing a decision to stay, and a detailed presentation on both grounds is simply unwarranted." *American Cyanamid,* 741 F. Supp. at 1154.

61. *Id.* at 1155 (emphasis added).

62. The case, interestingly, was pending, in federal court in New Jersey, not New York. The analysis is reminiscent of that used in the Prefatory Note to the Model Choice of Forum Act:

> The agreements also provide a natural complement of a choice-of-law clause. An agreement that suit on a contract should be brought only in the state which has been designated as the state whose law should be applied to determine the validity and effect of the contract provides perhaps the best insurance that the chosen law will be correctly applied. For a court is more likely to apply its own law correctly than would the courts of another state. Suit in the state of the chosen law would also obviate the difficulties frequently involved in proving the law of another state.

MODEL CHOICE OF FORUM ACT (1968) (withdrawn 1975); *see infra* note 79 and Appendix II.

> . . . From an overall perspective, it simply cannot be said that these American plaintiffs should be relegated to a foreign forum to resolve claims under an agreement governed by *American* law covering all the sales territories of the world except the territory where the foreign forum is located.[63]

Under the Model Act the convenience of the parties becomes secondary to the concerns of the international legal system. While the Model Act adopts some aspects of the analysis and policy of forum non conveniens doctrine, its approach is much broader since the overriding policy of the Model Act is to limit parallel proceedings, not only those that are inconvenient. The private and public factors incorporated within the Model Act are viewed in the transnational context, and comity for coordinate sovereigns becomes an overriding value. The public factors driving the Model Act expand to reach ultimate enforceability of judgments, not merely pending litigation.[64] In contrast to the truncated analysis of the *American Cyanamid* court, selecting the appropriate forum under the Model Act would encompass a much wider range of public factors than the district court's near exclusive reliance on the forum's familiarity with the chosen law.

C. Enjoining Parallel Proceedings

The third response, enjoining the parties from proceeding in another forum, is clearly the most abrasive procedure. While the injunctive relief is technically against the parties, not the foreign court, the impact is often the same, and the offense to the other court's jurisdiction and sovereignty is as obvious. One would be hard-pressed to say in the *Laker* case that the British court and government were unaffected by the injunction granted by the American federal court.

Federal courts in the United States deciding whether to enjoin parallel proceedings in foreign forums generally divide into two camps: those that follow the *Laker* "sparingly used" approach, and those that use the more liberal *American Home Assurance Co. v. Insurance Corp. of Ireland*[65] approach.[66] Assuming that the suits involve the same parties and that the resolution of the case in the enjoining court would be dispositive of that being enjoined, courts look for an exception to the general rule favoring concurrent litigation. The *Laker* approach recognizes exceptions when the injunction is necessary to protect the enjoining court's jurisdiction or to protect important public policy of the forum. The broader *American Home Assurance* test incorporates within its five factors the interests of the parties and the judicial system in efficient dispute resolution:

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63. *American Cyanamid*, 741 F. Supp. at 1158 (emphasis added). The transposition of choice of law from "New York" to "American" raises the question of what would have been the result if the choice of law had been that of Louisiana, rather than New York? Federal courts in diversity litigation are frequently required to apply statutory and case law that are "cumbersome."

64. One can view the Model Act as being more akin to the British concept of selecting the "natural forum," the most appropriate place of several for litigation to proceed. The British analysis determines whether a court should defer to another forum or should restrain the proceedings in another forum, arrogating to itself the power to control the dispute.

65. 603 F. Supp. 636 (S.D.N.Y. 1984).

66. For a thorough discussion of the two approaches to antisuit injunctions, see Note, *supra* note 30.

(1) frustration of a policy in the enjoining forum; (2) the foreign action would be vexatious; (3) a threat to the issuing court's in rem or quasi in rem jurisdiction; (4) the proceedings in the other forum prejudice other equitable considerations; or (5) adjudication of the same issue in separate actions would result in delay, inconvenience, expense, inconsistency, or a race to judgment.[67]

The difference in philosophy—and outcome—of the two approaches is obvious in a comparison between the district court opinion in *China Trade & Development Corp. v. M.V. Choong Yong*[68] and the subsequent Second Circuit opinion reversing the granting of an injunction.[69] *China Trade* is a simple dispute in admiralty arising from the loss of a cargo of soybeans en route from Tacoma, Washington, to China on a Korean-owned ship. The cargo owner sued the shipowner for damages to the ruined cargo in federal court in New York.[70] Discovery and trial preparation continued for over two years. Then in April 1987, just months before trial in New York was to begin, the defendants filed a second suit, basically a reverse image declaratory judgment action, in Korea—and apparently took another two months to serve counsel for the cargo owner. China Trade sought an injunction in New York federal court to stop the Korean proceedings, which involved the same parties and issues. The district judge applied the *American Home Assurance* test and found that the Korean action would be vexatious and defendants' Korean declaratory judgment could potentially frustrate the proceedings before the federal court by making its judgment unenforceable in Korea.

It seems as if a race to judgment between the two forums would necessarily result if defendants were allowed to pursue the lawsuit in Korea. Furthermore, the second action in Korea will force plaintiffs to pursue a course of action half way around the world, forcing plaintiffs to incur great expense.[71]

In reversing the district court, the circuit court pointed out that "parallel proceedings are ordinarily tolerable"[72] and cited to *Laker* for support. The court narrowed the *American Home Assurance* test from five to two factors, those of threatening jurisdiction and public policy. It found both factors lacking primarily because of the circular reasoning that parallel proceedings are the general rule.[73] The related issue of enforceability of judgments enters into both lower and

67. *American Home Assurance*, 603 F. Supp. at 643.

68. No. 85 Civ. 8794 (S.D.N.Y. July 2, 1987), *rev'd*, 837 F.2d 33 (2d Cir. 1987). Judge Motley's district court opinion is largely reproduced in Judge Bright's dissenting opinion in the subsequent Second Circuit opinion. *Id.*, 837 F.2d at 37–40.

69. The initial proceeding, filed by the plaintiffs in California, was an attachment action of an unrelated ship owned by the defendants as security for the damages to plaintiffs' cargo. The ship that had carried the cargo had gone aground in transit and was sold by defendants. In exchange for releasing the attached ship, the defendants agreed to appear in the suit in New York and to post security.

70. 837 F.2d 33 (2d Cir. 1987).

71. *China Trade*, 837 F.2d at 39 (Bright, J., dissenting) (quoting Judge Motley's lower court opinion).

72. *Id.* at 36 (majority opinion).

73. *Id.* at 36–37.

appellate court opinions, but the appellate court merely focused on whether this results in an attempt to evade important public policy of the forum. In contrast, the district court looked at the practical impact of extra litigation and costs. For the district court, the two-and-a-half-year delay in filing the Korean action and the absence of even an early motion to dismiss for forum non conveniens amounted to vexatious litigation, likely to result in delay, inconvenience, expense, inconsistency, and race to judgment.[74]

The contrasting approaches, demonstrating the narrow (*Laker*) and liberal (*American Home Assurance*) tests, are driven by different underlying values. The circuit court equated its overriding concern with comity, resulting in a system that normally sanctions parallel proceedings. The district court did not assume a model that inherently valued parallel proceedings. Rather, it preferred a pragmatic model that valued limiting litigation. The basic clash in underlying philosophies structured both the test selected and the factors chosen for emphasis.

The Model Act's equivalent to enjoining proceedings is the voluntarily created stay once a court determines the proper adjudicating forum. The stay is implicit in the policy of section 1 of the Act. Having participated in the proceedings to determine the adjudicating forum, neither party could pursue parallel proceedings in another forum without risking the refusal of subsequent enforcement of any judgment obtained in the undesignated forum. Since the designating forum is required to apply multiple factors in the selection process, the court making the determination does not necessarily end up as the adjudicating forum so as to arrogate to itself the power to control the dispute. If the parties choose not to follow the determination, the impact of the decision arises at the time of subsequent enforcement of judgment. A totally different forum from that first involved may refuse enforcement due to the earlier failure to select, or to abide by the decision of, a proper adjudicating forum.

III. A Funny Thing Happened on the Way to the Forums

A. The Model Act in Brief

Any uniform approach to conflicts of jurisdiction within the international system must include sufficient leeway to respond to varied circumstances and multinational goals, yet provide some degree of predictability and potential for subsequent enforcement. A model act must respect the sovereignty of the multiple legal systems involved not only to manage their own courts, but to adju-

74. *Id.* at 39 (dissenting opinion). The same contrasting approaches between trial court and appellate court can be seen in a state court case, Gannon v. Payne, 706 S.W.2d 304 (Tex. 1986), in which the Texas Supreme Court dissolved a temporary injunction in connection with proceedings in Canada. The court rejected granting an injunction based on multiplicity of suits or the risk of inconsistent judgments. "[T]hat further expenses will be incurred by Payne is not a sufficient reason to grant an anti-suit injunction. If additional expense were a sufficient reason . . . an injunction would be proper in every case." *Id.* at 307–08 (citing to *Laker*, 731 F.2d at 928).

dicate certain types of disputes. Present options fail to provide the parties with incentives to limit voluntarily parallel proceedings and instead encourage a "file quickly and file often" course. The existing alternatives, as described in part II above, have failed for assorted reasons. Worse, they lack theoretical support, often collapsing the distinction between jurisdiction and venue and between choice of law and choice of forum determinations.

The Model Act changes existing approaches and prior attempts at uniformity[75] by beginning with two assumptions. First, parallel proceedings are not a viable or preferred alternative to multiple country litigation. Second, choice of forum, jurisdiction to prescribe, and jurisdiction to adjudicate implicate separate and distinct policy concerns and need not be resolved similarly or simultaneously. The key to limiting concurrent jurisdiction litigation without impinging on a forum's sovereignty is not through enjoining other proceedings. Rather, it is through limiting the subsequent enforceability of judgments. Those secured in conformity with the Model Act will be enforceable. "[T]he threat of discretionary refusal to enforce vexatious judgments so little offends the sovereign jurisdiction of other nations that the courts . . . 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."[76]

The Model Act establishes a two-step analysis. The first step is the initial determination of an adjudicating forum by the "first known court of competent jurisdiction" following timely application for designation (section 2). This first-step determination based on fourteen factors (section 3) incorporates convenience and comity factors, paying due regard to the interests of both the parties and the multiple judicial systems (section 3(a)): "the interests of justice among the parties and of worldwide justice." Step one specifically includes consideration of the public policies of the countries having jurisdiction.

The second step is the subsequent required enforcement (section 2(a)) of a judgment of an adjudicating forum, which judgment is to be enforced "pursuant to the ordinary rules for enforcement of judgments" (section 2(c)). The selection of the adjudicating forum receives "presumptive validity" if the designating court followed all the necessary steps. The Model Act is not simply an enforcement of judgment statute since it has two levels of concerns. It focuses initially on the choice of forum and then uses the enforcement of judgment as the carrot and stick for voluntary limitation of multiple proceedings.

75. *See infra* notes 78–79 and accompanying text.

76. *See infra* Appendix I, comment to § 3 (this language appears as a comment to drafts of the Model Act preceding its adoption). The comments, not an official part of the Model Act, were drafted for two versions of the Model Act, but were not specifically revised to reflect the changes made for the final version. The comments to §§ 1, 3, and 4 are largely the same for both drafts and the language of these sections was not changed substantially in the final version of the Model Act. Section 3 changed the language from the discretionary "may" to the mandatory "shall." The major changes occurred in § 2. Therefore the comments to the two earlier versions of that section are not as helpful. *See infra* Appendix I.

The Model Act is distinct from existing forum non conveniens dismissals since it neither dismisses one of the proceedings nor bases the determination of the most appropriate forum on convenience. It is akin to U.S. federal court multi-district consolidation and transfer,[77] but on an international plane. It incorporates a unique stay-like approach, analogous to the procedure under U.S. bankruptcy law or to a *lis pendens alibi* stay under section 21 of the Brussels Convention, but one that is voluntarily created. The Model Act also contains a provision for enforcement of judgments that starts with a full faith and credit approach, yet still allows room for the concept of public policy of the forum. Public policy is blended into the first level, that of proper forum determination, rather than at the time of enforcement of judgment.

The Model Act is not the first attempt to resolve problems of concurrent jurisdiction. The Hague Convention of 1964 on the Choice of Court Act[78] addressed the issue within the context of contractual choice of forum. The Convention provides that, subject to certain circumstances, a court selected in an agreement by the parties as the proper forum must hear the controversy. Similarly, subject to certain circumstances, a court must decline to hear a suit if it is not the court chosen by the parties. United States' efforts at choice of forum codes following the Hague Convention, such as the Model Choice of Forum Act,[79] approved by the National Conference of Commissioners on Uniform State Laws in 1968, but withdrawn in 1975,[80] met with resistance in part because of

77. *See supra* note 28.

78. Convention on the Choice of Court, Oct. 28, 1964, 4 I.L.M. 348 (1965) (adopted solely by Israel).

79. *See also* Appendix II, which provides significant portions of the Model Choice of Forum Act. MODEL CHOICE OF FORUM ACT (1968) (withdrawn 1975), *reprinted in* HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 219–22 (1968), *and in* Willis L.M. Reese, *The Model Choice of Forum Act*, 17 AM. J. COMP. L. 292 (1969) [hereinafter Reese, *The Model Choice*]. The Model Choice of Forum Act, originally conceived of as a uniform act, was based on the 1964 Hague Convention on the Choice of Court, but was "redrafted in American style." Although both the Hague and Uniform Law Commissioners adopt the general propositions that a court designated by the parties is required to entertain an action and one not designated must refrain, the conditions under which these rules apply differ. Professor Reese, the drafter of the Model Act, described the distinctions between the Model Act and the Convention:

> The Model Act is not only drafted in the American style; it also gives the court far more discretion than does the Convention to refuse to entertain the action, although it has been designated by the parties as a proper forum, or to entertain the action although another court, or courts, have been designated a proper forum in its stead. The Model Act reflects the fact that Americans, in general, are more willing than Continentals to give discretion to their judges.

Reese, *The Model Choice, supra*, at 292; *see also* Willis L.M. Reese, *A Proposed Uniform Choice of Forum Act*, 5 COLUM. J. TRANSNAT'L L. 193 (1966).

80. The Model Choice of Forum Act began as a "uniform" act in 1966 but was revised and changed to a "model" act in 1968. The National Conference of Commissioners on Uniform State Laws approved it in that year. For a discussion of the Model Choice of Forum Act and the history of its development, see NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, PROCEEDINGS IN COMMITTEE OF THE WHOLE, MODEL CHOICE OF FORUM ACT (July 25, 1968) (available on microfiche). One source of controversy was the inclusion of the affirmative provision of consent as a basis for jurisdiction.

The Model Choice of Forum Act was withdrawn in 1975, in part because of its limited adoption by only two states at that time. The other bases for withdrawing it were:

the reluctance at the time of U.S. courts to recognize contractual forum selection. That reluctance derived from the concept that jurisdiction of a court did not depend upon and was not controlled by party autonomy.[81] In addition U.S. courts had reservations about selection clauses in consumer transactions. Not until the 1970s did U.S. courts adopt the approach already accepted by many of their European counterparts that contractual choice of forum was acceptable, provided unequal or unfair conduct was not present. The Supreme Court's decision in *The Bremen v. Zapata Off-Shore Co.*[82] reflects the change in attitude and the acceptance of party autonomy in choice of forum provided the choice is not unreasonable or a result of fraud or overreaching—an approach within the United States that has found validation in the Supreme Court's recent decision in *Carnival Cruise Lines Inc. v. Shute.*[83]

The Model Act differs from these earlier efforts in that it is not restricted to contractual, preplanned choices of forum; nor is it limited to certain types of substantive disputes. It is applicable to all civil matters and includes multiple claim actions. The Model Act is not subject to many of the criticisms of choice

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> [A]n agreement valid under the Act may be subject to constitutional question . . . ; other agreements in the consumer credit area directly invalidated by the U.C.C.C. while agreements invalid for inconvenience under the Choice of Forum Act are generally enforced in the Courts—all of which raise the question whether it is feasible to attempt by general statute to deal with all such agreements in all possible contexts. This suggests that the matter might more properly be left to judicial decision and specific legislation like the U.C.C.C.

NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, 1975 HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS 142 (1975).

81. For a thorough discussion of forum selection clauses, see Linda S. Mullenix, *Another Choice of Forum, Another Choice of Law: Consensual Adjudicatory Procedure in Federal Court,* 57 FORDHAM L. REV. 291 (1988). The author expresses some skepticism for the accuracy of Prof. Reese's generalizations on the state of the law at the time. The article also distinguishes between the concepts of prorogation and derogation. *See generally* Michael Gruson, *Forum Selection Clauses in International and Interstate Commercial Agreements,* 1982 U. ILL. L. REV. 133.

82. 407 U.S. 1 (1972). The *Bremen* opinion emphasized the hostility toward forum selection clauses by U.S. courts as ousting courts of jurisdiction and contrary to public policy, but noted that "in the light of present-day commercial realities and expanding international trade" the clause should be upheld absent a showing to the contrary. *Id.* at 15. "There are compelling reasons why a freely negotiated private international agreement, unaffected by fraud, undue influence, or overweening bargaining power . . . should be given full effect. . . . The elimination of . . . uncertainties by agreeing in advance on a forum . . . is an indispensable element in international trade, commerce, and contracting." *Id.* at 12–14. The Court also stressed the role of choice of forum clauses in international transactions.

> The expansion of American business and industry will hardly be encouraged if . . . we insist on a parochial concept that all disputes must be resolved under our laws and in our courts. . . . We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts.

Id. at 9.

For an analysis of *Bremen,* see Mullenix, *supra* note 81. Although the Supreme Court cited to the Model Choice of Forum Act in its *Bremen* opinion, the approach had not found widespread acceptance in the states and three years later the Model Choice of Forum Act was withdrawn. *See supra* note 80.

83. 111 S. Ct. 1522 (1991) (upholding a forum selection clause in an unbargained-for cruise ticket, finding it not unreasonable or sufficiently inconvenient). The Court stated:

> Additionally, a clause establishing *ex ante* the forum for dispute resolution has the salutary effect of dispelling any confusion about where suits arising from the contract must be brought and defended, sparing litigants the time and expense of pretrial motions to determine the correct forum, and conserving judicial resources that otherwise would be devoted to deciding those motions.

Id. at 1527.

of forum clauses since it applies only when jurisdiction already exists, if by no other basis than party acceptance and appearance. Indeed, the choice of forum is analytically distinct from jurisdiction or choice of law, although the determination of the appropriate forum may include similar factors. As a result, the Model Act does not necessarily provide for the selection of a forum that is identical to the chosen law since due process concerns are not determinative and *familiarity* with law to be applied, not the law alone, is a factor (section 3(e)). The Model Act does not seek to resolve jurisdictional issues, either to adjudicate or prescribe, but assumes that the court making the determination has jurisdiction over the person. Likewise, the Model Act lacks a negative prohibition ousting other courts of jurisdiction. Instead, it discourages other proceedings voluntarily through the reward of ability to enforce subsequent judgments.

B. The Development of the Model Act

The drafters of the Model Act began with one shared assumption: the desirability of avoiding the *Laker* situation of unseemly parallel and vexatious litigation. Any solution would need to respect the sovereignty of other countries and circumvent issues of conflicting jurisdiction to adjudicate. The Committee recognized the need to afford an incentive for participation since practical enforcement under varied legal systems was not an alternative. The Committee also focused on those situations giving rise to parallel proceedings, especially the lack of uniform treatment of foreign judgments. The initial question for the drafters was the form of the solution. Although the focus was on how to solve the problem within the U.S. system, the Committee was aware of the need to afford an alternative that would be acceptable to other legal systems, even if reciprocity were not required.

The initial starting point was that parallel proceedings have not worked. Likewise, the interest balancing approach advocated in antitrust cases such as *Mannington Mills Inc. v. Congoleum Corp.*[84] and *Timberlane Lumber Co. v. Bank of America*[85] has failed. That interest balancing approach produces unpredictable results, raises questions of proper judicial functions, and does not resolve the problems of primarily private litigation.[86]

One solution considered was a short, simple rule that the "first-filed" suit would always proceed, an approach that could be viewed as analogous to that adopted for jurisdiction in the Brussels and Lugano treaties. Thus section 21 of the Brussels Convention provides that the court "first seised" with jurisdiction proceeds, and all other actions are stayed.[87] Certainly, such a *lis pendens alibi*

84. 595 F.2d 1287 (3d Cir. 1979).
85. 549 F.2d 597 (9th Cir. 1976).
86. *See supra* note 22.
87. Although the rule in section 21 is straightforward, there has been litigation on what constitutes "first seised." *See* Case 129/83, Zelger v. Salinitri, 1984 E.C.R. 2397, [1985] 3 C.M.L.R. 366.

rule would be relatively easy to apply. On the other hand, such a rule would merely exacerbate the race to the courthouse that the Model Act sought to reduce. In addition, a "first-filed" rule fails to incorporate system concerns or appreciate changes in proceedings that may occur. Such a rule is also too easily manipulated. Ultimately, it would encourage plaintiffs to go on a forum-shopping spree, filing multiple suits for fear that one might be dismissed or filing in the most inconvenient forum for the defendant. Such a rule of "first-filed" would leave no room for the common law tradition of forum non conveniens if the first-filed action is in an inconvenient forum. Nor would it include the possibility of responding to public policies of the forums, thus raising the specter of a forum required to apply law inconsistent with its fundamental public policy.[88]

The drafters of the Model Act ultimately determined to formulate an approach not in keeping with the prevailing parallel proceedings rule,[89] but one that still allows the possibility for parallel proceedings in certain limited circumstances. One particular situation where international law generally upholds parallel proceedings is when important public policy of the forum is threatened. The drafters of the Model Act eventually adopted a variation on the first seised concept that also incorporated some flexibility. Under the Model Act the court in which the first proceeding is filed (assuming jurisdiction) generally determines the proper adjudicating forum, but the first-filed forum does not necessarily continue its own proceedings. In addition, the forum first seised may not be the one making the determination if the parties have failed to request determination or if that forum has declined to accommodate the parties in selecting the appropriate forum.

A major drafting decision was whether to make any rule mandatory or merely discretionary, and the related issue of review of any determination of the appropriate adjudicating forum. Although convinced that some distinct rule was necessary, the drafters struggled throughout the process with balancing the need for certainty and predictability with the need for flexibility and adaptability to multiple legal systems. This tension can be seen particularly in the compromise eventually reached in section 2, the heart of the Model Act. Section 2 provides that a determination of an adjudicating forum, generally to be made by the court first seised with jurisdiction, is a necessary prerequisite for subsequent enforcement in the subscribing forum and that the determination is accorded "presumptive validity."

One of the early drafts of the Model Act, contained in Appendix I as Alternate A of section 2, denied enforcement to a judgment not from the appropriate adjudicating forum. The comment to this early draft focused on the automatic

88. Another variation considered was to create an acceptance of the "first filed" by acquiescence. Failure to apply for designation of an adjudicating forum would result in acceptance.

89. As demonstrated above, there was already a chink in the wall, with several of the U.S. lower courts being willing to enjoin or stay parallel proceedings under general equitable theories or in some cases, on the basis of *Colorado River* abstention.

enforcement of the judgment, once determination was made by the appropriate court. The determination, if made in accordance with the Model Act, with notice, and considering all the required factors, was to be conclusive, in much the way that a final judgment is given full faith and credit if there is proper jurisdiction.[90]

In contrast, a subsequent draft contained in Appendix I as Alternate B of section 2, which also maintained the earlier draft as an optional section 2, reflects the concern with incorporating flexibility, even changing the title from "Enforcement of judgments obtained in parallel proceedings" to "Discretion to Enforce Judgments." This discretion is spelled out: "[T]he 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. . . ."[91] Although retaining the requirement for timely application and notice, the selection of the adjudicating forum in Alternate B of section 2, rather than being conclusive, is given "presumptive validity," an undefined term retained in the final Model Act. Indeed, the comment to Alternate B of section 2 captures the schizophrenic nature of the problem, the need to be strong enough to be effective, but not so strong as to be viewed "as a usurpation" by other jurisdictions. Alternate B of section 2 allows maximum flexibility while, in the comment, apprising "litigants that they risk refusal of enforcement of any judgment obtained through vexatious litigation." The final conclusion, that enforcement of those foreign judgments "procured in conformity with this Model Act . . . should be relatively automatic" again highlights the two strains, the need for certainty while maintaining adaptability.

The compromise incorporated into the final draft is a largely mandatory enforcement requirement with some escape hatches for unanticipated situations. Enforcement is required ("shall enforce only if") when the parties have complied with the Act (albeit that it is stated in a partially negative way—"only if"). Discretion is removed from the second step of the analysis, the enforcement of judgments, and instead retained in the first step, the determination of the proper adjudicating forum. At that first level a court may exercise discretion, especially, as discussed in part IV below, in connection with public policy of the forum. However, the actual factors that must be considered under section 3 of the final draft are also mandatory, the word "shall" replacing "may" of the earlier draft.

The drafters also vacillated with the contents of the factors to be considered under section 3, particularly the weight and relevance such factors—public policy (b), nationality (d), choice of law (e), judicial economy (g), location of witnesses and documents (h) (i), place of first filing (j)—should be given. This indecision reflects the problem of providing a predictable yet pliable rule. The drafters initially contemplated according preference to some factors, especially

90. *See infra* Appendix I, Alternate A of § 2 comment.
91. *Id.*, Alternate B of § 2, para. a.

that of the order of filing. Ultimately, the lack of consensus on the weight to be attached to the many interests—convenience, comity, public, private—resulted in an unscaled list. The only factor that arguably receives some additional strength is the initial forum choice of the "realigned plaintiff" (an undefined term) included as factor (n).[92] Whether a "realigned plaintiff" is the one seeking affirmative relief or the one who filed the initial proceeding is not clear. The factor, obviously derived from the *Reyno* approach to forum non conveniens that gives preference to the plaintiff,[93] amounts to an allocation of the burden of proof. Here the factor is hidden amidst the "public" type factors of forum concerns and concerns of the international systems. The inclusion and role of public policy raised some disagreement among the drafters but has been explicitly incorporated into the factors under (b) and implied under (m), as discussed in part IV below. Public policy is necessary to permit individual systems to make decisions on underlying substantive law consistent with the development of their own national law.[94]

The provenance of the multiple factors in section 3 reflects the Committee members' inability to reach agreement, as well as the need to adapt to various forms of concurrent proceedings. The comment to section 3 refers to two distinct doctrines, the *Gulf Oil/Reyno* venue cases and the *Laker* antisuit injunction case. The convenience factors, such as factors (h) and (i), location of witnesses and documents, are clearly derived from the "private interest" factors in *Gulf Oil.* So, too, the "public interest" factors of *Gulf Oil* and the forum non conveniens progeny are the source for factors considering administrative difficulties for the forum, such as those of docket, familiarity with foreign law, factors (g), (e), and also parts of (b) and (f), which have broader concerns derived from comity factors.

In contrast to the convenience factors of *Reyno,* the focus on efficient use of judicial resources and the deference in such a situation of one forum to another derive from the tradition evident in the *Colorado River* abstention case, in the interest of "wise judicial administration." In *Colorado River* the Supreme Court, although acknowledging that federal courts had a "virtually unflagging obligation . . . to exercise the jurisdiction given them," provided a checklist of

92. This factor was not included in the early draft of the Model Act, but was added subsequently. By failing to define "realigned," this phrase could be viewed as encouraging a first-to-file approach, with the assumption being that the "realigned plaintiff" is the term used in all proceedings for the plaintiff who was first to file in any jurisdiction.

93. Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981). The analysis under the Model Act shifts the burden of persuasion to the defendant opposing the forum, but unlike *Reyno,* it allows some weight to nationality even when the plaintiff is a foreigner.

94. This factor, however, may lead to increased forum-shopping if parties can use public policy as a means of subverting the ultimate decision or as leverage. For example, a party who knows that Texas is exceptionally unreceptive to enforcing covenants not to compete, finding them contrary to public policy, may select the forum deliberately, hoping that its selection will also be that of the designating forum (which could also be Texas if the party files there first).

factors to be balanced to determine if the case fell within one of the limited circumstances in which federal courts should abstain in "the presence of a concurrent state proceeding for reasons of wise judicial administration."[95] In the subsequent refinement and limiting of *Colorado River* the Supreme Court has characterized the paramount concern in that case as "the danger of piecemeal litigation."[96]

Under *Colorado River*, the Court considers whether any forum has jurisdiction over the property.

> In assessing the appropriateness of dismissal in the event of an exercise of concurrent jurisdiction [federal/state], a federal court may also consider such factors as the inconvenience of the federal forum; the desirability of avoiding piecemeal litigation; and the order in which jurisdiction was obtained by the concurrent forums. No one factor is necessarily determinative. . . .[97]

The *Colorado River* factors are comity derived, out of respect for a coordinate sovereign. They are pragmatic, without the choice of law interest analysis evident in the *Reyno* test, at least in the "public factors" portion. Several of these factors appear in the Model Act: the desirability of avoiding piecemeal litigation, assumed under section 1's general policy but conceivably changed by section 3(1); the order of obtaining jurisdiction, section 3(f), both a time and "significant relationship" factor combined; the law which controls, section 3(e); and which forum protects the parties by avoiding duplication without prejudice, concepts in sections 3(m) and 3(f).

Certain aspects of the Model Act, such as section 3(a) and (g), appear to derive from the choice of law principles in the Restatement (Second) of Conflict of Laws, which looks to "the needs of the interstate and international systems" and the policies of the forum and other "interested states."[98]

The underlying policies concerning concurrent jurisdiction, as incorporated into section 403 of the Restatement (Third), "Limitations on Jurisdiction to Prescribe," also form the basis for factors in the Mutual Act. That section provides relevant factors for determining whether the exercise of jurisdiction is "unreasonable." The drafters of the Model Act, aware that one of the primary reasons for parallel proceedings is concurrent jurisdiction to prescribe,[99] incorporated the notion of reasonableness into the Model Act. This concept is particularly important in cases where states have regulatory interests involved, even

95. Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 817–18 (1976); *see supra* note 48.

96. Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 19 (1983).

97. *Colorado River*, 424 U.S. at 818 (citation omitted).

98. RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 6, 145 (1971).

99. "The conflict faced here is not caused by the courts of the two countries. Rather, its sources are the fundamentally opposed national policies toward prohibition of anticompetitive business activity. These policies originate in the legislative and executive decisions of the respective countries." Laker Airways v. Sabena, Belgian World Airlines, 731 F.2d 909, 945 (D.C. Cir. 1984).

if the litigation is primarily a private dispute.[100] Thus the first factor listed in the Model Act, section 3(a), the interests of justice among the parties and of world-wide justice, would include the principle of the Restatement (Third)'s factor (f), "the extent to which the regulation is consistent with the traditions of the international system."[101] Nationality (section 3(d))[102] and the emphasis on the interest of the affected courts in having the proceedings take place in their forums (section (b)) are also in part derived from factors of the Restatement (Third).

Finally, theories from the antisuit injunction cases, discussed in part II above, give impetus to the Model Act. These appear primarily as the broad concepts of public policy of the forums (section 3(b)) and superiority of parallel, as opposed to unitary, proceedings (section 3(1)). The expanded antisuit injunction analysis of *American Home Assurance,* focusing on equitable considerations and on the impact of parallel proceedings on the parties and on the judicial systems, are incorporated into several factors, such as section 3, subsections (a), (f), (g), and (m), as well as in section 1's general policy of discouraging vexatious litigation.

The Model Act differs from earlier approaches in that it addresses operational issues. The drafters focused on the practical aspects of designation. For example, section 2(b) deals with timing by requiring that an application be made within six months of notice of multiple proceedings. Section 2(d) addresses the problem when no designation of an adjudicating forum has been made, also covering a situation in which a forum refused to do so and removing the need for reciprocity for the Model Act to be effective. Under this section, the determination is a part of the request for enforcement of judgment. Section 4 specifies in substantial detail the type of evidence acceptable to prove the factors for determining the adjudicating forum. It also provides notice requirements when foreign law is involved, but allows courts flexibility to determine the law of another forum.[103]

The ability to review a determination of the proper adjudicating forum, and thus the res judicata-type effect of such determination, created difficulties for the drafters, given multiple and coequal legal systems. To require courts of numerous countries to make findings in a unitary manner is not practical. Thus the Model Act refers to "the substance of the factors" and provides "presumptive

100. *See* Note, *supra* note 30.

101. RESTATEMENT (THIRD), *supra* note 8, § 403. The language also reflects the U.S. federal venue statute, 28 U.S.C. § 1404.

102. *See Laker,* 731 F.2d at 934–37, in which the argument was made for nationality to play a paramount role in forum determination.

103. One of the earlier drafts specifically stated that the determination is a ruling of law, but the phrase was deleted from the final version of the Model Act. The deletion creates some confusion since the comment to the section refers specifically to FED. R. CIV. P. 44.1, which changes the common law treatment of foreign law from one of fact to one of law, not only for purposes of proof but also for appellate review. *See generally* WRIGHT & MILLER, *supra* note 36, §§ 2441–2447. In addition, under the Model Act, there is the possibility of inconsistent or incorrect determinations of foreign law without the potential for correction. *See supra* notes 35–39 and accompanying text.

validity'' (section 2(c)) if the written decision reflects consideration of these factors. Although ''presumptive validity'' is not defined,[104] it surely would not encompass routine de novo review. The determination's preclusive effect is also limited to those who received notice of the application, an attempt to make the effect coextensive with due process limits under the U.S. system.

The most pressing problem for the Committee was how to enforce the determination of the appropriate forum. The solution adopted, that of tying proper designation to subsequent enforcement of judgments, avoids interfering with other sovereigns while providing the parties themselves with the incentive to avoid duplicative litigation and to stay other proceedings. Although a treaty on enforcement of judgments to which the United States subscribed could go a long way toward reducing the problem, ultimately a treaty would not discourage all multiple litigation, only those parallel proceedings designed to be protective. The approach of the Model Act is consistent with that taken by the EC and EFTA countries under the Brussels and Lugano treaties, and even without a U.S. treaty, would help bring the individual states that adopt the Model Act into line with a first-seised rule.

IV. Waiting in the Wings

The success of any Model Act depends on its integration into the existing legal systems. Although the Model Act attempts to anticipate problems likely to arise when it is applied to various fact patterns and systems, several issues remain unresolved. In coordinating the Model Act with the U.S. federal/state system, these sketchy areas, such as public policy, implicate basic doctrinal issues. For example, the Model Act's underlying policy of limiting parallel proceedings is compatible with the *lis alibi pendens* principles of jurisdiction and enforcement of judgments underlying the Brussels and Lugano treaties. It works equally well with the British approach to forum non conveniens and the ''natural forum.''[105] German law also has precluded the filing of additional suits if an action, which will be entitled to recognition, is pending abroad[106] and therefore would be receptive to the policy of the Model Act.

A. The Model Act and Abstention

While the Model Act is compatible with U.S. federal court policy of reducing vexatious litigation,[107] its adoption, other than by federal statute (or as part of a treaty) or by the individual states, faces some theoretical difficulties. First, the federal courts have repeatedly stated that the normal rule is one of parallel

104. Nor are the comments decisive. *See supra* note 76.
105. *See supra* note 42.
106. *See* Juenger, *supra* note 10, at 567–68.
107. *See, e.g.*, Fed. R. Civ. P. 11; 28 U.S.C. § 1927 (1988); Fed. R. App. P. 38.

proceedings,[108] although many of these cases have relied on precedent developed within the context of overlapping jurisdiction between state and federal courts, not between the federal courts and those of a foreign country. The more serious obstacle is that created when a federal court, in the face of legitimate jurisdiction, chooses to stay proceedings before it in deference to other proceedings. Under the Model Act a federal court would be required to defer to another country's court if either the U.S. court or another court had determined that the proper adjudicating forum was not the United States. The bases on which a federal court may refuse to exercise legitimate jurisdiction have been carefully circumscribed by the multiple abstention doctrines, particularly the *Colorado River* version. While *Colorado River* abstention has been available in cases of parallel and vexatious litigation, its limited use has been basically in mediating between state and federal proceedings.

Some federal cases reflect hostility to relying on *Colorado River* to stay cases in favor of foreign proceedings. For example, in a recent case, *Neuchatel Swiss General Insurance Co. v. Lufthansa Airlines,* the Ninth Circuit in what it described as "an ordinary commercial dispute over the loss of cargo," reversed the district court's granting of a stay, pending the outcome of proceedings in Switzerland, finding no "exceptional circumstances" to justify abstention.[109] Relying on cases that involve state/federal disputes, the court emphasized that "conflicting results, piecemeal litigation, and some duplication of judicial effort is the unavoidable price of preserving access to . . . federal relief."[110] The court then reasoned that the foreign aspect was immaterial, and that no greater deference was owed to foreign courts than state courts. The court, however, failed to analyze the origins of the *Colorado River* doctrine or to distinguish justification of the doctrine in situations involving foreign courts as opposed to state courts.[111]

In contrast to the Ninth Circuit's approach, the U.S. District Court for the District of Columbia determined that a foreign court, in this case Canadian, was owed the same degree of deference as another federal court.[112] The court applied the *Colorado River* test, stating that "the concerns that federalism normally presents for a diversity court are not implicated in this case."[113] In dismissing, the court relied on "international comity" and a "well-founded aversion to

108. *See, e.g.*, China Trade and Dev. Corp. v. M.V. Choong Yong, 837 F.2d 33, 36 (2d Cir. 1987); Laker Airways v. Sabena, Belgian World Airlines, 731 F.2d 909, 926–27 (D.C. Cir. 1984).

109. 925 F.2d 1193, 1194 (9th Cir. 1991).

110. *Id.* at 1195 (quoting Tovar v. Billmeyer, 609 F.2d 1291, 1293 (9th Cir. 1979)).

111. *But see* Ingersoll Milling Mach. Co. v. Granger, 833 F.2d 680, 685 (7th Cir. 1987) (acknowledging origins of *Colorado River* abstention but upholding stay).

112. Brinco Mining Ltd. v. Federal Ins. Co., 552 F. Supp. 1233 (D.D.C. 1982). The court stated two facts for support: (1) the other forum was Canada, which was also a common law country; and (2) the plaintiff was trying to use the U.S. court to circumvent proceedings *it* had originally brought *in its own country. Id.* at 1240.

113. *Id.*

forum shopping on an international scale," as well as application of the *Colorado River* factors.[114] The approach illustrates the confusion and conflicting treatment by U.S. courts of parallel proceedings involving American and foreign courts. In addition, it demonstrates the use of comity as a basis for abstaining, as opposed to being used as justification for allowing parallel proceedings to continue. The court's conclusion raises the question of whether the deference allowed the Canadian court results not only from the similarity in legal systems, but also from our special relationship with that country. Thus, abstention, in the sense of deference, would be appropriate in this case, but perhaps not in a case involving a Middle Eastern country.

The Model Act's approach could be integrated into existing U.S. federal practice and yet not run awry of abstention doctrine if one assumes that the underlying policy in section 1, to avoid concurrent proceedings, reflects the policy of the federal courts.[115] That policy could become part one of the "exceptional circumstances" referred to in the *Colorado River* cases. This type of analysis, in fact, is similar to that taken by the Seventh Circuit in *Ingersoll Milling*.[116] The court applied the *Colorado River* factors and upheld a district court stay in favor of advanced proceedings in Belgium, relying on the "special obligation of comity" in this case to a judgment pending appeal and on judicial economy.[117] Thus abstention becomes justified by comity.

The lack of a uniform approach within the U.S. courts to the treatment of foreign proceedings and the level of deference owed a foreign court is evidence of the weakness of any doctrinal basis for refusing to stay or dismiss an action. One district court justified its ability to stay pending actions in light of foreign proceedings by its inherent power and indicated that the propriety of doing so depended on several factors, including "pragmatic concerns such as the promotion of judicial efficiency and the related questions of whether the two actions have parties and issues in common and whether the alternative forum is likely to render a prompt disposition."[118] When the multiple proceedings are viewed as vexatious, a federal court should have less problem under its inherent authority to stay proceedings.

B. The Model Act and Public Policy

The Model Act's treatment of public policy of forums is crucial since enforcement is tied to the recognition of judgments. Unlike the requirement under the

114. *Id.* at 1242.

115. The *Erie* doctrine considers the question of abstention in a federal suit based on diversity jurisdiction to be a matter of federal, as opposed to state, law. *See Ingersoll Milling*, 833 F.2d at 685 n.1. The treatment of the Model Act for *Erie* purposes is beyond the scope of this article. The issue raises questions about whether one would treat it as a venue provision, a forum selection clause (private), or as a matter of federal law by analogizing to issues of foreign relations.

116. *Id.*

117. *Id.* at 685.

118. Ronar, Inc. v. Wallace, 649 F. Supp. 310, 318 (S.D.N.Y. 1986).

United States Constitution that a state's courts must give full faith and credit to the judgment of a sister state, under international practice a country may refuse enforcement of any judgment contrary to its public policy. For example, the Restatement (Third) specifically provides as a ground for nonrecognition of a foreign judgment, "(d) the cause of action on which the judgment was based, or the judgment itself, is repugnant to the public policy of the United States or of the State where recognition is sought."[119] The forum may refuse recognition if the underlying substantive claim is against a basic public policy, a distinction generally used to distinguish the concept of comity from that of full faith and credit. The public policy exception is also contained in the Uniform Foreign Money-Judgments Recognition Act,[120] which like the Restatement (Third) provides discretionary nonrecognition based on public policy. Thus, even a judgment in accord with the Model Act could be refused enforcement if the underlying cause of action is contrary to the forum's basic public policy. Since the success of the Model Act depends on the subsequent enforcement of a judgment, the use of public policy as a means of challenging enforcement is important and could weaken the Act's impact.

The Model Act acknowledges the role of public policy, but it does so explicitly in the first step of its two-step process, the determination of the adjudicating forum, rather than in the second step, at the time of enforcement of judgments. An early draft of the Model Act specifically provided that "when the public policy of any country is threatened by the proceedings, the initial court may determine that parallel actions should proceed," thus allowing each forum to enforce its own public policies. In the final version, public policy of forums is included as an aspect of several of the factors in section 3, including (b), "the public policies of the countries having jurisdiction of the dispute." The public policy of any adopting forum toward concurrent litigation is stated under section 1, "Declaration of Public Policy," which discourages vexatious litigation and refuses to enforce judgments from vexatious, inconvenient, or parallel litigation. In addition, forum public policy can be honored under section 3(1), which allows the designating forum to consider "whether designation of an adjudicating forum is a superior method to parallel proceedings in adjudicating the dispute," an underlying assumption in most cases. The designating forum, however, is theoretically free to decide that parallel proceedings are preferable to the potential result of having to enforce a subsequent judgment contrary to its basic public policy.

Public policy serves as a consistency factor for the Model Act and a means of acknowledging competing policies, including ones such as parallel proceedings. Thus flexibility is maintained to accommodate varying systems, without an explicit requirement for reciprocity. The danger, however, in incorporating public

119. RESTATEMENT (THIRD), *supra* note 8, § 482; *see supra* notes 10–11.
120. UFMJRA, *supra* note 3; *see supra* note 16.

policy as an explicit factor in the determination of the appropriate adjudicating forum is that this factor, designed to allow for exceptions, will swallow the rule itself. In addition, in cases of conflicting concurrent jurisdiction, this factor could result in favoring the designating forum even though the public policies of the forum theoretically receive no additional weight among the multiple factors.[121]

A more serious problem with the Model Act is its possible use to circumvent an important public policy of a forum and its inability to allow a forum not to enforce a result contrary to its own basic public policy. For example, if one filed to recover on a debt first in Abu Dhabi and then in Texas, one could arguably end up with Abu Dhabi as the appropriate adjudicating forum. If enforcement of that judgment were subsequently sought in Texas, then Texas, under the Model Act, might be required to enforce a judgment based on a rate of interest viewed as usurious and therefore contrary to a basic public policy of the forum.

One conceivable argument around requiring the Abu Dhabi judgment to be enforced is the language of section 2(c), which refers to enforcing judgments "pursuant to the ordinary rules for enforcement of judgments." One way to approach this language is to assume that the drafters meant to incorporate existing state law on enforcement of foreign judgments. This approach could mean recognition only if not contrary to a fundamental public policy of the forum, or in the case of some of the states, including Texas, that have adopted the Uniform Foreign Money-Judgments Recognition Act and added the requirement of reciprocity, only if reciprocity existed. The ultimate result would be that the Model Act provides absolutely no benefit. The first (Abu Dhabi) judgment would be unenforceable, even under the Model Act, and the parties would therefore need to begin proceedings again in Texas on the merits. Conceivably the designating forum (Abu Dhabi) could have anticipated that the public policy of Texas would be such that under sections 3(b) and 3(1) either parallel proceedings would have been preferred or Texas chosen as the adjudicating forum. To ask a foreign court to anticipate not only the result in a subsequent suit to enforce judgment, but also a foreign court's view of what amounts to fundamental public policy of the forum is asking a great deal.[122] This result would also appear contrary to the comment to section 2, which indicates that "enforcement should be relatively automatic"[123] for judgments in conformity with the Model Act, suggesting that the sentence in section 2 is more correctly viewed as ministerial, rather than as providing for nonenforcement of a judgment otherwise in accord with the Model Act.

121. Laker Airways v. Sabena, Belgian World Airlines, 731 F.2d 909, 948–50 (D.C. Cir. 1984).

122. The situation is analogous to requiring a U.S. federal court sitting in diversity jurisdiction to divine what a state court would decide on an unsettled, but complex issue of state law—a problem solved in many cases by the availability of the procedure of certification by the federal court to the state court.

123. *See infra* Appendix I and Alternate B.

C. The Model Act and Forum Selection Clauses

Although the Model Act is designed primarily to respond to unanticipated litigation and situations not involving prior consent, the treatment of forum selection clauses under the Act is problematic. No specific exception or provision is made in response to cases of prior forum selection. Thus a party who has contracted for a New York forum could find in a case of multiple lawsuits, which may in itself violate the forum selection clause if exclusive, that a Swiss court determines that the proper adjudicating forum under the Model Act is Switzerland. Such a result would also wreak havoc in connection with enforcing the judgment. Under section 2 of the Model Act the judgment is to be enforced, while under section 482 of the Restatement (Third) judgment need not be enforced if "(f) the proceeding in the foreign court was contrary to an agreement between the parties to submit the controversy on which the judgment is based to another forum."[124] The treatment of forum selection clauses and the role of party autonomy is further complicated by the divergent attitudes toward the enforceability of forum selection clauses, especially in commercial and consumer transactions.[125] While due process considerations should not generally be implicated, the question whether parties can create their own forum, even if inconvenient, or oust the proper adjudicating forum, is still an issue under the Model Act. And if the Model Act supersedes forum selection clauses, how can parties protect their expectations in international commercial transactions?

One possible means of treating the forum selection clause under the Model Act is to rely on section 3(b), the factor of public policies of the countries having jurisdiction. In U.S. federal court after *Bremen* and *Carnival Cruise Lines* the argument might be made that the public policy of the forum is to enforce a forum selection clause if not unreasonable.[126] The necessity to rely almost exclusively on this sole factor, however, suggests the need in the Model Act for a separate provision for contractual cases (and proceedings violating choice of forum clauses) or some way of valuing certain factors above others. In a forum that views these clauses as unenforceable or as contrary to public policy in certain cases, the incorporation of forum public policy would also lead to a result consistent with forum law. Using this interpretation, the Model Act can accord with the different forums' treatment of forum selection clauses in different circumstances and types of transactions.

124. Restatement (Third), *supra* note 8, § 482; *see supra* notes 10–11.

125. Many of these problems plagued the earlier Model Choice of Forum Act and the Hague Choice of Court Convention, both acts covering forum selection clauses. *See supra* notes 79–81 and accompanying text.

126. The Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972); Carnival Cruise Lines, Inc. v. Shute, 111 S. Ct. 1522 (1991). If the transaction involved a consumer or unequal bargaining, one could again rely on forum public policy, but this time a policy not to enforce unreasonable forum selection clauses.

D. The Boundaries of the Model Act: Definitional Questions

Collateral litigation is likely in several other areas, especially those involving definitional boundaries of the Model Act. For example, the Model Act fails to define what constitutes "proceedings arising out of the same transaction or occurrence" (section 2(a)) so as to be subject to the Model Act. This failure to define the phrase may provide some pliability and potentially expand coverage, at least when not all the parties or claims are identical.[127] The Committee's comments provide no clarification. The language, however, is clearly derived from that used in U.S. rules of civil procedure for purposes of differentiating compulsory and permissive counterclaims, as well as crossclaims.[128] "Occurrence" reappears in factor (c) of section 3. If "occurrence" extends beyond the reach of res judicata, it may run afoul of due process in the United States. Even if the Model Act reaches only to those under section 2(c) who were "served with notice of the application to designate," it may include those with notice, but without sufficient opportunity to be heard, a necessary component of American due process. The situation is further complicated if one looks to the Restatement (Third) concerning enforcement of judgments. Under section 482, a court *may not* recognize a foreign judgment if the rendering court did not provide "procedures compatible with due process of law."[129] How expansive the term "proceedings arising out of the same transaction or occurrence" is construed will ultimately determine how broadly the Model Act reaches and how likely it is to conflict with existing law.

While the Committee comments may provide insight into the development of the Model Act, they cannot be relied on as a basis for interpretation, at least not for interpretation of section 2. The final compromise reached in the Model Act combines portions of two earlier versions, each with its own set of comments. The Committee never created a final version of the comments, which explains the existence of several internal inconsistencies. In addition, an enacting country or state may decide not to adopt the comments as part of the Act.[130]

Other undefined terms in the Model Act may raise the specter of inconsistent interpretation by different countries. Thus, the phrase "pending" or "commenced" can create problems. One need only look at a recent case considering an analogous provision of the Brussels Convention, section 21, in which the

127. In many U.S. cases, the basis for allowing "parallel proceedings" is that not all the parties or claims are the same. *See, e.g.*, Herbstein v. Bruetman, 743 F. Supp. 184 (S.D.N.Y. 1990); Black & Decker Corp. v. Sanyei America Corp., 650 F. Supp. 406 (N.D. Ill. 1986).

128. *See* Fed. R. Civ. P. 13. The phrase also appears in the rule governing third-party practice, Fed. R. Civ. P. 14. The word "related" is used and defined in the Brussels Convention, *supra* note 13. *See supra* note 21.

129. Restatement (Third), *supra* note 8, § 482(1), (1)(a); *see supra* notes 10–11.

130. Connecticut, which adopted the Model Act in June 1991, did not include the comments as part of the legislation. *See supra* note 17.

parties, one German and one Italian, litigated what constitutes the concept of "first seised," when different systems have different means for initiating proceedings.[131] Similarly, the type of notice required under section 2(c) may not satisfy different systems. "Vexatious litigation," and "inconvenient forum," appearing as part of the general policy of section 1, are very imprecise terms. Phrases under section 3 such as "worldwide justice" and "realigned plaintiff" are also undefined, creating uncertainty. Finally, the Model Act does not actually indicate whether it applies to parallel proceedings in different types of forums, such as arbitration or administrative proceedings. Different systems may interpret the word "court" so as to reach forums not covered by other systems. Certainly with the role of arbitration and the multiple legal systems with administrative procedures, these mixed-media parallel controversies are likely to be an increased part of concurrent proceedings.[132]

IV. Conclusion

The Model Act addresses the increasingly significant problem of parallel proceedings. As long as concurrent jurisdiction to prescribe and to adjudicate exists, multiple litigation will continue. And as long as the rules of the road vary between systems, parties will opt for those most advantageous to their destination. The Model Act's solution of allowing one forum to determine the appropriate forum for all proceedings based on multiple factors incorporating convenience, judicial efficiency, and comity, provides flexibility. Yet, it supplies sufficient incentive to the parties through the mechanism of subsequent enforcement of judgments with minimal encroachment on the sovereignty of the countries involved. While the Model Act is subject to criticism for lack of predictability and has some shortcomings in its treatment of certain areas, it offers a framework for approaching parallel proceedings from a supranational perspective, one that divorces the solution from jurisdiction or choice of law. By removing parochial national interests, the Model Act's solution truly seeks to determine the forum that, under the language of section 3(a), is in "the interests of justice among the parties and of worldwide justice."

131. Case 129/83, Zelger v. Salinitri, 1984 E.C.R. 2397, [1985] 3 C.M.L.R. 366.

132. For a discussion on international arbitration, see BORN & WESTIN, *supra* note 11, at 605-46; *see also* David Westin, *Enforcing Foreign Commercial Judgments and Arbitral Awards in the United States, West Germany, and England*, 19 LAW & POL'Y INT'L BUS. 325 (1987).

APPENDIX I
THE CONFLICT OF JURISDICTION MODEL ACT

Sec. 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.

Sec. 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 enforce the judgments of any of such courts only if application for designation of an adjudicating forum was timely made to the first known court of competent jurisdiction where such a proceeding was commenced, or to the adjudicating forum after its selection, or to any court of competent jurisdiction if the foregoing courts were 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 written decision determining the adjudicating forum evaluated the substance of the factors set forth in the following section.

d. Where no conclusive determination has been made by another court as provided above, the proper adjudicating forum shall be determined in accordance with the following sections by the courts of this State requested to enforce the judgment.

Sec. 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 worldwide 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, 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 most 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 persona and property that are the subject of the proceeding;

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. a realigned plaintiff's choice of forum should rarely be disturbed.

Sec. 4. Evidence. 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; and

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 intergovernmental 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.

COMMENTS TO MODEL ACT AND TWO VERSIONS OF SECTION 2

Comment to Section 1

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.

Alternate A of Section 2 and Comment

Section 2. Enforcement of judgments obtained in parallel proceedings.

A. *General rule.* A judgment obtained from one of two or more courts concurrently hearing the same dispute shall be enforced if it is first determined that the court which rendered the judgment was the appropriate adjudicating forum.

B. *Determination by the court where the first action was commenced.* A written determination of the adjudicating forum by the court where the first of the parallel proceedings was commenced shall be conclusive, provided that

1. a request for such determination was submitted on notice to all known parties within six months after the requesting party had notice of the parallel proceedings; and

2. all parties whose rights would be substantially affected by enforcement of the judgment were afforded a reasonable opportunity to be heard in the proceeding determining the adjudicating forum; and

3. the determination recites the factors considered by the determining court in a manner consistent with the substance of Section 3.

C. *Determination by the enforcement court.* Where no conclusive determination has been made by another court as provided in subsection B, the appropriate adjudicating forum shall be determined in accordance with Sections 3 and 4 by the court requesting to enforce the judgment.

Comment to Alternate A of Section 2

Subsection A. This subsection would change the common and statutory law on the enforcement of judgments, so that *res judicata* would not apply unless there has been a determination that the rendering court was the appropriate adjudicating forum. The intent of the change is to encourage parties early in the course of parallel proceedings to obtain a judicial determination of a single adjudicating court and thereupon to discontinue proceedings in other courts. The choice of which judgment to honor would no longer be based on the happenstance of which court renders judgment first, but upon an inquiry into merits of where a dispute would best be heard.

Subsection B. If the court which first acquired jurisdiction over a dispute has made a written determination (meeting certain criteria) that a certain forum—itself or another court—shall be the adjudicating forum, then the court asked to enforce a judgment will be required to grant or deny enforcement according to whether the judgment was or was not rendered by the adjudicating forum. Paragraph 3 provides that the enforcing court is not bound by the forum determination if the determination does not recite the factors it considered "in a manner consistent with Section 3." A determination which fails to indicate that it was based (at least in part) on the substance of *any* of the factors of Section 3 would not be binding. At the other end of the spectrum, a determination which expressly applies most or all of the factors would be completely immune to attack under paragraph 3 of Section B. Between these two extremes, the enforcing court must decide from the face of the written determination whether there is sufficient indication that the determining court considered relevant factors. Determinations issued by courts unfamiliar with the Model Act should nevertheless be given binding effect if the writing gives sufficient indication that the determining court considered appropriate factors.

Subsection C. Where it is not bound by any prior determination, the enforcing court itself should apply the factors of Section 3 to determine whether or not the judgment before it was issued by the appropriate adjudicating forum. A negative determination must be accompanied by an affirmative determination of which other court concurrently hearing the dispute is the appropriate adjudicating forum. Enforcement must then be denied, just as enforcement must be granted if the judgment was rendered by the proper forum.

Alternate B of Section 2 and Comment

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 to Alternate B of Section 2

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 jurisdictions 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.

Comment to Section 3

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 Ltd. v. Sabena, Belgian 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.

Comment to Section 4

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.

APPENDIX II
UNIFORM LAW COMMISSIONERS' MODEL CHOICE OF FORUM ACT

. . . .

SECTION 2. [Action in This State by Agreement.]

(a) If the parties have agreed in writing that an action on a controversy may be brought in this state and the agreement provides the only basis for the exercise of jurisdiction, a court of this state will entertain the action if

(1) the court has power under the law of this state to entertain the action;

(2) this state is a reasonably convenient place for the trial of the action;

(3) the agreement as to the place of the action was not obtained by misrepresentation, duress, the abuse of economic power, or other unconscionable means; and

(4) the defendant, if within the state, was served as required by law of this state in the case of persons within the state or, if without the state, was served either personally or by registered [or certified] mail directed to his last known address.

(b) This section does not apply [to cognovit clauses] [to arbitration clauses or] to the appointment of an agent for the service of process pursuant to statute or court order.

COMMENT

This section applies only in situations where the court would have no jurisdiction but for the fact that the parties have consented to its exercise by the choice-of-forum agreement.

The references to cognovit and arbitration clauses have been placed in brackets, because these clauses are regulated by statute in many states, and the special provisions regarding them may be preferred to the general provisions of this Act.

SECTION 3. [Action in Another Place by Agreement.] If the parties have agreed in writing that an action shall on a controversy be brought only in another state and it is brought in a court of this state, the court will dismiss or stay the action, as appropriate, unless

(1) the court is required by statute to entertain the action;
(2) the plaintiff cannot secure effective relief in the other state, for reasons other than delay in bringing the action;
(3) the other state would be a substantially less convenient place for the trial of the action than this state;
(4) the agreement as to the place of the action was obtained by misrepresentation, duress, the abuse of economic power, or other unconscionable means; or
(5) it would for some other reason be unfair or unreasonable to enforce the agreement.

COMMENT

Effect should be given a choice of forum agreement, except as stated in Clauses (1)–(5). This is true whether the parties have designated a particular court for the trial of the action or have simply provided that suit may be brought only in the courts of another state or states. This is also true whether the agreement relates to existing controversies or to future controversies.

The Act leaves the court free to determine whether to dismiss or to stay the action. Undoubtedly, the court would decide to stay the action whenever there is a possibility that the plaintiff could not secure effective relief in the chosen state, at least for reasons apart from any delay on his part in bringing the action.

. . . .

Clause (3): *On rare occasions, the state of the forum may be a substantially more convenient place for the trial of a particular controversy than the chosen state.* If so, the present clause would permit the action to proceed. This result will presumably be in accord with the desires of the parties. It can be assumed that they did not have the particular controversy in mind when they made the choice-of-forum agreement since they would not consciously have agreed to have the action brought in an inconvenient place.

The fact that the state of the forum would be the most convenient place for the trial of the action is not enough to bring the present clause into operation. This clause is applicable only in the rare situation where the chosen state would provide a substantially less convenient place for the trial of the action than the state of the forum. Among the factors to be considered are the general availability of witnesses in the chosen state, the cost that would be involved in obtaining their attendance at the trial, and the enforceability of any judgment that might be obtained there.

Another factor is whether the chosen state is declared in the contract to be the state of the governing law. If so, the chosen state will almost certainly be a convenient place for the suit since it is easier for both judge and counsel to apply their own law, rather than the law of another state.

This clause is unlikely to be applied to a controversy that was already in existence at the time of the making of the choice of forum agreement. Almost certainly the parties would select a convenient place for the trial of the action in such a case. MODEL CHOICE OF FORUM ACT, *supra* note 79 (emphasis added).