

# TRAVEL ABROAD, SUE AT HOME 2011

## **FORUM NON CONVENIENS & THE ENFORCEMENT OF FORUM SELECTION AND MANDATORY ARBITRATION CLAUSES**

September 1, 2011

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One of the most interesting areas of Travel Law involves accidents sustained by U.S. citizens that occur outside of the United States whether in a foreign country or on a cruiseship<sup>2</sup> including murders, assaults and kidnappings by pirates in

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<sup>2</sup>See Dickerson, *Cruise Passengers Rights & Remedies 2011* at [http://www.nycourts.gov/courts/9jd/TacCert\\_pdfs/Dickerson\\_Docs/CRUISEPASSENGERSRIGHTS&REMEDIES2011.pdf](http://www.nycourts.gov/courts/9jd/TacCert_pdfs/Dickerson_Docs/CRUISEPASSENGERSRIGHTS&REMEDIES2011.pdf).

Somalia<sup>3</sup>, Mexico<sup>4</sup> and Peru<sup>5</sup>.

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<sup>3</sup> See Nagourney and Gettleman, *Pirates Brutally End Yachting Dream*, nytimes.com, February 22, 2011 ("Jean and Scott Adam shared a dream through 15 years of marriage: to retire, build a boat and sail the world. And that is precisely what they did, heading out in 2004 from Marina Del Rey, Calif., on a custom-built 58 yacht for a permanent vacation that brought them to exotic islands and remote coastlines...The dream came to a brutal end...when the Adams and their crew...were killed by pirates off the coast of Somalia in one of the most violent episodes since the modern-day piracy epidemic began several years ago...The killings underscore how lawless the seas have become in that part of the world. Just about every week another ship gets hijacked. More than 50 vessels, from fishing trawlers...to giant freighters and oil tankers are currently being held captive, with more than 800 hostages...The Somali seas are now known as the most perilous in the world, crawling with young gunmen in lightweight skiffs cruising around with machine guns, looking for quarry...Many pirate crews are paid by wealthy Somali business men who later get a cut of the ransom"); Gettleman, *In Somali Civil War, Both Sides Embrace Pirates*, New York Times Online September 1, 2010 ("For years, Somalia's heavily armed pirate gangs seemed content to rob and hijack on the high seas and not get sucked into the messy civil war on land, Now, that may be changing, and the pirates are taking sides-both sides...Somalia's pirates are famous opportunists-'we just want the money' is their mantra-so it is not clear how long these new alliances of convenience will last"); Hassan, *5 pirates drown with ransom share*, The Journal News, Jan. 11, 2009, p. 4B ("Five of the pirates who hijacked a Saudi supertanker drowned with their share of a \$3 million ransom...Piracy is one of the few ways to make money in Somalia...A recent report...said pirates raked in more than \$30 million in ransoms last year");

<sup>4</sup> Mexico. See e.g., Flam, *Did Mexican Pirates Attack Texas Man on Jet Ski?*, AOLNews.Com, October 5, 2010 ("The case of a Texas man whose wife said he was fatally shot by Mexican pirates while riding a Jet Ski grows more mysterious...Hartley's 29-year-old wife, Tiffany, told authorities the couple was taking in the sights on Jet Skis on Sept. 30 on the Mexican side of the border lake when several boats of gunmen began shooting at them, hitting her husband in the head. She said she tried to save him but then fled to safety. Authorities say the area on the Mexican side is abandoned and dangerous"); Vaughn, *Mexican officer investigating Falcon Reservoir shooting is killed*, denverpost.com 10/13/2010 ("The hunt for clues in the attack of a Colorado man Mexican drug

A common litigation strategy is to sue in the U.S. in federal or state court against a solvent defendant subject to long arm jurisdiction and applying U.S. common law or statutory law. Such cases raise a variety of complex liability and procedural issues including liability shifting, jurisdiction, forum non conveniens and choice of law. This paper will identify various types of travel accidents abroad, discuss the doctrine of *forum non conveniens* and the enforceability of forum selection and mandatory arbitration clauses in travel consumer contracts.

### **Types Of Accidents Abroad**

Traveling abroad, whether by international air carrier, aboard a cruiseship or while participating in a tour, can be a wonderful experience until you have an accident. This was, especially, true for these unlucky tourists:

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bandits took a macabre twist Tuesday with the murder of a Mexican police commander involved in the investigation-his severed head delivered in a suitcase").

<sup>5</sup> See Baran, Peru steps up security after two Amazon river ship attacks, Travel Weekly, August 17, 2009, p. 36 ("In the wake of two back-to-back pirate attacks on a tourist cruise ship sailing the Peruvian Amazon...On Aug. 4, armed pirates attacked and robbed passengers on the Aqua, just nine days after a similar attack on the luxury vessel").

(1) Wrongful Death In

A] Jamaica [ Abramson v. The Ritz-Carlton Hotel Company, LLC<sup>6</sup> ( hotel guest dies of heart attack )];

B] Martinique [ Bapte v. West Caribbean Airways<sup>7</sup>

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<sup>6</sup>Abramson v. The Ritz-Carlton Hotel Company, LLC, 2010 WL 3943666 (D.N.J. 2010) (“Plaintiff and her husband Martin... contacted defendant American Express Travel Related Services, Inc. (Amex)...(which) assured and represented...that the Ritz Carlton Golf and Spa Resort, Rose Hill, Jamaica (Jamaica Ritz) provided all of the necessary state of the art medical services and equipment...On June 8, 2007, while eating dinner in the dining room of the...Jamaica Ritz, Martin...went into cardiac arrest. Plaintiff alleges that employees...failed to respond adequately when assistance was requested (who) did not attempt to perform cardio-pulmonary resuscitation (CPR), take other life saving emergency response measures, or promptly contact Emergency Medical Services...when the hotel supervisor attempted to use an automated external defibrillator (it) malfunctioned allegedly because it was not maintained in proper working condition and none of the hotel employees knew how to operate the device”).

<sup>7</sup>Bapte v. West Caribbean Airways, 2010 WL 1141064 (11<sup>th</sup> Cir. 2010) (“In August 2005, while en route from Panama to Martinique, West Caribbean Airlines, S.A., Flight 708 crashed in Venezuela, killing all passengers and crew on board. Representative of the passengers filed several lawsuits, which were consolidated...In addition, representatives of the crew members brought products liability lawsuits against manufacturers of the airplane (which) were consolidated with one another, but were not consolidated with the passenger cases”; forum non conveniens motion granted as to passenger claims and denied as to crew member claims; forum non conveniens dismissal available under the Montreal Convention).

( all passengers die in aircraft accident )];

C] Antigua [ (cruise passengers killed during port call<sup>8</sup>)];

D] Egypt [ Guidi v. Inter-Continental Hotels Corp. ] ( guests murdered in hotel restaurant by terrorists );  
Klinghofer v. Achille Lauro ( tourist murdered on cruiseship by terrorists );

E] India [ hotel guests murdered in terrorist attack at two hotels in India<sup>9</sup> ]

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<sup>8</sup> See Myers & Jainchill, Cruise lines continuing Antigua port calls, Travel Weekly, February 1, 2010, p. 32 ("Cruise lines serving Antigua have not pulled out of the destination following the killing of a passenger from Star Clippers' Royal Clipper during a port call...Meanwhile the killer of the 3-year passenger remains at large...The body of Nine Elisabeth Nilssen...was found on a secluded trail...near Pigeon Point Beach...She suffered a stab wound to the neck and was partially unclothed").

<sup>9</sup> See Sengupta, " At Least 100 Dead in India Terror Attacks ", The New York Times at nytimes.com, November 27, 2008 ( " Coordinated terrorist attacks struck the heart of Mumbai, India's commercial capital, on Wednesday night, killing dozens in machine-gun and grenade assaults on at least two- five star hotels, the city's largest train station, a Jewish center, a movie theater and a hospital. Even by the standards of terrorism in India, which has suffered a rising number of attacks this year, the assaults were particularly brazen in scale and execution. The attackers used boats to reach the urban peninsula where they hit and their targets were sites popular with tourists. The Mumbai police said Thursday that the attacks killed at least 101 people and wounded at least 250. Guests who had escaped the hotels told television stations that the attackers

F] Uganda [ Haubner v. Abercrombie & Kent International, Inc<sup>10</sup>. ( tourists abducted from safari tents and murdered by rebels )];

G] Botswana [ Shea v. Global Travel Marketing, Inc<sup>11</sup>.

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were taking hostages, singling out Americans and Britons...Hours after the assaults began, the landmark Taj Mahal Palace & Tower Hotel, next to the famed waterfront monument the Gateway of India, was in flames. Guests banged on the windows of the upper floors as firefighters worked to rescue them. Fire also raged inside the luxurious Oberoi Hotel according to the police. A militant hidden in the Oberoi told India TV on Thursday morning that seven attackers were holding hostages there. ' We want all mujahedeen in India released and only after that we will release the people ', he said. Some guest, including two members of the European Parliament who were visiting as part of a trade delegation, remained in hiding in the hotels, making desperate cellphone calls, some of them, to television stations, describing their ordeal " ).

<sup>10</sup> Haubner v. Abercrombie & Kent International, Inc., 351 Ill. App. 3d 112, 812 N.E. 2d 704, 285 Ill. Dec. 884 ( 2004 ) ( " On March 1, 1999 Haubner and Rockwell were abducted from their tent and murdered by suspected Interhamwe rebels while vacationing at the Gorilla Forest Camp in the Bwindi Impenetrable Forest National Park...The complaint alleged that the Illinois A&K defendant owned and operated the Gorilla Forest Camp where the decedents were lodging. The complaint further alleged that the Illinois A&K defendants were negligent in failing to warn the decedents about various acts of civil unrest and armed violence occurring along the Ugandan border and in failing to provide adequate security at the Gorilla Forest Camp " ).

<sup>11</sup> Shea v. Global Travel Marketing, Inc., 2003 WL 1916874 ( Fla. App. 2003 ) ( " The child, age eleven, was killed while on safari with his mother in Botswana. He was sleeping alone in a tent at a campsite when he was dragged from his tent and mauled by hyenas " ) reversed and remanded 908 So. 2d 392 ( Fla. Sup. 2005 ) ( " Just as the mother in this case had the authority to enter into a contract for herself and her minor child to travel to Africa for a safari, she also had the authority to agree to

( mauled and killed by hyenas )].

H] Dominican Republic [Perez-Lang v. Corporacion De Hoteles, SA <sup>12</sup> ( hotel guests dies operating golf cart); Hernandez v. Barcelo Hotels & Resorts <sup>13</sup> ( hotel guest drowns snorkeling ); Gianocotas v. RIU Hotels, S.A. <sup>14</sup> ( hotel guest

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arbitrate claims on his behalf...we hold that an arbitration agreement incorporated into a commercial travel contract is enforceable against the minor or minor's estate in a tort action arising from that contract " ).

<sup>12</sup> Perez-Lang v. Corporacion De Hoteles, SA, 2008 WL 4181334 ( S.D. Fla. 2008 )( plaintiffs " purchased a vacation package to Casa de Campo...a resort located in La Romana Dominican Republic. The package...included use of a motorized golf cart as a means of transportation. ( Plaintiffs ) while on the premises of the Resort and operating the golf cart, were struck by an automobile. The accident produced severe and permanent injuries to both Plaintiff...and her daughter...and fatal injuries to her husband "; defendants' *forum non conveniens* motion granted; Dominican Republic adequate alternative forum ).

<sup>13</sup> Hernandez v. Barcelo Hotels & Resotrs, 2005 WL 67112 ( Cal. App. 2005 )( " The case arises from the fatal drowning of Roberto Hernandez ( which ) occurred...during the Hernandez family vacation at the hotel, located in Punta Cana, Dominican Republic. Appellants allege that Roberto drowned after he was encouraged and allowed to snorkel in a dangerous reef without a life vest "; Court has personal jurisdiction over hotel defendants ).

<sup>14</sup> Gianocotas v. RIU Hotels, S.A., 2001 WL 758695 ( Mass. Super. 2001 ), judgment reversed 797 N.E. 2d 937 ( Mass. App. 2003 ), on remand 2005 WL 503931 ( Mass. Super. 2005 )( insulin-dependent diabetic takes vacation and " became ill and vomited periodically through the night...A hotel representative put her in touch with Doctor Correa International Touristic Medical Service ( " the Clinic " ) which had a contractual relationship with the hotel to provide medical services to its guests...The

allegedly dies because of medical malpractice ).

(2) Assaulted In

A] The Caribbean<sup>15</sup> including in Puerto Rico

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doctor did not appear to understand the words ` diabetic ` or ` diabetes `. The doctor [ said ] that [ patient ] would be fine and that the pharmacy would re-open in the morning...[ She ] was discharged from the Clinic on March 18 but her vomiting and weakness persisted...[ the Doctor at the Clinic who treated the patient ] agreed that her condition was caused by ` nervousness `...[ She was eventually taken to the hospital ]. According to [ the patient's mother ] the hospital was filthy and the medical equipment antiquated. Hospital personnel were unresponsive to her inquiries...[ The patient ] was transported to a hospital in Miami where she died one month later as a result of an acute diabetic ketoacidotic come " ). See also: Gianocostas v. RIU Hotels, SA, 2006 WL 2089772 ( Mass. Super. 2006 ) ( failure of hotel and local clinic to diagnose and properly treat tour participant with diabetes; negligent misrepresentation claims against tour operator dismissed ) vacated 450 Mass. 715, 2008 WL 483766 ( Mass. Sup. 2008 ) ( " dismissal of the plaintiffs' negligent misrepresentation claim is conditioned on GWV's written agreement to waive any defenses based on statute of limitations or lack of personal jurisdiction, and to waive any requirement that the plaintiffs post a bond and on the further condition that the court in the Dominican Republic give full force and effect to such waivers " ).

<sup>15</sup> See Myers, Caribe Noire, Travel Weekly, January 11, 2010, p. 18 ("Crime in the Caribbean is the elephant in the room that no one wants to talk about, but several headline-grabbing events in 2009 propelled the issue onto newspapers' front pages, social media outlets and websites...Though examples of extreme violence remain isolated, a few have also been horrendously alarming: (1) Eighteen cruise passengers were ambushed and robbed in November by armed thugs in a daring daylight attack while they were touring the Earth Village nature attraction during a port call in Nassau, (2) That incident occurred just two weeks after the robbery of another group of cruisers during a tour stop at the Queen's Staircase, another attraction in Nassau, (3) In separate

[ Woods-Leber v. Hyatt Hotels of Puerto Rico ( mongoose attacks  
guest sunbathing at hotel pool )];

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incidents in October on Tobago, a British couple was wounded in a machete attack and two British women were raped at knife point in their Holiday villa, (4) Honeymooners from Wales were murdered on Antigua in 2008, (5) An Australian yachtsman was shot and killed on Antigua last January, (6) A pregnant U.S. jogger was abducted, raped and murdered in February during a run near Fajardo, Puerto Rico"); Higgins, When Crimes Comes to Paradise, N.Y. Times Online, December 6, 2009 ("Eighteen cruise passengers were robbed at gunpoint on Bahamas tours last month. A retired couple was seriously wounded in a machete attack at their second home in Tobago in August. A pregnant American tourist was abducted and killed during a morning jog in Fajardo, P.R. in February...Crime, in one form or another, is rising in Bermuda, Belize, St. Lucia and Trinidad and Tobago, based on a review of the State Department's consular information sheets, which provide data on safety and other issues in foreign countries. It continues to be an issue in places like to Dominican Republic, where pickpocketing and mugging are the most common crimes against tourists and in Jamaica, where the United States Embassy has received several reports of sexual assaults against Americans this year, including two at resorts...What is different, though, is how those crimes are handled. 'Law enforcement, especially in the Caribbean, does not necessarily have the resources or response that you might expect in the U.S....If you're victimized by a crime you need to be prepared for a slow justice process'").

B] Jamaica [ Schreiber v. Camm ( guests at Jamaican vacation estate shot by security guard )];

C] Cayman Islands [ Wilson v. American Trans Air, Inc. ( guest assaulted at hotel )] and

D] St. Thomas [ Manahan v. NWA, Inc. ( tourist mugged on walk to restaurant from hotel )].

(3) Raped, Sexually Assaulted Or Molested In

A] Puerto Rico [ Blankley v. Marriott Corp.<sup>16</sup> (inappropriate touching during massage)];

B] Galapagos Islands [ O'Keefe v. Inca Floats, Inc. ( sexual assault during cruise to Galapagos Islands )];

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<sup>16</sup>Blankley v. Marriott Corp., 2010 WL 3069224 (D.P.R. 2010) ("Bethany Blankley (alleged) that, while a guest at defendant Courtyard by Marriott Isla Verde Beach Resort...she was sexually assaulted by Cesar Gonzalez-Cardona, a concierge at the hotel who, pretending to be a masseur to gain access to her room, touched her inappropriately under the guise of providing a massage. The hotel then sued Gonzalez-Cardona's employer, third party defendant Group Services, Inc., (GSI) the company it hired pursuant to a concession contract to provide tour and travel services to its guests as well as concierge services at the hotel"; Hotel's partial judgment motion seeking to enforce hold harmless and defense obligations in concession contract denied).

C] Bahamas [ Doe v. Sun International Hotels, Ltd.  
( guest raped at resort )]; Loretti v. Holiday Inns, Inc. ( hotel  
guest raped on beach );

D] Jamaica [ Girden v. Sandals International<sup>17</sup>,  
( tourist sexually assaulted on small boat ); Catalano v. NWA,  
Inc. ( tourist raped during sailing excursion on a two-person  
sunfish sailboat ); Creteau v. Liberty Travel, Inc. ( tourist  
raped and robbed in Jamaica );

E] Cayman Islands [ Wilson v. Humphreys Cayman Ltd. (   
guest raped at hotel );

F] St. Thomas [ Flanagan v. Wyndham International,  
Inc.<sup>18</sup> ( children molested in hotel day care facility )].

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<sup>17</sup>Girden v. Sandals International, 2003 WL 21243109 ( 2d  
Cir. 2003 ), aff'g 206 F. Supp. 2d 605 ( D. Conn. 2002 ) ( "   
Plaintiff arranged to take a sailing lesson from David Titus, an  
employee of the resort...after navigating the small boat into the  
open sea, Titus sexually assaulted her " ).

<sup>18</sup>Flanagan v. Wyndham International, Inc., 231 F.R.D. 98  
( D.C.D.C. 2005 ) ( sexual assault by hotel employee of guest's  
child; " In December 2000, Flora Nicholas and Paul Gayter filed  
suit...on behalf of their minor daughter S.G. against ( hotel and  
employee who " worked at the Kids Klub day-care program at the  
Wyndham Sugar Bay Resort in St. Thomas. The suit sought damages  
arising out of Hornby's alleged sexual molestation of S.G. while  
she was under his care. After the initiation of the civil suit (   
employee ) was convicted of sexually molesting S.G. and is  
currently incarcerated in the Virgin Islands...Approximately two  
years after Nicholas was filed, the plaintiffs in the two

(4) Robbed In

A] Puerto Rico [ Gillmore v. Caribbean Cruise Line ( cruise passengers robbed and stabbed on pier )];

B] Grand Bahamas [ Fling v. Hollywood Travel and Tours ( tourist shot and robbed )];

C] Kenya [ Dow v. Abercrombie & Kent ( tourists on safari assaulted and robbed by bandits while camping in the Oloolo Escarpment in the Masai Mara reserve )];

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underlying actions, Flanagan and James, filed similar suits ( alleging ) that ( employee ) sexually molested the 9-year old Flanagan girl and the 8-year old James girl while they attended the Wyndham Kids Klub " ).

See also: Who's Minding The Kids?, Conde Nast Traveler, August 2005, pp. 61 ( " More hotels and resorts are opening children's programs every day, but few parents really know what separates the good ones from the bad...Our outlook changed radically, however, when we learned the story of a nine-year-old girl who was molested by a 22-year-old male counselor while staying with her parents at St. Thomas's Wyndham Sugar Bay Resort & Spa ( Although the abuse occurred in April 2000, the case gained widespread publicity only last year, after the man was denied an early prison release from his five-year sentence ). Just this past April, the issue of safety at these facilities made headlines again when the Australian press reported allegations that in recent years, two Australian children had been abused at two hotel kids' clubs in Bali. In one case, a three-year-old girl was diagnosed with gonorrhoea after spending time at a hotel kids' club; in the other a five-year-old boy was molested by a man who entered the child-care facility at the resort where the boy and family were staying " ).

(5) Drownings & Other Water Sports Accidents

A] Dominican Republic [ Calvo v. Sol Melia, S.A.  
( tourist struck by motorboat while swimming off the  
beach )];

B] Costa Rica [ Mayer v. Cornell University ( tourist  
on birdwatching tour of Costa Rica drowns while snorkeling off  
the Il de Cano )];

C] Cayman Islands [ Lehman v. Humphrey Cayman Ltd  
( tourist drowns in ocean )];

D] Hawaii [ Rygg v. County of Maui ( hotel guest is  
paralyzed and rendered a quadriplegic in surfing accident off of  
Kamaeale II Beach ); Tancredi v. Dive Makai Charters( scuba diver  
drowns diving in the Deep Reef )];

E] Jamaica [ Reid-Walen v. Hansen ( tourist run over by  
motor boat while swimming in the crystal clear waters of Jamaica  
)];

F] Taiwan [ Sun v. Taiwan ( tourist drowns during  
recreational visit to Ken-Ting National Park )];

G] Guadeloupe [ Sankaran v. Club Mediterranee, S.A.

( guest on snorkeling excursion abandoned and forced to return to Club Med facility by swimming and walking on sharp reef );

H] Mexico [ Gardemal v. Westin Hotel Company ( tourist drowns snorkeling off of Lovers' Beach ); Yurchak v. Atkinson & Mullen Travel, Inc.<sup>19</sup>, ( jet ski accident ); Walker v. Wedge Hotel<sup>20</sup>, ( para-sailing accident ); Rodriguez v. Class Travel

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<sup>19</sup>Yurchak v. Atkinson & Mullen Travel, Inc., 2006 WL 3076675 ( 3<sup>rd</sup> Cir. 2006 ) ( tourist injured on personal watercraft in Mexico; " The Yurchaks allege that in December 2002 they received an advertisement...soliciting them to purchase a vacation package. The advertisement included a picture of a jet ski in use. Before purchasing the package the Yurchaks asked about their safety while vacationing in Mexico but they were given no warnings...beyond a general assurance that travel to the country was safe. They were not told of a Consular Information Sheet from the United States Department of State that included a warning about jet skiing in Mexico...The Yurchaks's claims of misrepresentations-both negligent and fraudulent-are similarly faulty...Even assuming that the...general assurances of safety in Mexico could have been understood as an assurance that jet skiing there would be safe, such a statement would not have been material to the transaction between these parties. The rental and use of a jet ski was not part of the vacation package the Yurchaks purchased...it is not tenable based on the alleged facts that their decision to purchase the vacation package...turned on whether or not they believed it would be safe to jet ski on their vacation " ).

<sup>20</sup>Walker v. Wedge Hotel, U.S. Dist. Ct. S.D. Fla. No. 01-3564 ( CIV-GOLD, 27 ATLA Law Reporter 127 ( Sept. 3, 2002 ) ( " Walker, 27, went parasailing during a trip to the Bahamas. She and a friend were required to ride together of inclement weather. During the ride the frayed towrope failed, causing Walker to be dragged through the water for several minutes. Walker drowned... Walker's mother sued the management company of the hotel located on the stretch of beach on which the vendor operated its

Worldwide ( minor tourist on Grad Trip 1998 to Cancun pushed into hotel pool and suffers tragic injuries ); Sova v. Apple Vacations ( tourist injures back during scuba dive on snorkeling excursion ); Feldman v. Acapulco Princess Hotel ( accident at hotel pool )];

I] Hong Kong [ Nowak v. Tak How Inc. Ltd ( guest drowns in hotel pool )];

J] Brazil [ Darby v. Societe Des Hotels Meridien ( hotel guest drowns in ocean )].

K] Gabon [ Irwin v. World Wildlife Fund, Inc<sup>21</sup>.

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parasailing business. Plaintiff alleged the vendor, which had an office in the hotel, was an agent of the hotel. Plaintiff asserted defendant was liable for the vendor's negligence in failing to maintain the towrope and failing to give Walker instructions on how to unclip herself in the event of an emergency...A jury awarded plaintiff \$1.88 million " ).

<sup>21</sup>Irwin v. World Wildlife Fund, Inc., 448 F. Supp. 2d 29 ( D.C.D.C. 2006 )( " Plaintiffs allege that in June of 2002, Missa arranged, through the Gabonese entity Cecotour, for a trip in a small wooden boat on a lagoon adjacent to Gamba for himself, Irwin and two others...a second boat...collided with the left side of plaintiffs' boat...The bow of the oncoming boat struck Ms. Irwin in the face, dislodging her orbital ridge and shattering her face. In addition, the bow of the oncoming boat hit metal supports in the boat Ms. Irwin occupied, and the metal supports impaled Ms. Irwin's skull and tattooed her skin...Ms. Irwin's injuries are long-term, severe, painful and extensive and they include: loss of sensation and motor function, complete loss of smell and diminished sense of taste, diminished cognitive skills, short-term and working memory loss, shattered sinuses...diminished ability to perceive visual depth " ).

( boating accident in Gamba lagoon )];

L] Indonesia [ Lee v. Choice Hotels International, Inc.<sup>22</sup> ( near drowning in hotel pool in Indonesia )];

M] Aruba [ Crawley v. Marriott Hotels, Inc<sup>23</sup>. ( near drowning )];

N] Turks & Caicos [ Welch-Rubin v. Sandals Corp<sup>24</sup>.

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<sup>22</sup> Lee v. Choice Hotels International, Inc., 2006 WL 1148755 ( Del. Super. 2006 ) ( " the Lees...residents of Seoul, South Korea, embarked upon a vacation tour of Southeast Asia. The tour was arranged by a South Korean travel agency, Freedom Travel. The tour was to include an afternoon and one night at the Quality Resort Waterfront City, Batam, Indonesia...Of particular interest to the Lees was the large free form pool with a sunken bar which was connected to the children's pool. The resort was advertised as family friendly...The boys ultimately entered the pool behind their parents but became separated...Bo Hyun found ( his son ) at the bottom of the large pool unconscious. No lifeguard was seen on duty during this period of time and no other staff assisted in finding Chan Young ( who ) suffered brain damage and is in a permanent vegetative state " ).

<sup>23</sup> Crawley v. Marriott Hotels, Inc., 2006 WL 2331143 ( N. Ill. 2006 ) ( " She stayed at the Aruba Marriott Resort & Stellaris Casino( where ) the concierge recommended Crawley take a jeep island tour through ABC Tours...charging the deposit to her hotel room. While on this tour Crawley had a ' near drowning incident causing her to sustain serious personal injuries ' including permanent lung damage ' " ).

<sup>24</sup> Welch-Rubin v. Sandals Corp., 2004 WL 2472280 ( D. Conn. 2004 ) ( " The central issue in this case is whether Defendants-a resort company and a tour operator owned, operated or controlled

( shoulder injury boarding boat )].

(6) Slip & Falls In Jamaica [ Hofer v. The Gap, Inc<sup>25</sup>.

( guest falls into turtle pond at hotel after flip flop breaks )].

(7) On The Beach In Aruba [ Leinhart v. Caribbean

Hospitality Services, Inc<sup>26</sup>. ( hotel guest lying on beach in

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the Beaches Resort which Plaintiff...injured her shoulder while attempting to board a boat " );

<sup>25</sup>Hofer v. The Gap, Inc., 2007 WL 2827380 ( D. Mass. 2007 ) ( " She contends that as she turned around to descend the stairs, the thong of her right sandal became detached by pulling through the sole. This caused her to lose her balance, and she fell to her right into the turtle pond. As she fell, she gouged her left leg on the sharp rocks in the pond...It is well settled that travel agents are not generally liable for the negligence or dangerous conditions of third-party hotel or travel operators...Plaintiff contends, however, that this case should fall outside the general rule for three reasons (1) Expedia ` controlled ` the Turtle Beach Towers resort as a result of inspections it allegedly conduct at the hotel, (2) Expedia as plaintiff's agent owed her a duty to warn of dangerous hazards of which Expedia was aware through its ` inside information ` and (3) Expedia voluntarily assumed a duty to warn her of safety hazards " );

<sup>26</sup>Leinhart & Caribbean Hospitality Services, Inc., 426 F. 3d 1337 ( 11<sup>th</sup> Cir. 2005 ) ( " Lienhart was vacationing at the Aruba Grand ( which ) is located next to the public beach and it provides lounge chairs and tiki huts on the beach exclusively for use of its guests. Leinhart and a friend were spending the day relaxing and had been led to chairs by an Aruba Grand employee who placed the chairs under a tiki hut for their use... Leinhart was asleep in a lounge chair when...she was struck by a pickup truck and boat trailer operated by an employee of Unique Sports of Aruba. The boat and trailer were backing up along the

lounge chair and struck by truck )].

(8) Riding Accidents In

A] Egypt [ MacLachlin v. Marriott Corporation ( tourist in Egypt thrown from angry camel breaks eight ribs and fractures pelvis )];

B] Jamaica [ Colby v. Norwegian Cruise Lines, Inc. ( horse riding accident during shore excursion )];

C] Mexico [ Honeycutt v. Tour Carriage, Inc. ( tourist at Club Med facility thrown from horse and breaks ankle ); May v. Club Med Sales, Inc. ( guest at Sonora Bay Club Med thrown from horse ); Barber v. Princess Hotels International ( horse riding accident )];

D] Bahamas [ Tucker v. Whitaker Travel, Ltd. ( tourist thrown from horse )];

E] Hawaii [ Courbat v. DaHano Ranch, Inc.<sup>27</sup> ( horse  
beach " ) ).

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<sup>27</sup>Courbat v. Dahano Ranch, Inc., 141 P. 3d 427  
( Hawaii Sup. 2006 ) ( consumers purchased tour through " Island

riding accident )];

F] Namibia [ Hall v. Voyagers International Tours, Inc<sup>28</sup> ( tourist trampled by wild elephant )].

(9) Riding In Tour Buses, Limos & Golf Carts In

A] Vietnam [ Pearl Cruises v. Cohon ( cruise passengers injured in automobile accident during shore excursion )];

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Incentives, Inc., an internet-based tour organizer " and suffered injuries from horse riding accident at ranch; " The Courtbats do not dispute that they both signed the Ranch's waiver form...prior to their ride. Nor do they dispute that waivers are an accepted method by which businesses may limit their liability. Rather, they assert that the Ranch's practice of booking ride reservations through an activity company, receiving payment prior to arrival of the guest, and, upon the guest's arrival at the Ranch, requiring them to sign a liability waiver as a precondition to horseback riding is an unfair and deceptive business practice...The Courbats maintain...that the practice of withholding the waiver had ` the capacity or tendency to mislead ` customers...If on remand the trier of fact determines that the nondisclosure of the waiver was a deceptive trade practice, rendering the waiver void, then the Courtbat's negligence claims proceed free of the waiver defense " ).

<sup>28</sup> Hall v. Voyagers International Tours, Inc., 2007 WL 2088878 ( N.D.N.Y. 2007 )( " This action stems from the death of Donald Hall...when he was trampled by a wild elephant during a photographic safari in Namibia...There is evidence in the record that, if believed by a jury, would support a determination of direct negligence on the part of Voyagers...there is evidence that would support a determination that Voyagers was vicariously liable for the conduct of Wilderness under a theory of apparent agency or agency by estoppel " ).

B] Morroco [ Davies v. General Tours, Inc. ( tourist injured exiting tour bus )];

C] St. Thomas [ Lubick v. Travel Services, Inc. ( driver lost control and wrecked tour bus )];

D] Scotland [ Ramage v. Forbes International, Inc. ( tour bus accident )];

E] Mali [ Winter v. I.C. Holidays, Inc. ( bus accident; driver unlicenced and uninsured )];

F] Germany [ Chouset v. American Airlines, Inc. ( tour bus door closes on tourist's arm )];

G] Bahamas [ Fertels v. Resorts International ( motor vehicle accident in the Bahamas )];

H] Canada [ Lowy v. Heimann's Bus Tours, Inc. ( tour bus accident )];

I] Spain [ Rovinsky v. Hispanidad Holidays, Inc. ( accident in tour bus advertised as being safe )];

J] Egypt [ Paredes v. Princess Cruises, Inc. ( tour van accident )];

K] England [ McCartney v. Windsor, Inc. ( tour bus accident )];

L] Peru [ Vermeulen v. Worldwide Holidays, Inc.<sup>29</sup>  
( tour van accident in Peru )];

M] Dominican Republic [ Lang v. Corporacion De Hotels, SA<sup>30</sup> ( golf cart struck by truck )];

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<sup>29</sup> Vermeulen v. Worldwide Holidays, Inc., 922 So. 2d 271 ( Fla. App. 2006 ) ( " The day before his departure from Ft. Lauderdale to South America, Vermeulen called Worldwide, located in South Miami...to book a cruise to the Galapagos Islands... Worldwide told Vermeulen that someone from Chasquitur, the local Peruvian tour operator, would meet him upon his arrival to give him his tickets, but did not tell him that Chasquitur was its agent...Vermeulen was met at the airport by a Chasquitur employee ( who ) escorted him to van with a driver who proceeded to have accident causing injuries to Vermeulen ) " ).

<sup>30</sup> Lang v. Corporacion De Hoteles, SA, 2007 WL 3286385 ( D.P.R. 2007 ) ( " The complaint alleges that plaintiffs... traveled to the Dominican Republic for a vacation at Casa de Campo resort after purchasing and booking their vacation package through MK Tours (PR), Inc., a travel agency in Puerto Rico. During their stay...the family suffered an accident when their golf cart , which is claimed have been part of the vacation package deal, was struck by a truck in the premises of Casa de Campo resort. As a result Mr Lang died while plaintiffs were seriously injured...Plaintiffs allege that MK...is liable in tort because it advertised, marketed and sold a vacation package, which included a golf cart and ` knew or should have known that golf carts were permitted or allowed to be operated on the same roads...[ the regular vehicles use ] at Casa de Campo and that

(10) Driving A Rental Car In

A] Bahamas [ Sadkin v. Avis Rent A Car System, Inc.

( rental car accident )];

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under such circumstances the Lang family would be placed in a foreseeable zone of danger...We take all of plaintiffs' allegations as true, that is that MK...advertised and sold plaintiffs the vacation package to Casa de Campo resort and the package included a golf cart; that it assured plaintiffs that they would enjoy a safe, healthy and protected environment during their vacation; that it knew or should have known about the dangerous conditions of the roads/trails ( where ) golf carts are operated in the resort; that it negligently failed to warn plaintiffs about said conditions; and that the injuries suffered were the result of MK...placing them in a foreseeable zone of danger. These allegations if true are sufficient under Article 1802 to hold MK...liable for the injuries suffered by plaintiffs " ).

B] Mexico [ Chung v. Chrysler Corp. ( students killed in rental car crash )];

C] Italy [ Travalja v. Maieliano Tours ( rental car accident ) ];

D] England [ Weiner v. B.O.A.C. ( rental car accident )];

E] Rumania [ Kermisch v. Avis Rent-A-Car ( tourists arrested in Rumania for mistreating their rental vehicle )].

(11) Jumping Off Of Trains [ Meurer v. Cerkvnik-Anderson Travel, Inc. ( female student crushed by steel wheels of party train ) ] and balconies [ Knoell v. Cerkvnik-Anderson Travel, Inc. ( 18 year old student jumps to death from hotel balcony ); Powell v. Trans Global Tours, Inc. ( guest leans against hotel balcony rail and falls to ground )] in Mexico.

(12) Riding In Airplanes In

A] China [ Barkanic v. General Administrator of Civil Aviation ] ( tourist killed in airplane crash during tour )];

B] Bolivia [ Philippe v. Lloyd's Aero Boliviano ( tourist takes plane to La Paz traveling from sea level to an altitude of 13,313 feet within 40 minutes during which he suffers cerebral injuries due to hypoxia )];

C] Kenya [ Abercrombie & Kent v. Carlson Marketing Group ( tourists killed when plane crashes into a mountain ); Rizzutti v. Basin Travel Service<sup>31</sup> ( ( tourists killed in crash of aircraft ]).

(11) Walking In

A] Volcanos National Park, Hawaii [ Schechter v. Tauck Tours, Inc. ( tourist falls on hot lava rocks )];

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<sup>31</sup>Rizzutti v. Basin Travel Service, 125 Wash. App. 602, 105 P. 3d 1012 ( 2005 ) ( " Maryanne Rizzuti died in an airplane crash during a safari trip to Africa. Basin Travel Service of Othello, Inc., the travel agency that booked the trip, provided automatic transportation insurance through Travel Insured International, Inc....for clients whose tickets were issued by the agency. ( After insurance company disclaimed coverage because a tour operator issued tickets for transportation on aircraft that crashed ) Ms. Rizzuti's heirs sued for recovery under the policy and damages for bad faith and Consumer Protection Act ( CPA )...they did not establish unfair or deceptive trade practices in the investigation of and timely response to their claim...a reasonable basis for denying coverage constitutes a complete defense to any claim that the insurer denied coverage in bad faith or in violation of the CPA " ).

B] South Africa [ Connolly v. Samuelson ( tourist falls during walking safari )];

C] Fiji Islands [ Lavine v. General Mills, Inc. ( tourist falls on slippery rocks )];

D] Minahasu Highlands, Indonesia [ Carney v. Singapore Airlines ( tourist wearing only shorts and sandals falls into steaming hot sulphur vent and is severely burned )];

E] Brazil [ Stevenson v. Four Winds Travel, Inc. ( tourist falls on slimy pier in Amazon River, Brazil )];

F] Egypt [ Sanders v. Nabila Tours & Cruises ( tourist injured during tour of Catacombs Hala )].

### **Life Can Be Very Different Abroad**

Travelers assume that should they have an accident in a foreign country they will be protected by the same safety standards, high quality medical care, consumer protection laws and user friendly legal system available in the United States. The reality, however, is quite the opposite.

## **Safety Standards**

In many foreign countries the safety standards may be much lower [ see e.g. Wilson v. Best Travel ( tourist falls through weak plate glass window in Athens hotel; plate glass thickness standards lower in Greece than in England where tourist resided ); Carley v. Theatre Development Fund ( tourist falls through window at hotel in St. Petersburg, Russia ); Knoell v. Cerkvenik-Anderson Travel, Inc. ( 18 year old tourist from Arizona consumes large quantities of alcoholic beverages for three days and jumps to death from third story hotel balcony; Arizona Dram Shop law does not apply; drinking age in Mexico is lower than in Arizona ); Cicchiello v. Reney Tours Plane Broker, Inc. ( tourist injured when gas stove at hotel exploded )].

## **Emergency Medical Care**

The quality of medical care may be much lower [ Gianocostas v. RIU Hotels, SA<sup>32</sup> ( diabetic tourist misdiagnosed at hotel and

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<sup>32</sup> Gianocostas v. RIU Hotels, SA, 2005 WL 503931 ( Mass. Super. 2005 )( case remanded " for further consideration of whether the Dominican Republic offers an adequate remedy with respect to the plaintiffs' claims against ( tour operator ) and if so whether the action should proceed against the defendants jointly in Massachusetts or the Dominican Republic "; negligent selection of suppliers claim to be tried in Dominican Republic and negligent misrepresentation claim to be tried in Massachusetts ); 2006 WL 2089772 ( Mass. Super. 2006 )( failure

local hospital ); DeRoche v. Commodore Cruise Line, Ltd. ( cruise passenger on shore excursion suffers injuries in motor scooter accident; medical malpractice by local infirmary in Cozumel, Mexico ); Gillmore v. Caribbean Cruise Line ( malpractice by ship's doctor ); Bonaventure v. Home Lines, Inc. ( malpractice by ship's doctor ); Blinzler v. Marriott International, Inc. ( guest suffers heart attack at hotel; surviving spouse claims delay in

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of hotel and local clinic to diagnose and properly treat tour participant with diabetes; negligent misrepresentation claims against tour operator dismissed; " The ( Plaintiffs ) seek damages against GWV for the death of Jennifer under a theory of negligent misrepresentation...( Plaintiffs ) argue that they relied on false representations made by Harris ( GWV employee ) about Jennifer's condition and the quality of medical care available...in the Dominican Republic as a result of which ( Plaintiffs ) delayed their efforts to evacuate Jennifer...Here to the extent that Harris represented that Jennifer would receive satisfactory medical treatment in the Dominican Republic those statements were her opinion...Harris was not, however, in a position to obtain actual knowledge of the truth or falsity of her statements...The degree of competence of the medical providers and the standard of medical care in the Dominican Republic are not matters in respect to which Harris could have actual knowledge. Nor are such matters ones over which Harris would be expected to have special or superior knowledge... ( Plaintiffs ) reliance on Harris' expressions of opinion was unreasonable under the circumstances of this case...Reliance has been deemed unreasonable in circumstances in which the plaintiff alleging misrepresentations has reason to know of facts when then make his or her reliance unjustifiable...The record further demonstrates that ( Plaintiffs ) had contacted Jennifer's endocrinologist and had communicated with the doctors at the Clinic concerning Jennifer's illness who made assurances about Jennifer's well-being. These communications occurred the same day as Harris' statements to ( Plaintiffs ). Once in contact with medical professionals involved in the treatment of Jennifer, however, the ( Plaintiffs ) could not have justifiably relied on Harris' statements regarding Jennifer's condition and medical care " ).

obtaining medical assistance caused death; hotel liable for delay in calling emergency aid ); Johnson v. Commodore Cruise Lines. Ltd. ( passenger raped by crewmember and misdiagnosed as having had heart attack ); Room v. Caribe Hilton Hotel ( delay in providing medical assistance to heart attack victim )].

### **Foreign Substantive Law**

The law may be less sympathetic<sup>33</sup> to the injured traveler in, among other places,

A] Egypt [ MacLachlin v. Marriott Corporation ( tourist thrown from angry camel in Egypt; " an Egyptian forum which is based partially on Koranic law would be unduly harsh to plaintiff " )];

B] France [ In Re Air Crash Off Long Island, New York ( air crash; France does not allow punitive damages )];

C] Dominican Republic [ Calvo v. Sol Melia, S.A.

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<sup>33</sup> If the tour is governed by the law of the European Community, specifically, E.C. Council Directive of June 13, 1990 (90/314/EEC) then the tour operator may be liable for the defaults of travel suppliers such as hotels, airlines, cruiselines and so forth. See Travel Law, 5.04; Edelman, Admiralty Law, New York Law Journal, Feb. 21, 2008, p. 4.

( tourist struck by motor boat while swimming; Dominican Republic does not recognize product liability claims );

Gianocostas v. Interface Group<sup>34</sup> ( diabetic tourist misdiagnosed in Dominican Republic )];

D] Turkey [ Mercier v. Sheraton International, Inc. ( contract dispute; Turkey may not recognize claims for breach of contract or tortious interference with contract )];

E] Hong Kong [ Nowack v. Tak How Inv. Ltd. ( drowning accident; law uncertain in Hong Kong )];

F] Malaysia [ Simcox v. McDermott International ( slip and fall on barge; Malaysia has similar substantive law to U.S. )];

G] Cayman Islands [ Lehman v. Humphrey Cayman Ltd.

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<sup>34</sup>Gianocotas v. Interface Group, 450 Mass. 715, 2008 WL 483766 ( Mass. Sup. 2008 ) ( " The record contains affidavits of six lawyers licensed to practice in the Dominican Republic. Four lawyers indicate that reparations may be sought, under the Dominican Civil Code, for negligent misrepresentations causing physical injury...The plaintiffs make no argument...as a matter of law, a plaintiff cannot recover for negligent misrepresentation in the Dominican Republic " ).

( recovery for wrongful death in Cayman Island may not exceed \$5000 )];

H] China [ Barkanic v. General Administration of Civil Aviation ( air crash; maximum recoverable damages limited to \$20,000 ) ];

I] Mexico [ Wendelken v. Superior Court ( slip and fall; Mexico limits lost wage damages to 25 pesos per day ); Hernandez v. Burger ( auto accident; Mexican law limits recovery to the amount of the injured's party's medical and rehabilitative expenses and lost wages at the minimum rate )].

### **Foreign Procedural Law**

The applicable foreign legal system may discourage litigation as we know it in the U.S. by, among other things, barring contingency fee arrangements with attorneys and jury trials in, among other places,

A] Bermuda [ Bruemmer v. Marriott Corp. ( hotel guest playing golf falls off cliff adjacent to tee area for 18th hole and subsequently dies from his injuries; no contingent fees in Bermuda )];

B] Bahamas [ Doe v. Sun International Hotels, Ltd.  
( 18 year old female guest raped at hotel; no jury trials or  
contingency fees in Bahamas )];

C] France [ In Re Air Crash Off Long Island, New York  
( air crash; France does not allow contingency fee  
arrangements )];

D] Cayman Islands [ Wilson v. Humphreys Cayman Ltd  
( rape at hotel; no contingency fees or jury trials in Cayman  
Islands ); Lehman v. Humphrey Cayman Ltd. ( no contingency fees  
or jury trials in Cayman Islands )];

E] Jamaica [ Reid-Walen v. Hansen ( motorboat accident;  
no contingency fees or jury trials in Jamaica ); Lugones v.  
Sandals Resorts, Inc. ( no contingency fees or jury trials in  
Jamaica )];

F] England [ Neville v. Anglo American Management  
( tour bus accident; no contingency fees or jury trails in  
England )];

G] Trinidad and Tobago [ Flynn v. General Motors, Inc.  
( car accident; no jury trial in Trinidad and Tobago )];

H] Finland [ Carnival Cruise Lines, Inc. v. Oy Wartsila  
AB ( accident aboard cruiseship; no jury trials in Finland )];

I] Israel [ Gyenes v. Zionist Organization of America  
( student drowned in Jordan River; no right to jury trial in  
Israel )].

#### Is The Forum Selected Convenient?

Travelers injured abroad may commence a lawsuit in a U.S. court against a cruiseline, foreign hotel, tour bus company or various other ground operators. In response the defendants may seek to dismiss the lawsuit because the U.S. forum selected is not convenient [ *forum non conveniens* ] or a clause in the cruise passenger ticket, hotel registration form or tour participant contract states that all lawsuits must be brought in a specific forum [ forum selection clause ].

#### **Application Of Foreign Law**

In addition, the defendants may seek an early determination

by the Court that the law of a foreign country applies to one or more issues in the case [ choice of law ]. The applicable law, foreign or domestic, bears on the convenience of the selected forum. The theory being that foreign Courts are better able to interpret their own law than the Courts of a U.S. forum [ Mercier v. Sheraton International, Inc. ( contract dispute; difficulty in interpreting Turkish law one reason for dismissal ); Rudisill v. Sheraton Copenhagen Corp. ( fall in Danish hotel bathtub; Danish courts better able to apply Danish law ); Carnival Cruise Lines, Inc. V. Oy Wartsila AB ( contract dispute; Finnish courts better able to interpret Finnish law )].

### **Conditions For Dismissal**

Should the Court grant a *forum non conveniens* motion it may condition dismissal upon the defendant agreeing to the transfer of the case to a distant forum for trial [ Gianocotas v. Interface Group<sup>35</sup> ( dismissal conditioned on various waivers ); Chhawchharia v. The Boeing Co. ( dismissal subject to defendant

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<sup>35</sup> Gianocotas v. Interface Group, 450 Mass. 715, 2008 WL 483766 ( Mass. Sup. 2008 ) ( " dismissal of the plaintiffs' negligent misrepresentation claim is conditioned on GWV's written agreement to waive any defenses based on statute of limitations or lack of personal jurisdiction, and to waive any requirement that the plaintiffs post a bond and on the further condition that the court in the Dominican Republic give full force and effect to such waivers " ).

submitting to jurisdiction of English or Scottish courts, waiving any statute of limitation defense, conceding liability for all compensatory damages, providing access to all evidence, and paying the awarded damages ); Diaz v. Mexicana de Avion, S.A. ( dismissal subject to defendant accepting service in and jurisdiction of Mexican courts, waiving statute of limitations, producing all evidence and witnesses, and agreeing to satisfy any judgments ); Fertels v. Resorts International ( dismissal subject to accepting service and waiving statute of limitations )].

### **Plaintiff's Choice Is Important**

Although it is not dispositive [ Piper Aircraft Co. v. Reyno ( air crash )] the forum selected by the plaintiff, particularly if he or she resides in that forum, will be given serious consideration prior to dismissing a lawsuit on the grounds of forum non conveniens [ Guidi v. Inter-Continental Hotels Corp. ( murder in Egyptian hotel; " the choice of an American court over a foreign court should be given the heightened deference " ); Doe v. Sun International Hotels, Ltd. ( guest raped at hotel in Bahamas ); Anderson v. Marriott Hotel Services, Inc. ( guest falls on hotel tennis court ); Smith v. Chason ( minor tourist drowns during booze cruise ); Schechter v. Tauck Tours, Inc. ( tourist falls on hot lava rocks at Volcanoes National Park );

Chierchia v. Treasure Cay Services ( boating accident in the Bahamas ); Carter v. Trafalgar Tours, Ltd. ( auto accident in Austria )].

### **Residing Or Doing Business In The Forum**

If the plaintiff and the defendant reside in or are doing business in the selected forum the Courts will rarely dismiss the lawsuit [ Flynn v. General Motors, Inc. ( accident in Trinidad and Tobago; plaintiff from New York; lawsuit in New York; defendant doing business in New York ); Bruemmer v. Marriott Corp. ( accident in Bermuda; plaintiff from Illinois; lawsuit in Illinois; one of defendants doing business in Illinois ); Wilson v. Humphreys Cayman Ltd. ( accident in Cayman Islands; plaintiff from Indiana; lawsuit in Iowa; defendant-franchisor Tennessee corporation has agent in Iowa; defendant-franchisee Cayman Island corporation with offices in Tennessee ); Kermisch v. Avis Rent-A-Car ( tort in Rumania; plaintiff from New York; defendant-franchisor doing business in New York )].

The reasoning is that taxpayers should have access to the local courts. The converse, that non taxpayers should not have easy access to the local courts, is also true. Some Courts

presume that a defendant who can afford an office in the forum is also able to respond to local lawsuits. In Sadkin v. Avis Rent A Car System, a case involving a rental car accident in the Bahamas, the Court refused to dismiss the lawsuit because the rental car franchisor and decedent resided in New York State.

### **Advertising In The Forum**

If a defendant advertises and solicits business in the forum it should expect to be available for lawsuits brought by injured residents. In Reid-Walen v. Hansen, a case involving a motorboat accident in the Bahamas, the Court found that because of a Bahamian hotel's solicitation of business in the U.S. it " should not be ( totally ) surprised...that they may be sued in the courts of the U.S. " And in Nowak v. Tak How Inv. Ltd., a case involving a drowning in a Hong Kong hotel pool, the Court held that a cost of doing business is being available to respond to lawsuits in the U.S. The Nowak Court also declared that Massachusetts, where the lawsuit was brought, had a strong interest in protecting its citizens from solicitations for unsafe services [ Carter v. Trafalgar Tours, Ltd. ( auto accident in Austria ); Bruemmer v. Marriott Corp. ( golfing accident in Bermuda ); Lehman v. Humphrey Cayman, Ltd. ( tourist drowns in ocean off of Cayman Islands ); Radigan v. Innisbrook Resort (

tourist falls in Florida hotel )].

### **Availability Of Alternative Forum**

Generally, the Court will not dismiss a lawsuit unless there is an alternative forum available to hear plaintiff's claim. As stated by one Court " The court must be alert to the realities of the plaintiff's position, financial or otherwise, and his or her abilities as a practical matter to bring suit in the alternate forum ". The Courts differ widely on just how different the alternative forum can be to still be " available ". Such factors as whether the foreign forum recognizes U.S. legal theories [ Mercier v. Sheraton International, Inc. ( failure to show that Turkish law expressly recognizes claims for breach of contract and tortious interference with contract )], allows contingency fee arrangements with attorneys [ Lugones v. Sandals Resorts, Inc. ( no contingency fees in Jamaica )], provides for jury trials [ Flynn v. General Motors, Inc. ( no jury trials in Trinidad and Tobago )] and limits recoverable damages [ Abouchalache v. Hilton International Co. ( limit on punitive damages not dispositive )].

### **Plaintiff's Emotional Burden**

In Guidi v. Inter-Continental Hotels Corp. tourists were

shot and murdered at hotel restaurant in Egypt. In denying a motion to dismiss the lawsuit the Court noted the emotional burden of having family members travel to Egypt. " Plaintiffs are atypical in that they are either the widows or the victim of a murderous act directed specially against foreigners. Understandably, they are strongly adverse to litigating in a country where foreigners have been the target of hostile attacks and have concerns for their own safety if required to travel there ".

#### **Location Of Witnesses And Evidence**

Proving or defending an accident case may require the production of witnesses and documentary and physical evidence which is located in the distant forum where the accident occurred. In arguing for dismissal the defendant will show the Court a list of essential witnesses which are beyond the Court's jurisdiction and, hence, unavailable for trial [ Gianocotas v. Interface Group<sup>36</sup>; Dunham v. Hotelera Canco, S.A. ( snorkeling accident in Mexico; witnesses not subject to subpoena power of

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<sup>36</sup> Gianocotas v. Interface Group, 450 Mass. 715, 2008 WL 483766 ( Mass. Sup. 2008 ) ( " most, if not all, of the litigation will center on live testimony concerning the quality of medical care Jennifer received in Puerto Plata...All of the medical personnel who were in contact with Jennifer during the relevant time period are in the Dominican Republic, as are all clinic and hospital records " ).

U.S. courts ); Carney v. Singapore Airlines ( tour accident in Indonesia; defendant would not be able to subpoena witnesses if action brought in U.S. ); Magnin v. Teledyne Continental Motors ( French witnesses not subject to subpoena power of U.S. courts ); Carnival Cruise Lines, Inc. v. OY Wartsila AB ( Finnish witnesses and experts beyond subpoena power of U.S. courts )]. The defendant may also assert that the jury must have a view of the accident scene [ Rudisill v. Sheraton Copenhagen Corp. ( guest falls in hotel bathtub; view of site important consideration )]. The Court must examine the actual necessity of each listed witness [ Calvo v. Sol Melia, S.A. ( Spanish tourist struck by motorboat while swimming of the beach in Dominican Republic; all 41 witnesses to the accident lived in Dominican Republic and spoke only Spanish; motion to dismiss granted ); Chierchia v. Treasure Cay Services ( boating accident in the Bahamas; all witnesses to the accident in the Bahamas; motion to dismiss granted ); Anderson v. Marriott Hotel Services, Inc. ( guest falls on hotel tennis court; although most witnesses reside in Hawaii the defendant failed to identify any of them; motion to transfer denied ); Abouchalache v. Hilton International Co. ( bomb explosion at London hotel; necessary witnesses and view of accident scene in London; motion to dismiss granted ); Sarfaty v. Rainbow Helicopters, Inc. ( witnesses to helicopter accident located in Canada )] and decide whether there are alternative

forms of evidence which will make the witness's presence unnecessary such as dispositions, video presentations and sworn statements [ Delarosa v. Holiday Inn ( guest falls at North Carolina hotel; testimony of New York medical witnesses may be videotaped; motion to transfer to North Carolina granted ); Broussard v. Deauville Hotel Resorts, Inc. ( guest falls in Miami hotel; motion to transfer granted; medical witnesses may testify via video deposition ); Bruemmer v. Marriott Corp. ( admissions, video tapes, models, photographs acceptable alternative evidence )]. Foreign witnesses may [ MacLachlin v. Marriott Corp. ( Egyptian bell captain could be ordered to appear at trial in New York by resident employer hotel corporation ) or may not Gianocotas v. Interface Group<sup>37</sup>, be compelled by a U.S. Court to appear for depositions or a trial].

### **Choice of Law And Court Congestion**

If the case involves the application of foreign law then the Court may wish to consider whether a foreign court would not be in better position to interpret its own law [ Mercier v. Sheraton International, Inc. ( contract dispute; difficulty in

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<sup>37</sup>Gianocotas v. Interface Group, 450 Mass. 715, 2008 WL 483766 ( Mass. Sup. 2008 ) ( " Judicial notice may be taken of the likely fact that witnesses on this issue would be Dominican residents and...neither the parties nor a Massachusetts court can compel their testimony " ).

interpreting Turkish law one reason for dismissal ); Rudisill v. Sheraton Copenhagen Corp. ( fall in Danish hotel bathtub; Danish courts better able to apply Danish law ); Carnival Cruise Lines, Inc. V. Oy Wartsila AB ( contract dispute; Finnish courts better able to interpret Finnish law )]. Another factor which a Court may consider is the extent to which the transferee Court is able to handle the case sent to it. In Bhatnagar v. Surrendra Overseas, Ltd. the Court refused to transfer a case to the Calcutta High Court in India because there were only two Judges available to handle a backlog of 156,477 pending cases. Describing the Indian court as " almost on the verge of collapse " the Court concluded that it was not " available " in any practical sense [ see also: Schechter v. Tauck Tours, Inc. ( Hawaii courts less congested than those in New York; motion to transfer to Hawaii granted )].

### **Forum Selection Clauses**

It is quite common for travel suppliers to insert a clause into their consumer contracts requiring dissatisfied customers to file lawsuits in a specific forum, typically, one which is convenient for the travel supplier but not for the consumer. Such clauses can have a dramatic effect upon the consumer's enthusiasm in prosecuting his or her claim. Stated, simply, the further away

the Court is the less likely it is that the aggrieved consumer will file a lawsuit. This is because the cost of traveling to a distant court house and the cost of retaining out of state and, particularly, out of country attorneys [ no contingency fee arrangements in most foreign jurisdictions ] is too great to justify serious litigation. And this is, of course, the very reason why forum selection clauses are so popular with travel suppliers.

### **Forum Selection Clauses : Cruiselines**

Forum selection clauses are used by cruiselines [ Carnival Cruise Lines, Inc. v. Shutte ( Florida forum selection clause enforced ); Heinz v. Grand Circle Travel, ( passengers sustained injuries from malfunctioning doors aboard Blue Danube cruise ship on the Rhine in Germany; travel contract contained clause " all claims...must be litigated in Basel, Switzerland " ); Moeller v. Cruiseshipcenters ( Washington forum selection clause enforced ); Effron v. Sun Line Cruises, Inc. ( Greek forum selection clause enforced ); Hodes v. SNC Achille Lauro ( Naples forum selection clause enforced )].

Recently, two major cruiselines have drafted and implemented a forum selection clause that not only requires that all lawsuits be brought in a specific forum but that the lawsuit

must be brought in a U.S. District Court. The enforcement of what amounts to a " sovereign selection clause " may have the effect of eliminating jury trials otherwise available in state court<sup>38</sup>.

### **Forum Selection Clauses : Hotels & Resorts**

Forum selection clauses are used by hotels [ Doe v. Sun International Hotels, Ltd. ( female guest raped at hotel; Bahamas forum selection clause in guest registration form signed by minor guest's step father not enforced; void by reason of guest reaching age of majority; Decker v. Circus Circus Hotel ( Nevada forum selection clause enforced; combination of an interactive Web site with a forum selection clause negates any intent of being haled into a local courtroom )].

### **Forum Selection & Arbitration Clauses : Tour Operators**

Forum selection clauses are used by tour operators [ Shea v. Global Travel Marketing, Inc. ( estate of child tourist on safari

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<sup>38</sup> Travel Law at 3.02[2][b][iv]; See Eriksen, U.S. Maritime Public Policy Versus Ad-Hoc Federal Forum Provisions In Cruise Tickets, Fla. B.J., Dec. 2006, p. 21.

killed by hyenas bound by contract clause requiring arbitration of disputes in Fort Lauderdale, Florida ); Cameron v. Group Voyagers, Inc.<sup>39</sup> ( tour bus accident in Venice involving British passengers who entered into travel contract with British tour operators providing that " any dispute...will be dealt with under the ABTA Arbitration Scheme or by the Court of England and Wales only "; enforceability based upon U.S. law although the application of British law may have been appropriate ); Milgrim v. Backroads, Inc. ( bike tour accident in France; clause in travel contract providing arbitration in California enforced ); Sachs v. TWA Getaway Vacations, Inc. ( tour participant contract stated that " Any litigation concerning the trip may be brought only within the state of Missouri and nowhere else, and Missouri law will be applicable to any and all such litigation " ); Rodriguez v. Class Travel Worldwide ( minor tourist injured after being pushed into hotel pool; California forum selection clause in tour operator's registration form enforced ); Paster v. Putney Student Travel, Inc. ( tourist contracted oral yeast infection on the Blackfeet Indian Reservation in Montana during a " sweat ceremony ", one portion of which included the passing of a tobacco filed pipe; Vermont forum selection clause in tour participant contract enforced )].

## **Conclusion**

In litigating a travel law case involving accidents in a foreign jurisdiction counsel should carefully consider how the travel services were marketed and the presence of forum selection, arbitration and choice of law clauses in the travel contract in an effort to fashion a complaint which can be brought in and remain in the Courts of the United States.