

FORUM NON CONVENIENS & FORUM SELECTION CLAUSES : TRAVEL ABROAD, SUE AT HOME 2008

Prepared for the Pennsylvania Bar Institute
Hospitality Law Seminar In Philadelphia, Pennsylvania

April 28, 2008

By Justice Thomas A. Dickerson¹

What Is Travel Law?

Travel Law involves the traveler's rights and remedies against airlines [domestic and international], cruises, trains, buses, rental car companies, hotels, resorts, casinos, theme parks, tour operators, travel agents, depository banks and surety companies arising from wrongful death, physical injury and/or a failure to deliver travel services promised and paid for.

¹Thomas A. Dickerson is an Associate Justice of the Appellate Division, Second Department of the New York State Supreme Court. Justice Dickerson is the author of Travel Law, Law Journal Press, 2008; Class Actions: The Law of 50 States, Law Journal Press, 2008; Article 9 of 3 Weinstein, Korn & Miller, New York Civil Practice CPLR, Lexis-Nexis (MB), 2008 and over 250 articles on consumer law, class actions, travel law and tax certiorari.

Before I became a Judge I prosecuted many lawsuits against airlines, cruise lines, railroads, hotels, tour operators, travel agents, escrow banks, surety and insurance companies and the Civil Aeronautics Board for a variety of travel problems including hotel " bait & switch " schemes, improper handling of airline baggage claims, misrepresented services, facilities and food available at hotels and resorts, theft and conversion of charter tour participant deposits, misrepresented History Book Club tours, failing to enforce federal tour operator regulations, port skipping during a Caribbean cruise, flight delays and cancellations, death or physical injuries arising from a train crash, a bus crash, the contraction of typhoid fever, a delayed flight with cabin temperatures reaching 120 Degrees, an angry camel in Egypt, a wild horse in Mexico, unsafe snorkeling during a bird watching tour of Costa Rica and a failure to provide a lifeguard at a beach in Puerto Rico, serving food during Passover which was not Glatt Kosher, failing to deliver tickets to the Super Bowl, failing to investigate the financial stability of a tour operator and airline ticket price fixing.

Travel Law: The Book

I still research and write about Travel Law including many

articles² and my Treatise, Travel Law, Law Journal Press, 2008, updated every six months.

Travel Abroad, Sue At Home

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 cruiseship³. 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 shifting⁴, jurisdiction [see our companion paper Long Arm Jurisdiction And The Internet], *forum non conveniens* and choice of law. This paper will discuss the doctrine of *forum non conveniens* and the enforceability of forum selection and mandatory arbitration clauses in travel consumer contracts.

² http://classactionlitigation.com/library/ca_articles.html

³ See Dickerson, The Modern Cruise Passengers Rights & Remedies 2006 at <http://classactionlitigation.com/library/cruise passengers rights remedies2006.html>

⁴ See Travel Law, 5.01[6] (discussion of how to shift liability from foreign travel suppliers such as hotels, resorts and tour companies to domestic franchisors, tour operators, travel agents and others).

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:

(1) Wrongful Death In

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

B] Nassau [Carlisle v. Ulysses Line, Ltd.(robbers ambush and murder cruise passenger on beach);

C] Bahamas [Chan v. Society Expeditions, Inc.(cruise passenger drowns while being transported from ship to shore for excursion);

D] Canada [Goldstein v. D.D.B. Needham (five adventure tourists killed during rafting accident);

E] Nunavut, Canada [Brunner v. Hampson⁵ (hunters
burned in fire);

F] Uganda [Haubner v. Abercrombie & Kent
International, Inc⁶. (tourists abducted from safari tents and

⁵ Brunner v. Hampson, 411 F. 3d 457 (6th Cir. 2006)
(" Defendant Canada North is an international booking agent and
outfitter providing sport hunting excursions...Moore, a resident
of Ohio, was contacted by...a ` booking agent ` ...regarding a
muskox hunt to be offered by Canada North in 2001...Moore then
booked the hunt for himself, Brunner and Hampson...Canada North
used a cabin in the Ellice River in the Province of Nunavut...On
August 26, 2001, Jerry Hampson, while in the cabin placed a pot
on a Coleman stove and it caught fire. Hampson then grabbed a
container with clear liquid which he threw on the flames. The
liquid, however, was naphtha, a highly flammable substance, which
caused an explosion. The cabin caught fire...Hampson died and
plaintiffs...suffered severe burns. A fire investigation
concluded that (1) the hunting party was accommodated in an
inadequate hunting camp that was neither inspected nor licensed
for commercial operation, (2) camp safety orientation was not
provided, (3) portable fire extinguishers were not provided and
(4) the Coleman camp stove was operated contrary to the
manufacturer's instructions ").

⁶ 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 ").

murdered by rebels)].

G] Botswana [Shea v. Global Travel Marketing, Inc⁷.
(mauled and killed by hyenas)].

(2)Assaulted In

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

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)];

D] St. Thomas [Manahan v. NWA, Inc. (tourist mugged

⁷Shea 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 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 ").

on walk to restaurant from hotel)].

(3) Raped, Sexually Assaulted Or Molested In

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

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

C] Jamaica [Girden v. Sandals International⁸,
(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)];

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

⁸Girden 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 ").

E] St. Thomas [Flanagan v. Wyndham International, Inc.⁹ (children molested in hotel day care facility)]

(4) Robbed In

A] Puerto Rico [Gillmore v. Caribbean Cruise Line (

⁹Flanagan 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 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 ").

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)];

(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

Kamae 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.¹⁰, (jet ski accident); Walker v. Wedge Hotel¹¹, (para-sailing accident); Rodriquez v. Class Travel

¹⁰Yurchak v. Atkinson & Mullen Travel, Inc., 2006 WL 3076675 (3rd 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 ").

¹¹Walker 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 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 ").

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, Inc¹². (boating accident in Gamba lagoon)];

¹²Irwin 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 ").

L] Indonesia [Lee v. Choice Hotels International, Inc.¹³ (near drowning in hotel pool in Indonesia)].

M] Aruba [Crawley v. Marriott Hotels, Inc¹⁴. (near drowning)];

N] Turks & Caicos [Welch-Rubin v. Sandals Corp¹⁵.
(shoulder injury boarding boat)].

¹³Lee 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 ").

¹⁴Crawley 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 ' ").

¹⁵Welch-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 the Beaches Resort which Plaintiff...injured her shoulder while attempting to board a boat ");

(6) Slip & Falls In Jamaica [Hofer v. The Gap, Inc¹⁶. (guest falls into turtle pond at hotel after flip flop breaks)].

(7) On The Beach In Aruba [Leinhart v. Caribbean Hospitality Services, Inc¹⁷. (hotel guest lying on beach in lounge chair and struck by truck)].

¹⁶Hofer 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 ");

¹⁷Leinhart & Caribbean Hospitality Services, Inc., 426 F. 3d 1337 (11th 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 beach ").

(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.¹⁸ (horse riding accident)];

F] Namibia [Hall v. Voyagers International Tours, Inc¹⁹ (tourist trampled by wild elephant)].

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

A] Vietnam [Pearl Cruises v. Cohon (cruise passengers

¹⁸Courbat v. Dahano Ranch, Inc., 141 P. 3d 427 (Hawaii Sup. 2006)(consumers purchased tour through " Island 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 ").

¹⁹Hall 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 ").

injured in automobile accident during shore excursion)];

B] Morocco [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 unlicensed 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.²⁰
(tour van accident in Peru)];

²⁰ 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) ").

M] Dominican Republic [Lang v. Corporacion De Hoteles,

SA²¹ (golf cart struck by truck)];

²¹Lang 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 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 ").

(10) Driving A Rental Car In

A] Bahamas [Sadkin v. Avis Rent A Car System, Inc.
(rental car accident)];

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 Service²² ((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)];

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

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

²²Rizzutti 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 ").

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, SA²³ (diabetic tourist misdiagnosed at hotel and

²³Gianocostas 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 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

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 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)].

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 ").

Foreign Substantive Law

The law may be less sympathetic²⁴ 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. (tourist struck by motor boat while swimming; Dominican Republic does not recognize product liability claims)];

²⁴If 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.

Gianocostas v. Interface Group²⁵ (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. (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

²⁵ Gianocostas 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 ").

\$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 Group²⁶ (dismissal conditioned on various waivers); Chhawchharia v. The Boeing Co. (dismissal subject to defendant 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,

²⁶ 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 ").

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 Group²⁷; Dunham v. Hotelera Canco, S.A. (snorkeling accident in Mexico; witnesses not subject to subpoena power of 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

²⁷ 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 ").

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 Group²⁸, 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 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

²⁸Gianocotas 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 ").

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 court²⁹.

²⁹Travel 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.

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 killed by hyenas bound by contract clause requiring arbitration of disputes in Fort Lauderdale, Florida); Cameron v. Group Voyagers, Inc.³⁰ (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

30

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.