

# TRAVEL ABROAD SUE AT HOME 2009

## A STUDY OF *FORUM NON CONVENIENS* AND THE ENFORCEMENT OF FORUM SELECTION CLAUSES, CHOICE OF LAW CLAUSES AND MANDATORY ARBITRATION CLAUSES IN TRAVEL CONTRACTS

[ This Paper May Not Be Reproduced Without The Permission Of Thomas A. Dickerson ]

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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>.

Such cases raise a variety of complex liability and procedural issues including jurisdiction, *forum non conveniens*, choice of law and the enforcement of forum selection, choice of law and mandatory arbitration clauses in travel contracts. Travel accident claims may involve

*Wrongful deaths* in:

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<sup>2</sup> See Dickerson, The Modern Cruise Passenger's Rights And Remedies, New York State Bar Association Journal, Vol. 79, No. 3 ( March/April 2007 ); No. 5 ( June 2007 ); Dickerson, The Modern Cruise Passengers Rights & Remedies 2006 at [www.classactionlitigation.com/library/cruisepassengersrightsremedies2006.html](http://www.classactionlitigation.com/library/cruisepassengersrightsremedies2006.html); Dickerson, The Cruise Passenger's Dilemma: Twenty-First-Century Ships, Nineteenth Century Rights, 28 Tulane Maritime Law Journal 447-517, No. 2, Summer 2004.

## India<sup>3</sup>

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<sup>3</sup> 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 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 “ ).

Pakistan<sup>4</sup>

Chile<sup>5</sup>

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<sup>4</sup> Bradsher, Analysts Say It Will Be Difficult to Shield Luxury Hotels From Terrorist Attacks, The New York Times, nytimes.com, December 1, 2008 ( “ For decades, luxury hotels have been an oases for travelers in developing countries, places to mingle with the local elite, enjoy a lavish meal or a dip in the pool and sleep in a clean, safe room. But last week’s lethal attack on two of India’s most famous hotels—coming just two months after a hugh truck bomb devastated the Marriott in Islamabad, Pakistan-have underlined the extent to which these hotels are becoming magnets for terrorists. Worse, hotel executives and security experts say that little can be done to stop extensively trained gunmen with, military assault rifles and grenades who launch attacks like the ones that left this city’s Oberoi and Taj Mahal Palace & Tower strewn with bodies “ ).

Egypt: Niv v. Hilton Hotels Corporation<sup>6</sup>;

Guidi v. Inter-Continental Hotels Corp<sup>i</sup> (guests murdered in hotel restaurant by terrorists ).

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<sup>5</sup>The danger to cruise passengers of participating in shore excursions was recently demonstrated when twelve cruise passengers were killed during a stop over in Chile. The passengers were part of " 64-member B'nai B'rith group that was traveling aboard the cruise ship Millennium...( who ) had made a side excursion to see the mountains on a tour bus that tumbled more than 300 feet down a mountainside " [ Parry, Dead, Injured in Chilean Bus Crash Return Home, The Journal News, p. 7B ( March 25, 2006 )].

<sup>6</sup>Niv v. Hilton Hotels Corporation, 2008 WL 4849334 ( S.D.N.Y. )( " This action arises out of the tragic events that took place on October 7, 2004 at the Hilton Taba Hotel in Taba City, South Sinai, Egypt when a terrorist drove a vehicle with explosives into the lobby of the hotel, causing an explosion and the hotel's collapse. Plaintiffs are 157 individuals who were guests or whose decedents were guests of the Hilton Taba Hotel on October 7, 2004. Plaintiffs contend that the Hilton Taba Hotel is 'a long-favored holiday destination ' for Israelis and that the hotel markets to Israeli tourists " ).

Canada: Brunner v. Hampson<sup>7</sup>.

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<sup>7</sup> Brunner v. Hampson, 441 F. 3d 457 ( 6<sup>th</sup> 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 “ ).

Uganda: Haubner v. Abercrombie & Kent International, Inc<sup>8</sup>.

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<sup>8</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 “ ).

Botswana: *Shea v. Global Travel Marketing, Inc.*<sup>9</sup>

Austria: *In re Ski Train Fire In Kaprun Austria On November 11, 2000*<sup>10</sup>.

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<sup>9</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 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>10</sup> *In re Ski Train Fire In Kaprun Austria On November 11, 2000*, 499 F. Supp. 2d 437 ( S.D.N.Y. 2007 )(“ These cases arise from a disaster that occurred on November 11, 2000 in which a ski train in Kaprun, Austria caught fire, killing 155 people “).

Dominican Republic: Perez-Lang v. Corporacion De Hoteles, SA<sup>11</sup>.

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<sup>11</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 “ ).

Aruba: Vlasic v. Wyndham International, Inc.<sup>12</sup>

Greece: Clerides v. Boeing Company<sup>13</sup>.

St. Marten: Phillips v. Talty<sup>14</sup>.

Brazil: In re Air Crash Near Peixoto De Azeveda, Brazil<sup>15</sup>.

Russia: Esheva v. Siberia Airlines<sup>16</sup>.

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<sup>12</sup> Vlasic v. Wyndham International, Inc., 451 F. Supp. 2d 1005 ( C.D. Ill. 2006 )( guest in lounge chair at hotel in Aruba killed when palm tree fell on him ).

<sup>13</sup> Clerides v. Boeing Company, 534 F. 3d 623 ( 7<sup>th</sup> Cir. 2008 ) ( commercial aircraft “ scheduled to fly from Larnaca, Cyprus to Athens, Greece...After takeoff, the aircraft failed properly to pressurize. As a result, the crew and passengers lost consciousness and asphyxiated; the plane crashed near Athens, Greece, when it ran out of fuel “ ).

<sup>14</sup> Phillips v. Talty, 555 F. Supp. 2d 265 ( D.N.H. 2008 ) ( car accident in St. Martin; “ The notion that New Hampshire’s interest in providing redress for injuries caused by one of its residents somehow outweighs St. Martin’s interest at providing redress for the death of an infant resident of the island caused by the criminal negligence of a visiting foreigner strikes the court as counterintuitive “ ).

<sup>15</sup> In re Air Crash Near Peixoto De Azeveda, Brazil, 2008 WL 4093568 ( E.D.N.Y. 2008 )( Brazilian passengers killed when commercial aircraft “ crashed into the Amazon rainforest” ).

<sup>16</sup> Esheva v. Siberia Airlines, 499 F. Supp. 2d 493 ( S.D.N.Y.. 2007 )( “ While 79 passengers and crew members survived the crash, 124 died. Sixteen of the passengers were residents of countries other than Russia but none were U.S. residents “ ).

See also: Harakas & Alexander, Forum Non Conveniens and the Montreal Convention, For The Defense, June 2008, p. 46 ( “ More and more aviation claims are being brought in the United States, especially for extraterritorial air crashes, regardless

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of whether the accident has any meaningful contact with the United States forum...The reasons for his increase...are clear (1) there are many highly experienced aviation lawyers in the United States willing to handle such cases on a contingency basis and (2) recoveries in the United States are perceived to be significantly more generous than in other countries “ ).

Kenya: Rizzutti v. Basin Travel Service<sup>17</sup>.

Bahamas: Walker v. Wedge Hotel<sup>18</sup>.

*Assaults in:*

Puerto Rico: Woods-Leber v. Hyatt Hotels of Puerto Rico<sup>ii</sup>

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<sup>17</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 “ ).

<sup>18</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 [ due to ] 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 “ ).

(mongoose attacks guest sunbathing at hotel pool).

Jamaica: Schreiber v. Camm<sup>iii</sup> (guests at Jamaican vacation estate shot by security guard).

St. Thomas: Manahan v. NWA, Inc.<sup>iv</sup> (tourist mugged on walk to restaurant from hotel).

*Rapes, sexual assaults and molestations in:*

Galapagos Islands: O'Keefe v. Inca Floats, Inc<sup>v</sup> (sexual assault during cruise to Galapagos Islands).

Bahamas: Doe v. Sun International Hotels, Ltd<sup>vi</sup> ( guest raped at resort ).

Jamaica: Girden v. Sandals International<sup>19</sup>; Catalano v. NWA, Inc<sup>20</sup>; Creteau v.

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<sup>19</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 “ ).

Liberty Travel, Inc<sup>vii</sup> ( tourist raped and robbed in Jamaica ).

Cayman Islands: Wilson v. Humphreys Cayman Ltd.<sup>viii</sup>( guest raped at hotel ).

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<sup>20</sup> Catalano v. NWA, Inc., 1998 WL 777023 ( D. Minn. 1998 )  
( tourist raped during sailing excursion on a two-person sunfish sailboat ).

St. Thomas: Flanagan v. Wyndham International, Inc<sup>21</sup>.

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<sup>21</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 [ action ] 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

*Robberies in:*

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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 “ ).

Kenya: Dow v. Abercrombie & Kent<sup>ix</sup> (tourists on safari assaulted and robbed by bandits while camping in the Ololo Escarpment in the Masai Mara reserve).

Puerto Rico: Gillmore v. Caribbean Cruise Line<sup>x</sup>( cruise passengers robbed and stabbed on pier ).

Grand Bahamas: Fling v. Hollywood Travel and Tours<sup>xi</sup>  
( tourist shot and robbed ).

*Water Sports Accidents in:*

Mexico: Colvin v. Van Wormer Resorts, Inc.<sup>22</sup>; Elayyan v. Sol Melia, SA<sup>xii</sup>( tourist injured in hotel's swimming pool ); Gardemal v. Westin Hotel Company<sup>xiii</sup> (tourist drowns snorkeling off of Lovers' Beach); Yurchak v. Atkinson & Mullen Travel, Inc.<sup>23</sup>; Walker v.

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<sup>22</sup> Colvin v. Van Wormer Resorts, Inc., 2008 WL 5245987 ( D.N.J. 2008 )( fishing accident at Hotel Punta Colorado; “ while boarding a boat via a movable dock, Mary Colvin alleges that she stepped into a hole in the dock with her right foot. Her leg plunged through the break in the dock, up to her groin. Since only one leg broke through the dock, she fell into a painful split. Her body twisted and rusty nails punctured her leg in several spots “ ).

<sup>23</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

Wedge Hotel<sup>xiv</sup> (para-sailing accident ).

Hong Kong: Nowak v. Tak How Inc. Ltd. <sup>xv</sup> (guest drowns in hotel pool).

Bahamas: Miyoung Son v. Kerzner International Resorts, Inc.<sup>24</sup>;

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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>24</sup> Miyoung Son v. Kerzner International Resorts, Inc., 2008 WL 4186979 ( S.D.

Campbell v. Starwood Hotels & Resorts Worldwide, Inc.<sup>25</sup>

British Virgin Islands: Binder v. McVey<sup>26</sup>.

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Fla. 2008 )( tourist on excursion “ received severe and extensive injuries as a result of being pulled through the churning propellers of the excursion boat “).

<sup>25</sup> Campbell v. Starwood Hotels & Resorts Worldwide, 2008 WL 2844020 ( S.D. Fla. 2008 )( guest swimming struck by motorboat operated by Ocean Motion ).

<sup>26</sup> Binder v. McVey, 2007 WL 3391419 ( D.V.I. 2007 )( “ While on an around-the-world sailing trip, the McVeys...sailed the Seahorse to Jost Van Dyke, British Virgin Islands...In the early morning on January 1, 2004, while leaving a bar and restaurant on Jost Van Dyke, P. McVey was asked by several individuals, including plaintiff Heidi Binder, for a ride on his dinghy back to their boats...While P. McVey and...Binder were in the dinghy, the dinghy was struck by a motorboat. Binder sustained injuries in the collision “ ).

Gabon: Irwin v. World Wildlife Fund, Inc.<sup>27</sup>.

Turks & Caicos: O'Donnell v. Club Mediterranee, S.A.<sup>28</sup>; Welch-Rubin v. Sandals

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<sup>27</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 “ )

<sup>28</sup> O'Donnell v. Club Mediterranee, S.A., 2008 WL 794975 ( E.D.N.Y. 2008 )( “ At some point during the ( scuba diving ) excursion, plaintiff abandoned the dive and

Corp<sup>29</sup>.

Costa Rica: Mayer v. Cornell University<sup>xvi</sup>( bird watcher drowns while snorkeling off Il DeCano ).

Cayman Islands: Lehman v. Humphreys Cayman Ltd<sup>xvii</sup> ( tourist drowns in ocean ).

Hawaii: Rygg v. County of Maui<sup>xviii</sup>( hotel guest is paralyzed and rendered a quadriplegic in surfing accident off of Kamaoeele II Beach ).

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attempted to board the boat by climbing a side ladder, which provided access between the water and the boat...the ladder was slippery and the dive boat did not have a lookout on board to help plaintiff climb on board. Plaintiff slipped as she was trying to board the Bat Ray and suffered an ankle fracture, for which she was treated immediately by a physician in Turks & Caicos “ ).

<sup>29</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 the Beaches Resort which Plaintiff...injured her shoulder while attempting to board a boat “ ).

Jamaica: Torres v. International Hotels ( Jamaica ) Ltd<sup>30</sup>.

Taiwan: Sun v. Taiwan<sup>xix</sup>(tourist drowns during recreational visit to Ken-Ting National Park).

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<sup>30</sup> Torres v. International Hotels ( Jamaica ) Ltd., 2007 WL 2254929 ( S.D. Fla. 2007 )( plaintiff “ seeking relief for injuries sustained while vacationing at the Hedonism II Resort in Jamaica...she was injured while using Hedonism II’s water slide, a tube like structure which opens into a pool...immediately after exiting the slide and landing in the pool, an inebriated hotel guest crashed on top of her while she was still submerged underwater, injuring her head and neck and rendering her unconscious. Plaintiff further alleges that Hedonism II’s life guards made no attempt to aid or rescue her, that she was forced to seek medical attention on her own, and that, due to her injuries, she remained in bed in her hotel room for the next three days “ ).

Indonesia: Lee v. Choice Hotels International, Inc.<sup>31</sup>

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<sup>31</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 “ ).

Aruba: *Crawley v. Marriott Hotels, Inc*<sup>32</sup>.

*Slips, Trips, Falls & Food Poisoning* in:

Jamaica: *Hofer v. The Gap, Inc.*<sup>33</sup>.

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<sup>32</sup> *Crawley v. Marriott Hotels, Inc.*, 2006 WL 2331143 ( D. 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>33</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 conducted 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 “ ).

Aruba: Leinhart v. Caribbean Hospitality Services, Inc<sup>34</sup>.

Argentina: Morag v. Quark Expeditions, Inc.<sup>35</sup>

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<sup>34</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 beach “ ).

<sup>35</sup> Morag v. Quark Expeditions, Inc., 2008 WL 3166066 ( D. Conn. 2008 ) ( “ Plaintiff...who is a citizen and resident of Israel...were passengers aboard a cruise ship traveling from Antarctica to Argentina...During the ship’s two-day crossing of the Drake Passage, M. Morag fell and suffered extensive spinal and other injuries which have rendered him quadriplegic “ ).

Barbados: O'Connor v. Sandy Lane Hotel<sup>36</sup>.

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<sup>36</sup> O'Connor v. Sandy Lane Hotel, 496 F. 3d 312 ( 3d Cir. 2007 )( “ Mr. O'Connor was due for one of his massages. He went to the spa at the appointed time and the staff began to ‘ rejuvenate ‘ his ‘ mind, body and spirit ‘...As part of that process, a Sandy Lane employee instructed Mr. O'Connor to step into the shower and wash up. Unfortunately, Mr. O'Connor’s feet were still slick with massage oils, and there were no mats on the shower’s wet floor. As he stepped into the shower, Mr. O'Connor slipped, fell and tore his rotator cuff “ ).

Dominican Republic: Callista v. Inversora Internacional Hotelera, S.A.<sup>37</sup>.

*Riding accidents in:*

Egypt: MacLachlin v. Marriott Corporation<sup>38</sup> (camels).

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<sup>37</sup> Callista v. Inversora Internacional Hotelera, S.A., 2009 WL 137332 ( D.N.J. 2009 )( guest contracts food poisoning in Punta Cana ).

<sup>38</sup> MacLachlin v. Marriott Corporation, New York Law Journal, January 18, 1994, p. 29, col. 2 ( N.Y. Sup. 1994 )( “ Plaintiff and a friend...Yorke booked the Q8 Marriott Vacation Tour under Marriott’s Honored Guest’s Awards Program (HGA) which, inter alia, included air-fare to Egypt and a stay at the Cairo Marriott Hotel & Casino (the Cairo Marriott). Plaintiff and Yorke claim that upon arriving at the Cairo Marriott, they arranged to take various tours through the Marriott tour desk. Plaintiff alleges that on the morning of August 25, 1991, Abou Aziza (Aziza), the Cairo Marriott bell captain, stated that he could arrange a tour of the Sound and Light Show at the Pyramids that evening, to which the plaintiff and her companion agreed. Plaintiff contends that Aziza subsequently drove her and Yorke to a stable and informed them that a horse or camel were the only means available to reach the Pyramids. Plaintiff maintains that she explained to Aziza that she was afraid to ride a camel but was assured by Aziza that the camel and the camel path were ‘ perfectly safe ‘ and that a trained handler would guide the camel along the route. Plaintiff alleges that her camel was subsequently tied to Yorke’s camel and they were led down the trail by a young boy (the Camel Guide), a practice plaintiff avers was not in keeping with Egyptian law which requires one adult handler per camel. Plaintiffs claim that the path she was taken on was rocky, unlevel and strewn with debris, and that the Camel Guide continually beat the legs of both camels to prod them along. At some point, plaintiff avers that her camel stumbled and tripped, ‘ probably on some rocks or debris ‘ and with a loud cry the camel threw her into the air. Plaintiff landed on the rocky road where she remained until Aziza assisted her into his car and drove to the Pyramid Hospital. The fall allegedly caused plaintiff to break six ribs and fracture her pelvis...Even assuming that Aziza arranged the Pyramid Tour on his own accord, the allegations of plaintiff concerning how she was offered and subsequently booked the camel trip by the Bell Captain in the lobby of the Caro Marriott and subsequently driven to the camel stable in what appears to a an official Cairo Marriott car, in addition to Marriott’s brochures which promoted the Q8 vacation and lauded the preferential treatment plaintiff and her companion would receive, raise factual issues as to whether defendant should be estopped from disclaiming liability for the negligence of an independent contractor...and as to whether that contractor’s negligence was the proximate cause of plaintiff’s injuries. Contrary to defendant’s contention, the question is

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not whether plaintiff was a sophisticated traveler and was at fault, but, rather was the employee of Marriott's subsidiary negligent in the performance of his official duties and whether such duties included the planning, arranging and booking of the ill-fated camel ride to the Pyramids “ ).

Bahamas: Tucker v. Whitaker Travel, Ltd.,<sup>xx</sup> (horses).

Hawaii: Courbat v. DaHano Ranch, Inc.<sup>39</sup> (horses).

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<sup>39</sup> Courbat 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 “ ).

Namibia: Hall v. Voyagers International Tours, Inc<sup>40</sup> (wild elephants).

*Riding In Tour Buses, Limos, Taxis & Golf Carts in:*

Vietnam: Pearl Cruises v. Cohon<sup>xxi</sup> (cruise passengers injured in automobile accident during shore excursion).

Scotland: Ramage v. Forbes International, Inc.<sup>xxii</sup> (tour bus accident).

Mexico: Stromberg v. Marriott International, Inc.<sup>41</sup>

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<sup>40</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 “ ).

<sup>41</sup> Stromberg v. Marriott International, Inc., 2007 WL 4165428 ( D.C. Cir. 2007 ) ( “

Mississippi: Wilson v. Ameristar Casino Vicksburg, Inc.<sup>42</sup>

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Appellant is a Norwegian citizen alleging claims arising from a taxi cab accident that occurred in Mexico while riding in a cab driven by a Mexican national and owned by a Mexican company “ ).

<sup>42</sup> Wilson v. Ameristar Casino Vicksburg, Inc., 2007 WL 2284608 ( W.D. La. 2007 ) ( casino customer served alcohol sustains injuries in automobile accident ).

Jamaica: Tracy v. VRL Operators, Ltd.<sup>43</sup>

Peru: Vermeulen v. Worldwide Holidays, Inc.<sup>44</sup>;

Dominican Republic: Lang v. Corporacion De Hotels, SA<sup>45</sup>.

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<sup>43</sup> Tracy v. VRL Operators, Ltd., Case No: 50 2006 CA 005719, Fla. Cir. Ct. Palm Beach Cty ( Jan. 29, 2008 )( after stay at Hedonism III in Ocho Rios, Jamaica tourist injured in tour bus accident; Jamaica forum selection and choice of law clauses not enforced ).

<sup>44</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 a van with a driver who proceeded to have an accident causing injuries to Vermeulen ) “ ).

<sup>45</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 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

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1802 to hold MK...liable for the injuries suffered by plaintiffs “ ). See also Perez-Lang v. Corporacion De Hoteles, SA, 2008 WL 4181334 ( S.D. Fla. 2008 )( motion seeking dismissal on the grounds of forum non conveniens granted )

*Driving A Rental Car in:*

Virgin Islands: Poe v. Budget Rent A Car System, Inc.<sup>46</sup>

Mexico: Chung v. Chrysler Corp.<sup>xxiii</sup> ( students killed in rental car crash ).

Italy: Travajla v. Maieliano Tours<sup>xxiv</sup> (rental car accident).

Rumania: Kermisch v. Avis Rent-A-Car<sup>xxv</sup> (tourists arrested in Rumania for mistreating their rental vehicle).

*Riding In Airplanes:*

China: Barkanic v. General Administrator of Civil Aviation<sup>xxvi</sup> (tourist killed in airplane crash during tour).

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

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<sup>46</sup> Poe v. Budget Rent A Car System, Inc., 2006 WL 2161865 ( D. Md. 2006 )( rental car accident; case transferred to U.S. District Court for District of Virgin Islands ).

### **Suing At Home Is Better**

The best strategy, of course, in litigating on behalf of injured travelers is to sue available defendants in the United States. The worst strategy is being forced to sue in a foreign jurisdiction where the accident occurred. From the tourist's standpoint safety standards may be lower [ *Wilson v. Best Travel*<sup>xxix</sup> (tourist falls through weak plate glass window in Athens hotel; plate glass thickness standards lower in Greece than in England where tourist resided); *Knoell v. Cerkenik-Anderson Travel, Inc.*<sup>xxx</sup> (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) and the quality of medical care may be much lower [ *Gianocostas v. RIU Hotels*<sup>47</sup> ].

### **Not A lot Of Sympathy**

From counsel's standpoint the law may be less sympathetic to the injured traveler in

Egypt: *MacLachlin v. Marriott Corporation*<sup>xxxi</sup> (tourist thrown from angry camel in Egypt; " an Egyptian forum which is based partially on Koranic law would be unduly harsh

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<sup>47</sup> *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 ).

to plaintiff " ).

France: In Re Air Crash Off Long Island, New York<sup>xxxii</sup> (air crash; France does not allow punitive damages).

Dominican Republic: Gianocostas v. RIU Hotels SA<sup>xxxiii</sup>  
(diabetic tourist misdiagnosed in Dominican Republic).

Turkey: Mercier v. Sheraton International, Inc.<sup>xxxiv</sup> (contract dispute; Turkey may not recognize claims for breach of contract or tortious interference with contract).

China: Barkanic v. General Administration of Civil Aviation<sup>xxxv</sup> (air crash; maximum recoverable damages limited to \$20,000).

### **No Juries; No Contingency Fees**

In addition, foreign procedural law may be very different in, among other things, barring contingency fee arrangements with attorneys and jury trials in

Bermuda: Bruemmer v. Marriott Corp.<sup>xxxvi</sup> (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).

Bahamas: Doe v. Sun International Hotels, Ltd.<sup>xxxvii</sup>

(18 year old female guest raped at hotel; no jury trials or contingency fees in Bahamas).

France: In Re Air Crash Off Long Island, New York<sup>xxxviii</sup> (France does not allow contingency fee arrangements).

Cayman Islands: Wilson v. Humphreys Cayman Ltd.<sup>xxxix</sup>

(rape at hotel; no contingency fees or jury trials in Cayman Islands).

Jamaica: Reid-Walen v. Hansen<sup>xl</sup> (motorboat accident; no contingency fees or jury trials in Jamaica).

England: Neville v. Anglo American Management<sup>xli</sup> (tour bus accident; no contingency fees or jury trials in England).

Israel: Gyenes v. Zionist Organization of America<sup>xlii</sup> (student drowned in Jordan River; no right to jury trial in Israel).

### **Is The Forum Selected Convenient?**

In response to a lawsuit brought in the U.S. the defendants may seek to dismiss the lawsuit because the U.S. forum selected is not convenient 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 or may be subject to mandatory arbitration or requires the application of the law of a particular forum.

### **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. 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.*<sup>xliii</sup> (contract dispute; difficulty in interpreting Turkish law one reason for dismissal); *Rudisill v. Sheraton Copenhagen Corp.*<sup>xliiv</sup> (fall in Danish hotel bathtub; Danish courts better able to apply Danish law); *Carnival Cruise Lines, Inc. v. Oy Wartsila AB*<sup>xliv</sup> (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 [ *Niv v. Hilton Hotels Corporation*<sup>48</sup>; *Gianocotas v. Interface Group*<sup>49</sup>; *Chhawchharia v. The Boeing*

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<sup>48</sup> *Niv v. Hilton Hotels Corporation*, 2008 WL 4849334 ( S.D.N.Y. )( “ This dismissal is conditioned upon defendants appearing and defending these allegations on the merits, without raising statute of limitations defenses “ ).

Co.<sup>xlvi</sup> (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.<sup>xlvii</sup> (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).

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

Although it is not dispositive [ Piper Aircraft Co. v. Reyno<sup>xlviii</sup> ( 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.<sup>xlix</sup> (murder in Egyptian hotel; " the choice of an American court over a foreign court should be given the heightened deference ")].

### **Advertising In The Forum**

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<sup>49</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

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*<sup>i</sup>, 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.*<sup>ii</sup> 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.

### **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 "<sup>iii</sup>. 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, allows contingency fee arrangements with attorneys, provides for jury trials and limits recoverable damages and may be biased

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effect to such waivers " ).

[ Niv v. Hilton Hotels Corporation<sup>50</sup> ].

### **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 [ *Mastrondrea v. Occidental Hotels Management*<sup>liii</sup> (“ the Hotel points to Mexico as the locus of the accident...it also addresses the fact that Mexican witnesses are not within the subpoena power of the New Jersey courts and its notes the language difference between Mexico and the United States...”); *Loya v. Starwood Hotels & Resorts*<sup>liv</sup> (“ Mr. Loya’s death and the activities leading up to his accident, occurred in Mexico. A trial of that action will

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<sup>50</sup> *Niv v. Hilton Hotels Corporation*, 2008 WL 4849334 ( S.D.N.Y. )( “ the Court is unable to find Egypt to an inadequate forum for these claims. While the Court does not believe that the extensive number of articles and reports cited in plaintiffs’ papers detailing anti-Semitic and anti- Israeli sentiments can be dismissed as ‘ unsubstantiated and wholly insufficient ‘ , the Court cannot assume that Egyptian courts are unable to ignore the biases that might exist in the country and even in the legal profession. Moreover, plaintiffs have not pointed to any hostility targeted at this litigation or individuals connected with this case. Plaintiffs’ arguments rest entirely on general biases and dangers within Egypt “ ).

require evidence from people who were present before, during and after Mr. Loya's accident...Those sources of proof are predominantly located in Mexico “ ); Perez-Lang v. Corporacion De Hoteles, SA<sup>lv</sup> ( “ The Defendants have established that the courts in the Dominican Republic have subpoena power over individuals and documentary evidence...many of these witnesses are not within the employ of the Defendants, meaning they are outside the compulsory process of this Court ”); Miyong Son v. Kerzner International Resorts, Inc.<sup>lvi</sup> ( “ most of the relevant witnesses are not employees of the Kerzner Defendants... but this Court cannot effectively subpoena these foreign nationals residing in the Bahamas and compel them to appear before this Court “ )].

### **View Of The Premises**

The defendant may also assert that the jury must have a view of the accident scene [ Niv v. Hilton Hotels Corporation<sup>51</sup>; Perez-Lang v. Corporacion De Hoteles, SA<sup>lvii</sup> ( “ this Court notes that the instant action is one in which such a visit to the accident scene might be beneficial due to the nature of the complaint ( e.g., the location and design of the roads at the Resort. A series of photographs of the Resort might be a sufficient substitute but an in-person viewing might be deemed necessary “); Campbell v. Starwood Hotels & Resorts Worldwide, Inc.<sup>lviii</sup> ( guest swimming struck by motorboat operated by Ocean Motion; “

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<sup>51</sup> Niv v. Hilton Hotels Corporation, 2008 WL 4849334 ( S.D.N.Y. )( “ The Hilton asserts that an Egyptian court would be in better position to direct and supervise a viewing of the Hilton Taba Hotel...Defendants further argue that they would be severely prejudiced in their ability to defend the allegations if the Court could not view the hotel...This argument carries little weight since the hotel has been rebuilt since the explosion “ ).

Defendants assert that the need for the trier of fact to view the premises... However...the accident occurred in the ocean off the beach where the Westin resort is located, so any viewing of the actual precise accident scene is likely to be difficult or impossible.

Photographs are available that show the location of the buoys at the time of the accident “); *Miyong Son v. Kerzner International Resorts, Inc.*<sup>lix</sup> (“ a view of the site of Mrs. Son’s accident is meaningless because the ‘ shifting sands are no longer as they were at the time of the accident ’”).

### **Alternative Forms Of Evidence & Costs**

The Court must examine the actual necessity of each listed witness and decide whether there are alternative forms of evidence which will make the witness's presence unnecessary such as depositions, video presentations [ *Mastrondrea v. Occidental Hotels Management* <sup>lx</sup> (“ should it be relevant to the Hotel in defending the action, it is free to make an accurate videotape of the steps upon which plaintiff fell and to show that videotape to the jury ”) and sworn statements. In addition the Court must consider the costs involved [ *O’Donnell v. Club Mediterranee, S.A.*<sup>lxi</sup>(guest at Club Med in Turks & Caicos slipped trying to board boat and suffered ankle fracture; “ As a threshold matter defendants are large companies with vast resources, rendering it unlikely that the expense of ( witness ) travel would be particularly burdensome to them...as defendants are in the business of recreational travel, it would seem that arranging his transportation here would be a very

slight burden at most “ ), the language of the reports and records [ Phillips v. Talty<sup>lxii</sup> ( car accident in St. Martin; “ all of the pertinent reports and records generated out of the investigation and medical treatment are in French, the language in which French Courts located in St. Martin conduct their proceedings, and which the vast majority of witnesses in this case speak “ ) and the application of the Hague Evidence Convention [ De Arellano v. Starwood Hotels & Resorts Worldwide, Inc.<sup>lxiii</sup> ( “ Spain is a signatory to the Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters...and the protocols under that treaty can be used to obtain evidence “).

### **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. Forum selection clauses are used by

Cruiselines: Carnival Cruise Lines, Inc. v. Shutte<sup>lxiv</sup> (Florida forum selection clause enforced); Lischinskaya v. Carnival Corporation<sup>lxv</sup> ( federal forum selection clause enforced ); Heinz v. Grand Circle Travel<sup>lxvi</sup>, (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 “ );

Hotels: Ward v. Kerzner International Hotels Limited<sup>lxvii</sup> (guest injured riding bicycle; “the guest registration document is not ambiguous. It is apparent from the face of the document that each of the two forum selection clauses requires a signature. While the first forum selection clause pertains broadly to any claim against the defendants, the second clause pertains only to watersport activities. The defendant do not dispute that Mr. Ward’s accident had nothing to do with watersports. Since Mr. Ward did not sign or clearly accept the terms of the forum selection clause pertaining to the type of accident involved in this case ( forum non conveniens motion denied )”) and

Tour operators: Global Travel Marketing, Inc. v. Shea<sup>lxviii</sup> ( estate of child tourist on safari killed by hyenas bound by contract clause requiring arbitration of disputes in Fort Lauderdale, Florida; “ 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 the contract “).

## **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.

## **ENDNOTES**

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- i. Guidi v. Inter-Continental Hotels Corp. 203 F. 3d 180 ( 2d Cir. 2000 ).
- ii. Woods-Leber v. Hyatt Hotels of Puerto Rico, 1997 WL 476360 ( 1<sup>st</sup> Cir. 1997 ).
- iii. Schreiber v. Camm, 1994 WL 131611 ( D.N.J. 1994 ).
- iv. Manahan v. NWA, Inc., 821 F. Supp. 1105 ( D.V.I. 1992 ), recon. denied 821 F. Supp. 1110 ( D.V.I. 1992 ), aff'd 995 F. 2d 218 ( 3<sup>rd</sup> Cir. 1993 ).
- v. O'Keefe v. Inca Floats, Inc., 1997 U.S. Dist. LEXIS 17088 ( N.D. Cal. 1997 ).
- vi. Doe v. Sun International Hotels, Ltd., 20 F. Supp. 2d 1328 ( S.D. Fla. 1998 ).
- vii. Creteau v. Liberty Travel, Inc., 195 A.D. 2d 1012, 600 N.Y.S. 2d 576 ( 1993 ).
- viii. Wilson v. Humphreys Cayman Ltd., 916 F. 2d 1239 ( 7<sup>th</sup> Cir. 1990 ).
- ix. Dow v. Abercrombie & Kent, 2000 U.S. Dist. LEXIS 7290 ( N.D. Ill. 2000 ).
- x. Gillmore v. Caribbean Cruise Line, 789 F. Supp. 488 ( D.P.R. 1992 ).
- xi. Fling v. Hollywood Travel and Tours, 765 F. Supp. 1302 ( N.D. Ohio 1990 ).
- xii. Elayyan v. Sol Melia, SA, 2008 WL 2945456 ( N.D. Ind. 2008 ).
- xiii. Gardemal v. Westin Hotel Company, 186 F. 3d 588 ( 5<sup>th</sup> Cir. 1999 ).
- xiv. Walker v. Wedge Hotel, US Dist Ct. S.D. Fla. No. 01-3564 ( CIV-GOLD ), 27 ATLA Law Reporter 127 ( Sept. 3, 2002 ).
- xv. Nowak v. Tak How Inc. Ltd., 1995 WL 521874 ( D. Mass. 1995 ).
- xvi. Mayer v. Cornell University, 107 F. 3d 3 ( 2d Cir. 1977 ), cert. denied 1997 WL 336602 ( 1997 )( bird watcher drowns while snorkeling off Il DeCano ).
- xvii. Lehman v. Humphreys Cayman Ltd., 713 F. 2d 339 ( 8<sup>th</sup> Cir. 1983 ).
- xviii. Rygg v. County of Maui, 98 F. Supp. 2d 1129 ( D. Hawaii 1999 ).
- xix. Sun v. Taiwan, 1998 WL 738002 ( N.D. Cal. 1998 ), rev'd 201 F. 3d 1105 ( 9<sup>th</sup> Cir.

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2000 ).

xx. Tucker v. Whitaker Travel, Ltd., 620 F. Supp. 578 ( E.D. Pa. 1985 ), aff'd Mem. 800 F. 2d 1140 ( 3<sup>rd</sup> Cir. 1986 ), cert. denied 107 S. Ct. 578 ( 1986 ).

xxi. Pearl Cruises v. Cohon, 728 So. 2d 1226 ( Fla. App. 1999 ).

xxii. Ramage v. Forbes International, Inc., 1997 WL 785613 ( C.D. Cal. 1997 ).

xxiii. Chung v. Chrysler Corp., 1995 WL 669183 ( D.C.D.C. 1995 ).

xxiv. Travalja v. Maieliano Tours, 622 N.Y.S. 2d 961 ( N.Y.A.D. 1995 ).

xxv. Kermisch v. Avis Rent-A-Car, 71 A.D. 2d 790, 419 N.Y.S. 2d 793 ( 1979 ).

xxvi. Barkanic v. General Administrator of Civil Aviation, 923 F. 2d 957 ( 2d Cir. 1991 ).

xxvii. Abercrombie & Kent v. Carlson Marketing Group, 1989 U.S. Dist. LEXIS 4469 ( E.D. Pa. 1989 ).

xxviii. Rizzutti v. Basin Travel Service, 125 Wash. App. 602, 105 P. 3d 1012 ( 2005 ).

xxix. Wilson v. Best Travel, ( 1993 ) 1 All ER 353.

xxx. Knoell v. Cerkenik-Anderson Travel, Inc., 181 Ariz. 394, 891 P. 2d 861 ( 1994 ).

xxxi. MacLachlin v. Marriott Corporation, N.Y.L.J., Jan. 18, 1994, p. 29, col. 2 ( N.Y. Sup. 1994 ).

xxxii. In Re Air Crash Off Long Island, New York, 65 F. Supp. 2d 207 ( S.D.N.Y. 1999 ).

xxxiii. Gianocostas v. RIU Hotels, SA, 450 Mass. 715, 2008 WL 483766 ( Mass. Sup. 2008 ).

xxxiv. Mercier v. Sheraton International, Inc., 935 F. 2d 419 ( 1<sup>st</sup> Cir. 1991 ).

xxxv. Barkanic v. General Administrator of Civil Aviation, 923 F. 2d 957 ( 2d Cir. 1991 ).

xxxvi. Bruemmer v. Marriott Corp., 1991 U.S. Dist. LEXIS 2514 ( N.D. Ill. 1991 ).

xxxvii. Doe v. Sun International Hotels, Ltd., 20 F. Supp. 2d 1328 ( S.D. Fla. 1998 ).

xxxviii. In Re Air Crash Off Long Island, New York, 65 F. Supp. 2d 207 ( S.D.N.Y. 1999 ).

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- xxxix. *Wilson v. Humphreys Cayman Ltd.*, 916 F. 2d 1239 ( 7<sup>th</sup> Cir. 1990 ).
- xl. *Reid-Walen v. Hansen*, 933 F. 2d 1390 ( 8<sup>th</sup> Cir. 1991 ).
- xli. *Neville v. Anglo American Management*, 594 N.Y.S. 2d 747 ( N.Y.A.D. 1993 ).
- xlii. *Gyenes v. Zionist Organization of America*, 169 A.D. 2d 41 ( 1991 ).
- xliii. *Mercier v. Sheraton International, Inc.*, 935 F. 2d 419 ( 1<sup>st</sup> Cir. 1991 ).
- xliv. *Rudisill v. Sheraton Copenhagen Corp.*, 817 F. Supp. 443 ( D. Del. 1993 ).
- xlv. *Carnival Cruise Lines, Inc. v. Oy Wartsila AB*, 159 BR 984 ( S.D. Fla. 1993 ).
- xlvi. *Chhawchharia v. The Boeing Co.*, 657 F. Supp. 1157 ( S.D.N.Y. 1987 ).
- xlvii. *Diaz v. Mexicana de Avion, S.A.*, 20 CCH Aviation Cases 17,983 ( W.D. Tex. 1987 ).
- xlviii. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255, 102 S. Ct. 252 ( 1981 ).
- xlix. *Guidi v. Inter-Continental Hotels Corp.* 203 F. 3d 180 ( 2d Cir. 2000 ).
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- I. *Reid-Walen v. Hansen*, 933 F. 2d 1390 ( 8<sup>th</sup> Cir. 1991 ).
- li. *Nowak v. Tak How Inv. Ltd.*, 1995 WL 521874 ( D. Mass. 1995 ).
- lii. *Radigan v. Innisbrook Resort*, 142 N.J. Super. 419, 361 A. 2d 610 ( 1976 ), mod'd 150 N.J. Super. 427, 375 A. 2d 129 ( 1997 ).
- liii. *Mastrondrea v. Occidental Hotels Management*, 918 A. 2d 27 ( N.J. Super. A.D. 2007 ).
- liv. *Loya v. Starwood Hotels & Resorts*, 2007 WL 1991163 ( W.D. Wash. 2007 ).
- lv. *Perez-Lang v. Corporacion De Hoteles, SA*, 2008 WL 4181334 ( S.D. Fla. 2008 ).
- lvi. *Miyoung Son v. Kerzner International Resorts, Inc.*, 2008 WL 4186979 ( S.D. Fla. 2008 ).
- lvii. *Perez-Lang v. Corporacion De Hoteles, SA*, 2008 WL 4181334 ( S.D. Fla. 2008 ).
- lviii. *Campbell v. Starwood Hotels & Resorts Worldwide, Inc.*, 2008 WL 2844020 ( S.D.

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Fla. 2008 ).

lix. *Miyoung Son v. Kerzner International Resorts, Inc.*, 2008 WL 4186979 ( S.D. Fla. 2008 ).

Ix. *Mastrondrea v. Occidental Hotels Management*, 918 A. 2d 27 ( N.J. Super. A.D. 2007 ).

Ixi. *O'Donnell v. Club Mediterranee, S.A.*, 2008 WL 794975 ( E.D.N.Y. 2008 ).

Ixii. *Phillips v. Talty*, 555 F. Supp. 2d 265 ( D.N.H. 2008 ).

Ixiii. *De Arellano v. Starwood Hotels & Resorts Worldwide, Inc.*, 448 F. Supp. 2d 520 ( S.D.N.Y. 2006 ).

Ixiv. *Carnival Cruise Lines, Inc. v. Shutte*, 499 U.S. 585, 111 S. Ct. 39 ( 1991 ).

Ixv. *Lischinskaya v. Carnival Corporation*, 56 A.D. 3d 116, 865 N.Y.S. 2d 334 ( 2008 ).

Ixvi. *Heinz v. Grand Circle Travel*, 329 F. Supp. 2d 896 ( W.D. Ky. 2004 ).

Ixvii. *Ward v. Kerzner International Hotels Limited*, 2005 WL 2456191 ( S.D. Fla. 2005 ).

Ixviii. *Global Travel Marketing, Inc. V. Shea*, 908 So. 2d 392 ( Fla. Sup. 2005 ).