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# Conflict of Laws

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THE subject of this Article deals with cases in which either the parties or the event or transaction, or both, are connected with a foreign jurisdiction. Within conflict of laws lie three interrelated areas of study: jurisdiction, choice of law, and foreign judgments. Several Texas cases were decided in both the areas of jurisdiction and choice of law during the Survey period. There were no significant developments in the area of foreign judgments.

## I. Jurisdiction of Courts

Jurisdiction has been called "a coat of many colors," and within the context of conflict of laws, it is a principal concern insofar as jurisdictional principles have the effect of allocating judicial business among states and nations or of determining whether another state's exercise of judicial power will be respected.[1] Although the cases summarized in this section touch on both of these issues, most concern the allocation of judicial business among states or nations. The issue is addressed largely through a discussion of the factors that must be present in a given transaction in order for a chosen forum to have jurisdiction.

Four major questions must be considered in determining whether a case may be brought in a particular court: (1) Has the court jurisdiction over the person of the defendant or his property?; (2) Has the court jurisdiction over the subject-matter?; (3) Has the suit been brought in a proper venue?; and (4) Is there any statute or doctrine under which a court otherwise qualified to proceed with the case may or must refuse to entertain it? For this review of Texas law, the cases are grouped into those addressing whether or not the court has jurisdiction in the matter, and those addressing doctrines, such as forum non conveniens, which would cause an otherwise qualified court to refuse to entertain jurisdiction.

### A. *Adjudicatory Jurisdiction*

The basic rules which permit a court to exercise personal jurisdiction are

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1. Roger Crampton, et al. Conflict Of Laws: Cases, Comments, Questions 453 (1987).

well established and the subject of prior survey articles.[2] To summarize, there are two conditions that must be met in order for a Texas court to exercise personal jurisdiction over a non-resident defendant. First, the applicable long-arm statute must authorize the exercise of jurisdiction.[3] Second, the exercise of jurisdiction must be consistent with the constitutional guarantees of due process.[4] These two requirements are generally the same regardless of whether one is dealing with a case in state court or a federal court diversity case.

Under the long-arm statute component, it must be determined whether the nonresident defendant has purposefully established minimum contacts with the forum state; that is, whether the nonresident defendant "purposefully avail[ed] itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."[5] This purposeful availment requirement ensures that a nonresident defendant will not be haled into a jurisdiction based solely upon "random," "fortuitous" or "attenuated" contacts or the "unilateral activity of another party or third person."[6] In addition, individuals must have "fair warning that a particular activity may subject [them] to the jurisdiction of a foreign sovereign."[7]

To determine whether the assertion of personal jurisdiction is consistent with due process, the courts have long relied on the principles traditionally followed by American courts in marking out the territorial limits of each state's authority. In what has become the classic expression of the criterion, the United States Supreme Court held in *International Shoe Co. v. Washington*,[8] that a State court's assertion of personal jurisdiction satisfies the Due Process Clause if it does not violate "traditional notions of fair play and substantial justice."[9]

### *1. Texas Supreme Court*

Perhaps the most important case decided during the Survey period was *Guardian Royal Exchange Assurance, Ltd. v. English China Clays, P.L.C.*[10] in which the Texas supreme court clarified the jurisdictional formula established in *O'Brien v. Lanpar Co.*[11] and later modified in *Schlobohm v. Schapiro*,[12] to ensure compliance with federal constitutional requirements of due process. Guardian Royal is an English insurance company with its office and principal place of business in England. English China is an English

2. *See, e.g.*, Sharon Freytag & Michelle McCoy, *Conflict of Laws, Annual Survey of Texas Law* 5 Sw. L.J. 149, 150 (1991).
3. Schlobohm v. Schapiro, 784 S.W.2d 355, 356 (Tex. 1990).
4. *Id.* at 356.
5. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 474-75 (1985) (quoting Hanson v. Denckla, 357 U.S. 235, 253 (1958)).
6. *Id.* at 475; Helicopteros Nacionales de Colombia v. Hall, 466 U.S. 408, 417 (1984); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 298 (1980).
7. Shaffer v. Heitner, 433 U.S. 186, 218 (1977) (Stevens, J. concurring).
8. 326 U.S. 310 (1945).
9. *Id.* at 316.
10. 815 S.W.2d 223 (Tex. 1991).
11. 399 S.W.2d 340 (Tex. 1966).
12. 784 S.W.2d 355 (Tex. 1990).

company with American subsidiaries, including Southern Clay and Gonzales Clay, which are Texas corporations. In 1980-81 Guardian Royal issued an insurance policy including several endorsements to English China providing coverage for third party liability occurring anywhere English China and its subsidiary companies did business. All transactions between Guardian Royal and English China occurred in England.

Guardian Royal understood that the coverage was extended to the American subsidiaries, and that each subsidiary was to obtain underlying liability insurance from American insurers. Southern Clay and Gonzales Clay were two such subsidiaries. Southern Clay acquired liability coverage from United States Fire Insurance Company (U.S. Fire) and others. Although these two subsidiaries were listed in a policy endorsement as being located in the United States, there was no indication that they were located in Texas. Guardian Royal claimed that it did not know whether English China or its American subsidiaries did business in Texas or sent products to Texas.

In 1982 an employee of Southern Clay was killed in an on-the-job accident in Gonzales County, Texas. The decedent's family filed wrongful death lawsuits against the English China entities and others in federal and state courts in Texas. The English China entities settled the lawsuits and U.S. Fire contributed to the settlement. Guardian Royal declined to contribute to these settlements, as it claimed that its policy covered English China and its subsidiaries only for liability in excess of the coverage provided by American insurers. U.S. Fire, as subrogee of the English China entities, claimed that it was entitled to reimbursement for its settlement contribution from Guardian Royal, because Guardian Royal was the primary insurer. Guardian Royal refused, and U.S. Fire filed suit against Guardian Royal. Guardian Royal specially appeared, claiming that the insurance agreement was strictly between two English companies and was negotiated and implemented in England. Accordingly, Guardian Royal claimed it had insufficient contacts with Texas, and the trial court dismissed the claim on the ground that Guardian Royal negated every possible basis for personal jurisdiction.[13]

On appeal, the appellate court applied the *O'Brien v. Lanpar Co.*[14] three-prong test to determine the constitutional reach of the court's jurisdiction over defendants with only a single or few contacts with Texas.[15] The court of appeals noted that the insurer's agreement to cover accidents occurring

13. *English China*, 815 S.W.2d at 225.

14. *O'Brien*, 399 S.W.2d at 342. The test consists of the following three prongs: (1) the nonresident defendant or foreign corporation must purposefully do some act or consummate some transaction in the forum state; (2) the cause of action must arise from or be connected with such act or transaction. Even if the cause of the action does not arise from a specific contact, jurisdiction may be exercised if the defendant's contacts with Texas are continuous and systematic; and (3) the assumption of jurisdiction by the forum state must not offend traditional notions of fair play and substantial justice, consideration being given to the quality, nature and extent of the activity in the forum state, the relative convenience of the parties, and the benefits and protections of the laws of the forum state afforded the respective parties, and basic equalities of the situation.

15. Southern Clay Products, Inc. v. Guardian Royal Exchange Assurance, Ltd., 762 S.W.2d 927, 930 (Tex. App.—Corpus Christi 1988), *rev'd sub nom.*, Guardian Royal Exchange Assurance Ltd. v. English China Clays P.L.C., 815 S.W.2d 223 (Tex. 1991).

anywhere in the world included those occurring in Texas and indicated that Guardian Royal intended to serve the Texas market.[16] The court concluded its jurisdictional analysis with a discussion of foreseeability and acceptance of the risk of litigation in a particular forum.[17] The court stated that Guardian Royal assumed the risk of accidents occurring in foreign jurisdictions when they specifically agreed to cover U.S. subsidiaries. Therefore, Guardian Royal had sufficient notice that a substantial subject of insurance was regularly present in the United States and sufficient notice that it might be brought into any court where a United States subsidiary was located and a covered accident occurred.[18]

Guardian Royal argued that the Texas court's assertion of in personam jurisdiction over Guardian Royal was inconsistent with federal constitutional requirements of due process. The Texas supreme court agreed. The state long-arm statute authorizes the exercise of jurisdiction over nonresidents doing business in Texas.[19] Although it lists particular acts which constitute "doing business," the statute also provides that the nonresident's other acts may satisfy the "doing business" requirement.[20] The broad language of the long-arm statute's "doing business" requirement permits the statute to reach as far as the federal constitutional notion of due process will allow.[21] As a result the court was able to consider the sole issue of whether it was consistent with federal constitutional requirements of due process for Texas courts to assert in personam jurisdiction over Guardian Royal.[22]

Under the minimum contacts analysis, the court had to determine whether the nonresident defendant had purposefully availed itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws.[23] The court noted that "the exercise of personal jurisdiction is proper when the contacts proximately result from actions of the nonresident defendant which create a substantial connection with the forum state."[24] The substantial connection between the nonresident defendant and the forum state necessary for a finding of minimum contacts must come about by action or conduct of the nonresident defendant purposefully directed toward the forum state.[25] However, "the constitutional touchstone remains whether the [nonresident] defendant purposefully established minimum contacts in the forum State."[26]

The Texas supreme court recognized that the jurisdictional formula may be reviewed and modified to ensure compliance with federal constitutional

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16. *Id.* at 931.
17. *Id.* at 932.
18. *Id.*
19. TEX. CIV. PRAC. & REM. CODE ANN. § 17.042 (Vernon 1986).
20. *Id.*; *Schlobohm*, 784 S.W.2d at 357.
21. *Schlobohm*, 784 S.W.2d at 357; U-Anchor Advertising, Inc. v. Burt, 553 S.W.2d 760, 762 (Tex. 1977), *cert. denied*, 434 U.S. 1063 (1978).
22. *English China*, 815 S.W.2d at 226. *See Helicopteros*, 466 U.S. at 413-14.
23. *Burger King*, 471 U.S. at 474-75.
24. *English China*, 815 S.W.2d at 226. *Burger King*, 471 U.S. at 474-75.
25. *Id.* at 472-76.
26. *Id.* at 474.

requirements of due process.[27] In clarifying and refining the jurisdictional formula articulated in *O'Brien* and *Schlobohm*, the Texas supreme court stated that, first, the nonresident defendant must have purposefully established minimum contacts with Texas.[28] There must be a substantial connection between the nonresident defendant and Texas arising from action or conduct of the nonresident defendant purposefully directed toward Texas. When specific jurisdiction is asserted, the cause of action must arise out of or relate to the nonresident defendant's contacts with Texas. There must be continuous and systematic contacts between the nonresident defendant and Texas, when general jurisdiction is alleged. In addition, general jurisdiction requires a showing of substantial activities by the nonresident defendant in Texas.[29]

Second, the assertion of personal jurisdiction must comport with fair play and substantial justice. This inquiry requires the defendant to "present a compelling case that the presence of some other consideration would render jurisdiction unreasonable."[30] The Texas supreme court determined that the stringent standard to be applied is set forth in *Burger King*.[31]

In applying the jurisdictional formula to a particular case, the facts must be carefully weighed, and mechanical application of any test, including the Texas formula, must be avoided.[32] In addition, the Texas supreme court stated that Texas courts should strive to utilize a realistic approach when applying the jurisdictional formula.[33]

After applying this formula, the Texas supreme court determined that Guardian Royal had established minimum contacts with Texas. As the insurer of English China and approximately 120 subsidiaries located in many countries including the United States, and the issuer of an insurance policy providing coverage for third party liability occurring anywhere English China and its subsidiary companies did business, Guardian Royal could reasonably anticipate the significant risk that a subsidiary would become involved in disputes and litigation in many places, including any state in the United States. Accordingly, the court found that Guardian Royal had purposefully established minimum contacts with Texas.

The court, however, concluded that the assertion of personal jurisdiction

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27. *English China*, 815 S.W.2d at 230. The Texas supreme court recently acknowledged the necessity to review the jurisdictional formula, and, in Schlobohm, 784 S.W.2d at 358, modified the second part of the formula to include the concept of general jurisdiction.

28. *English China*, 815 S.W.2d at 230.

29. *Schlobohm*, 784 S.W.2d at 358.

30. *Burger King*, 471 U.S. at 477.

31. *Enlgish China*, 815 S.W.2d at 231. The following factors, when appropriate, should be considered: (1) the burden on the defendant; (2) the interests of the forum state in adjudicating the dispute (including the state's special regulatory interest in areas such as insurance); (3) the plaintiff's interest in obtaining convenient and effective relief; (4) the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and (5) the shared interest of the several states in furthering fundamental substantive social policies. *Burger King*, 471 U.S. at 477-78. *See also* Schlobohm, 784 S.W.2d at 358.

32. *English China*, 815 S.W.2d at 231.

33. *Id. See Schlobohm*, 784 S.W.2d at 358. The jurisdictional formula is a useful jurisdictional checklist which ensures that all aspects of the necessary analysis have been considered.

over Guardian Royal did not comport with notions of fair play and substantial justice and was, hence, unreasonable.[34] Requiring Guardian Royal, an English insurer unaffiliated with American companies, to submit its dispute with its English insured to a foreign nation's judicial system was burdensome. Frequently the interests of the forum state and the plaintiff justify the severe burden placed upon the nonresident defendant. In *English China*, however, the interests of Texas in adjudicating the dispute and the English China entities in obtaining convenient and effective relief were minimal.

The court continued that Texas has an interest in providing effective means of redress for its residents when their insurers refuse to pay claims, and these residents would be disadvantaged if they were forced to follow the insurance company to a distant state in order to litigate.[35] However, in this case, the dispute was between two insurers — Guardian Royal and U.S. Fire. The family of the deceased employee had already received compensation in settlement of their suit. U.S. Fire was the real party in interest as subrogee to the English China entities. Neither Guardian Royal nor U.S. Fire were Texas consumers or insureds; thus, Texas' interest in adjudicating the dispute (including the special interest of regulating insurance) was considerably diminished. Texas does not have a compelling interest in providing a forum for resolution of disputes between the two insurers. Thus, the assertion of personal jurisdiction over Guardian Royal was unreasonable and did not comport with fair play and substantial justice. Accordingly, the Texas supreme court held that it was inconsistent with federal constitutional requirements of due process for a Texas court to assert in personam jurisdiction over Guardian Royal and reversed the judgment of the court of appeals.

Justice Mauzy dissented in the case, contending that the pertinent inquiry was whether it was reasonably foreseeable that Guardian Royal would be haled into court in Texas. Justice Mauzy claimed that an insurer should foresee being sued in any jurisdiction in which its insured has substantial contacts.[36] Such was the case here, as Guardian Royal specifically extended coverage to English China's Texas subsidiaries and specifically deleted the policy's geographical limits.

In response to the question of whether the exercise of in personam jurisdiction was reasonable, Justice Mauzy discounted the fact that the real party in interest was U.S. Fire. He contended that the result should be no different, as Texas has an interest in encouraging subrogation since it facilitates recovery of injured plaintiffs and functions to distribute the incidence of loss in accordance with responsibility for the loss.[37]

34. *English China*, 815 S.W.2d at 232-33.

35. *English China*, 815 S.W.2d at 232-33 (citing McGee v. International Life Ins. Co., 355 U.S. 220, 223 (1957).

36. *Id.* at 233 (citing Eli Lilly and Co. v. Home Ins., 794 F.2d 710, 721 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1060 (1987)).

37. *English China*, 815 S.W.2d at 234 (Manzy, J., dissenting).

*2. Recent Decisions in Texas State Appellate Courts*

In *Bissbort v. Wright Printing & Publishing Co.*[38] a Texas appellate court held that a defendant who conducted business in Texas via the mails had satisfied the purposeful act requirement, thus making the exercise of jurisdiction by Texas courts consistent with fair play and substantial justice. Bissbort sued Wright for breach of a written contract to repair a printing press belonging to Wright. The parties stipulated that Wright was an Iowa corporation, Bissbort was a resident of Texas, and each party signed the contract at its office. Wright's foreman initially telephoned Bissbort inquiring if Bissbort would be interested in purchasing a surplus press from Wright and repairing the press described in the contract. Bissbort later went to Des Moines to discuss the transactions with Wright and, after returning to Texas, mailed Wright a proposal describing the repairs to be performed, his charge for the services, and the terms of the payment. After Wright accepted his proposal Bissbort prepared and mailed the contract to Wright.

Wright returned the signed contract to Bissbort and wired part of the contract price. Bissbort returned to Des Moines, disassembled the press, and transported the parts to Texas to be prepared. Bissbort sued Wright for breach of the contract alleging Wright had failed to pay the entire contract price for Bissbort's services. Wright filed a special appearance and challenged the trial court's jurisdiction over it by claiming that it had insufficient contacts with the State of Texas. The trial court agreed and entered an order sustaining Wright's special appearance and dismissing the suit. The appellate court reversed, stating that, under the Texas long-arm statute, "one is doing business within the state if he contracts by mail with a Texas resident and the contract is to be performed in whole or in part within the state."[39]

Additionally, the appellate court applied the three-prong test adopted in *O'Brien v. Lanpar Co.*[40] to ensure that the exercise of jurisdiction complied with federal constitutional standards. In doing so, it found that Wright purposefully acted to consummate a transaction in Texas by initiating negotiations with a telephone call to Bissbort, by executing a contract requiring it to make payments in Texas and by wiring partial payment price to Bissbort's bank account in Texas. Because Bissbort's cause of action arose from this transaction, an exercise of jurisdiction met the second requirement of the Texas formula. The third prong of the formula was the most difficult to satisfy, because it required the court to determine whether, despite the existence of minimum contacts, there was reason why the assertion of jurisdiction would offend traditional notions of fair play and substantial justice.[41]

Although Wright's Texas contacts were limited, the court held that because of the qualities of those acts, particularly the act of wiring money to a Texas bank, Wright had availed itself of the protection and remedies of the Texas law and Texas courts. When Wright wired the money to Texas, it

38. 801 S.W.2d 588 (Tex. App.—Fort Worth 1990, no writ).
39. *Id.* at 589; *see* TEX. CIV. PRAC. & REM. CODE ANN. §§ 17.041-.042 (Vernon 1986).
40. 399 S.W.2d 340, 342. For discussion of the test, see *supra* note 14.
41. *Schlobohm*, 784 S.W.2d at 359.

"took advantage of the protection from misappropriation provided by Texas law and implicitly expressed confidence in Texas courts to provide a remedy if misappropriation occurred."[42] Finally, the Court noted that Wright would not be excessively burdened or inconvenienced by litigating in the Texas court. Therefore, the court held that exercising jurisdiction over Wright did not offend traditional notions of fair play and substantial justice.

Another Texas appellate court reached a similar conclusion regarding the defendant's contacts with Texas in *Design Information Systems v. Feith Systems & Software, Inc.*[43] In *Feith* Carl Wilson, d/b/a Design Information Systems, had purchased computer software from Feith and instituted suit alleging that the product was not satisfactory. Feith was served a citation under the Texas long-arm statute,[44] and filed a special appearance and objection to jurisdiction. The trial court sustained Feith's objection and dismissed the suit. The appellate court reversed upon finding that Feith's contacts with Texas were continuous and systematic enough to permit the imposition of jurisdiction.

Feith was a Pennsylvania corporation that relied on national advertising in trade publications and exhibited at trade shows to sell its products. It had no offices, employees or representatives in Texas and did not engage in any advertising or sales efforts especially directed toward prospective customers in Texas. Feith's participation in trade shows and its national advertising generated prospective customers who called or wrote Feith about purchases of Feith's products.

Wilson became acquainted with Feith's products through a trade show in Nevada or through another customer of Feith. He placed his order with Feith by telephone and software was shipped to him in Texas. Feith wrote to Wilson in Texas but all letters were written in response to inquiries made by Wilson. Feith's president testified that at the time of Wilson's purchase Feith had about ten customers in Texas and by the time of the hearing Feith had about 25 customers in Texas. Feith's Texas customers constituted only a small percentage of its nationwide sales.

To determine whether a Texas court could properly exercise jurisdiction over Feith, the court applied the test set forth in *O'Brien*,[45] and modified in *Schlobohm*.[46] Feith contended that the holding in *C.W. Brown Machine Shop Inc. v. Stanley Machine Corp.*,[47] was dispositive of the issue before the court, but the court disagreed. In *C.W. Brown* the nonresident defendant was shown to have made only one isolated sale in Texas, whereas in *Feith* the nonresident defendant was shown to have had 25 Texas customers. The court found that repeated sales transactions with residents of the state satisfied the "continuing and systematic contacts" test enunciated by the Supreme Court. Furthermore, the court concluded that requiring Feith to

42. *Bissbort*, 801 S.W.2d at 589.
43. 801 S.W.2d 569 (Tex. App.—Ft. Worth 1990, no writ).
44. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 17.042 (Vernon 1986).
45. 399 S.W.2d 340 (Tex. 1966).
46. 784 S.W.2d 355 (Tex. 1990). *See supra* note 14 discussing the three prong test.
47. 670 S.W.2d 791 (Tex. App.—Ft. Worth 1984, no writ).

submit to the jurisdiction of Texas courts did not offend traditional notions of fair play and substantial justice.[48]

The case of *Lujan v. Sun Exploration & Production Company*[49] presents a third example of the application of Texas' long-arm statute. Lujan appealed from an order sustaining a challenge to personal jurisdiction in favor of Chaparral Services. In her sole point of error, Lujan contended that the trial court erred in sustaining the challenge to jurisdiction because Chaparral had been shown by the evidence to have systematic and continuous contacts with the state of Texas and had taken purposeful steps to submit itself to the jurisdiction of Texas courts. The appellate court reversed the judgment of the trial court.

Plaintiff's husband, a New Mexico resident and employee of Chaparral, a New Mexico corporation, was killed in an explosion at an oil tank storage facility located in Eunice, New Mexico. At the time of his death, the decedent was performing work under a contract between Chaparral and Sun Exploration & Production Company ("Sun"), a Delaware corporation with offices in Midland, Texas and Hobbs, New Mexico. Lujan, the decedent's wife, brought a wrongful death action against Sun and Chaparral in Dallas County, Texas alleging negligence on the part of Sun and gross negligence on the part of Chaparral. Chaparral filed a special appearance contesting the court's jurisdiction. The appellate court agreed with Lujan's contention that Chaparral's business contacts in Texas constituted both sufficient minimum contacts and a purposeful availment of the privilege of conducting activities, thus invoking the benefits and protections of Texas laws.[50]

Texas law requires that jurisdiction over a nonresident be authorized under the Texas long-arm statute[51] and consistent with federal and state constitutional guarantees of due process.[52] The Texas long-arm statute expressly authorizes the exercise of jurisdiction over those who do business in the state.[53]

Chaparral had entered into a contract in Texas with Sun to perform oil field service work. During the contract period Chaparral and Sun made several contacts by mail. Chaparral also sent his employees into Texas to obtain supplies and to perform occasional work under contracts with Texas-based companies. The court concluded that Chaparral's contacts with Texas, as a result of this business relationship with Sun, constituted doing

48. *Feith*, 801 S.W.2d at 571.

49. 798 S.W.2d 828 (Tex. App.—Dallas 1990, writ denied).

50. *Id.* at 829.

51. TEX. CIV. PRAC. & REM. CODE ANN. § 17.042 (Vernon 1986).

52. § 17.069 (Vernon 1986).

53. § 17.042 (Vernon 1986). Section 17.042 of the Civil Practice and Remedies Code provides that:

> In addition to other acts that may constitute doing business, a nonresident does business in this state if the nonresident: (1) contracts by mail or otherwise with a Texas resident and either party is to perform the contract in whole or in part in these state; (2) commits a tort in whole or in part in this state; or (3) recruits Texas residents, directly or through an intermediary located in this state, for employment inside or outside this state.

business under section 17.042.[54] Thus, the court found the requirement for jurisdiction under the Texas long-arm statute had been met. The court went on to determine that the exercise of jurisdiction was consistent with the federal and state constitutional guarantees of due process. The Texas supreme court has held that the broad language of section 17.042 allows the long-arm statute to reach as far as the federal constitution permits.[55]

A primary goal of the due process test is to protect the defendant.[56] Thus, all three prongs of the *Schlobohm* test must be met to support jurisdiction. The Texas supreme court rejected the mechanical application of any test, including the *Schlobohm* formula, regarding instead, the *Schlobohm* formula as a useful jurisdictional checklist which helps insure consideration of all aspects of the necessary analysis.[57] The first prong of the *Schlobohm* test concerns the "minimum contacts" analysis.[58] This analysis is somewhat narrow, focusing on the relationship between the defendant, the forum and the litigation.[59] In *Schlobohm* the court noted that, to establish minimum contacts, the foreign corporation must purposefully do some act or consummate some transaction in the foreign state.[60] The act must be purposefully directed into Texas, regardless of the volume.[61] Moreover, the activity must justify a conclusion that the defendant should reasonably anticipate being called into court there.[62]

Chaparral's manager testified that it operated an oil field service company, "hauling water, cleaning tanks, [and doing] hot [sic] oil well and roustabout connection work" for drillers and producers.[63] Business was obtained by getting on the approval list of oil companies. To do this Chaparral supplied a certificate of insurance and price list for its services to its prospects. Contracts would then be entered into by mailing them to the office designated by the oil company. For example, contracts with Sun Production and Exxon were signed by Chaparral and mailed to the Texas offices for acceptance.

In 1979, Chaparral entered into a contract with Sun to provide oil field services on an "as needed basis." No service was rendered in Texas by Chaparral for Sun during this time. Chaparral maintained both liability and workers compensation insurance coverage in Texas, as well as a commercial umbrella liability policy with Employers of Texas, from the inception of its contract with Sun in 1979. In 1986, Chaparral entered into a contract to perform oil field services for Oxy USA. Services under this contract were rendered in Texas by Chaparral during the period of the Sun contract. Fur-

54. *Lujan*, 798 S.W.2d at 830.

55. *See U-Anchor Advertising*, 553 S.W.2d at 762.

56. *World-Wide Volkswagen*, 444 U.S. at 292; *Schlobohm*, 784 S.W.2d at 357.

57. *See Schlobohm*, 784 S.W.2d at 358.

58. *See World-Wide Volkswagen*, 444 U.S. at 292; *International Shoe*, 326 U.S. at 316; *Schlobohm*, 784 S.W.2d at 358.

59. *See Helicopteros* 466 U.S. at 414 n.8 (citing Shaffer, 433 U.S. at 204.

60. *Schlobohm*, 784 S.W.2d at 357.

61. *Id.* at 359.

62. *See World-Wide Volkswagen*, 444 U.S. at 297, 299; Hanson v. Denckla, 357 U.S. 235, 250-52 (1958).

63. *Lujan*, 798 S.W.2d at 831.

thermore, Chaparral carried advertising during the past ten years for its service in a trade publication distributed throughout the Permian Basin, including both Texas and New Mexico. Furthermore, evidence revealed that Chaparral employees traveled in Texas on a regular basis. The court found this sufficient evidence to establish minimum contacts between Chaparral and Texas, satisfying the first prong of the *Schlobohm* formula.

The second prong of the *Schlobohm* test focuses on the distinction between specific and general jurisdiction. Prior to *Schlobohm*, the second prong of the due process test provided only that "the cause of action must arise from, or be connected with, such act or transaction."[64] In *Schlobohm*, the court modified the second prong of the test, adding that "jurisdiction may be exercised if the defendant's contacts with Texas are continuing and systematic."[65] In adopting this modification it was the court's intention to clarify the federal and state cases which stand for the proposition that jurisdiction is possible whether there are single or numerous contacts between the forum and the defendant.[66]

Where the activities of the defendant in the forum are isolated or disjointed, jurisdiction is said to be specific, and is proper if the cause of action arises from a particular activity.[67] Where the defendant's activities in the form are continuous and systematic, however, jurisdiction is said to be general, and may be proper without a relationship between the defendant's particular act in the cause of action.[68] The minimum contacts inquiry is broader and more demanding when general jurisdiction is alleged, requiring a showing of substantial activities in the forum state.[69]

In *Lujan*, Chaparral was not authorized to do business in Texas, had no agent in Texas for service of process, had no employees based in Texas, kept no records in Texas and owned no real or personal property in Texas. Nonetheless, Chaparral entered into a long term contract with Sun in Texas to perform work for it and performed work in West Texas for others and made occasional trips to Texas to purchase supplies. Chaparral carried insurance coverage to protect its employees while working in Texas, and to provide continuing protection to Chaparral in the event that work was done or it should be sued in Texas. Chaparral also advertised its services in a publication distributed in Texas. The court found that the advertisement clearly constituted a solicitation of business in Texas.[70]

The cause of action in *Lujan* did not arise from and was not connected with Chaparral's contacts in Texas. Rather it was based on allegations of wrongful death and gross negligence occurring in New Mexico. Therefore specific jurisdiction was not established. The court concluded, however, that general jurisdiction had been established, based on the contacts between Sun

64. *O'Brien*, 399 S.W.2d at 342.
65. *Schlobohm*, 784 S.W.2d at 358.
66. *See id.* at 359; *Helicopteros*, 466 U.S. at 414-15.
67. *Helicopteros*, 466 U.S. at 417 n.8; Schlobohm, 784 S.W.2d at 357.
68. *Schlobohm*, 784 S.W.2d at 357; *see Helicopteros*, 466 U.S. at 414 n.9.
69. *Schlobohm*, 784 S.W.2d at 357.
70. *Lujan*, 798 S.W.2d at 832.

and Chaparral and Chaparral's other continuing business operations in Texas.[71] In sum, one of the factors supporting general jurisdiction was evidence of prior negotiations and contemplated future consequences. The express terms of the contract between Sun and Chaparral provided that Texas courts would have the jurisdiction over litigation resulting from the execution of the contract.[72] The court concluded that these factors represented continuing and systematic contacts with Texas.

The third prong of the *Schlobohm* formula focuses on the equitable questions regarding the exercise of jurisdiction over a foreign corporation.[73] Exercising jurisdiction must not offend traditional notions of fair play and substantial justice.[74] In *Lujan* the court concluded that the third prong of the *Schlobohm* formula was satisfied. While Chaparral is a foreign corporation primarily operating in New Mexico and hiring New Mexico residents, its contract with Sun was broad and substantial. The court noted that the convenience of allowing Lujan to bring a single suit against Sun and Chaparral jointly in a Texas court is an important factor. The court concluded that Chaparral could and indeed did reasonably anticipate being brought before Texas courts to defend itself in litigation stemming from its contract with Sun, and that exercising jurisdiction over Chaparral in Texas would not offend traditional notions of fair play and substantial justice.[75]

In *G&R Gourmet Foods, Inc. v. The Natural Choice, Inc.*[76] the appellant challenged an effort to enforce a default judgment rendered in New Mexico against the appellant, claiming that the New Mexico court lacked jurisdiction over the appellant, thus rendering the New Mexico judgment unenforceable in Texas courts. If a foreign judgment is filed with the clerk of a court of competent jurisdiction in this state, it is entitled to the same effect as a Texas judgment.[77] However, the foreign judgment is also subject to the same procedures, defenses and proceedings for reopening, vacating and staying as the judgment of the Texas court.[78]

A defendant may challenge the jurisdiction of a court rendering the foreign judgment by asserting that the court's exercise of jurisdiction did not meet the requirements of that state's long-arm statute and due process of law.[79] Unless extrinsic evidence of the record establishes that the foreign court did not have jurisdiction, a Texas court will presume it did.[80] The

71. Id. at 833.
72. *See Burger King*, 471 U.S. 462; *McGee*, 355 U.S. at 223.
73. *Schlobohm*, 784 S.W.2d at 359.
74. *International Shoe*, 326 U.S. at 316, 320.
75. Lujan, 798 S.W.2d at 833.
76. 811 S.W.2d 184 (Tex. App.—Houston [1st Dist.] 1991, no writ).
77. TEX. CIV. PRAC. & REM. CODE ANN. § 35.003 (Vernon 1986).
78. TEX. CIV. PRAC. & REM. CODE ANN. § 35.003(c) (Vernon 1986).
79. Minuteman Press Int'l, Inc. v. Sparks, 782 S.W.2d 339, 340 (Tex. App.—Fort Worth 1989, no writ); Hill Country Spring Water v. Krug, 773 S.W.2d 637, 639 (Tex. App.—San Antonio 1989, writ denied); Moody v. First National Bank, 530 S.W.2d 879, 882 (Tex. Civ. App.—Houston [1st Dist.] 1975, writ ref'd n.r.e.).
80. Abramowitz v. Miller, 649 S.W.2d 339, 341 (Tex. App.—Tyler 1983, no writ); Colson v. Thunderbird Building Materials, 589 S.W.2d 836, 839 (Tex. Civ. App.—Amarillo 1979, writ ref'd. n.r.e.); Moody, 530 S.W.2d at 881.

presumption must be overcome by clear and convincing evidence that the foreign court lacked jurisdiction.[81] Along with the fairness standard, the forum state's interest must be considered.[82] The state has a great interest in providing a forum for its citizens where the cost relating to production of evidence and witnesses are considered.[83] The state also has an interest in providing a convenient forum in which disputes involving its citizens can be resolved.[84]

Under the New Mexico long-arm statute, a New Mexico court has jurisdiction over a non-resident corporation if the corporation transacts any business within the state.[85] New Mexico courts have equated "transaction of any business" required by the long-arm statute with sufficient minimum contacts required by due process.[86]

In *G&R Gourmet Foods* the evidence indicated that the appellant did not transact business in New Mexico. The appellant negotiated with a representative in Houston to buy the appellee's products; the appellant placed orders for the appellee's products with the representative in Houston; and the appellant received the appellee's products in Houston. The appellant did not go to New Mexico to pick up the appellee's products, nor did it send any agents to New Mexico.[87] The only contact that appellant had with New Mexico was sending six checks and one letter to the appellee in New Mexico.[88] These contacts were not sufficient to bring the appellant within the reach of New Mexico's long-arm statute.[89] Therefore, the New Mexico court lacked personal jurisdiction over the appellant, and the foreign judgment was unenforceable.

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81. Escalona v. Combs, 712 S.W.2d 822, 824 (Tex. App.— Houston [1st Dist.] 1986, no writ).

82. *World-Wide Volkswagen*, 444 U.S. at 292.

83. *McGee*, 355 U.S. at 223.

84. *Id.* at 223.

85. N.M. STAT. ANN. § 38-1-16 (Michie 1978).

86. Valley Wide Health Serv., Inc. v. Graham, 738 P.2d 1316 (1987); Diamond A Cattle Company v. Broadbent, 505 P.2d 64 (1973).

87. *Compare* McIntosh v. Navaro Seed Co., 466 P.2d 868 (1970) (appellant who initiated purchase of products in New Mexico, negotiated deal in New Mexico, and came to New Mexico to pick up product, transacted business in the state).

88. *See* Salas v. Homestake Enterprises, Inc., 742 P.2d 1049 (1987) (defendant is not subject to suit in New Mexico where his only contact with New Mexico was mailing two documents and making a telephone call into the state); *Diamond A*, 505 P.2d at 65, (defendant is not subject to judgment in personam on basis that three payments mailed into the state); *cf.* Tarango v. Pastrana, 616 P.2d 440 (N.M. Ct. App. 1980) (defendants were not subject to in personam jurisdiction on basis of statements for payments for services rendered in Texas and mailed to plaintiffs in New Mexico).

89. *See* Wesley v. H & D Wireless Ltd., Partnership, 678 F. Supp. 1540, 1542 (D.N.M. 1987) (under New Mexico law, defendants were not subject to jurisdiction in New Mexico courts when defendants merely responded, my mail and by telephone, to plaintiff's solicitations for business in another state and subsequently purchased a product from plaintiffs); Customwood Mfg., Inc. v. Downey Constr. Co., 691 P.2d 57 (1984) (defendant's contacts with New Mexico were insufficient to constitute transaction to do business within the state when he placed an order with the plaintiff, as had previously been arranged by the plaintiff and a third party, made telephone calls to the plaintiff in New Mexico, and periodically mailed payments to New Mexico).

In *Security Pacific Corporation v. Lupo*[90] Security Pacific's basic claim in challenging a default judgment was that the trial court did not acquire personal jurisdiction because Lupo failed to comply strictly with the requirements of the Texas long-arm statute. Lupo had brought suit against Security Pacific on an alleged usurious demand made upon him by a collection service. He alleged that the original loan was made by Mariner Corporation, a wholly-owned subsidiary of Security Pacific, that the collection service was acting as agent for Security Pacific in making the usurious demand, and that Security Pacific was a nonresident California corporation doing business in Texas that neither maintained a regular place of business nor had a designated agent for service of process in Texas. The allegations in Lupo's petition were sufficient to authorize substituted service upon the Secretary of State pursuant to the Texas Civil Practice & Remedies Code.[91]

Lupo twice attempted to serve a citation upon Security Pacific, the certificate being returned with a signature of the addressee's agent. Security Pacific did not file an answer and the trial court entered a default judgment in favor of Lupo. Security Pacific claimed that the attempted service was ineffective because the record established that Lupo failed to comply strictly with the requirements of section 17.045(a) of the Texas Civil Practice and Remedies Code.[92] The court agreed. "In order to show jurisdiction necessary to support a default judgment when service under a long-arm statute is used, [Lupo] must allege facts which, if true, would make [Security Pacific] amenable to process by the use of the long-arm statute; and second, there must be proof in the record that [Security Pacific] was, in fact, served in the manner required by the statute."[93] Lupo satisfied the first prong of the test, but failed the second.

Citing *Verges v. Lomas & Nettleton Financial Corporation*,[94] the court noted that because the long-arm statute authorized substituted service, its provisions must be strictly followed. Section 17.045(a) of the Texas Civil Practices & Remedies Code provides that: "[i]f the secretary of state is served with duplicate copies of process for a nonresident, he shall require the statement of the name and address of the nonresident's home or home office and shall immediately mail a copy of the process to the nonresident."[95] This provision clearly contemplates that process be mailed to the home office address of the non-resident. The court found that there was nothing in the record that would indicate that Security Pacific's address, as listed in the petition, was Security Pacific's home office address, or that there was a Security Pacific office located at that address. Therefore, the court determined that the record failed to affirmatively show that Lupo strictly complied with the provisions of section 17.045(a) of the Texas Civil Practices & Remedies

90. 808 S.W.2d 126 (Tex. App.—Houston [14th Dist.] 1991, writ denied).
91. TEX. CIV. PRAC. & REM. CODE ANN. § 17.044(b) (Vernon 1986).
92. *Id.* § 17.045(a).
93. Security Pacific, 808 S.W.2d at 127.
94. 642 S.W.2d 820, 821 (Tex. App.—Dallas 1982, no writ).
95. TEX. CIV. PRAC. & REM. CODE ANN. § 17.045(a) (Vernon 1986).

Code. Because the trial court did not acquire in personam jurisdiction over Security Pacific, the default judgment was set aside.

### *B. Forum Non Conveniens*

The doctrine of forum non conveniens is an equitable doctrine used by courts to resist imposition of an inconvenient jurisdiction on a litigant, even if jurisdiction is supported by the long-arm statute and would not otherwise violate due process. A trial court can use the doctrine when it determines that for the convenience of the litigants and witnesses and in the interest of justice the action should be instituted in another forum.[96] In determining whether to dismiss a case under the doctrine of forum non conveniens, the trial court must weigh a number of factors. These factors have been detailed previously in *Gulf Oil Corp. v. Gilbert*[97] and Texas courts have adopted the *Gilbert* factors.[98]

Factors to be considered are the private interests of the litigants, the relative ease of access to sources of proof, the availability of compulsory process for attendance of unwilling witnesses, and the cost of obtaining attendance from willing witnesses.[99] Other factors, known as "public factors," include the burden imposed upon the citizens of the state, the burden on the trial court, and the general interest in having localized controversies decided in the jurisdiction in which they arose.[100] Another consideration is whether a judgment obtained in this jurisdiction will be enforceable.[101] The *Gilbert* court concluded that "unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed."[102]

The doctrine of forum non conveniens presumes that at least two forums are available to the plaintiff to pursue the claim.[103] A trial court must first determine that an available and alternative forum exists. This is a two part inquiry: availability and adequacy.[104] A foreign forum is available when the entire case and all the parties can come within the jurisdiction of that forum.[105] A foreign forum is adequate when the parties will not be deprived of all remedies or treated unfairly. An exception to the general rule that the defendant bears the burden on all elements of the forum non conveniens analysis is that once the defendant establishes that an available forum exists,

96. *See* Van Winkle-Hooker Co. v. Rice, 448 S.W.2d 824, 826 (Tex. Civ. App.—Dallas 1969, no writ).

97. 330 U.S. 501 (1947).

98. *See generally* McNutt v. Teledyne Indus., Inc., 693 S.W.2d 666, 668 (Tex. App.—Dallas 1985, writ dism'd); *see also* Cole v. Lee, 435 S.W.2d 283, 285 (Tex. Civ. App.—Dallas 1968, writ dism'd); Forcum-Dean Co. v. Missouri Pac. R.R. Co., 341 S.W.2d 464, 466 (Tex. Civ. App.—San Antonio 1960, writ dism'd).

99. *Gilbert*, 330 U.S. at 508.

100. *Id.* at 508-09.

101. Flaiz v. Moore, 359 S.W.2d 872, 874 (Tex. 1962).

102. *Gilbert*, 330 U.S. at 508.

103. *Van Winkle-Hooker*, 448 S.W.2d at 826.

104. *See* In re Air Crash Disaster Near New Orleans, La., 821 F.2d 1147, 1165 (5th Cir. 1987).

105. *Id.*

the plaintiff must prove that the available forum is not adequate.[106]

*1. Legislative Response to the Alfaro Decision*

The last Survey Article reported on the decision of the Texas supreme court in *Dow Chemical Co. v. Castro Alfaro.*[107] The court ruled that section 71.031 of the Texas Civil Practices and Remedies Code abolished forum non conveniens in cases involving personal injury and wrongful death.[108] The *Alfaro* decision has been severely criticized and, as a result, significant efforts were made in the last legislative session to overrule the decision.

Bills were introduced in the House of Representatives (by Representatives Culberson and McCollough)[109] and in the Senate (by Senator Montford),[110] with the stated purpose to overrule *Alfaro.* Although the original House and Senate Bills were substantially the same, committee substitutes in the House would have limited the impact of the legislation. None of the Bills were passed.

*2. Relevant Decisions*

One important forum non conveniens decision during the Survey period was *Sarieddine v. Moussa.*[111] In that case, Sarieddine sued to recover on a note on which Moussa had defaulted. The sole point of error on appeal was that the trial court had erred in dismissing the case under the doctrine of forum non conveniens. Moussa, a Lebanese citizen residing in Bahrain, agreed to purchase all of Sarieddine's stock in a particular Luxembourg corporation. Sarieddine was a Lebanese citizen residing in a suburb of Seattle, Washington. Moussa defaulted under the payment agreements, including the agreement at issue in the case. This agreement was negotiated from Seattle and Bahrain, respectively, and contained a forum selection clause which allowed for suit to be brought in any jurisdiction in which any assets or property belonging to Moussa were located.

Sarieddine filed suit in Dallas to recover the amount of money still owed by Moussa under the agreement, and Moussa was personally served in Dallas. However, the trial court dismissed the case under the doctrine of forum non conveniens. Sarieddine asserted that the forum selection clause precluded Moussa from asserting forum non conveniens, and the court noted that, although Sarieddine cited no Texas authority in support of his contention, and the court on its own found none on point, federal case law dictated that a trial court is not bound by the forum selection clause agreement if the

106. Vaz Borralho v. Keydril Co., 696 F.2d 379, 393-94 (5th Cir. 1983). Justice Gonzalez, in his dissent in Dow Chemical Co. v. Alfaro, 786 S.W.2d 674, 695 (Tex.), *cert. denied,* 111 S. Ct. 671 (1990), suggested a standard similar to that adopted in Moussa: that an alternative forum should be more than one where the defendant is amenable to process.

107. 786 S.W.2d 674 (Tex.), *cert. denied,* 111 S. Ct. 671 (1990).

108. *Id.* at 679.

109. Tex. H.B. 8, 72nd Leg., R.S. (1991).

110. Tex. S.B. 790, 72nd Leg., R.S. (1991).

111. No. 05-90-01035-CV, 1991 LEXIS 3138 (Tex. App. —Dallas Oct. 2, 1991). This case has not been released for publication in the permanent law reports. Until released, it is subject to revision or withdrawal.

interests of the witness and of the public strongly favored transferring the case to another forum.[112] While the forum selection clause might confer personal jurisdiction, the court found that it did not preclude consideration of a motion to dismiss on the theory of forum non conveniens. Thus, the court decided that it would consider the forum selection clause only as a factor in determining whether the trial court erred by dismissing the case under forum non conveniens.

The court noted that before a court may invoke forum non conveniens, the court must find that it has jurisdiction over the defendant.[113] Moussa was personally served in Dallas, and he acknowledged that the trial court had jurisdiction over him due to the holding in the United States Supreme Court case, *Burnham v. Superior Court of California*.[114] Because Moussa conceded jurisdiction, the court did not find it necessary to determine whether Moussa maintained minimum contacts with Texas or whether his activities were "continuous or systematic" so that the exercise of general jurisdiction over Moussa would not offend traditional notions of "fair play and substantial justice."[115]

The first question addressed by the Moussa court was whether Texas still recognizes the doctrine of forum non conveniens in light of the recent Texas supreme court holding in *Alfaro*.[116] The court in *Alfaro* ruled that section 71.031 of the Civil Practice and Remedies Code abolished forum non conveniens in cases involving personal injury and wrongful death.[117] Sarieddine asserted that *Alfaro* had abolished forum non conveniens in all cases or, alternatively, that section 17.042 of the Texas Civil Practice and Remedies Code and Rule 108 of the Texas Rules of Civil Procedure have abolished forum non conveniens in Texas.

*Alfaro* is strictly limited to personal injury and wrongful death suits filed under section 71.031 of the Civil Practice and Remedies Code. Section 17.042, the long-arm statute, as well as sections 17.043 and 17.044, address the extent of personal jurisdiction granted to Texas courts by outlining who can be served.[118] There is no mandatory language in these statutes to justify holding that they abolish forum non conveniens. The statutes merely outline over whom Texas courts can acquire personal jurisdiction. While a trial court may be required to find jurisdiction over the defendant, there is no language in the statutes prohibiting the trial court from dismissing the case under a theory of forum non conveniens.[119] Thus, the appellate court found

112. *See* Plum Tree, Inc. v. Stockment, 488 F.2d 754, 758 n.7 (3rd Cir. 1973).

113. *McNutt*, 693 S.W.2d at 668.

114. 110 S. Ct. 2105 (1990) (jurisdiction based on physical presence alone satisfies due process).

115. *McNutt*, 693 S.W.2d at 668.

116. 786 S.W.2d 674.

117. *Id.* at 679.

118. TEX. CIV. PRAC. & REM. CODE ANN. §§ 17.042, .043, .044 (Vernon 1986). Sections 17.043 and 17.044 provide only for service of process.

119. *See* Sarieddine, 1991 WL 255133 at 3. The court also noted that there was no language in Rule 108 of the Texas Rules of Civil Procedure which prohibits a trial court from

that there was no basis for the assertion that Texas has abolished forum non conveniens for all cases.

Applying the two-part "availability and adequacy" test to Moussa, that court first determined whether there was evidence that any single available forum existed where all the defendants were amenable to process.[120] It held that Lebanon was available as a forum because both parties were citizens of Lebanon. Abu-Dhabi was also an available forum because Moussa had consented to jurisdiction there.[121] Bahrain was also an available forum since Moussa resided in Bahrain.

Having determined that three forums were available, the court determined whether they were also adequate. The court determined that Sarieddine had not established the inadequacy of any of the available forums; therefore, the court presumed that all of the available forums were adequate and qualified as alternative forums. The court then went on to weigh the other factors to determine whether the balance so strongly favored Moussa that Sarieddine's choice of forum should be disturbed.[122] The determination of whether a forum is convenient rests upon several private and public factors that the United States Supreme Court stated should be considered and balanced by a court when presented with a motion to dismiss for forum non conveniens. "[U]nless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed."[123] The burden of establishing that the balance strongly favors dismissal lies necessarily with the defendant. Weighing the various factors, the court determined that Moussa had not met this burden.

In *Quintero v. Klaveness Shiplines*[124] the Fifth Circuit determined, among other things, that dismissal of an action based on forum non conveniens was not required to be a dismissal without prejudice. A Filipino sailor was injured while unloading a Liberian-registered, Norwegian-owned ship docked in New Orleans. The sailor filed suit in federal district court in Louisiana, and brought a parallel suit in Louisiana state court. The federal court granted the defendant's motion to dismiss with prejudice for forum non conveniens. As part of its forum non conveniens analysis, the district court determined that Philippine law should govern the controversy. Based on this determination, and despite the provisions of the Anti-Injunction Act,[125] the district court granted the defendant's request for an injunction preventing

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dismissing a case on a theory of forum non conveniens once the defendant has "appeared and answered."

120. *Air Crash*, 821 F.2d at 1165.

121. *See* Piper Aircraft v. Reyno, 454 U.S. 235 (1981) (defendant is amenable to process for purposes of forum non conveniens analysis where the defendant has agreed to submit to the jurisdiction of a foreign country).

122. *Gilbert*, 330 U.S. at 508.

123. *Id.*

124. 914 F.2d 717 (5th Cir. 1990).

125. 28 U.S.C. § 2283 (1988). The *Klaveness* court noted, in *dicta*, that the United States Supreme Court has noted that the re-litigation exception of the Anti-Injunction Act allows a federal court to enjoin state court re-litigation of a federal choice-of-law determination made pursuant to a forum non conveniens dismissal.

the plaintiff from re-litigating the choice-of-law issue pending in the Louisiana state court proceeding.

On appeal, the plaintiff contended that the district court erred in dismissing the complaint with prejudice. Inter alia, he argued that the nature of a forum non conveniens dismissal requires special deference and should not be granted with prejudice. However, the court disagreed. The United States Supreme Court had expressly approved a district court's ability to enjoin relitigation of a choice of law determination made pursuant to a forum non conveniens dismissal.[126] The use of the injunction was premised on an exception to the Anti-Injunction Act that was intended to give preclusive effect to the judgments of federal courts. Given that a district court can give its choice of law determinations in forum non conveniens dismissals preclusive effect by issuing an injunction, forum non conveniens dismissals can be given preclusive effect by designating them as "with prejudice," so long as the plaintiff's ability to reinstate the action is otherwise adequately protected.

The court recognized that the plaintiff, in substance, was seeking the right to refile the action and relitigate the choice of law determination in another, more sympathetic forum. Thus, by dismissing with prejudice, the district court effectively enjoined any refiling and later litigation. A forum non conveniens dismissal with prejudice had the same effect in *Klaveness* as an injunction against any relitigation of the district court's choice of law determination. Therefore, the court concluded that nothing about a forum non conveniens dismissal requires a dismissal without prejudice.

## II. CHOICE OF LAW

In recent years, most states have moved away from the old rigid choice of law rules — easily applied, but often unfair — to the newer rules based on balancing competing interests. Texas has chosen to apply the "most significant relationship test" in addressing choice of law problems in tort actions, the substance of which is set forth in section 6 of the Restatement (Second) of Conflict of Laws.[127]

However, in contract actions, courts have adopted a rule of limited party autonomy, whereby parties may express in their agreements their own choice that the law of a particular jurisdiction apply to their agreement. This choice is limited only by the relationship of the parties or agreement to the chosen jurisdiction, and the public policy of the chosen jurisdiction.[128]

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126. *See* Chick Kam Choo v. Exxon Corp., 486 U.S. 140, 150-51 (1988).

127. *See generally* Alfred Hill, *The Judicial Function in Choice of Law*, 85 COLUM. L. REV. 1585 (1985). In the article, Professor Hill argued that judges are intentionally fashioning *ad hoc* choice-of-law models and rejecting the standard approaches such as the most-significant-relationship test. However, this did not appear to be the case in Texas. The problem with Texas choice-of-law decisions is more likely the result of hasty applications of the most-significant-relationship test, stemming from a lack of familiarity with the Restatement (Second) of Conflict of Laws and with United States Supreme Court opinions on choice of law.

128. *See* DeSantis v. Wackenhut Corp., 793 S.W.2d 670, 677 (Tex. 1990).

Judicial respect for the parties' choice within these boundaries advances the policy of protecting their expectations.

### A. *Choice of Law in Contract Actions*

#### 1. *United States Supreme Court*

In *Carnival Cruise Lines, Inc. v. Shute*[129] the United States Supreme Court rejected the Ninth Circuit's conclusion that a non-negotiated forum selection clause in a form ticket contract is never enforceable simply because it is not the subject of bargaining. A husband and wife residing in the state of Washington purchased tickets for a cruise between Los Angeles and Puerto Vallarta on a ship operated by a Panamanian corporation which had its principal place of business in Miami, Florida. There was a forum selection clause in the ticket contract, although it was questionable that the Shute's either read or should have read the clause. The clause designated courts located in the state of Florida as the agreed-upon exclusive venue for litigating any disputes arising under the contract between passenger and carrier.

While the cruise ship was in international waters off the coast of Mexico, the wife fell and was injured. The couple, claiming that the wife's injuries had been caused by the negligence of the cruise line and its employees, filed suit against the corporation in federal district court in Washington. The corporation moved for summary judgment on the grounds that the corporation's contacts with the state of Washington were insufficient to support the district court's exercise of personal jurisdiction over the corporation. The district court found in favor of the plaintiffs.[130] However, the Ninth Circuit reversed and remanded, holding that the corporation had insufficient contacts with the state to support personal jurisdiction.[131] Thus, it would be unreasonable to apply the forum-selection clause of the ticket contract because the clause was not freely bargained for, and there was evidence in the record to indicate that the couple was physically and financially incapable of pursuing litigation in Florida.[132]

The United States Supreme Court reversed, holding that the forum-selection clause was enforceable.[133] The Court noted that the Ninth Circuit seemed to have distorted the Court's previous holding in *M/S Bremen v. Zapata Off-Shore Co.*[134] In evaluating the reasonableness of the forum clause at issue, the Court refined the analysis of *M/S Bremen* to account for the realities of forum passage contracts.[135] The Court rejected the Ninth Circuit's decision that a non-negotiated forum-selection clause in a form ticket contract is never enforceable simply because it is not the subject of

129. 111 S. Ct. 1522 (1991).
130. *Id.*
131. Shute v. Carnival Cruise Lines, Inc., 863 F.2d 1437 (9th Cir. 1988), *rev'd*, 111 S. Ct. 1522 (1991).
132. *Id.*
133. Shute v. Carnival Cruise Lines, Inc., 111 S. Ct. 1522 (1991).
134. 407 U.S. 1 (1972).
135. 111 S. Ct. at 1524.

bargaining.[136] The Court recognized that a reasonable forum selection clause in a form contract of this kind may be permissible for several reasons.[137] First, the cruise line had a special interest in limiting the forum in which it potentially could be subject to suit.[138] Additionally, establishing *ex ante* the forum for dispute resolution has the salutary effect of dispelling any confusion about where suits arising from the contract must be brought and defended, sparing litigants the time and expense of pre-trial motions to determine the correct forum, and conserving judicial resources that would otherwise be devoted to deciding those motions.[139]

The Ninth Circuit's independent justification that the clause should not be enforced because the evidence suggested that the Shutes were not physically and financially capable of pursuing this litigation in Florida, was also rejected.[140] The Court concluded that the Ninth Circuit had not placed the Court's statement in *M/S Bremen*, that the serious inconvenience of the contractual forum to one or both of the parties might carry greater weight in determining the reasonableness of the forum clause, in proper context.[141] The *M/S Bremen* Court made this statement in evaluating a hypothetical agreement between two Americans to resolve their essentially local disputes in a remote alien forum.[142] The *Shute* Court noted that Florida was not a remote alien forum nor, given the fact that Mrs. Shute's accident occurred off the coast of Mexico, was the dispute essentially a local one inherently better suited to resolution in Washington than in Florida.[143] In light of these distinctions, and because the Shutes did not claim lack of notice of the forum clause, the Shutes had not satisfied the heavy burden of proof required to set aside the cause on grounds of inconvenience.[144]

The Court also emphasized that the forum-selection clauses contained in form passage contracts are subject to judicial scrutiny for fundamental fairness.[145] But, in *Shute* there was no indication that petitioners set Florida as the forum in which disputes were to be resolved as a means of discouraging cruise passengers from pursuing legitimate claims. Thus, by its plain language, the forum-selection clause did not take away respondents' right to a trial by a court of competent jurisdiction. The court located in Florida was plainly a court of competent jurisdiction.

### 2. *Texas Federal Courts*

In *Admiral Insurance Co. v. Brinkcraft Development, Ltd.*[146] the Court of Appeals for the Fifth Circuit affirmed its prior holding in *Woods-Tucker*

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136. *Id.*
137. *Id.* at 1527.
138. *Id.*
139. *Id.*
140. 111 S. Ct. at 1524.
141. *Id.*
142. *Id.* at 1528.
143. *Id.*
144. *Id.*
145. 111 S. Ct. at 1529.
146. 921 F.2d 591 (5th Cir. 1991).

*Leasing Corp. of Georgia v. Hutcheson-Ingram Dev. Co.*[147] and applied Texas law despite the fact that both contracts in issue in the case contained choice of law provisions specifying Mississippi law as applicable. In *Admiral Insurance* a payee's successor in interest sued the maker of a promissory note that had been negotiated and executed in Texas. The defendant claimed that the note's interest provision was usurious under Texas law. The choice of law provision in the note specified that the note "is to be governed and controlled 'by the statutes, laws and decisions of the state in which the partnership, as Payee of this instrument, maintains its Principal Place of Business' and that the note was 'submitted to the Payee at its principal Place of Business and shall be deemed to have been made thereat.' "[148] The initial payee listed a principal place of business as New York. Admiral Insurance Company acquired the note and brought suit against the defendant based upon the default.

The district court found that the parties' choice-of-law provision was unenforceable under Texas law because the transaction bore no reasonable relation to New York. Under New York law there is no maximum interest rate for notes over $250,000. Because the note was not usurious under New York law, the central issue in the appeal was whether the note's New York choice of law provision was enforceable under Texas law. Texas courts evaluate choice-of-law provisions by two separate standards, one for transactions governed by the Uniform Commercial Code and the other for transactions governed by the Texas common law.[149] This case dealt with the former, thus, the UCC choice-of-law provision applied. It stated that, "[e]xcept as provided hereafter in this section, when a transaction bears a reasonable relation to this state and also to another state or nation the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties. Failing such agreement, this title applies to transactions bearing an appropriate relation to this state."[150]

The defendants argued that the note did not bear a reasonable relation to New York, the note's contacts with New York were subterfuges designed to evade Texas usury law, and the note's choice of law provision was unenforceable because it contravened Texas public policy. The Fifth Circuit stated that all three arguments were foreclosed by its previous opinion in *Woods-Tucker.* That case involved two contracts structured as a sale and lease-back of farm equipment, but intended as a loan secured by the farm equipment; both contracts contained Mississippi choice of law provisions. The borrowers argued that the choice of law provisions were unenforceable, and the interest provisions usurious, under Texas law. Texas clearly had the most significant contacts with the transaction — the borrower was a Texas partnership conducting business in Texas, the lender also conducted some business in Texas, the borrower initiated the loan in Texas, and the farm

147. 642 F.2d 744 (5th Cir. 1981).
148. *Admiral Ins. Co.*, 921 F.2d at 592.
149. Uniwest Mortg. Co. v. Dadecor Condominiums, Inc., 877 F.2d 431, 433 (5th Cir. 1989).
150. TEX. BUS. & COM. CODE ANN. § 1.105(a) (Vernon 1990).

equipment was at all times located in Texas. In contrast, Mississippi's only contacts with the transaction arose from the fact that the lender, a Georgia corporation, maintained its principal offices in Mississippi, the parties finally executed the loan in Mississippi, and the borrower initially made payments in Mississippi. The court concluded, however, that Mississippi's contacts were sufficient to constitute a reasonable relation to the transaction.

In reaching that conclusion, the *Woods-Tucker* court emphasized that the UCC attempts to achieve uniformity in multi-state transactions through the principle of party autonomy. Thus, parties to multi-state transactions may include choice of law provisions in their contracts so long as the law chosen bears some relation to the transaction. In describing the reasonable relation test, the court had drawn substantially from *Seeman v. Philadelphia Warehouse Co.*,[151] involving a loan contract between a Pennsylvania lender and a New York borrower that was usurious under New York law. The contract contained no choice of law provision, but provided for repayment in Pennsylvania. The Supreme Court emphasized its policy of upholding contractual obligations assumed in good faith, and stated that the parties can contract for the higher rate of interest when there is a disparity of interest rates at the place of contract and the place of performance. The Court qualified the rule, however, by noting that parties cannot willfully evade or avoid the usury laws otherwise applicable by entering into the contract or stipulating for its performance at a place which has no normal relation to the transaction and to whose law they would not otherwise be subject. The *Woods-Tucker* court relied on this point in concluding that the reasonable relation test limited party autonomy only to the extent that it forbade parties from choosing the law of a jurisdiction with no normal relation to the transaction.[152]

Thus, *Woods-Tucker* compelled the conclusion that New York law bore a reasonable relation to the note held by Admiral. The note's original payee was located in New York, and the note and the original payee's partnership certificate both stated that New York was the principal place of business. Finally, defendants made payments on the note at the original payee's offices in New York, as expressly required by the note. The only factor in Texas' favor was the fact that the note was actually negotiated and executed in Texas. The court found the first three contacts sufficient to create a reasonable relation to New York.

In *Woods-Tucker* the court also noted that applying Mississippi usury law would not offend any fundamental Texas public policy.[153] The court found no Texas cases invalidating the choice of law provision on the ground that applying the chosen state's usury law would violate Texas public policy, and thus concluded that the absence of such holdings in Texas cases was a reflection that Texas seeks to balance the policy of national commercial uniformity embodied in the UCC against the parochial self-defense embodied in the

151. 274 U.S. 403 (1927).
152. *Woods-Tucker Leasing Corp. of Ga.*, 642 F.2d at 751.
153. *Admiral Ins. Co.* , 921 F.2d at 594.

state usury laws.[154]

Finally, the court noted that *Woods-Tucker* has not been undercut by any subsequent Texas cases. Further, the appellate court distinguished the recent decision in *DeSantis v. Wackenhut Corp.* where the Texas supreme court held that a Florida choice of law provision in a non-competition agreement was not enforceable under Texas law because Texas had a greater interest in the transaction than Florida, and the agreement violated Texas public policy.[155] The appellate court pointed out that *DeSantis* was decided under common law principles, not the UCC, and non-competition agreements implicate an arguably stronger Texas public policy than usurious contracts.[156]

In *Federal Savings & Loan Insurance Corp. v. Griffin*[157] a savings and loan association filed suit against the guarantor in a state court to recover a deficiency due on a promissory note. The case was removed by the FSLIC as receiver. The United States District Court for the Northern District of Texas ruled that the guarantor was liable under a guaranty in spite of claimed defenses, and the guarantor appealed.

After an unsuccessful attempt to make money in Dallas real estate, Griffin approached First Texas Savings Association about the possibility of a loan for a joint venture. First Texas agreed to fund the first phase and made a loan for the joint venture. Like many businesses in Texas real estate, the joint venture fell upon hard times. First Texas added to the joint venture's troubles by refusing to exercise its option to supply construction financing. The joint venture subsequently failed to fulfill its obligation under the note. In an effort to escape liability under the guaranty, Griffin asserted the affirmative defenses of breach of partnership duties, usury, wrongful foreclosure of property, and breach of agreement to fund. However, First Gibraltar asserted that the defenses were barred by the doctrine established in *D'Oench, Duhme & Co. v. Federal Deposit Insurance Corp.*.[158] That doctrine protects the FDIC and the FSLIC from unrecorded side agreements not reflected in the bank's records.[159] The district court held that Griffin was liable under the guaranty in spite of his claimed defenses.

Griffin strenuously urged that the choice of law provisions in the contract between him and the bank precluded application of *D'Oench, Duhme*. The loan documents provided that Texas law would apply, and the choice-of-law provisions would be enforceable under Texas law. Nevertheless, the court found that federal law applied in the case.[160] The choice of law provision in the guaranty addressed which state law applies when state law governs a case. The assertion of controlling federal law overpowers a contract provi-

154. *Id.*
155. 793 S.W.2d at 670.
156. *Admiral Ins. Co.*, 921 F.2d at 594.
157. 935 F.2d 691 (5th Cir. 1991).
158. 315 U.S. 447 (1942).
159. *Id.*
160. *Id.* at 461.

sion which addresses only which state law to apply when a state's law will provide the rule of decision.

The case of *Albany Insurance Co. v. Kieu*[161] addressed the application of choice of law principles to maritime insurance disputes. Kieu secured marine hull insurance for her shrimp vessel from Albany. Although the application contained inaccurate statements, Albany continued to receive premiums from Kieu, and to extend coverage on the vessel. In 1988, the vessel was involved in a collision, causing major damage to the vessel's hull. Investigators surveyed the damage and recommended that Albany deny any liability under the policy. Subsequently, Albany filed a declaratory judgment action in federal district court requesting a declaration of Kieu's rights on the policy. The court declared that under Texas law Kieu should recover the insured value of her vessel minus the salvage value of the vessel's hull.

On appeal, Albany attacked the district court's application of Texas insurance law, arguing that the district court should have instead applied the federal law of *uberrimae fidei*,[162] or in the alternative that the district court should have applied Louisiana insurance law. The appellate court noted that maritime commerce traverses the waters of many states; a set of facts in a maritime case could conceivably implicate the laws of several states, as well as the federal laws of the United States. Therefore, in determining the applicable law, a court must first consider whether federal maritime law is preeminent, and then often must also consider whether one state's law is applicable over another state's law.[163] Although the courts typically rely upon federal common law to resolve maritime disputes, state law occasionally can be used to supplement or even supersede maritime law.[164]

In *Wilburn Boat Co. v. Fireman's Fund Insurance Co.*[165] the United States Supreme Court concluded that the regulation of marine insurance is, in most instances, properly left with the states. Following this direction, the Fifth Circuit has ruled that the interpretation of a contract of marine insurance is, in the absence of a specific and controlling federal rule, to be determined by reference to appropriate state law.[166] The Fifth Circuit "has identified three factors that a court should consider in determining if a federal maritime rule controls the disputed issue: (1) whether the federal maritime rule constitutes 'an entrenched federal precedent'; (2) whether the state has a substantial and legitimate interest in the application of its law; and (3) whether the state's rule is materially different from the federal maritime rule."[167] The

161. 927 F.2d 882 (5th Cir. 1991).

162. This law invalidates marine insurance contracts on evidence of the assured's material misrepresentations to the underwriter. *Id.* at 886.

163. *Id.*

164. *Id.*; *see also* Coastal Iron Works, Inc. v. Petty Ray Geophysical, 783 F.2d 577 (5th Cir. 1986).

165. 348 U.S. 310 (1955).

166. Ingersoll-Rand Fin. Corp. v. Employers Ins. of Wausau, 771 F.2d 910, 912 (5th Cir. 1985).

167. *Kieu*, 927 F.2d, at 886. *See also* Fireman's Fund Ins. Co. v. Wilburn Boat Co., 300 F.2d 631, 633 (5th Cir. 1962), *cert. denied*, 370 U.S. 925 (1962); Morrison Grain Co. v. Utica

court noted, however, that the factors are merely instructive and not dispositive.

After concluding that federal maritime law did not govern the assured's right to payment on the marine insurance policy, the court next determined whether Texas or Louisiana insurance law should apply. Albany argued that, even if federal maritime law did not apply, the district court should have applied a similarly strict Louisiana law. Although a federal court generally applies the choice of law rules of the forum in which it is located,[168] the court in maritime cases must apply general federal maritime choice of law rules.[169] Thus, the court concluded that it was bound to consider the choice-of-law rules which specifically govern marine insurance disputes.

This, however, did not prove to be an easy process for the court, as prior Fifth Circuit decisions attempting to explain the proper choice of state insurance law governing the interpretation of marine insurance policies were conflicting.[170] Attempting to apply the various holdings to the facts of *Kieu* was somewhat difficult, as the contract was countersigned and therefore likely formed in Louisiana, it was issued in Louisiana but delivered in Texas, and Texas appeared to have the greatest interest in the application of its law.

Nevertheless, the court reconciled the inconsistent choice-of-law rules by noting that modern choice of law analysis, whether maritime or not, generally requires the application of the law of the state with the most significant relationship to the substantive issue in question.[171] In contract cases courts must consider such factors as the place of the formation of the contract and the place of negotiation of the contract to determine which states have sufficient contact with the transaction and the parties to support the application of their law.[172] However, the court noted that the application of the most significant relationship approach did not simply turn on the number of contacts each state had with the controversy.[173] The most significant relationship test, instead, examines the relative interests of all of the states which share a sufficient relationship with the transaction and the parties.[174]

Thus, the court concluded that both the options of requiring the application of the law of the state in which the policy formed or the law of the state in which the policy was issued and delivered, identify only the states which have sufficient contact with the policy and the parties that their laws can be

Mut. Ins. Co., 632 F.2d 424, 429 (5th Cir. 1980); Walker & Sons, Inc. v. Valentine, 431 F.2d 1235, 1239 (5th Cir. 1970).

168. Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941).

169. *Kieu*, 927 F.2d at 890; Gonzalez v. Naviera Neptuno A.A., 832 F.2d 876, 880 n.3 (5th Cir. 1970).

170. *Compare* Graham v. Milky Way Barge, Inc., 811 F.2d 881, 885 (5th Cir. 1987) (law of the state in which the insurance contract was formed determines the parties' rights) *with* Elevating Boats, Inc. v. Gulf Coast Marine, Inc., 766 F.2d 195, 198 (5th Cir. 1985) (law of the state where the marine insurance contract was issued and delivered is the governing law) *and* Truehart v. Blandon, 884 F.2d 223, 226 (5th Cir. 1989) (in identifying the appropriate state law to apply, look to the state having the greatest interest in the resolution of the issues).

171. *Kieu*, 927 F.2d at 891. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1980).

172. RESTATMENT (SECOND) OF CONFLICT OF LAWS § 188 (1990).

173. *Kieu*, 927 F.2d at 891.

174. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1980).

applied.[175] Requiring the application of the law of the state with the greatest interest, however, identifies the state law that should be applied. A federal court in a marine insurance dispute must apply the first two rules to isolate the eligible states, and then must determine which state has the greatest interest in the resolution of the issues.[176]

A review of the first two choice of law rules indicated that both Texas and Louisiana had sufficient contact with the marine insurance policy and the parties to support the application of their laws. However, Texas had a considerably greater interest in the application of its insurance code, as it has a strong interest in the protection of its citizens, including Kieu, against the overbearing tactics of insurance underwriters.[177] Louisiana's interest in the protection of citizens of foreign states was less significant. Thus, the appellate court determined that the district court properly applied the insurance laws of Texas.

### 3. *Texas State Courts*

At issue in *Maxus Exploration Co. v. Moran Brothers*,[178] was the enforceability of an indemnity clause in a contract between two companies, each with its principal place of business in Texas. Moran Brothers agreed to drill an oil well in Kansas for Diamond Shamrock Exploration Co., now Maxus Exploration Co. Moran, a Texas corporation, and Diamond Shamrock, a Delaware corporation, negotiated the contract in Texas where each has its principal place of business. Diamond and Moran each agreed to indemnify the other against bodily injury claims by its own employees and its contractors' employees, even if caused by the other's negligence. Each also agreed to support its indemnity obligation by purchasing liability insurance or to be self insured. Moran chose to self insure its risk. Diamond Shamrock was not required to obtain a specific amount of liability insurance, but it had policies covering 70% of each bodily injury claim over $1 million, up to $6 million.

The contract was executed and the well drilled in 1980. During the drilling operation an employee of one of Diamond Shamrock's contractors was injured on Moran's rig. The employee, an Oklahoma resident whose employer was also located in Oklahoma, sued Moran in the United States District Court in Kansas. Moran filed a cross-action against Diamond Shamrock for indemnity under the drilling contract. Diamond Shamrock undertook to defend Moran in the litigation, each reserving any right it might have to seek indemnity or other damages from the other. Based upon a jury verdict that the employee had suffered $3 million in damages caused 90% by Moran's negligence, the court rendered judgment against Moran for $2.7 million. Moran then settled with the employee. Diamond Shamrock and its insurer paid approximately half the settlement amount and Moran

175. *Kieu*, 927 F.2d at 891.
176. *Id.*; *Truehart*, 884 F.2d at 226.
177. *Kieu*, 927 F.2d at 891.
178. 817 S.W.2d 50 (Tex. 1991).

paid the balance. Diamond Shamrock and Moran continued to reserve their indemnity claims against one another.

Diamond Shamrock then brought an action against Moran to determine the validity of the indemnity provisions of the agreement. Diamond Shamrock contended that these provisions were governed by Texas law, and that what is now chapter 127 of the Texas Civil Practice & Remedies Code, governing indemnity provisions in certain mineral agreements, voids or at least limits, the obligation to indemnify Moran. Alternatively, Diamond Shamrock argued that the provisions were unenforceable under Kansas law. Kansas has no statue governing indemnity agreements, but requires generally a clear and unequivocal expression of intent to indemnify a party against its own negligence, and Diamond Shamrock argues that the provisions in its contract did not meet this requirement. Diamond Shamrock sought reimbursement from Moran for most or all of what it paid to the employee, plus its litigation costs for defending Moran. Moran contended that the indemnity provisions were valid under both Kansas and Texas law, and sought reimbursement for the amount it paid to the employee.

Diamond Shamrock and Moran both moved for summary judgment. The trial court denied Diamond Shamrock's motion for summary judgment, and granted Moran's, upholding the indemnity provision. The court of appeals affirmed, holding the indemnity agreement valid under Texas law.

The Texas supreme court first considered whether the indemnity provisions of the drilling contract were governed by Texas or Kansas law. In deciding which state's law should have governed the construction of contractual rights, the court had previously looked to the principles stated in the Restatement (Second) of Conflict of Laws (1971).[179] The court then applied these principles to *Maxus*.

When the parties to a contract have not themselves chosen the laws to govern the agreement, section 188(1) of the Restatement states the general rule: "[T]he rights and duties of the parties with respect to an issue in contract were determined by the local law of the state that had the most significant relationship to the transaction" and the parties and to the principals stated in section 6.[180] Section 188(2) lists the context comprising the relationship between transaction and locale ordinarily to be taken into account in applying the principals in section 6. These include "(a) the place of contracting, (b) the place of negotiation of the contract, (c) the place of performance, (d) the location of the subject matter of the contract, and (e) the domicile, residence, nationality, place of incorporation and place of business of the parties."[181] The court agreed that the general rule in section 188 controls the choice of law governing contractual rights and duties, and that these include indemnity agreements.[182]

179. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 173, 177-78 (1991); *DeSantis*, 793 S.W.2d at 679, *cert. denied*, 111 S. Ct. 755 (1991); Duncan v. Cessna Aircraft Co., 665 S.W.2d 414, 420 (Tex. 1984).
180. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188(1) (1991).
181. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188(2) (1991).
182. *Maxus Exploration*, 817 S.W.2d at 53.

With respect to certain specific transactions, the restatement indicates how the contacts listed in section 188(2) should be evaluated. In the case of a contract for rendition of services, section 186 accords the place of performance paramount importance.[183] The several virtues of this rule when applicable are explained in comment c to section 196.[184]

In *Maxus* nearly all the services were contemplated by the parties to be rendered and were actually rendered in Kansas where the well was drilled. Taken as a whole, the contract was performable almost entirely in Kansas. "As a rule, that factor alone is conclusive in determining what state's laws is to apply."[185] The court noted, however, that in some instances it is more appropriate to consider the disputed contractual issues separately from the contract as a whole.[186] Even assuming that the indemnity obligations and the agreements should be considered separately, they were also performable, at least for the most part, in Kansas, where Diamond Shamrock, pursuant to those obligations while reserving the issue of the validity, defended Moran and the employee's litigation. Following section 196 of the restatement, the court concluded that Kansas law should be applied to determine the party's rights under their contract unless, with respect to the validity of the indemnity provisions, some other state has a more significant relationship to the parties and their transaction under the principles in section 6 of the Restatement.[187]

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183. *Id.* at 679. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 186 states:

> The validity of a contract for the rendition of services and the rights created thereby are determined, in the absence of an effective choice of law by the parties, by the local law of the state where the contract requires that the services, or a major portion of the services, be rendered, unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the transaction and the parties, in which event the local law of the other state will be applied.

*See also* Castilleja v. Camero, 414 S.W.2d 424, 426 (Tex. 1967) (contract which is made in one jurisdiction but which relates to and is found to be performed in another jurisdiction is governed by the law of the place of performance); Gorsalitz v. Olin Mathieson Chem. Corp., 429 F.2d 1033, 1048 (5th Cir. 1970) (interpretation of contracts executed in Texas but to be performed wholly outside the state is governed by the law of the place of performance).

184. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 196, comment c states:

> The rendition of services is the principal objective of the contract, the place where the services, or major portion of the services, are to be rendered will naturally loom large in the minds of the parties. Indeed, it can often be assumed that the parties, to the extent that they thought about the matter at all, would expect that the local law of the state where the services, or a major portion of the services, are to be rendered would be applied to determine many of the issues under the contract. The state where the services are to be rendered will also have a natural interest in them . . . . The rule of this section also furthers the choice-of-law values of certainty, predictability and uniformity of result and, since the place where the contract requires that the services, or a major portion of the services, are to be rendered will be readily ascertainable, of ease in the determination of the applicable law.

185. *DeSantis*, 793 S.W.2d at 679.

186. *Maxus Exploration*, 817 S.W.2d at 54. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS, Title C, Particular Issues at 631-32 (1991). Although most issues involving a contract will usually be governed by single law, "occasionally" an approach directed to the particular issue, rather than to the kind of contract involved, will provide a more helpful basis for the decision of a choice-of-law question.

187. *Maxus Exploration*, 817 S.W.2d at 54. RESTATEMENT (SECOND) OF CONFLICT OF

Before the court could evaluate these factors, it had to first examine the differences between Texas and Kansas law. The parties raised two principal differences pertaining to the enforceability of indemnity provisions: One difference is that Texas has a statute governing indemnity provisions and certain mineral agreements and Kansas does not. The second difference is that Texas requires that an agreement to indemnify another for his own negligence must be express,[188] while Kansas law requires that the agreement be clear and unequivocal.[189] The court found that the indemnity agreement between the two parties met the unequivocal standard of Kansas law, as well as the requirement of Texas law that the indemnity agreement be express.

Thus, while the degree of certainty to which indemnity provisions are subject differs under Texas and Kansas law, they meet the standards imposed by both jurisdictions. The only effective difference between the two states' law remaining was the existence of a statute expressing public policy in Texas, in the absence of any such statute or policy in Kansas. With this difference in mind, the court addressed the principles of section 6 of the Restatement.

Of the seven choice of law principles in section 6, the court found that four militated in favor of applying Kansas law in this case: the protection of justified expectations; certainty, predictability and uniformity of results; easing the determination and application of the law to be applied; and the basic policies underlying the particular field of law. The latter pointed to the general choice-of-law rule for contracts.[190] The other three (identified by the Restatement) supported the rule favoring application of the law of the place of the performance of contracts for the rendition of services generally.[191] Although the parties did not expressly provide for the law which would govern their agreement, they should have expected that Kansas law would at least be invoked. Kansas law was in fact applied in the employee's personal injury action. Although a state may have an interest in applying its law to a particular issue arising under the contract, in circumstances like these it is less desirable that Kansas law govern the employee's action and Texas law govern the defendant's cross claims than it is that the same law govern both. Had Diamond Shamrock and Moran not agreed to reserve their indemnity claims, the federal court in Kansas would have been required to determine them in the employee's litigation.

One section 6 principle, that these are the interstate and international sys-

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LAWS § 6 (1980). Section 6 provides when there is no statutory directive concerning the law to be applied in the case,

> the factors relevant to the choice of the applicable rule of law include (a) the needs of the interstate and international systems, (b) the relevant policies of the forum, (c) the relevant policies of the other interested states and the relative interest of those states in the determination of the particular issue, (d) the protection of justified expectations, (e) the basic policies underlying the particular field of law, (f) certainty, predictability and uniformity of result, and (g) ease in the determination and application of the law to be applied.

188. Enserch Corp. v. Parker, 794 S.W.2d 2, 8 (Tex. 1990).

189. Bartlett v. Davis Corp., 219 Kan. 148, 547 P.2d 800, 807-10 (1976).

190. RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 173(b), 188 (1990).

191. *Id.* § 196(c).

tems, was not implicated much, if at all in this case. The parties had not identified any such needs pertaining to the issue in the case and the court was not aware of any. The two remaining principles to be considered — the relevant policies of Texas and Kansas, and the relative interest of each in determining the validity of indemnity agreements — did not determine the issue in the case. Texas had formulated a clear statutory policy pertaining to indemnity agreements. Kansas had no such policy. Arguably, the Texas legislature's purpose in enacting chapter 127 was to protect Texas contractors who work on mineral wells and mines wherever they may be situated; however, the court found it more plausible that the legislature had the more limited objective in mind of protecting contractors who drill wells in Texas. The court did not read the statute to have an extra territorial reach, as in some agreements between parties.[192] In deciding which state's law would govern an agreement like the one in this case, all relevant factors, including those set out in section 6 of the Restatement, had to be evaluated. On balance, those factors required the application of Kansas law in the case.

### *B. Choice of Law in Tort Actions*

#### *1. Texas Federal Courts*

In *Knight v. Department of Army*[193] Knight brought a medical malpractice action against physicians after contracting the HIV virus through blood transfusions given during heart surgery. Partial summary judgment was granted in favor of the defendant; however, the court was left to decide the issue of informed consent.

Although the parties agreed that the damage issue should be determined under Alabama law, the parties disagreed as to whether Texas or Alabama law should govern the liability issues. The court noted that in a Federal Tort Claims Act case, recovery is based on the law of the state where the alleged negligent act or omission occurred. This includes the choice of law of the state. Texas choice-of-law applies the most significant relationship test, the general principles of which are set out in section 6 of the Restatement (Second) of Conflict of Laws.[194]

The court was charged with identifying those qualitative factors relevant to the choice of the applicable rule of law. It noted that the evidence clearly established that the surgery and the acts or omissions to the informed consent issue occurred in Texas. Moreover, although the plaintiff was a resident of Alabama, he chose to come to Texas for his surgery. He could have reasonably expected that Army physicians performing surgery in Texas would be governed by Texas law. Conversely he could have had no such reasonable expectations that the same physicians would be governed by Alabama law. Finally, the transmission of the HIV virus into plaintiff occurred in Texas, although his death occurred in Alabama.

192. *See* TEX. CIV. PRAC. & REM. CODE § 127.002(a) (Vernon 1986).
193. 757 F. Supp. 790 (W.D. Tex. 1991).
194. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1980).

Although Alabama has an interest in seeing that its residents are fully compensated for their damages, Alabama has no interest in having physicians in Texas comply with Alabama medical standards. In contrast, Texas has a direct and important interest in seeing that the surgeons practicing in Texas comply with reasonable standards of their profession in this state. Furthermore, plaintiff conceded that both Alabama and Texas law apply the same objective standard in determining informed consent and would reach the same results. Accordingly, applying Texas choice-of-law principals, the court determined that Texas law applied to the liability issues.

An injured serviceman and the survivors of other servicemen killed in an explosion of a mortar shell led to a products liability action against the manufacturers of the shell in *Mitchell v. Lone Star Ammunition, Inc.*[195] The manufacturers of the shell alleged that North Carolina law governed the lawsuit and barred the plaintiff's claims. The plaintiffs, however, urged that Texas law should apply in the action. The district court applied Texas law. On appeal of an adverse verdict, both defendants claimed that the district court erred in applying Texas law, and should have applied the more restricted North Carolina law. The North Carolina statute of repose provides that no action for personal injuries resulting from a defective product shall be brought more than six years after the date of the initial purchase for use or consumption. Texas law contains no comparable provision.

The Court of Appeals for the Fifth Circuit noted that in a diversity action in federal court, the district court is required to follow the choice of law rules of the state in which it sits.[196] Texas has adopted the most significant relationship approach detailed in sections 6 and 145 of the Restatement (Second) of Conflict of Laws. Under this approach, in all choice of law cases, except those contract cases in which the parties have agreed to a valid choice of law clause, the law of the state with the most significant relationship to the particular substantive issue will be applied to resolve that issue.

In applying the most significant relationship test, the court must first identify the relevant state contacts. The court in this case found that although the premature explosion of the mortar shell occurred in North Carolina, the defective shell was completed in Texas and placed into the stream of commerce in Texas.

According to the court, it is not sufficient merely to isolate the state with the greatest number of contacts. The application of the most significant relationship approach to the resolution of the choice of law questions does not turn on the number of contacts, but more importantly on the qualitative nature of those contacts as affected by the policy factors enumerated in section 6 of the Restatement.[197] After identifying the states with the relevant contacts the court must identify the policies or governmental interests of each state in the controversy in question. In this case the only states with

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195. 913 F.2d 242 (5th Cir. 1990).

196. *Id.* at 245. *See Klaxon*, 313 U.S. at 487.

197. RESTATEMENT (SECOND) OF CONFLICT OF LAWS, § 6 (1980).

interests asserted were those of Texas and North Carolina. Thus, the court considered only the interests of these two states.

The court noted that North Carolina's statute of repose was enacted to shield North Carolina manufacturers from open-ended liability that might exist for an indefinite period of time after a product is sold and distributed. However, in this case there was no North Carolina manufacturer involved as a defendant. Therefore, the court found no compelling reason why the North Carolina legislature would have an interest in the application of its statute of repose to eliminate the claims of foreign plaintiffs against foreign defendants.

Texas, on the other hand, had a substantial interest in the resolution of the parties' claims and defenses. The Texas legislature and courts have developed an almost paternalistic interest in the protection of consumers in the regulation of the conduct of manufacturers that have business operations in the state. The expansive Texas system of tort liability for defective products serves as an incentive to encourage safer design and to induce corporations to control more carefully their manufacturing processes.[198] This interest is particularly strong when the defective product in question was manufactured and placed into the stream of commerce in Texas. Therefore, upon review of the respective interests of the states of North Carolina and Texas, Texas had the greater interest in the parties' claims and defenses. Under the most significant relationship tests, Texas law was properly applied.

In *Fogelman v. Aramco*[199] a worker who was injured on a platform off the shore of Saudi Arabia brought a personal injury suit against the employer, a Saudi Arabian subsidiary of a United States corporation, and against the platform owner, a United States corporation based in Saudi Arabia. The district court had decided that Saudi Arabian law applied in the suit for personal injury sustained by Fogelman. The appellate court reviewed de novo the district court's choice of law determination, and determined that whether federal maritime law or forum law should govern a maritime tort depends on an assessment of eight factors articulated by the Supreme Court in *Lauritzen v. Larsen*.[200] The factors included the place of the wrongful act, the law of the flag, the allegiance or domicile of the injured worker, the allegiance of the defendant ship owner, the place of the contract, the inaccessibility of foreign forum, the law of the forum, and ship owners base of operations. The court noted that the test is not a mechanical one in which a court simply counts a relevant context; instead, the significance of each factor must be considered within the particular context of the claim and national interest that might be served by the application of United States law, particularly the Jones Act.[201]

The court addressed each factor in light of the facts of the case, and found that the only significant factor that pointed to the application of United

198. *Mitchell*, 913 F.2d at 250.
199. 920 F.2d 278 (5th Cir. 1991).
200. 345 U.S. 571 (1953).
201. 46 U.S.C. § 688 (1988).

States law was the domicile of the plaintiff. Courts have previously held that the allegiance of a plaintiff, even when recruited in the United States, did not mandate the application of United States law in a maritime suit when all other factors indicate the application of foreign law. The plaintiffs also contended that the remedy available to them under Saudi Arabian law was inadequate on its face and that the application of United States law to the suit was therefore required. The fact that the law of another forum may be more or less favorable to the plaintiff, however, does not determine the choice of law.[202] Moreover, the court had previously mandated the application of the labor law of Saudi Arabia to proceedings in the United States. Therefore, the appellate court did not disturb the district court's ruling regarding choice of law.

Finally, in *Pruitt v. Levi Strauss & Co.*[203] Pruitt filed an action challenging the termination of his employment with a division of Levi Strauss & Co. Pruitt alleged that Levi Strauss fraudulently induced him to leave his former employment, breached oral and written contracts of employment, and breached a covenant of good faith and fair dealing. The district court granted Levi Strauss summary judgment on all claims.

Pruitt argued that the district court erroneously failed to apply California employment law to resolve the dispute between the parties. California law imposes on employers a covenant of good faith and fair dealing.[204] On the other hand, Texas law, the only alternative asserted by Levi Strauss, does not recognize the covenant of good faith and fair dealing in the employment relationship.[205]

In a diversity action in federal court, the district is required to follow the choice of law rules of the state in which it sits.[206] Texas has adopted the "most significant relationship" approach to the choice of law, as detailed in the Restatement (Second) of Conflict of Laws.[207] Under this approach, "in all choice of law cases, except those contract cases in which the parties have agreed to a valid choice-of-law clause, the law of the state with the most significant relationship to the particular substantive issue will be applied to resolve that issue."[208]

In cases involving contracts for the rendition of services, the Texas supreme court has usually relied upon section 196 of the Restatement.[209] As a general rule, the place in which the services are performed is controlling in

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202. *Fogelman*, 920 F.2d at 284. *See also* Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981).

203. 932 F.2d 458 (5th Cir. 1991).

204. Cleary v. American Airlines, Inc., 111 Cal. App.3d 443, 456, 168 Cal. Rptr. 722 (1980).

205. English v. Fischer, 660 S.W.2d 521 (Tex. 1983).

206. *Klaxon*, 313 U.S. at 496.

207. *DeSantis*, 793 S.W.2d at 678.

208. *Duncan*, 665 S.W.2d at 421.

209. *DeSantis*, 793 S.W.2d at 679. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 196 requires the application of the law of the state in which major portions of the contractual services were performed unless a different state has a more significant relationship to the transaction and the parties.

determining what state's laws to apply.[210] In *Pruitt* the majority of the employment obligations were performed in the state of Texas.

The appellate court could not discern any state which had a more significant relationship to the transaction of the parties than the state of Texas. Therefore a determination of the most significant relationship test did not turn on the number of contacts, but on the quality of those contacts, as affected by the policy factors enumerated in Section 6 of the Restatement.[211] Texas had a compelling interest in the application of its employment law to its own residents and employment activities that occurred within its borders.[212] Other states, including California, might have similar interests in the application of their respective employment laws, but these interests are much more attenuated when the aggrieved party is an out of state resident who suffered an out of state injury.[213] Thus under the guidelines of section 196 of the Restatement, the appellate court determined that the district court had properly applied Texas law.

## III. FOREIGN JUDGMENTS

There are generally two ways in which foreign judgments create conflicts of laws: the local enforcement of foreign judgments, and the preclusive effect of foreign lawsuits on local lawsuits. One topic potentially impacting these areas is that of the "anti-suit" injunction, which has become popular since the Texas supreme court's decision in *Dow Chemical Co. v. Alfaro*.[214] That decision appeared to open the door to allow foreign litigants to pursue their cases in Texas state courts regardless of where the accident occurred.[215] Thus, a Texas court could hear a case, no matter how remote the contacts with Texas, so long as the requirements for the exercise of in personam jurisdiction are met, and the case is not removable. The anti-suit injunction is a remedy by which a defendant may extricate himself from this situation. An anti-suit injunction enjoins a foreign plaintiff in his home jurisdiction from pursuing his action in Texas.

The test to be followed in determining whether to grant an anti-suit injunction is set forth in *SNI Aerospatiale v. Lee Kui Jak*.[216] Courts must first determine whether the foreign jurisdiction is the natural forum, and second, that justice does not require that the action proceed in Texas court. In determining the natural forum, courts are to consider the relationship between each of the forums and the parties, their transactions, the witnesses, and the evidence. The second requirement, that justice be served, restricts anti-suit

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210. *Id.*

211. Gutierrez v. Collins, 583 S.W.2d 312, 319 (Tex. 1979).

212. Garcia v. Total Oilfield Serv., Inc., 703 S.W.2d 411, 415 (Tex. App.- Amarillo 1986, writ ref'd n.r.e.), *per curiam*, 711 S.W.2d 237 (Tex. 1986).

213. Abston v. Levi Strauss & Co., 684 F. Supp. 152, 155 (E.D. Tex. 1987).

214. 786 S.W.2d 674 (Tex. 1990).

215. W. Carter, Jr., Anti-Suit Injunctions: Enjoining Foreign Plaintiffs From Pursuing Their Actions In Texas, TEX. ASSOC. OF DEFENSE COUNSEL MANUAL (section entitled "Injunctions") 1-8 (1991).

216. 3 All ER 510 (1987).

injunctions to those situations where the foreign proceedings are "vexatious or oppressive."[217]

The anti-suit injunction gained further recognition in *Amchem Products, Inc. v. Workers' Compensation Board*,[218] where two-hundred Canadian plaintiffs sued thirty American asbestos producers for work-related injuries occurring in British Columbia. The defendants commenced injunction proceedings in the British Columbia court to enjoin the suit proceeding in Texas. The Canadian court based its discussion primarily on the holding of *Aerospatiale* in determining that the overwhelming number of ties to British Columbia and almost non-existent Texas connections made British Columbia an easy choice as the natural forum. Because the effect of *Alfaro*[219] was essentially to strip Texas courts of the power to consider pleas of forum non conveniens, the *Amchem* court determined that the defendants would be oppressed if the Texas action were allowed. Thus, the court decided to enjoin the Texas action.[220]

*Owens-Illinois, Inc. v. Webb*,[221] which was dismissed by the Texas supreme court on October 16, 1991, for want of jurisdiction, also addressed the issues of the appropriateness of an anti-suit injunction and deciding whether comity should be invoked. Owens-Illinois appealed from a temporary injunction obtained by Webb in order to prevent Owens-Illinois from pursuing an injunction in Canadian court. The single question presented for review was whether the district court abused its discretion by enjoining the appellants from pursuing an injunction in a foreign court which could prohibit the appellees from pursuing their Texas action. In short, the court was dealing with an anti-suit proceeding.

The underlying personal injury asbestos suit was filed in district court in Texas in 1988. The plaintiffs were 216 Canadian citizens. The defendants were numerous corporate manufacturers and distributors of asbestos products. All damages were alleged to have occurred in Canada.

In 1989, the Texas defendants began a proceeding in trial court in British Columbia seeking to enjoin the ninety-eight British Columbian plaintiffs in the Texas action from pursuing the personal injury claims in a Texas court. The Canadian trial court granted the injunction in December of 1989 and the British Columbia court of appeals affirmed this action as to all ninety-eight British Columbian plaintiffs by written opinion in November of 1990.[222]

During this time appellees' counsel obtained a temporary restraining order from the Texas district court restraining the appellants from seeking

217. Carter, Jr., *supra* note 215, at 5.

218. No. CAO 11728 (Vancouver Court of Appeal, Nov. 5, 1990).

219. *Alfaro*, 786 S.W.2d at 674.

220. *Amchem*, No. CAO 11728 (Vancouver Court of Appeal, Nov. 5, 1990). The *Amchem* court did not address the question of whether comity would require accordance with the decision of the Texas court if it was based upon an adjudication on the merit of a plea of forum non conveniens.

221. 809 S.W.2d 899 (Tex. App.—Texarkana 1991, writ dism'd w.o.j.).

222. *Id.* at 900.

similar injunctions in other Canadian provinces. Immediately after the rendition of an opinion by British Columbia trial court in December of 1989, the plaintiffs' counsel withdrew his application for an injunction in the Texas court, and agreed to abate the Texas trial court proceeding pending final resolution of the British Columbia appeal.

On the date that the British Columbia court of appeals rendered judgment against prosecution of the claims, the plaintiffs' counsel obtained an ex parte temporary restraining order from the Texas district court. The order prevented appellants from seeking similar injunctions in the Canadian courts in the provinces in which the remaining parties resided. After a hearing in November of 1990, the Texas court granted the temporary injunction prohibiting the appellants from bringing an action in Canada to enjoin the appellees from proceeding with the Texas action. Appellants appealed.

The appellate court specifically noted that this was not a case concerning jurisdiction, as both Canadian courts and Texas courts would have jurisdiction of the underlying suits. As the case involved two sovereigns with concurrent jurisdiction to decide the controversy, the principle of comity required that the trial court exercise its equitable power sparingly and only in special circumstances.[223] Comity in the legal sense, the court noted, is

> neither a matter of absolute obligation, nor a matter of mere courtesy and good will. It is, however, the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.[224]

In *Gannon v. Payne* the Texas supreme court had held that the trial court abused its discretion in granting an anti-suit injunction involving the two sovereigns, Texas and Canada.[225] There are no precise guidelines for determining the appropriateness of an anti-suit injunction or for deciding whether comity should be invoked. Under *Gannon* the circumstances of each situation must be carefully examined to determine whether the injunction is required to prevent an irreparable miscarriage of justice.[226] "Anti-suit injunctions have been issued by courts (1) to protect their own jurisdiction, (2) to prevent evasion of important public policies of the forum nation, (3) to prevent a multiplicity of suits, or (4) to protect a party from vexation or harassing litigation."[227]

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223. *Id.* at 901. (citing Gannon v. Payne, 706 S.W.2d 304, 306 (Tex. 1986).

224. *Id.* (citing Hilton v. Guyot, 159 U.S. 113 (1894).

225. 706 S.W.2d 304 (Tex. 1986). The facts in *Owens-Illinois* differ in two significant aspects from the facts in *Gannon*: (1) In the *Gannon* case, the trial court had enjoined a Canadian citizen from bringing an action in Canada. In *Owens-Illinois*, the trial court enjoined Texas resident corporations from bringing a suit in Canada to enjoin Canadian citizens from bringing their action in Texas; (2) In *Gannon*, the matter had already been litigated in Canada, and the Canadian citizen was asking for a declaratory judgment based upon the prior judgment. In *Owens-Illinois*, not only had the matter not been litigated in Canada, there was no parallel suit pending, nor was there any pending litigation at any stage of the proceeding in Canada on the substance of the litigation.

226. *Gannon*, 706 S.W.2d at 307.

227. *Owens-Illinois*, 809 S.W.2d at 902.

The appellate court stated that the Texas trial court most likely granted the injunction for the purpose of protecting its own jurisdiction.[228] A Texas court can enjoin its residents, either corporate or individual, over which it has jurisdiction, from proceeding with litigation in another forum. Thus, the appellate court did not find an abuse of discretion on the part of the Texas trial court.

228. *Id.* If the appellants were allowed to enjoin the appellees in a Canadian action from further proceedings, the Texas court would lose its ability to proceed with the case.