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## Welcome to the Jungle: The Application of Foreign Law in Aircraft Accident Litigation

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## WELCOME TO THE JUNGLE: THE APPLICATION OF FOREIGN LAW IN AIRCRAFT ACCIDENT LITIGATION

BRYAN S. DAVID\*

### I. INTRODUCTION

ORDINARILY, ALL LEGALLY significant aspects pertaining to a lawsuit emanate from a single state (usually the state where the lawsuit was filed), and the court assigned to the lawsuit decides the case based strictly upon the laws of that state.<sup>1</sup> However, by its very nature, aircraft accident litigation often arises from factual scenarios involving people and aircraft emanating from multiple states and even multiple nations. And those scenarios often raise questions regarding which law will apply. The body of law known alternatively as “conflict of laws” or “choice of laws” was specially designed to answer those questions.

However, over the decades, the process has evolved into something significantly complex and variable. This inspired one judge to famously describe choice of law as:

a veritable jungle, which, if the law can be found out, leads not to a “rule of action” but a reign of chaos dominated in each case by

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<sup>1</sup> See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 1 cmt. a (AM. LAW INST. 1971).

the judge's "informed guess" as to what some other state other than the one in which he sits would hold its law to be.<sup>2</sup>

By the end of this article, the reader should be equipped with the machete necessary to carve a path through the jungle. This article will provide an overview of choice of law; it will discuss the various choice of law standards employed in state and federal courts across the nation; it will discuss the factors evaluated in the popular Restatement test; and it will discuss the practical considerations that often influence decisions regarding choice of law.

## II. INITIAL CONSIDERATIONS FOR CHOICE OF LAW

At the beginning of any case involving contacts with multiple jurisdictions, it is important to identify the states involved and the potential issues in the case.<sup>3</sup> Many times a pleading is filed alleging claims and damages entirely based on the forum's substantive law. And, unless there is a jurisdictional challenge or a venue problem, the parties race towards trial without stopping to ask what law will (or should) be used in the jury charge.

When the pleadings or discovery reveal that multiple states have contact with the underlying facts, certain questions should be asked to determine if choice of law may have a role in the resolution of the case. For example, where are the various parties from? What is the true relationship between the parties? Where did the alleged events giving rise to the accident occur, and what is the connection between those events and the location of the accident? What damages are sought by the plaintiffs? What causes of action are alleged in the pleadings? All of this is important to determine if a choice of law analysis is worthwhile.

Additionally, it is important to evaluate the potential differences in the substantive law of the various states with a connection to the case and any conflicts in that law that may affect the outcome. If there is no actual conflict between the various state laws that could apply to the relevant issues, the court will likely apply the law of the forum and forgo a deeper choice of law analysis:

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<sup>2</sup> *In re* Disaster at Detroit Metro. Airport on Aug. 16, 1987, 750 F. Supp. 793, 795 (E.D. Mich. 1989) (quoting *In re* Paris Air Crash of Mar. 3, 1974, 399 F. Supp. 732, 739 (C.D. Cal. 1975)).

<sup>3</sup> *See, e.g.*, Nat'l Union Fire Ins. Co. of Pittsburgh v. Dassault Falcon Jet Corp., 263 Fed. App'x 604, 606 (9th Cir. 2008) (stating that the first step is to "examine the substantive law of each jurisdiction to determine whether the laws differ as applied to the relevant transaction").

At the outset of any case in which legally significant facts have occurred in more than one state, the Court must identify those states that have sufficient contacts with this litigation. Once these states have been identified, this Court must determine whether the various substantive laws at issue differ with regard to the particular issues in contest. Should the substance of the relevant state laws differ or conflict, then it will become necessary to apply the choice of law rules . . . .<sup>4</sup>

Furthermore, it is important to weigh the true connection between the various states and the issues in the case because, under most choice of law rules, a state with little substantive interest in the issues will be given little, if any, consideration. For example, a state with “fortuitous” contacts with the parties, such as the location of the accident in a transnational flight, may be disregarded in the choice of law analysis.<sup>5</sup> But if the state has a more substantive connection, such as the domicile of the parties, that state’s interests may be given greater weight, depending on the issue involved.<sup>6</sup> This is important because, under the doctrine of *depecage*, different states’ laws may be applied to the different *issues* in the case.

### III. DEPECAGE (IT’S NOT FOR DECORATING ANTIQUES)

A key concept behind modern choice of law rules is the concept of *depecage*. *Depecage* “is the process of analyzing different issues within the same case separately under the laws of different states.”<sup>7</sup> In other words, *depecage* allows different issues within a cause of action to be defined by the laws of multiple jurisdictions.<sup>8</sup> For example, in a negligence case, duty/standard of care,

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<sup>4</sup> *In re Disaster at Detroit Metro. Airport*, 750 F. Supp. at 796; see *Rodgers v. Beechcraft Corp.*, 248 F. Supp. 3d 1158, 1167–68 (N.D. Okla. 2017) (stating that it was not necessary to resolve the choice-of-law issue because “[t]he Court has compared the manufacturer’s products liability and negligence law of Oklahoma and Kansas, and there is no substantial difference” regarding the issues raised).

<sup>5</sup> See, e.g., *In re Air Crash Disaster at Stapleton Int’l Airport, Denver, Colo.* on Nov. 15, 1987, 720 F. Supp. 1445, 1452 (D. Colo. 1988) (stating that in air crash cases courts often view the place of the crash (“the situs of injury”) as fortuitous).

<sup>6</sup> *Id.* at 1451 (noting the domicile of the plaintiffs is given more weight when the issue is compensatory damages but very little weight when the issue is punitive damages).

<sup>7</sup> *Simon v. United States*, 805 N.E.2d 798, 801 (Ind. 2004).

<sup>8</sup> See *Foster v. United States*, 768 F.2d 1278, 1281 (11th Cir. 1985) (“[D]ifferent substantive issues in a single case may have to be resolved under the laws of different states where the choices influencing decisions differ.”).

compensatory damages, and punitive damages could be defined by the laws of different jurisdictions.<sup>9</sup>

*Depeceage* is the engine that drives the choice of law analysis in many jurisdictions, and it is explicitly integrated into the popular most significant relationship test established under the Restatement (Second) of Conflict of Laws (Restatement). Section 145 states that the various contacts enumerated within the rule “are to be evaluated according to their relative importance with respect to the particular issue.”<sup>10</sup> According to one court:

Thus, it is important to understand that the search for the applicable law is not a general one, but rather it is one that takes proper notice of the fact that the significance of a state’s relationship to a particular aviation disaster may vary as a function of the particular issue presented.<sup>11</sup>

It is important to note, however, that *depeceage* is not universally accepted. States employing the *lex loci* framework for choice of law reject the concept.<sup>12</sup> Furthermore, some have criticized the concept of *depeceage* because it allegedly creates a “Frankenstein’s monster” that could thwart the purposes of the legislature in enacting bodies of law and give parties with access to resources an unfair advantage.<sup>13</sup> As one commentator protested: “a party ‘should not be allowed to put “together half a donkey and half a camel, and then ride to victory on the synthetic hybrid.””<sup>14</sup> Despite the criticisms of those who reject the wonders of animal husbandry, *depeceage* is the mule that carries the load in modern choice of law, especially in the complex situations presented in aircraft accident litigation.<sup>15</sup>

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<sup>9</sup> See *In re Air Crash at Belle Harbor, N.Y.* on Nov. 12, 2001, 2006 WL 1288298, at \*23–24 (S.D.N.Y. May 9, 2006) (“[T]he issue of punitive damages is distinct from the issue of compensatory damages and, therefore, the application of different laws to these different issues may be appropriate . . . [I]t is well settled that the law applicable to issues of compensatory damages may be different than the law applicable to standard of conduct.”).

<sup>10</sup> RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (AM. LAW INST. 1971); see also *In re Aircrash Disaster Near Roselawn, Ind.* on Oct. 31, 1994, 926 F. Supp. 736, 740 (N.D. Ill. 1996).

<sup>11</sup> *In re Aircrash Disaster Near Roselawn, Ind.*, 926 F. Supp. at 740.

<sup>12</sup> *Simon*, 805 N.E. 2d at 802–03.

<sup>13</sup> *Id.* (“By making separate determinations for each issue within a claim, the process amalgamates the laws of different states, producing a hybrid that may not exist in any state . . . [B]y applying *depeceage* a court may hinder the policy of one or more states without furthering the considered policy of any state.”).

<sup>14</sup> *Id.* at 803.

<sup>15</sup> See *In re Air Crash Disaster at Stapleton Int’l Airport, Denver, Colo.* on Nov. 15, 1987, 720 F. Supp. 1445, 1448 n.3 (D. Colo. 1988) (“Although *depeceage* may

## IV. PROOF OF FOREIGN LAW

After the various states with potential interests are identified, the next step in the choice of law analysis is to establish that an actual conflict exists between the law of the forum and the law of the foreign state (or states).<sup>16</sup> Generally, the party seeking the application of foreign law has the burden of proof on this issue.<sup>17</sup> If no conflict is demonstrated, courts will generally assume that the law of the interested foreign state is the same as the law of the forum, and the court will proceed with the application of the forum's laws.<sup>18</sup> Thus, demonstration of an actual conflict is key to success. But this necessarily raises a practical and legal question—how does one prove the substance of a foreign jurisdiction's laws? Like all good legal questions, the answer depends on the circumstances.

## A. ESTABLISHING THE LAWS OF "SISTER STATES" WITHIN THE UNITED STATES

When the foreign state at issue is another state within the United States (a sister state), proof of foreign law may be simplified. In this case, a timely motion for judicial notice of the sister state's laws (or a similar device) is often the most expeditious and prudent means of establishing the substance of that law in

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lead to the application of the law of different jurisdictions to different issues within the same case, the approach is widely applied to the multifaceted issues involved in aviation litigation.”).

<sup>16</sup> See, e.g., *Lewis v. Lycoming*, 917 F. Supp. 2d 366, 375 (E.D. Pa. 2013) (“The initial step in our analysis requires us to focus on whether there is a ‘true conflict between the relevant laws.’”); *In re Disaster at Detroit Metro. Airport on Aug. 16, 1987*, 750 F. Supp. 793, 796 (E.D. Mich. 1989) (stating that once the interested states are identified, the “[c]ourt must determine whether [its] various substantive laws . . . differ with regard to the particular issues in contest”).

<sup>17</sup> See, e.g., RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 136 cmt. f (AM. LAW INST. 1971) (“Frequently, the local law of the forum will provide that the party who claims that the foreign law is different from the local law of the forum has the burden of establishing the content of the foreign law.”).

<sup>18</sup> *Colvin v. Colvin*, 291 S.W.3d 508, 514 (Tex. App.—Tyler 2009, no pet.) (“If a party . . . fails to provide adequate proof of the content of [the foreign state’s] law, the law of that jurisdiction will be presumed to be the same as Texas law.”); see, e.g., RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 136 cmt. h (AM. LAW INST. 1971) (“[W]here either no information, or else insufficient information, has been obtained about the foreign law, the forum will usually decide the case in accordance with its own local law except when to do so would not meet the needs of the case or would not be in the interests of justice.”).

either state or federal court.<sup>19</sup> In fact, judicial notice has long been available as a tool to accomplish this goal.

As far back as 1885, the U.S. Supreme Court recognized that “[t]he law of any State of the Union, whether depending upon statutes or upon judicial opinions, is a matter of which the courts of the United States are bound to take judicial notice, without plea or proof.”<sup>20</sup> And, since 1936, when the National Conference of Commissioners on Uniform State Laws adopted the Judicial Notice of Foreign Law Act, most states have adopted statutes and rules requiring a state court to take judicial notice of the statutes, rules, ordinances, or court decisions of their sister states.<sup>21</sup> An example of such a rule is Texas Rule of Evidence 202, which is fairly simple, and which establishes fairly liberal timing and notice requirements for taking judicial notice of a sister state’s law:

- (a) *Scope.*—This rule governs judicial notice of another state’s, territory’s, or federal jurisdiction’s:
  - Constitution;
  - public statutes;
  - rules;
  - regulations;
  - ordinances;
  - court decisions; and
  - common law.
- (b) *Taking Notice.*—The court:
  - (1) may take judicial notice on its own; or
  - (2) must take judicial notice if a party requests it and the court is supplied with the necessary information.
- (c) *Notice and Opportunity to Be Heard.*
  - (1) *Notice.*—The court may require a party requesting judicial notice to notify all other parties of the request so they may respond to it.
  - (2) *Opportunity to Be Heard.*—On timely request, a party is entitled to be heard on the propriety of taking judicial notice and the nature of the matter to be noticed. If the court takes judicial notice before a party has been notified, the party, on request, is still entitled to be heard.
- (d) *Timing.*—The court may take judicial notice at any stage of the proceeding.

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<sup>19</sup> See, e.g., *Colvin*, 291 S.W.3d at 514 (“To assure the application of the laws of another jurisdiction, a preliminary motion is required.”).

<sup>20</sup> *Lamar v. Micou*, 114 U.S. 218, 223 (1885).

<sup>21</sup> C.T. Dreschler, *Uniform Judicial Notice of Foreign Law Act*, 23 A.L.R. 2d 1437, at \*2 (1952).

- (e) *Determination and Review*.—The court—not the jury—must determine the law of another state, territory, or federal jurisdiction. The court’s determination must be treated as a ruling on a question of law.<sup>22</sup>

It is important to note that, although judicial notice is available to establish the law of a sister state, it is generally not available when the foreign state at issue is a foreign country.<sup>23</sup> Additionally, although judicial notice may serve to streamline the process of establishing the law of a sister state, complex issues may require more proof, including expert affidavits in order to fully establish the letter of the law and its proper application under the sister state’s legal framework, and to establish an actual conflict of law.

#### B. ESTABLISHING THE LAW OF FOREIGN COUNTRIES

The establishment of the law of a foreign country is often more complex than the establishment of the law of a sister state. Language and cultural differences may create significant complications to the understanding and application of the foreign country’s law.<sup>24</sup> That being said, the bar is not high.

Federal Rule of Civil Procedure 44.1 (Federal Rule 44.1) controls the determination of foreign law in federal courts:

A party who intends to raise an issue about a foreign country’s law must give notice by a pleading or other writing. In determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court’s determination must be treated as a ruling on a question of law.<sup>25</sup>

There are a couple of interesting aspects of this rule that merit consideration. First, the rule does not require a notice of intention to apply foreign law in a pleading or any other specific document. The rule merely requires notice to be provided “by a pleading *or other writing*.”<sup>26</sup> Second, the rule does not create a

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<sup>22</sup> TEX. R. EVID. 202.

<sup>23</sup> See *Bangaly v. Baggiani*, 20 N.E.3d 42, 82 (Ill. App. Ct. 2014) (“[U]nder the Uniform Judicial Notice of Foreign Law Act, Illinois courts cannot take judicial notice of the laws of foreign countries . . . . Thus, in Illinois, the laws of foreign countries must be pled and proven as any other fact.”).

<sup>24</sup> See *Boromei v. United States*, 2003 WL 25796654, at \*3 (S.D. Fla. 2003) (refusing to apply Saudi Arabia law, in part, due to the significant language and cultural differences between Saudi Arabia and Florida).

<sup>25</sup> FED. R. CIV. P. 44.1.

<sup>26</sup> *Id.* (emphasis added).

specific deadline for the notice. The Advisory Committee Notes to Rule 44.1 state that the rule “does not attempt to set any definite limit on the party’s time for giving the notice of an issue of foreign law; in some cases the issue may not become apparent until the trial, and notice then given may still be reasonable.”<sup>27</sup> Further, the committee stated that “[i]f notice is given by one party it need not be repeated by any other and serves as a basis for presentation of material on the foreign law by all parties.”<sup>28</sup>

The court is not limited to the consideration of any particular form of evidence in determining foreign law: “the court may consider *any* relevant material or source . . . .”<sup>29</sup> Furthermore, the court may even conduct its own research into the matter:

[The court] may engage in its own research and consider any relevant material thus found. The court may have at its disposal better foreign law materials than counsel have presented, or may wish to reexamine and amplify material that has been presented by counsel in partisan fashion or in insufficient detail.<sup>30</sup>

Although the court may conduct its own research, there is no requirement to do so, and one should not rely upon the court to conduct the necessary research.<sup>31</sup>

The rules applied in many state courts closely follow (and, in some cases, are identical to) Federal Rule 44.1.<sup>32</sup> However, there are some differences. Since we examined the Texas rule on judicial notice of law of sister states, we will examine the associated rule regarding the determination of the law of a foreign country, which varies from Federal Rule 44.1:

- (a) *Raising a Foreign Law Issue.*—A party who intends to raise an issue about a foreign country’s law must:
  - (1) give reasonable notice by a pleading or other writing;  
and

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<sup>27</sup> FED. R. CIV. P. 44.1 advisory committee’s note to 1966 amendments; *Mut. Serv. Ins. Co. v. Frit Indus.*, 358 F.3d 1312, 1321 (11th Cir. 2004) (finding notice of intention to rely on Cayman Island law was sufficient when given during pre-trial conference).

<sup>28</sup> FED. R. CIV. P. 44.1 advisory committee’s note to 1966 amendments.

<sup>29</sup> FED. R. CIV. P. 44.1 (emphasis added).

<sup>30</sup> FED. R. CIV. P. 44.1 advisory committee’s note to 1966 amendments.

<sup>31</sup> *Mut. Serv. Ins. Co.*, 358 F.3d at 1321 (stating that the “court is not required to conduct its own research” and indicating that notice, without directing the court to a specific case or statute, was insufficient).

<sup>32</sup> See, e.g., GA. CODE ANN. § 9-11-43(c) (1968); HAW. R. CIV. P. 44.1; W. VA. R. CIV. P. 44.1.

- (2) at least 30 days before trial, supply all parties a copy of any written materials or sources the party intends to use to prove the foreign law.
- (b) *Translations.*—If the materials or sources were originally written in a language other than English, the party intending to rely on them must, at least 30 days before trial, supply all parties both a copy of the foreign language text and an English translation.
- (c) *Materials the Court May Consider; Notice.*—In determining foreign law, the court may consider any material or source, whether or not admissible. If the court considers any material or source not submitted by a party, it must give all parties notice and a reasonable opportunity to comment and submit additional materials.
- (d) *Determination and Review.*—The court—not the jury—must determine foreign law. The court’s determination must be treated as a ruling on a question of law.<sup>33</sup>

Although Texas Rule of Evidence 203 (Rule 203) does impose certain deadlines for notice and submission of materials (i.e., thirty days before trial), the requirements are not demanding.<sup>34</sup> Furthermore, like Federal Rule 44.1, Rule 203 allows the court to consider “any material or source” in determining foreign law.<sup>35</sup> In one case, a Texas court utilized this provision to justify the reliance on excerpts from a “*Martindale-Hubbell International Law Digest*” and a text entitled “*Doing Business in Japan*” pertaining to Japanese law to determine the recovery of attorney’s fees.<sup>36</sup> So, when the rule says “any,” it apparently means any.

## V. WHICH STATE’S CHOICE OF LAW RULES ARE APPLIED?

Once it is determined that multiple states have an interest or connection with the issues in the case, and it is determined that a conflict exists between the laws of those states, a natural question arises: which state’s choice of law rules will be applied? State

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<sup>33</sup> TEX. R. EVID. 203(a)–(d).

<sup>34</sup> *Id.* at 203.

<sup>35</sup> *Id.* at 203(c).

<sup>36</sup> *PennWell Corp. v. Ken Assocs.*, 123 S.W.3d 756, 761–62 (Tex. App.—Houston [14th Dist.] 2003, pet. denied) (stating that the parties failed to present expert testimony or affidavits regarding the laws of Japan but finding the excerpts from a “*Martindale-Hubbell International Law Digest*” and a text entitled “*Doing Business in Japan*” sufficient to determine the recovery of attorney’s fees under Japanese law).

courts generally apply their own choice of law rules (i.e., the rules of the forum) when deciding choice of law issues.<sup>37</sup>

Although the selection of choice of law rules is fairly straightforward in state courts, it can be much more complex in federal court. There are many sources that dictate which choice of law rules will be applied in federal court. For example, “[a] federal court sitting in diversity must utilize the forum state’s choice-of-law rules.”<sup>38</sup> And, “[a] federal court exercising supplemental jurisdiction is bound to apply the law of the forum state, including its choice of law rules.”<sup>39</sup> However, when a federal court is presiding over a number of diversity actions consolidated as a multidistrict litigation, the court must apply the choice of law rules from each of the jurisdictions where the cases were originally filed, not the rules applied in the forum state of the multidistrict-litigation court.<sup>40</sup>

When a federal court’s jurisdiction is based on a federal question, the court will generally apply the choice of law rules adopted under federal common law.<sup>41</sup> This typically requires the application of the most significant relationship test established under the Restatement.<sup>42</sup> However, these are not the only sources of choice of law rules applied routinely in federal court. The various paths to a choice of law decision may make many turns depending on the claims, parties, statutes, and circuit involved.<sup>43</sup> Thus, special attention to this issue should be paid in the more “exotic” cases.

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<sup>37</sup> See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (AM. LAW INST. 1971) (“A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.”).

<sup>38</sup> Baird v. Bell Helicopter Textron, 491 F. Supp. 1129, 1138 (N.D. Tex. 1980).

<sup>39</sup> Menuskin v. Williams, 145 F.3d 755, 761 (6th Cir. 1998).

<sup>40</sup> *In re Air Disaster at Ramstein Air Base, Ger. v. Lockheed Corp.*, 81 F.3d 570, 576 (5th Cir. 1996) (“Where a transferee court presides over several diversity actions consolidated under the multidistrict rules, the choice of law rules of each jurisdiction in which the transferred actions were originally filed must be applied.”); *In re Air Crash Disaster at Stapleton Int’l Airport, Denver, Colo.* on Nov. 15, 1987, 720 F. Supp. 1445, 1448 (D. Colo. 1988).

<sup>41</sup> *Cyprus Amax Minerals Co. v. TCI Pac. Commc’ns, Inc.*, 2012 WL 4006122, at \*10 (N.D. Okla. 2012) (stating that when “federal question jurisdiction is invoked, federal courts generally apply federal common law principles to resolve choice of law disputes,” and that “in the absence of guidance from Congress, courts have relied upon the Restatement (Second) of Conflicts of the Law”).

<sup>42</sup> *Id.*

<sup>43</sup> See *Lauritzen v. Larsen*, 345 U.S. 571 (1953) (establishing the choice-of-law principles applicable in maritime tort cases); *Oveissi v. Islamic Republic of Iran*, 573 F.3d 835, 841 (D.C. Cir. 2009) (stating that the choice-of-law rules of the forum apply when considering issues governed by state law in Foreign Sovereign

## VI. A VARIETY OF CHOICE OF LAW TESTS AND THEIR APPLICATION

In order to make the final determination on which state's law will apply, the court must execute the applicable choice of law test. However, there are many such tests employed in the various jurisdictions of the United States. Some states have established their own individual choice of law tests, while many apply the most significant relationship test established in the Restatement.<sup>44</sup> An evaluation of all of the various tests is beyond the scope of this paper. However, a consideration of certain traditional tests provides insight into the challenges associated with choice of law and the impact of the doctrine. Also, we will consider unique factors that should be considered when applying the tests.

### A. THE *LEX LOCI DELICTI* TEST

Under *lex loci delicti*, the choice of law is determined by “[t]he law of the place where the tort or other wrong was committed” (typically the location of the accident or injury).<sup>45</sup> Although it was once the national standard, *lex loci delicti* is no longer a popular test, as it is largely criticized as an antiquated view on choice of law.<sup>46</sup> However, despite this criticism, a small minority of states continue to apply it in tort cases.<sup>47</sup> This doctrine and its alleged faults are well illustrated in the case entitled *Pease v. Main Turbo Systems*.<sup>48</sup>

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Immunities Act cases); *Chuidian v. Philippine Nat'l Bank*, 976 F.2d 561, 564 (9th Cir. 1992) (stating that federal common law choice-of-law rules apply in an action removed to federal court under the Foreign Sovereign Immunities Act); *Boromei v. United States*, 2003 WL 25796654, at \*1 (S.D. Fla. 2003) (stating that the Federal Tort Claims Act mandates application of the forum state's choice-of-law rules).

<sup>44</sup> See *Nat'l Union Fire Ins. Co. of Pittsburgh v. Dassault Falcon Jet Corp.*, 263 Fed. App'x 604, 605–06 (9th Cir. 2008) (applying California's “governmental interest analysis” for choice of law); *Rodgers v. Beechcraft Corp.*, 248 F. Supp. 3d 1158, 1167 (N.D. Okla. 2017) (applying the most significant relationship test adopted by Oklahoma); *In re Takata Airbag Prods. Liab. Lit.*, 2016 WL 6072406, at \*145–54 (S.D. Fla. 2016) (reciting the tests from multiple jurisdictions including New York's “interest analysis” test); *Pease v. Main Turbo Sys.*, 768 F. Supp. 2d 775, 778 (M.D. Pa. 2011) (applying Alabama's *lex loci delicti* test).

<sup>45</sup> *Lex loci*, BLACK'S LAW DICTIONARY (10th ed. 2014).

<sup>46</sup> E.g., *Brickner v. Gooden*, 525 P.2d 632, 635–37 (Okla. 1974) (reciting the criticisms and abandonment of the *lex loci delicti*).

<sup>47</sup> *Id.* at 635.

<sup>48</sup> *Pease*, 768 F. Supp. 2d 775.

*Pease* arose out of the crash of a Piper Saratoga that occurred near Tazewall, Tennessee in 2005.<sup>49</sup> The pilot suffered serious injuries in the crash.<sup>50</sup> The pilot filed suit against fifteen defendants, including Lycoming Engines, alleging that the crash was caused by oil starvation.<sup>51</sup> The lawsuit was originally filed in the U.S. District Court for the Middle District of Alabama; however, it was ultimately transferred to the U.S. District Court for the Middle District of Pennsylvania.<sup>52</sup> Lycoming filed a motion for the determination of applicable law asserting that, under Alabama's *lex loci delicti* test, the court was required to apply Tennessee substantive law to the pilot's claims.<sup>53</sup> The pilot contended that *lex loci delicti* should not be applied and that Pennsylvania law should govern his claims.<sup>54</sup>

The court noted that, despite the transfer of the case to Pennsylvania, the court was bound to apply Alabama's choice of law rules because the case was originally filed there.<sup>55</sup> The court recognized that the *lex loci delicti* test required the court to apply the substantive law of the state where the injury occurred, which, in this case, was Tennessee.<sup>56</sup> The court noted that Alabama had a long history—more than a century—of adherence to the *lex loci delicti* doctrine.<sup>57</sup> Thus, the court was bound to apply it.<sup>58</sup> However, that did not stop the court from complaining about it.

The court stated that *lex loci delicti* is “quite simply, an antiquated and illogical approach to conflicts of laws in 21st century tort actions,” and the court noted that the doctrine was only followed by a handful of jurisdictions, predominantly in the south.<sup>59</sup> The court went on to explain why the case was a prime example of what the court dubbed the “nonsensical effect” of *lex loci delicti*, especially for aviation accident cases:

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<sup>49</sup> *Id.* at 776.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 777 (“[A] transfer under 28 U.S.C. § 1404(a) does not change the applicable state law; hence, a transferee court is required to apply the choice of law of the transferor court's state . . . . Thus, Alabama's choice of law jurisprudence governs the instant matter.”).

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 778

<sup>59</sup> *Id.* (noting that, as of 2010, only ten states followed *lex loci delicti* including Alabama, Georgia, Kansas, Maryland, New Mexico, North Carolina, South Carolina, Virginia, West Virginia, and Wyoming).

Aviation accident claims, like the instant matter, uniquely illustrate the nonsensical effect of a rigid application of the doctrine of *lex loci delicti*. . . . [T]he parties have no connection to Tennessee other than the aleatoric location of the crash site. Plaintiffs reside in Ohio, the destination of the flight in question. Plaintiffs raise product liability claims against a Pennsylvania corporation which purportedly designed and manufactured the product in the Commonwealth of Pennsylvania. The flight originated from Asheville, North Carolina. Tennessee was neither the origin of the flight in question nor the destination. The situs of the accident, and consequently the choice of law, were simply happenstance.<sup>60</sup>

Despite the court's "disdain for sweeping application of *lex loci delicti*," and despite the court's desire for the Alabama Supreme Court to change its ways, the court applied the doctrine and granted the motion to apply Tennessee law.<sup>61</sup>

This case illustrates the tensions that have led the majority of states to reject *lex loci delicti*. That being said, it is interesting to note that § 175 of the Restatement establishes a clear preference for applying the law of "the state where the injury occurred" (*lex loci delicti*) unless another state has a more significant relationship to the particular issue.<sup>62</sup> We will address the Restatement test later in this article.

## B. THE *LEX FORI* TEST

*Lex fori* means "law of the forum."<sup>63</sup> Like *lex loci delicti*, the doctrine of *lex fori* is generally considered an antiquated method of addressing choice of law.<sup>64</sup> As of this writing, only two jurisdictions—Kentucky and Michigan—continue to apply some form of *lex fori*.<sup>65</sup> Upon consideration, *lex fori* is not much of a choice

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<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 175 (AM. LAW INST. 1971).

<sup>63</sup> *Lex fori*, BLACK'S LAW DICTIONARY (10th ed. 2014).

<sup>64</sup> See, e.g., *In re Air Crash at Lexington, Ky.*, Aug. 27, 2006, 2008 WL 2151995 (E.D. Ky. 2008); Pippa Rogerson, *Choice of Law in Tort: A Missed Opportunity?*, 1995 INT'L & COMP. L. Q. 650, 656 (1995).

<sup>65</sup> See *Sutherland v. Kennington Truck Serv., Ltd.* 562 N.W.2d 466, 469-71 (Mich. 1997). It should be noted that the Kentucky Supreme Court recently stated that it applied the Restatement test in both contract and tort actions. *Kirilenko v. Kirilenko*, 505 S.W.3d 766, 769 (Ky. 2016) ("Kentucky follows the 'most significant relationship' approach in tort and contract cases."). However, an examination of the citations in that opinion indicates that Kentucky may not apply the entirety of the most significant relationship test: "[O]nly certain sections of the *Restatement (Second) of Conflict of Laws* have actually been adopted in

of law doctrine—it really makes no choice at all. It is basically an anti-choice of law doctrine, and as such, it is generally incompatible with current choice of law concepts like *depeçage*. The operation of *lex fori* is exemplified by the case titled *In re Air Crash at Lexington, Kentucky*.<sup>66</sup>

*In re Air Crash at Lexington, Kentucky* arose out the crash of Comair Flight 5191, which ran off the end of the runway during takeoff at Blue Grass Airport in Lexington, Kentucky.<sup>67</sup> Canadian citizen Lyle Anderson was among the passengers who sustained fatal injuries in the accident.<sup>68</sup> Mr. Anderson's estate filed suit, and his daughter, sisters, and brother joined seeking damages.<sup>69</sup> Comair moved the court to dismiss all the wrongful death claims except the claim asserted by Mr. Anderson's estate because, under the Montreal Convention, Kentucky law applied and Kentucky's wrongful death statute did not allow the other plaintiffs to recover.<sup>70</sup> Mr. Anderson's family asserted that Canadian law should apply to their claims under the doctrine of *depeçage*, and they asserted that Canadian law allowed children and siblings to recover.<sup>71</sup>

The court began its analysis by assuming that the Montreal Convention was applicable to the claims and by noting that, in the present case, application of the Convention would have no impact on the choice of law analysis for the issue presented.<sup>72</sup> The court stated that the Montreal Convention preserved the forum's law on issues related to the persons who have the right to file suit, including the forum's choice of law rules.<sup>73</sup> The court noted that, as it relates to choice of law, Kentucky's rule was simple—if the court has jurisdiction, a Kentucky court will apply its own law: “When the court has jurisdiction of the parties, its primary responsibility is to follow its own substantive law.

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Kentucky . . . Kentucky law will apply if Kentucky has any significant contacts with the action.” *Saleba v. Schrand*, 300 S.W.3d 177, 181 n.2 (Ky. 2009).

<sup>66</sup> *In re Air Crash at Lexington, Ky.*, Aug. 27, 2006, 2008 WL 2151995.

<sup>67</sup> NAT'L TRANSP. SAFETY BOARD, AVIATION ACCIDENT FINAL REPORT 3 (Aug. 27, 2006), <https://app.nts.gov/pdfgenerator/ReportGeneratorFile.ashx?EventID=20060828X01244&AKey=1&RType=Final&IType=MA> [http://perma.cc/MW6H-TJVN].

<sup>68</sup> *In re Air Crash at Lexington, Ky.*, Aug. 27, 2006, 2008 WL 2151995, at \*1.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at \*2.

<sup>73</sup> *Id.* (stating that under the Montreal Convention “[q]uestions as to who are the persons who have the right to bring suit and what are their respective rights are left to the law of the forum, including conflicts of law”).

The basic law is the law of the forum, which should not be displaced without valid reasons.”<sup>74</sup> The court recognized that the concept of *depeçage*, which applies different states’ laws to different issues, was incompatible with Kentucky’s choice of law rule, which applies only one state’s law.<sup>75</sup> Accordingly, the court granted Comair’s motion and dismissed the claims at issue.<sup>76</sup>

As one can see, there are many reasons for the rejection of *lex fori*. The doctrine arguably fosters forum shopping, and, just like *lex loci delicti*, it can result in the application of law with minimal connection to the facts of the case. However, it does avoid the alleged perils of *depeçage*, which some complain results in a patchwork of law being applied at trial.<sup>77</sup> In any event, *lex fori* is only applied in an extreme minority of U.S. jurisdictions, and may be moving towards extinction.

### C. THE RESTATEMENT’S MOST SIGNIFICANT RELATIONSHIP TEST

The majority of states generally follow the choice of law standards set out in the Restatement.<sup>78</sup> The Restatement contains guiding principles for a variety of cases, depending on the cause of action at issue.<sup>79</sup> When it comes to wrongful death and personal injury cases, the courts generally apply the list of principles contained in §§ 6, 145, and 175, which are collectively referred to as the “most significant relationship test.”<sup>80</sup>

The general principle of the most significant relationship test is that “[t]he rights and liabilities of the parties *with respect to an issue* in tort are determined by the local law of the state which, *with respect to that issue*, has the most significant relationship to the occurrence and the parties . . . .”<sup>81</sup> This is determined through a qualitative evaluation of a list of contacts (enumer-

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<sup>74</sup> *Id.* (quoting *Foster v. Leggett*, 484 S.W.2d 827, 829 (Ky. 1972)).

<sup>75</sup> *Id.* It is interesting to note that the court also recognized prior cases holding that, when an accident occurs in Kentucky, that fact alone justifies the application of Kentucky law. *Id.* at \*3. This appears to be a version of the *lex loci delicti* rule, which applies the law of the state where the injury occurred. *Id.* (citing *Adam v. J.B. Hunt Transp., Inc.*, 130 F.3d 219, 231 (6th Cir. 1997); and then citing *Arnett v. Thompson*, 433 S.W.2d 109, 113 (Ky. 1968)).

<sup>76</sup> *Id.*

<sup>77</sup> *Simon v. United States*, 805 N.E.2d 798, 802–03 (Ind. 2004).

<sup>78</sup> 16 AM. JUR. 2D *Conflict of Laws* § 111 (2018).

<sup>79</sup> See RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 145, 175 (AM. LAW INST. 1971).

<sup>80</sup> See, e.g., *Baird v. Bell Helicopter Textron Inc.*, 491 F. Supp. 1129, 1138 (N.D. Tex. 1980).

<sup>81</sup> RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145(1) (AM. LAW INST. 1971) (emphasis added).

ated in § 145) considered with reference to a separate list of policy factors (enumerated in § 6).<sup>82</sup> In other words, it is not appropriate “merely to tally the [number of] contacts and choose the state with the greatest number.”<sup>83</sup> Rather, it is the quality of the contacts that determines which jurisdiction has the most significant relationship.<sup>84</sup>

The list of contacts to be considered in applying the test are as follows:

- (a) the place where the injury occurred,
- (b) the place where the conduct causing the injury occurred,
- (c) the domicil, residence, nationality, place of incorporation and place of business of the parties, and
- (d) the place where the relationship, if any, between the parties is centered.<sup>85</sup>

These contacts are evaluated with reference to the following policy factors:

- (a) the needs of the interstate and international systems,
- (b) the relevant policies of the forum,
- (c) the relevant policies of other interested states and the relative interests 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.<sup>86</sup>

Upon reflection of the components of the most significant relationship test, it is clear that the list of contacts is fairly simple to amass. It is largely a recitation of basic facts. The real challenge in this test lies in the evaluation of the quality of each of the contacts, establishing their relative importance to the litigation, and in determining the needs and policies of the various interested jurisdictions, which are often difficult to ascertain with any degree of certainty. Indeed, this appears to be part of the concern expressed by the courts when characterizing choice of law

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<sup>82</sup> *Id.* § 145(2).

<sup>83</sup> *E.g.*, *Herrera v. Michelin N. Am., Inc.*, 2009 WL 700645, at \*7 (S.D. Tex. 2009).

<sup>84</sup> *Id.*

<sup>85</sup> RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145(2)(a)–(d) (AM. LAW INST. 1971).

<sup>86</sup> *Id.* § 6(2)(a)–(g)

as a “veritable jungle.”<sup>87</sup> On top of that, there are the inherent difficulties presented by the application of a law (and sometimes a language and culture) foreign to the court, which may be too much to bear. Below, we will discuss the application of certain of the factors listed in the most significant relationship test and discuss their impact on the choice of law analysis.

1. *The Place Where the Injury Occurred: “The Fortuity Factor”*

Under Restatement § 145(a), the court is to evaluate “the place where the injury occurred.”<sup>88</sup> This idea is repeated in Restatement § 175, which creates a preference for the application of the law of “the state where the injury occurred.”<sup>89</sup> The comments to § 175 state that the place of injury is “not necessarily that where the death occurs.”<sup>90</sup> Instead, it is defined as the “place where the force set in motion by the actor first takes effect on the person.”<sup>91</sup> However, for all practical purposes, in aircraft accident litigation, this is likely to be the location of the accident.<sup>92</sup> We call this the “fortuity factor” because, over the decades, courts have repeatedly stated that “in aircraft accident cases the place of the injury is almost always fortuitous and thus is not entitled to its usual weight in the choice of laws decision.”<sup>93</sup> Like most generalizations, there is always an example of when this is true; however, there are many where it is not. There are certainly accidents that occur in locations that have no real connection to the parties or the events allegedly giving rise to the accident.<sup>94</sup> It is not uncommon for this to occur in airline accident litigation where the aircraft often overfly multiple

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<sup>87</sup> See *In re Disaster at Detroit Metro. Airport* on Aug. 16, 1987, 750 F. Supp. 793, 795 (E.D. Mich. 1989) (quoting *In re Paris Air Crash* of Mar. 3, 1974, 399 F. Supp. 732, 739 (C.D. Cal. 1975)).

<sup>88</sup> RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145(a) (AM. LAW INST. 1971).

<sup>89</sup> *Id.* § 175.

<sup>90</sup> *Id.* § 175 cmt. b.

<sup>91</sup> *Id.*

<sup>92</sup> See *id.* § 145.

<sup>93</sup> *Foster v. United States*, 768 F.2d 1278, 1282 (11th Cir. 1985).

<sup>94</sup> See, e.g., *Rodgers v. Beechcraft Corp.*, 248 F. Supp. 3d 1158, 1167 (N.D. Ok. 2017) (“The parties agree that the place where the injury occurred is fortuitous, because none of the parties is from Indiana and the destination of the flight has no bearing on plaintiffs’ claims.”).

states carrying passengers from multiple states.<sup>95</sup> However, in other cases, it is important to give this factor greater attention.

For example, in *Wert v. McDonnell Douglas Corp.*, the U.S. District Court for the Eastern District of Missouri was asked to apply the most significant relationship test in connection with the crash of an F-4C Phantom fighter jet in Arizona.<sup>96</sup> The aircraft was operated and maintained by the Indiana Air National Guard.<sup>97</sup> The court was asked to evaluate the laws of Arizona, Missouri, and Indiana.<sup>98</sup> In considering the location of the accident, the court rejected the general rule assigning little weight to the place of injury in aircraft accident cases and made a substantive evaluation of the connections between the flight, the parties, and the location of the accident:

The Court, however, rejects defendants' talismanic approach to this case. This is not a typical flyover case. Major Wert was assigned to Luke Air Force Base in Arizona for the purpose of readiness training. At the time of the accident, Major Wert was conducting simulated bombing runs over the Gila Bend Tactics Range. He took off from, and was planning to land, at Luke Air Force Base. Therefore, there is more to Major Wert's presence in Arizona than the fortuitous flyover or [traversing] of Arizona air space.<sup>99</sup>

A similar analysis was performed by the Delaware Supreme Court in *Bell Helicopter Textron, Inc. v. Arteaga*.<sup>100</sup> *Arteaga* involved a helicopter accident that occurred in Mexico involving Mexican citizens traveling from one Mexican state to another.<sup>101</sup> The trial court originally determined that the location of the accident was fortuitous because the accident occurred in the Mexican state of Veracruz, which otherwise had no connection to the decedents.<sup>102</sup> However, the Delaware Supreme Court disagreed: "it is irrelevant that the Mexican state in which the helicopter crashed was 'fortuitous'—the helicopter's location in the vic-

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<sup>95</sup> See *In re Air Crash Disaster at Stapleton Int'l Airport, Denver, Colo.* on Nov. 15, 1987, 720 F. Supp. 1445, 1452 (D. Colo. 1988) (stating that, in air crash cases, courts often view the place of the crash ("the situs of injury") as fortuitous).

<sup>96</sup> *Wert v. McDonnell Douglas Corp.*, 634 F. Supp. 401, 402-03 (E.D. Mo. 1986).

<sup>97</sup> *Id.* at 404.

<sup>98</sup> *Id.* at 404-06.

<sup>99</sup> *Id.* at 404.

<sup>100</sup> 113 A.3d 1045, 1048 (Del. 2015).

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 1053.

tim's home country of Mexico was not."<sup>103</sup> As the court noted, "plaintiffs cannot invoke the fortuity concept when they were injured 'in their own home countries.'"<sup>104</sup>

2. *The Place Where the Conduct Causing the Injury Occurred: "The Fault Factor"*

"The fault factor" draws a distinction between the place where the injury occurred (discussed above) and "the place where the conduct causing the injury occurred," which is referenced in the Restatement § 145(2)(b).<sup>105</sup> In product liability cases, this has traditionally been associated with the location where the product was designed, manufactured, and tested.<sup>106</sup> Indeed, this appears to be the majority rule.<sup>107</sup> However, as some have recognized, focusing on the location of manufacturing activities could create a "perverse incentive for jurisdictions" to change their laws to restrict remedies available in products cases so as to attract manufacturers and create jobs.<sup>108</sup> Those courts have begun locating the injury-causing conduct at the place where the product was marketed, used, or both.<sup>109</sup> This currently appears to be a minority view.

3. *The Protection of the Justified Expectations of the Parties: "The Forsaken Factor"*

Although Restatement § 6(2)(d) requires the court to consider the "protection of justified expectations" of the parties, this factor is largely cast aside in tort cases, which is why we refer to it as "the forsaken factor."<sup>110</sup> Section 145, comment b, states that the expectations of the parties are "of extreme importance in such fields as contracts, property, wills and trust."<sup>111</sup> However,

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<sup>103</sup> *Id.* at 1054.

<sup>104</sup> *Id.* at 1053–54.

<sup>105</sup> RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145(2)(b) (AM. LAW INST. 1971).

<sup>106</sup> *E.g.*, *Johnson v. Am. Leather Specialties Corp.*, 578 F. Supp. 2d 1154, 1167 (N.D. Iowa 2008) ("Courts have recognized in products liability cases that the place where the allegedly defective product was designed, marketed, or manufactured is 'the place where the conduct causing the injury occurred,' and have given significant weight to that factor in the conflict-of-laws calculus.").

<sup>107</sup> *See id.*

<sup>108</sup> *Bell Helicopter Textron*, 113 A.3d at 1055.

<sup>109</sup> *Id.* at 1055.

<sup>110</sup> RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2)(d) (AM. LAW INST. 1971).

<sup>111</sup> *Id.* § 145 cmt. b.

that comment goes on to minimize such expectations, stating that they are “of lesser importance” because those who commit negligent acts without consideration of what law may be applied:

[P]ersons who cause injury on nonprivileged occasions, particularly when the injury is unintentionally caused, usually act without giving thought to the law that may be applied to determine the legal consequences of this conduct. Such persons have few, if any, justified expectations in the area of choice of law to protect, and as to them the protection of justified expectations can play little or no part in the decision of a choice of law question. Likewise, the values of certainty, predictability and uniformity of result are of lesser importance in torts than in areas where the parties and their lawyers are likely to give thought to the problem of the applicable law in planning their transactions.<sup>112</sup>

Whether or not one agrees with the comment’s assumption regarding the expectations of law to be applied to manufacturers, or even aircraft operators, the courts generally rely on this comment to forsake this factor in accident cases.

4. *The Ease of Determination and Application of the Law to Be Applied: “The Foreigner Factor”*

Under Restatement § 6(2)(g), the court must consider the “ease in the determination and application of the law to be applied.”<sup>113</sup> This principle is unlikely to be much of a factor when comparing the laws of the sister states within the United States. As discussed above, most U.S. courts will take judicial notice of the laws of their sister states.<sup>114</sup> However, the weight and importance of this factor appears to increase as the distance between the various interested jurisdictions increases, not only in terms of miles, but in terms of language, culture, and legal framework. There are times when the gap is simply too large, resulting in the rejection of foreign law. In one case, the law to be applied was so foreign that it seemed to give the court double vision, causing us to identify this factor as “the foreigner factor.”

In *Boromei v. United States*, the court wrestled with a request to apply the law of Saudi Arabia to a mid-air collision that occurred in Florida.<sup>115</sup> Ameer Bukhari (Bukhari), a Saudi Arabian national who sustained fatal injuries in the accident, was one of the

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<sup>112</sup> *Id.*

<sup>113</sup> *Id.* § 6(2)(g).

<sup>114</sup> *See, e.g.*, *Lamar v. Micou*, 114 U.S. 218, 223 (1885); *Colvin v. Colvin*, 291 S.W.3d 508, 513 (Tex. App.—Tyler 2009, no pet.).

<sup>115</sup> *Boromei v. United States*, 2003 WL 25796654, at \*1 (S.D. Fla. 2003).

pilots involved in the collision. Talal Mekki (Mekki), for the Estate of Ameer Bukhari, sued the United States asserting negligence by air traffic control.<sup>116</sup> The United States moved to apply the law of Saudi Arabia to Mekki's damages claims.<sup>117</sup> Mekki asserted that Florida law should apply, and that Saudi Arabia had no interest in the litigation.<sup>118</sup>

Reciting the contacts between Saudi Arabia, Florida, and the facts underlying the litigation, the court noted that the accident occurred in Florida, and the alleged negligence was committed by air traffic controllers located in Florida.<sup>119</sup> However, the court also noted that Bukhari was a citizen of Saudi Arabia and was present in Florida for flight training as an employee of Saudi Arabian Airlines.<sup>120</sup> Based on the visa held by Bukhari, he was required to return to Saudi Arabia upon completion of his flight training or after approximately twelve months.<sup>121</sup> Given these facts, the court found that both Saudi Arabia and Florida had an interest in the application of their law to the litigation.<sup>122</sup> However, the court found a greater challenge in its evaluation of the various policy factors recited in Restatement § 6, especially the "ease in determination and application of the law to be applied."<sup>123</sup>

From the start, it was clear that the court was troubled by the difficulties associated with the application of laws rooted in a religion, culture, and language that were completely foreign to the court. As the court put it, "[w]hat this Court confronts here is not simply a conflict of laws but perhaps a conflict of cultures."<sup>124</sup> The court noted that both parties agreed that "Saudi law is derived from Islam and the *Koran*" and that wrongful death actions "are governed by a system of *diyya*," referred to by the court as "a system of 'blood money.'"<sup>125</sup> Evaluating the requested limitation on damages, the court found that neither legal system was threatened by the application of the other, and the court recognized competing arguments regarding the propriety of applying religious law in a secular court:

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<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at \*1–2.

<sup>119</sup> *Id.* at \*2.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at \*5.

<sup>124</sup> *Id.* at \*3.

<sup>125</sup> *Id.*

A limitation of damages for Plaintiff would not offend Florida, and this Court sees no reason that an award greater than the value of 100 camels would be offensive to Saudi law. As the Court explained above, there is no Saudi interest in limiting the damages paid by the United States. There may be an argument that some religious and cultural interest exists which favors the limiting of damages received by a follower of Islam even in a court of secular law, however it might be said also that the notion of applying religious law in a secular court presents a competing interest.<sup>126</sup>

However, the court ultimately determined that such competing arguments need not be resolved because the difficulties in ascertaining and applying Saudi law far outweighed any interest Saudi Arabia may have in the litigation.<sup>127</sup> The court found that it was clearly better prepared to apply Florida law.<sup>128</sup> And, the court noted that the competing experts hired by the parties had presented competing opinions on Saudi law, which the court was not equipped to resolve: “Without even a rudimentary understanding of either Arabic or Islam, this Court is reluctant to venture into a field so foreign not only in terms of national borders but also in fundamental principles.”<sup>129</sup> Ultimately, the court determined that financial and time costs associated with the application of Saudi law were not warranted by any interest Saudi Arabia may have in the litigation.<sup>130</sup> Thus, the court denied the motion to apply Saudi law.<sup>131</sup>

*Boromei* presents some “food for thought” when it comes to the practical application of the foreigner factor. It should be expected that a court will react with hesitation when the parties present two divergent recitations of foreign law. And this hesitation will be exacerbated when the court speaks a different language, the court has limited resources, and the damages are valued based on the price of livestock.<sup>132</sup>

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<sup>126</sup> *Id.* at \*4.

<sup>127</sup> *Id.* at \*5.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at \*4–5.

5. *The Basic Policies Underlying the Particular Field of Law: "The Fudge Factor"*

One of the most challenging factors to address is Restatement § 6(2)(e), which is the consideration of "the basic policies underlying the particular field of law" at issue.<sup>133</sup> This area is often difficult to address because of the lack of easily available authorities to support the parties' arguments, especially when the case involves the laws of a foreign country. This is why we call this one "the fudge factor." It presents an opportunity and a risk. When there is a lack of direct authority on a policy matter, the courts must often resort to "presumption" in order to address this factor, divining the evident policies and presuming the likely motivations of the legislature when enacting a body of law.<sup>134</sup> An example of this occurred in *Baird v. Bell Helicopter Textron, Inc.*:

The fact that British Columbia has failed to adopt an equivalent to § 402A *exhibits governmental interests* which support the application of Texas law to Baird's claim against Bell. An *evident policy* of British Columbia is to protect its citizen manufacturers from excessive liability resulting from the distribution of domestic products. *It is clear* that this interest is not involved in the products liability aspect of this case because the allegedly defective product and its manufacturers are both Texan. British Columbia *would presumably* be uninterested in the outcome of a products case involving a Texas defendant. Along with its desire to insulate its citizens from excessive liability, however, British Columbia *is likely to* have the implicit paternalistic interest in seeing that its injured citizens are compensated and that those parties causing their injuries are held responsible. That interest would be furthered by the application of Texas law.<sup>135</sup>

As one can see from the quote above, the fudge factor provides the opportunity to educate the court about the substantive policies underlying the relevant body of law at issue. And, it provides the risk that the court could establish a basis for the application of local law based on presumption and "evident" policies. Legislative history (if available) and comprehensive affidavit testimony of an expert in the foreign law at issue may be the best defense against the fudge factor. However, there may be times

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<sup>133</sup> RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2)(e) (AM. LAW INST. 1971).

<sup>134</sup> *See, e.g., Baird v. Bell Helicopter Textron*, 491 F. Supp. 1129 (N.D. Tex. 1980).

<sup>135</sup> *Id.* at 1141 (emphasis added).

when legislative history is unavailable. In those events, the fudge factor may be used as a justification for a decision when it really should not be evaluated at all due to the lack of reliable authorities.

## VII. CONCLUSION

Choice of law may be a jungle, but it is certainly not unnavigable or impenetrable. Choice of law provides a litigant with the opportunity to shape the trial of a case in a way that best reflects the interests of the parties and the states involved. The practical reality associated with choice of law is that virtually everyone prefers the law that they feel comfortable with—the law they learned and applied through their practice. Choice of law seeks to push the parties and the court outside of their comfort zones, and that can be difficult to accomplish. Accordingly, if one plans to enter the jungle, advanced preparation and development of the necessary evidence is key to survival. Good luck and beware of the wildlife.