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Conflict of Laws—Traditional Lex Loci Delecti Rule Rejected—"Most Significant Contacts" Rationale Determines Effect of Foreign Guest Statute

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arbitration. Consolidation could well affect the manner in which an arbitration is or must be conducted.

Section 602(a), if relevant at all, causes further difficulty, stating "when actions[22] involving a common question of law or fact are pending before a court, the court, upon motion, . . . may order the actions consolidated. . . ." CPA section 96 was quite simple—special proceedings could be consolidated. If an arbitration has become a special proceeding with the first application, some stretch of the imagination is required to say that it is "before a court" in any normal sense in order to satisfy section 602(a). The section would seem to apply only to those actions or special proceedings conducted before a court in their entirety.[23]

The drafters of the CPLR recognized in the use of arbitration a "desire to settle . . . differences out of court."[24] Adopting this view, a court may be well justified in restricting its interference to those activities specifically provided by statute. Unless courts take an extremely liberal view of the pertinent CPLR sections, and the changes from the CPA, the instant case may have been rendered academic. Since no evidence of an intention to deny consolidation of arbitration proceedings has been found,[25] it may be assumed that this problem was overlooked in the redrafting. The present trend of greater reliance upon arbitration in commercial circles may make this an important oversight.

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CONFLICT OF LAWS

CONFLICT OF LAWS—TRADITIONAL LEX LOCI DELICTI RULE REJECTED—"MOST SIGNIFICANT CONTACTS" RATIONALE DETERMINES EFFECT OF FOREIGN GUEST STATUTE

Two New York residents took a weekend automobile trip. It was to begin and end in New York. In fact, their trip terminated in Ontario, Canada, when defendant, driver and owner of the car, lost control causing the car to leave the road and strike a stone wall. Plaintiff, a guest passenger, brought an action in New York for personal injuries suffered as a result of defendant's negligence. From a dismissal of the complaint by the New York Supreme Court on the ground that Ontario's guest statute barred recovery[1] and an affirmance thereof

22. N.Y. CPLR § 105(b), defining "action" to include special proceeding.
23. See N.Y. CPLR § 105(f) for the statutory definition of "court."
24. Second Preliminary Report of the Advisory Committee on Practice and Procedure 134 (1958).
25. No mention is found in any of the annual Committee reports, or in the Weinstein article (*supra* note 1).

1. Highway Traffic Act, Rev. Stat. Ont. 1960, c. 172, § 105(2): "Notwithstanding the provisions of subsection 1, the owner or driver of a motor vehicle, other than a vehicle operated in the business of carrying passengers for compensation, is not liable for any loss or damage resulting from bodily injury to, or the death of, any person being carried in, or upon, or entering or getting onto, or alighting from such motor vehicle."

by the Appellate Division,[2] on appeal, *held*, (5-2) reversed. As between two New York residents, the liability of a host-driver for the injuries of his guest-passenger resulting from the driver's negligence in a one-car accident beyond the borders of this state, shall be determined by the law of the place having the most significant contacts with the event. *Babcock v. Jackson*, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963).

The commonly stated and traditionally applied rule governing tort liability is that where an action is brought in one jurisdiction for a tort committed in another, the substantive law of the place of the wrong is controlling.[3] This rule can be traced to the vested rights doctrine, ". . . namely, that a right to recover for a foreign tort owes its creation to the law of the jurisdiction where the injury occurred and depends for its existence and extent solely on such law."[4] The benefit to be gained from this rule, as with most mechanical rules, lies in its ease of application. Despite the practical advantages provided by this choice of law formula, much criticism has fallen upon it,[5] and in the interest of doing justice between parties a ". . . judicial trend towards its abandonment or modification . . ."[6] is apparent.

With certain exceptions,[7] New York has, until recently, adhered to the traditional rule of looking to the place of the wrong, the *lex loci delicti*, in determining the substantive liabilities between parties in a multi-state action. In the first New York case to concisely formulate that rule the court said:

> The liability of a person for his acts depends, in general, upon the laws of the place where the acts were committed, and although a civil right of action acquired, or liability incurred, in one State or country for a personal injury may be enforced in another to which the parties may remove or when they may be found, yet the right or liability must exist under the laws of the place where the act was done.[8]

The built in rigidity of such a rule did cause courts to place some limitations upon its scope. Thus public policy[9] and dissimilarity[10] were grounds occasionally used by courts to evade a mechanical application of foreign law. It appears, however, that continued application, accompanied by a failure of the courts to perceive the logical limits of such a rule, served to strengthen and more deeply

2. Babcock v. Jackson, 17 A.D.2d 694, 230 N.Y.S.2d 114 (4th Dep't 1962) (per curiam, Justice Halpern dissenting). See generally, 12 Buffalo L. Rev. 359 (1963).
3. Slater v. Mexican Nat'l R.R., 194 U.S. 120 (1904). See generally 11 Am. Jur. *Conflict of Laws* § 182 (1937).
4. Instant case at 477-78, 191 N.E.2d at 281, 240 N.Y.S.2d at 746 (1963) (citing authorities).
5. See Cook, *The Logical and Legal Basis of the Conflict of Laws*, 33 Yale L.J. 457 (1924); Ehrenzweig, *Guest Statutes in the Conflict of Laws*, 69 Yale L.J. 595 (1960).
6. Instant case at 478, 191 N.E.2d at 281, 240 N.Y.S.2d at 747.
7. See Nashko v. Standard Water Proofing Co., 4 N.Y.2d 199, 149 N.E.2d 859, 173 N.Y.S.2d 565 (1958). See also Dyke v. Erie Ry., 45 N.Y. 113 (1871).
8. McDonald v. Mallory, 77 N.Y. 546 (1879).
9. See generally Paulsen & Sovern, *"Public Policy" in the Conflict of Laws*, 56 Colum. L. Rev. 969 (1956).
10. See generally Hancock, Torts in the Conflict of Laws 26-29 (1942); Paulsen & Sovern, *supra* note 9, at 975-976.

entrench its reign over choice of law questions. The final stamp of approval for the place-of-wrong formula may well have been its adoption by the *Restatement.*

"Significantly, it was dissatisfaction with 'the mechanical formulae of the conflicts of law' which led to judicial departure from similarly inflexible choice of law rules in the field of contracts . . . ."[11] Whereas New York courts in previous contract cases had given controlling emphasis to the intent of the parties or "the place of making or performance," in *Auten v. Auten* the Court of Appeals chose, instead, "the law of the place . . . [having] the most significant contacts with the matter in dispute" as determinative of the choice of law question.[12]

In the field of torts, the Court of Appeals made its first significant thrust away from the traditional rule in the now famous case of *Kilberg v. Northeast Airlines, Inc.*[13] In that case the decedent, Kilberg, was a New York resident. He purchased a ticket and boarded defendant's plane in New York. The plane crashed in Massachusetts. Faced with a Massachusett's wrongful death statute which limited recovery to $15,000 the Court gave emphasis to the ". . . merely fortuitous circumstance that the wrong and injury occured in Massachusetts . . ." as opposed to the controlling interest of New York ". . . in providing its residents or users of transportation facilities there originating with full compensation for wrongful death."[14] Thus the Court, in *Kilberg*, widened the field of deviation from the traditional conflicts rule, a deviation which it had initiated in the field of contracts only seven years before.[15]

It is the policy of New York that a tort-feasor compensate his guest for injuries caused by his negligence.[16] In Ontario, on the other hand, the legislature has decreed that a non-paying guest has no cause of action for injuries negligently inflicted by his host.[17] Application of the traditional place-of-wrong formula would, of course, require that Ontario law control. Thus the central issue facing the Court in the instant case was: "Shall the law of the place of the tort *invariably* govern the availability of relief for the tort or shall the applicable choice of law rule also reflect a consideration of other factors which are relevant to the purposes served by the enforcement or denial of the remedy."[18] As recently as 1960 the New York Court of Appeals had answered this question in the negative.[19] But in the instant case the Court looked to the essential facts: a New York guest injured by a New York host; a car registered and insured in New York; and a trip which began and was to end in New York.

11. Instant case at 479, 191 N.E.2d at 281, 240 N.Y.S.2d at 747.
12. Instant case at 479, 191 N.E.2d at 282, 240 N.Y.S.2d at 747.
13. 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961) (Massachusetts limitation on wrongful death damages rejected).
14. Instant case at 480, 191 N.E.2d at 282, 240 N.Y.S.2d at 748.
15. Auten v. Auten, 308 N.Y. 155, 124 N.E.2d 99 (1954).
16. Instant case at 482, 191 N.E.2d at 284, 240 N.Y.S.2d at 750.
17. See note 1 *supra* and accompanying text.
18. Instant case at 477, 191 N.E.2d 281, 240 N.Y.S.2d at 746 (footnote omitted).
19. Naphtali v. Lafazan, 8 A.D.2d 22, 186 N.Y.S.2d 1010 (2d Dep't 1959), *aff'd mem.*, 8 N.Y.2d 1097, 171 N.E.2d 462, 209 N.Y.S.2d 317 (1960).

"In sharp contrast, Ontario's sole relationship with the occurrence . . . [was] the purely adventitious circumstance that the accident occured there."[20] Thus the Court, in reference to its past decisions in similar conflict of laws cases, said: ". . . reconsideration of the inflexible traditional rule persuades us . . . that, in failing to take account essential policy considerations and objectives, its application may lead to unjust and anomalous results. This being so, the rule, formulated as it was by the courts, should be discarded."[21]

With a clarity and forcefulness seldom seen, Judge Fuld's opinion in the instant case rejects the traditional choice of law rule in the torts field. In its place there is substituted the more recent approach of looking to the place having the most significant contacts with the occurance to determine the "proper law." It is a flexible, policy oriented approach. And notwithstanding some criticism of the term—"most significant contacts"—as used by the Court, it is a workable term ". . . in the sense that the rule can develop and grow as the content of this phrase is redefined."[22] In adopting this new approach, the Court has aligned itself with the most recent revision of the Conflict of Laws *Restatement* in the field of torts.[23] To be sure, many questions remain unanswered. Possibly the most significant, is the extent to which this decision will be limited to its facts. In this regard it is important to note that the Court said: "Where the issue involves standards of conduct, it is more likely that it is the law of the place of the tort which will be controlling . . . ." As the dissent pointed out, this statement, is hardly consistent with a footnote by the Court indicating that it would adhere to this decision even where the foreign guest statute required gross negligence before a guest could recover. The practical meaning of this apparent discrepancy would seem to indicate a willingness on the part of the Court to extend its reasoning in *Babcock* to similar cases in the more typical guest statute jurisdictions. One thing is certain. There are ". . . harder cases that are on the way,"[24] cases where the balance of contacts and policy considerations will not disproportionately favor the application of the law of one state. The task of decision in such cases will call for a real analysis of the term "significance" as used in *Babcock*. Should the courts in future cases evade this difficult issue and resort to a mere counting of contacts, then the common criticism as to the mechanical nature of the traditional rule would apply with equal force to the "significant contacts" approach. Despite these difficulties and others which time will no doubt reveal, the instant case is "believed to

20. Instant case at 482, 191 N.E.2d at 284, 240 N.Y.S.2d at 750.

21. *Id.* at 484, 191 N.E.2d at 285, 240 N.Y.S.2d at 751.

22. Leflar, in *Comments on Babcock v. Jackson, A Recent Development in the Conflict of Laws*, 63 Colum. L. Rev. 1247, 1251 (1963).

23. Restatement (Second), Conflict of Laws § 379(1) (Tent. Draft No. 8, 1963); "The local law of the state which has the most significant relationship with the occurrence and with the parties determines their rights and liabilities in tort." But note that subpart (2) of § 379 mentions the place of the wrong as one of the significant contacts to be given consideration in the process of deciding what law shall apply."

24. Leflar, *supra* note 22, at 1249.

be well worth the price"[25] because it is a major step towards a rational determination of choice of law questions in the field of torts.

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NON-RESIDENT'S ACTION AGAINST FOREIGN CORPORATION WHERE CAUSE OF ACTION AROSE IN NEW YORK

Petitioner, a Cuban national, purchased a United States currency draft in Havana for $120,000 from the Industrial Bank of Cuba, payable at the Colonial Trust Company in New York City. Upon presentation of the draft to the New York bank the petitioner, Gonzalez, was denied payment, because the nationalized Cuban bank had directed the Colonial Trust Company not to honor the draft. Subsequently, the petitioner brought an action in the Supreme Court of New York against the foreign bank by attaching its assets in New York.[1] The Court of Appeals, applying New York law, reversed the Appellate Division, Second Department, and *held*, three judges dissenting, the Supreme Court properly took jurisdiction. First, the respondent had a duty not to affirmatively interfere with payment of the draft in New York, and by countermanding the order for payment there was a cause of action established in New York. Second, the Act of State Doctrine was not a bar to the jurisdiction of the state. *Gonzalez v. Industrial Bank (of Cuba)*, 12 N.Y.2d 33, 186 N.E.2d 410, 234 N.Y.S.2d 210 (1962).

Prior to World War II the state courts of the United States firmly adhered to the Act of State Doctrine that "the courts of one country will not sit in judgment on the acts of the government of another done within its own territory."[2] After the war, however, the state courts began to re-examine the tenet in an effort to justify the harsh and steadfast doctrine. With the deep scrutiny there evolved a corrosion of the once absolute rule: first, it appears that the doctrine is a self-imposed limitation of state courts, and second, even more important to the unstabilizing effect on the doctrine, is the tendency for the state courts to sit in judgment on acts committed by foreign nations when the latter breach recognized rules of international law.[3] In the instant case, there being no present policy from the executive branch requiring acquiescence by Cuba to be sued in our courts, New York was at liberty to take jurisdiction.[4] Consequently, the New York policy on such acquiescence is operative, and the

25. Reese, *supra* note 22, at 1254.

1. Gonzalez v. Industrial Bank (of Cuba), 33 Misc. 2d 285, 227 N.Y.S.2d 459 (Sup. Ct. 1961).

2. Oetjen v. Central Leather Co., 246 U.S. 297, 303 (1918). See Hewitt v. Speyer, 250 Fed. 367 (2d Cir. 1918); Comment 57 Yale L.J. 108 (1947); Metzger, *The Act of State Doctrine and Foreign Relations*, 23 U. Pitt. L. Rev. 881 (1962).

3. Banco National de Cuba v. Sabbatino, 193 F. Supp. 375 (S.D.N.Y. 1961). See also, Hyde, *The Act of State Doctrine and the Rule of Law*, 53 Am. J. Int'l L. 635 (1959); Committee on International Law, Association of the Bar of City of New York, A Reconsideration of the Act of State Doctrine in United States Courts (May 1959).

4. 43 Dep't State Bull. 171 (1960).