Choice for Tort Law in Enclaves Established by United States Corporations for Expatriate Employees

Wade F. Hyder
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By Wade F. Hyder
Member of the Class of 1988

There are things that might surprise you about our lives here.


I. INTRODUCTION

When individuals agree to take jobs that require relocation abroad to a United States corporation’s special enclave for employees, they may be accepting more than just a position of employment. If such employees become involved in civil disputes, they may be quite surprised and disappointed by the resolution of their cases when the question of applicable rules of conduct is presented to courts in the United States.

When there is a clash between the laws of two jurisdictions, traditional conflict of law rules favor the law of the jurisdiction where a tort allegedly has occurred. In the context of the overseas operations of modern multinational corporations, the application of these rules may result in decisions that effectively allow defendants to engage in tortious conduct without fear of adverse consequences. This is because, in nations in which special enclaves of expatriate employees are located, the laws often afford tort victims no viable remedy.

To define individual rights and duties a court must first ascertain which jurisdiction’s law should govern tort liability in the enclaves. Unfortunately, a trial judge may find prior adjudications of this issue un-

1. The enclaves are discussed infra notes 13-25 and accompanying text.
2. This is commonly referred to as lex loci delictus. This concept is discussed infra notes 57-74.
helpful because United States courts have not perfected a consistent approach to the choice of law problem. While most courts ultimately have concluded that the law of the jurisdiction where an alleged tort occurred should prevail, some courts have found it more reasonable to apply United States law to disputes arising from conduct occurring within the enclaves. The conflict in the courts underscores the difficulty of ascertaining which jurisdiction's law should govern tort liability and of defining individual rights and duties in the enclaves.

Confusion regarding the source and nature of basic rules of conduct runs contrary to a fundamental notion underlying Western law—that the law should be discoverable so that individuals can conduct themselves in accordance with its principles. The theory is that when rules of conduct are discoverable, an individual abiding by those rules can rest assured that she has incurred no liability in relations with others. A corollary to this theory is that the same obligation to conform conduct to a known standard will apply to others. This Note will argue that when Americans are before a United States court to litigate disputes arising in these special enclaves, the court should apply American principles of tort liability to resolve the disputes.

Laws grounded in a religion that emphasizes sacred principles in-
volving punishment by either the state as a crime or the divine as a sin do not protect rights in the same manner as laws based upon such concepts as, for example, compulsory redistribution of wealth between private parties.\textsuperscript{9} The divergence between such systems of law demonstrates the great consequences of the decision on the conflicts question. Applying tort principles such as those of Islamic common law results in an inadvertent grant of immunity to a defendant and an effective foreclosure of remedies to a plaintiff\textsuperscript{10} whose claim would have warranted compensation had American tort law been applied to the case.

This Note uses Saudi Arabian law as a paradigm of religion-based jurisprudence. This jurisdiction is a useful focus for analysis both because scholarship on principles of Islamic law operative in Saudi Arabia is so well-developed\textsuperscript{11} and because involvement by United States corporations in that country has been so extensive.\textsuperscript{12}

This Note first examines the nature of an enclave of expatriates in a foreign nation to show the context in which this legal question arises. Then, focus shifts to the problem of determining standards for the adjudication of claims of harmful misconduct arising out of relations within the enclaves. This section will review some of the differences between the principles of substantive law in America and Saudi Arabia. Next, various
solutions adopted to address the problem of the choice of law question in these enclaves will be reviewed. Finally, this Note will evaluate the adopted solutions and suggest a revised policy for determining tort liability in the enclaves.

II. THE ENCLAVES

United States corporations have established enclaves to accommodate their employees living abroad who are citizens of the United States, Great Britain, Canada, and many other nations. ¹³ These enclaves pro-

13. This Note does not consider the viability of the enclaves as communities. Likewise, the propriety of this or any form of large-scale inhabitation of a developing nation is not addressed. Rather, the existence of the U.S. corporation and the Western enclave in a host country are presupposed, and the discussion focuses on how to determine tort liability in light of that presence. The following list of nations represented in the enclave of Dhahran, Saudi Arabia gives the number of resident employees coming from each nation in 1985. Note that the American, British, and Canadian citizens together account for 3607 of the total number of 5222, or approximately 70% of the employee residents of Dhahran. This list was submitted to the court in McGhee v. Arabian Am. Oil Co., No. 85 Civ. 2983 (N.D. Cal. Mar. 10, 1986).

<table>
<thead>
<tr>
<th>DHAHRAN FAMILY CAMP EMPLOYEES</th>
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<td>Nationality</td>
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<td>Australia</td>
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<td>Bahrain</td>
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<td>Bangladesh</td>
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<td>Belgium</td>
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<td>Canada</td>
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<td>Central &amp; South America/Caribbean</td>
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<td>Colombia</td>
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<td>Iraq</td>
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<td>Ireland/Eire</td>
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<td>Italy</td>
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<td>Jordan</td>
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<td>Nigeria</td>
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<td>Pakistan</td>
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<td>Palestine (All)</td>
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vide a special community that is technically within the boundaries of the host country, but functionally within the cultural expectations of the expatriates. In these enclaves, expatriates are largely isolated from the culture dominant in the host country. As discussed below, the distinction between life in the enclaves and life in the mainstream of the society of the host country is vital to the definition of the enclaves as distinct entities.

In recognition of the unique status of enclave residents, multinational corporations and host countries have endeavored to develop certain understandings about how various legal matters will be decided. Unfortunately, the operative relationships in each country can be determined only to a limited extent by examining explicit policy statements. Because of the delicate nature of the political, economic, and even religious issues that frequently are involved, many agreements and understandings are never recorded and thus are not available for review. One

<table>
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<tr>
<th>Country</th>
<th>Count</th>
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<tbody>
<tr>
<td>Philippines</td>
<td>349</td>
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<tr>
<td>Republic of China (Taiwan)</td>
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<tr>
<td>Republic of South Africa</td>
<td>1</td>
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<tr>
<td>Saudi Arabia</td>
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<td>Singapore</td>
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<tr>
<td>Sudan</td>
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<tr>
<td>Switzerland</td>
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<tr>
<td>Syria</td>
<td>10</td>
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<tr>
<td>Trinidad</td>
<td>3</td>
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<tr>
<td>Turkey</td>
<td>19</td>
</tr>
<tr>
<td>Uganda</td>
<td>1</td>
</tr>
<tr>
<td>United States of America</td>
<td>2598</td>
</tr>
<tr>
<td>Venezuela</td>
<td>1</td>
</tr>
<tr>
<td>Yemen</td>
<td>2</td>
</tr>
<tr>
<td>Total</td>
<td>5222</td>
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One characteristic shared by virtually all expatriate residents of the enclaves is the fact that the corporation for which they work considers their employment necessary to effectuate the arrangements it has reached with the host country. The expatriates are thus necessary to the fulfillment of existent policies of the host country itself. From the point of view of a host country, the presence of Western corporations enables it to utilize its natural resources and maximize its economic wealth. Articles 1, 2, and 22 of the Concession Agreement of 1933, see Plaintiff’s Memorandum in Opposition to Defendant’s Motion for Partial Summary Judgment at 3 n.2, Levine v. Arabian Am. Oil Co., No. 84 Civ. 2396 (S.D.N.Y. Feb. 15, 1985), attest to just such a conclusion. This policy statement explicitly includes the caveat that foreign corporations operating in the host country shall be staffed by nationals of the host country whenever possible. The Concession Agreement of 1933 required Aramco to “employ Saudi Arab nationals as far as practicable, and insofar as the Company can find suitable Saudi Arab employees it will not employ other nationals.” Preliminary Statement of Defendants-Appellees at 42, Levine, No. 86-7041 (2d Cir. Mar. 27, 1986). Consequently, the very presence of nationals of other countries frequently demonstrates the necessity of their employment.

14. See infra notes 17-24 and accompanying text.
arrangement that often is made explicit by the host country is that separate dwelling compounds be developed for employees who are foreign nationals. For example, in Saudi Arabia, as of March 1977, foreign investors with contracts exceeding 100 million Saudi riyals\(^5\) are no longer allowed to rent within city limits and are required to build accommodations for their employees on previously undeveloped land.\(^6\)

As a result of such edicts, the lifestyle in the compounds is very American. Dhahran, Saudi Arabia is the oldest of the enclaves and now has spawned third-generation expatriate Aramco employees. A recent history of modern Saudi Arabia describes Dhahran as follows:

Aramco's oil town on the hill at Dhahran looks like a cover from the Saturday Evening Post. There are neat white weather board houses, gauzed porches and pitched red roofs, sprinklers play on the lawns, mowers chatter across the verges, and the yellow school buses never fail to halt at the crossing signs. There are oleander hedges, barbecue pits, soda fountains and baseball bleachers. Visitors often comment that this leafy, ordered suburb could be Main Street, U.S.A. . . .

You can very easily live inside Aramco's Dhahran township and never realize you are in the Kingdom.\(^7\)

The American residents of Dhahran have never been required to comply with all of the various Moslem laws of Saudi Arabia.\(^8\) These exemptions have never been specified in writing, but were created orally by the King of Saudi Arabia.\(^9\) Within the enclaves, residents observe American customs and practices that are directly contrary to Saudi law outside the compound. These practices include purchasing and consuming pork; driving of automobiles by women; mixing of the sexes in schools, swimming, and other recreational facilities; viewing American movies; wearing Western-style dress; and conducting Christian and Jewish religious services.\(^20\)

The treatment of the production, acquisition, and consumption of alcoholic beverages is instructive as a means of understanding the rela-
tionship between the explicit domestic policy determinations of a sovereign and the often conflicting circumstances in an enclave. Prior to 1950, Saudi Arabia recognized an unwritten but complete exception to the Islamic prohibition against alcohol for Aramco's employees in Dhahran. The rule was changed in 1950 or 1951. The new rule prohibiting the importation of alcohol has remained in force since 1951.

No similar prohibition has ever been made on the consumption of alcohol within the compound. The expatriate employees still serve alcohol in their homes, and no company policy controls that practice or attempts to hide it from Saudi authorities. Company policy appears, to the contrary, to endorse consumption of alcohol: alcoholic beverages are frequently served at company parties, corporations have houses built for employees with a room specifically intended for the placement of the still, and corporation-operated special-order stores sell and deliver paraphernalia necessary for the production of alcoholic beverages.

III. THE CHOICE OF TORT LAW QUESTION

Allegations of damage caused to one person by another in an enclave trigger an inquiry into rights and duties. Out of this inquiry arise questions concerning the source of the standards of conduct that control in these planned communities. Judicial attempts to eliminate the uncertainty of ascertaining which jurisdiction's law should govern tort liability within the enclaves have taken a variety of forms. These attempts have brought more uncertainty to the choice of law question.

The choice of law issue is acute. A decision in favor of one jurisdic-
tion's laws may spell an end to the litigation, while a decision in favor of the laws of another jurisdiction could allow the case to be taken to the trier of fact. Principles of tort law vary greatly from jurisdiction to jurisdiction. A comparison of the requirements for establishing civil liability under the tort law of many United States jurisdictions with those in a system of law like that of Saudi Arabia reveals the enormous differences in the principles of tort law among different jurisdictions.

Dr. Saba Habachy provided the following uncontested Statement of Saudi Arab Law while testifying as an expert in recent litigation:

Islamic law, as applied in Saudi Arabia, has no general theory of liability for acts which cause damage to another. Damages for injury to the person or property can only be claimed in those cases in which the Shari'a specifically recognizes a private right of action in the victim. In other words, there is no general substantive rule of liability for damage; there are instead particular causes of action in certain determined cases.

In addition to the absence of a general substantive rule of liability for damages, Islamic tort law does not allow recovery of money damages in the event of personal injury that is considered "moral injury" only. Actual physical injury—permanent disfigurement of the person or deprivation of the use of a limb or an organ—is required before personal injury damages will be awarded.

Further distinctions between the substance of Western and Saudi Arabian tort law appear upon examination of limitations on the class of persons who may be required to appear as defendants in Saudi Arabia. The law's nonrecognition of any principle equivalent to the doctrine of respondeat superior reflects the historical absence of the corporate person from Saudi culture: "The Shari'a has a strict rule that responsibility for human action is individual and that there can be no vicarious liability."

26. See infra notes 27-33 and accompanying text.
27. Statement of Saudi Arab Law at 17, Levine, No. 84 Civ. 2396.
28. Id. at 15-16 (citing S. MAHMASSANI, 1 THE GENERAL THEORY OF THE LAW OF OBLIGATIONS AND CONTRACTS UNDER MOHAMMADAN JURISPRUDENCE 171-72 (1935); SHIEKH ALY AL-KHAFEEN, INDEMNIFICATION IN ISLAMIC JURISPRUDENCE 54-55 (1973)).
In *Chadwick v. Arabian American Oil Company*,1 the court concluded as follows:

This case is governed by what the Angel Gabriel said to the Prophet Mohammad in the Seventh Century A.D.

In this diversity action, plaintiff has filed a complaint seeking damages for the alleged medical malpractice of defendant, Arabian American Oil Company ("Aramco"). Under Delaware choice of law rules, Saudi Arabian law applies because that country was the locus of the injury in question. Saudi Arabian law, known as the Shari'a and revealed to the Prophet Mohammad centuries ago, does not recognize the doctrine of vicarious liability which is the cornerstone of plaintiff's medical malpractice theory. For this reason, the Court will grant defendant's motion to dismiss under [Federal Rule of Civil Procedure] 12(b)(6).32

The *Chadwick* court acknowledged that the law applicable in the 1987 case was the same law that applied in the seventh century A.D. Applying Delaware's choice of law rule that the place of the injury controls resolution of the tort claims, the court was compelled to dismiss the claim against Aramco upon determining that vicarious responsibility was not present in Saudi Arabian jurisprudence. Bound by its obligation to follow the substantive law of the forum state under *Erie Railroad v. Tompkins* (including its choice of law rules under *Klaxon v. Stentor Electric Manufacturing Company*)33 the *Chadwick* court was powerless to consider the equities of applying to a corporation a rule of law that stems from a time hundreds of years before the corporation was even developed as an entity.

**IV. SOLUTIONS ADDRESSED TO THE CHOICE OF LAW PROBLEM**

**A. The "Most Significant Relationship" Test**

In *In re "Agent Orange" Product Liability Litigation*,34 the United States District Court for the Eastern District of New York engaged in a comprehensive review of various conflicts tests. The court described section 6 of the Second Restatement of Conflict of Laws as setting forth "the general principles to be applied by a court in deciding what substantive

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32. Id. at 858.
33. See supra notes 122-23 and accompanying text.
law governs." That section provides as follows:

(1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.
(2) When there is no such directive, the factors relevant to the choice of the applicable rules of law include
   (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.36

The court described when the policies behind a forum's substantive law should be given consideration in the conflicts analysis. The court explained that these policies should be considered when the forum has some interest in the case independent of the mere fact that it is the forum and distinguished:

"... the forum [that] has no interest in the case apart from the fact that it is the place of the trial of the action," from "the forum [that] has an interest in the case apart from the fact that it is the place of the trial." In the former, the policies behind the substantive law of the forum will be irrelevant. ... For those cases in which parties do have a significant contact with the forum such as the residence, place of business or state of incorporation of the parties, the policies behind the substantive laws must be considered.37

In attempting to resolve the choice of law question before it, the Agent Orange court explained that the choice of law decision "requires a comprehensive analysis of many interlocking local and national policies whenever a new problem is posed."38

The court stated that section 145 of the Second Restatement of Conflict of Laws contains the specific list of "factors to be considered when applying the principles of section 6 to a tort case."39 According to the court, these factors "include a wide array of relationships of the parties

35. Id. at 700.
36. Id. (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6).
37. Id. at 701 (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6).
38. Id. at 700.
39. Id.
and their contacts with various jurisdictions. Under section 145:

(1) The 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 under the principles stated in § 6.

(2) Contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:

(a) the place where the injury occurred,
(b) the place where the conduct causing the injury occurred,
(c) the domicile, 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.

These contacts are to be evaluated according to their relative importance with respect to the particular issue.

This Restatement section provides an account of what has become known as the "most significant relationship" test. The "most significant relationship" test enjoys widespread application and has assumed a position of great importance in conflicts law. The New York, New Jersey, and Texas state courts and the Third and Fifth Circuits have each recognized the test.

These jurisdictions have abandoned the traditional choice of law rule in tort cases, that the law of the place where the wrong occurred governs. They instead look to the law of the jurisdiction having the most significant relationship and closest contacts with the parties and the occurrence of the wrong.

The "most significant relationship" test requires subtle analysis that considers the interplay between sections 6 and 145 of the Restatement. The Agent Orange court cautions that in viewing the contacts used in conducting the test described in section 145, it is vital to remember that "[w]hile individual factors must be analyzed, 'the most significant relationship' analysis should not turn on the number of contacts but more importantly on the qualitative nature of those contacts as affected by the

40. Id.
41. Id. (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145).
44. Guiterrez v. Collins, 583 S.W.2d 312, 318 (Tex. 1979).
policy factors enumerated in Section 6.”

B. The “Governmental Interest” Test

California courts have developed a “governmental interest” approach to analysis of choice of law problems. For many years California followed the rule that its courts should apply the law of the place where a tort occurred even when this law differed from California’s law. This rule was overturned in the landmark case of Reich v. Purcell. In this case the California Supreme Court held that the “forum must search to find the proper law to apply based upon the interests of the litigants and the involved states.” The court concluded that “the law of the place of the wrong is not necessarily the applicable law for all tort actions brought in the courts of this state.”

Reich and its progeny developed a choice of law doctrine based upon a “governmental interest” analysis. Before making a choice of law, a court must consider the actual stake that the potentially concerned states have in the litigation.

The governmental interest approach also requires a court to consider “whether the public policy of a particular legislature would be furthered, frustrated or is irrelevant if applied in the case at bar.” The preference is to apply California law; if, however, the foreign state has a strong interest in the application of its own law, the court must compare the impairment caused to each state’s interest by the choice of one rule over the other. The law of the forum will be displaced only if the policy of the legislature of another forum has a stronger interest.

46. *In re “Agent Orange” Prod. Liab. Litig.*, 580 F. Supp. 690, 700 (E.D.N.Y. 1984) (citing Gutierrez, 583 S.W.2d at 319). Note that both the Agent Orange court and the Restatement itself are careful in emphasizing that section 145 is to be understood in relation to the factors enumerated in section 6.


48. 67 Cal. 2d 551, 63 Cal. Rptr. 31 (1967).

49. *Id.* at 553, 63 Cal. Rptr. at 33.

50. *Id.* at 555, 63 Cal. Rptr. at 34.


52. *Strassberg*, 575 F.2d at 1264.


The precise analysis to be employed when following the governmental interest test was detailed in *Harding v. Arabian American Oil Company*:

This analysis requires examination of the allegedly applicable laws to determine if there is a conflict between them. A conflict exists when two different jurisdictions each have a governmental interest in applying their laws to a particular situation and their laws are materially different. A conflict does not exist if the laws are merely different, but only when the laws are different and the different jurisdictions each have a reason to see their laws enforced.\(^{56}\)

C. *Lex Loci Delictus*

Among the several solutions courts have proposed in answer to the choice of law question in the enclaves, the traditional conflicts of law test—*lex loci delictus*—has maintained a position of importance. According to section 377 of the First Restatement of Conflict of Laws, which embodies the *lex loci* approach, the law of “the place of the wrong” generally should be the law applied.\(^{57}\) In the case of a tort claim involving a personal injury, for example, the “place of the wrong” is defined as “the place where the harmful force takes effect upon the body.”\(^{58}\)

Many states continue to follow the *lex loci* approach. Michigan, for instance, looks to the place of the injury to determine if there is a cause of action for injury to the person or property.\(^{59}\) Similarly, Delaware’s choice of law rule for tort claims requires a Delaware court (or a United States district court sitting in diversity) to apply the substantive law of the place where the tort arose.\(^{60}\)

A jurisdiction may depart from its commitment to a particular choice of law test in individual cases. The *Agent Orange* court, for example, explained that the fact that a state uses the *lex loci* approach in most cases does not mean that it is immune to arguments based on the relative interests of jurisdictions.\(^{61}\) A court that has aligned itself with the *lex loci* test may depart from that test when it is successfully argued that a particular jurisdiction’s connection with the controversy is sufficient to

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\(^{57}\) RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 377.

\(^{58}\) In re “Agent Orange” Prod. Liab. Litig., 580 F. Supp. 690, 707 (quoting RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 377 note 1).


\(^{61}\) Agent Orange, 580 F. Supp. at 708.
justify displacing the rule of \textit{lex loci delictus}.\textsuperscript{62}

Another modification of the rule applies in cases in which a jurisdiction's law is so uncivilized or undeveloped that it is considered no viable law at all.\textsuperscript{63} The judiciary, however, is reluctant to appear to endorse the position that a legal system is uncivilized or rife with religious discrimination, possibly because of concerns with comity. Justice Holmes drafted opinions in \textit{Slater},\textsuperscript{64} \textit{American Banana Company},\textsuperscript{65} and \textit{Cuba Railroad Company}\textsuperscript{66} that recognized exceptions to the \textit{lex loci delictus} rule in rare cases having unspecified "exceptional circumstances."\textsuperscript{67}

Perhaps the best explanation for the apparent widespread use of the \textit{lex loci} test is the development of specific exceptions to the governmental interest and most significant relationship tests, which provide that in circumstances when "the rightness or wrongness" of the defendant's conduct is at issue, a court should essentially avoid any balancing tests and automatically conclude that the law of the place where the conduct occurred should govern.\textsuperscript{68} For example, the court in \textit{Babcock v. Jackson}\textsuperscript{69} stated that:

Where the defendant's exercise of due care in the operation of his automobile is in issue, the jurisdiction in which the allegedly wrongful conduct occurred will usually have a predominant, if not exclusive, concern. In such a case, it is appropriate to look to the law of the place of the tort so as to give effect to that jurisdiction's interest in regulating conduct within its borders, and it would be almost unthinkable to seek the applicable rule in the law of some other place.\textsuperscript{70}

This reasoning was echoed in the recent case of \textit{McGhee v. Arabian American Oil Company}, in which the court decided against applying California law, stating that it felt the correctness of its position was "particularly true when the rightness or wrongness of the defendant's conduct is


\textsuperscript{63} \textit{See Walton}, 233 F.2d at 545.

\textsuperscript{64} Slater v. Mexican Nat'l R.R., 194 U.S. 120, 129 (1903).

\textsuperscript{65} \textit{American Banana Co. v. United Fruit Co.}, 213 U.S. 347, 355-56 (1908).


\textsuperscript{68} Babcock v. Jackson, 12 N.Y.2d 473, 482, 240 N.Y.S.2d 743, 749 (1963) (quoting \textit{RESTATEMENT (SECOND) OF CONFLICT OF LAWS} § 379[1]).

\textsuperscript{69} Babcock, 12 N.Y.2d at 483, 240 N.Y.S.2d at 751.

\textsuperscript{70} \textit{Id.} at 483, 240 N.Y.S.2d at 750-51.
at issue.”

The McGhee court quotes the conclusion in Hernandez v. Burger that “[i]ndeed, with respect to regulating or affecting conduct within its borders, the place of the wrong has the predominant interest.”

The *lex loci* approach is also followed despite a jurisdiction’s adoption of a balancing test when the interest analysis does not point directly to the law of any jurisdiction. In the event that no clear “winner” exists in the competition of interests, the law of the place where the tort occurred prevails.

**D. Individual Cases**

In *Walton v. Arabian American Oil Company,* the plaintiff was injured when he was hit by an Aramco vehicle during his brief stay in Saudi Arabia. The court dismissed the claim for damages in tort because of the plaintiff’s failure to prove the content of Saudi Arabian law. The *Walton* court explained that the plaintiff had the burden of proving that a right of recovery was recognized under Saudi Arabian law because the New York courts at that time followed the *lex loci* choice of law rule. The court stated that the *lex loci* approach “is often said to be based on the motion [sic] that to hold otherwise would be to interfere with the authority of the foreign sovereign.” In a footnote, the court explained that:

[A] variant but related notion is that the foreign sovereign alone has the power to create a legal obligation resulting from an act done within the territory over which it has “jurisdiction”, and that, if that sovereign does create such an obligation, that obligation accompanies the person of the defendant everywhere.
In addition to positing rationale for the application of the *lex loci* approach to a dispute between United States citizens in Saudi Arabia, the *Walton* court addressed, in dicta, the concern that is the essential dilemma addressed in this Note:

It has been suggested that, where suit is brought in an American court by an American plaintiff against an American defendant, complaining of alleged tortious conduct by the defendant in a foreign country, and that conduct is tortious according to the rules of the forum, the court, in some circumstances, should apply the forum's tort rules. . . . Morris decries, as "mechanical jurisprudence," the invariable reference to the "law" of the place where the alleged tort happened. . . . There may be much to Morris' suggestion; and a court—particularly with reference to torts, where conduct in reliance on precedents is ordinarily absent—should not perpetuate a doctrine which, upon re-examination, shows up as unwise and unjust.80

The *Walton* court recognized the merit in giving consideration to alternatives to the *lex loci* approach and acknowledged that:

[I]t might perhaps be appropriate to suggest that the Supreme Court should reconsider the accepted doctrine (as to the complete dominance of the "law" of the place where the alleged tort occurred) which seems to have been unduly influenced by notions of sovereignty à la Hobbes . . . as to the reification of the "notion of power."81

The *Walton* court, however, was unable to do more than relegate its discussion of the merits of the *lex loci* approach to a footnote because that was then the test followed by the New York courts. The court was constrained by the well-established rule that a federal court sitting in diversity must follow the substantive law of the state in which it sits, including the state's choice of law rules.82

Some courts have departed from the mechanical rule followed in *Walton* and have concurred with the Second Restatement that a more sophisticated analysis is appropriate to resolve the choice of law question in a tort case. For example, the court in *Harding v. Arabian American Oil Company* upheld the plaintiffs' right to proceed under the tort law of either Texas or California for fraud, intentional infliction of emotional

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80. *Walton*, 233 F.2d at 543 (citations omitted).
81. Id. at 543 n.5.
82. Id. *See infra* note 123 and accompanying text.
distress, and other torts alleged to have occurred in Saudi Arabia.\textsuperscript{83}

The \textit{Harding} court followed California’s governmental interest test\textsuperscript{84} to determine which jurisdiction’s tort law would apply. The court noted that there were three possible jurisdictions whose laws conceivably could apply in the case: California, because the suit was brought and the plaintiffs were residents there; Texas, because Texas law was to control the construction of the employment contract; and Saudi Arabia, because performance of the contract occurred there.\textsuperscript{85}

In making its decision, the court stated that it was “at a loss to determine what interest Saudi Arabia ha[d] in enforcing its law of fraud and damages over Aramco and the Plaintiffs.”\textsuperscript{86} The court emphasized that neither of the former enclave residents suing as plaintiffs was a citizen of Saudi Arabia. John Harding, an American citizen, had been employed by Aramco and Patricia Harding, an Italian citizen, had moved to Saudi Arabia to be with her husband and their children in what the court described as “a western style” city run by Aramco and “insulated from many Saudi Arabian laws and customs.”\textsuperscript{87} The court addressed the interest of Saudi Arabia in having its law apply to the plaintiffs. The court focused on the question independently for each individual concluding that “Saudi Arabia’s interest in applying its law to Patricia seems very tenuous to this Court. . . . [I]n regard to John, the interest of Saudi Arabia in regulating Aramco’s relations with its employees is very weak.”\textsuperscript{88}

As a result, each party was allowed to look to Western tort law for adjudication of claims against Aramco. This treatment indicates that although the existence of a former employment relationship can be of key importance in the choice of tort law analysis, its presence or absence must not prove dispositive of the conflicts question. The cause of action itself is based in tort rather than in contract.

The court devoted considerable discussion to the role of the employment contract in application of the governmental interest analysis. It found that the employment relationship was actually centered in America, even though all work was performed in Saudi Arabia, because the standard Aramco employment application was returnable on its face to Houston and Aramco’s employees were processed and paid through

\begin{itemize}
  \item \textsuperscript{83} Memorandum in Support of Choice of Law Order at 12, Harding v. Arabian Am. Oil Co., No. 80-3847 (C.D. Cal. March 25, 1985).
  \item \textsuperscript{84} See supra notes 47-56, and accompanying text.
  \item \textsuperscript{85} Memorandum in Support of Choice of Law Order at 9, Harding, No. 80-3847.
  \item \textsuperscript{86} Id.
  \item \textsuperscript{87} Id. at 13.
  \item \textsuperscript{88} Id.
\end{itemize}
Houston in United States dollars rather than in the currency of Saudi Arabia. Aramco classified employees as "expatriates," adjusted their salaries on the basis of their "expatriate" status, and referred to their moves back to the United States as "repatriation." These facts led the court to reject the defendant's argument that Saudi Arabia had any cognizable interest in having its tort principles apply to the plaintiff's contentions:

The Court finds that the Saudi Arabian government has no apparent interest in protecting Aramco, a foreign corporation, from lawsuits brought by non-Saudi Arabians and based on acts which occurred either on land intentionally separated from the normal course of Saudi Arabian life (Dhahran) or outside of Saudi Arabia altogether. The Court will not apply Saudi Arabian law.

The court also noted that Aramco had engaged in conduct inconsistent with its assertion that the plaintiffs should have expected that Saudi Arabian law would govern the parties' relationship. The employment application, which later became part of the employment contract between the parties, "expressly provided that Texas law was to govern the contract, not Saudi Arabian law." The court additionally noted that the contract also provided that Texas worker's compensation law and its limitations on liability were to control any work-related injuries sustained by the plaintiffs, despite the fact that it was absolutely clear that neither the plaintiff nor Aramco ever intended the plaintiff to work anywhere but Saudi Arabia. In summary, the court stated that:

The evidence is overwhelming that Aramco, with the assistance of the government of Saudi Arabia, stations its expatriate employees in Dhahran, a "western style" city intentionally created by Aramco to be set apart and insulated from many Saudi Arabian laws and customs. The court finds implausible the assertion that Saudi Arabia has any governmental interest in having its law control relations between a foreign employer and its foreign employees who live in a city intentionally set apart from and insulated from the mainstream of Saudi Arabian life and laws.

The Harding court thus provides a decision that serves as authority for the argument that the reasonable expectations held by individuals in

89. Id. at 9.
90. Id. at 12-13.
91. Id.
92. Id.
these enclaves is an extremely important, if not determinative, factor in this choice of law question. In explaining its decision, this court was not concerned with the constraints imposed by the "reification of the notion of power" to which the Walton court alluded as the possible basis of a mechanical application of the lex loci approach. Indeed, the Harding court clearly departed from this thinking; it unequivocally stated that, given the unique nature of the enclaves, the assertion that Saudi Arabia had any legitimate governmental interest in applying its laws to relations between enclave residents and Aramco was "implausible."

In Levine v. Arabian American Oil Company, the United States District Court for the Southern District of New York gave an opinion that employed a distinctly different rationale and reached a conclusion contrary to that of the Harding court. The plaintiffs' claims for damages resulting from defendants' allegedly tortious conduct were dismissed because of the court's ruling on the choice of law question.

The Levine court concluded that "every significant factor points to Saudi Arabia as this case's center of gravity." The court listed those factors it considered significant. The alleged torts occurred in Saudi Arabia. The plaintiffs were employed and present in Saudi Arabia at the time the alleged torts took place. The individuals named as defendants along with Aramco were three Saudi Arab nationals and a Filipino resident. The principle place of Aramco's business was Saudi Arabia. Based on these factors, the court characterized the connection of any state in the United States with the torts alleged as insignificant and "too tenuous for their interest to have any weight."

The court summarily concluded that Texas had no connection with the torts at issue. Unlike the Harding court, the court in Levine attached no particular significance to the choice of law provision that Aramco included in its employment contracts. The court stated that "[w]hile Texas law may apply to the employment agreements between Aramco and plaintiffs, resolution of the contract claim does not necessarily con-

96. Id.
97. Id., slip op. at 16.
98. Id. The Levine court cites Bing v. Halstead, 495 F. Supp. 517, 520 (S.D.N.Y. 1980) (fact that plaintiff was a New York domiciliary did not call for the application of New York law when plaintiff was "a long time resident of another jurisdiction"); Cooperman v. Sunmark Indus., 529 F. Supp. 365, 370 (S.D.N.Y. 1981) (Carter, J.) ("long-term employment" of New York plaintiff in New Jersey was a factor warranting application of New Jersey law).
trol the question whether plaintiffs' tort claims are also governed by Texas law. 99

The court found that Texas was precluded from asserting any legitimate interest in having its law applied to the case because the plaintiffs were not domiciled in Texas at the time of the alleged tort and Aramco's co-defendants were not United States citizens. 100 The court reasoned as follows:

Since all the elements constituting the alleged torts occurred within Saudi Arabia's borders, Saudi Arabia has a strong interest in regulating and determining standards for liability. In Babcock, . . . the court recognized that when the rightness or wrongness of the defendant's conduct is at issue, as it is here, rather than the extent of liability, it is appropriate to look to the place of the tort so as to give effect to that jurisdiction's interest in regulating conduct within its borders, and it would be almost unthinkable to seek the applicable rule in the law of some other place.

Plaintiffs do not dispute that under Saudi Arab law plaintiffs are unable to state viable tort claims. Rather, plaintiffs contend that application of Saudi Arab law is anachronistic and unfair when applied to Americans raised in a different culture with different expectations, and hence this court should refuse to apply Saudi Arab tort law to American employees working for American employers in that country. 101

The court acknowledged that the plaintiffs raised an issue of fairness, but it refused to address the issue in light of the quantity of Saudi Arabian contacts present. The rule respecting a strong governmental interest in the determination of rightness or wrongness of defendants conduct was recited without apparent concern for any unique considerations that might arise from its application to enclaves. The court ignored the fact that these communities have been both officially and unofficially removed from the rest of Saudi Arabian life for over half a century. 102

The same line of reasoning was followed in McGhee v. Arabian American Oil Company, in which the court granted the defendants' mo-

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100. Id.

101. Id. at 17 (citations omitted). The Levine court cites Babcock v. Jackson, 12 N.Y.2d 473, 483-84, 240 N.Y.S.2d 743, 751 (1963), and Bing v. Halstead, 495 F. Supp. 517, 520 (S.D.N.Y. 1980) (applicable substantive law was the place where the tort occurred, Costa Rica, under whose law no justiciable claim in tort would be recognized for negligent or intentional infliction of emotional distress resulting from a letter written in Arizona and sent to a New York domiciliary residing in Costa Rica).

102. See argument in Brief of Plaintiffs-Appellants at 12-13, Levine, No. 86-7041 (2d Cir. 1986).
tion for partial summary judgment and dismissed the plaintiffs' tort claims. The court thus allowed the litigation to proceed only on the contract causes of action that had arisen out of the former employment relationship between the parties.

The McGhee court concluded that the reasoning in Levine controlled the choice of law question. The court observed that Saudi Arabian law does not permit the recovery of money damages for the infliction of emotional distress, fraud, defamation, and conversion, and thus decided to grant Aramco's motion for summary judgment on the plaintiffs' tort claims. Although the Levine court emphasized the fact that the defendants included several Saudi Arabian nationals as key in its decision to apply Saudi Arabian law, the cases were not distinguished by the McGhee court despite the absence of any foreign defendants.

V. POLICY RECOMMENDATIONS

Having set out the courts' various solutions to the conflicts question, it is possible to review the opinions and their treatment of distinct factors in arriving at those solutions. This section is divided into subsections, discussing the factors identified by section 6 of the Second Restatement of Conflict of Laws and the Agent Orange court as generally necessary in the determination of any conflicts issue.

A. The Protection of Justified Expectations

The positions adopted in Walton and Harding are directly opposed with respect to the significance of individuals' perceptions of the source and character of respective rights and responsibilities. In the context of an enclave of expatriates in Saudi Arabia, expectations of recourse to a certain body of law (that is, Western common law as opposed to the Islamic Shari'a) for the resolution of conflicts should be a crucial factor in the determination of the choice of law question.

In the particular personal injury case before the Walton court, the plaintiff may have failed to develop any expectations relevant to the dispute before he was hit by the corporation's truck. Nonetheless, in other tort cases, an individual's expectations may not only be vitally relevant, but their consideration may also be necessary to a just adjudication.

104. Id. at 13.
105. Id. at 13-14.
106. Levine, No. 84 Civ. 2396, slip op. at 16 (S.D.N.Y. Nov. 27, 1985).
107. See Memorandum and Order at 1-2, McGhee, No. 85 Civ. 2983.
If expatriates are living in an enclave established by their employer, they should be able to maintain a reasonable expectation that if a tort takes place, the responsible party must answer for that tortious conduct. There is currently an enormous increase in litigation in the United States arising out of allegations of employment-related slander and libel. One-third of all slander and libel verdicts are decisions in cases targeting employers.\(^{108}\) As many as eight thousand such suits may have been filed in the past five years.\(^{109}\) Verdicts have run heavily in favor of the employees with awards going as high as two million dollars.\(^{110}\) Individuals hired in the United States by a United States corporation and placed in an environment separated from the heart of the local culture reasonably could, and probably will, believe that the basic common law protections of reputation, property, and person familiar to them will apply in the overseas enclave.

The court in *Harding* found that Aramco created expectations that American law would apply in the enclaves. Aramco was found to have created these expectations, in part, through its efforts to secure the benefits of American law for matters arising out of the employment contract. Aramco also actively engages in the practice of generating these expectations through the use of advertisements in recruiting potential employees. These solicitations frequently employ rhetorical strategies that emphasize elements of life familiar to American culture such as little league and golf. The enclaves are portrayed as "little pieces of America" in corporate recruitment and employee relations literature. The following is an example of the full-page advertisements picturing golf games, little league teams, and Cub Scouts which Aramco has placed in leading national publications:

> Important talks in the Middle East—Statesmen aren't the only people in the Middle East who have important talks. In Saudi Arabia, where we live, Cub Scouts have important talks with Den Mothers. Car owners have important talks with mechanics. Batters have them with umpires. And schoolgirls have *lots* of them with other schoolgirls.

> We're Aramco, the Arabian American Oil Company. There are 13,000 North Americans in Saudi Arabia with us. And even though you hear a lot of news about Saudi Arabia, there are things that might


\[^{109}\text{Id.}.

\[^{110}\text{Id.}.

surprise you about our lives here.\textsuperscript{111}

The unfortunate irony is that the surprise described in this advertisement refers to the extreme similarity of life in Saudi Arabia to that in America. The real surprise in store for the expatriates, however, lies in a defendant's asserting, and an American court's accepting, the idea that the Shari'a is the sole source of law governing conduct in the enclaves. The expectations of an American lifestyle in Saudi Arabia are no accident. A corporation like Aramco cultivates such expectations as an essential element of recruitment. Any description of the expatriates' perception of the nature of life in these enclaves must devote serious consideration to the representations made by such corporations.

B. Relevant Policies and Interests of the Other States: The Needs of the Interstate and International Systems

Refusal to recognize specific conduct as a basis for imposing civil liability in a country does not necessarily mean that such conduct is condoned in that society. The role of tort liability and recourse to private civil litigation in regulating conduct is significantly greater in the United States than in countries where a more unified church and state assume a proportionately greater role in serving that end.

Neither society's interest is served when defendants escape the sanctions of Western civil liability and the law, such as the Shari'a, is deemed controlling on the issue. The defendants are not subjected to civil liability under the principles of such a body of law. Because they may be corporate entities or repatriated natural persons, these defendants may effectively be immune from the traditional nonlegal religious and political means of regulating conduct in these countries. A host country's commitment to emphasizing individual accountability through following a policy such as nonrecognition of vicarious liability is in no way furthered by allowing a corporation to avoid answering for the acts of its agents. The policy simply predates the origination of the corporate person as a legal entity.

Litigation is not employed in the sanctioning or restriction of conduct by these societies. There is simply no general theory of recovery for injury and no notion of the obligation to compensate for loss proximately

\textsuperscript{111} Copies of typical Aramco ads used in the 1980s were made available to the Levine court. Reply Brief of Plaintiffs-Appellants at 20 n.11, Levine v. Arabian Am. Oil Co., No. 86-7041 (2d Cir. Apr. 9, 1986) (WESTLAW, Federal library, Allfeds file) (quoting Aramco advertisement, which appeared 1981-1985 in such periodicals as Outdoor Life, Sports Illustrated, National Geographic, Time, Newsweek, Oil & Gas Journal, Computerworld, and Wall Street Journal).
caused; instead, in many of these jurisdictions, a handful of specific circumstances entitle a private party to obtain relief against another private party. The power of the faith and the state to establish and enforce the code of conduct in such a country is strong. This power may be set in some perspective by viewing it against what may be its cultural antithesis—the hyperlitigious nature of American culture. In the American scheme, norms and edicts that control conduct are issued by the courts, and then only in response to demands from individuals who are meeting as adversaries using what they feel is a fundamental right of access to a neutral forum.

The *Harding* court recognized the significant role that official corporate policy regarding the standards of conduct and the nature of rights existent in the enclaves should play in the analysis of choice of tort law. The corporations have received authority from the government to establish policy within the boundaries of the enclave. This authority is significant both as it exists in reality in the relationship between a corporation and a sovereign and as it is understood by employees. Belief in this authority gives the communications from their employers meaning and relevance.

The government of the host country frequently explicitly grants authority to the corporations to set down rules within the enclaves. For example, the Concession Agreement of 1933 provides that the company Aramco has the exclusive right for a sixty-year period to explore for, extract, and export petroleum from eastern Saudi Arabia and to use "all means and facilities it may deem necessary or advisable to carry out the purposes of this enterprise including, among other things, the right to construct and use roads, structures and all systems of communication... in connection with the camps, buildings and quarters of the personnel of the company." It is pursuant to this Concession Agreement that Aramco obtained certain land in Saudi Arabia and set up Western style towns. The American residents "have always been exempt, within the compounds, from the religious laws of Saudi Arabia. The exemption was never spelled out in writing. Rather it was orally approved by the king and communicated to Aramco's original chairman." The corporation's limited ability to declare policy quasi-indepen-

112. For an extensive discussion of this power, see V.S. NAIPAUL, AMONG THE BELIEVERS: AN ISLAMIC JOURNEY (1981).


114. *Id.* at 4.
dently of the sovereign is also demonstrated implicitly. In allowing the existence of the enclaves and corporate operations within its territory, the host country can be seen as having exchanged untrammeled sover-
eignty for a slightly compromised sovereignty with the benefit of eco-
nomic utility—a quid pro quo.

The following scholarly description offers analysis that lends sup-
port to the theory of a quid pro quo arrangement:

Interestingly enough, [the Saudi Arabians] also reveal a quasi-capitula-
tions system whereby the United States military and Corps of Engi-
neers personnel are subject only nominally to Saudi laws. This
concession of sovereignty may be acceptable to the Saudis as a neces-
sity to induce American assistance in developing areas critical to their
national security; the bypassing of national laws is thus an expedient in
their long-term national interests. The same reasoning may be operative
in their unwillingness to punish foreigners, particularly West-
erners, who have violated the law. In short, Saudi Arabia: 1) not
only accepts in treaties its international responsibility to protect aliens,
but it also argues that it does so equally; 2) nowhere promises aliens
equality before the law with its citizens but it does require them to
obey its laws; and 3) allows unequal treatment of certain foreigners
whose legal status is better than that accorded other aliens because
they are necessary for developmental purposes, and overlooks the local
rule requirement in the case of other foreigners for fear of offending
their government.115

It seems that the Walton, Levine, and McGhee courts would not ac-
cept this quid pro quo analysis. They placed paramount significance on
the interest of the host country in declaring the rights and responsibilities
operative in all territory within its jurisdiction. The mechanical jurispru-
dence decried in the treatise cited over thirty years ago in Walton per-
sists, despite that treatise’s admonition against perpetuating “a doctrine
which, upon re-examination, shows up as unwise and unjust.”116

Nonetheless, courts like Harding have recognized that a compro-
mise of absolute sovereignty transpires when a host country allows a cor-
poration and its employees to engage in conduct that normally would be
forbidden in that jurisdiction. To accrue the economic benefits that the
foreign corporation’s presence generates, Saudi Arabia provides an envi-
ronment for the corporation and its employees that is conducive to a
sustained presence. Finally, Saudi Arabia has historically demonstrated

115. J.P. Piscatori, Islam and the International Order: The Case of Saudi Arabia 357 (May
little interest in applying its law to disputes between foreigners who, as nonbelievers, are in principle strangers to its Muslim judges.\textsuperscript{117}

In addition to the difficulty inherent in any attempt to ascertain the content of foreign law, it is important to remember that codified law and policy statements often fail to reflect accurately unwritten but existent economic policies. These policies often diametrically oppose stated religious and cultural objectives. Thus, the policy of a foreign jurisdiction that a United States court might be able to discover may not be the policy that is truly controlling in the host country itself.

C. Relevant Policies of the Forum

The \textit{Harding} court recognized the significance of the United States' interest in declaring and enforcing the rights and duties of its citizens to one another, regardless of those natural or corporate persons' geographic location at any particular point in time. Such an opinion appreciates a phenomenon significant to United States culture: modern international corporations' use of discrete communities to accommodate expatriates in a particular country.

The majority of modern commercial transactions possess an international quality. Developments in transportation and communication have resulted in an increasingly mobile work force. Combined with the degree of accident involved in determining the locations in which American businesses operate, this leads to a high probability of a United States corporation using United States citizens as employees in a country with vastly different tort law than the United States.

Courts should take notice that corporations such as Aramco use United States publications to lead individuals to believe that American standards will apply to its conduct. The United States has a strong concern for fraud perpetrated on the American public.\textsuperscript{118} America also has a strong interest in the conduct of its citizens in foreign countries, particularly when intentionally tortious conduct is alleged.\textsuperscript{119} This interest is relevant whenever the conduct of an American corporate or natural person is at issue. A policy of accountability is frustrated by decisions that apply the tort law of the host country and thus resolve liability questions in favor of the defendant.

\textsuperscript{117} MIDDLE EAST INSTITUTE, LAW IN THE MIDDLE EAST 338 (1955) (discussing whether national courts may assume jurisdiction in civil suits involving only foreigners, considering the Islamic court's discretion to refuse jurisdiction to nonbelievers).


D. Basic Policies Underlying the Particular Field of Law

Despite the difficult comity concerns involved, it is necessary to develop a policy to provide enclave residents with a tort system more attuned to their expectations and needs. A United States court faces appreciable difficulty in attempting to apply rules modeled after the solutions to domestic conflict of law questions to the inapposite situation of a conflict between a particular state's form of Western common law tort principles and the sacred and monarchial principles of Islamic law in Saudi Arabia. Provided that the forum has some interest in the litigation apart from the fact that it is the forum, a court should look to whether its decision on the conflicts question furthers or frustrates the policies underlying Western tort law. In *Harding*, the court presumed that "California has a governmental interest in giving its residents a forum in which to vindicate torts which California recognizes." The policies favoring an individual's ability to ascertain the law and the protection of such individual interests as reputation are frustrated when a court opts for the application of tort principles of the Islamic *Shari'a*.

E. Certainty, Predictability, and Uniformity of Result: Ease in the Determination and Application of the Law to Be Applied

Finally, a problem is presented by *Erie Railroad v. Tompkins* and later cases that include a forum's choice of law rules as part of the substantive law of the state in which a federal court is sitting. Because a federal court sitting in diversity is constrained to look to the substantive law of the state in which it sits, a lack of uniformity in choice of law resolution will be inevitable in the United States so long as jurisdictions employ different tests. This lack of uniformity will give rise to the concomitant ills of inequitable administration of justice and forum shopping. Consistent adoption of a policy like that employed in either *Harding* or section 6 of the Second Restatement of Conflict of Laws would bring an end to the uncertainty and eliminate the preemption of disposition of genuine disputes.

Concededly, adoption of a balancing test would mean that courts must employ some analysis in deciding which jurisdiction's law to apply. However, in a situation in which the the court decides to apply American...
law, the loss of ease involved in giving up a de facto *lex loci* rule is incon-
sequential in comparison to the accessibility to the courts gained by
adoption of a balancing test.

VI. CONCLUSION

Employers with foreign operations benefit from initially having
made definite representations that life would be governed by one set of
standards. The same employers subsequently benefit from the argument
that operative legal standards are determined wholly by strict application
of the laws of the jurisdiction in which the events transpired. The bene-
fits of the initial position include the ability to solicit future employees
and secure the benefits of law favorable to the employer to govern all
claims arising out of the contracts for foreign employment. The benefits
of the latter position become apparent once litigation has ensued and it is
understood that the conduct would not be tortious under the substantive
law of the jurisdiction in which the events transpired, while it would be
tortious according to the law of the forum. Courts are accepting this
self-preserving sophistry when they grant motions for summary judg-
ment on the basis of the conflicts analysis together with official descrip-
tions of the jurisdiction's substantive tort law principles.

The jurisdiction in which the enclave is located has only a slight
interest in having its law apply to the transactions between the enclaves'
occupants. Litigation generally takes place upon repatriation and, there-
fore, there is no significant impact on the host country from recognizing
a right of recovery in the United States in a situation in which the host
country would deny recovery. Next to the interests of the individual liti-
gant in seeking redress and the interest of a country in seeing that all its
citizens have meaningful access to the law, concern with pure exercise of
sovereignty dims in significance. To the extent that legitimate issues of
sovereignty remain, it must be determined to what degree the exercise of
sovereignty has been restricted by previous compromise and exchange.
Even then, a court should ask how well the interest of the foreign juris-
diction would be served by handing down a decision that effectively al-
lows defendants to engage in tortious conduct without fear of adverse
consequences.

In failing to apply Western tort law to a dispute arising within these
enclaves, a court fails to meet its obligation of providing citizens within
its jurisdiction with a forum for the resolution of legitimate disputes.
Such a court also fails to meet its obligation to set down rulings that
discourage future misconduct by others within its jurisdiction. Perhaps
this amounts to a failure to recognize the implications of the international quality of the modern business world. In any event, this amounts to a failure to recognize the seemingly reasonable contention that an American living temporarily abroad with other Americans and working for a United States corporation has a right to expect that American law will apply in any disputes that occur with those Americans.