

TRAVEL LAW: FORUM SELECTION CLAUSES IN TRAVEL

CONTRACTS: SHOULD ADEQUATE NOTICE BE REQUIRED?

REVISION #2

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In this week's article we examine several recent cases involving the enforceability of forum selection clauses (FSCs) in travel contracts. We have previously discussed the subject of changing forums in which to litigate a travel case [see *Travel Accidents: where to sue*, www.eturbonews.com (3/27/2014); *Where to Sue Part 2: Changing the playing field*, www.eturbonews.com (4/3/2014); *Travel Abroad: Sue at home again*, www.eturbonews.com (4/9/2015)]. The issue raised in this article is whether or not travelers should be given adequate notice of the existence of a FSC in a travel contract before they agree to purchase a particular travel service. The states of Florida and New York seem to differ on whether such advance notice is required as a condition to enforcing a *FSC Karlsberg v. Hunter Mountain Ski Bowl, Inc.*, 2015 WL 5568788 (2d Dept. 2015)].

Travel Law Update

ISIS Terror Update

In *Top Suspect in Paris Attacks Died in Raid, Fingerprints Used to Confirm Identity*, www.nytimes.com (11/19/2015) it was noted "Abdelhamid Abaaoud, the Belgian militant suspected of orchestrating the attacks that left 129 dead, was killed in the police raid on Wednesday, French officials said".

In *ISIS claims it downed Russian airliner with a soda can bomb*, www.eturbonews.com (11/19/2015) it was noted that "In the magazine (Dabig), ISIS published a photo of what it said was the bomb that brought down the Russian airliner over Egypt's Sinai Peninsula last month, killing all 224 people on board. In the issue-titled 'Just Terror'-and circulated on social media, the group showed a Schweppes Gold soda can it said contained explosives".

In *Sharm el Sheikh plane crash: It was a bomb! \$50 million reward offered*, www.eturbonews.com (11/17/2015) it was noted that "Russia promises \$50 million reward for information to help catch those behind Egypt jet explosion".

See also: Breeden, Freytas-Tamura & Bennhold, *Call to Arms in France And Hunt for Belgian Suspect in Paris Attacks*, www.nytimes.com (11/17/2015); MacGFarquhar, *Russia Allies With*

France Against ISIS, Saying Jet That Crashed in Sinai Was Bombed, www.nytimes.com (11/18/2015); Fisher, In Rise of ISIS, No Single Missed Key but Many Strands of Blame, www.nytimes.com (11/19/2015).

Good Travel Advice?

In Perrin, *7 Keys to Traveling Without Fear Despite Terrorist Attacks, www.wendyperrin.com (11/15/2015)* it was noted that "The terrorist attacks in Paris underscore that we're living in a world where anything can happen anywhere at any time-in a Paris theater, in a Madrid train station, in a hotel in Mumbai, at a shrine in Bangkok, in the London Tube, in a nightclub in Bali, at a running race in Boston, in a skyscraper in Manhattan ...The answer is not to stop traveling-or to avoid huge swaths of the globe...The answer is to keep traveling, to make friends around the world, and to be a thoughtful ambassador for your country".

Ski Lift Operator Guilty

In *Ski lift operator guilty of indirect manslaughter of British boy, www.travelmole.com/news (11/19/2015)* it was noted that "A ski lift operator in France has been found guilty of the

indirect manslaughter of a British boy who dies while on holiday in the Alps. Fourteen-year-old Kieren Brookes from Devon was strangled when the straps of his backpack got caught as he tried to get off the lift in the resort of Chatel, part of the popular Portes du Soleil ski area. Richard Cettour, 50...who was supervising the lift at the time of the accident...was found not to have been at his post when Kieran got caught trying to exit at the top, so he failed to hear other skiers yelling at him to press the emergency stop button”.

Pakistan Train Crash

In *Pakistan train derails: 15 dead, over 100 injured*, www.eturbonews.com (11/17/2015) it was noted that “At least 15 persons were killed and over 100 injured as a Rawalpindi-bound Jaffar Express derailed near Aab-e-Gum Railway Station in Bolan district Tuesday afternoon”.

Airbnb Pledges Cooperation

In Isaac, *Airbnb Pledges to Work With Cities and Pay 'Fair Shares' of Taxes*, <http://nyti.ms/1kMEQUI> (11/11/2015) it was noted that “The start-up...on Wednesday introduced a lengthy treatise pledging a renewed spirit of cooperation with local

governments. Called the Airbnb Community Compact, the document outlines several ways that the popular company plans to work with municipalities, including sharing anonymized data on the hosts and guests who use the service, preventing illegal hotel landlords from operating on the platform and promising to pay its 'fair share' of hotel and tourist taxes in cities that have them...Airbnb has had plenty of momentum, now the upward of two million listings across more than 34,000 cities, and with private investors valuing the company at more than \$24 billion. That has allowed Airbnb to flex some of its muscles with local regulators- but too much flexing can backfire...On Wednesday, Mr. Schneiderman (New York State Attorney General) said Airbnb's Community Compact 'is a transparent ploy by Airbnb to act like a good corporate citizen when it is anything but. The company has all of the information and tools its needs to clean up kits act. Until it does, no one should take this press release seriously' "

Are Airbnb Rentals Safe?

In Howard, *A Man Dies At An Airbnb Rental. Here's How The Company Responded*, www.huffingtonpost.com (11/9/2015) it was noted that "The story of man's tragic death at an Airbnb rental in Texas is drawing more attention to the responsibilities tech companies have in keeping their users safe. Freelance journalist

Zak Stone, in a wrenching feature published Monday on Matter, recounted his family's stay at an Airbnb property that featured a rope swing attached to a tree. His father, trying out the swing, suffered a lethal injury when 'the trunk it was tied to broke in half and fell on his head, immediately ending most of his brain activity'. Stone added that Airbnb sent him a 'thoughtful note' three days after his father's death...Stone pointed out in his story that Airbnb, which enables people to rent out their private apartments or homes to travelers, is willing to send professional photographers to properties to take professional pictures of listings, but that the platform has not, to date, made inspectors visit to make sure those properties are safe...Airbnb spokesman Nick Papas...told HuffPost that Airbnb hosts are supposed to follow local rules and regulations, including applicable safety requirements...He did not specify whether the platform requires certifications or inspections for property owners to list on Airbnb, or if the only protection visitors have are their host's self-reported safety concerns or precautions...There is currently no 'Safety' section under Airbnb's hosting Standards. The Trust section of the website offers a 'responsible hosting' guide, which links to safety tips for hosts...Airbnb's website also notes that 'adding an extra layer of protection with your own renter's or homeowner's insurance may be right for you'. This is a key issue. As the New York Times reported last December, many

home insurance policies for residences exclude coverage on commercial activity-like an Airbnb rental. In January 2015, Airbnb began offering \$1 million dollars in Host Protection Insurance to provide additional secondary coverage. Figuring out how to reconcile homeowner's insurance with hosting insurance, however, can still lead to headaches for mystified property owners...As Stone documents in his feature, Airbnb has added more protections for hosts over the years after various horror stories emerged, but it hasn't done as much for the guests who use the platform".

Uber Tax Shell Game

In O'Keefe & Jones, *How Uber plays the tax shell game*, <http://fortune.com> (11/22/2015) it was noted that "In May (2013) Uber formed a new business entity in the Netherlands called Uber International C.V. Over the next few weeks (Uber) executed a flurry of transactions that shifted ownership of several foreign subsidiaries to Uber International C.V. and formed an agreement with the Dutch business to split the profits from Uber's intellectual property (IP). By mid-June, Uber was ready to continue with its dizzying rise, but with one critical difference: From that point on, nearly all its ride-share income outside the U.S. would be effectively shielded from U.S. taxes..."

Outside the U.S., the company's network of subsidiaries has been carefully pieced together to create a state-of-the-art structure for minimizing taxes. The strategies that it employs are legal and similar to those of bigger tech names such as Apple...Google ...and Facebook".

Travel Law Article: Finding A Convenient Forum

Generally, in state and federal courts in the United States, the defendants in a lawsuit may seek to have the case dismissed or transferred on the grounds that there is another forum which is more convenient. This doctrine, known as forum non conveniens, is a standard procedural defense [such as a lack of personal jurisdiction] which recognizes that the situs of the accident, the location of witnesses and evidence, the existence of an adequate alternative forum, and other factors, may require that the lawsuit be adjudicated in a forum different from the one chosen by the plaintiff [*Travel Law Section 1.03[4]; Litigating International Torts in U.S. Courts Chapter 10*].

Importance Of A Forum Selection Clause

Forum selection clauses (FSCs) are important to defendants since forcing injured travelers to pursue their claims in a

distant and foreign forum with a legal system (e.g., no contingency fees) and laws not necessarily as accommodating as those in the United States, may chill the enthusiasm of injured travelers to pursue their claims. A particularly important factor in a forum non conveniens analysis is whether the plaintiff has "consented" to a change of forum based upon the existence of a FSC in the travel contract which states, in essence, that any and all claims against the purveyor of the travel service must be brought before a Court in a specific forum, typically, where the accident took place or where the travel purveyor is headquartered [see *Cleveland v. Kerzner Int'l Resorts, Inc.*, 2015 U.S. Dist. LEXIS 131126 (S.D. Fla. 2015) ("The (US) Supreme Court [*Atl. Marine Const. Co. v. U.S. Dist. Ct.*, 134 S. Ct. 568, 580 (2013)] has stated that the 'the appropriate way to enforce a (FSC) pointing to a state or foreign forum is through the doctrine of forum non conveniens'... When there is a valid (FSC), the court's forum non conveniens analysis changes in three ways: (1)'the plaintiff's choice of forum merits no weight'; (2) the court 'should not consider arguments about the parties' private interests' and (3) the choice-of-law rules of the original venue are not transferred to the new venue...'the practical result is that (FSCs) should control except in unusual cases'...The Court's preliminary step, therefore, is to determine whether there is a valid (FSC)"]].

Cruise Passenger Contracts

FSCs got their start in the cruise industry and are still used in passenger contracts requiring that all cruise passenger lawsuits be brought in locales in which a cruise company may be headquartered such as Broward County, Florida, or New York, New York or Seattle, Washington. Generally, such clauses are enforceable under appropriate circumstances such as adequate notice and fairness [see *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S.585, 111 S. Ct. 1522, 113 L. Ed. 2d 622 (1991)].

FSCs Gain Popularity

Recently other purveyors of travel services such as hotels [see *Cleveland v. Kerzner Int'l Resorts, Inc.*, 2015 U.S. Dist. LEXIS 131126 (S.D. Fla. 2015) (inner tube accident during "river ride at Atlantis" resort; Bahamas FSC enforced); *Noel v. Walt Disney Parks and Resorts*, 2011 WL 1326667 (D. Mass. 2011) (change machine falls on hotel guest; Florida FSC enforced)], ski resorts [see *Hall v. Shawnee, Inc.*, 2006 WL 2869528 (E.D. Pa. 2006) (snow tubing accident at ski resort; "this action has a stronger connection to...Pennsylvania...where the accident occurred and the contract was entered into as well as (where) defendant is headquartered and conducts business")], tour operators [see *Heinz*

v. Grand Circle Travel, 329 F. Supp. 2d 896 (W.D. Ky. 2004) (accident on Blue Danube river cruise ship; Switzerland FSC enforced)], Internet travel sellers [see *Caldwell v. CheapCaribbean.Com, Inc.*, 2010 WL 3603778 (E.D. Mich. 2010) (Bucks County, Pennsylvania FSC not enforced because decedents did not see website)], helicopter manufacturers [see *Van Humbeck v. Robinson Helicopter Company, Inc.*, 2007 WL 4340996 (Cal. App. 2007) (crash in British Columbia; forum non conveniens motion denied)], railroads [see *In re Ski Train Fire in Kaprun, Austria*, 2002 U.S. Dist. LEXIS 14929 (S.D.N.Y. 2002) (ski train fire in tunnel; Austrian FSC not enforced)], resort time share facilities [see *D'Elia v. Grand Caribbean Co., Ltd.*, 2010 WL 1372027 (D.N.J. 2010) (Mexico FSC not enforced)], para-gliding company [see *Venard v. Jackson Hole Paragliding, LLC*, 292 P. 3d 165 (Wyo. Sup. 2013) (California FSC not enforced against non-signatories)] and scuba diving companies [see *Di Ruoco v. Flamingo Beach Hotel & Casino*, 163 A.D. 2d 270 (1990) (scuba diving accident; Bonaire FSC enforced)] have used FSCs in their travel contracts.

Florida's Case Law

In several cases involving accidents at the Atlantis Paradise Island Resort (Atlantis) in the Bahamas the federal courts in Florida have advanced the salutary concept that a

consumer of travel services should be given sufficient advanced notice of a FSC to be able to reject the travel contract in which it appears. As noted by the Court in *Cleveland*, supra, "The Eleventh Circuit [see *Krenkel v. Kerzner Int'l Hotels Ltd.*, 579 F.3d 1279, 1281 (11th Cir. 2009)] has adopted a two-part 'reasonable communicativeness' test for this analysis. The Court looks first to the clause's physical characteristics [visibility based on print size and location in travel contract] to determine whether the (FSC) was hidden or ambiguous, and second to 'whether the plaintiffs had the ability to become meaningfully informed of the clause and to reject its terms'".

The Sun Trust Case

The first case addressing this issue was *Sun Trust Bank v. Sun International Hotels Limited*, 184 F. Supp. 2d 1246 (S.D. Fla. 2001) in which an infant tourist was killed while snorkeling at a resort in the Bahamas. The Sun Trust Court rejected the application of a Bahamas' FSC in the hotel guest registration document. "The extrinsic circumstances indicating the plaintiff's ability to become meaningfully informed and to reject the contractual terms at stake are equally important in determining enforceability...a forum selection clause is not fundamentally fair if it shown that the resisting party was not free to reject

it with impunity (citing *Shute* at 499 U.S. 595)...Here, while Atlantis guests may be afforded sufficient opportunity to read the forum selection clause (upon arrival), they have no objectively reasonable opportunity to consider and reject it. It is undisputed that (consumer) was not told when she made her reservations that she would be required to sign the clause. This rule has been followed in subsequent Florida cases [see *Foster v. Sun International Hotels, Ltd.*, 2002 WL 34576251 (S.D. Fla. 2002) (Bahamas FSC in hotel registration form not enforced for first time guest who did not have 'adequate opportunity to consider the clause and reject his contract with the Atlantis hotel"); *Ward v. Kerzner International Hotels Limited*, 2005 WL 2456191 (S.D. Fla. 2005) ("Mr. Ward did not sign or clearly accept the terms of the (FSC) pertaining to the type of accident involved in this case"); *Larsen v. Kerzner International Hotels, Ltd.*, 2009 WL 1759585 (S.D. Fla. 2009) (FSC in hotel registration form not enforced; plaintiff "did not receive prior notice of the forum selection clause")].

Prior Visits

If the traveler has previously visited the hotel and signed the guest registration form containing an FSC then the Courts in Florida have found that the adequate advance notice requirement

has been satisfied [see *Krenkel*, supra (guest signed hotel registration form containing a FSC and choice of law clause on a prior visit; Bahamas FSC enforced); *Miyoung Son v. Kerzner International Resorts, Inc.*, 2008 WL 4186979 (S.D. Fla. 2008) (guest on prior visit signed form and was advised by email of need to sign form upon arrival); *Horberg v. Kerzner International Hotels Limited*, 744 F. Supp. 2d 1284 (S.D. Fla. 2007) (guest signed hotel registration form containing FSC on four prior occasions)].

Emails

If the travel purveyor sends emails advising the traveler of the existence of the FSC in a guest registration form which must be signed upon arrival then Florida Courts may find adequate advance notice [see *Miyoung*, supra ((guest was advised by email of need to sign hotel registration form upon arrival); *Myhra v. Royal Caribbean Cruises, Ltd.*, 695 F. 3d 1233 (11th Cir. 2012) (applicability of FSC communicated to cruise passengers five times before arrival); *Larsen*, supra (resort sent notice by email of the FSC in hotel registration form but plaintiff sister never advised and not bound by FSC)].

Informing Travel Agents

If the travel purveyor informs the consumer's travel agent of the existence and applicability of a FSC then Florida Courts may find adequate advance notice [see *McArthur v. Kerzner Intern. Bahamas Ltd.*, 607 Fed. App'x 845, 847-48 (11th Cir. 2015) (traveler has constructive of FSC notice where "[t]he travel agent, via its contact with the resort, knew that the attendees at the resort were subject to certain additional terms and conditions, agreed to notify their clients regarding the terms and conditions and knew where to obtain the specific terms and conditions"); *Cleveland*, supra (plaintiffs "made their travel arrangements through the use of a travel agent at Viking Travel Service, who in turn was an agent for Funjet Vacations (which) through its agreement with Kerzner International Resorts, Inc., had knowledge of the (FSC) in question")].

New York Case Law

The Courts in New York State have taken a different approach by enforcing FSCs in travel cases without any requirement that there be some form of advance notice of the applicability of an FSC before arriving at the resort [see *Molino v. Sagamore*, 105 A.D. 3d 922 (2d Dept. 2013) (slip and fall accident at Sagamore Resort in Warren County; traveler arrives at hotel and signed a "Rental Agreement" containing a proviso that "'if there is a

claim or dispute that arises out of the use of the facilities that results in legal action, all issues will be settled by the courts of the State of New York, Warren County'...Here, the fact that the Rental Agreement containing the (FSC) was presented to the plaintiffs at registration and was not the product of negotiation does not render it unenforceable"); *Bhonlay v. Raquette Lake Camps, Inc.*, 120 A.D. 3d 1015 (1st Dept. 2014) (accident at camp; Hamilton County venue clause enforced); *Karlsberg*, supra (snow boarding accident at ski resort; Greene County FSC enforced; "Contrary to the plaintiff's contentions, the 'Equipment Rental Form and Release of Liability' was not an unenforceable contract of adhesion, and enforcement of the (FSC) contained therein does not contravene public policy"; see concurring opinion)].

Conclusion

FSCs can have a dramatic effect upon the injured traveler's ability to prosecute those travel purveyors which may be responsible for his or her injuries. Travelers are well advised to determine before purchasing specific travel services whether they may be bound by a FSC.

Justice Dickerson been writing about *Travel Law* for 39 years

including his annually updated law books, ***Travel Law***, Law Journal Press (2015) and ***Litigating International Torts in U.S. Courts***, Thomson Reuters WestLaw (2015), and over 400 legal articles many of which are available at www.nycourts.gov/courts/9jd/taxcertatd.shtml. For additional travel law news and developments, especially, in the member states of the EU see www.IFTTA.org