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Forum Selection Clauses in Travel Contracts: Should Adequate Notice Be Required?

By Hon. Thomas A. Dickerson

I. Introduction

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.¹

II. Importance of a Forum Selection Clause

Forum selection clauses (FSCs) are important to defendants since forcing injured travelers to pursue their claims in distant and foreign forums, with legal systems (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.²

III. 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.³

IV. FSCs Gain Popularity

Recently, other purveyors of travel services, such as hotels,⁴ ski resorts,⁵ tour operators,⁶ Internet travel sellers,⁷ helicopter manufacturers,⁸ railroads,⁹ resort time share facilities,¹⁰ para-gliding companies,¹¹ and scuba diving companies,¹² have used FSCs in their travel contracts.

V. 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 advance notice of a FSC to be able to reject the travel contract

in which it appears. As noted by the Court in *Cleveland v. Kerzner International Resorts, Inc.*,

The Eleventh Circuit¹³ 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."

VI. The Sun Trust Case

The first case addressing this issue was *Sun Trust Bank v. Sun International Hotels, Limited*,¹⁴ 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 is shown that the resisting party was not free to reject it with impunity....¹⁵

Here, while Atlantis guests may have been afforded sufficient opportunity to read the forum selection clause (upon arrival), they had no objectively reasonable opportunity to consider and reject it. It is undisputed that (the 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.¹⁶

VII. 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.¹⁷

VIII. 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.¹⁸

IX. 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.¹⁹

X. 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 a FSC before arriving at the resort.²⁰

XI. 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.

Endnotes

1. Thomas A. Dickerson, *Travel Law*, § 1.03(4) (2015); Thomas A. Dickerson, *Litigating International Torts in U.S. Courts*, Chapter 10 (2015).
2. See *Cleveland v. Kerzner Int'l Resorts, Inc.*, No. 1:2014cv23897, 2015 U.S. Dist. LEXIS 131126, at *3-4 (S.D. Fla. 2015) ("The [U.S.] Supreme Court [*Atl. Marine Const. Co. v. U.S. Dist. Ct.*, 134 S. Ct. 568, 580 (2013)] has stated that '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... [T]he 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]."
3. See *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 591 (1991).
4. See *Cleveland*, No. 1:2014cv23897, LEXIS 131126 at *1, 4-7 (inner tube accident during "river ride at Atlantis" resort; Bahamas FSC enforced); *Noel v. Walt Disney Parks & Resorts*, No. 10-40071-FDS, 2011 WL 1326667 at *1, 4, 9-15 (D. Mass. 2011) (change machine falls on hotel guest; Florida FSC enforced).
5. See *Hall v. Ski Shawnee, Inc.*, No. 06-CV-274, 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").
6. See *Heinz v. Grand Circle Travel*, 329 F. Supp. 2d 896, 897 (W.D. Ky. 2004) (accident on Blue Danube river cruise ship; Switzerland FSC enforced).
7. See *Caldwell v. CheapCaribbean.com, Inc.*, 2:09-cv-13828, 2010 WL 3603778 (E.D. Mich. 2010) (Bucks County, Pennsylvania FSC not enforced because decedents did not see website).
8. See *Van Humbeck v. Robinson Helicopter Co., Inc.*, 2007 WL 4340996 (Cal. App. 2007) (crash in British Columbia; forum non conveniens motion denied).
9. See *In re Ski Train Fire in Kaprun, Austria*, No. 3:01-1794, 2002 U.S. Dist. LEXIS 14929 (S.D.N.Y. 2002) (ski train fire in tunnel; Austrian FSC not enforced).
10. See *D'Elia v. Grand Caribbean Co., Ltd.*, No. 1:09-cv-01707, 2010 WL 1372027 (D.N.J. 2010) (Mexico FSC not enforced).
11. See *Venard v. Jackson Hole Paragliding, LLC*, 292 P. 3d 165, 168 (Wyo. 2013) (California FSC not enforced against non-signatories).
12. See *Di Ruocco v. Flamingo Beach Hotel & Casino, Inc.*, 163 A.D. 2d 270, 271 (1990) (scuba diving accident; Bonaire FSC enforced).
13. See *Krenkel v. Kerzner Int'l Hotels Ltd.*, 579 F.3d 1279, 1281 (11th Cir. 2009).
14. 184 F. Supp. 2d 1246, 1262 (S.D. Fla. 2001).
15. Citing *Shute* at 499 U.S. 595.
16. See *Foster v. Sun Int'l Hotels, Ltd.*, No. 01-1290-CIV-KING, 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 Int'l Hotels Ltd.*, No. 03-23087-CIV-JORDAN, 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 Int'l Hotels, Ltd.*, No. 08-22031, 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").
17. See *Krenkel*, 579 F.3d 1279 (guest signed hotel registration form containing a FSC and choice of law clause on a prior visit; Bahamas FSC enforced); *Son v. Kerzner Int'l Resorts, Inc.*, No. 07-61171, 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 Int'l Hotels Ltd.*, 744 F. Supp. 2d 1284, 1288 (S.D. Fla. 2007) (guest signed hotel registration form containing FSC on four prior occasions).
18. See *Son*, No. 07-61171, 2008 WL 4186979 (guest was advised by email of need to sign hotel registration form upon arrival); *Estate of Myhra v. Royal Caribbean Cruises, Ltd.*, 695 F. 3d 1233, 1236 (11th Cir. 2012) (applicability of FSC communicated to cruise passengers five times before arrival); *Larsen*, No. 08-22031, 2009 WL 1759585 (resort sent notice by email of the FSC in hotel registration form but plaintiff's sister never advised; not bound by FSC).
19. See *McArthur v. Kerzner Int'l. Bahamas Ltd.*, 607 Fed. App'x 845, 847-48 (11th Cir. 2015) (traveler has constructive notice of FSC 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*, No. 1:2014cv23897, LEXIS 131126 at *6-7 (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").
20. See *Molino v. Sagamore*, 105 A.D. 3d 922, 923 (2d Dept. 2013) (slip and fall accident at Sagamore Resort in Warren County; traveler arrived 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, 1016 (1st Dept. 2014) (accident at camp; Hamilton County venue clause enforced); *Karlsberg v. Hunter Mountain* No. 2014-05431 (A.D.3d, June 22, 2015) (snowboarding 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).

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