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To: Transport Industry Operators

**Malaysian jurisdiction clause**

In its Judgment of 15/3/2006, the Hong Kong District Court refused to grant a carrier a stay despite the existence of a Malaysian jurisdiction clause in the contract of carriage.

Mr Tung was a passenger on board the "*Superstar Leo*" ("the Vessel"), a cruise liner operated by Star Cruises (HK) Limited ("Star Cruises"), on a 6-day Hong Kong/Shanghai excursion voyage departing from Hong Kong on 18/8/2002. The trip was booked by Mr Tung through Star Cruises' booking agent over the telephone on 12/6/2002. After the telephone call, Mr Tung faxed to Star Cruises his personal particulars and that of his family together with a photocopy of his credit card. Later on the same day, Mr Tung received, also by fax, a confirmation slip and a receipt issued by Star Cruises. It was stated on the confirmation slip that the same should be presented upon check-in in exchange for the boarding passes. Towards the bottom of the confirmation slip there were some printed terms under the heading "Important Note". Some of these terms were given slightly greater prominence by way of capital prints, including Clause 9 which read as follows:

"CONTRACT IS SUBJECT TO THE TERMS AND CONDITIONS OF CARRIAGE OF THE OPERATOR AND OWNER."

The Terms and Conditions referred to in Clause 9 were nowhere to be found on the confirmation slip. It was however Star Cruises' case that these Terms and Conditions were readily available to any passenger upon request at the time of reservation, or on the website of Star Cruises any time before departure.

The two particular terms and conditions that fell to be considered were Conditions 22 and 25:

**"22. Jurisdiction Clause**

The Passenger and the Carrier irrevocably agree to submit any and/or disputes and matters whatsoever arising under, in connection with or incidental to the Passage Contract or the service thereunder provided by the Carrier to the exclusive jurisdiction of either the Courts of Singapore or the Courts of Malaysia at the sole option of the Carrier.

**25. Choice of Law Clause**

All Passage Contract and these terms and conditions shall be governed by and construed in accordance with Malaysian law."

It was Mr Tung's case that at around 4 pm on 18/8/2002, while he and his family were touring around on the Vessel, he slipped on a patch of water on the bow deck and sustained injuries. Mr Tung received some medical attention by a doctor stationed on the Vessel. Upon arrival in Shanghai, he was sent to the hospital where he was diagnosed to have fractured ribs over the left lower chest. Upon his return to Hong Kong on 23/8/2002, he was immediately admitted into Pamela Youde Nethersole Eastern Hospital ("PYNEH") where he was hospitalized for 3 days. After discharge Mr Tung was followed up on a regular basis at the surgical department of PYNEH and was granted sick leave up to August 2003. He was also referred to the Southorn Centre of Tang Shiu Kin Hospital ("TSKH") for physiotherapy and psychiatric treatment.

Mr Tung was an Assistant Officer I at the Correctional Services Department at the time of the accident. Apart from loss of earnings, loss of earning capacity, medical expenses and other special damages, Mr Tung also claimed that he had suffered loss of promotion prospects as a result of the accident. Mr Tung issued the writ in Hong Kong jurisdiction on 12/1/2005.

By a letter dated 10/6/2005, Star Cruises through its solicitors requested Mr Tung to discontinue his claim by reason of (1) the exclusive jurisdiction clause, and (2) the time-bar stipulated under Conditions 5 and 20 of the Terms and Conditions. In the same letter, Star Cruises' solicitors also gave notice to Mr Tung's solicitors that Star Cruises was opting for the Malaysian courts as opposed to the courts of Singapore pursuant to the exclusive jurisdiction clause.

Star Cruises referred to a number of well-known English 'ticket cases' and submitted that a passenger would be bound by the terms of the contract of carriage, including those incorporated by reference, on the acceptance of the ticket (i.e. the confirmation slip) as long as reasonable notice had been given.

In the classic decision of *Thompson v. London, Midland & Scottish Railway Co.* [1930] 1 KB 41, Sankey L.J. at 55 succinctly summarised the principle as follows:

"I rather think that this is a class of case where you make a contract in one document which clearly refers to conditions and incorporates conditions which are contained in another document, and if you do make a contract like that I do not think it is open to you to say either: (1.) that you did not in fact look at the document which contained the incorporated terms; or (2.) that the document which contained the incorporated terms was one which you might have had some difficulty in finding. The fact remains that you had made a contract which clearly says that the conditions are contained in a particular document."

The Court accepted Star Cruises' submission that if Mr Tung was unhappy with the introduction of the Terms and Conditions, it would have been open to him to reject the offer of Star Cruises and to refuse to be bound by them before he boarded the Vessel some two months later.

Mr Tung further submitted that unlike the *Thompson* case, the confirmation slip did not contain any reference as to where the Terms and Conditions might be found. He relied on the observation made by Sankey LJ (at p.56) that where the conditions sought to be incorporated were so unreasonable that nobody could have contemplated their existence, the other party should not be bound by such conditions unless special attention had been drawn to them. The Court did not consider the exclusive jurisdiction clause to be so onerous that exceptional steps should have been taken to bring it to the attention of Mr Tung.

The Court took the view that Clause 9 of the confirmation slip constituted sufficient notice of the Terms and Conditions and therefore both the exclusive jurisdiction clause and the choice of law clause formed part of the contract between Mr Tung and Star Cruises.

Mr Tung had an alternative objection on the ground that the Terms and Conditions were invalidated by the *Unconscionable Contracts Ordinance*, Cap.458 ("UCO"). Besides objecting to the inclusion of the Terms and Conditions generally on the ground that there was 'an imbalance of bargaining power' and 'failure to reveal the severity of the terms' to the consumer, Mr Tung mounted his attack in particular on the following features: (1) the claimant would be required to bring his claim in a strange and distant country in accordance with the law of a place which had no connection with him whatsoever (Conditions 22 and 25); (2) the claim would be subject to a two-year limitation period (Conditions 5 and 20); and (3) the liability of the carrier was limited in accordance with certain limitations imposed by the *Athens Convention* (Condition 5).

The second and third complaints might be disposed of quickly. The 1974 Athens Convention was extended to Hong Kong by the *Merchant Shipping (Limitation of Shipowners' Liability) Ordinance*, Cap.434. The two-year limitation period and caps on liability, if applicable, would be available to Star Cruises irrespective of whether Malaysian or Hong Kong law should apply. It was interesting to note that the relevant limit of liability under Article 7 of Schedule 1 of the Ordinance (i.e. 46,666 SDR) was in fact lower than that of Condition 5(a)(ii) of the Terms and Conditions (i.e. 175,000 SDR), as Hong Kong was not a party to the 1990 Protocol which amended the Athens Convention by substituting an enhanced compensation limit under Article 7.

As Star Cruises pointed out, Mr Tung was in effect suggesting that the inclusion of the exclusive jurisdiction clause *per se* was unreasonable. In rebutting that proposition Star Cruises cited the Privy Council's decision in *The Pioneer Container* [1994] 2 AC 324 where Lord Goff, in dealing with the question

of whether an exclusive jurisdiction clause in a bill of lading issued by a sub-bailee was binding on the cargo owner, had this to say at 334G to 335C:

"Here is a ship, upon which the goods are loaded in a large number of containers; indeed, one container may contain goods belonging to a number of cargo owners. One incident may affect goods owned by several cargo owners, or even (as here) all the cargo owners with goods on board. Common sense and practical convenience combine to demand that all of these claims should be dealt with in one jurisdiction, in accordance with one system of law. If this cannot be achieved, there may be chaos. Much expense may be wasted on litigation in a number of different jurisdictions, as indeed happened in the present case, where there was litigation in eight other countries as well as Hong Kong and Taiwan. There is however no international regime designed to produce a uniformity of jurisdiction and governing law in the case of a multiplicity of claims of this kind. *It is scarcely surprising therefore that shipowners seek to achieve uniformity of treatment in respect of all such claims, by clauses designed to impose an exclusive jurisdiction and an agreed governing law . . .* Within reason, such an attempt must be regarded with a considerable degree of sympathy and understanding."

"Their Lordships do not consider that it can possibly be said that the incorporation of such a clause in a bill of lading is per se unreasonable."

Although *The Pioneer Container* was in the context of carriage of goods by a container vessel, the Court did not see any reason why the same considerations could not be applied to the carriage of passengers on board a cruise liner. Further, Mr Tung had of course a higher hurdle to surmount. He must prove that the exclusive jurisdiction clause was not only 'unreasonable', but also 'unconscionable' for the purpose of section 5 of the UCO.

Although Mr Tung initially contended that Star Cruises was 'hiding' the details of the Terms and Conditions when conducting the deal with Mr Tung, Mr Tung disavowed as he developed his argument any suggestion of fraud or deliberate concealment on the part of Star Cruises. The gravamen of Mr Tung's complaint was rather the alleged failure of revealing sufficiently the 'severity of the terms'.

The Court found that sufficient notice of the Terms and Conditions was given by virtue of Clause 9 of the confirmation slip, the Court rejected Mr Tung's contention that there was insufficient notice or that Star Cruises had deployed 'unfair tactics' against him within the meaning of s.6(1)(d) of the UCO. The Court accepted Star Cruises' argument that uniformity of treatment in case of claims was something of considerable significance for the owner or operator of a cruise liner. The Judge thought that it would be the norm rather than the exception for the owner or operator of a pleasure cruise liner, carrying passengers of a plethora of domicile on board, to include an exclusive jurisdiction clause in the contract of carriage. The Court held that the exclusive jurisdiction clause in question was merely a provision which was '*reasonably necessary for the protection of the legitimate interests*' of Star Cruises within the meaning of s.6(1)(b) of the UCO.

Regarding the central issue whether the proceedings should be stayed, the position was governed by the principles laid down by Brandon LJ (as he then was) in *The El Amria* [1981] 2 Lloyd's Rep 119. The principles were reaffirmed by the Court of Appeal in *The Thor Scan* [1999] 2 HKLRD 136, per Mortimer VP at 143:

"The *El Amria* principles are well known. If the plaintiffs sue in the Hong Kong Courts in breach of an exclusive jurisdiction clause, the Hong Kong Court has a discretion whether to grant the defendant a stay but such should be granted unless there is a 'strong case' for not doing so. In the exercise of this discretion all the circumstances of the case must be taken into account."

The factors to be taken into account by the Court in the exercise of its discretion were conveniently summarised in *Dicey & Morris*, Vol. 1 at p.443:

- (1) In which country the evidence is available, and the effect of that on the relative convenience and expense of a trial in this jurisdiction or abroad.
- (2) Whether the contract is governed by the law of the foreign country in question, and if so, whether it differs from English law in any material respect.
- (3) With what country either party is connected, and how closely.
- (4) Whether the defendants genuinely desire trial in a foreign country, or are only seeking procedural advantages.
- (5) Whether the plaintiffs would be prejudiced by having to sue in the foreign court because they would be deprived of security for their claim, or be unable to enforce the judgment in their favour, or be faced with a time-bar not applicable in this jurisdiction, or for political, racial, religious or other reasons be unlikely to get a fair trial.

As far as (4) and (5) of the above are concerned, it was not seriously pursued by Mr Tung that Star Cruises had no genuine desire for trial in Malaysia or that Mr Tung would suffer any juridical disadvantage there. In any event, apart from the undertaking not to take any additional advantage of any

limitation defence under Malaysian law, Star Cruises had also undertaken not to seek any security for costs in any proceedings brought there.

As regards (1) and (3), Mr Tung pointed out that both parties were based in Hong Kong, the contract arose in Hong Kong, and neither party had any real or substantial connection with Malaysia for the matter to be brought there. From the totality of the evidence and the pleadings it seemed quite obvious at least some of Mr Tung's family members should have witnessed the accident. The fact that the family members were residing in Hong Kong was evidenced by the personal particulars (including Hong Kong identity card numbers) faxed by Mr Tung to Star Cruises booking agent at the material time. It was said that the former crew members were no longer traceable, they would not be available irrespective of whether the trial was to take place in Malaysia or in Hong Kong.

In the Court's judgment, the most compelling factor against a stay was the fact that the vast majority of witnesses, factual or medical, who might be called to give evidence at the trial were in Hong Kong.

As far as medical experts were concerned, Mr Tung had been treated by various government doctors and physiotherapists at PYNEH and TSKH. The Judge thought it could be safely assumed that both parties would engage or might even have already engaged specialist doctors from the private practice in Hong Kong as expert witnesses. It was true that at least one doctor who might be required to give expert evidence at the trial, namely, the physician at the hospital in Shanghai, was outside Hong Kong. Be that as it may, the Judge did not think it would be more convenient or less costly to have the doctor flown from Shanghai to Malaysia instead of to Hong Kong. Quite to the contrary, the Judge believed it would be more expedient to have the evidence of the doctor and the relevant hospital notes adduced in Chinese in the courts of Hong Kong. Apart from medical experts, either party might also call witnesses from the civil service including the Correctional Services Department in respect of the Plaintiff's claim for loss of promotion prospects. Star Cruises also relied on a medical report dated 23/8/2002 prepared by Dr B. M. Creus, the doctor stationed onboard the Vessel. No evidence had been adduced as to whether Dr Creus was ordinarily resident out of Hong Kong. Even if that was the case, the Judge was not convinced that any inconvenience that might be caused to the ship's doctor would outweigh the need to dispose of the trial in an expedient and costs-saving manner.

The Judge had no doubt that the inconvenience and expenses involved in transporting and accommodating the witnesses if the trial were to take place in Malaysia rather than in Hong Kong militated strongly against the exercise of the Court's discretion to grant a stay. In his judgment justice could be done at substantially less inconvenience and expense if the action was tried in Hong Kong. The Court refused to grant a stay.

Please feel free to contact us if you have any questions or you would like to have a copy of the Judgment.

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