

**HOTEL LAW: THE BEST DEFENSE: AN ENFORCEABLE
FORUM SELECTION CLAUSE**

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In *St. Aubin v. Island Hotel Company*¹ the Federal District Court in the Southern District of Florida court once again considered the enforceability of a Bahamas forum selection and choice of law clause in a hotel registration agreement which guests at the Atlantis Resort in Nassau are required to sign upon checking in. The forum selection clause was not enforced this time ["she did not sign the Agreement-or any other document containing a forum-selection clause-or authorize anyone else to do so on her behalf and she did not receive reasonable notice of the forum-selection clause before or during the check-in process"] and neither was defendant's *forum non conveniens* motion granted ["there is no dispute that the Bahamas is an available and adequate forum for plaintiff to bring her claims", however the

private interest factors determine the outcome here). Nonetheless, such clauses are enforceable not only in Florida, under the right circumstances and, but especially, here in New York State. This article compares the Florida and New York law regarding the enforceability of hotel and resort forum selection clauses.

Importance Of Forum Selection Clauses

Forum selection clauses (FSCs) are important to defendants since forcing injured travelers to pursue their claims in distant forums, with legal systems that do not recognize contingency fees or jury trials and with laws not necessarily as accommodating as those in the United States, may chill the enthusiasm of injured travelers to pursue their claims abroad. A particularly important factor in a forum selection clause analysis is whether the hotel guest has "consented" to a change of forum upon the existence of a forum selection clause in a travel contract, which states, in

essence, that any and all claims against the hotel or purveyor of other travel services must be brought before a court in a specific forum and subject to local law; typically, where the accident took place or where the hotel is located².

FSCs Are Spreading

Requiring lawsuits to be brought where the³ cruiselines are headquartered, i.e., Miami, New York or Seattle. Recently, other purveyors of travel services such as hotels⁴, ski resorts⁵, tour operators⁶, Internet travel sellers⁷, railroads⁸, resort time share facilities⁹, para-gliding companies¹⁰ and scuba diving companies¹¹ have used FSCs in their travel contracts.

Florida Case Law

In several cases involving accidents at the Atlantis Paradise Island Resort (Atlantis) in the Bahamas, including the very recent *St. Aubin* case, the federal courts in Florida have advanced the concept that a hotel guest 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.*¹²,

“The Eleventh Circuit¹³ has adopted a two-part ‘reasonable communications’ 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* ¹⁴, in which an infant tourist was killed while snorkeling at a resort in the Bahamas. The Sun Trust Court refused to enforce a FSC in 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..."

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 hotel guest) 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 cases¹⁵.

Prior Visits

If the hotel guest has previously visited the hotel and signed the guest registration form containing the FSC the court in Florida have found that the adequate advance notice requirement has been satisfied¹⁶.

Emails And Hyperlinks

If the hotel sends emails advising the guest of the existence of the FSC in a guest registration form which must be signed upon arrival, the Florida courts may find adequate advance notice¹⁷. In *Son v. Kerzner Int'l Resorts, Inc.*¹⁸, the guest was advised by email of the need to sign hotel registration form upon arrival. In addition, in *Feggestad v. Kerzner International Bahamas Limited*¹⁹ the Court

noted that "The record demonstrates that the Feggestads first received notice of the forum selection clause via the email confirmation of their reservations. Even though th clause was contained in a hyperlink in the body of the email, there was nothing that prevented them from clicking on the link to read the terms and conditions that would apply to their stay at the Atlantis...the Feggestads received notice for a second time when they registered at the Atlantis". However, the enforcement of contractual terms and conditions lurking in hyperlinks such as forum selection clauses, choice of law clauses and mandatory arbitration clauses are problematic [See Dickerson & Berman, Consumers' Loss Of Rights In The Internet Age²⁰].

Informing Travel Agents

If the hotel informs the guest's travel agent of the existence and applicability of a FSC, the Florida courts may find adequate notice²¹. In *McArthur v. Kerzner Int'l Bahamas, Ltd.*²², the Courts noted that "[t]he travel agent, via its contract 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”.

New York Case Law

The Court of 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 hotel. In *Molino v. Sagamore*²³, a slip and fall accident at the Sagamore Resort in Warren County, the guest arrived at the 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”²⁴.

ENDNOTES

¹. *St. Aubin v. Island Hotel Company*, 2017 U.S. Dist. LEXIS 37042 (S.D. Fla. 2017).; See also: *Serov v. Kerzner International Resorts, Inc.*, 53 Misc. 3d 1214 (N.Y. Sup. 2016)(forum non conveniens motion granted).

² See *Cleveland v. Kerzner Int'l Resorts, Inc.*, 2015 U.S. Dist. LEXIS 131126 (S.D. Fla. 2015).

³ See *Carnival Cruise Line, Inc. v. Shutt*, 499 U.S. 585, 591 (1991).

⁴ See *Cleveland v. Kerzner Int'l Resorts, Inc.*, 2015 U.S. Dist. LEXIS 131126 (S.D. Fla. 2015); *Noel v. Walt Disney Parks & Resorts*, 2011 WL 1326667 (D. Mass. 2011).

⁵ See *Hall v. Ski Shawnee, Inc.*, 2006 WL 2869528 (E.D. Pa. 2006).

⁶ See *Heinz v. Grand Circle Travel*, 329 F. Supp. 2d 896 (W.D. Ky. 2004).

⁷ See *Caldwell v. CheapCaribbean.com, Inc.*, 2010 WL 3603778 (E.D. Mich. 2010).

⁸ See *in re Ski Train Fire in Kaprun, Austria*, 2002 U.S. Dist. LEXIS 14929 (S.D.N.Y. 2002).

⁹ See *D'Elia v. Grand Caribbean Co., Ltd.*, 2010 WL 1372027 (D.N.J. 2010).

¹⁰ See *Venard v. Jackson Hole Paragliding, LLC*, 292 P. 3d 165 (Wyo. 2013).

¹¹ See *Di Ruocco v. Flamingo Beach Hotel & Casino, Inc.*, 163 A.D. 2d 270, 271 (1990).

¹² See *Cleveland v. Kerzner Int'l Resorts, Inc.*, 2015 U.S. Dist. LEXIS 131126 (S.D. Fla. 2015).

¹³ See *Krenkel v. Kerzner International Hotels, Ltd.*, 579 F. 3d 1279, 1281 (11th Cir. 2009).

¹⁴ *Sun Trust Bank v. Sun International Hotels, Limited*, 184 F. Supp. 2d 1246 (S.D. Fla. 2001).

¹⁵ See *Foster v. Sun Int'l Hotels, Ltd.*, 2002 WL 34576251 (S.D. La. 2002); *Ward v. Kerzner Int'l Hotels, Ltd.*, 2005 WL 2456191 (S.D. Fla. 2005); *Larsen v. Kerzner Int'l Hotels, Ltd.*, 2009 WL 1759585 (S.D. Fla. 2009).

¹⁶ See *Krenkel v. Kerzner International Hotels, Ltd.*, 579 F. 3d 1279, 1281 (11th Cir. 2009); *Son v. Kerzner Int'l Resorts, Ltd.*, 2008 WL 4186979 (S.D. Fla. 2008); *Horberg v. Kerzner Int'l Hotels, Ltd.*, 744 F. Supp. 2d 1284, 1288 (S.D. Fla. 2007).

¹⁷ *Larsen v. Kerzner Int'l Hotels, Ltd.*, 2009 WL 1759585 (S.D. Fla. 2009); *Son v. Kerzner Int'l Resorts, Ltd.*, 2008 WL 4186979 (S.D. Fla. 2008);

¹⁸ *Son v. Kerzner Int'l Resorts, Inc.*, 2008 WL 4186979 (S.D. Fla. 2008).

¹⁹ *Feggstad v. Kerzner International Bahamas Limited*, 2016 WL 7210067 (S.D. Fla. 2016)

²⁰ *Dickerson & Berman, Consumers' Loss Of Rights In The Internet Age*, New York State Bar Association Journal (October 2014)

²¹ See *McArthur v. Kerzner Int'l Bahamas, Ltd.*, 607 Fed. App's 845, 847-48 (11th Cir. 2015).

²² *Id.*

²³ See *Molino v. Sagamore*, 105 A.D. 3d 922, 923 (2d Dept. 2013).

²⁴ See also *Bhonlay v. Raquette Lake Camps., Inc.*, 120 A.D. 3d 1015, 1016 (1st Dept. 2014); *Karlsberg v. Hunter Mountain, Inc.*, ___A.D. 3d___ (1st Dept.____).