



TALES from *The Love Boat*

Jurisdictional issues for passengers injured on cruises

By Matthew Harvey

In the late 1970s to mid-80s, Australians would gather around their televisions to watch *The Love Boat*, a series set on a cruise ship with a regular crew and new set of passengers each week. Each episode would contain a number of story lines set on a rather glamorous looking cruise ship called the *Pacific Princess*.

While its popularity may have waxed and waned over time, cruising never seems to have lost its appeal. Passengers rarely think of being injured on a cruise so, when it happens, the first question they ask, when back home in Australia, is whether they can sue in an Australian court. There are numerous issues requiring consideration in order to answer this question. Some of the principal issues are: first, does the cruise ticket contain a clause giving exclusive jurisdiction to courts of a foreign country; secondly, is the injured passenger bound by the jurisdiction clause; thirdly, on what basis can an Australian court exercise jurisdiction; and, finally, can the proceeding be stayed on the ground that the Australian court is clearly an inappropriate forum?

EXCLUSIVE FOREIGN JURISDICTION CLAUSE

An exclusive foreign jurisdiction clause in a passenger's ticket may read:

'... any action against the Carrier must be brought only before the courts of Athens, Greece, to the jurisdiction of which the Passenger submits himself formally excluding the jurisdiction of all and other ... courts of any other country ... which ... courts otherwise would have been competent to deal with such action'.¹

An exclusive foreign jurisdiction clause does not exclude the jurisdiction of an Australian court, but it may give rise to the Australian court refusing to exercise jurisdiction. The power to grant a stay in such circumstances is based on the principle that, unless there are strong reasons to the contrary, parties should abide by their agreements.²

Whether a foreign jurisdiction clause is *exclusive* is a question of construction. The use of the word 'exclusive' is not determinative. Thus, in the absence of such a word or phrase, a foreign jurisdiction may be held to be exclusive. If, in the absence of such a clause, the courts of the foreign country would have jurisdiction, that may suggest an intention to confer exclusive jurisdiction. But this may not always be so.³

IS THE PASSENGER BOUND BY THE TERMS ON THE TICKET?

The inclusion of an exclusive jurisdiction clause in the cruise ticket does not necessarily mean that it is a term of the contract. Courts carefully analyse the facts surrounding the issue of the ticket in order to decide when and where the contract of carriage was formed. The payment of the fare may not, depending on the facts, amount to making the contract. Furthermore, the unilateral imposition of terms by way of a ticket *after* the parties have formed their contract of carriage may, in all the circumstances, be ineffective.

The following cases illustrate the types of matters that courts consider in their analysis of when the contract was formed and whether the terms of the ticket were incorporated.

***Hood v Anchor Line Ltd*⁴**

Mr Hood purchased a ticket from Anchor Line for passage

from New York to Glasgow. Anchor Line's ship, the *California*, grounded off the Irish coast. Mr Hood was then put on board the *Cassandra* for carriage to Glasgow. He claimed he was injured when hoisted from a lifeboat by Anchor Line's employees on to the *Cassandra*.

The ticket contained conditions including terms limiting a passenger's entitlement to damages and applying British law to the contract. Did these conditions bind Mr Hood?

He purchased his ticket at Anchor Line's office in New York. Upon payment of the passage money, he received the ticket in an unsealed envelope. On the outside of the envelope were words printed in capital letters requesting the passenger to read the conditions of contract. The ticket contained a notice that it was subject to particular conditions, which were set out. At the foot of the ticket was printed in capitals: 'Passengers are particularly requested to carefully read the above contract.' Mr Hood purchased the ticket a day or so before the ship was due to sail. He did not read the conditions of passage.

The House of Lords held that the contract was formed shortly after Mr Hood received the ticket; he was taken to have accepted it after being given an opportunity to read the conditions.⁵ The exclusion clause applied to Mr Hood. It followed that, although the contract was formed in New York, British law applied.

***Baltic Shipping Co v Dillon*⁶**

Mrs Dillon purchased a ticket from Baltic Shipping for a cruise of the New Zealand Sounds on its ship, the *Mikhail Lermontov*. During the cruise, the ship struck a shoal off Cape Jackson, New Zealand, and subsequently sank. Mrs Dillon was saved but suffered physical and mental injury and lost her luggage. The ticket contained an exclusion clause on which Baltic Shipping relied. Was Mrs Dillon bound?

After responding to an advertisement and then obtaining a brochure, Mrs Dillon attended a travel service agency, where she chose her cabin and paid a deposit for the cruise. She received an account which stated that the travel service agency was acting only as an agent. Shortly after, the travel service agency gave Mrs Dillon a booking form, which stated it was not a travel document and, importantly, 'contract for carriage for travel as set out herein will be made only at the time of issuing of tickets and will be subject to the conditions and regulations printed on the tickets'. It went on to say that a copy of the conditions could be obtained at certain offices.

Mrs Dillon paid the balance owing on the account. Some weeks later she received her ticket. The cruise commenced a couple of weeks later.

Here, the booking form stipulated that the contract would arise only at the time of issuing the tickets. At that time, unless she had taken initiatives of her own, Mrs Dillon would not have had knowledge of the terms nor an opportunity to affect the terms. Baltic Shipping had not taken adequate steps to inform Mrs Dillon of the terms. The Court of Appeal concluded, by majority, that the contract was formed at the time appointed in the booking form. Mrs Dillon was not given the opportunity to read and agree to the terms. Once the contract was made, it was not open to Baltic Shipping >>

unilaterally to impose terms on Mrs Dillon.⁷ Thus, the exclusion clause did not bind Mrs Dillon. Presumably, any other written conditions on the ticket affecting jurisdiction or imposing foreign law would also not have applied to Mrs Dillon.

Oceanic Sun Line Special Shipping Co Inc v Fay⁸

Dr Fay was a passenger on Oceanic Sun's ship, the MS *Stella Oceanis*, during a cruise of the Aegean Sea. He sustained serious injuries while engaging in trap-shooting on the ship. The ticket contained a condition that the courts of Greece had exclusive jurisdiction in any action against Oceanic Sun. Could Dr Fay bring a claim in negligence against Oceanic Sun in the Supreme Court of New South Wales?

Dr Fay was given a brochure about the cruise; it stated that the transportation of passengers was governed by the terms printed on the passenger ticket and that the terms could be inspected at a particular office. He paid a deposit to a travel agent. The travel agent did not have a copy of the ticket available. The agent then issued Dr Fay with an exchange order. This document stated that, if the cruise proceeded, the passenger was contractually entitled on presentation of the exchange order to a ticket entitling the passenger to be carried. When Dr Fay boarded the ship at Piraeus, he was given a ticket, containing the exclusive jurisdiction clause, in exchange for the exchange order.

The High Court concluded that Oceanic Sun was bound to issue a ticket in return for the exchange order in performance of a contract of carriage already made in New South Wales. Therefore, it could not introduce new conditions of carriage by printing them on the ticket.⁹ Thus, the exclusive jurisdiction clause was not binding on Dr Fay.

Daly v General Steam Navigation Co Ltd¹⁰

Mrs Daly was injured while standing on the main deck of the *Dragon* when a mooring wire which was snagged on the jetty whiplashed violently, striking her on the shoulder. The passenger ticket she had been issued with contained a clause exempting the defendant from liability. Was this binding on Mrs Daly?

Some months earlier, in January, Mrs Daly's husband had gone to the defendant's agents, where he asked the clerk to book return passages for himself, Mrs Daly and their children from Rosslare to Le Havre. The outward journey was booked for 7 July and the return for 20 July on the defendant's ship, the *Dragon*. At the time he attended the agent's office he paid a deposit and was given a receipt containing a booking reference. At no time did anyone at the agent's office draw his attention to or mention the conditions of carriage. Subsequently, the agent sent Mr Daly a reservation confirmation and a coupon. Some time later, Mr Daly paid the balance at the agent's office; again, no one

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drew his attention to the conditions of carriage. Shortly afterwards, Mr Daly received a ticket containing conditions of carriage.

The court held that the contract of carriage was made in January when the booking was made and confirmed, subject to Mr Daly paying the balance. Since no steps were taken to bring the condition of carriage to Mr Daly's notice, they could not be incorporated in the contract. Further, by subsequently issuing the ticket containing the conditions, the carrier could not

introduce them in the contract when it was not subject to them originally.¹¹

GENERAL COMMENTS

A reading of these cases establishes the following:

1. In order to incorporate terms in a contract of carriage, the carrier must take reasonable steps to bring them to the passenger's attention;
2. A contract of carriage may well be formed before a ticket is issued; and
3. The unilateral imposition of terms after the formation of a contract of carriage does not incorporate terms in that contract.

AUSTRALIAN COURTS' JURISDICTION

'Jurisdiction' is used here in two ways. First, it describes a type of claim that courts have the power to determine. Secondly, it means that particular parties are susceptible to a court's exercise of power.

Under s9(1)(a) of the *Admiralty Act 1988* (Cth), jurisdiction is conferred on the Federal Court and the Federal Circuit Court, and the courts of the states are invested with federal jurisdiction in respect of proceedings commenced as actions *in personam* on a maritime claim. Section 4(1) of the *Admiralty Act* provides that a maritime claim is a reference to a proprietary maritime claim and general maritime claim. Section 4(3) describes certain categories of claims which are general maritime claims. With respect to injury to passengers, one would rely on s4(3)(c), which describes:

'... a claim for loss of life, or for personal injury, sustained in consequence of a defect in a ship or in the apparel or equipment of a ship'

Section 4(3)(d) relevantly describes:

'... a claim (including a claim for loss of life or personal injury) arising out of an act or omission of:

- (i) the owner or charterer of a ship; being an act or omission in the navigation or management of the ship, including an act or omission in connection with: ...
- (vi) the carriage of ... persons on the ship.'

Section 4(3)(f) relevantly describes:

'... a claim arising out of an agreement that relates to the carriage of ... persons by a ship ...'.

Thus, by operation of the *Admiralty Act*, federal and state courts have the power to determine claims arising from personal injury on cruises.

As to the second meaning of 'jurisdiction', one must effect valid service on the defendant in order to make it susceptible to a court's jurisdiction. In the Federal Court, one must seek the Court's leave to serve in a foreign country.¹² In other courts (for example, the Supreme Court of Victoria), the rules permit service in a foreign country without seeking leave to do so.¹³ Under both procedures, one must establish or be satisfied that the claim falls within particular categories of case described in the relevant court's rules.

Thus, in a case involving personal injury on a foreign cruise, one might rely on item 5 of rule 10.42 of the *Federal Court Rules*, which describes a:

'... proceeding based on, or seeking the recovery of, damage suffered wholly or partly in Australia caused by a tortious act or omission (wherever occurring)'.¹⁴

The plaintiff in *Oceanic Sun Line Special Shipping Co Ltd v Fay*¹⁵ relied on a similar provision in the New South Wales Supreme Court's Rules.

If the claim arises out of a breach of contract where the contract of carriage was made in Australia, one might rely on item 3 of rule 10.42, which relevantly describes a:

'... proceeding in relation to a contract that:

- (a) is made in Australia; ...
- in which the applicant seeks ...
- (f) an order for damages or other relief in relation to a breach of the contract'.

For completeness, it should also be noted that another means by which an injured person may obtain a foreign defendant's submission to an Australian court's jurisdiction is by arresting the ship in Australia. This is done under the *Admiralty Act* and the *Admiralty Rules* and, while the state Supreme Courts have the power to arrest a vessel, this is best done via the Federal Court, which has more appropriately trained and experienced staff.

STAY: CLEARLY INAPPROPRIATE FORUM

Even if jurisdiction is properly invoked and a defendant submits to the jurisdiction of an Australian court, that may not be the end of the jurisdictional issues. It is open to a defendant to seek a stay of a proceeding on the basis that the local court is a clearly inappropriate forum.

As Deane J summarised the law in *Oceanic Sun v Fay*:

'The power should only be exercised in a clear case and the onus lies upon the defendant to satisfy the local court in which the particular proceedings have been instituted that it is so inappropriate a forum for their determination that their continuation would be oppressive and vexatious to him.'¹⁶

A carrier seeking to persuade a court to stay a proceeding on this basis should identify a foreign court to which the carrier is amenable and which would determine the passenger's claim. Ultimately, the defendant's prospects of success in discharging the onus are dependent on the particular circumstances of the case.

CONCLUSION

While an injury to a passenger on a foreign cruise can occur in the blink of an eye, the decision to sue a carrier in an Australian court requires careful consideration of the facts giving rise to the contract of carriage, the terms of the contract, and whether the court can and should exercise jurisdiction. Despite the injury occurring in international waters or in the territorial waters of a foreign country, it may be possible to pursue a claim in an Australian court. ■

Notes: **1** See *Oceanic Sun Special Shipping Co Inc v Fay* (1988) 165 CLR 197, 205. **2** *Ibid*, 224 and 259. **3** See *FAI General Insurance Co Ltd v Ocean Marine Mutual Protection and Indemnity Association* (1996) 41 NSWLR 117, 126 – 7. **4** [1918] AC 837. **5** *Ibid*, 842 – 3, 845, 847 and 849. **6** (1991) 22 NSWLR 1. The Court of Appeal's decision was reversed by the High Court in *Baltic Shipping Co v Dillon* (1993) 176 CLR 344. However, this did not affect the Court of Appeal's conclusion (by majority) about the incorporation of terms in the contract; see 347. **7** (1991) 22 NSWLR 1, 8 (per Gleeson CJ) and 25 (per Kirby P). **8** (1988) 165 CLR 197. **9** *Ibid*, 205 – 6 and 228. **10** [1979] 1 Lloyd's Law Rep 257. **11** *Ibid*, 262. **12** Division 10.4 of the *Federal Court Rules 2011* (Cth). **13** Rule 7.01 of the *Supreme Court (General Civil Procedure) Rules 2005* (Vic). **14** See also r7.01(1)(j) of the *Supreme Court (General Civil Procedure) Rules (Vic?)*. **15** (1988) 165 CLR 197, 201-2 and 220-1. **16** (1988) 165 CLR 197, 248.

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