

The referral to arbitration

The background to the referral to Arbitration arises from the terms and conditions under which the service was provided to the consumer by the trader. These can be seen on the trader's website under the following link

https://www.booking.com/content/terms.en-gb.html?label=gen173nr-1FCAEoggl46AdIM1gEaFCIAQGYAQm4ARfIARTYAQH0AQH4AQulAgGoAgO4AqWAuOUFwAIB;sid=27baf3c9f213f15efebcb6ea6e71ae3c#tcs_s11

Specifically, clause 11 sets out the relevant provisions which is copied below for the record.

11. Applicable law, jurisdiction, and dispute resolution

These terms and conditions and the provision of our services shall be governed by and construed in accordance with Dutch law. Notwithstanding the foregoing choice of law, a natural person using any of our services for a purpose which can be regarded as being outside their trade or profession (hereinafter also referred to as "consumer") can rely on the mandatory provisions of the law of the country where they have their habitual residence (i.e. provisions that, in accordance with the choice-of-law rules of the said country, must apply regardless of this choice-of-law clause; hereinafter: "Mandatory Provisions"). Any dispute arising out of these general terms and conditions and our services shall exclusively be submitted to the competent courts in Amsterdam, the Netherlands. Notwithstanding the foregoing jurisdiction clause, a consumer may also bring proceedings in respect of enforcement of relevant applicable Mandatory Provisions in the courts of the country in which they are domiciled, and proceedings against a consumer may be brought only in the courts of the country in which they are domiciled. For consumers (in the European Economic Area): We advise you to first notify us of any complaints by contacting our Customer Service. If this does not resolve your complaint, you can upload your complaint via the European Commission's ODR platform. This platform for online dispute resolution can be found here: <http://ec.europa.eu/odr>.

Essentially, the trader submits to the jurisdiction of law specified thereunder but this is qualified with the trader leaving open to the consumer the option to bring a complaint through the EU ODR platform, if after contacting Customer Service '*this does not resolve your complaint*'.

The consumer has referred the complaint to the London Arbitration Centre (a member of the EU Online Dispute Resolution platform) in accordance with the trader's terms and conditions. The London Arbitration Centre has agreed to supply to the consumer and trader its Alternative Dispute Resolution services in accordance with its rules and procedures.

It should be mentioned here that the effect of BREXIT is that the ADR's entities in the UK will be cut off from the EU ODR platform when it leaves the EU in the event of a no deal scenario. Clearly, this would be unsatisfactory to both parties to this dispute if this

happened during the course of the Arbitration. For this reason, direct communication has been deemed appropriate.

The procedural history

The claim by the consumer was referred to ADR following the trader's final decision letter dated 23rd February 2019 (the 'decision letter'). I say final decision letter with some reservation because the decision letter does not fully comply with Directive 2013/11/EU, in particular,

Paragraph 47

"...Where a dispute cannot be settled directly, the trader should provide the consumer, on paper or another durable medium, with the information on relevant ADR entities and specify if he will make use of them"

In other respects the letter is useful in that it helpfully sets out the issues that need to be adjudicated upon by us. The letter is annexed to the decision such is the importance to the issues raised therein.

By letter dated 19 March 2019, the trader was asked whether they would like to submit any other information in response to the claim. The trader, for whatever reason, has decided not to do so.

The issues

I have extracted from the decision letter the issues upon which an adjudication is sought. These can be summarized as follows;- The trader acts as an agent for 'Trip Provider' otherwise referred to as the hoteliers in this instance with whom the consumer contracts directly. The trader's computer servers are based in the Netherlands. The traders' subsidiaries around the world provide internal support to the trader and then on page 3 of the decision letter;-

"the Subsidiaries do not (a) render the Service, (b) have a website, and (c) perform or offer any travel/transportation services, packages, excursion, congresses, organized trips, catering or other (tourist) activities. Therefore the Subsidiaries also do not operate nor qualify as a travel agent or tourist agency.

2.4.3 Therefore, we do not have any obligation or duty (of care/diligence) in respect of the Trip Provider that we offer on our Platform (including the Trip Provider information).

2.4.4 Booking.com does not pay the Trip Provider on our Platform, since the Trip Providers pay us a commission based on the reservations booked through our Platform."

The jurisdiction

First off, I do not have any knowledge of Dutch law but I do not consider Dutch law has any application here because the trader has submitted the dispute to ADR under the rules and procedures of the ADR entity under which the dispute is to be resolved. These are set out on the webpage

<http://www.londonarbitrationcentre.com/Home/Rules>

The relevant rules in this case would be;

Rule 6

The dispute shall be resolved in accordance with the laws of England and Wales.....

It seems to me that the trader has waived application of Dutch law on referral of the dispute to an ADR entity listed on the EU ODR platform in favour of the rules and procedures of that organisation. In this case, Dutch law has given way to the laws of England & Wales which is perhaps fitting in all the circumstances given that the service was provided in London.

If I had not made this finding, I would have not regarded the purported exclusive jurisdiction clause has been definitive position in this case in any event. REGULATION (EC) No 593/2008 states;-

Paragraph (12)

An agreement between the parties to confer on one or more courts or tribunals of a Member State exclusive jurisdiction to determine disputes under the contract should be one of the factors to be taken into account in determining whether a choice of law has been clearly demonstrated.

In my view, the law of England & Wales has a very close relationship with the contract. The Netherlands does not appear to play any part in the circumstances of the dispute save that we are told that the computer servers are based there. I should add here that the consumer does not reside in the Netherlands either.

I believe that the law of England & Wales applies to this dispute whichever way I look at this case.

The agreement between the parties

I approach this case with the benefit of reading the Judgements in [Alam & Farrar & others and Unber B.V., Uber London Ltd and Unber Britannia Limited](#) in the Employment Tribunal and in the [Employment Appeal Tribunal](#). The case concerns rights of workers. The issue in that case was whether the drivers used by Uber were agents or employees. Uber argued it was merely a technology company providing a platform for taxi users. The issue was decided against Uber BV in the lower Tribunal and on Appeal.

I also have the benefit of reading the Judgement of the Supreme Court in [The Commissioners for Her Majesty's Revenue and Customs \(Respondent\) v Secret Hotels2 Limited \(formerly Med Hotels Limited\) \(Appellant\)](#). The issue in that case concerned the treatment of VAT in the supply by the Appellant. The Supreme Court held that the

Appellants were agents on behalf of hoteliers. The starting point for determination of the issue in that case was the contractual agreements.

The facts in this case appear to have more similarities with the later rather than the former, however, the Employment Appeal Tribunal considered that case together with the judgement in [Autoclenz Ltd v Belcher and Ors \[2011\] ICR 1157 SC\(E\)](#). Here the Court held that it was entitled to disregard the terms in the written agreements and the labels used therein. Again, the case was in an employee and employer context.

Whilst I do not disagree with the decision of the Supreme Court in *The Commissioners for Her Majesty's Revenue and Customs (Respondent) v Secret Hotels2 Limited (formerly Med Hotels Limited) (Appellant)* I believe it is important to have regard to the Consumer Rights Act 2015. When I do this, I believe the approach adopted by the Employment Tribunal in the context of employee rights is also the correct approach in the context of consumer rights. *Secret Hotels2* is distinguished.

The trader states on page 1 of the decision letter;

1.1.1 Booking.com B.V. (a private limited liability company incorporated under the laws of the Netherlands and having its registered seat in Amsterdam, the Netherlands) operates as a disclosed agent for third party Trip Providers (the "Trip Provider"), providing an online reservation system through which the Trip Provider can advertise and make their Trip Services available for reservation on the platform of Booking.com (the "Platform"), and through which users can make a reservation (the "Trip Reservation"), whereas Booking.com only sends the reservation to the Trip Provider and the confirmation back to the user.
disclosed agent for third party Trip Provider

I am to decide whether the trader is indeed an agent for the Trip Provider or agent for the consumer when making the contract with the hotel. If I find that the trader is actually an agent for the consumer then I believe it must follow that the trader owes to the consumer a duty of care. Section 49 of the Consumer Rights Act 2015 states;-

Service to be performed with reasonable care and skill

(1) Every contract to supply a service is to be treated as including a term that the trader must perform the service with reasonable care and skill.

Clause 1 of the trader Terms and conditions states as follows;-

1. Scope and nature of our Service

Through the Platform, we (Booking.com B.V. and its affiliate (distribution) partners) provide an online platform through which Trip Providers – in their professional conduct of business (i.e. B2C or B2B) – can advertise, market, sell, promote and/or offer (as applicable) their products and service for order, purchase, reservation, hire, and through which relevant visitors of the Platform can discover, search, compare, and make an order, reservation, purchase or payment (i.e. the Trip Service). By using or utilizing the Trip Service (e.g. by making a Trip Reservation through the Trip Service), you enter into a direct (legally binding) contractual relationship with the Trip Provider with which you make a reservation or

purchase a product or service (as applicable). From the point at which you make your Trip Reservation, we act solely as an intermediary between you and the Trip Provider, transmitting the relevant details of your Trip Reservation to the relevant Trip Provider(s) and sending you a confirmation email for and on behalf of the Trip Provider. Booking.com does not (re)sell, rent out, offer any (travel) product or service.

When rendering our Trip Service, the information that we disclose is based on the information provided to us by Trip Providers. As such, the Trip Providers that market and promote their Trip on the Platform are given access to our systems and extranet through which they are fully responsible for updating all rates/fees/prices, availability, policies & conditions and other relevant information which is displayed on our Platform. Although we will use reasonable skill and care in performing our Trip Service, we will not verify if, and cannot guarantee that, all information is accurate, complete or correct, nor can we be held responsible for any errors (including manifest and typographical errors), any interruptions (whether due to any (temporary and/or partial) breakdown, repair, upgrade or maintenance of our Platform or otherwise), inaccurate, misleading or untrue information or non-delivery of information. Each Trip Provider remains responsible at all times for the accuracy, completeness and correctness of the (descriptive) information (including the rates/fees/prices, policies & conditions and availability) displayed on our Platform. Our Platform does not constitute and should not be regarded as a recommendation or endorsement of the quality, service level, qualification or (star) rating of any Trip Provider (or its facilities, venue, vehicles, (main or ancillary) products or services) made available.

Our Trip Service is made available for personal and non-commercial use only. Therefore, you are not allowed to re-sell, deep-link, use, copy, monitor (e.g. spider, scrape), display, download or reproduce any content or information, software, reservations, tickets, products or services available on our Platform for any commercial or competitive activity or purpose.

The text underlined is in my view the trader seeking exclude or limit liability for the supply to the consumer. Section 62 (4) of the Consumer Rights Act 2015 states;

A term is unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer.

My view is that it must not be difficult at all for the trader to ensure that the hotel meets minimum standards before allowing the hotel to list rooms on its website. Now reading the terms and conditions relied upon by the trader, I come to the conclusion that the overall effect is that there is simply an overwhelming imbalance in the parties' rights and obligations under the contract to the detriment of the consumer.

I have come to the conclusion that the trader acts as agent for the consumer and therefore owes to the consumer a duty of care to ensure that the accommodation displayed on their website meets minimum standards fit for human habitation. I do not regard a room infested with mould as within such a category.

I believe the fact that the trader receives payment when the consumer pays for the room is a powerful indication that the trader acts as agent for the consumer and not the trader. This might be different if the trader received payment from the 'Trip Providers' whether or not a consumer made a booking. I do not know about this but even if the trader does charge a listing fee that would only lend to the argument that the trader is acting as agent for the both the consumer and the hotel jointly and owes to each a duty of care.

Whether the payment made to the trader is called a commission or a charge or collected from the hotelier or anybody else is irrelevant. I do not accept that the trader merely provides a mechanism to enable users to make payment to hoteliers. I do not accept that it does no more than provide a mechanism for money moving around. It takes a fee. I see the paying party here is the consumer and the receiving party is the trader as agent for the consumer or even agent jointly for the hotel and the consumer.

Before looking at the effect of an unfair term in a consumer contract, I need to satisfy myself that the term or terms are not excluded from assessment. Section 64 of the Consumer Rights Act 2015 states;-

Exclusion from assessment of fairness

(1) A term of a consumer contract may not be assessed for fairness under section 62 to the extent that—

(a) it specifies the main subject matter of the contract

I can see the possible argument that the contract was not to supply accommodation. The law has laid down certain requirements before this argument can succeed. This being

Section (2)

Subsection (1) excludes a term from an assessment under section 62 only if it is transparent and prominent.

It is important in this respect to see what the 'average' consumer might be expected to know looking at the trader's website. Unless reading the trader's T & C's carefully, which I refer to here as the small print, I might not be expected to know that Booking.com were only actually acting as an intermediary during the booking stage of the contract. I have concluded that *the main subject matter of the contract* in the booking process is not '*transparent and prominent*' such that the average consumer is aware that the trader is a technology company providing a platform for hoteliers to contract with consumers.

The decision

Once I have reached the conclusion that the trader is agent for the consumer then I find that the trader is in breach of Section 49 of the Consumer Rights Act 2015. I find the trader in breach of the Section 49 by the presence of the mould in the hotel room. A serious and substantial health risk which no doubt caused the personal injury described by the consumer. I find the trader's terms and conditions limiting or excluding liability for the service provided by the hotel to be an unfair term and consequently pursuant to section

Section 62 of the Consumer Rights Act 2015 is not binding on the consumer.

I am going to order the trader to pay compensation to the consumer in the sum sought by the consumer in damages. I do not know how much the consumer paid for the accommodation but I have no hesitation in ordering payment of the sum sought by the consumer. The sum represents damages I would have ordered to be paid for physical inconvenience and discomfort and mental distress as a minimum under the guidelines set out in Milner-v-Carnival plc (2010 EWCA Civ 389).

Finally, I should add here that even if I had not found the trader agent for the consumer in contract, I would have found the trader liable to the consumer in tort and the outcome would have been the same in any event.

ORDER

IT IS HEREBY ORDERED that the trader pay the consumer the sum of £450.00 within 14 days of the date hereof.

Date 11th April 2019



Signed

Mr Ayub Sadiq

ADR Official appointed by the London Arbitration Centre Limited

