###### DCPI 44/2005

### IN THE DISTRICT COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO. 44 OF 2005

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##### BETWEEN

## TUNG HO WAH Plaintiff

### and

## STAR CRUISES (HK) LIMITED Defendant

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Coram: Deputy District Judge S. Chan in Chambers

Date of Hearing: 10 February 2006

Date of Handing Down of Judgment: 15 March 2006

## Judgment

1. This is the Defendant’s application to stay these proceedings in favour of the courts of Malaysia pursuant to Order 12 rule 8.
2. Although various grounds have been put forward in the Defendant’s Summons, Mr Lam, who appeared for the Defendant, was essentially relying on the ground that these proceedings were commenced by the Plaintiff in breach of an exclusive jurisdiction clause.

# *The Exclusive Jurisdiction Clause*

1. The Plaintiff was a passenger on board the “*Superstar Leo*” (“the Vessel”), a cruise liner operated by the Defendant, on a 6-day Hong Kong/Shanghai excursion voyage scheduled to depart from Hong Kong at 3 pm on 18 August 2002.
2. The trip was booked by the Plaintiff through the Defendant’s booking agent over the telephone on 12 June 2002. After the telephone call, the Plaintiff faxed to the Defendant his personal particulars and that of his family together with a photocopy of his credit card. Later on the same day, the Plaintiff received, also by fax, a confirmation slip and a receipt issued by the Defendant.
3. It was stated on the confirmation slip that the same should be presented upon check-in in exchange for the boarding passes.
4. 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.”

1. It is common ground that the Terms and Conditions referred to in Clause 9 were nowhere to be found on the confirmation slip. It is however the Defendant’s case that these Terms and Conditions were readily available to any passenger upon request at the time of reservation, or on the website of the Defendant any time before departure.
2. The two particular terms and conditions that fall to be considered in the present application are 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.”

*The Plaintiff’s Claims*

1. It is the Plaintiff’s case that at around 4 pm on 18 August 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.
2. The Plaintiff 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 August 2002, he was immediately admitted into Pamela Youde Nethersole Eastern Hospital (“PYNEH”) where he was hospitalized for 3 days.
3. After discharge the Plaintiff 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.
4. The Plaintiff 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, the Plaintiff also claims that he has suffered loss of promotion prospects as a result of the accident.
5. The Plaintiff issued the writ in this jurisdiction on 12 January 2005.
6. By a letter dated 10 June 2005, the Defendant through its solicitors requested the Plaintiff 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.
7. In the same letter, the Defendant’s solicitors also gave notice to the Plaintiff’s solicitors that the Defendant was opting for the Malaysian courts as opposed to the courts of Singapore pursuant to the exclusive jurisdiction clause.

### *The Issues*

1. There are 3 issues before the court:

(1) Had the Terms and Conditions referred to under Clause 9 of the confirmation slip and hence the exclusive jurisdiction clause (Condition 22) been incorporated into the contract of carriage?

(2) Was the exclusive jurisdiction clause ‘unconscionable’ within the meaning of the *Unconscionable Contracts Ordinance* (Cap.458)?

(3) Should the court refuse a stay of proceedings applying the principles in *The El Amria* [1981] 2 Lloyd’s Rep 119?

1. Both the affidavit evidence and submissions of Counsel for the parties focused primarily on the first two issues. Mr Lam submitted that since the Plaintiff had failed to address the issue of *forum non conveniens* at all in his affirmation, the third issue simply did not arise, given that the burden was on the Plaintiff to show a strong case against a stay. I was told that the Plaintiff’s failure to put into issue the question of *forum non conveniens* on affidavit also explained why the evidence adduced by the Defendant in this regard was so thin.
2. I am unable to agree with Mr Lam’s contention. It is of course settled law that the burden is on the plaintiff suing in breach of an exclusive jurisdiction clause to show a ‘strong case’ against a stay (see *The El Amria*, supra; *The Thor Scan* [1999] 2 HKLRD 136). However, it is in my view one thing to say that the Plaintiff has failed to discharge the burden under the *The El Amria* principles on the evidence adduced, it is quite another thing to say that the he has not put into issue the very question that the Defendant has invited the court to determine by invoking Order 12 rule 8.
3. In any event, the third issue has in fact been addressed at some length in the skeleton argument of the Defendant.
4. At one stage Mr Lam suggested that the Defendant should perhaps be given the chance to put in further evidence, but after taking further instructions Mr Lam indicated that the Defendant was content to proceed with the application on the evidence as it stood.

### *Incorporation of the Exclusive Jurisdiction Clause*

1. As a general rule, issues on the ‘material validity’ of a contract or of any term of a contract, such as formation of the agreement or incorporation of terms, are determined by the putative applicable law of the contract, viz. the law which would govern the contract if the contract or term were valid (see *Dicey & Morris on The Conflict of Laws*, 13th ed., Rule 176, Vol. 2, pp.1250-1253).
2. By reason of the choice of law clause in Condition 25, the putative applicable law on material validity is apparently Malaysian law.
3. No evidence of Malaysian law has been adduced by either party. It appears that both parties proceeded on the assumption that the principles governing the material validity of a contract under the law of Malaysia would be the same as that of the law of Hong Kong.
4. Having said that, I am prepared to follow the approach adopted by Hartmann J in *Koninklijke Philips Electronics N.V. v. Laser Media International Ltd* (unreported, HCA19408/1999, 20 July 2000), which was an appeal against master’s decision refusing an application for a stay of proceedings in favour of the courts of Netherlands. The learned Judge quoted Lord Parker’s dictum in *The Parchim* [1918] AC 157 at 161 and determined the appeal on the basis that the relevant Dutch law governing the construction of the exclusive jurisdiction clause was *presumed* to be the same as that of Hong Kong law in the absence of any evidence of Dutch law placed before the court. See also *Dicey & Morris*, Vol. 1, p.232.
5. I shall therefore consider the issue of incorporation of the exclusive jurisdiction clause on the basis that the relevant principles of Hong Kong law apply.
6. Mr Lam 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.
7. 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.”

1. Mr Lam also drew my attention to the following passage of the judgment of Viscount Haldane in the House of Lord’s decision in *Hood v. Anchor Line (Henderson Brothers) Ltd* [1918] AC 837 at 845, which is particularly apposite to the present case:

“But I am of the opinion that the real question was not whether they did read it, but whether they can be heard to say that they did not read it. If it had been merely a case of inviting people to put a penny into an automatic machine and get a ticket for a brief journey, I might think differently. . . . But when it is a case of taking a ticket for a voyage of some days, with arrangements to be made, among other things, as to cabins and luggage, I think ordinary people do look to see what bargain they are getting, and should be taken as bound to have done so and as precluded from saying that they did not know.”

1. Mr So, who appeared for the Plaintiff, sought to distinguish the above authorities by arguing that the transaction had already been completed by the time the Defendant faxed its receipt to the Plaintiff at 11:25 am on 12 June 2002. It follows that, so the argument goes, the Terms and Conditions could no longer be incorporated into the contract by the time the confirmation slip was faxed to the Plaintiff a few minutes later at 11:29 am.
2. Mr So also prayed in aid the table of ‘cancellation charges’ faxed by the Defendant to the Plaintiff together with the receipt and the confirmation slip. Mr So submitted that the immediate applicability of cancellation charges was a telltale sign of a concluded contract and there was therefore no room for incorporation of any further term or condition after payment.
3. I do not consider it useful to embark on a forensic analysis of the sequence in which the booking documents were sent by the Defendant for the purpose of determining whether the Terms and Conditions were incorporated into the contract.
4. It is noteworthy that on the Plaintiff’s own evidence, the receipt, the confirmation slip, the cancellation charge sheet together with an optional tours price list were apparently dispatched by the Defendant at the same time as ‘the set of fax’ received by the Plaintiff. It follows that, as Mr Lam rightly observed, either *all* the terms contained in the aforesaid booking documents applied or they did not. It is not open to the Plaintiff to argue that whilst the terms contained in the cancellation charge sheet were part of the contract, those printed on the confirmation slip were not.
5. In any event, where there is a ‘battle of forms’ the conduct of the parties to a contract can always be taken into account in resolving whether the terms introduced by one of the parties have been displaced subsequently (see *Manohar Chugh v. OKA Electronics Ltd* [1991] 2 HKC 1). I accept Mr Lam’s submission that if the Plaintiff was unhappy with the introduction of the Terms and Conditions, it would have been open to him to reject the offer of the Defendant and to refuse to be bound by them before he boarded the Vessel some two months later.
6. Mr So 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.
7. As will be explained later in this judgment, I do not consider the exclusive jurisdiction clause to be so onerous that exceptional steps should have been taken to bring it to the attention of the Plaintiff.
8. I take 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 the Plaintiff and the Defendant.

*Unconscionable Contracts Ordinance*

1. I shall now turn to the Plaintiff’s alternative objection on the ground that the Terms and Conditions were invalidated by the *Unconscionable Contracts Ordinance*, Cap.458 (“UCO”).
2. It is common ground between the parties that the UCO is still applicable notwithstanding that the law governing the material validity of the contract should be Malaysian law according to the choice of law clause.
3. The justification is to be found in section 7(2) of the UCO:

“This Ordinance has effect notwithstanding any contract term which applies or purports to apply the law of a jurisdiction other than Hong Kong, where (either or both) –

* 1. the terms appears to the court or arbitrator to have been imposed wholly or mainly for the purpose of enabling the party imposing it to evade the operation of this Ordinance; or

(b) in the making of the contract one of the parties dealt as consumer, and he was then habitually resident in Hong Kong, and the essential steps necessary for the making of the contract were taken there, whether by him or by others on his behalf.”

1. 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 So 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).
2. The second and third complaints may 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 the Defendant irrespective of whether Malaysian or Hong Kong law should apply.
3. It is interesting to note that the relevant limit of liability under Article 7 of Schedule 1 of the Ordinance (i.e. 46,666 SDR) is 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.
4. In any event, the Plaintiff through Mr Lam has undertaken not to take advantage of any difference in limitation on damages that may be imposed under Malaysian law as opposed to Hong Kong law should the cap on damages prevailing in Malaysia be lower than that under Hong Kong law (which would seem to be unlikely in light of what I have said in the preceding paragraph).
5. As far as the first complaint is concerned, both counsel drew my attention to *Shum Kit Ching v. Caesar Beauty Centre Ltd* [2003] 3 HKLRD 422 where Mr Recorder Edward Chan SC held that in deciding whether a contract or part of a contract was unconscionable or not for the purpose of s.5 of the UCO, the factors set out in s.6(1) were not exclusive and the court should have regard to all the circumstances relevant to the issue at the time the contract was made.
6. The learned Recorder also held that before the contract could be properly described as unconscionable, the party against whom relief was sought had to have knowledge of the other party’s points of weakness and had to have knowingly exploited such points of weakness.
7. As Mr Lam pointed out, the Plaintiff in relying on the features set out in paragraph 40 above was in effect suggesting that the inclusion of the exclusive jurisdiction clause *per se* was unreasonable. In rebutting that proposition Mr Lam 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.” (my emphasis)

1. And later on at 346F:

“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.”

1. Although *The Pioneer Container* was in the context of carriage of goods by a container vessel, I do not see any reason why the same considerations cannot be applied to the carriage of passengers on board a cruise liner.
2. Further, the Plaintiff has 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.
3. In this regard I derive assistance from the speech of Lord Radcliffe in *Campbell Discount Co Ltd v. Bridge* [1962] AC 600 at 626, cited with approval by Litton NPJ in *Polyset Ltd v. Panhandat Ltd* (2002) 5 HKCFAR 234 at 292:

“‘Unconscionable’ must not be taken to be a panacea for adjusting any contract between competent persons when it shows a rough edge to one side or the other . . . Even such masters of equity as Lord Eldon and Sir George Jessel, it must be remembered, were highly skeptical of the court’s duty to apply the epithet ‘unconscionable’ or its consequences to contracts made between persons of full age in circumstances that did not fall within the familiar categories of fraud, surprise, accident etc . . .”

1. Although Mr So initially contended that the Defendant was ‘hiding’ the details of the Terms and Conditions when conducting the deal with the Plaintiff, he disavowed as he developed his argument any suggestion of fraud or deliberate concealment on the part of the Defendant. The gravamen of his complaint was rather the alleged failure of revealing sufficiently the ‘severity of the terms’.
2. Given my finding earlier that sufficient notice of the Terms and Conditions was given by virtue of Clause 9 of the confirmation slip, I reject the Plaintiff’s contention that there was insufficient notice or that the Defendant had deployed ‘unfair tactics’ against him within the meaning of s.6(1)(d) of the UCO.
3. I accept Mr Lam’s argument that uniformity of treatment in case of claims was something of considerable significance for the owner or operator of a cruise liner. I venture to think 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.
4. I observe in passing that in the affirmation of Mr Henry Fung filed in support of the summons, Shanghai was described as an ‘intermediate port of call’. I would therefore not be surprised if passengers from different countries or jurisdictions might be found on board the Vessel during the voyage.
5. In my judgment the exclusive jurisdiction clause in question was merely a provision which was ‘*reasonably necessary for the protection of the legitimate interests*’ of the Defendant within the meaning of s.6(1)(b) of the UCO.
6. I therefore also hold against the Plaintiff on the second issue.

### *Should the Proceedings be Stayed?*

1. I shall now turn to the central issue in the present application.
2. It is common ground that the position is 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.”

1. The factors to be taken into account by the Court in the exercise of its discretion are 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.

1. As far as (4) and (5) of the above are concerned, it was not seriously pursued by Mr So that the Defendant had no genuine desire for trial in Malaysia or that the Plaintiff would suffer any juridical disadvantage there. In any event, apart from the aforesaid undertaking not to take any additional advantage of any limitation defence under Malaysian law, the Defendant has also undertaken not to seek any security for costs in any proceedings brought there.
2. In relation to (2) Mr Lam accepted that although the contract was governed by Malaysian law by virtue of the choice of law clause, the Plaintiff’s cause of action in tort might not necessarily be governed by the law of Malaysia. Mr Lam nonetheless submitted that Malaysian law vis-à-vis the terms of the contract would still be relevant in so far as it might determine the extent of the Defendant’s liability.
3. As Suffiad J observed recently in *Kwok Yu Keung v. Yeung Pang Cheung & Others* (unreported, HCPI579/2004, 9 September 2005, at p.4), which was also an application for a stay in favour of a forum elsewhere: “It has long been recognized that claims in tort raise peculiarly difficult questions of choice of law.”
4. Putting aside the question whether the law relating to the duty of care of a sea carrier under Malaysian law differs from Hong Kong and the lack of evidence in that regard, neither party has addressed the vexed question as to whether the governing law of the tortious claim should be the *lex fori* or the *lex loci delicti* or otherwise. There is also some uncertainty as to whether the accident occurred within the waters of Hong Kong at the material time. I am therefore unable to attach any weight to this factor.
5. As regards (1) and (3), Mr So 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.
6. Mr Lam countered by saying that the Plaintiff had given no indication as to who his witnesses would be or where they would be located, the crew members had long been dismissed as a result of the Plaintiff’s delay in bringing this claim, the medical evidence was not entirely in Hong Kong, and there was no evidence as to whether and how the Plaintiff would be inconvenienced by having the matter tried in Malaysia.
7. Mr Lam also drew my attention to an address for service on ‘Star Cruises’ in Singapore provided under Condition 24 of the Terms and Conditions, which was different from the Defendant’s correspondence address in Hong Kong printed on the confirmation slip and the receipt.
8. It is true that the evidence adduced by the Plaintiff in support of his contention on ‘real and substantial connection’ with Hong Kong could have been more specific. However, it is always open to the court to draw inferences in relation to matters pertaining to (1) and (3). As Megarry J said in *Flynn v. Flynn* [1968] 1 WLR 103 at 107 when dealing with a domicile issue in that case:

“In one sense there is no end to the evidence that may be adduced; for the whole of a man’s life and all that he has said and done, however trivial, may be prayed in aid in determining what his intention was at any given moment of time . . . All that the courts can do is to draw inferences from what has been said and done; and in doing this, too much detail may stultify.”

1. In any event, it was not entirely correct for the Defendant to say that the identities or whereabouts of the Plaintiff’s witnesses were unknown. From the totality of the evidence and the pleadings it seems quite obvious at least some of the Plaintiff’s family members should have witnessed the accident. The fact that the family members were, and presumably still are, residing in Hong Kong was evidenced by the personal particulars (including Hong Kong identity card numbers) faxed by the Plaintiff to the Defendant’s booking agent at the material time.
2. In so far as it was said that the former crew members were no longer traceable, since they will not be available irrespective of whether the trial is to take place in Malaysia or in Hong Kong, I fail to see the relevance of such inability to locate witnesses for the present purpose.
3. It is not apparent how the presence of an address for service in Singapore justifies a Malaysian forum, assuming for the moment that ‘Star Cruise’ under Condition 24 was the synonym for the Defendant.
4. In *Rambas Marketing Co LLC v. Chow Kam Fai David* [2001] 3 HKC 250, Mr Recorder Ma SC (as he then was) stated at 255B that:

“Mere convenience is not enough nor is it enough simply to point to factors which connect a case or the parties to any particular jurisdiction. The approach in forum non conveniens applications is not just an exercise in loading up with factors which point to any particular jurisdiction. The court is required to focus on the appropriateness of a forum *from the point of view of the trial* of the action.” (my emphasis)

1. The above passage of the judgment in *Rambas* was cited by Deputy High Court Judge Reyes SC (as he then was) in another application for stay in *Hwoo Huang Linda v. Fu Being San & Others* (unreported, HCA4888/2001, 10 April 2002, at p.25).
2. In my judgment, the most compelling factor against a stay is the fact that the vast majority of witnesses, factual or medical, who may be called to give evidence at the trial are in Hong Kong.
3. I have already touched upon the identities and whereabouts of potential witnesses of fact. As far as medical experts are concerned, the Plaintiff have been treated by various government doctors and physiotherapists at PYNEH and TSKH. I think it can be safely assumed that both parties will engage or may even have already engaged specialist doctors from the private practice in Hong Kong as expert witnesses.
4. It is true that at least one doctor who may be required to give expert evidence at the trial, namely, the physician at the hospital in Shanghai, is outside Hong Kong. Be that as it may, I do not think it will be more convenient or less costly to have the doctor flown from Shanghai to Malaysia instead of to Hong Kong. Quite to the contrary, I believe it will be more expedient to have the evidence of the doctor and the relevant hospital notes adduced in Chinese in the courts of Hong Kong.
5. Apart from medical experts, either party may also call witnesses from the civil service including the Correctional Services Department in respect of the Plaintiff’s claim for loss of promotion prospects.
6. I have not lost sight of the fact that the Plaintiff also relied on a medical report dated 23 August 2002 prepared by Dr B. M. Creus, the doctor stationed onboard the Vessel. No evidence has been adduced as to whether Dr Creus is ordinarily resident out of Hong Kong. Even if that is the case, I am not convinced that any inconvenience that may be caused to the ship’s doctor would outweigh the need to dispose of the trial in an expedient and costs-saving manner.
7. Indeed Mr Lam was driven to concede, quite properly, that the issue of quantum might be more conveniently dealt with in Hong Kong. It has not been suggested that there should be a split trial or ‘split forum’ on liability and quantum.

*Conclusion*

1. I have 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 militate strongly against the exercise of my discretion to grant a stay in the present case. In my judgment justice can be done at substantially less inconvenience and expense if the action is tried in Hong Kong.
2. For the reasons I have given I refuse to grant a stay and the Defendant’s summons is dismissed.

*Costs*

1. Mr Lam submitted that in the event that I decline to grant a stay, the Plaintiff’s failure to put into issue the question of *forum non conveniens* sufficiently or at all should perhaps be reflected in costs.
2. As I have mentioned under paragraph 18 of this judgment it is for the Defendant to conduct its own application. I therefore see no reason why the Plaintiff should not have the costs of the summons. I make an order *nisi* that the Defendant shall pay the Plaintiff the costs of this application, to be taxed if not agreed, with certificate for counsel.
3. It only remains for me to thank counsel on both sides for their assistance.

(Samuel Chan)

Deputy District Judge

Mr Selwyn So, instructed by Messrs B. Mak & Co, for the Plaintiff

Mr Douglas Lam, instructed by Messrs Holman Fenwick & Willan, for the Defendant