

Exclusion of Liability and Unfair Contract Terms in Hong Kong Travel Contracts: Problems and Solutions

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1. Introduction

To facilitate more efficient commerce, it is common for travel companies to draft standard form contracts. However, these contracts are often offered to the travelling consumers, a commercially weaker party, on a take-it-or-leave-it basis. As observed by Lord Reid,¹ the weaker party had no chance to negotiate over the terms and conditions, and the only freedom of choice available is to go to a rival travel company which offers much the same package of terms and conditions.

Taking full advantage of this position, the travel companies in Hong Kong often endeavour to exclude their liability or impose wholly unfair terms into the contracts. For instance, it is observed that travel agencies commonly incorporate terms which permitted tour operators to impose surcharges if costs rose but denied a reduction if they fell, or terms which gave no cancellation rights after a holiday started where there was a change to the tour arrangements.² Such types are regarded as unfair in the UK.³

In the hope of curbing the exploitative exclusion clauses and unfair terms, various common law rules and legislations are developed. This Note aims to explore whether the existing legal framework in Hong Kong is sufficient to protect aggrieved travellers against the travel agents' widespread use of exclusion clauses and unfair terms through a comparative analysis of the legislation implemented in the UK.

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¹ *Suisse Atlantique Societe D'Armement SA v. NV Rotterdamsche Kolen Centrale*, [1966] 2 All E.R. 61 (H.L.) (appeal taken from Eng.).

² See, e.g., *Miramar Travel, Terms & Conditions*, MIRAMAR TRAVEL (Jan. 27, 2015, 10:00 AM), <http://www.hkmiramartravel.com/AboutUs/TermAndCondition.aspx>.

³ DAVID GRANT AND STEPHEN MASON, *HOLIDAY LAW* 226 (5th ed. Sweet & Maxwell 2012).

2. Existing Regime in Hong Kong

Two major observations can be made from the existing regime in Hong Kong. First, in regulating exclusion clauses, while Hong Kong applies common law principles and the Control of Exemption Clauses Ordinance (Cap. 71) (“CECO”), it does not have effective legislations regulating package tours. Second, in regulating unfair terms in travel contracts, the current legal framework offers inadequate protection to aggrieved travellers.

2.1 Regulating Exclusion Clauses

In relation to exclusion clauses, Hong Kong courts apply common law principles and CECO, which are, in essence, laws from the UK.

2.1.1 Common Law Principle

There are two main common law principles that can be derived from English travel cases. First, a clause will not be effective unless it has been incorporated in the contract, by way of signature,⁴ notice or a course of dealing. This is why travel companies place great emphasis on obtaining the client’s signature on a booking form, or ticking the right box during the booking process on the Internet. In *Budd v Peninsular and Oriental Steam Navigation Co*,⁵ the agents of the shipping company had made sure that the client signed the declaration on the booking form to indicate that she understood the liability-exemption conditions. Further, the conditions were legible and reasonably comprehensible to an average person. Therefore, the shipping company was allowed to rely on the exemption clause. Other cases demonstrated that, where a clause is particularly unusual, greater steps should be taken to draw it to the attention of the other party, such as printing in red ink “*on the face of the document with a red hand pointing to it*” so as to give sufficient notice.⁶

Second, the clause will be ineffective if it does not cover the breach that occurred. Such a clause will be construed *contra proferentem* against the person proffering the clause. A number of travel cases show the dangers of poor or inappropriate drafting. For instance, in *Askew v*

⁴ L’Estrange v. Graucob, [1934] 2 K.B. 394 (C.A.).

⁵ Budd v. Peninsular and Oriental Steam Navigation Co, [1969] 2 Lloyd’s Rep 262 (C.A.).

⁶ J Spurling Ltd v. Bradshaw, [1956] 1 WLR 461 (C.A.). See also Thornton v. Shoe Lane Parking, [1971] 2 Q.B. 163 (C.A.).

Intasun North,⁷ the exclusion clause that the defendants relied upon was so “*poorly worded and difficult to interpret*” that the court avoided it.

2.1.2 Control of Exemption Clauses Ordinance

The common law was simply insufficient to cope with the challenges faced – a consumer had to resort to arguing either that the term was not properly incorporated,⁸ or that the term was ambiguous and should be interpreted *contra proferentem*.⁹ Therefore it became necessary to legislate against exploitative exclusion clauses. The CECO, modelled on the English Unfair Contract Terms Act 1977 (“UCTA”), has been a major piece of legislation to regulate exclusion clauses.

The CECO has two main features. First, Section 7(1) of CECO provides an outright ban on clauses which exclude liability for death or personal injury resulting from negligence. In *Chea Kam Wing v Kwan Kin Travel Services Ltd*,¹⁰ a local travel agent had been negligent in hiring a convicted drunk-driver, resulting in an accident which caused deaths and injuries. By virtue of Section 7(1), it was held that the travel agent was not able to rely on a clause to exclude its liability for the deaths and injuries caused.¹¹ The same principle has been applied in another similar personal injury claim.¹²

Second, Schedule 2 sets out guidelines for determining the reasonableness of exclusion clauses. For example, if a tour operator imposed a 28-day time limit for the receipt of complaints, it may generally be regarded as reasonable. But it may not be reasonable if clients are injured on a skiing holiday and have to spend weeks or months afterwards in hospital.¹³

2.1.3 Legislation Specifically Designed for Package Tours

There is currently no legislation of specific application to package holidays. Under the self-regulatory system in the tourism sector,¹⁴ the Travel Industry Council (“TIC”) is entrusted with

⁷ *Askew v. Intasun North*, [1980] C.L.Y. 637. See also *Spencer v. Cosmos Air Holidays Ltd*, *The Times*, December 6, 1989; *Williams v. Travel Promotions Ltd (t/a Voyage Jules Verne)*, *The Times*, March 9, 1998.

⁸ *Olley v. Marborough Court Ltd*, [1949] 1 KB 532 (C.A.).

⁹ *Andrews Bros (Borunemouth) Ltd v. Singer and Co Ltd*, [1934] 1 K.B. 17 (C.A.).

¹⁰ [2007] 1 H.K.L.R.D. 937 (C.F.I.) (H.K.).

¹¹ Control of Exemption Clauses Ordinance, (1990) Cap. 71, 1, § 2 (H.K.).

¹² [2007] H.K.E.C. 2292 (C.F.I.) (H.K.).

¹³ GRANT AND MASON, *supra* note 3, at 209.

¹⁴ Consumer Council, *Consumer Council Submission on the Review of the Operation and Regulatory Framework of the Tourism Sector in Hong Kong*, CONSUMER COUNCIL (Mar. 10, 2015, 10:00 AM), http://www.consumer.org.hk/website/ws_en/competition_issues/policy_position/2011070802.html.

responsibility for regulating travel agents under the Travel Agents Ordinance (Cap. 218) (“TAO”).¹⁵ Although it has prepared a number of Codes of Conduct ranging from outbound package tours to study tours, neither the TAO nor the Codes of Conduct makes any express reference to exclusion clauses. Further, the Codes are arguably toothless because violation of the Codes does not attract criminal consequence imposed by the court¹⁶ but is merely enforced by the TIC, an institution which not only lacks sufficient power to carry out investigation and sanctioning of the trade¹⁷ but is also perceived by the public as having vested interest despite participation of increased number of non-trade directors.¹⁸

2.2 Regulating Unfair Terms

The inadequate protection offered to travellers aggrieved by unfair terms can be attributed to (i) ineffectual legislation and (ii) unsatisfactory dispute resolution regime for unfair terms cases.

2.2.1 Ineffectual Legislation

Under the current legislations, where a tour operator seeks to limit or exclude its liability for breach of contract, negligence or misrepresentation, the CECO, the Supply of Services (Implied Terms) Ordinance (Cap. 457) and the Misrepresentation Ordinance (Cap. 284) may be utilised to hold such terms ineffective. However, these statutes only afford protection from unfair *exemption* clauses; they do not address unfair terms which seek to serve *other* purposes.

Whilst Hong Kong has passed the Trade Description (Unfair Trade Practices) Ordinance (Cap. 362) in 2012 and widened the scope of protection to consumers in relation to unfair trade practices (such as misleading omissions¹⁹ and bait advertising²⁰), travelling consumers are still vulnerable without statutory protection against unfair terms incorporated into standard form contracts.

The only existing statute against these unfair terms is the Unconscionable Contracts Ordinance (Cap. 458) (“UCO”). The UCO allows the court to hold such terms to be

¹⁵ Travel Agents Ordinance, (2002) Cap. 218, § 11, sched. 2 (H.K.).

¹⁶ CODE OF BUSINESS PRACTICE ON OUTBOUND PACKAGE TOURS, art. 11(3)(a), (b), http://www.tichk.org/public/website/en/codes/codes_of_conduct/part_two_2/print.html.

¹⁷ Commerce and Economic Development Bureau, *Review of the Operation and Regulatory Framework of the Tourism Sector in Hong Kong – Consultation Paper*, GOVHK (Mar. 10, 2015, 10:00 AM), <http://www.gov.hk/en/residents/government/publication/consultation/docs/2011/tourism.pdf>.

¹⁸ *Id.*

¹⁹ Trade Description Ordinance, (2013) Cap. 362, § 13E (H.K.).

²⁰ *Id.* at § 13G.

“unconscionable” and thus unenforceable. However, in practice, the UCO is of very limited use for protection of consumers against unfair terms. Since coming into force 19 years ago, there have only been 4 successful challenges to unfair terms under UCO.²¹

The lack of successful claims may be attributed to the ineffectual UCO. Under the UCO, an unfair term on its own is insufficient to make out a case for unconscionable contract.²² The statute is silent on the definition of the crucial term “unconscionable”. Thus the court has to refer to a non-exhaustive list in Section 6(1) and common law definitions.²³ However, these interpretation aids tend to focus on the *totality* of the circumstances and conduct that give rise to unfairness in the bargaining process, instead of the *meaning* and *effect* of the term alone. This means that so long as there is procedural fairness in the way the contract has been formed, any substantive unfairness will be over-looked and not considered sufficient to be unconscionable. Hence, it is argued that the current legal framework in Hong Kong is inadequate in consumer protection from unfair terms.

2.2.2 Unsatisfactory Dispute Resolution Regime for Unfair Terms Cases

It is further argued that the existing dispute resolution regime is grossly insufficient in protecting aggrieved travellers against the prevalent use of unfair terms by travel agents in Hong Kong in the following three aspects.

First, there is no specific body responsible for taking representative actions on behalf of aggrieved travellers against the travel agents’ use of unfair terms. At present, travel consumers who are dissatisfied with the travel agent’s services may either file a case individually, or lodge a complaint with the TIC or the Consumer Council (“the Council”). However, neither the TIC nor the Council²⁴ are law enforcement bodies. Neither has the power to apply to the Court on behalf of the aggrieved travellers for any declaratory or injunctive relief against the travel agent’s use of unfair terms. As the Council admits, “[aggrieved consumers] are faced with the daunting task of

²¹ Lee Mason, *Hong Kong consumers deserve fairer deal in goods and services contracts*, SOUTH CHINA MORNING POST (Feb. 11, 2015 9:00 AM), <http://www.scmp.com/comment/article/1553978/hong-kong-consumers-deserve-fairer-deal-goods-and-services-contracts>.

²² *Hang Seng Credit Card Ltd v. Tsang Nga Lee*, [2000] 3 H.K.C. 269 (H.K.); *Shum Kit Ching v Caesar Beauty Centre Ltd*, [2003] 3 H.K.C. 235 (H.K.).

²³ CHITTY ON CONTRACTS (28th ed. 1999) vol.1, p.452, para.7-078; *Shum Kit Ching v Caesar Beauty Centre Ltd*, [2003] 3 H.K.C. 235 (H.K.).

²⁴ Consumer Council of Hong Kong, *Consumer Complain Form*, CONSUMER COUNCIL (Mar. 10, 2015, 9:30 AM), <https://www.consumer.org.hk/cc-complaint/index.php?lang=en>.

taking civil action on their own as the only redress option".²⁵ Not only does this discourage many aggrieved travellers from bringing such a claim for fear of incurring considerable legal costs,²⁶ it also means turning a blind eye to the rampant use of unfair terms within the tourism industry, since many travellers themselves are unaware of their legal rights to be protected from unfair or unconscionable contract terms.²⁷

Second, the existing policy contains many disincentives for bringing consumer legal actions.²⁸ For cases that involve substantial consumer interest but could not be resolved by mediation or other processes, application can be made to the Consumer Legal Action Fund set up by the Council for financial and legal assistance.²⁹ Yet there is a non-refundable application fee payable at the time of application.³⁰ If the application is successful, the legal assistance granted by the Fund may be terminated "*at any time*".³¹ If the claim turns out to be dismissed owing to the applicant not providing true and accurate information, he/she would be made responsible for "*all losses, costs, expenses, claims, damages and liabilities*" regardless of whether the omission was committed unwittingly.³² As a result of many of these disincentives, even those aggrieved travellers who are fully aware of their rights may not be inclined to pursue them as far as court.³³

Third, currently consumers cannot seek redress by only relying on unfairness of a term. When a travel consumer lodges a complaint to the Council, the complaint will in effect be referred to TIC.³⁴ Upon receipt of a complaint, the TIC Executive Office will verify the materials

²⁵ Consumer Council of Hong Kong, *Fairness in the Marketplace for Consumers and Business*, CONSUMER COUNCIL (Mar. 10, 2015, 9:30 AM), http://www.consumer.org.hk/web/CompetitionStudyReports/2008-02_Fairness_in_the_marketplace.pdf.

²⁶ Lee Mason, *Inadequacy and ineffectuality: Hong Kong's consumer protection regime against unfair terms in standard form contracts*, 44 HKLJ 90 (2014).

²⁷ GRANT AND MASON, *supra* note 3, at 223.

²⁸ Mason, *supra* note 26.

²⁹ Consumer Council of Hong Kong, *Information Pamphlet on Consumer Legal Action Fund* CONSUMER COUNCIL (Mar. 10, 2015, 9:30 AM), http://www.consumer.org.hk/website/ws_en/legal_protection/consumer_legal_actions_fund/CLAFBriefPDF.pdf

³⁰ *Id.*

³¹ *Id.*

³² *Id.*; Mason, *supra* note 26.

³³ GRANT AND MASON, *supra* note 3, at 223.

³⁴ Consumer Council of Hong Kong, *Other Complaint Channels*, CONSUMER COUNCIL (Mar. 10, 2015, 9:30 PM), http://www.consumer.org.hk/website/ws_en/complaints_and_advices/other_complaint_channels/OtherComplaintChannels.html.

provided to decide whether to accept the complaint.³⁵ The complaint will be rejected when there is no evidence that the travel agent has violated any provisions in the contract.³⁶ This means that no matter how unfair and one-sided the terms in the standard form contract are, the aggrieved traveller cannot seek any redress from the TIC so long as the travel agent did not violate any contractual provisions. In any event, even if the complaint is accepted, aggrieved travellers may still face certain challenges. Where the parties are unable to settle after mediation,³⁷ the case may be referred to the Consumer Relations Committee which will make a decision on the complaint case with reference to the information provided by both parties, the TIC rules and industrial practices.³⁸

The fact that industry practices and conventions are taken into consideration does not in any way assist the aggrieved traveller when the unfair terms are commonly found in the industry and widely adopted by all major travel agents in Hong Kong. If the complainant is not satisfied with the Committee's decision, his only remaining option is to take legal action against the travel agent,³⁹ which is yet another uphill battle as discussed above.

3. The UK Approach

Contrasting the deficient regime in Hong Kong, in addition to the existing common law principles and the UCTA, the UK has further developed two specific set of rules, namely the Package Travel Regulations ("PTR") and the Unfair Terms in Consumer Contracts Regulations 1999 ("UTCCR"). Both offer greater protection to weaker parties. Further, the Office of Fair Trading acts as a specific enforcement body dealing with unfair terms.

3.1 Package Travel Regulations

The PTR contains rules on exclusion clauses which are of specific application to package holidays. It applies to anyone who organises packages whether they are for profit or not, and whether they are for business or club purposes.⁴⁰

³⁵ Travel Industry Council of Hong Kong, *Handling of outbound traveller complaints*, TRAVEL INDUSTRY COUNCIL OF HONG KONG (Mar. 15, 2015, 10:30 AM), http://www.tichk.org/public/website/en/forms/complaint/outbound_complaint_eng.pdf.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ DTI Consumer & Competition Policy Directorate, *Question and Answer Guidance for Organisers and Retailers*, Gov.UK (Mar. 23, 2015, 7:30 PM),

What differentiates the PTR from the classic UCTA is that the PTR contains many new obligations and sweeping provisions preventing tour operators from excluding liability if they break these new obligations.⁴¹ While the UCTA imposes a reasonableness test, the PTR imposes both an outright prohibition on any term which excludes liability for a breach of any contractual obligations,⁴² subject to the exceptions listed in Regulation 15(2), such as unforeseeable circumstances.⁴³ In *Lathrope v Kuoni Travel Ltd*,⁴⁴ there was a 26-hour flight delay of a seven-day package holiday. The travel agent sought to rely on an exclusion clause. As a result, the court held that both the exclusion clause and limitation clause were caught by the PTR and thus ineffective. As the mechanical failure which caused the delay was “*by no means an uncommon occurrence*”⁴⁵ and contemplated in the brochures, there was a breach of contract for which the travel agent was liable.

A failure to comply with the provisions the Regulations will result in potential liability to pay compensation to the consumer for breach of contract or the commission of a criminal offence, punishable with a fine of up to £5,000 in the magistrates’ court or by an unlimited fine in the Crown court.⁴⁶

As illustrated, in effect, on top of the UCTA, the PTR imposes greater liability on tour operators than ever before, while on the other, it prevents the exclusion of that liability.

3.2 Unfair Terms in Consumer Contracts Regulations

Amidst a whole battery of legislation to protect consumers against exclusion clauses, there exists a novel legislation, the UTCCR. The UTCCR goes beyond the existing legislation and regulates not only exclusion clauses, but also unfair terms – a much wider concept.

Here is an example illustrating the difference in scope of the legislations. If a travel agent states in the contract that the agent will not be liable to pay any compensation for any breaches on its part, the agent is seeking to exclude its liability. But if the agent states in the contract that a

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/49791/bis-06-1640-package-travel-regulations-question-and-answer-guidance-for-organisers-and-retailers.pdf.

⁴¹ GRANT AND MASON, *supra* note 3, at 209.

⁴² Package Travel Regulations, 1992, S.I. 1992/3288, reg. 15(5) (U.K.).

⁴³ *Id.* at reg. 15(2)(c)(i).

⁴⁴ [1999] C.L.Y. 1382 (U.K.).

⁴⁵ *Id.*

⁴⁶ *Id.*

traveller will need to pay an extortionate charge to cancel his booking, the agent is relying on a term that one may regard as unfair. While the UCTA and the PTR may catch only the former, the UTCCR catches both.

Under the UTCCR, a term which has not been individually negotiated is to be regarded as unfair if “*contrary to the requirement of good faith, it causes a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer*”.⁴⁷ The concept of good faith, in relation to consumer contracts, and the concept significant imbalance in parties’ rights are novel.⁴⁸ In particular, as observed by Lord Bingham, while good faith is a concept wholly unfamiliar to British lawyers, it looks to “*good standards of commercial morality and practice*”.⁴⁹

The UTCCR offers guidance as to the factors to be taken into account in assessing unfairness,⁵⁰ and contains an indicative and non-exhaustive list of terms which may be regarded as unfair.⁵¹ These include terms such as excluding a consumer’s legal rights in the event of non-performance by the supplier.⁵² Such a list may be helpful to the traders in drafting the contracts and to the consumers in comprehending unfairness of a term. A consumer aggrieved by an unfair term is given the right to treat the term as not binding. But the contract will still continue to be in force if it “is capable of continuing in existence without the unfair term”.⁵³

The UTCCR is clearly intended to offer protection against the inherent dangers in standard form contracts, such as those for package holidays,⁵⁴ as it does not cover individually negotiated terms.⁵⁵ A term will always be regarded as not being individually negotiated if it has been drafted in advance and the consumer has not been able to influence the substance of the term.⁵⁶ For example, if a consumer A agrees with the tour operator B at the time of booking that B will provide a non-smoking room, this will be an individually negotiated term and will not be subject to the UTCCR. Likewise, if B explains that it will not be liable if there is no non-smoking room,

⁴⁷ Unfair Terms in Consumer Contracts Regulations (UTCCR), 1999, (S.I. 1999/2083), reg. 5(1) (U.K.).

⁴⁸ EWAN MCKENDRICK, *GOOD ON COMMERCIAL LAW* (Penguin Books 2010).

⁴⁹ Director General of Fair Trading v. First National Bank Plc, [2002] 1 A.C. 481, para. 17 (H.L.).

⁵⁰ UTCCR, reg. 6(1) (U.K.).

⁵¹ UTCCR, sched. 2 (U.K.).

⁵² *Id.* § 1(b).

⁵³ UTCCR, reg. 8(2) (U.K.).

⁵⁴ GRANT AND MASON, *supra* note 3, at 217.

⁵⁵ UTCCR, reg. 5(1) (U.K.).

⁵⁶ UTCCR, reg. 5(2) (U.K.).

this will be an individually negotiated term. But if B simply relies upon a standard exclusion clause term, this will not be individually negotiated and the UTCCR will apply. In any event, even if certain terms have been individually negotiated, the UTCCR will still apply to the rest of the contract if overall it can be regarded as a ‘pre-formulated standards contract’.⁵⁷

The efficacy of the UTCCR have further been strengthened by case laws throughout the years.⁵⁸ It is no wonder why the UTCCR has been successfully employed on numerous occasions for the protection of UK consumers against unfair contract terms.

3.3 Office of Fair Trading

Unlike Hong Kong, the UK has specific enforcement bodies. The UTCCR empower the Office of Fair Trading (“OFT”) to consider, *inter alia*, travellers’ complaints in relation to unfair contractual terms. If a complaint is made to the OFT, it is their duty to consider it unless the complaint is vexatious.⁵⁹ After considering the complaint, the OFT may restrain the use of the term by applying for an injunction on the traveller’s behalf.⁶⁰ While it was only the OFT that could seek injunction when the UTCCR first came into effect in 1995, a number of qualifying bodies, including the Consumers’ Association, are now also given that power.⁶¹

The OFT has made significant contributions. For example, it took an action against the booking conditions used by the four major tour operators and recommended by the Association of British Travel Agents. Eventually, they all agreed to make significant changes to the terms and conditions they used.⁶² Furthermore, in order to demonstrate how the OFT will approach its obligations concerning travel contracts, it issued a specific and informative guidance on unfair terms in package holiday contracts (OFT 668).⁶³ While not legally binding, this guidance is sufficiently authoritative.⁶⁴

⁵⁷ UTCCR, reg. 5(3) (U.K.).

⁵⁸ *See, e.g.,* Director General of Fair Trading v. First National Bank Plc, [2002] 1 A.C. 481 (H.L.).

⁵⁹ UTCCR, reg. 10 (U.K.).

⁶⁰ UTCCR, reg. 12 (U.K.).

⁶¹ UTCCR, sched. 1 (U.K.).

⁶² GRANT AND MASON, *supra* note 3, at 223.

⁶³ UK Office of Fair Trading, *Guidance on unfair terms in package holiday contracts*, GOV.UK (Mar. 15, 2015, 7:30 AM), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284435/oft668.pdf.

⁶⁴ GRANT AND MASON, *supra* note 3, at 217.

4. Suggested Reforms in Hong Kong

Having elaborated the operation of the better-developed legal framework in the UK, this essay makes three suggested reforms in Hong Kong. It is about time for Hong Kong to: (a) introduce legislation specifically on package travel; (b) replace the UCO with a more effective legislation against unfair terms; and c) set up a specific enforcement body.

4.1 Introducing Legislation Specifically on Package Travel

As illustrated above, the existing Travel Agents Ordinance and Codes of Conduct do not impose control on the use of exclusion clauses, and the package travel agents are mostly self-regulatory. It is therefore recommended that Hong Kong introduce a legislation modelled on the Package Travel Regulations, particularly on the exclusion of liability by the travel agents. Furthermore, the legislation will introduce criminal sanctions, which has a deterrent effect. If Hong Kong follows the footsteps of the UK, it is likely that greater consumer protection will be provided to the travellers.

4.2 Replacing the UCO with New Legislation Against Unfair Terms

In order to compete with other common law jurisdictions and to keep up with overseas development, Hong Kong should consider having a piece of legislation curbing unfair terms. The UK UTCCR has been followed in a number of common law jurisdictions. For instance, Australia introduced Part 2B of the Victorian Fair Trading Act 1999, which was later extended by the Fair Trading and Other Acts Amendment 2009. The meaning of unfair term, like the UTCCR, is illustrated by an indicative and non-exhaustive list of examples.⁶⁵ Other common law jurisdictions, such as Singapore⁶⁶ and Malaysia,⁶⁷ have also adopted legislations specifically covering unfair terms.

Hong Kong should introduce a legislation modelled on the UTCCR, with appropriate modifications. This suggestion is supported by the Consumer Council⁶⁸ and scholars.⁶⁹ For

⁶⁵ *Trade Practices Amendment (Australian Consumer Law) Act (No.1) 2010* (Cth) sched. 1, pt. 1, s 3(1) (Austl.).

⁶⁶ Unfair Contract Terms Act (1994) (Sing.); Consumer Protection (Fair Trading) Act (2009) (Sing.).

⁶⁷ Consumer Protection Act 1999, pt. III (Malay.).

⁶⁸ Consumer Council, *Unfair Terms in Standard Form Consumer Contract (Full Report)*, CONSUMER COUNCIL (Mar. 2, 2015, 6:30 PM)

http://www.consumer.org.hk/website/ws_en/competition_issues/model_code/2012040301FullText.html.

⁶⁹ Mason, *supra* note 26; Stefan Lo, *Limitations in the Regulation of Unfair Marketing Practices in Hong Kong* 7 J. INT'L BUS. & L. 77 (2008).

instance, there may be an indicative and non-exhaustive list of potential unfair terms, constructed with reference to the UTCCR, but also taking into account the differences in culture and marketplace between Hong Kong and the UK. Further, this new legislation will replace the UCO, directing at *unfair* terms instead of *unconscionable* terms. In any event, the Hong Kong courts will have a readily available body of UK case precedent to help guide the judges on the application of the new statute.⁷⁰

4.3 Setting Up a Specific Enforcement Body

In order to rectify the deficiencies in Hong Kong's existing dispute resolution regime, it is recommended that the Consumer Council and the Consumer Association be granted the same power like the OFT in the UK such that, upon receipt of valid complaints, the Council could apply to the Court for injunctive relief on behalf of travellers against the travel agents. It is believed that this proposal could offer a range of benefits. For example, travellers aggrieved by the unfair terms in Hong Kong would no longer have to take civil action on their own as the only redress option. Furthermore, with more cases brought to the Court and more unfair terms in holiday contracts being restrained, there will be more judicial precedents set for the benefit of all other travel consumers (rather than only the complainant when the case is settled outside court).⁷¹ Eventually, travel agents will have no alternative but to review and amend their terms and conditions.

Most importantly, with the proposed power, the Consumer Council will rid itself of a reputation as a "*toothless tiger*"⁷² and will be in a bargaining position as strong as the OFT when encouraging the travel agents to remove unfair terms from their contracts.

⁷⁰ Mason, *supra* note 26, at 92.

⁷¹ GRANT AND MASON, *supra* note 3, at 223.

⁷² South China Morning Post, *Learning from our neighbours*, SOUTH CHINA MORNING POST (Mar. 5, 2015, 7:30 AM) <http://www.scmp.com/comment/insight-opinion/article/1253590/learning-our-neighbours>; Heike Phillips, *Toothless tiger wants legal bite to sue dodgy traders*, SOUTH CHINA MORNING POST (Mar. 6, 2015, 7:30 AM), <http://www.scmp.com/article/336253/toothless-tiger-wants-legal-bite-sue-dodgy-traders>; The Standard, *Watchdog chief to lead UN body on consumer rights*, THE STANDARD (Mar. 5, 2015, 7:30 AM), http://www.thestandard.com.hk/news_detail.asp?we_cat=4&art_id=128059&sid=38125391&con_type=1&d_str=20121106&fc=2; KAU NYAW MEE AND SI-MING LI, *THE OTHER HONG KONG REPORT* 1996 308 (Chinese University Press 1996).

5. Conclusion

The practice of incorporation of exclusion clauses and unfair terms in standard form contracts by travel agents is increasingly prevalent. As illustrated, compared with overseas development, the existing legal regime to protect travel consumers is ineffectual and inadequate. Fairly drafted consumer contracts are the “*prerequisite of a fair marketplace*” and a “*sound basis for a prosperous development of economy*”.⁷³ Indeed, by redressing the imbalance in bargaining strengths between travel consumers and corporate travel agencies, the suggested reforms will bring Hong Kong into close alignment with other common law jurisdictions and eventually increase consumers’ confidence in using tourism industry services as well as increase spending within tourism industry.

⁷³ Consumer Council of Hong Kong, *Report on Unfair Terms in Standard Form Consumer Contract*, CONSUMER COUNCIL (Mar. 3, 2015, 5:00 PM), http://www.consumer.org.hk/website/ws_en/competition_issues/model_code/2012040301Full.pdf.