Leisure Industries

Newsletter of the Leisure Industries Section of the International Bar Association Legal Practice Division

NUMBER 40 JUNE 2014

In this issue

International Bar Association

4th Floor, 10 St Bride Street,
London EC4A 4AD, United Kingdom
Tel: +44 (0)20 7842 0090
Fax: +44 (0)20 7842 0091
www.ibanet.org

The *Travel Law Quarterly* (TLQ) is provided in electronic form to members of the IBA Leisure Industries Section as an exclusive member benefit. Members wishing to purchase printed copies of the TLQ and to have access to all past copies of the TLQ at the TLQ website (www.tlq.travel) can do so by visiting the website and clicking on the 'Subscribe' button and following the instructions.

Contributions to this newsletter are always welcome and should be sent to David Grant at the following email address:

david.grant@tlq.travel

Terms and Conditions for submission of articles for this Newsletter

1. Articles for inclusion in the newsletter should be sent to the Newsletter Editor.
2. The article must be the original work of the author, must not have been previously published, and must not currently be under consideration by another journal. If it contains material which is someone else's copyright, the unrestricted permission of the copyright owner must be obtained and evidence of this submitted with the article and the material should be clearly identified and acknowledged within the text. The article shall not, to the best of the author's knowledge, contain anything which is libellous, illegal, or infringes anyone's copyright or other rights.
3. Copyright shall be assigned to the IBA and the IBA will have the exclusive right to first publication, both to reproduce and/or distribute an article (including the abstract) ourselves throughout the world in printed, electronic or any other medium, and to authorise others (including Reproduction Rights Organisations such as the Copyright Licensing Agency and the Copyright Clearance Center) to do the same. Following first publication, such publishing rights shall be non-exclusive, except that publication in another journal will require permission from and acknowledgment of the IBA. Such permission may be obtained from the Head of Editorial Content at editor@int-bar. org.
4. The rights of the author will be respected, the name of the author will always be clearly associated with the article and, except for necessary editorial changes, no substantial alteration to the article will be made without consulting the author.

Section officers

Chair
Shivendra Kundra
Kundra & Bansal, New Delhi
Tel: +91 (11) 2923 8021
Fax: +91 (11) 2923 8023
shiven@kundrabansal

Vice-Chair
David Jacoby
Schiff Hardin, New York
Tel: +1 (212) 745 0876
djacoby@schiffhardin.com

Treasurer
Constantine Boulougouris
Norton Rose Fulbright, Sydney
Tel: +61 (2) 9330 8471
Fax: +1 (2) 9330 8111
constantine.boulougouris@gmail.com

Secretary
Sabrina Fiorellino
Gilbert's, Toronto
Tel: +1 (416) 703 3217
sabrinaf@gilbertslaw.ca

Newsletter Editor
John Wilson
John Wilson Partners, Colombo
Tel: +94 (11) 232 4579
Fax: +94 (11) 244 6954
john@srilankalaw.com

Corporate Counsel Forum Liaison Officer
Kees van de Meent
Hocker Advocaten, Amsterdam
Tel: +31 (20) 577 7773
Fax: +31 (20) 671 9710
meent@hocker.nl

Social Media Officer
Joanna Luzak
University of Amsterdam, Amsterdam
j.a.luzak@uva.nl

Website Officer
David Grant
Travel Law Quarterly,
Newcastle Upon Tyne
Tel: +44 (191) 289 2897
Fax: +44 (191) 289 2897
david.grant@tlq.travel

Subcommittees

Electronic Entertainment and Online Gaming Subcommittee

Chair
Gabrielle Patrick
iSeed, London
Tel: +44 (0)20 3239 2970
gpatrick@iseed.co

Vice-Chair
Mark Methenitis
T-Mobile USA, Richardson, Texas
Tel: +1 (469) 300 4700
lawofthegame@gmail.com

Programme Officer
Marcus Clinch
Eiger Law, Taiwan
Tel: +886 (2) 2771 0086
Fax: +886 (2) 2771 0186
marcus.clinch@eigerlaw.com

Sports Law Subcommittee

Chair
Javier Medin
Alfaro Abogados, Buenos Aires
Tel: +54 (11) 4393 3003
Fax: +54 (11) 4393 3004
jmedin@alfarolaw.com

LPD Administrator
Charlotte Evans
charlotte.evans@int-bar.org

From the Chair

Shivendra Kundra,
Kundra & Bansal, New Delhi
shiven@kundrabansal.com

Dear friends,

Greetings! This is the penultimate newsletter before the IBA Annual Conference in October. I look forward to seeing many of you in Tokyo. Once again, we have an interesting itinerary of sessions and I hope you will support Leisure Industries Section's sessions by attending in large numbers and also urging your friends and colleagues to be a part of these sessions too.

Before outlining the sessions that we have for this year, I would like briefly to highlight a series of recent worldwide events that should particularly engage the attention of Section practitioners.

First, the tragic event in South Korea that involved the capsizing of the ferry, *Sewol*, that killed close to 300 people, most of them school children. The investigations into the causes of the disaster are still going on, but the initial outrage seems to centre on lax safety standards and inadequate rescue operations. Apparently, the cargo on the ship was loaded way beyond capacity, and not for the first time. There are allegations that the company that owned *Sewol* had earned tens of thousands of dollars by booking excess cargo over several journeys in the past. It is also alleged that the Coast Guard failed in its duty to conduct rescue operations with alacrity and efficiency expected of an organisation in such circumstances. To make matters worse, the captain and the first mate abandoned the ship. They are now charged with manslaughter. So, what are the lessons to be learnt for Leisure Industries Section practitioners? To my mind, in many jurisdictions, it is not the absence of law, but the wilful neglect on the part of implementing agencies to ensure adherence to the law in letter and spirit. Therein lies the greater challenge. How do we ensure safety for our citizens when they travel nationally and internationally? I leave you with questions rather than answers.

I now turn my attention to Ukraine. According to the *Wall Street Journal*, quoting a spokesperson from the Russian Tourism Industry Union, 'The crisis in Ukraine has led to a sharp drop in foreign tourism to Russia, with cancellations coming not just from the US and Europe but also from Asia, a region usually indifferent to political tensions surrounding Russia.' Interestingly, cancellations were triggered not just by safety concerns but also ideological reasons. The series of events in Ukraine and Crimea have complex political reasoning and connotations. As I write this message, there is turmoil in another tourist hotspot, Thailand, with the military junta having declared a coup. There has been a recent terrorist bombing in Kenya, leaving some tourists stranded and others having to cancel their plans.

The fact is that local and regional as the crises might be their impact is far reaching, affecting tourists and service providers alike across jurisdictions. For the Leisure Industries Section practitioner, there are several issues to contend with – consumer liability, tort, contract, nuisance abatement, safe passage, etc.

Leaving you with these thoughts, I wish to now draw your attention to our planned sessions for the IBA Annual Conference in Tokyo. The Section is involved with six programmes for Tokyo, full details of which can be found on page 161.

I look forward to seeing you in Tokyo.

Shivendra Kundra

LEISURE INDUSTRIES SECTION
Monday 20 October
0930 – 1230

Crossing the line

Presented by the Leisure Industries Section and the Arbitration Committee
The session will examine the use of arbitration by sports federations for the redress of disputes; discuss the nature of arbitral agreements in professional player contracts/management contracts where the trigger is misconduct; discuss arbitration clauses in player endorsement contracts; and examine opportunities in general for arbitration in relation to sports misconduct.

Tuesday 21 October
0930 – 1230

Social media and the digital age in the workplace

Presented by the Young Lawyers' Committee, the Employment and Industrial Relations Law Committee and the Leisure Industries Section

This session will focus on the following issues:
- social media challenges in the global workplace: curtailing employer risk and the lawful use of social media by employees;
- are employees spending too much time at work on social media sites? When is the time spent good for business and bad for business?
- acceptable and unacceptable social media activities in the workplace; and
- examination of the various social media platforms available to young lawyers and assess the advantages it provides to young lawyers over traditional forms of marketing, networking and business development.

Thursday 23 October
0930 – 1730

Electronic games summit

Presented by the Intellectual Property, Communications and Technology Section, the Leisure Industries Section and the Asia Pacific Regional Forum

The electronic games industry has developed into one of the largest entertainment industries. Blockbuster sequel game Grand Theft Auto 5 (GTA5) has just been launched with a production budget of over US$250m and sales reaching over US$1bn within the first week. The increase of mobile gaming through social gaming, with hit games such as Candy Crush, is unprecedented and generates significant revenues. This full day section topic will feature a keynote speaker from the games industry and be divided into four blocks throughout the full day, including the protection and licensing of content (IP), advertising and rights of publicity (media), data protection and user interface (technology) as well wireless and mobile networks interplay where the trend puts electronic games as the jewel of content (communication).

ELECTRONIC ENTERTAINMENT AND ONLINE GAMING SUBCOMMITTEE
Monday 20 October
1430 – 1730

Broken bad: money laundering issues with online gaming, virtual currency and other techniques

Presented by the Criminal Law Committee, the Electronic Entertainment and Online Gaming Subcommittee, the Intellectual Property and Entertainment Law Committee and the Technology Law Committee

Criminals are increasingly using the cyber world to launder money. This panel will examine some of the typical examples of cyberlaundering and then address ways of combatting cybercrime.

Virtual currencies, such as Bitcoin, WebMoney, Paymer, PerfectMoney, Liberty Reserve etc, which are being used to transfer money anonymously, will be discussed. In addition, online games including Second Life and World of Warcraft will also be reviewed. Criminals launder money by using game currencies that can be exchanged for real money in different countries. Finally, micro money laundering, using sites like PayPal or EBay, will be analysed for the latest developments in cyber laundering.

There is barely any means of monitoring, policing or regulating the virtual world. This panel will provide a lively debate on how to combat global cyber money laundering issues

Wednesday 22 October
1430 – 1730

Your money is in the Cloud: mobile payments, virtual currencies, and other issues at the intersection of real money and digital reality

Presented by the Banking Law Committee and the Electronic Entertainment and Online Gaming Subcommittee

We were used to keeping our money in our wallets; then it was held in bank accounts. Recently, it found its way into our mobile phones. Now it can be parked in a cloud. What are the new challenges to the operation of the monetary system? Is it safe for customers? And what about all digital currency? These and other issues will be discussed at the panel. The speakers will endeavour to provide the audience with the best and up-to-date answers. However, the rapid pace of change in this sector coupled with new technological developments is likely to require updated answers at frequent intervals.

SPORTS LAW SUBCOMMITTEE

Wednesday 22 October
1430 – 1730

Corruption in sport

Presented by the Criminal Law Section and the Sports Law Subcommittee

Football, cricket, the Olympic Games, horse racing, snooker and sumo wrestling have all grappled with issues of corruption and match-fixing. This session – featuring speakers from the Criminal Law Section and the Sports Law Subcommittee, together with guest speakers from the world of sport – discusses recent high profile corruption scandals. What is the role of the law in combatting corruption in sport and are these issues better dealt with through self-regulation?

Conference report
IBA Annual Conference, Boston, 6–11 October 2013

Thursday 10 October

Revision of EC Regulation 261 on passenger rights

Anthony J Cordato
Cordato Partners Lawyers, Sydney
ajc@businesslawyer.com.au

Joint session of the IBA Aviation Law Committee, the European Regional Forum and the Leisure Industries Section

Session Chair
Mia Wouters
LVP Law, Brussels

Speakers
Noura Rouissi
European Commission, Directorate General for Mobility and Transport, Unit for Passenger Rights, Brussels
Rhys Griffiths
Fieldfisher, London
Robert Donald
Davis, Calgary
Frédérick Malaud
International Civil Aviation Organization, Montreal
George N Tompkins Jr
Wilson Elser Moskowitz Edelman & Dicker, New York

The European Union perspective

After ten years of operation, the EU has reviewed EC Regulation 261/2004, and EC Regulation 2012/1997. It has issued a report which recommends a number of changes.

Noura Rouissi provided insights from the European Commission, which traversed three main areas where EC Regulation 261 required revision. These were:

(1) Legal grey areas and loopholes:
- definition of extraordinary circumstances;
- right to compensation for delay;
- passenger rights for re-routing, missed connecting flights, rescheduling;
- tarmac delays, partial ban on 'no show' policy, information;
- the right to correct misspelled names & baggage loss provisions (EC Regulation 2027/97).

(2) Enforcement difficulties – long, complex and inconsistent complaint handling proceedings need to be simplified to allow for better enforcement by:
- introducing a deadline of two months for airlines to deal with claims;

- providing access to out of court procedures;
- extending the enforcement of baggage rules, including providing complaint forms for baggage claims;
- giving national enforcement bodies more power to handle complaints, launch investigations, issue recommendations but not to compel the airline to provide compensation.

(3) Disproportionate financial cost – more realistic financial cost is needed by:
- changing the three-hour delay threshold to five hours for long haul cancellation compensation;
- limiting the obligation to compensate to providing accommodation, if extraordinary circumstances apply;
- providing airlines with the ability to pursue third parties for damages for delays and cancellations.

Mia Wouters identified two areas are of particular concern to air passengers:
- Should a long delay of more than three hours be treated as a cancellation?
- What kinds of 'extraordinary circumstances' can an airline rely on to avoid payment of compensation for cancellation?

Rhys Griffiths supported this view and said that EC Regulation 261 had failed to meet the fundamental legal principle of certainty, specifically for delayed boarding and extraordinary circumstances.

He pointed to the tension between the airline industry and consumer rights. In Europe, airlines have been trying to remove or restrict EC Regulation 261 because it is expensive. But the European Parliament is very consumer minded, and the reality is more, not less, consumer rights will apply to airlines.

The delayed boarding decision in *Sturgeon* – where the passenger was delayed in travelling from Vienna to Mexico, illustrates the legal uncertainty. Originally it was intended under Article 7 of EC Regulation 261 not to provide compensation for delay. But the Court did so, reasoning that although the delay was not so much within the capacity of the airlines as denied boarding or cancellation, it was compensable none the less.

Another illustration of the current legal uncertainty is found in the fact that there is no obligation on an airline to compensate for cancellation if the airline proves extraordinary circumstances. This applies although the airline could have avoided the cancellation if it had taken all reasonable measures.

Panel discussion and attendee comments raised several practical problems

- Financial compensation is not proportionate to the price of the ticket.
- EC Regulation 261 has forced airlines to compensate but airlines have a legitimate complaint that they have no rights of complaint against Government action which creates compensation rights, such as closing airspace after a volcanic eruption.
- The obligation to provide information on consumer rights needs to be strengthened. The warnings displayed on signboards at the check-in are not sufficient. This problem could be addressed by handing out a notice of rights to passengers and more public education.
- Can airlines levy passengers when pricing tickets for the cost of compensation?

The Canadian perspective

Both the US and Canada have similar regulations to EC Regulation 261. These regulations set out consumer rights for denied boarding and cancellations and long delays. Cancellations are compensated in all three jurisdictions, delays in two of them.

Robert Donald provided insights from IATA, and the Canadian perspective. Delays are specifically addressed in the Montreal Convention 1990. There are rules for injuries to passengers and for damage to and loss of cargo. These rules have been accepted.

IATA challenged EC Regulation 261, arguing that Montreal was intended to be an exclusive remedy for passenger assistance. The court ruled that EC Regulation 261 does not exclude, but adds to Montreal. As a result, we have a multiplicity of regimes for passenger protection.

We have EU cases such as *Sturgeon* and *Nelson* where compensation was obtained for flights which were delayed, not cancelled.

In Canada, there are administrative decisions which have looked at EC Regulation 261 where the airlines have opposed penalties. The Canadian decisions are not well drafted or balanced, creating uncertainty. There are damages even when there is no fault; the penalty does not relate to the price of the ticket; and no account is taken of no-go decisions by the pilot. In summary a 'one size' regulation does not fit all – especially in the far north of Canada.

In Canada, the system is complaint based. All carriers must file their rules. If complaints are upheld, the airlines are ordered to change their conditions of carriage. Air Canada has complained that this imposes an unfair financial burden or competitive disadvantage on Canadian airlines, compared with foreign airlines who must comply only for flights into or from Canada. Airlines flying to Canada need to review their tariffs in the light of these decisions.

Air Canada and other Canadian airlines have chosen to change their conditions of carriage, but not adopt the EC Regulation 261 wording.

Administrators considering compensation for denied boarding, delays and cancellations, need to consider these questions:

- What risks should a passenger assume?
- Should there be national or regional rules?
- What obligations should be imposed on an airline to deliver passengers to their destination on time?
- Does imposing a levy on tickets make sense?
- Is the compensation regime a form of flight insurance?
- Cases of denied boarding in Canada are rare.

Lost baggage is not covered by the Canadian system. The ticket information makes no reference to what happens if baggage is lost or delayed. Should airlines be more pro-active in providing this information?

Airlines are being held to obligations they cannot opt out of.

Mia Wouters commented that from the European perspective, Montreal is essentially directed to safety of transport, and to ensure that the baggage arrives at more or less the same time as the passenger. That leaves room for national regulations to be introduced to protect consumer rights for denied boarding, delay and cancellation.

Frédérick Malaud provided insights from the International Civil Aviation

Organization ICAO). He said that the function of ICAO is to issue technical standards – safety management, pilot licensing, communications. These apply worldwide.

ICAO looks at passenger protection as economic regulation, which is introduced after consultation between States and industry stakeholders Therefore it has not issued standards equivalent to EC Regulation 261.

But at a conference held in March 2013, the fact that 55 jurisdictions have passenger rights regimes created awareness in ICAO of the necessity to converge treatment of passenger rights.

States around the world adopt either specific consumer protect regimes, for example, the EU, US and Canada; or general consumer protection regimes allowing market forces to apply, for example, Singapore and Australia.

States have asked ICAO to develop high level core principles on passenger protection. These are the issues:

- Price transparency – passengers should be able to obtain clear information on the airfare;
- Carrier information – to know which airlines will be flying on the code share;
- Assistance with information during flights;
- Proper treatment of passengers with disabilities;
- Dealing with force majeure;
- How to achieve the same level of consumer protection across legal systems;
- Proportionality between the airfare paid and the service provided;
- Sharing the burden – where flight delays are caused by external events not within the control of the airline;
- To what extent should right of redress be incorporated into the high level discussion?
- What law should be applied between jurisdictions with different regimes?

The US perspective

George N Tompkins Jr provided insights on the Montreal Convention (1999). He noted that it was 14 years old in November 2013. The convention has been adopted by 103 parties. The US was the 30th state to ratify, which it did in 36 hours, which brought the convention into force. Some signatories have not ratified it, such as Russia, Libya, Mauritius, Indonesia, Thailand, the Philippines and Iran. Their failure deprives passengers of their right to sue in their state of residence under the 'fifth jurisdiction' introduced in the Montreal Convention.

He voiced these concerns about the unravelling of the universality of the Montreal Convention.

1. Is it failing in its purpose?
2. Is it being misapplied around the world?
3. Is it being undermined by consumer advocates in the USA and the EU?

Further concerns arise because some countries may be parties to, but do not necessarily follow, the Montreal Convention. The drafters intended that the Montreal Convention be exclusive of local laws, and be interpreted and applied uniformly.

But in the US, exclusivity is not always the case. In California, Chicago and some other US states, the courts have decided that the Montreal Convention is not pre-emptive or exclusive – and that state laws not inconsistent with the Montreal Convention will be upheld.

The commercial reality is that if airlines don't take care of their passengers, they

will lose them. Delays are covered by the Montreal Convention. The US Courts do recognise the exclusivity of the Montreal Convention when it comes to delays. They bar the EU from enforcing EC Regulation 261 against non EU airlines flying in and out of the EU. This does not stop the EU from applying EC Regulation 261 using the argument that it provides for specified compensation for cancellation or delay, and is therefore consistent with the Montreal Convention.

The US Department of Transport (the 'DOT') fines US carriers for not complying with the Montreal Convention. This came about as a result of tarmac delays at JFK and La Guardia caused by a snowstorm. The DOT adopted a regulation that no tarmac delay is to extend beyond four hours. Airlines must provide embarkation within four hours. Also, passengers must be provided with food and water during tarmac delays. In one case, an airline returned to the terminal after three-and-a-half hours, opened its doors, and was refuelled. But because the airline failed to announce to passengers that they could leave the aircraft, they were prosecuted for tarmac delay and agreed to a settlement of US$100,000.

Because 99 per cent of airline delays are not within their control, it is unfair that they are being taxed regardless.

Panel discussion and attendee comments concluded the session on issues of general principle, namely:

- Is it not contrary to principles of law to impose liability regimes on non EU carriers? Trying to impose worldwide liability is unfair to airlines, because airlines do not have a vote!
- Should the approach be that EC Regulation 261 is a consumer rights law, not an air passenger law, and not be subject to the Montreal Convention?
- It is important that airlines make passengers aware of their rights.
- Does EC Regulation 261 provide a more user friendly regime than the Montreal Convention? If it does not compete with the Montreal Convention, it should do so. But just how you add more liability for delay under EC Regulation 261 to the Montreal Convention, which already provides compensation for delay, is an interesting question.
- There needs to be a balance between protection of passengers and increases in air fares that consumer protection entails.
- Should there not be a time limit on the compensation for accommodation?

Air Wisconsin Airlines v Hoeper: US Supreme Court gives broad scope to immunity under Aviation Terrorism Reporting Statute

David Jacoby
Culhane Meadows, New York
djacoby@culhanemeadows.com

Some days are just much worse than others. Take one December day in 2004 for William Hoeper, then a pilot for six years at Air Wisconsin Airlines (AWA). Hoeper had flown from his Denver home to AWA's Virginia training centre for a simulator proficiency test on the BAe-146 aircraft. This was Hoeper's fourth try to qualify to fly that plane, which had become the only type AWA flew from Denver; another failure and he was out of a job. The test went badly. After that, his commercial flight home was hauled back to the gate so that federal agents, alerted by AWA, could board to pull Hoeper out of his seat and off the plane.

AWA's call to the Transportation Security Administration (TSA) had followed a conference of its executives. They discussed a post-test verbal blow-up between Hoeper and the simulator instructor, whom the pilot accused of railroading him. They also discussed the fact that Hoeper was a designated 'Federal Flight Deck Officer', a status which meant he was allowed to carry a gun aboard aircraft to prevent interference with flights, that such a weapon had been issued to him, and AWA did not know if Hoeper had it with him; and that there had been two past instances of disgruntled airline employees who had become violent during flights, in one case leading to a fatal passenger jet crash. AWA told TSA that Hoeper was a Federal Flight Deck Officer who might be armed; that the airline was concerned about his mental stability and the location of his weapon; and that an unstable pilot in the FFDO program was being terminated that day.

Hoeper had no gun with him and caught a flight home later in the day without further incident. As expected, AWA dismissed him the next day.

The lawsuit

Hoeper sued AWA for defamation and other claims in Colorado State Court. A jury returned a verdict in his favour of just under US$850,000 in compensatory damages, plus about US$391,000 in punitive damages. The punitive award was reduced to US$350,000 on appeal, but otherwise the outcome was affirmed by an intermediate appellate court and the Colorado Supreme Court.

AWA had asked the trial judge to grant it summary judgment, arguing that the post-9/11 Aviation and Transportation Security Act, and specifically 49 U S C §44941, immunised its statements to TSA. The trial court denied that motion, and also denied a request that the jury be instructed that ATSA immunity would

cover a statement which was materially true. The federal Supreme Court granted certiorari to decide the applicability of the statutory immunity. Ultimately, all nine justices agreed that AWA's statements, while inaccurate in certain respects, were protected if they were materially true. The majority opinion found they were and dismissed the claims. A three-justice partial dissent would have remanded the matter for a determination as to whether the statements were materially false.

ATSA immunity

Section 44941(a) provides civil immunity to air carriers and their employees who voluntarily disclose to law enforcement or aviation security officials, including TSA, 'any suspicious transaction relevant to a possible violation of law or regulation, relating to air piracy, a threat to aircraft or passenger safety, or terrorism.' Section 44941(b) carves out from the grant of immunity:

'1. any disclosure made with actual knowledge that the disclosure was false, inaccurate, or misleading; or
2. any disclosure made with reckless disregard as to the truth or falsity of that disclosure.'

The majority opinion, written by Justice Sotomayor, held that Congress modelled the ATSA immunity on the 'actual malice' standard established in *New York Times Co v Sullivan*, 376 US 254 (1964), a leading First Amendment case, and its progeny. *Sullivan* held that a public official (later cases extended its holding to public figures) could not recover for defamation unless it was shown the complained-of statement had been made with 'actual malice', that is, knowledge that it was false, inaccurate or misleading, or at least a reckless disregard for its truth or falsity. Slip Op at 7. Beyond that, the falsity must be material, that is, one which would have a different effect on a recipient than the alleged truth. Id. at 8, citing *Masson v New Yorker Magazine, Inc*, 501 US 496, 517 (1991).

Justice Sotomayor further found that this understanding served the intended purpose of ATSA, which shifted responsibility for assessing and reporting possible threats to airline security from the carriers, with whom it had rested previously, to TSA, under a policy nicknamed 'when in doubt, report'. The recipient whose impression has to be gauged for the materiality determination for the AWA report, the Court concludes, is the authorities' perception of, and their response to, a possible threat. Thus, 'any falsehood cannot be material, for purposes of ATSA immunity, absent a substantial likelihood that a reasonable security officer would consider it important in determining a response to the supposed threat.' Slip op at 13. While the majority concedes that some of AWA's statements could have been framed with greater care – for example, that he 'may have a gun', that he was 'unstable', or that he already been terminated – it concluded 'Congress meant to give air carriers the 'breathing space' to report potential threats to security officials without fear of civil liability for a few inaptly chosen words.' Slip op at 18.

The partial concurrence and partial dissent by Justice Scalia accepts the majority's conclusions, including the 'actual malice' standard, parting company only as to its application of the material falsity test and its failure to remand that issue to the Colorado state courts for further consideration. In Justice Scalia's view, the materiality issue was a mixed question of law and fact for a jury to resolve and the US Supreme Court should have

concluded that a reasonable jury could have found AWA's statements to be materially false, and therefore outside the ATSA-conferred immunity. Justice Scalia laid particular weight on the reference to mental instability, which he thought was made all the more potentially material by the context of anger over a firing. He analogised: 'Falsely reporting to the TSA that a young Irishman is an IRA terrorist is much more likely to produce a prompt and erroneous response than reporting that a 70-year-old English grandmother is.' Opinion of Scalia, J, at slip op. 5.

Bitcoin, a traveller's risk or reward?

Gabrielle M Patrick*
iSeed, London
gpatrick@iseed.com

Since 2013, there has been much debate and focus on bitcoin. This cryptocurrency has gained almost exponential momentum over the last 18 months – both negative and positive. Interestingly, it is being increasingly used by travellers. This article explores whether this poses an overall legal risk or reward to travellers who use the cryptocurrency.

What is bitcoin?

Bitcoin is the world's first decentralised digital currency, otherwise known as a 'cryptocurrency'. Many are confused by the concept but in simple terms it is the opposite of fiat currency, such as the United States Dollar ($), British Pound Sterling (£) or Euro (€).

Bitcoin is created by a process called mining, typically driven by collective computer power. All bitcoin transactions are recorded in a shared public database called a 'block-chain'. When new bitcoin is produced or mined a new block is attached to the chain. Bitcoin can be exchanged between persons or parties without a central regulator or authority such as a central bank. It is therefore a peer-to-peer payment system.

Is bitcoin legally recognised?

European regulators have recognised it at least as 'something of money's worth'.[1] In the United Kingdom, the tax authority, HMRC (HM Revenue & Customs), announced in March 2014 it would stop charging Value Added Tax (VAT) on bitcoin activities.[2] Meanwhile in the United States the Inland Revenue Service (IRS) has recognised it as property not currency.[3] In Germany, it is recognised as a 'unit of account', meaning it is can be used for tax and trading purposes in the country and any commercial trading activity would require licensing by Germany's financial regulator BaFin. Pursuant to Section 1(11) of the German Banking Act (*Kreditwesengesetz – KWG*), BaFin deemed bitcoin as having legally binding effect as financial instruments in the form of units of account.

Yet, in all jurisdictions, bitcoin is not recognised as valid legal tender. And in most jurisdictions there is an absence of laws specifically addressing bitcoin. It is this grey area that perhaps is to the traveller's advantage.

How do travellers use bitcoin?

Today, bitcoin can be used to pay for most goods and services internationally. Taxis, hotels, travel agencies, restaurants and entertainment can all be paid for using bitcoin. Spendbitcoin.com, operated by an Australian company, lists over 9,000 places to spend your bitcoin in every

continent. TravelForCoins.com, a California LLC, allows you to book your travel in bitcoin. And of course, if you want to be an astronaut, you can use bitcoin to book your ticket with Virgin Galactica LLC, the space tourist company founded by Richard Branson. All seats to fly to space are US$250,000 or bitcoin equivalent.

Traveller rewards

Bitcoin represents borderless payment in its truest form. Travellers are said to be using bitcoin with greater enthusiasm in countries with strict foreign currency controls such as Argentina. Bitcoin is currently being described as Argentina's 'default currency' following the 2011 issue of Communication 'A' 5237 by the Argentine Central Bank which imposes strict requirements for foreign exchange market access and repatriation of direct investments made in Argentina. Argentinian laws have required its citizens to obtain state approval to purchase US dollars at an official rate to the detriment of the traveller, but beneficial to the government.

Travellers now have the added convenience of bitcoin ATMs. The bitcoin automated teller machines allow travellers to buy and sell bitcoin using cash. In October 2013, the first bitcoin ATM was opened in a coffee shop in Vancouver, Canada and has reportedly transacted over CAD$1m in volume. Bitcoin ATMs have also been installed in Australia, China, Finland, Ireland, Slovakia, Germany, New Zealand, the UK, the US and Switzerland. Bitcoin ATMs are expected in the next weeks in Japan, Singapore and Brazil. Notably, ahead of the 2014 World Cup, Brazil has enacted Law No 12,865 which creates the possibility for the creation of electronic currencies, including the bitcoin. Law No 12,865 provides for the payment arrangements that comprise the Brazilian Payment System and defines 'electronic currency' as resources stored on a device or electronic system that allow the end user to perform a payment transaction.[4]

Bitcoin ATMs effectively mean travellers can go to another country without an ATM card. By simply scanning the bitcoin ATM machine's code with a phone, a traveller can exchange bitcoin on the spot for local cash. Bank cards are now perhaps a thing of the past, as bitcoin ATM machines can be used to skirt banking regulations which have been grappling with cryptocurrencies.

Legal pitfalls?

One obvious problem bitcoin travellers face is security. Like all bitcoin holders, when keeping bitcoin in a digital wallet or within a cryptocurrency exchange it is vulnerable to hacking and theft. In February 2014, Tokyo based Mt Gox, the world's largest bitcoin exchange made an application for commencement of a procedure of civil rehabilitation (*minji saisei*) at the Tokyo District Court, the equivalent of bankruptcy. The exchange stated that 850,000 bitcoin had 'disappeared' 'through the abuse of a bug in the bitcoin system'.[5] Retrieving any hacked data is almost impossible.

Another legal problem is losing your bitcoin wallet. If the traveller's wallet gets stolen or the device on which the wallet is stored (laptop or phone) crashes or the password is forgotten, then all bitcoin stored in that wallet is lost to the traveller. There is no traceability similar to cash being stolen or falling out of one's wallet, the difference is that the loss occurs in cyberspace and there is no way to put a face to the culprit or retrace your steps to find your lost bitcoin wallet.

These types of unique risks have prompted regulators in Israel, Singapore, the US, EU and elsewhere to warn the public regarding possible risks in using bitcoin.

Another pitfall is tax treatment of a traveller's bitcoin transactions. The IRS has mandated that the average bitcoin user in the US keep a record of all bitcoin transactions for a year so that capital gains can be assessed.[6] This is of course an accounting nightmare in the context of fluctuating bitcoin values. To further illustrate the point, by virtue of Finland's Income Tax Act, s 29, any gains in bitcoin value is taxable as capital income, but losses are not deductible.

Notwithstanding the above, bitcoin seems to be increasingly attractive to travellers who, in spite of legal pitfalls, want their travel experience to be completely borderless, including of course, the way they pay for it.

Notes

* Gabrielle M Patrick, is a US & UK lawyer who focuses on cryptocurrency law. This article is provided for informational purposes only and is not intended to be legal advice.

1. Typically in the context of gaming laws such as in the Isle of Man, The Gaming, Betting and Lotteries Act 1988; Alderney,The Gambling (Alderney) Law, 1999; and in the United Kingdom, The Gambling Act 2005.
2. Revenue & Customs Brief 09/14, issued 3 March 2014.
3. Internal Revenue Bulletin: 2014–16, Notice 2014–21, dated 16 April 2014.
4. Lei No. 12.865, de 9 de Outubro de 2013 [Law No. 12,865 of 9 October 2013], article 6(VI).
5. Mt.Gox Announcement Regarding An Application For Commencement Of A Procedure Of Civil Rehabilitation, dated 24 February 2014.
6. Internal Revenue Bulletin: 2014–16, Notice 2014–21, dated 16 April 2014.

The right to travel: developments in Chinese tourism law

Larry Gore
Laurence D Gore & Associates, Fort Lauderdale
president@laurencegore.com

Dr Phil Cameron
Anolik Law Offices, San Francisco
president@laurencegore.com

China had, in its past, often been considered 'the forbidden country'. Travel to China for the average tourist and businessman was, in its simplest sense, not permitted. Domestic travel for Chinese people was also very limited. Travel for the Chinese outside of the country has been more vehemently prohibited. Although China is still on the current 'List of Restricted Countries' under the Office of Foreign Asset Control of the US Treasury, this is mostly a situation of trade restrictions and not tourism. In recent years, Chinese citizens travelling abroad have been subject to more relaxed regulations, both from the People's Republic of China (PRC) and many host countries. This, combined with a rise in wealth of Chinese tourists, is resulting in what will soon be the largest boom ever of international tourists – the Chinese.

Between 1949 and 1974, the People's Republic was closed to all but selected foreign visitors. Deng Xiaoping decided to actively promote tourism to China in the late 1970s. It was decided that tourism would be an excellent means of earning foreign currency. Almost everyone has heard of China's one child policy, but what they might not know, is that this policy applies to those Chinese of the 'Han' race. The other 55 ethnic races in the PRC are permitted to have as many children as they like. This diversity of culture, food and ethnicity within China has been a boon for domestic Chinese tourism, as there are so many multicultural experiences to have while travelling within China, generating a new tourism economy. This new economy and reawakened interest in their diversity of peoples, leaves many in China struggling to rediscover and invent social rules and ethnic pride in the wake of the equalising effects of the Cultural Revolution. China's 2013 Tourism Law addresses many of these developments.[1]

Hotels were recognised by the PRC to be the first travel necessity for this growth in tourism and moved to increase vastly the number of first class modern hotels and guest houses. Major hotel construction thrived as Chinese legal regulations on foreign corporations, particularly in the tourism arena, were relaxed and Chinese 'partnerships' replaced the ban on only fully owned Chinese corporations. The Holiday Inn Lido in Beijing in 1984 became the first international hotel company in China. However it remains true that, subsequent hotel development continues to require strong partnerships with Chinese hotel developers. As China's inbound tourism industry began to flourish China realised the necessity of constructing brand name hotel chains

with accompanying legislation to protect those brands. The newly permitted joint ventures with foreign partners helped to create a burgeoning hotel industry with the number of tourist hotels increasing dramatically from around 5,500 in 1998 to nearly 10,000 in 2003.

Hotel upkeep in China is affected by the government control of land. As it turns out, Chinese law views hotels as buildings on top of land, and all of the land is owned by the government. The structure of the hotel is permitted to exist on government land for about 80 years. When the hotel is newly constructed, it may be fabulous, but as time passes there is less and less of an incentive to keep up its quality standards, so it starts a downward spiral of decay and disrepair.

Like so many things in China, for the tourist, the price of the hotel room is negotiable. In fact, Chinese never pay the full hotel room price, and negotiation for a lesser price is customary in the lobby during check-in, when there is no pre-existing reservation. Internet hotel fees tend to be higher than a Chinese would pay following a negotiation. This is a travel example of the general rule that Chinese contracts are quite fluid.

Taxi passengers face similar fluidity. It is not uncommon for a taxi driver to seek to negotiate a higher price with you, when his circumstances change, such as a traffic detour, or his failure to fully understand the length he agreed to drive you and the price he agreed to accept. More than one traveller has felt the pain of believing the price was agreed upon, only to find that his later choice 'became pay more or get out here' – wherever 'here' is.

New destinations emerged as a result of the renovation of historic and scenic areas which were opened to tourists. The training of professional guides and service personal became of critical importance. The numbers tell the story. In 1978, China only received about 230,000 international foreign tourists; this was a result of the restrictive laws and regulations that the PRC placed on who was allowed to visit the country and who was not. By the year 2006 China received 49.6 million international visitors. China had become among the top five most visited countries in the world. Travel within China also became easier with the lifting of travel controls, massive investment in transport infrastructure such as roads, railways and airlines, and the rapid rise in incomes.

Airline development followed as China realised that just 'opening the gates' was not enough. China wanted to compete in the international airline market and thus the rapid growth of the Chinese domestic and international airline market was a necessity. China undertook to purchase the most modern of aircraft, build new airports, and roads connecting them, utilising Western sources including Boeing.[2]

Inbound travel increased exponentially as over 250 cities and regions were opened to foreign visitors by the mid-1980s. To attract and host business and trade personnel regulations for business travel were overhauled. The traveller to China now needed only valid visas or residence permits to visit up to 100 locations. Travel permits are required, however, for most of the remaining areas of China. Travel permits must be acquired from public security departments, with additional requirements for Tibet.

Outbound travel developed from the emergence of the newly wealthy Chinese middle class. Tourism from China is now vastly increasing as a result of the easing of restrictions on outbound travel by Chinese authorities. Mainland Chinese are now able to take previously prohibited organised leisure tours. While still limited

to countries with the 'Approved Destination Status', this list now includes over 100 countries. Until very recently, the major omission on that list, and the country that middle and upper class Chinese claim to wish to visit more than any other, was the United States. In 2007, the two countries signed a 'Memorandum of Understanding' and the first groups of non-business Chinese travellers began arriving in the US in June 2008. They arrived in the US as part of specially organised and approved tour groups, not as individuals, couples or families – to ensure accountability and control of the travel experience.

Meanwhile, all over the world, there are more and more Chinese tourists, and this is being felt by rising numbers of shoppers flying to the US, and other countries. Some say that tourist-shoppers can rebuild the US economy. Governments like that of the US would be wise to enable the Chinese nouveau riche to burn their wealth in US department stores. Thanks to years of rapid growth, China now has the world's third largest population of millionaire households after the United States and Japan according to a Boston Consulting Group report.[3] Japan has recently eased restrictions for Chinese tourists wishing to come to Japan and according to Kouichi Ueno, chief official of the international tourism promotion division at the government-run Japan Tourism Agency, 'The Chinese economy is booming and China's demand for overseas travel, especially among wealthy people, is about to explode.'[4]

Cruises to China were always very popular with the major, and some minor, cruise lines making frequent port calls. However, luring the Chinese into cruising was difficult not only due to the government restrictions on travel but also because the Chinese had virtually no experience with this form of travel and the major cruise lines had no practical experience of the Chinese traveller. The establishment of strong local representatives by the major cruise lines and the concept of bringing aboard the Chinese lifestyle have made great inroads. Particular success has been had by Royal Caribbean and Costa Cruises and with the most recent removal of many trade restrictions between Taiwan and China the future prospects look very bright.[5]

Travel Agency start-up numbers have vastly increased due to both inbound and outbound travel. Almost all of the growth in travel agencies thus far has been in Chinese-owned agencies with a growth rate that has more than doubled since 1998. International travel agencies have faced much the same problem as in other foreign industries attempting to gain a foothold in China in that a majority controlled Chinese partner is most often required. There are currently just over 1,300 international travel agencies in China. The China National Tourism Administration and the Ministry of Commerce jointly issued new Interim Regulations on the Establishment of Foreign-funded or Wholly Foreign-owned Travel Agencies on 12 June 2003. JALPAK International (China) Ltd was approved by the China National Travel Administration as the first wholly foreign-owned travel company in China's tourist market on 18 July 2003. The first 'overseas controlled' joint venture travel company was established in December 2003 as the TUI China Travel Company. It is a combination of Europe's largest travel group with China Travel Service as its partner.[6]

Tour Operator development on the other hand faces a great many challenges. Chinese travel lawyers and the pleas of many travellers have had their voice

heard in China, with the PRC developing new laws for Chinese tour operators. Basically, individual tour conductors working for tour operators are not paid by the government of China, nor by the travel agency. In fact, generally speaking, their only source of revenue for conducted tours is in the form of tips from tourists and kickbacks from the vendors for purchases made at the 'Friendship Stores' and shops that they visit during their excursions. Oftentimes, these detours take more than 50 per cent of the tourists' sight-seeing time and they are not able to visit the true tourist destinations and cultural attractions. The Ministry of Tourism responded with a new law, and we are waiting to feel its effect on the industry.[7]

Internet use is also spurring the growth of China's tourism industry. Despite restrictions on content, Chinese consumers are quickly becoming empowered to find and share travel information online. The Chinese reluctance to book online is quickly eroding. The same legal problems facing other legal regimes concerning jurisdiction over online contracts will also be of concern to the PRC.

China's lack of historical artefacts and world class museums remains a hindrance to tourism development. A tourist or business trip to Beijing is likely to include at least a short visit to Tiananmen Square and the Forbidden City, formerly the Palace of the Emperor of China. One expects to find, in those 500-year-old historic buildings, belonging to one of the greatest and oldest civilizations in all of human history, a virtual treasure trove of historical artefacts. One expects to see them in several museums throughout the capital of the country that boasts one fifth of the world's population comprising one of its oldest civilizations, if not the oldest. After all, the great museums of every city in the world play host to numerous Chinese treasures and historical artefacts, so it only seems logical that the former Palace of the Emperor of the Middle Kingdom will also hold similar collections.

However, that is not the case, as the Forbidden City Museum is strikingly under stocked. There is simply not much to see in the museums of China. Why? Because most of the ancient treasures of the People's Republic of China have been removed, either during western colonisation and Opium War trading, or during the exodus of the Chiang Kai-shek regime to Taiwan, or destroyed by the communist Cultural Revolution, or through modern commercial trading and illegal trafficking of cultural property. The result is that there is little to see and therefore little incentive for tourists to visit these sites. Seasoned Western tourists have probably visited the British Museum and the Louvre prior to visiting the Forbidden City, and are quick to note that the display in China is lacking. China, like Egypt, has found it necessary to legislate to preserve and restore their cultural heritage, as a matter of national pride, but also to promote their tourism economy.[8]

Rather than restrict tourism the government of China has embraced it and as a consequence the economics of tourism are booming.

Notes

1. Tourism Law of the People's Republic of China (Adopted at the 2nd session of the standing committee of the 12th National People's Congress on 25 April 2013).
2. Civil Aviation Law of the People's Republic of China (Adopted by the 16th Meeting of the Standing Committee of the Eighth National People's Congress on 30 October 1995).
3. B Beardsley, J Becerra, B Holley, D Kessler, M Naumann, T Tang and A

Zakrzewski 2013.Global Wealth 2013: Maintaining Momentum in a Complex World. Available at: **www.bcgperspectives.com/content/articles/financial_institutions_growth_global_wealth_2013_maintaining_momentum_complex_world/?chapter=2#chapter2_section3**, accessed 11 March 2014.

4. S Yuasa, Japan economy getting lift from Chinese tourist shopping sprees In-text: (Yuasa, 2014) Bibliography: S Yuasa 2014. Japan economy getting lift from Chinese tourist shopping sprees. Available at: **www.chinapost.com.tw/business/2010/06/30/262773/Japan-economy.htm**, accessed 11 March 2014.
5. Maritime Law of the People's Republic of China (Adopted at the 28th Meeting of the Standing Committee of the Seventh National People's Congress on 7 November 1992, promulgated by Order No 64 of the President of the People's Republic of China on 7 November 1992, and effective as of 1 July 1993).
6. Tourism Law of the People's Republic of China (Adopted at the 2nd session of the standing committee of the 12th National People's Congress on 25 April 2013).
7. Tourism Law of the People's Republic of China (Adopted at the 2nd session of the standing committee of the 12th National People's Congress on 25 April 2013).

8 Law of the People's Republic of China on Protection of Cultural Relics (Adopted at the 30th Meeting of the Standing Committee of the Ninth National People's Congress of the People's Republic of China on 28 October 2002).