



the global voice of  
the legal profession

# Leisure Industries

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

NUMBER 41 SEPTEMBER 2014

## In this issue

Section officers	252
Subcommittee officers	253
From the Chair	254
Tokyo, 19–24 October 2014 Leisure Industries Sessions	255
Articles	257

## 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](http://www.ibanet.org)

© International Bar Association 2014.

All rights reserved. No part of this newsletter may be reproduced or transmitted in any form or by any means, or stored in any retrieval system of any nature without the prior permission of the copyright holder. Application for permission should be made to the Head of Editorial Content at the IBA address.

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](http://www.tlq.travel)) can do so by visiting the website and clicking on the 'Subscribe' button and following the instructions.

Copyright of the TLQ remains with Oakhurst Academic Press and reproduction or forward transmission in any form without the express permission of the publisher is strictly forbidden.

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

[david.grant@tlq.travel](mailto: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](mailto: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



**Newsletter Editor**

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



**Vice-Chair**

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



**Treasurer**

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



**Social Media Officer**

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



**Secretary**

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



**Website Officer**

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

---

# Subcommittee officers

## 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,*

In my last message from the chair I referred to the crisis in the Ukraine and its effect on tourism in that country and to the sinking of the ferry, the *Sewol*, in South Korea that killed 300 people, most of them schoolchildren going on holiday.

Since then the situation in the Ukraine has deteriorated with the heinous shooting down of Flight MH17 en route to Kuala Lumpur from Amsterdam, again with many innocent tourists aboard. They include a British lawyer working in Holland and his family and two football supporters from Newcastle upon Tyne, the home city of our Website Officer David Grant. Tourism can be a force for good but it is a sad reflection on the current state of world affairs that tourists are often caught up in the crossfire of evil people who, by some distorted view of the world, feel it is justifiable to slaughter them in the name of a perverted ideology.

As I write, news is coming in of another boat disaster, this time in Indonesia. Early reports say that a tour boat on its way to the island of Lombok to see the Komodo dragons sank off the coast of eastern Indonesia. The boat appears to have hit a reef and sunk in stormy weather near Sumbawa. Fortunately the number of casualties seems to be low but it is a timely reminder of my comments on the *Sewol* disaster that in order to keep travellers safe the regulatory authorities have to apply the law both in letter and spirit. By the time you read this the scope of the tragedy will be known but it will be some time until we know if the boat owners or the local maritime safety agencies were found to be wanting. If so this will only cause more grief to the bereaved. Although of little consolation a pure accident would be more tolerable than a preventable one.

The IBA Annual Conference is round the corner, and I hope to see a large contingent of Leisure Industries members in Tokyo. I have talked, in my previous messages, about a number of exciting sessions that will see the participation of Leisure Industries. Do include these sessions in your diary.

We are still looking for regional representatives. See page 255 for further details. So, if any of you is interested in playing a more active role in the Section, please get in touch with us. Tokyo will provide us with a wonderful opportunity to interact, and the Leisure Industries leadership would welcome views on how to make our Section work more effectively.

I look forward to seeing you in Tokyo.

Shivendra Kundra

# TOKYO 19-24 OCTOBER 2014

## ANNUAL CONFERENCE OF THE INTERNATIONAL BAR ASSOCIATION



### LEISURE INDUSTRIES SECTION

Monday 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 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 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 1430–1730

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

Wednesday 1430–1730

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

### **SPORTS LAW SUBCOMMITTEE**

Wednesday 1430–1730

#### **Criminal Law Section Corruption in sport**

## Travel Law Specialists at the Bar

1 Chancery Lane boasts one of the few dedicated specialist International Travel & Leisure teams at the independent Bar.

Chambers is listed as a top tier travel law set in *Chambers & Partners* and as a leading consumer law set in *The Legal 500*, a ranking which is attributed to the practice's travel industry knowledge.

Members of the Travel Team act for both claimants and defendants in all types of overseas accident litigation, as well as contractual recovery actions against overseas suppliers, international and national regulatory compliance and related areas of leisure activity litigation. We also provide non-litigious advisory consultation for organisations concerned with regulatory compliance in the travel industry, due diligence, standard terms and conditions and the configuration of internet businesses.

1 Chancery Lane, London, WC2A 1LF

[www.1chancerylane.com](http://www.1chancerylane.com), clerks: 0845 634 6666

# Can TripAdvisor reviews be trusted?

**Anthony J Cordato**  
*Cordato Partners, Sydney*  
*ajc@businesslawyer.com*

The Union Street Guest House in New York posted on its Facebook page ‘a US\$500 fine ... will be deducted from your deposit for every negative review placed on any internet site by anyone in your party’ in response to a number of negative reviews following a wedding.

This posting highlights the frustration that many hotels and restaurants experience when negative travel reviews are posted on the internet.

Every month 260 million visitors reference TripAdvisor reviews to help them choose where ‘stay, eat and play’ before booking a hotel, resort, restaurant or tourist attraction. Surveys reveal that up to 80 per cent of travellers look at online travel reviews before they book a hotel.

TripAdvisor is the world’s largest travel website, sharing over 100 million travel reviews posted by travellers covering 1.5 million hospitality businesses. Many hospitality providers ‘live or die’ on online travel reviews for their bookings.

The integrity of online travel reviews is of utmost commercial importance to TripAdvisor, to hotels and accommodation providers and to travellers.

It is therefore of great concern that an estimated ten to 20 per cent of online travel reviews are fake. TripAdvisor denies these estimates.

If the estimates are correct, two questions must be asked:

1. How does a hotel or restaurant identify a fake travel review?
2. What can a hotel or restaurant do to remove a fake travel review?

What can be done about fake travel reviews on TripAdvisor is explored in this article.

## What do fake travel reviews look like?

The Australian Competition and Consumer Commission (the ACCC), has recently taken an interest in online reviews. It has issued a guide which contains a warning to online review platforms which might host fake reviews that they may be misleading the public, in breach of the Australian Consumer Law. The ACCC guide is – ‘Online reviews – a guide for business and review platforms’ on how to maintain the integrity of online review sites.<sup>1</sup>

The ACCC guide states that reviews which are overly enthusiastic or critical, or which contain incorrect facts, are often fake.

Illustrations of fake travel reviews (not drawn from the ACCC guide) are:

- ‘Can definitely NOT recommend’ or ‘This place is a DUMP’ [The capital letters point to a fake review posted by a competitor]
- ‘This place is fantastic! The rooms are BEAUTIFUL and the staff very attentive and wonderful!! [The exclamation marks point to a fake review posted by the hotel on itself]
- The room descriptions correspond word-for-word with the hotel website, but the description of the location and surrounds is factually inaccurate [Word-for-word descriptions raise suspicion; factual inaccuracies show it to be fake]
- ‘The trains came past the hotel every 20 minutes’ [Fake because the nearest railway track was many miles away]
- A review of a one night visit posted 15 months afterwards [Probably fake – does a genuine guest wait this long?]
- ‘I loved the view from the room’ [Probably a fake paid review because the style is eye-witness. Reviewers say ‘The view was breathtaking’]
- ‘The hotel promised WiFi but it was not available when I stayed’ [The review appears genuine, until you find the hotel made no promise that WiFi was available]

### Who posts fake travel reviews?

Fake travel reviewers have different profiles. One profile is a traveller for whom ‘no melon is ever ripe enough’, or who may have an axe to grind about a particular hotel. Another profile is a hotel or restaurant which posts a fake review either to promote their hotel or restaurant or to drive away guests from a competitor’s hotel (towards to their hotel), or both.

### *Illustration*

In June 2013, it was discovered that Peter Hook, a hotel manager in Sydney, had published 105 reviews on TripAdvisor over several years. The reviews he published contained glowing reviews about the hotels owned by his employer, Accor and Sofitel, and critical reviews about the hotel group's rivals. For example:

‘As a first time visitor to Phnom Penh I didn't know much about the hotel scene so booked a brand I knew well. It turned out to be a good choice,’ Hook wrote about the Sofitel in Phnom Penh.

In contrast, in a 2010 review Hook criticised rival the Intercontinental Hotel in Adelaide as ‘the ideal location but stuck in a time warp and rather expensive’.

It is hard to tell by looking at them that these are fake reviews.

The reason why they were not noticed for several years was that the fake reviews were published under a user name ‘Tavare’. TripAdvisor allows pseudonyms to be used without identity verification. It was only when the user name was referenced to a Facebook page which displayed a name, photograph and location that the hotel manager was ‘outed’.

The reviews were removed by TripAdvisor because they broke its listing rules in two ways. First, an employee of the hotel reviewed is not permitted to write a review of their own hotel. Secondly, a person associated with a hotel cannot write a review of a property of the same type within ten miles of their hotel. The manager was dismissed for breach of the hotel group’s ‘social media policy’. The hotel group retained its TripAdvisor listing.

Some hotels might be tempted by offers from an SEO (Search Engine Optimiser) to post travel reviews as an ‘independent’ reviewer. These offers should be rejected.

*Illustration:*

In February 2014 the Tourism Industry Association New Zealand warned against emails from a fake review optimiser offering to post as many as 20 false reviews for NZ\$297.

### **How does TripAdvisor deal with fake reviews?**

TripAdvisor is an open online review platform. It is a distributor of third-party content rather than publishing its own opinions. This means that it publishes reviews contributed by ‘everyday’ consumers, relying on the so-called ‘wisdom of the crowd’, rather than publishing a ‘traditional’ travel and accommodation guide with its own reviews.

Because it receives more than 60 contributions every minute, TripAdvisor does not have the resources to check reviews. It relies heavily upon its review screening process and travellers and hospitality businesses to report ‘inappropriate’ reviews.

### **The TripAdvisor review screening process**

Because it does not filter the identities of its contributors to any real extent, TripAdvisor must have an effective screening process for identifying fake travel reviews. This is the process it uses:

Before submitting a review, the reviewer provides this warranty:

‘I certify that this review is based on my own experience and is my genuine opinion of this establishment, and that I have no personal

or business relationship with this establishment, and have not been offered any incentive or payment originating from the establishment to write this review. I understand that TripAdvisor has a zero-tolerance policy on fake reviews.’

Next, the review is screened by technology and by editors before it is published. This takes between 24 and 48 hours.

The filtering algorithm that TripAdvisor uses to moderate reviews is confidential. But it can be assumed that it identifies ‘patterns of suspicious activity’ by reference to indicators such as a ‘spike’ in reviews, use of the same email or IP addresses, using ‘marketing-speak’ writing styles, and copying the same marketing language as the business uses.

Other factors included in the filtering algorithm are: whether the review is family-friendly; if it is posted to the correct business and complies with the guidelines; the extent to which the reviewer has received ‘helpful votes’ for previous reviews; the degree to which the reviewer can be identified; and the use of expressions in the review which are consistent with a fake review.

TripAdvisor may block publication of the guest’s review if a hotel owner warns TripAdvisor that they suspect a guest is about to post a fake review. To do so, the hotel needs to use TripAdvisor’s ‘Reporting Potential Blackmail’ procedure – which is designed for use when a guest threatens to write a negative review unless a demand for a refund, upgrade, or other request is met.

### **The TripAdvisor review removal process**

TripAdvisor warns hospitality businesses to monitor reviews regularly and to use the ‘Report an Inappropriate Review’

procedure, also known as a 'Notice & Takedown Procedure', to request removal of a review for inappropriate or defamatory content.

The Notice requires the complainant to identify the inappropriate or defamatory words or photographs and to give reasons why the review is inappropriate, defamatory or untrue.

The business should highlight factual inaccuracies which indicate that the reviewer did not visit; and highlight defamatory comment, which it calls 'non family-friendly comment', such as profanity, threats, prejudiced comments, hate speech, sexually explicit language, or other content that 'is not appropriate for the community'.

The internet blogs show that some businesses are happy with this procedure, while others are critical that it takes too long for TripAdvisor to remove the offensive review, or failing to remove the review at all.

### **Do TripAdvisor's processes comply with the ACCC guide?**

TripAdvisor's review screening and review removal processes appear to comply with the ACCC recommendations that online review platforms adopt both a proactive approach – using automated or manual internal systems to screen a review before it is published, and a reactive approach – relying on complaints information after the review is published.

There is room for improvement in TripAdvisor's review removal policy. When a hotel or restaurant comes under new ownership, or when it undergoes extensive refurbishment or building work, it should be able to request TripAdvisor to remove all travel reviews posted prior to the change of ownership

or to the date the work was carried out. And TripAdvisor should respond to requests for removal within a time frame of seven to 14 days.

### **How should a hotel or restaurant deal with critical reviews which are not fake?**

As a rule, so long as the review is accurate and is not exaggerated, then it is not a fake travel review. For these critical reviews, alternatives to removal need to be explored.

Hoteliers and restaurateurs know that positive online travel reviews are powerful marketing tools. Many encourage guests to post reviews on the excellent service and experience they have received, when they are leaving. In that way, sheer numbers of positive reviews might drown out the critical reviews.

Coupled with this approach is the need to respond to negative reviews in an appropriate fashion.

TripAdvisor has a 'Write a Management Response' procedure. It suggests that the business responds quickly, is courteous and professional, addresses the specific issues and highlights the positives.

This is consistent with the approach recommended by the Australian regulator, the ACCC, which recommends that internet review platforms provide businesses with an opportunity to post a public response to negative reviews which do not qualify to be removed as fake reviews.

This approach makes good marketing sense. Hospitality businesses should look at all reviews posted as first hand market research, as an opportunity to engage with the public, and to demonstrate that they take customer service seriously.

## Should a business consider a defamation suit against reviewers who post fake travel reviews?

If TripAdvisor does not remove the fake review a business may consider taking direct action for defamation against the reviewer. Without going into any depth, these are the considerations:

The immediate consideration in taking defamation action against the reviewer is that in almost all cases, fake reviews are published anonymously.

The next consideration is whether the online travel reviewer is expressing an honest opinion based on fact or a defamatory opinion?

The next consideration is that in some jurisdictions, such as in Australia, corporations (defined as having more than ten employees) cannot bring a defamation action.

The final consideration is the legal costs incurred in pursuing the claim, and adverse costs orders if unsuccessful.

## Are there circumstances where the travel review platform may be liable for defamation?

TripAdvisor publishes lists. The Grand Resort Hotel in Pigeon Forge, TN was number 1 on the 2011 Dirtiest Hotels list.

This reviewer comment was quoted:

‘If you’re looking for a hotel with chewing tobacco spit oozing down the halls ... carpeting so greasy and dirty you wouldn’t want to sit your luggage down – let alone walk around barefoot ... by all means, stay at the Grand Resort.’

The Grand Resort Hotel sued TripAdvisor, not because it published the reviewer comment (which presumably

was true), but because the hotel was number 1 on the list.

The US 6th Circuit Court of Appeals (in August 2013) upheld lower court decisions that the list was ‘merely a hyperbolic opinion or rhetorical exaggeration’ and not a defamatory communication of a ‘false or misleading statement of fact, or a statement of opinion that implies having a basis in defamatory facts’. Therefore it did not cross the line from being an honest opinion based on fact to being a defamatory imputation.

As a footnote, the hotel shut down and was completely renovated the following year.

TripAdvisor has not published the *Dirtiest Hotels* list since 2011. These days, TripAdvisor publishes positive lists only, such as ‘The top 25 destinations in the world’, ‘The 10 most unusual beaches you’ll ever set your eyes on’ and ‘Reach new heights! 10 must visit hotel rooftops’.

There are no reported decisions in Australia against TripAdvisor. In fact, there are only six decisions in which TripAdvisor has been mentioned. In five of those decisions, TripAdvisor is mentioned as a reference tool, and in the sixth, a court order was enforced to change the contact details of a resort on a TripAdvisor listing.

## The ACCC’s regulatory warnings to travel review platforms and hospitality businesses

Apart from requiring review screening and review removal processes, the ACCC guide contains various warnings.

### *Incentivised consumer reviews*

The ACCC is concerned that incentives offered to consumers in exchange for their reviews may lead to biased, inflated or misleading reviews. The ACCC recom-

mends that incentives offered by the review platform to reviewers are prominently disclosed on the review page.

TripAdvisor has a non-financial incentive scheme for reviewers, called review badges. Review badges are awarded for both positive and negative reviews. The contributor's photo, reviewer status and number of reviews appear on the review.

A business is entitled to offer incentives, such as vouchers or sending a link asking for a review after the stay, so long as they are offered to all consumers and for both positive and negative reviews.

Businesses are not entitled to offer incentives to customers, such as meal or accommodation vouchers, to remove negative reviews.

The ACCC is concerned to ensure that incentives offered by businesses do not result in 'inflated reviews' being published. The ACCC recommends that if the review platform notices a spike in consumer reviews, then it should ask the business to disclose any incentive offered.

### **The omission of credible consumer reviews, inflated (average) reviews and the 'big picture'**

Most online review platforms use a star rating system to give the 'big picture'. The more reviews, the more reliable the rating.

TripAdvisor uses a 'bubble rating' scale of 1 to 5, which it displays prominently under the name of the business reviewed, together with the number of reviews upon which this rating is based.

Because a body of reviews creates the overall impression, the ACCC states that the review platform should not selectively remove or edit reviews. But it is not misleading to remove fake, offensive, defamatory or irrelevant reviews.

### **Disclosing commercial arrangements with reviewed businesses**

Most review platforms have a business model of deriving revenue through paid advertising or 'sponsorship links', rather than charging membership or listing fees to businesses or access fees to users.

TripAdvisor has a basic business listing which is free of charge. TripAdvisor allows hospitality businesses to 'upgrade' by paying for a Business Listing which has contact information and links for bookings, a slide show for photographs and a more prominent display.

The ACCC accepts these commercial arrangements, so long as they are prominently disclosed, are transparent and do not impact upon the content and presentation of the review. The TripAdvisor website pages display the businesses reviewed on the left hand side of the page, and the ranking according to its algorithm. The paid Business Listings are displayed separately in columns such as 'Best deals' on the right hand side or in shaded boxes which are marked 'sponsored links'. This appears to satisfy the ACCC requirements.

### **Final comments**

TripAdvisor is both a blessing and a curse for hotels, resorts, restaurants and tourist attractions.

A blessing for marketing because it is the most popular website on the internet for publishing travel reviews. A curse because the reviews are unpredictable, and in their eyes, the negative reviews are unfair postings by 'whingers and ranters'.

Hospitality businesses should regularly monitor travel reviews and use the procedures available to promptly request that fake reviews be removed and to respond to both positive and negative reviews.

PS The Union Street Guest House defended the 'US\$500 fine for negative reviews' posting as 'tongue-in-cheek'. It removed the posting, but not before it attracted 'dozens of phony one-star reviews'.

## Note

- 1 <http://www.accc.gov.au/system/files/Online%20reviews%E2%80%94a%20guide%20for%20business%20and%20review%20platforms.pdf>

---

# The French hotel industry: Competition and consumer frauds authorities take aim at online travel agencies' parity clauses and unfair conditions

Kathie Claret

Bryan Cave, Paris

kathie.claret@bryancave.com

Facing pressure from hotel owners and consumers, France has taken action in response to the aggressive marketing policies and practices that online travel agencies ('OTAs') are imposing. Three cases are currently pending before the French Courts and the French Competition Authority (FCA).

At the end of May 2014, the French Minister of Economy Arnaud de Montebourg revealed that a lawsuit was filed by his predecessor in February 2014 before the Paris Commercial Court against the OTA Booking.com BV ('Booking') for abusive clauses in its standard contracts with hotels. The main clause in question is the price parity clause (or most favoured nation clause) whereby contracting hotels are obligated to provide the OTA with prices equal to or better than those charged by the hotel directly to consumers or to other OTAs.

The Booking case, based largely on investigations carried out by the consumer frauds authorities (DGCCRF), follows a similar action against Expedia Inc, which was sued by the French government, before the Paris Commercial Court in November 2013. The decision is expected in summer 2014.

Both these cases follow an earlier action pursuant to which the Paris Commercial Court in 2011 ordered Expedia, TripAdvisor and Hotels.com to pay several thousands of euros in damages to the Union of Hotel Professionals (*Syndicat National des Hôteliers, Restaurateurs, Cafetiers et Traiteurs*) for deceptive and misleading commercial practices. In these proceedings, the Union of Hotel Professionals together with two other companies managing hotels (SAS Hôtel de la Place du Louvre and SARL Château de Guilguiffin) complained that Expedia, TripAdvisor and Hotels.com engaged in misleading commercial practices and committed acts of unfair competition consisting notably in displaying false information regarding the availability, prices and sales conditions so as to induce consumers to believe for instance that no rooms were available at hotels which refused to contract with these OTA's. The defendants objected that the internet users should be able to understand that the information to the effect that no rooms were available referred to the availability through their websites, rather than to the real vacancies at the hotels. Nevertheless, the Paris Court rejected the

defendants arguments noting that they provided no evidence of their assertions and held that the indications of the hotels not being available were deceptive and misleading. The Court enjoined OTA's to remove such indications from their websites subject to a daily fine of €1,000. The OTAs were also ordered to pay €370,000 in damages to the Union of Hotel Professionals, the SAS Hôtel de la Place du Louvre and the SARL Château de Guilguiffin.

In July 2013, two other industry groups, the Confederation of Independent Hotel Professionals (*Confédération des professionnels indépendants de l'hôtellerie or CPIH*) and the Hotel industry professionals union (*Union des Métiers et des Industries de l'Hôtellerie or UMIH*) complained to the FCA about the parity clause and other allegedly restrictive practices (including extremely large commissions) implemented by Booking.com, Expedia and HRS. They claimed that the latter appear to have violated:

- (i) Articles L. 420-1 of the French Commercial Code (cartels) and Article 101.1 of the Treaty on the functioning of the European Union (TFEU) by imposing parity clauses; and
- (ii) Articles L. 420-2 of the French Commercial Code (abuse of dominant position) and Article 102 of the TFEU by abusing their collective dominant position to impose unfair conditions on the hotels with which they contract.

On 16 September 2013, seized by several unions of Hotel professionals, the French Commercial Practices Commission (*Commission d'examen des pratiques commerciales or 'CEPC'*) published an advisory opinion regarding parity and other restrictive clauses in OTA contacts.

In its paper, the CEPC referred to Article L.442-6-II-d of the French Commercial Code, introduced on 4 August 2008, which provides that any clause or contract allowing a commercial party to benefit automatically from 'most favoured nation' (MFN) treatment, ie, the more favourable conditions granted to its competitors by its contracting party, is deemed null and void. Based on this article, the CEPC opined that parity clauses imposing an automatic alignment of the conditions offered to competitors were against the law and to be considered null and void.

After having examined several contracts entered into by OTAs and hotels, the CEPC noted a multitude of other contractual provisions imposed on the hotels by the OTAs without consideration or reciprocity on the part of the hotels (eg discretionary powers granted for the sole benefit of the OTAs, possibility for the OTAs to terminate without notice or with insufficient notice, non-reciprocal payment terms, non-reciprocal disclaimers of liability, contractual provisions preventing the hotels from directly marketing their services). The CEPC considered that application of such provisions would likely give rise to unlawful abrupt terminations of commercial relations and in any case likely created a significant imbalance in the rights and obligations of the parties, in contravention of Articles L. 442-6-I-2 and I-5 of the French Commercial Code (pursuant to which liability attaches for abruptly terminating the contract and imposing or to trying to impose on a business partner obligations which create a significant imbalance in the parties the rights and obligations).

The CEPC's advisory opinion will certainly be taken into account by the FCA, whose decision is expected by the end of 2014.

The various pending French actions will be resolved in the context of a wider European offensive against the restrictive clauses imposed by OTAs.

The German Federal Cartel Office (*Bundeskartellamt*) has in December 2013 prohibited leading German hotel portal company HRS from applying an MFN clause which required HRS's hotel partners to offer their lowest rates to HRS's booking website. The Cartel Office considered that such MFN clauses created barriers to entry and prevented price competition. Given the fact that HRS had a market share of more than 30 per cent, the effects of the MFN clause in question were particularly pronounced.

The United Kingdom, Hungary and Switzerland have also taken up the same issue. In January 2014, the British competition authority, the Office of Fair Trading (OFT) accepted two-year binding commitments from Booking, Expedia and InterContinental Hotels Group Plc intended to allow all OTAs and hotels that deal with those three business to offer discounts off room-only rates under certain conditions. Whilst the commitments relate only to the operations of these companies, the OFT will be looking to other companies in the industry to adjust their behaviour or face the threat of further regulatory action.

More recently, on 19 May 2014, the Italian Competition Authority (ICA) announced that it had launched an investigation into the practices of Booking and Expedia Inc regarding whether or not their contracts with hotels had violated competition laws.

A clause may breach EU competition law if it 'has as its object or effect' a restriction of competition. The current EU competition law position is that most favoured nation (MFN) clauses will

infringe Article 101(i) of the Treaty on the Functioning of the European Union (TFEU) if in the individual circumstances of the case they result in an appreciably adverse effect on competition in the EU. This is likely to happen when the party imposing such clauses has substantial market power. To date, the relevant cases in the EU have been advanced notably on the grounds that the effect of MFN clauses has been to reduce competition.

However, if EU regulators' views on MFNs harden in the future, such clauses may find themselves grouped together with other serious per se infringements such as resale price maintenance. If this were to happen, MFNs would then be treated as restrictions 'by object', with the result that regardless of the effect or consequences of the clause, it will be an infringement exposing the parties to potentially heavy fines and other sanctions such as the unenforceability of the agreement or clause in question.

On the other side of the Atlantic, US antitrust law generally treats MFNs as vertical restraints and as a result, such provisions are judged under the 'rule of reason' – balancing the pro-competitive benefits of the arrangement against any anti-competitive effects. Generally speaking, only an MFN provision that is, on balance, more harmful than beneficial to competition will run foul of the law. Thus, MFNs employed in unconcentrated markets will be less concerning than those employed in highly concentrated markets.

In any case, given that the clauses and practices implemented by OTAs, especially Expedia and Booking, are being carefully scrutinised, all OTAs should assess their market and legal positions if they wish to implement or retain parity and other restrictive clauses in their agreements.

# TOKYO 19-24 OCTOBER 2014

## ANNUAL CONFERENCE OF THE INTERNATIONAL BAR ASSOCIATION



**W**ith a population of more than 13 million, the capital of Japan and the seat of Japanese government is one of the largest metropolises in the world. A city of enormous creative and entrepreneurial energy that enjoys a long history of prosperity, Tokyo is often referred to as a 'command centre' for the global economy, along with New York and London. Not only a key business hub, Tokyo also offers an almost unlimited range of local and international culture, entertainment, dining and shopping to its visitors, making it an ideal destination for the International Bar Association's 2014 Annual Conference.

### WHAT WILL TOKYO 2014 OFFER?

- The largest gathering of the international legal community in the world – a meeting place of more than 4,500 lawyers and legal professionals from around the world
- More than 180 working sessions covering all areas of practice relevant to international legal practitioners
- The opportunity to generate new business with the leading firms in the world's key cities
- A registration fee which entitles you to attend as many working sessions throughout the week as you wish
- Up to 25 hours of continuing legal education and continuing professional development
- A variety of social functions providing ample opportunity to network and see the city's key sights, and an exclusive excursion and tours programme



To register your interest, please contact: 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 [ibaevents@int-bar.org](mailto:ibaevents@int-bar.org)

[WWW.IBANET.ORG/CONFERENCES/TOKYO2014.ASPX](http://WWW.IBANET.ORG/CONFERENCES/TOKYO2014.ASPX)

#### OFFICIAL CORPORATE SUPPORTERS

