

THE DIGEST



NEWS AND RECENT DEVELOPMENTS IN LAW AND PRACTICE IN THE TRAVEL INDUSTRY

EU (1): Airline Pricing

New EU results show a "step change" in airline ticket selling websites across Europe in terms of compliance with consumer protection rules. The findings feature in a final report on an 18 month EU-wide process to crackdown on misleading advertising and unfair practices. As a result of an EU enforcement investigation started in September 2007 – with 15 EU national authorities and Norway – 115 airline websites out of the 137 websites investigated have been corrected. Following an additional "health check" process involving independent mystery shopping in March 2009 on 67 major airlines, 52 airlines have either been given a "clean bill of health" and undertaken to maintain the same standards or immediately responded to the Commission's consultation with undertakings to remedy outstanding issues. The health check process checked websites against a comprehensive 14 point checklist, which was previously agreed with the airline industry. The Commission is now working to put in place an industry wide agreement to provide a level playing field for airlines across the EU and to maintain sites to a high standard.

EU Consumer Commissioner, Meglena Kuneva said: "This Europe-wide airline investigation is changing the face of airline websites across the EU. There is no room for complacency; there is more work to be done. But this first pan European enforcement investigation has shown it has real 'teeth' and can deliver. The next step is an industry wide agreement, and we will continue to monitor developments in the sector closely."

Vice President Antonio Tajani, in charge of Transport said, "Applying full price transparency is an obligation under the air services regulation. It is a duty for airlines to impose high standards across the industry; it is our responsibility to ensure that all players respect the same rules. This is of first and foremost importance for the consumer who wants to compare prices across airlines and make a real choice."

(Source: EU Commission, 14 May 2009)

EU (2): Competition Investigation into Global Airline Alliances

European regulators have opened formal competition investigations into members of two of the three global airline alliances. The move follows months of informal talks between the European Commission and members of the Star and Oneworld alliances, amid intensifying scrutiny of industry tie-ups on both sides of the Atlantic. The Commission is unlikely to disband the alliances or fine members, according to people briefed on its plans, but may curb some of their existing and planned cooperation on routes, fares and marketing.

It said it suspects that some airlines under the broader Star and Oneworld banners may have cooperated too closely on pricing and capacity. Commission spokesman Jonathan Todd said that it was investigating the matter to "assess whether there is a violation of antitrust rules."

The Commission said the level of cooperation within the targeted alliances "appears far more extensive

than the general cooperation between these airlines and other airlines which are part of the Star and Oneworld alliances."

The third global alliance, SkyTeam, is already the subject of a formal Commission probe launched in 2006, with members including Delta Air Lines Inc. and Air France-KLM "testing" potential remedies to the regulator's concerns.

(Source: Wall Street Journal Online, April 20, 2009)

European Court of Justice: *Walz v Clickair SA* (Case C-63/09)

A reference has been made for a preliminary ruling from the Juzgado de lo Mercantil 4, Barcelona (Spain). It was lodged on 13 February 2009. The question referred is whether the limit of liability referred to in Article 22.2 of the Convention for the Unification of Certain Rules for International Carriage, signed in Montreal on 28 May 1999, include both non-material damage and material damage resulting from the loss of baggage?

[For those of us who have suffered at the hands of airlines who have lost or delayed our baggage it is to be hoped that the ruling will permit not merely financial loss but also provide for damages for the frustration and inconvenience caused by the deprivation of our baggage – whether travelling for business or leisure purposes.]

CAA (1): European Union Regulation on Disabled Persons

The Civil Aviation Authority (CAA) has begun to examine the operation of the European Union Regulation on Disabled Persons and Persons with Reduced Mobility (PRM). The work will help the CAA to identify whether the Regulation is effectively protecting such passengers and consider what areas need to be addressed in the future.

The CAA's findings will contribute to the European Commission's review of the operation of this

Regulation, which is due be delivered to the European Parliament in January 2010.

As part of its work, the CAA is starting a two-month consultation on the operation of the Regulation that will call for evidence from industry, interest groups and other stakeholders. The results of this consultation will feed into a report, which the CAA expects to publish later this year.

Announcing the work the CAA's Director of Economic Regulation, Harry Bush, said: "Over 15 million flights are taken by disabled people and people with reduced mobility in the UK every year. The CAA wants to ensure EU rules for protecting such vulnerable passengers are working efficiently."

In the UK, the Civil Aviation Authority works with the Equality and Human Rights Commission (EHRC) and the Consumer Council for Northern Ireland (CCNI) to implement the Regulation. In the first instance, passengers should contact their airline or airport operator to resolve a complaint. If the problem is not resolved, passengers flying from England, Scotland and Wales should contact the Equality and Human Rights Commission for further advice. Passengers flying from Northern Ireland should contact the Consumer Council for Northern Ireland. The consultation closes on 31 July 2009.

Regulation (EC) No 1107/2006 came fully into force on 26 July 2008 and imposes legal obligations on airport operators, air carriers, their agents or tour operators. The Regulation means that airlines must not refuse to carry disabled passengers, except on established safety grounds or if it is physically impossible to do so. Airports are responsible for providing assistance to disabled travellers at airports. The Regulation applies across all European airports.

Passengers needing assistance must not be charged, and airports handling more than 150,000 passengers a year must publish quality standards so that passengers can measure the service they receive against these standards. The Regulation requires all staff providing direct assistance to passengers to be suitably trained, and disability awareness training will need to be provided to all staff.

Airlines themselves must carry passengers' medical equipment and up to two pieces of mobility equipment free of charge. They must also carry assistance dogs on permitted routes.

Passengers are required under the Regulation, to provide at least 48 hours advanced notice, to guarantee assistance at airports. If passengers feel that they have not received the service they are entitled to under the Regulation, they can complain to the Equalities and Human Rights Commission or the Consumer Council for Northern Ireland.

(Source: CAA, 21 May 2009)

CAA (2): Consultation on ATOL Funding

The Civil Aviation Authority (CAA) has published a consultation document on the future level of the ATOL Protection Contribution (APC) paid by tour operators to protect holidaymakers.

Proposals for an increase from the current level of £1 per passenger are intended to ensure that the ATOL Scheme continues to provide effective financial protection for holidaymakers. The proposals include setting the rate paid by tour operators at £3 per passenger from 1 October 2009, which offers a reasonable balance between setting the rate as low as possible while providing resilience in the current period of economic uncertainty.

The fall in air passenger numbers and the failure of XL have brought about the need for changes to the rate of APC. Previous industry bookings estimates, on which the current APC rate was based, are forecast to drop significantly as a result of the recession, directly affecting the income of the Air Travel Trust Fund (ATTF). In addition, the failure of XL, which was the UK's third largest tour operator when it collapsed in September 2008, has affected forecasts of ATTF expenditure.

Commenting on the launch of the consultation, Richard Jackson, Director of Consumer Protection for the CAA, said: "ATOL offers consumers peace of mind and comprehensive protection. It is therefore

in the interests of holidaymakers that the CAA takes action to strengthen the ATOL Scheme so it has the resilience to meet the challenges that face the travel industry and to continue to protect people during the current economic downturn. We are also pleased that the Government has given some initial thought to what options may be considered to further clarify protection for consumers."

The consultation paper on proposals to increase the rate of the ATOL (Air Travel Organisers' Licence) protection contribution can be found at: <http://www.caa.co.uk/application.aspx?catid=33&pageid=65&appid=11&mode=detail&id=3526>

The consultation document includes a full financial analysis about the funding of the ATTF, the models used to decide on the options for the new rate, and estimated costs of the XL failure.

The consultation also reports the Government's initial thinking on options for financial protection for consumers. This forms part of the "lessons learned" exercise following the collapse of XL. The options the Department for Transport and CAA and are considering include:

- extending financial protection to all flights sold with another holiday component;
- allowing airlines to protect flights sold with another holiday component through the ATOL scheme; and
- allowing ATOL licence-holders' non-air packages to be financially protected through ATOL.

(Source: CAA, 27 April, 2009)

OFT: Requirements Imposed on Citi For Overseas Credit Card Transactions

In a decision that will have important, and beneficial, consequences for travellers the Office of Fair Trading has imposed requirements on Citifinancial Europe plc (Citi) after its terms and conditions had wrongly claimed it did not share joint liability for

overseas credit card transactions. Under the requirements Citi will invite those consumers who feel they may have been misled, and think they have a claim, to contact them.

Under Section 75 of the Consumer Credit Act 1974, credit card issuers are individually and jointly liable with suppliers if a consumer has a valid claim against the supplier for misrepresentation or breach of contract.

Following an investigation, the OFT found that up until 1 December 2008, Citi had expressly stated in the terms and conditions of several of its credit cards that use of the cards abroad would not be covered by the provisions of section 75. This has been legally incorrect since 22 March 2006 when the Court of Appeal gave judgment, subsequently upheld by the House of Lords, that section 75 did apply to overseas transactions.

The OFT raised its concerns with Citi and confirmed it intended to impose requirements. Citi acknowledged the problem and, as provided for under the Consumer Credit Act 1974, made a proposal to address the OFT's concerns.

Ray Watson, OFT Director of Credit, said:

'Section 75 provides important protection for consumers who use their credit cards abroad. While in practice Citi has been honouring claims for overseas use of its cards, some of its customers may have been misled into not claiming by its stated exclusion of liability for overseas transactions. Citi has recognised the problem and has acted responsibly to make consumers aware of their rights.'

(Source: OFT, 23 April, 2009)

California AG and YourTravelBiz.com Settle Pyramid Scheme Suit

Last year, shortly after being named as one of the USA's leading travel agencies in Travel Weekly's 2008 Power List, YourTravelBiz.com (YTB) was sued by the State of California. Attorney General Edmund G.

Brown alleged YTB was operating a "gigantic pyramid scheme" that recruited thousands of members with deceptive claims that they could earn huge sums of money through YTB's online travel agency.

According to the California complaint, YTB and its affiliates operate an illegal pyramid scheme that only benefits members if and when they find enough new members to join the company. Once enrolled, members earn compensation for each new person they enlist, regardless of whether they sell any travel. The suit alleged that YTB lures new members by offering huge income opportunities through their own online travel agency. However, the Attorney General claimed, the median income of the minority of members who earned travel commissions in 2007 was \$39.00, less than a single months cost to maintain their YTB website. Members, according to the pleadings, paid more than \$1,000 per year to set up (\$449.95) and maintain (\$49.95 per month) an "online travel agency." The lawsuit also asserted that YTB had more than 200,000 member travel agents in 2007.

If the matter proceeded to trial and the Attorney General prevailed, YTB could have been liable for \$2,500 per violation. Brown's suit demanded a civil penalty of at least \$15,000,000 and an additional \$10,000,000 or more in restitution for Californians who were defrauded by the company. However, the parties settled the case and in May Judge William F. Fahey of the California Superior Court entered a Final Order and Permanent Injunction that included the following provisions:

- Prohibiting false and misleading marketing by YTB (e.g. videos of YTB agents driving luxury cars and holding up \$10,000 cheques), and requiring the company to "provide consumers with information in a clear and conspicuous manner about typical income earned by website purchasers, typical cost of operations, the number of people who quit, and the number of people who have not earned commissions." According to the Attorney General, this will allow "consumers to see that most YTB travel sellers make no money, and in fact rack up high costs."

- Requiring YTB to establish a free demonstration website to be used when recruiting others. This will reduce the incentives for people to purchase YTB websites, which are largely unprofitable when used to sell travel. Previously the only way consumers could recruit others was to purchase a YTB website for \$449.95. Moreover, the settlement significantly limits how much members can make from individuals they have recruited and who themselves have become recruiters of others (the "pyramid"). Sixty percent of recruiters' sales must come from persons who are not themselves recruiters; otherwise, their income will be reduced. YTB also is required to make quitting the company easily available by fax, email, or telephone.
- Prohibiting YTB from issuing travel credentials in California and advertising that travel discounts, perks and tax-write offs are available to website purchasers; stating or implying that YTB travel rates are comparable with those of travel booking sites such as Expedia or Orbitz; and providing any recruitment bonuses or compensation based on the recruiter's purchase of a website.
- Requiring YTB to pay \$1 million in penalties, costs, and restitution to California victims who filed complaints against the company.

In a prepared statement, YTB CEO Scott Tomer said, "We believe the agreement with the State of California improves our business model, and that as a result YTB will emerge a better company. This agreement will help secure the future for our valued customers."

This statement was made after the company had publicly stated it may not survive. In its 2008 Security and Exchange Commission 10-K filing, YTB stated: "Our independent registered public accounting firm has issued an opinion on our consolidated financial statements that states ... our loss from operations and working capital deficiency raise substantial doubt about our ability to continue as a going concern." The warning was repeated shortly before the settlement became final but after its first quarter financials were released. YTB reported a net

loss of \$1.9 million with only 11.6% of its revenue coming from travel commissions and services. The first quarter also saw the company lose 20% of its travel sellers (now called travel site owners); it began 2009 with more than 92,000 but the number dropped to about 74,000 by the end of March, down from 138,525 in the same period of 2008.

On the heels of the settlement with California, Illinois Attorney General Lisa Madigan filed suit in state court against YTB and its three founders, charging them with operating an "unlawful pyramid sales scheme" and seeking injunctions that would put the travel company out of the multilevel marketing business.

(Sources: Nadine Godwin, *Travel Weekly*; California Office of Attorney General; YTB International, SEC10-K 2008. Joseph Harbaugh)

ASA (1): Shearings Holidays

A national press ad, for holidays, stated "STAR DEALS ... ALL INCLUSIVE 5 DAYS FROM £129 March - April". A complainant challenged the availability of holidays at £129.

Shearings Holidays responded by sending a spreadsheet, which detailed the holidays that were included in the offer featured in the ad. They said they had a total capacity of 6,134 places, of which 1181 places on 35 different tours were available at the offer price of £129 for 5 days all inclusive. They pointed out that that exceeded the ASA's availability guidelines, which required at least 10% of capacity to be available at the advertised price.

The complaint was not upheld. The ASA noted the availability information sent by Shearings Holidays. They also noted, subsequent to making the complaint, the complainant had advised them that she had been able to obtain one of the holidays at the offer price. Because the ASA considered that Shearings Holidays had substantiated the availability of the holidays at the offer price of £129, they concluded that the ad did not breach the Code.

(Source ASA)

ASA (2): Virgin Atlantic Airways Ltd

A regional press ad for long-haul flights had the headline "You only live once". Text underneath listed the following destinations and prices: "New York from £320; Washington DC from £331; Boston from £341; Chicago from £350; Los Angeles from £391; Hong Kong from £457". Footnoted text at the bottom of the ad stated "Hong Kong fare bookable by 10pm 28 Oct 2008 all other fares bookable by 10pm 14 Oct 2008. For selected travel periods only, Inclusive of all pre-paid taxes, fares and surcharges. Credit card charges apply. Subject to availability. Weekend supplements may apply ... Hong Kong fare for VS238/239 only".

British Airways plc challenged:

1. whether the ad was misleading, because it did not state the travel period to which the quoted prices applied;
2. the availability of the advertised fare to Hong Kong, because they believed the fare applied to a limited number of days and was available only from the 4th November, whereas the ad appeared on 13th October.

Response

1. Virgin Atlantic Airways Ltd (Virgin Atlantic) said the travel periods for the advertised fares to the US destinations were 13 October 2008 to 9 December 2008, 25 December 2008 to 31 March 2009 and 10 April 2009 to 27 May 2009, and for the advertised Hong Kong fare was 4 to 30 November 2008. They said the ad stated that the fares applied to "selected travel periods only" and that customers could find full details on their website or by phoning their contact centre, the contact details for which were included in the ad. They said they believed that to be in line with CAP guidance on travel marketing.

2. Virgin Atlantic said the advertised Hong Kong fare was available to purchase from the day the ad appeared (13 October 2008) up until 28 October 2008, for the travel period 4 to 30 November 2008.

They submitted documentation that showed the number of seats available at the advertised 'from' price of £457 across the whole of that travel period. Virgin Atlantic explained that they operated two flights to Hong Kong, and that the £457 fare was available on one of those flights only. They pointed out that the footnoted text stated that the advertised fare applied only to flight number VS238/239, which departed three times a week during the offer period.

The first complaint was not upheld. The ASA noted Virgin Atlantic's response. They understood that CAP guidance specified that, unless otherwise stated, quoted fares should apply to flights departing between one week after the ad appeared and six weeks later. They noted that the first travel period for all US destinations featured in the ad started on the day the ad appeared, and that the travel period for the Hong Kong fares started three weeks after the ad appeared. They also noted that the ad stated that the advertised fares applied to "selected travel periods only". Because the flights to which the quoted fares applied departed between one week and six weeks after the ad appeared, and because they considered that the ad made clear that those fares would not necessarily apply to all travel periods, the ASA concluded that on this point the ad was not misleading.

The second complaint was also not upheld. The ASA noted that the advertised fare applied to one of Virgin Atlantic's two services to Hong Kong only, flight VS238/239, which departed three times a week during the offer period. The ASA also understood that Virgin's other Hong Kong service, VS200/201 departed daily during the offer period. They noted that the footnoted text in the ad stated "Hong Kong fare for VS238/239 only", and they considered that that made it clear to customers that the advertised fare applied to bookings on that particular flight only.

The ASA noted that the data submitted by Virgin Atlantic showed that over 10% of the overall number of available seats to Hong Kong during the travel period were available at the advertised 'from' price of £457. They also understood from that data

that the advertised fare was available across the entire travel period and on all days of the week on which Hong Kong flight VS238/239 departed. They acknowledged that the travel period to which the advertised fare applied did not begin until three weeks after the ad appeared, but for the reasons explained above, they considered that customers were unlikely to be misled on that point. Because of that, because the data showed that there was sufficient availability of seats at the advertised 'from' price throughout the period to which the offer applied, and because the footnoted text made clear that the offer applied to one of Virgin's Hong Kong services only, the ASA concluded that on this point the ad was not misleading.

(Source ASA)

AUC: Mishandled Baggage

The Air Transport Users Council (AUC) has published a report on mishandled baggage. AUC chairman Tina Tietjen said:

"According to the latest industry data, airlines mishandled 42 million bags worldwide in 2007 compared to 30 million in 2005. Airlines primary duty to passengers should therefore be to put into place systems that will mean they mishandle as a few bags as possible. But if something does go wrong then they should also be prepared to compensate their passengers fairly. Complaints to the AUC show that passengers often struggle to get reasonable redress from airlines after the event.

The Montreal Convention, which came into force in 2004, and in which we carried much hope, has made little difference to settlements given to claimants for mishandled baggage. For example, on too many occasions passengers are not fairly compensated for lost luggage because they do not have receipts for the items that were in their bag or because the airline is taking into account depreciation of the value of the items in the bag. And with delayed baggage, passengers are often left out of pocket because airlines will not reimburse them fully for expenses they incurred buying essential items whilst

they are without their bag. Of course, of most benefit to passengers would be for airlines to mishandle fewer bags in the first place. We know that a number of airlines have gone to great lengths to address their baggage handling performance. We commend these efforts. But airlines should also turn their attention to what happens when something goes wrong and offer settlements that better reflect the loss to the passenger. Airlines are still too quick to load risk onto the passenger".

A copy of the report can be found at:
www.auc.org.uk/docs/306/Report%202009.pdf

(Source: AUC, 17 March, 2009)

Luggage Fees are Here to Stay for US Travellers

As the first quarter of 2009 ended, the International Air Transport Association (IATA) nearly doubled its forecast of losses for global airlines this year to \$4.7 billion, from its previously projected \$2.5 billion. This estimate reflected "the rapid deterioration of the global economic conditions" despite the benefits to the industry of a sharp decline in fuel hedging losses as oil prices stabilised. This comes on the heels of at least \$8 billion in airline losses in 2008.

However, US business and holiday travellers who were hoping for relief in luggage charges imposed by strapped domestic carriers can forget any rollback of those fees in the near term. *Business Travel News (BTN)* reports that even high volume corporate travel buyers are finding limited success in negotiating the cost of checked-baggage fees with their preferred airlines, even though an increasing number plan to make that a part of corporate contracting discussions this year. According to a survey of corporate travel buyers conducted by BTN, 12 percent said they negotiated with their preferred carrier to "to reduce or eliminate checked bag fees in 2008" and almost 32 percent of the respondents expect to do so this year. Despite an emphasis on fee elimination by corporations, Dan Pirnat of TRX Travel Analytics, an independent corporate travel data service, gloomily reported that, "We've not seen

anybody have success in negotiating reduced or eliminated baggage fees across the board. Zero success." The only way business travellers have been able to mitigate checked luggage fees is to use their elite frequent traveller status that entitles them to limited relief.

Although baggage fees have drawn the ire of travellers and buyers, they have created a new revenue source for US domestic airlines. Of course, the first-checked-bag fee disproportionately affects leisure travellers, as corporate travellers are less likely to check a bag and more likely to hold elite status. Holiday travellers in the US seem to be down to three options: (1) fly frequently enough to qualify from luggage fee exemptions; (2) carry-on luggage and store all of your liquids in one-quart plastic bags; or (3) bite the bullet and pay the bloody checked-bag fees!

(Source: *Business Travel News*; Joseph Harbaugh)

Irwin Mitchell Class Action

More than 300 UK holidaymakers are to take legal action after their holidays at a Bulgarian hotel last year were ruined. Travel lawyers at Irwin Mitchell are acting for the group, who suffered serious gastric illness while staying at the all-inclusive four-star Royal Park Hotel in the Bulgarian resort of Bourgas last summer. This is the fourth time in five years that guests at the hotel have been taken ill. The holidaymakers are now taking legal action against the company they booked with, First Choice Holidays and Flights Limited, which is still offering holidays to the hotel on its website despite the problems in four of the past five years.

In the past Irwin Mitchell has been instructed to act for around 100 holidaymakers who became ill with gastric illness at the Royal Park in 2004, 2005 and 2007.

(Source: Irwin Mitchell, 28 January, 2009)

Obama Administration: US Congress Moving to Lift Cuba Travel Restrictions

President Obama fulfilled a campaign promise by reversing Bush administration policies and permitting unlimited travel to Cuba by Cuban Americans and eliminating restrictions on them making remittances (money transfers) to family members in the island nation. Under President Bush, the 1.5 million Americans with relatives in Cuba could only travel to Cuba for two weeks every three years and were limited to visiting immediate family members. Bush only allowed remittances of \$300 quarterly to the sender's immediate family.

President Obama also instructed administration officials to consider the possibility of more flights to Cuba originating in the United States. One official noted that existing charter flights between the United States and Cuba could be expanded to accommodate more passengers. Another spokesperson said that the President had asked the Secretaries of State, Treasury and Commerce to study allowing commercial airlines to initiate regular scheduled flights to Cuba.

The US Congress also is moving in bi-partisan fashion to eliminate all travel restrictions to Cuba. Versions of the legislation, entitled the Freedom to Travel to Cuba Act, have been introduced in the House of Representatives and the Senate. Lead House co-sponsors, Bill Delahunt (D-MA) and Jeff Flake (R-AZ), were joined by 118 other House members. On the Senate side, Senators Byron Dorgan (D-ND), Michael Enzi (R-WY), Chris Dodd (D-CT), and Richard Lugar (R-IN) have sixteen other co-sponsors.

Although a battle is expected in the Congress, iterations of the proposed legislation have been adopted by both chambers in the past. They were eliminated from conference committee reports in response to veto threats from President Bush. President Obama, on the other hand, is very likely to sign Cuba travel legislation that reaches his desk. With all of this,

there are no ongoing efforts to lift the trade embargo the United States imposed on Cuba almost fifty years ago.

(Sources: Mark Silva and Tracy Wilkinson, Los Angeles Times; Reuters; and Guardian.co.uk. Joseph Harbaugh)

Carnival Cruise Company Working With Military on Pirate Threat

At its annual shareholder meeting held at the University of Southampton in April, Carnival Corporation's Chief Operating Officer, Howard Frank, responding to a question about the company's planning to protect passengers and crew from pirate attacks, stated, "We take it [piracy] very seriously. We'd never put any passenger in jeopardy or crew member." Frank also told shareholders that Carnival was working with the US military, the British Ministry of Defence and allied forces on contingency plans but did not share any details. "Beyond that, I'm not sure I can say a whole lot," Frank said.

The question was prompted by one of Carnival's "forward looking" statements required by the US Securities and Exchange Commission. In the statement, Carnival noted it was taking into account the "international political climate, armed conflicts, terrorist attacks and threats thereof ... and their impact on the demand for cruises." Carnival Corporation maintains headquarters in England and the US

In 2005, one of Carnival's luxury Seabourn brand ships, the *Spirit*, was serving destinations in Africa and the Middle East when it was attacked off the Somali coast in early morning hours by two small boats carrying pirates armed with machine guns and rocket-propelled grenades. While there was minor damage to the ship (water service was interrupted, for example, and there was a report that a grenade exploded on board) and one crew member was injured, the captain evaded the attack and eventually outran the pirates' boats. None of the 151 passengers was hurt in the 2005 attack.

Concerns about piracy increased after Somali pirates took Richard Phillips, an American freighter captain, hostage off Africa's eastern coast earlier in April. US Navy forces rescued Phillips but in the process killed three of the pirates and captured a fourth. Somali pirates have vowed to hunt down US ships and kill their crew members. There has long been a fear that cruise ships are attractive piracy targets.

(Sources: Kristen A. Lee, Associated Press; ASTA SmartBrief; CNN Online. Joseph Harbaugh)

Regulation 261/2004

In a judgment of April 30, 2009 the German Supreme Court (BGH) held that missing a connecting flight due to a delay of the feeder flight where both flights were operated by the same airline and jointly booked as parts of one and the same contract for carriage would not constitute "denied boarding" under Reg. 261/2004.

BGH reasoned that a right to compensation would require the passenger:

- to prove a confirmed booking
- to have appeared at check-in on time and
- to demonstrate a refusal of carriage against the passenger's will despite him being present at the gate.

These requirements were not fulfilled if the passenger, due to the delay of the feeder flight, did not present himself for check-in and/or boarding on time.

Despite the different view of some other German courts (LG Berlin, RRA 2008, 42; OLG Hamburg, 6 U 94/07; LG Leipzig 6 S 319/08), the BGH regarded the issue as "non-ambiguous" and therefore saw no reason to make a reference for a preliminary ruling to the European Court of Justice.

(Source: Michael Wukoschitz, IFTTA - International Travel and Tourism News, 11 May, 2009)

US Border Screening under Fire

Civil liberties groups are renewing calls for the Obama administration to change screening at border posts by limiting questions about Americans' political beliefs and religious practices and establishing a process for US citizens and residents who are mistakenly included on terrorist watch lists to clear their names.

In a report the Asian Law Caucus of San Francisco cited more than 40 complaints from US citizens and immigrants that it has received since 2007 as evidence of "a much wider pattern of profiling and discrimination at US borders."

"Many people in America's Muslim, South Asian and Middle Eastern communities have come to expect harassment and discriminatory treatment at our nation's doorstep" when returning home, the report said.

Separately, Muslim Advocates, the advocacy arm of the National Association of Muslim Lawyers, issued a report saying that citizens should not be threatened with detention for not answering questions that go beyond establishing their legal status to enter the United States or whether they are carrying contraband.

Both reports urged the DHS to prohibit profiling based on race, ethnicity, religion and national origin in border inspections.

(Source: *Washington Post*, April 20, 2009)

Good News for Travellers: Hotels Hurting During Recession; Bad News: Travellers Likely to Have Fewer Choices with Reduced Quality

Recently, a group of 30 that had booked luxury condos at a high-end South Carolina island resort for a leadership retreat were assigned to standard hotel rooms upon arrival. To make matters worse,

the trapped guests, who had no option to cancel or move the meeting, were forced to endure low-end food and housekeeping services due to severe staff cutbacks. Shortly thereafter the owners of the resort filed for bankruptcy and later the hotel.

Guests at upscale properties in the US and elsewhere around the world are noticing changes in amenities, including older models of in-room electronics, faded linens that show more wear, and the elimination of the free coffee station and fresh flowers in the lobby. More obvious are restaurant closures on slow nights or only opening the nightclub one or two nights a week, moves reportedly made by some Las Vegas hoteliers to reduce expenses.

As corporations and individuals cut back on business and holiday travel, the hospitality industry is struggling in these tough economic times. The 2009 US forecast issued by PKF Hospitality Research projects severe revenue decline and the lowest occupancy (58.3 percent) in twenty years. Revenue per available room (RevPAR) is expected to drop 13.7 percent and US hoteliers' profits to dip by 7.9 percent in the current calendar year. All of the fifty largest US lodging markets will see a decline in RevPAR; occupancy rates will plummet in Atlanta, Chicago, Dallas, Orlando and Washington, D.C. New York City, once the invincible US market, will suffer an expected RevPAR loss of 26.1 percent. Hotels are adjusting corporate rates as travel managers are pushing hotel suppliers to renegotiate earlier agreements. Some companies are seeing significant savings, as much as \$100 per room per night.

If anything, the European hospitality industry faces an even gloomier outlook as the region endures a projected three percent decline in outbound travel in 2009 and no rebound projected by hotel executives until 2011. European hotel occupancy fell 10.7 percent year-over-year in January and prospects for the remainder of the year are not brighter. European hoteliers also experienced a 22.5 percent fall in average daily rates (ADR) at the outset of the calendar year. Of fifteen major global markets, London hotels were hit the hardest in January with an ADR drop of 31.1 percent. Top executives in the European hospitality industry expect a sharp uptick in hotel

chain bankruptcies this year, with almost two-thirds (62 percent) of those polled in DLA Piper's 2009 Europe Hospitality Outlook Survey predicting at least one and as many as ten chains would go under; another 17 percent believed chain bankruptcies would exceed ten.

The Hospitality Industry Group of one US law firm, Seattle's Graham & Dunn, has formed a Hotel Asset Resolution Task Force to address the needs of clients who own, hold, manage, or will take control of troubled hotel assets. According to an email sent to members of the Academy of Hospitality Industry Attorneys (AHIA) announcing the creation of the Task Force, "Many – if not most – upscale hotels that have been financed within the last five years are now in loan covenant default. This year, so far, relatively few hotel loans have fallen into monetary default, as owners use up their reserves to meet debt service. This cannot last. By June, hotel lenders will see increasing monetary defaults." The firm has posted an article on its website outlining legal strategies that may be of interest to travel law lawyers and travel industry professionals.

While all of this means travellers are likely to find remarkably good deals at hotels in the near term, they may face an extended period with little or no new construction of hospitality facilities and a corporate strategy to defer even essential upkeep as they struggle through hard times. Financing difficulties brought on by the closing of the usual credit markets have largely eliminated the construction of new hotels. Moreover, as many hotel owners neglect facility maintenance and necessary repairs, guests are likely to encounter shabby conditions in public and private spaces, ineffective HVAC units and more.

Unfortunately, disappointed US travellers who expected exceptional service and amenities have little legal recourse. According to Alexander Anolik, travel lawyer and author of "Traveler's Rights: Your Legal Guide to Fair Treatment and Full Value," there is no legal or industry standard for reimbursing travellers for curtailed or closed amenities. Advise your clients to bargain hard for a favourable rate because the room may come with less than they anticipated.

(Sources: *Business Travel News*, <http://www.btonline.com/businesstravelnews/index.jsp>; Martha C. White, *New York Times* (April 13, 2009); Graham & Dunn, P.C., <http://www.grahamdunn.com/search-articles.cfm?team=Hospitality,-Beverage-and-Franchise-amp;-Distribution>; Joseph Harbaugh)

NTSB

The National Transportation Safety Board has determined that the probable cause of the motorcoach accident in Mexican Hat, Utah, on January 6, 2008, was the driver's diminished alertness due to inadequate sleep resulting from a combination of factors. The Board found that the driver's state of fatigue affected his awareness of his vehicle's excessive speed and lane position on a downhill mountain grade of a rural secondary road. Contributing to the accident's severity was the lack of an adequate motorcoach occupant protection system, primarily due to the National Highway Traffic Safety Administration's delay in developing and promulgating standards to enhance the protection of motorcoach passengers.

"This tragic accident was entirely preventable," said Acting Chairman Mark Rosenker. "More importantly, it shines a spotlight on the need for all motor vehicle operators to take responsibility for their physical fitness before they get behind the wheel."

On January 6, 2008, about 3:15 p.m. MST, a 2007 Motor Coach Industries 56-passenger motorcoach with a driver and 52 passengers on board departed Telluride, Colorado, en route to Phoenix, Arizona, as part of a 17-motorcoach charter. The normal route from Telluride to Phoenix along Colorado State Route 145 was closed due to snow, and the lead driver planned an alternate route that included US Route 163/191 through Utah.

Approximately five hours after the trip began, the motorcoach descended a 5.6-percent gradient leading to a curve to the left. After entering the curve, the vehicle departed the right side of the roadway at a shallow angle, striking the guardrail, and travelled off the roadway. The motorcoach

overturned in a complete 360 degree rollover sequence and came to rest on its wheels. During the rollover, the roof of the motorcoach separated from the body of the vehicle, and 51 of the 53 occupants were ejected. Nine passengers were fatally injured and 43 passengers and the driver received injuries ranging from minor to serious.

Major safety issues identified by this accident investigation include driver fatigue, excessive vehicle speed, hours-of-service violations, motor carrier trip planning, motorcoach occupant protection, and emergency medical notification and response with regard to large motorcoaches traveling on rural roads.

As a result of this accident, the NTSB made eight recommendations to federal and state government agencies, trade associations and the motorcoach operator. Among the most significant are the recommendations to the Federal Highway Administration, the American Association of State Highway and Transportation Officials, and the National Association of State Emergency Medical Services Officials to work together to develop and implement criteria based on traffic patterns, passenger volume, and bus types that can be used to assess the risks of rural travel by large buses.

The NTSB also reiterated one recommendation and reclassified four recommendations to modal agencies of the US Department of Transportation that incorporate two items on the NTSB's Most Wanted List of Transportation Safety Improvements:

- Enhance Protection for Motorcoach Passengers (National Highway Transportation Safety Administration)
- Require On-board Electronic Recorders (Federal Motor Carrier Safety Administration)

A synopsis of the accident investigation report, including the findings, probable cause, and safety recommendations, can be found on the Publications page of the Board's website at: <http://ntsb.gov/Publictn/2009/HAR0901.htm>.

(Source: NTSB, April 21, 2009)

British Airways: Lost Luggage Class Action

British Airways passengers attempting to hold the airline accountable for losing an estimated one million pieces of luggage received some good news when a New York District Court judge ruled that a nationwide class-action lawsuit could move forward in the United States court system.

The ruling, issued by United States District Judge Nicholas Garaufis, denied British Airways' motion to dismiss the consumer class action, filed in 2007, which seeks to recover travellers' actual losses rather than a \$1,500 cap the airline uses to limit damages. The Court noted, and rejected "BA's extreme position" that it was not responsible for actual losses for lost baggage unless its mishandling rate was "worse than fifty percent."

According to the suit, originally filed in Federal Court in Seattle, British Airways lost 23 bags per 1,000 passengers carried, about 60 percent more than the industry average and twice as bad as the worst US carrier.

International airlines typically cap liability for lost luggage, citing The Montreal Convention, to which the United States and 124 other countries are signatories. That agreement limits liability to \$1,500 per passenger, but also waives that limit if the airline acted recklessly, and with knowledge that damage would probably result.

"The judge's ruling puts international airline carriers on notice that they cannot hide behind the Montreal Convention to deny passengers the care and respect to which they are entitled" said Steve Berman, managing partner of Hagens Berman Sobol Shapiro and the attorney representing the passengers. "This ruling affirms that the convention protects passengers from airlines that demonstrate they don't care about passengers' luggage."

"Since we filed the complaint in September 2007, we have been inundated with calls and e-mails from passengers who experienced horrific treatment by British Air, in the way the airline dealt with baggage,

and how they dealt with passengers searching for luggage," Berman continued.

Media reports cite huge piles of lost luggage from British Airways flights piled on London's Heathrow airport tarmac subjected to rain, and was otherwise misrouted and mistreated.

(Source: Hagens Berman Sobol Shapiro LLP, April 6, 2009)

Rest and Recuperation: Hotel or Hospital?

An Austrian hotelier let some parts of his hotel to a doctor to run her surgery. The doctor offered health treatments related to cardiovascular diseases to the hotel guests as well as outsiders. The appointments were made through the hotel reception and, as far

as hotel guests were concerned, were billed for the treatment and the room rate on one bill.

Local authorities accused the hotelier of having turned his hotel into a hospital or sanatorium without the necessary licence and imposed administrative fines on him. He appealed to the Austrian Administrative Court. In a decision of December 12, 2008 (Case 2006/11/0093), the Administrative Court held that the services rendered by the hotelier would not amount to the services of a hospital or sanatorium and there was no evidence that the furnishing of the hotel had been similar to such institutions. The Court therefore overturned the penalty as unlawful.

(Source: Michael Wukoschitz, IFTTA - International Travel and Tourism News, 7 April, 2009)