

September 11: The Legal Fallout

THIS EDITION of *Issues and Trends* summarises some of the salient issues discussed at the Fourth Annual National Travel Law Symposium held in Washington D.C. on January 16, 2002, organised by *Travel Weekly* (U.S.) and the Association of Retail Travel Agents. While mainly relevant to the United States, the subject matter has far-reaching implications and pointers for the Pacific Asia travel and tourism industry at large.

The travel industry is no stranger to litigation, but in the wake of the September 11 attacks, it is set to become more exposed to legal issues than ever before. While safety and security are the dominant issues, the industry risks seeing the long arm of the law reaching out to everything from dealing with insurance companies to civil rights, bankruptcies, protection of trade secrets and personal liability. The days when the industry had only to worry about "simple" issues such as environmental violations and consumer protection are gone.

Insurance Protection and Claims

Today, there is increased awareness of the importance of travel protection programmes as consumers seek to protect their vacation dollars. After the Sept. 11 attacks, many U.S. travellers postponed trips or changed their overseas plans to domestic vacations. There has been a dramatic increase in sales of travel insurance.

For insurers and the travelling public, the biggest change is that security concerns have shifted from the realm of foreseeability to predictability. Both are key concepts.

According to Mr. Samuel Halpern, lawyer and Executive Vice President of Insuractive, Inc., "Travel insurance policies cover possible but unforeseen situations. The more likely something is to occur, the more foreseeable it is, and thus the less insurable it is, and the less likely a claim will be paid subsequently. From the insurance provider's perspective, when an outcome crosses the threshold from possible to likely, it becomes foreseeable...The anxiety travellers face today merits careful

reading of the bright-line provisions in travel insurance policies by agents and travellers alike."

Before Sept. 11, commercial terrorism coverage was routine, neither expensive nor excluded. Insurers did not contemplate substantial losses from terrorism within the U.S. even though acts of terrorism were considered possible after the Oklahoma City attack.

In the U.S., the Sept. 11 attacks led to a string of travel supplier bankruptcies, and major airlines sought U.S. federal loan assistance to stay solvent. The insurance industry was somewhat less affected. Re-insurers – unregulated financial entities that share the risks of regulated primary insurance providers – bore the brunt of losses. Despite record losses resulting from the attacks, because of their size and capital reserves, the majority of re-insurers remained financially stable.

However, to make up for their substantial losses in 2001, re-insurers are increasing the rates they charge insurers. As a result, primary insurers will increase premiums. Moreover, because the likelihood and magnitude of future terrorist attacks is so difficult to predict, pricing the risk in insurance terms is extremely difficult, leaving some primary insurers with nowhere to turn for terrorism coverage.

U.S. insurance industry groups want the federal government to absorb the risk of paying claims resulting from terrorism that exceed a certain dollar value threshold. However, the U.S. government has not agreed. Thus, because many re-insurers, primary insurers and the federal government have balked at providing terrorism coverage, many states (except New York and California) are allowing insurers to exclude hitherto mandatory coverage for terrorism from commercial insurance policies.

The number of travel industry bankruptcies is expected to increase, especially among travel agencies, tour operators, cruise lines, airlines (major/minor) and related service industries which are all at risk, especially if another terrorist act occurs. Much depends on their ability to generate cash flow and adapt to

the 20 percent decline in travel. An even greater number of consolidations are expected. A number of travel agencies are projected to close but more "home-based" travel agents are likely to join an affiliation. The successful "outside" agents affiliated with a "name" will utilise their client rosters to continue to earn income without the overhead of a bricks and mortar shop. Speakers said Web-based travel is projected to enjoy a growth cycle.

The percentage of default payments is also expected to rise. According to Mr. Halpern, consumers need the coverage (now more than ever) and underwriters need to make sure that they are doing a good job of underwriting the exposure.

Travel Insurance Overview

The major aspects covered by travel insurance typically include emergency medical insurance; trip cancellation, interruption or delay; emergency evacuation; accidental death and dismemberment; baggage loss or delay; and repatriation of remains.

Regarding travel-supplier bankruptcy or default, the only issue is eligibility for trip cancellation insurance (TCI). Under what circumstances relating to a travel-supplier's default or bankruptcy is a traveller covered for TCI? In other words, if a travel supplier defaults, thereby cancelling the traveller's trip, can the traveller get reimbursed by the insurer for non-refundable trip costs?

Leading travel insurance providers have recently amended policy wordings regarding terrorism and bankruptcy/default protections, creating diverse and some rather innovative variations. Some insurers have excluded coverage altogether for one or the other, or both. Either way, there are several issues at stake:

The definition of terrorism: There is no uniform definition from the travel insurance industry, just as there is no generally accepted definition of terrorism among nations, and no generally accepted definition of terrorism among travel insurance providers. With travel insurance, what constitutes terrorism for purposes of making a claim under the travel insurance policy is defined within that policy. Different policies underwritten by the same insurer may include substantially different wordings, exclusions, and/or provisions relating to any number of issues including terrorism.

Location of the incident: This is usually only covered if the attack takes place in one of the cities located on an itinerary. The number of days preceding the event is subject to change from one policy to another.

Foreseeability factors: Coverage is excluded if the location is on the list of U.S. State Department advisories.

Area of coverage: Many insurance companies are limited to U.S. corporations. One new move by U.S. insurance companies has been to set up a list of "approved" travel companies who meet a specific set of financial criteria to gain such coverage. These insurance companies will only insure those travel companies on the list, a move that is designed to protect themselves from bankruptcy insurance claims. This could lead to a further shakeout in the industry and have long-term implications for suppliers in Pacific Asia.

Advice to Travel Agents from the Insurance Companies

Nine U.S. travel insurance providers responded to a survey by Mr. Halpern in January 2002 about the impact of the Sept. 11 attacks on travel. One question he posed was: What general (non-product-specific) advice regarding terrorism and/or bankruptcy/default would you give travel agents to best protect their clients in 2002? Here is an edited sample of the responses he received:

- Off-load as much financial risk to your business as possible. Structure cancellation penalties to protect your bottom-line. Make sure you have appropriate insurance in place and, if possible, business-interruption insurance specific to terrorism and supplier bankruptcies.
- Make sure your clients are aware that there is risk involved in travelling and that travel protection is available to mitigate that risk. If your client refuses to purchase protection, get it in writing. Protect yourself from the forgetful or litigious client.
- Bankruptcy protection is available with some travel protection companies and not with others. Not all travel protection companies offer the same levels of protection. Some offer bankruptcy protection, but only up to a portion of the trip cost, not the full cost of the trip. These are important differences. Make sure you know what you are offering your clients. And realise that cruise line and tour operator protection does not protect your client from that supplier's bankruptcy.
- Always insist that clients pay for their trip with a major credit card, purchase quality third-party travel insurance with terrorism and default benefits, and avoid riskier destinations.
- Choose your vendor wisely. Stability and security are greater considerations at this time than value.
- Support companies that are dedicated to the travel insurance business and have the resources to withstand tough times.

Travel Agencies and Civil Rights

A different set of legal issues confront the travel industry when dealing with issues related to civil rights laws which, in most countries, protect persons from discrimination based on race, colour, religion, or national origin. In the U.S., the Sept. 11 attacks have led to an increased suspicion of people protected by civil rights laws, including Arabs, Muslims and others of "Middle Eastern appearance." Although the suspicion of these persons may be in good faith and well intentioned, discrimination against them may violate civil rights laws and subject the violator to significant liability.

In most developed countries, workplace discrimination based on religion, national origin, race, colour, or sex is illegal. The prohibitions include harassment or any other action based on affiliation, physical or cultural traits, clothing, perception, and/or association. Employers may be liable not only for harassment by supervisors, but also co-workers or by non-employees under their control.

It is also unlawful for an employer to harass or otherwise discriminate because of physical, cultural, or linguistic characteristics, such as an accent or dress associated with a particular religion, ethnicity, or country of origin. For example, in the U.S., travel agencies which refuse to hire a woman wearing a *hijab* (a body covering and/or head scarf worn by some Muslims) or a man with a dark complexion and an accent believed to be Arab, are in violation of the law.

Harassment or discrimination based on a perception or belief that a person is a member of a particular racial, religious or national group, is prohibited. Therefore, the law does not tolerate discriminatory actions where an employer fails to hire a person because it is believed that the person is from, for example, the Middle East. Similarly, it is also illegal, for example, for an employee to harass a Sikh man wearing a turban because the employee believes that the man is a Muslim.

Examples of violations of federal civil rights law as applied to public accommodation and travel and travel-related agencies include: a group of Muslim women wearing *hijabs* who wait for over an hour to be served in a busy travel office while Caucasian and African-American customers receive prompt service; and South Asian visitors to a hotel who are told they must pay in cash rather than by credit card, or are charged higher rates than other customers; or are not provided with the same amenities, such as soap and towels.

Employers should therefore implement the following measures:

- Clearly communicate to all employees, through a written policy or other appropriate mechanism, that harassment such as ethnic slurs or other verbal or physical conduct directed toward any racial, ethnic, or religious group is prohibited and that employees must respect the rights of their co-workers;
- Clearly communicate to all employees, policies and procedures for addressing complaints of harassment. Managers should be trained on how to identify and respond effectively to harassment even in the absence of a complaint;
- Urge employees to report any improper conduct;
- Provide training and counselling, as appropriate; and
- Reasonably accommodate the religious practices of an employee or prospective employee, unless doing so would create an undue hardship for the employer.

- Do not assume that a supplier insurance product provides the best and cheapest coverage; shop around and compare; you'll find that third-party products are often more comprehensive and competitively priced.

- Agents should not limit or focus their advice to their clients on terrorism. This is limiting and short-sighted. Travel insurance is comprehensive coverage and should be addressed as such.

- Try and keep abreast of the financial strength and performance of travel suppliers.

- Pay attention to U.S. State Department warnings and stay away from "trouble spots."

- Remember that the financial default of a travel supplier

is not covered if you purchased that insurance policy from the defaulting travel supplier. This means that if you purchase travel insurance through a cruise line and that cruise line goes bankrupt, travel insurance will not cover this. Had you purchased a travel insurance policy through a travel agent to cover the cruise, financial default would have been covered (but only in the U.S.).

- Read the policy carefully. Terrorism benefits may only apply if the act occurs in a city to which you are scheduled to travel to within a very finite number of days, usually 30 days or less. Terrorism is generally excluded if the location where you are travelling has a history of terrorism.

- Talk to your sales representatives and ask questions if

the coverage is provided. Always call whenever you are unsure of the specifics of the policy you are selling, or have the traveller call directly.

- Agents and travellers should educate themselves as best they can on the insurance products they rely on and ask for help in understanding complicated provisions from insurance providers or insurance brokers they can trust.

New Channels of Dispute Settlement

Too little money, time or resources to fight legal battles? The legal system is slow, ponderous and costly. A legal case may end in justice, or simply the exhaustion of one of the party's resources. The rapid changes that have occurred in the travel industry demand rapid responses, which the traditional legal methods used by the industry are often incapable of delivering.

There is a new concept called Alternative Dispute Resolution (ADR). This is being marketed by lawyers as "an economical and expedient method of resolving disputes between parties without resorting to the traditional court system." It consists primarily of either mediation or arbitration or sometimes a combination of both.

In mediation, a mediator is chosen that is agreeable to both parties. The mediator listens to both parties in a structured but informal environment, which may or may not involve counsel for the parties and attempts to resolve the dispute by presenting to each party the strengths and weaknesses of their respective positions.

Arbitration on the other hand is more court-like in structure but much less formal and time consuming. An arbitrator or panel of arbitrators is chosen by the parties. The arbitrators hear presentation of the issues by both sides, usually by the attorneys for the parties. The arbitrators, acting in a judicial fashion, then reach a decision that the parties have previously agreed to be bound by. The decision may be appealed to a judge but if the judge reaches the same opinion, the party having made the appeal is then responsible for all costs.

Significantly, in either mediation or arbitration the parties customarily split the costs of the mediator or arbitrator.

Because ADR is frequently used in a number of areas from family law and admiralty to construction disputes, knowledge of the subject matter on behalf of the mediator or arbitrator has made resolution of the disputes much more efficient and effective in these arenas. Now, travel industry lawyers are moving to create a corps of similar trained mediators or arbitrators with a better understanding of the travel industry.

This involves the creation of standardised training programmes under which persons with a substantial travel

industry background, or attorneys and mediators, can become trained ADR specialists available for travel industry disputes.

The International Forum of Travel and Tourism Advocates (IFTTA), at its July 2001 meeting in Dundee, Scotland, passed a resolution endorsing the sponsorship and development of ADR in travel. It has since been working to establish Model Rules for Travel and Tourism ADR to promote standardisation, consistency and professionalism in ADR. These rules will guide ADR Mediators' and Arbitrators' conduct.

IFTTA will adopt (a) minimum standards and procedures for qualification by establishing a structure for an ADR Qualification Board; (b) professional conduct rules which provide ethical standards of conduct to guide both the mediators and arbitrators in performance of ADR service; (c) certification which provides specific prerequisites and educational requirements; (d) discipline; and (e) uniform training standards for certification.

The body is also working on development of a Centre for Dispute Resolution. The initial training programme in Travel Mediation for current IFTTA members is targeted for launch at the May 2002 conference of IFTTA in Budapest, Hungary, where the Model Rules are also expected to be presented for adoption at the annual meeting.

The training programme will be offered to attorneys and academics and is being structured both for those with and without previous mediation experience. It comprises four components: 1) Travel Law 2) Mediation Skills 3) Model Rules of Ethics and Professional Conduct for Travel Law Mediators, and 4) Jurisdictional Specific Requirements.

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