New York Law Journal

ALM Properties, Inc.
Page printed from: *New York Law Journal*

Back to Article

Travel Law 2013: Summer Travel Tips

Thomas A. Dickerson and Cheryl E. Chambers

New York Law Journal

2013-07-05 00:00:00.0

Going on vacation this summer? Here are a few suggestions that may help you avoid a nightmare to remember.[1]

Crime, Terror and Pirates

First, determine the incidence of criminal activity,[2] terrorism[3] and, yes, pirates,[4] at your selected destination and avoid all three.

The Fine Print

Second, read the fine print in the brochures and travel contracts that you enter into and act accordingly. Typically, this will mean determining the risks involved, responsibilities disclaimed and the need to obtain appropriate insurance. Contractual clauses seeking to disclaim liability for the torts of independent contractors[5] are nothing new and unless prohibited by statute are, typically, enforced. On occasion the courts may find liability shifting warranties of safety[6] and assumptions of duties in brochure language. Recently, however, there has been an explosion of new travel contract clauses, e.g., requiring mandatory arbitration of disputes, allowing the filing of lawsuits in a selected and distant forum, applying foreign law, and seeking to limit recoverable damages.

Dangerous Shore Excursions

Third, be very selective in the local sports activities (e.g., zip-lining, para-sailing, snorkeling and scuba diving) you participate in during cruise shore excursions or at foreign resorts. Typically, these services are provided by foreign companies not subject to the jurisdiction of U.S. courts,[7] and which may be uninsured, unlicensed, insolvent, irresponsible and, worst of all, the cruise line or resort that recommends the local service provider and earns a commission[8] doing so, may disclaim all liability[9] for any injuries you sustain.

Cruise Local

Fourth, if you cruise, do so on a cruise ship that touches a U.S. port since you are protected by U.S. Maritime Law[10] which, inter alia, requires that each cruiseship/cruiseline be subject to The Center For Disease Control (CDC) sanitation inspections[11] and must report to the FBI any incident involving "homicide, suspicious death…kidnaping, assault with serious injury (rapes)" and shall also "furnish a written report of the incident to an Internet-based portal maintained by" the U.S. Coast Guard and accessible to consumers.[12] For those who cruise elsewhere, such as those unhappy folks who sailed on the Costa Concordia[13] early last year, your rights and remedies may be governed by the Athens Convention[14] or by foreign substantive[15] and procedural[16] law, not nearly as accommodating as that of the United States.

No Fly Zone

Fifth, avoid flying on foreign air carriers, intra-country, since you may not be protected by the Montreal Convention[17] and your recoverable damages, if any, may be very modest, indeed.[18] In addition, many foreign air carriers are on the European Union's "Blacklist"[19] which you should consult before you book.

Safety Standards

Sixth, if you sustain a serious injury, avoid using the medical facilities on cruise ships (which have consistently avoided liability for the malpractice of the ship's doctor[20]). In addition, a cruise ship may involuntarily disembark you and transport you to a local medical facility with an uncertain outcome.[21] Travelers may assume that when they travel

abroad they are protected by the same safety standards and medical care available in the United States. The reality, however, is quite the opposite.

In many foreign countries the safety standards may be much lower; e.g., the plate glass in a Greek hotel lobby may be very thin;[22] the windows in a Russian hotel may be less secure;[23] a gas stove in a hotel may explode.[24] The quality of medical care may be much lower; e.g., a diabetic tourist may be misdiagnosed at the hotel and in a local hospital;[25] a hotel guest may die from a heart attack because of a delay in calling for medical assistance.[26] Best bet, use your evacuation insurance, get on a plane and fly home to the United States as fast as you can.

Keep Your Children Close

Seventh, think very carefully about entrusting your children to the day care centers of foreign resorts or hotels. In *Flanagan v. Wyndham International,*[27] guests entrusted their child to the "Kids Klub day-care program at the Wyndham Sugar Bay Resort in St. Thomas" only to have her molested by an employee later convicted of sexual molestation. Taking your mother-in-law or another family member with you to watch after your children may be the best approach.

Behave Yourself

Eighth, travelers need to behave in accordance with the laws and customs of the destination country. For example, "In Singapore, which places a high value on order, prostitution is legal but careless disposal of chewing gum can invoke fines up to $500. Jaywalking and spitting result in similar fines. On the bright side, Singapore saves canings for more serious offenses, such as vandalism.

Sensitivity to another country's values is important, as Raffi Nernekian, a Lebanese tourist visiting the United Arab Emirates learned when he was arrested for wearing a skin cancer awareness T-shirt depicting Posh Spice in her birthday suit. Nernekian spent a month in jail. And Ireland, the land of creative invective, just passed a blasphemy law making it a 25,000-euro ($37,000) offense to say or print anything 'grossly abusive or insulting' about any subject held sacred by any religion."[28]

Forum Selection Clauses

Clearly, forum selection clauses are meant to chill the enthusiasm of injured travelers by making it expensive and problematic to sue in a distant jurisdiction. Nonetheless they have been enforced by some courts[29] depending on certain considerations such as lack of notice and the incidence of cancellation penalties.[30] Just how onerous must it be to declare such a forum selection clause unenforceable?

In *Madoff v. Bold Earth Teen Adventures*,[31] a 15-year-old boy was "swept out to sea near Kealakekua Bay, (in Hawaii) during a kayaking and hiking adventure tour…[his] body has not been recovered and he is presumed dead." The defendant tour operator sought to enforce a "Jefferson County, Colorado" forum selection clause which the court rejected since it "will effectively deprive [the administrator] of a meaningful day in court."

Arbitration

In *Lhotka v. Geographic Expeditions*[32] the 37-year-old hiker died while climbing Mount Kilimanjaro. The tour operator's contract disclaimed all liability, required the application of California law and limited recoverable damages to the air and sea cost of the trip. The court refused to enforce the disclaimer on the grounds of unequal bargaining power.

On the other hand in *Shea v. Global Travel Marketing,*[33] "the child, age 11, was killed while on safari with his mother in Botswana. He was sleeping alone in a tent at a campsite when he was dragged from his tent and mauled by hyenas." The child's mother had signed a travel contract on behalf of her son which contained a mandatory arbitration clause which the Florida court enforced. "We hold that an arbitration agreement incorporated into a commercial travel contract is enforceable against the minor or minor's estate in a tort action arising from that contract."

Thomas A. Dickerson *and* **Cheryl E. Chambers** *are associate justices of the Appellate Division, Second Department. Dickerson is the author of "Travel Law" (Law Journal Press, 2013).*

Endnotes:

1. Coauthor Thomas A. Dickerson has for more than 30 years written about travel law and the traveler's rights and remedies. See Dickerson, *Travel Law* (Law Journal Press, 2013); Dickerson, Gould and Chalos, *Litigating International Torts in United States Courts*, Thomson Reuters West 2013. See also: Dickerson, "Travel Consumer Fraud: Rip-Offs & Remedies," 28 Syra. L.R. No. 4 (Fall 1977); Dickerson, "The Cruise Passenger's Dilemma: Twenty-First Century Ships, Nineteenth-Century Rights," 28 Tulane Maritime L.J. No. 2 (Summer 2004); Dickerson, "Travel Abroad, Sue at Home 2012; Forum Non Conveniens and the Enforcement of Forum Selection and Mandatory Arbitration Clauses," 32 Pace L.R. No. 2 (Spring 2012); Dickerson, Chambers and Cohen, "Personal Jurisdiction and the Marketing of Goods and Services on the Internet," 41 Hofstra L.R. No. 1 (Fall 2012); The Cruise Passenger's Rights and Remedies 2013 at www.nycourts.gov/courts/9jd/taxcertatd.shtml.

2. See Linda, "Underfunded Belize Police Challenged by Crime," www.eturbonews.com (Aug. 20, 2012) ("CNN Go rated Belize City as the tenth most hated city in the world…Between January and June 2012 there were 35 murders in Belize City"); Myers, "Caribe Noire," Travel Weekly, Jan. 11, 2010, p. 18

3. See Sengupta, "At Least 100 Dead in India Terror Attacks," The New York Times at nytimes.com, Nov. 27, 2008. See also: *DiFederico v. Marriott International*, 2013 WL 1811872 (4th Cir. 2013) (U.S. citizen killed in terrorist attack at Marriott Islamabad Hotel in Pakistan; forum non conveniens motion denied). See also: Steinmetz, "Top 10 places where tourists get kidnapped," www.eturbonews.com (June 19, 2013) ("Top 10 threat areas for kidnap for ransom in 2012: 1. Afghanistan, 2. Somalia, 3. Iraq, 4. Nigeria, 5. Pakistan, 6. Yemen, 7., Venezuela, 8. Mexico, 9. Haiti, 10. Columbia."). See also: Masod and Walsh, "Militants Kill 10 Climbers in Himalayas of Pakistan," www.nytimes.com (June 24, 2013) ("In one of the most brazen attacks on foreigners in Pakistan in recent years, gunmen disguised as paramilitary police shot dead 10 tourists, including one American and their Pakistani guide on a mountain-climbing expedition"). See also Steinmetz, "Bloody protest against governor with terror background continues," www.eturbonews.com (June 24, 2013)(protests regarding the appointment of a governor in Luxor, Egypt, with a "strong connection to a terror group" that massacred 58 tourists a few years ago "when six attackers…used assault weapons to systematically gun down men, women and children inside the 3,400-year-old Temple of Hatshepsut, the female pharaoh who lead Egypt around 1500 BC.")

4. See Sayare, "Frenchwoman Abducted in Kenya Dies," www.nytimes.com (Oct. 21, 2011); Nagourney and Gettleman, "Pirates Brutally End Yachting Dream," nytimes.com, Feb. 22, 2011.

5. See *Perry v. Hal Antillen*, 2013 WL 2099499 (W.D. Wash. 2013) (shore excursion accident; discussion of relationships between cruiseline, ground tour operator and subcontractor transportation providers; theories of liability); *Smolnikar v. Royal Caribbean Cruises,* 787 F.Supp.2d 1308 (S.D. Fla. 2011) (cruise passenger injured when slams into tree while riding a zip-line during shore excursion; review of theories of cruise ship liability); *Young v. Carnival,* 2011 WL 465366 (S.D. Fla. 2011) (slip and fall during shore excursion; disclaimer of liability for misconduct of ground operator enforced).

6. See Travel Law at §5.04[4][C].

7. See Travel Law at §1.03[3]; See also: Dickerson, Chambers and Cohen, "Personal Jurisdiction and the Marketing of Goods and Services on the Internet," 41 Hofstra L.R. No. 1 (Fall 2012), pp. 31-51.

8. For a discussion of how cruiseships market shore excursions, see *Perry v. Hal Antillen*, 2013 WL 2099499 (W.D. Wash. 2013) (shore excursion accident; discussion of relationships between cruiseline, ground tour operator and subcontractor transportation providers; theories of liability); *Koens v. Royal Caribbean Cruises*, 774 F.Supp.2d 1215 (S.D. Fla. 2011) and *Smolnikar v. Royal Caribbean Cruises*, 787 F.Supp.2d 1308 (S.D. Fla. 2011). See also Perrin, "What I Learned Moonlighting as a Cruise Ship Trainee" www.cntraveler.com/perin-post/2013/04.

9. See Travel Law at §5.04[10].

10. See Travel Law at §§3.02[1]-[3]. See International Cruise Line Passenger Bill of Rights at www.eturbonews.com/35058/cruise-industry-adopts-passenger-bill-rights which is a beginning but falls far short of the cruise lines accepting responsibility for the medical malpractice of ship's doctors or the torts of independent contractor shore excursion ground service providers.

11. See Stieghorst, "Federal inspectors rate 5 cruise ships unsatisfactory on issues of sanitation," Travel Weekly, May 6, 2013, p. 1.

12. See www.uscg.mil/hq/cgis/CruiseLine.asp.

13. On Jan. 13, 2012, the Costa Concordia struck a large rock and nearly sank (Higgins, "So, Just How Safe Is Your Ship?" http://travel.nytimes.com (Feb. 6, 2012)) leaving "a haunting image: that of the 13-story luxury liner Costa Concordia half-submerged in the Tyrrhenian Sea last January after its captain piloted the ship and its 4,252 passengers and crew into a rock off the Tuscan coast, killing 32 on board"); See also: *Giglio Sub S.N.C. v. Carnival Corp*., 2012 WL 4477504 (S.D. Fla. 2012) (a purported class of 1,000 "'fishermen, property owners, business owners and wage earners on Giglio Island, as well as those working in and around the island' who claim damages to their businesses stemming from the wreck of the Costa Concordia…most, if not all, of Plaintiffs are Italian"; motion to dismiss on the grounds of forum non conveniens granted).

14. See Travel Law at §3.02[2][e]. See also Edelman, The Athens Protocol 2002 MLA Report Doc. 806 (Spring 2012) p.16881. See also *Wallis v. Princess Cruises,* 306 F.3d 827 (9th Cir. 2002).

15. See e.g., *MacLachlin v. Marriott*, New York Law Journal, Jan. 18, 1994, (N.Y. Sup. 1994) (tourist thrown from angry camel in Egypt; "an Egyptian forum which is based partially on Koranic law would be unduly harsh to plaintiff"); *In re Air Crash Off Long Island, New York*, 209 F.3d 200 (2d Cir. 2000) (air crash; France does not allow punitive damages); *Calvo v. Sol Melia,* 761 So. 2d 461 (Fla. App. 2000) (tourist struck by motor boat while swimming; Dominican Republic does not recognize product liability claims); *Nowack v. Tak How Inv.,* 94 F.3d 708 (1st Cir. 1996) (drowning accident; law uncertain in Hong Kong)]; *Lehman v. Humphrey Cayman,* 713 F.2d 339 (8th Cir. 1983) (recovery for wrongful death in Cayman Islands may not exceed $5,000).

16. See e.g., *Bruemmer v. Marriott*, 1991 WL 30141 (N.D. Ill. 1991) (hotel guest playing golf falls off cliff; no contingent fees in Bermuda); *Doe v. Sun International Hotels,* 20 F.Supp.2d 1328 (S.D. Fla. 1998) (18-year-old female guest raped at hotel; no jury trials or contingency fees in Bahamas); *Gyenes v. Zionist Organization of America,* 564 N.Y.S.2d 155 (1st Dept. 1991) (student drowned in Jordan River; no right to jury trial in Israel).

17. See Travel Law at Chapter 2A. Note that if your air transportation in country is a "leg" of an "international flight" then you may be covered by the Montreal Convention.

18. See *Barkanic v. General Administration of Civil Aviation,* 923 F.2d 957 (2d Cir. 1991) (air crash; maximum recoverable damages limited to $20,000). The same concept applies to other accidents in foreign venues. See, e.g., *Wendelken v. Superior Court,* 671 P.2d 896 (Ariz. 1983) (en banc)(slip and fall; Mexico limits lost wage damages to 25 pesos per day); *Hernandez v. Burger,* 162 Cal. Rptr. 564 (Ct. App. 1980)(auto accident; Mexican law limits recovery to the amount of the injured party's medical and rehabilitative expenses and lost wages at the minimum rate).

19. See Clark, "E.U. Expands Airline 'Blacklist,'" www.nytimes.com (April 1, 2010) "The European Union on Tuesday banned all airlines from the Philippines and Sudan from flying into the region's airports, citing 'serious safety deficiencies' found by the United Nations and U.S. aviation authorities"). For a list of the banned airlines see http://ec.europa.eu/transport/modes/air/safety/air-ban/index_en.htm. See also: "Aviation Safety Commission Updates the European Safety list of airlines (Dec. 4, 2012) at http://europa.eu/rapid/press_release_IP_12_1302_en.htm.

20. See Travel Law at §3.02[6][g].

21. See *Wajnstat v. Oceania Cruises*, 2011 WL 465340 (S.D. Fla. 2011) (cruise passenger becomes ill and diagnosed by ship's doctor as having bleeding hemorrhoids; symptoms worsened and passenger was medically disembarked in the Ukraine and transported to a medical facility wherein more than half of his colon was removed; plaintiff claimed he received substandard medical care in Ukraine; the court dismissed a cause of action against the cruise line alleging a failure to investigate the competency of land-based medical providers).

22. See *Wilson v. Best Travel*, (1993) 1 All ER 353 (Tourist fell through weak plate glass window in Athens hotel; plate glass thickness standards lower in Greece than in England where traveler resided).

23. See *Carley v. Theatre Development Fund*, 22 F.Supp.2d 224 (S.D.N.Y. 2998)(Tourist fell through window at hotel in St. Petersburg, Russia).

24. See *Cicchiello v. Reney Tours Plane Brokers*, 1996 WL 278348 (Conn. Super. Ct. 1996).

25. See *Gianocostas v. RIU Hotels, SA*, 2005 WL 503931 (Mass. Super. 2005) (case remanded for further consideration of whether the Dominican Republic offers an adequate remedy with respect to the plaintiffs' claims); 2006 WL 2089772 (Mass. Super. 2006) (failure of hotel and local clinic to diagnose and properly treat tour participant with diabetes; negligent misrepresentation claims against tour operator dismissed).

26. See *Abramson v. The Ritz-Carlton Hotel*, 2010 WL 3943666 (D.N.J. 2010) (hotel guest went into cardiac arrest; staff failed to promptly contact emergency medical services; "when the hotel supervisor attempted to use an automated external defibrillator [it] malfunctioned…and none of the hotel employees knew how to operate the device").

27. *Flanagan v. Wyndham International*, 231 F.R.D. 98 (D.C.D.C. 2005). See also: "Who's Minding the Kids?" Conde Nast Traveler, August 2005, pp. 61 ("More hotels and resorts are opening children's programs every day, but few parents really know what separates the good ones from the bad… Just this past April, the issue of safety at these facilities made headlines again when the Australian press reported allegations that in recent years, two Australian children had been abused at two hotel kids' clubs in Bali.")

28. Dougherty, "The Informer, Lost in Translation," Conde Nast Traveler, p. 76.

29. See e.g., *Molino v. Sagamore,* 2013 WL 1632496 (2d Dept. 2013) (forum selection clause enforced); *Bernstein v. Wysocki*, 77 A.D.3d 241, 249 (2d Dept. 2010) (forum selection clauses prima facie enforceable).

30. See e.g., *Horberg v. Kernzner International Hotel*, 744 F.Supp.2d 1284 (S.D. Fla. 2007) (four prior visits); *Estate of Myhra*, 695 F.3d 1233 (11th Cir. 2012) (terms and conditions of contract of passage conveyed to passenger five times); *Casavant v. Norwegian Cruise Line*, 2005 WL 1523886 (Mass. App. 2005); *Ward v. Cross Sound Ferry*, 273 F.3d 520 (2d Cir. 2001); *Osborn v. Princess Tours*, 1995 American Maritime Cases 2119 (S.D. Texas. 1995).

31. *Madoff v. Bold Earth Teen Adventures,* 2012 WL 1337337 (U.S.D.C. Hawaii 2013).

32. *Lhotka v. Geographic Expeditions*, 181 Cal. App. 4th 816 (Cal. App. 2010).

33. *Shea v. Global Travel Marketing*, 2003 WL 1916874 (Fla. App. 2003 reversed and remanded 908 So. 2d 392 (Fla. Sup. 2005).

ARTHUR B. LEVINE COMPANY

Bankruptcy Bond Agents

- Ch. 7 & 11 Trustees
- Plan Administrators
- Disbursing Agents
- Examiners and Receivers

Copyright 2013. ALM Media Properties, LLC. All rights reserved.