

The 2011 Global Congress on Travel Risk Management

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Mobility of Jurisdictions the Corporate Duty of Care Quagmire

Presented By:

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Carla Potok – E.H.L. Switzerland

**Julie McCashin, Vice President, Health Services Development,
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As Vice President, Health Services Development for the Americas Region of International SOS, Julie McCashin is responsible for managing the company's relationships with the North American Oil and Gas Industry. She has been with International SOS since 1994.

Ms. McCashin's recent projects include:

- Health Plan Author, Chad Cameroon
- Health Services Design, Sakhalin
- Health Care Management Program, Angola
- Medical Services Review, Aluminum Production Facilities, Samara and Belaya Kalitva, Russia
- Construction Medical Services, Equatorial Guinea.

Ms. McCashin holds a Master of Public Health degree from the University of Alabama in Birmingham, and Master of Business Administration and Bachelor of Science degrees from Georgetown University, Washington, D.C.



CARLA POTOK

Carla is an American-born French and British litigator, admitted to the Paris and London Bars. She specialized in transnational disputes and international arbitration, thereby acquiring experience in managing cross-cultural conflicts. She has been a speaker or helped organize conferences on such subjects as:

- « *The European Code of Contract Law* », for the Franco-British Chamber of Commerce and the Franco-British Lawyers Society, March 2002.
- « *Costs of the arbitration and procedure* », for the London Court of International Arbitration (LCIA), September 2001
- « *On-line justice* », for the Franco-British Lawyers Society in participation with the Supreme court of Singapore, September 2001
- « *Adjudicating disputes in France* », for the American Board of Trial Advocates (ABOTA), July 1997.
- « *Corporate criminal liability in France and recourse to arbitration* », for the International Aviation Women's Association (IAWA), October 1995.

and has written on such topics as :

- "Recourse to an Umpire under the English Arbitration Act"
- « *The liability of French exporters in the United States* »
- Co-author of, « *Living in France (renamed « Vital Issues – How to survive officialdom while Living in France* »)
- Contributed to « *Doing Business in France* », Mathew Bender.

After nearly 25 years in private practice, Carla accepted a professorship at the *Ecole Hôtelière de Lausanne* in Switzerland (E.H.L.), where she currently teaches international comparative law as it relates to the hospitality sector. She also owns and manages a private Riad or traditional Moroccan guesthouse in Marrakech, Morocco, a business she set up as an American woman in a predominantly Muslim country. She is perfectly bilingual French/English, has a working knowledge of Spanish and German and has recently begun studying Arabic.

Professional distinctions and memberships : She served for nearly 10 years as an Advisory Board Member of the 21st Century Trust (London) under the presidency of

the Rt. Hon. Sir Christopher Patten. Professional memberships included participation in the international section of the I.B.A., the International Court of Arbitration of the I.C.C. (Paris), the Franco-British Lawyers Association, the London Court of International Arbitration (LCIA), the Chartered Institute of Arbitrators (CIA) in London, the Association of Women in Arbitration (Paris), and the International Association of Women in Aviation (IAWA).


THE GLOBAL CONGRESS
ON LEGAL, SAFETY & SECURITY SOLUTIONS IN TRAVEL
AUGUST 23-24, 2011 HOUSTON

**“Mobility of Jurisdictions
 The Corporate Duty of Care Quagmire”**

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Presenters



- **Carla Potok**
- French and British litigator specialized in cross-border disputes and international arbitration;
- Business Law Professor , *Ecole Hôtelière de Lausanne*, the well-known Swiss hotel management school;
- Owner of a private guesthouse in Marrakech, Morocco.







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The Global Context

The 21st Century is characterized by :

- **9/11 , Terrorism, Kidnapping, Hostages, Ransom**
- **Globalization, Global warming, CSR**
- **Bail-outs, Hack-ins**
- **Natural disasters of increasing magnitude**
- **Civil war, Political instability, Social unrest**

Terrorism alone - 2008

U.S. Statement Department report :

11,700 terrorist attacks worldwide

54,747 people killed, injured or kidnapped.

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21st Century Duty of Care

Initially this meant that :

Company Officers and Directors have a duty of care obligation to shareholders to manage the company as :

« a normal prudent person would under similar circumstances ».

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The scope of this duty has grown.

- Who now benefits ?
- **Shareholders** but also
- **Staff** (employees on mission at home or abroad)
- **Clients** (ex: hotels, airline companies, restaurants)
- **Society-at-large** (ex: no disturbance to public policy)

All are owed a « corporate duty of care ».

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The « QUAGMIRE »

Webster's definition:

« a difficult or inextricable position »

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The « Corporate » quagmire

Why are international hospitality companies in an inextricable legal quagmire today ?

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Between the « rock and the hard place »

Legislators

Governments

Courts

Insurers

Victims

Hospitality Companies

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2018-2019

Legislators

<p>Trends</p> <ul style="list-style-type: none"> • Increased safety and security obligations • Sanctions for non-compliance 	<p>Consequences</p> <ul style="list-style-type: none"> • Increased costs to business to ensure compliance
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WORLDWIDE CONGRESS
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ON BANKING & ACCOUNTING
2018-2019

Governments


<p>Trends</p> <ul style="list-style-type: none"> ➤ Massive <u>bailouts</u> : Companies on the brink of bankruptcy Country-wide bailouts, particularly in the E.U. ➤ Serious domestic turmoil ➤ Massive <u>reconstruction</u> efforts 	<p>Consequences</p> <ul style="list-style-type: none"> ➤ Unmanageable crises at home and abroad ➤ Financial and political instability ➤ Increased social unrest and discontent ➤ Increased insecurity ➤ Over-endebedtness
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2018-2019

COURTS


<p>Trends</p> <ul style="list-style-type: none"> • More victims • More severe damage • Greater frequency and magnitude of events • Need for deep pockets to pay from 	<p>Consequences</p> <ul style="list-style-type: none"> • Interpretation of the law to accommodate victims ? • Criteria : <ul style="list-style-type: none"> ✓ reasonable care ✓ foreseeability
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Insurers




<p>Trends</p> <ul style="list-style-type: none"> • Increased pressure from insured • Creation of new products : <ul style="list-style-type: none"> ➢ Kipnap insurance ➢ Terrorism insurance ➢ Pooled fund systems 	<p>Consequences</p> <ul style="list-style-type: none"> • Additional insurance costs more • Reimbursements not always forthcoming <i>(Lloyds and combined Insurance of America v. underwriters of Lloyds London)</i> • Forcing businesses to pay damages then claim against insurers
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Victims and Mobility of Jurisdictions





<p>Trends</p> <ul style="list-style-type: none"> • Clients' entitlement to expect a given result • Sharp rise in risks in hospitality industries • Increased number of victims and thus • Increased demands for damages • Enlarged scope of liabilities 	<p>Consequences</p> <ul style="list-style-type: none"> • Forum shopping : <ul style="list-style-type: none"> • Where : US, UK, France, Italy, elsewhere ? ▪ Class action (not in arbitration....) ▪ Punitive damages ▪ Terrorism not FM ▪ Corporate criminal liability ▪ Exclusive jurisdiction
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Also « Abuses of mobility »



- Simultaneous multiple claims.
- Attempts to obtain several compensations for the same prejudice in different courts
- « Changing stories » in different languages for the purposes of different laws
- Exorbitant costs for court-appointed translators, interpreters, local counsel in each country and a multi-cultural legal team to orchestrate !!





Example : Staff as victims



What concretely is a company's Corporate Duty of Care to its staff in the 21st Century?



Best efforts or Given Result ?



- What started out as a « **Best efforts** » obligation has become
 - Entitlement to « **a given result** »
- Implying the « right » to a « reasonably » safe and secure job or service.



2006 - France



- During a trip to Malaysia in 2000, 21 people were kidnapped from their hotel and held hostage in the Philippines including 3 French citizens. The French citizens were granted damages for a work-related accident.
- A « Best efforts obligation » became the « right » for clients to a « given result ».



What is Force Majeure today ?



- **Act of God** : « the operation of natural force free from human intervention »
- Terrorism should then be an **Act of War** as there is human intervention
- However, several jurisdictions now question the « **unforeseeable** » nature of **terrorist attacks** to exclude these from Force Majeure exemptions. (France and U.K.)

2006 : France



- Following a series of terrorist attacks on French soil, in 2006 in a case against a French Tour Operator, the French Supreme Court declared that terrorist attacks are no longer « unforeseeable » and therefore companies can no longer raise Force Majeure to exonerate their liability for damages. The Tour Operator was condemned to pay these.

2008 United Kingdom



- A survey conducted by GTD Search Results found that in the United Kingdom courts no longer automatically consider terrorist threats as « Force Majeure » considering that their « **unforeseeability is questionable** ».
- Indeed, a London night Club was condemned to pay damages to victims when an undetected bomb exploded on the premises as being « partially liable ».

What is a « work-related » accident today?



2008 : Khan v. Parsons Global Services, Ltd.

On one of his days off when his company was closed, Mr. Khan was kidnapped and tortured. He accused his employer of having delayed ransom payment thereby causing his ear to be cut off as threatened.

The kidnapping took place on a non-business day, after a private leisure meal rather than a business dinner.



2001 – France



The French Supreme Court extended employee protection to all accidents occurring whilst on mission for an employer, whether in the course of a professional OR a personal activity.



9/11 Third party witnesses suffering Emotional Distress ?



- Damages were recently awarded by the French courts to Air France navigating personnel having witnessed the 9/11 attacks from their hotel before having to fly on the grounds of Air France's breach of Corporate duty of care and the resulting severe depression and emotional distress on employees.



Air France Paris/Rio crash witnesses ?



- Even more recently, French courts awarded damages to Air France land personnel having witnessed the last communications and ultimate crash of the the Paris/Rio flight on video screens on these same grounds.

SO, Where does the chain of liabilities end?
Does it end ?

2010 – Spain limits the chain



- Following terrorist attacks on Spanish soil, the Spanish Supreme Court limited damages to « only those persons directly affected » to the exclusion of any related persons even if they suffered personal injury or suffering from the incident.
- Furthermore, amounts were limited to ordinary damage awards to victims of permanent partial disability.

Corporate criminal liability



- Where ? In France and in Italy :
- Grounds : Gross violations of duty of care can lead to criminal sanctions against the company as a corporate entity for involuntary manslaughter !!

Sanctions ?



- Heavy fines
- Suspension of corporate activities
- Ultimately the court-ordered closing down and liquidation of the company
- Individual lawsuits for involuntary manslaughter against specific managers in addition

Moral security of employees : On-site employee suicides



- France Télécom, was recently « indicted » for « involuntary manslaughter » following a series of 23 suicides over an 18-month period, including violent on-site suicides witnessed by staff.
- New trend ??: Apple's Foxconn factory in China had to place security nets around the building further to a dozen on-site suicides.

PREVENTIVE PROTECTION



- 3 types :
- Preventive contract drafting !!!!
- Internal measures
- Outsourcing of security management

Prevent Contract Drafting



• The legal tool box :

- Choice of law and jurisdiction
- Mediation and arbitration
- War and terrorism carve-out
- Limitation of liability – Risk waiver
- Compulsory crisis management training
- Force majeure
- Contract clause on terrorism (PNUD model)
- Liquidated damages
- Dismissal for serious misconduct – violation safety procedures.
- Specific insurance policy extensions for kidnap and terrorism.

In-house measures



- Risk management procedures
- Strategic planning
- Evacuation plans
- Crisis training and management
- Compulsory travel policy and procedure
- Employee tracking
- On-site surveillance and screening
- Security belt around premises (Ghazala Gardens Hotel, Egypt)
- Compliance Controls
- Regular audit of efficiency

Risk Management out-sourcing



- Out-sourcing to third party experts such as International SOS

- One advantage : An element of proof in proving the company made all « reasonable » efforts to ensure security, including consulting a company specialized in security and rescue matters.

CONCLUSION:



- US. Officials have intercepted intelligence indicating that Al-Qaida is considering surgically implanting explosive devices in the bodies of suicide-bombers. There is no apparent immediate end to the 21st Century's innovative criminality.
- When did you last conduct a formal audit of your company's security procedures and policies ? Are they sufficient ?
