

Travel and Holiday Claims amid a Global Lockdown

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The world-wide lockdown in response to the Covid-19 pandemic will have an unprecedented financial impact, not only on businesses in all areas of the economy but also on consumers. Public gatherings are banned or strictly limited and events have been cancelled or postponed. Future travel plans remain uncertain, with the borders of many other countries remaining closed to travellers from the UK and strict 14-day quarantine measures set to be imposed on those entering the UK from the end of May. Many companies are refusing or delaying offering refunds to affected consumers, who may have to resort to litigation to protect their rights. This alerter provides a broad overview of several affected areas, including package holidays, travel, holiday accommodation and events.

Introduction

1. Most people plan and pay for their summer holidays in the early part of the year in order to capitalise on available deals. Now businesses and their customers alike have been hit hard by the Covid-19 pandemic lockdown measures, and both may be left out of pocket. By one estimate, for example, global airline revenues in 2020 are expected to drop by 44% (\$250 billion) over the previous year as airlines have had to cancel hundreds of flights.¹ Faced with ongoing uncertainty, unprecedented cancellations and demands for refunds, it has been reported that a number of airlines and holiday providers are either refusing to refund customers or are issuing credit

¹ The International Air Transport Association.

notes automatically for cancelled flights and package holidays, even where a cash refund has been requested.

2. In this alert we highlight the legal frameworks in a few key areas and possible claims that are likely to arise.

Package holidays

3. Consumer contract for the sale of package holidays have terms implied into them by the Package Travel and Linked Travel Arrangements Regulations 2018/634 (“**the Package Travel Regulations**”). A “package holiday” includes most contracts under which travel services are provided and where those services comprise at least two of the following components: travel, accommodation, vehicle hire, and any other tourist service (Regulations 2(1) and 2(5)). If there are “unavoidable and extraordinary circumstances” occurring at the place of destination or its immediate vicinity and which significantly affect the performance of the package or the carriage of passengers to the destination, the traveller may terminate the contract before it starts without paying any termination fee and is entitled to a full refund within 14 days of termination of any payments made.² Similarly, if the organiser is prevented from performing the contract because of unavoidable and extraordinary circumstances and notifies the traveller of the termination of the contract without undue delay before the start of the package, the organiser may terminate the contract and provide the traveller with a full refund of any payments made within 14 days and will not be liable for additional compensation.³
4. The Package Travel Regulations implement the 2015 EU Package Travel Directive.⁴

² Regulations 12 and 14.

³ Regulations 13 and 14.

⁴ Directive (EU) 2015/2302 of the European Parliament and of the Council of 25 November 2015 on package travel and linked travel arrangements...

Under Regulation 2 “*unavoidable and extraordinary circumstances*’ means a situation (a) *beyond the control of the party who seeks to rely on such a situation ...; and (b) the consequences of which could not have been avoided even if all reasonable measures had been taken...*” It is difficult to see how the outbreak of Covid-19 would not amount to unavoidable and extraordinary circumstances for the purposes of Regulations. Indeed, Recital 31 of the Directive confirms that it was intended to cover situations including “*significant risks to human health such as the outbreak of a serious disease at the travel destination.*”

5. Therefore, if there is an outbreak of Covid-19 at the place of destination or its immediate vicinity, and either the performance of the contract or the travel arrangements to the destination are significantly affected (for example, because of hotel closures or travel restrictions at the destination, or because travel to the destination is prohibited by English law or the laws of the foreign country concerned, or perhaps subject to a 14-day quarantine on return to the UK) the consumer will have the right to take the positive step of terminating the contract and claiming a full refund within 14 days. It is worth noting that, for Regulation 12 to apply, the unavoidable and extraordinary circumstances must be at the place of destination. If the impact on performance of the contract or travel arrangements is caused by an outbreak or lockdown in the UK the right to cancel will not be available to consumers, although it would be available to the organiser under Regulation 13. As other countries may be ahead of the UK in recovering from the current pandemic and easing their lockdowns, this scenario may become increasingly likely. A consumer’s right to a refund under Regulation 13(3)(a) will depend on the organiser taking the step of terminating the contract, and it is likely that organisers will wait to do so until the very last moment.
6. There have been reports in the press of organisers refusing refunds to customers whose package holidays have not gone ahead because of the outbreak of Covid-19, and offering instead vouchers. Certain organisers appear to have suggested that the

Package Travel Regulations were not intended to apply in the event of an international shutdown of tourism. That suggestion, however, has no basis in the wording of the Regulations or the Directive.

7. On 19 March 2020, the EU Commission released guidance in relation to the Directive which stated:

“Having regard to the strains on liquidity of tour operators because of missing new bookings coupled with reimbursement claims, travellers should consider accepting that their package tour is postponed to a later point in time. Having regard to the current uncertainty to make travel plans, that could be done by means of a credit note (so-called “voucher”). However, the traveller should have the possibility to ask for a full refund if, eventually, he or she does not make use of the voucher. Moreover, it should be ensured that the voucher is covered by appropriate insolvency protection.”

8. This guidance has no legal effect on consumer rights under the Package Travel Regulations. Indeed, the European Commission has written to all EU member states (including, for now, the UK) reminding them that they must enforce citizen rights to a refund and sanction any airlines or holiday firms which fail to provide one.

Travel

9. For consumers who have booked travel and accommodation separately rather than as a package, the applicable legal framework will vary depending on factors such as the terms and place of formation of the contract and the type of transport involved.

Flights

10. EU Regulation 261/2004⁵ (“**the Denied Boarding Regulation**”) applies to air passengers either (a) departing from an airport in an EU member state or (b) departing from an airport outside an EU member state for an airport in an EU member state, if the operating air carrier of the flight concerned has a valid operating licence granted by an EU member state.⁶ Those passengers are entitled, if their flights are cancelled, to be offered the choice between (i) reimbursement of the full cost of the ticket at the price at which it was bought within 7 days; (ii) re-routing, under comparable transport conditions, to their final destination⁷ at the earliest opportunity, or (iii) re-routing, under comparable transport conditions, to their final destination at a later date at the passenger’s convenience, subject to availability of seats.⁸
11. Articles 5 and 7 of the Regulations also give air passengers the right to compensation where their flights are cancelled if they have not been informed of the cancellation sufficiently in advance, but this is unlikely to apply during the current global lockdown because air carriers do not have to pay compensation if they can prove that the cancellation is caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken (Article 5(3)).
12. Claims under the Denied Boarding Regulation can be brought in the UK for up to 6 years from the date of cancellation.⁹

⁵ Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights...

⁶ In the case of (b), the Regulation only applies if passengers have not received benefits or compensation and been given assistance in the country of departure. The Regulation as whole does not apply to passengers travelling free of charge or at a reduced fare not available directly or indirectly to the public.

⁷ The destination on the ticket presented at the check-in counter or, in the case of directly connecting flights, the destination of the last flight (Article 2(h)).

⁸ Articles 3 and 8(1).

⁹ *Dawson v Thomson Airways Ltd* [2014] EWCA Civ 845.

13. Rights in relation to cancelled flights outside the EU where the passenger is travelling with a non-EU airline will depend on the terms and conditions of the contract with the airline.

Ferries

14. EU Regulation 1177/2010¹⁰ (“**the Sea and Inland Waterway Regulation**”) provides in similar terms for cancellation rights for passengers (a) on passenger services¹¹ where the port of embarkation is situated in an EU member state; (b) on passenger services where the port of embarkation is situated outside an EU member state and the port of disembarkation is situated in an EU member state, provided that the service is operated by a carrier established within the territory of an EU member state or offering transport by passenger services operated to or from the territory of an EU member state. By Article 18(2), if a passenger service is cancelled or its departure delayed by more than 90 minutes, among other things passengers have the right to either (a) re-routing to the final destination, under comparable conditions, at the earliest opportunity and at no additional cost, or (b) reimbursement of the ticket price within 7 days.

Holiday accommodation

15. Where accommodation (including accommodation abroad) has been booked via a travel company but not as part of a package, consumers will not be able to rely on the Package Holiday Regulations and any right to a refund upon cancellation will depend on the terms and conditions of the booking. Refunds may be excluded or limited and/or cancellation by the consumer may be subject to a termination fee.

¹⁰ Regulation (EU) No 1177/2010 of the European Parliament and of the Council of 24 November 2010 concerning the rights of passengers when travelling by sea and inland waterway...

¹¹ Defined as “a commercial passenger transport service by sea or inland waterways operated according to a published timetable” (Article 3(f)). Certain smaller services, historical ships and excursion and sightseeing tours are excepted by Article 2(2).

16. However, despite the lockdown being eased in certain ways, restrictions remain in place as a matter of English law against going on holiday or staying overnight at a holiday home or second home. Hotels in England and across Europe remain closed. Accordingly, performance of the holiday accommodation contract has arguably been rendered unlawful by a supervening illegality: no one should be staying at, for example, a rented holiday cottage. Despite this, consumers have been facing difficulties obtaining refunds: five of the UK's largest holiday cottage rental companies are being referred to the CMA for potentially unfair terms in their contracts with consumers

Events

17. A further key area likely to affect consumers and businesses is the cancellation of sporting and entertainment events. Organisers have dealt with the crisis in different ways: many events (such as the Tokyo Olympics) have not been cancelled *per se* but postponed until next year, whilst others such as the Glastonbury Music Festival 2020 have been cancelled but the tickets have been rolled over to the 2021 festival.

18. Where, for example, consumers were planning a holiday in order to watch the Tokyo Olympics or attend a festival abroad, the arrangements may be covered by the Package Travel Regulations. If not, a consumer's rights will depend on the terms and conditions of the relevant contract.

19. The main issue for consumers seeking to obtain a refund is whether they bought their tickets from a primary ticket seller (such as the venue itself or a website such as Ticketmaster) or a secondary ticket seller (like the website StubHub). While tickets purchased from primary sellers are likely to be subject to the usual consumer rights and protections, the terms and conditions of secondary ticket sellers may state that tickets are not refundable.

20. If the ticket seller is a member of STAR (“Secure Tickets from Authorised Retailers”), the self-regulating body for the entertainment ticketing industry in the UK, consumers can use the STAR dispute resolution process if the seller refuses a refund.
21. Consumers should be alive to the fact that they do not have to accept a rolled-over ticket and can insist on a cash refund, in the way that consumers of flights and holidays do not have to accept a credit note or voucher.

Other considerations

22. There are at least two other considerations worthy of note, which will be the subject of another alert. Firstly, contractual parties may be able to argue that their contracts have been frustrated as a result of the Covid-19 pandemic, in that it has become physically or commercially impossible to fulfil the contract, or transforms the contractual obligation into something radically different from the one undertaken at the time of entering into the contract. The result would be either that both parties are released from any further performance under the contract or, for contracts falling under the Law Reform (Frustrated Contracts) Act 1943, that one contracting party is entitled to recover money paid to the other party prior to the frustrating event. Whether or not and the extent to which this argument is open to the contractual parties will depend on whether the contract contains a force majeure clause.
23. Secondly, as a result of the enormous financial losses suffered in almost every area of the economy, many companies may go out of business and it will be impossible for consumers to recover from them directly. In such circumstances, where for any single item payment of more than £100 and less than £30,000 has been made using a credit card, it may be possible for consumers to bring a claim which would otherwise be for breach of contract against the other party to the contract, against the credit card provider itself pursuant to s.75 of the Consumer Credit Act 1974.

CMA Expectations

24. Companies should be aware of the recent statement by the Competition and Markets Authority (“**CMA**”) as to how it expects businesses to act during this time. The CMA “would expect a consumer to be offered a full refund where:

- *a business has cancelled a contract without providing any of the promised goods or services;*
- *no service is provided by a business, for example because this is prevented by Government public health measures;*
- *a consumer cancels, or is prevented from receiving any services, because Government public health measures mean they are not allowed to use the services*

25. This is so even where the business has charged what is said to be a non-refundable deposit and/or advance payment. Companies should also not mislead or apply pressure to consumers to accept a voucher or credit note. A refund should still be a clearly and easily available option. Any restrictions that apply to credits, vouchers, re-booking or re-scheduling, such as the period in which credits must be used or services re-booked, must also be fair and made clear to consumer.

26. The CMA’s statement should be read alongside the Government’s recent non-statutory and non-legally binding “*Guidance on responsible contractual behaviour in the performance and enforcement of contracts impacted by the Covid-19 emergency*”, which states that all parties to contracts should “*act responsibly and fairly, support the response to Covid-19 and protect jobs and the economy.*” Whilst this Guidance applies to business to business contracts, the clear expectation is that everyone should behave fairly and reasonably.

Conclusion

27. This is a rapidly developing area. There are no guarantees that the holiday, travel and events companies relied on by thousands every year will still be in business once international travel and holidays are feasible again. Many consumers and businesses will be left trying to pick up the pieces in terms of rebooking, cancelling and refunds for a long time to come.