

FCDO ADVICE, FREE CANCELLATION RIGHTS AND THE LAW

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Background

One of the most common legal issues faced by travel companies during the Covid-19 pandemic is determining when customers are entitled to cancel a package holiday and claim a full refund. Historically, advice by the Foreign, Commonwealth and Development Office (FCDO) against all or all non-essential travel to a destination was taken as the trigger for this cancellation right. However, this convention has been called into question by its recent use, with the FCDO's blanket approach leading to illogical outcomes. Many have criticised blanket advice for an entire country when flare-ups are regionalised. Why include islands with low infection rates which are far away from the affected area?

Many airlines have chosen to operate flights to these destinations in spite of the FCDO's advice. Travel associations and companies alike have repeatedly criticised the Government's approach and have called for a more nuanced approach. Indeed, the EU has recently proposed such an approach by recommending a traffic light system to identify risk areas on a regional basis¹. We are also now starting to see some recognition by the FCDO that a more nuanced approach is needed with its recent advice in relation to specific Greek islands.

When the European Commission (EC) drafted the Package Travel Directive (PTD), it considered whether advice from bodies such as the FCDO should automatically trigger customers' free cancellation rights but it decided against it. In one of the PTD workshops given to Member States to explain how the PTD should be implemented, the EC explained that reliance on the advice of national bodies was "*very controversial during the legislative process and, in the end, no reference was included for instance to foreign office travel warnings.*" Rather, the EC explained that "*[d]ifferent sources of information, including official travel advice, may be relevant when establishing whether there were unavoidable and*

¹ https://ec.europa.eu/info/files/proposal-council-recommendation-coordinated-approach-restriction-free-movement-response-covid-19-pandemic_en

*extraordinary circumstances and might be taken into account by judges when deciding on such matters*².

This advice has been repeated by the EC in its published guidance on how the PTD should be applied in the context of Covid-19³. The EC has stressed the importance of assessing the question of free cancellation rights on a case-by-case basis. Fundamentally, the question posed by the PTD is not what the FCDO advice may say (although this is an important source of information). Rather, the question is whether customers can reasonably be expected to travel to the destination in light of the risk to their health and life. The EC says that a subjective feeling of fear is not sufficient. The example given of when the cancellation right is triggered is of a customer whose particular medical condition means that exposure to Covid-19 is particularly dangerous and the risk of contracting Covid-19 in the particular destination has been declared high by the competent authorities.

To be fair to the FCDO, they have never said that their advice triggers the free cancellation rights set out in the PTD. The FCDO is clear that this is a matter between the travel company and the customer⁴. The truth is that FCDO advice has simply been adopted by the travel industry for determining when to offer free cancellation. There has been little reason before Covid-19 to move away from this convention but now that there are doubts as the suitability of using FCDO advice for determining PTD rights it begs the question: what is the legal position on free cancellation rights?

The three stage test

The PTD sets out a three stage test which must be satisfied for free cancellation rights to be triggered. This test has to be applied on a case-by-case basis to each specific booking.

First, there must be “*unavoidable and extraordinary circumstances*”. This phrase is defined in the PTD as meaning a situation which is beyond the control of the customer, the

² Transposition of Directive (EU) No 2015/2302 on Package Travel and Linked Travel Arrangements; Workshop with Member States on 16 February 2017.

³ https://ec.europa.eu/info/sites/info/files/coronavirus_info_ptd_19.3.2020.pdf

⁴ <https://www.gov.uk/guidance/how-the-foreign-commonwealth-office-puts-together-travel-advice#how-travel-companies-and-airlines-use-our-travel-advice>

consequences of which could not have been avoided even if all reasonable measures had been taken.

There seems little doubt that Covid-19 is a situation which is beyond the control of the customer. What is more difficult to determine is whether its consequences (i.e. the risks to human health) can be avoided if reasonable measures are taken. This latter question is really one for the safety experts. Is it possible to introduce precautions to manage the risks of Covid-19 which exist during travel and in the destination such that the package is reasonably safe? If not, then unavoidable and extraordinary circumstances do exist and one must move on to consider the second and third stages of the test. If it is possible to manage the risks of Covid-19, then there are no unavoidable and extraordinary circumstances and so the free cancellation rights do not arise.

Secondly, the unavoidable and extraordinary circumstances must occur at the place of destination or its immediate vicinity. Therefore, if a customer is travelling to Mallorca, then the Covid-19 related circumstances need to exist in Mallorca. Issues in the UK are not relevant to the analysis.

Thirdly, the unavoidable and extraordinary circumstances must “*significantly affect*” either the performance of the package or carriage of passengers to the destination. The latter is more likely to be easily identifiable e.g. the cancellation of all flights to the destination. Whether Covid-19 significantly affects the performance of the package is more difficult to assess. This involves looking at what travel services are included in the package, what the customer was promised in relation to those travel services and whether Covid-19 will significantly affect delivering on those promises. There is likely to be overlap here with the first stage of the test – if safety precautions cannot ensure the provision of a reasonably safe package, then I would suggest that performance of the package has been significantly affected.

Importance of legal accuracy

One of the most frustrating features of the Covid-19 pandemic for a travel lawyer is the lack of accuracy in the debate over the industry’s response. The status of FCDO advice is one such area. There may be good reasons why the Government has chosen to take a blanket approach with its advice, taking into account wider public health issues in the UK. There may

also be good policy or commercial reasons as to why a travel company may wish to follow the FCDO advice regardless of whether that might lead to a more generous refund policy than what is required by the PTD. However, it is important to recognise that such a decision is a choice. The legal position is different.

There are likely to be very many instances where there is overlap between the FCDO advice and PTD free cancellation rights, for instance during the height of the pandemic earlier this year when Covid-19 infection and death rates were increasing exponentially and Europe was in strict lockdown. However, there will also be cases where PTD cancellation rights may be triggered even when the FCDO has not advised against travel⁵. There will also be cases where PTD free cancellation rights do not arise even when the FCDO advise against travel, for instance where the blanket nature of FCDO advice does not represent the true picture of Covid-19 risks in a particular holiday destination.

In these circumstances, it was disappointing to read the CMA's recent summary of the legal position, which does not summarise the three stage test but instead simply adopts the approach that the EC was at pains to caution against⁶: *"[I]f a package holiday is cancelled in light of Foreign and Commonwealth Office advice against travel to the relevant country, there are specific protections which mean that consumers should be entitled to a full refund."* It is difficult to see how the public interest is served by publishing this oversimplistic summary of the legal position, which risks creating false expectations and unnecessary conflict between travel companies and their customers.

Work to be done

The distinction drawn in this article between FCDO advice and PTD free cancellation rights should not be read as a panacea for travel companies to avoid refunding their customers. In many cases, they will overlap, particularly during the height of the pandemic earlier this year.

However, the situation and the risks continue to change, and unless the FCDO adopts an approach which more accurately reflects the risks in specific holiday destinations, some will

⁵ As Travel Weekly recently reported on a German case - <https://www.travelweekly.co.uk/articles/385186/german-court-rules-covid-extraordinary-circumstance>

⁶ <https://www.gov.uk/government/news/coronavirus-covid-19-cancellation-and-refund-updates>

inevitably look at moving away from the FCDO convention towards an approach which more accurately reflects the PTD cancellation rights.

Travel companies wishing to take this more nuanced approach will still be left facing the practical issue of setting up a system which determines when free cancellation rights arise. This will have to include setting up systems to monitor the risks to customers on holiday, the steps needed to manage those risks and when it becomes impossible to provide a reasonably safe holiday. There may also be work to be done on terms and conditions and booking paths to make Covid-19 cancellation policies clear to the customer at the time of booking, together with ensuring insurance coverage for the business.

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