

## NEVER SAY NEVER AGAIN: LOCKDOWN2 AND TRAVEL RESTRICTIONS

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*In this article the author sketches out the impact on holidays and flights of the new Coronavirus restrictions.*

The new restrictions announced on 31<sup>st</sup> October and coming into force on 5 November include the avoidance of all non-essential travel, with a prohibition on holidaying either in the UK or abroad, although business travel is permitted. Essentially, people with holidays due to commence between 5<sup>th</sup> November and 2<sup>nd</sup> December will not be able to take them.

Those already on holiday are entitled to continue with their holidays as booked, and any attempt on the part of the tour operator to repatriate holidaymakers early will constitute a breach of Regulation 15 of the Package Travel and Linked Travel Arrangements Regulations 2018, attracting a price reduction (i.e. a refund) and compensation. Pursuant to Regulation 15, compensation will not be payable if the tour operator can show that early repatriation was necessary due to the unforeseeable or unavoidable actions of the government, or unavoidable and extraordinary circumstances. Whether Lockdown2 was unforeseeable is a rather moot point; scientists, commentators and politicians have been predicting it for some weeks. Whether it is an extraordinary circumstance might also be arguable, given that it has happened before, is happening across Europe, and appears to be one of the tools for containing the pandemic that come most readily to the hand of government. Time will tell what the courts will make of these arguments.

Those due to embark on holidays between 1<sup>st</sup> and 4<sup>th</sup> November can, technically, still do so; but it is to be expected that their return flights will be disrupted by the inevitable upheaval in flight scheduling. Pursuant to Regulation 13, the tour operator may cancel the holiday prior to departure due to unavoidable and extraordinary circumstances, and if it does so, a full refund is payable, but no compensation. This is, of course, subject to the same arguments about avoidability and extraordinary circumstances.

Holidaymakers who took advantage of the travel corridor to the Canary Islands announced a week ago in order to book a holiday commencing between 5<sup>th</sup> November and 2<sup>nd</sup> December are in the most unfortunate position of all. They, along with all would-be travellers due to depart during this period, will not be able to take their holiday due to the prohibition on non-essential travel. They are, however, entitled to a refund under Regulation 13; but no compensation is payable.

Those holidaymakers brave enough to make travel arrangements with suppliers directly, rather than booking a package, have even more to fear than the disappointment of missing out on a holiday. If their flights are not operated, they will be entitled to a refund pursuant to Articles 5 and 8 of the Denied Boarding Regulations (Regulation (EC) 261/2004); but some flights will continue to operate, if only in order to repatriate existing holidaymakers from the point of destination. In those cases, the holidaymaker is not entitled to a refund, notwithstanding the fact that he or she cannot take up the seat on the aircraft. Clearly in those circumstances the holidaymaker cannot use the accommodation booked; but again, if that accommodation can be made available to him or her, it may very well be that no refund is due from the supplier. This bold cohort of travellers may also find that in the case of travel insurance taken out after March of this year, no cover is provided in the event of Covid-related cancellation, compounding their woes still further.

The CMA appears to believe that in the case of domestic accommodation bookings holidaymakers need have no fears:

*“A consumer will generally be entitled to a refund when they have paid money in advance for services or goods that cannot be provided because of the coronavirus pandemic.”*

But is this (non-binding) advice accurate? If as a result of a change in the law it is unlawful for a holidaymaker to use accommodation (whether domestic or abroad) booked between lockdowns, there is surely a good argument that such force majeure clauses as the accommodation contract may feature will be engaged. Even if not, the doctrine of frustration could be pleaded as justification for the retention of at least some of the booking price. It is far from clear why the CMA does not appear to take these possibilities into account.

Whatever the true position, one thing is absolutely clear; the second lockdown will be as fraught with difficult legal niceties as the first, albeit for slightly different reasons. And as disgruntled holidaymakers lose still further confidence in travel providers, it is increasingly vital that something is done to support the industry as it faces gradual annihilation through repeated changes in government policy.

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