RISK DESTINATIONS: CONSUMER PROTECTION – A MYTH OR REALITY?

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In July 2013, The European Commission published the long awaited draft of the new-look Package Travel Directive.1 One area that attracted attention was the right of a consumer to terminate a contract in the event that ‘unavoidable and extraordinary circumstances’ arise prior to the holiday commencing.

Chapter III, which deals with ‘changes to the contract before the start of the package’, carries the new provision where a consumer is able to terminate their contract ‘before the start of the package’.

Article 10(2) states that:

“The traveller shall have the right to terminate the contract before the start of the package without compensation in the event of unavoidable and extraordinary circumstances occurring at the place of destination or its immediate vicinity and significantly affecting the package”.

The inclusion of this provision is a radical departure from the present Package Travel Regulations as this imports a specific significant ‘event’ that could trigger the right to termination.

The Consumer Conundrum

For many years, HolidayTravelWatch (HTW) has campaigned on the difficulties that holiday-makers face when confronted with a ‘natural or man-made disaster’.2 We have argued that all too often the claim of force majeure3 is made, when it is clear that events arising prior to departure, are either subject to very accurate predictive technologies or a political situation that clearly reveals very real danger for consumers.

Since 2000, HTW has dealt with holidaymakers where, pre-departure (and indeed in resort), they have been affected by the ravages of hurricanes, tropical storms and tsunamis upon their intended destinations. It is worth noting the case of Hayes v Airtours [2001] CLY 42834 where

3. http://www.holidaytravelwatch.com/Content/Files/Articles%20-%202027.9.05/Is%20%20Really%20All%20God’s%20Fault%20-%2030.6.06.pdf
the court decided that the claimant could not succeed because of the ‘uncertainty’ of the path of the hurricane. However, the advance of accurate hurricane predictive technology has I would suggest relegated this case to the dusty shelves of legal history; it is a good example of how circumstances can change how we view our world and how we deal with our problems. For many of the consumers faced with weather events, they have been often faced with travel companies intent on delivering them into the affected zones and a broken infrastructure, without regard to the concept and rights of ‘significant change’ under the present Package Travel Regulations (Regs 12 & 13).

However, it was the rapid changes brought about by the ‘Arab Spring’ in Egypt and Tunisia from 2011 that brought consumer inequality in contract into sharp focus. For nearly 12 months, our helpline was inundated with calls from distressed consumers who found that a holiday they had bought, in many cases, some 12 months previously, was now going to take them into an area affected by civil strife. It was not uncommon then, and remains the case, that holidaymakers were telling us that they could hear gunshots at night, protests, tanks outside hotels, groups of armed men accompanying holidaymakers on their Nile cruise, cancelled excursions and clear warnings not to venture outside their hotel or resort. This was not what holidaymakers had bought; they were not adventure travellers, they were Package Holidaymakers.

In this mix, we had the further difficulty of the UK Foreign & Commonwealth Office (FCO) apparently refusing to follow other Member States’ or other Countries’ travel advisories and maintaining that it was safe to travel to areas in Egypt - designated by my now infamous swipe at this policy in Twitter (@HTWFrank) as the #thinggreenstripe or #thinggreenspot strategy.

Consumers were caught between a travel company’s intransigence and a foreign policy that seemed to indicate that the UK had to be the last man standing. Holidaymakers were faced with difficult choices. Some would not take the risk with their families and cancelled without advice and were then faced with the difficulty of claiming their monies back. Others were faced with the difficulties of not having valid travel insurance after those companies withdrew cover and were then faced with some travel companies advising them that they could still travel, ignoring the fact that travel insurance was a contractual obligation under their contracts.

Many consumers understood the concept of ‘significant change’ but were faced with an industry which appeared to hide behind FCO advice and seemingly ignoring the fact that the very viability of the holiday was now under threat. This is very well illustrated by the recent calls we have received from UK holidaymakers, flown to Kenya one day and returned the next. A ‘reasonable man’ test would surely establish that planning and logistics would have taken several days to implement before repatriation, so why fly consumers to a ‘risk destination’? Where were their rights relating to ‘significant change’ under the current Regulations?

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6. https://twitter.com/HTWFrank
Cath Urquhart best described this consumer conundrum by commenting on the then Foreign Secretary’s observation that to stay away from the Red Sea resorts (after the Dahab bombing) would be ‘letting the terrorists win’. She stated that “When I go on holiday I want to relax, not be a foot soldier in the War on Terror”.9

And there lies the crux of the problem; the disjoint between a consumer’s right to get what s/he has paid for and the commercial imperative.

**Defining Unavoidable and Extraordinary Circumstances:**

As a result of these consumer experiences we urged the EU Commission that in the drafting of any new Directive regard must be had to the unique element that is summarised as a ‘Risk Destination’ and its effect on the operation of a travel contract. So has the new proposed Directive actually delivered a new Consumer Right?

We must begin by looking at what the Directive means by ‘unavoidable and extraordinary circumstances’.

At preamble 26 of the proposed Directive, it acknowledges that holidaymakers buy their holidays well in advance and that events can intervene that could affect the operation of the package. The preamble sets out various trigger points for changes and refunds whilst recognising the rights of the organiser of the holiday. However, the newly acquired rights of the consumer would appear to be sharply curtailed by the remainder of preamble 26 when it states:

“Travellers should also have the possibility of cancelling the contract at any time before the start of the package against paying appropriate compensation, as well as the right to terminate the contract without paying compensation where unavoidable and extraordinary circumstances like warfare or a natural disaster will significantly affect the package”

and

“Unavoidable and extraordinary circumstances should in particular be deemed to exist where reliable and publicly available reports, such as recommendations issued by Member State authorities, advise against travelling to the place of destination”.

At first reading does this simply returns us to the status quo that all roads lead to the FCO?

At Article 3 (10) we find that unavoidable and extraordinary circumstances is defined in the following fashion:

“‘unavoidable and extraordinary circumstances’ means a situation beyond the control of the trader the consequences of which could not have been avoided even if all reasonable measures had been taken”.

What constitutes an ‘extraordinary circumstance’ has recently developed into a whole new legal niche industry in relation to air passenger rights. The cases of Wallentin-Hermann v Alitalia10 and Sturgeon & Others v Condor11 and the current crop of cases scheduled before

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the UK Court of Appeal reflect the crucial importance of this definition both to consumers and the travel industry.

It is therefore relevant at this stage to note that the concept of ‘extraordinary circumstances’ was not a concept to be found in the current Package Travel Directive (90/314/EEC) but it did appear in the Denied Boarding etc. Regulation (EC 261/2004) which at preamble 14 it states:

“[Limitation of compensation] ... where an event has been caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken. Such circumstances may, in particular, occur in cases of political instability, meteorological conditions [references to flight operations], security risks ... strikes ...”

Further, EC Regulation 1177/2010, which creates passenger rights for those travelling by sea or inland waters provides that extraordinary circumstances:

“...should include, but not be limited to, natural disasters such as fires and earthquakes, terrorist attacks, wars and military or civil armed conflicts, uprisings, military or illegal confiscations, labour conflicts, landing any sick, injured or dead person, search and rescue operations at sea or on inland waterways, measures necessary to protect the environment, decisions taken by traffic management bodies or port authorities, or decisions by the competent authorities with regard to public order and safety as well as to cover urgent transport needs”.

The fallout from the Wallentin and Sturgeon cases along with the infamous Icelandic volcano on air passenger rights, caused the EU Commission to examine the operation of EC Regulation 261/2004 in 2012 and in 2013. They produced a new draft Air Passenger Rights Regulation (implementation expected 2015), which extends the current definition of ‘extraordinary circumstances’ to include (leaving aside aircraft operational issues):

1. Natural disasters;
2. Security risks;
3. Sabotage;
4. Terrorism;
5. Life threatening health risks;
6. Meteorological conditions;
7. Labour disputes.

(This is also reinforced by an interim statement from the Commission and National Enforcement Bodies in April 2013).

So why is this analysis important? Clearly the drafters of the new Directive had in mind the representations and concerns of consumers when seeking to include the new provision at

13. http://eur-lex.europa.eu/resource.html?uri=cellar:439cd3a7-fd3c-4d4a7-8bf4-b0f6060c1d6:0004.02/DOC_1&format=PDF
Article 10(2). However, it is also clear that they consciously decided not to include a wider definition of what constitutes an 'extraordinary circumstance', perhaps to assuage the travel industry?

Whatever the debate of EU membership, on the important point of ‘extraordinary circumstances’ consumers have demonstrated that they will seek to challenge narrow definitions and they will counter challenges to defeat them. To demonstrate how definitions in consumer laws are becoming more important, in the definition of what constitutes a ‘consumer’, the EU Commission is taking a broad view that such a definition should travel intact across any Regulation/Directive they create. It is therefore clear that the EU Commission is seeking to introduce a similar range of definitions from other pieces of travel consumer legislation into package travel rights. I predict that the time will come when the various travel rights regulations/directives will be incorporated into one all-encompassing Directive/Regulation. In the meantime, consumers under the new Package Travel Directive would do well to take a leaf from the air passengers’ book and seek not to rely on what appears at first glance to be a narrowly defined set of circumstances that define ‘extraordinary circumstances’.

Reliable and Publicly Available Reports?

In my view, this is clearly the most controversial area within the preamble to the new Directive for travellers affected by pre-departure problems.

As I set out in the earlier part of this article, there is often a disjoint between the advisories published by the UK FCO and that of their counterparts in EU Member States or other countries, causing confusion and difficulty for consumers.

This was an issue covered by HTW during the various crises in Sri Lanka, Kenya, Tunisia and Egypt. We made the argument that it would be reasonable for a consumer to raise a ‘significant change’ point under the current Package Travel Regulations and demonstrated how it could be done using the following kinds of evidence:17,18

1. Travel review site postings;
2. Local newspapers at the intended destination;
3. Television news items from countries other than the UK;
4. Other countries’ travel advisories;
5. Testimony from those who either live in a destination or who have just returned.

In the future consumers will have to make their arguments in much the same way but the difference will be that the new Directive at last acknowledges the ‘risk destination’ factor.

It is therefore not inconceivable to suggest that the ability for a consumer to rely on Article 10(2) will fall into a five-stage test if taken before a court:

1. Is the definition proposed by the Directive not clear enough? Can examples from other Regulations/Directives be drawn upon? Is it reasonable to do so?

2. Is it reasonable to limit a consumer’s argument simply to FCO Travel Advisories? How far must a court go to accept information from a consumer? How reliable and accurate is that information?

3. Does the information affect the ‘destination’ or its ‘immediate vicinity’? How is such a geographical spread to be defined? Will any limitation prejudice how such a destination or immediate vicinity can be affected in a rapidly changing situation? Is it better to adopt a ‘precautionary principle’?

4. Does the threat of the ‘extraordinary circumstance’ significantly alter the package purchased to the ‘destination’ or the ‘immediate vicinity’? Is the destination wider because of touring opportunities?

5. If answers to points 1 to 4 of the test are answered in the affirmative then the court can conclude safely that the consumer shall enjoy his pre-departure right to terminate the contract.

Concluding thoughts

In this very interesting area it is important to note one further provision of the new Directive which affects travellers pre-departure. Under Article 10(3)(b) the organiser will have the right not to pay compensation if he terminates the contract where an ‘unavoidable and extraordinary circumstance’ arises provided it seems he ‘notifies the traveller of the termination without undue delay before the start of the package’.

I can see the arguments already: can you?

It is this and the areas I have outlined above which will, when implemented, give rise in my opinion to a new but nonetheless important merry-go-round of litigation and will no doubt have a much wider effect on the development of travel consumer law beyond the new Package Travel Directive.

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