

THE DIGEST



NEWS AND RECENT DEVELOPMENTS IN LAW AND PRACTICE IN THE TRAVEL INDUSTRY

CAA. New Guide for Travel Agents

"Improving holiday protection: your guide to how ATOL is changing" is a new guide published by the CAA which has been developed as part of the CAA's ATOL education campaign to help travel agents to easily understand how the reforms announced by the Government earlier this month will affect their work.

The guide covers the key changes to the scheme such as the introduction of Flight-Plus and the new ATOL certificate, which will offer greater protection and improved clarity to UK holidaymakers. A range of case studies are also included in the guide which will help agents to see how the reforms will change the way the holidays they sell are protected from 30 April this year.

Thousands of copies are being distributed to travel agents across the country, and iBook and PDF versions are also available to download so agents can easily use the guide at their desk, at home or on the move.

In addition to the guide, the CAA's ATOL education campaign will also see CAA representatives speak at over 50 events in the coming months. As part of this, ATOL open days offering ATOL holders and agents one-to-one support and advice will be taking place across the UK, whilst further information on ATOL reform is available from a dedicated area on the CAA's website. The guide can be downloaded as a PDF from www.atol.org.uk/reform

(Source: CAA, 27 February, 2012)

Office of Fair Trading. Gym Membership Contracts

The OFT has opened an investigation under the Enterprise Act 2002 into a number of companies that operate gym and fitness club chains or who provide management services to gyms. It is considering whether these companies are using or recommending unfair contract terms in breach of the Unfair Terms in Consumer Contracts Regulations 1999 and/or are engaging in any unfair business practices under the Consumer Protection from Unfair Trading Regulations 2008.

This investigation is at an early stage and it should not be assumed that the parties involved have breached any consumer protection legislation. The OFT will not reach a view on whether the law may have been infringed by any company until it has completed its investigation.

This investigation follows the enforcement order the OFT secured from the High Court in August 2011, which prevents Ashbourne Management Services Limited (AMS), a gym management company, and its directors from recommending, using or relying on certain unfair contract terms and prohibits a number of its debt collection practices which amount to unfair commercial practices.

This judgment provides useful guidance to other businesses in the health and fitness club sector which use similar contract terms. The OFT expects businesses using terms similar to those which have been held to be unfair to amend their contracts accordingly, and to refrain from enforcing unfair terms in existing contracts.

Following the AMS court ruling, the OFT issued a press release advising other gyms to check their contract terms to ensure they were not using similar unfair terms and/or business practices.

[See the article at p. 78 in this issue on the position in Australia]

(Source: OFT, 31 January 2012)

US Department of Transportation: New Airline Passenger Protection

New regulations went into effect in January which will help ensure that consumers are treated fairly when they travel by air. Among the new provisions, part of the airline consumer rule issued by the US Department of Transportation in April 2011, are requirements that airlines and ticket agents include all mandatory taxes and fees in published airfares and that they disclose baggage fees to consumers buying tickets.

Passengers will be able to hold a reservation without payment, or cancel a booking without penalty, for 24 hours after the reservation is made, if they make the reservation one week or more prior to a flight's departure date. In addition, airlines will be required to promptly notify passengers of flight delays of over 30 minutes, as well as flight cancellations and diversions, and they will generally be prohibited from increasing the price of a passenger's ticket after it is bought.

The new rules also will make it easier for passengers to determine the full price they will have to pay for air transportation prior to travel. Currently, airlines and ticket agents are allowed to publish ads that list government-imposed taxes and fees separately from the advertised fare, as long as these taxes and fees are assessed on a per-passenger basis. However, sometimes the notice of these taxes and fees is not obvious to consumers. Under the new requirements, all mandatory taxes and fees must be included together in the advertised fare. The advertising provision took effect on Jan. 26, 2012 while all of

the other consumer protections went into effect on Jan. 24.

In addition, airlines and ticket agents will be required to disclose baggage fees to consumers when they book a flight online. The first screen containing a fare quotation for a specific itinerary must show if there will be additional baggage fees, and inform consumers where they can go to see these fees. Information on baggage fees also must be included on all e-ticket confirmations, and for most trips the same baggage allowances and fees must apply throughout a passenger's journey.

The new requirements are the final provisions to become effective from the Department's most recent airline consumer rule. A number of new measures required by the rule took effect on Aug. 23, 2011, including requirements that airlines refund baggage fees if bags are lost and provide increased compensation to passengers bumped from oversold flights.

The Department is looking at other airline consumer protection measures for a possible future rulemaking, including requiring that all airline optional fees be disclosed wherever consumers can book a flight, strengthening disclosure of code-share flights, and requiring additional carriers to file on-time performance reports.

(Source: DOT, January 23, 2012)

European Commission. DG Mobility and Transport: A European vision for Passengers

In December the European Commission published what it called 'A European vision for Passengers' (COM(2011) 898 final). In the introduction it states:

"Ten years ago in the 2001 White Paper the Commission set the objective to introduce passenger protection measures to all modes of transport. This has now been achieved. With the adoption of passenger rights for bus and coach transport in 2011 the EU now has a comprehensive integrated set of basic passenger rights rules in all modes: air, rail,

waterborne and road transport. The rules on EU passenger rights provide minimum protection for citizens and in doing so facilitate mobility and social integration. They help create a level playing field for transport operators within as well as across modes."

It goes on to say:

"Passenger rights are based on three cornerstones: non-discrimination; accurate, timely and accessible information; immediate and proportionate assistance. The following ten rights that stem from these principles form the core of EU passenger rights:

- 1) Right to non-discrimination in access to transport
- 2) Right to mobility: accessibility and assistance at no additional cost for disabled
- 3) passengers and passengers with reduced mobility (PRM)
- 4) Right to information before purchase and at the various stages of travel, notably in case of disruption
- 5) Right to renounce travelling (reimbursement of the full cost of the ticket) when the trip is not carried out as planned
- 6) Right to the fulfilment of the transport contract in case of disruption (rerouting and rebooking)
- 7) Right to get assistance in case of long delay at departure or at connecting points
- 8) Right to compensation under certain circumstances
- 9) Right to carrier liability towards passengers and their baggage
- 10) Right to a quick and accessible system of complaint handling
- 11) Right to full application and effective enforcement of EU law"

It also states that the current rules need reinforcing because passengers are not aware of their rights or they give them up in frustration because they are costly and cumbersome to enforce and national authorities apply the law in different ways which confuses passengers and carriers alike and creates distortions in the market. A public consultation on air passenger rights is also announced.

(Source: DG Mobility and Transport, 19 December 2011)

Commission for Aviation Regulation, Ireland. New website on air passenger rights.

The Commission for Aviation Regulation in Ireland has launched a new consumer-focused website: www.flihrights.ie. The website is designed to facilitate easy access to information on passenger rights and entitlements in the event of flight cancellations, delays or instances of denied boarding.

The new website will also provide information to disabled persons and persons with reduced mobility about their entitlements when travelling by air.

In addition to the new website, the Commission also launched its Air Passenger Rights Reports for 2010 and H1 of 2011. Links to the reports can be found on the website.

(Source: CAR, 14 Dec 2011)

European Court of Justice. *Jürgen Blödel-Pawlik v HanseMerkur Reiseversicherung AG, (Case C 134/11)*

On 4 August 2009, Mr Blödel-Pawlik booked package travel for himself and his wife with Rhein Reisen GmbH ('Rhein Reisen'), a company which, as a travel organiser, had taken out insurance against insolvency – effective from 1 August 2009 – with HanseMerkur. Rhein Reisen provided Mr Blödel-Pawlik with two notices of guarantee which confirmed that the cost of the trip would be refunded if the travel services failed to be provided owing to the travel organiser's insolvency. Before the start of the trip, Rhein Reisen informed Mr Blödel-Pawlik that it was obliged to declare itself insolvent. It was apparent from the file that Rhein Reisen, represented by a sole administrator, never really intended to organise the trip in question. Both the chronology of events and the transactions shown on the travel organiser's bank account statements revealed fraudulent conduct on the part of that operator. In those circumstances, Mr

Blödel-Pawlik presented HanseMerkur with a claim for reimbursement of the price which he had paid for the trip. HanseMerkur argued, however, that it was not required to arrange a refund, since Article 7 of Directive 90/314 does not cover a situation where the travel has been cancelled solely because of fraudulent conduct on the part of the travel organiser.

The Landgericht Hamburg (Regional Court, Hamburg) was also doubtful as to whether Directive 90/314 seeks to protect consumers against fraudulent conduct on the part of travel organisers. On the view that resolution of the dispute before it depends on the interpretation of Directive 90/314, the Landgericht Hamburg decided to stay the proceedings and to refer the following question to the ECJ for a preliminary ruling:

'Does Article 7 of Directive 90/314 apply where the travel organiser becomes insolvent because, from the beginning with fraudulent intent, it has used all the money collected from the travellers for an improper purpose and it was never intended that the trip would be organised?'

The decision of the ECJ, in the light of the above considerations, was that the answer to the question is that Article 7 of Directive 90/314 is to be interpreted as covering a situation in which the insolvency of the travel organiser is attributable to its own fraudulent conduct. The full text of the judgment is available at the ECJ website.

(Source: ECJ, 16 February 2012)

European Court of Justice. *Christoph Becker v Société Air France SA (Case C-594/11)*

The Amtsgericht Düsseldorf has made the following reference for a preliminary ruling.

Is a passenger entitled to compensation under Article 7 of Regulation (EC) No 261/2004 if the departure time of a flight has been delayed for a period of time falling within the limits defined in Article 6(1) of the regulation, but the flight arrives

at the final destination at least three hours after the scheduled time of arrival? [Note that the same question is being asked in the case of *Ekkerhard Schaub v Transportes Aéreos Portugueses SA (Case C-437/11)* lodged on 26 August 2011]

(Source: ECJ. Case lodged 25 November 2011)

European Court of Justice. *ÖBB-Personenverkehr AG v Schienen-Control Kommission and Bundesministerin für Verkehr, Innovation und Technologie (Case C-509/11)*

The Verwaltungsgerichtshof (Administrative Court) (Austria) has made the following reference for a preliminary ruling.

Is the first subparagraph of Article 30(1) of Regulation (EC) No 1371/2007 of the European Parliament and of the Council of 23 October 2007 on rail passengers' rights and obligations, OJ 2007 L 315, p. 14, to be interpreted as meaning that the national body designated responsible for the enforcement of that regulation may prescribe, with binding effect on a railway undertaking whose compensation terms do not conform to the criteria laid down in Article 17 of that regulation, the specific content of the compensation scheme to be used by that railway undertaking although national law permits that body only to declare such compensation terms null and void?

Is Article 17 of Regulation (EC) No 1371/2007 of the European Parliament and of the Council of 23 October 2007 on rail passengers' rights and obligations, OJ 2007 L 315, p. 14, to be interpreted as meaning that a railway undertaking may exclude its obligation to pay compensation of the ticket price in cases of force majeure, either through application by analogy of the grounds for exclusion provided for in Regulations (EC) No 261/2004, (EU) No 1177/2010 and (EU) No 181/2011 or by taking into account the exclusions from liability provided for in Article 32(2) of the Uniform Rules concerning the contract for

international carriage of passengers and luggage by rail (CIV, Annex I to the Regulation) also for cases of compensation for the ticket price?

(Source: ECJ. Case lodged on 30 September 2011)

Australian Competition and Consumer Commission

The ACCC has instituted legal proceedings in the Federal Court, Melbourne against Air Asia Berhad (Air Asia).

Air Asia is a foreign corporation that carries on a business in Australia as a supplier of international air travel services to the Australian public. The ACCC alleges that Air Asia on its website (www.airasia.com/au) did not display some airfare prices inclusive of all taxes, duties, fees and other mandatory charges. Businesses that choose to advertise a part of the price of a particular product or service must also prominently specify a single total price.

The alleged conduct is in relation to the following flights between:

- Melbourne and Macau, London, Ho Chi Minh City, New Deli, Hangzhou and Chengdu
- Perth and Taipei, Phuket, Osaka, London, Ho Chi Minh City, and Hangzhou, and
- Gold Coast and Ho Chi Minh City.

The ACCC alleges the conduct contravenes section 48 of the Australian Consumer Law within the Competition and Consumer Act 2010. The ACCC is seeking:

- declarations that Air Asia contravened the *Competition and Consumer Act 2010*
- an injunction to restrain Air Asia from engaging in misleading conduct in the future
- a court order that Air Asia publish corrective notices on its websites regarding the conduct
- penalties, and
- ACCC costs.

(Source: ACCC, 24th January 2012)

Canadian Transportation Agency

Malcolm Johnson filed an application with the Canadian Transportation Agency (Agency) pursuant to subsection 172(1) of the Canada Transportation Act, S.C., 1996, c. 10, as amended (CTA) against Air Canada with respect to additional fees charged for economy class seats that afford extra leg room. Mr. Johnson submitted that, due to his height, he cannot sit in a "regular seat" without endangering his health due to restricted circulation in his legs from cramped seating.

Mr. Johnson requested that Air Canada eliminate the additional fees charged to persons who, due to their height, need economy class seats that afford extra leg room. In addition, Mr. Johnson asks that Air Canada reimburse him "for all previous flights where [he had to pay] for extra leg room seating".

The issue was whether Mr Johnson is a person with a disability for the purposes of Part V of the CTA due to his height?

It was decided that Mr. Johnson did not provide evidence to demonstrate either a loss or abnormality in body structure or physiological function associated with his height. As such, the Agency found that Mr. Johnson had not met his evidentiary burden of demonstrating the existence of an impairment, which is a pre-requisite to a positive finding of disability.

(Source: CTA, 3 January 2012)

Advertising Standards Authority: TripAdvisor LLC

Claims on tripadvisor.co.uk, a website providing holiday and travel consumer reviews, stated "... read reviews from real travellers ... TripAdvisor is the world's largest travel site, enabling travellers to plan and have the perfect trip. TripAdvisor offers trusted advice from real travellers and a wide variety of travel choices and planning features ...

TripAdvisor.com features: More than 50 million honest travel reviews and opinions from real

travellers around the world". Review pages on the website featured the TripAdvisor logo next to the claim "Reviews you can trust" above a chart that gave details of the rating summary and percentage recommendation of the relevant location. The website was viewed in July 2011, when TripAdvisor was owned by Expedia, Inc.

KwikChex Ltd and two hotels challenged whether the claims "Reviews you can trust", "... read reviews from real travellers", "TripAdvisor offers trusted advice from real travellers" and "More than 50 million honest travel reviews and opinions from real travellers around the world" were misleading and could be substantiated, because they understood that TripAdvisor did not verify the reviews on their website and therefore could not prove that the reviews were genuine or from real travellers.

TripAdvisor LLC (TripAdvisor) said they provided a unique forum for travellers to obtain impartial, unbiased information from numerous sources, reflecting a wide variety of backgrounds and opinions. They said users were able to choose from any number of individual reviews that were posted on the site, and that whilst their users would not expect every reviewer to share their subjective tastes, the high level of trust that users placed in the site was demonstrated by the site's continued growth since it was founded ten years ago. TripAdvisor said they did not claim to be 100% fraud free; no review site could guarantee that it was 100% free of fraudulent content. They said, however, that they did use advanced and highly effective fraud detection systems, and dedicated substantial resources to identifying and minimising any non-genuine content.

TripAdvisor said users would not continue to rely on the site if they did not trust the content, and they provided data showing a high volume and proportion of repeat visitors to the site. They said the number and proportion of reviews contributed by repeat reviewers was also high and growing. TripAdvisor said an independent study conducted in July 2011 showed that respondents found reviews on the site to be accurate of their actual experience of the hotels they had visited. They said, in addition,

a growing number of companies had entered into agreements to feature TripAdvisor content, and a large number of hotels and other providers currently used their self-service 'widgets' to automatically add updated TripAdvisor reviews to their own websites. TripAdvisor believed that review content distribution was the most widely adopted of its kind in the industry and spoke volumes about the travel industry's confidence in their website.

TripAdvisor said, whilst they were concerned about any non-genuine content, they maintained that the practical impact of small numbers of fraudulent reviews was effectively negligible. That was because research data showed that the average traveller read dozens of reviews before making a booking, and tended to discount reviews that were significantly out of line with others. TripAdvisor said their users had experience of other unrelated online review sites more generally, such as for music, books and consumers products, and as a result tended to have a healthy scepticism of user reviews in general. They believed that mitigated the effect of any fraudulent content that might occasionally come to a user's attention.

TripAdvisor said, because trust was such a key component in the site's ongoing success, they had invested heavily in systems, processes and resources to identify and minimise fraudulent content: they provided details of their anti-fraud systems in confidence. TripAdvisor said they also provided an opportunity for owners or managers of hotels and other locations to respond to reviews publicly on the site, and required that every review was accompanied by an active declaration from the reviewer that it was genuine and honest. They said that declaration clearly informed the reviewer that any fake reviews were both illegal and prohibited by their terms and conditions. TripAdvisor said it was not practical for them to screen each and every item manually before it was posted, and explained that their independence from the operators and the site's non-transactional nature meant that there was no practical way for them to verify identities by reference to credit card details or reservation details, for example. They explained, however, that the

techniques and practices they used to combat fraud were ever-evolving and increasingly sophisticated, and kept fraud to an extremely low level.

The complaints were upheld. The ASA considered that consumers would understand the claims "Reviews you can trust", "... read reviews from real travellers", "TripAdvisor offers trusted advice from real travellers" and "More than 50 million honest travel reviews and opinions from real travellers around the world" to mean that they could be certain that the reviews posted on the site were from genuine travellers, and accurately reflected those travellers' experiences of the places they visited.

The ASA noted that reviewers were asked to agree to a declaration that their review was their genuine opinion of the hotel and that they had no personal or business affiliation with the hotel, or been offered an incentive to write a review for it. The ASA also noted that reviewers were not asked to similarly confirm that they had no competitive interest in the place they were reviewing, or were posting a review on behalf of a competitor or other interested party, and the ASA did not consider that agreeing to a declaration in itself would necessarily prevent non-genuine reviews from being posted on the site.

Notwithstanding that, the ASA understood that reviews could be placed on the site without any form of verification, and that whilst TripAdvisor took steps to monitor and deal with suspicious activity, it was possible that non-genuine content would appear on the site undetected.

The ASA noted that TripAdvisor allowed hoteliers a 'right of reply' to critical or negative reviews posted on the site and that they believed that users of the site had a healthy scepticism as a result of their experience of review sites more generally. However, the ASA did not consider that consumers would necessarily be able to detect and separate non-genuine reviews from genuine content, particularly where a hotel or other establishment had not received many reviews, and nor did the ASA consider that a hotelier's response in itself would go far enough to alert consumers to, and moderate, non-genuine content.

Because the ASA considered that the claims implied that consumers could be assured that all review content on the TripAdvisor site was genuine, when the ASA understood that might not be the case, they concluded that the claims were misleading.

(Source: ASA, 1 February 2012)