

# What are unavoidable and extraordinary circumstances under the PTRs?



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**If you do not change direction, you may end up where you are heading. – Lao Tzu**

The jury's out as to whether this great philosopher was predicting the content of the 2018 Package Travel and Linked Travel Arrangements Regulations or whether the draftsmen were themselves philosophers... One thing is clear however: the 2018 Regulations require a transformation of the travel industry's approach to managing change.

## The challenge

The consumer protection impetus behind the new Regulations is clear. The accompanying guidance to the EU Directive describes the new Regulations as providing 'strong cancellation rights', apparently necessitated by the combination of early financial commitments, with a perceived vulnerability of packages to changing circumstances. However, when you are an organiser of a complex package with multiple suppliers, a change to the holiday contract at the drop of a hat requires a uniquely high level of flexibility.

In recent times the industry has had to show precisely this. Drone disruption, rapidly spreading Zika virus, increased (and increasingly random) terrorist attacks have all created a situation where the traditional touchstone of advice, the Foreign and Commonwealth Office (FCO), does not always provide the answer the industry needs, or within the right timeframe. The recent issues caused by the Boeing crisis have highlighted the difficulties for the travel industry where inconsistent advice is being given by organisations internationally.

## The changes made

At part 3, Regulations 9–12, you will find the relevant statutory provisions for changes to the holiday contract. In summary, the changes mean that travellers can now cancel their package for any reason (subject to a reasonable, justified fee). There are stricter criteria for passing on price increases to the traveller and the traveller can cancel free of charge where the package price is raised more than 8% of the original price. Furthermore, travellers now take the benefit of price decreases, which must be passed on if the organiser reserves the right to surcharge.

This article focuses on the changes at Regulations 12 and 13: enabling both the traveller and the organiser to cancel a package due to 'unavoidable and extraordinary' circumstances.

While both incorporate the same concept, the duties and rights of the two parties to the contract differ. Regulation 2(1) defines unavoidable and extraordinary circumstances as a situation which is:

- a) **'Beyond the control** of the party who seeks to rely on such a situation for the purpose of regulation 12(7), 13(2)(b), 15(14) or (16), 16(4)(c) or 28(3)(b) and
- b) The consequences of which could not have been avoided **even if all reasonable measures had been taken.**'



## The traveller's right to cancel

The new Regulations provide an unrestricted right to the traveller to cancel the contract 'at any time'.

Regulation 12(7) states that in the event of **unavoidable and extraordinary circumstances** occurring at the place of destination **or its immediate vicinity** and which **significantly affect**:

- a) the performance of the package, or
- b) the carriage of passengers to the destination, the traveller may terminate the package before the start without paying any termination fee and is entitled to a full refund of payments made for the package but is not entitled to additional compensation.

As will be clear from the text above, it is crucial when you are considering such situations to ensure that the second limb of the test is satisfied, ie, that the performance of the package or the carriage of passengers is significantly affected by the event.

Situations such as this were described as 'unusual and unforeseeable' circumstances in the old Regulations. In its response to the consultation exercise preceding the new Regulations, the Government considered that there was no change in substance and sought to emphasise that this term only applies in situations significantly affecting the performance of the package.

In my opinion, this is rather an optimistic view of lawyers' sense of restraint!

There is a difference in emphasis with the word 'extraordinary' rather than 'unusual', which arguably creates a slightly higher threshold. Further, the word 'unavoidable' imports a practical consideration of whether something is possible, versus the more theoretical concept of whether something is 'foreseeable'.

To return to the definition at Regulation 2(1), the key issue will be whether it is (a) beyond your control and (b) something that is unavoidable even taking all reasonable measures. See, we lawyers just can't resist.

No guidance is provided within the Directive or the Government's guidance on the new Regulations as to what is meant by the 'immediate vicinity' and this is also likely to be a source of keen debate in the legal profession; however, the key issue here, again, is whether the event significantly affects the performance of the package.

## The organiser's right to cancel

But what of the position of the organiser? Regulation 13(2)(b) deals with the organiser's ability to terminate in extraordinary and unavoidable circumstances. A full refund is triggered again and there is an additional requirement to inform the traveller without 'undue delay' – it is worth noting that there is no such requirement on the traveller under 12(7).

## When will this apply?

The industry has hitherto considered the FCO the touchstone for advice on travel safety, however, the recent events referred to above haven't always been within the FCO remit.

In fact, in the Government's response to the consultation exercise it sought to reframe the role of the FCO: 'We know that travel companies often take FCO travel advice into account and it is encouraging that many respondents consider it to be a useful and objective benchmark. However, we would like to emphasise that we advise against all or all but essential travel only when we judge there to be a significant risk to the safety and/or security of British nationals. Therefore, travel advice may not cover all issues that could be considered by a customer or travel company to significantly affect the performance of a travel package.'

## So where does this leave us?

Firstly, the FCO advice is still highly relevant and useful in many situations. Secondly, it is imperative that whatever the issue, you ensure that the second limb, of the significant impact on the performance of the package, is satisfied.