

# TRAVEL LITIGATION AND COVID-19

## ARE YOU READY FOR THE “NEW NORMAL”?

A Joint Practical Guide from 2TG and DAC Beachcroft Madrid

Spring 2020

The travel industry has been hard hit by the COVID-19 crisis, with grounded flights, trip cancellations, repatriations and thousands of guests quarantined in hotels and on cruise ships. There has had to be sensitive, careful management of critical situations on both a human and an economic level. This unprecedented situation follows a series of previously unimaginable challenges for the global travel industry such as increased (and increasingly random) terrorist attacks, the Boeing crisis and the Zika outbreak, to name but a few.

Can this resilient industry rise to this latest challenge?

At a legislative level, tour operators, hotels and airlines have been pressing for their Governments to take steps so as to provide some financial stability in the coming months and to protect the jobs of the thousands of people working within the industry in the medium and long term.

In Spain, the travel industry represents approximately 12.5% of GDP and approximately 2.6 million jobs. In the UK it represents 10% of GDP and supports approximately 3.8 million jobs.

Shortly after the declaration of a global pandemic by the WHO in March 2020, the European Commission responded to the industry's calls and published guidance to try to mitigate the effect of the stringent duties imposed by the Package Travel Directive 2015/2032.



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The standard position under the Directive is that either the organiser or the traveller can cancel the holiday, without penalty, where there are *'unavoidable and extraordinary circumstances occurring at the place of destination or its immediate vicinity and significantly affecting the performance of the package, or which significantly affect the carriage of passengers to the destination'* (Article 12(2) of the Package Travel Directive).

The traveller is then entitled to a refund without *'undue delay'* and in any event within 14 days.

The Commission's guidance encourages travellers to accept credit notes ("vouchers") but preserves the right of customers to request a full refund. This Guidance was warmly received by travel associations across Europe as a sensible means of easing their members' liquidity restrictions caused by the paralysation of the travel industry.

However, some countries have taken this further and have legislated for this change in the contractual obligations imposed by the Directive.

In Spain, on 31<sup>st</sup> March 2020, the Spanish Government issued the Royal Decree 11/2020 adopting urgent measures in respect of COVID-19. In respect of package travel contracts, the Royal Decree states as follows:

- Retailers and organisers can issue vouchers equal to the value of the package with a validity of one year from

the date of cancellation under the condition that they have sufficient financial support to guarantee its performance. These vouchers may be redeemable for cash if they are left unused after one year.

- Travellers may accept the voucher or request a refund. That said, refunds are subject to retailers and organisers being able to recover the amounts from their individual supplier, meaning that for multiple suppliers under a package: i) if only one supplier provides a full, or a partial, refund of its services to the retailer or the organiser, the traveller will only be entitled to receive that partial refund, and ii) this partial refund will be discounted from the amount of the voucher.
- A refund will be issued within 60 days of termination of the contract or from the date on which the organiser received the funds from their suppliers.

These measures depart from the Package Travel Directive in two key regards. Firstly, a refund is no longer compulsory, provided that the retailer or organiser has not received the funds. Secondly, the refund period has been extended to 60 days (as opposed to the original 14 days).

In contrast, the UK Government has not yet amended the Package Travel and Linked Travel Arrangements Regulations 2018, despite

repeated pleas to do so from the UK travel industry.

The Government has simply adopted the approach of the European Commission in recommending that vouchers are issued in lieu of refunds. However, in the absence of any legislative change, travellers are still contractually entitled to simply seek a refund within 14 days.

This is notwithstanding the urgent need to protect the long term financial health of the sector in the short term; in particular, given the recent announcement of likely job losses by two of the UK's largest employers in this sector: TUI UK Limited and British Airways.

Separately, the recent announcement by the UK Government of a 14-day quarantine on people arriving into the UK has been met with bewilderment and frustration. Despite there being no such restrictions at the height of the outbreak in the UK, the industry has been told to expect such measures at 'some point in the future'. Unsurprisingly, the aviation industry has challenged the practicalities of this scheme and warned of its likely damage to the economy.

However, there are glimmers of the recovery to come on the horizon. Numerous European airlines have indicated plans to operate at least 50% of flights across Europe by July 2020 with social distancing measures and temperature checks in place. In spite of the UK's plans for quarantine, other European countries are exploring initiatives to establish travel 'bubbles'

or safe tourism zones within which travellers can visit a small group of countries. Indeed, even under the outline plans from the UK for quarantine, visitors from France are exempt. Fortunately, the French Government has reciprocated the offer.

Countries presently less affected by COVID-19, such as Greece, are yet more ambitious and expect to be welcoming tourists, in June 2020 for domestic travel and July 2020 for European visitors; albeit with many of the usual attractions closed. Greece has recently urged the European Commission to adopt its suggested policy of requiring travellers to undergo a COVID-19 test 72 hours prior to departure as a means to safely restart its tourism industry.

Sicily has adopted the novel approach of suggesting that it will subsidise visitors' holidays by up to 50% of the cost of flights and 33% of the cost of hotel accommodation through a voucher scheme for those booking holidays in Autumn 2020.

Other countries harder hit by the pandemic are very slowly allowing the reopening of businesses under strict conditions. In Spain, the process for easing the lockdown began on 4<sup>th</sup> May 2020 and it is expected that "new normal" may be reached as from 22<sup>nd</sup> June 2020. In England, it seems that restrictions may be eased in the hospitality sector from early July 2020 – although this is an ever-changing picture.

It is hoped that there will be a lot of 'pent-up' demand for holidays in summer and autumn

given that the Easter season was obliterated by COVID. However, in order to continue this recovery, not only do airlines and hotels need to be operational but also travellers need to be confident that when they book their holidays, that they will go ahead as planned.

This recovery will need to go hand in hand with key players in the insurance sector re-entering the travel insurance market.

Given that the industry will need to take its first steps towards reopening in the absence of a vaccine for COVID-19, the hotel industry, in particular, has been actively working on strategies to enable hotels to reopen safely and in a way that will meet the need for public confidence.

For example, some hotels and hotel associations are working on a "COVID FREE" certificate which will be given to those establishments demonstrating the implementation of protocols minimising COVID-19 risk.

We anticipate that these protocols will follow the recommendations set out in the Guidance published by WHO on 31<sup>st</sup> March 2020<sup>2</sup> covering aspects specifically related to the accommodation sector, such the creation of an action plan and risk assessment, the provision of training and necessary equipment to employees, satisfactory social distancing measures and an appropriate cleaning and disinfection process.

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<sup>2</sup> Operational considerations for COVID-19 management in the accommodation Sector. Interim Guidance 31 March 2020.

However, what will happen if a guest, or a group of guests, reports coronavirus during their stay at the hotel? What will happen if this guest, or group of guests, brings proceedings alleging that coronavirus was contracted in the hotel as a result of improper performance on the part of the hotel or on the part of the organiser? What defences are available for hotels, organisers and liability insurers in these circumstances?

Leaving aside the force majeure argument (a topic in itself, that will be subject of a separate article), in our opinion, we will need to consider two aspects of the hotels' systems in assessing breach of duty.

- First, what proactive measures does the hotel have in place in order to monitor, detect and prevent the risk of COVID-19 being present in the hotel?
- Second, what systems does the hotel have in place when the case or cases are detected in order to contain or control the spread of the virus?

This assessment of reasonable care has been, and is, the main battleground in collective claims for damage caused by the existence of more familiar diseases such as norovirus and Legionnaires' disease. In these claims, the relevant question when determining liability was not whether the virus or pathogen was in the hotel, but rather whether the hotel exercised

reasonable care in its efforts to prevent it, detect it and contain it.

The pleadings in COVID-19 related cases will likely not differ from those in norovirus or other such claims: the existence of a system to prevent the contagion and spread of the virus, that system's efficiency and its timely and correct implementation by the hotel will be determinative of whether the relevant duty has been breached.

Key to the industry's response to this crisis going forward will be preparing for these new systems to be adopted, bearing in mind the ever-changing scientific understanding of this new disease.

Are hotels, organisers and their legal teams ready for this "new normal"? Judging by the industry's nimble response to crises past, we are very optimistic.

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*"She's very friendly and approachable." "She has superb technical skills and provides very clear and structured advice. She is always efficient, friendly and pragmatic."*



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