

TRAVEL LAW **UPDATE**



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TRAVEL LAW UPDATE



Package Travel Directive

Refunds on cancellation



Athens Convention

Accidents on vessels



Montreal Convention

Regulation 261
(Flight Delays/Cancellation)



PACKAGE TRAVEL DIRECTIVE – REFUNDS!

The most significant 'grey area' exposed by the COVID-19 pandemic!

- **Millions** of package holidays were cancelled due to the COVID-19 pandemic
- **Consumer claims:** Not everyone had travel insurance, or insurers refused to pay out
- **Subrogated claims:** Travel insurers are now making 'subrogated claims'
- **High value bookings:** e.g. school trips: 40 students at \$3,000 EUR pp = \$120,000

A game of 'who blinks first'?

- Consumers want to cancel asap to avoid an increase in cancellation charges
- Package organisers want to cancel as late as possible to avoid refunds



REFUNDS UNDER ARTICLE 12(2)

The traveller has the right to terminate the package and receive a full refund if:

- They cancel the package **before** it starts,
- There is a situation occurring at the **place of destination**
- The situation is beyond the traveller's control and the consequences could not be avoided even if all reasonable measures are taken: 'unavoidable and extraordinary circumstances' or '**UEC's**',
- The UEC's **significantly affect** the performance of the package, or carriage of passengers to the destination

A FEW HOLES - PROXIMITY | PROBABILITY | HINDSIGHT

REFUNDS UNDER ARTICLE 12(2)



Post-Pandemic Case Law...

- (1) UK court decisions
- (2) German court decisions
- (3) Referrals to the CJEU



THE STORY SO FAR....

ARTICLE 12(2) – THE UK COURTS



Brynmawr Foundation School v Holiday World Int. Travel, Cardiff CC 7 December 2021

When cancelling a package holiday under Article 12(2):

- *“there must be an element of looking to and predicting the future and deciding what is likely to happen... except perhaps in the case of a destination itself or all permissible means of transport being irreparably destroyed by fire or some other catastrophe”*
- *“An alternative interpretation = right to terminate is provisional and must eventually be reviewed with hindsight. I do not think it is a correct interpretation”(Refunds due within 14 days) ”*
- This accords with Recital (31) of the Directive: travellers ‘should also have the right to terminate.... without paying any termination fee where unavoidable and extraordinary circumstances will significantly affect the performance of the package’;

PROXIMITY | PROBABILITY | HINDSIGHT

ARTICLE 12(2) – THE UK COURTS



What actually happened in Brynmawr?

- School trip was cancelled by the school in late March 2020
- School trip was due to depart in early April 2020
- School awarded a full refund!
- Lower court decision – not binding on other Judges/courts

My view?

- **100%** agree with the legal analysis
- **100%** agree with the decision

ARTICLE 12(2) – THE COURTS OF GERMANY



QM v Kiwi Tours GmbH, Bundesgerichtshof (Germany)

- Trip due to depart to Japan, 3rd April 2020
- Japan goes into lockdown (long before UK!), 26th February 2020
- Traveller cancelled the booking, 3rd March
- Japan restrict entry for tourists, 26th March

DECISION?

- First Hearing: Traveller is entitled to a full refund
- Appeal Hearing: Cancellation charges apply because:
 - It was ‘too soon to cancel’. The lockdown measures could have been successful
 - Events after cancellation are not relevant – i.e. Japan closing its borders on 26th March
 - An assessment must be based on knowledge available at the time of termination

My View?

- **Agree, but this is a close call!**

ARTICLE 12(2) – THE COURTS OF GERMANY



Trendtours Touristik GmbH v SH: Landgericht Frankfurt am Main (Germany)

- German gov advised against travel to the Canary Islands due to a rise in COVID-19
- Traveller cancelled the package the next day, 3rd September 2020
- Advice against travel lifted, 24th October
- Trip departed to Gran Canaria as planned, 4th November

DECISION?

- Full Refund! Traveller did not cancel the trip too early
- There was > a 25% likelihood that there would be a significant health risk at the time of the trip

My View?

- **Disagree!** 'too soon to call'

ARTICLE 12(2) – THE UK COURTS



Mr Manish Patel & Others –v- P & R Travel Agency, Northampton CC, 22 July 2022

- School trip was due to depart to Tanzania, 14th July
- School cancelled the trip 16th April
- At the time of cancellation:
 - UK government advised against all but essential travel to Uganda
 - Flights to Uganda suspended until 5th May 2020
 - Restrictions in Uganda in place until 5th May 2020

DECISION?

- *“The position was clearly continually under review. In my Judgment he terminated the agreement too early and thus he is not entitled to a full refund under Article 12(2)”*

My View?

- **100%** agree! ‘Too Soon to Call’

ARTICLE 12(2) – THE UK COURTS



Cledford Primary School –v- Travel Class, Chester County Court, 3rd Feb 2023

- Domestic UK School trip, due to start in March 2021
- On 22nd September 2020, UK announce further lockdown restrictions expected to stay in place for 'about 6 months'
- School cancelled the trip 29th September 2020 (5-6 months prior)

DECISION?

- Judge agreed with the analysis in Brynmawr, yet concluded that....
- The school were entitled to a full refund *"I do not accept, having regard to the facts known at the time of the cancellation (but also, incidentally, with the benefit of hindsight), that the interval of time between the cancellation and the booking makes any material difference to my conclusion"*.

My View?

- **Nonsense** | Boris Johnson Bingo | Crystal Ball | Airline Payments | Appeal?

ARTICLE 12(2) – THE UK COURTS



PROXIMITY | **PROBABILITY** | HINDSIGHT

Travelsphere Cases, 2005 & 2014 – ‘a flicker of hope’

- *Package organisers do not have to cancel trips for so long as there is a ‘flicker of hope’ that the holiday can proceed, i.e. until it is ‘absolutely inevitable and unavoidable’ that the organiser is forced to make ‘significant changes’ to the holiday.*

STILL GOOD LAW?

Sherman v Readers Offers Limited, High Court, 2023 (UK) – “reasonable possibility”

- Flicker of hope ‘sets the bar too low’
- Objective of the Directive is to ensure a high level of consumer protection
- **NEW TEST:** Organisers don’t need to cancel until there is ‘no longer a reasonable possibility’

NOTE: (1) PROBABLY BINDING ON LOWER COURTS

(2) BUT...ARTICLE 11 (not 12) & 1990 DIRECTIVE – should they be mirrored?

ARTICLE 12(2) – OUTSIDE OF THE UK



THE **PROXIMITY** TEST – GERMANY

- Industry standard is that cancellation charges of 20-25% apply for cancellation up to 4 weeks before departure. It increases steadily after that point,
- It might therefore be justified for the traveller to have until that point in time in order to decide whether or not to cancel

THE **PROBABILITY** TEST – GERMANY

- There must be a 'substantial degree of probability'....
- 'force majeure' applies where there is a threat to the life and limb of the traveller with a likelihood of occurrence of at least 25%

EU DIRECTIVE 2015 – Information Requirements provided to customers must say...

- *Travellers may terminate the contract without paying any termination fee before the start of the package in the event of exceptional circumstances, for instance if there are serious security problems at the destination which are **likely** to affect the package.*

ARTICLE 12(2) – OUTSIDE OF THE UK

PROXIMITY | PROBABILITY | HINDSIGHT

WHERE DOES THAT LEAVE US? 🤔

Full Refunds apply where...

- there is no longer a 'reasonable possibility'? (UK)
- there is a 'substantial degree of probability'? (Germany)
- there is at least a 25% chance of health risks? (Germany)
- UEC's are likely to affect the package (EU Directive Info Requirements).... > 50%?

CAN THE CJEU COME TO THE RESCUE?



ARTICLE 12(2) – CJEU REFERRALS | HINDSIGHT



QM v Kiwi Tours GmbH: (Case C-584/22): 

Referred to the CJEU for preliminary ruling: 5 September 2022

- Where travellers cancel and seek a full refund under Article 12(2) of the Package Travel Directive:
 - Is the assessment of the justification of the termination based solely on UEC's which have already occurred at the time of termination, or
 - Is it also necessary to take into account UEC's that actually occur after the termination but before the planned start of the journey?

My Guess?

- Based on the time of cancellation
- Ignore events after cancellation



ARTICLE 12(2) – CJEU REFERRALS



Trendtours Touristik GmbH v SH (Case C-170/23) 

Referred to the CJEU for preliminary ruling: 20 March 2023

- Where travellers cancel and seek a full refund under Article 12(2) of the Package Travel Directive:
 - (1) Does the right to cancel under Article 12(2) 'lapse' if there were UEC's at the place of destination, but they no longer exist at the time of departure, or is it based solely on a prediction at the time of the cancellation? **(HINDSIGHT)**
 - (2) up to what point in time must the traveller wait until he or she is entitled to cancel under Article 12(2) **(PROXIMITY)**

My Guess?

- (Q2) There must be a [**PROBABILITY**] that UEC's will apply... etc
- (Q2) Leave it for the national courts to determine?



ARTICLE 12(2) – CJEU REFERRALS



Austrian Supreme Court (OGH 4 Ob 184/22) 

Referred to the CJEU for preliminary ruling: 25 April 2023

- Where travellers cancel and seek a full refund under Article 12(2) of the Package Travel Directive, does it matter if:
 - *the UEC's already existed at the time of booking?*
 - *the customer was aware of the UEC's at the time of booking?*
 - *the UEC's were 'foreseeable' at the time of booking?*

My Guess?

- It doesn't matter!



ALSO IN THE NEWS!



REGULATION 261 – Flight Delays/Cancellations

TAP Portugal v flightright GmbH (C-156/22); Myflyright GmbH (C-157/22 and C-158/22)



- Sudden death of co-pilot, outside the airline's base, no medical problems
- Compensation applies! No defence of 'extraordinary circumstances'

MONTREAL CONVENTION

Mather v easyJet Airline Co Ltd, S.L.T. 209 (2023), Court of Session



- airline liable for uncapped damages to a disabled passenger
- injured when disembarking a flight, fell from a wheelchair being pushed by an employee of a ground handling company, deemed to be 'agent of the airline' (as per USA authorities)

PACKAGE TRAVEL DIRECTIVE 2015



FTI Touristik GmbH (Case C-396/21)

- Guidance for calculating 'price reductions' when holidays start but are affected

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