

Air Passenger Rights and Covid-19 restrictions

Study of the European Consumer Centre Luxembourg

Study on the legal situation for flights operated normally by the airline but a passenger is not allowed to enter the destination territory due to Covid-19 restrictions (quarantine imposed, border closed for specific nationalities, etc...).

Introduction

Due to Covid-19, we are currently experiencing situations that we were not used to. As airlines costumers, we were clear about the conditions of our tickets, however this "certainty" has changed due to the current conditions. Through this study we want to respond to some situations that could arise.

For example, what would happen if given airlines operate again flights, for instance from Greece to France, but the French border restrictions due to Covid-19 still prevent the normal, average passenger (i.e. not French citizen or resident, among others) to enter French territory, it means these passengers cannot take their flights. Will they simply lose their tickets unless the airlines offer on their own commercial initiative a reimbursement/ re-scheduling? Or can they invoke the 'fait du prince' as a kind of force majeure which takes away the mere purpose of the transport contract concluded with the airline (e.g. caducité du contrat, Wegfall der Geschäftsgrundlage)?

Different airlines have different rules over what the passenger can do but many are waiving any charges for changing to a later flight or having a voucher instead.

In this scenario, what would happen if the passenger decides against going on a future flight, which is not yet cancelled, then there is no right to a refund? The passenger's travel insurance may, or may not, cover this new situation.

The current scenario

If a person decides to cancel the travel due to health concerns, usually it is not possible to cancel it for free. The passenger has to accept the regular cancellation terms. If the ticket offers the option of changes and cancellation, such benefits will apply, sometimes for free, sometimes the passenger will have to pay a price difference for change the date or fees for cancellation of the ticket, or in some cases the loss of the ticket, all depends on the fare rules in the "contract" that governs the ticket.

In this regard, some forums and websites mention that tour operators are usually a bit more generous regarding cancellation than the airlines. Also is important to highlight that depending how far in advance the passenger cancel, he/she will always get a certain part of the money back.

The airlines, due to the current situation, are applying different rules for flights that might be cancelled, such as free date changes; but this is up to the each airline to do so, since the flight is not officially cancelled. Some passengers have experienced that airlines tried to reimburse them with a voucher (valid up to one year) instead of money. Airlines state extraordinary circumstances to justify their position. It appears that various carriers are offering vouchers to passengers, who do not want to (or are not authorized to) travel any more as a result of the outbreak of Covid-19. Passengers can use these vouchers for another trip with the same carrier within a timeframe established by the carrier.

One of the different policies being implemented by the airlines can be seen with "Emirates" which has established that starting on April, 14, 2020; the airline offers full refunds regardless of ticket regulations. (Until then, Emirates denied any requests for monetary refunds.) Further option is the ticket can be put on hold up to 760 days after issuance. This way, it will remain valid and the passenger can alter it at a later point. After twelve months, the passenger can opt to get a full refund instead. The most important requirement is that the first segment on

the ticket happens on or before November, 2020 (this deadline may be extended in the future).¹

In case the passenger decides to opt for the refund or travel voucher even if the flight hasn't been cancelled yet, Emirates requests that the cancellation of the ticket has to be related with the Covid-19 situation, if is not "the refund or voucher amount will be processed according to the fare rules available on the ticket. A change fee and/or a difference in fare may also apply if the passenger chooses to change the date or destination of the booking".²

Voucher/reimbursement situation: If the carrier proposes a voucher, this offer cannot affect the passenger's right to opt for reimbursement instead, because if the flight is cancelled by the carrier, the rule to apply is the Regulation 261/2004³. In this sense, the Commission in its Notice Interpretative Guidelines on EU passenger rights regulations in the context of the developing situation with Covid-19⁴, states that: if the airline cancels the flight, passengers have the right to get their money back. Compensation in form of a voucher is lawful, but the voucher does not revoke a passenger's right for a monetary compensation.

By the other side, what happens if there is a confirmed health risk in the destination country - i.e. a warning issued by the Department of Health or Public Health of a government? For these passengers the flight tickets will be refunded, free of charge. In all other cases, the regular cancellation conditions of the airline will be applied.⁵

Other case will be if there is an entry general ban in the country of destination. If a flight is cancelled, passengers have no right to compensation because, as the airlines argued, this is an *exceptional circumstance*. Nevertheless, passengers can have their ticket costs reimbursed or rebooked.⁶

However, there is not legislation in place on the right of airline passengers to cancel their own flights, meaning that their ability to do so will depend on the airline's terms and conditions on tickets, the airline's desire to be flexible, the current situation in the destination area, measures implemented by authorities and the timing of flights. It is quite possible that

¹ <https://travel-dealz.eu/deal/emirates-rebooking-policy/>

² <https://www.emirates.com/english/help/keep-your-ticket/>

³ Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91. <https://eur-lex.europa.eu/legal-content/en/ALL/?uri=celex:32004R0261>

⁴ <https://ec.europa.eu/transport/sites/transport/files/legislation/c20201830.pdf>

⁵ <https://www.flightright.com/coronavirus-cancellations>

⁶ <https://www.flightright.com/coronavirus-cancellations>

passengers will not be able to cancel or reschedule the majority of current low-fare flights without any costs. Passenger will be dependent on the goodwill regulations and terms and conditions of the airlines for forthcoming trips to countries with entry bans or travel warnings. There are no special rights for a free cancellation or rebooking.

With a more global view, outside the European Union, the United States is trying to pass a law to regulate these circumstances to extend benefits (cash refunds) to passengers who decide to cancel their tickets even though the airline has not cancelled the flight.⁷

With regard to the possibility of invoking "fait du prince", is possible that a positive outcome would be unlikely. According to the theory of "fait du prince", this can be explained as the alteration provoked in the conditions of an administrative contract, unpredictable for the contracting governed and to their detriment, arising from decisions taken or conduct assumed by the contracting authority, not as part of the contract, but in the exercise of the derived from its nature as a public authority. Strictly speaking, it refers to the decision of a State entity, within a contract relationship. This theory could not be applied because the State is not a binding party to the contract between the airline and the passenger. On the other hand, if we take this theory from a broader conception, within a private contract, in which the airline and the passenger are the contracting parties, the decision to apply the entry ban to a country to certain passengers does not arise from the airline but from the State, which is not a party to the contract, in that case such responsibility cannot be assigned to the airline, despite being an unforeseeable act for the airline, the decision of the entry ban directly assigned to State and not to the airline, so it would not be responsible for compensation or reimbursement of the cost of the ticket if the flight has not been cancelled, and if this is not within the fare rules of the ticket.

The airline, if it so decides, may make the trip to the country of destination that has the entry ban for certain passengers, which would be fulfilling its part of making the trip, and the responsibility would fall on the passenger if he/she decides to travel despite the circumstances. However, a different scenario would be, if in spite of the restrictions the flight is not cancelled, the passenger decides to travel but the airline denies him/her access to the flight, in this case, the rule to be applied would be the Regulation 261/2004.

⁷ For more information see: <https://www.consumerreports.org/returns-refunds-exchanges/proposed-law-would-guarantee-refunds-for-air-travel-canceled-by-coronavirus-pandemic/> and <https://www.markey.senate.gov/imo/media/doc/Cash%20Refunds%20for%20Coronavirus%20Cancellations%20bill.pdf>

As a last point, if the passenger decides not to go on a future flight, which has not yet been cancelled, he/she will most likely not be entitled to a monetary refund (if this is not within the fare rules of the ticket). The same applies to the travel insurance, which may or may not cover these eventualities, depending on the contract with the travel insurer.

Finally, since there is no specific rule on what would happen to passengers who decide to cancel their tickets if the airline has not cancelled the flight, the rules to be applied would be in each case those of the contract between the passenger and the airline.

Conclusion

As a general rule, if the airline cancels the flight, the passenger is entitled to a refund or rebooks. Due to the current circumstances, compensation in form of a voucher is lawful; however the voucher does not revoke the passenger's right to a refund.

On the other hand, if the passenger decides to cancel the travel before the airline cancels the flight, in most cases the terms and conditions governing the ticket must be observed. Furthermore, it is also possible that the passenger may be dependent on the goodwill regulations and conditions applied by the airline in the current circumstances.

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