

Introduction

The "Round Table on Package Travel Contracts" is a group of legal experts, of which one third represent the travel industry, one third represent consumers' associations and one third are independent high-ranking judges, public servants and academics having expertise in the field of legal disputes concerning package travel. This group of experts met at the initiative and under the guidance of the European Commission, in order to discuss and define best practice for package travel and holiday tours. The conclusions of the expert group that are made available here must be seen as non-binding recommendations. They draw their significance from the expertise of the members of the group. They do not, however, reflect the views or the policy of the European Commission.

The members representing the travel industry have been nominated by ECTAA, the European Travel Agents and Tour Operators Association. The members representing consumers' associations have been selected by the Commission following proposals made by leading consumers' associations from all Member States of the EU. The independent members have been selected by the European Commission.

Participants in the Round Table Group:

ECTAA:

Mr. Andrew Cooper (UK)

Mr. Riccardo Nardi (UK)

Mrs Brigitte Waignein (B)

Mrs. Karin Aagesen (DK)

Mr. Peter Hamburger (D)

Mrs. Elisabeth Rehulka (A)

Mr. Felix Arevelo (E)

Consumer Associations:

Mr. Hans De Coninck (Test Achats/Test Aankoop, B)

Mr. Claude Brasseur (UFC Que Choisir, F)

Mrs. Paola Moreschini (Adiconsum, I)

Mr. Paulo Quelhas Vilarinho (DECO, P)

Mr. Bruce Treloar (Trading Standards Service, UK)

Prof. Klaus Tonner (Universität Rostock, D)

Independent Experts:

Mr. Ray Woolley (Office of Fair Trading, UK)

Mr. Dietrich Seyderhelm (Landgericht Frankfurt am Main, D)

Mr. Erik Mickwitz (Kuluttajavirasto, SF)

Mr. Axel Edling (substituted by Mrs. Marianne Abyhammar, both: Konsumentverket, S)

Mr. Jean-Pierre Bouscharain (Conseiller à la Cour de Cassation, F)

Round-Table on Package Travel Contracts

Conclusions of the Expert Group

Adopted on 13 February 2001

This Expert Group on unfair contract terms in package travel arrangements was organised by the Commission. Representatives of consumers and the industry as well as independent experts met to discuss to set out a code of conduct, which, whilst having only the character of “soft law” may serve as a point of reference for travel organisers, retailers and consumers throughout Europe.

1. ORGANISER’S/RETAILER’S OBLIGATIONS BEFORE A CONTRACT IS CONCLUDED

When a consumer buys a package tour he makes an investment, not only in terms of money but also in terms of time, his leisure time. That is why it can justifiably be claimed that a package tour is a commodity, in respect of which consumers have great expectations.

The fact that a package tour is sold on the basis of information provided by the organiser and/or retailer and that the consumer can usually not acquaint himself with the product in advance, except perhaps in a few special cases, makes great demands on both the organiser and the retailer. The consumer is compelled to make his choice on the basis of his own imagination and the information provided by the operator. It is true that information about most package-tour destinations can be obtained from other sources as well, but the great majority of consumers rely in their decisions expressly on the information and advice provided by the operator and the travel agent.

Another feature typical of the package travel industry, which deserves to be mentioned specifically, is the mode of payment. As an exception from the general rule according to which a performance shall be simultaneous with a counter-performance, the prevailing practice in the package travel industry is that the journey is paid for in advance. This practice has in turn made it necessary to create certain special arrangements for the protection of consumers, for example the security systems which, in the event of the organiser’s insolvency, ensure return transport and repayment of the advances paid by the consumers.

- *It thus seems recommendable for the organiser and/or retailer to provide accurate information about the packages, where possible going beyond the mandatory minimum requirements set out in the Package Travel Directive.*
- *The information should not only indicate the destination, but also include an adequate description of the package on the basis of which the consumer can decide whether the package is likely to suit his expectations and whether he able to go on the package. Further information must be, if required, made available for*

customers with special needs, e.g. families with small children, elderly people, disabled persons, etc.

- *The information and contract terms must state the price in its entirety, including all taxes and charges.*
- *Cancellation terms on which the consumer is entitled to cancel the package and cancellation charges must also be clearly stated.*
- *The organiser and/or retailer should, where he is able, inform the consumer of whatever circumstances he is aware of that may complicate the journey but that will not impede the accomplishment of the package in any decisive or essential manner, such as ongoing building works in the hotel or its neighborhood.*
- *Special care should be taken by tour organisers and retailers in making promises to consumers that they will meet special requirements. Tour organisers and retailers should distinguish between essential and non-essential requirements, and not promise to meet essential requirements unless they are sure they are able to.*

In what manner and where shall the operator then make the required information available to consumers? If he publishes a brochure, it is most evident that the information will be included in it. This requirement applies to all kinds of brochures or lists, whether published in printed or electronic form. The question becomes more complicated when the so-called "last-minute" reservations are concerned.

According to the current directive the operator is not required to supply the terms of contract in writing to consumers who have made a last-minute reservation. However, many operators do print their terms on the reverse of their invoices to ensure that the consumer will always receive them. In the absence of such a system, it would be reasonable to oblige the operator to announce where the consumer can obtain these terms or where he can acquaint himself with them.

- *In this case information on the place of business or the internet home page where the terms of contract are available must be considered sufficient. All other information that the operator shall provide the consumer with before the conclusion of the contract should also be available at these places. At the same time this requirement places the operator under an obligation to make the required information available to consumers in a comprehensible and transparent manner.*

2. BROCHURES

The brochure must make clear what is available and what is not, for each type of holiday. Information about non-availability should be clearly brought to the consumer's attention in the brochure or prior to contract. The supplier should give as much detail as he can about the availability of facilities as soon as the information is known.

- *Brochures will not promise facilities*
- *that are not available for certain times of year or seasons when the operator is aware in advance that they may not be available*

- *where the operator is otherwise aware in advance of a specific problem or risk of unavailability or knows that certain facilities will not, or may not, be available.*

3. INSURANCE

There is a wide consensus about the benefit to consumers of travel insurance. The tour operator and, where required, the travel agent should inform the consumer of the availability of a suitable travel insurance policy and of a cancellation insurance. However, including a travel insurance policy within the price of the package can be somewhat problematic, especially if the consumer has annual or multi-trip insurance.

- *Unless there are sound reasons to the contrary, tour operators should therefore avoid requiring consumers to obtain double insurance coverage. Nevertheless, the consumer should be requested to make sure that he has an adequate insurance coverage. The organiser and/or retailer must provide, in accordance with their national laws, adequate information about any policy available from them that is suitable for the consumer's requirements.*

4. CANCELLATION OF OR WITHDRAWAL FROM THE CONTRACT

There are no rules for cancellations in the Package Travel Directive. Various systems of regulating the matter prevail in different European countries. In the Nordic countries there are mutual agreements between the package tour operators and Consumer Ombudsman/ the Consumer Agency. In the other contributing countries each tour operator makes unilateral terms.

The common denominator for all countries is a system where a sliding scale is applied to the cancellation of a package tour. The principle of sliding scales of cancellation charges depending on the date of cancellation has many advantages. They provide a useful degree of certainty and a measure of 'rough justice', help consumers and traders overall by avoiding the time and expense of calculating loss in each individual case, ensure that the consumer does not have to pay for a service that he is no longer interested in and keep the tour operator from suffering a financial loss from the cancellation. But the following principles should be observed in the setting of these scales:

- *Sliding scales must be fair and not penalise the consumer.*
- *The fees contained within any scale should not be higher than agreed by industry and consumer groups or public authorities in those States where this system is used, unless such agreements explicitly allow for exceptions..*
- *The fees should follow the principle of "liquidated damages" in other states. In other words, the operator must make a fair, reasonable and genuine pre-estimate of the loss it is likely to suffer if the consumer cancels at a given period before his planned departure*
- *Operators may also use a system where cancellation charges are individually assessed. In such cases, any method of calculation used by the operator must be fair, reasonable and genuine.*

- *In all cases, the operator must set out its cancellation terms in an unambiguous and transparent manner.*

5. DISRUPTIVE EVENTS

This issue has not been included in the Package Travel Directive although the Directive does refer to events beyond the control of the operator or both parties.

As this point concerns situations that may occur at the destination even at the date of the departure it seems appropriate that both parties shall have to cancel the contract at any time.

- *The operator and the traveller should each be entitled to withdraw from the contract if, after the contract has become binding for both parties, at or in the vicinity of the destination or close to the planned route there occurs a disaster, warlike event, general strike or other disruptive event that will seriously disrupt the journey or endanger the safety of the consumer when the journey is to be taken. Public authorities, such as governmental foreign office advice departments should be consulted.*

6. EXCLUSION/LIMITATION OF LIABILITY

Standard contract terms should not contain inappropriate exclusions or limitations of liability. The operator and his agent should be liable for failure to perform the contract, or for improper performance of it, whether or not the operator is directly supplying the service in question.

Subject to the terms of international conventions,

- *terms should not exclude or restrict liability for death or personal injury*
- *not seek to hinder the making of claims. Examples (see below) include unreasonable and unlawful time limits, restrictive applicable law and jurisdiction clauses, and exclusive arbitration clauses*
- *not unfairly restrict the damages for direct loss caused by its negligence or that of its agents*
- *not unfairly restrict damages for foreseeable indirect loss caused by the operator's or agent's own negligence. Here 'foreseeable' means that it could reasonably have been anticipated by the parties to the contracts and could have been prevented with reasonable care. And*
- *not restrict liability by more than is permitted by international conventions or mandatory regulatory requirements.*
- *Best practice is for tour operators to inform consumers where international Conventions may restrict liability.*
- *Specific time limits for making claims must be reasonable and give the consumer sufficient opportunity to make his claim.*

- *The contract should require the consumer, if problems arise at the destination, to make his complaint at the earliest opportunity. The tour operator should therefore make all necessary arrangements to enable this obligation to be undertaken..*
- *All the facilities and services promised in the brochures and contracted for must be supplied and liability for not supplying them must not be excluded.*

7. PERFORMANCE OF THE CONTRACT BY THE TOUR OPERATOR AND SUBCONTRACTORS

Where an operator makes a significant change to an essential term, the consumer is entitled to know how it affects the price - so that he can decide whether to exercise his right to cancel or accept the alteration and the impact on price. If he does cancel, he is entitled to choose between three further options: *to accept an inferior holiday with a proportionate refund, to cancel with a full refund, or to take an alternative of equivalent or superior quality at no extra cost.* Tour operators will offer a holiday of equivalent value if they are able. If the tour operator offers the consumer an equivalent holiday he may also offer the consumer a choice of a more expensive holiday; but the operator may not charge the extra for the more expensive holiday if he does not also offer an *equivalent* one. These protections apply also where the operator has cancelled the holiday.

- *What is a 'significant change' should, in the contract, not be defined by an exhaustive list, though examples can be given.*
- *Where a term excludes liability for 'force majeure' only a definition consistent with that employed in Article 4 of the Package Travel Directive should be used. A list of examples may be given providing that it is clear that the governing words are those of the definition.*

A number of subcontractors are involved in the provision of the contracted package holiday arrangements and any of them could fail to take reasonable care. However, terms should not protect operators from such failure by subcontractors who are their agents or employees, or protect them from negligence in the choice or recommendation of other subcontractors.

- *A term may permit minor or trivial variation to the detail of holiday arrangements if it is narrowly drafted so that it does not permit changes that significantly affect the consumer's view of the quality of facilities or his convenience and enjoyment of the holiday.*

8. OVERBOOKING AND CHANGES IN THE ARRANGEMENTS

Consumers are entitled to expect to receive exactly what they have booked. For example, where a named hotel is booked, rather than unspecified accommodation of a specified standard, care should be taken to ensure that the named hotel is available.

Accordingly, operators must avoid terms that give them wide rights to change what is supplied. Allowing the consumer the right to cancel if he or she does not like the

changes offered does not make such a term fair. The right of the operator to change what is contracted must be limited and only exercised when required by forces beyond the control of the operator.

- *A term may be included to allow change to what is contracted if the operator is constrained to do so but must*
 - *require the operator to notify the consumer at the earliest opportunity, and*
 - *state (as stated at 7. above) that the consumer is allowed to accept it, to cancel it, or take an alternative holiday as provided in the Package Travel Directive.*
- *If the consumer elects to cancel:*
 - *there must be no penalty*
 - *all prepayments to the operator should be refunded*
 - *the right to compensation for loss suffered by the consumer must not be excluded, or if it is, only where the change had to be proposed because of unforeseeable circumstances beyond the control of the operator.*
- *Where a holiday is taken and for reasons other than force majeure (cf. Art. 4 Package Travel Directive) the tour operator is unable to procure a significant proportion of the service provided, the operator will*
 - *make suitable alternative arrangements at no cost to the consumer, to enable the holiday to continue, and*
 - *compensate the consumer where appropriate for the difference between the services promised and those supplied.*
- *If it is not possible to make these arrangements or the consumer does not accept them for good reason, the operator will*
 - *provide equivalent return transport to the departure point or to a place the consumer agrees and*
 - *will compensate the consumer where appropriate.*

9. CONSUMER REDRESS - COMPETENT JURISDICTION - EXTRA-JUDICIAL SETTLEMENT

The rights of consumers to redress under national law must not be restricted by unfair exclusion clauses, or clauses that make it more difficult for the consumer to make claims for compensation.

- *Consumers should not be prevented or discouraged by a term from bringing a claim in their home jurisdiction under their home law, or the jurisdiction of the tour operator under the law of that jurisdiction. Contract terms must not purport to reduce consumers' rights under the appropriate international Conventions.*
- *Where extra-judicial settlement (eg conciliation or arbitration) is offered, the consumer must be able to choose whether or not to accept the option. Arbitration*

schemes may be organised by trade associations of operators, but the decision-making process must be independent of the trade association.