

TRAVEL LAW UPDATES IN UK AND APAC

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EXECUTIVE SUMMARY

We have prepared an update on developing regulatory issues and case law in the UK and APAC:

"The consultation...will consider whether the regulations strike the right balance between consumer protection and business freedoms. This is based on representations from the travel sector that the PTR appears too complicated and causes confusion for both travellers and organisers."

UK UPDATE

UK consultation on the Package Travel Regulations

The UK's consultation on revising the Package Travel and Linked Travel Arrangements Regulations (the "PTR") and the ATOL regime:

- the UK is also proposing to reform the PTR which would introduce some amendments that follow the EU's proposals, but some which may diverge from the PTD. This includes a minimum cost threshold for the PTD to apply to reduce compliance costs, more flexibility in how insolvency protection is provided and excluding business travellers from the PTR protection; and
- for OTAs, while some of the proposals appear welcome (such as the right of redress from third parties), any divergence from the revised PTD will be more burdensome to implement operationally.

The consultation on the PTR was announced in September and closed on 13 December 2023 and will consider whether the regulations strike the right balance between consumer protection and business freedoms. This is based on representations from the travel sector that the PTR appears too complicated and

causes confusion for both travellers and organisers.

The consultation will consider the following, through the proposal "Package Travel Legislation: Updating the Framework" (the "proposal" or the "UK proposal"):

- removing domestic packages from the PTR because of the imbalance between compliance burdens and tangible benefits to domestic consumers where there is no requirement for repatriation. Consumers would instead rely on general consumer law in relation to the performance of a service or accuracy of information provided to them. Alternatively, domestic packages could be removed unless they include the transport of travellers;
- setting minimum cost threshold for the PTR to apply. This would allow organisers to offer packages to travellers at lower cost, leading to a more affordable range for consumers and lower compliance costs for smaller or budget organisers. As with paragraph (a), consumers would benefit from general consumer protections instead. The threshold may be the total price of the package, average cost per head, deposit size or some other measure of value;
- changing the protection for linked travel arrangements (LTA). The PTR has lower levels of protection for LTAs than for packages. The options are to (i) remove LTAs from the PTR and general consumer protection to apply; (ii) amend the definition of “package” to include all or some arrangements within the definition of LTA, which would strengthen the protections for such LTAs while increasing obligations for organisers; or (iii) retain the LTA category but limit how it can be created and better reflect the online consumer purchasing habits;
- to simplify the consumer disclosure requirements for linked travel arrangements;
- to make how insolvency protection is provided more flexible beyond the current options of bonding, insurance and trust accounts. The consultation is considering whether traders could choose how to provide insolvency protection, for example combining trust and insurance or trust and bonding rather than having insurance to meet PTR repatriation requirements;
- the extent to which “other tourist services” falls under the PTR. This includes the ambiguity of the “significant proportion” and “essential feature” wording. Whilst EU guidance remains persuasive that a significant proportion is 25% or more of the value of the package, the UK is no longer bound by this and can define the terms as it sees fit. Options include removing the significant proportion wording and instead relying on the essential feature element;
- which travellers the PTR should apply to. “Traveller” is more broadly defined than “consumer” in consumer protection legislation because it includes business travellers. The proposal will consider excluding business travellers and the benefits of including business travellers, particularly those in small businesses; and
- redress from third parties. Similar to the EU proposal, the UK proposal recognises that while the PTR contains a right of redress from third parties, organisers can struggle to get that redress after fulfilling their obligations to travellers. This can lead to organisers failing to provide refunds within the prescribed 14 days if they are out of pocket from suppliers. The proposal seeks to obtain views on organisers’ experience seeking recompense from suppliers which may lead to positive changes such as in the EU proposal.

Action point: the UK Government will publish findings from the consultation and recommended next steps, which may be in Q1 2024.

UK cases

On the Beach Limited, Sunshine.co.uk Limited, Classic Package Holidays Limited v Ryanair UK Limited and Ryanair DAC [2023] EWHC 2694 (Comm): the claimants were organisers under the PTR and successfully enforced the right of redress under Regulation 29 PTR against Ryanair as the provider of flights. Ryanair was ordered to compensate the claimant organisers for refunding passengers for cancelled packages following their inability to arrange alternative flights after Ryanair cancelled their flights during COVID-19.

"Ryanair was ordered to compensate the claimant organisers for refunding passengers for cancelled packages following their inability to arrange alternative flights after Ryanair cancelled their flights during COVID-19."

Facts of the case

- the first and second claimants are online travel agents, on whose platforms travellers can book travel services offered by third parties. The third claimant is part of the same group of travel businesses and operates an online portal, through which travel agents can sell third party services to travellers (the "OTB Group");
- the OTB Group organises package holidays, some of which include Ryanair flights. The OTB Group paid for the Ryanair flights on behalf of the customers at the time of the booking, because Ryanair does not sell flights via online travel agents. The OTB Group procured the flights as agents of the customers;
- flights were cancelled as a result of COVID-19. This resulted in cancellation of package holidays including the Ryanair flights and the OTB Group fully refunded the customers; and
- the OTB Group would try to rebook the traveller on a suitable alternative flight in line with its PTR obligations, but this was not possible during the pandemic.

Legal basis for claims against Ryanair

- Regulation 29 PTR: the right of redress of organisers against third parties where the organiser has paid compensation and such third parties contributed to the event triggering compensation (or other obligations) on the organiser. The OTB Group argued that Ryanair's flight cancellations and major schedule changes forced it to cancel package holidays and refund its customers;
- the law of unjust enrichment. Organisers have a right to claim a contribution from third parties whose own liability to refund the customer is extinguished by the payment made by the organiser. Once OTB Group had refunded its customers, in compliance with its obligations under the PTR, Ryanair's obligation to refund the customers for the cost of the flights ceased; and
- Ryanair claimed that it had **no contractual obligation** to refund travellers who purchased flights via an online travel agent, which was in breach of its website terms of use.

"Regulation 29 PTR creates an independent legal right for an organiser to recover funds from third party travel suppliers."

Ruling:

- the High Court ruled in favour of the OTB Group on **both** grounds and Ryanair paid £2m in damages;
- this ruling clarifies that Regulation 29 PTR creates an independent legal right for an organiser to recover funds from third party travel suppliers. Where an organiser is required to rearrange the package holiday and refund the traveller and where affected travellers have a right of compensation from an organiser, notwithstanding that the actual package products are provided by other travel suppliers, the organiser should be provided with a right of redress against those suppliers;

- the judgment supports the concept of the PTR providing a standalone means of redress by emphasising that Regulation 29 PTR allows for the possibility of no contract between an organiser and its suppliers and no corresponding contractual means of redress; and
- it is likely that this case will pave a way for future claims for redress from travel suppliers; however, in view of the proposed review of the PTD and PTR – both of which look at the right of redress and the practicalities of recovering funds from travel suppliers – if future legislation prescribes a statutory form of redress, such a statutory right would be preferable for organisers to litigating their claims for refunds.

APAC UPDATE:

Thailand: changes to laws on hotels took effect from 29 October 2023.

The key changes are:

- premises with up to eight rooms accommodating a total of 30 guests do not require a hotels licence;
- introduction of four types of hotel licences:
 - Type 1: Hotels with up to 50 guest rooms;
 - Type 2: Hotels with more than 50 guest rooms or hotels with guest rooms and a dining room, restaurant, or kitchen;
 - Type 3: Hotels with guest rooms, a dining room, restaurant, or kitchen, and an entertainment venue or a conference room; and
 - Type 4: Hotels with guest rooms, a dining room, restaurant, or kitchen, an entertainment venue under the law governing entertainment venues, and a conference room;
- the regulations also recognise other types of premises as hotels, such as rafts and tents and now impose minimum safety requirements on these premises.

Action point: consider whether hotel inventory complies with these new requirements.

Thailand: prohibition on the use of condos for hotel business from November 2023

In November 2023, the Lands Dept issued a notice confirming that business operations permitted in condos do not include accommodation or other hotel business. This is irrespective of whether the co-owners consent or the permitted use of the condo is changed from residential to hotel.

Action point: consider whether hotel inventory complies with these new requirements.

Thailand: New regulations on Digital Platforms

The Royal Decree on Digital Platforms (DPs) came into force in August 2023. In November 2023, the Electronic Transaction Development Agency (ETDA) issued subordinate regulations which define high risk DPs and which could face greater compliance requirements. The criteria for high-risk DPs include:

"Online platforms should consider [the ability of users to post content and comment on their platforms]...in the context of Thailand's criminal defamation and lèse majesté laws."

- total annual turnover in Thailand of more than THB100m (approximately US\$2.8m);
- DPs which have not registered with the Dept of Business Development and have more than 100 local merchants or whose total Thai users are between 5 and 10% of the population; and
- DPs which allow users to freely post content and comments which may affect the Thai public, such as illegal content and content which may have a negative impact on the political opinions of Thai citizens.

Action points: the ETDA will issue a list of high-risk DPs and this is likely to be in early to mid-2024. Online platforms should consider the third issue, particularly in the context of Thailand's criminal defamation and *lèse majesté* laws.

On our radar:

1. The UK has been running a series of consultations on reforming the ATOL regime, although it is significantly delayed and will not be in place for its proposed date of April 2024. Key changes include consideration of segregation methods for funds from licensable activities and changing the ATOL Protection Contribution – a fee payable to the CAA by ATOL holders – based on the level of risk presented by an ATOL holder and to move away from government support through the Air Travel Trust Fund.
2. Implementation of the Australian *Unfair Contract Terms Act*, which came into force in November, in the travel sector and how its provisions will affect terms of use and consumer rights.

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