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TRAVEL LAW TODAY

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ATOL Reform and what it means for ATOL holders and agents.

Will PTR changes affect your business?

Brexit: the latest guidance for customers and overseas workers.

Analysis of X v Kuoni.

Post-pandemic claims.

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Welcome

Simon Bunce, Director of Legal Affairs, ABTA

Simon's team is responsible for the provision of legal and regulatory guidance to Members; the advice and alternative dispute resolution services to customers of ABTA Members; and for the operation of ABTA's Code of Conduct.

In this edition of Travel Law Today, ABTA Partners address the big issues facing travel companies right now.

Regulatory reform is on its way. The impact of Brexit is starting to be realised as travel starts again in earnest after the enforced slowdown. The impact of COVID is still felt even as we, hopefully, return to more normal times.

I am very grateful for the support that ABTA Partners have given ABTA and its Members over the past months. Serious challenges remain but it is clear that travel is an industry that will be in demand as the world opens up.

Simon Bunce
Director of Legal Affairs, ABTA

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ATOL Reform – what it means for ATOL holders and their agents

Zohar Zik, Partner – HFW
Zohar is a Partner specialising in aviation and travel law. He is a former GC Aviation at TUI Travel and is recognised as a "Leading Individual" by Legal500 (2021).

Gareth Miller-Reedman, Claims Manager – HFW
Gareth joined HFW in 2020 from Thomas Cook with over seven years' experience of travel law issues and customer care, as well as project management in this area. Gareth has particular expertise in handling and advising airlines on issues surrounding EU261 claims.

Consultation closed in August for the proposals on how the Air Travel Organiser's Licence (ATOL) scheme might be changed by the Civil Aviation Authority (CAA). The ATOL scheme in its current form has been high on the agenda for many years and is once again in the spotlight following several high-profile failures in the travel industry, culminating in the collapse of Thomas Cook in 2019. That required repatriation of more than 150,000 people, 45% of whom were protected by ATOL, and a pay-out in excess of £445 million from the beleaguered Air Travel Trust (ATT).

The ATOL proposals focus on the way licence holders should be funded and hold customer funds in the future, as well as the regulatory requirements and insurance infrastructure needed to achieve this and ensuring that licence holders are better positioned to refund customers themselves.

Proposed changes

The CAA has proposed two very distinct routes for insolvency protection with varying levels of flexibility:

Segregated customer accounts – as part of this proposal, operational cash balances would be held separately from customer funds. Crucially, there would be no access to the segregated funds until the customer returns from holiday. This will, in effect, require ATOL-holding operators to finance their operations by alternative means or funds, for example, the funds could be segregated by trust, escrow or customer accounts. This, however, could negatively impact licence holders' cash flow and finances and risk rendering their business commercially unviable.

Mandatory bonds – extending the current practice of requiring bonds from applicants who do not meet certain financial criteria to a mandatory requirement for bonds to be provided by all ATOL holders.

One proposal is to select one of the above options and introduce it across the board; an alternative would be to allow applicants to choose that which works best for them.

ATOL Protection Contribution (APC)

The CAA has proposed amendments to the APC, noting that the current fee of £2.50 per passenger is not linked to either financial risk or the value of the booking:

1. **Flat rate APC**: an increase in the existing flat rate, although this does not account for either the risk of failure or the value of customer bookings. In addition, this would fail to incentivise the ATOL holder to protect customer monies.

2. **Risk priced APC**: a variable rate APC could be charged taking into account the risk profile of the ATOL holder. This might include financial and business risk, capital structure or whether customer monies are used to fund the business.

3. **Value priced APC**: this APC would be based around the value of the booking. Whilst the option does not reflect the risk of some ATOL licence holders, it does more accurately reflect if a booking is for a higher value product.

4. **Hybrid risk and value model**: this option considers both risk and value of the booking, with any formula to calculate the rate of APC to be weighted in favour of risk of the business.

Options linked to legislative change

Whilst the CAA would remain responsible for issuing ATOLs, operators could seek insurance cover through third-party providers, as is the case elsewhere in Europe. These insurers would establish the criteria in addition to the cost of any such policies. Part of the requirement in offering this type of cover would be to ensure protection in accordance with the existing ATOL scheme. Insurers would not be permitted to exempt any areas included in the current scheme, which could deter some underwriters from participating and lead to increased premiums and, as such, could potentially render this option unappealing to licence holders.

The future of ATOL following consultation?

The CAA is expected to announce their findings from the consultation in spring 2022 (with further consultations planned before any transition or implementation). There is no doubt that the ATOL scheme in its current form does need to be revisited. However, it is likely that a cautious, measured approach will be necessary. Indeed, Richard Moriarty (CAA CEO) has recently spoken about the need for the CAA to be open to further conversation and has said that he does not intend for this process to cause a contraction of the UK travel market.

Whilst licence holders, and ABTA as their main trade association, are generally supportive of the CAA's ambition to reform ATOL, they remain concerned that a one-size-fits-all approach could actually increase the proportion of holidays sold without protection and that an ATOL reform without a parallel corresponding reform of airline insolvency rules – most chiefly to reverse the automatic suspension of Air Operator's Certificates and Operating Licences of insolvent airlines – would be counterproductive.

What is clear during this period of consultation on ATOL reform is that this comes at a time when the travel trade is still fragile as it begins a period of slow recovery from COVID-19. It is essential that these long-awaited measures are not rushed through, so that both licence holders and their customers are given the best possible chance to benefit from truly meaningful reform.

There is no doubt that the ATOL scheme in its current form does need to be revisited. However, it is likely that a cautious, measured approach will be necessary

Regulatory update

What might BEIS propose and how will it affect your business?

Debbie Venn, Partner – DMH Stallard LLP
Debbie is a specialist (individually ranked in Chambers & Partners and Legal 500 for Travel, IT and IP) in commercial law, contracts, intellectual property, information technology, cyber-security and data protection, with particular expertise in the travel industry. Debbie has advised travel businesses over many years on T&Cs, travel regulations, data protection, IT, information security and privacy issues.

The Package Travel and Linked Travel Arrangements Regulations 2018 (PTR) were designed to provide a high level of consumer protection. Originating from the EU Package Travel Directive (PTD), the PTR remain part of English law. The EU Commission is currently reviewing the PTD and although since Brexit the UK would not be required to implement any changes that the EU Commission implements, the UK may be persuaded to make some changes to the PTR if it agrees with any amendments made to the PTD.

BEIS review

The Department for Business Environment Innovation and Skills (BEIS) launched a review this year to look at, and invite input from stakeholders on, the current PTR, with a particular focus on:

- The scope of a package.
- Insolvency protection.
- Cancellation and refunds.
- Enforcement and understanding.

Feedback has been reviewed following a series of workshops with stakeholders, although we are waiting to hear what proposals BEIS may put forward.

What areas of the PTR is BEIS looking at?

Package scope

One of the main topics raised at the stakeholder workshops was the list of services comprising a package, and whether these are the correct ones. Under the PTR, a **package** combines **two** or more **travel services, combined** for the purposes of the **same** trip. 'Travel services' could include (i) transport; (ii) accommodation; (iii) motor vehicle hire; and (iv) other tourist services (which are not intrinsically part of the carriage of passengers, accommodation or motor vehicle hire) where this is a significant part of the holiday either because of its value or because it is an essential part of the trip.

If 'another tourist service' is only combined with one of transport, accommodation, or motor hire services, then a package or Linked Travel Arrangement (LTA) is only created if the 'other tourist service' is (i) advertised as an essential feature; or (ii) accounts for a significant proportion of the value of the combination.

Some would prefer to make travel a mandatory element. Others feel this would create a disparity in consumer protection, particularly as some international packages do not include transport and these would likely need to still be protected.

Assessing whether a service is a significant part based on value is difficult, particularly given how travel ticket prices across high/low season change and focusing on the 'essential' reason for the trip could be more important, ie, was a part of the trip the reason that a customer booked a holiday. This will depend on how the arrangements were sold. For example, if it is a golf holiday and the customer is travelling to play golf, then the golf element would be a significant part. A sailing trip would be the same; if a customer chartered a boat then this would not be a package in itself, but if you added a skipper, then this would be a package as the skipper would be a significant part as the customer could not sail otherwise.

The 'super package', or package plus

Another area to consider is the 'super package', where a trader takes an original package and adds another element for a customer and sells that together. Technically, the PTR do not allow for a new package to be made where an existing package provided by one provider is mixed with another element by a different provider. This is because the original package is not 'other tourist services'; a package is a product that is distinct from the carriage of passengers, accommodation and car hire and it is therefore unlikely that a package holiday itself can be classed as a travel service.

In these instances, who is responsible if problems arise with the trip? Potentially, the agent, but this is quite disproportionate as it would place the agent (who will no doubt have sold the original package as agent on behalf of the original organiser) under additional responsibilities and, if it does create another package, significantly increased potential liabilities and financial protection obligations. It is therefore important to assess where the consumer detriment is and how best to protect the customer, so that the gap is closed in any revised PTR, by confirming either that such arrangements fall inside or outside the definition of a package.

Linked Travel Arrangements (LTA)

An LTA is where a trader facilitates the combination of travel services, but the combination does not create a package.

The BEIS review will consider whether LTA are too confusing and whether they should be scrapped or brought into the definition of a package. One popular option could be to strip out ATOL and flights and just have LTA for accommodation only or accommodation and other tourist services.

Insolvency protection

There are currently different routes to how a package provider can provide insolvency protection: bond, insurance, or through an independent trust account. It is acknowledged that having multiple routes for providing insolvency protection to comply with the PTR is a good thing, however, fragmented protection can cause gaps and duplication, which is inefficient and can confuse consumers. The availability of bonding and insurance can also be problematic, as can the advantages of strong trust accounts versus the disadvantages to business cash flow. This needs to be explored further.

Cancellations and refunds

Some consider that the PTR stood up fairly well during the pandemic for dealing with cancellations and refunds. However, this highlighted issues in the supply chain, mainly where organisers struggled to get money back from suppliers.

The pandemic highlighted the concern around refund timings: the PTR require refunds to be made within 14 days, but in light of the problems getting monies back from suppliers, some stakeholders feel this should be extended. One suggestion has been to build flexibility into the PTR to deal with specific circumstances (such as a pandemic), although it is generally agreed that a single point of refund for consumers helps keep things clear and helps combat fraudulent claims.

Enforcement and understanding

Generally, industry and public bodies consider the PTR to be too complex and that consumers find them difficult to understand. The PTR schedules of information could be simplified, with better guidance on when and how often information should be given to consumers.

PTD review at EU level

The EU Commission has published an evaluation roadmap and impact assessment for the PTD. Although this does not affect the UK and the enforceability of the PTR in the UK, it will be instructive to know what is happening in Europe on this subject.

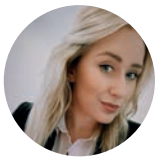
The evaluation and impact assessment will assess whether the PTD is achieving its aims, ie, the proper functioning of the internal market and robust and comprehensive consumer protection, in all circumstances (including during disruptions such as the COVID-19 pandemic), which may lead to a revision of the PTD. This could include amendments relating to refunds for travellers, insolvency protection, use of vouchers, refund rights of organisers vis-a-vis travel service providers or in relation to certain concepts, such as LTA.

The findings of the evaluation will feed into an impact assessment, which is likely to start in spring 2022. From this, there may be proposals to amend the PTD to tackle gaps, with policy options to be assessed.

Summary

The COVID-19 pandemic was the first real challenge to the PTR on such an industry-wide scale and it has certainly raised issues about what level of consumer protection is in place and how this can be improved. Communications with consumers certainly highlighted customer confusion on areas such as whether they had booked a package, what insolvency protection was in place and how they could cancel, postpone trips or get their money back. We eagerly await the outcome of the BEIS review and discussions, to see what proposals might be put forward to bring clarity for consumers and a more even playing field for the industry.

Sending staff to work in Europe – the latest position



Julie-Rose Helling, Solicitor – BLM
Julie-Rose is a Solicitor in BLM's Employment Team and specialises in acting on behalf of employers in defending all types of employment Tribunal claims, including all forms of discrimination. Julie-Rose also provides advice and guidance to employers on non-contentious issues such as managing the employment relationship from recruitment to dismissal.

The start of the ski season is imminent and for many tour operators this will be the first time they are sending staff to work in Europe since the end of the transition period.

Brexit has brought an end to the freedom of movement UK citizens once exercised and sending staff to work in the EU has become more difficult. There are new requirements tour operators will need to comply with and it is important to be familiar with the options available for entry and visa requirements.

Tour operators who wish to send staff to work in an EU country will need to check the individual country's immigration rules and specific visa requirements: in most cases, individuals will require work permits – the same as other nationals from outside the EU and the EEA.

There are, however, exceptions in place through the ability to exercise rights under the UK-EU Trade and Cooperation Agreement (TCA) and the Withdrawal Agreement, which came into effect on 31 January 2020.

Short visits up to 90 days

British citizens are permitted to visit the EU for certain restricted purposes for up to 90 days, within any 180-day period, without the need to obtain a visa.

Country-specific restrictions are in place, however, which tour operators and travel agents will need to be aware of. Greece, for example, requires third-country nationals to obtain a diploma from the Tourist Guide Schools of the Greek Ministry of Tourism to be able to practise, with limited exceptions.

To ensure compliance with relevant laws, the requirements for each country will need to be scrutinised prior to sending staff abroad.

TCA – conducting business within short visits up to 90 days

In accordance with the TCA, whether staff undertaking business or work activity in an EU country require a work visa or not is dependent on the country being visited and the type of business activity being undertaken.

Whilst the TCA sets out the business activities that are permitted and prohibited, there are exceptions for specific countries, making application of these rules more complex.

This list is not exhaustive, but business activities generally permitted under the TCA for a short-term visit to an EU country include:

- Meetings, conferences or consultations with business associates.
- Certain research (including market research) and design activities.
- Training in techniques and work practices restricted to observation, familiarisation and classroom instruction.
- Trade fairs and exhibitions for promoting company products or services.

- Representatives of a supplier of services or goods taking orders or negotiating or entering into agreements, but not delivering goods or supplying services themselves.
- Commercial transaction activity: management and supervisory personnel and financial services personnel (including insurers, bankers and investment brokers) engaging in commercial transactions for a UK organisation.
- Tourism personnel attending or participating in conventions or accompanying a tour that has begun in the UK.

Some EU countries have not agreed to the full list of permitted business activities and other individual EU countries have carved out their own applicable restrictions. For example, Sweden requires a visiting person exercising their right under the TCA as tourism personnel to obtain a work permit, except if they are drivers and staff of tourist buses.

It will be important for tour operators to familiarise themselves with the restrictions in place in the EU country they wish to send staff to.

There are certain activities that are prohibited, such as selling goods and services to the general public, receiving local remuneration and engaging in the supply of certain services.

TCA – establishing a business

If you are looking to set up a business in the EU, UK staff in a senior role, who are responsible for establishing the legal entity on behalf of their company, are able to travel as visitors and will generally not require a work permit for stays of up to 90 days within a 180-day period.

The staff member must not receive payment from a source within the EU or provide services other than those required for the establishment of the legal entity.

TCA – providing services under a contract

If you are sending staff to an EU country under a contract to supply services to a consumer within that EU country, they may be able to work in that country for up to 12 months. To exercise this right the staff member must have worked for the tour operator for at least 12 months and have sufficient experience and qualifications legally required by the host country to carry out the activity under the contract.

The service provided under the contract must fall within the scope of the TCA, which includes the provision of services relating to travel agency, tour operator's services and tourist guide services. Some member states have their own set of restrictions, for example, Denmark requires individuals providing services relating to travel agencies and tour operators to undertake an economic needs test if they are staying for longer than three months.

Certain EU countries have put in place schemes requiring the consumer of the service to obtain a particular type of work permit. It will therefore be important for a tour operator to consider the extent to which the EU country they are sending staff to has adopted the TCA and carved out their own exceptions.

TCA – intra-corporate transferees

The TCA states that managers, specialists and trainees can be considered as intra-corporate transferees and, as long as an intra-corporate transferee permit is successfully applied for, the staff member will be able to enter and stay temporarily in an EU country.

Whilst these rules may enable tour operators with presence in the EU to send certain staff to another office within an EU country, there are often more arduous requirements, such as the need for a new employment contract to be entered into with the arm of the company in the destination country and the requirement for individuals to continue to obtain a residency permit.

The duration for which they can stay is dependent upon their position, for example, managers or specialists can remain for up to three years, with trainee-level employees only able to exercise this right for up to one year.

Frontier workers

If you have staff who had previously commuted regularly to Europe prior to 1 January 2021, including countries in the EU or EFTA, they may be eligible to apply for a Frontier Worker Permit.

The permit needs to be obtained from the destination country. It offers tour operators looking to send staff to a destination within the EU, where they had previously worked on a continuous basis, a unique gateway as an alternative to a visa.

Each EU country has their own specific guidance in place for the application process and applicants are therefore advised to check the guidance for the country they intend to obtain their permit from. The deadlines for applications for some of the countries have passed, although others are continuing to accept frontier worker applications.

Summary

Outside the freedom offered under the TCA and through the Withdrawal Agreement, staff will need to comply with the country's individual immigration and visa requirements. The rules for sending staff to Europe remain complex and it will be necessary for tour operators to consult local immigration lawyers to ensure they comply with specific requirements in each EU country.

This is an issue that will extend into summer 2022 as tour operators look to send staff to cover the summer season at resorts throughout the EU. With COVID-19 continuing to create challenging trading conditions, the need for tour operators to take local immigration advice for individual destinations will represent an additional burden on the travel industry.

It may be sensible for tour operators to forecast for the additional costs that will be incurred in complying with the new requirements for sending staff to work in Europe and ensure all options are considered so the most cost-effective method of deploying staff can be taken.

Employment practices in a post-pandemic world

Ingrid Hesselbo, Associate – Fladgate LLP
Ingrid is an Associate in the Employment team at Fladgate, solving a range of employment law issues for clients including employment advisory matters, contentious tribunal cases and supporting on the employment aspects of corporate transactions

The move to remote working has dramatically affected business operations in a way that did not seem possible only a year and a half ago; how companies formalise this set-up to make sure it works in the long term is a key issue for many as they seek to recover to pre-pandemic activity levels.

Similarly, vaccines are here to stay with annual boosters seeming inevitable. How employers manage the vaccination status of their workforce is likely to continue to be significant.

Flexible working

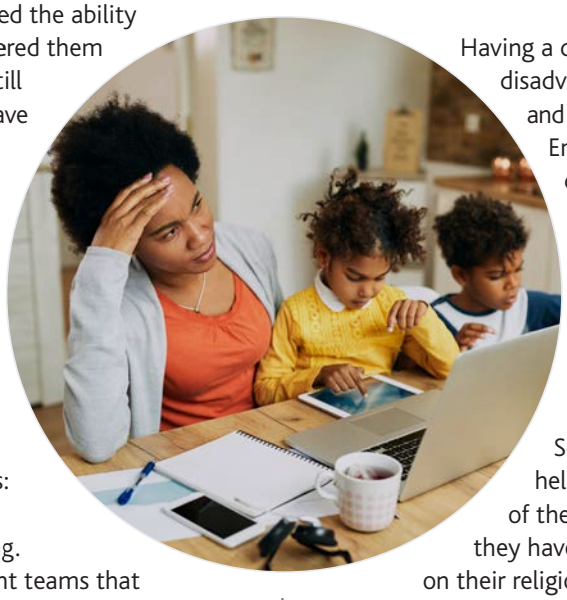
For employees who have been working from home during the last 18 months, the pandemic has demonstrated that hybrid or remote working can be efficient and productive. Some employers have capitalised on a reduced need for office space by limiting the amount spent on leases. However, not all roles can move to a hybrid or remote working system, and many jobs require a face-to-face presence. Determining the best working practice for each role and implementing that fairly and consistently continues to be an important issue for businesses.

All employees with at least 26 weeks' service can now make a statutory request for flexible working if they wish to formalise a change to their working arrangements (for example, working from home or changing the hours they work). It is expected that employers will see an increase in these statutory requests over the next year or so as many employees seek to extend the work-life balance benefits discovered during lockdowns. At the same time, there is an ongoing Government consultation on changing the system. This could allow employees to make

multiple requests in a year and to do so from the first day of employment.

Once employers receive flexible working requests it is best practice to treat the request as a chance to communicate openly with the employee. If the employee requests something that doesn't quite work, then the employer should try to find an arrangement that does work for everyone, rather than simply rejecting the request outright. If the employee genuinely needs the flexibility, having a strict approach may lead to dissatisfaction, higher staff turnover and, ultimately, a claim.

Refusals to accept flexible working requests without providing proper justification are more likely to be scrutinised now, leading to formal employee grievances and lost management time. That said, failure to follow the statutory process is currently not often used as the basis of an employment tribunal claim. Instead, indirect sex discrimination is used as the vehicle to bring a claim where there has been a refusal to accept a flexible working request. While many fathers have enjoyed the ability that hybrid and flexible working has offered them to be more involved in family life, it is still accepted by the tribunal that mothers have a greater childcare burden. A blanket policy against flexible working that cannot be properly justified is at risk of discriminating against working mothers.



The best way forward is to adopt a proactive approach. Discuss the return to the office and the business needs with employees, but be prepared to be flexible where necessary. Beware of deferring responsibility to line managers: some line managers may have differing views and approaches to flexible working. An inconsistent approach across different teams that does not have proper justification can increase the risk to the business. If individual line managers do have total discretion, it may be sensible to organise a training session to set out guidelines.

> Refusals to accept flexible working requests without providing proper justification are more likely to be scrutinised now, leading to formal employee grievances and lost management time

Vaccinations

With the roll-out of booster vaccinations for the over 50s, it is clear that vaccination as a tool to manage COVID-19 is here to stay. The approach employers take in terms of vaccines and their staff will continue to be an issue. In addition to mandatory vaccination for care home staff, there has now been confirmation NHS workers in England must get the vaccine by April 2022. There are also increasing moves from some companies within the travel industry to require all customer-facing roles to be filled by those who are fully vaccinated. It remains to be seen how this will play out in the long term, especially as it is expected that an ongoing vaccination programme will be required and it seems inevitable that, over time, the take-up of booster vaccinations will decline.

In the UK, can employers have a compulsory requirement for staff to be vaccinated? If companies do adopt this approach, what are the risks?

First, employers have an obligation on the one hand to ensure that they provide a safe workplace for staff. But it does seem likely that requiring all employees to have the vaccine is going to be considered, on its own, an unreasonable approach in trying to achieve that aim, unless there are very specific circumstances.

Having a compulsory vaccine policy may disadvantage specific groups of employees, and could invite claims for unfair dismissal. Employees that might pursue such claims can be broadly split into two groups. First, those who as a result of certain medical conditions are not able to have the vaccine, this includes those who have a history of severe allergies to the ingredients in the vaccines. It may be that these individuals should also be considered disabled. Second are employees with sincerely held beliefs, who could reject the offer of the vaccine on this basis. Any protection they have against detriment or dismissal based on their religion or belief must be weighed against the employer's legitimate interests (in this case to provide a safe workplace for all staff).

It may be more sensible to adopt a carrot rather than a stick approach to getting staff vaccinated. Steps that employers may consider are, for example, offering reasonable time off for staff to make their vaccine appointments, and making efforts to inform employees about the benefits of vaccines to try to encourage take-up.

What complaints can travel companies expect from people travelling during COVID?

Joanna McLachlan, Associate Partner – Plexus Law LLP
Joanna acts for tour operators, insurers and airports, in particular defending claims involving personal injury. Prior to qualifying as a solicitor in 2003, she worked in the travel industry for several years.

After the restrictions of the last 18 months, the increased opportunity to travel overseas is another step to freedom for many. Inevitably, as more passengers travel there will be more complaints, but what complaints can be expected from people travelling in a world still dealing with COVID-19?

As a result of the restrictions put in place to manage COVID-19, we have all become accustomed to our day-to-day life being moderated in many ways. Most people will be aware that, when they travel to another destination, they will be required to comply with local COVID-19 restrictions. The information provided pre-departure is key to managing the expectations of passengers.

Many holidays will have been cancelled prior to departure under Regulation 11(3) of the Package Travel and Linked Travel Arrangements Regulations 2018 (PTR), covering situations where the organiser is constrained by circumstances beyond their control to alter significantly any of the main characteristics of the travel services.

A passenger who is able to proceed with their holiday may find that they are unable to board their flight or enter the destination country of arrival, due to a failure to comply with the appropriate COVID-related requirements for entry. Although the individual passenger is responsible for complying with entry and return requirements, if there has been a failure to provide adequate or accurate information regarding health formalities by the tour operator at the time of booking, in accordance with Schedule 1(15) of the PTR, this will be a breach if a passenger has placed reasonable reliance upon it. The tour operator could find themselves liable for consequential losses.

Most people will be aware that, when they travel to another destination, they will be required to comply with local COVID-19 restrictions

Every hotel in each resort will have been required to comply with local government COVID-related requirements: certain hotels may be closed, with alternative accommodation offered; buffet service may be restricted and replaced with waiter service; there may be a reduced range of available restaurants because of staff sickness and quarantine, or the practicalities of serving guests safely; limits might be imposed on the number of guests who may use the swimming pool at any one time, and it may be necessary to pre-book an allocated slot; bars and nightlife might ordinarily be a compelling draw to the destination, but they may be closed entirely or limited. The list of possible areas for quality complaints is extensive, but whether they are justified and whether compensation will be payable, will largely depend on the information available to the tour operator, and what is provided to the passenger, prior to departure.

The starting point is Regulation 15 of PTR 2018. The organiser is required to remedy any lack of conformity with the contract unless it is impossible to do so. Under Regulation 16(4) of the PTR however, passengers will not be entitled to damages if the organiser can prove that the lack of conformity is: '(a) attributable to the traveller; (b) attributable to a third party unconnected with the provision of the travel services included in the package travel contract and is unforeseeable or unavoidable; (c) due to unavoidable and extraordinary circumstances'. The sudden imposition by the local government of additional restrictions whilst a passenger is already in resort will be covered by Regulation 16(4)(b) and (c), and thus there would be no obligation to pay a passenger compensation.

Each case will be different, depending on the nature of the restriction, the availability of information prior to departure and the degree to which the holiday as a whole has been affected. For instance, a swimming pool may be only one of several advertised features at a hotel, but whilst allocated slots must be booked as a result of COVID-19 restrictions, it is still available. It is unlikely therefore, that compensation would be payable, especially if passengers have been warned of restrictions prior to departure. Contrast this with a hotel where the major advertised feature is a water park, and there has been a failure to warn passengers that guests may only access this on a restricted basis once a day. This is far more likely to impact the holiday. The question will be whether warning could have been given in advance, or whether the restriction has been imposed suddenly as a result of COVID-19 restrictions whilst the passenger is already in resort. If the information was available prior to departure and the passenger could have been offered cancellation or alternative options, it is more likely that they will be entitled to a remedy under Regulation 16 of the PTR.

Some passengers managed to enjoy a holiday, but then found they were unable to return home due to testing positive for COVID-19 whilst in resort. In these cases, the tour operator would be required to give assistance without due delay in accordance with Regulation 18 of the PTR. This might take the form of assisting with re-booking a flight, providing information on access to medical or consular facilities or organising accommodation. This circumstance may also be covered by Regulation 15(14)(a) of the PTR. Where the organiser is unable to ensure the traveller's return as agreed in the package travel contract because of unavoidable and extraordinary circumstances, the organiser must bear the cost of necessary accommodation for a period not exceeding three nights. It is, of course, debatable whether a passenger contracting COVID-19 during the current pandemic would be considered "unavoidable and extraordinary circumstances". It is open to a court to interpret the wording of Regulation 15(14)(a) as written.

Let's end with some good news. Some restrictions may actually lead to fewer complaints. Whilst most hotels take great pains with food hygiene, it may be that the enhanced health, safety and hygiene procedures necessitated by COVID-19, will see fewer gastric sickness claims arising. That could be a COVID positive!

What could tour operators do to protect themselves in the light of X v Kuoni?

James Hawkins, Barrister – 3 Hare Court
James specialises in personal injury claims, particularly claims arising from accidents which have occurred abroad, illness claims, Athens Convention claims and claims against foreign insurers. He is regularly instructed by UK tour operators. James is recognised in the legal directories, Chambers and Partners and The Legal 500 for his work in Travel Law.

On 30 July 2021, the Supreme Court handed down its unanimous judgment in the case of X v Kuoni, a case that began in 2016 in the Birmingham District Registry and was eventually resolved in the claimant's favour after a reference to the Court of Justice of the European Union (CJEU) in Luxembourg. The facts are by now well known: Mrs X was on a package holiday to Sri Lanka when a member of the hotel's maintenance staff (a male called, in the judgements, 'N') offered to guide her to reception and, while purporting to show her a shortcut, raped and assaulted her.

Mrs X's claim was primarily a contractual claim; it was based on the written express terms of the contract contained in Kuoni's booking conditions, although since these terms were intended to replicate Kuoni's liability under the Package Travel, Package Holidays and Package Tours Regulations 1992, the Supreme Court's decision focused on these regulations, and the directive that they were intended to implement.

It is beyond the scope of this article to analyse strengths or weaknesses of the Supreme Court's judgment (and there are certainly topics for discussion provided by the judgment. For instance: the judgment specifically refers, more than once, to the hotel being a four-star hotel when discussing whether N, in offering to guide Mrs X, was providing a holiday service; would this mean that a member of staff in a two- or three-star hotel

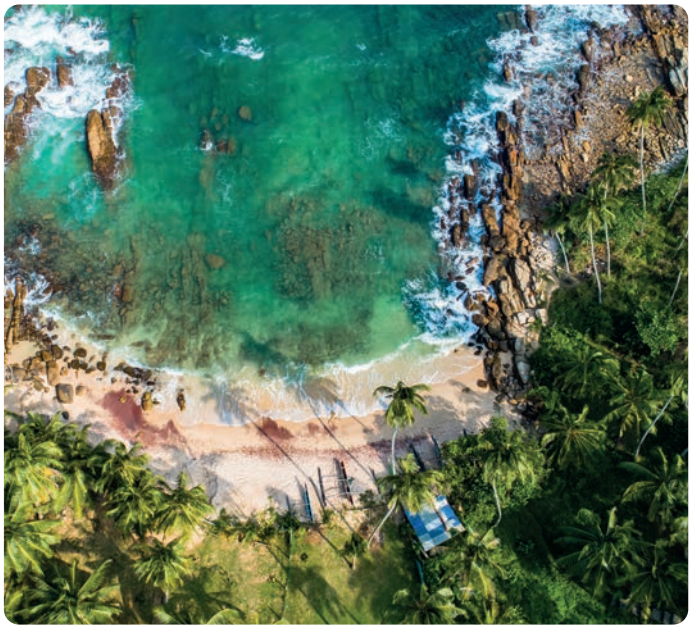
would be in a different position? On the Supreme Court's broad interpretation of arrangements falling within a package holiday contract, what acts by a member of hotel staff would not be caught by the term?).

The case of X itself concerned an extreme situation, certainly one that is unusual compared with most claims for injury that arise from a package holiday. It was also a situation that would have been hard, if not impossible, for a tour operator to prevent: on the factual findings in X, neither the tour operator nor the hotel had any reason to suspect that the perpetrator might commit such an act, and they were expressly acquitted of any direct negligence. In a more usual injury claim, tour operators can audit suppliers or require certain procedures to be in place, but there was nothing practically that could have been done in X's case. Yet the tour operator was still liable. It was clear from the CJEU's judgment on the reference in this case, and the reasoning adopted in the Supreme Court's decision, that consumer protection was the foremost consideration.

One major impact of the decision in X is that a tour operator may be liable even in cases where the hotel would not have been liable if the hotel had been sued in the country where the incident happened. Had Mrs X sued the hotel, the hotel may well not have been held responsible for the criminal acts of its employee – but the tour operator would be liable, irrespective of the hotel's position. The CJEU and Supreme Court rejected the argument that there should be parity in such circumstances.

It may, therefore, be necessary to ensure that indemnity clauses in contracts with suppliers are carefully drawn, to make sure they cover liability in such circumstances

This could lead to issues for tour operators regarding indemnities. One can well imagine a situation where a hotel refuses to indemnify a tour operator in such a situation, as the hotel could argue that, as it had done nothing that it could be held liable to the holidaymaker for, why should it have to indemnify the tour operator?



It may, therefore, be necessary to ensure that indemnity clauses in contracts with suppliers are carefully drawn, to make sure they cover liability in such circumstances.

X also greatly restricts the availability of the defence that Kuoni had attempted to invoke: that this was an event that neither the tour operator nor supplier could have foreseen or forestalled even with due care. This defence is not available where a supplier or an employee of a supplier was performing a service under the holiday contract but did so improperly. Culpability of the tour operator or the hotel is, therefore, not relevant: the focus is on whether a holiday service (which, as we have seen, is interpreted broadly) was being performed. Again, one can foresee issues of indemnities if, in order to apply, they require the hotel or other supplier to have been at fault.

Further, tour operators might consider requiring suppliers to impose restrictions on interactions between employees and guests, or more strictly delimit roles and functions of particular staff members. Taking such steps would not provide a defence (as noted above, neither Kuoni nor the hotel could reasonably have taken any further steps themselves – and, while the wording of the equivalent defence under the Package Travel and Linked Travel Arrangements Regulations 2018 is slightly different compared with the 1992 regulations, there must be a reasonable chance that it would be interpreted in a similar way), nor prevent a determined criminal, but may at least reduce opportunities for such events occurring.

Brexit information – how to avoid problems when your customers travel in the EU

Yvonne Firth, Solicitor – Crawford Legal Services UK
Yvonne has ten years' experience of litigation and claims handling in international travel claims, motor, employers liability and public liability claims. Yvonne qualified as a Solicitor in September 2018 and over the past three years has focused on international travel claims acting for insurers, policyholders and tour operators.

Passport validity

Traditionally, the UK has given passport renewals up to nine months' extra validity (allowing enough time to process and issue a new passport prior to travel) in addition to the normal ten years. For example, a passport issued on 30 December 2010 could show an expiry date of 30 September 2021.

However, new passport rules came into effect on 1 January 2021. UK customers are now classed as visitors from "third countries" meaning they will now need to apply for a new passport if, on the day after they leave the country they are visiting, their passport is either valid for less than three months or is more than ten years old. The UK government's general advice is that an individual should have at least six months left on their passport on the date they travel to the EU.

If a customer has the well-known burgundy passport that has more than six months left on it and it was issued less than ten years ago, then they will be able to travel with their current passport.

If a customer is visiting more than one country in the EU, then their passport must be valid for at least three months from the day after they leave the last country they visited.

Visa

If a customer is travelling to the EU Schengen area for either leisure or business purposes then provided their trip is for less than 90 days in any 180-day period, they will not need to apply for a visa. If a customer visits more than one country in the EU area within a 180-day period, they will need to ensure they do not spend more than 90 days, in total, across all the countries they visit; most EU countries apply the 90-day limit as a group.

Certain countries apply different rules, so it is important for customers to check the applicable entry rules prior to departure.

Bulgaria, Croatia, Cyprus and Romania each have their own separate 90-day limits. The time you spend in other countries does not affect how long you can spend in each of these countries without a visa.

Border control

With Brexit came the rejection of "free movement of persons" and so at border control, customers may be required to show a return or onward ticket, prove that they have sufficient money for their period of stay and have their passport stamped.

Some EU countries, such as France, may also require proof of where customers intend to stay and proof of insurance. Customers will now use different lanes to those specifically designated for EU, EEA and Swiss citizens at border control.

Products that can be taken into the EU are now more restricted. Customers cannot take meat or products containing meat or dairy products (with some exceptions, such as certain amounts of powdered infant milk/food). Customers cannot take fresh fruit (with some exceptions), vegetables, plants, or plant products unless they pay to have them inspected before they leave and get a "phytosanitary certificate."

Alcohol and tobacco allowances

Customers travelling to the EU can purchase duty-free liquor and tobacco. The EU allowances limit alcohol to four litres of still wine, 16 litres of beer or one litre of spirits. Tobacco is limited to 200 cigarettes or 50 cigars. There are limits on customers returning from the EU, however, the return limits are much higher!

Pet passports

Post-Brexit the UK has Part 2 listed status under the EU Pet Travel Scheme. If a customer wants to travel with their pet or assistance dog, a pet passport issued in Great Britain will no longer be accepted. The new requirements are:

- A microchip
- A valid rabies vaccination
- An animal health certificate
- Tapeworm treatment for dogs if a customer is travelling directly to Finland, Ireland, Northern Ireland, Norway or Malta.

If a customer has had their pet passport issued in an EU country or Northern Ireland, then they will be able to use this for travel with their pets.

Pets will need to enter the EU through a traveller point of entry and a new certificate and tapeworm treatment will be required for each trip. Customers will need to speak to their vet at least one month in advance of travel to make sure the above requirements are in place.

Roaming charges

Between 2017 and the end of 2020, UK travellers were able to use the minutes, texts and data included in their mobile phone tariffs when travelling in the EU. Even though most mobile operators at the time of Brexit promised not to reintroduce roaming charges, many of the larger mobile operators have now done so, including Vodafone, EE and Three.

Most mobile operators have included these charges within their mobile phone plans. Customers should check with their provider before travelling to avoid a higher than normal mobile phone bill when they return.

Driving in the EU

If a customer intends to drive abroad, they will need with them:

- Driving licence
- Certificate of Motor Insurance
- Logbook (V5C)
- UK sticker.

Customers with a photocard driving licence will not need an International Driving Permit for short visits to the EU. There are some exceptions, for example, those with licences issued in Guernsey, Jersey or the Isle of Man, or who have a paper driving licence.

In addition, depending upon the country requirements may include:

- Extra equipment – a reflective jacket and a warning triangle
- Emission stickers
- Headlight converter stickers.

Healthcare

When a customer travels to an EU country they should have either:

- A European Health Insurance Card (EHIC) – issued prior to the UK's departure from the EU. An existing EHIC will remain valid until the expiry date on the card; or
- A UK Global Health Insurance Card (GHIC); and
- Travel insurance.

An EHIC or GHIC allows a customer to receive medically necessary state healthcare in Europe at a reduced cost or sometimes for free; it is not a replacement for travel insurance. Each country and healthcare system is different and in some countries, customers will need to pay to have treatment.

It is important that customers are proactive before they travel: complying with applicable rules for the country they intend on visiting; ensuring their passport is valid; checking they have sufficient travel insurance; and ensuring appropriate mobile plan coverage to avoid any surprises during their time at the airport, on holiday and when they return.

Spotting fraudulent claims after COVID

Anthony Chendo, Solicitor – Horwich Farrelly LLP
Anthony joined Horwich Farrelly in 2020 and has over ten years' experience of personal injury and insurance litigation. Specialising in serious personal injury work, he has a wealth of knowledge of all aspects of defendant litigation such as travel accident and illness claims, military, public and employment liability claims and road traffic accident claims

It is no great surprise to say that the COVID-19 pandemic has had an unprecedented impact on both the nation's economy and people's way of living. It has been a challenging time for pretty much everyone.

One indirect area that has perhaps not received as much attention, however, is the impact it has also had on the behaviour of fraudsters – both opportunistic and organised.

The pandemic and the response to it has provided experienced fraudsters with new ideas as well as new areas to act upon. Precarious employment combined with a widescale move to remote working – together with large numbers of people on furlough who wished to top up their income – created a perfect breeding ground for fraudulent activities. Although cyber-fraud grabbed some headlines, the personal injury claims arena wasn't immune to such threats, especially given that remote working appears to be a useful tool to persuade those tempted to pursue spurious claims.

Claims management companies (CMCs) are likely to increase

their daily output of calls because the 'working from home' model is a perfect opportunity for them to try to persuade home workers to consider pursuing potentially fraudulent claims, for example, for repetitive strain or a bad back.

It is expected that part of their pitch to convince people to make a claim is that all medical examinations, and court trials, will be done remotely; it is arguably easier to conceal the truth about specific subject matter. Consequently, whilst it is evident that remote working can have some positive financial and health benefits, it is also a good platform to harvest fraudulent Employment Liability/Public Liability (EL/PL) personal injury claims.

Indeed, because all medical reports were produced via remote examination – especially when the claimant alleges they suffered physical injuries – potential fraud should definitely be a consideration.

Another potential red flag to consider is when the claim commences close to the limitation deadline date. It could be that the CMC persuaded fraudsters to reconsider making a claim when such claims were unlikely to fly if the person was examined by a medical expert in person.

In particular, and assuming no further lockdowns occur, I envisage a dramatic rise in COVID-19 related package holiday claims in the next 24-36 months. This is largely due to timing as some claimants may find their financial situation changed adversely in the period between booking and returning from their holiday. The anticipation is that fraudsters will assert they contracted the virus during their stay in the resort because they, "remained in the resort/hotel premises from the point of arrival until the date of the illness onset."

In particular, and assuming no further lockdowns occur, I envisage a dramatic rise in COVID-19 related packaged holiday claims in the next 24–36 months

As our record in the related area of fake holiday illness claims in the past three years has shown, fraud considerations should always be considered when reviewing such claims, especially where there is evidence that the person and/or the travelling party left the hotel/resort premises before the illness onset. Another pointer may perhaps be a change in the person's employment status. Is it different from when the holiday was booked to when they returned home?

Uncertainty surrounding the direction of the UK economy and the rising death count we have seen in every news cycle over the past 18 months has almost certainly exacerbated mental health problems. It would not be a surprise if stress illness claims from employees expected to return to work during the crisis also increase. Whilst undoubtedly true in some cases, this area also presents itself as an opportunity to the experienced fraudster: they may provide inaccurate information about the effects of the alleged mental ill health. A reluctance to be examined by the insurer's medical expert in person should always be considered a red flag.

Long COVID symptoms are also a potential new and fast developing personal injury area. No doubt this has also grabbed fraudsters' attention; symptoms such as chronic fatigue will only drive up the value and complexity of any personal injury claim. It isn't difficult to imagine a rise in inflated loss of earnings and/or care claims here. Any inconsistencies surrounding a claimant's alleged restrictions as communicated to medical experts is another red flag and investigations should certainly help when considering loss of earnings and care claims.

As our own market-leading intelligence department shows time and time again when investigating fraudulent claims, active social media fitness accounts such as Strava, Garmin and Under Armour, which can highlight an active lifestyle often contrary to the information given to medical experts, are also helpful for defendants.

As we know, one of the biggest 'winners' during the pandemic, apart from Amazon and Netflix, were hand sanitiser wholesalers. Although hand sanitisers are intended to help keep you and those around you safe from the virus, some fraudsters saw this as another way they could defraud insurance companies. With hand sanitisers in almost every area of a holiday resort/hotel, we envisage a rise in fraudulent claims centred around 'falls' or 'trips' caused by hand sanitiser spills. CCTV footage of the potential fraudster before and after the fall, which often show a different version of events, should be carefully assessed here.

As we are approaching winter, it is difficult to predict how long the current crisis will last and whether any further lockdowns will be implemented. However, what is evident is that the economic downturn has undoubtedly led to financial hardship. Monitoring the direction of the economy and being alive to new fraud trends is vital. We envisage new types of fraud will continue to emerge given the dramatic change in the way we perform our day-to-day activities.

It's not business travel as usual

Daniel Scognamiglio, Partner – Blake Morgan LLP
Daniel leads the firms travel team. He is a specialist in multi-jurisdictional disputes, travel insurance litigation and tour operator liability and is qualified as a solicitor in England and Attorney at Law (non-practising) New York.

Business travel and insuring the businesses that arrange business travel post-pandemic will be far from 'business as usual'.

There are a number of changes that businesses need to be aware of. This article focusses on the new International Standard and Business Interruption Insurance, although the consequences of the pandemic reach far wider.

We would all like to see a return to travelling as normal in a post-pandemic world, but the very clear message from scientists and governments is that we are going to need to learn to live with COVID-19 for some time to come.

ISO 31030

Experts at the International Organisation for Standardization (ISO) have been working in conjunction with the British Standards Institute (BSI) and other national standards bodies to look at the management of risk to business and business travellers. Based on the principles, framework and process of ISO 3100, ISO 31030 was published at the end of September 2021.

First, it should be noted that this is guidance. There is no obligation to comply with it to the letter. The guidance is designed to help organisations manage risks, prepare their risk assessments and deal with the consequences of an incident if it occurs.

Inevitably, a lot of employees will feel more vulnerable when travelling as the world opens up again. The guidance is explicit in

stating that it is designed to help organisations demonstrate that 'their decisions related to risk are based on solid and reliable information.'

Kevin Myers, convener of the group of experts that developed the standard, has said:

"Travel risks vary and change enormously based on destinations, political or health situations, amongst other things, and there is no one set of rules that works for every destination or traveller profile. "ISO 31030 is a key tool to help any kind of organisation put a realistic and comprehensive plan in place to cover all bases and keep their workers safe when on the move."

The risks and strategy should be clearly communicated with the employee, who should agree with the assessment and approach. The employee should feel safe when travelling.

The standard is substantial but easy to digest and work through, running to about 50 pages. It is a helpful start for any size of organisation in preparing a risk assessment. There is a small section available for free online and it is well worth anyone managing their firm's travel risk or strategy to have access to the balance of the document.

Whilst it is 'guidance', it will inevitably be referred to by lawyers should something go wrong during travel or where an employee has a relevant claim in a tribunal. Even though there is no legal requirement to implement the standard, not having a risk assessment prepared or otherwise following the framework could be fatal to the defence of a claim; it will be much easier to defend an employer who has implemented and followed the standard. Every employer owes a duty of care to their employees and adherence to the guidance would be helpful evidence of compliance with that duty.

Post Brexit, courts in England will not necessarily be bound by the decisions of other jurisdictions' interpretation of the standard, but those decisions could be persuasive to an English court. This standard is implemented as guidance throughout the EU and in the UK. Jurisdictions further afield often adopt or refer to ISO standards.

Regular travel and health insurance policies now have COVID-19 exclusions that can make it difficult to recover costs where a trip has been cancelled or medical or quarantine costs are COVID-19 related. However, there are specialist insurers out there keen to take on the risk of travelling employees, and experts available to help organisations understand the risk of business travel. Pre-pandemic risks are still there, for example, car accidents, terrorist attack, or falling ill abroad. Inevitably, business insurers will expect to see the implementation of a comprehensive risk assessment and strategy.

Business Interruption (BI) Insurance

In May 2020, the Financial Conduct Authority (FCA) announced its intention to bring a test case to the High Court, seeking clarity on BI insurance policy wording in light of COVID-19. The FCA was looking for a "timely, transparent and authoritative judgment". The test case, and the various appeals, culminated in early 2021. Financial Conduct Authority (FCA) v Arch Insurance (UK) Ltd and others [2021] UKSC 1 aimed to resolve contractual uncertainty around the validity of many BI insurance policies, and ensure policyholders are treated fairly by insurers and insurance intermediaries. Whilst the decision was made in the early stages of the pandemic, the consequences are further reaching.

Of significant importance is the FCA's expectations of those dealing with BI insurance claims and complaints. That guidance was first published in May 2020 and was last updated on 26 July 2021.

The FCA continues to work closely with the Financial Ombudsman Service to monitor trends and (broadly summarised) expects:

- Insurers to be aware of their customers' needs and to show flexibility especially due to any vulnerability caused by COVID-19. It does not expect to see customers' ability to claim impacted by circumstances over which they have little control.
- Policy terms, exclusions, and the insurer's approach and any decision to be clear and sympathetic, timely and accurate. Insurers have an essential role to play in supporting their policyholders.
- Insurers to assess and settle claims quickly and fairly. The financial pressures of the pandemic should not be exacerbated by the insurer's conduct.
- Interim or partial payments to be made where there are reasonable grounds to do so. Many insurers had already been adopting this approach.
- Insurers to consider other ways to help their customers, such as signposting other sources of support.

Policyholders can find the guidance on the FCA website.

The pandemic has clearly caused challenges for business travel far beyond those addressed by the ISO and FCA, but the guidance offered by both organisations is essential as we try to mitigate the risks of travelling with the ever-present threat of COVID-19, and a return to business 'as close to normal' as it can be.

Latest developments in air passenger rights and their application to UK travel companies

Hayley Kiely, Legal Assistant – Weightmans LLP
Hayley joined Weightmans LLP's Aviation and Travel department in October 2018 as a legal assistant handling a varied caseload of both contentious and non-contentious aviation and travel work. Prior to joining Weightmans, Hayley had a successful in-house career at Monarch Travel Group as Head of Claims and subsequently as Head of Aviation at a Civil Aviation Authority approved alternative dispute resolution service.

As the travel industry continues to recover from the effects of COVID-19, the issue of air passenger rights post-Brexit is once again under the spotlight. Following the Air Passenger Rights and Air Travel Organiser's Licensing (Amendment) (EU Exit) Regulations 2019 and the EU-UK Trade and Cooperation Agreement, the question of interaction between the UK and EU Regulations is a hot topic.

Regulation EC261/2004 has been subject to much debate and comment, especially since the introduction of flight delay compensation rights in October 2012. Initially, airlines attempted to limit the application of existing rules for cancellation compensation to flights delayed over three hours, subject to the defence of 'extraordinary circumstances'. Over time, and following some very surprising Court of Justice for the European Union (CJEU) decisions, the scope for airlines to defend claims was severely reduced.

Despite the UK formally leaving the EU on 31 January 2020, EC261/2004 has remained applicable as a result of the European Union (Withdrawal) Act 2018, this directly applying EU legislation into UK law at the end of the transitional period. This 'retained EU law', in the context of EC261/2004, has been subject to minor amendments, by way of The Air Passenger Rights and Air Travel Organiser's Licensing (Amendment) (EU Exit) Regulations 2019. In principle, the same passenger rights apply albeit there is now overlap of the regulations where both sets of regulations apply to EU carriers departing from and returning to the UK.

Flights departing the UK

- UK Carrier – The Air Passenger Rights and Air Travel Organiser's Licensing (Amendment) (EU Exit) Regulations 2019 applies.
- EU Carrier - The Air Passenger Rights and Air Travel Organiser's Licensing (Amendment) (EU Exit) Regulations 2019 and EC261/2004 rules apply.
- Non-UK and Non-EU Carrier - The Air Passenger Rights and Air Travel Organiser's Licensing (Amendment) (EU Exit) Regulations 2019 applies.

Return flight to the UK from the EU

- UK Carrier - The Air Passenger Rights and Air Travel Organiser's Licensing (Amendment) (EU Exit) Regulations 2019 applies.
- EU Carrier - The Air Passenger Rights and Air Travel Organiser's Licensing (Amendment) (EU Exit) Regulations 2019 and EC261/2004 rules apply.
- Non-UK and Non-EU carrier - The Air Passenger Rights and Air Travel Organiser's Licensing (Amendment) (EU Exit) Regulations 2019 applies.

Return flight from the UK from outside the EU

- UK Carrier - The Air Passenger Rights and Air Travel Organiser's Licensing (Amendment) (EU Exit) Regulations 2019 applies.
- EU Carrier - The Air Passenger Rights and Air Travel Organiser's Licensing (Amendment) (EU Exit) Regulations 2019 applies.
- Non-UK and Non-EU Carrier – Neither Regulation applies.

Case law

CJEU judgments handed down on or before 31 December 2020 are retained indefinitely and binding on claims presented under the new UK regulations. The UK Supreme Court and Court of Appeal will be able to depart from this existing case law in limited circumstances. CJEU judgments handed down after 31 December 2020 will not be binding. The question, therefore, is whether the UK courts will adopt a similar approach to the EU's application of the regulation, or will there be divergence between UK and EU case law?

It is expected that UK consumers will present claims under the new UK regulation. However, passengers who travel on a flight that attracts both regulations retain their rights under EC261/2004, unless they have received compensation or benefits under UK law. This creates the potential for consumers, to select the forum for their claim, be that under the UK or EU regulations. In this scenario, a key factor will no doubt be the development of UK case law and the perception of how 'consumer friendly' it is.

Whilst it is too early to predict the future application of the UK regulations by the UK court, the focus on consumer protection is likely to play a significant role. In circumstances where the travel and aviation industry attempt to recover from the continued impact of the COVID-19 pandemic, the EU continues to demonstrate its approach to passenger rights, which are considered by many in the industry to be significantly imbalanced and overly pro-consumer.

The recent investigation by the Consumer Protection Cooperation (CPC) in relation to airline cancellation and reimbursement policies in the context of the pandemic is an indicator of the expected EU standard of consumer protection. The investigation was the biggest CPC action in the CPC network's history and the first that was based on an alert from the Commission. It was alleged that airlines had systematically breached air passenger rights in 2020, specifically in terms of providing refunds and vouchers for flights cancelled because of the pandemic. Subsequently, 16 airlines have committed to adopting better practices when it comes to flight cancellations. For those without knowledge of the realities of the travel sector, could this commitment to adopt better practices be misconceived as a failure to uphold passenger rights and indirectly influence application of the regulations?

The UK courts will inevitably seek guidance from other post-Brexit legislation and statute as claims are presented under the new UK regulations without the binding of future CJEU judgments. The EU-UK Trade and Cooperation Agreement states that there is an expected level of cohesion when it comes to consumer protection. Whilst the agreement does not specifically refer to the application of EC261/2004 or the UK regulations, Article 438 broadly refers to passenger rights including reference to compensation. Parties to the agreement are required to cooperate in providing a high level of consumer protection and have appropriate measures in place to achieve this. It may be considered that application of the UK regulations inconsistent with the CJEU approach may be contradictory to the agreement.

Considering the continued focus on air passenger rights, it would not be surprising for the UK court system to be influenced and persuaded by future CJEU judgments. Even if the UK courts eventually begin to redress the imbalance, for the time being, the UK travel industry continues to be at the mercy of historical CJEU judgments and finds itself in an all too familiar position – wait and see.

ABTA has been a trusted travel brand for over 70 years. Our purpose is to help our Members to grow their businesses successfully and sustainably, and to help their customers travel with confidence.

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We help our Members and their customers navigate through today's changing travel landscape by raising standards in the industry; offering schemes of financial protection; providing an independent complaints resolution service should something go wrong; giving guidance on issues from sustainability to health and safety and by presenting a united voice to government to ensure the industry and the public get a fair deal.

For more details about what we do, visit **abta.com**

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