ABTA
The Travel Association

Spring 2016 | Issue 1

Travel Law Today

Your essential insights into the latest in travel law

A brave new world

The new Package Travel Directive and the Consumer Rights Act 2015 signal change for travel companies

Don't leave safety to chance

Safeguard your customers and your business with a robust Safety Management System. We explain all

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Would a decision to leave mean a regulation-free future for travel?

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We settle the thorny business of dispute resolution

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Legal advice in black and white

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Welcome

A very warm welcome to this first edition of ABTA's new publication – Travel Law Today. The launch coincides with the 18th ABTA Travel Law Seminar and feels like a very fitting coming-of-age gift to all of you who have contributed to making the event such a success over the past 18 years.

Travel Law Today will complement the content delivered at the seminar, to give readers insight into some of the most pressing issues affecting travel companies and to act as a practical guide to the steps that those advising travel companies should be taking to deal with those issues.

This first edition comes at a time when travel companies are seeking innovative ways of marketing holidays to customers faced with an ever-changing geo-political situation in some of our most popular destinations; a time when customer safety is high on everyone's agenda. Changes in the regulation of booking terms and conditions and the handling of customer claims make this a very challenging time for those trying to provide the most up to date and relevant advice to travel businesses.

And all of this against the backdrop of a referendum on the UK's membership of the EU and while preparing for the introduction of the new Package Travel Directive in 2018.

We asked some of the most informed lawyers in the industry to provide you with relevant, practical and succinct information to help you in your own business or to help you advise other businesses and I think that they have all delivered.

Simon Bunce
Head of Legal Services, ABTA

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ABTA The Travel Association

ABTA is the UK's largest travel association representing around 1,200 travel agents and tour operators that sell £32 billion of holidays and other travel arrangements each year. ABTA's purpose is to support and promote a thriving and sustainable travel and tourism industry. The ABTA brand stands for support, protection and expertise. These qualities are core, as they help ensure that ABTA's Members' customers travel with confidence.

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A holiday that's not the full package

Susan Deer looks at selling holidays – and how you'll need to differentiate between linked travel arrangements and package holidays come 2018

Susan Deer ABTA. **Susan started her travel industry career as a business travel agent before qualifying as a solicitor. Having worked in-house and in private practice, she has a broad range of expertise in travel law including commercial, regulatory and consumer law as well as litigation. Before working at ABTA she was Group Lawyer for Cosmos Holidays.**

"For the sake of transparency, packages should be distinguished from linked travel arrangements (LTA), where traders facilitate the procurement of travel services by travellers leading the traveller to conclude contracts with different travel services providers which do not contain the features of a package and in relation to which it would not be appropriate to apply all of the obligations applicable to packages."
2015 Package Travel Directive (PTD)

Whether or not one agrees that the recital in the PTD (due to be implemented in the UK in 2018) delivers transparency, the idea that there is a way of selling holidays that does not involve all the obligations of a package organiser is an attractive proposition. However, to benefit from that does require some careful planning.

Closing the deal

However you sell, whether from a shop or on a website, you want to make the buying process as seamless as possible. You want to keep the customer's attention while offering up a range of options when you know that they may well have already searched in other shops or may even have other websites open at the same time. To make the most of a sale, you want to present the customer with the ideal holiday and get them to pay as quickly as possible.

If that holiday is made up of multiple services that the customer has selected before they agree to pay, you will be selling a package holiday with all the liability and obligations that that entails.

To avoid those obligations you would have to ensure that the customer selected and paid for each service separately. But what would that look like from a booking point of view?

Go wild in the aisles

According to the PTD, the separate selection and payment of services to create an LTA has to be distinguished from sales where the various services are selected within the same booking process before the customer agrees to pay.

The current generic shopping basket model used on websites would appear to drive such sales into the package model. The customer chooses the various services and pays for them all in one go. Discussing options with a customer in a shop to ensure that their flights match up with their hotel and transfers would seem to mean that the customer would end up booking a package.

To avoid that when selling holidays online, a customer should not be given the option of selecting multiple services before being given the option to pay as that would create a package. Instead, to create an LTA, they would have to be directed to choose one service and pay for that before choosing and paying for the next service.

In a shop, the conversation should be directed towards the choosing of one service, eg the hotel, and payment being taken for that service, before moving on to discussing how the customer might get to the hotel.

While there will already be examples of bookings where a customer books a flight and then decides that they will also book a hotel, that is not how most travel companies will plan their sales strategies.

So whilst some bookings might, almost inadvertently, fall into the LTA definition, if a business is planning to develop a model avoiding the package liabilities they will need to look closely at their whole sales process, whether online or face to face, and work out how they can make this multiple-step process as user-friendly as possible.

And the process must be robust. The PTD prevents the restriction or exclusion of a customer's rights and simply because a trader says a holiday is an LTA does not mean it is an LTA if it is, in reality, a package.

So, building a sales model around an LTA is not simple. Knowing the creative minds of the travel industry as I do though, I'm sure that we will see businesses moving in this direction from 2018.

Out of the ordinary

When the new Package Travel Directive is implemented, travellers will have the right to cancel their booking without penalty. Maria Pittordis discusses the implications

Maria Pittordis Hill Dickinson. **Maria is a specialist in dealing with all aspects arising from any accident minor or major, civil or criminal, on land or at sea or offshore. Maria also regularly advises passenger and tour operators in respect of their liabilities and has particular expertise on Athens Convention and other cruise/ferry issues.**

Under Article 12 2, the new rights include cancellation prior to travel, without penalty, where unavoidable and extraordinary circumstances occur at the place of destination or its immediate vicinity and significantly affect the performance of the package or significantly affect the carriage of passengers to the destination.

'Unavoidable and extraordinary circumstances' are defined as 'situations beyond the control' of the organiser (or its suppliers) 'the consequences of which could not have been avoided even if all reasonable measures had been taken'. Examples given include warfare, other serious security problems such as terrorism, significant risks to human health such as the outbreak of a serious disease at the travel destination, or natural disasters such as floods, earthquakes or weather conditions which make it impossible to travel safely to the agreed destination. Anything fault based is not included.

It is unlikely that insurance will cover cancellation in these circumstances. Organisers will face significant costs in providing free cancellation and refunds unless they can share that risk with their suppliers.

Organisers therefore need to understand when this cancellation right can be properly exercised by the traveller and when they can refuse to accept a cancellation without a cancellation fee.

Unavoidable and extraordinary

The examples given all relate to safety. No such qualification appears in Article 12 2. Will industrial action at an airport which prevents travel qualify? Will a single act of violence or other disruption in the destination qualify if the FCO or other regulator does not advise against travel? Would Article 12 2 have given travellers the right to cancel holidays without charge after the Tunis bombings but before the beach shootings when the FCO advice changed? Would Article 12 2 have applied to travellers to Paris in the months after the terrorist attacks because they didn't *want* to go?

What is meant by 'significant'?

If the FCO advises against all travel by a particular mode (for example by air to Sharm el Sheikh), then the carriage of passengers will be 'significantly' affected. If the advice is against all but essential travel to a particular resort, then is this significant?

If the 'unavoidable and extraordinary circumstance' will affect only part of the package contract or changes can be made to avoid the problem, is this significant? Examples might be cruises where the ship is prevented from calling at a particular port or a holiday where an excursion or one resort of a multi-resort holiday is no longer available. Can the tour operator simply offer substitutes for those parts of the package? The focus is on the product and how it was marketed. Is the missed port or excursion a real 'highlight' of the package? If so, changing the itinerary to avoid cancellation under Article 12 2 may trigger the right to cancel in any event.

Who can benefit from Article 12 2?

Where travel advice affects only a certain class of passenger (such as old people, children or pregnant women) would this allow accompanying travellers to cancel without charge? The latest advice from Public Health England against all but essential travel to areas with current active ZIKV transmission relates to pregnant women. So a pregnant traveller can cancel her booking under Article 12 2 but what about those travelling with her? Does it differ if it is a group of 10 as opposed to a booking for two?

> "Would Article 12 2 have applied to travellers to Paris in the months after the attacks because they didn't *want* to go?"

Looking to the future

The impact of Article 12 2 on tour operators will depend on their ability to react to situations quickly and their ability to assess whether all elements of Article 12 2 have been met. Some of the questions raised above are not new but the wording of Article 12 2 does raise new questions and may deliver different answers to old questions. Hopefully, the opportunity will be taken to deal with some of these uncertainties in the 2018 Regulations and all travel companies should closely monitor the development of those regulations and the possible impact on their business.

Time for a Euro break?

Neil Baylis explores whether a Brexit would deliver a regulation-free or regulation-lite future for the travel industry

Nail Baylis K&L Gates. **Neil has been a partner at K&L Gates for over 10 years and has advised travel sector clients on commercial, regulatory and competition law matters during that time. K&L Gates is ranked in Band 1 for travel law by Legal 500 and has hosted a number of Brexit-related talks and events in the last few months.**

On 23rd June 2016, British voters will go to the polls to answer the question: "Should Britain remain a member of the European Union or leave the European Union?" The referendum represents the first opportunity since 1975 for the British public to formally voice its opinion on the EU.

The effects of Brexit will essentially depend on the ongoing nature of the UK's relationship with the EU. This point is far from settled: on one hand there could be a continued, close relationship (via membership of EFTA and/or the EEA, or a bespoke treaty, for example); on the other hand the UK could choose to ally itself more closely with the US and Asian countries. The final form of the relationship with the EU may depend on, among other things, the size of the majority in favour of Brexit and the attitude of the remaining EU countries to the UK in the light of a decision to leave.

Freedom to move

Immigration is perhaps the most highly-charged theme in the Brexit debate and remains one of the most significant concerns of the electorate. By extension, the principle of the free movement of persons will be a contentious issue in any negotiations with the EU post-Brexit.

Free movement of persons acutely touches the travel industry. Removal or restriction of visa-free movement would likely stifle travel, as inevitable costs and paperwork would make travel less appealing and affordable. The government could also delegate border control functions to private airlines and ferry operators. Companies would be required to ensure that everyone they transported to the UK had a right to be there, with hefty fines for breaches. This would represent a significant burden on those involved in transport between the UK and the rest of Europe.

In addition, the travel industry employs large numbers of EU migrant workers. The leisure, hospitality and travel sectors could all experience a shortage of willing employees if free movement of persons was abolished and visas were required for all workers from the EU.

The sky's the limit

In 2014, there were 29.3 million flights taken for leisure and 4.6 million business flights from the UK to Europe. Leaving the EU would require the UK to negotiate terms for participating in the European Common Aviation Area (ECAA), which covers 36 states and 500 million people (including non-EU states, like Norway). This framework allows airlines from any ECAA state to fly between any airports within the ECAA.

As Norway's membership demonstrates, joining the ECAA once outside the EU requires satisfaction of two conditions: acceptance of EU aviation law and 'close economic cooperation'. It is unclear to what extent the UK government would be willing to fulfil these conditions while also withdrawing from the EU.

Being positioned outside of the ECAA will bring with it costs and regulation. Switzerland, for example, has a bespoke aviation relationship with the EU, but part of that arrangement requires its compliance with a variety of EU regulations.

What about the law?

Generally the legislative effects of Brexit remain to be decided. It would precipitate some changes, but a significant portion of existing EU law in force in the UK would likely be retained, at least in the short term.

While some EU law, enacted via EU regulations, might automatically fall away, EU directives implemented through UK regulation (e.g, the Package Travel Directive) would remain in place. A wholesale repeal of EU-originated legislation is impractical and difficult and would require the government to review, regulation by regulation, whether or not to retain or dispense with individual laws. Therefore, EU-derived legislation would likely remain unchanged at least in the initial period following a Brexit.

In any event, businesses would still need to comply with EU law if they operated anywhere in the EU even if the UK withdrew from the treaties and repealed all EU law. By its nature, any travel company operating in the EU would remain bound by those rules, so only those companies operating exclusively in the UK could potentially see a real de-regulatory impact from Brexit.

The future is always impossible to predict, but in the event of a Brexit vote, one suspects that pragmatism could win the day and that dramatic change would be slow to come, if it came at all.

The art of advertising

David Bond looks at what you can and can't do when using third-party brands in online comparisons

David Bond Fieldfisher LLP. **David advises the travel industry on advertising and marketing law including comparative advertising, creative and media planning and agency contracts, ASA complaints and defence.**

Look at any website and you will see frequent use of and references to third-party trademarks. The majority of these references simply describe the business or products that are being discussed – and that is absolutely fine. Any honest use of a third party's trademark in a descriptive manner or in a way other than 'in the course of trade' is acceptable and would not infringe the owner's rights.

However, there are many situations where you can stray from fair, legitimate use to potentially infringing a third party's trademarks. Comparative advertising – where you identify a competitor or its products or services (either expressly or by implication) – is one of the most common areas where this line can be crossed. So what can and can't you do?

As a starting point, always consider the circumstances in which trademark infringement occurs, as detailed in the **table below:**

The law governing comparative advertisements has largely been harmonised across the EU by virtue of the Comparative Advertising Directive and, in brief, you can use a third party's trademark in such advertising provided the following key conditions are met:

- The use is not 'misleading'. It is misleading if it, in any way, deceives (or is likely to deceive) the target and as a result is likely to affect the target's buying decision or injures (or is likely to) the competitor.
- The use is a fair comparison, i.e. the products and services you compare meet the same needs or are intended for the same purpose.
- The use objectively compares one or more material, relevant, verifiable and representative features of products or services, and these may include price.
- The use does not discredit or denigrate the marks or products or services of your competitor.
- If your products contain a designation of origin, the comparison must relate to products with the same designation.
- The use does not take unfair advantage of the reputation of your competitor's trademark. The ECJ's quite controversial decision in the *L'Oréal SA and Others v Bellure NV and Others* case clarifies this condition. Bellure took unfair advantage of L'Oreal's reputation by using packaging similar to various registered shape marks owned by L'Oréal and using comparison lists to indicate which of L'Oréal's well-known perfumes corresponded in fragrance to each of Bellure's cheap imitations.
- The use does not present products or services as imitations or replicas of the competitor's products or services.
- The use does not create confusion among traders, between you and a competitor or between your trademarks, other distinguishing marks, products or services and those of a competitor.

Be aware that if your comparative advertisement cannot be shown to fall within these rules then you will be exposed to liability for trademark infringement and possible enforcement action.

A registered trademark is infringed where it is used in the course of trade without the owner's consent in any of the following circumstances:

- The name or logo ("mark") you are using is identical to someone else's registered trademark and is used in relation to goods/services which are identical to those for which the trademark is registered.
- The mark you are using is:
  - identical to the registered trademark, and used in relation to goods or services which are similar to those for which the trademark is registered.
  - similar to the registered trademark, and used in relation to goods or services which are identical or similar to those for which the trademark is registered; and, in each case, the use is likely to cause confusion on the part of the public, often through creating an association.
- The mark you are using is identical or similar to a registered trademark that has a reputation in the UK, and the use of the mark, being without due cause, takes unfair advantage of, or is detrimental to, the distinctive character or the repute of the trademark.

A brave new world

Malati Parekh looks at how to address new travel laws which make demands for greater transparency and fairness for the consumer

Malati Parekh ABTA. **After qualifying, Malati worked in private practice for a couple of years before moving to an in-house role within the travel industry. This, and her various roles since, have given her the opportunity to gain experience on many travel-related legal matters. Before joining ABTA, she worked for TUI UK as Customer Claims Manager.**

We've recently seen the final version of the Package Travel Directive (PTD), implementation of the Consumer Rights Act 2015 (CRA), and we've read a new consultation from the Department for Business, Innovation and Skills. Common themes emerging in these documents focus on requirements for fairness, prominence and transparency in consumer contracts.

According to the CRA: "A term is transparent… if it is expressed in plain and intelligible language and (in the case of a written term) is legible." The Competition and Markets Authority unfair terms guidance says :

- The term should not only make grammatical sense to the average consumer but must put him into a position where he can evaluate the economic consequences.
- The consumer should be able to see how his rights and obligations relate to each other, so he can foresee the potential future consequences at the time of entering into the contract.
- Where complex or technical issues have to be covered, give the consumer sufficient information to ensure that the consumer understands both the words used and the practical implications of any unavoidably difficult terms and their relationship with his other rights and obligations.

Failing the transparency test alone will not make a term unenforceable against a consumer. However, if a term is ambiguous, the meaning that is most favourable to the consumer will prevail. And if a term is found to be unfair, it is not binding on a consumer.

Make it crystal clear

It's time to adopt a plain English approach, removing any jargon, unnecessary legal terms and vague language.

- Review each clause as if you were the consumer: is its meaning clear?
- Use headings and examples and a legible font.
- Make sure online terms are easy to read and navigate.
- Make potentially onerous terms more prominent.
- If your business has different terms depending on the services provided, avoid confusion by having separate versions of your T&Cs.
- Check all your terms against the Lists in the CRA; the Black List (automatically unfair) and the Grey List (potentially unfair).

And there's more to come

The PTD will bring more changes in 2018. The first step will be to identify your intended business model. Look carefully at the scope and definitions in Articles 2 and 3 and think about how you currently sell holidays and how you might want to sell holidays in the future.

Your responsibilities will differ depending on whether you are a package organiser or a facilitator of linked travel arrangements (LTA); whether you are acting as an agent or principal and whether you are a carrier.

Package organiser: terms to include

- Clearly set out your status as agent or principal.
- Provide a copy or confirmation of contract on a durable medium.
- Reserve the right in the contract to make unilateral insignificant (minor) changes.
- With a sliding scale of cancellation charges, ensure they are a real pre-estimate of loss, considering factors like early receipt of monies and potential resale of cancelled services or refunds from suppliers.
- The traveller is entitled to terminate without paying a fee if unavoidable and extraordinary circumstances occur at the place of destination or its immediate vicinity and significantly affect the performance of the package, or significantly affect the carriage of passengers to the destination.

Looking ahead: 2018 and beyond

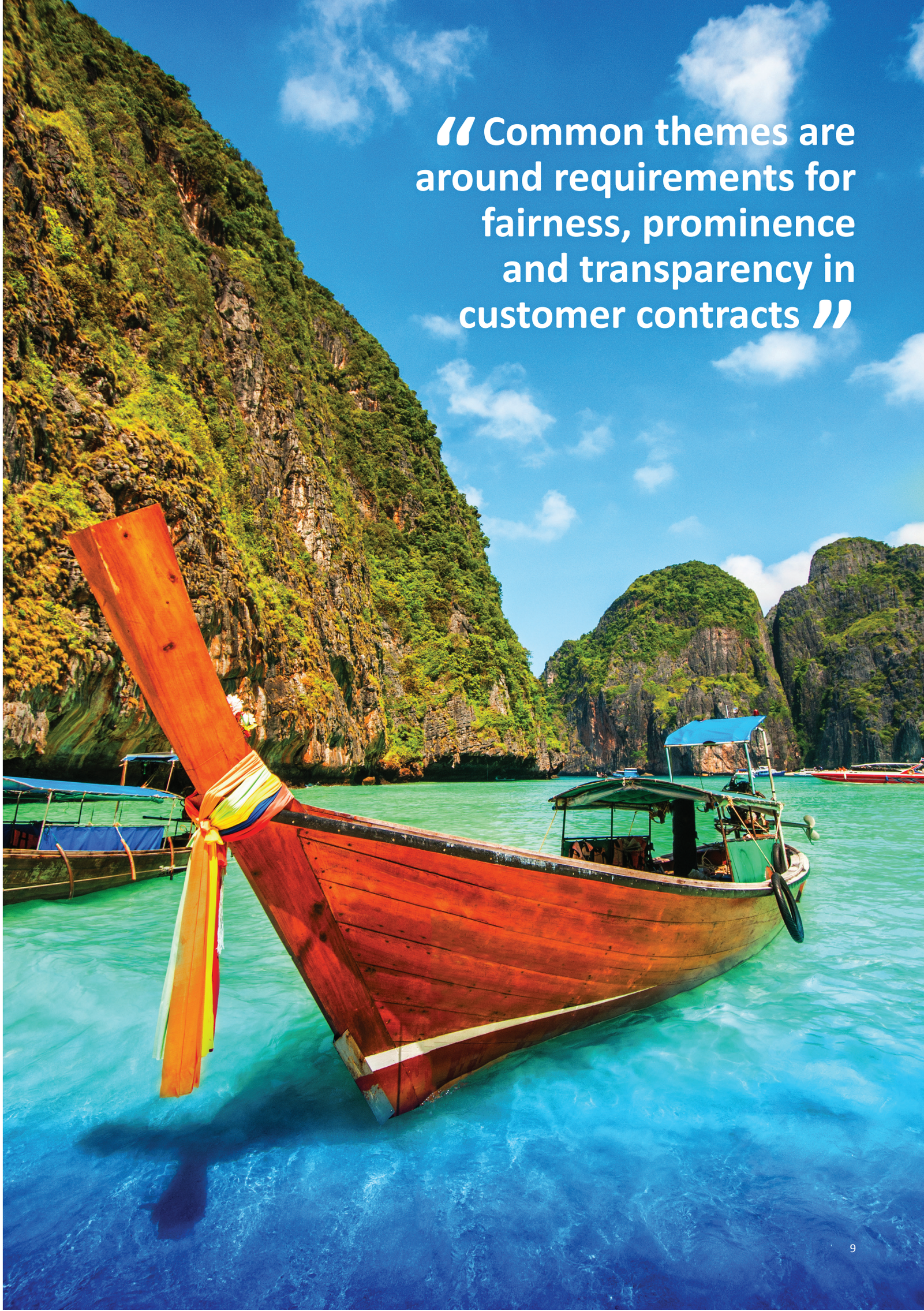
- Customers will be entitled to transfer their package contract to another traveller. They will no longer have to be 'prevented' from travelling. As now, you can pass on any additional costs arising directly from the transfer.
- If the package price increases by more than 8% (currently 10%), you should allow the customer to cancel with a refund. If you reserve the right to increase prices by surcharging, customers must similarly benefit from price decreases.
- If it is impossible to ensure a traveller's return because of unavoidable and extraordinary circumstances, you must provide accommodation for a period not exceeding three nights.
- The contract may limit liability in accordance with international conventions or, for non-personal injury claims, to three times the package price.

Guidance for LTA facilitators

- Clearly set out your status as agent or principal.
- Include details of financial protection in the event of your insolvency.
- It's important to note that if you do not tell customers that they do not have the protection of a package traveller they will have the same rights as package travel customers.

How can ABTA help?

Once the UK Regulations to implement the PTD are in place, the Legal Team will be reviewing, amending and publishing updated model booking conditions and guidance notes and making recommendations for any changes to the Code of Conduct. The Business Support team will provide telephone advice for Members on **020 3117 0564.**


“Common themes are around requirements for fairness, prominence and transparency in customer contracts”

Power to the people

If you thought consumer rights law was already a minefield, the new Act lays a few more dangers in your path. Alex Padfield negotiates his way through

Alex Padfield Hextalls Ltd. **Alex is widely recognised for his specialist advice on tour operators' and travel agents' liability and acts for insurers and travel industry clients in this field. He also advises his travel clients on a wide range of commercial and regulatory issues. Alex speaks regularly at seminars, both in-house and externally, including the ABTA Travel Law conference.**

Everyone is used to having terms and conditions and being able to rely upon those. And everyone is used to promoting their business and their services in ways which show them off in the best light.

Typically, the terms and conditions would be the responsibility of the legal team or the legal advisers and the promotion would fall under the marketing team's roof. It is not unheard of for the two teams not to liaise together as much as might be hoped. But now, under the Consumer Rights Act 2015, what you say about your company or about what you are going to provide could become part of the formal contract with the customer, even if it is not in your terms and conditions.

The new Act... Scene I

As a result of the changes in the new Act:

- Traders will need to take particular care about what they, their employees and/or agents say about the services promised – including statements on websites and in brochures. Essentially, if you tell a customer something about yourself or the service, that 'something' should be true. You cannot dismiss it as mere marketing fluff.
- If a statement is inaccurate, consumers will be able to make a claim for breach of contract.

This has implications for staff training, procedures and publicity. Your staff should understand that whatever they say could be held to be a term of the contract. Accuracy, openness and honesty are very important.

Customer remedies

Potentially, the most significant change for the travel industry from a cost point of view is the new remedies consumers have been given for when a tour operator does not do what it contracted to do.

The first is 'repeat performance'. If a trader fails to provide services with 'reasonable skill and care' or performance is not in accordance with the information provided, the customer is entitled to repeat performance of the contract. The trader must then provide this within a reasonable time and bear any cost associated with having to do so.

The exception to this right is if repeat performance is impossible, which may lead to arguments about whether a contract to provide a particular holiday can ever be repeated. My guess, however, is that any tour operator who tries to argue this will meet with little sympathy from the courts and may find that customers who want another holiday argue that it makes no difference to them when that holiday is!

> "Accuracy, openness and honesty are very important"

The second new remedy is a right to a price reduction, which may be the full cost of the service. This remedy applies if repeat performance is impossible or the trader has failed to provide repeat performance within a reasonable time.

Although a customer cannot recover twice for the same breach, these remedies are additional to existing remedies.

Prevention is better than cure

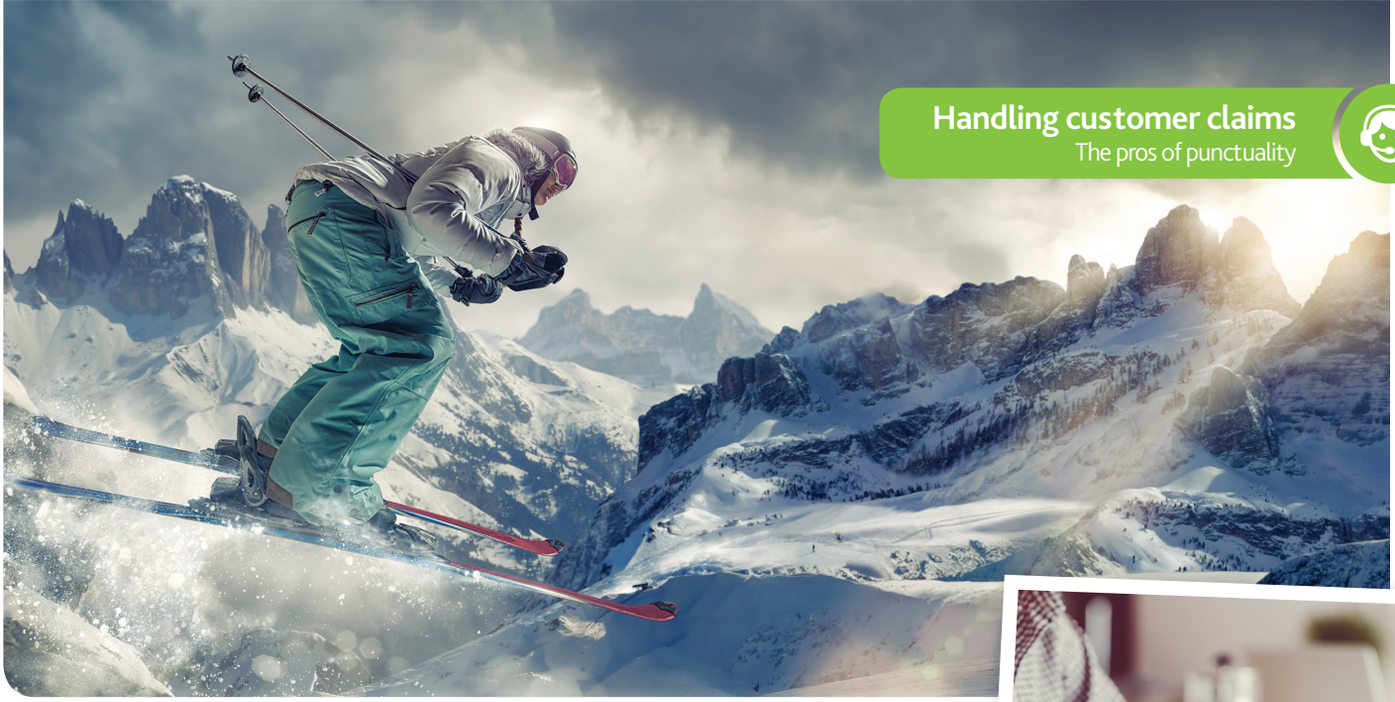
This is a bare outline of changes that will affect the travel industry and the way it conducts its business, subject as it is already to a high level of customer complaints and claims. As always, the best remedy is prevention.

Ensure your booking terms are clear and easy to understand and if necessary pay a professional to review them rather than doing it yourself.

Train your staff properly. It is even more important than before that the sales pitch you make is a fair and honest representation of what you are selling. Telesales people need training and to be aware that they must not depart from the script or the descriptions you have given of a particular package or holiday.

You will need to be even more careful in selecting your resort agents and suppliers, ensuring they supply what you have promised your customers, and protecting yourself with proper agreements.

And it goes without saying, never promise what you cannot be sure of delivering.



Tick tock, tick tock

Michael Gwilliam highlights the potential pitfalls of liability insurance, namely late notification of claims

Michael Gwilliam Plexus Law. **Michael acts for insurance companies, tour operators, travel agents, accommodation suppliers, airlines and airports. He has over 25 years' experience in travel law. He is heavily involved in jurisdictional issues, in defending multi-party and group actions and in handling claims involving catastrophic loss and fatalities.**

Every business hates complaints and every business hates legal claims even more. The Package Travel Regulations (PTR) impose wide-ranging liabilities upon travel companies that organise packages – not only for their own mistakes but also for those of their ultimate suppliers in the UK and overseas.

Unfortunately, injuries and illnesses occur every day and subsequent claims can affect even the best run company. They can also be very expensive – running into many thousands, and occasionally many millions, of pounds. Happily, most businesses take the prudent step of off-setting the financial risk involved by making sure that they have specialist liability insurance firmly in place at the start of every season.

Taking precautions

The relationship between your company and your insurer is governed by the wording of the insurance policy which is the contract between you. Having taken the necessary precaution to insure your business, it is vital that you understand the onerous obligations under the policy and carefully comply with them so that the insurance company is there to support you and to pick up the tab if things go wrong.

First among those obligations is the need to notify your insurers very promptly not only of any formal claims that might arise but, crucially, of accidents or occurrences which may much later result in a claim – however unlikely that eventuality may at first appear. A failure to comply with the duty to tell your insurers about an accident may have unexpected and devastating consequences further down the line.

Although it may seem like just a lot of 'small print', all insurance policies will set out the requirements for notification.

What are you obliged to report?

Your policy will no doubt oblige you to report any formal legal claims received but by then it may already be too late as, in addition, you are likely to be obliged to report any 'occurrence' or 'circumstance' that *might* (not will) give rise to a claim.

As a result, the onus is on you to tell your insurers of all accidents and incidents which may in due course lead to a claim being made – even if it seems very unlikely and even if you are convinced (rightly or wrongly) that an accident could not possibly be down to you. In *Kidsons v Lloyds Underwriters*, the Judge commented that the question "involves a degree of crystal ball gazing". If in doubt, report it.

When are you obliged to report it?

Most policies require you to notify insurers of reportable events either 'immediately' or 'as soon as possible/reasonably practicable'. There is little case law on the meaning of 'immediately' but the courts have been known to impose a restrictive meaning to the detriment of the insured party.

In *Brook v Trafalgar Insurance*, 17 days was found to be out of time. In *Aspen Insurance v Pectel*, it was suggested that a period of one to two weeks would be the cut-off. It is perfectly clear, in any case, that if you leave it for a couple of months or even longer, you will be in breach. If in doubt, report it QUICKLY.

What happens if you fail to report it in time?

If the obligation to notify your insurers swiftly is stated within the policy wording to be 'a condition precedent' to insurer's liability under the policy, they can refuse to indemnify you for the consequences of a claim, however trivial or however serious, and whether or not the delay has caused them any prejudice.

In other words, late notification may have made no difference and caused no harm, but they are still entitled to refuse the claim.

The unexpected consequences of late notification can be far reaching and of devastating effect to any business, but can also be easily avoided as long as you understand what your insurer expects of you and have a reliable system in place to ensure that notifications are made promptly and in the fashion required.
To be forewarned is to be forearmed.

Safety doesn't happen by accident

A Safety Management System (SMS) is a vital piece of a travel company's toolkit. Stephen Mason takes you through the process of ensuring you have a failsafe system

Stephen Mason TravLaw LLP. **Stephen is senior partner of Travlaw LLP, where he advises a large number of travel companies. He is the co-author of the textbook Holiday Law. Stephen speaks at many conferences and seminars and is Chair of the Law Society's Civil Justice Section. He is ranked as top travel lawyer in Chambers Directory 2016.**

The recent inquest involving Thomas Cook and gas heaters has raised may issues for the travel industry and it certainly concentrated minds among travel companies on whether they have in place their own effective Safety Management System (SMS).

So this would be a good time to create – or update – your SMS.

Start at the very beginning

What are the essentials of a basic SMS?

- First of all to show that the SMS has traction at the highest level of the company. In my opinion, the SMS should start with an introduction from the MD (or CEO or equivalent) of the company.
- The SMS should then describe the role and duties of the Health and Safety Manager/Officer. Assuming that this person (the HSM) is not a Director him or herself, then it is a good idea for the HSM to report directly to a Director or the Board.
- Next, a Health and Safety Committee should be established. Exactly who is on this committee will vary from company to company, but the point of having a Committee is:
  - **a)** To involve all relevant departments so that the whole company is invested in the SMS, and the HSM is not left to be an isolated figure who everyone ignores.
  - **b)** To give genuine practical help and ideas to the HSM. (It is more important for meetings of the committee to be regular rather than frequent).
- The SMS will then describe the health and safety auditing system which is to be used.

Getting down to specifics - or not!

It is at this point that travel companies often ask very pertinent questions such as: What does the law require?; How often does it say we have to audit hotels?; What questions does the law require us to ask?; On what criteria does the law say we should assess how safe hotels (or coach companies etc) are?; Does the law allow self-assessment by the suppliers themselves?; We only use top hotels from international brands – do we really have to audit them?

And then these companies are really disappointed to learn that the law does not specifically answer any of these questions at all!

So what *is* required?

In effect, the process is of risk-assessing a risk assessment system: and the following should be kept in mind:

- Every company is different. What is needed is a system for your specific company. This will vary according to your destinations and what type of customers you seek to attract (couples, families, an older age group etc) and what types of supplier you use (international brand hotels or those at the other end of the market). You also shouldn't forget other types of supplier, for example coach companies or ski schools.
- The SMS needs to be responsive to customer complaint or comment as well as to the formal auditing system.
- As to the actual audit questionnaires, some companies create these themselves, and others buy in the expertise of established H&S companies.
- A major issue for the industry in this context is the role of bedbanks – you need to be aware of and happy with the systems the bedbank has in place for ensuring the safety of hotels you contract via, if you are not auditing the hotel yourself. And an explanation of this policy needs to be in the SMS.
- Any system is likely to be better than no system. The object of the exercise is to take all reasonable steps for the safety of your customers (and of course staff), and to negate any possible accusation of gross negligence (eg by closing your eyes to obvious or known dangers).

Finally, the single most important requirement for an SMS is that, once written, it is referenced and used throughout the company, and does not gather dust on an actual or virtual shelf.

Death in paradise

What process do travel companies have to follow when a customer dies while on holiday? Claire Mulligan explains all

Claire Mulligan Kennedys Law. **With over 20 years of experience in representing tour operators and their insurers, clients include TUI (Thomson Holidays), Kuoni, Royal Caribbean, Mark Warner, and ABTA, together with over 400 tour operators and travel agents. She has been listed as a 'Super Lawyer' in the Telegraph's rankings in the field of travel, and as a 'leading lawyer' by Chambers & Partners and Legal500.**

Given the spate of deaths overseas involving tour operator customers, with high-profile inquests attracting media attention like those involving deaths from carbon monoxide, terrorism activity and children drowning in hotel pools, travel companies must understand the process and their involvement in it to ensure businesses are protected.

There have always been tragic accidents involving customers overseas, but coroners have begun to increase their scrutiny on the role travel companies play in ensuring the safety of guests overseas. Over the past 24 months, we have seen a marked increase in tour operators being called to give evidence at inquests.

Rising numbers

If one of your customers or one of your employees dies unexpectedly as a result of an accident overseas, an inquest will be heard in the UK to establish the following facts: who died; how they died; where they died; and when they died. While an inquest is a court hearing, it is not a process designed to apportion blame but to establish facts.

At Kennedys we now deal with around one inquest a month – or 12 to 15 inquests a year – whereas just 24 months ago we may have dealt with one or two cases every five years or so. It is routine now for coroners to compel operators to provide disclosure of relevant health-and-safety documentation, risk assessments, accident reports, witness statements and any internal investigations into deaths, and to require a representative from the company to attend the inquest to answer the coroner's questions about the death.

Inquest in question

Inquests are usually held in public, and as such the press, and members of the public, in addition to the family of the deceased, are likely to be in attendance to witness the proceedings.

Other interested parties are entitled to question a witness (such as a tour operator) including the family of the deceased, police, enforcing authorities or government departments such as the Health and Safety Executive and the fire authorities.

It is important that travel companies seek proper assistance and guidance throughout this process to fully understand the legal obligations upon the Directors and Managers of the business, to ensure only relevant documentation is provided and to be properly prepared for the inquest process and hearing.

New concerns

When evidence at an inquest indicates that similar fatalities might occur in the future the coroner has to draw this to the attention of any person or organisation who may be able to take steps to prevent it happening. He or she will do this in the form of a Prevention of Future Deaths report. A total of 504 of these reports were issued in 2014.

Anyone who receives such a report, like a tour operator, or organisation like ABTA, must send the coroner a written response. These reports and the responses to them, are copied to all interested persons and to the Lord Chancellor.

Reports over the last 18 months have raised concerns about the following:

- Evacuation processes upon being alerted to a drowning in a hotel pool.
- The provision of adequate lifesaving equipment at pools.
- The protection of guests against CO2 and gas risk assessments of properties.
- The training of lifeguards at hotel pools.
- The provision of warnings about dangerous seas, and rip tides.

Not all of these reports result in action being taken or rules and regulations being changed but they do highlight the areas that coroners will explore when seeking to establish why someone has died.

To protect your businesses we suggest you review your health-and-safety processes and risk management with close attention to what you would need to disclose to show that as a company you have followed your own procedures and adequately protected your customers.

A quick checklist

- Do you follow the due diligence and risk management processes you lay down in your health-and-safety manuals? If not, amend your processes or your manuals.
- Immediately alert your insurers/legal advisors if you are contacted by a coroner following the death of a guest or employee overseas.
- Ensure you can demonstrate that your suppliers comply with local laws and have appropriate licences.
- Decide who in your organisation would represent the company if required to give evidence.

ADR and ODR: all clear now?

The UK has now implemented EU law on alternative dispute resolution (ADR) schemes for consumer claims. Sue Barham trains her eye on these somewhat muddied waters

Sue Barham Holman Fenwick Willan LLP. **Sue specialises in aviation and travel regulatory and liability advice for airline and travel industry clients, including UK and EU consumer law, licensing, traffic rights, slot trading and regulatory compliance for airlines operating into the EU. Sue gives regular lectures to clients and she speaks at industry conferences and seminars on aviation and regulatory issues.**

It's fair to say that the travel industry's experience of recent new law on ADR is so far something of a curate's egg.

Most travel companies who are well used to resolving customer disputes via ABTA (now approved as an ADR provider) will have discerned very little difference to what went before, aside from the need to amend their terms and conditions to include necessary references to the ABTA ADR scheme.

For the airline industry though, and in particular non-European carriers operating to the UK, experience of ADR is limited. The merits of the choices to be made – to subscribe or not to subscribe to an ADR scheme – are opaque at best, and the communications from the Civil Aviation Authority (CAA) as competent authority in this area have so far confused rather than clarified.

For airlines, ADR remains a voluntary option and progress to approve ADR providers and get ADR up and running has been slow. A number of significant UK carriers have indicated they have or will be subscribing to an ADR scheme but, for non-UK carriers, the benefits at this early stage have yet to crystallise.

Defying logic

The issue which continues to cause most confusion is the information obligations on companies, whether or not they subscribe to ADR. The logic-defying nature of those obligations – the formal legal requirement to tell customers about approved ADR schemes which could deal with their claim even if the company does not subscribe to that ADR scheme – appear designed to paint non-subscribers in a poor light. In the context of non-mandatory ADR, it also does nothing for those airlines and travel companies who are striving to give clear and relevant information to their customers.

> "Good or bad, sensible or slightly bonkers, the bottom line is that these are binding legal obligations"

The all-important link

The amendment to the ADR Regulations* (to include the EU's Online Dispute Resolution (ODR)) platform has managed to confuse matters even further.

The ODR platform exists to facilitate access to ADR for cross-border claims but there are two issues here. Firstly, if a company does not subscribe to ADR, it must nevertheless display a link to the ODR platform on its website. One might well ask how it helps a customer to be provided with a completely worthless link.

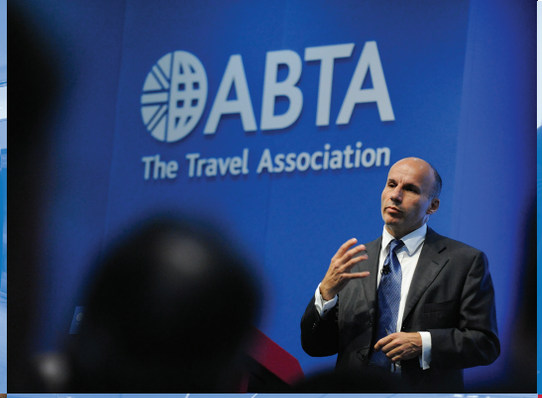
Secondly, if a company subscribes to ADR, relevant details and contact information for the ADR scheme it uses will already be given to customers in terms and conditions and on the company's website. However, a link must still be provided to the ODR platform; if used, the customer can transmit his claim through an online portal before it ends up with the ADR body which would have handled it in the first place had the customer communicated with that body directly.

The bottom line

It is easy to criticise these information requirements as bureaucracy gone mad and as strong-arm tactics to force industry generally down the route of ADR short of actually making it mandatory for all sectors. However, good or bad, sensible or slightly bonkers, the bottom line is that these are binding legal obligations, and that enforcement action can follow if it is found customers aren't being given the requisite ADR/ODR information. The Civil Aviation Authority, for example, has conducted a compliance exercise among airlines operating to the UK requesting provision of documentary evidence of their compliance with these provisions.

Anyone unsure of their ADR/ODR information obligations – and current experience suggests that if you are, you are very far from being alone – should refer to sections 19 and 19A of the ADR Regulations and, if still unsure, should consult ABTA or legal advisers.

**Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations 2015*

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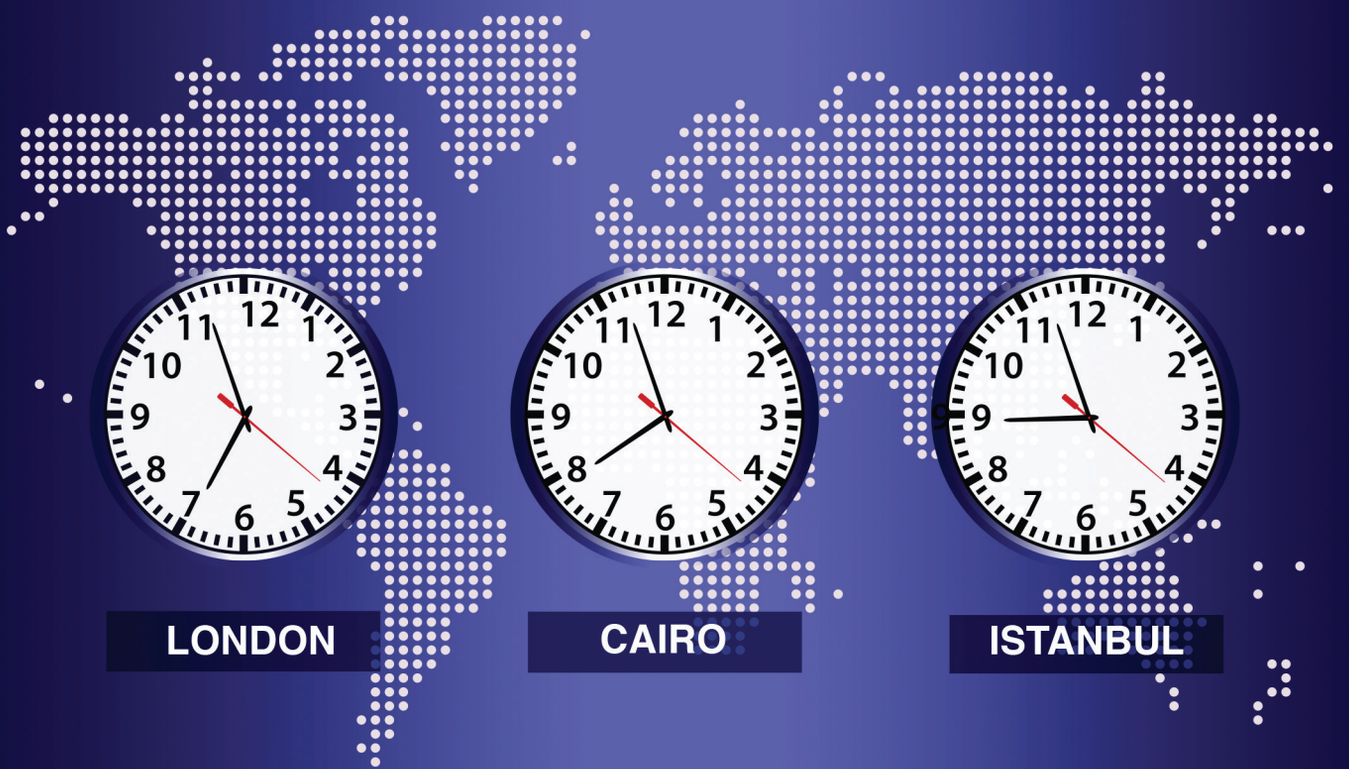

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