Travel Law Today Your essential insights into the latest in travel law

ABTA
The Travel Association

Autumn 2016 | Issue 2

A different world

We explore the impact Brexit will have on all aspects of the travel industry

Minor illness claims, major headache

Sickness claims are on the increase and travel companies are bearing the financial brunt
Vital advice inside

People power

Update on recent changes to employment law to keep you ahead of the crowd

Put customers in the picture

Making travellers aware of Foreign and Commonwealth Office advice

Changes in TOMS: chewing the VAT

Will Brexit mean an alternative tax solution for travel companies?

Brexit: a chance to look at the rules

The impact of an EU exit is unclear but it opens up certain possibilities

Welcome

The world was a very different place when we launched Travel Law Today at the ABTA Travel Law Seminar in May. People were talking about the upcoming referendum on the UK's membership of the EU but few in the travel industry really thought that, six months on, we would be heading towards the UK's departure.

Brexit makes an appearance in many of the articles in this issue. The UK government is keen to identify the opportunities that might arise from leaving the EU and that is a theme picked up by a number of our contributors. But most telling is the thread of uncertainty that weaves its way through some critical areas of travel law and business.

While Brexit affects all industries, including, as picked up by our writers, in the areas of employment law, credit card charges, data protection and tax, travel has its own particular challenges due to businesses being involved in complex and distant supply chains and dealing with people. Claims by customers are on the increase and it appears ever more difficult to resist claims even where it's perhaps unclear why the travel company should be in the frame at all.

All of this is why it is more important than ever to keep on top of the issues that will affect your business, and any future plans for your business, over the next few years. We are extremely grateful again to the ABTA Partners who have provided the expert comment in this edition and who deliver advice to our Members through the year, through their participation in the ABTA conferences and events programme.

Simon Bunce
Director 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 £33 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.

CONTACT US

ABTA Ltd, 30 Park Street, London, SE1 9EQ
abta@abta.co.uk
+44 (0) 20 3117 0500
@ABTAMembers
Find out more at: abta.com

Brexit means Brexit

It's a compelling sound bite, but what will Brexit actually mean for travel businesses and their customers? Susan Deer explores

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.**

Until Brexit arrangements are finalised, the UK remains a full member of the EU and bound by treaty obligations and EU law. The position post-exit will depend on the negotiated position and will be unclear until full discussions take place between UK and EU negotiators. If Britain does not remain in the Single Market or part of the EEA, as seems likely following the Prime Minister's conference announcement, the government will have the opportunity to explore how the best regulatory systems for the UK travel industry can be delivered outside the EU.

Out with the old...?

EU law comes in the form of Regulations and Directives. Regulations are binding and directly applicable and do not require transposition into domestic law in order to be enforceable in the UK courts; Directives are not directly enforceable in domestic law without Member States transposing them by, for example, UK regulation.

The Prime Minster has said that, on leaving, all EU law will be replaced with domestic legislation. Unless this happens, the EU Regulations will cease to have effect in the UK. UK courts are currently required to follow decisions of the Court of Justice of the European Union (CJEU) on the interpretation of EU law. Under post-exit arrangements, the Prime Minster has said that the UK courts will not be required to continue to apply CJEU decisions. This remains to be seen.

Passenger rights provisions for transport services are currently contained in a series of EU Regulations for air (EC261/2004), rail (EC1371/2007), sea or inland waterways (EC1177/2010) and bus or coach (EC181/2011). If the UK government doesn't replace those Regulations, for example, British travellers will lose the right to claim against British airlines for delays on outbound flights from the UK. They will retain rights in respect of flights departing from EU Member States.

EU Member States must implement the Package Travel Directive (PTD) 2015 by 1st January 2018. Most commentators don't expect Brexit to take place before 2019, so PTD 2015 will need to be implemented to comply with treaty obligations. However, this does not prevent a review or repeal of legislation post-exit.

The current Flight-Plus regime is an example of measures taken by the UK government which fall outside the current PTD but implement important financial protection and other measures for the benefit of UK consumers. Although Flight-Plus arrangers must protect against financial failure, making alternative arrangements for consumers where the supplier of a service fails, they do not have the liabilities derived from the Package Travel Regulations, where the organiser of a package is liable for the proper performance of all services which form part of the package contract.

The government could conclude that ensuring financial protection for all travel services sold in combination is sufficient to offer adequate consumer protection without the additional imposition of liability for proper performance. This could have significant impact on areas like personal injury claims, where consumers are currently able to sue the organiser in the UK rather than taking legal action against the overseas supplier.

Business as usual

The General Data Protection Regulation (GDPR), an EU Regulation, will take effect in 2018 and will be directly applicable. This is an area where UK government is unlikely to move away from EU standards; the ICO said in June: "With so many businesses and services operating across borders, international consistency around data protection laws and rights is crucial to businesses and organisations, and to consumers and citizens." The UK may need to introduce comparable UK regulations to prove the 'adequacy' of UK data protection standards in order to trade with the Single Market on equal terms.

The two biggest changes to wider consumer law over the last few years have been a mix of EU law - the EU Consumer Rights Directive (implemented into UK law by the Consumer Contracts Regulations 2013) - and UK law - the Consumer Rights Act, which consolidated and updated previous UK consumer law.

There may be opportunities for regulatory change but, whatever the effects of Brexit, selling to EU consumers will mean complying with varied EU law. As such, it may, in the end, be in the interests of the UK travel business to follow EU consumer law as far as possible.

ABTA is in regular discussion with the UK government on regulations which are important to travel businesses and will keep members informed of developments in these areas.

One step at a time

Stephen Mason presents a common-sense guide to preparing for the new Package Travel Regulations

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*, and speaks at many conferences and seminars. He is Chair of the Law Society's Civil Justice Section and is ranked as a top travel lawyer in Chambers Directory 2016.**

The UK government has made it clear that, despite and whatever the outcome of Brexit, it will be implementing the new Package Travel Directive (PTD) by 2018 and consulting on UK regulations shortly. Although the finer detail of the new regulations is not yet available, some things are clear and you can take steps now to ensure you are prepared for 2018.

1 Find out now whether what you sell will be deemed to be packages under the new law. Long lead times in our industry mean that many are already selling holidays (or soon will be) for 2018, when the new regulations come into force.

The new definition of 'package' is much wider, and will encompass many more types of holiday sales, and will, for example, probably capture most combinations of travel services even if sold at separate prices (online, by phone, or in a travel agency shop), and everything currently sold as a Flight-Plus.

2 Find out whether you are selling Linked Travel Arrangements (LTAs). This new creature is designed to capture any holidays which manage to escape the definition of 'package', though is most likely to be prominent in the field of website click-throughs.

Note: If either 1 or 2 above does apply to you, plan how you are going to provide security for all prepayments by consumers; and remember that it's not just flight-inclusive arrangements which are captured.

3 Find out whether you will be the retailer of other companies' packages. It will still be possible to act as retailer (agent) for other package organisers, and avoid most legal responsibility for the travel services; but even so, see points 8 and 10 below, which tell of new duties on retailers.

> **"Refunds will have to be made within 14 days"**

4 Your paperwork will need to be reviewed. This includes your pre-booking information, booking conditions, invoices, website, call scripts, etc. We recommend that you take advice from the ABTA legal team or your specialist travel solicitor. Getting it wrong can (among other things) have a negative impact on your insurance premium. (See point 11 below.)

5 If you are new to trading as a package organiser, you will need to think about cancellation and amendment fees, which have to be both reasonable and justifiable.

6 Refunds due to customers will have to be made within 14 days. Review whether your systems can deal with this.

7 While package organisers will still be able to surcharge, the maximum amount that can be passed on before the customer has a right to cancel the booking will be an amount equivalent to 8% of the package price. Consider how this might affect you.

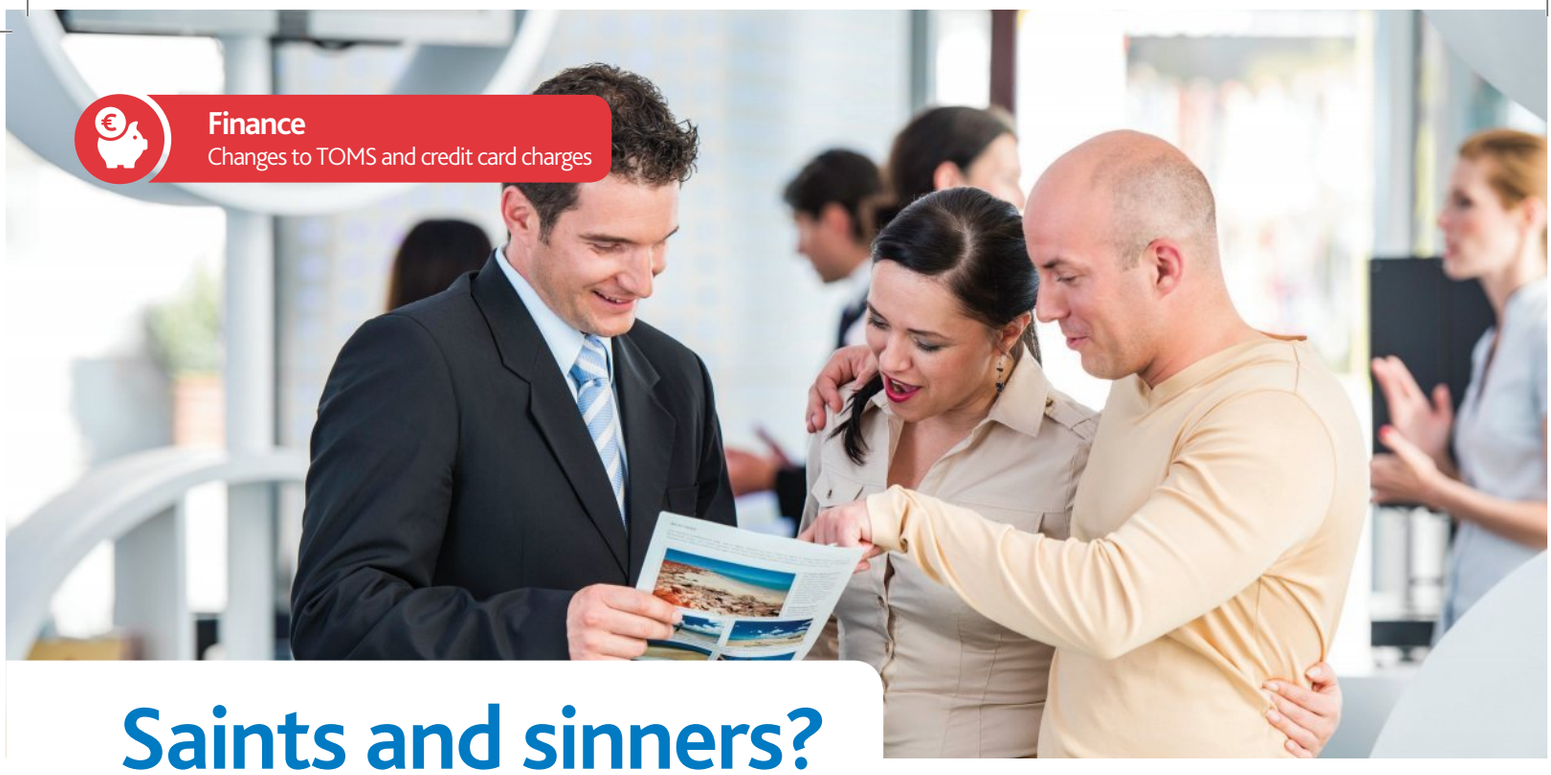
8 Complaint handling. The new directive gives a new right to consumers to address all enquiries and complaints to the retailer instead of the organiser, if they want to; and time limits start from receipt by the retailer. Retailers and organisers need to agree a system to cope with this.

9 Supplier and agency contracts (and indemnities) will need reviewing. Again, we recommend that you take advice from your specialist travel solicitor.

10 Do you retail packages for overseas organisers? Many UK companies will sell land arrangements such as safaris that are provided by travel companies in the destination. And many of these will fall within the definition of a package. You need to be sure that any organiser based outside the European Economic Area (EEA), that you sell, has adequate financial and liability protection in place, otherwise you as retailer can have these legal duties imposed on you, which would be a nasty shock (and think about insurance again, in this context).

11 Do you have insurance? We still see companies receive big injury claims from consumers for which there is no insurance cover in place, or disputes as to whether such insurance is in place! In future, more companies will need adequate liability insurance when they sell – by design or sometimes by mistake – a 'package'. Talk to your broker and/or your solicitor.

12 Take part in the UK government's consultation, either by helping ABTA with its response, or by yourself – after all, it's about your business!



Finance
Changes to TOMS and credit card charges

Saints and sinners?

Carolyn Watson explores the unlikely union between St Matthew and VAT, with particular focus on future developments in TOMS

Carolyn Watson ABTA. **Carolyn is a chartered accountant and ABTA's Director of Finance and Resources. She leads ABTA's VAT Working Group ensuring Members' views are represented both in the UK and at EU level. Having held senior positions in commercial and not for profit businesses, she has broad experience both in finance and managing support services.**

What do VAT and St Matthew have in common? St Matthew is the patron saint of tax collectors and accountants so it was appropriate that ABTA held its recent VAT/Brexit workshop on his feast day. A workshop to explore future options for VAT in the travel industry and in particular the Tour Operator Margin Scheme (TOMS).

Mention of TOMS brings either a glazed-over look or one of horror, so abolishing TOMS as a result of Brexit would at first seem an attractive option. But be careful what you wish for…

Keep it simple

UK VAT law is rooted in EU law. TOMS was introduced in the main EU VAT directive in 1977. It is applied to transactions carried out by tour operators who deal with customers in their own name and who use supplies of goods/services provided by other persons.

The margin is calculated as the difference between the total amount paid by the traveller and the actual cost. This margin is subject to VAT. TOMS simplifies by avoiding tour operators having to register for VAT in every EU Member State where the underlying supplies take place. As a simplification scheme, it works and is better than multiple VAT registrations and returns.

What happens to TOMS post Brexit? Consideration of the likely effects of Brexit on VAT in the travel sector must include other current initiatives, namely the EU Commission's VAT Action Plan and the possibility of TOMS reform. These add complexity to the issues.

VAT action plan

Published by the Commission in April, this outlines proposals to revise the VAT system with the aim of creating one EU VAT area to tackle the VAT gap and adapt the VAT system to the digital economy. While the principle for VAT should be taxation in the Member State of destination (not wildly different to the current approach), the means by which VAT is collected would change. This preferred approach would be influential in determining the future EU taxation of travel and this would influence UK rules, even after Brexit.

Commission tender

The Commission has sought tenders for a study on the reform of TOMS. The study includes looking at whether TOMS is fit for purpose, and alternative options, including its abolition. Future models must also consider how equality can be achieved between EU and third country competitors (which the UK may become).

Chewing the VAT

So following Brexit, what possible VAT structures could there be? The UK could:

- remain part of a VAT union - functioning for VAT purposes as part of the EU
- remain part of the Single Market - adopting a VAT system compatible with, but separate from, the EU VAT system
- be a third country – designing its own VAT system.

In all scenarios the EU will still have an influential role in shaping the UK rules for the application of VAT to travel. Even if the UK designed its own VAT system it would need to harmonise place of supply rules with the EU to avoid double or non-taxation in the UK.

Whatever the future UK VAT system may be, it will apply only to domestic transactions: the EU rules will continue to apply to services with an EU place of supply. So, whatever deal the UK strikes with the EU, given the international nature of its operations, the travel sector will continue to be faced with legal obligations imposed by the EU and, without a scheme such as TOMS, this could require multiple VAT registrations.

Tick-a tick-a tick-a tick-a… timing

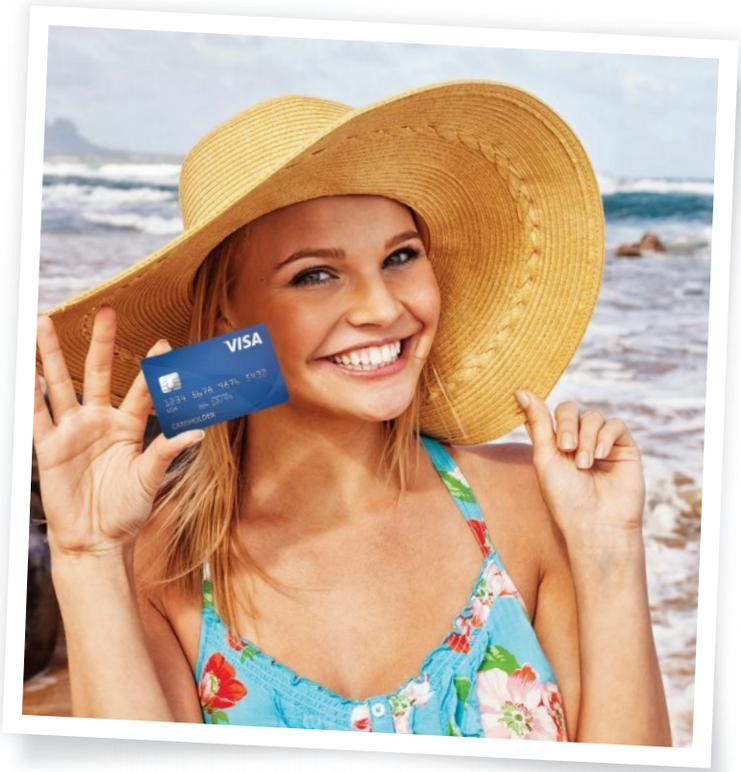
It seems unlikely that any new EU rules will take effect before late 2020. The timing of Brexit is also uncertain, but it could happen before changes to the EU travel VAT rules. Therefore, we may be faced with:

- existing rules until Brexit
- then a post-Brexit UK system and
- then the obligations of a new EU scheme.

The future is complicated! HM Treasury and HMRC have told us they are in 'listening mode'. At our workshop, we worked through the implications of different options and we'll use this analysis to ensure the best interests of the travel industry are considered in the design of VAT schemes with or without TOMS.

Play your cards right

Rhys Griffiths and John Worthy look at the current state of play with payment card regulation



Rhys Griffiths Fieldfisher LLP. **Rhys is a partner and the head of the Travel Group at Fieldfisher. He advises clients on travel regulation and disputes.**

John Worthy Fieldfisher LLP. **John is a partner in the Payments and Cards group at Fieldfisher. He advises clients on payments transactions and regulation across Europe and beyond.**

The travel industry has a long and controversial history with payment card surcharging. Many customers will have been frustrated by the drip-pricing techniques used by some travel companies, where the low headline price returned on a search is gradually and inevitably increased by the addition of charges, often very late in the booking process. The Office of Fair Trading (OFT) estimated that in 2010 consumers spent around £300m on payment card charges in the airline industry alone.

The controversy attracted the attention of the authorities. In April 2013, new laws were brought into force to help tackle this practice and the government emotively announced a 'crackdown on rip-off card charges'. At around the same time, the OFT and the Civil Aviation Authority (CAA) published joint guidance on the consumer law applicable to the sale of flights and holidays in an attempt to keep the industry honest. Many readers will remember how this ultimately led to a flurry of enforcement notices by the CAA which, among other matters, demanded an end to the practice of drip-pricing.

> "Surcharges will no longer be permitted for leisure customers"

The law has not stood still. There has been more consumer protection legislation which impacts on the legality of payment card surcharging, as well as clear guidance issued by ABTA in August 2016 on the dos-and-don'ts of payment card surcharging. That is not the end of it – there is more EU legislation due to be implemented in the UK by 2018 (subject to what happens with Brexit), and so this all begs the question: where are we now?

Change on the horizon

As the regulation around payments has become tighter, payment card surcharging (not to be confused with fuel and currency surcharging) has become a more topical subject in the travel industry. So travel players have been reviewing the implications for their card payments, as there is a wide variety of commercial approaches across the sector.

Above-cost payment surcharges are prohibited by the Consumer Rights (Payment Surcharges) Regulations 2012 (the Surcharges Regulations) currently. Hence, whilst payment card surcharges are allowed, they must reflect the actual cost to the retailer of processing the card transaction. The clear policy is that payment surcharges should not be used as a means to generate profit. Importantly, however, business–to-business payments are not subject to this requirement.

UK government guidance clarifies that only the fees which are directly charged to the business when using a means of payment are recoverable through a payment surcharge. Therefore, for instance, the fixed costs related to payment equipment, staff costs or other admin/operating costs are excluded. Legitimate payment surcharges, however, could include fees directly charged to the business such as the merchant service charge, which traders pay to their acquiring bank.

The position on card surcharging in the UK has been evolving in step with the EU position. The second Payment Services Directive (PSD2), which Member States must transpose into national law by 13th January 2018, will ban card surcharges entirely for most card payments. In short, this means that under the new PSD2 regime surcharges will no longer be permitted for leisure customers and so the headline price will have to include any cost incurred in taking payment by card.

Travel companies will not be allowed to increase the price by the use of payment card surcharges, although it is worth noting that this practice can continue for business customers. Thus, many who have used card surcharges to date will have to re-evaluate their approach.

Keep your eye on the ball

In view of the Brexit vote, there are questions about how far the tighter 'no surcharge' requirements under PSD2 will be adopted in English law (and how far the Surcharges Regulations, which flow from the Consumer Rights directive, may be amended). Among other things, this will depend on how long it takes to negotiate an exit (since the UK needs to implement PSD2 by January 2018) and what form of trading relationship the UK negotiates with the EU.

All those concerned should be tracking these developments closely.

Offer ends soon

Claire Ingleby has pertinent advice for anyone who is looking to sell their business in the short or long term. Being fit for sale could speed the deal considerably

Claire Ingleby mb LAW. Claire advises on all types of commercial agreements and business transactions, including share sales and acquisitions, share schemes including EMI, company reorganisation and airline charter, agency, supplier and partnership agreements. She also specialises in travel regulatory advice.

As with the UK's departure from the EU, selling your business, whenever your choose to do it, and for whatever reason, is a resource heavy, energy sapping and time consuming exercise. And, again, as with Brexit, the actual moment of exit is often unpredictable whether due to an unexpected opportunity or change in fortunes.

This article gives business owners an overview of the process involved in selling a business and some issues which are worth addressing before embarking on it, even if a sale is not in your shorter-term planning. (Note: the hypothetical business discussed through this article is assumed to be incorporated and the sale will be of the shares rather than the assets.)

Start as you mean to go on

In general, the sale of a business involves agreeing the price and other headline terms; a process of due diligence conducted by the buyer with a view to getting as much clarity as possible on what they are acquiring; and a formal share purchase agreement.

Once the deal has been agreed in principle, heads of terms will usually be prepared. As this document certainly ought to be expressly 'subject to contract', close attention will not always be paid to its drafting and legal advice is often not sought at this stage. However, this may prove to be a false economy as getting the right structure for the sale, from an accountancy, tax and legal perspective, can avoid mistakes and save time and expense further down the line.

All business sales will involve the buyer conducting financial, commercial and legal due diligence into every aspect of the business, including some you may not previously have given any thought to. In order to make that exercise as smooth as possible, you need to have your paperwork sorted and up to date.

> "Whether you're the buyer or seller of a business, great care needs to be taken to ensure your position is sensibly protected"

Leave no stone unturned

There are a number of issues and legal requirements which are regularly overlooked and it's not just small companies which do so. The following, amongst others, often require some attention.

- **Data protection**. Ensure the company is registered as a data controller under the Data Protection Act 1988. New laws on Data Protection are likely in 2018 so, if they are likely to apply to your sale, you should ensure that you are preparing for compliance now.
- **Employees**. Ensure all employees have been issued with written contracts which include the details prescribed by law and that these are up to date.
- **Self-employed contractors**. Identify all individuals who you consider to be self employed and ensure you have contractual documentation in place with them which reflects this.
- **Contracts**. Ensure you have written, concluded contracts with all suppliers and customers. It's worth noting here that an email exchange may be sufficient just as long as it provides certainty as to all the agreed contractual terms.
- **Intellectual property rights**. Identify who owns the rights to your website and marketing materials, and the software you use to run this business. Don't assume it's yours simply because you paid for the work; you will still need a licence or assignment if a third party was involved.

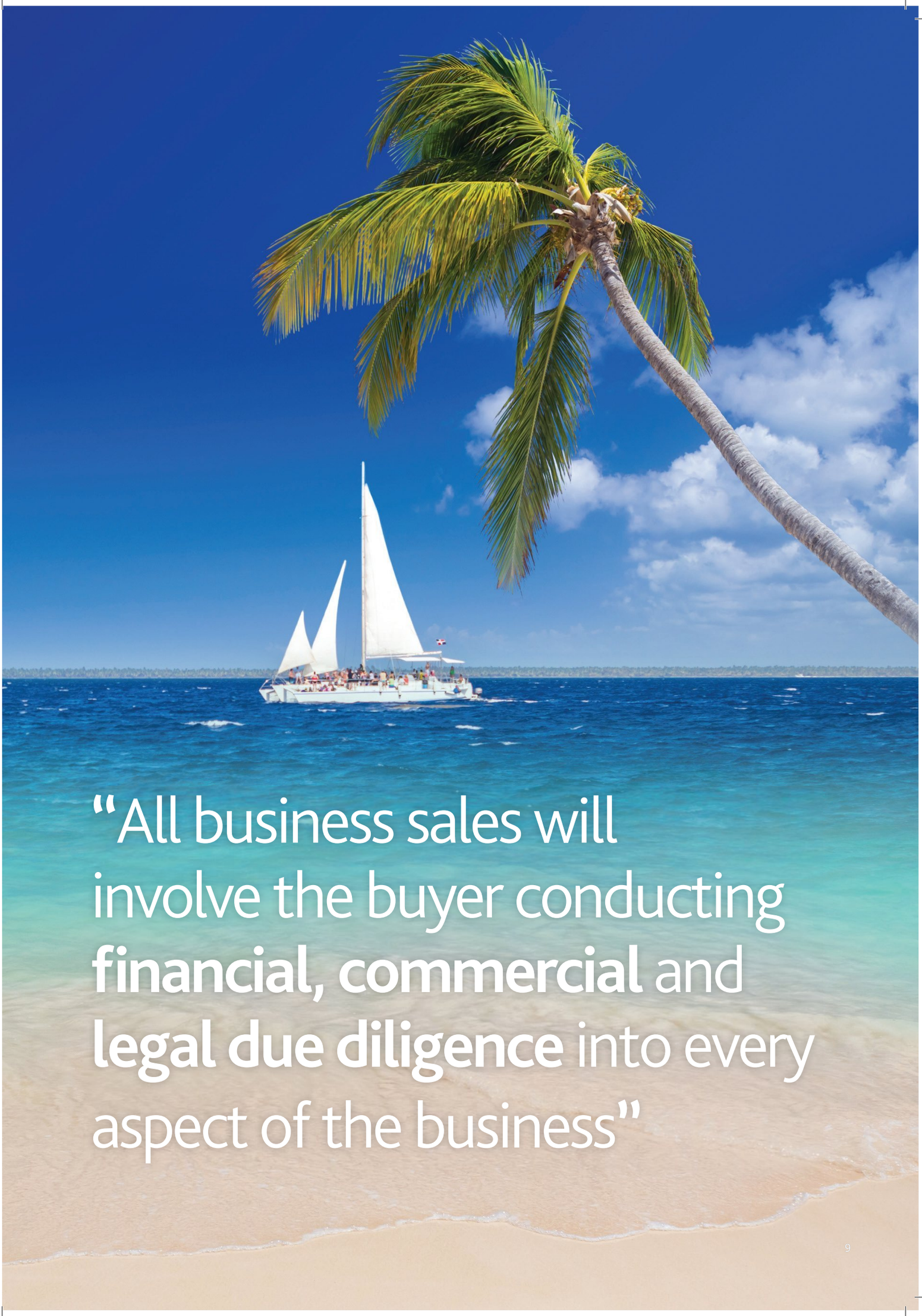
Future-proofing the business

These are all matters that every company can and should take steps to put right even if the sale of the business is not something that is on the immediate horizon. They are also matters that can significantly delay or defeat a sale if problems are discovered at a critical time in the sale process.

The formal share purchase agreement which gives effect to the sale will be shaped by the heads of terms and the due diligence investigations. It will usually include extensive warranties and indemnities as well as a tax covenant.

Whether you're the seller or buyer of the business, great care needs to be taken to ensure your position is sensibly protected.

For further confidential advice, contact Claire Ingleby at mb LAW, email **claire.ingleby@mb-law.co.uk** *tel* **0113 2424444**



"All business sales will involve the buyer conducting **financial, commercial** and **legal due diligence** into every aspect of the business"

People power

Rather than focussing on the possible employment law consequences of Brexit there is still a need to maintain a watching brief on current 'business as usual' issues, says Rebecca Thornley-Gibson

Rebecca Thornley-Gibson Ince & Co. **Rebecca has worked extensively in travel and aviation sectors with European airlines, global tour operators and suppliers to the sectors. Her work covers all areas of employment law including support on contract and policy frameworks, tribunal representation, employee relations issues, company restructuring, TUPE and exit arrangements.**

Brexit may have big implications for the workplace but, as all those involved in people management will know, there has always been a plethora of new legislation and case law developments to adapt to. Here we look at some big areas in human resourcing.

Holiday pay

Knowing what to include in employee holiday pay calculations continues to keep employers scratching their heads. Recent cases have confirmed the need for employers to pay compulsory overtime and sales-related commission to employees. However there is still uncertainty over whether voluntary overtime should be included in the holiday pay calculation.

Two non-binding tribunal decisions have decided that voluntary overtime should be included in calculations. Employers do not need to rely on these decisions but they demonstrate the likely direction of the higher courts and the decisions continue to widen the categories of payments to be included in holiday pay.

There is a growing realisation that employees in receipt of regular incentive bonuses will be able to enhance their holiday pay on the basis that this payment is linked to normal earnings and needs to be included.

Although there is a pending appeal judgment against the commission ruling, employers should recognise the issue and deal appropriately by having a plan in place on how they will deal with holiday pay calculations; whether their contracts need to be changed; and also prepare for possible backdated employee claims.

Working time issues

Following the case of Tyco, mobile or remote/home workers who travel to appointments are now able to count travel time to and from the first and last appointments of the day as part of their working time. Whilst for some this will not result in increased salary it may prompt employers to review working patterns to ensure they are not breaching Working Time Regulations in respect of the 48-hour week and rest breaks.

For low-paid workers who will benefit from the Tyco decision, the case could mean a rise in their salary if the increased time would result in a National Minimum Pay calculation that falls below permitted payments. Hourly-paid workers would also benefit from extra hours if their contracts of employment were drafted on the basis of pay in respect of all hours worked.

Both the holiday pay and working time issues above originate from EU legislation which has been incorporated into UK law. Any change in the position as a result of Brexit is likely to be minimal, certainly in the short term, as the Working Time Regulations would need to be repealed before employers can ignore their current statutory obligations.

Free movement of workers

Brexit could acutely affect the free movement of workers throughout Europe. Cross-border deployment of employees will be subject in the future to greater consideration by UK employers and the possible complexities of visas, work permits or other regulatory permissions will also need to be taken into account by employers in the remaining EU member states.

Employers making decisions on cross-border hires will need to consider matters such as termination in the event that an amnesty for existing employees is not part of Brexit negotiations. However, offering overseas employees less favourable terms such as shorter notice periods or fixed-term rather than permanent contracts could expose the employer to race discrimination risks.

Dismissing an employee because they don't have the legal right to work in the UK is a fair dismissal reason. However, not recruiting EU nationals because they may not in the future have the right to work would not be fair and likely to result in discrimination claims.

Transfer of undertakings

UK TUPE legislation has come from an EU directive. Post-Brexit there is the potential to relax obligations unpopular with UK business. Employers would be able to enhance the success of integration with transferring employees if they were permitted more flexibility on harmonisation of terms post transfer. Currently changes are not permitted even if the employee agrees to them if the changes are connected to the transfer.

The next 12 months will see employers getting to grips with gender pay reporting, the new apprenticeship levy, data protection reforms and new tax treatment on termination payments. Second guessing repeals and revisions to existing legislation post-Brexit is likely to be a little further down the HR Director's to-do list.

Up to data

Julian Ward looks at new data protection regulations - something that needs to be on your agenda regardless of the ins-and-outs of Brexit

Julian Ward Hamlins. **Julian is a leading intellectual property, technology and media lawyer. He has an enviable reputation as an expert on all aspects relating to digital content, entertainment and publishing, across multimedia platforms.**

Are you ready for the new data protection and privacy regime? The EU Data Protection Regulations come into force early 2018. They represent the biggest shake-up in data protection for the last 30 years. Whatever the final version of Brexit, UK businesses, especially those in the travel sector required to transfer personal data around Europe and beyond, will need to comply with Regulations. The scope and potentially onerous requirements of the new regime means companies must prepare now for its implementation.

› **Accountability and privacy by design.** The Regulations impose obligations on businesses to demonstrate compliance. For example, where a business *controls* the data use, such as collecting customer data for hotel or holiday bookings, companies will be required to: maintain certain documentation; engage in a data protection assessment for certain high-risk processing and implement 'data protection by design' (to minimise the data captured).

› **Data subject consent.** The Regulations are clear that a data subject's consent to process their personal data must be freely given, informed, specific and unambiguous. *Explicit* consent must be given for sensitive data and consent can be withdrawn. In deciding if consent has been freely given, data authorities will take into consideration, for example, whether a customer's ability to obtain travel services online is only made if they agree to a company's privacy policy. If a data subject's personal data is processed for direct marketing, the data subject will have the right to object.

› **Notification of data breach.** Currently there's no need for companies to notify the Information Commissioner of a breach of the Data Protection Act but new Regulations change this. As from 2018, a breach or suspect breach must be notified to the Commissioner without undue delay and where possible in 72 hours.

› **Extension of territorial reach.** The Regulations extend to data controllers and processors beyond the EU whose activities relate to the 'offering of goods and services' to EU data subjects or 'monitoring' of EU data subjects. It remains to be seen how UK companies will be dealt with following Brexit.

› **Fines.** The Regulations increase the sanctions available and authorities are able to impose a fine of up to €20m or equivalent to 4% of a company's annual worldwide turnover (whichever is greater) for a breach.

› **Data protection officers.** Businesses may have to designate a data protection officer. This person will need sufficient expert knowledge and must be employed by or under a service contract with the business.

› **Right to be forgotten.** Individuals will have the right to have personal data removed in certain circumstances e.g. where a data subject withdraws their consent to allow their personal data to be processed and there are no legal grounds for continuing to process.

Not all doom and gloom for businesses

› **No more notification requirements.** One welcome change is the removal of the requirement to notify or register (and pay a fee) with the Commissioner

› **One stop shop**. The Regulations will adopt a one-stop-shop regime, meaning companies will only have to deal with one lead authority rather than having to deal with each and every EU Member State authority.

What should you be doing now to prepare?

1 Prepare for data breaches. Design procedures to ensure your business can act quickly and notify the data protection authority in time if there is a breach.

2 Establish a framework for accountability by reviewing your data protection procedures; check staff are trained properly by conducting practice assessments.

3 Embrace privacy by design; for any new product being rolled out, privacy must be embedded.

4 Analyse the legal basis on which you use data. Is your use lawful and do you have the required consent?

5 Privacy notices and privacy policy; are they transparent and in plain language? Are they prominent?

6 Consider the rights of data subjects; make sure you are prepared for them to exercise their rights under the new regulations. If you store data, make sure you have legitimate grounds to continue to store the data. The burden of proof will be on you.

7 If you process data for others make sure you are complying with the obligations under the Regulations on data processors; consider, for example, whether your existing contracts are adequate to meet the new responsibilities for data processors.

8 Cross-border data transfers; when transferring data outside the EU (including intra-group transfer) make sure you have a legitimate basis for transferring personal data to jurisdictions that are not recognised as having adequate data controls.

In extraordinary circumstances

When does ordinary become extraordinary? A matter of semantics maybe, but one that holds importance for customers and airlines alike. Ian Skuse investigates

Ian Skuse Blake Morgan. **Ian is a partner in Blake Morgan's Aviation team and is based in their London office. Ian was a partner with Piper Smith Watton LLP who merged with Blake Morgan LLP on 1st August 2015.**

Following a Court of Appeal decision in Huzar v Jet2 (2014), airlines generally accept that few technical issues with the aircraft are 'extraordinary'. So when can an airline defend a claim for delay compensation under EU Regulation 261/2004 ('the Regulation') by arguing that 'extraordinary circumstances' apply?

Article 5(3) of the Regulation states: "An operating air carrier shall not be obliged pay compensation…if it can prove that the cancellation is caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken".

Recital 14 lists examples of 'extraordinary circumstances' as political instability, weather conditions incompatible with the operation of the flight, security risks, unexpected flight safety shortcomings and strikes that affect the operation of the air carrier. Recital 15 says extraordinary circumstances exist where a delay is caused by an air traffic control decision, even though reasonable measures have been taken to avoid the delay. The European Commission published guidelines on the Regulation to explain it more clearly but those guidelines do not change the law or bind the Courts.

Case histories

1 Cabin crew illness

› **Smith/Collinson v. BA – Staines County Court**. A sick Captain was unfit to fly causing delay. The Judge found that this was not extraordinary and it was not unreasonable for replacement crew to be available and this was not 'commercially unviable'.

› **Coffer v. KLM – Liverpool County Court**. The unexpected illness of the cockpit crew and the fact that no spare crew were available was 'extraordinary'. Airlines cannot be expected to keep spare pilots and other cockpit crew at each and every airport.

› **Barford & Hobbs v. Ryanair - Liverpool County Court.** Illness of the captain was 'extraordinary' where no standby captain was available and to be contrasted to a situation where the airline merely failed to provide sufficient crew members for a plane to take off.

2 Delays arising from third-party action

Some airport operations which cause delay (e.g. the late arrival of steps, the bus for disabled passengers, the baggage system) are outside of the airlines' operations. Siewert v. Condor (European Court November 2014) involved a delay due to boarding stairs colliding with the aircraft. The court found this was not extraordinary.

3 Lightning strike and bird strike

› **Evans/Lee v. Monarch – Luton County Court**

The judge found that a lightning strike was 'inherent in the normal exercise of the activity of the airline' and not an extraordinary circumstance.

› The EU advocate general issued an opinion in August 2016 concluding that bird strikes do not fall within the extraordinary circumstances defence.

4 The latest battlegrounds

› **Air Traffic Control.** Despite the wording of Recital 15, the courts are often asked to declare these delays as common-place and falling within the scope of the normal operations of the airline. In recent cases:

(a) O'Dell v. KLM – Staines County Court. The judge found a delay caused by an ATC decision to hold the aircraft on the ground due to adverse weather conditions in Amsterdam amounted to extraordinary circumstances. Nothing could be done to minimise the delay and the carrier took the first available slot.

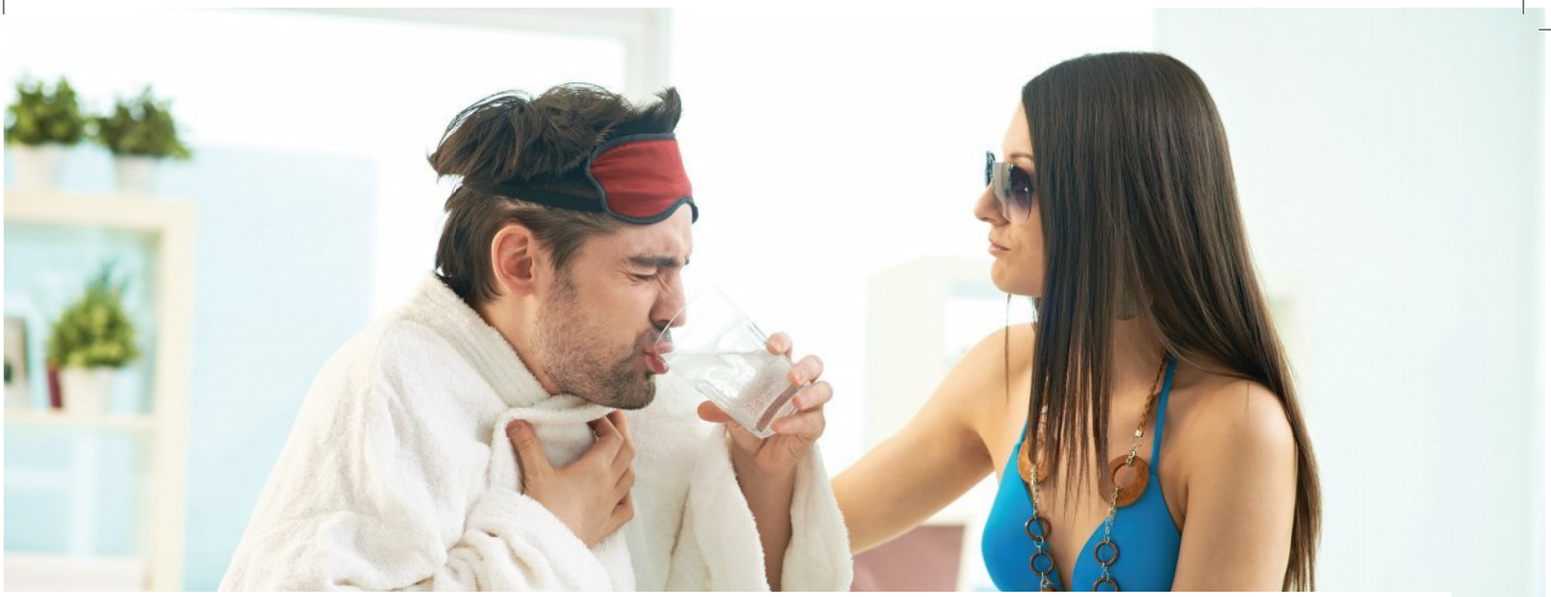
(b) Orenuga v. Air France – Staines County Court (2016). The airline showed evidence that a French ATC decision which caused the delay was 'extraordinary', and that the only alternative flight would not have reduced the delay.

› **Weather**. Weather delays are argued by some claimants as not 'extraordinary'. Weather conditions unsuitable for flying occur all of the time and therefore not unusual. Airlines argue that weather is often unexpected and unsafe and results in ATC decisions limiting flight departures and causes delays.

5 Non-EU connecting flight

Of significance to non-EU carriers is a test case going to the Court of Appeal (Garhan v. Emirates). A late landing in Dubai caused a missed connection to Thailand resulting in a 13-hour delay. The carrier argues that the flight between Dubai and Thailand should not give rise to any airline liability as both locations are outside the EU.

Inconsistent decisions of the County Court make this a difficult area to advise on with certainty. Notwithstanding the Commission guidelines, we can expect these arguments to continue.



Minor illness claims, major headache

We're seeing a marked increase in minor sickness claims and Michael Gwilliam draws comparison with the explosion in PPI claims in recent years

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.**

Many of us will have had our patience sorely tested by irritating cold calls from claims management companies asking whether we have had an accident in the last three years that wasn't our fault or if we have ever purchased PPI.

Those at the sharp end of customer claims will also now attest that the travel industry is experiencing a knock-on effect from the existence of such companies and a growing new phenomenon – a tidal wave of minor sickness actions following holidays overseas.

A significant spike

The attitude of the judiciary has always been that, on an individual basis, sickness claims of limited duration are trivial matters and the bar to the recovery of damages is set very low. As a result, travel companies and their insurers have, in the past, generally looked to settle quickly and cheaply in order to reach an economic solution partly due to a fear of incurring disproportionately high third-party costs. This is particularly true with all-inclusive properties where the customers swear blind that they neither ate nor drank anywhere other than in the hotel restaurant.

This year, there has been a 'spike' in gastric illness claims many of which share similar characteristics: individuals or families (rather than larger group actions or outbreaks); relatively short duration illness (anything up to two weeks or so); no illness reported in resort; no supporting medical evidence (either from a resort doctor or UK GP); and no contact from the customer prior to a formal letter of claim up to three years after their return.

Why should this be? The answer may be simple; it's where the money is for the lawyers and the claims management companies. Since the Legal Aid, Sentencing and Punishment of Offender Act 2012, most low-value personal injury claims are subject to restricted fixed costs regimes under which successful claimants firms recover only very limited sums for their efforts (after, some would say, many years of making hay).

As their income streams fall away, many have looked for replacement revenues – and identified tour operator claims as an attractive alternative. As most accidents and illnesses occur overseas, these claims are excluded from the fixed costs regime and their fees are recoverable on more or less the traditional basis. It is no wonder that the travel industry finds itself increasingly in the firing line.

Giving lawyers a bad name

If you Google 'holiday sickness', you're bombarded by adverts from many claims companies. They seem to be re-focusing away from the PPI market (which has limited time left to run) and EC261 claims (where airlines are starting to pay or using ADR schemes).

Extravagant promises are made: 'Pursuing a claim is easy'; 'Claim up to £40,000 now'; 'Illness on holiday is usually food poisoning'; and 'You have nothing to lose'. An average value of £2,500 per person is often quoted. In addition, we hear more and more of large adverts taken out in airports and of claims staff handing out leaflets in popular resorts to drum up business.

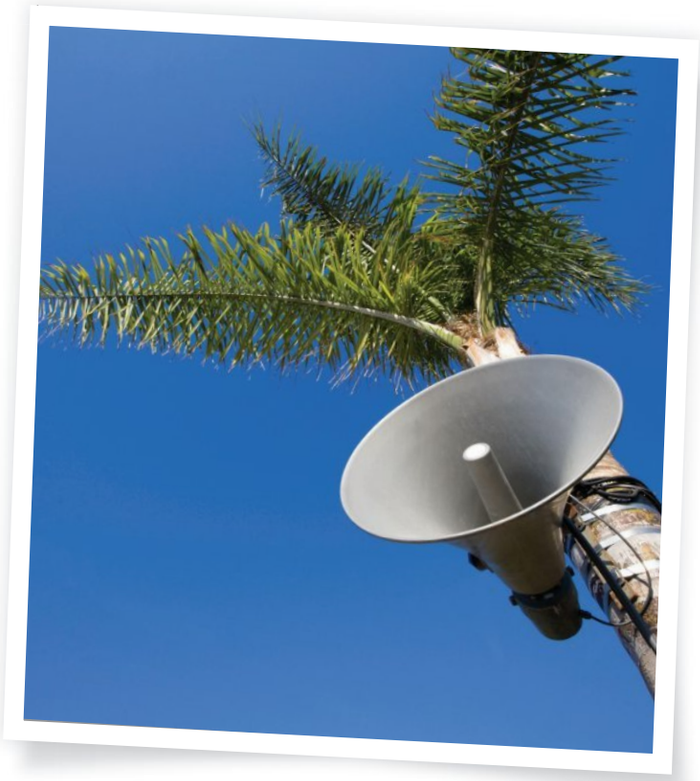
As a result of all this, a new focus is being brought to bear on the proper defence of illness claims – especially where the level of supporting evidence is so poor. Tour operators and their insurers are rightly starting to stand up to the tidal wave and to push back – partly this is from necessity due to the financial impact of failing to do so.

A turbulent future

ABTA is running a number of streams of work in this area, including lobbying the Ministry of Justice regarding the proposed increase in Small Claims limit (which would remove the entitlement to costs from many low value illness claims) and the expansion of the current fixed fee regime to cover holiday claims. They are also keeping a close eye on the more ambitious advertising promises made by the claims management companies with a view to involving the Advertising Standards Authority or the Information Commissioner's Office where appropriate.

But what of the future? The current indication is that the government will continue the implementation of the new Package Travel Directive (PTD) in 2018 notwithstanding the Brexit vote. As we all know, the new PTD will bring with it a much broader definition of a holiday package and draw many more companies' current trading models within its liability provision.

I fear that there are new challenges ahead for travel companies hitherto protected from the illness claim deluge. There will inevitably be a significant number of travel companies out there who will have to wrestle with the new challenge brought by swathes of illness claims - and many may have no idea what is about to hit them.



Message received and understood

Claire Mulligan says that companies should take steps to ensure customers are aware of essential travel advice from the Foreign and Commonwealth Office

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.**

Recent tragic events overseas, from attacks at the Bardo Museum, Tunisia, to the incident on the esplanade in Nice, have highlighted the importance of considering travel advice provided by the Foreign and Commonwealth Office (FCO) .

The travel industry has always looked to FCO advice around the safety of destinations. It proved pertinent from a security perspective when considering whether to fly customers to Kenya after civil unrest, and has also been relevant for operators offering holidays to more adventurous, off-the-beaten-track destinations such as Libya and Afghanistan.

Clearly with some of the recent terrorist activity in France, Belgium, Egypt, and Tunisia, FCO advice is back in the spotlight. Advice and the way it is provided to the public is currently under review by the FCO.

Getting the message out there

The FCO travel advice pages are available to the public on their website, and they provide advice on over 200 countries, having roughly 40m page views a year and over 1m subscribers to their travel alerts. The FCO also advertises its service by – for example – sending details with each new passport issued.

Case law has shown there has been no liability on operators who follow FCO advice when deciding whether to allow no-cost cancellation of holidays (Lambert v Travelsphere [2004] where a customer was not entitled to cancel and receive a refund when there was a 'flicker of hope' that the holiday could go ahead and it was not 'absolutely inevitable and unavoidable' that the holiday could not go ahead); or by placing restrictions on those travelling with them (Wilkinson & Others v First Choice Holidays and Flights Limited [2008] when civil unrest broke, and the FCO advised against travel, after the clients had been flown out and a number of excursions and facilities weren't available).

How far does a travel company need to go to bring FCO advice to customers' attention in the first place?

ABTA's Code of Conduct

It is timely to remind readers of ABTA's Code of Conduct which requires Members to advise customers of the availability of FCO advice.

The ABTA Code requires, at clause 2H, that "Before a contract is made, (Members shall) advise their Clients of the availability of any advice issued by the FCO. This can be viewed at *www.gov.uk/foreign-travel-advice*".

ABTA's Website Checklist says: "You must refer clients to travel advice issued by the FCO. This can be done by way of a link to *www.gov.uk/foreign-travel-advice* and this information should be prominent and in an easy to find area."

Now is a good time to review your brochure and web text to clarify just how you publish and highlight FCO advice and how you ensure that you are bringing it to the attention of your clients before they enter into a contract with you.

Is it enough to highlight the existence of the FCO website and provide a click-through link on your website or do you need to set out the specific advice per country? Given the rate at which the FCO advice changes per region it is unlikely that the latter choice would be a realistic option for any company offering multiple destinations.

Man power

Have you thought through what your booking team should tell customers when they ask if a region is safe to travel to? Or what you tell customers if they ask if they can cancel their holidays if they do not feel safe to travel to certain areas of the world? Are your staff aware of how your approach will fit with customers' travel insurance which typically does not pay out for travel arrangements cancelled due to security concerns not affected by a change in FCO advice?

We would suggest that you definitely include reference to terrorism and security when describing the type of information available on the FCO site.

It may be good practice to ensure customers are aware of the availability of the advice by including a click-through link in your pre-departure information and communication with customers.

And do ensure your sales team have scripts to follow when they receive queries about the security and safety of destinations and that they again refer customers back to the FCO advice if concerns are raised. Your staff are your most important asset in communicating with customers and they need to be confident in what they are saying.

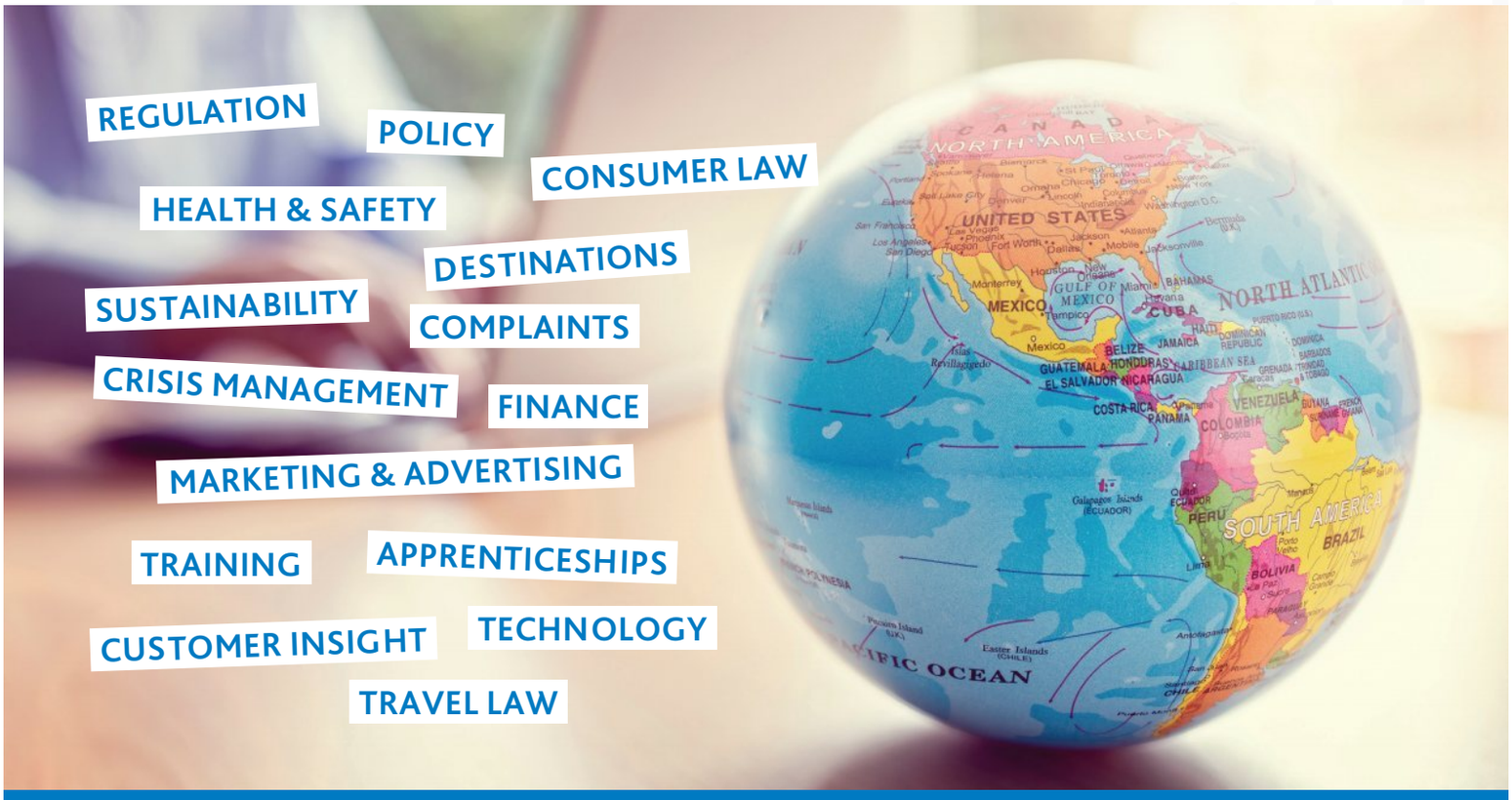
ABTA | CONFERENCES & EVENTS

ABTA is expanding its Conferences and Events programme

Our aim? To deliver practical, high-quality training opportunities for the travel industry covering a range of critical issues.

Conferences and Events take place in London, Manchester, Edinburgh, Leeds and Birmingham. Members benefit from discounted rates.

For more information visit abta.com or contact us on events@abta.co.uk



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HILL DICKINSON

The travel lawyers

Joanna Kolatsis
Partner - head of aviation and travel
+44 (0)20 7280 9103
joanna.kolatsis@hilldickinson.com

Maria Pittordis
Partner - marine business group leader
+44 (0)20 7280 9296
maria.pittordis@hilldickinson.com

ABTA PARTNER

hilldickinson.com

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