TATLA

TRAVEL AND TOURISM LAWYERS' ASSOCIATION

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A warm welcome to readers old and new to this first TATLA Newsletter of 2017!

I am afraid that, having resisted BREXIT for most of last year (if we pretend the referendum didn't happen, it might just go away …) we have now decided to add our own editorial to the deafening echo chamber of BREXIT opinions. However, we approach this now well-worn topic from a peculiarly travel law angle. The fate of the Package Travel etc. Regulations 1992 (and, for that matter, the new EU Directive) may be low on a politician's list of priorities, but we are nothing if not parochial at TATLA. The regulation of package travel is important to us and our clients. We have spent years (some of us, decades) debating and litigating the meaning of "*package*", the liability of tour operators for excursions and other off-package sales (among other topics). This stuff matters and we therefore make no apologies for what follows. Whatever the Article 50 trigger (when fired) may bring, we wish you all a happy and interesting 2017.

EUROPEAN PACKAGE TRAVEL REGULATION AND THE UNITED KINGDOM: A STUDY OF BREXIT IN MINIATURE?

The Package Travel etc. Regulations 1992 can justifiably claim to be the foundation stone of travel law as a separate legal discipline in the jurisdictions of the United Kingdom. The reason that travel law (unlike, say, sports law) is more than simply scraps of tort law and contract, but, instead, has a consistent and discrete identity is because of the Package Travel etc. Regulations 1992. A large body of case law has accreted around the Regulations; travel law has its own burgeoning jurisprudence, its own textbook and its own society (this one). Talented and imaginative English lawyers have given us the "*local safety standards*" defence (***Wilson v Best Travel Ltd*** [1993] 1 All ER 353 (QB) which ante-dates the coming into force of the 1992 Regulations makes clear reference to them) and, as the preamble above suggests, we have spent many, many hours (and expended good money in costs) in working out what – in an English setting – the 1992 Regulations mean and where the boundaries of tour operator extended liability might lie.

The 1992 Regulations survived (and still survive, however creakily) the age of the internet and the development of concepts like "*click-through bookings*" and "*dynamic packaging*". The EU has now – somewhat belatedly – caught up with some of the technological advances and, as most readers will know, we now have a new Package Travel Directive[1] which mandates a reinforced model of consumer protection in the event of insolvency (in particular): there are additional provisions to extend rights as to advance information and cancellation. However, as the EU Directive emerged into the grainy Brussels light, a new dawn was breaking on our side of the Channel: Brexit. The timing – from a travel lawyer's perspective – could not really have been any worse.

The melancholy theme of what follows is that the fate of the Package Travel etc. Regulations 1992 (and their successor,if any) highlights wider problems with Brexit: the continuing importance and impact of the EU and the corresponding loss of UK influence.

First, the EU Directive requires translation into UK Law and this has to take place by 2018 (at which time, of course, the UK is likely still to be a member of the EU). The form and method by which the Directive is to be translated into UK law is left by Brussels to the UK. We deal with such matters by subordinate legislation: a statutory instrument or Order in Council (as with the existing Package Travel etc. Regulations 1992: a statutory instrument SI

[1] Directive (EU) 2015/2302.

1992/3288). The subordinate legislation is made by the Secretary of State pursuant to section 2(2) of the European Communities Act 1972. The 1972 Act is the conduit by which EU law emanating from the Brussels institutions becomes the law of the UK and, albeit there is some debate about the matter and whether the Interpretation Act 1978 might generally save existing subordinate legislation, the general view appears to be that *when* – on what the Government terms "*BREXIT DAY*" – the Great Repeal Bill receives the Royal Assent and the 1972 Act is no more *then* all subordinate legislation passed by authority of it will also be repealed unless saved. Accordingly, on BREXIT DAY we will lose the Package Travel etc. Regulations 1992 (and any replacement passed under section 2(2) of the 1972 Act) unless these are saved by the Government. Absent the 1992 Regulations (and its important provisions on extended liability) we will, one supposes, default back to pre-1993 common law contract principles as to tour operator liability.

What then are the Government's intentions as to package travel regulation? But for the 2015 Directive (and the imperative need to translate this into domestic law by 2018) we would probably still be ignorant. However, the Government has published a green paper on this topic: in a October 2016 publication – "*Modernising Consumer Protection in the Package Travel Sector: Consultation on ATOL Changes*" – the DfT stated as follows:

"*1 This consultation is part of the Government's programme of reform for the Air Travel Organisers' Licencing (ATOL) scheme. Since the 1970s ATOL has provided effective protection to holiday-makers, ensuring that they can complete their holiday or obtain a refund in the rare circumstances that a travel company fails. The scheme protects over 20 million holiday-makers each year, and it has been the key way in which the UK implements the EU Package Travel Directive (PTD 1990) for package holidays that include a flight.*

2 We have already taken steps to update the ATOL scheme, and bring it in line with modern trade practices. In 2012, we worked with the Civil Aviation Authority (CAA) to introduce the "Flight-Plus" category, ATOL Certificates, and Agency Agreements in the Civil Aviation (Air Travel Organisers' Licensing) Regulations 2012 ("2012 Regulations") . We believe these interventions have had a positive impact by extending consumer protection, levelling the playing field between businesses and improving clarity for all.

3 We are now considering further reforms, to build upon these changes and make sure that ATOL keeps pace with a changing travel market. In particular, a new EU Directive on package travel and linked travel arrangements1 ("PTD 2015"), has been introduced to bring similar, but further

reaching improvements to consumer protection across Europe. This will need to be implemented across EU Member States by January 2018, and brought into force six months later.

4 The UK Government has supported the rationale for updating the PTD, in order to bring greater clarity on what constitutes a package holiday and to harmonise protection. Overall, the new Directive has the potential to provide a greater level of protection to UK consumers, whether they purchase from a company established in the UK or overseas. The amendments in PTD 2015 will also help to bring a level playing field for companies, whether they operate on the high street or online.

5 While our future relationship with the EU is still to be determined, the Prime Minister has announced that the UK will continue to be a full Member of the EU until exit negotiations are concluded. This means that all the rights remain in place, and our obligation to transpose EU law, including the PTD 2015, will remain at this time."

So there it is. Theresa May suggested, in an October 2016 speech, that the existing corpus of EU law – the *Acquis Communautaire* – will "*where practical*" be retained (to prevent large gaps opening up in the law of the UK jurisdictions as we repeal the 1972 Act and its subordinate legislation) and, it clearly appears from the DfT paper, that some form of package travel regulation will be retained.

Where does this leave us? It would be naïve to assume that package travel regulation will remain static and as enshrined in the 2015 Directive as we hurtle through and beyond the Brexit door. The Court of Justice (CJEU) will continue to be active in this field (as it has been in the past). Equally, the Brussels institutions will probably continue to enhance consumer rights in this sector and there may yet be further revisions of the new Directive. In the English Courts litigants will no longer – following Brexit – be able to take their cases to Luxembourg, we will no longer nominate Judges to sit on the CJEU and the English Courts will not be bound (in any formal sense) by the CJEU's decisions. However, it appears that we are going to retain consumer rights *inspired by Europe* in the field of package travel (post-Brexit) and, in these circumstances, English Judges are likely to regard the continuing pronouncements of the CJEU as significant and highly persuasive. In other words, we will continue to be heavily influenced and affected – for good or ill – by Brussels and Luxembourg while having no representation on the Council or Commission, in the Parliament or on the Court or much/any influence on their decision-making. One might regard that as the worst of all worlds: an apt illustration, perhaps, of this country's general plight as we depart the EU.

Editor
Matthew Chapman

NEW EDITION

Saggerson on Travel Law and Litigation

Matthew Chapman, Sarah Prager and Jack Harding

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