

## The Insurance Implications of the EC Package Travel , Package Holidays & Package Tours Regulations 1992

This legislation was one of the most important changes in the law affecting relationships between corporate event organisers and their clients. The following notes are provided as opinion only and should not be relied upon as statements of law. The Regulations raise the following areas of risk, some of which are likely to be catered for by existing insurances (if held), whilst others present problems which may need to be addressed by specialist insurance products:

The following sections provide short notes on the implications of the legislation and how the Regulations apply.

### Legal Liabilities

#### Public Liability

**Clause 15 (2), (3) & (4) : Public Liability for damage sustained by a consumer, including personal injury.** Liability for damage may be limited in accordance with International Conventions (e.g. Paris Convention, Warsaw Convention).

**Clause 15(2)** refers to “ unless the failure...is due neither to any fault of that other party nor to that of another supplier of services “ - the implication being that the tour operator can now be responsible for the negligence of suppliers (with certain exceptions as below).

Comment:

***This certainly increased the exposure of the tour operator to liability for personal injury claims.***

#### Errors & Omissions

Clause 15(1) and (2): Liability for failure to perform or failure to properly perform obligations under the contract. Includes liability of sub contractors (with right of subrogation ).

Exceptions are:

- fault of the consumer
- fault of third parties unconnected with the provision of services contract and unforeseen and unavoidable.
- failures due to unusual and unforeseeable circumstances beyond the control of the party pleading this exception, the consequences of which could not have been avoided even if all due care had been exercised
- events which the organiser, with all due care could not foresee or forestall

#### **Comments:**

***It is worth noting that most of these excluded liabilities are risks that can be covered by event insurance.***

***Damages for liability other than personal injury may be limited under contract provided such limitation is not unreasonable.***

***In the light of some major claims arising from injuries to consumers in certain parts of the world the insurance market is taking a more cautious approach to the relationship with sub contractors.***

***Essentially they are looking for careful selection of suppliers who themselves carry adequate insurance without waiver of rights against them for their actions.***

**Under Clause 13 (3) the consumer is entitled to compensation for non-performance** of the contract (subject to certain exceptions). We understand that this compensation may exceed the cost of the tour (e.g. to include financial loss.)

**Clause 8 (d): Failure to make cancellation/assistance insurance available.**

This raises the interesting possibility that except where they make insurance compulsory the tour operator may actually be committing an offence if they fail to supply details of insurance which a consumer may take if he wishes - this ignores the possibility that an individual consumer may be uninsurable ( e.g. heavily pregnant woman, or person with a serious medical condition.)

**Comments:**

***A tour operator's liability insurance should also cover the costs incurred in defending a case. Fines are not insurable, but the cost of defending a prosecution may be insurable under a legal expenses insurance. Presumably an offending party could be held responsible for the financial consequences of failing to comply with this term of the Regulations.***

## Pecuniary Losses

Clause 12: Significant Alterations (before departure)

The consumer is entitled to cancel without penalty.

Clause 13: Potential losses under Clause 12 where organiser cancels for any reason (other than fault of the consumer) then the consumer may be entitled to either:

- A substitute package
- The difference in value for an inferior package
- A refund

Clause 14: Significant Proportion of Services Not Provided

This relates to curtailment or non-performance after departure. Organiser may be liable for:

- The cost of alternative arrangements
- Compensation for difference in value
- The cost of possible transport back to point of departure
- Compensation to the consumer

Clause 15 (7): Assistance to Consumer

Possible additional costs in giving "prompt assistance to a consumer in difficulty" This can even include assisting a consumer who has declined travel insurance, although there are possibilities for recovery. A good insurance should also provide cover in these circumstances where the Regulations don't apply.

**Comments**

***These are the "tour operator's liability risks" which arise under breach of contract.***

To whom do these Regulations apply?

**“Organisers”** - i.e. people, bodies of companies who organise packages or sell them either directly or through a retailer such as a travel agent. The Regulations make organisers legally liable for the proper execution of all parts of the package, even where independent sub contractors are at fault.

What is a “Package”?

The Regulations define a package as a pre-arranged combination of two (or more) of the following components:

1. travel
2. accommodation
3. other tourist services not ancillary to transport or accommodation and accounting for a significant proportion of the package

sold at an inclusive price and provided the service covers a period of at least 24 hours or involves a night away from home.

**It is not possible to escape the provisions of the regulations by pricing components separately.**

What are “Significant Other Tourist Services”?

**What is a “tourist service”?**

The question is “is it something you would do on holiday?” If yes then it may be a tourist service.

This would probably include a visit to a theme park, but not simple attendance at a conference or seminar.

Therefore a combination of hotel accommodation plus a visit to a theme park would probably be construed as a package, and therefore covered by the regulations.

**What is “Significant”?**

This term is not defined in the legislation.

There is no case law specifically on this at present. However, judgements have been made in the High Court on what is a material error in accounts:

- < 5% : unlikely to be material
- 5-10%: possibly material
- 10%> : probably material

If the same criteria apply then it might be construed that an element of an event accounting for more than 10% of the budget is likely to be significant.

Another view is that the services concerned are “significant” if they are a reason for taking the package.

**What is Pre-arranged?**

You do not have to offer packages for sale in brochures. Even if the package is put together to a client’s specification, it is still likely to be pre-arranged if the elements are put together before the conclusion of the contract.

## General Notes & Comments

1. Whilst some of the obligations placed upon organisers appear onerous, there is significant scope for recovery from negligent sub contractors. It is important therefore that tour operators should be aware of who all their sub-contractors are, and preferably confirm details of their insurance arrangements.
2. Under Clauses 13 and 15, there are exceptions for “unusual and unforeseen circumstances beyond the control of the party by whom this exception is pleaded, the consequences of which could not have been avoided even if all due care had been exercised”, but this is not defined in any more detail.

We do not yet know how this term will be interpreted, although it would seem logical that unforeseen disasters, which are insurable risks, are likely to be reasonable grounds for pleading exceptions. Most of these can be covered under an event insurance.

3. It is not clear whether failure to anticipate the consequences of an unforeseen disaster (as distinct from the anticipation of the disaster itself) might leave the tour operator exposed to not being able to plead this exception, but it would not be sensible for a consumer to assume that he could not, and so the consumer is still likely to be exposed to Event Insurance risks.
4. It is also not clear what a reasonable limitation of non-injury liability will mean, but clearly limiting it to a nominal or minimal sum is unlikely to be reasonable. It would seem sensible to assume that reasonableness would be judged on the circumstances of an individual claim.
5. It is clear from protracted correspondence that the Regulations applies equally to business travel, and considers a corporate buyer to be a consumer. The provisions of the Regulations are therefore equally as important to companies managing groups of business travellers as it is to holiday operators.

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