

UNFAIR TERMS IN PACKAGE TRAVEL CONTRACTS IN BULGARIA – REVIEW AND COMMENTARY

Tanya YONCHEVA^a

^a Agricultural University - Plovdiv, Faculty of Economics, Department of Tourism, 12 Mendeleev Blvd, 4000, Plovdiv, Bulgaria, ORCHID: 0000-0003-3063-9924

Cite this article:

Abstract

Nowadays, package travel contracts (contracts for package tourist trips) are a traditional legal form through which travel agencies carry out their activities. Similar to other consumer contracts, the relations between the parties are largely standardized, insofar as the terms of the contract are drawn up in advance by the tour operator and offered to the consumer in a ready-made form, and the consumer's options for influence are limited to deciding whether to accept or reject the contractual content. This leads to the unilateral imposition of clauses that significantly affect the rights and legitimate interests of consumers participating in the trip. The purpose of this study is to analyze the nature and characteristics of unfair terms in package travel contracts, to indicate the legal consequences of their inclusion in the content of the contract, and to identify existing ways of removing them.

Keywords: unfair terms, consumer, package travel contract

FEATURES OF THE PACKAGE TRAVEL CONTRACT

The package travel contract began to enter the legal systems of modern states in the 1960s. At that time, the technology of travel agencies, which is well established today, gradually developed and spread – combining several different travel services into a single complex travel product and offering it at a total price to the customer directly from the tour operator or through an intermediary (Bunce, S., 2016, Vries, A., 2016). Under the package travel contract, the tour operator undertakes to prepare and provide the consumer with a trip consisting of a combination of specific services, for which the latter is obliged to pay the agreed price. The relations concerning the conclusion of such contracts, their performance, non-performance, and the liability of the parties to the contract are expressly regulated in Chapter Seven, Section II of the Tourism Act (published in State Gazette No. 30/26.03.2013). The primary source of the legal regulation is Directive (EU) 2015/2302 of the European Parliament and of the Council of 25 November 2015 on package travel and linked travel arrangements (Directive (EU) 2015/2302), which repealed Directive 90/314/EEC (Arrowsmith, S., 2016, Dean, K., 2016, Griffiths, R., 2016, Masutti, A. & Torok, Z., 2016).

The parties to the contract are the tour operator and the consumer. The tour operator is a trader who, by profession, prepares, offers, and sells package tours either directly or through a travel agent (for the definition of the term "tour operator," see Article 3, paragraph 8 of Directive (EU) 2015/2302 and paragraph 1, item 60 of the Supplementary Provisions of the Tourism Act). In order to carry out such activity, the person must be registered with the competent state authority, namely the Minister of Tourism, and must meet the legal requirements.

The other party to the package travel contract is the consumer, who, according to the terminology used in Directive (EU) 2015/2302, is referred to as the "traveler." This is essentially a person who purchases a travel package with a view to satisfying their personal needs of an intangible nature (rest and recuperation, accumulation of pleasant experiences, participation in cultural and other events, etc.). In an effort to include all potential participants in organized travel within its scope, Directive (EU) 2015/2302 specifies the following entities that are included in the category of "traveler." These are: 1. any person who seeks to conclude a contract falling within the scope of the Directive; 2. a person who is entitled to travel on the basis of such a contract.

In most cases, the users of the services under the contract are natural persons who agree to purchase a package tour for their own needs. However, it is not excluded that a party to a package travel contract may also be a legal entity that concludes the contract for the benefit of its employees participating in the trip (Tormonov, Z. 2012, Varadinov, O. 2002, Bineva, V. 2008, Goleva, P. 2002).

In doctrine, a package travel contract is classified as a consumer contract (Goleminov, Ch. 2001, Loos, M. B. M., 2014, Loos, M. B. M., 2007, Loos, M. B. M., 2020), and its inclusion in this legal category is justified primarily by the nature of the parties who conclude it. On the one hand, these are natural persons as consumers of the relevant type of services included in the subject matter of the contract, and on the other hand, the trader. Consumer contracts have two other specific features in common that distinguish them from other commercial and contractual agreements. The first is their subject matter – goods or services, with the direction of acquisition always being the same – from the trader to the consumer. The other is the requirement that the consumer be a natural person who acquires the goods or uses the service for personal, non-commercial purposes – see paragraph 13, item 1 of the Consumer Protection Act (published in State Gazette No. 99/2005, in force since June 10, 2006), containing a definition of the term "consumer."

NEED FOR LEGAL PROTECTION OF CONSUMERS

The introduction of special protective legislation for consumers is a consequence of the international obligations undertaken by our country as a member of the European Union to harmonize its domestic legal framework with the rules of European law, and the protection of consumers of goods and services is one of the areas subject to mandatory harmonization (Reich, N., 2014, Morandi, F., 2020). In our national law, the main principle in this regard is proclaimed in the Constitution of the Republic of Bulgaria, in Article 19, paragraph 2 (published in State Gazette No. 56/13.07.1991). The text states that "*the law creates and guarantees equal legal conditions for economic activity for all citizens and legal entities, while ... protecting the consumer.*" Based on this constitutional provision, the Consumer Protection Act (CPA) regulates in detail and comprehensively the various types of relationships related to consumer protection. The need for such protection is justified primarily by the subordinate role of the consumer in negotiations with the trader, given the latter's professionalism and better preparation and the monopoly position that it often occupies in the market (Schulte-Nölke, H., Twigg-Flesner, C. & Ebers, M., 2007). On a general basis, some of the guiding principles of the CPA will apply to consumers of package travel, namely: the declaration of invalidity of the prior exclusion or restriction of rights and the waiver of rights under this law, and the nullity of any agreement specifying the law of another country, not a member of the EU, as applicable, which excludes the application of the provisions of this law or the law of an EU member state. To these are added the special protective provisions provided for in the Tourism Act: the obligation to provide information to the consumer before, during, and after the conclusion of the contract (Tormannov, Z. 2010, Loos, M. B. M., 2016, Schulze, R., 2005), prohibition of unfair terms in the contract (according to the view expressed by Ch. Goleminov, it is more correct to speak of "terms that lead to unfair treatment of consumers"), the possibility for the consumer to withdraw from the contract, the obligation of the trader to assist the consumer, and the conclusion of compulsory insurance to cover his professional liability (Goleva, P., 2007). Of particular importance not only for participants in package tours, but also for consumers of goods and services in general, is that the special protection already established in the legal order should be continuously maintained and enhanced (Tonner, K., 2016). The latter is achieved through various legal means, one of which is precisely the prevention and combating of the unilateral imposition of unfair terms in contracts concluded with consumers. A key role in this regard is played by Council Directive

93/13/EEC of 5 April 1993 on unfair terms in consumer contracts and the subsequent acts amending it - Directive 2011/83/EU on consumer rights and Directive (EU) 2019/2161 on better enforcement and modernisation of consumer protection rules in the Union. Their basic principles are incorporated in Chapter Six of the CPA.

CRITERIA FOR ASSESSING UNFAIRNESS

When clarifying the issue of the unfair nature of the terms of package travel contracts, the objective criteria for assessment set out in Article 3 of Directive 93/13/EEC should be taken as a starting point. This means that a contractual term is unfair, i.e. unequal, invalid, when its inclusion in the contract leads to the simultaneous fulfillment of several conditions: the clause in question conflicts with the requirement of good faith (in the sense of fairness and respect for the interests of the other party), causes a significant imbalance between the rights and obligations of the parties; the imbalance creates a risk of harm to the consumer. The overall assessment of unfairness requires the listed general criteria to be broken down into several individualizing factors that depend on the specific case. These are: the specific nature of the services included in the package tour; the circumstances surrounding the conclusion of the contract; interpretation of the disputed term in light of all other arrangements at the time of signing the deal. The doctrine advocates the view that the three subjective criteria mentioned above do not apply to contracts under general terms and conditions, such as package travel contracts, due to the standardized rules for concluding the transaction, which do not reflect individual characteristics. (Varadinov, O. 2002).

It is important to note that only contractual clauses that have been drafted in advance and unilaterally by the trader and accepted "en bloc" by the consumer are subject to unfairness analysis. In other words, individual terms resulting from independent negotiations between the entrepreneur and the consumer are excluded from the assessment, and the European legislator's motive for such a provision is the existence of a fundamental opportunity for the consumer in such a situation to influence the content of the contract.

Insofar as the meaning of the term "unfair clause" is defined by law and its intended content is used in the assessment of all consumer contracts, regardless of their type, there is no basis for independently defining the concept in question with regard to package travel contracts. Nevertheless, based on the current regulatory framework, an attempt can be made to categorize the types of unfair terms appearing in the contract in question, dividing them into two groups:

1. general terms, the legal regulation of which is contained in the CPA and which are applicable to a wide range of consumer contracts, including package travel contracts. Some of these are as follows:

- a clause that exempts the tour operator from liability or limits its liability under the law in the event of death or personal injury to the consumer caused by the actions or omissions of the organizer or any of the providers of the tourist services due (Alleweldt, Fr., Tonner Kl., McDonald, M., 2008, Magnus, U. & Micklitz, H., 2004);

- a clause that excludes or limits the consumer's legal rights vis-à-vis the tour operator in the event of complete or partial non-performance or incorrect performance of contractual obligations, including the possibility of offsetting an obligation to the organizer with another counterclaim;

- a clause making the performance of the tour operator's obligations dependent on a condition whose fulfillment depends solely on its will;

- a clause allowing the organizer to retain the amounts paid by the consumer in the event that the latter refuses to conclude or perform the contract, while not providing for the consumer's right to receive compensation of the same value in the event of non-conclusion or non-performance of the contract by the tour operator. Such would be an agreement providing that if the consumer has paid a deposit but has not paid the total price of the trip in full within the specified period, the deposit shall not be refunded;

- a clause obliging the consumer to pay unreasonably high compensation or a penalty in the event of non-performance of his obligations;

- a clause allowing the tour operator to unilaterally and without justification change the characteristics of the tourist services included in the package, etc.

2. special clauses that have legal significance only within the framework of package travel contracts. An argument for the proposed distinction can be found in the existing relationship between the two laws – the Consumer Protection Act and the Tourism Act, or more precisely, their correlation as general and special laws.

From the point of view of doctrine and practice, the unfair contractual terms in the second category are of greater interest, which is why the focus of attention in the following lines falls on them. The following unfair terms are most commonly found in the texts of package travel contracts:

- a clause that obliges the consumer to pay a disproportionately high administrative fee when transferring their rights and obligations under the contract to a third party, or provides for an excessively long period before departure during which they are obliged to

notify the organizer of the transfer. It should be noted that our law does not exclude the possibility of the consumer being replaced before the start of the trip, but the consumer has a reciprocal obligation to notify the tour operator of this within a "reasonable period" (Article 86 (1) of the Tourism Act). The period is considered reasonable when the consumer gives notice no later than seven days before the start of the package tour. Formulated in this way, the provision allows tour operators to stipulate an unreasonably long period in contracts, for example 20 or more days before the start, by which the consumer must have found a suitable replacement who meets all the requirements for participation in the trip and has given the necessary notice. In this way, the consumer is forced to exercise his right of substitution within the time limit set, otherwise he loses it, which undoubtedly harms his interests.

- a clause that exempts the tour operator from liability in the event that, for reasons beyond its control, the trip is canceled, delayed, or significantly altered. It should be noted here that, under certain conditions, the law itself provides for the removal of liability for damages when the trip is canceled before the start date. According to Article 89, paragraph 7, items 1 and 2 of the Tourism Act, there are two conditions for this: failure to recruit the minimum number of tourists required for the trip to take place, or force majeure. In all other cases, the organizer is obliged to compensate consumers affected by the cancellation. In the event that an insufficient number of tourists have registered for a particular trip, the tour operator may be released from liability only if the contract stipulates in advance that the trip must be filled with a certain minimum number of participants and if consumers have been notified in a timely manner that the required minimum has not been reached. In the second of the scenarios considered, the assessment of whether exemption from liability is permissible requires clarification of which events fall within the scope of the concept of "force majeure" and can therefore serve as grounds for exemption. Regarding the content of the concept of "force majeure," the ZT refers directly to the legal definition in Article 306, paragraph 2 of the Commercial Law, which states that it is "an unforeseen or unavoidable event of an extraordinary nature that occurred after the conclusion of the contract."

In addition to the general definition of force majeure given in commercial law, the understanding of the same term in legal theory must also be taken into account when analyzing the grounds for cancellation of the trip by the tour operator. It defines force majeure by means of several cumulative conditions, such as: a sudden external event that does not fall within the professional sphere of activity of the tour operator or the personal

sphere of the consumer and which cannot be prevented even with the exercise of extraordinary care (Führich, E. 2010).

Usually, in the general terms and conditions of contracts, tour operators refer to changes in the schedule or cancellation of flights (Pazos, R., 2019) and bus transport by the carrier for technical or meteorological reasons (fog, storms, heavy snowfall, etc.), orders by the authorities to impose quarantine, strikes, riots, terrorist attacks in the area of the excursion. However, the organiser cannot justify the failure to fulfil its obligations by duplicating reservations. Based on the above criteria, we must accept that the mere occurrence of an extraordinary circumstance before the start of the trip or during the trip does not in all cases lead to the organizer's liability being waived. In the specific case, it must constitute an obstacle that makes the trip impossible or significantly jeopardizes it. In view of the above, in order to avoid harming the consumer, any clause with similar content in the contract should be interpreted in relation to the specific circumstances invoked by the tour operator in the event of cancellation, delay, partial or poor performance.

- an agreement that exempts the tour operator from liability if, in the case referred to in Article 90(7) of the Tourism Act, it is unable to offer other tourist services or provides that the consumer shall pay the costs of those services. The above text refers to a case where, during the trip, the organizer fails to perform a significant part of the promised services or finds that it will not be able to perform them. This is a case of non-performance or improper performance of the contract, which gives rise to specific secondary obligations for the tour operator. The first obligation is to arrange other suitable tourist services of the same or higher quality than those agreed upon in order to continue the performance of the contract (replacement services in place of the failed ones). The second obligation is to provide transport to the starting point of the trip or to another agreed location when the provision of replacement services is objectively impossible or the consumer has refused them for a valid reason. The obligation to provide return transport stems from the nature of the services included in the package, and in particular from the fact that their use requires the consumer to travel to remote locations. Added to this is the unusual situation in which the consumer finds himself, all of which may make it difficult for him to return home. Taking into account the risks mentioned above, the law requires the tour operator to assist the consumer regardless of who is responsible for the non-performance or improper performance. Even if these are the result of actions by service providers or force majeure, the above obligation remains with the tour operator. Therefore, the inclusion of a clause in the contract that preemptively eliminates the tour operator's liability for failure to provide

replacement services and transportation or imposes additional costs on the consumer will certainly cause a significant imbalance in the rights and obligations of the parties to the detriment of the consumer.

- a clause that introduces a mandatory written form for filing a complaint, or requires the complaint to be made only at the tour operator's office, or unreasonably shortens the period for submitting a claim by the consumer to 7 days from their return, instead of the statutory 14-day period, which runs from the discovery of the non-conformity or non-performance of the service. It should be clarified that when a consumer is provided with a poor-quality service during their trip, they are obliged to notify the tour operator in a timely manner and "without undue delay." For their part, the organizer is obliged to take the necessary steps to remedy the deficiency.

Complaints about services may be made by the consumer in writing or by any technical means, provided that the statement made can be reproduced. It is common practice for travel companies to draw up a report on the spot, certifying the defect found and the consumer's related claims. However, there are cases where compliance with a specific form is not possible or would greatly inconvenience the consumer (for example, the absence of a tour operator representative at the place of arrival is a serious problem for tourists, which can be overcome by making a verbal complaint by telephone). In situations such as this, the verbal form is obviously more appropriate given its accessibility and speed. Furthermore, excluding the possibility of submitting a complaint verbally could lead to a situation where the consumer misses the 14-day deadline if they are unable to submit their complaint in writing within that period. On the other hand, the general provisions of the Consumer Protection Act regarding the submission of complaints about services do not require a written form as a condition for their admissibility. In other words, the prior restriction of the methods and deadlines for making claims in connection with a package tour should be treated as a manifestation of bad faith, capable of infringing on the legitimate rights of the consumer.

LEGAL CONSEQUENCES OF INCLUDING UNFAIR TERMS IN A PACKAGE TRAVEL CONTRACT

The main protective measure against unfair terms forming part of a contract is to declare them invalid. The Tourism Act contains a principle of inadmissibility of including such clauses in the contract, but if they are directly imposed on the consumer, they are considered null and void under Article 146 of the Consumer Protection Act. In the contract

analyzed, the main problems related to unfair terms may potentially arise from the lack of balance in the general terms and conditions, in the drafting of which tour operators generally prefer their own economic interests over those of tourist consumers. This is even more true given the way in which the general terms and conditions of these contracts are presented to consumers – in a very voluminous form and with insufficient time to understand and comprehend their texts (Colangelo, M. & V. Zeno-Zencovich, 2016, Tereszkievicz, P., 2018). The question arises whether there is an effective legal mechanism through which the persons concerned can protect their personal and property rights. The first possible option is to follow the established administrative procedure by referring the matter to the state control authority in the form of the Consumer Protection Commission. If the subsequent inspection finds that the contractual terms in question are indeed "unfair," the Commission issues recommendations to the tour operator to remedy them. If the trader fails to comply with them within the statutory time limit, package travellers are left with the option of seeking legal protection for their infringed rights and interests. The Commission itself, by virtue of its legal powers, may bring an action to declare the relevant clauses null and void where the recommendations made previously have not been accepted by the tour operator and there is a risk that the terms of the contract may affect a large number of consumers or be used by other traders. In essence, this is a declaratory action, which is considered under Chapter Thirty-Three of the Civil Procedure Code, governing collective actions (Goleminov, Ch., 2010).

After the claim has been upheld, and if the consumers concerned have suffered actual damage as a result of the inclusion of the clauses declared null and void in the contract, each of them is entitled to bring a separate action for damages. To this end, it is necessary to prove the amount of the damages and the causal link between the damages incurred and the unlawful conduct of the tour operator. *De lege ferenda*, it is desirable that, in addition to the existing administrative and judicial control in the Tourism Act, a financial penalty be imposed on the tour operator when it is duly established that a separate term/terms of the contract is unfair and on that basis its invalidity is declared. This would encourage package tour operators to act fairly and, on the other hand, would reinforce the authority of the contract as an individual means of regulating relations between traders and consumers.

REFERENCES

- Alleweldt, Fr., Tonner Kl., McDonald, M. (2008). Study on Safety and Liability Issues Relating on Package Travel. <http://arrow.dit.ie/cg>.
- Arrowsmith, S. (2016). Making sense of new EU Package Travel Directive. www.travelmore.com/news_feature.php.
- Bineva, V. (2008). Liability for non-pecuniary damages in case of breach of contract for organized tourist trip. *Legal Thought*, (1), 49.
- Bunce, S. (2016). Analysis: Implications of the Package Travel Directive for Agents. www.travelweekly.co.uk/articles/56504/analysis-implications-of-the-package-travel-directive-for-agents.
- Colangelo, M., V. Zeno-Zencovich. (2016). Online Platforms, Competition Rules and Consumer Protection in Travel Industry. *Journal of European Consumer and Market Law*, 5 (2), 75-86.
- Dean, K. (2016). The Reform of the Package Travel Directive/Lexology. www.lexology.com/library/detail.
- Führich, E. (2010). Reiserecht, 6. Auflage. C. H. Beck München, 3-14.
- Goleminov, Ch. (2010). Fundamentals of Bulgarian Consumer Law. Varna, Chernorizets Hrabar University.
- Goleminov, Ch. (2001). Legal Protection of Consumers. Sofia, Siela.
- Goleva, P. (2002). Contract for an organized tourist trip with a total price. *Market and Law*, (9).
- Goleva, P. (2007). Compulsory liability insurance of the tour operator. *Commercial and Competition Law*, 5, 2-16.
- Griffiths, R. (2016). The new Package Travel Directive: a regulatory race to the top. Fieldfisher. www.fieldfisher.com/publications/2015/12/the-new-package-travel-directive-a-regulatory-race-to-the-top.
- Koning, I. (2014). The Disabling of the EC Disability Regulation: Stott v. Thomas Cook Tour Operators Ltd. In the Light of the Exclusivity Doctrine. *European Review of Private Law*, 22 (5), 769-786.
- Loos, M. B. M. (2016). Precontractual information obligations for package travel contracts. *Journal of European Consumer and Market Law*, 5 (3), 125-130.
- Loos, M. B. M. Review of: N. Reich, H.-W. Micklitz. (2014). European consumer law. *European Review of Private Law*, 22 (6), 1073-1074.
- Loos, M. B. M. (2007). The Influence of European Consumer Law on General Contract Law and the Need of Spontaneous Harmonization. *European Review of Private Law*, 15 (4), 515-531.
- Loos, M. B. M. (2020). The Modernization of European Consumer Law (Continued): More Meat on the Bone After All. *European Review of Private Law*, 28 (2), 407-424.
- Magnus, U., Micklitz, H. (2004). Comparative Analysis of National Liability Systems for Remediating Damage Caused by Defective Consumer Services. Institut für Europäisches Wirtschafts- und Verbraucherrecht. www.ec.europa.eu/consumers/archive/cons_safe/serv_safe/liability/.
- Magrani, E. (2018). Threats of the Internet of Things in a techno-regulated Society: a new legal Challenge of the information Revolution. *International Journal of Private Law*, 9 (1/2), 4-18.
- Masutti, A. & Torok, Z. (2016). Call for a Change. The New Package Travel Directive – Corporate/Commercial Law – European Union. www.mondaq.com.
- Morandi, F. (2020). The New Italian Regulation on Package Travel and Linked

Travel Arrangements According to Directive (EU) 2015/2302. *Journal of European Consumer and Market Law*, 9 (3), 93-103.

Pazos, R. (2019). The Right to a Compensation in Case of Long Delay of Flights: A Proposal for a Future Reform. *European Review of Private Law*, 27 (4), 695-717.

Reich, N. (2014). *European Consumer Law*. Second Edition. Intersentia, 5.

Schulte-Nölke, H., Twigg-Flesner, C. & Ebers, M. (2007). EC Consumer Law Compendium – Comparative Analysis, Report on the transposition of the Package Travel Directive 90/314/EEC in the EU Member States, 29 September 2007, 767-794.

Schulze, R. (2005). Precontractual Duties and Conclusion of Contract in European Law. *European Review of Private Law*, 13 (6), 841-866.

Tereszkiewicz, P. (2018). Digital Platforms: Regulation and Liability in EU Law. *European Review of Private Law*, 26 (6), 903-920.

Tonner, K. Editorial. (2016). Does the new Package Travel Directive respond to the challenges of the IT world?. *Journal of European Consumer and Market Law*, 5 (3), 117-118.

Tormanov, Z. (2012). Contract for an organized tourist trip. Sofia, Siela, 64.

Tormanov, Z. (2010). Provision of information in connection with a package travel contract. *Contemporary Law*, (3).

Varadinov, O. (2002). Contract for an organized tourist trip with a total price. *Contemporary Law*, (5), 21.

Varadinov, O. (2002). Scope and main requirements of Directive 93/13/EEC on unfair terms in consumer contracts. *Collection of comments on the application of consumer legislation*. Sofia, Bulgarian National Association of consumers.

Vries, A. (2016). Travel intermediaries and responsibility for compliance with EU travel law. *Journal of European Consumer and Market Law*, 5 (3), 119-125.