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Brexit & travel: destination unknown?

Christopher Loxton reports on the impact of Brexit on travel arrangements between the UK and EU

This article sets out what impact the EU–UK Trade and Cooperation Agreement (the TCA) will have, along with Brexit more generally, on travel between the UK and the EU. An article on the TCA's impact on aviation between the UK and the EU, including flight routes between the two territories, can be found here: *bit.ly/3q28F5I*.

Very little of the TCA itself concerns travel between the UK and EU. The section of the TCA entitled 'Heading Two: Aviation' runs to just 25 pages out of a total of 1,246, with most of the section of little interest to passengers. A short section on visas (Heading Four, Title II: Visas for short-term visits) amounts to just one page. Other parts concern the transportation of passengers by road and the rights of UK/EU travel agents, tour operators and guides to operate and travel in the two respective territories; however, these latter parts are beyond the scope of this article.

Entry requirements

The TCA provides visa-free travel for short-term visits for travel between the UK and EU in accordance with the domestic law of each particular country. The UK and EU are both obligated to notify the other of any intention to impose a visa requirement for short-term visits 'in good time and, if possible, at least three months before such a requirement takes effect' (Heading Four, Title II: Visas For Short-Term Visits, Article VSTV.1: Visas for short-term visits).

At the time of writing, UK tourists, business travellers and students can stay for up to 90 days in any 180-day period in all EU countries that are in the Schengen area without a visa; however, visits to more than one country in the area within the previous 180 days count towards the 90-day total. Different rules apply to Bulgaria, Croatia, Cyprus, and Romania where visits to other EU countries do not count towards the 90-day total.

Travel to, and work in, Ireland is unaffected by the TCA.

Compliance with laws and regulations

Article AIRTRN.10 (under Heading Two: Aviation, Title I: Air Transport) of the TCA obliges carriers and passengers, crew, baggage, cargo, and mail carried by the carriers to comply with the laws and regulations (including entry, clearance, immigration, passports, customs, quarantine, and postal regulations) of the party they are entering, operating within, or leaving, respectively. This includes the continuation on the part of carriers to ensure only passengers with the correct travel documents for entry into, or transit through, the territory of the other party are carried to that territory.

Passenger rights

Article AIRTRAN.22(2) of the TCA stipulates that the EU and the UK shall each 'ensure that effective and non-discriminatory measures are taken to protect the interests of consumers in air transport. Such measures shall include the appropriate access to information, assistance including for persons with disabilities and reduced mobility, reimbursement and, if applicable, compensation in case of denied boarding, cancellation or delays, and efficient complaint handling procedures'.

The UK has retained the following EU Regulations concerning air passengers, with necessary amendments to reflect their changing regulatory scope (through The Air Passenger Rights and Air Travel Organisers' Licencing (Amendment) (EU Exit) Regulations 2019 (SI 2019/278)):

(1) Council Regulation (EC) No 2027/97 on air carrier liability in respect of the (domestic) carriage of passengers and their baggage by air;
(2) Regulation (EC) No 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights ('Regulation 261'); and
(3) Regulation (EC) No 1107/2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air is amended as follows ('the PRM Regulation').

Strangely, the civil enforcement regime contained in the Civil Aviation (Access to Air Travel for Disabled Persons and Persons with Reduced Mobility) Regulations 2014 (SI 2014/2833), which built on the provisions of the PRM Regulation, has been largely gutted by the Consumer Protection (Enforcement) (Amendment etc) Regulations 2020 (SI 2020/484). The explanation in the Explanatory Notes to the 2020 Regulations explains that this was done because the repealed provisions 'are redundant following the listing in Schedule 13 to the Enterprise Act 2002 of the EU Regulations implemented by those instruments'; however, this makes little sense given the retained PRM Regulation does not itself specify, for example, how the Civil Aviation Authority (CAA) is to take enforcement action against carriers or airport authorities who flout their obligations under that Regulation. Whether this lacuna was intentional or an oversight remains to be seen.

So far as Regulation 261 is concerned, it now applies as a matter of UK law (under an amended Art 3) to:

(1) Passengers departing from a UK airport (regardless of the operating air carrier's flag country);
(2) Passengers departing from an airport located in a country other than the UK to an airport situated in –
  (i) the UK if the operating air carrier of the flight concerned is a Community carrier or a UK air carrier; or
  (ii) the territory of an EU member state if the operating air carrier of the flight concerned is a UK air carrier,

unless the passengers received benefits or compensation and were given assistance in that other country.

Following the Court of Appeal's decision in *Gahan and Buckley v Emirates* [2017] EWCA Civ 1530, [2017] All ER (D) 114 (Oct) and the Court of Justice of the European Union's (CJEU) in *CS and Others v České aerolinie a.s.* [2019] All ER (D) 87 (Jul) (Case C-502/18) and *Flightright GmbH v Iberia LAE SA Operadora Unipersonal* (Case C-606/19), all connecting flights need to be considered for the purposes of deciding whether the Regulation applies, even if the flights are provided by different operating carriers.

Given the amended Art 3, Regulation 261 will now apply in both the UK and in the EU in respect of flights from an EU or third country to the UK, if the operating carrier is an EU carrier. A passenger with a confirmed reservation on such a flight, who suffers denied boarding, a cancellation

or long delay, will therefore have the choice of whether to bring the claim in the UK or the relevant EU country. As the European Small Claims Procedure has been revoked, the potential for forum shopping between the UK and EU will now only be confined to those flights.

The UK has also retained the following EU Regulations, again, with necessary amendments to reflect their changing regulatory scope:

(1) Regulation (EC) No 1371/2007 on rail passengers' rights and obligations;
(2) Regulation (EC) No 392/2009 on the liability of carriers of passengers by sea in the event of accidents;
(3) Regulation (EU) No 1177/2010 concerning the rights of passengers when travelling by sea and inland waterway and amending Regulation (EC) No 2006/2004; and
(4) Regulation (EU) No 181/2011 concerning the rights of passengers in bus and coach transport and amending Regulation (EC) No 2006/2004.

Pursuant to s 6 of the European Union (Withdrawal) Act 2018 (EU(W)A 2018), any decision from the CJEU handed down before 31 December 2020 will continue to apply to the interpretation of the EU Regulations by UK courts, tribunals, and alternative dispute resolution (ADR) providers, save that the UK Supreme Court and the Court of Appeal (as well as the Inner House of the Court of Session in Scotland and other courts set out in reg 3 of the European Union (Withdrawal) Act 2018 (Relevant Court) (Retained EU Case Law) Regulations 2020) (SI 2020/1525)) are not bound to follow such decisions.

From 1 January 2021 onwards, UK courts, tribunals or ADR providers are no longer bound to follow new decisions of the CJEU, though they can 'have regard to' such decisions so far as they are relevant to matters in dispute in any given case (EU(W)A 2018, s 6(2)). Similarly, the CAA will not be required to follow any guidance from the European Commission on passenger rights (or any other subject matter). UK courts are also unable to make references to the CJEU from 1 January, meaning the Supreme Court is now the final arbiter when it comes to interpreting EU law retained in the UK.

Article AIRTRAN.21 of the TCA reaffirms the UK's and EU's obligations under the Montreal Convention, though this is considered otiose unless, in the extremely unlikely event, the EU (or a member thereof) or the UK decide to withdraw from the Convention.

For sea and rail passengers, there will be little change to the scheme of liability for either form of transport as the UK continues to be a party in its own right to the 1974 Athens Convention and 1980 Berne Convention. However, as with EU case law concerning Regulation 261 and the Montreal Convention, the UK courts will no longer be obliged to follow the decisions of the CJEU on its interpretation of the regulations incorporating the Athens and Berne Conventions into EU law.

Package travel

The Package Travel and Linked Travel Arrangements Regulations 2018 (2018 Regulations) (SI 2018/634), which implemented the 2015 EU Package Travel Directive, remain in force in the UK through the Package Travel and Linked Travel Arrangements (Amendment) (EU Exit) Regulations 2018 (the 2018 EU Exit Regulations) (SI 2018/1367). Accordingly, the duties imposed upon organisers of package holidays and those selling or facilitating linked travel arrangements (LTAs) remain the same in UK law.

However, the effect of Brexit, and the 2018 EU Exit Regulations, is to remove the obligation on EU member states to recognise the insolvency protection of UK organisers that sell to European consumers. The government protection scheme operated by the CAA, the Air Travel Organiser's Licence (ATOL), will continue to protect bookings that were made prior to 1 January 2021; however, any sales made by UK traders into EU countries after that date will need to meet national requirements for insolvency protection in those EU countries. Conversely, the UK (through the CAA) is no longer obliged to recognise EU insolvency protection schemes for EU-based traders which sell to UK customers.

The 2018 EU Exit Regulations requires EU traders who actively sell package holidays or LTAs to UK customers to comply with UK insolvency protection rules; in other words, to obtain an ATOL. This requirement does not apply to EU traders that are not targeting sales in the UK.

For UK travel agents selling packages organised by EU-established organisers, it will no longer be possible to sell such packages in the UK solely as an agent of that organiser. Travel agents will need either to ensure that the organiser holds its own ATOL, or the agent itself will need to obtain an ATOL to cover those sales.

Motor travel

From 1 January 2021, the Consolidated Motor Insurance Directive, which enabled cross-border claims to be brought directly against foreign motor insurers, and claimants to serve local proceedings on insurers' locally appointed claims representatives, ceased to apply to the UK.

The European Communities (Rights against Insurers) Regulations 2002 (SI 2002/3061) made under the Directive has been retained in UK law, pursuant to EU(W)A 2018, s 2, though as the TCA provides no cross-border extension of the 2002 Regulations, the retained reg 3 still permits a direct claim against the insurer only where the accident occurs in the UK and where the vehicle is registered in the UK.

As the UK is no longer a member of the European Economic Area (EEA), and the TCA made no provision for a driving certificate exemption, it is necessary for UK-based drivers to now carry green cards when visiting any EEA (including EU) member state; a green card being an international certificate of insurance evidencing a visiting motorist has the minimum compulsory motor insurance cover.

Health cards

The TCA contains no agreement as to the extension of the European Health Insurance Card (EHIC) scheme and therefore UK nationals cannot renew or apply for new EHICs, though cards still valid will be honoured in EU members states.

UK nationals can now apply for the UK Global Health Insurance Card (GHIC) which is accepted in all EU member states (though as with the EHIC, is not accepted in Monaco, San Marino, or the Vatican). It should be well-known that neither the EHIC or GHIC are substitutes for comprehensive travel insurance, whatever the travel destination.

Comment

There can be little argument that travel between the UK and EU post-Brexit will become more restricted, and passenger and travel claims with cross-border elements more complicated. Whether greater convergence in travel arrangements will occur—including by the UK joining the 2007 Lugano Convention—or further divergence—with the Supreme Court or Court of Appeal departing from CJEU case law—remains to be seen. Only time will tell. One thing has not changed though—the continuation of clichéd conclusions. NLJ

Christopher Loxton, barrister, 3 Hare Court (*www.3harecourt.com*).