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One day I'll fly away...

Voucher schemes for cancelled package travel contracts after the outbreak of the Covid-19 pandemic

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PRIVATE LAW

HOMeward BOUND: PACKAGE TRAVEL AND UNFORESEEN CIRCUMSTANCES

CASE NOTE TO GESCHILLENCOMMISSIE REIZEN 22 SEPTEMBER
2020, REFERENCE CODE 29916/33919, AND TO
GESCHILLENCOMMISSIE REIZEN 30 SEPTEMBER 2020,
REFERENCE CODE 28181/33982

Marco B.M. Loos

Amsterdam Law School Legal Studies Research Paper No. 2021-14

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Homeward bound: package travel and unforeseen circumstances

Case note to *Geschillencommissie Reizen* 22 September 2020, reference code 29916/33919,¹ and to *Geschillencommissie Reizen* 30 September 2020, reference code 28181/33982²

Marco B.M. Loos³

Abstract

Since the outbreak of the Covid-19 pandemic, package travel contracts have been cancelled throughout the world, both before and after departure of individual consumers. In this paper I will discuss whether and to what extent courts and recognised ADR entities may rely on national contract law rules on unforeseen circumstances in order to tackle the consequences of the pandemic for package travel contracts or whether the 2015 Package Travel Directive does not allow for the application of such rules.

1. Introduction

The Package Travel Directive⁴ governs the conclusion and performance of package travel contracts. This Directive is implemented in Dutch law in Title 7.7A of the Dutch Civil Code (hereinafter: “BW”). As the Package Travel Directive is based on targeted full harmonisation, Member States may not maintain or introduce legislation diverging from the Directive,⁵ but remain free to apply rules of general contract law, such as the rules on the validity, formation or effect of a contract, insofar as general contract law aspects are not regulated in the Directive.⁶ In this contribution, I will discuss two cases pertaining to holidays that were broken off due to the outbreak of the Covid-19 pandemic. The cases bring to the fore the tension between targeted full harmonisation in Art. 4 of the Package Travel Directive, and Member States’ freedom under Art. 2 (3) of the Directive to apply rules of general contract law insofar as general contract law aspects are not regulated in the Directive. The underlying question, therefore, is what room the Package Travel Directive leaves for the application of a general contract doctrine such as unforeseen circumstances. This contribution hopes to provide some clarity on this legal point.

In the Netherlands, cases pertaining to package travel contracts are generally not decided by courts, but by the *Geschillencommissie Reizen* (*Complaints Committee Travels*), which is part of *De Geschillencommissie*, a recognised ADR⁷ entity within the meaning of the ADR Directive.⁸ The recognition of an ADR entity should give to the consumer the confidence that

¹ Available in Dutch on <https://www.degeschillencommissie.nl/uitspraken/reis-naar-suriname-door-corona-vroegtijdig-afgebroken-ondernemer-moet-passende-prijsverlaging-terugbetalen/> (accessed on 18 March 2021).

² Available in Dutch on <https://www.degeschillencommissie.nl/uitspraken/uitbraak-corona-virus-ten-tijde-rondreis-klager-in-vs/> (accessed on 18 March 2021).

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⁴ Directive (EU) 2015/2302 of the European Parliament and of the Council of 25 November 2015 on package travel and linked travel arrangements, amending Regulation (EC) No 2006/2004 and Directive 2011/83/EU of the European Parliament and of the Council and repealing Council Directive 90/314/EEC, *OJ* 2015, L 326/1.

⁵ Cf. Art. 4 of the Package Travel Directive.

⁶ Cf. Art. 2 (3) of the Package Travel Directive.

⁷ ‘ADR’ stands for alternative dispute resolution.

⁸ Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC, *OJ* 2013, L 165/63.

the ADR body complies with the quality requirements set out in the ADR Directive.⁹ One of these quality requirements implies that decisions of recognised ADR entities must comply with the mandatory law of the Member State where the consumer habitually resides.¹⁰ As European law requires Member States to implement European directives through binding national law from which contractual parties cannot derogate to the detriment of the consumer, these recognised ADR entities must act in accordance with European consumer law as well.

One of the problems with ADR is that even though (recognised) ADR entities are required to apply mandatory law, including provisions implementing European directives, they are not considered to be courts within the meaning of Art. 267 of the Treaty on the Functioning of the European Union, since they can operate only if the parties agree to have their dispute being decided by such entity. As a consequence, in accordance with standing case law of the Court of Justice of the European Union (hereinafter “Court of Justice”), these ADR entities are not allowed to refer their questions as to the correct interpretation of EU legislation to the Court of Justice for a preliminary ruling.¹¹ Since only few decisions of ADR entities are submitted to courts for judicial review, this implies that if the interpretation of EU law by the ADR entity is wrong, this will often be neither established nor remedied. This can be different, of course, if the decisions of ADR entities are discussed in law reviews. That, next to the discussion of the underlying legal question, is the second purpose of this contribution.

2. A holiday in Surinam and another holiday in the United States

The case decided on 22 September 2020 pertained to a consumer who had concluded a package travel contract with a tour operator on 1 November 2019. This contract related to a group trip to Surinam for twenty days for a price of € 2,327.50. The holiday took off on 10 March 2020, but was broken off eight days later by the tour operator because of the outbreak of the Covid-19 pandemic. The tour operator repatriated the consumer, reimbursed him an amount of € 290 and awarded him a (non-redeemable) voucher of € 300. As the consumer missed out on, as he claimed, 2/3 of the agreed package, he claimed restitution of € 1,000 as compensation for the lost days of holiday. The tour operator argued that the outbreak of the pandemic constituted an abnormal and unforeseen circumstance. As the largest cost component consists of the flights to and from Surinam, and the consumer was indeed transported to and from Surinam, the consumer could only expect the reimbursement of the value of the services missed in Surinam (€ 290); as a gesture of goodwill, the tour operator also offered a voucher of € 300.

In this case, the *Geschillencommissie Reizen* held that the consumer was entitled to an appropriate price reduction for the period during which a lack of conformity existed.¹² As a result, the consumer was entitled to reimbursement of € 780. Since the lack of conformity was caused by unavoidable and exceptional circumstances (the Covid-19 pandemic), the consumer was not entitled to damages, but this did not affect his right to reimbursement, the Committee held.

⁹ Cf. recital (22) of the preamble to the ADR Directive.

¹⁰ Cf. Art. 11 of the ADR Directive.

¹¹ Cf. CJEU 23 March 1982, *Nordsee Hochseefischerei*, ECLI:EU:C:1982:107; CJEU 27 January 2005, *Denuit*, ECLI:EU:C:2005:69; CJEU 10 December 2009, *Umweltanwalt von Kärnten/Kärntner Landesregierung*, ECLI:EU:C:2009:767.

¹² Cf. Art. 7:511 (1) of the BW, which is the implementation of Art. 14 (1) of the Package Travel Directive.

A case decided only eight days later led to a different outcome. This case pertained to a 23-days individual holiday for two persons booked on 29 August 2019, consisting of a flight to and from the United States with accommodation in a hotel for two nights and the rental of a motorhome, for the period from 7 to 29 March 2020 for the amount of € 2,018.45. This holiday was broken off by the consumers after having received an alarming email from the tour operator on 16 March 2020, advising them to drive as soon as possible from their current location (Dallas, Texas) to their final destination (San Francisco, California), where they were supposed to return the motorhome and take a flight back. The consumers immediately drove in the direction of San Francisco. When they arrived in Flagstaff (Arizona), almost 1,600 km from Dallas, they learned that by then California was in full lockdown. Later that day, they arrived in Las Vegas, where the tour operator had booked them a flight back to The Netherlands. The consumers were asked to pay an additional fee of € 366 for these flights, and they did so. The flight was then cancelled and the consumers were rebooked for a flight on 22 March 2020. This flight arrived safely in The Netherlands. The consumers claimed reimbursement of the additional costs for the flights, arguing that the tour operator should have repatriated them free of charge. In addition, they claimed reimbursement of the days that they were unable to make use of the motorhome for the amount of € 348. They indicated that they would accept reimbursement in the form of a voucher. The tour operator argued, however, that the consumers (albeit upon the tour operator's advice) had decided to break off the holiday prematurely themselves, even though the remainder of the holiday at that time could still be enjoyed. The tour operator then helped the consumers to return earlier, but insisted it cannot be held liable as this was a case of *force majeure*.

In this case, the *Geschillencommissie* held that even though the consumers had decided to terminate the contract themselves, this situation had to be assimilated to one in which the tour operator could no longer provide the services in accordance with the contract, as the consumers had their backs against the wall due to the outbreak of the Covid-19 pandemic and had no choice but to follow the advice of the tour operator. Since the lack of conformity with the original contract is due to unavoidable and extraordinary circumstances, the consumers are not entitled to damages.¹³ In so far as the consumers had argued that the tour operator is required to bear the additional costs of the return flight,¹⁴ the *Geschillencommissie* found that such a claim is to be dismissed under the circumstances of the case, as the outbreak of the Covid-19 pandemic constituted unforeseen circumstances within the meaning of Art. 6:258 of the BW, and the consumers could not reasonably expect the contract to remain unchanged.¹⁵ According to the *Geschillencommissie*, this general contract law provision therefore set aside the provisions on the consequences of the lack of conformity.

3. Comments

¹³ Cf. Art. 7:511 (2) under (c) of the BW, which is the implementation of Art. 14 (3) under (c) of the Package Travel Directive.

¹⁴ Cf. Art. 7:510 (8) of the BW, which is the implementation of Art. 13 (6) (last sentence) of the Package Travel Directive.

¹⁵ Art. 6:258 of the BW provides as follows: '1. Upon the demand of one of the parties, the judge may modify the effects of a contract, or he may set it aside in whole or in part on the basis of unforeseen circumstances which are of such a nature that the cocontracting party, according to criteria of reasonableness and equity, may not expect that the contract be maintained in an unmodified form. The modification or the setting aside of the contract may be given retroactive force. 2. The modification or the setting aside of the contract is not pronounced to the extent that the person invoking the circumstances should be accountable for them according to the nature of the contract or common opinion. 3. For the purposes of this article, a person to whom a contractual right or obligation has been transferred, is assimilated to a contracting party.' (Translation taken from P.P.C. Haanappel & E. Mackaay (eds.), *Netherlands Civil Code – Book 6. General Part of the Law of Obligations (English-French)*, 1990, available online at <https://ssrn.com/abstract=1737848> (accessed on 18 March 2021)).

The two cases decided by the *Geschillencommissie Reizen* are largely based on the same fact-pattern: in both cases, the holiday was broken off and the consumers were repatriated. The main difference is that in the case of the Surinam holiday, it was the tour operator who decided to break off the trip, whereas the American holiday was broken off by the consumers themselves upon the tour operator's urgent advice. Moreover, in the second case the consumers were asked to pay an additional amount for their repatriation, while in the first case, they were not. The legal questions, however, are the same: were the consumers entitled to repatriation without additional costs and to (some) reimbursement of the price paid to the tour operator?

It is clear that due to the outbreak of the Covid-19 pandemic, many ongoing holidays had to be terminated or carried out differently than the consumer was initially entitled to expect. This means that there was a lack of conformity within the meaning of Art. 13 (1) of the Package Travel Directive. In view of the seriousness of the lack of conformity and the fact that, obviously, the tour operator could not remedy it within a reasonable period, the consumers were in principle free, pursuant to Art. 13 (6) of the Directive, to terminate the contract and to request a price reduction and/or compensation. Moreover, according to the final sentence of this paragraph, the tour operator was obliged to repatriate the consumer at no extra cost for the consumer.

According to Art. 14 (2) of the Package Travel Directive, the consumer is in principle entitled to an appropriate *compensation* for any damage he sustains as a result of any lack of conformity. Paragraph (3) adds, however, that the consumer is not entitled to compensation if the lack of conformity is attributable to the traveller, to a third party not involved in the performance of the contract, or is the result of 'unavoidable and extraordinary circumstances'. As the lack of conformity was caused by the outbreak of the Covid-19 pandemic and the (governmental) measures taken in response to it, it cannot be attributed to the tour operator. If a holiday was broken off on these grounds, consumers obviously are not entitled to compensation.

The right to a *price reduction* applies according to Art. 14 (1) of the Package Travel Directive for each period during which there was a lack of conformity, unless the lack of conformity can be attributed to the consumer. If the lack of conformity cannot be attributed to the tour operator, it can certainly not be attributed to the consumer. This means that, according to the Package Travel Directive, the consumer is simply entitled to reimbursement of the part of the price of the package that corresponds to the services not rendered in conformity with the contract.¹⁶

This raises the question of how the price reduction should be calculated. The price reduction does not involve compensation for the loss of the missed enjoyment of the last days of the holiday, as this relates to immaterial damage, which is not eligible for compensation under Article 14 (1) of the Package Travel Directive. Instead, the price reduction constitutes compensation for the value of the services not provided. Since the Directive does not provide any guidance on how to calculate the price reduction, the amount of the price reduction must be determined in accordance with the applicable national contract law.

¹⁶ The Package Travel Directive does not indicate when the reimbursement is due. In the case where the contract is terminated before departure, Art. 12 (5) of the Directive indicates that the tour operator is required to pay out the reimbursement 'without undue delay and in any event not later than 14 days after the package travel contract is terminated'. It would seem logical to apply this provision by analogy.

This being said, the outcome of cases such as the Surinam and the US holidays seems easy to predict: on the basis of Art. 13 (1) and (6) and 14 (1) of the Package Travel Directive, the consumers are entitled to reimbursement of the costs of repatriation and to compensation for the services not rendered, e.g. of the costs of accommodation in the Surinam case and of the costs of the unused rental days for the motorhome in the US case. This is indeed the outcome of the Surinam case. In the US case, however, the consumer was in for a rude awakening: in this case the *Geschillencommissie* held that the outbreak of the Covid-19 pandemic and the (governmental) measures taken in response to it constitute unforeseen circumstances within the meaning of Art. 6:258 of the BW. According to the *Geschillencommissie*, the consumers could therefore no longer expect, according to the standards of reasonableness and fairness, the contract (and the rules applicable to it) to remain unchanged. In short: because there are unforeseen circumstances, Art. 13 and 14 of the Package Travel Directive should remain inapplicable.

It will be clear that the two decisions rendered by the *Geschillencommissie Reizen*, given the similarity in the fact-patterns and the underlying legal question, cannot both be correct. But which decision is correct and which is not?

In the US case, the *Geschillencommissie*, in itself correctly, held that the rules on unforeseen circumstances may stand in the way of the application of the terms of the contract and also of the application of mandatory law. Whether the application of this doctrine of unforeseen circumstances is allowed, however, must be determined by analysing whether the consequences of such unforeseen circumstances are regulated exhaustively in the Package Travel Directive. If this is the case, national rules of general contract law cannot be applied.

It may be deduced from Art. 13 (6) of the Package Travel Directive that the consumer has a right to termination and price reduction. However, as stated above, there is no entitlement to compensation for damages in this case, as there are ‘unavoidable and extraordinary circumstances’ within the meaning of Art. 14 (3) under (c) of the Package Travel Directive. Art. 13 (7) of the Directive adds that if it is impossible to arrange repatriation due to ‘unavoidable and extraordinary circumstances’, the organiser must bear the costs of the necessary accommodation for a period not exceeding three nights. This obligation does not concern a form of compensation of damages, but an (alternative) form of performance of the obligations resulting from the ‘unavoidable and extraordinary circumstances’ that gave rise to the lack of conformity. The conclusion that the Directive exhaustively regulates the subject of the occurrence of such circumstances – whether they are called ‘unavoidable and extraordinary’ or ‘unforeseen’ – seems unavoidable. It means then that the national rules on unforeseen circumstances do not apply to package holidays that are broken off because of such circumstances. It also means that the *Geschillencommissie* was right in the Surinam case and wrong in the US case.

Concluding remarks

The relationship between the provisions of national law implementing targeted full harmonisation directives, and national rules of general contract law are far from clear. What is and what is not regulated exhaustively, is a matter of interpretation of the relevant directive, and as such ultimately up to the Court of Justice to determine. This is problematic when these cases are dealt with through ADR as these cases do not reach the courts, and therefore no

preliminary questions can be submitted to the Court of Justice. The ADR Directive is adopted to stimulate the development of ADR, but falls short in safeguarding the quality of ADR. In my view, Member States should be required to strengthen the relation between ADR entities and courts, e.g. by allowing or even requiring (recognised) ADR entities to submit questions of law to a court for a preliminary ruling; in turn, if the question pertains to the interpretation of European law, that court may, or, as the case may be, must, refer the question further to the Court of Justice. Then and only then will ADR entities be able to deliver what is expected of them: to provide justice on the one hand, and to guarantee that the consumer is not deprived of the mandatory law aimed at protecting the consumer on the other hand.¹⁷

¹⁷ See on this point more extensively M.B.M. Loos, Enforcing consumer rights through ADR at the detriment of consumer law, *European Review of Private Law* 1-2016 [61–80], p. 76-78.