

RESPONSIBILITY OF THE ORGANIZING TRAVEL AGENCY FOR THE INADEQUATE PROVISION OF TOURIST SERVICES

Phd. Ilie DUMITRU¹

Abstract

The contractual relationship that is established between a travel agency and a tourist can take the form of either a contract for the sale of travel packages or a contract of tourist services, depending on its purpose. The obligations of the travel agency that sold a package of travel services or that are obliged to provide tourist services, as well as the sanctions applicable in case of failure to fulfill the obligations assumed, are established by a recent special law, which transposes a European directive. If we consider the relatively new character of this regulation that derogates from the common law, the particularities of the tourist services and the context of assuming their provision by the intermediary-tourism agency, as well as the lack of a consistent Romanian case law in this field, make it necessary to analyze the issue of civil sanctions applicable to the travel agency that does not fulfill its obligations. Our analysis will have a trilateral composition: legal, doctrinal and jurisprudential.

Keywords: package travel contract, tourist services, civil sanctions, breach of the contract.

JEL Classification: K12, K30

1. General framework for the sale and provision of tourist services

Tourism is a sector of activity which is more and more present in the national economies of many states, with an important percentage contribution to the global gross domestic product².

Even at the EU level, tourism has been recognized as having an important role due to its economic and employment potential, as well as to its social and environmental implications.

Given the technological evolution determined by the rapid forms of communication and information, especially the Internet, and by the development of electronic commerce, the tourism industry has experienced a re-establishment of the relationship between the main actors, respectively the tourism service providers, on the one hand, and their beneficiaries (tourists), on the other hand.

Even if an important part of the tourist activity is realized as a result of a direct relationship (legal kind, but not only) established between the tourist and the tourist service provider (tourist-hotel, tourist-carrier, etc.), in the modern era, with an increasingly high level of specialization in all economic fields, specialized intermediaries in tourism have emerged, generically referred to as "travel agents/agencies".

In addition, the tourist services also wore a "consumerist" clothes and became "tourist products".

From this moment forward, at international level, including within the European Union, the travel agencies have been regarded as "traders" of such particular category of products: travel service packages.

On the other hand, since the beginning of the post second world war period, with the rapid development of the tourism phenomenon, some tourism agencies practice an "anticipatory" trade and are not satisfied only to intermediate the contractual relationship between the tourist and the tourist service provider, but they produce themselves a complex tourism product, named "travel package" in European and national legislation, composed of two or more tourist services, and which is offered for sale to tourists.

In this context, at the beginning of the 90s, this new role assumed by the tourism agencies came to the attention of the national and European legislators, so that appeared very soon the first forms of regulation of the legal relationship between the tourism agency and tourist, materialized in

¹ Ilie Dumitru - associate teacher at the Law Department, Bucharest University of Economic Studies, Romania, ilie.dumitru@gmail.com.

² According to WTTC (World Travel and Tourism Council) analysis and statistics, the contribution of tourism and travel to the global gross domestic product was 10.4% in 2018.

the contract that aims to sell a travel services package.

Directive 90/314/EEC on package travel, package holidays and package tours³ was the first act of its kind which set out to introduce common rules on package tourism services into national laws of EU Member States, contributing to the creation of a common market for tourist services, in order to allow operators in one Member State to offer their services in other Member States and for consumers to benefit from similar conditions, regardless of the Member State from which they buy the package.

More than 25 years after this moment, the European Union reassessed the situation of the tourism industry and concluded that, although Directive 90/314/EEC establishes a number of important consumer rights in relation to travel packages, and it also contains rules on the liability of traders for the performance of the services included in the package and the insolvency protection of the organizer or the retailer, however, it is necessary to adapt the legislative framework to market developments to ensure its suitability to the specific of the internal market, in order to eliminate ambiguities and to remedy the legislative gaps.

Accordingly, Directive (EU) 2015/2302 on package travel and linked travel arrangements was adopted⁴.

This new EU directive was transposed into Romanian national law by the Government Ordinance (G.O.) no. 2/2018 regarding the packages of travel services and the associated travel services, as well as for the modification of some other laws⁵.

This regulation is a "special law", which constitutes the general normative framework regarding the package of tourist services⁶; its provisions do not extend to single tourist services, or even to certain types of travel services packages, expressly provided by art. 2 paragraph 2 of the G.O. no. 2/2018:

- packages and linked travel arrangements covering a period of less than 24 hours unless overnight accommodation is included;
- packages offered, and linked travel arrangements facilitated, occasionally and on a not-for-profit basis and only to a limited group of travellers;
- packages and linked travel arrangements purchased on the basis of a general agreement for the arrangement of business travel between a trader and another natural or legal person who is acting for purposes relating to his trade, business, craft or profession.

Thus, we can deduce that the legal relationships that have as their object a single tourist service or several tourist services grouped by an organiser⁷ in a tour package, but which are expressly excluded from the regulatory object of the special law mentioned above, shall be subject to the provisions of the Civil Code regarding contracts, in general, or service contracts, in particular.

In this study, we will limit our analysis to the conditions of responsibility of the organiser, which concludes with tourist a package travel contract⁸, subject to the provisions of G.O. no. 2/2018.

2. The legal characteristics of the contract regarding the package travel

It is important to list the main characteristics of the contract regarding the package travel because, according to some of them, we will also determine which sanctions are applicable to the

³ Council Directive of 13 June 1990 on package travel, package holidays and package tours, published in Official Journal of EU no. L 158 of 23.06.1990.

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.

⁵ Government Ordinance no. 2/2018 regarding the packages of travel services and the associated travel services, as well as for the modification of some normative acts, published in the Official Monitor no. 728 of 23 August 2018.

⁶ According to art. 1, "This ordinance establishes the legal framework regarding the contracts that have as their object the packages of travel services and the associated travel services, concluded between travelers and merchants ..."

⁷ 'Organiser' means a trader who combines and sells or offers for sale packages, either directly or through another trader or together with another trader, or the trader who transmits the traveller's data to another trader.

⁸ 'Package travel contract' means a contract on the package as a whole or, if the package is provided under separate contracts, all contracts covering travel services included in the package.

organiser that does not properly fulfill its obligations and which, with others in other words, they do not provide the tourist services at the qualitative and quantitative level agreed with the tourist.

According to the legal definition⁹, the contract for the package travel is "the contract that has as object a package as a whole or, if the package is executed under separate contracts, all the contracts applicable to the travel services included in the package". We also note that the legislator stipulates at art. 14 paragraph 1 of the G.O. no. 2/2018 that "the organiser is responsible for **the proper execution of the travel services** included in the contract regarding the package of travel services, whether or not these services are to be provided by this one or by another travel service provider". Therefore, the law does not speak of any obligation to "hand over" the "tourist product", but "to provide" the tourist services. Or, such a provision of the law would seem to be at odds with the text of art.2 paragraph 1 of G.O. no.2/2018, which shows that "this ordinance applies to **packages offered for sale or sold** to travelers by merchants...".

As stated in the foreign juridical doctrine, it would seem that the legislator was in error talking about a product sale relationship, given that the main obligation assumed by the organiser is **to provide services**.

This seemingly unclear legal nature of the contract that deals with travel services packages has generated a broad debate in European law literature, especially in the French one.

The problem arose with Directive 90/314/EEC, which introduced in the Community law the expression "package travel sale", thus giving birth to a new type of special contract. The expression is confusing because, as a rule of law, a service can only be provided, it cannot be sold.

There have been authors¹⁰ who have openly rejected the use of the expression "sale of tourist services" or "sale of travel", pointing out that these expressions are an abuse of language because the contract does not have a good as object, but a service, and the service cannot be object of a sale. It was thus proposed that at the doctrinal level the "error" of the legislator on the name of this contract should be repaired and use expressions reflecting the real nature of the contract, namely intermediation in the provision of services, respectively a mandate contract¹¹ or a supply agreement¹².

Other authors have argued that the European legislator made a "choice", not a mistake, naming the legal operation as a "sale" and giving birth to a legal report inspired by the sale of consumer goods¹³.

The apparent vagueness was maintained by the European legislator¹⁴ also after the advent of Directive (EU) 2015/2302 on package travel and linked travel arrangements. This is because this normative act, as we have seen, speaks of the packages "offered for sale or sold to travelers by traders", which would mean that we were in the hypothesis of a sale contract, and not in the one of a contract for tourist services (providing).

Therefore, whatever the doctrinal opinions, it must be admitted that, from the perspective of the European legislator (and, implicitly, the Romanian one, who transposed Directive 2015/2302 by adopting the G.O. no. 2/2018), the packages of tourist services are assimilated to the goods, and this legal fiction is able to justify the classification of the contract regarding the travel package in the category of sales.

This does not mean, however, that we will apply to this contract *mutatis mutandis* all the rules specific to the contract of sale. Therefore, even in Directive 2015/2302 it is explicitly mentioned that it does not affect the general national law of the contracts, such as the rules regarding the validity, formation or effects of a contract¹⁵, insofar as the aspects of the general law of the contracts are not regulated by the directive in question.

⁹ See art.3 paragraph 1 pt. 5 of G.O. no. 2/2018.

¹⁰ See René Savatier, *The sale of service*, Dalloz, Paris, 1971, p. 223, quoted by Christophe Lachièze, *Droit du tourisme*, LexisNexis, Paris, 2014, p. 79.

¹¹ For the legal definition of this contract, see art. 2009 Romanian Civil Code.

¹² For the legal definition of this contract, see art. 1851 Romanian Civil Code.

¹³ See Christophe Lachièze, *Les agents de voyages*, Ed. LexisNexis, Paris, 2007.

¹⁴ On the doctrinal and jurisprudential divergences, see widely our book: Ilie Dumitru, *Dreptul și economia turismului – analiză pluridisciplinară națională și internațională*, Universul Juridic Publishing House, Bucharest, 2018, pp. 299-301.

¹⁵ See art. 2 paragraph 3 of the EU Directive 2015/2302.

In other words, the legal regime applicable to the sale of package travel contains also derogations from the common law in the matter of contracts and particular rules, which must be considered and applied with priority to the general regulatory framework of the contracts, in general, and of the sale contract, in particular.

Once this exposure of the difficulty of the package travel contract in a certain category of contracts is made, we already have sufficient arguments to find that we are in front of a *sui generis* contract, with a particular regulation, different from any other one contract, even though, of course, we will find elements that bring it closer to a classic sales contract, as there will be others that will make us associate it with a service contract.

Therefore, given the way this contract is regulated by the current legislation, as well as the particularities of its object, as well as the rights and obligations of the contracting parties, we can identify the following legal characteristics of the package travel contract:

a. It is a consensual contract, because it is validly concluded by the simple agreement of will of the parties (no need to respect any form)¹⁶.

b. It is a bilateral contract, because it implies mutual and interdependent obligations for both co-contractors. The organiser will be obliged to provide the tourist services for the benefit of the tourist, and the latter will be obliged to pay the price.

c. It is a contract with an onerous title, since each of the contracting parties pursues a patrimonial gain: the tourist to benefit from the tourist services, and the travel agency to receive the price.

d. It is usually a commutative contract because the existence and extent of the obligations assumed do not depend in principle on a future and uncertain event.

e. It is a named and regulated contract.

f. It is a contract with successive execution, as the tourist services are provided by the travel agency for a certain period of time, being not possible an instant execution of the assumed obligations.

In the Romanian judicial practice it was expressed, in the reasoning of a court decision¹⁷, an opinion that the travel package contract would be "by its nature a contract with *uno actu* execution, and the fact that the applicant assumed a unique payment obligation, having as object the cost of the purchased service, while the agency has assumed an obligation that is executed in stages, it does not make its nature successive, given that a convention cannot have a dual nature, with unique execution for one party and with successive execution for the other party".

We consider such a legal reasoning fundamentally improper, since we are in the hypothesis of a contract with successive execution whenever one of the parties fulfills its obligations by actions that last in time or by several successive acts. Thus, the actions of the travel agency cannot be carried out instantly, at the time of the conclusion of the contract, but they last in time, being made up of numerous material and/or legal acts that must be performed or concluded repeatedly, throughout the duration of the tour/travel. Even though the payment of the price by the tourist would be done only once (which is an exception in the tourist agencies activity), this does not change the successive nature of the obligation of the travel package contract.

If we accept this opinion of the judge from the decision I referred to above, it would mean to accept that it would have an instant execution also a rent contract concluded, for example, for a period of one year, if the tenant pays the rent in full at the moment of the conclusion of the contract. Or, such an allegation would be in total contradiction with the entire legal doctrine, as well as with the provisions of art.1777 Romanian Civil Code.

The fact that in the legal definition of the travel package contract the notion of "sale" is used, and the sale contract, in general, is qualified as one with *uno actu* (instant) fulfillment of the obligation, it cannot change the reality and the "successive" mode, long-drawn, in which the obligations of the travel agency are fulfilled. In addition, not all purchase and sale contracts are instant performance

¹⁶ Art. 7 paragraph 1 of the G.O. no.2 / 2018 stipulates that "The language used in the travel package contracts is simple and intelligible and, in the case of the written contracts, the text is legible". This expression leads us to the conclusion that unwritten travel package contracts shall be validly concluded.

¹⁷ Civil sentence no.7168/2017 of the Cluj-Napoca First Court (unpublished).

contracts; for example, the contract of sale of electricity concluded between a supplier and a beneficiary, is a contract with successive/continuous fulfillment acts.

An additional argument to support our opinion is that, although the Romanian Civil Code does not contain a legal definition of the contract with successive and instant execution, the Québec Civil Code, which served as its source of inspiration, contains definitions of these types of contracts, which is in line with our opinion set out above¹⁸.

Recognizing the character of the travel package contract as one with successive performance is particularly important, because the choice of the cancelation or of the termination in case of non-fulfillment of the obligations assumed by one of the parties depends on it. Specifically, being in the hypothesis of a contract with successive performance, in case of a non-execution of the contractual obligations, the creditor of the obligation not executed or improperly executed will be able to request the termination of the contract, the cancelation being the sanction that intervenes in the case of instant performance contracts.

3. The legal consequences of incomplete or inadequate performance of tourist services

As stated in the provisions of art. 14 of G.O. no.2/2018, "the organiser is responsible for the proper supply of the travel services included in the travel package contract, regardless of whether these services are to be provided by itself or by another travel service provider".

If, during the trip, respectively lasting the organizer provides the tourist services, the traveler finds a "lack of conformity" of the tourist services that are provided to him, he has the obligation to inform the organiser about it, without undue delay. Once informed, the organiser must remedy the lack of conformity within a reasonable period set by the traveler¹⁹, except in cases where (i) the lack of conformity cannot be remedied or (ii) the remediation involves disproportionate expenses, taking into account the extent of the lack of conformity and the value of the travel services affected.

In the event that the organiser does not remedy the lack of conformity, the traveler benefits from an appropriate reduction of the price for any period in which there was a lack of conformity²⁰. Also, in such a case, the traveler can remedy the lack of conformity himself and request the reimbursement of the necessary expenses.

When the lack of conformity also caused damage to the traveler, he was entitled to receive adequate compensation from the organizer, unless it proves that the lack of conformity is:

- (a) attributable to the traveller;
- (b) attributable to a third party unconnected with the provision of the travel services included in the package travel contract and is unforeseeable or unavoidable; or
- (c) due to unavoidable and extraordinary circumstances.

Where a lack of conformity substantially affects the performance of the package and the organiser has failed to remedy it within a reasonable period set by the traveller, the traveller may terminate the package travel contract without paying a termination fee and, where appropriate, request price reduction and/or compensation for damages.

A special situation is that in which **a significant part of the travel services cannot be provided** as agreed in the contract. As a remedial measure, G.O. no. 2/2018 provides in paragraph 10 of art. 14 that the organiser shall offer, at no extra cost to the traveller, suitable alternative arrangements of, where possible, equivalent or higher quality than those specified in the contract, for the continuation of the package, including where the traveller's return to the place of departure is not provided as agreed.

However, if the proposed alternative arrangements result in a package of lower quality than

¹⁸ Art. 1.383 The Québec Civil Code has the following wording: "Where the circumstances do not preclude the performance of the obligations of the parties at a single time, the contract is a contract of instant performance. Where the circumstances absolutely require that the obligations be performed at several different times or without interruption, the contract is a contract of successive performance".

¹⁹ It shall not be necessary for the traveller to specify a time-limit if the organiser refuses to remedy the lack of conformity or if immediate remedy is required.

²⁰ The traveler does not benefit from such a reduction when the organizing travel agency proves that the non-compliance is attributable to it.

that specified in the package travel contract, the organiser shall grant the traveller an appropriate price reduction.

In either of the two hypotheses (higher or lower quality alternative tourism services), the traveller may reject the proposed alternative arrangements only if they are not comparable to what was agreed in the package travel contract or (in the case of for lower quality alternative services) the price reduction granted is inadequate.

When the travel agency is **unable to provide alternative services or the traveler rejects the proposed alternative services**, the latter has the right, as the case may be, to a price reduction and/or compensation, without terminating the travel package contract. If, however, he chooses to terminate the contract, and the package also includes transport, the organizer is obliged to ensure the repatriation of the passenger by equivalent transport, without unjustified delays and without additional costs for the traveler.

We note that all this mechanism of civil remedies and sanctions applicable to the organiser that does not ensure the provision of the contracted tourist services is one that takes into account the situation that the tourist finds any "lack of conformity" after the beginning of the tourist trip.

On the other hand, all this legal framework of the organiser responsibility is a particular one, with a special character, and must be applied with priority over the provisions of the general law, respectively of the Civil Code. This is because, in accordance with the principle of law *specialia generalibus derogant*, **no general rule can remove from the application a special rule**.

It is therefore true, from all the above-mentioned regulations, contained in the provisions of art. 14 and 15 of the G.O. no. 2/2018, that after the finish of the trip, therefore after all the tourist services have been provided (even with "lack of conformity") for the benefit of the tourist, he does not (anymore) have the way of an action in front of the court asking the termination of the contract, but only that of an action for damages.

Such a conclusion is also logical: the contract regarding the package travel being, as we have shown, one with successive performance, its termination can only occur as long as, temporarily, the provision of tourist services has not been exhausted.

Despite these provisions of special law, derogating from the common law, in the Romanian judicial practice, however, have been issued court decisions that have taken into account the sanctioning regime provided by the Civil Code for the contractor who does not fulfill his obligations.

Some tourists who are dissatisfied with the tourist services they have benefited from during their trip, after spending their vacation according to the tourist program established by the contract, returning back to Romania or to their town, initiate court proceedings against the organizer. By such court actions they request the "cancellation" of the contract, the agency being obliged to return the price paid for the travel package and, in addition, the agency being obliged to pay compensation for the material and/or moral "damages" suffered. Unfortunately, there are courts that lose sight of the special character of the responsibility of the organizer and apply the provisions of art. 1549 et seq. Romanian Civil code, regarding termination and cancellation of the contract. In a specific decision, the Special Court of Cluj, in the appeal, upheld the solution of the court of first instance²¹, which had ordered the contract cancellation and obliged the travel agency to refund the full price, although the tourists (the complainants) had benefited from alternative tourist services from the travel agency, about which they had been informed before starting the tourist trip and they had accepted them by going on vacation; only upon returning from vacation, they decided to bring court action! Reasoning this decision, the Court stated, in contradiction with the entire applicable legal framework, that "even if, according to the special law, the sanction that intervenes for non-execution of the tourism contract is the termination of it, and not the cancellation, this sanction does not produce effects according to the common law, respectively only for the future, but also affects the obligations already executed, the tour operator having the obligation to return to the tourist the price charged under the contract".

²¹ Civil Decision no. 2227/A/2018 pronounced in the resolution of the appeal against the civil sentence to which we made reference to footnote 17.

4. Conclusions

In our opinion, after completion of the provision of travel services to the tourist, the termination of the package travel contract is no longer possible, and the cancellation less so. Otherwise, we should admit that it is possible for any tourist of bad faith to wait for organizer fulfillment of the contract and to benefit so from all agreed travel services, so that, subsequently, they ask for the "cancellation" of the contract invoking some less or more important "lack of conformities". Or, such a possibility is, first and foremost, unfair and, at the same time, inconsistent with the special law (G.O. nr.2/2018).

After the organizer has provided the tourist services (even with "lack of conformity"), and the tourist has benefited from them, it is no longer possible for a court to order neither the cancelling nor the termination of the contract. Essentially, because the cancellation is a specific sanction for instant performance contracts, and also because by contract termination, according to art. 1554 paragraph 3 Romanian Civil Code, the contract ends for the future only. And as a "future" of the contract no longer exists when it has already been executed, the termination becomes devoid of any legal effect. In addition, producing its effects only for the future, the termination does not determine the obligation to refund the benefits, and these remain paid²².

Bibliography

1. Christophe Lachièze, *Les agents de voyages*, LexisNexis, Paris, 2007.
2. Christophe Lachièze, *Droit du tourisme*, LexisNexis, Paris, 2014.
3. Ilie Dumitru, *Dreptul și economia turismului*, Universul Juridic, Bucharest, 2018.
4. Gabriel Tița-Nicolescu, *Rezoluțiunea și rezilierea contractului în noul Cod civil*, „Universul juridic magazine”, no. 2/2016, p. 10-17.
5. René Savatier, *The sale of service*, Dalloz, Paris, 1971.

²² See also Gabriel Tița-Nicolescu, *Rezoluțiunea și rezilierea contractului în noul Cod civil*, „Universul juridic magazine”, no. 2/2016, p. 10-17.