

Case C-299/22

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

4 May 2022

Referring court:

Lietuvos Aukščiausiasis Teismas (Supreme Court of Lithuania)

Date of the decision to refer:

4 May 2022

Applicant:

M. D.

Defendant:

‘Tez Tour’ UAB

Third party:

‘Fridmis’ UAB

Subject matter of the main proceedings

Dispute concerning the termination of a contract for tourist and recreational services and the refund of money for package travel.

Subject matter and legal basis of the request for a preliminary ruling

Interpretation of Article 12(2) of 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; third paragraph of Article 267 of the Treaty on the Functioning of the European Union.

Questions referred for a preliminary ruling

1. Is it necessary for there to be an official warning of the authorities of the State of departure and/or arrival to refrain from unnecessary travel and/or classification of the country of destination (and possibly also the country of departure) as belonging to a risk area in order for it to be considered that unavoidable and extraordinary circumstances have occurred at the place of destination or its immediate vicinity within the meaning of the first sentence of Article 12(2) of Directive (EU) 2015/2302?

2. When assessing whether unavoidable and extraordinary circumstances exist at the place of destination or its immediate vicinity at the time of termination of a package travel contract and whether they significantly affect the performance of the package: (i) should account be taken only of objective circumstances, that is to say, is a significant effect on the performance of the package related only to objective impossibility and must it be interpreted as only covering cases where the performance of the contract becomes both physically and legally impossible, or does it nevertheless also cover cases where performance of the contract is not impossible but (in this case, owing to the well-founded fear of becoming infected with COVID-19) becomes complicated and/or economically inefficient (in terms of the safety of the travellers, risk to their health and/or life, the possibility of achieving the objectives of the holiday travel); (ii) are subjective factors relevant, such as adults travelling together with children under 14 years of age, or belonging to a higher-risk group owing to the traveller's age or state of health, and so forth? Does the traveller have the right to terminate the package travel contract if, as a result of the pandemic and related circumstances, in the opinion of the average traveller, travel to and from the destination becomes unsafe, gives rise to inconvenience to the traveller or causes him or her to have a well-founded fear of a risk to health or of infection with a dangerous virus?

3. Does the fact that the circumstances on which the traveller relies had already arisen or were at least already presupposed/likely when the trip was booked affect in some way the right to terminate the contract without paying a termination fee (for example by that right being denied, by stricter criteria being applied for assessing the negative effect on the performance of the package, and so forth)? When applying the criterion of reasonable foreseeability in the context of the pandemic, should account be taken of the fact that, although the WHO had already published information on the spread of the virus at the moment when the package travel contract was concluded, nevertheless the course and consequences of the pandemic were difficult to predict, there were no clear measures for managing and controlling the infection or sufficient data on the infection itself, and the increasing development of infections from the time of booking the trip until its termination was evident?

4. When assessing whether unavoidable and extraordinary circumstances exist at the place of destination or its immediate vicinity at the time of termination of a package travel contract and whether they significantly affect the performance of

the package, does the concept of ‘the place of destination or its immediate vicinity’ cover only the State of arrival or, taking into account the nature of the unavoidable and extraordinary circumstance, that is to say, a contagious viral infection, also the State of departure as well as points related to going on and returning from the trip (transfer points, certain means of transport, and so forth)?

Provisions of EU law and case-law of the Court of Justice cited

Article 38 of the Charter of Fundamental Rights of the European Union.

Article 169 of the Treaty on the Functioning of the European Union.

Recital 31, Article 3(12) and Article 12(2) of Directive 2015/2302.

Judgments of 20 October 2011, *Interedil*, C-396/09, paragraph 42, and of 23 March 2021, *Airhelp*, C-28/20, paragraphs 42, 44 and 45.

Provisions of national law cited

Lietuvos Respublikos civilinis kodeksas (Civil Code of the Republic of Lithuania; ‘the Civil Code’): paragraph 1 of Article 6.212 (*‘Force majeure’*) and point 3 of paragraph 4 of Article 6.750 (*‘Right of a tourist to terminate a package travel contract and to withdraw from a package travel contract’*).

Succinct presentation of the facts and procedure in the main proceedings

- 1 On 10 February 2020, the appellant in cassation (the applicant at first instance) and the other party to the proceedings in cassation (the defendant at first instance) concluded a package travel contract (‘the Contract’), under which the other party to the proceedings in cassation undertook to provide the appellant in cassation and his family with a leisure trip to the United Arab Emirates from 1 March 2020 to 8 March 2020 and to provide the following services: air travel on the route Vilnius-Dubai and Dubai-Vilnius, accommodation for seven nights in a 5-star hotel, all-inclusive catering, transfer from the airport to the hotel and from the hotel to the airport, and the services of a representative of the tour operator. For these services, the appellant in cassation paid EUR 4 834 to the other party to the proceedings in cassation.
- 2 On 27 February 2020, the appellant in cassation requested the other party to the proceedings in cassation to terminate the Contract, asking to be allowed to use the money paid for another trip when the risk of COVID-19 had decreased. The other party to the proceedings in cassation refused to grant the request.
- 3 The appellant in cassation brought judicial proceedings, requesting the court to declare that the Contract had been terminated on the basis of clause 2.1.2.3 thereof – that is to say, owing to the occurrence of circumstances of *force majeure*

at the place of destination or its immediate vicinity which may make it impossible to perform the trip or to transport tourists to the place of destination – and to award the amount paid under the Contract.

Principal arguments of the parties to the main proceedings

- 4 The appellant in cassation has stated that information published in February 2020 by both official authorities and the media about the global outbreak of COVID-19 infection constituted sufficient grounds to doubt the safety of travel and, more generally, its feasibility. He has argued that the circumstances (an increasing number of COVID-19 cases worldwide, flight restrictions, official recommendations to refrain from travelling to other States, and so forth) are to be considered *unavoidable and extraordinary* and constitute a legal basis for exercising the right laid down in Article 6.750(4)(3) of the Civil Code and Article 12(2) of Directive 2015/2302 to terminate the package travel contract owing to, respectively, circumstances of *force majeure* (*unavoidable and extraordinary* circumstances) without incurring losses. According to the appellant in cassation, the circumstances of *force majeure* referred to in Article 6.750(4)(3) of the Civil Code should be understood not as circumstances of *force majeure* which make it completely impossible to perform a trip, but as *unavoidable and extraordinary* circumstances that may significantly affect the performance of the contract or the carriage of passengers to the destination. The fact that it is impossible to perform the trip should be interpreted not only as the inability to provide the services at the destination but also as the inability to ensure a safe trip without causing inconvenience or risk to the tourist.
- 5 The other party to the proceedings in cassation has stated that, taking into account the definition of *unavoidable and extraordinary* circumstances provided in Directive 2015/2302 and the circumstances of this specific case, the spread of the COVID-19 virus was capable of being regarded as a circumstance beyond control but not as either an outbreak or a circumstance which made it impossible to reach the destination safely. It has argued that Directive 2015/2302 emphasises not only the significant effect on the performance of the trip, but also the fact that it is not possible to ensure a safe trip to the destination, with the result that circumstances of *force majeure* under Article 6.750(4)(3) of the Civil Code may be interpreted and proved as circumstances of *force majeure* [within the meaning of Article 6.212 thereof].
- 6 The first instance court and the appellate court that heard the case adopted the position that, according to the data in the case-file (the appellant in cassation decided to purchase the trip after information on the taking of safety measures was published, he had to assess himself the risk of whether the trip would be possible, the situation related to the risk posed by the trip had not changed during the period from the purchase of the trip to the decision to withdraw from it), there were no grounds for classifying the circumstances referred to by the appellant in cassation as circumstances of *force majeure* (*unavoidable and extraordinary* circumstances)

which made it impossible to perform the Contract. Those courts were of the opinion that the appellant in cassation's decision to terminate the Contract was determined by his will (subjective aspect) and not by an actual threat which existed objectively at the time of termination. They noted that the Contract was perhaps terminated owing to well-founded fears and uncertainty regarding the spread of the COVID-19 pandemic, but the appellant in cassation did not provide evidence that it was on the day of the termination of the Contract (27 February 2020) and not later that there were objective rather than subjective reasons for it not being possible to perform the Contract during the relevant period (from 1 to 8 March 2020).

Succinct presentation of the reasons for the request for a preliminary ruling

- 7 The referring court raises, in particular, the question regarding the validity of the application of *unavoidable and extraordinary* circumstances as the traveller's means of defence forming the basis for termination of the package travel contract without losses to the traveller, because the answer to this question will determine which of the parties to the Contract will face the adverse legal consequences of its termination. That court states that the concept of *unavoidable and extraordinary* circumstances, specified in Directive 2015/2302, is autonomous, that it has not yet been interpreted in the case-law of the Court of Justice and also that the Court of Justice has not yet given a ruling on the criteria to be applied in determining whether circumstances are *unavoidable and extraordinary* within the meaning of Article 12(2) of Directive 2015/2302 in the event of a global pandemic.
- 8 The referring court notes that the definition of *unavoidable and extraordinary* circumstances laid down in Directive 2015/2302 has been transposed into national law in Article 6.750(4)(3) of the Civil Code using the definition of *force majeure*. The court of first instance and the appellate court relied on the general concept of *force majeure* laid down in Article 6.212(1) of the Civil Code and on the qualifying characteristics of circumstances of *force majeure* formulated in the case-law of national courts; they thus regarded the concept of *force majeure* laid down in national law and the concept of *unavoidable and extraordinary* circumstances used in EU law as synonyms.
- 9 However, according to the referring court, the concept of *unavoidable and extraordinary* circumstances is broader than that of *force majeure*. First, on the basis of the principle that protection of the rights of the traveller should be accorded priority, the possibility for the traveller to defend himself or herself cannot be excessively restricted. Second, in interpreting the provisions of Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004, the Court of Justice has already noted that the concept of *extraordinary* circumstances is to be interpreted as covering not only external but also internal events in the activities of undertakings, such as strikes (judgment of 23 March 2021, *Airhelp*, C-28/20, paragraphs 42, 44 and 45). The referring court considers that, by analogy, the concept of *unavoidable and extraordinary*

circumstances covers not only cases where it is objectively impossible to perform the contract (either physically or legally) but also cases where its performance is theoretically possible but complicated and/or economically inefficient in practice (as regards the safety of the traveller, the risk to his or her health and/or life, the possibility of achieving the objectives of the holiday travel) or the traveller suffers loss of enjoyment of the holiday. The referring court adds that recommendations (a warning) from the authorities (such as the Ministry of Foreign Affairs) to refrain from travelling could be regarded as presuming *extraordinary* circumstances significantly affecting the performance of the travel contract package.

- 10 The referring court considers that, for the purpose of establishing that significant effect, the *ex ante* assessment as to the feasibility of the performance of the contract conducted by the average traveller, who is reasonably well-informed and reasonably observant and circumspect, should, in principle, be relied on. It is therefore important to take account of the factual data available to the traveller and of publicly available information that *unavoidable and extraordinary* circumstances and the effect stemming from them are likely and, where a dangerous situation has already arisen, that there is a low likelihood of the situation improving.
- 11 The referring court also seeks to ascertain whether, if *unavoidable and extraordinary* circumstances within the meaning of the first sentence of Article 12(2) of Directive 2015/2302 were present at the time of travel, the right to terminate the contract without payment of the termination fee may apply regardless of whether the existence of such circumstances could have been foreseen at the time of the conclusion of the contract. The court is uncertain whether, in applying the criterion of reasonable foreseeability, it should be taken into account that—owing to the particularly rapid increase in COVID-19 virus cases that were confirmed at the beginning of 2020 and the lack of reliable scientific data—the especially great risk of the virus to human health and life was emphasised, there were no clear measures for managing and controlling the infection, the course and consequences of the pandemic were difficult to predict, and from the time of booking the trip to the termination of the Contract the number of infections clearly increased.
- 12 At the same time, the referring court is uncertain in relation to the concept of ‘the place of destination or its immediate vicinity’ used in Directive 2015/2302. In its opinion, on the basis of Article 12(2) of Directive 2015/2302, a traveller’s right to terminate a contract is linked to the occurrence of *unavoidable and extraordinary circumstances* at ‘the place of destination’ or ‘its immediate vicinity’; therefore, the assessment of such circumstances when a contract is terminated owing to the pandemic should not be linked only to the final destination, that is to say, the State of arrival. The referring court considers that the right to terminate a package travel contract should also exist where, as a result of the pandemic and related circumstances, in the opinion of the average traveller, travel to and from the

destination becomes unsafe, gives rise to inconvenience or causes a well-founded fear of a risk to health or of infection with a dangerous virus.

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