Anonymised version

Case C-170/23

Request for a preliminary ruling

Date lodged:

20 March 2023

Referring court:

Landgericht Frankfurt am Main (Germany)

Date of the decision to refer:

13 March 2023

Defendant and appellant:

trendtours Touristik GmbH

Applicant and respondent:

SH

[…]

Order

In the case of

Trendtours Touristik GmbH […], […] Kriftel,

defendant and appellant

[…]

v

SH […],

appellant and respondent

[…],

the 24th Civil Chamber of the Landgericht Frankfurt am Main (Regional Court, Frankfurt am Main, Germany)

[…]

made the following order on 13 March 2023:

I. The following questions on the interpretation of EU law are referred to the Court of Justice of the European Union for a preliminary ruling pursuant to the second paragraph of Article 267 of the Treaty on the Functioning of the European Union in the version of 9 May 2008, as last amended by Article 2 of the amending European Council Decision 2012/419/EU of 11 July 2012 (OJ 2012 L 204, p. 131):

1. Is the first sentence 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 2001/83/EU of the European Parliament and of the Council and repealing Council Directive 90/314/EEC (‘the Package Travel Directive’) to be interpreted as meaning that the organiser’s entitlement to compensation for termination does not lapse if, at the time of the trip, there are no longer any significant adverse effects resulting from unavoidable and extraordinary circumstances, even if such circumstances had reportedly existed at an earlier point in time and those circumstances would have resulted in significant adverse effects, or does the answer to the question as to whether or not unavoidable and extraordinary circumstances are significantly affecting the trip depend solely on a decision made on the basis of a prediction at the time of the declaration of termination?

2. If the determinative factor is a decision made on the basis of a prediction, up to what point in time must the traveller wait until he or she is entitled to issue his or her declaration of termination without being required to pay compensation for termination, even if the significant adverse effects resulting from unavoidable and extraordinary circumstances subsequently cease?

II. The proceedings are stayed.

Grounds:

I.

The facts of the case are as follows:

On 13 February 2020, the applicant booked a travel package with the defendant, a travel organiser, for himself and his wife entitled '*(K)urlaub auf Gran Canaria*' ('(Cure) holiday in Gran Canaria'), which was to take place between 4 November 2020 and 18 November 2020. The price of the trip came to EUR 2 118.00. At the request of the defendant, the applicant paid a deposit of EUR 423.60.

On 2 September 2020, the Auswärtiges Amt (Federal Foreign Office) of the Federal Republic of Germany issued a travel warning for trips to the Canary Islands because the coronavirus case numbers there had reportedly begun rising again. As a result of that travel warning, the applicant terminated the trip by letter of 3 September 2020.

On the basis of its travel conditions, the defendant then informed the applicant that it had calculated termination compensation in the total amount of EUR 529.50 and requested from the applicant an additional payment of EUR 105.90, which the latter paid to the defendant subject to reservation.

The travel package organised by the defendant took place at the agreed time.

In his action before the Amtsgericht Frankfurt am Main (Local Court, Frankfurt am Main, Germany), the applicant requested that the defendant be ordered to repay his deposit and the additional amount paid, that is to say, a total payment of EUR 529.50.

In support of his claim, he submitted that he had been entitled to terminate the trip in view of the travel warning issued by the Federal Foreign Office.

The defendant submitted that the applicant had terminated the trip too early. The applicant, it argued, had failed to provide sufficient factual evidence, in respect of either the time of his declaration of termination or the agreed travel period, to justify the conclusion that the trip would have been significantly affected as a consequence of the coronavirus pandemic. According to the defendant, the applicant had neither submitted any coronavirus case numbers nor any evidence of local travel disruption, in particular with regard to quarantine measures, curfews, hotel closures or other closed tourist attractions.

Moreover, it continued, at the time of the applicant's declaration of termination it had not been foreseeable that the circumstances giving rise to the travel warning would have still existed at the time of the trip. According to the defendant, the applicant should instead have waited before issuing his declaration of termination in order to monitor subsequent developments. At the earliest, he would have been entitled to issue his declaration of termination four weeks before the start of the trip.

By judgment of 24 August 2021, the Local Court upheld the action. The applicant, it ruled, was entitled, on the basis of his declaration of termination, to reclaim the amounts paid to the defendant. The defendant was not entitled to any compensation for termination. In the opinion of the Local Court, there had been

extraordinary circumstances within the meaning of Paragraph 651h(3) of the Bürgerliches Gesetzbuch (German Civil Code; 'the BGB'). The travel warning issued by the Federal Foreign Office had constituted sufficient evidence of a health risk that the applicant and his wife could not have been expected to accept. Furthermore, the applicant had not terminated the trip too early. He had been entitled to assume that the pandemic would continue and had been justified in assuming, with a 25% likelihood, that there would also be a significant health risk at the time of the trip.

The defendant appealed against the judgment handed down against it.

In view of an order for reference issued by the Amtsgericht Düsseldorf (Local Court, Düsseldorf, Germany) on 8 December 2021 (file reference no. 37 C 270/21), the appeal court initially stayed the proceedings pending a ruling by the Court of Justice of the European Union ('CJEU') in that case (Case C-776/21). However, those proceedings before the CJEU have since been terminated without a decision (order of 3 November 2022 removing the case from the register of the Court).

II.

As a result of the order removing Case C-776/21 from the register of the Court of Justice of the European Union, the reason for staying the proceedings in the present case no longer applies. Instead, it is now necessary for the present Chamber to submit its own request for a preliminary ruling on the interpretation of Article 12(2) of the Package Travel Directive.

1.

According to the facts presented, the applicant, on 3 September 2020, took the travel warning published on 2 September 2020 as a reason to terminate the trip scheduled for November 2020. That newly published travel warning could constitute sufficient grounds for a declaration of termination under Paragraph 651h(1) of the BGB, read in conjunction with Paragraph 651h(3) thereof – which is based on Article 12(2) of the Package Travel Directive – if a prediction issued at the time of the declaration of termination is the determinative factor. However, unavoidable and extraordinary circumstances no longer obtained at the time when the trip took place. The defendant was able to operate the trip without any significant adverse effects.

The dispute therefore concerns the question as to the point in time that is to be taken into account for the purpose of determining whether unavoidable and extraordinary circumstances exist that significantly affect the performance of the package, as contemplated in Article 12([2]) of the Package Travel Directive or in the first sentence of Paragraph 651h(3) of the BGB.

It is argued, on the one hand, that the time of the scheduled trip performance should be the determinative factor, which is why, according to this line of

argument, the operator cannot be entitled to compensation whenever the operator ultimately cancels the trip, or performs it in a significantly impaired manner, as a consequence of unavoidable and extraordinary circumstances, regardless of whether those circumstances were already foreseeable at the time of the traveller's declaration of termination ([…] [references]; Landgericht Frankfurt am Main (Regional Court, Frankfurt am Main, judgment of 10 August 2021 – 24 S 31/21, BeckRS 2021, 23370; judgment of 14 October 2021 – 24 S 40/21, BeckRS 2021, 33155; Landgericht Düsseldorf (Regional Court, Düsseldorf), RRa 2022, 30; Amtsgericht München (Local Court, Munich), RRa 2022, 26, paragraphs 21 and 22; Amtsgericht Aschaffenburg (Local Court, Aschaffenburg), judgment of 18 January 2021 – 126 C 1267/20, BeckRS 2021, 3262 paragraph 8; Amtsgericht Hannover (Local Court, Hanover), judgment of 29 October 2020 – 515 C 4994/20, BeckRS 2020, 30571 paragraph 21, see also the request for a preliminary ruling submitted by the Bundesgerichtshof (Federal Court of Justice, Germany, 'the BGH') to the Court of Justice of the European Union on 2 August 2022, file reference no. X ZR 53/21; CJEU Case C-584/22).

This would mean that in the converse scenario – that is to say, when performance of the trip is not significantly affected by unavoidable and extraordinary circumstances – the entitlement to compensation need not be extinguished pursuant to Article 12(2) of the Package Travel Directive or Paragraph 651h(3) of the BGB.

The wording of Article 12(2) of the Package Travel Directive could also support that view. This is because that wording focuses solely on unavoidable and extraordinary circumstances in connection with the performance of the trip and does not provide for there to be any link with the time of the declaration of termination and any prediction that may have been issued.

On the other hand, it is argued that an *ex ante* assessment made at the time of the traveller's declaration of termination should be the determinative factor, which is why, according to this line of argument, subsequent events cannot alter the *ex ante* assessment retrospectively. In this regard, reference is primarily made to the case-law of the German Federal Court of Justice in respect of Paragraph 651j of the BGB (old version), according to which a case of *force majeure* must have existed at the time of termination, such as a threat to the life and limb of the traveller with a likelihood of occurrence of at least 1 in 4 (BGH, judgment of 15 October 2002 – X ZR 147/01 –, paragraph 11, cited by *juris*). According to this line of argument, that case-law is to be applied also to Paragraph 651h(3) of the BGB, new version; consequently, the determinative factor would, according to that argument, be whether it could have been expected with a substantial degree of probability – based on a decision made on the basis of a prediction at the time of the declaration of termination – that the trip would be cancelled or suffer significant adverse effects as a consequence of the coronavirus pandemic ([…] [references to legal literature]; Amtsgericht Frankfurt am Main (Local Court, Frankfurt am Main), NJW-RR 2020, 1315 paragraph 22 et seq.; Amtsgericht Köln (Local Court, Cologne), RRa 2021, 70, 71; Amtsgericht München (Local Court, Munich), RRa

2021, 85 and 86; Amtsgericht Duisburg (Local Court, Duisburg), RRa 2021, 72 and 73; see also BGH, CJEU request for a preliminary ruling of 2 August 2022 – X ZR 53/21 –, paragraph 34, cited by *juris*).

In the present case, the answer to this question is material to the decision:

At the time of the termination (on 2 September 2020), there was a travel warning in place for the holiday destination. It is recognised that the existence of an official travel warning issued by the Federal Foreign Office constitutes a strong indication that the trip will be significantly affected […][reference to legal literature]. The present Chamber is also of the opinion that the existence of a travel warning would justify an assumption that there would be significant adverse effects as contemplated in the first sentence of Paragraph 651h(3) of the BGB (Landgericht Frankfurt (Regional Court, Frankfurt), judgment of 24 February 2022 – 2-24 S 113/21 –, paragraph 23, cited by *juris*; and Regional Court, Frankfurt, judgment of 14 October 2021 – 2-24 S 40/21 –, paragraph 26, cited by *juris*), at least where there was no indication – as in the present case – that the travel warning would be lifted again in the near future.

Conversely, if the opinion holding that the determinative factor should be the time of actual performance of the trip were to be followed, then the question as to whether there were significant adverse effects in the present case would have to be answered in the negative. It is common ground that the travel warning was no longer in place at the time of the trip and that the trip was able to be performed with almost no complaints. The travel warning for the Canary Islands was lifted on 24 October 2020.

Paragraph 651h(3) of the BGB is to be interpreted in conformity with primary law, in the light of Article 12(2) of the Package Travel Directive. As in the case of Paragraph 651h of the BGB, Article 12(2) of the Package Travel Directive is also lacking in sufficient clarity, with the result that an interpretation by the Court of Justice of the European Union is necessary.

If the answer to the question as to whether or not entitlement to compensation is extinguished on account of significant adverse effects resulting from unavoidable and extraordinary circumstances depends upon a prediction made at the time of the declaration of termination, then the question arises as to the point in time up to which a traveller must wait before he or she is entitled to make a decision based on that prediction and to declare termination of the package travel contract without having to pay termination compensation. If the applicant had waited until 10 days before the start of the trip before making his declaration of termination, he would have been able to establish that performance of the trip was no longer going to be significantly affected in view of the fact that the travel warning had been lifted at that time. If the applicant's entitlement to declare termination had already arisen before that point in time, with the consequence that the compensation for termination was no longer payable by virtue of Paragraph 651h(3) of the BGB, then the prediction would have operated in his favour. This is because the travel

warning that was issued on 2 September 2020 was still in effect and the unavoidable and extraordinary circumstances would not have ceased by that point. In view of the fact that the standard terms and conditions of many operators provide only for termination compensation of 20-25% in cases where termination is declared up to four weeks or one month before the start of the trip, whereas the amount increases steadily after that point, it might therefore be justified for the traveller to have until that point in time in order to decide whether or not he or she wishes to terminate the trip, and thereby minimise the financial risk ensuing from the possibility that the unavoidable and extraordinary circumstances might subsequently cease. In the event of termination 31 days before the start of the trip, the defendant's termination compensation would have been 25%, whereas the amount would have been 55% as of the 30th day before the trip start date. If termination had been declared 31 days before the start of the trip (4 October 2020), the travel warning issued by the Federal Foreign Office would still have been in effect and this would have constituted an unavoidable and extraordinary circumstance within the meaning of Paragraph 651h(3) of the BGB, with the consequence that the defendant would not be entitled to compensation for termination.

[…] [Stay of proceedings]

[Signatures]

[…]