

## Case law

### Case Details

**National ID:** MD 2010:10

**Member State:** Sweden

**Common Name:** Konsumentombudsmannen v. Kuoni Scandinavia AB

**Decision type:** Other

**Decision date:** 14/04/2010

**Court:** Marknadsdomstolen (Others)

**Subject:**

**Plaintiff:**

**Defendant:**

**Keywords:**

### Directive Articles

Unfair Contract Terms Directive, [Article 2](#) Unfair Contract Terms Directive, [Article 3, 1.](#) Unfair Contract Terms Directive, [Article 3, 3.](#) Package Travel Directive, [Article 4, 4.](#) Package Travel Directive, [Article 4, 5.](#) Package Travel Directive, [Article 4, 6.](#)

### Headnote

Amendments of contractual terms in package travel agreements

### Facts

The company Kuoni Scandinavia AB ("Apollo") offered package travels to consumers. The packages were sold through the company website, through its own stores and through nearly 300 selected agents. In their agreements (section 5.4, last paragraph) with consumers the following condition was provided:

"If the final flight schedule .... differs from the preliminary with more than 8 hours in each direction, the passenger shall be entitled to cancel the contract if the trip has not begun. If the traveller withdraws from the trip, he or she should be reimbursed the full amount paid by him or her. Withdrawals shall be made promptly, and no later than 4 days after the traveller is informed of the final flight schedule. Changes in the preliminary flight schedule do not entitle the traveller to a price reduction, a replacement trip or any other compensation."

The Consumer Ombudsman filed suit against Apollo and plead that the Market Court should forbid Apollo under the threat of penalty payments to apply:

- 1) terms under which the traveller is not entitled to a price reduction, a replacement trip, or damages or other compensation when the final schedule deviates from the agreed preliminary schedule; and to apply
- 2) the condition that the traveller's withdrawal shall be made promptly and no later than 4 days after the traveller has been informed about the final flight schedule; or to apply
- 3) substantially the same terms as under 1) and 2).

First pleading: The petitioner argued that a change of flight schedule with more than 8 hours in each direction is an amendment of the agreement, and that such amendment may legally entitle the traveller to reimbursement, price reduction and damages (§ § 11-14 Package Travel Act (Lagen (1992:1672) om paketresor)). Apollo's terms exclude all these legal entitlements. The agreement clause is therefore contrary to mandatory applicable law and therefore unreasonable under § 3 Consumer Contract Act (Lagen (1994:1512) om avtalsvillkor i konsumentförhållanden).

Second pleading: The condition is contrary to § 12, third paragraph of the Package Travel Act, i.e. the said period of four days may not always be proper. The Act and the legislative history make it clear that the reasonable time for change is intended to be calculated on a case by case basis. The condition is therefore contrary to mandatory applicable law and as a result of that; unreasonable under § 3 Consumer Contract Act. In any case, the condition causes a significant imbalance between the parties. The condition ensures Apollo to amend the agreement any number of times up until 14 days prior to departure, while the traveller is only allowed to respond within 4 days.

A ban on these types of conditions or terms is in the interest of the public.

The defendant's arguments were basically that:

1. This particular condition in the agreement with consumers has been applied for more than 18 years by all major tour operations and is approved by the Consumer Agency (Konsumentverket). Hence, it should follow that the condition or term is acceptable market practise.
2. It is not a change or amendment of the agreement to specify the preliminary flight schedule. No rights of consumers should therefore follow from the Package Travel Act.
3. No matter whether rights should follow from the Package Travel Act or not; it is not unreasonable to conclude agreements with preliminary flight schedules and inform the customer about the final time of departure no later than 14 days prior to departure.

### Legal issue

The Market Court:

Introduction: The court started off by stating that according to § 3 Consumer Contract Act, the Market Court can determine whether a contractual term that a trader is using in an offering of goods, services or other benefits to consumers, taking into account the price and other circumstances, is unfair to the consumer. If so, the Market Court may prohibit the trader to use the same or similar types of terms in similar cases. If the ban is warranted in the public

interest or otherwise in the consumers or competitors interest penalty payments should be added, if no reasons are speaking against it.

The court continued and specified the legal assessment; that the legal assessment should focus on whether a condition typically is unfair to the consumer. This is said to be the case if the condition is derogating from mandatory rules of law, giving the trader a benefit or depriving the consumer of a right – thereby providing an uneven load in terms of rights and obligations that no reasonable balance is upheld between the parties.

The question whether a terms is deemed unfair is based upon an overall assessment of the rights and obligations. The assessment is also made towards mandatory rules of law. A contract or a term in the contract that is contrary to mandatory law is normally considered to be unfair. Any contractual term contrary to overriding general principles of law, may also be banned, as well as terms that are misleading or unclear – making it impossible for the consumer to predict what consequences the terms may have for him or her.

The assessment:

First claim: According to the Market Court's view constitutes a deviation of more than 8 hours in the preliminary flight schedule an amendment of the agreement between the parties. The fact that the contract itself allows such a deviation does not mean that the deviation is not an amendment or change of the agreement. When terms of the agreement is amended, the consumer has a right of compensation under the Package Travel Act (§ § 12-14). Apollo's term in the contract only allow the consumer the right to terminate the contract. The term is therefore contrary to mandatory law.

Second claim: According to Apollo's terms, the consumer never have more than four days to announce a possible withdrawal, regardless of when the consumer is given the final flight schedule. The term therefore gives no room for any consideration to the circumstances in the case – no matter how serious these individual circumstances may be. The preparatory work states regarding the calculation of the time the consumer is allowed should be assessed made on a case by case basis. In the view of this reasoning must Apollo's contractual condition of withdrawal within 4 days be considered contrary to mandatory law in the Package Travel Act.

Summary assessment: The contractual terms is contrary to mandatory law as described above. The terms in question are standard terms used in Apollo's contracts to all consumers in package travel deals. Based on this, and since the court found it to be in the interest of the public, Apollo was banned from using these terms or similar terms in the future. The ban was combined with a penalty payment of 1 000 000 SEK (to be paid if the defendant would not follow the ban).

(Abstract drafted by Martin Lilja)

#### **Decision**

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#### **Related Cases**

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#### **Legal Literature**

No results available

#### **Result**