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'The Flight for Survival: Legal Implications of Covid-19 for the Airline Business'

The global scale of flight grounding is so huge that airports cannot provide sufficient parking space. Consequently many aircrafts are being parked in the desert strips of Australia and the USA.

The airline industry is facing severe danger and prospects for recovery seem bleak. In 2003, after the SARS outbreak, it took carriers six months to recover. That outbreak was largely confined to the Asia-Pacific region. Even before Covid-19 forced borders to close worldwide airlines experienced falling demand in January. If there is a recovery this time it will be far longer. Virgin Australia has commenced voluntary administration and Avianca has filed for bankruptcy.

For customers, airports and employees a precise and situational understanding of contract law could make the difference between irrecoverable losses and a second chance. Whether Covid-19 amounts to a frustrating or *force majeure* event will largely depend on its impact on specific relationships.

Customers

Many customers will have been left in a tough spot if the terms of their ticket do not allow a full refund.

But in the absence of a relevant *force majeure* clause in the ticket contract could a customer who cancels their flight ticket claim that the contract was *frustrated* because of Covid-19? Such cases would have to be assessed individually. A customer has lower chances of invoking frustration if they cancelled a ticket before official advice cautioning against travel to their intended destination was issued. He may have a stronger argument if such travel advisory has been issued. A travel ban or mandatory quarantine requirement would advance his case. But absent such circumstances, it would be difficult for a customer who voluntarily cancels a ticket to invoke the doctrine of frustration for a refund.

Customers may look to other means of redress, such as any insurance or other policies airlines may have in place. Vietjet, for instance, rolled out a universal complimentary insurance scheme to compensate any passenger who contracts the virus on its domestic flights. Those with third-party travel insurance subject to policy terms and interpretation, however, may generally only claim for cancelled trips if they purchased it before Covid-19 was a "known event" by the company. Most Singapore insurers set a cut-off date in January 2020.

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If an airline cancels a ticket a *force majeure* clause may apply. A customer's options will be subject to its terms and is generally not entitled to further relief from the airline for other losses caused by the cancellation, such a lost business deal. Instead of cash, the *force majeure* clause may also limit the refund to vouchers or credits with the carrier, or it may offer to reschedule a flight. However, even if an airline is not obligated to provide a refund, it may do so to secure customer loyalty and goodwill.

Airline-Airport Relationship

While planes are grounded parking contracts will have to deal with parking fees, maintenance, allocation of liability, insurance, and more. Some airports such as Melbourne and Brisbane have offered free parking, possibly for goodwill or fees from other sources such as maintenance. Unfortunately, in Perth, the airport seized Virgin Australia planes as collateral against unpaid debts by the airline. This illustrates an uglier side of the tension in the airline-airport relationship.

Airports rely on airlines' airport fees and passenger traffic for their commercial activities. With reduced air travel, airport operators suffer.

The airline-airport agreement generally determines an airline's fees and access to ground facilities. During the pandemic, parties are often unable to meet their contractual obligations. For example, a contract may state that a carrier must average 250 jet flights per day from a given airport. The BBC has reported that some airlines operated near-empty flights just to retain coveted privileges at major airports such as London's Heathrow. Certain landing slots are crucial to airlines as they occupy the most popular times for business travellers to depart and arrive at major destinations. A "use it or lose it" rule under international guidelines is enshrined in EU law.

Forcing airlines to fulfil such terms like this constitute a massive waste of fuel, with significant economic and environmental consequences. Should airlines that are unable to reasonably fulfil the minimal flight volume be deprived of their gates/slots?

Airlines have successfully lobbied the European Council to disapply the "use it or lose it" rule till October 2020. But what about private airline-airport contracts? The frustration doctrine is not useful here, as airlines are not seeking a discharge from the entire contract, simply a suspension of its flight volume obligation. However, a *force majeure* term which temporarily suspends certain obligations may be helpful. Remember that where the contract provides for a *force majeure* clause, frustration cannot be raised.

Airfreight Services

Many airlines are also involved in airfreight services. Although airfreight accounts for only one percent of global trade by volume, it represents thirty-five percent by value. Since 1 May 2020, Covid-19 had caused a 29% reduction in global air cargo capacity compared to 2019. This is primarily because cargo often travels in the hold on passenger flight.

Interestingly, airfreight prices are rising as demand for medical supplies spiked while capacity collapsed. Airlines are increasingly using passenger cabins to transport goods. The Australian government contracted Singapore Airlines and Qantas to transport Australian food products to help their struggling exporters.

Carriers (and others in the logistics supply chain) struggling to deliver on their contractual obligations due to Covid-19-related disruptions should note the English Unfair Contract Terms Act (UCTA), which also applies in Singapore. It invalidates certain "unreasonable" liability exclusion clauses but these restrictions do not apply to an "international supply contract" (as defined in the UCTA). It is likely that the restrictions imposed by UCTA will not apply to many contracts for international airfreight.

Furthermore, Article 19 of the 1999 Montreal Convention, which applies to over 130 states, including Singapore, makes clear that "the carrier shall not be liable for damage occasioned by delay if it proves that it [...] took all measures that could reasonably be required to avoid the damage or that it was impossible for it or them to take such measures."

Airfreight carriers unable to cope with cargo due to reduced capacity may have to consider these laws (besides frustration or *force majeure*) for relief.

Airline-Employee Relationship

If airlines are struggling to stay afloat, many of their employees are in an even tighter spot. Singapore Airlines grounded 138 of its 147 planes and cut 96% of its capacity, forcing roughly 10,000 staff to take pay cuts, furloughs, or compulsory no-pay leave. This is bad news to airline staff. Many have turned to gig and part-time work to supplement their slashed incomes. But what measures are airlines allowed to subject their employees to?

In Singapore, as long as airlines abide by the specific employment contracts (including collective agreements with registered unions), the Singapore Employment Act, airlines are generally allowed to take such action, subject to any renegotiation with employees. However, the interests of businesses must be balanced against the interests of employees, as unemployment is detrimental to society.

The Tripartite Alliance – Singapore's forum for labour unions, employers and government – has advised businesses to take a long-term view and to only retrench excess employees as a last resort. Employers are encouraged to send their employees for training, redeploy staff, implement flexible work arrangements, reduce wages reasonably, or implement no-pay leave. This is, however, only advisory, without binding obligations. However, employers cannot slash wages or retrench with impunity. They are still subject to the Employment Act and other rules. Further, Singapore employers must now notify the Ministry of Manpower if employees' wages are cut. This allows the Ministry to monitor the scale of such measures throughout the country, and to step in if necessary. It also "encourage[s] a sense of social responsibility and prevent[s] downstream salary disputes", according to Manpower Minister Josephine Teo.

Notably, in Sweden, furloughed airline and hotel employees are retrained to work in hospitals and nursing homes to combat Covid-19. This benefits both employers and employees, as the former can

cut costs while the latter maintains an income. Not to mention providing more frontline workers to stop the virus. In Singapore, furloughed airline staff are similarly redeployed as "safe distancing ambassadors" to remind and educate the public on such measures.

The Singapore government has also rolled out subsidies to help businesses pay as much as seventy-five percent of workers' salaries. This should help airlines stay afloat and disincentive excessive wage-cutting and retrenchment. As an additional disincentive for employers to cut wages, income-slashing companies will receive lower government wage subsidies. MOM has also cautioned that employers who treat their employees in "irresponsible or unfair" ways could lose future support and benefits.

Singapore's Workplace Safety and Health Act requires employers to "take, so far as is reasonably practicable, such measures as are necessary to ensure the safety and health of his employees at work." Breaches may attract a fine or private liability to employees exposed to Covid-19 at work. Similar rules elsewhere and in Singapore may oblige airlines to take precautions to protect their staff. This may mean reducing flights to risky countries, ensuring adequate sanitation of cabins and workplaces, or providing cabin crew with personal protection equipment. Furthermore, cabins may be subject to compulsory government disinfection if there are suspected cases. As an AirAsia flight in India recently experienced, such cleansing costs precious time.

Conclusion

In such unprecedented times, many airlines are struggling for their lives. Some have already collapsed. However, despite Virgin Australia's \$7 billion debt the airline's administrators revealed that as many as twenty interested parties had considered a bid. It remains to be seen if Virgin Australia will rise from the ashes.

Whatever happens airlines will have to manage their relationships with regulators, customers, airports, and employees carefully. Many airlines have a special place in the national economy, not least as major employers. With the influx of government aid in Singapore and some other countries, airlines must adapt to survive if they are to emerge from the pandemic as they did for 9/11 and SARS crisis.