

COVID-19 RELATED FLIGHT REFUNDS – BALANCING COMPETING DEMANDS

OFF THE CUFF

AVIATION

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In the wake of the Covid-19 pandemic, the aviation industry has been rocked by abrupt travel restrictions imposed by Governments worldwide, followed by a growing number of travel cancellations. Closure of airports brought about the inevitable grounding of aircrafts, airline staff being benched or even furloughed, massive costs escalation without generation of revenue and all of a sudden, airlines across the globe are fighting for their lives for those who have not already succumbed to the effects and have folded such as Flybe (UK)^[1], Trans State^[2] and Compass Airlines (USA)^[3], and recently Virgin Australia stepping into administration^[4].

The aviation industry is, broadly speaking, an essential cog in the global economy and provides a convenient logistical platform for commerce and passenger commute. Their role is vital and its significance is and will be more distinct as the crisis that has infected the industry leaves its mark.

The loud complaints heard in the aviation sector today comes from the consumers of air travel who have felt that they have been short-changed by airlines who are dragging their feet in addressing the consequence of flight cancellation as a result of the Covid-19 pandemic and the consequent Government directives on lockdowns and movement control globally.

In the main, passengers whose flights have been cancelled as a result of the various government lockdowns and movement control regulations, and those who do not wish to travel for fear of risking contracting the virus have sought to demand and recover cash refunds and reimbursements for their unused tickets and cancelled travels. There has been, reportedly, growing resistance from airlines to refund, albeit in a less obvious way; by offering travel vouchers, credit shells, extension period for air travel and even by stating in clear terms that requests for cash refunds would be delayed.

In such a situation, what right does a passenger and airline have against each other?

Does a passenger have the right to ask for a cash refund when the scheduled travel had been cancelled?

The right for a refund of the ticket cost, and for all other passenger-airline rights, lie within the four corners of the contract of carriage (often referred to as the General Conditions of Carriage (“GCC”)) between the airline and the passenger. The GCC would broadly house the usual terms and conditions of carriage together with various other country-centric conditions. Relevant to the subject of this article, the provisions relating to “*Delays and Flight Cancellation*” and “*Refunds*” come to the fore. Most, if not all, of the airlines have also incorporated into their respective GCC a “*force majeure*” clause or definition to cover *unforeseeable circumstances beyond the control* of the airline.

It must be pointed out that several airlines have, in their respective GCC, addressed the consequences of cancellation under these circumstances differently; there are some airlines who have provided for specific exemption of the application of provision giving options to the passenger in the event of a usual operational cancellation (ie. *airline-caused* events) whilst in the case of other airlines, such exemptions are not explicitly incorporated in its GCC. A typical case of such exemption is when the terms provide that where cancellation was due to *causes beyond the control of the airline*, including *force majeure* and act of God, the airline is not obliged to provide the usual options available but shall make all reasonable efforts to assist the passengers.

On the options that are availed to the passenger in a case on cancellation, the 3 automatic contractual options largely prescribed in the GCC of many airlines are as follows:

- To carry the passenger on the next available flight
- Re-route the passenger to his destination
- Refund the passenger in accordance with the refund provisions under the GCC

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These options would be available to passengers for cancellation of flights due to an *airline-caused* events. What options are there for passengers where the cancellations were due to *circumstances beyond the control of the airline or force majeure*? In the case of the present lockdown and movement control resulting in the cessation of air travel, a forceful case may be made out for the application of *force majeure*. In this regard, what cannot be denied are that:

- The pandemic was not foreseeable by the airline nor was it within its control to contain it
- The lockdown and movement control as a result thereof was directed by the Government
- Mitigating steps by the airline was not possible as all air travel was halted completely in many jurisdictions. In jurisdictions where limited and controlled air travel was sanctioned by the Government, airlines have relented and do fly, albeit with very low capacity

We say that the Covid-19 pandemic can certainly be categorised as a *force majeure* within the definition of an airlines' GCC.

The rights of the passenger in such instances would, therefore, completely depend on the provisions of the respective airline's GCC and subject always to the domestic laws. It is a matter of contract and this has been acknowledged by the regulators of air travel in all jurisdictions, including aviation consumer protection authorities like MAVCOM in Malaysia, by their constant reference to the terms of the ^[5]. Recommendations are made in the strongest and appealing terms for airlines to provide the passengers

with the option for a refund or, if they so opt, travel deferment methods in the form of travel vouchers or credit shell.

We subscribe to the more robust argument that the cancellation of flights due to “*extraordinary circumstances*” or causes beyond the control of the airline, whilst not triggering the automatic contractual options available to the passenger under the GCC for usual operational cancellation, has

“...cancellation of flights due to extraordinary circumstances... has allowed the passenger to acquire an entitlement to terminate the contract of carriage for non-performance or total failure of consideration, and to seek restitution as a result ”

allowed the passenger to acquire an entitlement to terminate the contract of carriage for non-performance or total failure of consideration, and to seek restitution as a result ie. the refund of the monies paid for the ticket.

A vague reference that the airline *shall make all reasonable efforts to assist the passengers*, in the GCC, does not help either party in terms of clarity; it merely provides a broad platform to allow the airlines to engage and negotiate with passengers to opt for travel deferments or a refund. In the Malaysian context, the rights of passengers are available under the Contracts Act 1950, but before we look at the statutory rights available to the passenger, there must be a sufficient inquiry into the legal effect of the cancellation on the contract of carriage.

Frustration of a contract may arise where an event that was not foreseen by the parties, and which did not arise as a result of an infraction of the contract of carriage by either of party, makes performance of the contract impossible or unlawful. However, frustration will not apply where the contract has made provisions for such events. Whilst this position in law is unassailable, it can be argued that where the provision in the contract does not address all the necessary points relevant to the legal consequences of a cancellation due to causes beyond the control of the airline, then there is no impediment in law to invoke the principle of frustration of contract under Section 57(2) of the Contracts Act 1950. The remedy of restitution or refund is consequently available to the passenger under Section 66 of the Contracts Act 1950 and Section 15 of the Civil Law Act 1956.

The passenger's right to refund is, therefore, firmly grounded in law.

Does the airline have any justification to resist or prevent the passenger from insisting on this refund?

It is evident from reports that airlines globally have been massively hit financially by the freezing of air travel as a result of governmental lockdown and movement control regulations as a result of the pandemic. In the US and in many other jurisdictions, airlines are avoiding the option of refund and more focused on convincing passengers to take up flight vouchers with extended expiry date and attractive credit shell.

They have made a strong case that refunds will financially impact the airline as there is no generation of revenue in the period of lockdown and

ban on air travel and the costs are rising steeply by the idle grounding of aircrafts and its future maintenance and in maintaining employment of airline staff. To top all of these escalating costs with refunds, the airline could very well see themselves folded earlier than expected. Airlines, for these reasons, have *subtly* opposed any “full-throttle” enforcement of passenger entitlement.

It has been widely perceived by the public that the aviation authorities have leaned towards protecting the interest of the Airlines in this regard. This perception, we say, is unfounded.

Under the aviation consumer protection regime in Malaysia, the MAVCOM Code provides the following reliefs that are available to the passengers due to flight cancellation.

- (a) The Code prescribes, in Paragraph 12(1), that the consequence of flight cancellation is that that the airline would be obliged to provide passengers “*compensation and care*”. This compensation has been expressed to be:
 - (i) Re-imburement within 30 days of the full cost of the ticket; or
 - (ii) Re-routing, under comparable transport conditions, to their final destination at the earlier opportunity or a later date at the convenience of the passenger subject to seat availability.

- (b) In paragraph 12(5) of the Code, the airline is however not obliged to pay “compensation” in the case of the cancellation caused by

“*extraordinary circumstances*” which could not have been avoided even if all reasonable measures had been taken. “*Extraordinary circumstances*” has been given a non-exhaustive definition under the Code. This provision in itself excludes the option of refund.

The largely unregulated legal consequence or rights of passengers in the case of cancellation due to “*extraordinary circumstances*” would necessitate the reliance or fall back on the terms of the airlines’ GCC.

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It is instructive to note that MAVCOM had attempted to provide some relief and carve a middle path for both the airline and the passengers in its recent Notice to Airlines dated 8/4/2020^[6]. MAVCOM assisted passengers to understand their rights flowing from this “*extraordinary circumstances*” that caused the cancellation of flights through the publication of an FAQ^[7] on their website. In its Notice, MAVCOM had, inter alia, extended the 30-day timeline for airlines to remit refunds and to resolve passenger complaints to 60 days.

With the intervention of MAVCOM, the passenger who had expended monies for services that cannot be delivered by the airline is certainly entitled to a refund whichever permutation is adopted in construing where his rights fall within the terms

of the contract of carriage. The law is not uncertain in this regard to cause the passenger's money locked with the airline with no certain rights of recovery.

Is there a constructive big-picture consideration required in the balancing of rights in the issue of refunds under these circumstances?

The rights of the passengers to a refund of the cost of tickets as a result of the cancellation due to the ban on air travel as a result of the Governmental lockdown and the MCO cannot be disputed.

Airlines would, therefore, be hard-pressed to deny the passenger of his right to refund.

The machinations that have been adopted by some airlines to avoid the subject of immediate refunds and to hard-sell the option of travel vouchers and alternatives to refunds have been given a negative perception to the public. This, we say, is not a true reflection of the object or intent of the airlines. It would seem to be very much driven by the current unprecedented circumstances that has befallen the industry, in particular our domestic airlines. The insistence of wholesale refunds could bring an airline to its knees. Survival of the airlines is paramount for the industry, commerce, domestic economy and more particularly the consumers of air travel, the passengers themselves.

Airlines on the other hand, whilst recognising and valuing the passengers rights to a refund, have in their armoury various modalities that they have designed and promoted to lessen the stress of refunds like allowing the passenger to hold on to their ticket with extension of its validity, providing credit shell, issuance of travel vouchers which can be used to purchase airlines products, collaborating with loyalty programs and converting the value of the ticket to Miles under the loyalty program and many more options that continue to be explored. The airlines have the interest of the passenger in mind whilst taking steps to also ensure its survival.

The importance of the airlines' survival has been acknowledged and given due cognisance by IATA internationally and even locally by MAVCOM. As mentioned above, MAVCOM has come under some criticism for being too airline-centric in their recent Note to Airlines. With respect, such criticisms are unjustified and without basis.

As mentioned, the continued survival of our domestic airlines is of fundamental importance. Airlines need time to make remittance of refunds as liquidity of funds is scarce in the current

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circumstances. In the middle of negative cashflow and mounting debts the airline has and continues to do its part in the realms of social responsibility. The airlines have balanced the financial crunch they face with their social responsibility of ensuring continued employment and the least inconvenience to its employees. They have the largest payroll compared to other industries. The airlines have played a vital part in the repatriation of its citizens and have lent a hand to other nations for such service. Its freighter division, in the midst of this health concern, has and continues to ensure that the food and medical supply chain is not interrupted. Local airlines, particularly the low-cost carriers, have strived to enable *all Malaysians to fly*, providing the convenience of affordable and fun air travel.

The aviation industry has and continues to face the mounting risks that are approaching it head-on like a runaway train, in these war-time like circumstances and it is only right for there to be an equitable balancing of interest for greater survival of the airlines as the aviation sector will have a pivotal role to play post Covid-19 pandemic in the efforts to jump start the country's fledgling economy.

The only palpable risk that has befallen the passenger as the other contracting party to the contract of carriage, is the cost of the ticket. The competing demands should find a correct balance; the refunds of tickets to passengers in the current setting can be relaxed and breathing space be given to the airlines to get back on its feet for the better good of the masses. Surely Malaysians want to fly again. Let there be an allowance of time to facilitate the airlines to fulfil their refund obligations to the

passengers, whilst they repair the damage done by the pandemic and to once again take-off and serve the national interest.

It is the best way forward.

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