

Aviation-Focused Webinar Series:

Handling the Turbulence from COVID-19



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English Law - Hell or High Water vs. Coronavirus

- Do the terms of a lease excuse a lessee from performing its obligations?
 - Olympic Airlines SA v ACG [2014] EWCA Civ 821
 - Aquila WSA Aviation Opportunities v Onur Air [2018] EWHC 519
 - Drafting recommendations – draft widely to reflect previous market events and inherent risks in aircraft possession and operation

New York Law – Hell or High Water vs. Coronavirus


- Do the terms of a lease excuse a lessee from performing its obligations?
 - *Wells Fargo Bank Nw., N.A. v. Taca International Airlines, S.A.*, 247 F. Supp. 2d 352, 361 (S.D.N.Y. 2002)
 - *Paulicopter - Cia. Paulista v Bank of America, N.A.*, 2019 N.Y. Slip Op. 30771[U], (N.Y. Sup Ct, N.Y. Cnty 2019)

New York Law – Hell or High Water vs. Coronavirus



- *Wells Fargo Bank Minn., N.A. v. CD Video, Inc.*, 6 Misc. 3d 1003[A], 2004 N.Y. Slip Op. 51707[U] (N.Y. Sup. Ct. N.Y. Cnty 2004), *aff'd*, 22 A.D.3d 351, 351 (1st Dep't 2004)
- “This ‘absolute and unconditional’ agreement to make payments regardless of any defenses that may be raised and under any circumstance ... is common to equipment leases, and has uniformly been given force and effect by the courts.”
- *In re O.P.M. Leasing Services, Inc.*, 21 B.R. 993 (Bankr. S.D.N.Y. 1982)
- “To deny their effect as a matter of law would seriously chill business in this industry because it is by means of these clauses that a prospective financier-assignee of rental payments is guaranteed meaningful security for his outright loan to the lessor.”

English Law - Hell or High Water vs. Coronavirus



- Can the terms of a lease/contract excuse a party from performing its obligations?
 - Force Majeure
 - “Neither party shall be in breach of this agreement nor liable for delay in performing, or failure to perform, any of its obligations under this agreement if such delay or failure result from events, circumstances or causes beyond its reasonable control”
 - No recognized meaning under English law – interpreted by the courts by reference to the words used and not intention
 - Force majeure concept is never superimposed/or implied into contracts
 - Relevance to English law aircraft leases?
 - Effects of force majeure in contracts

New York Law – *Force Majeure* Clause/Defense



- Do the terms of a lease/contract excuse performance by a party of its obligations?
 - *Force Majeure*
 - Must be in the contract (no common law)
 - *Connecticut National Bank v. TWA*, 762 F. Supp. 76 (SDNY 1991):
 - “TWA could have negotiated for a *force majeure* clause in the contract. That was not done and such a clause cannot be read into the contract.”
 - Circumstances beyond the control of the parties
 - *Kel Kim Corp. v. Central Markets, Inc.*, 70 NY2d 900 (1987)
 - “clauses excusing nonperformance due to circumstances beyond the control of the parties”

New York Law – *Force Majeure* Clause/Defense



- Effects of *Force Majeure* in Contracts
 - Narrowly Construed
 - *Wuhan Airlines v. Air Alaska*, 1998 WL 689957 (SDNY Oct. 2, 1998)
 - “New York narrowly construes force majeure provisions, and limit them to contingencies specifically listed or similar to those listed.”
 - *Kel Kim Corp. v. Central Markets, Inc.*, 70 NY2d 900 (1987)
 - “only if the *force majeure* clause specifically includes the event that actually prevents a party’s performance”
 - Financial hardship does not work
 - *In re Republic Airways*, 2016 WL 2616717 (Bankr SDNY May 4, 2016)
 - “financial hardship is not grounds for avoiding performance under a contract”

English Law - Hell or High Water vs. Coronavirus



- Do the terms of a lease/contract excuse performance by a party of its obligations?
 - The Doctrine of Frustration
 - A frustration event is an event which:
 - Occurs after the contract has been formed
 - Is so fundamental as to be regarded by the law both as striking at the root of the contract and is entirely beyond what was contemplated by the parties when they entered into the contract
 - Is not due to the fault of the other party and
 - Renders further performance impossible, illegal or makes it radically different from that contemplated by the parties at the time of the contract

English Law - Hell or High Water vs. Coronavirus

- Do the terms of a lease/contract excuse performance by a party of its obligations? Frustration continued...
- But ...case law has suggested that frustration is not available in the following circumstances:
 - Where the alleged frustrating event should or could have been foreseen by the parties
 - The contract is merely more expensive to perform
 - There are changes in economic conditions
- Even for supervening illegality to frustrate, the event must remove all or substantially all of the benefit that one party receives from the contract
- Very difficult for the relying party to argue, especially in lease agreements – times could change though?

New York Law – Frustration of Purpose



- Do the terms of a lease/contract excuse performance by a party of its obligations?
 - The Doctrine of Frustration of Purpose
 - Complete Basis of Contract
 - *Jack Kelly Partners LLC v. Zegelstein*, 140 AD3d 79 (1st Dept 2016)
 - “the frustrated purpose must be so completely the basis of the contract that, as both parties understood, without it, the transaction would have made little sense”
 - Unanticipated Circumstances
 - *407 East 61st Garage v. Savoy Fifth Ave. Corp*, 23 NY2d 275 (1968)
 - Doctrine inapplicable because event “did not result from unanticipated circumstances”

New York Law – Impossibility of Performance



- Do the terms of a lease/contract excuse performance by a party of its obligations?
 - Impossibility of Performance
 - Unforeseeable
 - *Kel Kim Corp. v. Central Markets, Inc.*, 70 NY2d 900 (1987)
 - “the impossibility must be produced by an unanticipated event that could not have been foreseen or guarded against in the contract”

New York Law – Impossibility of Performance



- Destruction of subject matter
 - *407 East 61st Garage v. Savoy Fifth Ave. Corp*, 23 NY2d 275 (1968)
 - “the excuse of impossibility of performance is limited to the destruction of the means of performance by an act of God, Vis major, or by law”
 - *Kel Kim Corp. v. Central Markets, Inc.*, 70 NY2d 900 (1987)
 - “destruction of the subject matter of the contract or the means of performance makes performance objectively impossible.”

English Law – Guarantee and/or Indemnity

- Guarantee

- Promise to fulfil or perform the obligations of a third party
- Creates a secondary obligation (guarantor's obligation contingent on the primary obligation)
- Must be in writing and signed by the guarantor
- With a typical form of guarantee, the lessor's/lender's right of action against the guarantor will arise as soon as the lessee/borrower has defaulted in performance of its obligations and the lessor/lender has served a written demand upon the guarantor
- A guarantee should be enforced in accordance with the terms of the guarantee and the wording dealing with the method of service.
- As a guarantee creates a secondary obligation, **it will be extinguished if the underlying contract is deemed void or unenforceable**, for instance, by way of frustration or successful reliance on a force majeure clause

English Law – Guarantee and/or Indemnity

- Indemnity

- An indemnity is the obligation of one party (the indemnifier) to make good a loss suffered by another party (the indemnified party).
- The liability of an indemnifier is a stand alone primary obligation. It is independent from and not contingent on the principal's liability to the indemnified party.
- The primary nature of the obligations under an indemnity are advantageous for a lessor/lender — if the underlying contract is deemed invalid, or the borrower/lessee's obligations extinguished, **the indemnity will still stand.**

English Law – Guarantee and/or Indemnity

- Benefits of an English Law Guarantee and Indemnity:
 - Essential for lessor or lender that a guarantee is supported by an indemnity
 - Clear drafting is required to show both the secondary obligation and primary obligation
 - If the underlying transaction (obligation) is set aside for any reason then the guarantor's obligations under the guarantee will also be unenforceable
 - If an indemnity is included then the primary nature of the liability manes that even if the underlying transaction is set aside for any reason the indemnity will remain valid
 - Could be relevant in the event any lessee claim against the hell or high water principle is successful

New York Law – Guaranty



- Guaranty

- Promise to fulfil or perform the obligations of a third party
- Must be in writing and signed by the guarantor
- Courts enforce Waiver of Defenses / Unconditional Nature of Guaranties
 - *Hotel 71 Mezz Lender LLC v. Mitchell*, 63 AD3d 447 (1st Dept 2009)
 - “language of the waivers is sufficiently specific to bar ... defenses of frustration of performance ..., breach of the covenant of good faith and fair dealing, and fraudulent inducement”

New York Law – Guaranty



- *Sterling Nat'l Bank v. Biaggi*, 47 AD3d 436 (1st Dept 2008):
 - Affirming order enforcing written personal guaranty based on valid waiver of right to plead defenses:
 - (1) “[the guaranty] is absolute and unconditional in all respects and enforceable irrespective of any other agreements or circumstances which might otherwise constitute a defense to the guaranty and obligation of the guarantor under the loan agreement”;
 - (2) “the guarantor absolutely, unconditionally and irrevocably waives any and all rights to assert any defense, set-off, counterclaim or cross claim of any nature whatsoever concerning the guarantor's obligations under the guaranty or the loan agreement”; and
 - (3) “the guarantor waives the right to interpose any defense based upon statute of limitations or any claim of laches and set-off or counterclaim of any nature or description in any action in which plaintiff is an adverse party.”

Employment



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Employee Inquiries



- EEOC Pandemic Guidance:
 - Can ask employees who report feeling sick at work, or who call in sick, if they are experiencing symptoms
 - Can ask employees about exposure, even if not experiencing symptoms
- Travel-related inquiries
 - Can ask employees about recent travel to ascertain whether employee can return to workplace
 - Applies even if employees are not sick and even if travel was personal
- Must keep all medical information confidential

Employee Inquiries



- Can employers take employee temperatures?
Yes, but . . .
 - Must ensure objective justifiable reason
 - Not always most accurate predictor
- Inquiries into pre-existing or underlying health conditions?
 - No, but . . .
 - EEOC has pandemic exception – allows inquiries by employer to help determine who is at higher risk
 - Model questionnaire published by EEOC

Other Privacy Issues



- Individuals who test positive for COVID-19
 - All efforts should be made to maintain confidentiality (ADA and other legal requirements still apply)
 - Must also ensure safe workplace; provide facts without identifying person
- HIPAA-related issues
 - “Employers” not covered entities under HIPAA; no HIPAA issues if information gleaned from employee self-disclosure or source other than health plan or plan records
 - PHI may be disclosed by covered entity to public health authorities
 - Always limit disclosure to minimum necessary

Employee Leave Rights



- Employees with positive COVID-19 test and/or symptoms
 - Sick leave
 - New federal law – Families First Coronavirus Response Act (< 500 employees; up to two weeks paid sick leave)
 - State or local law
 - Employer policies
 - FMLA leave (or similar state “mini-FMLA” law)
 - Medical leave due to STD
 - Leave as reasonable accommodation under ADA
- These are “protected” leaves

Employee Leave Rights



- Employees with family members who are sick or under quarantine
 - Sick leave
 - New federal law – Families First Coronavirus Response Act (< 500 employees; up to two weeks paid sick leave)
 - State or local law
 - Employer policy
 - Some state sick leave laws mandate leave for family members deemed a public health risk
 - FMLA leave (or similar state “mini-FMLA” leave law)
 - “Parent” is a covered family member
- These are “protected” leaves

Employee Leave Rights



- Quarantined after possible exposure, but no symptoms
 - New federal law – Families First Coronavirus Response Act (< 500 employees; up to two weeks paid sick leave)
 - State/local laws
 - Sick leave laws – some existing laws require leave for employee's **exposure** to a communicable disease
 - States passing new COVID-19 laws
 - Other existing state leave laws protect employees in quarantine or isolation (e.g., MD, SC, and TX)
 - Employer policies (leave or work from home)
 - STD leave (employers who self-fund have discretion)
- FMLA? *Probably not.*

Employee Leave Rights



- School or daycare closures
 - New federal law – Families First Coronavirus Response Act (< 500 employees)
 - Expanded FMLA temporarily to allow paid leave due to school closure
 - Provides up to two weeks paid sick leave due to school closure / loss of childcare provider
 - State or local laws (many already mandate paid sick leave for school closures)
 - Employer policies
- These are “protected” leaves

Forcing Employees to Stay Home



- Permitted under EEOC Pandemic Guidance so *long as* reasonable and based on objective facts
 - No ADA issues – “direct threat”
 - CDC has issued “avoid nonessential travel” warnings for many countries
 - Employee exhibiting symptoms in workplace
 - Employee tests positive for COVID-19
- Employers have general duty to keep workplace safe and free of hazard (OSHA)
- Limit required leave to reasonable time period

Benefits and Compensation on Leave



- Right to pay or benefits depends on type of leave
 - State-issued disability payments (traditional and COVID-19 expansion)
 - State-issued family and medical leave benefits (traditional and COVID-19 expansion)
 - Employer-sponsored disability programs (insured or self-funded)
 - Workers' compensation payments (if work-related)
- Wage and hour laws will also dictate pay rights
- Employment agreements or CBAs may have additional requirements
- Unemployment due to reduction in hours / some states waiving waiting period

Remote Work



- No legal obligation to allow employees to telework; business decision
 - Exception: Reasonable accommodation under the ADA (allows employee to perform essential job functions without posing undue hardship)
 - Ex: Disabled employee with underlying conditions seeks to work from home
- EEOC – employers may force telework
- Must track non-exempt employee work time; consider obtaining certification from employees as to accuracy of records
- Consider written policy; remind employees of confidentiality requirements

Hiring and Return to Work

- EEOC Guidance
 - May ask *applicants* if they have, or have had symptoms consistent with COVID-19
 - May take temperatures after *conditional* job offer
 - May delay start dates or withdraw job offers if individual exhibiting symptoms
 - May ask for certification upon return to work
 - Conflicts with CDC interim guidance
 - Negative COVID-19 tests not a reality at present

Hiring and Return to Work



- Ensure uniform practices to avoid discrimination claims
- Watch out for state and local sick leave laws with respect to RTW certifications
 - Some place restrictions around documentation an employer is permitted to seek
 - More generous law will control
- Consider alternatives to provider certifications – self-certifications or employee verifications

Termination of Employment

- COVID-19 related leave laws do not prohibit employers from terminating employment due to lack of work, business shut-down, etc.
- Temporary or permanent layoffs will trigger federal WARN Act (60-day notice requirements)
 - Triggered by a “plant closing” or “mass layoff”
 - Violators liable for back pay/benefits and penalties
 - **“Unforeseeable circumstances”** – likely exception (but still must provide notice as soon as practicable)
- State WARN acts – laws changing by the day
 - California announced COVID-19 related layoffs will not trigger full state WARN protections

Termination of Employment

- The new federal emergency leave law does not require paid leave for temporary closure or layoff
 - Employees may seek unemployment benefits
- Payout of accrued vacation / PTO may be required, depending on employer's policy and/or state law
- Termination of employees on protected leaves
 - Depends on the reason for termination

Don't Forget Local Laws!

- Varying paid sick leave laws (state, city, county)
- Varying family and medical leave laws (“mini-FMLA” laws)
- Varying additional leave laws
- Varying wage and hour laws (FLSA type laws)
 - Vacation pay rules
 - Forfeiture of wages rules
 - Deductions from wages rules
 - Exemptions and OT rules
- Varying WARN Act laws

Union Issues



- National Railway Labor Act
 - Governs labor relations in airline industry
 - Terms and conditions of employment are bargained
 - Has its own dispute resolution procedures
- National Labor Relations Act (NLRA)
 - Governs non-airline labor relations
 - Most disputes adjudicated by NLRB
 - “Section 7” rights – right to engage in “concerted activities” for purposes of collective bargaining or mutual aid or protection
 - **Applies to union and non-union**
 - Potential risk with respect to “forcing” employees to work in unsafe conditions

FAA Update & Social Distancing

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FAA Update 2020 Social Distancing Issues

McAFEE & TAFT

FAA Registry Procedures

Pre-March 19, 2020

- Public Room Users (law firms, title companies, others) allowed access to the FAA Public Documents Room (PD Room)
- File paper documents through the FAA filing window from 7:30am to 3:30pm Central Time and obtain official FAA filing time
- FAA issues its AEP authorization code for International Registry **(IR) filings (via the FAA's 135 form)**
- Documents are indexed and scanned and added to the queue for **an FAA examiner's** review
- Priorities (exports, imports and fly wires) are marked as such by the filer and worked on an expedited basis

FAA Registry Procedures

March 18 -23, 2020:

- Public Room users (still permitted)
- The FAA filing window is closed
- Paper documents are now placed in envelopes and into bins outside of the PD Room
 - Regular filing bins – picked up twice a day
 - Priority bins – picked up every hour
 - Filing times are not provided by the FAA. Filing times can be provided once the documents are scanned and indexed into the system and appear on the FAA computer to which PD Room users have access.
- Filings can also be made through an FAA email address: 9-AVS-AR-Electronic-Submittals@faa.gov; but submissions are limited to 20 pages

FAA Registry Procedure Post-March 24, 2020

- Due to the ability of the virus to survive on surfaces, the FAA will quarantine all paper documents, including priorities, for 72 hours
- Filings can still be made through the FAA email address but the 20-page maximum will not apply to priorities. However, a filing package may need to be broken into separate email submissions to meet the 20 page maximum per email.

Practice Points

- 1) Significant delay in obtaining the FAA AEP authorization code for IR filings. So, obtain prospective AEP authorization codes immediately upon knowledge that a deal may be closing in the future (documents must be filed with the FAA within 60 days of a prospective registration covering an FAA registered airframe).
- 2) Use digital signatures which meet the FAA requirements, *i.e.* an electronic signature is not acceptable, a copy of an ink signature is not acceptable, a digital signature without the required digital certificate for verification of the signer is not acceptable.

Practice Points *(cont'd)*

- 3) Acceptable digital signatures reflect evidence of **authentication of the signer's identity such as the text "digitally signed by" along with the software provider's seal/watermark**, and date and time of execution; or, have an authentication code or key identifying the software provider.
- 4) Pre-position ink signature pages if digital signatures are not approved by the relevant company.
- 5) Check state law regarding notaries who may now be authorized to digitally sign the notary acknowledgment.

Practice Points *(cont'd)*

- 6) For aircraft title transfers that require effectuation of the 8050-1 aircraft registration application as temporary authority to operate domestically, it may be best to mail the documents to the FAA (relying on the FAA mailbox rule), which provides a date certain by which the application can serve as temporary authority to operate.
- 7) If the FAA shuts down, then we will be back to the minimal processes used during federal government shut-downs.

Additional Information



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Including SGR Webinars Concerning COVID-19

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ANY QUESTIONS?



Thank You For Joining Us!

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