TEMPLARS

WAITING IN THE WINGS – SURVIVING THE EFFECT OF COVID-19 IN THE NIGERIAN AVIATION INDUSTRY

The adverse business impact of the COVID-19 pandemic is currently battering the global aviation industry at an unprecedented scale. Virtually all commercial passenger planes in the world are grounded. The International Air Transport Association (IATA) estimates that the aviation industry globally will lose US$252 billion in 2020.

The Nigerian aviation industry is not spared of this bleak reality. According to the Airline Operators of Nigeria (AON), indigenous operators have lost N360 billion (approximately $1 billion) since the suspension of flights started. The impact of this hit is already being felt, as one of the leading airlines in Nigeria recently announced that 90% of its staff will proceed on indefinite leave without pay whilst the remaining 10% would take an 80% pay cut on their salaries/wages.

Beyond loss of profit, however, there is arguably a risk of insolvency for many Nigerian airlines, as they struggle to meet their financial obligations to financiers, lessors, employees and other contractual partners.

Ultimately, the survival of Nigerian airlines may not depend entirely on what help or stimulus packages are available from governments but also on what steps they are taking now to remain afloat. In this article, we discuss a few of those legal/practical steps that are potentially available to Nigerian airlines as they face the economic strain occasioned by the corona virus pandemic.

What Nigerian airlines could do

Presently, not much help seems to be available from the Nigerian government to businesses in the aviation sector. Hence, in addition to exploring any government lifeline(s), airlines must be resilient, innovative and dynamic to survive. A summary of recommendations that Nigerian airlines, depending on their peculiar business circumstances and realities, could consider taking include the following:

- ***renegotiate loan agreements/leases, leveraging on some contractual/legal protections;***
- ***take advantage of any stimulus package made available by the Nigerian government;***
- ***explore the limited opportunities that remain available during the pandemic;***
- ***cut cost; and***
- ***prepare for a quick restart.***

In the brief discussions that follow, we assess each of the solutions proposed above.

1. *Review/renegotiate loan agreements, leases and other contracts*

This is recommended as an immediate step. Operating an airline invariably entails several contractual relationships. These could be either financial contracts––e.g with lessors and financiers––or operating contracts––e.g. with the airport authorities (FAAN, NAMA, NIMET etc) and service providers.

Because airlines typically operate on low margins, they tend to look to external sources to raise funding to acquire new aircraft to replenish their fleet or they resort to leasing. In respect of loans, where there is default in repayment, the financiers will usually want to enforce their security by taking possession of and possibly selling the aircraft used as collateral. And for leases, any default in paying rent as and when due would typically entitle the lessors to reposes the aircraft. In both cases, the airline depends on the proceeds realized from its operations to meet its obligations.

It appears imperative, therefore, for airlines to approach their contracting parties––whether lessors or financiers––for a review or renegotiation of the agreements with a view to arriving at terms that take the present crisis into consideration. At a minimum, airlines may be able to secure a postponement of the obligations to pay rent or loan-repayment moratorium (as the case may be) pending the time normalcy is restored in the industry.

Airlines could likewise seek to review/renegotiate their operating contracts such as the agreements which require flights to maintain landing spaces in airports at all times. Given that the ability to meet this obligation is tied to the revenue generated by an airline from its operations, airlines could persuasively plead their case as regards the impairment arising from the present realities.

In seeking these contractual reviews/renegotiations, an airline may rely on a review clause if the relevant contract contains one. Absent a review provision, however, an airline could rely on any *Force Majeure* or *Material Adverse Change* (MAC) provisions in its contract to postpone the performance of its obligation or exempt itself from liability for non-performance of the contract. And on the off chance that none of these contractual provisions are available, the airline may resort to the common law principle of Frustration.[1]

2. *Take advantage of any stimulus package made available by government*

Countries all over the world are providing interventions in the form of bailouts to airline companies. For example, the US federal government rolled out US$50 billion bailout fund which the airlines can access to fund cash grants for airline workers, and to ensure their business stability, among other things. More than 200 airlines applied for this fund and many are receiving allocations.

Other countries like the UK, Italy, Australia and Singapore have introduced several bailout interventions for the airlines operating in their respective territories.

There is, at the moment, no intervention specific to the aviation industry in Nigeria. However, in view of the adverse effect of COVID-19 pandemic on businesses generally, the Central Bank of Nigeria (CBN) introduced a N50 billion Targeted Credit Facility (TCF) as a stimulus package to support households and micro, small and medium enterprises (MSMEs) affected by the COVID-19 pandemic.

[1] We have discussed the subjects of Force Majeure, Frustration and review/renegotiation of contracts and their applicability in more detail in our paper: *"COVID-19: FREQUENTLY ASKED QUESTIONS ABOUT MANAGING COMMERCIAL TRANSACTIONS IN NIGERIA"* published earlier on the Templars website on 4 April 2010

Answers to the following questions regarding the TCF scheme may be of interest to Nigerian airlines:

Are airlines eligible to benefit from the TCF scheme?

The scheme is ostensibly portrayed to be for the benefit of MSMEs, with the fund for the scheme sourced from the Micro, Small and Medium Enterprises Development Fund (MSMEDF). However, under the March 2020 Guidelines issued by the CBN for the operation of the scheme, airline operators are clearly listed as part of the target.

How can an eligible beneficiary apply for the loan?

The eligible participating financial institution for the Scheme is NIRSAL Microfinance Bank (NMFB). An airline operator desiring to benefit from the scheme may submit application to NMFB with clear evidence of the adverse impact of the COVID-19 pandemic.

How much is available as loan to an applicant?

An airline company can apply for working capital. Under the scheme, working capital shall be a maximum of 25% of the average of the previous 3 years' annual turnover. Where the enterprise is not up to 3 years in operation, 25% of the previous year's turnover will suffice.

What is the interest rate?

Interest rate under the intervention is 5% per annum (all inclusive) up to 28 February 2021. Thereafter, the interest rate will revert to 9% per annum (all inclusive) as from 1 March 2021.

What is the tenor of the loan?

Working capital shall be for a maximum period of one year, with no option for rollover.

Nigerian airlines, for whatever it is worth, should seek to benefit from the CBN's TCF to contain any potentially biting financial strain that the pandemic has occasioned. It is doubtful that any airline in Nigeria has taken any serious steps to take the benefit afforded by the scheme. The first ones to do so may well reap full benefits.

Recently, the Chairman of the House of Representatives Committee on Aviation called for a single digit interest loan for indigenous airline operators.[2] If this call is heeded by the relevant authorities, it would be a significant boost in ameliorating the pandemic-induced liquidity challenges of Nigerian airlines. It is a development that the Nigerian airlines will want to look out for, and take benefit of, if and when it materializes.

3. Explore opportunities that remain available amid the pandemic

Being vital for keeping supply chains open, air freight is not subject to the restrictions placed on movements by governments across the world in response to the COVID-19 pandemic. People are (and will remain) in need of medical supplies (pharmaceuticals and equipment, medical personnel, ventilators, PPEs and other medical kits) and food for survival in this lockdown. The quickest way to transport these necessaries to the places they are needed has been by air. In the US, as passenger flights were cancelled, the cost of sending cargo by air changed rapidly upwards. The cost of sending cargo across the Pacific Ocean tripled by late March 2020.[3]

Experts in the industry have recommended that airlines transform their passenger cabin to aircraft freighters as a quick recovery plan. Consistent with this approach, the likes of American Airlines and Virgin Atlantic have started deploying their passenger aircraft to carry cargo. Ethiopian Airlines also recently completed the flight and delivery of the second round of shipments of life-saving medical supplies to fight COVID-19 donated by Jack Ma to African countries, with its CEO expressing delight "*to see the fruits of* [Ethiopia airline's] *multi-hundred million dollars investment in cargo infrastructure now coming to save Africa from the COVID-19.*" Nigerian airlines should key into this opportunity. Even in Nigeria, cargo flights are operating at a significant level, which offers a window for revenue generation by airlines, including commercial passenger carriers. Hence, if a Nigerian airline has this capability, it should be adequately advertised to potential clients in order to take benefit of the uptick in air cargo business arising from the pandemic.

[2] He also called for special Federal Government grant to the Federal Airports Authority of Nigeria, (FAAN), Nigerian Airspace Management Agency (NAMA) and the Nigerian Meteorological Agency (NIMET) to help them in the planned facilities upgrade in all the 22 airports across the country.

[3] New York Times, 23 March 2020.

Quite commendably, an airline in Nigeria was recently engaged by the Nigerian government to convey personal and medical supplies from China to Nigeria. This was only possible because the airline positioned itself to take that opportunity. Cargo revenue will certainly not be enough, but it would help to keep airlines afloat while the war against COVID-19 rages.[4]

4. Cut cost

Nigerian airlines, unfortunately, must make tough decisions to cut cost. This would include cancellation or postponement of capital expenditure. They may also need to reach an agreement with staff which may involve, among other things, pay cuts, minimum staffing, and shift work to ensure that only essential services continue for as long as possible amid the crisis of the pandemic.

Maintenance contracts should be reviewed or renegotiated to obtain terms that are cost effective without compromising safety, taking into account the present financial constraints.

5. *Prepare for a quick restart*

Looking forward, IATA has predicted that when the pandemic is over, domestic markets will be the first to recover. So, Nigerian airlines will do well to position themselves now for a quick restart.

A key element for a quick restart is the restoration of passenger confidence. Given the dormancy of several planes occasioned by the pandemic-induced restrictions on commercial passenger flights for long periods, passengers must be assured of their safety in two material respects––their health and the airworthiness of an airline's fleet. It is to be expected that, even after the pandemic is over, the dread of COVID-19 will continue into the foreseeable future. IATA rightly notes that the overall objective of its industry restart project is to enable airlines to resume operations while reducing the risk of aviation being a vector for the spread of COVID-19. It has therefore suggested several measures (by way of initial thoughts) that airlines can take to ensure safety of passengers and thus restore passenger confidence.

These include:

- *Temperature screening: This should be done efficiently either at entry point to the terminal building or prior to the security checkpoint, and upon arrival in customs halls or baggage pick up areas.*

- *COVID-19 testing: This can be implemented when the issues as to the efficacy of the tests, their reliability and timeliness are adequately addressed, possibly by generally accepted standards on a global scale. It should be implemented when ready but should not prevent a restart of the industry if all other measures have been put in place.*

- *Use of PPE (Protective Personal Equipment) by crew members: This is very important but will be implemented with proper guidance for customers and airport staff and would ultimately require a standard and recommended practices document to be produced.*

- *Social distancing: This can be managed inside the terminal buildings. Proper distancing should also be implemented as much as possible throughout the check in, security and boarding process.*

- *Aircraft cleaning: It is expected that IATA will finalize and communicate a standard implementation of grooming and sanitization onboard aircraft and in the terminal buildings.*

- *Face masks and sanitizers: It should be made compulsory for passengers to wear face masks at all times––during check-in, boarding and while on board. Passengers should also be provided with sanitisers and disinfectant wipes at all times.*

- *Airport Terminal buildings should be considered for customer and staff use only, therefore limiting access and reducing the amount of people in the facility.*

- *Self-Service options should be promoted and utilized as much as possible to limit contact at all at passenger touchpoints, and eventually allowing for the greater use of touchless technology and biometrics.*

[4] In addition, many countries including Nigeria are presently contracting with different airlines that have shown readiness and capacity to evacuate their citizens who are currently stranded in different countries. Nigerian airlines may therefore position themselves to benefit from such opportunities.

When intending passengers are assured that helpful measures (such as the ones above and potentially others) have been put in place by airlines for their safety, they would likely be inclined to fly as soon as, or within a short period after normalcy is restored and operations are restarted.

In addition to the above, whilst the pandemic lasts, it goes without saying that airlines must ensure that their fleet are in good repair and airworthy, in accordance with the prescribed industry standards. What may be less obvious is the benefit for the airlines if they keep existing and potential customers informed of the repair and maintenance routines that they are observing whilst the fleet remains grounded due to the pandemic.[5] This could dispel any customer-scepticism scepticis regarding the airworthiness and safety of an airline's fleet and in turn attract high patronage when operations resume.

Conclusion

The COVID-19 pandemic is dealing a tough blow on the world economy and the aviation industry is one of the most hit. There is no one-size-fits-all solution to the problem. But it is our belief that implementing the above recommendations or a combination of them can assist Nigerian airlines to cushion the effect of the pandemic on their business health and potentially weather the storm of this unprecedented economic upheaval.

While airlines are at it, it is also incumbent on the Nigerian government to step up intervention efforts in the aviation industry. Nigerian airlines have an infamous history of not standing the test of time. Government will do well to ensure that yet another such unenviable history is not repeated in these extraordinary times.

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[5] The airline may therefore consider occasionally giving media coverage to your maintenance works so that they will be in public view.