

# Court examines alleged abusive clauses in airline terms and conditions

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The Spanish courts are confronted with claims concerning the allegedly abusiveness of airlines' standard terms and conditions on a regular basis. On 8 January 2019 Commercial Court No 3 of Gijón resolved a collective cessation action brought by the Association of Financial Users (ASUFIN), a non-profit entity, against the Spanish airline Volotea relating to some of its transport terms and conditions. Although the court was asked to give its opinion on a number of Volotea's terms and conditions, this article focuses on the most significant issues discussed in this judgment.

## Administration fee for no-shows

ASUFIN claimed that Volotea's Clause 4.4 'Refund' was abusive. In this clause, Volotea stated that it would charge a €5 administration fee per passenger and flight if a passenger did not use their ticket and claimed a refund to which they were entitled. ASUFIN argued that Clause 4.4 was abusive, as such a management fee was unfounded.

The court began by clarifying that the wording of the clause was transparent and easily understandable for consumers. The court also found that Volotea had signed a contract with an external service provider for technical support, customer service and other business processes, to whom it had outsourced the management of passenger refund requests for the non-use of tickets. Accordingly, under that contract, the service provider received a fee based on a tariff system, whereby a unit price was set for calls, emails or written complaints received, depending on the average duration of the calls. Volotea was able to prove that it paid an average of €3.989 per call to the service provider, to which the costs deriving from the use of Volotea's material means and human resources to supervise such customer services must be added. The court thus ruled in favour of Volotea, considering the €5 administration fee to be legitimate and reasonable.

When defending its position, the airline had opened its books to the court to show the calculations that it had made to explain the administration fee. However, not all airlines are ready or in a position to make such disclosures and are often hampered by confidentiality clauses in agreements with their service providers. It is unclear whether the court would have come to the same opinion had the fee been higher.

## Extraordinary circumstances which justify no-shows

A second point of dispute was Clause 4.5 'Exceptional Circumstances' of Volotea's standard terms. Under this clause, the airline essentially stated that it would consider offering a refund only in the event of a no-show in the following limited number of cases:

- Unavoidable surgery of a direct family member (up to the first or second degree of consanguinity) – Volotea would grant only the possibility to change the date of a flight free of charge, but in no case would it allow a refund.
- Death of a passenger – return of the ticket price if requested.

The court agreed with the claim brought by ASUFIN, ruling in favour of the plaintiff and considered Clause 4.5 to be abusive for:

- depriving consumers of their rights to terminate the contract in case of *force majeure*, which is an implied term under Article 1,105 of the Civil Code and covers many more circumstances;
- limiting the clause to only two cases of surgical intervention and death;
- limiting the alternative flight option to six months; and

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- limiting the criteria in the first point to direct relatives (eg, leaving non-married partners and other close relatives outside its scope).

### **Inspection of passengers' baggage**

Clause 6.5 'Carrier's right to inspect baggage' of Volotea's standard terms was also examined. Pursuant to this provision, the airline reserved the right to inspect passenger's baggage and deny boarding if passengers refused such an inspection or if the baggage was found to contain illegal contents.

The court considered this clause to have an abusive character. In the court's view, the wording of the clause led to the understanding that the airline was assuming powers beyond its legal scope. Baggage registration is an invasion into the private and personal sphere of individuals, which can be carried out only by persons legally empowered to do so. The court stated that the obligation to inspect baggage set out in the National Civil Aviation Security Programme does not mean that it can be carried out by airlines, as it is beyond the scope of their powers to carry out such controls or supervision activity, which exclusively rests with the police authorities or, where applicable, private security enterprises. Further, the court indicated that the wording of the clause reverses the liability regime established in Article 17.2 of the Montreal Convention, thereby violating Spanish consumer protection laws, as it again limits basic consumer and user rights.

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