Legal Consequences for Travel Agents Arising from Yield Management

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Abstract

A travel agent may face legal challenges from disgruntled travellers who are dissatisfied due to over-bookings arising from use of the yield management technique. This article discusses the principle of yield management and explores the legal consequences for a travel agent.

Introduction

Within the travel and tourist industry the technique called ‘yield management’ (also known as revenue pricing) is used widely to maximise revenue and ultimately profitability. However, as explained in this article, this technique uses forecasting techniques to match the predictable demand with the supply. In addition, a logical over-booking policy is essential to any good yield management system. Legal consequences can arise not only for the enterprise that has applied yield management techniques and as a result over-booked, but also the customers and agents such as travel agencies and tour operators. This article examines the application of agency and contract law to a travel agent with a customer who is dissatisfied as a result of over-bookings arising from the yield management technique used by airlines, hotels, coaches, trains and other tourism providers, and discusses the legal consequences for a travel agent arising from the use of yield management techniques.

What is yield management?

Yield management or revenue pricing is an extremely important topic in the travel and tourism industry and given its widespread and growing use, it is important to understand what it is and the legal consequences arising from its use, particularly for travel agents who are intermediaries between the traveller and the supplier using the yield management technique.

Yield management is essentially a method for managing capacity profitability, and involves allocating capacity, such as an airline seat or hotel room, to available demand so as to maximise revenue and hence profit. It is defined by Kimes, a pioneering scholar, as: ‘the application of information systems and pricing strategies to allocate the right capacity to the right customer at the right place at the right time.’

The term ‘yield’ has its origins in the airline industry and refers to yield (or revenue) per available seat mile. Inventory unit is per time period and refers to a seat in the case of airlines, a room in the case of hotels or other appropriate unit of output depending on the travel and

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3 Kimes, above n1, 4.
The tourism sector. Yield management can also be applied to other service sectors of the economy, including entertainment such as soccer, cinema and so on.

Yield management may be understood in terms of a basic formula:

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\text{Yield} = \frac{\text{Realised revenue}}{\text{Potential revenue}}
\]

Historically, yield management originated with the deregulation of the US airline industry in the late 1970s. A low-price airline, People’s Express, forced the major US airlines such as American and United to compete at lower fares for some seats whilst maintaining their higher fares for the remaining majority of their seats. Thus began the early days of yield management. Attracted by even lower fares, People’s Express passengers began switching to the more established airlines and, unfortunately, People’s Express eventually went bankrupt. This was blamed in part upon its lack of a yield management system.

Since those early days, yield management has been most successfully applied in the airline industry, first by the large international scheduled carriers and, in the last decade, by highly successful low-price or budget airlines, which have been particularly successful in the USA, western Europe and, in the last few years, Australia. The other major sector of the travel and tourism industry in which it is applied is the hotel industry and, to a limited extent, other parts of the hospitality industry such as restaurants and MICE (meetings, incentives, conventions and exhibitions). Yield management has also been applied to varying degrees in visitor attractions, cruising, casinos, theatre and entertainments.\(^4\)

From a quantitative aspect, yield management is seen as a problem since it is often difficult to forecast the demand in order to fully utilise available capacity. Data collection and analysis needs to be carefully conducted in order to compile information such as percentages of reservations, the time period of these reservations, e.g., peak or off-peak, and the time ahead that the booking was made, e.g., six months or the day before. From such information prices for exactly the same tourism product, say, a particular holiday at a specific time, may be adjusted from time to time beforehand in order to maximise revenue for the business. The key problem is thus determining a probable but sometimes unpredictable demand and matching it to a quantity of limited resources so as to optimise either profits or utilisation (these are not necessarily equivalent), or both.\(^5\)

As a process of managing capacity, yield management also needs to be seen in the context of an organisation’s decision-making.\(^6\) A few of the ensuing effects of operating a yield management system, such as ‘bumping’ excess passengers off an over-booked flight, needs to be assessed within the context of the country’s legal system, particularly contract law.\(^7\) Yield management may also legally expose an intermediary travel agent to consequences arising from over-booking leading to dissatisfied travellers. Agency and contract law may be particularly relevant for a travel agent.

### Legal implications for the travel agent

A disgruntled traveller may be inclined to seek a legal remedy. The legal implications of this management practice would require an understanding of more than one country’s legal system. The reason for this is that the traveller may be a resident of one country where the contract was concluded with a travel agent, the travel agent may have a contract with an intermediary from another country and the intermediary may have had a

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\(^4\) Pope, above n2, 235-236.


contract with an enterprise in yet another country. There may be more than one intermediary involved in a single transaction, and each of them may be legally liable to some extent if the transaction breaks down as a result of applying the yield management technique. The question is whether the travel agent has acted as an agent for the various intermediaries, in which case, agency law applies. Alternatively, the travel agent could have contracted directly with the consumer. The question remains as to what is the legal basis of the relationship between the traveller, the travel agent and the supplier.

A number of sources of law to which the travel agent (in Australia) may be exposed include:

- relevant principles of contract law, agency law and tort law;
- consumer legislation such as the Trade Practices Act 1974, Fair Trading Acts (State Acts) and Frustrated Contracts Acts in some Australian States;
- the Travel Agency Act 1985/6 (State Acts);
- quasi-legal sources such as the International Air Transport Association and Australian Federation of Travel Agents;
- international law, for example, the 1929 Warsaw Convention, the Athens Convention of 1974 and the International Hotels Regulations.

There is a need for legal clarification in this complex commercial environment, and the yield management practice exacerbates the problems.

If the law of contract applies, the consumer’s contract is with the principal. The question is, who is the principal? Is it the travel agent, or the service provider?

Application of agency and contract law to travel agents

It is often assumed that the travel agent is acting as an agent for the service provider, such as the airline or the hotel. If this is the case, then the travel agent would not be the principal and the service provider as principal incurs contractual responsibility for its performance. When a principal gives authority to an agent to contract on its behalf, the principal is bound to the third parties, if the agent has acted within the authority granted by the principal. The contract by the agent is made in the name of the principal, and thus only the principal can be sued. However, most cases throughout the world have established that an agency relationship does not exist between a travel agent and the service provider.

In Rosen v De Porter-Butterworth Tours Inc, the plaintiff sued his travel agent for breach of agreement for not notifying the plaintiff of changes in the tour schedule. The majority in the courts held the travel agent directly liable to the plaintiff as principal because it had not properly disclosed the identity of the principal to the plaintiff, although the plaintiff was aware of the service provider.

In Simpson v Compagnale Air France, the court found that the travel agent was not in an agency relationship with the airline because of the absence of the duty of loyalty. The agent was free to book passengers on any other competing carriers and could not be sued by the airline for not acting in its best interest. The court then held the travel agent to be a broker for the plaintiff traveller. A broker is different from an agent in that the broker is only a special agent for a single object,  

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whereas an agent sustains a fixed and more permanent relation to the principal.\textsuperscript{11}

Some cases have indicated that travel agents could be dual agents, that is, agents for both the customer and the service provider. In an English case, \textit{Green v Sunworld Ltd},\textsuperscript{12} the judge held that up to the time the booking was made, the travel agents were only the agents for the plaintiff (the customer), but after that, they were agents for the defendants (service provider). However, this may give rise to a conflict of interests, and the need for a duty to disclose conflicts of interests.

If an agency relationship exists between a travel agent and a service provider, then fiduciary duties would be imposed on the travel agent. As a fiduciary, the travel agent is in a position of ‘trust’ and has a duty not to allow his or her personal interest to conflict with that of the principal. As a result, the travel agent would have to act in the best interest of the principal and to disclose to the principal should any conflict of interests arise.\textsuperscript{13}

\textbf{Legal consequences for the travel agent arising from yield management}

Since yield management usually operates on making more bookings than the available supply, it is possible that it will give rise to disgruntled travellers if the forecasts do not eventuate as expected. Thus if more people turn up than forecast, some travellers may not receive the tourism product originally booked and may become dissatisfied. Such disgruntled travellers may then seek compensation from the travel agent on returning home.\textsuperscript{14}

\textbf{The traveller may claim not only the contract price, but also damages for disappointment and distress. In \textit{Jarvis v Swan Tours},\textsuperscript{15} the plaintiff was awarded damages for disappointment and distress caused by loss of enjoyment. Similarly in \textit{Baltic Shipping and Dillon},\textsuperscript{16} the plaintiff was awarded damages for disappointment and distress when the promised holiday cruise was cancelled. A travel agent that is exposed to its supplier using yield management should be particularly aware of \textit{Steadman v Swan Tours}.\textsuperscript{17} In this case, the plaintiff entered into a contract with the defendant travel agent to arrange a superior room with sea view in a first class hotel for six travellers. However, the travellers were not given such a room. Lord Justice Singleton held that damages could be recovered for the travellers ‘appreciable inconvenience and discomfort’ caused by the breach of contract.

Although travel agents rely on small margins of commission from the suppliers, they could expose themselves to serious legal liabilities to travellers. Travel agents should also take care to ensure that they are not providing any misrepresented information to the traveller. The travel agent could shift the legal burden to the supplier by acting as an agent for the supplier. If an agency relationship is created, then the contract would be between the traveller and the supplier. The travel agent would have no contractual responsibility to the traveller and the only recourse for the traveller would be to sue the supplier.


\textsuperscript{13} See Lord Cranworth LC’s judgement in \textit{Aberdeen Railway Co v Blaikie Bros} (1854) 1 Macq 461, 471.


\textsuperscript{15} (1973) 1 All ER 71, extracted from Y. Chittenden, ‘Legal Liability of travel agents: are they agents at all?’ (1999) 8(4) Auckland University Law Review 1087.


\textsuperscript{17} (1952) 95 Sol Jo 727, extracted from Y. Chittenden, ‘Legal Liability of travel agents: are they agents at all?’ (1999) 8(4) Auckland University Law Review 1087.
However, as discussed above, the law in this area is vague and uncertain. Beumont J in Cameron v Qantas Airways Limited\textsuperscript{18} said:

\begin{quotation}
[I]n acting as middlemen between potential travellers and persons or corporations in the business of supplying travel and tourism products, eg airlines, it is not always clear when an agent is acting for one, the other, both, or merely for himself or herself… [I]t is not possible to generalise in this area and regard must be had to the particular circumstances of the case at hand.
\end{quotation}

It is obviously in the best interest of the travel agent to ensure an agency relationship between the travel agent and the supplier exists, especially if the travel agent is aware that the supplier uses yield management. The travel agent could clarify the existence of an agency relationship in a written agreement with the supplier. Once this is done, the travel agent should then ensure that the principal is disclosed to the traveller. The rule of agency generally requires satisfactory disclosure of the principal. Without satisfactory disclosure, the travel agent may be exposed to legal liability as a principal. The travel agent could limit its liability to the traveller by inserting a clause as follows in the contract between the travel agent and the supplier:

\begin{quote}
We act only as agent for the suppliers providing transportation, sightseeing, accommodation or other services comprising your booking. All coupons, receipts and other documents are issued subject to the terms and conditions specified by the supplier. By accepting the coupons, receipts and tickets and/or utilizing the services, you agree that neither we nor any of our affiliated companies shall have any obligation to you whatsoever for the operation of the travel arrangements.\textsuperscript{19}
\end{quote}

If the travel agent is acting as an agent for the supplier, then the travel agent must act \textit{bona fide} in the best interest of the supplier, and make full disclosure of any conflicts of interest.


\textsuperscript{19} Boella, above n7, 43.