To indemnity – and beyond

As Len Kirsch explains, the devil may well be in the small print – so it behoves the handler to scrutinise a contract before signing.

Let's face it. The most important clause in ground handling agreements, besides price, is the Indemnification Clause. We all know I am a big supporter of the IATA SGHA. However, in many countries, the SGHA is not utilised by some carriers. This is especially true of the US where US carriers utilise their own form of handling agreement. Besides, every ground handler will deal with other service agreements that contain indemnification provisions. So there's no excuse - you need to understand this stuff.

The most important part of an indemnification clause is the waiver or exclusion of consequential damages. Consequential damages (also referred to as indirect or "special" damages) are damages, losses, costs or injuries which result from the immediate and direct act or omission. For instance, the actual aircraft hull damage and the cost of repairs are examples of direct damages. However, the loss of use and cost of chartering a replacement aircraft are examples of consequential type damages.

Without a written disclaimer of consequential damages, the aircraft owner or operator may be entitled to recover the costs for any such damages which were reasonably foreseeable or "within the contemplation of the parties" at the time of contract formation. Often consequential damages arising from an aircraft incident or accident greatly exceed the cost of the direct damages.

Now, let's assume that we are negotiating a non-IATA handling agreement.

A standard indemnification clause may read as follows:

"Handler agrees to indemnify, defend and holds harmless Carrier, its officers, directors, employees, agents and servants from and against any claim, damage, loss or reasonable expense, including reasonable attorneys' fees and expenses ("Losses"), resulting from bodily injury or property arising out of Handlers negligence or willful misconduct in the provision of services hereunder, except to the extent such Losses are due in whole or in part to the *negligence or willful misconduct* of Carrier, its officers, directors, employees, servants and agents."

Often the Carrier demands that the Handler's indemnification be more inclusive such as:

Handler agrees to indemnify, defend and holds harmless Carrier, its officers, directors, employees, agents and servants from and against any claim, damage, loss or reasonable expense, including reasonable attorneys' fees and expenses ("Losses"), resulting from bodily injury or property arising out of Handlers *acts or omissions*, except to the extent such Losses are due to the *sole* [or gross] negligence or willful misconduct of Carrier, its officers, directors, employees, servants and agents.

The most inclusive protection for a Carrier would be:

Handler agrees to indemnify, defend and holds harmless Carrier, its officers, directors, employees, agents and servants from and against any claim, damage, loss or reasonable expense, including reasonable attorneys' fees and expenses ("Losses"), resulting from bodily injury or property *caused by Handler*, unless such Losses are due to the *sole* negligence or willful misconduct of Carrier, its officers, directors, employees, servants and agents.

Sometimes a Carrier will request to be held harmless for its negligence and will request:

Handler agrees to indemnify, defend and holds harmless Carrier, its officers, directors, employees, agents and servants from and against any claim, damage, loss or reasonable expense, including reasonable attorneys' fees and expenses ("Losses"), resulting from bodily injury or property arising out of Handler's negligence or willful misconduct, unless such Losses are due in whole or in part to the *gross negligence or willful misconduct* of Carrier, its officers, directors, employees, servants and agents.

A standard limitation of liability clause for consequential damages would be as follows (these provisions are usually in capital letters, as some state laws require):

IN NO EVENT SHALL HANDLER, AND ITS OFFICERS, DIRECTORS, EMPLOYEES, SERVANTS AND AGENTS BE LIABLE FOR ANY INDIRECT, SPECIAL, INCIDENTAL, CONSEQUENTIAL OR PUNITIVE DAMAGES WHETHER IN CONTRACT OR TORT, SUCH AS BUT NOT LIMITED TO, LOSS OF REVENUE, LOSS OF USE OR ANTICIPATED PROFITS, THE DIMINUTION OR LOSS OF VALUE OR THE COST ASSOCIATED WITH SUBSTITUTION OR REPLACEMENT OF ANY PROPERTY RELATED TO USER'S OPERATION, EXCEPT FOR THOSE CLAIMS WHICH RESULT FROM THE GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF HANDLER.

The most Handler friendly clause would provide an indemnification by the Carrier of third party claims (such as claims by its passengers) and would be as follows:

IN NO EVENT SHALL HANDLER, AND ITS RESPECTIVE OFFICERS, DIRECTORS, EMPLOYEES, SERVANTS AND AGENTS BE LIABLE FOR ANY INDIRECT, SPECIAL, INCIDENTAL, CONSEQUENTIAL OR PUNITIVE DAMAGES WHETHER IN CONTRACT OR TORT, SUCH AS BUT NOT LIMITED TO, LOSS OF REVENUE, LOSS OF USE OR ANTICIPATED PROFITS, THE DIMINUTION OR LOSS OF VALUE OR THE COST ASSOCIATED WITH SUBSTITUTION OR REPLACEMENT OF ANY PROPERTY RELATED TO USER'S OPERATION, HOWSOEVER CAUSED, AND CARRIER SHALL INDEMNIFY AND DEFEND HANDLER FROM AND AGAINST ANY SUCH CLAIMS FROM ANY THIRD PARTY.

Ultimately, when negotiating a contract it is very important to read the indemnity clause thoroughly. A party should understand the degree of their liability and protection under the contract. Failure to appreciate indemnity could lead to liability beyond what was originally bargained for.

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