EUROPEAN BUSINESS AVIATION ASSOCIATION

GUIDELINES AND RECOMMENDATIONS FOR BUSINESS AVIATION GROUND HANDLING SERVICES CONTRACTING

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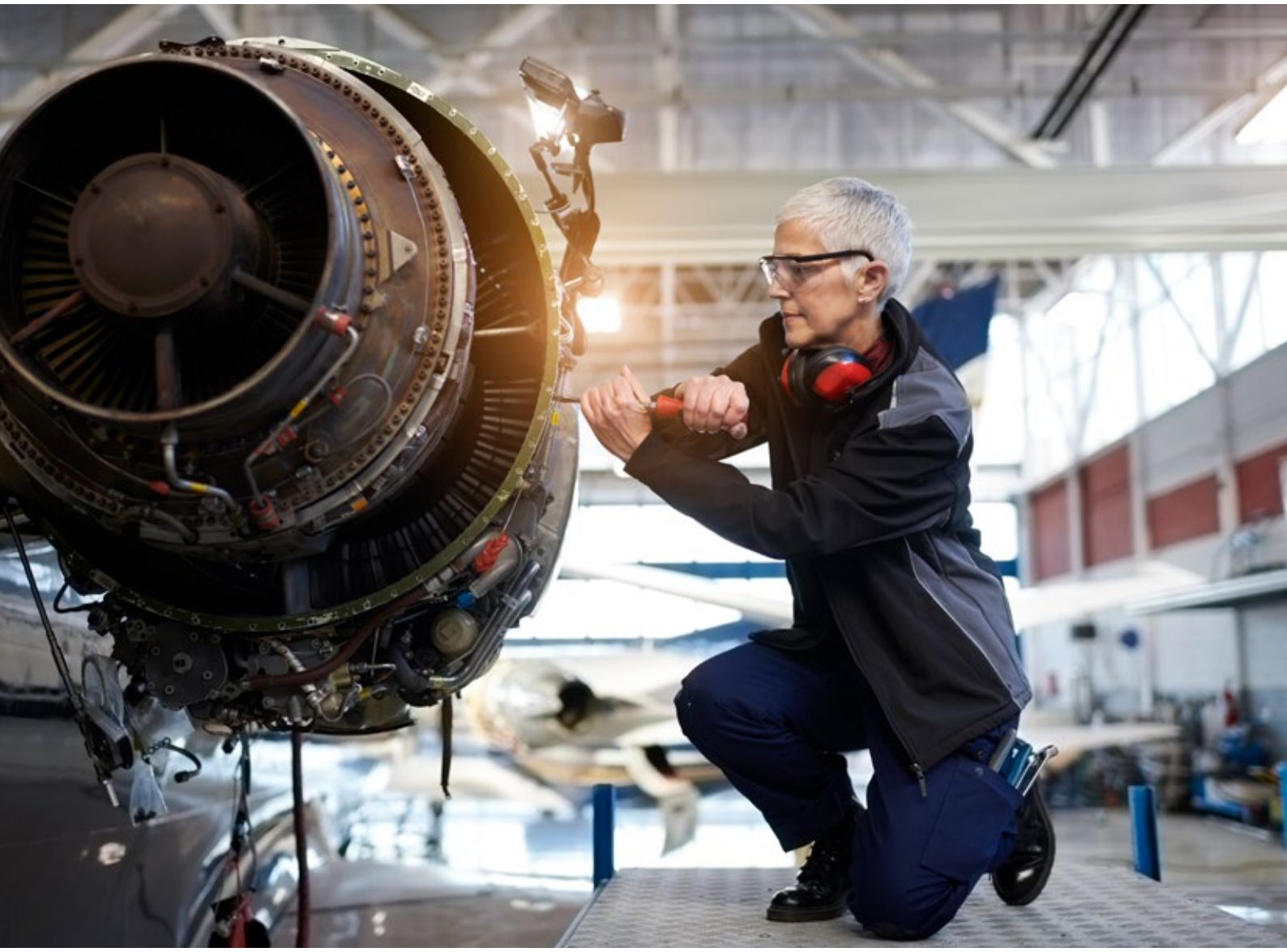

Disclaimer

This non-binding document is intended to provide general guidance on ground handling contracts and is not intended to provide legal advice. Readers should obtain their own legal counsel if they have questions about their individual situation. Readers are also cautioned that this document is not intended to be an exhaustive nor exclusive list of terms that may be employed by Ground Handling Service Providers (GHSPs) and Operators. Examples given are for illustration purposes only.

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Introduction

This EBAA document is intended to provide guidelines to both business aircraft owners and operators and business aviation GHSPs when contracting for ground handling services at various airports worldwide.

The aviation industry has standardised ground handling service contracts for many years. Airlines, airports, GHSPs and other service providers in commercial, general and business aviation may traditionally have relied upon industry templates such as the International Air Transport Association's (IATA) Standard Ground Handling Agreement (the SGHA) among others.

The SGHA certainly endures as a robust and familiar set of contractual terms.

However, the SGHA endeavours to cater for users who come in all shapes and sizes. Its terms are understandably high-level, generic and simple. Simplicity is laudable and very welcome when entering into a contract. These Guidelines therefore consider those widely-used terms as well as focusing on other contractual terms for bespoke business aviation ground handling services, which address specific concerns and issues of this part of the aviation industry.

Is there a contract?

Establishing whether there is a contract between the operator and the GHSP is an important starting point. It's an obvious point - operators wish to purchase handling services and GHSPs wish to provide those services for valuable consideration i.e., the payment of the handler's rates, fees and charges. From a legal perspective, this will inevitably lead to what is known as an intention to create legal relations and therefore a binding contract, which will be enforceable by both parties.

Depending on which jurisdiction you are operating in, a ground handling agreement could be created verbally and will be binding. That could be as simple as oral instructions from the flight deck to proceed with specific ramp and passenger services upon arrival. For the sake of clarity and good management, it is prudent to ensure some written terms apply and that both parties understand and agree on what they should be.

Lengthy negotiation of bespoke terms is however not always possible or desirable. Much will depend on the bargaining strength of the operator and the GHSP. A single handling company at an airport may seek to impose its standard terms on all incoming operators without exception whilst the situation might be more balanced in other locations where the operator has a bigger presence or there are multiple GHSPs competing for the same business. Whatever the commercial reality, certainty of terms is important and something that these Guidelines seek to address.

Therefore, a key question to ask is what are the terms that have been incorporated into the contract? For this, it is worth asking yourself some or all of the following:

How are the contractual terms brought to the attention of the parties?

To ensure that terms are binding, they must be brought to the attention of the other party. In practice, this means giving them the opportunity to access and read them (whether they do or not does not matter) in some tangible form i.e., in writing whether in hard copy or a link to a functioning website page.

Are the contractual terms all in one place?

It is much easier if the ground handling agreement is a single document with services and a set of commercial and legal terms overleaf. For example, for a GHSP that might be a services purchase order form. Likewise, the operator may have its own documentation. Establish whose terms shall apply to avoid confusion and disputes about which terms should prevail.

When services are performed, who is entitled to sign off on them?

It is good practice internally to ensure the right personnel have the authority to agree and sign contractual terms for the services to be performed. Bear in mind that each party may reasonably be able rely on the authority of, say, crew or a turn coordination officer to act on behalf of their respective organisations and sign off.

Do crew members have to sign a detailed service delivery sheet?

It depends on what process the parties agree for the services to commence. In the absence of any express terms, the authority of that crew member may be inferred as mentioned in the paragraph above.

Agreeing amendments, variations and changes to terms.

Making changes to the contract from time to time will require consent of both parties. Any variation to existing terms or the introduction of new terms should be in writing to demonstrate that the contract has been varied. It is however possible to vary an existing agreement by conduct. This is known as changing terms by a "course of dealing" so that the parties agree to the amended terms by continuing to perform the contract upon these varied terms. It will be difficult for one party to renege on that change simply by claiming that they did not sign for it. This can be a complex area and a detailed explanation is beyond the scope of these Guidelines. It is therefore worthwhile remembering to document all agreed contractual terms as well as any subsequent changes.

What services will be performed?

The agreed scope, handling, line maintenance, hangarage, AOG etc.

Having a well-defined schedule of services (and the associated set of fees and charges) within the contract will greatly assist in successfully managing the contract. You should agree a clear scope of contractual services from the outset and ensure you have a contractual mechanism to adjust that scope as necessary from time to time (see Agreeing amendments, variations and changes to terms section page 5).

Additional services

Identify which services will be out of scope or added extras and then price them accordingly. You may wish to have a separate contractual schedule which sets out the extent of those services and the applicable fee and charges.

Standards

- As a general starting point, the parties will usually agree that the GHSP shall perform the services with reasonable skill and care and in accordance with applicable laws and industry codes of practice. What that means in practice depends on the type of service provided and what your expectations are.
- You should therefore discuss and agree which standards shall apply when performing the services. This could mean that the GHSP either agrees to adopt the aircraft operator's ground operations policies, procedures and instructions or apply its own standards.
- Adhering to the carrier's standards is a fairly common approach in ground handling for commercial transport services. In business aviation however, GHSPs will follow their own standard operating procedures (SOPs). Operators might issue instructions on what it wants the GHSPs to do (or not to do) for particular flights, aircraft or passengers. However, they will generally leave it to the GHSP to determine how to undertake the services in accordance with its own SOPs. In any event, these SOPS must comply with the requisite rules and regulations mandated by national aviation authorities and should also adhere to recognised industry codes of practice, such as those which are issued by IATA (ISAGO) and IBAC (IS-BAH).
- In business aviation, the GHSP may have developed its standard operating procedures to enable it to handle a far broader range of business and general aviation movements at the airport(s) at which it operates. This also includes factoring in any aerodrome safety, security and licensing requirements for ground handling service delivery set out by the local airport management authority.
- The other key elements are the requirements for a "management system" with a core safety focus, which requires hazard identification (reactive and proactive) and risk assessment within the four components and twelve elements of an SMS that aligns with Annex 19 of ICAO.

As we will see in the liability section, a failure either to develop proper standards or to adhere to established ones may contribute to an accident or incident. We have addressed dealing with fall-out in our liability section on page 10.

Subcontracting

Should the GHSP need to outsource any of the services to a third party then such rights should be clear in the agreement. Usually, this is subject to the operator's consent and, depending on the circumstances, the parties may agree that such consent will not be unreasonably withheld, delayed or conditioned.

The question about standard operating procedures is also important since the operator will want to ensure that any subcontractor also performs to the applicable standard. It is also very common for the service provider to agree to be contractually responsible for the performance of its subcontractors, but a prudent operator may want to conduct due diligence on the relevant parts of the supply chain beforehand or periodically.

How much will be paid for the services and when will payment be made?

The importance of payment terms.

For both the operator and the GHSP 'cash is king'. Clear payment terms are therefore vital and will have significant implications on cash flow for the business. Most terms of business will have standard payment terms which should either be incorporated into or otherwise replicated in your handling agreements. The payor will naturally seek to enjoy longer payment terms whilst the payee will no doubt want to secure funds as early as possible or in advance of any services being performed.

Payment terms were recently strengthened in the SGHA version 2018 to entitle GHSPs to suspend services should carriers fail to pay. It is therefore essential to consider what terms are needed to ensure the relationship between the parties remains smooth and does not get to the stage that services are suspended for non-payment.

Key payment terms, methods, late payment interest etc

The key terms to think about carefully when looking at how and when payment should be made include:

- Ensure that it is clear when payment is due. For example, should it be from the date on the invoice or the date that the other party receives the invoice? This will depend on how invoices are sent and received and whether one or other party has an automated payment or payments system.

- The method of payment. For the most part, this is likely to be electronic via a bank transfer. In some instances, it might be done locally with a company credit card on the flight deck, but this is more likely to be on an ad-hoc basis or an emergency. The parties need visibility so determining which payment methods are (or are not) acceptable is prudent.

- The GHSP should determine whether any pre-payments or deposits should be made before services commence. It will depend on the relationship e.g., if the operator has only recently started flying, if the relationship between the parties is new or if there have been payment challenges in the past etc.

- The payor may wish to have the right of set-off if there are multiple invoices being paid on a regular basis. This enables them to reduce invoices against payment already made and then reconcile monies either owed or disputed. Whether this is acceptable to a payee is a commercial decision, but they need to be comfortable that allowing set-off does not disrupt their accounting process.

- The payee needs to consider the consequences of late payment and how to discourage it. This might involve charging interest on overdue amounts or, as mentioned above, suspending services until payments are duly paid. In some jurisdictions, local law provides for an implied right to charge interest on outstanding invoices unless the parties agree otherwise.

- The payor should ensure that there is a mechanism to dispute invoices in good faith. It should not used frivolously, but legitimate issues concerning erroneous billing or overcharging should be addressed amicably at an early stage.

- Given the nature of the industry, it is prudent to agree which currency shall apply. This could be a mix of local currency and a more freely convertible one such as USD, GBP or EUR. Bear in mind that local airport charges, fuel, catering, taxes, customs and duties will likely need to be paid separately and in the local currency (if different).

What does the aircraft operator need to do?

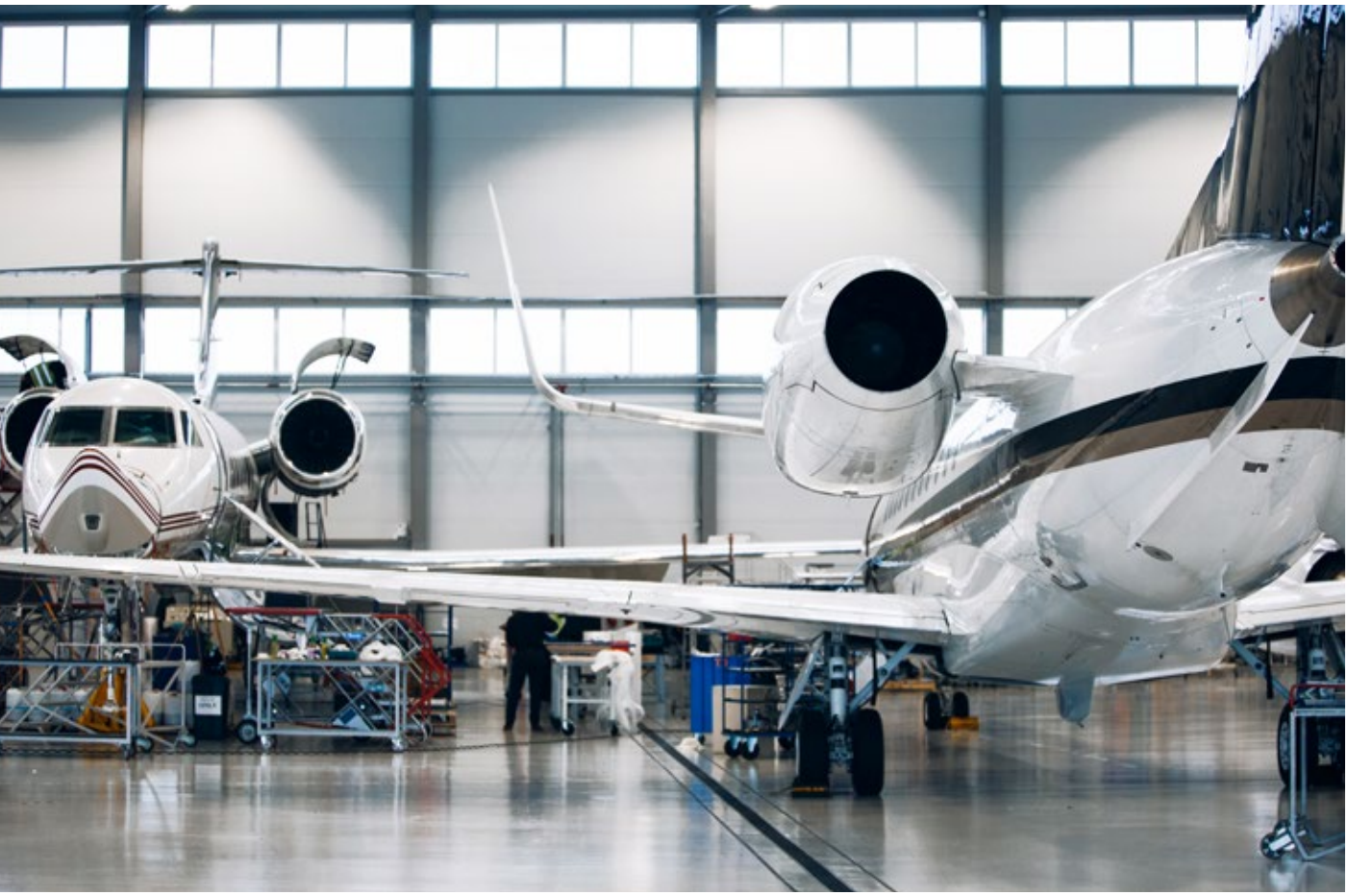
Besides paying for the services, the aircraft operator will also need to comply with other obligations under the contract. The agreement should at the very least include terms that oblige the aircraft operator to comply with local rules and regulations at the airport, obey health and safety rules and GHSP instructions whilst on the premises, maintain its own licences, permits and authorisations to fly into and out of the airport and provide all relevant operating manuals, documents and technical information to the GHSP.

This is important for an effective and smooth contract performance. Furthermore, failure to do so could have a bearing on establishing liability in the event of an accident, incident or alleged breach of contract (see Liability section page 10).

Liability for damage and when things go wrong

Legal and commercial importance

Liability is a fundamental component of any contracting process and should not be treated separately or in isolation as purely a 'legal' point. A good limitation or exclusion clause underpins the commercial relationship of parties and helps to identify and apportion risk. Without these clauses, the contracting parties' liability is potentially unlimited. However, this depends on several practical and legal factors. Whether limitation and exclusion clauses are enforceable or not will also vary from country to country. Most jurisdictions have specific rules that determine their validity, so the choice of governing law and dispute resolution forum is also important (see Governing law of the contract and jurisdiction).



So, what should we to consider when negotiating and drafting liability clauses?

Finding a reasonable balance between operator and handler is essential.

Key to this exercise is finding a reasonable balance between the interests of the operator and those of the GHSP. It is reasonable to assume that the GHSP, as the service provider, will more likely want to limit the extent of damages payable or to exclude liability for certain types of loss. However, if the operator has obligations besides paying for the services, then it may also wish to limit its own exposure under the contract. At the end of the day, an operator wants to ensure that the GHSP is incentivised to avoid mistakes whilst a GHSP will naturally seek to avoid its financial exposure becoming unviable or ruinous.

Standard terms and industry norms

Most business aircraft operators and GHSPs will have a starting point and will variably have liability clauses embedded into their own standard terms and conditions. Whether the parties agree that these terms shall apply depends on the strength of their respective bargaining positions. But if bespoke terms are agreed then allocating operational and commercial risk is crucial and if done openly and transparently then that will potentially reduce the risk of dispute and uncertainty in future.

A common approach is to rely on liability language derived from IATA's Standard Ground Handling Agreement (SGHA). Article 8 of the SGHA is well known to the aviation industry and is usually the default setting for establishing each contracting party's limits of liability in respect of ground handling services. Here's why briefly:

- Under SGHA Article 8, a carrier traditionally agreed to indemnify and hold a GHSP harmless from aircraft damage, third-party claims, and other significant exposure in the event of an accident or incident caused by that handler's act or omission (including negligence).
- The carrier could however withdraw that indemnity protection if the GHSP's act or omission had been *"done with intent or recklessly and with the knowledge that damage, death, delay, injury or loss would probably result"*.
- The carrier would therefore pay for the GHSP's mistakes, except for any wrongdoing or bad behaviour on the part of the handler. This approach made sense in the days when carriers and handlers were one and the same company, but the market has been liberalised and enabled large multinational handling companies to flourish.
- To address this sub-Article 8.5 was introduced, requiring GHSPs to indemnify carriers for physical loss or damage to the operator's aircraft caused by its negligent act or omission, provided liability was limited to an amount not exceeding the level of deductible under the carrier's Hull All Risk insurance policy and up to a maximum of USD 1,500,000.

Some take the view that the SGHA is more suitable for high frequency scheduled commercial air transportation services, but for others the SGHA governs liability for physical aircraft damage sufficiently well and with certainty for business aviation partners.

SGHA Article 8 is however not universally popular, owing to the way in which it has evolved and changing market dynamics. It may not always be fit for purpose for private and business aviation. For example:

Should the SGHA terms be applied verbatim?

Not all operators want the GHSP's liability for physical aircraft damage to be limited to the level of the operator's own hull deductible. A GHSP effectively benefits from a prudent operator who has low deductible levels whilst aircraft damage will invariably run into millions.

What about other types of loss that do not involve physical aircraft damage?

The indemnity in favour of the GHSP in SGHA Article 8.1 is a wide exclusion, broken only by particularly bad behaviour on its part. This might not be appropriate in circumstances where handling particular flights, passengers and cargo at a given time may represent a much higher risk to the operator. The operator may wish to ensure the GHSP accepts a greater share of the risk. The GHSP may accept this but is equally entitled to price that risk in when calculating charges. More generally, it might be appropriate for the GHSP to have different prices based on accepting higher limits of liability.

What does indirect and consequential loss mean?

The SGHA only defines indirect and consequential loss to the extent that it does not arise naturally and directly from an occurrence and is excluded. As we will see shortly the meaning is not always very clear.

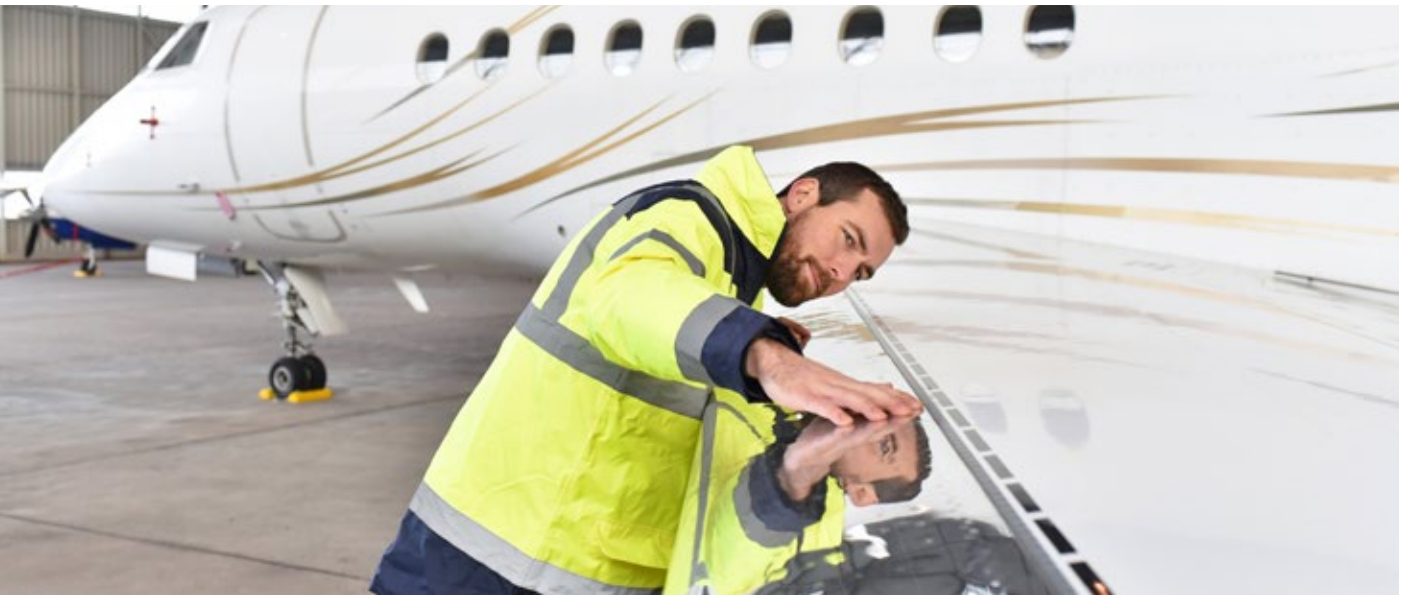
When is a GHSP deemed to be negligent?

Negligence is defined as a breach of the duty of care that the service provider owes to the recipient of services. It is important to be able to determine how is that assessed. That will sometimes be obvious, depending on the circumstances leading up to the occurrence. Parties could for example agree that failure to have and/or to follow standard operating procedures is automatically negligent. However, in the event of a claim, the parties are still likely to argue over whether the occurrence was the result of such failure and whether there were any other relevant causal factors.

What does some liability language mean?

Furthermore, the GHSP's liability for that negligent act or omission would still be limited under an unaltered SGHA, unless you introduce different levels of negligence or bad behaviour into the agreement. You may then see the terms such as *'wilful misconduct'*, *'intent'*, *'recklessness with knowledge that damages would probably result'*, *'slight'*, *'gross'* and *'unconscionable'* negligence drafted into liability clauses. Their meaning and impact on the contract may depend on how they are drafted and what purpose they serve in the context of the agreement: for example, wilful misconduct and gross negligence might be used to remove any financial cap on a party's liability. To a large extent how local law interprets them is also critical. For example, gross negligence is expressly defined in New York and German law whilst under English law the concept is at times fluid.

Understanding what these phrases mean is beyond the scope of these Guidelines, but it is essential that you discuss it with your legal advisors if and when to use or accept their use.



Other factors

There are other heads of loss to consider that negotiators may not think about or wish to discuss openly. It may make negotiations more protracted as each team has to consider its position more thoroughly. As mentioned above, a GHSP who suddenly realises it might be liable for more than just physical aircraft damage will be tempted to increase the service price to mitigate the risk.

What are indirect and consequential indirect losses?

It is common practice to exclude 'indirect' and 'consequential' damages and losses in commercial contracts, but the terms do not describe any particular kind of damage or loss. Loss of revenue and profits are examples of indirect and consequential losses that are excluded under the SGHA. However, some jurisdictions consider loss of profits to be a direct loss so placing them as subcategories of indirect and consequential loss will not have the effect of automatically excluding them!

Therefore, a more prudent approach might be to exclude loss of profit, and certain other losses explicitly in the agreement. That does not mean you have to list any and all losses imaginable. Indeed, it would be unwise to try and list everything since an incomplete list potentially leaves gaps of potentially unlimited liability. But you could expressly exclude those losses that you believe will habitually arise as a result of service delivery failure or an occurrence. So for example, in an excluded loss clause you might see any number of the following:

- Loss of profits or revenue;
- Loss of business or potential sales;
- Loss of agreements or contracts (i.e. a lost opportunity or chance);
- Loss of anticipated savings or wasted expenditure (above a certain amount);
- Loss of use or corruption of software, data or information;
- Loss of or damage to the goodwill or reputation of each party's business;
- Damages and losses as a result of arrival and or departure delays;
- Diminution in aircraft value; or
- Interest payments and other costs associated with the use of capital or financing.

You can then wrap it up with the usual 'any indirect, consequential, punitive or special damages and losses' language for good measure.

The advantage of this approach is that important heads of loss can be dealt with clearly from the outset. There is no need to label them as direct, indirect or consequential to determine liability. The parties know where they stand. It is important to stress that these are subject to commercial negotiations and having your own legal advice tailored to specific circumstances.

As mentioned above, you will need to consider whether any exclusion clause will be enforceable in the chosen governing law and jurisdiction of the contract. Some jurisdictions, like the UK and the US, these clauses will be struck out if you attempt to excuse death or personal injury due to your negligence, fraud or any limit or exclusion that would be deemed to be unreasonable or unfair.

Determining Liability limits

Risk vs reward

This is a key commercial decision for the business. It is not purely a legal issue and involves a lot of thought about the value of the contract versus the potential for serious damage to occur in a handling agreement. We have discussed liability limits and issues emanating from the SGHA, which may or may not be appropriate. But if you have a blank page then it makes sense to map out the losses, the likely associated costs, whether they are insurable or insured and the value of the contract in terms of handling charges and other revenues generated.

How should they be calculated?

You should consider whether some or all of the potential liabilities should or can be limited by a liability cap. The cap will not apply to liabilities that cannot be limited by applicable unfair contract terms laws.

The cap might be a fixed amount for the whole duration of the agreement or over a given period of time. For longer term arrangements the limit may be a mix of fixed sum and the amount of charge over preceding 12 months, whichever is the greater. This enables the parties to factor it into price escalation and the value of services over time. However, it might not be appropriate for ad-hoc or short-term services.

If limited to a fixed period of say a year, then you should consider when it starts to run and whether the limit is on a per claim basis or for all claims in that period. You may see references to total or aggregate liability. Service providers tend to want to limit liability for charges 'actually paid' whilst customers will prefer 'paid and payable' to ensure a greater reach throughout the life of the contract.

Insurance aspects

Interaction with liability terms

When negotiating and agreeing what each party is prepared to be liable for, up to what limit and what should be excluded, both operators and handlers like ought to liaise with their insurers. Never assume that insurance will automatically pay for any and all claims made under a policy. Some claims may be insurable but only up to a certain limit. It depends entirely on what your policy says. They will also be subject to limits and exclusions.

Working together to assess the risk

More positively, it is worthwhile involving your brokers, underwriters and lawyers when undertaking risk assessments, testing the robustness of your policies and procedures as well as implementing, maintaining and improving operational standards. They will then be better placed to advise you on how exposed you might be to such risks and the impact it might have on your ability to insure yourself against such risks when things go wrong.

How long should the contract last and how do we bring it to an end?

Certainty about when a contract starts and ends enables both parties to plan operations in the long term. The SGHA provides for the contract to continue in force (effectively on a permanent basis) unless either party gives 60 days' notice to terminate for whatever reason. It also provides for termination rights in the event of a licence or permit being revoked or in case of insolvency of the other party. This approach might be appropriate, but it depends on the circumstances and the bargaining position of the parties.

Some other factors to consider when agreeing contract term and termination provisions include:

- If appropriate, agree to commit to a minimum contract duration. This could also include a minimum traffic volume scheduled and performed over that time. This might be difficult for an operator if aircraft use is ad-hoc and at the mercy of the owner or charterer, but the GHSP may consider more attractive commercial terms and pricing models to encourage an increased number of turnarounds during the minimum term.

- Ideally, the agreement should clearly state what happens if services continue beyond the expiry date if, for example, the parties have yet to agree to an extension or are still negotiating. As mentioned in Agreeing terms section on page 5, conduct which implies a variation to the terms of the contract could include an assumption that the contract terms should still apply beyond that expiry date.

- Consider whether termination for breach should be included and, if so, whether the party in breach should have time to remedy that breach. Simply terminating might not be in either parties' best interests if services are needed and sourcing an alternative partner locally is not viable or possible.

- Think about the consequences of termination or expiry. The parties should ensure that the rights that they have accrued prior to the contract ending are acknowledged whilst in some circumstances a transition plan (if the services move to a new supplier or are taken in-house) might be appropriate.

We recognise that the operational and practical reality might run roughshod over term and termination provisions. Operators may simply ignore or renege on any commitments whilst GHSPs might seek to impose higher charges unilaterally from time to time. That situation is unfortunate and to some extent difficult to manage. Nevertheless, positive discussions and agreement on contractual terms from the outset is infinitely better than nothing. The agreement will be legally binding, enforceable by a court or arbitral body if necessary. Whilst that is a measure of last resort, it usually helps to focus the parties' attention.

What are the other key terms?

Take time to consider whether you need terms to cover certain risks. Such risks include data privacy (particularly if you are operating in the EU and in places where data protection rules are strict), anti-bribery and anti-corruption, competition and ethics compliance, sanctions and export/import control obligations.

There are also terms which are often referred to as "boilerplate" terms because they are used repeatedly with little to no change. They should not be ignored. They regulate the operation of the agreement on matters such as:

Duration or term of the agreement

You should decide whether there is a fixed term or if the contract will continue on a rolling basis until either party terminates at their discretion (see Contract section page 15);

Interpretation

What do certain words and phrases mean in the contract? The parties are free to agree what certain terms mean. The governing law will also have a bearing on contractual interpretation which is why it is important to consider (see Governing law of the contract and jurisdiction section page 17)

How to assign or transfer the agreement

You should determine whether transferring the benefit of the agreement to a third party should be subject to consent of the other party or if intra-group transfers might be permitted

Variation of terms

Ensure that this is undertaken formally and in writing. Bear in mind that the conduct of the parties may still have an impact on the agreed terms over time if you fail to document contractual changes.

The rules governing notices

Ideally notices should be in writing and rules set out to determine how they are deemed to be delivered between the parties. For example, decide whether email is an acceptable method of delivering a contractual notice.

Third party rights

Rights of third parties, who are not privy to the contract, are usually excluded. However, you may wish for certain identified parties to be able to enjoy the benefit of it and be able to force the parties to honour the terms.

Force majeure

These clauses can be subject to heavy negotiation. It's common practice to incorporate an extensive list of circumstances that are beyond the parties' reasonable control and therefore excuse or suspend performance of the agreement for a period time. In certain civil law jurisdictions in Continental Europe the meaning of force majeure is defined in law, but this has not stopped parties from having a well drafted definition of force majeure in the interests of certainty. For example, strikes or industrial action might be beyond either party's control, but some take a dim view of allowing a party to rely on the strike action by its own staff to plead force majeure.

Resolving disputes

Unfortunately disputes arise from time to time. Defining a clear dispute resolution procedure in the agreement is therefore prudent. One approach is to include a tiered dispute resolution with different levels of internal escalation and a set period of time to attempt an amicable settlement before resorting to formal legal action. The benefits of this are self-evident since litigation can be uncertain, lengthy and very costly. Dispute resolution could also include mediation through the Centre for Effective Dispute Resolution (CEDR) or such other neutral forum. Whether the decision is binding or not is up to the parties, but it provides an opportunity to air grievances and find a compromise before having to take more formal action.

Governing law of the contract and jurisdiction

Ground handling agreements should stipulate the substantive law which governs them. A well-drafted governing law clause will reduce the risk of uncertainty and a dispute on which country's governing law applies to the contractual rights and obligations of each party. Article 11.1 of the SGHA Annex B allows the parties to select a governing law and, if possible, this subject should be considered from the outset. Each party will likely favour their 'home' law (if different), but acceptance of a foreign law may require local legal advice to understand the implications of agreeing to it.

A clear jurisdiction clause is equally as important. Jurisdiction refers to the competence of a court to resolve a dispute. Why is it important? Consider the following reasons:

- The parties can agree which country's court or arbitral body will have jurisdiction to hear disputes arising from the contract.
- The parties may be able to avoid the jurisdiction of certain courts if their experience with other courts is positive in terms of practicality, convenience, the speed and cost of the litigation process and effective enforcement of judgments.
- It can save considerable time and cost of a dispute over which courts have jurisdiction.
- It can increase the likelihood of enforcement of the court's judgment if the parties choose a respected jurisdiction.
- If there is no effective jurisdiction clause, the correct forum for the settlement of disputes will be determined by the rules of private international law. This can also lead to uncertainty and inconvenience, additional costs and delays in resolving a dispute.

Some parties may prefer to use arbitration. The debate about which forum is more appropriate is beyond the scope of these Guidelines: suffice to say that a key difference between litigation in court and arbitration is that arbitral proceedings are conducted in private. Indeed, arbitration is the default choice in the SGHA, but the parties are free to choose as they see fit.

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