

The air charter broker Wire

Top 10 checklist for air charter brokers

The air charter broking industry can often be a little confused when it comes to working out the broker's role in the chartering arrangement. In legal terms, an intermediary is an agent who arranges a contract – in this case, the charter agreement for the use of the aircraft – without being a party to this contract themselves.

However, most air charter brokers sit within the chain of contracts by entering into one contract with the operator, and another with their flying customer. This tends to blur the line considerably between broking and chartering, and brokers need to be especially aware of the risks and liabilities that this style of contracting can bring.

The following page offers suggestions on what you can do to avoid this, and the other common pitfalls of air charter broking.



Top 10 checklist for air charter brokers *(continued)*

1. **Where possible, arrange the contract directly between the operator and your flying customer.** This will help you to avoid all of the liabilities and penalties that you may incur as the result of being the contractual charterer and operator of the aircraft.
2. **...However, if you can't, do ensure that the contracts between you and the operator and you and your flying customer are on a fully back-to-back basis.** Check the details, and then check again.
3. **Regardless of how you structure the charter contracts, do use standard terms and conditions to limit your liability** so that you are only liable for losses that arise directly from your failure to use reasonable skill and care. Your standard trading terms and conditions are your first source of risk management, so ensure that they are fully incorporated into all your business activities. You can find details of how to incorporate your standard terms and conditions on ITIC's website: <https://www.itic-insure.com/knowledge/guidelines-on-incorporating-standard-terms-and-conditions-129819/>
4. **Try to limit and/or exclude your exposure to liabilities under contract, where you are permitted to do so.** For example, did you know that English law permits you to exclude your liability for loss of profit, business interruption, loss of reputation and indirect or consequential losses?
5. **Be thorough in your due diligence on the aircraft, its operator and the AOC that applies.** No broker wants to be the one who unintentionally arranged a grey charter. Your position (and the unfair damage to your reputation) is a lot easier to remedy when it can be shown that you were diligent in your work.
6. **Check the bank details to ensure that they are correct.** With email frauds on the increase it is essential to check all new bank details with your client over the phone, using the main switchboard number when you make the call. Most instances of email fraud that ITIC sees could have been avoided by simply picking up the phone.
7. **Get all instructions in writing.** Your position is a lot easier to defend when your defences to liability are evidenced in black and white, and your file is in good order.
8. **Join industry bodies and look at accreditation to boost your professional standing.** Industry bodies such as BACA (The Baltic Air Charter Association) provide excellent training sessions and allow you to meet your peers and competitors in a neutral environment. They can also introduce you to accreditation agencies such as Argus International.
9. **Look at buying non-owned aircraft liability insurance.** This will provide cover for operational liabilities that arise from bodily injury and property damage resulting from your contractual use of aircraft that you do not own. It's especially important if you back-to-back the charter contracts, and it fits perfectly alongside a professional indemnity ("PI") policy.
10. **Buy professional indemnity insurance.** With a sufficient limit and a deductible you can afford from a specialist insurer such as ITIC. We're your second source of risk management!

Something doesn't add up

An aviation charter broker (Broker) had arranged a long running contract between the operator of an aircraft (Operator) and their flying customer (Charterer), who required flight services to move their staff to and from a specific location. The contract called for the Charterer to make a certain specified minimum number of flights per annum. This was set at 100.

The agreement was evidenced in two contracts. One between the Broker and the Operator (whereby the Broker is named as charterer) and a second between the Broker and Charterer (whereby the Broker is named as the operator). These contracts were made on a back to back basis.

The contracts worked well for a number of years. However, the Charterer decided to close some of their operations in the location and therefore did not require so many flights. In fact, after a number of months, they had only used five flights. They decided that terminating the contract early may be necessary.

The Broker advised that rather than terminating the contracts, it may be possible, and to everyone's mutual benefit, to amend the current terms. Following a meeting between all the parties it was

decided that the contracts would continue but with a new pricing structure in place – to take into account that it was extremely unlikely that all 100 flights would be used.

The new arrangement split the costs of the flights into "fixed" and "variable". A lower fixed cost amount would be paid by the Charterer per flight whether it was used or not. A higher variable cost would be paid on flights that were actually used. An endorsement was concluded and added to both contracts. This endorsement was drafted by the Broker.

Unfortunately, the Broker appeared to make an error in the endorsement, which should have been the same (back to back) in both contracts. By mistake the Broker added a "+" sign in one contract and a "-" in the other. This error meant that Charterer potentially owed a significant amount of

money in respect of variable costs to the Operator in respect of unused flights. The Charterer claimed that this was not what was agreed. They argued that the contract endorsement was clearly an error by the Broker as there was no way the Charterer would have agreed to put themselves in a worse position than they were already in under the original contract.

The Operator ignored these arguments and issued court proceedings for their unpaid invoice in the sum of EUR 1m.

Eventually, considering the costs of litigation, the time involved and the litigation risk, it was decided that a settlement at an appropriate level would be preferable. Therefore, following a period of negotiation the matter was settled for EUR 200,000. ITIC covered the Broker's settlement and legal costs.



A view from the market regarding air charter broker negligence

The air charter broking market is largely unregulated, which causes it to stand apart from the vast majority of other aspects of aviation. Unlike its marine equivalent, there are no standard charter contracts and high value air charters are flown under an array of agreement terms across many different choices of law and jurisdiction. The aircraft types, flight pairs and other contractual details are also many and varied. Accordingly, a broker must deploy skill, experience and diligence to ensure that no mistakes are made.

For an aviation lawyer specialising in dispute resolution, this soup of uncertainty should give rise to significant amounts of work. However, historically the incidences of litigation arising out of air charter contracts has been relatively low. There are a number of factors that have influenced the incidence of charter contract disputes. Clearly, air charter brokers are skilled at solving problems and are, for the most part, diligent in their work. The market, although highly competitive, has also tended to look to resolve potential issues amicably to the good of the flying customer.

However, there is a slow change in this latter approach. The past decade or more has seen a number of changes in the market that have caused margins to thin and brokers and operators to become more corporate in their outlook. As a result, the incidence of disputes that progress to external legal scrutiny is starting to rise.

What can commonly go wrong?

The air charter contract chain is not generally a pure agency - i.e. in most cases the charter broker does not simply organise a direct contract between the flying customer and the operator. Rather, they tend to sit within the contractual chain, either entering into contracts with the operator as agent for the customer or taking a principal position on both

sides of the transaction. This gives rise to contractual risk (which in itself is not negligence) and also to a higher risk of negligence on the part of the broker.

Negligent acts typically include:

1. Factual errors, such as booking the aircraft on the wrong day or route, booking an inappropriate aircraft (eg one that cannot fly the proposed charter) or forgetting to arrange WiFi, flight permits or other documentation.
2. Negligently handling payments, such as paying the client's money away to the wrong party or failing to pay it at all, causing the operator to cancel the flight.
3. Falling foul of data breaches in relation to sensitive customer information.
4. Failing to take note of declared customer medical conditions, such as severe allergies or other conditions that would require care to be taken with the flight arrangements.
5. Failing to handle cargo, baggage or equipment requirements correctly. Examples might include the carriage of dangerous or corrosive goods, or sensitive equipment such as medical or musical instruments.

Most of the time these give rise to a delay or some direct financial loss. Most charter contracts will seek to clarify and limit the circumstances in which a broker will be responsible to their customer for failures to perform their obligations. Not all will be deemed to be negligent for insurance purposes. Indeed, the air charter professional indemnity insurance market remains relatively new and so coverage is not yet widely held. However, the traditionally deep margins that allowed brokers to self-insure have evaporated and so a growth in the indemnity market is anticipated. This erosion of margin also applies to the operators and, indeed, to all participants in the air charter contract chain.

Accordingly, all parties have gradually become more litigious when things go wrong because there is less financial slack in the transaction.

About the author: Richard Mumford is a specialist aviation lawyer with unique experience of the air charter market. He is a partner at London firm REN Legal. Richard served as Chairman of BACA - The Air Charter Association for the past three years.





Own goal

A chartering contract stated that football fans were to be flown from Madrid to Milan, over a series of two flights. The return flights were scheduled for a day or two later. The total cost of the flights was US\$ 475,000.

As the aircraft was being prepared for the empty leg to Spain, it was grounded by the UK Civil Aviation Authority (as it was located in the UK) for failing a safety inspection. The failure was due to a number of safety defects coming to light which were not in compliance with international aviation standards. The following day, which was the scheduled date of the first flight, the chartering contract was terminated due to the serious nature of the safety problems, and the timescales for repair not being known.

The air charter broker then entered into a second chartering contract, (again acting as agent for their travel agent principal). This contract was to carry out three flights (as the aircraft was slightly smaller) from Spain to Italy between 24th and 28th May, and a return flight on 29th May. The return flight was stated as being "subject to availability". The total cost of the new flights was US\$ 917,000; US\$ 442,000 more expensive than the first flights – and not all the passengers would fit on the single flight home.

However, on 28th May, the return flight, (which had always been known by the travel agency to be "subject to availability")

was cancelled by the second operator – as it was not available. The air charter broker notified the travel agency and reimbursed them US\$ 200,000, which was the cost of the return flight.


The travel agency still had 500 football fans to return home. As a result, they entered into a third chartering contract for two return flights with a new aircraft operator, which was arranged without the intervention of the air charter broker. These return flights were US\$ 172,000 more expensive than the previously cancelled flight.

The travel agency sent a letter of claim to the air charter broker alleging firstly that they breached their duty of care to their principal, and secondly that they had failed to perform their contractual duties. This second claim was brought not under the terms of the chartering contract, but under the terms of a separate contract which was in place between the air charter broker and the travel agency. Indemnity was sought for all additional costs incurred by the travel agent in relation to the alternative flights operated, as well as reputation damage, communication and PR expenses, loss of earnings, various additional expenses

incurred by the travel agent's client and defence costs. The total quantum for both documented and undocumented losses came to just under EUR 3.3m.

The air charter broker's general terms and conditions limited their liability, and stated that they could not be held liable for direct or indirect losses resulting from the operation or absence of operation of any flights on behalf of their principal, its employees, agents or passengers and also excluded consequential damages. The travel agent disputed that they were bound by these general terms and conditions as they did not sign them. The action was brought in Germany as German law governed the contract.

ITIC assisted in the defence of the air charter broker. Ultimately the defence was successful. It was held that the air charter broker had not been negligent and were not to blame for the failures of the operators of the aircraft, over which they had no control. Despite successfully defending the claim, the air charter broker incurred legal costs of over EUR 280,000, proving that the cost of innocence can be high. These costs were paid by ITIC.

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