

# **RECOMMENDED LIABILITY REGIME IN CONTRACTS FOR THE PROVISION OF MANNED AIRPORT SECURITY SERVICES**

## **Introduction**

This document sets out certain recommended clauses having the common purpose of limiting a security provider's liability in contracts for the provision of manned airport security services.

It is recommended that every contract with a customer for the provision of manned airport security services (including the recommended clauses set out in this document) are reviewed and approved by local legal counsel in the jurisdiction governing the relevant contract, in order to make sure that they are consistent with applicable law in such jurisdiction and that they will not be set aside by a court in case of a dispute with the customer.

## **Clauses**

## **Explanatory Notes**

### 1. **Definitions**

**“Act of Terrorism”** shall mean and refer to any act including, but not limited to, the use or threat of force or violence of any person or group(s) of persons, whether acting alone or on behalf of or in connection with any organisation(s) or government(s), committed for political, religious, ideological or similar purposes, including the intention to influence any government and/or to put the public, or any section of the public, in fear.

**“Biological or Chemical Contamination”** shall mean and refer to contamination, poisoning, or prevention and/or limitation of use of objects due to the effects of biological or chemical substances.

**“Hijacking”** shall mean and refer to any unlawful seizure or wrongful exercise or control, by the use or threat of force or violence, of an aircraft (or the crew thereof).

These definitions are used in Clause 3.3 and Clause 4 to define the exact extent of the liability exclusions contained in these clauses.

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## 2. The Customer's obligations

- 2.1 Except as expressly otherwise provided herein, the Customer will, at its own expense, provide timely all equipment and facilities at the location(s) where the security services are to be provided required to enable the Company's employees to carry out the security services. Such equipment and facilities shall at all times function and be in good order and shall include, without limitation, modern and up-to-date screening and other security equipment that is required and adequate for the security services to be performed.
- 2.2 The Customer shall provide on a timely basis all information and materials reasonably required to enable the Company to provide the security services. The Customer warrants that all information disclosed or to be disclosed to the Company is or will be true, accurate and not misleading in any material respect. The Company will rely on, and will not independently verify, the accuracy and completeness of any information supplied by the Customer. The Customer shall be responsible for informing the Company of any changes to the information originally presented to it.
- 2.3 The Customer shall comply with and fulfil the security recommendations (if any) made in writing by the Company in connection with the performance of the security services.
- This Clause 2.1 puts a number of basic requirements to the Customer, which are essential to the provision of the security services by the Company. Non-compliance by the Customer may exonerate the Company from any liability. See Clause 3.4.
- Certain Customers tend to economise on security. It is important in the context of the Company's liability exposure that, if in the (reasonable) opinion of the Company the security provisions for the premises in question are inadequate in spite of the services purchased from the Company, it advises the Customer accordingly (with recommendations on how to improve the security).

### 3. The Company's liability

- 3.1 The Company will use reasonable skill and care in the provision of the security services in accordance with good industry practice.
- Clause 3.1 defines the very nature of the Company's contractual obligations. The Company is to exercise reasonable skill and care in providing the security services, which includes (i) the Company exercising reasonable skill and care when recruiting, training, assigning, rostering and supervising its security staff and (ii) the Company's security staff exercising reasonable skill and care when performing the actual security services. In most jurisdictions, the Company will be liable for any negligence or omission of its employees if such negligence or omission occurs as a part of the duty of the relevant employee.
- 3.2 The Company shall in no event be obligated to compensate or indemnify the Customer other than in respect of any loss or damage suffered by the Customer as a direct result of any material breach by the Company of its contractual obligations in connection with the provision of the security services but, without prejudice to Clauses 3.3, 3.4, 3.5 and 3.6, the total liability of the Company (whether arising in contract, negligence or otherwise) for all resulting losses, damages, costs and expenses shall in no circumstances exceed...
- The purpose with Clause 3.2 is to limit the Company's liability in monetary terms. An appropriate maximum amount for the liability accepted in respect of any one incident or series of related incidents should be included (*Option 1*). If desired, specific (lower) limits may be set for certain categories of damages (like theft, death or personal injury, pure financial loss etc.) (*Option 2*).
- In longer term contracts it may be desirable to include an aggregate liability limit in respect of any and all incidents (whether or not related) occurring during one calendar year (*Option 3*) (often to reflect similarly structured caps in insurance policies) or during the duration of the contract between the parties (*Option 4*).
- Option 2 could be combined with Options 3 or 4.

#### Option 1

...[*insert currency and amount*] in respect of any one incident or series of related incidents (the "**Limit of Liability**").

#### Option 2

...[*insert currency and amount*] in respect of any one incident or series of related incidents, provided that the total liability of the Company in respect of [*insert type of loss or damage to be specifically limited*] shall in no circumstances exceed [*insert currency and amount*] in respect of any one incident or series of related incidents (the "**Limit of Liability**").

It should be noted that in certain jurisdictions it might be against the law to restrict contractual liability in respect of personal injury or death. Furthermore, a restriction of contractual liability will in many jurisdictions lapse in case of gross negligence or wilful misconduct on behalf of the Company or its employees and may also be set aside if creating unreasonable results. It is not necessary, however, to reflect any such unlimited liability in Clause 3.2, as Clause 3.6 deals with this point.

Option 3

...[insert currency and amount] in respect of any one incident or series of related incidents and [insert currency and amount] in aggregate in respect of any and all incidents (whether or not related) occurring during one calendar year (the “**Limit of Liability**”).

Option 4

...[insert currency and amount] in respect of any one incident or series of related incidents and [insert currency and amount] in aggregate in respect of any and all incidents (whether or not related) occurring during the duration of the contract between the parties (the “**Limit of Liability**”).

- 3.3 The Company will not be liable in any way whatsoever for any loss, injury, damage, cost or expense of whatsoever nature directly or indirectly caused by, resulting from or in connection with any Act of Terrorism, Biological or Chemical Contamination or any Hijacking or any action taken in controlling, preventing, suppressing or in any way relating to any Act of Terrorism, Biological or Chemical Contamination or any Hijacking, regardless of any breach of contract or other negligence by the Company or any of its employees or agents or other event contributing concurrently or in any other sequence to such loss, injury, damage, cost or expense.
- The purpose of Clause 3.3 is to expressly exclude any liability for any breach of contract or negligence, which causes or contributes to the occurrence of an Act of Terrorism, Biological or Chemical Contamination or Hijacking.
- 3.4 The Company will not be liable in any way whatsoever for any loss, injury, damage, cost or expense of whatsoever nature if the Customer is in breach of its obligations under the contract between the parties, where such breach is a contributing cause of such loss, injury, damage, cost or expense.
- See Clause 2 in regard to the Customer’s obligations. The Company should not be held liable for any loss or damage (even if it is in breach of contract), if a breach of the Customer’s obligations under Clause 2 is a contributing cause of such loss or damage.

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- 3.5 The Company shall not be liable in any way whatsoever for any punitive damages, or any business interruption, or any loss of profits, business contracts, revenues or anticipated savings, or any other indirect or consequential damages suffered by the Customer howsoever arising.
- Clause 3.5 excludes liability of the Company for any indirect or consequential damages. As ‘indirect or consequential damages’ is not a legally defined term, Clause 3.5 refers to specific categories of damages to be expressly excluded from the Company’s liability.
- 3.6 The remedies available and the liability the Company accepts under this Section 3 are, to the extent permissible by law, the only remedies and the absolute limit of the Company’s liability arising under, out of or in connection with the provision of the security services. To the extent permissible by law, all other liability is expressly excluded.
- This Clause provides the link between the liability exclusion provisions and any applicable mandatory law, which might override the liability exclusion provisions.
- 3.7 Any claim or legal proceedings against the Company arising in connection with the provision of the security services must be brought within six months from the date on which the Customer first becomes aware, or ought reasonably to have become aware, of the facts which give rise to any such claim or legal proceedings. If the Customer has failed to notify the Company of a claim within the said time limits, the Company shall not be liable to pay any compensation whatsoever relating to such claim.
- There should be a time limit for the Customer to raise claims against the Company. A shorter time period than six months may be considered, but an all too short period might be set aside in certain jurisdictions if creating unreasonable results.

- 3.8 The Customer will indemnify and keep indemnified the Company, its directors and employees against any liabilities, losses, expenses or other costs the Company may incur in connection with any claims or enforcements against the Company by the Customer and/or any third party as a result of or in connection with the Company's appointment or the exercise or non-exercise of the Company's duties and services under the contract between the parties that would cause the Limit of Liability to be exceeded, regardless of whether such liabilities, losses, expenses or other costs arise in whole or in part from any negligent act or omission or wrongful act on the part of the Company.
- Although the clauses in this Section 3 intends to limit the Company's contractual liability, they are not limiting any third party liability of the Company. If a breach of contract by the Company at the same time constitutes a tortious act against any third party, the Company becomes liable in contract to the Customer and liable in tort to any such third party. What Clause 3.8 does, is to require from the Customer that it indemnify the Company for any amount by which the total of contractual claims and third party claims exceed the Limit of Liability.
- When relying on a Customer third party liability indemnity the Company will have to take a credit risk on the Customer. The Company should therefore, where appropriate, consider ways to handle the credit risk, e.g. by becoming additional insured under the Customer's general liability insurance or by receiving some kind of security (guarantee, pledge etc.).

#### 4 Force Majeure

The Company will not be liable to the Customer for any delay or failure to fulfil its obligations in connection with the provision of the security services where any such delay or failure is caused in whole or in part by any Act of Terrorism, Biological or Chemical Contamination or Hijacking, or to the extent that any such delay or failure arises from causes beyond its control, including, without limitation, fire, floods, acts of God, acts or regulations of any governmental or supranational authority, war and riots and (by or amongst the staff of the Company or any other person) strikes, lock-outs, boycotts or blockades.

This Clause is self-explanatory.