REDUCING EXPOSURE TO LIABILITY FROM COVID-19

The impacts of COVID-19 have left the travel industry bruised and battered. Many companies have not been able to withstand the financial impact that the restrictions against travel have caused. Since the lifting of some travel restrictions consumer interest in travel has returned, although not to the levels see before the pandemic.

Those travel companies that continue to trade have the difficult task of riding out the storm. This is no easy task due to constantly shifting travel restrictions. The next challenge will be protecting against the risk of customers travelling and becoming ill whilst abroad with COVID-19 and the possibility of liability claims flowing from that. Liability Insurers are becoming more risk averse when it comes to liability cover for COVID-19 related claims. This article looks at how acting now to mitigate against those risks can also help to create a business resilience against this and other similar risks.

HOW CAN TRAVEL COMPANIES REDUCE THEIR EXPOSURE TO CLAIMS?

1. TIGHTEN SUPPLIER CONTROLS

Travel companies should proactively work with their suppliers to ensure that they have updated risk management strategies in place considering the risks of COVID-19. A well-documented and implemented risk management plan could serve as useful evidence to defend potential illness claims connected with COVID-19. Some examples of practical steps your suppliers can take are:

- Placing hand sanitisers in all communal areas
- Enforcement of Social distancing measures
- Ensuring that staff or customers who fall ill (or are exposed to someone who has) are quarantined effectively
- Requiring face masks to be worn in accordance with local requirements
- Following all local requirements on the prevention of spreading COVID-19.
- Receiving evidence from suppliers that they are complying with local requirements and that this has been verified independently

2. REVIEW SUPPLIER AGREEMENTS

With some insurance policies not covering claims arising from COVID-19, restricting and/or limiting the amount of liability cover provided, it is paramount that travel companies look to mitigate their liability risk profile in other ways. A key factor in this exercise is ensuring that supplier agreements contain appropriate indemnities for both customer injury and illness claims. If you are selling packages, remember that you are primarily liable for the actions of your suppliers, so having a route of recovery from them is essential.

Quite often, travel companies think that they have a good indemnity in place only to find out that it is either not fit for purpose, is one-sided in favour of the supplier or contains hidden financial caps. Now is the time to carry out a review of your existing supplier agreements to make sure that they are adequate. If you do not and you have no insurance cover in place, this will create financial risk to your business. It is also worth noting that many liability insurers are now requiring good indemnities to be in place and that failure to do might increase your insurance premiums.

In addition, you need to ensure that your supplier terms and conditions place an obligation on the suppliers to comply with COVID 19 protocols. You also need to ensure that there is a contractual obligation on the supplier to provide you with the evidence of compliance and let you check on the level of that compliance if you are not wholly satisfied.

Of course, quite often it is not possible to negotiate the terms you would like in an ideal world. What is important in these circumstances is that you fully understand what your contractual position is; can you secure a recovery from the supplier, to what extent and what conditions do you need to abide by to ensure that you can invoke the terms of that contract? You may choose to take the financial risk that less than ideal terms might impose, but this truly is a situation in which you want to take these decisions on an informed basis.

3. ENSURE YOU ARE GIVING ACCURATE AND APPROPRIATE ADVICE TO CUSTOMERS

Customers still want to travel despite the risks and warnings that are presented globally. This is good news for the industry but presents additional challenges when providing advice to customers, before they book and/or travel, whilst COVID-19 persists. You need to adequately manage customer expectations. We suggest that this should include drawing attention to the fact that:

- they may have to quarantine if they fall ill
- certain services and facilities may be different to normal circumstances (including at airports and accommodation)
- restrictions or requirements may be in place that might impact them at their intended destination (such as the use of face masks)
- they will need to adhere to local laws/standards (which may more be more, or less, stringent than those in the UK).

In the context of package holidays, whilst this information will serve as notification to customers of these risks, it will not avoid liability if a customer falls ill because of a supplier's failure to have adequate protection measures in place. However, from a loss of enjoyment perspective, provided any changes made because of COVID-19 do not constitute a significant change, this will not result in a breach of your contract/Package Travel and Linked Travel Arrangement Regulations 2018 ("PTR 2018"). Travel companies will need to be able to demonstrate that customers were made aware of the risk, of potential changes to their holiday prior to travel, and that they decided to travel on this basis. As such, it is important that you can evidence this if a customer brings a claim for loss of enjoyment against your business.

4. REVIEW CUSTOMER BOOKING CONDITIONS

Even prior to the COVID-19 outbreak, we were seeing customer booking conditions that were not yet compliant with the PTR 2018. Many companies have fallen foul of the PTR 2018 changes when dealing with COVID-19 related claims, which could have been avoided. We would strongly recommend that you ensure that your booking conditions are reviewed in advance of bookings increasing in a post pandemic world. My colleague, Mark Fanning, has recently written an article about the expected claims arising from COVID-19 and it would be prudent to review your contracts now. This will ensure that they protect your business as much as possible before we move into 2021, which will, hopefully see a return to much larger numbers of customers travelling again.

HOW CAN WE HELP?

We have extensive experience in providing clear commercial legal advice to our clients, both before and during this pandemic. It is important that we understand each client's appetite and ability to accept risk and that the contracts we help draft are structured accordingly. We recognize, for example, that we are easily able to provide clients with the ideal set of terms and conditions, but that these will very often be difficult for you to get suppliers to sign up to, particularly for smaller businesses.

We are also able to use our extensive experience in claims handling and dispute resolution, to understand how contracts stand up to real life situations. Sometimes, what looks like a perfectly worded contract might not actually prove helpful in practice.

Our recent work has included reviewing supplier agreements and updating customer terms and conditions to warn of the risks of COVID-19. If you would like to discuss this article or if you would like our support with your supplier and consumer agreements, please do not hesitate to contact us.

Lucy Schofield – Associate Director
Lucy.schofield@milesfanning.co.uk

Mark Fanning - Managing Director
Mark.fanning@milesfanning.co.uk