

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 ACA (The 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.



The challenges of the illegal charter market for aviation

By Melanie Daglish, Senior Aviation Underwriter at ITIC

The aviation industry is one of the most regulated industries in the world, with many professionals ensuring that operations run smoothly and, even more importantly, safely. However, illegal or 'grey' charter flights can considerably threaten this system as they operate outside any legal framework.

International Transport Intermediaries Club (ITIC) has provided professional indemnity (PI) insurance to its aviation members since 2014 and has made significant strides to grow its market share.

ITIC's PI insurance covers aviation professionals for claims brought against them for losses suffered by their customers due to their negligence, error or omission. Even though PI insurance remains relatively uncommon in the aviation sector, it is gaining importance.

Over the past year, ITIC has seen an increase in claims arising from a variety of issues. One clear concern for air charter brokers is that they could be accused of deliberately or negligently arranging illegal or grey charters.

However, it is not only air charter brokers that may be affected; other ITIC members that could be drawn into disputes include aircraft brokers, aircraft surveyors and valuers, civil aviation authorities, aircraft registries and aircraft managers.

ITIC was part of a panel discussion, 'The realities of new technology: can aviation adapt and transition?' at the Isle of Man Aviation Conference in June 2023.

During the conference, illegal charter flights and the importance of adhering to rules, guidelines and legislation to counteract any breach of contract were discussed. Illegal charter flights are a massive risk to the aviation industry and professionals, and the aviation industry has adopted a zero-tolerance policy.

A flight for the transportation of passengers, for which remuneration or other valuable consideration is exchanged, is categorised as a commercial flight (Part-CAT). These aircraft must be certified and maintained per rigorous requirements. The easiest way to define a grey charter flight is that it is any unlicensed charter flight operation. Even though this is not a new phenomenon, these types of flights have come to the public's attention in recent years.

Less stringent regulation and oversight apply to non-commercial flights, including those operated by private pilots for private, pleasure and business purposes.

The rationale, as noted by the Civil Aviation Authority (CAA) in its Consultation document, is that "in non-commercial aviation, the safety level of a flight is not determined by the giving of remuneration

or other valuable consideration; however, when money changes hands for a service, there is an expectation of a resultant level of safety standards being applied"¹.

However, there needs to be greater clarity between legally conducted cost-shared flights and illegal commercial charters.

Illegal charters do not comply with international commercial (or 'Part-CAT') transport standards. Part-CAT transport can involve the carriage of passengers, cargo or mail in return for some form of valuable consideration, usually hire or remuneration.

Grey charters include, but are not limited to, operating privately used aircraft for commercial purposes or pilots who do not have the necessary qualifications to fly at a specific time of the day or a particular type of aircraft. These all have implications for aviation insurance coverage and PI insurance.

No insurer can cover liabilities that arise from an unlawful act; however, the danger for the aviation professional is that they unwittingly become involved in an illegal charter.

¹ General Aviation: putting grey air charter in the shade



The challenges of the illegal charter market for aviation (continued)

If so, ITIC's PI cover can help to defend their interests.

The danger lies in the grey areas, for example:

- Where a pilot hires an aircraft to fly himself – does his payment of operating costs blur the lines?
- Demonstration, delivery, and flights undertaken as part of a payment protection insurance (PPI); are these commercial flights or not?
- Cost-sharing arrangements between passengers and pilots.
- Private dry leases can often be the norm in corporate jet ownership. However, what happens if remuneration occurs between different company groups for using the jet?
- Where the remuneration is promised to a registered charity, is this Part-CAT or not?
- Where an aircraft is available for charter with suspect supporting regulatory documentation, such as an aircraft operating certificate (AOC) and/or airworthiness review certificate (ARC), should the air charter broker be required to check the validity of this?

As an example, ITIC handled a claim where an air charter broker arranged a jet charter on behalf of a charterer and contacted a co-broker with whom he had a long-standing relationship, and who held himself out to be representing the aircraft operators. On the basis that he could trust him, he transferred the money.

However, it then became known that the co-broker had no authority to arrange the aircraft's charter; the aircraft was grounded and undergoing work and was in no condition to be chartered. Even though the air charter broker relied on the co-broker's word, the air charter broker was arguably not negligent, and ITIC resolved the matter on his behalf. However, this case showed that it is vital that air charter brokers do their due diligence and ensure all is above board.

Air charter brokers want to avoid unintentionally arranging a grey charter, and the damage to your reputation would be significant if you did. The key is to be thorough in your due diligence, especially when dealing with new operators.

Look out for any shortfalls with the following checklist:

- What do you know about the aircraft? Have you seen a copy of an up-to-date Certificate of Airworthiness? ('C of A') Have you cross-checked the details of the Air Operator's Certificate ('AOC') that applies to the flight with the issuing authority?
- Speak to your industry colleagues to find out if they have had any dealings with this operator. Does the operator have a track record in performing flights of a similar nature and/or operating a similar fleet of aircraft to the subject of your charter?

- Know the finer details of the charter that you are arranging. Are any special permissions required, and if so, have you obtained any written evidence that such permissions are either held by the operator or arranged before the flight? Seek legal advice whenever you are unsure.
- Keep a written file detailing all stages of the charter negotiation. If you were provided with information that you relied upon for your defence, it is essential that this can be presented to respond to any allegations.
- Make sure you are insured. No insurance policy will provide cover for an unlawful act. Still, where the arrangement of the grey charter was alleged to be an act of unintentional negligence, ITIC's protection could include cover for legal costs incurred in defence of your position.

While the importance of a PI policy can easily be overlooked when navigating through the complex web of regulation and insurance requirements in the aviation sector, it remains essential, especially with the increase in grey charters. You can sleep a little easier knowing that you have support to manage and fund your defence should your liability be questioned.

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