2023 Legal Topics for IITA Tour Operators

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What We Will Discuss Today:
The Legal Elements of Success

- Contracts, Terms and Conditions and Waivers
- E&O Insurance
- Independent Contractors
- Non-Compete Agreements
Contracts, Terms and Conditions, and E&O coverage
Group Contracts: Shifting Responsibility Between B2B Partner and Participants

Partner Agreements should include:

- Price – potential changes
- Payments dates and schedule
- Trip details – dates of travel, destinations, accommodations
- Damages and limitations on damages
- Choice of law and venue selection
- Dispute resolution – arbitration
- Cancellations and refund schedule acknowledgement of participants agreement to their terms

Participant Agreements should include:

- Assumption of risk
- Release of liability
- Expected conduct
- Photographic likeness
- Covid-19 waiver
- Choice of law and venue – doesn't have to be the same!
- Arbitration or Not??
Force Majeure

Every contract should provide for termination without liability in the event of an event over which neither party has control (also known as "force majeure" or an "impossibility").

But, Courts strictly construe these provisions so the language is critical.
Force Majeure

Tour Operator cannot accept liability, and shall be entitled to a full refund, not a credit, where the performance or prompt performance of either parties' contractual obligations is prevented or affected or a tour is cancelled either by us or our guest, as a result of circumstances amounting to "force majeure". "Force majeure" means any event or circumstances which we could not foresee or avoid. Such events and circumstances may include, acts of God, actual or threatened, war, insurrection, riots, strikes, civil action, decisions by governments or governing authority, technical or maintenance problems with transport, changes of schedules or operational decisions of air carriers, terrorist activity or the threat thereof, industrial action, natural or nuclear activity, epidemic, pandemic, illness, physical injury, quarantine, medical or customs or immigration regulation, delay, or cancellation, adverse weather conditions, fire and all similar events outside our control. In the case of Force Majeure, supplier shall promptly refund all money paid for services and cease all work for the specified event effected by Force Majeure.
Indemnification

“To indemnify” means to compensate someone for his/her harm or loss.

In most contracts, an indemnification clause serves to compensate a party for harm or loss arising in connection with the other party's actions or failure to act.

The intent is to shift liability away from one party, and on to the indemnifying party.

It is also known as a “hold harmless” clause, because one party will hold harmless the other for certain events.

The events usually stem from something under control of the indemnifying party's (again, the party who is doing the compensating, or the paying party).

Except for Tour Operator's gross negligence or willful misconduct, Vendor shall indemnify, defend and hold Tour Operator harmless from any liability, loss, claim, injury, damage or expense (including reasonable attorneys’ fees and costs) incurred by Tour Operator as a result of and to the extent of: (i) any negligent or willful act or omission by Vendor or its employees, agents or subcontractors in the performance of the Services; (ii) any material breach of this Agreement by Vendor, (iii) any claim by third party for injury, loss, damage or costs caused by negligent or willful act or omission by Vendor or its employees, agents or subcontractors, or (iv) any claim by third party for payment for goods or services ordered by Vendor on behalf of Tour Operator without Tour Operator’s prior written approval or for which Tour Operator has previously reimbursed Vendor.
Contracting Transparency with Clients

• Any third-party Supplier policies should be known to guests and they should be advised they are subject to supplier terms

• Cancellation policies should be transparent

• Be prepared to share the cancellation terms of suppliers
E&O Definitions:

• **Travel Agency Operations** means all operations necessary to the conduct of a travel agency, meeting planner, tour operator, or online travel supplier. **Travel Agency Operations** includes providing advice about travel, accommodations, cruises, excursions, or tours and researching travel related information via the internet, placing reservations via the internet, and communicating by email in furtherance of **Travel Agency Operations**.
E&O Provisions & Coverage:

1. Coverage A: Bodily Injury and Property Damage Liability

   The Company will pay on behalf of the Insured those sums that the Insured becomes legally obligated to pay as Damages because of Bodily Injury or Property Damage to which this insurance applies arising out of the Travel Agency Operations of the Named Insured. This Coverage A applies to Bodily Injury or Property Damage only if:

   a. The Bodily Injury or Property Damage is caused by an Occurrence anywhere in the world;

   b. The Bodily Injury or Property Damage occurs during the Policy Period; and

   c. Prior to the Policy Period, no Insured and no employee authorized by the Named Insured to give or receive notice of an Occurrence or Claim, knew that the Bodily Injury or Property Damage had occurred, in whole or in part. If such Insured or authorized employee knew, prior to the Policy Period, that the Bodily Injury or Property Damage occurred, then any continuation, change or resumption of such Bodily Injury or Property Damage during or after the Policy Period will be deemed to have been known prior to the Policy Period.

   Coverage A also provides Non-Owned and Hired Auto Liability coverage.
3. Coverage B: Professional Liability

The Company will pay on behalf of the Insured those sums that the Insured becomes legally obligated to pay as Damages to which this insurance applies by reason of an act or omission committed anywhere in the world by the Insured, or any person for whom the Insured is legally liable, in the performance of Travel Agency Operations by the Named Insured provided such act or omission occurs during the Policy Period.
4. Coverage C: Personal Injury Liability

The Company will pay on behalf of the Insured those sums that the Insured becomes legally obligated to pay as Damages to which this insurance applies because of Personal Injury caused by an offense anywhere in the world arising out of Travel Agency Operations of the Named Insured provided such offense is committed during the Policy Period.
E&O Exclusions:

Exclusions:
This policy does not apply to any Claim:

A. Based upon or arising out of an Insured’s breach of contract or warranty, except Claims for tort liability of another party assumed by the Named Insured’s under a hold harmless or indemnification agreement contained in an Incidental Contract;

B. Based upon or arising out of the Insured’s violation of any consumer fraud, consumer protection, consumer privacy, unfair trade or deceptive business practice or statutory or common law unfair competition;

C. Based upon or arising out of any Bodily Injury, Property Damage, act or omission, or offense which is expected or intended from the standpoint of the Insured or is dishonest, fraudulent, malicious, or criminal. This exclusion applies, even if the Bodily Injury or Property Damage is of a different degree or type than actually intended or expected. This exclusion does not apply to Bodily Injury resulting from the use of reasonable force to protect persons or property;
E&O Exclusions:

Exclusions:
This policy does not apply to any Claim:

D. Based upon or arising out of any misquotation or misstatement of prices or applicable taxes or costs, cancellation provisions, payment terms, pricing changes, failure to secure promotional offers, or any dispute with respect to fees or charges;

E. Based upon or arising from the breach of any employment agreement, non-competition agreement, non-solicitation agreement, confidentiality agreement, fiduciary duty, or duty of loyalty on the part pf the Insured or any past, present or prospective employee, independent contractor, director, officer, partner, or shareholder of the Insured;

F. Choice of law/venue issues!!

G. Based upon or arising from any commingling of money, or the inability or failure to pay or collect money or value of mileage points, vouchers, travel credits, or other negotiable instrument, for any reason, whether on the part of the Insured, or any other party, including but not limited to unauthorized or illegal credit card transactions, debt memos, commissions, profits, or refunds and bankruptcy, insolvency, receivership, liquidation or cessation of operations.
Non-Compete Agreements
Independent Contractors: What About Non-Compete Agreements?

• Non-Compete clauses do not contemplate why the termination happens and most state that the clause will survive termination.
• Be careful when hiring to ensure that your new employee will not be in breach of their agreement.
• A non-compete is not enforceable in the State of California. The law prohibits an employer from restraining anyone is engaged in legal practice or trade.
Non-Competes: Evolving Legislation

- President Biden has requested that the Federal Trade Commission set limits on the use of non-compete clauses:

  "To address agreements that may unduly limit workers' ability to change jobs, the Chair of the FTC is encouraged to consider working with the rest of the Commission to exercise the FTC's statutory rulemaking authority under the Federal Trade Commission Act to curtail the unfair use of non-compete clauses and other clauses or agreements that may unfairly limit worker mobility."
Non-Competes: Evolving Legislation

• The FTC has now proposed a federal ban on all non-compete agreements.

• Currently, FTC is seeking public comment on the proposed rule. The new rule would affect over 30 million contracts and employees.

• Rule would apply to full time employees and independent contractors.

• Comment period is open until March 10, 2023.
Non-Competes: Evolving Legislation

“Workers restrained by noncompetes are unable to pursue certain job opportunities and are therefore deprived of higher wages and more favorable working conditions and benefits. Similarly, businesses that need to hire workers are inhibited from attracting and hiring noncompete-restrained workers through better working conditions, pay, and benefits. Even more alarming is the evidence that shows noncompetes reduce earnings for workers not individually bound by them. Studies also show reduced entrepreneurship, new-business formation, or both when workers are inhibited by noncompetes. Finally, American consumers can suffer from noncompete clauses through paying higher prices for lower-quality goods and services.”
Giving Notice to Employees (and former ones too!)

A new rule enforced by the Federal Trade Commission makes it unlawful for us to maintain a non-compete clause in your employment contract. As of [DATE 180 DAYS AFTER DATE OF PUBLICATION OF THE FINAL RULE], the non-compete clause in your contract is no longer in effect. This means that once you stop working for [EMPLOYER NAME]:

You may seek or accept a job with any company or any person—even if they compete with [EMPLOYER NAME].
You may run your own business—even if it competes with [EMPLOYER NAME].
You may compete with [EMPLOYER NAME] at any time following your employment with [EMPLOYER NAME].
Non-Competes: Some ideas!

The rule would apply only to noncompetition covenants; it would not apply to nonsolicitation or nonhandling provisions, nondisclosure agreements or trade-secret-protection agreements, unless those provisions are so broad in scope that they function as a de facto noncompetition agreement. So, if the rule is adopted, you can change your noncompetes to nonsolicitation or nonhandling covenants, if the applicable state law allows such clauses.
Independent Contractors
Where are we now?
Employee vs. Independent Contractor

On October 2022, the U.S. Department of Labor announced a proposed rule entitled Employee or Independent Contractor Classification Under the Fair Labor Standards Act.

The proposed rule updates the test for determining whether a worker is an employee under the Fair Labor Standards Act (FLSA) or an independent contractor.

The rule broadens the definition of an employee and if issued would significantly increase the number of workers classified as employees under the FLSA.

What is the Test Under the Proposed Rule?

• The new test is based on the “economic reality” of the work arrangement when viewing the totality of the circumstances.

• It is intended to encompass all individuals who “as a matter of economic reality” are “economically dependent” on the employer for work. An independent contractor is defined as a worker who is “in business for themself.”

• To determine whether a worker is “economically dependent” on an employer for work, the proposed rule provides factors for employers to consider.
Employee vs. Independent Contractor

The general rule is that an individual is an independent contractor if the payer has the right to control or direct only the result of the work, not what will be done and how it will be done.
Employee vs. Independent Contractor

1. Control the manner and means of accomplishing a desired result;
2. Is the person engaged in a separately established occupation or business;
3. The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of a principal without supervision;
4. What skill is required;
5. Does the principal or the person providing the services supply the instrumentalities, tools, and place of work for the person doing the work;
6. Length of time of the assignment (i.e. isolated or continuous);
7. Method of payment (time, piece, job);
8. Is the work part of the regular business of the Principal;
9. What do the parties believe;
10. Extent of actual control by Principal over manner and means of performing services; and
11. Whether the Principal is or is not engaged in a business enterprise.
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