

FAQs: How to limit liability exposure during COVID-19

Risk management is much broader than insurance cover and contracts. It is extremely important that you look at your business and ensure that your paperwork is in order. Put down in writing an overview of your products and services, suppliers and clients, short- and long-term goals, and any potential risk factors. Should you be pulled into litigation or arbitration of any sort, make sure it is evident that you have reasonably considered the risks to you and your clients—and mitigated or managed them where possible.

Mitigating liability through T&Cs

The COVID-19 crisis has demonstrated to many industries and businesses the importance of robust terms and conditions.

T&Cs must consider at least two components. The first is the basis on and circumstances under which a business or person will render service(s) to their clients. As a service provider, it is your responsibility to ensure that you understand what you are willing and able to deliver to your clients.

The second part is the basis on and circumstances under which your clients will accept the service(s) that you intend to render to them.

You must then determine the risks that you are willing and able to shoulder, as well as offer your client the opportunity to accept those risks that you are not willing and able to shoulder yourself.

There are several template T&Cs documents available, and there are some clauses that are consistent across industries and businesses, but it is within your best interest to ensure that your T&Cs are well-drafted and specific to your business, services, and clients.

Although T&Cs documents are subject to contract law, they are also subject to legislation and common law. Courts will, however, hesitate to interfere in the contractual relationship between two entities who willingly entered into a reasonable agreement.

This is why it is important from the start to ensure reasonable T&Cs in favour of not only your business but also your clients, thereby minimising the risk of being held liable by a court, should it interfere.

Q: Does a client need to actually sign your T&Cs?

It is not necessarily a requirement to have a signature. And you can stipulate in your T&Cs, or on your quote/invoice, that upon payment the client hereby accepts your T&Cs.

However, if it is possible to acquire your client's signature, it is then easier to confirm, or at least argue that the client read the entirety of the document.

It is in your best interest to ensure you are in a position where you can argue that the client was aware of the contents of your T&Cs, should you be confronted with litigation. Some T&Cs will contain a tick box in the middle of the document or ask the signee a question based on the contents, thereby making it evident that the document was read.

To ensure that you are covered as much as possible, you must take reasonable steps to ensure that your client is informed.

Q: Whose T&Cs apply if guests book through an OTA (e.g. Booking.com)?

Both the OTA's and your T&Cs will apply—one does not preclude the other. Your T&Cs are the basis on which you are willing and able to render services to *any* client—whether they booked directly with you or via a third-party entity.

The OTA's T&Cs will apply not only to the client who booked through their site, but also to you as the service provider. So, it is essential that you understand your responsibility both ways.

Indemnities: the first line of defence

Liability policies differ but many stipulate that you have to offer your clients an indemnity. This is your first line of defence—you should be acting as if you're not insured and protect yourself as best as possible.

An indemnity is typically a contract between two parties, that serves to minimise one party's liability to the other. In the tourism and hospitality industry, they are often presented to clients and guests to protect the business from claims resulting from damages. First, you as a provider of a tourism product or service, must identify the types of risks that you and your clients will be exposed to and include sufficient detail of these risks in the indemnity. A client cannot indemnify you against an unknown risk.

Second, an indemnity precludes the third party (i.e. your client) from claiming damages as a result of their participation.

It is important to note that you cannot indemnify yourself entirely, regardless of the terms of your indemnity. Indemnities can often be written too broadly (e.g. "no claims will be paid out by us for any conduct or failure to act on our part, direct or indirect...") and a court will not enforce such an indemnity.

Read before signing

Remember that contractual liability is excluded from insurance policies. If you enter into a contract and accept liability by way of contract, and that liability would not have existed in the absence of that contract, then your liability policy is not going to respond.

Before signing a contract, you can send it to your broker to look over and recommend ways for you to reword it to ensure that your policy will respond. While they are not legal advisors, they can provide general guidelines and point you towards an appropriate legal advisor if deemed necessary.

It is imperative to read the ‘fine print’ to ensure that you do not prejudice your cover. Here are some of the considerations you should bear in mind when reading and signing any contract:

Excessive compensation

In these times more than ever, it is extremely important to be vigilant with regards to the contracts that you sign. International entities will sometimes include contractual clauses that allow them to claim compensation if the product delivered does not match their own expectations.

Compensation in some of these cases is not limited to a refund but can include costs incurred from direct, indirect or consequential economic loss, damage to reputation, legal costs and more. Signing a contract like this indemnifies the entity against such claims (i.e. claims lodged against you by them and/or claims against them made by their clients who have been referred to you), and obviously, no insurer will cover you against this kind of risk. The risk of taking on these kinds of agreements, primarily with international entities, by far outweighs any benefit you would achieve by entering into a relationship where you effectively sign away your rights.

Governing law and jurisdiction

Ensure that you check the Jurisdiction stipulated in a contract with an international entity (e.g. agent, operator, DMC). If it includes mention of being governed and construed in accordance with certain law (e.g. American or British law), then your insurance policy may not respond if it does not extend to include that specific Country, under “Jurisdiction”.

This is very much dependant on your specific insurance policy and Jurisdiction can be adjusted to your specific needs (e.g. only South Africa, only SADC, etc.). The Jurisdiction on most local policies is worldwide—excluding USA and Canada; but it is important that you check this and ensures it aligns to your specific business.

USA and Canada are excluded primarily because they are so litigious, and awards are very much in favour of claimants and excessively high. You can extend your policy to include American jurisdiction, but it is normally expensive, specifically if you have assets in America that can be attached. Therefore, this is normally considered on a case by case basis.

Waiving your rights to subjugation

Some international entities will include a clause stipulating that you waive your right to subjugation. Normally, if the international booking agent or entity is liable, the liability underwriter would try to recover costs from them. But by waiving your rights to subjugation, you’re waiving any recourse and ability to recover costs. This essentially prejudices you and the insurer.

Refusal to sign agreement

Some international entities have begun to refuse to sign indemnities. This may occur if an indemnity is so broadly drafted that it comes across as a blanket indemnity that would not, in any case, be enforceable by a court.

However, if you have drafted your contract reasonably, considering in full what you are willing and able to offer and the basis on and circumstances under which you can do so, then it may be better to walk away if a party isn't willing or able to accept the terms of your agreement. This is especially difficult during these times, but it is important to remember that no business is still better than bad business.

Q: Can you recommend changes to a contract before signing?

Yes—make sure that you do not effectively sign away your rights. If a party insists on a specific clause, you can at least tweak the wording to ensure that your insurance policy responds. If you have questions about wording in a contract you are being asked to sign, you should speak to a legal advisor and your insurance broker.

It is, in fact, in the best interests of the international entity for your policy to respond. Therefore, more often than not, if approached in the right way, they are willing to compromise.

Consumer Protection Act

The Consumer Protection Act (CPA) is very much consumer orientated. This can make it difficult to analyse and offer advice to businesses on. Two important things to consider are:

Q: As a tourism industry stakeholder, am I liable for a refund?

Yes, your clients are entitled to a refund. You can try to negotiate with your clients to consider vouchers or postponement, however, those who refuse are entitled to a refund.

Q: If I have to refund, can I recover some of my expenses incurred?

Yes, you are entitled to recover a cancellation fee from deposits paid or bookings made. However, this should be stipulated in your T&Cs upfront.

Note that if the reason for a refund request is due to a client's hospitalisation or death, then no cancellation fee can be deducted.

Working with different suppliers with different payment timelines themselves can make it difficult to commit to a set amount of percentage as a cancellation fee. However, it is within your interest to be clear about your cancellation fee in writing to help manage your risk.

Liability cover

Since COVID-19 is a known event, it is now excluded from all insurance policies. This blanket exclusion is not necessarily driven by the insurers, but rather by the reinsurers who refuse to cover COVID-19. However, one must consider the liability risks that exist beyond COVID-19.

First, it is important to understand what type of liability policy you have and what it comprises:

Claims Made policy

For a Claims Made policy to respond, it has to be in force when the claim is made, bearing in mind that there is a 3-year prescription period for liability. For example, if you cancelled your liability cover during COVID-19, and a claim was brought against you for an incident that occurred up to 3 years ago, you would not be covered. Claims Made liability policies are more common among South African and other African insurers.

Occurrence policy

An Occurrence policy has to be in force at the time that the liability incident occurred. So even if you cancel your cover, the policy will respond to an incident that happened prior.

Occurrence liability policies are more common among international insurers.

Sub-limits

A sub-limit is a limitation in your policy on the amount of coverage for specific losses. This could refer to guest's effects, movement of third-party vehicles, breakouts, airstrip, etc.

Some policies will limit the covers that they give on some of the high-risk sections, whereas others will give you the full indemnity limit on an each-and-every basis.

Policies differ and it is very important to check what the sub-limits are on your policy and that your covers are structured on your specific needs.

Standard exclusions

While each policy is different, normally the exclusions on a general public liability policy are:

- **Coastal, water and marine** – You're normally covered for up to 1 nautical mile from the shore. Anything beyond this, or if you have a watercraft, etc. you will need a separate cover.
- **Aviation** – Aviation is an exclusion if you are the actual operator. If you are a tour broker who arranges flights, you would be covered for the actions of the sub-contractor who flies the plane.
- **Mechanically propelled vehicles** – Passenger liability is a separate cover if you are transporting fare-paying passengers in a vehicle.
- **Cyber** – Cyber liability is also a separate cover and is highly advisable as cyber crimes are on the rise, especially here in South Africa.
- **Pure financial loss** – This usually refers to instances where your suppliers become insolvent. There is no traditional insurance product that protects against this. A possible solution for this is creating a fund towards which all tourism stakeholders contribute, driven through the associations.

Proposal forms

Proposal forms make up the basis of your contracts. You need to make sure that all the activities and services you provide are noted in your proposal form. Many times, a business will fill this out at the beginning of the year, and then forget to tell their broker or insurer when they adapt or add to their activities mid-term. If it is nothing material in terms of your turnover or risk, it is not likely to result in a change to your cover or premiums, but it is still important to note.

Q: Do I need liability cover if I am not trading?

Yes, there are still several liability risks whether or not you are operational—from property owners liability risk to spread of fire liability risk.

That said, if you speak to your broker, they will be able to assess your operations and work to secure you savings if, for instance, you are no longer trading. Furthermore, most liability cover is based on revenue. So, if your revenue is down during this time, then your premiums should likewise go down.

Q: If I have a worldwide standard liability policy excluding USA and Canada, are my guests from those countries not covered?

No, that is not the case—your policy would still respond here in South Africa. However, if an incident occurs here, then the guest must institute legal proceedings here in a South African court of law.

Furthermore, if you do not have assets in those countries, it is unlikely that they will institute legal proceedings there. That is not to say that it can't happen, but a prudent attorney would take you to court in the country where you have the most assets. So, if there is an award, and your insurance policy is exhausted, they have assets to attach.

If you do have assets in USA and Canada, then it is advisable that you extend your policy to include those jurisdictions.

SATIB's standard liability cover is worldwide, excluding USA and Canada—which caters for about 90% of insurance clients and is more cost-effective. If you wish to extend your policy you can speak to your broker about your options.

Q: What is the difference between jurisdiction and territorial limits?

Jurisdiction is representative of the courts in which the policy will respond, whereas territorial limits refer to the countries in which you trade. For instance, if you are a tour operator conducting tours in other countries, you need to ensure that the territorial limits stipulated in your policy extend to all the places where you offer services.

Q: How is general public liability different from professional indemnity?

General public liability covers you if you're held legally liable for bodily injury to any third-party person or property, but it doesn't cover financial loss—which would be professional indemnity.

Professional indemnity will cover you for financial loss to a third-party and is important for anyone who books travel. For example, if you are a booking agent and you book the wrong flight, causing a client to miss their connecting flight and throw off their itinerary, you could be held liable for that client's additional accommodation, flights, etc. if you are not covered with professional indemnity.

Q: How do I protect myself against if COVID-19 is excluded from all liability cover?

To help protect yourself against COVID-related claims, ensure that your T&Cs and indemnities are all up to date and reflect your business operations and risks. Manage your

risk further by implementing the tourism and hospitality industry [standard protocols for COVID-19 operations](#), adhering to the [Travel Safe – Eat Safe](#) certification program, and training your staff to comply.

Prior to COVID-19 being declared a pandemic, it would have been difficult to prove someone negligent and legally liable for a COVID-related claim. That is obviously no longer the case. We know the threat, and should you fail to identify and mitigate the specific risk areas within your operations, it would be much easier to prove negligence on your part.

Q: If I am a tour broker, who doesn't offer any activities myself, why do I need liability cover?

International booking agents are held to the standard whereby the experience must meet the client's expectation. Where the expectation falls short, this is referred to as diminished holiday value and an international booking agent can hold you liable here in South Africa.

Liability follows the flow of money through the full value chain. Whether or not you provided the product or service yourself, if you benefitted financially, you can get pulled into litigation. Therefore, it is really important to ensure that you are using reputable suppliers along the value chain and ask for their proof of insurance.

Q: How much liability cover do I need?

It is important to bear in mind that liability is arguably one of the biggest risks to your business. That said, there are several things to consider when determining how much liability cover to take, depending on how much you can afford.

Unlike property damage claims, you cannot anticipate what the award would be in a liability claim. Take for instance a client who severely injures themselves on your property and is no longer able to work. If you are found to be liable, you are responsible for lost wages, taking into account inflationary increases, potential promotions, in addition to medical and legal costs, and pain and suffering. If you consider that individual being from overseas (where these costs will be in GBP, EUR, or USD rather than ZAR) or more than one individual being injured, the figures can be insurmountable.

Also, don't discount that fact that your legal defence costs can sometimes outweigh the reward costs.

While it is very much based on your financial position, and you should consider your client base (e.g. local or international, young or old, etc.), the advice to insurance clients is to take as much liability cover as you can afford. Your broker will help you with this process.

Q: What if a large international hospitality chain insists on being noted as an additional insured on your liability policy?

Indeed, most insurers will not allow a large international hospitality chain to be noted as an additional insured on your liability policy, and SATIB would never recommend it.

If an entity is listed on an insurance policy as an additional insured, they have full rights to that policy to make a claim, whether or not it relates to your activities as the primary insured.

Therefore, if a large international hospitality chain is named on your insurance policy as an additional insured, you're essentially carrying not only the risk of their business with you, but all their business.

If you negotiate this, most will accept their interests being noted, rather than being listed as an additional insured. This effectively protects all parties' interests and ensures that you do not take on their risk in its entirety.

Q: What should I do if a liability claim is brought against me?

If you receive a summons for a liability claim, you should immediately contact your insurance broker and insurer. The legal teams of both parties will handle the claim from start to finish. Do not prejudice yourself by apologising, admitting responsibility or contacting the third party.

While the prescription period is three years—that is, a client has three years from the time an incident occurs to institute legal proceedings against you—the legal proceedings themselves can go for many years (e.g. 10, 15 years).