Possible Modification of Article 8 of the IATA SGHA (Liability and Indemnity Provisions) and Changes to the Definition of Actual Loss

By: Leonard D. Kirsch, Esq.
McBreen & Kopko
Attorneys at Law
500 North Broadway
Suite 129
Jericho, NY 11753
(516) 364-1095
lkirsch@mklawny.com
Article 8.1

Article 8.1: Except as stated in Sub-Article 8.5, the Carrier shall not make any claim against the Handling Company and shall indemnify it (subject as hereinafter provided) against any legal liability for claims or suits, including costs and expenses incidental thereto, in respect of:

(a) delay, injury or death of persons carried or to be carried by the Carrier;
(b) injury or death of any employee of the Carrier;
(c) damage to or delay or loss of baggage, cargo or mail carried or to be carried by the Carrier, and
(d) damage to or loss of property owned or operated by, or on behalf of, the Carrier and any consequential loss or damage; arising from an act or omission of the Handling Company in the performance of this Agreement unless done with intent to cause damage, death, delay, injury or loss or recklessly and with the knowledge that damage, death, delay, injury or loss would probably result.

PROVIDED THAT all claims or suits arising hereunder shall be dealt with by the Carrier; and

PROVIDED ALSO THAT the Handling Company shall notify the Carrier of any claims or suits without undue delay and shall furnish such assistance as the Carrier may reasonably require.

PROVIDED ALSO THAT where any of the services performed by the Handling Company hereunder relate to the carriage by the Carrier of passengers, baggage or cargo, then if the limitations of liability imposed by the Warsaw Convention and/or the Montreal Convention (1999) as applicable and as amended from time to time would have applied if any such act or omission had been committed by the Carrier but are held by a Court not to be applicable to such act or omission committed by the Handling Company in performing this Agreement then upon such decision of the Court the indemnity of the Carrier to the Handling Company hereunder shall be limited to an amount not exceeding the amount for which the Carrier would have been liable if it had committed such act or omission.
Article 8.2: The Carrier shall not make any claim against the Handling Company in respect of damage, death, delay, injury or loss to third parties caused by the operation of the Carrier's aircraft arising from an act or omission of the Handling Company in the performance of this Agreement unless done with intent to cause damage, death, delay, injury or loss or recklessly and with knowledge that damage, death, delay, injury or loss would probably result.
Article 8.5

**Article 8.5:** Notwithstanding Sub-Article 8.1(d), the Handling Company shall indemnify the Carrier against any physical loss of or damage to the Carrier's Aircraft caused by the Handling Company's negligent act or omission.

**PROVIDED ALWAYS THAT** the Handling Company's liability shall be limited to any such loss of or damage to the Carrier's Aircraft in an amount not exceeding the level of deductible under the Carrier's Hull All Risk Policy which shall not, in any event, exceed USD 1,500,000 except that loss or damage in respect of any incident below USD 3,000 shall not be indemnified. For the avoidance of doubt, save as expressly stated, this Sub-Article 8.5 does not affect or prejudice the generality of the provisions of Sub-Article 8.1 including the principle that the Carrier shall not make any claim against the Handling Company and shall indemnify it against any liability in respect of any and all consequential loss or damage howsoever arising.
**Article 8.6**

**Article 8.6:** Furthermore, notwithstanding Sub-Article 8.1.(c), the Handling Company shall indemnify the Carrier against direct loss of or damage to the Carrier's cargo (excluding Mail) caused by the negligent act or omission by or on behalf of the Handling Company in the provision of the services and/or the supply of goods under this Agreement provided always that the Handling Company's liability shall be limited to 17 SDR per kilo or to the actual compensation paid out by the Carrier, whichever is less. In any event, the total amount of the claim shall not exceed USD 1,000,000, except that loss or damage in respect of any claim below USD 500 shall not be indemnified. Any claim shall be submitted within the time limits of the Warsaw convention. For the avoidance of doubt, the liability of the Handling Company shall never exceed the liability of the Carrier.
Option A

- The Carrier and Ground Handling Agent agree that the Ground Handling Agent shall indemnify the Carrier for any loss arising from physical loss or damage to the Carrier’s Aircraft

- This option would include compensation not only for physical loss of or damage to the Carrier’s Aircraft, but also for all further losses which generally are referred to as “consequential loss”
Option B

The parties agree that AHM 660 shall be binding either in its entirety or in parts. In order to make this option work AHM 660 requires some modifications.

- The term “physical loss of or damage to the Carrier’s Aircraft” should be changed to “Direct Loss” to be in line with the definition under Definition and Terminology of the SGHA.

- Indemnification for consequential loss or damage has been excluded and is still excluded as of this date in Article 8.
  - The exclusion of indemnification for consequential loss/damage should be reconsidered – at least in respect of aircraft damage claims and at least to an amount mutually agreed upon.

- To make AHM 660 legally binding, it could either become a new Annex X or incorporated into the existing Annex B on the ground handling contract.

- In order to avoid an unreasonably long period for the calculation of consequential losses, it is recommended to define a period for which such losses can be claimed.
  - This will put a limit on the costs and also provide the insurer sufficient information of the risk they have to take.

- With regard to the costs, the limitation stated for each aircraft type in Annex B of the SGHA can be chosen to also limit the amount of consequential damages.
Option C

• The Carrier and the Ground Handling Agent agree that in respect of claims arising from physical loss or damage to the Carrier’s Aircraft, the Carrier will be limited to recovering only those damages not excluded by Article 8 of the Main Agreement.

• The “physical loss of or damage to the Carrier’s Aircraft” sentence in Article 8.5 of AHM 810 is poorly worded. For it to mean anything it must be interpreted as if it said “any loss arising from physical loss of or damage to the Carrier’s Aircraft”
  - By explicitly stating that interpretation of the wording in Option C, the potential for arguments that it means something to the contrary should be minimized.

• Option C is not intended to be an extension of the Ground Handler’s liability under AHM 810, it is merely intended to provide for a carrier to specify that it wishes to rely on the current wording under AHM 810 (albeit with the intention of also trying to minimize the potential for arguments that it means something to the contrary).

• The objective of this approach is to obtain a reasonable allocation of the risks and the liabilities inherent in ground handling of aircraft.

• Insurers will not be able to increase premiums for the ground handlers in advance of a changing claims performance profile.

• More Transparency should be an incentive for ground handling agents to establish more effective preventive measures resulting in a lower damage frequency and lower total costs for the aviation industry including insurance premiums.
Guidelines for Aircraft Ground Accident Cost Assessment

- Recommendation to use the following method to assess the direct and consequential costs of aircraft ground accidents

**Purpose:** Detail the standard elements for cost assessment (direct and consequential) for ground handling incidents

**Direct Costs:** Directly associated with the incident

**Consequential Costs:** Fully describe the financial impact of an incident/accident outside of direct costs
Direct Costs Related to Aircraft Damage

- Aircraft repairs including man hours and material plus the transportation related. Calculation should be based on a standard hourly rate, which the company would normally charge to an outside party.

- Leasing costs of equipment for recover/repair of aircraft including transportation.

- All costs related to passengers and crew in respect of the damaged aircraft at the actual station. This includes the cost of transportation on other carriers. If impossible to travel within 24 hours on flight of the damaged aircraft carrier.

- Compensation associated with the affected flight of non-passenger revenues. (ex. Cargo, mail, etc.)

- Ferry costs: either to a repair station or to a base station.

- Extra parking fee/costs/handling service including overtime at the actual station.

- Cost of Investigation/claim administration.

Consequential Costs

- Delay of services (other stations).

- Revenue loss/aircraft operating time lost.

- Aircraft delay costs including sub-charter on other flight than the one actually involved.

- Capital Costs.
Calculations of Labor Costs

• It may be difficult to determine exact labor costs

• It is therefore recommended that an average labor rate an hour be used for skilled, semi-skilled, unskilled workers, engineers, pilots, administrative staff, etc.

• The cost should reflect the cost which a third party would be charged.
Material Costs

• Material cost should include a handling fee for all costs associated with material parts used for the repair.

• The handling fee shall cover transportation costs, storage, customs, and handling.
Consequential Costs

• It is important to calculate the following items based on aircraft type and scheduled production hours during specific down period (down time period):

  - Gross revenue cost per block hour
  - Variable operating cost per block hour
  - Net revenue cost per block hour

• All other consequential costs can vary from case to case, and also in which economic environment the carrier is operation
• AHM 660 (fka AHM 698) was drafted by the IATA Airside Safety Group ("ASG"), discussed at an ASG meeting in November 1996, and submitted to IGHC/10 in 1997.

• In 1998 an amendment of the text was submitted to IGHC/11. In January 2003 the document became AHM 660. The current content of the AHM has not changed since being incorporated in the 1999 edition of the Airport Handling Manual.

• However, at least a decade ago, members of the Aviation Ground Services Agreement Working Group ("AGSAWG") recognized that this inclusion was in error and complained to the Chairperson of the ASG, who promised to try to resolve the issue, but did not deal with the issue.
The criteria used by AHM 660 to determine direct costs related to aircraft damage are directly in conflict with Article 8.

- First, Article 8.5 limits a handling Company's exposure to physical loss of or damage to the Carrier's Aircraft. Physical loss or damage means simply repairing the physical loss or damage. Based on the plain meaning of these words it cannot mean anything else or different.

- Even if the damage is so severe that a repair is not possible or impractical, then the $1,500,000 limitation would apply (since aircraft generally are valued more than the limitation).
• Moreover, Article 8.1 states that Carrier shall not make any claim against the Handling Company and shall indemnify it against (a) delay, injury or death of persons carried or to be carried by the Carrier.

• How then can "All costs related to passengers and crew in respect of the damaged aircraft at the actual station" be an element of damages if such costs are directly related to delay of passengers carried or be carried by the Carrier?

• These costs cannot be termed third party damages since Article 8.2 provides that the "Carrier shall not make any claim against the Handling Company in respect of damage, death, delay, injury or loss to third parties caused by the operation of the Carrier's aircraft."
• In addition, how can a Handling Company be held liable for "Compensation associated with the affected flight of non-passenger revenue, e.g. cargo, mail, etc. when under Article 8.1 (c), a Handling Company is indemnified against "damage to or delay or loss of baggage, cargo or mail carried or to be carried by the Carrier?"

• Often the manner a claim is handled is determined by the contents of the hull insurance policy. Even if a claim is settled by an adjustor based on terms contained in a Handling Company's airport liability policy, it’s the language contained in the Carrier's hull insurance policy that will control the actual handling of the claim since many of these claims are the result of subrogation's by the carrier's insurer against the Handling Company's insurer.

• Standard hull insurance policy provides coverage and exclusions for aircraft damage. Coverage is determined according to certain limitations, self-insured retentions and deductibles. The standard policy form is in conflict with AHM 660.
This case involved aircraft damage caused by a portable stairway, which stairway allegedly was not properly locked, and which hit the aircraft on a windy day. The airline sought $8,107 for the cost of repair of the aircraft and approximately $200,000 for the costs of lodging passengers in hotels and providing alternative transportation.

Counsel for Singapore Airlines acknowledged that they were not seeking consequential damages, but only "damages that flowed directly and immediately from the injurious act." Judge Dennis M. Cavanaugh granted partial summary judgment to Signature holding that the requested costs of lodging and transporting passengers are "not direct damages."