

Unlimited Liabilities Required by TfL for the Transfer of Network Management Services

The legal documentation for the transfer of network management services is still being finalised but it is anticipated that provisions very similar to those set out below will be required by TfL:

1. “Each party shall be solely responsible for all losses, claims, expenses, actions, demands, costs and liability incurred by it in relation to these Arrangements prior to the Commencement Date. Each party (the “**Indemnifying Party**”) shall indemnify/keep indemnified and hold harmless the other party from and against all losses, claims, expenses, actions, demands, costs and liability incurred by the other party arising out of or in connection with the consequence of a breach by the Indemnifying Party of this clause.”

TfL has requested this mutual unlimited indemnity in which the LDA is required to indemnify TfL in the event that TfL incurs any losses, expenses etc as a result of the LDA not meeting the liabilities it has prior to the transfer of the network management services (such as under third party contracts). The result of agreeing to this unlimited indemnity is that the LDA would not be any worse off than it currently is as these liabilities currently exist for the LDA in any event. Additional risk is only created for the LDA if it fails to meet these liabilities. The LDA is managing this risk by ensuring that it meets its liabilities up until the point of transfer.

2. “Subject to [certain clauses], each party shall be solely responsible for all losses, claims, expenses, actions, demands, costs and liability incurred by it in relation to the Delegation. The Indemnifying Party shall indemnify/keep indemnified and hold harmless the other party from and against all losses, claims, expenses, actions, demands, costs and liability incurred by the other party arising out of or in connection with the consequence of a breach by the Indemnifying Party of this clause.”

TfL has requested this mutual unlimited indemnity in which the LDA is required (subject to certain exceptions) to bear any losses it may incur as a result of the services transfer and to indemnify TfL for any losses it may suffer as a result of TfL being found liable for related losses. As above, the result of agreeing to this unlimited liability is that the LDA would not be any worse off than it is now as these risks currently exist for the LDA in any event. Additional risk is only created for the LDA if it fails to meet these liabilities. Of course, if the LDA was to procure these services and enter into a contract for services with a services provider, it would have greater remedies in respect of service provision.

3. “In the event that the Recipient Authority [TfL] terminates these Arrangements due to the Delegating Authority’s [LDA’s] failure to pay

the Specified Functions Budget as provided for in clause 4.4.3, the Delegating Authority [LDA] shall be liable for the Recipient Authority's [TfL] reasonable charges, costs and expenses incurred as a result of such a termination.”

The LDA is seeking to limit this clause to its failure to pay the fees when due (as drafted above). If this principle is accepted, the LDA would only have an unlimited liability to TfL if TfL incurs any expenses as a result of the LDA failing to pay the fees when due. The LDA has requested that TfL provides a similar indemnity in the event that the LDA terminates the Arrangements as a result of TfL committing a breach of the agreement. It is unclear at this stage as to whether TfL may require an indemnity in respect of these costs.