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What has 2017 Meant for the Transport Sector?

September 2017

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Following our Transport horizon scanning article in the Spring, we now take a look at how 2017 has been progressing for the Transport Sector and consider what items should be on your legal checklist for the months ahead.

Intelligent Travel has Landed: What are the Legal Implications?

Our Transport Group recently sponsored the 4th Annual Scottish Transport Conference in Edinburgh. This thought-provoking event focused on the future of transport and in particular the impact of technology on transport now and in the years ahead. The speakers focused on 'mobility as a service' in the context of evolving technology – envisaging a consumer led revolution/evolution where digital solutions and change driven by disruptors will mean we take intelligent (i.e. digitally managed, convenient and environmentally friendly) journeys from A to B. They envisage that we will have the benefit of improved and integrated services linking one hub and system to another, using pre-existing (rail/ferry/air) and new (electric, shared and automated cars, buses on demand) modes, with the aim of achieving efficient, low emission and low cost travel.

Whether or not the process will truly be consumer led, rather than commercially led and policy driven is still to be seen. However, with recent news articles covering 700 mph hyperloop pods travelling in a vacuum tube - with a

proposed route from Edinburgh via London to Cardiff taking 89 minutes - self-driving lorries to be tested on UK roads during 2018 and Uber, Embraer and Bell Helicopter to test a network of flying cars by 2020, intelligent travel is firmly on the agenda.

Data Protection

These changes, of course, sit within a legal context. For example, the passenger data gathered electronically by the transport providers will have real value to companies for further personalised sales of games, destinations, future journeys, hotels, etc. The Economist recently reported that *'the world's most valuable resource is no longer oil but data'*.

However, use of personal data in this way will be increasingly regulated from 25th May 2018 when the European General Data Protection Regulation will become enforceable in the UK and the associated risk of fines on companies for breach will rise to 4% of the annual worldwide turnover of that company in the preceding financial year.



» Data protection and cyber security remain high on the agenda, and with good reason.

There will be increasing regulatory scrutiny of the use of customer data. A Chicago court recently approved a settlement requiring Carnival, Norwegian, Royal Caribbean and an associated marketing company to pay \$12 million for spamming people with pre-recorded telemarketing calls that promoted the cruise lines, whilst FlyBe and Honda were fined for sending 'customer service' emails considered to be marketing communications sent without consent.

Cyber security failures will carry increasing risks and affect every organisation – as can be seen from the recent worldwide WannaCry ransomware attack and the current hacking incident reported by credit-scoring company Equifax which puts the data of 143 million customers at risk.

Organisations need to review their contracts now to ensure that the relevant data protection policies and structures are in place, for example to obtain necessary consents and respond to requests to remove data.

Contract Review

As travel businesses evolve technologically there is merit in organisations carrying out a contract review to ensure that their legal protection also evolves to meet the new era. While many new systems, designs and technologies will be successful, some will not perform as promised. The London Ambulance IT system, which was intended to enable clear instructions to be given to send vehicles to necessary locations, faced numerous glitches repeatedly bringing the fleet to a halt.

Ensuring that contractors brought in to supply systems and products will be on the hook for failings remains

important. In the March 2017 case of *MT Højgaard v. E.ON*¹, the Supreme Court found that the contractor must do more than simply produce a design which is compliant with the specification, it must also produce a product that gives the agreed service life – but robust contract terms are needed to achieve this outcome.

Whilst artificial intelligence analytics may take on an increasingly important role, human error remains a real risk. Typing in flawed algorithms may lead to flawed outcomes, bad code may be used and AI may be offered for uses which are not appropriate – leading to contractual disputes and negligence claims. BA's recent £150 million system failure has been attributed to an IT contractor from a consultant company failing to follow proper procedure and rebooting a crashing system too quickly. The error left 75,000 people stranded around the world. Strong contract terms will be vital to obtain reimbursement in such circumstances. Such terms will also assist to limit disputes such as the case brought by Waymo against Uber in the San Francisco court, in which Uber is accused of stealing trade secrets in relation to self-driving cars.

Whatever the contract terms in place, larger companies working with start-up specialists as sub-contractors and business partners may well find that these smaller entities simply don't have the financial strength to pick up the cost when things go wrong. Ensuring where possible that guarantors are in place to back up obligations and that you can rely on security bonds and appropriate insurance is also important to offer some safeguard if the promised services or products do not materialise or system designs prove inadequate. Litigation may otherwise offer only a pyrrhic victory.

The nature of insurance put in place will also be relevant. In the May 2017 Supreme Court decision in *Gard Marine*² the Court held that where joint insurance is in place between charterers and owners it is understood implicitly that there will be no claim between the parties and they must look to insurers for indemnification, even where charterers had breached a safe port warranty. If a different result is wanted then your contract terms will need to be amended to achieve this.

A key feature of Intelligent Travel is sharing, with Easyjet recently announcing that its customers may use its website to book long-haul flights with other carriers and BlaBlaCar's online car sharing now being used by 35 million members in 22 countries. But shared responsibility can prove complex in practice. Where there are interfaces between old and new technology, multiple suppliers, public and private service providers and numerous system users, it becomes less clear who will bear liability if something goes wrong. If a pooled electric car fails to arrive because of a power cut, causing a traveller to miss an expensive flight connection – who will pay? Will drivers seek to pursue class actions, as the sale of petrol and diesel cars is phased out, if sufficient charging points do not become available in local areas? Ensuring that your contract terms clearly delineate and where possible limit or exclude your liability remains key.

Employment contract terms also remain high profile as 2017 progresses with the growing the gig economy. City Sprint and Uber respectively categorised cycle couriers and drivers of private hire vehicles as self-employed, but tribunals have found that they are workers under Employment Rights Act. Uber has appealed the decision with its appeal due to be heard imminently. Employment contracts will need to be kept under review as the law reacts to the new challenges.

Regulation and Legislation

For public authorities the pace of technological change makes planning and legislating for transport a challenge. If shared cars mean in future there will only be 10% of the current cars on the road then what are the best infrastructure projects for government to invest in? Should road tax be replaced by a tax on distance travelled, etc.? This may limit enthusiasm in future to embark on projects like the Queensferry Crossing and perhaps push focus more onto projects such as the recently announced investment to be made into new cycle lanes across Glasgow, Edinburgh, Inverness and Stirling. Intense public scrutiny such as the ongoing inquiry into the Edinburgh Tram Project may also affect infrastructure decision making.

Modern legislation must reflect the technology revolution. The English 2017 Bus Services Act includes obligations on open data sharing and powers to make multi-operator/ multi-modal 'advanced ticketing schemes', as well as powers to make regulations compelling the provision of accessible passenger information for disabled persons. The Vehicle Technology and Aviation Bill has also been discussed in the House of Commons this year, with provision for regulation of automated and electric vehicles and proposing that persons who suffer damage by an accident involving an automated vehicle will have a direct claim against an insurer.

Transport Minister Humza Yousaf MSP spoke at the Scottish Transport Conference about the forthcoming Scottish Transport Bill. This covers items such as smart ticketing, the drawing up of transport strategies for regions, and wider regulation of road works. Of course,

1 MT Højgaard A/S v E.ON Climate and Renewables UK Robin Rigg East Limited [2017] UKSC 59

2 Gard Marine & Energy Limited v. China National Chartering Co Ltd. [2017] UKSC 35



» The business environment looks set to remain challenging for the transport sector...

one topic which also remains on all agendas is the legislation which will need to follow Brexit, for example traffic rights affecting aviation when the EU-US Open Skies arrangement no longer applies to the UK. In the meantime this year's European Aviation Safety Agency proposal to regulate the operation of small drones in Europe – permitting safe operation of drones while allowing this industry to remain agile and grow - will continue to affect UK companies.

Failure to comply with legislation can have a real cost to local and national authorities. In March 2017 the General Court of the European Union confirmed that France must recover over EUR 220 million in illegal State aid granted to a ferry operator group consisting of two organisations: Société Nationale Corse-Méditerranée and Compagnie Méridionale de Navigation. This ruling follows a series of challenges to a 2013 European Commission decision that the compensation paid to the companies under a 2007 to 2013 concession contract failed to satisfy the so-called 'Altmark criteria'.

It is clear too that UK civil claims for toxic diesel fumes exposure are escalating. Local authorities are among major employers who are facing increased numbers of claims; some Trade Unions are even setting up a diesel emissions register for employees to record their exposure to toxic air. Such claims are being brought under the Control of Substances Hazardous to Health Regulations 2002, which require employers to either prevent or reduce their employees' exposure to substances that are hazardous to their health.

It is not just the public bodies which are affected; regulation and legislation affect all decision making for

transport companies. This can be seen from Transport for London's recent decision to deny Uber's application to renew its private hire licence, arguing Uber has not demonstrated that it is a fit and proper entity to hold such a licence. Uber immediately announced it would appeal citing the impact on 40,000 drivers and its millions of customers and at the time of writing this remains unresolved. Before this Airbus faced an anti-corruption investigation in France following a probe in the UK into irregularities involving its use of third-party agents.

Ryanair will also feel the impact of regulation following its recent largescale cancellation of flights for which it is bound to compensate passengers around €20 million. This was tested in the European Court of Justice in May this year when Surinaamse Luchtvaart Maatschappij NV was penalised for failing to inform and/or assist a passenger on the cancellation of his flight contrary to EC Regulation No 261/2004.

Conclusion

The 4th Annual Scottish Transport Conference reminded us that transport remains constantly high profile and is a truly dynamic and swiftly changing sector. A review of these transformational changes confirms that legal issues are front and centre on every occasion:

- Understanding the legislative and regulatory environment in which the transport industry operates is key for all organisations and will ensure you are able to avoid or at least ready to meet regulatory challenges and investigations.

- Ensuring that your contracts evolve to provide robust protection in a new environment is an equally high priority, which is too often overlooked or delegated to a non-legal team who may not be fully aware of the risks of using particular out-dated clauses or wording. In an interconnected market with overlapping and interfacing obligations, being able to limit your risk and insist on quality from suppliers and contractors is essential.
- If nothing else, ensuring you are ready to meet the requirements of the European General Data Protection Regulation is an obligatory task for the months ahead.

If there are areas we have covered in this briefing with which we could assist you, please do get in touch.

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