How 2016 is shaping up for the transport sector

Risk issues to focus on in the months ahead

July 2016
At the mid-point of the year, we take a look at how 2016 is shaping up for the transport sector and consider what should be on your risk checklist for the months ahead.

**Brexit**

Obviously for everyone in the UK or doing business in the UK, the most dramatic development is Brexit and what that may mean over the months and years ahead. It is going to take time to work out and understand the detail as it emerges, but there is real merit in looking at all aspects of your business and considering what if anything is likely to be changed by the break from Europe. We anticipate a preference for cross-border disputes to be dealt with by arbitration rather than the courts (owing to the much wider international enforcement regime for arbitral awards already in place whilst there remains uncertainty about how the UK court systems will be affected by Brexit); and a potential increase in attempts by contracting parties to trigger force majeure clauses as a result of Brexit (and corresponding development of the law on this area), amongst the other areas discussed below. Our new “Brexit Next” website addresses many of the issues you may face.

But Brexit is not the only consideration for businesses, although it may feel like it at the moment…

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**Technology and Data Protection**

**Cyber security**

Cyber security will continue to occupy a high place on the board room agenda in all business sectors for some time to come. Breaches are now regarded as a ‘when’, not an ‘if’, and can be costly to deal with (TalkTalk’s hack attack last year cost it £42m). The key to dealing with a cyber security breach is preparation. We do not anticipate Brexit will lessen the importance of cyber security in the UK (and in fact it may increase it). Britain has made plain its wish to be the world leader in cyber security and to provide a safe place to do business and this will require a robust cyber security regime. So businesses should continue to ensure they undertake appropriate evaluation and preparation for a cyber security incident. At CMS we have experience of supporting clients in relation to cyber security incidents and can assist with managing claims and potential claims which might arise from a cyber security incident. If you would like to discuss any aspect of this, please contact us. You may also be interested in our LawNow Virtual reality - preventing cyber attacks onboard ships.

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**New: European General Data Protection Regulations**

The text of the long-awaited GDPR, which aims to standardise the data protection rights throughout the EU regardless of where the data is processed, will come into force on 25 May 2018. As this is likely to be before the UK comes out of the EU, we should expect the UK to need to comply with it. As the GDPR applies to any organisation processing the personal data of EU citizens, even after Brexit UK businesses will not be able to simply ignore the GDPR – European trade with a post-Brexit UK will require the UK to offer at least the same level of data protection rights and obligations as GDPR provides for. So what should you be preparing for? The Information Commissioner’s Office (ICO) has published a guide setting out how organisations can begin their preparations for the changes (The 12 step guide). One of the most widely reported changes the GDPR will introduce is a new maximum level of fine of up to €20m or 4% of annual worldwide turnover – the reasons for ensuring your business’s compliance do not get much more compelling than that! With such high stakes, it is important to get DP right. For advice on your data protection obligations – present and future, and protecting yourself from the risk of claims, please contact us. You can also read more in our LawNowos:

- The General Data Protection Regulation is coming...
- New EU data protection rules published today
- Data protection: where are we now?

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**Data protection and damages**

In a change to what was understood to be the position, the Court of Appeal’s decision in March 2015 in the case of Vidal-Hall v. Google Inc. suggested for the first time that individuals have a right to claim compensation for the misuse of their private data, even where they have not suffered any financial loss. This decision is currently the subject of an appeal by Google Inc. to the Supreme Court, and if the Court of Appeal’s decision is upheld this case has the potential to open the floodgates to clalmants. The outcome will be of particular interest in the current climate, given the Court of Appeal reached its decision by preferring EU legislation over domestic legislation. While we await the outcome of the appeal, businesses should however consider this a potential source of new individual and group claims.

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**Autonomous vehicles**

Autonomous vehicles have been hailed as a significant and beneficial technological development and are expected to be on UK roads by 2020. Whilst excitement mounts, there are a variety of legal, regulatory and health and safety matters which still need to be addressed. The investigation by US authorities into the death of a driver in the US in May - the first death potentially caused by self-driving technology, is likely to be watched with interest by manufacturers, insurers, lawyers and many more in the UK for lessons that can be learned. This is going to be an evolving area of the law for some time to come. The issue of liability for mishaps is itself likely to be technically and legally challenging owing to the variety of potential causes; besides driver error, there will be issues of software malfunction or hardware failure to rule in or out. We will keep you updated with developments in this evolving area – sign up for our LawNowos to keep up-to-date. Meantime you may be interested in the following LawNowos:

- EU gears up for Connected Vehicle Regulation but Longer Road
- Ahead for Autonomous Vehicles
- Connected and Autonomous Vehicles - A Rocky Road
Contract Enforcement and Claims

Contracts and common sense

The interpretation of contracts by the UK Courts remains on the agenda. Generally, contracts are agreed in the most favourable terms each party can achieve in light of prevailing circumstances. However when contracts are reviewed, often years later and in very different circumstances, disagreement may arise as to how the terms should be interpreted and the effect they should have on the contract. In a series of decisions in 2015, the UK courts have reviewed the role played by business common sense in the interpretation of contracts. The emerging trend suggests the courts are increasingly unwilling to use “commercial common sense” to rescue one party from a bad bargain or the consequences of poor advice. We expect to see more clarity in relation to this shift over the remainder of the year. Meanwhile the importance of clear and accurate drafting of commercial contracts, with consideration being given to both language and structure, should not be underestimated. We expect that Brexit will cause more people to take a long hard look at their contracts and consider whether they are still profitable or viable in a post-Brexit world. If you want to do the same please come and talk to us. You may be interested in our most recent Commercial Contracts Bulletin, which also includes details (and links to register for) our Commercial Contracts Round-Up sessions which we will be holding in Aberdeen, Edinburgh, London and Glasgow during September. Meantime you can read more on this topic in our Transformation article “The role of business common sense in contractual interpretation”.

Force majeure?
The UK leaving the EU may well affect the operation of existing contracts, possibly making them more difficult or expensive to perform. Parties adversely affected by such changes may understandably wish to explore the extent to which they can argue that the contracts are frustrated, or force majeure provisions triggered, as a consequence of the UK leaving the EU. There is however a long line of case authority to the effect that contracts are not frustrated by becoming more expensive and there is a distinction between an inability to perform and a commercial inconvenience. On this basis, the courts have readily accepted that force majeure will not be allowed just because performance is commercially impracticable. If you feel that Brexit is being used unjustifiably as a means of avoiding an ongoing contract, do come and talk to us.

Mediation
If you are not keen to get involved in full litigation, mediation is now a standard part of the dispute resolution tool kit. Courts encourage parties to try alternative dispute resolution and in some jurisdictions may even require this. However unreasonable your opponent is proving, refusing to talk is a risky strategy. Courts are increasingly penalising non-participation in mediation through costs awards. A series of cases in England & Wales during 2015 showed parties facing cost sanctions because of a refusal to mediate, and this approach is expected to continue during 2016. Please see our Disputes Digest articles ‘Refuse to mediate at your own risk’ (March 2016) and ‘Recent trends in mediation’ (December 2015) for further reading on this topic.

Discrimination claims
The case of FirstGroup plc v Paulley [2014 EWCA Civ 1573] is regarded as a test for those who have been advocating for clearer policies from transport service providers for wheelchair users. Mr Paulley succeeded in his discrimination action against FirstGroup plc, which arose from his being unable to board a bus as the wheelchair space was occupied by a mother and child who refused to move. The court at first instance found that the policy of FirstGroup plc in not moving the passenger resulted in Mr Paulley being discriminated against. However the Court of Appeal ruled in favour of FirstGroup on the grounds that the policy offered no discretion to the driver to eject the passenger occupying the wheelchair space. The matter was heard by the Supreme Court on 15 June 2016 and its decision is now pending. If Mr Paulley is successful, service providers may find an increase in claims from individuals who have faced similar struggles when using transport services. Whilst these claims tend to be of relatively low value, a favourable result for Mr Paulley may open the floodgates, so this is one to watch.

Potential compensation claims arising from Forth Road Bridge
Whilst many commuters felt the pain of the Forth Road Bridge closure over the winter, those most likely to have claims arising from the closure will be passenger transport operators and haulage companies who were worst affected by the lengthy detour via the Kincardine bridge leading to higher fuel costs and delays. Holyrood’s Infrastructure and Capital Investment Committee held an Inquiry into the circumstances giving rise to the closure and concluded that the defect could not have been foreseen. However calls for compensation continue to be heard from politicians, industry bodies and individual hauliers and the possibility of claims progressing through the court cannot be excluded. If you have suffered a loss as a result of the closure and think you may have a claim for compensation then please get in touch.

Sanctions
Sanctions are particularly relevant in such an international sector. The Summer 2016 edition of our Sanctions Update provides a round-up of recent developments in relation to economic and trade sanctions across the EU, with a particular focus on recent developments concerning the lifting of Iranian sanctions, the new UK Office of Financial Sanctions Implementation and potential implications of Brexit for the application of sanctions measures by the UK.

CMS Disputes Conference
On 3 November 2016 we will be hosting the annual CMS Disputes Conference at our Cannon Place office in London. Topics under discussion will include:

— Litigation readiness - how do corporates choose to manage their disputes?
— ADR - When is the right time?
— Emergency procedures - short cut or diversion?
— Arbitration - fast track or slow lane?
— Litigation - does reform always equal efficiency?
— Technology - help or hindrance?

If you would be interested in attending, then you can register your interest in this event here.
Rail

Smart ticketing

It was announced by industry leaders at the Rail Delivery Group (RDG) annual Conference in February 2016 that smart ticketing has been made a key priority for UK rail. The RDG, representing train operators and rail infrastructure provider, Network Rail, wishes to extend the scheme, which was piloted in defined zones of the North and West Midlands, to make barcoded mobile ticketing available nationwide, possibly within the next three years. Understanding the implications and requirements imposed by this scheme will be important.

Maritime

EU Port Services Regulation

Despite Brexit, day to day changes and development in the transport arena continue. But some of these changes will need to be reviewed in the context of Brexit. In March 2016, the European Parliament voted in favour of the EU Port Services Regulation (PSR), regulations intended to redress the huge disparities in performance levels by modernising the port services offered by the EU’s 329 main seaports. In particular the PSR aims to eliminate unfair competition, guarantee a level playing field and improve the commercial efficiency of ports. However whilst the UK supports attaining a level playing field (particularly between UK and continental ports, which currently operate very differently), it has serious concerns that the PSR’s proposed one size fits all approach will damage the EU port sector, particularly the UK’s thriving commercial ports sector. Trilogue negotiations will take place in relation to the text of the PSR. The UK’s role in negotiations is now unclear but transport is by its nature such an international industry that it will not be able to avoid participation in key EU requirements.

Aviation

Come fly with me…?

The European Commission has published a new Commission Communication on Interpretative Guidelines on EC Regulation 261/2004 (“the Regs”). The Regs provide for compensation and assistance to passengers in the event of denied boarding, cancellation or long delay of flights, but in fairly restrictive circumstances: a delay or cancelled flight claim will only be successful if the delay is over three hours, or the flight is cancelled, provided it is not caused by what the Regs call an ‘extraordinary circumstance’. The Regs have already been the subject of court proceedings in the UK, with a passenger being found entitled to compensation from Easyjet following a 6 hour delay to a flight from Scotland to Spain. The court held that while the underlying delay was caused by extraordinary circumstances, as the aircraft in question could not leave Gatwick because of an air traffic control decision that was predicated upon a number of factors, he was not satisfied that everything reasonably possible was done by the airline given that the delay was known about for many hours. Now that there is a precedent in favour of the passenger, we should expect to see more claims following.

Conclusion

The transport industry will need to continue with its day to day business, irrespective of political uncertainty, but keeping an eye on your legal position is crucial at the moment.

If you would like to discuss any of the issues discussed above, then please contact us: