

# Section 1. - Introduction

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 37 - Carriage by Air

## Section 1. - Introduction<sup>1</sup>

*David McClean*

### Provisions governing carriage by air

- 37-001 The rules of the common law have minimal importance in the law of carriage by air, virtually all of which is governed by international conventions, or their provisions as applied to other instances of carriage. In the case of passengers, legislation creates remedies for those who suffer denied boarding, or cancellation of or long delay to their journey.<sup>2</sup> The common law rules apply only to carriage which is gratuitous and which is performed neither by an air transport undertaking nor by the Crown. In the rare cases in which the carrier's liability is to be determined by the common law rules as to negligence, the maxim of *res ipsa loquitur* is available to assist the claimant.<sup>3</sup> There are now four major conventions which have effect in English law: (a) the original Warsaw Convention 1929 (and that convention as amended by Montreal Additional Protocol No.1 of 1975 which substituted Special Drawing Rights (SDRs) for gold francs in the provisions dealing with liability limits); (b) the Warsaw Convention 1929 as amended by the Hague Protocol 1955, commonly known as "Warsaw-Hague" (and that convention as amended by Montreal Additional Protocol No.2 of 1975 which similarly substituted SDRs for gold francs); (c) Warsaw-Hague as further amended by Montreal Protocol No.4 of 1975, "the MP4 Convention"; and (d) the Montreal Convention 1999. National legislation ensures that the provisions of the Montreal Convention 1999 apply in the carriage of passengers and baggage by UK carriers more widely than the international legal regime requires.<sup>4</sup>

### Footnotes

- 1 See Shawcross and Beaumont, Air Law, Vol.1, Div.VII; Drion, Limitation of Liabilities in International Air Law (1954); Miller, Liability in International Air Transport (1977); Mankiewicz, The Liability Régime of the International Air Carrier (1981); Magdalénat, Air Cargo (1983).
- 2 European Parliament and Council Regulation 261/2004 of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or of long delay in flights, as amended by the [Air Passenger Rights and Air Travel Organisers' Licensing \(Amendment\) \(EU Exit\) Regulations 2019 \(SI 2019/278\)](#). See paras 37-054—37-072.
- 3 [\*George v Eagle Air Services Ltd \[2009\] UKPC 21, \[2009\] 1 W.L.R. 2133\*](#).
- 4 See below, paras 37-019 et seq.

## Section 2. - The International Conventions

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### The Warsaw Convention 1929

- 37-002 The Warsaw Convention of 1929 was drafted in order to remove inconsistencies between the national laws of the different countries<sup>5</sup> and to strike a fairer balance than might otherwise have been the case between carriers and passengers and owners of cargo in respect of their mutual rights and liabilities. The Convention sought to provide a set of uniform rules as to the carrier's liability and to settle jurisdictional questions and ensure a uniform limitation period. Under the Convention, the carrier was enabled to limit his liability. In return the passenger or owner of cargo did not have to prove negligence on the part of the carrier. Fault on the part of the carrier was presumed on proof of damage.<sup>6</sup> The Warsaw Convention was first given effect in the United Kingdom by the [Carriage by Air Act 1932](#). The unamended Warsaw Convention continues to have effect as [Sch.2 to the Carriage by Air Acts \(Application of Provisions\) Order 2004](#).<sup>7</sup> Schedule 3 to the same Order gives effect to Montreal Additional Protocol No.1 of 1975. The two Schedules differ only in respect of the currency units by reference to which liability limits are prescribed.

### The Hague Protocol 1955

- 37-003 The Warsaw Convention 1929 was amended by the Hague Protocol 1955, which attracted the support of most but not all of the parties to the original convention. The principal amendments effected by the Hague Protocol to the Warsaw Convention were as follows. First, the mandatory contents of the passenger ticket, baggage check and air waybill were much reduced, and the effect of failure to comply with them was rendered much less severe for the carrier.<sup>8</sup> Secondly, the maximum financial limit of liability for the death of or bodily injury to a passenger was doubled.<sup>9</sup> Thirdly, the troublesome phrase "wilful misconduct" which appeared in the English text of the Warsaw Convention was redefined as "intentional or reckless misconduct".<sup>10</sup> Fourthly,

the carrier's employees and agents, as well as the carrier himself, could avail themselves of the limits of liability imposed by the Convention, provided that they were acting within the scope of their employment.<sup>11</sup> The Warsaw Convention as amended by The Hague Protocol of 1955 was given effect in the United Kingdom by the [Carriage by Air Act 1961](#). The text of the Convention as set out in [Sch.1 to the 1961 Act](#) was amended by the [Carriage by Air and Road Act 1979](#) so as to incorporate the amendments made by Montreal Additional Protocol No.2 of 1975.<sup>12</sup>

## The Guadalajara Convention 1961

- 37-004 A Convention supplementary to the Warsaw Convention was signed at Guadalajara in 1961: it deals with the situation where the “contracting carrier” sub-contracts all or part of the contract of carriage to an “actual carrier”.<sup>13</sup> This Convention was given statutory force by the [Carriage by Air \(Supplementary Provisions\) Act 1962](#), which came into force on 1 May 1964.<sup>14</sup> The provisions of the amended Warsaw Convention are set out in the [First Schedule to the Carriage by Air Act 1961](#), and the provisions of the Guadalajara Convention are set out in the [Schedule to the Carriage by Air \(Supplementary Provisions\) Act 1962](#).<sup>15</sup> Both these Schedules are in two Parts, comprising an English and a French text; and under the Acts, the French text prevails if there is any inconsistency between them.<sup>16</sup>

## The “MP4 Convention”

- 37-005 The Guatemala City Conference 1971 modernised those provisions of the Warsaw Convention as amended at The Hague which governed the carriage of passengers and baggage, producing a Protocol which has never come into effect. The Montreal Conference 1975 carried out a similar task in respect of cargo, and the resulting Montreal Protocol No.4 contains the results of both exercises. The Protocol adopts the principle of the absolute liability of the carrier, subject only to contributory negligence. The defence available under art.20(1) of the Convention, that the carrier, his servants and agents have taken all necessary measures to avoid the damage, is removed in cases concerning cargo, except where liability is based on delay. The possibility existing under the earlier instruments of recovery beyond the prescribed maxima where the documentation was defective or on proof of intentional or reckless misconduct is removed in cases concerning cargo. There are changes in the rules governing cargo documentation, notably the possibility of using, instead of an air waybill, other means which would preserve a record of the carriage to be performed. The Protocol was given effect in English law by the [Carriage by Air Acts \(Implementation of Protocol No.4 of Montreal, 1975\) Order 1999](#),<sup>17</sup> which added a new Sch.1A to the Carriage by Air Act 1961.

## The Montreal Convention 1999

- 37-006 The Montreal Convention overhauls the whole “Warsaw system” covering the full range of issues dealt with in the earlier instruments, including liability for passengers, baggage, cargo and delay, and incorporates the effect of the Guadalajara Convention.<sup>18</sup> It clarifies the exclusivity of the Convention rules and provides that punitive, exemplary or other non-compensatory damages are not to be recoverable.<sup>19</sup> By 1 January 2021 it had 137 States Parties and so is the Convention most often applicable to international carriage by air. In its provisions as to jurisdiction, the Convention adds a “fifth jurisdiction” for passenger claims. It makes new and more modern provision as to passenger documentation. For damages not exceeding a prescribed amount for each passenger, the carrier is not able to exclude or limit its liability. The carrier is not liable for such damages to the extent that they exceed the prescribed amount if the carrier proves that (a) such damage was not due to the negligence or other wrongful act or omission of the carrier or its servants or agents; or (b) such damage was solely due to the negligence or other wrongful act or omission of a third party. The prescribed amount was 100,000 SDRs in the original text of the Convention; it was raised with effect from 30 December 2009 to 113,100 SDRs and with effect from 28 December 2019 to 128,821 SDRs.<sup>20</sup> As to baggage, the Convention provides that the carrier must deliver to the passenger a baggage identification tag for each piece of checked baggage; the “baggage check” of the earlier instruments in the Warsaw system disappears. The cargo provisions are based, with minor improvements, upon those in Montreal Protocol No.4. Effect is given to the Convention in English law by the [Carriage by Air Acts \(Implementation of the Montreal Convention 1999\) Order 2002](#).<sup>21</sup>

## Parties to the Conventions

- 37-007 For the purposes of English law, the states which are parties to the various versions of the Warsaw Convention and the Montreal Convention 1999 are conclusively identified in the Order in Council made under the [Carriage by Air Act 1961](#).<sup>22</sup>

## Footnotes

5 *Grein v Imperial Airways Ltd [1937] 1 K.B. 50, 74–77.*

6 See, generally, *Lowenfeld and Mendelsohn* (1967) 80 Harv.L.Rev. 497.

7 [SI 2004/1899](#).

8 See below, paras 37-024, 37-026, 37-074, 37-078, 37-080.

- 9 See below, para. 37-035.
- 10 See below, para.37-038.
- 11 See below, para.37-043. See, generally, *Forrest* (1961) 10 I.C.L.Q. 726.
- 12 *Carriage by Air and Road Act 1979* s.4(1).
- 13 See below, paras 37-048—37-050.
- 14 SI 1964/486.
- 15 The full text of the Hague Protocol is also published as Cmnd.3356 and that of the Guadalajara Convention as Cmnd.2354.
- 16 1961 Act s.1(2); 1962 Act s.1(2). In *Corocraft Ltd v Pan American Airways Inc* [1969] 1 Q.B. 616, a decision on the unamended Convention, the Court of Appeal preferred the French to the English text of that Convention, although there was no provision in the *Act of 1932* corresponding to s.1(2) of the Acts of 1961 and 1962 (noted [1969] C.L.J. 40). Similarly, the United States courts give primacy to the French text of the unamended Convention: *Eastern Airlines Inc v Floyd*, 111 S.Ct. 1489 (1991).
- 17 SI 1999/1312.
- 18 For a pessimistic assessment of its treatment in national courts, see *Tompkins* (2014) 39 A.S.L. 203.
- 19 See *O'Carroll v Ryanair*; 2009 S.C.L.R. 125.
- 20 The decision to raise the amount was in the form of a decision of the ICAO Council under art.24 of the Convention.
- 21 SI 2002/263, which came into force on 28 June 2004.
- 22 s.2(1) as amended by SI 1999/1312 and SI 2002/263 (and see the *Carriage by Air Acts (Application of Provisions) Order 2004* (SI 2004/1899) arts 5(2) and 6(2)). The power has been exercised in the *Carriage by Air (Parties to Convention) Order 1999* (SI 1999/1313) and the *Carriage by Air (Parties to Protocol No.4 of Montreal 1975) Order 2000* (SI 2000/3061), but not yet in relation to the Montreal Convention 1999.

## Section 3. - Scope and Application of the Conventions

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### Scope of the Conventions

- 37-008 Every version of the Warsaw Convention, and the Montreal Convention 1999, declares that it applies to all international carriage of persons, baggage or cargo performed by aircraft for reward.<sup>23</sup> The Conventions also apply to gratuitous carriage by aircraft performed by an air transport undertaking.<sup>24</sup> Carriage performed directly by the Crown, whether gratuitously or for reward, is also within the Conventions.<sup>25</sup> The Conventions themselves do not apply to the carriage of mail or postal packages: under English law such carriage is subject to [Sch.1 to the Carriage by Air Acts \(Application of Provisions\) Order 2004](#), under art.2(2) of which the carrier is liable only to the relevant postal administration and in accordance with the rules applicable to the relationship between carriers and postal administrations.<sup>26</sup>

### Carriage or other service

- 37-009 The Conventions apply to “carriage”, and issues may present themselves as to whether the contract is one of carriage or for the provision of some other type of service. It has sometimes been argued that the notion of carriage implies that a flight is undertaken for the primary purpose of moving an individual or goods from Point A to Point B. This argument was not accepted by the House of Lords where it was held that in the absence of any relationship between the carrier and a person carried other than that of carrier and carried (for example, a relationship of employer and employee, or of instructor and student) the person carried was a passenger for the purposes of the Conventions.<sup>27</sup>

## Applicable only to actions between carrier and passenger or goods owner

- 37-010 It must also be remembered that the Conventions only regulate the legal relations between the air carrier<sup>28</sup> and his passengers and owners of baggage and cargo. They do not embrace the legal relations between the carrier's customers and other persons or entities concerned with the carriage for whom the carrier is not in law responsible. Thus such liabilities in law as those of the manufacturers of the aircraft used for the carriage and those of the agencies (governmental or non-governmental) responsible for the airworthiness of the aircraft fall outside the Conventions. The liabilities of such entities are unlimited and are regulated by the normal principles of the law of tort.

## Implementation of the Convention texts

- 37-011 The Warsaw Convention 1929 is in a single text in the French language. The Hague Protocol of 1955 was drawn up in three authentic texts, in English, French and Spanish; it was, however, agreed that in case of any inconsistency the French text was to prevail.<sup>29</sup> In the case of the "MP4 Convention", there was a fourth authentic text in Russian, but the French text again prevails in case of inconsistency.<sup>30</sup> Both the English and the French texts of the Convention as amended by the Hague Protocol and of the MP4 Convention are given effect in England.<sup>31</sup> The Montreal Convention of 1999 is in six languages, English, Arabic, Chinese, French, Russian and Spanish, all texts being equally authentic. However, the [Carriage by Air Acts \(Application of Provisions\) Order 2004](#)<sup>32</sup> gives effect in the United Kingdom only to the English versions of the unamended Warsaw Convention (despite that Convention having a single authentic text in French) and of that Convention as amended by Montreal Additional Protocol No.1; similarly, the [Carriage by Air Acts \(Implementation of the Montreal Convention 1999\) Order 2002](#)<sup>33</sup> gives effect only to the English text of the Montreal Convention.

## Interpretation of the Conventions

- 37-012 There have been relatively few reported cases in England on the interpretation of the Convention texts. The similarities between the various versions of the Warsaw Convention and of the Montreal Convention mean that a decision on one may well be applicable to some or all of the other texts. The paucity of decisions means that it is necessary to seek guidance from the decisions of courts in other Convention jurisdictions as to the operation of the detailed provisions of the Conventions.<sup>34</sup>

The courts in the United States in particular have been prolific in their decisions, especially on the original Convention which was until 2003 the only version ratified by the United States. Many of these decisions display a great ingenuity in interpreting the Convention as far as possible in the passenger's favour in the event of claims for personal injuries.<sup>35</sup> The House of Lords has approved a liberal approach to the interpretation of English statutes giving effect to international Conventions generally<sup>36</sup> and has specifically held that ambiguities in, or doubts as to, the text of the Warsaw Convention may be resolved by cautious and infrequent reference to the travaux préparatoires of the international conferences which led up to the adoption of the Conventions. Their Lordships however stipulated that such reference should only be made when the material consulted is public and accessible and where it clearly and indisputably points to a definite legislative intention. The purpose of the Conventions is uniformity and the English courts should have recourse to the same aids to interpretation as would be used in other Convention jurisdictions.<sup>37</sup> However, while giving due weight to the need for uniformity of interpretation, an English court should approach the applicable Convention in an objective spirit in order to try to discover what its true intent is.

<sup>38</sup>

**U** The starting-point for interpretation must always be the text of the Convention and not the language used, even by a court of the highest authority, in formulating a statement of its effect.<sup>39</sup> The terms of the carrier's conditions of contract or of carriage or of the documents of carriage (the passenger ticket or air waybill) cannot be relevant where the issue is one of interpretation of the Carriage by Air Act 1961 and the Convention to which it gives effect.<sup>40</sup>

## Definition of international carriage

37-013 Each of the conventions contains a definition of "international carriage"; the differences between the various definitions are matters of drafting only. The definition as it appears in the Montreal Convention 1999<sup>41</sup> is:

"... any carriage in which, according to the agreement between the parties, the place of departure and the place of destination, whether or not there be a break in the carriage or a transhipment, are situated either within the territories of two States Parties, or within the territory of a single State Party if there is an agreed stopping place within the territory of another State, even if that State is not a State Party."<sup>42</sup>

Which of the various conventions, if any, applies to a particular case of carriage turns on the reference to the places of departure and destination in the definition of "international carriage" in each convention. It is crucial to identify the places of departure and destination, and to determine to which, if any, conventions the state in which each of those places is situated is a party. The most recent convention to which both states are parties will apply. In every case, what must be

examined is the carriage of the particular passenger or cargo, not that of the aircraft effecting the carriage. Carriage between two points within the territory of a single high contracting party without an agreed stopping place within the territory of another state (for example between London and Belfast, or London and Gibraltar) is not international carriage.<sup>43</sup> For the purpose of determining whether or not the carriage is international, carriage to be performed by several successive air carriers will in some circumstances be deemed to be one undivided carriage: it must have been regarded by the parties as a single operation, whether it had been agreed upon under the form of a single contract or of a series of contracts.<sup>44</sup>

## Conventions provide exclusive cause of action

- 37-014 The Conventions provide a statutory cause of action which is not subject to the choice of law rules applying to claims in contract or tort.<sup>45</sup> Any action for damages, however founded, can only be brought subject to the conditions and limits of liability set out in the relevant convention.<sup>46</sup> The Convention does not purport to deal with all matters relating to contracts of international carriage by air; but in those areas with which it deals, such as the liability of the carrier, the code was intended to be uniform and to be exclusive also of any resort to the rules of domestic law. The words used in art.24 of the MP4 Convention and art.29 of the Montreal Convention 1999, “in the carriage of passengers, baggage and cargo ...” make very clear the exclusivity of the Convention rules across the whole field. That this is true of the earlier conventions has been established by judicial decisions of the highest courts in England, Ireland, South Africa and the United States.<sup>47</sup> The exclusivity principle was applied in the context of the Montreal Convention 1999 by the Supreme Court in *Hook v British Airways Plc; Stott v Thomas Cook Tour Operators*.<sup>48</sup> The Convention was intended to deal comprehensively with the carrier’s liability for whatever might physically happen to passengers between embarkation and disembarkation. A claim for breach of duty under equality laws or alleging ill-treatment of a disabled passenger was precluded as within the substantive scope of the Convention. A decision of the High Court of Australia has held that the Convention rules apply not just to claims by passengers (or the representatives of deceased passengers) but also to claims under Australian common law by family members of passengers for negligently caused psychiatric harm following the death of a passenger.<sup>49</sup>

## No contracting out

- 37-015 Article 23 of each version of the Warsaw Convention (and art.26 of the Montreal Convention 1999) provides that, with one exception,<sup>50</sup> any provision tending to relieve the carrier of liability or to fix a lower limit than that laid down in the applicable Convention is null and void, although without prejudice to the validity of the contract as a whole under the Convention.<sup>51</sup> Moreover

art.32 of the various Warsaw texts provides that any clause contained in the contract by which the parties purport to infringe the rules laid down by the Convention, whether by deciding the law to be applied or by altering the rules as to jurisdiction, is also null and void (though arbitration clauses are allowed for the carriage of cargo, provided that the arbitration takes place in a Convention jurisdiction). However, art.33 (and art.27 of the Montreal Convention 1999) expressly permits the carrier to make regulations which do not conflict with the provisions of the Convention; and most carriers by air issue General Conditions of Carriage, one set for passengers and baggage and another set for cargo. These conditions are commonly based on those recommended from time-to-time by the International Air Transport Association ("IATA"). Thus, contracts of carriage by air possess, as it were, a two-tier structure. The bottom tier of the contract is formed by the statute, and is mandatory. The upper tier of the contract is formed by the carrier's regulations which may fill gaps in the statutory provisions (or merely repeat such provisions), and may increase his statutory liabilities, but cannot reduce them. There is, therefore, practically no scope for the rules of the common law in carriage by air,<sup>52</sup> and in particular no scope for its distinction between common and private carriers.<sup>53</sup>

## Choice of law

**37-015A** The rule against contracting out prohibits any contractual term seeking to impose a choice of law rule that would infringe the rules of the relevant Convention. The Conventions contain no provisions as to the law to be applied insofar as matters are not expressly dealt with in the Convention's text. The normal choice of law rules of the forum will apply. In England the Rome I<sup>54</sup>

**U** and Rome II<sup>55</sup>

**U** Regulations will be relevant.<sup>56</sup>

**U**

## Jurisdiction under the Warsaw Convention

**37-016** The English courts can assume jurisdiction in a claim for damages under the conventions only in accordance with the jurisdictional rules they contain. In all versions of the Warsaw Convention,

art.28 provides that an action for damages must be brought, at the option of the plaintiff, in the territory of one of the High Contracting Parties before one of the following

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**U** : (a) the court having jurisdiction where the carrier is ordinarily resident; or (b) the court having jurisdiction where the carrier has its principal place of business; or (c) the court having jurisdiction where the carrier has an establishment by which the contract has been made; or (d) the court having jurisdiction at the place of destination. Although there is little English judicial authority on art.28(1), it seems from cases in other jurisdictions that a corporate carrier is “ordinarily resident” in the jurisdiction where the central administration of the company is located: a branch office in England of a foreign carrier would not suffice for this purpose.

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**U** The place of central administration will, of course, also be the principal place of business of the carrier.

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**U** The “establishment by which the contract has been made” seemingly does not have to be owned by the carrier: it may be that of a general sales agent who carries on the carrier’s business in the country in question.

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**U** A contract may be made by an establishment where the establishment has played a part in the meeting of minds of the parties.

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**U** Finally, the “place of destination” will be that identified in the particular passenger ticket or air waybill

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**U** : in the case of a round trip or return ticket, then, the place of destination will be the place of departure provided that the carriage was envisaged as a single operation.

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**U**

## Jurisdiction under the Montreal Convention

<sup>37-016A</sup> The Montreal Convention 1999 retains these four grounds of jurisdiction (with changes of wording) and a fifth ground is added. Article 33 of that Convention provides that an action for damages must be brought, at the option of the plaintiff, in the territory of one of the States Parties, before one of the following: (a) the court of the domicile of the carrier; or (b) the court of the

carrier's principal place of business; or (c) the court where the carrier has a place of business through which the contract had been made; or (d) the court at the place of destination; or (e) in respect of damage resulting from the death or injury of a passenger, before a court in the territory of a state party in which at the time of the accident the passenger had his or her principal and permanent residence and to or from which the carrier operates services for the carriage of passengers by air, either on its own aircraft, or on another carrier's aircraft pursuant to a commercial agreement, and in which that carrier conducts its business of carriage of passengers by air from premises leased or owned by the carrier itself or by another carrier with which it has a commercial agreement.

<sup>64</sup>

**U** “Principal and permanent residence” is defined as the one fixed and permanent abode of the passenger at the time of the accident.

<sup>65</sup>

**U** A “commercial agreement” is an agreement, other than an agency agreement, made between carriers and relating to the provision of their joint services for carriage of passengers by air; this will include a code-share agreement.

<sup>66</sup>

**U**

## Bases of jurisdiction exhaustive

37-017 The English court has held the four options in art.28(1) to be exhaustive

<sup>67</sup>

**U** : it provides “a self-contained code”.

<sup>68</sup>

**U** The same applies to the five options in art.33 of the Montreal Convention 1999.

<sup>69</sup>

**U** If an action is begun in the English courts, which have jurisdiction under art.28(1), it is not open to the defendant to raise the plea of *forum non conveniens*;

<sup>70</sup>

**U** if an action is commenced in a foreign court which appears not to have jurisdiction under art.28(1), an anti-suit injunction may be granted by the English court.

<sup>71</sup>

**U** Article 28(1) is strictly applied, and its constraints cannot be avoided by the use of procedural rules for service of claim forms out of the jurisdiction.

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## Limitation of actions

- 37-018** The right to damages in respect of the carrier's liability under arts 17 to 19 of the Warsaw Convention or the Montreal Convention is extinguished if an action is not brought within two years reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the carriage stopped.<sup>73</sup> The "actions" referred to seemingly cover not only actions brought under the *Carriage by Air Act 1961* but also those brought under the *Fatal Accidents Act 1976* and the *Law Reform (Miscellaneous Provisions) Act 1934*. The right of action is seemingly completely destroyed and cannot be relied upon as a defence to an action brought by the carrier.<sup>74</sup> The two-year period cannot be suspended, interrupted or extended by reference to domestic law.<sup>75</sup> The expiry of the period of limitation extinguishes any cause of action under the Convention even when the carrier could not have limited his liability because of art.25.<sup>76</sup> The two-year period of limitation applies in lieu of any period specified under the *Limitation Act 1980*<sup>77</sup> or any other statute. It applies to actions against the carrier's employees or agents acting within the scope of their employment,<sup>78</sup> to actions against "actual carriers" under the *Carriage by Air (Supplementary Provisions) Act 1962*,<sup>79</sup> and also to arbitration proceedings,<sup>80</sup> but actions by the carrier to recover his fare, or for freight, however, are not subject to the two-year limitation period at all. The Convention makes no express provision concerning changes of party once the action has been commenced, but a change of party under *CPR r.17.4* or *19.5* after the expiry of the two-year period cannot be allowed as this would conflict with the Convention.<sup>81</sup>

## Footnotes

- 23** Warsaw Convention 1929 art.1(1); Warsaw-Hague text art.1(1); MP4 Convention art.1(1); Montreal Convention 1999 art.1(1). "Aircraft" has been held to include a hot air balloon: *Laroche v Spirit of Adventure (UK) Ltd [2009] EWCA Civ 12, [2009] Q.B. 778*. "Reward" includes any form of consideration: see *Civil Aviation Act 1982 s.105(1)*; *Corner v Clayton [1976] 1 W.L.R. 800, 804–805* (no profit element required); *Herd v Clyde Helicopters Ltd, 1996 S.L.T. 976 IH* (lump sum payment for series of flights sufficed).

- 24 Warsaw Convention 1929 art.1(1); Warsaw-Hague text art.1(1); MP4 Convention art.1(1); Montreal Convention 1999 art.1(1). “Air transport undertaking” is not defined in the Conventions or in the United Kingdom implementing legislation; however, it is defined in s.95(5) of the Transport Act 2000, for the purposes of that Act, as meaning “an undertaking ... which includes the provision of services for the carriage by air of passengers or cargo for hire or reward”.
- 25 Carriage by Air Acts (Application of Provisions) Order 2004 (SI 2004/1899) art.8 (excluding, in art.8(2), cases where members of the Armed Forces are carried during a time of actual or imminent hostilities, severe international tension, or great national emergency).
- 26 Carriage by Air Acts (Application of Provisions) Order 2004 (SI 2004/1899) art.4.
- 27 *Herd v Clyde Helicopters Ltd [1997] A.C. 534* (carriage of police personnel and equipment for operational purposes); *Laroche v Spirit of Adventure (UK) Ltd [2009] EWCA Civ 12, [2009] Q.B. 778* (recreational flight in hot air balloon).
- 28 This expression can in certain circumstances embrace carriers other than the contracting carrier such as “successive carriers” and “actual carriers”: see below, paras 37-048—37-050.
- 29 Hague Protocol, final clause; Carriage by Air Act 1961 s.1(8) as substituted by the Carriage by Acts (Implementation of the Montreal Convention 1999) Order 2002 (SI 2002/263) art.2(2).
- 30 Montreal Protocol No.4, final clause; Carriage by Air Act 1961 s.1(8) as substituted by the Carriage by Acts (Implementation of the Montreal Convention 1999) Order 2002 (SI 2002/263) art.2(2). For this convention, see above, para.37-005.
- 31 For the Warsaw-Hague text, see the Carriage by Air Act 1961 Sch.1. For the MP4 Convention text, see the Carriage by Air Act 1961 Sch.1A as substituted by the Carriage by Air Acts (Implementation of Protocol No.4 of Montreal, 1975) Order 1999 (SI 1999/1312), a corrected French text being substituted by the Carriage by Acts (Implementation of the Montreal Convention 1999) Order 2002 (SI 2002/263) art.2(26).
- 32 Carriage by Air Acts (Application of Provisions) Order 2004 (SI 2004/1899) arts 5(1) and 6(1).
- 33 Carriage by Acts (Implementation of the Montreal Convention 1999) Order 2002 (SI 2002/263).
- 34 For the weight to be given to decisions of foreign courts, see *Abnett v British Airways Plc [1997] A.C. 430; Morris v KLM Royal Dutch Airlines [2002] 2 A.C. 628; Gahan v Emirates [2017] EWCA Civ 1530*.
- 35 See, e.g. *Lisi v Alitalia-Linee Aeree Italiane SpA [1967] 1 Lloyd's Rep. 140, [1968] 1 Lloyd's Rep. 505* (but cf. the stricter approach commended in *Chan v Korean Air Lines Ltd, 109 S.Ct. 1676 (1989)*). For a comparative study of the approaches of United States and French courts to the interpretation of the Convention, see Miller, Liability in Air Transport (above, para.37-001 (note)).
- 36 *James Buchanan and Co Ltd v Babco Forwarding and Shipping (UK) Ltd [1978] A.C. 141, 152*.
- 37 *Fothergill v Monarch Airlines Ltd [1981] A.C. 251, 278, 283, 287 and 294*. cf. *Corocraft Ltd v Pan American Airways Inc [1969] 1 Q.B. 616, 655; Rustenburg Platinum Mines Ltd v South African Airways [1977] 1 Lloyd's Rep. 564, 576–577; Adatia v Air Canada (1992)*

- 2 S. & B. Av.R. VII/63, CA; *Tondriau (or Sauvage) v Air India*, 13 E.T.L. 126 (1978) Cour de Cassation, Brussels.
- 38 *King v Bristow Helicopters Ltd* [2002] UKHL 7, [2002] 2 A.C. 628, especially, per Lord Hobhouse of Woodborough at [147]–[150]; *Swiss Bank Corp v Brink's-MAT Ltd* [1986] Q.B. 853; *Antwerp United Diamonds BVBA v Air Europe* [1996] Q.B. 317, CA. The correct approach to the interpretation of the Montreal Convention was stated in *Akulina v Ifly SA* [2022] EWHC 166 (QB) at [13].
- 39 *Re Deep Vein Thrombosis and Air Travel Group Litigation* [2005] UKHL 72, [2006] 1 A.C. 495, commenting on over-reliance on the formulation in *Air France v Saks*, 470 U.S. 392 (1985).
- 40 *Antwerp United Diamond BVBA v Air Europe* [1996] Q.B. 317, CA.
- 41 Carriage by Air Act 1961 Sch.1B art.1(2).
- 42 See *Grein v Imperial Airways Ltd* [1937] 1 K.B. 50; *Rotterdamsche Bank NV v BOAC* [1953] 1 W.L.R. 493.
- 43 Carriage by Air Acts (Application of Provisions) Order 2004 (SI 2004/1899) Sch.2 art.1(2); Carriage by Air Act 1961 Sch.1 art.1(2), Sch.1A as inserted by SI 1999/1312 art.1(2); Sch.1B as inserted by SI 2002/263 art.1(2).
- 44 Carriage by Air Acts (Application of Provisions) Order 2004 (SI 2004/1899) Sch.2 art.1(3); Carriage by Air Act 1961 Sch.1 art.1(3), Sch.1A as inserted by SI 1999/1312 art.1(3); Sch.1B as inserted by SI 2002/263 art.1(3).
- 45 *Corocraft Ltd v Pan American Airways Inc* [1969] 1 Q.B. 616 (reversed on other grounds [1969] 1 Q.B. 616, CA); *Rothmans of Pall Mall (Overseas) Ltd v Saudi Arabian Airlines Corp* [1981] Q.B. 368, CA; *Holmes v Bangladesh Biman Corp* [1982] A.C. 1112, HL; *American Express Co v British Airways Board* [1983] 1 W.L.R. 701.
- 46 Carriage by Air Acts (Application of Provisions) Order 2004 (SI 2004/1899) Sch.2 art.24(1), (2); Carriage by Air Act 1961 Sch.1 art.24(1), (2); Sch.1A as inserted by SI 1999/1312 art.24(1), (2) (using different language); Sch.1B as inserted by SI 2002/263 art.29.
- 47 *Sidhu v British Airways Plc; Abnett v British Airways Plc* [1997] A.C. 430, HL; *Herd v Clyde Helicopters Ltd* [1997] A.C. 534, HL; *Deaville v Aeroflot Russian International Airlines* [1997] 2 Lloyd's Rep. 67; *R. v Secretary of State for the Environment, Transport and the Regions Ex p. IATA* [2000] 1 Lloyd's Rep. 242; *Morris v KLM Royal Dutch Airlines* [2001] EWCA Civ 790, [2001] 3 All E.R. 126; *King v Bristow Helicopters Ltd* [2002] UKHL 7, [2002] 2 A.C. 628; *Western Digital Corp v British Airways Plc* [2001] Q.B. 733, CA; *The Deep Vein Thrombosis and Air Travel Group Litigation* [2002] EWHC 2825; (affirmed [2003] EWCA Civ 1005, [2003] 3 W.L.R. 956) and [2005] UKHL 72, [2006] 1 A.C. 495; *Smyth & Co Ltd v Aer Turas Teoranta* Unreported 3 February 1997, SC (followed in *Nolan v Aer Lingus Group Ltd* Unreported 9 November 2009, Cir Ct, *McAuley v Aer Lingus Ltd* [2011] IEHC 89, and *Hennessey v Aer Lingus Ltd* [2012] IEHC 124); *Potgieter v British Airways Plc* (2005) 2 S.A. 133 (C); *El Al Israel Airlines Ltd v Tseng*, 119 S.Ct. 662 (1999). [2014] UKSC 15, [2014] A.C. 1347. See paras 37-051—37-053. The approach of the European Court in the context of Regulation 261/2004 is very different: see para.37-066.

For a Canadian decision on the exclusivity of the Montreal Convention 1999, see *Thibodeau v Air Canada* 2014 SCC 67.

49 *Parkes Shire Council v South West Helicopters Pty Ltd* [2019] HCA 14, (2019) 266 C.L.R. 212.

50 As to this, see 1961 Act Sch.1 art.23(2) (inherent defect, quality or vice & cargo); see, e.g. *Corocraft Ltd v Pan American Airways Inc* [1969] 1 Q.B. 616 (reversed on other grounds [1969] 1 Q.B. 616, CA).

51 For the rationale of this provision (to protect the passenger or other person dealing with the carrier against provisions of the kind which it describes), see *Abnett v British Airways Plc* [1997] A.C. 430.

52 The common law rules may still be of importance in connection with gratuitous carriage not performed by an air transport undertaking, which as we have seen (see above, para.37-001) is not within the scope of the Convention. See *Fosbroke-Hobbes v Airwork Ltd* [1937] 1 All E.R. 108; *Ludditt v Ginger Coote Airways* [1947] A.C. 233.

53 As to whether a carrier by air can be a common carrier, see *Aslan v Imperial Airways Ltd* (1933) 45 L.L. Rep. 316, 322 (decided before the original Warsaw Convention came into operation); McNair pp.138–141; Shawcross and Beaumont, at Vol.1, para.VII[5]; Kahn-Freund pp.696–697. In *Aslan v Imperial Airways Ltd*, the flight documents expressly repudiated common carrier status. The matter appears to be of only academic interest now. See above, Vol.I, Ch.33, esp. paras 33-005 (effects of Brexit) and 33-128 et seq.

54 See above, Vol.I, para.33-038.

55 *Silverman v Ryanair DAC* [2021] EWHC 2955 (QB), considering decisions in other jurisdictions: *Zicherman v Korean Air Lines Co Ltd* 116 S.Ct. 629 (1996); *El Israel Airlines Ltd v Tseng* 119 S.Ct. 662 (1999); *Grueff v Virgin Australian Airlines Pty Ltd* [2021] FCA 501.

56 Carriage by Air Acts (Application of Provisions) Order 2004 (SI 2004/1899) Sch.2 art.28(1); Carriage by Air Act 1961 Sch.1 art.28(1); Sch.1A as inserted by SI 1999/1312 art.28(1). See generally, Shawcross and Beaumont, at paras VII[416] et seq.; Dicey, Morris and Collins on the Conflict of Laws, 15th edn (2012), Vol.1, paras 15-008—15-019.

57 *Rothmans of Pall Mall (Overseas) Ltd v Saudi Arabian Airlines Corp* [1981] Q.B. 368, per Roskill LJ at 386; Shawcross and Beaumont, at Vol.1, para.VII[443]ff.

58 *Eck v United Arab Airlines Inc* 360 F. 2d 804 (1966), 2nd Cir.

59 *Berner v United Airlines Inc* 157 N.Y.S. 884 (1956); 170 N.Y.S. 2d 340 (1957), Bundesgerichtshof, 23 March 1976 (11 E.T.L. 873 (1976)).

60 *Orchestre Symphonique de Vienne v Trans World Airlines* (1971) I.A.T.A. A.C.L.R. No.418.

- ⑥2 The place of destination will be the ultimate destination. This helps to determine whether or not carriage is “international carriage” within the meaning of the Convention: [1961 Act Sch.1 art.1\(2\)](#); see above, para.[37-013](#).
- ⑥3 *Qureshi v KLM Royal Dutch Airlines* 102 D.L.R. (3d) 205 (1979), Nova Scotia SC.
- ⑥4 Carriage by Air Act 1961 Sch.1B as inserted by [SI 2002/263 art.33](#). The discussions leading to the adoption of the fifth ground for jurisdiction are examined in *Akulina v Ifly SA [2022] EWHC 166 (QB)* at [18]–[25]. Some US courts hold that the Convention confers subject matter but not personal jurisdiction: see *Erwin-Simpson v AirAsia Berhad* 985 F.3d 883 (2021), *DC Cir.*
- ⑥5 Carriage by Air Act 1961 Sch.1B as inserted by [SI 2002/263 art.33\(2\)\(b\)](#), which adds that “The nationality of the passenger shall not be the determining factor in this regard”.
- ⑥6 Carriage by Air Act 1961 Sch.1B as inserted by [SI 2002/263 art.33\(2\)\(a\)](#). See *Akulina v Ifly SA [2022] EWHC 166 (QB)* where the meaning of “commercial agreement” was closely examined.
- ⑥7 Questions of procedure are governed by the lex fori, the law of the court seised of the case: Carriage by Air Acts (Application of Provisions) Order 2004 ([SI 2004/1899](#)) Sch.2 art.28(2); Carriage by Air Act 1961 Sch.1 art.28(2); Sch.1A as inserted by [SI 1999/1312 art.28\(2\)](#); Sch.1B as inserted by [SI 2002/263 art.33\(4\)](#). The English court would, therefore, determine whether a particular case falls under its jurisdiction, as opposed to that of a court in Scotland or Northern Ireland. See the Scottish decision to this effect: *Abnett v British Airways Plc, 1995 S.C.L.R. 654*. Although the matter remains controversial, the CJEU held in *Guaitoli v easyJet Airline Co Ltd (C-213/18) [2019] 4 W.L.R. 160* that art.33(1) of the Montreal Convention 1999 governed not only the allocation of jurisdiction as between the States party to the Convention, but also the allocation of territorial jurisdiction as between the courts of each of those States.
- ⑥8 *Rothmans of Pall Mall (Overseas) Ltd v Saudi Arabian Airlines Corp [1981] Q.B. 368*, per Roskill LJ at 385; *Milor SRL v British Airways Plc [1996] Q.B. 702, CA.*
- ⑥9 *Akulina v Ifly SA [2022] EWHC 166 (QB)*.
- ⑦0 *Milor SRL v British Airways Plc [1996] Q.B. 702, CA.* United States courts are divided: in agreement with *Milor* is *Hosaka v United Airlines Inc*, 305 F. 3d 989 (2002), *9th Cir, cert. den. 537 US 1227 (2003)*; to the contrary is *Re Air Crash Disaster near New Orleans, Louisiana on July 9, 1982, Trivelloni-Lorenzi v Pan American World Airways Inc*, 821 F. 2d 1147 (1987), *5th Cir*; both are cases on versions of the Warsaw Convention. A US Court of Appeals has held that forum non conveniens is available under the Montreal Convention

1999: *Re West Caribbean Airways SA* 305 F. 3d 989 (2002), 9th Cir, followed in *Pierre-Louis v Newvac Corp* 584 F. 3d 1052 (2009), 11th Cir. and *Galbert v West Caribbean Airways* 715 F. 3d 1290 (2013), 11th Cir.

⑥71 *Deaville v Aeroflot Russian International Airlines* [1997] 2 Lloyd's Rep. 67 (injunction refused on facts).

⑥72 *Rotterdamsche Bank NV v British Overseas Airways Corp* [1953] 1 W.L.R. 493.

73 Carriage by Air Acts (Application of Provisions) Order 2004 (SI 2004/1899) Sch.2 art.29(1); Carriage by Air Act 1961 Sch.1 art.29(1); Sch.1A as inserted by SI 1999/1312 art.29(1); Sch.1B as inserted by SI 2002/263 art.35(1). English law will, as the lex fori, determine the method of calculating the period of limitation: Carriage by Air Acts (Application of Provisions) Order 2004 (SI 2004/1899) Sch.2 art.29(2); Carriage by Air Act 1961 Sch.1 art.29(2); Sch.1A as inserted by SI 1999/1312 art.29(2); Sch.1B as inserted by SI 2002/263 art.35(2).

74 cf. *Aries Tanker Corp v Total Transport Ltd (The Aries)* [1977] 1 W.L.R. 185, HL, per Lord Wilberforce at 188; *Timeny v British Airways Plc* (1991) 102 A.L.R. 565 S. Australian SC.; *Mediterranean Freight Services Ltd v BP Oil International Ltd (The Fiona)* [1994] 2 Lloyd's Rep. 506, CA (obiter); *Agtrack (NT) Pty Ltd v Hatfield* [2005] HCA 38; *Air Link Pty Ltd v Paterson* [2005] HCA 39 and see *Bogiatzi v Deutscher Luftpool* (C-301/08) EU:C:2009:649, [2010] 1 All E.R. (Comm) 555.

75 *Laroche v Spirit of Adventure (UK) Ltd* [2009] EWCA Civ 12, [2009] Q.B. 778.

76 *Re Air Disaster at Lockerbie, Scotland on December 21, 1988*, 928 F. 2d 1267, 1286 (1991), US Ct of Appeals, 2nd Cir.

77 Limitation Act 1980 s.33(2).

78 Carriage by Air Act 1961 s.5(1).

79 Carriage by Air (Supplementary Provisions) Act 1962 s.3(2).

80 Carriage by Air Act 1961 s.5(3).

81 *Hall v Heart of England Balloons Ltd* [2010] 1 Lloyd's Rep. 373, Birmingham Cty Ct, followed in *Jeffery v Thomas Cook Airlines Ltd* Unreported 2 June 2010, Macclesfield Cty Ct and *Foster v Thomas Cook Group Plc* Unreported 31 March 2011, Newcastle-upon-Tyne Cty Ct.

## Section 4. - Regulation 2027/97: "the Montreal Regulation"

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 37 - Carriage by Air

Section 4. - Regulation 2027/97: "the Montreal Regulation"

**Council Regulation 2027/97 and European Parliament and Council Regulation 889/2002**

<sup>37-019</sup> A retained EU Regulation,<sup>82</sup> Council Regulation 2027/97 of October 9, 1997 on air carrier liability in the event of accidents,<sup>83</sup> extends the scope of application of the provisions of the Montreal Convention 1999 and makes some supplementary provisions. In its original form, the Regulation was limited to passenger liability, but it was radically amended, and in effect replaced, by European Parliament and Council Regulation 889/2002 of 13 May 2002 to align it fully with the Montreal Convention 1999 and to extend it to cover baggage liability.<sup>84</sup> The Convention provisions which would otherwise be applicable do not apply to UK carriers to the extent that Regulation 2029/97 has the force of law<sup>85</sup>; a UK carrier is one holding an air operating certificate issued by the Civil Aviation Authority. The liability of a UK air carrier in respect of passengers and their baggage is declared to be governed by all provisions of the Montreal Convention relevant to such liability,<sup>86</sup> including its limitation provisions.<sup>87</sup> This applies to all international carriage, whatever the places of departure and destination. The effect is that the provisions of the Montreal Convention must be applied even where the UK is under a treaty obligation to apply some other instrument in the Warsaw system. The Regulation also deals with the supplementary sum which, in accordance with art.22(2) of the Montreal Convention, may be demanded by a UK air carrier when a passenger makes a special declaration of interest in delivery of their baggage at destination. This sum is to be based on a tariff, to be made available to passengers on request, which is related to the additional costs involved in transporting and insuring the baggage concerned over and above those for baggage valued at or below the liability limit.<sup>88</sup>

## Advance payments

- 37-020 Regulation 2027/97 makes provision in respect of advance or interim payments. The minimum advance in the event of death is the equivalent in sterling of 16,000 SDRs per passenger. An advance payment does not constitute recognition of liability, but it is declared not to be returnable, except in the cases prescribed in art.20 of the Montreal Convention or where the person who received the advance payment was not the person entitled to compensation.<sup>89</sup>

## Conditions of carriage

- 37-021 Regulation 2027/97 also deals with the provision of information to passengers.<sup>90</sup> All air carriers<sup>91</sup> must, when selling carriage by air in the United Kingdom, ensure that a summary of the main provisions governing liability for passengers and their baggage, including deadlines for filing an action for compensation and the possibility of making a special declaration for baggage, is made available to passengers at all points of sale including sale by telephone and via the internet.<sup>92</sup> In order to comply with this requirement, UK air carriers (but not other air carriers) must use a notice set out in the Annex to the Regulation.<sup>93</sup> In addition, all air carriers<sup>94</sup> must in respect of carriage by air provided or purchased in the UK, provide each passenger with a written indication of the applicable limit for that flight on the carrier's liability in respect of death or injury, if such a limit exists; the applicable limit for that flight on the carrier's liability in respect of destruction, loss of or damage to baggage, and a warning that baggage greater in value than this figure should be brought to the airline's attention at check-in or fully insured by the passenger prior to travel; and the applicable limit for that flight on the carrier's liability for damage occasioned by delay.<sup>95</sup> Failure to comply with the requirements of art.3a or art.6 of the amended Regulation is made an offence by the [Air Carrier Liability Regulations 2004](#).<sup>96</sup>

## Insurance requirements

- 37-022 European Parliament and Council Regulation 785/2004 of 21 April 2004 on insurance requirements for air carriers and air operators,<sup>97</sup> retained in United Kingdom law,<sup>98</sup> requires all air carriers and aircraft operators flying within, into, out of, or over the United Kingdom to have specified levels of insurance cover in respect of their aviation-specific liability in respect of passengers (death and personal injury caused by accidents), for loss or destruction of or damage to baggage and cargo, and to third parties (death, personal injury and damage to property caused by accidents).<sup>99</sup> The insured risks must cover acts of war, terrorism, hijacking, acts of sabotage,

unlawful seizure of aircraft and civil commotion. Insurance in respect of the carriage of mails is excluded.<sup>100</sup> The minimum level of insurance in respect of passenger liability is 250,000 SDRs per passenger (100,000 SDRs per passenger in the case of non-commercial operations by aircraft with a maximum take-off mass of 2,700 kg or less); in respect of baggage 1,288 SDRs per passenger in commercial operations; and in respect of cargo 22 SDRs per kilogramme in commercial operations.<sup>101</sup> An air carrier or aircraft operator (other than a carrier or operator regulated by another Member State) who fails to comply with these requirements commits an offence.<sup>102</sup>

## Footnotes

- 82 On the retention of EU Regulations after Brexit, see Vol.I, paras 1-021, et seq.
- 83 For text, see [1997] O.J. L285/1.
- 84 The effect is that the Montreal Convention became part of the EU legal order: *Wallentin-Hermann v Alitalia-Linee Aeree Italiane SpA* (C-549/07) EU:C:2008:771, [2008] E.C.R. I-11061; *Stott v Thomas Cook Tour Operators Ltd* [2012] EWCA Civ 66 at [28]; *Air Baltic Corp AS v Lietuvos Respublikos specialiųjų tyrimų tarnyba* (C-429/14) EU:C:2016:88, [2016] 1 Lloyd's Rep. 407 at [23].
- 85 Carriage by Air Act 1961 s.1(2) as substituted by the Carriage by Acts (Implementation of the Montreal Convention 1999) Order 2002 (SI 2002/263) art.2(2), and as amended by the Air Passenger Rights and Air Travel Organisers' Licensing (Amendment) (EU Exit) Regulations 2019 (SI 2019/278) reg.2(2); Carriage by Air Acts (Application of Provisions) Order 2004 (SI 2004/1899) art.3(2), as amended by SI 2019/278.
- 86 Regulation 2027/97 art.3(1). References are to the Regulation as it has effect in the UK with the amendments made by the Air Passenger Rights and Air Travel Organisers' Licensing (Amendment) (EU Exit) Regulations 2019 (SI 2019/278). For the effect of the Regulation on non-international carriage, see below, paras 37-095—37-096.
- 87 *Bogiatzi v Deutscher Luftpool* (C-301/08) EU:C:2009:649, [2010] 1 All E.R. (Comm) 555 (a case under Regulation 2027/97 and the Warsaw Convention, but of wider application).
- 88 Regulation 2027/97 art.3a.
- 89 Regulation 2027/97 art.5. Art.20 deals with cases of exoneration; see para.37-034.
- 90 Regulation 2027/97 art.6.
- 91 But in the case of non-UK carriers, only in relation to carriage to, from or within the United Kingdom: Regulation 2027/97 art.6(3).
- 92 Regulation 2027/97 art.6(1).
- 93 Regulation 2027/97 art.6(1).
- 94 But in the case of non-UK carriers, only in relation to carriage to, from or within the United Kingdom: Regulation 2027/97 art.6(3).
- 95 Regulation 2027/97 art.6(2).

- 96 SI 2004/1418, as amended by the Air Passenger Rights and Air Travel Organisers' Licensing (Amendment) (EU Exit) Regulations 2019 (SI 2019/278).
- 97 For original text, see [2004] O.J. L138.
- 98 With amendments made by the Civil Aviation (Insurance) (Amendment) (EU Exit) Regulations 2018 (2018/1363).
- 99 Regulation 785/2004 art.4(1). The provisions as to the minimum level of insurance in respect of passengers, baggage and cargo will not apply with respect to flights over the territory of the United Kingdom carried out by non-UK air carriers and by aircraft operators using aircraft registered outside the United Kingdom which do not involve a landing on, or take-off from, the territory of the United Kingdom.
- 100 Regulation 785/2004 art.1(2). There are insurance requirements in this context, to be found in Council Regulation 2407/92 art.7 and the law of the various parts of the United Kingdom.
- 101 Regulation 785/2004 art.6; Civil Aviation (Insurance) Regulations 2005 (SI 2005/1089) reg.5. The provisions as to the minimum level of insurance in respect of passengers, baggage and cargo do not apply with respect to flights over the territory of the United Kingdom carried out by non-UK air carriers and by aircraft operators using aircraft registered outside the United Kingdom which do not involve a landing on, or take-off from, the territory of the United Kingdom: Regulation 785/2004 art.6(4).
- 102 Civil Aviation (Insurance) Regulations 2005 (SI 2005/1089) reg.4.

## **(a) - Passengers: Death or Injury**

Chitty on Contracts 34th Ed.

Consolidated Mainwork Incorporating First Supplement

Volume II - Specific Contracts

Chapter 37 - Carriage by Air

Section 5. - Liability of the Carrier

**(a) - Passengers: Death or Injury**

### **Who is a passenger?**

- 37-023 In order to be a “passenger” a person need not personally have made a contract with the carrier.<sup>103</sup> It is sufficient if he is on board the aircraft with the carrier’s consent, i.e. is not a stowaway. IATA Conditions thus define a passenger as “any person, except members of the crew, carried or to be carried in an aircraft pursuant to a ticket”.<sup>104</sup> So a person whose ticket was bought by a parent, spouse, employer or friend would certainly be included, and so would the holder of a free pass.<sup>105</sup> The definition would make it appear that the carriage by the carrier of employees who are not members of the crew is carriage under the Conventions.<sup>106</sup> The mere fact that a flight is for recreational purposes and not for transport from point A to point B does not prevent the person being carried from being a passenger for the purposes of the Conventions.<sup>107</sup>

### **Passenger ticket**

- 37-024 The requirements as to passenger documentation vary depending on which convention is applicable. Where the Warsaw Convention 1929 applies, the carrier must deliver a passenger ticket which must contain the following particulars: (a) the place and date of issue; (b) the place of departure and of destination; (c) the agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity, and that if that right is exercised, the alteration shall not have the effect of depriving the carriage of its international character; (d) the name and address of the carrier or carriers; and (e) a statement that the carriage is subject to the rules relating to liability established by the Warsaw Convention.<sup>108</sup> Where the carriage is governed

by the Warsaw-Hague text or the MP4 Convention, a ticket must be delivered (not necessarily by the carrier) containing: (a) an indication of the places of departure and destination; (b) if the places of departure and destination are within the territory of a single high contracting party, one or more agreed stopping places being within the territory of another state, an indication of at least one such stopping place; (c) a notice, generally referred to in practice as “The Hague notice”, to the effect that, if the passenger’s journey involves an ultimate destination or stop in a country other than the country of departure, the Warsaw Convention may be applicable and that the Convention governs and in most cases limits the liability of carriers for death or personal injury and in respect of loss of or damage to baggage.<sup>109</sup> The Montreal Convention 1999 provides that in respect of carriage of passengers an individual or collective document of carriage must be delivered. The document must: (a) give an indication of the places of departure and destination; (b) if the places of departure and destination are within the territory of a single state party, one or more agreed stopping places being within the territory of another state, an indication of at least one such stopping place.<sup>110</sup> A ticket as such is not prescribed; any other (for example, electronic) means which preserve this information may be substituted.<sup>111</sup> The passenger must also be given written notice to the effect that where the Montreal Convention is applicable it governs and may limit the liability of carriers in respect of death or injury, and for destruction or loss of, or damage to baggage, and delay.<sup>112</sup>

## Time of delivery of ticket

- 37-025 Where a ticket is required by the terms of the applicable convention, it must be delivered before the start of the flight<sup>113</sup> if the passenger is to be bound by its terms. It was argued in a number of American cases that delivery had to be early enough to give the passenger a reasonable opportunity to take measures (such as buying insurance) to protect himself,<sup>114</sup> and that this consideration, taken with the need to give proper notice of the liability limitations, required the ticket to meet certain minimum requirements as to the size and legibility of its printed text.<sup>115</sup> Later United States decisions rejected these arguments, while recognising that a document could be so defectively printed as not to qualify as a “ticket” at all.<sup>116</sup>

## Absence, irregularity or loss of passenger ticket

- 37-026 The absence, irregularity, or loss of the ticket does not affect the existence or the validity of the contract of carriage which is, nonetheless, subject to the rules of the relevant convention. However, if in a case governed by the Warsaw Convention 1929, the carrier accepts a passenger without a passenger ticket having been delivered, the carrier is not entitled to avail himself of those provisions which exclude or limit liability.<sup>117</sup> The corresponding rule in cases under the Warsaw-Hague text or the MP4 Convention is that if, with the consent of the carrier, the passenger

embarks without a passenger ticket having been delivered, or if the ticket does not include the prescribed notice as to the possible applicability of the Warsaw Convention,<sup>118</sup> the carrier is not entitled to avail himself of the provisions of art.22 limiting his liability.<sup>119</sup> Non-compliance with the provisions of the Montreal Convention 1999 as to passenger documentation does not affect the existence or the validity of the contract of carriage, which is, nonetheless, subject to the rules of the Convention including those relating to limitation of liability.<sup>120</sup> In cases under any of the Conventions, the provisions as to passenger documentation are excluded if the carriage is “in extraordinary circumstances outside the normal scope of an air carrier’s business” (for example, a rescue flight to recover persons stranded by a natural disaster).<sup>121</sup>

## Information for passengers

- 37-027 An air carriage contractor (a carrier concluding a contract of carriage, a tour operator or ticket seller) must inform the passenger at the time of reservation of the identity of the operating air carrier or carriers, and notify the passenger if there is any change in the operating carrier.<sup>122</sup> There are further requirements as to the publication of air fares which must show separately any taxes, airport charges, and other charges, surcharges or fees such as those related to security or fuel that have been added to the basic fare. Optional price supplements must be communicated in a clear, transparent and unambiguous way at the start of any booking process and their acceptance by the customer must be on an “opt in” basis.<sup>123</sup>

## Right of refusal

- 37-028 Each convention makes it clear that its provisions do not prevent the carrier from refusing to enter into a contract of carriage.<sup>124</sup> The Passenger Conditions of Carriage recommended by IATA allow the carrier, in the reasonable exercise of its discretion to refuse to carry a passenger or his baggage on any flight after the date of a notice in writing to that effect; the passenger is entitled to a refund of any fare already paid. In addition, the Conditions reserve the right to refuse carriage if certain circumstances exist or in the carrier’s reasonable belief may occur. These are (a) the need to comply with applicable laws; (b) the proposed carriage might endanger the safety, health or materially affect the comfort of other passengers or crew; (c) the passenger’s mental or physical state presents a hazard or risk to the passenger concerned, other passengers, crew or property; (d) misconduct on a previous flight which may be repeated; (e) refusal to submit to a security check; (f) failure to pay the applicable fare, taxes, fees or charges; (g) lack of necessary travel documents; (h) presentation of an unlawfully obtained or counterfeit ticket; (i) misuse of the ticket, as where coupons are used out of sequence to obtain a prohibited fare advantage; and (j) failure to observe the carrier’s instructions with respect to safety or security.<sup>125</sup>

## Liability for death and bodily injury

- 37-029 Article 17 of the Warsaw Convention 1929, which was not changed either by the Hague Protocol 1955 or by Montreal Protocol No.4 1975, provides that the carrier is liable for damage sustained in the event of death or wounding of a passenger or any other bodily injury suffered by a passenger if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.<sup>126</sup> The corresponding article in the Montreal Convention 1999 provides that the carrier is liable for damage sustained in case of death or bodily injury of a passenger upon condition only that the accident which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking.<sup>127</sup> “Damage” in this context was held by the United States Supreme Court to mean “legally cognizable harm”, art.17 leaving it to adjudicating courts to specify what harm is cognizable.<sup>128</sup> The European Court of Justice has held that the term “damage” must be given a uniform and autonomous interpretation, one identical throughout Ch.III of the Montreal Convention, notwithstanding the different meanings given to that concept in the domestic laws of the States Parties to the convention. As there was nothing in the Montreal Convention to indicate that the contracting States intended to attribute a special meaning to the concept of damage and to derogate from its ordinary meaning, the term “damage” was to be construed as including both material and non-material damage.<sup>129</sup>
- 37-030 In interpreting the phrase “in the course of any of the operations of embarking or disembarking” the court will enquire whether the passenger’s movement through the airport procedures indicates that at the relevant time he was engaged upon the operation of embarking upon (or disembarking from) the particular flight in question.<sup>130</sup> This will involve looking at the location of the passenger at the relevant time, but also at other factors, which might include the activity in which the passenger was engaged, the degree of control exercised over the passenger by the carrier,<sup>131</sup> and the question whether the passenger was in the “zone of aviation-related risk”.<sup>132</sup>

## “Accident”

- 37-031 The term “accident” is not defined for the purposes of the conventions. A statutory definition, for the purposes of accident investigation, defines “accident” as including “any fortuitous or unexpected event by which the safety of an aircraft or any person is threatened”.<sup>133</sup>

**U** The United States Supreme Court has held that an “accident” must be an unexpected or unusual event or happening that is external to the passenger: it is not sufficient that the plaintiff suffers injury as a result of his or her own internal reaction to the usual, normal and expected operation of the aircraft.

134

**U** It is clear that an aircraft crash, or a hijack, will constitute an accident, but so may less dramatic incidents such as extreme cases of turbulence, and incidents during flight such as the spillage of scalding hot drinks

135

**U** or the service of infected food. A United States decision held that sexual molestation by a fellow passenger was an “accident”

136

**U** : the characteristics of air travel made the plaintiff vulnerable. The Court of Appeal followed that decision but questioned the need to establish that an accident had to be a characteristic of air travel

137

**U** (and the CJEU later held that the concept of “accident” did not depend on the presence of a hazard typically associated with aviation)

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**U**; that the assault was an accident was confirmed in the House of Lords.

139

**U** It is not an accident when a passenger becomes ill during a normal flight; it has been held that the occurrence of deep vein thrombosis, and a failure to warn of the risk of its occurrence, cannot be an accident,

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**U** but where a passenger who later died had been refused a change of seat to avoid the cigarette smoke to which he was allergic, this was held to be an unusual event external to the passenger and so an “accident”.

141

**U** There is a range of judicial views on the question whether an omission may amount to an accident (and whether a distinction can properly be drawn between act and omission in this context).

142

**U** Some United States courts have taken into account normal industry practice, seeing a departure from such practice as necessarily constituting an “unusual and unexpected event”. The better view is that a court must always ask whether there was an “unexpected or unusual event”; some departures from an industry standard might be “accidents” in that sense but others not.

143

**U** Discussion of a departure from industry practice is appropriate for liability based on negligence, which is not relevant under the Montreal Convention; similarly, it is immaterial whether or not the air carrier concerned has or has not failed to fulfil its diligence and safety obligations, as liability does not depend on fault or negligence on the part of the carrier.

144



## “Bodily injury”

37-032 The term “bodily injury” is to be construed narrowly; mere mental anxiety, unaccompanied by physical injury, will give rise to no liability under art.17. This conclusion was reached by the United States Supreme Court after many years in which American courts were divided as to the scope of “lésion corporelle” in the French text of the Convention,<sup>145</sup> and was later adopted by the House of Lords, resolving a difference of view between the English Court of Appeal and the Inner House of the Court of Session.<sup>146</sup> “Bodily injury” was held to mean a change in some part or parts of the body of the passenger which was sufficiently serious to be described as an injury; it does not include mere emotional upset such as fear, distress, grief or mental anguish. Post Traumatic Stress Disorder will not constitute “bodily injury” unless it has caused actual physical brain damage; there is no liability for mental injuries which are accompanied by, but not caused by physical injuries.<sup>147</sup>

## Defences available to the carrier: “all necessary measures”

37-033 Under art.20 of the Warsaw Convention 1929, the Warsaw-Hague text, and the MP4 Convention, the carrier is not liable if he proves that he and his employees or agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures.<sup>148</sup> In the Montreal Convention 1999 the defence is available only in cases of liability for delay.<sup>149</sup> In that Convention, however, it is provided that in passenger cases to the extent that the damages exceed a prescribed amount,<sup>150</sup> the carrier is not liable if the carrier proves that (a) such damage was not due to the negligence or other wrongful act or omission of the carrier or its servants or agents

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**U**; or (b) such damage was solely due to the negligence or other wrongful act or omission of a third party.<sup>152</sup> The English courts have rarely had to consider art.20 of the Convention.

In *Chisholm v British European Airways*<sup>153</sup> a passenger was injured after she had left her seat when, because of turbulence, the passengers had been warned to fasten their seat belts and remain seated. The plaintiff disregarded the warnings given by illuminated signs, by the aircraft's public address system, and also by the cabin crew to each passenger. It was held that the carrier was not liable because his employees had taken all necessary measures to avoid the damage. The court considered that "all necessary measures" meant all *reasonable* measures or, as it was put more recently, "all measures necessary in the eyes of a reasonable man".<sup>154</sup> Thus, what looks like a strict liability under the Convention seems to have been relaxed, although the carrier must still prove more than that he was not negligent.<sup>155</sup> If the court had reached the opposite conclusion under art.20, the plaintiff's damages might perhaps have been reduced under art.21 by reason of her contributory negligence.<sup>156</sup> However, on somewhat similar facts to the *Chisholm* case but where the passengers had not been instructed to fasten their seat belts prior to the aircraft encountering forecast turbulence, the court held that the failure of the carrier's employees to warn the passengers was a breach of art.20. The fact that the plaintiff passenger had unfastened his seat belt at some time during a long flight did not constitute contributory negligence under art.21.<sup>157</sup>

## Contributory negligence

37-034 Under art.21 of the Warsaw Convention 1929,<sup>158</sup> which was unchanged by the Hague Protocol 1955,<sup>159</sup> if the carrier proves that the damage was caused by or contributed to by the negligence of the injured person, the court may, in accordance with the provisions of its own law, exonerate the carrier wholly or partly from its liability. This is retained, with a drafting change, in the MP4 Convention.<sup>160</sup> Under the Montreal Convention 1999, if the carrier proves that the damage was caused by or contributed to by the negligence or other wrongful act or omission of the person claiming compensation, or the person from whom his or her rights are derived, the carrier is wholly or partly exonerated from its liability to the claimant to the extent that such negligence or wrongful act or omission caused or contributed to the damage.<sup>161</sup>

## Upper financial limit of liability

37-035 In cases governed by the Warsaw Convention 1929, in the absence of a special contract, and unless the carrier loses the protection of art.22(1) of the Convention (by failing to deliver a passenger ticket, or on proof of wilful misconduct by the carrier, its servants or agents), its liability in the carriage of persons is limited to the sum of 125,000 francs for each passenger.<sup>162</sup> The figure of 8,300 SDRs was substituted for the amount in francs by Montreal Additional Protocol No.1 of

1975. <sup>163</sup> Under the Warsaw-Hague text and the MP4 Convention, and in the absence of a special contract, and unless the carrier loses the protection of art.22(1) of the Convention (by failing to deliver a passenger ticket, or on it being shown that the damage resulted from the intentional or reckless misconduct of the carrier, its servants or agents), its liability in the carriage of persons is limited to the sum of 250,000 francs for each passenger. <sup>164</sup> In cases under the Montreal Convention 1999, there is no limit to the damages which may be payable once the liability of the carrier for the death of or injury to a passenger has been established. However, for damages not exceeding a prescribed amount

<sup>165</sup>

**1** for each passenger, the carrier is not able to exclude or limit its liability. The carrier is not liable for such damages to the extent that they exceed the prescribed amount if the carrier proves that (a) such damage was not due to the negligence or other wrongful act or omission of the carrier or its servants or agents; or (b) such damage was solely due to the negligence or other wrongful act or omission of a third party. <sup>166</sup> The references to “special contract” mean in practice terms in the carrier’s Conditions of Carriage.

- 37-036 A large number of airlines are now parties to agreements which have an effect similar to and supplement the provisions of the Montreal Convention 1999: the IATA Intercarrier Agreement on Passenger Liability of 1995 and its Intercarrier Implementation Agreement of 1996, and the ATA Implementing Agreement of 2005. <sup>167</sup>

## Unfair terms

- 37-037 Under Pt 2 of the Consumer Rights Act 2015 various types of contractual term are classed as unfair and so not binding on the consumer. They include any term which has the object or effect of excluding or limiting the trade’s liability in the event of the death of or personal injury to the consumer resulting from an act or omission of the trader. As already noted, in cases covered by the Montreal Convention 1999 any contractual provision tending to relieve the carrier of liability or to fix a lower limit than that laid down in the applicable Convention is null and void. <sup>168</sup> Part 2 of the Consumer Rights Act 2015 itself does not apply to a term of a contract, or to a notice, to the extent that it reflects (a) mandatory statutory or regulatory provisions, or (b) the provisions or principles of an international convention to which the United Kingdom is a party. <sup>169</sup>

## Misconduct

- 37-038

In cases governed by the Warsaw Convention 1929, the carrier is not entitled to avail itself of the provisions which limit or exclude its liability,<sup>170</sup> if the damage is caused by its wilful misconduct or by such default on its part as, in accordance with the law of the court seised of the case, is considered to be equivalent to wilful misconduct; or by the wilful misconduct or equivalent fault of any servant or agent of the carrier acting within the scope of his or her employment.<sup>171</sup> The test of “wilful misconduct” having proved unsatisfactory, a new formulation was adopted in the Hague Protocol of 1955. Under the Warsaw-Hague text and the MP4 Convention, the limits of the liability specified in art.22 do not apply if it is proved that the damage<sup>172</sup> resulted from an act or omission of the carrier, its servants or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result; provided that, in the case of such act or omission of a servant or agent, it is also proved that he or she was acting within the scope of his or her employment.<sup>173</sup> In the Montreal Convention 1999, intentional or reckless misconduct is relevant in passenger cases only in respect of liability for delay.<sup>174</sup>

- 37-039 This loss of the carrier’s protection by virtue of misconduct has been much debated as far as the construction of the expressions “with intent to cause damage” and “recklessly and with knowledge that damage would probably result” is concerned. It seems clear that the probability of the result qualifies the nature of the act or omission of the carrier, i.e. if the nature of the act or omission necessarily makes damage—any damage—probable and not just possible, the requirements of the Convention provision will be met.<sup>175</sup> The probability does not have to be high or predominant<sup>176</sup>: one just anticipates damage from the act or omission. “Probably” just means that something is likely to happen.<sup>177</sup>

## A subjective test

- 37-040 In construing the term “recklessly and with knowledge that damage would probably result” the courts have applied a subjective approach. It must be shown that the relevant actor himself had knowledge that damage would probably result. It is not enough to show that some other person had that knowledge, or that he would have had it if only he had applied his mind to the matter.<sup>178</sup> So in a case involving a failure by the commander of a passenger aircraft to give warnings of turbulence,<sup>179</sup> the Court of Appeal held that if the pilot did not know that damage would probably result from his omission, the court was not entitled to attribute to him knowledge which another pilot might have possessed or which he himself should have possessed. Similarly, it has been held that there can be no reliance on “background knowledge”, facts within a pilot’s knowledge but not present in his mind at the time of the relevant acts or omissions, even if, had he thought about them, they would have led to him appreciating the probability of damage, in this context.<sup>180</sup>

## An alternative approach

- 37-041 Taken to its logical conclusion, the subjective test would make it impossible for a plaintiff to establish misconduct by the carrier other than in the exceptional case. It is submitted that a fairer balance has to be struck between the parties. That such a balance can be achieved was demonstrated by a Canadian decision in which it was held that where, on the evidence, goods must have been stolen by some employee of the carrier having access to them, and where it could be concluded that they had been stolen in the course of that employee's employment, it was not necessary specifically to identify the thief before concluding that in stealing them he had acted with intent to cause damage or recklessly and with knowledge that damage would probably result. A thief must be deemed to have knowledge that theft is damaging to the owner.<sup>181</sup>

## Failures at the corporate level

- 37-042 Misconduct of course not only covers the acts or omissions of the carrier's employees or agents but also embraces the acts or omissions of the carrier itself at corporate level. If therefore the carrier has a reckless system—say, with regard to the operation of procedures to ensure the safety of passengers—or if he has failed to modify his system in light of painful experience—this may lead to a finding of misconduct.

## Liability of carrier's employees or agents

- 37-043 If the action is brought, not against the carrier, but against his employees or agents, they are entitled to avail themselves of the limit of liability which the carrier himself could have invoked, provided they prove that they were acting within the scope of their employment. This is expressly provided in the Warsaw-Hague text,<sup>182</sup> the MP4 Convention,<sup>183</sup> and the Montreal Convention 1999,<sup>184</sup> and is generally taken to have been the case under the Warsaw Convention 1929.<sup>185</sup> It is further provided that, in that case, the aggregate amount recoverable from the carrier and his employees and agents is not to exceed that limit. If the damage resulted from an act or omission of the employee or agent done with intent to cause damage or recklessly and with knowledge that damage would probably result, that fact has the same effect on the liability of the carrier, his employees and agents as similar conduct by the carrier himself.

## Fatal accidents

- 37-044 Section 3 of the Carriage by Air Act 1961 provides that references in s.1 of the Fatal Accidents Act 1976 to a wrongful act, neglect or default shall include references to any occurrence which gives rise to liability under the applicable convention.<sup>186</sup> Hence, in the event of the death of a passenger, the Fatal Accidents Act 1976 will determine which defendants can recover damages for the loss of their breadwinner.<sup>187</sup> The damages are not limited to financial loss.<sup>188</sup>

## Several actions by one passenger

- 37-045 The limitations on liability in art.22 of the Warsaw-Hague text, in the MP4 Convention, and in arts 21 and 22 of the Montreal Convention 1999 apply whatever the nature of the proceedings by which liability may be enforced. They apply to the aggregate liability of the carrier in all proceedings which may be brought against it under the law of any part of the United Kingdom, together with any proceedings brought against it outside the United Kingdom.<sup>189</sup> These provisions are also applied by the Carriage by Air Acts (Application of Provisions) Order 2004<sup>190</sup> to proceedings under the unamended Warsaw Convention and under that Convention as amended by Montreal Additional Protocol No.1; and by the Civil Liability (Contribution) Act 1978 to proceedings under that Act to recover contribution from any other person liable in respect of the same damage.<sup>191</sup> A court may, at any stage of the proceedings, make any such order as appears to the court to be just and equitable in view of the limits set in the Conventions and of any proceedings which have been, or are likely to be, commenced in the United Kingdom or elsewhere to enforce the liability in whole or in part.<sup>192</sup> The court is expressly given jurisdiction to award an amount less than it would have awarded if the limitation in the applicable Convention applied solely to the proceedings before the court, and can make any part of its award conditional on the result of any other proceedings.<sup>193</sup> Where there are claims under both the Fatal Accidents Act 1976 and the Law Reform (Miscellaneous Provisions) Act 1934 and the combined total damages would exceed the applicable Convention limit, the amounts recoverable under art.22(1) will be apportioned by the court in accordance with s.4(2) of the Carriage by Air Act 1961,<sup>194</sup> the court making such order as is just and equitable.

## Overbooking

- 37-046 Whilst it is not unreasonable for a carrier to exclude liability for damage occasioned by delay in the event inter alia of facts beyond his control or facts not reasonably to be anticipated there seems no good reason for a carrier to escape liability when the likelihood of delay is in practical terms

reasonably foreseeable. This could happen, for example, when a carrier overbooks the capacity of an aircraft on a particular flight as a matter of commercial policy, thus deliberately creating a risk that he will not be able to accommodate all the passengers who hold tickets and who turn up for the flight. The policy of overbooking was examined by the House of Lords in *British Airways Board v Taylor*,<sup>195</sup> a case on the applicability of s.14 of the Trade Descriptions Act 1968 to air carriers' reservations. Although at one stage, airlines sought to avoid liability through terms in their Conditions of Carriage, most have now adopted a "denied boarding compensation policy". It seems likely that liability for "overbooking" would arise outside art.19 which in all versions of the Warsaw Convention and in the Montreal Convention 1999 governs liability for delay. Decisions in other jurisdictions show a tendency to treat such cases as amounting to non-performance of the contract rather than as creating delay in the carriage by air.<sup>196</sup> Denied boarding compensation under European Parliament and Council Regulation 261/2004<sup>197</sup> applies, inter alia, to denied boarding as a result of overbooking.

## Successive carriers

- 37-047 A carriage to be performed by several successive carriers is deemed to be one undivided carriage for the purposes of the Convention if it is regarded by the parties as a single operation, whether there is a single contract or a series of contracts, and it does not lose its international character merely because one contract or a series of contracts is to be performed entirely within the territory of the same state.<sup>198</sup> Each carrier who accepts passengers, baggage or cargo under such a carriage is subjected to the rules of the Convention, and is deemed to be one of the contracting parties to the contract of carriage insofar as the contract deals with that part of the carriage which is performed under his supervision.<sup>199</sup> In the case of carriage of this nature, however, the passenger or his representative can only sue the carrier who performed the carriage during which the accident or the delay occurred, except when by express agreement the first carrier assumed liability for the whole journey.<sup>200</sup> IATA Conditions negative any such agreement.<sup>201</sup> Hence, if part of the carriage not only is, but to the knowledge of the passenger is to be, performed by a carrier other than the one who made the contract, the liability of each carrier is limited to what happens during his part of the journey.

## Contracting carriers and "actual" carriers

- 37-048 The situation is different, however, if one carrier makes the contract with the passenger, and another carrier by virtue of authority from the first performs the whole or part of the carriage without becoming a "successive carrier" as above defined. This would happen if, for instance, the passenger was not told at the time when he made his contract that another carrier would perform the whole or

part of the carriage.<sup>202</sup> This situation is dealt with by the Guadalajara Convention 1961, which is supplementary to the Warsaw Convention and has the force of law in the United Kingdom by virtue of the *Carriage by Air (Supplementary Provisions) Act 1962*.<sup>203</sup> With minor drafting changes, the text of the Guadalajara Convention is incorporated as Ch.V (arts 39 to 48) of the Montreal Convention 1999. The general effect is that in relation to the carriage performed by the actual carrier, an action for damages may be brought, at the option of the plaintiff, against that carrier or the contracting carrier, or against both together or separately. If the action is brought against only one of those carriers, that carrier will have the right to require the other carrier to be joined in the proceedings, the procedure and effects being governed by the law of the court seised of the case.<sup>204</sup> The rules of the applicable convention will govern all claims,<sup>205</sup> but the aggregate of the amounts recoverable from the actual carrier and the contracting carrier (and from their respective employees and agents acting within the scope of their employment) may not exceed the highest amount which could be awarded against either the contracting carrier under that Convention, or against the actual carrier under that Convention, as applied by the Guadalajara Convention.<sup>206</sup> Each carrier is, in general, benefitted by, and liable for, the other's acts and omissions and those of the other's employees or agents acting within the scope of their employment; but those of the actual carrier and of his employees or agents are of course only imputed to the contracting carrier in relation to that part of the carriage which the actual carrier performs, and vice versa.<sup>207</sup> Thus, if the actual carrier and his employees and agents took all necessary measures to avoid the damage, the contracting carrier can rely on this fact as a defence. On the other hand, no act or omission of the contracting carrier or his employees or agents will subject the actual carrier to liability exceeding the limits specified in art.22 of the Warsaw Convention<sup>208</sup>; nor can the actual carrier be adversely affected by any special contract between the passenger and the contracting carrier which has the effect of enlarging his liability, unless the actual carrier agreed to it.<sup>209</sup>

## Sub-contracted carriage

- 37-049 The Guadalajara Convention appears to assume that, as between the passenger and the contracting carrier, the contracting carrier is entitled to sub-contract the contract of carriage to another carrier. Airlines' conditions of contract always reserve the right to substitute other carriers for the whole or part of the journey in question.<sup>210</sup> In the absence of such a term, where for example a passenger negotiated a contract with the owner of a light aircraft for a flight to a family function on a basis akin to that of an air-taxi flight, it is not clear whether the pilot could sub-contract the carriage to another. There is very little English authority as to when a contract of carriage can be sub-contracted. Even if an unauthorised sub-contracting amounted, on the facts of a particular case, to a breach of contract, it is very doubtful whether this would disqualify the contracting carrier from relying on the defences and limitations of liability contained in the Warsaw Convention.

37-050

It has been held sufficient to create a “successive carrier” situation where a contractual carrier’s timetable forms part of the contract of carriage and makes it clear that part of the carriage is to be performed by another carrier.<sup>211</sup> This was in a pre-Guadalajara Convention case. The provisions of the Guadalajara Convention make it unnecessary, however, to contrive “successive carrier” relationships.

## Disabled persons and persons with reduced mobility

- 37-051 European Parliament and Council Regulation 1107/2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air applies in respect of both disabled persons and persons with reduced mobility, defined as: “any person whose mobility when using transport is reduced due to any physical disability (sensory or locomotor, permanent or temporary, intellectual disability or impairment, or any other cause of disability, or age, and whose situation needs appropriate attention and the adaptation to his or her particular needs of the service made available to all passengers)”,<sup>212</sup> thus including the blind, the old and also those with a temporary injury. Enforcement of Regulation 1107/2006 is by means of a civil procedure which replaced the earlier criminal offences.<sup>213</sup> Regulation 1107/2006 applies to disabled persons and persons with reduced mobility using or intending to use commercial passenger air services on departure from, on transit through, or on arrival at an airport, when the airport is situated in the United Kingdom; and to passengers departing from an airport situated in a country other than the United Kingdom to an airport situated in: (a) the United Kingdom, if the operating carrier is a Community air carrier or a UK air carrier; or (b) the territory of an EU Member State, if the operating carrier is a UK air carrier.<sup>214</sup>
- 37-052 Air carriers, their agents and tour operators must not refuse, on grounds of disability or reduced mobility, to accept a flight reservation or embark a person (provided the person has a valid ticket and reservation), and must not require that the person can only travel if accompanied by another person who can give assistance.<sup>215</sup> If applicable safety requirements, the size of the aircraft or its doors, makes embarkation physically impossible, the air carrier (or its agent or tour operator) must make reasonable efforts to propose an acceptable alternative, and the person must be offered the right of reimbursement or re-routing, and must be given reasons.<sup>216</sup> Amongst other obligations, airlines, their agents and tour operators must provide specified types of assistance without charge to disabled persons.<sup>217</sup> This includes carriage of recognised assistance dogs in the cabin (subject to national regulations), transport of mobility equipment, making all reasonable efforts to arrange seating to meet the person’s needs, assistance in moving to toilet facilities and all reasonable efforts to give an accompanying person a seat next to the disabled person.

37-053

In *Hook v British Airways Plc; Stott v Thomas Cook Tour Operators*<sup>218</sup> the claimant alleged a breach by the carrier of the obligation in art.10 to make reasonable efforts to meet his seating needs. It was held that although reg.9 of the Civil Aviation (Air Travel for Disabled Persons and Persons with Reduced Mobility) Regulations 2007<sup>219</sup> provides that a claim by a disabled person or a person with reduced mobility for an infringement of any of his rights under Regulation 1107/2006 may be made the subject of civil proceedings in the same way as any other claim in tort, this had to be interpreted so as to avoid conflict with the exclusivity provisions in art.29 of the Montreal Convention<sup>220</sup> which were binding on EU institutions. It followed that a claim for damages could not be made in respect of anything occurring during the time (when the passenger is on board the aircraft or in the course of any of the operations of embarking or disembarking)<sup>221</sup> in which the Convention is applicable.

## Footnotes

- 103 *Ross v Pan American Airways Inc*, 299 N.Y. 88 (1949); *Block v Compagnie Nationale Air France*, 386 F. 2d 323 (1967), US Ct of Appeals, 5th Cir.
- 104 Passenger Conditions (PSC(24) 1724) art.1.
- 105 *Western Digital Corp v British Airways Plc* [2001] Q.B. 733, CA.
- 106 Drion, pp.58–62. cf. *Herd v Clyde Helicopters Ltd* [1997] A.C. 534; *Re Mexico City Aircrash of October 31, 1979*, 708 F. 2d 400 (1983) US Court of Appeals, 9th Cir.
- 107 *Laroche v Spirit of Adventure (UK) Ltd* [2009] EWCA Civ 12, [2009] Q.B. 778.
- 108 Carriage by Air Acts (Application of Provisions) Order 2004 (SI 2004/1899) Sch.2 art.3(1).
- 109 Carriage by Air Act 1961 Sch.1 art.3(1); Sch.1A as inserted by SI 1999/1312 art.3(1). See *Abnett v British Airways Plc* [1997] A.C. 430, HL; and the cargo case of *Fujitsu Computer Products Corp v Bax Global Inc* [2005] EWHC 2289 (Comm), [2006] 1 Lloyd's Rep. 231.
- 110 Carriage by Air Act 1961 Sch.1B as inserted by SI 2002/263 art.3(1).
- 111 Carriage by Air Act 1961 Sch.1B as inserted by SI 2002/263 art.3(2).
- 112 Carriage by Air Act 1961 Sch.1B as inserted by SI 2002/263 art.3(4).
- 113 *Fosbroke-Hobbes v Airwork Ltd* [1937] 1 All E.R. 108.
- 114 *Mertens v Flying Tiger Line Inc*, 341 F.2d. 851 (1965), US Ct of Appeals, 2nd Circuit; *Warren v Flying Tiger Line Inc*, 352 F.2d. 494 (1965), US Ct of Appeals, 9th Cir.
- 115 *Lisi v Alitalia-Linee Aeree Italiane SpA* [1967] 1 Lloyd's Rep. 140, US Ct of Appeals, 2nd Circuit; affirmed [1968] 1 Lloyd's Rep. 505, US SC. This decision also rested on an interpretation of the unamended Convention (as to the effect of omitting the required statement) which was later rejected by the US Supreme Court: *Chan v Korean Air Lines Ltd*, 109 S.Ct. 1676 (1989). In Canada, the legibility test in *Lisi v Alitalia-Linee Aeree Italiane SpA* was applied in respect of the “notice” required by the Warsaw-Hague text (*Montreal Trust Co v Canadian Pacific Airlines Ltd* [1977] 2 Lloyd's Rep. 80, SC of Canada), but not followed in the context in which it was decided, that of the “statement” in the unamended

- Convention, in *Ludecke v Canadian Pacific Airlines Ltd [1979] 2 Lloyd's Rep. 260, SC of Canada*.
- 116 *Chan v Korean Air Lines Ltd*, above.
- 117 Carriage by Air Acts (Application of Provisions) Order 2004 (SI 2004/1899) Sch.2 art.3(2). See *Preston v Hunting Air Transport Ltd [1956] 1 Q.B. 454*. The provisions excluding or limiting liability include art.20 (which enables the carrier to escape liability if he proves that he, his servants and agents have taken all necessary measures), art.21 (contributory negligence) and art.22 (limit to damages payable by the carrier).
- 118 See above, para.37-024.
- 119 Carriage by Air Act 1961 Sch.1 art.3(2); Sch.1A as inserted by SI 1999/1312 art.3(2).
- 120 Carriage by Air Act 1961 Sch.1B as inserted by SI 2002/263 art.3(5).
- 121 Carriage by Air Act 1961 Sch.1 art.34; Sch.1A as inserted by SI 1999/1312 art.34; Sch.1B as inserted by SI 2002/263 art.51; Carriage by Air Acts (Application of Provisions) Order 2004 (SI 2004/1899) Sch.2 art.34.
- 122 European Parliament and Council Regulation 2111/2005 on the establishment of a list of air carriers subject to an operating ban within the United Kingdom and on informing air transport passengers of the identity of the operating air carrier (a retained EU Regulation) art.11. Failure to comply is made an offence by the Civil Aviation (Provision of Information to Passengers) Regulations 2006 (SI 2006/3303).
- 123 European Parliament and Council Regulation 1008/2008 of 24 September 2008 on common rules for the operation of air services in the United Kingdom (a retained EU Regulation as amended by the Operation of Air Services (Amendment, etc.) (EU Exit) Regulations 2018/1392) art.23(1); *Air Berlin Plc & Co Luftverkehrs KG v Bundesverband der Verbraucherzentralen und Verbraucherverbände - Verbraucherzentrale Bundesverband eV (C-290/16) EU:C:2017:523*. For enforcement in the UK, see Pt 2 of the Operation of Air Services (Pricing etc.) Regulations 2013 (SI 2013/486) regs 4 and 5.
- 124 Carriage by Air Acts (Application of Provisions) Order 2004 (SI 2004/1899) Sch.2 art.33; Carriage by Air Act 1961 Sch.1 art.33; Sch.1A as inserted by SI 1999/1312 art.33; Sch.1B as inserted by SI 2002/263 art.27. Note the possible relevance of Equality Act 2010 s.29 (discrimination in the provision of services). However in *Hook v British Airways Plc; Stott v Thomas Cook Tour Operators [2014] UKSC 15, [2014] A.C. 1347* where the Act was not in issue, it was held that the Montreal Convention was intended to deal comprehensively with the carrier's liability so that a claim for breach of duty under equality laws or alleging ill-treatment of a disabled passenger was precluded.
- 125 PSC(24)1724 art.7.1. For overbooked flights, see below, para.37-046.
- 126 Carriage by Air Acts (Application of Provisions) Order 2004 (SI 2004/1899) Sch.2 art.17.
- 127 Carriage by Air Act 1961 Sch.1B as inserted by SI 2002/263 art.17(1).
- 128 *Zicherman v Korean Air Lines Ltd*, 116 S.Ct. 629 (1996).
- 129 *Walz v Clickair SA (C-63/09) EU:C:2010:251; [2010] E.C.R. I-4239*.
- 130 *Adatia v Air Canada (1992) 2 S. & B. Av. R. VII/63, CA; Galvin v Aer Rianta Unreported 13 October 1993, Irish High Ct; Phillips v Air New Zealand [2002] EWHC 800 (Comm), [2002] 1 All E.R. (Comm) 801; Barracough v Thomas Cook Airlines Ltd Unreported 23 April 2010, Manchester Cty Ct* (wheelchair incident 300 metres from departure gate; not "embarking").

- 131 See the tripartite test developed in the American cases of *Day v Trans World Airlines Inc*, 528 F. 2d. 31 (1975), *US Ct of Appeals*, 2nd Cir (cert. denied 429 US 890 (1976)); and *Evangelinos v Trans World Airlines Inc*, 550 F.2d. 152 (1976), *US Ct of Appeals*, 3rd Cir; and a test based on location in *MacDonald v Air Canada*, 439 F.2d. 1402 (1971), *US Ct of Appeals*, 1st Cir.
- 132 This approach is to be found in a number of cases in civil law jurisdictions: e.g. *Maché v Air France*, 20 R.F.D.A. 228 (1966) Cour de Cassation. See also *Hernandez v Air France*, 545 F. 2d. 279 (1976), 1st Cir (cert. denied 97 S.Ct. 1592 (1977)), speaking of the need for a logical nexus between air travel per se and the accident. See Shawcross and Beaumont, at Vol.1, paras VII[721]–[723].
- ①133 Civil Aviation Act 1982 s.75(4).
- ①134 *Air France v Saks*, 105 S.Ct. 1338 (1985) cf. *Chaudhari v British Airways Plc*, *The Times*, 7 May 1997, CA (passenger with paralysis of the left side of his body could not claim that a fall on board the aircraft occurring as he tried to stand was an “accident”); *Barclay v British Airways Plc* [2008] EWCA Civ 1419, [2009] 1 All E.R. 871 (passenger’s slip on standard feature of passenger cabin, a plastic strip covering the seat fix tracking, not an “accident”); *Labbadia v Alitalia (Societa Aerea Italiana SpA)* [2019] EWHC 2103 (Admin), [2019] 2 Lloyd’s Rep. 273 (slip on compacted snow on disembarkation stairs without any canopy held an “accident”); *Ford v Malaysian Airline Systems Berhad* [2013] EWCA Civ 1163, [2014] 1 Lloyd’s Rep. 301 (passenger unable to urinate during flight due to a medical condition, so “internal” to the passenger; diuretic administered by a doctor also on board; later tests suggested that treatment inappropriate; held not an “unusual” event for the purposes of art.17).
- ①135 As in *GN v ZU (C-532/18)* [2020] 1 Lloyd’s Rep. 124.
- ①136 *Wallace v Korean Air*, 214 F. 3d 293 (2000), 2nd Cir.
- ①137 *Morris v KLM Royal Dutch Airlines* [2001] EWCA Civ 790, [2001] 3 All E.R. 126.
- ①138 *GN v ZU (C-532/18)* [2020] 1 Lloyd’s Rep. 124.
- ①139 See *Morris v KLM Royal Dutch Airlines*, above; *King v Bristow Helicopters Ltd* [2002] UKHL 7, [2002] 2 A.C. 628.
- ①140 *Re Deep Vein Thrombosis and Air Travel Group Litigation* [2005] UKHL 72, [2006] 1 A.C. 495. For a full discussion, see Shawcross and Beaumont, at Vol.1, paras VII[691] et seq.
- ①141 *Olympic Airways v Husain*, 124 S.Ct. 1221 (2004).
- ①142

*Olympic Airways v Husain*, 124 S.Ct. 1221 (2004); *Povey v Qantas Airways Ltd* [2005] HCA 33, (2005) 216 A.L.R. 427; *Deep Vein Thrombosis and Air Travel Group Litigation* [2003] EWCA Civ 1005, [2004] Q.B. 234, per Lord Phillips of Worth Matravers MR and the same case on appeal, [2005] UKHL 72, [2006] 1 A.C. 495, per Lord Mance.

- ①143 The view taken in *Blansett v Continental Airlines Inc* 379 F 3d 177 (2004), 5th Cir. See *YL v Altenrhein Luftfahrt GmbH* (C-70/20) [2021] 2 Lloyd's Rep. 436 (hard landing not an accident).

- ①144 *Austrian Airlines* (C-589/20).

145 *Eastern Airlines Inc v Floyd*, 111 S.Ct. 1489 (1991); *Kotsambasis v Singapore Airlines Ltd* (1997) 148 A.L.R. 498, NSWCA. The position stated in the text was accepted by counsel for both parties in *Sidhu v British Airways Plc* [1995] P.I.Q.R. P427, CA, but some doubt was expressed by Lord Hope on appeal in the same case: *Abnett v British Airways Plc* [1997] A.C. 430.

146 *Morris v KLM Royal Dutch Airlines*, above; *King v Bristow Helicopters Ltd* [2002] UKHL 7, [2002] 2 A.C. 628.

147 *Ehrlich v American Airlines Inc*, 360 F. 3d 366 (2004), 2nd Cir.

148 Carriage by Air Acts (Application of Provisions) Order 2004 (SI 2004/1899) Sch.2 art.20(1); Carriage by Air Act 1961 Sch.1 art.20; Sch.1A as inserted by SI 1999/1312 art.20.

149 Carriage by Air Act 1961 Sch.1B as inserted by SI 2002/263 art.19. For the application of the Montreal Convention 1999 to govern the liability of United Kingdom air carriers, see above, para.37-019.

150 100,000 SDRs in the original text of the Convention, raised by decisions of the ICAO Council with effect from 30 December 2009 to 113,100 SDRs and with effect from 28 December 2019 to 128,821 SDRs.

- ①151 *Mather v EasyJet Airline Co Ltd* [2022] CSOH 40, 2022 S.L.T. 631.

152 Carriage by Air Act 1961 Sch.1B as inserted by SI 2002/263 art.21(2).

153 [1963] 1 Lloyd's Rep. 626.

154 *Goldman v Thai Airways International Ltd* (1981) 125 S.J. 413 (reversed on other grounds [1983] 1 W.L.R. 1186, CA). A similar interpretation was arrived at in *United International Stables Ltd v Pacific Western Airlines Ltd* (1969) 5 D.L.R. 3d 67, SC of British Columbia; and *Manufacturers Hanover Trust Co v Alitalia*, 429 F.Supp. 964 (1977), US District Ct. The approach in this last decision was expressly approved in *Swiss Bank Corp v Brink's-MAT Ltd* [1986] Q.B. 853 at 96–97.

155 *Swiss Bank Corp v Brink's-MAT Ltd*, above, at 97.

156 Kahn-Freund, p.727.

157 *Goldman v Thai Airways International Ltd* (1981) 125 S.J. 413; reversed on another ground [1983] 1 W.L.R. 1186, CA: see below, para.37-040.

158 Carriage by Air Acts (Application of Provisions) Order 2004 (SI 2004/1899) Sch.2 art.21.

159 Carriage by Air Act 1961 Sch.1 art.21.

160 Carriage by Air Act 1961 Sch.1A as inserted by SI 1999/1312 art.21(1).

- 161 Carriage by Air Act 1961 Sch.1B as inserted by SI 2002/263 art.20. For the application of the Montreal Convention 1999 to govern the liability of United Kingdom air carriers, see above, para.37-019.
- 162 Carriage by Air Acts (Application of Provisions) Order 2004 (SI 2004/1899) Sch.2 art.22.
- 163 Carriage by Air Act 1961 Sch.1 art.22.
- 164 Carriage by Air Act 1961 Sch.1A as inserted by SI 1999/1312 art.22.
- 165 100,000 SDRs in the original text of the Convention, raised by decisions of the ICAO Council with effect from 30 December 2009 to 113,100 SDRs and with effect from 28 December 2019 to 128,821 SDRs. For (belated) implementation in the UK, see [Carriage by Air \(Revision of Limits of Liability under the Montreal Convention\) Order 2021 \(SI 2021/1448\)](#).
- 166 Carriage by Air Act 1961 Sch.1B as inserted by SI 2002/263 art.21. For the application of the Montreal Convention 1999 to govern the liability of United Kingdom air carriers, see above, para.37-019.
- 167 See generally, Shawcross and Beaumont, at Vol.1, paras VII[183] et seq.
- 168 See para.37-015.
- 169 Consumer Rights Act 2015 s.73, as amended by the [Consumer Protection \(Amendment, etc.\) \(EU Exit\) Regulations 2018/1326](#). See generally Ch.40.
- 170 See above, para.37-026.
- 171 Carriage by Air Acts (Application of Provisions) Order 2004 (SI 2004/1899) Sch.2 art.25. See *Horabin v British Overseas Airways Corp [1952] 2 All E.R. 1016*; *Rustenburg Platinum Mines Ltd v South African Airways [1977] 1 Lloyd's Rep. 564*; *Thomas Cook Group Ltd v Air Malta Co Ltd [1997] 2 Lloyd's Rep. 399*; *Rolls Royce Plc v Heavylift-Volga DNEPR Ltd [2000] 1 All E.R. (Comm) 796*.
- 172 See *Goldman v Thai Airways International Ltd [1983] 1 W.L.R. 1186, CA*, for the view that the damage anticipated must be of the same kind of damage as that suffered.
- 173 Carriage by Air Act 1961 Sch.1 art.25; Sch.1A as inserted by SI 1999/1312 art.25.
- 174 Carriage by Air Act 1961 Sch.1B as inserted by SI 2002/263 art.22(5). For the application of the Montreal Convention 1999 to govern the liability of United Kingdom air carriers, see above, para.37-019.
- 175 *Goldman v Thai Airways International Ltd (1981) 125 S.J. 413*. See, generally, *Bin Cheng (1977) 2 Annals of Air and Space Law 55*.
- 176 *Goldman v Thai Airways International Ltd*, above.
- 177 *Goldman v Thai Airways International Ltd [1983] 1 W.L.R. 1186, CA*, per Eveleigh LJ at 1196; *Qantas Airways Ltd v SS Pharmaceutical Co Ltd [1991] 1 Lloyd's Rep. 288, NSWCA*.
- 178 *SS Pharmaceutical Co Ltd v Qantas Airways Ltd [1989] 1 Lloyd's Rep. 319, NSWSC*.
- 179 *Goldman v Thai Airways International Ltd [1983] 1 W.L.R. 1186, CA*. See also *Gurtner v Beaton [1993] 2 Lloyd's Rep. 369, CA*; *Connaught Laboratories Ltd v British Airways (2002) 217 D.L.R. (4th) 717 Ont.*
- 180 *Nugent v Michael Goss Aviation Ltd [2000] 2 Lloyd's Rep. 222, CA* (but note the observations of Pill LJ as to the possible relevance of the pilot's "fund of knowledge", the general knowledge his experience of flying brings him).

- 181 *Swiss Bank Corp v Air Canada* (1981) 129 D.L.R. (3d) 85 at 95, 104, Federal Ct, Canada (affirmed (1987) 44 D.L.R. (4th) 680, Federal Ct of Appeal).
- 182 Carriage by Air Act 1961 Sch.1 art.25A.
- 183 Carriage by Air Act 1961 Sch.1A as inserted by SI 1999/1312 art.25A.
- 184 Carriage by Air Act 1961 Sch.1B as inserted by SI 2002/263 art.30.
- 185 *Reed v Wiser*, 555 F. 2d 1079 (1977), 2nd Cir.
- 186 Carriage by Air Act 1961 s.3 as amended by SI 1999/1312 and SI 2002/263.
- 187 *Kandalla v British European Airways* [1981] Q.B. 158.
- 188 *Preston v Hunting Air Transport Ltd* [1956] 1 Q.B. 454.
- 189 Carriage by Air Act 1961 s.4, as amended by SI 1999/1312 and SI 2002/263.
- 190 SI 2004/1899 art.7.
- 191 Civil Liability (Contribution) Act 1978 s.2(3).
- 192 Carriage by Air Act 1961 s.4(2), as amended by SI 1999/1312 and SI 2002/263.
- 193 Carriage by Air Act 1961 s.4(3), as amended by SI 1999/1312 and SI 2002/263.
- 194 As amended by SI 2002/263.
- 195 [1976] 1 W.L.R. 13.
- 196 *Wolgel v Mexicana Airlines*, 821 F. 2d 442 (1987), US Ct of Appeals, 7th Circuit; Bundesgerichtshof, 20 September 1978, 1979 Z.L.W. 134.
- 197 See paras 37-054—37-072.
- 198 Carriage by Air Acts (Application of Provisions) Order 2004 (SI 2004/1899) Sch.2 art.1(3); Carriage by Air Act 1961 Sch.1 art.1(3); Sch.1A as inserted by SI 1999/1312 art.1(2); Sch.1B as inserted by SI 2002/263 art.1(3). See *Rotterdamsche Bank NV v BOAC* [1953] 1 W.L.R. 493, see below, para.37-050. Both parties to the contract of carriage must regard the carriage as a single, individual operation: *Karfunkel v Compagnie Nationale Air France*, 427 F.Supp. 971 (1977), New York District Ct; *Bafana v Commercial Airways (Pty) Ltd* [1990] (1) S.A. 368, Witwatersrand Ct.
- 199 Carriage by Air Acts (Application of Provisions) Order 2004 (SI 2004/1899) Sch.2 art.30(1); Carriage by Air Act 1961 Sch.1 art.30(1); Sch.1A as inserted by SI 1999/1312 art.30(1); Sch.1B as inserted by SI 2002/263 art.36(1). A carrier may be a successive carrier under art.30 even where the contract of carriage was incomplete to the extent that return flights were not agreed upon, provided that the completion of the contract and consequent amendment of the ticket were within the contemplation of the parties when the contract was made. The completion and amendment will relate back to the time of making of the contract, thus making the carrier in question a successive carrier: *Briscoe v Compagnie Nationale Air France*, 290 F.Supp. 863 (1968), New York District Ct.
- 200 Carriage by Air Acts (Application of Provisions) Order 2004 (SI 2004/1899) Sch.2 art.30(2); Carriage by Air Act 1961 Sch.1 art.30(2); Sch.1A as inserted by SI 1999/1312 art.30(2); Sch.1B as inserted by SI 2002/263 art.36(2).
- 201 PSC(24)1724 art.15.1.2(b).
- 202 See European Parliament and Council Regulation 2111/2005 of 14 December 2005 on the establishment of a Community list of air carriers subject to an operating ban within the United

- Kingdom and on informing air transport passengers of the identity of the operating air carrier; and above, para.37-027.
- 203 The [1962 Act](#) was drafted so as to be supplementary to both the Warsaw Convention 1929 and the Warsaw-Hague text; it has been amended to perform the same function in respect of the MP4 Convention: [Carriage by Air \(Supplementary Provisions\) Act 1962 s.2\(1\)\(b\)](#), as amended by [SI 1999/1312](#).
- 204 [Carriage by Air \(Supplementary Provisions\) Act 1962 Sch. art.VII](#); [Carriage by Air Act 1961 Sch.1B](#) as inserted by [SI 2002/263 art.45](#).
- 205 [Carriage by Air \(Supplementary Provisions\) Act 1962 Sch. art.II](#); [Carriage by Air Act 1961 Sch.1B](#) as inserted by [SI 2002/263 art.40](#).
- 206 [Carriage by Air \(Supplementary Provisions\) Act 1962 Sch. art.VI](#); [Carriage by Air Act 1961 Sch.1B](#) as inserted by [SI 2002/263 art.44](#).
- 207 [Carriage by Air \(Supplementary Provisions\) Act 1962 Sch. art.III](#); [Carriage by Air Act 1961 Sch.1B](#) as inserted by [SI 2002/263 art.41](#).
- 208 [Carriage by Air \(Supplementary Provisions\) Act 1962 Sch. art.III\(2\)](#); [Carriage by Air Act 1961 Sch.1B](#) as inserted by [SI 2002/263 art.41\(2\)](#).
- 209 [Carriage by Air \(Supplementary Provisions\) Act 1962 Sch. art.III\(2\)](#); [Carriage by Air Act 1961 Sch.1B](#) as inserted by [SI 2002/263 art.41\(2\)](#).
- 210 For code-shares, see IATA recommended conditions ([PSC\(24\)1724](#)) art.2.3.
- 211 *Rotterdamsche Bank NV v British Overseas Airways Corp [1953] 1 W.L.R. 493*. The use of joint designator codes, identifying two carriers in respect of the same journey, will have the same effect.
- 212 Regulation 1107/2006 (a retained EU Regulation) art.2(a).
- 213 [Civil Aviation \(Access to Air Travel for Disabled Persons and Persons with Reduced Mobility\) Regulations 2014 \(SI 2014/2833\) reg.4](#) as amended by [SI 2016/729](#) (which designates the CAA and dispute resolution bodies). See [Enterprise Act 2002 s.212](#) for which [2014 Regulations](#) are listed for enforcement purposes: [Enterprise Act 2002 Sch.13 para.9CA](#) as inserted by the [Consumer Protection \(Enforcement\) \(Amendment, etc.\) Regulations 2020 \(SI 2020/484\)](#).
- 214 Regulation 1107/2006 art.1(2) and (3) as amended by the [Air Passenger Rights and Air Travel Organisers' Licensing \(Amendment\) \(EU Exit\) Regulations 2019 \(SI 2019/278\)](#). See *Viegas, (2013) 38 A.S.L. 47*. A UK air carrier is one with a valid operating licence granted by the CAA: art.2(m), as inserted by [SI 2019/278](#).
- 215 Regulation 1107/2006 art.3.
- 216 Regulation 1107/2006 art.4 as amended by the [Air Passenger Rights and Air Travel Organisers' Licensing \(Amendment\) \(EU Exit\) Regulations 2019 \(SI 2019/278\)](#).
- 217 Regulation 1107/2006 art.10 and Annex 2.
- 218 *[2014] UKSC 15, [2014] A.C. 1347*. See *Prassl, (2014) 130 LQR 538*.
- 219 [SI 2007/1895](#).
- 220 See para.37-014.
- 221 See paras 37-029—37-030.

## **(b) - Passengers: Denied Boarding, Cancellation and Long Delay**

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Volume II - Specific Contracts

Chapter 37 - Carriage by Air

Section 5. - Liability of the Carrier

### **(b) - Passengers: Denied Boarding, Cancellation and Long Delay**

#### **Regulation 261/2004**

37-054 Under a retained EU Regulation, European Parliament and Council Regulation 261/2004,  
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**U** compensation is payable and other assistance is to be provided to passengers denied boarding or subjected to cancellation of or long delay to their journey. This takes the form of standardised and immediate assistance in contrast to the individualised damage for delay under the Montreal Convention 1999.

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**U** It follows that Regulation 261/2004 does not operate to limit the liability of the carrier for delay under the Montreal (or Warsaw) Convention, and that the Montreal Convention does not preclude the payment of compensation under the Regulation.

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**U**

#### **When does the Regulation apply?**

37-054A The scope of Regulation 261/2004 depends in part on the location of airports and partly on the identity of carriers. It applies to: (1) passengers carried by any carrier between any two airports in

the UK; (2) passengers carried by any carrier from an airport in the UK to one in any other country; (3) passengers carried by a UK air carrier from an airport in any other country to one in the UK; (4) passengers carried by a Community air carrier from an airport in any other country (whether or not an EU Member State) to one in the UK; (5) passengers carried by a UK air carrier from an airport in any other country (whether or not an EU Member State) to an airport in the EU; and (6) passengers carried by a UK air carrier between two airports within the same EU Member State, unless, in each case, the passengers received benefits or compensation and were given assistance in that other country.

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**U** In applying the Regulation, the Court of Appeal chose to follow the CJEU's ruling

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**U** that where a series of flights is booked as a single unit, it is treated as a whole. This has a number of consequences. First, the Regulation applies when the first leg is operated from a UK airport and this causes a connecting flight to be missed, even if the resulting denied boarding is on the second leg operated by a non-UK carrier and wholly outside the UK.

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**U** Second, in some cases a delay in departure from an airport in the UK cannot found a claim. So in *Chelluri v Air India Ltd*,

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**U** the claimant booked flights Kansas City – Detroit – London Heathrow – Mumbai – Bengaluru. The first two legs were operated by a US carrier, Delta Airlines, and the final two by Air India. The departure from Heathrow, the third leg of the journey, was delayed by 48 hours and the claimant's arrival at the final destination was delayed by much more than the 4 hours needed to found a claim for compensation. As the four flights were to be treated as a unit, the only relevant departure was that from Kansas City; the delay at Heathrow could not found a claim.

37-055

**U** The Regulation applies only to passengers who (a) have a confirmed reservation on the flight concerned

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**U** and, except in the case of cancellation, present themselves for check-in as stipulated and at the time indicated in advance and in writing (including by electronic means) by the air carrier, the tour operator or an authorised travel agent (or, if no time is indicated, not later than 45 minutes before the published departure time)

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**U**; or (b) have been transferred by an air carrier or tour operator from the flight for which they held a reservation to another flight, irrespective of the reason.

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**U** Regulation 261/2004 does not apply to passengers travelling free of charge or at a reduced fare not available directly or indirectly to the public; but it does apply to passengers having tickets issued under a frequent flyer programme or other commercial programme by an air carrier or tour operator.

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**U** The Regulation only applies to passengers transported by motorised fixed wing aircraft.

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**U** The Regulation does not affect the rights of passengers under the [Package Travel and Linked Travel Arrangements Regulations 2018](#).

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**U** It does not apply in cases where a package tour is cancelled for reasons other than cancellation of the flight.

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37-056 The CAA is designated under the [Civil Aviation \(Denied Boarding, Compensation and Assistance\) Regulations 2005](#) for the purposes of Regulation 261/2004 art.16(1) as responsible for the enforcement of the Regulation.

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**U** Where appropriate, it must take the measures necessary to ensure that the rights of passengers are respected. Each passenger may complain to the CAA or either of the dispute resolution bodies designated for the purposes of art.16(2) of the Regulation (CEDR Services Ltd and Consumer Dispute Resolution Ltd) about an alleged infringement of the Regulation.

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**U**

37-057 An operating air carrier is guilty of an offence if, in the United Kingdom or elsewhere, it fails to comply with an obligation imposed on it by arts 4, 5, 6, 10, 11 or 14.

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**U**

## Jurisdiction

- 37-058 Regulation 261/2004 does not contain any provisions regarding jurisdiction. The jurisdiction of the English courts is therefore governed by the usual rules applying to actions in personam.

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## Which carrier is liable?

- 37-059 Liability under Regulation 261/2004 is always that of the operating carrier. “Operating carrier” is defined to mean “an air carrier that performs or intends to perform a flight under a contract with a passenger or on behalf of another person, legal or natural, having a contract with that passenger”.  
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U This was given an extended meaning by the CJEU: it held an air carrier was an “operating air carrier” in respect of a passenger where the passenger had concluded a contract with a tour operator for a specific flight operated by that air carrier, even if the carrier had not confirmed the hours of the flight and/or the tour operator had not made a booking for that passenger with that air carrier. It is difficult to see that such a carrier either performed or intended to perform the flight, but the Court held that by making an offer of air carriage which corresponded to the offer referred to by a tour operator in its relations with a passenger (and even though that offer might be subject to change), the carrier must be regarded as having intended to perform a flight.

## The position where there are connecting flights

- 37-059A In the usual case, the relevant carrier will be that which operated the flight on which the delay or denied boarding occurred but the position is less straightforward where there are connecting flights booked as part of a single journey. It is not uncommon for a delay on the first of two flights (not necessarily in itself sufficient to attract the Regulation) causes a passenger to arrive too late for a connecting flight and therefore to be denied boarding. The Court of Appeal in *Gahan v Emirates*, in which both flights were by the same carrier, held the carrier liable on such facts: the first leg was operated from an EU airport and it was immaterial that the denied boarding was on the second leg operated by a non-Community carrier and wholly outside the EU.

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**U** Under the Regulation as incorporated into UK law, the same result would seem to follow if the first leg was operated from a UK airport and the denied boarding was on the second leg operated by a non-UK carrier.

37-060 An extraordinary decision of the Court of Justice of the EU strains the meaning of “operating carrier” beyond any reasonable interpretation. In *CS v Ceske aerolinie as*,  
**U** <sup>241</sup>

**U** a delay occurred on the second leg, causing the passenger to arrive at the destination more than three hours late. The defendant, a Community carrier, performed the first leg departing from an EU airport. It was clearly the “operating carrier” in respect of that flight. It did not perform the flight on which the delay occurred but the court held that as, for some purposes, flights with one or more connections that are the subject of a single reservation must be regarded as a single unit, it was also the case that, in the context of such flights, “an operating air carrier that has operated the first flight cannot take refuge behind a claim that the performance of a subsequent flight operated by another air carrier was imperfect”. The defendant was therefore liable for the delay. The court also relied on art.3(5) of the Regulation, which provides that where an operating air carrier which has no contract with the passenger performs obligations under the Regulation, it is to be regarded as doing so on behalf of the person having a contract with that passenger. Without any full analysis the court held that it followed that where, in the context of connecting flights consisting of two flights that were the subject of a single reservation, the second flight is performed under a code-share agreement by an operating air carrier other than the operating air carrier that entered into the contract of carriage with the passengers concerned and that performed the first flight, the latter carrier remains subject to contractual obligations to the passengers, even in relation to the performance of the second flight. It is far from clear how a code-share agreement can be relevant to liability to the passenger, especially as EU law recognises the importance to the passenger of knowing which airline is the actual operator.

<sup>242</sup>

**U**

## Limitation of actions

37-061 Regulation 261/2004 does not contain provisions concerning limitations of actions. In *Cuadrench Moré v Koninklijke Luchtvaart Maatschappij NV*<sup>243</sup> the European Court held that neither art.35 of the Montreal Convention nor art.29 of the Warsaw Convention was applicable (since compensation under Regulation 261/2004 falls outside the scope of those conventions); the matter was governed by the domestic legal system of each Member State, as long as those domestic systems safeguarded

the rights of individuals derived from EU law. In England, the six-year limitation period under [s.9 of the Limitation Act 1980](#) applies.<sup>244</sup>

## Denied boarding

37-062 *Denied boarding* is defined in Regulation 261/2004 as:

“... a refusal to carry passengers on a flight, although they have presented themselves for boarding under the conditions laid down in Article 3(2), except where there are reasonable grounds to deny them boarding, such as reasons of health, safety or security, or inadequate travel documentation.”<sup>245</sup>

“Denied boarding” is not limited to overbooking cases.<sup>246</sup> When an operating air carrier reasonably expects to deny boarding on a flight, it must first call for volunteers to surrender their reservations in exchange for benefits under conditions to be agreed between the passenger concerned and the operating air carrier. Volunteers must be assisted in accordance with art.8 (in respect of reimbursement or re-routing), such assistance being additional to the agreed benefits.<sup>247</sup> If an insufficient number of volunteers comes forward to allow the remaining passengers with reservations to board the flight, the operating air carrier may then deny boarding to passengers against their will and immediately compensate them in accordance with art.7 and assist them in accordance with arts 8 and 9.<sup>248</sup>

An incident of denied boarding must be considered in context. Compensation was held not to be payable to a passenger who had a single reservation for connecting flights and that reservation was amended against the passenger’s will, so that the passenger was denied boarding on the first planned flight but was given a seat on a later flight which allowed the passenger to board the second planned flight and to reach the final destination at the arrival time originally scheduled.<sup>249</sup>

## Cancellation

37-063 *Cancellation* is defined in Regulation 261/2004 as meaning “the non-operation of a flight which was previously planned and on which at least one place was reserved”.

<sup>250</sup>

**U** The Regulation distinguishes between cancellation and delayed departure, without defining “delay”. The European Court has held that a flight is delayed for the purposes of art.6 of Regulation 261/2004, which is drafted in terms of delay in departure, if it is operated in accordance with the original planning and its actual arrival time is later than the scheduled arrival time; the flight can be classified as cancelled only if the air carrier arranges for the passengers to be carried on another flight whose original planning is different from that of the flight for which the booking was made.

[251](#)

**U** However, “cancellation” includes the situation in which the aircraft takes off but, for whatever reason, is subsequently forced to return to the airport of departure where the passengers are transferred on to another flight.

[252](#)

**U** It also includes cases in which the departure time of the relevant flight is brought forward by more than one hour.

[253](#)

**U** In the case of cancellation, the passengers concerned must (a) be offered assistance by the operating air carrier in accordance with art.8 (reimbursement or re-routing); and (b) be offered assistance by the operating air carrier in accordance with art.9(1)(a) (meals and refreshment) and 9(2) (messages), as well as, in event of re-routing when the reasonably expected time of departure of the new flight is at least the day after the departure as it was planned for the cancelled flight, the assistance specified in art.9(1)(b) and 9(1)(c) (hotel accommodation and associated transport); and (c) have the right to compensation by the operating air carrier in accordance with art.7.

[254](#)



37-064

**U** However, passengers are not entitled to compensation if (i) they are informed of the cancellation at least two weeks before the scheduled time of departure; or (ii) they are informed of the cancellation between two weeks and seven days before the scheduled time of departure and are offered re-routing, allowing them to depart no more than two hours before the scheduled time of departure and to reach their final destination less than four hours after the scheduled time of arrival; or (iii) they are informed of the cancellation less than seven days before the scheduled time of departure and are offered re-routing, allowing them to depart no more than one hour before the scheduled time of departure and to reach their final destination less than two hours after the scheduled time of arrival.

[255](#)

**U** The operating carrier has the burden of proof concerning the questions as to whether and when the passenger has been informed of the cancellation. [256](#) An operating air carrier is also not obliged

to pay compensation if it can prove that the cancellation is caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken.<sup>257</sup>

## Delayed departure

- 37-065 The provisions as to delayed departure in Regulation 261/2004 apply where a flight is expected to be delayed: (a) for two hours or more in the case of flights of 1,500 km or less; (b) for three hours or more in the case of intra-Community flights of more than 1,500 km and other flights between 1,500 and 3,500 km; or (c) for four hours or more in the case of other flights.<sup>258</sup> When an operating carrier reasonably expects a flight to be delayed beyond its scheduled time of departure for a period that attracts Regulation 261/2004, it must offer the affected passengers: (a) the assistance specified in art.9(1)(a) (meals and refreshment) and art.9(2) (free messages); and (b) when the reasonably expected time of departure is at least the day after the time of departure previously announced, the assistance specified in art.9(1)(b) and 9(1)(c) (hotel accommodation and associated transport); and (c) when the delay is at least five hours, the assistance specified in art.8(1)(a) (reimbursement or re-routing).<sup>259</sup> In any event, the assistance shall be offered within the time limits set out in art.6(1) with respect to each distance bracket.<sup>260</sup>

## Late arrival at destination

- 37-066 The remedies for delay in art.6 of Regulation 261/2004 define delay in terms of delayed departure. The text of the Regulation provides no remedy for late arrival at the destination. It was nonetheless held by the European Court in *Sturgeon v Condor Flugdienst GmbH*<sup>261</sup> that the Regulation gave a remedy for delayed arrival at destination, where the lateness was three hours or more (regardless of the length of the flight); and that the remedy was compensation, payable unless the carrier proves that the long delay was caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken, namely circumstances beyond the actual control of the air carrier. The decision was much criticised but was reaffirmed by the European Court in *Nelson v Deutsche Lufthansa GmbH*.<sup>262</sup> One question asked repeatedly was whether the compensation for loss of time caused by late arrival is compensatory or not and what the consequences of an affirmative answer would mean in the light of the Montreal Convention's embargo on non-compensatory damages. In *Nelson v Deutsche Lufthansa GmbH* the European Court held that as compensation for loss of time fell outside the definition of damage occasioned by delay in art.19 of the Montreal Convention, it also fell outside the scope of art.29 of the Montreal Convention, and thus the obligation under Regulation 261/2004 to compensate delayed passengers for their loss of time was compatible with art.29 of the Montreal Convention.<sup>263</sup> The approach of the Court to the interpretation of art.29 of the Montreal Convention is plainly at variance with

that of the UK Supreme Court and the US Supreme Court in the landmark cases of *Hook v British Airways Plc*<sup>264</sup> and *El Al International Airlines Ltd v Tseng*,<sup>265</sup> according to which the Warsaw and Montreal Conventions are exclusive in the sense that if the damage arises out of international carriage to which the convention applies, no other basis for a claim is allowed, not only when the convention does provide in a basis for the claim, but also if it does not. There is liability under the *Sturgeon* rule whether or not there was also delay in the departure of the flight sufficient to attract art.6.<sup>266</sup> Now that CJEU decisions may be departed from by appellate courts in England,<sup>267</sup> this line of cases is certain to be challenged.

## Upgrading and downgrading

- 37-067 If, as a result of over-booking or re-routing, an airline places a passenger in a higher class, it may not request any supplementary payment, and if it places a passenger in a lower class it must reimburse the passenger (a) 30 per cent of the ticket price for flights of 1,500 km or less; (b) 50 per cent of the ticket price for intra-EC flights of more than 1,500 km and other flights between 1,500 and 3,500 kms; (c) 75 per cent of the ticket price for all other flights.<sup>268</sup> In the case of journeys comprising several legs, downgrading occurring on only one leg, the reimbursement is to be based on the price of the specific flight, and not the overall ticket price. If the price of the individual leg is not specified on the ticket, the basis should be the part of the overall ticket price that corresponds to the quotient of the distance of the flight in question and the total distance that the passenger is entitled to travel.<sup>269</sup> For this purpose, taxes and charges are excluded from the concept of ticket price, as long as neither the requirement to pay those taxes and charges, nor their amount, depends on the class for which that ticket has been purchased.<sup>270</sup>

## The remedies: compensation

- 37-068 Where compensation is prescribed as a remedy under Regulation 261/2004, for denied boarding,<sup>271</sup> cancellation,<sup>272</sup> and under the *Sturgeon* rule as to long delay in arrival at destination,<sup>273</sup> the level of compensation payable depends upon the length of the flight, namely (a) £220 for all flights of 1,500 kilometres or less; (b) £350 for all flights between 1,500 and 3,500 kilometres; (c) £520 for all other flights, the distance being calculated to the last destination at which the denial of boarding or cancellation will delay the passenger's arrival.<sup>274</sup> "Distance" relates, in the case of air routes with connecting flights, only to the distance calculated between the first point of departure and the final destination on the basis of the "great circle" method, regardless of the distance actually flown.<sup>275</sup> The amount of mandatory compensation is halved when the

airline offers re-routing to final destination on a flight which arrives not later than two, three or four hours respectively later than the original scheduled arrival time.

<sup>276</sup>

**U** Article 12 of the Regulation provides that the compensation provided for by art.7 is “without prejudice to a passenger’s rights to further compensation”, although the compensation granted under art.7 may be deducted from such compensation. This allows a national court to award compensation for damage, including non-material damage, under the Montreal Convention or under the applicable domestic law of a Member State arising from breach of a contract of carriage by air. It may not serve as a legal basis for a claim for compensation of the expenses a passenger incurred because of the failure of that carrier to fulfil its obligations to assist and provide care under art. 8 and art.9 of Regulation 261/2004 in case of delay or cancellation of a flight.<sup>277</sup>

## Compensation not payable in extraordinary circumstances

- 37-069 If the cancellation or delay of more than three hours in arrival at destination is caused by extraordinary circumstances, which could not have been avoided even if all reasonable measures had been taken, the carrier is not obliged to pay the standardised compensation provided for in art.7 of the Regulation; the burden of proof is on the carrier.<sup>278</sup> Two recitals address this issue: Recital (14) lists as situations that might constitute extraordinary circumstances:

“... cases of political instability, meteorological conditions incompatible with the operation of the flight concerned, security risks, unexpected flight safety shortcomings and strikes that affect the operation of an operating air carrier.”

Recital (15) deals specifically with the impact of an air traffic management decision.<sup>279</sup> In *Wallentin-Hermann v Alitalia Linee Aeree Italiane SpA*,<sup>280</sup> the European Court noted that “extraordinary circumstances” was not defined in the text of the Regulation, and that as art.5(3) derogated from the principle of compensation it had to be interpreted strictly. The carrier must prove that the cancellation is caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken: the carrier must establish that, even if it had deployed all its resources in terms of staff or equipment and the financial means at its disposal, it would clearly not have been able—unless it had made intolerable sacrifices in the light of the capacities of its undertaking at the relevant time—to prevent the extraordinary circumstances with which it was confronted from leading to the cancellation of the flight.<sup>281</sup> The examples given in Recital (14) did not themselves constitute extraordinary circumstances, but they might produce such circumstances.

37-070

A technical problem caused by failure to maintain an aircraft is to be regarded as inherent in the normal exercise of an air carrier's activity, and not as amounting to "extraordinary circumstances".

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**U** The same is true even of unexpected problems, not attributable to poor maintenance, given the very complex operating systems of aircraft.

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**U** A collision with mobile boarding stairs has been held to be an event inherent in the normal exercise of the activity of the air carrier and consequently, cannot be considered as an extraordinary circumstance.

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**U** The same result has been reached in cases concerning bird strikes,

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**U** strike action by aircrew,

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**U** damage to an aircraft tyre caused by a foreign object on the runway,

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**U** closure of the runway owing to a fuel spillage,

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**U** lightning hitting the aircraft during take-off,

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**U** or lightning damage to an aircraft intended for use.

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**U** The spread of volcanic ash from an eruption of the Icelandic volcano Eyjafjallajökull in 2010 did amount to "extraordinary circumstances"

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**U**; so did the closure of the runway at Treviso airport owing to a fuel spillage.

292

**U** At least in certain circumstances, the sudden illness of the pilot may amount to "extraordinary circumstances".

293

**U** So may the behaviour of an unruly passenger that forces the pilot to divert to another airport to disembark the passenger.

294

**U** An operating carrier may be able to rely on extraordinary circumstances affecting a previous flight by the same aircraft when they cause the cancellation or long delay complained of.  
<sup>295</sup>



## The remedies: reimbursement or re-routing, care

- 37-071 The remedy of reimbursement or re-routing under art.8 of Regulation 261/2004 obliges the airline to offer the passenger the choice between (a) reimbursement of the full ticket cost<sup>296</sup> for the part or parts of the journey not made, and for the part or parts already made if the flight is no longer serving any purpose in relation to the passenger's original travel plan, together with, when relevant, a return flight to the first point of departure at the earliest opportunity<sup>297</sup>; and (b) re-routing under comparable transport conditions<sup>298</sup> to final destination at the earliest opportunity or, at the passenger's choice, at a later date.<sup>299</sup> In a number of cases the question has arisen whether a passenger whose flight has been seriously delayed at departure and who chooses the option to be reimbursed for the ticket price by the airline is still entitled to compensation under art.7 of the Regulation. Although the Regulation seems to be sufficiently clear in this matter concerning cancellations in art.5 (the answer would be affirmative), the Regulation lacks a clear provision on this matter for delays. Breach of art.8 does not give rise to a civil action for damages,<sup>300</sup> but is a matter for administrative enforcement, the Civil Aviation Authority being responsible for enforcement in the United Kingdom.<sup>301</sup>
- 37-072 The obligation under art.9 of Regulation 261/2004 on the airline to provide care entails the provision of (a) meals and refreshments in a reasonable relation to the waiting time<sup>302</sup>; (b) hotel and accommodation<sup>303</sup> where necessary, and related transport; and (c) two telephone calls, telex or fax messages, or emails. The duty to provide care has been held to be ongoing and to last until (a) the passenger's arrival at the final destination or (b) the passenger's election to make his own way to the final destination.<sup>304</sup>

## Footnotes

- ②222 European Parliament and Council Regulation 261/2004 of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or of long delay in flights. Reference is made to the Regulation as in

force in the UK with the amendments made by the [Air Passenger Rights and Air Travel Organisers' Licensing \(Amendment\) \(EU Exit\) Regulations 2019/278](#). Airlines must ensure that a clearly legible and visible notice containing prescribed wording as to the Regulation's provisions is displayed to passengers at check-in, and must provide passengers affected by denied boarding, cancellation or delay with a notice setting out the rules for compensation and assistance: art.14. The CJEU has interpreted this to mean that the air carrier must inform the passenger of the precise name and address of the undertaking from which to claim compensation under art.7 and, where appropriate, to specify the documents which need to be attached to the claim: [\*AD v Corendon Airlines \(C-146/20, C-188/20, C-196/20, and C-270/20\) \[2022\] Bus. L.R. 263\*](#). For commentary on many aspects of the Regulation, see Bobek and Prassl (eds), *Air Passenger Rights: Ten Years On* (2016).

- ②223 [\*R \(on application of International Air Transport Association\) v Department for Transport \(C-344/04\) EU:C:2006:10, \[2006\] E.C.R. I-403.\*](#)
- ②224 [\*Gahan v Emirates \[2017\] EWCA Civ 1530\* at \[31\]ff.; \[\\*Guaitoli v easyJet Airline Co Ltd \\(C-213/18\\) \\[2019\\] 4 W.L.R. 160.\\*\]\(#\)](#)
- ②225 Regulation 261/2004 art.3(1). See [\*Emirates Airlines Direktion für Deutschland v Schenkel \(C-173/07\) EU:C:2008:400, \[2008\] E.C.R. I-5237\*](#). A UK air carrier is one with a valid operating licence granted by the CAA: reg.2(m).
- ②226 [\*Wegener v Royal Air Maroc SA \(C-537/17\) EU:C:2018:361, \[2018\] Bus. L.R. 1366; CS v Ceske aerolinie as \(C-502/18\) EU:C:2019:604, \[2020\] 1 C.M.L.R. 12.\*](#)
- ②227 [\*Gahan v Emirates \[2017\] EWCA Civ 1530\* \(effectively overruling \[\\*Sanghvi v Cathay Pacific Airways \\[2011\\] EWHC 1684 \\(Ch\\), \\[2012\\] 1 Lloyd's Rep 46\\*\]\(#\); \[\\*Varano v Air Canada \\[2021\\] EWHC 1336 \\(QB\\)\\*\]\(#\)\).](#)
- ②228 [\*\[2021\] EWCA Civ 1953, \[2022\] Bus. L.R. 286.\*](#)
- ②229 For the meaning of this term, see [\*AD v Corendon Airlines \(C-146/20, C-188/20, C-196/20, and C-270/20\) \[2022\] Bus. L.R. 263\*](#) (confirmation by a tour operator not the airline).
- ②230 A number of French decisions (e.g. [\*A v Air France \(Cour de cassation, 10 October 2019\)\*](#) require the passenger to prove arrival at check-in at the required time; in some but not all cases production of a boarding pass has been held sufficient. The CJEU has held that that passengers who hold a confirmed reservation on a flight, and have taken that flight, must be considered to have properly satisfied the requirement to present themselves for check-in; production of a boarding card is not required: [\*LC v easyJet Airline Co Ltd \(C-756/18\) \[2019\] 2 Lloyd's Rep. 591.\*](#)
- ②231

Regulation 261/2004 art.3(2). See *Caldwell v easyJet Airline Co Ltd*, 2015 S.L.T. (Sh Ct) 223; *Kupeli v Kibris Turk Hava Yollari Sirketi* [2016] EWHC 930 (QB).

②32 Regulation 261/2004 art.3(3).

②33 Regulation 261/2004 art.3(4).

②34 SI 2018/634.

②35 Regulation 261/2004 art.3(6).

②36 Civil Aviation (Denied Boarding, Compensation and Assistance) Regulations 2005 (SI 2005/975) reg.5(1).

②37 Civil Aviation (Denied Boarding, Compensation and Assistance) Regulations 2005 (SI 2005/975) reg.5(2) as substituted by the Civil Aviation (Denied Boarding, Compensation and Assistance and Access to Air Travel for Disabled Persons and Persons with Reduced Mobility) (Amendment) Regulations 2016 (SI 2016/729).

②38 Civil Aviation (Denied Boarding, Compensation and Assistance) Regulations 2005 (SI 2005/975) reg.3(1) as substituted by the Air Passenger Rights and Air Travel Organisers' Licensing (Amendment) (EU Exit) Regulations 2019 (SI 2019/278).

②39 Regulation 261/2004 art.2(b).

②40 *Gahan v Emirates* [2017] EWCA Civ 1530, [2018] 1 W.L.R. 2287. See *Varano v Air Canada* [2021] EWHC 1336 (QB).

②41 C-502/18, EU:C:2019:604, [2020] 1 C.M.L.R. 12.

②42 See para.37-027.

243 *Cuadrench Moré v Koninklijke Luchtvaart Maatschappij NV* (C-139/11) EU:C:2012:741, [2013] 2 All E.R. (Comm) 1152.

244 *Dawson v Thomson Airways Ltd* [2014] EWCA Civ 845, [2015] 1 W.L.R. 883. For the relevance of provisions in the carrier's Conditions of Carriage, see *Vergara v Ryanair Ltd* 2014 S.L.T. (Sh Ct) 119.

245 Regulation 261/2004 art.2(j).

246 *Finnair Oyj v Timy Lassooy* (C-22/11) EU:C:2012:604, [2013] 1 C.M.L.R. 18.

247 Regulation 261/2004 art.4(1).

248 Regulation 261/2004 art.4(1). For the remedies under arts 8 and 9, see paras 37-071—37-072.

249 *OI v Air Nostrum Lineas Aereas del Mediterraneo SA* (C-191/19).

②50

- Regulation 261/2004 art.2(l).
- ②51 *Sturgeon v Condor Flugdienst GmbH* (heard with *Böck v Air France SA (Joined Cases C-402/04 and C-432/07)* EU:C:2009:716, [2009] E.C.R. I-10923. In *Rose v easyJet Airline Co Ltd Unreported 2015, Liverpool Cty Ct*, the court held that a passenger who had been told, incorrectly, by the airline's representatives that the intended flight had been cancelled was entitled to the same remedies as if the cancellation had taken place. *Sed quaere.*
- ②52 *Sousa Rodriguez v Air France (C-83/10)* EU:C:2011:652, [2012] 1 C.M.L.R. 40.
- ②53 *Airhelp Ltd v Laudamotion GmbH (C-263/20)* [2022] Bus. L.R. 251; *AD v Corendon Airlines (C-146/20, C-188/20, C-196/20, and C-270/20)* [2022] Bus. L.R. 263. Such bringing forward amounts to “re-routing”.
- ②54 Regulation 261/2004 art.5(1). For the remedies under arts 8 and 9, see paras 37-071—37-072.
- ②55 Regulation 261/2004 art.5(1)(c); *Airhelp Ltd v Laudamotion GmbH (C-263/20)* [2022] Bus. L.R. 251 (position where passenger booked through an intermediary).
- 256 Regulation 261/2004 art.5(4). When passengers are informed of the cancellation, an explanation must be given concerning possible alternative transport: art.5(2). The carrier is obliged to pay compensation where the airline informs the relevant travel agent in time, but the latter fails to inform the passenger: *Krijgsman v Surinaamse Luchtvaart Maatschappij NV (C-302/16)* EU:C:2017:359.
- 257 Regulation 261/2004 art.5(3). For these extraordinary circumstances, see para.35-069.
- 258 Regulation 261/2004 art.6(1).
- 259 Regulation 261/2004 art.6(1).
- 260 Regulation 261/2004 art.6(2). For the remedies under arts 8 and 9, see paras 37-071—37-072.
- 261 Heard with *Böck v Air France SA (Joined Cases C-402/07 and C-432/07)* EU:C:2009:716, [2009] E.C.R. I-10923, [2010] 2 All E.R. (Comm) 983.
- 262 Heard with *R. (on the application of TUI Travel) v Civil Aviation Authority (Joined Cases C-581/10 and C-629/10)* EU:C:2012:657, [2013] 1 All E.R. (Comm) 385.
- 263 *Joined Cases C-581/10 and C-629/10*, EU:C:2012:657 at [50]–[55].
- 264 [2014] UKSC 15, [2014] A.C. 1347; see para.37-014.
- 265 *119 S.Ct. 662 (1999)*.
- 266 *Air France v Folkerts (C-11/11)* EU:C:2013:106, [2013] All E.R. (EC) 1133. See also *Guadrench More v Koninkijke Luchtvaart Maatschappij NV (C-139/11)* EU:C:2012:741, [2013] 2 All E.R. (Comm) 1152; *Coelho dos Santos v TAP Portugal (C-365/11)* and *Becker v Société Air France (C-584/11)* EU:C:2013:281; *Wegener v Royal Air Maroc SA (C-537/17)* EU:C:2018:361, [2018] Bus. L.R. 1366.
- 267 See Vol.I, para.1-027.
- 268 Regulation 261/2004 art.10(2).

- 269 *Mennens v Emirates Direktion fur Deutschland* (C-255/15) EU:C:2016:472.
- 270 *Mennens v Emirates Direktion für Deutschland* (C-255/15) EU:C:2016:472 at [38].
- 271 Regulation 261/2004 art.4; see para.37-062.
- 272 Regulation 261/2004 art.5(1); see paras 37-063—37-064.
- 273 See para.37-066.
- 274 Regulation 261/2004 art.7(1).
- 275 *Bosken v Brussels Airlines SA/NV* (C-559/16) EU:C:2017:644.
- ②276 Regulation 261/2004 art.7(2). See *Sanghvi v Cathay Pacific Airways* [2011] EWHC 1684 (Ch), [2012] 1 Lloyd's Rep 46 at [27]–[28]; *AD v Corendon Airlines* (C-146/20, C-188/20, C-196/20, and C-270/20) [2022] Bus. L.R. 263.
- 277 *Sousa Rodriguez v Air France* (C-83/10) EU:C:2011:652, [2012] 1 C.M.L.R. 40; *McDonagh v Ryanair* (C-12/11) EU:C:2013:43 [2013] 2 C.M.L.R. 32; *Graham v Thomas Cook Group UK Ltd* [2012] EWCA Civ 1355. Compensation is payable even if the flight in question is part of a package covered by the Package Travel Directive: *Králová v Primera Air Scandinavia A/S* (C-215/18).
- 278 Regulation 261/2004 art.5(3). The National Enforcement Bodies under the Regulation produced in April 2013 a list of events they considered “extraordinary circumstances”; it has no legal force.
- 279 *Blanche v easyJet Airline Co Ltd* [2019] EWCA Civ 69, [2019] 1 Lloyd's Rep. 286.
- 280 C-549/07, EU:C:2008:771 (which applies in cases falling within Recital (14), but not in an art.15 case: *Blanche v easyJet Airline Co Ltd* [2019] EWCA Civ 69, [2019] 1 Lloyd's Rep. 286).
- 281 *Wallentin-Hermann v Alitalia Linee Aeree Italiane SpA* (C-549/07) EU:C:2008:771; *Eglitis v Latvijas Republikas Ekonomikas ministrija* (C-294/10) EU:C:2011:303, [2011] 3 C.M.L.R. 40. See *Dunbar v easyJet Airline Co Ltd*, 2015 GWD 36-570, Sh Ct (North Strathclyde, Paisley).
- ②282 *Wallentin-Hermann v Alitalia Linee Aeree Italiane SpA* (C-549/07) EU:C:2008:771; *Jet2.com Ltd v Huzar* [2014] EWCA Civ 791, [2014] 4 All E.R. 581; *A v Finnair Oyj* (C-832/18) (failure to replace defective component despite spare part in stock).
- ②283 *Van der Lans v Koninklijke Luchtvaartmaatschappij NV* (C-257/14) EU:C:2015:618. cf. *Bland v Thomas Cook Airlines Ltd* Unreported 21 January 2016, Manchester Cty Ct (aircraft tyre damaged by foreign object on runway: extraordinary circumstance).
- ②284 *Siewert v Condor Flugdienst GmbH* (C-394/14) EU:C:2014:2377.
- ②285 *Pesková v Travel Service as* (C-315/15) EU:C:2017:342, [2017] Bus. L.R. 1134.
- ②286 *Krüsemann v TUIfly GmbH* (C-195/17; joined with many others) EU:C:2018:258, [2018] Bus. L.R. 1191 (see *Kucko* (2019) 44 A.S.L. 321); *Ryanair DAC v Commissioner for Civil*

*Aviation [2020] IEC 54; Civil Aviation Authority v Ryanair DAC [2022] EWCA Civ 76; CS v Eurowings GmbH (C-613/20).*

②287 *Germanwings GmbH v Pauels (C-501/17) EU:C:2019.288.*

②288 *Moens v Ryanair Ltd (C-159/18) EU:C:2018:1040, [2019] Bus.L.R. 2041.*

②289 *Monarch Airlines Ltd v Evans and Lee Unreported 14 January 2016, Luton Cty Ct.*

②290 See *X v easyJet (French cour de cassation, 12 September 2018)*.

②291 *Marshall v Iberia Lineas Aereas de España SA Unreported 13 December 2010, Mayor's and City of London Ct* (reversed but not on this point, HH Judge Birtles, 2011, Unreported); *Williams v KLM Royal Dutch Airlines Unreported 2011, Taunton Cty Ct; Rosen v EasyJet Airline Co Ltd Unreported 15 December 2011, Croydon Cty Ct.* However the volcanic eruption did not excuse the carrier from providing the remedies other than compensation: *McDonagh v Ryanair (C-12/11) EU:C:2013:43, [2013] 2 C.M.L.R. 32.*

②292 *Moens v Ryanair Ltd (C-159/18) EU:C:2018:1040.*

②293 *Marchbank-Smith v Virgin Atlantic Airways Ltd Unreported 14 January 2015, Manchester Cty Ct; cf. D v Air India (Cour de cassation, 5 February 2020).*

②294 *LE v Transport Aéreos Portugueses SA (C-74/19), [2020] Bus.L.R. 1503.* It is difficult to support the reasoning in *Bass v easyJet Airline Co Ltd Unreported 24 October 2019 Luton Cty Ct* where the diversion of a flight due to passenger illness was held not to amount to “extraordinary circumstances” as illness was inherent in the carrying of passengers by air, a risk that the air carrier was aware of and had to be prepared for.

②295 *LE v Transport Aéreos Portugueses SA (C-74/19), [2020] Bus.L.R. 1503.*

296 The full cost includes any commission paid by the passenger to an intermediary, unless the commission was fixed without the airline's knowledge: *Harms v Vueling Airlines SA (C-601/17) EU:C:2018:702, [2018] Bus. L.R. 2298.*

297 Reimbursement is excluded where the passenger is entitled to claim under the Package Travel Directive from the tour organiser: Regulation 261/2004 art.8(2); *HQs v Aegean Airlines SA (C-163/18) EU:C:2019:585, [2019] Bus. L.R. 2032.*

298 See *Marshall v Iberia Lineas Aereas de España SA Unreported 2011 (HH Judge Birtles)* (putting on a wait list not comparable to a confirmed flight).

299 *LE v Transport Aéreos Portugueses SA (C-74/19)* (re-routing to arrive a day late not a reasonable measure); *Hendy v Iberian Lineas de España SA Unreported 21 March 2011, Oxford Cty Ct; Rozen v EasyJet Airline Co Ltd Unreported 15 December 2011, Croydon Cty Ct.*

300 *Graham v Thomas Cook Group UK Ltd [2012] EWCA Civ 1355.*

- 301 Civil Aviation (Denied Boarding, Compensation and Assistance) Regulations 2005 (SI 2005/975) reg.5(1). Dispute resolution bodies are specified in reg.5(2) as substituted by SI 2016/729.
- 302 Regulation 261/2004 art.9.
- 303 For the extent of the carrier's duty of care in respect of hotel accommodation, see *NM v ON (C-530/19) EU:C:2020:635, [2020] Bus.L.R. 2008*.
- 304 *Hendy v Iberian Lineas de España SA Unreported 21 March 2011, Oxford Cty Ct; Rozen v EasyJet Airline Co Ltd Unreported 15 December 2011, Croydon Cty Ct.*

## **(c) - Baggage**

**Chitty on Contracts 34th Ed.**

**Consolidated Mainwork Incorporating First Supplement**

**Volume II - Specific Contracts**

**Chapter 37 - Carriage by Air**

**Section 5. - Liability of the Carrier**

### **(c) - Baggage**

#### **Forms of baggage**

- 37-073 In the law of carriage by air, baggage is of two kinds. There is hand baggage, i.e. “objects of which the passenger takes charge himself”<sup>305</sup> and keeps with him in the aircraft; and registered baggage, sometimes termed checked baggage, of which the carrier takes charge. This is carried in the hold of the aircraft in which the passenger travels, or of another aircraft. The IATA Conditions define baggage in general as “your personal property accompanying you in connection with your trip”.<sup>306</sup> The terms “registered” or “registration” used in the Convention in relation to baggage are not defined, and the English court has been prepared to interpret the Convention’s provisions in relation to the carrier’s liability for baggage as if the terms “registered” or “registration” were not there.<sup>307</sup>

#### **Baggage check**

- 37-074 In cases falling under the Warsaw Convention 1929, for the carriage of registered baggage, the carrier must deliver a baggage check in practice combined with the passenger ticket. The baggage check must contain the following particulars: (a) the place and date of issue; (b) the place of departure and of destination; (c) the name and address of the carrier or carriers; (d) the number of the passenger ticket; (e) a statement that delivery of the baggage will be made to the bearer of the baggage check; (f) the number and weight of the packages; (g) the amount of any value at destination declared by the passenger; and (h) a statement that the carriage is subject to the rules relating to liability established by the Warsaw Convention.<sup>308</sup> The absence, irregularity or loss of the baggage check does not affect the existence or the validity of the contract of carriage,

which is nonetheless subject to the rules in the Convention. Nevertheless, if the carrier accepts baggage without a baggage check having been delivered, or if the baggage check does not contain particulars (d), (f) and (h), then the carrier is not entitled to avail itself of those provisions<sup>309</sup> of the Convention which exclude or limit its liability.<sup>310</sup> In cases under the Warsaw-Hague text and the MP4 Convention, in respect of the carriage of registered baggage, a baggage check must be delivered which, unless combined with or incorporated in a passenger ticket which complies with the provisions of the Convention, must contain: (a) an indication of the places of departure and destination; (b) if the places of departure and destination are within the territory of a single high contracting party, one or more agreed stopping places being within the territory of another state, an indication of at least one such stopping place; and (c) a notice to the effect that, if the carriage involves an ultimate destination or stop in a country other than the country of departure, the Warsaw Convention may be applicable and that the Convention governs and in most cases limits the liability of carriers in respect of loss of or damage to baggage.<sup>311</sup> The baggage check constitutes *prima facie* evidence of the registration of the baggage and of the conditions of the contract of carriage.<sup>312</sup> The absence, irregularity, or loss of the baggage check does not affect the existence or the validity of the contract of carriage, which is nonetheless subject to the rules of the Warsaw-Hague text. Nevertheless, if the carrier takes charge of the baggage without a baggage check having been delivered, or if the baggage check does not contain, and is not combined with or incorporated in a passenger ticket which contains, the prescribed notice as to the possible applicability of the Warsaw Convention, the carrier is not entitled to avail itself of the provisions of art.22(2) limiting its liability.<sup>313</sup> In cases under the Montreal Convention 1999, no baggage check is required but the carrier must deliver to the passenger a baggage identification tag for each piece of checked baggage.<sup>314</sup>

## Liability for damage, destruction or loss

37-075 In all cases other than those under the 1999 Convention, unless the carrier can establish one of the defences allowed by the applicable Convention (that is, either that it and its servants or agents had taken all necessary measures to avoid the damage or that it was impossible for it or for them to have taken such measures; or the defence of contributory negligence; or in cases under the 1929 Convention proof that the damage was occasioned by negligent pilotage or negligence in the handling of the aircraft or in navigation and that, in all other respects, the carrier and his servants and agents had taken all necessary measures to avoid the damage), it is liable for damage sustained in the event of the destruction, or loss of, or of damage to, any registered baggage, if the occurrence which caused the damage so sustained took place during the carriage by air.<sup>315</sup> For this purpose, “carriage by air” comprises the period during which the baggage is in the charge of the carrier, whether in an aerodrome or on board an aircraft or, in the case of a landing outside an aerodrome, in any place whatsoever.<sup>316</sup> Under the Montreal Convention 1999, the carrier is liable for damage sustained in case of destruction or loss of, or of damage to, checked baggage upon

condition only that the event which caused the destruction, loss, or damage took place on board the aircraft or during any period within which the baggage was in the charge of the carrier. In the case of unchecked baggage, the carrier is liable if the damage resulted from its fault or that of its servants or agents. However, the carrier is not liable if and to the extent that the damage resulted from the inherent defect, quality, or vice of the baggage, checked or unchecked.<sup>317</sup> European Parliament and Council Regulation 889/2002 applies the Montreal Convention regime to govern the baggage liability of Union air carriers.<sup>318</sup>

## Upper financial limit of liability

- <sup>37-076</sup> In cases governed by the Warsaw Convention 1929, the liability of the carrier in respect of registered baggage is limited to a sum of 250 francs per kilogramme<sup>319</sup> of the lost or damaged package,<sup>320</sup> and liability in respect of objects of which the passenger takes charge himself is limited to 5,000 francs per passenger.<sup>321</sup> In cases governed by the Warsaw-Hague text, the limits remain as in the 1929 Convention.<sup>322</sup> Under the Warsaw-Hague text, however, when the loss, damage or delay of a part of the registered baggage, or of an object contained therein, affects the value of other packages covered by the same baggage check, the total weight of such package or packages must also be taken into consideration in determining the limit of liability.<sup>323</sup> The limits in the 1929 Convention and the Warsaw-Hague text as amended by Montreal Additional Protocols 1975 No.1 and No.2 respectively, and in cases under the MP4 Convention, are 17 SDRs per kilogramme for registered baggage, and 332 SDRs per passenger for unregistered baggage.<sup>324</sup> Under the Montreal Convention 1999 (and the rules of that Convention as applied to Union air carriers under EU law) the liability of the carrier in the case of destruction, loss, damage, or delay to checked or unchecked baggage was limited in the original text of the Convention to 1,000 SDRs for each passenger.<sup>325</sup> This limit was raised with effect from 30 December 2009 to 1,131 SDRs for each passenger and from 28 December 2019 to 1,288 SDRs for each passenger.<sup>326</sup>

**U** The Convention limits apply per passenger; this means that it is not correct to apply the limit separately to claims in respect of material and non-material damage,<sup>327</sup> but that if a single piece of baggage contains property belonging to two or more passengers, each may recover the actual loss up to the convention maximum, and it is immaterial that there is only one baggage check.<sup>328</sup> The sums specified in the Convention are maximum sums, but a claimant must establish the actual loss in accordance with the normal rules of evidence.<sup>329</sup> In all cases, the carrier's liability in respect of registered or checked baggage may be increased if the passenger makes, at the time when the package was handed over to the carrier, a special declaration of the value at delivery and pays a supplementary sum if the case so requires. In that case, the carrier will be liable to pay a sum not

exceeding the declared sum, unless it proves that the sum is greater than the actual value to the passenger at delivery.<sup>330</sup>

## Time for making claims

- 37-077 Where baggage is damaged, the person entitled to delivery must complain to the carrier forthwith after the discovery of the damage, and, at the latest, within (a) under the Warsaw Convention 1929, three days from the date of receipt; and (b) under all the other conventions, seven days from the date of receipt. Where baggage is delayed, the complaint must be made at the latest within (a) under Warsaw Convention 1929, 14 days from the date on which the baggage has been placed at his or her disposal; and (b) under all the other conventions, 21 days from the date on which the baggage has been placed at his or her disposal.<sup>331</sup> “Days” means current days, not working days.<sup>332</sup> Every complaint must be made in writing and given or dispatched within the specified times<sup>333</sup>; an oral complaint recorded in the information system of the carrier, provided the record identifies the complainant, satisfies this requirement.<sup>334</sup> If no complaint is made within the prescribed time limits, no action lies against the carrier, save in the case of fraud on its part.<sup>335</sup> Notice of complaint is not required in the case of total loss or destruction.

## Footnotes

- 305 Carriage by Air Acts (Application of Provisions) Order 2004 (SI 2004/1899) Sch.2 art.22(3); Carriage by Air Act 1961 Sch.1 art.22(3); Sch.1A as inserted by SI 1999/1312 art.1(3). The term “unchecked baggage” is used in the Montreal Convention 1999: *Carriage by Air Act 1961 Sch.1B* as inserted by SI 2002/263 art.17(4) where, however, it is provided that references to “baggage” include both “checked” and “unchecked” baggage. English courts have not examined the question of the proper categorisation of baggage originally taken on board by the passenger but subsequently handed to the aircraft crew for stowage in the hold.
- 306 PSC(24)1724 art.1.
- 307 *Collins v British Airways Board [1982] Q.B. 734, CA*, Kerr LJ dissenting (at 182) considered that “registration” of baggage must require the completion of a document constituting a baggage check to the effect that the carrier had taken charge of registered baggage.
- 308 Carriage by Air Acts (Application of Provisions) Order 2004 (SI 2004/1899) Sch.2 art.4.
- 309 See above, para.37-026.
- 310 Carriage by Air Acts (Application of Provisions) Order 2004 (SI 2004/1899) Sch.2 art.4(4).
- 311 Carriage by Air Act 1961 Sch.1 art.4(1); Sch.1A as inserted by SI 1999/1312 art.4(1). See *Collins v British Airways Board [1982] Q.B. 734, CA*.
- 312 Carriage by Air Act 1961 Sch.1 art.4(2); Sch.1A as inserted by SI 1999/1312 art.4(2).
- 313 Carriage by Air Act 1961 Sch.1 art.4(2); Sch.1A as inserted by SI 1999/1312 art.4(2).

- 314 Carriage by Air Act 1961 Sch.1B as inserted by SI 2002/263 art.3(3).
- 315 Carriage by Air Acts (Application of Provisions) Order 2004 (SI 2004/1899) Sch.2 art.18(1); Carriage by Air Act 1961 Sch.1 art.18(1); Sch.1A as inserted by SI 1999/1312 art.18(1). For the meaning of “damage”, see *Walz v Clickair SA (C-63/09) EU:C:2010:251, [2011] 1 All E.R. (Comm) 1037*, and paras 37-029—37-030, above.
- 316 Carriage by Air Acts (Application of Provisions) Order 2004 (SI 2004/1899) Sch.2 art.18(2); Carriage by Air Act 1961 Sch.1 art.18(2); Sch.1A as inserted by SI 1999/1312 art.18(2).
- 317 Carriage by Air Act 1961 Sch.1B as inserted by SI 2002/263 art.17(2), (4).
- 318 See above, para.37-019.
- 319 Carriage by Air Acts (Application of Provisions) Order 2004 (SI 2004/1899) Sch.2 art.22(2).
- 320 cf. the cargo case of *Data Card Corp v Air Express International Corp [1984] 1 W.L.R. 198*.
- 321 Carriage by Air Acts (Application of Provisions) Order 2004 (SI 2004/1899) Sch.2 art.22(3).
- 322 Carriage by Air Act 1961 Sch.1 art.22(2)(3) (which, as amended by the Carriage by Air and Road Act 1979 s.4, actually contains the limits as amended by Montreal Additional Protocol No.2 of 1975); *Bland v British Airways Board [1981] 1 Lloyd's Rep. 289, CA; Collins v British Airways Board [1982] Q.B. 734, CA*.
- 323 Carriage by Air Act 1961 Sch.1 art.22(2)(b). cf. the cargo case of *Allied Implants Technology Ltd v Lufthansa Cargo AG [2000] 2 Lloyd's Rep. 46*.
- 324 Carriage by Air Acts (Application of Provisions) Order 2004 (SI 2004/1899) Sch.3 art.22(2), (3); Carriage by Air Act 1961 Sch.1 art.22(2), (3) (as amended by the Carriage by Air and Road Act 1979 s.4); Sch.1A as inserted by SI 1999/1312 art.22(2)(a), (3).
- 325 Carriage by Air Act 1961 Sch.1B as inserted by SI 2002/263 art.22(2) (applied to European Union air carriers by Council Regulation 2027/97 art.3.1 as substituted by Parliament and Council Regulation 889/2002).
- ③26 By decisions of the ICAO Council under art.24 of the Convention. For (belated) implementation in the UK, see Carriage by Air (Revision of Limits of Liability under the Montreal Convention) Order 2021 (SI 2021/1448).
- 327 *Walz v Clickair SA (C-63/09) EU:C:2010:251, [2011] 1 All E.R. (Comm) 1037*.
- 328 Bundesgerichtshof, 15 March 2011, XZR 99/10.
- 329 *SL v Vueling Airlines SA (C-86/19)*.
- 330 Carriage by Air Acts (Application of Provisions) Order 2004 (SI 2004/1899) Sch.2 art.22(2); Carriage by Air Act 1961 Sch.1 art.22(2)(a); Sch.1A as inserted by SI 1999/1312 art.22(2)(a); Sch.1B as inserted by SI 2002/263 art.22(2).
- 331 Carriage by Air Acts (Application of Provisions) Order 2004 (SI 2004/1899) Sch.2 art.26(2); Carriage by Air Act 1961 Sch.1 art.26(2); Sch.1A as inserted by SI 1999/1312 art.26(2); Sch.1B as inserted by SI 2002/263 art.31(2).
- 332 Carriage by Air Acts (Application of Provisions) Order 2004 (SI 2004/1899) Sch.2 art.35; Carriage by Air Act 1961 Sch.1 art.35; Sch.1A as inserted by SI 1999/1312 art.35; Sch.1B as inserted by SI 2002/263 art.52.
- 333 Carriage by Air Acts (Application of Provisions) Order 2004 (SI 2004/1899) Sch.2 art.26(3); Carriage by Air Act 1961 Sch.1 art.26(3); Sch.1A as inserted by SI 1999/1312 art.26(3); Sch.1B as inserted by SI 2002/263 art.31(3).

- 334 *Finnair Oyj v Keskinainen Vakuutusyhtio Fennia* (C-258/16) EU:C:2018:252, [2018] 1 W.L.R. 4407.
- 335 Carriage by Air Acts (Application of Provisions) Order 2004 (SI 2004/1899) Sch.2 art.26(4); Carriage by Air Act 1961 Sch.1 art.26(4); Sch.1A as inserted by SI 1999/1312 art.26(4); Sch.1B as inserted by SI 2002/263 art.31(4).

## **(d) - Cargo**

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**Volume II - Specific Contracts**

**Chapter 37 - Carriage by Air**

**Section 5. - Liability of the Carrier**

### **(d) - Cargo**

#### **Air waybill**

- 37-078 In cases governed by the Warsaw Convention 1929 or the Warsaw-Hague text, every carrier of cargo has the right to require the consignor to make out and hand over to him a document called an air waybill.<sup>336</sup> Though the legal responsibility for making out the waybill and for ensuring the correctness of its contents is that of the consignor,<sup>337</sup> in practice the carrier can make out the waybill<sup>338</sup> and, if he does, is deemed to have done so on the consignor's behalf. When more than one package is consigned, the carrier has the right to require a separate waybill for each package.<sup>339</sup> Each air waybill is made out in a set of three: the consignor and carrier retain one each, while the third copy is for the consignee and travels with the cargo.<sup>340</sup> In practice, sets of air waybills may include as many as 15 copies, with three "top copies". In practice, air waybills are not negotiable, though a provision introduced in the Hague Protocol 1955 makes it clear that negotiable air waybills are a possibility.<sup>341</sup>

#### **Statements in waybill**

- 37-079 The statements in the waybill relating to the weight, dimensions and packing of the cargo, and to the number of packages, are *prima facie* evidence of the facts stated; but those relating to the quantity, volume and condition of the cargo do not constitute evidence against the carrier unless they both have been, and are stated in the waybill to have been, checked by him in the presence of the consignor, or relate to the apparent condition of the cargo.<sup>342</sup>

## Absence of waybill, etc.

- 37-080 The absence, irregularity or loss of the document does not affect the existence or validity of the contract of carriage, which continues to be governed by the rules of the applicable convention. In a case governed by the Warsaw Convention 1929, the air waybill must contain many prescribed particulars, and if the carrier accepts cargo without an air waybill having been made out, or if the air waybill does not contain the prescribed particulars, the carrier is not entitled to avail itself of the provisions <sup>343</sup> which exclude or limit its liability. <sup>344</sup> In a case governed by the Warsaw-Hague text, the air waybill must contain the same notice as to the applicability of the Convention as is required for passenger tickets and baggage checks. <sup>345</sup> If, with the consent of the carrier, cargo is loaded on board the aircraft without an air waybill having been made out, or if the air waybill does not contain a notice to the effect that the Convention governs, the carrier cannot avail himself of the limitations on his liability contained in art.22. <sup>346</sup> This is subject to the same exception as in the case of passenger tickets and baggage checks. <sup>347</sup>

## Cargo documentation under recent conventions

- 37-081 The MP4 Convention and the Montreal Convention 1999 also provide that in respect of the carriage of cargo an air waybill must be delivered. <sup>348</sup> However, in cases governed by these conventions any other means that would preserve a record of the carriage to be performed may, with the consent of the consignor, be substituted for the delivery of an air waybill. If such other means are used, the carrier must, if so requested by the consignor, deliver to the consignor a receipt for the cargo permitting identification of the consignment and access to the information contained in the record preserved by such other means. <sup>349</sup> Under the MP4 Convention, the impossibility of using, at points of transit and destination, the other means that would preserve the record of the carriage does not entitle the carrier to refuse to accept the cargo for carriage. <sup>350</sup>

## Acceptability of goods for carriage

- 37-082 The IATA recommended Conditions of Carriage for Cargo entitle the carrier to examine the packaging and contents of all shipments, <sup>351</sup> to the extent permitted by law, to refuse carriage of cargo when circumstances so require. <sup>352</sup> The cargo must be packed in an appropriate way for air carriage so as to ensure that it can be carried safely with ordinary care in handling and so as not to injure or damage any persons, goods or property. <sup>353</sup> Where dangerous goods are to be carried,

the consignor must furnish a dangerous goods transport document, describing and certifying the goods in accordance with the current Technical Instructions for the Safe Transport of Dangerous Goods by Air prepared by ICAO.<sup>354</sup>

## Liability for damage, destruction or loss

- 37-083 In cases governed by the Warsaw Convention 1929 or the Warsaw-Hague text, unless the carrier can establish one of the defences allowed by the applicable Convention (that is, either that it and its servants or agents had taken all necessary measures to avoid the damage or that it was impossible for them to have taken such measures; or in the case of the unamended Convention that the damage was occasioned by negligent pilotage or negligence in the handling of the aircraft and that in all other respects, the carrier and its servants and agents have taken all necessary measures to avoid the damage; or the defence of contributory negligence), it is liable for damage<sup>355</sup> sustained in the event of the destruction or loss of, or of damage to, any cargo if the occurrence<sup>356</sup> which caused the damage so sustained took place during the carriage by air.<sup>357</sup> For this purpose, “carriage by air” comprises the period during which the cargo is in the charge of the carrier, whether in an aerodrome or on board an aircraft, or in the case of a landing outside an aerodrome in any place whatsoever.<sup>358</sup> In cases governed by the MP4 Convention, the carrier is liable, subject to the question of contributory negligence for damage sustained in the event of the destruction or loss of, or damage to, cargo upon condition only that the occurrence which caused the damage so sustained took place during the carriage by air. However, the carrier is not liable if it proves that the destruction or loss of, or damage to, the cargo resulted solely from: (a) the inherent defect, quality or vice of the cargo; (b) defective packing of that cargo performed by a person other than the carrier or its servants or agents; (c) an act of war or an armed conflict; or (d) an act of public authority carried out in connection with the entry, exit or transit of the cargo.<sup>359</sup> Similar rules as to liability are to be found in the Montreal Convention 1999,<sup>360</sup> where there is a simplified definition of the period of carriage by air.<sup>361</sup>

## Upper financial limit of liability

- 37-084 In cases governed by the Warsaw Convention 1929, the liability of the carrier in respect of cargo is limited to a sum of 250 francs per kilogramme of the lost or damaged package.<sup>362</sup> In cases governed by the Warsaw-Hague text, the limits remain as in the 1929 Convention.<sup>363</sup> Under the Warsaw-Hague text, however, when the loss, damage or delay of a part of the cargo, or of an object contained therein, affects the value of other packages covered by the same air waybill, the

total weight of such package or packages must also be taken into consideration in determining the limit of liability.<sup>364</sup> The limits in the 1929 Convention and the Warsaw-Hague text as amended by Montreal Additional Protocol 1975 No.1 and No.2 respectively, and in cases under the MP4 Convention are 17 SDRs per kilogramme.<sup>365</sup> The same limit was set in the original text of the Montreal Convention 1999 but the limit was raised with effect from 30 December 2009 to 19 SDRs per kilogramme and with effect from 28 December 2019 to 22 SDRs per kilogramme.

<sup>366</sup>

**U** In all cases, the carrier's liability may be increased if the consignor makes, at the time when the package was handed over to the carrier, a special declaration of the value at delivery and pays a supplementary sum if the case so requires. In that case, the carrier will be liable to pay a sum not exceeding the declared sum, unless it proves that the sum is greater than the actual value to the consignor at delivery.<sup>367</sup>

## Stoppage in transit

37-085 Under the [Sale of Goods Act 1979](#), the consignor, if he is an unpaid seller who has learnt of the insolvency of the buyer, has a right to instruct the carrier to stop the goods while they are in transit.<sup>368</sup> The Convention gives the consignor, as between himself and the carrier,<sup>369</sup> a much more extensive power of withdrawing, stopping or deflecting cargo, which is not dependent on the insolvency of the buyer or even on the existence of a contract of sale between the consignor and consignee. Subject to his liability to carry out all his obligations under the contract of carriage, and provided that the cargo has not arrived at the place of destination<sup>370</sup> the consignor may withdraw the cargo at the aerodrome of departure or destination, stop it in the course of the journey on any landing, direct that it shall be delivered to a person other than the consignee named in the air waybill, or require it to be returned to the aerodrome of departure. He must not exercise this right of disposition in such a manner as to prejudice the carrier or other consignors and he must repay any expenses occasioned by the exercise of the right.<sup>371</sup> The carrier may refuse to obey the consignor only if to obey is impossible.<sup>372</sup> The rights which the consignee may have against the consignor as a result of the latter's action remain unaffected by the Convention. The consignor's right of disposal ceases when that of the consignee begins, i.e. when the cargo arrives at the place of destination.<sup>373</sup>

## Delivery to the consignee

37-086 On arrival of the cargo, the carrier must give notice of the fact to the named consignee, unless the contract provides to the contrary.<sup>374</sup> The consignee is then entitled to require delivery of

the air waybill and of the cargo on payment of outstanding charges and compliance with any relevant conditions of carriage set out in the waybill.<sup>375</sup> Under the IATA recommended Conditions of Carriage, the consignee must accept delivery of and collect the shipment at the airport of destination or a facility designated by the carrier, unless delivery service has been specified.<sup>376</sup> Delivery to the consignee is deemed to have been effected when the carrier has delivered to the consignee or its agent any authorisation required to obtain release of the shipment and the shipment has been delivered to customs or any other government authorities as required by applicable law or customs regulations.<sup>377</sup>

## Failure to take delivery

- 37-087 If the consignee refuses or fails to take delivery of the cargo, the carrier's rights and powers are closely defined in the IATA recommended Conditions of Carriage. In the absence of previous instructions from the consignor given on the face of the air waybill in anticipation of this kind of emergency, or if such instructions cannot reasonably be complied with, the carrier will send notice of the failure to take delivery to the consignor, and may return the cargo to the airport of departure to await the instructions of the consignor, or may even, after 30 days, sell it.<sup>378</sup> In the case of perishable goods, delivery of which is refused, or which are unclaimed or for other reasons threatened with deterioration, the carrier may immediately take such steps as he sees fit for the protection of himself and other parties in interest, including storage, sale, abandonment and even destruction of the goods.<sup>379</sup> Expenses incurred in meeting the contingency of refusal to take delivery are charged to the consignor.<sup>380</sup>

## Time for making claims: damage or delay

- 37-088 Where cargo is damaged, the person entitled to delivery must complain to the carrier forthwith after the discovery of the damage, and, at the latest, within (a) under the Warsaw Convention 1929, seven days from the date of receipt; and (b) under all the other conventions, 14 days from the date of receipt. Where cargo is delayed, the complaint must be made at the latest within (a) under Warsaw Convention 1929, 14 days from the date on which the baggage has been placed at his or her disposal; and (b) under all the other conventions, 21 days from the date on which the cargo has been placed at his or her disposal.<sup>381</sup> "Days" means current days, not working days.<sup>382</sup> Every complaint must be made in writing and given or dispatched within the specified times<sup>383</sup>; an oral complaint recorded in the information system of the carrier, provided the record identifies the complainant, satisfies this requirement.<sup>384</sup> If no complaint is made within the prescribed time limits, no action lies against the carrier, save in the case of fraud on his part.<sup>385</sup> Notice of complaint is not required in the case of total loss or destruction.

## Loss of cargo

- 37-089 In cases of loss, that is where there is no delivery, the conventions do not impose a time limit for complaint, but the IATA recommended Conditions of Carriage provide that complaint must be made in the case of non-delivery within 120 days of the date on which the goods ought to have arrived at the destination. In some jurisdictions such a contractual term has been approved on the ground that it does not conflict with anything in the Warsaw Convention rules, but the better view appears to be that such a notice requirement is void as tending to relieve the carrier of liability.<sup>386</sup> If the carrier admits the loss of the cargo, or if the cargo has not arrived at the expiration of seven days after the date on which it ought to have arrived, the consignee is entitled to put into force against the carrier the rights which flow from the contract of carriage.<sup>387</sup>

## Who can sue the carrier?

- 37-090 If goods are lost or damaged during transit, the general rule of common law in the case of carriage by land is that the owner of the goods is the person entitled to sue the carrier.<sup>388</sup> If goods are being carried because they have been sold, the owner will usually be the consignee; and the consignor is deemed to contract with the carrier as agent for the consignee. These principles of the common law are in general, unaffected by the Convention, which, as we have just seen,<sup>389</sup> gives the right of action in the case of loss to the consignee,<sup>390</sup> and in the case of damage or delay requires the person entitled to delivery to complain in writing to the carrier before bringing his action.<sup>391</sup> The “person entitled to delivery” is normally the consignee, but may exceptionally be the consignor if he has exercised his extensive rights of stoppage in transitu.<sup>392</sup> A literal interpretation of the Convention text suggests that the consignor never has a right of action in the event of loss of goods. This appears to follow from the restriction of the right of action to the consignee in cases of loss and from the fact that all rights of action must be brought subject to the conditions set out in the applicable Convention.<sup>393</sup> In practice actions are often brought in the name of consignors.<sup>394</sup>
- 37-091 At common law, in the case of carriage by land, a stranger to the contract of carriage, one who is neither the consignor nor the consignee, may be able to sue the carrier in tort or in bailment if he can show that the carrier owed him a duty of care, or if he can show the necessary proprietary interest on which to base an action for conversion. The question arises whether such a stranger can sue the carrier by air. It has been argued that he cannot, because the Convention text gives no rights of action to anyone except the consignor and consignee, and provides that any action for damages, however founded, can only be brought subject to the conditions and limitations set

out in the applicable Convention<sup>395</sup> with the significant exception that this is without prejudice to the question who can sue for the death of a passenger.<sup>396</sup> This is the conclusion which foreign courts have come to on this question, though by no means unanimously.<sup>397</sup> The English court has, however, followed a forceful Commonwealth decision<sup>398</sup> and held that there is nothing in the Convention to prevent the owner of goods from bringing an action in his own name against an air carrier if goods are lost or damaged: the Convention was silent when it could easily have excluded the rights of the real party in interest had that been the draftsman's intention. In the circumstances, the *lex fori* can fill the gaps and allow a right of action to those who, like the owner of the goods, could sue the carrier at common law.<sup>399</sup> It seems, then, that the Convention in granting rights of action to consignors and consignees which they would not have had at common law is not to be construed as having abrogated rights of action possessed by owners of goods at common law.<sup>400</sup>

## Who pays freight?

- 37-092 The Convention does not deal with the question of who is liable to the carrier for the payment of freight and other charges. This is dealt with by the IATA recommended Conditions of Carriage, of which three features are noteworthy here. First, the carrier is entitled to payment in full, whether or not the cargo is lost or damaged or fails to arrive.<sup>401</sup> Secondly, the consignor guarantees payment of all the carrier's unpaid charges, advances, disbursements and any costs which the carrier may incur by reason of the carriage of cargo prohibited by law or incorrectly described. By taking delivery or exercising any other right under the contract of carriage, the consignee agrees to pay the charges, but not so as to discharge the consignor's guarantee.<sup>402</sup> Thirdly, the carrier has a lien on the cargo for all such charges; the lien is enforceable by sale after notice to the consignor or consignee.<sup>403</sup>

## Footnotes

- 336 Carriage by Air Acts (Application of Provisions) Order 2004 (SI 2004/1899) Sch.2 art.5(1); Carriage by Air Act 1961 Sch.1 art.5(1).
- 337 Carriage by Air Acts (Application of Provisions) Order 2004 (SI 2004/1899) Sch.2 art.10(1); Carriage by Air Act 1961 Sch.1 art.10(1).
- 338 Carriage by Air Acts (Application of Provisions) Order 2004 (SI 2004/1899) Sch.2 art.6(5); Carriage by Air Act 1961 Sch.1 art.6(5).
- 339 Carriage by Air Acts (Application of Provisions) Order 2004 (SI 2004/1899) Sch.2 art.7; Carriage by Air Act 1961 Sch.1 art.7.
- 340 Carriage by Air Acts (Application of Provisions) Order 2004 (SI 2004/1899) Sch.2 art.6(1), (2); Carriage by Air Act 1961 Sch.1 art.6(1), (2).

- 341 Carriage by Air 1961 Sch.1 art.15(3). See generally *Gatewhite Ltd v Iberia Lineas Aereas de España Soc [1989] 1 Lloyd's Rep. 160*.
- 342 Carriage by Air Acts (Application of Provisions) Order 2004 (SI 2004/1899) Sch.2 art.11(2); Carriage by Air Act 1961 Sch.1 art.11(2).
- 343 See above, para.37-026.
- 344 Carriage by Air Acts (Application of Provisions) Order 2004 (SI 2004/1899) Sch.2 art.9; *Corocraft Ltd v Pan American Airways Inc [1969] 1 Q.B. 616, CA*.
- 345 Carriage by Air Acts (Application of Provisions) Order 2004 (SI 2004/1899) Sch.2 art.8; see above, para.37-024. There must be an identifiable notice; it is not sufficient that there are conditions from which the applicability of the Convention may be discovered: *Fujitsu Computer Products Corp v Bax Global Inc [2005] EWHC 2289 (Comm), [2006] 1 Lloyd's Rep. 231*.
- 346 Carriage by Air Acts (Application of Provisions) Order 2004 (SI 2004/1899) Sch.2 art.9; see below, para.37-084. An air waybill does not have to be signed under art.6(2) to be “made out” within the meaning of art.9 and the carrier can still limit his liability: *United International Stables Ltd v Pacific Western Airlines Ltd (1969) 5 D.L.R. (3d) 67*, SC of British Columbia.
- 347 SI 2004/1899 Sch.2 art.34; see above, para.37-026.
- 348 Carriage by Air Act 1961 Sch.1A as inserted by SI 1999/1312 art.5(1); Sch.1B as inserted by SI 2002/263 art.4(1).
- 349 Carriage by Air Act 1961 Sch.1A as inserted by SI 1999/1312 art.26(4); Sch.1B as inserted by SI 2002/263 art.4(2).
- 350 Carriage by Air Act 1961 Sch.1A as inserted by SI 1999/1312 art.5(3).
- 351 CSC1601 art.3.6.
- 352 CSC1601 art.3.1.1.2.
- 353 CSC1601 art.3.3.1.
- 354 Air Navigation (Dangerous Goods) Regulations 2002 (SI 2002/2786). These regulations are regularly amended, most recently by SI 2011/1454, to refer to the most recent edition of the Technical Instructions.
- 355 For the meaning of “damage”, see *Walz v Clickair SA (C-63/09) EU:C:2010:251, [2011] 1 All E.R. (Comm) 1037*, and paras 37-029—37-030, above.
- 356 *Winchester Fruit Ltd v American Airlines Inc [2002] 2 Lloyd's Rep. 265*.
- 357 Carriage by Air Acts (Application of Provisions) Order 2004 (SI 2004/1899) Sch.2 art.18(1); Carriage by Air Act 1961 Sch.1 art.18(1). For the relationship between the Warsaw Convention and the CMR Convention see *Quantum Corp Inc v Plane Trucking Ltd [2002] EWCA Civ 350, [2002] 2 Lloyd's Rep. 25*; and *Schenker International (Australia) Pty Ltd v Siemens Ltd [2002] NSWCA 172 (affd without reference to this point [2004] HCA 11, (2004) 216 C.L.R. 418)*.
- 358 Carriage by Air Acts (Application of Provisions) Order 2004 (SI 2004/1899) Sch.2 art.18(2); Carriage by Air Act 1961 Sch.1 art.18(2); *Swiss Bank Corp v Brink's-MAT Ltd Unreported 14 November 1985, QBD; Rolls Royce Plc v Heavylift-Volga DNEPR Ltd [2000] 1 Lloyd's Rep. 653*. cf. *Victoria Sales Corp v Emery Air Freight Inc, 917 F. 2d 705 (1990), 2nd Cir; United International Stables Ltd v Pacific Western Airlines Ltd (1969) 5 D.L.R. (3d) 67, Brit Columbia SC*.

- 359 Carriage by Air Act 1961 Sch.1A as inserted by SI 1999/1312 art.18(3).
- 360 Carriage by Air Act 1961 Sch.1B as inserted by SI 2002/263 art.18(1), (2).
- 361 Carriage by Air Act 1961 Sch.1B as inserted by SI 2002/263 art.18(3), (4).
- 362 Carriage by Air Acts (Application of Provisions) Order 2004 (SI 2004/1899) Sch.2 art.22(2); *Data Card Corp v Air Express International Corp [1984] 1 W.L.R. 198*.
- 363 Carriage by Air Act 1961 Sch.1 art.22(2) (which, as amended by the Carriage by Air and Road Act 1979 s.4, actually contains the limits as amended by Montreal Additional Protocol No.2 of 1975).
- 364 Carriage by Air Act 1961 Sch.1 art.22(2)(b); *Allied Implants Technology Ltd v Lufthansa Cargo AG [2000] 2 Lloyd's Rep. 46*.
- 365 Carriage by Air Acts (Application of Provisions) Order 2004 (SI 2004/1899) Sch.3 art.22(2); Carriage by Air Act 1961 Sch.1 art.22(2), (3) (as amended by the Carriage by Air and Road Act 1979 s.4); Sch.1A as inserted by SI 1999/1312 art.22(2)(a); Sch.1B as inserted by SI 2002/263 art.22(2).
- ⑥366 By decisions of the ICAO Council under art.24 of the Convention. For (belated) implementation in the UK, see Carriage by Air (Revision of Limits of Liability under the Montreal Convention) Order 2021 (SI 2021/1448).
- 367 Carriage by Air Acts (Application of Provisions) Order 2004 (SI 2004/1899) Sch.2 art.22(2); Carriage by Air Act 1961 Sch.1 art.22(2)(a); Sch.1A as inserted by SI 1999/1312 art.22(2)(a); Sch.1B as inserted by SI 2002/263 art.22(2).
- 368 ss.44–46.
- 369 The Guadalajara Convention requires the orders of the consignor under art.12 of the Warsaw Convention to be addressed to the contracting carrier rather than to an actual carrier: 1962 Act Sch. art.IV.
- 370 Carriage by Air Acts (Application of Provisions) Order 2004 (SI 2004/1899) Sch.2 arts 12(4), 13(1); Carriage by Air Act 1961 Sch.1 arts 12(4), 13(1); Sch.1A as inserted by SI 1999/1312 arts 12(4), 13(1); Sch.1B as inserted by SI 2002/263 arts 12(4), 13(1).
- 371 Carriage by Air Acts (Application of Provisions) Order 2004 (SI 2004/1899) Sch.2 art.12(1); Carriage by Air Act 1961 Sch.1 art.12(1); Sch.1A as inserted by SI 1999/1312 art.12(1); Sch.1B as inserted by SI 2002/263 art.12(1). See generally *Morton-Norwich Products Inc v Intercen Ltd [1978] R.P.C. 501*.
- 372 Carriage by Air Acts (Application of Provisions) Order 2004 (SI 2004/1899) Sch.2 art.12(2); Carriage by Air Act 1961 Sch.1 art.12(2); Sch.1A as inserted by SI 1999/1312 art.12(2); Sch.1B as inserted by SI 2002/263 art.12(2). The IATA recommended Conditions of Carriage (CSC1601) use the phrase “not reasonably practicable” where the convention texts have “impossible” (art.7.2.2); this makes practical sense but the convention text awaits judicial interpretation on this point.
- 373 Carriage by Air Acts (Application of Provisions) Order 2004 (SI 2004/1899) Sch.2 arts 12(4), 13(1); Carriage by Air Act 1961 Sch.1 arts 12(4), 13(1); Sch.1A as inserted by SI 1999/1312 arts 12(4), 13(1); Sch.1B as inserted by SI 2002/263 arts 12(4), 13(1).
- 374 Carriage by Air Acts (Application of Provisions) Order 2004 (SI 2004/1899) Sch.2 art.13(2); Carriage by Air Act 1961 Sch.1 art.13(2); Sch.1A as inserted by SI 1999/1312 art.13(2);

- Sch.1B as inserted by SI 2002/263 art.13(2). See the IATA recommended Conditions of Carriage (CSC1601) art.8.1.
- 375 Carriage by Air Acts (Application of Provisions) Order 2004 (SI 2004/1899) Sch.2 art.13(1); Carriage by Air Act 1961 Sch.1 art.13(1); Sch.1A as inserted by SI 1999/1312 art.13(1); Sch.1B as inserted by SI 2002/263 art.13(1).
- 376 CSC1601 art.8.3.
- 377 CSC1601 art.8.2.
- 378 CSC1601 art.8.4. There will, of course, usually be in these circumstances a bailment giving the bailee ultimate powers of sale under the *Torts (Interference with Goods) Act 1977* s.12.
- 379 CSC1601 art.8.5.
- 380 CSC1601 art.8.5.2.
- 381 Carriage by Air Acts (Application of Provisions) Order 2004 (SI 2004/1899) Sch.2 art.26(2); Carriage by Air Act 1961 Sch.1 art.26(2); Sch.1A as inserted by SI 1999/1312 art.26(2); Sch.1B as inserted by SI 2002/263 art.31(2). “Damage” includes the loss of part of the contents: *Fothergill v Monarch Airlines Ltd [1981] A.C. 251*; Carriage by Air Act 1961 s.4A as inserted by the Carriage by Air and Road Act 1979 s.4 and as amended by SI 2002/263. The test for the adequacy of the notice of complaint is an objective one: *Western Digital Corp v British Airways Plc [2001] Q.B. 733, CA*.
- 382 Carriage by Air Acts (Application of Provisions) Order 2004 (SI 2004/1899) Sch.2 art.35; Carriage by Air Act 1961 Sch.1 art.35; Sch.1A as inserted by SI 1999/1312 art.35; Sch.1B as inserted by SI 2002/263 art.52.
- 383 Carriage by Air Acts (Application of Provisions) Order 2004 (SI 2004/1899) Sch.2 art.26(3); Carriage by Air Act 1961 Sch.1 art.26(3); Sch.1A as inserted by SI 1999/1312 art.26(3); Sch.1B as inserted by SI 2002/263 art.31(3).
- 384 *Finnair Oyj v Keskinainen Vakuutusyhtio Fennia (C-258/16) EU:C:2018:252, [2018] 1 W.L.R. 4407* (a baggage case).
- 385 Carriage by Air Acts (Application of Provisions) Order 2004 (SI 2004/1899) Sch.2 art.26(4); Carriage by Air Act 1961 Sch.1 art.26(4); Sch.1A as inserted by SI 1999/1312 art.26(4); Sch.1B as inserted by SI 2002/263 art.31(4).
- 386 Carriage by Air Acts (Application of Provisions) Order 2004 (SI 2004/1899) Sch.2 art.23; Carriage by Air Act 1961 Sch.1 art.23; Sch.1A as inserted by SI 1999/1312 art.23; Sch.1B as inserted by SI 2002/263 art.26. See Shawcross and Beaumont at Vol.1, para.VII[944]. Loss of part of the contents is treated as “damage”: *Fothergill v Monarch Airlines Ltd [1981] A.C. 251*; Carriage by Air Act 1961 s.4A as inserted by the Carriage by Air and Road Act 1979 s.4 and as amended by SI 1999/1312 and SI 2000/263.
- 387 Carriage by Air Acts (Application of Provisions) Order 2004 (SI 2004/1899) Sch.2 art.13(3); Carriage by Air Act 1961 Sch.1 art.13(3); Sch.1A as inserted by SI 1999/1312 art.13(3); Sch.1B as inserted by SI 2002/263 art.13(3). See *Gatewhite Ltd v Iberia Lineas Aereas de España [1989] 1 Lloyd's Rep. 160*; and Shawcross and Beaumont at Vol.1, para.VII[933].
- 388 cf. below, paras 38-043—38-044.
- 389 See above, para.37-089.
- 390 Carriage by Air Act 1961 Sch.1 art.13(3).
- 391 Carriage by Air Act 1961 Sch.1 art.26(2).

- 392 See above, para.37-085.
- 393 Carriage by Air Acts (Application of Provisions) Order 1967 (SI 1967/480) Sch.2 arts 13(3) and 24(1); Carriage by Air Act 1961 Sch.1 arts 13(3) and 24(1); Sch.1A as inserted by SI 1999/1312 arts 13(3) and 24(1); Sch.1B as inserted by SI 2002/263 arts 13(3) and 29. cf. *Gatewhite Ltd v Iberia Lineas Aereas de España [1989] 1 Lloyd's Rep. 160*; *Western Digital Corp v British Airways Plc [2001] Q.B. 733, CA*.
- 394 See, e.g. *Samuel Montagu and Co Ltd v Swiss Air Transport Co Ltd [1966] 2 Q.B. 306*.
- 395 Carriage by Air Acts (Application of Provisions) Order 2004 (SI 2004/1899) Sch.2 art.24(1); Carriage by Air Act 1961 Sch.1 art.24(1); Sch.1A as inserted by SI 1999/1312 art.24(1); Sch.1B as inserted by SI 2002/263 art.29.
- 396 Carriage by Air Acts (Application of Provisions) Order 2004 (SI 2004/1899) Sch.2 art.24(2); Carriage by Air Act 1961 Sch.1 art.24(2); Sch.1A as inserted by SI 1999/1312 art.24(2); Sch.1B as inserted by SI 2002/263 art.29.
- 397 See Shawcross and Beaumont at Vol.1, paras VII[967] et seq.
- 398 *Tasman Pulp and Paper Co Ltd v Brambles JB O'Loghlen Ltd [1981] 2 N.Z.L.R. 225*.
- 399 *Gatewhite Ltd v Iberia Lineas Aereas de España Sociedad [1990] 1 Q.B. 326*; *Thomas Cook Group Ltd v Air Malta Co Ltd [1997] 2 Lloyd's Rep. 399*; *Western Digital Corp v British Airways Plc [2001] Q.B. 733, CA*. cf. dicta of Lord Hope of Craighead in *Abnett v British Airways Plc [1997] A.C. 430*; Lord Hope thought it more consistent with the purpose of the Convention to regard it as providing a uniform rule about who can sue for goods which are lost or damaged during carriage by air, with the result that the owner who is not a party to the contract has no right to sue in his own name; but the point was not fully argued.
- 400 *Tasman Pulp and Paper Co Ltd v Brambles JB O'Loghlen Ltd*, above, at 235.
- 401 Conditions of Carriage art.5.4.2.
- 402 Conditions of Carriage art.5.4.3.
- 403 Conditions of Carriage art.5.4.3.

## **(e) - Delay to Passengers, Baggage or Cargo**

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Volume II - Specific Contracts

Chapter 37 - Carriage by Air

Section 5. - Liability of the Carrier

### **(e) - Delay to Passengers, Baggage or Cargo**

#### **Liability for delay**

- 37-093 Under the Conventions, the carrier is liable for damage occasioned by delay in the carriage by air of passengers, baggage or cargo.<sup>404</sup> The carrier may, however, rely on a number of defences: (a) proof that he and his servants or agents have taken all necessary measures to avoid the damage or that it was impossible to take them<sup>405</sup>; (b) in the case of the unamended Warsaw Convention 1929 that the damage was occasioned by negligent pilotage or negligence in the handling of the aircraft and that in all other respects, the carrier and its servants and agents have taken all necessary measures to avoid the damage<sup>406</sup>; and (c) contributory negligence.<sup>407</sup> In the carriage of baggage and cargo, the provisions as to timely notice of complaint apply.<sup>408</sup> Delay means failure to complete the carriage in a reasonable time.<sup>409</sup> The effect of the provisions in Conditions of Carriage that the carrier “does not guarantee flight times shown in timetables and they do not form part of your contract with us”<sup>410</sup> is merely to prevent the carrier being under a stricter liability than is imposed by the applicable Convention. Although “punitive, exemplary or non-compensatory” may not be awarded under the Montreal Convention 1999, damages may be awarded to compensate passengers for the stress, inconvenience, frustration and disruption to their holiday caused by the delay in the arrival of their baggage at their destination.<sup>411</sup> There can be liability to persons other than the delayed passenger. Article 19 of the Montreal Convention applies not only to the damage suffered by a passenger but also to the damage suffered by a person in its capacity as an employer who had concluded a contract of international carriage with an air carrier for the purpose of carriage of passengers who were its employees.<sup>412</sup> Delay is to be distinguished from “non-performance”, the latter falling outside the scope of the Montreal Convention.<sup>413</sup>

## Upper limit of liability

- 37-094 In cases governed by the Warsaw Convention 1929, the liability of the carrier for delay is limited to a sum of 125,000 francs per passenger; 250 francs per kilogramme in the case of registered baggage or cargo; and 5,000 francs per passenger in respect of objects of which the passenger takes charge.<sup>414</sup> In cases governed by the Warsaw-Hague text, the passenger limit is raised to 250,000 francs,<sup>415</sup> but the other limits are unchanged. The Warsaw-Hague figures are restated in Montreal Protocol No.2 of 1975 as 16,600 SDRs, 17 SDRs per kilogramme, and 332 SDRs per passenger,<sup>416</sup> and these limits were retained in the MP4 Convention.<sup>417</sup> The limit of the carrier's liability under the original text of the Montreal Convention 1999 was set in the carriage of passengers at 4,150 SDRs per passenger, in the carriage of baggage at 1,000 SDRs per passenger, and 17 SDRs per kilogramme of cargo<sup>418</sup>; the limits were raised to 4,694 SDRs, 1,131 SDRs and 19 SDRs with effect from 30 December 2009; and to 5,346 SDRs, 1,288 SDRs and 22 SDRs with effect from 28 December 2019.

<sup>419</sup>



## Footnotes

- 404 Carriage by Air Acts (Application of Provisions) Order 2004 (SI 2004/1899) Sch.2 art.19; Carriage by Air Act 1961 Sch.1 art.19; Sch.1A as inserted by SI 1999/1312 art.19 (using different language); Sch.1B as inserted by SI 2002/263 art.19. For claims under EU Regulation 261/2004, see paras 37-054—37-055.
- 405 Carriage by Air Acts (Application of Provisions) Order 2004 (SI 2004/1899) Sch.2 art.20(1); Carriage by Air Act 1961 Sch.1 art.20; Sch.1A as inserted by SI 1999/1312 art.20; Sch.1B as inserted by SI 2002/263 art.19.
- 406 Carriage by Air Acts (Application of Provisions) Order 2004 (SI 2004/1899) Sch.2 art.20(2).
- 407 Carriage by Air Acts (Application of Provisions) Order 2004 (SI 2004/1899) Sch.2 art.21; Carriage by Air Act 1961 Sch.1 art.21; Sch.1A as inserted by SI 1999/1312 art.21; Sch.1B as inserted by SI 2002/263 art.20.
- 408 See above, paras 37-077 and 37-088—37-089.
- 409 *Panalpina International Transport Ltd v Densil Underwear Ltd [1981] 1 Lloyd's Rep. 187*. See also *Bart v British West Indian Airways Ltd [1967] 1 Lloyd's Rep. 239*, Guyana CA.
- 410 See IATA Recommended Conditions (PSC(24)1724) art.9.1.1.
- 411 *O'Carroll v Ryanair 2009 S.C.L.R. 125*.

- 412 *Air Baltic Corp AS v Lietuvos Respublikos specialiųjų tyrimų tarnyba* (C-429/14)  
EU:C:2016:88, [2016] 1 Lloyd's Rep. 407.
- 413 See Shawcross and Beaumont, on Air Law, para.VII[1003.1] and the very full judgment in  
*Chaing v Air Canada Unreported 22 January 2016*, Kingston-upon-Thames Cty Ct.
- 414 Carriage by Air Acts (Application of Provisions) Order 2004 (SI 2004/1899) Sch.2 art.22.
- 415 Carriage by Air Act 1961 Sch.1 art.22 as originally enacted.
- 416 Carriage by Air Act 1961 Sch.1 art.22 as amended by the Carriage by Air and Road Act  
1979 s.4(1).
- 417 Carriage by Air Act 1961 Sch.1A as inserted by SI 1999/1312 art.22.
- 418 Carriage by Air Act 1961 Sch.1B as inserted by SI 2002/263 art.22.
- ④419 By decisions of the ICAO Council under art.24 of the Convention. For (belated)  
implementation in the UK, see Carriage by Air (Revision of Limits of Liability under the  
Montreal Convention) Order 2021 (SI 2021/1448).

## Section 6. - Non-international Carriage

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Chapter 37 - Carriage by Air

Section 6. - Non-international Carriage

### Applicable rules

- 37-095 The Conventions treated above regulate only international carriage. Carriage which is not international carriage as defined in any of the Conventions falls outside the Convention system. The applicable law is to be found in two sources. UK air carriers engaged in the carriage of persons or baggage are subject to Council Regulation 2027/97 as incorporated into UK law,<sup>420</sup> which applies the provisions of the Montreal Convention 1999 to national as well as international carriage. A UK air carrier is one with a valid operating licence issued by the Civil Aviation Authority.<sup>421</sup> Carriage within the United Kingdom to view a property from the air by a carrier not required to have a valid operating licence is not to be within the Regulation or (as it was not international carriage) the Montreal Convention.<sup>422</sup>
- 37-096 The liability of other air carriers, and UK air carriers engaged in the carriage of cargo, is governed by [Sch.1 to the Carriage by Air Acts \(Application of Provisions\) Order 2004](#),<sup>423</sup> which applies a modified version of the Montreal Convention 1999. Subject to the Regulation, the [2004 Order](#) applies to all carriage by air other than carriage to which the Warsaw-Hague text, the MP4 Convention or the Montreal Convention 1999 applies, and [Sch.1](#) applies to carriage which is not international carriage as defined in [Schs 2 or 3](#) (applying the original Warsaw Convention and that Convention as amended by Montreal Additional Protocol No.1 of 1975).<sup>424</sup> To avoid giving too extensive a scope to the predecessor provisions, for it was arguable that the provisions of the United Kingdom Order applied to internal carriage in other countries, the House of Lords held that their application is limited to (a) carriage in which the places of departure and destination and any agreed stopping places are all within the United Kingdom or other British territory; and (b) non-convention carriage involving a place of departure or destination or an agreed stopping place in a foreign state and a place of departure or destination or an agreed stopping place in the United Kingdom or other British territory.<sup>425</sup>

## The modified convention regime under Sch.1 to the 2004 Order

- 37-097 Only parts of the Montreal Convention 1999 are applied by the [2004 Order](#).<sup>426</sup> Chapter II (arts 3 to 16) dealing with documentation is omitted except for parts of [art.3](#) requiring the carrier to deliver a baggage identification tag for each piece of checked baggage. Liability for death or injury is unlimited but if the carrier proves an absence of fault there is no liability beyond 100,000 SDRs. There are no provisions regulating the carriage of mail and postal packages save for a provision that in these cases the carrier is liable only to the relevant postal administration and in accordance with the rules applicable to the relationship between carriers and postal administrations.<sup>427</sup>

### Footnotes

- 420 With the amendments made by the [Air Passenger Rights and Air Travel Organisers' Licensing \(Amendment\) \(EU Exit\) Regulations 2019](#) (SI 2019/278). See above, paras 37-019 et seq.
- 421 Council Regulation 2027/97 art.2(1)(b).
- 422 *Prüller-Frey v Brodnig* (C-240/14) EU:C:2015:567, [2015] 1 W.L.R. 5031.
- 423 SI 2004/1899 art.4.
- 424 Carriage by Air Acts (Application of Provisions) Order 2004 (SI 2004/1899) arts 3 and 4.
- 425 *Holmes v Bangladesh Biman Corp* [1989] A.C. 1112.
- 426 Carriage by Air Acts (Application of Provisions) Order 2004 (SI 2004/1899).
- 427 2004 Order Sch.1 art.2(2). See the Postal Services Act 2000 s.90; *American Express Co v British Airways Board* [1983] 1 W.L.R. 701; *Post Office v British World Airlines Ltd* [2000] 1 All E.R. (Comm) 532.

## **(a) - General**

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**Volume II - Specific Contracts**

**Chapter 38 - Carriage by Land**

**Section 1. - Introduction**

### **(a) - General**

*P.J.S. MacDonald Eggers*

## **The law of carriage**

38-001 The law of carriage of goods<sup>1</sup> is a branch of the law of bailment.<sup>2</sup> Like the law of bailment, it transcends the distinction between contract and tort. The law of carriage of passengers<sup>3</sup> and their luggage<sup>4</sup> similarly transcends this distinction. As the present work deals with the law of contract and not the law of tort, those aspects of the law of carriage which are part of the law of tort are discussed only briefly. The alternative remedies in tort open to a passenger or an owner of goods cannot, however, be ignored, as it is sometimes possible to bypass an exemption clause by bringing an action in tort against someone other than the contracting carrier.<sup>5</sup>

## **Internal carriage**

38-002 The law of carriage by land is of very ancient origin.<sup>6</sup> For centuries the common carrier occupied a special position in the law. Today, however, the common carrier is practically extinct.<sup>7</sup> The modern law of carriage is not so much enshrined in reported cases as exemplified by the contractual terms by which carriers define the conditions on which they are prepared to carry goods, passengers and luggage.<sup>8</sup> Any account of the modern law must necessarily take account of these contractual terms, many of which have become standard forms of contract. Some of these terms have, of course, themselves been the subject of judicial interpretation. As the rights and duties of carriers towards their customers differ from those of other intermediaries in the freight trade, it is important

on occasion to distinguish between carriers by land and others concerned with the transport of goods, such as forwarding agents.<sup>9</sup>

## International carriage

- 38-003 In recent years, and particularly since 1952,<sup>10</sup> the international law of carriage by land has been developed by the adoption by the international community, especially in Europe, of multilateral treaties in this field. These treaties are designed to govern contracts of carriage by land between countries which have accepted the particular treaties. In particular they are intended to regulate the mutual rights and duties of carriers and their customers. The United Kingdom has accepted some of these treaties. In 1954, for example, the United Kingdom became a contracting party to two international conventions on carriage by rail.<sup>11</sup> In 1967, the United Kingdom became a party to an international convention on carriage of goods by road.<sup>12</sup> As a result of the United Kingdom government's acceptance of treaties such as these and their successors, the particular treaty régimes have become binding on the United Kingdom and as such can be said to form part of the English law of carriage by land insofar as their terms have been incorporated in Acts of Parliament either directly or by reference.<sup>13</sup>

## The identification of a carrier

- 38-004 The common law has recognised a variety of carriers—those who accept custody of or responsibility for persons or goods for the purpose of transporting them to a destination agreed between the carrier and the customer. The classification of a carrier depends on how his business of carriage is conducted. There are common carriers, private carriers and other “special” carriers. The status of the last category is dependent on Parliament's intervention (by virtue of domestic legislation or the incorporation of international conventions) or unusual exceptions etched by the common law. Whilst these distinctions potentially have relevance in the realm of international carriage, more often they arise for consideration in connection with the internal carriage of goods and persons, and even then the distinctions have less importance than of old. For this reason, the categorisation of carriers will be discussed as part of the section on internal carriage. It should not, however, be forgotten that the distinction unexpectedly may be resuscitated when an international carriage falls for judicial consideration.

## Footnotes

1 See below, paras 38-007 et seq.

- 2 See above, Ch.4, and Palmer, *Bailment*, 3rd edn (2009). See also Holdsworth, *A History of English Law*, 2nd edn (1937), Vol.VIII, 259.
- 3 See below, paras 38-054 et seq.
- 4 See below, paras 38-068 et seq.
- 5 See below, paras 38-044—38-046, 38-057, 38-078.
- 6 See *Southcote's Case (1601)* 4 Co. Rep. 83, 84.
- 7 See below, paras 38-009—38-010.
- 8 See Leslie, *Law of Transport by Railways*, 2nd edn (1928); Kahn-Freund, *The Law of Inland Transport*, 4th edn (1965), especially Pts 2 and 3; Halsbury's *Laws of England*, 5th edn (2008), Vol.7; Clarke, *International Carriage of Goods by Road: CMR*, 6th edn (2014); Clarke and Yates, *Contracts of Carriage by Land and Air*, 2nd edn (2008).
- 9 *Marston Excelsior Ltd v Arbuckle, Smith and Co Ltd [1971]* 2 Lloyd's Rep. 306; *Gillespie Bros and Co Ltd v Roy Bowles Transport Ltd [1973]* Q.B. 400; *Hair and Skin Trading Co Ltd v Norman Airfreight Carriers Ltd [1974]* 1 Lloyd's Rep. 443; *Chas Davis (Metal Brokers) Ltd v Gilyott and Scott Ltd [1975]* 2 Lloyd's Rep. 422. See, generally, Hill, *Freight Forwarders* (1972), pp.16–25; *Hill [1975]* L.M.C.L.Q. 139; see below, para.38-006.
- 10 This was when the first comprehensive Berne Rail Conventions CIM and CIV were signed. There had been earlier limited Berne Conventions on carriage by rail, the earliest being concluded in 1890. See, as to the history of the international conventions on carriage by rail, Kahn-Freund at pp.408–409. The United Kingdom ratified the Berne Conventions CIM and CIV of 25 October 1952, in 1954 and became a party to the revised CIM and CIV of 25 February 1961, on 1 January 1965 and to the further revised CIM and CIV of 7 February 1970, on 1 January 1975. Currently the United Kingdom is a party to COTIF, the revised and amalgamated convention concerning international carriage by rail of 9 May 1980. COTIF entered into force generally and for the United Kingdom on 1 May 1985, and was modified by the Protocol of 3 June 1999, which entered into force in the United Kingdom on 1 July 2006; see below, paras 38-079—38-081.
- 11 i.e. the Berne Conventions CIM and CIV of 25 October 1952.
- 12 i.e. CMR, signed at Geneva on 19 May 1956: see below, para.38-082.
- 13 See below, paras 38-079—38-081. As to the general rule regarding the municipal effect and interpretation of such treaty provisions, see *James Buchanan and Co Ltd v Babco Forwarding and Shipping (UK) Ltd [1978]* A.C. 141; and *Fothergill v Monarch Airlines Ltd [1981]* A.C. 251. The relationship between international law and national law is now clearly explained in art.8 of COTIF, as modified by the Protocol of 3 June 1999. For a survey of international carriage conventions and a search for a common substratum for all modes of carriage, see Clarke, “*The transport of goods in Europe: patterns and problems of uniform law*” [1999] L.M.C.L.Q. 36; Clarke and Yates, *Contracts of Carriage by Land and Air*, 2nd edn (2008).

## **(b) - Definition of Carrier**

**Chitty on Contracts 34th Ed.**

**Consolidated Mainwork Incorporating First Supplement**

**Volume II - Specific Contracts**

**Chapter 38 - Carriage by Land**

**Section 1. - Introduction**

### **(b) - Definition of Carrier**

#### **Carrier**

- 38-005 Before the law relating to carriers and carriage by land is considered in depth below, a moment's thought should be dedicated to the issue whether in a given case a person should be described as a "carrier" at all. A *carrier* is a person who transports goods or passengers or both from any place to any place in the manner agreed with the passenger or the owner of the goods to be carried. The carrier need not be paid in any sense for this service. The test is whether the person said to be the carrier is in fact accepting the responsibility of the carriage.<sup>14</sup> Although a person's business involves, whether necessarily or by choice, the conveyance of goods, that does not necessarily mean that that person is a carrier. If a person undertakes to carry a passenger or goods only for reasons associated with his own personal or commercial expedience, then that person is not a carrier. The carriage is not the *raison d'être* of that person. If the carriage is wholly incidental to that person's business, then he will not be a carrier. For example, a warehouseman,<sup>15</sup> a stevedore<sup>16</sup> and a wharfinger<sup>17</sup> have all been held not to be carriers. The "carrier's" business should be examined to determine the purpose of the carriage.<sup>18</sup> Such questions generally are more difficult to answer in the case of goods, as opposed to passengers. In the case of passengers, whether a person is acting as an agent or a carrier generally is clear.

#### **Freight forwarder**

- 38-006 A forwarding agent, or freight forwarder, is a person who contracts with the owner of goods to arrange for the transportation of those goods, rather than to carry the goods himself.<sup>19</sup> A freight

forwarder, therefore, usually is not classified as a carrier,<sup>20</sup> so long as he remains true to his calling. Unlike the warehouseman, the stevedore, and the wharfinger, the freight forwarder often never acquires possession (that is, custody) of the goods to be carried.<sup>21</sup> As the functions of a carrier and a freight forwarder are necessarily linked, uncertainty may arise as to whether a person describing himself as a freight forwarder is in fact a carrier.<sup>22</sup> A freight forwarder, or any goods-handler, may also contract or act as a carrier as an adjunct to their principal business.<sup>23</sup> It is a question of fact in every case whether a person is a carrier.<sup>24</sup>

## Footnotes

- 14 *Aqualon (UK) Ltd v Vallana Shipping Corp [1994] 1 Lloyd's Rep. 669, 676.* cf. *M Bardiger Ltd v Halberg Spedition APS Unreported 26 October 1990.*
- 15 *Consolidated Tea and Lands Co v Oliver's Wharf [1910] 2 K.B. 395;* contra *Maving v Todd (1815) 1 Stark 72;* *Armour & Co Ltd v Tarbard Ltd (1920) 37 T.L.R. 208.*
- 16 *Scruttons Ltd v Midland Silicones Ltd [1962] A.C. 446.*
- 17 *Chattock & Co v Bellamy & Co (1895) 64 L.J. Q.B. 250.*
- 18 *Lacey's Footwear (Wholesale) Ltd v Bowler International Freight Ltd [1997] 2 Lloyd's Rep. 369* where the court examined the circumstances of the making of the contract of carriage.
- 19 As to the distinction between a forwarder (that is, a person who contracts with the carrier as a principal, so that the owner of the goods is not a party to the contract) and a forwarding agent (who contracts on behalf of the owner of the goods with the carrier), see *M Bardiger Ltd v Halberg Spedition APS Unreported 26 October 1990;* *Aqualon (UK) Ltd v Vallana Shipping Corp [1994] 1 Lloyd's Rep. 669, 673.* See also Clarke, International Carriage of Goods by Road: CMR 6th edn (2014), para.10a.
- 20 *Moto Vespa SA v MAT (Britannia Express) Ltd [1979] 1 Lloyd's Rep. 175, 179;* *Elektronska Industrija Oour TVA v Transped Oour Kintinentalna Spedicna [1986] 1 Lloyd's Rep. 49, 52;* cf. *Swiss Bank Corp v Brink's-MAT Ltd [1986] 2 Lloyd's Rep. 79.*
- 21 In *Kala Ltd v International Freight Services (UK) Ltd Unreported 7 June 1988*, the freight forwarder was held to have exercised legitimately a contractual lien and right of detention over goods, the right to the control of which the owners had given to the freight forwarder. The court distinguished the freight forwarder's right to possession of the goods from mere custody, which was held by the actual carrier.
- 22 The fact that a freight forwarder describes himself as such is not a decisive answer to the question, although assistance is gained from any written contract: *Lacey's Footwear (Wholesale) Ltd v Bowler International Freight Ltd [1997] 2 Lloyd's Rep. 369;* see also *Kala Ltd v International Freight Services (UK) Ltd Unreported 7 June 1988;* *M Bardiger Ltd v Halberg Spedition APS Unreported 26 October 1990;* and *Aqualon (UK) Ltd v Vallana Shipping Corp [1994] 1 Lloyd's Rep. 669, 676.* cf. *Texas Instruments Ltd v Nason (Europe) Ltd [1991] 1 Lloyd's Rep. 146.*

- 23 *Hellaby v Weaver* (1851) 17 L.T.O.S. 271; *Langley Beldon & Gaunt Ltd v Morley* [1965] 1 *Lloyd's Rep.* 297, 306; *Lee Cooper Ltd v CH Jeakins & Sons Ltd* [1967] 2 Q.B. 1; *Elektronska Industrija Oour TVA v Transped Oour Kintinentalna Spedicna* [1986] 1 *Lloyd's Rep.* 49, 52; *M Bardiger Ltd v Halberg Spedition Aps* Unreported 26 October 1990.
- 24 Taking into account matters such as how the carrier or forwarder describes himself, how he charges, how he arranges the carriage, and what documents he issues: *M Bardiger Ltd v Halberg Spedition Aps* Unreported 26 October 1990.

## **(i) - Common and Private Carriers**

**Chitty on Contracts 34th Ed.**

**Consolidated Mainwork Incorporating First Supplement**

**Volume II - Specific Contracts**

**Chapter 38 - Carriage by Land**

**Section 2. - Internal Carriage**

**(a) - Goods**

**(i) - Common and Private Carriers**

### **The common carrier**

38-007 At common law, the rights and obligations of a carrier are defined by contract and the status of the carrier. As regards status, the classification of the carrier as a common or private carrier<sup>25</sup> will identify certain of the carrier's duties and liabilities. A common carrier is a person who publicly professes, orally or by conduct, to undertake for reward<sup>26</sup> to all such persons, indiscriminately,<sup>27</sup> who desire to employ him, the transportation of goods provided that he has room.<sup>28</sup> It is a question of fact in each case whether a person is a common carrier.<sup>29</sup> A common carrier does not lose his legal character because he limits the class of goods he is prepared to carry<sup>30</sup> or the routes or areas over which he is ready to operate.<sup>31</sup> He is entitled to fix these limitations, for to compel him to do otherwise would be an intolerable and prohibitive imposition. Nor, again, does he relinquish his status because one terminus is outside the jurisdiction,<sup>32</sup> or because he fails altogether to fix his termini<sup>33</sup> or to specify the goods he is prepared to carry.<sup>34</sup>

### **Abdication of status**

38-008 The common carrier may voluntarily abdicate this status by giving notice that he will not accept custom from the public. Alternatively, the common carrier may shed this status as regards particular types of goods only.<sup>35</sup> A carrier therefore may choose to be a common carrier for such times, places, and goods as he considers it appropriate, provided that he offers carriage in

accordance with the calling of the common carrier and is thereby prepared to accept the burden of that calling.

## The identification of a common carrier

- 38-009 How a carrier sees fit to describe himself is indecisive for the establishment of his status. The courts have regard solely to the substance of the matter.<sup>36</sup> But “express and detailed professions as a common carrier are rare. In most cases, the fact that a profession has been made, and its extent, have to be collected from the conduct of the carrier”.<sup>37</sup> He is not a common carrier if he carries for particular persons only,<sup>38</sup> or if his practice is to pick and choose among offers which consignors make him,<sup>39</sup> or if, as a furniture-remover, his rule is not to accept whatever furniture is offered, but to inspect it to decide first whether he will take it, and at what rate.<sup>40</sup> A carrier will not be a common carrier if he reserves to himself the right of refusal of the goods which a customer asks him to carry.<sup>41</sup> The question is always one of fact to be determined objectively, not dependent entirely upon the subjective intention of the carrier,<sup>42</sup> nor his appearance to a particular customer. In answering this question, regard may be had to the carrier’s stated or published conditions of carriage<sup>43</sup> and advertisements,<sup>44</sup> policies adopted by the carrier to his customers, the nature of the goods carried and the routes taken by the carrier. All aspects of the carrier’s business may be considered in identifying the carrier’s status.<sup>45</sup> The test whether a person is a common carrier generally will not turn upon whether passengers or goods are carried.<sup>46</sup> A common carrier may by special contract restrict his insurer’s liability at common law<sup>47</sup> without losing his status as a common carrier.<sup>48</sup> To the extent that the provisions of the contract do not modify them, he is still subject to the liabilities and entitled to the rights of a common carrier at common law.

## The near extinction of the common carrier

- 38-010 Before 1963 the railway companies, and their successor the British Transport Commission, were undoubtedly common carriers of most kinds of goods.<sup>49</sup> But now no person (including the franchised and privatised railway undertakings) shall be regarded as common carriers by railway.<sup>50</sup> Similarly, Transport for London<sup>51</sup> and the operators of the Channel Tunnel<sup>52</sup> have been declared by Parliament not to be common carriers by rail. Given the diversification in the railways industry,<sup>53</sup> it is perhaps not surprising that the common carrier by rail is now extinct. Moreover, during the last 100 years the courts have shown a tendency not to attach a common carrier’s liability to carriers by road<sup>54</sup>; and today it seems that most carriers of goods by road are private carriers, except as regards passengers’ luggage in public service vehicles.<sup>55</sup> Under the

Road Haulage Association's Conditions of Carriage of 2009, the carrier stipulates that he is not a common carrier.<sup>56</sup> The point is of little practical importance, in view of the almost universal practice of all carriers, whether public or private, to contract out of their common law liability.<sup>57</sup> It should be noted that the provider of a "postal services" within the meaning of the *Postal Services Act 2000* shall not be regarded as a common carrier.<sup>58</sup>

In *Volcafe Ltd v Cia Sud Americana de Vapores SA*,<sup>59</sup> the Supreme Court said that:

"... although the position of common carriers is commonly referred to by way of background in the case law, as it was in the judgments below, it is no longer a useful paradigm for the common law liability of a shipowner. Common carriers have for many years been an almost extinct category. For all practical legal purposes, the common law liability of a carrier, unless modified by contract, is the same as that of bailees for reward generally."

## The private carrier

- 38-011 Where for any of the reasons above stated, a carrier of goods is not a common carrier, he will in virtually all cases<sup>60</sup> be a private carrier.<sup>61</sup> There is one additional reason why he might be a private carrier, namely, where he is merely a casual contractor for the transport of goods; for the common carrier is required to engage in his business habitually.<sup>62</sup> The precise limits of "habitually" have not been judicially clarified.

## The consequences of the distinction between common and private carriers

- 38-012 The importance of the classification of a carrier as a common or private carrier lies in the liabilities of and remedies available to the carrier. Their importance is subject to the terms of the contract of carriage.<sup>63</sup> Subject to that contract, the key differences in the position of the two types of carrier are as follows. It is the duty of the common carrier to carry the goods entrusted to him by a customer, provided he can accommodate those goods on his conveyance.<sup>64</sup> A common carrier effectively undertakes, save in circumstances recognised by the common law as providing an exception, to indemnify the owner of the goods he carries for any loss or damage sustained by the goods<sup>65</sup>; whereas a private carrier is liable, as a consequence of the bailment of the goods to him, only if his conduct amounts to negligence.<sup>66</sup> The common carrier has the right to demand advance payment of freight<sup>67</sup> and has a common law right to exercise a particular lien over the goods in his charge

for freight which is due.<sup>68</sup> The rights of limitation of the liability of the carrier differ depending upon status.<sup>69</sup> These rights and liabilities, and others, will be discussed below.

## Footnotes

- 25 It has been mooted that there is another class of carrier, namely a carrier, whilst not a common carrier, who has assumed the responsibilities of a common carrier, by virtue of their public employment. Such was the decision concerning lightermen in *Liver Alkali Co v Johnson (1871-72) L.R. 7 Ex. 267; (1873-74) L.R. 9 Ex. 338*. However, this view has been rejected, at least so far as carriage by road is concerned: *Nugent v Smith (1876) 1 C.P.D. 423, 433; Watkins v Cottell [1916] 1 K.B. 10; Belfast Ropework Co Ltd v Bushell [1918] 1 K.B. 210*; cf. *Aslan v Imperial Airways Ltd (1933) 149 L.T. 276, 278*.
- 26 That is, at a reasonable price: *Belfast Ropework Co Ltd v Bushell [1918] 1 K.B. 210*. If the carrier gives an estimate and seeks to negotiate the price with his customer, thus reserving a discretion to himself to refuse to carry the goods, he is not a common carrier: *Electric Supply Stores v Gaywood (1909) 100 L.T. 855*. A gratuitous carrier is not a common carrier: *Tylly v Morrice (1699) Carth. 485*.
- 27 In the provision of carriage services, discrimination against a person on the grounds of race, sex, religion, belief or sexual orientation is prohibited under the *Equality Act 2010 ss.4–13, 28–29*. Discrimination on the grounds of disability is also prohibited, but the prohibition does not apply in certain circumstances: *Equality Act 2010 s.31* and *Sch.3 Pt 9*.
- 28 *Bennett v Peninsular & Oriental Steam-Boat Co (1848) 6 C.B. 775, 787; Watkins v Cottell [1916] 1 K.B. 10, 14; Belfast Ropework Co Ltd v Bushell [1918] 1 K.B. 210, 212; GN Ry v LEP Transport [1922] 2 K.B. 742, 765*.
- 29 *Tamvaco v Timothy (1882) 1 Cab. El. 1; Belfast Ropework Co Ltd v Bushell [1918] 1 K.B. 210, 212; Eastman Chemical International AG v NMT Trading Ltd [1972] 2 Lloyd's Rep. 25; A Siohn & Co Ltd v R H Hagland & Son (Transport) Ltd [1976] 2 Lloyd's Rep. 428*.
- 30 *Johnson v Midland Railway Co (1849) 4 Ex. 367, 373; Date v Sheldon (1921) 7 Ll.L. Rep. 53, 54*. *Brind v Dale (1837) 8 Car. & P. 207* suggests that, if carriage is from place to place within the same town, the carrier is not a common carrier. But the decision is an isolated one, without reasoning on this point, and seems unsound in principle: see, Kahn-Freund at p.205; *Eastman Chemical International AG v NMT Trading Ltd [1972] 2 Lloyd's Rep. 25*.
- 31 cf. *Johnson v Midland Ry (1849) 4 Ex. 367* at 373.
- 32 *Crouch v LNW Ry (1854) 14 C.B. 255, 289; Piancini v LSW Ry (1856) 18 C.B. 226*. cf. *Bennett v P & O SS Co (1848) 6 C.B. 775* at 787.
- 33 *Date v Sheldon (1921) 7 Ll.L. Rep. 53*; also, *Belfast Ropework Co v Bushell [1918] 1 K.B. 210* at 214. Leslie at p.25, suggests that the courts would read reasonable termini into the common law contract of carriage.
- 34 Here, too, Leslie at pp.8, 25, suggests that the courts would read in reasonable classes of goods, on an analogy with the exclusion of dangerous goods and goods of an exceptional character from the normal profession of common carrier.

- 35 *Johnson v Midland Railway Co* (1849) 4 Ex. 367; *Sutcliffe v Great Western Railway Co* [1910] 1 K.B. 478.
- 36 *Belfast Ropework Co v Bushell* [1918] 1 K.B. 210 at 212; *Date v Sheldon* (1921) 7 Ll.L. Rep. 53 at 54; *Eastman Chemical International AG v NMT Trading Ltd* [1972] 2 Lloyd's Rep. 25; *A Siohn and Co Ltd v RH Hagland and Son (Transport) Ltd* [1976] 2 Lloyd's Rep. 428.
- 37 Leslie at p.13.
- 38 e.g. *Re Oxlade and NE Ry* (1864) 15 C.B.(N.S.) 680; *Consolidated Tea & Lands Co v Oliver's Wharf* [1910] 2 K.B. 395.
- 39 e.g. *Belfast Ropework Co v Bushell* [1918] 1 K.B. 210.
- 40 e.g. *Watkins v Cottell* [1916] 1 K.B. 10; *Scaife v Farrant* (1875) L.R. 10 Ex. 358, 364–365. See also *Electric Supply Stores v Gaywood* (1909) 100 L.T. 855.
- 41 *Ingate v Christie* (1850) 3 Car. & K. 61; *Belfast Ropework Co Ltd v Bushell* [1918] 1 K.B. 210, 215; *A Siohn & Co Ltd v RH Hagland & Son (Transport) Ltd* [1976] 2 Lloyd's Rep. 428, 429–430, although in the last case, the court held that the carrier's decision not to carry goods for a particular customer who was unsatisfactory did not affect that carrier's status as a common carrier.
- 42 *A Siohn & Co Ltd v RH Hagland & Son (Transport) Ltd* [1976] 2 Lloyd's Rep. 428.
- 43 cf. *Lacey's Footwear (Wholesale) Ltd v Bowler International Freight Ltd* Unreported 17 March 1995; affirmed [1997] 2 Lloyd's Rep. 369.
- 44 *A Siohn & Co Ltd v RH Hagland & Son (Transport) Ltd* [1976] 2 Lloyd's Rep. 428, 430.
- 45 *Upston v Stark* (1827) 2 Car. & P. 598; *Chattock & Co v Bellamy & Co* (1895) 64 L.J. Q.B. 250.
- 46 *Clarke v West Ham Corp* [1909] 2 K.B. 858, 879; *A Siohn & Co Ltd v RH Hagland & Son (Transport) Ltd* [1976] 2 Lloyd's Rep. 428.
- 47 See below, para.38-018.
- 48 *Baxendale v GE Ry* (1869) L.R. 4 Q.B. 244; *GN Ry v LEP Transport Co* [1922] 2 K.B. 742. cf. *Crouch v LNW Ry* (1854) 14 C.B. 255, 293; *Peek v N. Staffs Ry* (1863) 10 H.L. Cas. 473, 494 et seq.
- 49 *GN Ry v LEP Transport Co* [1922] 2 K.B. 742 at 769.
- 50 Railways Act 1993 s.123; the Railways Regulations 1998 (SI 1998/1340) reg.23. The Transport Act 1962 s.43(6) provides that the British Waterways Board shall not be regarded as common carriers by inland waterway.
- 51 Greater London Authority Act 1999 s.156(8), Sch.11 para.31. See also London Regional Transport Act 1984 Sch.2 para.7(3); s.2(6).
- 52 Channel Tunnel Act 1987 s.19(2).
- 53 This diversification has been propelled by the EC Council Directive of 29 July 1991 (91/440) and the EU Council Directives of 19 June 1995 (95/18 and 95/19), which require the separation and allocation of the management of railway infrastructure and railway services. These Directives have been implemented by the Railways Regulations 1998 (SI 1998/1340). The United Kingdom has sought to achieve this by privatising the railway undertakings by a system of franchising pursuant to the Railways Act 1993 and the Railways Act 2005.
- 54 Kahn-Freund at pp.205–207, citing *Electric Supply Stores v Gaywood* (1909) 100 L.T. 855; *Watkins v Cottell* [1916] 1 K.B. 10; and *Belfast Ropework Co v Bushell* [1918] 1 K.B. 210.

- 55 See below, para.38-068.
- 56 For these Conditions, see below, para.38-032.
- 57 See *McBain*, “*Time to abolish the common carrier*” [2005] *J.B.L.* 545.
- 58 Postal Services Act 2000 s.99 (as amended by the Postal Services Act 2011 s.91 and Sch.12 para.30). *Lane v Cotton* (1701) 12 *Mod.* 472; *Whitfield v Le Despencer* (1778) 2 *Cowp.* 754, 764; *Triefus & Co Ltd v Above Office* [1957] 2 *Q.B.* 352.
- 59 *Volcafe Ltd v Cia Sud Americana de Vapores SA* [2018] *UKSC* 61, [2019] *A.C.* 358 at [8].
- 60 See para.38-007, above.
- 61 The same carrier may, of course, operate some vehicles as a common carrier and some as a private carrier: *Date v Sheldon* (1921) 7 *Ll.L. Rep.* 53, 54.
- 62 See *Watkins v Cottell* [1916] 1 *K.B.* 10, 14; cf. too, *Brind v Dale* (1837) 8 *Car. & P.* 207; and *Belfast Ropework Co v Bushell* [1918] 1 *K.B.* 210.
- 63 Clarke, International Carriage of Goods by Road: CMR, 6th edn (2014), para.222.
- 64 *Jackson v Rogers* (1683) 2 *Show.* 327; *Boson v Sandford* (1685) 1 *Show.* 101, 104; *Lane v Cotton* (1701) 12 *Mod. Rep.* 472, 484; *Macklin v Waterhouse* (1828) 5 *Bing* 212; *Johnson v Midland Railway Co* (1849) 4 *Ex.* 367; *Carr v Lancashire and Yorkshire Railway Co* (1852) 7 *Ex.* 707; *Oxlade v North Eastern Railway Co* (1864) 15 *C.B.N.S.* 680; *Clarke v West Ham Corp* [1909] 2 *K.B.* 858, 877.
- 65 *Coggs v Bernard* (1703) 2 *Ld. Raym.* 909; *Dale v Hall* (1750) 1 *Wils. K.B.* 281; *Forward v Pittard* (1785) 1 *Term Rep.* 27; *Trent and Mersey Navigation v Wood* (1785) 3 *Esp.* 127; *Covington v Willan* (1819) *Gow.* 115; *Brooke v Pickwick* (1827) 4 *Bing.* 218; *Riley v Horne* (1828) 5 *Bing.* 217; *Brind v Dale* (1837) 8 *Car. & P.* 207. See below, para.38-018.
- 66 *Coggs v Bernard* (1703) 2 *Ld. Raym.* 909; *Hayman v Hewitt* (1798) *Peake Add. Cas.* 170; *Richardson v North Eastern Railway Co* (1872) *L.R.* 7 *C.P.* 75; *John Carter (Fine Worsteds) Ltd v Hanson Haulage (Leeds) Ltd* [1965] 2 *Q.B.* 495; *Morris v CW Martin & Sons Ltd* [1966] 1 *Q.B.* 716. See below, para.38-017.
- 67 *Batson v Donovan* (1820) 4 *B. & Ald.* 21; *Wyld v Pickford* (1841) 8 *M. & W.* 443. See below, para.38-050.
- 68 *Skinner v Upshaw* (1702) 2 *Ld. Raym.* 752, see below, para.38-052.
- 69 See below, paras 38-033—38-034.

## **(ii) - Introduction to Carrier's Duties and Liabilities**

**Chitty on Contracts 34th Ed.**

**Consolidated Mainwork Incorporating First Supplement**

**Volume II - Specific Contracts**

**Chapter 38 - Carriage by Land**

**Section 2. - Internal Carriage**

**(a) - Goods**

**(ii) - Introduction to Carrier's Duties and Liabilities**

### **Introduction**

- 38-013 The carrier's duties and liabilities are dependent on his designation as a common or private carrier. Once his status is determined, the liability of a common carrier is decided by reference to the obligations imposed on him by law. However, these responsibilities may be modified by the contract which he has concluded with the consignor, owner or forwarder of the goods. Additionally, there may be a liability in tort. The private carrier, on the other hand, will be liable simply under the contract he has concluded or in tort. The common or private carrier's liability may also rest in bailment, insofar as it is separate from liability in contract or tort.<sup>70</sup> The liability of the carrier in contract and tort may be concurrent.<sup>71</sup> We shall consider below the nature of the carrier's liability in respect of the carriage of goods, from the perspective of both common and private carriers, as it may arise in each of the respects described above, for loss or damage, delay and misdelivery.

### **Footnotes**

70 See above, para.38-001.

71 *Henderson v Merrett Syndicates Ltd [1995] 2 A.C. 145*; cf. *Tai Hing Cotton Mills Ltd v Liu Chong Hing Bank Ltd [1986] A.C. 80*.

## **(iii) - Carrier's Liability Imposed by Law**

**Chitty on Contracts 34th Ed.**

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**Chapter 38 - Carriage by Land**

**Section 2. - Internal Carriage**

**(a) - Goods**

**(iii) - Carrier's Liability Imposed by Law**

### **Common carrier**

- 38-014 By reason of his public calling, the common carrier is subject, at common law, to three peculiar obligations: he must accept for transport goods tendered with the appropriate freight, provided he has space in his vehicles<sup>72</sup>; he must charge only a reasonable rate for their carriage<sup>73</sup>; and he is strictly responsible for all loss or damage which occurs in the course of transit.

### **Wrongful refusal**

- 38-015 If a common carrier refuses goods for which he has space, or demands an unreasonable rate, he commits, *prima facie*, the common carrier's tort of wrongful refusal of goods.<sup>74</sup> But the following grounds of justification for refusing to carry goods will be open to him, namely:

(i)that the goods are not of the class that he carries, either because they fall outside his specified categories, or because, none being specified, it is unreasonable to expect him to carry such goods<sup>75</sup>;

(ii)that the goods are dangerous,<sup>76</sup> or exceptional in character,<sup>77</sup> e.g. of exceptional size, or would, in the circumstances, expose the carrier to undue risk,<sup>78</sup> or have a value disproportionate to the security measures at his disposal<sup>79</sup>;

(iii)that the goods were tendered an unreasonable time before the carrier was ready for his journey<sup>80</sup>;

(iv)that the goods consigned were inadequately packed.<sup>81</sup>

The common carrier will not be liable if, in fact, there was no room for the particular consignment in the carrier's vehicle or vehicles,<sup>82</sup> or if the consignor refused to pay the freight in advance when so requested.<sup>83</sup>

## Unreasonable charge

38-016 A common carrier must charge only a reasonable rate. If he demands and recovers an unreasonable charge, an action for money had and received will lie for the difference between the charge made and the charge that was reasonable.<sup>84</sup> But, though he cannot pick and choose among his customers, there is no rule at common law that he must treat all customers equally in the matter of charges.

“There was nothing in the common law to hinder a carrier from carrying for favoured individuals at an unreasonably low rate, or even gratis. All that the law required was, that he should not charge more than was reasonable.”<sup>85</sup>

## Private carrier

38-017 The private carrier is under no obligation to accept any goods for carriage,<sup>86</sup> but once he has done so, usually for reward, his obligations are regulated by the contract which governs the carriage, or by the bailment to which his acceptance of the goods has subjected him.<sup>87</sup> The contract may stipulate expressly the time, route and charges of the carriage and set out the carrier's responsibilities as to the safety of the goods, which will be construed and enforced subject to the [Unfair Contract Terms Act 1977](#) and [Unfair Terms in Consumer Contracts Regulations 1999](#) or the [Consumer Rights Act 2015](#) (which has replaced the [1999 Regulations](#) for contracts made on or after 1 October 2015<sup>88</sup>). Where the contract is silent, the private carrier will bear the obligation of a bailee to exercise reasonable care of the goods and there will be implied into the contract, by virtue of the [Supply of Goods and Services Act 1982](#), obligations to carry the goods to destination with reasonable care and skill,<sup>89</sup> within a reasonable time,<sup>90</sup> and at a reasonable price.<sup>91</sup> Similar rights are “treated as included” in respect of consumer service contracts under the [Consumer Rights Act 2015](#).<sup>92</sup>

## Common carrier's liability for loss and damage

- 38-018 Liability for loss or damage merits fuller discussion. The private carrier's liability extends only to loss or damage caused by his own or his employees' negligence or want of reasonable care,<sup>93</sup> the burden of disproving which is on him<sup>94</sup> even if the carriage is gratuitous.<sup>95</sup> But the common carrier is, *prima facie*, strictly responsible for all loss or damage which occurs in the course of transit,<sup>96</sup> subject, at common law, to the plea of any of four "excepted perils", coupled with the disproof of negligence on the part of the carrier or his employees. Furthermore, a claim for loss of or damage to the goods carried cannot be enforced by a set-off against or a deduction from the freight which is due to the carrier.<sup>97</sup> Thus, the common carrier is, *prima facie*, liable where goods in his charge are lost or damaged through the wrongful acts of third parties,<sup>98</sup> including robbery<sup>99</sup> or riot,<sup>100</sup> or through an accidental fire<sup>101</sup> or other inevitable accident.<sup>102</sup> This liability is often described vividly, though strictly speaking inaccurately, as an "insurer's liability".<sup>103</sup> To escape his insurer's liability the common carrier must prove both (i) that the loss or damage was caused by an act of God, an act of the Queen's enemies, inherent vice in the goods or the consignor's own fault; and (ii) that no negligence or want of reasonable care on the part of the carrier or his employees contributed to the loss or damage.

## Act of God

- 38-019 The archaic legal phrase "act of God" means an operation of natural forces (as opposed to an act of man<sup>104</sup>) which it was not reasonably possible to foresee and guard against, like lightning,<sup>105</sup> extraordinary weather conditions,<sup>106</sup> "some extraordinary natural event",<sup>107</sup> or a totally unexpected heart attack.<sup>108</sup>

## Act of the Queen's enemies

- 38-020 Acts of the Queen's enemies probably do not include acts of rebels, and certainly not acts of rioters. This defence refers rather to the acts of the armed forces of a foreign power with which the country is at war.<sup>109</sup> It is open to question whether this exception would be construed to apply to all acts and incidents of war and hostilities.<sup>110</sup> However, as the liability of a common carrier is likely to continue to exist, if it exists at all, in respect of inland carriage only, the scope of the exception of acts of the Queen's enemies may be justified.

## Inherent vice

- 38-021 “Inherent vice” in the goods consigned for carriage refers to the development of some latent characteristic or natural behaviour of the goods themselves (including their packaging and containers) which tends to their injury, deterioration or destruction, without the operation of any fortuitous, external cause.<sup>111</sup> In the context of the carriage of goods, “inherent vice” refers to the risk of deterioration of the goods as a result of their natural behaviour during the carriage or the inability of the goods to withstand the ordinary incidents of carriage without the involvement of an external fortuitous event.<sup>112</sup> For example, if an animal, for some reason like fright, injures or destroys itself in the course of transit in a way that it was not reasonable to foresee or guard against, its common carrier will normally escape liability.<sup>113</sup> Similarly, an inherent vice has been held to exist in the case of inadequate gin casks,<sup>114</sup> the explosion of fermented wine,<sup>115</sup> and defective vehicles that collapse while being transported.<sup>116</sup> For this purpose, any defect in the goods’ packaging will be treated as an inherent vice.<sup>117</sup>

## Consignor’s fault

- 38-022 If the loss, damage or destruction is due solely to the fault of the consignor (or his agent), the common carrier is free from liability. This defence may overlap with that of “inherent vice”, as where fragile or perishable goods are consigned inadequately packed and without any indication to the carrier of the particular precautions which they demand. Examples of the defence in question are consignor’s fraud,<sup>118</sup> defective packing,<sup>119</sup> misleading packing,<sup>120</sup> or insufficient or misleading addressing<sup>121</sup> by the consignor. It should be added that the carrier will probably be exonerated where, without negligence on his part, the loss or damage is due to the act of the consignee (or his agent).<sup>122</sup>

## Carrier’s negligence

- 38-023 As already mentioned, the common carrier does not escape liability merely by proving that the loss or damage was due to an excepted peril. He must also show that no negligence on his part contributed thereto.<sup>123</sup> It may also be noted that though damage has been caused by an excepted peril, a common carrier will be liable in respect of subsequent aggravation of such damage by his negligence.<sup>124</sup>

## Private carrier's liability for loss and damage

- 38-024 The private carrier's responsibility is to carry the goods entrusted to him with reasonable care, the degree of care depending on the nature and value of the goods, the nature of the agreed or anticipated conveyance and the standard of conduct reasonably expected of a competent carrier.<sup>125</sup> Unlike the common carrier, the private carrier's liability is not strict, although if the goods are lost or damaged, the burden will lie on the carrier to prove that he exercised the requisite degree of care or that the loss or damage was not caused by any failure to exercise such care.<sup>126</sup>

### Footnotes

- 72 e.g. *Jackson v Rogers* (1683) 2 Show. 327; *Lane v Cotton* (1701) 12 Mod. 472, 484; *Riley v Horne* (1828) 5 Bing. 217, 224.
- 73 e.g. *Pickford v Grand Junction Ry* (1841) 8 M. & W. 372, 377; *GW Ry v Sutton* (1869) L.R. 4 H.L. 226, 237. A rate is not unreasonable merely because it consists of a higher charge made for the greater risk attending the carriage of valuable goods: *Harris v Packwood* (1810) 3 *Taunt.* 264. cf. *Baxendale v Eastern Counties Ry* (1858) 4 C.B.(N.S.) 63.
- 74 *Jackson v Rogers* (1683) 2 Show. 327; *Crouch v LNW Ry* (1854) 14 C.B. 255.
- 75 See Leslie at p.8.
- 76 *Bamfield v Goole and Sheffield Transport Co Ltd* [1910] 2 K.B. 94, 115; Leslie at p.30.
- 77 *Date v Sheldon* (1921) 7 Ll.L. Rep. 53, 54.
- 78 *Edwards v Sherratt* (1801) 1 East 604.
- 79 *Batson v Donovan* (1820) 4 B. & Ald. 21, 32; Leslie at p.30.
- 80 *Lane v Cotton* (1701) 12 Mod. 472, 481.
- 81 *Munster v SE Ry* (1858) 4 C.B.(N.S.) 676, 701; *Sutcliffe v GW Ry* [1910] 1 K.B. 478, 503; *LNW Ry v Hudson* [1920] A.C. 324, especially at 340.
- 82 *Jackson v Rogers* (1683) 2 Show. 327; *Riley v Horne* (1828) 5 Bing. 217, 221.
- 83 *Wyld v Pickford* (1841) 8 M. & W. 443.
- 84 *Baxendale v LSW Ry* (1866) L.R. 1 Ex. 137; *GW Ry v Sutton* (1869) L.R. 4 H.L. 226.
- 85 *GW Ry v Sutton* (1869) L.R. 4 H.L. 226 at 237: advice of Blackburn J to the House of Lords.
- 86 Subject to the Equality Act 2010 ss.4–13, 28–29, 31 and Sch.3 Pt 9.
- 87 *Hunt & Winterbotham (West of England) Ltd v BRS (Parcels) Ltd* [1962] 1 Q.B. 617; cf. Clarke, International Carriage of Goods by Road: CMR, 6th edn (2014), para.222.
- 88 See below, paras 40–273 et seq.
- 89 Supply of Goods and Services Act 1982 s.13.
- 90 1982 Act s.14.
- 91 1982 Act s.15.

- 92 Consumer Rights Act 2015 ss.49, 51, 52, 57. See below, paras 40-571—40-592.
- 93 *Coggs v Bernard* (1703) 2 *Ld. Raym.* 909; *Hayman v Hewitt* (1798) *Peake Add. Cas.* 170.
- 94 *Travers (Joseph) & Sons Ltd v Cooper* [1915] 1 *K.B.* 73.
- 95 *Houghland v RR Low (Luxury Coaches) Ltd* [1962] 1 *Q.B.* 694.
- 96 As to when transit begins and ends, see below, para.38-041.
- 97 *United Carriers Ltd v Heritage Food Group (UK) Ltd* [1995] 2 *Lloyd's Rep.* 269. Indeed, a judgment obtained by a carrier for freight should not be stayed pending the obtaining and execution of a judgment against the carrier for loss or damage (at 273). See below, para.38-050.
- 98 *Gosling v Higgins* (1808) 1 *Camp.* 451; *Evans v Hutton* (1842) 4 *Man. & G.* 954. This includes goods entrusted to a fraudulent sub-contractor with whom the carrier has contracted (as opposed to a person falsely holding himself out to the customer as the carrier): *John Rigby (Haulage) Ltd v Reliance Marine Insurance Co Ltd* [1956] 2 *Q.B.* 468; *Harrisons and Crossfield Ltd v London and North Western Railway Co* [1917] 2 *K.B.* 755. cf. the definition of “bogus sub-contractor” in a carriers’ transit insurance policy in *London Tobacco Co (Overseas) Ltd v DFDS Transport Ltd* [1994] 1 *Lloyd's Rep.* 394.
- 99 *Morse v Slue* (1671) 1 *Vent.* 190, 239 (ship); *Barclay v Cuculla* (1784) 3 *Doug. K.B.* 389 (ship); *Gibbon v Paynton* (1769) 4 *Burr.* 2298.
- 100 *Forward v Pittard* (1785) 1 *T.R.* 27.
- 101 *Forward v Pittard* (1785) 1 *T.R.* 27; *Thorogood v Marsh* (1819) *Gow.* 105; *Hyde v Trent & Mersey Navigation Co* (1793) 5 *Term Rep.* 389.
- 102 *Forward v Pittard* (1785) 1 *T.R.* 27.
- 103 *HIH Casualty and General Insurance Ltd v Chase Manhattan Bank* [2003] *UKHL* 6, [2003] 2 *Lloyd's Rep.* 61 at [66].
- 104 *Forward v Pittard* (1785) 1 *T.R.* 27; and cf. *Oakley v Portsmouth and Ryde Steam Packet Co* (1856) 11 *Ex.* 618 (ship).
- 105 *Forward v Pittard* (1785) 1 *T.R.* 27.
- 106 e.g. *Blyth v Birmingham Waterworks Co* (1856) 11 *Exch.* 781 (frost); *Briddon v GNRy* (1858) 28 *L.J. Ex.* 51 (snow); *Nugent v Smith* (1876) 1 *C.P.D.* 423 (storm); *Makin v LNE Ry* [1943] *K.B.* 467 (flood).
- 107 *Environment Agency v Empress Car Co (Abertillery) Ltd* [1999] 2 *A.C.* 22, 35.
- 108 *Ryan v Youngs* [1938] 1 *All E.R.* 522.
- 109 The restriction of the excepted peril to acts done by states with which the sovereign is at war is sound on historical grounds: see Holmes, Common Law, p.177. *Curtis v Mathews* [1918] 2 *K.B.* 825; and *HM Secretary of State for War v Midland & GW Ry* [1923] 2 *Ir.R.* 102, seem not to be true exceptions: the one case involved an act of the “Provisional Government” in Dublin during Easter Week, 1916, and in the other, the judgment was influenced by the fact that the Irish Bench, at the time of the “Troubles”, considered a state of war to exist.
- 110 See *Spinney's (1948) Ltd v Royal Insurance Co* [1980] 1 *Lloyd's Rep.* 406. Note the treatment in Clarke, International Carriage of Goods by Road: CMR, 6th edn (2014), para.236b–236f.
- 111 *Soya GmbH v White* [1983] 1 *Lloyd's Rep.* 122; *Global Process Systems Inc v Syarikat Takaful Malaysia Berhad* [2011] *UKSC* 5, [2011] 1 *All E.R.* 869. cf. *Blower v GW Ry* (1872) *L.R.* 7 *C.P.* 655, 662–663. The concept of “inherent vice” has been explored at length in the

- context of carriage of goods by sea and is included as a defence in the CMR Convention (art.17.2) and the CIM Convention (art.23.2). See below, paras 38-093, 38-127. See *Rodière (1971) 6 E.T.L. 2, 16.*
- 112 *Soya GmbH v White [1983] 1 Lloyd's Rep. 122, 126; Noten BV v Harding [1990] 2 Lloyd's Rep. 283; Global Process Systems Inc v Syarikat Takaful Malaysia Berhad [2011] UKSC 5, [2011] Lloyd's Rep. I.R. 302.*
- 113 *Blower v GW Ry (1872) L.R. 7 C.P. 655; Kendall v LSW Ry (1872) L.R. 7 Ex. 373.* See also *Gill v Manchester Ry (1873) L.R. 8 Q.B. 186; Prior v LSW Ry (1885) 2 T.L.R. 89.* The carrier is required to comply with the regulations for the protection of animals laid down in the *Welfare of Animals (Transport) (England) Order 2006 (SI 2006/3260) (Wales Order: SI 2007/1047)*, made pursuant to *Animal Health Act 1981*. Accordingly, the carrier may seek to require the consignor to warrant that the animals to be carried are in a fit state to be carried and properly packed and secured.
- 114 *Hudson v Baxendale (1857) 2 H. & N. 575.*
- 115 *Farrar v Adams (1711) Buller N.P. 69 (c).*
- 116 *Johnson v NE Ry (1888) 5 T.L.R. 68; Lister v L & Y Ry [1903] 1 K.B. 878.*
- 117 *Wilson, Holgate & Co Ltd v The Lancashire and Cheshire Insurance Corp Ltd (1922) 13 Ll.L. Rep. 486, 487; Mayban General Insurance BHD v Alstom Power Plants Ltd [2004] EWHC 1038 (Comm), [2004] 2 Lloyd's Rep. 609* at [19]–[22] (overruled on other grounds in [2011] UKSC 5).
- 118 *Tylly v Morrice (1699) Carth. 485; Gibbon v Paynton (1769) 4 Burr. 2298.*
- 119 *Barbour v SE Ry (1876) 34 L.T. 67; Gould v SE & C Ry [1920] 2 K.B. 186* (which shows that the defence is applicable even if the carrier is aware of the defective packing when he accepts the goods). cf. *Baldwin v LC & D Ry (1882) 9 Q.B.D. 582; LNW Ry v Hudson [1920] A.C. 324*; and see Kahn-Freund at pp.370–372.
- 120 *Bradley v Waterhouse (1828) 3 Car. & P. 318.*
- 121 cf. *Bradley v Dunipace (1861) 7 Hurl. & N. 200* (ship); *Wise v GW Ry (1856) 1 Hurl. & N. 63.*
- 122 *Nurrell v Larkin (1831) 1 L.J. C.P.(N.S.) 2; Butterworth v Brownlow (1865) 19 C.B.(N.S.) 409.* In these cases, the common carrier escaped being liable qua warehouseman, transit having been completed.
- 123 Act of God: *Blower v GW Ry (1872) L.R. 7 C.P. 655, 663; Talley v GW Ry (1870) L.R. 6 C.P. 44, 51–52.* Queen's enemies: *Blower v GW Ry (1872) L.R. 7 C.P. 655; Talley v GW Ry (1870) L.R. 6 C.P. 44;* cf. *Phillips v Clark (1857) 2 C.B.(N.S.) 156, 164* (ship). Inherent vice: cf. *Blower v GW Ry (1872) L.R. 7 C.P. 655;* cf. too, *Gill v Manchester Ry (1873) L.R. 8 Q.B. 186.* Consignor's fault: *Stuart v Crawley (1818) 2 Stark. 323;* contrast *Richardson v NE Ry (1872) L.R. 7 C.P. 75.*
- 124 *Notara v Henderson (1872) L.R. 7 Q.B. 225* (ship). See, too, *Cox v LNW Ry (1862) 3 F. & F. 77.*
- 125 *A F Colverd & Co Ltd v Anglo-Overseas Transport Co Ltd [1961] 2 Lloyd's Rep. 352; James Buchanan & Co Ltd v Hay's Transport Services Ltd [1972] 2 Lloyd's Rep. 535; Johnson Matthey & Co Ltd v Constantine Terminals Ltd [1976] 2 Lloyd's Rep. 215; A Siohn & Co Ltd v RH Hagland & Son (Transport) Ltd [1976] 2 Lloyd's Rep. 428; Swiss Bank Corp v Brink's*

- MAT Ltd [1986] 2 Lloyd's Rep. 79; Metaalhandel JA Magnus BV v Ardfields Transport Ltd [1988] 1 Lloyd's Rep. 197.*
- 126 *John Carter (Fine Worsteds) Ltd v Hanson Haulage (Leeds) Ltd [1965] 2 Q.B. 495; Morris v CW Martin & Sons Ltd [1966] 1 Q.B. 716; British Road Services Ltd v Arthur V Crutchley Co Ltd [1968] 1 All E.R. 811.* Any damages awarded against the private carrier may be reduced by reason of the claimant's contributory negligence pursuant to the [Law Reform \(Contributory Negligence\) Act 1945](#), because the private carrier bears a duty of care both in contract and tort, as will be discussed below. See Vol.I, para.[29-094](#).

## **(iv) - Contractual Liability**

**Chitty on Contracts 34th Ed.**

**Consolidated Mainwork Incorporating First Supplement**

**Volume II - Specific Contracts**

**Chapter 38 - Carriage by Land**

**Section 2. - Internal Carriage**

**(a) - Goods**

**(iv) - Contractual Liability**

### **Liability by the terms of the contract**

- 38-025 The common carrier may modify the obligations which rest on him by virtue of his public status by means of the contract with the consignor or owner of the goods, in which case his liability will be determined by his “special contract”. The private carrier will often <sup>127</sup> conduct the carriage of goods pursuant to a contract, which will regulate his liability. Indeed, the carrier may be subject to obligations implied by law. <sup>128</sup> The terms of the contract may be liable to be upset by the [Unfair Contract Terms Act 1977](#), <sup>129</sup> insofar as they are exemption clauses, and the [Unfair Terms in Consumer Contracts Regulations 1999](#), which renders as non-binding on a consumer any term which has not been “individually” negotiated and may be deemed “unfair”. <sup>130</sup> Such terms will be controlled in respect of consumer contracts under the [Consumer Rights Act 2015](#), which replaces and revokes the [1999 Regulations](#) for contracts made on or after 1 October 2015. <sup>131</sup>

### **Special contracts**

- 38-026 In the modern law of carriage of goods by land the strict liability of the common carrier has almost completely disappeared, because carriers have for very many years entered into “special contracts” with their customers relieving them of the common carrier’s heavy liability. <sup>132</sup> The common carrier’s liability at common law as described in the preceding paragraphs is thus no

longer part of the living law. Nonetheless, it has had a profound effect upon the contract practice of carriers by rail and road.

## Incorporation of terms

- 38-027 The question whether exemption clauses form part of a contract of carriage of goods by land now depends almost entirely upon the common law. The rules of the common law on the incorporation of terms are fully discussed elsewhere.<sup>133</sup> Briefly, the consignor will be bound if he signed a consignment note which contains or refers to the exemption clauses<sup>134</sup>; and this, of course, is the most usual way in which such clauses are in practice incorporated in a contract for the carriage of goods. He will also be bound if he received without signing it a document such as a receipt or ticket<sup>135</sup> which contains or refers to exemption clauses, provided he knew that there was writing on the document and that this contained conditions, or provided the carrier did what was reasonably sufficient to give him notice of the conditions.<sup>136</sup> The more burdensome or unusual the clause restricting or excluding liability, the more closely notice of it must be made.<sup>137</sup> He may perhaps also be bound if the previous course of dealing between him and the carrier justifies the inference that he must have known not only that goods are always accepted for carriage upon conditions, but also what those conditions are.<sup>138</sup> He may well be bound by any such course of dealing or notice even if he never read the conditions and did not know what they were.<sup>139</sup> In any event, the carrier's capacity to impose terms purporting to exclude or restrict his liability for negligence in the case of loss or damage is now fettered in that any contractual term or notice to that effect has to satisfy the requirement of reasonableness under the [Unfair Contract Terms Act 1977](#) and, where applicable, the requirement of fairness under the [Unfair Terms in Consumer Contracts Regulations 1999](#).<sup>140</sup> Such provisions insofar as they affect consumers will be subject to the [Consumer Rights Act 2015](#), which replaces and revokes the [1999 Regulations](#) for contracts made on or after 1 October 2015.<sup>141</sup>

## Construction of contracts

- 38-028 A common carrier no less than a private carrier can contract out of his liability for loss of or damage to the goods.<sup>142</sup> But he must do so in plain language: otherwise his common law liability remains and cannot be removed by "subtle implications or ambiguous words".<sup>143</sup> Such clauses of exemption or limitation will be construed strictly and narrowly<sup>144</sup> and, therefore, will operate to exclude liability for the negligence of the carrier if the clause expressly (or necessarily by implication) so provides.<sup>145</sup> Whilst the task at hand is to construe the exemption clause in order to understand the intention of the parties,<sup>146</sup> broadly if the clause makes no specific reference to negligence, liability for negligence will be excepted where the carrier's only realistic liability

would lie in negligence<sup>147</sup>; but this is not necessarily so, as the question is one of construction and so it must be clear that the parties intended to exclude liability for negligence.<sup>148</sup> There may be an important difference between the positions of common and private carriers in respect of exemption clauses which do not specifically refer to negligence. The potential liability of a common carrier includes and extends beyond negligence. Such a clause therefore would not protect the common carrier from his own negligence.<sup>149</sup> On the other hand, the private carrier may be liable in tort or contract if he fails to take reasonable care. It is probable that such a clause would protect the private carrier from liability for negligence,<sup>150</sup> but it is arguable that the clause would operate to except liability in contract, but not in tort.<sup>151</sup> Nevertheless, at common law a common carrier can contract out of liability for negligence,<sup>152</sup> or even for theft by his employees,<sup>153</sup> provided he uses clear enough words. Naturally the capacity of a carrier to contract out of his liability for negligence in the case of loss of or damage to goods has now been limited by the [Unfair Contract Terms Act 1977](#) and any attempt so to do now has to satisfy the requirement of reasonableness under that Act.<sup>154</sup> As with exemption clauses, the reasonableness of provisions purporting to limit liability may fall to be assessed under the [Unfair Contract Terms Act 1977](#), especially where the parties' bargaining strength is unequal, whether by reference to economic strength or to convenience or opportunity.<sup>155</sup> Similarly, where applicable, the relevant terms will have to satisfy the requirement of fairness under the [Unfair Terms in Consumer Contracts Regulations 1999](#) or, for contracts made on or after 1 October 2015, the [Consumer Rights Act 2015](#) (which replaces and revokes the 1999 Regulations).<sup>156</sup>

## Fundamental breach

38-029 The construction of exemption clauses is discussed elsewhere in this work, and various judicial techniques for confining them within narrow limits are there considered.<sup>157</sup> One of these techniques was formerly so important in the law of carriage of goods that it must be briefly mentioned. This was the so-called "doctrine" of fundamental breach (or breach of a fundamental term). If the carrier committed a fundamental breach of the contract of carriage, so that the other party had the right to terminate the contract, the carrier might be unable to rely on the exemption clauses in the contract at all, unless the other party, with full knowledge of the facts, elected to affirm and not to terminate the contract. The carrier might be unable to do so if, for instance, he unjustifiably deviated from the agreed or customary route,<sup>158</sup> or sent perishable goods by goods train after contracting to send them by passenger train,<sup>159</sup> or left the goods even for a short time to their fate,<sup>160</sup> or unjustifiably delivered them to the wrong person,<sup>161</sup> or unjustifiably subcontracted the contract of carriage to another carrier of whom he must have known his customer would not approve.<sup>162</sup> The cases illustrating this doctrine in the law of carriage by land produced some fine distinctions and some anomalous results.<sup>163</sup> For instance, it is curious that if a lorry driver negligently left a loaded lorry unattended whilst he had a meal and the contents were stolen,

his employer might have been guilty of fundamental breach<sup>164</sup>; but if he deliberately stole the contents himself, his employer was not so guilty.<sup>165</sup> Again, it is curious that if a thief tricked a carrier into employing him as a lorry driver by means of forged references, and then stole the goods, the carrier's negligence in not checking the references properly did not amount to fundamental breach<sup>166</sup>; but if a thief tricked a carrier into sub-contracting the contract by posing as the representative of a non-existent haulage firm, the carrier's negligence in not checking his credentials properly might do so.<sup>167</sup> As regards the burden of proof, the Court of Appeal held that if the plaintiff pleads breach of contract or duty and nothing more, the burden of proving the absence of a fundamental breach by the carrier rests on the defendant.<sup>168</sup>

## Rule of construction only

- 38-030 The House of Lords has, of course, emphasised that the "doctrine" of fundamental breach is not a rule of substantive law but a rule of construction to the effect that normally an exemption clause will be construed as not applying to a situation created by fundamental breach.<sup>169</sup> As a result of this decision the scope of the "doctrine" is now somewhat uncertain.<sup>170</sup> The scope of an exemption clause in a particular contract of carriage will be a question of construction depending on the intention of the parties, and it will require very clear words for an exemption clause to be interpreted as wide enough to cover a fundamental breach of contract.<sup>171</sup> Obviously many of the decisions cited in this and the last paragraphs must now be read in light of the more recent expressions of view by the House of Lords, although it is fair to say that their Lordships did not expressly disapprove of any of these cases.<sup>172</sup> It has been assumed that the doctrine of fundamental breach as previously enunciated should continue to apply to deviations from the contractual carriage and the line of cases concerning deviation (generally involving carriage by sea) should continue to avoid the application of exemption clauses.<sup>173</sup> It is submitted that such cases, at least as they apply to carriage by land, should be tailored to the main line of authorities and the now evolved rule of construction, as an exemption clause may be so drafted to take account of deviations.<sup>174</sup>

## Exceptions to liability commonly found in special contracts

- 38-031 Standard form contracts often distinguish between goods carried at the carrier's risk and goods carried at the owner's risk, the former attracting a higher freight.<sup>175</sup> Where the parties agree that the goods are carried at the carrier's risk, the carrier will be liable for loss, damage or delay but subject to a list of exceptions. The exceptions often relied on by carriers include the four common law excepted perils, namely, act of God, act of foreign enemy, inherent vice and consignor's fault,<sup>176</sup> and some others, e.g. any consequence of war, invasion, hostilities, civil war, insurrection,<sup>177</sup>

requisition, destruction of or damage to property by or under any order of any government or public or local authority,<sup>178</sup> and seizure under legal process.<sup>179</sup> Additionally, the contract may provide that the carrier is liable for loss or damage caused by insufficient or improper packing, labelling or addressing<sup>180</sup> by riots, civil commotions,<sup>181</sup> strikes, lockouts, stoppage or restraint of labour<sup>182</sup> from whatever cause; or by the consignee not taking or accepting delivery within a reasonable time. Where goods are carried at the owner's risk, the carrier will generally only be liable for loss, damage or delay resulting from the carrier's "wilful misconduct". The contract will often provide that the onus of proving "wilful misconduct" lies on the owner of the goods. The meaning of "wilful misconduct"<sup>183</sup> means something a great deal more than negligence, even gross or culpable negligence, and the onus of proving it may be prove to be a heavy one,<sup>184</sup> because the House of Lords has held that the carrier is entitled to refuse to give any explanation as to how the loss or damage occurred.<sup>185</sup>

## The Road Haulage Association's Conditions of Carriage

<sup>38-032</sup> There are no standard conditions of carriage applicable to the road haulage industry as a whole.<sup>186</sup> Consequently, some carriers seek to apply highly individual conditions, constrained only by the requirements of the [Unfair Contract Terms Act 1977](#)<sup>187</sup> and the [Unfair Terms in Consumer Contracts Regulations 1999](#) (or the [Consumer Rights Act 2015](#), which replaces and revokes the [1999 Regulations](#) for contracts made on or after 1 October 2015).<sup>188</sup> There are, however, conditions of carriage issued by the Road Haulage Association Ltd (RHA) which are used by most carriers by road. The most recent version of these conditions is that which became operative as from 1 September 2020.<sup>189</sup> It is common for individual variations of these conditions to be applied. However, even where a contract of carriage has not been expressly made subject to the Association's Conditions, a course of previous dealing may be held sufficient to bring the contract in question under the Conditions.<sup>190</sup> Under the RHA's Conditions, the carrier's liability incorporates a number of the exceptions referred to above<sup>191</sup> and there is a specific provision that the carrier is still liable, even in the case of an excepted peril, if he fails to use reasonable care to minimise the effect of that peril. The RHA's Conditions provide that the liability of the carrier in respect of physical loss, misdelivery of or damage to the consignment shall be limited to the lesser of the value of the goods, the cost of repair or £1,300 per tonne on the gross weight of the goods lost, misdelivered or damaged.<sup>192</sup> In relation to all other claims, the RHA Conditions limit the carrier's liability to the lesser of the carriage charges or the amount of the proved loss.<sup>193</sup> In either case, the customer may declare an increase in this limit, provided that additional carriage charges are agreed.<sup>194</sup>

## Upper financial limit of liability: the Carriers Act 1830

- 38-033 While imposing its very strict liability upon common carriers, the common law drew no distinction between different kinds of goods, nor did it give the carrier any general right to open and inspect the packages brought to him for transport, or to be informed of their contents.<sup>195</sup> Hence the stagecoach proprietors had a real grievance: they were required to carry articles potentially of great value without any means of knowing what they were carrying, and were strictly liable if the articles were stolen during transit. The *Carriers Act 1830* was passed in order to remove this grievance.<sup>196</sup> It relieved the common carrier by land (and mail contractors and stagecoach proprietors) of liability for certain goods of a specially valuable or breakable nature and worth more than £10, unless a special declaration of value was made. The Act provides<sup>197</sup> that no common carrier by land for hire shall be liable for the “loss<sup>198</sup> of or injury to” a “parcel or package”<sup>199</sup> containing certain articles of a valuable or breakable nature enumerated in *s.1 of the Act*,<sup>200</sup> the total value of which exceeds £10, unless their value is declared on delivery to the carrier, and an increased charge paid (if demanded)<sup>201</sup> as compensation for the greater risk and care to be taken. The carrier must give notice that such an increased charge will be made by a notice fixed in legible characters in some public and conspicuous part of his premises<sup>202</sup> and must on request give a signed receipt for the parcel or package.<sup>203</sup> If no declaration of value is made by the consignor, or if he does not pay or promise to pay the increased charge, the carrier is under no liability for the loss of or injury to the goods, unless it arose from any theft or forgery on the part of his employees.<sup>204</sup> If the carrier fails to post up the statutory notice, or to give the signed receipt on request, he is subject to the common carrier’s liability for loss or damage.<sup>205</sup> If all the mandatory requirements of the Act are duly fulfilled, the owner may recover the value of the goods if they are lost or injured, and in addition the increased charge.<sup>206</sup> The carrier may still rely on the defence of the *Carriers Act* even though he has deviated from the route and so committed a fundamental breach of contract,<sup>207</sup> or has been guilty of “gross negligence”.<sup>208</sup> One provision of the Act looks strange to modern eyes, namely that if no declaration of value is made, the carrier’s liability is not merely limited to the now paltry sum of £10 but is excluded altogether.

## Scope of application of the Carriers Act

- 38-034 The *Carriers Act* is still in force but its practical importance today is very small. It applies to “mail contractors, stage coach proprietors, and other common carriers by land for hire”. It does not apply to private carriers and therefore not to any carrier by rail<sup>209</sup> nor to the great majority of modern carriers by road, except in regard to passengers’ luggage carried in public service vehicles (buses and coaches<sup>210</sup>). Though such luggage is carried “free of extra charge” and the Act only applies

to “carriers for hire”, the Act nevertheless applies to passengers’ luggage when carried in such vehicles because the fare paid by the passenger is deemed to include freight for his luggage.<sup>211</sup> Indeed, this is probably the most important sphere of application of the Act today. The Act applies to “common carriers by land” and therefore not to carriers by sea, even though the ship belongs to a common carrier by land. Hence, in the case of a through journey by land and sea, the carrier is not protected by the Act<sup>212</sup> unless he can prove that the loss or injury occurred during the land part of the journey.<sup>213</sup>

## Dangerous and unusual goods

- 38-035 At common law even a common carrier was never obliged to carry dangerous goods.<sup>214</sup> The customer impliedly warrants that the goods to be carried are not dangerous, unless the carrier knew or had the means of knowing that the goods are dangerous.<sup>215</sup> The customer will be liable at law for all loss or damage caused by any breach of this warranty, whether he was aware of the dangerous nature of the goods or not.<sup>216</sup> The carriage of dangerous and radioactive goods in the United Kingdom is governed by regulations<sup>217</sup> made to implement European Parliament and Council Directive 2008/68/EC of 24 September 2008 on the approximation of the laws of the Members States concerning the inland transport of dangerous goods. These regulations implement the Annexes to the European Agreement concerning the International Carriage of Dangerous Goods by Road signed at Geneva on 30 September 1957, as amended (“ADR”) and the [Annex to the Regulation concerning the International Carriage of Dangerous Goods by Rail \(“RID”\)](#) which forms Appendix C to the Convention concerning International Carriage by Rail (“COTIF”).<sup>218</sup>

## Deviation

- 38-036 At common law a carrier, whether common or private, must carry the goods entrusted to him by the agreed route or by his own usual route (though it may not be the shortest)<sup>219</sup> and he must not deviate unnecessarily from his usual or the agreed route.<sup>220</sup> What amounts to a justifiable deviation in carriage by land has not been settled with precision. Deviation is certainly necessary and justifiable to secure the safety of the goods,<sup>221</sup> and probably justifiable if, e.g. it is to avoid a peril to the goods that lies ahead on the route, or, possibly, to bypass a blockage of the route in order to obviate unreasonable delay. The effect of deviation as constituting a fundamental breach of contract and so disentitling the carrier from relying on his exemption clauses has already been considered.<sup>222</sup>

## Delay

- 38-037 At common law a carrier, whether common or private, must deliver the goods at the agreed time, or if no time has been agreed, within a reasonable time.<sup>223</sup> Unless the carrier's obligation to deliver the goods at destination at an agreed time is construed strictly, he will be liable for delay only insofar as he has failed to exercise reasonable care to deliver the goods at the required time.<sup>224</sup> He is not liable for delay where it was due to any cause outside the range of reasonable foresight and his own control, like an act of God,<sup>225</sup> or the act of a third party,<sup>226</sup> imperfect addressing of the goods by the consignor,<sup>227</sup> a strike of the carrier's employees,<sup>228</sup> the need (which could not reasonably have been foreseen) to give priority to passenger traffic,<sup>229</sup> or an exceptional and not reasonably foreseeable press of traffic.<sup>230</sup> In the latter case, it is the carrier's duty to forward goods in the order in which he received them; failure to do this may amount to negligence.<sup>231</sup> If the carrier has failed to exercise the requisite degree of care so as to be liable for delay, the *Carriers Act* will afford him no protection.<sup>232</sup>

## Detention

- 38-038 Detention is only another form of delay; it means negligent failure to dispatch the goods in proper time from the station of dispatch or retention of the goods at the station of destination for more than a reasonable time.<sup>233</sup>

## Measure of damages for delay

- 38-039 At common law the carrier is liable for such damages resulting from delay as arise naturally, i.e. according to the usual course of things, from the breach of contract<sup>234</sup>; or, to put it differently, for such damages as were at the time of the contract reasonably foreseeable as likely to result from such breach.<sup>235</sup> He is not liable for loss of exceptional profit which the owner would have made<sup>236</sup> unless it is shown that he knew of the facts which would lead to such special loss if he was guilty of delay.<sup>237</sup> Several standard form contracts provide that in general the carrier will not be liable for indirect or consequential damages or for loss of a particular market, whether held daily or at intervals.<sup>238</sup>

## Misdelivery

- 38-040 If the carrier delivers the goods to the wrong person, he is liable for breach of contract and for conversion.<sup>239</sup> But the strict liability in the tort of conversion is modified in favour of carriers. Thus, provided the carrier delivers to the consignee named in the contract, in accordance with its terms, he is not guilty of breach of contract or conversion if the consignee is not otherwise entitled to the goods, e.g. because he is receiving stolen goods.<sup>240</sup> This privilege has been regarded as a just corollary to the common carrier's general duty to accept the goods of all<sup>241</sup>; but today it probably applies to all carriers, whether common or private. Again, if the carrier, in delivering, as he thinks, to the agreed consignee, is in fact tricked into delivering to the wrong person in circumstances which ought reasonably to have aroused suspicion in his mind that the person holding himself out as consignee was not lawfully entitled to the goods, the carrier will be liable for breach of contract, because of his fault, and for conversion.<sup>242</sup> But if he delivers the goods to the address to which they were consigned, and there are no suspicious circumstances to warn him that the person claiming delivery there is not in fact entitled to it, he will escape liability.<sup>243</sup> It is not necessarily misdelivery to deliver goods to a swindler who has induced the consignor to send him the goods. In some circumstances, delivery to the wrong person may amount to a fundamental breach of contract and so may prevent the carrier from relying on his exemption clauses,<sup>244</sup> but this will turn on the construction of the clause and the intentions of the parties.<sup>245</sup>

## Beginning and end of transit

- 38-041 It is important to determine when transit begins and ends, because the carrier's liability as a carrier only exists between these times: after the end of transit he is only subject to the (usually lesser) liability of a warehouseman.<sup>246</sup> Transit begins not when the vehicle begins to move<sup>247</sup> but when the goods are delivered to and accepted by the carrier or by one of his actually or ostensibly authorised employees or agents.<sup>248</sup> At common law transit ends when the goods are tendered to the consignee, whether he has accepted them or not. Where the goods are not to be delivered at the consignee's premises, transit ends a reasonable time after their arrival at the station or place of destination.<sup>249</sup>

## Stoppage in transit

- 38-042

Under the [Sale of Goods Act 1979](#)<sup>250</sup> the consignor, if he is an unpaid seller who has learnt of the insolvency of the buyer, has a right to stop the goods while they are in transit, even though he is not the owner and even though he may not be a party to the contract of carriage. The meaning of “in transit” for the purposes of this rule is defined in the Act<sup>251</sup> and does not exactly coincide with its meaning for the purposes of holding the carrier liable as a carrier.<sup>252</sup> For instance, if the carrier wrongfully refuses to deliver the goods to the buyer, transit is at an end for the purposes of stoppage in transit<sup>253</sup> but not for the purposes of the carrier’s liability. Conversely, if the goods are rejected by the buyer and the carrier continues in possession of them, transit continues for the purposes of stoppage in transit<sup>254</sup> but ends for the purposes of the carrier’s liability. Failure to comply with a notice to stop the goods when the consignor is properly exercising his right exposes the carrier to an action in tort for conversion. Compliance with an invalid notice may make him similarly liable to the owner. Subject to the foregoing, the carrier is always bound (unless otherwise agreed) to follow the instructions of the owner of the goods, provided it is reasonably practicable to do so<sup>255</sup>; and he is entitled to assume that, in the absence of notice to the contrary, the owner is the consignee.<sup>256</sup>

## Title to sue in contract

- 38-043 Where the owner has suffered loss or damage to his goods, and has contracted with the carrier, the owner may sue the carrier in an action on that contract. At common law, it is necessary that both the owner and the offending carrier are parties to that contract.<sup>257</sup> Difficulties of identifying the contracting parties arise, where the owner of the goods has sold or bought the goods during the transit, and where the contracting carrier has entrusted the carriage to a sub-carrier or has delivered the goods to a successive carrier.<sup>258</sup> In the case of a sale of the goods carried, an initial presumption is made that he who is the owner of the goods at the time of the breach has contracted with the carrier<sup>259</sup> and that that person is the consignee.<sup>260</sup> In that case, either the carrier has contracted directly with the consignee or the consignor of the goods has contracted with the carrier as the consignee’s agent.<sup>261</sup> Insofar as the consignor is the consignee’s agent, any representation made or variation agreed by the consignor, will bind the consignee,<sup>262</sup> provided it is made or agreed with the consignee’s authority. Where the presumption is rebutted and it is established that the consignor, and not the consignee, is a party to the contract of carriage, the consignor will have title to sue the carrier. This may be to the detriment of the consignee, who may have no contractual rights, as the consignor might have no wish to sue the carrier for the benefit of the consignee, especially if the consignor has discharged his obligations to the consignee by delivering the goods to the carrier and has been paid by the consignee. However, there is a possibility of an implied contract coming into being when the consignee takes delivery of the goods from the carrier<sup>263</sup>; such implied contracts, however, raise numerous objections and are limited in their scope.<sup>264</sup> In cases where the consignor or consignee are not contracting parties, they may now be able to enforce

a contractual term which was intended for their benefit pursuant to the Contracts (Rights of Third Parties) Act 1999.<sup>265</sup> Whether or not the owner of the goods is a party to the carriage contract, he may well have his rights in bailment and remedy in tort in respect of any loss of or damage to the goods.<sup>266</sup>

## Footnotes

- 127 This need not always be the case. For example, the private carrier may be a gratuitous or involuntary bailee.
- 128 For example, under the Supply of Goods and Services Act 1982.
- 129 *Frans Maas (UK) Ltd v Samsung Electronics (UK) Ltd* [2004] EWHC 1502 (Comm), [2004] 2 Lloyd's Rep. 251 at [154]–[161]; *Scheps v Fine Art Logistic Ltd* [2007] EWHC 541 (QB) at [30]–[32]. See below, Ch.40.
- 130 regs 4(1), 5(1), 8(1). See below, Ch.40. See also *Lacey's Footwear (Wholesale) Ltd v Bowler International Freight Ltd* [1997] 2 Lloyd's Rep. 369, 385. In *English Welsh & Scottish Railway Ltd v E On UK Plc* [2007] EWHC 599 (Comm), a contract for carriage of coal by rail was held to be void and unenforceable where it contained terms which the rail regulator determined to be an abuse of a dominant market position.
- 131 See below, paras 40-273 et seq.
- 132 For an account of the evolution of “special contracts” in relation to the carriage of goods by land, see the 24th edn of this work, Vol.II, paras 2817–2818; Kahn-Freund at Ch.9. Note the sage suggestion of Lord Coke in *Southcote's Case* (1601) 4 Co. Rep. 83, 84.
- 133 Vol.I, paras 15-008—15-021.
- 134 *L'Estrange v F Graucob Ltd* [1934] 2 K.B. 394.
- 135 See below, para.38-061.
- 136 See, e.g. *Parker v SE Ry* (1877) 2 C.P.D. 416; *Watkins v Rymill* (1883) 10 Q.B.D. 178; *Thompson v LMS Ry* [1930] 1 K.B. 41; *Lacey's Footwear (Wholesale) Ltd v Bowler International Freight Ltd* [1997] 2 Lloyd's Rep. 369; *Cory Bros Shipping Ltd v Baldan Ltd* [1997] 2 Lloyd's Rep. 58, 61–62. cf. *T Comedy (UK) Ltd v Easy Managed Transport Ltd* [2007] EWHC 611 (Comm), [2007] 2 Lloyd's Rep. 397 at [28]–[31], where the Court held that such references would not override an already existing agreement between the parties.
- 137 *Parker v South Eastern Railway* (1877) 2 C.P.D. 416, 428; *Thornton v Shoe Lane Parking Ltd* [1971] 2 Q.B. 163; *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] 1 Q.B. 433; see Vol.I, para.15-012.
- 138 cf. *J Spurling Ltd v Bradshaw* [1956] 1 W.L.R. 461, 467; *Circle Freight International Ltd v Medeast Gulf Exports Ltd* [1988] 2 Lloyd's Rep. 427, CA; *Lacey's Footwear (Wholesale) Ltd v Bowler International Freight Ltd* [1997] 2 Lloyd's Rep. 369, where it was held that a carrier's mailshots to a customer before their first contract did not amount to a prior course of dealing. In that case, the majority of the Court of Appeal concluded that a party's standard terms were incorporated because the other party was aware that carriers and forwarding agents tended to contract on the basis of limitation provisions, even though he had not turned

his mind to the content of those provisions; whether the party who relied on such provisions had taken adequate steps to draw these provisions to the attention of the other was irrelevant. In such cases, it is legitimate to take into account the nature of the transaction and the position and character of the parties: see also *Poseidon Freight Forwarding Co Ltd v Davies Turner Southern Ltd* [1996] 2 *Lloyd's Rep.* 388.

- 139 *Hardwick Game Farm v Suffolk Agricultural Poultry Producers' Association* [1966] 1 *W.L.R.* 287, 308–309, 316–317, 339; affirmed [1969] 2 *A.C.* 31; *Lacey's Footwear (Wholesale) Ltd v Bowler International Freight Ltd* [1997] 2 *Lloyd's Rep.* 369, 378; cf. *McCutcheon v David MacBrayne Ltd* [1964] 1 *W.L.R.* 125 *HL*.
- 140 Unfair Contract Terms Act 1977 ss.2(2) and 11. In *Granville Oil and Chemicals Ltd v Davies Turner and Co Ltd* [2003] *EWCA Civ* 570, [2003] 1 *All E.R. (Comm)* 819 at [31], the Court of Appeal upheld a nine-month time-bar in the British International Freight Association Standard Trading Conditions, having found that the road transport leg was sufficient to make the Act applicable to the contract (carriage by sea ordinarily being excluded from the operation of the Act), because the contract was between commercial parties and not consumers. In *Frans Maas (UK) Ltd v Samsung Electronics (UK) Ltd* [2004] *EWHC* 1502 (*Comm*), [2004] 2 *Lloyd's Rep.* 251, the court held that the limitation provision under the BIFA Conditions was reasonable. In *Rohlig (UK) Ltd v Rock Unique Ltd* [2011] *EWCA Civ* 18, [2011] 2 *All E.R. (Comm)* 1161 at [23], the Court of Appeal said, in upholding the time bar provision in the BIFA Conditions, that when considering the reasonableness of a standard condition the Court should not be astute to draw fine distinctions between cases which are broadly similar. In this case, at [24]–[25], the Court of Appeal compared the requirements of the 1977 Act and the 1999 Regulations. The party who relies on standard form conditions has to plead and bear the onus of proof that such terms are reasonable: *Sheffield v Pickfords Ltd* [1997] *C.L.C.* 648. The difficulties associated with the issue of incorporation of terms were highlighted in *Matrix Europe Ltd v Uniserve Northern Ltd* [2008] *EWHC* 11 (*Comm*), [2008] 1 *Lloyd's Rep. Plus* 27. See also below, Ch.40 as to the Unfair Terms in Consumer Contracts Regulations 1999 and the Consumer Rights Act 2015 which replaces and revokes the 1999 Regulations for contracts made on or after 1 October 2015.
- 141 See below, paras 40–273 et seq.
- 142 See above, para.38–008.
- 143 *LNW Ry v Neilson* [1922] 2 *A.C.* 263, 266 (Lord Buckmaster).
- 144 *Alexander v Railway Executive* [1951] 2 *K.B.* 882, 893.
- 145 *Page v London Midland & Scottish Railway* [1943] 1 *All E.R.* 455; *Buckmaster v Great Eastern Railway Co* (1870) 23 *L.T.* 471.
- 146 *Lamport & Holt Lines Ltd v Coubro Scrutton Ltd* [1982] 2 *Lloyd's Rep.* 42, 50.
- 147 *Rutter v Palmer* [1922] 2 *K.B.* 87, 92; *Alderslade v Hendon Laundry Ltd* [1945] *K.B.* 189; *Shell Chemicals UK Ltd v P & O Roadtanks Ltd* [1995] 1 *Lloyd's Rep.* 297, 301.
- 148 *Hollier v Rambler Motors (AMC) Ltd* [1972] 2 *Q.B.* 71; *Gillespie Bros & Co Ltd v Roy Bowles Transport Ltd* [1973] *Q.B.* 400, 415; *IIH Casualty and General Insurance Ltd v Chase Manhattan Bank* [2003] *UKHL* 6, [2003] 2 *Lloyd's Rep.* 61 at [11], [59]–[66], [95]. See above, Vol.I, paras 17–013—17–016.

- 149 *Price & Co v Union Lighterage Co* [1903] 1 K.B. 750; affirmed [1904] 1 K.B. 412. See Kahn-Freund at pp.231–234. A similar analysis was considered by Lord Hoffmann in *HIH Casualty and General Insurance Ltd v Chase Manhattan Bank* [2003] UKHL 6, [2003] 2 Lloyd's Rep. 61 at [66]–[67] in the analogous case of the impact of an exemption clause on an assured's duty of disclosure, the negligent or non-negligent breach of which results in the voidability of the insurance contract.
- 150 *Rutter v Palmer* [1922] 2 K.B. 87; *Turner v Civil Service Supply Association Ltd* [1926] 1 K.B. 50; *Fagan v Green and Edwards Ltd* [1926] 1 K.B. 102; *Bontex Knitting Works Ltd v St John's Garage* [1943] 2 All E.R. 690; affirmed [1944] 1 All E.R. 381n; *Harris Ltd v Continental Express Ltd* [1961] 1 Lloyd's Rep. 251; cf. *Alderslade v Hendon Laundry Ltd* [1945] K.B. 189.
- 151 *White v John Warwick & Co Ltd* [1953] 2 All E.R. 1021.
- 152 *Austin v MS & L Ry* (1852) 10 C.B. 454; *Carr v L & Y Ry* (1852) 7 Ex. 707; *Manchester, Sheffield & Lincs Ry v Brown* (1883) 8 App. Cas. 703.
- 153 *Shaw v GW Ry* [1894] 1 Q.B. 373.
- 154 Unfair Contract Terms Act 1977 s.2(2).
- 155 *Overseas Medical Supplies v Orient Transport Services Ltd* [1999] 1 All E.R. (Comm) 981.
- 156 See below, paras 40-273 et seq.
- 157 See Vol.I, Ch.17.
- 158 *Mallet v GE Ry* [1899] 1 Q.B. 309; *LNW Ry v Neilson* [1922] 2 A.C. 263.
- 159 *Gunyon v SE & C Ry* [1915] 2 K.B. 370; cf. *Sleat v Fagg* (1822) 5 B. & Ald. 342.
- 160 *Bontex Knitting Works Ltd v St John's Garage* [1943] 2 All E.R. 690; affirmed [1944] 1 All E.R. 381n. In *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1 A.C. 361, 435, Lord Wilberforce had doubts about the correctness of this decision, but was prepared to accept it as a case of deviation.
- 161 *Alexander v Railway Executive* [1951] 2 K.B. 882; contrast *Hollins v J Davy Ltd* [1963] 1 Q.B. 844.
- 162 *Garnham, Harris & Elton Ltd v Alfred W Ellis (Transport) Ltd* [1967] 1 W.L.R. 940, where the load (copper wire) was known to be particularly susceptible to theft.
- 163 For further anomalous results when goods are carried by rail at owner's risk, see below, para.38-031.
- 164 *Bontex Knitting Works Ltd v St John's Garage* [1943] 2 All E.R. 690. It should not be inferred from this case (where the circumstances were rather special) that every time a lorry driver left a loaded lorry unattended, this amounted to fundamental breach. The contrary has often been decided: see, e.g. *Harris Ltd v Continental Express Ltd* [1961] 1 Lloyd's Rep. 251, 260; *Colverd & Co Ltd v Anglo-Overseas Transport Co Ltd* [1961] 2 Lloyd's Rep. 352; *Mayfair Photographic Supplies (London) Ltd v Baxter, Hoare and Co Ltd* [1972] 1 Lloyd's Rep. 410.
- 165 *Carter (Fine Worsteds) Ltd v Hanson Haulage Ltd* [1965] 2 Q.B. 495. The decision of the majority of the Court of Appeal on this part of the case may need reconsideration—that it is clear that an employee who steals goods which have been bailed to his employer may be acting within the scope of his employment: *Morris v CW Martin Ltd* [1966] 1 Q.B. 716. In particular, the statement in [1965] 2 Q.B. 495 at 524–525 that fundamental breach must always be personal and not vicarious is questionable.

- 166 *Carter (Fine Worsteds) Ltd v Hanson Haulage Ltd* [1965] 2 Q.B. 495.
- 167 *Garnham, Harris & Elton Ltd v Alfred W Ellis (Transport) Ltd* [1967] 1 W.L.R. 940.
- 168 *Woolmer v Delmer Price Ltd* [1955] 1 Q.B. 291; *Levison v Patent Steam Carpet Cleaning Co Ltd* [1978] Q.B. 69. The latter decision of the Court of Appeal is at odds with the Court of Appeal's decision in *Hunt and Winterbotham (West of England) Ltd v BRS (Parcels) Ltd* [1962] 1 Q.B. 617; cf. *HC Smith Ltd v GW Ry* [1922] 1 A.C. 178. See *Euro Cellular (Distribution) Plc v Danzas Ltd* [2003] EWHC 3163 (Comm), [2004] 1 Lloyd's Rep. 521 at [60]–[64].
- 169 *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1 A.C. 361; *Photo Production Ltd v Securicor Transport Ltd* [1980] A.C. 827.
- 170 See Vol.I, paras 17-023—17-027, where the question is fully discussed. See, generally, *Kenyon, Son and Craven Ltd v Baxter, Hoare and Co Ltd* [1971] 1 W.L.R. 519 (bailment); followed in *Gallaher Ltd v British Road Services Ltd* [1974] 2 Lloyd's Rep. 440 (carriage by road).
- 171 *Photo Production Ltd v Securicor Transport Ltd* [1980] A.C. 827.
- 172 With the possible exception of *Bontex Knitting Works Ltd v St John's Garage* [1943] 2 All E.R. 690.
- 173 *Photo Production Ltd v Securicor Transport Ltd* [1980] A.C. 827 at 845.
- 174 *Kenya Railways v Antares Pte Ltd (The Antares) (Nos 1 and 2)* [1987] 1 Lloyd's Rep. 424, 430; *State Trading Corp of India Ltd v M Golodetz Ltd* [1989] 2 Lloyd's Rep. 277, 288–289. Such clauses when included in standard forms or used against consumers must always be reasonable: *Unfair Contract Terms Act 1977 s.3(2)(b)*. See also *Unfair Terms in Consumer Contracts Regulations 1999 Sch.2 para.1(b)* and the *Consumer Rights Act 2015 ss.62–65* and *Sch.2 Pt 1 para.2*. For contracts made on or after 1 October 2015 the 1999 Regulations are replaced and revoked by the 2015 Act (see below, paras 40-273 et seq.).
- 175 The distinction between exemption clauses and clauses allocating risk may be a fine one and may be controversial: see *HIH Casualty and General Insurance Ltd v Chase Manhattan Bank* [2001] EWCA Civ 1250, [2001] 2 Lloyd's Rep. 483 at [118]–[119]; reversed in part [2003] UKHL 6, [2003] 2 Lloyd's Rep. 61.
- 176 See above, paras 38-018—38-022.
- 177 There are numerous authorities concerning carriage and insurance contracts interpreting such “war risks” exceptions: see e.g. *Green v British India Steam Navigation Co Ltd* (1920) 4 Ll.L. Rep. 245; *Pesquerias y Secaderos e Bacalao de España SA v Beer* (1949) 82 Ll.L. Rep. 501; *Spinney's (1948) Ltd v Royal Insurance Co* [1980] 1 Lloyd's Rep. 406. As to “insurrection”, see *National Oil Co of Zimbabwe (Private) Ltd v Sturge* [1991] 2 Lloyd's Rep. 281.
- 178 *Sommer v Mathews* (1934) 49 Ll.L. Rep. 154.
- 179 cf. *Handelsbanken Norwegian Branch of Svenska Handelsbanken AB v Dandridge (The Aliza Glacial)* [2002] EWCA Civ 577, [2002] 2 Lloyd's Rep. 421.
- 180 *Gould v South Eastern and Chatham Railway Co* [1920] K.B. 186.
- 181 *Boggan v Motor Union Insurance Co Ltd* (1923) 16 Ll.L. Rep. 64.
- 182 The meaning of “stoppage or restraint of labour” was considered in *Young and Son Ltd v British Transport Commission* [1955] 2 Q.B. 177.

- 183 “Wilful misconduct” is a term which is used in the CMR Convention (see below, para.38-131) and in the *Marine Insurance Act 1906* (see below, para.44-022). As a contractual term, the words may attract a different meaning through the process of contractual construction.
- 184 See, e.g. *Lewis v GW Ry* (1877) 3 Q.B.D. 195; *Graham v Belfast and Northern Counties Ry* [1901] 2 I.R. 13; *Forder v GW Ry* [1905] 2 K.B. 532; *Bastable v NB Ry*, 1912 S.C. 555; *Hartstoke Fruiterers Ltd v LMS Ry* [1942] 2 All E.R. 488; affirming on other grounds [1943] K.B. 362; *Horabin v BOAC* [1952] 2 All E.R. 1016; *Young & Son Ltd v BTC* [1955] 2 Q.B. 177; Kahn-Freund at pp.257–261.
- 185 *HC Smith Ltd v Great Western Railway* [1922] 1 A.C. 178.
- 186 See generally, *Hill* [1969] J.B.L. 100.
- 187 *Unfair Contract Terms Act 1977* ss.2(2) and 11.
- 188 See below, paras 40-273 et seq.
- 189 The extent to which the conditions are applicable to contracts for the hire of vehicles by one carrier from another was discussed in *Gillespie Bros and Co Ltd v Roy Bowles Transport Ltd* [1973] Q.B. 400.
- 190 *Eastman Chemical International AG v NMT Trading Ltd* [1972] 2 Lloyd's Rep. 25. cf. *T Comedy (UK) Ltd v Easy Managed Transport Ltd* [2007] EWHC 611 (Comm), [2007] 2 Lloyd's Rep. 397, [28]–[31].
- 191 See above, para.38-031.
- 192 RHA Conditions cl.11(1). This provision in the 1998 conditions was new and was inserted together with a new cl.8, as a result of the court’s decision in *Spectra International Plc v Hayesoak Ltd* [1997] 1 Lloyd's Rep. 153, [1998] 1 Lloyd's Rep. 162. As to the meaning of consignment, see *Gillespie Bros and Co Ltd v Roy Bowles Transport Ltd* [1973] Q.B. 400; and *Acme Transport Ltd v Betts* [1981] 1 Lloyd's Rep. 131.
- 193 RHA Conditions cl.11(2).
- 194 RHA Conditions cl.11(1) and 11(2).
- 195 *Walker v Jackson* (1842) 10 M. & W. 161; *Crouch v LNW Ry* (1854) 14 C.B. 255.
- 196 The public had a grievance too: see 24th edition of this work, Vol.II, para.2817.
- 197 s.1. See Kahn-Freund at pp.335–337, 345–354; Leslie at pp.182–216.
- 198 For the meaning of “loss”, see *Hearn v LSW Ry* (1855) 10 Ex. 793; *Piancini v LSW Ry* (1856) 18 C.B. 226; *Wallace v Dublin & Belfast Ry* (1874) I.R. 8 C.L. 341; *Millen v Brasch* (1882) 10 Q.B.D. 142. The Act provides no protection if the goods are lost or damaged by delay: *Hearn v London and South Western Ry Co* (1855) 10 Ex. 793; *Millen v Brasch* (1882) 10 Q.B.D. 142.
- 199 See, e.g. *Whaite v L & Y Ry* (1874) L.R. 9 Ex. 67. cf. *Treadwin v GE Ry* (1868) L.R. 3 C.P. 308.
- 200 See Leslie at pp.193–198; Kahn-Freund at pp.348–350. The list includes gold, silver, bank notes or coin, jewellery, precious stones, watches, clocks, stamps, maps, “writings”, title deeds, paintings, glass, china, silk, furs, and lace. The *Carriers Act Amendment Act 1865* excepted from this list “machine-made lace”. The *Statute Law (Repeals) Act 2004* repealed the *1865 Act* (Sch.1 Pt 17, Group 11(4)), but re-introduced the exception into s.1 of the *1830 Act* (Sch.2 para.1).

- 201 *Behrens v GN Ry* (1861) 6 *Hurl. & N.* 366; affirmed (1862) 7 *Hurl. & N.* 950.
- 202 Carriers Act 1830 s.2.
- 203 s.3.
- 204 ss.1, 8. Section 8 originally referred to “the felonious acts” of servants. The words in the text were substituted by s.10 of and Sch.2 para.4, to the Criminal Law Act 1967 (as amended by the Theft Act 1968 s.33(3) and Sch.3 Pt III). As to who is a servant, see *Stephens v LSW Ry* (1886) 18 *Q.B.D.* 121. For the degree of proof necessary, see *Boyce v Chapman* (1835) 2 *Bing. N.C.* 222; *GW Ry v Rimell* (1856) 18 *C.B.* 575; *Metcalfe v LB & SC Ry* (1858) 4 *C.B. (N.S.)* 307; *Vaughton v LNW Ry* (1874) *L.R.* 9 *Ex.* 93; *Kirkstall Brewery Co v Furness Ry* (1874) *L.R.* 9 *Q.B.* 468; *M'Queen v GW Ry* (1875) *L.R.* 10 *Q.B.* 569. Some of these cases are difficult to reconcile.
- 205 s.3.
- 206 s.7. The carrier may, however, prove that the actual value is less than the declared value, in which case his liability is limited to the former: s.9. The value is the invoice price to the buyer, not the price paid by the seller: *Blankansee v LNW Ry* (1881) 45 *L.T.* 761.
- 207 *Morritt v NE Ry* (1876) 1 *Q.B.D.* 302; *Millen v Brasch* (1882) 10 *Q.B.D.* 142. For fundamental breach, see above, paras 38-029—38-030.
- 208 *Boys v Pink* (1838) 8 *C. & P.* 361; *Hinton v Dibbin* (1842) 2 *Q.B.* 646.
- 209 Today, no person may be a common carrier by rail: Railways Act 1993 s.123; the Railways Regulations 1998 (SI 1998/1340) reg.23. See above, para.38-010.
- 210 No conclusion to the contrary should, it is submitted, be drawn from *Houghland v RR Low (Luxury Coaches) Ltd* [1962] 1 *Q.B.* 694, where not only was it not argued that the defendant was a common carrier, but also the carriage was what is technically known as “contract carriage”, i.e. where the coach is hired for a lump sum, and not “stage carriage” or “express carriage”, where each passenger pays a separate fare.
- 211 *Le Conte v LSW Ry* (1865) *L.R.* 1 *Q.B.* 54; *Casswell v Cheshire Lines Committee* [1907] 2 *K.B.* 499.
- 212 *LNW Ry v Ashton* [1920] *A.C.* 84.
- 213 *Le Conte v LSW Ry* (1865) *L.R.* 1 *Q.B.* 54.
- 214 See above, para.38-015. See, generally, *Hill* [1978] *L.M.C.L.Q.* 74; *Effort Shipping Co Ltd v Linden Management SA; The Giannis NK* [1998] 1 *All E.R.* 495. The RHA Conditions by cl.1 define *dangerous goods* as meaning “goods named individually in the Approved Carriage List issued from time to time by the Health and Safety Commission, explosives, radioactive substances and any other substances presenting a similar hazard”.
- 215 *Brass v Maitland* (1856) 6 *El. & Bl.* 470, 482; *Bamfield v Goole and Sheffield Transport Co Ltd* [1910] 2 *K.B.* 94.
- 216 *Farrant v Barnes* (1862) 1 *C.B.N.S.* 553; *Great Northern Railway Co v LEP Transport and Depository Ltd* [1922] 2 *K.B.* 742; *Bamfield v Goole and Sheffield Transport Co Ltd* [1910] 2 *K.B.* 94; *Girvin* [1996] *L.M.C.L.Q.* 487.
- 217 See, for example, Carriage of Dangerous Goods by Rail Regulations 1996 (SI 1996/2089), Carriage of Explosives by Road Regulations 1996 (SI 1996/2093), Carriage of Dangerous Goods by Road Regulations 1996 (SI 1996/2095), Packaging Labelling and Carriage of Radioactive Material by Rail Regulations 2002 (SI 2002/2099), and Carriage of Dangerous

Goods and Use of Transportable Pressure Equipment Regulations 2009 (SI 2009/1348, as amended by SI 2011/1885); Carriage of Dangerous Goods and Use of Transportable Pressure Equipment (Amendment) (EU Exit) Regulations 2020 (SI 2020/1111). See also European Commission Directives 96/86 and 96/87, implemented by Carriage of Dangerous Goods (Amendment) Regulations 1999 (SI 1999/303).

218 See below, paras 38-079—38-082.

219 *Hales v LNW Ry* (1863) 4 B. & S. 66, 71; *Myers v LSW Ry* (1869) L.R. 5 C.P. 1.

220 *Davis v Garrett* (1830) 6 Bing. 716 (barge); *Taylor v GN Ry* (1866) L.R. 1 C.P. 385, 388.

221 *Taylor v GN Ry* (1866) L.R. 1 C.P. 385.

222 See above, paras 38-029—38-030.

223 See also Supply of Goods and Services Act 1982 s.14.

224 *Raphael v Pickford* (1843) 5 Man. G. 551; *Taylor v Great Northern Railway Co* (1866) L.R. 1 C.P. 385; *Panalpina International Transport Ltd v Densil Underwear Ltd* [1981] 1 Lloyd's Rep. 187.

225 e.g. *Briddon v GN Ry* (1858) 28 L.J. Ex. 51.

226 *Taylor v GN Ry* (1866) L.R. 1 C.P. 385.

227 *Caledonian Ry v William Hunter and Co* (1858) 20 D.(Ct. of Sess.) 1097.

228 *Sims v Midland Ry* [1913] 1 K.B. 103.

229 *Briddon v GN Ry* (1858) 28 L.J. Ex. 51; *Goddard v Midland Ry* (1899) 80 L.T. 624.

230 *Wallace v G & SW Ry* (1869) 17 W.R. 464.

231 *Page v GN Ry* (1868) I.R. 2 C.L. 228.

232 *Hearn v London and South Western Ry Co* (1855) 10 Ex. 793; *Millen v Brasch* (1882) 10 Q.B.D. 142.

233 See *Gordon v GW Ry* (1881) 8 Q.B.D. 44.

234 *Hadley v Baxendale* (1854) 9 Exch. 341, 354–355.

235 *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 K.B. 528, 539–540; *Czarnikow Ltd v Koufos* [1969] 1 A.C. 350. See Vol.I, paras 29-126—29-152.

236 *Horne v Midland Ry* (1873) L.R. 8 C.P. 131.

237 *Simpson v LNW Ry* (1876) 1 Q.B.D. 274.

238 Such clauses essentially only purport to exclude damages which might be recoverable pursuant to the second limb of the rule in *Hadley v Baxendale* (1854) 9 Exch. 341, although each clause will have to be construed in its own context: *Croudace Construction Ltd v Cawoods Concrete Products Ltd* [1978] 2 Lloyd's Rep. 55; *British Sugar Plc v NEI Power Projects Ltd* (1998) 87 B.L.R. 42; *Deepak Fertilisers & Petrochemical Corp v ICI Chemicals & Polymers Ltd* [1999] 1 All E.R. (Comm) 69.

239 *Youl v Harbottle* (1791) Peake 68; *M'Kean v M'Ivor* (1870) L.R. 6 Ex. 36, 41.

240 *M'Kean v M'Ivor* (1870) L.R. 6 Ex. 36 at 41; *Fowler v Hollins* (1872) L.R. 7 Q.B. 616, 632; *British Traders Ltd v Ubique Transport Ltd* [1952] 2 Lloyd's Rep. 236. cf. Clarke at para.231.

241 *Sheridan v New Quay Co* (1858) 4 C.B.(N.S.) 618; *Fowler v Hollins* (1872) L.R. 7 Q.B. 616 at 649–650.

242 *Duff v Budd* (1822) 3 Brod. & Bing. 177; *Stephenson v Hart* (1828) 4 Bing. 476. Quaere: whether *Duff v Budd* and *Stephenson v Hart* are not in fact cases of involuntary bailment?

- Stephenson v Hart* was so regarded in *Heugh v LNW Ry* (1870) *L.R.* 5 Ex. 51, 56–57, 58, but not in *M'Kean v M'Ivor* (1870) *L.R.* 6 Ex. 36 at 39. cf. the similar rule of reasonably careful delivery in the law of sale of goods: *Galbraith & Grant Ltd v Block* [1922] 2 *K.B.* 155; see below, para.46-245.
- 243 *M'Kean v M'Ivor* (1870) *L.R.* 6 Ex. 36; *Heugh v LNW Ry* (1870) *L.R.* 5 Ex. 51; *British Traders Ltd v Ubique Transport Ltd* [1952] 2 *Lloyd's Rep.* 236. See also *Birkett v Willan* (1819) 2 *B. & Ald.* 356; Leslie at pp.92–96; Kahn-Freund at pp.298–301; *Hughes* (1931) 47 *L.Q.R.* 244 et seq.
- 244 *Alexander v Railway Executive* [1951] 2 *K.B.* 882; contrast *Hollins v J Davy Ltd* [1963] 1 *Q.B.* 844; *Sze Hai Tong Bank Ltd v Rambler Cycle Co Ltd* [1959] *A.C.* 576; see above, paras 38-029—38-030.
- 245 *Photo Production Ltd v Securicor Transport Ltd* [1980] *A.C.* 827.
- 246 As to the liability of a warehouseman, see above, para.35-058. As to the distinction between the liability of carriers and that of other intermediaries in the freight trade see, generally, Hill, *Freight Forwarders* (1972), Chs 2 and 11. See above, para.38-006.
- 247 *Sadler Brothers Co v Meredith* [1963] 2 *Lloyd's Rep.* 293, 307.
- 248 *Soanes v LSW Ry* (1919) 88 *L.J. K.B.* 524; *Rigby (Haulage) Ltd v Reliance Marine Insurance Co Ltd* [1956] 2 *Q.B.* 468. Contrast *Slim v GN Ry* (1854) 14 *C.B.* 647; *Harrisons & Crossfield Ltd v LNW Ry* [1917] 2 *K.B.* 755; *Crows Transport Ltd v Phoenix Assurance Co Ltd* [1965] 1 *W.L.R.* 383. See also Leslie at pp.65–68; Kahn-Freund at pp.312–321.
- 249 *Chapman v GW Ry* (1880) 5 *Q.B.D.* 278.
- 250 ss.44–46; see below, paras 46-327—46-339. See Leslie at pp.74–84; Kahn-Freund at pp.304–306. As to priority between the right of stoppage in transit and the carrier's lien, see below, para.38-052.
- 251 s.45.
- 252 See above, para.38-041.
- 253 s.45(6).
- 254 s.45(4).
- 255 *Scothorn v S Staffs Ry* (1853) 8 *Ex.* 341.
- 256 *Cork Distilleries Co v GS & W Ry* (1874) *L.R.* 7 *H.L.* 269.
- 257 See Leslie at pp.51–63; Kahn-Freund at pp.209–212.
- 258 See below, paras 38-046—38-047.
- 259 *Dawes v Peck* (1799) 8 *Term Rep.* 330; *Fragano v Long* (1825) 4 *B. & C.* 219; *Dunlop v Lambert* (1839) 6 *Cl. & F.* 600, 627; *Coats v Chaplin* (1842) 3 *Q.B.* 483; *Coombs v Bristol and Exeter Ry* (1858) 3 *Hurl. & N.* 1, 510; *Murphy v Midland Great Western Ry* [1903] 2 *I.R.* 5.
- 260 *Stephenson v Hart* (1828) 4 *Bing.* 476, 487; *Heugh v London and North Western Ry* (1870) *L.R.* 5 Ex. 51, 57–58; *Albacruz (Cargo Owners) v Albazero (Owners); The Albazero* [1977] *A.C.* 774.
- 261 *Cork Distilleries Co v GS & W Ry* (1874) *L.R.* 7 *H.L.* 269, 277, 281; *Murphy v Midland Great Western Ry* [1903] 2 *I.R.* 5, 23, 30; *Albacruz (Cargo Owners) v Albazero (Owners) (The Albazero)* [1977] *A.C.* 774, 785–786, 842–848; *Texas Instruments Ltd v Nasan (Europe) Ltd* [1991] 1 *Lloyd's Rep.* 146, 148–149; Kahn-Freund at p.210.

- 262 Clarke, International Carriage of Goods by Road: CMR, 6th edn (2014), para.216c. cf. *Leduc v Ward (1888) 20 Q.B.D. 475*.
- 263 *Brandt v Liverpool Brazil & River Plate [1924] 1 K.B. 575*.
- 264 *The Aramis [1989] 1 Lloyd's Rep. 213*. The difficulties led to the passing of the Carriage of Goods by Sea Act 1992 in relation to sea carriage. Other devices which have been developed to circumvent the doctrine of privity include the so-called principle in *Dunlop v Lambert (1839) 6 Cl. & F. 600*; *Albacruz (Cargo Owners) v Albazero (Owners) (The Albazero) [1977] A.C. 774, 847*; *Alfred McAlpine Construction Ltd v Panatown Ltd [2001] 1 A.C. 518*) to the effect that the original contracting party has entered into the contract for the benefit for all his successors in title to the goods, and assignments (*Britain & Overseas Trading (Bristles) v Brooks Wharf & Bull Wharf [1967] 2 Lloyd's Rep. 51, 60*).
- 265 The 1999 Act does not apply to contracts for the carriage of goods by rail or road which are the subject of an international convention, save that provisions which provide for the exemption of a third party's liability may be enforced by that third party under s.1: s.6(5).
- 266 If the consignee engaged the carrier, they will have established a relationship of bailment at will: *Transcontainer Express Ltd v Custodian Security Ltd [1988] 1 Lloyd's Rep. 128, 135*. If the consignor contracted with the carrier and assigns the benefit of that contract to the consignee, the latter will succeed to the consignor's rights as bailor: *Sonicare International Ltd v East Anglia Freight Terminal Ltd [1997] 2 Lloyd's Rep. 48, 53*. cf. Clarke, International Carriage of Goods by Road: CMR, 6th edn (2014), para.216c. See above, paras 38-001, 38-013.

## (v) - Liability in Tort

Chitty on Contracts 34th Ed.

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Volume II - Specific Contracts

Chapter 38 - Carriage by Land

Section 2. - Internal Carriage

(a) - Goods

(v) - Liability in Tort

### Liability in tort

38-044

A person whose goods are lost or damaged during transit has alternative remedies against the carrier either for breach of contract or for tort.



<sup>267</sup>

This has long been settled law.

“The declaration in an action against a carrier may be framed either upon the contract, charging the injury as a breach of contract; or upon the duty imposed by law, charging the injury as breach of duty or wrong.”<sup>268</sup>

This does not mean that, if the contract contains exemption clauses, the claimant can disregard the contract and allege a wider liability in tort.<sup>269</sup> Exemption clauses may, indeed, be construed as being wide enough to indemnify a carrier against liability in tort, not only his own but also that of his employees,<sup>270</sup> although naturally such clauses as purport, in the case of loss or damage to goods, to exclude or limit liability for negligence must now satisfy the statutory test of reasonableness.<sup>271</sup> But the existence of the alternative remedy does mean that the claimant may be able to sue in tort if there is no privity of contract between him and the defendant, for example, where the consignor makes the carriage contract, but the consignee suffers loss at the carrier’s hands. The remedy in tort will be of service to claimants where there is lack of privity in various

situations.<sup>272</sup> First, for example, the claimant may be a stranger to the contract of carriage, as when his goods have been borrowed or stolen from him, or hired to a hirer under a hire-purchase contract, and are then handed to a carrier by the borrower, thief or hirer, for carriage to a consignee. Secondly, the defendant may be a stranger to the contract of carriage, as when the owner of goods contracts with a carrier, and then sues someone else whose act or omission caused the loss or damage, e.g. the carrier's employee, or another carrier to whom the contract of carriage was sub-contracted either in whole or in part.

## Title to sue in tort

- 38-045 A claimant claiming damages in tort for the loss of or damage to his goods will rely either on the tort of negligence or on the tort of conversion. If he relies on negligence, he will have to prove that the defendant owed him a duty of care and broke it,<sup>273</sup> and that he was the owner of the goods or entitled to possession of them at the time when the loss or damage occurred by reason of the negligent act.<sup>274</sup> If he relies on conversion, he will have to prove that he had an immediate right to possession,<sup>275</sup> unless he can show a permanent injury to his reversionary interest,<sup>276</sup> e.g. by reason of the destruction or loss of the goods.<sup>277</sup> However, if the relation between the claimant and defendant is that of head bailor and sub-bailee, as it may be when the contract of carriage has been sub-contracted with the actual or ostensible authority of the owner, then the claimant may be in a more favourable position.<sup>278</sup> If he sues for negligence, he will not have to prove that the defendant owed him a duty of care, because this arises automatically from the relationship between the parties; and the onus of disproving negligence will be on the defendant.<sup>279</sup> If he sues for conversion, he will not have to prove that he has a better right to possession, because the defendant will probably be estopped from denying his head bailor's title.<sup>280</sup> A carrier who voluntarily takes into his possession the goods of some other person can only invoke the terms of the sub-bailment under which he received the goods from an intermediate bailee against the owner of the goods when the owner has actually, expressly or impliedly, or even ostensibly authorised the sub-bailment and thus consented to the terms of the sub-bailment.<sup>281</sup>

## Scope of exemption clauses: sub-contracting

- 38-046 An exemption clause contained in a contract can only operate contractually; and it is a fundamental principle of the common law that no one except a party to a contract can take any advantage from it.<sup>282</sup> Hence, even if an exemption clause purports to exonerate not only the carrier but also his employees or agents, they will not be entitled to the benefit of the clause if the claimant sues them in tort, because they are not parties to the contract of carriage.<sup>283</sup> Similarly, if the carrier sub-contracts the whole or part of the contract of carriage as principal, and not as agent, and the owner

sues the sub-carrier in tort, the owner will not be bound by exemption clauses contained in the sub-contract, because he is not a party thereto.<sup>284</sup> However, it is different if the carrier contracted with the owner as agent for the sub-carrier, because in that case the sub-carrier is a party to the original contract<sup>285</sup>; or if he contracted with the sub-carrier as agent for the owner, because in that case the owner is a party to the sub-carrier's contract<sup>286</sup>; or if the owner consented to the sub-bailment on the terms of the exemption clause.<sup>287</sup> These common law principles are now subject to the **Contracts (Rights of Third Parties) Act 1999**, which might permit an employee, agent or sub-bailee to enforce the benefit of an exemption clause.<sup>288</sup>

## Successive carriers

- 38-047 If a carrier engages the services of another carrier to perform part of the contract of carriage, it is important to know whether he contracted to carry the goods to their ultimate destination, or only to the point where he hands them over to the second carrier.<sup>289</sup> In the former case the first carrier will be liable to the owner (subject, of course, to the conditions of carriage) for loss of or damage to the goods which happens at any stage of the journey. In the latter case the first carrier will only be liable for loss or damage which happens while the goods are in his hands. In both cases, of course, the second carrier may be liable to the owner in tort in accordance with the principles already discussed,<sup>290</sup> or for breach of contract, if the second carrier contracted directly with the owner or through the agency of the first carrier.

## Footnotes

- 267 Although set-off against freight cannot be relied upon: *United Carriers Ltd v Heritage Food Group (UK) Ltd [1995] 2 Lloyd's Rep. 269*; *Hollemon Special Transport & Project Cargo Srl v CO UK Shipping and Trading Ltd [2022] EWHC 1114 (Comm)* at [13].
- 268 Bullen and Leake, *Precedents of Pleadings*, 3rd edn (1868), p.120; cf. 13th edn (1990), p.142. For modern cases, see *Harris Ltd v Continental Express Ltd [1961] 1 Lloyd's Rep. 251*; *Learoyd Bros Ltd and Huddersfield Fine Worsteds Ltd v Pope & Sons (Dock Carriers) Ltd [1966] 2 Lloyd's Rep. 142*; *Lee Cooper Ltd v CH Jeakins & Sons Ltd [1967] 2 Q.B. 1*; cf. *Morris v CW Martin Ltd [1966] 1 Q.B. 716* (bailment); *Moukataff v BOAC [1967] 1 Lloyd's Rep. 396* (carriage by air at common law); *Transmotors Ltd v Robertson, Buckley & Co Ltd [1970] 1 Lloyd's Rep. 224* (bailment to sub-contractor in carriage of goods); *James Buchanan v Hay's Transport Services [1972] 2 Lloyd's Rep. 535* (gratuitous sub-bailment in carriage of goods); *Gillespie Bros & Co Ltd v Roy Bowles Transport Ltd [1973] Q.B. 400*. As to the scope of liability in tort where there is a contract between the tortfeasor and the claimant, see *Henderson v Merrett Syndicates Ltd [1995] 2 A.C. 145*; cf. *Tai Hing Cotton Mills Ltd*

- v *Liu Chong Hing Bank Ltd* [1986] A.C. 80. cf. Clarke, International Carriage of Goods by Road: CMR, 6th edn (2014), para.229a.
- 269 *Hall v Brooklands Auto Racing Club* [1933] 1 K.B. 205, 213; contrast *White v John Warwick Ltd* [1953] 1 W.L.R. 1285.
- 270 *Gillespie Bros & Co Ltd v Roy Bowles Transport Ltd* [1973] Q.B. 400; reversing [1971] 2 *Lloyd's Rep.* 521: this concerned the construction of cl.3(4) in the 1967 Conditions of the Road Haulage Association. The RHA amended and amplified this clause in light of the decision at first instance so as to cover a carrier in the event of his own negligence. The amendment proved unnecessary in light of the Court of Appeal's decision. See also *Hair and Skin Trading Co Ltd v Norman Airfreight Carriers Ltd* [1974] 1 *Lloyd's Rep.* 443 on the construction of the similar cl.20 under the RHA's 1961 Conditions. Clause 3(4) in the RHA Conditions 1967 was held only to regulate rights and duties arising strictly out of the carriage of goods and not, e.g. indemnities in respect of claims against a carrier by employees for breach of common law and statutory duties: *Boughen v Frederick Attwood Ltd* [1978] 1 *Lloyd's Rep.* 413. See *Cert Plc v George Hammond Plc* [1999] 2 All E.R. (Comm) 976 as to the scope of RHA Conditions 1991 cl.11. As to the employer's vicarious liability for the acts of his employees, see *Frans Maas (UK) Ltd v Samsung Electronics (UK) Ltd* [2004] EWHC 1502 (Comm), [2004] 2 *Lloyd's Rep.* 251.
- 271 Unfair Contract Terms Act 1977 ss.2(2) and 11.
- 272 The disabling effect of a lack of privity is now qualified by the Contracts (Rights of Third Parties) Act 1999.
- 273 *Lee Cooper Ltd v CH Jeakins & Sons Ltd* [1967] 2 Q.B. 1.
- 274 *Margarine GmbH v Cambay Prince Steamship Co Ltd* [1969] 1 Q.B. 219; *Leigh and Sillavan Ltd v Aliakmon Shipping Co Ltd* [1986] A.C. 785.
- 275 *Kahler v Midland Bank Ltd* [1950] A.C. 24.
- 276 *Mears v LSW Ry* (1862) 11 C.B.(N.S.) 850; *HSBC Rail (UK) Ltd v Network Rail Infrastructure Ltd* [2005] EWCA Civ 1437, [2006] 1 *Lloyd's Rep.* 358.
- 277 *Moukataff v BOAC* [1967] 1 *Lloyd's Rep.* 396, 415.
- 278 *KH Enterprise (Cargo Owners) v Pioneer Container (Owners) (The Pioneer Container)* [1994] 2 A.C. 324. A successor in title to the bailor's goods will be owed a duty in bailment by the bailee or sub-bailee if the original bailor assigns the benefit of the contract of carriage to the successor or if the bailee attorns to the successor: *Sonicare International Ltd v East Anglia Freight Terminal Ltd* [1997] 2 *Lloyd's Rep.* 48, 53; *East West Corp v DKBS* 1912 [2003] EWCA Civ 83, [2003] 1 *Lloyd's Rep.* 239 at [39]–[42]. See also *Spectra International Plc v Hayesoak Ltd* [1997] 1 *Lloyd's Rep.* 153, [1998] 1 *Lloyd's Rep.* 162.
- 279 *Victoria Fur Traders Ltd v Roadline (UK) Ltd* [1981] 1 *Lloyd's Rep.* 570, 578.
- 280 However, even if the claimant proves a sub-bailment, he may be caught by exceptions included in the terms on which the goods were received by the sub-bailee from the head bailee: *Johnson, Matthey & Co Ltd v Constantine Terminals Ltd* [1976] 2 *Lloyd's Rep.* 215; *Singer Co (UK) Ltd v Tees and Hartlepool Port Authority* [1988] 2 *Lloyd's Rep.* 164, 168. The claimant will, however, only be subject to the terms of the sub-bailment when he expressly or impliedly consented to them: *KH Enterprise (Cargo Owners) v Pioneer Container (Owners)*

- (*The Pioneer Container*), above. See, generally, Palmer and McKendrick (eds), *Interests in Goods*, 2nd edn (1998), Ch.19 (Bell).
- 281 *KH Enterprise (Cargo Owners) v Pioneer Container (Owners) (The Pioneer Container)* [1994] 2 A.C. 324 PC. See *Sandeman Coprimar SA v Transitos y Transportes Integrales SA* [2003] EWCA Civ 113, [2003] 2 W.L.R. 1496, [61]–[66], where it was held that the terms of the sub-bailment, which were based on the CMR Convention, applied as between the bailor and sub-bailee. See also *Cami Automotive Insurance v Westwood Shipping Lines Inc* 2009 FC 664, 2012 FCA 16 (Fed CA Canada).
- 282 *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd* [1915] A.C. 847; Vol.I, Ch.20.
- 283 *Scrutons Ltd v Midlands Silicones Ltd* [1962] A.C. 446.
- 284 See the cases cited above, paras 38-044—38-045.
- 285 *Hall v NE Ry* (1875) L.R. 10 Q.B. 437, 443; *Barratt v GN Ry* (1904) 20 T.L.R. 175; cf. *Gill v MS & L Ry* (1873) L.R. 8 Q.B. 186; *United States Steel Products Co v GW Ry* [1916] 1 A.C. 189, 205, 210, 213; *The Mahkutai* [1996] A.C. 650.
- 286 *Hall v NE Ry* (1875) L.R. 10 Q.B. 437 at 442. For the difficulties involved in this agency device, see Vol.I, paras 17-050—17-052. cf. *Victoria Fur Traders Ltd v Roadline (UK) Ltd* [1981] 1 Lloyd's Rep. 570.
- 287 See above, para.38-045.
- 288 *Homburg Houtimport BV v Agrosin Ltd* [2003] UKHL 12, [2003] 2 W.L.R. 711 at [57]. Even though the 1999 Act does not apply to contracts for carriage by rail or road, which is subject to the rules of an international convention, the Act is expressed to apply even in such cases where the third party seeks to rely on an exemption clause: s.6(5).
- 289 See Kahn-Freund at pp.325–334.
- 290 See above, paras 38-044—38-045.

## **(vi) - Claims against the Carrier**

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**(a) - Goods**

**(vi) - Claims against the Carrier**

### **Time for making claims**

- 38-048 It may be important for a carrier to receive early warning of a claim for loss of or damage to goods which he has carried, so that he may investigate the claim, inform his insurers and decide whether the claim should be admitted or resisted.<sup>291</sup> The general law will allow the claimant to institute proceedings in respect of his claim at any time during the period sanctioned by the [Limitation Act 1980](#). In order to shorten the time in which claims are notified to the carrier, several standard form contracts provide that claims for loss, damage, misdelivery or delay must be presented to the carrier within specified short time periods. The capacity of the carrier to prescribe time limits for the making of claims and the institution of legal proceedings is constrained by the [Unfair Contract Terms Act 1977](#), which provides that where the Act prevents a contract term excluding or restricting liability, as unreasonable, it also prevents any term which purports to make that liability or its enforcement subject to restrictive or onerous conditions.<sup>292</sup> A term in a contract of carriage requiring notice of a claim for, say, loss of or damage to goods to be given within an exceptionally short period of time might conceivably be rendered ineffective by this section.<sup>293</sup> Where the carrier has contracted with a consumer, such terms imposing short time limits on the consumer's presentation of a claim may not be binding on the consumer if it has not been individually negotiated and it is unfair within the meaning of the [Unfair Terms in Consumer Contracts Regulations 1999](#).<sup>294</sup> Such provisions will be subject to the [Consumer Rights Act 2015](#), which replaces and revokes the [1999 Regulations](#) for contracts made on or after 1 October 2015.<sup>295</sup>

## Footnotes

- 291 See, generally, *Clarke [1982] L.M.C.L.Q. 533.*
- 292 ss.2(2), 3, 11 and 13.
- 293 *Granville Oil and Chemicals Ltd v Davies Turner and Co Ltd [2003] EWCA Civ 570, [2003] 1 All E.R. (Comm) 819* at [31]. See *Rohlig (UK) Ltd v Rock Unique Ltd [2011] EWCA Civ 18, [2011] 2 All E.R. (Comm) 1161.*
- 294 1999 Regulations regs 4(1), 5(1), 8(1) Sch.2 para.1(q).
- 295 See below, paras 40-273 et seq.

## (vii) - Carrier's Rights

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(a) - Goods

(vii) - Carrier's Rights

### Consignor's warranty of fitness

- 38-049 At common law the consignor impliedly warrants that the goods are fit and proper for carriage and are not dangerous.<sup>296</sup> This principle was originally developed as a corollary to the common carrier's duty to accept all consignments offered to him even if he was unable to inspect their contents; but now it probably extends to all carriers, whether or not they are under a duty to carry the goods, and whether or not the consignor knows of the danger.<sup>297</sup> The carrier may recover damages for breach of this warranty, whether in respect of personal injuries sustained by himself or his employees<sup>298</sup> or in respect of damage sustained by the carrier's own property or by the goods of other consignors<sup>299</sup>; and it is immaterial whether or not the carrier is himself liable to the other consignors.<sup>300</sup>

### Carrier's right to freight

- 38-050 As a compensation for the heavy burden of his profession the carrier is entitled to demand payment of his reasonable charges in advance.<sup>301</sup> But if the freight is not paid before the goods are consigned, the carrier may not sue for it until the goods are finally delivered,<sup>302</sup> unless the consignor exercises his right of stoppage in transit.<sup>303</sup> Several standard form contracts therefore

provide that a claim or counterclaim shall not be made a reason for deferring or withholding payment of the carrier's charges. Even without such protection in the carriage contract, the carrier (whether common or private) is entitled to the payment of freight on the due date without any deduction or set-off being made to allow for any claim which the consignor may have under the contract of carriage.

<sup>304</sup>

**U** This right to freight without set-off exists notwithstanding that the contract is for a series of carriages as opposed to one carriage and that the carrier may have obligations under the contract ancillary to that of carriage, although his claim must be for freight and not a charge unrelated to the carriage. <sup>305</sup>

## Who pays freight?

38-051 The person liable to pay the freight is the person with whom the carrier contracts. Thus, if the consignor contracted as agent for the consignee, the consignee is obliged to pay <sup>306</sup>; but if the consignor contracted as principal, the carrier must recover from the consignor. <sup>307</sup> The consignor may, by express contract, exclude his liability for freight and leave the carrier with a remedy against the consignee alone: but the courts are very ready to imply an undertaking by the consignor to pay the freight if the consignee does not do so, even if the consignment note says in so many words that freight will be paid by the consignee. Acceptance of the goods by the consignee is, in the absence of notice to the contrary, evidence of an implied contract to pay the carrier's charges: the consideration for this contract is the fact that the carrier parted with his lien. <sup>308</sup> The incidence of liability for freight must be distinguished from the right to sue the carrier for loss of or damage to the goods. This has already been considered. <sup>309</sup>

## Carrier's lien

38-052 At common law the common, but not the private, <sup>310</sup> carrier has a particular lien upon the goods for the payment of his freight. <sup>311</sup> But, in the absence of a contract or of binding usage, <sup>312</sup> he has no general lien on the goods for debts owing by his customer in respect of previous transactions <sup>313</sup>; nor can he sell the goods in order to defray his expenses. Under several standard form contracts, however, the carrier has not only a particular lien but also a general lien against the owner of the goods. <sup>314</sup> The unpaid seller's right of stoppage in transit has priority over the carrier's general, but not particular, lien. <sup>315</sup> The carrier's contractual right to exercise a general lien under a standard form of contract may come into existence at the time at which the contract was made notwithstanding that it is not exercisable except upon the happening of a particular event, i.e. the

carrying of the goods. The lien is conveniently described as a “possessory lien” because it is only if the carrier has possession that it can be exercised. This does not imply, however, that the lien does not come into existence until possession is assumed.<sup>316</sup> In practice, the lien cannot be exercised until the goods reach their destination or the unpaid seller stops them in transit. The carrier cannot, for instance, detain the goods at the beginning of the transit in purported exercise of a general lien.<sup>317</sup> On the other hand it may continue after the end of transit and while the carrier remains in possession of the goods as warehouseman. The common carrier’s lien is exercisable against the true owner, though the consignor may have been a thief or other person having no right to deal with the goods.<sup>318</sup> Similarly, a private carrier’s contractual lien is exercisable against the true owner.<sup>319</sup>

## Carrier’s right to sell the goods

**38-053** At common law, the carrier as agent of necessity<sup>320</sup> has a very restricted right to sell perishable goods (and perhaps livestock, which have to be tended, fed and watered<sup>321</sup>) and goods which are left on his hands or which he cannot deliver to their destination, e.g. because of a strike of his employees. But there must be a real business necessity for the sale; and he must first communicate with the owner, unless it is commercially impossible to do so; otherwise he will be liable in damages.<sup>322</sup> In a number of standard form contracts, the carrier reserves to himself the right to sell the goods in defined circumstances. The contractual right of sale is often exercised on the basis of the carrier’s general or particular lien, if the lien is not satisfied within a reasonable time from the date when the carrier first gave notice of the exercise of the lien to the owner of the goods.<sup>323</sup>

## Footnotes

- 296 *Bamfield v Goole and Sheffield Transport Co* [1910] 2 K.B. 94; *GN Ry v LEP Transport Co Ltd* [1922] 2 K.B. 742.
- 297 *Burley v Stepney Corp* [1947] 1 All E.R. 507, 510.
- 298 *Farrant v Barnes* (1862) 11 C.B.(N.S.) 553; *Bamfield v Goole and Sheffield Transport Co* [1910] 2 K.B. 94.
- 299 *GN Ry v LEP Transport Co Ltd* [1922] 2 K.B. 742.
- 300 *GN Ry v LEP Transport Co Ltd* [1922] 2 K.B. 742 at 765; cf. *The Winkfield* [1902] P. 42.
- 301 *Batson v Donovan* (1820) 4 B. & Ald. 21, 28; *Wyld v Pickford* (1841) 8 M. & W. 443. In an action for refusal to carry, actual tender of freight need not be shown, only that the consignor was ready and willing to pay: *Pickford v Grand Junction Ry* (1841) 8 M. & W. 372.
- 302 *Barnes v Marshall* (1852) 18 Q.B. 785, 789.
- 303 *Booth SS Co Ltd v Cargo Fleet Iron Co Ltd* [1916] 2 K.B. 570.
- 304

- United Carriers Ltd v Heritage Food Group (UK) Ltd [1995] 2 Lloyd's Rep. 269, 273; A S Jones Ltd v Burton Gold Medal Biscuits Unreported 11 April 1984; Hollemon Special Transport & Project Cargo Srl v CO UK Shipping and Trading Ltd [2022] EWHC 1114 (Comm) at [13]. See also Britannia Distribution Co Ltd v Factor Pace Ltd [1998] 2 Lloyd's Rep. 420* (set off available against freight between freight forwarder and principal); cf. *Schenkers Ltd v Overland Shoes Ltd [1998] 1 Lloyd's Rep. 498* (concerning the validity, under the Unfair Contract Terms Act 1977, of a “no set-off” clause in a freight forwarding contract, as opposed to a carriage contract). This “freight rule” is a rule of law originating in international commercial custom and so is not liable to be upset by the Unfair Contract Terms Act 1977 (cf. *Stewart Gill Ltd v Horatio Myer & Co Ltd [1992] Q.B. 600*). As to air freight, see *Schenker Ltd v Negocios Europa Ltd [2017] EWHC 2921 (QB), [2018] 1 W.L.R. 718*.
- 305 *United Carriers Ltd v Heritage Food Group (UK) Ltd [1995] 2 Lloyd's Rep. 269.*
- 306 cf. *Dickenson v Lano (1860) 2 F. & F. 188*. See Kahn-Freund at pp.399–401.
- 307 *GW Ry v Bagge (1885) 15 Q.B.D. 625*. As to the freight forwarder’s liability for freight, see *Britannia Distribution Co Ltd v Factor Pace Ltd [1998] 2 Lloyd's Rep. 420* at 423.
- 308 *World Transport Co v Tealing [1936] 2 All E.R. 573.*
- 309 See above, para.38-043.
- 310 *Electric Supply Stores v Gaywood (1909) 100 L.T. 855.*
- 311 *Skinner v Upshaw (1702) 2 Ld. Ray. 752.*
- 312 The courts require particularly strong evidence of such usage. See Leslie at pp.87–88.
- 313 *Rushforth v Hadfield (1806) 7 East 224, 228; Aldred v Pearson (1843) 1 L.T.(O.S.) 457.*
- 314 The “owner” is the consignee or other person entitled to delivery: *US Steel Products Co v GW Ry [1916] 1 A.C. 189, 207–208, 211–212, 214*. cf. *T Comedy (UK) Ltd v Easy Managed Transport Ltd [2007] EWHC 611 (Comm), [2007] 2 Lloyd's Rep. 397.*
- 315 *US Steel Products Co v GW Ry [1916] 1 A.C. 189; Booth SS Co Ltd v Cargo Fleet Iron Co Ltd [1916] 2 K.B. 570.*
- 316 *George Barker (Transport) Ltd v Eynon [1974] 1 W.L.R. 462.*
- 317 *Wiltshire Iron Co v GW Ry (1871) L.R. 6 Q.B. 776, 780.*
- 318 *Exeter Carrier's Case*, cited in *Yorke v Grenhaugh (1702) 2 Ld. Ray. 866, 867.*
- 319 Leslie at pp.88–91; cf. *Singer Manufacturing Co Ltd v LSW Ry [1894] 1 Q.B. 833*. See also Clarke, International Carriage of Goods by Road: CMR, 6th edn (2014), para.251.
- 320 For agency of necessity, see Vol.I, para.21-038.
- 321 *Sachs v Miklos [1948] 2 K.B. 23, 35*; cf. *GN Ry v Swaffield (1874) L.R. 9 Ex. 132*. As to the entitlement to reimbursement of gratuitous bailees incurring reasonable expenses in safeguarding and preserving goods for the benefit of the owners thereof, see, generally, *China Pacific SA v The Food Corp of India (The Winson) [1982] 1 Lloyd's Rep. 117 HL.*
- 322 Compare *Sims v Midland Ry [1913] 1 K.B. 103* with *Springer v GW Ry [1921] 1 K.B. 257*. See also Torts (Interference with Goods) Act 1977 s.12.
- 323 It has been suggested that such power of sale may be unreasonable within the meaning of the Unfair Contract Terms Act 1977: Yates (ed.), Contracts for the Carriage of Goods (1993), para.3.2.1.17.1 (Clarke).

## **(b) - Passengers**

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### **(b) - Passengers**

#### **Carriage by rail**

- 38-054 By Regulation (EC) 1371/2007 on rail passengers' rights and obligations, which entered into force on 3 December 2009, the European Parliament adopted certain provisions of Appendix A (CIV) to the International Convention on Carriage by Rail (COTIF) as applicable to the carriage of passengers and their luggage by rail by licensed railway undertakings, whether such railway journeys were carried out internationally (in more than one country) or domestically (in one country).<sup>324</sup> The provisions of CIV are discussed in the context of international carriage later in this chapter and should now be read as also applicable to domestic carriage.<sup>325</sup> Obligations imposed by CIV on the railway undertakings cannot be limited or waived by a derogation or restrictive clause in the transport contract, although the railway undertakings may offer contract conditions more favourable for the passenger.<sup>326</sup> In addition, the Regulation provides for the provision of pre-journey information and information during the journey set out in Annex II,<sup>327</sup> and the taking out of adequate insurance by the railway undertaking in respect of its liability to passengers.<sup>328</sup> In the event of a claim or complaint by a passenger against the railway undertaking, the Regulation legislates for the provision of assistance and remedies (reimbursement and compensation) to the passenger.<sup>329</sup> Certain provisions of the Regulation are qualified or supplemented by the Rail Passengers' Rights and Obligations Regulations 2010, which entered into force on 25 June 2010.<sup>330</sup>

#### **Common carriers**

- 38-055

The common carrier of passengers is he who holds himself out as willing to carry members of the public generally. This profession draws in its train the general duty to receive all persons as passengers who offer themselves in a fit state to be carried and ready to pay the proper and reasonable fare and prepared to conform to all reasonable requirements as to carriage, unless there is no longer any room in the conveyance for such persons.<sup>331</sup> As we have seen,<sup>332</sup> the privatised railway companies and Transport for London are not regarded as common carriers; whether common carrier or not, they are not obliged to carry any person who is in an unfit condition.<sup>333</sup> But the common carrier of passengers is not subject to the strict form of liability applicable to the common carrier of goods. Hence the distinction between common and private carriers has never been as important in the law of carriage of passengers as it has in the law of carriage of goods.

## **Liability for death or personal injuries**

- 38-056 At common law the carrier's liability for safety of his passengers is not strict but is based on fault. His duty is to see that reasonable care is taken for the safety of his passengers. The House of Lords has put it succinctly:

“A carrier's obligation to his passengers, whether it be expressed in contract or in tort, is to provide a carriage that is as free from defects as the exercise of all reasonable care can make it.”<sup>334</sup>

But he is not liable for harm suffered through a latent defect in his conveyance which could not reasonably be detected<sup>335</sup>; there is no implied warranty that the conveyance is fit for its purpose.<sup>336</sup> Nor is he liable for an accident to a very young child which would not have happened if the child had been properly looked after by the adult in whose care the child was travelling.<sup>337</sup>

## **Liability in tort**

- 38-057 A passenger who has paid for his ticket and is injured by the negligence of the carrier has the choice between suing for breach of contract or for the tort of negligence.<sup>338</sup> It follows that claims against a carrier for damages for personal injuries or death do not necessarily depend on the existence of a contract of carriage between the carrier and the injured or dead person. It is sufficient if he was in the train or vehicle with the carrier's permission, i.e. provided that he was not a trespasser or (perhaps) an unborn person.<sup>339</sup> He can recover damages for negligence whether he bought his ticket himself or whether it was bought for him by, e.g. a parent, spouse, employer or friend, or

whether he was travelling on a free pass.<sup>340</sup> In the case of a trespasser, the carrier's only duty is one of a limited duty of care, perhaps being no more than to avoid the intentional or reckless infliction of harm.<sup>341</sup> But, apart from this exceptional case, the standard of care is the same for passengers who have paid for their tickets as it is for those who, for one reason or another, have made no contract with the carrier but are present in his conveyance with his express or implied permission. Another consequence of the passenger's alternative rights of action in contract or tort is that the injured passenger can sue not only the carrier, who is vicariously liable for the negligence of his employees acting in the scope of their employment, but also the employee who negligently caused the harm.<sup>342</sup> It is immaterial that the employee was not a party to the contract of carriage.

## Liability for negligence of independent contractors

- 38-058 At common law a carrier was liable for injury caused to a passenger in a contractual relation with the carrier, even when the injury was caused by the negligence of an independent contractor.<sup>343</sup> So, where a passenger held a ticket issued by the Great Western Railway and was injured in an accident caused by the negligence of the South Wales Railway, on whose lines the journey was partly run, it was held that the Great Western Railway were liable to the passenger.<sup>344</sup> This liability was based on an implied term in the contract that the Great Western Railway undertook that due care would be used in carrying the passenger throughout the journey. This form of liability is unaffected by the *Occupiers' Liability Act 1957*, whether the injury is caused by the defective state of the vehicle in which the passenger is being carried,<sup>345</sup> or by any other form of negligence.<sup>346</sup> There does not appear to be any authority on the liability of a carrier for the negligence of an independent contractor to a passenger who is lawfully in the vehicle but who is not in a contractual relationship with the carrier, e.g. a person travelling on a free pass, or a person travelling on a ticket purchased for him by a third party (but not as his agent) such as a child travelling on a ticket purchased by his parent. As pointed out above,<sup>347</sup> such a person is (so far as the standard of care is concerned) normally in the same position as a passenger who has a contract with the carrier, and can sue in tort for breach of the ordinary duty of care; but it is not clear whether this tortious liability would involve liability for the negligence of an independent contractor. But where the injury is caused by the defective state of the vehicle (as opposed to other forms of negligence) the position may today be governed by the *Occupiers' Liability Act 1957*. Although this Act does not affect the obligations imposed on any person:

“... by or by virtue of any *contract* ... for the carriage for reward of persons ... in any vehicle, vessel, aircraft or other means of transport”,<sup>348</sup>

it does affect the liability in *tort* of an occupier of any premises (including vehicles<sup>349</sup>). In particular a person is not vicariously liable for the negligence of an independent contractor under

the Act<sup>350</sup>; and a passenger who has no contract with the carrier and is compelled to sue in tort may therefore be in a less favourable position in this particular respect than a passenger who can sue in contract.<sup>351</sup>

## **Res ipsa loquitur**

- 38-059 The otherwise heavy burden of proof imposed on injured passengers (or their estates or defendants) is alleviated in one important respect. In many cases of accidents to passengers, especially passengers by rail, the long-established and frequently illustrated doctrine of res ipsa loquitur may apply, with the result that it is very often for the carrier to disprove negligence, and not for the passenger to prove it.<sup>352</sup>

## **Breach of statutory duty**

- 38-060 Carriers are under numerous statutory duties relating to, e.g. the construction and equipment of vehicles, the qualifications of drivers, and the safety rules of rail and road.<sup>353</sup> In an action against a carrier for negligence, proof of the breach of a statutory duty of this kind may in certain circumstances amount to *prima facie* evidence of negligence.<sup>354</sup> But it is no more than that. Such breach of a statutory duty by a carrier does not found an independent action in tort in which negligence need not be proved.<sup>355</sup>

## **Defences**

- 38-061 The defences open to the carrier (apart from special contract, considered immediately below) are those usual in actions for negligence in tort, including contributory negligence, *volenti non fit injuria*, and remoteness of damage. A discussion of these matters is outside the scope of this work.<sup>356</sup>

## **Special contract**

- 38-062 At common law there was nothing to prevent a carrier from contracting out of his duty to take reasonable care for the safety of his passengers and out of other duties, e.g. the duty to carry them with reasonable speed. The technical procedure by which exemption clauses may be incorporated

in standard form contracts of carriage through the issue of tickets has been established in the well-known line of “ticket cases”, which are considered elsewhere.<sup>357</sup> Briefly, the passenger will be bound by the conditions if he knew that there was writing on the ticket and that this contained conditions, or if the carrier did what was reasonably sufficient to give the passenger notice of the conditions. A statement on the face of the ticket saying “For Conditions See Back” and a reference on the back to the railway timetables, bills and regulations is sufficient notice, even if the passenger cannot read.<sup>358</sup> The degree and specificity of notice will depend on the onerousness or unusual nature of the term said to be incorporated.<sup>359</sup> The terms and conditions alleged to be incorporated may not be binding on the consumer if they are unfair within the meaning of the **Unfair Terms in Consumer Contracts Regulations 1999** or the **Consumer Rights Act 2015**, which replaces and revokes the **1999 Regulations** for contracts made on or after 1 October 2015.<sup>360</sup> Most of the ticket cases were concerned with carriage by rail or carriage by sea, where the passenger does not normally board the train or the ship until after he has taken his ticket and made his contract. No doubt the principle of the cases is equally applicable to carriage by long-distance coach if the ticket is bought at a coach station or from a travel agency. But what is the position if the passenger enters the vehicle before taking a ticket, e.g. if he boards a bus, or arrives at a railway station too late to buy a ticket at the booking office, but is allowed to board the train and pay during the journey or on arrival at his destination?<sup>361</sup> In such cases it may be very important to establish when the contract was made, because an exemption clause will be of no effect unless it is communicated to the passenger at or before that time.<sup>362</sup> There is some authority for saying that the contract of carriage is made when the passenger puts himself either on the platform of the bus or inside it.<sup>363</sup> The principle of the ticket cases still applies to exemption clauses excluding liabilities which the carrier can lawfully exclude, e.g. for delay. But they have ceased to have much significance in cases where personal safety is concerned, for reasons about to be discussed.

## **Limitations on carriers’ contracting out of liability for death and personal injury**

- 38-063 Section 2(1) of the **Unfair Contract Terms Act 1977** renders ineffective the exclusion or restriction of the liability of any person for death or personal injury resulting from negligence by reference to any contractual term or to a notice given to persons generally or to particular persons. The general provision appears to supersede previous statutory prohibitions on the insertion of terms in contracts of carriage of passengers by land excluding or limiting such liability. Section 43(7) of the **Transport Act 1962**, which prohibited the Boards set up under that Act (including the British Railways Board and the London Transport Executive) from excluding or limiting their liability for death of, or personal injury to, passengers (other than those travelling on free passes) was, indeed, expressly repealed by the **1977 Act**.<sup>364</sup> Section 29 of the **Public Passenger Vehicles Act 1981** makes void any contract for the conveyance of a passenger in a public service vehicle<sup>365</sup> insofar as it purports to negative or restrict the liability of any person for the death of, or personal

injury to, a passenger while being carried in, entering or alighting from the vehicle, or purports to impose any conditions with respect to the enforcement of any such liability. **Section 149 of the Road Traffic Act 1988** renders of no effect any agreement between the user<sup>366</sup> of a vehicle on the road and a passenger whereby the liability of the user for death or personal injury is excluded or limited or whereby conditions are imposed on the enforcement of such liability. The various statutory provisions described above invalidate not only terms purporting to exclude or restrict liability but also terms purporting to impose any conditions with respect to the enforcement of any such liability. Thus the Unfair Contract Terms Act<sup>367</sup> prohibits the insertion of terms making the liability or its enforcement subject to restrictive or onerous conditions or excluding any right or remedy in respect of the liability where the Act prevents a contract term excluding or restricting liability, as unreasonable. Whilst the **1977 Act** does not treat a contract term which requires disputes to be referred to arbitration as a term excluding or restricting liability,<sup>368</sup> the **Unfair Terms in Consumer Contracts Regulations 1999** exposes such terms to emasculation as against a consumer if they are unfair within the meaning of those Regulations.<sup>369</sup>

## **Exceptions to the general limitations on carriers' contracting out of liability**

38-064 It may happen that a carrier by land also provides within the United Kingdom or between the United Kingdom and the British Islands regular passenger shipping services complementary to his road or rail services. **Prima facie** such combined land-sea carriers would be prohibited under **s.2(1) of the Unfair Contract Terms Act 1977** from excluding or restricting their contractual liability for the death of, and personal injury to, passengers on their ships. Parliament has, however, intervened and enabled carriers by sea to limit their liability in such cases as those listed in the previous paragraph. By a statutory instrument,<sup>370</sup> contracts for the domestic carriage of passengers and their luggage by sea have been, since 30 April 1987, subjected to a modified version of the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea 1974 where, *inter alia*, under the contract the places of departure and destination are in the area consisting of the United Kingdom, the Channel Islands and the Isle of Man and there is no intermediate port of call outside that area.<sup>371</sup> The Athens Convention<sup>372</sup> (which embraces international carriage of passengers and their luggage by sea) makes a carrier liable for damage resulting from the death of, and personal injury to, a passenger during the course of carriage by sea due to the fault or neglect of the carrier.<sup>373</sup> Such fault is usually presumed in the case of death of, or personal injury to, a passenger.<sup>374</sup> The carrier is permitted to limit his liability for death and personal injury.<sup>375</sup>

## **Standard forms of contract**

38-065

The carriage of passengers by rail in respect of domestic scheduled passenger train services on the railway network of Great Britain is subject to the National Rail Conditions of Carriage the most recent version of which applies from 20 May 2012. The train companies are obliged to contract on the basis of these terms or terms no less generous to the customer. There are no generally accepted conditions of carriage of passengers by road; the National Rail Conditions of Carriage do, however, apply to the carriage of passengers in road vehicles owned or operated by the Train Company.<sup>376</sup>

## Liability for delay

- 38-066 At common law the carrier owes a duty to take passengers to their agreed destinations within a reasonable time and at a reasonable speed.<sup>377</sup> The customer will be entitled to recover damages for any breach of this duty.<sup>378</sup> But the damage must not be too remote: it does not cover the expense of ordering a special train in order that the traveller might arrive at a seaside resort in time for dinner.<sup>379</sup> At common law the mere fact that times of departure and arrival are published does not amount to a warranty that the times will be strictly adhered to.<sup>380</sup> The National Rail Conditions of Carriage, at cl.42 to 45, provide that the passenger is entitled to compensation for delay, cancellation or poor service within the control of the Train Company in accordance with the Passenger's Charter, published by the Train Company, subject to the minimum levels of compensation set out in the National Rail Conditions of Carriage, provided a claim is lodged within 28 days of the completion of the journey; the Train Company does not accept liability for loss (including consequential loss) caused by the delay or cancellation of any train. Minimum compensation takes the form of vouchers which entitle the passenger to discounts off the price of his next railway journey. The list of circumstances which are not within the Train Company's control include these wide ranging categories: acts or apprehended threats of vandalism or terrorism; suicides or accidents to trespassers; gas leaks or fires in lineside buildings not caused by the Train Companies or their employees or agents; line closures at the request of the police or emergency services; exceptionally severe weather conditions; industrial action, riot or civil commotion; fire or failure due to electrical failure or defects not caused by the Train Company, their employees or agents.

## Carrier's right to receive the proper fare

- 38-067 If a passenger misuses his ticket by breaking the conditions on which it was issued to him, he breaks his contract and may be liable to pay the fare or part of it over again. This principle may be illustrated by reference to the National Rail Conditions of Carriage and decided cases. Thus, a railway ticket is not transferable; it cannot be used by anyone except the person for whom it was bought.<sup>381</sup> Tickets are valid only for a limited period, namely the period of validity printed on the ticket or stated in the Train Company's publications, leaflets and notices relating to the

ticket.<sup>382</sup> Tickets are only available for use between the stations shown on them and by the specified route.<sup>383</sup> Whilst most ticket types permit the passenger to stop his journey at a station short of that shown on his ticket, the Train Company may in some cases at certain times charge a higher fare for the shorter journey. In those cases, the passenger must pay the appropriate fare for the journey actually made.<sup>384</sup> At common law a passenger has no right to break his journey at an intermediate station and resume it later.<sup>385</sup> Of course, the contract of carriage may provide otherwise.<sup>386</sup>

## Footnotes

- 324 The EC Regulation will continue in force after the UK's exit from the EU: European Union (Withdrawal) Act 2018 ss.2, 3; European Union (Withdrawal Agreement) Act 2020 s.2.
- 325 See below, paras 38-079, 38-100—38-117.
- 326 art.6.
- 327 art.8.
- 328 art.12.
- 329 arts 14, 16, 17 and 18. Ch.V of the Regulation concerns the obligations of railway undertakings with respect to the carriage of disabled persons: see also Ch.3 of the Rail Passengers' Rights and Obligations Regulations 2010 (SI 2010/1504).
- 330 SI 2010/1504.
- 331 *Clarke v West Ham Corp [1909] 2 K.B. 858, 876–877, 878, 879.*
- 332 Greater London Authority Act 1999 s.156(8), Sch.11 para.31; Railways Act 1993 s.123; the Railways Regulations 1998 (SI 1998/1340) reg.23. The privatised operators provide services for the carriage of passengers by railway pursuant to franchise agreements: Railways Act 1993 s.23. See above, para.38-010.
- 333 *Garton v Bristol and Exeter Ry Co (1861) 1 B. & S. 112* at 162. See also the National Rail Conditions of Carriage (published in May 2012) cl.59, which allows a railway company to refuse carriage to any person which it has reasonable grounds to believe is likely to act in a riotous, disorderly or offensive manner.
- 334 *Barkway v South Wales Transport Co Ltd [1950] 1 All E.R. 392, 403–404*, per Lord Radcliffe. This is an obligation reinforced by the Supply of Goods and Services Act 1982 s.13.
- 335 *Readhead v Midland Ry (1869) L.R. 4 Q.B. 379*; cf. *Hyman v Nye (1881) 6 Q.B.D. 685, 687–688.*
- 336 *John Carter (Fine Worsteds) Ltd v Hanson Haulage (Leeds) Ltd [1965] 2 Q.B. 495*. The common law liability of the carrier probably is unchanged by the Occupiers' Liability Act 1957, whether the passenger has paid for the carriage or not.
- 337 *O'Connor v BTC [1958] 1 W.L.R. 346.*
- 338 *Foulkes v Metropolitan District Ry (1880) 5 C.P.D. 157; Kelly v Metropolitan Ry [1895] 1 Q.B. 944, 946; Taylor v MS & L Ry [1895] 1 Q.B. 134.*

- 339 *Walker v GN Ry* (1891) 28 L.R.Ir. 69; contrast *Montreal Tramways v Leveille* (1933) 4 D.L.R. 337. Note, however, *Congenital Disabilities (Civil Liability) Act* 1976.
- 340 *Marshall v York, Newcastle and Berwick Ry* (1851) 11 C.B. 655, 662; *Collett v LNW Ry* (1851) 16 Q.B. 984; *GN Ry v Harrison* (1854) 10 Ex. 376; *Austin v GW Ry* (1867) L.R. 2 Q.B. 442, 445–446; *Harris v Perry* [1903] 2 K.B. 219. In *Gray v Thames Trains Ltd* [2007] EWHC 1558 (QB) at [18], the carrier admitted negligence.
- 341 Clerk & Lindsell on Torts, 21st edn (2014), paras 12-67—12-72; *Videan v BTC* [1963] 2 Q.B. 650; *Commissioner for Rys v Quinlan* [1964] A.C. 1054; *Herrington v British Railways Board* [1972] A.C. 877. cf. the liability of the carrier to a trespasser concerning the condition of his vehicle provided for by the *Occupiers' Liability Act* 1984 s.1. A passenger who holds a second-class ticket is not necessarily a trespasser if he travels in a first-class compartment: *Vosper v GW Ry* [1928] 1 K.B. 340, 349.
- 342 *Cosgrove v Horsfall* (1945) 62 T.L.R. 140; *Adler v Dickson* [1955] 1 Q.B. 158; *Genys v Matthews* [1966] 1 W.L.R. 758; *Gore v Van der Lann* [1967] 2 Q.B. 31.
- 343 *GW Ry v Blake* (1862) 7 Hurl. & N. 987; *John v Bacon* (1870) 39 L.J. C.P. 365; *Thomas v Rhymney Ry* (1871) L.R. 6 Q.B. 266.
- 344 *GW Ry v Blake* (1862) 7 Hurl. & N. 987.
- 345 See s.5(3).
- 346 In this event the Act does not apply at all: s.1.
- 347 See above, para.38-044.
- 348 s.5(3).
- 349 s.1(3).
- 350 s.2(4)(b). See Clerk & Lindsell on Torts, 21st edn (2014), paras 12-56—12-58.
- 351 But it is arguable that a passenger travelling on a ticket issued to a third party (e.g. a child) travels “by virtue of” a contract of carriage.
- 352 See, e.g. *Skinner v LB & SC Ry* (1850) 5 Ex. 787; *Dawson v MS & L Ry* (1862) 5 L.T. 682; *Gee v Metropolitan Ry* (1873) L.R. 8 Q.B. 161; *Laurie v Raglan BS Ltd* [1942] 1 K.B. 152; *Radley v LPTB* [1942] 1 All E.R. 433; *Easson v LNE Ry* [1944] K.B. 421; *Brookes v LPTB* [1947] 1 All E.R. 506; *Hale v Hants and Dorset Motor Services Ltd* [1947] 2 All E.R. 628.
- 353 See, e.g. the *Railways Regulations 1998* (SI 1998/1340); *Public Passenger Vehicles Act 1981* Pts II and III; *Road Traffic Act 1988*; and Orders and Regulations made thereunder.
- 354 *Blamires v L & Y Ry* (1873) L.R. 8 Ex. 283; *Croston v Vaughan* [1938] 1 K.B. 540, 551–552.
- 355 *Phillips v Britannia Hygienic Laundry Co* [1923] 2 K.B. 832; *Stennett v Hancock* [1939] 2 All E.R. 578; *Clarke v Brims* [1947] 1 K.B. 497; *Barkway v South Wales Transport Co Ltd* [1950] 1 All E.R. 392, 400. See Kahn-Freund at pp.473–483. As to the effect of a breach of statutory duty on the level of the carrier’s contribution to liability, see *Madden v Quirk* [1989] 1 W.L.R. 702.
- 356 See Clerk & Lindsell on Torts, 21st edn (2014), Chs 2–3.
- 357 See Vol.I, paras 15-008—15-021, and see above, para.38-027.
- 358 *Thompson v LMS Ry* [1930] 1 K.B. 41; *Fosbroke-Hobbes v Airwork Ltd* [1937] 1 All E.R. 108. cf. *Parker v South Eastern Railway* (1877) 2 C.P.D. 416. The conditions alleged to be incorporated may not be binding on the consumer if they are unfair within the meaning of the *Unfair Terms in Consumer Contracts Regulations 1999*.

- 359 *Thornton v Shoe Lane Parking Ltd [1971] 2 Q.B. 163; Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd [1989] 1 Q.B. 433*; see above, Vol.I, para.15-012.
- 360 See below, paras 40-273 et seq.
- 361 See *Hooper v Furness Ry (1907) 23 T.L.R. 451*.
- 362 cf. *Olley v Marlborough Court Ltd [1949] 1 K.B. 532*. See Vol.I, para.15-009.
- 363 *Wilkie v LPTB [1947] 1 All E.R. 258, 259*.
- 364 Unfair Contract Terms Act 1977 s.31(4) and Sch.4. See below, Ch.40.
- 365 s.1 defines a “public service vehicle” as a motor vehicle used for carrying passengers for hire or reward. This definition does not require a plaintiff to demonstrate that there was a legally enforceable agreement or right to be carried or that payment had been made: *Rout v Swallow Hotels [1993] R.T.R. 80* (where a hotel minibus provided for the benefit of hotel guests was held to be a public service vehicle); *DPP v Sikondar [1993] R.T.R. 90* (where a vehicle used for the systematic carrying of girls to and from school, whose driver received the occasional contribution to the cost of petrol, was held to be a public service vehicle).
- 366 That is, one who controls, manages or operates the vehicle: *Brown v Roberts [1965] 1 Q.B. 1*. See also *Stinton v Stinton [1995] R.T.R. 157; Hatton v Hall [1997] R.T.R. 212*.
- 367 Unfair Contract Terms Act 1977 s.13(1).
- 368 Unfair Contract Terms Act 1977 s.13(2).
- 369 Such terms are automatically unfair in so far as they relate to a pecuniary claim of up to £5,000: Arbitration Act 1996 ss.89–91; Unfair Arbitration Agreements (Specified Amount) Order 1999 (SI 1999/2167).
- 370 The Carriage of Passengers and their Luggage by Sea (Domestic Carriage) Order 1987 (SI 1987/670) made under the Merchant Shipping Act 1979 s.16. The 1979 Act has been repealed by the Merchant Shipping Act 1995. However, the 1987 Order continues to have force by virtue of the Interpretation Act 1978 s.17(2)(b), as if made under s.184 of the 1995 Act. Under s.184(5), the meaning of “contracts of carriage” exclude contracts which are not for reward. See also The Carriage of Passengers and their Luggage by Sea (United Kingdom Carriers) Order 1998 (SI 1998/2917) as regards United Kingdom carriers. See *South West Strategic Health Authority v Bay Island Voyages [2015] EWCA Civ 708* at [2]–[5]. In this case, the Court of Appeal said that although the 1974 Athens Convention applied to domestic carriage, its construction should take account of the fact that it is an international convention [28].
- 371 Merchant Shipping Act 1995 s.2.
- 372 The substantive provisions of the Convention are set out in the Merchant Shipping Act 1995 s.183, Sch.6 Pt I.
- 373 Athens Convention art.3. As to the effect of the time limitation in art.16, see *Higham v Stena Sealink Ltd [1996] 1 W.L.R. 1107; South West Strategic Health Authority v Bay Island Voyages [2015] EWCA Civ 708, [2016] Q.B. 503; Warner v Scapa Flow Charters [2018] UKSC 52, [2018] 1 W.L.R. 4974*.
- 374 Athens Convention art.3(3).
- 375 Athens Convention art.7. See also the Merchant Shipping (Convention Relating to the Carriage of Passengers and their Luggage by Sea) Order 2014 (SI 2014/1361). See *R G Mayor v P&O Ferries Ltd (The Lion) [1990] 2 Lloyd's Rep. 144*.

- 376 National Rail Conditions of Carriage cl.60.
- 377 *Hurst v GW Ry (1865) 19 C.B.(N.S.) 310*. See also Supply of Goods and Services Act 1982 s.14.
- 378 *Hobbs v LSW Ry (1875) L.R. 10 Q.B. 111*. See, as to the damages claimed and awarded in this case, *M'Mahon v Field (1881) 7 Q.B.D. 591, 594, 596–597*; *Bailey v Bullock [1950] 2 All E.R. 1167, 1170–1171*.
- 379 *Le Blanche v LNW Ry (1876) 1 C.P.D. 286*.
- 380 *Lord v Midland Ry (1867) L.R. 2 C.P. 339*; *Lockyer v International Sleeping Car Co (1892) 61 L.J. Q.B. 501*. So far as *Denton v GN Ry (1856) 5 El. & Bl. 860* and *Cooke v Midland Ry (1892) 57 J.P. 388* held that advertised times do form terms in the contract of carriage, they would probably not be followed today, because the exhibition of a timetable would not be construed as an offer capable of acceptance by the passenger.
- 381 National Rail Conditions of Carriage cl.6.
- 382 National Rail Conditions of Carriage cl.11.
- 383 National Rail Conditions of Carriage cl.13.
- 384 National Rail Conditions of Carriage cl.16. See *GN Ry v Winder [1892] 2 Q.B. 595*; *GN Ry v Palmer [1895] 1 Q.B. 862*.
- 385 *Ashton v L & Y Ry [1904] 2 K.B. 313*; *Bastaple v Metcalfe [1906] 2 K.B. 288*.
- 386 See, for example, National Rail Conditions of Carriage cl.16.

## (c) - Passengers' Luggage

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Volume II - Specific Contracts

Chapter 38 - Carriage by Land

Section 2. - Internal Carriage

(c) - Passengers' Luggage

### Common carriers

- 38-068 At common law, there appears to have been no obligation on a carrier to carry passengers' luggage free of extra charge or at all.<sup>387</sup> For evident commercial reasons, however, carriers habitually accepted their passengers' luggage, generally without extra charge; and, in the absence of special terms to the contrary, they incurred, in relation to the luggage, the liability of common carriers.<sup>388</sup> From the nature of their liability, they came to be regarded as common carriers of luggage by implication. No person, such as Transport for London or the franchised railway companies, shall be regarded as common carriers by rail.<sup>389</sup> It is likely, however, that Transport for London and the operators of public service vehicles (buses and coaches) outside London are common carriers of passengers' luggage by road, except in the case of "contract carriage" (where the vehicle is hired for a lump sum).<sup>390</sup> It should be noted, however, that the National Rail Conditions of Carriage purport to apply the conditions applicable to carriage of passengers' luggage by rail to luggage carried in road vehicles owned or operated by the Train Company or its agents.<sup>391</sup>

### Permitted luggage

- 38-069 All passengers by rail and road are entitled to take with them certain quantities of luggage. This right may be either statutory or contractual. As to the former, the traffic commissioners in granting road service licences under Pt III of the Public Passenger Vehicle Act 1981 can impose conditions as to the amount of luggage to be carried free of extra charge and can fix the charges for excess luggage. The National Rail Conditions of Carriage provide that the Train Company will accept small items of luggage (including animals) accompanying a passenger, subject to specified

exceptions (such as large luggage), free of charge.<sup>392</sup> Although there is no precise limitation upon the size, quantity or weight of the luggage which accompanies the passenger, the Train Company may refuse to carry the luggage if there is no room for it. The Train Company may refuse to accept luggage additionally where the luggage might cause injury, inconvenience or property damage, its loading or unloading might cause delay or it is not carried or packed in a suitable manner, notwithstanding that such luggage has been accepted previously or is accepted normally.

## Definition of passengers' luggage at common law

- 38-070 At an early period it was important to determine whether or not articles which a passenger took with him were "passengers' luggage" because not only did carriers undertake an insurer's liability towards such articles, but they also carried them without extra charge. Moreover, if articles which appear to be passengers' luggage, but in fact are not so, are lost or damaged, the carrier may avoid all liability on the ground that he never contracted to carry such articles. The classic definition of passengers' luggage at common law is that of Cockburn CJ in *Macrow v Great Western Railway*.<sup>393</sup> According to this, passengers' luggage is ordinary, personal luggage, that is to say, luggage for personal use or convenience according to the habits or wants of the particular class to which the passenger belongs, with reference to either the immediate necessities or the ultimate purpose of his journey. The meaning of this definition will be elucidated in the paragraphs that follow.<sup>394</sup>

## The requirement of personal use

- 38-071 From luggage carried for the passenger's personal use or convenience must be distinguished (a) articles taken by a passenger for the use of others, like sheets and blankets for a household<sup>395</sup> or a rocking-horse as a present for a child<sup>396</sup>; and (b) at common law articles taken by a passenger for the purposes of his profession, trade or business.<sup>397</sup> Under the National Rail Conditions of Carriage, however, passengers are permitted to take with them small items of luggage free of charge.<sup>398</sup> Thus, in carriage by rail, many of the cases on the carriage of luggage at common law might now be decided differently; and it would no longer be necessary to consider whether, e.g. the artist's sketches were done for his own amusement or for sale. It should be stressed that at common law it is not the ownership of the articles but their use that is of crucial importance. Thus, if the luggage is taken by the passenger for the use of someone else, the carrier is not liable<sup>399</sup>; conversely, if the luggage contains articles lent to the passenger by a friend, the carrier is liable.<sup>400</sup> Even an employee may recover for the loss of his employer's luggage, provided the luggage was required for the use of the employee, e.g. a uniform.<sup>401</sup> The National Rail Conditions of Carriage,

on the other hand, are concerned not with personal use but with the condition, size and weight of the luggage.

## Use in connection with journey

- 38-072 At common law the articles must be for the passenger's use on the actual journey, or in connection with the journey. What the latter phrase means is, at present, uncertain. Articles for personal use during the passenger's stay in a hotel whilst away from home would certainly be articles for use in connection with the journey.<sup>402</sup>

## In the nature of a package

- 38-073 At common law objects taken by the passenger must correspond with the image normally evoked by the word "luggage", i.e. something of a size and shape that can reasonably be carried as luggage.<sup>403</sup>

"An article which is taken, as it were, loose ... is subject to rather different considerations... There is, in addition to the requirement that they are for some personal use, the requirement that they must be of the kind of goods that are usually denominated as luggage ... it conveys the idea that they are carried about in a box or a bag or something of that kind."<sup>404</sup>

So bicycles,<sup>405</sup> invalid chairs<sup>406</sup> and radio sets<sup>407</sup> have not in the past been treated as passengers' luggage. Nor does the term include the articles carried by a passenger on his person.<sup>408</sup> Whether the phrase embraces, e.g. a passenger's coat, hat, umbrella, stick, handbag, book or toy that is placed on the luggage rack or on the seat remains open.<sup>409</sup> The Train Companies often will allow the carriage of such items under their conditions of carriage.

## Carriage of items not permitted by the contract

- 38-074 "If the carrier permits the passenger, either on payment or without payment of an extra charge, to take more than the regulated quantity of luggage, or knowingly permits him to take as personal luggage articles that would not come under that denomination, he will be liable for their loss, though not arising from his negligence."<sup>410</sup>

On the other hand:

“If a passenger, who knows or ought to know that he is only entitled to have his ordinary personal luggage carried free of charge, chooses to carry with him merchandise, for which the company are entitled to make a charge, he cannot claim to be compensated in respect of any loss or injury by the company, to whom he has abstained from giving notice of the contents. In such a case he carries it at his own risk.”<sup>411</sup>

Similarly, if a passenger puts luggage into a train or other vehicle, and the carrier discovers that it consists of merchandise or exceeds the permitted weight, the carrier can make the appropriate charge and retain the luggage until the charge is paid.<sup>412</sup>

## Common carrier's liability for loss and damage

- 38-075 The common carrier of passengers' luggage is strictly liable for loss or damage, subject to the four excepted perils,<sup>413</sup> unless he has limited his liability by special contract. The only one of the excepted perils which requires discussion here is the passenger's fault. In the case of luggage put in the luggage compartment of a coach, this defence could only be available where, e.g. the loss or damage occurs because the luggage is wrongly labelled or addressed or badly packed. But where the passenger takes the luggage into the coach with him, the application of the defence widens. The fact that the passenger retains possession of his luggage does not affect the nature of the carrier's liability; it only enhances the possibility of a successful defence. The carrier is still a common carrier, whether the luggage is placed in the luggage compartment or is taken inside by the passenger.<sup>414</sup> In the days when the railways were common carriers it was held that a passenger need not keep a watchful eye on his luggage throughout the journey.<sup>415</sup> But if the passenger is negligent in looking after his luggage, the carrier is not liable.<sup>416</sup> Thus if luggage disappears from the luggage compartment of a coach during transit, the carrier will very probably be liable.<sup>417</sup> He would also be liable if the luggage disappeared from inside the coach while it stopped for 10 minutes to allow the passengers to visit a toilet or to buy sandwiches.<sup>418</sup> But he might not be liable if the coach stopped for an hour in order that the driver and passengers might take a meal. Since the carriage of luggage is not gratuitous, even if it is carried “free of extra charge”,<sup>419</sup> the defence of s.1 of the Carriers Act 1830 is also available.<sup>420</sup> A passenger's clothes, jewellery, watch and so on which he carries on his person or in his pockets are not passenger's luggage. For these, the carrier is under the same liability as he is towards the passenger himself: his liability is based on negligence.<sup>421</sup>

## The carrier's contractual liability for loss and damage

- 38-076 A common carrier, who has modified his status by a special contract, and a private carrier will be liable for loss and damage to the passenger's luggage in accordance with the terms of that contract.<sup>422</sup> Alternatively, the passenger may have remedies in tort.<sup>423</sup> Any contract terms which seek to exclude or restrict such liability in contract or for negligence must yield to the requirement of reasonableness under the *Unfair Contract Terms Act 1977*,<sup>424</sup> and fairness in respect of consumer contracts made on or after 1 October 2015, under the *Consumer Rights Act 2015*.<sup>425</sup> Under the National Rail Conditions of Carriage, the Train Companies are only liable for loss of or from, or for damage or delay to, luggage brought on to premises or taken into trains upon proof that such loss, damage or delay was caused by the fault of the Train Company. The Train Company's liability in respect of any item will not exceed the limit laid down in the EU Rail Passengers Rights and Obligations Regulation (1371/2007) or the item's value, whichever is lower. The Train Company will also take reasonable care of lost property. In any event, the Train Company's liability is limited to the lesser of the value of the item or a specified limit.<sup>426</sup> Under the National Rail Conditions of Carriage, the Train Company may remove or dispose of any property which might in their opinion cause damage or injury or inconvenience to persons or may sell or dispose of unclaimed property.<sup>427</sup>

## Beginning and end of transit

- 38-077 As in the case of the carriage of goods,<sup>428</sup> it is important to determine in relation to the carriage of passengers' luggage when transit begins and ends, because it is only during this period that the carrier can be made liable as a carrier. The National Rail Conditions of Carriage no longer indicate when transit begins or ends. The decided cases are still of interest on the question when transit ends at common law, and decisive of the question when it begins; and no doubt the principles contained in the cases can be applied with caution to the somewhat different conditions of carriage by road. At common law, transit begins when the luggage is received for transport by the carrier or one of his actually or ostensibly authorised employees<sup>429</sup> a reasonable and proper time before the train is due to start. What is a reasonable and proper time is a question of fact depending on the circumstances of each case.<sup>430</sup> If luggage is handed to a railway porter at an earlier time than this, the carrier will not be liable if it is stolen, because it should have been placed in the left luggage office.<sup>431</sup>

## Liability in tort

- 38-078 If there is no contract with the passenger, the carrier may still be liable in tort. Thus, an employee can recover for the loss of his personal luggage, though his employer paid for his ticket<sup>432</sup>; and the employer can recover for the loss of luggage owned by him but required for the use of the employee, e.g. a uniform, though the employer was not himself a passenger.<sup>433</sup>

## Footnotes

- 387 See Leslie at p.295.
- 388 cf. *Lovett v Hobbs* (1680) 2 *Show.* 127 and the cases cited in Leslie at p.301.
- 389 Greater London Authority Act 1999 s.156(8), Sch.11 para.31; Railways Act 1993 s.123; the Railways Regulations 1998 (SI 1998/1340) reg.23. See above, para.38-010.
- 390 See Kahn-Freund at pp.598–599, 609; and see above, para.38-034 (note).
- 391 National Rail Conditions of Carriage cl.60.
- 392 National Rail Conditions of Carriage, cl.47–49.
- 393 (1871) *L.R.* 6 *Q.B.* 612, 622.
- 394 See Kahn-Freund at pp.600–608.
- 395 *Macrow v GW Ry* (1871) *L.R.* 6 *Q.B.* 612.
- 396 cf. *Hudston v Midland Ry* (1869) *L.R.* 4 *Q.B.* 366. In *Buckland v R* [1933] 1 *K.B.* 329, 340, McCardie J, in a useful and important survey of “passengers’ luggage”, said that “a smaller toy might well have been included in the phrase ‘ordinary luggage’”. But the difficulty remains that the child was not a passenger.
- 397 *Phelps v LNWR Ry* (1865) 19 *C.B.(N.S.)* 321 (solicitor carrying client’s title deeds for use in lawsuit); *Gilbey v GN Ry* (1920) 36 *T.L.R.* 562 (actor’s theatrical clothing); *GW Ry v Evans* (1921) 38 *T.L.R.* 166 (professional musician’s violoncello); *Mytton v Midland Ry* (1859) 28 *L.J. Ex.* 385 (professional artist’s sketches); *Belfast & Ballymena Ry v Keys* (1861) 9 *H.L. Cas.* 556 (merchandise); *Hastie v GE Ry* (1911) 46 *L.J. News.* 507 (typewriter carried for business purposes). Distinguish *Jenkyns v Southampton Steam Packet Co* [1919] 2 *K.B.* 135 (army officer’s revolver, ear-defenders, binoculars and flash-lamp), which is not strictly reconcilable with the above cases or the rule they illustrate, but is perhaps comprehensible when recalled as a case arising during the First World War.
- 398 National Rail Conditions of Carriage cl.47. Many of the cases on passengers’ luggage at common law arose on the construction of the expression “ordinary luggage” which occurred in the former railway companies’ private Acts; but in no case was a distinction suggested between “ordinary luggage” and “passengers’ luggage”. The National Rail Conditions of Carriage no longer employ the term “ordinary luggage”.
- 399 *Becher v GE Ry* (1870) *L.R.* 5 *Q.B.* 241 (employee taking employer’s luggage).

- 400 *Jenkyns v Southampton Steam Packet Co* [1919] 2 K.B. 135.
- 401 *Meux v GE Ry* [1895] 2 Q.B. 387, 394.
- 402 See *Britten v GN Ry* [1899] 1 Q.B. 243, 248.
- 403 *Macrow v GW Ry* (1871) L.R. 6 Q.B. 612, 621; *Britten v GN Ry* [1899] 1 Q.B. 243 at 248–249.
- 404 *Britten v GN Ry* [1899] 1 Q.B. 243 at 248 (Channell J).
- 405 *Britten v GN Ry* [1899] 1 Q.B. 243. See National Rail Conditions of Carriage, cl.48.
- 406 *Cusack v LNW Ry* (1891) 7 T.L.R. 452.
- 407 *Page v LMS Ry* [1943] 1 All E.R. 455, 457.
- 408 cf. *Smitton v Orient Steam Navigation Co* (1907) 96 L.T. 848.
- 409 But see *Le Conte v LSW Ry* (1865) L.R. 1 Q.B. 54, 62. See also Kahn-Freund at p.610, n.79.
- 410 *Macrow v GW Ry* (1871) L.R. 6 Q.B. 612, 619 (Cockburn CJ). cf. *Page v LMS Ry* [1943] 1 All E.R. 455.
- 411 *Cahill v LNW Ry* (1863) 13 C.B.(N.S.) 818, 819 (Cockburn CJ). cf. *GN Ry v Shepherd* (1852) 8 Ex. 30.
- 412 *Rumsey v NE Ry* (1863) 14 C.B.(N.S.) 641.
- 413 See above, paras 38-018—38-022.
- 414 See *Le Conte v LSW Ry* (1865) L.R. 1 Q.B. 54, 58–59; *GW Ry v Bunch* (1888) 13 App. Cas. 31, 42, 48, 53.
- 415 *Ehinger v SE & CRy* (1922) 38 T.L.R. 678; *Vosper v GW Ry* [1928] 1 K.B. 340; *Carr v LMS Ry* [1931] N.I. 94.
- 416 *Talley v GW Ry* (1870) L.R. 6 C.P. 44. See also National Rail Conditions of Carriage cl.51.
- 417 cf. *Houghland v RR Low (Luxury Coaches) Ltd* [1962] 1 Q.B. 694, where (as previously pointed out) the carriage was “contract carriage” and the carrier therefore not a common carrier.
- 418 cf. *Carr v LMS Ry* [1931] N.I. 94.
- 419 *Casswell v Cheshire Lines Committee* [1907] 2 K.B. 499.
- 420 See above, paras 38-033—38-034.
- 421 *Smitton v Orient Steam Navigation Co Ltd* (1907) 96 L.T. 848.
- 422 Although such terms must not be unfair within the meaning of Unfair Terms in Consumer Contracts Regulations 1999, where applicable.
- 423 *Meux v Great Eastern Ry Co* [1985] 2 Q.B. 387; *Houghland v RR Low (Luxury Coaches) Ltd* [1962] 1 Q.B. 694; *Sullivan v Ashway Coaches* [1981] C.L.Y. 302. See also below, para.38-077.
- 424 1977 Act ss.2(2), 3, 11.
- 425 2015 Act ss.62–65. The 2015 Act revokes the Unfair Terms in Consumer Contracts Regulations 1999: see below, paras 40-273 et seq.
- 426 National Rail Conditions of Carriage, cl.50. As at 6 May 2014, the limit is £1,376.25.
- 427 National Rail Conditions of Carriage, cl.52–57. See also Torts (Interference with Goods) Act 1977 s.12.
- 428 See above, para.38-041.
- 429 *Soanes v LSW Ry* (1919) 88 L.J. K.B. 524.

- 430 *GW Ry v Bunch* (1888) 13 App. Cas. 31 (40 minutes at Paddington Station on Christmas Eve held reasonable); *Steers v Midland Ry* (1920) 36 T.L.R. 703 (luggage left, with station inspector's approval, for one hour in sleeping-car while passenger had a meal outside the station: held reasonable). See also *Lovell v LC & D Ry* (1876) 34 L.T. 127; *Leach v SE Ry* (1876) 34 L.T. 134; contrast *Welch v LNW Ry* (1886) 34 W.R. 166.
- 431 *GW Ry v Bunch* (1888) 13 App. Cas. 31, 44, 53.
- 432 *Marshall v York, Newcastle and Berwick Ry* (1851) 11 C.B. 655.
- 433 *Meux v GE Ry* [1895] 2 Q.B. 387.

## **(a) - Introduction**

**Chitty on Contracts 34th Ed.**

**Consolidated Mainwork Incorporating First Supplement**

**Volume II - Specific Contracts**

**Chapter 38 - Carriage by Land**

**Section 3. - International Carriage**

### **(a) - Introduction**

#### **International Convention on Carriage by Rail**

- 38-079 The United Kingdom is a party to an important multilateral treaty on international carriage by rail. This is the Convention concerning International Carriage by Rail known as COTIF, signed at Berne on 9 May 1980.<sup>434</sup> COTIF is both a revision and an amalgamation of three previous carriage by rail Conventions, respectively known as CIM, CIV and CAV, which had been in force in their most recent form since 1 January 1975.<sup>435</sup> The new Convention incorporates all three Conventions with certain amendments as sets of Uniform Rules forming two appendices to COTIF. Appendix A embraces the CIV Uniform Rules regarding the international carriage of passengers and their luggage by rail; Appendix B covers the CIM Uniform Rules regarding the international carriage of goods by rail. Whilst most of the basic provisions of CIM, CIV and CAV remain in force, many of the articles of the earlier Conventions have been re-numbered. The object of having such Uniform Rules as appendices to COTIF is to enable them to be amended much more readily and quickly than under the old Conventions. The new Convention also provides for an intergovernmental organisation, known as OTIF, to monitor the performance of the Convention so far as international through traffic by rail between Member States is concerned, and to facilitate its development. The Central Office for International Carriage by Rail in Berne provides the OTIF Secretariat, and the Organisation's headquarters are in Berne. The CIM Uniform Rules have annexed to them four sets of regulations, concerning the international carriage by rail of dangerous goods ("RID"),<sup>436</sup> containers ("RICO"),<sup>437</sup> express parcels ("RIEx")<sup>438</sup> and the international haulage by rail of private owners' wagons ("RIP").<sup>439</sup>

## International Transport Conventions Act 1983

- 38-080 The United Kingdom government has ratified COTIF. The Convention came into force generally, and for the United Kingdom, on 1 May 1985, the day agreed by Member States under art.24(1) of COTIF, once the necessary 15 states had ratified or acceded to the Convention. The entry into force of the Convention by virtue of art.24(2) of COTIF automatically abrogated the earlier Conventions CIM, CIV and CAV. United Kingdom legislation had previously been enacted to give COTIF the force of law in the United Kingdom in the shape of the [International Transport Conventions Act 1983](#).<sup>440</sup> The provisions thus given the force of law were those set out in Command Paper Cmnd.8535, which contains the English text of the Convention and the Uniform Rules.<sup>441</sup> References in the present text to the English text of COTIF and its Appendix A (CIV) and Appendix B (CIM) are drawn from the Command Paper Cmnd.8535, which is separate from the Act. The French text of COTIF is, however, the only authoritative text.<sup>442</sup> The [1983 Act](#) provided for the entry into force of COTIF as far as the United Kingdom is concerned to be certified by an Order in Council under [s.11\(3\) of the Act](#). The certification of 1 May 1985, as the date of entry into force was thus made.<sup>443</sup> Under [s.11\(3\) of the 1983 Act](#), the [Carriage by Railway Act 1972](#) was repealed in its entirety from that date: this was the Act which had incorporated into English law the Additional Convention (CAV) relating to the liability of railways for death of and personal injury to passengers. The [International Transport Conventions Act 1983](#) empowers Her Majesty by Order in Council from time to time to certify which states are Member States for the purposes of COTIF.<sup>444</sup> A Protocol modifying COTIF was incorporated into English law and came into force on 1 November 1996.<sup>445</sup>

## Modification to COTIF: the Vilnius Protocol

- 38-081 On 3 June 1999, a Protocol modifying COTIF was signed in Vilnius by a number of states, including the United Kingdom. In anticipation of the Protocol entering into force and the United Kingdom's ratification of the Protocol by Royal Prerogative, Parliament enacted [s.103 of the Railways and Transport Safety Act 2003](#), which empowers the Secretary of State to make regulations for the purpose of giving effect to the modified Convention. By the [Railways \(Convention on International Carriage by Rail\) Regulations 2005](#),<sup>446</sup> the Vilnius Protocol was implemented as part of the law of the United Kingdom. The modifications import a general revision to COTIF, reflecting major changes in railway management and operations particularly following EC Directive 91/440, 95/18 and 95/19<sup>447</sup> including the increasing separation of infrastructure management from the operation of train companies and the increase of competition on any one network. In place of the three existing annexures to COTIF, the Protocol introduces (a) entirely

new CIV Uniform Rules (Appendix A), the modifications to which also ensure that minimum levels of compensation exist for certain incidents throughout all signatory states; (b) new CIM Uniform Rules (Appendix B); (c) a free-standing Appendix for the carriage of dangerous goods (RID) (Appendix C

<sup>448</sup>

(U); (d) new Uniform Rules for contracts for use of vehicles in international rail traffic (CUV), contracts for use of infrastructure in international rail traffic (CUI), the validation of technical standards and prescriptions applicable to railway material to be used in international traffic (APTU) and the technical admission of railway material used in international traffic (ATMF) (Appendices D to G). The [2005 Regulations](#), and therefore the Protocol (now referred to as COTIF 1999), entered into force on 1 July 2006.<sup>449</sup> The United Kingdom has declared pursuant to art.42 of the Protocol that it will not apply the CUI, APTU and ATMF (Appendices E, F and G). In addition, pursuant to an agreement between the United Kingdom and France, the CIV Uniform Rules and the CIM Uniform Rules will not apply to carriage by means of rail shuttle services carrying road vehicles and their passengers performed exclusively between the Channel Tunnel terminals at Cheriton in Kent and Coquelles in the Pas-de-Calais.

## International Conventions on Carriage by Road

- 38-082 Two important multilateral treaties must be noted.<sup>450</sup> The United Kingdom is a party to the Convention on the Contract for the International Carriage of Goods by Road (CMR),<sup>451</sup> signed at Geneva on 19 May 1956.<sup>452</sup> This Convention entered into force for the United Kingdom on 19 October 1967. The English and French texts of this Convention are of equal authenticity. The Convention was implemented in English law by the [Carriage of Goods by Road Act 1965](#), the English text of the Convention forming a [Schedule to the Act](#). The Act came into force on 5 June 1967.<sup>453</sup> The United Kingdom has also ratified a Protocol to CMR.<sup>454</sup> The Protocol was implemented in English law by the [Carriage by Air and Road Act 1979](#)<sup>455</sup> and entered into force on 28 December 1980.<sup>456</sup>

## Convention for Carriage of Passengers and Luggage by Road

- 38-083 The United Kingdom may at some stage become a party to the Convention on the Contract for the International Carriage of Passengers and Luggage by Road (CVR),<sup>457</sup> signed at Geneva on 1 March 1973. The Convention entered into force on 12 April 1994. Although represented at the Diplomatic Conference which drew up the Convention, the United Kingdom government has not yet signed,<sup>458</sup> still less ratified, the Convention. Although implementing legislation in the

shape of the [Carriage of Passengers by Road Act 1974](#) was passed, the possibility of signature and ratification grows remote, given that the [1974 Act](#) was repealed by the [Statute Law \(Repeals\) Act 2004](#).<sup>459</sup>

## Multi-modal or combined transport

- 38-084 With the rise of containerised transport, it is becoming increasingly common for the contract of carriage of goods to contemplate the international transport of those goods by more than one mode of carriage, namely by road, rail, sea and/or air. Each mode of carriage presently is governed by its own international legal regime provided each mode involves international transport,<sup>460</sup> with few attempts to identify the scope of their application in cases of combined transport.<sup>461</sup> Difficulties may arise where there is an overlap between the scope of each of these regimes. It is not proposed to discuss this topic here at length. The International Convention on the Multimodal Transport of Goods 1980 is an attempt to legislate for such combined transport but has not yet entered into operation, having received significantly less ratifications than required.<sup>462</sup> By art.30(4), the Multimodal Convention will not apply to those states which are bound to apply the CMR or the CIM rules.

## Footnotes

- 434 “COTIF” stands for “Convention Relative aux Transports Internationaux Ferroviaires”. The European Union acceded to COTIF, with effect from 1 July 2011.
- 435 An account of these Conventions and their effect in English law is given in paras 2877–2879 of the 25th edition of this work.
- 436 CIM Annex I; CIM arts 4(D) and 5(1)(a). See above, para.38-035.
- 437 CIM Annex III; CIM art.8(2).
- 438 CIM Annex IV; CIM art.8(3).
- 439 CIM Annex II; CIM art.8(1).
- 440 International Transport Conventions Act 1983 s.1(1).
- 441 International Transport Conventions Act 1983 s.1(3).
- 442 COTIF art.28. Under art.45 of the modified COTIF (see below, para.38-081), the Convention shall be expressed in English, German and French, but in the case of divergence, the French text shall prevail.
- 443 International Transport Conventions Act 1983 (Certification of Commencement of Convention) Order 1985 (SI 1985/612).
- 444 International Transport Conventions Act 1983 s.2(1).
- 445 SI 1994/1907. Note also the Supplementary Provisions agreed between Member States in 1993.

- 446 SI 2005/2092.
- 447 Implemented by the Railways Regulations 1998 (SI 1998/1340).
- ④448 The Carriage of Dangerous Goods and Use of Transportable Pressure Equipment Regulations 2009 (SI 2009/1348, as amended by SI 2011/1885, implement RID. A new Appendix C (RID) has been formulated with effect from 1 January 2021. See also the Carriage of Dangerous Goods and Use of Transportable Pressure Equipment (Amendment) (EU Exit) Regulations 2020 (SI 2020/1111) and 2021 (SI 2021/1370). See above para.38-035.
- 449 See London Gazette dated 3 July 2006; Railways (Convention on International Carriage by Rail) Regulations 2005 (SI 2005/2092) art.1.
- 450 The United Kingdom has entered into bilateral treaties concerning international carriage of goods by road with several states: see, e.g. the Agreements with Yugoslavia of 3 February 1969 (Cmnd.4282; TS. No.18 (1970)) and with France of 28 March 1969 (Cmnd.4324; TS. No.27 (1970)). These treaties are, however, mere facilitation agreements, designed to provide for the terms of entry of vehicles and for permits and the like. They do not affect the contractual relation between carrier and customer in any way.
- 451 Cmnd.3455; TS. No.90 (1967). See below, paras 38-117 et seq. “CMR” stands for “Convention Relative au Contrat de Transport International des Marchandises par Route”.
- 452 There was also a European Agreement concerning the International Carriage of Dangerous Goods by Road signed at Geneva on 30 September 1957 (“ADR”). The Annexes to that Agreement, as amended, were incorporated into English law by the Carriage of Dangerous Goods and Use of Transportable Pressure Equipment Regulations 2007 (SI 2007/1573). See now SI 2009/1348 and SI 2011/1885 and Carriage of Dangerous Goods and Use of Transportable Pressure Equipment (Amendment) (EU Exit) Regulations 2020 (SI 2020/1111). See above, para.38-035.
- 453 Carriage of Goods by Road Act 1965 (Commencement) Order 1967 (SI 1967/819).
- 454 Cmnd.8138; TS. No.6 (1981).
- 455 See ss.3(3), 4(2) (4), 5 and 6(1)(b).
- 456 Carriage by Air and Road Act 1979 (Commencement No.1) Order 1980 (SI 1980/1966).
- 457 Cmnd.5622. See below, paras 38-149 et seq. “CVR” stands for “Convention Relative au Contrat de Transport International des Voyageurs et des Bagages par Route”.
- 458 Only Luxembourg and the Federal Republic of Germany signed the Convention. The former states of Czechoslovakia and Yugoslavia acceded to it.
- 459 s.1(1) and Sch.1 Pt 14. The 2004 Act also repealed those parts of the Carriage by Air and Road Act 1979 which provided for the implementation of the Protocol to the CVR which was agreed in 1979.
- 460 CMR (road), CIM (rail), Warsaw Convention 1929, protocols and supplements (air—see above, Ch.37), and Hague Rules 1924 and Hague-Visby Rules 1968 (sea). Also note the Budapest Convention on Contracts for the Carriage of Goods by Inland Waterway (CMNI) signed on 22 June 2001. As to defining the modes of carriage, see Clarke, “*The Shape of the Conventions on the Carriage of Goods*” (2015) 50 E.T.L. 371, 375–376.

- 461 CMR art.2; COTIF art.2(2) and 3(3); CIM art.48; Warsaw Convention arts 18(5) and 31; Hague-Visby Rules art.1.
- 462 See also the UNCTAD/ICC Rules for Multimodal Transport Documents 1991. See generally de Wit, *Multimodal Transport* (1995). See *Faghfouri*, “*International Regulation of Liability for Multimodal Transport—In Search of Uniformity*” (2006) 5 WMU *Journal of International Affairs* 95. As an example of the difficulties in identifying the terms governing each leg of the combined transport of goods, see *Finagra (UK) Ltd v OT Africa Line Ltd* [1998] 2 *Lloyd's Rep.* 622.

## **(b) - Goods by Rail**

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**(b) - Goods by Rail**

### **Scope of the Uniform Rules (CIM) under Appendix B to COTIF<sup>463</sup>**

- 38-085 CIM regulates the form and conditions of the contract of carriage of goods by rail, the performance of the contract, its modification, the disposal of the goods being carried, liability for loss, damage and delay, compensation and enforcement of claims by action.<sup>464</sup>

### **Application of CIM**

- 38-086 CIM applies to every contract of carriage of goods by rail for reward when the place of taking over of the goods and the place designated for delivery are situated in two different Member States, irrespective of the place of business and the nationality of the parties to the contract of carriage.<sup>465</sup> It follows that CIM will apply even though the carriage is performed through the territory of a non-Member State<sup>466</sup> and that CIM will not apply if the place of taking over and the place of delivery are in the same state even though the carriage is performed through the territory of another state. CIM will also apply to contracts of carriage of goods by rail where only one of the place of taking over or place of delivery are in a Member State provided the parties to the contract agree that CIM will apply.<sup>467</sup> CIM will further apply where the international carriage is the subject of a single contract which contract includes carriage by road or internal inland waterway as a supplement to the trans-frontier carriage by rail or carriage by sea or trans-frontier inland waterway if the latter services are listed in accordance with art.24 of COTIF.<sup>468</sup> However, CIM will not apply where the carriage is performed between stations situated on the territory of neighbouring states, when the infrastructure of the stations is managed by one or more infrastructure managers subject only

to one of those states.<sup>469</sup> Any stipulation in the contract of carriage which, directly or indirectly, derogates from CIM shall be null and void, but such nullity shall not operate to nullify the other provisions of the contract.<sup>470</sup>

## Interpretation of the Convention

- 38-087 Whilst there have been no English decisions on the interpretation of CIM, some decisions of the courts of the Continental parties to the unmodified Convention have been reported. In view of the similarity of the provisions regarding the carrier's liability and the carrier's exemptions from liability between CIM and the Geneva Convention on the Contract for the International Carriage of Goods by Road (CMR),<sup>471</sup> the reported decisions on the interpretation of CMR are often of assistance in the interpretation of CIM.<sup>472</sup>

## The carrier's role

- 38-088 Under the contract of carriage, the carrier undertakes to carry the goods consigned for reward to the place of destination and to deliver them at the destination to the consignee.<sup>473</sup> For this service, the carrier is entitled to the payment by the consignor of the carriage charge, customs duties and other costs.<sup>474</sup>

## Consignment note

- 38-089 CIM requires the contract of carriage to be confirmed by a consignment note which accords with a uniform model.<sup>475</sup> The uniform model is to be established by international associations of carriers in agreement with customers' associations and relevant customs authorities.<sup>476</sup> The consignment note is *prima facie* evidence of the conclusion and conditions of the contract and the taking over of the goods being carried.<sup>477</sup> CIM specifies a number of formal requirements for the consignment note, stipulating the particulars which the consignment note must contain (e.g. places of issue, taking over and delivery, names of consignor, carrier and consignee, and details of the goods to be carried), the responsibility for which largely falls on the consignor.<sup>478</sup> However, the absence, irregularity or loss of the consignment note shall not affect the existence or validity of the contract which the Convention emphasises shall remain subject to CIM.<sup>479</sup> One consignment note shall be issued for each consignment and, unless the contracting parties agree otherwise, must not relate to more than one wagon load.<sup>480</sup> CIM contemplates that there will be two copies of the consignment

note, the duplicate being given to the consignor.<sup>481</sup> CIM provides that the consignment note will not have effect as a bill of lading.<sup>482</sup>

## Loading, carriage and delivery

- 38-090 CIM contemplates two types of consignments which may be carried by rail, namely packages and full wagon loads. Unless the parties otherwise agree, the carrier is responsible for the loading and unloading of packages and the consignor is responsible for the loading of a wagon load and the consignee is responsible for the unloading of the wagon load.<sup>483</sup> The consignor is responsible for any defects in the packing of the goods unless the defects were apparent to the carrier on taking them over and the carrier made no reservations concerning the defects.<sup>484</sup> On arrival at the destination, the carrier must deliver the goods to the consignee and hand over the consignment note against the provision of a receipt and the payment of sums outstanding under the carriage contract.<sup>485</sup> Delivery also may be effected by the handing over of the goods to customs authorities, or the deposit of the goods for storage with the railway, with a forwarding agent or in a public warehouse, provided that such delivery is permitted by the provisions in force at the destination station.<sup>486</sup>

## Modification of the contract

- 38-091 The consignor shall be entitled to dispose of the goods and to modify the contract of carriage by giving “subsequent orders”. Such orders may require the carrier to delay delivery of the goods or to deliver the goods to a consignee or to a destination other than the one identified in the consignment note.<sup>487</sup> The modification of the contract appears to be limited to these matters and must be effected by the consignor producing to the carrier the duplicate consignment note on which the modifications must be entered.<sup>488</sup> Such modifications must be “possible, lawful and reasonable”, must not interfere with the normal working of the carrier’s undertaking nor prejudice the consignors or consignees of other consignments and must not have the effect of splitting the consignment.<sup>489</sup> The consignee will acquire the right to modify the contract of carriage once the consignment note is drawn up, unless the consignor reserves the right to himself or herself on the consignment note.<sup>490</sup> The consignor will lose the right to modify the contract when the consignee has acquired the right of modification or has accepted from the carrier the consignment note or the goods or has demanded both.<sup>491</sup> Similarly, the consignee will lose the right of modification when he has requested or accepted the consignment note or the goods. Additionally, the consignee will lose the right when he has instructed the carrier to deliver the goods to another person, who requests the carrier to hand over the consignment note and deliver the goods; that person will not

be entitled to modify the contract.<sup>492</sup> The consignor may have a right of stoppage in transit vis-à-vis the consignee pursuant to the *Sale of Goods Act 1979* if English law governs the contract between them.<sup>493</sup>

## Prevention of carriage or delivery

- 38-092 If the carriage of the goods has been prevented by circumstances,<sup>494</sup> the carrier must decide whether it is preferable (presumably in the interests of the person entitled to dispose of the goods) to modify the route or to ask the person entitled for instructions.<sup>495</sup> If it is impossible to continue the carriage or to effect delivery, the person entitled shall be asked for his instructions. If the carrier is unable to obtain instructions, he shall take such steps which he considers to be in the best interests of the person entitled.<sup>496</sup> If circumstances exist which prevent delivery, the carrier must ask the consignor or (if the consignee has modified the contract) the consignee for instructions.<sup>497</sup> If the consignee refuses delivery, the consignor may give instructions, even if he is unable to produce the duplicate consignment note.<sup>498</sup> If circumstances alter permitting delivery before the receipt of instructions, the carrier shall deliver the goods to the consignee.<sup>499</sup> If the goods are of a perishable nature or if the carrier does not receive instructions, the carrier may sell the goods and, after deducting relevant costs, place the proceeds of sale at the disposal of the person entitled.<sup>500</sup>

## Loss, damage and delay

- 38-093 The carrier is liable for loss (total or partial) of the goods, damage and delay (i.e. for exceeding the transit periods<sup>501</sup>) unless he can prove an applicable exception to that liability.<sup>502</sup> The carrier is liable for his own employees and for any other persons, including the managers of the railway infrastructure on which the carriage is performed, whose services he uses in the performance of the carriage.<sup>503</sup> There are two kinds of exceptions. The first type arises where the relevant loss, damage or delay was caused by (1) the fault of the person entitled; (2) an order given by the person entitled other than as a result of the fault of the carrier; (3) inherent defect in the goods (decay, wastage, etc.)<sup>504</sup>; or (4) circumstances which the carrier could not avoid and the consequences of which he was not able to prevent.<sup>505</sup> The burden of proving any of these is on the carrier.<sup>506</sup> Thus far, the exceptions are very similar to those applicable to the common carrier at common law. But the second kind of exception comprises circumstances when loss or damage arises from the special risks inherent in one or more of the following circumstances: (a) carriage in open wagons when that has been agreed; (b) absence or inadequacy of packaging; (c) loading by the consignor or unloading by the consignee; (d) the nature of certain kinds of goods which particularly exposes them to loss or damage, especially through breakage, rust, interior and spontaneous decay, desiccation or wastage;

(e) irregular, incorrect or incomplete description or numbering of packages; (f) the carriage of live animals; and (g) the carriage of consignments which, with the parties' agreement, must be accompanied by an attendant.<sup>507</sup> If the carrier establishes that loss or damage could be attributed to one or more of these exceptions, this is rebuttably presumed, unless in (a) above there is an abnormal shortage or a loss of a package.<sup>508</sup> If the goods are not delivered to the consignee or held at his disposal within 30 days after the expiry of the transit period, they are presumed to be lost.<sup>509</sup>

## Ascertainment of loss or damage

- 38-094 Upon delivery, the person entitled may ask the carrier for an opportunity to examine the goods to determine the existence of any loss or damage. Any failure by the carrier to permit such an examination will entitle the person entitled to the goods to refuse to accept the goods, even when he has accepted the consignment note and/or paid the outstanding charges.<sup>510</sup> In the event of the discovery, presumption or allegation of partial loss of or damage to the goods, the carrier must, without delay prepare, if possible in the presence of the person entitled, a report concerning the condition of the goods and the nature, extent, cause and time of the loss or damage.<sup>511</sup> If the person entitled does not accept the report's findings, he can insist upon the circumstances surrounding the loss or damage to be investigated by an expert.<sup>512</sup>

## Upper financial limits of liability

- 38-095 The carrier's liability for loss of the goods, whether total or partial, is limited to 17 units of account<sup>513</sup> per kilogramme of gross mass short,<sup>514</sup> unless the consignor and carrier agree that the consignor shall declare in the consignment note a value for the goods exceeding this limit or a special interest in delivery by entering an amount in figures on the consignment note, in which case compensation can be claimed up to the value or amount declared.<sup>515</sup> The compensation is calculated by reference to the commodity exchange quoted price or current market price or the usual value of the goods of the same kind and quality at the time and place at which the goods were taken over for the carriage.<sup>516</sup> The carrier must also refund the carriage charges, customs duties and other expenses paid in respect of the missing goods.<sup>517</sup> The carrier's liability for delay (i.e. for exceeding the transit periods) depends on whether actual loss or damage was thus caused. If actual loss or damage resulted from the delay, the compensation may not exceed four times the amount of the carriage charges, although the total compensation for the loss or damage caused by delay and otherwise may not exceed the compensation payable for a total loss.<sup>518</sup> The carrier's liability for damage is for the amount by which the goods have been diminished in value, but may not exceed the amount payable in respect of loss.<sup>519</sup> The maximum limits of compensation for loss, damage

or delay are removed altogether if it was due to the carrier's wilful misconduct (namely, an act or omission which the carrier has committed either with intent to cause such loss or damage, or recklessly and with knowledge that such loss or damage would probably result).<sup>520</sup> The claimant may recover interest on the compensation payable at the rate of 5 per cent per annum from the time a claim, together with supporting documents, is submitted in accordance with the CIM Uniform Rules,<sup>521</sup> or failing such a claim, from the time of the commencement of legal proceedings in respect of the claim.<sup>522</sup>

## Successive and substitute carriers

38-096 If carriage is governed by a single contract and is performed by several successive carriers, each carrier, by the very act of taking over the goods with the consignment note, shall become a party to the contract of carriage in accordance with the terms of the contract and shall assume the obligations arising therefrom. Each carrier shall be responsible in respect of carriage over the entire route up to delivery.<sup>523</sup> Where the carrier has entrusted all or part of the performance of the carriage to a substitute carrier, the carrier shall remain liable in respect of the entire carriage. The CIM provisions governing the liability of the carrier shall also apply to the liability of the substitute carrier for the carriage performed by him.<sup>524</sup> Actions based on the contract of carriage may be brought only against the first carrier, the last carrier or the carrier who performed that part of the carriage on which the event giving rise to the claim occurred.<sup>525</sup> A successive carrier may be sued if that carrier has been named, with his consent, in the consignment note as the carrier who must deliver the goods, even if that carrier has not received the goods or the consignment note.<sup>526</sup>

## Claims

38-097 Claims against the carrier relating to the contract of carriage must be made in writing only by those persons who have the right to claim.<sup>527</sup> The consignor may bring an action against the carrier until such time as the consignee has taken possession of the consignment note or accepted the goods or demanded that the consignment note be handed over and that the goods be delivered or asserted his right to modify the contract.<sup>528</sup> From that time, the consignee may bring an action against the carrier unless and until the person to whom the consignee has ordered the carrier to deliver the goods has accepted the consignment note or the goods or has demanded both.<sup>529</sup> Actions based on CIM may be brought in the Member States designated by the parties' agreement or where the defendant is domiciled or resident or where the goods were taken over by the carrier or where the place designated for delivery is situated.<sup>530</sup>

## Extinction of claims

- 38-098 Acceptance of the goods by the person entitled extinguishes all rights of action against the carrier arising from the contract of carriage in case of partial loss, damage or delay,<sup>531</sup> subject to four exceptions. First, claims for partial loss or damage can be made if the damage was ascertained by the preparation of a report or if report was not prepared solely by reason of the carrier's fault.<sup>532</sup> Secondly, claims for loss or damage which is not apparent and not discovered until after acceptance can still be made, provided the person entitled to claim asks the carrier for a report within seven days of acceptance and proves that the loss or damage occurred between the time of taking over the goods for carriage and the time of delivery.<sup>533</sup> Thirdly, claims for delay in delivery can be made within 60 days of acceptance.<sup>534</sup> Fourthly, the claim is not extinguished if wilful misconduct can be proved.<sup>535</sup>

## Limitation of actions

- 38-099 All actions arising from the contract of carriage are time-barred after one year, or two years in the case of, *inter alia*, wilful misconduct.<sup>536</sup> The period of limitation runs, in the case of partial loss, damage or delay in delivery, from the date of delivery; in the case of total loss, from the 30th day after the expiry of the transit period.<sup>537</sup> A written claim suspends the running of the period of limitation until such date as the carrier rejects the claim in writing.<sup>538</sup>

## Footnotes

- 463 See above, para.38-079. As to the work being undertaken towards the harmonisation of CIM with the framework applied in Eastern Europe and Asia under the Agreement on International Goods Transport by Rail, administered by the Organisation for Cooperation between Railways, see *Abel (2012) 12 S.T.L. 8.*
- 464 See Clarke and Yates, Contracts of Carriage by Land and Air, 2nd edn (2008).
- 465 CIM art.1(1).
- 466 *Azienda Autonoma Ferrovie dello Stato v La Pace (1976) 11 E.T.L. 137*, Corte di Cassazione Civile, Italy; *Anon., Gerechtshof Den Haag, 30 April 2019 (2019) 55 E.T.L. 71.*
- 467 CIM art.1(2). See *Anon., Gerechtshof Den Haag, 30 April 2019 (2019) 55 E.T.L. 71.*
- 468 CIM art.1(3), (4). See *Anon. (2013) 49 E.T.L. 228, BGH.* As to rail-road traffic, see also CMR art.2(1) and para.38-119 below.
- 469 CIM art.1(6).

470 CIM art.5.

471 Some of these decisions have been reported in such periodicals as European Transport Law (E.T.L.) and Lloyds Maritime and Commercial Law Quarterly (L.M.C.L.Q.).

472 See *Anon., Gerechtshof Den Haag, 30 April 2019 (2019) 55 E.T.L. 71.*

473 CIM art.6(1).

474 CIM art.10(1).

475 CIM art.6(2).

476 CIM art.6(8).

477 CIM art.12(1).

478 CIM arts 7, 8.

479 CIM art.6(2). In *NMBS Holding/Belgische Naamloze Vennootschap voor transport door middel van het gecombineerd rail-weg-systeem TRW* (2007) 42 E.T.L. 656, the Hof van Cassatie van Belgie held that a claim for damages could be brought against the railway carrier, in absence of a railway bill, provided that the contractual relationship between the claimant and carrier could be established.

480 CIM art.6(6).

481 CIM art.6(4).

482 CIM art.6(5).

483 CIM art.13(1).

484 CIM art.14.

485 CIM art.17(1). In Antwerp, it has been held that the consignee named in the consignment note who acts as agent for the final consignee will become a party to the contract by acceptance of the goods or the consignment note: *Sobelgra NV v Nationale Maatschappij der Belgische Spoorwegen (NMBS)* (1997) 33 E.T.L. 714.

486 CIM art.17(2).

487 CIM art.18(1).

488 CIM art.19(1). If the carrier accepts the consignor's orders to deliver the goods to some person other than the consignee named in the consignment note without requiring the duplicate consignment note to be produced, he will be liable for any loss or damage arising from that omission: art.19(7); *SA Nicolas Corman v SNCF* (1976) 11 E.T.L. 120, Court of Appeal, Paris.

489 CIM art.19(3), (4).

490 CIM art.18(3).

491 CIM art.18(2).

492 CIM art.18(4), (5).

493 See below, paras 46-327—46-339.

494 The carrier will not be liable for any loss of or damage to the goods or delay caused by circumstances which are unavoidable by the carrier: art.23(2).

495 CIM art.20(1).

496 CIM art.20(2).

497 CIM art.21(1), (4).

498 CIM art.21(3).

- 499 CIM art.21(2).
- 500 CIM art.22(3), (4).
- 501 The transit period is that which is agreed between the carrier and consignor or, in the absence of agreement, as specified in art.16.
- 502 A failure to comply with the instructions of the person entitled to dispose of the goods during carriage may also render the carrier liable for loss or damage caused thereby: art.19(6). There is a facility by which the carrier may seek an exception to liability for losses arising by specified causes in respect of rail-sea traffic, provided that the relevant Member State made such provision in the listed services set out in art.24(1) of COTIF. As to the possibility of liability beyond that provided for under CIM where it is contractually incorporated, see *DSM Acrylonitrile BV ea v DB Schenker Rail Nederland* (2016) 51 E.T.L. 335, Rechtbank te Rotterdam.
- 503 CIM art.40.
- 504 Where there is wastage in transit of goods which, by reason of their nature, is caused by the sole fact of carriage, the carrier will be liable only to the extent that the wastage exceeds specified allowances: art.31.
- 505 CIM art.23(2).
- 506 CIM art.25(1).
- 507 CIM art.23(3). The unmodified Convention included an additional exception in respect of loss caused by a failure to comply with customs formalities. Such matters are now regulated by art.15. The carrier is under a general duty to maintain its rolling stock put at a customer's disposal in good condition: *NMBS v NV Fonciere Carner* (1976) 11 E.T.L. 780, Hof van Beroep, Brussels. See also art.24 which concerns railway vehicles consigned as goods.
- 508 CIM art.25(2), (3).
- 509 CIM art.29(1).
- 510 CIM art.17(4).
- 511 CIM art.42(1).
- 512 CIM art.42(3).
- 513 However, the carrier is free to assume a greater liability: art.5. The unit of account is the Special Drawing Right ("SDR") defined by the International Monetary Fund ("IMF"): COTIF art.9(1). Its value is expressed in the national currency of a State Member of the IMF in accordance with IMF methods of valuation: art.9(2). States which are not Members of the IMF shall determine their own methods of calculating the value of the SDR: if their legislation does not permit this, the unit of account is deemed to be the equivalent of three gold francs, each gold franc weighing 1031 of a gramme and of millesimal fineness 900: art.9(3), (4). In any event the conversion of the gold franc must express in national currency a value approximating closely to the value calculated by reference to the IMF methods of valuation. In the case of judicial proceedings or arbitration in the United Kingdom, the SDR is converted into its sterling equivalent on the day of the judgment or award: [Railways \(Convention on International Carriage by Rail\) Regulations 2005 \(SI 2005/2092\) reg.7](#).
- 514 CIM art.30(2).
- 515 CIM arts 34, 35.

516 CIM art.30(1).

517 CIM art.30(4). The charges do not include charges which would have been incurred in the event that the carriage was performed in accordance with the contract, would have contributed to the value of the goods at the destination, and which were not incurred as a result of the incident giving rise to the claim (*Anon.* (2004) 39 E.T.L. 93, Bundesgerichtshof). The claimant cannot recover any additional duty or VAT payable in respect of the goods which do not find themselves at their destination: *Anon.*, Cass. Paris, 28 January 1975; cf. *James Buchanan & Co Ltd v Babco Forwarding and Shipping (UK) Ltd [1978] 1 Lloyd's Rep. 119*; contra *Anon.* (1994) 29 E.T.L. 360, Supreme Court of Denmark (CMR). See below, para.38-130 (note).

518 CIM art.33(1), (2), (3).

519 CIM art.32(1), (2). Under the unmodified Convention, in the event of damage by deterioration, the carrier's liability is calculated under the provisions concerning damage not delay: *Anon.* (1976) 11 E.T.L. 787, Bundesgerichtshof. Under art.33(4), in the case of damage to goods, not resulting from the transit period being exceeded, the compensation payable under art.33(1) shall, where appropriate, be payable in addition to that provided for in art.32.

520 CIM art.36.

521 CIM art.43. If no supporting documents are provided within a reasonable time so that the amount of the claim can be finally settled, no interest shall accrue between the expiry of the time allotted and the actual submission of such documents: art.37(3).

522 CIM art.37(2).

523 CIM art.26.

524 CIM art.27(1), (2).

525 CIM art.45(1). Article 45 does not preclude there being joint and several liability on the part of the carrier and sub-carrier: *Anon.*, *Gerechtshof Den Haag, 30 April 2019 (2019) 55 E.T.L. 71*.

526 CIM art.45(2).

527 CIM art.43(1), (2). The claim generally has to be supported by the consignment note: see art.43(3)-(6). In *NMBS Holding/Belgische Naamloze Vennootschap voor transport door middel van het gecombineerd rail-weg-systeem TRW* (2007) 42 E.T.L. 656, the Hof van Cassatie van Belgie held that a claim for damages could be brought against the railway carrier, in absence of a railway bill, provided that the contractual relationship between the claimant and carrier could be established.

528 CIM art.44(1)(a).

529 CIM arts 44(1)(b), 44(2). *Hammerschmeidová*, "Right of the consignee to bring an action" *Bulletin of International Carriage by Rail* 3/2010, 83. Where there is an inconsistency with EU rules on jurisdiction, see *Anon.*, *Cour de Cassation de France, 29 November 2016, (2016) 51 E.T.L. 684*.

530 CIM art.46(1).

531 CIM art.47(1).

532 CIM art.47(2)(a).

533 CIM art.47(2)(b). See *Clarke*, "Non-apparent damage to goods in transit" [1982] *L.M.C.L.Q.* 533.

534 CIM art.47(2)(c).

535 CIM art.47(2)(d).

536 CIM art.48(1). The limitation provision applies to claims based on the contract of carriage, whether brought by or against the rail carrier: *Anon.* (2005) 40 E.T.L. 395, Oberster Gerichtshof Österreich. Where CIM is contractually incorporated without limitation of the scope of its application, art.48 may not apply to all claims governed by the CIM: *Anon.*, *Oberster Gerichtshof Österreich*, 6 April 2016, (2016) 51 E.T.L. 443.

537 CIM art.48(2).

538 CIM art.48(3).

## **(i) - Application and Scope of the Convention**

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**Chapter 38 - Carriage by Land**

**Section 3. - International Carriage**

**(c) - Passengers, Luggage and Vehicles by Rail**

**(i) - Application and Scope of the Convention**

### **Scope of the Uniform Rules (CIV) under Appendix A to COTIF**

- 38-100 The CIV Uniform Rules regulate the making and performance of the contract of carriage of passengers, luggage and vehicles by rail, the liability of the rail carrier for death of, and personal injury to, passengers, and for failure to keep to the timetable, the liability of the passenger and the relations between carriers.

### **Application of CIV**

- 38-101 CIV provides a unified set of rules to be applied to every contract of carriage of passengers by rail for reward or free of charge, when the place of departure and the place of destination are situated in two different Member States, irrespective of the domicile or the place of business and the nationality of the parties to the contract.<sup>539</sup> CIV applies also to international carriage pursuant to a single contract which includes carriage by road or by internal inland waterway or, provided that the services are provided for in art.24(1) of COTIF, by sea or trans-frontier inland waterway.<sup>540</sup> CIV also applies, as far as the liability of the carrier in the case of death or personal injury is concerned, to persons accompanying a consignment whose carriage is effected in accordance with the CIM Uniform Rules.<sup>541</sup> As with CIM, CIV will not apply where the carriage is performed between stations situated on the territory of neighbouring states, when the infrastructure of the stations is managed by one or more infrastructure managers subject only to one of those states.<sup>542</sup> By Regulation (EC) 1371/2007 of the European Parliament, since 3 December 2009, the provisions

of CIV are now also applicable to domestic carriage (i.e. carriage within one State).<sup>543</sup> Any stipulation in the contract of carriage which, directly or indirectly, derogates from CIV shall be null and void, but such nullity shall not operate to nullify the other provisions of the contract.<sup>544</sup>

## Rail-sea carriage

- 38-102 As mentioned above, CIV applies to a single contract of international carriage by rail and sea provided that the carriage is performed on services listed pursuant to art.24(1) of COTIF.<sup>545</sup> It should be noted, however, that, whilst CIV may in certain circumstances cover aspects of rail-sea carriage, legislation in the United Kingdom has provided that as far as English law is concerned, the terms of the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea 1974 are applied to any contract for international carriage by sea under which a place in the United Kingdom is the place of departure or destination.<sup>546</sup> The Athens Convention enables carriers by sea to limit their liability in respect of the death of, or personal injury to, a passenger. The terms of the Athens Convention have also been applied to carriage by sea by United Kingdom carriers and within the United Kingdom.<sup>547</sup>

## The carrier's role

- 38-103 Under the contract of carriage, the carrier is obliged to carry the passenger and, where appropriate, the passenger's luggage and vehicle to the place of destination and to deliver the luggage and vehicle at the place of destination.<sup>548</sup> Subject to the terms of the contract, the carrier is entitled to advance payment of the carriage charge.<sup>549</sup>

## Footnotes

539 CIV art.1(1).

540 CIV art.1(2), (3).

541 CIM art.1(4).

542 CIV art.1(5).

543 See above, para.38-054. See also the [Rail Passengers' Rights and Obligations Regulations 2010 \(SI 2010/1504\)](#), which entered into force on 25 June 2010; [Rail Passengers' Rights and Obligations \(Exemption\) Regulations 2014 \(SI 2014/2793\)](#). See also the [Merchant Shipping \(Convention Relating to the Carriage of Passengers and their Luggage by Sea\) Order 2014 \(SI 2014/1361\)](#). The EC Regulation will continue in force after the UK's exit from the EU:

- European Union (Withdrawal) Act 2018 ss.2, 3; European Union (Withdrawal Agreement) Act 2020 s.2.
- 544 CIV art.5.
- 545 CIV art.1(3).
- 546 Merchant Shipping Act 1995 s.183. The Athens Convention came into force on 30 April 1987. See *South West Strategic Health Authority v Bay Island Voyages [2015] EWCA Civ 708*, the Court of Appeal held that the Convention did not apply to contribution claims between carriers (at [15]–[21]).
- 547 The Carriage of Passengers and their Luggage by Sea (United Kingdom Carriers) Order 1998 (SI 1998/2917); Carriage of Passengers and their Luggage by Sea (Domestic Carriage) Order 1987 (SI 1987/670), which now takes effect as if made under the Merchant Shipping Act 1995 s.184. Under s.184(5), the term “contract of carriage” in the context of the Athens Convention excludes a contract which is not for reward.
- 548 CIV art.6(1).
- 549 CIV arts 8(1), 19, 25.

## **(ii) - Passengers and Hand Luggage**

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### **The passenger's rights**

- 38-104 The passenger in possession of a valid ticket is entitled to be carried in accordance with the terms of the contract of carriage. The passenger is also entitled to take with him articles which can be handled easily (hand luggage), but it is the passenger's responsibility to supervise such hand luggage.<sup>550</sup> If a passenger is unable to produce a valid ticket, the carrier may require the passenger to pay a surcharge. If the passenger fails to pay the carriage charge or the surcharge, the carrier may require the passenger to discontinue the journey.<sup>551</sup> The carrier may also exclude a passenger from carriage or require a passenger to discontinue his journey, without refunding the carriage charge, if that passenger presents a danger for the safety and the good functioning of the operations of the rail operations or for the safety of the other passengers or if that passenger inconveniences other passengers in an intolerable manner.<sup>552</sup>

### **The ticket**

- 38-105 The contract of carriage must be confirmed by one or more tickets issued to the passenger. However, the absence, irregularity, or loss of the ticket shall not affect the existence or validity of the contract, which remains subject to the application of the CIV Uniform Rules.<sup>553</sup> The ticket is *prima facie* evidence of the making and contents of the contract of carriage.<sup>554</sup> The terms and conditions of the contract are those which are legally in force in each Member State. Such

conditions will determine the form and content of tickets.<sup>555</sup> The ticket may be established in the form of electronic data registration, which can be transformed into legible written symbols.<sup>556</sup> However, the ticket must identify the carrier and must state that the carriage is subject to the CIV Uniform Rules.<sup>557</sup> It is incumbent on the passenger to ensure that on receipt of the ticket that it has been made out in accordance with his instructions.<sup>558</sup> If the ticket is not made out in the passenger's name, the ticket is transferable, provided that the journey has not yet begun.<sup>559</sup>

## Liability for death and personal injury

- 38-106 In general under CIV the carrier is liable for damage resulting from the death of, or personal injury or any other physical or mental harm to, a passenger, when the damage is caused by an accident arising out of the operation of the railway and happening while the passenger is in, entering or alighting from, railway vehicles.<sup>560</sup> In the event of death, the carrier is liable for damages comprising the necessary costs following the death (including transport and funeral expenses) and is liable to the passenger's dependents, whom the passenger was legally obliged to maintain, for the loss of support.<sup>561</sup> In the case of personal injury (whether or not it leads to death), or other physical or mental harm, the carrier is liable for damage comprising any necessary costs (including medical treatment and transport expenses) and compensation for financial loss due to incapacity to work or increased needs.<sup>562</sup>

## Fatal accidents

- 38-107 Regulation 5 of the Railways (Convention on International Carriage by Rail) Regulations 2005<sup>563</sup> provides that where under the Convention a person has a right of action in respect of the death of a passenger by virtue of his being a person whom the passenger was under a legally enforceable duty to maintain, no action in respect of the passenger's death may be brought for the benefit of that person under the Fatal Accidents Act 1976, although actions under that Act may be brought for the benefit of any other person. The Regulations further provide that in actions brought under CIV the same benefit shall be excluded in the assessment of damages as would be excluded under s.4 of the Fatal Accidents Act 1976. Where separate proceedings can be brought under CIV and under the Fatal Accidents Act 1976, a court may, in assessing damages under the 1976 Act, take account of any damages awarded in proceedings under the Convention.

## Carrier's exemptions from liability for death and personal injury

- 38-108

The carrier is relieved of liability for death or personal injury (a) if the accident was caused by circumstances not connected with the operation of the railway and which the carrier, despite the exercise of the care required in the circumstances, could not avoid and the consequences of which he could not prevent<sup>564</sup>; (b) to the extent that the accident was due to the passenger's fault<sup>565</sup>; and (c) if the accident was caused by the behaviour of a third party which the carrier, despite the exercise of the care required in the circumstances, could not avoid and the consequences of which it could not prevent.<sup>566</sup> If the accident is due to the behaviour of a third party and if the carrier is in any event not entirely relieved of liability, he shall be liable in full up to the limits imposed by CIV.<sup>567</sup>

## **Liability for delay**

- 38-109 The carrier is liable to the passenger for loss or damage resulting from the fact that the journey cannot, or could not reasonably, be continued on the same day because of a cancellation, the late running of a train or a missed connection. The damages for which the carrier is liable comprises the reasonable costs of accommodation and the reasonable costs of notifying persons expecting the passenger.<sup>568</sup> The carrier will be exempt from such liability in similar circumstances exempting the carrier from liability for death and personal injury.<sup>569</sup>

## **Liability for hand luggage**

- 38-110 In the event that the passenger dies or sustains a personal injury, the carrier shall also be liable for loss or damage resulting from the total or partial loss of, or damage to, hand luggage.<sup>570</sup> In other cases, the carrier shall not be liable for hand luggage the supervision of which is the responsibility of the passenger, unless the loss or damage was caused by the fault of the carrier.<sup>571</sup>

## **Upper financial limits of liability**

- 38-111 The amount of damages to be awarded in cases of death or personal injury under CIV are to be determined in accordance with national law. The limit of damages per passenger is fixed, for the purposes of the CIV Uniform Rules, at 175,000 units of account, where national law provides for an upper limit of less than that amount.<sup>572</sup> There is no specified financial limit of liability for delay. Where the carrier is liable for damage to, or loss of, hand luggage, the limit of compensation is 1,400 units of account per passenger.<sup>573</sup> The liability of the carrier is, however, not limited at all if the loss or damage results from an act or omission which the carrier has committed either with

intent to cause such loss or damage or recklessly with the knowledge that such loss or damage probably will result.<sup>574</sup>

## Footnotes

- 550 CIV arts 12(1), 15.
- 551 CIV art.9(1).
- 552 CIV art.9(2).
- 553 CIV art.6(2). This is subject to the carrier's right, as set out in art.9, to demand a surcharge in the event of the non-production of the ticket and to require the passenger to discontinue the journey if the carriage charge or surcharge is not paid. See *Nationale Maatschappij der Belgische Spoorwegen NV v Demey (C-261/15) EU:C:2016:709*, 21 September 2016 (preliminary ruling of ECJ as to passenger not in possession of a ticket).
- 554 CIV art.6(3).
- 555 CIV arts 3(c), 7(1).
- 556 CIV art.7(5).
- 557 CIV art.7(2).
- 558 CIV art.7(3).
- 559 CIV art.7(4).
- 560 CIV art.26(1).
- 561 CIV arts 27(1), 27(2). National law shall govern the rights of action of those whom the passenger was maintaining without a legal obligation so to do: art.27(2).
- 562 CIV art.28. National law shall govern the right to claim damages other than those set out in arts 27 and 28: art.29.
- 563 SI 2005/2092. See also the Rail Passengers' Rights and Obligations Regulations 2010 (SI 2010/1504) reg.7.
- 564 CIV art.26(2)(a).
- 565 CIV art.26(2)(b).
- 566 CIV art.26(2)(c). As to the relationship between Regulation (EC) 1371/2007 and art.32 CIV, see *ÖBB-Personenverkehr AG (C-509/11) EU:C:2013:613*, (2014) 49 E.T.L. 43. See also *Pavliha and Hojnik (2014) 49 E.T.L. 5*. Another undertaking using the same railway infrastructure shall not be considered as a third party for the purposes of this provision.
- 567 CIV art.26(3).
- 568 CIV art.32(1). National law shall govern the passenger's right to claim other heads of damage: art.32(3).
- 569 CIV art.32(2). See above, para.38-108.
- 570 CIV art.33(1).
- 571 CIV art.33(2).
- 572 CIV art.30(2). As to "units of account", see para.38-095.
- 573 CIV art.34.

574 CIV art.48.

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## **(iii) - Registered Luggage and Vehicles**

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### **Transport documents**

- 38-112 A passenger may consign articles as registered luggage in accordance with the application of general conditions of carriage.<sup>575</sup> The carrier's obligations concerning the forwarding of registered luggage must be established by a luggage registration voucher issued to the passenger. The absence, irregularity or loss of the voucher shall not affect the existence or validity of the contract of carriage, which remains subject to the application of the CIV Uniform Rules.<sup>576</sup> The voucher is *prima facie* evidence of the registration of the luggage and the contents of the contract of carriage.<sup>577</sup> The form and content of the voucher are determined in accordance with the general conditions of carriage.<sup>578</sup> The voucher must identify the carrier and must state that the carriage is subject to the CIV Uniform Rules.<sup>579</sup> It is incumbent on the passenger to ensure that on receipt of the voucher that it has been made out in accordance with his instructions.<sup>580</sup> Similar provisions exist in respect of vehicles, for which a carriage voucher must establish the carrier's contractual obligations.<sup>581</sup>

### **Loss, damage and delay**

- 38-113 The carrier is liable for loss or damage resulting from the total or partial loss of, or damage to, registered luggage or the vehicle carried between the time of taking over by the carrier and the time of delivery as well as from delay in delivery.<sup>582</sup> The carrier will be relieved from this liability

to the extent that the loss, damage or delay was caused by a fault of the passenger, an order given by the passenger other than as a result of the carrier's fault, an inherent defect or circumstances which the carrier could not avoid and the consequences of which he was unable to prevent.<sup>583</sup> Further, the carrier will be relieved of liability to the extent that the loss or damage arises from the special risks inherent in (a) the absence or inadequacy of packing; (b) the special nature of the luggage or vehicle; and/or (c) the consignment as luggage of articles not acceptable for carriage.<sup>584</sup> The person entitled to the luggage or vehicle may consider the luggage or vehicle lost, without adducing further proof, if has not been delivered within 14 days after a valid request for delivery has been made.<sup>585</sup>

## Upper financial limits of liability

- 38-114 The amount of the carrier's liability for loss of registered luggage, whether total or partial, depends on whether or not the passenger establishes the amount of loss or damage suffered. If the amount of loss is proved, the loss is limited to 80 units of account per kilogramme of gross mass short or 1200 units of account per item of luggage; if not, the carrier must pay liquidated damages of 20 units of account per kilogramme of gross mass short or 300 units of account per item of luggage.<sup>586</sup> The carrier must also refund the carriage charges.<sup>587</sup> Liability for damage is for the amount by which the luggage has been diminished in value, but may not exceed the amount payable in respect of loss.<sup>588</sup> As regards delay, if the passenger proves that he suffered loss or damage, the maximum amount payable as compensation is 0.80 units of account per kilogramme of gross mass of the luggage or 14 units of account per item of luggage delivered late; but if loss or damage is not proved, the measure of damages is liquidated at 0.14 units of account per kilogramme of gross mass of the luggage or 2.80 units of account per item of luggage delivered late.<sup>589</sup> The maximum limits of compensation for loss, damage or delay are removed altogether if it was due to the act or omission of the carrier which was done with the intent to cause loss or damage or recklessly with the knowledge that such loss or damage probably will result.<sup>590</sup> As regards vehicles, compensation for loss of or damage to the vehicle shall be calculated on the basis of the usual value of the vehicle subject to a limit of 8,000 units of account<sup>591</sup>; compensation for proven loss or damage resulting from delay is limited to the amount of the carriage charge.<sup>592</sup>

## Footnotes

<sup>575</sup> CIV art.12(2).

<sup>576</sup> CIV art.16(1), (2). As to the responsibility of successive and substitute carriers, see arts 38, 39.

<sup>577</sup> CIV art.16(3).

- 578 CIV art.17(1).
- 579 CIV art.17(2).
- 580 CIV art.17(3).
- 581 CIV arts 24, 25.
- 582 CIV arts 36(1), 47. It is rebuttably presumed that when the carrier took over the registered luggage that it was apparently in good condition and that the number and mass of the items of luggage corresponded to the entries on the voucher: art.16(4). Delivery of the luggage or vehicle must be effected on surrender of the voucher: art.22(1). See *Anon. (2013) 49 E.T.L. 470, BGH*.
- 583 CIV arts 36(2), 47. The carrier bears the relevant burden of proof: art.37(1).
- 584 CIV arts 36(3), 47. The carrier bears the initial burden of proof, which thereafter falls upon the claimant: art.37(2). See *Anon. (2013) 49 E.T.L. 470, BGH*.
- 585 CIV art.40(1).
- 586 CIV art.41(1).
- 587 CIV art.41(2).
- 588 CIV art.42.
- 589 CIV art.43(1).
- 590 CIV art.48.
- 591 CIV art.45.
- 592 CIV art.44.

## **(iv) - Claims**

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### **Claims against carriers**

- 38-115 A claim relating to liability for death or personal injury must be addressed in writing to the carrier against whom an action may be brought. Where successive carriers performed the carriage under a single contract, the claim may also be made against the first or the last carrier as well as the carrier who has his principal place of business or whose agency concluded the contract in the state where the passenger is domiciled or resident.<sup>593</sup> An action in respect of death or personal injury may be brought only against the carrier (including substitute carriers) who was bound pursuant to the contract of carriage to provide the service of carriage in the course of which the accident happened.<sup>594</sup> Other claims based on the contract of carriage may be brought only against the first carrier, the last carrier or the carrier who performed that part of the carriage on which the event giving rise to the claim occurred.<sup>595</sup> A successive carrier may be sued if that carrier has been named, with his consent, in the voucher as the carrier who must deliver the luggage or vehicle, even if that carrier has not received them or the voucher.<sup>596</sup> Actions based on CIV may be brought before the courts or tribunals as agreed between the parties or in those Member States in which the defendant is domiciled or resident or has his principal place of business or agency which concluded the contract.<sup>597</sup>

### **Extinction of claims**

38-116

A claimant loses his right of action based on the carrier's liability for death or personal injury if he does not give notice of the accident to one of the carriers to which a claim may be presented within 12 months of his becoming aware of the loss or damage.<sup>598</sup> Nonetheless, the right of action is not lost if (a) notice has been given to one of the carriers against a claim brought within the relevant period; (b) the carrier who is liable has learned of the accident within the relevant period in some other way; (c) notice of the accident has not been given, or has been given late, as a result of circumstances for which the claimant is not responsible; or (d) the claimant proves that the accident was caused by fault of the carrier.<sup>599</sup> As regards other claims, acceptance of the luggage by the person entitled extinguishes all rights of action against the carrier arising from the contract of carriage in case of partial loss, damage or delay,<sup>600</sup> subject to four exceptions. First, claims for partial loss or damage can be made if the damage was ascertained in accordance with CIV.<sup>601</sup> Secondly, claims for loss or damage which is not apparent and not discovered until after acceptance can still be made, provided the person entitled to claim asks the carrier for ascertainment within three days of acceptance and proves that the loss or damage occurred between the time of taking over and the time of delivery.<sup>602</sup> Thirdly, claims for delay in delivery can be made within 21 days of acceptance.<sup>603</sup> Fourthly, the claim is not extinguished if the person entitled proves that the loss or damage was caused by fault on the part of the carrier.<sup>604</sup>

## Limitation of actions

38-117 Actions for damages brought under CIV based on the carrier's liability for death or personal injury are time-barred in the case of a passenger who has sustained an accident, three years from the day after the accident. In the case of other claimants, actions are barred three years from the day after the death of the passenger or five years from the day after the accident, whichever is the earlier.<sup>605</sup> As regards all other claims, the period of limitation shall be one year (or two years in the case of wilful misconduct) (a) in the case of compensation for loss, from the 14th day after the person entitled calls for delivery; (b) in the case of compensation for partial loss, damage or delay in delivery, from the day when delivery took place; and (c) in all other cases involving the carriage of passengers, from the day of expiry of the validity of the ticket.<sup>606</sup> When a claim is made in writing to the carrier, the limitation period is suspended until the carrier against whom the claim has been made rejects it in writing.<sup>607</sup>

## Footnotes

593 CIV art.55(1).

594 CIV arts 26(5), 56(1).

595 CIV arts 55(2), 56(2).

- 596 CIV art.56(3).  
597 CIV art.57(1).  
598 CIV art.58(1).  
599 CIV art.58(2).  
600 CIV art.59(1). It is assumed that this provision applies alike to vehicles.  
601 CIV arts 54, 59(2)(a).  
602 CIV art.59(2)(b).  
603 CIV art.59(2)(c).  
604 CIV art.59(2)(d). cf. CIM art.47(2)(d).  
605 CIV art.60(1).  
606 CIV art.60(2), (3).  
607 CIV art.60(4).

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## (d) - Goods by Road

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Chapter 38 - Carriage by Land

Section 3. - International Carriage

(d) - Goods by Road

### Application to the United Kingdom of the CMR Convention

- 38-118 The [Carriage of Goods by Road Act 1965](#) by s.1, enacts as part of the law of the United Kingdom the Geneva Convention on the Contract for the International Carriage of Goods by Road of 1956,<sup>608</sup> familiarly known as CMR, the substantive provisions of CMR being set out in the Schedule to the Act.<sup>609</sup> The Act came into force on 5 June 1967,<sup>610</sup> and has been extended to Gibraltar, the Isle of Man and Guernsey by Order in Council.<sup>611</sup> The [1965 Act](#) was amended in certain respects by the [Carriage by Air and Road Act 1979](#)<sup>612</sup> in order to give effect as part of English law to a Protocol<sup>613</sup> adopted at Geneva in 1978–1979 which had amended the Convention.<sup>614</sup> Those parts of the [1979 Act](#) which amended the [1965 Act](#) came into force on 28 December 1980,<sup>615</sup> when the Protocol itself entered into force. Those parts of the [1979 Act](#) have been extended to Gibraltar, the Isle of Man and Guernsey.<sup>616</sup> The [1965 Act](#), by s.2, gives power to Her Majesty by Order in Council conclusively to certify which states are parties to CMR: this power has been exercised.<sup>617</sup>

### The scope of CMR

- 38-119 CMR applies to every contract for the carriage<sup>618</sup> of goods<sup>619</sup> by road in vehicles<sup>620</sup> for reward, when the place of taking over of the goods and the place designated for delivery are situated in two different countries, at least one of which is a party to the Convention.<sup>621</sup> CMR applies to any part of the agreed international carriage even where the goods are carried on a vehicle which

does not leave its national territory.<sup>622</sup> The place of residence and the nationality of the parties are irrelevant,<sup>623</sup> as are their respective registered places of business.<sup>624</sup> The parties may have the same nationality.<sup>625</sup> Even if CMR does not apply to the carriage contemplated by the contract, it is still open to the parties to agree to the application of CMR,<sup>626</sup> presumably in whole or in part. In that event, the fact that the carriage falls outside the scope of application of CMR set out in art.1 is of no consequence. The Convention does not apply to carriage performed under the terms of any international postal convention, to funeral consignments or to furniture removal, nor does it apply to traffic between the United Kingdom and the Republic of Ireland.<sup>627</sup> CMR does not cover every possible legal right or obligation arising under a contract of carriage otherwise governed by the Convention; extraneous matters, such as liens, are governed by national law.<sup>628</sup>

## Combined transport

- 38-120 CMR applies where the vehicle is carried over part of the journey by sea, rail, inland waterways or air and the goods are not unloaded from the vehicle.<sup>629</sup> If, however, any loss, damage or delay in delivery occurs during the carriage by the other means of transport, and was not caused by an act or omission of the carrier by road, but by some event which could only have occurred in the course and by reason of that other means of transport, then, by art.2(1) of CMR, the road carrier's liability is not determined by the Convention, but by conditions prescribed by law for the carriage of goods by that means of transport.<sup>630</sup> In the absence of such conditions, the liability of the carrier by road is determined by CMR.<sup>631</sup> As CMR is intended to fit in with other Conventions governing carriage by other means of transport, reference may be had to those Conventions in cases covered by art.2(1) to establish the time at which carriage by road began or ended and carriage by the other means of transport was effective.<sup>632</sup>

## Interpretation of the Convention

- 38-121 CMR was somewhat loosely drafted. Consequently many provisions require judicial interpretation. The House of Lords has stated that the English text of the Convention, which is of equal authenticity to the French text, should be interpreted in a normal manner, unconstrained by technical rules of English law, or by English legal precedent, but adopting broad principles of general acceptation.

<sup>633</sup>

**U** Assistance from the French text may be sought whether or not the English text is ambiguous.<sup>634</sup> Where the language used is capable of two interpretations, the court must seek to give effect to the intention of those who made the Convention.<sup>635</sup> There is comparatively little English authority on CMR.<sup>636</sup> Although there have been many reported decisions on the Convention in the courts of the Continental parties to CMR,<sup>637</sup> only limited guidance can be obtained from these as there has been no consistency of approach to matters of interpretation; on some provisions there are as many interpretations of CMR as there are contracting states.<sup>638</sup> Whilst the Court of Appeal has emphasised that English courts must nonetheless endeavour to interpret CMR as far as possible in the same way as in the courts of the Continental parties,<sup>639</sup> the House of Lords has warned of the dangers inherent in trying to assess a balance of foreign judicial opinion, especially where the decisions are not those of the highest courts.<sup>640</sup>

## Consignment note

**38-122** Whilst the contract of carriage does not have to be written, the contract must be confirmed by the making out of a consignment note  
**U** <sup>641</sup>

**U** of which there must be three copies signed by the sender and the carrier, one copy being handed to the sender, one accompanying the goods, and one retained by the carrier.  
**642**

**U** If no consignment note is issued, neither the carrier nor anyone else bears any responsibility for the omission.  
**643**

**U** The consignment note must contain a number of statements and particulars, including the names and addresses of the sender, the carrier and the consignee, the place and date of taking over the goods and the place of delivery, the description of the goods, the gross weight and the number of packages, and a statement that the carriage is subject to the provisions of the Convention.  
**644**

**U** The consignment note should also include a generally recognised description of the goods, if they are dangerous.  
**645**

**U** Other particulars which are pertinent to the contemplated carriage should be entered in the consignment note, such as carriage charges,  
**646**

**U** sender's charges, "cash on delivery" charges, insurance requirements, declarations of value,  
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**U** and any other particulars which the parties deem useful.  
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**U** The sender will be responsible for any losses, damages and expenses resulting from any deficiency or inadequacy in the particulars furnished in the consignment note.  
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**U** On taking over the goods, the carrier is required to check the accuracy of such statements in the consignment note as to the number of packages, their marks and numbers and the apparent condition of the goods and packaging.  
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**U** Where the carrier has no reasonable means of checking, he must enter his reservations, and the grounds for them, in the consignment note. He must also specify the grounds for any reservations with regard to the apparent condition of the goods and their packaging. These reservations do not bind the sender unless he has expressly agreed to be bound by them in the consignment note.  
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**U** A carrier who does not make any reservations at the time at which the goods are handed over for carriage is presumed to have received them in good condition and has to prove that the damage established at the destination existed prior to the time at which he took them over.  
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**U** When a carrier makes reservations concerning the apparent condition of the goods, they must be written on the consignment note when the goods are received. Reservations written on the sender's copy of the consignment note are inoperative so long as the consignment note remains in the carrier's possession.  
653

**U** The sender may require the carrier to check the gross weight of the goods, their quality and the contents of the packages. The carrier may claim the cost of checking. The results of the checks must be entered in the consignment note.  
654

**U**

## The consignment note as evidence of the contract

The consignment note is *prima facie* evidence<sup>655</sup> of the making of the contract of carriage,<sup>656</sup> the conditions of the contract and the receipt of the goods by the carrier<sup>657</sup>; and of the identity of the parties to the contract<sup>658</sup>; but the absence, irregularity or loss of the consignment note does not affect the existence or validity of the contract of carriage which remains subject to the provisions of the Convention.

<sup>659</sup>

**U** However, if the consignment note does not contain the required statement that the carriage is subject to the provisions of the Convention, the carrier is liable for all expenses, loss and damage sustained through such omission by the person entitled to dispose of the goods,<sup>660</sup> i.e. he cannot rely on the limitations on his liability mentioned below.<sup>661</sup> This is a less drastic penalty than the similar one provided in the Warsaw Convention on Contracts of Carriage by Air,<sup>662</sup> because it does not apply automatically, but only if the claimant is prejudiced by the omission.

## Sender's right of disposal

- 38-124 The sender has the right to "dispose" of the goods, in particular by asking the carrier to stop them in transit, to change the place of delivery or to substitute another consignee.<sup>663</sup> Article 12(5) of the Convention requires the right of disposal to be exercised by compliance with three conditions: first, the first (the sender's) copy of the consignment note must have the instructions given pursuant to the right of disposal entered upon its face and must be given to the carrier<sup>664</sup>; secondly, the instructions must be possible to carry out and must not interfere with the carrier's undertaking or prejudice the senders and consignees of the other consignments carried by the carrier<sup>665</sup>; thirdly, the instructions must not result in a division of the consignment.<sup>666</sup> As in the Uniform Rules (CIM) under Appendix B to COTIF,<sup>667</sup> this right of stoppage in transit is much more extensive than in English law, because it does not depend on the consignee being an insolvent buyer or on the sender being an unpaid seller; but, as under CIM, it presumably applies only as between the sender and the carrier, and not as between the sender and the consignee. The sender's right of disposal ends when that of the consignee begins. This happens when the second copy of the consignment note is handed to the consignee<sup>668</sup> or when the goods arrive at the place designated for delivery and the consignee requires the carrier to deliver the goods and the second copy of the consignment notes<sup>669</sup> or, when the goods having failed to arrive at the contractual destination, the consignee seeks to enforce his rights under the contract of carriage.<sup>670</sup> When instructions are given to the carrier in accordance with the Convention, the carrier is obliged to obey them.<sup>671</sup> A failure to comply with valid instructions will render the carrier liable for all resulting loss or damage.<sup>672</sup> When the right of disposal is exercised, it is exercised without regard to the requirements of contracts other than the contract of carriage.<sup>673</sup> This right may be exercised in breach of the contract of sale,<sup>674</sup> although the right of disposal may be instrumental in passing property in the goods being carried.<sup>675</sup>

## Delivery

38-125 The consignment note must specify the destination of the goods and the name and address of the consignee.<sup>676</sup> With this information, it should be possible for the carrier to deliver the goods in accordance with the contract of carriage.<sup>677</sup> The consignee has the right to call for delivery of the goods. Under art.13(1), the consignee is entitled to take delivery of the goods and the second copy of the consignment note upon production by the consignee of a receipt.<sup>678</sup> Nothing more is required from the consignee.<sup>679</sup> There is therefore little safeguard for the carrier if faced with a demand for delivery by a plausible, but fraudulent, consignee.<sup>680</sup> The carrier must not knowingly or recklessly deliver the goods to the wrong person.<sup>681</sup> Further, if the carrier's suspicions about the credentials of the "consignee" are aroused, the carrier must explore whether these suspicions are justified.<sup>682</sup> The carrier must exercise a high degree of care that the person to whom he proposes to deliver the goods is the named consignee.<sup>683</sup> If the carriage or the delivery of the goods is rendered impossible, the carrier must seek instructions from the person entitled to dispose of the goods.<sup>684</sup> If the goods are still in transit, the carrier may perform the contract by taking such steps which seem to the carrier to be in the best interests of the person entitled to dispose of the goods.<sup>685</sup> If the carriage or delivery remains impossible, the carrier may avail himself of the rights of unloading, storage and sale referred to in art.16.<sup>686</sup>

## Loss, damage and delay

38-126 The carrier is liable for loss (total or partial), damage and delay in delivery in substantially the same circumstances as he is under CIM.<sup>687</sup> The general assertion of a carrier's liability in art.17(1) of CMR thus broadly corresponds to the position of a carrier in English law, quite apart from the Convention.<sup>688</sup> Nonetheless art.17(1) does not exclude the carrier's liability for non-performance or for loss of or damage or delay to something other than the consigned goods, provided, of course, that this has not resulted from loss of or damage or delay to the consigned goods, in which case CMR does limit or exclude liability.<sup>689</sup> The loss or damage must occur between the time at which the carrier takes over the goods and the time of delivery.<sup>690</sup> The goods appear to be taken over by the carrier for the purposes of this provision when they pass from the control of the sender to that of the carrier, irrespective of when the carriage begins. "Delivery" similarly is marked by the goods leaving the carrier's control and passing into the control of the consignee.<sup>691</sup> The passing of control is a question of fact in the individual case. The terms "loss" and "damage" are used in

an ordinary sense.<sup>692</sup> Consequently even very serious damage to goods falls to be assessed for compensation purposes as damage under art.25 of the Convention rather than being regarded as “constructive total loss” embraced by art.23.

<sup>693</sup>

**U** Delay occurs when the goods have not been delivered within the agreed time limit<sup>694</sup> or, if none has been agreed, within a reasonable time.<sup>695</sup> If goods have not been delivered within 30 days of the agreed time limit or, if none, within 60 days of the carrier taking over the goods, this is conclusive evidence of loss.<sup>696</sup> The effect of these provisions is to make the limitation period in art.32(1)(b)<sup>697</sup> (which applies in cases of total loss) apply in cases where goods are damaged but not delivered.<sup>698</sup>

## The carrier's exemptions from liability: art.17(2)

38-127 The carrier's exemptions from liability are almost identical to those listed in CIM.<sup>699</sup> The burden of proof is also substantially the same.<sup>700</sup> Thus the carrier is exempted under art.17(2) from liability for loss, damage or delay in the event of (1) a wrongful act or neglect of the claimant<sup>701</sup>; (2) instructions of the claimant given otherwise than as the result of a wrongful act or neglect of the carrier<sup>702</sup>; (3) inherent vice of the goods<sup>703</sup>; and (4) circumstances which the carrier could not avoid and the consequences of which he was unable to prevent.<sup>704</sup> The burden of proving any of these exceptions is on the carrier.<sup>705</sup> When the court has to decide whether or not a carrier could avoid circumstances and prevent consequences within the meaning of art.17(2), the carrier who raises art.17(2) as a defence must show that he could not have avoided the loss, if he is to escape the primary liability imposed on him by art.17(1). The carrier cannot escape liability by showing that he has complied with common practice if he could, by taking precautions, have prevented the loss. Whether or not he has shown due diligence or behaved reasonably by reference to the standards applied in the tort of negligence is not relevant.<sup>706</sup> Article 17(2) requires a carrier to attain a standard somewhere between taking every conceivable precaution, however extreme, and on the other hand doing no more than act reasonably in accordance with prudent carrier's practice. The words “could not avoid” are to be construed as having the rider “with the utmost care”.<sup>707</sup> It is for the claimant to suggest (but not prove) what the carrier ought to have done and for the carrier then to rebut specific complaints thus put forward.<sup>708</sup> The exemptions under art.17(2) are not available to the carrier if the loss or damage arises by reason of the defective condition of his vehicle or the wrongful act or neglect of the person from whom he hired the vehicle.<sup>709</sup> Where the relevant loss or damage is caused in part by the carrier's conduct for which he is liable and in part by one or more of the exempted causes, the carrier shall be liable only for that part of the loss or damage for which he is responsible, pursuant to art.17(5).<sup>710</sup>

## The carrier's exemptions from liability: art.17(4)

- 38-128 The second type of excepted risks, embraced by art.17(4), covers loss or damage arising from the special risks inherent in one or more of the following circumstances: (a) carriage in open, unsheeted vehicles when their use has been expressly agreed and specified in the consignment note; (b) absence or inadequacy of packing of goods liable to wastage or damage if not properly packed<sup>711</sup>; (c) handling, loading, stowage or unloading of the goods by the sender, the consignee, or persons acting on their behalf<sup>712</sup>; (d) the nature of certain kinds of goods which particularly exposes them to total or partial loss or to damage, especially through breakage, rust, decay,<sup>713</sup> desiccation, leakage, normal wastage, or the action of moth or vermin; (e) insufficient or inadequate marks or numbers on packages; and (f) the carriage of livestock.<sup>714</sup> If the carrier establishes that the loss or damage could be attributed to one or more of these excepted risks, this is rebuttably presumed, provided that in (a) above there has not been an abnormal shortage or a loss of any package.<sup>715</sup> If a claimant rebuts, within the meaning of the second sentence of art.18(2), the presumption under the first sentence of that paragraph that loss or damage could be attributed to an excepted risk, the carrier is then liable for loss or damage under art.17(1). To disprove the presumption the standard of proof is that of the balance of probabilities.<sup>716</sup> The carrier under CMR art.18(4) is not entitled to the exemption granted by art.17(4)(d) above where he performs the carriage in a specially equipped vehicle, unless he proves that all steps incumbent on him in the circumstances with regard to the choice, maintenance and use of the equipment were taken.<sup>717</sup> Under art.18(5) the carrier, when carrying livestock, must show that he took all steps normally incumbent on him in the circumstances, despite the exemption in art.17(4)(f). There should be a reduction in the carrier's liability to the extent that the loss or damage was contributed to matters falling within one or more of the exemptions.<sup>718</sup>

## Sender's liability

- 38-129 The Convention identifies specified instances of liability which may attach to the sender under the contract of carriage. For example, the sender will be liable for loss, damage and expense caused by any inaccuracies in or inadequacies of the consignment note,<sup>719</sup> defective packing of the goods entrusted to the carrier,  
U <sup>720</sup> the absence, irregularity or inadequacy of documents or information required to be given to the carrier for the purposes of customs or other formalities<sup>721</sup> and arising out of the carriage of dangerous goods, at least where the sender has failed to inform the carrier, and the carrier is

not aware, of the dangerous nature of the goods.<sup>722</sup> Any other liability of the sender falls to be determined in accordance with the contract of carriage and national law.<sup>723</sup> The sender is also liable for freight (unless the contract provides otherwise). Such liability is not, however, one which can form the subject matter of a set-off against any liability owed by the carrier to the sender.<sup>724</sup> Unlike the liability of a carrier under the CMR regime,<sup>725</sup> compensation for the sender's liability is not subject to limitation.<sup>726</sup>

## Upper financial limits of liability and measure of damages

- 38-130 Where a carrier is held liable for loss of the goods, the value of the goods is calculated for compensation purposes as being their value at the place and time at which they were accepted for carriage.

<sup>727</sup>

**U** The value is fixed according to the commodity exchange price, or, failing that, the current market price, or, failing both, the normal value of goods of the same kind and quality.

<sup>728</sup>

**U** The carrier's liability for loss of the goods is limited to 8.33 units of account per kilogramme of gross weight short,

<sup>729</sup>

**U** unless the sender declared in the consignment note a higher value

<sup>730</sup>

**U** or a special interest in delivery

<sup>731</sup>

**U** against an agreed surcharge. The carrier must also refund the carriage charges, customs duties and other charges incurred in respect of the carriage.

<sup>732</sup>

**U** The expression "the carriage" in this context is restricted to the carriage covered by the contract and does not embrace, for example, the return carriage charges and storage costs of goods damaged during the period of carriage covered by the contract.

<sup>733</sup>

**U** The carriage charges, customs duties and other charges are refunded in full in the case of damage amounting to total destruction but only in proportion to the damage sustained in the event of damage not amounting to total destruction.

<sup>734</sup>

**U** The carrier's liability for delay is limited to the carriage charges.

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**U** His liability for damage is the amount by which the goods have diminished in value, but may not exceed the amount payable in respect of loss.

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**U** The carrier is also liable to the sender for compensation for an amount representing the "cash on delivery" charge,

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**U** in the event that the carrier fails to collect that charge.

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**U** The court has power at any stage of the proceedings to make such order as appears to be just and equitable if the carrier's liability is limited, and may have regard to other proceedings which have been, or are likely to be, commenced in the United Kingdom or elsewhere.

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**U**

## Wilful misconduct: an exception to limitation

38-131 Pursuant to [art.29](#), the carrier may not avail himself of the provisions excluding or limiting

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**U** his liability or shifting the burden of proof if the damage was caused by his wilful misconduct,

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**U** or any default regarded by English law as equivalent to wilful misconduct. The burden of proof of wilful misconduct, of course, lies on the claimant.

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**U** Wilful misconduct appears to mean that the carrier or his agents or servants,

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**U** including the driver, (a) was guilty of misconduct, (b) (i) committed the misconduct deliberately knowing that the conduct was wrongful, regardless of the consequences or (ii) committed the misconduct deliberately with reckless indifference as to whether what he or she was doing was right or wrong, where such misconduct was unreasonable in all the circumstances, and (c) was aware of an increased real and substantial risk of damage to the goods resulting from such misconduct.

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**U** Negligence or gross negligence is not sufficient to constitute wilful misconduct.

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**U** For example, a driver who was well aware of the EEC Regulations governing the length of time for which it was permissible for a driver continuously to drive a vehicle, without rest, and who deliberately chose to ignore them, knowing that he was thus exposing himself, his load and other road users to a greater risk than if he complied with the Regulations, was held to be guilty of wilful misconduct within art.29(1).

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**U** On the other hand, it has been held by the Court of Appeal that there was no wilful misconduct merely because the driver was aware that he was sleepy and decided to continue to drive; if, however, the driver deliberately flouted the regulatory limits set for time and rest periods or was aware that he could not overcome his sleepiness (e.g. because his vehicle hit the side of the road), there would be wilful misconduct.

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**U** Where a carrier insisted that an employee should park a trailer carrying goods unattended in a public car park when he knew that there was a high risk of loss, he was held to have been guilty of wilful misconduct.

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**U**

## Scope of limitation provisions

- 38-132 The CMR provisions relating to the limitation of compensation apply only in the event the carrier is liable for loss of, damage to or delay in the arrival of the goods placed in the carrier's charge.<sup>749</sup> The CMR provisions are relevant whether the carrier's liability arises under the contract or outside of the contract,<sup>750</sup> for example in tort or restitution. In respect of any other liability of the carrier<sup>751</sup> or any liability of any other party to the contract of carriage or at all, the CMR regime concerning compensation is inapplicable.

## Interest

- 38-133 A claimant is entitled to claim interest on the compensation payable. Article 27(1)<sup>752</sup> sets the interest recoverable at 5 per cent per annum and provides that interest shall accrue from the date on which a claim in writing was sent to the carrier, or in the absence of such a claim, from the date of

the institution of legal proceedings. The provision appears expressly to disallow interest accruing before the written claim is made or legal proceedings are commenced.<sup>753</sup> Such a claim does not have to be quantified; a general intimation of intention to hold the carrier liable is sufficient.<sup>754</sup> The date on which legal proceedings are commenced, so far as English legal procedure is concerned, is the date on which the claim form is issued.<sup>755</sup>

## The parties to the contract

- 38-134 The [Carriage of Goods by Road Act 1965](#) makes not only the sender of the goods and the carrier parties to the contract, but also includes as parties the consignee and any successive carrier and that carrier's employees and agents.<sup>756</sup> This provision enables sub-contractors to obtain the benefit of exemption clauses in the principal contract of carriage. CMR in any event makes the carrier responsible for the acts and omissions of his employees and agents and of any other persons of whose services he makes use for the performance of the carriage when they are acting within the scope of their employment.<sup>757</sup> Such persons are entitled to avail themselves of the provisions of the Convention which exclude or limit the liability of the carrier.<sup>758</sup> The Convention does not itself list exhaustively the parties to the contract. Whilst it does identify as parties the sender, the consignee and the carrier, it defines none of them.<sup>759</sup> Although the term "carrier" is not defined, the whole scheme of CMR supports the conclusion that "carrier" means someone who contracts to carry, irrespective of whether or not he in fact performs any part of the carriage in question. A person who has contracted to carry can perform the whole carriage by means of a sub-contractor whilst himself remaining liable under the Convention as a "carrier".<sup>760</sup> A freight forwarder is *prima facie* not a carrier under the Convention,<sup>761</sup> although he might be so regarded if he was himself to contract for the international carriage of goods by road, no matter what arrangements he made for sub-contracting. If the freight forwarder on the facts was the "sender" of the goods, as opposed to being merely the agent of the shipper or carrier, he might well be held to be subject to CMR under this head. All turns on what the freight forwarder contracted to perform on the facts of the particular case.<sup>762</sup>

## Title to sue

- 38-135 The Convention is also silent as to those who can invoke the carrier's liability. It seems clear that the person who concludes the contract of carriage with the carrier has a right of action, even if he has not himself suffered material damage. The sender will also have a right of action if he has suffered damage. Actions will normally be brought by the person entitled to dispose of the goods or

those claiming under him.<sup>763</sup> The consignee is given an express right of action against the carrier in the event of loss of the goods and (it seems) delay.<sup>764</sup>

## Successive carriers

38-136 If carriage governed by a single contract under CMR is performed by successive road carriers, each of them is responsible for the performance of the whole operation, the second and each succeeding carrier becoming a party to the contract of carriage by his acceptance of the goods and the consignment note.<sup>765</sup> There is, then, joint and several responsibility.<sup>766</sup> A carrier can be a successive carrier under CMR even where he only carries out a national sector of the carriage.<sup>767</sup> The person with whom the sender, the consignee or another person interested in the goods makes a contract of carriage is the first or contracting carrier for the purpose of art.34 (and presumably, art.36) of CMR, whether or not he himself takes possession of the goods.<sup>768</sup> All subsequent carriers are likewise successive carriers within the meaning of the Convention, whether or not they in turn take possession of the goods.<sup>769</sup> Main contractors and sub-contractors may be successive carriers under CMR: the creation of this relationship will, however, depend on whether or not the sub-contractor becomes a party to the contract of carriage by accepting the goods and the consignment note.<sup>770</sup> The Convention appears, then, to create an artificial statutory contract between the person interested in the goods and each successive or actual carrier.<sup>771</sup> The effect of art.34 is, therefore, to apply to each successive carrier the rights and obligations of “the carrier”, as the term is used in arts 1 to 33 of CMR, save where the context makes it clear that only the first or contracting carrier is being referred to.

## Acceptance of consignment note

38-137 The term “acceptance of the … consignment note” in art.34 should be given a natural and ordinary meaning.<sup>772</sup> Thus the consignment note, like the goods, is accepted when it is taken over by the carrier concerned with a view to carrying out the next part of the carriage pursuant to the terms of the consignment note. There can be an acceptance of the goods within the meaning of art.34 without a receipt being first given under art.35(1) by the accepting carrier, acceptance and the giving of a receipt being two distinct matters. Failure of the carrier to enter his name and address on the consignment note does not prevent acceptance of the consignment note under art.34.<sup>773</sup> It seems that a person cannot be a successive carrier under art.34 unless a consignment note is available for him to accept with the goods, and he accepts it.<sup>774</sup> Otherwise a carrier performing only a national sector of the carriage might assume that his obligations as a carrier were regulated only by municipal law or by his own trading conditions.<sup>775</sup> A successive carrier, however, can

delegate to an agent or sub-contractor the task of accepting the consignment note for the purpose of art.34.<sup>776</sup>

## Which carrier may be sued by those interested in the goods

- 38-138 CMR envisages primary legal proceedings, seeking compensation under art.23(1) for breach of the contract of carriage, as being brought against a carrier by the sender or consignee of goods or by some person otherwise interested in the goods. Where there are successive carriers, such proceedings may be brought against the first or contracting carrier, the last carrier or the carrier who was performing that portion of the carriage during which the event causing the loss, damage or delay occurred, or any two or more of them.

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**U** A carrier can be a “last carrier” under art.36 even where he has not complied with art.35(1) in failing to enter his name and address on the consignment note accompanying the goods from a previous carrier.<sup>778</sup> A carrier may, furthermore, be a “last carrier” under this article even where he has issued a document covering the last stage of the carriage within the territory of a single contracting state.<sup>779</sup>

## Proceedings against the carriers

- 38-139 The effect of arts 31(1) and 34 is to enable a claimant to bring a single action against any or all of the carriers concerned. Such an action may only be instituted either (a) in a court of a contracting state agreed between the parties; or (b) in the court of a country where the defendant<sup>780</sup> is ordinarily resident, or has his principal place of business or the branch or agency through which the contract of carriage was made; or (c) in the courts of the place where the goods were taken over for carriage or the place where they were to be delivered.<sup>781</sup> Whilst art.36 limits the number of carriers against whom such primary proceedings may be instituted, art.34 seems to make a successive carrier potentially liable in such proceedings for damage sustained during a portion of the carriage which he had not contracted to perform. It appears that the burden laid on a carrier by art.18(1) of proving that loss, damage or delay had occurred in such a way as to relieve him of liability under art.17(2) must be directly discharged by each successive carrier.<sup>782</sup>

## Carrier's rights of recovery from other carriers

- 38-140 A carrier who has paid compensation under art.23(1) of CMR may recover such compensation by way of contribution or indemnity, together with interest and costs, from other carriers under art.37.<sup>783</sup> This CMR contribution régime replaces that applicable under the **Civil Liability (Contribution) Act 1978**.<sup>784</sup> Provided that a carrier from whom contribution is claimed under art.37 has received due notice of the primary proceedings under CMR and has had an opportunity of entering an appearance therein, he cannot dispute the “validity of the payment made” to a claimant by the carrier seeking contribution from him if the amount of the compensation was determined by judicial authority.<sup>785</sup> The determination referred to in this context appears to be the determination of quantum. “Due notice” can, it seems, be given merely by letter.<sup>786</sup> Under the procedure of the English courts, a carrier receiving due notice of primary proceedings (assuming, of course, that he had not been made a defendant therein) could become a party to those proceedings if he wished to dispute the question of liability.<sup>787</sup> Whilst CMR is silent as to the extent to which a carrier receiving due notice of primary proceedings is bound by the determination therein of liability if he has not entered an appearance, he would seem to be estopped thereafter from denying liability in contribution proceedings.

## Contribution proceedings

- 38-141 Contribution proceedings are envisaged as being secondary to and consequential upon the main action. The procedure of the English courts, however, enables such proceedings to be brought by way of third-party proceedings in the main action, even if the carrier seeking contribution has not already paid the compensation.<sup>788</sup> The carrier must, however, pay the sender or consignee before enforcing his right to recover against another carrier.<sup>789</sup> Article 37 provides that the carrier responsible for loss or damage should be solely liable for the compensation.<sup>790</sup> Where two or more carriers are responsible, each pays an amount in contribution proportionate to his share of liability. If no apportionment is possible, each responsible carrier is liable in proportion to his share of the payment for carriage.<sup>791</sup> If, however, it cannot be ascertained to which carrier liability is attributable, the amount of compensation is apportioned between all of them in proportion to their share of the payment for carriage.<sup>792</sup> In the absence of agreement to the contrary, separate contribution proceedings between carriers can only be brought before the courts of the country in which one of the carriers from whom recovery is sought is ordinarily resident or has his principal place of business or has the branch through which the contract of carriage was made.<sup>793</sup> These provisions apply only to recourse proceedings between carriers.<sup>794</sup> The jurisdictional provisions of art.31(1) do not apply to secondary contribution proceedings.<sup>795</sup>

## Carrier's right to sell the goods

- 38-142 The carrier may sell the goods, without awaiting instructions from the person entitled to dispose of them, (a) if the goods are perishable or their condition warrants such a course; (b) if the storage expenses would be out of proportion to the value of the goods; or (c) if after the expiry of a reasonable time he has not received from the person entitled to dispose of the goods instructions to the contrary which he may reasonably be required to carry out.<sup>796</sup> The proceeds of sale, after the deduction of the expenses chargeable against the goods, belong to the person entitled to dispose of the goods.<sup>797</sup>

## Reservations at delivery and extinction of claims

- 38-143 If, upon taking delivery of the goods, the consignee checks with the carrier the condition of the goods, the result of that check will be conclusive evidence of the condition of the goods at the time of delivery, unless any loss or damage sustained by the goods is not apparent and the consignee has sent to the carrier reservations in writing about the goods within seven days of delivery.<sup>798</sup> Where the consignee takes delivery of the goods without checking their condition with the carrier and without providing reservations to the carrier, the fact that delivery has been accepted shall constitute *prima facie* evidence that the condition of the goods is that which is represented in the consignment note.<sup>799</sup> Such reservations must be sent to the carrier immediately (in the case of apparent loss or damage<sup>800</sup>) or in writing within seven days (in the case of loss or damage which is not apparent) and provide a general indication of the loss or damage sustained by the goods.<sup>801</sup> Such *prima facie* evidence may be controverted.<sup>802</sup> The acceptance of delivery in these circumstances does not mean that the consignee loses any right of action because of any failure to make a reservation.<sup>803</sup> Further, the taking of delivery will be evidence of the condition of the goods only so far as the interest of the consignee is concerned. No compensation is payable for delay unless a written reservation is sent to the carrier within 21 days from the time at which the goods were placed at the disposal of the consignee.<sup>804</sup> A failure to send such a reservation in the case of delay will result in the loss of a right of action.<sup>805</sup> The carrier and the consignee shall give each other every reasonable facility for making the requisite investigations and checks.<sup>806</sup>



## Limitation of actions

- 38-144 All actions arising from the contract of carriage are time-barred after one year, or three years in the case of wilful misconduct.

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807 As far as primary actions between owners of goods and carriers are concerned, art.32 provides that the period of limitation runs (a) in the case of partial loss, damage or delay in delivery, from the date of delivery; (b) in the case of total loss

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U from the thirtieth day after the expiry of the agreed time limit or, if none, from the sixtieth day from the date on which the goods were taken over by the carrier; and (c) in all other cases, on the expiry of three months after the making of the contract of carriage.

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U Article 32 is intended to be comprehensive and to cover all claims arising under CMR.

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U When goods are damaged but not delivered (e.g. where, after receiving damage, they are returned to the sender), the period of limitation applied is that for total loss under art.32(1)(b), having regard to art.20(1).

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U Alternatively, if it is to be regarded as a claim for damage rather than loss, art.32(1)(c) applies in such a case, on the basis that it covers all cases where neither art.32(1)(a) nor art.32(1)(b) provides in the particular case a point from which the one-year CMR limitation period can run.

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U A written claim suspends the running of the period of limitation until such date as the carrier rejects the claim in writing.

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U In order to suspend the running of the limitation period, the claim holding the carrier liable must be notified to the carrier in an unambiguous manner by or on behalf of the person entitled to bring the claim and must be accompanied by such supporting documents so as to enable the carrier to define and pronounce his response to the claim, although it is not necessary that the claim describe precisely the level of compensation claimed.

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U The owner of goods who wishes, when met by a plea of limitation, to set up suspension of the period of limitation, must show that the particular carrier relying on the time-bar has received

a written claim from him or from someone acting on his behalf. A written claim made to the first carrier or to any one carrier does not suspend the running of the period of limitation against all carriers. A carrier obviously cannot reject a claim under art.32(2) unless it is made against him directly.

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**U** The rejection must be clear and unambiguous so that the claimant must understand that, time having been suspended since the claim was made, there has now come the time when the claimant must decide whether to start proceedings. The mere non-acceptance or non-admission of the claim is not sufficient. If the rejection is communicated in circumstances attracting privilege (for example, being marked “without prejudice”), the rejection will not restart the running of time within the meaning of art.32(2). In order to constitute a valid rejection for the purposes of art.32(2), the documents which were attached to the claim must be returned to the claimant; this requirement is not limited to such original documents as are provided by the claimant, but includes photocopies.

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**U** The period of limitation may also be extended in any of the ways applicable under the **Limitation Act 1980**.

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**U** A counterclaim served within the relevant limitation period stops time running under the Convention.

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**U** CMR however provides specifically that a right of action once time-barred cannot be exercised as a counterclaim or set-off.

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**U** Until a counterclaim has been served, a right of action by way of counterclaim is not exercised within the meaning of the Convention.

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## Limitation of actions between carriers

- 38-145 The limitation period applies to claims between carriers. The period begins to run either on the date of the final judicial decision fixing the amount of compensation payable under CMR, or, if there is no such judicial decision, from the actual date of payment.<sup>821</sup> In the context of claims between carriers the term “carrier” means any person who contracts to carry. It is not restricted to claims between successive carriers within the meaning of art.34.<sup>822</sup> The courts have, however, emphasised that the term “claims” in art.39(4) embraces claims by one successive carrier against another in respect of that other’s responsibility for something which has gone wrong in the course

of the carriage where breach by that other of his obligations either to the consignor or to his predecessor as carrier has resulted in damage and a claim for compensation at the end of the line. The term “claims” has no application to claims between successive carriers in respect of moneys due not for breach of the contract of carriage (i.e. compensation for something which has gone wrong) but as payment for services duly performed. Articles 34 to 40 of the Convention are solely concerned with resolving the rights inter se of successive carriers where something has gone wrong en route.<sup>823</sup>

## Jurisdiction

- 38-146 Article 31(1) prescribes those states in which legal proceedings may be brought in connection with any contract of carriage to which the CMR Convention applies, in addition to the state agreed between the parties,<sup>824</sup> namely the state of the residence of the defendant, the state where the goods are taken over by the carrier, the place designated for delivery of the goods or the state which has been agreed by the parties.<sup>825</sup> This is intended to provide a self-contained code for the allocation of jurisdiction,<sup>826</sup> so that Regulation (EU) 1215/2012<sup>827</sup> or any other jurisdiction regulation<sup>828</sup> is inapplicable insofar as the same rule is provided for in both conventions, provided that the applicable rule in CMR is highly predictable, facilitates the sound administration of justice, enables the risk of concurrent proceedings to be minimised, and is construed harmoniously with the objectives of the Regulation.<sup>829</sup> In the event of more than one set of proceedings being commenced in more than one state, art.31(2) provides that the later action will not be entertained if it concerns the same parties and is brought on the same grounds.<sup>830</sup> The claimant may bring proceedings against the first carrier, the last carrier or the carrier who was performing that part of the carriage where the relevant loss, damage or delay has occurred.<sup>831</sup> When the defendant carrier seeks recourse against other carriers concerned in the carriage, such action is governed by art.39(2), which is more restrictive than art.31(1). Such recourse must (not may, as suggested by the provision itself) be brought in the state of residence of one of those carriers.<sup>832</sup> Article 39(2) is concerned only with actions among carriers and not claims by cargo interests (whose claims are governed by art.31).<sup>833</sup> It appears not to be open to the carriers to agree an alternative forum for the determination of the carrier’s recourse claim, except possibly arbitration.<sup>834</sup>

## Arbitration

- 38-147 The contract of carriage may contain an arbitration clause if the clause provides that the arbitration tribunal shall apply the Convention.<sup>835</sup> There must be an express provision to this effect.<sup>836</sup> If

there is a valid arbitration clause, the English courts will stay proceedings and refer the matter to the arbitration tribunal in question.<sup>837</sup>

## No contracting out

- 38-148 Any stipulation which would directly or indirectly derogate from the provisions of the Convention is null and void,<sup>838</sup> but only to the extent of the derogation.<sup>839</sup> Successive carriers can agree among themselves as to their liability to contribution and the effect thereon of the insolvency of one of them.<sup>840</sup> Compensation under CMR must be assessed solely in accordance with the terms of the Convention itself, and the principles applicable to the assessment of damages at common law are irrelevant.<sup>841</sup>

## Footnotes

608 Cmnd.3455; TS No.90 (1967). For the meaning of the abbreviation “CMR”, see above, para.[38-081](#).

609 See, generally, *Hill* [1968] *J.B.L.* 155; *Fitzpatrick* [1968] *J.B.L.* 311; *Hill* [1975] *L.M.C.L.Q.* 303; *Donald* [1975] *L.M.C.L.Q.* 420; *Giles* [1975] 24 *I.C.L.Q.* 379; *Wijffels* [1977] *L.M.C.L.Q.* 30; *Hill* [1977] *L.M.C.L.Q.* 212. For comprehensive accounts, see Donald, The CMR (1981); Clarke, International Carriage of Goods by Road: CMR, 6th edn (2014); Hill and Messent, CMR: Contracts for the International Carriage of Goods by Road, 3rd edn (2000); Clarke and Yates, Contracts of Carriage by Land and Air, 2nd edn (2008). For an appraisal of the problems of CMR as seen from particular national standpoints, see *Loewe* (1976) 11 *E.T.L.* 166, 311.

610 [SI 1967/819](#).

611 [SI 1967/820](#) (Gibraltar); SI 1969/1365 (Isle of Man); [SI 1971/1743](#) (Guernsey). These Orders were made under [s.9 of the Act](#). For the position of Jersey, see *Chloride Industrial Batteries Ltd v F & W Freight Ltd* [1989] 1 *W.L.R.* 823 *CA*.

612 [1979 Act ss.3\(3\), 4\(2\)\(4\), 5 and 6\(1\)\(b\)](#).

613 Cmnd.8138; TS No.6 (1981).

614 See below, para.[38-130](#) (dealing with units of account).

615 [SI 1980/1966](#).

616 [SI 1981/604](#) (Gibraltar); [SI 1981/1543](#) (Isle of Man); [SI 1986/1882](#) (Guernsey).

617 [Carriage of Goods by Road \(Parties to Convention\) Order 1967 \(SI 1967/1683\)](#) as amended by SI 1969/385, SI 1973/596 and [SI 1980/697](#).

618 In *Anon.* (2008) 43 *E.T.L.* 747, the Bundesgerichtshof held that a “contract of carriage” has an autonomous meaning independent of national law. The Convention has been held to apply to an umbrella agreement providing for multiple deliveries over a long period of time; there

- is no requirement that the Convention will apply only to those contracts where consignment notes may be issued contemporaneously with or soon after the contract is made: *Gefco (UK) Ltd v Mason [1998] 2 Lloyd's Rep. 585*. CMR will not apply to an existing relationship between the carrier and the purchaser of goods, where the latter is not interested, directly or indirectly, in the contract of carriage: *Atlanta Companies, Judge & Dolph Ltd v Pvba Transport Leopold Laureys & Zonen (1996) 31 E.T.L. 843*, Ghent.
- 619 For the purposes of CMR, “goods” may include a trailer hauled by the carrier’s vehicle if that is what he contracted to carry: *NV Cobelfret v NV Transport Jaco (1996) 31 E.T.L. 579*, Antwerp.
- 620 Defined in the *Carriage of Goods by Road Act 1965 Sch. art.1(2)*. As to the limits of a contract of carriage under CMR, see *Kruidenier Hzn CV v Vink CV [1978] L.M.C.L.Q. 649*, District Court, Rotterdam. In *Anon. (2006) 41 E.T.L. 228*, Hof van Cassatie van België, it was held that where the contract was silent on the mode of carriage and the circumstances were such that the parties did not contemplate road transport, CMR was inapplicable. See also *NV DPD Belgium v Timmerman (2011) 48 E.T.L. 82*, where it was also held that courier services could fall within the scope of the Convention.
- 621 *1965 Act Sch. art.1(1)*. Jersey is not a “different country” from the United Kingdom for the purposes of CMR: *Chloride Industrial Batteries Ltd v F & W Freight Ltd [1989] 1 W.L.R. 823 CA*. It is essential, for the Convention to apply, that the road carriage contemplated by the contract is international. If the contract contemplated, for example, one road leg in one country and one sea leg in another country, the Convention will not apply: *Princes Buitoni Ltd v Hapag-Lloyd Aktiengesellschaft [1991] 2 Lloyd's Rep. 383*.
- 622 *NV Crowe and Co v Alliance Ass Cie Ltd (1969) 4 E.T.L. 948*, Hof van Beroep, Brussels.
- 623 *1965 Act Sch. art.1(1)*.
- 624 *Anon. (1975) 10 E.T.L. 410*, Oberlandesgericht, Celle.
- 625 *Anon. (1966) 1 E.T.L. 691*, Landgericht, Bremen.
- 626 *Princes Buitoni Ltd v Hapag-Lloyd Aktiengesellschaft [1991] 2 Lloyd's Rep. 383, 385–386*. Where the CMR applies by agreement, rather than by the application of art.1, the parties are entitled to deviate from the terms of CMR (subject to any other restrictions applicable as a matter of national law): *Anon. (2013) 48 E.T.L. 619, BGH*.
- 627 *1965 Act Sch. art.1(4), (5)* Protocol of Signature. As to the meaning of “furniture removal” in art.1(4), see *Parr v Clark & Rose Ltd, 2002 S.C.L.R. 222*. In *Quantum Corp Inc v Plane Trucking Ltd [2002] EWCA Civ 350, [2002] 1 W.L.R. 2678* at [64], the Court of Appeal was dismissive of an argument that the Protocol excluded the CMR Convention in respect of traffic between the UK and Ireland even where the traffic took place in UK as part of an international carriage extending beyond the UK and Ireland.
- 628 CMR occasionally, not always, specifies which municipal law applies. National legislation, however, should not be discriminatory against carriers from other EU Member States so as to offend art.76 of the EEC Treaty of Rome: *Anon. (1993) 28 E.T.L. 592*, Gerichtshof der Europäischen Gemeinschaften.
- 629 *1965 Act Sch. art.2(1)*. In *Quantum Corp Inc v Plane Trucking Ltd [2002] EWCA Civ 350, [2002] 1 W.L.R. 2678* at [15]–[18], [21], [62]–[63], the Court of Appeal, interpreting art.1, held that the CMR Convention applied to an international road leg which formed part of

a larger contract where (a) the carrier promised unconditionally to carry by road and on a trailer; (b) the carrier reserved either a general or a limited option to elect to carry out some other means of carriage for all or part of the way; (c) the carrier left the means of transport open either entirely or as between a number of possibilities at least one of them being carriage by road; or (d) where the carrier undertook to carry by some other means but reserved either a general or limited option to carry by road. The concept of a contract for carriage by road embraced a contract providing for or permitting carriage of goods by road on one leg, when such carriage actually took place under such contract; the place of taking over and delivery under art.1(1) were to be read as referring to the start and end of the contractually provided or permitted road leg: at [39]. cf. *The OOCL Bravery* (1999) 35 E.T.L. 398, US District Ct SDNY. Anon., *Bundesgerichtshof* (2009) 44 E.T.L. 196. See also Anon. (2013) 49 E.T.L. 228, *BGH*.

- 630 *PVBA Transport Maes v NV Centraal Beheer Schadeverzekering* (1996) 31 E.T.L. 558, Netherlands. In Anon. (2011) 47 E.T.L. 87, the Oberlandesgerichtshof Düsseldorf held that a trailer in which the goods are carried, even without a tractor, is a vehicle for the purposes of art.2(1), that a fire on board a sea-going vessel is a typical risk for that means of transport under art.2(1), and that the Hague Rules are prescribed conditions within the sense of art.2(1).
- 631 **1965 Act Sch. art.2(1).** The Warsaw Convention may thus regulate aspects of a road carrier's liability in the case of road-air carriage. The Hague Rules have been applied to regulate the carrier's liability in road-sea carriage: *Thermo Engineers Ltd v Ferrymasters Ltd* [1981] 1 Lloyd's Rep. 200, 205. See, generally, Clarke, International Carriage of Goods by Road: CMR, 6th edn (2014), para.15.
- 632 *Thermo Engineers Ltd v Ferrymasters Ltd* [1981] 1 Lloyd's Rep. 200 at 204.
- ⑥33 *James Buchanan and Co Ltd v Babco Forwarding and Shipping (UK) Ltd* [1978] A.C. 141; *Hatzl v XL Insurance Co Ltd* [2009] EWCA Civ 223, [2010] 1 W.L.R. 470 at [33]–[34]; *Knapfield v CARS Holdings Ltd* [2022] EWHC 1437 (Comm) at [72]. See, generally, *Hardingham* [1978] L.M.C.L.Q. 51; Clarke, para.3a. The House of Lords has approved a teleological approach to the interpretation of purely domestic statutes, unfettered by any rule requiring an exclusive reliance upon the occasionally inadequate words used in the statute itself: *Pepper (Inspector of Taxes) v Hart* [1993] A.C. 593. See *Wijffels* (2001) 36 E.T.L. 653.
- 634 *James Buchanan and Co Ltd v Babco Forwarding and Shipping (UK) Ltd* [1978] A.C. 141 at 152.
- 635 *James Buchanan and Co Ltd v Babco Forwarding and Shipping (UK) Ltd* [1978] A.C. 141 at 157; *Hatzl v XL Insurance Co Ltd* [2009] EWCA Civ 223, [2010] 1 W.L.R. 470 at [33]. cf. *Shell Chemicals UK Ltd v P & O Roadtanks Ltd* [1993] 1 Lloyd's Rep. 114, 115; affirmed on other grounds: [1995] 1 Lloyd's Rep. 297.
- 636 Most of the reported English decisions on CMR are referred to in the present text with the exception of *SCA (Freight) Ltd v Gibson* [1974] 2 Lloyd's Rep. 533; *Avandero (UK) Ltd v National Transit Insurance Co Ltd* [1984] 2 Lloyd's Rep. 613; and *London Tobacco Co (Overseas) Ltd v DFDS Transport Ltd* [1994] 1 Lloyd's Rep. 394, where the implications of a carrier's insurance cover against liability under CMR were discussed. The Court of Appeal has made significant contributions as far as the construction of the Convention is concerned:

see, generally, *Ulster-Swift Ltd v Taunton Meat Haulage Ltd* [1975] 2 *Lloyd's Rep.* 502; affirmed [1977] 1 *W.L.R.* 625 *CA*; more fully reported at [1977] 1 *Lloyd's Rep.* 346; *James Buchanan and Co Ltd v Babco Forwarding and Shipping (UK) Ltd* [1977] *Q.B.* 208 *CA*; affirmed on different grounds [1978] *A.C.* 141; *Cummins Engine Co Ltd v Davis Freight Forwarding (Hull) Ltd* [1981] 2 *Lloyd's Rep.* 106; affirmed [1981] 1 *W.L.R.* 1363 *CA*.

- 637 Many decisions of the courts of the Continental parties to CMR on the interpretation of the Convention have been reported since 1966 in the periodical European Transport Law. The decisions are usually fully reported in the original language and have a headnote in English. Since 1974 some additional decisions of Continental courts have been reported in *Lloyd's Maritime and Commercial Law Quarterly*. Some of these Continental decisions are cited in the present text.
- 638 See, generally, *Hill* [1975] *L.M.C.L.Q.* 303; *Hill* (1976) 11 *E.T.L.* 182; *Wijffels* (1976) 11 *E.T.L.* 208; *Loewe* (1976) 11 *E.T.L.* 311: this last reference is to an authoritative commentary on CMR.
- 639 *James Buchanan and Co Ltd v Babco Forwarding and Shipping (UK) Ltd* [1977] *Q.B.* 208 at 213–214. See also *Ulster-Swift Ltd v Taunton Meat Haulage Ltd* [1977] 1 *W.L.R.* 625 at 631–632; *Fortis Corporate Insurance NV/Uni-Data Logistics BV/UPS SCS (Nederland) BV* (2009) 45 *E.T.L.* 101, *Hoge Raad der Nederlanden*. As to the influence (or lack of it) of Human Rights legislation, see *Re Deep Vein Thrombosis and Air Travel Group Litigation* [2002] *EWHC 2825 (QB)*, [2003] 1 *All E.R. (Comm)* 418 at [180]–[182], [191]–[192], [229], [2003] *EWCA Civ* 1005, [2003] 3 *W.L.R.* 956.
- 640 *Fothergill v Monarch Airlines Ltd* [1981] *A.C.* 251 at 284. In *Morris v KLM Royal Dutch Airlines* [2002] *UKHL* 7, [2002] 2 *A.C.* 628 at [147], Lord Hobhouse said: “Whilst it is important to have regard to the international consensus upon the understanding of the provisions of international conventions and hence to what the courts in other jurisdictions have had to say about the provision in question, the relevant point for decision always remains: what do the actual words used mean?”
- 641 1965 Act Sch. art.4. The taking over of the goods is not a prerequisite to the formation of a contract of carriage: *Anon.* (1966) 1 *E.T.L.* 691, *Landgericht, Bremen*; or the application of CMR: *Gefco UK Ltd v Mason* [1998] 2 *Lloyd's Rep.* 585.
- 642 Sch. art.5(1). Whether or not the consignment note is signed is a matter for national law determined by the rules of private international law: *Anon.* (2012) 48 *E.T.L.* 610, *BGH*. In the context of art.5(1), the “carrier” must be the original or contracting carrier. As to the difficulties which may arise when another consignment note is issued during the carriage, see *Harrison & Sons Ltd v R T Steward Transport Ltd* (1993) 28 *E.T.L.* 747, where the court placed more importance on the original consignment note in the context of art.34 (see below, para.38–135).
- 643 *Knapfield v CARS Holdings Ltd* [2022] *EWHC 1437 (Comm)* at [79]–[94].
- 644 Sch. art.6(1).

- ⑥45 Sch. arts 6(1)(f) and 22(1). See also the European Agreement concerning the Carriage of Dangerous Goods by Road, Cmnd.3769 (1968) and EU Council Directive 1994/55, 21 November 1994 on the approximation of laws within Member States concerning carriage of dangerous goods by road. As to the meaning of “dangerous”, see *Anon.*, *OLG Düsseldorf*, 23 January 1992 (1992) *Transp.R.* 218; cf. *Effort Shipping Co Ltd v Linden Management SA (The Giannis NK)* [1998] 1 All E.R. 495.
- ⑥46 Sch. art.6(1)(i). See *T Comedy (UK) Ltd v Easy Managed Transport Ltd* [2007] EWHC 611 (Comm), [2007] 2 Lloyd's Rep. 397 at [60].
- ⑥47 Sch. art.6(2).
- ⑥48 Sch. art.6(3). See, for example, *Harrison & Sons Ltd v R T Steward Transport Ltd* (1993) 28 E.T.L. 747.
- ⑥49 Sch. arts 7(1) and 22(2).
- ⑥50 Sch. art.8(1). As to the meaning of “apparent condition”, see *Stef Transport Rennes v D&M Fraser* [2018] EWHC 2756 (Comm) at [31]. The carrier is not obliged to check the manner in which the goods were loaded (assuming that the carrier did not load the goods): *General Transports Assurances ea v Kuhne & Nagel ea* (2002) 37 E.T.L. 511. The apparent condition of goods includes the pre-cooling of the goods which are to be carried by refrigerated transport: *Anon.*, *Oberlandesgericht Zweibrücken*, 12 March 2019 (2019) 54 E.T.L. 449.
- ⑥51 Sch. art.8(2).
- ⑥52 *SA De Zeven Provinciën v SPRL Ultra Rapid Wagner Freres* (1977) 12 E.T.L. 776, Commercial Court, Charleroi; *Anon.* (1993) 28 E.T.L. 745, Cass.
- ⑥53 *NV Alptripan v NV Ruys and Co* (1976) 11 E.T.L. 271, Commercial Court, Antwerp.
- ⑥54 Sch. art.8(3).
- 655 Whilst the signature on the consignment note may be printed or in the form of a stamp (art.5(1)), the absence of a signature will render the consignment note of neutral (or at best *prima facie*) evidential value: *City Vintages Ltd v SCAC Transport International Unreported 1 December 1987*. cf. *Anon.* (1998) 33 E.T.L. 427, BGH.
- 656 The Convention does not state when and where the consignment note must be issued, save that art.5 requires one copy of the consignment note to accompany the goods, which might suggest that the note should be made out prior to the commencement of the carriage (cf. *M Bardiger Ltd v Halberg Spedition APS Unreported 26 October 1990*). Such matters, however, will affect the probative value of the consignment note as evidence of the contract of carriage:

- Electronika Industrija Oour TVA v Transped Oour Kintinentalna* [1986] 1 Lloyd's Rep. 49, 51; *Texas Instruments Ltd v Nason (Europe) Ltd* [1991] 1 Lloyd's Rep. 146.
- 657 Sch. art.9(1). Despite the issue of a CMR consignment note, the presumption of the existence of a contract was displaced in *Ulster-Swift Ltd v Taunton Meat Haulage Ltd* [1975] 2 Lloyd's Rep. 502; affirmed [1977] 1 Lloyd's Rep. 346, 358 CA.
- 658 *Aqualon (UK) Ltd v Vallana Shipping Corp* [1994] 1 Lloyd's Rep. 669. See *Anon.* (2001) 36 E.T.L. 947, BGH.
- 659 Sch. art.4. See *Gefco (UK) Ltd v Mason* [1998] 2 Lloyd's Rep. 585; *Knapfield v CARS Holdings Ltd* [2022] EWHC 1437 (Comm) at [79]–[94]. Art.4 does not apply to the relations between successive carriers: *SGS-Ates Componenti Elettronici SpA v Grappo Ltd* [1978] 1 Lloyd's Rep. 281, 284. See below, para.38-135. See, generally, Clarke, International Carriage of Goods by Road: CMR, 6th edn (2014), Ch.2.
- 660 Sch. art.7(3).
- 661 This refers to para.38-130, below, and perhaps also to paras 38-127—38-128, below; but the matter is far from clear.
- 662 See above, para.37-080.
- 663 Sch. art.12(1). Dicta in one English case suggest that where goods are damaged in transit and the sender on hearing of the damage requires the goods to be returned to him, he is exercising his rights under art.12(1). When his instructions are carried out there may be a “delivery” for the purpose of calculating the CMR limitation period under art.32(1)(a) (see below, para.38-143): *Worldwide Carriers Ltd v Ardtran International Ltd* [1983] 1 Lloyd's Rep. 61, 65.
- 664 Sch. art.12(5)(a). It seems that this condition is not essential: *Anon.* (1985) 20 E.T.L. 349, BGH. Indeed, under art.15(1), where the consignee refuses delivery of the goods, the sender may exercise the right of disposal without producing the first copy of the consignment note. Nevertheless, save for situations covered by art.15(1), the carrier will obey the instructions of the sender without the first copy of the consignment note at his risk: art.12(7).
- 665 Sch. art.12(5)(b). The “interference” must be more than merely incidental: Hill & Messent, CMR: Contracts for the International Carriage of Goods by Road, 3rd edn (2000), para.5.5–5.7; Clarke, International Carriage of Goods by Road: CMR, 6th edn (2014), para.32a(f). If it is not possible to carry out the instructions, the carrier must notify the person entitled to dispose of the goods “immediately”: art.12(6).
- 666 Sch. art.12(5)(c). Whether “consignment” refers to the goods covered by the consignment note or all the goods carried by the carrier is unclear. The former construction is preferable, because the rights of those interested in the other consignments are protected by art.12(5)(b). Contra Hill & Messent, CMR: Contracts for the International Carriage of Goods by Road, 3rd edn (2000), paras 5.5–5.6.
- 667 See above, para.38-091.
- 668 Sch. art.12(2).
- 669 Sch. art.13(1). The vesting of a right of action in the consignee under art.13(1) does not result in the sender losing his right of action: *NV VAPO v SPRL Frigo-Express-Adriaenssens and Zonen* (1976) 11 E.T.L. 295, Commercial Court, Antwerp.

- 670 Sch. arts 12(2) and 13(1). If the consignee exercises the right of disposal by nominating another consignee, that new consignee cannot name yet another consignee (art.12(4)), unless it is the original consignee (*Anon.*, Arrond. Amsterdam 16.2.66 S. & S. No.69). The consignment note may provide that the consignee has the right of disposal from the time the consignment note is drawn up: art.12(3). It is only in this last circumstance that the consignee is obliged to produce a copy of the consignment note in exercising the right of disposal: art.12(5)(a).
- 671 Sch. art.12(1) and (2). cf. *Anon.* (2002) 37 E.T.L. 817, *BGH*.
- 672 Sch. art.12(7).
- 673 cf. *Kala Ltd v International Freight Services (UK) Ltd Unreported 7 June 1988*.
- 674 Benjamin's Sale of Goods, 8th edn (2010), paras 21-063—21-065.
- 675 *Aqualon (UK) Ltd v Vallana Shipping Corp [1994] 1 Lloyd's Rep. 669, 677*. The right of disposal provided for in the CMR Convention must be distinguished from the right of disposal referred to in the *Sale of Goods Act 1979* s.19.
- 676 Sch. art.6(1)(d) and (e).
- 677 If the carrier does not have adequate information in this regard, he is obliged (at least as a matter of English law) to make reasonable enquiries and take reasonable steps to locate the place of delivery and the consignee.
- 678 And payment of or security for charges outstanding and shown on the face of the consignment note: art.13(2). In *T Comedy (UK) Ltd v Easy Managed Transport Ltd [2007] EWHC 611 (Comm), [2007] 2 Lloyd's Rep. 397* at [52]–[53], [60], the Court held that art.13(2) effectively created a particular lien, allowing the carrier to withhold delivery pending the payment of or the provision of security for the unpaid carriage charges; insofar as the contract of carriage created a general lien, allowing the carrier to retain the goods pending payment of other debts, or a wider particular lien, the relevant provision would be void pursuant to art.41 (see below, para.38-148).
- 679 Contrast the use of bills of lading and warehouse warrants.
- 680 Given the liability regime imposed by the Convention: see below, para.38-126.
- 681 *Sze Hai Tong Bank Co v Rambler [1959] A.C. 576*; *Anon.* (1991) 26 E.T.L. 359, Court of Cassation, France. See also *Lacey's Footwear (Wholesale) Ltd v Bowler International Freight Ltd [1997] 2 Lloyd's Rep. 369*, where the driver delivered the goods to thieves notwithstanding being instructed otherwise; in this case, the carrier was held to be guilty of wilful misconduct because of the act of the driver by virtue of art.3. cf. *Vesta Forsikring A/S v JN Spedition A/S* (1998) 33 E.T.L. 70.
- 682 cf. *Stephenson v Hart (1828) 4 Bing. 476*.
- 683 cf. the common law position: *M'Kean v M'Ivor* (1870-71) L.R. 6 Ex. 30; Clarke, International Carriage of Goods by Road: CMR, 6th edn (2014), para.35.
- 684 Sch. arts 14(1), 15(1) and 15(3). In *Anon.* (2003) 38 E.T.L. 512, Oberster Gerichtshof Österreich, it was held that delivery was not prevented if the carrier was able to carry the goods to the destination by alternative means. In *NV Gebroeders Van Arde/NV SBTC - Sotramari* (2007) 43 E.T.L. 99, the Hof van Beroep te Antwerpen held that a driver who noticed a defect in the cooling system of the refrigerated container being carried, which was followed by a slight explosion, but did not notify the principal or ask for instructions in

accordance with art.14(1), but instead continued with the transport and delivered container to destination, was in breach of art.14(1).

685 Sch. art.14(2).

686 See below, para.[38-142](#).

687 Sch. art.17(1); see above, para.[38-093](#). Art.17(1) does not in any event exhaust the carrier's liabilities: see also art.7(3) (above, para.[38-123](#)) and art.21 (failure of carrier to collect "cash on delivery" charge from consignee). Other liabilities may arise under national law. See, generally, Clarke at Ch.5; *Anon.*, *Rechtbank te Rotterdam*, 30 March 2016, (2016) 52 E.T.L. 101.

688 Where the sender's loss would have been caused in any event even if the carrier fails in its duty, see *Anon.*, *Oberlandesgericht Frankfurt am Main*, 11 September 2019 (2019) 55 E.T.L. 33.

689 *Shell Chemicals UK Ltd v P & O Roadtanks Ltd* [1993] 1 Lloyd's Rep. 114, 116; affirmed on other grounds: [1995] 1 Lloyd's Rep. 297 (driver mistakenly collected a tank of detergent instead of contractual consignment of particular liquid chemical); *NV De Dijcker/NV Sonatra* (2007) 42 E.T.L. 427, Hof van Beroep te Antwerpen. See also *Anon.* (1993) 28 E.T.L. 917, where it was held that a claim based on inaccurate information provided by the carrier as to the location and expected arrival time of his vehicle was a claim under national law and not under the Convention. The Court of Appeal has confirmed that the CMR regime is inapplicable to personal injury suffered in the course of carriage: *Noble v RH Group Ltd Unreported 5 February 1993*. In *Tiense Suikerraffinaderij ea* (2014) 49 E.T.L. 337, the Hof van Cassatie van België held that other types of loss are governed by national law. See also *Dalesi v VC Europe BV* (2016) 52 E.T.L. 567, *Gerechtshof Arnheim-Leeuwarden*.

690 As to the meaning of "taking over the goods", see *NV De Dijcker/NV Sonatra* (2007) 42 E.T.L. 427, Hof van Beroep te Antwerpen. As to delivery and temporary storage during transit, see *Anon.* (2020) 56 E.T.L. 93, Oberster Gerichtshof Österreich.

691 Sch. art.15(1) provides that where circumstances prevent delivery of the goods after their arrival at the place designated for delivery, the carrier shall ask the sender for instructions. Where art.15(1) applies, there is no delivery within art.32(1)(a) and consequently no limitation period begins to run: *Moto Vespa SA v MAT (Britannia Express) Ltd* [1979] 1 Lloyd's Rep. 175, 180. cf. *Castrol Industries Belgium nv v De Rijke Vloeistoffentransport bv* (1999) 35 E.T.L. 544, Antwerp. See Clarke, International Carriage of Goods by Road: CMR, 6th edn (2014), para.37. Where there has been online payment fraud, delivery takes place when the goods are handed over to the person instructed by the sender, even if that person's identity is feigned: *Anon.*, *Oberlandesgericht Koblenz*, 9 May 2019 (2019) 55 E.T.L. 26.

692 *Stef Transport Rennes v D&M Fraser* [2018] EWHC 2756 (Comm) at [32].

693 *William Tatton and Co Ltd v Ferrymasters Ltd* [1974] 1 Lloyd's Rep. 203, 206; *Worldwide Carriers Ltd v Ardtran International Ltd* [1983] 1 Lloyd's Rep. 61, 63–64. See also *Forega Logistics Oii v Towarzystwo Ubezpieczen I Reasekuracji Allianz Polska Akcyjna* (2021) 57 E.T.L. 198. When a carrier has to return damaged goods for repairs, such return carriage is covered by the original contract which has not been executed by reason of the non-delivery

- of the goods at their destination: *SA Soffritti Milan v Usines Balteau* (1977) 12 E.T.L. 881, Court of Appeal, Brussels.
- 694 This time limit will be binding, provided that it has been agreed, even if it has not been included in the consignment note: *Anon.* (1994) 29 E.T.L. 97, *BGH*; cf. art.6(2)(f). This is not surprising, given art.5.
- 695 Sch. art.19. This article emphasises the need for diligence in the making up of complete loads when partial loads are taken. The provisions in the Convention regarding compensation for delay presuppose performance (albeit late) of the contract by the carrier. They do not apply when the carrier has not performed the contract of carriage at all: *Gondrand SA v Agrati* [1978] L.M.C.L.Q. 518, Court of Appeal, Milan.
- 696 Sch. art.20(1). cf. *Anon.* (2001) 37 E.T.L. 353, *BGH*. See Clarke at paras 56, 58.
- 697 See below, para.38-143.
- 698 *Worldwide Carriers Ltd v Ardtran International Ltd* [1983] 1 Lloyd's Rep. 61, 65; *ICI Plc v MAT Transport Ltd* [1987] 1 Lloyd's Rep. 354, 360. cf. *Royal Insurance Cie v Transport R Marcel* (1978) 13 E.T.L. 742, Tribunal de Commerce, Paris.
- 699 Sch. art.17(2), (3) and (4): see generally, *Ulster-Swift Ltd v Taunton Meat Haulage Ltd* [1975] 2 Lloyd's Rep. 502: affirmed [1977] 1 Lloyd's Rep. 346 CA; Clarke at Ch.6. As to the relationship between art.17(2) and art.17(3), see *Walek and Co v Chapman and Ball (International) Ltd* [1980] 2 Lloyd's Rep. 279, 282–283. See above, para.38-093.
- 700 Sch. art.18. See Clarke at Ch.6.
- 701 Whether the word “claimant” in this context refers to the person bringing the claim or those interested in the goods (that is, any person who might bring a claim under the contract) is unclear and subject to debate (Hill & Messent at para.6.16). Notwithstanding the unfortunate language used, the purpose of the Convention is to provide a defence to the carrier in circumstances where those interested in the goods or possessed of the right of disposal are responsible for the losses claimed. It is suggested that the latter construction is preferable (*Anon.* (1982) B.T. 73 App. Paris). Otherwise, absurd situations may arise, for example, where the carrier is faced with a claim by both the sender and the consignee. If the former construction were correct, the carrier could not avoid liability (if no other defence were available). If the sender or consignee is prejudiced by the latter construction, he might have a right of action against the other under the relevant contract between them. This broad interpretation is not so broad as to defeat claims against the carrier which clearly are not contemplated by the Convention. See, for example, *Noble v RH Group Ltd Unreported, 5 February 1993*. In *Datec Electronic Holdings Ltd v United Parcels Service Ltd* [2005] EWHC 221 (Comm), [2005] 1 Lloyd's Rep. 470 at [127]; reversed on other grounds [2005] EWCA Civ 1418, [2006] 1 Lloyd's Rep. 279 at [28]; cf. [2007] UKHL 23, [2007] 2 Lloyd's Rep. 114 at [29], the court held that the consignment of a package worth more than US\$50,000, pursuant to a contract which provided that the value of a package may not exceed US\$50,000, did not constitute a wrongful act for the purposes of art.17(2).
- 702 *Anon.* (1998) 34 E.T.L. 371, *BGH*.
- 703 Frozen meat carried on a refrigerated trailer has been held not to have any relevant inherent vice within the meaning of art.17(2): *Ulster-Swift Ltd v Taunton Meat Haulage Ltd* [1975] 2 Lloyd's Rep. 502, 505–506: affirmed [1977] 1 Lloyd's Rep. 346, 351–352 CA. cf. *Centrocoop*

*Export-Import SA v Brit European Transport Ltd [1984] 2 Lloyd's Rep. 618*. See further *Stef Transport Rennes v D&M Fraser [2018] EWHC 2756 (Comm)* at [33].

- 704 There is little English authority on this exemption. Where a carrier proved that goods and the trailer on which they were carried were stolen by violent armed robbers, he was held to have established his defence under art.17(2): *GL Cicatiello SRL v Anglo-European Shipping Services Ltd [1994] 1 Lloyd's Rep. 678*. The Continental courts have construed the carrier's exemptions under this head narrowly. See, generally, *Loewe (1976) 11 E.T.L. 311, 312–364*. Sudden, violent braking of the vehicle has been held insufficient to absolve the carrier from liability: *PVBAKC v PVBA Roeckens (1972) 7 E.T.L. 1058*, Court of Conciliation, Antwerp; *SA Soffriti Milan v Usines Balteau (1977) 12 E.T.L. 881*, Court of Appeal, Brussels. Theft of the goods similarly does not exempt the carrier: *Anon. (1969) 4 E.T.L. 888*, Bundesgerichtshof; *Kuhne and Nagel v Transports Internationaux Van Mieghem (1974) 9 E.T.L. 330*, Court of Commerce, Brussels; *NV La Préservatrice v Well Transport (1969) 14 E.T.L. 924*, Hof van Beroep, Antwerp; *Føroya Sjovatrygging v PK Transport (1998) 33 E.T.L. 52*, Supreme Court, Denmark; *Anon. (1998) 33 E.T.L. 60*, BGH; cf. *m/v Nord Cloud (2006) 41 E.T.L. 79*, Hof van Beroep te Antwerpen. However, a "wildcat", unlawful strike has been held to relieve the carrier (*NV Westvlees v NV Saelens Intertransport Sitra (1997) 32 E.T.L. 606*). The carrier must particularise the unavoidable circumstances. If, e.g. the cause of a fire on a vehicle is unknown, the carrier's liability remains: *Transport van de Nederlanden v Zeilemaker's Transportbedrijf (1967) 2 E.T.L. 1013*, Arrondissementsrechtbank, Alkmaar. The contributory negligence of other road users may not be a circumstance which the carrier could not avoid within the meaning of art.17(2): *Gebr H C en C J in 'T Veen NV v Haluco BV [1978] L.M.C.L.Q. 517*, Court of Appeal, The Hague. A carrier has been exempted from liability under art.17(2) where goods were damaged or lost by reason of a traffic accident which the driver of the vehicle on which they were laden could not avoid under the circumstances even with the utmost care: *Anon. (1975) 10 E.T.L. 516*, Bundesgerichtshof. A tyre puncture has also been held to relieve a carrier of liability when the tyres were in good condition and had been checked both before and during the course of the journey: *NV Maatschappij van Assurantie v A J Koeneman (1966) 1 E.T.L. 137*, Arrondissementsrechtbank, Rotterdam. cf. *Anon. (1993) 28 E.T.L. 293*, Hof Antwerpen. However, in *'S-Hertogenbosch (2014) 49 E.T.L. 701*, the Gerechtshof held that a principal carrier was liable for the actions of a fraudster who pretended to be someone else and who was engaged by the principal carrier through a digital freight exchange system and that the carrier could not invoke this exemption, because it had chosen to use the exchange.
- 705 1965 Act Sch. art.18(1). This burden was discharged in *Centrocoop Export-Import SA v Brit European Transport Ltd [1984] 2 Lloyd's Rep. 618*. Under art.17(3) the carrier is not relieved of liability if the condition of the vehicle used by him to perform the carriage was defective. See *Walek & Co v Chapman Ball (International) Ltd [1980] 2 Lloyd's Rep. 279*. In addition, the carrier will not be able to avoid liability if the vehicle is unsuitable for the carriage of the particular goods in the carrier's charge: *Anon. (1994) 29 E.T.L. 669*, Cass.
- 706 *Michael Galley Footwear Ltd v Iaboni [1982] 2 All E.R. 200, 206*; *Thermo Engineers Ltd v Ferrymasters Ltd [1981] 1 W.L.R. 1470, 1478–1479*; *NV Valkeniersnatie v NV International*

- Services and Freightforwarding* (2006) 41 E.T.L. 272, Hof van Beroep te Antwerpen. cf. *Sidney G Jones Ltd v Martin Bencher Ltd* [1986] 1 Lloyd's Rep. 54.
- 707 707 *JJ Silber Ltd v Islander Trucking Ltd* [1985] 2 Lloyd's Rep. 243, 247. Indeed, in The Netherlands, it has been held that where the carrier parked his lorry at night beside the gates of an illuminated industrial park and failed to drive for a further 50–60 km to a secure parking area, even though so to do would have breached—without any danger to road safety—the rules as to driving time, the carrier had not demonstrated that he acted carefully to avoid the loss: *Gebr Oegema BV v Amev Schadeverzekering NV* (1998) 34 E.T.L. 82. See also *Anon.* (1998) 34 E.T.L. 109, BGH; cf. *Anon.* (1997) 33 E.T.L. 829, BGH; *Anon.* (2013) 49 E.T.L. 334, Oberster Gerichtshof Österreich.
- 708 708 *JJ Silber Ltd v Islander Trucking Ltd* [1985] 2 Lloyd's Rep. 243, 247. In *GL Cicatiello SRL v Anglo European Shipping Services Ltd* [1994] 1 Lloyd's Rep. 678, the court rejected the claimants' suggestions that the carrier should have had installed a variety of security devices, had a second driver and sought a secure lorry park on the motorway from Rome to Naples, because the loss would have occurred in any event. cf. *M. Bardiger Ltd v Halberg Spedition APS* Unreported 26 October 1990; *National Semiconductors (UK) Ltd v UPS Ltd* [1996] 2 Lloyd's Rep. 212.
- 709 709 Sch. art.17(3). See *NW Ewals Cargo Care v Lear Corp Ltd* (2009) 45 E.T.L. 426, Hof van Beroep te Antwerpen. Given its subject matter and its location within the article, this provision does not apply to the defences under art.17(4): Clarke, International Transport, para.75f. See *Anon.* (2001) 38 E.T.L. 131, Oberster Gerichtshof Österreich; *Anon.* (2004) 39 E.T.L. 244, Oberster Gerichtshof Österreich; *NV De Dijcker/NV Sonatra* (2007) 42 E.T.L. 427, Hof van Beroep te Antwerpen.
- 710 710 *Anon.* (2007) 42 E.T.L. 766, Bundesgerichtshof.
- 711 711 This exemption was construed strictly in *Tetroc Ltd v Cross-Con (International) Ltd* [1981] 1 Lloyd's Rep. 192. cf. *Anon.*, App. Paris 19.10.93 (1993) B.T. 792. See also *Aquascutum Ltd v Europa Freight Corp* Unreported 20 November 1985; *Anon.*, Oberster Gerichtshof Österreich, 27 April 2016, (2016) 51 E.T.L. 560.
- 712 712 Whilst many decisions of Continental courts on the interpretation of art.17(4)(c) have been reported, these courts have differed widely in their approach. There has been a tendency to introduce legal concepts drawn from the particular municipal law. Some decisions suggest that the sender is always responsible for loading and stowage. Others make the carrier responsible and suggest that he has been guilty of a wrongful act and neglect if he has not checked loading and stowage, unless the parties agree contractually otherwise (*Anon.*, Oberster Gerichtshof Österreich, 6 July 2016, (2016) 51 E.T.L. 565), carried out by the sender. See, e.g. *Anon.*, Bundesgerichtshof, 19 March 2015, (2016) 51 E.T.L. 99. See *Wijffels* (1976) 11 E.T.L. 208, 211–229, for an analysis of Continental decisions interpreting art.17(4)(c) in 12 different ways. Whilst CMR does not expressly provide that unloading must be performed by the carrier, the carrier has been held responsible for unloading in the absence of stipulations to the contrary or exemptions resulting from the nature of the goods: *PVBA Wanman and Zorn v Transport Internationaux L'Essor Maritime Français* (1976) 11 E.T.L. 231, Hof van Beroep, Ghent. If the carrier notices during the carriage that the goods have been packed defectively within the meaning of art.17(4)(b) he must

take all steps to avoid damage to the goods. Failure to do so will result in liability for any damage being apportioned between the carrier and the sender: *Anon.* (1976) 11 E.T.L. 261, Oberlandesgericht, Saarbrucken. A carrier who undertakes to unload goods is liable for the whole operation even if that carrier is a successive carrier: *Anon.* (1993) 28 E.T.L. 286, Hof Brussel. He should refuse to unload if in his view it is likely to prove dangerous. Alternatively, he should at least enter reservations: *SA Polysar France v Booy Clean Belgium* (1977) 12 E.T.L. 293, Commercial Court, Antwerp. Art.8 requires the carrier to check the condition of the goods and their packaging. Further, it has been held that art.17(4)(c) does not exonerate a carrier from checking the stowage of the goods performed by the sender. If the carrier performs the carriage, notwithstanding obvious inadequacies or defects in the stowage, the carrier will be liable for the resultant damage: *Anon.* (1993) 28 E.T.L. 618, Cass.; *GIE La Réunion Européene v SA Warin* (1995) 30 E.T.L. 688, Cass. However, it may be that the carrier is under no obligation to check the loading or stowage of the goods, if adequately performed by one who is accustomed to such operations (i.e. a specialist): *Anon.* (1993) 28 E.T.L. 768, Rechtbank van Koophandel te Antwerpen. See *Cigna Insurance Co of Europe v Intercargo NV* (1999) 34 E.T.L. 264. On the other hand, in *Anon.* (2007) 42 E.T.L. 766, Bundesgerichtshof, it was held that the carrier's liability would be reduced pursuant to art.17(5) where the carrier stowed the goods but subject to the sender's supervision.

- 713 The carrier was relieved of liability under this head in *Centrocoop Export-Import SA v Brit European Transport Ltd* [1984] 2 Lloyd's Rep. 618. As to the breadth of this defence, see *W Donald & Son (Wholesale Meat Contractors) Ltd v Continental Freeze Ltd*, 1984 S.L.T. 182; *Anon.* (2013) 49 E.T.L. 213, Oberster Gerichtshof Österreich.
- 714 See art.18(5) and *Hans Johan Kosta v Samson Transport Co A/S* (1997) 32 E.T.L. 230, Denmark.
- 715 Sch. art.18(2), (3). Where a sender of dangerous goods has not informed the carrier of the nature of the danger and the necessary precautions and where this information has not been entered in the consignment note, the sender or the consignee has the burden of proving that the carrier knew the nature of the danger: art.22(1). The phrase “*could be attributed to*” means that the carrier need only prove that one or more of the excluded matters relied upon could plausibly have caused the damage, not that on a balance of probabilities the excluded matter did cause the damage: *Exportadora Valle de Colina SA v AP Moller-Maersk A/S* [2010] EWHC 3224 (Comm) at [24]–[26]; *Stef Transport Rennes v D&M Fraser* [2018] EWHC 2756 (Comm) at [34]. cf. *Hijka BV v Vermeulen* [1978] L.M.C.L.Q. 650 DC, Utrecht; *GIE Law Réunion Européene v SA Warin* (1995) 30 E.T.L. 688, Cass. See also *Hans Johan Kosta v Samson Transport Co A/S* (1997) 32 E.T.L. 230, Denmark. The carrier need not have entered reservations in the consignment note: *van Asten bvba v Mercator nv* (1999) 35 E.T.L. 386, Hof Cass., Belgium.
- 716 *Ulster-Swift Ltd v Taunton Meat Haulage Ltd* [1977] 1 Lloyd's Rep. 346, 352; *Exportadora Valle de Colina SA v AP Moller-Maersk A/S* [2010] EWHC 3224 (Comm) at [24]–[26].
- 717 When the court is considering whether or not a carrier has proved that he took all steps incumbent on him in the circumstances pursuant to art.18(4), the court can take into account not only the evidence adduced by the carrier as to the steps taken but also evidence as to the soundness or otherwise of the goods at the time of loading. Where the goods have admittedly

deteriorated during the period of transport, the court is entitled to hold that the carrier has failed to discharge the burden of proof on him under art.18(4) if, on all the evidence, it was more likely than not that he had failed to take some unidentified step incumbent on him: *Ulster-Swift Ltd v Taunton Meat Haulage Ltd* [1977] 1 Lloyd's Rep. 346, 353. The court considered that this interpretation of art.18(4) was consistent with the view that in English law a claimant need not prove what was the precise, specific event by reason of which his goods were lost whilst in the custody of the carrier: cf. *Houghland v RR Low (Luxury Coaches) Ltd* [1962] 1 Q.B. 694. The court found that the carrier had discharged this burden of proof under art.18(4) in *Centrocoop Export-Import SA v Brit European Transport Ltd* [1984] 2 Lloyd's Rep. 618. See also *Anon.*, Oberlandesgericht Zweibrücken, 12 March 2019 (2019) 54 E.T.L. 449.

- 718 Sch. art.17(5); *Anon.* (2007) 42 E.T.L. 766, Bundesgerichtshof.
- 719 Sch. art.7(1).
- ⑤720 Sch. art.10. If the goods are in bulk, there will be no defective packing: *Anon.* (2020) 57 E.T.L. 191, Oberster Gerichtshof Österreich.
- 721 Sch. art.11(2).
- 722 Sch. art.22(2).
- 723 cf. *Shell Chemicals UK Ltd v P & O Roadtanks Ltd* [1993] 1 Lloyd's Rep. 114; affirmed on other grounds [1995] 1 Lloyd's Rep. 297.
- 724 *RH & D International Ltd v IAS Animal Air Services Ltd* [1984] 1 W.L.R. 573; *United Carriers Ltd v Heritage Food Group (UK) Ltd* [1995] 2 Lloyd's Rep. 269.
- 725 Sch. arts 23–26.
- 726 cf. *Shell Chemicals UK Ltd v P & O Roadtanks Ltd* [1993] 1 Lloyd's Rep. 114; affirmed on other grounds [1995] 1 Lloyd's Rep. 297. However, the time limitation provisions of the CMR Convention do apply to claims against the sender: art.32(1)(c); for example, see *Anon.*, *Arrond. Rotterdam* 5 June 1992 (1993) S. & S. No.107; *AXA Assurances SA v Jan de Poorter bv* (2000) 35 E.T.L. 381, Hoge Raad der Nederlanden; cf. *Van Vlierden L v Engelen V* (2000) 35 E.T.L. 671, Hof Cass., Belgium.
- ⑤727 Sch. art.23(1). See, generally, Clarke at Ch.8. CMR only provides compensation for loss of, or damage to, the goods carried. A claim for compensation for damage done, e.g. to the sender's or the consignee's tanks, cannot be brought within CMR: *English and American Insurance Co Ltd v Transport Nagels* (1977) 12 E.T.L. 420, Commercial Court, Antwerp. In *NV Valkeniersnatie v NV International Services and Freightforwarding* (2006) 41 E.T.L. 272, Hof van Beroep te Antwerpen, it was held that where a carrier was instructed to take out 100 per cent insurance, but failed so to do, he could not rely on the limits set out in art.23. See further *Anon.* (2019) 55 E.T.L. 271 (BGH).
- ⑤728 Sch. art.23(2). Such exchange, market or normal value is a reference to the standard rate for the goods and ignores the peculiar situation of the goods in question: *Anon.* (1993) 28 E.T.L. 740, BGH. The current market price has been held not to include, e.g. any excise duty payable on the product sold in a home market: *James Buchanan and Co Ltd v Babco Forwarding and*

*Shipping (UK) Ltd [1977] Q.B. 208 CA*; unanimously affirmed on this point: *[1978] A.C. 141*. *Contra, Anon. (1994) 29 E.T.L. 360*, Supreme Court of Denmark.

⑥729 Sch. art.23(3) as amended by the *Carriage by Air and Road Act 1979* s.4(2). See *Topdanmark Forsikring A/S v DSV Road A/S* (2016) 51 E.T.L. 93, Supreme Court of Denmark; *Anon. (2018) 53 E.T.L. 453*, Bundesgerichtshof; *Anon. (2018) 54 E.T.L. 218*, Oberster Gerichtshof Österreich. This section gave effect as part of English law, with effect from 18 December 1980, to a Protocol to CMR which entered into force on that date: see above, para.38-118. Prior to that time the unit used in the Convention was the gold franc: this franc had the same meaning as in the rail Conventions CIM, CIV and the Additional Convention CAV, which Conventions were abrogated when the new rail Convention COTIF entered into force on 1 May 1985: see above, paras 38-079—38-081. The Protocol which effected the changeover to units of account also added a new paragraph to CMR which became art.23(7) and which provided that the unit of account in the Convention was to be the Special Drawing Right (SDR) as defined by the International Monetary Fund (“IMF”). The amount specified in art.23(3) is to be converted into the national currency of the State of the court seised of the case on the basis of the value of that currency on the date of the judgment or the date agreed upon by the parties. When, however, the amounts on which compensation under the Convention is based are not expressed in the currency of the country in which payment is claimed, conversion shall be at the rate of exchange applicable on the day and at the place of payment of compensation: *1965 Act Sch. art.27(2)*.

⑥730 Sch. art.24. See *Anon. (2020) 56 E.T.L. 433*, Bundesgerichtshof; *Knapfield v CARS Holdings Ltd [2022] EWHC 1437 (Comm)* at [74]–[78].

⑥731 Sch. art.26.

⑥732 Sch. art.23(4). The expression “other charges incurred in respect of the carriage” was construed by reference to the French text (“les autres frais encourus à l’occasion du transport”) as meaning “any other expenses which the owner of the goods has to pay as a result of the carriage of the goods”: *James Buchanan & Co Ltd v Babco Forwarding and Shipping (UK) Ltd [1977] Q.B. 208* at 224, per Lawton LJ; affirmed by the House of Lords *[1978] A.C. 141*. Lord Wilberforce (at 154) agreed that the English and French versions of art.23(4) are equally broad and loosely-drafted. They should, in his Lordship’s opinion, be interpreted broadly so as to cover charges arising in the course of the removal from the failure of the carrier to carry in accordance with the contract of carriage. Viscount Dilhorne (at 158) construed the words “in respect of” as meaning “in consequence of” or “arising out of” in this context. See Clarke, International Carriage of Goods by Road: CMR, 6th edn (2014), para.98; *Anon. (2004) 39 E.T.L. 93*, Bundesgerichtshof. A survey fee incurred as part of the cost of realising the damaged value of goods falls within art.23(4): *ICI Plc v MAT Transport Ltd [1987] 1 Lloyd’s Rep. 354, 362*; as do premiums for the insurance of the goods carried: *M Bardiger Ltd v Halberg Spedition Aps Unreported, 26 October 1990*. As to charges and duties due to the non-reconciliation of documents after the theft of goods during transport

see, *Philip Morris Holland BV v Transportgroep Van der Graaf BV* (2006) 41 E.T.L. 804, Hoge Raad der Nederlanden. However, the cost of cleaning or destruction of the goods does not fall within art.23(4): *PB v O en A* (1999) 35 E.T.L. 566, Ghent. The plaintiff will be entitled to a refund under art.23(4) where the carrier is guilty of wilful misconduct, although the limitation “no further damages shall be payable” will not, in that event, apply: *Lacey's Footwear (Wholesale) Ltd v Bowler International Freight Ltd* [1997] 2 Lloyd's Rep. 369. See also *Transport Van Laer NV v Comexas Benelux NV* (2002) 37 E.T.L. 475; *Sandeman Coprimar SA v Transitos y Transportes Integrales SA* [2003] EWCA Civ 113, [2003] 2 W.L.R. 1496; *Philip Morris Products SA v Smidl SRO Unreported, 17 November 2017; Anon., Gerechtshof 'S-Hertogenbosch, 30 April 2019* (2019) 54 E.T.L. 540. In *JTI Polska Sp Zoo v Jakubowski* [2021] EWHC 1465 (Comm), the High Court granted a certificate pursuant to s.12 of the Administration of Justice Act 1969 allowing an application to be made for permission to appeal directly to the Supreme Court concerning the correctness of the decision in *James Buchanan v Babco* that art.23(4) extended to excise duty.

- ⑤733 *William Tatton Co Ltd v Ferrymasters Ltd* [1974] 1 Lloyd's Rep. 203. However in *James Buchanan & Co Ltd v Babco Forwarding and Shipping (UK) Ltd* [1977] Q.B. 208 at 215, the Court of Appeal (per Lord Denning MR) expressed the opinion that, in light of their broader interpretation of the Convention, return carriage charges and storage costs should be allowed; affd [1978] A.C. 141. See also *Thermo Engineers Ltd v Ferrymasters Ltd* [1981] 1 W.L.R. 1470, 1478.

- ⑤734 *William Tatton and Co Ltd v Ferrymasters Ltd* [1974] 1 Lloyd's Rep. 203.

- ⑤735 Sch. art.23(5). The compensation which may be awarded pursuant to this provision need not be the carriage charges themselves; the compensation is limited in quantum to the amount of those charges. The provision refers to “damage” resulting from delay. It is suggested that this is a reference to any financial deprivation suffered by the claimant, rather than to physical damage sustained by the goods: *Anon. (1993)* 28 E.T.L. 740, BGH. The claimant may recover both damages sustained directly or losses incurred as a result of his liability to another party: *Anon. (1994)* 29 E.T.L. 97, BGH. If goods are lost as a result of delay, it has been held that the limitation provisions under art.23(1)–(4) on the one hand and under art.23(5) on the other hand may be aggregated (*Deniz-Er v NV Soncotra* (2007) 42 E.T.L. 275, Hof van Beroep te Gent). This decision is to be doubted; see Clarke, International Carriage of Goods by Road: CMR, 6th edn (2014), para.59. See also *Anon. (2019)* 55 E.T.L. 271 (BGH).

- ⑤736 Sch. art.25. See generally, *William Tatton and Co Ltd v Ferrymasters Ltd* [1974] 1 Lloyd's Rep. 203. See also *Anon. (2020)* 56 E.T.L. 433, Bundesgerichtshof.

- ⑤737 Which should have been entered on the face of the consignment note (art.6(2)(c)). Given art.4, it is unlikely that the failure to enter the COD charge on the consignment note will deprive any contractual requirement that the charge be collected against delivery to the consignee of its force.

①738 Sch. art.21. In *Eastern Kayam Carpets Ltd v Eastern United Freight Ltd Unreported 6 December 1983*, the court held that such a charge was not limited to freight and could extend to the price of the goods. The charge to be collected by the carrier could be in cash or in the form of a draft (*Anon. (1970) 5 E.T.L. 670*, Arrond. Breda). If the carrier is ordered to deliver the goods against receipt of a certified cheque, this order must be obeyed with all reasonable care to ensure that the carrier receives a certified cheque: *Anon. (1994) 29 E.T.L. 464*, Hof van Cassatie van België; cf. *Eastern Kayam Carpets Ltd v Eastern United Freight Ltd Unreported 6 December 1983*; *Anon. (1996) 31 E.T.L. 404*, BGH. The COD charge would not include any document which did not represent payment of the charge (*Eastern Kayam Carpets Ltd v Eastern United Freight Ltd*). See also *Coveretex v Dendertrans Int* (1997) *32 E.T.L. 602*.

①739 s.3.

①740 Sch. art.29(1); Although the carrier may still continue to rely on those provisions which “fix” his liability such as arts 23(1), (2) and 27(1), (2): *Lacey’s Footwear (Wholesale) Ltd v Bowler International Freight Ltd [1997] 2 Lloyd’s Rep. 369*; cf. art.28(1). Where art.29 applies to remove any limitation on liability, the plaintiff may recover loss of profits (*Lacey’s Footwear (Wholesale) Ltd v Bowler International Freight Ltd*) or interest in excess of the 5 per cent limit provided for in art.27 (*B. Paradise Ltd v Islander Trucking Ltd Unreported 28 January 1985*). Such losses might be calculated in accordance with the applicable national law or arts 17–28: *Anon. (2005) 40 E.T.L. 729*, Bundesgerichtshof-Deutschland; *Anon. (2010) 45 E.T.L. 625*, Bundesgerichtshof. In *Antwerp United Diamonds BVBA v Air Europe [1995] 2 Lloyd’s Rep. 224*, the Court of Appeal held, in the context of the Carriage By Air Act 1961, that the “misconduct” provision (similar to art.29) would permit compensation to be awarded in excess of the limit imposed by virtue of a special declaration of interest (which may be made under CMR pursuant to arts 24 and 26).

①741 As to the requirement of a causal connection, see *Anon. (2017) 53 E.T.L. 297*, Cour de Cassation de France.

①742 Sch. art.29(1). See Clarke at para.101; *Datec Electronic Holdings Ltd v United Parcels Service Ltd [2005] EWCA Civ 1418, [2006] 1 Lloyd’s Rep. 279, [2007] UKHL 23, [2007] 2 Lloyd’s Rep. 114*; *Van Wijngen International BV v EFB European Freight Brokers VOF ea (2017) 52 E.T.L. 575, Rechtbank Rotterdam*.

①743 Sch. art.29(2).

①744 *TNT Global SpA v Denfleet International Ltd [2007] EWCA Civ 405, [2007] 2 Lloyd’s Rep. 504* at [8]–[11], [25]; *Knapfield v CARS Holdings Ltd [2022] EWHC 1437 (Comm)* at [95]–[100].

①745

- Knapfield v CARS Holdings Ltd [2022] EWHC 1437 (Comm)* at [95]–[100].
- ⑦46 *Sidney G Jones Ltd v Martin Bencher Ltd [1986] 1 Lloyd's Rep. 54, 58–60*. The court applied the classic English authorities (such as *Lewis v Great Western Railway (1877) 3 Q.B.D. 195*; and *Forder v Great Western Railway [1905] 2 K.B. 532*) on “wilful misconduct” as a matter imposing liability on a railway where goods were carried at owner’s risk. The court also relied on the well-known direction of Barry J as to the meaning of the phrase “wilful misconduct” in the context of carriage by air under the original Warsaw Convention in *Horabin v British Overseas Airways Corp [1952] 2 All E.R. 1016*; see above, paras 37-038—37-042.
- ⑦47 *TNT Global SpA v Denfleet International Ltd [2007] EWCA Civ 405, [2007] 2 Lloyd's Rep. 504*. See also *Anon. (2007) 43 E.T.L. 86*, Bundesgerichtshof, where it was held that if the driver dozed off, that of itself was not wilful misconduct unless it was proved that the driver ignored clearly recognised symptoms of fatigue.
- ⑦48 *Texas Instruments Ltd v Nason (Europe) Ltd [1991] 1 Lloyd's Rep. 146*. cf. *M Bardiger Ltd v Halberg Spedition APS Unreported 26 October 1990; Anon. (1993) 28 E.T.L. 762*, Rechtbank van Koophandel te Brussel. See also *National Semiconductors (UK) Ltd v UPS Ltd [1996] 2 Lloyd's Rep. 212, 214–215; Lacey's Footwear (Wholesale) Ltd v Bowler International Freight Ltd [1997] 2 Lloyd's Rep. 369*, where the carrier’s employee’s misconduct was not intentional, but “reckless carelessness”; *Alena Ltd v Harlequin Transport Services Ltd (2002) 38 E.T.L. 218* at [29]–[31]. cf. *BVBA Transport Nys v NV Cigna Insurance Co of Europe EA (1996) 31 E.T.L. 840*, Brussels; *Nordland Transportkontor GmbH v Storebrand Skadeforsikring AS (1996) 31 E.T.L. 563*, Norway; *Anon. (1996) 31 E.T.L. 703, BGH; Micro Anvika Ltd v TNT Express Worldwide (Euro Hub) NV [2006] EWHC 230 (Comm); Anon. (2006) 41 E.T.L. 668, BGH*. See *Wijffels (2001) 36 E.T.L. 653*, where there is a brief survey of the differing interpretations given to “wilful misconduct” in the Contracting States. In Spain, Portugal, Belgium and The Netherlands, the carrier will not usually be deprived of his right of limitation if there has been no intention to deceive. In *Anon. (2012) 47 E.T.L. 556*, the Hoge Raad der Nederlanden held that in order that the limitation should not apply, the carrier must have at least acted recklessly and with knowledge that damage would probably result. See also *Topdanmark Forsikring A/S v DSV Road A/S (2016) 51 E.T.L. 93, Supreme Court of Denmark; Anon. (2019) 55 E.T.L. 547, Oberlandesgericht Wien*.
- 749 Sch. arts 23–26.
- 750 Sch. art.28(1).
- 751 For example, the failure by the carrier to perform the contract at all: *Anon. (1994) B.T. 636 Comm. Carpentras; Anon. (1994) B.T. 736 App. Toulouse*; cf. *Anon. (1975) 10 E.T.L. 75, BGH*. See also *Shell Chemicals UK Ltd v P & O Roadtanks Ltd [1993] 1 Lloyd's Rep. 114; affirmed on other grounds [1995] 1 Lloyd's Rep. 297; Anon. (1993) 28 E.T.L. 917, BGH; Noble v RH Group Ltd Unreported 5 February 1993*, where the Court of Appeal commented upon a late Respondents’ Notice, holding that the Convention was not intended to regulate the carrier’s liability for personal injury occurring during the carriage. See *Lacey's Footwear*

- (Wholesale) Ltd v Bowler International Freight Ltd [1997] 2 Lloyd's Rep. 369, as to the carrier's failure to comply with his obligation to insure the goods.
- 752 This provision creates an entitlement to interest. The court has no discretion in the matter: *Elektronska Industrija Oour TVA v Transped Oour Kintinentalna Spedicna* [1986] 1 Lloyd's Rep. 49, 53. See also *Frans Maas Groningen BV v Delta Lloyd Schadeverzekering NV* (1998) 34 E.T.L. 254, Netherlands; *Anon.* (2012) 48. E.T.L. 424, Oberster Gerichtshof Österreich. Art.27 also applies to claims under art.37: *Anon.* (2004) 39 E.T.L. 517, BGH.
- 753 It seems also that interest at 5 per cent will run until payment is made (art.27(2)). Accordingly, it is unlikely that interest at the Judgments Act 1838 rate will be allowed, although it appears that such interest was awarded at first instance in *James Buchanan & Co Ltd v Babco Forwarding and Shipping (UK) Ltd* [1978] 1 Lloyd's Rep. 119 HL.
- 754 *William Tatton and Co Ltd v Ferrymasters Ltd* [1974] 1 Lloyd's Rep. 203, 207; *Worldwide Carriers Ltd v Ardtran International Ltd* [1983] 1 Lloyd's Rep. 61, 66; *ICI Plc v MAT Transport Ltd* [1987] 1 Lloyd's Rep. 354, 361.
- 755 *Sidney G Jones Ltd v Martin Bencher Ltd* [1986] 1 Lloyd's Rep. 54. cf. *Dresser (UK) Ltd v Falcongate Freight Management Ltd* [1991] 2 Lloyd's Rep. 557, where in the context of the Civil Jurisdiction and Judgments Act 1982, service of the writ was held to be the operative date.
- 756 s.14(2); see also Sch. arts 3, 28(2) and 34. See *M Bardiger Ltd v Halberg Spedition Aps Unreported 26 October 1990*. CMR, however, will not apply to an existing relationship between the carrier and a purchaser of the goods carried, where the latter is not interested in the contract of carriage: *Atlanta Companies, Judge & Dolph Ltd v Pvba Transport Leopold Laureys & Zonen* (1996) 31 E.T.L. 843, Ghent. In *Royal & Sun Alliance Insurance Plc v MK Digital Fze (Cyprus) Ltd* [2006] EWCA Civ 629, [2006] 2 Lloyd's Rep. 110 at [3], the Court of Appeal held that the contract was not one to which the CMR Convention applied, because there was insufficient evidence that the claimant was a carrier, as opposed to a commissionnaire de transport.
- 757 Sch. art.3. *Thermo Engineers Ltd v Ferrymasters Ltd* [1981] 1 Lloyd's Rep. 200, 206; *Noble v RH Group Ltd Unreported 5 February 1993*; *Lacey's Footwear (Wholesale) Ltd v Bowler International Freight Ltd* [1997] 2 Lloyd's Rep. 369. See also *Anon.* (1995) 30 E.T.L. 678, Tribunal Supremo (Civil) de España. In 'S-Hertogenbosch' (2014) 49 E.T.L. 701, the Gerechtshof held that a principal carrier was liable for the actions of a fraudster who pretended to be someone else and who was engaged by the principal carrier through a digital freight exchange system.
- 758 Sch. art.28(2) which affords to such third parties the benefit of the CMR exclusion or limitation of liability provisions in relation to extra-contractual liability. Although the Convention does not so provide, it would be reasonable to assume that this protection of the exclusion and limitation provisions would extend to the third parties for whom the carrier is responsible under art.3.
- 759 See, generally, *Hill* (1976) 11 E.T.L. 182, 192.
- 760 *Ulster-Swift Ltd v Taunton Meat Haulage Ltd* [1977] 1 Lloyd's Rep. 346, 358–359, CA. cf. *Moto Vespa SA v MAT (Britannia Express) Ltd* [1979] 1 Lloyd's Rep. 175, 181; *Elektronska Industrija Oour TVA v Transped Oour Kintinentalna Spedicna* [1986] 1 Lloyd's Rep. 49.

- 761 See *M Bardiger Ltd v Halberg Spedition Aps* Unreported 26 October 1990, where it was held that the CMR Convention does not apply to freight forwarders and any contract which they make, other than a contract of carriage.
- 762 *Tetroc Ltd v Cross-Con (International) Ltd* [1981] 1 Lloyd's Rep. 192, 198 (freight forwarders held to be CMR carriers on the facts); *Kala Ltd v International Freight Services (UK) Ltd* Unreported 7 June 1988. See, generally, Clarke, International Carriage of Goods by Road: CMR, 6th edn (2014), para.10a. Where a CMR consignment note named a company as a carrier, the English court concluded that this was evidence of the identity of the carrier: *Aqualon (UK) Ltd v Vallana Shipping* [1994] 1 Lloyd's Rep. 669. There have been many divergent decisions of the courts of the Continental parties to CMR on the status of freight forwarders: see, e.g. *NV Koeltransport Rotterdam v Don Augustin Arxè* (1970) 5 E.T.L. 587, Gerechtshof, The Hague; *Anon.* (1971) 6 E.T.L. 273, Arrondissementsrechtbank, Rotterdam; *PVBA Mallentjer v NV Ruys & Co* (1975) 10 E.T.L. 235, Hof van Beroep, Brussels; *Schueremans v General Accident Fire and Life Ass Corp* (1972) 7 E.T.L. 865, Hof van Beroep, Brussels; *NV Marubeni-Lida v PVBA Kuhne and Nagel* (1974) 9 E.T.L. 608, Hof van Beroep, Brussels. A commission agent has been held not to be a carrier under the Convention: *Phoenix Assurance Ltd v NV Muller* (1969) 4 E.T.L. 1026, Tribunal de Commerce, Antwerp. As to the characteristics of a forwarding agency contract as opposed to a contract of carriage under the Convention, see *NV Hollandsche Assurantie v NV Gerlach Co* (1969) 4 E.T.L. 151, Gerechtshof, Amsterdam. A person to whom both international carriage of goods and the import and customs formalities are entrusted remains a CMR carrier even when he employs third parties to perform the actual carriage and personally only sees to the import and customs formalities: *Graphische Technik Bremen v NV Schenkers & Co* (1977) 12 E.T.L. 411, Commercial Court, Antwerp. The fact that a person describes himself as a forwarder and as offering "specialised trading services" and "full load and groupage services" does not imply that he is not prepared to make a contract of carriage as a principal. The method of invoicing may be of evidentiary significance: *Elektronska Industrija Oour TVA v Transped Oour Kintinentalna Spedicna* [1986] 1 Lloyd's Rep. 49 at 52–53. Any party effecting carriage who draws up a freight invoice must by virtue of CMR art.1 be held to be a carrier rather than a forwarding agent, even if some other person carries out the actual operation of carriage: *SA Chemin de Fer Industriel Groups v Geszait* (1978) 13 E.T.L. 285, Commercial Court, Brussels. An organiser of a particular international carriage by road operation who was not instructed to perform the carriage personally but was told only to make arrangements for the carriage is an agent to whom CMR provisions are not applicable: *Soc Fratelli Gondrand v Lebole-Euroconf* (1978) 13 E.T.L. 407, Court of Appeal, Paris. See above, paras 38-005—38-006.
- 763 Sch. art.12(7). It is likely that the sender who has had the right of disposal would retain a title to sue, notwithstanding that the right of disposal has been acquired by the consignee. That is, both the sender and the consignee (and indeed any subrogated insurers) may claim damages on the basis of art.12: *Anon.* (1993) 28 E.T.L. 286, Hof Brussel. See the discussion in Hill & Messent, CMR: Contracts for the International Carriage of Goods by Road, 3rd edn (2000), para.5.8.

- 764 Sch. art.13(1). *Texas Instruments Ltd v Nason (Europe) Ltd [1991] 1 Lloyd's Rep. 146, 149*. The English text of this article is somewhat ambiguous. The French text, however, confirms the view expressed in the text as to the consignee's right of action in the event of delay. See, generally, Clarke at para.40. After goods have been delivered to the consignee, he has a right of action in respect of damage to the goods without being required to prove that he has himself suffered loss: *Transport Internationaux Van Mieghen v Kuhne and Nagel (1976) 11 E.T.L. 238*, Court of Appeal, Brussels. The consignee also has a right of action where his identity may be deduced from a document attached to the consignment note: *Anon. (1993) 28 E.T.L. 934*, Hof Antwerpen. See also *GM De Rooy & Zonen International Transportbedrijf Belgie v Philips Innovative Applications (2007) 42 E.T.L. 390*, Hof van Cassatie van Belgie.
- 765 Sch. art.34. Carriers of goods in separate lots under separate consignment notes and governed by separate contracts are not successive carriers under a single contract within the meaning of art.34, even if employed by the same employer. Hence the presence within the jurisdiction of the English court of one carrier will not justify service on another carrier out of the jurisdiction in respect of that employer's claim to be indemnified for damaged goods in contribution proceedings under art.39(2) (see below, paras 38-140—38-141); *Arctic Electronics (UK) Ltd v McGregor Sea and Air Services [1985] 2 Lloyd's Rep. 510*. In England, it has been held that a sea carrier, who was sub-contracted by the road carrier who accepted the goods, could be a successive carrier under art.34, if the sea carrier became a party to the single contract for the whole of the carriage: *Dresser (UK) Ltd v Falcongate Freight Management Ltd (1991) 26 E.T.L. 798*; contra *NV Agfa Gevaert v NV Rhenus Belgium (1989) 24 E.T.L. 574*, App. Anvers. See also *Flegg Transport Ltd v Brinor International Shipping and Forwarding Ltd [2009] EWHC 3047 (QB)*.
- 766 *PVBA Transcom v Sasse Europa Auto Transport (1975) 10 E.T.L. 419*, Commercial Court, Brussels.
- 767 *St Paul Fire and Marine Ins Co v SPRL Kuhne and Nagel (1975) 10 E.T.L. 548*, Commercial Court, Antwerp; *PVBA Wanman and Zorn v Transports Internationaux L'Essor Maritime Français (1976) 11 E.T.L. 231*, Hof van Beroep, Ghent.
- 768 See *Anon., Hoge Raad der Nederlanden, 11 September 2015, (2016) 51 E.T.L. 109*; *Laurijssen (2016) 51 E.T.L. 121*.
- 769 Sch. arts 1(1) and 34; *Ulster-Swift Ltd v Taunton Meat Haulage Ltd [1975] 2 Lloyd's Rep. 502, 508; affirmed [1977] 1 Lloyd's Rep. 346*. cf. *NV Travaca v Roba Ltd (1996) 31 E.T.L. 545*, Belgium; *Anon. (2002) 37 E.T.L. 809*, Oberster Gerichtshof Österreich.
- 770 *Muller Batavia Ltd v Laurent Transport Co Ltd [1977] 1 Lloyd's Rep. 411, 415*. *M Bardiger Ltd v Halberg Spedition Aps Unreported 26 October 1990*; *Union des Assurances de Paris v Planza Transports SA (1995) 30 E.T.L. 675*, Tribunal Federal Suisse; *Pauwels International nv v Alva Transport Salters nv (1999) 35 E.T.L. 432*, Mechelen. A successive carrier will be responsible for the acts of a sub-contractor (art.3). The sender has no right of action against a sub-contractor who is not also a successive carrier, under the contract of carriage between the sender and the carrier, at least under the CMR Convention and English law, although there may be a right of action under another national law (*NV Valkeniersnatie v NV International Services and Freightforwarding (2006) 41 E.T.L. 272*, Hof van Beroep te Antwerpen). The sender might have an extra-contractual claim against the sub-contractor, for example a claim

arising out of the bailment of the goods to the sub-contractor, which bailment may be subject to the terms of the CMR contract of carriage (see, for example, *The Pioneer Container [1994] 1 Lloyd's Rep. 593*; *The Mahkutai [1996] 2 Lloyd's Rep. 1*); *Spectra International Plc v Hayesoak Ltd [1997] 1 Lloyd's Rep. 153*, [1998] 1 Lloyd's Rep. 162; *Sandeman Coprimar SA v Transitos y Transportes Integrales SA [2003] EWCA Civ 113*, [2003] 2 W.L.R. 1496. In the event of an extra-contractual claim against the sub-contractor, the latter can rely on the Convention's limitation and exclusion provisions (art.28(2)). If the sender has no right of action against the sub-contractor, he can sue the carrier, who is responsible for the sub-contractor's acts and omissions.

- 771 *Ulster-Swift Ltd v Taunton Meat Haulage Ltd [1975] 2 Lloyd's Rep. 502, 508*; affirmed [1977] 1 Lloyd's Rep. 346, 358. *Aqualon (UK) Ltd v Vallana Shipping Corp [1994] 1 Lloyd's Rep. 669, 673*. It is possible that s.14(2)(d) of the 1965 Act extends the contract to persons for whom the carrier is responsible under art.3: *M Bardiger Ltd v Halberg Spedition Aps Unreported 26 October 1990*; contra, *Aqualon (UK) Ltd v Vallana Shipping Corp [1994] 1 Lloyd's Rep. 669, 673*. In *Harrison & Sons Ltd v RT Steward Transport Ltd (1993) 28 E.T.L. 747*, the court held, relying on the terms of s.14(2)(c) of the 1965 Act, that a "carrier" for the purposes of art.39 included a carrier who became a party to the contract of carriage whether by virtue of art.34 "or otherwise".
- 772 In *Harrison & Sons Ltd v RT Steward Transport Ltd (1993) 28 E.T.L. 747*, the Court held that the "consignment note" referred to in art.34 was a reference to the original consignment note issued by the first carrier, and not a consignment note issued during an intermediate leg of the contractual journey. cf. *Dresser (UK) Ltd v Falcongate Freight Management Ltd (1991) 26 E.T.L. 798*.
- 773 *SGS-Ates Componenti Elettronici SpA v Grappo Ltd [1978] 1 Lloyd's Rep. 281, 284*. See, generally, *Hardingham [1978] L.M.C.L.Q. 499*.
- 774 *Graphische Technik Bremen v NV Schenkers & Co (1977) 12 E.T.L. 411*, Commercial Court, Brussels; contra, *St Paul Fire and Marine Ins Co v SPRL Kuhne and Nagel (1975) 10 E.T.L. 419*, Commercial Court, Antwerp. *Harrison & Sons Ltd v RT Steward Transport Ltd (1993) 28 E.T.L. 747*; *Dresser (UK) Ltd v Falcongate Freight Management Ltd (1991) 26 E.T.L. 798*; *Parr v Clark & Rose Ltd, 2002 SCLR 222*. CMR art.4 dealing with the absence, irregularity or loss of the consignment note does not, seemingly, apply to the relationship between successive carriers.
- 775 *SGS-Ates Componenti Elettronici SpA v Grappo Ltd [1978] 1 Lloyd's Rep. 281* at 284.
- 776 *Coggins T/A PC Transport v LKW Walter International Transportorganisation AG [1999] 1 Lloyd's Rep. 255*.
- 777 Sch. art.36. See, generally, *Cummins Engine Co Ltd v Davis Freight Forwarding (Hull) Ltd [1981] 1 W.L.R. 1363, 1371 CA*; *M Bardiger Ltd v Halberg Spedition Aps Unreported 26 October 1990*; *Sandeman Coprimar SA v Transitos y Transportes Integrales SA [2003] EWCA Civ 113*, [2003] 2 W.L.R. 1496; *Rosewood Trucking Ltd v Balaam [2005] EWCA Civ 1461*, [2006] 1 Lloyd's Rep. 429; Clarke at para.50. The restrictions of art.36 do not apply in the event of a counterclaim or the raising of a set-off in proceedings concerning the contract of carriage. As to the difficulties of raising a set-off against a claim for freight, see

- United Carriers Ltd v Heritage Food Group (UK) Ltd [1995] 2 Lloyd's Rep. 269; Hollemon Special Transport & Project Cargo Srl v CO UK Shipping and Trading Ltd [2022] EWHC 1114 (Comm) at [13].*
- 778 *SGS-Ates Componenti Elettronici SpA v Grappo Ltd [1978] 1 Lloyd's Rep. 281, 284.*
- 779 *SA Precam v SPRL Independent Transport and Forwarding Agency (1979) 14 E.T.L. 664,* Tribunal de Commerce, Verviers. However, the carrier must accept the original consignment note in order to be treated as a successive carrier within the meaning of Ch.VI of the Convention: *Harrison & Sons Ltd v RT Steward Transport Ltd (1993) 28 E.T.L. 747; Dresser (UK) Ltd v Falcongate Freight Management Ltd (1991) 26 E.T.L. 798.* In France, it has been held that where a carrier has been instructed to perform the last leg of the carriage and that carrier does not participate in, but sub-contracts, the actual performance of this last leg, that carrier will not be a last carrier for the purposes of art.36: *Skandia Insurance Co Ltd v Theo Adams Expeditie en Transport (1995) 30 E.T.L. 685, Cass.*
- 780 In *Hatzl v XL Insurance Co Ltd [2009] EWCA Civ 223, [2010] 1 W.L.R. 470*, the Court of Appeal interpreted “defendant” as excluding insurers or assignees.
- 781 Sch. art.31(1). See Clarke at para.50. In this respect, the allocation of jurisdiction pursuant to rules of the *Civil Jurisdiction and Judgments Act 1982* is inappropriate, given the terms of art.71 of Regulation (EU)\_1215/2012: *Harrison & Sons Ltd v RT Steward Transport Ltd (1993) 28 E.T.L. 747*. cf. *Deaville v Aeroflot Russian International Airlines [1997] 2 Lloyd's Rep. 67, 71* (Warsaw Convention). See below, para.38-146. However, it has been held that the Brussels Convention and the Brussels Regulation Recast rules on lis alibi pendens continue to apply, because there are no provisions in CMR providing for parallel proceedings: *Frans Maas Logistics (UK) Ltd v CDR Trucking BV [1999] 2 Lloyd's Rep. 179; Royal & Sun Alliance Insurance Plc v MK Digital Fze (Cyprus) Ltd [2005] EWHC 1408 (Comm), [2005] 2 Lloyd's Rep. 679* at [55]–[69]; reversed on other grounds *[2006] EWCA Civ 629, [2006] 2 Lloyd's Rep. 110*. The Brussels Regulation Recast rules on jurisdiction continue to apply to proceedings instituted before 11.00pm on 31 December 2020: European Union (Withdrawal) Act 2018 ss.2, 3; the *Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019 (SI 479/2019)* regs 92–93; European Union (Withdrawal Agreement) Act 2020 s.2.
- 782 Subject, of course, to that carrier’s right of recovery from other carriers concerned: Sch. art.37. See below, paras 38-140—38-141.
- 783 In *Rosewood Trucking Ltd v Balaam [2005] EWCA Civ 1461, [2006] 1 Lloyd's Rep. 429*, the Court of Appeal refused to allow a carrier who compensated the first carrier but who was not the first, last or responsible carrier within the meaning of art.36 to recover an indemnity from the responsible carrier.
- 784 s.5(1) as amended by *Civil Liability (Contribution) Act 1978* s.9(1) and Sch.1; *ITT Schaub-Lorenz Vertriebsgesellschaft mbH v Birkart Johann Internationale Spedition GmbH & Co KG [1988] 1 Lloyd's Rep. 487, 494.*
- 785 Sch. art.39(1). See Clarke at paras 51–53.
- 786 *Cummins Engine Co Ltd v Davis Freight Forwarding (Hull) Ltd [1981] 1 W.L.R. 1363* at 1374 CA.
- 787 e.g. under CPR r.19.2(2); see *Cummins Engine Co Ltd v Davis Freight Forwarding (Hull) Ltd [1981] 1 W.L.R. 1363* at 1372.

- 788 *Cummins Engine Co Ltd v Davis Freight Forwarding (Hull) Ltd [1981] 1 W.L.R. 1363* at 1372; *ITT Schaub-Lorenz Vertriebsgesellschaft mbH v Birkart Johann Internationale Spedition GmbH [1988] 1 Lloyd's Rep. 487, 494 CA*. See CPR Pt 20.
- 789 *ITT Schaub-Lorenz Vertriebsgesellschaft mbH v Birkart Johann Internationale Spedition GmbH [1988] 1 Lloyd's Rep. 487* at 494; *Frans Maas Logistics (UK) Ltd v CDR Trucking BV [1999] 2 Lloyd's Rep. 179*.
- 790 “The carrier responsible” under art.37(a) must be a person who has made himself a party to the contract of international carriage: *ITT Schaub-Lorenz Vertriebsgesellschaft mbH v Birkart Johann Internationale Spedition GmbH [1988] 1 Lloyd's Rep. 487* at 493.
- 791 See, generally, *Walek and Co v Chapman and Ball (International) Ltd [1980] 2 Lloyd's Rep. 279*.
- 792 By Sch. art.38, a similar apportionment is provided in the event of the insolvency of one of the carriers. See *C. Steinweg-Handelsveem BV v Exsan Nederland BV (2019) 55 E.T.L. 307*.
- 793 Sch. art.39(2): *Cummins Engine Co Ltd v Davis Freight Forwarding (Hull) Ltd [1981] 1 W.L.R. 1363* at 1373, 1375. See, generally, *Glass [1982] L.M.C.L.Q. 173*. Art.39(2) of CMR does not provide for a compulsory and exclusive jurisdiction in disputes. See *British American Tobacco Switzerland SA v Exel Europe Ltd [2015] UKSC 65, [2016] A.C. 262* at [36]–[37], [68]. It is presently open to question whether the jurisdiction provided for in art.39(2) is compulsory and exclusive: *Arctic Electronics (UK) Ltd v McGregor Sea and Air Services [1985] 2 Lloyd's Rep. 510*; contra, *Harrison & Sons Ltd v RT Steward Transport Ltd (1993) 28 E.T.L. 747*. Proceedings brought pursuant to art.39(2) would not require the leave of the court under CPR r.6.20: *Harrison & Sons Ltd v RT Steward Transport Ltd (1993) 28 E.T.L. 747*. Whilst the carrier from whom a contribution is sought must be a party to the one contract of carriage (*Arctic Electronics (UK) Ltd v McGregor Sea and Air Services [1985] 2 Lloyd's Rep. 510*), it is not necessary that such a carrier is a successive carrier within the meaning of the Convention (*Harrison & Sons Ltd v RT Steward Transport Ltd*).
- 794 *Anon. (2007) 43 E.T.L. 94*, Bundesgerichtshof.
- 795 *Cummins Engine Co Ltd v Davis Freight Forwarding (Hull) Ltd [1981] 1 W.L.R. 1363* at 1373.
- 796 Sch. art.16(3).
- 797 Sch. art.16(4).
- 798 Sch. art.30(2). See *Anon. (2018) 53 E.T.L. 180*, Rechtbank Zeeland-West-Brabant.
- 799 Sch. art.39(1). The provision is inelegantly drafted by the use of the word “or”, rather than “and”: see *Transports Lesage et Compagnie SA v Transports Fromilhague (1997) 34 E.T.L. 248*, Cour de Cassation, France. Invisible damage, such as contamination of chemicals, can constitute inherent vice and can be the subject of reservations made within seven days of delivery of the goods. Provided that such reservations are made within that period, the absence of any protest in the consignment note at the time of delivery does not give rise to the presumption in the carrier’s favour under art.30(1): *English and American Insurance Co Ltd v Transport Nagels (1977) 12 E.T.L. 420*, Commercial Court, Antwerp. See also *Clarke [1982] L.M.C.L.Q. 533*.
- 800 A verbal reservation is sufficient in the case of apparent damage: *Société Coop UTRAC v SPRL Legrand (1970) 5 E.T.L. 716*, Court of Appeal, Liège. Reservations are “sent” to the

carrier within the meaning of art.30(1) if they are noted on the copy of the consignment note in the possession of and to be kept by the carrier: *Anon.* [1978] *L.M.C.L.Q.* 517, Court of Cassation, France.

- 801 *Anon.* (2004) 39 *E.T.L.* 400, Oberster Gerichtshof Österreich.
- 802 *Anon.* (1993) 28 *E.T.L.* 286, Hof Brussels; *Anon.* (1994) *B.T.* 623 App. Douai.
- 803 cf. *Anon.* (1993) 28 *E.T.L.* 265, *BGH*.
- 804 Sch. art.30(3).
- 805 *Anon.* (1993) 28 *E.T.L.* 265, *BGH*, where the court also held that the exceptions provided in art.29 were inapplicable to situations covered by art.30(3).
- 806 Sch. art.30(5). See *Anon.* (2021) 56 *E.T.L.* 453, Hof van Beroep Antwerpen.
- 807 As to the three-year limitation period in the case of wilful misconduct, see *Anon.* (2018) 53 *E.T.L.* 308, Hanseatisches Oberlandesgerichts Hamburg; *Anon.* (2018) 53 *E.T.L.* 460, Gerechtshof 'S-Hertogenbosch.
- 808 Total loss includes no more than what is called an actual total loss in [s.57\(1\) of the Marine Insurance Act 1906](#). The concept of constructive total loss is not applicable to CMR: *ICI Plc v MAT Transport Ltd* [1987] *1 Lloyd's Rep.* 354, 358.
- 809 Sch. art.32(1). See, generally, Clarke at paras 43–44. The limitation period applies equally to proceedings brought by and against the carrier: *Anon.* (1975) 10 *E.T.L.* 523, *Bundesgerichtshof*; *Anon.* (1976) 11 *E.T.L.* 266, *Hof van Beroep, Amsterdam*. As to claims in delict or tort, see *Anon.* (2005) 40 *E.T.L.* 878, *Oberster Gerichtshof Österreich*. As to claims other than for total or partial loss, damage or delay, see *Anon.* (2021) *E.T.L.* 98, *Hof van Beroep Antwerpen*. CMR provides under art.15(1) that where circumstances prevent delivery of the goods after their arrival at the place designated for delivery, the carrier shall ask the sender for his instructions. Where art.15(1) applies, there is no “delivery” within the meaning of art.32(1)(a) and consequently no relevant period of limitation applies under the Convention: *Moto Vespa SA v MAT (Britannia Express) Ltd* [1979] *1 Lloyd's Rep.* 175, 180 (see above, para.38-126). Combined road-sea transport is subject to CMR if the road transport is international within the meaning of the Convention (*Anon.* (2021) 56 *E.T.L.* 453, Hof van Beroep Antwerpen). For the purposes of prescription, clauses in combined transport bills of lading are of no effect insofar as they conflict with CMR arts 31 and 32: *Atlas Assurance Co Ltd v Ocean Transport and Trading Ltd* (1976) 11 *E.T.L.* 279, Commercial Court, Antwerp; cf. *Agence Belgo-Danoise NV v Rederij HAPAG-Lloyd AG (The Hamburg Express)* (1976) 11 *E.T.L.* 691, Commercial Court, Antwerp; and *Atlas Assurance Co Ltd v Peninsular & Oriental Steam Navigation (The Osaka Bay)* (1977) 12 *E.T.L.* 843, Commercial Court, Antwerp.
- 810 *Worldwide Carriers Ltd v Ardtran International Ltd* [1983] *1 Lloyd's Rep.* 61, 65. See also *Frigo Express bvba v Frigo Traffic Co nv* (2004) 39 *E.T.L.* 521, Hof van Cassatie van België (claim by carrier against sub-carrier); *Transports Collomb Muret auto SA v Panini France*

*SA* (2004) 39 E.T.L. 531, Cour de Cassation de France (claim by carrier against consignee); *NV Navex & Van Meerbeeck v BVBA Butti & Zonen* (2006) 41 E.T.L. 102, Rechtbank van Koophandel te Antwerpen (claim for customs debt); *Extra Logistics NV v Gebroeders Delhaize & Cie* (2014) 49 E.T.L. 341 (claim for storage charges after consignee refused to accept delivery). As to extra-contractual claims, see *NV Axa Belgium/NV Deceuninck Compound/NV AZO* (2008) 43 E.T.L. 379.

⑧11 *ICI Plc v MAT Transport Ltd* [1987] 1 Lloyd's Rep. 354, 360.

⑧12 *Worldwide Carriers Ltd v Ardtran International Ltd* [1983] 1 Lloyd's Rep. 61 at 65. *Shell Chemicals UK Ltd v P & O Roadtanks Ltd* [1993] 1 Lloyd's Rep. 114, 116; affirmed [1995] 1 Lloyd's Rep. 297, 301. cf. *Royal Insurance Cie v Transport R. Marcel* (1978) 13 E.T.L. 742, Tribunal de Commerce, Paris. See, generally, *Glass* [1984] L.M.C.L.Q. 30.

⑧13 Sch. art.32(2). See Clarke at para.45. The term “claim” in art.32(2) refers to a claim for compensation when something has gone wrong in the course of the carriage. It does not refer to a request by one carrier against another, or against the consignor, for payment of the freight: *Muller Batavia Ltd v Laurent Transport Co Ltd* [1977] 1 Lloyd's Rep. 411, 416. A claim can be made within the meaning of art.32(2) by a damage assessor acting on behalf of parties interested in the goods: *SARL Prufser v Michel* (1977) 12 E.T.L. 300, Commercial Court, Mons; *Anon.* (1997) 32 E.T.L. 442, BGH (insurance broker). The burden of proof, inter alia, that a claim has been received rests upon the party relying on such an assertion: art.32(2). That burden was held to have been discharged in *Sidney G Jones Ltd v Martin Bencher Ltd* [1986] 1 Lloyd's Rep. 54, 64–65. A written claim does not require any particular formality: *Worldwide Carriers Ltd v Ardtran International Ltd* [1983] 1 Lloyd's Rep. 61 at 66; *ICI Plc v MAT Transport Ltd* [1987] 1 Lloyd's Rep. 354 at 361. For the purpose of art.32(2), a written claim may be sent to an agent of the carrier expressly or impliedly authorised to receive it, such as a carrier’s liability insurer who is, on the facts, so authorised: *Poclaim SA v SCAC SA* [1986] 1 Lloyd's Rep. 404, 406-407. A telex message holding the carrier liable is a written claim within the meaning of art.32(2): *NV Van Dijck v PVBA Welltransport* (1977) 12 E.T.L. 437, Commercial Court, Antwerp. See also *NV La Préservatrice v Well Transport* (1979) 14 E.T.L. 924, Hof van Beroep, Antwerp; *Anon.*, Cour d’Appel de Paris, 14 December 2011, Bulletin of International Carriage by Rail 1/2011, 6. A claim can be validly rejected in the carrier’s name by a third party such as an insurance broker: *NV Rombouts Internationale Transporten v Vlatrex Continental BV* (1976) 11 E.T.L. 767, Gerechtshof, The Hague. A written claim which is not rejected suspends the limitation period as soon as it begins to run if it has not already begun to do so: *ICI Plc v MAT Transport Ltd* [1987] 1 Lloyd's Rep. 354 at 361.

⑧14 *Anon.* (1995) 30 E.T.L. 211, OGH; *Chatruco v Jura Belgique* (2010) 45 E.T.L. 623, Hof van Cassatie van Belgie. cf. *Sprl Transports Cremer v SA van de Castele et Cie* (1996) 31 E.T.L. 833, Brussels. In *Delamode Plc v ECS European Containers* (2012) 48 E.T.L. 210, the Hof van Cassatie van België held that there was no requirement that the written claim state the

amount of damage, provided that it contained sufficient information so as to allow the carrier to form an opinion as to the nature and quantum of damage so that the carrier can respond to the claim.

- ⑧15 *Worldwide Carriers Ltd v Ardtran International Ltd [1983] 1 Lloyd's Rep. 61* at 66. Information imparted by one carrier to other carriers that a claim is being made against him by the owner of goods and that he intends to make a claim against those other carriers cannot constitute a “written claim” against those other carriers under art.32(2) in respect of a claim which the owners of goods are not making against those other carriers. See also *Sidney G Jones Ltd v Martin Bencher Ltd [1986] 1 Lloyd's Rep. 54* at 60–61.
- ⑧16 *Zerowatt SpA v International Express Co Ltd Unreported 6 October 1989; Microfine Minerals and Chemicals Ltd v Transferry Shipping Co Ltd [1991] 2 Lloyd's Rep. 630*. See also *NV Optitrade ea v NV Cat Benelux (2004) 39 E.T.L. 407*, Hof van Beroep te Antwerpen.
- ⑧17 Sch. art.32(3). See Vol.I, Ch.31.
- ⑧18 *Impex Transport Aktieselskabet v AG Thames Holdings Ltd [1981] 1 W.L.R. 1547, 1552*.
- ⑧19 Sch. art.32(4). The fact that CMR by arts 32(4) and 36 contemplates the possibility of a set-off or counterclaim does not exclude the operation of the general rule that a claim against a carrier in respect of loss of, or damage to, cargo or in respect of delay, cannot be asserted by way of a deduction from freight. The rule enunciated by the House of Lords in *Aries Tanker Corp v Total Transport Ltd [1977] 1 W.L.R. 185* applies to contracts subject to CMR: *RH and D International Ltd v IAS Animal Air Services Ltd [1984] 1 W.L.R. 573*. See also *United Carriers Ltd v Heritage Food Group (UK) Ltd [1995] 2 Lloyd's Rep. 269*; *Hollemon Special Transport & Project Cargo Srl v CO UK Shipping and Trading Ltd [2022] EWHC 1114 (Comm)* at [13]. As to air freight, see *Schenker Ltd v Negocios Europa Ltd [2017] EWHC 2921 (QB), [2018] 1 W.L.R. 718*.
- ⑧20 *Impex Transport Aktieselskabet v AG Thames Holdings Ltd [1981] 1 W.L.R. 1547* at 1557–1558. See CPR Pt 20. See, generally, *Rose [1982] L.M.C.L.Q. 33* and *[1984] L.M.C.L.Q. 199*.
- 821 Sch. art.39(4).
- 822 See above, para.38-135; *Ulster-Swift Ltd v Taunton Meat Haulage Ltd [1977] 1 Lloyd's Rep. 346, 358–360*; *Harrison & Sons Ltd v RT Steward Transport Ltd (1993) 28 E.T.L. 747*. cf. *NV Travaca v Roba Ltd (1996) 31 E.T.L. 545*, Belgium.
- 823 *Muller Batavia Ltd v Laurent Transport Co Ltd [1977] 1 Lloyd's Rep. 411* at 415.
- 824 *Catlin Insurance Co (UK) v Gasia (2013) 49 E.T.L. 222, Rechtbank van Koophandel te Antwerpen*.
- 825 A carrier who did not agree to a particular jurisdiction, and had no notice of a particular jurisdiction agreement, would not be bound by that agreement: *British American Tobacco Switzerland SA v Exel Europe Ltd [2012] EWHC 694 (Comm), [2012] 2 Lloyd's Rep. 1*

- at [46]–[51], [2015] UKSC 65, [2016] A.C. 262* at [26]. Accordingly, a successive carrier cannot be sued in proceedings brought against the primary carrier pursuant to a jurisdiction agreement between the claimant and the primary carrier, if the successive carrier did not agree to that clause and if the jurisdiction agreement is not in the consignment note, subject to the other heads of jurisdiction in CMR: *British American Tobacco Switzerland SA v Exel Europe Ltd* [2015] UKSC 65, [2016] A.C. 262. In *Anon.* (2002) 37 E.T.L. 80, *BGH*, it was held that art.31 extends to extra-contractual claims. See also *Anon.*, *Oberster Gerichtshof Österreich, 25 February 2015*, (2015) 50 E.T.L. 700. Art.31(1) does not lay down any formal requirements for any jurisdiction agreement between the parties (cf. art.25 of Regulation (EU) 1215/2012). Whether the factual requirement of an “agreement” on jurisdiction will be construed in the manner adopted by the European Court of Justice in the context of art.25 of Regulation (EU) 1215/2012 is unclear. In *LSG-RA Leutner GmbH v BVBA Ideal Transport* (2006) 41 E.T.L. 570, the Hof van Beroep te Gent held that the parties are free to choose a jurisdiction without stating it in the waybill and that the agreement was to be adjudged by reference to national law; see, however, (2007) 42 E.T.L. 401, Hof van Cassatie van Belgie. There is much to be said in favour of a consistent approach, given the difficulties posed by multi-modal transport involving carriage by road (which in isolation would be governed by CMR) and by sea (which in isolation would require jurisdiction agreements to comply with art.25 of the Brussels Regulation Recast insofar as it applies).
- 826 826 *Arctic Electronics (UK) Ltd v McGregor Sea and Air Services* [1985] 2 Lloyd's Rep. 510, 514. Art.31 gives the plaintiff the option to choose the forum, so that the forum should not be able to exercise any otherwise available power to decline jurisdiction: cf. *Milor Srl v British Airways Plc* [1996] 3 All E.R. 537; *Deaville v Aeroflot Russian International Airlines* [1997] 2 Lloyd's Rep. 67, 72 (Warsaw Convention art.28). In *Ideal Transport v LSG-RA Leutner GmbH* (2007) 42 E.T.L. 401, the Hof van Cassatie van Belgie held that the choice offered by art.31 was cumulative and a contractual choice of forum did not necessarily prevail.
- 827 827 Council Regulation 1215/2012 art.71. This Regulation applies to proceedings instituted on or after 10 January 2015: *Civil Jurisdiction and Judgments (Amended) Regulations 2014* (SI 2014/2947) reg.1. See *Harrison & Son Ltd v RT Steward Transport Ltd* (1993) 28 E.T.L. 747; *British American Tobacco Switzerland SA v Exel Europe Ltd* [2015] UKSC 65, [2016] A.C. 262; *Nickel & Goeldner Spedition GmbH v “Kintra” UAB* (C-157/13) EU:C:2014:2145, [2015] Q.B. 96 (CJEU). However, note the ECJ’s decision in *Réunion Européenne SA v Spliethoff’s Bevrachtingskantoor BV* [1999] C.L.C. 282, which concerned multi-modal carriage by sea and then land, and the application of the Brussels Convention. See *Anon.*, *Oberster Gerichtshof Österreich* (2003) 38 E.T.L. 656, 658, 661; *DFDS Transport A/S v Dieter Mehrholz Internationale Transporte* (2004) 39 E.T.L. 74, Supreme Court of Denmark; *Royal & Sun Alliance Insurance Plc v MK Digital Fze (Cyprus) Ltd* [2005] EWHC 1408 (Comm), [2005] 2 Lloyd's Rep. 679 at [55]–[69]; reversed on other grounds [2006] EWCA Civ 629, [2006] 2 Lloyd's Rep. 110; *Zurich Insurance Plc v Abnormal Load Services (International) Ltd* (C-88/17) [2018] 4 W.L.R. 155. Regulation (EU) 1215/2012 applies until 31 December 2020: European Union (Withdrawal) Act 2018 ss.2, 3; the *Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019* (SI 479/2019) regs 92–93; European Union (Withdrawal Agreement) Act 2020 s.2. The Hague Convention on

- Choice of Court Agreements 2005 does not apply to the carriage of goods or passengers: art.2(2)(f).
- 828 *BA van Velthaven v Containerships CSG Rotterdam BV* (2019) 55 E.T.L. 41.
- 829 *TNT Express Nederland BV v AXA Versicherung AG* (C-533/08) EU:C:2010:243, [2011] R.T.R. 11. In the same case, the ECJ held that it did not have jurisdiction to interpret art.31 of CMR. See *British American Tobacco Switzerland SA v Exel Europe Ltd* [2015] UKSC 65, [2016] A.C. 262 at [48]–[58]. See also *Nipponkoa Insurance Co (Europe) Ltd v Inter-Zuid Transport BV* (C-452/12) EU:C:2013:858, (2013) 49 E.T.L. 165, ECJ, where it was held that art.31 must be interpreted in a manner which ensures conditions which are no less favourable than the objectives under the Regulation.
- 830 *Andrea Merzario Ltd v Internationale Spedition Leitner Gesellschaft mbH* [2001] EWCA Civ 61, [2001] 1 Lloyd's Rep. 490. cf. the French text of the CMR Convention: “pour la même cause”. Arts 21 and 22 of the Brussels Convention have been held to remain applicable, because CMR does not regulate the matters of *lis alibi pendens*: *Frans Maas Logistics (UK) Ltd v CDR Trucking BV* [1999] 2 Lloyd's Rep. 179; *Royal & Sun Alliance Insurance Plc v MK Digital Fze (Cyprus) Ltd* [2005] EWHC 1408 (Comm), [2005] 2 Lloyd's Rep. 679 at [55]–[69]; reversed on other grounds [2006] EWCA Civ 629, [2006] 2 Lloyd's Rep. 110. This question was identified but not resolved in *Harrison & Son Ltd v RT Steward Transport Ltd* (1993) 28 E.T.L. 747. cf. *Deaville v Aeroflot Russian International Airlines* [1997] 2 Lloyd's Rep. 67, 71 (Warsaw Convention). In *Anon.* (2006) 41 E.T.L. 561, the Oberster Gerichtshof Österreich held that *lis pendens* must be assumed under art.31 where the respective claims are for negative declaratory relief and affirmative relief (contra *Anon.* (2004) E.T.L. 255, BGH; *Anon.* (2004) E.T.L. 264, BGH).
- 831 Sch. art.36. However, art.36 is not a provision stipulating in which jurisdiction proceedings by cargo claimants may be brought; that is a matter for art.31. See *British American Tobacco Switzerland SA v Exel Europe Ltd* [2015] UKSC 65, [2016] A.C. 262 at [19]–[20], [34]–[47], [67], [69].
- 832 See above, paras 38–140—38–141. *Harrison & Son Ltd v RT Steward Transport Ltd* (1993) 28 E.T.L. 747; *Cummins Engine Co Ltd v Davis Freight Forwarding (Hull) Ltd* [1981] 2 Lloyd's Rep. 402, 408–409; contra, *Arctic Electronics (UK) Ltd v McGregor Sea and Air Services* [1985] 2 Lloyd's Rep. 510, adopting the view of Eveleigh LJ in *Cummins Engine Co Ltd v Davis Freight Forwarding (Hull) Ltd* [1981] 2 Lloyd's Rep. 402, 409. In *Blue Water Shipping A/S v Melship Eesti OÜ* (2000) 35 E.T.L. 772, the Supreme Court of Denmark held that art.39 referred to the residence of the defendant successive carrier and not the claimant successive carrier. cf. art.40.
- 833 *British American Tobacco Switzerland SA v Exel Europe Ltd* [2015] UKSC 65, [2016] A.C. 262 at [36]–[37], [62], [68].
- 834 Sch. art.33, which gives force to an arbitration clause in the contract of carriage, will bind the parties to the contract of carriage. Such parties are identified in s.14(2)(c) of the 1965 Act.
- 835 Sch. art.33. By s.7(2) of the 1965 Act as amended, the time at which an arbitration is commenced is determined by the Arbitration Act 1996 s.14(3)–(5).
- 836 *AB Bofors-UVA v AB Skandia Transport* [1982] 1 Lloyd's Rep. 410, 413; *Inco Europe Ltd v First Choice Distribution* [1999] 1 All E.R. 820, 831 (a clause which required the

- arbitrators to observe “the applicable imperative legal stipulations including the provisions of international transport treaties” was held to be valid). However, see *Anon.* (2010) 45 E.T.L. 637, Oberster Gerichtshof Österreich. See, generally, *Glass* [1984] L.M.C.L.Q. 30.
- 837 Arbitration Act 1996 s.9; *AB Bofors-UVA v AB Skandia Transport* [1982] 1 Lloyd's Rep. 410 at 413.
- 838 Sch. art.41(1). A carrier’s general conditions of contract can never relieve him of his liability if such conditions derogate from CMR: *SA Chemin de Fer Industriel Groups v Geszait* (1978) 13 E.T.L. 285, Commercial Court, Brussels; *Datec Electronic Holdings Ltd v United Parcels Service Ltd* [2005] EWCA Civ 1418, [2006] 1 Lloyd's Rep. 279 at [24]; *Air & Road OVT SrL v Zurich* (2018) 53 E.T.L. 469, Rechtbank Zeeland-West-Brabant.
- 839 *Datec Electronic Holdings Ltd v United Parcels Service Ltd* [2005] EWCA Civ 1418, [2006] 1 Lloyd's Rep. 279 at [24], [2007] UKHL 23, [2007] 2 Lloyd's Rep. 114 at [30]; *T Comedy (UK) Ltd v Easy Managed Transport Ltd* [2007] EWHC 611 (Comm), [2007] All E.R. (D) 469 at [52]–[53]; *Anon.*, Oberster Gerichtshof (2008) 44 E.T.L. 311. See also *Noble v RH Group Ltd Unreported 5 February 1993*, where it was held that liability of the carrier for accidents occurring during the unloading of the goods, as opposed to their carriage, and for personal injury was not intended to be regulated by the Convention and therefore any provisions dealing with such liability were not affected by art.41. Quaere whether unloading of goods may be equated with delivery so as to engage art.17; it would depend on whether the carrier is responsible for the unloading of the goods. In *Anon.* (2009) 45 E.T.L. 110, the Bundesgerichtshof held that a clause in the contract regulating the kind of goods which the carrier was not willing to carry was not in conflict with art.41.
- 840 Sch. art.40. This permits carriers engaged in secondary contribution proceedings (see above, paras 38-140—38-141) to derogate from arts 37 and 38. Contractual provisions purporting to give exemptions from liability have been held valid as regards the mutual relationship between successive carriers: *Anon.* (1976) 11 E.T.L. 290, Landgericht, Duisburg.
- 841 *William Tatton and Co Ltd v Ferrymasters Ltd* [1974] 1 Lloyd's Rep. 203, 206; *James Buchanan and Co Ltd v Babco Forwarding and Shipping (UK) Ltd* [1977] Q.B. 208, 219 CA: affirmed [1978] A.C. 141.

## **(e) - Passengers and Luggage by Road**

**Chitty on Contracts 34th Ed.**

**Consolidated Mainwork Incorporating First Supplement**

**Volume II - Specific Contracts**

**Chapter 38 - Carriage by Land**

**Section 3. - International Carriage**

**(e) - Passengers and Luggage by Road**

### **Application and scope of the CVR Convention**

- 38-149 The [Carriage of Passengers by Road Act 1974](#) by s.1(1) was passed to enact, as part of the law of the United Kingdom, the Geneva Convention on the Contract for the International Carriage of Passengers and Luggage by Road (CVR) of 1973,<sup>842</sup> the main provisions of the Convention being set out in the Schedule to the Act. The Convention entered into force on 12 April 1994. The United Kingdom has not yet become a party to the Convention. In 2004, the [1974 Act](#) was repealed by the [Statute Law \(Repeals\) Act 2004](#).<sup>843</sup> The Convention applies to every contract for the carriage of passengers and their luggage in vehicles by road for reward when the carriage takes place in the territory of more than one state and the place of departure or the place of destination, or both, are situated in the territory a contracting state, irrespective of the place of residence and nationality of the parties to the contract.<sup>844</sup> The Convention applies where carriage by road is interrupted by another mode of transport, at least so far as the portions of carriage performed by road are concerned, even if such portions are not international.<sup>845</sup> It also applies to loss or damage caused by an incident connected with the carriage by the vehicle where the vehicle itself is carried over part of the journey by another mode of transport, provided that the loss or damage occurred either while the passenger was inside the vehicle or entering or alighting therefrom.<sup>846</sup>

### **Transport documents**

- 38-150 Where passengers are carried, the carrier must issue an individual or collective ticket showing the name and address of the carrier and containing a statement to the effect that the contract is subject

to CVR.<sup>847</sup> The ticket is *prima facie* evidence of the particulars shown on it<sup>848</sup> but the absence, irregularity or loss of the ticket shall not affect the existence or validity of the contract of carriage, which remains subject to the provisions of the Convention.<sup>849</sup> The carrier is liable for any damage caused to the passengers by a breach of his obligations in relation to the ticket.<sup>850</sup> The ticket is, in general, transferable at any time before the journey begins.<sup>851</sup> The carrier may, and at the request of the passenger shall, issue a luggage registration voucher giving the number and nature of the pieces of luggage handed to him.<sup>852</sup> The voucher has to contain an express statement as to the applicability of the Convention.<sup>853</sup> Its issue is *prima facie* evidence that the luggage appeared to be in good order when handed over.<sup>854</sup> A carrier acting in good faith makes a valid delivery of the luggage if he delivers it to the holder of the voucher.<sup>855</sup> He may require any person claiming the luggage but not producing the voucher to prove his right to the luggage and to produce adequate security for the luggage if the proof appears insufficient.<sup>856</sup>

## Personal injuries

38-151 The CVR carrier is liable for loss or damage resulting from the death or wounding of, or from any other bodily or mental injury caused to, a passenger as a result of an accident connected with the carriage and occurring while the passenger is inside the vehicle or is entering or alighting from it.<sup>857</sup> If the accident was caused by circumstances which the carrier could not have avoided even by using the diligence required by the facts of the case, he will be relieved of liability.<sup>858</sup> The carrier will not, however, be relieved of liability if the accident resulted from any physical or mental failing of the driver or from any defect in or malfunctioning of the vehicle or from any wrongful act or neglect of any person from whom the carrier hired the vehicle.<sup>859</sup> The national law of the country where the court seised of the case is located determines not only the extent of an injury giving rise to compensation but also the persons who are entitled to compensation for such injury.<sup>860</sup>

## Loss of, or damage to, luggage

38-152 The carrier is liable for loss or damage resulting from the total or partial loss of luggage and for damage thereto.<sup>861</sup> This liability for luggage handed to the carrier extends over the whole period from the time when he takes charge of the luggage until he delivers it or deposits it in a safe and convenient place,<sup>862</sup> if it is not claimed on the arrival of the vehicle.<sup>863</sup> The carrier is in general responsible for other luggage (which term includes personal effects carried or worn by the passenger) while it is in the vehicle but is only held responsible for luggage which is stolen or cannot be found if it has been placed in his care. The only exception to this is in the event of

an accident.<sup>864</sup> The carrier is relieved of liability if the loss or damage results from an inherent defect in the luggage or from a special risk inherent in its perishable or dangerous nature or from circumstances which the carrier could not have avoided even if he had used the diligence required by the facts of the case.<sup>865</sup> As in the case of personal injuries, the carrier is responsible for the failings of the driver, the defects in the vehicle and the wrongful acts of any person from whom he has hired the vehicle.<sup>866</sup> Luggage not delivered within 14 days from the date on which the passenger claims it is deemed to have been lost.<sup>867</sup>

## Upper financial limits of liability

<sup>38-153</sup> The CVR carrier's liability and that of his employees and agents<sup>868</sup> in the event of death of or personal injury to passengers is limited to 83,333 units of account<sup>869</sup> for each victim in respect of the same occurrence.<sup>870</sup> This amount is exclusive of both legal or other costs incurred by the parties and of interest.<sup>871</sup> A higher limit may be agreed between the parties to the contract of carriage.<sup>872</sup> It is, however, competent for any contracting state to set a higher limit of liability or to set no limit at all. When a carrier has his principal establishment in such a state (or in a non-contracting state which has a higher limit, or no limit at all) the law of that state prevails in relation to the determination of the total amount of damages.<sup>873</sup> The carrier's liability and that of his employees and agents in the event of total or partial loss of, or damage to, luggage for which he is responsible cannot exceed 166.67 units of account for each piece of luggage or 666.67 units of account for each passenger. Compensation in respect of personal effects carried or worn by the passenger is limited to 333.33 units of account for each passenger.<sup>874</sup> These amounts, once again, are exclusive of legal or other costs and of interest.<sup>875</sup> If, however, loss or damage results from wilful misconduct or gross negligence by the carrier or by a person for whom he is responsible (i.e. his employees and agents and all other persons whose services he uses to perform his obligations under the Convention),<sup>876</sup> the carrier cannot rely on those provisions of CVR which exclude his liability in whole or in part or which limit the compensation payable.<sup>877</sup>

## Carrier's exemptions from liability

<sup>38-154</sup> The carrier's exemptions under arts 11(2) and 14(2) have already been described.<sup>878</sup> The carrier may also be exonerated wholly or in part if any loss or damage resulted from the wrongful act or neglect of the passenger or from conduct by the passenger not conforming to the normal conduct of a passenger.<sup>879</sup> The carrier is not liable for loss or damage caused by a nuclear incident if by

the law of a particular contracting state the operator of a nuclear installation is liable instead for such loss or damage.<sup>880</sup>

## Extinction of claims and limitations of actions

- 38-155 The period of limitation for actions arising out of death or personal injury to passengers is three years from the date on which the person suffering loss or damage in this respect had or should have had knowledge of it. This period of limitation cannot, however, exceed five years from the date of the accident.<sup>881</sup> The period of limitation for all other actions arising out of carriage under the Convention is one year from the date on which the vehicle arrived at the place of destination of the passenger or (in the case of non-arrival) from the date on which the vehicle ought to have arrived at that place of destination.<sup>882</sup> The receipt of luggage by a passenger without complaint on his part is *prima facie* evidence that it was delivered complete and in good condition. Any complaint must be made to the carrier orally or in writing within seven days of actual receipt of the luggage by the complainant passenger.<sup>883</sup> The passenger is, however, relieved of this obligation if the loss or condition of the luggage has been duly checked by the passenger and the carrier.<sup>884</sup>

## Jurisdiction

- 38-156 A claimant instituting proceedings arising out of carriage under the Convention may bring an action in any court or tribunal of a contracting state designated by agreement between the parties. He may also institute proceedings in the courts or tribunals of the state within whose territory either (a) the loss or damage occurred; or (b) the place of departure or destination of the carriage was located; or (c) the defendant had his principal place of business or was habitually resident or had the place of business through which the contract of carriage was made.<sup>885</sup>

## No contracting out

- 38-157 Any stipulation which would directly or indirectly derogate from the provisions of the Convention is null and void.<sup>886</sup> In particular any clause assigning to the carrier the benefit of any insurance made in favour of the passenger or any similar clause, or any clause shifting the burden of proof, is null and void.<sup>887</sup> Any proceedings to enforce a liability imposed on the carrier under CVR are subject to the terms and limits laid down in the Convention.<sup>888</sup>

## Footnotes

- 842 See above, para.38-082. See, generally, *Hodgin [1976] L.M.C.L.Q. 1.*
- 843 s.1(1) and Sch.1 Pt 14. The 2004 Act also repealed those parts of the Carriage by Air and Road Act 1979 which provided for the implementation of the Protocol to the CVR which was agreed in 1979.
- 844 CVR art.1(1).
- 845 CVR art.2.
- 846 CVR art.3.
- 847 CVR art.5(1) and (2).
- 848 CVR art.6.
- 849 CVR art.5(1).
- 850 CVR art.5(3).
- 851 CVR art.7.
- 852 CVR art.8(1).
- 853 CVR art.8(2).
- 854 CVR art.9.
- 855 CVR art.10(1).
- 856 CVR art.10(2).
- 857 CVR art.11(1).
- 858 CVR art.11(2).
- 859 CVR art.11(3).
- 860 CVR art.12.
- 861 CVR art.14(1).
- 862 CVR art.10(3).
- 863 CVR art.14(1).
- 864 CVR art.14(1).
- 865 CVR art.14(2).
- 866 CVR art.14(3).
- 867 CVR art.15.
- 868 CVR arts 4 and 18(1).
- 869 CVR art.19, inserted by the Protocol to the CVR 1979 (Cmnd.7481). The unit of account is the Special Drawing Right (SDR).
- 870 CVR art.13(1).
- 871 CVR art.13(2).
- 872 CVR art.13(3).
- 873 CVR art.13(1).
- 874 CVR art.16(1).

- 875 CVR art.16(2).
- 876 CVR art.4.
- 877 CVR art.18(2).
- 878 See above, paras 38-150—38-151.
- 879 CVR art.17(1).
- 880 CVR art.17(3).
- 881 CVR art.22(1).
- 882 CVR art.22(2).
- 883 CVR art.20(1).
- 884 CVR art.20(2).
- 885 CVR art.21(1).
- 886 CVR art.23(1).
- 887 CVR art.23(2).
- 888 CVR art.18(1).

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## **(a) - Definitions**

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**Consolidated Mainwork Incorporating First Supplement**

**Volume II - Specific Contracts**

**Chapter 39 - Construction Contracts**

**Section 1. - The Nature of Construction Contracts**

### **(a) - Definitions**

*Vincent Moran QC and William Webb*

## **Construction**

- 39-001 The term “construction” comprehends any form of building or assembling, but is usually confined to the creation of, or the carrying out of work to or in connection with, immovable property. Construction embraces the carrying out of both building and engineering works. The same principles, with some adaptation, apply to construction in relation to other property such as ships, aircraft, plant and machinery, as well as computer hardware and software.

## **Construction contract**

- 39-002 English law, with some exceptions, contains no rules or principles which would regulate the performance of construction work, and hence construction contracts subject to English or other similar legal systems<sup>1</sup> generally employ relatively elaborate forms of contract setting out the rights and duties of the parties, which have been said to resemble a “legislative code”.<sup>2</sup> The term “construction contract” includes both “building contract” and “engineering contract”, which will have particular characteristics depending upon the technical subject matter of the contract under consideration. Building usually indicates a structure intended for occupation whereas engineering will embrace any form of construction, which need not be static. The former tends to employ the JCT<sup>3</sup> Standard Form of Building Contract and the latter the ICC<sup>4</sup> form in the case of civil engineering works or other specialist forms. The JCT and ICC forms are referred to in this chapter to illustrate the many legal points which can arise and the way in which the standard forms deal

with them. Many construction contracts are now let on individually drafted contract forms, but on analysis their terms will usually be found to be based on one or more of the standard forms dealt with in this chapter.

## Work, materials and design

- 39-003 Construction contracts involve the provision of work (also referred to as labour and, more recently, services) and materials (including goods, plant or equipment). In addition, construction contracts usually involve an element of “design”, a ubiquitous and imprecise term which is often a source of dispute. At its lowest level, design involves the choice of appropriate materials and working methods, where not specified in the contract. At another level, design includes determination of the detailed physical characteristics of the building or works to comply with stated requirements or performance criteria. Such a contract is usually termed “design and build” but there are many intermediate stages. Similarly, “management” is comprehended to some degree in all construction contracts. Where this is the primary contribution of the contractor, who is intended otherwise to sub-let all physical work, the arrangement is usually called a “management contract”.<sup>5</sup>

## Building contract

- 39-004 A building contract has been judicially described as:

“... an entire contract for the sale of goods and work and labour for a lump sum price payable by instalments as the goods are delivered and the work is done ...”<sup>6</sup>

although the payment for work by instalments is not a necessary feature of all construction contracts<sup>7</sup>; and nor are all building contracts for a lump sum. The subject matter of construction contracts will often require complex and specialist provisions and contractual machinery not often found in other commercial contracts, such as provisions in relation to the grant of an extension of time for completion of the contract works. However, consistent with the above definition, the law relating to construction contracts is the application in a particular context of the general principles of the law of contract, and no more.<sup>8</sup>

## Statutory definition

- 39-005

The above description of construction contracts<sup>9</sup> now needs to take account of the **Housing Grants, Construction and Regeneration Act 1996** which, in ss.104 and 105, provides an extensive, but by no means comprehensive, statutory definition of “construction contract”. Thus, by s.104(2) of the **Housing Grants, Construction and Regeneration Act 1996**, a construction contract will include an agreement to do architectural, design or surveying work,<sup>10</sup> or an agreement to provide advice on building, engineering, interior or exterior decoration or on the laying-out of landscape,<sup>11</sup> in relation to construction operations. However, drilling for oil or gas, tunnelling generally, plant or steel work for nuclear processing, power generation, water or effluent treatment or chemical, oil, gas, steel or food and drink production and the supply (excluding installation) of components, materials, plant and machinery generally are all excluded from the definition and therefore the provisions of the **Housing Grants, Construction and Regeneration Act 1996**.<sup>12</sup> In addition, by statutory instrument<sup>13</sup> Private Finance Initiative (PFI) contracts and highway and sewerage works for adoption are excluded from the definition of “construction contract”. These exclusions together cover a major portion of what is generally regarded as construction work. Furthermore, the structure of s.105 in terms of “inclusions” and “exclusions” leads to the position that a contract between a contractor and an owner of a crane for the hire of a crane plus a driver was held to be a contract for construction operations which formed an integral part of, or were preparatory to, or were for rendering complete, construction operations within s.105(1)(a).<sup>14</sup>

## Application of Housing Grants, Construction and Regeneration Act 1996

- 39-006 The **Housing Grants, Construction and Regeneration Act 1996** is to apply whether or not the contract is subject to English law, provided the construction operations are within the jurisdiction.<sup>15</sup> Furthermore, the **Housing Grants, Construction and Regeneration Act 1996** provides that

“... where an agreement relates to construction operations and other matters, this part applies to it only so far as relates to construction operations.”<sup>16</sup>

The notional division of contracts in relation to payment obligations may be workable but the resolution of disputes by adjudication<sup>17</sup> in relation to part only of a contract, or the operation of a right of suspension<sup>18</sup> in relation to part of the work, may require further consideration.<sup>19</sup>

## Footnotes

- 1 This covers all common law jurisdictions including the United States; and even where Code law exists defining rights and duties in relation to construction activities, there is an increasing tendency to use standard forms similar to the English models.
- 2 *Amalgamated Building Contractors v Waltham Holy Cross UDC [1952] 2 All E.R. 452*, per Lord Denning at 453.
- 3 Joint Contracts Tribunal.
- 4 Until 2011 this form was sponsored by and bore the name of the Institution of Civil Engineers (ICE). The ICE in 2011 withdrew its sponsorship and the (substantially unamended) form is now issued by its other sponsors, the Civil Engineering Contractors Association (CECA) and the Association of Consulting Engineers (ACE) under the new name of the Infrastructure Conditions of Contract (ICC).
- 5 See below, para.39-016.
- 6 Lord Diplock in *Modern Engineering (Bristol) Ltd v Gilbert-Ash (Northern) Ltd [1974] A.C. 689* at 717B and 722G. This is referred to in *Beaufort Developments (NI) Ltd v Gilbert-Ash (NI) Ltd [1999] 1 A.C. 266, 290*.
- 7 A construction contract falling within the definition provided by ss.104 and 105 of the **Housing Grants, Construction and Regeneration Act 1996** must now contain provision for payment by instalments unless it is specified in the contract that the duration of the work is to be less than 45 days (s.109).
- 8 Lord Reid in *Modern Engineering (Bristol) Ltd v Gilbert-Ash (Northern) Ltd [1974] A.C. 689, 699H*: "... When parties enter into a detailed building contract there are, however, no overriding rules or principles covering their contractual relationship beyond those which generally apply to the construction of contracts ...". See also, Lord Lloyd of Berwick in *Beaufort Developments (NI) Ltd v Gilbert-Ash Ltd [1999] 1 A.C. 266, 290*: "... Standard forms of building contract have often been criticised by the courts for being unnecessarily obscure and verbose. But in fairness one should add that it is sometimes the courts themselves who have added to the difficulty by treating building contracts as if they were subject to special rules of their own ...".
- 9 For a table of the dates on which the relevant provisions of the **Housing Grants, Construction and Regeneration Act 1996** came into force, see **Housing Grants, Construction and Regeneration Act 1996 (Commencement No.3) Order 1997** (SI 1997/2846).
- 10 s.104(2)(a).
- 11 s.104(2)(b).
- 12 The statutory definition has been further considered in *Nottingham Community Housing Association Ltd v Powerminster Ltd [2000] B.L.R. 309*; *Shepherd Construction Ltd v Mecright Ltd [2000] B.L.R. 489*; and *ABB Zantingh Ltd v Zedal Building Services Ltd [2001] B.L.R. 66*. It is also to be noted that a party can become estopped from contending, at the stage of enforcement of the Adjudicator's Decision, that the **Housing Grants, Construction and Regeneration Act 1996** and the Scheme do not apply; see *Maymac Environmental Services Ltd v Faraday Building Services Ltd (2000) 75 Con. L.R. 101*.
- 13 See s.105(3).
- 14 *Baldwins Industrial Services Plc v Barr Ltd [2003] B.L.R. 176*.
- 15 s.104(6), (7).

- 16 s.104(5). For a consideration of the principles that apply to such “hybrid” contracts, see *Equitix Ltd v Bester Generation UK Ltd [2018] EWHC 177 (TCC), [2018] B.L.R. 281* per Coulson J at [19]–[23].
- 17 s.108 and see below, paras 39-269 et seq.
- 18 s.112.
- 19 The **Housing Grants, Construction and Regeneration Act 1996** has been amended by the **Local Democracy, Economic Development and Construction Act 2009** but ss.104 and 105 are unchanged.

## **(b) - Types of Construction Contract—Payment**

**Chitty on Contracts 34th Ed.**

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**Volume II - Specific Contracts**

**Chapter 39 - Construction Contracts**

**Section 1. - The Nature of Construction Contracts**

**(b) - Types of Construction Contract—Payment**

### **Range of subject matter**

- 39-007 From the descriptions of construction contracts above, it follows that there is a very broad range of subject matter which will fall under this heading, ranging from the refurbishment of a domestic dwelling to the construction of a power station or a motorway. In view of this diversity of technical subject matter, and the vastly different requirements and anticipated roles of the parties to the contracts, construction contracts can be usefully considered as falling into one of several broad categories, depending upon how the obligations of the parties are defined and arranged.

### **Lump sum contract**

- 39-008 In a lump sum contract, the contractor is required to carry out and complete the entirety of the identified contract works for a fixed sum agreed in advance, or, as is more usual, if there are changes in the scope of the named contract works, for "... such other sum as shall become payable under this contract".<sup>20</sup> In the case of lump sum contracts, the proposed contract works will be of a known extent (that is, not at the development/design stage) and described in detail in a specification, bill of quantities or in drawings or in a combination of these. Where the specification or bill of quantities forms part of the contract,<sup>21</sup> provided the work is sufficiently described, the contractor will be taken to have included for that work in his fixed price.<sup>22</sup> Where work is not sufficiently described, and its existence is not reasonably to be inferred from the language of the contract,<sup>23</sup> the contractor will be entitled to recover payment in addition to the fixed price.<sup>24</sup> A lump sum contract may include responsibility for design and management.

## Degree of completion required

- 39-009 An important question in the context of lump sum contracts is the extent to which completion of the entire contract must be achieved before the lump sum price is payable, assuming the absence of any right of the contractor to payment by instalments. The general position is that where, on a true construction, a contract is an entire contract, then the contractor is entitled to recover nothing on the contract before the work is completed.<sup>25</sup> However, this does not mean that the employer will be able to avoid payment of the fixed price by reference to defects or omissions since:

“It is not every breach of that term which absolves the employer from his promise to pay the price, but only a breach which goes to the root of the contract, such as an abandonment of the work when it is only half done. Unless the breach does go to the root of the matter, the employer cannot resist payment of the price. He must pay it and bring a cross-claim for the defects-and omissions, or, alternatively, set them up in diminution of the price ...”<sup>26</sup>

## Remeasurement contract

- 39-010 Work carried out under a remeasurement contract is measured and valued as the work proceeds, so that there is no pre-agreed lump sum. There is typically a bill of quantities in which the quantities are estimated, the rates inserted being intended to form the basis for the remeasurement of work<sup>27</sup> carried out, in the case of the ICC Form of Contract, by the engineer, although the task of preparing interim statements and a final account for submission to the engineer is an obligation upon the contractor.<sup>28</sup> Equally, under cl.56(2) of ICC (2011 edn), a mechanism exists whereby the engineer can vary the agreed rates where the quantities differ sufficiently from those described in the bills of quantities as to change the nature of the work undertaken,<sup>29</sup> since the contractor is entitled to price on the quantities in the bill.<sup>30</sup>

## Prime cost contracts

- 39-011 In this type of contract (used most often in connection with works requiring substantial design development during the course of the work) the contractor is paid the actual or prime cost of carrying out the works or (in the case of management contracts) of procuring the contract works, plus a fee or other element for profit (which may or may not depend upon the final value of

the works). The JCT Management Contract is a Prime Cost contract, the definition and detailed machinery for the ascertainment of the prime cost being set out in a contract schedule. Any definition of Prime Cost will exclude certain costs which the contractor is required to bear. Thus, there will usually be express exclusions of cost resulting from any negligence by the contractor in performing his obligations under the contract.

- 39-012 A prime cost contract may contain an express term that the contractor will incur cost with reasonable efficiency and care. However, in the absence of an express term the question whether such a term is to be implied will depend on the circumstances surrounding the making of the contract.

## Hybrid contracts

- 39-013 Since construction contracts cover such a wide range of activities, contracts will be found which combine the above methods of payment and which contain or include others. Many contracts contain payment mechanisms related to performance, especially for work which includes maintenance; and in others, the sum payable depends on the contractor's success in meeting an agreed cost-limit or "target".

## Footnotes

- 20 art.2 of the Articles of Agreement, JCT Standard Building Contract (2011 edn).
- 21 *Patman & Fotheringham v Pilditch (1904) 2 H.B.C., 4th edn, 368.*
- 22 *A-Jac Demolition (London) Ltd v Urlin Rent-A-Car Inc (1990) 74 O.R. 2nd 474 DC.*
- 23 *Williams v Fitzmaurice (1858) 3 H. & N. 844.*
- 24 *C Bryant & Son Ltd v Birmingham Hospital Saturday Fund [1938] 1 All E.R. 503.*
- 25 *Hoenig v Isaacs [1952] 2 All E.R. 176, 178H*, per Somervell LJ; and see *Sumpter v Hedges [1898] 1 Q.B. 673.*
- 26 *Hoenig v Isaacs [1952] 2 All E.R. 176, 181A*, per Denning LJ. The question of what is required for substantial completion is discussed in Keating on Construction Contracts, 11th edn (2021), para.4-019.
- 27 See, for example, cl.56(1) of the ICC (2011), formerly the ICE Form, 7th edn (1999).
- 28 ICC Form cl.60.
- 29 See Keating on Construction Contracts, 9th edn (2012), p.1180 (commentary on cl.56(2) of the 2011 ICC Form); Abrahamson, Engineering Law and the ICE Contracts, 4th edn (1979, reprinted 1996), p.210.

- 30 The question of re-rate under the ICE 5th edn is considered in *Construction Award No.6 (1992) in [1995] Con. L. Yb. 57*. See also *Kelly Pipelines Ltd v British Gas Plc (1989) 48 B.L.R. 126*.

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## **(c) - Types of Construction Contract—Procurement**

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**Chapter 39 - Construction Contracts**

**Section 1. - The Nature of Construction Contracts**

**(c) - Types of Construction Contract—Procurement**

### **Standard procurement**

- 39-014 The JCT and ICC forms of contract represent a type of procurement which has become traditional during most of the 20th century. Such contracts are based on a full description of the works to be executed being provided by or on behalf of the employer, to be produced respectively by the architect or engineer, who is intended then to become the contract administrator under the construction contract. Prospective contractors are invited to bid in competition for the work described, the contract usually being awarded to the lowest tenderer.<sup>31</sup> The general principle is that the employer, through his agents, provides the design and the contractor builds to it. But even in this form of contract contractors may, to a greater or lesser extent, accept some form of design responsibility. Other methods of procurement have existed in the past and many alternatives presently exist for the commissioning of construction works, and are considered below. While the JCT and ICC Forms of Contract are no longer dominant in the construction industry, they remain well-known and are frequently used as the basis of ad hoc forms. They are used in this chapter to illustrate many of the issues under consideration.

### **Design and build contracts**

- 39-015 This type of contract may be regarded as a “package deal” whereby the employer obtains all or substantially all of the design work and construction through the main contractor, although the construction work may be performed by sub-contractors and the design by a sub-contracted professional team. The JCT Standard Form of Building Contract with Contractor’s Design 1981 Edition (now 2011) and the ICC Design and Construct Version<sup>32</sup> are examples of such contracts.

These forms each incorporate within the contract documents “Employer’s Requirements”, in which the works to be produced are described in terms of performance and any other requirements the employer wishes to lay down. The tenderer is required to produce “Contractor’s Proposals”, which set out in detail the way in which the employer’s requirements are to be fulfilled, such proposals also being incorporated into the contract. Design and build contracts are usually based on prime cost, but may also contain lump sum elements where the detailed design work precedes the contract. Expressions such as “design and build” (or “turnkey” or “package deal” contracts) can often obscure<sup>33</sup> the precise nature of the rights and obligations of the parties to a particular contract. In *Viking Grain Storage v TH White Installations*<sup>34</sup> the court considered whether the contractor (White) had assumed a responsibility for the design of a grain drying and storage installation. After considering the evidence in relation to the formation of the contract, the Official Referee said<sup>35</sup>:

“Those documents and the conduct of the parties as borne out by the correspondence before me, from 29 January 1980, point unequivocally, in my view, to the assumption by White of responsibility for all aspects of the project, including its design from start to finish ... The lump sum price was to include the services which were to be laid on. The specifications and drawings for the civil works were prepared by White; as were those for drainage and other services, for the buildings and for the functional parts of the installation ...”

Where the contractor takes on design work, and there is reliance on his skill and judgment,<sup>36</sup> then, save where the implication of a term is displaced by the express terms of the contract, there will be an implied term as to the fitness of those works for their intended purpose.<sup>37</sup> This is a valuable implied term to an employer because it will be no defence for the contractor to show that he has taken reasonable skill and care in the preparation of the relevant aspect of design. Most standard forms, however, seek to limit the contractor’s responsibility to one of reasonable skill and care. Contractors may engage a professional firm to carry out the design element of a design and build contract as a sub-contractor. In such circumstances the relevant standard of care owed to the contractor will be at least a duty to take reasonable care, although it is possible for a strict obligation (analogous to that ordinarily owed by a contractor to his client in respect of construction issues) to be owed.<sup>38</sup> Similarly, the employer may engage professionals to safeguard his own interests and to inspect the contractor’s design and work.

## Management contracts

- 39-016 This expression refers to a variety of different types of contract under which the principal role of the contractor is the management of the construction operation as opposed to the physical performance of the work, which is usually substantially or wholly sub-contracted. Although the physical

work is sub-contracted, the management contractor will often undertake primary responsibility for carrying out the work in accordance with the time limits and quality requirements specified in the contract. However, the forms of contract usually limit the liability of the management contractor, often by reference to sums recovered from the sub-contractor who may be in default.<sup>39</sup> Management contracts generally require the whole of the physical work to be sub-let and treated as prime cost, with the main contractor receiving remuneration in the form of a management fee, rather than payment based on value of the work executed. Standard forms of management contract are issued by both the JCT and ICC and these also provide the basis for further ad hoc forms devised by parties, often with specific projects in mind.

## Term contracts

- 39-017 Such arrangements are commonly used for the carrying out of large numbers of small repetitive items such as excavation and backfilling to carry out work to statutory undertakers' equipment in highways (holes in the road). The relevant authority may let a contract to carry out such work as may be instructed within a given period, at rates which are specified or ascertainable. Part of the consideration may be in the form of a periodic "retainer" to cover overheads and there may be provisions covering substantial changes to the anticipated quantity of work. It is a matter of construction in each case, whether the arrangement consists of one continuing contract or a series of contracts created when orders are placed.<sup>40</sup>

## Joint ventures

- 39-018 Contracts are frequently undertaken by two or more contractors operating as a "joint venture". This has no effect on the position of the employer other than through the advantage of having two or more contractors who are usually required to accept joint and several liability. The structure of the joint venture may take any legal form. If a partnership is used, each partner will undertake direct liability to the employer; or if a company structure is used, the companies forming the joint venture will be required to enter into direct collateral agreements with the employer. As between the joint venturers inter se there will be a management structure which will define inter alia the sharing of cost and profit, the provision of capital, the management of the project and the settlement of any disputes between the joint venturers. The rights of joint venturers inter se will be determined by the general law of partnership or companies. Joint ventures may be formed to bid for a single project or for a number of projects; or for a continuing business. Provision will need to be made for the costs of tendering for unsuccessful projects, particularly where it is intended to form the joint venture only upon the tender being accepted.

## Private Finance Initiative (PFI)

- 39-019 This represents the most far-reaching change to the UK (and worldwide) construction industry since the early 1990s. The PFI provides an alternative means of financing major public projects through the use of private equity finance. The PFI “contractor” enters into a contract with the intended user of the project or facilities, under which the user covenants to pay fees or charges over the period of the PFI contract, which is usually 25 years. The necessary land will usually be transferred to the PFI contract for the period so that the arrangement operates in a manner similar to a mortgage of the property, which is usually to be returned to the original owner at the end of the period. While the PFI contract will be governed by particular and special conditions (further dealt with below<sup>41</sup>) the design and construction of the facilities or works will be carried out under a series of contracts and sub-contracts similar to and governed by the same principles as conventional construction contracts.

## Footnotes

- 31 The dangers of encouraging low bidding have been much discussed. Tendering for public works and services is now subject to European Directives, implemented by the [Public Contracts Regulations 2006](#) or the [Public Contracts \(Scotland\) Regulations 2006](#) under which (inter alia) a contracting authority may award a contract on the basis of the most economically advantageous tender (“MEAT”), a principle which may also be applied outside the range of the Regulations. See also *Bowsher and Moser*, “*Damages for breach of the EC Public Procurement Rules in the United Kingdom*” (2005) 15 *P.P.L.R.* 195.
- 32 (2011) edition.
- 33 See *I. N. Duncan Wallace*, “*Contracts for Industrial Plant Projects*” (1984) 1 *I.C.L.R.* 322.
- 34 (1985) 33 *B.L.R.* 103.
- 35 (1985) 33 *B.L.R.* 103 at 110–111.
- 36 *Young & Marten v McManus Childs* [1969] 1 *A.C.* 454, 472; *Norta Wallpapers v John Sisk & Sons* (1976) 14 *B.L.R.* 49 (a decision of the Irish Supreme Court); *IBA v EMI and BICC* (1980) 14 *B.L.R.* 1, 44–46; *University of Warwick v Sir Robert McAlpine* (1988) 42 *B.L.R.* 1 at 10–16 (in which Garland J considered all of the decisions referred to above).
- 37 *Samuels v Davies* [1943] 1 *K.B.* 526; *Greaves & Co (Contractors) Ltd v Bayham Meikle & Partners* [1975] 1 *W.L.R.* 1095; *Independent Broadcasting Authority v EMI Electronics Ltd and BICC Construction Ltd* (1980) 14 *B.L.R.* 1; *Viking Grain Storage Ltd v TH White Installations Ltd* (1985) 33 *B.L.R.* 103. In *John Lelliott (Contracts) Ltd v Byrne Bros (Formwork) Ltd* (1992) 31 *Con. L.R.* 89 at 92 His Honour Judge Newey QC said: “I think that the effect of the cases is that when a party to a contract agrees to supply a structure for a particular purpose knowing that his knowledge and skill will be relied upon by the other

party the courts will readily imply a term requiring that it will be fit for that purpose, but that express terms of the contract, particular facts or general background may result in this not being so ...". See also *Rotherham MBC v Frank Haslam Milan (1996) 78 B.L.R. 1, CA*.

38 See *Greaves and Co Ltd v Baynham Meikle [1975] 1W.L.R. 1095, CA*; and *George Hawkins v Chrysler UK Ltd (1986) 38 B.L.R. 36*.

39 See *Copthorne v Arup Associates (1997) 85 B.L.R. 22* (a case on the JCT Form of Management Contract, 1987 edn).

40 See *Brogden v Metropolitan Railway (1877) 2 App. Cas. 666*. For an indication of the way in which the courts approach term (or "maintenance") contracts, see *Bonnells Electrical Contractors v London Underground (1995) C.I.L.L. 1110*.

41 See paras 39-024, 39-040.

## **(d) - Standard Forms of Contract**

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Volume II - Specific Contracts

Chapter 39 - Construction Contracts

Section 1. - The Nature of Construction Contracts

**(d) - Standard Forms of Contract**

### **Use of standard forms**

- 39-020 Construction contracts are often characterised by, and have also been criticised for,<sup>42</sup> the use of lengthy and elaborate standard forms.<sup>43</sup> Given the frequent long-term nature of construction contracts, detailed machinery is required which permits adjustment of the relationship between the parties in changed circumstances (for example, by the use of variation and price escalation clauses).<sup>44</sup> Although standard forms have been thought of as resembling legislative codes of the parties,<sup>45</sup> their effect is no different to any other written form of contract.<sup>46</sup> There are now many clauses in the most frequently used standard forms which are the subject of decisions of the courts and the broad approach of the courts to such decided cases is that reasonable businessmen are entitled to assume that the authoritative construction of particular words will be followed.<sup>47</sup> Where bespoke forms are encountered it is almost invariably found that the bulk of the provisions are nevertheless based on one or more of the standard forms, with amendments as required by the particular client. However, it is also commonplace for standard forms to be substantially amended.<sup>48</sup> In these circumstances it is important to remember that<sup>49</sup> “Comparison of one contract with another can seldom be a useful aid to construction and may be ... positively misleading ...”.

### **The contract administrator**

- 39-021 A common feature of practically all standard forms of contract (as well as most bespoke forms) is the widespread use of a third party, variously given the title engineer, architect, supervising officer,

or project manager, who is given an important administrative role involving both action as the employer's agent and decisions taken on the basis of an impartial professional opinion.<sup>50</sup> Such persons are compendiously referred to in this chapter as the contract administrator.

## Institutional standard forms

- 39-022 Standard forms issued by public and local authorities for both building and civil engineering work were well known in the nineteenth century.<sup>51</sup> Forms officially sanctioned by the construction institutions emerged only during the twentieth century. Best known are the JCT Standard Form of Building Contract (until 1977 known as the RIBA Form) and the ICC Conditions of Contract (until 2011 known as the ICE Conditions). The JCT Form is published in three versions: with quantities, without quantities, and with approximate quantities. The ICE 7th Edition of 1999 and the ICC Form are described as "Measurement Version" but are also available as a "Term Version". References in this chapter are to the Measurement Version. Both the JCT and ICC Forms are available as versions for design and build and there are also standard sub-contract documents. Many standard forms of sub-contract have been issued by the institutions which have produced main contract standard forms,<sup>52</sup> but some are issued by sectional bodies such as contractors' organisations.<sup>53</sup> Particular types of construction activity have generated distinct standard forms, such as that issued by the Institutions of Mechanical Engineers and of Engineering and Technology (formerly the Institution of Electrical Engineers) known as MF/1 (Rev 4, 2000). This form is suitable for the construction of process plant and equipment where the contractor's obligation is to include the attainment of specified performance criteria or output levels at the end of the construction period. Other standard forms are issued by the same Institutions and also by the Institution of Chemical Engineers for process plant contracts. For international engineering and construction work a suite of standard form exists, known as the FIDIC Forms.<sup>54</sup>

## Other standard forms

- 39-023 Since the 1970s increasing numbers of variants of these forms have been issued including forms for design and build contracts, for management contracts and for minor and intermediate works.<sup>55</sup> A standard form used by many government departments was issued by the former Property Services Agency and known as GC/Works/1. A new suite of such forms, known as GC/Works/1 to 10, was produced in 1998 and 1999. There have been various attempts to produce a "common" standard form of construction contract of a kind to be found in some European countries.<sup>56</sup> Such a form was recommended by the Banwell Committee (1964), but without result. During the 1980s an initiative was launched by the British Property Federation, again without lasting effect. In 1991, however, the ICE published the New Engineering Contract (now called the Engineering and Construction Contract), which aimed at providing, in a unified format, a complete range of contract documents

covering all types of procurement and construction through the use of “core clauses” with optional additions. This form of contract was specifically recommended in the Latham Report<sup>57</sup> as being conducive to best practice contracting. Its use of present tense language has been controversial<sup>58</sup> but the form is now used in a wide variety of projects. The NEC is now in its 3rd edition (2005) and has been used for a number of high profile contracts, including the London 2012 Olympic projects. There are also sets of standard forms for the engagement of architects and engineers for use in different circumstances, some of which are issued by the relevant professional bodies such as the Royal Institute of British Architects or the Association of Consulting Engineers.

## PFI contract forms

- 39-024 Since the advent of PFI contracting different forms of contract have emerged, initially drafted by private law firms. As projects have grown and expanded into new areas the task of achieving some form of standardisation has been undertaken not by the traditional construction industry institutions, but by HM Treasury which, since July 1999, has published and periodically revised a document entitled Standardisation of PFI Contracts (“SoPC”). An edition, known as Version 4, was issued in March 2007 and may be downloaded free from the Treasury website.<sup>59</sup> SoPC provides very detailed guidance, including draft contract provisions, for the preparation of PFI contracts. The contents of such contracts are further reviewed below. As already noted contracts for the performance of the design and construction work involved in the PFI project are based on conventional contracts and governed by the same principles save where PFI-specific legislation applies.

## Footnotes

42 *Peak Construction v McKinney Foundations* (1970) 1 B.L.R. 111, 114.

43 There have been some deliberate attempts to simplify construction and engineering contracts, and perhaps the most important example is the New Engineering and Construction Contract (“NECC”).

44 For a discussion of adjustments to long-term contracts, see Ewan McKendrick, “The Regulation of Long-term Contracts in English Law” in Beatson and Friedmann (eds), Good Faith and Fault in Contract Law (1995).

45 *Amalgamated Building Contractors Ltd v Waltham Holy Cross UDC* [1952] 2 All E.R. 452.

46 Save that a printed form may constitute “written standard terms” of one party for the purposes of the *Unfair Contract Terms Act 1977* s.3(1). Despite the terms of the DoE Consultation Paper, “Fair Construction Contracts”, issued in May 1995 following the Latham Report, the *Housing Grants, Construction and Regeneration Act 1996 Pt II* draws no distinction between standard and non-standard or “bespoke” (see May 1995 Consultation Paper) forms contract.

- Accordingly, the provisions of the *Housing Grants, Construction and Regeneration Act 1996* apply in the same way to both types of construction contract.
- 47 *British Sugar v NEI Power Projects (1997) 87 B.L.R. 42* at 501, per Waller LJ (a case on the meaning of “consequential loss”).
- 48 For a discussion on the use of bespoke and amended standard forms in the construction industry see DoE Consultation Paper, “Fair Construction Contracts”, May 1995.
- 49 *Mitsui Construction Co Ltd v The Att-Gen of Hong Kong (1986) 33 B.L.R. 1, 18, PC.*
- 50 *Sutcliffe v Thackrah [1974] A.C. 727; Ashville Investments Ltd v Elmes Contractors Ltd [1989] 1 Q.B. 488* at 506; but see *Beaufort Developments (NI) Ltd v Gilbert-Ash Ltd [1999] 1 A.C. 266, 290*. See also *Scheldebouw BV v St James Homes (Grosvenor Dock) Ltd [2006] EWHC 89 (TCC), [2006] B.L.R. 113*, where Jackson J described how, when undertaking a decision-making function, a contract administrator had a duty to act in a manner that was independent, impartial, fair and honest.
- 51 See I. Duncan Wallace, *Construction Contracts: Principles and Policies in Tort and Contract* (1986), paras 27-09—27-14.
- 52 Such as the JCT Domestic Sub-Contract 1981 (“DOM/1”) recommended for use where the JCT 80 has been used in the main contract. In practice, the use of DOM/1 is more widespread than this: its popularity seems to be based upon the focus upon interim payment and “cashflow” in its terms. The equivalent in the JCT 2011 Form is the Standard Building Sub-Contract (SBCSub/A).
- 53 Notably the CECA “Blue Form” of sub-contract which is used where the ICE Conditions are part of the main contract.
- 54 Federation Internationale des Ingénieurs Conseils. While successive versions up to the 4th edn of 1987 were based closely on the format, including clause numbering of the ICE conditions, in 1998 FIDIC departed from tradition by producing a new suite of forms, covering a wide range of construction activities, in a new format which may be regarded a *sui generis*, although much of the detailed drafting owes its origin to earlier standard forms.
- 55 The JCT Intermediate Form of Building Contract 2011 edn and the JCT Agreement for Minor Building Works 2011 are particularly widespread standard forms.
- 56 Notably Denmark, Holland and Sweden.
- 57 See para.5.1.9.
- 58 See *Valentine (1996) 12 Const. L.J. 305*.
- 59 <https://www.gov.uk/government/organisations/hm-treasury> [Accessed 1 September 2021].

## **(e) - Content of Standard Forms**

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### **(e) - Content of Standard Forms**

#### **Typical features**

39-025 Whilst differing greatly both in their precise provisions and in their attempt to accommodate particular kinds or levels of construction activity, standard forms often have typical features of content and structure. Some of these are considered below by reference to the following popular standard forms of contract: the Joint Contracts Tribunal Standard forms (JCT 98 and JCT SBC 2005), Intermediate JCT form (IFC 98 and IC 2005), JCT Minor Works form (MW 98 and 2005) and the Infrastructure Conditions of Contract, 2011 (formerly the ICE Conditions 7th edn). The JCT in 2005 published a new suite of standard form contracts. The contract forms within the 2005 suite have been significantly reorganised in terms of structure and clause numbering, although the JCT SBC 2005 contains most of the material contained in the JCT 98 form. JCT 98 was itself largely a consolidation of the JCT 1980 form. The form was again re-issued in 2011, substantially to incorporate new payment provisions following amendment of the [Housing Grants, Construction and Regeneration Act 1996](#). Despite appearances, JCT 2005 and 2011 forms represent in substance the latest in a policy of continuity. The major changes from that which went before are as follows<sup>60</sup>:

- (1)the integration in the main body of the JCT SBC 2005 form of certain provisions previously contained in a JCT supplement;
- (2)some amendments to the wording of important provisions;
- (3)some omissions from the JCT 98 form (such as nominated sub- contractors provisions);
- (4)abandonment of the long-used title “Standard Form of Building Contract” in favour of “Standard Building Contract” (SBC).

## Contractor's general obligations

- 39-026 The overriding obligations upon the contractor are often set out at the beginning of the standard form. Clause 2.1 of JCT 2011 provides a general description of the contractor's obligations and provides that the work shall be carried out and completed in a proper and workmanlike manner. Clause 2.3 also provides further general obligations in respect of the quality of materials, goods and workmanship. In contracts involving some element of contractor's design, there will also ordinarily be general design obligations. Under the ICC Form, the contractor's general responsibilities are set out in cl.8,<sup>61</sup> whilst the duties and authority of the engineer are set out in cl.2.<sup>62</sup>

## Priority of contract documents

- 39-027 Standard forms will typically identify which of the contract documents will have priority in the case of conflict, and then go on to provide for the adjustment of discrepancies in such documents. Clause 1.3 of the JCT 2011 Form provides that:

“The Agreement and these Conditions are to be read as a whole but nothing contained in the Contract Bills or the CDP Documents shall override or modify the Agreement or these Conditions.”

The Contract Bills will have been specifically agreed by the parties for the purposes of a particular contract, whereas the Contract Conditions will be the printed standard form. The clear words of cl.1.3 and the other similar provisions of other standard form contracts displace the general rule of construction<sup>63</sup> that the written words specifically agreed by the parties will prevail over printed words in this way: if there is a direct conflict, then the conditions will prevail, but otherwise the bills may supplement what is stated in the conditions.<sup>64</sup> Clause 5 of the ICC Form adopts a different approach to the priority of contract documents in two principal ways: (i) the clause provides that the several documents forming the contract are to be taken as mutually explanatory of one another; and (ii) ambiguities or discrepancies are to be explained and adjusted by the engineer, who is then to issue an appropriate instruction in writing (under cl.13).

## Extras and changes

- 39-028

Variations will often be required in construction contracts as a result of changes to the employer's requirements or alterations to the design not apparent at tender. Clause 5.1 of JCT 2011 provides a definition of "Variation" for the purposes of those conditions and cl.5.2 to 5.10 deal with valuation. Equivalent provisions appear in other JCT contracts. In the ICC Form (2011 edn), the procedure for ordered variations is set out in cl.51, and the basis for valuation in cl.52. An important point of contrast here is that the ICC Form (2011 edn) contains no equivalent of the JCT provisions for separate recovery of loss and expense caused by matters materially affecting regular progress of the works, so that, under the ICC Form, any cost incurred in connection with a variation must be recovered through cl.52.<sup>65</sup>

## Instructions

- 39-029 Standard forms will provide a machinery for the contract administrator to give instructions to the contractor to secure the construction of the works in conformity with the contract.<sup>66</sup> Instructions will be necessary where drawings and specifications produced for pricing and tender purposes are found to be insufficiently comprehensive to build the finished product. Whilst the precise scope of the authority of the contract administrator will depend upon the construction of the contract,<sup>67</sup> he will not have power to modify the express terms of the contract, and there will usually be an implied term that instructions are to be given at a time which is reasonable in all the circumstances of the particular contract.<sup>68</sup> Clauses 3.10 to 3.21 of the JCT 2011 Form deal with the architect's instructions. Clause 3.10 requires the contractor to comply with all instructions issued to him by the architect insofar as the architect is expressly empowered by the contract to issue such instructions and cl.3.14 to 3.21 set out those instructions which the architect is empowered to issue. Clause 3.10.1 of JCT 2011 provides that where an instruction is one requiring a variation the contractor need not comply to the extent that he makes a reasonable objection. Otherwise, if the contractor fails to comply with an instruction within seven days, cl.3.11 permits the employer to employ others to execute the relevant work and pass on all additional costs to the contractor. Clause 2(6) of the ICC Form deals with the method by which instructions can be given by the engineer; cl.7(1) deals with the situation where further drawings, specifications and instructions are "... necessary for the purpose of the proper and adequate construction and completion of the works ..." and cl.7(4) deals with the question of late instructions.

## Certificates

- 39-030 In most construction contracts, the entitlement of the contractor to payment or extensions of time depends on the certificate or decision of the architect, engineer or other professional identified in the contract.<sup>69</sup> For example, the elaborate provisions of cl.4 of JCT 2011 deal with certificates (interim and final) and payment of the contractor. Clauses 4.9 to 4.13 of JCT 2011 deal with

certification of interim payment and cl.4.15 provides for issue of the final certificate. Clause 60 of the ICC Form deals with certificates and payment. It is to be noted that many of the most prevalent standard forms use words such as “opinion”, and so call for an assessment by the contract administrator, based upon his skill and judgment.

## Time for completion

- 39-031 The parties will usually make express provision for a completion date or at least a completion period, and many construction contracts have optional additional requirements for sectional or phased handover of parts of the works.<sup>70</sup> Clause 14 of the ICC Form provides for the submission by the contractor to the engineer for his acceptance of a programme “... showing the order in which he proposes to carry out the Works having regard to the provisions of clause 42(1)” (possession of the site and access). The status and effect of the stipulations as to time in a building contract are matters of construction in the particular case: sectional handover of work may be required; time may be fixed by reference to specified start and finish dates; programmes submitted by the contractor may, but need not, create enforceable obligations; or time may be expressly stated to be of the essence, thereby allowing the innocent party to treat breach as putting the contract at an end.<sup>71</sup> The courts have shown a distinct reluctance to accept the proposition that building contracts are easily undermined by events which impact upon the time for completion.<sup>72</sup> Where the express term governing time for completion is lost, then time is sometimes described as being rendered “at large” (so that completion will be required in a reasonable time). The courts have not always been content with this solution to the problem of time, as in *Bruno Zornow v Beechcroft Developments*<sup>73</sup> where the Court considered that it made commercial sense to imply a date for completion into an agreement which varied works covered by an agreement which did contain a completion date.<sup>74</sup> In the absence of an enforceable express stipulation as to time, the court will normally imply a term into a contract that completion is to be within a reasonable time.<sup>75</sup> In the absence of express words governing the rate of progress to be achieved by the contractor within the period for completion<sup>76</sup> it seems that, depending upon the circumstances of the particular case, there may be room for the implication of a term that the contractor will proceed with reasonable diligence, or it may be that the sole obligation upon the contractor is that of completing within the period for completion.<sup>77</sup>

## Extensions of time and liquidated damages

- 39-032 Standard forms will often contain detailed provisions identifying the circumstances in which, and the precise means by which, the time for completion may be extended (so that such other provisions of the contract as, say, those permitting the levy of liquidated damages for delay, will not apply). Clause 2.32 of JCT 2011 deals with the entitlement to deduct liquidated damages for

non-completion and cll.2.26 to 2.29 deal with extensions of time. In the ICC Form, extensions of time are dealt with by cl.44, and liquidated damages by cl.47.<sup>78</sup>

## Valuation and payment

39-033 The provisions in any given standard form relating to interim and final valuation and payment will be central to the contractor's cash flow. For any "construction contract" within the meaning of s.104 of **Housing Grants, Construction and Regeneration Act 1996**, ss.109–113 will have an important impact upon provisions relating to payment. Equally, from the point of view of cash flow, in circumstances where rights of set-off otherwise existing at common law can be restricted or curtailed by the use of clear words,<sup>79</sup> standard forms of sub-contract may, in particular, contain detailed notice provisions governing the entitlement of the main contractor to set-off sums in respect of defects or delays to the works.<sup>80</sup> These provisions will need to be adhered to in detail to avoid loss of the right to set-off.<sup>81</sup>

## Insurance of the works

39-034 Given the expense and risk of damage involved in construction projects, standard forms will typically make extensive provision for the insurance of the works.<sup>82</sup> Clauses 6.4 to 6.9 of JCT 2011 require the contractor to take out and maintain insurance in respect of claims for injury to persons or property and also deal with the insurance of the works. Clauses 23 and 21 respectively of the ICC Form contains similar requirements.

## Correction of defects

39-035 Standard forms will often make specific provision for the correction of defects during the course of the works. Clauses 3.17 to 3.20 of JCT 2011 deal with the power of the architect to issue instructions to ensure that the works meet the standards described in the contract. In the ICC Form, the removal, substitution and re-execution of unsatisfactory work and materials (by instruction in writing from the engineer to the contractor) during the progress of the works is dealt with by cl.39.

## Termination

39-036

Construction contracts will typically provide machinery identifying the circumstances in which defaults of either party will entitle the innocent party to terminate the contractor's employment under the contract. These often complex procedures will need to be operated with considerable care since a party purporting to terminate a contract without an entitlement to do so will generally be found to have repudiated the contract. The relevant provision of JCT 2011 (cl.8) is organised around the occurrence of defined specified defaults. Clause 8.3.1 makes clear that the provisions of the contract do not affect the rights and remedies available at common law. Thus, in the case of repudiatory breach by the contractor, cl.8.4 would not preclude the employer from treating the contract as at an end, as in *Sutcliffe v Chippendale & Edmondson*.<sup>83</sup> The employer has an option either to accept the repudiation and treat the contract as at an end, or to comply with the contractual termination provisions. Under the ICC Form, termination of the contractor's employment is dealt with by cl.65.

## Disputes

- 39-037 Standard forms of building contract will typically contain provisions for the resolution of disputes or differences, whether by litigation, arbitration, expert determination or adjudication.<sup>84</sup> The JCT suite of contracts provide for the parties to elect between litigation and arbitration as their ultimate form of dispute resolution with litigation being the default position if the parties fail to specify. This is to be contrasted with the position that applied up to and including the 1998 versions of the JCT Form, which provided for arbitration to be the default form of dispute resolution. Where there is an arbitration agreement, [s.9\(4\) of the Arbitration Act 1996](#) entitles either party to a stay of legal proceedings save where the narrow circumstances identified in [s.9 of the 1996 Act](#) apply.<sup>85</sup> All forms of JCT contract also include provision for the temporary resolution of disputes by adjudication. This is required in all domestic construction contracts by virtue of [s.108 of the Housing Grants, Construction and Regeneration Act 1996](#) but by making express provision for adjudication the parties to the contract will be permitted to adjudicate even if they would otherwise have fallen outside the scope of the Act, for example because one of the parties is a residential occupier with the meaning of [s.106 of the Act](#).

## Footnotes

- 60 See generally Keating on Construction Contracts, 11th edn (2021), at para.20-008—20-014.
- 61 This clause is substantially the same as cl.8 in the ICE 5th edn, save that by cl.8(2) of the ICE 7th edn, on which the ICC Conditions are based, the contractor is stated not to be responsible for the design or specification of the Permanent Works except as may be expressly provided in the contract, and the contractor is required to exercise all reasonable skill, care and diligence in designing any part of the Permanent Works for which he is

- responsible. For a discussion of the interrelationship between cl.8(2) and cl.12 of the ICE 5th edn, see *Humber Oil Terminals Trustee Ltd v Harbour and General Works (Stevin) Ltd (1991) 59 B.L.R. 1, CA*.
- 62 On the general position of the engineer, see: *Sutcliffe v Thackrah [1974] A.C. 727, HL; Pacific Associates v Baxter [1990] 1 Q.B. 993, CA*.
- 63 See Keating on Construction Contracts, 11th edn (2021), para.3-045; Lewison, The Interpretation of Contracts, 7th edn (2020) para.7.04.
- 64 *English Industrial Estates v Wimpey [1973] 1 Lloyd's Rep. 118, CA*.
- 65 See Keating on Construction Contracts, 9th edn (2012), pp.1169–1174. On cl.52 ICE 5th edn, see the commentary in Abrahamson, Engineering Law and the ICE Contracts, 4th edn (1996), pp.178 et seq. and also the decision in *Henry Boot Construction Ltd v Alston Combined Cycles Ltd [1999] B.L.R. 123*.
- 66 In *AMF International Ltd v Magnet Bowling Ltd [1968] 1 W.L.R. 1028, 1046* Mocatta J said: “It is the function and right of the builder to carry out his own building operations as he thinks fit. The architect, on the other hand, is engaged as the agent of the owner for whom the building is being erected, and his function is, *inter alia*, to make sure that in the end, when the work has been completed, the owner will have a building properly constructed in accordance with the contract and any supplementary instructions which the architect may have given ...”.
- 67 For example, the power to omit work and give it to another contractor, on which see *Commissioner for Main Roads v Reed & Stuart (1974) 12 B.L.R. 55* (a decision of the High Court of Australia).
- 68 *Neodox Ltd v Borough of Swinton and Pendlebury (1958) 5 B.L.R. 34* (a decision on the ICE Conditions), where Diplock J went on to say (at 46–47): “I think that in general clauses 10 and 18 give to the engineer the power to determine the method by which works are to be executed, such as the excavation of trenches where there are alternative methods possible; and I think, too, that clause 6 of the specification, on its true construction, entitles the engineer to decide when and where timbering or other forms of sheeting are to be used. His decision as to whether one method or another is satisfactory to him must, of course, be a honest one, but it does not seem to me that the Corporation warrant his competency or skill, or warrant that his decision will be reasonable ...”.
- 69 Generally, see *Ashville Investments Ltd v Elmer Contractors Ltd [1989] Q.B. 488, 507; (1987) 37 B.L.R. 60* at 79.
- 70 Many of the JCT Forms have Sectional Completion Supplements; although under the reformulated JCT 2011 suite these provisions are incorporated into the main body of the standard form.
- 71 The general position is that time is not of the essence in building contracts; see the discussion in Keating on Construction Contracts, 11th edn (2021), paras 8-005—8-011.
- 72 *McAlpine Humberoak v McDermott International Inc (1992) 58 B.L.R. 1, CA*.
- 73 *(1989) 51 B.L.R. 16* (a case where the contract incorporated the 1963 edn of the JCT, 1977 revision, with quantities, substantially amended).

- 74 Whilst the decision of the Judge is open to question, the case is illustrative of the way in which the courts will often strive to retain at least some enforceable stipulation as to time, to reflect commercial realities.
- 75 *Hick v Raymond & Reid [1893] A.C. 22, 32*; Supply of Goods and Services Act 1982 s.14.
- 76 See *West Faulkner Associates v London Borough of Newham (1994) 71 B.L.R. 1, CA* on cl.25(1)(b) of the JCT Local Authorities Form with Quantities, 1963 edn (1977 revision) and the meaning of "... to proceed regularly and diligently with the Works ...".
- 77 *Greater London Council v Cleveland Bridge and Engineering Co Ltd (1986) 34 B.L.R. 50* (Staughton J at first instance), cf. 72, 78, per Parker LJ.
- 78 For extension of time and recovery of liquidated damages generally see below, paras 39-115—39-126.
- 79 Lord Diplock in *Modern Engineering v Gilbert-Ash [1974] A.C. 689, 717*. However: (i) a provision restricting a right of set-off contained in written standard terms of business may fall within *Unfair Contract Terms Act 1977 s.13(1)(b)* so that it will be subject to a requirement of reasonableness; and (ii) there can be no restriction on the right of set-off in insolvency: *Stein v Blake [1996] A.C. 243, HL*.
- 80 As cl.23 of DOM/1.
- 81 *Mellowes Archital v Bell Projects (1997) 87 B.L.R. 26, CA*; *Rupert Morgan Building Services (LLC) Ltd v Jervis [2003] EWCA Civ 1563, [2004] 1 W.L.R. 1867, [2004] B.L.R. 18*.
- 82 See below, para.39-136.
- 83 (*1971*) 18 B.L.R. 149 at 160–162, a decision on the 1963 edn of the Standard Form of Building Contract or RIBA Form.
- 84 For the statutory right of a party to a “construction contract” to refer a dispute arising under the contract for adjudication, see *Housing Grants, Construction and Regeneration Act 1996 s.108*.
- 85 See *Halki Shipping Corp v Sopex Oils Ltd [1997] 1 W.L.R. 1268*, decision of Clarke J, affirmed by the Court of Appeal at [1998] 1 W.L.R. 726; *Beaufort Developments (NI) Ltd v Gilbert-Ash NI Ltd [1999] 1 A.C. 266, 281*; *Birse Construction Ltd v St David Ltd [1999] B.L.R. 194*; *Jitendra Bhailhai v Dilesh R Patel [2000] Q.B. 551, CA*. Furthermore, a party dealing as a “consumer” within the meaning of the *Unfair Terms in Consumer Contracts Regulations 1994* may be able to avoid a mandatory stay by arguing that the arbitration clause is unfair: *Zealander v Laing Homes Ltd (2000) 2 T.C.L.R. 724*. In *Ahmad Al-Naimi v Islamic Press Agency Inc [2000] 1 Lloyd's Rep. 522, [2000] B.L.R. 150*, the Court of Appeal said that, in a case where the issue is whether the underlying dispute is subject to an agreement to arbitrate at all, the court has a choice whether to decide that issue itself, or to stay proceedings whilst that issue is referred to arbitration. Significantly, both parties in *Al-Naimi* had asked the judge at first instance and the Court of Appeal to resolve the question of jurisdiction on the affidavit evidence. Chadwick LJ went on (at 156) to say that the correct approach was that set out by Judge Humphrey Lloyd QC in *Birse Construction Ltd v St David Ltd [1999] B.L.R. 194*.

## **(f) - PFI Contracts**

**Chitty on Contracts 34th Ed.**

**Consolidated Mainwork Incorporating First Supplement**

**Volume II - Specific Contracts**

**Chapter 39 - Construction Contracts**

**Section 1. - The Nature of Construction Contracts**

### **(f) - PFI Contracts**

#### **Private Finance Initiative**

- 39-038 Historically, major construction projects have been financed either publicly, through local authorities and government departments, or privately through the raising of equity and loans.<sup>86</sup> With increasing pressure on public finances in the last two decades, many different schemes have been evolved for the raising of private project finance. For example, many inner city redevelopment schemes have been financed through sale and lease-back arrangements coupled with planning agreements promoted by local authorities. During the 1980s some local authorities raised finance for their own projects by deferred loan agreements under which the financier became the project employer, thereby giving rise to issues as to the recoverability of loss.<sup>87</sup> In 1992 the government announced its support for a new policy known as the Private Finance Initiative (“PFI”). This involved relaxation of previous finance policy, encouragement of public-private joint ventures and promotion of opportunities for private sector financing. There is no definition of PFI, which has now extended well beyond construction projects, into the provision of services formerly provided through public finance in many different fields. An early and substantial example of PFI is the cross-channel rail link. PFI is now regarded as falling under the broader description of Private-Public Partnerships (“PPP”) in which construction may play a varying role. PPP contracts may involve PFI arrangements coupled with privatisation of former publicly operated facilities. PFI may be based on differing methods of financing. The most usual, which is dealt with here, is referred to as the Project Finance model. The capital value of PFI projects entered into up to 2006 is estimated at around £50bn.<sup>88</sup> While the value of projects is increasing, a number currently being in excess of £1bn, PFI still represents only a small proportion of the total annual capital value of the UK construction market at around £60bn.

## Operation of PFI schemes

- 39-039 A scheme based on project finance PFI usually involves the creation of a special purpose vehicle (SPV) company which is intended to undertake the primary contractual obligation (for example, to construct or refurbish a hospital and to operate certain services within it), financed through equity and loans in whatever proportions the promoters may decide. The involvement of government or public authorities is usually limited to the provision of land, with operating agreements under which the project is usually to revert back to public ownership (as in the case of the channel tunnel) but may involve outright sale. PFI is currently utilised for the provision of schools, roads, prisons, hospitals and other capital projects and services. The essence of PFI projects is that they involve long-term operation agreements (which are outside the ambit of this section), coupled with construction contracts in which the terms are modified to fit the wider roles being undertaken by the parties. For example, contractors are likely to have a financial interest in the project, and to undertake substantially enhanced risks under the construction contract. The design will also play an important role in the overall viability of the project, and its provision is likely to be integrated with the arrangements for financing and constructing the capital works.<sup>89</sup> PFI projects have given rise to a number of legal difficulties, including issues of authority and vires.<sup>90</sup> There are a number of statutory provisions designed to support PFI in various sectors.<sup>91</sup> Certain construction contracts entered into under the PFI are excluded from the operation of the [Housing Grants, Construction and Regeneration Act 1996](#)<sup>92</sup> and are thus not required to conform to the payment provisions under the Act, nor to include the right to adjudication.<sup>93</sup>

## Typical provisions of PFI contracts

- 39-040 PFI contracts contain many provisions similar to those of conventional construction contracts and with the same objective of securing the satisfactory construction of capital works comprising or forming part of the services to be provided to the user (in the contract referred to as “the authority”) over the duration of the contract. The major difference is that there are no provisions for payment by the authority in respect of the capital costs, which is to be paid for out of the “unitary charge” payable once the services become available. The exception is so called “compensation events” which are intended to cater for matters arising before the “service commencement date” which are at the authority’s risk and which result in delay or increased costs to the contractor (equivalent to claims under more conventional construction contracts). Matters giving rise to such compensation include breach by the authority, authority changes<sup>94</sup> and discriminatory or specific changes in law as defined.<sup>95</sup> For the construction of the facility or works, the PFI contract is intended to operate as a design and build contract with the authority’s requirements being set out in an output specification. The contractor’s proposals for realisation of the authority’s requirements

are set out in the initial tender and developed in detail after award of the contract. Compliance with the output specification is intended to be secured through provisions for submission of information to the authority as the design is developed, by quality management systems and provisions for inspection and tests at completion.<sup>96</sup> The construction phase (which concludes with “service commencement”) may be subject to delays in the same way as conventional construction projects and in the event that the authority anticipates incurring loss as a result of late service commencement, there may be a provision for liquidated damages to be payable on a conventional basis. The PFI contractor will be expected to transfer all conventional construction risks, including delay, to the contractor carrying out the works, who will usually enter into a conventional design and build contract with the PFI contractor.

## Other features of PFI contracts

- 39-041 There are many other features usually found in PFI contracts which are designed to regulate the relations between the parties over the 25-year (or other) span of the contract. Thus, depending on the nature of the service there will be detailed provision for monitoring performance by the PFI contractor (through sub-contractors) and for payment of the unitary charge and appropriate adjustments thereto. There will be provisions for early termination for authority default or contractor default and for termination on other grounds including voluntary termination, in each case involving complex accounting procedures to accommodate many levels of financial interest in the project including particularly that of the project’s financiers (lenders). As an alternative to termination, PFI contracts usually provide for the authority to have a right of “step-in” on the ground of serious but short-term default by the contractor which the authority is in a position to resolve, the intention being that the authority will subsequently “step-out” and allow the contract to continue. A related device is usually provided under a direct agreement between the authority and the senior lenders under which, in the event of termination or threatened termination for contractor default, the lenders may step-in to protect their investment (which is otherwise inadequately secured) with similar provisions for step-out. Different standard models exist for such provisions and there is no standardised recommendation. While there have been a limited number of PFI “failures” many projects have proved financially successful to the promoters such that SoPC now contains recommendations for “refinancing” provisions aimed at securing a partial return for the authority in the event that a PFI contractor decides to “sell” the project at a profit, reflecting the secured long-term income under the contract. The current recommendation is for a 50 per cent sharing of the refinancing gains.<sup>97</sup> Thus, it can be seen that a PFI project involves a large number of complex and interrelated contracts between the authority, the PFI contractor, financiers, principal and sub-contractors, designers and other professionals, usually accompanied by many cross-warranties or collateral contracts between those not in primary contractual relationships. Bidding and negotiating all the necessary contracts is costly and time-consuming, such that there is usually a staged bidding arrangement, with the final stage of negotiation being conducted only with one preferred bidder whose bid is considered the most favourable.

## Example of PFI project

- 39-042 A decision of the Technology and Construction Court<sup>98</sup> dealt with a range of complex issues in contract (and tort) which illustrate the practical operation of a PFI project. The claimant (BL) entered into a PFI contract with a local authority (LCC) for the collection, recycling and disposal of domestic waste. The contract required construction of a recycling plant which was the subject of the dispute. An essential feature of the plant was a large drum known as the ball mill in which waste was broken down into its constituent parts for different forms of treatment and disposal. BL entered into a back-to-back contract with an associated company (BW) which undertook to discharge BL's obligations as to construction of the plant. BW engaged MEH under a contract to design and build the plant, MEH entering into a direct performance warranty with BL. MEH subcontracted the work to HU who in turn entered into a contract for the design and construction of the ball mill with OT. After practical completion of the ball mill further works were required during the commissioning process, including welding and grinding. The additional works were carried out by P. During a tea-break a fire broke out caused by the negligence of HU and P. A substantial delay ensued which was partly mitigated by running the ball mill with a temporary liner at additional cost. BL and BW claimed liquidated damages and the additional cost incurred against MEH under the design and build contract and the direct agreement. Ramsey J held that MEH were liable to BW for liquidated damages, but such damages were an exhaustive remedy and there was no liability for the additional cost of mitigation measures. MEH had no remaining liability to BL whose action was therefore stayed. The case illustrates the complexity of PFI contractual arrangements and the application of conventional legal analysis to those arrangements.<sup>99</sup>

## Foreign projects

- 39-043 The means of financing the project has a major influence on the method of procurement. In the developing world much construction work has been financed by the World Bank or the European Bank for Reconstruction and Development, each of which has favoured standard procurement methods using the FIDIC forms of contract. PFI has also become widely used in a variety of forms depending on the particular project. The procurement methods employed are variously known as Build Operate Transfer (BOT), Build Own Operate Transfer (BOOT) and latterly, Design Build Finance Operate (DBFO). Projects vary greatly in their financial and administrative detail, but all involve the provision of capital works financed through external private sources. The promoters are granted leases or licenses to provide and operate the capital works, with the objective of recouping their investment and profit, the works ultimately being transferred to the government or other promoter of the scheme. Such projects have included power stations, hydro-electric schemes and all forms of building and construction throughout the developing world. Contracts usually involve multi-national parties and may be subject to any national law chosen by the parties as the governing

or proper law, which may occasionally be English law. Disputes, particularly under the FIDIC form of contract, involve multi-stage processes, usually with the final stage being arbitration under the ICC Rules with an agreed neutral seat.

## Footnotes

- 86 Historically, canals and railways in the UK were privately financed, while roads, harbours and military works were financed by the public purse. See, for example, *Hawke and Reed* (1969) 2 *Economic History Review* 269–286 and the discussion of railways in Atiyah, *The Rise and Fall of Freedom of Contract* (1979).
- 87 See *Darlington BC v Wiltshire Northern* [1995] 1 *W.L.R.* 68; (1994) 69 *B.L.R.* 1; *Linden Gardens Trust v Lanesta Sludge Disposal* [1994] 1 *A.C.* 85; (1993) 63 *B.L.R.* 1; *Alfred McAlpine Construction v Panatown* [2001] 1 *A.C.* 518.
- 88 <http://www.amaresearch.co.uk> [Accessed 1 September 2021].
- 89 See generally *Haley* (1999) 15 *Const. L.J.* 220.
- 90 See *Crédit Suisse v Waltham Forest LBC* [1997] *Q.B.* 362; *Crédit Suisse v Allerdale BC* [1997] *Q.B.* 306.
- 91 Residual Liabilities (National Health Service) Act 1996, National Health Service (Private Finance) Act 1997, Local Authorities (Capital Finance) Regulations 1997 (SI 1997/319).
- 92 The *Construction Contracts (England and Wales) Exclusion Order* 1998 (SI 1998/648).
- 93 s.108.
- 94 SoPC s.13.
- 95 SoPC s.14.6.
- 96 SoPC ss.3.4, 3.5 and 3.6.
- 97 SoPC s.34.
- 98 *Biffa Waste Services v Maschinenfabrik Ernst Hese GmbH* [2008] *EWHC* 6 (TCC), [2008] *B.L.R.* 155; see also *Amey Birmingham Highways Ltd v Birmingham City Council* [2018] *EWCA Civ* 264, [2018] *B.L.R.* 225.
- 99 Although the decision in first instance in *Biffa Waste* as to the vicarious liability of OT for the negligence of P has now been reversed by the Court of Appeal, see [2008] *EWCA Civ* 1257, [2009] 3 *W.L.R.* 324, [2009] *B.L.R.* 1.

## **(a) - General Principles**

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**Section 2. - Formation of Contract**

### **(a) - General Principles**

#### **General principles**

- 39-044 The law relating to the formation of construction contracts is no more than the application of general principles of contract<sup>100</sup> in a particular context. Given that the process of construction contract procurement is often long, complex and costly, and the pressures at tender stage are often very considerable, disputes linked to contract formation are amongst the most frequent to come before the courts.<sup>101</sup> In construction contracts, as with other kinds of contract, the parties are bound by what they have agreed. However, in order to distinguish between binding promises which the courts will enforce and the whole range of tender documents, offers, negotiations and counter-offers which will typically precede the formation of a contract, the law imposes certain essential requirements.

#### **Offer and acceptance**

- 39-045 The link between an offer and acceptance of that offer<sup>102</sup> is almost invariably essential to the formation of a contract. In most situations it will be clear by the canons of offer and acceptance that the parties must be taken to have reached an agreement and that it covered all the matters which they thought necessary, so that there is a contract in law.<sup>103</sup> Occasionally, where it proves impossible to discern a clear offer or a clear acceptance then, when judged objectively, a contract may still be found to have been made since the canons of offer and acceptance are not the last word and may be incapable of precise application.<sup>104</sup> In particular, in cases where work has commenced in anticipation of agreement being reached, the courts will look for clear words (such as “subject to contract”) to establish that the parties did not intend to, and did not enter into, a binding legal

relationship.<sup>105</sup> However, an analysis in terms of offer and acceptance will generally be the only way of ensuring that the parties have given a clear outward expression of agreement, which also promotes certainty.<sup>106</sup> For construction cases in which an analysis of offer and acceptance was applied in the context of work which had commenced, see *Peter Lind v Mersey Docks and Harbour Board*<sup>107</sup> (no coincidence of offer and acceptance) and the decision in *Hall & Tawse South Ltd v Ivory Gate Ltd*<sup>108</sup> (coincidence of offer and acceptance).

## Consideration<sup>109</sup>

- 39-046 In order for a promise to be enforceable it must be supported by “something of value in the eye of the law”<sup>110</sup> which is given in exchange, unless the promise was made by deed. Typically, in the context of construction contracts, the consideration provided by the employer is the promise to pay the contract price, and the consideration provided by the contractor is the promise to carry out the works. The separate promise of performance of an existing contractual obligation can also constitute valuable consideration.<sup>111</sup>

## Intention to create legal relations

- 39-047 The parties must intend that their agreement was to give rise to legal consequences.<sup>112</sup> In commercial or business agreements the intention to create legal relations is presumed and must be clearly rebutted by the party seeking to deny it.<sup>113</sup> The parties to the contract must have the capacity to make the contract.<sup>114</sup>

## Certainty

- 39-048 ”The parties are to be regarded as masters of their contractual fate. It is their intentions which matter and to which the Court must strive to give effect”.<sup>115</sup> The parties must express themselves such that their meaning can be determined by others with a reasonable degree of certainty.<sup>116</sup> The courts do not recognise a contract to negotiate, or an “agreement to agree”, since this would be too uncertain.<sup>117</sup> A “lock out” agreement will be recognised by the courts if it is sufficiently certain. As Lord Ackner said in *Walford v Miles*<sup>118</sup>:

“There is clearly no reason in the English contract law why A, for good consideration, should not achieve an enforceable agreement whereby B agrees, for a specified period of time, not to negotiate with anyone except A in relation to the sale of his property ...”

It is to be noted that in *Lambert v HTV Cymru (Wales) Ltd*<sup>119</sup> the Court of Appeal (distinguishing *Walford v Miles*), held that a clause requiring a party to:

“... use all reasonable endeavours to obtain a right of first negotiation from any assignee of the purchaser for the author to write ‘conceptual’ children’s books in connection with the film to be negotiated in good faith”

was sufficiently certain to found an enforceable obligation.

## Essential terms

- 39-049 It is for the parties to decide the terms of the contract between them,<sup>120</sup> and these must include all the terms which are essential to allow the contract “to be workable as a matter of commercial common sense”.<sup>121</sup> Typically in construction contracts, matters such as the scope of work, the time for completion and the price will need to be finalised in order to make the contract workable, but there is no prescriptive definition of what will be an essential term in every case. It is for the parties to decide what is essential or important to their reaching agreement,<sup>122</sup> where the parties have indeed failed to agree a term which is essential to the working of their agreement, the court cannot fill the gap.<sup>123</sup> This situation is to be distinguished from the position where the court is able to imply a term which gives effect to the plain intention of the parties, as in *Trollope & Colls v Atomic Power Constructors*<sup>124</sup> where, in relation to the implication of a term, Megaw J said<sup>125</sup>:

“I do not think that a term such as this can be implied simply for the purpose of upholding the existence of a contract, unless it can clearly be seen that it conforms with what the parties truly intended and with what they both would have accepted as a matter of course had the question been raised in the course of the negotiations or at the moment of making the supposed contract ...”<sup>126</sup>

In practice, the question will often arise whether *price* is an essential requirement of a particular construction contract. In each case, it will be necessary to look at what was said and done by the parties and determine what the parties intended would be essential for an agreement, as emphasised by Goff J in *British Steel Corp v Cleveland Bridge*.<sup>127</sup> In this case it was decided that price was

indeed an essential term on which (among other essential terms) no final agreement was ever reached, so that there was no contract between the parties.

## Footnotes

- 100 See Vol.I, Ch.4.
- 101 *VHE Construction v Alfred McAlpine Construction Ltd* (April 1997), reported in attenuated form in (1997) *C.I.L.L.* 1253. See *Ove Arup & Partners International Ltd v Mirant Asia-Pacific Construction (Hong Kong) Ltd* [2003] *EWCA Civ* 1729, [2004] *B.L.R.* 49.
- 102 See Vol.I, Ch.4.
- 103 This requires an objective assessment of the effect of what was said and done, and is not concerned with the subjective, undisclosed intentions of the parties. See *Hussey v Horne-Payne* (1879) 4 *App. Cas.* 311, 323; *Storer v Manchester City Council* [1974] 1 *W.L.R.* 1403, 1408H; *Harmony Shipping v Saudi-Europe Line (The Good Helmsman)* [1981] 1 *Lloyd's Rep.* 377 at 414; *Pagnan v Feed Products* [1987] 2 *Lloyd's Rep.* 601, 610. See also, *Howarth* (1984) 100 *L.Q.R.* 265.
- 104 *Percy Trentham v Architral Luxfer* [1993] 1 *Lloyd's Rep.* 25, 27; (1992) 63 *B.L.R.* 44, 52–55.
- 105 *Percy Trentham v Architral Luxfer*, above; *Sykes (Wessex) Ltd v Fine Fare Ltd* [1967] 1 *Lloyd's Rep.* 53 at 57; and see *Birse Construction Ltd v St David Ltd* [1999] *B.L.R.* 194; *Adonis Construction v O'Keefe Soil Remediation* [2009] *EWHC* 2047 (TCC).
- 106 *Brogden v Metropolitan Railway* (1877) 2 *App. Cas.* 666, 693; *Gibson v Manchester City Council* [1979] 1 *W.L.R.* 294, 297.
- 107 [1972] 2 *Lloyd's Rep.* 234.
- 108 (1998) 62 *Con. L.R.* 117.
- 109 See Vol.I, Ch.6. For a discussion of the doctrine of consideration in the context of third party rights, see Law Commission Report No.242 (1996) 68–73.
- 110 *Thomas v Thomas* (1842) 2 *Q.B.* 851, 859.
- 111 *North Ocean Shipping v Hyundai Construction* [1979] *Q.B.* 705; *Pao On v Lau Yiu Long* [1980] *A.C.* 614, *PC*; *Comyn Ching v Oriental Tube* (1979) 17 *B.L.R.* 47, *CA*; *Williams v Roffey Bros* [1991] 1 *Q.B.* 1, *CA*.
- 112 See Vol.I, paras 4-206—4-252.
- 113 *Edwards v Skyways* [1964] 1 *W.L.R.* 349, [1964] 1 *All E.R.* 494.
- 114 See Vol.I, Ch.11.
- 115 *Pagnan v Feed Products* [1987] 2 *Lloyd's Rep.* 601, 611.
- 116 *Scammel v Ouston* [1941] *A.C.* 251, 255; *Teekay Tankers Ltd v STX Offshore & Shipbuilding Co Ltd* [2017] *EWHC* 253 (*Comm*), [2018] 1 *All E.R. (Comm)* 279.
- 117 *Courtney & Fairbarn v Tolaini Brothers* [1975] 1 *W.L.R.* 297, 301–302; *Mallozzi v Carapelli* [1976] 1 *Lloyd's Rep.* 407; *Albio Sugar v Williams Tankers* [1977] 2 *Lloyd's Rep.* 457; *Scandinavian Trading Tanker Trees v Cripps* (1983) 267 *E.G.* 596; *Walford v Miles* [1992] 2 *A.C.* 128, 136C to 137H.
- 118 [1992] 2 *A.C.* 128, 139D.

- 119 [1998] EWCA Civ 387, [1998] F.S.R. 874.
- 120 *Pagnan v Feed Products* [1987] 2 Lloyd's Rep. 601, 611.
- 121 *Trollope and Colls v Atomic Power Constructions* [1963] 1 W.L.R. 333, 337. See also *Nicolene v Simmonds* [1953] 1 Q.B. 543, 552 (and the reference to “essential terms”); *Hillas v Arcos* (1932) 38 Com. Cas. 23, 43; *Rossiter v Miller* (1878) 3 App. Cas. 1124, 1151. Applied in *J Murphy & Sons Ltd v Johnston Precast Ltd* [2008] EWHC 3024 (TCC), where it was held that a contractor and sub-contractor had concluded a binding contract when the contractor had faxed an order for the sub-contractor to make and supply a pipe.
- 122 *Pagnan v Feed Products* [1987] 2 Lloyd's Rep. 601, 619.
- 123 *Mmecen v Inter Ro-Ro and Gulf Ro-Ro Services (The Samah and Lina V)* [1981] 1 Lloyd's Rep. 40, 43, referred to in the construction case, *Mitsui Babcock Energy v John Brown Engineering* (1996) 51 Con. L.R. 129, 183.
- 124 [1963] 1 W.L.R. 333.
- 125 [1963] 1 W.L.R. 333 at 341.
- 126 See also, *Arbiter Investments Ltd v Wiltshier London* (1991) 7 Const. L.J. 49; *Mitsui Babcock Energy v John Brown Engineering* (1996) 51 Con. L.R. 129, 183.
- 127 [1984] 1 All E.R. 504, 511g–j.

## **(b) - Contract/No Contract**

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**Section 2. - Formation of Contract**

### **(b) - Contract/No Contract**

#### **Concluded agreement**

- 39-050 Construction contracts are often the product of lengthy negotiation over a range of issues such as scope of work, price, time for completion, specification and performance criteria. It will be a question of importance and often one of some complexity to decide at what point (if at all) in the negotiations the parties reached a concluded agreement. Some important guidelines are set out in *Trollope & Colls v Atomic Power Constructors*<sup>128</sup> and *Pagnan v Feed Products*<sup>129</sup> which can be summarised in the following propositions<sup>130</sup>:
- (i)in order to determine whether a contract has been concluded in the course of negotiations, one must look to the negotiations as a whole<sup>131</sup>;
  - (ii)there must be an intention by both parties, continuing up to the date of the supposed contract, to make a contract;
  - (iii)at the date of the supposed contract, the parties must have been of one mind on all the terms which they then regarded as being required in order that a contract should come into existence;
  - (iv)the terms on which the parties were of one mind must not omit any term which, even though the parties did not realise it, was in fact essential to be agreed if the contract was to be commercially workable;
  - (v)in relation to the agreement of further terms the parties must intend that agreement would become binding forthwith, even though there were terms still to be agreed;
  - (vi)there must be some manifestation which indicated with sufficient clarity the acceptance by the offeree of the offer as then made to him, such acceptance complying with any stipulation in the offer itself as to the manner of acceptance.

## Subject to contract clauses

- 39-051 Where the negotiations of the parties are expressed to be “subject to contract” (or similar words are used to refer to a more formal document being executed at a future time) then there will generally be no concluded contract.<sup>132</sup> Although the factual matrix in which the words are used may be considered, the *prima facie* effect of the words “*subject to contract*” will only be taken away by the most compelling of circumstances. The words “*subject to contract*” have therefore acquired a clear legal meaning and once introduced they only cease to have effect if the parties expressly or by necessary implication so agree.<sup>133</sup> Agreement expressed to be subject to a more formal document being executed in the future creates a rather lower hurdle to be overcome in establishing that the agreement is nevertheless binding.<sup>134</sup>

## Effect of standard forms <sup>135</sup>

- 39-052 The existence of standard forms generated by the parties as “standard terms of business” creates additional complexities in issues of contract formation, especially where each party seeks to impose its terms on the other. The expression “battle of forms”<sup>136</sup> refers to the situation where there is an offer, followed by a series of counter-offers, all seeking to introduce the respective parties’ written standard terms of business. The conflict between competing written terms may often be resolved in favour of the party who puts forward the latest terms and conditions; and if they are not objected to by the other party, then he may be taken to have agreed to them.<sup>137</sup> While it has been said that “In many of these cases our traditional analysis of offer, counter-offer, rejection and acceptance and so forth is out-of-date ...”<sup>138</sup> an analysis based upon simple standards (not rigid rules) of offer and acceptance is almost invariably the correct and practical approach for ascertaining the actual or presumed intentions of the parties to see if they were *ad idem*.<sup>139</sup>

## Decisions on contract/no contract

- 39-053 Some of the more significant court decisions are here summarised. In *British Steel Corp v Cleveland Bridge*<sup>140</sup> the plaintiffs (steel fabricators) were approached by the defendants to supply steel-cast nodes for incorporation into a building. The plaintiff prepared an estimate for the works based on incomplete information. In February 1979 the defendant gave a letter of intent which (i) stated the defendant’s intention to place a contract with the plaintiff based on prices quoted; (ii) proposed that the contract incorporate the defendant’s standard form of sub-contract (which

provided for unlimited liability on the part of the plaintiff for consequential loss arising out of late delivery); and (iii) required the plaintiff “to proceed immediately with the works pending the preparation and issuing to you of the official form of sub-contract”. The plaintiff did not reply to the letter of intent; the defendant then indicated that it required delivery of the nodes in a particular sequence; and there followed further discussions after which the specification was substantially changed. The plaintiff proceeded to manufacture and deliver the nodes, although the parties were unable to agree on progress payments and liability for loss for late delivery. By December 1979, all but one of the nodes had been delivered. The defendant refused to make any interim payment for the nodes delivered, and instead sent a claim to the plaintiff for damages for late delivery. The plaintiff issued proceedings, contending that no contract had been made between the parties, and claiming the value of the nodes. Robert Goff J held that there was no contract, and said<sup>141</sup>:

“In the present case, an unresolved dispute broke out between the parties on the question of whether CBE’s or BSC’s standard terms were to apply, the former providing no limit to the seller’s liability for delay and the latter excluding such liability altogether. Accordingly, when, in a case such as the present, the parties are still in a state of negotiation, it is impossible to predicate what liability (if any) will be assumed by the seller for, e.g. defective goods or late delivery, if a formal contract should be entered into. In these circumstances, if the buyer asks the seller to commence work ‘pending’ the parties entering into a formal contract, it is difficult to infer from the buyer acting on that request that he is assuming any responsibility for his performance, except such responsibility as will rest on him under the terms of the contract which both parties confidently anticipate they will shortly enter into.”

In *Drake and Scull v Higgs and Hill (Northern)*<sup>142</sup> the defendants were main contractors for certain works to a Liverpool hospital, and they invited the plaintiffs to tender for the supply and installation of mechanical and electrical installations. There was extensive correspondence between the parties in relation to design obligations, the plaintiffs’ daywork rates, and whether formal contract documentation would be entered into. The Official Referee found that all matters of dispute were resolved by May 1991, save for the fixing of the plaintiffs’ daywork rates, which both parties regarded as essential. No further relevant correspondence passed until May 1993. The plaintiffs commenced work in April 1992 and completed in July 1993. The Official Referee, finding a contract between the parties, said:

“I am satisfied that, by May 11, all the terms save one necessary for a binding sub-contract to come into being were ‘agreed’. That is to say, *inter alia*, price, commencement date of the contract, duration of the contract and obligations under the contract. The fact that D&S had no design obligations save for the extremely limited development of design requirements was only reached on May 11, but it was resolved on that date. The only matter which was not agreed at that time were the daywork rates. It is clear that up to May 12, both parties were regarding agreement on daywork rates as an essential matter. The potential importance of reaching agreement may be gauged from the fact that in the absence of agreement D&S have as yet been unable to recover

any payment for the daywork that they have done. But I have reached the conclusion on the basis of the arguments advanced by Mr. Collins Q.C. that if the failure to agree daywork rates was the only matter which might have prevented the coming into being of a contract, that lacuna would be made good by the implication of a term that D&S should be paid a reasonable sum.”

- 39-054 In *Mitsui Babcock Energy v John Brown Engineering*,<sup>143</sup> the defendants were the main contractors for the construction of a 600 MW combined cycle power station. They engaged the plaintiffs to design, manufacture and install two generators. In May 1992 the defendants issued a letter of intent to the plaintiffs, followed by negotiation over performance tests which were provided for in cl.35 of the standard form MFI. The defendants pressed for strict compliance with the design requirements and for payment of substantial sums as liquidated damages if the generators failed to pass the performance tests. In the result, cl.35 was struck out and a marginal annotation “to be discussed and agreed” was inserted. The contract documents were signed on behalf of both parties in June 1993. In September 1995, the defendants sent a letter to the plaintiffs alleging that there was no contract. The Official Referee holding that there was a contract, said<sup>144</sup> that “... the parties made a coherent and workable contract ...” which was not invalidated by the failure to arrive at an agreement on cl.35. The Official Referee also observed that the parties operated the contract provisions up to September 1995.

- 39-055 In *ERDC Group Ltd v Brunel University*,<sup>145</sup> the Court found that, for a period prior to 1 September 2002, the series of letters of intent<sup>146</sup> issued by Brunel, and worked to by ERDC, were sufficient to create a binding contract. However, on the unusual facts of the case, the court concluded that, in the period after 1 September 2002, there was no contract and, furthermore, the move to the non-contractual basis did not justify a departure from contract rates and prices in favour of remuneration based on ERDC’s costs.

## Footnotes

128 [1963] 1 W.L.R. 333.

129 [1987] 2 Lloyd's Rep. 601, 619, per Lloyd LJ. The principles set out by Lloyd LJ were expressly referred to in *Mitsui Babcock Energy v John Brown Engineering* (1996) 51 Con. L.R. 129, 166–167. See also *Birse Construction Ltd v St David Ltd* [1999] B.L.R. 194 and *Anchor 2020 Ltd v Midas Construction Ltd* [2019] EWHC 435 (TCC), 184 Con. L.R. 215.

130 See *RTS Flexible Systems Ltd v Molkeri Alois Muller GmbH & Co* [2010] UKSC 14, [2010] 1 W.L.R. 753 at [48]–[49] where the Supreme Court held that these same principles applied whether one was considering a contract concluded in correspondence or by oral communications and conduct. See also *Iliffe & Iliffe v Feltham Construction Ltd* [2014]

*EWHC 2125 (TCC)*, per Stuart-Smith J at [79]–[82] for a summary of the relevant principles in a construction context. In *Hamid v Francis Bradshaw Partnership [2013] EWCA Civ 470, [2013] B.L.R. 447*, the Court of Appeal found that where an issue arises as to the identity of a party referred to in a written contract extrinsic evidence is admissible to assist in the resolution of that issue and that, if an objective analysis shows that a party has been misdescribed in the document, the court may correct that error as a matter of construction, not rectification; however, in *Liberty Mercian Ltd v Cuddy Civil Engineering Ltd [2013] EWHC 2688 (TCC), [2014] B.L.R. 179*, it was held that in order to identify the true parties to a written contract the principle of misnomer may only apply to replace the identified contracting party with another entity in circumstances there was a clear mistake on the face of the instrument when it is read by reference to its relevant background or context and where it is clear what correction should be made. See also *Arcadis Consulting (UK) Ltd v Hyder Consulting (UK) Ltd [2018] EWCA Civ 2222, 181 Con. L.R. 1* for a further consideration by the Court of Appeal of acceptance of a counter-offer in full by the conduct of a contractor in performing building works.

- 131 See also, *Hussey v Horne-Payne (1879) L.R. 4 App. Cas. 311; Port Sudan Cotton v Chettiar [1977] 2 Lloyd's Rep. 5, 10; Bushwall Properties v Vortex [1976] 1 W.L.R. 591, 603; British Steel Corp v Cleveland Bridge [1984] 1 All E.R. 504, 509; Pagnan v Granaria [1986] 2 Lloyd's Rep. 547, 548; VHE Construction v Alfred McAlpine Construction (1997) C.I.L.L. 1253, 1254; Global Asset Capital Inc v Aabar Block SARL [2017] EWCA Civ 37, [2017] 4 W.L.R. 163.*
- 132 *Winn v Bull (1877) 7 Ch. D. 29, 31–32; Von Hatzfeldt-Wildenburg v Alexander [1912] 1 Ch. 284, 288–289; CH Rugg & Co Ltd v Street [1962] 1 Lloyd's Rep. 364, 369; Fraser Williams v Prudential Holborn (1993) 64 B.L.R. 1, 9; Lexair Ltd (in administrative receivership) v Edgar W Taylor (1993) 65 B.L.R. 87, 98; Manchester Cabins Ltd v The Metropolitan Borough of Bury Unreported 1997.*
- 133 As in *Alpenstow v Regalian [1985] 1 W.L.R. 721*. See also *Confetti Records v Warner Music [2003] EWHC 1274 (Ch), [2003] All E.R. (D) 61 (Jun), Ch D.*
- 134 *Harvey Shopfitters Ltd v ADI Ltd [2003] EWCA Civ 1757, [2004] 2 All E.R. 982.*
- 135 Generally, see Furmston, Norisada and Poole, *Contract Formation and Letters of Intent* (1997), Ch. 4; Rawlings (1979) 42 M.L.R. 715; Adams [1983] J.B.L. 297; Jacobs (1985) 34 I.C.L.Q. 297.
- 136 *Butler Machine Tool Co Ltd v Ex-Cell-O Corp (England) Ltd [1979] 1 W.L.R. 401, 404, [1979] 1 All E.R. 965, 968f.*
- 137 *Butler Machine Tool Co Ltd v Ex-Cell-O Corp (England) Ltd*, above, at 404.
- 138 *Butler Machine Tool Co Ltd v Ex-Cell-O Corp (England) Ltd*, above, at 404.
- 139 See *Chichester Joinery v John Mowlem (1987) 42 B.L.R. 100* for a case in which an analysis of offer and acceptance is applied to competing standard terms of business.
- 140 *[1984] 1 All E.R. 504.*
- 141 At 510j to 511a.
- 142 *(1995) 11 Const. L.J. 214.*
- 143 *(1996) 51 Con. L.R. 129.*
- 144 At 184.

145 [2006] EWHC 687 (TCC), [2006] B.L.R. 255.

146 For a review of cases on letters of intent, see Whittaker, "What are your intentions?" New Law Journal (28 July 2006) p.1200.

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## **(c) - Tenders**

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**Chapter 39 - Construction Contracts**

**Section 2. - Formation of Contract**

### **(c) - Tenders**

#### **Tendering procedure**

- 39-056 The employer will typically send out an invitation to tender to a list of pre-selected contractors or even to a single contractor, and the contractors will submit offers to carry out the work in the form of a tender. For larger construction projects, the tender procedure will often be complex, protracted and costly for the prospective contractors. The submission of a tender is an offer by the contractor to carry out work, so that a tenderer is always at risk of having his tender rejected. This is generally to be regarded as an occupational hazard of the contractor's business.<sup>147</sup> Any claim to recover the costs of tendering will fail if it is made clear that no contract will be entered into unless a certain condition is satisfied, and the condition is not satisfied, or if negotiations are conducted on the assumption that either party is free to withdraw from them and the defendant does withdraw before a contract is concluded.<sup>148</sup>

#### **Qualifications to general rule**

- 39-057 The contractor may be able to recover payment of a reasonable sum where the tenderer carries out work which (i) goes beyond or is distinct from the work ordinarily carried out by a tenderer free of charge; and (ii) is carried out at the prospective employer's request<sup>149</sup> and for the prospective employer's benefit. However, the basis upon which negotiations are carried on between the parties may mean that the tenderer will not be able to bring himself within the requirements of what is a restitutionary remedy.<sup>150</sup> Alternatively, where the ground for rejection of a tender conflicts with some binding undertaking or representation relating to how the submitted tender will be treated, then the tenderer will be able to recover damages for breach of the contract which will

be implied into the tender arrangements. In *Blackpool Aero Club v Blackpool BC*<sup>151</sup> the Court of Appeal held that, in all the circumstances, the Council's rules for the submission of tenders gave rise to a contractual right (not a mere expectation) on the part of the tenderer that his tender, submitted in accordance with the rules, would be considered.<sup>152</sup> In *MJB Enterprises Ltd v Defence Construction (1951) Ltd*,<sup>153</sup> the Supreme Court of Canada decided that, although on a true construction of the contract there was no obligation upon the putative employer to award a contract to the lowest tenderer, there was a term to be implied into the contract (to give effect to the presumed intentions of the parties) which obliged the putative employer only to accept a compliant tender. The tender process must also now be considered in the light of relevant EU legislation and relate domestic regulatory provisions.<sup>154</sup>

## Good faith and partnering

- 39-058 English law does not recognise a more general duty of good faith which might prevent the employer rejecting tender offers at any stage, or ending negotiations at any time.<sup>155</sup> Given the general antipathy of English law towards a broader understanding of pre-contractual duties and obligations of good faith, professionals in the construction industry have sought to develop new approaches to the problems of financial risk experienced by tenderers, as well as the risk, cost and uncertainty to which the employer is exposed. The phenomenon of "partnering" in the construction industry (an expression covering a loose amalgam of different strategies for co-operation and collaboration between contracting parties) can be considered in this light. Partnering arrangements may be based on the long-term relationship between contractor and employer or may be project-specific. Partnering charters set out the broad aims of the parties, such as co-operation in a spirit of openness and team work. Partnering agreements may provide for more concrete collaboration between the parties, such as shared use of information and resources. The essence of partnering is that it is intended not to create enforceable contractual rights, and is therefore beyond the scope of this chapter.

## Estoppel

- 39-059 Given the substantial amount of preparation and negotiation which will typically accompany building projects, it is relevant to consider whether such matters as estoppel by representation or proprietary estoppel are capable of giving rise to new rights of the parties, or whether an estoppel operates exclusively as a rule of evidence.<sup>156</sup> The balance of authority,<sup>157</sup> is in favour of estoppel by representation being an evidential matter, rather than something which can create new substantive rights. However, once A is estopped from denying against B certain facts, this is a step on the way<sup>158</sup> to establishing a cause of action, since certain legal consequences will

flow from the facts which A is now unable to deny.<sup>159</sup> Estoppel may therefore play an important role in the *evidence* considered by the court on the issue whether there was a concluded and binding agreement. In *Mitsui Babcock Energy Ltd v John Brown Engineering Ltd*,<sup>160</sup> for example, the Official Referee decided there was a contract, but also indicated that he would, if necessary, be prepared to rely upon evidence of conduct amounting to an estoppel in reaching the same conclusion. That estoppel in contract formation is likely to be confined to an evidential role is further supported by the rejection, in the construction context, of the contention that an estoppel can found a contract.<sup>161</sup>

## Footnotes

- 147 *William Lacey (Hounslow) Ltd v Davis* [1957] 1 W.L.R. 932, 934; *Fairclough Building v Port Talbot BC* (1992) 62 B.L.R. 82, 94.135a.
- 148 See *Rackline Ltd v The National Library of Wales* (1997) C.I.L.L. 1268 for consideration of whether, on the construction of a contract for work in stages, the contractor was entitled to work on all stages.
- 149 *William Davis (Hounslow) Ltd v Lacey* [1957] 1 W.L.R. 932; *Craven-Ellis v Canons Ltd* [1936] 2 K.B. 403.
- 150 Goff and Jones, *The Law of Unjust Enrichment*, 8th edn (2011), Ch.26. *Regalian Properties v London Docklands Development Corp* (1995) 11 Const. L.J. 127; *Blackpool Aero Club v Blackpool BC* [1990] 1 W.L.R. 1195, CA.
- 151 [1990] 1 W.L.R. 1195, CA.
- 152 At 1202.
- 153 (2000) T.C.L.R. 235.
- 154 In *Harmon CFEM Facades (UK) Ltd v The Corporate Officer of the House of Commons* (1999) 67 Con. L.R. 1, Judge Humphrey Lloyd QC held that the House of Commons had failed in a number of different ways to conduct a tendering process in accordance with Public Works Regulations, and also in accordance with the principles of fairness and equality which were held to derive from a contract to be implied from the procurement regime required by the European Directives, as interpreted by the European Court (see at 168–169). Note also that the decision in *R. v Tower Hamlets LBC Exp. Gary Luck (trading as G Luck Arbocultural and Horticultural Services)* (1999) 15 Const. L.J. 235, where a council refused to include the applicants in their list of tenderers, the applicants' remedy under the Public Services Contract Regulations 1993 was damages and a judicial review was inappropriate.
- 155 *Walford v Miles* [1992] 2 A.C. 128 at 140C. On good faith, see: Nili Cohen, “Pre-Contractual Duties: Two Freedoms and the Contract to Negotiate” in Beatson and Friedmann, *Good Faith and Fault in Contract Law* (1995); Furmston, Norisada and Poole, *Contract Formation and Letters of Intent* (1997) Ch.10; and also the Australian decision in *Hughes Aircraft Systems International v Airservices Australia* (1997) 146 A.L.R. 1, noted by Furmston in (1998) 114 L.Q.R. 362. By way of comparison, see the Privy Council treatment of fairness and good faith in an appeal from the New Zealand Court of Appeal in *Pratt Contractors Ltd v Transit New*

*Zealand [2004] B.L.R. 143*. For a case where the court (in this case the Court of Appeal in the SAR of Hong Kong) decided that the terms of a settlement agreement were no more than an agreement to agree, applying *Walford v Miles*, see *Hyundai Engineering & Construction Co Ltd v Vigour Ltd [2005] B.L.R. 416*. See also *Monde Petroleum SA v WesternZagros Ltd [2016] EWHC 1472 (Comm), [2017] 1 All E.R. (Comm) 1009*.

- 156 See Wilken and Ghaly, *Waiver Variation and Estoppel*, 3rd edn (2012), paras 9.04–9.12; Halliwell, *Equity and Good Conscience in a Contemporary Context* (1997), Ch.2. For a discussion of good faith in the context of construction contracts and the building industry, see “*Good Faith in Construction Contracts—The Hidden Agenda*” (1999) 15 *Const. L.J.* 288.
- 157 *Bell v Marsh [1903] 1 Ch. 528* at 540; *London Joint Stock Bank Ltd v Macmillan [1918] A.C. 777, 818*; *Evans v Bartlam [1937] A.C. 473* at 484; *Hopgood v Brown [1955] 1 W.L.R. 213, 223*.
- 158 *Low v Bouvierie [1891] 3 Ch. 82, 105*.
- 159 *Low v Bouvierie [1891] 3 Ch. 82, 112*. See also *Haden Young Ltd v Laing O'Rourke Midlands Ltd [2008] EWHC 1016 (TCC), [2008] All E.R. (D) 49 (Jun)*, where Ramsey J held that a party was not estopped from contending that no contract had been concluded. An estoppel could not be used to create a legal relationship where there was no such relationship at the outset. It was prohibited to use an alleged estoppel to assert an obligation equivalent to a cause of action and the Court should not bridge the lacuna in “no contract” cases by reference to estoppel.
- 160 *(1996) 51 Con. L.R. 129, 186*.
- 161 *J Murphy & Sons Ltd v ABB Daimler-Benz Transportation (Signal) Ltd [1998] All E.R. (D) 718 (Dec)*.

## **(d) - Letters of Intent**

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**Section 2. - Formation of Contract**

### **(d) - Letters of Intent**

#### **Purpose**

- 39-060 In construction contracts, there will typically be a wide range of contractual and commercial issues to be resolved between the parties to the intended contract, prior to its finalisation. Pressures to commence the intended works will often also be considerable. The use of a letter of intent, or letter of comfort, is intended to give some measure of security to the party commencing work, pending the conclusion of the contract. Although always a matter of construction in all the circumstances of the particular case,<sup>162</sup> a letter of intent will typically involve the expression of an intention by A to enter into a contract with B at some point in the future, coupled with an indication from A to B that B should commence work.<sup>163</sup>

#### **Effect of letter of intent**

- 39-061 This will be partly a matter of construction of the particular document<sup>164</sup> and partly a question of legal analysis. In many cases, the terms of the letter of intent will mean that it cannot have the effect of creating enforceable promises in the form of a contract; indeed, this will often be its main objective.<sup>165</sup> In *British Steel v Cleveland Bridge*,<sup>166</sup> Cleveland Bridge requested BSC to proceed immediately with the work pending the preparation and issuing of the official form of sub-contract. Robert Goff J said<sup>167</sup>:

“In these circumstances, if the buyer asks the seller to commence work ‘pending’ the parties entering into a formal contract, it is difficult to infer from the buyer acting on that request that he is assuming any responsibility for his performance, except such

responsibility as will rest on him under the terms of the contract which both parties confidently anticipate they will shortly enter into ...”

## Exceptional situations

- 39-062 A letter of intent may result in a binding contract. In *Turriff Construction v Regalia*<sup>168</sup> the judge found on the facts that, although the letter of intent stated that the proposed contract was “subject to agreement on an acceptable contract”, those words referred only to the full contract and not to the preliminary contract by which the plaintiffs were to be indemnified for the cost of the work properly undertaken by them pending the conclusion of the full contract.<sup>169</sup> In *Wilson Smithett v Bangladesh Sugar*<sup>170</sup> the judge considered that the letter of intent was the acceptance of an offer leading to a binding contract, despite the requirement for the submission of a security deposit/ performance bond. Where, as in *Turriff v Regalia*, there is a preliminary contract between A and B, then B’s entitlement to be paid is based upon the implied term of that preliminary contract that A will pay B a reasonable sum for the work done. Where, as in *BSC v Cleveland Bridge*, there is no contract, then the legal basis for recovery by B of a quantum meruit or reasonable sum is *not* by the implication of a promise or assurance of payment, but by the application of the law of unjust enrichment<sup>171</sup>: the law imposes an obligation on the party making the request to pay a reasonable sum for the work done in pursuance of the request.

## Footnotes

- 162 *Wilson Smithett v Bangladesh Sugar* [1986] 1 Lloyd’s Rep. 378, 379. In this case, a letter of intent was construed as constituting acceptance of an offer which was then binding on both parties.
- 163 *British Steel Corp v Cleveland Bridge and Engineering Co Ltd* [1984] 1 All E.R. 504; *Monk Construction Ltd v Norwich Union Life Assurance Society* (1992) 62 B.L.R. 107; *Turriff Construction Ltd v Regalia Knitting Mills Ltd* (1971) 9 B.L.R. 20; *Kleinwort Benson Ltd v Malasia Mining Corp* [1989] 1 W.L.R. 379, [1989] 1 All E.R. 785; *Wilson Smithett v Bangladesh Sugar* [1986] 1 Lloyd’s Rep. 378; *Hall & Tawse South Ltd v Ivory Gate Ltd* (1998) C.I.L.L. 1376; *Jarvis Interiors Ltd v Galliard Homes Ltd* [2000] B.L.R. 33; Furmston, Norisada and Poole, Contract Formation and Letters of Intent (1998), Ch.5.
- 164 *Wilson Smithett v Bangladesh Sugar* [1986] 1 Lloyd’s Rep. 378, 379, per Leggatt LJ: “The fact that it has the particular label that it has does not brand it at the outset as a contractual document or as a non-contractual document”.
- 165 See, for example, the decision of the Court of Appeal in *RTS Flexible Systems Ltd v Molkerei Alois Muller GmbH & Co* [2009] EWCA Civ 26, [2009] B.L.R. 181. However, see now the

decision of the Supreme Court at *[2010] UKSC 14*, *[2010] 1 W.L.R. 753*, where this decision was reversed. The case is discussed in detail in Vol.I, para.4-268.

166 *[1984] 1 All E.R. 504*.

167 At 510j to 511a.

168 *(1971) 9 B.L.R. 20*.

169 See also *Bryen & Langley Ltd v Boston* *[2005] B.L.R. 508*, where it was held that the fact that one of the parties had stated in a letter that their agreement should be contained in a formal JCT Standard Form of Contract 1998 to be drawn up and signed in due course did not prevent the parties from being taken to have already concluded a contract on the terms of the JCT form prior to its formal execution.

170 *[1986] 1 Lloyd's Rep. 378*.

171 *BSC v Cleveland Bridge* *[1984] 1 All E.R. 504, 511*.

## Section 3. - Contract Terms

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Section 3. - Contract Terms

### Introduction

- 39-063 The range of obligations contained in a given construction contract will, in common with other kinds of contract, be derived from a number of different sources, and the general principles relating to express and implied terms, and the principles applicable to their construction, are not considered in detail here.<sup>172</sup> However, a number of issues of particular relevance in the context of construction contracts are considered briefly below.

### Footnotes

<sup>172</sup> See Vol.I, Ch.15 on express terms and Ch.16 on implied terms.

## **(a) - General Principles Apply**

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Section 3. - Contract Terms

### **(a) - General Principles Apply**

#### **Contract material**

- 39-064 The period of pre-contract preparation and negotiation will often be complicated and lengthy; there may be preliminary investigations (for example, site investigations, viability studies, negotiations with landlords and sub-contractors) which take months or years to complete. There will often be discussions, formal meetings (recorded or unrecorded), correspondence, memoranda and “heads of agreement” before the parties arrive at a contract. The question will often arise whether, and to what extent, prior negotiations and other kinds of extrinsic evidence, can be relied upon to construe the contract.<sup>173</sup> The object of the construction of a written agreement is to discover the intentions of the parties to the agreement.<sup>174</sup>

#### **Application of principles**

- 39-065 The use of standard forms may pose particular problems, as do other practices common in the drawing up of construction contracts. Where there are conflicts between contractual documents or provisions, the court must construe the intentions of the parties from the documents taken as a whole, reading the documents together unless there are manifest contradictions.<sup>175</sup> Standard forms will often identify the priority to be accorded to the different contract documents, for example, by stating that nothing contained in the specification or the bills of quantities shall override or modify the application or interpretation of the Articles and Conditions of the standard form.<sup>176</sup> While words should be given their natural and ordinary meaning, the court must strive to give meaning to the words chosen by the parties. The court will not easily reach the conclusion that formal contract documents contain mistakes of language. However:

“... if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense.”<sup>177</sup>

In *Somerfield Stores Ltd v Skanska Rashleigh Weatherfield Ltd*,<sup>178</sup> the Court of Appeal held that while the terms of a commercial contract must be construed in the light of the relevant factual matrix and commercial common sense, that did not permit the court to rewrite the parties’ agreement merely because the terms appeared unexpected or unwise.<sup>179</sup> Although the “matrix of fact” is broad,<sup>180</sup> evidence of previous negotiations,<sup>181</sup> declarations of subjective intent,<sup>182</sup> and of conduct occurring after conclusion of a contract will not be admissible.<sup>183</sup> Following the broad approach taken by the House of Lords in the *ICS v West Bromwich* case, it is to be noted that a more restrictive and conventional approach has subsequently been taken by the Court of Appeal<sup>184</sup> on pragmatic grounds of time and cost, as well as authority. When construing a construction contract, even one entirely contained in writing, it is therefore permissible to have regard to the factual background known to each parties at or before the date of the conclusion of the contract,<sup>185</sup> although a proper balance should be struck between a consideration of the factual background and the words used by the parties, especially if the latter yield a fairly clear conclusion.<sup>186</sup> In *Hancock v Promontoria Ltd* it was held that on a question of construction of a contractual document, the document ordinarily had to be placed before the court as a whole, although sometimes it might be obvious that parts could properly be omitted—but a clear explanation had to be provided of the nature and extent of the omissions, and the reasons for them.<sup>187</sup> A more difficult question arises where parties make deletions to a printed document. There is authority both in support of and against the proposition that the court can have regard to the deletions in the interpretation of the concluded contract.<sup>188</sup> From a practical point of view, deletions will only become significant where there is obvious ambiguity in the retained words, and consideration of the deleted words in these circumstances is permissible.<sup>189</sup>

## Footnotes

<sup>173</sup> Although evidence of prior negotiations would normally not be admissible as part of the factual matrix to assist in construing contracts (see *Chartbrook Ltd v Persimmon Homes Ltd [2009] UKHL 38, [2009] 1 A.C. 1101*), in *Maggs (t/a BM Builders) v Marsh [2006] EWCA Civ 1058, [2006] B.L.R. 395*, the Court of Appeal found that the subsequent conduct of the parties was admissible evidence in connection with the construction of a partly written and partly oral contract.

<sup>174</sup> *Marquis of Cholmondley v Clinton (1820) 2 Jac. & W. 1, 91.*

<sup>175</sup> *Pagnan v Tradax Ocean Transportation [1987] 2 Lloyd's Rep. 342, 348, 350, [1987] 3 All E.R. 565, 571, 574.*

- 176 IFC 98 Form cl.1.3.
- 177 *Antaios Compania Naviera SA v Salen Rederierna AB* [1985] A.C. 191, 201; *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 W.L.R. 896, 913. In the context of a badly drafted building contract, see *Mitsui Construction Co Ltd v Att-Gen of Hong-Kong* (1986) 33 B.L.R. 1, 14, PC.
- 178 [2006] EWCA Civ 1732.
- 179 Although if there are two possible meanings the more commercial construction is likely to be preferred, see *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50, [2011] 1 W.L.R. 2900. But note Hamblen J (as he then was) in *Cottonex Anstalt v Patriot Spinning Mills Ltd* [2014] EWHC 236 (Comm), [2014] 1 Lloyd's Rep. 615 at [53]–[57] for a cautious approach to courts accepting what is alleged as business sense.
- 180 See the decision in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 W.L.R. 896, HL.
- 181 See also *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] 1 A.C. 1101 where it was confirmed by the House of Lords that evidence of prior negotiations would normally not be admissible as part of the factual matrix to assist in construing contracts.
- 182 *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 W.L.R. 896, 913b.
- 183 *Whitworth Street Estates (Manchester) Ltd v James Miller & Partners* [1970] A.C. 583, 603; *Wates Ltd v Greater London Council* (1983) 25 B.L.R. 1, 29.
- 184 *National Bank of Sharjah v Dellborg* [1997] EWCA Civ 2070, CA; *Scottish Power Plc v Britoil (Exploration) Ltd* [1997] EWCA Civ 2752. See also *William Hare v Shepherd Construction* [2010] EWCA Civ 283, [2010] B.L.R. 358 at [18], where the Court of Appeal held that when construing an exclusion clause, any ambiguity in the meaning or effect of the clause is a matter counted against the party seeking to rely upon the clause.
- 185 See *Volta Developments Ltd v Waltham Forest Friendly Society Ltd* [2008] All E.R. (D) 306 (Mar) and *Prenn v Simmonds* [1971] 1 W.L.R. 1381 at 1384.
- 186 See *Wayne Martin v David Wilson Homes Ltd* [2004] 3 E.G.L.R. 77 and now *Wood v Capita Insurance Services Ltd* [2017] UKSC 24, [2017] A.C. 1173 at [9]–[14].
- 187 [2020] EWCA Civ 907, [2020] 4 W.L.R. 100 at [74].
- 188 See Keating on Construction Contracts, 11th edn (2021) para.3-011 to 3-014 for a discussion of the authorities.
- 189 *Louis Dreyfus et Cie v Parnaso Cia Naviera SA* [1959] 1 Q.B. 498, 515, CA.

## **(b) - Contract Documents**

**Chitty on Contracts 34th Ed.**

**Consolidated Mainwork Incorporating First Supplement**

**Volume II - Specific Contracts**

**Chapter 39 - Construction Contracts**

**Section 3. - Contract Terms**

**(b) - Contract Documents**

### **Formal contract**

- 39-066 Many different documents will be brought into existence for a construction project. Some of these will be incorporated into the formal contract, often bound together with a form setting out “general” conditions. Whether the form is standard or bespoke, certain formal details will need to be incorporated such as the price, the contract period or completion date and a description of the work. In addition the engineer or architect (and under the JCT Form, the quantity surveyor) will be identified. These, and other specific details may be included in an appendix, or in separate articles of agreement, which are also convenient if the contract is to be under seal. In addition to a set of general conditions there may be “special” or “particular” conditions which may give rise to issues of priority. The fundamental distinction to be drawn is between documents which are incorporated into and become part of the formal contract and those which are not. It is partly a question of fact and one of construction whether particular documents should be considered as contract documents.

### **Description of work**

- 39-067 Documents setting out details of the work to be undertaken will usually be prepared specifically for the contract. These may include a set of “contract drawings”, specifications and bills of quantities. Other specific documents may be drawn up for incorporation into the contract, such as a method statement<sup>190</sup> schedules of “daywork” charges and correspondence intended to have contractual effect. Various provisions may be found within the conditions of contract regulating the effect of such incorporated documents. They may, for example, all be given equal status and the contract administrator may be empowered to “explain and adjust” the terms where any discrepancy

appears.<sup>191</sup> Alternatively, there may be a stated order of precedence. There may also be a reference within the contract to other documents not forming part of the substantive obligations but having a secondary effect, such as a standard method of measurement.

## Status of bill

- 39-068 Misunderstanding can arise as to the status of a bill of quantities. The document usually comprises a brief description of each item of work by reference to a standard catalogue of descriptions usually termed a standard method of measurement. To each such item the person compiling the bill adds the appropriate quantity which has been “taken off” the tender drawings, so that the contractor may insert his rate and thereby gross up the contract price. The status and use of bills of quantities (and in particular the abbreviated descriptions of the work and any other provisions that may be included) vary significantly between the Standard Forms. Where the bill of quantities is a full contract document (as under the ICC Form) any other provisions incorporated into the bill will similarly have full contractual effect. Under the JCT 98 Form and JCT SBC 2005 and 2011, however, the bill is limited in its status to defining the quality and quantity of the work and may not override or modify the conditions.<sup>192</sup> Consequently, any provision purporting to modify the conditions which is contained within the bill, such as a provision for sectional completion, may be of no effect even though the apparent intention of the parties is to the contrary.<sup>193</sup> The effect of the bill is also dependent upon whether the contract provides for remeasurement of the work and whether the conditions provide for “correcting” the bill in the event of departure from the standard method of measurement.<sup>194</sup>

## Incorporated documents

- 39-069 Most construction contracts will incorporate other material by reference, with either full or qualified contractual effect. Thus, in many public works contracts “standard” specifications are incorporated by reference, the contract documents containing merely lists of amendments and substituted clauses. Quality may be defined by reference to identified British standards or other public documents, although the mere incorporation of “appropriate British standards” may lead to uncertainty. Standard pricing documents such as schedules of daywork charges may similarly be incorporated and then amended by reference only by the parties.

## Sub-contract conditions

- 39-070

These commonly incorporate, by reference, relevant provisions of the main contract, in order to create a “back-to-back” obligation. This may be achieved by deeming the sub-contractor to have notice of the main contract and requiring that the sub-contractor perform the obligations of the main contractor in relation to the sub-contract works and indemnify the contractor against liability incurred by reason of any breach.<sup>195</sup> Such a device will not avail the employer where the sub-contractor’s obligation is more extensive than that of the main contractor, e.g. where a nominated sub-contractor is employed to carry out design work which does not form part of the main contract.

## Non-contractual documents

- 39-071 Depending upon a true construction of the contract as a whole, certain documents may be intended not to bind the parties to their literal terms, but to have more limited effect. Thus, a programme setting out the contractor’s intended sequence of work, even though the contract may require its provision, will generally not constitute a contract document. Were it to bind the parties literally, the inevitable failure of one or both parties to comply in every respect would render one or both parties in breach. Where programmes are to be referred to in the contract documents, the obligation will generally be to produce and review a sequence of working, but not to comply with each detail. Where important stages of the work are to be completed by particular dates, sectional completion may be provided for. There will be other documents which are supplied to the contractor by the employer (or a member of the professional team) which form part of the background information available to the contractor at tender and which may be of critical importance in relation to particular types of claims that may be made by the contractor. For example, in civil engineering contracts the contractor will usually be supplied with site investigation data upon which the initial design of the works will have been based. The content of the site investigation report will become significant in relation to any claim made by the contractor asserting additional cost or delay caused by unforeseen ground conditions.<sup>196</sup>

## Footnotes

190 See *Yorkshire Water Authority v McAlpine* (1985) 32 B.L.R. 114.

191 See ICC Form of Contract cl.5.

192 JCT 98 cl.14.1, 2.2.1; JCT SBC 2005 cl.1.3, 2.3.

193 *Gleeson v London Borough of Hillingdon* (1994) Con. L. Yb. 111; *English Industrial Estates v Wimpey* [1973] 1 Lloyd’s Rep. 118.

194 See below, para.39-147.

195 CECA Form of Sub-contract cl.3. See the approach of the Court of Appeal in *Acqua Design Ltd v Kier Regional Ltd* [2002] EWCA Civ 797, [2003] B.L.R. 111 to the question of whether

certain provisions of the Standard DOM/1 Form of Sub-Contract were incorporated into a negotiated sub-contract.

196 See cl.12 of the ICC Form.

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## **(c) - Implied Terms**

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### **(c) - Implied Terms**

#### **General principles**

- 39-072 Where problems or conflicts occur which are not clearly addressed by the express terms of the construction contract, then parties will frequently seek to imply a term into their contract which will enable them to achieve their objective such as, for example, access to the site or to particular working areas of the site, or timely provision of drawings and information.<sup>197</sup> The general rules governing the implication of terms by the courts apply to construction contracts in the same way as to contracts generally, and they are considered in detail elsewhere.<sup>198</sup> The basic principles are that<sup>199</sup>:
- (i)the term must be reasonable and equitable<sup>200</sup>;
  - (ii)the term must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it<sup>201</sup>;
  - (iii)the term must be so obvious that “it goes without saying”<sup>202</sup>;
  - (iv)the term must be capable of clear expression<sup>203</sup>;
  - (v)the term must not contradict any express term of the contract.<sup>204</sup>

#### **Necessary terms**

- 39-073 The courts will imply terms into a construction contract where necessary to achieve the intentions of both<sup>205</sup> of the parties to a contract,<sup>206</sup> and where necessary to make the contract work as a

matter of business efficacy.<sup>207</sup> It follows from the requirement of necessity that the courts will not imply terms which, in effect, improve the contract made by the parties,<sup>208</sup> or which is but one of many routes by which a problem may be addressed.<sup>209</sup> A term will be implied only where there is an obvious gap in the contract which requires filling.<sup>210</sup> A term may be implied into a contract notwithstanding the existence of an entire agreement clause.<sup>211</sup>

## Non-prevention

- 39-074 One of the most important implied terms in the context of construction is that the employer<sup>212</sup> will not hinder or prevent the contractor from carrying out its obligations in accordance with the terms of the contract and from executing the works in a regular and orderly manner.<sup>213</sup> Where the express terms of the contract are silent as to obstructions and access, then it will be important to establish an implied term that the contractor is to be given access to the site where work is to be carried out.<sup>214</sup> In *Milburn Services Ltd v United Trading Group*,<sup>215</sup> the court implied a term that the sub-contractor was to have access to the works notwithstanding that the main contract contained an “entire agreement clause”. However, where non-prevention and access are concerned, the courts will only imply obligations which are strictly necessary to the performance of contractual obligations, so that exclusive access to the site, or a complete absence of debris prior to commencement, are unlikely to be the subject of implied terms.<sup>216</sup> In *Bernhard's Rugby Landscapes Ltd v Stockley Park Consortium Ltd*<sup>217</sup> the court was not prepared to imply a term of co-operation to enable a party to carry out its contract works in accordance with its own method statement and/or programme where the manner of execution of these activities was entirely a matter for the party seeking to imply the term. The degree of co-operation to be implied depends in each case on the obligations undertaken, rather than on what is reasonable.<sup>218</sup> Claims for damages arising out of delay to the works will often be based on breach of an implied term as to non-prevention. There will generally be an implied term as to the timely delivery of information, instructions and drawings, since although the employer will be entitled to issue information as the works proceed,<sup>219</sup> he is not entitled to issue information in such a way as prevents or impedes performance by the contractor.<sup>220</sup> Such matters are, however, frequently covered by express terms, which will preclude further implication. Also, it should be noted that in *Leander Construction Ltd v Mulalley & Co Ltd*<sup>221</sup> it was held that ordinarily there will be no implied term in a building contract that the contractor should proceed regularly and diligently with the works prior to the contract completion date.

## Co-operation

- 39-075

Construction contracts will often require a high degree of collaboration between the contractor and the employer (or his representative under the contract), and between the main contractor and his specialist sub-contractors. The implication of a term as to co-operation between contracting parties is well-established<sup>222</sup> and arises as a matter of law since otherwise A might frustrate the performance of an obligation by B which was dependent on action being taken or not taken by A. The precise scope of A's implied obligation to co-operate in his contract with B will depend upon the nature of the obligations under the contract, but it is thought that, in most cases, A's obligation to co-operate is more in the nature of an obligation to maintain the state of affairs between A and B, rather than an obligation upon A positively to facilitate the performance of obligations which B has undertaken to carry out.<sup>223</sup> Thus, the appointment or re-appointment of a contract administrator and, where the contract administrator is an employee, securing compliance with his terms of employment, will fall within the obligation to co-operate.<sup>224</sup> So, too, will the provision of access by a contractor to a sub-contractor where certain dates for completion are contractual obligations.<sup>225</sup> The implication of an obligation that the employer should positively assist the contractor in the execution of his works will depend upon the circumstances of the particular case, but is likely to be rare, given the basic principles governing the implication of terms generally. In the context of a PFI contract it was held in *Essex CC v UBB Waste Ltd* that a duty of good faith and co-operation could be implied in a contract for the construction of a mechanical biological waste treatment facility in the event that the contract could properly be described as a relational contract, where a high degree of communication, co-operation and mutual trust and confidence was required.<sup>226</sup>

## Standard of workmanship

- 39-076 The contractor must carry out his works using all proper skill and care, and the standard required in the particular case is to be gathered from all the circumstances of the contract.<sup>227</sup> Where a contractor is required to obtain materials (where specified by the employer), the implied term as to workmanship requires the contractor to make a proper inspection of the materials before using them, and the contractor will be responsible for defects in the materials obtained by him if such defects would have been apparent upon reasonable inspection.<sup>228</sup> There is authority to suggest that the implied obligation upon the contractor as to workmanship is more onerous than the requirement to identify reasonably apparent defects in materials, and will, in appropriate circumstances, become a duty to warn.<sup>229</sup> Depending upon all the relevant circumstances, the implied term may require the contractor to inform their employer's architect of defects in the design of which he is aware,<sup>230</sup> or it may extend to defects which the contractor believes to exist in the works.<sup>231</sup> In *Edward Lindenbergs v Joe Canning*<sup>232</sup> the judge, having heard expert evidence, concluded that the fact that such an obviously important structural feature as the chimney breast being indicated on plans as non-load-bearing should "by itself" have led the defendant contractor to have had grave doubts about the plan which he ought, in turn, to have raised with the surveyor overseeing the works.<sup>233</sup>

## Duty to warn

- 39-077 A duty to warn will arise where there is an obvious danger. In *Plant Construction Plc v Clive Adams Associates*,<sup>234</sup> certain temporary works were, to the knowledge of the defendant, obviously dangerous, so that the obligation to carry out the works with the skill and care of an ordinary competent contractor carried with this an obligation to warn of the danger perceived.<sup>235</sup>

## Fitness of materials

- 39-078 Where the contractor is responsible for the supply of materials for the building works, there will be an implied warranty that the materials (i) will be reasonably fit for their purpose; and (ii) will be of good quality.<sup>236</sup> In each case, the warranties can be excluded or negated by reference to the express agreement of the parties, or by reference to evidence of the intentions of the parties.<sup>237</sup> In order for the implication to arise there must be reliance on the skill of the contractor.<sup>238</sup> The provision of materials must also conform to the requirements of the *Supply of Goods and Services Act 1982*.

## Fitness of works

- 39-079 There will be a further implied warranty that the work carried out by the contractor will, on completion, be reasonably fit for its particular purpose where: (i) the employer makes known to the contractor the particular purpose for which the building is required; (ii) the work is of a kind which the contractor holds himself out as performing; and (iii) the employer relies on the contractor's skill and judgment.<sup>239</sup> The scope for the implication of a warranty as to fitness for intended purpose will vary considerably depending upon the nature of the express obligations of the contractor. Where the express obligations of the contractor are broadly in the nature of "design and build" obligations, then there will be far greater room for the implication of the warranty as to fitness for intended purpose.<sup>240</sup> Where, however, the contractor is required to carry out work in accordance with detailed plans or a specification provided by another, then there is little room for the implication of the warranty.<sup>241</sup> In *MT Hogaard A/S v E.ON Climate and Renewables UK*<sup>242</sup> it was held at first instance that the contractor was in breach of an express fitness for purpose term requiring a certain design life for transition pieces in a windfarm structure, notwithstanding the design's compliance with the other DNV standard design specifications in the contract. The Supreme Court<sup>243</sup> upheld that finding, stating that where a contract requires an item to be produced in accordance with prescribed criteria and in accordance with a prescribed design which will

inevitably result in the product falling short of that criteria, the contractor will often be obliged to improve upon the aspects of the prescribed design contained in the contract. Whether this is true in any given case is likely to turn upon the nature of the inconsistency in the contract and the relative expertise of the contractor and the employer, or its designing architect.

## Construction and sale of a dwelling

- 39-080 When a purchaser buys a house from a builder who contracts to build it, there will be implied warranties: (i) that the builder will do the work in a good and workmanlike manner; (ii) supplying good and proper materials for the work; and (iii) that the house will be reasonably fit for human habitation.<sup>244</sup> However, the “threefold implication” will not arise if the contractor simply sells a house which he has previously constructed.<sup>245</sup>

## Footnotes

197 For a discussion of the basic principles, see *Peden* (2001) 117 L.Q.R. 459. Note also that in the decision in *Bloor Construction (UK) Ltd v Bowmer & Kirkland (London) Ltd* [2000] B.L.R. 314, it was decided that the power of an adjudicator under the *Housing Grants, Construction and Regeneration Act 1996* to correct an error arising from an accidental error or omission in his decision arose by way of an implied term.

198 See above, Vol.I, Ch.16.

199 For a clear statement of the principles involved, see *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1978) 52 A.L.J.R. 20, 26; *Phillips Electronique v British Sky Broadcasting Ltd* [1995] E.M.L.R. 472, CA. See the decision of the Court of Appeal in *Ultraframe (UK) Ltd v Tailored Roofing Systems Ltd* [2004] 2 All E.R. (Comm) 692, [2004] B.L.R. 341. See also *Essex CC v UBB Waste (Essex) Ltd* [2020] EWHC 1581 (TCC), 191 Con L.R. 77 for an application of these principles in the case of a complex building contract concerned with a waste to energy plant. In *Marks & Spencer Plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72, [2016] A.C. 742, the Supreme Court reaffirmed the applicability of these five principles and provided further guidance as to their usage.

200 *Young and Marten Ltd v McManus Childs Ltd* [1969] 1 A.C. 454, 465, HL; *Liverpool City Council v Irwin* [1977] A.C. 239, 262, HL.

201 *The Moorcock* (1889) 14 P.D. 64, 68, CA; *Reigate v Union Manufacturing Co* [1918] 1 K.B. 592, 605, CA. In *Clin v Walter Lilly & Co Ltd v Clin* [2018] EWCA Civ 490 it was held that in order to make a Design Portion JCT Contract work effectively there was an implied term to the effect that the employer, who had the responsibility for obtaining planning permission, should take due diligence to obtain the same, and that this obligation included a requirement to provide in good time to the local authority the information that its planning officers require and are lawfully entitled to expect in order to grant the necessary consents. For the application

- of this finding in the context of the planning consent requirement in dispute, see *Walter Lilly & Co Ltd v Clin* [2019] EWHC 945 (TCC), 184 Con. L.R. 34.
- 202 *Shirlaw v Southern Foundries* (1926) Ltd [1939] 2 K.B. 206, 227, CA.
- 203 *Shell UK Ltd v Lostock Garage Ltd* [1976] 1 W.L.R. 1187, 1196.
- 204 *Tamplin (FA) Steamship Co Ltd v Anglo-Mexican Petroleum Products Co Ltd* [1916] 2 A.C. 397, 422; *Lynch v Thorne* [1956] 1 W.L.R. 303, 311.
- 205 *Duke of Westminster v Guild* [1985] Q.B. 688, 699; *Barratt Southampton v Fairclough Building Ltd* (1988) 27 Con. L.R. 62, 70.
- 206 *Liverpool City Council v Irwin* [1977] A.C. 239, 253, HL.
- 207 *Trollope & Colls Ltd v North West Metropolitan Regional Hospital Board* [1973] 1 W.L.R. 601, 609, HL.
- 208 *The Moorcock* (1889) 14 P.D. 64, 68, CA.
- 209 *Trollope & Colls Ltd v North West Metropolitan Regional Hospital Board* [1973] 1 W.L.R. 601, 610, HL.
- 210 *Adams Holden & Pearson v Trent Regional Health Authority* (1989) 47 B.L.R. 34, 49; *Barratt Southampton Ltd v Fairclough Building Ltd* (1988) 27 Con. L.R. 62, 70; *GLC v Cleveland Bridge and Engineering Co* (1984) 34 B.L.R. 50, 78.
- 211 See *Harrison v Shepherd Homes Ltd* [2011] EWHC 1811 (TCC), 27 Const. L.J. 709, per Ramsey J at [54]–[66].
- 212 The employer will be responsible for acts of prevention by the contract administrator: *London Borough of Merton v Leach* (1985) 32 B.L.R. 51.
- 213 *London Borough of Merton v Stanley Hugh Leach Ltd* (1985) 32 B.L.R. 51, 79 where Vinelott J applied dicta of Vaughan Williams LJ in *Barque Quilpue v Bryant* [1904] 2 K.B. 264, 274 to the JCT Standard Form, 1963 edn, 1971 Revision. For a decision in which the principle was applied in a construction contract, see *Allridge (Builders) Ltd v Grandactual Ltd* (1997) C.I.L.L. 1225.
- 214 *Roberts v Bury Commissioners* (1870) L.R. 5 C.P. 310, 320, 325.
- 215 (1995) 52 Con. L.R. 130.
- 216 *Allridge (Builders) Ltd v Grandactual Ltd* (1997) C.I.L.L. 1225.
- 217 (1997) 82 B.L.R. 39.
- 218 *Mackay v Dick* (1881) 6 App. Cas. 251, 263. See also: *Nala Engineering Ltd v Roselec Ltd* (1999) C.I.L.L. 1534; and *Scottish Power Plc v Kvaerner Construction (Regions) Ltd* (1999) S.L.T. 721 Outer House.
- 219 *Neodox Ltd v Swinton & Pendlebury BC* (1958) 5 B.L.R. 78.
- 220 *London Borough of Merton v Stanley Hugh Leach* (1985) 32 B.L.R. 51; *J & J Fee Ltd v The Express Lift Co Ltd* (1993) 34 Con. L.R. 147; *Royal Brompton Hospital NHS Trust v Hammond (No.4)* (1999) 69 Con. L.R. 170.
- 221 [2011] EWHC 3449 (TCC), [2012] B.L.R. 152.
- 222 *Mackay v Dick* (1881) 6 App. Cas. 251, 263; *Luxor (Eastbourne) Ltd v Cooper* [1941] A.C. 108, 118; *Mona Equipment Ltd v Rhodesia Railways Ltd* [1949] 2 All E.R. 1014, 1018.
- 223 *Mona Oil Equipment & Supply Co Ltd v Rhodesia Railway Ltd* [1949] 2 All E.R. 1014.
- 224 *Perini Corp v Commonwealth of Australia* [1969] 2 N.S.W.L.R. 530; (1969) 12 B.L.R. 82, 104.

- 225 *Jardine Engineering v Shimizu* (1992) 63 B.L.R. 96.
- 226 [2020] EWHC 1581 (TCC) at [100]–[116], applying *Yam Seng Pte Ltd v International Trade Corp Ltd* [2013] EWHC 111 (QB) and *Al Nehayan v Kent* [2018] EWHC 333 (Comm). cf. above, Vol.I, paras 2-081—2-082.
- 227 *Young & Marten Ltd v McManus Childs Ltd* [1969] 1 A.C. 454, 465, per Lord Reid; *Greaves & Co (Contractors) Ltd v Baynham Meikle & Partners* [1975] 1 W.L.R. 1095, 1098, per Lord Denning MR.
- 228 *Young & Marten Ltd v McManus Childs Ltd* [1969] 1 A.C. 454, 466, 470 and 479.
- 229 For a critical consideration of cases on the duty to warn, see: *Wilson and Rutherford* (1994) 10 Const. L.J. 90.
- 230 *Equitable Debenture Assets Corp Ltd v William Moss* (1983) 2 Con. L.R. 1.
- 231 *Victoria University of Manchester v Hugh Wilson* (1984) 2 Const. L.R. 43. And see in the context of an engineer's duty to warn about dangerous temporary works, *Hart Investments Ltd v Fidler and Larchpack Ltd* [2007] B.L.R. 526.
- 232 (1992) 62 B.L.R. 147.
- 233 See also *Harrison v Shepherd Homes Ltd* [2011] EWHC 1811 (TCC), 27 Const. L.J. 709, per Ramsey J at [39]–[52], where it was held, albeit as a matter of construction of the relevant express term, that where a contractor carries out both design and construction of the works, the obligation to carry out the work in a proper and workmanlike manner extends to any design work as well as to the construction work undertaken.
- 234 [2001] B.L.R. 137.
- 235 See also *Aurum Investments Ltd v Avonforce Ltd (In Liquidation)* [2001] 2 All E.R. 385.
- 236 *Young & Marten v McManus Childs Ltd* [1969] 1 A.C. 454, HL; *Gloucestershire CC v Richardson* [1969] 1 A.C. 480, HL; *Rotherham MBC v Frank Haslam Milan & Co Ltd and MJ Gleeson (Northern) Ltd* (1996) 78 B.L.R. 1, CA. The implied warranties form a parallel to the warranties contained in s.14 of the Sale of Goods Act 1979. In respect of contracts for the supply of computer software, see *St Albans City & District Council v ICL* [1996] 4 All E.R. 481, CA.
- 237 *Young & Marten Ltd v McManus Childs Ltd* [1969] 1 A.C. 454, 474, per Lord Upjohn, referring to *G H Myers & Co v Brent Cross Service Co* [1934] 1 K.B. 46, 55, per du Parcq J.
- 238 *IBA v EMI & BICC* (1980) 14 B.L.R. 1, 47, HL.
- 239 *Greaves v Baynham Meikle* [1975] 1 W.L.R. 1095, 1098G, per Lord Denning MR.
- 240 *IBA v EMI and BICC* (1980) 14 B.L.R. 1, 47 where Lord Scarman said (obiter) that: "... in the absence of a clear, contractual indication to the contrary, I see no reason why one who in the course of business contracts to design, supply and erect a television aerial mast is not under an obligation to ensure that it is reasonably fit for the purpose for which he knows it is intended to be used ...". See also *Viking Grain v TH White* (1985) 33 B.L.R. 103.
- 241 *Lynch v Thorne* [1956] 1 W.L.R. 303, 311, CA; *Norta Wallpapers (Ireland) Ltd v John Sisk & Sons (Dublin) Ltd* (1976) 14 B.L.R. 49, where the Irish Supreme Court held (at 63–64) that there was no room for the implication that the contractor warranted that a factory roof would be reasonably fit for its intended purpose in circumstances where the roof had been chosen by a specialist sub-contractor.
- 242 [2014] EWHC 1088 (TCC), [2014] B.L.R. 450.

- 243 [2017] UKSC 59, [2017] B.L.R. 477.
- 244 *Hancock v BW Brazier (Anerley) Ltd* [1966] 1 W.L.R. 1317, 1332F; *Greaves v Baynham Meikle* [1975] 1 W.L.R. 1095, 1098G. See *Harrison v Shepherd Homes Ltd* [2011] EWHC 1811 (TCC), 27 Const. L.J. 709 for a consideration of when such obligations will survive a conveyance of the property.
- 245 *Minster Trust Ltd v Traps Tractors Ltd* [1954] 1 W.L.R. 963, 975.

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## **(d) - Statutes Relevant to Construction**

**Chitty on Contracts 34th Ed.**

**Consolidated Mainwork Incorporating First Supplement**

**Volume II - Specific Contracts**

**Chapter 39 - Construction Contracts**

**Section 3. - Contract Terms**

**(d) - Statutes Relevant to Construction**

### **Introduction**

- 39-081 Statute plays an increasingly important part in determining the obligations which arise in construction contracts independent of the agreement of the parties. Some of the more important legislation is considered here.<sup>246</sup>

### **Statutory implied terms**

- 39-082 The **Supply of Goods and Services Act 1982 (Pt II)** (“**SOGSA 1982**”) is applicable to contracts<sup>247</sup> for the supply of a service, and this includes construction contracts, e.g. through supply of building materials and work.<sup>248</sup> Subject to the possibility of exclusion or restriction in accordance with s.16, a supplier of a service acting in the course of business is obliged to carry out the service with reasonable skill and care<sup>249</sup>; there will be an implied term that the supplier will carry out the service within a reasonable time<sup>250</sup>; and there will be an implied term that the party contracting with the supplier will pay a reasonable charge.<sup>251</sup> The obligations created by **SOGSA 1982** may be negatived or varied by express agreement, by the course of dealing between the parties, or by such usage as binds both parties to the contract; but a term implied by **SOGSA 1982** is not negatived by an express term of the contract between the parties unless it is inconsistent with it.<sup>252</sup>

## Defective Premises Act 1972

39-083 Section 1(1) provides:

### Section 1

“(1) A person taking on work for or in connection with the provision of a dwelling (whether the dwelling is provided by the erection or by the conversion or enlargement of a building) owes a duty—

(a) if the dwelling is provided to the order of any person, to that person; and

(b) without prejudice to paragraph (a) above, to every person who acquires an interest (whether legal or equitable) in the dwelling;

to see that the work which he takes on is done in a workmanlike or, as the case may be, professional manner, with proper materials and so that as regards that work the dwelling will be fit for habitation when completed.”

The following points in relation to s.1(1) may be noted:

(i)although the word “dwelling” is nowhere defined in the statute, it “... implies a building used or capable of being used as a residence for one or more families, and provided with all necessary parts and appliances, such as floors, windows, staircases, etc. ...”<sup>253</sup>;

(ii)s.1(1) is directed at the creation of new dwellings, either by construction or by adaptation, and is not concerned with works of rectification to an existing dwelling<sup>254</sup>;

(iii)fitness for habitation is a measure of the standard required to be achieved in the performance of the obligations imposed by s.1(1), so that it is a necessary ingredient to a cause of action that the plaintiff can show that the dwelling is not fit for habitation<sup>255</sup>;

(iv)the question of whether a dwelling is fit for habitation is one of fact and degree and can extend to defects of quality which render the dwelling unsuitable for its purpose as well as to dangerous defects<sup>256</sup>;

(v)to be fit for habitation, a dwelling must be capable of occupation for a reasonable time without risk to the health or safety of the occupants and without undue inconvenience or discomfort for the occupants<sup>257</sup>;

(vi)if, when a dwelling is complete, it lacks some essential attribute, then, notwithstanding that the defect is latent rather than patent, the dwelling will be unfit for habitation and come within the scope of s.1(1).<sup>258</sup>

(vii)a person will only fall within the scope of s.1(1) if they “[take] on work for or in connection with” the provision of a dwelling. This includes the builder who carries out the work and any professionals who positively contribute to the construction by carrying out design work. It does not include persons whose role is a solely negative one of seeing that no work is done which contravenes the building regulations and therefore approved inspectors are generally excluded from s.1(1).<sup>259</sup>

## Unfair Contract Terms Act 1977<sup>260</sup>

- 39-084 This Act applies for the most part to contract terms that seek to exclude or restrict liability, whether that liability arises in contract or in tort. Where a consumer makes a contract with the seller or supplier of goods, then the contract will also fall within the [Unfair Terms in Consumer Contracts Regulations 1999](#) or the [Consumer Rights Act 2015](#) as applicable. It should be noted, however, that for contracts entered into after 1 October 2015, in respect of business to consumer contracts only, the provisions of [UCTA 1977](#) and the [Unfair Terms in Consumer Contracts Regulations 1999](#) no longer apply. When applicable the two regimes, which exist in parallel, play an important part in the regulation of contractual terms in the context of construction. The Act affects contractual terms which arise in the course of business<sup>261</sup> in three different (though frequently overlapping) ways: (i) control over contractual terms which purport to exclude or restrict liability in negligence<sup>262</sup>; (ii) control over contractual terms which purport to exclude or restrict liability in relation to implied terms in contracts of sale or hire purchase; (iii) a more general power of review of contract clauses, by s.3, exercisable in the particular circumstances described in the section. The section applies between contracting parties where one of them deals as a consumer or on the other's written standard terms of business. It is not necessary for a party's terms and conditions to be incorporated in their entirety to trigger the application of this section and a single incorporated clause taken from a party's standard terms and conditions may, on the right facts, be sufficient.<sup>263</sup> In these circumstances, contract terms which purport to exclude or restrict liability for breach of contract or which purport to entitle one party to render a contractual performance substantially different from that reasonably expected of him at the time the contract was made, may to that extent be ineffective.<sup>264</sup>

## Exclusion depends on reasonableness

- 39-085 In each situation identified above, the exclusion or restriction of liability will be ineffective except insofar as the contract term satisfies the requirement of “reasonableness”, a concept which is explained in s.11 and elaborated in guidelines in Sch.2 which are frequently regarded as being of general application.<sup>265</sup> The burden of proof in relation to reasonableness is on the party seeking to

uphold the disputed clause,<sup>266</sup> and it is also for the party who relies on standard form conditions to plead the facts and matters on which it relies if it seeks to contend that its conditions are reasonable.<sup>267</sup>

## Reasonableness in construction

- 39-086 The test of “reasonableness” has been of wide application in construction contracts, indicating that the courts will consider a wide range of circumstances in determining whether the test has been met. In *Rees Hough v Redland Reinforced Plastics*<sup>268</sup> a clause purporting to limit the liability of the designer and supplier of defective pipes to defects notified within three months of supply was held to be unreasonable. In *Smith v Eric Bush* the disclaimer contained in a building society valuation for a modest dwelling was held to be unreasonable<sup>269</sup> since the valuer assumes a responsibility to both mortgagee and purchaser by agreeing to carry out a valuation for mortgage purposes knowing that the valuation will probably be relied upon by the purchaser in order to decide whether or not to enter into a contract to purchase the house.<sup>270</sup> In *The Chester Grosvenor Hotel Co Ltd v Alfred McAlpine Management Ltd*,<sup>271</sup> a management contract provided that the client could not recover from the project manager sums for delay in excess of monies received by the project manager from the works contractors. The clause was held to be reasonable in circumstances where the parties were substantial concerns dealing at arm’s length; the parties had choice open to them in relation to contracting party and terms. In *Stewart Gill Ltd v Horatio Myer Ltd*<sup>272</sup> a clause in a contract for the supply and installation of an overhead conveyor system which purported to exclude rights of set-off was held to be unreasonable. In *Barnard Pipeline Technology Ltd v Marston Construction Co Ltd*<sup>273</sup> a clause which provided that the liability of the supplier of pipes for defects was to be limited to the cost of replacement or repair of the goods supplied was held to be reasonable, in circumstances where there was equality of bargaining power and the parties had had previous dealings. In *St Albans City & DC v ICL*<sup>274</sup> a clause limiting the liability of the supplier of computer software to the price or £100,000, and excluding liability for specific types of loss, was held to be unreasonable, the trial judge observing, inter alia, that the defendant had called no evidence to show that it was fair and reasonable to limit their liability to £100,000 or to any other sum. In *James Moore v Yakeley Associates*<sup>275</sup> it was held that a clause limiting the liability of an architect to £250,000 was reasonable.

## Unfair Contract Terms in Consumer Contracts Regulations

- 39-087 The regime of the Act exists in parallel with that imposed by the *Unfair Terms in Consumer Contracts Regulations 1999* which replace the *Unfair Terms in Consumer Contracts Regulations 1994*, which implemented a European Council Directive<sup>276</sup> on Unfair Terms in Consumer

Contracts.<sup>277</sup> The Regulations apply to contracts concluded after July 1, 1995<sup>278</sup> between a “consumer” and a seller or supplier—although it should be noted that they no longer apply to contracts entered into after 1 October 2015. [Schedule 2 to the Regulations](#) contains an indicative, rather than exhaustive, list of the terms which are regarded as causing a significant imbalance which operates to the detriment of the consumer, and may therefore be considered to be unfair under the Regulations. The [1999 Regulations](#) confer upon the Office of Fair Trading a power to go to the court to prevent the continued use of unfair terms brought to his attention.<sup>279</sup> For contracts made on or after 1 October 2015, the [Consumer Rights Act 2015](#) revokes and replaces the [1999 Regulations](#).

## The Building Regulations<sup>280</sup>

- 39-088 The power to make building regulations as part of the system of building control in England and Wales is vested in the Secretary of State by operation of [s.1 of the Building Act 1984](#).<sup>281</sup> The regulations currently in force are the [Building Regulations 2010](#),<sup>282</sup> as amended by successive Amending Regulations issued from 2011 and continuing.<sup>283</sup> The [Building Regulations](#) themselves are a concise document, with the applicable technical detail being found in a series of approved documents. An important aspect of the scheme for building regulation is that there is a dual system in operation: there is building control carried out by local authorities, and then there is control by way of certificates issued by approved inspectors operating under the [Building \(Approved Inspectors, etc.\) Regulations](#), the latest version of which is the [2010 Regulations](#).<sup>284</sup> Up to 2005 the only Approved Inspector was NHBC Building Control Services Ltd, a subsidiary of the NHBC,<sup>285</sup> but a list of individual approved inspectors is now maintained by the Construction Industry Council.

## Civil liability in relation to the Building Regulations

- 39-089 Given the status of [s.38 of the Building Act 1984](#) (not brought into force), the civil liability of the building contractor for breaches of the building regulations will depend upon the terms of the contract between him and the employer. Where the building contract contains no express provision requiring compliance with statutory requirements,<sup>286</sup> liability for breach of the building regulations may arise through breach of express or implied terms as to materials or workmanship and it is also thought that there may generally be an implied term in building contracts that the works will be carried out and completed in accordance with the building regulations.<sup>287</sup> The fact that the works have been inspected and approved by a local authority building inspector as being compliant with the [Building Regulations](#) is no defence to a civil claim against the builder if there

has, in fact, been a breach of the [Building Regulations](#)<sup>288</sup> although where there is a factual dispute as to what was built it may be of evidential relevance.

- 39-090 Since the decision of the House of Lords in *Murphy v Brentwood DC*<sup>289</sup> a local authority, exercising its functions in relation to the building regulations (such as the approval of plans, the supervision of work and the issue of relevant notices), is not generally liable either to an original or a subsequent owner for the cost of repairing a building which is, in breach of the building regulations, in a defective state.<sup>290</sup> Equally, an expert instructed by a local authority to advise the authority about the ground conditions and adequacy of foundations for dwellings built on an old mining area, owed no duty of care to a first purchaser or the then owner/occupier to prevent or avoid the occurrence of pure economic loss.<sup>291</sup>

## Approved inspectors

- 39-091 The duty of the approved inspector is to supervise building works to ensure that they comply with the requirements of the building regulations. The position of the approved inspector has<sup>292</sup> been contrasted with that of the local authority in that whereas the local authority has a discretion whether to inspect, the approved inspector must inspect at the stages set out in the building regulations.

## Footnotes

- 246 For the [Housing Grants, Construction and Regeneration Act 1996](#) (as now amended), see below, paras 39-149 et seq.
- 247 Made on or after 4 July 1983.
- 248 For a case where [SOGSA 1982](#) is considered in the context of a construction contract, see *Charlotte Thirty Ltd and Bison Ltd v Croker Ltd (1990) 24 Con. L.R. 46*. Contracts for the supply of materials are normally governed by the [Sale of Goods Act 1979](#) (see below, Ch.46); see *Jewsons Ltd v Boykan [2004] 1 Lloyd's Rep. 505, [2004] B.L.R. 31* on fitness for purpose under s.14(3) in the building context.
- 249 s.13.
- 250 s.14.
- 251 s.15. By s.2 what is a reasonable charge is a question of fact.
- 252 s.16.
- 253 Halsbury's Laws (Vol.31, 4th re-issue), p.246.
- 254 *Jacobs v Moreton & Partners (1994) 72 B.L.R. 92, 105*.

- 255 *Thompson v Clive Alexander & Partners* (1992) 59 B.L.R. 77, 87; *Alexander v Mercouris* [1979] 1 W.L.R. 1270, 1274B, per Buckley LJ: “The duty is one to be performed during the carrying on of the work. The reference to the dwelling being fit for habitation indicates the intended consequence of the proper performance of the duty and provides a measure of the standard of the requisite work and materials ...”. These decisions were followed in *Murray v Jack Lunn (Construction) Ltd* Unreported 1996. See also *Harrison v Shepherd Homes Ltd* [2011] EWHC 1811 (TCC), 27 Const. L.J. 709, where the Court held that it was bound by *Alexander v Mercouris* to find that “fitness for habitation” provided a measure of the required “work and materials” obligation, although Ramsey J stated obiter that absent this authority he would have found that the duty created by s.1(1) was a threefold duty analogous to that at common law under *Hancock v Brazier* and not a single duty (see at [124]–[153]).
- 256 See *Bole v Huntsbuild* [2009] EWCA Civ 1146, 127 Con. L.R. 154, per Dyson LJ at [29] and also *Harrison v Shepherd Homes Ltd* [2011] EWHC 1811 (TCC), 27 Const. L.J. 709, per Ramsey J at [154]–[165].
- 257 *Rendlesham Estates Plc v Barr Ltd* [2014] EWHC 3968 (TCC).
- 258 *Andrews v Schooling* [1991] 1 W.L.R. 783, 790.
- 259 *Lessees and Management Co of Herons Court v Heronslea Ltd* [2019] EWCA Civ 1423, [2019] 1 W.L.R. 5849 at [40].
- 260 See generally Vol.I, Ch.17.
- 261 That is, liability for breach of obligations or duties arising from things done or to be done by a person in the course of a business: s.1(3).
- 262 See, for example, *Phillips Products Ltd v Hyland* [1987] 1 W.L.R. 659; *Smith v Eric S Bush* [1990] A.C. 831.
- 263 See *Commercial Management (Investments) Ltd v Mitchell Design & Construct Ltd* [2016] EWHC 76 (TCC), 164 Con L.R. 139.
- 264 See *Langstane Housing Association Ltd v First Riverside Construction Ltd* [2009] CSOH 52, 124 Con. L.R., where the Outer House of the Court of Session held that a net contribution clause in the retainer of an engineer did not fall within the scope of cl.16 or 17 of the Act (as it applies in Scotland), but that had it done so it would have satisfied the fair and reasonable test and have been effective.
- 265 For judicial reference to Sch.2 in the construction context, see: *Rees Hough Ltd v Redland Reinforced Plastics* (1984) 27 B.L.R. 136; *Barnard Pipeline Technology Ltd v Marston Construction Co Ltd* (1992) C.I.L.L. 743; *Edmund Murray Ltd v BSP International Foundations Ltd* (1992) 33 Con. L.R. 1, CA. See also: *Pegler Ltd v Wang (UK) Ltd* [2000] B.L.R. 218; *Casson v Ostley* [2003] B.L.R. 147; *Stent Foundations Ltd v MJ Gleeson Group Plc* [2001] B.L.R. 134; and *Watford Electronics Ltd v Sanderson CFL Ltd* [2001] 1 All E.R. (Comm) 696, [2001] B.L.R. 143.
- 266 Unfair Contract Terms Act 1977 s.11(5).
- 267 *Sheffield v Pickfords Ltd* [1997] EWCA Civ 984; *Lacey's Footwear Ltd v Bowler* [1997] 2 Lloyd's Rep. 369.
- 268 (1984) 27 B.L.R. 136, 153.
- 269 [1990] 1 A.C. 831, 847D, 859A.
- 270 at 847D.

- 271 *(1991) 56 B.L.R. 115, 133–135.*
- 272 *[1992] Q.B. 600, 606, 609, [1992] 2 All E.R. 257, 261a, 263a–e.*
- 273 *(1991) C.I.L.L. 743.*
- 274 *[1996] 4 All E.R. 481.*
- 275 *(1998) 62 Con. L.R. 76.*
- 276 93/13 of 5 April 1993.
- 277 [1993] O.J. L95/29. For a discussion of the directive, see: Beale, “Legislative Control of Fairness: The Directive on Unfair Terms on Consumer Contracts” in Beatson and Friedmann, Good Faith and Fault in Contract Law (1995).
- 278 reg.1 of the 1994 Regulations states that they “... shall come into force on 1st July 1995 ...”; reg.1 of the 1999 Regulations “... on 1st October 1999”.
- 279 reg.8. A “Bulletin” is produced by the Office of Fair Trading containing, inter alia, “Case Studies” where the Regulations have been applied to standard terms in consumer transactions.
- 280 See Keating on Building Contracts, 11th edn (2021), para.16-048; Powell-Smith and Billington, The Building Regulations—Explained and Illustrated, 10th edn (1995, 1998 reprint).
- 281 The Act came into force on 1 December 1984 when the relevant powers were to be exercised by the Department for the Environment. Since 2007 the relevant powers are transferred to the Department for Communities and Local Government.
- 282 SI 2010/2214.
- 283 There are other specialist regulations also derived from the 1984 Act: the Building (Approved Inspectors, etc.) Regulations 2010 (SI 2010/2215), the Building (Inner London) Regulations 1987 (SI 1987/798), the Building (Disabled People) Regulations 1987 (SI 1987/1445), the Building (Prescribed Fees) Regulations 1994 (SI 1994/2020), each of which are also regularly amended by further SIs.
- 284 SI 2010/2215.
- 285 National House Building Council.
- 286 *Townsend (Builders) v Cinema News (1958) 20 B.L.R. 118, CA; Equitable Debenture Assets Corp v William Moss (1984) 2 Con. L.R. 1.*
- 287 See Keating on Construction Contracts, 11th edn (2021), para.4-060.
- 288 *Hunt v Optima Cambridge Ltd [2013] EWHC 681 (TCC), 148 Con. L.R. 27.*
- 289 [1991] 1 A.C. 398.
- 290 Ending 14 years of such claims, which commenced with *Anns v Merton LBC [1978] A.C. 728.*
- 291 *Preston v Torfaen BC (1993) 36 Con. L.R. 48, CA.*
- 292 See Powell-Smith and Billington, The Building Regulations—Explained and Illustrated, 11th edn (1999).

## **(e) - Tort in Construction**

**Chitty on Contracts 34th Ed.**

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**Chapter 39 - Construction Contracts**

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**(e) - Tort in Construction**

### **Overview**

- 39-092 Although the law applicable to the modern construction industry is often perceived as being solely concerned with the operation of standard forms contracts, a broad range of statutory and common law obligations are also encountered in the construction context.<sup>293</sup> The tort of negligence has in recent times played a particularly important role which has, however, now been significantly reduced and redefined.

### **Modern role of negligence**

- 39-093 The departure from *Anns v Merton LBC*<sup>294</sup> in *Murphy v Brentwood DC*<sup>295</sup> had a fundamental impact upon the duties and liabilities which arise in the construction industry,<sup>296</sup> bringing with it the distinction between physical damage to person or other property<sup>297</sup> (recoverable on the basis of *Donoghue v Stevenson*)<sup>298</sup> and economic loss (irrecoverable save where there is some factor beyond the mere occurrence of the loss and the fact that its occurrence could be foreseen<sup>299</sup>). This distinction is reflected in a number of decisions on building projects,<sup>300</sup> although it is to be observed that there has been a divergence of view between the English courts and other common law jurisdictions on this controversial subject.<sup>301</sup>

## Tort and contract

39-094

**U** Following the decision in *Henderson v Merrett Syndicates*<sup>302</sup> there has been further clarification of the underlying principles of tortious liability, which were traced back to *Hedley Byrne v Heller & Partners*<sup>303</sup> with its frequent references to one party having assumed or undertaken a responsibility to another in respect of the application of a particular skill, then relied on by the other party. In the light of the assumption of responsibility principle developed in *Henderson v Merrett*,<sup>304</sup> the specialist building contractor is by no means immune from claims for pure economic loss in tort, although the situations where such liability may still arise will be narrow.

305

**U** Accordingly, the Court of Appeal has held that a specialist contractor carrying out maintenance work (in this case the removal of asbestos) assumed a responsibility to the owner of the building which invited reliance no less than the work carried out by any other professional adviser, so that pure economic loss was recoverable.<sup>306</sup> This is to be contrasted with the Court of Appeal's decision in *Robinson v PE Jones (Contractors) Ltd*,<sup>307</sup> where it was held that a builder did not owe a home owner a duty of care in tort (concurrent with the obligations owed under the building contract between the same parties) in respect of economic losses associated with the quality of the building works to be undertaken pursuant to the building contract. It was decided that ordinarily the position of a builder in this respect is to be distinguished from that of a professional, who generally would be found to owe a concurrent duty of care in respect of such economic losses in parallel to any contractual obligations created by its retainer with the client. Adopting the same approach in the case of building contracts would involve the wholesale subordination of the law of tort into the law of contract and the parties had to be taken to have agreed that the rights and obligations between them were to be derived from the building contract alone. Following the Court of Appeal decision in *Wellesley Partners LLP v Withers LLP*<sup>308</sup> the contractual rules on remoteness, and possibly also causation, would continue to apply even where there are concurrent duties of care in contract and tort.

## Liability of professionals

39-095

A further aspect of liability in tort which is of substantial importance in construction is the liability of professionals within the industry, such as engineers, architects, project managers and quantity surveyors.<sup>309</sup> Although such professionals will typically have contracts of retainer with the employer (such retainer being often more formal than in other professions), the parallel liability in tort (based on the principles enunciated in *Hedley Byrne v Heller*,<sup>310</sup> *Henderson v Merrett*

*Syndicates*<sup>311</sup> and *White v Jones*<sup>312</sup>) may be important in particular circumstances, such as where the claim in contract is time-barred.<sup>313</sup> The duties assumed by the architect or the engineer will depend upon terms of their assumption of responsibility, but there will typically be a duty to design the works<sup>314</sup> and then to supervise the contractor, limited to ensuring that the work is completed in accordance with the contract, so that detailed method of working will be a matter for the builder. Accordingly, cl.3.22 of the RIBA terms provide that the client “... shall hold the contractor, and not the Architect, responsible for the contractor’s management and operational methods and for the proper carrying out and completion of the Works and for health and safety provisions on the site ...”.<sup>315</sup> However, where the contract specifies a particular method of working as an important feature of the design, then there is clearly a duty upon the architect to supervise that work. The architect may also have an obligation in relation to general on-site supervision, and both the ACE and the RIBA conditions of appointment contemplate this as a possibility where necessary. Such an obligation will not be discharged by reference to, for example, a clerk of works installed by the architect or by the employer, since the architect will retain overall control.<sup>316</sup> The extent of the supervision which the architect should supply will depend upon the project concerned, but should be sufficient to carry out the job successfully.<sup>317</sup> The professional named in the building contract also has a duty of care towards his client in respect of the certificates which he issues,<sup>318</sup> whether interim or final.<sup>319</sup> However, the right of the building contractor to pursue a claim in negligence against the certifier is limited in the light of *Pacific Associates v Baxter*<sup>320</sup> where the Court of Appeal struck out a claim by contractors under a FIDIC form of engineering contract against the engineers under the contract. It should be noted that a professional may limit its potential liability by way of a net contribution clause. In *West v Ian Finlay & Associates*,<sup>321</sup> it was held by the Court of Appeal that such a clause contained in an architect’s retainer should be construed in accordance with the normal meaning of the unambiguous words used in it, that as a result it should apply to a main contractor as well as specialist sub-contractors and that it did not fall foul of the *Unfair Terms in Consumer Contracts Regulations 1999*<sup>322</sup> as an unfair term nor fail the test of reasonableness under the *Unfair Contract Terms Act 1977*.

## Footnotes

- 293 See *Palmer Birch v Lloyd* [2018] EWHC 2316 (TCC), [2018] 4 W.L.R. 164 for a successful claim in the economic torts of inducing a breach of contract and unlawful conspiracy against two individuals who stood behind a company that agreed to pay a contractor for certain work under a building contract.
- 294 [1978] A.C. 728, HL.
- 295 *Murphy v Brentwood DC* [1991] 1 A.C. 398, HL.
- 296 For discussion, see Cane, *Tort Law and Economic Interests*, 2nd edn (1996), pp.208–214; and Baatz, “The language of duty” in *Construction Law—Themes and Practice* (1998).

- 297 *Jacobs v Moreton & Partners* (1994) 72 B.L.R. 92; *Tunnel Refineries Ltd v Bryan Donkin Co Ltd* (1998) C.I.L.L. 1392. But see *Bellefield Computer Services Ltd v E Turner & Sons Ltd* [2000] B.L.R. 97 for a rejection of an attempt to circumvent the effect of *Murphy* by the suggestion of a distinction to be drawn in negligence claims between the damage to the negligently constructed building itself and items which are within but not part of the building. See also the decisions in *Linklaters Business Services v Sir Robert McAlpine Ltd* [2010] EWHC 1145 (TCC), [2010] B.L.R. 537 (at the interlocutory stage) and at [2010] EWHC 2931 (TCC), 133 Con. L.R. 211 (after trial) and *Broster v Galliard Docklands Ltd* [2011] EWHC 1722 (TCC), [2011] B.L.R. 569 which all followed *Bellefield* and discuss of the law of negligence as it applies to duties of care owed by contractors in the context of alleged complex structures.
- 298 [1932] A.C. 562, HL.
- 299 *Murphy v Brentwood DC* [1991] 1 A.C. 398, 487.
- 300 *Hydrocarbons Great Britain Ltd v Cammell Laird Shipbuilders Ltd* (1991) 58 B.L.R. 123; *Lancashire and Cheshire Association of Baptist Churches Inc v Howard & Seddon Partnership* (1991) 65 B.L.R. 21, [1993] 3 All E.R. 467; *Morse v Barrett (Leeds) Ltd* (1993) 9 Const. L.J. 158; *Londonwaste Ltd v AMEC Civil Engineering Ltd* (1997) 83 B.L.R. 136.
- 301 *Bryan (Allan) v Judith Maloney* (1995) (Australia) reported at 74 B.L.R. 35; *Winnepeg Condominium Corp No.36 v Bird Construction Co Ltd and Smith Carter Partners* (1995) (Canada) reported at 74 B.L.R. 1 and 11 Const. L.J. 306; *Invercargill City Council v Noel Gordon Hamlin* (1996) (New Zealand) reported at 78 B.L.R. 78; affirming 72 B.L.R. 39 and 11 Const. L.J. 285.
- 302 [1995] 2 A.C. 145, HL.
- 303 [1964] A.C. 465, HL.
- 304 See also *White v Jones* [1995] 2 A.C. 207, HL.
- 305 See *Cartwright* (1997) 13 Const. L.J. 157 and the decision of Ramsey J in *Biffa Waste Services v Maschinenfabrik Ernst Hese* [2008] B.L.R. 155. The decision in first instance in *Biffa Waste* as to the vicarious liability of a contractor for the negligence of a third party has now been reversed by the Court of Appeal, see [2008] EWCA Civ 1257, [2009] 3 W.L.R. 324, [2009] B.L.R. 1. See also *Multiplex Construction Europe Ltd v Bathgate Realisations Civil Engineering Ltd* [2021] EWHC 590 (TCC), [2021] B.L.R. 391 for a recent example of the Court's reluctance to find the required assumption of responsibility between parties in a construction project (in that case a contractor and a sub-contractor's consultant engineer) where rights, obligations and responsibility as between the various parties are dictated by a series of complex contracts.
- 306 *Barclays Bank v Fairclough* (1995) 76 B.L.R. 1, CA. See also *BSkyB Ltd v HP Enterprise Services UK Ltd* [2010] EWHC 86 (TCC), [2010] B.L.R. 267 at [341]–[358], where it was held that when considering whether a duty of care existed in respect of an alleged negligent misstatement, the impact of the contractual regime must be considered and a duty of care should not be permitted to circumvent or escape a contractual exclusion or limitation of liability clause.
- 307 [2011] EWCA Civ 9, [2011] 3 W.L.R. 815, [2011] B.L.R. 206.

308 [2015] EWCA Civ 1146, [2016] 2 W.L.R. 1351.

309 See Hodgin (ed.), Professional Liability: Law and Insurance (Lloyd's 1996) Ch.3; note also the potential for liability to arise in the tort of negligence in respect of economic loss even absent the existence of a contractual relationship, as with the architect in *Burgess v Lejonvarn* [2017] EWCA Civ 254, [2017] B.L.R. 277.

310 [1964] A.C. 465, HL.

311 [1994] 2 A.C. 145, HL.

312 [1995] 2 A.C. 207, HL.

313 Note that in *Samuel Payne v John Setchell Ltd* [2002] B.L.R. 489 HH Judge Humphrey Lloyd QC found that ordinarily there would be no concurrent duty of care owed in tort by a construction professional in respect of pure economic losses caused to his client as a result of the incompetent performance of his services. It was concluded that *both* a contractor and an engineer should ordinarily only be taken to owe a tortious duty to take reasonable care against causing their contractual client personal injury or damage to property other than to the building or construction work that is itself the subject of their work/services. It is thought, however, that the judgment gave insufficient weight to the decision in *Henderson v Merrett* and it is notable that the approach taken has not been followed in subsequent construction professional cases. Thus in *Mirant Asia Pacific v Ove Arup* [2005] P.N.L.R. 10 HH Judge Toulmin QC declined to follow the Court's reasoning in *Payne v Setchell*, holding instead that *Henderson* principles applied in the case of an engineer's concurrent duty of care to his client in respect of economic losses referable to design errors. It should also be noted that the approach taken in *Payne v Setchell* to this issue was not followed by HH Judge Seymour QC in *Tesco v Costain* (2003) C.I.L.L. 2062. Reference should also be made to *Bellefield Computer Services Ltd v E Turner & Sons Ltd* [2000] B.L.R. 97 where Schiemann LJ observed that in his view the builder in that case did owe a duty of care to the original owner of a property in respect of damage caused to the building itself.

314 In the absence of an express provision to the contrary, an architect is under a duty to review his design as necessary until the works are complete: *Brickfield Properties v Newton* [1971] 1 W.L.R. 862, CA; and for the position after completion, see *Eckersley v Binnie & Partners* (1988) 18 Con. L.R. 1, per Bingham LJ. But see now *New Islington and Hackney HA v Pollard Thomas and Edwards Ltd* [2001] B.L.R. 74.

315 See also *Clayton v Woodman & Sons (Builders) Ltd* [1962] 2 Q.B. 533, CA.

316 *Leicester Gardens v Trollope* (1911) 75 J.P. 197.

317 *Alexander Corfield v David Grant* (1992) 59 B.L.R. 102. The liability of construction professionals in negligence has been considered in *JD Williams & Co Ltd v Michael Hyde & Associates Ltd* [2001] B.L.R. 99 (the application of the *Bolam* test); and *Baxall Securities Ltd and Norbain SDC v Sheard Walshaw Partnership* [2002] B.L.R. 100, CA (consideration of the duties of the architect in a particular case of flooding and latent defects). It must of course be remembered that the test for negligence is a particular one (*Bolam v Friern Hospital Management Committee* [1957] 1 W.L.R. 582). For notable examples, see: *Department of National Heritage v Steensen Varming Mulcahy* (1998) 60 Con. L.R. 33; and *London Underground Ltd v Kenchington Ford Plc* (1998) 63 Con. L.R. 1.

- 318 *Sutcliffe v Thackrah* [1974] A.C. 727, 737, *HL*. See also *John Barker Construction Ltd v London Portman Hotel Ltd* (1996) 83 B.L.R. 31.
- 319 *London Borough of Merton v Lowe* (1981) 18 B.L.R. 130, *CA*.
- 320 [1990] 1 Q.B. 993; (1988) 44 B.L.R. 33, *CA*; and see also *Leon Engineering & Construction Co Ltd v Ka Duk Investment Co Ltd* (1989) 47 B.L.R. 139 Hong Kong.
- 321 [2014] EWCA Civ 316, [2014] B.L.R. 324.
- 322 SI 1999/2083.

## **(a) - Variations**

**Chitty on Contracts 34th Ed.**

**Consolidated Mainwork Incorporating First Supplement**

**Volume II - Specific Contracts**

**Chapter 39 - Construction Contracts**

**Section 4. - Particular Features**

### **(a) - Variations**

#### **Introduction**

- 39-096 It is commonplace that construction works, as finally built, will vary from what was contemplated at the date when the contract was priced by the contractor and executed between the parties. Without express authority there is no power to order the contractor to carry out extra work,<sup>323</sup> and an unauthorised change to the works, if not corrected, may become a breach of contract. Under the law applying in the USA, both State and Federal, there is a principle which limits the power to order variations to those which fall within the general scope of the work. Variations outside this limit are termed “Cardinal Changes”, and entitle the contractor to damages.<sup>324</sup> No such doctrine exists under English law, although there is high authority suggesting that there may be an implied limit on changes that may be ordered.<sup>325</sup> There may be a limit, prescribed by the contract, on variations which may be ordered. This may be in the form of a stated proportion of the value of the works which may not be exceeded without consent<sup>326</sup>; or there may be a provision entitling the contractor to additional payment if net additions or deductions exceed a stated limit.<sup>327</sup> There may be a limit arising by implication in particular circumstances.<sup>328</sup> Otherwise, there will ordinarily be no limit, provided the changes fall within the express terms of the contract.<sup>329</sup>

#### **What constitutes a variation**

- 39-097 Modern construction contracts generally contain complex variation clauses which empower the contract administrator to order a wide range of changes under the power to give a variation. Such clauses usually comprise a series of examples rather than a definition.<sup>330</sup> The effect of such clauses

will be to designate particular actions of the contract administrator as variations under the contract, e.g. an instruction which restricts access to the site<sup>331</sup>; or an instruction to change the specified sequence of construction.<sup>332</sup> A departure from the contract requirements not instructed by the contract administrator will not constitute a variation, although the contract administrator may be given authority to sanction such a departure as a variation.<sup>333</sup> Even where there is no additional work, there may be a variation where an instruction has the effect of depriving the contractor of choice. Thus in *English Industrial Estates v Kier Construction*<sup>334</sup> the contractor had a choice whether to crush demolition waste on site or to import fill. An instruction of the engineer to crush all hard arisings was held to constitute a variation order by limiting the contractor's choice. In *Strachan & Henshaw Ltd v Stein Industrie (UK) Ltd*<sup>335</sup> the Court of Appeal considered whether the instruction given to the plaintiff sub-contractor to remove its cabins from next to the workface to a distance of half a mile away (involving an alleged increase in "walking time") was an "alteration to the Works" and a variation within the meaning of cl.27 of the MF/1 Conditions of Contract (as amended). It was held that the instruction given by the defendant contractor in relation to the location of the cabins did not alter the "*work to be done by the Contractor under the Contract*" which was the phrase used in cl.1.1 to define "*the Works*" and so there was no variation under cl.27. Variations under a contract are to be distinguished from variations *of* the contract itself. The wording of the particular contract may be relevant to whether a variation under or of the contract is recognised. However, in *MWB Business Exchange Centres Ltd v Rock Advertising Ltd*<sup>336</sup> it was held by the Supreme Court that where a contract contained an anti-oral variation clause and one party alleged a variation to the same was agreed orally, the anti-oral variation clause precluded an informal variation of the contract being effective unless some words or conduct unequivocally representing that the variation was valid notwithstanding its informality gave rise to an estoppel. Something more would be required for that purpose than the informal promise itself.<sup>337</sup>

## Work not constituting a variation

- 39-098 The carrying out of "additional" work not mentioned in the contract will not constitute a variation if the work is included within the contractor's overall obligation to complete.<sup>338</sup> An instruction of the contract administrator to carry out particular work, where the contractor would otherwise have been obliged to carry out the same or similar work, has been held to be a variation.<sup>339</sup> But the better view, it is thought, is that there is no variation unless the contractor is required to carry out work additional to that necessarily included in the contract. In practice the question whether work which the contractor has not priced is a variation for which extra payment is due constitutes a dispute under the contract, to be determined by an adjudicator or arbitrator.<sup>340</sup> Note that under cl.51(3) of the ICC Form the contractor is not to be paid for any variation necessitated by the contractor's default. While an ordered variation may consist of additional quantities of work, the mere carrying out of work in quantities additional to those stated does not, without more, constitute a variation. Additional quantities or reduced quantities may entitle the contractor to claim compensation where

the change in quantities impacts upon the underlying nature of the work and the contractor's tender assumptions or tender prices.<sup>341</sup>

## Payment for variations

- 39-099 The valuation of variations will either be carried out by reference to a mechanism contained within the contract, or on the broader basis of a reasonable valuation of the work. The contract mechanism may provide for a reasonable valuation in default of applicable rates.

## Valuation under the contract

- 39-100 The Standard Forms of Contract make elaborate provision for the valuation of variations, which usually involve valuations of the work at rates and prices contained in (or to be ascertained from) the contract documents. Where additional work differs from the contract work, either by its nature or the conditions which it is executed, the additional work may be valued using the contract rates as a basis, or the contract may provide that reasonable rates are to be ascertained.<sup>342</sup> Work which cannot be measured may be ordered to be executed at daywork rates,<sup>343</sup> and the contract may provide a schedule of daywork rates to be used in these circumstances. More modern forms of contract seek to quantify both the value and the time impact of variations in advance of their being instructed.<sup>344</sup> In the absence of agreement, however, the variation and its effect must be valued subsequent to its order and carrying out. Standard Forms of Contract usually provide for additional compensation arising from the issue of variation instructions, typically in terms of general "loss and expense" incurred in addition to payment due in respect of the variation itself<sup>345</sup> or by way of adjustment of other contract rates which have been rendered "unreasonable or inapplicable" by the variation.<sup>346</sup> Where the contract does not contain a bill of quantities, provision is usually made for the contractor to submit a Schedule of Rates to be utilised in the valuation of variations. In *Henry Boot Construction Ltd v Alstom Combined Cycles Ltd*<sup>347</sup> it was held that mistakes in the contractor's rates and prices were to be disregarded for the purposes of arriving at a new rate pursuant to cl.52(1) of the ICE 6th edition even though the practical effect of such an approach was to give the contractor a windfall.<sup>348</sup>

## Reasonable valuation

- 39-101 Where there are no rates or prices in the contract documents covering the variation in question and the contract does not provide for a reasonable rate to be determined, the contractor will be

entitled to a reasonable sum on the basis of an implied term as to payment.<sup>349</sup> What is a reasonable sum will be a question requiring consideration of all the factors in the case, and there are no rigid rules which will apply in such cases. Although “cost plus a percentage for profit” is often associated with reasonable remuneration<sup>350</sup> there are situations where the contractor may recover on a more generous basis to take account of such matters as the value of the contractor’s work to the employer.<sup>351</sup> On the question of what is a reasonable sum, the shipping case of *Greenmast Shipping v Jean Lion et Cie*<sup>352</sup> is instructive and has been referred to in a number of decisions on building contracts.<sup>353</sup> In that case, owners were entitled to payment in a situation where there was held to be an implied contract to pay for a vessel laying off Aqaba for nine days whilst the charterers resolved certain problems in relation to the sale of the vessel’s cargo. Saville J approached the question of remuneration “... by asking simply what would be a fair commercial rate for the services provided outside the charter-party ...”.<sup>354</sup>

## Footnotes

323 *Dodd v Churton [1897] 1 Q.B. 562.*

324 See Construction Claims and Liability: Simon, sect.11.2, Wiley.

325 *Thorn v London Corp (1876) 1 App. Cas. 120.*

326 Model Form MF/1 cl.27.2.

327 FIDIC Conditions 4th edn cl.52.3: additional payment in excess of 15 per cent. The 1998 edition contains a more conventional provision for the adjustment of rates where quantities are varied by more than 10 per cent: cl.12.3(a).

328 *Parkinson v Commissioner of Works [1949] 2 K.B. 632.*

329 *McAlpine Humberoak v McDermott (1992) 58 B.L.R. 1.*

330 See ICC Form cl.51(1).

331 JCT cl.5.1.2.1.

332 ICC Form cl.51(1).

333 JCT SBC 2011 cl.3.14.4.

334 (1991) 56 B.L.R. 93.

335 (1997) 87 B.L.R. 52, CA.

336 [2018] UKSC 24, [2019] A.C. 119.

337 [2018] UKSC 24, [2019] A.C. 119 at [16].

338 *Sharpe v San Paulo Railway (1873) L.R. 8 Ch. App. 597; Williams v Fitzmaurice (1858) 3 H. & N. 844; Bottoms v Mayor of York (1892) II Hudson’s Building Contracts (4th edn) 208.*

339 *Simplex Concrete Piles v St Pancras BC (1958) 14 B.L.R. 80.*

340 See *Howard de Walden v Costain (1991) 55 B.L.R. 124; Kirk & Kirk v Croydon Corp (1956) J.P.L. 585*; and *English Industrial Estates (1991) 56 B.L.R. 93*; and see generally “The inclusive price principle—A tribute to Ian Duncan Wallace QC” by HH Judge

- Anthony Thornton QC July 2007, published by the Society of Construction Law at <http://www.scl.org.uk> [Accessed 1 September 2021].
- 341 See ICC Form cl.56(2)—rates or prices rendered unreasonable; and FIDIC (1993 edn) cl.12.3(a). For a case where a claim for extra payment for hard work conditions encountered on excavation was rejected, see: *Worksop Tarmacadam Co Ltd v Hanneby (1995) 55 Con. L.R. 105*.
- 342 See JCT 98 cl.13.5, JCT SBC 2005 cl.5.10, ICC Form cl.52(1), FIDIC (1998 edn) cl.12.3(b). Clause 52 of the ICE 6th edn was considered by the Court of Appeal in *Henry Boot Construction Ltd v Alstom Combined Cycles Ltd [2000] B.L.R. 247*; and the entitlement to an uplift for overheads and profit as part of a fair valuation under the “third limb” of cl.52 was considered in *Weldon Plant Ltd v The Commission for New Towns [2000] B.L.R. 496*.
- 343 See above, para.39-067.
- 344 See ICC Design and Construct Version cl.52(1) and New Engineering and Construction Contracts cl.62.
- 345 See JCT 98 cl.26.1 and JCT SBC 2005 cl.4.23 to 4.26.
- 346 ICC Form cl.52(4).
- 347 *(2000) 69 Con. L.R. 27, CA*.
- 348 For observations on the decision at first instance, see: *I. Duncan Wallace (2000) 16 Const. L.J. 40*.
- 349 *Thorn v London Corp (1876) 1 App. Cas. 120*; *Parkinson v Commissioner of Works [1949] 2 K.B. 632, CA*; *Pilgrim Shipping Co Ltd v The State Trading Co of India Ltd (The Hadjitsakos) [1975] 1 Lloyd's Rep. 356, 369*; *Costain Civil Engineering Ltd v Zanen Dredging and Contracting Co Ltd (1996) 85 B.L.R. 77, 94*.
- 350 *Sanjay Lachhani v Destination Canada (UK) Ltd (1997) 13 Const. L.J. 279*.
- 351 *Costain v Zanen (1996) 85 B.L.R. 77*.
- 352 *[1986] 2 Lloyd's Rep. 277*.
- 353 *Laserbore Ltd v Morrison Biggs Wall Ltd (1993) C.I.L.L. 896*; *Costain Civil Engineering v Zanen Dredging and Contracting Co Ltd (1996) 85 B.L.R. 77*.
- 354 *[1986] 2 Lloyd's Rep. 277, 279*.

## **(b) - Instructions, Certificates and Approval**

**Chitty on Contracts 34th Ed.**

**Consolidated Mainwork Incorporating First Supplement**

**Volume II - Specific Contracts**

**Chapter 39 - Construction Contracts**

**Section 4. - Particular Features**

### **(b) - Instructions, Certificates and Approval**

#### **Introduction**

- 39-102 These are three types of “event” typically provided for under the terms of a construction contract as part of the machinery of performance: the giving of instructions, the issue of certificates and the grant of approval. The effect of each will depend on the terms of the individual contract but there are some general principles which can be formulated from the cases. Each such event involves a decision in writing, or confirmed in writing, of the contract administrator. With limited exceptions, all such decisions are subject to review by adjudication or by arbitration or litigation, subject to any other dispute resolution process that may be incorporated into the contract.

#### **Instructions**

- 39-103 A construction contract will usually provide expressly for the issue of instructions, which allow for the ongoing direction and supervision of the works and of the contractor. The ICC Form cl.13(1), provides that the contractor “shall comply with and adhere strictly to the Engineer’s instructions on any matter ...”. Clause 13(3) then provides:

“... if such instructions require any variation to any part of the Works the same shall be deemed to have been given pursuant to Clause 51.”

These common provisions express the general principle that an “instruction” may or may not constitute a variation: if it does so, it will not be prevented from taking effect as such by being called an instruction; an instruction not amounting to a variation will take effect in accordance

with the terms of the contract.<sup>355</sup> Examples of other types of instruction (not amounting to variations) are an instruction to commence the works,<sup>356</sup> an instruction to suspend the progress of the works (often referred to as an Order),<sup>357</sup> an instruction to carry out tests on materials or workmanship,<sup>358</sup> an instruction nominating a sub-contractor,<sup>359</sup> an instruction (referred to as a request) to furnish vouchers to prove the quality of materials<sup>360</sup> and an instruction to remove from the site work materials or goods<sup>361</sup> or any person employed thereon.<sup>362</sup> Every construction contract requires large numbers of instructions of the foregoing, and of many other, types for their practical operation. The power to give instructions may need to be implied as a matter of necessity, where not expressly stated in the contract documents.<sup>363</sup>

## Certificates

- 39-104 Most construction contracts expressly require the issue of documents called “certificates” by the Contract Administrator. There is no definition of the term, but a certificate is usually taken to embody a decision requiring the exercise of professional skill and judgment on issues which will often require subjective assessments.<sup>364</sup> The subject matter of certificates and of instructions may overlap, but the latter normally embodies no more than an administrative decision, while the former may involve the initial resolution of a dispute. In *Kaye v Hosier and Dickinson* it was said that the architect:

“... has to issue certificates showing how much money is owing. Incidentally, his certificates and instructions may resolve some controversial points, and he has to act fairly, but he is not primarily or characteristically adjudicating on disputes.”<sup>365</sup>

Certificates may be categorised into interim (or payment) certificates, final certificates and certificates of record. They will be issued throughout the contract, as required by progress of the works. Completion will involve certificates of all three types. Although it is rare for a construction contract to specify the precise form for a certificate, to be effective the document should clearly and unambiguously represent the physical expression of the certifying process.<sup>366</sup> Further, a certificate is subject to the general rules of construction.<sup>367</sup>

## Interim certificates

- 39-105 These are the means whereby instalment payments are effected, the most usual arrangement being for monthly valuations to be made on the basis of an approximate measure of work carried out.<sup>368</sup> This will be appropriate whether the contract is for a lump sum or subject to remeasure. In the

latter case, however, work will need to be accurately measured as each section is completed, for the purpose of the final account.<sup>369</sup> It was held by the House of Lords in *Gilbert-Ash v Modern Engineering*<sup>370</sup> that an interim certificate created a debt which could, subject to any contractual term to the contrary, be reduced or extinguished by set-off, reversing decisions of the Court of Appeal to the contrary.<sup>371</sup> An alternative form of interim payment not involving measurement is referred to as “milestone” payments, whereby the contract sum is divided into predetermined amounts to be released at dates or stages (milestones) of the work. Such payments may, depending on the terms of the contract, require a form of certificate, e.g. as to completion of the requisite work stages. Milestone payments may also be made subject to the achievement of stipulated rates of progress. Milestone payments have been recommended eventually to replace interim payments based on monthly measurement.<sup>372</sup> Although the value stated in interim certificates may be corrected in subsequent certificates,<sup>373</sup> the contract administrator will be required to give more than a merely superficial glance at the works prior to the issue of a certificate.<sup>374</sup> Furthermore, where the contract provides for interim payments to be made in respect of “... the total value of the sub-contract work on site properly executed by the sub-contractor ...”<sup>375</sup> or similar terms,<sup>376</sup> then defective work should not be included in a valuation, and should be included only when rectified at a later stage.

## Final certificate

- 39-106 This is provided for under most construction contracts, although the terminology and the effect of such a certificate will vary between different forms of contract. A final certificate may take effect only as a statement of account<sup>377</sup> but in most cases it also certifies the work as being finally complete.<sup>378</sup> The certificate may also be made conditionally final and binding on the parties as to the opinion of the contract administrator on quality of the work.<sup>379</sup> A claim to have a sum included in a final certificate constitutes a separate and different cause of action to a claim to have a sum, even if the same, included in an interim certificate.<sup>380</sup>

## Certificates of record

- 39-107 The third type of certificate (not always so called) signifies events such as completion of the works<sup>381</sup> and making good of defects.<sup>382</sup> Other examples are a certificate that the contractor has failed to complete the works by the completion date<sup>383</sup> and a certificate of the contractor’s default prior to termination of employment.<sup>384</sup> Examples which are not called certificates, but operate as such, are extensions of time<sup>385</sup> and the valuation of a contractual claim or variation, which will subsequently be incorporated into the next interim payment certificate.

## Recovery without a certificate

- 39-108 It is a matter of construction of the underlying contract whether a certificate is a condition precedent to recovery of the sum of money to be certified. In *Lubenham v South Pembroke DC*<sup>386</sup> the Court of Appeal held that a certificate issued under the JCT Standard Form of Building Contract, 1963 edition, where there was a patently incorrect deduction, was nevertheless binding, so that the contractor could not assert entitlement to a further sum. May LJ, giving the judgment of the court, held:

“Whatever the cause of the undervaluation, the proper remedy available to the contractor is, in our opinion, to request the Architect to make the appropriate adjustment in another certificate, or if he declines to do so, to take the dispute to arbitration under clause 35. In default of arbitration or a new certificate the conditions themselves give the contractor no right to sue for the higher sum. In other words we think that under this form of contract the issue of a certificate is always a condition precedent to the right of the contractor to be paid.”

Where the certificate is a condition precedent to recovery of payment, a sum otherwise due may be recovered without a certificate in the following circumstances: (i) where the condition precedent has been waived by the other parties to the contract; (ii) where the certifier has been disqualified by improper conduct<sup>387</sup>; (iii) where there has been prevention by or on behalf of the employer<sup>388</sup>; and (iv) where the certifier becomes incapacitated without being replaced.<sup>389</sup> In practice, however, it will usually be more convenient to rely on the powers of an arbitrator to review and revise any certificate, which will ordinarily include the power to grant a certificate which has been refused by the certifier.<sup>390</sup> Where the dispute is litigated, the same powers will be available to the court.<sup>391</sup> In *Henry Boot Ltd v Alstom Combined Cycles Ltd*<sup>392</sup> it was explained by the Court of Appeal that the absence of a certificate is not a bar to the right to payment even where it is expressed to be a condition precedent (at least where the contract administrator's decision is not expressed to be binding) because a court or arbitrator can find that a party was entitled to payment in a larger sum than certified.

## Liability of the certifier

- 39-109 It was held in *Sutcliffe v Thackrah*<sup>393</sup> that the immunity assumed to attach to an arbitrator<sup>394</sup> did not apply to a certifier, reversing earlier authority to the contrary.<sup>395</sup> The decision applied both to the issue of an interim or final certificate. The House recognised, however, the possibility that

the function of a certifier might involve a “sufficient judicial element to require an arbitrator’s immunity to attach”.<sup>396</sup> Examples of “certification” which could attract immunity are the engineer’s decision under cl.66 of earlier versions of the ICE Conditions, or the decision of an adjudicator under the terms of a contract.<sup>397</sup>

## Approvals

- 39-110 Most construction contracts require a variety of approvals to be given by the contract administrator. These may be expressed in positive terms requiring “approval” to be expressed, or they may require the “satisfaction” of the engineer or architect. The Standard Form of Building Contract 1963 edition required the works generally to be to the architect’s satisfaction, but this is modified in the 1998 edition, such satisfaction now being applicable “where and to the extent that approval of the quality of materials or of the standards of workmanship is a matter for the opinion of the Architect”; and in such a case the work is to be to his “reasonable satisfaction”.<sup>398</sup> In the JCT SBC 2005 and 2011, cl.1.10 is to similar effect. The ICC Form, however, requires the whole of the works to be “to the satisfaction of the Engineer”.<sup>399</sup> Other examples of an express approval are in relation to the “mode, manner and speed of construction of the works” which are to be “acceptable to the Engineer” under the ICC Form<sup>400</sup>; and in relation to the contractor’s programme which is required to be accepted by the engineer.<sup>401</sup> The effect of the giving or withholding of such approvals is dependent on the terms of the contract. In general, however, action which is within the discretion of the contract administrator will not afford the contractor any ground of claim, while action outside the area of contractual discretion will give rise to a right to compensation, as a variation or as a breach.<sup>402</sup> Non-approval within the discretion of the contract administrator may give rise to express rights under the terms of the contract.<sup>403</sup>

## Footnotes

- 355 cl.13(3) of the ICC Form also provides for the possibility of additional payment where instructions disrupt the contractor’s arrangements.
- 356 ICC Form cl.41(1)(b), where the contractor is to be “notified”.
- 357 ICC Form cl.40(1).
- 358 ICC Form cl.36(1).
- 359 JCT 98 cl.35.1. Note that no equivalent provisions remains in JCT SBC 2005.
- 360 JCT 98 cl.8.2.1.
- 361 JCT 98 cl.8.4.1 and JCT SBC 2011 cl.3.18.1.
- 362 JCT 98 cl.8.6 and JCT SBC 2011 cl.3.21.

- 363 Where work is carried out in the absence of a formal instruction, then it will often be necessary for the contractor to rely upon estoppel arguments in order to recover payment for additional work carried out in the absence of an instruction or confirmation of verbal instruction, but nevertheless accepted by the employer. For a consideration of these issues, see *Ministry of Defence v Scott Wilson Kirkpatrick* [2000] *B.L.R.* 20, *CA*. See also the decision of the Court of Appeal of New South Wales in *Trimis v Mina* [2000] *T.C.L.R.* 346.
- 364 See, for example, JCT 2011 cl.2.28 (“If, in the opinion of the Architect, ... the Architect shall ... give an extension of time ... as he then estimates to be fair and reasonable ...”).
- 365 [1972] *1 W.L.R.* 146.
- 366 See *BR and EP Cantrell v Wright & Fuller Ltd* [2003] *B.L.R.* 412 at 413.
- 367 [2003] *B.L.R.* 412 at 430–431.
- 368 See *Secretary of State for Transport v Birse Farr Joint Venture* [1993] 62 *B.L.R.* 36 at 53.
- 369 See ICC Form cll.55–57.
- 370 [1974] *A.C.* 689.
- 371 *Dawnays v Minter* [1971] *1 W.L.R.* 1205; *Frederick Mark v Schield* [1972] *1 Lloyd's Rep.* 9; *GKN Foundations v Wandsworth LBC* [1972] *1 Lloyd's Rep.* 528; *John Thompson v Wellingborough Steel* (1972) *1 B.L.R.* 69; *Token Construction v Naviewland Properties* (1973) *1 B.L.R.* 48.
- 372 “Latham” Report—Constructing the Team, HMSO 1994.
- 373 See *Rupert Morgan Building Services Ltd v Jervis* [2003] *EWCA Civ* 1563, [2004] *1 W.L.R.* 1867, *CA* at 1870. In *Urang Commercial Ltd v Century Investments Ltd* [2011] *EHWC* 1561 (*TCC*), 138 *Con. L.R.* 233 it was held, following the decision in *Rupert Morgan*, that the effect of the interim payment provisions under a JCT form of contract was that when a sum was certified as a “sum due” the employer had to pay the relevant amount on the date specified unless an appropriate withholding notice was issued within time (although there was no requirement to serve such a notice in respect of other claims made by the contractor).
- 374 *Sutcliffe v Chippendale & Edmondson* (1971) *18 B.L.R.* 149; *Townsend v Stone Toms & Partners* (1984) *27 B.L.R.* 26, *CA*.
- 375 DOM/1 Conditions cl.21.4. These words were considered (in the context of alleged defects) in *Barrett Steel Building Ltd v Amec Construction Ltd* Unreported 3 March 1997 (see 15-CLD-10-07).
- 376 See IFC 98 cl.4.2.1(a) and JCT IC 2005 cll.4.6 and 4.7, and JCT MW 2005 cl.4.3.
- 377 See ICC Form cl.60(4).
- 378 See JCT 98 cll.30.8, 30.9 and JCT SBC 2011 cl.4.15.
- 379 JCT 2011 cl.1.10. In certain circumstances, the protection afforded by a Final Certificate may arise on the basis of an estoppel; see *Tameside MBC v Barlows Securities Group Services Ltd* (1999) *C.I.L.L.* 1559. See *Cantrell v Wright and Fuller Ltd* [2003] *EHWC* 1545 (*TCC*), [2003] *B.L.R.* 412.
- 380 See *Henry Boot Construction Ltd v Alstom Combined Cycles Ltd* [2005] *EWCA Civ* 814, [2005] *1 W.L.R.* 3850 at 3870 3873, *CA*.
- 381 JCT 98 cl.17.1, and JCT SBC 2011 cl.2.30, ICC Form cl.48(2).
- 382 JCT 98 cl.17.4, and JCT SBC 2011 cl.2.39, ICC Form cl.61(1).

- 383 JCT 98 cl.24.1 and JCT SBC 2011 cl.2.31.
- 384 ICC Form cl.65(1).
- 385 JCT 98 cl.25, and JCT SBC 2011 cl.2.26 to 2.29, ICC Form cl.44.
- 386 (*1986*) 33 B.L.R. 39.
- 387 *Panamena Europea Navigacion v Frederick Leyland [1947] A.C. 428; Hickman v Roberts [1913] A.C. 229.*
- 388 *Roberts v Bury Commissioners (1870) L.R. 5 C.P. 310; Croudace v London Borough of Lambeth (1986) 33 B.L.R. 20.*
- 389 *Perini Pacific v Commonwealth of Australia (1969) 12 B.L.R. 82; Croudace v Lambeth (1986) 33 B.L.R. 20.*
- 390 See JCT 98 cl.41.4, JCT SBC 2011 cl.9.5 and ICC Form cl.66(8).
- 391 *Beaufort Developments v Gilbert-Ash NI [1999] 1 A.C. 266.*
- 392 [2005] EWCA Civ 814, [2005] 1 W.L.R. 3850 at 3861.
- 393 [1974] A.C. 727.
- 394 See now Arbitration Act 1996 s.29.
- 395 *Chambers v Goldthorpe [1901] 1 Q.B. 624.*
- 396 per Lord Reid.
- 397 See below.
- 398 1998 edn cl.2.1.
- 399 ICC Form cl.13(1).
- 400 ICC Form cl.13(2).
- 401 ICC Form cl.14(2).
- 402 But see above as to effect of actions of the supervisor on the employer.
- 403 See ICC Form cl.13(3) where the contractor is entitled to compensation if an instruction of the engineer gives rise to costs which could not have been foreseen.

## **(c) - Completion, Maintenance and Performance**

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Chapter 39 - Construction Contracts

Section 4. - Particular Features

### **(c) - Completion, Maintenance and Performance**

#### **Scope of obligations**

- 39-111 Construction contracts can be divided into an initial construction period followed by a post-completion period during which different types of contract impose different requirements. In the simplest case the contract may contain provisions which apply post-completion, for correction of latent defects which appear during a stipulated period. Alternatively, the contract may require works to be maintained for a stipulated period. Where the subject matter of the contract is plant or machinery, there is usually an obligation to operate and demonstrate performance, as part of the substantive obligations. In the case of process plant, performance is likely to include both consumption of resources and output in terms of product quality and rate. Various questions arise where fully conforming performance is not achieved, which are considered further below.

#### **Completion**

- 39-112 Standard form contracts will usually be found to stipulate the degree of completion required to bring the construction period to an end. This may be referred to as "*practical*" completion<sup>404</sup> or "*substantial*" completion which may also be subject to passing any final testing or commissioning prescribed by the contract.<sup>405</sup> There may also be provisions entitling the contractor to achieve completion notwithstanding outstanding work.<sup>406</sup> In the absence of qualifying provisions, the work must be sensibly finished even though subject to defects or uncompleted details for which allowance is made.<sup>407</sup> The achievement of completion is unaffected by the subsequent manifestation of defects that were latent at the date of completion,<sup>408</sup> although such defects will entitle the owner to an abatement of, or set-off against, the contract price or any instalment

payable upon completion.<sup>409</sup> Practical completion is often easier to recognise than define. It means completion free from patent defects other than ones to be ignored as trifling, but the mere fact that a defect was irremediable does not necessarily mean that the works are not practically complete.<sup>410</sup>

## Maintenance and defects correction

- 39-113 These terms are sometimes used interchangeably. Editions of the ICE Conditions of Contract up to the 5th (1973) referred to “maintenance” as meaning the correction of defects. The position is clarified under the 7th edition of the ICE Conditions and under the same provision of the ICC Form.<sup>411</sup> Maintenance, properly so called, refers to maintaining the works, by repair or renewal, during a specified period. Such an obligation will require express words, as opposed to the correction of defects for which the contractor will in any event be liable (see below) by way of damages for breach. The JCT Standard Form of Building Contract has traditionally referred to the period during which the contractor corrects “defects, shrinkages or other faults” as the defects liability period. While the contract could provide for the contractor’s liability for latent defects to be limited to such a period, it is clear that this is not the effect of the JCT Form of Contract. The effect of the “defects liability” provisions is not to render the contractor liable to correct defects (such liability existing in any event) but to afford the contractor a right to receive notice of defects in the stipulated period and to have the opportunity of correcting them at his own expense, as opposed to what may be the greater expense of bringing in other contractors. Once completion is achieved, any latent defect appearing in the work renders the contractor in breach and liable in damages which will not be capped by any provision for liquidated damages in respect of loss of use of the works. Conversely, defects appearing before the achievement of completion may be regarded as a “temporary disconformity” not ordinarily sounding in separate damages.<sup>412</sup> In *Oksana Mul v Hutton Construction Ltd*<sup>413</sup> Akenhead J held that cl.2.30 of the JCT Intermediate Form of Contract, which created a right for the employer to deduct sums from the contract sum in respect of unremedied defects in certain circumstances, did not exclude the employer’s parallel right to claim damages for defects present in the works as at practical completion.

## Performance obligations

- 39-114 Contracts for the provision of process plant and machinery are usually divided into an initial construction period, followed by a post-completion period during which the plant must be operated and performance demonstrated.<sup>414</sup> The provisions as to testing are usually accompanied by a detailed protocol involving stages, such as an initial period of operation followed by performance tests over a prescribed period. The contract may provide prescribed penalties or deductions as compensation in respect of failure to meet required performance levels. The detailed performance requirements will be specific to each item of plant or machinery, but standard forms exist which

prescribe the basic contract structure.<sup>415</sup> In addition to performance of obligations, the contract may require other services, such as training of operating personnel, the provision of spares for the plant, as-built drawing of the works and detailed operating manuals and instructions.

## Footnotes

- 404 JCT 2011, cl.2.30.
- 405 ICC Form cl.48(1). See also *University of Warwick v Balfour Beatty Group Ltd [2018] EWHC 3230 (TCC), 182 Con. L.R. 158* for a consideration of the meaning of practical completion in the context of an amended JCT Design and Build form of contract.
- 406 ICC Form cl.49(1).
- 407 *Hoenig v Isaacs [1952] 2 All E.R. 176; Bolton v Mahadeva [1972] 1 W.L.R. 1009.*
- 408 *Jarvis v Westminster CC [1970] 1 W.L.R. 637.*
- 409 *Gilbert-Ash v Modern Engineering [1974] A.C. 689, HL.*
- 410 *Mears Ltd v Costplan Services Ltd [2019] EWCA Civ 502, [2019] 4 W.L.R. 55.*
- 411 cl.49 of ICE 7th edn and ICC Form.
- 412 This passage is based on the (dissenting) judgment of Lord Diplock in *P & M Kaye v Hosier & Dickenson [1972] 1 W.L.R. 146*, but see further *Lintest v Roberts (1980) 13 B.L.R. 38*, where defects prior to completion were held to give rise to a vested right of correction.
- 413 *[2014] EWHC 1797 (TCC), [2014] B.L.R. 529.*
- 414 For an example of a project with substantial performance testing, see *Mitsui Babcock Energy Ltd v John Brown Engineering Ltd (1996) 51 Con. L.R. 129* where it was unsuccessfully argued that a failure of the parties to agree on performance testing meant that there was no contract at all.
- 415 See for mechanical & electrical plant, Form MF/1 and for chemical plant the I. Chem. E. Conditions.

## **(d) - Extension of Time and Liquidated Damages**

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### **(d) - Extension of Time and Liquidated Damages**

#### **Date for completion**

- 39-115 Construction contracts almost invariably stipulate a period or date for commencement and/or completion. The contractor must be afforded the opportunity to carry out the work within the stipulated period.<sup>416</sup> Any act of prevention, such as the ordering of variations or late access to working areas, will release the contractor from the fixed period unless the contract provides machinery for adjustment of the time period.<sup>417</sup> The major consequence of time becoming “at large” is that by operation of the so-called “prevention principle” the employer thereby loses its ability to rely upon any liquidated and ascertained damages clause in the contract. The prevention principle is based on the notion that a promisee cannot insist upon the performance of an obligation which he has prevented the promisor from performing. In a building contract, acts of prevention (such as variation instructions) do not have to amount to breaches of contract in order to trigger the application of the prevention principle. However, for the act relied upon to amount to an act of prevention, it must actually prevent the contractor from carrying out the works within the contract period. Thus, in *Adyaryad Abu Dhabi v SD Marine Services*<sup>418</sup> it was held that where there were concurrent causes of delay (one the contractor’s responsibility and the other the employer’s) the prevention principle does not operate because the delay would have occurred anyway absent the employer’s delay event happening.

#### **Extension of time**

- 39-116 Clauses relating to the grant of extensions of time for completion are to be regarded as being inserted for the benefit of the employer, to permit re-fixing of the completion period where

delay is occasioned by the employer. It follows that an extension of time clause is to be construed contra proferentem, against the employer, and that general words such as “other unavoidable circumstances” will not be construed so as to apply to specific delay occasioned by the employer.<sup>419</sup> Extension of time clauses under standard forms of contract usually contain elaborate machinery providing for the giving of notice by the contractor and for decisions by the contract administrator, which may be given in stages.<sup>420</sup> There is generally no objection to an extension of time being given retrospectively.<sup>421</sup> The contractor’s notice may be made a condition precedent to the right to extension,<sup>422</sup> but it is more usual to permit the grant of an extension in the absence of notice, in order to avoid time becoming “at large”. Alternatively, on a proper construction of the contract the procedural requirements may only be “directory”, in which case a failure to comply with the same will only be capable of sounding in damages as opposed to preventing the contractor obtaining an extension of time. Where there is ambiguity as to whether or not notification is a condition precedent to an extension of time, it is to be construed not to be.<sup>423</sup>

## Relevant delay

- 39-117 The right to extension will be conditional on proof of the relevant events and may also require proof that “completion of the Works is likely to be delayed thereby”.<sup>424</sup> It has been held that under the JCT form of building contract, in order to establish an entitlement to an extension of time, it is necessary to show that the relevant event relied upon was likely to or did in fact cause actual delay to the progress of the works and thereby to the completion date for the works as a whole.<sup>425</sup> In *Balfour Beatty v Chestermount Properties* it was therefore held that delay to the completion date must be assessed by reference to the progress of the works in relation to the then-projected completion date.<sup>426</sup> Following this approach, in *Adyary Abu Dhabi v SD Marine Services* it was held that merely establishing delay caused to a particular work activity which does not impact on the completion date of the works as a whole, or theoretical delay, will not suffice.<sup>427</sup> In *Adyary* the Court rejected the claimant shipbuilder’s submission that an employer’s risk event need only be measured against the contractual completion date and that this did not require any factual analysis of competing causes of delay to the actual progress of the works that the claimant might be responsible for.
- 39-118 Alternatively, the right to extension may be conditioned on showing that “delay ... has been suffered by the contractor as a result of” the relevant event.<sup>428</sup> In the latter case, the contractor may be entitled to an extension even though the work has not been shown to be delayed beyond the completion date. Such an extension may have the effect of allowing the contractor to mitigate the effect of his own delay or to claim compensation for delay caused by some other event for which the employer is liable.

- 39-119 Any extension of time awarded will invariably be added by reference to the period immediately following the contractual completion date, even if the delaying event in fact occurred at some other point in time, such as substantially after the original completion date.<sup>429</sup> This could produce incongruous results in terms of liability for damages arising from late completion or claims for loss and expense, but it is submitted that such problems can be reduced or eliminated entirely by correctly applying the causation requirements of such subsequent claims rather than focussing too strictly on the period in respect of which an extension of time has been granted.

## Assessment of entitlement

- 39-120 The assessment of any extension of time entitlement involves an exercise of judgment by the contract administrator which must be fair and rational. In *John Barker Construction Ltd v London Portman Hotel Ltd*<sup>430</sup> it was held that an architect, when considering what a “fair and reasonable” extension of time would consist of under cl.25 of the JCT Standard Form of Building Contract With Quantities (1980 edition), must (i) apply any relevant provisions of the building contract, (ii) make a logical and methodical analysis of the effect any relevant events had or were likely to have on the programme, and (iii) conduct a calculation of the relevant critical delay, rather than simply make an impressionistic general assessment of the same. Although the need for a logical and methodical analysis to underpin any award of an extension of time has been doubted.<sup>431</sup> It is submitted that Arbitrators and Courts are likely to require contract administrators to discharge this function in a way that contains some form of logical and methodical assessment.

## Time at large

- 39-121 Where the work is delayed by the employer and an appropriate extension of time is not granted, time is said to be “at large”, i.e. the contractual date is no longer binding. The contractual obligation is then replaced by an obligation to complete within a reasonable time.<sup>432</sup> Time will be “at large” where delay is caused by the employer and no machinery exists under the contract allowing the completion date to be re-fixed.<sup>433</sup> The same applies where the contract administrator fails to extend time.<sup>434</sup> In *McAlpine Humberoak v McDermott International*,<sup>435</sup> the contract provided for an extension of time but contained no machinery whereby it was to be granted. The Court of Appeal held that this did not prevent time being re-fixed, if necessary by the court, so as to permit the recovery of general (not liquidated) damages by the employer. Where the contract contains an arbitration clause, time may similarly be re-fixed by the arbitrator’s award, provided that the contract allows for an extension on the appropriate grounds.

## Concurrent delay

- 39-122 Concurrent delay can be defined as a period of project overrun which results from two or more effective causes of delay which are of approximately equal causative potency.<sup>436</sup> Under the JCT and similar forms of construction contracts, as long as it is established that the relevant event relied upon as the basis of an extension of time claim is at least a concurrent cause of actual delay to the completion date of the works, the contractor will be entitled to an extension of time.<sup>437</sup> The approach of the Scottish Courts in this situation, to permit an apportionment of the relevant period of delay between the parties so as to permit a partial award of an extension of time to the contractor,<sup>438</sup> probably does not reflect the law of England.<sup>439</sup>

## Liquidated damages

- 39-123 Most construction contracts make provision for recovery of pre-fixed or “liquidated” damages for delay in completion by the contractor. While such damages may be regarded as limiting the contractor’s liability,<sup>440</sup> all the modern authorities treat such damages potentially as a penalty, recoverable only where it is shown to be a “genuine pre-estimate of loss”.<sup>441</sup> There are very few instances in which the stipulated damages have been successfully challenged on the ground they were not a genuine pre-estimate. In *Alfred McAlpine Capital Projects Ltd v Tilebox Ltd*,<sup>442</sup> the court provided a useful summary of the law relating to liquidated damages and penalty clauses in the construction field: the pre-estimate of liquidated and ascertained damages did not have to be correct to be enforceable; the test for whether a clause was an unenforceable penalty was an objective one; for a pre-estimate to be unreasonable there had to be a substantial difference between the estimated and actual damage sustained; and the court would normally be predisposed to uphold the terms of the parties’ agreement in this respect when made in a commercial context between parties with comparable bargaining power. The fact that damages may be difficult or even impossible to estimate does not lead to the conclusion they must be a penalty.<sup>443</sup> There are, conversely, many cases in which the deduction of liquidated damages has been challenged on the ground of improper operation of the contract machinery,<sup>444</sup> or inability to fix the damages with precision,<sup>445</sup> or failure to establish the applicable completion date.<sup>446</sup> The leading case is *Peak v McKinney*,<sup>447</sup> where delay occurred on a local authority housing contract as a result of the discovery of defective work. Additional delay, not of the contractor’s making, was caused by the employers’ inaction. Liquidated damages were deducted but the Court of Appeal held that the words of the extension of time clause “or other unavoidable circumstances” should be construed contra proferentem, and therefore did not permit the architect to grant an extension on account of the employer’s delay. Consequently, time was at large and no liquidated damages could be recovered. The court further held that in such a case the employer was “left to his ordinary

remedies; that is to say, to recover such damages as he can prove flow from the contractor's breach".<sup>448</sup>

## Revised rule on penalty clauses

39-124 In *Cavendish Square Holding BV v Makdessi* the Supreme Court held that the true test for a penalty is whether the impugned provision is a secondary obligation which imposes a detriment on the contract-breaker out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation.<sup>449</sup> This test is likely to be more permissive of liquidated damages clauses and any cases pre-dating this decision must be treated with care.

39-125 An interesting question which arises is whether, upon the liquidated damages provisions in the contract becoming unenforceable, the amount of liquidated damages nevertheless takes effect as a limit on the unliquidated damages which can be recovered. A number of charterparty cases suggest that damages can be recovered in excess of the cap.

<sup>450</sup>

 Two TCC decisions

<sup>451</sup>

 suggest, albeit obiter, that the answer is a matter of contractual construction. The question in each case is whether on a proper construction of the relevant clause, there is a parallel general limitation of liability provision which can survive even after the liquidated damages provision is struck down.

<sup>452</sup>

 If there is, then the general limitation on liability will still apply to general damages.

<sup>453</sup>

 If the limitation on liability is, properly construed, only applicable to a liquidated damages claim then it will not apply to a general damages claim.

<sup>454</sup>



## Recovery of damages

39-126

Contracts will often require the employer to take certain procedural steps in relation to the contractor before he will become entitled to deduct liquidated damages. In *JF Finnegan v Community Housing Association Ltd*<sup>455</sup> it was held that JCT 80 cl.24.2.1 makes the requirement of notice in writing from the employer a condition precedent to the deduction of liquidated damages for the employer. Furthermore, the notice (which, it was conceded, could accompany the deduction and need not precede it) needed to specify: (i) whether the employer is making any deduction of liquidated damages; and (ii) what sum is being deducted, the whole or only part of the liquidated damages.

## Liquidated damages after termination of contract

39-127

**U** Liquidated damages are commonly assessed by applying an agreed weekly rate to the period between the contractual completion date (as extended by any extension of time provision) and the actual date that the works are completed. If the contract is terminated before the contract works are completed, then ordinarily liquidated damages which accrued prior to termination will still be payable but further liquidated damages will cease to accrue upon termination.

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**U** The effect of termination upon liquidated damages is, however, fundamentally a matter of interpretation and in rare cases accrued rights to liquidated damages may be lost if the contract is terminated prior to completion.

<sup>457</sup>**U**

## Footnotes

416 *Wells v Army & Navy Co-op* (1902) 86 L.T. 764, HBC (4th edn), Vol.2, p.346.

417 *Dodd v Churton* [1897] 1 Q.B. 562.

418 [2011] EWHC 848 (Comm), [2011] B.L.R. 384.

419 *Peak v McKinney* (1969) 1 B.L.R. 111.

420 ICC Form cl.44, JCT SBC 2011 cl.2.27. In *Walter Lilly & Co Ltd v DMW Developments Ltd* [2012] EWHC 1773 (TCC), [2012] B.L.R. 503 it was held (at [362]–[365]) that cl.25.3.3 of the JCT Standard Form of Building Contract required a consideration of what events critically delayed the works as they went along, as opposed to a purely retrospective exercise.

421 *Amalgamated Building Contractors v Waltham Holy Cross UDC* [1952] 2 All E.R. 452.

422 See *Bremer Handelsgesellschaft mbH v Vander Avenne Izegem PVBA* [1978] 2 Lloyd's Rep. 109, HL for the general approach to the construction of a notice clause as a condition

- precedent, requiring the time for service and resultant loss of rights from a failure to comply to be expressed. But note the less stringent approach taken in *Steria Ltd v Sigma Wireless Communications Ltd* [2008] *B.L.R.* 79.
- 423 *Steria Ltd v Sigma Wireless Communications Ltd* [2008] *B.L.R.* 79 *TCC* at [88] and [89]. See also *WW Gear Construction Ltd v McGee Group Ltd* [2010] *EWHC 1460 (TCC)* where it was indicated that in deciding whether a clause was or was not a condition precedent to recovery, the ordinary rules of contractual construction should apply (see at [11]–[13]).
- 424 JCT 98 cl.25.3.1.2 and JCT SBC 2011 cl.2.28.1 and see generally *Henry Boot v Central Lancashire NTDC* (1980) 15 *B.L.R.* 1.
- 425 See *Balfour Beatty v Chestermount Properties Ltd* (1993) 62 *B.L.R.* 1 at 27; *Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd* (1999) 70 *Con. L.R.* 32; and *City Inn Ltd v Shepherd Construction Ltd* [2010] *B.L.R.* 473 (per Lord Osborne at [42]).
- 426 (1993) 62 *B.L.R.* 1, per Colman J at [25] and [29]–[32].
- 427 [2011] *EWHC 848 (Comm)*, [2011] *B.L.R.* 384, per Hamblen J at [257]–[292].
- 428 ICC Form cl.44(2).
- 429 *Carillion Construction Ltd v Emcor Engineering Services Ltd* [2017] *EWCA Civ 65*, [2017] *B.L.R.* 203 where this was described as an extension being awarded on a “contiguous” basis.
- 430 (1996) 83 *B.L.R.* 31.
- 431 See the dicta of HH Judge Seymour QC in *Royal Brompton Hospital NHS Trust v Hammond (No.7)* 76 *Con. L.R.* 148 at 176, which appeared to approve the adoption of an impressionistic approach.
- 432 *Pentland Hick v Raymond and Reid* [1893] *A.C.* 22; *British Steel v Cleveland Bridge* (1981) 24 *B.L.R.* 94. In *Shawton Engineering Ltd v DGP International Ltd (t/a Design Group Partnership)* [2005] *EWCA Civ 1359*, [2006] *B.L.R.* 1, the Court of Appeal held that when time was at large the determination of a reasonable time for completion was a composite question that had to be judged objectively as at the time when the question arose and in the light of all relevant circumstances—and not simply, e.g. by a consideration of the time required to complete any work associated with the instruction of a variation.
- 433 *Stanmor Floors Ltd v Piper Construction Midlands Ltd Unreported 4 May 2000*; *Multiplex Construction (UK) Ltd v Honeywell Control Systems (No.2)* [2007] *EWHC 447 (TCC)*, [2007] *B.L.R.* 195. See also the general observations of Fraser J on the time at large principle in *North Midland Building Ltd v Cyden Homes Ltd* [2017] *EWHC 2414 (TCC)*, upheld on appeal, [2018] *EWCA Civ 1744*.
- 434 *Peak v McKinney* (1969) 1 *B.L.R.* 111.
- 435 (1992) 58 *B.L.R.* 1.
- 436 See John Marrin QC, “Concurrent Delay” (2002) 18 *Const. L.J.* 6 at 436, as approved in *Adyad Abu Dhabi v SD Marine Services* [2011] *EWHC 848 (Comm)*, per Hamblen J at 277.
- 437 See *Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd* (1999) 70 *Con. L.R.* 32. The *Malmaison* approach was apparently approved in *Motherwell Bridge Construction Ltd v Micafil Vakuumtechnik* (2002) 81 *Con. L.R.* 44, per HH Judge Toulmin, CBE, QC, at 559–564; see also *Walter Lilly & Co Ltd v Mackay & DMW Developments Ltd* [2012] *EWHC 1773 (TCC)* where it was held that concurrent delay was sufficient to establish

an entitlement to an extension of time under the JCT form, per Akenhead J at 362–370; and *Saga Cruises BDF Ltd v Fincantieri SpA [2016] EWHC 1875 (Comm)* at [249]–[251].

438 See *John Doyle Construction Ltd v Laing Management (Scotland) Ltd [2004] B.L.R. 295*; and *City Inn v Shepherd Construction Ltd [2010] B.L.R. 437*. See also the obiter dicta in support of this approach in the decision of the High Court of Hong Kong in *W. Hing Construction Co Ltd v Boost Investments Ltd [2009] B.L.R. 338* at [61]–[62].

439 See the discussion of this issue by Ramsey J in the papers entitled “Claims for Delay & Disruption: the impact of *City Inn*”, presented at the annual TECBAR conference in January 2011 and in the TECBAR Review for Spring 2011. See also *Walter Lilly & Co Ltd v DMW Developments Ltd [2012] EWHC 1773 (TCC), [2012] B.L.R. 503*, where it was held that, under the JCT extension of time clause wording and similar forms of construction contracts, as long as it is established that the relevant event relied upon as the basis of an extension of time claim by a contractor is at least a concurrent cause of actual delay to the completion date of the works, the contractor will be entitled to an extension of time (see at [362]–[370]).

440 See *Suisse Atlantique v Rotterdamsche Kolen Centrale [1967] 1 A.C. 361*.

441 *Dunlop v New Garage [1915] A.C. 79*.

442 *[2005] EWHC 281 (TCC), [2005] B.L.R. 271*.

443 *Clydebank Engineering v Don Jýse y Z Quierdo [1905] A.C. 6*.

444 *Ramac v Lesser [1975] 2 Lloyd's Rep. 430*.

445 *Brammell & Ogden v Sheffield CC (1983) 29 B.L.R. 73*.

446 *Miller v LCC (1934) 50 T.L.R. 479*.

447 *Miller v LCC (1934) 50 T.L.R. 479*.

448 per Salmon LJ at 121.

449 *[2015] UKSC 67* at [32], [255] and [291]. See above, paras 29–203 et seq.

450 *Wall v Rederialktiebolaget Luggage [1915] 3 K.B. 66*; *Watts v Mitsui [1917] A.C. 227*.

451 As was the case in *Eco World-Ballymore Embassy Gardens Co Ltd v Dobler UK Ltd [2021] EWHC 2207 (TCC)* and *Buckingham Group Contracting Ltd v Peel L&P Investments and Property Ltd [2022] EWHC 1842 (TCC)*.

452 *Buckingham Group Contracting Ltd v Peel L&P Investments and Property Ltd [2022] EWHC 1842 (TCC)* at [96].

453 As was the case in *Eco World-Ballymore Embassy Gardens Co Ltd v Dobler UK Ltd [2021] EWHC 2207 (TCC)*.

454 As was the case in *Buckingham Group Contracting Ltd v Peel L&P Investments and Property Ltd [2022] EWHC 1842 (TCC)*, see at [96].

455 (1995) 77 B.L.R. 22, CA, approving *A Bell & Son (Paddington) Ltd v CBF Residential Care and Housing Association (1989) 46 B.L.R. 102*.

456

*Triple Point Technology Inc v PTT Public Co Ltd [2021] UKSC 29, [2021] A.C. 1148, [2021] 3 W.L.R. 521.*

- ④57 *British Glanzstoff Manufacturing Co Ltd v General Accident, Fire and Life Assurance Corp Ltd* [1913] A.C. 143, qualified but not overruled by the Supreme Court in *Triple Point Technology Inc v PTT Public Co Ltd [2021] UKSC 29, [2021] A.C. 1148, [2021] 3 W.L.R. 521.*

## **(e) - Bonds and Guarantees**

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**(e) - Bonds and Guarantees** <sup>458</sup>

### **The nature of suretyship** <sup>459</sup>

- 39-128 Suretyship is a general term which describes a situation where A (the surety) agrees to take responsibility for an existing (or future) liability of B (the principal) to a third party C (the beneficiary) such that the liability of A to C is additional to the liability of B to C. Within the general category of contracts of suretyship, there are contracts of guarantee and contracts of indemnity. In a contract of guarantee, the guarantor (A) promises to be responsible—with the principal (B)—for the performance of the principal's obligations to the beneficiary (C) so that the guarantor will be personally liable if the principal fails to perform his obligations to the beneficiary (C) to the same extent as the principal (B). <sup>460</sup> A contract of indemnity is not predicated upon the failure in performance of the principal (B). Although it will often, in practice, be understood as between the surety (A) and the principal (B) that the principal is to be primarily liable to the beneficiary (C), under a contract of indemnity, the surety has a liability to make good the loss suffered by the beneficiary (C) which is not dependent in any way on the continuing liability of the principal (B). <sup>461</sup> Whether a contract is one of guarantee or indemnity will be a matter of construction of all the words used in the document, <sup>462</sup> although the contract will be one of indemnity, and not guarantee, if there are circumstances in which the liability of the surety is separate or different from that of the principal. <sup>463</sup>

### **Suretyship in the construction context**

39-129

In the construction industry there are a variety of situations in which some form of security will be sought by an employer or contractor in relation to particular features of, or all of, a given project. A retention bond may be given by a contractor in return for early release of retention, or for payment in full without deduction, so as to provide him with the cash to complete the project without recourse to separate borrowing. Where a contract provides for payment to be made by the employer to the contractor in advance of work being carried out, then typically the employer will require a bond as security from the contractor. In *Wardens and Commonalty of the Mystery of Mercers of the City of London v New Hampshire Insurance Co*<sup>464</sup> the Court of Appeal construed a document as a guarantee of liability for sums which had not been earned under the terms of the building contract but had been paid in advance in order to avoid liability for VAT which would have become payable on the works at a future date.

## Performance bonds<sup>465</sup>

- 39-130 The type of suretyship most frequently encountered in the construction context is the performance bond (or performance guarantee). Some of the issues encountered in relation to this type of security are considered here. The underlying commercial purpose of the performance bond will depend upon the nature of the particular project and the particular terms of the bond. However, the purpose of a performance bond in a construction contract will often be quite different from that of a bond provided in connection with other commercial contracts such as a contract of international trade. In many commercial contracts, the bond is regarded as an easily realisable source of capital which can be used to maintain the transaction upon the occurrence of a default. In construction contracts, rapid availability of funds is less important than the existence of such funds where, for example, the contractor becomes insolvent. This divergence between the purpose of performance bonds in construction contracts and their use in other commercial fields, is one explanation for the difference in views between the Court of Appeal<sup>466</sup> and the House of Lords<sup>467</sup> in the *Trafalgar House* case (below).

## Categories of bond

- 39-131 Performance bonds may be considered as falling into one of two categories. Conditional performance bonds exist where the guarantor only becomes liable to the party entitled to claim the bonded sum (the beneficiary), on proof of breach of the terms of the underlying building contract, or on proof of both breach and loss as a result of the breach.<sup>468</sup> Unconditional or (more usually) “on demand” bonds exist where, on a true construction of the words used in the bond, the guarantor is liable to pay the beneficiary the bonded sum when the demand is made in the manner provided for in the bond, without the need for the beneficiary to prove breach of the underlying building contract or damage (or both). It is a question of construction in each case whether a bond, taken

as a whole, is conditional or “on demand” and, in the former case, the nature of the conditions attaching to the bond will also be a matter of the construction of the often complex and archaic<sup>469</sup> language still used in such documents. In *IE Contractors Ltd v Lloyds Bank Plc and Rafidain Bank*<sup>470</sup> Staughton LJ said:

“The question is ‘What was the promise which the bank made to the beneficiary under the credit, and did the beneficiary avail himself of that promise?’ The degree of compliance required by a performance bond may be strict, or not so strict. It is a question of the construction of the bond ...”

Accordingly, although the words “on demand” may appear in the bond, they are not a term of art and so are not determinative<sup>471</sup> of the question of whether the bonded sum is payable on a conditional or on an “on demand” basis, since the bond must be construed as a whole. The courts have indicated the importance of construing bonds in the light of their overall presumed commercial purpose.<sup>472</sup> However, the basis and precise nature of the liability of the bondsman is ultimately a question of construction.

## Conditional bonds

- 39-132 Conditional bonds are based upon breach of the underlying building contract by the contractor, and because they are based on a failure by the principal to perform, conditional bonds are in the nature of contracts of guarantee.<sup>473</sup> In *Trafalgar House Construction (Regions) Ltd v General Surety & Guarantee Co Ltd*<sup>474</sup> the House of Lords considered the effect of the following words in a performance bond:

“... or if on default by the Subcontractors the Surety shall satisfy and discharge the damages sustained by the Main Contractor hereby up to the amount of the above-written Bond ...”

Dealing with the first part of the clause (default), Lord Jauncey (with whom Lord Lloyd and Lord Steyn agreed) said,<sup>475</sup> after having considered the authorities,<sup>476</sup> that he had no hesitation in concluding that the performance bond amounted to a guarantee so that all questions of sums due and cross-claims could be raised in answer to the demand made. It was held that the words in the bond “... damages sustained by the main contractor ...” were not sufficient<sup>477</sup> to exclude the normal legal incidents of suretyship, with the result that the extent of the remaining obligation under the bond could only be determined after taking account of any unpaid sums and set-offs.

## Termination of the underlying contract

- 39-133 In the case of a conditional performance bond which exists for the benefit of the employer in circumstances of default by the contractor (such as a failure to complete the contract works), the employer must be careful to ensure that it acts in such a way towards the contractor that its right to claim damages from the contractor, and its entitlement to call the bond, are preserved. In *Perar BV v General Surety and Guarantee Co Ltd*<sup>478</sup> there was a main contract substantially based on JCT 81 with contractor's design and cl.27.2 providing for the automatic termination of the contractor's employment in the event of administrative receivership. Prior to completion of the works, the contractor went into administrative receivership and was said to have abandoned the works. The plaintiff (as assignee of the rights of the employer under the bond) sought to recover the sum under the bond from the defendant surety. The claim was rejected at first instance. On appeal the Court of Appeal held that if, following automatic termination, the contractor had no right to continue with the contract work then he could have no duty to do so, and therefore was not in breach in failing to continue the works. For the same reasons, there had been no "default" of the contractor within the meaning of the bond in circumstances where the building contract provided specific machinery following on from the automatic termination. In *Laing Management Ltd v Aegon Insurance Co (UK) Ltd*<sup>479</sup> it was held that although the appointment of an administrative receiver was not itself repudiatory conduct, the acceptance of other acts as repudiatory breaches in the statement of claim, meant that a claim in damages for the costs of completion could be recovered under the bond. In *Aviva Insurance UK Ltd v Hackney Empire Ltd*,<sup>480</sup> it was held that a side agreement made between an employer and a contractor arising out a dispute relating to delay to a project did not have the effect of discharging a bond provided by the claimant in favour of the defendant employer. In *CIMC Raffles Offshore (Singapore) Ltd v Schahin Holding SA*<sup>481</sup> the Court of Appeal indicated that it would be difficult to disapply by the wording of a guarantee the doctrine<sup>482</sup> whereby a material variation to the contract guaranteed, without the guarantor's consent, may lead to the discharge of the guarantee.

## "On demand" bonds

- 39-134 Where a performance bond is, on its true construction, unconditional (or "on demand") then the obligation of the surety will arise merely upon a demand being made (in the manner prescribed in the bond) by the beneficiary.<sup>483</sup> In *Bache & Co (London) Ltd v Banque Vernes et Commerciale de Paris SA*<sup>484</sup> a commercial guarantee provided for payment by the surety forthwith of the amount stated in the demand, such notice of default being conclusive evidence that the liability of the surety had accrued in that amount. The Court of Appeal upheld the claim of the beneficiary to sums under the bond. In *Esal (Commodities) Ltd v Oriental Credit Ltd*<sup>485</sup> it was held that, on a construction

of the material words in the bond, the beneficiary did not have to demonstrate breach since it was thought that this would be wholly inconsistent with the entire object of the transaction.<sup>486</sup>

## Final accounting

- 39-135 Where a beneficiary makes a claim on an unconditional bond, then he is entitled without more to the whole sum stated in the bond from the surety. However, in the absence of clear words to the contrary (which may, in any event, be construed as a penalty<sup>487</sup>) there will be an accounting exercise between the parties at some stage after the bond has been called. If the amount of the bond is not sufficient to satisfy the beneficiary's claim for damages then he can bring proceedings for his loss, giving credit for the amount received under the bond. However, if, following the accounting exercise, the amount received by the beneficiary under the bond exceeds the loss sustained, then the surety is entitled to recover the overpayment.<sup>488</sup>

## Footnotes

- 458 See generally, Andrews and Millett, *Law of Guarantees*, 7th edn (2015); Phillips, *The Modern Contract of Guarantee*, 4th edn (2020); Moss and Marks, *Rowlatt on Principal and Surety*, 5th edn (1999).
- 459 See, generally, Ch.47.
- 460 *Moschi v Lep Air Services Ltd* [1973] A.C. 331, 348, *HL*.
- 461 *Yeoman Credit Ltd v Latter* [1961] 1 W.L.R. 828, 830; *Davys v Buswell* [1913] 2 K.B. 47, 53.
- 462 *Moschi v Lep Air Services Ltd* [1973] A.C. 331, 349; *Alfred McAlpine Construction Ltd v Unex Corp Ltd* (1994) 38 Con. L.R. 63, *CA*.
- 463 *Yeoman Credit Ltd v Latter* [1961] 1 W.L.R. 828, 832; *Argo Caribbean Group v Lewis* [1976] 2 *Lloyd's Rep.* 289, 296. See also Phillips, *The Modern Contract of Guarantee*, 4th edn (2020), pp.25–31.
- 464 [1992] 1 W.L.R. 792, [1992] 2 *Lloyd's Rep.* 365, *CA*.
- 465 See generally Ch.47.
- 466 (1994) 66 B.L.R. 42.
- 467 [1996] A.C. 199.
- 468 See *OTV Birwelco Ltd v Technical and General Guarantee Co Ltd* [2002] 4 All E.R. 668; (2002) 84 Con. L.R. 117.
- 469 *Trade Indemnity Co Ltd v Workington Harbour and Dock Board* [1937] A.C. 1, 17; *Tins' Industrial Co Ltd v Kono Insurance Ltd* [1987] 3 H.K.C. 71, 77; *Trafalgar House Construction (Regions) Ltd v General Surety and Guarantee Co Ltd* [1996] A.C. 199; *Paddington Churches Housing Association v Technical and General Guarantee* [1999]

- B.L.R. 244; *Yuanda Co Ltd v Multiplex Construction* [2020] EWHC 468 (TCC), 189 Con L.R. 26.
- 470 [1990] 2 Lloyd's Rep. 496, 500.
- 471 cf. *Tins' Industrial Co Ltd v Kono Insurance Ltd* [1987] 3 H.K.C. 71, 76G where the Court of Appeal of Hong Kong appear to have been impressed with absence of the words "on demand" in reaching the conclusion that this was a conditional bond.
- 472 For a careful analysis of a guarantee in a construction context, see: *Try Build Ltd v Blue Star Garages* (1998) 66 Con. L.R. 90.
- 473 See Andrews and Millett, Law of Guarantees, 7th edn (2015), para.1.4.
- 474 [1996] 1 A.C. 199, HL.
- 475 [1996] 1 A.C. 199, 207D and G.
- 476 In particular, *Trade Indemnity Co Ltd v Workington Harbour and Dock Board* [1937] A.C. 1, HL ("the *Workington* case").
- 477 By contrast with the words used in *Hyundai Shipbuilding & Heavy Industries Co Ltd v Pournaras* [1978] 2 Lloyd's Rep. 502, CA.
- 478 (1994) 66 B.L.R. 72, CA.
- 479 (1997) 55 Con. L.R. 1.
- 480 [2012] EWCA Civ 1716, [2013] B.L.R. 57.
- 481 [2013] EWCA Civ 644, [2013] B.L.R. 458.
- 482 *Holme v Brunskill* (1877) 3 Q.B.D. 495; see generally below, para.47-108.
- 483 In these circumstances, the principal remaining defence to a summary call on the bond will be that the call involves fraud, on which see the decision in *Balfour Beatty Civil Engineering Ltd v Technical & General Guarantee Co Ltd* (1999) 66 Con. L.R. 90.
- 484 [1973] 2 Lloyd's Rep. 437, CA.
- 485 [1985] 2 Lloyd's Rep. 546, CA.
- 486 [1985] 2 Lloyd's Rep. 546, 549 (col.2).
- 487 *Cargill International SA v Bangladesh Sugar and Food Industries Corp* [1998] 1 W.L.R. 461.
- 488 *Cargill International SA v Bangladesh Sugar and Food Industries Corp* [1998] 1 W.L.R. 461, 465 See also: *ENS Ltd v Derwent Cogeneration Ltd* (1998) 62 Con. L.R. 141, 182.

## **(f) - Insurance**

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**Section 4. - Particular Features**

### **(f) - Insurance**

#### **Introduction**

- 39-136 On most construction projects, there will be a number of levels of insurance<sup>489</sup> cover against different kinds of loss, the relevant policies being held by different participants. On major projects, a compendious arrangement is sometimes encountered known as “Project Insurance”, which is intended to supersede (or duplicate) all the levels of cover as discussed below. The majority of projects, however, involve many individual policies which frequently overlap in practice. There is no general statutory requirement to provide insurance under construction projects. Individual parties may, however, be under statutory duties to insure, e.g. employers in respect of their employees.

#### **Insurance of the works**

- 39-137 In the absence of other cover, e.g. through project insurance, the construction contract will usually require the contractor to effect insurance of the works. This will usually include goods and materials awaiting incorporation and may cover the contractor’s plant and equipment. The insurance cover required may be in respect of loss from any cause (all risks) save for specified excepted risks.<sup>490</sup> Alternatively, some forms of contract require insurance only against specified perils. Where the work is to be carried out to, or to form part of, existing works or buildings, the contract must specify whether cover is required in respect of the existing works. Some contracts require insurance of the works to be in joint names,<sup>491</sup> which will enable either party to recover in the event of loss. In *London Borough of Barking & Dagenham v Stamford Asphalt Co Ltd*,<sup>492</sup> a case concerning conditions 6.2 and 6.3B of the JCT Agreement for Minor Building Works, it was

held that, on the assumption that the sub-contractor's negligence had caused certain fire damage to the employer's property, then the failure of the employer to obtain condition 6.3B insurance did not affect the employer's right of recovery against the contractor under condition 6.2, since neither condition referred to or qualified the other.<sup>493</sup> However, the position in this respect under the JCT Minor Works Building Contract 2011 has probably been materially altered by the express exclusion from the terms of the cl.5.2 indemnity of loss and damage to any property required to be insured under cl.5.4B by a specified peril. Thus the employer may, in this case, bear the sole risk of damage to the existing structures caused by specified perils, even if due to the contractor's negligence.

## Third party liability insurance

- 39-138 Construction contracts must also make provision for liability to third parties arising out of the works. The usual scheme is to render the contractor responsible for any such loss, and to require liability insurance in respect of it.<sup>494</sup> While insurance of the works will usually be effected by a bespoke policy, liability insurance will often be covered by a contractors all risks ("CAR") policy which will contain a variety of cover, usually including some cover in respect of materials, workmanship and design.

## Professional indemnity

- 39-139 Insurance will usually be held by the professional team (architect, engineer and quantity surveyor) termed professional indemnity ("PI") insurance. Such policies will provide cover in respect of loss arising from design fault, which will usually be an excepted risk under the contractor's works insurance. The cover will, however, usually be limited to negligent acts or omissions. A potential lacuna therefore exists where loss arises from a design fault which is non-negligent.<sup>495</sup> PI insurance may also provide cover in respect of defective work where negligent supervision is established.

## Footnotes

- 489 See Wright, Construction Insurance (1997). Following the Latham Report Working Group 10 of the Construction Industry Board has produced Liability law and latent defects insurance (1997, Thomas Telford).
- 490 See ICC Form cl.20 and JCT 80 cl.22, JCT SBC 2011 cl.6.8.

- 491 e.g. ICC Form cl.21(1). For consideration by the House of Lords of the JCT 1998 contractual machinery providing for Joint Names insurance, see *CRS v Taylor Young Partnership [2002] UKHL 17, [2002] 1 W.L.R. 1419* where it was held that the effect of the contractual joint names insurance scheme was to exclude the normal rules for compensation for negligence and breach of contract and see also *Bovis Construction Ltd v Commercial Union Assurance Co [2001] 1 Lloyd's Rep. 416*. But note that the approach taken in *CRS v Taylor Young Partnership* was held not to be a rule of law and was distinguished on the facts in *Tyco Fire & Integrated Solutions Ltd v Rolls Royce Motor Cars Ltd [2008] EWCA Civ 286, [2008] B.L.R. 285* where the joint names insurance provision under the particular building contract under consideration found not to exclude the contractor's potential liability for negligence causing damage to existing structures as provided for in other clauses of the contract. In *TFW Printers Ltd v Interserve Project Services Ltd [2006] EWCA Civ 875, [2006] B.L.R. 299*, the Court of Appeal held, in a case concerning a modified version of the JCT Agreement for Minor Building Works, that the employer's obligation under cl.6.3B to provide joint names' insurance cover against specified perils expired on practical completion of the works.
- 492 (*1997*) 82 B.L.R. 25, CA, approving the reasoning of Otton J in *National Trust v Haden Young Ltd (1993) 66 B.L.R. 88* (upheld by the Court of Appeal at (*1994*) 72 B.L.R. 1).
- 493 (*1997*) 82 B.L.R. 25 at 36B, per Auld LJ.
- 494 JCT 98 cl.21, JCT SBC 2005 cl.6.1 to 6.4, ICC Form cl.23.
- 495 See *Queensland Railways v Manufacturers Insurance [1969] 1 Lloyd's Rep. 214*.

## **(g) - Retention**

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**Section 4. - Particular Features**

### **(g) - Retention**

#### **Definition**

- 39-140 Monies held on account of retention form part of the sums certified by the contract administrator and earned by the contractor but which are not payable to the contractor until the final stages of the contract works. Typically, once practical completion is reached the next certificate will include one half of the retention monies; and the second half will be stated to be due upon the certificate issued after the certificate of making good defects. The amount of retention as a percentage deducted from successive interim certificates can vary and will depend upon the provisions of the construction contract. In some cases retention can be a substantial percentage of the certified value,<sup>496</sup> but in modern contracts based on the standard forms, retention is typically between 3 to 5 per cent of the value certified.

#### **Purpose and operation**

- 39-141 Under the JCT 2011 Standard Form, the status of retention, and the rights and obligations of the parties in relation to sums retained, is defined in cl.4.18.1 in the following way:

“... the Employer’s interest in the Retention is fiduciary as trustee for the Contractor (but without obligation to invest) ...”

The operation of the retention fund can be viewed from the perspective of the (main) contractor, the employer and a nominated sub-contractor.

## Position of contractor

- 39-142 The words impose a trustee type obligation upon the employer with the result that (i) the employer will be in breach of trust if he seeks to use the retention monies for his own purposes<sup>497</sup>; and (ii) as long as the employer is not in liquidation or administrative receivership,<sup>498</sup> the court will enforce these obligations by requiring the employer (on application by the contractor) to set aside the retention fund<sup>499</sup> without the need for the contractor to show that the employer is financially at risk.<sup>500</sup> The contractor can require the employer to set up a retention trust account at any time during the life of the contract<sup>501</sup> (provided the application is not too late),<sup>502</sup> and the insolvency of the contractor or the termination of his employment under the contract is not a bar to such remedy.<sup>503</sup>

## Position of employer

- 39-143 The stages at which retention typically becomes payable—practical completion and the issue of the certificate of making good defects—provide a clear indication that the practical purpose of retention is to ensure satisfactory completion by the contractor and by nominated sub-contractors. However, insofar as the employer has rights of deduction under the contract against the contractor, then he will (i) have a valid excuse for not having set up the retention fund in the first place; and (ii) have a right to withdraw sums from it. In *Henry Boot Building v Croydon Hotel*<sup>504</sup> the plaintiff contractor under a JCT Form of Contract was refused a mandatory injunction to set aside retention of £355,179 in circumstances where certificates had been issued by the architect under cl.22 entitling the defendant employer to liquidated damages in excess of the retained sums. There are also dicta in *Rayack Construction* (see above) which suggest that the employer may be entitled to have recourse to retention on the strength of a claim for damages for breach of the contract (and not just in relation to claims under the contract).<sup>505</sup>

## Footnotes

- 496 In *Rayack Construction Ltd v Lampeter Meat Co Ltd (1979) 12 B.L.R. 30*, the retention was 50 per cent and this was to be retained during the whole of the five year defects liability period.
- 497 *Wates Construction v Franthon Property (1991) 53 B.L.R. 23, 37, CA.*
- 498 *Re Jartay Developments Ltd (1982) 22 B.L.R. 134; Mac-Jordan Construction v Brookmount Erostin (1991) 56 B.L.R. 1, CA.*

- 499 *Rayack v Lampeter* (1979) 12 B.L.R. 30; *Concorde Construction Co Ltd v Colgan Co Ltd* (1984) 29 B.L.R. 125; *Henry Boot Building v Croydon Hotel* (1985) 36 B.L.R. 41, CA; *Wates Construction v Franthon Property* (1991) 53 B.L.R. 23, CA; *Mac-Jordan Construction v Brookmount Erostin* (1991) 56 B.L.R. 1, CA.
- 500 *Rayack v Lampeter Meat* (1979) 12 B.L.R. 30, 38.
- 501 *Finnegan v Ford Sellars Morris Developments* (1991) 53 B.L.R. 38.
- 502 *GPT Realisations v Panatown* (1992) 61 B.L.R. 88.
- 503 *Re Arthur Sanders Ltd* (1981) 17 B.L.R. 125.
- 504 (1985) 36 B.L.R. 41, CA.
- 505 *Rayack Construction v Lampeter Meat* (1979) 12 B.L.R. 30, 38.

## **(a) - Measure and Value**

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**Section 5. - Payment**

### **(a) - Measure and Value**

#### **Payment generally**

- 39-144 Payment under construction contracts typically involves the initial identification in the contract of a sum of money, variously called the “contract sum”<sup>506</sup> or “tender total”.<sup>507</sup> The contractor is entitled to this sum, or such other sum as may become payable in accordance with the contract conditions. In practice, the contractor is most unlikely to be paid the exact sum identified in the contract, given that every contract may be subject to variations,<sup>508</sup> claims,<sup>509</sup> fluctuation payments<sup>510</sup> or other factors by which the figure will require adjustment. Although the resolution of issues of payment will be a matter of the construction of the contract documents in the particular case, certain general principles can be identified and are discussed below.

#### **Lump sum**

- 39-145 Where the effect of the agreement, in accordance with the contract conditions, is to carry out the work for a stated amount, it is referred to as “lump sum”, a technical expression so understood by valuers.<sup>511</sup> The simplest form of lump sum contract is that in which the technical description of the works is contained in a specification and/or drawings, the terms of the contract requiring expressly, or as a matter of construction, that the contractor is to perform the whole of the work so described for the stated figure. This was the case in *Sharpe v Sao Paulo Railway*<sup>512</sup> where, although the contractor was involved in substantially more work than he could have anticipated, his promise to complete a railway from terminus to terminus meant that the increased work was not extra work under the contract. This represents the usual mode of contracting in the USA and

many other parts of the world. In the majority of UK contracts, however, a bill of quantities<sup>513</sup> is also incorporated into the contract, primarily for the calculation of interim payments, but also having other effects.

## Effect of bill of quantities

- 39-146 A bill of quantities does not prevent the contract operating as lump sum. The JCT Form of Contract, with quantities, operates in this way, providing expressly that the employer will pay the contractor “the contract sum or such other sum as shall become payable hereunder”.<sup>514</sup> The effect of a lump sum contract containing bills of quantities is that the contractor takes the risk that the given quantities will over—or under—state the true quantities. Only if it is shown that the bills have been prepared erroneously from the drawings will the contractor be entitled to seek an adjustment of the contract price.<sup>515</sup>

## Remeasurement

- 39-147 A contract containing quantities in which the sum finally due to the contractor is to be ascertained by recalculating each stated quantity from the actual amount of work performed, is referred to as a “remeasurement” contract. Various editions of the ICE Conditions and the ICC Form are to this effect, typically providing that the engineer shall “determine by admeasurement the value in accordance with the contract of the work done”<sup>516</sup> and providing further that the quantities set out in the bill “are not to be taken as the actual and correct quantities of the works”.<sup>517</sup> Remeasurement contracts are practically limited to civil engineering projects, where substantial changes can occur, particularly in relation to earthworks and foundations. The contract sum is to be recalculated using the actual quantities and the quoted rates; but the ICC Form also provides that the rate may be adjusted where an increase or decrease of the quantities stated in the bill “of itself shall so warrant”.<sup>518</sup>

## Error or omission

- 39-148 Where a bill of quantities is used, questions may arise as to the precise work included in each item. If the effect of the contract conditions is that the drawings or other contract description are to prevail over the bill, the risk of any error or omission in the bill will be that of the contractor. However, it is now a common and almost invariable practice to provide that the bills are “deemed to have been prepared” in accordance with a stated method of measurement.<sup>519</sup> There are a range of standard

methods of measurement (“SMMs”) available for building, civil engineering, highways and other works, each of which sets out details of “deemed” item coverage. The contract conditions may then provide for the consequences of any departure from the SMM. Both the JCT Form<sup>520</sup> and the ICC Form<sup>521</sup> require any error in description or omissions, by reference to the relevant SMM, to be corrected and treated as equivalent to a variation.

## Footnotes

506 JCT Form art.2.

507 ICC Form cl.(1)(1)(i).

508 See para.39-096.

509 See para.39-245.

510 See para.39-174.

511 See Keating on Construction Contracts, 11th edn (2021), paras 4-002—4-026.

512 *(1873) L.R. 8 Ch. App. 597.*

513 See para.39-068.

514 JCT Form art.2.

515 See below, para.39-147.

516 ICC Form cl.56(1).

517 ICC Form cl.55(1).

518 ICC Form cl.56(2).

519 ICC Form cl.57.

520 JCT SBC 2011 c.2.14.

521 ICC Form cl.55(2).

## **(b) - Interim Payment Under the Housing Grants, Construction and Regeneration Act 1996**

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**(b) - Interim Payment Under the Housing Grants, Construction and Regeneration Act 1996**

### **Payment under the Housing Grants, Construction and Regeneration Act 1996**

39-149 The [Housing Grants, Construction and Regeneration Act 1996](#) ("the 1996 Act") applies to all construction contracts in England and Wales with limited exceptions.<sup>522</sup> One of the major features of the [1996 Act](#) is detailed rules regarding the availability and procedure for interim payments during construction projects which limit the parties' freedom to contract in important respects. As a result, the interim payment requirements of the Housing Grants Act are now relatively standard across the industry, being found in many standard forms. The particular requirements of the Act are:

- (i)a party to a construction contract is entitled to interim payments provided the duration of the work is expected to be 45 days or greater<sup>523</sup>;
- (ii)the construction contract must provide an adequate mechanism for determining what payments become due under the contract and when<sup>524</sup>;
- (iii)the construction contract must provide a final date for payment in relation to any sum which becomes due<sup>525</sup>;
- (iv)the construction contract must require one of the parties, or a specified person such as an architect or contract administrator, to give a notice specifying the sum due not later than five days after the payment due date.<sup>526</sup> This is referred to as a payment notice;
- (v)if the payer intends to pay less than the amount stated in the payment notice, it must issue a further notice prior to the final date for payment.<sup>527</sup> This is referred to as a pay less notice.

Where the terms of the contract do not comply with the requirements of the [1996 Act](#), the relevant terms of the Scheme for Construction Contract are implied to the extent necessary to achieve compliance with the [Act](#).<sup>528</sup>

## Right to interim payments

- 39-150 Whilst the Act requires that a contract make provision for interim payments and specifies a particular procedure to be followed in each instance, the parties are afforded considerable latitude as to the frequency and amount of the payments. Many construction contracts provide for interim payments to be made on a monthly basis or pursuant to progress milestones with a similar degree of regularity and commonly the value of each interim payment is broadly in line with the value of the work carried out to date, subject to a retention being kept by the employer. However, the Act does not mandate such approaches and it is permissible for the total amount of interim payments to fall far short of the value of the work carried out. The only limit imposed by the Act appears to be that the parties must incorporate the statutory requirement in good faith.<sup>529</sup> Whilst it has been judicially suggested that a cynical regime prescribing one interim payment of an insignificant amount would probably not satisfy the Act, it has been held that interim payments which in fact stopped many months prior to completion satisfied the requirements of the Act.<sup>530</sup>

## Due dates and final dates

- 39-151 Rather than a single deadline for payment, the [1996 Act](#) introduces two relevant dates—the due date for payment and the final date for payment.<sup>531</sup> Despite its name, it is not expected that payments will be made on or before the due date. Instead, it is the final date for payment which represents the last occasion upon which a payment can be made without giving rise to a breach of contract and a right to recover interest. The due date serves little purpose other than to mark the start of a window within which the payment and pay less notices referred to in the Act must be served. The parties are free to determine when the due date is, when the final date for payment is and when, between the two dates, pay less notices must be served.

## Payment notices

- 39-152 The Act envisages that a payment notice may be given by one of three parties referred to as the payer, the payee or a specified person; designations which in practice refer to the employer, the contractor and the construction professional such as an architect or engineer. The parties are expected to specify in the contract who is to provide the notice and the deadline for the

notice, which may not be more than five days after the due date.<sup>532</sup> As discussed below, in large construction contracts it is most common to choose an architect or an engineer to issue valuation certificates for the purposes of interim payments and provided they are valid such certificates will ordinarily constitute the relevant payment notice. In order to be valid, s.110A provides that the notice must set out the sum considered to be due and the basis upon which that sum has been calculated. Any notice served must be in a form which would be recognised by a reasonable recipient as a payment notice with contractual effect.<sup>533</sup>

## Payment notices in default

- 39-153 Section 110B of the 1996 Act provides that the payee may issue its own payment notice if the payer or a specified person who is due to issue the payment notice misses the contractual deadline. This is to prevent the employer, or professionals engaged by the employer, from unilaterally delaying or avoiding interim payments by refusing to issue payment notices. If pursuant to the contract the payee has previously issued an application for payment complying with the requirements of a payment notice then this notice will automatically be treated as the payment notice in default and no further notice need be issued.<sup>534</sup> It has been held that any document relied upon by the payee must be in “substance, form and intent” the payment notice or application for payment required by the contract or the 1996 Act,<sup>535</sup> but a more recent formulation has been to ask whether the reasonable recipient of the document in question would have realised that it was an application or payment notice with contractual force and with all the consequences that may entail.<sup>536</sup> To the extent that there is a difference between these two formulations, the latter is to be preferred. Whether a given document complies with the contractual requirements is a question of objectively interpreting the contractual requirements and the document served. Provided a reasonable recipient would have understood the status of the document, there is no reason for imposing additional requirements of specific substance, form or intent. If the payment notice in default is served later than the contractual deadline for the original payment notice, the final payment date will be extended.<sup>537</sup>

## Pay less notices

- 39-154 Section 111 of the 1996 Act provides that a party wishing to pay less than the sum stated in the applicable payment notice must issue a pay less notice by the relevant deadline. Whilst the Act is written in such a manner that this provision takes direct effect, such that there is no need for the contract to expressly set out the entitlement to serve a pay less notice, most standard form contracts do so. It is, however, expected that the contract will set out the deadline for service of the pay less notice<sup>538</sup> and if this does not occur the Scheme for Construction Contracts implies a deadline of seven days prior to the final date for payment.<sup>539</sup> The content of the document is

effectively the same as a payment notice. It must set out the sum the payer considers to be due on the date the notice is served and the basis on which that sum is calculated.<sup>540</sup> In addition, the document must be such that the reasonable recipient of the document would realise that it was a pay less notice.<sup>541</sup> Nevertheless, it is not fatal if the document does not describe itself as a pay less notice or is otherwise misleading as to its purpose. A document which was stated to be a final certificate but which was served in the appropriate window for a pay less notice was upheld as a valid pay less notice on the basis that a reasonable recipient would have realised that the sender was confused about the true legal position and would therefore have recognised that the document should be treated as a pay less notice.<sup>542</sup>

## **Effect of failure to serve a pay less notice**

- 39-155 If the employer fails to serve a pay less notice, then the payee is entitled to recover the full sum stated in the payment notice without deduction, set-off or abatement.<sup>543</sup> This is frequently pursued by way of adjudication, a statutory form of dispute resolution also introduced by the **1996 Act**, but can also be pursued directly in litigation.<sup>544</sup> It has been held that this aspect of the **1996 Act** only works in favour of the party carrying out the work (the contractor or sub-contractor) and cannot be relied on by the employer to recover sums due in its direction, such as liquidated damages.<sup>545</sup>
- 39-156 The amount which the employer has to pay as a result of having failed to serve the requisite notices may well exceed the true value of the works as calculated pursuant to the contractual valuation mechanism. This is an inevitable risk of the statutory regime and does not provide any defence to the employer. The employer can recover any overpayment which it might make in such circumstances by utilising the contractual dispute resolution processes to obtain a determination of the true value of the work and a consequent determination as to any amount that must be repaid as a result. Such a claim can be brought at any time after the employer has paid the full amount stated as due in the relevant payment notice.<sup>546</sup>

## **Circumstances where the payer can avoid paying the notified sum**

- 39-157 On the exceptional facts of *Melville Dundas Ltd v George Wimpey UK Ltd*<sup>547</sup> the terms of the contract were found to avoid the need to serve a withholding notice, so that no payment needed to be made even though no withholding notice had been served by the required deadline. In that case, the contractor had applied for an interim payment, but by the final date for payment the employer had neither made a payment nor served a withholding notice. The contractor then became insolvent and the employer on this ground terminated the contract. It was held that the words of cl.27.5.5.1

of the JCT Standard Form of Building Contract (With Design 1998 edition) were clear and that the contractor ceased to become entitled to any further payment whatever once the contract had been terminated, that there was no conflict between this clause and [s.111\(1\) of the 1996 Act](#) and therefore that the failure to serve a withholding notice in respect of the interim payment did not affect the parties' rights. Potentially this decision creates a problem for contractors or suppliers seeking to obtain payment, at least in a termination situation.<sup>548</sup> An amendment to the [Housing Grants, Construction and Regeneration Act 1996](#) appears to confirm the effect of [Melville Dundas](#) in providing that the obligation to pay the notified sum does not apply where the contract provides for payment to be suspended upon insolvency.<sup>549</sup>

## Right to suspend work

- 39-158 The Act further reinforces the right to prompt payment by providing a statutory right to suspend performance, subject first to giving seven days' notice.<sup>550</sup> The period during which performance is so suspended is to be disregarded in computing the time taken to complete any work affected by exercise of the right.

## Pay-when-paid and pay-when-certified clauses

- 39-159 [Section 113 of the 1996 Act](#) (prohibition of conditional payment provisions) prevents reliance upon what are often termed "pay-when-paid" clauses except in the case of the insolvency of the employer (or any other person, payment by whom is a precondition to payment of the third party under the contract). While [s.113](#) will prevent some of the potentially harsh effects of "pay-when-paid" clauses seen in other jurisdictions,<sup>551</sup> the insolvency exception will mean that in certain cases the sub-contractor will, in practice, be accepting substantial risks in relation to the outcome of a construction project. In these circumstances, the effect of a particular "pay-when-paid" clause will be a matter of construction, requiring clear and unambiguous words, and requiring careful consideration of whether, on a true construction, the clause affects the right to payment or only the time for payment.<sup>552</sup>
- 39-160 The amendments made to the Act in 2011 introduced at [s.110\(1A\)](#) further limitations by prohibiting terms which make payment conditional upon the performance of obligations under another contract or the decisions of any other person as to whether obligations under another contract have been performed. This amendment prevents "pay-when-certified" clauses whereby a sub-contractor's payment is conditional upon money being certified for payment under the main

contract, a common way by which main contractors sought to circumvent the prohibition on pay-when-paid clauses described above.

## Footnotes

- 522 s.105 of the 1996 Act sets out certain excluded areas of construction operations, and s.106 provides that contracts with residential occupiers are excluded from the 1996 Act.
- 523 1996 Act s.109(1).
- 524 1996 Act s.110(1)(a).
- 525 1996 Act s.110(1)(b).
- 526 1996 Act s.110A(1).
- 527 1996 Act s.111.
- 528 1996 Act s.110(3). See also *Bennett (Construction) Ltd v CIMC MBS Ltd [2019] EWCA Civ 1515, [2019] 4 W.L.R. 155* at [54].
- 529 *Balfour Beatty Regional Construction Ltd v Grove Developments Ltd [2016] EWCA Civ 990, [2017] 1 W.L.R. 1893* at [57].
- 530 *Balfour Beatty Regional Construction Ltd v Grove Developments Ltd [2016] EWCA Civ 990, [2017] 1 W.L.R. 1893* at [57]–[58].
- 531 Introduced by s.110(1)(a) and 110(1)(b) respectively.
- 532 If the parties fail to specify the date, then the Scheme for Construction Contract implies a deadline of five days after the due date.
- 533 *S&T (UK) Ltd v Grove Developments Ltd [2018] EWCA Civ 2448, [2019] B.L.R. 1* at [55].
- 534 1996 Act s.110B(4).
- 535 *Jawaby Property Investment Ltd v The Interiors Group Ltd [2016] EWHC 557 (TCC), [2016] B.L.R. 328* at [59].
- 536 *S&T (UK) Ltd v Grove Developments Ltd [2018] EWCA Civ 2448, [2019] B.L.R. 1* at [55].
- 537 1996 Act s.110B(3).
- 538 1996 Act s.111(7)(a).
- 539 Scheme for Construction Contracts para.10.
- 540 1996 Act s.111(4).
- 541 *S&T (UK) Ltd v Grove Developments Ltd [2018] EWCA Civ 2448, [2019] B.L.R. 1* at [55].
- 542 *Surrey and Sussex Healthcare NHS Trust v Logan Construction (South East) Ltd [2017] EWHC 17 (TCC), [2017] 1 All E.R. (Comm) 586.*
- 543 *Rupert Morgan Building Services (LLC) Ltd v Jervis [2003] EWCA Civ 1563, [2004] 1 WLR 1867.*
- 544 As happened in *Rupert Morgan Building Services (LLC) Ltd v Jervis [2003] EWCA Civ 1563, [2004] 1 W.L.R. 1867.*
- 545 *Balfour Beatty Construction Northern Ltd v Modus Corovest (Blackpool) Ltd [2008] EWHC 3029 (TCC), [2009] C.I.L.L. 2660.* However, it is difficult to find such a limit in the wording of the Act and the point has not been tested at Court of Appeal level or above.

- 546 *S&T (UK) Ltd v Grove Developments Ltd* [2018] EWCA Civ 2448, [2019] B.L.R. 1 at [107].  
547 [2007] UKHL 18, [2007] UKHL 18, [2007] B.L.R. 257.
- 548 The decision in *Melville Dundas* was applied in *Pierce Design International Ltd v Mark Johnston* [2007] EWHC 1691 (TCC), [2007] B.L.R. 381.
- 549 s.111(10) as inserted by the Local Democracy, Economic Development and Construction Act 2009; 1996 Act s.111(10).
- 550 1996 Act s.112.
- 551 Hong Kong: *Hong Kong Teakwood Works v Shui On Construction Ltd* [1984] H.K.L.R. 235; *Schindler Lifts (Hong Kong) Ltd v Shui On Construction Ltd* [1985] H.K.L.R. 118; (1985) 29 B.L.R. 95, Singapore; *Brightside Mechanical and Electrical Services Group Ltd v Hyundai Engineering and Construction Co Ltd* (1988) 41 B.L.R. 110.
- 552 *Iezzi Construction Pty v Curumbin Crest Development Pty* (1995) 2 Qd. R. 350 Australia; *Smith and Smith Glass Ltd v Winstone Cladding Systems Ltd* [1992] 2 N.Z.L.R. 473 New Zealand. See “Back to Back Payment Clauses—‘If and When’” at (1995) C.I.L.L. 1029.

## **(c) - Interim Payment Generally**

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### **(c) - Interim Payment Generally**

#### **Right to interim payment**

- 39-161 As set out above, in most construction contracts in England and Wales the [Housing Grants, Construction and Regeneration Act 1996](#) requires an interim payment regime to be included, failing which one will be implied from the Scheme for Construction Contracts. In contracts to which the [1996 Act](#) does not apply, it is nevertheless common for parties to make express provision for interim payments due to the financing demands of large-scale construction projects.

#### **Interim measurement**

- 39-162 Where there is a bill of quantities, the contract conditions usually provide for approximate monthly measurement to be taken, based on the quantities and rates set out in the bill. In the case of a lump sum contract, the quantity surveyor will estimate the proportions of the total stated quantities which have been performed. In the case of a remeasurement contract, the work may need to be physically measured. This is particularly important where work is to be covered up by succeeding work.<sup>553</sup> Standard forms of contract frequently provide for interim payments to be made in respect of goods and materials on site but not yet incorporated, and even goods and materials manufactured but not yet delivered.<sup>554</sup> The bill of quantities may also contain items other than measured work, such as preliminaries (i.e. fixed charges covering items such as insurance or the provision of site facilities) and method related charges.<sup>555</sup> All such items will be paid proportionally through periodic interim measurement, subject to retention and to any other adjustment permitted under the contract.

## Milestone payments

- 39-163 As an alternative to the somewhat cumbersome process of monthly measurement, a lump sum contract may provide for periodic payments in the form of a series of separate lump sums payable at stated intervals or by reference to stages of the work. Such payments are referred to as “milestones” and have been given the imprimatur of Sir Michael Latham in his report.<sup>556</sup> The payments need not be equal and may be graduated to create an incentive to achieve completion. Their release may be made conditional upon performance to quality and/or programme requirements.

## Interim certificates

- 39-164 Interim payments may become payable directly in accordance with the contract conditions; or they may be payable only upon the certificate of the contract administrator. In the latter case the certificate is usually a condition precedent to the right to claim payment.<sup>557</sup> Where a certificate has been withheld by the contract administrator an arbitration clause may empower the arbitrator to award what is due, despite the absence of a certificate<sup>558</sup>; and where proceedings are brought, the court may exercise the same power to open up, review and revise any certificate or decision given under the contract.<sup>559</sup> At common law, it has been held that a certificate creates a debt which is susceptible to right of set-off, unless the contract otherwise provides.<sup>560</sup> This position is, however, substantially altered by [s.111 of the Housing Grants, Construction and Regeneration Act 1996](#) which requires a notice to be served in a tight timeframe if the employer does not intend to pay the full sum stated in a certificate.<sup>561</sup>

## Requirement for completion

- 39-165 If there is no statutory or express contractual right to interim payment, a construction contract normally operates as an entire contract<sup>562</sup> so that payment is conditional upon the achievement of substantial completion.<sup>563</sup> The same rule will apply to instalments in respect of defined sections of the work. In addition, it is not uncommon for payments to be made in advance of carrying out the work. For example, in major international projects, advance payment in foreign currency may be provided for to finance the establishment of the site or importation of plant. Such payments are likely to be conditional upon the provision of a repayment bond. Where advance payments are made, there is likely to be a reduction in subsequent periodic payments proportional to the value of the work performed.

## Set-off

- 39-166 The right of the employer (under a main contract) or the contractor (under a sub-contract) to make deductions from sums which might otherwise be due under the terms of the contract, but for the existence of, for example, defects and delays to the works, is an important aspect of modern construction industry practice which often leads to formal disputes. From the point of view of the contractor or sub-contractor, regular income from work as it progresses is vital for cash flow. However, the employer will not wish to pay interim valuations in circumstances where there are existing problems with the works. The general law on set-off applies equally to construction contracts, but it is important to note that in most cases the employer will need to serve a pay less notice by the contractual deadline if it wishes to rely on a set-off. Otherwise, the employer will be required to pay the sum stated as due in the preceding payment notice without deduction by reference to such set-off.

## Abatement

- 39-167 The principle of abatement,<sup>564</sup> settled in *Mondel v Steel*,<sup>565</sup> applies to contracts for the sale of goods or for work or labour, and was described in *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd*<sup>566</sup> when Lord Morris said:

“... it has long been an established principle of law that if one man does work for another, the latter, when sued, may defend himself by showing that the work was badly done and that the claim made in respect of it should be diminished ...”

There are a number of points on the principle of abatement which are of significance in the construction context. First, provisions of a building contract which exclude equitable set-off may not be sufficiently clear to exclude the common law defence of abatement. Where, for example, notices of set-off have not been complied with, then contractual and equitable set-off may not be open, but there will be an independent right to abate.<sup>567</sup> Secondly, the rule of abatement applies only to matters that go to reduce the value of the work performed or of the goods sold and it does not apply to claims based on delay.<sup>568</sup> Where there is an abatement by reference to defective work, the question becomes one of how to value an abatement. The measure of an abatement is how much less the subject matter of the action is worth by reason of the breach; but in *Duquemin v Slater*<sup>569</sup> it was decided, by reference to the case of sale of goods, that the cost of repair could not be taken into account. It is thought that in many cases of abatement by reference to defects, the cost of remedial works will, in practical terms, be an important factor in deciding the extent of a right to abate.<sup>570</sup> As with set-off, unless the abatement is already taken into account in the

preceding payment notice, an employer will generally need to have served a pay less notice in order to withhold payment on the basis of an abatement.

## Footnotes

- 553 See ICC Form cl.56(3).
- 554 See, generally, JCT 80 cl.30, JCT SBC 2011 cl.4.17, and ICC Form cl.60(1)(b), (c).
- 555 See Civil Engineering Standard Method of Measurement, 2nd edn (1985).
- 556 Constructing the Team, HMSO 1994.
- 557 See generally Keating on Construction Contracts, 11th edn (2021), Ch.5.
- 558 Both the JCT Form and the ICC Form contain such arbitration clauses.
- 559 *Beaufort Developments v Gilbert-Ash NI [1999] 1 A.C. 266, HL.*
- 560 *Gilbert-Ash v Modern Engineering [1974] A.C. 689; Mondel v Steel (1841) 8 M. & W. 858; Hanak v Green [1958] 2 Q.B. 9.*
- 561 See below, para.39-154.
- 562 *Gilbert-Ash v Modern Engineering [1974] A.C. 689, HL*, per Lord Diplock.
- 563 See above, para.39-009.
- 564 Derham, Set-off, 2nd edn (1996), pp.124–130.
- 565 *(1841) 8 M. & W. 858.*
- 566 *[1974] A.C. 689, HL.*
- 567 *Acsim (Southern) Ltd v Danish Contracting and Development Co Ltd (1989) 47 B.L.R. 59, CA; Mellowes Archital v Bell Projects (1997) 87 B.L.R. 26, CA.*
- 568 *Mellowes Archital v Bell Projects (1997) 87 B.L.R. 26, 40, CA.*
- 569 *(1993) 65 B.L.R. 124.*
- 570 See *Barrett Steel Building Ltd v Amec Construction Ltd Unreported 3 March 1997* and the reference to *Linden Gardens v Lenesta Sludge Disposals Ltd [1994] 1 A.C. 85, 111.*

## **(d) - Cost-based Payment**

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### **(d) - Cost-based Payment**

#### **Introduction**

- 39-168 Where construction work is the subject of competitive tendering payment, both for the original contract work and for any varied work, is usually to be calculated on the basis of the tendered figures. Various devices exist for deriving rates to be used for the payment of variations where these are to be based on the original tendered figures. An alternative method of payment is one based on “cost”. This requires appropriate definition since it is doubtful whether the term could have any absolute meaning. This section discusses a number of situations in which cost-based payments arise and the way in which such claims are to be valued.

#### **Claims based on cost**

- 39-169 The standard forms of contract frequently contain provisions for particular payments to be based on cost rather than quoted rates. Under the ICC Form, a substantial number of provisions entitling the contractor to additional payment state that the payment is to be cost-based. For example, for delay in the provision of necessary instructions, the contractor is to be paid “the amount of such costs (incurred) as may be reasonable”<sup>571</sup>; in respect of encountering conditions which could not reasonably have been foreseen, the contractor is entitled to be paid “the amount of any costs which may reasonably have been incurred by the contractor together with a reasonable percentage addition thereto in respect of profit” by reason of such conditions or obstructions<sup>572</sup>; and in respect of general instructions issued by the Engineer the contractor is entitled to be paid any “cost beyond that reasonably to have been foreseen by an experienced contractor at the time of tender … as may be reasonable except to the extent that such … extra costs result from the contractors’ default”.<sup>573</sup>

The form also includes a definition of “cost” as “all expenditure properly incurred or to be incurred whether on or off the site including overhead finance and other charges properly allocatable thereto but does not include any allowance for profit”.<sup>574</sup> These provisions are typical of those found in many Standard Forms of Contract. The JCT Standard Form of Building Contract, on the contrary, contains uniform procedures and definitions applying to all such claims, by which the contractor is entitled to recover:

“... direct loss and/or expense ... for which he would not be reimbursed by a payment under any other provision of this contract.”

This is thought to be equivalent to cost. The contract itself does not contain a definition, but the words have been interpreted by the courts as being equivalent to damages,<sup>575</sup> and such as to include interest or finance costs.<sup>576</sup>

## Prime cost

- 39-170 There is no fixed definition of this term which generally refers to work which is intended to be valued in accordance with a definition contained in the contract. This may be in the form of a lengthy schedule of sums which are to be allowable (and those which are not) so as to arrive at a definite computation of the sum payable. Various forms of prime cost contract have been issued containing elaborate definitions of sums recoverable in respect of labour, materials, plant and sub-contracted work. In all such cases, express provision needs to be made for the cost of supervision and of other forms of overhead, and all other matters which may give rise to dispute.

## Prime cost sums

- 39-171 Another distinct use of the term “prime cost” occurs in relation to intended sub-contracts.<sup>577</sup> In such cases, it is customary to include a prime cost or PC sum chosen by the employer within the tender, with provision within the conditions of contract for the work in question to be executed by a sub-contractor, the actual cost of the sub-contracted work being substituted for the PC sum.<sup>578</sup> The sum to be paid constitutes actual cost to the contractor but not prime cost as may be defined. The usual procedure is for the employer (or the contract administrator) to obtain a lump sum tender from the prospective nominated sub-contractor whose payment will then be determined in accordance with the terms of the sub-contract, the final total replacing the PC sum for the purpose of the main contractor’s account.

## Dayworks

- 39-172 This is a form of prime cost payment usually provided for under conditions of contract where the supervisor is empowered to order particular work to be executed on dayworks, usually on the basis that the work in question cannot properly be valued by measurement.<sup>579</sup> The term refers to lists of rates for labour, plant and materials together with appropriate mark-ups in respect of all additional charges. The rates in question may be included as an annex to the contract or reference may be made to published schedules.<sup>580</sup>

## Provisional sums

- 39-173 This term appears in most forms of contract and refers to a sum of money (specified) which is to be “provided” in the contractor’s price, to be expended as directed (usually by the contract administrator). It is therefore in the nature of a contingency item, where the contractor will be paid according to the instructions which may be given.

## Footnotes

571 ICC Form cl.7(4)(a).

572 ICC Form cl.12(6).

573 ICC Form cl.13(3).

574 ICC Form cl.1(5).

575 *Wraight v PH & T (Holdings) (1968) 13 B.L.R. 26.*

576 *Minter v WHTSO (1980) 13 B.L.R. 1; Rees & Kirby v Swansea CC (1985) 30 B.L.R. 1.*

Note that in *Sempra Metals Ltd v Inland Revenue [2007] UKHL 34, [2007] 3 W.L.R. 354*, the House of Lords has radically reassessed the circumstances in which a claimant may be entitled to claim compound interest. It was held that (i) the Court could award compound interest where a claimant was seeking restitution of money paid under a mistake; and (ii) the Court had a common law jurisdiction to award interest, simple or compound, as damages on claims for non-payment of debts as well as other claims for breach of contract and tort. It is therefore now open to claimants to plead and prove their actual interest losses as a result of a late payment of a debt, and this may include compound interest.

577 See below, para.39-185.

578 See *NWM Hospital Board v Bickerton [1970] 1 W.L.R. 607* for the House of Lords’ interpretation of the process of nomination and accounting.

579 See JCT 2011 cl.5.7 and ICC Form cl.52(5), 56(4).

- 580 See definition of Prime Cost of Daywork carried out under a building contract issued by the RICS, and the BEC and Schedule of Dayworks carried out incidental to contract work issued by the FCEC (now CECA).

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## **(e) - Price Fluctuations**

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### **(e) - Price Fluctuations**

#### **Meaning**

- 39-174 Where the contract provides for the contractor to be compensated in respect of price increases, the additional payments are referred to as “fluctuation”. Such payments may be provided for whether the underlying contract is lump sum or subject to remeasure. Variations which are priced on the basis of rates contained in the contract may be subject to fluctuation payments, but not claims based on cost, which will be assumed to be current unless the contrary is stated. Contracts which provide for payment of such increases are commonly known as “fluctuation contracts” while those which are not so subject are usually termed “fixed price” (although the price is fixed only in this limited sense).

#### **Net fluctuation clauses**

- 39-175 Such provisions allow the contractor to recover the net increase in various costs on which the tender is deemed to be based by computing the actual price increase in respect of elements of the work actually carried out on a monthly basis. The JCT Forms of Contract print a separate clause applying to “rates of contribution levy and tax” payable by an employer, which is intended to apply in all cases.<sup>581</sup> A more extensive clause covers net increases in labour and materials costs, in addition to employer’s contribution, levy and tax.<sup>582</sup> In respect of materials, goods, electricity and fuel, the clause is intended to operate from a list of “basic prices” provided by the contractor from which increases or decreases may be determined. Variants of this type of clause are found in many other standard construction contracts. Such clauses are important and may give rise to disputes in times of financial instability where the price, e.g. of hydrocarbon products to be used

in the works may be subject to rapid and substantial change. The clauses also operate in reverse, at least in theory, where prices decrease. The objective of these clauses is for the contractor to recover the actual price increase in respect of the stipulated components. The price of any element not listed in the clause will be deemed to be fixed.

## Formula adjustment

- 39-176 An alternative and somewhat simpler means of assessing price fluctuation is by use of a set of formulae for different components of the work. Such clauses are found both in the ICC Form<sup>583</sup> and in the JCT Forms.<sup>584</sup> The ICC model represents the simplest form of calculation, whereby a predetermined apportionment of the constituents of the work is made, which is then applied to published cost index figures to calculate the fluctuation payment each month. The clause thus operates irrespective of actual constituents of the work which has been carried out. An alternative version of the standard clause exists for fabricated structural steelwork whereby the apportionment can itself be adjusted. These clauses operate on the basis of “Baxter” indices, named after their originator. The JCT formula clause operates in a similar manner, but is based on Formula Rules issued by the Joint Contracts Tribunal. The clause applies to all work carried out save for items based on actual cost or current prices, including dayworks.

## Footnotes

581 JCT SBC 2011 cll.4.21 and 4.22, and Sch.7.

582 JCT SBC 2011 cll.4.21 and 4.22.

583 The clause is published as a separate insert.

584 JCT SBC 2011 cll.4.21 and 4.22 and Sch.7.

## (f) - Quantum Meruit

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(f) - Quantum Meruit

### Where available

39-177 Payment based upon quantum meruit (literally “what he deserves”) is an important and surprisingly frequent feature of the construction industry and is most likely to arise in one of two particular situations which it is important to distinguish. First, where there is no contract,<sup>585</sup> a builder who carries out work at the request of, and for the benefit of, the employer, will be entitled to a quantum meruit by way of reasonable sum, for the work carried out. It is now clear that the underlying basis for such a claim is the law of unjust enrichment.<sup>586</sup> In *British Steel Corp v Cleveland Bridge and Engineering Co Ltd*<sup>587</sup> Robert Goff J found that no contract had been concluded since the parties had not agreed the price or other essential terms, but held that the plaintiffs could recover on a quantum meruit for the work they had done, stating that:

“... if, contrary to their expectation, no contract was entered into, then the performance of the work is not referable to any contract the terms of which can be ascertained, and the law simply imposes an obligation on the party who made the request to pay a reasonable sum for such work as has been done pursuant to that request, such an obligation sounding in quasi contract or, as we now say, in restitution ...”

Secondly, where the contract contains no express provision relating to payment, both generally or in respect of specific matters such as a particular variation, the contractor will be entitled to a reasonable sum for the work carried out<sup>588</sup> on the basis of an implied term to that effect. The distinction between the contract and no-contract scenarios is important because it affects the basis upon which the valuation of a reasonable sum is carried out.<sup>589</sup>

## Quantum meruit on repudiation

- 39-178 It has been suggested that a contractor, whose contract is brought to an end by the repudiation of the employer, which is accepted by the contractor, may claim quantum meruit in respect of the whole of the contract works, as an alternative to claiming the value of work done together with loss of profit.<sup>590</sup> However, the better view is that older authorities supporting such a right cannot stand in the face of modern House of Lords authority; and that a contractor may not benefit from his own poor performance and obtain payment on a more favourable basis.<sup>591</sup> Thus, the contractor cannot put the contract to one side and recover the whole value of work done on the basis of a quantum meruit since in any event the contract, on repudiation, is determined only insofar as it is executory.<sup>592</sup>

## Assessment of a reasonable sum

- 39-179 The courts have laid down no rigid guidelines to be applied in the assessment of a reasonable sum although it is clear that the contractor should be paid a fair commercial rate for the work done in all the relevant circumstances.<sup>593</sup> The basis for any such assessment of a reasonable sum can be a source of controversy, since the employer may wish to confine recovery to the contractor's actual or tender costs,<sup>594</sup> whereas the contractor may want the reasonable sum to reflect the value which his work ultimately represented to the employer.<sup>595</sup> Although in some instances a reasonable sum will be calculated on the basis of actual cost plus an uplift for profit and overheads, it will be a matter of importance in the particular case whether, for example, the contractor who has obtained his resources at an especially low cost will be obliged to share that benefit with the employer, or whether a more objective view of "fair commercial rate" should be adopted. The correct answer will depend upon the legal basis of the quantum meruit claim.<sup>596</sup> If the claim is in unjust enrichment, then the focus should be on the enrichment received by the employer whereas if the claim is on the basis of an implied term, then the intention of the parties will be used but it is likely that market rates will be applied.

## Footnotes

585 See Goff and Jones, *The Law of Unjust Enrichment*, 9th edn (2016), *Mannolini* (1996) *M.L.R.* 111; *Ball* (1983) *L.Q.R.* 572.

586 See above, Vol.I, Ch.32. In *Costello v MacDonald* [2011] EWCA Civ 930, [2011] *W.L.R.* 1341 it was held by the Court of Appeal that there was no basis for a restitutive claim

for payment based upon unjust enrichment by the claimant building contractor against the owners of land on which a property was built because there was in existence a building contract for the works between the claimant and a company owned by the defendants that for tax reasons had been used as the employer for the project.

587 *[1984] 1 All E.R. 504*.

588 See *Turriff Construction v Regalia Knitting Mills* (1971) 9 B.L.R. 20. See also the decision of the Court of Appeal in *Furmans Electrical Contractors v Elecref Ltd* [2009] EWCA Civ 170, [2009] T.C.L.R. 6.

589 *Benedetti v Sawiris* [2013] UKSC 50, [2014] A.C. 938 at [9].

590 *Planchè v Colburn* (1831) 8 Bing 14; *Appelby v Myers* (1867) L.R. 2 C.P. 651 at 659; *Lodder v Slavey* [1904] A.C. 442 at 453, PC.

591 Keating on Construction Contracts, 11th edn (2021), paras 9-060—9-062.

592 *Bank of Boston v European Grain* [1989] A.C. 1056, 1098, HL; *Photo Production v Securicor* [1980] A.C. 827, 849.

593 *Greenmast Shipping v Jean Lion (The Saronikos)* [1986] 2 Lloyd's Rep. 277; *Laserbore Ltd v Morrison Biggs Wall Ltd* (1993) C.I.L.L. 896.

594 An approach discussed in *Sanjay Lachhani v Destination Canada (UK) Ltd* (1997) 13 Const. L.J. 279, 284.

595 Discussed in *Costain Civil Engineering v Zanen Dredging* (1996) 85 B.L.R. 77.

596 *Benedetti v Sawiris* [2013] UKSC 50, [2014] A.C. 938 at [9].

## **(a) - Sub-contractors**

**Chitty on Contracts 34th Ed.**

**Consolidated Mainwork Incorporating First Supplement**

**Volume II - Specific Contracts**

**Chapter 39 - Construction Contracts**

**Section 6. - Sub-contracts**

### **(a) - Sub-contractors**

#### **Use of sub-contractors**

- 39-180 In the majority of the more substantial construction projects, the main contractor will engage specialist sub-contractors to carry out particular parts of the overall works identified in the main contract. So, in the context of a large commercial development, the main contractor will typically engage a specialist mechanical and electrical (“M&E”) sub-contractor to carry out relevant works and there will be other “works packages” which will similarly be let under the direction of the main contractor or the professional team. In addition, sub-contracting often includes the more basic “building” elements of the work, such as foundation work, bricklaying, carpentry and the like. There are a number of standard forms of sub-contract which are used extensively within different parts of the construction industry in conjunction with particular standard forms of main contract. Sub-contractors are often liable for losses up the contractual chain pursuant to indemnity clauses. In *Greenwich Millennium Village Ltd v Essex Services Group*,<sup>597</sup> the Court of Appeal found that an indemnity clause in a contract between a sub-contractor and its labour only sub-sub-contractor operated to indemnify the sub-contractor in respect of a loss partly caused by its own negligence in failing to spot defects in works. This was because it was held as a matter of commercial common sense that is how the wording of the clause should be construed, notwithstanding the absence of clear words indicating such an intention.

#### **Standard forms—civil engineering**

- 39-181 In the civil engineering context, the CECA (originally FCEC) form of sub-contract (also known as the “blue form”) was designed for use in conjunction with the ICE Conditions of Contract, up

to the 7th edition, and has been widely used.<sup>598</sup> The form will continue to be used in conjunction with the ICC Form. In a number of decisions the courts have considered ways in which the CECA form allows the sub-contractor to have the benefit (in a broad sense) of matters which are commercially relevant to the sub-contractor but occur between the employer and the main contractor. In *Mooney v Boot*<sup>599</sup> the plaintiff carried out certain drainage works under the blue form for the defendant main contractor. The main contractor was subsequently paid a lump sum settlement by the employer in respect of claims which included a claim for delay and disruption to drainage works. The Court of Appeal decided that the words “such contractual benefits … as may be claimable” in cl.10(2)<sup>600</sup> of the sub-contract meant that the sub-contractors could attach to such contractual benefits as may be claimed by the main contractor in good faith, and were not confined to such benefits as become due under the main contract, so that they included any unapportioned settlement windfall. In *Redland Aggregates v Shepherd Hill Engineering*<sup>601</sup> the Court of Appeal considered the interrelation between the arbitration clause under the FCEC sub-contract (cl.18) and the ICE main contract (cl.66). The practical effect of that decision is that all three parties may join in a single arbitration, but where the main contractor is unwilling or unable to proceed with a joint arbitration in the manner contemplated by cl.18(2) FCEC, then the main contractor will not be able to prevent the sub-contractor from proceeding with its own arbitration under cl.18(1).

## Standard forms—building

- 39-182 In the context of building contracts, there are a number of standard forms of sub-contract available. The particular form selected will also depend upon whether the sub-contractor is domestic and selected by the contractor, or nominated on behalf of the employer. As with engineering sub-contracts, standard forms of building contract raise issues as to the extent to which the sub-contractor can rely on events under the main contract. In *Birse Construction v Co-operative Wholesale Society*<sup>602</sup> the Court of Appeal considered the relationship between the JCT Standard Form 1963 (Private with Quantities) main contract and a sub-contract substantially in the form of the NFBTE/FASS/BEC Form of Sub-Contract 1963 in the context of “name borrowing”. It was held that it was implicit in the JCT scheme of main contract and sub-contract that where, in an arbitration under the main contract, the arbitrator made an award of a sum which should have been certified as due under the sub-contract, that sum was to be treated under the sub-contract as duly certified, so that the award became binding in the arbitration under the sub-contract.

## No right to direct payment

- 39-183 In the absence of any provisions in the main contract to the contrary, the rules in relation to privity of contract will mean that the contractual relationship between the employer and the main contractor and between the main contractor and the sub-contractor will be quite distinct

and separate.<sup>603</sup> It follows that, in the absence of a valid assignment from the contractor, the sub-contractor will not be able to sue the employer for goods supplied or work done under his sub-contract with the main contractor. Accordingly, in *Hampton v Glamorgan CC*<sup>604</sup> a builder contracted with a council to build a school in accordance with the specification and other documents contained in the contract. Part of the contract works comprised the provision of low pressure heating apparatus, and a specialist sub-contractor was asked to provide a scheme for this part of the works. During the course of the works, the builder paid the sub-contract on account, but was eventually unable to pay the balance so that sub-contractor sued the council. It was held that on a true construction of the building contract there was no privity between the sub-contractor and the council, so the sub-contractor's claim failed.<sup>605</sup> If the employer (following the demise or failure of the main contractor) gives an verbal assurance to the sub-contractor that he will be paid if he completes his work, then it is possible that such action could be construed as an enforceable promise to pay,<sup>606</sup> as opposed to a guarantee which may be unenforceable.<sup>607</sup> Equally, a direct instruction by the employer to the sub-contractor may be construed as a promise to pay the sub-contractor.<sup>608</sup> In each case, it is a question of construction of the contract as to what rights and obligations have been conferred, or imposed, on the parties.<sup>609</sup>

## Direct liability for default

- 39-184 The employer will generally have no right of recourse against the sub-contractor for defects in that sub-contractor's work. However, a direct right of recourse may be created by use of a collateral warranty. These devices are widespread in the construction industry and their use is by no means limited to sub-contractors. Their subject matter may extend to compliance with design and programme requirements, as well as quality (see further section (b) below). The possibility of direct recourse is further subject to the effect of the Contracts (Rights of Third Parties) Act 1999.<sup>610</sup>

## Footnotes

597 [2014] EWCA Civ 960.

598 The edition of July 1998 was intended for use with the sixth edition of the ICE Conditions but has been reprinted with amendments (April 2001) for use with the seventh edition. A similar form (also reprinted April 2001) is intended for sub-contracts under the ICE Design and Construct Conditions.

599 (1996) 80 B.L.R. 66, CA.

600 "On receiving any such contractual benefits from the Employer (including any extension of time) the Contractor shall in turn pass on to the Sub-Contractor such proportion if any thereof as may in all the circumstances be fair and reasonable".

- 601 [1999] *B.L.R.* 252, *CA*; affirmed by the House of Lords, [2000] *1 W.L.R.* 1621, [2000] *B.L.R.* 385.
- 602 (1997) 84 *B.L.R.* 58, *CA*.
- 603 *Scobie & McIntosh Ltd v Clayton Bowmore Ltd* (1990) 49 *B.L.R.* 119, 129–130.
- 604 [1917] *A.C.* 13, *HL*.
- 605 [1917] *A.C.* 13, 21.
- 606 *Smith v Rudhall* (1862) 3 *F. & F.* 143; *Conrad v Kaplan* (1914) 18 *D.L.R.* 37.
- 607 *Poucher v Treahey* (1875) 37 *U.C.R.* 367.
- 608 *Dixon v Hatfield* (1825) 2 *Bing.* 439.
- 609 *Actionstrength Ltd v International Glass Engineering IN.GL.EN SpA* [2003] *UKHL* 17, [2003] 2 *A.C.* 541; and *Brican Fabrications Ltd v Merchant City Developments Ltd* [2003] *B.L.R.* 512 Court of Session.
- 610 The case of *Junior Books v Veitchi* [1983] 1 *A.C.* 520 also remains as an unlikely but possible route to liability, in the tort of negligence, but on its own facts. In that case, the House of Lords refused to strike out a claim for economic loss brought by an employer against a nominated sub-contractor, in respect of defects in the flooring resulting from negligence of the sub-contractor. While the dissenting judgment of Lord Brandon received specific approval in *D & F Estates v Church Commissioners* [1989] *A.C.* 177, the case has not been disapproved and is now to be regarded, it appears, as based on the existence of a special relationship, equivalent to contract: see *Murphy v Brentwood DC* [1991] 1 *A.C.* 398, 466, 481. See above, Vol.I, para.3-071.

## **(b) - Nomination**

**Chitty on Contracts 34th Ed.**

**Consolidated Mainwork Incorporating First Supplement**

**Volume II - Specific Contracts**

**Chapter 39 - Construction Contracts**

**Section 6. - Sub-contracts**

### **(b) - Nomination**

#### **Meaning**

- 39-185 This refers to a practice which has evolved over many years, initially in the building industry, whereby a sub-contractor is selected or “nominated” by or on behalf of the employer to carry out designated work, usually of specialist nature. The objective is to ensure that particular items of work are executed by specialists to known standards. Nomination has traditionally been applied to elements such as lifts and mechanical services within buildings. Appropriate contractual devices have evolved whereby the work in question, usually designated as a Prime Cost or PC sum in the bill of quantities, is required to be executed by a sub-contractor to be selected and notified to the main contractor. The sub-contract price will be negotiated by or on behalf of the employer. The main contractor will be presented with a “nomination” instruction in which all the major terms of the sub-contract are specified. For the protection of the main contractor, the standard forms have traditionally provided for certain terms to be included in the nominated sub-contract. The prospective sub-contractor must also undertake to carry out the work within a period conformable with the requirements of the main contract. Upon acceptance of a nomination by the main contractor, the employer drops out of the picture, leaving the prospective sub-contract parties free to negotiate any outstanding terms. The main contractor subsequently receives payment due in accordance with the nomination, in place of the PC sum. The main contractor is usually entitled additionally to a stipulated level of profit and/or discount on the sums paid. Nomination under JCT forms of contract progressively lost its advantages as a result of limitations on the liability of the main contractor and, as a result, was removed from JCT forms in 2005. It remains in other standard forms which have not so qualified the main contractor’s liability; and it may be found that the principles developed in the cases apply to other ad hoc contracts where the employer retains the right to select or approve sub-contractors, even though not called nomination.

## Effect on privity rule

- 39-186 It is an important feature of nomination that there is no transgression of the privity rule. Neither the employer nor the architect assumes any responsibility towards the nominated sub-contractor, as to payment or otherwise, nor does the nominated sub-contractor undertake, via the nomination system, any obligation towards the employer (but see below). This is so even though, as is commonly the position, the prospective nominated sub-contractor has performed and is intended to perform design work. Where such design work is carried out prior to and as part of the tendering process for the Prime Cost work, the product of the successful design will be incorporated into the nomination, and will take effect as an instruction of the architect. Where subsequent design work, including the provision of necessary construction details, is carried out by the nominated sub-contractor after the sub-contract has been entered into, the status of the design information so produced is uncertain. Where the main contract includes design responsibility, such information may be regarded as being provided pursuant to such responsibility. Where this is not the case, the status of design information remains uncertain. The question requires to be addressed in order to determine responsibility for such information being provided late and causing delay. The standard forms contain a number of express provisions relevant to these issues.

## Direct warranties

- 39-187 These difficulties have been regulated, to some extent, by the development of a variety of direct or “collateral” warranties for use between the employer and the nominated sub-contractor. These may consist simply of undertakings by the sub-contractor in relation to design services; or there may be parallel obligations undertaken by the employer to operate the direct payment provisions under the main contract in favour of the nominated sub-contractor, if not paid. The origin of warranties may be traced to the case of *Shanklin Pier v Detel Products*.<sup>611</sup> During the 1970s and 1980s<sup>612</sup> the use of warranties was somewhat eclipsed by the apparent availability of remedies in tort. The law having now been clarified,<sup>613</sup> warranties remain the prime source of establishing direct liability between parties otherwise displaced in the contractual chain, typically employer and sub-contractor.<sup>614</sup> As regards design, such warranties typically undertake a direct obligation to the employer to carry out such design services as are required. The warranty will usually cover past and future design work, and may include an obligation timeously to provide such details as may be required by the main contractor. In most cases the warranty is expressed, not in absolute terms, but as an undertaking to exercise (and to have exercised) reasonable skill and care, commensurate with the ordinary duty undertaken by the architect. Such a warranty, therefore, fills a lacuna in the network of obligations undertaken in relation to design and construction, but creates a theoretical gap in respect of non-negligent design error or delay.

## Advantage of nomination

- 39-188 The nomination system can be seen as providing for the employer both the advantage of specialist and selected materials and components, while preserving the overall responsibility of the main contractor. Additionally, the employer has the advantage of specialised design services with a direct right of action against the designer being created by warranty. Under the JCT (and former RIBA) Standard Forms of Building Contract (prior to the 2005 suite), separate provision was made for nominated sub-contractors and nominated suppliers.<sup>615</sup> The 1998 edition of the forms continued this distinction, nominated sub-contractors being the subject of a lengthy and detailed code.<sup>616</sup> In traditional forms of building contract it has not been uncommon to find the value of nominated work amounting to one third or more of the total building cost. Nominated sub-contracting has been used in civil engineering, although to a lesser extent. The 5th edition of the ICE Conditions included, for the first time, fully detailed provisions governing nomination,<sup>617</sup> which is continued with some modification into the 6th and 7th editions and the ICC Form.<sup>618</sup> As a result of various decisions of the court and of the drafting bodies, nomination has become less utilised in favour of “listed” sub-contractors (see below).<sup>619</sup> The JCT SBC 2005 and 2011 forms do not provide for nominated sub-contractors at all; but now provides instead for the “three person” procedure.<sup>620</sup>

## Re-nomination

- 39-189 A number of questions concerning liability for performance of a nominated sub-contractor or supplier remained uncertain under the Standard Forms until resolved by decisions of the courts. Notably, the House of Lords decided in *NW Metropolitan Hospital Board v Bickerton*<sup>621</sup> that where a nominated sub-contractor repudiated by failing to complete or failing to perform, the architect was obliged to re-nominate so that the employer would bear the increased cost of carrying out the work. The decision was given in relation to the JCT 1963 edition but subsequently given contractual effect both in later editions of the JCT Form<sup>622</sup> and in the ICE Conditions.<sup>623</sup> It was further held by the Court of Appeal in *Fairclough v Rhuddlan BC*<sup>624</sup> that, where a nominated sub-contractor repudiated, the main contractor was not responsible for defects in the nominated work discovered after repudiation. The re-nomination had, therefore, to include for the remedial work, necessarily at the employer’s cost.

## Delay

- 39-190 As part of the bargain by which the employer acquired the right to nominate, successive editions of the Standard Form of Building Contract have exonerated the main contractor from responsibility for delay caused by a nominated sub-contractor.<sup>625</sup> The effect of this was not merely to relieve the main contractor but, in effect, to leave the sub-contractor without liability for its own delay, save for any loss suffered by the main contractor through such delay. The employer's loss may be covered by a direct warranty (see above) but recovery will be subject to proof by the employer of fault, rather than the onus falling on the sub-contractor to prove entitlement to extension of time. In practice, the effect of exonerating the main contractor from liability for delay by a nominated sub-contractor has usually meant that such loss could not be recovered. However, where delay resulted from the need to re-nominate a replacement sub-contractor, it was held by the House of Lords in *Percy Bilton v GLC*,<sup>626</sup> that such delay was not the responsibility of the employer, not being caused by his fault nor covered by any of the express provisions of the contract. Furthermore, once a nominated sub-contractor has achieved apparent completion, the subsequent discovery of latent defects does not constitute delay on the part of a nominated sub-contractor.<sup>627</sup> These decisions apply only to the JCT Form of Contract prior to the 2005 suite. Other major Standard Forms do not provide a direct right of extension in respect of delay by a nominated sub-contractor. In the absence of such a provision, the general rule is that the main contractor remains liable and must pass on any such liability to the sub-contractor.

## Listed sub-contractors

- 39-191 The difficulties surrounding nomination, as outlined above, led to employers seeking alternative means of selection, not involving any reduction in the liability of the main contractor. The JCT suite of contracts have since 2005 omitted the previous formal procedures associated with nominated sub-contractors as well as provisions for "listed" or "specified" sub-contractors which were also found in earlier form of the contract. The 2016 forms provide, in their place, a "three-person procedure". Thus, under cl.3.8 of JCT Standard Form of Contract 2016 the contract bills may list not fewer than three persons from whom the contractor may select at his sole discretion a sub-contractor to carry out the work described in the bills.<sup>628</sup>

## Footnotes

611 [1951] 2 K.B. 854.

- 612 See *Dutton v Bognor Regis UDC* [1972] 1 Q.B. 373; and *D & F Estates v Church Commissioners* [1989] A.C. 177.
- 613 *Murphy v Brentwood DC* [1991] 1 A.C. 398.
- 614 The possible use of the Contracts (Rights of Third Parties) Act 1999 to fill gaps in the contractual chain has been eschewed generally by the construction industry in favour of continued use of warranties.
- 615 See 1939 edition, cl.22, 23 and 1963 edn, cl.27, 28.
- 616 JCT 98 cl.35 and see also cl.36.
- 617 See cl.58, 59 A, B, C.
- 618 See cl.58, 59.
- 619 The continuing utility of nomination has, however, been recognised by the inclusion of such provisions in more modern forms such as GC/Works/1 (1998) and FIDIC (1998), generally without relieving the main contractor of overall responsibility, as provided by earlier forms.
- 620 See below, para.39-191.
- 621 [1970] 1 W.L.R. 607.
- 622 JCT 98 cl.35.
- 623 ICE 5th edn cl.59B.
- 624 (1985) 30 B.L.R. 26.
- 625 See above, para.39-185. See JCT 1963 edn cl.23(g) and JCT 98 cl.25.4.7.
- 626 [1982] 1 W.L.R. 794.
- 627 *Jarvis v Westminster Corp* [1970] 1 W.L.R. 637.
- 628 See generally Keating on Construction Contracts, 11th edn (2021) at paras 20-219—20-221.

# **(a) - Engineers, Architects and Quantity Surveyors**

**Chitty on Contracts 34th Ed.**

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**Volume II - Specific Contracts**

**Chapter 39 - Construction Contracts**

**Section 7. - The Contract Administrator**

**(a) - Engineers, Architects and Quantity Surveyors**

## **Introduction**

- 39-192 This section deals with professionals who are appointed under the terms of a construction contract, not as a party to the contract, but to perform designated functions. Engineers, architects, surveyors and other professionals are appointed under standard forms, and other bespoke contracts, to exercise the powers and duties assigned to a third party, variously designated as the supervising officer, project manager, contract administrator, employer's agent or, more traditionally, the engineer or architect. The appointment may be of an individual or, more usually, a professional partnership. There may also be a corporate or ex-officio appointment, e.g. a borough surveyor. In the case of a partnership or company, the contract may require identification of the individual who is to act. Otherwise, the question of how a partnership or corporation is to form a professional opinion appears not to have been the subject of any judicial consideration. A common abuse of the standard forms is for the corporate employer to be appointed also as the contract administrator, including the role of giving a professional opinion on matters of difference. Such procedure, while open to criticism, has been upheld by the courts on the basis of a concession, accepted by the court, that "in all its judgments, decisions and certificates the employer was obliged to act honestly, fairly and reasonably".<sup>629</sup> Later authority, however, has cast doubt on whether such an appointment can be effective.<sup>630</sup> The ICE Conditions of Contract for Minor Works required the employer to appoint "a named individual to act as Engineer" and the same wording is adopted in the ICC Form.<sup>631</sup> The roles of the most prominent professionals likely to be encountered under standard forms of contract are described below.

## Architect

- 39-193 An architect, in order to practise under the title, must be registered by the Architect's Registration Council pursuant to s.20 of the Architects Act 1997.<sup>632</sup> In addition to having an ongoing responsibility for the design<sup>633</sup> and often for obtaining all necessary planning and other permissions for the works,<sup>634</sup> the architect, under many standard forms of building contract, will be responsible for the supervision and monitoring of the works, and this will often include the issuing of instructions, variations and certificates. In relation to the grant of certificates, the assessments which the architect will be required to make call for the formation of an opinion<sup>635</sup> which will often be subjective and open to interpretation. However, the architect will owe a duty to his client, the building owner, to use reasonable care in issuing his certificates.<sup>636</sup>

## Engineer

- 39-194 This term is used generically in that different types of construction contract will contemplate people with qualifications from different specialist bodies (e.g. the Institution of Mechanical Engineers or the Institution of Civil Engineers). Typically, the engineer will carry out a similar range of functions under engineering contracts as is performed by the architect in the context of building contracts.

## Quantity surveyor

- 39-195 A quantity surveyor may have different functions at different stages in a construction contract, but will generally be concerned with the quantity (measure) and value of work. Before commencement of the works, the quantity surveyor will typically be involved in drawing up the bills of quantities (for the employer) or pricing the bills of quantities (for the contractor). During the contract works, a quantity surveyor will be engaged in the preparation and submission of interim applications (for the contractor), or in measuring and valuing work (either as a professional named in the contract,<sup>637</sup> or informally for the employer).<sup>638</sup>

## Project manager

- 39-196 A project manager will often be used by the employer in complex construction projects to organise and co-ordinate the activities of the contractor and the professional team (i.e. architect, quantity

surveyor, specialist engineers, etc.). However, the scope of the project management function will be shaped by the particular character of the project involved, so that any general definition of the role is unlikely to assist on the question what, on a true construction of the terms of a particular contract, are the rights and obligations of the parties.<sup>639</sup> It has been held that a project manager had a duty to his client to ensure that contractor's liability insurance was in place.<sup>640</sup>

## Footnotes

- 629 *Balfour Beatty v DLR* (1996) 78 B.L.R. 42. The basis of the case was the decision in *Northern Regional Health Authority v Crouch* [1984] Q.B. 644, now reversed by *Beaufort Developments Ltd v Gilbert-Ash NI Ltd* [1999] 1 A.C. 266, HL.
- 630 *Scheldebouw BV v St James Homes (Grosvenor Dock) Ltd* [2006] EWHC 89 (TCC), [2006] B.L.R. 113.
- 631 ICE Conditions cl.2.1 The ICC Form cl.2(2)(a) requires, where the engineer is not an individual, that a chartered engineer be named to act on behalf of the engineer.
- 632 See ss.118–125 of the **Housing Grants, Construction and Regeneration Act 1996** in relation to the regulation of architects. For a discussion of the architect and his role, see: *Munckenbeck and Marshall v Kensington Hotel* (1999) 15 Const. L.J. 231.
- 633 *Brickfield Properties Ltd v Newton* [1971] 1 W.L.R. 862, CA; *University of Glasgow v William Whitfield* (1988) 42 B.L.R. 66; *New Islington and Hackney Housing Association Ltd v Pollard Thomas and Edwards Ltd* [2001] B.L.R. 74.
- 634 In some cases an architect may be under a duty to take some steps to ascertain the financial viability of tenderers, as in *Partridge v Morris* (1995) C.I.L.L. 1095.
- 635 See JCT SBC 2011 cl.4.9.
- 636 *Arenson v Arenson* [1977] A.C. 405, HL; *Michael Salliss & Co v Calil and William F Newman* (1987) 13 Con. L.R. 68; see also *Pacific Associates v Baxter* (1988) 44 B.L.R. 33, [1990] 1 Q.B. 993, CA and *Galliford Try Infrastructure Ltd v Matt McDonald Ltd* [2008] EWHC 1570 (TCC), 120 Con L.R. 1.
- 637 As provided for by art.4 of the Articles of Agreement used in conjunction with JCT.
- 638 In *Dhamija v Sunningdale Joineries Ltd* [2010] EWHC 2396 (TCC), [2011] P.N.L.R. 9, it was held that ordinarily there would be no implied term of a quantity surveyor's retainer to the effect that there was a positive obligation to ensure that only properly executed work was valued or to inspect work being valued to consider whether the same were properly executed or not; but there would be an implied obligation, where the quantity surveyor was aware of the related terms of the building contract, to take reasonable care to value only properly executed work (per Coulson J at [18]–[26]).
- 639 *Pozzolanic Lytag Ltd v Bryan Hobson Associates* [1999] B.L.R. 267; and *Costain Ltd v Bechtel Ltd* [2005] EWHC 1018 (TCC), [2005] T.C.L.R. 6.
- 640 *Pozzolanic Lytag Ltd v Bryan Hobson Associates* [1999] B.L.R. 267.

## **(b) - Role Under Contracts**

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**Section 7. - The Contract Administrator**

### **(b) - Role Under Contracts**

#### **Dual role**

- 39-197 The role of professionals who may be identified in construction contracts will depend upon a true construction of the terms contained in the particular contract.<sup>641</sup> Generally, the role will be divided between actions taken as the employer's agent, where the contract administrator must act in the employer's best interest, and those involving a professional opinion. In the latter case, the role of the architect has been described in the following terms:

“The building owner and the contractor make their contract on the understanding that in all such matters the Architect will act in a fair and unbiased manner and it must therefore be implicit in the owner's contract with the Architect that he shall not only exercise due care and skill but also reach such decisions fairly, holding the balance between his client and the contractor.”<sup>642</sup>

Such duty is sometimes said to be “independent”, but the term is unnecessary and potentially misleading given that the contract administrator is invariably employed by, and can therefore be dismissed by, the employer.<sup>643</sup> The proper analysis, it is submitted, is that the employer undertakes that a person will be appointed (or re-appointed as necessary) who is capable of performing the actions required by the contract. However, the employer does not promise that the actions will be performed.<sup>644</sup>

## Action as agent

- 39-198 When giving instructions for a variation, the contract administrator acts as the employer's agent, and requires appropriate authority. Likewise, certain instructions involving consequences akin to variation of the works involve acting as agent, e.g. an instruction given under cl.13 of the ICC Form (see above, s.3(b)). An instruction nominating a sub-contractor will be given as the employer's agent. In matters of approval of the work for compliance with the contract requirements, the contract administrator also acts as the employer's agent, being under a duty to ensure that the employer does not suffer loss through certification of defective work or materials. In cases where approval, or "satisfaction" are a matter of professional judgment, the contract administrator's role is likely to be that of reaching a decision "fairly, holding the balance between his client and the contractor" (see above).

## Authority

- 39-199 Where the contract terms empower the contract administrator to take particular actions, his unqualified appointment by the employer necessarily involves authority, by holding out, to exercise all such power. In addition, the contract administrator will have an implied authority to do other things reasonably necessary and ancillary to those matters for which express authority is given.<sup>645</sup> It follows that any limitation of authority to exercise the powers set out in the contract must be notified to the contractor, if the employer is to avoid being bound. In practice, there may be a limitation on the authority of the Contract Administrator to perform functions which are necessary to the operation of the contract, such as granting extensions of time. For this reason, many standard forms expressly require any limitation upon the authority of the Contract Administrator to be stated.<sup>646</sup>

## Acting impartially

- 39-200 Actions of the contract administrator which are to be taken having regard to the interests of both parties, involving the giving of a professional opinion, are sometimes termed "impartial" decisions. Actions falling within this category include valuing the works for the purpose of issuing interim and final payment certificates, granting extensions of time, accepting the contractor's programme,<sup>647</sup> giving a certificate of default as part of the termination procedure<sup>648</sup> and many other specific instances. Even though acting impartially, the contract administrator acts pursuant to his duty to the employer, under the contract of employment. The employer, in turn, has an

obligation under the construction contract to appoint a contract administrator who can carry out the duties required under the contract (see above).<sup>649</sup>

## Challenging the contract administrator

- 39-201 Under a traditional standard form construction contract, the decision of the Contract Administrator is binding, subject to challenge by arbitration or litigation, which, in some cases could not be brought until completion of the works. The position is also now radically altered by the [Housing Grants, Construction and Regeneration Act 1996](#) which provides, in respect of construction contracts within the Act, for a right of adjudication at any time.<sup>650</sup> The effect is that either party now<sup>651</sup> may immediately challenge any decision of the contract administrator. The adjudicator's decision is to be binding until the dispute is finally determined by legal proceedings or arbitration.<sup>652</sup> Under the ICE Conditions provision was made, after the decision of the contract administrator, for a "second stage" decision on matters of dispute or difference, which were required to be referred to the engineer for his decision before a further challenge by arbitration<sup>653</sup>; and under the FIDIC Conditions (1998 edition), disputes are to be referred, after an initial decision, to a Dispute Adjudication Board.<sup>654</sup> Where the contract in question is subject to the Act, the existence of a dispute gives rise to an immediate right to refer the matter for adjudication, followed by arbitration or litigation, thus rendering the engineer's decision otiose. The ICE Conditions were initially amended in an attempt to avoid any "dispute" arising until after the matter had been referred to the engineer, so as to postpone the right to refer a dispute for adjudication. This was palpably contrary to [s.108\(2\)\(a\) of the Act](#), by which the contract must enable the parties to give notice "at any time of his intention to refer a dispute to adjudication". The amendment was subsequently withdrawn and the ICE Conditions and now the ICC Form thus contain no provision for a further decision of the engineer, and provide for adjudication at any time.
- 39-202 Decisions of the contract administrator under the main contract are frequently referred to in forms of sub-contract, where the sub-contractor may be bound to comply with instructions given under the main contract. Other provisions may link the rights of the sub-contractor to payment, extensions of time and other matters to decisions given by the contract administrator under the main contract. The question arises whether the sub-contractor has the right to challenge such decisions under the main contract and if so in what manner.<sup>655</sup> In the light of *Beaufort Developments v Gilbert-Ash NI*<sup>656</sup> it is thought that there would be no difficulty in challenging such decisions under a sub-contract, in the absence of clear words giving the decisions binding effect. Any such challenge would also be subject to the right of adjudication at any time. Difficulties may nevertheless arise where the decision is also challenged under the head contract, unless the proceedings can be joined.

## Project manager and employer's agent

- 39-203 These terms are met in particular types of contract, e.g. the new Engineering and Construction Contract. The particular role created is entirely dependent upon the conditions of contract. Usually, such appointment indicates a person or body appointed to act solely on behalf of the employer. In the case of the project manager, there may be additional management functions allowing greater control and direction of the works than normally exercised by a contract administrator.

## Footnotes

- 641 For a consideration of the duties of members of a large professional team in a particular context, see *Chesham Properties Ltd v Bucknall Austin Project Management Services Ltd [1996] 53 Con. L.R. 22*.
- 642 *Sutcliffe v Thackrah [1974] A.C. 727, 737*.
- 643 See the description of the architect in *Beaufort Developments Ltd v Gilbert Ash Ltd [1999] 1 A.C. 266, 276*, per Lord Hoffmann (“... He is a professional man but can hardly be called independent”). See also: *John Holland Construction and Engineering Ltd v Majorca Products (Supreme Court of Victoria, 26 July 1996) reported in (2000) 16 Const. L.J. 114*.
- 644 See *Perini Corp v Commonwealth of Australia (1969) 12 B.L.R. 82, SC NSW*.
- 645 See the decision of the Court of Appeal in *Naylor & Naylor v JL Builders & Son [2009] EWCA Civ 1621* where it was held that the contractual functions of an agent were not to extend beyond what he was expressly instructed to do or what was reasonably incidental thereto.
- 646 See FIDIC (1998 edn) cl.3.1 and ICC Form cl.2(1)(b).
- 647 ICC Form cl.14(2).
- 648 ICC Form cl.65(1), JCT 2011 cl.8.4.
- 649 For an analysis of the duties of a “Construction Manager”, where those duties involve the issue of certificates, see the judgment of Jackson J in *Scheldebow BV v St James Homes (Grosvenor Dock) Ltd [2006] EWHC 89 (TCC), [2006] B.L.R. 113*.
- 650 s.108.
- 651 Provided the contract was entered into on or after 1 May 1998.
- 652 s.108(3). For discussion of the status of the adjudicator’s decision, see *Macob Civil Engineering Ltd v Morrison Construction Ltd [1999] 3 B.L.R. 93*; and *Outwing Construction Ltd v H Randell and Son Ltd [1999] B.L.R. 156*.
- 653 ICE 7th edn cl.66.
- 654 FIDIC (1998 edn) cl.20.2.
- 655 See *Modern Engineering v Miskin [1981] 1 Lloyd's Rep. 135; (1980) 15 B.L.R. 82* where the point was decided by an arbitrator, who was then removed for misconduct.

656 [1999] 1 A.C. 266.

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## **(c) - Liability of Contract Administrator**

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**(c) - Liability of Contract Administrator**

### **Basis of liability**

- 39-204 The contract administrator owes duties under his contract of appointment to the employer. He will be liable for the negligent exercise of those duties, whether involving acts as the employer's agent or acts performed impartially.<sup>657</sup> Earlier authority suggested that the contract administrator might have immunity from suit on the basis that acting impartially involved a "judicial" element.<sup>658</sup> It is clear that no such immunity attaches to the ordinary process of certifying but the possibility remains of actions under particular contracts being regarded as of a "judicial" nature. The contract administrator will be additionally liable for breach of authority for actions done without appropriate authority where the employer is bound by virtue of the terms of the main contract.

### **Standard of duty**

- 39-205 The contract administrator owes a duty in contract, implied if not express, to act with reasonable skill and care.<sup>659</sup> The duty of a professional man in a construction context (albeit involving a claim in tort) was considered in *Eckersley v Binnie & Partners*<sup>660</sup> where Bingham LJ (dealing with the liability of engineers who had failed to provide against the possibility of methane migration into a water transfer pipe and dissenting in the result from the majority of the Court of Appeal) said that a professional man:

"... must bring to any professional task he undertakes no less expertise, skill and care than other ordinary competent members would bring but need bring no more. The

standard is that of the reasonable average. The law does not require of a professional man that he be a paragon combining the qualities of polymath and prophet.”

In *Greaves v Baynham Meikle & Partners*<sup>661</sup> an engineer was held liable on the basis that work under his design was not fit for purpose, despite there being no findings of negligence. The particular circumstances of the case were that the engineer was employed by a design and build contractor who was himself assumed to be liable on a fitness for purpose basis. The decision has not been followed in similar circumstances,<sup>662</sup> and may be regarded as limited to its own facts. Most design and build contracts now limit the contractor’s design responsibility to that which would be assumed by a separately engaged design professional.<sup>663</sup> In the absence of such limitation, however, there is likely to be an implied term of fitness for purpose which could render the design and build contractor similarly liable.<sup>664</sup> It is also to be noted that where design work is carried out by the contractor under the FIDIC Conditions the works are expressly required to be “fit for the purposes for which the works are intended”.<sup>665</sup>

## Liability in particular circumstances

- 39-206 In circumstances where construction projects have become far more complex in recent years, there are many professionals in addition to the traditional architect/engineer to take responsibility for particular features of a project. Again, the liability of such professionals will depend upon their terms of engagement and the responsibilities assumed by them in fact. In *Pozzolanic Lytag Ltd v Bryan Hobson Associates*<sup>666</sup> it was held that a project manager had a duty to his client to ensure that all adequate insurance arrangements for the liability of a building contractor were in place, as required by the contract for the proposed project. In the same way, decisions in relation to the liability of architects have indicated the increasing range of functions performed by architects, such as decisions to proceed with a given development<sup>667</sup> and advice given on the acceptability of tenderers.<sup>668</sup> However, the scope of an architect’s obligations will always depend upon his brief and all the circumstances of the project, so that in *Tesco Stores Ltd v The Norman Hitchcox Partnership Ltd*<sup>669</sup> the court decided that the architect did not owe any duty towards the employer to inspect the supermarket shell works during or at the end of their construction merely as a consequence of the architect’s retainer to design those works.

## Liability to third parties

- 39-207 Engineers, architects and surveyors may incur liability to third parties under the general law of tort<sup>670</sup> and under the special circumstances envisaged by the law relating to negligent

misstatement.<sup>671</sup> The important distinction between these heads of liability is that the former is generally limited to a liability in respect of physical damage, including personal injury,<sup>672</sup> while the latter may include purely economic loss, as now understood.<sup>673</sup> Of particular interest is the possible liability of the contract administrator to the building contractor.<sup>674</sup> In *Pacific Associates v Baxter*,<sup>675</sup> the plaintiff contractor sought to recover damages against the defendant engineer, who had rejected the contractor's claim under the contract. In subsequent arbitration proceedings, the claim succeeded but was settled for a small proportion of the contractor's loss. The contractor sought to recover the balance from the engineer on the basis of negligent administration of contract. The claim was struck out as disclosing no reasonable cause of action, on the basis that the defendant had entered into a contractual relationship with the employer, against whom the contractor had separate rights to bring arbitration proceedings. There had been no voluntary assumption of responsibility to the plaintiff and no duty upon the engineer had been established. The main contract, additionally, contained a disclaimer by which the defendant declined to accept any responsibility for the plaintiff, but the conclusions of the Court of Appeal may be seen as standing independent of such disclaimer.<sup>676</sup>

## Footnotes

657 *Sutcliffe v Thackrah* [1974] A.C. 727.

658 See *Chambers v Goldthorpe* [1901] 1 K.B. 624, overruled by *Sutcliffe v Thackrah* [1974] A.C. 727. But an express contractual term requiring a "first class" service has been held to be more onerous than a duty to exercise reasonable skill and care: *Conoco Phillips Petroleum Co Ltd v Snamprogetti Ltd* [2003] All E.R. (D) 134.

659 *Bolam v Friern Hospital Management Committee* [1957] 1 W.L.R. 582; and see *Holland Hannon & Cubitts v WHTSO* (1985) 35 B.L.R. 1.

660 (1988) 18 Con. L.R. 1.

661 [1975] 1 W.L.R. 1095.

662 *George Hawkins v Chrysler* (1986) 38 B.L.R. 36.

663 ICE Design and Construction Conditions cl.8(2).

664 *IBA v EMI & BICC* (1980) 14 B.L.R. 1 and 11 B.L.R. 29, CA; *Viking Grain Storage v TH White Installations* (1985) 3 Con. L.R. 52.

665 FIDIC Plant and Design-Build Conditions (Yellow Book), cl.4.1; FIDIC Construction Conditions (Red Book) cl.4.1(c).

666 [1999] B.L.R. 267.

667 *Gable House Estates Ltd v The Halpern Partnership and Bovis Construction Ltd* (1995) 48 Con. L.R. 1.

668 *Partridge v Morris* (1995) C.I.L.L. 1095.

669 (1997) 56 Con. L.R. 42.

670 *D & F Estates v Church Commissioners* [1989] A.C. 177; *DoE v Thomas Bates* [1991] 1 A.C. 499; and *Murphy v Brentwood DC* [1991] 1 A.C. 398.

- 671 *Hedley Byrne v Heller* [1964] A.C. 465.
- 672 See *Clay v Crump* [1964] 1 Q.B. 533; and *Spartan Steel v Martin* [1973] Q.B. 27.
- 673 *Sutherland Shire Council v Heyman* (1985) 60 A.L.R. 1, HC Australia.
- 674 See *Old School v Gleeson* (1976) 4 B.L.R. 103.
- 675 [1990] 1 Q.B. 993.
- 676 See also *South Nation River v Auto Concrete Curb* (1993) 11 Con. L.J. 155 Canada SC but see *John Mowlem v Eagle Star Insurance (No.1)* (1992) 62 B.L.R. 126. Also, in *Leon Engineering Construction v Ka Duk Investments* (1989) 47 B.L.R. 139, the Supreme Court of Canada held that it was arguable that engineers would be liable for negligent misstatement in respect of errors in tender documents.

## **(d) - Contract with Employer**

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**(d) - Contract with Employer**

### **Standard terms**

- 39-208 Contracts for professional services require no formality. The professional bodies, however, issue standard forms of engagement which make detailed provisions as to duties, work stages and payment. Provision may be made for a “scale fee”, which is dependent upon the valuation of the works at various stages. Architects and engineers, at least, are now frequently required to submit lump sum design “tenders”, with the resulting fee being paid in stages to be agreed. Standard conditions of engagement invariably provide for an express duty of reasonable skill and care together with certain exclusions or limitations such as:

“The client shall hold the contractor and not the Architect responsible for the contractor’s management and operational methods and for the proper carrying out and completion of the works and for health and safety provisions on site.”<sup>677</sup>

### **Delegation**

- 39-209 A professional may not delegate design duties without express authority. In *Moresk Cleaners v Hicks*<sup>678</sup> an architect delegated the design of reinforced concrete work to a sub-contractor. It was held that the architect had the option of arranging for the client to employ the specialist designer or of employing the specialist himself, while retaining responsibility for the design. An architect may, however, properly delegate a specialist design process details of which would not be revealed

by the supplier. Thus in *Merton LBC v Lowe*<sup>679</sup> an architect was held to be entitled to delegate the design of a specialist ceiling finish. Waller LJ stated:

“Pyroc were nominated sub-contractors employed for a specialist task of making a ceiling with their own proprietary material. It was the defendant’s duty to use reasonable care as Architects. In view of successful work done elsewhere, they decided that to employ Pyroc was reasonable. No witness called suggested that it was not at the beginning.”

The architects were, however, held liable under their general design responsibility for failing to take adequate steps to remedy defects which subsequently became apparent.

## Continuing duty

- 39-210 A continuing duty to review a design was upheld by the Court of Appeal in *Brickfield Properties v Newton*<sup>680</sup> where Sachs LJ said:

“The Architect is under a continuing duty to check that his design will work in practice and to correct any errors which may emerge. It savours the ridiculous for the Architect to be able to say ‘true my design was faulty, but of course I saw to it that the contractors followed it faithfully’.”

Although there is authority that duties last until completion of the works,<sup>681</sup> it is probably right that duties endure beyond completion. The extent of a continuing post-completion design duty gives rise to serious potential difficulties. In *Eckersley v Binnie*,<sup>682</sup> where an explosion attributed to methane occurred some years after completion of a project, Bingham LJ considered the nature of a duty continuing into the future. He said<sup>683</sup>:

“What is plain is that if any such duty at all is to be imposed, the nature, scope and limits of such a duty require to be very carefully and cautiously defined. The development of the law on this point, if it ever occurs, will be gradual and analogical.”

However, the “continuing” duty to review the design only arises after the initial breach associated with a defective design, when a “trigger event” occurs to put the architect on notice that a review is or may be required.<sup>684</sup>

The extent to which the courts will impose continuing obligations to warn or advise will, in practice, be determined by the manner and extent to which the parties provide for this in their contract.

## Footnotes

- 677 RIBA Standard Form of Appointment (SFA/92), published as an Appendix in Keating on Building Contracts, 6th edn (1995). A similar wording is contained in SFA198 (see App.C to the 7th edition of Keating on Construction Contracts).
- 678 *[1966] 2 Lloyd's Rep. 338.*
- 679 *(1982) 18 B.L.R. 130.*
- 680 *[1971] 1 W.L.R. 862, 873.*
- 681 *Chelmsford DC v Evers (1985) 25 B.L.R. 99, 106; Equitable Debenture Assets Corp v William Moss (1984) 2 Con. L.R. 1, 24.*
- 682 *(1988) 18 Con. L.R. 1.*
- 683 The judgment of Bingham LJ was a dissenting opinion on the question of liability of the engineers, but his observations on the continuing nature of the design obligation, while obiter, are of great significance.
- 684 See *New Islington and Hackney Housing Association Ltd v Pollard Thomas and Edwards Ltd [2001] B.L.R. 74* at 80.

## **(a) - General Principles**

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**Section 8. - Breach and Non-performance**

### **(a) - General Principles**

#### **The basis for a claim for breach**

39-211



In construction contracts, as with contracts generally, it is fundamental to distinguish<sup>685</sup> between claims made under the contract and claims for breach of the contract which are the subject of this section. A breach of contract by party A which has not been excused will give party B a right to claim at least nominal damages simply on the basis that there has been “an infraction of a legal right”.<sup>686</sup> Where B can go further and show that A’s breach of contract is causative of a type of loss which the law will allow, and where the loss claimed is not too remote,<sup>687</sup> then B will be entitled to claim substantial damages.<sup>688</sup> Although an award of damages is a question of fact in the particular case,<sup>689</sup> the broad principle behind any award of damages for breach of contract remains “where a party sustains a loss by reason of a breach of contract he is, so far as money can do it, to be placed in the same situation with respect to damages as if the contract had been performed”.<sup>690</sup> A further principle is that before considering any question of causation or remoteness of damage it is necessary to consider whether the type or kind of loss in respect of which damages are claimed was within the contractual scope of the obligation that has been breached.

691



#### **Mitigation of loss**

39-212

A plaintiff must take all reasonable steps to minimise the loss to him as a result of breach, but the plaintiff is under no obligation to take any step which a reasonable and prudent man would not ordinarily take in the course of his business.<sup>692</sup> The plaintiff need not, for example, take steps which would involve him in complicated litigation<sup>693</sup> or steps which he cannot financially afford.<sup>694</sup> In the context of construction contracts, a failure by the employer (or by the contract administrator on his behalf) to permit the contractor to return to the site to correct minor defects (often referred to as “snagging”) may amount to a failure to mitigate.<sup>695</sup> Likewise, where more substantial defects appear post-completion the employer should consider whether it is reasonable to permit or invite the contractor to carry out repairs. The decision will be a complex matter where the repairs proposed by the contractor are less extensive than those advised by the employer’s expert advisers.<sup>696</sup>

## Betterment

- 39-213 If, following defective work by the builder in breach of contract, the plaintiff takes the step of rebuilding to a higher standard than necessary, or to a standard higher than the building contract, properly performed, would have produced, then the plaintiff must give credit for the element of betterment.<sup>697</sup> However, betterment will not apply where the plaintiff obtains a building which, whilst necessarily newer and better than the defective building, is a reasonable choice of replacement in all the circumstances.<sup>698</sup>

## Causation

- 39-214 For a plaintiff to succeed in his claim for substantial damages, he must show an effective causal connection between breach and loss, and causation will be a matter of fact in each case to be determined by the application of common sense.<sup>699</sup>

**U** causal connection between breach and loss, and causation will be a matter of fact in each case to be determined by the application of common sense.<sup>700</sup> In practical terms, causation is at the core of most construction disputes, since the connection, or possible competing connections, between breach and loss will not be clear-cut, and will be a matter of impression or inference from the primary facts.<sup>701</sup> In *Lamb v Jarvis*<sup>702</sup> the court considered that the defective jointing of pipework by the plaintiff, taken with the defendant’s defective groundworks, had jointly caused leaks which were the damage forming the subject matter of the remedial scheme for which the plaintiff sought payment from the defendant. Faced with the problems of causation and apportionment, it was

held<sup>703</sup> that the court was entitled to arrive at an apportionment between the parties, rather than being bound to arrive at a conclusion on an “all or nothing” basis.<sup>704</sup>

## Footnotes

685 In complex building cases, the distinction can sometimes be in danger of being overlooked: see *McAlpine Humberoak v McDermott International (No.1)* (1992) 58 B.L.R. 1, 22, CA.

686 *The Mediana* [1900] A.C. 113, 116.

687 See the discussion of the rule in *Hadley v Baxendale* (1854) 9 Ex. 341 in McGregor on Damages, 19th edn (2014), paras 8-157 et seq.; and in Keating on Construction Contracts, 10th edn (2016) at paras 9-007—9-016; and also *Balfour Beatty Construction (Scotland) Ltd v Scottish Power Plc*, 1994 S.C. (H.L.) 20; (1994) 71 B.L.R. 20, HL.

688 See also the discussion of the general principles when considering an award of damages in relation to defective premises in *Harrison v Shepherd Homes Ltd* [2011] EWHC 1811 (TCC), 27 Const. L.J. 709, per Ramsey J at [234]–[264].

689 *British Westinghouse Electric & Manufacturing Co Ltd v Underground Electric Railways Co Ltd* [1912] A.C. 673, 688.

690 *Robinson v Harman* (1848) 1 Ex. 850, 855. For other clear expressions of the principle see *Wertheim v Chicoutimi Pulp Co* [1911] A.C. 301, 307; *Monarch SS Co Ltd v Karlhamns Oljefabriker* [1949] A.C. 196 at 220; *Radford v De Frobergville* [1977] 1 W.L.R. 1262, 1268; *DO Ferguson v M Sohl* (1992) 62 B.L.R. 95, 103; *Ruxley Electronics Ltd v Forsyth* [1996] 1 A.C. 344, 365. See also *Fuller and Perdue* (1936-37) 46 Yale L.J. 52, 373.

691 See *South Australia Asset Management Ltd v York Montague Ltd* [1997] A.C. 191; and *Transfield Shipping Inc v Mercator Shipping Inc* [2009] 1 A.C. 61 (on which see further above, Vol.I, paras 29-144 et seq.). For an application of these principles in a construction contract context, see *HOK Sport Ltd v Aintree Racecourse Co Ltd* [2003] B.L.R. 155; *Earl Terrace Properties v Nilsson Design* [2004] B.L.R. 273 and *Hancock v Tucker* [1999] Lloyd's P.N. 814. See also *John Grimes Partnership Ltd v Gubbins* [2013] EWCA Civ 37, [2013] B.L.R. 126 where the Court of Appeal held that if the type or kind of loss was, at the time of contract, reasonably foreseeable by the defendant as not unlikely to result from his breach (had a breach been contemplated at that time) then such a type or kind of loss was not too remote (see at [17]–[19]). See also *Attorney General of the Virgin Islands v Global Water Association Ltd* [2020] UKPC 18, where the Privy Council confirmed that the type of loss must have been reasonably contemplated as a serious possibility to be recoverable.

692 *British Westinghouse Electric v Underground Electric Railways* [1912] A.C. 673, 689.

693 *Pilkington v Wood* [1953] Ch. 770, 777.

694 *Clippens Oil Co Ltd v Edinburgh and District Water Trustees* [1907] A.C. 291; *Perry v Sidney Phillips & Son* [1982] 1 W.L.R. 1297, [1982] 1 All E.R. 1005, 1013; *Trans Trust SPRL v Danubian Trading Co Ltd* [1952] 2 Q.B. 297, 306.

695 *City Axis Ltd v Daniel P Jackson* (1998) 64 Con. L.R. 84.

- 696 See *Great Ormond Street Hospital v McLaughlin & Harvey* (1987) 19 Con. L.R. 25; and *Kaye v Hosier & Dickinson* [1972] 1 W.L.R. 146.
- 697 *British Westinghouse Electric and Manufacturing v Underground Electric Railways* [1912] A.C. 673, 691; *Richard Roberts v Douglas Smith Stimson* (1988) 46 B.L.R. 50; *Skandia Property (UK) v Thames Water* (1998) C.I.L.L. 1326. An appeal against this decision was dismissed; see [1999] B.L.R. 338. See *Linklaters Business Services v Sir Robert McAlpine Ltd* [2010] EWHC 2931 (TCC), 133 Con. L.R. 211, per Akenhead J at [145]–[146], where *Skandia* was distinguished and a claimant was permitted to recover damages based upon the cost of replacing damaged pipework instead of remedying defects to insulation and corrosion to pipework locally because, in all the circumstances, this was a reasonable decision to have made (not least because bona fide experienced experts advised that replacement was required and there was no suggestion that this advice was negligent or that further experts should have been called in to provide advice as well).
- 698 *Harbutts Plasticine v Wayne Tank & Pump Co* [1970] 1 Q.B. 447. See also *Voaden v Champion* [2002] 1 Lloyd's Rep. 623 at [85]–[89] where the test of reasonableness in this sense is set out.
- 699 *Monarch Steamship Co v Karlshamns Oljefabriker* [1949] A.C. 196, 226. See also *Beattie Passive Norse Ltd v Canham Consulting Ltd* [2021] EWHC 1116 (TCC), [2021] P.N.L.R. 22, per Fraser J at [106]–[112], where it was found that the essential issue is whether the breach of contract or duty was an effective cause of the alleged loss.
- 700 *Galoo Ltd v Bright Grahame Murray* [1994] 1 W.L.R. 1360, 1369–1375, CA. See also *Nulty v Milton Keynes BC* [2013] EWCA Civ 15, [2013] B.L.R. 134, where the Court of Appeal held that the civil balance of probability test meant no less and no more than the court having to be satisfied on rational and objective grounds that the case for believing that the suggested means of causation occurred was stronger than the case for not believing it (at [35]). But also note the unusual approach taken to the burden of proof in relation to the application of the “but for” test in *West v Ian Finlay & Associates* [2013] EWHC 868 (TCC) (reversed on other grounds, [2014] EWCA Civ 316, [2014] B.L.R. 324). In this case the defendant architect was found to have been negligent in failing to notice the poor quality of the M&E services installations in the renovation of the claimants’ property, but argued that there was no loss because the work under this contract would never have been properly carried out and completed by the M&E contractor irrespective of how competently it had acted. It was held that given the nature of its breaches of duty, the onus was on the defendant to show that even if it had acted with reasonable care the damage would probably still have occurred, applying the approach adopted by the Court of Appeal in the context of a road traffic personal injury claim in *Phethean-Hubble v Coles* [2012] EWCA Civ 349, [2012] R.T.R. 31.
- 701 For building cases in which causation is directly discussed, see *Pratt v George J Hill Associates* (1987) 38 B.L.R. 25, CA; *Gable House Estates v The Halpern Partnership* (1995) 48 Con. L.R. 1; *Skandia Property (UK) Ltd and Vala Properties BV v Thames Water* (1997) 57 Con. L.R. 65.
- 702 (1998) 60 Con. L.R. 1.

- 703 Following the decision in *Tennant Radiant Heat Ltd v Warrington Development Corp [1988] 1 E.G.L.R. 41, CA*.
- 704 See also the discussion of approaches to causation in Keating on Construction Contracts, 11th edn (2021), paras 8-026—8-030.

## **(b) - Breach by Employer**

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**Section 8. - Breach and Non-performance**

### **(b) - Breach by Employer**

#### **Introduction**

- 39-215 Although the contractor, in practice, may follow a less systematic pattern, claims for damages by the contractor against the employer are based upon the assumption that the contractor, in tendering for given works, has: (i) analysed the scope of the work by reference to documentation and/or inspection of the works; (ii) identified his basic costs (labour and materials) of carrying out the work; (iii) included in his tender prices a margin for overheads (vehicles, head office costs) and for profit; and (iv) foregone other profitable work in tendering for the given works. Since claims for damages are based upon the compensation of loss incurred, the assumptions identified above will need (along with many other factors) to be revisited on the facts of each case, to ascertain the true extent of the contractor's recoverable loss. Some of the principal areas of liability of the employer to pay damages to the building contractor are considered below.

#### **Payment for work done**

- 39-216 The contractor's entitlement to be paid (both in timing and amount) will be derived from the terms of the construction contract, and failure to pay will amount to a breach. Although non-payment by the employer is not generally a breach which will entitle the contractor to treat the contract as at an end,<sup>705</sup> the failure of the employer to pay under a "construction contract" falling within the **Housing Grants, Construction and Regeneration Act 1996**<sup>706</sup> will confer upon the contractor a right to suspend work. If there is no express provision relating to time for payment, then payment is to be made within a reasonable time in all the circumstances.<sup>707</sup> Where the employer wrongfully terminates the contract prior to completion by the contractor, then the contractor is entitled to

be paid (either under the contract or as damages)<sup>708</sup> for work done, and the rate of payment will be by reference to the rates and prices in the contract, and not on the basis of a reasonable sum. Additionally, in respect of that portion of the work which the contractor was prevented from completing, the contractor may claim either the expenditure which he has wasted following the employer's breach, or alternatively loss of profit on the work.<sup>709</sup>

## Withdrawal of work

39-217

**U** Although the general rule may be altered or displaced by the terms of the contract, the contractor has a legitimate expectation and contractual right to carry out the work contained in the contract. The employer cannot generally remove work from a contractor in order to have that work carried out by a third party.<sup>710</sup> Similarly, an employer cannot generally look to remove the entirety or a substantial proportion of the contractor's work.

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**U** The contractor will be entitled to recover by way of damages for breach the loss of profit element on the work withdrawn, by reason of the reduced amount of turnover. In assessing such a claim for loss of profit, the court will have to consider whether the work was indeed profitable, as well as assessing how far (if at all) the loss of profit on the particular item of work reduced the overall profit of the contractor's business.

## Delay and disruption

39-218

**U** Where the employer, in breach of the express or implied terms of the contract, interrupts or otherwise interferes with the work of the contractor<sup>712</sup> then the contractor may incur costs which are additional to the extra direct cost of carrying out the work. The different heads of recovery for delay and disruption (increased preliminaries, overheads, loss of profit, loss of productivity, increased costs as a result of inflation, interest for non-payment of money) are considered in detail in the specialist textbooks.<sup>713</sup> Disruption claims are difficult to establish. The contractor must prove that there was disruption to its activities, that this was caused by a breach of contract or a matter that the employer is contractually responsible for and that the sum/loss claimed flowed from the same. In *Walter Lilly & Co Ltd v DMW Developments Ltd*

714

**U** Akenhead J stated that there is no set way to prove these elements and that it is open to contractors to prove them with whatever evidence will satisfy the tribunal to the requisite

standard of proof. However, it is to be noted that the calculation of loss of overheads and profit in construction contracts will often be evaluated together by reference to the “Hudson formula” which takes a percentage for head office cost or profit and multiplies this by the contract sum. This is multiplied by the period of delay (in weeks), divided by the contract period. The formula has been the subject of consideration by the courts,<sup>715</sup> but it is thought that it must be used with some regard being paid to some factors which the formula may ignore, such as the effect of re-deployment of resources during the period of delay and the likelihood that the profit multiplier will not take account of the element for profit already contained within the contract sum. It appears also that claims for overhead and profit have to be established in principle, i.e. the contractor must show that there was other work available that, but for the employer’s breach, would have been undertaken in the relevant period.<sup>716</sup> In *Cleveland Bridge UK Ltd v Severfield-Rowen Structures Ltd*<sup>717</sup> it was held that where the Court is satisfied that some (more than de minimis) disruption must have occurred as a result of the contractor’s breaches, it should make a reasoned assessment, albeit one based on the minimum loss or expense probably attributable to the same.

## Footnotes

- 705 *D R Bradley (Cable Jointing) Ltd v Jefco Mechanical Services Ltd* Unreported 1988 (see 6-CLD-07-21).
- 706 See s.112 of the Housing Grants, Construction and Regeneration Act 1996, as amended by the Local Democracy, Economic Development and Construction Act 2009.
- 707 Here again the applicability of the Housing Grants, Construction and Regeneration Act 1996 must be considered.
- 708 *Canterbury Pipe Lines v Christchurch Drainage* (1979) 16 B.L.R. 76 Court of Appeal of New Zealand.
- 709 *Felton v Wharrie* (1906) H.B.C. (4th edn) Vol.2, 398, CA. See also the discussion in Keating on Construction Contracts, 11th edn (2021), paras 9-058—9-063.
- 710 *Gallagher v Hirsch* [1899] N.Y. 454 App. Div. 467; *Carr v JA Berriman Pty Ltd* (1953) 27 A.J.L.R. 273; *Commissioners of Main Roads v Reed and Stuart* (1974) 12 B.L.R. 55; *Abbey Developments Ltd v PP Brickwork Ltd* [2003] C.I.L.L. 2033 (TCC).
- 711 *Star Real Estate Ltd v South Q 100 Ltd* [2022] 4 WLuk 449 at [72]. For a High Court case appearing to support this conclusion, see *Stratfield Saye Estate v AHL Construction Ltd* [2004] EWHC 3286 (TCC) at [36].
- 712 Common examples will be delayed, reduced and interrupted access to the works, or late procurement of planning or building permissions (on which see *Ellis-Don v Parking Authority of Toronto* (1978) 28 B.L.R. 98, 110).
- 713 See for example Keating on Construction Contracts, 11th edn (2021), paras 9-048—9-054.
- 714 [2012] EWHC 1773 (TCC), [2012] B.L.R. 503 at [486c]. See also *BDP Ltd v Standard Life Assurance Ltd* [2021] EWCA Civ 1793, [2022] 1 W.L.R. 878, where the Court of Appeal

considered a related issue, namely the presentation of extrapolated claims, and held that a claimant could plead an extrapolated claim at the outset in a professional negligence claim if it was sufficiently clear and proportionate to do so.

715 *Ellis-Don v Parking Authority of Toronto* (1978) 28 B.L.R. 98 Supreme Court of Ontario; *Finnegan v Sheffield City Council* (1988) 43 B.L.R. 124; see also *Walter Lilly & Co Ltd v Mackay & DMW Developments Ltd* [2012] EWHC 1773 (TCC) where it was held that the use of a formula, supported by relevant factual evidence of opportunities foregone, was a legitimate and helpful way of establishing this head of loss, per Akenhead J at 540–543.

716 See generally Keating on Construction Contracts, 11th edn (2021), paras 9-046—9-057. In *Walter Lilly & Co Ltd v DMW Developments Ltd* [2012] EWHC 1773 (TCC), [2012] B.L.R. 503 it was held that the use of a formula, supported by relevant factual evidence of opportunities foregone, was a legitimate way of establishing this head of loss; but that in order to prove a claim for loss of profit and head office overheads caused by delay it had to be shown on the balance of probabilities that, but for the delay, the claimant would have secured other work which would have contributed to such overheads and/or generated profit and the loss would not have been sustained (see at [540]–[543]).

717 [2012] EWHC 3652.

## **(c) - Breach by the Contractor**

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**(c) - Breach by the Contractor**

### **Introduction**

- 39-219 Claims for damages by the employer following breach by the contractor are considered in this section by reference to: (i) failure to build; (ii) defective work; (iii) delay; (iv) consequential loss; and (v) claims for non-pecuniary loss. In considering the types of claims typically made by the employer in construction contracts, the application of general principles relating to the duty to mitigate and the requirement to account for betterment<sup>718</sup> should be borne in mind.

### **Failure to build**

- 39-220 Where the contractor fails to build at all or in part, then the normal measure of damages is the cost to the employer of completing the building works in a reasonable manner less the contract price. The leading authority on the point is still *Mertens v Home Freeholds*.<sup>719</sup> The employer may also recover in respect of increased costs arising through delay in completion following the contractor's failure to build.<sup>720</sup>

### **Defective work**

- 39-221 Where, after completion, there are defects in the works, the employer will normally be entitled to damages equal to the costs of making good the defects (this is sometimes referred to as the costs

of reinstatement).<sup>721</sup> However, whilst such an award of damages puts the plaintiff (employer) into the position he would be in if the contract had been properly performed in the first place, it is still for the plaintiff to show that reinstatement is a reasonable response to the damage in question.<sup>722</sup> In *Ruxley Electronics & Constructions Ltd v Forsyth*<sup>723</sup> the plaintiff contractor was engaged to build a swimming pool for Mr Forsyth which was to have a diving area 7ft 6ins deep, whereas the pool which was built had a diving area with a depth of 6ft. The pool was suitable for diving and the failure to follow the requirement as to depth was found to have had no effect on the value of Mr Forsyth's property. Mr Forsyth counterclaimed the cost of re-building the pool to the depth specified in the contract with the plaintiff contractor, which was estimated at £21,560. The House of Lords (reversing the decision of the Court of Appeal) awarded Mr Forsyth modest damages for loss of amenity, and not the costs of reinstatement.<sup>724</sup> The judgments in *Ruxley*, both in the Court of Appeal and House of Lords dealt with the question of the intention of the innocent party to carry out re-instatement. The position appears to be that the court normally has no concern with the use to which an award of damages will be put and an undertaking to re-instate would be irrelevant. However, intention may be relevant to the reasonableness of re-instatement.<sup>725</sup>

## Delay

- 39-222 Where a contractor, without excuse, fails to complete in accordance with the timescale provided for within the contract,<sup>726</sup> then the employer will either be entitled to levy "liquidated and ascertained damages" at the contractual rate<sup>727</sup> or he will be entitled to claim general (unliquidated) damages referable to the loss incurred by reason of the delay. Furthermore, where the form of contract provides for the contractor to proceed with the works regularly and diligently,<sup>728</sup> then a failure to do so may entitle the employer to dismiss the contractor from the site<sup>729</sup> if the breach is to be regarded as repudiatory (see below). This is to be distinguished from termination under the terms of the contract. Where (which will be rare in construction contracts) time is stated to be of the essence, then failure by the contractor will mean that the employer is entitled to treat the contract as at an end and dismiss the contractor from the site.<sup>730</sup>

## Consequential loss

- 39-223 In construction projects, defects in the works will often have a wider impact upon the employer's existing operations and production process. Such losses will rarely be said to arise naturally according to the usual course of things and, accordingly, consequential losses will usually fall under the second limb of *Hadley v Baxendale*<sup>731</sup>: that is, damage which, in the reasonable contemplation of both parties at the time of making the contract would, had they thought about it,

have had a very substantial degree of probability.<sup>732</sup> Construction contracts will often have clauses limiting or excluding liability for “consequential loss”, and the effect of such clauses will be a matter of construction,<sup>733</sup> although it may also be important to consider whether such exclusion is reasonable for the purposes of the *Unfair Contract Terms Act 1977*.<sup>734</sup>

## Non-pecuniary loss

- 39-224 Where building works are to the plaintiff’s main dwelling, he will be able to recover modest damages for anxiety and distress associated with the defective work of the building contractor.<sup>735</sup> However, this head of loss will not be recoverable as between commercial parties, or where the plaintiff’s property is substantially for investment purposes.<sup>736</sup>

## Footnotes

718 See section (a) above.

719 [1921] 2 K.B. 526, 535, CA. There are no other authorities on this point, although in *DO Ferguson v M Sohl* (1992) 62 B.L.R. 95, 104, the relevant passage from the judgment of Lord Sterndale MR in *Mertens* was referred to by Hirst LJ without adverse comment.

720 See also *Dodd Properties v Canterbury CC* [1980] 1 W.L.R. 433.

721 *East Ham Corp v Bernard Sunley & Sons Ltd* [1966] A.C. 406, HL. See *Brit Inns Ltd v BDW Trading Ltd* [2012] EWHC 2143 (TCC), 145 Con. L.R. 181 for an example of the approach to the measure and proof of damages in claims for defective work and loss of profits.

722 See *Atkins v Scott* (1990) 7 Const. L.J. 215, CA.

723 [1996] 1 A.C. 344, HL.

724 Note in particular the passage in the speech of Lord Mustill at 360. See on this, *McInnes, “The Yellow Brick Road: Ruxley revisited”* (1998) 14 Const. L.J. 33. See also *Bovis Lend Lease v RD Fire Protection* (2003) 89 Con. L.R. 169, where the cost of reinstatement was also refused. See also *Harrison v Shepherd Homes Ltd* [2011] EWHC 1811 (TCC), 27 Const. L.J. 709, per Ramsey J at [263]–[264], for a summary of the general principles to apply when considering an award of damages for defective premises and, in particular, the circumstances in which damages based on the cost of reinstatement, diminution in value and loss of amenity and inconvenience will be appropriate.

725 See [1996] A.C. 344, per Lord Jauncey at 359 and Lord Lloyd at 372–373 and [1994] 1 W.L.R. 650, per Staughton LJ at 658; and see *Radford v DeFroberville* [1977] 1 W.L.R. 1262. For a decision in which a claimant had no intention of conducting the postulated repair work and where this was found to be relevant to the reasonableness of adopting reinstatement costs as the basis for the measure of damages, see *London Fire and Emergency Planning Authority v Halcrow Gilbert Associates Ltd* [2007] EWHC 2546 (TCC).

- 726 Or within a reasonable time: *Hick v Raymond & Reid [1893] A.C. 22, 32*.
- 727 See above, para.39-032.
- 728 In *Leander Construction Ltd v Mulalley & Co Ltd [2011] EWHC 3449 (TCC), [2012] B.L.R. 152*, it was held that ordinarily there will be no implied term in a building contract that the contractor should proceed regularly and diligently with the works prior to the contract completion date.
- 729 *West Faulkner Associates v London Borough of Newham (1994) 71 B.L.R. 1, CA*. See also *Sabic UK Petrochemicals Ltd v Punj Lloyd Ltd [2013] EWHC 2916 (TCC), [2014] B.L.R. 43*, where it was held in relation to an express term requiring a contractor to carry out and complete the works with due diligence that a consideration of what was required to satisfy this obligation was linked to the parties' other contractual obligations and, in particular, on the facts of the case to the contractor's obligation to meet a milestone date for the commencement of commissioning.
- 730 *Rickards v Oppenheim [1950] 1 K.B. 616, 628, CA*.
- 731 *(1854) 9 Ex. 341*. This is the broad effect of *British Sugar Plc v NEI Power Projects Ltd (1997) 87 B.L.R. 42, CA*.
- 732 *Balfour Beatty Construction (Scotland) Ltd v Scottish Power Plc, 1994 S.C. (H.L.) 20; (1994) 71 B.L.R. 20, HL*.
- 733 *British Sugar Plc v NEI Power Projects Ltd (1997) 87 B.L.R. 42, CA; Hotel Services Ltd v Hilton International Hotels (UK) Ltd [2000] 1 All E.R. (Comm) 750, [2000] B.L.R. 235*.
- 734 See above, para.39-084.
- 735 *Rawlings v Rentokil Laboratories [1972] E.G.D. 744; Perry v Sidney Phillips [1982] 1 W.L.R. 1292; Ruxley Electronics v Forsyth [1996] A.C. 344, 360–361, HL*. See also, *Franklin, "Mere Heartache" (1992) 7 Const. L.J. 318; Humphries, "Contractual Damages for Mental Distress" (1996) S.J. 182*.
- 736 *Hutchinson v Harris (1978) 10 B.L.R. 19, 37*.

## **(d) - Repudiation and Discharge**

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**(d) - Repudiation and Discharge**

### **Repudiatory breach**

- 39-225 Where one party so acts or expresses himself as to show that he does not mean to accept the obligations of the contract any further, then this may, depending on the circumstances, amount to a repudiatory breach of contract.<sup>737</sup> Generally, a breach of contract will only give rise to a claim for damages, and the innocent party will be obliged to continue its outstanding performance of the contract notwithstanding the breach.<sup>738</sup> However, where there is a breach of a condition which amounts to a refusal to perform going to the root of the contract, then there will be a repudiatory breach<sup>739</sup> entitling the innocent party, on acceptance of the repudiation, to treat the contract as at an end.<sup>740</sup> The act of repudiation may consist of a clear unqualified refusal, but will more probably involve some other breach which goes to the root of the contract, or may be such as to indicate an intention no longer to be bound by the contract.<sup>741</sup> In considering where there has been a repudiation, it is necessary to look at the conduct and the circumstances of the parties as a whole.<sup>742</sup>

### **Acceptance**

- 39-226 The innocent party faced with a repudiatory breach can do one of two things: (i) affirm the contract in a clear way; or (ii) accept the repudiation by making it plain that by reason of the repudiatory act of the defaulting party, he considers that the contract is at an end.<sup>743</sup>

## What will amount to repudiation?

- 39-227 What will amount to a repudiation of the contract will depend upon the terms which the parties have agreed and the relative importance which they have placed on them. In relation to acts or defaults of the contractor, a refusal to carry out work is likely to evince the appropriate intention no longer to be bound. Poor workmanship, however, will generally not be sufficient to constitute repudiation,<sup>744</sup> unless there is a manifest inability to comply with the requirements of the contract indicative of a basic inability, or basic lack of competence and intention, to perform the contract. Unless time is of the essence, delay may amount to a repudiation only where the delay gives rise to the inference that the defaulting party does not intend to be bound by the terms of the contract. In relation to acts or defaults of the employer, an act of prevention such as a refusal to grant the contractor access to the site, or dismissal of the contractor from the site, is likely to amount to a repudiation. A failure by the employer to pay the contractor could amount to a repudiation, depending on the terms as to payment, and the circumstances of the refusal,<sup>745</sup> but generally there is no right to suspend work where payment is withheld from the contractor.<sup>746</sup> It is to be noted that [s.112 of the Housing Grants, Construction and Regeneration Act 1996](#) gives rise to a right to suspend in specified circumstances of default.

## Repudiation and contractual termination

- 39-228 Save where the contract provides that the machinery of contractual termination<sup>747</sup> is an exclusive remedy of the parties, then such machinery will not exclude the remedies available at common law following an act of repudiation.<sup>748</sup> However, the often complex machinery for termination of employment under a given contract will have to be operated with care and precision. In particular, standard form contracts will often identify particular defaults the occurrence of which will entitle the other party to terminate. The contract will also often identify periods of time during which the innocent party must give proper notice of default to the party in breach<sup>749</sup> so that the specified default can be made good. A party who operates the machinery of contractual termination without justification under the contract is likely to be regarded as having repudiated the contract, since operation of the machinery will typically be accompanied by a refusal to perform obligations under the contract.<sup>750</sup>

## Footnotes

737 *Heyman v Darwins [1942] A.C. 356, 378, HL.*

- 738 *Channel Tunnel Group v Balfour Beatty* [1992] Q.B. 656, 666, CA.
- 739 *Woodar Investment Development v Wimpey Construction UK* [1980] 1 W.L.R. 277, 283. See also *Eminence Property Developments Ltd v Heaney* [2010] EWCA Civ 1168, [2011] 2 All E.R. (Comm) 223, where the Court of Appeal held, following *Woodar*, that the legal test for repudiatory conduct was whether, looking at all the circumstances of the case objectively, from the perspective of a reasonable person in the innocent party's position, the contract breaker had clearly shown an intention to abandon and altogether refuse to perform the contract (per Etherton LJ at [33]–[61]).
- 740 *Photo Productions Ltd v Securicor Transport Ltd* [1980] A.C. 827, 849; see also *Scobie & McIntosh v Clayton Bowmore* (1990) 49 B.L.R. 119.
- 741 *General Billposting Co Ltd v Atkinson* [1909] AC 118, 122; *Sutcliffe v Chippendale and Edmondson* (1971) 18 B.L.R. 149, 157, 161 (Sir William Stabb QC); *Woodar Ltd v Wimpey Ltd* [1980] 1 W.L.R. 277, 282–283, HL. See also *Price v Great Yarmouth BC* (2003) T.C.L.R. 1, CA at 9.
- 742 *Woodar Ltd v Wimpey Ltd* [1980] 1 W.L.R. 277, 281, HL.
- 743 *Fercometal v Mediterranean Shipping* [1989] A.C. 788, 805, HL. On acceptance of repudiatory breach, see also *Laing Management Ltd v Aegon Insurance Co (UK) Ltd* (1997) 55 Con. L.R. 1.
- 744 There were not sufficient in *Sheffield v Conrad* (1987) 22 Con. L.R. 108, CA.
- 745 In *Alan Auld Associates Ltd v Rick Pollard Associates* [2008] EWCA Civ 655, [2008] B.L.R. 419, it was held by the Court of Appeal that in a contract for the provision of engineering services, which was analogous to an employment contract, a party's persistent and cynical failure to pay invoices in spite of repeated complaints from the party providing the services amounted to a repudiatory breach of contract. Also, note that in *Mayhaven Healthcare Ltd v Bothma & Bothma* [2009] EWHC 2634 (TCC), [2010] B.L.R. 154 it was held that the question of whether a contractor's wrongful suspension of works amounts to a repudiatory breach of contract was not capable of a simple answer, as it would depend upon the terms of the contract, the nature of the breach and all the facts and circumstances of the case.
- 746 *Supamarl v Federated Homes Ltd* (1981) 9 Con. L.R. 25; *Channel Tunnel Group v Balfour Beatty* [1992] Q.B. 656, 666, CA. See also *Multiplex Constructions (UK) Ltd v Cleveland Bridge UK Ltd* [2006] EWHC (TCC) 1341, (2006) 107 Con. L.R. 1, where it was held that a contractor's failure to make payments to its sub-contractor in accordance with a supplementary agreement did not amount to a repudiatory breach of contract in all the circumstances, especially having regard to the fact that the contractor had referred the relevant payment dispute to adjudication.
- 747 See paras 39-251—39-252 below.
- 748 *Architectural Installation v James Gibbons* (1989) 46 B.L.R. 91. However, *Lockland Builders v John Kim Rickwood* (1995) 77 B.L.R. 38, CA indicates that it may be easier to exclude common law rights following repudiatory breach than was previously thought. Note that in *Golden Straight Corp v Nippon Kisen Kubishika Kaisha* [2007] UKHL 12, [2007] 2 W.L.R. 891 the House of Lords held that the assessment of damages for wrongful repudiation could take into account events which took place after the date of the acceptance of the repudiatory breach.

749 See cl.8.4 and 8.9, JCT 2011.

750 *Architectural Installation Services v James Gibbons* (1989) 46 B.L.R. 91. See also *Stocznia Gdynia SA v Gearbulk Holdings Ltd* [2009] EWCA Civ 75, [2009] 3 W.L.R. 677, [2009] B.L.R. 196, where it was held by the Court of Appeal that a party did not lose its right to treat a contract as repudiated and to recover damages for repudiation simply because it exercised its contractual termination rights; and that on the facts there was no inconsistency between recovering instalments of the price, pursuant to the termination provisions, and claiming damages at common law for loss of bargain.

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## (e) - Frustration and Force Majeure

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(e) - Frustration and Force Majeure

### Frustration

39-229 This is a principle which addresses those situations where the underlying objectives of the parties in entering into a contract are defeated, without fault of either party, through changes in circumstances which are unforeseen, or on the occurrence of particular types of supervening events. The general rule is that contractual obligations are binding and absolute, so that a party is not absolved from performance merely because this has become more expensive, more difficult or even proves to be impossible.<sup>751</sup> Prior to the decision in *Taylor v Caldwell*,<sup>752</sup> parties were regarded as capable of making provision for the occurrence of supervening events in their contracts, so that a very strict view prevailed. In its modern form, the doctrine of frustration, as seen in the case of construction contracts as well as other kinds of contract, involves the identification of situations where it would be unjust and unreasonable to hold parties to their contracts.<sup>753</sup> However, the authorities indicate that a plea of frustration ought not to be lightly invoked, since the operation of the doctrine has been kept within very narrow limits. In particular, to see if the doctrine applies:

“... you have first to construe the contract and see whether the parties have themselves provided for the situation which has arisen. If they have provided for it, the contract must govern.”<sup>754</sup>

### Frustration of construction contract

39-230

In construction contracts, frustration arising out of delay will be kept within very narrow confines, such as occurred in *Metropolitan Water Board v Dick Kerr & Co.*<sup>755</sup> Here, indefinite delay was imposed by a government order to stop work under the Defence of the Realm Acts which was held not to fall under the extension of time provision in the contract. Frustration will almost invariably have no application to a case of ground conditions which render construction impossible, since the onus is upon the contractor to ascertain at tender stage whether there are difficulties which may affect the site. Unexpected adverse weather conditions will only excuse non-performance by the contractor to the extent provided by the contract terms.<sup>756</sup> Since the courts will not generally release parties from the consequences of poor bargains, unforeseen increases in costs and price in the course of a construction contract will not give rise to frustration save where increases make the obligations radically different from those contemplated.<sup>757</sup>

## Force majeure

- 39-231 Parties to commercial contracts will often make provision for situations where circumstances beyond the control of the parties render performance impossible by one of the contracting parties.<sup>758</sup> Most of the standard forms of contract include clauses dealing with force majeure covering such matters as war, strikes, fire, weather and government action, but each clause must be construed carefully to ascertain its true scope and effect.

## Footnotes

751 *Paradine v Jane* (1646) *Al. 26; 82 E.R. 897*, where it was held that the tenant was not released from the obligation to pay rent in circumstances where the lease had become dispossessed by Royalists during the English Civil War; *The Company of Proprietors of the Brecknock and Abergavenny Canal Navigation Co v Pritchard* (1796) *6 Term Rep. 750* (the defendant builders were not released from a liability to maintain a bridge which was washed away by flood); see also *Davis Contractors Ltd v Fareham UDC* [1956] *A.C. 696, 729, HL* (serious shortages of labour caused work to take 22 months rather than the anticipated 8 months).

752 (1863) *3 B. & S. 826*.

753 *J Lauritzen AS v Wijsmuller BV (The Super Servant Two)* [1990] *1 Lloyd's Rep. 1, CA*.

754 *The Eugenia* [1964] *2 Q.B. 226, 239, CA; Bank Line Ltd v Capel* [1919] *A.C. 435, 456, HL*.

755 [1918] *A.C. 119, HL*, also considered by the Privy Council in *Wong Lai Yong v Chinachem* (1979) *13 B.L.R. 81*.

756 (1888) *52 J.P. 392*.

757 *Wates Ltd v Greater London Council* (1983) *25 B.L.R. 1, 35, CA*.

758 For one judicial definition of force majeure see *Lebeaupin v Crispin* [1920] *2 K.B. 714, 718*.

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## **(f) - The Privity Rule and its Exceptions**

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Chapter 39 - Construction Contracts

Section 8. - Breach and Non-performance

**(f) - The Privity Rule and its Exceptions**

### **The privity rule**

- 39-232 The general rule of the common law is that no-one but the parties to a contract can be entitled under it, or bound by it.<sup>759</sup> The privity rule is best seen as distinct from the rule that consideration must move from the promisee,<sup>760</sup> since privity is concerned with who can enforce a contract, whereas the doctrine of consideration regulates the kinds of promises which the parties can enforce.<sup>761</sup>

### **Criticism of the privity rule**

- 39-233 The privity rule has been the subject of trenchant criticism, both from the judiciary and from academic lawyers.<sup>762</sup> Some of the most important decisions on the contemporary scope of the privity rule have been cases on construction contracts, reflecting the complex array of parties affected by construction work. For example, in complex projects, the owner of the land and the party employing the builder will rarely go on to occupy the building on completion, since rights of ownership or occupation will be the subject of a lease, sale, assignment or other transfer.<sup>763</sup> Accordingly, it will frequently occur that the party who suffers the loss and damage caused by defects in the building will be different from the party with which the builder has a direct contractual relationship.

## Exceptions to the privity rule

- 39-234 The response of the courts to the problems created by the rule has been to couple the suggestion for systematic <sup>764</sup> reform by the legislature, <sup>765</sup> with a process of developing exceptions to the privity rule on a case-by-case basis. Although the precise scope of the exceptions to the privity rule is unclear, it is nevertheless apparent that in allowing exceptions the underlying rationale, at least in part, is this: what was in the contemplation of the parties at the time when the building contract was entered into? The starting-point for the development of what has now been described as a “contract-based” <sup>766</sup> approach to the privity rule is the proposition that a consignor in a contract for the carriage of goods by sea under a bill of lading is entitled to substantial damages from the carrier, although property in the goods had passed to a third party when the damage occurred. <sup>767</sup>

## Decisions on privity

- 39-235 A number of important cases in the construction field have raised privity issues. In *St Martin's Property Corp v Sir Robert McAlpine* <sup>768</sup> the contract between the employer and the contractor contained a prohibition on assignment save where the contractor gave his consent in writing. The employer subsequently assigned ownership in the site to a third party, but that assignment was ineffective to transfer to the third party the benefit of the building contract. The House of Lords held that the employer was entitled to recover damages for defects where the loss was suffered by the third party. <sup>769</sup> Having referred to *Dunlop v Lambert* Lord Browne-Wilkinson said:

“In my judgment the present case falls within the rationale of the exceptions to the general rule that a plaintiff can only recover damages for his own loss. The contract was for a large development of property which, to the knowledge of both the Corporation and McAlpine, was going to be occupied, and possibly purchased, by third parties and not by the Corporation itself. Therefore it could be foreseen that damage caused by a breach would cause loss to a later owner and not merely to the original contracting party, Corporation.”

- 39-236 In *Darlington BC v Wiltshire Northern Ltd* <sup>770</sup> the Council employer entered into an arrangement to procure the construction of a recreational centre which would not be affected by restrictions on its powers of borrowing. There was a contract between the building contractor and a bank and a second contract between the bank and the Council, whereby the bank contracted to procure the construction of the centre for the Council and to assign all benefits to the Council. The Court of Appeal held that since the building contracts, to the knowledge of both parties, were entered

into for the benefit of the Council, then it was foreseeable that the Council, as assignee of the bank's rights, would claim substantial damages, even though (in contrast to the *McAlpine* case) the bank never acquired or transmitted to the Council any proprietary interest in the centre.<sup>771</sup> In *Alfred McAlpine v Panatown*,<sup>772</sup> for reasons of VAT liability, the building contract was concluded between the builder (McAlpine) and a company (Panatown) within the same group as the owner of the site which wished to develop the site (Unex), although there was also a Duty of Care Deed between McAlpine and Unex. Panatown proceeded against McAlpine for damages for breach of contract. The Court of Appeal<sup>773</sup> held that Panatown was entitled to recover substantial damages from McAlpine, on the basis that it was "intended or contemplated" that Panatown should have such a right. However, the House of Lords allowed the appeal of *McAlpine* on the basis that the *Linden Gardens* exception to the general rule that a party could only claim substantial damages in respect of its own loss, did not apply on the facts of this case as *Unex* and *McAlpine* had their own direct contractual relationship under the duty of care deed.

## Footnotes

- 759 *Tweddle v Atkinson* (1861) 1 B. & S. 393 (but see the comments in *Darlington BC v Wiltshier Northern Ltd* [1995] 1 W.L.R. 68, 76G, per Steyn LJ); *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd* [1915] A.C. 847 at 853 ("Our law knows nothing of a *jus quaesitum tertio* arising by way of contract"); *Beswick v Beswick* [1968] A.C. 58 at 72, 78, 83 and 92, HL; and see generally Law. Com. No.242 Privity of Contract: Contracts for the Benefit of Third Parties (1996).
- 760 *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd* [1915] A.C. 847, 853.
- 761 See the Contracts (Right of Third Parties) Act 1999. In *Themis Avraamides v Mark Colwill and Stephen Martin (t/a Bathroom Trading Co)* [2006] EWCA Civ 1533, [2007] B.L.R. 76, a building case concerning the installation of defective bathroom equipment, it was held that s.1(3) of the Contracts (Rights of Third Parties) Act 1999 required the third-party beneficiary to be expressly identified in order for the subsection to be relied upon.
- 762 Some of the most important sources of criticism are reviewed in *Darlington BC v Wiltshier Northern* [1995] 1 W.L.R. 68, 73, and 77.
- 763 In *Technotrade Ltd v Larkstore Ltd* [2006] EWCA Civ 1079, [2006] 1 W.L.R. 2926, [2006] B.L.R. 345, the Court of Appeal held that the rights and benefits under a ground investigation report prepared for the original owner of some development land could be assigned to and relied upon by a purchaser of the land in a claim for breach of contract by the purchaser against the party that produced the report in respect of damage that had occurred between the date of sale of the land and the assignment. But a claimant cannot pursue claims in relation to a contract as an assignee where the terms of the relevant contract preclude the assignment, see *Ruttle Plant Hire v Secretary of State for the Environment, Food and Rural Affairs* [2007] EWHC 2870 (TCC).
- 764 See *Darlington BC v Wiltshier Northern Ltd* [1995] 1 W.L.R. 68, 76E.
- 765 Contracts (Rights of Third Parties) Act 1999: see generally Ch.20.

- 766 *Alfred McAlpine Construction Ltd v Panatown Ltd* [2001] 1 A.C. 518.
- 767 *Dunlop v Lambert* (1839) 6 Cl. & F. 600 as explained in *The Albazero* [1977] A.C. 774, 847. See now the discussion of the concept of transferred loss by the Supreme Court in *Swynson v Lowick Rose LLP* [2017] UKSC 32, [2018] A.C. 313, per Lord Sumption at [14]–[17] and a recent application of the principle in *Yeovil Ltd v Stepping Stone Group* [2020] EWHC 2308 (TCC).
- 768 This appeal was heard with *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 A.C. 85, HL.
- 769 Note the broader principle on which Lord Griffiths was prepared to decide the matter (at 96–97) and with which Steyn LJ agreed in *Darlington BC v Wiltshier Northern Ltd* [1995] 1 W.L.R. 68, 80, although not adopted in *Alfred McAlpine v Panatown* [2001] 1 A.C. 518.
- 770 [1995] 1 W.L.R. 68, CA.
- 771 [1995] 1 W.L.R. 68, 75.
- 772 [2000] 1 A.C. 518.
- 773 (1998) 88 B.L.R. 67.

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## **(g) - Non-performance Not Amounting to Substantial Breach**

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Section 8. - Breach and Non-performance

### **(g) - Non-performance Not Amounting to Substantial Breach**

#### **Introduction**

39-237 Construction contracts often create obligations whose non-fulfilment does not or may not amount to breach sounding in substantial damages at the suit of the party adversely affected. This is usually because, on analysis, there is no “breach” at the time in question, the right of the injured party being transferred into some secondary obligation under the terms of the contract. Alternatively, where non-fulfilment or default occurs on the part of the engineer/architect, who is not a party to the primary contract, no direct or immediate remedy may be available against the employer.<sup>774</sup>

#### **Complaint by employer**

39-238 Non-performance not amounting to breach occurs in the case of (i) failure to comply with quality obligations,<sup>775</sup> where the employer’s right before completion will be limited to nominal damages, contractual rights of rectification and other rights available in the case of serious default<sup>776</sup>; and (ii) failure to comply with a programme issued under the terms of the contract, which will usually give rise to a secondary obligation to prepare a revised programme or to take steps to expedite progress if so instructed.<sup>777</sup> An obligation to achieve sectional completion will be enforceable provided it is clear that separate damages are intended to be recovered. If liquidated damages are provided for failure to achieve overall completion, the failure to achieve completion of a section within the specified time will sound in damages whether or not separate liquidated damages are provided for the section.<sup>778</sup> Where the employer is concerned about the quality of the works prior to their completion, then as discussed above, the employer will rarely be justified in ejecting the contractor

from the site.<sup>779</sup> The employer will need to exercise considerable caution before preventing his contractor from returning to complete and carry out snagging to the works, since any such acts of prevention may amount to a failure to mitigate loss. In *City Axis v Daniel P Jackson*<sup>780</sup> it was held that the defendant employer had acted unreasonably in refusing the plaintiff access to complete certain building works, and that the failure to permit snagging constituted a failure to mitigate loss.

## Complaint by the contractor

- 39-239 Where the contractor is aggrieved by failure of the contract administrator to carry out specified duties under the contract, e.g. to certify appropriately, or to grant extensions of time, such failure will not generally be actionable against the employer<sup>781</sup>; nor generally, will the failure be actionable against the contract administrator.<sup>782</sup> Complex questions can arise where non-fulfilment of the duties of the contract administrator impede or prevent proper operation of the contract machinery vis-à-vis the contract parties. In such a situation, the courts have proceeded on the basis that the actions of the contract administrator, even if patently flawed, should continue to bind the parties until revised by arbitration or other agreed procedure.<sup>783</sup>

## Footnotes

774 The alternative analysis is that the employer has a right to nominal damages for breach of contract, which, in the rare cases where substantial loss will result if the error is not immediately dealt with, becomes a right to substantial damages or other remedy. On this analysis, the contractor is protected by the fact that if the error is remediable, he will always have the right to attempt to remedy it first.

775 See *Kay v Hosier & Dickinson [1972] 1 W.L.R. 146* at 165D-H where such non-fulfilment is characterised as a “temporary disconformity” in a dissenting speech by Lord Diplock. Lord Diplock’s dictum has, however, never been enthusiastically adopted; see: *Lintest Building v Roberts (1980) 13 B.L.R. 38* at 44; *Nene Housing Society Ltd v National Westminster Bank Ltd (1980) 16 B.L.R. 22* at 32; *Surrey Heath BC v Lovell Construction Ltd and Haden Young Ltd (1988) 42 B.L.R. 25*; *Guinness Plc v CMD Property Developments Ltd (1995) 76 B.L.R. 40* at 57–58; *Pearce and High Ltd v Baxter Pt 3 [1999] B.L.R. 101, CA*.

776 Principally termination of employment.

777 ICC Form cl.46.

778 *Turner v Mathind (1992) 23 Con. L.R. 16* at 27, CA.

779 See *Sutcliffe v Chippendale & Edmondson (1971) 18 B.L.R. 157, 165*; and the references to *Yeoman Credit Ltd v Apps [1962] 2 Q.B. 508, CA*.

780 *64 Con. L.R. 84*.

- 781 *London Borough of Merton v Leach* (1985) 32 B.L.R. 51, 78; and see *Perini v Commonwealth of Australia* (1969) 12 B.L.R. 82.
- 782 *Pacific Associates v Baxter* (1988) 44 B.L.R. 33.
- 783 *Lubenham Fidelities v South Pembrokeshire DC* (1988) 33 B.L.R. 39; and see *Channel Tunnel Group v Balfour Beatty* [1993] A.C. 334; (1993) 61 B.L.R. 1, HL.

## **(a) - Control by Contract Administrator**

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**Section 9. - Remedies by Enforcement**

**(a) - Control by Contract Administrator**

### **Introduction**

- 39-240 Commercial contracts may contain both primary obligations (e.g. description of subject matter, delivery dates, etc.) and secondary obligations<sup>784</sup> which take effect upon breach or non-performance of the former (e.g. an obligation to pay liquidated damages). In construction contracts such extensive use is made of secondary obligations that it may be said that the principal and often exclusive remedies for non-performance are to be found within the contract terms, through direct enforcement. The principal agency through which this is achieved (by whichever party enforcement is sought) will usually be the contract administrator. Thus, while claims for breach of contract will usually be available, they are often in practical terms limited, in the case of the employer to those arising from latent defects which are manifested after completion and, in the case of the contractor, to claims similar to or even duplicating those available under the contract terms.

### **Alternative to breach**

- 39-241 The Standard Forms of Contract empower the contract administrator to give decisions whose effect is to correct potential breaches, so as to bring the work back into conformity, where there is a departure from the requirements of the contract. Under JCT SBC 2011, for example, the architect may issue instructions for the removal from site of any work or materials not in accordance with the contract.<sup>785</sup> Similar powers exist under ICC Form, which also contains elaborate provisions for testing to ascertain compliance with the contract.<sup>786</sup> Where the work is brought back into conformity as a result of Contract Administrator instructions, there will be no further contractual consequence save that the contractor remains liable to the employer for any delay and must himself

bear any expense which results from the need for the instruction in the first place. However, where the basis of the instruction is disputed, both the cost and delay consequences may form the subject of a claim by the contractor.

## Delay by contractor

- 39-242 Intervention by the contract administrator where the contractor's default consists of delay (as opposed to defects in quality) involves more difficult concepts, since delay will usually be measured by a programme which is not itself an express obligation of the contractor. No breach, therefore occurs until the completion date is reached, save for the possibility of establishing a failure to proceed with due expedition<sup>787</sup> or regularly and diligently. In *West Faulkner Associates v London Borough of Newham*<sup>788</sup> it was held that cl.25(1)(b) of the JCT form for use by Local Authorities (1963 edn 1977 rev.) required the contractor to proceed both regularly and diligently, and that the contractor could be dismissed from the site if he failed to do either. Some contracts empower the contract administrator to give instructions which are intended to result in more expeditious progress.<sup>789</sup> The exercise of such powers, however, frequently lead to disputes where the contractor claims to be entitled to extension of time. In such a case, the instruction may be contended to be an instruction to accelerate.<sup>790</sup>

## Operation of the contract

- 39-243 Many of the powers of the contract administrator are essential to operation of the procedures of the contract. Thus, payment provisions depend on the proper operation of the procedure for interim and final certificates of payment, including detailed provisions for measurement and valuation. These powers include decisions on whether work and materials conform to the requirements of the contract, as well as decisions on "claims" made by the contractor. Where delay occurs, the contract requires decisions on whether or not extension of time is merited, where rejection will almost invariably lead, when the completion date is passed, to a claim by the employer for delay damages. The contract administrator must exercise his power to consider the grant of extensions of time as much for the benefit of the employer as for the benefit of the contractor. This is because the courts will not allow a claim for liquidated damages by an employer who has effectively prevented completion.<sup>791</sup>

## Powers of control generally

- 39-244

Standard forms of construction contract, particularly those of a more traditional kind, tend to vest the contract administrator with wide and seemingly arbitrary powers of control which appear to place the appointed person in full charge of the works. Thus, under ICC Form, cl.13(1) provides that the contractor shall:

“... complete the Works in strict accordance with the contract to the satisfaction of the Engineer and shall comply with and adhere strictly to the Engineer’s instructions on any matter connected therewith (whether mentioned in the contract or not).”

Such clauses do not, however, in practice lead to the engineer taking control of the works, since by doing so the engineer would risk incurring liability on behalf of the employer for any variation to the works that might be ordered.<sup>792</sup> The standard forms generally provide other means of claiming compensation in addition, where the contractor’s ability to carry out the works as he may choose is interfered with.<sup>793</sup> Engineers and architects will therefore generally be reluctant to exercise powers vested in them, save where this is clearly necessary or (in the case of a variation) authorised by the client, who must bear the financial consequence. Other powers typically available to the contract administrator, and which will in practice be utilised with caution, include powers to suspend or postpone work<sup>794</sup> and to terminate the contractor’s employment under the contract (see below).

## Footnotes

- 784 See *Photoproductions v Securicor Transport [1980] A.C. 827; Lombard North v Butterworth [1987] Q.B. 527.*
- 785 JCT SBC 2011 cl.3.18.1.
- 786 See cll.36, 38 and 39.
- 787 See ICC Form cl.41(2).
- 788 *(1994) 71 B.L.R. 1, CA.*
- 789 See, e.g. ICC Form cl.46.
- 790 In the absence of direct English authority, see *Norair Engineering v US (1981) 666 F. 546;* and *Morrison Knudsen v BC Hydro (1978) 85 D.L.R. 3d 186; (1978) 7 Const. L.J. 227.*
- 791 *Percy Bilton Ltd v GLC [1982] 1 W.L.R. 794; (1982) 20 B.L.R. 1, HL.*
- 792 The term “variation” tends to be given a wide definition under most standard construction contracts: see, e.g. ICC Form cl.51, JCT 98 cl.13 and JCT SBC 2005 cl.5.1.
- 793 See ICC Form cl.13(3), JCT 98 cl.26 and JCT SBC 2005 cl.4.23 to 4.26.
- 794 ICC Form cl.40, JCT 2011 cl.3.15.

## **(b) - Claims**

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**Section 9. - Remedies by Enforcement**

### **(b) - Claims**

#### **Claims by contractor**

- 39-245 The term “claim” is often applied to any application involving payment beyond the stated contract sum (in the case of a lump sum contract) or beyond the sum of the remeasured quantities applied to the contract rates (in the case of a remeasurement contract). Claims typically include payment for disputed extras and payment under the provisions of the contract which allow for additional recovery in specified circumstances. A claim brought pursuant to the terms of a contract is for enforcement of its terms, subject to proof of the facts asserted where these are disputed, and so is a claim under the contract, rather than being a claim for breach. In addition, the term “claim” is often applied to a claim for damages for breach.<sup>795</sup> Such claims often overlap with or form an alternative to a contractual claim, the facts relied on and the financial consequences asserted being common. Where this is so, consideration needs to be given to whether the effect of the contract is to render the contractual claim an exclusive remedy. Generally, the reverse is the case. The effect of bringing an alternative claim for breach may be to avoid the effect of a notice provision which would bar the claim under the contract terms.

#### **Claims by employer—delay**

- 39-246 Claims under the terms of the contract brought by the employer are usually limited to claims for delay damages, which are frequently expressed as liquidated (i.e. predetermined) damages involving no requirement of proof. Whether a delay claim is for liquidated or actual damages, it is rarely necessary for the employer to launch proceedings since, under most systems of procurement, the employer is the debtor and may simply set-off the sum claimed. The claim will then require

proof as a counterclaim to any proceedings for non-payment which may be brought by the contractor.<sup>796</sup>

## Claims by employer—quality

- 39-247 Claims by the employer relating to the quality of the work arising during the period of performance are generally intended to be settled by the contract administrator by decisions given under express powers, i.e. to reject non-conforming work. The work should, therefore, comply fully with the contract at the date of the completion certificate.<sup>797</sup> Latent defects appearing during the “defects liability period”<sup>798</sup> or “rectification period”<sup>799</sup> amount to a breach of contract, which the contractor, by virtue of these provisions, is entitled to be given the opportunity to correct.<sup>800</sup> Where the contractor fails to carry out such correction or there is a dispute, the employer remains the debtor through the retention fund, to which recourse may be had to satisfy any loss. It is therefore similarly unlikely that the employer will need to bring proceedings. With the possible exception of a claim for termination or repudiation, claims by the employer (other than claims by set-off) are in practice limited to those arising from latent defects in the work. Such claims are not usually subject to any action by the contract administrator, who will be functus officio. Such a claim will be for breach of contract<sup>801</sup> and will be subject to the effect of any final certificate as well as limitation.

## Particular provisions for claims

- 39-248 Each form of contract has its own characteristic types of claim, based on risks typically encountered by a particular industry. Thus, in civil engineering work, unexpected sub-surface conditions are a frequent cause of difficulty. The ICE Conditions and subsequently the ICC Form has, from its inception, made provision for dividing this risk between the parties such that the contractor undertakes the risk of ground conditions which could reasonably be foreseen by an experienced contractor and the employer takes the risk where such conditions could not reasonably be so foreseen.<sup>802</sup> Where such a claim is established the conditions of contract entitle the contractor to be paid for the additional cost incurred, including delay. Building contracts are typically silent as regards ground conditions which will therefore be at the contractor’s risk unless conditions exist which should have been measured in accordance with the relevant standard method of measurement<sup>803</sup> or unless the circumstances can be brought within any other provision of the contract. Adverse ground conditions are typical of claims in which the risk may be placed upon the employer (as under the ICC Form), but where the contract is silent, the risk will fall upon the contractor (as under the JCT Form). Another example is cost inflation (fluctuations) where the risk will fall upon the contractor unless transferred to the employer by the terms of the contract.

## Claims for loss and expense

- 39-249 The JCT Form of Contract contains a well-known claim provision entitling the contractor to payment of “direct loss and/or expense” arising from a variety of matters including late provision of instructions, failure to give access and architect’s instructions requiring a variation.<sup>804</sup> Such a claim is conditional upon timely notice<sup>805</sup> and upon the loss or expense being such that it would “not be reimbursed by payment under any other provision in this contract”. In the case of a variation, therefore, the contractor is entitled to recover payment for the work itself pursuant to the valuation provisions included in the contract, together with any additional loss and/or expense incurred.<sup>806</sup> Normally a contractor will be unable to recover loss and expense in relation to delay where it would have suffered the exact same loss and expense anyway, even absent the relevant matters alleged to be the employer’s responsibility, as a result of causes within the contractor’s control or for which it is contractually responsible.<sup>807</sup> The ICC Form contains no similar provision, but allow a claim based on variations where it is established that the effect is to render “any rate or price contained in the contract … unreasonable or inapplicable”.<sup>808</sup> The engineer is then empowered to increase the rate in question so as to compensate the contractor. Claims for late instructions or failure to give access are dealt with under other specific clauses. In contrast to the last paragraph, claims for loss and/or expense or rate adjustment are matters which may, absent provisions under the contract, still be regarded as employer’s risks since they arise from interference through the issuing of variations. Such claims may otherwise be expressed, in the alternative, as claims for breach.

## Extensions of time and claims

- 39-250 Where a ground of claim also gives rise to an extension of time, part of the quantification of the claim will be the time-dependent element of the loss or additional cost. Not all grounds of claim give rise to delay, nor do all entitlements to extension of time carry a right to payment. For example, exceptionally adverse weather is usually recognised (but subject to the precise wording of the contract) as qualifying for an extension but any additional cost is at the contractor’s risk. Under the JCT 2016, cl.2.29 lists those relevant events which entitle the contractor to an extension of time<sup>809</sup> and cl.4.24 lists those relevant matters which entitle the contractor to recover loss and expense including time related costs. A comparison of those two clauses reveals those issues which entitle the contractor to additional time but not additional money. Under the ICC Form grounds of claim carrying an entitlement to reimbursement are contained within individual clauses.<sup>810</sup> Extensions of time are dealt with by a general clause as well as in a number of individual clauses.<sup>811</sup>

## Footnotes

- 795 For an analysis of the problems of quantifying claims for time and money, see: *Ascon Contracting Ltd v Alfred McAlpine Construction (Isle of Man) Ltd (1999) 66 Con. L.R. 119*.
- 796 For contracts subject to the **Housing Grants, Construction and Regeneration Act 1996** a counterclaim also requires appropriate notice, pursuant to s.111 of intention to pay less than the sum otherwise due to the contractor.
- 797 With the exception of particular powers whereby the Contract Administrator may accept completion subject to minor or outstanding work see, e.g. ICC Form cl.48, 49.
- 798 See JCT 98 cl.17.
- 799 See JCT SBC 2005 cl.2.34 and 2.39.
- 800 See *Kaye v Hosier & Dickinson [1972] 1 W.L.R. 146, HL*.
- 801 In *McGlinn v Waltham Contractors Ltd [2007] EWHC 149 (TCC), [2007] 111 Con. L.R. 1* it was held that a claimant who had demolished and rebuilt his property due to building defects was only entitled to damages based upon the cost of repairing the defects, rather than the higher cost of demolishing and rebuilding the property, because the defects complained of were aesthetic rather than structural and he had not acted reasonably in demolishing the building.
- 802 ICC Form cl.12.
- 803 Such as rock or running sand.
- 804 JCT SBC 2016 cl.4.20 and 4.21.
- 805 See *WW Gear Construction Ltd v McGee Group Ltd [2010] EWHC 1460 (TCC), 131 Con. L.R. 63*, where the JCT Standard Trade Contract (TC/C) Conditions 2002 (as amended) were construed to make a timely request in writing a pre-condition for an entitlement to recover loss and expense under the contract, and where it was indicated that in deciding whether a clause was or was not a condition precedent to recovery, the ordinary rules of contractual construction should apply (at [11]–[13]).
- 806 Loss and/or expense has been equated to common law damages: *Wraight v PT & H Holdings (1968) 13 B.L.R. 26*.
- 807 See *De Beers v Atos Origin IT Services [2011] B.L.R. 274*, per Edwards-Stuart J at [177]–[178]. The distinction between the test of causation that applies to extension of time and loss and expense provisions using the JCT wording was confirmed in *Walter Lilly & Co Ltd v DMW Developments Ltd [2012] EWHC 1773 (TCC), [2012] B.L.R. 503*, per Akenhead J at [362]–[370] and [540]–[543].
- 808 ICC Form cl.52(4).
- 809 Relevant Events are discussed in *Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd (1999) 70 Con. L.R. 32*. A contractor may be entitled to an extension of time not only if the matter relied upon is the dominant cause of delay, but also if it has only “equal causative potency”, see *Henry Boot Construction v Malmaison; Steria Ltd v*

*Sigma Wireless Comm Ltd [2008] B.L.R. 79* and Keating on Construction, 11th edn (2021) at para.8-026 to 8-031.

- 810 For example, cl.7: late instructions; cl.12: adverse ground conditions; cl.13: engineer's instructions.
- 811 See cl.7, 12, 13 above and cl.44. For a consideration of the different approach to causation in the context of a claim for damages compared to an extension of time claim, see *Costain Ltd v Charles Haswell & Partners Ltd [2009] EWHC 3140 (TCC), 128 Con. L.R. 154*.

## **(c) - Termination of Employment**

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**(c) - Termination of Employment**

### **Meaning**

- 39-251 This refers to termination of the employment of the contractor under the contract, as opposed to bringing the contract itself to an end. Other terms, including “forfeiture”, appear in different forms of the contract but the effect is the same. Both parties remain bound by terms of the contract which are to apply upon termination coming into effect. These will include provisions for the drawing up of accounts, including those relating to completion of the work by others. The consequences of termination for default are broadly equivalent to the effect of acceptance of a repudiatory breach of contract as terminating the contract. In the case of termination of the contractor’s employment pursuant to the terms of the contract, however, the contract makes express provision for the consequences. Termination is brought about by service of appropriate notices, whose effect may be subject to subsequent proof of the matters asserted.

### **Termination by employer**

- 39-252 A provision entitling the employer to terminate on the ground of various defaults is found in practically every form of construction contract. The grounds upon which such termination is available, however, differ. Generally, termination of the contractor’s employment will be at the employer’s option and will not occur until the service of a notice to that effect. It is not uncommon for contract to require a notice of default to be served prior to the termination, giving the contractor a chance to remedy any breach. For example, under cl.8.4 of the JCT 2011 contract, the employer must give 14 days’ notice of various defaults such as a failure to proceed regularly and diligently with the works before he is entitled to terminate. By contrast, in the event of contractor insolvency

under cl.8.5, the right to terminate arises immediately and even before it is exercised certain interim measures take automatic effect.

## Termination by contractor

- 39-253 Some, but not all, forms of contract provide for termination by the contractor. The JCT Form allows termination by the contractor on various grounds, notably non-payment on a certificate after notice, and suspension of the works.<sup>812</sup> The ICE Form introduced, in the 7th edition, a right of termination available to the contractor following events equivalent to insolvency of the employer, or where the employer attempts to assign without prior consent, and this continues in the ICC Form.<sup>813</sup> Where the grounds of termination under the contract are equivalent to repudiation, termination may be effected both under the contract and, in the alternative, in common law. It is possible that the two remedies may be seen as involving mutual inconsistency. There is authority, however, to the effect that both remedies may be exercised in the alternative.<sup>814</sup> The remedy provided, following a valid termination for default,<sup>815</sup> whether by employer or contractor, is usually equivalent to common law damages following termination at law, but with added contractual remedies. Thus, there is usually a provision that upon termination by the employer the contractor must assign the benefit of sub-contracts.<sup>816</sup> Under the 6th edition of the ICE Conditions, property in plant and materials was deemed to vest in the employer when on the site and could subsequently be used by the employer after any termination.<sup>817</sup> These provisions were removed from the 7th edition and do not appear in the ICC Form.

## Termination of employment and fundamental breach compared

- 39-254 It is important to note that in the case of termination by either the employer or the contractor, the grounds provided under the contract may fall far short of what could be regarded as fundamental breach, leading to a right to terminate the contract in law.

## Termination at will

- 39-255 Many forms of contract provide for termination, solely by the employer, without ground of default, providing a remedy broadly equivalent to that generally available under civil law in respect of an administrative contract.<sup>818</sup> Such provisions exist in Form GC Works/1, formerly issued for use by UK government departments. In such cases, the contractor will usually be entitled to full compensation, including loss of profit. The JCT Form of Contract provides for termination without

fault where the works are suspended for specified reasons, including force majeure.<sup>819</sup> Such termination may be effected by either party.

## Disputed termination

- 39-256 To be effective, the act of termination by one party must be followed by withdrawal from the site. In the case of termination by the employer it is possible that the contractor may seek to resist physical removal from the site pending final resolution of the question whether the employer was entitled to take such action. In *Hounslow v Twickenham Gardens*<sup>820</sup> the contractor refused to leave the site after service of notice of termination under a JCT Form of Contract. The employer sought an injunction which was refused by Megarry J on the ground that the employer was under an implied obligation not to revoke the contractor's licence to occupy the site except in accordance with the contract. It was held that the employer had not, for the purpose of the injunction proceedings, conclusively established the validity of its termination notices. It was stated:

“I fully accept the importance to the Borough on social grounds as well as others of securing the due completion of the contract, and the unsatisfactory nature of damages as an alternative. But the contract was made, and the Contractors are not to be stripped of their rights under it, however desirable that may be for the Borough. A contract remains a contract even if (or perhaps especially if) it turns out badly.”

This decision has been much criticised and has not been followed in a number of cases including *Chermar v Pretest*<sup>821</sup> and *Tara Civil Engineering v Moorfield Developments*.<sup>822</sup> In the latter case, where a contractor disputed notice of termination served under the ICE Conditions, the Court rejected the contractor's claim to be entitled to remain on the site in the interim, holding that the issues raised by the parties were to be decided by arbitration. Pending ultimate resolution, the balance of convenience was strongly in favour of the court supporting the engineer's decision.<sup>823</sup> It would appear unlikely that the courts will now support a challenge to an apparently bona fide exercise of a contractual right of termination by granting an injunction.

## Mutual termination

- 39-257 In some cases both parties have sought, virtually simultaneously, to exercise rights of termination. This was the case in *Att-Gen of Hong Kong v Ko Hon Mau*,<sup>824</sup> where the contractor gave notice of termination under the HK Public Works Highways Maintenance Conditions. Ten days later, the Government gave cross-notice of termination and physically re-entered the site taking possession of the contractor's plant. The contractor sought to enforce his right to take possession of the plant,

which was resisted by the Government. The Hong Kong Court of Appeal upheld the contractor's right on the basis that his notice was first in time, both notices being accepted as bona fide. The court observed that both notices were provisional in the sense that they would only take final effect at the conclusion of the arbitration proceedings.

## Footnotes

- 812 See JCT SBC 2011 cl.8.9.
- 813 This latter provision is surprising given that any such purported assignment will be of no effect: *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd [1994] 1 A.C. 85*; *Hendry v Chartsearch [1998] EWCA Civ 1276, [2000] 2 T.C.L.R. 115*.
- 814 *Supamarl v Federated Homes [1981] 9 Con. L.R. 25*; *Architectural Installation Services v James Gibbon (1989) 46 B.L.R. 91*; but see also *Lockland Builders v John Kim Rickwood (1995) 77 B.L.R. 38, CA* and para.39-225, above.
- 815 See *Laing Management Ltd v Aegon Insurance Co (UK) Ltd (1997) 55 Con. L.R. 1* where it was decided that the exercise of a contractual right to terminate was not to be treated as acceptance of a repudiatory breach so as to discharge both parties from future performance.
- 816 See, e.g. JCT 98 cl.27.4 and JCT SBC 2011 cl.8.7.2.3. Note *Energy Works (Hull) Ltd v MW High Tech Projects UK Ltd [2020] EWHC 2537 (TCC), [2020] B.L.R. 747* where, notwithstanding the awkward wording of the provision in that case, a purported "assignment of the sub-contract" could not operate as a novation, as the language of "assignment" was inherently inconsistent with a full novation.
- 817 ICE 6th edn cl.53, 63(2).
- 818 See further N. Brown and J.S. Bell, French Administrative Law, 5th edn (1998).
- 819 See JCT SBC 2011 cl.8.11.
- 820 *[1971] Ch. 233*.
- 821 *8 Const. L.J. 44*.
- 822 *(1989) 46 B.L.R. 72*.
- 823 Following *American Cyanamid v Ethicon [1975] A.C. 396*.
- 824 *(1988) 44 B.L.R. 144*.

## (d) - Final Certificates

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(d) - Final Certificates

### Binding effect

- 39-258 The issue of the final certificate (for which provision is made in most standard forms of contract) will occur in the final stages of the work of the contract administrator. This may have a profound effect on the ability of either party subsequently to enforce the terms of the contract. In JCT 2011, cl.1.10 provides for the issue of a Final Certificate, which may be disputed within 28 days after issue, but will become binding both as to matters of quality and payment to the extent that it is not specifically challenged. The significance and effect of the issue of a final certificate which is not challenged within the specified period, will be a matter of construction.<sup>825</sup> In *Crown Estates Commissioners v John Mowlem*<sup>826</sup> the Court of Appeal held that the final certificate issued under JCT 80 was conclusive in respect of all works under the contract, since on a true construction of cl.30.9.1.1 all matters of standards and quality of work and materials were for the reasonable opinion of the architect and so were concluded (in the absence of arbitration) by the issue of a final certificate. A similar decision had previously been reached in relation to the IFC 84 Form in *Colbart v Kumar*.<sup>827</sup> The consequence of these decisions is that, under these forms of contract, no evidence may be called to contradict or qualify the architect's decision as expressed in the final certificate, so that it is effectively binding on the parties on all relevant questions of fact. However, although the final certificate operates as an evidential bar, it does not constitute a cessation of liability for the purposes, for example, of the *Civil Liability (Contribution) Act 1978*.<sup>828</sup>

### Decisions criticised

- 39-259

The decision in *Crown Estates* was the subject of trenchant criticism<sup>829</sup> and it is also to be observed that the JCT changed the wording of the clause to overcome the perceived difficulties created by *Crown Estates*. The current version of the clause gives the final certificate conclusive effect in respect of the quality of work or materials only if the contract documents make it clear that the parties have agreed to abide by the decision of the architect in issuing the final certificate for the relevant parts or requirements of the works. However, decisions on final certificates in other standard forms indicate that a broad construction of the relevant contract terms is still preferred. In *Matthew Hall Ordtech v Tarmac Roadstone*<sup>830</sup> it was held that on a true construction of cl.38.5 of the Institution of Chemical Engineers Model Form of Conditions of Contract for Process Plants (1981 rev.) the final certificate is conclusive evidence that all work has been completed in accordance with the requirements of the contract. However, it is to be observed that the Scottish Court of Session has given a more restrictive view to the effect of a Final Certificate issued under JCT 63 (July 1977 revision) Form of Contract.<sup>831</sup>

## Footnotes

- 825 See generally as to the effect of final certificates Keating on Construction, 11th edn (2021) at para.5-020; *Kaye v Hosier and Dickinson* [1972] 1 W.L.R. 146, *HL*; and *East Ham Corp v Bernard Sunley & Sons Ltd* [1966] A.C. 406, *HL*.
- 826 (1994) 70 B.L.R. 1, *CA*.
- 827 (1992) 59 B.L.R. 89.
- 828 *Oxford University Fixed Assets Ltd v Architects Design Partnership* (1999) 64 Con. L.R. 12.
- 829 *Duncan Wallace* (1995) 11 Const. L.J. 184.
- 830 (1997) 87 B.L.R. 96.
- 831 *Belcher Food Products Ltd v Miller & Black*, 1999 S.L.T. 142 (opinion of Lord Gill).

## **(a) - Nature of Disputes**

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**Section 10. - Disputes**

### **(a) - Nature of Disputes**

#### **Disputes under construction contracts**

- 39-260 In contrast to a contract for sale of goods, where disputes may relate to the quality of the goods as delivered or to the date of delivery, disputes under construction contracts can arise from every aspect of the production of the works required by the contract, including the speed of production. Moreover, as regards quality, as a consequence of the proper application of the contract terms, the works as finally delivered may be expected to accord to the requirements of the contract and to give rise to subsequent disputes only in respect of latent defects. Disputes concerning pre-delivery performance of the work are likely to involve, in addition to the original contract requirements, consideration of instructions, variations and approvals, both in terms of their timing and overall effect. Where delay occurs, there may be detailed disputes as to the causes, including scrutiny of programmes and progress reports. In all such cases, decisions may have been made by the contract administrator which may (with limited exceptions) subsequently be challenged by way of adjudication, arbitration or litigation. Disputes may thus encompass all aspects of quality, timing and payment. The question of whether a “dispute” or “difference” has in fact arisen may be important in the context of dispute resolution procedures, particularly in the case of adjudication or arbitration, where a dispute or difference must have arisen before those procedures are operated, in order to vest the adjudicator or arbitrator with jurisdiction. The most authoritative discussion of this topic, in the context of arbitration but equally applicable to adjudication, is in *Amec Civil Engineering Ltd v Secretary of State for Transport*,<sup>832</sup> and in *Collins (Contractors) Ltd v Baltic Quay Management (1994) Ltd*,<sup>833</sup> where Clarke LJ accepted as “broadly correct” the test set out in the form of the seven propositions by Jackson J in the first instance decision in *Amec*.

## Footnotes

832 [2005] EWCA Civ 291, [2005] 1 W.L.R. 2339.

833 [2004] EWCA Civ 1757, [2005] B.L.R. 63.

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## **(b) - Conditions Precedent**

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**Section 10. - Disputes**

### **(b) - Conditions Precedent**

#### **Multi-stage disputes**

- 39-261 While disputes are a widespread feature of construction contracts, their incidence is usually controlled by the terms of the contract. Generally, more elaborate contracts will provide for a series of stages through which a dispute may or must proceed before arbitration or litigation become available to the parties. Where a particular stage, on the true construction of the contract, is mandatory, it will operate as a condition precedent to the right to pursue the claim to the next stage.<sup>834</sup> Subject to any question of waiver, the failure to comply with such a condition precedent may afford the other party a defence to the claim.<sup>835</sup> Such conditions precedent may arise through necessary implication from the express requirements of the contract. An example is the requirement for a claim or contention to be referred to the engineer under earlier versions of the ICE Conditions of Contract.<sup>836</sup> The 1998 edition of FIDIC similarly requires disputes which have not been settled through reference to the engineer to be referred to a Dispute Adjudication Board. The effect of these provisions (subject to the effect of the [Housing Grants, Construction and Regeneration Act 1996](#) where applicable) is that the matter in question must have been so referred, and other provisions of the contract (such as the service of timely notice) also complied with, as a condition precedent to an arbitrator subsequently appointed having jurisdiction. Complex issues of fact and construction can arise under such clauses, for example where the engineer has failed to give a clear response under the contract.<sup>837</sup> Care must also be exercised in complying with the requirements for the commencement of arbitration proceedings within agreed time periods since the courts will make use of the power under [s.12 of the Arbitration Act 1996](#) (to extend time for reference to arbitration) sparingly, and not to overcome the carelessness or ignorance of one of the parties.<sup>838</sup>

## Enforcement of conditions precedent

- 39-262 The modern attitude of the courts to such provisions was expressed by Lord Mustill in *Channel Tunnel Group v Balfour Beatty Construction*<sup>839</sup> as follows:

“Having made this choice I believe that it is in accordance not only with the presumption exemplified in the English cases cited above that those who make arrangements for the resolution of disputes must show good reasons for departing from them, but also with the interests of the orderly regulation of international commerce, that having promised to take their complaints to the experts and if necessary to the arbitrators, that is where the appellants should go. The fact that the appellants now find their chosen method too slow to suit their purpose, is to my way of thinking quite beside the point.”

The case concerned the enforcement by the court, pursuant to its inherent jurisdiction, of a dispute resolution procedure involving reference to a panel of experts, to be followed by arbitration, where one party had sought an injunction from the court in respect of an issue which was to be so referred. Where litigation has been commenced without the parties having fully complied with mandatory steps in the dispute resolution procedure, the Courts will ordinarily enforce the agreed procedure by granting a stay of the proceedings until such time as the preceding steps in the procedure have been complied with, although there is a residual discretion not to grant a stay.<sup>840</sup>

## Footnotes

834 See *Channel Tunnel Group v Balfour Beatty [1993] A.C. 334*, per Lord Mustill at 353.

835 A party who concurs in arbitration proceedings without raising any alleged condition precedent may found a waiver or estoppel or even give rise to an ad hoc submission: see *Jones v Balfour Beatty (1992) 42 Con. L.R. 1*; and see also *Arbitration Act 1996 s.73* as to the timely raising of questions of jurisdiction.

836 cl.66, as to which see *Monmouthshire CC v Costelloe & Kemple [1965] 5 B.L.R. 83* at 91; *Anglian Water v RDL Contracting (1988) 43 B.L.R. 98*; *Wigan Metropolitan BC v Sharkey Bros (1988) 43 B.L.R. 115*; *ECC Quarries v Merriman (1988) 45 B.L.R. 90*; *Mid Glamorgan CC v The Land Authority for Wales (1990) 49 B.L.R. 61*; *Havant BC v South Coast Shipping Co (1998) 14 Const. L.J. 420*; *Edmund Nuttall v RG Carter [2002] B.L.R. 312*. The ICE Conditions were substantially amended in the light of the *Housing Grants, Construction and Regeneration Act* and the ICC Form now contains no requirement for an engineer's decision.

837 See I.N.D. Wallace QC, *Construction Contracts: Principles and Policies in Tort and Contract*, Ch.18—The Timebar in FIDIC cl.67.

- 838 *Harbour and General Works v Environmental Agency* [1999] 1 All E.R. (Comm) 953, [1999] B.L.R. 143.
- 839 [1993] A.C. 334.
- 840 See *DGT Steel and Cladding Ltd v Cubitt Building and Interiors Ltd* [2007] EWHC 1584 (TCC) at paras 5–13 and cases cited therein.

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## (c) - Arbitration

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### (c) - Arbitration

#### Alternative fora

- 39-263 Most standard form construction contracts,<sup>841</sup> and particularly those in use internationally, provide for arbitration as the final means of resolution of disputes between the parties to the contract.<sup>842</sup> In the case of an arbitration agreement contained in a domestic construction contract (being one in which both parties and the seat of the arbitration are located in England and Wales), arbitration and litigation effectively provide alternative fora for the resolution of disputes. Either party is, however, entitled to enforce an arbitration agreement<sup>843</sup> irrespective of the wish of the other party to bring concurrent court proceedings against other parties which may not be available in arbitration,<sup>844</sup> or of any other considerations which might render litigation more appropriate. The discretion formerly available to the court is no longer available under the *Arbitration Act 1996*.<sup>845</sup>

#### Jurisdiction of court

- 39-264 In *Northern RHA v Derek Crouch Construction*<sup>846</sup> the Court of Appeal held that, where an arbitration clause empowered the arbitrator to “open up review and revise” a certificate of the architect, the court did not possess such a power but was limited to enforcing the terms of the contract. The effect was that any dispute which involved challenging decisions given by an architect, engineer or other contract administrator had to be brought by arbitration. This was followed in a number of subsequent cases.<sup>847</sup> The decision has, however, now been conclusively reversed by the House of Lords in *Beaufort Developments v Gilbert-Ash*,<sup>848</sup> with the effect that words expressly empowering an arbitrator to grant particular remedies will not be construed as

limiting those remedies to arbitration proceedings. While the contract may provide for certificates to bind the court:

“... in all other respects, where a party comes to the court in the search for an ordinary remedy under the contract or for a remedy in respect of an alleged breach of it, the court is entitled to examine the facts and to form its own opinion upon them in the light of the evidence. The fact that the Architect has formed an opinion on the matter will be part of the evidence. But, as it will not be conclusive evidence, the Court can disregard his opinion if it does not agree with it.”<sup>849</sup>

## Footnotes

- 841 It should be noted that the default position in respect of dispute resolution under the JCT 2005 suite of contracts is now litigation, not arbitration. This represents a change from previous editions of the JCT Standard Form suite of contracts, although the parties are of course free to make arbitration the final means of dispute resolution by way of an appropriate amendment or by ad hoc agreement to refer.
- 842 Arbitration clauses are to be construed in the same way as any other contractual clause. However, whilst arbitration clauses, like any other clause, can be unenforceable for ambiguity, the court will generally lean heavily towards a construction of the words used by the parties which gives a sensible and effective interpretation to the arbitration clause. See *Star Shipping AS v China National Foreign Trade Transportation Corp (The Star Texas)* [1993] 2 Lloyd's Rep. 445, CA; *Lobb Partnership Ltd v Aintree Racecourse Co Ltd* [2000] B.L.R. 65.
- 843 See *Arbitration Act 1996* s.9.
- 844 See *Taunton Collins v Cromie* [1964] 1 W.L.R. 633, a case under the *Arbitration Act 1950*, which gave the court discretion to refuse a stay where litigation was considered more appropriate.
- 845 The statutory provisions which created a discretion were s.4(1) of the *Arbitration Act 1950* and s.86 of the *Arbitration Act 1996* (not brought into effect). For decisions on the mandatory stay provided by s.9(4) of the *Arbitration Act 1996*, see: *Halki Shipping v Sopex Oils* [1998] 1 W.L.R. 726, CA; *Birse Construction Ltd v St David Ltd* [2000] B.L.R. 57, CA; *Ahmad Al-Naimi (trading as Buildmaster Construction Services) v Islamic Press Agency Inc* [2000] B.L.R. 150, CA. The requirements for a “step” within the meaning of s.9(3) of the *Arbitration Act 1996* were considered in *Bhaiilbai Patel v Dilesh R Patel* [2000] Q.B. 551, [1999] B.L.R. 227, CA.
- 846 [1984] Q.B. 644.
- 847 Including the decisions of the Court of Appeal in: *Rapid Building v Ealing Family Housing Association* (1984) 29 B.L.R. 5; *Turner & Goudy v McConnell* [1985] 1 W.L.R. 898; *CM Pillings v Kent Instruments* (1985) 30 B.L.R. 80; *Youll v Arthur White (Contractors) Ltd*

*Unreported 5 March 1987; Benstrete Construction v Hill (1987) 38 B.L.R. 115; Ashville Investments v Elmer Contractors [1989] Q.B. 488; North West Reg Thames RHA v Shephard Robson (1995) 50 Con. L.R. 79; Balfour Beatty Civil Engineering v Docklands Light Railway (1996) 78 B.L.R. 42.*

848 [1999] 1 A.C. 266.

849 per Lord Hope at 291–292.

## **(d) - Litigation**

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**(d) - Litigation**

## **Technology and Construction Court**

- 39-265 In cases where the parties do not enter into, or do not seek to enforce, an arbitration agreement, either party is free to litigate any issue arising under a construction contract, subject to the effect of any certificate<sup>850</sup> or decision rendered binding under the terms of the contract.<sup>851</sup> The existence of an arbitration clause, if not enforced, is immaterial.<sup>852</sup> Proceedings may be brought in the Technology and Construction Court (TCC) list of the Business and Property Courts, where cases are heard by specialist judges experienced in construction matters.

## **Particular features of the TCC**

- 39-266 For the purposes of Pt 49 of the Civil Procedure Rules, the TCC is considered as specialist proceedings. Every claim allocated to the TCC will be allocated to the multi-track and the rules relating to track allocation will not apply.<sup>853</sup> “TCC business” includes any claim which involves issues or questions which are technically complex or for which trial by a judge of the TCC is for any other reason desirable. TCC business may be dealt with either in the High Court or in the county court. Under their former name as Official Referees’ Courts, original procedures were introduced, many of which have been adopted generally throughout the courts. These include the exchange of expert evidence,<sup>854</sup> exchange of witness statements<sup>855</sup> and meetings between experts without prejudice.<sup>856</sup> Procedures not commonly adopted in other divisions include preparation of pleadings and particulars in the form of schedules. A schedule which sets out, in columns, the

items in dispute with a note of the contention of each party and the sums contended for is popularly known as a “Scott Schedule”.<sup>857</sup>

## Presentation of claims

- 39-267 The nature and often complicated factual basis for many claims made in construction litigation will mean that special difficulties arise in the way they are presented and pleaded in court. Where an alleged loss may be attributed to a series of possible competing technical causes, there is a question as to the degree of particulars and detailed analysis of nexus which must be set out in the written presentation of the case. In a “global claim” or “total cost claim”<sup>858</sup> the claimant will identify alleged breaches, events alleged to permit recovery and alleged loss suffered, but the loss will be given as a global sum without specific linkages to particular alleged causative events. The practical difficulties and necessary limitation in pleading an accurate apportionment of loss between competing causes was accepted in *Crosby v Portland UDC*<sup>859</sup>; but in other cases, a far more demanding approach to the requirements of pleading has been adopted.<sup>860</sup> The modern approach is to permit global claims to be brought and to proceed to trial but to recognise that a party seeking to prove a claim on a global or total costs basis carries a greater burden than a party seeking to prove the same claim on a particularised or itemised basis.<sup>861</sup>

## Alternative dispute resolution (ADR)

- 39-268 Where a commercial agreement between parties requires ADR to be undertaken, the strong tendency of the courts, especially in the specialist divisions, is to refuse to permit a party to pursue proceedings without having first instituted ADR proceedings.<sup>862</sup> There is a separate jurisdiction to stay proceedings in accordance with the principles set out in the CPR, and in *Shirayama Shokusan Co Ltd v Danovo Ltd*<sup>863</sup> Blackburne J concluded that the court had jurisdiction to order the parties to mediate even where one party was opposed to any mediation, and although the prospects for success of such a process was limited. A refusal by one party to mediate will often, though not necessarily, have adverse costs consequences, but each case will depend on its own facts.<sup>864</sup>

## Footnotes

- 850 The question of final certificates was further considered in *London Borough of Barking & Dagenham v Terrapin Construction Ltd [2000] B.L.R. 479, CA* (in the context of JCT 1981

with Contractor's Design); and in *Tameside MBC v Barlow Securities Group Services Ltd [2001] B.L.R. 113, CA.*

851 See above.

852 See *Beaufort Development v Gilbert-Ash [1998] 2 W.L.R. 860.*

853 TCC Practice Direction (11 March 1999). For changes, consult the website of the Lord Chancellor's Department. See also Pt 60 of the CPR (which came into force on 25 March 2002), the Supplementary Practice Direction and the TCC Guide (2nd edn) with effect from 3 October 2007).

854 Originally RSC Ord.38 rr.35–37, now CPR r.35.5.

855 Originally RSC Ord.38 r.2A, now CPR r.32.4.

856 Originally RSC Ord.38 r.38, now CPR r.35.12.

857 After a former Official Referee, George Alexander Scott (1920–1933).

858 See *Mid-Glamorgan CC v J Devonald Williams (1991) 29 Con. L.R. 129*. See the review of the decided cases on “global” claims by Lord Macfayden in *John Doyle Construction Ltd v Laing Management (Scotland) Ltd [2002] B.L.R. 393* Court of Session. Subsequent to the opinion of the Lord Ordinary, see the opinions of Lords MacLean, Johnston and Drummond Young in the Extra Division of the Inner House of the Court of Session (following a reclaiming motion by the management contractor) in *Laing Management (Scotland) Ltd v John Doyle Construction Ltd [2004] B.L.R. 295.*

859 (1967) 5 B.L.R. 121.

860 *Wharf Properties Ltd v Eric Cumine Associates (No.2) (1991) 52 B.L.R. 1, PC.*

861 *Walter Lilly & Co Ltd v Mackay [2012] EWHC 1773 (TCC), [2012] B.L.R. 503* per Akenhead J at [486]; *John Sisk & Son Ltd v Carmel Building Services Ltd [2016] EWHC 806 (TCC)* per Carr J at [55]–[56].

862 *Cable & Wireless Plc v IBM UK Ltd [2002] EWHC 2059 (Comm), [2003] B.L.R. 89.*

863 [2003] EWHC 3306 (Ch), [2004] B.L.R. 207.

864 *The Wethered Estate Ltd v Michael Davis [2006] B.L.R. 86, Ch D.*

## **(e) - Adjudication**

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**Volume II - Specific Contracts**

**Chapter 39 - Construction Contracts**

**Section 10. - Disputes**

**(e) - Adjudication**

### **Adjudication by statute**

- 39-269 The [Housing Grants, Construction and Regeneration Act 1996](#) imposes a requirement that all construction contracts covered by the Act include adjudication as a form of dispute resolution. The Act applies to all construction contracts in England and Wales save for certain excluded operations<sup>865</sup> and contracts with residential occupiers.<sup>866</sup>

### **Statutory requirements**

- 39-270 The [1996 Act](#) lays down a series of requirements for an adjudication procedure in any construction contract as defined. [Section 108](#) requires that the contract shall:
- (a)enable a party to give notice at any time of his intentions to refer a dispute to adjudication;
  - (b)provide a timetable with the object of securing the appointment of the adjudicator and referral of the dispute to him within seven days of such notice;
  - (c)require the adjudicator to reach a decision within 28 days of referral or such longer period as is agreed by the parties after the dispute has been referred;
  - (d)allow the adjudicator to extend the period of 28 days by up to 14 days, with the consent of the party by whom the dispute was referred;
  - (e)impose a duty on the adjudicator to act impartially; and
  - (f)enable the adjudicator to take the initiative in ascertaining the facts and the law.

Section 108 of the Housing Grants, Construction and Regeneration Act 1996 further provides that a party to a construction contract has the right to refer a dispute for adjudication, that the contract is to provide that the decision of the adjudicator is binding until finally determined by arbitration or other means, and that the contract provides for immunity of the adjudicator.

## Excluded operations and hybrid contracts

- 39-271 Section 105(2) of the Housing Grants, Construction and Regeneration Act 1996 excludes a variety of matters from the scope of the Act which would otherwise have been classed as construction operations, particularly in the energy and natural resources sectors. Where construction work falls within the excluded operations defined in s.105(2) of the Act does not apply, with the result that the adjudication terms of the Act are not implied.
- 39-272 A particular problem is caused by contracts for the carrying out of work that falls partly within the scope of the Act and partly outside the scope of the Act. These are described as hybrid contracts<sup>867</sup> and in such instances, the Act applies to those works falling within the scope of the Act, but not the excluded works.<sup>868</sup> In the context of adjudication this leads to a particular difficulty because a party seeking to claim more money in relation to a disputed interim payment will only be entitled to adjudicate on those parts of the work falling within the Act. However, the exact boundaries of the excluded operations in s.105(2) of the Act are not easy to identify and any error by the referring party is liable to deprive the adjudicator of jurisdiction.<sup>869</sup> As such, it can be very difficult for a referring party to formulate a valid referral in such instances and litigation may be a preferable route.<sup>870</sup>

## Collateral warranties and adjudication

- 39-272A Generally, a collateral warranty under which a contractor warrants the ongoing performance of the works will be considered a contract for the carrying out of construction operations and therefore fall within s.104 of the Housing Grants, Construction and Regeneration Act 1996.

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**U** This will be the case notwithstanding the fact that the works have already been procured pursuant to a separate primary building contract and even where the collateral warranty is signed some time after the works are in fact complete.

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**U** It is thought that a collateral warranty which is executed after the works were completed and solely warrants the proper past performance of the building contract would not fall within the [Act](#).<sup>873</sup>



## The statutory scheme

39-273 If the contract does not comply with the requirements of [s.108 of the Housing Grants, Construction and Regeneration Act](#), the [Scheme for Construction Contracts](#)<sup>874</sup> (“the Scheme”) applies.<sup>875</sup> The Scheme sets out, *inter alia*, the powers and responsibilities of the adjudicator together with a strict timetable for the conduct of the adjudication proceedings. However, the [Housing Grants, Construction and Regeneration Act 1996](#) makes no provision for the enforcement of an adjudicator’s award. Accordingly, one of the early questions raised by the [Housing Grants, Construction and Regeneration Act 1996](#) was the attitude which the court would take to enforcement.

39-274 In *Macob Civil Engineering Ltd v Morrison Construction Ltd*,<sup>876</sup> MCL, the unsuccessful party in an adjudication, argued that, given that the adjudicator’s determination was challenged,<sup>877</sup> it was not a “decision” within [para.23 of the Scheme](#). Dyson J rejected this argument pointing out that, if it were correct, it would substantially undermine the effectiveness of the Scheme, which was intended by Parliament “... to introduce a speedy mechanism for settling disputes in construction contracts on a provisional interim basis ...”.<sup>878</sup> MCL also sought a mandatory stay to arbitration under [s.9 of the Arbitration Act 1996](#), but this was rejected on the facts of the case.<sup>879</sup> Finally, Dyson J indicated that the usual remedy for failure to pay in accordance with an adjudicator’s decision will be for the successful party to issue proceedings claiming the sum due, followed by an application for summary judgment.<sup>880</sup> In *Ringway Infrastructure Services Ltd v Vauxhall Motors Ltd*<sup>881</sup> Akenhead J held that the cause of action to enforce an adjudicator’s award was contractual and that for the purposes of an award of interest under [s.35A of the Senior Courts Act 1981](#), it accrued when the defendant failed to honour the decision.

## The enforcement of adjudicator’s awards

39-275 Following *Macob*, the courts have taken a robust approach to the enforcement of adjudicator’s awards, although in the light of the decision of the Court of Appeal in *Halki Shipping v Sopex Oils*<sup>882</sup> it is not altogether easy to see why the question of enforcement ought not to be a matter to

be referred to arbitration. However, the effect of the decisions on the enforcement of adjudicator's awards may be summarised as follows<sup>883</sup>:

(1) A decision of an adjudicator whose validity is challenged as to its factual or legal conclusions or as to procedural error remains a decision that is both enforceable and should be enforced.<sup>884</sup>

(2) A decision that is erroneous, even if the error is disclosed by the reasons, will still not ordinarily be capable of being challenged and should, ordinarily, still be enforced.<sup>885</sup>

(3) A decision may be challenged on the ground that the adjudicator was not empowered by the **Housing Grants, Construction and Regeneration Act** to make the decision because there was no underlying construction contract between the parties<sup>886</sup> or because the adjudicator has gone outside his terms of reference<sup>887</sup> or because there has been a breach of the rules of natural justice,<sup>888</sup> although in the case of the latter it has been emphasised that enforcement will only be refused in the clearest cases.<sup>889</sup>

(4) Adjudication is intended to be a speedy process in which mistakes will inevitably occur. Accordingly, the court should guard against characterising a mistaken answer to an issue, which is within the adjudicator's jurisdiction, as being an excess of jurisdiction. Furthermore, the court should give a fair, natural and sensible interpretation to the decision in the light of the disputes that are the subject of the reference.<sup>890</sup>

(5) An issue as to whether a construction contract ever came into existence, which is an issue challenging the jurisdiction of the adjudicator, so long as it is reasonably and clearly raised, must be determined by the court on the balance of probabilities with, if necessary, oral and documentary evidence.<sup>891</sup>

(6) Generally the courts will view an alleged set off against an adjudicator's decision as an attempt to frustrate the operation of the **1996 Act** which will ordinarily not be permitted, especially where the subject matter of the set off has been implicitly dealt with in the adjudicator's decision.<sup>892</sup>

## Some procedural aspects of adjudication

39-276 The decisions of the courts on adjudication have also clarified a number of procedural issues which may be summarised as follows.

(1) A party to a "construction contract" to which the provisions of the **Housing Grants, Construction and Regeneration Act 1996** apply, can refer a matter to adjudication at any time and even in the course of ongoing court proceedings.<sup>893</sup> Section 107 of the original **Act** required the contract to be "in writing", which was held to require that the whole of the contract should be evidenced in writing.<sup>894</sup> The section is repealed by the **Local Democracy, Economic Development and Construction Act 2009** with respect to contracts entered into on or after 1 October 2011.

(2)A party responding to an adjudication notice can raise any matter by way of response to the claim (including set-off and counterclaim) provided that all of those matters are raised in the responding party's notice of intention to withhold payment or, in a case subject to the amendments introduced by the **Local Democracy, Economic Development and Construction Act 2009**, that those matters are raised in the notice of intention to pay less than the notified sum.<sup>895</sup>

(3)Neither the **Housing Grants, Construction and Regeneration Act 1996** nor the Scheme confers on an adjudicator the power to award costs in adjudication proceedings and the parties' freedom to agree otherwise is the contract is severely limited by **s.108A of the Act**. Further, **s.5A(2A) of the Late Payment of Commercial Debts (Interest) Act 1998** cannot be relied upon as a basis for recovering costs.<sup>896</sup>

(4)Although much will depend upon the terms of the particular contract, the mere fact that the responding party to an adjudication has failed to serve a proper notice of intention not to pay sums otherwise due will not relieve the referring party from the obligation to demonstrate entitlement and prove its case.<sup>897</sup> This is an issue which, however, the Court of Appeal declined to consider in **C&B Scene Concept Design v Isobars**.<sup>898</sup>

(5)Mere procedural breaches of little consequence are not to be taken as vitiating the decision reached by an adjudicator<sup>899</sup> but the adjudicator does have an obligation to follow the Scheme and "... to conduct the proceedings in accordance with the rules of natural justice or as fairly as the limitations imposed by Parliament permit ...".<sup>900</sup>

(6)The general law in relation to actual or apparent bias will apply to the conduct of adjudicators, but the courts have indicated that a robust approach will be taken, so that a telephone conversation with one side may not amount to apparent bias<sup>901</sup>; and where the adjudicator receives privileged material, he may properly continue if he concludes that there can be no legitimate fear that he might not have been impartial.<sup>902</sup> However, where an adjudicator is very critical of a party for not producing a witness who was never asked to attend, this may amount to bias,<sup>903</sup> as may a large number of former appointments by one of the parties, particularly if combined with certain conduct during the conduct of the adjudication.<sup>904</sup>

(7)Although the possibility has been raised that some disputes may be so complex that it is impossible for them to be dealt with fairly within the timescales available in the adjudication process,<sup>905</sup> such concerns have subsequently not found favour with the courts, particularly in cases where substantial extensions of time have been agreed between the parties.<sup>906</sup>

(8)Where a contract has been entered into under duress, then that contract is voidable; and so, if it has in fact been avoided by the innocent party, then the agreement to adjudicate is unenforceable and the adjudicator will have no jurisdiction.<sup>907</sup>

## Contractual adjudication schemes

In most cases, Standard Forms of Contract have now been amended to take account of the [Housing Grants, Construction and Regeneration Act 1996](#) by the addition of conforming adjudication procedures which apply in place of the Scheme. A party who signs up to such a contract without amending the dispute resolution provisions will be bound by the adjudication clause even if he would not ordinarily fall within the Act, for example because one of the parties is a residential occupier.<sup>908</sup> The solution generally adopted for enforcement of an adjudication decision is to provide that the arbitration clause does not apply to an adjudication decision, leaving the parties free to enforce through the courts.

## Effect of an adjudicator's decision

- 39-278 Unless the contract provides otherwise, the decision of an adjudicator, at least in the statutory context, is taken to be temporarily binding, meaning that it must be complied with, but can be overturned by a subsequent Court decision showing it to be wrong. There is a difficult issue as to the legal basis on which an unsuccessful party to adjudication may seek to obtain repayment of sums paid over to a referring party as a result of an adjudicator's decision. In *Aspect Contracts (Asbestos) Ltd v Higgins Construction Plc*<sup>909</sup> it was held by the Supreme Court that there was an implied term in the contract under consideration (as a result of [para.23\(2\) of the Scheme](#)) to the effect that the losing party had a right to refer the dispute to court and, if successful, have any money paid out returned to it.<sup>910</sup>

## Adjudication and insolvent parties

- 39-279 Adjudicators' decisions may not be enforced where one party is insolvent, either in the technical sense of being in liquidation or in the factual sense of being unable to pay their debts as they fall due. Where the successful party is in liquidation, the Court will ordinarily stay enforcement of any sum awarded by the adjudicator<sup>911</sup> but the Court will generally not stop an adjudication commenced by an insolvent party by issuing an injunction.<sup>912</sup> Where a successful party is not in liquidation but would probably be unable to repay an adjudicator's award if subsequently reversed by litigation or arbitration proceedings, a stay may be available depending on the facts.<sup>913</sup> Where the losing party is impecunious, the decision will generally be enforced, but it cannot be used to wind up the losing party if the latter has an arguable cross-claim.<sup>914</sup>

## Footnotes

- 865 1996 Act s.105(2).
- 866 1996 Act s.106.
- 867 *C Spencer Ltd v MW High Tech Projects UK Ltd* [2020] EWCA Civ 331 at [2].
- 868 Housing Grants, Construction and Regeneration Act 1996 s.104(5).
- 869 *Severfield (UK) Ltd v Duro Felguera UK Ltd* [2015] EWHC 2975 (TCC) at [14].
- 870 See *C Spencer Ltd v MW High Tech Projects UK Ltd* [2020] EWCA Civ 331, [2020] 1 W.L.R. 3426 at [56]–[57], where the Court expressed sympathy for the referring party's situation in such a case, but confirmed that the onus was on the referring party only to refer matters falling within the scope of the Act.
- ①871 *Abbey Healthcare (Mill Hill) Ltd v Simply Construct (UK) LLP* [2022] EWCA Civ 823 at [58(e)] and [64].
- ①872 *Abbey Healthcare (Mill Hill) Ltd v Simply Construct (UK) LLP* [2022] EWCA Civ 823 at [71]–[77].
- ①873 Applying the distinction drawn by Coulson LJ in *Abbey Healthcare (Mill Hill) Ltd v Simply Construct (UK) LLP* [2022] EWCA Civ 823 at [64].
- 874 The Scheme for Construction Contracts (England and Wales) Regulations 1998 (SI 1998/649).
- 875 The Scheme applied in *Macob Civil Engineering Ltd v Morrison Construction Ltd* [1999] B.L.R. 93; and in *Outwing Construction Ltd v H Randall & Son Ltd* [1999] B.L.R. 156.
- 876 [1999] B.L.R. 93.
- 877 In this case, both on the merits and on the basis of certain breaches of natural justice.
- 878 [1998] B.L.R. 93 at 97.
- 879 To this extent, the interrelationship between s.9 of the Arbitration Act 1996 (as considered in *Halki* [1998] W.L.R. 726, CA) and the Scheme may benefit from further consideration by the courts.
- 880 The decision in *Outwing Construction Ltd v H Randall & Son Ltd* [1999] B.L.R. 156 further emphasises the robust approach taken by the courts in implementing the presumed intention of the legislature where enforcement of the Scheme is concerned.
- 881 (2007) 115 Con. L.R. 149.
- 882 [1998] 1 W.L.R. 726, CA.
- 883 See *Sherwood & Casson Ltd v Mackenzie Engineering Ltd* (2000) 2 T.C.L.R. 418.
- 884 *Macob v Morrison* [1999] B.L.R. 93; *C&B Scene Concept Design Ltd v Isobars Ltd* [2002] B.L.R. 93, CA.
- 885 *Bouygues (UK) Ltd v Dahl-Jensen (UK) Ltd* [2000] B.L.R. 49. The adjudicator is permitted to take the initiative in ascertaining the facts and the law, but the proper ambit of the dispute will be determined by the notice of adjudication, properly construed, and the adjudicator will ordinarily have no jurisdiction to decide what is the real dispute between the parties: *McAlpine PPS Pipeline Systems Joint Venture v Transco Plc* [2004] EWHC 2030 (TCC), [2004] B.L.R. 352.

- 886 *The Project Consultancy Group v The Trustees of the Gray Trust [1999] B.L.R. 377. Redworth Construction Ltd v Brookdale Healthcare Ltd [2006] EWHC 1994 (TCC), [2006] B.L.R. 366.* In *Treasure & Son Ltd v Martin Dawes [2008] B.L.R. 24* Akenhead J held that there was jurisdiction for the adjudicator to make the decision under consideration notwithstanding the fact that there had been an oral variation of the original written contract that contained the adjudication clause. But see *Lead Technical Services Ltd v CMS Medical Ltd [2007] EWCA Civ 316, [2007] B.L.R. 251* where the Court of Appeal held that there was an arguable case that an adjudicator had no jurisdiction because the relevant contract was partly oral. See also *Pegram Shopfitters Ltd v Tally Wiejl (UK) Ltd [2003] EWCA Civ 1750, [2004] 1 W.L.R. 2082* in which the Court of Appeal held that it had been wrong to enter summary judgment on an adjudicator's decision where it had been contended that there was no contract at all between the parties. As to the need for all of the material terms to be contained in writing, see *RJT Consulting Engineers Ltd v DM Engineering (NI) Ltd [2002] B.L.R. 217.*
- 887 *Bouygues (UK) Ltd v Dahl-Jensen (UK) Ltd [2000] B.L.R. 49.*
- 888 *Quietfield Ltd v Vascroft Construction Ltd [2006] EWCA Civ 1737, [2007] B.L.R. 67*, on appeal from *[2006] EWHC 174 (TCC), (2006) 109 Con. L.R. 29*. For an example of a breach of natural justice being found by the Court, see *CJP Builders Ltd v William Verry Ltd [2008] EWHC 2025 (TCC), [2008] B.L.R. 545*. See also *Vision Homes Ltd v Lancsville Construction Ltd [2009] EWHC 2042 (TCC), [2009] B.L.R. 525*, where it was held that no breach of natural justice occurred; and *PC Harrington Contractors Ltd v Tyroddy Construction Ltd [2011] EWHC 813 (TCC)*, where it was held that an adjudicator had acted in breach of natural justice by not dealing with a specific defence raised by a party and by not giving either party an opportunity to deal with a jurisdictional issue that arose and which was decided in the adjudication.
- 889 *Carillion Construction Ltd v Devonport Royal Dockyard Ltd [2005] EWCA Civ 1358, [2006] B.L.R. 15*. Note that in *Speymill Contracts Ltd v Baskind [2010] EWCA Civ 120, [2010] B.L.R. 257* the Court of Appeal confirmed that fraud or deceit could be raised as a defence in adjudication enforcement proceedings provided that it was a real defence to the claims being made and was supported by clear and unambiguous evidence.
- 890 *Carillion Construction Ltd v Devonport [2005] EWCA Civ 1358, [2006] B.L.R. 15.*
- 891 *The Project Consultancy Group v The Trustees of the Gray Trust [1999] B.L.R. 377*. See also *Adonis Construction v O'Keefe Soil Remediation [2009] EWHC 2047 (TCC)*, where it was held that there was no written contract for the purposes of the *Housing Grants, Construction and Regeneration Act 1996* in circumstances where the sub-contractor had never signed the order for works and where the draft order did not amount to an offer capable of acceptance to form a contract. See *Naylor Construction Services Ltd v Acoustafoam Ltd [2010] B.L.R. 183 (TCC)*, where it was held that all material terms were sufficiently set out in the relevant documents. Also in *Durham CC v Kendall [2011] EWHC 780 (TCC), [2011] B.L.R. 425*, it was held, following *RJT Consulting*, that an agreed minute of a meeting was capable of being a written record for these purposes if it recorded the agreement in writing of a material term.
- 892 *Ferson Contractors Ltd v Levolux AT Ltd [2003] B.L.R. 118.*

- 893 *Herschel Engineering Ltd v Breen Property Ltd* [2000] *B.L.R.* 272. See also *Connex South Eastern Ltd v MJ Building Services Group Plc* [2005] *EWCA Civ 193*, [2005] *1 W.L.R.* 3323, [2005] *B.L.R.* 201, where the Court of Appeal held that the words “at any time” were to be given their literal and ordinary meaning and that therefore a dispute could be referred to adjudication (subject to the possibility that the right to adjudicate has been waived or was the subject of an estoppel) even after the expiry of a relevant limitation period—although, of course, the responding party would be able to take the limitation point as part of its defence in this event.
- 894 *RJT Consulting Engineers Ltd v D M Engineering (NI)* [2002] *B.L.R.* 217.
- 895 *VHE Construction Plc v RBSTB Trust Ltd* [2000] *B.L.R.* 187; *Northern Developments (Cumbria) Ltd v J & J Nichol* [2000] *B.L.R.* 158; and see s.111(3) of the Housing Grants, Construction and Regeneration Act 1996 as inserted by the Local Democracy, Economic Development and Construction Act 2009.
- 896 *Enviroflow Management Ltd v Redhill Works (Nottingham) Ltd* [2017] *EWHC 2159 (TCC)*, *174 Con. L.R.* 13.
- 897 *Woods Hardwick Ltd v Chiltern Air Conditioning Ltd* [2001] *B.L.R.* 23; *SL Timber Systems Ltd v Carillion Construction Ltd* [2001] *B.L.R.* 516 (Lord Macfayden, Outer House).
- 898 [2002] *B.L.R.* 93.
- 899 See *Discain Project Services Ltd v Opecprime Development Ltd (No.1)* [2000] *B.L.R.* 402; and *Balfour Beatty Construction Ltd v Lambeth LBC* [2002] *EWHC 597 (TCC)*, [2002] *B.L.R.* 288.
- 900 *Glencot Developments v Ben Barrett* [2001] *B.L.R.* 207; and *Discain Project Services Ltd v Opecprime Ltd (No.1)* [2000] *B.L.R.* 402.
- 901 *Amec Capital Projects Ltd v Whitefriars City Estates Ltd* [2004] *EWCA Civ 1418*, [2005] *B.L.R.* 1.
- 902 See *Specialist Ceiling Services Ltd v ZVI Construction (UK) Ltd* [2004] *B.L.R.* 403; cf. *Paice v Harding (t/a MJ Harding Contractors)* [2015] *EWHC 661 (TCC)*.
- 903 As in *A&S Enterprises Ltd v Kema Holdings Ltd* [2005] *EWHC 3365 (QB)*, [2005] *B.L.R.* 76.
- 904 As in *Cofely Ltd v Bingham* [2016] *EWHC 240 (Comm)*, [2016] *1 All E.R. (Comm)* 129, [2016] *B.L.R.* 187.
- 905 *AWG v Rockingham Motorway Speedway Ltd* (2004) *T.C.L.R.* 6.
- 906 *CIB Properties Ltd v Birse Construction Ltd* [2005] *1 W.L.R.* 2252.
- 907 *Capital Structures Plc v Time & Tide Construction Ltd* [2006] *B.L.R.* 226.
- 908 *Treasure & Son Ltd v Dawes* [2007] *EWHC 2420 (TCC)*, [2008] *B.L.R.* 24.
- 909 [2015] *UKSC 38*, [2015] *1 W.L.R.* 2961, [2015] *B.L.R.* 503.
- 910 cf. Vol.I, para.31-056.
- 911 *Wimbledon Construction Co 2000 Ltd v Vago* [2005] *EWHC 1086 (TCC)*, [2005] *B.L.R.* 374, approved in *Gosvenor London Ltd v Aygun Aluminium UK Ltd* [2018] *EWCA Civ 2695*, [2019] *B.L.R.* 99. However, it may be possible for an insolvent company to enforce an award if it can provide sufficient security in respect of any future order for repayment of the sum awarded and any costs of the enforcement action and subsequent final determination proceedings. See *Meadowside Building Developments Ltd (In Liquidation) v 12-18 Hill Street Management Co Ltd* [2019] *EWHC 2651 (TCC)*, *186 Con. L.R.* 148 at [87] and *John*

- Doyle Construction Ltd v Erith Contractors Ltd [2020] EWHC 2451 (TCC), [2020] B.L.R. 671.*
- 912 *Bresco Electrical Services Ltd (In Liquidation) v Michael J Lonsdale (Electrical) Ltd [2020] UKSC 25, [2020] Bus. L.R. 1140.*
- 913 The principles upon which such a stay will be available are those set out in *Wimbledon Construction Co 2000 Ltd v Vago [2005] EWHC 1086 (TCC), [2005] B.L.R. 374* at [26] as extended by *Gosvenor London Ltd v Aygun Aluminium UK Ltd [2018] EWCA Civ 2695, [2019] B.L.R. 99.*
- 914 *Shaw v MFP Foundations & Piling Ltd [2010] EWHC 9 (Ch), [2010] 2 B.C.L.C. 85.* If there is no cross-claim, it may be sufficient that the adjudicator's decision is disputed in good faith. This question was left open in *Shaw*.

## **(f) - International Disputes**

**Chitty on Contracts 34th Ed.**

**Consolidated Mainwork Incorporating First Supplement**

**Volume II - Specific Contracts**

**Chapter 39 - Construction Contracts**

**Section 10. - Disputes**

### **(f) - International Disputes**

#### **Forum, jurisdiction and choice of law**

- 39-280 Many construction projects involve contracts or sub-contracts of an international character. In such cases problems of forum, jurisdiction and choice of law may arise. Such questions are to be determined in accordance with the applicable rules of conflict of laws. As regards litigation, where issues arise between parties from European states, questions of forum and jurisdiction will be governed by the Brussels Convention<sup>915</sup> and the Judgments Regulation<sup>916</sup> and matters of choice of law by the Rome Convention.<sup>917</sup> Where the matters are before the court in England and Wales, the relevant enacting legislation in relation to forum is the Civil Jurisdiction and Judgments Act 1982<sup>918</sup> and, in the case of choice of law, the Contracts (Applicable Law) Act 1990.

#### **Arbitration**

- 39-281 Prima facie, neither Convention applies to arbitration, which is overwhelmingly the most frequently used form of dispute resolution in international construction matters. In the case of an international arbitration<sup>919</sup> whether the seat is in England and Wales or abroad, the procedural law will, prima facie, be that of the seat of the arbitration<sup>920</sup> together with such rules as may be stated in or incorporated by the arbitration agreement. Many such contracts incorporate either the ICC<sup>921</sup> or the LCIA<sup>922</sup> Rules, each of which provide for the arbitration to be administered.

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The proper law or governing law, in the absence of express choice, will be determined by the applicable rules of conflict of laws, but is almost invariably specified in the terms of the contract.<sup>923</sup> Where there is no choice of applicable law but the arbitration is subject to Institutional Rules, these may empower the Tribunal to apply rules of law to the merits of the dispute which are not necessarily the same as the proper or governing law which would be applied by a court.<sup>924</sup>

- 39-283 Where the seat of an international arbitration is in London (or technically England and Wales) Pt I of the Arbitration Act 1996 applies<sup>925</sup> including the right to seek leave to appeal against an award on a point of law.<sup>926</sup> The parties may by agreement exclude any right of appeal<sup>927</sup> and both the ICC and LCIA Arbitration Rules contain such an exclusion agreement. Where appeal is not excluded the question of law must be a question of English law.<sup>928</sup> In *Reliance Industries Ltd v Enron Oil and Gas India Ltd*<sup>929</sup> the applicant sought to argue that there was a question of English law arising out of the award of an arbitral tribunal within the meaning of s.69 of the Arbitration Act 1996 on the basis that, although the substantive law was Indian law, the arbitrators had in practice applied English law. The arbitrators had in fact applied Indian law, which happened to be the same as English law on the point in question, but it was held by the Commercial Court that there was no basis for an appeal under the Arbitration Act. In *Braes of Doune Wind Farm v Alfred McAlpine*<sup>930</sup> the arbitration clause provided that the seat of the arbitration was Glasgow but the arbitration was to be subject to the English Arbitration Act 1996. On an application to the TCC in London for leave to appeal it was held that, on the construction of the arbitration agreement, the venue of the hearing was to be Glasgow but seat of the arbitration was England so that the court had jurisdiction to entertain the application.

## New York Convention 1958

- 39-284 The successor of the Geneva Convention 1927,<sup>931</sup> the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 is probably the most important international instrument relating to international commercial arbitration, providing for the recognition and enforcement of arbitration agreements and of foreign arbitral awards. In particular in relation to international arbitration agreements, the Convention requires the national courts of contracting states to refuse to allow a dispute which is the subject of an arbitration agreement to be litigated if an objection is raised by any party to the arbitration agreement.<sup>932</sup> This is given effect to by s.9 of the English Arbitration Act 1996, which applies whether or not the seat is in England and Wales.<sup>933</sup> Enforcement of awards under the New York Convention is provided for under English law by Pt III ss.100–104 of the Arbitration Act 1996.

## Footnotes

- 915 Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968, as amended.
- 916 Which came into force on 1 March 2002; with the necessary changes to the [Civil Jurisdiction and Judgments Act 1982](#) being made by the [Civil Jurisdiction and Judgments Order 2001 \(SI 2001/3929\)](#).
- 917 Convention on the Law Applicable to Contractual Obligations 1980.
- 918 As extended by the [Civil Jurisdiction and Judgments Act 1991](#) and to the [Civil Jurisdiction and Judgments Order 2001 \(SI 2001/3929\)](#).
- 919 There is no universal definition, but art.1(3) of the UNCITRAL Model Law on International Commercial Arbitration, provides that an arbitration is international, *inter alia*, if the parties have their places of business in different states.
- 920 *Miller v Whitworth Street Estates [1970] A.C. 583*; and see also [Arbitration Act 1996 s.2](#).
- 921 International Chamber of Commerce, Paris.
- 922 London Court of International Arbitration.
- 923 See, for example, FIDIC (1998 edn) cl.1.4.
- 924 See ICC Rules of Arbitration 1998 art.17.1 and LCIA Arbitration Rules 1998 art.22.3.
- 925 By [s.2\(1\) of the Act](#).
- 926 Under [s.69](#).
- 927 [Arbitration Act 1996 s.69\(1\)](#).
- 928 [Arbitration Act 1996 s.82\(1\)\(a\)](#).
- 929 *[2002] 1 All E.R. (Comm) 59, [2002] B.L.R. 36*.
- 930 *[2008] EWHC 426 (TCC), [2008] B.L.R. 321*.
- 931 Which remains in force in England by virtue of Pt II of the [Arbitration Act 1950](#), and [s.99 of the Arbitration Act 1996](#).
- 932 See further, Redfern and Hunter, [Law and Practice of International Commercial Arbitration](#), 6th edn (2015); Dicey, Morris and Collins, [The Conflict of Laws](#), 15th edn (2012), Ch.16. See also Collins, [Essays in International Litigation and the Conflict of Laws](#) (1994), Ch.5 on arbitration.
- 933 [Arbitration Act 1996 s.2\(2\)](#).