

Claims Allocation Review

In February 2006 the Railway Industry Dispute Resolution Committee (RIDR) sought suggestions from interested parties for amendments to the Claims Allocation and Handling Agreement (CAHA). On 14 May 2008 the RIDR Committee circulated its proposal for amending and updating the Agreement which it plans to consider implementing following a meeting on 2 July 2008.

Parties with concerns about any of the drafting or other proposed changes have until **23 June 2008** to comment on the current proposals.

The changes are apparently principally intended to clarify the existing CAHA regime. Nonetheless the proposals do raise a number of potentially interesting provisions some of which are identified below with brief comments. This note is however a digest rather than detailed comment on the operation of the existing CAHA regime or the exact proposals.

Registrar's Roles and Obligations

The CAHA Registrar is a special purpose company which manages and co-ordinates the CAHA allocation process. The Registrar's duties and powers have been set out more fully in a new schedule 2 to the amended Agreement. This provides explicitly for book keeping and co-ordination obligations as well as the professional standard of due skill and care which it must display. There is also a detailed mechanism for replacement of the Registrar at the instigation of the RIDR Committee or a number of CAHA parties.

Formalisation of the Registrar's role is likely to be advantageous. However, as the fee structure is based upon the Registrar's own estimate of its annual funding requirement, care needs to be taken that this does not result in higher fees building up over the coming years.

Mechanisms to control the exercise of the Registrar's functions may be a sensible issue for consultation responses.

Costs Threats on Allocation

The drafting setting out responsibility for handling (on the one hand) and liability (on the other) for claims appears to create some issues or queries.

In respect of claims below the Threshold (new clause 8) a CAHA Party receiving a claim may at its election pass it to another CAHA Party which it believes to be responsible. If this 'first receiver' disputes its responsibility for handling the claim, it must notify the Registrar following which the Chairman of RIDR will make a binding determination. Clause 8.8, 8.9 and 8.10 then apparently govern how either or both liability and responsibility for handling the claim are determined. There appears to be some confusion between these clauses on how the correct party for each is identified and whether the 'first receiver' must pay all the costs of any dispute about its obligations.

The guidance to the amendments suggests that RIDR is seeking to impose a deterrent on parties disputing their responsibility for claims handling in the form of costs. Currently however this drafting suggests that a 'first receiver' nominated by the CAHA Party originally served with a claim may become liable to all costs of determination of responsibility regardless of the party found to be liable.

There is a similar lack of clarity around the processes under clause 9 for claims handling and allocation of issues above the Threshold. These points need to be considered carefully in the consultation to ensure that all CAHA Parties are clear how claims will be handled.

There is also a lack of clarity around how allocation of liability is affected by a court determination under clause 8.10 and around the reasons for maintaining differing routes for determination of large claims arising from Major Incidents and non-Major Incidents.

Nuclear Issues

BNFL has been removed as a CAHA party and the nuclear obligations restructured into a new clause 7. As currently drafted the proposal apparently provides for absolute liability for operators involved in the carriage of all nuclear material (including that not subject to the Nuclear Installation Act). This is apparently regardless of fault or cause of loss.

Bank Facility

The bank facility for Lead Parties has been removed. This facility was formerly provided to ensure that Lead Parties defending a claim had access to liquid funds to do so. It has, however, never been used and consequently is being cancelled. Although this could potentially disadvantage a small party which found itself as the lead defendant to a big claim, the lack of demand suggests that this will not be a significant issue.

The Agency

CAHA has to date provided for an Agency (originally conceived as 'Railway Claims Ltd') to act as a central claims defence body. This has however not been operative for several years and consequently is also due to be cancelled.

Thresholds and Liability

The threshold between small and large claims has been left at the mid 1990s figure of £7,500 despite inflation and costs rises. The current proposal, however, does now remove the £5 million cap for property damage which was disputed during proceedings following the Hatfield derailment. This cap has already been largely but not completely dis-applied by the new model form of Track Access Contract since 2004.

The £5m still lives on in the contract chain however and in TOC on TOC claims. This change could therefore potentially be significant in the event of a major incident causing damage.

Other liability caps will continue to apply as between certain CAHA parties including bespoke arrangements in e.g. maintenance contracts and those between Network Rail and TOCs in Schedule 9 of most Track Access Agreements.

There are some minor amendments to the liability tables for small claims including a transfer of responsibility for damage

due to train doors from the station manager to the train operator and clarification in certain circumstances involving property that the responsible party is the party in control of the property where that is different from the infrastructure manager.

Overall subject to the points below, the changes are intended to clarify and update the Agreement. The majority of changes are simply improvements to existing wording.

Issues to be dealt with in the Consultation

The current proposed drafting may need to be clarified after the current consultation process to ensure that CAHA Parties are clear on their respective obligations. The following issues may be central matters to be dealt with during consultation:

- A mechanism for control or challenge of the exercise by the Registrar of its obligations;
- Clarification of liability in relation to losses from carriage of non-Nuclear Installations Act material;
- Allocation of claims handling both below and above the Threshold;
- Allocation of liability both below and above the Threshold;
- Costs liabilities where parties dispute their responsibility;
- The interaction between the findings of a court and the assignment of liability under CAHA for claims below threshold.

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