

On the right track?

In the second of a series of four articles on common areas of dispute and how to avoid them, **Charlotte Heywood** and **Darren Fodey** of Stephenson Harwood LLP provide their tips on dealing with disputes under track access contracts (TACs)

A message we have seen emerging from the Secretary of State in recent years is bringing the operation of track and train closer together. Legal requirements on the separation of track from train currently place limits on how far the integration can go. There are also practical reasons why full integration may not be realistic: Network Rail (NR) (and not the train operator (TOC)) is responsible for the management of the infrastructure; the TOC (and not NR) is responsible for service operations. Signalling is outside of the control of the TOC. Train maintenance is outside of the control of NR.

Alliances aside, the interface between those organisations is principally set out in the TAC. This is a regulated agreement and must be approved by the ORR before it is entered into, otherwise it has no legal effect. Based on a model form, the TAC sets out the rights the TOC has to use NR's infrastructure.

It incorporates the Network Code, describing many of the pan-industry arrangements, such as timetabling and network change. The Network Code also brings in the Timetable Planning Rules, Engineering Access Statement, Delay Attribution Principles and Rules (DAPR) and Access Dispute Resolution Rules (ADRR), which impact how the TAC operates (the names of those documents well-describing their contents).

Disputes under various different parts of the TAC are common. TACs are complex documents and it is easy to make procedural errors when dealing with claims, particularly as different notice provisions apply depending upon which part of the TAC you are making a claim under. We set out below some of the most common areas of dispute and our tips for managing claims.

Each of the topics covered is worth an article of its own, so we have covered only the key points. While this article refers to NR, many of the principles will apply equally to railways operated by others.

Indemnities

One of the most common types of claim under the TAC is under the indemnities.

They are relatively broad, going both ways and encompassing:

- Failures to comply with safety obligations
- Environmental damage
- Damage caused to the network/trains arising from the other party's negligence.

In our experience, the third tends to be the most relevant – for example, greater wear and tear may be found on parts of a train due to the network not being fully aligned. In order to successfully bring a claim under this indemnity, it needs to be shown that the other party was negligent – either in something it did or in something it failed to do – and the negligence needs to have caused the loss.

In the example above, it would need to be shown that the misaligned network caused the greater wear and tear and was as a result of NR being negligent. This can be difficult to demonstrate and may need involvement from experts to show the link between the negligence and the loss, the extent of the 'greater wear and tear' and the financial impact.

A successful claim under the indemnity results in 'Relevant Losses' being recoverable. This is defined widely and includes all costs, expenses and losses caused by the breach, including loss of profit and loss of revenue. That said, there are some limitations to bringing claims:

- Notice must be given as soon as reasonably practicable after first becoming aware of the relevant circumstances and in any event within 365 days. It is therefore vital to bring a claim promptly, otherwise the right to bring the claim could be lost
- There is a requirement to mitigate the circumstances and the amount of losses suffered. Therefore, evidence of steps taken to mitigate should be recorded in writing and retained
- In the case of NR only – payments made under access agreements to third parties – other than for property damage – and loss of track access revenue are excluded
- In the case of the TOC – 'Relevant Losses' resulting from delays or cancellations to trains are excluded, except where the 'Sustained Poor Performance' mechanism



has been activated

- 'Relevant Losses' that result from a party's own negligence or breach of contract are excluded.

The normal rules on recovery of damages apply in that:

- Any losses need to arise naturally from the breach in 'the usual course of things'.

These are referred to as direct losses, the test for which is what a reasonable person would consider to be the 'usual course of things'

- Any losses that do not arise naturally will only be recoverable if they were, or were reasonably supposed to have been, within the contemplation of the parties as the probable result of the breach, referred to as indirect or consequential losses. This means that exceptional or unusual losses outside of the contemplation of the parties may not be recoverable.

There is also a cap on the amount which can be recovered for certain types of losses in any contract year. If, however, there are continuing breaches of contract which continue for more than twelve months, or 'beyond a period within which it might reasonably be expected to have been remedied', the injured party is entitled to make a new indemnity claim.

Possessions and performance

Schedules 4 and 8 of the TAC deal with planned engineering work reducing the availability of the railway (possessions) and 'on-the-day' performance, respectively. In relation to possessions, think about the following:

- What type of possession it is: type 3 (120 hours or more), type 2 (60-119 hours) or type 1 (less than 60 hours). This has an impact on revenue compensation, i.e. people not using the railway as a result of the work, and costs recovery, i.e. additional costs incurred, such as for replacement buses
- Type 1 payments are modelled for both revenue and costs. Type 2 payments are modelled, save that where there is a costs (but not revenue) difference of more than £10,000, a negotiation takes place for full recovery of costs with referral to the ADRR if required. Type 3 payments work in the same way as Type 2, except that both revenue and costs are assessed in considering whether the £10,000 threshold is met
- In order to trigger the negotiation process, an 'RoU Claim Notice' must be served on NR within 56 days of the issue of the 'Day 42 Statement', for the period in which the possession took place, i.e. the possessions statement issued by NR within 14 days of the end of the period. It is critical to make sure that this notice is served at the right time and in compliance with the notice provisions.

In relation to 'on-the-day' performance (Schedule 8), particular points to bear in mind are:

- The key area for disagreement is likely to be who is allocated responsibility for particular incidents, whether NR, the TOC, joint responsibility or an unidentified incident. Allocation takes place under the DAPR and allocations are set out in a statement provided by NR on

the following working day. It is important for the TOC to verify the information set out in the statement and, in particular, whether they agree with the attributions, as this then feeds into the money mechanism in the TAC

- If there is any disagreement, this must be raised by the TOC within two working days; otherwise the statement is deemed to have been accepted and there is no further opportunity to challenge. Therefore, it is essential to remain on top of these timescales
- Any disputes on allocation are firstly escalated. There is then a further resolution process – both for allocation disputes and other disputes as to amounts payable – including preparing written position summaries, further escalation and, ultimately, reference to the ADRR for determination
- Importantly, there are separate provisions for providing notices under Schedule 8 – make sure to comply to the letter with these.

Timetable planning

Timetable planning is another common area of dispute. In simple terms, the TAC sets out the TOC's rights on various matters, such as the number of passenger train slots, service intervals, platform rights and journey time protection.

These must be taken into account by NR when preparing and revising the timetable. NR does this twice a year after a consultation and revision process and following the applicable Timetable Planning Rules and Engineering Access Statement, which are also revised bi-annually and together are known as the 'Rules'. Important things to bear in mind are:

- The strict timescales for making variation requests and access proposals must be followed
- The principles NR must follow when varying the working timetable and the Rules and considering variation requests are set out in the Network Code. When reviewing any decision of NR, make sure to check these principles
- Appeals against NR's decisions must be made within strict time limits; otherwise the right to appeal will be lost. These time limits vary, but can be as short as five working days
- Appeals should be referred for a determination by a Timetabling Panel under the ADRR. If the TOC is dissatisfied by the decision of the Timetabling Panel, then an appeal can be made to the ORR, again within strict time limits
- If a TOC is successful in overturning a decision of NR, then NR is only liable to pay damages where the decision was made in bad faith or was unreasonable.

Quantifying losses

Claims under TACs can be notoriously difficult to quantify. In simple terms,

you need to prove: (i) that loss has been incurred; and (ii) the amount of that loss. In addition, it needs to be demonstrated that the loss is linked to the breach. We sometimes find that TOCs have claims that they cannot quantify because they do not have clear and specific records or cannot link the losses to the breach.

A common issue is that the quantification of the claim is often not thought about until well after the losses have been incurred. As soon as a claim is notified, think about the types of loss and damage that might have arisen, or are likely to arise, and how best to capture those costs. Put systems in place to ensure that costs incurred are clearly recorded contemporaneously and records are retained and updated as required.

For example, if you are dealing with issues like damage to rolling stock or wear and tear, keep photographic records or other contemporaneous evidence. If you are dealing with a possessions claim, ensure that full details of the incident and any costs incurred as a result are recorded on the day by the appropriate people, so that they can be properly checked.

Equally, the amount of potential future revenue losses can be very difficult to demonstrate. TOCs will need to have robust evidence – perhaps with a supporting revenue model – to show the future impact on revenue.

Top tips for avoiding disputes

After a quick look through some of the issues, here are our top tips for avoiding disputes under TACs:

- Be clear about what provisions of the TAC you are making a claim under and ensure that everyone who deals with such claims is familiar with the applicable provisions
- Get your notice in on time, within any prescribed time periods and making sure it goes to the right address or email address as specified under the TAC
- If you have a claim, think about what will be required to quantify that claim as soon as it arises. Keep specific records of the losses suffered and how such losses have been caused by the breach
- Put everything in writing, including assessments of damage caused, how that damage may have arisen and steps taken to mitigate the damage and losses caused by that damage
- Review decisions of NR carefully against the requirements set out in the Network Code
- If a dispute does arise, ensure that the dispute is properly notified under the relevant part of the ADRR.

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