



# **THE TRANSPORT SECTOR AND THE CONSUMER RIGHTS ACT 2015**

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The Consumer Rights Act 2015 (“CRA”) reformed and consolidated consumers’ rights and remedies in respect of defective goods and services.

Whilst the majority of the CRA came into force on 1 October 2015, the application of the CRA to certain contracts for travel by rail, air, sea and inland waterways was deferred. This allowed the government to consult on proposals for transport providers to continue to cap their liability in accordance with existing compensation regimes (and to a lower level than the CRA would otherwise permit). However, the proposals have been dropped and the CRA will apply in full to such contracts for consumer transport services from 1 October 2016 (with a further limited exemption for the rail sector until 1 October 2017).

This article considers the impact of the changes on providers of consumer transport services, including their interaction with the existing compensation regimes that exist in each of the sectors.

### **The relevant CRA provisions for consumer transport service contracts**

As a result of the CRA, contracts for consumer transport services will be treated as including certain terms (i.e. implied terms, although the CRA does not use that terminology). We consider each in turn.

#### *Services to be performed with reasonable care and skill*

The CRA requires that transport providers perform the services with reasonable care and skill. The CRA does not elaborate upon what is meant by “reasonable care and skill” as it is intended to be a flexible concept to be adaptable for different sectors.

#### *Information about the service or trader to be binding*

The CRA states that anything said or written to the consumer, about the trader or service, is to be treated as a term of the contract, provided that it is taken into account by the consumer when:

- deciding to enter the contract; or
- making any decision about the service after entering into the contract.

However, this implied term is subject to (i) anything that qualified such information (whether said or written and which was provided on the same occasion) and (ii) any change to such information that is expressly agreed to.

Therefore transport service providers will need to take care about suitably qualifying any information provided to consumers, such as in marketing or promotional materials, if they do not want to be contractually bound to such information.

#### *Reasonable Price and Services to be Performed in a Reasonable Time*

The CRA also introduces implied terms regarding the price for services and the timeframe for performance of service. However, these are only relevant in the absence of express terms and are therefore unlikely to apply in a consumer transport context.

#### *Remedies*

The CRA introduces statutory remedies for breach of any such implied term – a right to repeat performance (unless it is impossible) or a right to a price reduction (which may include a full refund).

The government’s view is that it is impossible for performance to be repeated at the same time and date that performance should have occurred, and therefore a price reduction will be the applicable remedy in the transport sector. The CRA requires a refund to be:

- paid within 14 days of the parties agreeing to a refund;
- repaid using the same means via which the consumer made the original payment (unless agreed otherwise); and
- made without imposition of any fee.

The CRA makes clear that its remedies do not affect any stricter remedies that may result from other laws (including the sector-specific remedies considered below). The CRA does not prevent consumers pursuing other claims, such as for damages, provided that there is no double recovery.

#### *Excluding or Restricting Liability*

The CRA further provides that, in respect of these implied terms, it is not possible for a transport provider to: (i) exclude its liability; and (ii) restrict its liability to less than the price the consumer paid. Furthermore, a term that



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does restrict liability to the price paid may still be challenged on the basis that it is unfair under the CRA.

In addition, any other terms that restrict the ability of a consumer to enforce their rights or remedies, or put them at a disadvantage if they do, are also deemed to not be binding.

The government ran a consultation (in November 2015) on dis-applying the provisions on restricting liability to less than the price paid for certain contracts in the consumer transport sector. This was on the basis that each industry could continue to limit liability in accordance with each industry's own established regime and therefore the application of the CRA would introduce overlapping rights, add complexity and cause confusion.

However, the government has decided that consumer interests are not best served in pursuing the proposed exemptions and the respective industries need to prepare for the additional remedies stemming from the CRA which will come into force from 1 October 2016 (or 1 October 2017, in respect of one provision for the rail sector, as detailed below). That said, section 53(2) of the CRA will still offer some protection as any "enactment" that restricts liabilities for a service of any description takes priority over this part of the CRA. Therefore, transport providers, can continue to restrict their liability in accordance with such "enactments" as specified therein.

### *Fairness of Terms*

The CRA also requires that consumer contract terms and notices are "fair".

A term or notice is unfair if "contrary to the requirement of good faith" it "causes a significant imbalance in the parties' rights and obligations to the detriment of the consumer." As a result, unfair terms are not binding on consumers.

The CRA also requires that terms are transparent (i.e. that they are expressed in plain and intelligible language). In addition, in the event of ambiguity in a contract or notice, the most favourable interpretation to the consumer prevails.

### *Enforcement*

In addition to consumers taking legal action, the provisions of the CRA can be enforced by a "regulator" seeking an injunction. The Competition and Markets Authority is the primary regulator; but other bodies, including the Office of Rail and Road, are also "regulators" for the purpose of the CRA.

### *The Rail Regime*

The CRA will apply to EU licenced rail passenger operators. This means that rail users, on the national rail network, will be able to seek remedies under the CRA in addition to existing remedies under the National Rail Conditions of Carriage (NRCoC), a train operator's Passenger Charter and, in the case of franchise operators, the Delay Repay compensation scheme.

As the delayed implementation of the CRA only applies to EU licenced rail passenger operators, users of light rail and metro-style networks (such as London Underground, the Tyne & Wear Metro and Glasgow Subway) already have the benefit of CRA protections.

### *National Rail Conditions of Carriage*

Under the NRCoC, in cases of cancellation or delay (or where a passenger's reservation will not be honoured) and the passenger decides not to travel, a passenger is entitled to claim a full refund for the relevant part of the journey (condition 26). Claims (other than those presented immediately at the ticket office) must be processed within one month of receipt. The NRCoC is expected to be updated to reflect the CRA changes.

It is also possible to claim compensation for delays under the NRCoC (condition 42). This applies when delays, cancellations or poor service arise for reasons within the control of the train operator. While an operator's passenger charter may be more generous, as a minimum the NRCoC requires a 50% refund in cases of delay of over an hour (paid in rail vouchers, or if requested, cash). Passengers cannot also claim under condition 26 and condition 42 acts as a maximum liability of the operator. In view of the CRA, the 50% refund cap will no longer be compatible. However, in order to allow the industry time to adjust to the removal of the 50% liability cap for breach of the CRA, the Government proposes to further delay this element of CRA (for the rail sector only) coming into force until 1 October 2017. All other rights and remedies stemming from the CRA will come into force on 1 October 2016.

### *Delay Repay Compensation*

The Delay Repay scheme offers more generous compensation than the NRCoC. However, the scheme is not universal – it is tied into the terms of rail franchises (and the roll out of these more generous terms is still underway as the franchise letting process progresses) and it does not apply to open access operators, unless they opt to apply a scheme voluntarily.

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However, where it does apply, delays of over 30 minutes entitle a 50% refund and if delays are over 60 minutes, a full refund is given for the single fare. Delays of over 2 hours entitle a full refund of the return fare. Furthermore, the Delay Repay scheme also applies to delays outside of the operator's control. Some operators have voluntarily taken steps to improve passenger remedies, such as introducing automatic refunds.

Therefore the CRA will introduce some overlap with this scheme, but will also apply where the scheme does not (as yet) apply.

In addition, the rail industry (i.e. national rail services) will have to adapt to further remedies that will be introduced pursuant to EU regulation (1371/2007), providing passenger rights to reimbursement, re-routing or compensation, as well as assistance (e.g. accommodation), in the event of delays. These are to be introduced by 2024 at the latest, and the government ran a consultation in October 2014 upon an earlier introduction.

### The Aviation Regime

The aviation sector enjoys a sector-specific consumer protection regime which is set at international and EU level and will continue to apply alongside the CRA. The CRA could see airlines facing greater exposure to liability and higher compensation awards, whilst the overlapping schemes could be confusing to passengers in attempting to understand their consumer rights. Airlines will need to review their current terms and communications to ensure they are CRA compliant.

The Montreal Convention 1999 ("Convention") and a number of EU regulations impose liability on carriers for damage suffered by passengers in relation to international air travel. The Convention imposes liability on carriers in the event that a passenger's baggage is delayed, lost or damaged, amongst other things. Case law has established that in circumstances where the Convention applies, it will provide the exclusive remedy. It therefore remains to be seen how the CRA will fit with the principle of exclusivity.

In respect of the EU regulations, perhaps the most well-known is Regulation (EC) No. 261/2004 ("Regulation"), which governs liability in respect of flight delay, cancellation and denied boarding. The Regulation applies to flights departing the EU (including Iceland, Norway, Liechtenstein and Switzerland by way of bilateral treaties) or when flying with an EU (including UK) carrier to somewhere in the EU (and the countries above). The regulation provides a set regime if flights are (i) delayed by 3 hours or more, (ii) cancelled, or (iii) if boarding is denied or downgraded.

The Regulation sets out the assistance to be provided (which includes rights to care, reimbursement, re-routing and accommodation), depending on the length of delay and distance of the flight. Levels of compensation between €250 – €600 are awardable by reference to delay time, route and distance of the flight. Consequently, levels of compensation payable by the airline may be more than the cost of the flight. The only exception is when the cancellation/delay in question is due to "extraordinary circumstances" which could not have been avoided even if all reasonable steps had been taken. In such circumstances, compensation is not payable.

As a result of the CRA, airlines may also face claims for breach of the new CRA implied terms. Therefore, even though an airline may have already compensated a passenger in excess of the cost of their flight ticket under the Convention and/or the EU regulations, the airline will nevertheless still have exposure to liability under the CRA.

The British Air Transport Association has warned that the new restrictions on limiting liability could see airlines facing higher administrative costs as they operate overlapping but inconsistent compensation regimes, which may affect their ability to compete in the international market. In addition, passengers may experience higher fares or adjustments to timetabling as airlines seek to mitigate exposure to liability under the CRA.

Accordingly, it would appear that the aviation sector is ripe for clarification on the interrelation between the Convention, EU regulations and the CRA, especially given the global customer base of UK airlines.

### The Maritime Regime

Passengers travelling by boat have prescribed remedies under EU regulation 1177/2010. Apart from some exceptions (e.g. small ships, excursion and sightseeing tours, distances of less than 500 metres, among others), the regulation applies to passengers where (i) the port of embarkation is in the EU or (ii) disembarkation is in the EU and the service is provided by a carrier established within the EU.

In the event of cancellation or delays of more than 90 minutes passengers shall be offered snacks, meals or refreshments and a choice of (i) re-routing to their destination or (ii) reimbursement and a return service free of charge. Reimbursement is to be paid within 7 days.

Passengers are also to be offered free accommodation (which the carrier can limit to three days at €80 per night).

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Passengers are also entitled to compensation of 25% (or 50%) of the ticket price, depending on the length of delay relative to the scheduled journey time. Compensation is to be paid within 1 month of a request and may be provided in vouchers or other services unless the consumer requests cash.

Accommodation and compensation rights do not apply when cancellation or delay is caused by weather conditions endangering the safe operation of the ship. Compensation is also not payable if there are “extraordinary circumstances” hindering provision of transport which could not have been avoided even if all reasonable steps had been taken.

Therefore, passengers entitled to remedies under EU legislation will also have the benefit of remedies pursuant to the CRA. Passengers on forms of maritime travel outside of the scope of EU legislation already enjoy remedies pursuant to the CRA.

### The Impact of the CRA

The CRA will overlay the existing schemes – and may in some cases provide a better and speedier remedy. It will also ensure more flexibility in the form of compensation – as it must (unless agreed otherwise) be in the same form via which the consumer made the original payment for the services.

The CRA will also enable consumers to seek remedies in a broader set of circumstances, such as for non-delay related claims for poor service or where the service is not in accordance with the information provided or statements made. However, in the absence of an agreed settlement, consumers will need to commence legal proceedings to seek remedies under the CRA, whereas the existing regimes are broadly intended to apply without recourse to courts. That said, it is open to regulators to take action to seek injunctions under the CRA.

Transport operators will no longer be able to cap their liability for breach of the new implied terms to less than the price paid. This is not to say that claims will always lead to a full refund – rather that, where appropriate, an entitlement to a price reduction *may* equate to a refund of the full price.

As a result of the CRA, transport providers within each industry may seek, over time, to harmonise the regimes (to a greater extent) for when things go wrong. This would be a welcome development, for both the industry and passengers, and would provide clarity on the interfaces between regimes.

Of course, it should be noted that some of the industry-specific regimes provide remedies in no-fault situations (e.g. Delay Repay) and the existence of the CRA – in the absence of a breach an implied term too – would not provide additional or overlapping remedies available to consumers.

### Impact of EU Referendum

Many of the rights and remedies referred to in this article have their basis in EU legislation. However, notwithstanding the outcome of the EU referendum, such legislation will continue to apply until exit negotiations are concluded and the outcome of the negotiations will shape the future regulatory regime across these sectors.

### Resources

- Consumer Rights Act 2015
- The Consumer Rights Act 2015 (Commencement No. 3, Transitional Provisions, Savings and Consequential Amendments) Order 2015 (SI 1630 of 2015)
- Department for Transport Consultation Document “Applying the Consumer Rights Act 2015 to the rail, aviation and maritime sectors”, October 2015
- Department for Transport Response to Consultation “Applying the Consumer Rights 2015 to the rail, aviation and maritime sectors”, July 2015
- The National Rail Conditions of Carriage
- Regulation (EC) No 1371/2007 of The European Parliament and of the Council of 23 October 2007 on rail passengers’ rights and obligations
- The Montreal Convention 1999
- Regulation (EC) No. 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights
- *Sidhu v British Airways Plc* [1997] A.C. 430
- *Stott v Thomas Cook Tour Operators Limited* [2014] UKSC www15
- Regulation (EU) No 1177/2010 of the European Parliament and of the Council of 24 November 2010 concerning the rights of passengers when travelling by sea and inland waterway



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