IN THE MATTER OF THE ARBITRATION ACT 1996

AND IN THE MATTER OF AN ARBITRATION

B E T W E E N :

GREAT NORTH EASTERN RAILWAY LIMITED

Claimant

- and -

NETWORK RAIL INFRASTRUCTURE LIMTED

Respondent

SECOND PARTIAL AWARD

---

1. In an earlier Partial Award which I made on 19th June 2006, I acceded to an application by the Claimant, Great North Eastern Railway Limited ("GNER"), to lift a stay of these proceedings, so that a number of preliminary issues of law and construction could be heard. Those preliminary issues relate to a claim brought by GNER against Network Rail Infrastructure Limited ("Network Rail") under a written Track Access Agreement ("TAA") between them made on 1st April 1995 (although, at the time this agreement was made, Network Rail was known as "Railtrack"). Network Rail is the facility owner of railway track infrastructure in this country. GNER is a franchised passenger train operating company, which requires access over Network Rail's railway infrastructure in order to provide its railway services to passengers.

2. The precise questions of law and construction which I have to determine are set out in paragraph 2 of the Directions which I subsequently made, with the consent of the parties, on 10th July 2006. I now make this second Partial Award to give my decision on the questions before me. Before turning, however, to those questions of law and construction, and the conclusions I have reached in relation to them, it is helpful to explain a little of the background to these proceedings, so as to put those questions in context.

Background

3. In February 2004 I, Stephen Moriarty QC, was appointed sole arbitrator in relation to a dispute between GNER and Network Rail concerning alleged damage to rolling stock leased by GNER, which arose out of a derailment at Hatfield which occurred on 17th October 2000. I was appointed arbitrator pursuant to clause 11.1 of the TAA between GNER and Network Rail to which I have already referred, and my appointment was confirmed on behalf of the parties by Mr Chris Blackman, the Disputes Secretary of the Access Disputes Resolution Committee, on 19th February 2004. The seat of the arbitration is England.

4. GNER's claim against Network Rail is pursued under clause 8.2 of the TAA. The full terms of clause 8.2 of the TAA are as follows:

> *"Railtrack shall indemnify the Train Operator and keep it indemnified (on an after tax basis) against all damage, losses, claims, proceedings, demands, liabilities, costs, damages, orders, and out of pocket expenses (including costs reasonably incurred in investigating or defending any claim, proceedings, demand or order and any expenses reasonably incurred in preventing, avoiding or mitigating loss, liability or damage) incurred or suffered by the Train Operator*
>
> *(i) as a result of a failure by Railtrack to comply with its obligations under the Safety Obligations*

(ii) *as a result of any Environmental Damage to the Network arising directly from the operations of the British Railways Board prior to 1st April, 1994 or directly from the operations of Railtrack, or*

(iii) *as a result of any damage to the Specified Equipment or other vehicles or things brought onto the Network in accordance with the permission to use granted by this Agreement arising directly from Railtrack's negligence or failure to comply with its obligations under this Agreement*

save to the extent that any such damage, losses, claims, proceedings, demands, liabilities, costs, damages, orders and out of pocket expenses result from the Train Operator's negligence or its breach of this Agreement and provided that this indemnity shall not extend to loss of revenue or other indirect loss and shall be subject to any limitations provided for in the Claims Allocation and Handling Agreement."

5. GNER contends that it suffered loss on account of damage to rolling stock, and that Network Rail is liable to indemnify it under clause 8.2 because, amongst other things, the damage arose directly from Network Rail's negligence. For the purposes of this arbitration, Network Rail admits that it is liable to GNER under clause 8.2(c) of the TAA on the basis of its negligence.

6. However, as can be seen from the final thirteen words of clause 8.2 of the TAA, the indemnity to which GNER is entitled under that provision is expressly stated to be *"subject to any limitations provided for in the Claims Allocation and Handling Agreement"*. The reference to the Claims Allocation and Handling Agreement is to another agreement between (amongst others) GNER and Network Rail ("CAHA"), which contains, in clause 16, a number of limitations upon the extent to which a CAHA Party may recover its loss in respect of damage to property resulting from a single event or circumstance for which one or more other CAHA Parties would be liable at law. In particular, by clause 16(ii) of CAHA, aggregate net payments are subject to a £5 million cap.

7. The full terms of clause 16 of the relevant version of CAHA are as follows:

> *"A CAHA Party may recover its loss in respect of damage to its property resulting from a single event or circumstance for which one or more CAHA Parties would be liable at law, subject to the following conditions:*
>
> *(i) it may recover such loss only to the extent that it exceeds £10,000 provided that:*
>
> *(a) only loss which would otherwise be recoverable under this clause (which, for the avoidance of doubt, does not include any claims by a third party) may be taken into account in determining whether the loss exceeds £10,000; and*
>
> *(a) the threshold of £10,000 shall be reviewed after one year and thereafter as part of the review carried out by the RIDR Committee in accordance with the provisions of clauses 19.3 and 19.4;*
>
> *(ii) it may recover such loss subject to a cap, to be fixed by the RIDR Committee, arbitrator or court deciding the issue, such that the aggregate net amounts (that is, the total of the amounts which each CAHA Party is ordered to pay to all other CAHA Parties after deducting[1] the amounts which all other CAHA Parties are ordered to pay to that CAHA Party, but ignoring the result if negative) which he or it orders to be paid by all CAHA Parties to other CAHA Parties in respect of such losses resulting from that event or circumstance shall not exceed £5 million.*
>
> *(iii) the terms of clauses 17 and 22.*
>
> *Provided that the provisions of this clause:*
>
> - *are subject to the terms of any contract between the parties concerned; and*
> - *shall not apply to any claim which does not arise out of railway operations."*

8. Both GNER and Network Rail are "CAHA Parties" for the purpose of clause 16 of CAHA. The preliminary issues to be determined by me all raise matters of law and construction concerned with the effect (if any)

---

1 The word used is actually "deducing" but it is common ground that this is a typographical error.

which the £5 million aggregate cap in clause 16(ii) of CAHA, as incorporated into clause 8.2 of the TAA, has upon GNER's right to be indemnified by Network Rail under clause 8.2. In this connection, GNER's pleaded loss (which Network Rail admits) amounts to £5,244,176.22, comprising £1,420,516.67 sustained in consequence of the write-off of two coaches, and a further £3,823,659.55 incurred in repairing damage to the remaining affected coaches. For convenience, I will refer to GNER's total losses, in round terms, as £5.2 million.

9. It is to be noted, moreover, that Network Rail sustained damage to its own property (its railway track) as a result of the Hatfield derailment. Although GNER does not accept the quantum of this loss, Network Rail presently puts it at £6,143,326.99 million – a figure which I will assume to be correct for the purposes of dealing with the preliminary issues before me, albeit I will also refer to it in round terms as £6.1 million. Network Rail also contends that two other CAHA parties – Balfour Beatty Rail Infrastructure Services Limited ("Balfour Beatty") and Jarvis PLC ("Jarvis") – are legally liable to it for some part of that loss, by reason of their own negligence. Balfour Beatty was responsible for inspecting the track, whilst Jarvis was responsible for track replacement.

10. Although there are other industry proceedings afoot between Network Rail, Balfour Beatty and Jarvis, in which (amongst other things) Network Rail advances claims against them for damage to its track, and for a contribution or indemnity against its liability to GNER, I have no jurisdiction over those disputes for reasons which appear from my first Partial Award. One of the reasons, therefore, for dealing with the questions of law and construction before me as preliminary issues is to determine whether (as GNER contends) it is appropriate to decide how much it should recover from Network Rail in advance of it being

determined how much Network Rail is entitled to recover from Balfour Beatty and/or Jarvis, or whether (as Network Rail contends) that question cannot sensibly and fairly be decided in isolation from those other claims.

The preliminary issues

11. Against that background, it is now possible to turn to the specific questions set out in paragraph 2 of the Directions made on 10th June 2006.

12. The first issue is whether clause 16(ii) of CAHA, as incorporated into clause 8.2 of the TAA, limits or excludes Network Rail's liability to GNER for negligence under clause 8.2 of the TAA ("the negligence issue"). GNER contends that clause 16(ii) of CAHA does not extend to liability in negligence, so that it is able to recover its £5.2 million loss from Network Rail completely free from the £5 million aggregate cap imposed by clause 16(ii). If it is right about that, self-evidently there is no reason why recovery need await any determination of the liability of Balfour Beatty and/or Jarvis to Network Rail. Network Rail contends, however, that clause 16(ii) does apply to liability in negligence. I deal with the negligence issue in paragraphs 19 – 27 below.

13. The second and third issues can be treated together, because they both concern the proper construction of clause 16(ii) of CAHA ("the construction issues"). The second issue is whether clause 16(ii) of CAHA, as incorporated into clause 8.2 of the TAA, requires the liability of Balfour Beatty and/or Jarvis (if any) to Network Rail for Network Rail's property damage, to be determined before clause 8.2 of the TAA can be applied between GNER and Network Rail. The third issue is what is the correct construction of clause 16(ii) of CAHA, as

incorporated into clause 8.2 of the TAA, if the answer to the second issue is in the negative. GNER advances a construction which would have the effect that it is not necessary for the liability of Balfour Beatty and/or Jarvis to be determined before applying clause 8.2 of the TAA to GNER's claim against Network Rail. Network Rail advances a construction which has the opposite effect. I deal with the merits of the parties' rival constructions in paragraphs 28 – 45 below.

14. The fourth issue is whether clause 16(ii) of CAHA, as incorporated into clause 8.2 of the TAA, is void for uncertainty and/or ambiguity ("the uncertainty issue"). GNER contends that it is, although it is fair to say that it did not argue for this result with much enthusiasm, and puts forward the case only as a last resort. Network Rail contends that clause 16(ii) is not void. I deal with this issue in paragraphs 46 – 47 below.

15. The fifth and sixth issues can also be taken together, and relate to a question which has largely been superseded by events. The fifth issue concerns whether, on the basis of my answers to the preceding questions, the effect of clause 16(ii) of CAHA, as incorporated into clause 8.2 of the TAA, is such that no amount is payable by Network Rail to GNER in respect of its admitted liability under clause 8.2, or whether an amount (or a minimum amount) is payable. The sixth issue is, if some amount (or some minimum amount) is payable, whether GNER is entitled to a full or partial award for that amount.

16. These last two issues arise, for the most part, out of a construction of clause 16(ii) which was advanced before me by Network Rail during the course of the previous hearing to determine whether I should lift the stay on these proceedings. As will become apparent when I turn to the construction issues, the effect of Network Rail's pleaded construction of clause 16(ii) of CAHA is such that, even if correct, GNER ought to be

entitled to a minimum sum of £2.3 million without more ado, notwithstanding the existence of the £5 million aggregate cap. However, when GNER applied for a partial award for such a minimum sum, at the same time as applying to lift the stay on proceedings, Network Rail advanced another construction of clause 16(ii) of CAHA which would have the effect that GNER was entitled to no recovery at all from Network Rail (albeit leaving GNER with a potential claim against Balfour Beatty and/or Jarvis, notwithstanding that GNER was not actually suing either of them). Although GNER argued, on that occasion, that Network Rail's new argument was "hopeless", I did not feel able to decide the matter there and then. In my first Partial Award, however, I invited GNER to renew the application, so that I could consider it more fully in the context of the construction issues as a whole.

17. In the event, however, the day before the hearing of the preliminary issues was due to commence, Network Rail's solicitors wrote indicating that Network Rail would not oppose GNER's application for a partial award in the sum of £2.3 million. In the same letter, they also indicated that Network Rail would not argue that the clause 16(ii) cap applied to liability for interest. Accordingly, GNER is, on any view, entitled to a minimum sum of £2.3 million plus interest. My answers to the above questions determine whether, at this stage, it is entitled to more.

18. Before turning to deal with the issues themselves, there is one final matter I should mention. Although not specifically identified as a separate issue in the Directions I gave on 10th June 2006, it became apparent that there was an issue between the parties as to the amount of interest to which GNER is entitled, even though Network Rail does not contend that it is covered by the CAHA cap in clause 16(ii). In particular, there is a dispute as to the date from which interest should run, and a dispute concerned

with the question of compound interest. I deal with this ("the interest issue") in paragraphs 48 – 53 below.

The negligence issue

19. As I have already explained, GNER argues that, on the proper construction of clause 16.2 of CAHA, as incorporated into clause 8.2 of the TAA, the aggregate cap of £5 million does not extend to loss arising from Network Rail's negligence. It argues this on the basis of the familiar principle of construction that exclusion and limitation clauses should only be read as excluding or limiting liability for negligence if that is their clear and unambiguous effect. In particular, GNER relies upon the approach laid down by Lord Morton in *Canada Steamship Lines v. The King* [1952] A.C. 192. In that case, Lord Morton postulated a three-stage approach ([1952] A.C. 192, at 208). First, if the clause contains language which expressly exempts the person in whose favour it is made from the consequences of negligence, effect must be given to that provision. Secondly, if there is no express reference to negligence, the court must consider whether the words used are wide enough, in their ordinary meaning, to cover negligence. If a doubt arises at this point, it must be construed against the proferens. Thirdly, if the words are wide enough to cover negligence, the court must then consider whether the head of damage may also be based on some ground other than negligence. If it can be, then – provided the other ground is not fanciful or remote – the existence of that other ground is fatal to the proferens, even if the words are *prima facie* wide enough to cover negligence.

20. Mr Butcher QC, for GNER submitted that, applying this test to clause 16(ii) of CAHA, as incorporated into clause 2.8 of the TAA, it cannot be construed as limiting liability for negligence. There is no express reference to negligence being excluded or limited, so the first stage of

Lord Morton's test is not satisfied. It is doubtful, submitted Mr Butcher, whether the words are even capable of extending to negligence; and, if that is so, they are to be construed against Network Rail. Accordingly, the second stage of Lord Morton's test is not satisfied either, so one does not even get to the third stage. But even if that is wrong, submitted Mr Butcher, Network Rail cannot satisfy the third stage of the test. There are plainly grounds of liability other than negligence on which a claim to damages could be based here (such as breach of statutory duty, or liability in bailment), and they are not fanciful or remote. Accordingly, argued Mr Butcher, those other grounds are fatal to clause 16(ii) extending to negligence.

21. Mr Crane QC, for Network Rail sought to argue that even a strict application of Lord Morton's three-stage test did not lead to the conclusion that clause 16(ii), as incorporated into clause 2.8 of the TAA, does not extend to negligence. He conceded that there are grounds of liability other than negligence which could exist in a case covered by the clause, and that they are not fanciful or remote grounds. He said, however, that the clause satisfied the first stage of Lord Morton's test, because, on analysis, the clause did expressly apply to cases of negligence. They key here, he argued, was to recognise that what was being construed was not clause 16(ii) of CAHA as such, but clause 16(ii) as incorporated into clause 8.2 of the TAA. Clause 8.2(c) of the TAA specifically applies to damage to Specified Equipment brought onto the network when that damage arises directly from Network Rail's negligence (as well as its failure to comply with its obligations under the TAA). When clause 8.2 of the TAA goes on to provide, therefore, that the indemnity given by that clause is *"subject to any limitations provided for in CAHA"* that amounts to an express application of the CAHA limitation to claims under the TAA founded on negligence.

22. I am not convinced that, strictly speaking, this is a sufficiently clear reference to negligence to satisfy Lord Morton's test in the *Canada Steamship* case. Whatever inference Mr Crane invited me to draw from looking at clause 8.2 of the TAA and clause 16(ii) of CAHA together, there is no *express* reference in either of those clauses to the CAHA limitation on liability applying to negligence. Moreover, if when applying Lord Morton's first test to clause 16(ii) of CAHA, it does not extend to negligence, there is nothing inconsistent in clause 8.2 of the TAA being subject to all and any limitations of CAHA, yet still not extending to negligence.

23. Mr Crane's primary argument, however, was that it did not matter whether he could satisfy a strict application of Lord Morton's test, because that was not, in fact, the right approach to apply in cases such as this, for a number of reasons. First, he relied upon cases such as *Cert Plc v. George Hammond Plc* [1999] 2 All ER (Comm) 976, *HIH Casualty and General Insurance Ltd. v. Chase Manhattan Bank* [2003] 2 Lloyd's Rep. 61, and *Frans Maas (U.K.) Ltd. v. Samsung Electronics (UK) Ltd.* [2004] 2 Lloyd's Rep. 251 as showing that Lord Morton's guidelines are to be regarded as general guidance only, and are not to be treated as a comprehensive code, or a series of tests which are to be applied mechanistically. Particularly in commercial contracts, the tendency is to give words their natural meaning, and not to strain their construction so as to avoid perceived injustice.

24. Secondly, moreover, he relied upon the line of authority, of which the decision of the House of Lords in *Ailsa Craig Fishing Co. Ltd. v. Malvern Fishing Co. Ltd.* 1983] 1 W.L.R. 964 is a leading exemplar, which indicates that limitation clauses are not be regarded with the same hostility as exclusion clauses, and in particular that Lord Morton's guidelines are not

to be regarded as applying in their full rigour when considering clauses which merely limit liability. In this context, he placed weight on the rationale for this ventured by Lord Fraser of Tullybelton in the *Ailsa Craig* case, namely the difference in the inherent improbability of a party to a contract intending to exempt the proferens from liability as opposed to merely limiting its liability (see [1983] 1 W.L.R. 964, at 970D-F).

25. Thirdly, and more generally, he also pointed to the general trend being against construing exclusion or limitation clauses very strictly, because there is less need to do so in order to avoid injustice since the Unfair Contract Terms Act, 1977 was enacted. In the *HIH Casualty and General Insurance* case, for example, this was a factor which Lord Hoffman said should be borne in mind when applying the *Canada Steamship* guidelines, referring to the observations of Lord Denning M.R. in *George Mitchell (Chesterhall) Ltd. v. Finney Lock Seeds Ltd* [1983] Q.B. 284 at 297-298 ([2003] 2 Lloyd's Rep. 61, at paragraph 63).

26. I agree with Mr Crane that, for the above reasons, Lord Morton's test does not fall to be applied either mechanistically, or with full rigour, in this case. Although I do not think, therefore, that Network Rail meets the first stage of Lord Morton's test if one applies it strictly (because, as I have already said, there is no *express* reference to negligence being covered by clause 16(ii)), I do think the very clear inference is that negligence is to be covered as much as any of the other potential causes of action identified by Mr Butcher. After all, those other causes of action may not be remote or fanciful, but it does not alter the fact that negligence remains one of the most obvious grounds for liability being imposed in the situation to which clause 16 applies, namely where a CAHA Party seeks to recover *"its loss in respect of damage to its property"*. It would seem to be to be inherently improbable that steps would have been taken to draw

up a complicated capping mechanism so as to limit CAHA Parties' recoverable aggregate net losses from property damage exceeding £5m., whilst at the same time not applying it to one of the most common causes of action likely to be relied upon by CAHA Parties when property damage is then caused.

27. In short, not only are the introductory words of clause 16 – which refer in the most general of terms to *"loss in respect of damage to ... property"* and do not purport to identify more specific causes of action for recovering that loss – amply wide enough to embrace a claim grounded in negligence, but, as it seems to me, the clear inference is that those words were intended to cover such claims in negligence as much as any other. It is only by applying Lord Morton's guidelines in the most mechanistic of ways that one would reach a contrary conclusion; and I do not think such a conclusion accords with what the law requires of me, or what the parties are to be regarded as having intended. My answer in relation to the negligence issue, therefore, is that clause 16(ii) of CAHA, as incorporated by clause 8.2 of the TAA, does indeed limit Network Rail's liability to GNER for negligence under clause 8.2 of the TAA.

The construction issues

28. Before turning to what each of the parties contends to be the proper construction and application of clause 16(ii) of CAHA, it is convenient to start out by considering the proper approach I have to adopt in reaching a conclusion on construction, because I heard considerable submissions from the parties as to the proper application of the *contra proferentem* rule, which has a bearing on that question. I start, therefore, by dealing with the *contra proferentem* rule, and then turn to the parties' rival contentions on how clause 16(ii), on its proper construction, is to be regarded as applying.

The contra proferentem rule

29. The approach which the law takes in leaning against exclusion and limitation clauses exempting or limiting liability for negligence is one aspect of a more general approach which the law takes in construing contractual clause against the *proferens* in question. Mr Butcher, who relied upon the *contra proferentem* rule more generally, as well as upon the *Canada Steamship* case which I have already considered, contended that there are, in fact, two different aspects to the general rule. Referring to *Chitty on Contracts* (29th ed. 2004) ¶14-009, and to the observations of Staughton L.J. in *Youell v. Bland Welch & Co. Ltd.* [1992] 2 Lloyd's Rep. 127, at 134, he submitted that one application of the rule was that, in cases of doubt, wording in a contract is to be construed against a party who seeks to rely upon it in order to diminish or exclude his basic obligation; whilst the other aspect of the rule is that, in cases of doubt, wording is to be construed against the party who proposed it for inclusion in the contract.

30. It was not suggested that the second aspect of the rule had any bearing upon this case, as neither party had proposed that their contractual or other rights should be subject to the limitations in clause 16 of CAHA. The evidence of Mr Gilbert, adduced on behalf of Network Rail, was to the effect that this was something required as a result of the conditions attached to the network licence granted to Railtrack (as it was then known) and to GNER's own operating licence. It was the first aspect of the rule on which Mr Butcher relied, since Network Rail was seeking to rely upon clause 16(ii) of CAHA. Accordingly, he said, it was only if I considered that the words of clause 16(ii), as incorporated into clause 8.2 of the TAA, *clearly* led to the result contended for by Network Rail, and

are not ambiguous, that I can determine the question of construction in Network Rail's favour.

31. Mr Crane stressed the cases (*e.g. Mira Oil Resources of Tortola v. Bocimar N.V.* [1999] 2 Lloyd's Rep. 101 and *Sinochem International Oil (London) Co. Ltd. v. Mobil Sales and Supply Corporation* [2000] 1 Lloyd's Rep. 339) which point out that it is only in cases of real ambiguity, where the principle may be resorted to as a default rule, that the *contra proferentem* rule should be used, and that it should not be used to create an ambiguity where one is not there. He also floated the possibility that, although expressed in terms of construing an ambiguous provision against the party who seeks to *rely* upon it, the principle underlying the maxim may, in truth, really be concerned with construing the provision against the party for whose benefit the provision was introduced. It is just that, when a limitation or exclusion clause is introduced for the benefit of a particular party, it will typically be that party who seeks to rely upon it if a relevant dispute arises. The significance of this, if right, would be that this aspect of the *contra proferentem* rule would not apply in a case such as this, where the clause was not introduced for the benefit of any particular party, and was, in principle, capable of being relied upon by GNER as much as by Network Rail.

32. It is fair to say that there may be some small hint of such an approach in the observations of Mance L.J. in the *Sinochem International Oil* case to which I have already referred ([2000] 1 Lloyd's Rep. 339, at paragraph 27). It is also right to record that, in the *Canada Steamship* case which GNER relied upon so heavily, the first stage of Lord Morton's three-stage test refers to the *proferens* as being the person in whose favour the exclusion clause is made, rather than the person seeking to rely upon it. However, aside from the fact that the customary description of the rule

almost invariably refers to the relevant person against whom a provision will be construed as being the person seeking to rely upon it, Mr Butcher also pointed to cases in which the *contra proferentem* principle was applied to a clause, notwithstanding that it was mutual in nature. This was true of the mutual fire exception clause in the charterparty considered in *Re Polemis* [1921] 3 K.B. 560 (see, in particular, pp. 572, 573-4); and it was also true of the time-bar clause considered in *The Pera* [1985] 2 Lloyd's Rep. 103. Indeed, in his judgment at first instance, Staughton J. (as he then was) expressly rejected an argument to the effect that the *contra proferentem* rule did not apply to a clause worded so as to protect either party ([1984] 2 Lloyd's Rep. 363, at 365-366). Mr Butcher also pointed out that the passage from Mustill & Boyd, *Commercial Arbitration*, which was specifically approved by the Court of Appeal in *The Pera* was a statement to the effect that time-bar clauses restricting the right of either party to commence proceedings must be construed strictly.

33. In these circumstances, if clause 16(ii) is unclear or ambiguous, I consider that the right approach is to construe it against Network Rail, even though the clause does not specifically aim to protect Network Rail in particular. I accept the submissions of Mr Crane, however, that it is only in cases of genuine ambiguity that I should resort to the rule, and that I should not use it to create an ambiguity which is not there. If I conclude, therefore, that Network Rail's construction is significantly to be preferred to GNER's, I would adopt that construction even if I thought that GNER's construction was also certainly tenable. It is to the question of those rival constructions that I now turn.

The rival constructions of clause 16(ii) of CAHA

34. It is convenient to start by setting out again the wording of clause 16(ii) of CAHA, which is incorporated into clause 8.2 of the TAA. Clause

16(ii) sets out one of the conditions which is imposed upon the right of a CAHA Party to *"recover its loss in respect of damage to its property resulting from a single event or circumstance for which one or more CAHA Parties would be liable at law"*. Clause 16(ii) provides:

> *"it may recover such loss subject to a cap, to be fixed by the RIDR Committee, arbitrator or court deciding the issue, such that the aggregate net amounts (that is, the total of the amounts which each CAHA Party is ordered to pay to all other CAHA Parties after deduc[t]ing the amounts which all other CAHA Parties are ordered to pay to that CAHA Party, but ignoring the result if negative) which he or it orders to be paid by all CAHA Parties to other CAHA Parties in respect of such losses resulting from that event or circumstance shall not exceed £5 million."*

35. By the time of the hearing, there was a considerable measure of common ground between the parties as to the approach indicated by this provision. In the first place, it was common ground that what clause 16(ii) was focussing upon was the aggregate net amount of *payments* ordered to be made by CAHA Parties, rather than the aggregate net *losses* of CAHA Parties. Network Rail's original pleaded case was that it was the net losses of *recipients* (*i.e.*, those sustaining damage) which were to be taken into account when calculating the aggregate net amount, and applying a £5 million cap. During the course of the hearing, however, Mr Crane accepted that it was the amount of net *payments* ordered to be made by CAHA Parties which fell to be aggregated under clause 16(ii), and he deleted the sentence in paragraph 20 of Network Rail's Amended Statement of Defence which suggested otherwise.

36. Secondly, it was also common ground that clause 16(ii) requires one to aggregate only *net* payments; that is to say the amount which any party is ordered to pay after deducting amounts which any other party has been ordered to pay to that party (ignoring any negative outcome). Thus, for example, if Balfour Beatty was ordered to pay £5 million to Network Rail, and Network Rail was ordered to pay £5 million to GNER, the

aggregate net amount of payments would still only be £5 million (and not £10 million). This is because, although Network Rail would, on this hypothesis, be required to pay £5 million to GNER, the *net* amount it would be required to pay out would be zero, since that would be its net position after deducting it from the £5 million which Balfour Beatty was being ordered to pay to Network Rail. It is the aggregate of those net amounts which cannot be allowed to exceed £5 million.

37. Thirdly, and effectively in consequence of this second point, it was also common ground between the parties that, even if Network Rail was ordered to pay £5 million to GNER (which is the maximum amount which Network Rail can be ordered to pay, because of the cap), that would have no effect on Network Rail's ability to claim up to £5 million from Balfour Beatty and/or Jarvis (the aggregate maximum which Balfour Beatty and/or Jarvis could be ordered to pay to Network Rail, again because of the cap). This is because, as already indicated, it is only Network Rail's *net* position which counts towards the aggregate net amount; and if it is entitled to receive £5 million from Balfour Beatty and/or Jarvis, but liable to pay £5 million to GNER, Network Rail's net position is zero.

38. It is at this point, however, that the approach of the parties towards clause 16(ii) diverges. GNER contends that, under the indemnity given it under clause 8.2 of the TAA, it is entitled to recover its full loss from Network Rail, subject only to ensuring that the £5 million cap on the aggregate net amount imposed by clause 16(ii) of CAHA is not exceeded. In this case, argues GNER, the £5 million cap does prevent it recovering its full £5.2 million loss from Network Rail, just in the same way that the £5 million cap would prevent Network Rail recovering its full £6.1 million loss from Balfour Beatty and/or Jarvis (assuming, which GNER

does not accept, that the amount which it is entitled to recover is not substantially less in any event, on grounds of contributory negligence). However, subject to GNER's recovery being capped at £5 million, it is entitled to recover that sum from Network Rail; and there is no reason why it should not recover it now. If it does so, the aggregate net amount will never exceed £5 million (which is all that clause 16(ii) prohibits), however much, or little, Network Rail may recover from Balfour Beatty and/or Jarvis in due course.

39. Network Rail argues, however, that this is not what clause 16(ii) provides for. In Network Rail's submission, the words of clause 16(ii) require the RIDR Committee, arbitrator or court, as the case may be, to *"fix"* a cap *"such that"* the aggregate net amount does not exceed £5 million. What this contemplates, it is said, is that the relevant person has a discretion to decide how to allocate a limited £5 million "pot" between the relevant CAHA Parties who have suffered loss, after having established what the cumulative net liabilities of each CAHA Party are. Any other result leads, it is argued, to the unfairness that GNER is allowed to "scoop the pot", leaving Network Rail to recover a disproportionately small proportion of its own loss.

40. The approach advocated by Network Rail, therefore, is to apply the £5 million cap in proportion to the parties' respective property losses. On this basis, on the assumption that GNER's loss is £5.2 million, and Network Rail's is £6.1 million, the £5 million cap should be applied in the proportion 5.2:6.1 – so that GNER recovers £2.3 million from Network Rail (leaving Network Rail to recover £2.7 million from Balfour Beatty and/or Jarvis). It is because Network Rail's approach leads to the conclusion that GNER would be entitled to this minimum sum, even if it was wrong on its own construction, that GNER applied for, and

Network does not now oppose, a Partial Award in this sum (plus interest). Since this figure is arrived at upon the assumption that Network Rail has sustained a loss of £6.1 million in respect of property damage (which GNER says is grossly exaggerated), and that Balfour Beatty and/or Jarvis are eventually found fully liable for that loss (which GNER says will not be the case, because of Network Rail's substantial contributory negligence), it is only a minimum sum. On Network Rail's construction, however, no final decision can be made as to how much it should be required to pay GNER over and above £2.3 million, in advance of Network Rail's position as against Balfour Beatty and Jarvis being determined.

41. At the hearing, Mr Crane conceded that GNER's construction of clause 16(ii) of CAHA was a tenable one. He contended, however, that his construction was significantly to be preferred. He stressed that GNER's construction has the effect of leaving Network Rail with the ability to recover a disproportionately small proportion of its own loss, and he gave hypothetical examples of the particular unfairness this would cause if a party in the position of Network Rail sustained significantly larger loss than in this case. Since clause 16(ii) did contemplate my having a discretion in relation to the cap, both the language and scheme of the clause, as well as the interests of justice, required that Network Rail's quantum be ascertained before applying the cap to GNER's own claim. Clause 16(ii) he said, clearly contemplates a comprehensive one-off adjustment of all claims.

42. Unlike Mr Crane, Mr Butcher did not even concede that the alternative construction to his own was a tenable one. He said that there was absolutely nothing in clause 16(ii) of CAHA which talked of allocation *pro rata* to each party's property loss. If there was an allocation to be

performed, it was left to the discretion of the tribunal, and any fair exercise of that discretion would have to take account of the fact that Network Rail was (as it admits for the purpose of this arbitration) negligent, whereas GNER was a wholly innocent party – and, moreover, an innocent party with the benefit of a contractual indemnity from Network Rail.

43. As for his own proposed construction, Mr Butcher said that the fact that some form of discretionary allocation might be called for in other situations (for example, where both GNER and Network Rail were suing a third party for causing losses to each of them in excess of £5 million, and where Network Rail was not partly responsible for GNER's loss), did not mean that it was called for here. The only limit imposed by clause 16(ii) of CAHA on GNER's right to recover its full loss from Network Rail under the clause 8.2 contractual indemnity was that the aggregate net amount should not exceed £5 million, and, for the reasons already given, it did not do so (and could not do so) provided GNER recovered no more than £5 million from Network Rail. As for the criticism that his construction resulted in an unfair and disproportionate reduction in Network Rail's loss (and, even more so, had Network Rail's loss been larger), Mr Butcher said that any unfairness was not the result of his construction of clause 16(ii). Rather, it was the result of there being such a cap as small as £5 million in the first place, coupled with the clear principle of English law that a negligent party is *fully* liable to the innocent party to whom he causes loss, even if there are other parties who are partly (or even largely) to blame. In this case, he said, there was nothing unfair about Network Rail being fully liable to GNER, up to the £5 million cap, when it *was* to blame, and had contracted to indemnity GNER for (amongst other things) that negligence.

44. I do not agree with Mr Butcher that Network Rail's construction is so misconceived that it is not a tenable one. Both approaches have their merits and drawbacks, and, at some points during the argument, I was even inclined to think that Mr Crane's approach had its nose in front. Having reflected, however, on the points made by Mr Butcher, and in particular the reasons he advances as to why his construction cannot be said to produce an unfair result, I think I now marginally incline towards his suggested construction. Either way, it seems to me that clause 16(ii) is plainly unclear and ambiguous – in the sense that, on the words of the clause, there is room for two perfectly tenable constructions which lead to very different results – and I do not think that Network Rail's construction is sufficiently to be preferred that I can afford to ignore the *contra proferentem* rule. Applying that rule, it seems to me that the proper construction of the clause is that advanced by GNER.

45. For the above reasons, therefore, I answer the second and third questions as follows. To the question *"does clause 16(ii) of CAHA, as incorporated into clause 8.2 of the TAA require the liability of Balfour Beatty and/or Jarvis (if any) to Network Rail, for Network Rail's claimed property damage, to be determined before clause 8.2 can be applied between GNER and Network Rail?"*, my answer is "no". To the question *"then what is the correct construction and application of clause 16(ii) of CAHA as incorporated by clause 8.2 of the TAA?"*, my answer is "the construction and application advanced on behalf of GNER, which I have sought to summarise in paragraphs 35 – 38 above". As regards the fifth and sixth questions, concerned with whether an amount is payable to GNER by Network Rail, and whether GNER is entitled to an award of that amount, my answer is that GNER is entitled to be awarded £5 million, plus interest (to which I return in paragraphs 48 – 53 below).

The uncertainty issue

46. I can deal with the uncertainty issue briefly because, as I have already indicated, it was an argument which Mr Butcher advanced on behalf of GNER with little enthusiasm, and only as a last resort. He referred to *E.J.R. Lovelock, Ltd. v. Exportles* [1968] 1 Lloyd's Rep. 163 as showing that a clause may be so meaningless or self-contradictory as to be void for uncertainty. However, Mr Crane referred to authorities (such as *Nea Agrex S.A. v. Baltic Shipping Co. Ltd.* [1976] 1 Q.B. 933, and *Star Shipping A.S. v. China National Foreign Trade Transportation Corp.* [1993] 2 Lloyd's Rep. 445) which make clear that it is only when it is virtually impossible to make sense of a clause that it is to be treated as void for uncertainty, and the fact that there may be a considerable number of possible meanings does not justify the conclusion that a provision is meaningless. The job of a court or tribunal is to strive to select the best meaning, if it can.

47. In this case, difficult as I have found the job of deciding what is the correct construction and application of clause 16(ii) – and I have found it very difficult indeed – I have no doubt whatsoever that it is certainly not meaningless. My answer, therefore, to the fourth question, *"is clause 16(ii) of CAHA, as incorporated into clause 8.2 of the TAA, void for uncertainty or ambiguity?"*, is "no".

The interest issue

48. Finally, it remains to deal with the question of interest. As I have already indicated, it is common ground that interest does not fall within the £5 million cap imposed by clause 16(ii) of CAHA. There is a dispute, however, as to the type and rate of interest I should order, and from when it should run.

49. GNER relies upon clause 15 of the TAA, which deals with payments, and clause 15.6 in particular, which provides for interest compounded monthly to be payable from the due date, at the Default Interest Rate – which is defined as being two percent above the average of the Base Lending Rates published by Barclays Bank Plc during any period in which an amount is payable under the TAA and remains unpaid (see the definition in clause 1.1, referring to paragraph 2 of Schedule 1 to the TAA). Clause 15.1 and clause 15.6 of the TAA provide as follows:

> *"15.1 Subject to Clause 15.2 and without prejudice to the specific provisions of Clause 15.10, all sums due and payable by either party under this Agreement shall be paid free and clear of any deduction or withholding, save only as may be required by law or where any sum shall be contested in good faith by the party from whom payment is due and payable with timely recourse to the appropriate means*
>
> ... ...
>
> *15.6 Without prejudice to any other rights or remedies which either of the parties may have in respect of non-payment of any amount or any failure to credit on the date it is due and payable, such an amount shall carry interest (incurred daily and compounded monthly) at the Default Interest Rate from the due date until the date of actual payment or credit (as well after judgment as before)*

50. Mr Butcher submitted that clause 15.1 of the TAA makes clear that the provisions of clause 15 cover all sums payable by either party under the TAA; that a sum payable under the indemnity afforded by clause 8.2 of the TAA is a sum payable under the agreement; that, in accordance with the normal position in the case of indemnities, the sum becomes payable immediately a loss is suffered which falls to be indemnified; and that GNER is accordingly entitled to contractual interest under clause 15.6 from the date that GNER sustained loss, at the compound rate provided for by that clause. If, for some reason, he said, GNER's claim under the indemnity does not fall strictly within clause 15, then I should exercise the

discretion I have as regards interest to achieve the same result. By section 49(3) of the Arbitration Act, 1996 ("AA 1996"), I have power to award simple or compound interest from such date or dates, and at such rate or rates and with rests, as I consider to meet the justice of the case.

51. Mr Crane conceded that, if sums payable under the indemnity afforded by clause 8.2 of the TAA are sums due and payable under the agreement for the purposes of clause 15.1 of the TAA, then GNER was entitled to compound interest in accordance with the provisions of clause 15.6. However, he contended that sums payable by way of indemnity do not fall within clause 15.1. He referred, in this connection, to the provisions of clause 15.2 to 15.4, which appear to presuppose that one is dealing with charges and other amounts for which one party would invoice the other, and which would then become payable within a given number of days from receipt. Clause 15.2 also lays down a specific mechanism by which one party can contest an amount claimed under an invoice within a limited time-frame, by notifying the other party of the amount which is in dispute, and paying the undisputed amount in accordance with the terms of the invoice. All this indicates, suggested Mr Crane, that clause 15 is not directed to sums which have to be paid by reason of the contractual indemnity in the TAA. Ultimately, he did not suggest that it would wrong of me to award compound interest under AA 1996, s. 49, but he did say that interest compounded monthly was very unusual indeed, and that it should not run immediately from the date of loss.

52. In spite of the reference in clause 15.1 to *"all sums due and payable by either party under this Agreement"* I agree with Mr Crane that the clauses which follow do appear to suggest that clause 15 is not directed at sums which fall to be reimbursed, by way of indemnity, under clause 8.2. Aside from the fact that the invoicing mechanism provided for by clause 15 does not

sit particularly comfortably with a claim to be indemnified for loss and damage to property caused by the negligence of the other party, the date from which the sum then becomes payable under that mechanism sits even less comfortably with the logic of when a right to be indemnified conceptually arises.

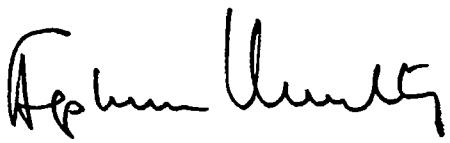
53. Nor do I agree with Mr Butcher that, if the right to be indemnified under clause 8.2 of the TAA is not covered by clause 15, I should simply mirror the same result by exercising my discretion under AA 1996, s. 49(3). If, as I think to be the case, the parties were not specifically directing their minds to how interest should apply in the case of sums payable by way of indemnity under clause 8.2, there is no necessary reason to conclude that this is what they would have agreed had they done so. In my opinion, it is right that GNER should be awarded compound interest on the sum payable by Network Rail under clause 8.2, but I consider that the justice of the case is met by Network Rail paying interest at the default rate referred to in the TAA, compounded quarterly, and from the date or dates on which GNER sought reimbursement of its losses from Network Rail.

Conclusion

54. Save for one other matter, I think that this deals with all the questions I have been asked to decide for present purposes. The remaining matter concerns a request made of me, on behalf of GNER, after the conclusion of the hearing, to include in my award an order under Arbitration Act, 1996, s. 49 for interest to be payable on any sum awarded in favour of GNER at 8%, or such other rate as I consider appropriate. Since I have not heard submissions from Network Rail on this question, however, I would prefer to reserve the matter, as indeed do I the question of costs (pending which each party remains liable for its share of the costs of the

Tribunal). I imagine submissions on these matters can be made in writing, but would be happy to deal with the matter at a short hearing if one or both parties would prefer. I will also leave it to the parties to work out what interest is payable on the £5 million due to GNER, unless they are unable to reach agreement, in which event I would again be happy to deal with the matter in writing or at a short hearing, depending upon the preferences of the parties.

55. This award is final as to what it decides. Any remaining issues which I may have to decide can be dealt with, if required, on some future occasion in accordance with the above.



STEPHEN MORIARTY QC

30th October 2006

Fountain Court,
Temple,
London,
EC4Y 9DH

IN THE MATTER OF THE ARBITRATION ACT 1996

AND IN THE MATTER OF AN ARBITRATION

B E T W E E N :

GREAT NORTH EASTERN RAILWAY LIMITED

Claimant

- and -

NETWORK RAIL INFRASTRUCTURE LIMTED

Respondent

SECOND PARTIAL AWARD
