



## **BAM Nuttall management system**

### **Commercial guidance CG30: The CPA model conditions for the hiring of plant**

#### **1 Introduction**

- 1.1 The CPA (Construction Plant-hire Association) Model Conditions for the Hiring of Plant (the 'Model Conditions') have been with us for some time. Previously amended and issued for use in July 2001 they have now been amended and updated again to '*reflect the changes in legislation and industry practice, which have arisen since the Model Conditions were last revised in 2001*'. This current version took effect for all hire that commences after 1 July 2011.
- 1.2 The Model Conditions are, generally, although not exclusively, used for the medium to large items of plant including mobile plant such as excavators and dumpers, as well as static plant. The CPA has, along with the Model Conditions, supplementary conditions covering the hire of cranes, concrete pumps, rail plant, shoring equipment, tools and equipment, and tower cranes. It's advisable to check any offer of hire to understand which of these additional conditions the Owner is seeking to use.
- 1.3 In some instances plant suppliers use their own amended form of the Model Conditions and again, if that is the case, a copy of those conditions should always be sought, understood and agreed before entering into any hire agreement. It is always open to request changes to those conditions should it be warranted.

It is BAM Nuttall policy to hire operated plant through the vendor accord system (see Management Bulletin MB82 dated 1 February 2013). A big advantage in complying with this is that many of the problems highlighted below in the Model Conditions have been resolved with the vendor accord companies by the agreement of amended Model Conditions.

The hiring of plant is to be undertaken in accordance with company procedures, in particular NP4: *Plant*.

NP1.4: *Inspection and maintenance of work equipment* should be referred to in the context of inspection and maintenance of plant to comply with the Provisions and Use of Work Equipment Regulations 1958 (PUWER), regulation 5 (maintenance), regulation 6 (inspection) and the Construction (Design and Management) Regulations 2007, regulations 31, 32 and 33.

- 1.4 Every plant hire should be covered by a hire contract, usually a BAM Nuttall Order, identifying the terms and conditions of that hire, which will usually be based on the Model Conditions, along with the obvious things like hire rate, transport arrangements, whether it is hired on a self drive basis or is owner operated, whether it will be used on public roads, etc. The Owner may have provided what amounts to an 'offer' to hire. If so this should only be included in the hire contract if we are in total



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agreement with its terms and there are no conflicts with details in our Order. Plant is frequently hired by telephone, sometimes at short notice and in a hurry and, in such circumstances, consideration as to the terms of the hire may not always be discussed or recorded. Given the greater use of cost reimbursable contracts and the requirement to maintain proper and auditable accounts there is an even greater need to ensure that these matters are properly recorded by a hire contract, although that should not be the overriding reason for recording the terms and conditions, good practice and the requirements of NP4 are primary.

- 1.5 Cost reimbursable contracts will contain definitions of what costs will be reimbursable under the contract. It may be that in its published or any amended contract form that there are costs for which the Hirer is liable that will not fall within that definition and will, therefore not be reimbursed. This will need to be understood. For instance, Clause 9(c) of the Model Conditions places the liability for damage to tyres and puncture repairs on the Hirer. Such costs might not be reimbursable as a defined cost but will be deemed to be included in the fee or overhead charge (under the ECC it may be possible to recover this cost through article 27 of the Schedule of Cost Components but this is not certain). If this is the case it might be preferable to make the Owner liable under the hire contract by amending Clause 9(c) accepting that the hire rate might be increased to allow for this. This might cause some practical difficulties as the Hirer would have to wait for the Owner to organise the repair or replacement, but it might be possible to provide for the Hirer to be responsible for arranging the repair or replacement and for the cost to be re-charged to the Owner at a later date, although this would require good records to be kept and a degree of trust between the parties.
- 1.6 Unsurprisingly the Model Conditions favour the Owner rather than the Hirer and there are a number of clauses where the Hirer may consider amendments or changes are appropriate. If this is the case it is obviously important that a site's requirements are specified on any requisition sent to the Plant Department.

## **2 Clause 1, Definitions**

- 2.1 Clause 1 of the Model Conditions sets out the definitions of the terms and expressions used throughout its 37 clauses and there are some fundamental changes from the 2001 edition. This clause defines the Owner and Hirer and what constitutes the hire contract.
- 2.2 Clause 1(b) defines what the 'Hire Period' is; this is said to be from the moment the plant leaves the depot (or the last place where it was employed) until it is received back at the depot (or some other agreed location). However, it also goes on to say that the Hire Period includes the time plant is left on site during a 'Holiday Period'. Clause 1(d) then goes on to define a holiday period as any



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cessation period over Easter, Christmas, New Year and any Bank or Public Holidays. These periods are defined as idle time in Clause 25 (Idle Time) and the applicable charge for these periods is two thirds of the hire rate. Given industry practice to shut down during these periods it might be advisable to amend Clause 1(b) for particularly expensive plant such that it states the Hire Period **excludes** any 'Holiday Period'. The Hire Period is also referred to in Clause 23 (Commencement and Termination of Contract (Transport of Plant)) so any agreed alteration to this clause needs similar alteration to Clause 23. The termination of the Hire Period, if the Hire Period is not determined in the Hire Contract, is dealt with under Clause 24 (Hirer's liability during the Notice of Termination of Contract).

- 2.3 The definition of a Working Day is Monday to Thursday 08:00 to 16:30, Friday 08:00 to 15:30, allowing for half hour break. A Working Week runs from 08:00 Monday to 15:30 Friday and amounts to a 39 hour week. This is subject to Clause 34 where provision is made for where a 39 hour week is not the norm.

Despite these definitions of the Hire Period, the Working Day and the Working Week the basis of charging is set out separately in Clauses 19, 20, 21 and 22.

### **3 Clause 2 and 3, Extent of Contract/Acceptance of Plant**

- 3.1 Clause 2 seeks to exclude all other terms, conditions and warranties the Hirer may try to impose on the Owner through separate Orders, Acknowledgements and the like. To the extent that any changes or amendments are required, or deemed suitable, it is necessary to have those changes agreed by the Owner in writing and signed. Clearly this needs to be signed on behalf of the Owner by a person in authority. Clause 2 also excludes any third party rights by virtue of the Contracts (Rights of Third Parties) Act 1999. It should also be noted that Clause 3 is relevant to Clause 2 as it states that acceptance of plant on site is acceptance of the terms and conditions **unless otherwise previously agreed in writing**. So any changes to the Model Conditions have to be agreed prior to accepting the plant on site. The practice of arranging plant hire at short notice without a chance to consider any required changes or amendments to the Model Conditions is clearly not good practice.

### **4 Clause 4, Unloading and Loading**

- 4.1 Under Clause 4 the responsibility for the loading and unloading of plant on site is vested in the Hirer. It also provides for any personnel supplied by the Owner to the Hirer to assist in unloading or loading to be under the supervision and control of the Hirer, however any personnel supplied by the Owner should be competent (see Clause 8); it is therefore arguable that any damage to the plant



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occasioned by the incompetence of the Owner's personnel would not be to the Hirer's account. As the Model Conditions are not definitive on this point it is wise to undertake normal competence checks in respect of all personnel supplied by the Owner and not just drivers.

- 4.2 There may be cases when it may be prudent to reverse the responsibilities for loading and unloading provided by this clause. For instance, in those cases where the Hirer takes no part in unloading or loading, eg where the use of operated plant is concerned and the operator is supplied by the Owner, it would make sense to modify Clause 4, again this must be agreed in writing and signed for on behalf of the Owner.

## **5 Clause 5, Delivery, Maintenance and Inspection**

- 5.1 Clause 5 deems plant and equipment to be in good order unless the Hirer notifies the Owner to the contrary within four working days or three working days if it is supplied without an operator. The only category of fault that fall outside of this proviso is if the fault is inherent or could not have been found by reasonable inspection. The Hirer should carry out an immediate inspection of the plant once it has been delivered and notify the Owner at the same time of any faults. The periods of three and four days are tight, such that it is doubtful whether or not any notice would be received within those allotted time periods if such notice was made by post. Hence, such notices should be sent by either electronic mail or facsimile correspondence as well as by post.
- 5.2 Even if the Owner supplies an operator the responsibility for inspecting plant on delivery rests with the Hirer and it will not be sufficient to merely inform the operator of any faults. It should not be assumed that the operator will resolve any apparent faults even if he offers to do so. The responsibility for accepting plant onto the site is solely the Hirer's.
- 5.3 It may be worth trying to get these notice periods extended, depending of the circumstances, or for the burden of inspection to be reversed where, for instance, an operator is provided.
- 5.4 Under Clause 5 the Hirer is responsible for the safe keeping of the plant and he will be responsible for any loss or damage, expenses or accidents if the plant is not kept 'safe' or not used for its intended purpose or not returned in good order (fair wear and tear excepted). In any event should the plant experience any damage the Owner should be notified immediately. The Hirer should on no account try and undertake any repairs on his own volition.
- 5.5 The Hirer should seek any inspection reports required by relevant legislation held by the Owner. These should be kept safely as they need to be returned on completion of the Hire Period.



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### **6 Clause 6, Servicing and Inspection**

6.1 This clause requires the Hirer to allow access by the Owner or its representatives to the plant for inspections, testing, repairs or replacement. Where reasonably practical this will be during the defined Working Day. It is arguable that where the Owner wishes to have access at times that are not reasonably practical to the Hirer the Hirer should be able to pass back to the Owner any incurred cost, such as the opening up the site and having its personnel in attendance during a holiday period. On the other hand it might suit the Hirer to have the servicing and inspection done outside of the defined Working Day in which case the question of passing back costs should not arise. No hire charge should be payable for such servicing or inspection periods.

### **7 Clause 7, Ground Conditions**

7.1 The Hirer is deemed to have a thorough knowledge of the ground and site conditions and warrants that the condition of the ground and/or the site is suitable for the plant to operate on. If the Hirer is of the opinion that the ground is not suitable then either it needs to be made suitable (this may involve some form of temporary works) or the plant not used on such ground. The Owner may participate in these temporary works by providing timbers or mats or other equipment but this does not absolve the Hirer from its liability under this clause unless the clause is modified in the hire contract.

7.2 Under Clause 10 the Hirer is responsible for the cost of recovery of stranded plant due to ground or site conditions and any necessary repairs as a result thereof. If these costs were incurred due to unforeseeable physical conditions then it may be possible to recover such costs, depending on the terms of the main contract, under the main contract, or through appropriate insurance cover.

### **8 Clause 8, Handling of Plant**

8.1 Clause 8 deals with the handling or operating of the plant and it is said to be **'without prejudice to any of the provisions of Clause 13'** (which deals with the Hirer's responsibility for loss and damage).

8.2 Where personnel are supplied by the Owner it is the Owner's responsibility to ensure that such personnel, whether driver, operator or any other person, are competent to undertake the tasks for which they are supplied.



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- 8.3 Notwithstanding who supplies personnel connected with the hired plant it is prudent for the Hirer to satisfy himself of competence and legal requirements, in line with existing company procedures.
- 8.4 It may be possible to pass responsibility back to the Owner for loss or damage if it transpires that he has supplied an incompetent operator or driver but it is clearly in everyone's interest to not allow an operator or driver to stay on a project where there is any suspicion of lack of competence.

#### **9 Clause 9, Breakdown, repairs and adjustments**

- 9.1 Clause 9 deals with breakdown. Any breakdown or unsatisfactory working must be notified to the Owner **in writing**. It is not clear if this is the responsibility of the operator or driver where one has been supplied by the Owner but it is likely to be interpreted as the responsibility of the Hirer regardless of who supplies the operator or driver. The Owner is responsible for the cost of repairs following a breakdown from any cause other than the Hirer's negligence, misdirection or misuse except that the Hirer is responsible for the cost of spares and/ or repairs where such cost is the result of theft from or vandalism to the plant. In such circumstances an insurance notice might be appropriate.
- 9.2 If a breakdown has resulted from negligence, misdirection or misuse of the plant by the Hirer, then the Hirer is responsible for all expenses arising and all loss or damage incurred by the Owner, as well as payment of hire at the idle time rate (Clause 25) whilst the plant is idle due to such breakdown. Again, in such circumstances, an insurance notice might be appropriate.
- 9.3 The repair of plant by the Hirer should be resisted even if the Owner is willing for him to undertake those repairs. All repairs should be undertaken by the Owner. If it is absolutely unavoidable then the Owners directions should be sought and the agreement to costs made before any expenditure is incurred. The Owner's permission for the Hirer to undertake repairs must be obtained in writing. Carrying out a repair that later proves to be faulty may incur the Hirer in further costs.
- 9.4 Clause 12 (limitation of liability) is relevant to this clause as it limits the Owner's liability for any consequential loss suffered by the Hirer. The definition of 'consequential costs' has exercised the courts on a number of occasions and further guidance should be sought on this aspect if and when it arises.
- 9.5 Under Clause 9(c) the Hirer is responsible for the cost of and undertaking puncture repairs and replacing tyres but this shouldn't be taken as providing an absolute obligation as the fact that a tyre needs replacing or requires a puncture repair may be as a result of fair wear and tear. The Hirer



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should ensure that the tyres are inspected upon the plant's arrival and report the condition in its notice to the Owner under Clause 5. This should be referred back to when an occasion arises for replacement or repair. In addition a report should be made of the condition of tyres at the end of a hire to avoid arguments about tyre replacement once the plant has been returned to the Owner. Also, any abuse to tyres arising from a lack of competence or care on the part of an Owner supplied operator or driver should be reported to the Owner as a protection against any unwarranted excessive wear claims.

#### **10 Clause 10, Other stoppages**

10.1 Under this clause the Owner is not liable for "other stoppages" that are not covered by Clause 9 or are in any event out with the Owner's control. This will include, for instance, weather conditions, ground and/or site conditions, repairs to tyres, etc. During these periods the full hire rate will be applicable, except in the instance of tyre repairs where the full hire rate is charged for the first two hours and at two thirds the rate thereafter (see clause 18).

#### **11 Clause 11, Loss of other plant due to breakdown**

11.1 If an item of plant breaks down and this affects the productivity or otherwise of other items of plant the Owner is not liable for any loss arising whether or not those affected items of plant are owned by the Owner or not. The only exception to this is when two or more items of plant are expressly hired together as a unit, i.e. they cannot work independently of each other. As an example where a loader and dump trucks are employed to work together it is worth ensuring that the hire contract lists them as one unit so that the dump trucks are not charged while they are idle awaiting repairs to the loader.

#### **12 Clause 12, Limitation of liability**

12.1 Except as otherwise specifically provided for in the Model Conditions,

- clause 12 is an overarching provision that limits the liability of the Owner to the Hirer for any costs howsoever arising from any cause beyond the Owner's reasonable control. This is further limited by the exclusion of a wide range of what is sometimes called consequential costs, and
- to the extent that provision is made in the Model Conditions for the hire rate not to be chargeable in certain circumstances this is the Hirer's sole and exclusive remedy for any failure on the part of the Owner.



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Whilst there may be some room for argument over the definition of direct and consequential costs this clause is particularly onerous for the Hirer.

- 12.2 In clause 12(d) there is recognition that this clause 12 cannot relieve the Owner of its liability for claims in respect of death or personal injury due to his negligence or fraud or for any other liability which cannot be avoided in law.

### **13 Clause 13, Hirer's responsibility for loss and damage**

- 13.1 Clause 13 places responsibility upon the Hirer for '**all loss of or damage to the plant from whatever cause the same may arise, fair wear and tear excepted**' during the Hire Period. The definition of Hire Period (Clause 1(b)) is mentioned earlier in this note and will include, unless Clause 1(b) is amended, the journey to the site and the period after the plant ceases to be used by the Hirer (and is awaiting collection by the Owner) until the plant is received back in the Owner's depot.

There are some stated exceptions to the Hirer's liability for loss or damage due to or arising from:

- Prior to delivery of the plant to the site (or if a site is not immediately adjacent to a public highway, prior to the plant leaving the highway), where the plant is being transported by the Owner;
- During the erection and/or dismantling of the plant where it requires to be erected and/or dismantled and that work is under the control of the Owner;
- After the plant has been removed from the site and is in transit on a public highway to the Owner by his transport;
- Where the plant travelling to or from a site on a public highway under its own power, with a driver supplied by the Owner.

This still leaves the period when the plant is awaiting collection by the Owner at the risk of the Hirer for loss and damage. Care, therefore, needs to be taken to protect the plant during this period. Clause 24 (Hirer's liability during the Notice of Termination of Contract) may be relevant here.

- 13.2 In addition, Clause 13(a) provides that the operation of Clause 13 is qualified by reference to certain other clauses; '**For the avoidance of doubt it is hereby declared and agreed that nothing in this Clause affects the operation of Clauses 4,(Unloading and Loading) 5,(Delivery in Good Order and Maintenance Reports) 8(Handling of Plant) and 9(Breakdown, Repairs and Adjustment) of these conditions**'.



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- 13.3 Where we accept that there is some liability for loss and damage, and subject to any insurance implications, it will often be feasible to negotiate with the Owner so that the measure of liability under Clause 13 will be the reasonable repair cost, or, if repairs are not economic, the pre-accident market value of the plant less any residual or salvage value. Deductions can often be negotiated for any betterment which arises from the repairs, which is likely to arise where components with a limited life due to normal wear and tear have to be replaced with new. Adjustments may also be appropriate to reflect the general pre-loss condition of the plant.
- 13.4 As noted earlier occasions can arise where the plant is stolen or damaged after it has been 'off hired' and is awaiting collection by the Owner. This is where the defined Hire Period needs careful consideration as there does not seem to be a limit on the time that an Owner can leave plant on site at the risk of the Hirer except to the extent provided by Clause 24 (Hirer's liability during the Notice of Termination of Contract). Further reference is made to this later in this note.
- 13.5 The Hirer is also liable under this Clause 13 for the payment of 'continuing hire charges' at idle time rates (two thirds of the rate) until settlement of the claim for loss or damage has been made – not the date on which the repairs were completed. Settlement of such claims must be made within 21 days of the date of the agreement of the claim. Failure to agree the claim only leads to greater liability for continuing hire charges. Presumably if the plant remained on site and continued working after the repair had been affected this could generate additional income for the Owner as it would be in receipt of the full hire charge plus two thirds of the hire charge until payment was made. This is an obvious case where provision should be sought in this clause to avoid that eventuality.
- 13.6 In the event of a possible claim under this Clause it will be prudent for the Hirer, once the Owner has been notified of any loss or damage, to make a detailed record of the circumstances of the event leading to the loss or damage and, in the case of damage, obtain sufficient photographs and witness statements to record the state of the damaged plant. Insurers need to be informed forthwith following which the Hirer should leave all negotiations to its insurers and their loss adjusters. They are in a better position to assess the loss than the Hirer. The Hirer should not agree to claims made by or costs suggested by the Owner.
- 13.7 Whilst Clause 13 deals with loss or damage to the plant itself, it also provides that the Hirer shall also indemnify the Owner in respect of all claims by any person whatsoever for injury to person or property caused by or in connection with or arising out of the storage, transit, transport, unloading, loading or use of the plant during the continuance of the Hire Period, whether arising under statute or common law. These obligations in respect of third party claims are subject to the same exceptions as apply to loss or damage to the plant itself.



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### **14 Clause 14, Notice of Accidents**

14.1 This clause requires the Hirer to notify the Owner immediately by telephone, (to be confirmed in writing within 24 hours thereafter), if any of its plant is involved in any accident resulting in injury to persons or damage to property. To the extent that the Hirer is not required to indemnify the Owner under the hire contract, the Hirer is obliged to not admit to any liability or promise compensation on the Owners behalf unless the Owner gives permission in writing to the Hirer so to do.

### **15 Clause 15, Re-hiring**

15.1 The Hirer is not allowed to re-hire or sub-let or lend any plant to others without the Owner's written permission.

### **16 Clause 16, Change of site**

16.1 If it is the intention of the Hirer to move plant between sites then the permission of the Owner in writing must first be sought.

### **17 Clause 17, Return of plant for repairs**

17.1 If the item of plant being hired requires urgent repairs the Owner has the right to carry out those repairs at a place of its choosing, whether on the site or not. However, subject to the provisions of Clause 9 (Breakdown, Repairs and Adjustment) and/or Clause 13 (Hirer's Responsibility for Loss and Damage), the Owner has an obligation to replace that item of plant with similar plant, if available, and is required to meet the cost of all transport charges. If he is unable to do so he has the right to terminate the hire contract by giving notice in writing to the Hirer. In reality this Clause is really only applicable to repairs that are not the responsibility of the Hirer and are urgent (urgent to whom is not specified).

17.2 If as a result of being unable to replace the item of plant the Owner terminates the hire contract then the original transport charges are reconsidered, dependant on the length of hire:

- If the termination is within three months of the Hire Period commencing then the Owner is obliged to meet all transport costs;
- If it is after three months from the Hire Period commencing then the Owner is responsible only for the cost of reloading and return transport.

Once again this is subject to the urgent repairs being the Owner's responsibility.



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### **18 Clause 18, Basis of charging**

- 18.1 Where the plant is provided to the Hirer without a driver or operator it is the Hirer's responsibility to notify the Owner of the daily hours worked for each Working Week. Although not a strict requirement of the Model Conditions it is prudent to also record on this weekly return any breakdown time or other stoppages and the reason for those non working hours. Where a driver or operator is supplied it is the responsibility of the Hirer to sign their time sheet in which case it is just as important for any breakdowns or stoppages to be recorded thereon together with the reasons. In either case it is the Hirers responsibility to ensure that the weekly return is made to the Owner notwithstanding the custom and practice of the driver or operator undertaking this task where he is supplied by the Owner.
- 18.2 Any breakdown time due to an inherent fault is not chargeable nor is time chargeable where the driver or operator has been absent for any reason (which also needs to be recorded on any time sheet). However stoppages due to repairing punctures or changing tyres are chargeable at full hire rates for the first two hours and at idle time rates thereafter.
- 18.3 If the plant requires erection and later dismantling the full hire rate will apply during these periods, (given that the Hire Period starts and stops when it leaves the Owner's depot and finally returns), unless alternative provision is made in the hire contract.
- 18.4 No payment provisions exist in the Model Conditions. This needs to be corrected in the hire contract, particularly if a driver or operator is provided with the plant as this will render the hire contract a construction contact under the Housing Grants Construction and Regeneration Act (the 'HGCR Act') in which case compliant conditions must be provided.

### **19 Clause 19, 20 and 21, Plant hire periods**

- 19.1 Clause 19 through to Clause 21 deal with the basis on which plant is hired and cover plant hired with reference to one of the following:
- Plant hired by the day without qualification as to hours (Clause 19);
  - Plant hired by the week or month without qualification as to hours (Clause 20);
  - Plant hired by the week or hour for a minimum of 39 hours per week (Clause 21).

In the first two instances the rate applicable is a daily, weekly or monthly rate irrespective of the hours worked, subject to any stoppage time. In the third instance whether the plant is hired on an hourly or a weekly basis the full hire for the minimum period is chargeable and an **additional** pro



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rata rate becomes applicable to any additional hours in excess of the minimum. In some cases this might be seen as excessive charging in which case it is important to modify this basis of charging in the hire contract.

There are adjustment provisions within Clause 21 for breakdowns and idle time (although no specific mention is made for driver absence where reliance for adjustment will rest on the provisions of Clause 18(b) (Basis of Charging)).

Within Clause 21 is the only reference in the conditions to a 'minimum period of hire'. There is no minimum period of hire specified only a reference to 'the minimum period of hire in the contract'. It follows therefore that if there is to be a minimum period of hire it needs to be specified in the BAM Nuttall Order. In the absence of this it will be open to argue that there is no minimum period, only the specified Hire Period or, where this is not determined by the hire contract, that which is determined by the operation of Clause 24 (Hirer's liability during the Notice of Termination of Contract).

**20 Not Used**

**21 Not Used**

**22 Clause 22 'All-in' Rates**

22.1 This Clause refers to 'All-in Rates' but there is no definition of what is meant by this term. Presumably this could be a lump sum for the complete Hire Period including delivery charges but it is more likely to be a composite rate for plant and a driver or operator. This would make sense of the mention in Clause 25 (Idle Time) of 'All-in rates' in the context of idle time. It is unlikely that it means that the 'All-in Rate' is the only payment due irrespective of all of the provisions of the hire contract. Clearly it is not one of the hire basis's provided by Clause 19, 20 or 21 or designed to fix prices for long hire periods as there are no provisions elsewhere for hire rate fluctuations (except in the case of drivers and operators wage cost increases, where Clause 26 applies). Where an 'All-in Rate' is provided for in the hire contract it will be as well to specify clearly what is included in the rate.

22.2 There is no minimum payment period applicable to 'All-in Rates' (such as a 39 hour working week prescribed by Clause 21). This will have to be clarified in the hire contract if it is to be applicable. However this clause is subject to Clause 26 (Wages and other Chargeable items relating to Drivers and Operators of Plant).



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#### **23 Clause 23, Commencement and termination of contract (transport of plant)**

- 23.1 Clause 23 repeats the definition of the Hire Period but goes on to state that where the hire contract provides for the Owner to arrange transport the hire charge only applies to a maximum of one day during the period of transport between the Owner's depot (or such other place) and the Hirer's site unless the transport properly and unavoidably takes longer than one day in which case any period in excess of one day is chargeable at idle time rates. This is a bit woolly so it will be sensible for any applicable hire charges during transportation, and erection if appropriate, to be specified in the hire contract.
- 23.2 Where plant is hired for a period of less than one week then the full rate is applicable to the transportation period however long this takes. Again the hire contract should clarify this if this is it is seen that this is needed as there could, conceivably, be more hire charges for travelling than working.
- 23.3 If the plant is not available for the Owner to collect at the end of the Hire Period then it will be deemed to have gone back on hire. The Hirer runs the risk of having to pay for continuing hire if it chooses to make use of the off hired plant even if this use is minimal and a one off and only on site due to the tardiness of the Owner in collecting it. It is usually best to secure and protect off hired plant and leave it be.
- 23.4 Clause 23(c) obliges the Hirer to ensure that prior to return the plant has been cleaned and is free from all contaminants. In the event of failure to observe this the Owner may undertake this cleaning and re-charge his costs to the Hirer, without any limit as to reasonableness. It is sensible to ensure reasonable cleaning is undertaken on site and to ensure that there is some form of record available of the condition of the plant on its collection; this could take the simple form of noting on the collection ticket that the plant is being collected in a clean condition. Alternatively take a photograph to record its condition. Notwithstanding the wording of this clause any charges from the Owner should be challenged if they are perceived as being unwarranted or unsubstantiated.

#### **24 Clause 24 Hirer's liability during the notice of termination of contract**

- 24.1 If no Hire Period is specified in the hire contract or any specified Hire Period extended (by agreement?- probably, but this is unclear in the Model Conditions) then either party may terminate the hire contract by the giving of seven days notice to the other party in writing. The Hirer will be liable for hire charges during that notice period even if the Hirer and Owner agree a notice period shorter than seven days. It is clearly sensible to avoid unproductive hire charges by giving the seven



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days notice in good time. Where the Hirer is responsible for transporting the plant back to the Owner's depot it is unclear if the hire charge is applicable for the period after the notice expires and until the plant is delivered back to the depot but as the Hire Period will have expired after the seven days notice it is arguable that no hire charge is applicable. However, it is good practice to ensure that plant is returned to the Owner's depot immediately the notice period has expired.

- 24.2 Notwithstanding the lack of clarity over applicable hire charges after the notice period has ended the Hirer is likely to be responsible for loss or damage to the plant pursuant to Clause 13 (Hirer's responsibility for loss and damage) until the plant is returned to the Owner's depot. However, the Model Conditions are not totally clear on this point so there may be room for argument although the best policy is to avoid any argument by taking care of plant while it is in our possession and returning it promptly. If the hire contract provides for the Owner to collect the plant then every effort should be made to get him to pick the plant up promptly and maintain records of efforts to get him to collect.
- 24.3 If the Hirer terminates the hire contract prior to the Hire Period commencing then the Hirer will be liable to the Owner for any costs and charges incurred as a result of the termination. Any costs and charges will have to be reasonable and steps should be taken to seek justification of why and how they were incurred. This clause does not contemplate any claim for loss of hire or loss of profit on the hire and any claim put forward by the Owner should be resisted.

### **25 Clause 25 Idle time**

- 25.1 Idle time is defined as when the plant is prevented from working for a complete Working Week, which itself is defined in Clause 1 (Definitions) as 08:00 Monday to 15:30 Friday. There is no qualification on what might constitute 'prevention' so it is important to be alive to the possibility of claiming idle rates whenever plant is idle for a prolonged period, for whatever reason (see comments on Clause 18 (Basis of Charging) earlier). During such periods the hire charge payable is two thirds of the hire rate, although if the plant works at any time during the Working Day then the full hire rate is applicable for the whole of that day. If the plant is idle for a reason within the Owner's control, eg breakdown due to a fault or unavailability of a driver, then no charge is applicable (see Clause 18 (Basis of Charging)). If an operator has been provided with the plant under an 'All-in rate' then the operator is paid for at the full rate during idle periods, other than when the stoppage is within the Owner's control. This begs the question as to whether the full operator rate is payable where the plant and operator have been supplied at separate rates. The Model Conditions are not clear on this point. There is also the need to specify the breakdown of the 'All-in rate' in the hire contract so that the plant idle time rate can be charged when applicable, which begs the question as to what the



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point of 'All-in rates' is in the first place (if the purpose of 'All-in rates is for a composite plant and driver/operator rate).

### **26 Clause 26 Wages and other chargeable items relating to drivers and operators of plant**

26.1 This clause provides for an increase in the hire rates should there be an award under 'any wage agreements' or any increase in the Owner's statutory contributions. This can apply to increases before (applicable to the period after the hire contract comes into being but before the Hire Period starts) or during the Hire Period. This clause applies to any hire that involves a driver or operators regardless of whether an 'All in rate' is applicable. It might be useful to clarify in the hire contract what wages agreements will apply rather than leaving it open to 'any wage agreements'.

### **27 Clause 27 Travelling time and fares**

25.1 Travelling time, fares and similar expenses incurred by an Owner in respect of supplied operator or driver (or any other person) are paid for at cost for travel at the beginning and end of the Hire Period. However, travelling time is not chargeable at other times during the course of the Hire Period. The drafting of this clause is not clear on what fares and similar expenses are chargeable for drivers and operators during the Hire Period. It seems that the intention is that return fares from home to site are chargeable, at cost, but, as stated, this is not clear. If this is the case then there is, additionally, lack of clarity where no fares are involved, such as travel by car. Some clarity would seem to be appropriate in the hire contract.

In the event the Owner provides personnel to carry out repairs, servicing or maintenance then no charges in respect of travel time or travelling costs are chargeable, providing that such work is not as a result of negligence, misdirection or misuse by the Hirer.

### **28 Clause 28 Fuel, oil and grease**

28.1 All fuel, oil and grease consumed by the plant are to the Hirers account and if supplied by the Owner are charged at net cost. The Owner is required to specify what grade or type of consumable is to be used if the hire contract provides that these are to be supplied by the Hirer. It is important that the Hirer obtains the Owners requirements/specification in writing as the Hirer is responsible if the wrong type or grade causes damage to the plant.



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### **29 Clause 29 Sharpening of drills/steels etc.**

29.1 The Hirer is responsible for the cost of sharpening or replacing drill bits, blades and the like.

### **30 Clause 30 Owner's name plates**

30.1 The Owner's name plate or mark (such as a trading logo) must not be removed or defaced without the Owner's permission. Some Owners are willing to provide plant in whatever colour the Hirer requires, if this is important to the Hirer, particularly for long hires

### **31 Clause 31 Transport**

31.1 Transport costs of the plant to and from the Owner's depot, or other agreed place, is the sole responsibility of the Hirer except as otherwise provided for elsewhere in the Model Conditions, for instance when the plant is returned for repair at the Owner's expense. The Owner can require that the Hirer makes the transport arrangements; this should be specified in the hire contract.

### **32 Clause 32 Government regulations**

32.1 This clause makes the Hirer responsible (for the duration of the Hire Period) for compliance with all Government and Local Authority regulations in connection with the plant, except in limited cases. This includes being responsible for the cost of road fund licenses and statutory insurance requirements. The exception is when travelling to or from site under the control of the Owner's personnel. It could be prudent to establish that the plant is fully compliant with all applicable regulations prior to the Hirer assuming responsibility at the start of the Hire Period. Even better for this to be confirmed in the hire contract as this clause requires that the Hirer indemnifies the Owner against any charges or fines arising out failure to comply during the Hire Period.

### **33 Clause 33 Protection of owner's rights**

33.1 This clause prevents the Hirer from re-hiring, selling, mortgaging or parting with possession of the plant. However, there is one exception and that is in the case of Government requisition. There may be cases where a third party claims that it has a lien on the plant. But it is not for the Hirer to decide if this is valid and give up possession as to do so would trigger a claim from the Owner for indemnity of his costs arising there from. In such cases the Owner should be contacted immediately and his instructions sought.



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- 33.2 Clause 33(b) provides instances where the Owner may terminate the hire contract, namely;
- Failure of the Hirer to make payment on time;
  - Hirer fails to perform the terms and conditions of the hire contract;
  - The Hirer suffers or the Owner believes that the Hirer is about to suffer any distress or execution to be levied against it;
  - The Hirer becomes insolvent using the definitions of insolvency contained in Clause 113 of the HGCR Act;
  - The Hirer causes the Owners rights in the plant to be prejudiced or put in jeopardy.

In such instances the Hirer is required to allow the Owner access to recover the plant and the Owner is entitled to claim hire charges up to the point of termination, although this is not an exclusive remedy. Note that there is no obligation on the Owner to provide prior warning of a notice of termination in the above circumstances. It might be sensible to require prior warning of, say, seven days in the hire contract to allow rectification, if possible, in cases where it would be difficult to replace key plant at short notice.

- 33.3 Clause 33(e) allows the Owner to suspend performance of the contract if the Hirer fails to make payment by the final date for payment. This is an odd provision as there is no definition in the Model Conditions of a final date for payment or any payment timetable at all. It is considered that a hire contract involving plant supplied with a driver is a construction contract under the HGCR Act (the 'Construction Act'). In default of compliant payment provisions the relevant provisions of the Scheme for Construction Contracts will apply. As far as suspension is concerned the definition of a final date for payment can be implied from the Scheme. However it will be far preferable to provide a compliant payment regime in the hire contract. In any event, the Owner must first have given to the Hirer in writing at least seven days notice of its intention to suspend performance.

## **34 Clause 34 Changes in normal working week**

- 34.1 The Model Conditions are framed around the Hirer working a 5-day, 39 hour week. If there are any changes in the normal working week as a result of industry changes or if the hire contract is made on some basis other than a 39 hour week then, where applicable, the Model Conditions clauses are deemed conformably modified. These include Clauses 1(h), 1(i), 18(c), 18(d), and 20.



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### **35 Clause 35 Dispute resolutions**

- 35.1 This clause provides for either party to refer a dispute for resolution by adjudication. The procedure is the 'Scheme for Construction Contracts'. The nominating body is the Construction Plant-hire Association, unless an adjudicator has been specified in the hire contract.

### **36 Clause 36 Late payments**

- 36.1 As previously mentioned no payment period provisions are defined in the Model Conditions. This needs to be confirmed in the hire contract regardless of whether a driver or operator is supplied (in which case, as previously stated, the 'Construction Act' will apply) or not. Without such provisions this clause is meaningless. If possible a payment period of 35 days from receipt of invoice (not from date of invoice) should be sought. Interest accruing on late payments is in accordance with the 'Late Payment of Commercial Debts (Interest) Act' which, at the present time, sets interest at 8% above the Bank of England dealing rate current when the debt accrues. This will be quite a high penalty and where possible should be amended to, say, 2% above the London Interbank Offer Rate (LIBOR).

### **37 Clause 37 Severability**

- 37.1 This final clause provides for any clauses that are held to be unlawful, void or unenforceable to be severed from the remaining clauses so that the remaining clauses are valid and enforceable