A PRACTICAL GUIDE TO THE ATHENS CONVENTION

A practical guide from the 2TG Travel and Jurisdiction Group **July 2020**

The 1974 Athens Convention concerns the carriage of passengers by sea and covers liability of a carrier to a passenger for death and personal injury, and for loss and damage to luggage.

When the 24 nations convened in Athens in 1974 to agree the terms of the Convention no-one could have predicted the seismic changes that 2020 would bring for the industry, which has been uniquely affected by the COVID-19 outbreak. This should have been a golden year for cruise operators, with the launch of 19 new vessels worth in the region of 19 billion USD. Instead, the industry is facing its biggest challenge yet.

Whilst the industry recovers and reflects on the changes that the outbreak will inevitably bring, part of that reflection will necessarily include how the carriers' liabilities will be affected by it.

This document is intended as an introduction to bringing and responding to claims under the Convention.

Context

A legal issue arising from the *domestic* carriage of passengers on ships will ordinarily be covered by the one national regime in which the carriage took place. By contrast, in the case of *international* carriage, with a journey passing through the waters of more than one country, a multiplicity of legal systems may be relevant and conflicts between those systems might arise. Hence the need for international regulation.

As to the contents of this international regulation: passengers' rights as against a carrier by sea are determined by a contract, evidenced by the issuance of a ticket. The terms of such contracts are normally written by carriers without any opportunity for the passengers to negotiate. That being the case, as in many other areas of international regulation, the law has increasingly sought to increase protection for the weaker party, in this case, passengers.

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However, it is important to note that the Convention is focused on *carriage* itself, and does not cover claims relating to quality, enjoyment and comfort.

Exclusivity

The Athens Convention was intended to be the sole framework for a passenger to claim against a carrier in respect of carriage itself. Article 14 states: "*No action for damages for the death or personal injury to a passenger, or for the loss of or damage to luggage, shall be brought against a carrier or performing carrier otherwise than in accordance with this Convention.*"

The legal framework

- The 1974 Athens Convention came into force in 1987.
- The Convention was amended by the 2002 Athens Protocol, which came into force on 23 April 2014[1].
- The Convention, as amended, has force of law in England and Wales pursuant to sub-sections 183 and 184 of the Merchant Shipping Act 1995, the terms of the Convention being set out in Schedule 6 to that Act.
- However, European Regulation (EC) No 392/2009 on the liability of carriers of passengers by sea in the event of accidents came into force on 31 December 2012 ("the Athens Regulation"). It largely imports the provisions of the amended Athens Convention (in Annex I) but with some additional features. Pursuant to the 1995 Merchant Shipping Act, section 183, as amended by the Merchant Shipping (Carriage of Passengers by Sea) Regulations 2012 (SI 2012/3152), where the Athens Regulation applies, Schedule 6 (i.e. the Athens Convention) will not. The remainder of this guide will refer to provisions of the Athens Convention, except where the Regulation expressly differs.

Which regime applies?

The Athens Regulation will apply to the international carriage of passengers or luggage by a ship where one of the following is a Member State: the flag state of the ship[2], the state where the relevant contract of carriage has been made, or the place of departure or destination according to that contract of carriage.

Should the Regulation not apply, the Athens *Convention* will apply to the international carriage of passengers or luggage by a ship where the flag state of the ship, the state where the contract of carriage was made, or the place of departure or destination is a party to the Convention.

'International carriage' effectively means carriage 'between states', or specifically: "*any carriage in which, according to the contract of carriage, the place of departure and the place of destination are situated in two different States, or in a single State if, according to the contract of carriage or the scheduled itinerary, there is an intermediate port of call in another State.*"[3] This will, for example, cover (a) carriage from England to France; (b) carriage from England to France where the ship never reaches France and remains in Britain; (c) carriage beginning and ending in England but with a stopover in France.

However, the Athens Regulation expands the scope of the Convention in that it also applies to *domestic* voyages taken by 'Class A' ships, as defined in in Council Directive 98/18/EC, and will apply to domestic voyages on 'Class B' ships from 1 January 2019[4].

Furthermore, the UK has also extended the application of the provisions of the 1974 Athens Convention to carriage by sea between UK ports including the Isle of Man and the Channel Islands[5].

Who can bring a claim?

The Convention covers liability to "*passengers*", defined in Article 1.4 as "*any person carried in a ship*

[1] Although it became part of EU law on 31 December 2012 via the Athens Regulation described below.
[2] i.e. the State whose registered flag the ship is flying.
[3] Article 1.9 of the Athens Convention, as incorporated in Annex 1 of the Athens Regulation.
[4] This refers to the classification of ships as detailed at https://www.gov.uk/guidance/vessel-classification-and-certification.
[5] See the Carriage of Passengers and their Luggage by Sea (Domestic Carriage) Order 1987/670, Sch. 1 Para 1 and the Merchant Shipping (Convention Relating to the Carriage of Passengers and their Luggage by Sea) Order 2014, Article 3.

(a) under a contract of carriage, or (b) who, with the consent of the carrier, is accompanying a vehicle or live animals which are covered by a contract for the carriage of goods not covered by this Convention." This does not include the carrier's employees acting in the course of their employment.

It covers "*cabin luggage*" defined in Article 1.6 as "*luggage which the passenger has in his cabin or is otherwise in his possession, custody or control.*" The latter category is broad and appears to cover items in the passenger's control generally[6].

It also covers liability for other "*luggage*", defined in Article 1.5 as "*any article or vehicle carried by the carrier under a contract of carriage* [i.e. as part of the ticket] *excluding (a) articles and vehicles carried under a charter party, bill of lading or other contract primarily concerned with the carriage of goods; and (b) live animals*". Luggage left in the passenger's vehicle would fall under this category.

Liability for valuables is excluded by Article 5 "*except where such valuables have been deposited with the carrier for the agreed purpose of safe-keeping*".[7] This exclusion has been held not to apply where there should have been, but there was not, an opportunity given to passengers to deposit their valuables with the carrier for safekeeping[8].

Who can be sued?

Pursuant to Article 1(3) of the Convention, only 'seagoing' ships are covered[9]. *The Sea Eagle* [2011] EWHC 1438 (Admlty) provides more guidance. This case concerned a rigid inflatable boat (RIB) that was used for pleasure trips around the coast of Anglesey and was intended to be able to go offshore. The judge found that for a craft to fall under the Athens Convention, it had to be (a) a ship or vessel; and (b) seagoing. As to the former requirement, the judge found that a structure was a 'ship or vessel' if it could in theory be capable of use in navigation, even if it was not so in fact. In determining that The Sea Eagle was capable, the judge considered *inter alia* its design and construction and the manufacturer's description. As to the latter, the judge ruled a vessel was 'seagoing' if it was in fact (as opposed to in theory) used at sea, in the context of the claim being brought. The court also considered whether the coastal waters in which The Sea Eagle operated were 'sea' and found that they were, pursuant to the Merchant Shipping Notice MSN 1776. It was therefore 'seagoing'.

The person liable under the Athens Convention is the contracting carrier – see Article 1(1)(a). Where there is a separate 'performing carrier' (who actually performs the whole or a part of the carriage[10]), they and the contracting carrier are jointly and severally liable for incidents during the time that they were performing the contract – Article 4.

Rights of recourse between the carriers are preserved[11], as is the defence of contributory negligence[12].

It is also notable that the substitution of defendants after expiry of the limitation period may be possible pursuant to the court's discretion under CPR r17.4 and r19.5. In *Adams v Thomson Holidays* [2009] EWHC 2559 (QB), it was decided, *obiter*, that the fact that the Convention did not prohibit such substitution implied that it 'allowed' such substitution for the purposes of the gateways in CPR r17.4(1)(b)(iii) and r19.5(1)(c).

Embarkation until disembarkation

The Athens Convention covers *passengers* from the point of embarkation until disembarkation – Article 1.8(a). For example, in *Collins v Lawrence* [2017] EWCA Civ 2268, the claimant was a passenger on the defendant's fishing boat. The process of disembarkation involved using free-standing steps onto a shingle beach. The steps were a semi-permanent structure on the beach and not part of the

[6] *Lawrence v NCL (Bahamas) Ltd t/a Norwegian Cruise Line* [2016] 5 WLUK 109, see discussion of this case in the 'Embarkation until disembarkation' section of this guide.
[7] Article 10.1, Article 8.3.
[8] *Lee and Another v Airtours Holidays Ltd and Another* [2004] 1 Lloyd's Rep 683.
[9] The Convention does however apply to air-cushion vehicles such as hovercraft.
[10] As defined in Article 1.1(b).
[11] Article 4.5.
[12] Article 6.

boat. The Claimant alleged that he slipped on a wet wooden board at the bottom of the steps and injured himself. The Defendant argued that the accident took place before disembarkation was complete, meaning that the Athens Convention 1974 and specifically its limitation provision, applied. The Court of Appeal agreed with the Defendant, noting (1) disembarkation includes the whole period of moving from the vessel to a safe position on the shore; and (2) it includes any time when the passenger is using disembarkation equipment, i.e. the means by which a passenger is to disembark from the ship to the shore.

This Convention also covers the period when the passenger *and* his cabin luggage are transported to and from the ship, so long as such transportation is included in the fare or the vessel of transportation is put "*at the disposal of the passenger by the carrier*". Although this part of Article 1.8(a) specifies transportation of the passenger *and their cabin luggage,* in *Lawrence v NCL (Bahamas) Ltd t/a Norwegian Cruise Line* [2017] EWCA Civ 2222, the Defendant cruise company was liable when the Claimant was injured on a tender boat operated by local company to take passengers from the ship to shore for an excursion, even though the Claimant did not have all of his luggage. It was sufficient that the Claimant had some or any of his possessions with him on the tender boat – as 'cabin luggage' included any luggage in his 'possession, custody or control'.

'Carriage' does not, however, include the period when the passenger is in a marine terminal, station or other port installation. For example, in *Jennings v TUI UK Ltd (t/a Thomson Cruises)* [2018] EWHC 82 (Admlty), it was held that, when a passenger slipped on a fixed walkway leading from the ship to the terminal, which walkway was installed in the port and was not part of the ship, this was not part of the 'carriage' and the Athens Convention did not apply. Notably, the Package Travel, Package Holidays and Package Tours Regulations 1992 did apply, but no duty of care arose since the accident occurred after the passenger had left the ship and was in an area over which the tour operator had no control. This decision was affirmed in the case of *Dr Sucheta Mahapatra v TUI UK Limited* [2018] EWHC 3140 (Admlty).

Article 1.8(b) extends cover for cabin luggage which has been temporarily taken by the carrier – to any time when a passenger is in a port installation and the cabin luggage has not been redelivered.

Article 1.8(c) prescribes cover for other luggage during "*the period from the time of its taking over by the carrier or his servant or agent on shore or on board until the time of its re-delivery by the carrier or his servant or agent.*" It remains unclear as to when, for example, a vehicle left with the carrier is "*taken over*".

Liability for injury and death

Shipping incidents

The 2002 Athens Convention imposes strict liability for 'shipping incidents' – that is, "*shipwreck, capsizing, collision or stranding of the ship, explosion or fire in the ship, or defect in the ship*"[13] as distinct from, for example, an incident arising from the food served on the ship.

Where there is a claim for loss of life or personal injury arising from such an incident, the fault of the carrier is presumed[14], pursuant to Article 3.3, and it is up to them to disprove this. However, the burden of proving that the incident was a 'shipping incident' still rests with the Claimant[15].

There are two exceptions to strict liability in such cases, set out in Article 3.1(b). To paraphrase this provision, carriers can be exonerated entirely for a shipping incident if they can show that the loss of life "*resulted from*" war, hostilities and inevitable natural phenomena; or if it "*was wholly caused*" by the intentional acts or omissions of a third party (e.g. terrorist attacks). The wording of the latter exception – "*wholly caused*" – is notably narrow.

[13] Article 3.5(a). '*Defect in the ship*' is defined in detail in Article 3.5(c).
[14] This shift towards strict liability is a major change from the 1974 Athens Convention.
[15] See *Nolan v TUI Ltd* [2016] 1 Lloyd's Rep 211.

Non-shipping incidents

Establishing liability for death or personal injury that did not arise from a shipping incident requires the claimant to prove fault or neglect on the part of the carrier, its servants or agents acting in the course of their employment[16]. The following cases provide some guidance as to proving fault.

Davis v Stena Line [2005] EWHC 420 (QB) is often cited as being authority for the proposition that the question of fault or neglect is equivalent to common law negligence. Indeed, this is the broad approach taken by the Courts in the cases discussed below and it does not appear to have ever been argued that another gloss should be applied to the wording, perhaps for good reason. However, on closer inspection, this point was not in fact argued in *Davis* but was 'common ground' between the parties, at paragraph 6.

Nolan v TUI Ltd [2016] 1 Lloyd's Rep 211 concerned gastroenteritis suffered by passengers on a ship as a result of an outbreak of norovirus. In this case the claimant failed to prove that an outbreak of norovirus was caused by a 'defect in the ship' and was hence a 'shipping incident'. That being the case, the burden to prove fault or neglect was on the claimant but this was also not satisfied in this case. The outbreak was caused by a boarding passenger, and appropriate safety measures had been taken. The court also found that a failure to warn the passengers prior to boarding about a previous outbreak of norovirus did not satisfy this burden or fall under the ambit of the Athens Convention because it was something that occurred *prior to* carriage. However, these cases are extremely fact-sensitive and often the Defendant faces an uphill struggle to marshal its evidence in response to the Claimant's allegations of fault or neglect in the implementation of its HACCP and illness control procedures. An illustration of this challenge can be found in the case of *Swift v Fred Olsen* [2016] EWCA Civ 785, where the carrier was found to be at fault for failing to implement its norovirus outbreak and control plan.

The Court of Appeal in *Dawkins v Carnival Plc (t/a P&O Cruises)* [2011] EWCA Civ 1237 provided guidance as to the Claimant's burden in respect of non-shipping incidents. The case concerned a passenger who slipped on water spilled in the restaurant of a cruise ship. The High Court clarified that because the premises were in the control of the carrier and a hazard (spillage) was present, this established a prima facie case of negligence against the carrier following *Ward v Tesco Stores Ltd* [1976] 1 WLR 810. The evidential burden then shifted to the carrier to establish that there was an appropriate system in place and the spill was there for only a very short, or reasonable amount of time. Although the carrier had contemporaneous written evidence of its systems for inspection and cleaning, none of the crew directly responsible for this were available to give evidence at trial. The Court of Appeal held, contrary to the first instance decision, that a judge could not infer from the general existence of a system that there was an appropriate system in place at the material time.

In *Williams & others v Fred Olsen Cruises Limited,* 15 July 2011 (unreported), a claim brought by two claimants who fell from a ship in the process of re-boarding when it came detached from its mooring, the claimants were able to rely on the maxim *res ipsa loquitor* in establishing liability.

The High Court in *Lawrence v Norwegian Cruise Line,* 6 May 2016 (unreported) provided further guidance as to the standard to be expected of a carrier. The claim was brought by a passenger who tripped over a 'sill' when entering a tender boat that was supposed to transport him to the cruise ship. In finding the carrier liable, the court noted that given the majority of cruise passengers were older and retired people, carriers should exercise a standard of care commensurate with caring for elderly passengers who might be less wary of potential danger; for example, in this case, by marking the sill with a warning.

[16] Article 3.2.

Liability for damage or loss of luggage and vehicles

In this respect the Athens Convention covers loss and damage including the non-delivery of luggage to a passenger within a reasonable time of their arrival at the destination[17].

The burden of proof in respect of cabin luggage is the same as those for death or personal injury: the carrier's fault is presumed for shipping incidents and must be proved by the Claimant for other incidents – Article 3.3.

For other luggage, the fault of the carrier is always presumed – Article 3.4.

There are also notice requirements in respect of such claims. Pursuant to Article 15, the passenger must give written notice to the carrier or his agent:

- In the case of cabin luggage before or at the time of disembarkation of the passenger;
- In the case of other luggage, before or at the time of its re-delivery;
- In the case of damage to luggage which is not apparent or loss of luggage, within 15 days of (i) disembarkation; (ii) re-delivery; or (iii) the time when re-delivery should have taken place.

Failure to comply with the notice requirements leads to a rebuttable presumption that the passenger received the luggage undamaged.

Limits of liability

Pursuant to Articles 3, 7 and 8, the 2002 Convention limits liabilities as follows[18]:

- Death or personal injury:
  - Shipping incidents: 250,000 units of account (SDR)[19] per passenger on each occasion under strict liability; and more if the carrier cannot disprove fault[20]. Article 10 allows the passenger and carrier to agree to higher limits, expressly and in writing.
  - Non-shipping incidents: 400,000 SDR per passenger on each occasion (but this can be increased under national law[21])
  - The above will differ where the IMO reservation described below is adopted.
- Cabin luggage: 2,250 SDR per passenger per carriage;
- Vehicles including luggage in or on vehicles: 12,700 SDR per vehicle, per carriage (although the carrier and passenger can agree a deductible of 330 units for damage to a vehicle);
- Other luggage: 3,375 SDR per passenger, per carriage (although the carrier and passenger can agree a deductible of 149 units in this respect).

Interest and costs are governed by national law and are recoverable in addition to these limits.

Cases relating to war etc.

The International Maritime Organisation in 2006[22] provided guidelines for contracting states to consider when ratifying the Convention. These include (1) a reservation which obliges the Contracting State to limit a carrier's liability to the lower of 250,000 units per passenger or 340 million units overall, where certain causes like war and hostility apply; (2) additional guidelines which, among other things, permit insurers to reduce their exposure to certain risks by introducing certain clauses to contracts of insurance. The EU Regulation adopts the reservation, and some of the guidelines, but some contracting states do not.

Relationship with other limits

The 1976 Convention on Limitation of Liability for Maritime Claims ("LLMC") and the 1996 Protocol to this have effect in UK law primarily by virtue of Schedule 7 of the Merchant Shipping Act 1996.

Pursuant to Article 19 of the 2002 Athens Convention, the rights of limitation in these provisions co-exist with those in the Athens Convention.

[17] Unless that delay was caused by a labour dispute.
[18] Domestic journeys by UK carriers remain covered by the limits in the 1974 Convention as applied by the 1995 Merchant Shipping Act, and amended by the Carriage of Passengers and their Luggage by Sea (United Kingdom Carriers) Order 1998.
[19] These units of account are defined in Article 9 as 'Special Drawing Rights', whose value is determined by the IMF and can be found at https://www.imf.org/external/np/fin/data/rms_sdrv.aspx. The amount awarded is determined by taking the value of the domestic currency as against these units at the date of judgment.
[20] Article 3.1, Article 3.5, Article 3.5(b).
[21] Article 6.
[22] Ref. A1/P/5.01, Circular Letter No.2758, 20 November 2006.

In brief, the UK position on this, as decreed in the Merchant Shipping Act, Schedule 7, Part II, is as follows.

- Personal injury and death: The LLMC as amended imposes a limit for personal injury or death of 175,000 SDR multiplied by the number of passengers that the ship is allowed to carry[23]. This is for any claim, whether by one passenger or more (unlike the Convention whose limits are per passenger). However, the LLMC allows for national law to disapply those limits – a step which the UK government has taken in respect of sea going ships[24], meaning that, in effect, for any case involving a sea going ship, the only limit that applies is that in the Athens Convention.
- Luggage etc: by contrast, for damage to things like luggage, both the limits in Article 8 of the Athens Convention and Article 6.1(b) of the 1976 LLMC (as amended in 1996) will apply. This means that passengers can recover up to the prescribed Athens Convention limit, except where the 1996 Protocol limits are exceeded.

Intention or recklessness

Article 13.1 of the Convention excludes the carrier's right to limit liability "*if it is proved that the damage resulted from an act or omission of the carrier done with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result.*" This is specific to intention or recklessness on the part of the carrier, rather than their employees or servants[25]. Similarly, those employees or servants, when sued in their own capacity, cannot limit liability if the damage resulted from their own intention or recklessness (Article 13.2). A similar provision applies to the LLMC Convention (Article 4).

This exclusion was put to effect by the Southern District Court of Florida in *Farraway v Oceana Cruises Inc. Case No. 10-cv-24312-JLK*, a case concerning the alleged rape and false imprisonment of the plaintiff by a crew member. The Court refused the Defendant permission to amend its Defence to rely upon the limitations under the Convention on the basis that the assaults were intentional torts and therefore came within the recklessness exclusion. It is unclear from the judgment whether the Defendant argued with any real force that this exclusion did not apply to the recklessness of the carrier's employees. Whilst the status of this case is unclear given that the action settled prior to trial, it is interesting to note how the argument was received in a different jurisdiction.

Limitation

The limitation period for a claim brought under the Convention is two years[26]. According to Article 16.2, this starts to run:

- In cases of personal injury: from the contractual date of disembarkation;
- In cases of death occurring during carriage: from the date when the passenger should have disembarked;
- In cases of personal injury during carriage resulting in death after disembarkation: from the date of death;
- In cases of loss or damage to luggage: from the later of the date of disembarkation, or the date disembarkation should have taken place.

All of the above is subject to a longstop of three years after disembarkation or the date that disembarkation should have taken place, after which no claim may be brought[27].

The period of limitation can be extended by a declaration by the carrier or by agreement of the parties, in writing[28]. It is also possible for the limitation period to be suspended or interrupted, and this is based on the law of the court hearing the case[29]. For example, in *Warner v Scapa Flow Charters* [2018] UKSC 52, the claim of the guardian of a child whose father died as a result of a diving accident was not barred by Article 16 of the Athens Convention because s18 of the Prescription and Limitation (Scotland) Act 1973 had suspensive effect on the

[23] There is also an additional upper limit based on the tonnage of the vessel.
[24] Merchant Shipping Act 1995, Schedule 7 Part II paragraph 6.
[25] See *R G Mayor v P&O Ferries* [1990] 2 Lloyd's Rep 144.
[26] Article 16.1.
[27] Article 16.3.
[28] Article 16.4.
[29] Article 16.3.

Athens Convention time bar. Such domestic legislation could have such an effect even where it postpones the start of a limitation period, rather than stopping the clock after the limitation period has commenced; and even where the domestic limitation provision was not framed to cover limitation periods in conventions like the Athens Convention.

By contrast, it is notable that in *Higham v Stena Sealink Ltd* [1996] 2 Lloyd's Rep 26 (CA), where the claimant sought to rely on provisions of the Limitation Act 1980, it was held that s33 of the Act could not be used in respect of time bars set by the Athens Convention as this section refers expressly to the time bars set by section 11 of the Act. The same problem may apply to sections 28-32 of the Act.

The bar in Article 16 is to the *remedy* of the passenger, not the *right*. This is why, in *South West Strategic Health Authority v Bay Island Voyages* [2015] EWCA Civ 708, the carrier could still be sued for contribution by another party who was liable for the passenger's injuries (the passenger's employer), despite the Athens Convention time bar having passed.

Jurisdiction

Article 17 allows the Claimant to choose where to bring a claim in any of the following jurisdictions, so long as they are a State Party to the Convention:

- The place of residence or principal place of business of the defendant;
- The contractual place of departure or destination;
- The claimant's place of domicile or permanent residency, if the defendant has a place of business and is subject to jurisdiction in that state;
- The place where the contract was made, if the defendant has a place of business there and is subject to the jurisdiction of that state.
- A jurisdiction agreed on by the parties after the occurrence of the incident which caused the damage.

However, a final enforceable judgment from a competent court is enforceable in all Contracting States, except where obtained by fraud, or where the defendant was not given reasonable notice and a fair opportunity to submit a defence[30].

Admiralty Jurisdiction

Claims for personal injury or death under the Athens Convention must be started in the Admiralty Division of the High Court, pursuant to CPR r 61.2. This rule applies to claims "*for loss of life or personal injury in section 20(2)(f) of the Supreme Court Act 1981*" and this section, to paraphrase, covers claims for loss or life or personal injury sustained in consequence of a defect in a ship, or in consequence of the wrongful act, neglect or default of the owners and persons in possession or control of the ship.

Claims incorrectly brought in the County Court, where they are started within time, are not vexatious, and disclose a cause of action, should normally be transferred to the High Court, rather than being struck out[31].

Athens Regulation

The Athens Regulation incorporates the provisions of the Convention in an Annex, including the IMO Guidelines[32]. However, these provisions came into force on 31 December 2012[33], and remain in force irrespective of the Athens Convention. Notable points in the Regulation include:

- Coverage: as above, the extensions of coverage to some cases of domestic carriage;
- Jurisdiction: this is considered to be part of the exclusive competence of the EU and therefore the above provisions are not included in the Athens Regulation[34]. Therefore, when it comes to matters of jurisdiction, Athens Regulation cases fall under the Brussels Recast Regulation[35]. However, the Athens Convention 2002 only permits the application of other jurisdictional rules "*provided that their effect is to ensure that judgments are recognised and enforced at least to the same*

[30] Article 17*bis*.
[31] *Re NP Engineering v Pafundo* [1998] BCLC 208.
[32] Article 3.2.
[33] Article 12.
[34] See further paragraph 11 of the recital to that Regulation.
[35] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast).

extent as under [the Convention]"[36]. In effect, this means that the jurisdictional provisions in the Convention, where more specific, take precedence.

- Mobility equipment: Article 4 prescribes that in cases of damages to mobility equipment or "*other specific equipment used by a passenger with reduced mobility*", Article 3.3 of the Athens Convention will apply (i.e. fault will be presumed if the loss is caused by a shipping incident) and compensation will correspond to the replacement value of the equipment or, where relevant, the cost of repairs.
- Link with national legislation on limits of liability: Article 5 effectively says that the Regulation will not override national legislation implementing the 1976 LLMC, as amended by the 1996 Protocol. It also provides that "*In the absence of such applicable national legislation, the liability of the carrier or performing carrier shall be governed only by Article 3 of this Regulation* [which itself imports a number of provisions of the Athens Convention]."
- Advance payments: Article 6 requires a defendant to make an advance payment within 15 days of the person entitled to damages being identified. The sum to be paid must be sufficient to cover the claimant's immediate economic needs and must be at least EUR 21,000 in cases of death. This does not constitute an admission and may be offset against subsequent sums payable but is not usually refundable. Article 6 applies in personal injury and death cases arising from shipping incidents, and applies to carriers flying the flag of or registered in a Member State or where damages occur in the territory of a member state,
- Information to passengers: Article 7 requires passengers to be given certain information about their rights under the Regulation but does not impose a penalty for breach of this provision.

Relationship with other regulatory regimes

Neither the Athens Convention nor the Athens Regulation will apply where another mode of transport was also used and there is a compulsorily applicable international regime. Article 2.2 of the Convention states: "*...the Convention shall not apply when the carriage is subject, under any other international convention concerning the carriage of passengers or luggage by another mode of transport, to a civil liability regime under the provisions of such convention, in so far as those provisions have mandatory application to carriage by sea.*"

The position remains unclear as to conflicts between the Convention and the EU Package Travel Directive[37] but the following should be borne in mind.

- Article 14 of the Convention intends that it is the sole framework for a passenger to claim against a carrier – see above.
- In *Lee and Another v Airtours Holidays Ltd and another* [2004] 1 Lloyd's Rep 683, Judge Hallgarten QC suggested that the Directive could provide an alternative remedy as it was implemented in English law and the Convention was not incorporated into the contract; also noting that in the event of any conflict, the Package Travel Regulations, as the domestic implementation of an EU Directive, would override the domestic law in the Merchant Shipping Act. However, the County Court in *Norfolk v My Travel Group Plc* [2004] 1 Lloyd's Rep 106, without reference to the previous case, found that the UK implementation of the Convention in section 183 of the Merchant Shipping Act 1995 meant that it applied irrespective of reference in the contract, and noted its standing as an international convention – concluding that no alternative claim may be brought under the Package Travel Regulations. As a result, in that case, the Athens Convention and its stricter limitation rules applied instead of the common law (note the exclusivity point above) and the claim was time-barred.
- As part of the legal order of the EU, the Athens Regulation cannot be overridden by national implementation of the Directive.

Relationship with contract

The Convention applies automatically, in that it does not require incorporation into a contract of carriage.

[36] Article 17*bis*(3).

[37] Directive 90/314/EC and related legislation.

For example, in *The Lion* [1990] 2 Lloyd's Rep 144, it was held that a carrier could limit his liability to a passenger pursuant to Article 3 of the Convention, even if this was not set out on the ticket[38].

However, Article 18 of the Convention renders null and void contractual provisions concluded before the material incident that purport to exclude or limit liability under the Convention (save as provided for in Article 8), as well as those that purport to shift the burden of proof, or restrict the jurisdictional options in Article 17.

Commercial carriage by states or public authorities is covered by the Convention, so long as there is a contract governed by the Convention – see Article 21.

Compulsory insurance

This is dealt with in Article 4. In summary, the Athens Convention makes provisions for carriers to have compulsory insurance, including that a performing carrier of a ship licensed to carry more than 12 passengers must carry insurance of 250,000 units of account per passenger on each distinct occasion.

The Convention also makes provision for direct actions against insurers, which can be brought under Article 10. Liability of insurers is limited to 250,000 units per passenger, even if the carrier has lost the right to rely on such a limit itself. In response, an insurer can rely on any exceptions or defences open to the carrier (including as provided by the IMO guidelines 2006); or can escape liability where the damage was caused by the wilful misconduct of its insured; but it generally cannot rely on coverage points and the contract of insurance. The insurer can also join the contractual and performing carriers into proceedings.

Brexit

Although, at the time of writing, the position as to the effect of Brexit is still in flux, the Merchant Shipping (Miscellaneous Provisions) (Amendments etc.) (EU Exit) Regulations 2018 provide for a saving provision in relation to this legislation.

Conclusion

So, what does this mean in practice, for parties preparing for litigation under the Athens Convention especially in the aftermath of COVID?

Firstly, the *Bay Island Voyages* decision underlines the importance for carriers not only to conduct thorough contemporaneous investigations of accidents and illness outbreaks in order to secure evidence from an often changing crew, but also to preserve that evidence for much longer than previously was necessary.

For those Claimants who present their claims outwith the Convention limitation period, in the right case, *Bay Island Voyages* now offers them a lifeline.

Furthermore, with significantly increased liability limits under the Athens Convention and the fact that Convention claims are outwith the Pre-Action Protocol for Resolution of Package Travel Claims[39], we are sure to see a move towards more large-scale group actions for sickness claims and disease outbreaks in this area - not least following the numerous COVID outbreaks this year.

In such cases, carriers and their representatives will need to ensure that the huge volumes of evidence on the HACCP systems etc. necessary to robustly defend the group litigation are presented to the Judge in as condensed and user-friendly way as possible.

At 2TG we are experts in such claims. Our Travel and Foreign Claims team regularly deal with large-scale group litigation and all other claims under the Athens Convention ranging from fatal and catastrophic injury claims to fast track claims. For further information, please contact the clerks on 020 7822 1200 or clerks@2tg.co.uk.

[38] However, this failure by the carrier to set out on the ticket matters relating to the Athens Convention was a criminal offence in that it was in breach of the Carriage of Passengers and their Luggage by Sea (Interim Provisions) Notice Order 1980 (SI 1980/1125).

[39] See rule 1.1(13)(c) of that protocol which expressly excludes Athens Convention claims.

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