

# *All at Sea?* *Bringing, Amending and Defending Athens* *Convention Claims*

---

Speakers:



Lois Aldred  
aldred@12kbw.co.uk



Henry King  
king@12kbw.co.uk



# Limits of Liability Under the Athens Convention

- Under the Athens Convention, carriers are subject to a two-tier liability system for claims involving personal injury to and death of passengers:
  - Carriers are strictly liable up to 250,000SDR for personal injury and death claims arising out of shipping incidents
  - Where the Carrier is liable for death or personal injury to a passenger caused by a shipping incident and the liability exceeds this amount, the Carrier is further liable to an overall liability limit of 400,000SDR unless the Carrier proves that the incident occurred without the fault or neglect of the Carrier
  - For all cases not arising out of a 'shipping incident', the claimant must establish that the Carrier was at fault
  - The Carrier loses their entitlement to rely upon the limits for personal injury and death if it is proved that the damage resulted from an act or omission of the carrier done with intent to cause such damage, or recklessly and with knowledge that such damage would probably result
- A 'shipping incident' is defined as the shipwreck, capsizing, collision or stranding of the ship, explosion or fire in the ship or defect in the ship

# Limits of Liability cont.

- Where the death or injury to a passenger does not occur by a Shipping Incident, i.e. slip or trip on board the vessel, the liability of the Carrier for such claims will be limited to 400.000 SDRs subject to Article 13 and conduct barring limitation
- Carriers are also liable for the loss of or damage to luggage and vehicles up to the following limits:
  - 2,250 SDR per passenger for cabin luggage;
  - 12,700 SDRs per vehicle for vehicles including all luggage carried in or on the vehicle; and
  - 3,375 SDRs per passenger for 'other luggage'
- Carriers are required to maintain insurance or other financial security to cover death or personal injury for a minimum amount of 250,000SDR per passenger
- Inapplicable to domestic cruises
- Must be during carriage on a seagoing vessel (See The Sea Eagle [2011] EWHC 1438 (Admlty))

# Liability for Damage as a Result of Personal Injury or Death

- Carrier is liable where (Art. 3(1)):
  - Damage occurred in the course of carriage
  - Was due to the fault or neglect of his servants or agents
- Burden of proof is on the claimant (Art. 3(2))
- Presumption of fault or neglect if damage arose from or in connection with the shipwreck, collision, stranding, explosion or fire or defect in the ship (Art. 3 (3))
  - The presumption is rebuttable
  - The burden of so proving is on the carrier
- Liability is for personal rather than bodily injury; includes psychiatric injuries as well as other impairments to mental faculties



# Fault or Neglect

- Courts often approach fault or neglect in a similar way to allegations of negligence
- Evidential burden can be imposed on the Defendant (*res ipsa loquitur*):
  - Dawkins v Carnival PLC [2011] EWCA Civ 1237
    - The claimant slipped on a liquid in the ship's restaurant
    - The restaurant was fully staffed and busy at the time
    - No staff members gave evidence at trial
    - The defendant only adduced evidence as to their general inspection system
    - The Court of Appeal found that the presence of the slipping hazard on the floor of the restaurant, under the management of the ship, gave rise to an inference of negligence
    - The evidence as to the general inspection regime was not sufficient to displace this inference without direct evidence from cleaning staff present
- Carrier can still argue contributory negligence (Art. 3 (7))

# Exclusivity of Athens Convention

- Athens applies even where carrier is also a tour operator within the meaning of the Package Travel Regulations

*"No action for damages for the death of 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."*

(Art. 14)

- Where Athens applies its regime prevails over the PTR where carrier is also a tour operator (see Norfolk v MyTravel Group PLC [2004] 1 Lloyd's Rep 106)

Cf

- Lee v. Airtours Holidays Ltd [2004] 1 Lloyds Rep 683 NB generally regarded as having been wrongly decided.
- See Sidhu v British Airways [1997] 2 WLR 26 for House of Lords reasoning on a similar provision in the Warsaw Convention

# Limitation

- The general rule is 2 years (Art. 16)
- This is subject to the suspension or interruption of the limitation period allowed by domestic law

*'The law of the court seized of the case shall govern the grounds of suspension and interruption of limitation periods, but in no case shall an action under this Convention be brought after the expiration of a period of three years from the date of disembarkation of the passenger or from the date when disembarkation should have taken place, whichever is later' (Art. 16(3))*

- Those domestic rules can be applied subject to an absolute bar of 3 years save for another agreement of the parties or declaration of the carrier
  - E.g. in England and Wales, the limitation can be extended up to 3 years in the case of a patient or a child



# Accident 'in the course of carriage'

- Article 8: the Convention applies where the passenger and/or his cabin luggage are on board the ship or in the course of embarkation or disembarkation, or being transported by the carrier by water from land to ship or vice versa.
- Carriage does not include the period during which he is in a marine terminal or station or on a quay or in or on any other port installation.

# When Does Carriage Stop During Disembarkation?

- *Jennings v TUI UK Limited (t/a Thomson Cruises)* [2018] EWHC 82 (Admlty):
  - The claimant and his wife had booked a cruise with the defendant for 7 days which started and finished at the Port of Malaga, Spain
  - The holiday contract with the defendant included flights, the transfer between the airport and the Port of Malaga, as well as the cruise
  - At the end of the cruise, the claimant was leaving the cruise ship via a covered walkway. It was raining.
  - He made his way along an “airfinger” which was a covered walkway supported at each end by steel legs and running on railway type lines set in the top of the quay. He then crossed over a fixed concrete walkway to access another walkway supported on steel legs which sloped down into the terminal building
  - As the claimant was walking down this last walkway he slipped on water and fell

- Claimant's case: disembarkation was not complete until the passenger was safely established ashore and sought to rely upon the decision in Collins v Lawrence [2017] 1 Lloyds Rep 13
  - A passenger fell from a platform at the top of freestanding steps from a grounded fishing vessel which had been provided by the vessels owners and which led onto the beach. The judge in that case held that disembarkation was not completed until the passenger was safely on the shingle beach
- Defendant's case: the fixed walkways were port installations using the ordinary meaning of that phrase and the period of carriage had already ended when the fall occurred
- The Court found that the Athens Convention did not apply as the fall did not occur during the course of carriage
  - Whilst the scope of the Athens Convention is generally intended to include disembarkation, this does not apply once a passenger has left the ship and has reached spaces or equipment which are clearly not under the control of the ship
  - Once the claimant had passed through the port door in the ship's side and stepped onto the walkway (operated by the Port Authority) leading to the terminal the period of carriage was over and the Athens Convention no longer applied

# What About a Shoreside or Moveable gangway?

- Collins v Laurence[2017] EWCA 2268 (Civ) permission hearing in the Court of Appeal – Q is whether C is still using equipment that facilitates disembarkation

*'In a case such as the present, **the process of disembarkation covers the whole period of moving from the vessel to a safe position on the shore and whilst a person is still using equipment which facilitates disembarkation**, such as the steps and board in this case, he is still in the process of disembarking.*

*19. The case may be said to be analogous to one where disembarkation is by a gangway provided from the shore side. There too the gangway would be independent of the vessel and it could be said that the disembarking passenger was in a "place of safety" when he stepped onto a platform at the top of the gangway. In my judgment, the gangway would however be regarded as being a part of the disembarking equipment, being the means by which the passenger disembarks from the ship to a shore. In those circumstances, disembarkation would not be completed until he had stepped off the gangway so that the disembarking equipment was no longer being used' (Per LJ Hambleton at 18/19)*

- Dr Sucheta Mahapatra v TUI UK Limited [2018] EWHC 3140 – Registrar Kay says Hambleton LJ's comments above obiter. Whether structure is moveable gangway/fixed walkway is relevant

*'In my judgment there is a distinction between a moveable "gangway" and a walkway which is, in my view, part of the port installation. Whether an injury which occurs on the moveable gangway is to be considered as taking place in the course of carriage has not, so far as I am aware, been considered or decided and it is a moot point as to whether it would be considered as part of the port installation for the purposes of the proviso.'*

# Sorting Out/Response to Claims Wrongly pleaded

- Claims erroneously not pleaded under Athens Regime
- Brought after two years but within 3 years
- Options
  - D application for strike out/summary judgment
  - C needs to find a way of extending the two year limitation period and amending the claim accordingly



# Possible Bases to Extend Limitation Under Domestic Rules

- S. 33 of the Limitation Act 1980 cannot be relied upon to extend time
  - The application of s. 33 does not suspend or interrupt the limitation period
  - S. 33 serves to disapply a limitation period that has already expired
  - see Higham v Stena Sealink [1996] 1 WLR 1107
- S32 Limitation Act 1980 can be used: Warner v Scapa Flow Charters [2018] 1 WLR 4774 (2018)

*'Secondly, Hirst LJ observed (obiter) that there were other sections in the Limitation Act 1980, such as section 32, which postpones the limitation period in the case of fraud, concealment or mistake, which might at first sight be eligible to qualify under article 16(3) of the Convention. But he went on to express the tentative view that the fact that in each case the section postponed the periods of limitation "prescribed by this Act" or words to that effect might disqualify them (p 1111F-G). If in expressing that view he meant that the grounds of suspension in the lex fori were to apply under article 16(3) of the Convention only if they were framed to extend beyond the scope of the domestic limitation regime of the lex fori so as to cover limitation periods in conventions such as the Athens Convention, I must respectfully disagree. In my view, where article 16(3) speaks of the law of the court seized governing "the grounds of suspension ... of limitation periods" (in the plural) it was applying the grounds - such as minority or mental incapacity - which the lex fori would apply to domestic claims for personal injury, or death or loss or damage to property. Thus, the existence of a ground in a domestic limitation statute which suspended the limitation periods set out in that statute, such as section 32 of the Limitation Act 1980 (fraud, concealment or mistake) or in this appeal section 18 of the 1973 Act (legal disability by reason of non-age or unsoundness of mind) is sufficient to bring article 16(3) into operation and extend the article 16 time bar by one year.'* (Per Lord Hodge at 32/33)

# Concealment s32 Limitation Act 1980

- Potentially relevant to cases where applicability of Athens unclear

## *S32 Limitation Act 1980*

*Postponement of limitation period in case of fraud, concealment or mistake.*

*(1) Subject to [F1subsection (3)][F1subsections (3) [F2, (4A) and (4B)]] below, where in the case of any action for which a period of limitation is prescribed by this Act, either—*

*(a) the action is based upon the fraud of the defendant; or*

***(b) any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant;** or*

*(c) the action is for relief from the consequences of a mistake;*

***the period of limitation shall not begin to run until the plaintiff has discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have discovered it.***

*References in this subsection to the defendant include references to the defendant's agent and to any person through whom the defendant claims and his agent.*

- Defendants need to be accurate in pre-action correspondence

# Deliberate concealment of a relevant fact

- Deliberate concealment includes recklessness under s32 - Canada Square Operations Ltd v Potter [EWCA Civ 339] (para 87 and 137)

- Recklessness test of *R v G and anor* [2003] UKHL 50 is to be applied

*'a person acts recklessly with respect to a circumstance when he is aware of a risk that it exists or will exist and it is, in the circumstances known to him, unreasonable to take the risk. A person acts recklessly with respect to a result when he is aware of the risk that it will occur and it is, in the circumstances known to him, unreasonable to take that risk'*

## Rv G Recklessness test

1) Is D aware that there is a risk that C will consider that Athens will not be applicable due to a concealment or misrepresentation on its part

2) Was it unreasonable for D to take that risk

- Need for accuracy in pre-action communications between D and C so as not to mislead C into considering the claim would not fall under Athens Regime
- Note requirement for diligence of C even where a material concealment

# Amendments to Substitute an Athens Claim

- CPR 17.4

## ***Amendments to statements of case after the end of a relevant limitation period***

### **17.4**

*(1) This rule applies where –*

*(a) a party applies to amend his statement of case in one of the ways mentioned in this rule; and*

*(b) a period of limitation has expired under –*

*(i) the Limitation Act 1980<sup>1</sup>;*

*(ii) the Foreign Limitation Periods Act 1984<sup>2</sup>; or*

*(iii) **any other enactment which allows such an amendment, or under which such an amendment is allowed.***

*(2) The court may allow an amendment whose effect will be to add or substitute a new claim, **but only if the new claim arises out of the same facts or substantially the same facts as a claim in respect of which the party applying for permission has already claimed a remedy in the proceedings.***

- Not CPR 17.3 as CPR 17.4 applies and requirements of doctrine of *relation back* difficult to overcome



# Athens Allows Amendment as it Doesn't Not allow it

- Parsons v George and another [2004] 1 W.L.R. 3264 The Court of Appeal considered the meaning of almost identical provision under CPR 19.5(1)(c)

- CPR 19.5(1) (c) allowed change to parties in circumstances where

(c) *any other enactment which allows such a change, or under which such a change is allowed.*

- In Parsons, LJ Dyson made it clear that 19.5(1)(c) could be interpreted widely to include enactments that do not prohibit change of parties. So to by analogy 17.4b(iii) should encompass the limitation period under the Athens Convention that does not expressly prohibit amendments to a statement of case after the expiry of the relevant limitation period.

*In my judgment, it is possible to interpret rule 19.5(1)(c) as referring to any enactment which allows or which does not prohibit a change of parties after the end of a relevant limitation period. Plainly, something is allowed if it is expressly allowed. But there are many contexts in which it is a legitimate use of language to say that something is allowed merely because it is not prohibited. Thus, in a restaurant which does not prohibit smoking, it could properly be said (at least until recently) that smoking is allowed, even if there is no sign which says "smoking is allowed". People who visit restaurants expect to be allowed to smoke there unless smoking is prohibited, because smoking is an activity that is customarily carried on by those who visit restaurants. Smoking may be said to be an incident of restaurant life which is allowed unless it is prohibited. The same point can be made in relation to walking on lawns in public parks or gardens. On the other hand, it would be considered to be a strange use of the word "allow" to say that visitors to a restaurant are allowed to sing in the restaurant unless they are prohibited from doing so. Singing in restaurants is allowed only if it is expressly permitted. I suggest that the reason for this is that visitors to a restaurant do not need to be banned from singing in order to understand that they are not allowed to sing there. It cannot sensibly be said that singing is an incident of restaurant life which is allowed unless it is prohibited. These examples demonstrate that the context will determine whether it is a legitimate use of language to say that something is "allowed" simply because it is not prohibited. (Per Dyson LJ at35 )*

- That the reasoning in Parsons applies to the interpretation of CPR 17.4 was accepted before the Court of Appeal in Secretary of State for Communities and Local Government v Vicente and another [2013] EWCA Civ 817.
- Adams v Thompson Holidays [2009] EWHC 2559: CPR 17.4/19.5 engaged when considering Athens Convention claims



# New Athens Claim Arising Out of Substantially Same Facts?

- If applying to amend under 17.4 to substitute an Athens Claim the originating claim was probably pursued as a PTR claim
- Many Athens claims will arise out of substantially same facts
- NB Registrar Kay disagreed in Mahapatra
  - confined to its facts?
  - a belt and braces judgment
  - arguably wrongly decided on this issue
- Will also depend on what if any new facts are pleaded and whether those new facts are controversial.

# Case Study: McLaughlin v Carnival (Unreported)



- C has slipping accident in November 2017 while disembarking from a cruise
- Letter of Claim sent to cruise operator 6 weeks after accident asserts:
  - C using the Deck 4 disembarkation ramp when he slips on a slippery substance on the ramp's surface
  - Ramp was metal with downward slope
  - Accident caused by negligence and Statutory breach of the Convention
- C requests risk assessments and maintenance records of ramp

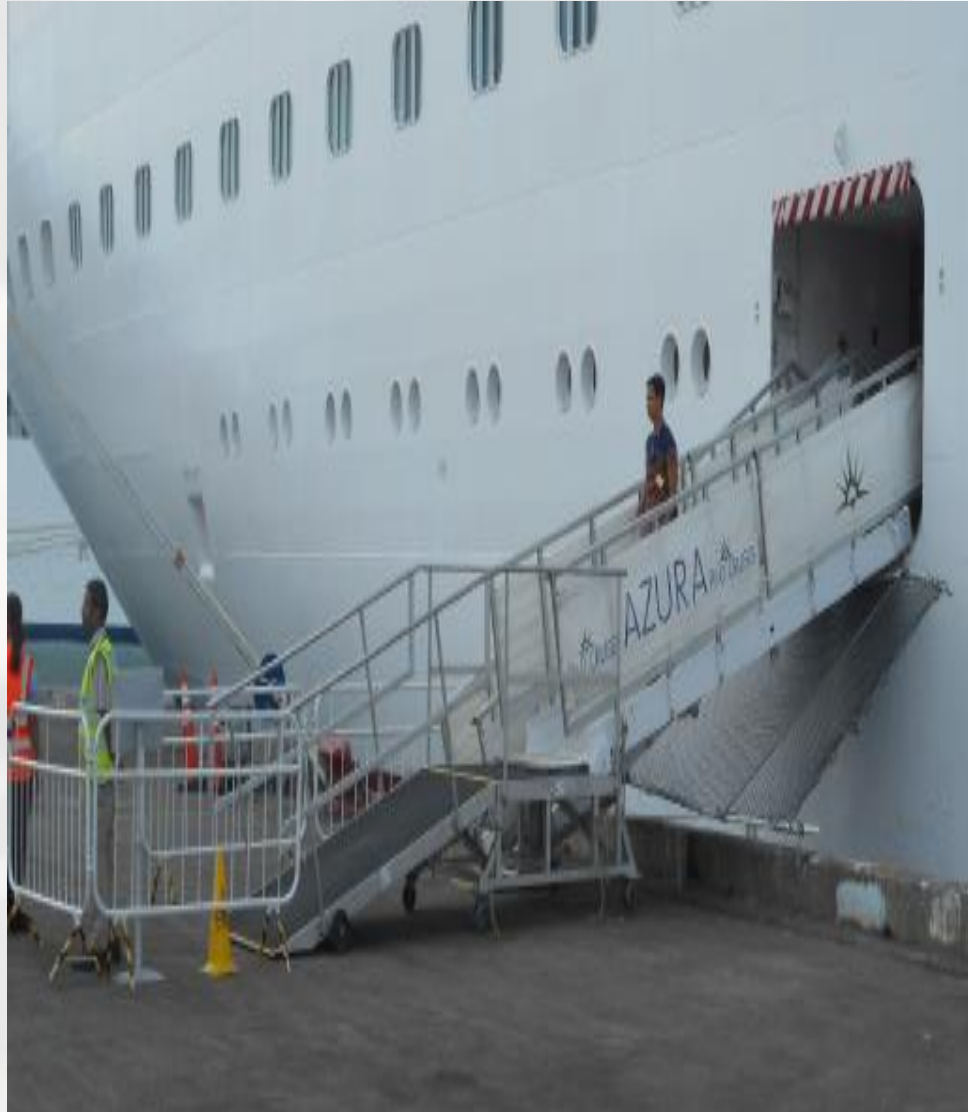
- D's denial of liability 4 months after accident
  - Did not dispute the accident occurred but did not accept allegations of fault *'your client was disembarking from the ship using the gangway when he slipped causing injury'*
  - Makes no mention of Athens
  - Accompanying Passenger Accident Investigation Form , stated to be contemporaneous record of accident circumstances recorded that the gangways used were shoreside gangways supplied by the Port of Castres.

*'We can confirm the gangway in question was operated and maintained by the port of St Lucia. Prior to opening the gangway for disembarkation, this is checked by a senior crew on board the ship to ensure that it is fit for purpose'*

- The gangway was used by all brands of the operator and by other operators who visit the port of St Lucia.

- C makes no further enquiries as to status of ramp but on the strength of D's denial concludes that the gangway C slipped on a port installation
- C brings claim Nov 2020 just within PTR 3 year limitation period
- D files a defence asserting the disembarkation ramp was owned by D, that the claim is an Athens claim and applies to strike out C's claim/Summary judgment as claim brought outside 2 year Athens Limitation period
- C applies to amend to bring an Athens claim under CPR 17.4 on ground that the claim is out of time but when issued was in time, relying on s32 limitation Act extending the Limitation Period to 3 years under Athens Convention





- District Judge James:
- Allows amendment to substitute Athens claim
  - The incorrect facts in the denial of liability were relevant to the question of whether the ramp was a port installation
  - C reasonably concluded that the gangway was a port installation from the denial of liability
  - D would have known, in view of photo it had in its possession from 2014 disclosed with D's application that there was a real risk that the contents of the accident investigation were wrong and D would have been aware of a real risk that the denial of liability was misleading
  - The new facts pleaded are pleaded out of substantially the same facts



# Admiralty Court Jurisdiction

- CPR r. 61.2(1): claims must be started in the Admiralty Court when they concern the loss of life or personal injury specified in s. 20(2)(f) of the Senior Courts Act 1982:
  - any claim for loss of life or personal injury sustained in consequence of any defect in a ship or in her apparel or equipment, or in consequence of the wrongful act, neglect or default of—
    - (i) the owners, charterers or persons in possession or control of a ship; or
    - (ii) the master or crew of a ship, or any other person for whose wrongful acts, neglects or defaults the owners, charterers or persons in possession or control of a ship are responsible, being an act, neglect or default in the navigation or management of the ship, in the loading, carriage or discharge of goods on, in or from the ship, or in the embarkation, carriage or disembarkation of persons on, in or from the ship
- In practice, likely to fall within scope of the Act particularly as the concept of ship management will be wide enough to embrace most operational scenarios.
- If the claim is wrongly issued in the County Court
  - S. 42 of the County Courts Act 1984 applies:

Where the county court is satisfied that any proceedings before it are required by any provision of a kind mentioned in subsection (7) to be in the High Court, it shall—

    - (a) order the transfer of the proceedings to the High Court; or
    - (b) if the court is satisfied that the person bringing the proceedings knew, or ought to have known, of that requirement, order that they be struck out.
  - Following Court of Appeal decision in Re Np Engineering v Pafundo [1998] BCLC 208, unusual for a claim to be struck out unless frivolous, vexatious or do not disclose a cause of action

