

SEA PASSENGER RIGHTS AND THE IMPLEMENTATION OF THE ATHENS CONVENTION IN THE EU*

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Abstract

This paper demonstrates that the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 1974, as amended by the Protocol of 2002,¹ can be successfully embedded into a broader passenger and/or consumer law framework. Key features of such implementation including relevant boundary issues are illustrated. The focus is placed firstly on the implementation of Athens 2002 by the European Union, and secondly on the manifestation of such EU implementation within a Member State, in this case the United Kingdom. The latter was, at least at the time of writing, a Member State of the EU.

Lessons learned and understanding gained from the case study of the EU's and its Member States' implementation may guide countries in their assessment of and approaches to a possible implementation of Athens 2002 in the interest of harmonising sea passenger rights.

1 Introduction

1.1 The International and EU matrix

The European legal system is entwined with international carriage conventions for all modes of transport. Road, rail, sea, inland waterways and air carriage conventions are in force and applied for carriage of goods² and as for rail, sea and air³ there is also a widespread convention system for the carriage of passengers; whereas for road⁴ it is less popular and the convention on passenger carriage by inland waterways⁵ never came into force.

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¹ Hereafter Athens 2002.

² See the *Convention on the Contract for the International Carriage of Goods by Road*, May 19, 1956, amended by *Protocol to the Convention for the International Carriage of Goods by Road*, 1978, (the CMR); the *Convention Concerning International Carriage by Rail*, May 9, 1980, amended by Protocol of 3 June 1999 [hereinafter COTIF] and its Appendix B, Uniform Rules Concerning the Contract for International Carriage of Goods by Rail [hereinafter CIM]; and to a lesser extent (mostly Asian and Eastern European countries, including China and Russia) the Agreement for International Goods Transit by Rail, Nov. 1 1951 [hereinafter SMGS]. For air carriage see *Convention for the Unification of Certain Rules for International Carriage by Air* (Montreal, 1999) and the earlier *Warsaw Convention*, the *Convention for the Unification of Certain Rules Relating to International Carriage by Air* (Warsaw, 1929) and its various protocols. With respect to sea carriage see the *International Convention for the Unification of Certain Rules Relating to Bills of Lading* 1924 (the Hague Rules), as amended by Protocol To Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading 1968 (Hague-Visby Rules) apply to large extent with a small minority of states (e.g. Austria and Romania) having ratified the *United Nations Convention on the Carriage of Goods by Sea*, Mar. 31, 1978 (Hamburg Rules).

³ See the Uniform Rules Concerning the Contract for International Carriage of Passengers by Rail, Appendix A of COTIF; the *Athens Convention relating to the Carriage of Passengers and their Luggage by Sea*, 1974, and the 1974 Convention as amended by the Protocol of 2002; and the Montreal and Warsaw Conventions (see above) which also apply to the carriage of passengers.

⁴ See the *Convention on the contract for the international carriage of passengers and luggage by road* (CVR) Geneva, 1973, while in force has only 9 state parties and its 1978 Protocol is not in force (see UN Treaty status information at <<https://treaties.un.org/pages/participationstatus.aspx>> Chapter XI, B Road Traffic, no 26 and 26a, accessed 20.06.18).

⁵ See the *Convention on the contract for the international carriage of passengers and luggage by inland waterway* (CVN) Geneva, 1976, not in force with only one party (see UN Treaty status information <<https://treaties.un.org/pages/participationstatus.aspx>> Chapter XI, D Water Transport, accessed 20.06.18).

Implementation of the 2002 Athens Convention is only one element of the EU's passenger rights initiative, celebrated as one of the resounding achievements of the EU transport policy,⁶ providing passengers with guaranteed rights across all forms of transport.⁷ It is part of the broader implementation of and alignment to international carriage regimes, which therefore harmonises carrier liabilities and compensation to passengers not only across the European Union but internationally per mode of transport. A further element is provided by EU Regulation across all EU Member States giving passengers rights of information, non-discrimination in case of disability or mobility impairment, assistance and compensation in case of cancellation or delay. And last, but not least, the resulting specialised system is given priority within the general consumer law matrix.

The advantages of a regime based on international carriage conventions are plentiful: firstly the fora in which the parties can claim are allocated usually by giving the claimant a choice between jurisdictions⁸ and, if at all, allowing jurisdiction clauses to only supplement this choice but not to exclude it. Secondly, by harmonising the rules of substantive law of carriage, the regime limits to large extent the advantages of forum shopping and increases legal certainty and foreseeability of the content of the rights and obligations of the parties.

While there are some teething problems regarding the interaction of the transport conventions with other EU and national law instruments in support of the traveller and/or consumer, overall, the carriage conventions as embedded in the laws of European Member States provide protection to both sides:

- To the passenger, who benefits from mandatory liability of the carrier, which, in some regimes, may even go further and also enshrine strict liability⁹ and compulsory insurance¹⁰ of the carrier; and
- To the carrier, who can call on a shortened time bar, compared to those available under general contract and tort law, and can calculate his maximum exposure as limited by the conventions and thus obtain appropriate insurance to the relevant levels.

1.2 Relevance of regulating carriage of passengers by sea

The area of carriage of passengers by sea has seen quite recent changes and developments. Cruise holidays are becoming ever more popular, and for 2018 27.2 million passengers were expected to embark on a cruise in 2018.¹¹ Some of the largest cruise ships now have capacity to carry well above 6,000 passengers and 2,000 crew.¹² Thus, the nature of cruise and other passenger ships means that compared to other vessels, the likelihood

⁶ See <https://ec.europa.eu/transport/facts-fundings/infographics/zero-to-ten_en> towards the end, at tab: "10 passenger rights however you travel", and see also <https://ec.europa.eu/transport/themes/passengers_en>, both accessed 23.07.2018.

⁷ See <https://europa.eu/youreurope/citizens/travel/passenger-rights/index_en.htm> accessed 23.07.2018. Entitlements cover information about a journey, reservation and ticket fare; and rights in the event of accidents, damage to baggage, delays and cancellations, denied boarding, or in case of difficulties with package holidays. Remedies include compensation, re-routing or ticket reimbursement, and assistance – including meals, and accommodation if necessary. Rights and remedies are adapted according to the mode of transport but in essence are comparable and are based on the three key principles of non-discrimination; accurate, timely and accessible information; and immediate and proportionate assistance.

⁸ Yet, typically also, by connecting it to the cornerstones of the contract and the place of business of the defendant. However, depending on how and where the passenger contract was made this may not necessarily coincide with the place of domicile of a passenger. Article 17.1 of Athens 2002, for example, offers the claimant a choice between "(a) the Court of the State of permanent residence or principal place of business of the defendant, or (b) the Court of the State of departure or that of the destination according to the contract of carriage, or (c) the Court of the State of the domicile or permanent residence of the claimant, if the defendant has a place of business and is subject to jurisdiction in that State, or (d) the Court of the State where the contract of carriage was made, if the defendant has a place of business and is subject to jurisdiction in that State." As can be seen, the place of domicile or permanent residence of the passenger is not enough on its own terms according to Athens 2002, may however be sufficient to found a claim based on a countries' consumer law. While a consumer according to EU Law on international jurisdiction is entitled to sue the other party at the place of his/her domicile, this is only for qualified consumer contracts (i.e. sale of goods on instalment credits; loan contracts repayable in instalments or other credit agreements to finance sales; and contract activities which were directed to the consumer's Member State (Br I bis Reg art 17.1) and transport contracts, other than package travel contracts, are excluded (Br I bis Reg art 17.2) in order to allow for the provisions of relevant international convention regimes. In this light, it needs to be appreciated that the substantive law is harmonised via Athens and protection of the passenger should thus also be available in all other contracting states to the convention.

⁹ See the Montreal Convention arts 17.1 and 21.1 for air carriage and for sea carriage see Athens Convention 2002 art 3.1.

¹⁰ See the Montreal Convention art 50 for air carriage and for sea carriage see Athens Convention 2002 art 4 bis; the latter also providing the claimant with the benefit of direct action against the insurer (art 4 bis (10)).

¹¹ See Press Release of the Cruise Lines International Association (CLIA) Europe (CLIA being the world's largest cruise industry trade association with representation in North and South America, Europe, Asia and Australasia) <https://www.cliaeurope.eu/images/SOTCI_Release_Final_EU_121517.pdf> (accessed 14.09.18): "Current data shows cruise travel is steadily on the rise with a projected 27.2 million passengers expected to set sail in 2018. In 2017, an estimated 25.8 million passengers cruised compared to a confirmed 24.7 million passengers in 2016, an increase of 20.5 percent over five years from 2011-2016. To meet ongoing demand, more ships are scheduled to set sail in 2018. CLIA Cruise Lines are scheduled to debut 27 new ocean, river and specialty ships this coming year."

¹² See e.g. the new 'Symphony of the Seas' <<https://www.royalcaribbeanpresscenter.com/fact-sheet/31/symphony-of-the-seas/>> or the 'Allure of the Seas' <<https://www.royalcaribbeanpresscenter.com/fact-sheet/20/allure-of-the-seas/>> (both accessed 14.09.18).

of high numbers of human casualties in any one incident is much increased.¹³ This fact combined with relatively recent ferry disasters have contributed to bringing the regulation of compensation for sea passenger claims once again to the forefront,¹⁴ and to motivating the modernisation of the 1974 Athens Convention relating to the Carriage of Passengers and their Luggage by Sea.

The topic of protection of sea passengers is of keen interest in the EU and can be seen in the trailblazing implementation of the modernised Athens regime in the EU as discussed below.¹⁵ The EU has a large coastline and passenger vessels operate on international and domestic routes, including a significant amount of cruise and ferry activity. Ferries provide vital links within and across Member States and operate in the English Channel, the Baltic, the North Sea and the Mediterranean. For example in 2013 and similarly in 2012, the total number of passengers in transit in EU ports was 400 million.¹⁶ Furthermore, the European cruise market was reported to be one of the largest cruise markets in the world, ranking only behind North America for market revenue,¹⁷ with around 6.96 million passengers engaged in cruises in Europe in 2017¹⁸ and an estimated 06.50 million embarking on their cruise from a European port.¹⁹ Moreover, a number of European Member States rank high on the list of ship ownership of the world fleet²⁰ and a significant amount of the world's leading flags of registration by tonnage are in the EU.²¹ Harmonisation of the laws in the EU therefore ought to have a noticeable impact.

1.3 Overview

This paper focuses on the regulation of passenger rights and carrier liabilities for carriage of passengers by sea within the EU and examine the implementation of the Athens Convention in the context of the broader EU passenger rights initiative. It therefore firstly examines the choices made by the European Union on implementation of the convention rules and their place in the relevant EU passenger and consumer protection framework and secondly applies this to the laws of an EU Member State on the example of the UK. It is on this level of Member State application that some of the issues are examined that arise on the boundaries of international, EU and national law.

¹³ According to the Insurance Information Institute, referring to information collected from Swiss RE in 2017, out of 33 events classed by Swiss RE as a marine catastrophe (due to the high losses incurred either in insured losses, total losses or in loss of life or injury, or in making people homeless) 27 events involved passenger ships and out of the 1,163 catastrophe victims 1,087 were incurred on passenger ships; furthermore the information reported shows figures for victims of passenger ship catastrophes over the period of 2008 – 2017 between 1,058 and 2,259; see <[https://www.iii.org/fact-statistic/facts-statistics-marine-accidents#Passenger%20Ship%20Losses.%202008-2017%20\(1\)](https://www.iii.org/fact-statistic/facts-statistics-marine-accidents#Passenger%20Ship%20Losses.%202008-2017%20(1))>, and in 2006 even having reached 3,719 victims; see <<https://www.iii.org/table-archive/22667>>, (both assessed 14.09.18). Furthermore passenger ships are involved in a significantly high number of marine casualties, compared to their percentage of the world merchant fleet (according to Statista, as of January 2017 out of 52,183 ships 4,428 were passenger ships (including ro-ro vessels) – see <<https://www.statista.com/statistics/264024/number-of-merchant-ships-worldwide-by-type/>> (assessed 14.09.218) and see the Annual Overview of Marine Casualties and Incidents 2016 by European Maritime Safety Agency (EMSA), available at <<http://www.standard-club.com/media/2519681/annual-overview-of-marine-casualties-incidents-2016.pdf>> (assessed 14.09.18), showing that in marine casualties and incidents during the period 2011–2015 according to main categories, cargo ships were in the lead (45%), followed by passenger ships (23%), followed by fishing vessels, service vessels and others (at p.17). See also M N Tsimplis, “Liability in respect of passenger claims and its limitation”, (2009) 15(2) JIML 125, n.1, showing figures for the period 1989–1994.

¹⁴ See for examples in the EU: the Express Samina (off the Greek island of Paros, 2000), the Sleipner (Norway, 1999), the Superfast 3 (Greece, 1999), the Estonia (between Estonia and Sweden, 1994), the Moby Prince (Italy, 1991) and The Herald of Free Enterprise (Belgium, 1987) disasters (see TRT Trasporti e Territorio: M Brambilla, A Martino, “Research for TRAN Committee - The EU Maritime Transport System: Focus on Ferries” (IP/B/TRAN/IC/2016-022 2016) at <[http://www.europarl.europa.eu/RegData/etudes/STUD/2016/573423/IPOL_STU\(2016\)573423_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/573423/IPOL_STU(2016)573423_EN.pdf)> accessed 01.08.18, at Annex II).

¹⁵ At 2.1 (a).

¹⁶ TRT Trasporti e Territorio Report (n 14) at 21 f.

¹⁷ Statistica Report <<https://www.statista.com/topics/4211/cruise-industry-in-europe/>> accessed 17.09.18.

¹⁸ See 2018 CLIA Report, “Contribution of Cruise Tourism to the Economies of Europe 2017”, <<https://es.cruiseexperts.org/media/2971/2017-europe-economic-impact-report.pdf>> p 1 (Foreward); and Statistica Report (n 17) (both accessed 17.09.18).

¹⁹ CLIA Report (n 18) p.2.

²⁰ See UNCTAD Review of Maritime Transport, 2017 p.228, table 2.36 at <http://unctad.org/en/PublicationsLibrary/rmt2017_en.pdf> accessed 01.08.18.

²¹ See UNCTAD Review of Maritime Transport, 2017 (n 20) at p 32, table 2.6. According to an IMO Document entitled “PASSENGER SHIP SAFETY - SAR plans for cooperation”, MSC 94/6/4 (12 September 2014) (see <<https://www.cruising.org/docs/default-source/imo/sar-plans-for-cooperation.pdf?sfvrsn=0>> at p.5 (accessed 14.09.18) the EU registries Malta, Netherlands and Italy were in the top 6 flag states for CLIA Members, however Italy with 8 registrations (in 6th position) ranked significantly behind the Bahamas with 84 (in 1st position); indeed overall the cruise ships were mostly flagged in the Bahamas, followed by Malta, Panama and Bermuda. Implementation of The Athens 2002 regime in the EU is likely to have motivated further moves to flags of convenience since. On the flag state as relevant to passenger ships and flag states see K Lewins, *International Carriage of Passengers by Sea* (n 21) at 1-009 ff.

2 The Implementation Framework at EU level

2.1 Athens 2002 Regime

This section examines the choices made in the adoption of the Athens regime in the EU and considers some of the consequences resulting therefrom. Incorporation has taken place on several levels, the Member States' ratification of the 1974 Convention and the 2002 Protocol, the ratification of the 2002 Athens Convention by the EU as Regional Economic Integration Organization,²² and by EU Regulation implementing the 2002 consolidated version of the Athens Convention. To provide the relevant context, a short summary of the content of the resulting Athens Regime is given.

2.1.1 International Law and EU Law Foundations

EU Accession to the Athens 2002 Convention

The Council of the European Union²³ approved the accession of the EU to the Protocol of 2002 of the Athens Convention and ordered the ratification or accession by the European Union and its Member States within reasonable time.²⁴ Both were actioned on the basis of making the reservation contained in the IMO Model Reservation and Guidelines for Implementation of the Athens Convention,²⁵ when depositing instruments of ratification or accession, in order to address issues within the Athens Convention concerning the compensation for terrorism-related damages.²⁶ The European Union deposited instruments of ratification on 15 December 2011²⁷ but it took invariably longer for the Member States to do so. The 2002 Athens Protocol thus only came into force on 23 April 2014.²⁸ Therefore, Athens 2002 applies since then as a matter of international law²⁹ in its contracting states, which include those EU Member States, who had already ratified the 2002 Protocol.³⁰ However a number of later accessions have since taken place and for these states the respective later dates of entry into force of Athens 2002 must be consulted.

EC Athens Regulation

Application

However, the European Union chose not to wait until the coming into force internationally of the Convention but took action to bind all Member States to an Athens 2002 Convention inspired regime with the same start date set by the EU. By virtue of EC Athens Regulation,³¹ the Athens Convention 2002³² therefore applied already from 31 December 2012 to international carriage within the European Union a matter of EU law.³³ The EC Athens Regulation is applicable insofar as there is international carriage as defined by the Athens

²² Although without counting as a contracting state, see n. 2 on ratification of the EU at IMO, STATUS OF IMO TREATIES, Comprehensive information on the status of multilateral Conventions and instruments in respect of which the International Maritime Organization or its Secretary-General performs depositary or other functions of 06 July 2018 <<http://www.imo.org/en/About/Conventions/StatusOfConventions/Documents/Status%20-%202018.pdf>> accessed 10.07.18.

²³ Council Decision of 12 December 2011 concerning the accession of the European Union to the Protocol of 2002 to the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 1974, with the exception of Articles 10 and 11 thereof (2012/22/EU), OJ L8, 12.01.12, 1.

²⁴ See arts 1, 3 and 4 of Council Decision 2012/22/EU (n 23).

²⁵ Adopted by the Legal Committee of the International Maritime Organisation on 19 October 2006.

²⁶ See Preamble, recital (6) to Council Decision 2012/22/EU. And see E Røsæg, "Passenger Liabilities and insurance: Terrorism and war risks, Ch. 12 in D R Thomas, *Liability Regimes in Contemporary Maritime Law* (Informa, 2007) on the background to and the development and content of the IMO Reservation and Guidelines.

²⁷ With the Secretary General of the International Maritime Organization (IMO) as depositary.

²⁸ As of 06 July 2018 the 2002 Protocol to the Athens Convention had 28 contracting states, representing 44.62% of World Tonnage (see <<http://www.imo.org/en/About/Conventions/StatusOfConventions/Documents/StatusOfTreaties.pdf>> accessed 10 July 2018).

²⁹ And according to the relevant rules of domestic implementation of international agreements.

³⁰ Note, according to art 17(5) of the 2002 Protocol this also required denunciation of the previous versions of the Athens Convention.

³¹ Regulation EC/392/2009 of the European Parliament and of the Council of April 23, 2009 on the liability of carriers of passengers by sea in the event of accidents (OJ L131, 28.5.2009, p.24) (hereafter EC Athens Reg) implementing and embedding the Athens 2002 Convention into the EU legal framework.

³² The Athens Convention of 1974 as amended by the 2002 Protocol and as appended with slight modification and omission of a few articles in Annex I to the EC Regulation (see below the commentary on the amendments to or omissions of arts 2.1, 17, 17bis and 19).

³³ By virtue of the Treaty on the Functioning of the European Union (TFEU), art 288, a regulation adopted by the EU Institutions has general application; it is binding in its entirety and directly applicable in all Member States without any further action by Member States. While Member States may provide additional domestic legislation in order to embed the EC or EU Regulation's provisions into their respective legal system, this is not necessary to give the EC/EU Regulation the force of law.

Convention 2002,³⁴ and there is a relevant Member State connection. The latter is fulfilled either where (a) the ship is flying the flag of or is registered in a Member State; (b) the contract of carriage has been made in a Member State; or (c) the place of departure or destination, according to the contract of carriage, is in a Member State.³⁵ Furthermore, the EC Athens Regulation also applies to certain carriage within a single EU Member State: at the latest since 31 December 2016 the provisions of Athens 2002 apply by virtue of the Athens Regulation also to all domestic carriage by Class A ships and as of 31 December 2018 to Class B ships.³⁶ Between end of 2012 and 2018 application to domestic carriage could be phased in,³⁷ an option of which 11 Member States took advantage.³⁸ While it is also possible to apply Athens 2002 to all domestic carriage irrespective of the ship's class,³⁹ hardly any Member States announced such an application.⁴⁰

Considerations on extension of EC Athens Regulation to domestic operations and insurance

EU maritime passengers are mainly carried by domestic or intra-EU ferry services and about 58% of maritime passengers are transported between ports within the same country.⁴¹ Effective regulation of an EU sea passenger regime ought to therefore also cover domestic services. Indeed the Preamble to the EC Athens Regulation in Recital (3) justifies the extension of the provisions of Athens to the domestic context suggesting that the distinction between national and international transport had been eliminated within the internal market in maritime transport services and that it was therefore appropriate to have the same level and nature of liability in both international and national transport within the Community. However the possible impact of the necessary insurance levels on fares and the difficulties in obtaining appropriate, yet affordable, insurance coverage were set against the policy background of strengthening passengers' rights, but also recognising the seasonal nature of some of the traffic. It was therefore declared that shipowners ought to be in a position to manage their insurance arrangement in an economically acceptable way. In particular in the case of small shipping companies operating national transport services any seasonal nature of their operations had to be borne in mind.⁴² Insurance arrangements should therefore also take into account the different classes of ships,⁴³ a consideration which is critical in the extension of the Regulation regime to domestic services.

Substantive provisions of Athens 2002 and the EC Athens Regulation

The substantive provisions of the Athens Conventions 1974 and 2002 are discussed in more detail in other works.⁴⁴ Here, for the purpose of the following discussion, a short summary of Athens 2002 suffices. The

³⁴ Athens 2002 art 1(9): "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".

³⁵ See EC Athens Reg art 2.

³⁶ The following classification of ships applies: according to art 2(e) of Directive 98/18/EC 'a passenger ship' means a ship which carries more than 12 passengers; and according to art 4 the Classes are defined as follows:

- a) 'Class A' means a passenger ship engaged on domestic voyages other than voyages covered by Classes B, C and D.
- b) 'Class B' means a passenger ship engaged on domestic voyages in the course of which it is at no time more than 20 miles from the line of coast, where shipwrecked persons can land, corresponding to the medium tide height.
- c) 'Class C' means a passenger ship engaged on domestic voyages in sea areas where the probability of exceeding 2,5 m significant wave height is smaller than 10 % over a one-year period for all-year-round operation, or over a specific restricted period of the year for operation exclusively in such period (e.g. summer period operation), in the course of which it is at no time more than 15 miles from a place of refuge, nor more than 5 miles from the line of coast, where shipwrecked persons can land, corresponding to the medium tide height.
- d) 'Class D' means a passenger ship engaged on domestic voyages in sea areas where the probability of exceeding 1,5 m significant wave height is smaller than 10 % over a one-year period for all-year-round operation, or over a specific restricted period of the year for operation exclusively in such period (e.g. summer period operation), in the course of which it is at no time more than 6 miles from a place of refuge, nor more than 3 miles from the line of coast, where shipwrecked persons can land, corresponding to the medium tide height.

³⁷ Member States could defer the implementation for up to 4–6 years; see EC Athens Reg arts 1(2),(3), 2 and 11. Class A ships were therefore (Note: Directive 98/18/EC as referred to in the Regulation has been replaced by Directive 2009/45/EC (as amended by Directive 2010/36/EU)).

³⁸ Namely Croatia, Cyprus, Estonia, Germany, Greece, Ireland, Italy, Latvia, Portugal, Spain, and the UK. See application of Regulation (EC) No 392/2009 to domestic carriage on board ships of classes A, B, C and D as of 31/12/2012 <<https://ec.europa.eu/transport/sites/transport/files/themes/passengers/maritime/doc/application-of-regulation-392-2009.pdf>> accessed 20.06.18.

³⁹ See EC Athens Regulation art 2, last sentence.

⁴⁰ Namely Denmark, although with some exceptions, The Netherlands and Sweden. See application of Regulation (EC) No 392/2009 to domestic carriage on board ships of classes A, B, C and D as of 31/12/2012 (n 38).

⁴¹ See TRT Trasporti e Territorio Report (n14) at 21 referring to Eurostat, 2015.

⁴² EC Athens Reg recital (10).

⁴³ EC Athens Reg recital (4 and 10).

⁴⁴ See K Lewins, *International Carriage of Passengers by Sea* (n 21); M Tsimplis, "Carriage of Passengers", Ch 6 in Y Baatz et al, *Maritime Law* (4th ed, Informa Law from Routledge, 2018) and B Soyer, G Leloudas, "Carriage of Passengers by Sea: A Critical Analysis of the International Regime", 26(3) (2018) Michigan State International Law Review 483. See also N A Martínez Gutiérrez, "New European rules

regime is mandatory⁴⁵ and provides for the carrier's liability in case of death of or injury to a passenger, and for loss of or damage to luggage.⁴⁶ A strict liability regime applies for loss or damage resulting from death or personal injury caused by shipping incidents (shipwreck, capsizing, collision or stranding of the ship, explosion or fire in the ship, or defect in the ship)⁴⁷ up to a limit of 250,000 SDR, with the possibility of a further fault-based liability up to 400,000 SDR⁴⁸ which can be avoided if the carrier proves that the loss was caused without his fault or neglect or that of his servants acting within the scope of their employment.⁴⁹ For loss suffered as a result of death or personal injury caused by incidents other than shipping incidents, the carrier is only liable for fault or neglect, which has to be proven by the claimant.⁵⁰ Insurance is compulsory⁵¹ to cover liability in respect of death of or personal injury to passengers for no less than SDR 250,000 per passenger per each distinct occasion and up to this level claimants have a right of direct action against the insurer.⁵²

Insofar as cabin luggage is lost or damaged, the carrier's liability is fault-based, but, in case of shipping incidents, presumed.⁵³ For loss or damage to luggage other than cabin luggage it is upon the carrier to disprove his fault.⁵⁴ Liability is capped for all heads of damage,⁵⁵ although contracting states can, by means of national law, provide for higher limits or no limits at all for claims resulting from death or personal injury of passengers.⁵⁶ However, the carrier cannot benefit from limitation where there was intent to damage, or reckless behaviour.⁵⁷ There are detailed provisions relating to performing carriers, valuables, contributory fault, time-limits in respect of giving notice to the carrier of damaged or lost luggage, a two-year time-bar for reparation actions, rules on jurisdiction, and nuclear damage.⁵⁸

The Convention's rules on jurisdiction⁵⁹ as well as on recognition and enforcement are not included in the application as a matter of EU law via the EC Athens Regulation, since, within the EU, these questions are determined by separate EC Regulation.⁶⁰ Where the Athens 2002 Convention however applies by virtue of international law, the Athens jurisdiction rules apply, whereas with respect to recognition and enforcement of judgments the Athens 2002 Convention makes provision enabling states to use other rules.⁶¹ Thus for judgments of and amongst EU Member States or Lugano Convention⁶² Contracting States,⁶³ the rules of the Brussels I bis Regulation⁶⁴ or Lugano Convention will apply instead of the Athens 2002 Convention provisions.

on the liability of carriers of passengers by sea in the event of accidents" 18(4) (2012) JIML 293; F Berlingieri, *International Maritime Conventions Volume I: the Carriage of Goods and Passengers by Sea* (Informa Law from Routledge, 2014), Ch 4 "Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 1974, as amended by the Protocol of 2002"; P Griggs, R Williams, J Farr, *Limitation of Liability for Maritime Claims*, (4th ed, LLP, 2005), ch 4 "Limitation: Passenger Claims" and ch 5 "Athens Protocol 2002".

⁴⁵ And attempts to contract out of the regime or even to shift the burden of proof are null and void; see Athens 2002 art 18.

⁴⁶ Excluding live animals; see Athens 2002 art 1(5b).

⁴⁷ See Athens Convention 2002 art 3(5); liability for other incidents including so-called "hotel risks" remains negligence based (art 3(2-4)).

⁴⁸ See Athens 2002 art 7; note that it is possible for a State Party to impose higher limits or unlimited liability by national law (art 7(2)).

⁴⁹ Athens 2002 art 3(1) and (5)(b), although the carrier can escape liability if he can prove that the incident resulted from: (a) an act of war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional, inevitable and irresistible character; or (b) was wholly caused by an act or omission done by a third party with the intent to cause the incident.

⁵⁰ Athens 2002 art 3(2).

⁵¹ And appropriate certification is required (see Athens 2002 art 4bis (2-9)).

⁵² Athens 2002 art 4bis (1) and (10).

⁵³ Athens 2002 art 3(3).

⁵⁴ Athens 2002 art 3(4).

⁵⁵ For Athens 2002, see arts 3(1), 7, 8, 9, 10, 12, 13 and note the revision clause in art 23, setting out an adjustment procedure for the limits of limitation in Athens 2002. Note that passenger claims are also subject to global limitation as per the Convention of Limitation of Liability for Maritime Claims 1976 (as amended by the 1996 Protocol).

⁵⁶ Athens 2002 art 7(2).

⁵⁷ Athens 2002 art 13.

⁵⁸ Athens 2002 arts 4, 5-6, 15-17 and 20.

⁵⁹ Athens 2002 arts 17 and 17 bis.

⁶⁰ See EU Regulation 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (OJ L351, 20.12.2012, p.1), known as the Brussels I bis Regulation, replacing as of 10 January 2015 Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. EC Regulation 44/2001 itself was based on and superseded the 1968 Brussels Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, which operated between EU Member States.

⁶¹ See Athens 2002 art 17bis (3) and the Declaration thereunder made by the EU on ratification. And see art 19 of the 2002 Protocol to the Athens Convention, making provision for Regional Economic Integration Organizations and P Griggs, R. Williams, J Farr (n 44) ch 5 "Athens Protocol 2002" at 127f.

⁶² *Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters* of 30 October 2007 (OJ L339, 21.12.2007, p. 3) in force since 1 January 2010 and the earlier and superseded version of the Lugano Convention of 16 September 1988 (88/592/EEC) (OJ L319, 25.11.1988, p. 9).

⁶³ The Member States of the European Union including Denmark, as well as Iceland, Norway and Switzerland (see the status information as published by the Swiss Federal Council as depositary <https://www.eda.admin.ch/dam/eda/fr/documents/aussenpolitik/voelkerrecht/autres-conventions/Lugano2/Lugano-2-parties_fr.pdf> accessed 10 July 2018).

⁶⁴ See n 60 above.

The EC Athens Regulation, over and above the Athens Convention requires the actual carrier, in case of a shipping incident having caused death of or personal injury to a passenger, to make advance payment within 15 days of the identification of the person entitled to damages. The payment must be sufficient to cover immediate economic needs on a basis proportionate to the damage suffered.⁶⁵ It is clarified that any such advance payment is not an acceptance of liability and can be off-set against subsequent payments to be made under the Regulation.⁶⁶ A similar right to advance payment in the EU is provided for air passenger claims under EU Regulation embedding the Montreal Convention.⁶⁷ The Montreal Convention itself, similarly to the Athens Convention, does not provide for such interim remedy, but explicitly allows for national law to do so.⁶⁸ Furthermore, under the EC Athens Regulation's rules, the carrier must ensure that passengers are provided with appropriate and comprehensible information on their rights.⁶⁹ The EC Regulation also stipulates that loss or damage to mobility equipment and other special equipment must be compensated by the carrier under the convention rules as cabin luggage, but insofar no monetary limitation can be invoked. Compensation must cover the full replacement value or, where applicable, the repair costs.⁷⁰

Interaction of Athens 2002 monetary limitation and global limitation

Global limitation in the EC Athens Regulation regime

While the Athens 2002 Convention clarifies that it does not impact on the availability of any applicable global limitation regime,⁷¹ the EC Athens Regulation⁷² only condones national law implementing global limitation in form of the Convention on Limitation of Liability for Maritime Claims (LLMC) 1976 as amended by the Protocol of 1996,⁷³ including any further amendments thereof.⁷⁴ In the absence of availability of the provisions of the LLMC 1996, only the EC Athens Regulation/Athens Convention Rules are applicable.⁷⁵ It is possible that this will result in a conflict between earlier versions of Limitation Conventions and article 5.1 of the EC Athens Regulation. If so, the conflict between supremacy of EU law⁷⁶ and a Member State's obligations under international law⁷⁷ will once again arise.⁷⁸ The issue has been largely addressed by opening conventions to

⁶⁵ EC Athens Reg art 6. In the event of the death the advance payment must not be less than EUR 21,000. The provisions in art 6.1 also apply to any carrier established within the Community.

⁶⁶ EC Athens Reg art 6.2.

⁶⁷ See art 5 of Regulation (EC) No 2027/97 on air carrier liability in respect of the carriage of passengers and their baggage by air (as amended by Regulation (EC) No 889/2002 of 13 May 2002).

⁶⁸ See Montreal Convention art 28.

⁶⁹ EC Athens Reg art 7. And see also the air carriage equivalent in Regulation (EC) No 2027/97 (n 67) art 6.

⁷⁰ EC Athens Reg art 4. See also B. Czerwenka, „Neue Haftungs- und Entschädigungsregelungen in der Personenschifffahrt; Harmonisierung durch Europarecht“ TranspR 2010, 165, 169. A provision for air carriage on the compensation of mobility equipment according to rules of international, Community or national law can be found in art 12 of the EC Regulation 1107/2006 concerning rights of disabled persons and persons with reduced mobility when travelling by air.

⁷¹ Athens 2002 art 19. A global limitation regime is distinct from any applicable substantive rules of liability sounding in damages (such as those under the Athens Convention). It sets a maximum exposure of “the ship-owner” (interpreted broadly) for all his liabilities arising out of the same casualty and allows these liabilities (as established under the substantive liability regimes) to be serviced pro rata, where their total would exceed the global limitation amount. For a short overview see e.g. M Tsimplis, “Liabilities of the Vessel” (n.44) at 9. Limitation of Liability. For arguments on the appropriateness, past and present, of limitation of liability see Justice A MacKenzie, “Limitation of Liability as a Risk Allocation Mechanism in Maritime Law”, (2015) 29 ANZ Mar LJ 1 ff. and articles by Lord Mustill “Ships are Different - Or Are They?” [1993] LMCLQ 490 and in response D Steel “Ships are Different: the Case for Limitation of Liability” [1995] LMCLQ 77. For a discussion of jurisdiction and applicable law rules applied to Global Limitation versus limitation under (substantive) liability regimes see M N Tsimplis, “Law and jurisdiction for English limitation of liability proceedings”, (2010) 16 (4) JIML 289 ff.

⁷² EC Athens Reg art 5 and see also recital (18).

⁷³ National law that does not fulfil the levels of the LLMC 1996 as amended will be in breach of EU law and overridden by the EC Athens Regulation rules. Apart from Austria, Czech Republic, Italy, Slovakia (which do not partake in any of the LLMC 1976/1996 conventions) all other Member States have ratified the 1996 LLMC Protocol; however not all have denounced the 1976 Convention (see information of the depository 06 July 2018 <<http://www.imo.org/en/About/Conventions/StatusOfConventions/Documents/Status%20-%202018.pdf>> accessed 24.07.2018) or the earlier International Convention for the Unification of Certain Rules Relating to the Limitation of the Liability of Owners of Sea-going Vessels of 1957 and 1924 (both done at Brussels). The 1957 Convention (including its 1979 Protocol) still has a number of contracting states, including Portugal and Poland (see depository information by the Belgian Government <<https://diplomatie.belgium.be/sites/default/files/downloads/i10a.pdf>> and <<https://diplomatie.belgium.be/sites/default/files/downloads/i10b.pdf>> accessed 25.07.2018). And for a short overview and history of the limitation conventions 1924 – 1976 see R.P. Grime, “Implementation of the 1976 limitation convention”, 12(3) (1988) Marine Policy, 306 – 313 and Justice A MacKenzie (n 71) 1 ff.

⁷⁴ By virtue of LLMC 1996 art 21 providing a procedure for revision of the limitation amount and of the unit of account. Art 8 of the LLMC 1996 determines the unit of account to be special drawing rights as defined by the International Monetary Fund.

⁷⁵ EC Athens Reg art 5.1 sentence 2. See also B. Czerwenka, „Neue Haftungs- und Entschädigungsregelungen in der Personenschifffahrt; Harmonisierung durch Europarecht“ 5 (2010) TranspR 165, 169.

⁷⁶ See *Case 6/64 Costa v ENEL* [1964] ECR 585; [1964] C.M.L.R. 425, a key case of the then European Court of Justice (now Court of Justice of the European Union) in the development of this principle; and see Declaration No.17 “Declaration concerning primacy” included in “A. Declarations concerning provisions of the Treaties” annexed to The Lisbon Treaty (2007/C 306/01) (OJ C306, 17.12.2007, p.1, at 249 ff.).

⁷⁷ See arts 26 and 27 Vienna Convention on the Law of Treaties, 1969.

accession or ratification by Regional Economic Integration Organizations such as the EU. Once the EU has ratified a convention it is bound by it and this obligation is then also part of the EU legal order, so that there no longer is a conflict. In C-344/04 *IATA and ELFAA*⁷⁹ the European Court of Justice stated:

“Article 300(7) EC provides that 'agreements concluded under the conditions set out in this Article shall be binding on the institutions of the Community and on Member States'. In accordance with the Court's case-law, those agreements prevail over provisions of secondary Community legislation (Case C-61/94 *Commission v Germany* [1996] ECR I-3989, paragraph 52; and Case C-286/02 *Bellio F.lli* [2004] ECR I-3465, paragraph 33).”⁸⁰

This was confirmed in the transport convention context on the example of the Montreal Convention which had been ratified by the European Union;⁸¹ however such solution is, at this stage, not in place for any of the limitation conventions.

Impact of IMO Model Reservation

Concerning global limitation, the EC Athens Regulation itself is making the IMO Model Reservations and Guidelines binding and applicable, so that the limits for the risks set out in paragraph 2.2 of the IMO Guidelines⁸² are set accordingly and made available to the carrier and performing carrier directly by virtue of the EC Regulation, irrespective of the availability of the provisions of Limitation Conventions.⁸³ Thus under the EC Regulation, the carrier can, in any event, for war and terrorism related exposure, invoke as a global limit the lower of either 250,000 units of account per passenger or 340 million⁸⁴ units of account overall per ship on each distinct occasion.⁸⁵

Opt-out or increase of limits

The EC Athens Regulation has also incorporated article 7.2 of the Athens Convention allowing State Parties to provide for higher limitation or no limitation at all for death of or personal injury to a passenger under Athens 2002.⁸⁶ If the Athens limitation levels were opted out of altogether,⁸⁷ this would then leave the carrier only with recourse to any, if at all, available global limitation. However, conversely, the most recent Global Limitation Convention, the LLMC 1996, also allows special stipulation to be made for claims for loss of life or personal injury to passengers of a ship⁸⁸ with the only proviso that the limitation must not be lower than provided for by the LLMC.⁸⁹ Thus, in principle, both conventions allow national law to provide higher limits or even unlimited liability for passenger claims for loss of life or personal injury. Whether the latter was however insurable,⁹⁰ is

⁷⁸ As to the dilemma caused by the conflict see for example the UK case law on the conflict of the Athens Convention and the EU Package Directive and implementing legislation in the cases of *Lee v Airtours Holidays Ltd*, County Court (Central London) [2004] 1 Lloyd's Rep. 683 and *Norfolk v My Travel Group Plc*, County Court (Plymouth) [2004] 1 Lloyd's Rep. 106, reaching opposing conclusions on the topic. See below at 3.1 (e) and for a detailed discussion see B. Soyer, “Liability of tour operators: cruising in muddy waters” (2007) 13(3) JIML 194 ff.

⁷⁹ EU:C:2006:10; [2006] E.C.R. I-403; [2006] 2 C.M.L.R. 20, at [35].

⁸⁰ Note, EC standing for the then Treaty establishing the European Communities; art 300 EC is now enshrined in art 218 TFEU (Treaty on the Functioning of the European Union).

⁸¹ See decision of the European Court of Justice in Case C-173/07 *Emirates Airlines Direktion für Deutschland v Schenkel* [2008] E.C.R. I-5237; [2009] 1 Lloyd's Rep. 1 at [43].

⁸² See para 1.2 of the IMO Model Reservation.

⁸³ EC Athens Reg art 5.2.

⁸⁴ An amount which has been said to be somewhat arbitrary (see E. Røsæg, “Passenger Liabilities and insurance: Terrorism and war risks, Ch. 12 in D R Thomas, *Liability Regimes in Contemporary Maritime Law* (Informa, 2007) at 12.80); and similarly, the selection of any figure for a per passenger limit (insofar see See N. Gaskell, Submission to the Department of Infrastructure and Regional Development, RE: Carriage of Passengers and their Luggage by Sea: the Athens Convention 2002, of 22 December 2017, at 5).

⁸⁵ IMO Model Reservation 1.2. Art 9 of Athens 2002 determines the unit of account to be special drawing rights (SDR) as defined by the International Monetary Fund. According to these figures of the IMO Model Reservation, the overall limit of 340 million units of would come into play where more than 1,360 passengers were affected by an incident on any one ship and with more than 1942 passengers per ship, the limit distributed via the IMO Model Reservation would fall below SDR 175,000 – the multiplier under the LLMC 1996 (thus further limiting the LLMC global liability, where applicable, in case all passengers (up to the certified maximum carrying capacity) were affected).

⁸⁶ See F L Wiswall, “2002 Protocol to the Athens Convention: an internationalist's Commentary”, [2003] *Benedict's Maritime Bulletin* 17 – 19 on the development of the provision allowing national law to set higher limits for death and personal injury in order to entice states (in particularly also the United States and Canada) to ratify the 2002 Protocol, which were preciously reluctant to partake in the convention regime arguing the limits were too low.

⁸⁷ However irrespective of such opt-out, direct action against the insurer would only be available to the limit as prescribed in Athens.

⁸⁸ LLMC 1996 art 15.3 bis. However where a State Party makes use of this option must inform the Secretary-General of the limits of liability adopted or of the fact that there are no limits.

⁸⁹ LLMC 1996 art 7.1.

⁹⁰ Including reinsurable.

another question. If at all, rather than legislating out of all limitation it might be more appropriate to choose one or the other convention for a single provision on limitation, possibly coupled with an increase of the maximum liability.

Different arguments can be raised for one or the other convention to provide the backdrop for such solution. In favour of only applying Athens limits one could put forward the quest for equal treatment of passengers, particularly under EU law, where passenger rights apply across all transport modes. While their respective limits differ significantly, whether the mode of transport is by rail, road (including bus and coach), sea and inland waterways, or air,⁹¹ all conventions covering liability towards passengers know and apply per capita limits.⁹² However only the sea and inland waterways regimes recognise and provide additional global limits. Furthermore, the inland waterway regime is quite limited to only a very small number of contracting states.⁹³ One may therefore argue that global limitation is the exception, suggesting an opt-out of the global limits would be appropriate. This is a solution that, within the EU, was taken by the UK and also Malta.⁹⁴

On the other hand, one may feel inclined to provide the solution most likely to be best for the individual passenger. This, arguably, is exemplified in the Montreal Convention for carriage by air, which applies a prescribed level of strict liability (insofar having provided inspiration for Athens 2002), but leaves fault based liability unlimited. This may point to a solution in favour of uncapped liability per person, although – for reasons of insurability etc. - with a global limitation overall. Indeed, where only a few passengers were affected by an incident to only apply a global limit under the 1996 LLMC⁹⁵ ought to work out best from a passenger perspective. This is because the limit is calculated by a sum (at present 175,000 SDR) coupled with a multiplier according to the ship's passenger carrying capacity,⁹⁶ making the resulting amount available in full for distribution⁹⁷ amongst all claimants.⁹⁸ Yet, in case of a major incident involving most, if not all, passengers, the much improved limits under Athens 2002, would provide a better solution to the individual claimant.⁹⁹ However, compensation also in the case of Athens 2002 would be for a lower amount than initially provided within the convention's provisions, if the loss of life or personal injury was caused by a war risk or terrorism-related risk. If wholly caused by terrorism, the carrier could exclude his liability but, if there was some

⁹¹ Although the air conventions have undergone significant change over time. Initially under (a) the Warsaw system a strict per capita limit was applied, whereas (b) under the Montreal Convention this position has changed and a per capita limit is only applied to establish the maximum level of strict liability, beyond this threshold, fault based liability, however, is unlimited.

⁹² These are

- (1) for rail via COTIF/CIV art 30.2: 175.000 SDR;
- (2) for international carriage by road via the CVR 1973 arts 13.1 and 19: 250,000 gold francs, which if the 1978 Protocol came into force would instead be 83,333 SDR;
- (3) for bus or coach transport via EU Regulation No 181/2011 of the European Parliament and of the Council of 16 February 2011 concerning the rights of passengers in bus and coach transport (OJ L55, 28.2.2011, p.1) art 7.2: to be determined according to national law, but the maximum **not to be less than 220,000 EURO**;
- (4) for inland waterway, if the CVN 1976 convention came into force arts 7 and 14: 200,000 gold francs, which under the Protocol of 1978 would be amended to 66,667 SDR; and, last but not least,
- (5) for air (a) via the Warsaw system art 22.1: a per capita limit at the level of 8,300 SDR under the Warsaw-Montreal Protocol No.1 and 16,600 SDR under the Warsaw- Hague-Montreal Protocol No.2 regime and (b) via the Montreal Convention 1999 art 21: 113,000 SDR (but see n 91 – the limits apply only to establish the maximum level of strict liability and are uncapped where fault of the carrier can be proven).

For a comparative overview over the regimes see also E. Røsæg, "New laws on passenger rights", SIMPLY 2010, Scandinavian Institute of Maritime Law Yearbook, (Sjørettsfondet, 2011), 324, 327f.

⁹³ Regarding inland waterways see the Strasbourg Convention of 2012 on the Limitation of Liability in Inland Navigation which will come into force on 1 July 2019 (see depository information by the Central Commission for the Navigation of the Rhine (CCNR) <<https://www.ccr-zkr.org/12050400-en.html#03>>; and the former 1988 version of the Strasbourg Convention, in force since 1 June 1997 has been denounced with effect of 1 July 2019 by Germany, Luxemburg and the Netherlands; see <<https://www.ccr-zkr.org/12050400-en.html#01>>, both accessed 23.07.18.

⁹⁴ See IMO Depository information (n 22) and on the UK position see 2.2. (a) below.

⁹⁵ Including any amendments thereto (by virtue of the limitation amendments procedure set out in art 21). The increases of limits as of 8 June 2015 however only concern the general limits other than for death or personal injury to a passenger (see IMO LEG 99/14, 19 April 2012). See also N. Gaskell, "Appendix 4, Limitation of Liability and Division of Loss in Operation" in S Gault, S Hazelwood (gen eds), A Tettenborn, S D Girvin, E Cole, T Macey-Dare, M O'Brien (eds), *Marsden and Gault on Collisions at Sea* (14th ed, Sweet and Maxwell, 2016).

⁹⁶ See LLMC 1996 art 7.1 The limit for passenger claims: "1. In respect of claims arising on any distinct occasion for loss of life or personal injury to passengers of a ship, the limit of liability of the shipowner thereof shall be an amount of 175,000 Units of Accounts multiplied by the number of passengers which the ship is authorized to carry according to the ship's certificate."

⁹⁷ But only to the level of the damages in fact incurred.

⁹⁸ See N.Gaskell, Submission to the Department of Infrastructure and Regional Development, (n 84), at 2-6 and see also N. Gaskell, "New limits for passengers and others in the United Kingdom", [1998] LMCLQ 312, 328 f. on a similar argument on the changes in UK law on the application of the LLMC limits to sea-going and non-seagoing ships by virtue of the Merchant Shipping (Convention on Limitation of Liability for Maritime Claims) (Amendment) Order 1998 (SI 1998/1258).

⁹⁹ Providing a minimum of 250,000 per passenger and possible higher liability of up to 400,000 SDR in case of fault of the carrier; compared to the 175,000 SDR under the LLMC 1996 if all passengers were affected and the full passenger carrying capacity was exhausted.

contributory fault of the carrier he would remain liable,¹⁰⁰ and the IMO Model Reservation would come into play for any country that has ratified Athens 2002 on this basis, as in case of the EU and its Member States.

Overall determination of the favoured approach requires decisions on broad questions of policy and numerous variations are possible, as limits of each of the conventions could be increased instead of abolished altogether.¹⁰¹ Examples by EU Member States are Finland and Sweden, who have by national law provided for a higher limit under the LLMC 1996 of SDR 250,000 per ship's passenger as multiplier.¹⁰² It appears that this therefore aligns the ship owner's maximum liability, in case of a major casualty affecting all passengers, with the levels of strict liability, compulsory insurance and direct action against the insurer available under Athens 2002, and therefore is using the Athens 2002 prescribed levels of compulsory insurance to full capacity.

2.1.2 Potential for Preliminary Rulings by the Court of Justice of the European Union

Since the coming into force in December 2012 of the EC Athens Regulation for all Member States, which incorporated the Athens Convention in the version of the 2002 Protocol into EU law, the provisions of the Athens Convention (insofar as adopted), had become part of the European legal order,¹⁰³ even before the 2002 Athens Convention had come into force for its Contracting Parties as a matter of international law. The Court of Justice of the European Union, since then, has jurisdiction to give preliminary rulings¹⁰⁴ on the interpretation of these provisions of the Athens Convention and the IMO Model Reservation and Guidelines, due to their being part of the *acquis communautaires*. While its rulings are only binding on European Union Member States, the fact that the law is interpreted and applied in a unified manner in all of 28 states,¹⁰⁵ is likely to be persuasive. Since the aim of international conventions is the harmonisation of the law, the view of a majority of countries¹⁰⁶ should be a very strong consideration for a court identifying the meaning of a provision. Whether it will matter that the Court of Justice of the European Union is not a court with maritime or transport law specialism will remain to be seen.¹⁰⁷ There is however a potential for an increase in uniformity in interpretation, at least throughout EU Member States.¹⁰⁸

2.2 Broader EU Matrix

Within the EU context, ratification and implementation of the Athens Convention is only one part of a wider regime that is aimed at securing passengers' rights in sea carriage (and beyond). The following will give a short introduction of the broader framework in which the Athens regime applies.

¹⁰⁰ According to Athens 2002 art 3.1 (a) or (b).

¹⁰¹ See N.Gaskell, Submission to the Department of Infrastructure and Regional Development (n 84), at 2-6 for discussion of possible options to be considered by Australia for possible implementation.

¹⁰² See IMO Depository information (n 22); accordingly Denmark also has notified national law will provide higher limits, but no further detail was provided.

¹⁰³ In the context of air law where the Montreal Convention was implemented via EU Regulation and the EU ratified the Convention see the argument by the European Court of Justice in case C-344/04 *IATA and ELFAA*, EU:C:2006:10; [2006] E.C.R. I-403; [2006] 2 C.M.L.R. 20 [36, 40]:

“36 The Montreal Convention, signed by the Community on December 9, 1999 on the basis of Art.300(2) EC, was approved by Council Decision of April 5, 2001 and entered into force, so far as concerns the Community, on June 28, 2004. Therefore, from that last date the provisions of that Convention have, in accordance with settled case law, been an integral part of the Community legal order (*Haegeman* (181/73): [1974] E.C.R. 449; [1975] 1 C.M.L.R. 515 at [5]; and *Demirel* (12/86): [1987] E.C.R. 3719; [1989] 1 C.M.L.R. 421 at [7]). It was after that date that, by decision of July 14, 2004, the High Court of Justice made the present order for reference in the judicial review proceedings before it.” And on the principles according to which international conventions were to be interpreted:

“40 It is to be noted with regard to the interpretation of those articles that, in accordance with settled case law, an international treaty must be interpreted by reference to the terms in which it is worded and in the light of its objectives. Article 31 of the Vienna Convention of May 23, 1969 on the Law of Treaties and Art.31 of the Vienna Convention of March 21, 1986 on the Law of Treaties between States and International Organisations or between International Organisations, which express, to this effect, general customary international law, state that a treaty is to be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose (see, to this effect, *Jany* (C-268/99): [2001] E.C.R. I-8615; [2003] 2 C.M.L.R. 1 at [35]).”

And see the judgments of the European Court of Justice in Case C-63/09 *Walz v Clickair SA*, EU:C:2010:251; [2011] 1 All E.R. (Comm) 1037; [2011] Bus. L.R. 855; [20, 23] and Case C-429/14 *Air Baltic Corporation AS v Lietuvos Respublikos specialiujų tyrimų tarnyba*, EU:C:2016:88; [2016] Bus. L.R. 623; [2016] 1 Lloyd's Rep. 407; [2016] 3 C.M.L.R. 1 [22-24].

¹⁰⁴ See art 19 (3) Treaty on European Union (TEU) and art 267 Treaty on the Functioning of the European Union (TFEU) on the jurisdiction of the Court of Justice of the EU to give preliminary rulings.

¹⁰⁵ And after Brexit only 27 by binding force of EU law.

¹⁰⁶ Assuming that all Member States will also eventually ratify the 2002 Athens Convention itself, as ordered by the Council of the European Union (see n 23). Otherwise, the argument might still be valid, yet have less force if only some of the EU member states are bound by the convention itself. However currently 19 out of 28 contracting states are EU Member States, which is still a significant majority.

¹⁰⁷ Member States with significant maritime law expertise may possibly be slow in seeking preliminary rulings.

¹⁰⁸ To this effect see also M. Jacobsson, “To what extent do international treaties result in the uniformity of maritime law?”, 22(2) (2016) *JIML* 94, 110.

2.2.1 Passenger Rights Regulation for travel by sea and inland waterways

In addition the EU Regulation concerning the rights of passengers when travelling by sea and inland waterway¹⁰⁹ applies to carriers offering passenger services from a port of embarkation within a European Union Member State, or failing that, to cases where the carrier is a Union carrier¹¹⁰ and the port of disembarkation is a port within the territory of a Member State or, with limited reach, also for cruises¹¹¹ where the port of embarkation is within the territory of an EU Member State.¹¹² The Regulation imposes mandatory rules¹¹³ relating to non-discrimination between passengers with regard to transport conditions offered by carriers,¹¹⁴ to non-discrimination and assistance for disabled persons and persons with reduced mobility (“DPRMs”),¹¹⁵ on rights of passengers in cases of cancellation or delay,¹¹⁶ on minimum information to be provided to passengers and on handling complaints¹¹⁷ and general rules of enforcement.¹¹⁸ While the Athens framework is mostly concerned with liability of the carrier to compensate damage caused to the passenger during the performance of the carriage, the Passenger Rights Regulation is concerned with the non-discriminatory manner in which transport services are made available, travel information is provided and assistance and support is given in case of travel disruptions.

2.2.2 EU Package Travel Directive

The 2015 EU Directive on package travel and linked travel arrangements¹¹⁹ is concerned with yet another arena in which travel services are provided in conjunction with other services of the hospitality or travel industry and insures that travel customers do not lose out due to the patchwork of providers and arrangements for the various different services on offer. While cross-overs between the different systems are unavoidable, the new EU Directive aims to avoid any clashes. The 2015 Directive overhauled the previous 1990 Package Travel Directive¹²⁰ and extended protection for bookings of package holidays organised by traditional tour operators to online bookings of combined travel in its various forms.¹²¹ With effect from 1 July 2018, Member States were required to implement the Directive’s provisions and principles into national law and amend their legislation accordingly.

The Package Travel Directive provides rules on information obligations and on the content of the package travel contracts (including linked travel arrangements);¹²² rules on changes to the package contract before the start of the package;¹²³ on performance duties and consequences of lack of conformity in the performance of the

¹⁰⁹ EU Regulation 1177/2010 of 24 November 2010 concerning the rights of passengers when travelling by sea and inland waterway and amending Regulation (EC) No.2006/2004 (OJ L334, 17.12.2010, p.1) (hereafter Sea Passenger Rights Regulation), applicable from 18 December 2012.

¹¹⁰ Which under EU Regulation 1177/2010 art.3(e) is defined as a carrier established within the territory of a Member State or offering transport by passenger services operated to or from the territory of a Member State.

¹¹¹ There are specific provisions dealing with rerouting, reimbursement and compensation for cancellations of delays of passengers services only, although duties to provide information and assistance also apply for the benefit of cruise passengers.

¹¹² EU Regulation 1177/2010 art.2.1. And see the excluded vessels or services under paras 2 and 4 of art.2. Art 2.2 reads: “This Regulation shall not apply in respect of passengers travelling: (a) on ships certified to carry up to 12 passengers; (b) on ships which have a crew responsible for the operation of the ship composed of not more than three persons or where the distance of the overall passenger service is less than 500 metres, one way; (c) on excursion and sightseeing tours other than cruises; or (d) on ships not propelled by mechanical means as well as original, and individual replicas of, historical passenger ships designed before 1965, built predominantly with the original materials, certified to carry up to 36 passengers.” And see also the option to exclude public service contracts, provided passengers rights are comparably ensured under national law (art 2.4). Art 2.3 a transitional exemption, the period of which has expired by end 2014.

¹¹³ EU Regulation 1177/2010 art.6.

¹¹⁴ EU Regulation 1177/2010 art.4.

¹¹⁵ EU Regulation 1177/2010 arts 7–15.

¹¹⁶ EU Regulation 1177/2010 arts 16–21.

¹¹⁷ EU Regulation 1177/2010 arts 22–24.

¹¹⁸ EU Regulation 1177/2010 arts 25–28.

¹¹⁹ Directive (EU) 2015/2302 of the European Parliament and of the Council of 25 November 2015 on package travel and linked travel arrangements, amending Regulation (EC) No 2006/2004 and Directive 2011/83/EU of the European Parliament and of the Council and repealing Council Directive 90/314/EEC (hereafter EU Package Travel Directive).

¹²⁰ EEC Council Directive 90/314.

¹²¹ Such as encompassing combinations of travel and hire car or travel and hotel offered on the same website and as part of the same booking process. According to the European Commission “[t]he new directive applies to 3 different sorts of travel combinations:

- pre-arranged packages: ready-made holidays from a tour operator made up of at least 2 elements: transport, accommodation or other services such as car rental
- customised packages: a selection of components for the same trip or holiday and bought from a single business online or offline
- linked travel arrangements such as “click through” bookings, where the traveller, after having booked one travel service on one website, is invited to book another service on another website through a link. For this kind of arrangement the customer must be informed that they are not booking a package, but that, subject to conditions, their advance payments will be protected.

See <https://ec.europa.eu/info/law/law-topic/consumers/travel-and-timeshare-law/package-travel-directive_en> accessed 21.06.18.

¹²² EU Package Travel Directive chapter II.

¹²³ EU Package Travel Directive chapter III.

contract.¹²⁴ In particular, the organiser is made liable for the performance of the travel services included in the package travel contract, irrespective of whether he or others provide the services.¹²⁵ The Directive also deals with the interaction between retailer and organiser with the traveller and ensures that the traveller is not disadvantaged in the enforcement of his rights by interacting with and booking through a retailer.¹²⁶ Furthermore, it provides for insolvency protection for packages and linked travel arrangements and relevant obligations of the organiser.¹²⁷ The rules required by the Directive are of imperative nature, not to be circumvented by contractual clauses.¹²⁸

The protection of the traveller is further increased by making a retailer who is established in a Member State responsible for the fulfilment of the duties of performance of the contract and of insolvency protection where the organiser is not established in the European Economic Area. However, the retailer can escape this responsibility if he provides evidence that the organiser complies with the relevant requirements.¹²⁹

The Directive also regulates the interaction of its provisions with international conventions and the EU Passenger Rights Regulations for carriage by sea and inland waterways, road, rail, bus and coach.¹³⁰ Priority of international conventions is to remain and the rules of the package legislation is to be read and adjusted in the light of a conventions' provisions, where applicable. Compensation under national package legislation, international conventions and under the EU Passenger Rights Regulations can be pursued separately, but over-compensation ought to be avoided and deductions applied accordingly, where compensation or price reduction is achieved under more than one system.¹³¹ This is a clear improvement from the 1990 EU Package Travel Directive¹³² which was made before any of the Passenger Rights Regulations were conceived and which also left the interaction with international instruments to Member States' discretion. Since then the European Union acceded to the rail, air and sea conventions – i.e. COTIF, Montreal and Athens - and is therefore committed to ensuring that these conventions' provisions and liability limitations are observed.¹³³ The observance of other convention systems is left to the discretion of Member States allowing them to fulfil their obligations under international law.¹³⁴

As a result, Member States must incorporate Athens 2002 effectively into any national package travel regime, ensuring that the Athens provisions imprint themselves also on any package travel organiser's¹³⁵ liability.¹³⁶

2.2.3 EU Consumer Protection Laws

In addition to general principles of contract and tort law EU Consumer Protection as regulated by Member States taking into account relevant EU Directives such as the Directive 93/13/EEC of the Council on Unfair Terms in Consumer Contracts will need to be taken into account for any issues not covered by the specialised instruments as discussed above.¹³⁷

¹²⁴ EU Package Travel Directive chapter IV.

¹²⁵ EU Package Travel Directive art 13.1.

¹²⁶ See EU Package Travel Directive recitals 22-24, 41-42 and arts 5, 6, 7.1, 13.1 and 15.

¹²⁷ EU Package Travel Directive chapters V and VI.

¹²⁸ EU Package Travel Directive art 23.

¹²⁹ EU Package Travel Directive art 20.

¹³⁰ EU Package Travel Directive recitals 35, 36 and arts 14.4 and 14.5. Regarding the EU Sea Passenger Rights Regulation for travel by sea or inland waterways see above (text to n 109 ff); the Regulations on Passenger Rights for other modes of transport provide similar rules: see Regulation (EC) No 261/2004 of the European Parliament and of the Council establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91 (OJ No L 46, 17.2.2004, p. 1); Regulation (EC) No 1371/2007 of the European Parliament and of the Council on rail passengers' rights and obligations (OJ No L 315, 3.12.2007, p. 14); Regulation (EU) No 1177/2010 of the European Parliament and of the Council concerning the rights of passengers when travelling by sea and inland waterway and amending Regulation (EC) No 2006/2004 (OJ No L 334, 17.12.2010, p. 1) as amended; and Regulation (EU) No 181/2011 of the European Parliament and of the Council concerning the rights of passengers in bus and coach transport and amending Regulation (EC) No 2006/2004 (OJ No L 55, 28.2.2011, p. 1).

¹³¹ EU Package Travel Directive arts 14.4 and 14.5.

¹³² Council Directive of 13 June 1990 on package travel, package holidays and package tours (90/314/EEC) (OJ L158, 23.06.90, p.59) (hereafter 1990 EU Travel Package Directive).

¹³³ Compare 1990 EU Package Travel Directive Preamble OJ L158/60 and art 5.2 with the 2015 EU Package Travel Directive at Preamble recitals 35-36 and arts 14.4 and 14.5.

¹³⁴ 2015 EU Package Travel Directive art 14.4 2nd sentence.

¹³⁵ Or, where relevant, also the travel package retailer's liability; see EU Package Travel Directive art 20.

¹³⁶ And similarly for the Montreal and COTIF-CIV conventions.

¹³⁷ More on this below in the context of the UK Consumer Rights Act 2015 (see 3.1(f)).

2.2.4 Plans for EU Multimodal Passenger Regime

Furthermore, the European Union is currently considering action with respect to protecting passengers in the EU when undertaking multimodal journeys.¹³⁸ The Commission intends to come up with a measure (legislative proposal/non-legislative measure, but defined yet) at the last quarter of 2018. This may then have an impact on the scope of application of unimodal conventions, such as Athens, and all regimes will have to be coordinated appropriately.

The above has shown the consumer friendly framework for passengers and travellers as perceived by the European Union. We will now turn to examine the embedding of the EU framework and the application of its rules as part of the laws of the UK.

3 Implementation at Member State Level – Example UK:

For the UK,¹³⁹ in the position of an EU Member State,¹⁴⁰ the situation is equally multi-layered. Before analysing the interaction of the Athens Convention system using examples from UK case law,¹⁴¹ the picture of the international and European framework as enshrined in the laws of the UK is quickly recalled.

3.1 The Athens Regime within the broader passenger rights and consumer framework

3.1.1 Athens 1974

Application

The UK was one of the first states to deposit instruments of ratification of the 1974 Athens Convention,¹⁴² but it took until 1987 for the convention to come into force. For a short time carriage of passengers and their luggage by sea was temporarily covered by section 28 of the Unfair Contract Terms Act 1977, which applied¹⁴³ the boundaries¹⁴⁴ of the Athens Convention prior to the Convention's coming into force as a matter of international law, but only for contracts with a UK connection.¹⁴⁵ This aspect of section 28¹⁴⁶ was redundant for contracts made from 1st January 1981, the coming into force of the Carriage of Passengers and their Luggage by Sea (Interim Provisions) Order 1980 (SI 1980/1092), which then also covered domestic carriage.

Both regimes were superseded by the coming into force on 30 April 1987:

- (a) of the Athens 1974 Convention for International Carriage¹⁴⁷ and,
- (b) for intra UK carriage, of the Carriage of Passengers and their Luggage by Sea (Domestic Carriage) Order 1987.¹⁴⁸

¹³⁸ See European Commission DG MOVE UNIT B.5 Inception Impact Assessment of 22 December 2016 <http://ec.europa.eu/smart-regulation/roadmaps/docs/2017_move_005_passenger_rights_multimodal_transport_en.pdf> and the Public Consultation in 2017 at <https://ec.europa.eu/transport/themes/passengers/consultations/2017-pax-rights-multimodal-transport_en> and on the year of Multimodality see <<http://www.eltis.org/discover/news/2018-year-multimodality>>, all accessed 21.06.18.

¹³⁹ Maritime law is predominantly a reserved matter under the Scotland Act 1998 (Scotland Act 1998 s 30, Sched 5 Pt II, Head E3: see Ch 1, para 27. See also *Stair Memorial Encyclopaedia*, "Carriage" (Reissue), para 146.

¹⁴⁰ At least at the time of writing.

¹⁴¹ Below at 3.2.

¹⁴² On 31 January 1980 with the Secretary General of the International Maritime Organization (IMO) as depository.

¹⁴³ As of 1 February 1978.

¹⁴⁴ i.e. regarding exclusions and restrictions of liability for loss or damage, being loss or damage which would have been covered under the Athens Convention, had the convention had the force of law.

¹⁴⁵ See UCTA 1977 s 28(1)-(3). A UK connection was given either when the contract was made in the UK or the place of departure or place of destination under the contract was in the UK.

¹⁴⁶ But see also s 28(1) and (2) of the UCTA 1977 which allowed contract terms which would have been excluded by Athens to be applied if Athens was not applicable according to UK law and there was no UK connection. This too is now also repealed (see the Consumer Rights Act 2015, Sched 4 para.25 with effect from 1 October 2015).

¹⁴⁷ Implemented by the then Merchant Shipping Act (MSA) 1979 s 14 and appended as Sched 3 to the Act. Athens 1974 has been denounced with effect of the coming into force of Athens 2002 via its 2002 Protocol on 23 April 2014. The latter is implemented in the UK via the MSA 1995 s 183 and appended in Sched 6 (see below at 3.1 b)).

¹⁴⁸ Made under the 1979 MSA s 16; (nowadays enshrined in MSA 1995 s 184).

Increased limits for UK carriers

Following, in particular, the *Herald of Free Enterprise* disaster, the liability limits in the event of death and personal injury of the Athens 1974 Convention were increased by UK statutory instrument for carriers with principal place of business in the United Kingdom, whether Athens was applied to international or domestic carriage.¹⁴⁹ The first increase took effect from 1 June 1987 from the Athens 1974 limit of 46,666 SDR to 100,000 SDR¹⁵⁰ and furthermore with effect from 1 January 1999 to 300,000 SDR.¹⁵¹

While for international carriage this regime has been superseded by Athens 2002,¹⁵² carriage of passengers within the United Kingdom, the Channel Islands and the Isle of Man, insofar as the service does not fall within the EC Athens Regulation,¹⁵³ remains to be covered by Athens 1974,¹⁵⁴ including the relevant amendments for UK carriers.¹⁵⁵

3.1.2 Athens 2002 Convention and EC Athens Regulation

From 31 December 2012, the Athens 2002 regime applies to international carriage within the UK as Member State of European Union by virtue of the EC Athens Regulation, that is, EC Regulation 392/2009.¹⁵⁶ For domestic carriage, the UK has made maximum use of the possibility to defer application of the EC Regulation, so that Athens 2002 applies to Class A ships only since 31 December 2016 and for Class B ships from 31 December 2018.¹⁵⁷

After the coming into force of the 2002 Athens Convention in April 2014, its provisions also obtained the force of law in the UK via implementation into the laws of the UK with effect of 28 May 2014 by virtue of section 183 of the Merchant Shipping Act 1995 and Schedule 6.¹⁵⁸

For a diagram of the entry into force of the various instruments in the UK see “UK Athens Timeline” below.

Noteworthy may also be the revision clause in article 23 of Athens 2002, setting out an adjustment procedure for the liability limits enshrined in the convention. Furthermore, the 2002 Convention in article 7.2 allows State Parties to adopt higher limits of liability for death or personal injury to passengers as a matter of national law. The UK, as of July 2018, has not taken advantage of this provision for the 2002 Convention¹⁵⁹ which adopts a limit of 400,000 SDR. In contrast, it may be recalled that the UK had made use of a similar option for Athens 1974 to increase the then rather low convention limit for carriers with place of business in the UK to 300,000 SDR in its most recent regulation.¹⁶⁰ While the Secretary of State is enabled to make future provision of higher limits by Order, the wording of this delegation provision remains that of the Athens 1974 language,¹⁶¹ limiting such increase to carriers with principal place of business in the United Kingdom, whereas Athens 2002 no longer requires such a narrow approach.

¹⁴⁹ Making use of the option provided in Athens 1974 art 7.2 to increase limits for domestic carriers by national law and of MSA 1979 Sched 3 PT II para 4 (now MSA 1995 Sched 6 Part II para 4) which empowers the Secretary of the States to make such orders. See also P Griggs, R. Williams, J Farr (n 44) ch 4 “Limitation: Passenger Claims” at 104.

¹⁵⁰ By virtue of the Carriage of Passengers and their Luggage by Sea (United Kingdom Carriers) Order 1987 (SI 1987/855) as amended by the Carriage of Passengers and their Luggage by Sea (United Kingdom Carriers) (Amendment) Order 1989 (SI 1989/1880) (the latter giving effect to the Athens Protocol of 1976, which replaced the reference to gold francs in the Athens Convention by references to Special Drawing Rights).

¹⁵¹ By the Carriage of Passengers and their Luggage by Sea (United Kingdom Carriers) Order 1998 (SI 1998/2917).

¹⁵² Whether directly or via the EC Athens Regulation.

¹⁵³ Domestic UK carriage that is performed on Class A or Class B ships is covered by the EC Athens Regulation, although its application was phased in; see Merchant Shipping (Carriage of Passengers by Sea) Regulations 2012 (SI 2012/3152) reg 4.

¹⁵⁴ The Carriage of Passengers and their Luggage by Sea (Domestic Carriage) Order 1987 (SI 1987/670) which was preserved by art 3 of the Merchant Shipping (Convention Relating to the Carriage of Passengers and their Luggage by Sea) Order 2014 (SI 2004/1361).

¹⁵⁵ In form of the Carriage of Passengers and their Luggage by Sea (United Kingdom Carriers) Order 1998 (SI 1998/2917).

¹⁵⁶ The Regulation and its provisions are directly applicable in all Member States (TFEU art 288), and thus the UK, by virtue of it being an EC or EU Regulation. Furthermore, the EC Regulation is embedded by the Merchant Shipping (Carriage of Passengers by Sea) Regulations 2012 (SI 2012/3152), and see in particular its regs 3, 4 and 14.

¹⁵⁷ SI 2012/3152 reg. 4.

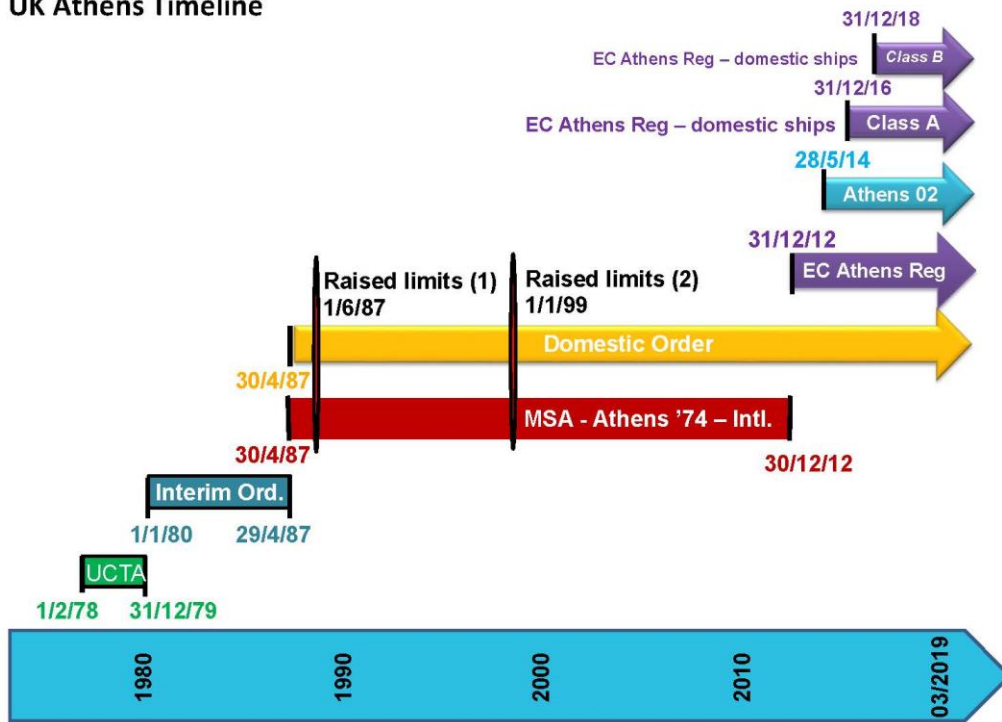
¹⁵⁸ The provisions of the MSA 1995, ss 183-184 and Sched 6 were accordingly amended by the Merchant Shipping (Convention Relating to the Carriage of Passengers and their Luggage by Sea) Order 2014 (SI 2014/1361).

¹⁵⁹ See IMO Depository information of July 2018 on Athens 2002 (n 22) and also MSA 1995, Sched 6 Part II providing no amendment to the Athens 2002 limits.

¹⁶⁰ Carriage of Passengers and their Luggage by Sea (United Kingdom Carriers) Order 1998 reg 3. Note art 7.2 of Athens 1974 only allowed the increase for carriers who were nationals of the State which increased liability.

¹⁶¹ See MSA 1995, ss 183-184 and Sched 6 PT II para 4.

UK Athens Timeline



3.1.3 Global limitation with respect to passengers

Athens 1974 and 2002 explicitly leave conventions on limitation of liability untouched¹⁶² and the UK has implemented the LLMC 1996 in the Merchant Shipping Act 1995.¹⁶³ The LLMC 1996 provisions apply by virtue of UK law not only to sea-going but also to non-seagoing ships and the LLMC 1996 also applies with modification to ships with a tonnage of less than 300 tons.¹⁶⁴ Regarding passenger claims for loss of life and personal injury the UK has taken advantage of the option to regulate global limitation;¹⁶⁵ as a result it no longer applies any limits for such claims arising on sea-going ships.¹⁶⁶

Yet for the same claims arising on non-seagoing ships a strict per capita limitation is provided,¹⁶⁷ and seemingly aligned to the levels of the then¹⁶⁸ version of the Athens Convention in form of its 1990 Protocol.¹⁶⁹ It must be recalled that the Athens Convention only applies to seagoing ships, so that no limit applies to non-seagoing vessels via this avenue; to provide some limit therefore seems appropriate and has for non-seagoing ships – for reasons of legislative procedure – been effected via global limitation, albeit as a per capita limit. However the limits as implemented in 1998 now seem rather low and outdated, after the shift in limitation levels achieved via 2002 amendments to Athens¹⁷⁰ and may be worth revising.

¹⁶² Athens 2002 art 19.

¹⁶³ MSA 1995 s 185 with Sched 7 (and formerly the previous version, the LLMC 1976, in the then MSA 1979 s 17 with Sched 4).

¹⁶⁴ See MSA 1995 Sched 7 Pt II paras 2, 5 and 6 as amended by the Merchant Shipping (Convention on Limitation of Liability for Maritime Claims) (Amendment) Order 1998 (SI 1998/1258), art 7(a, d, e).

¹⁶⁵ See LLMC 1996 art 15 (3bis)

¹⁶⁶ See MSA 1995 Sched 7 Pt II para 6 amended by Merchant Shipping (Convention on Limitation of Liability for Maritime Claims) (Amendment) Order 1998 (SI 1998/1258), art 7(e). See also N. Gaskell, “Appendix 4, Limitation of Liability ...” (n 95), tables 3.1 and 3.2 with n.46; example 7 with n.123-9; and example 14 with n.147.

¹⁶⁷ By MSA 1995 Sched 7 Pt II para 6 (as amended by Merchant Shipping (Convention on Limitation of Liability for Maritime Claims) (Amendment) Order 1998 (SI 1998/1258), art 7(e)).

¹⁶⁸ At the time of making the Order in 1998 of 175,000 SDR per passenger.

¹⁶⁹ Even though the latter Protocol never came into force.

¹⁷⁰ Including the opt-out of global limitation otherwise for claims for death or personal injury by the UK. See also N Gaskell, “New limits...” (n 98) 328 f. on the development and adequacy of the limit as applied to non-seagoing ships, suggesting that a strict per capita limit was already then inappropriate.

In summary, for claims for a passenger's personal injury or death on seagoing vessels only the Athens 2002 limits apply, as moderated by the IMO Model Reservation for war and terrorism risks.

3.1.4 EU Sea Passenger Rights Regulation

The Merchant Shipping (Passengers' Rights) Regulations 2013¹⁷¹ embeds the directly applicable EU Sea Passenger Rights Regulation within the laws of the UK by designating the Maritime and Coastguard Agency as enforcement body in the UK and by providing rules on offences and penalties. The Regulation runs alongside and separate from the Athens regime and its implementation.

3.1.5 UK Package Travel and Linked Travel Arrangements Regulations 2018

The 2015 EU Package Travel Directive has been transposed¹⁷² into the law of the UK by the Package Travel and Linked Travel Arrangements Regulations 2018,¹⁷³ which makes provision for package travel contracts and linked travel arrangements sold, or offered for sale, in the United Kingdom. Of particular interest for the current discussion are the provisions of Part 4.¹⁷⁴ It provides for liability of the package tour operator for the performance of the package and contains rules on price reduction and compensation for lack of conformity in the performance of the package travel contract, as well as the provisions regulating the interaction with other international and European Instruments.¹⁷⁵ Therefore, where the sea carrier was also classed as a tour operator¹⁷⁶ according to the 2018 UK Regulations,¹⁷⁷ a conflict is avoided by giving the Athens Convention¹⁷⁸ priority. The additional application of the Passenger Rights and Package Regulation's rules would then only be possible insofar as the matter was not already exclusively dealt with by the convention.

The UK Package Travel Regulation would apply, for example, where a sea carrier was to offer not only the cruise, but also travel to and from the cruise ship, or other related travel services, (such as vehicle hire or accommodation either side of the cruise).¹⁷⁹ The mere offering of the cruise together with organising shore trips would mostly be ineffective in pushing the carrier into the category of tour operator. Where the cruise (the travel service) was combined only with the short trips (i.e. other tourist services), this combination would only be classed as a package falling within the 2018 Regulations if the shore trips (a) accounted for a significant proportion of the value of the combination, and were advertised as, and would also otherwise represent, an essential feature of the combination; or (b) were selected and purchased before the cruise started.¹⁸⁰

The 2018 UK Regulations are a clear improvement from the former 1992 UK Package Travel Regulations,¹⁸¹ which – not providing any hierarchy amongst instruments - led to confusing results in case law. The County Court in Central London in *Lee v Airtours*¹⁸² gave priority to the UK Package Travel Regulation 1990 over the Merchant Shipping Act 1995 implementing Athens 1974. With reference to the European Communities Act 1972, the court decided that the UK Regulation which was derived from an EU Directive prevailed over domestic law. The opposite result was achieved in the Plymouth County Court in *Norfolk*¹⁸³ where the judge applied the Athens Convention over and above the UK Package Travel Regulation 1990, by prioritising - to the

¹⁷¹ SI 2013/425.

¹⁷² By virtue of European Union Law an EU Directive must be implemented into the laws of the Member State. In the wording of TFEU art 288: "... A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods. ..."

¹⁷³ SI 2018/634 made on 28 May 2018 with effect from 1 July 2018 (hereafter UK Package Travel Regulations 2018).

¹⁷⁴ UK Package Travel Regulations 2018 regs 15-18.

¹⁷⁵ See in particular UK Package Travel Regulations 2018 regs 15(14)(b), 16(5), 16(7)-(10).

¹⁷⁶ And a tour operator may also be keen to be classed as a carrier to obtain any advantages a carrier may have under the convention regimes.

¹⁷⁷ On the question of who is a tour operator/carrier (albeit under application of the 1992 Package Regulation) see B Soyer, "Boundaries of the Athens Convention: what you see is not always what you get!" ch 11 in D R Thomas, *Liability Regimes in contemporary Maritime Law* (Informa, 2007), esp para 11.35 ff.

¹⁷⁸ Or, where appropriate, the Warsaw and Montreal air and COTIF rail conventions.

¹⁷⁹ See UK Package Travel Regulations 2018 reg 3(1)(a) with reg 2 (1) on definitions inter alia of "organiser", "package travel contract", "travel service".

¹⁸⁰ See UK Package Travel Regulations 2018 reg. 2(6): "A combination of travel services where not more than one type of travel service of the kind listed in paragraph (a), (b) or (c) of the definition of "travel service" is combined with one or more tourist services of the kind listed in paragraph (d) of that definition is not a package if the latter services—

(a) do not account for a significant proportion of the value of the combination and are not advertised as, and do not otherwise represent, an essential feature of the combination; or

(b) are selected and purchased after the performance of a travel service of the kind listed in paragraph (a), (b) or (c) of the definition of "travel service" has started."

¹⁸¹ Package Travel, Package Holidays and Package Tours Regulations 1992 (SI 1992/3288)(UK).

¹⁸² *Lee v Airtours* (n 78), Judge Hallgarten QC.

¹⁸³ *Norfolk v My Travel* (n 78) Judge Overend.

extent that the convention created a uniform and exclusive code - the international convention as implemented in the UK over domestic law in form of the UK Package Regulation 1990. It did so irrespective of the narrow wording of the relevant Package Travel Regulation provision,¹⁸⁴ which only gave way to international conventions if so provided in the contract,¹⁸⁵ and instead relied on the reasoning in the House of Lords in *Sidhu v British Airways*¹⁸⁶ on exclusivity of the Warsaw air carriage regime.¹⁸⁷

3.1.6 Unfair Contract Terms Legislations

Legislation dealing with the fairness of contract terms ousting unfair clauses may also apply. For B2B contracts protection is provided by the Unfair Contract Terms Act 1977 and, where consumer contracts are concerned, these rights are now enshrined in the Consumer Rights Act 2015.¹⁸⁸ Of particular relevance is the definition of a consumer in the CRA 2015, the rules on provision of services in Part I, Chapter 4¹⁸⁹ and of Part 2 on Unfair Terms.¹⁹⁰ A broad application of the consumer provisions is supported by a reversal of the burden of proof with respect to whether a transaction is a consumer transaction. A trader claiming that the actions of an individual acting wholly or mainly outside his trade or profession falls outside a consumer transaction, must prove it.¹⁹¹

According to the CRA 2015, consumer contracts must be performed with reasonable care and skill, for a reasonable price and within reasonable time.¹⁹² However, these provisions of Part I, Chapter 4 of the CRA 2015 (a) do not affect any enactment of stricter liability and (b) are subject to other enactments, defining or restricting the rights, duties or liabilities arising in connection with a service.¹⁹³ Equally, Part II of the CRA 2015 contains rules requiring contract terms and notices to be fair and transparent, provides that in case of ambiguity of terms the most consumer friendly meaning applies, and bars any exclusion or restriction of liability for death or personal injury resulting from negligence.¹⁹⁴ Yet these provisions of Part II are subject to mandatory statutory or regulatory provisions and provisions of international conventions to which the UK or EU is a party.¹⁹⁵ Therefore, provisions of the Athens Convention and the EU Package Travel and Passenger Rights legislation will take precedence over the provisions of the CRA 2015. A similar system of hierarchy is in place for the provisions of the UCTA 1977.¹⁹⁶

While there may be a complicated web of rules aimed at protection of travellers and passengers, having set out the hierarchy of rules, it was established that, in principle, Athens trumps other EU and UK rules. However in order to take priority, the Athens Convention regime must be applicable. In the following, after a short outlook on the likely changes to the regime post Brexit, we will therefore consider terms relevant for the application and the interpretation of the reach and boundaries of the Athens convention.

¹⁸⁴ See UK Package Travel Regulations 1992 s 15(3).

¹⁸⁵ A similarly narrow wording – referring to a contract of carriage including reference to the convention - is also applied in MSA 1995 Pt II para 2 which is to apply the provision of the Athens 2002 Convention art 2.2 designed to avoid conflict with other conventions covering the transport of passengers by another mode and including by way of extension the carriage of the passenger by sea. This might be a relic from the time when the application of conventions required a reference to it in the contract document (such as for example via passenger ticket or consignment note) – an approach which since has been changed due to the ability to circumvent the application of the convention. In any event, it is submitted that this approach is too narrow to avoid a conflict of conventions - for an example on the mandatory application of COTIF-CIV see arts 5 and 6 § 2 CIV for carriage under CIV based on its art 1 § 3 (rail with auxiliary international sea carriage where the latter is performed on registered lines (on the latter see <http://otif.org/en/?page_id=202> (accessed 07.08.18)). Yet such a conflict was foreseen and appropriately dealt with by the conventions themselves – as in art 2.2 of Athens – if it was fully given effect.

¹⁸⁶ [1997] AC 430, 453, [1997] 2 WLR 26, 46-7 Lord Hope of Craighead.

¹⁸⁷ For an overview see K Lewins, *International Carriage of Passengers by Sea*, (n 21) at 4-036 and for a detailed discussion of the cases and their UK context see B Soyer, “Liability of tour operators...” (n 78) 194 ff. and also B Soyer, “Boundaries of the Athens Convention...” (n 177), esp para 11.42 ff. See also G Leloudas, B Soyer, “Temporal Limits of the Athens Regime – Potential Conflicts between International and Domestic Legal Regimes”, ch 4 in B. Soyer, A Tettenborn, *Maritime Liabilities in a Global and Regional Context*, (Informa Law from Routledge, 2019), para 4.2.1.3.

¹⁸⁸ Unfair Contract Terms Act 1977(hereafter UCTA 1977) s.15(3)(b) (i). For consumer contracts entered into as of 1st October 2016 the Consumer Rights Act 2015 (hereafter CRA 2015) applies (see The Consumer Rights Act 2015 (Commencement No. 3, Transitional Provisions, Savings and Consequential Amendments) Order 2015 (SI.2015/1630)) and see the disapplication to consumer contracts in the UCTA 1977 ss 2(4) and 3(3) for England, Wales and Northern Ireland and ss.16(4), 17(3) for Scotland.

¹⁸⁹ CRA 2015 ss 48 – 57.

¹⁹⁰ See CRA 2015 ss 61 – 72 and see also Schedule 2.

¹⁹¹ CRA 2015 s.2(3-4) read: “(3) Consumer” means an individual acting for purposes that are wholly or mainly outside that individual's trade, business, craft or profession.

(4) A trader claiming that an individual was not acting for purposes wholly or mainly outside the individual's trade, business, craft or profession must prove it.”

¹⁹² See CRA 2015 ss 49-52.

¹⁹³ CRA 2015 s. 53.

¹⁹⁴ CRA 2015 ss 62 – 69.

¹⁹⁵ CRA 2015 s 73.

¹⁹⁶ See UCTA 1977 s 29, which as a provision under Part III of the UCTA applies to the whole of the United Kingdom.

3.1.7 BREXIT

How will this landscape change with the UK's exit from the EU? As for the application of Athens 2002 not much will change, however regarding any other EU Passenger Rights there will be impact in the sense that the Passenger Rights and Package Travel Regulations and other Consumer Rights will be limited in application and reach, both as applied in the UK and in the post-Brexit EU Member States.

As Athens 2002 is now applicable in the UK due to ratification by the UK and enactment of Athens 2002 as a matter of international law,¹⁹⁷ the EC Athens Regulation is no longer necessary to attain this result. However the EC Regulation also provides for other elements which are not included in the Athens Convention itself, such as the right to advance payment in case of a shipping incident and the right to have mobility equipment compensated as cabin luggage.¹⁹⁸ As it stands, these will also remain available to claimants, however now as a matter of UK law. The European Union Withdrawal Act 2018 provides for EU legislation and EU-derived domestic legislation to remain in force insofar as it was operative immediately before exit day.¹⁹⁹ However Government Ministers have been provided with the powers to make amendments by regulation in order to deal with deficiencies in retained EU law arising from the withdrawal of the UK and in particular where an application would go beyond what had practical application in relation to the UK or was otherwise redundant.²⁰⁰ No amendments have been proposed at this stage. The process of adjusting the EU derived legislation is likely to take some time. It is likely however that the additional provisions of the EC Athens Regulation, including the application of Athens 2002 to domestic ships, as embedded in the UK²⁰¹ will remain applicable as a matter of UK law.²⁰² Retained, as per Government advice,²⁰³ will be the rights and obligations under the EU Passenger Rights Regulation²⁰⁴ as embedded in the UK.²⁰⁵ But what are the consequences of limiting the application of EU Rules as UK retained legislation?

The UK has provided guidance for passengers on 20 December 2018 in the following terms:

“Consumer rights for all passengers travelling to the EU from the UK - From 29 March 2019, if there is no EU Exit deal, your consumer rights in regards to travelling will remain **largely unchanged**. You will have the same rights under UK law in the event of denied boarding, cancellation or long delay of passenger air, rail, road or sea services. For EU registered passenger transport operators, EU law will continue to apply in respect of journeys to and from the EU.”²⁰⁶

The key feature and change however is that the UK will then no longer count as an EU Member State. Therefore, from the point of view of the remaining EU Member States and their courts, journeys to and from the UK will no longer trigger the application of the EU Regulations or impact on their reach. Furthermore, the UK application of the EU Regulations as a matter of UK law will be limited to the UK and services where the port of embarkation is situated in the UK, or where the port of disembarkation is in the UK as well as carriage

¹⁹⁷ See Merchant Shipping Act 1995 s 183 and Sched 6.

¹⁹⁸ EC Athens Regulation arts 6 and 4; and see art 7 on the duty to provide information to passengers setting out their rights.

¹⁹⁹ See European Union Withdrawal Act 2018 (hereafter EUWA 2018) ss 3(1) and 2(1).

²⁰⁰ EUWA 2018 s 8(1)(b), (2)(a). For application of these powers in carriage by air and for package travel see n 207 and below.

²⁰¹ See Merchant Shipping (Carriage of Passengers by Sea) Regulations 2012 (SI 2012/3152) regs 3 and 4.

²⁰² The latest date for deferral of the application of Athens 2002 to domestic voyages expired (see above 3.1 b) and thus Athens 2002, by virtue of the EC Athens Regulation, is applicable from 31st December 2018 also to intra-UK voyages on Class B ships. This has not (as of 05.01.19) been amended by UK law for the period after Brexit.

²⁰³ See EUWA 2018 ss 3(1) and 2(1). And see UK guidance to passengers at <https://www.gov.uk/guidance/passenger-travel-to-the-eu-by-air-rail-or-sea-after-brexit> [last accessed 13.01.2019]: “**Travelling by sea to the EU from the UK** - From 29 March 2019, if there is no EU Exit deal, most passengers travelling to the EU by sea should not experience any difference to their journey.

Ferry passengers - From 29 March 2019, if there is no EU Exit deal, passengers on ferry services will continue to be protected by the EU regulation on passengers' rights, **which will be brought into UK law.**” Furthermore suggestions are made to take out travel insurance and to check schedules.

“**Cruising** - From 29 March 2019, if there is no EU Exit deal, cruise operations will continue on the same basis as today. Passengers who **embark on a cruise at a UK port** will continue to be protected by the EU regulation on maritime passengers' rights, **which will be brought into UK law.** ...” (Emphasis added.)

²⁰⁴ Regulation (EU) No 1177/2010 and see above at 2.2 a).

²⁰⁵ By the Merchant Shipping (Passengers' Rights) Regulations 2013 (SI 2013/425).

²⁰⁶ See <https://www.gov.uk/guidance/passenger-consumer-rights-when-travelling-to-the-eu-after-brexit> [last accessed 13.01.2019] (emphasis added). And see n 203 above.

undertaken by a UK carrier.²⁰⁷ And cruise passengers will only be protected by UK law where embarkation is from a UK port.²⁰⁸

Thus, limitations of application and reach of the instruments and thus passengers' rights will emerge, compared to the status before the UK's exit. Furthermore, jurisdiction, recognition and enforcement of judgments are also matters that will see changes as the European framework no longer applies to the UK.²⁰⁹ This is likely to create further barriers for consumers to make a claim and enforce their rights across borders.

A similar outlook can be gleaned from the amendments to the 2018 UK Package Travel and Linked Travel Arrangements Regulation.²¹⁰ References to EU legislation are substituted with relevant UK legislation and references to the European Union and EU Member States deleted with the consequences that the rules and the market freedoms are limited to the UK. For example, providers from other Member States are no longer exempt from providing insolvency security in the UK and UK retailers are liable for the performance of the package and insolvency protection unless the retailer proves that the organiser complies with the provisions of the Regulation.²¹¹

The result is thus a UK-centric application of the former EU legislation and thus a narrowing of the market, which is likely to have some impact on the provision of services, offers and prices available to UK customers. The reach of passengers' rights will no longer be as expansive and non-UK organisers will have further regulatory hurdles to overcome and costs to bear in order to offer services in the UK.

3.2 Delineating Athens

To aid interpretation, a number of relevant cases are sketched below, considering scope and exclusivity of the Athens Convention. The cases were mostly motivated by the shorter time bar in Athens compared to the limitation rules of the general law. Some of the cases may motivate countries who are yet to implement Athens to consider providing relevant fine tuning in their domestic implementing framework. For example, they may wish to consider which legal rules of domestic law would be capable in fulfilling an effective role where the convention defers to the *lex fori*. Furthermore legislators may choose to spell out certain topics which fall outside the convention, such as recourse claims and consider whether their coverage is considered appropriately under domestic law.²¹²

3.2.1 Scope

International carriage or where given the force of law domestically

The Convention sets out in article 2.1 that it only applies "to any international carriage if: (a) the ship is flying the flag of or is registered in a State Party to this Convention, or (b) the contract of carriage has been made in a State Party to this Convention, or (c) the place of departure or destination, according to the contract of carriage, is in a State Party to this Convention." And similar rules apply with respect to the EC Athens Regulation requiring these above links to EU Member States.

As will be recalled, this application range has been extended further to domestic carriage within EU Member States as discussed above. This means for the UK that Athens 1974 applies to carriage on seagoing ships within the UK, the Channel Islands and the Isle of Man, insofar as they are not already captured into Athens 2002 via the EC Athens Regulation. The Athens Regime therefore reaches out to a wider range of (smaller) ships and activities via its domestic application, as seen from some of the UK case-law as discussed below.

²⁰⁷ See EU Regulation 1177/2010 art 2(1) as retained UK law – as envisaged (see EUWA 2018 s 8(1)(b), (2)): At the time of writing (05.01.19) no EU Exit amendments had been implemented or draft regulation made available; however the changes proposed to the largely comparable Regulations for air carriage by the Air Travel Organisers' Licensing (Amendment) (EU Exit) Regulations 2018 (Draft) Part 4, seem to suggest this approach. A similar outlook can be gleaned from the amendments to the 2018 UK Package Travel and Linked Travel Arrangements Regulation (see Package Travel and Linked Travel Arrangements (Amendment) (EU Exit) Regulations 2018 (SI 2018/1367).

²⁰⁸ See EU Regulation 1177/2010 art 2(1)(c) as retained UK law - as envisaged (see n 207).

²⁰⁹ For an overview from the EU viewpoint see the European Commission's Notice to Stakeholders of 27 February 2018 "Withdrawal of the United Kingdom and EU Rules on Consumer Protection and Passenger Rights", available at file:///M:/Passenger%20rights/EU%20-%20transport-future-relationship_21february2018_en.pdf [last accessed 13.01.2019].

²¹⁰ See the Package Travel and Linked Travel Arrangements (Amendment) (EU Exit) Regulations 2018 (SI 2018/1367).

²¹¹ Package Travel and Linked Travel Arrangements (Amendment) (EU Exit) Regulations 2018 regs 19, 26(4) and 27.

²¹² See S Lamont-Black, "Recourse Claims between Carriers – another obstacle to intermodality?" 21(6) (2015), JIML 473 ff. on the ill-fitting interaction between convention and domestic contribution rules under English law.

Meaning of ship

To fall within Athens, carriage must be on a ship, which covers only a seagoing vessel.²¹³ Therefore carriage on an inflatable banana raft, used to carry passengers round a bay, was held by the Hove County Court not to be a “ship” for the purposes of the Athens Convention. Neither was the banana raft an extension to the marine assault craft that pulled it, so to make the combination of the two into a “ship” covered by the Athens Convention. To fall within the definition, the vessel needed to be capable to undertake a voyage of some length rather than simply to be a joy ride in a bay.²¹⁴ However a rigid inflatable boat (RIB) was held to be sea-going vessel and thus a ship for the purposes of the Athens Convention provided she in fact went to sea.²¹⁵

The period of application - “carriage”

Athens only covers the period where the passenger is on board ship or which is used to get from land to and from the ship. This includes therefore the process of embarkation and disembarkation,²¹⁶ but does not include any time at the marine terminal or port installation. Recent case law considered the meaning of disembarkation. Hamblen LJ in the Court of Appeal in *Collins v Lawrence*²¹⁷ decided that it covered the whole period of moving from the vessel up and until the passenger was free of any equipment used for this purpose and had safely reached the ground ashore. Thus semi-permanent steps used to alight from a fishing boat when winched up on the shore were part of the disembarkation equipment. That the claimant slipped on the last plank on ground level of the steps did not make any difference; this was not yet a ‘place of safety’ on land.

In another case, *Lawrence v NCL (Bahamas) Ltd (The Norwegian Jade)*,²¹⁸ Hamblen LJ clarified that disembarkation did not only concern the final leaving of the vessel by the passenger and his luggage, but also included the transfer of a cruise passenger to the shore for the purpose of a land excursion. It did not matter that the contractual carrier (NCL) did not perform the transfer itself, nor paid the performing carrier directly. What mattered was that the tender, while operated and owned by the Union Boatmen of Santorini, was still a vessel supplied by the contracting carrier for the purpose of passengers disembarking for the shore trip. NCL was thus liable jointly and severally with the performing carrier²¹⁹ for the injury incurred by a passenger tripping on a poorly marked step on the tender. However any parts of the shore trip on land will be outside the Athens Regime.

The defendant “Carrier”

The same case²²⁰ also clarified that a cruise line could nevertheless be “the carrier”, even though the cruise and added travel had been booked via a travel agent. The opposite end of the spectrum was reached in *The Marco Polo*.²²¹ In this case a general sales agent (GSA) of a cruise ship’s time charterer was held not to be a contracting carrier under the Athens Convention, nor a charterer for the purposes of the time charterer’s liability insurance.²²² The GSA had engaged tour operators who advertised and contracted with passengers for cruises. After the cruise in questions had had to be cancelled²²³ the general sales agent had made payments to the passengers via the tour operators. The court held that these payments had not been made on the basis of a liability as carrier under Athens, since the GSA had not contracted with the passengers; nor had he been a charterer. The payments made could therefore not be indemnified under the policy.

²¹³ See Athens 2002 art 1.3.

²¹⁴ See *McEwan v Bingham* [2000] CLY 4691, Hove County Court.

²¹⁵ See *Michael v Musgrove (t/a YNYS Ribs)* [2011] EWHC 1438 (Admlty); [2012] 2 Lloyd’s Rep. 37.

²¹⁶ Article 1.8 contains the following definition for carriage: “‘carriage’ covers the following periods: (a) with regard to the passenger and his cabin luggage, the period during which the passenger and/or his cabin luggage are on board the ship or in the course of embarkation or disembarkation, and the period during which the passenger and his cabin luggage are transported by water from land to the ship or vice-versa, if the cost of such transport is included in the fare or if the vessel used for this purpose of auxiliary transport has been put at the disposal of the passenger by the carrier. However, with regard to the passenger, 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”.

²¹⁷ [2017] EWCA Civ 2268; [2018] 1 Lloyd’s Rep. 603; and see case comment on the decision at first instance of Canterbury County Court by K Lewins, “‘In the Course of Disembarkation’ under the Athens Convention”, 23(2) (2017) JIML 95 ff.

²¹⁸ [2017] EWCA Civ 2222; [2018] 1 Lloyd’s Rep. 607.

²¹⁹ See Athens art 4.1 and 4.4

²²⁰ *The Norwegian Jade* [2017] EWCA Civ 2222; [2018] 1 Lloyd’s Rep. 607.

²²¹ See *Cruise and Maritime Services International Ltd v Navigators Underwriting Agency Ltd (The Marco Polo)* [2017] Lloyd’s Rep 575 and case comment by K Lewins, “‘Carrier’ under the Athens Convention 1974”, 23(5) (2017) JIML 336f.

²²² To which he had been added as co-insured.

²²³ Just two days into the cruise, due to an outbreak of norovirus.

3.2.2 Exclusivity?

No contracting out

Article 18, ousting deviating contractual arrangements, works hand in hand with article 14 providing for application of the regime to all basis of claim and thus providing a certain level of exclusivity. However this exclusivity is not all-embracing, as will be seen.

The type of claim – action for damages for death or personal injury

In *South West SHA v Bay Island Voyages*²²⁴ a question of scope arose as to the types of claims covered by the Athens Convention.²²⁵ The case was not a claim for damages by the injured passenger against the carrier. The injured person had already been compensated by her employer who had organised the corporate team building exercise on board the carrier's RIB (Rigid Inflatable Boat) on the Bristol Channel where the employee incurred a spinal injury. The claim was therefore one of contribution brought by the employer against the carrier, at a time when an action for damages against the carrier for personal injury of the passenger would have been time barred under the Athens Convention.²²⁶

The carrier's plea was effectiveness of the time bar due to exclusivity of the convention.²²⁷ The Court of Appeal²²⁸ explained that while the Convention indeed provided exclusive²²⁹ rules on liability of an actual or performing carrier to a passenger for damages,²³⁰ this was explicitly without prejudice to rights of recourse between a carrier and performing carrier.²³¹ As the carriers' interaction inter se was covered no further by the Convention, nor were recourse rights between carriers and other parties,²³² there was therefore a gap, which could be filled by other legal or contractual provisions.²³³ The contribution claim was therefore not time barred on account of Athens.²³⁴

As it was of relevance for the application of the domestic contribution statute,²³⁵ the Court of Appeal also decided on the nature of the time bar and found that it only barred the remedy, rather than extinguishing the claim, as, for example, explicitly provided in the air carriage conventions.²³⁶

South West SHA v Bay Island Voyages therefore highlights that Athens only covers and bars action under EU or national law instruments insofar as they are fitting firmly into the regime provided by Athens. Athens covers liability of the carrier to the passenger (or their estate), for death or personal injury or loss or damage to the passenger's luggage. Note however that liability and exclusivity under Athens is not limited to shipping incidents or risks related to the carriage element, but also covers hotel risks, such as cases where the carrier negligently failed to adequately implement its "norovirus outbreak and control plan" or slipping and tripping incidents.²³⁷

²²⁴ 14 July 2015, [2015] EWCA Civ 708; [2016] Q.B. 503; [2015] 2 Lloyd's Rep. 652. See case comments by B Soyer, "Injury to passengers—contribution claim—scope of the Athens Convention" (2016) 22 JIML 87 and P Todd, "Athens Convention Time Bar, *South West Strategic Health Authority v Bay Island Voyages*" [2015] LMCLQ 477 ff.

²²⁵ In its application to domestic carriage; thus in this case, Athens 1974 as implemented by the Carriage of Passengers and their Luggage by Sea (Domestic Carriage) Order 1987 (SI 1987/670).

²²⁶ Athens Convention 1974 art 16.1 provides: "an action for damages arising out of the death of or personal injury to a passenger or for the loss of or damages to luggage shall be time-barred after a period of two years".

²²⁷ Athens Convention 1974 art 14 reads: "No action for damages for 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." According to the carrier, no contribution action could be brought outside the conventions rules.

²²⁸ The leading judgment was given by Tomlinson LJ; Kitchen LJ and Laws LJ agreed.

²²⁹ See Athens Convention 1974 art 4. Other Conventions also provide similarly: see Guadalajara Convention, esp. art X for the Warsaw regime; MC arts 39 ff. and esp. art 48; HambR art 10, esp. 10.6.

²³⁰ See Athens Convention 1974 art 14.

²³¹ Athens Convention 1974 art 4.5. A similar approach was also taken in MC art 37 to which the court referred.

²³² See *South West SHA v Bay Island Voyages* [15-21].

²³³ Lord Hope of Craighead in *Sidhu v British Airways Plc* [1997] AC 430 at 444 and 447 had clarified for air carriage that while the Warsaw Convention aimed at holistic harmonisation of those issues that were covered, in that the remedies available to passengers could only be those of the Convention and no others.

²³⁴ See also *Cairns v Northern Lighthouses Board* [2013] CSOH 22; [2013] SLT 645 at [53] for acceptance of a recourse claim against a recourse defendant who could invoke the provisions of the Athens Convention against the injured passenger but not against the recourse claimant, the employer of the injured passenger.

²³⁵ Civil Liability (Contribution) Act 1978 s 1(3).

²³⁶ See MC art 35 and WC art 29.

²³⁷ *Swifi v Fred Olsen Cruise Lines* [2016] EWCA Civ 785, where appeal against the judgment awarding damages in favour of the passenger was dismissed. Note liability for incidents other than shipping incidents, so-called "hotel risks", remains negligence based (art.3(2)–(4)). See also *Nolan v TUI UK Ltd* [2016] 1 Lloyd's Rep. 211, County Court (Central London) where norovirus was pleaded successfully. However as

Reference to domestic law and extent of its application

*Warner v Scapa Flow Charters*²³⁸, on appeal from the Court of Session Inner House, turned on the interpretation of article 16.3. The article concerns the time bar and calls on the *lex fori* to govern the grounds of “suspension and interruption of limitation periods”, but only within a precise window; in no case shall an action be brought later than three years from the date of disembarkation or the date when disembarkation should have taken place.²³⁹ The question was whether article 16.3 not only enabled the application of domestic law, which paused the running of time in a limitation period that had already commenced, but also postponed the start of the limitation period.²⁴⁰

The case concerned a domestic charter of a vessel, for a diving trip off Cape Wrath. Sadly the father of the infant claimant²⁴¹ died in a diving accident. The shipowner was alleged to be responsible for the death. After the two-year time bar period but before the three-year absolute bar, the claimant brought his claim, represented by his guardian. If the Scots law provision was effective also in the context of Athens in halting the commencement of time running on the basis of legal disability due to nonage, the time bar would not yet have expired. Different convention countries provided different rules of domestic law on the topic; some had provisions others did not, and their content varied. What mattered to the Inner House of the Court of Session²⁴² was that Scots law had a relevant provision. It decided that this provision²⁴³ and article 16 of the Convention should be read in context with each other with the result that the period of limitation had not even commenced.²⁴⁴ After first instance and appeal courts disagreed, Lady Hale, Lord Reed, Lord Sumption, Lord Hodge and Lord Briggs of the Supreme Court heard the case on 28th June 2018.²⁴⁵

In the English case of *Higham v Stena Sealink Ltd*²⁴⁶ it had been held that the application of a provision under the English Limitation Act 1980²⁴⁷ empowering a court, if it thought it equitable, to exclude altogether a limitation period that had already run its course, could not qualify as a provision of the *lex fori* suspending or interrupting the time bar. Obiter, the judge opined that he would have difficulty, in any event, to read the provision in a manner that could be applied to article 16.3 of the convention, since the domestic rule was explicitly framed to apply to specific provisions of the Limitation Act only. Furthermore the judge questioned, since all provision allowing for suspension or interruption referred back to others of the Limitation Act, whether there was room at all to apply these provisions in the context of Athens. This had however not been considered a problem by the Court of Session in *Warner v Scapa Flows* in the context of a comparable provision of Scots law. All that was needed was to read both provisions in context with each other.²⁴⁸

The Supreme Court with judgment of 17 October 2018 given by Lord Hodge with whom Lady Hale, Lord Reed, Lord Sumption and Lord Briggs agreed, dismissed the appeal.²⁴⁹ In line with the principles of interpretation of international conventions the words suspension or interruption should be given a natural meaning. This natural meaning encompassed application to both types, the pausing of a limitation period which had already commenced and the postponement of the start of the limitation period. What was available depended on the applicable domestic law. Domestic law provisions, in order to be applicable, did not have to be expressed as extending beyond the domestic statutory regime to encompass the Convention rules in order to apply. Insofar Lord Hodge explicitly disagreed with the reasoning of Hirst LJ in *Higham v Stena Sealink*.

for hotel risks, the burden of proof can be a stumbling block for passenger claimants and courts may be inclined to provide a helping hand by drawing inferences as in *Davkins v Carnival* [2011] EWCA Civ 1237; [2012] 1 Lloyd's Rep 1 and see case comment by A Tettenborn, “Passenger Injury claims: Plain Sailing or Not?” 18(1) (2012) JIML 20.

²³⁸ [2017] CSIH 13; 2017 S.C. 361; Court of Session (Inner House, Extra Division).

²³⁹ Athens 1974 art 16.3.

²⁴⁰ See Prescription and Limitation (Scotland) Act 1973 s 18(3).

²⁴¹ Represented by his guardian.

²⁴² The appellate court.

²⁴³ Prescription and Limitation (Scotland) Act 1973 s 18(3) reads: “Where the pursuer is a relative of the deceased, there shall be disregarded in the computation of the period specified in subsection (2) above any time during which the relative was under legal disability by reason of nonage or unsoundness of mind.”

²⁴⁴ See [2017] CSIH 13; 2017 S.C. 361 [16-20] and [26-30].

²⁴⁵ See <<https://www.supremecourt.uk/cases/uksc-2017-0103.html>> (accessed 07.08.18).

²⁴⁶ [1996] 1 WLR 1107; [1996] 2 Lloyd's Rep 26, CA.

²⁴⁷ S 33.

²⁴⁸ See [2017] CSIH 13; 2017 S.C. 361 [29].

²⁴⁹ See [2018] UKSC 52 and see Press Release and Judgement Summary at <<https://www.supremecourt.uk/cases/uksc-2017-0103.html>> (accessed 18.10.18).

Whilst clarity is now achieved by the Supreme Court judgment, the latter two cases illustrate problems of delineation and embedding that could easily be tackled by implementing legislation, thus avoiding any doubt as to the boundaries of the convention framework and supporting domestic law.

4 Conclusion

Athens has brought welcome simplification to passenger claims. Jurisdiction, recognition and enforcement are facilitated and forum shopping curtailed. Athens enshrines the most modern passenger liability regime, in particular with respect to claims for death of and personal injury, where liability in some circumstances is strict and with its core level of liability being covered by compulsory insurance and furthermore inclusive of claimant's right to direct action against the insurer. It allows contracting states to make their own policy decisions whether higher limits for death and personal injury claims should be provided, compared to the internationally agreed liability limit. However as with every legal system the details and boundaries have to be tested. To this extent, good progress has been made and examples have been provided via case law from the UK. Insofar the importance of wide reporting of Athens cases is essential, and in need of attention in order to aid efforts in harmonisation. States considering ratifying the Convention should aim to clarify any interpretation and boundary issues by clear implementing legislation.

A welcome direction over time may be given by rulings of the Court of Justice of the European Union should Member States be willing to put forward referrals for preliminary rulings on matters of Athens. In the interest of international harmonisation, these may be persuasive beyond the EU borders.

However, large areas of passenger law and law relevant to the cruise industry are outside the ambit of Athens and remain to be covered by consumer law or, where applicable, the law relating to package travel, such as questions of adequacy of cabins, food and entertainment and the fulfilment of contractual promises, as well as liability for passengers on shore trips. Countries opting into the Athens regime thus have the freedom and the need to embed Athens into their passenger and consumer protection frameworks. On the example of the interplay of Athens with EU Passenger Rights and EU consumer law it has been shown that Athens 2002 can beneficially supplement a broad pro-consumer policy framework.