

Temporal Limits of the Athens Regime – Potential Conflicts Between International and Domestic Legal Regimes

4.1 Introduction

Carriers of passengers enjoyed the benefits of “freedom of contract” until the latter part of the twentieth century. They abused them shamelessly, often excluding their liability to passengers in its entirety.¹ All this changed with the introduction of an international regime in 1974. The Convention relating to the Carriage of Passengers and their Luggage by Sea of 13 December 1974 (commonly known as the Athens Convention 1974), came into existence with a view to providing a uniform legal framework for passengers carried on international sea voyages.²

The liability of the carrier under the Athens Convention 1974 is fault-based. When death of or injury to a passenger, or loss of or damage to cabin luggage, arises from a non-shipping-related incident (sometimes called a hotel-type incident), the passenger has to prove both fault attributable to the carrier and a causal connection between it and the damage.³ When, on the other hand, death, injury or cabin baggage loss arises from a shipping-related incident, the burden of proof shifts; the carrier is presumed to be at fault, and to avoid liability must prove that it took all necessary precautions to avoid the accident.⁴ The carrier’s fault is also presumed in respect of loss of or damage to hold baggage, irrespective of the nature of the incident from which the loss or damage resulted.⁵ The 1974 Convention allows carriers to limit their liability,⁶ though the limits are generally regarded as low by contemporary standards

1 Not so with air carriers. Right from the outset, the 1929 Warsaw Convention in Art. 23 nullified any (contractual) provision relieving the carrier of liability or reducing the liability limits of the Convention. This continued despite modifications, most notably in 1955 and 1961. The 1999 Montreal Convention contains a similar prohibition in Art. 26: “[a]ny provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in this Convention shall be null and void ...”.

2 As of May 2018, the following countries are party to this Convention: Argentina, Bahamas, Barbados, China, Congo, Dominica, Egypt, Equatorial Guinea, Estonia, Georgia, Guyana, Jordan, Liberia, Libya, Luxembourg, Malawi, Nigeria, Poland, Russia, St Kitts & Nevis, Switzerland, Tonga, Ukraine, Vanuatu, Yemen, Hong Kong and Macau (the last two as associate members). The 1974 regime has been incorporated, sometimes with higher limits, into the national laws of some states, such as Canada and Vietnam, even though these states have not officially ratified the convention. Note that this list excludes a large number of states that have now denounced the 1974 Convention and ratified the 2002 Protocol.

3 See Arts. 3(1) and (2) of the Athens Convention 1974.

4 Art. 3(3). This refers to an incident arising from or in connection with the shipwreck, collision, stranding, explosion or fire or defect in the ship. The term “shipping-related incident” is an unofficial one.

5 See Art. 3(3) of the Athens Convention 1974.

6 See Arts. 7–8.

(for instance, for personal injury and death claims the sum is 46,666 SDRs).⁷ It also enacts a two-year time-bar,⁸ and provides a number of alternative jurisdictions in which the passenger can bring an action, provided that the court is located in a State Party.⁹

The Athens Convention 1974 was not perfect. In an attempt to improve the rights of passengers and make the Athens regime more attractive for other states to ratify, a Protocol¹⁰ to vary it was adopted in 2002 at a diplomatic conference in London (the varied Convention being commonly known as the Athens Convention 2002).¹¹ The Athens Convention 2002 did a number of things, such as introducing a compulsory insurance regime with direct actions against insurers,¹² increasing the limits for luggage losses,¹³ amending the time-bar regime to allow its suspension¹⁴ and allowing supranational organisations such as the European Union (EU) to ratify it.¹⁵ Most importantly, however, it introduced fundamental changes to the liability regime.¹⁶ The new regime provides a two-tier liability system for a passenger's death or personal injury caused by shipwreck, capsizing, collision or stranding of the ship, explosion or fire in the ship or defect in the ship.¹⁷ Under the first tier, the carrier is strictly liable up to 250,000 SDRs,¹⁸ unless it proves that the accident was caused solely by an act of war, hostilities, civil war, insurrection or some exceptional natural phenomenon, or that it was wholly the result of an act or omission by a third party committed with intent to cause it.¹⁹ Fault is otherwise irrelevant. Above 250,000 SDRs liability is fault-based, with a reversed burden of proof, up to 400,000 SDRs (the maximum liability expressed in the amended Art 7).²⁰ No change is made, however, to the liability regime for personal injury and death arising out of non-shipping incidents: these remain subject to a simple fault regime.

7 See Art. 7.

8 See Art. 16.

9 Art. 17.

10 Protocol of 2002 to the Athens Convention Relating to the Carriage of Passengers and Their Luggage by Sea, 1974, Nov. 1, 2002, IMO Doc.: LEG/CONF. 13/20 of 19 Nov. 2002, available at <http://folk.uio.no/erikro/WWW/corrgr/dipcon/20.pdf> (last tested on 1 March 2018).

11 For discussion on the Athens Convention 2002, see B. Soyer, "Sundry Considerations on the Draft Protocol to the Athens Convention Relating to the Carriage of Passengers and Their Luggage by Sea 1974" (2002) *J. Mar. L. & Com.* 519; E. Røsæg, "News under the Athens Sun – New Principles and Lost Opportunities of the Athens Convention 2002" (2004) 46 *Scandinavian Stud. L.* 153; R. D. Peltz, "The Athens Convention Revisited" (2012) *J. Mar. L. & Com.* 491.

12 See Art. 12.4bis of the Athens Convention 2002.

13 Art. 8.

14 Art. 16. This only applies if the forum allows suspension. England generally does not.

15 Art. 19.

16 Art. 3.

17 What used to be known informally as a shipping-related incident, and is now officially christened a "shipping incident": Art. 3(5)(a).

18 The carrier is required to obtain compulsory insurance in respect of the death of and personal injury to passengers up to this figure (Art. 4bis).

19 Art. 4. Similar exceptions appear in other conventions adopting a strict liability regime; see, e.g., Art. III of the International Convention on Civil Liability for Oil Pollution Damage 1992; Art 7(2) of the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea 2010 (not yet in force).

20 Art. 3(1).

The Athens Convention 2002 officially entered into force on 23 April 2014.²¹ However, for EU Member States matters were different, since the EU had already adopted it into EU law by virtue of a 2009 Regulation.²² The Regulation, moreover, did not only apply the uniform liability regime as laid down in the Convention. In addition it extended the scope of application of the Convention regime to domestic carriage and inland waterways;²³ removed the power of Member States to apply higher limitations of liability, although this was allowed in the Convention itself;²⁴ and introduced a system of interim payments for passenger injury and death.²⁵

Currently, the Athens regime (either 1974 or 2002) plays a significant role in the carriage of passengers, especially on international voyages. Apart from the fact that the Athens Convention 2002 applies throughout EU and several non-EU states have incorporated it into their legal systems, most carriage contracts issued by cruise lines expressly incorporate the Athens Convention 1974.²⁶ If the Athens regime is applicable in a particular instance, it thus provides a comprehensive liability regime with monetary limits and time-bars.

In cases where the Athens regime is not applicable by force of law or contractual agreement, the relevant national law is likely to be that of the first port of call. This could potentially alter the balance between the carrier and the passenger by introducing a different liability regime. Passengers might in some cases, for example, benefit from bringing their claim outside the Athens regime, for example to escape the short Athens time-bar. Conversely, carriers often prefer to respond to passenger claims under the Athens regime so as to be able to benefit from that time-bar and the monetary limits on liability.

Disputes concerning the temporal scope of the Athens regime have already given rise to litigation and the authors are of the view that further difficulties are likely to arise given the ambiguous nature of certain of its provisions. The purpose of this chapter is not to provide a critical analysis on the Athens liability regime, something already done elsewhere,²⁷ but to discuss the awkward issue of when it will govern a given passenger claim. In the course of the analysis, reference will also be made to national and regional legislation, and also to some other international regimes dealing with carriage of passengers by different modes of transport.

21 As of May 2018, the member states to the Athens Convention 2002 are: Albania, Belgium, Belize, Bulgaria, Croatia, Denmark, Finland, France, Greece, Ireland, Latvia, Lithuania, Malta, the Marshall Islands, Montenegro, Netherlands, Norway, Palau, Panama, Portugal, Romania, Serbia, Slovakia, Slovenia, Spain, Sweden, Syria, the United Kingdom and the EU.

22 Council Regulation 392/2009 of 23 April 2009, on the Liability of Carriers of Passengers by Sea in the Event of Accidents, 2009 O.J. (L 131) 24 also makes the following major changes in this area.

23 Art. 1.

24 Art. 4.

25 Art. 5.

26 See, for example, Royal Caribbean Cruise/Cruisetour Contract, cl 11 at https://secure.royalcaribbean.com/content/en_US/pdf/CTC_Not_For_BR.pdf (last tested 1 March 2018).

27 See B. Soyer and G. Leloudas, "Carriage of Passengers by Sea: A Critical Analysis of the International Regime". forthcoming in 26 *Michigan State University International Law Review* (2018).

4.2 Temporal scope of the Athens Convention

4.2.1 *Inherent limits of the Athens regime*

4.2.1.1 Contract of carriage

Under the Athens regime (in both its 1974 and 2002 forms), the Convention is applicable if, and only if, a contract of carriage is made by or on behalf of a carrier for the carriage of a passenger, with or without luggage, on a ship.²⁸ Not surprisingly, the drafters made no attempt to define what a contract is, leaving this question to be answered by the national laws of the Contracting States. This may create difficulties in common law jurisdictions, where it is necessary for a valid contract that both parties provide consideration. Is it possible, for example, to say in English law that a passenger who obtains a free promotional ticket from the carrier is carried under a contract of carriage?²⁹ The legislation incorporating the Athens Convention 1974 into UK law partly answers the question by stipulating that “any reference in the Convention to a contract of carriage excludes a contract of carriage which is not for reward.”³⁰ But problems could still arise. It is not uncommon practice for ferry operators to issue tickets free of charge to youngsters travelling with adults. In that case, would the ticket issued for the youngster come under the Convention regime at all, since technically the contract is not for reward? The question is finely balanced, but it is suggested that the Convention will apply. Since the young person is issued with a ticket only when an adult ticket is purchased, it seems the better view that the adult passenger’s payment would provide adequate consideration for the child’s ticket too and take it out of the category of carriage not for reward.³¹

A problem of this nature is unlikely to arise in the context of the air carriage conventions. This is because both the 1999 Montreal Convention and the older Warsaw Convention system provide explicitly that they are applicable to gratuitous carriage performed by air transport undertakings.³² The term “air transport undertaking” is not defined in the conventions, leaving its interpretation to national laws. In the UK the term is currently defined, for regulatory purposes, in the Transport Act 2000 as an undertaking that provides “services for the carriage by air of passengers or cargo for

28 By virtue of Art. 2 of the Athens Convention 1974, the voyage must be of an international character but it is open to Contracting States to extend the application of the Convention to domestic voyages. As mentioned above, the EU Regulation does just this in respect of Member States.

29 Conversely, under Art. 1 of the Convention on the Contract for the International Carriage of Passengers and Luggage by Road 1979, a passenger has been described as “any person who, in the performance of a contract of carriage made by him or on his behalf, is carried either for reward or gratuitously by a carrier”.

30 Merchant Shipping Act 1995, Sched. 6, Art. 9.

31 Note that the Merchant Shipping Act 1995, Sched. 6, Art. 9, merely refers to carriage “not for reward”: in the converse case of carriage for reward, it does not say who must provide the reward. One suspects this is intentional: if an employer buys a ticket for an employee, it would be bizarre if the latter were not within the Athens regime merely because he had not personally paid. It is worth noting that the Canadian enactment of the Athens Convention extends the application of the Convention to all passengers of commercial or public craft carried by water, whether or not they are being carried pursuant to a contract, see, s.37(2) of Marine Liability Act 2001. However, the Convention would not apply when a visitor makes use of a boat for accommodation purposes: *Buhlman v Buckley* (2011), 330 D.L.R. 4th 755.

32 Art. 1 of the Montreal Convention and Art. 1(1) of the Warsaw Convention.

hire or reward”, a definition that is not particularly helpful in our case.³³ A consensus nevertheless seems to have developed among courts that to be an “air transport undertaking”, the relevant entity or person is required to “provide air carriage as part of a commercial enterprise even though aviation is not its principal activity”;³⁴ or “even if air transport is only a small or subordinate part of the whole business”.³⁵ It has even been suggested that the only flights excluded are “casual, isolated flights when a free ride is afforded by an owner not engaged in the business (enterprise) of flying”.³⁶ Still, there is no doubt that a commercial air carrier would qualify as such and the transport of an under-two-year-old for free would trigger the application of the aviation conventions.

Similarly, Art. 1.1 of the Uniform Rules concerning the Contract of International Carriage of Passengers by Rail (CIV) 1999 provides that the Rules are applicable “to every contract of carriage of passengers by rail for reward or *free of charge*”.³⁷ The express wording makes it clear that in the context of international rail carriage the holder of free ticket will be treated no differently from a paying passenger.³⁸

A more difficult question arises when a pregnant woman sustains injuries while she is carried on board a vessel that result in the child being later born with disabilities. There is no doubt that under English law the child would be able to sue the carrier.³⁹ But is such a claim within the Athens system? The claim will fall within the regime if the unborn child can be regarded as being carried as a passenger, or possibly if it can be viewed as a third-party beneficiary of the mother’s contract.⁴⁰ Courts might be attracted to this solution on the basis that it was unacceptable that a mother injured during carriage should be subjected to a different legal regime from her unborn child. But it seems difficult to justify as a matter of interpretation: a contract to carry a pregnant woman would normally be regarded as a contract to carry one person, not two (or more). If this is so, then the child’s claim is outside the Athens system altogether.⁴¹ In England it will thus be able to sue under the relevant legislation,⁴² with the disadvantage that it cannot take advantage of the strict liability provisions of the

33 See s.95(5) of the Transport Act 2000. The following more helpful definition was included in the Air Navigation Order 2005 (SI 1970/2005), Art. 155: “Air transport undertaking means an undertaking whose business includes the undertaking of flights for the purposes of public transport of passengers or cargo.” But this disappeared in the Air Navigation Order 2009 (SI 2009/3015) and the current Air Navigation Order 2016 (SI 2016/765).

34 E. Giumulla et al, *Montreal Convention* (Kluwer Law, 9th Supp, 2014), paras.1–20.

35 D. McClean et al, *Shawcross and Beaumont: Air Law* (Lexis Nexis, Issue No. 159, 2018), Division VII, at para.312.

36 *Bates Block v Compagnie Nationale Air France*, 386 F.2d 323, 333 (5th Cir. 1967).

37 Uniform Rules concerning the Contract of International Carriage of Passengers by Rail (CIV) – Appendix A to the Convention concerning International Carriage by Rail (COTIF) 1999 (emphasis added).

38 It is interesting to note that the equivalent provision in the Uniform Rules concerning the Contract of International Carriage of Goods by Rail (CIM) provides for the application of the convention only in contracts of carriage of goods for reward. See Art. 1.1; Appendix B to the Convention concerning International Carriage by Rail (COTIF) 1999.

39 Congenital Disabilities (Civil Liability) Act 1976. This was also the position at common law: see *Burton v Islington HA* [1993] Q.B. 204 and cf *X & Y v Pal* (1991) 23 N.S.W.L.R. 26.

40 In English law under the Contracts (Rights of Third Parties) Act 1999. Note that s.1(3) stipulates: “The third party... need not be in existence when the contract is entered into.”

41 See Art. 14 of the Athens Convention 1974

42 That is, the Congenital Disabilities (Civil Liability) Act 1976, referred to above.

Convention, but conversely will escape the effects of the Convention time-bar and can rely on the global, rather than the Convention, limitation figures.⁴³

The authors know of no reported cases of this nature under the aviation conventions. Yet the recent decision of the ECJ in the *Air Baltic* case⁴⁴ might be relevant, as it confirmed that a contract of carriage by air can be concluded with a third party for the benefit of the actual passenger.⁴⁵ In this case the tickets were paid for by the employer, but issued in the names of its employees, who were the actual passengers transported. The air carrier was held liable to the employer for damage occasioned by delay to the carriage of its employees.

Still, it would stretch the boundaries of the aviation conventions to use this decision to argue that the unborn child was a beneficiary of the mother's contract of carriage. First, case law is clear that a passenger, gratuitous or otherwise, must have consented to the carriage in question by means of a contract. The existence of such consent explains why the aviation conventions have been held not to apply to "stowaways, persons on the flight to be expelled from the state of departure, persons employed by the carrier to carry out routine maintenance, flight attendants, and student pilots ... [T]hey have not contracted for carriage as such ..."⁴⁶ What the CJEU decision seems to suggest is that, although it is irrelevant whether the third, contracting party is a passenger or not, the beneficiary must qualify as a passenger. Secondly, air tickets usually bear the name of the passenger and do not permit substitutions or transfers.⁴⁷ As such, it is difficult to identify the unborn child as a member of a class or of a particular description under s.1 of the Contracts (Rights of Third Parties) Act 1999.

If the action under the aviation conventions fails, it is doubtful whether a claim under the Congenital Disabilities Act 1976 would be successful. The concept of exclusivity is central to the application of the aviation conventions.⁴⁸ The prevailing view argues that the claimant is precluded from bringing a claim against the carrier under national law for an incident that took place during international carriage, even when the carrier is not liable under the conventions. English courts have demonstrated remarkable consistency in the application of the exclusivity principle.⁴⁹ Most recently,

43 In maritime law, carriers can benefit from global limitation. This essentially allows carriers to limit their liability for all claims emerging from an incident. The Athens Convention, on the other hand, allows carriers to limit their liability with regard to each passenger claim (unit limitation). If a state is party both to the Athens Convention and a global limitation regime, such as the 1976 Convention on Limitation of Liability for Maritime Claims (LLMC 1976), if the combined amount of all the claims exceeds the fund set by the global limitation regime, all the claims (including passenger claims under the Athens Convention) will be reduced proportionately. Protocol of 1996 to Amend LLMC 1976 allows State Parties to make a reservation with regard to passenger claims under the Athens Convention (96 Art. 15bis.3). This means that the limits set by the Athens Convention will not be susceptible to further reduction under the global limitation regime.

44 *Air Baltic Corp. AS v Lietuvos Respublikos Specialiuju Tyrimu Tarnyba (Case C-429/14)* [2016] 3 C.M.L.R. 1; [2016] 1 Lloyd's Rep. 407.

45 E. Giumulla et al, *Montreal Convention* (Kluwer Law, 9th Supp, 2014), paras.1–26.

46 See M. Clarke, *Contracts of Carriage by Air* (Lloyd's List, 2nd ed., 2010), p.38 with reference to case law.

47 See, e.g., condition 3.a of the General Conditions of Carriage of British Airways (BA) available at <https://www.britishairways.com/en-gb/information/legal/british-airways/general-conditions-of-carriage> (last tested on 1 March 2018).

48 Montreal, Art. 29; Warsaw, Art. 24.

49 See, e.g., *Sidhu v British Airways Plc.* [1997] AC 430, [1997] 2 W.L.R. 26 (HL).

the Supreme Court in the case of *Stott v Thomas Cook Operators Ltd.*⁵⁰ dismissed the claim of a disabled passenger against the tour operator brought under the UK Disability Regulations.⁵¹ The relevant incident took place on board the aircraft, yet the claim was brought under the Regulations because they permit recovery for injury to feelings, which is not recoverable under the Montreal Convention (or the Warsaw Convention). The Supreme Court was quick to dismiss the claim by applying the principle of exclusivity:

Should a claim for damages for ill treatment in breach of equality laws as a general class, or, more specifically, should a claim for damages for failure to provide properly for the needs of a disabled passenger, be regarded as outside the substantive scope of the Convention? As to the general question, my answer is no ...⁵²

It is clear that the matter (i.e. whether the international carriage regime(s) should govern an action brought by an unborn child injured during the course of transit) remains unsolved under both the sea and the air convention regimes. It is fair to say that authorities in the context of carriage by air seem to suggest that the international regime should govern such an action. This would be the preferred solution of the authors under the Athens regime too.

4.2.1.2 Sea-going ship

Art. 1(3) of both versions of the Athens Convention defines a ship as a “sea-going vessel, excluding an air-cushion vehicle”.⁵³ Yet the Convention provides no further guidance as to the physical attributes a craft should carry to be considered as a “ship”.⁵⁴ Similarly, it is not clear what the term “sea-going” means. For example, would the Convention apply to passengers who purchase tickets for a ride on an inflatable raft?⁵⁵ The answer depends on (i) whether such a craft can be considered a “ship” under national law⁵⁶ and (ii) whether it is adequate that the craft is capable of proceeding to

50 [2014] UKSC 15, [2014] AC 1347.

51 Civil Aviation (Access to Air Travel for Disabled Persons and Persons with Reduced Mobility) Regulations 1895/2007 implementing Commission Regulation (EC) 1107/2006 of 5 July 2006, Concerning the Rights of Persons with Reduced Mobility when Travelling by Air, 2006 O.J. (L 204) 1.

52 *Stott v Thomas Cook Operators Ltd.* [2014] UKSC 15, [2014] AC 1347, at [60]–[61] (Lord Toulson). For a detailed analysis of the case see below p.00.

53 Thus excluding hovercraft. In the UK, the rights of hovercraft passengers and their baggage are covered by the Carriage by Air Act 1961 as modified by Sched. 1 of the Hovercraft (Civil Liability) Order 1986 (SI 1305/1986) as amended by the Hovercraft (Civil Liability) (Amendment) Order 1987 (SI 1835/1987).

54 The position is different under some other international conventions. For example, under the IMO’s International Regulations for Preventing Collisions at Sea, r. 3(a), a vessel is defined as “including every description of water craft ... used or capable of being used as a means of transportation on water”.

55 It was held in *McEwan v Bingham (t/a Studland Watersports)* [2000] CLY 2001 (Cty. Ct. Hove) that a 17-foot inflatable banana raft which was towed in a bay by a marine assault craft was not a vessel.

56 As far as law that applies in England and Wales is concerned, the most general definition of the term can be found in s.313 of the MSA 1995. This section indicates that the term “ship” includes every description of vessel used in navigation. Over the years, British judges have equated navigation with controlled/planned travel over the water (*Steedman v Schofield* [1992] 2 Lloyd’s Rep. 163 (QB) and *R. v Goodwin* [2005] EWCA (Crim) 3184, [2006] 1 Lloyd’s Rep. 432) and set their face against classifying craft used purely for pleasure purposes (in Kenneth Grahame’s terms, “messaging about in boats”) as vessels capable of navigation (*Curtis v Wild* [1991] 4 All ER 172 (QB)). See, on the other hand, *Michael v Musgrave (The Sea Eagle)* [2011] EWHC (Admlty) 1428 where a rigid inflatable boat was treated as a ship within the scope of the Athens Convention 1974. See also *Feest v South West Strategic Health Authority* [2015] EWCA (Civ) 708; [2016] Q.B. 503.

sea, or essential that it actually goes to sea.⁵⁷ If the latter is correct, a vessel operated within a harbour to provide sightseeing tours for tourists will possibly not be regarded as sea-going. Therefore, there is a genuine possibility that in case of an accident, passengers who purchase a ticket for a ride on an inflatable raft in a harbour in Barbados will be treated differently than those who enjoy a similar ride off the rugged coast of Dominica (both of which states are parties to the Athens Convention 1974).

4.2.1.3 Carrier

A final point on the scope of the Athens Convention system relates to the definition of a “carrier”. By virtue of Art. 1, a “carrier” means a person by or on behalf of whom a contract of carriage has been concluded, whether the carriage is actually performed by him or someone else (a “performing carrier”). The definition of “carrier” is very wide, suggesting that anybody who has been involved in the process of establishing a contractual relationship with the passenger could possibly, regardless of their status, be regarded as the contractual carrier.⁵⁸ Therefore, there is no reason why a tour operator could not be treated as “carrier” under the Convention even though he does not perform any part of the transport himself. In fact, authorities tend to agree that a tour operator could be treated as a “contracting carrier” under the Athens regime as long as it assumes responsibility for the performance of the contract including the sea leg.⁵⁹ But a travel agent who does not undertake, but merely arranges, carriage is different.⁶⁰

This is not necessarily an adverse development for passengers, as it enables them in principle to bring an action against tour operators as well as carriers in cases of mishaps occurring at sea. But some uncertainty may arise where the sea travel forms part of a package holiday. Assume that a tour operator arranges a package holiday for a consumer including sea carriage and the consumer is injured during the sea leg of the

⁵⁷ In *Salt Union Ltd. v. Wood* [1893] 1 QB 370 a river steamer used to carry salt on the rivers Weaver and Mersey between Winsford and Liverpool was held to be a non sea-going vessel as the steamer never set out to go anywhere other than inland waters. See also *Union S.S. Co. of New Zealand Ltd. v Commonwealth* (1925) 37 CLR 130 and *Kirmani v Captain Cook Cruises Pty Ltd. [No 1]* (1985) 159 CLR 351 (Austl.).

⁵⁸ Rather as under the Hamburg Rules 1978 on carriage of goods by sea, which provide for a similarly expansive definition of the term “carrier”.

⁵⁹ HHJ Hallgarten QC in *Lee v Airtours Holidays Ltd. & Another* [2004] 1 Lloyd’s Rep. 683 (Cent. London Cty. Ct.) made the following observation, at [32]: “I do not consider that the [Athens] Convention is concerned with *status* at all: there is nothing which confines its application to concerns in the nature of shipping lines. Basically what emerge from the Convention are two categories: (1) the carrier—being the person by or on whose behalf a contract of carriage has been concluded; and (2) the performing carrier—being the person to whom such carriage is entrusted. As I see it, the essential question is whether, as between the claimants and the [tour operators] there was a contract of carriage by sea: if so then the [tour operators] assumed responsibilities as carriers, with the word carrier being used in a non-technical sense ... The matter is very largely one of impression, but for my part I see no difficulty in saying that the [tour operators] were carriers, in that the agreement with the claimants included obligations pertaining to carriage by sea and to that extent, it represented a contract for the carriage by sea of the claimants by the [tour operators] ...” See also *Norfolk v My Travel Grp. Plc.* [2004] 1 Lloyd’s Rep. 106 (Plymouth Cty. Ct.).

⁶⁰ See *Lawrence v NCL (Bahamas) Ltd (The Norwegian Jade)* [2017] EWCA Civ 2222 whether a travel agent or the ship operator was the contractual carrier under the Athens regime. The Court of Appeal was of the firm view that the contractual carrier was the operator as the travel agent had duly informed the passenger that it was acting as agent and the contract was subject to the operator’s terms and conditions.

journey as a result of negligence of the performing carrier. The consumer chooses to bring an action against the tour operator under the Package Travel, Package Holidays and Package Tours Regulations 1992.⁶¹ Under Reg 15(2) of these Regulations, the tour operator is liable to the consumer for any damage caused by him by the failure to perform the contract or improper performance of the contract unless the failure or improper performance is due neither to any fault of that party, nor to that of another supplier of services; the tour operator conversely can limit his liability in accordance with relevant international conventions.⁶²

So far so good. However, the EU Regulation applying the 2002 Athens regime applies it to non-international voyages too. So what if a tour operator arranges a package holiday that involves a trip from, say, Piraeus to Mykonos (also in Greece) and the consumer is injured during that voyage? Can the tour operator, sued under the Package Regulations 1992, limit his liability? Reg 15(3) of the Package Regulations 1992 makes reference only to international conventions, so one might plausibly suggest that an EU Regulation extending the scope of an international convention to inland voyages would not come under its scope; if so, the tour operator would not be able to limit.

This is not a problem that is unique to sea carriage. It could also arise in connection with air carriage, in the context of a similar EU Regulation⁶³ which extends the application of the Montreal Convention to domestic air carriage within EU Member States. However, the wording adopted by this Regulation differs from that of the Regulation applying the Athens regime⁶⁴ in two important respects. First, Art. 3 provides that “[t]he liability of a Community air carrier in respect of passengers and their baggage shall be governed by all provisions of the Montreal Convention relevant to such liability”. In that respect, the Regulation acts as a conduit imposing the Montreal Convention regime to all European air carriers, irrespective of the law applicable to the actual carriage in question. As such, carriage by British Airways from the UK to Liberia will actually be governed by the Montreal Convention on the basis of the Regulation, although this is strictly speaking a Warsaw Convention route.⁶⁵ The effect of the Regulation is, therefore, to “oblige Member States to apply the Montreal Convention in cases where they are under a treaty obligation to apply some other instrument in the Warsaw system”.⁶⁶ The policy reason supporting such extension is expressed in the Preamble to the Regulation: “it is impractical for Community air carriers and confusing for their passengers if they were to apply different liability regimes

61 Hereinafter referred to as the Package Regulations 1992. These Regulations give effect to the Package Travel, Package Holidays and Package Tours Directive 1992 (90/314/EEC).

62 Reg 15(3). The preamble of the Directive (90/314/EEC) refers to the Warsaw Convention on Carriage by Air, the Bern Convention on Carriage by Rail, the Athens Convention and Paris Convention on the Liability of Hotel Keepers).

63 Council Regulation 889/2002 of 13 May 2002 amending Council Regulation (EC) No 2027/97 on air carrier liability in the event of accidents.

64 Regulation 392/ 2009 referred to above.

65 See E. Giumulla et al, *Montreal Convention* (Kluwer Law, 9th Supp, 2014), paras.1–15. The Warsaw Convention would otherwise apply because that is the latest Convention that both the UK and Liberia are parties to.

66 D. McClean et al, *Shawcross and Beaumont: Air Law* (Lexis Nexis, Issue No. 159, 2018), Division VII, para.214.

on different routes across their networks”.⁶⁷ Secondly, Art. 1 of the Regulation applying the Montreal Convention provides that the Convention will apply to “carriage by air within a single Member State”. In that respect, the wording supports the interpretation that the international convention is directly applicable to the domestic carriage in question, satisfying as such the relevant provision of the Package Regulations 1992. Therefore, in the context of domestic carriage within the EU, a tour operator sued under the Package Regulations 1992 would still be able to rely on the provisions of the Montreal Convention.

The difficulty in the context of the Regulation applying the Athens Convention stems from a subtle difference in wording: it states that the Regulation aims to apply the Athens Convention “to carriage by sea within a single Member State” rather than stating that the liability of the sea carrier shall be governed by the provisions of the Convention.⁶⁸ Still, the authors believe that the said Regulation probably does satisfy the relevant provision of the Package Regulations 1992, for two reasons. First, Art. 1(2) of the Regulation explicitly states that it “extends the application” of the Athens Convention to domestic sea carriage. Secondly, the Regulation does not purport to amend the Athens Convention; as with the provision dealing with the Montreal Convention, it simply expands the Convention’s scope of application and imposes a few additional requirements (for example, regarding advance payments and provision of information to passengers). Courts will thus be required to limit the liability of the sea carrier by reference to the limits of the Athens Convention in a case of an accident taking place in a Community cruise ship between Piraeus and Mykonos with the Regulation being the enabling (but not amending) mechanism for such limitation. As such, the authors believe that the Package Regulations need to be interpreted in a manner that extends the application of the Athens Convention to domestic carriage via the relevant Regulation. That said, there is no authority to support the authors’ contention and this issue remains a live one.

A more difficult question is how any conflict between the Package Regulations and the Athens regime could be resolved if a passenger brings an action against the tour operator for personal injury that occurs on the sea leg. Assuming that a tour operator qualifies as a contracting carrier under the Athens regime, would the basis of its liability be the Athens regime solely? Or should the role of the Athens regime be restricted to the limitation provisions of the Athens regime, with all other matters, including liability, being governed by the Package Regulations?

HHJ Hallgarten QC in *Lee v Airtours Holidays Ltd*⁶⁹ held (wrongly we submit) that the latter solution was correct. There, the claimants purchased from the tour operator a package holiday involving a short stay in Singapore, a cruise on the liner *Sun Vista* and stays in Penang and Kuala Lumpur. After a five-day stay in Singapore, the claimants boarded the *Sun Vista*; on the voyage she caught fire and was abandoned, later sinking with all the claimants’ belongings save for the clothing they stood up in (and a video camera). The claimants brought an action against the tour operator under Regulation 15 of the Package Regulations seeking damages for personal injury,

⁶⁷ Para.13 of the Preamble of Regulation 889/2002.

⁶⁸ Art. 2.

⁶⁹ [2004] 1 Lloyd’s Rep. 683.

including psychiatric damage, compensation for loss of their possessions (including valuables) and damages for non-pecuniary loss arising out of disappointment. The tour operator admitted liability but argued that its liability for personal injury and loss of property was limited under Arts. 7 and 8 of the Athens Convention 1974, incorporated into English law by s.183 of the MSA 1995, and that liability for the loss of the valuables was excluded entirely by reference to Art. 5 of that Convention.⁷⁰ Having recognised the existence of a potential conflict between relevant provisions of the Package Regulations and the Athens Convention on liability issues, the judge proceeded on the basis that in so far as domestic legislation conflicted with regulation taking effect under s.2(2) of the European Communities Act 1972, the latter had to prevail.⁷¹

The judge here clearly took the view that if and when the liability regime of the Convention was set aside, all its ancillary provisions should also be disregarded.⁷² There is some logic to this, if one considers that the main objective of the Athens Convention is to provide a liability regime for passengers, that its ancillary provisions take colour from this context and that if the underlying context is overridden, there is no longer any role for them to play. On this approach, the only role the Athens Convention 1974 could play would be to give the tour operator the opportunity to incorporate one particular aspect of the Convention – that relating to limitation of liability – which, absent Regulation 15(3) of the Package Regulations 1992, would be wholly inapplicable.

It is the view of the authors, however, that a tour operator who qualifies as a contracting carrier should be able to take advantage of the entire set of provisions of the Athens Convention, and not just its liability limitation provisions (which is what Reg 15(3) of the Package Regulations prescribes). In that respect, we respectfully disagree with the conclusion in *Lee v Airtours Holidays Ltd* that “the regulations represent an *alternative regime*”⁷³ to the Athens Convention. Our reasons are as follows.

First, Reg 15(3) of the Package Regulations opens the door to the application of the limitation provisions of the Athens Convention to tour operators, in principle prioritising the Convention over the application of the Regulation in cases where the Convention is contractually incorporated. The draftsman possibly felt the need to incorporate Reg 15(3) into the Package Regulations 1992 in order to afford tour operators a monetary limitation that the international carriage regimes would have afforded to them in a case when the relevant carriage convention did not apply by force of law. On that premise, we agree with the sentiments of HHJ Hallgarten to the extent that contractual incorporation of the Convention into the agreement does not set the liability scheme of the Regulation aside, except for the provisions on limitation of liability, if the tour operator is not to be regarded as the carrier under the relevant convention. However, the matter is rather different when a tour operator qualifies as a contracting carrier under the sea or air conventions. In that case, the tour operator can

⁷⁰ “The carrier shall not be liable for the loss of or damage to monies, negotiable securities, gold, silverware, jewellery, ornaments, works of art, or other valuables, except where such valuables have been deposited with the carrier for the agreed purpose of safe-keeping in which case the carrier shall be liable up to the limit provided for in paragraph 3 of Art 8 unless a higher limit is agreed upon in accordance with paragraph 1 of Article 10.”

⁷¹ Following cases such as *Hunt v London Borough of Hackney* [2002] EWHC 195 (Admin), [2003] Q.B. 151.

⁷² See [2004] 1 Lloyd’s Rep. 683, at [20].

⁷³ [2004] 1 Lloyd’s Rep. 683, at [20].

take advantage of the respective convention in full even in the absence of its contractual incorporation into the agreement. Any contrary interpretation would amount to a clear breach of the exclusivity provisions of the relevant conventions.

Therefore, it is submitted that the conflict is not between the domestic statute incorporating the Athens Convention into English law and the Package Regulations 1992, but between the Regulations and the exclusive applicability of the air and sea conventions. We believe that this conflict should be resolved in favour of the conventions, on the basis that they provide the exclusive legal remedy to a claimant for an incident that arises during carriage by air or sea. In other words, “any action for damages, however founded against the contracting or actual carrier can only be brought subject to the conditions and limits of liability set out in the relevant treaty”.⁷⁴

As we mentioned earlier, English courts have been consistent in applying the exclusivity provisions of the Warsaw and Montreal Conventions,⁷⁵ even in cases where they hold that the carrier is not liable under the conventions, meaning that the claimant loses out. In the leading case of *Sidhu v British Airways Plc*⁷⁶ Lord Hope held that the Warsaw Convention

extends ... to all claims made by the passenger against the carrier arising out of international carriage by air ... The intention seems to be to provide a secure regime, within which the restriction on the carrier's freedom of contract is to operate ... To permit exceptions, whereby a passenger could sue outwith the Convention for losses sustained in the course of international carriage by air, would distort the whole system, even in cases for which the Convention did not create any liability on the part of the carrier.⁷⁷

In that respect, we agree with the authors who argue that the reasoning of the Court in *Lee*, if not the final decision, was wrong as it was made *per incuriam* in that *Sidhu* was not cited and the arguments concerning the exclusive application of the Convention were rejected without proper analysis.⁷⁸

In the *Sidhu* case the application of the Warsaw system was preferred over a common-law negligence action against the carrier. One might be tempted to argue that the issue under consideration here, i.e. where the conflict is between an instrument of EU law and the Montreal Convention, is different than the matter in the *Sidhu* case where the conflict was between an international legal regime and a common-law principle. However, the UK Supreme Court in the case of *Stott v Thomas Cook Operators Ltd*⁷⁹ emphasised that the international convention regime should prevail even over an EU instrument. There, the Supreme Court dismissed the claim of a disabled passenger against the tour operator brought under regulations implementing Regulation (EC) 1107/2006 on the rights of passengers with disabilities.⁸⁰ The relevant incident took

⁷⁴ D. McClean et al, *Shawcross and Beaumont: Air Law* (Lexis Nexis, Issue No. 159, 2018), Division VII, at [405].

⁷⁵ Arts. 24 and 29 respectively.

⁷⁶ [1997] A.C. 430.

⁷⁷ [1997] A.C. 430, 447.

⁷⁸ D. Grant and S. Mason, *Holiday Law: The Law Relating to Travel and Tourism* (Sweet & Maxwell, 4th ed, 2007), p.429.

⁷⁹ [2014] UKSC 15, [2014] A.C. 1347.

⁸⁰ The Civil Aviation (Access to Air Travel for Disabled Persons and Persons with Reduced Mobility) Regulations 1895/2007 implemented Commission Regulation (EC) 1107/2006 of 5 July 2006, concerning the Rights of Persons with Reduced Mobility when Travelling by Air, 2006 O.J. (L 204) 1.

place on board the aircraft, yet the claim was brought under the Regulations because they permitted recovery for humiliation and distress, which is not permissible under the Montreal regime. The Supreme Court was quick to endorse *Sidhu* and dismiss the claim. Lord Toulson regarded as crucial “the time and place of the accident or mishap”,⁸¹ opining that the Convention was intended to deal comprehensively with the carrier’s liability for whatever might physically happen to passengers between embarkation and disembarkation.⁸² This, he suggested, was so even if the causes of the death or bodily injury of the passenger could be traced back to events before embarkation. He was adamant that “[t]o hold otherwise would encourage deft pleading in order to circumvent the purpose of the Convention”.⁸³ He stressed that many if not most accidents or mishaps on an aircraft were capable of being traced back to earlier operative causes and

it would distort the broad purpose of the Convention explained by Lord Hope in *Sidhu* to hold that it does not apply to an accident or occurrence in the course of international carriage by air if its cause can be traced back to an antecedent fault.⁸⁴

Most significantly, the Supreme Court unanimously held that the conflict in this context was “whether the claim is outside the substantive scope and/or temporal scope of the Montreal Convention”,⁸⁵ stating that the answer to this question depended entirely on the proper interpretation of the scope of that Convention.⁸⁶ We believe that in resolving any conflict between the Athens and Montreal Conventions and the Package Regulations 1992 a similar approach should be adopted, as long as the tour operator qualifies as a carrier. This is so as the relevant international convention regime attempts to regulate the liability of contracting and actual carriers for the death or bodily injury of passengers in a comprehensive manner while the Package Regulations 1992 deal with such claims in a coincidental manner and it only intervenes to enable tour operators to benefit from limitation provisions of such carriage conventions when such conventions do not apply to them by force of law.

In that respect, the case of *Akehurst v Thomson Holidays Ltd & Britannia Airways Ltd*,⁸⁷ although rightly decided, should be distinguished. There, following an air crash at Girona in Spain, claimants brought suit for bodily injury and psychological damage against the tour operator (Thomson Holidays) under the Package Regulations 1992 and against the air carrier (Britannia Airways) under the Warsaw Convention. The airline admitted liability for the bodily injury under Art. 17 of Warsaw; yet the tour operator conceded that it did not qualify as a carrier under the said Convention, a qualification that would have triggered its application to the claim. As a result, the court did not entertain the question whether “the claimant’s rights under Regulation

81 *Stott v Thomas Cook Operators Ltd*. [2014] UKSC 15, [2014] A.C. 1347, at [60]–[61].

82 See [60]–[61].

83 See [60].

84 See [60].

85 See [59].

86 See [59].

87 Cardiff County Court – 6 May 2003 (unreported). The authors relied on the synopsis prepared by Alan Saggerson for the Travel and Tourism Association Lawyers in December 2003, available at https://www.travellawquarterly.co.uk/wp-content/uploads/resources/tatla_cases_2003.doc (last tested on 1 March 2018).

15 were restricted by the Warsaw Convention”.⁸⁸ Instead, the court turned its attention to the question whether the Warsaw Convention was incorporated (via the airline’s conditions) into the contract between the claimant and the tour operator, rightly finding that it was not.⁸⁹ As such, the decision in *Akehurst* by no means supports the reasoning of HHJ Hallgarten in *Lee v Airtours Holidays Ltd* as the court did not get the chance to rule on the potential conflict between the air law conventions and the Package Regulations 1992.

HHJ Overend in *Norfolk v My Travel Group plc*.⁹⁰ attempted to reconcile these liability regimes (i.e. the Athens regime and Package Regulations 1992) by suggesting that the liability of a tour operator ought to be regulated by the Athens regime on matters where there was no conflict between these regimes. He was, therefore, of the view that given that there was no provision with regard to time-bars in the Package Regulations 1992, on such matters the Athens Convention should prevail. However, the authors would like to point out that the decision of HHJ Overend probably reflects the fact that he viewed the conflict as a conflict between a domestic legislation (i.e. the Merchant Shipping Act 1995 which incorporated at the time the Athens Convention 1974 into English law) and a legislation giving effect to an EU Directive (i.e. Package Regulations 1992). Given that the Athens Convention 2002 is now incorporated into EU law with a Regulation, if there is a conflict with the Package Regulations, the Convention regime should prevail as long as the tour operator is treated as a contracting carrier under the Athens regime. Therefore, the liability of the tour operator and the limits of such liability should be determined by the Athens Convention 2002 and any provision of the Package Regulations 1992, which is in direct conflict with the Athens Convention 2002, e.g. Regs 15(1)–(4) (as they establish a different liability regime), should be disregarded if the loss that the passenger suffers arises at the sea leg of the tour. Needless to say, other provisions of the Package Regulations 1992 remain intact. For example, the tour operator is still under an obligation to find appropriate solutions if the consumer complains about a defect in the performance of the contract under Regulation 15(8) of the Package Regulations 1992.

4.2.2 *External limits of the Athens regime – contribution claims*

As pointed out above, the Athens Convention is designed to be the sole framework under which a passenger can claim against the carrier or the contractual carrier. Hence, Art. 14 stipulates: “No action for damages for the death of or personal injury to a passenger, or for the loss of or damage to luggage, shall be brought against a carrier or performing carrier otherwise than in accordance with this Convention.” There is nothing extraordinary in this. Indeed, it can be viewed as a price passengers pay in return for the protection afforded by the Convention regime. However, does this provision ensure that the provisions of the Athens Convention apply when a claim is brought by a third party against the carrier? This was the central issue in *Feest v South*

⁸⁸ *Ibid.*

⁸⁹ *Ibid.*

⁹⁰ [2004] 1 Lloyd’s Rep. 106. This was another County Court decision, this time from Plymouth.

West Strategic Health Authority.⁹¹ There, the claimant was injured on a boat trip that was arranged by her employers as part of a team-building exercise. She successfully sued her employers for failing to undertake a proper risk assessment or implement a safe system of work on the outing. After the expiry of the two-year time-bar in the Athens Convention, the employers sought contribution against the owners of the boat (i.e. the carriers). The carriers sought to strike out the claim on the basis that the time-bar in Art. 16 of the Convention extinguished the cause of action, and, therefore, the limitation period had expired prior to the commencement of the third-party proceedings.

The first instance judge held that Art. 16 applied to actions for contribution and struck out the third-party claim for contribution. The Court of Appeal disagreed, holding that a claim for contribution under s.1(1) of the Civil Liability (Contribution) Act 1978 was not a claim for damages for personal injury to a passenger brought against a carrier and therefore not within the scope of the Convention or the time-bar imposed by Art. 16. It also held that the effect of Art.16 was not to extinguish the claimant's right but merely to bar the remedy, thus defeating a technical argument based on the interpretation of the 1978 Act itself.⁹²

The Court of Appeal was thus of the view that a claim for contribution brought by a third party to the carrier had a life of its own, deriving from the relevant English domestic statutory entitlement. With respect, this reasoning unfortunately severs the link between the Athens Convention and a claim for contribution, meaning that the latter is not subject to the Convention time-bar, even though the carrier's liability to contribute is founded on its own liability to the passenger, which *is* governed by time-bar! Taking this to its natural conclusion, in contribution proceedings the Convention would be critical in determining the liability of the carrier and the limits of such liability,⁹³ but its time-bar provisions should simply be ignored and give way to the time-bar provisions stipulated in national legislation. The carrier would therefore lose much of the advantage of the time-bar.

The judgment clearly demonstrates that in some jurisdictions contribution claims by third parties against the carrier could potentially be treated as distinct from the Convention regime. The authors believe that this unfortunately opens the door to bypassing the Convention regime and making carriers subject to a different legal regime, an outcome which is clearly not in the spirit of Art. 14. This could have been avoided if the time-bar provision in the Convention had been construed as extinguishing the claimant's right rather than simply barring the remedy. However, this was also rejected by the Court of Appeal. Although in continental jurisdictions prescription usually has the effect of extinguishing the claimant's right, the Court of Appeal was adamant that the wording used in Art. 16(1) of the Athens Convention would not have the same effect under English law.⁹⁴

91 [2015] EWCA (Civ) 708; [2016] Q.B. 503.

92 See s.1(3) (expiry of main limitation period can be pleaded in defence to a contribution claim if, and only if, the effect was to destroy not only the remedy but the right itself).

93 See s.2(3)(a) of the 1978 Act.

94 There are decisions of English courts which have construed time-bar provisions drafted in similar fashion to Athens Convention 1974 as barring the remedy only. For example, Art. 7 of the International Convention for the Unification of Certain Rules of Law with Respect to Collision Between Vessels 1910

Conversely, Art. 29 of the Warsaw Convention and Art. 35 of the Montreal Convention leave no doubt that the time-bar provision extinguishes any right whatever:

The right to damages shall be *extinguished* if an action is not brought within a period of two years, reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the carriage stopped.⁹⁵

Courts have held that the right for an action is “completely destroyed and not merely rendered unenforceable by action. It follows that it cannot be relied upon by way of defence to an action brought by the carrier.”⁹⁶ In that respect, the debate in the *Feest* case would have been resolved in favour of the air carrier if such case had arisen in the context of the air liability conventions. However, matters get complicated when an indemnification action is filed from a liable carrier against third parties or is filed against the air carrier by a liable third party. The reason for such uncertainty is that there is little judicial consensus on how to treat such indemnification actions.

With the objective of achieving such consensus, Art. 37 of Montreal indicates that “[n]othing in this Convention shall prejudice the question whether a person liable for damage in accordance with its provisions has a right of recourse against any other person”. The wording of Art. 37 makes clear that actions of indemnification initiated by carriers against third parties which are not subject to the Convention do not come into its scope, including the two-year limitation period, leaving their determination to national laws.⁹⁷

Still, the wording leaves open the question whether the Montreal Convention applies to indemnification actions filed by liable third parties which are subject to the Convention, such as a ground-handler or a contracting carrier, against an actual carrier for damage falling into the Convention regime (e.g. the death of a passenger on board an aircraft). With a few exceptions, a consensus seems to be developing here, with courts in the US holding that such actions are not subject to the Convention on the basis that they take on a life of their own and they are not any more actions for damages.⁹⁸ Still, these decisions have been criticised on the basis that they create an artificial distinction between action for damages and indemnification.⁹⁹ Under English law, s.5(2) of the Carriage by Air Act 1961 provides that the limitation provisions of the aviation conventions do not apply “to any proceedings for contribution between persons liable for any damage to which any of the Carriage by Air Conventions relates”. As such, s.1(3) of the Civil Liability (Contribution) Act 1978 applies and provides that the carrier remains liable to contribute until its own liability under the

was held to be barring the remedy only by Lord Wilberforce in *Aries Tanker Corp. v Total Transp. Ltd. (The Aries)* [1977] 1 Lloyd’s Rep. 334 (HL). The relevant part of Art. 7 stipulates: “Actions for the recovery of damages are barred after an interval of two years from the date of the casualty.”

⁹⁵ Emphasis added.

⁹⁶ D. McClean et al, *Shawcross and Beaumont: Air Law* (Lexis Nexis, Issue No. 159, 2018), Division VII, para. 443.

⁹⁷ Under English law the limitation period would be governed by s.10 of the Limitation Act 1980 which provides that the limitation is “two years from the date on which that right accrued”.

⁹⁸ See, e.g., *Chubb Ins. Co. of Europe SA v Menlo Worldwide Forwarding Inc.*, 634 F.3d 1023 (9th Cir. 2011), *United Airlines v Sercel* [2012] NSWCA 24.

⁹⁹ L.Chassot, “Le Domaine de La Responsabilité Du Transporteur Aérien International à La Lumière de Deux Décisions Récentes”, (2016) 277 *Revue Française De Droit Aérien et Spatial* 5 ff.

aviation conventions is extinguished (i.e. replicates the two-year limitation period of the aviation conventions).

The Warsaw Convention does not contain any provisions on the right of indemnification, with the decision of the Supreme Court of Ontario in *Connaught Laboratories Ltd. v Air Canada* being influential with respect to claims between air carriers:¹⁰⁰

[s]uch claims are not included, nor does it appear that they are intended to be included, within the purview of The Warsaw Convention which ... deals with the claims of passengers, consignors and consignees, and the liability of carriers therefore, it does not deal with the claims of carriers *inter se*.¹⁰¹

Still, there is no judicial consensus with respect to indemnity claims, with conflicting decisions been taken within the same jurisdiction:

In a number of Warsaw Convention cases in the United States it was held that art 29 of that Convention applied to recourse actions against carriers and a French court, in a case in which the principal claim was against a handling-agent who sought contribution from a carrier, held that art 29 did apply, as it drew no distinction between principal and recourse actions. Some decisions of US District Courts have held art 29 applicable to claims for contribution against carriers and their handling agents; but it has been held in other District Court cases that the Convention rule does not apply to a claim by a carrier against its own handling-agent though it would to recourse actions against carriers. A decision of the French Cour de Cassation has held that the Convention limitation provision does not protect handling-agents in actions for contribution brought by carriers, even if the contract between the carrier and the handling-agent incorporated the Warsaw Convention in general terms.¹⁰²

Most recently, the French Cour de Cassation, in a heavily criticised decision,¹⁰³ confirmed that an indemnification action filed by the aircraft manufacturer against the air carrier (resulting from passengers' death claims covered by the original Warsaw Convention) is not subject to the two-year limitation period.

In the authors' view, indemnification claims should also come under the air liability regimes, as any contrary solution would have the effect of undermining the international liability regime. It is interesting to see that disputes regarding the scope of an international liability regime still arise, although it is expressly stipulated in the relevant Conventions that the right to damages shall be extinguished. The aviation experience on the issue of indemnification claims highlights that the failure of the Athens Convention regime to expressly stipulate the effect of its time-bar provisions has invited controversy and possibly hindered the prospect of achieving uniformity. States considering the ratification of the Convention should consider seriously addressing this point in their implementing legislation.

4.3 Conclusions

Legal issues concerning the scope of an international convention often arise and are not unique to the Athens regime. However, it is undeniable that the wording used in

100 *Connaught Labs v Air Canada* (1978), 94 D.L.R. 3d 586 (Can.).

101 *Id.* at [26] (Robins, J.).

102 D. McClean et al, *Shawcross and Beaumont: Air Law* (Lexis Nexis, Issue No. 159, 2018), Division VII, para.446-1.

103 Cour de cassation [Cass.] 1e civ., Mar. 4, 2015, Bull. civ. I, No. 327, (Fr.).

the Athens regime on key terms, such as the meaning of “contract of carriage” or “sea-going ship” makes such disputes more acute. The Athens regime does not provide a satisfactory answer as to what these terms mean precisely and leaves the matter to national laws. The authors highlight some of the problems that could arise and offer solutions by making comparison with the manner in which similar issues have been dealt with under other carriage of passenger conventions.

Also, the liberal definition of the term “carrier” in the Athens regime has the potential to create a conflict with domestic legislation, such as the Package Regulations 1992. Having analysed the difficulties that can emerge, the authors are of the firm view that the Athens regime should prevail and be treated as the main legal instrument in determining the liability of tour operators when passenger claims arise at the sea leg of a tour as long as the tour operator assumes responsibility for the performance of the contract.

Furthermore, in dualist legal systems, such as the UK, there is a risk that contribution claims brought against the carrier will be viewed as falling outside the remit of the Athens regime putting sea carriers in a vulnerable position. This is partially due to the wording used in the time-bar provisions of the Athens regime which seems to suggest that claims are not extinguished once the time that is allowed to bring a claim under the Athens regime, i.e. two years, has expired. This potentially means that in the UK contribution claims can be brought against the carrier after the expiry of the Athens time-bar period under the Civil Liability (Contribution) Act 1978. The authors are of the view that this is against the spirit of the Athens regime and regret that the Court of Appeal has recently not opted to construe the relevant provisions in a liberal manner to avoid this undesired outcome. This seems to be a problem that could arise under the Athens regime. Other carriage conventions, i.e. in air law, at times prevent contribution claims from having a life of their own.