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A SUCCESSFUL SUBSTANTIVIST CARVE-OUT?: THE ATHENS CONVENTION AS UNIFORM INTERNATIONAL LAW

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A Successful Substantivist Carve-Out?: The Athens Convention as Uniform International Law

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This paper examines the Athens Convention Relating to the Carriage of Passengers and their Luggage by Sea 1974 and its 2002 Protocol through a private international law lens, to evaluate the extent to which it functions as a successful 'substantivist carve-out' achieving international legal uniformity, and to determine the degree to which conflicts problems still bedevil passenger claims brought under the Athens regime. The paper concludes that the Athens regime is not a particularly successful uniform international law instrument, largely because of uncertainties surrounding its scope of application and operation as a mandatory exclusive code, the ability to easily circumvent its jurisdiction framework and shop for a more favourable forum, a lack of clarity regarding coverage of 'personal injury', and a messy and complicated relationship with global limitation of liability regimes. The Athens regime would undoubtedly be more effective if it enjoyed more widespread uptake amongst maritime jurisdictions. However, for a range of economic and political reasons, that seems unlikely for the foreseeable future.

Keywords: Carriage of passengers by sea, transnational litigation, Athens Convention, uniform law.

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1 Introduction

In his general private international law course at the Hague Academy, Symeonides describes the Athens Convention,[1] as well as several other multilateral treaties regulating transnational private and commercial law issues, as 'substantivist carve-outs'.[2] By this he means that they are instruments that seek to delineate and make uniform broad areas of substantive law by means of the (usually mandatory) application of internationally negotiated legal frameworks. A successful substantivist carve-out achieves uniform results by eliminating or at least minimizing conflict of laws issues within its scope of application. In Symeonides' terminology, therefore, a substantivist carve-out is designed to be an exception to the usual 'selectivist' method of private international law, which necessarily involves choosing one or another domestic legal rule to govern the relevant issue.

This paper examines the Athens Convention through a conflict of laws lens, to evaluate the extent to which it functions as a successful substantivist carve-out achieving international legal uniformity, and to determine the degree to which conflicts problems still bedevil passenger claims brought under the Athens regime.

2 Scope of application

The first requisite for a successful substantivist carve-out is to define and demarcate as clearly as possible the scope of substantive application of the regime. Article 2 of the Athens regime[3]

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1 For this paper, the focus will be on the Athens Convention Relating to the Carriage of Passengers and their Luggage by Sea 1974, 1463 UNTS 19 ('Athens 1974'); and Athens 1974 as amended by the Protocol of 2002 to the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea 1974 (IMO LEG/CONF 13/20, 19 November 2002, read with LEG/CONF 13/20/Corr 1, 4 December 2002) ('Athens 2002'). On the Athens Convention regime generally, see Kate Lewins, *International Carriage of Passengers by Sea* (Sweet & Maxwell 2016); Francesco Berlingieri, *International Maritime Conventions: Volume 1 – The Carriage of Goods and Passengers by Sea* (Informa Law 2014) Chapter 4; Norman A Martínez Gutiérrez, *Limitation of Liability in International Maritime Conventions* (Routledge 2011) Chapter 4; S F Gahlen, *Civil Liability for Accidents at Sea, Hamburg Studies on Maritime Affairs 32* (Springer-Verlag 2015) Chapter 5.

2 Symeon C Symeonides, 'Private International Law: Idealism, Pragmatism, Eclecticism' (2017) 384 Recueil des Cours 30, 65 et seq.

3 The text of art 2 is identical in Athens 1974 and Athens 2002. This overlap in scope of application means that a single instance of carriage of passengers can give rise to the mandatory application of both Athens

provides that the Convention 'shall apply' to any international carriage by sea[4] where the ship is flagged or registered[5] in a State Party; or the carriage contract has been made in a State Party; or the place of departure or destination, according to the carriage contract, is in a State Party.[6]

This is something of a departure from the usual method of defining scope of application in international passenger carriage Conventions, which tend to focus exclusively on whether both the points of departure and destination are in State Parties.[7] Under the Athens Convention, only one of the connecting factors in art 2 is required to trigger the mandatory application of the regime. Controversially, this means that the Athens Convention will have mandatory application where the carrying vessel is flagged in a State Party, even if the relevant carriage takes place between non-contracting States and the carriage contract was entered into in a non-contracting State.[8] It might be argued that using the law of the ship's

1974 and Athens 2002 (this is not unique to the Athens regime — the Hague-Visby Rules and the Hamburg Rules can equally both apply mandatorily to a single carriage of goods). There is no express guidance as to how to resolve this conflict of Conventions, but the practical result of art 18 of the Athens regime (discussed below) is that the claimant ought to be able to access the more favourable limitation provisions of Athens 2002 by electing to sue in a court of a State Party to Athens 2002 — assuming that this is possible in practice. On this issue, see Lewins (n1) 104-105.

4 This is, surprisingly, not explicitly stated in art 2(1), but is obvious from the context of art 2(2), the definition of 'contract of carriage' in art 1(2), and the description of the period of carriage in art 1(8).

5 This wording was proposed by the Federal Republic of Germany: see IMO LEG/CONF/4/4/Add 2 p 3: 'This formulation is in accordance with the model of the Convention on the High Seas of 1958. In more recent conventions it has likewise been adopted. The registration of a ship is not always a point of contact for her nationality, while the right to fly the flag is in any case an expression of her nationality.'

6 The final wording is an amalgam of the scope of application provisions of the two predecessor Conventions to Athens 1974: art 2 of the International Convention for the Unification of Certain Rules relating to Carriage of Passengers by Sea 1961; and art 2 of the International Convention for the Unification of Certain Rules relating to Carriage of Passenger Luggage by Sea 1967 (which never came into effect).

7 See art 1(2) of the Warsaw Convention 1929: 'any carriage in which, according to the contract made by the parties, the place of departure and the place of destination, whether or not there be a break in the carriage or a transhipment, are situated either within the territories of two High Contracting Parties, or within the territory of a single High Contracting Party, if there is an agreed stopping place within a territory subject to the sovereignty, suzerainty, mandate or authority of another Power, even though that Power is not a party to this Convention'. See also art 1 of the Contracts of International Carriage of Passengers by Rail (CIV) (now Appendix A to the Berne Convention concerning International Carriage by Rail 1980 (COTIF)): 'carriage of passengers and luggage under international carriage documents over the territories of at least two of the Contracting States ...'. But see art 1 of the CVR Convention 1973: 'carriage of passengers, and, where appropriate, of their luggage in vehicles by road when the contract provides that the carriage shall take place in the territory of more than one State and that the place of departure or the place of destination, or both these places, shall be situated on the territory of a Contracting State, irrespective of the place of residence and the nationality of the Parties'.

8 See the Swedish objection at IMO LEG/CONF/4/4: 'The Convention should not apply where the only connexion to a Contracting State is that the carrying ship is flying the flag of or is registered in such State.' The connecting factor of the law of the ship's flag is unlikely to be effective where the forum hearing the

flag as a trigger for the mandatory application of the Athens regime is inappropriate in the context of a Convention that has nothing whatsoever to do with the nationality, registration or ownership status of ships, or security interests in them.[9] By comparison, the international carriage of goods by sea Conventions do not focus on the law of the ship's flag, and the international air carriage Conventions do not refer to the place of registration of the relevant aircraft as a connecting factor.[10]

'International carriage' is given an extended definition by art 1(9) to include a round trip with an intermediate port of call in another state, provided that the intermediate port is specified in the carriage contract or scheduled itinerary.[11] Purely domestic carriage is therefore not intended to be covered by the Athens regime.[12] Article 1(8) provides detailed definitions of when the international carriage covered by the Athens regime begins and ends — this has, unsurprisingly, given rise to some tricky demarcation issues.[13]

In addition, there are subject-matter restrictions on the Convention's substantive scope of application — art 1(3) defines 'ship' restrictively as including only sea-going vessels and excluding air-cushion vehicles such as hovercraft.[14] As Soyer points out, the line in the surf

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claim is in non-contracting State: see *Friesen v Norwegian Cruise Lines Inc* 2003 BCSC 256 (argument that Bahamian law as law of the flag and therefore the Athens Convention applied rejected where accident took place in Alaskan waters); *Chan v Society Expeditions* 123 F 3d 1287, 1997 AMC 2713 (9th Cir Cal 1997) (argument that Liberian law as law of the flag and therefore the Athens Convention applied rejected where there was a US choice of law clause in the passenger ticket).

9 It is particularly nonsensical in the context of the cruise industry, where vessels are routinely chartered: see the BIMCO standard form CRUISEVOY 1998; Juan L Pulido Begines, 'Cruise Ship Law' in Jürgen Basedow et al (eds), *The Hamburg Lectures on Maritime Affairs 2011-2013, Hamburg Studies on Maritime Affairs 28* (Springer-Verlag 2015) 199, 217-236.

10 For a critique of the use of the law of the ship's flag as a connecting factor in maritime conflict of laws, see William Tetley, 'The Law of the Flag, Flag Shopping, and Choice of Law, (1993) 17 Tul Mar LJ 139. There is also a problematic 'national exception' under art 22 of the Athens regime, whereby a State Party can on ratification exclude the application of the Athens regime to international carriage where both carriers and passengers are nationals or subjects of that State: on which, see Gahlen (n 1) 224-225.

11 This is modelled on art 1(2) of the Warsaw Convention 1929, cited at n 7 above.

12 Some State Parties have, however, extended the Athens regime to domestic carriage through national legislation: in Canada see the Marine Liability Act (SC 2001, c 6), s 37; in the UK, the Carriage of Passengers and Their Luggage by Sea (Domestic Carriage) Order 1987 (SA 1987/670).

13 See eg *Collins v Lawrence* [2018] 1 Lloyd's Rep 603; *Lawrence v NCL (Bahamas) Ltd (The Norwegian Jade)* [2018] 1 Lloyd's Rep 607; Kate Lewins, 'In the Course of Disembarkation under the Athens Convention' (2017) 23 JIML 95.

14 See *Nolet-Charron c Croisières Baie de Gaspé inc* 2006 QCCS 4463 [18]-[19]: a rigid inflatable boat (RIB) does not fall within the definition of an 'air-cushion vehicle': 'Le "zodiac" est un navire à fond rigide dont les côtés sont formés de tubes qui sont gonflés d'air, ce qui en assure la légèreté. Il ne s'appuie pas sur un coussin d'air et flotte sur l'eau comme tous les navires. Sur le premier point en litige, le tribunal conclut

between sea-going and non-sea-going vessels may sometimes be difficult to pinpoint, and may be subject to shifting interpretations in different jurisdictions.[15] Article 2(2) further provides that the Athens regime does not apply where the carriage is subject 'under any other international convention concerning the carriage of passengers or luggage by another mode of transport, to a civil liability regime under the provisions of such convention, in so far as those provisions have mandatory application to carriage by sea'.[16]

3 Jurisdiction

3.1 Within the Athens jurisdiction framework

Article 17 sets out the bases for competent jurisdiction under the Athens regime:[17]

> 1 An action arising [under Articles 3 and 4 of] this Convention shall, at the option of the claimant, be brought before one of the courts listed below, provided that the court is located in a State Party to this Convention[, and subject to the domestic law of each State Party governing proper venue within those States with multiple possible forums]:

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que l'embarcation utilisée par les demandeurs est un navire au sens de la Convention d'Athènes et au sens de la Loi sur la responsabilité en matière maritime.'

15 B Soyer, 'Boundaries of the Athens Convention: What You See Is Not Always What You Get!', in D R Thomas (ed), *Liability Regimes in Contemporary Maritime Law* (Informa 2007) 183, 187-188; see also Lewins (n 1) 100-102. The scope of application of the Athens regime has been extended to non-sea-going vessels in Canada by the Marine Liability Act (SC 2001, c 6), s 36(1): see *Gundersen v Finn Marine Ltd* 2008 BCSC 1665, 302 DLR (4th) 266 151 (coastal commercial water taxi covered by the extended Athens regime); *Frugoli c Services Aériens des cantons de L'Est inc* 2007 QCCS 6203 (boat navigating on Lake Louis in Northern Quebec on a hunting trip covered by the extended Athens regime).

16 This rather obscure and pedantic provision has its origins in a concern raised by the Federal Republic of Germany — see IMO LEG/CONF/4/4/Add 2, p 2: 'The scope of application of the Convention must ensure that there will be no overlapping with the planned Convention on the Contract for the Carriage of Passengers and Luggage by Inland Waterway (CVN). The Convention should not, therefore, be made to cover any carriage that is governed by CVN or national inland waterway legislation corresponding to CVN.' The final, more generic wording was proposed by Belgium (IMO LEG/CONF/4/WP1) and subsequently accepted by the Working Party tasked to report back on this issue (IMO LEG/CONF/4/WP25). CVN, which was signed in Geneva in 1976, has never come into effect. To date the Russian Federation is the sole State Party.

17 Words in square brackets were added by Athens 2002.

(a) the Court of the State[18] of permanent residence or principal place of business[19] of the defendant, or

(b) the Court of the State[20] of departure or that of the destination according to the contract of carriage, or

(c) the[21] Court of the State of the domicile or permanent residence of the claimant, if the defendant has a place of business[22] and is subject to jurisdiction in that State, or

(d) the[23] 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.

[2 Actions under article 4bis of this Convention shall, at the option of the claimant, be brought before one of the courts where action could be brought against the carrier or performing carrier according to paragraph 1.]

3 After the occurrence of the incident which has caused the damage, the parties may agree that the claim for damages shall be submitted to any jurisdiction or to arbitration.

Jurisdictional bases (a), (b) and (c) derive from art 13 of the International Convention for the Unification of Certain Rules relating to Carriage of Passenger Luggage by Sea 1967.[24] The IMO Legal Committee also considered, but rejected, a proposal to add a fifth jurisdictional basis: an additional court provided for in a (necessarily non-exclusive) choice of court clause agreed to by the parties.[25] In the negotiations leading up to Athens 2002, there was yet another proposal to add a fifth forum, namely a court of the State to or from which the carrier provides

18 Original wording in Athens 1974: 'the court of the place'.

19 This phrase was apparently adopted to deal with the issue of 'flags of convenience': Berlingieri (n 1) 282. It is likely to give rise to significant difficulties where the ship operator is a multinational company or part of an international group of companies: see discussion at n 30 below.

20 Original wording in Athens 1974: 'the court of the place'.

21 Original wording in Athens 1974: 'a court of the State'.

22 The French text is 'siège de son activité' which may be susceptible to a broader interpretation of business activities performed through agents: see Berlingieri (n 1) 283.

23 Original wording in Athens 1974: 'a court of the State'.

24 Berlingieri (n 1) 282. Given that the 1967 Convention was only ever acceded to by Algeria and Cuba, the repetition of these jurisdictional bases in Athens 1974 might perhaps be regarded as a triumph of optimism over experience. Somewhat bizarrely, the claimant's option under art 13 of the 1967 Luggage Convention was required to be exercised in a choice of court agreement entered into prior to the occurrence of the event that caused the loss or damage – in this regard, the Athens regime is antithetical.

25 See the Polish proposal in IMO LEG/CONF/4/WP 28: 'Such an addition will not affect the principle of the claimant's option, but it renders possible the lodging of a claim with the court which both parties consider as admissible for them, or which merits in their opinion their mutual confidence.'

services for carriage of passengers by sea, provided that the claimant is domiciled or has his permanent residence in that State.[26] The rationale for this proposal was apparently to capture ferry operators running services through agents in jurisdictions where they did not have their principal places of business. The proposal was defeated on the basis that it would cause difficulties for the European Union.[27]

Athens 2002 made three important changes to the Athens regime's jurisdiction framework. First, it narrowed the framework to cover only passenger claims brought under arts 3 and 4 (ie death and personal injury and loss or damage to luggage claims), thereby excluding from the jurisdiction framework claims for valuables[28] and actions against the servants of the carrier.[29] Second, Athens 2002 expressly provided for the issue of domestic venue selection to be left to the lex fori — this will largely be relevant in federal jurisdictions. Third, Athens 2002 provided in a new art 17(2) for a parallel jurisdictional framework for passenger claims under art 4bis against the providers of compulsory insurance or other financial security.

In policy terms, the alternative jurisdictional bases of the Athens regime make for rather odd bedfellows. Given that it is a passenger/claimant-oriented Convention, one would expect the claimant to be given a generous choice of competent courts.[30] However, from a consumer law perspective, the result is hardly ideal, in the sense that most of the available competent courts are restricted by the additional requirement that the defendant carrier must have a place of business in, and must be subject to, the jurisdiction of the forum State. Passengers who have suffered personal injury would obviously usually prefer to, or sometimes may realistically only be able to, sue in their home State, regardless of where the defendant carrier

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26 See Baris Soyer, 'Sundry Considerations on the Draft Protocol to the Athens Convention Relating to the Carriage of Passengers and Their Luggage by Sea 1974' (2002) 33 JMLC 519, 535.

27 Ibid, 536; Berlingieri (n 1) 284. It was also opposed by the P & I clubs, which argued that a proliferation of available fora would cause practical problems for them.

28 Article 5.

29 Article 11.

30 Although the generic terminology of 'claimant' is used, the reference to actions arising under arts 3 and 4 implies that only passenger claims against the carrier are meant: see Berlingieri (n 1) 282. It is not clear where this leaves counterclaims by the carrier against the passenger, for example for a negative declaration or an anti-suit injunction where this is available.

is based.[31] Where passengers have booked their carriage through a local travel agent but the defendant carrier is based offshore, this may create significant difficulties.

For example, in *Princess Cruises v Nicolazzo*[32] the Canadian claimants booked a cruise with the defendant carrier through a local travel agent in Ontario. They embarked on the cruise in Italy and disembarked in England. They sued the defendant carrier for negligence in Ontario after cash was allegedly stolen from their stateroom. The defendant brought a motion for summary judgment dismissing the action on the basis that the court lacked jurisdiction. The motion was dismissed. The defendant appealed. On appeal, Ramsay J found that the defendant carrier was Princess Cruise Lines Ltd, a corporation having its head office in California. The judge below had discovered through his own internet research that Princess Cruise lines was owned by Carnival Corporation, one of the biggest vacation companies in the world, which has places of business in the Yukon Territory and British Columbia, operating as Holland America Tours and Princess Tours. On this basis, the judge below had decided to pierce the corporate veil and determined that the Ontario court therefore had jurisdiction under art 17(1)(c) and (d) of the Athens regime. Ramsay J reversed this decision, holding that there was no ground to pierce the corporate veil, and that the fact that 'Princess Cruise Lines had ships that landed at Canadian ports from time to time' did not amount to the defendant carrier having a place of business in Canada. Article 17(1)(a) was therefore not applicable, as the US was not a signatory to the Athens regime. However, art 17(1)(b) of the Convention did apply, because the place of destination, the United Kingdom, was a State Party to the Athens regime.

Article 17(1)(d) is also peculiar in its focus on the place of formation of the contract of carriage, rather than the place where a ticket or voucher is issued. The Athens regime is silent as to documentary information requirements, in sharp contrast to the much older Warsaw Convention regime on air carriage of passengers and luggage, which sets out relatively detailed documentary requirements for passenger and luggage tickets.[33] Localizing the place

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31 Claimants may be left with Hobson's choice if most of the countries on the Art 17 list are not contracting States: see Gahlen (n 1) 224.

32 (2009) 97 OR (3d) 630.

33 See eg the Warsaw Convention 1929, arts 3 (passenger tickets) and 4 (luggage tickets). See too the Contracts of International Carriage of Passengers by Rail (CIV) (now Appendix A to COTIF 1980), arts 5-13;

of formation of the carriage contract inevitably causes more problems than a stipulated place of issue of a ticket, particularly where the contract of carriage is arranged in stages or involves multiple documents, or where carriage is booked offshore or over the internet.[34]

From the defendant carrier's perspective (and that of the defendant carrier's insurer), the Athens jurisdiction framework is equally problematic in that it contains no mechanism for channelling proceedings into a single forum. Where an event gives rise to multiple passenger claims, therefore, defendant carriers may face litigation in several jurisdictions.[35] While the Athens jurisdiction framework does obliquely address lis alibi pendens issues,[36] it only requires each individual claimant to make an election between competent courts. It is not clear whether the defendant carrier can make use of the doctrine of forum non conveniens to persuade competent courts to exercise a discretion to stay proceedings brought under art 17 in the interest of avoiding multiple proceedings. The Athens regime only refers to internal venue decisions, but does not deal explicitly with forum non conveniens issues. There is a faint suggestion in *Princess Cruises v Nicolazzo*[37] that the jurisdictional bases in the Athens Convention are binary, which might militate against a competent court's discretion to decline jurisdiction on the basis of forum non conveniens:

> [13] It is plain and obvious that the appellant has no place of business in Canada. No genuine issue for trial remains on that question. Paragraphs (c) and (d) of s. 1 of art. 17 do not apply. *The action cannot be brought in Canada if art. 17 of the Convention requires it to be brought elsewhere.*

Geneva Convention on the Contract for the International Carriage of Passengers and Luggage 1973 (CVR), arts 5-7 (passenger tickets), 8-10 (luggage registration vouchers).

34 See Lewins (n 1) 40-55 on formation of passenger contracts; and see discussion at n 50 below.

35 There is also the possibility of the art 17 jurisdictional framework in the Athens regime being 'short-circuited' by strategic use of the in rem admiralty jurisdiction, which adds the forum arresti into the mix as a further possible forum for litigation.

36 Presumably, if a claimant has brought an action 'before one of the courts listed', the other options fall away. Article 17 does not, however, deal with the situation where a court seized of the matter for whatever reason refuses to exercise jurisdiction, or where the claimant has a change of mind and applies for a stay or termination of proceedings so that a second option can be exercised. Cf the proposal put forward by the Central Office for International Rail Transport (OCTI) in IMO LEG/CONF/4/6/Add 1, p 3, which suggested the following addition to the draft jurisdiction framework to put the matter beyond doubt: 'Where the claimant has a choice between several courts, his right of options ceases from the moment when proceedings are commenced in one of those courts.'

37 (2009) 97 OR (3d) 630. Emphasis added.

[14] Paragraph (a) of s. 1 of art. 17 does not apply. Article 17 by its terms applies only if the court mentioned in one of the four paragraphs is located in a state party. The permanent residence or principal place of business of the defendant, the U.S.A., is not a state party. But para. 1(b) of art. 17 does apply, because the destination, the United Kingdom, is a state party. *The Convention, therefore, specifies where the action may be brought.*

However, it must be remembered that in this case there was only one competent court within the Athens jurisdictional framework, and the issue of availability of the forum non conveniens doctrine was not specifically addressed. Where there are several potential competent courts under art 17, for example the court in the State of departure, the court in the flag State, and the court in the State of arrival, but the last State (as will often be the case) has undertaken the accident investigation and treated the victims, and the ship and most or all of the witnesses to the accident are situated there, it makes sense for any other art 17 competent courts seized of the matter to give way and stay proceedings on the basis of forum non conveniens, assuming that that avenue is available to them.[38] Another consideration in support of this view is that the drafters of the Athens regime would presumably have been aware of forum non conveniens issues — the fact that they did not explicitly exclude the operation of the doctrine within the art 17 jurisdiction framework may suggest that their intention was to leave this issue to domestic law.[39]

The jurisdictional picture becomes even more fragmented in the case of incidents that are sufficiently serious for the defendant carrier to invoke the global limitation of liability regime under one of the Limitation of Liability for Maritime Claims (LLMC) Conventions.[40] The Athens

[38] See eg *Star Cruises (HK) Ltd v Tung Ho Wah* [2006] HKDC 61, [2006] 3 HKLRD 254 [73]: '[T]he most compelling factor against a stay is the fact that the vast majority of witnesses, factual or medical, who may be called to give evidence at the trial are in Hong Kong'. The forum non conveniens analysis is likely to be more complex where some of the competent courts would apply Athens 1974 and others would apply Athens 2002. It is unlikely, however, that the higher limitation amounts under Athens 2002 will be regarded as a legitimate personal or juridical advantage in the context of forum non conveniens: see eg *The 'Reecon Wolf'* [2012] SGHC 22, [2012] 2 SLR 289 (LLMC 1957 v LLMC 1976); *Re 'Kappa Sea'* [2017] HKCFI 1572 (Hague v Hague-Visby Rules).

[39] Cf *OT Africa Line Ltd v Magic Sportswear Corp* [2007] 1 Lloyd's Rep 85 [25]-[37], where, in an admittedly different context, the Canadian Federal Court of Appeal held that the promulgation of s 46(1) of the Marine Liability Act (SC 2001, c 6), which preserves the right of claimants to litigate or arbitrate in Canada by mandatorily adding Canadian courts as an additional competent forum in carriage of goods by sea cases did not explicitly or implicitly abrogate the forum non conveniens doctrine.

[40] On which, see Lewins (n 1) 144-171.

and LLMC regimes are based on different limitation, jurisdiction and procedure models. They largely talk past each other. Article 19 of the Athens regime expressly reserves the defendant carrier's right to invoke global limitation. Where both limitation regimes apply to passenger claims, this inevitably raises the spectre of a further proliferation of proceedings. Passengers will presumably first have to litigate in competent courts under the Athens jurisdiction framework to determine the liability and quantum of their claims. Their remedies, however, will be further limited by the LLMC regime. In particular, where the defendant carrier has constituted a global limitation fund in another jurisdiction (which is entirely at the defendant's choice, and will have been chosen strategically in the carrier's, rather than the claimants', interests), claimants will face the additional hurdle of having to apply to the court in the fund jurisdiction for a final determination of quantum and pay-out. The lack of any sensible 'linkage' between the Athens regime and the global limitation of liability regime[41] will therefore inevitably generate more conflicts issues and encourage forum shopping in serious incidents involving personal injury or death to multiple passengers, which is precisely where conflicts minimization and a simple, effective, efficient, inexpensive and comprehensive liability and compensation process is most needed.

Where the Athens regime is mandatorily applicable, art 18 nullifies any choice of court or arbitration agreements entered into prior to the event causing death, personal injury, loss or damage that have 'the effect of restricting the option specified in Article 17, paragraphs 1 or 2'. The rest of the carriage contract remains valid.[42] This has the effect of striking down exclusive choice of court or arbitration clauses that refer to a court outside the art 17 list, or otherwise purport to narrow down the claimant's available menu on the art 17 smorgasbord.

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41 Erik Røsæg, 'News under the Athens Sun — New Principles and Lost Opportunities of the Athens Convention 2002' (2004) 46 Scandinavian Studies in Law 153, 156-157.

42 Article 18, which also nullifies exclusion of liability clauses, limitation of liability clauses below the Athens limit, and clauses that reverse the burden of proof resting on the carrier. As Lewins (n 1) 128 points out, clauses disadvantaging passengers but falling outside these categories will not be rendered null and void, but may be subject to relevant domestic legislation on unfair contracts, trade practices or consumer protection. There may be some grey areas here: for example, would a clause in a cruise contract that requires a passenger to submit to mediation before suing be regarded as having 'the effect of restricting the option specified in paragraph 1 of Article 17'? See Begines (n 9) 212. Non-exclusive choice of court or arbitration clauses that add an agreed forum to the art 17 list appear inoffensive, but are unlikely to occur in practice, given that carriers will be drafting the standard form contracts. There may also be an argument that they are impermissible because the drafters specifically rejected such a proposal in the context of the Athens jurisdiction framework: see discussion at n 25 above.

The parties are, however, entitled to enter into binding choice of court or arbitration agreements after the event.[43] The prohibition on choice of court or arbitration clauses entered into prior to the event is obviously motivated by concerns over contracts of adhesion and the unequal bargaining powers of passenger and carrier. Presumably such issues may also arise in respect of agreements entered into after the event. The level of supervision over, and intervention into, such agreements is likely to differ from jurisdiction to jurisdiction.

Conduct indicating the defendant carrier's submission to the jurisdiction will probably be treated as equivalent to an agreement between the parties to submit the claim to a court under art 17(2). In *Stoymenoff v Airtours PLC*[44] Spence J held that:[45]

> In principle, it seems fair and reasonable to say that, where a party sues in a particular jurisdiction, and the defendant enters a defence in that jurisdiction and takes other steps consistent with an apparent willingness to proceed with the litigation in that jurisdiction and does nothing that would disclose to the plaintiff that it is proceeding under a mistaken understanding as to the applicability of that jurisdiction, the plaintiff would be given a basis for a reasonable expectation that jurisdiction was accepted and would be justified in proceeding on that basis. There is nothing before me to suggest that the concept of 'agreement', as used in Article 17(2) of the Athens Convention should, in the circumstances of this case, be considered to require more than conduct which would support such a reasonable expectation. In the absence of anything more, the better view must be that Airtours has by its conduct agreed to the jurisdiction of the Courts in Ontario.

Within the bounds of the art 17 jurisdiction framework, service of process on the defendant carrier out of the jurisdiction will generally not be required, because under arts 17(1)(a), (c) and (d), the defendant will already be subject to the court's jurisdiction. Where art 17(1)(b) is used as the jurisdictional basis, service of process on the defendant carrier out of the jurisdiction at the place of departure or destination may be required. As the court will already

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43 Article 17(3). Presumably, although the Convention is silent on this, post-event choice of law agreements are also permissible, provided they do not offend against art 18. On this issue generally, see Maya Mandery, 'Party Autonomy in Contractual and Non-Contractual Obligations' in Erik Jayme et al (eds), *Studien zum vergleichenden und internationalen Recht/Comparative and International Law Studies* (vol 189, Peter Lang 2014).

44 [2001] OJ No 3680.

45 Ibid, [34].

have extraterritorial jurisdiction under the Athens Convention, leave to serve process out of the jurisdiction should not be required.[46]

3.2 Outside the Athens jurisdiction framework

The art 17 jurisdiction framework is premised on the claimant bringing an action in a court in a State Party to the Convention. What is the position if the claimant chooses to sue in a court in a non-contracting State? This is a common occurrence, either to secure home advantage or to shop in a more favourable forum.[47] Article 17, read with art 14 of the Convention, which provides that '[n]o 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', suggests that the Athens jurisdiction framework was intended to operate as a uniform exclusive code.[48] However, this is the Achilles' heel of all substantivist carve-outs by international treaties — they only enjoy mandatory application in the courts of State Parties. Courts in non-contracting States are generally not required to defer to mandatory public international law rules adopted by other countries.[49]

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46 See eg *Dicey, Morris and Collins on the Conflict of Laws* (15 edn, Sweet & Maxwell 2017) [15.033], 'Permission is not required for the service of process out of the jurisdiction when the claim is brought under the [Athens] Convention as given effect by section 183(1) of the Merchant Shipping Act 1995 or (in its modified form) by Order in Council.' See CPR 6.33(3)(UK): 'The claimant may serve the claim form on a defendant out of the United Kingdom where each claim made against the defendant to be served and included in the claim form is a claim which the court has power to determine other than under the 1982 Act, the Lugano Convention, the 2005 Hague Convention, or the Judgments Regulation, notwithstanding that — (a) the person against whom the claim is made is not within the jurisdiction; or (b) the facts giving rise to the claim did not occur within the jurisdiction.'

47 See Lewins (n 1) 318-324 on forum shopping in the EU and US.

48 See Part 4.1 below for more detailed discussion of this issue.

49 Whether they should, is another question entirely — see Sjur Brækhus, *Choice of Law Problems in International Shipping (Recent Developments)* (1979) 164 Recueil des Cours 251, 291: 'Apart from those instances where there exists a duty under a convention to employ the mandatory contractual legislation of other States, the judge's attitude in regard to such foreign mandatory law will vary greatly. In certain States courts have been reluctant to set aside a contract by applying a foreign mandatory law. The foreign law is viewed as a manifestation of the sovereignty of the State in question, and this sovereignty, it is assumed, should not be given effect beyond that State's own borders. There is much to be said for this view as far as foreign mandatory law of a public law nature is concerned, e.g., export and import regulations and similar provisions of trade policy. In regard to mandatory rules to protect private individuals in their capacity as cargo owners or passengers, however, one ought to attempt to arrive at a system which co-ordinates the areas of applicability of the various national laws.'

For a claimant suing outside the Athens jurisdiction framework, establishing jurisdiction over the defendant carrier will not be an issue where the defendant carrier is based in the claimant's chosen jurisdiction, or where an in rem claim can be brought directly against the relevant ship if it is present in the claimant's chosen jurisdiction. In other instances, the claimant will need to persuade the court to serve process on the defendant carrier out of the jurisdiction.

In Anglo-Common Law terms, this usually involves the claimant having to demonstrate that its claim has a reasonable prospect of success, that the chosen court is forum conveniens or 'the proper place' in which to bring the claim, and that the claim fits through one of the jurisdictional 'gateways' or specified connections between the cause of action and the court's jurisdiction. Where the passenger's claim is based on breach of the carriage contract, this typically means that the breach must have occurred within the jurisdiction, or that the contract must have been made within the jurisdiction, or must have been made by or through an agent trading or residing within the jurisdiction, or must be governed by the law of the forum State, or must contain a homeward choice of court clause.[50] These connecting factors may prove problematic in the context of passenger claims arising out of international carriage contracts — by definition, unless the ship was in territorial waters at the relevant time, the breach is likely to have occurred outside the jurisdiction (subject of course to arguments as to whether the breach is ongoing), and there may be difficulties in localizing formation of the international carriage contract.[51]

Where the passenger claim is based on the defendant carrier's tort, the usual gateway required for service of process out of the jurisdiction is that 'damage' was sustained, or will be sustained, within the jurisdiction.[52] This requirement can give rise to significant difficulties, as the recent split decision of the UK Supreme Court in *Four Seasons Holdings Inc v Brownlie*[53] demonstrates. In addition to the usual debate over whether, and to what extent, damage was

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50 See eg CPR 6B PD para 3.1(6)-(8) (UK).

51 See *Gonzalez v Agoda Company Pte Ltd* [2017] NSWSC 1133 for issues regarding website bookings.

52 See eg CPR CPR 6B PD para 3.1(9) (UK).

53 [2017] UKSC 80, [2018] 1 WLR 192, noted Andrew Dickinson, 'Faulty Powers: One-Star Service in the English Courts' [2018] LMCLQ 189; Adrian Briggs, 'Holiday Torts and Damage within the Jurisdiction' [2018] LMCLQ 196; William Day, 'Jurisdictional Gateways in the CPR' [2018] CLJ 36.

sustained within the jurisdiction, and where one draws the line in terms of factual and legal causation and the de minimis principle, there is the further issue of which heads of damage are jurisdictionally relevant in the context of an Athens Convention claim. Does the Athens regime cover, for example, consequential economic losses, medical or funeral expenses, pain, suffering, emotional or psychological harm, and loss of amenity or consortium?[54] These are the types of ongoing harm that are likely to occur in the claimant's home jurisdiction. Where the claim is subject to the Athens Convention, despite being brought in a non-contracting State, the substantive scope of 'personal injury' covered by the Convention may therefore indirectly influence the court's analysis of what constitutes 'damage' for the purposes of establishing extraterritorial jurisdiction over the defendant carrier.

Assuming that a claimant has been able to establish jurisdiction in a court outside the Athens jurisdiction framework, the next question is whether the court will exercise that jurisdiction. Where the carriage contract contains a foreign exclusive choice of court or arbitration clause that has been effectively incorporated into the carriage contract and communicated properly to the claimant, the defendant carrier is likely to succeed in an application for a stay of proceedings,[55] unless the claimant can show a 'strong cause'[56] as to why the foreign exclusive choice of court or arbitration clause should not be enforced.[57] A court in a non-contracting State is unlikely to be swayed by an argument that the clause should be struck down under art 18 because it restricts the claimant's options under art 17 of the Convention. Article 18 is toothless because the Convention is not mandatorily applicable in the forum State,[58] and this

54 Discussed in more detail in Part 4.1 below.

55 For a survey of choice of court clauses and their enforceability in US and EU law in the context of the cruise market, see Robert D Peltz, 'The Athens Convention Revisited' (2012) JMLC 491, 505-508; Igor Volner, 'Forum Selection Clauses: Different Regulations from the Perspective of Cruise Ship Passengers' (2006) 8 European Jnl of Law Reform 439; Begines (n 9) 212.

56 See *The Eleftheria* [1970] P 94; *The El Amria* [1981] 2 Lloyd's Rep 119. Choice of court clauses in passenger carriage contracts are excluded from the ambit of the Hague Convention on Choice of Court Agreements 2005: see Craig Forrest, 'Hague Convention on Choice of Court Agreements: The Maritime Exceptions' (2009) 5 J Priv Intl L 491, 505-506. As Forrest points out, 'the exclusion of these contracts from the Hague Convention has no doctrinal basis. It appears to have been [simply the] existence of conventions that specifically address the area, such as the Athens Convention, which underpins their exclusion.'

57 See eg *Star Cruises (HK) Ltd v Tung Ho Wah* [2006] HKDC 61, [2006] 3 HKLRD 254.

58 See *Friesen v Norwegian Cruise Lines Inc* 2003 BCSC 256 [13]: 'Articles 17 and 18 of the Athens Convention, as adopted by Canada only weeks after the plaintiff's accident, render null and void any clause such as clause 28 [a Florida exclusive choice of court clause]. But this is not available to the plaintiff by law because Canada was not a party to the Convention at the time of her accident. Additionally, I reject the submission

argument would, in any event, not sit well in the mouth of a claimant who has elected to litigate outside the art 17 jurisdiction framework. This can create insurmountable hurdles for passenger claimants:[59]

> Regarding forum selection clauses, litigation on behalf of cruise passengers can be made especially difficult because of the enforcement of these stipulations. Since most consumers purchase cruise vacations from their local retail travel agent, they expect to be able to file a complaint or commence a lawsuit in their local courts. But this is, however, not always possible when it comes to complaints arising from cruise shipping. The passenger ticket may contain a forum selection clause and a choice-of-law clause, both of which can have a negative impact upon the passenger's ability to prosecute his claim. A forum selection clause may require that all passenger lawsuits be brought in the local court where the cruise line is headquartered. When faced with prosecuting a claim in a distant forum, some passengers may be discouraged from doing so.

Where the claimant can persuade a court that a stay of proceedings in accordance with the foreign exclusive choice of court or arbitration clause will result in an outcome that is inconsistent with applicable mandatory consumer protection,[60] unfair contracts,[61] or trade practices[62] rules of the forum, the clause is likely to be ineffective. The result in any given case will therefore often turn entirely on whether the claimant's chosen court is situated in a jurisdiction that has implemented a robust mandatory consumer protection regime. This is, of course, a recipe for forum shopping on the part of sophisticated or well-advised consumers. In the absence of an exclusive foreign choice of court or arbitration clause in the carriage contract, the defendant carrier may nonetheless apply to the court to exercise its discretion to stay proceedings on the basis that it is forum non conveniens. Given that the (potentially

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that article 18 provides a free-standing avenue to the result contended for. As I interpret article 18, it only operates if article 17 is applicable, which it was not.'

59 Begines (n 9) 212.

60 See Kate Lewins, 'Cruise Ship Operators, Their Passengers, Australian Consumer Law and State Civil Liability Acts: Part 1' (2015) 29 Austl & NZ Mar LJ 93; Kate Lewins, 'Cruise Ship Operators, Their Passengers, Australian Consumer Law and Civil Liability Acts: Part 2' (2016) 30 Austl & NZ Mar LJ 12.

61 In *Star Cruises (HK) Ltd v Tung Ho Wah* [2006] HKDC 61, [2006] 3 HKLRD 254 the exclusive jurisdiction clause was found not to fall foul of the Unconscionable Contracts Ordinance, Cap 458 (HK), which was held to apply even though the governing law of the carriage contract was Malaysian law rather than Hong Kong law.

62 See eg Kate Lewins, 'The Cruise Ship Industry — Liabilities to Passengers for Breach of s52 and s74 Trade Practices Act 1974 (Cth)' (2004) 18 Austl & NZ Mar LJ 30.

binary) art 17 Athens jurisdiction framework does not bind courts in non-contracting States, the issue will undoubtedly be resolved on an application of the normal forum non conveniens discretion. This is illustrated by *Stoymenoff v Airtours PLC*, where, in deciding whether to stay proceedings in Ontario in favour of England, Spence J provided the following analysis:[63]

> [37] As to whether England must be considered the most convenient forum, a number of considerations are adduced for Airtours. These are stated and considered below.
>
> 1. The agreement between Airtours and the plaintiff is subject to the Athens convention, which provides for the jurisdiction of the Courts of England. ... The better view is that the parties, by their conduct, and as allowed for under the Athens Convention, have agreed to the jurisdiction of the Courts of Ontario. This conclusion is virtually sufficient to dispose of the motion, because the courts accord major significance to the parties' choice of forum.
>
> 2. The location of the damage complained of. The accident that led to the damage occurred outside Ontario but the damage continued into Ontario in the form of the further deterioration in the health of the plaintiff and his eventual death. Based on the decision in *Duncan v. Neptunia Corp.* (2001) 53 O.R. (3d) 754 at paras. 102 to 104, this continuing damage in Ontario is sufficient to support Ontario in this respect.
>
> 3. The location of key witnesses and documents. It appears that some key witnesses and documents of Airtours are in England or outside Ontario. But there is nothing to suggest any difficulty in making them available in Ontario. The reports of doctors in Ontario may also be quite important, as may be their evidence as witnesses. Mrs. Stoymenoff, the widow of the deceased, and his companion on the voyage in question, would presumably be a key witness. She resides in Ontario.
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> 4. Airtours' principal place of business is in the U.K. This is not disputed.

[63] [2001] OJ No 3680.

5. The contract between the plaintiff and Airtours is governed by the laws of England. Paragraph 10 so provides. This argument is addressed below in paragraph 8.

6. Airtours carried out its obligations under the contract outside Canada. This contention relates to the location of the incident complained of but does not deal directly with the resulting damages, which include the damages eventually suffered in Canada.

7. The links to persons in Canada are few. This is contentious. The deceased lived in Ontario. His widow lives in Ontario. The other defendant, NALG has offices in Quebec. These persons are all important to the proceedings.

8. The plaintiffs' action against NALG is based on a different contract and involves different (and Canadian) law. This argument does not deal directly with how the action against the two defendants NALG and Airtours can best proceed. Since the claims arise out of the same incidents, the case for hearing the claims together is apparent. It is desirable to avoid multiplicity of proceedings and possibly conflicting or inconsistent results. Whether the claims are heard in England or in Canada, it may well be that English law will apply to the case against Airtours and Canadian law will apply to the case against NALG. It is not shown that it would be more difficult to prove English law in a Canadian court than to prove Canadian law in an English court. …

[38] In view of the foregoing considerations, it cannot be concluded that England is a more appropriate forum under the criteria which are to be taken into account under the forum non conveniens doctrine.

4 Governing law

4.1 Mandatory exclusive code?

Where the Athens scope of application provision is triggered, the Convention regime is mandatorily applicable to all passenger claims falling within the substantive carve-out and brought in courts of State Parties, regardless of any choice of law:[64]

> [C]ertain laws apply regardless of the law chosen by the parties. The Athens Convention …, for example, applies if the ship is flying the flag of or is registered in a country that is a party to the convention. Hence, if a vessel flies the flag of Liberia, a signatory to the convention, the Athens Convention and its liability limits should apply *ex proprio vigore*.

The mandatory character of the Convention regime is underlined by art 18, which provides, in the familiar formula found in most mandatorily applicable international carriage Conventions, that any contractual agreement entered into prior to the event causing the death, personal injury, or loss of, or damage to, luggage on which the claim is based, which attempts to exclude or lessen the carrier's liability below Convention limits, to shift the burden of proof resting on the carrier, or to restrict the claimant's jurisdictional options under art 17, is null and void.[65]

The next question is whether the Athens regime is intended to operate as an *exclusive* mandatory code. In other words, is a claimant within the mandatory Convention framework confined exclusively to its Convention claims and remedies, or are broader or different domestic law causes of action and remedies still available? This issue, which has been much debated in the context of the Warsaw Convention, and which has now seemingly been settled in favour of exclusivity,[66] remains relatively unexplored in relation to the Athens regime.

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64 B Otis Felder, 'Unifying Choice-of-Law Rules and Their Effects on Maritime Remedies' (1999) 11 USF Mar LJ 213, 217.

65 See Berlingieri (n 1) 275: this method of listing the mandatory rules 'has the implied effect of excluding the mandatory character of the rules that are not mentioned'.

66 *Sidhu* v *British Airways plc, Abnett (known as Sykes)* v *Same* [1997] AC 430. See also Paul Myburgh, 'Exclusivity of the Warsaw Convention' [1998] LMCLQ 476.

Although Lewins rightly warns of the dangers of analogizing too readily between differently worded international carriage Conventions,[67] in my view the Athens regime is intended to operate as an exclusive code.[68] Article 14, which is headed 'Basis for claims', provides that '[n]o 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'. This would seem to be an even clearer candidate for exclusivity than the Warsaw Convention, which is an open-ended code, in the sense that it leaves to domestic law the issues of identity of the claimant and basis for title to sue under the Convention, and therefore only provides an exclusive uniform framework in terms of the defendant carrier's legal position.[69]

This view is supported by *McDonald v The Queen of the North*,[70] where the claimants argued that the lack of availability of punitive or exemplary damages under Athens 2002[71] created a gap which ought to be filled by Canadian maritime common law or judicial law reform. Joyce J was not convinced. After finding that the wording in art 3 of the Athens Convention is analogous to that in art 17 of the Warsaw Convention, he held that art 14 'operates to confine the action within the convention'[72] and concluded as follows:[73]

> *[T]he dependants' claims in these actions fall exclusively under the MLA and the Athens Convention.* There is no ability under the statute and convention for a dependant of a deceased passenger to recover punitive, exemplary or aggravated damages. I am not persuaded that such damages are recoverable under maritime common law applicable in

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67 Lewins (n 1) 116-118.

68 Except, of course, where the Convention expressly refers an issue to the lex fori, which it does in three instances: contributory fault (art 6), the awarding of periodical income payments (art 7) and the suspension and interruption of limitation periods (art 16(3)): see O N Sadikov, 'Conflicts of Laws in International Transport Law' (1985) 190 Recueil des Cours 189, 236; Marco Lopez de Gonzalo, 'Carriage of Passengers' in Jürgen Basedow et al (eds), *Encyclopaedia of Private International Law* (Elgar Online) 272.

69 Paul Myburgh, 'Title to Sue Under the Warsaw Convention: Construing a Dinosaur Text in the Digital Age' (2000) 6 NZBLQ 305.

70 2008 BCSC 1777.

71 See art 3(5)(d): '"loss" shall not include punitive or exemplary damages'. 'It is not a coincidence that terminology from the law of the United States of America has been used': Røsæg (n 40) 172.

72 *McDonald v The Queen of the North* 2008 BCSC 1777 [19]. See also [20]: 'where the claim falls under the MLA and Athens Convention, as these claims do, the provisions of the legislation do not permit the recovery of punitive or exemplary damages, which are not in the nature of compensation'.

73 Ibid [60]. Emphasis added.

> Canada. I am not persuaded that this court should engage in judicial reform of Canadian maritime law to expand the scope of recovery to include such damages. In my opinion, if such reform is warranted it must come from Parliament.

If the view that the Athens regime operates as an exclusive mandatory code is correct, this brings sharply into focus the scope of 'personal injury' under the Athens regime, as any personal injury not falling within the Convention term will be irrecoverable. The Warsaw and Montreal regimes governing carriage of passengers by air notoriously use the more restrictive expression 'bodily injury', which is generally accepted to exclude compensation for claims based solely on psychological injury.[74] Although restricting compensation for such injury under the international air carriage regimes may be regarded as morally repugnant,[75] it may at least be said that the parties and their insurers know where they stand. The use of 'personal injury' in the Athens regime is vague enough to leave the door open to different interpretations by national courts.[76] Whilst it is likely that courts will interpret the term 'personal injury' broadly as to include claims based on psychological or even emotional harm,[77] the matter cannot be said to be free from doubt.[78] It is surprising and disappointing that the drafters of the Athens regime did not address the definition of 'personal injury' with more care and attention. There were already 19 reported US cases discussing the boundaries of 'bodily injury' under the Warsaw Convention in 1974. By 2002, that number had swelled to 233. This was hardly an issue of which the drafters could have been unaware. Also, a large sector of international carriage of passengers by sea is devoted to pleasure and holiday travel

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74 But see McKay Cunningham, 'The Montreal Convention: Can Passengers Finally Recover for Mental Injuries?' (2008) 41 Vand J Transnatl L 1043 for counter-arguments.

75 Soyer (n 14) 194 makes the point that, at the time of drafting the Warsaw Convention in 1929, most states had not recognized psychological injury as a separate cause of action, and scientific knowledge about mental health issues was still very basic. That does not, however, explain or excuse the retention of the restrictive terminology in art 17 of the Montreal Convention 1999.

76 See Gutiérrez (n 1) 131 n 137; Soyer (n 14) 193-195; Røsæg (n 40) 172: 'The compensation under the Convention could be for economic loss, but could also extend to compensation for pain, suffering and bodily injury. Which losses are compensable, and how they are evaluated, is a matter for national law.'

77 de Gonzalo (n 67) 272: the Athens regime's reference to personal injury 'seems to be a broader notion than the "bodily injury" of the Montreal Convention'. As Lewins (n 1) 111-112 says, the predominant modern Anglo-Common Law view would be that 'personal injury' includes psychological or emotional injury.

78 *Kotai v The Queen of the North* 2009 BCSC 1604 (supplementary reasons to *Kotai v The Queen of the North* 2009 BCSC 1405) [6]: 'By referring to the concession made by B.C. Ferries, I was not intending to suggest that I was making a determination of the recovery of damages of a psychological nature under the MLA and the Athens Convention outside of this case. I want to make it clear, therefore, that the actual recovery of damages of a psychological nature under the MLA and the Athens Convention remains an open question.'

— a field ripe for non-pecuniary claims, ranging from mild disappointment through to stress, vexation, emotional harm and, in more extreme events, ongoing psychological trauma.[79] The Athens regime leaves such issues to the private international mercies of the lex fori, which will undoubtedly be a contributing factor in encouraging future forum shopping.[80]

The focus of the Athens regime on the carrier's liability and compensation for personal injury or death, or loss or damage to luggage, means that it does not address other issues, such as the carrier's liability for breach of the obligation to transport, defective performance of the carriage contract, insufficient quality of services provided under the carriage contract, damages for delay, contribution claims against the carrier, as well as consequential losses.[81] These matters will also have to be resolved by domestic law on the basis of an application of the forum's private international law rules.[82]

4.2 Parties' choice of law

Where the Athens regime operates as a mandatory code, choice of law is policed by art 18 — any choice of law clause that has the effect of a prohibited outcome under art 18 will therefore be null and void to that extent. Any choice of law that does not have that effect, or that purports to govern issues not covered by the Convention, will presumably be unobjectionable. The efficacy of such a choice of law clause will therefore be determined by

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79 See Gahlen (n 1) 227-228 for a discussion of a Spanish decision concerning the grounding of the *Costa Concordia*, where the claimants filed suit under EU Regulation 392/2009 for mental anguish suffered during the incident and the evacuation of the vessel.

80 So too Gutiérrez (n 1) 131 n 137.

81 See Gahlen (n 1) 221, 227; Begines (n 9) 209: 'The limited scope of the Convention is in contrast to the uniform law for passengers carried by other means, such as railway or air, such law containing a more comprehensive regulation.' See also *South West Strategic Health Authority v Bay Island Voyages* [2015] 2 Lloyd's Rep 652 (CA) [15]: 'The Convention is a convention "for the unification of certain rules relating to the carriage by sea of passengers and their luggage" – it does not purport to be a complete code governing all liability of sea carriers to whomsoever owed in respect of the carriage of passengers and their luggage … [R]eading the Convention as a whole it is to my mind clear that it deals with claims by passengers against carriers, and with nothing else.'

82 de Gonzalo (n 67) 273: The Athens regime 'is silent regarding which consequences of the passenger's death or personal injury must be compensated, and how such compensation should be calculated. These issues are accordingly to be determined under the applicable national law…'.

the usual rules relating to incorporation and notice laid down in the ticket cases.[83] As discussed above in relation to choice of court clauses, the efficacy of choice of law clauses will also depend on the overriding operation of mandatory forum rules such as consumer protection statutes, which may strike down foreign choice of law clauses, or simply ignore them.[84]

Even where the Athens regime does not operate as a mandatory code, defendant carriers will often choose to opt into all or part of the Convention, or a domestic legal system implementing the Convention, to receive the benefit of limited liability. In these cases, because the substance of the Convention is contractually incorporated rather than having mandatory application, parties can cherry pick or vary Convention provisions without falling foul of art 18. Particularly selective or one-sided incorporations of Convention provisions are likely to be regarded with a more jaundiced judicial eye, as opposed to where the entire compromise package of the Athens regime is incorporated.[85] Courts are likely to require at

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83 See eg *Roy v North American Leisure Group* (2004) 73 OR (3d) 561, 246 DLR (4th) 306 [16]: 'The first paragraph of the Sunquest brochure alerted the reader to the distinction between the responsibilities of the tour organizer and the responsibilities of those who provided tour services. The plaintiffs received cruise materials specifically cautioning them in large bold letters as to the importance of the documents and asking them to read them carefully. Those materials clearly advised the plaintiffs of the application of the law of England and of the two-year limitation on any causes of action. These contractual provisions did not contain any unusual or onerous terms. They did not, for example, provide an exclusion of liability. The included terms as to applicable law and limitation period were consistent with the purpose of the contract. As such, it was not necessary that they be specifically brought to the plaintiffs' attention. Further, the reasonable expectations of the parties would not have included the expectation that Ontario law would apply to a Caribbean cruise supplied by a British cruise company. In the circumstances of this case, the plaintiffs' failure to read this term is not sufficient to negate its application. Thus, by contract, the applicable law is that of England.'

84 See eg s 67 of the Australian Consumer Law discussed in *Australian Competition and Consumer Commission v Valve Corporation (No 3)* [2016] FCA 196; s 43(1) of the Consumer Guarantees Act 1993 (NZ). Gahlen (n 1) 219 notes that strong consumer protection rules, such as those found in the EU, may favour passengers over victims of maritime torts: 'Because they have a contractual relationship with one of the actors of the maritime trade, even though they consciously entered into an agreement by which they expose themselves to the risk of maritime transport, they are likely to enjoy better protection …'.

85 Unsurprisingly, the Athens limitation of liability provisions, stripped of their Convention context, are popular candidates for incorporation into standard form carriage contracts. See Peltz (n 54) 515: '[T]he incorporation of the damage limitation from the Athens Convention by itself is neither the adoption of the treaty or the choice of a foreign law. Instead the cherry picking of the damage limitation is merely a rather transparent effort by carriers to insert a limitation on the amount of recovery with an attempt to justify it by giving it special status through the claim that it is part of a treaty or foreign law.'

least an express reference to the Athens Convention,[86] or, in some jurisdictions, a plain English explanation of the implications of the application of the Convention to the carriage contract.[87] It is not clear whether an express choice of the law of a State Party to the Athens Convention (eg 'English law') will, without more, be enough to indicate an intention to incorporate the Athens Convention provisions.[88]

4.3 Tort claims

Determining which law governs maritime torts, particularly torts committed on the high seas, can be a difficult exercise.[89] Where the passenger's tort claim is covered by Athens qua mandatory regime, the application of the Convention framework may assist in producing more consistent outcomes, at least so far as quantum is concerned. The introduction by Athens 2002 of strict liability in respect of 'shipping incidents',[90] and the reversal of the burden of proof onto the carrier,[91] may also assist in producing more uniform results, minimizing the influence of the lex loci delicti (or other governing law of the tort).

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86 See eg *Roy v North American Leisure Group* 73 OR (3d) 561; 246 DLR (4th) 306 [4], [6]: 'The plaintiffs' vacation … included flights to and from the Dominican Republic, a seven-day hotel stay in the Dominican Republic, and a seven-day Caribbean cruise on a ship registered in the Bahamas and owned by a related company, Airtours, which had its head office in and operated from England. The brochure specified that the law of England governed the cruise contract. … The brochure referenced the Athens Convention and alerted the reader that a copy of this Convention was available on request.'

87 See eg *Wallis v Princess Cruises Inc* 306 F 3d 827, 840 (9th Cir Cal 2002): A clause that merely references the '"Convention Relating to the Carriage of Passengers and Their Luggage by Sea" of 1976 ("Athens Convention")' without providing an approximate monetary limitation 'does not meaningfully inform a passenger of a liability limitation, and is therefore unenforceable'.

88 See *Hellenic Steel Co v Svolamar Shipping Co Ltd (The Komninos S)* [1991] 1 Lloyd's Rep 370 (CA) (choice of English law insufficient to incorporate the Hague-Visby Rules); but cf US cases on the United Nations Convention on Contracts for the International Sale of Goods 1980 (CISG), eg *Asante Techs Inc v PMC-Sierra Inc* 164 F Supp 2d 1142, 1150 (ND Cal 2001): 'Although selection of a particular choice of law, such as "the California Commercial Code" or the "Uniform Commercial Code" could amount to implied exclusion of the CISG, the choice of law clauses at issue here do not evince a clear intent to opt out of the CISG. For example, Defendant's choice of applicable law adopts the law of British Columbia, and it is undisputed that the CISG *is* the law of British Columbia.'

89 See Jürgen Basedow, 'Rome II at Sea — General Aspect of Maritime Torts' (2010) RabelsZ 118; Jürgen Basedow, 'Die private Haftung aus Seedelikten zwischen Völkerrecht und Internationalem Privatrecht' in Holger P Hestermeyer et al (eds), *Coexistence, Cooperation and Solidarity: Liber Amicorum Rüdiger Wolfrum* (Brill 2011) 1869; Martin P George, 'Choice of Law in Maritime Torts' (2007) 3 J Priv Intnl L 137; *Roy v North American Leisure Group* 73 OR (3d) 561; 246 DLR (4th) 306 (shipboard tort on Caribbean cruise — lex loci delicti held to be Bahamian law, as the law of the ship's flag).

90 Article 3(1). Article 3(5)(a) defines 'shipping incident' as meaning 'shipwreck, capsizing, collision or stranding of the ship, explosion or fire in the ship, or defect in the ship', unless the carrier proves the exceptions contained in art 3(1)(a) or (b).

91 Article 3(6).

However, the interplay between the governing law of the tort and the Athens regime may still cause headaches. What if the lex loci delicti limits liability for personal injury to a greater extent than the Athens Convention, or excludes it altogether?[92] Article 18 polices contractual provisions excluding or lessening liability below Convention limits, but not common law or statutory caps or exclusions. Where the court is applying the Convention as a mandatory code, it may decide that its public international law obligations require the Convention limitation of liability rules to take precedence. Where the Convention has been contractually incorporated, however, it will probably have to give way to the lex loci delicti, particularly if the latter is expressed in mandatory statutory and/or extraterritorial terms.

In addition, the lex loci delicti may influence the scope of 'personal injury' recoverable under the Athens regime. If the type of injury complained of is not actionable at the lex loci delicti,[93] it is difficult to see how it can be recoverable under the Athens regime, unless the court is willing to give 'personal injury' in art 3 an autonomous, anational interpretation to avoid undermining the purpose of art 3, read with art 14. Although there is no explicit basis for this in the Athens Convention,[94] it would significantly undermine international uniformity if the claimant's ability to claim for, say, psychological injury depended on exactly where the ship was situated or flagged when the event causing the injury occurred.

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92 For example, because there is a statutory accident compensation scheme that bars tort proceedings, as is the case in New Zealand: on which, see Rosemary Tobin and Elsabe Schoeman, 'The New Zealand Accident Compensation Scheme: The Statutory Bar and the Conflict of Laws' (2005) 53 American Jnl of Comp Law 493; Bevan Marten, 'Limitation of Liability for Personal Injury in New Zealand: ACC Meets the Sea' (2006) 20 Australian & NZ Mar LJ 16.

93 See eg *Paul v Holland America Line Inc* 463 F Supp. 2d 1203, 2006 AMC 2772 (WD Wash 2006): loss of consortium claims not cognizable in cases governed by maritime law. Conversely, the lex loci delicti might take a much broader view of 'personal injury' in some jurisdictions, particularly in respect of breaches of dignitary, reputational or privacy interests.

94 Cf art 7(1) of the CISG, which expressly mandates autonomous interpretation of the text: 'In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.'

5 Recognition and Enforcement of Judgments

Athens 1974 does not regulate this issue, leaving it instead to national law. Athens 2002 adds a specific provision on recognition and enforcement of judgments in the form of art 17bis, which provides that any judgment given by a competent court with jurisdiction under art 17 which is enforceable in the judgment State and no longer 'subject to ordinary forms of review', must be recognized and enforced in any other State Party to Athens 2002 as soon as the 'formalities' required by the recognizing State have been complied with.[95] The recognizing State is not permitted to reopen the merits of the case. The only permissible exceptions to recognition are fraud or a failure of natural justice.

Article 17bis (3) provides that alternative recognition and enforcement of judgement rules may be applied, provided their effect is to ensure that judgments are recognized and enforced at least to the same extent as under the Athens regime. The European Union has exercised this option, preferring instead to make use of its own general recognition and enforcement regulation.[96]

The Athens 2002 recognition and enforcement of judgments regime does not apply to judgments delivered by courts in non-contracting States. Recognition and enforcement of such judgments will therefore be governed by the usual domestic legal rules, which vary from jurisdiction to jurisdiction.

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95 Berlingieri (n 1) 284-285 argues that the wording here is vague, and appears to allow a considerable margin of flexibility on the part of the recognizing State. He concludes that the Athens recognition and enforcement provisions 'have more a political, rather than legal flavour'.

96 See the European Commission proposal at IMO LEG/CONF 13/7 [13]: 'Since the provisions on recognition and enforcement of judgments of Regulation 44/2001 generally are less restrictive than the rules provided for in paragraphs 1 and 2 of Article 17bis, EU Member States could continue to apply the main thrust of the Regulation. EU Member States could in other words continue to recognise and enforce judgments given in other EU Member States to a wider extent than the mere application of the provisions of paragraphs 1 and 2 of Article 17bis would imply. On the other hand, the Regulation should be applied only to the extent that it would ensure at least the same level of recognition as those two paragraphs. In this way a certain minimum threshold for the standards for recognition and enforcement of judgment under the Athens Protocol is achieved among its all Parties. In any case, however, Regulation 44/2001 only deals with the way a judgment given in one EU Member State is recognised and enforced in another EU Member State.' On the complexity of the interplay between the Athens regime and EU law generally, see Gahlen (n 1) 244-248; Erik Røsæg, 'The Athens Convention on Passenger Liability and the EU' in Jürgen Basedow et al (eds), *The Hamburg Lectures on Maritime Affairs 2007-2008, Hamburg Studies on Maritime Affairs 16* (Springer-Verlag 2010) 55.

6 Conclusion

It is easy to be critical of the shortcomings of the Athens regime and to forget that 'the liability system adopted at that time represented a milestone in the progressive development of maritime law'.[97] However, it cannot be said that the Athens regime has proved to be a particularly successful substantivist carve-out. This is largely the result of uncertainties surrounding its scope of application and operation as a mandatory exclusive code; the ability to easily circumvent its jurisdiction framework and shop for a more favourable forum; a lack of clarity regarding coverage of 'personal injury'; and a messy and complicated relationship with global limitation of liability regimes. The Athens regime would undoubtedly be more effective if it enjoyed more widespread uptake amongst maritime jurisdictions.[98] However, for a range of economic and political reasons, that seems highly unlikely.[99] The world has also changed considerably since 1974 — what may then have seemed a progressive advance in the protection of passengers' rights, has now been overtaken by a consumer protection revolution in most developed countries. In 2018, the Athens regime arguably looks a lot more like a regressive evasion of maritime operators' corporate responsibilities towards their clients.

Ultimately, substantivist carve-outs will only be successful if the substance in question is homogenous enough to be pinned down sufficiently for effective legal unification. It is much easier to draft uniform international solutions for goods than for people. The reality is that international carriage of passengers by sea takes place in vastly varied and divergent contexts, which are not easily susceptible to unification:[100]

> Not only are there different standards in comfort and, unfortunately, in safety, in different countries, but there are already marked differences between ferries, transport of passengers

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97 Walter Müller, 'Passengers Carried by Sea. Should the Athens Convention 1974 be Modified and Adapted to the Liability Regime in Air-Law?' [2000] CMI Yearbook 665, 667.

98 Athens 1974 took 13 years to enter into force and still only applies to 32.17% of world tonnage. Athens 2002 took almost as long to come into effect and currently covers only 44.62% of world tonnage. See IMO Status of Treaties <http://www.imo.org/en/About/Conventions/StatusOfConventions/Documents/StatusOfTreaties.pdf>, accessed 20 June 2018.

99 Jan Ramberg, 'Freedom of Contract in Maritime Law' [1993] LMCLQ 178, 183: the prospects of the Athens Convention 'seem to remain rather bleak'.

100 Gahlen (n 1) 218-219.

on cargo ships, short day cruises, and cruise ships even in one country, which also influence the attitude of passengers towards the voyage. Cultural differences and differences in cost of living in a given country also create problems and setting appropriate liability limits – or in deciding whether liability should be limited at all. Uniformisation regarding claims for death and personal injury is very difficult where standards are different, and may not be beneficial to any party if the limits are set in the middle between extremes.