It's All Greek to Me: The Importance of Pleading the Athens Convention in Cruise Cases

In the second of their articles on procedural points arising out of the Athens Convention, Sarah Prager and Jack Harding of 1 Chancery Lane consider whether failure to plead the applicability of the Convention is a bar to recovery.

the applicability of the Athens Convention

It will be recalled that, in broad terms, the Athens Convention is concerned with a carrier's liability to passengers for death, personal injury and loss of or damage to luggage in the course of international carriage by sea. The Convention does not cover liability in respect of quality complaints which might arise in the context of, for example, a cruise which forms part of a regulated package holiday.

the exclusivity of the Convention regime

Article 14 of the Convention provides that:

"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".

The equivalent provision in the Montreal Convention was held by the House of Lords in *Sidhu v British Airways [1997] 2 WLR 26* to have the effect that, where the Convention applied, no additional or parallel remedy was available to the Claimant, whether at common law 'or otherwise'. Since there is no material difference between the two conventions in this regard,

it is generally accepted that Article 14 must have the same effect, and that the regime is exclusive in its application.

When the Athens Convention was originally ratified in 1974, however, the travel law landscape looked very different. The 'package holiday' was still in its infancy, and the desire of the European Parliament for harmonisation and uniformity was not as strongly felt as it is today. When the Package Travel Regulations 1992 (the 'PTR') came into force, they created a regime which was unashamedly consumer-oriented and which did not, and does not, sit easily alongside the restrictive, pragmatic provisions of the Convention.

What, then, is the legal position where a package holiday includes carriage by sea which is otherwise covered by the Athens Convention? If, for example a Claimant is injured on board the vessel, and such injury is caused by the negligence of the carrier or its employees, can he or she bring a claim pursuant to Regulation 15 of the PTR unfettered by the limitations imposed by the Convention?

The position is complicated by two diametrically opposed first instance decisions, both reported in the Lloyds Law Reports in 2004.

In *Lee v Airtours [2004] 1 Lloyds Rep 683* the Claimant booked a cruise holiday with the Defendant tour operator. On the eighth day of the voyage a fire broke out aboard the vessel. The passengers and crew boarded lifeboats and the ship sank with most of the Claimant's luggage on board. The Claimant relied exclusively on Regulation 15 of the PTR and sought damages for psychiatric injury, loss of her possessions and loss of enjoyment of the holiday. The Defendant accepted that there had been an 'improper performance' of the contract, but argued that its liability was limited pursuant to Articles 7 and 8 of the Athens Convention. It contended that the Convention applied as a matter of law, save to the extent that it was expressly ousted by the PTR.

HHJ Hallgarten QC rejected the Defendant's arguments. He held that the PTR provided an *alternative* regime which, in so far as it conflicted with UK domestic law must, pursuant to the European Communities Act 1972, prevail. Relying upon Regulation 15(3) of the PTR, once the liability

provisions of the Convention were overridden by the PTR, there was no basis for the limitation provisions of the Convention to operate.

In *Norfolk v MyTravel [2004] 1 Lloyds Rep 106* the Defendant tour operator provided a package holiday comprising a sea cruise sailing from Palma. The Claimant was injured when she slipped on water on the floor of a lift on board. She issued a claim pursuant to Regulation 15 of the PTR. The Defendant contended that the claim was issued out of time, since pursuant to Article 16 of the Athens Convention claims for damages for personal injury become time-barred after a period of three years from the date of disembarkation. If the PTR applied the three year period under the Limitation Act 1980 could be relied upon, and the claim would have been brought in time.

HHJ Overend concluded that the time-limit in the Athens Convention applied, and the Claim was dismissed. He found that the principle in *Sidhu v British Airways* was applicable to the Athens Convention. The purpose of both international conventions was to create a uniform international code which could be applied by the courts of all the high contracting parties without reference to the rules of their own domestic law. If the effect of section 183 of the Merchant Shipping Act 1995 was to be qualified or even effectively partially repealed so as to make the Convention applicable only in circumstances where there had been an express reference to it in the contract, rather than the Convention applying as a matter of law, the draughtsmen would and should have said so in clear terms. The fact that the Regulations flow from a European Directive does not affect the standing of an international Convention. The aim of both the Directive and the Convention was harmonisation, but one group's harmony may be another group's distortion. In any event, Regulation 15(3) refers to the damage capping provisions of Articles 7 and 8 of the Convention, and not to the time-bar in Article 16.

It is suggested that the reasoning of the Court in *Lee*, if not the final decision, was wrong. It was made *per incuriam* in that *Sidhu* was not cited to the judge, and the arguments concerning the application of the Convention as a matter of law, and the exclusivity of the regime, were

rejected peremptorily without any proper analysis. The PTR provide an effective potential remedy where injury is sustained in any other aspect of the package holiday, but where there is a conflict with the Convention, the latter must prevail. Under the Athens Convention, it is likely that a tour operator providing a cruise holiday will, prima facie, be the 'contracting carrier' within the meaning of the Convention, even though the cruise itself may be provided by a different company ('the performing carrier').

failure to plead the applicability of the Athens Convention

If this is right, almost all claims arising out of accidents occurring in the course of international carriage must be brought under the Athens Convention, and claims founded in breach of contract or negligence must fail. What, then, is the consequence of failure to plead the applicability of the Athens Convention?

As a starting point, nothing in the Civil Procedure Rules requires a party to plead law, and CPR Part 16.4 merely requires a Claimant to plead 'a concise statement of the facts on which he relies'. However, CPR Part 6.2 requires a Claimant to set out in the claim form 'a concise statement of the nature of the claim'. Does this require him to state that it is brought under the Athens Convention? In *Wilding v Commissioner for the Metropolis [2004] EWHC 3042* the High Court held that "…it is a matter of elementary pleading to specify independently each and every cause of action", and a Claimant's claims were struck out because of his failure to particularise them in the claim form. It appears, therefore, that a Claimant *is* required to plead on the face of the claim form that the claim arises under the Convention.

amending the Particulars of Claim to plead the Athens Convention

Where it becomes necessary to amend Particulars of Claim to plead the Athens Convention, and where the limitation period under the Convention has not expired, generally the court will grant permission for such an amendment (cf the guidelines given in *Cobbold v London Borough of Greenwich, unreported, 9th August 1999* in this regard).

Where, however, the two year limitation period has expired, the position is more complex. Pursuant to CPR Part 17.4:

"(1) This rule applies where—

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

(b) a period of limitation has expired under—

(i) the Limitation Act 1980; or

(ii) the Foreign Limitation Periods Act 1984; or;

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

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

Essentially, therefore, a party may amend his claim form to include a claim under the Athens Convention under CPR Part 17.4 only if he applies to do so pursuant to the Limitation Act 1980, the Foreign Limitation Periods Act 1984 or another enactment which allows him to do so. The Foreign Limitation Periods Act is of no application in these circumstances, and the Convention does not allow for such amendment. Under Article 16, any action under the Convention shall be time-barred after a period of two years, although this period may be suspended or interrupted for not longer than a total period of five years.

In *Higham v Stena Sealink [1996] 2 Lloyds Rep 26*, the Court of Appeal held that a Claimant who had issued a claim after the expiry of the Convention time limit under the Convention could not rely upon s.33 of the Limitation Act. The reasoning was two-fold:

- The effect of section 33 was to disapply completely a period which had already run its course and therefore could not possibly be treated as a ground for 'suspension or interruption' within the meaning of Article 16 of the Convention.
- Even if s.33 was a 'suspension or interruption', that section expressly referred to "the provisions of section 11 or 11A or 12 of the (Limitation) Act" and therefore could not be construed as embracing Article 16 of the Convention.

In the circumstances, therefore, a Claimant in such a position may not amend his claim form pursuant to CPR Part 17.4. Does this have the effect of preventing him from bringing a claim under the Convention where he has not pleaded this cause of action within the two year time limit?

A possible answer is provided by CPR Part 17.3, which provides for the court to have a general discretion to give permission for amendments to be made to statements of case. It may be that, because Part 17.4 does not apply in Athens Convention cases, Part 17.3 could be invoked and the general discretion operated. It is suggested that, if so, the guidance in *Cobbold* would tend to suggest that such an amendment would be allowed. As far as the authors are aware, such a submission has never been considered by the higher courts, and at first glance it seems surprising that a Claimant should be placed in a better position by operation of the strict non-extendable time limit provided for in the Convention than by operation of s.33 of the Limitation Act. On the other hand, such an interpretation would be more consistent with the overriding objective under the CPR of doing justice between the parties, and would accord with the prevailing ethos of consumer protection.

conclusions

It is suggested that in claims involving death, personal injury and loss of or damage to luggage in the course of international carriage by sea the Athens Convention applies and should be pleaded in terms. A claim not so pleaded may be amended prior to the expiry of the limitation period under the Convention without a great deal of difficulty, save in the most unmeritorious of cases. However, there may be greater difficulty in amending after the expiry of the two year limitation period. Only time will tell whether CPR Part 17.3 allows a Claimant to do so; it seems that CPR Part 17.4 does not.

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