AUSTRALIAN CRUISE PASSENGERS TRAVEL IN LEGAL EQUIVALENT STEERAGE- CONSIDERING THE MERITS OF A PASSENGER LIABILITY REGIME FOR AUSTRALIA

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Two Australian passengers contact their travel agent on the same day. Each books a cruise of similar duration, embarking at an Australian port for a Pacific cruise, on a different cruise ship line. One contract claims to governed by US law, with any claim to be brought in Florida within 1 year, and a limit on liability of about AUD$80,000 for personal injury or death claims. The second, (the lucky one), boards a ship with a contract governed by Australian law, allowing commencement in an Australian court within 2 years.

Any legal recovery for injury or death sustained on the cruise is already fraught with complexity. But the variation between cruise ship liner's passenger contracts for voyages departing Australia can be significant. This paper argues that the time has come for Australia to introduce a regime for the liability for passengers carried by sea from or to Australian ports.

Introduction

Australians have taken to cruising like the proverbial fish to water. According to industry records, despite the global financial crisis, Australian passenger numbers rose from 263,435 in 2007 to 330,949 in 2008.[1] Even more staggering is the increase over the past 5 years. Between 2002 and 2008, the number of Australian passengers embarking on a cruise has trebled.[2] In 2008-2009 there were 38 different cruise ships visiting Australia, with a total of 521 visits to Australian ports by cruise ships.[3]

The cruise lines are to be commended for their effective marketing which has glamorised a holiday once seen as the domain of the blue rinse set, such that it now appeals to all demographics. Governments and tourism authorities have also been driving the popularity of the cruise ship holiday.[4] Australian consumers are heeding the siren call of the all-inclusive, multi destination, 'unpack your suitcase once' experience.

What the average Australian cruise passenger is unlikely to realise is that walking up the gangway is striding into a complex legal framework likely to grind down even the most legitimate claim against a

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[1] 2008 Australian Cruise Industry Statistics available at http://www.cruising.org.au/filelibrary/files/Press%20Release%202008%20AU%20Stats.pdf (accessed on 21 September 2009).
[2] In 2002, 116,308 Australians took a cruise: the 2008 number is 330,949: see 2008 Australian Cruise Industry Statistics available at http://www.cruising.org.au/filelibrary/files/Press%20Release%202008%20AU%20Stats.pdf (accessed on 21 September 2009).
[3] Economic Impact Assessment of the Cruise Shipping Industry in Australia, 2008-09 Cruise Down Under Final Report September, 2009 Executive Summary, available at www.cruisedownunder.com/admin accessed 24 November 2009.
[4] See for example, various strategies and action plans developed over the past 10 -15 years in Australia, designed at streamlining the cruiseship industry and government regulation affecting it.(see Action Plan for the Development of the Australia- Pacific Cruise Industry 1997 and Revised Action Plan for the Development of the Australia- Pacific Cruise Industry 2006, both available from Tourism Australia website under 'cruise tourism – research and statistics'. :http://www.tourism.australia.com/Marketing.asp?lang=EN&sub=0437&al=2596 accessed 9 November 2009. In those resources no mention is made of cruise ship operator liability to passengers or desirability of laws to protect passengers.

cruise line. The principle of autonomy of contract means that parties are free to enter a contract on whatever terms they wish, subject only to applicable domestic legislation. In entering a cruise ship passenger contract, Australian passengers can draw upon some domestic law to protect them[5] but may well be bound by the standard terms generated by the shipping lines. Usually these are presented on a 'take it or leave it' basis and there is often a debate as to whether the terms have been incorporated in the contract in any event.[6] If they are incorporated, these terms almost invariably include limits as to where and when claims can be brought, and caps on the overall right to claim compensation – and have been known to contain an outright exclusion of liability.[7] They also stipulate the law that is to apply to the contract. In many cases the passenger probably does not even bother reading these terms.[8] But if the standard terms are part of the contract, and something were to go wrong during the cruise giving rise to a claim, the terms will have a profound impact on the likelihood of a successful claim against the cruise ship line.

For commercial maritime lawyers, these types of contractual provisions are a familiar recipe – part careful drafting and part incorporation of useful sections of international convention, and drafted by one party largely for its own benefit.[9] Generally, commercial international conventions bring benefits in exchange for tradeoffs, but for the passengers, **contractual** incorporation of a Convention can be a mixed blessing. On its face, one cannot argue with the fact that passengers are better off with a contractual incorporation of a capped liability scheme as opposed to, say, a blanket exemption of liability. (Incidentally, in 2009 there is nothing stopping cruise ship lines operating out of Australia from enacting a blanket exemption of liability for negligence causing injury or death[10]). Nonetheless, in many respects passengers with a contractual incorporation of the *Athens Convention* are travelling in the legal equivalent of steerage. They are bound by the **disadvantageous** provisions of the Convention – the caps on quantum, still set at 1974 rates – without the offsetting **advantageous** provisions of the Convention – such as their choice of forum for the dispute.

It is time for the Australian Parliament to simplify the legal regime surrounding such claims and provide a basic level of protection against the more odious of the standard terms. That path is by adopting the core provisions of the *Athens Convention on the Carriage of Passengers and their Luggage by Sea 1974* (*Athens Convention*) and its more recent protocols. The numbers of Australians undertaking cruising is such that the Australian Government should consider the benefits to Australian citizens of adopting this Convention, albeit that it may wish to do so with some modifications.

Introducing the Athens Convention

The *Athens Convention*[11] seeks to create a liability regime for claims brought by passengers against the ships with whom they have a contract of carriage.[12]

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[5] Most notably, the consumer protection provisions of the TPA (See K.Lewins, 'The Cruise Ship Industry – Liabilities to Passengers for Breach of s52 and s74 *Trade Practices Act* 1974 (Cth)' (2004) 18 MLAANZ Journal 30) as well as provisions such as the Contracts Review Act 1980 (NSW) and *Fair Trading Act 1999* (Vic) . The *Trade Practices Amendment (Australian Consumer Law) Bill* 2009 (Cth) (*Australian Consumer Law Bill*), if enacted, will also give a passenger protection against 'unfair' standard terms, which offers a whole new basis for passengers to maintain that the contractual conditions are not enforceable. That Bill is flagged to commence on 1 July 2010, if it is passed. Apart from a brief comment in text accompanying fn80 below, the new provisions are outside the ambit of this paper.

[6] Note though that proving the incorporation of relevant clauses in the contract of carriage is by no means always an easy hurdle for cruise ship lines: see *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 79 ALR 9; *Knight v Adventure Associates Pty Ltd* [1999] NSWSC 861; *Baltic Shipping Co v Dillon* (1991) 22 NSWLR 1, and on the facts of *Ross Gordon v Norwegian Capricorn Line (Australia) Pty Ltd* [2007] VSC 517, although in this case there was no finding as to the incorporation of terms as it was an interlocutory application for extension of the relevant time bar.

[7] See cases cited by Michael Tsimplis,'Liability in respect of passenger claims and its limitation' (2009) 15 *The Journal of International Maritime Law* 125 at 126.

[8] As was the case in both *Fay* and *Knight*, ibid, and in *Lee v Airtours Holidays Ltd* [2004] 1 Lloyd's Rep 683.

[9] They are, in this sense, the passenger equivalent to sea carriage documents such as waybills and bills of lading.

[10] Subject perhaps to some clever drafting to manage the potential TPA liability under s74. See Lewins 'Cruise Ship Industry', above fn 5. This position may change once the Standard Terms legislation is passed by Parliament. See fn 5 above.

[11] For a more comprehensive summary of the provisions of the *Athens Convention* 1974 and the 2002 Protocol, See Tsimplis, above fn 7.

The *Athens Convention* applies only to contracts[13] for international voyages (including those that have the same embarkation and disembarkation port, so long as they have visited a port in another State)[14] although it is open to any State to extend the operation of the *Athens Convention* to other local voyages.[15] Its provisions bind both a contracting carrier and the performing carrier.

Article 2 of *Athens Convention* stipulates that:

1) This Convention shall apply to any international carriage if:

   a) The ship is flying the flag of or is registered in a State Party to the Convention; or

   b) The contract of carriage has been made in a State Party to this Convention; or

   c) The place of departure or destination, according to the contract of carriage, is in a State Party to this Convention.

Article 3 sets out the basis of liability of the carrier:

> 1. A carrier shall be liable for the damage suffered as a result of a death of or personal injury to a passenger… if the incident which caused the damage so suffered occurred in the course of the carriage and was due to the fault or neglect of the carrier or of his servants or agents acting within the scope of their employment.
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> 2. The burden of proving that the incident which caused the loss or damage occurred in the course of the carriage, and the extent of the loss or damage, shall lie with the claimant.
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> 3. Fault or neglect of the carrier or of his servants or agents acting within the scope of their employment shall be presumed, unless the contrary is proved, if the death of or personal injury to the passenger or the loss of or damage to cabin luggage arose from or in connexion with the shipwreck, collision, stranding, explosion or fire, or defect in the ship. In respect of loss of or damage to other luggage, such fault or neglect shall be presumed, unless the contrary is proved, irrespective of the nature of the incident which caused the loss or damage. In all other cases the burden of proving fault or neglect shall lie with the claimant.

Essentially, the *Athens Convention* represents a trade off of the right of freedom of contract (which allows a carrier to exclude liability to its passengers entirely[16]) in exchange for the carrier being able to impose caps on liability.[17]

It is important to understand that the *Athens Convention* operates quite differently to the general right shipowners have to limit their claims pursuant to the *Limitation of Maritime Claims Convention 1976*,[18] enacted in Australia by the *Limitation of Maritime Claims Act* 1989 (LLMCA). While the *Athens Convention* offers a 'per claim' limit, the LLMCA provides a global limit for all passenger claims arising out of one incident, capping the total of all claims.[19] As the limitation amounts are calculated by reference to number of passengers the ship is authorised to carry, for cruise ships these

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[12] Or are accompanying goods or live animals the subject of a contract of carriage.
[13] It will not, therefore, extend to people invited to board a vessel as guests of the owner. However it is unclear if the same would apply if the host has chartered the vessel, as occurred in the *Marchioness* tragedy in 1989. As Griggs, Williams and Farr note in their text *Limitation of Liability for Maritime Claims* (4 ed, 2005), this issue was never tested. (Chapter 4. Commentary on Article 1(d)).
[14] See Art 1.10.
[15] Some countries have done this – such as Canada and England. Federal Parliament could and should extend the operation to interstate voyages. See the discussion at fn 83 below.
[16] Subject to any applicable domestic law.
[17] A similar trade off occurred in International Conventions governing carriage of goods by sea.
[18] And its amending Protocol of 1996 also now incorporated in Australian law by the LLMCA.
[19] See Article 2.1(b) and Article 7.

limitation amounts are so high that they are unlikely to be relevant in all but the most catastrophic, *Titanic* type cases.[20]

Although the 1974 *Athens Convention* adopts a fault based system of liability, carrier fault is presumed where the incident was of a maritime nature defined in the provision. Where there has been a maritime incident, the cruise ship passenger will not have to prove negligence;[21] rather the carrier will have to disprove negligence to escape liability.[22] If the passenger's injury or damage claim is not due to a maritime incident, then the passenger bears the onus of proof in the usual way.[23]

The *Athens Convention* stipulates a limitation amount for each passenger claim for personal injury or death, and separate amounts for luggage claims. By reason of a Protocol in 1976, the Convention adopts limitation amounts in the currency of the Special Drawing Right (SDR). The basic limits under the *Athens Convention* are therefore 46,666 SDRs (about AUD $80,000) for death or personal injury and 833 SDRs (about AUD$1424) for cabin luggage.[24]

The *Athens Convention* has been ratified by 32 countries.[25] It has also been enacted by many more countries without formally ratifying the Convention;[26] usually because the country considers that the quantum limits stipulated by the Convention are too low. [27] By enacting the Convention without ratifying it, a country can unilaterally increase the limits applicable in that country.[28]

Significantly, parties to a carriage contract may agree to incorporate the *Athens Convention* terms into their contract, although the cruise line will expressly vary parts of the *Athens Convention* by the terms of the contract.[29] If the Convention does not apply by force of law to a particular carriage contract then it – or chosen parts of it – may apply by express incorporation in the contract.[30]

A rudimentary comparison of the relevant terms and conditions of some of the cruise lines active in our region is set out in the table annexed to this paper.

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[20] The 1996 Protocol stipulates that the global limit for all passenger claims is to be 175,000 SDR for each passenger the ship is authorised to carry. The *Oasis of the Seas*, launched in November 2009, can carry 6300 passengers (5400 at double occupancy). Using the maximum occupancy, its global limit for personal injury or death claims arising from one incident under the LLMCA would be 1,102,500,000SDRs or a staggering AUD $1,885,275,000. See Tsimplis, above fn 7 at 134 – 137 for a discussion of the interaction between the *Athens Convention* 1974 and the LLMCA in the UK.

[21] The maritime incidents cited in Article 3.3 are those 'from or in connexion with the shipwreck, collision, stranding, explosion or fire, or defect in the ship.' The last criterion, defect in the ship, is relatively ambiguous (see Limitation – Chapter 4 i-law.com text accomp fn 19) and has led to some case law particularly in the US where passengers have routinely claimed that 'slip trip and/or fall type accidents' are due to defects in the ship: see Robert Peltz & Vincent Warger 'Amendments to Athens Convention Threaten US Maritime Law' [2001] *International Travel law Journal* 170, 180.

[22] 'Proving negligence for a passenger's injuries or death may be difficult because the carrier is usually the only party to have the relevant information. Where the ship has been lost, the details of the incident may not become available at all. This difficulty has been resolved under the 1974 Convention by a reversal of the burden of proof in some circumstances.' Tsimplis, above fn 7 at 128.

[23] Art 3.3. Although Richard Shaw (below fn 37, at p 148) says that the *Athens Convention* does not apply to 'hotel risks', it is doubtful that it is so limited. Article 3.3 expressly envisages claims arising 'from shipwreck, collision, stranding, explosion or fire, or defect in the ship' as well as 'other claims'.

[24] Article 2.(1) and (2). The Convention also contains limits for loss of or damage to vehicles and their contents (3,333 SDRs), and 'other' luggage (1200 SDRs). As at 16 November one SDR was worth AUD $1.71.

[25] As at 31 October 2009. Up to date information on ratification of Maritime Conventions can be found at the IMO website http://www.imo.org under 'status of conventions'.

[26] Walter Muller 'Should the Athens Convention be modified?' At http://www.comitemaritime.org/singapore/passengers/passengers.html accessed 17 November 2009. Professor Muller was President of the Diplomatic Conference which adopted the *Athens Convention* in 1974. Muller cites the laws of Germany, the four Scandinavian countries, France, Netherlands, and Vietnam as countries that have incorporated Athens Convention in their law without ratifying the Convention itself.

[27] Ibid.

[28] Ibid.

[29] Particularly, as will be discussed, the choice of forum and times for claim provisions.

[30] Although note comments in fn 6 above concerning the requirement for cruise ship lines to establish that the terms were properly incorporated in the contract.

Proposals for update and reform of the Athens Convention

There have been several attempts to update the Athens Convention. Initially efforts were directed at increasing the quantum limits, which were out of date almost as soon as the Convention came into force in 1987. In 1990, a Protocol sought to increase the limitation amounts to 175,000 SDR for death and injury, and 1800 SDR for luggage, as well as introduce a 'tacit acceptance' procedure to increase the limits in the future.[31] The 1990 Protocol has not come into force internationally as it has only 6 of the 10 ratifications required.[32] Perhaps in 1990, the limitation amounts were seen to be too high; however, twenty years later, they would be unacceptably low to some countries. In any event, as Professor Muller notes, the decision in 1996 to begin another round of amendments to the *Athens Convention* caused some governments to withhold from ratifying the 1990 Protocol:

> This indicates, once more, that international maritime lawyers' somewhat restless desire for change and in particular their desire to change, previously adopted rules, actually impedes efforts to implement adopted Conventions world-wide…[33]

The 2002 Protocol to amend the *Athens Convention* has been even less successful, with only 4 of the required 10 ratifications at the time of writing. The 2002 Protocol seeks to bring the ship passenger into line with the airline passenger, who enjoys the benefit of a carrier strictly liable for injuries sustained during the flight. As such the 2002 Protocol makes significant changes to the Athens regime such as incorporating strict liability for injuries resulting from shipping accidents below a certain limit. There is a dramatic overall increase in quantum limits for personal injury and death to 250,000 SDR (AUD$427,500[34]) for strict liability claims. If the quantum of the loss is greater than that limit and the carrier cannot disprove negligence,[35] the limit will be 400,000 SDR (AUD$684,000[36]). In addition, States may permit unlimited liability on the part of the carriers.[37] The 2002 Protocol also seeks to introduce a compulsory insurance regime similar to that operating in the oil pollution conventions.[38]

Reaction to the 2002 Protocol has been hostile from most within the industry[39] and some commentators[40] but with surprising support from others.[41] It was initially considered unlikely that it would ever come into effect.[42] However, the prospects of the 2002 Protocol coming into force have

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[31] The tacit acceptance procedure ensures that updates to limitation amounts can happen without negotiating and updating a full protocol. It is commonly found in oil pollution and safety conventions.
[32] Summary of Status of Conventions (as at 31 October 2009) available at <http//www.imo.org> .
[33] Muller above fn 26.
[34] As at 16 November 2009.
[35] As is the case in the *Athens Convention* 1974: see fn 22 above.
[36] Ibid.
[37] Richard Shaw 'Carriage of Passengers' in *Southampton on Shipping Law*, (Informa 2009) p 148 – 149.
[38] Ibid, 149.
[39] 'Shipowners need to speak with one voice if they are to stop the campaign to penalise and criminalise the shipping industry, according to the North of England P&I Club' (citing the 500% increase in passenger liability proposed by the 2002 Protocol to the *Athens Convention*. Maritime Risk International, 1 July 2004. See also discussion of Richard Shaw 'Draft Protocol to the 1974 Athens Convention' Maritime Risk International 1 May 2002. Bernd Kroger of the International Chamber of Shipping did not consider that the air passenger regime was analogous, he was in favour of a strict liability for ship related incidents, and a requirement that cruise ships have liability insurance. He was not in favour of unlimited liability, nor direct action against the insurer. See 'Passengers Carried by Sea – Should they be Granted the Same Rights as Airline Passengers?' *CMI Yearbook 2001*, 244 at 252.
[40] See for example Robert Peltz & Vincent Warger 'Amendments to the Athens Convention Threaten US Maritime Law' [2001] *International Travel Journal* 170, also Prof. Muller above n26 who argues compellingly why the airline passenger and cruise passenger are different. By contrast, renowned Aviation counsel, Charles Haddon-Cave spoke in favour of the amendments: see 'Limitation against Passenger Claims: Medieval, Unbreakable and Unconscionable' in *CMI Yearbook 2001* p 234.
[41] See Bernd Kroger, fn 39 above.
[42] Much of its unpopularity seems to centred on the fact that the aim of the Protocol seems to be to improve the lot of passengers on ferries (particularly in developing countries, where ferry capsizing and mortality are horrifyingly common); while industry is more concerned about the effect of the 2002 protocol on cruise ship lines. See Coglin writing in Maritime Risk International 1 November 2003; also Muller above fn 26. Perhaps the answer is to have a different Convention altogether for archipelago island ferries.

been significantly boosted by recent news that the EU Parliament has made the Convention EU law, and that it expects all member States to have ratified the Convention by 2012.[43]

In summary, the *Athens Convention* 1974 and its later iterations have their drawbacks for passengers. The quantum limits in the 1974 Convention are now inadequate, but attempts to update them have not been successful. The limits in the 1990 Protocol were probably too high for many developing countries, and not high enough for developed countries. Unfortunately, the *Athens Convention* and the 1990 Protocol did not permit individual states to increase the limits unilaterally except for ships registered in their country. Flag of convenience countries, whose registers contain many cruise ships, are unlikely to unilaterally increase the limit amounts as that is not in their best interests. Other countries have enacted the Convention (and even the 1990 Protocol) without ratification, so as to give the flexibility to unilaterally increase limits.[44] While the 2002 Protocol delivers the flexibility to States to increase limits, as we have already seen, that Protocol has other difficulties. It is far from clear whether that Protocol will ever be widely accepted outside Europe.

Nonetheless, the *Athens Convention* and its Protocols can be used as a basis for a useful and desirable scheme working to the advantage of cruise ship passengers whilst still offering a cap on liability to cruise ship operators.

Current position for Australian passengers under Australian law

For Australian cruise passengers departing from an Australian port, the fact that Australia has not enacted the Convention means that it can only have force of law if Article 2.1 a) applies; in other words, if the country in which the ship is flagged is a party to the *Athens Convention* 1974.[45] The significance of it having force of law is that the core provisions to do with time limits and place of issue of proceedings are generally more generous in the Convention itself than in the contractual provisions of the carrier.[46] As a result, two Australian cruise ship passengers, contracting and embarking in Australia for an international holiday, could potentially have quite different sets of rights. Caveat emptor indeed.

Of the various international cruise lines operating out of Australia, most[47] seek to incorporate the *Athens Convention* in their terms and conditions of carriage. Therefore (subject to proper incorporation into the contract[48]) the Convention will most likely apply to the cruise by reason of contract rather than force of law.[49] One might wonder, then, if there is any advantage in Australia

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[43] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:131:0024:0046:EN:PDF at 16 November 2009. See also the discussion in Tsimplis, above fn 7 at 149.

[44] In fact, the Convention should allow a State to increase limits applicable for passengers embarking on a cruise ship in that State, rather than just for ships registered in that State.

[45] The important flag states of Liberia, Bahamas and Greece are all signatories to the *Athens Convention* 1974, while Panama is not. None of those four have signed the 1990 or 2002 Protocols. Up to date information on ratification of Maritime Conventions can be found at the IMO website http://www.imo.org under 'status of conventions'.

[46] Although the exception to this appears to be P&O Cruises operating out of Australia; its Terms and Conditions apparently do not incorporate the *Athens Convention* in any of its guises. See http://www.pocruises.com.au/resource/POAU%202nd%20Ed%20Brochure%20Low%20Res.pdf accessed 19 November 2009. While the quantum limitations in the *Athens Convention* would therefore not apply, the carrier would still be entitled to claim a right to limit liability as a matter of law under the *Limitation of Liability for Maritime Claims Act* 1989 (Cth). For a discussion of that Convention see text accompanying fn 18 above. However, the Terms and Conditions do seek to exclude liability for luggage/belongings and for sickness injury or death unless caused by 'proven negligence', and also disclaim responsibility for medical care and shore bookings.

[47] Not P&O – ibid.

[48] Ibid.

[49] At present, most carriers operating out of Australia attempt to impose a contractual limitation to the low 1974 value, of 46,666 SDRs there is some possibility that this contractual limit might be inapplicable if there was, for instance, an allegation of a breach of s74 TPA imposing a duty to exercise due care and skill in the provision of services. However, at least some carriers have sought to limit their liability under that provision to the cost or providing the services again, purporting to satisfy s68A of the TPA (see Annexure to this paper.) Passengers are unlikely to be aware that s68A is subject to a 'fair and reasonable' provision and this limitation to resupply can be disputed (albeit that the passenger would bear the onus of establishing that it was not 'fair or reasonable' for the carrier to so rely). In any event, recent amendments to the TPA make it a minefield as a source of liability for passengers who have suffered personal injury: see K. Lewins 'Trade Practices Act (Cth) 1974 and its Impact on Maritime Law in Australia' (digital thesis, available Murdoch University Library) 73 – 78.

enacting the *Athens Convention* if it will, in most cases, apply anyway; and what is in it for the cruise ship passengers?

However there are several sound reasons to legislate to protect Australian cruise ship passengers:

1. To counteract the exclusive jurisdiction clauses usually contained in the carriage contract, and allow cruise passengers the option to sue in Australia (as the place where the contract and/or embarkation and/or disembarkation took place).

2. To ensure that Australian law applies to the contract of carriage, rather than the law 'chosen' by the parties to the contract (or, in reality, the carrier.)

3. To prescribe an appropriate quantum of liability limit. Most carriers[50] adhere to the limit set in the original *Athens Convention* of 1974; considered out of date even 20 years ago.

4. To ensure that the appropriate limitation of time for claims set out in the Convention is applicable. Again, most carriers seek to shorten the time for claims in their contract.[51]

I will now deal with each of these in turn.

Exclusive Jurisdiction Clauses

> The competent court for persons who have no general court of jurisdiction in the Federal Republic of Germany shall be Hamburg. Passengers may only bring an action against Hapag-Lloyd in the competent court of jurisdiction for the place in which Hapag-Lloyd has its registered office. The contractual relationship between Hapag-Lloyd and the Passenger shall be subject solely to German law. This shall also apply to the legal relationship as a whole. *Hapag Lloyd Cruises.* [52]

If there is an express exclusive jurisdiction clause such as this in the contract, then current law is that courts are to favour enforcing the clause as a way of requiring the parties to adhere to the contract.[53] A passenger could, despite such a clause, choose to issue proceedings in Australia.[54] There is a real risk that the cruise line will bring an application for a stay on *forum non conveniens* grounds. The passenger will have various arguments in reply[55] and it may be that the new Consumer Bill Standard Terms legislation[56] will give those arguments extra traction. However the cruise ship will not be without arguments either, and may choose to 'up the stakes' by obtaining an anti-suit injunction from the contractual forum. Such proceedings could then end up in an unpalatable - and expensive - 'procedural stew'.[57]

At the end of this process, the passenger may well win the right to have the matter heard in Australia. But these preliminary skirmishes will be hard fought, and the passenger's will – and wallet – may take a battering.

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[50] See Appendix at conclusion of this paper.
[51] See Appendix at conclusion of this paper.
[52] Hapag Lloyd Terms and Conditions of Travel (LV 05/2008), clause 22. Available online at http:www.hlkf.de (accessed 24 November 2009).
[53] See Lewins 'Maritime Law and the TPA as a 'Mandatory Statute' in Australia and England: Confusion and Consternation?' (2008) 36 *Australian Business Law Review* 78 at 85.
[54] And will be entitled to do so if the ship flies the flag of a signatory State to the Athens Convention. Lawyers faced with such a claim should explore the registry of a ship as it may give them a useful argument in this regard. See fn 45 above for important flag state nations that are signatories to the Convention, and the wording to Article 2.
[55] Particularly if there is a claim on the Trade Practices Act which could not be supported in the contractual forum. See the discussion of what will constitute 'strong reasons' for not enforcing an exclusive jurisdiction clause at Lewins 'Maritime Law and the TPA as a 'Mandatory Statute' in Australia and England: Confusion and Consternation?' (2008) 36 *Australian Business Law Review* 78 at 87 – 88.
[56] *Australian Consumer Law Bill* as discussed at fn 5 above.
[57] *Hi Fert Pty Ltd v United Shipping Adriatic Inc & Anor* [1998] FCA 1426 per Emmett J.

Crucially, there are two ways this whole stage could be avoided. The first, as it currently exists, is to issue proceedings in the place stipulated in the contract. By doing so the passenger exposes itself to laws and procedures (and perhaps a language) that are unknown, to payment of lawyers in a currency not their own, and to trusting legal representatives without the benefit of regular meetings. The effect of this on the passenger's will, and wallet, may be much the same as suing in Australia. While the cruise lines and their P&I representatives would have use believe that the lion's share of legitimate claims brought properly are settled expeditiously,[58] one still has to go to their choice of jurisdiction to preserve an indisputable right to sue.[59]

The second way this whole stage could be avoided is for the Australian parliament to enact the *Athens Convention* as law in Australia. Article 17 gives the Claimant the option of a range of places in which to commence proceedings, including the port of embarkation and disembarkation and the place the contract was entered.[60] Certainly any cruise passengers who leave or arrive from an Australian port will be able to commence here, and even those who undertake an entirely foreign cruise may be able to rely on the Australian provisions if the contract was entered in Australia.[61]

Choice of Law

> …this contract shall be governed by and construed in accordance with the general maritime law of the United States; to the extent such maritime law is not applicable, it shall be governed by and construed in accordance with the laws of the State of Washington (U.S.A.) *Holland America Line Cruise contract.*[62]

Choice of law is closely intertwined with choice of jurisdiction, although the *Athens Convention* is silent about choice of law clauses. Australia has some legislative and judicial experience (although, one has to concede, somewhat vexed[63]) with nullifying contractual choice of law clauses where, absent the clause, the applicable law would be that of Australia. In reality though, one would have to welcome an attempt to 'level the playing field' for Australian consumers who enter a contract whilst in Australia for an Australian cruise, such that the consumer does not find their rights under the contract are determined by foreign law. Again, the new standard terms amendments to the TPA[64] may assist in this regard, they are not yet law and even once enacted, their reach and effect would be uncertain for some time. Enacting, or ratifying, an international Convention would give a passenger who embarked or disembarked in Australia a right to commence proceedings in Australia and to be subject to the international regime; an Australian court could then deal with the allegation that foreign law is to apply to the contract.

Limitation amounts

> The liability (if any) of the Company for damage suffered as a result of the loss of life or personal injury to the passenger shall be determined in accordance with the relevant terms and provisions of the International Convention relating to the Carriage of Passengers and the (sic) Baggage by Sea adopted at Athens…1974 which relevant terms and provisions….are hereby incorporated into this Passage

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[58] See Shaw 'The draft protocol to the 1974 Athens Convention', in *Maritime Risk International* 1 May 2002 (newspaper article)
[59] Again, P&O Cruises is the only cruise ship line operating out of Australia that stipulates an Australian jurisdiction and Australian law. As advised above, plaintiff solicitors should also look closely at the ship's registry, as that may give application of Athens Convention force of law and thereby a right to sue in port of embarkation/disembarkation: Article 17.1(b).
[60] Article 17.1(b)
[61] Choosing an Australian travel agent would presumably assist with this, however direct internet bookings would throw up all sorts of possibilities outside the ambit of this paper.
[62] Found at http://www.hollandamerica.com/legalAndPrivacy/Main.action accessed 19 November 2009.
[63] ICA, TPA, COGSA as discussed in Lewins 'Maritime Law and the TPA as a 'Mandatory Statute' in Australia and England: Confusion and Consternation?' (2008) 36 *Australian Business Law Review* 78, 94 – 101.
[64] Although the Bill does not expressly deal with provisions such as choice of court provisions, those types of provisions might be regarded as offensive and therefore void. If and when this Bill is enacted, there is the potential for a 'perfect storm' of litigation should a properly incorporated *Athens Convention* limitation come up against an argument that the standard terms are unfair. While it would be difficult to argue that an internationally accepted convention, in the *Athens Convention*, could itself be unfair per se, the passenger could attempt to argue that the low limits are unfair.

> Contract as if set out fully hereunder and liability shall in no circumstances exceed the limits there provided from time to time. *Cunard Line.*[65]

(Even passengers paying for premium cruises may find their claims limited to 46,666 SDRs due to their contract.)

It is clear that the original *Athens Convention* limits are well out of date and inadequate for the possible serious injuries or death that may result on a cruise ship. That may, perhaps, be a reason that the Australian Government has been reticent to ratify the Convention; thinking that it is not generous enough and intending parties to have the option of unlimited liability. The problem is that as time goes by, the *Athens Convention* 1974 becomes more and more attractive to the cruise lines exactly because the limits in the *Athens Convention* were set in 1974 - almost 40 years ago. Indeed, it is rare to find an international cruise ship line cruising internationally from Australia that does not seek to incorporate the *Athens Convention* 1974 or some other low limit.[66]

If the *Athens Convention* was enacted in Australia, Australia could choose to incorporate the 1990 Protocol with its higher limits[67] as Canada has done,[68] unilaterally raise the limit further,[69] or ratify the 2002 Protocol while giving it immediate domestic effect pending it coming into force internationally. Those quantum limits, given the force of law in Australia, would then usurp the contractual limit.[70]

Time limits

> Any action arising out of loss of life or injury to a passenger shall be extinguished if not commenced within 1 year of the date when the loss or injury occurred. *Cunard Line.*[71]

It is not uncommon for cruise conditions of carriage to have shorter time frames than those stipulated under the Athens Convention. Already, the 2 year limit in the *Athens Convention* is shorter than most limitation periods in Australian States for contract or tort claims.[72] Already at risk of missing that shorter than usual time bar,[73] the situation is exacerbated when an even shorter limitation period is

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[65] Cunard Line January 2010 - March 2011 Brochure – Australian edition p 46. The words 'from time to time' are a curious addition, and may lead to an argument that the limitation amount is intended to include the increase brought in by later Protocols.
[66] Of those surveyed in compiling the appendix to this paper P&O Lines is an obvious exception.
[67] 175 000 SDR. Still a modest limit, but almost four times the 1974 figure of 46,667 SDR.
[68] See *Marine Liability Act* 2009 (Can.), Part 4 s35. Canada has extended the operation of the Convention and Protocol to non seagoing ships and transportation from one place in Canada to another. As a result of the British registered *Herald of Free Enterprise* casualty in 1987, the UK increased their limits to 300,000 SDR (about AUD $513,000) in relation to carriers who have their principal place of business in the UK: see Statutory Instrument 1998 no 2917 at <http://www.bailii.org/uk/legis/num_reg/1998/19982917.html> accessed 12 November 2009. However, at the time of writing, England still maintains the original limit of 46,666 SDRs per passenger for other claims to which the *Convention* applies; a limit now pitifully out of date. As the number of British registered ships decline, the significance of the 300,000 SDR limit is similarly reduced.
[69] Inspiration could be taken from the updating of the *Hague Visby Rules* in the context of carriage of goods by sea, where Australia's enactments in the 1990s enhanced the international convention. There are some dangers in going down this path however – see *The Hollandia* [1983] 1 AC 565 as discussed in Davies & Dickey, Shipping Law(3rd ed) at 172 , and also in Lewins 'Maritime Law and the TPA as a 'Mandatory Statute' in Australia and England: Confusion and Consternation?' (2008) 36 *Australian Business Law Review* 78 at 108.
[70] Although if Australia unilaterally enacts a higher limit (as opposed to, say, ratifying the 2002 Protocol), and there is some dispute as to whether Australian law is applicable, then the quantum limit would itself be challenged. For example, if the contract was made outside Australia by a UK citizen who was embarking at an Australian port, both the English Act and any Australian Act might each appear relevant. Should the claimant choose to sue in an Australian port, because of higher quantum limits, the shipowner might challenge that court's jurisdiction or bring an anti suit injunction in England, particularly if it can rely on an exclusive jurisdiction clause. This is an area, again, not unfamiliar to maritime lawyers; see fn 69.
[71] Cunard Line terms, above fn 65.
[72] Which is generally 3 years. See for example *Limitation Act 2005* (WA) s13, 14 – General limitation period is 6 years; for personal injury claims it is 3 years.
[73] For an example of this in a cruise ship setting see the recent case of *Ross Gordon v Norwegian Capricorn Line (Australia) Pty Ltd* [2007] VSC 517. The plaintiff's prognosis after suffering an on-board heart attack was allegedly worsened by the cruise line's failure to have thrombolytics available in the infirmary. Unfortunately the plaintiff's solicitors did not file proceedings until after the 1 year contractual limitation, but did within the 2 year Athens Convention period. It was in dispute as to whether the contractual conditions were properly incorporated in any event so the court applied the New South Wales limitation period of 3 years. Due to the negligence of solicitors, the proceedings were not served and were eventually struck out by the court. Proceedings were recommenced after the 3 year limit but an application for an extension of time was refused. The court noted that the plaintiff had acted reasonably throughout and would have a 'powerful, if not overwhelming' case of negligence against the solicitor [at 107]. Had this case proceeded it would have been an interesting addition to the cruise ship law decisions in Australia.

stipulated in the contract. This is especially the case where the 'notification of claims' provisions are concerned, as they may stipulate that a claim needs to be notified within a period of a matter of days. A clear statement of the applicable time limit contained in the *Athens Convention* can only be a welcome development for cruise ship passengers in Australia.

It has to be acknowledged that for passengers of one cruise line would appear to be worse off if the *Athens Convention* regime were enacted in Australia. At the time of writing, P&O does not incorporate the *Athens Convention* nor exclude or limit liability for injuries sustained by its negligence; it stipulates Australian law and the forum of New South Wales to resolve any disputes.[74] In a sense the P&O Conditions contain the benefits of the *Athens Convention* for the passengers (beneficial forum being place of embarkation) and not the disadvantages for passengers, being the quantum limits on claims. These terms can, however, be changed at any time. In addition, the increased certainty for all cruise passengers – and indeed the cruise ship operators themselves – makes it worthwhile considering incorporating the *Athens Convention* framework into Australian law.

Athens legislation in Australia would suit cruise ship operators too?

Australia is not a straightforward venue to determine passenger claims, and one of the complicating factors for cruise ship operators is Australia's consumer protection laws.[75] As already noted in passing, Australian passengers (or those whose contracts are governed by Australian law) have some protection offered by domestic law; most notably the *Trade Practices Act 1974* (Cth). The effect of this Act on cruise ship contracts has been discussed elsewhere;[76] suffice to say that s74 imposes a non delegable duty to exercise due care and skill in the provision of services to a consumer under a contract. An exclusion of liability will be void pursuant to s68 if a provider limits its liability to the cost of resupplying the service again.[77] However, reliance on that limitation will not be allowed if the consumer can establish that it is not fair or reasonable for the corporation to rely on that term of the contract.[78] Further, a corporation is able to exclude liability for injury or death where there is a contract for the supply of recreational services.[79]

The new *Australian Consumer Law*, currently in Bill form, will add unfair terms regulation to the passengers' quiver. Under that regime, if the court declares that a term in a consumer contract is unfair, then the term will be void.[80] A term will be unfair if it causes a significant imbalance in the parties' rights and obligations under the standard form contract, and is not reasonably necessary to protect the legitimate business interests of the part who would be advantaged. For cruise ship lines, this adds uncertainty to its contracts with consumers. Will exclusive jurisdiction clauses be 'unfair'? Will quantum limits be 'unfair', even if they are limits set under international convention (albeit hopelessly out of date)? Again, we see the clash of domestic policy with the ideals of maritime commerce, where operators are seeking the efficiency of a certain outcome from a chosen court and legal system.[81]

With this domestic background in mind, enacting the *Athens Convention* into Australian law would in fact assist the cruise ship operators. First, the unfair terms legislation would not apply to the *Athens*

[74] See annexure to this paper.
[75] Another would be the Australian test for *forum non conveniens* – the test is whether Australia is a 'clearly inappropriate forum' – *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538.
[76] See above fn 5.
[77] S68A(1)(b).
[78] S68A(2).
[79] S68B. On a wide interpretation of that provision an entire cruise could be a recreational service; however as a matter of construction, one would expect the courts not to give that provision an unnecessarily wide meaning.
[80] Schedule 1, Section 2 *Australian Consumer Law Bill*.
[81] For an English example of a similar dilemma, see materials referred to at fn100.

Convention provisions that Australia enacted.[82] That will give much greater certainty to the operators and the passengers alike. Second, the disputes on jurisdiction would be less likely; granted, the cruise ship operators may not be happy to be sued in Australia, but at least they need not spend money and time disputing jurisdiction any longer. Thirdly, the cruise ship operators would no longer have to argue about incorporation of the *Athens Convention* limits as a question of contract, because those limits would apply as a matter of law. Again, the carriers may not like the limits themselves (especially if Australia increased the limits beyond the 1990 Protocol) but at least there would be a clear right to claim up to the limit, and an equal right, by the operator, to refuse to pay beyond the limit.

Other areas that could be included

Whilst contemplating this reform, some other aspects could be considered.

Expanding scope of operation of the Convention within Australia

Australia may choose to have the Convention apply to domestic carriage, by removing the 'international voyage' limitation. There is every reason to apply the Convention to cruise ships carrying passengers on shorter cruises interstate, within their state or on a 'voyage to nowhere'.[83] The Act would need to be carefully drafted so as not to unwittingly capture smaller craft.

It is also possible that the application could be further extended by removing the 'seagoing ships' requirement. This has happened in England and in Canada. Effectively it means that carriers of passengers under a contract whether on coastal waters, inland waterways, rivers and lakes would be able to claim the limitation. Bear in mind that the law as it currently stands arguably allows these carriers to potentially exclude all their liability;[84] so in fact, this may well be more beneficial to passengers than the current state of affairs.[85] It could also clarify whether limitation of liability will apply where passengers are guests on a chartered vessel.[86] It could also exclude adventure tourism from its reach, as the Canadian Act has done.[87]

There are many different options here. The legislation could apply to interstate but not intrastate traffic;[88] it could apply to travel of more than 1 night's duration so as not to catch ferry operators, and/or it could restrict the ability to claim a limit to the larger vessels, if it is deemed desirable to allow smaller vessels to retain their right to contract out of most liability.[89]

Considering issue of vicarious liability for medical staff on board

This is a vexed question in cruise ship law. In the United States of America the courts have mostly upheld the cruise ship lines conditions which state that the medical personnel are independent contractors for whom the cruise ship takes no responsibility, however the tide is starting to turn with several decisions holding the cruise ship operator liable for the negligence of its medical officer.[90]

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[82] See *Australian Consumer Law Bill*, Schedule 1, s5(1)(c).
[83] There may be constitutional issues with the Commonwealth legislating in this respect, which are outside the ambit of this paper. If that is the case, States could be asked to enact parallel legislation.
[84] Subject to the obligation to provide the service again if s74 applies and s68A has been properly invoked.
[85] For Example, Captain Cook Cruises overnight cruises contain a general exclusion of liability for injry and death, and a limit on loss of passenger's property to AUD$100: http://www.captaincook.com.au/home.asp?pageid=E216254D176306DC#overnight.
[86] See *Marchioness* tragedy discussed in fn 13 above.
[87] *Marine Liability Act* 2009 (Canada) s37.1.
[88] This would resolve constitutional issues.
[89] Subject to any non excludable obligations under s74 TPA.
[90] In the US there has been a constant stream of cases upholding the effectiveness of these clauses, but there have been several cases that have found the carrier liable for the negligence of the medical officer on board the ship; most significantly and recently the case of *Carlisle v Carnival Corp* 864 So.2d, 1 (Fla 3rd Dist Ct App 2003) which held that Carnival was liable for the negligence of its on board doctor who failed to diagnose a case of appendicitis in a 14 year old girl, who was later rendered sterile by the infection that resulted when her appendix ruptured. For a discussion see Melissa Konick, 'Malpractice on the High Seas: the Liability of Owners and Physicians for Medical Errors'

Alternatively if the cruise ship operators seek to maintain their current conditions, they could at least be required to maintain insurance of the medical practitioners and accept service at an Australian address on behalf of medical practitioners on board cruise ships.

Imposing notice requirements

It would be helpful for cruise ship operators to be required to give a formal notice of the applicability of the Australian provisions to passengers embarking or disembarking in Australia. The English provisions do something similar,[91] and it would be desirable to promote awareness of the applicability of the Australian law amongst these passengers.

Some integration with current laws will be required

Clearly reform of the sort proposed will have to be properly integrated with other potentially applicable laws. While it is not within the intended ambit of this paper, one would expect that the provisions of the *Trade Practices Act 1974*, the new *Australian Consumer Law* standard terms provisions (assuming they are passed) and the *Civil Liability Act* reforms will all be pertinent.

It may even be desirable for the Australian Parliament to follow the lead of the Canadian Legislature and collect under one umbrella the various liability conventions relating to sea. The Canadian *Marine Liability Act* 2009 sets out the regimes governing carriage of goods by sea, carriage of passengers by water, limitation of liability for maritime claims and the oil pollution regimes. Currently the Australian legislation is scattered in the Statute books,[92] and several Conventions are schedules to the unwieldy *Navigation Act* 1912 (Cth).

Conclusion

The explosion in the cruise ship industry from Australia, the number of Australian passengers travelling aboard cruise ships and the potential variation and unfairness in terms incorporated in the cruise ship contracts converge to make a compelling case for the adoption of a passenger liability regime in Australia.

Perhaps the failure of Australia to ratify or enact the *Athens Convention* is because historically Australia was merely an interesting port for foreigners to dock, rather than having much of a cruise industry of its own; and Australians interested in cruising generally travelled overseas to the port of embarkation. Exact figures have not been kept about the state of the industry in Australia in the 1970s and 1980s, so it is hard to gather any real data in that regard. Perhaps, with the Australian based cruise industry in nascent form in the 1970s and 1980s, the few cruise lines that offered cruises from Australia used conditions incorporating Australian law and stipulated an Australian jurisdiction[93] – or, perhaps more likely, were silent.

Or perhaps the initial Athens limit per passenger was thought to be too low as far as the government of the day was concerned and this was also a black mark against the Convention. One can imagine that imposing a 'limit' on claims might be seen as a 'shipowner friendly' act, rather than an act of consumer protection.[94] (After all, Conventions allowing shipowners to limit liability are controversial

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[2006] *International Travel Law Journal* 53. In that article Konick describes several instances where the plaintiff's action against the medical practitioner direct has been thwarted because of an inability to locate and serve the practitioner with legal process.

[91] *The Carriage of Passengers and their Luggage by Sea (Notice) Order* 1987 (UK).

[92] LLMCA above fn18.

[93] See for instance the terms and conditions of Norwegian Capricorn Lines in use in 1990 as cited in *Gordon v Norwegian Capricorn Lines (Australia) Pty Ltd* [2007] VSC 517, [22]. P&O also stipulates Australian law and jurisdiction for its Australian cruises, and may well have done so then.

[94] The LLMCA is purely for shipowner protection, although with the latest protocol enacted, the larger ships have a limit so high as to only be applicable in the most tragic of circumstances: see fn20.

– no other industry is given quite the same protection.) [95] Alternatively, perhaps there was a thought that it was better for Australians that there be no passenger limit such that the passengers might be able to recover the full amount of any injury sustained.[96] Certainly today, with the advent of well drafted and tight conditions of carriage published in brochures and on websites, there would be few passengers' injury claims not met by an argument based on a contractual limit on quantum.[97]

No matter what the cause of Australia's reticence in the past, it is now time to look to the future. There is clear data to show that in more recent times there has been an explosion of interest in cruising by Australians from Australian ports. While the state of international regulation of passenger contracts is fractured, there is some fuzzy uniformity as to general principles based on the original Athens Convention. It is clear that adopting an *Athens Convention* based regime[98] would be an act of consumer protection with the added benefit of certainty for cruise ship operators. That, in itself, should encourage our Parliament to review the laws applicable to the carriage of passengers from our shores. Further, this paper argues that it would provide a framework within which both the passengers and the cruise ship operators benefit.

Fortunately, the incidence of injury to cruise passengers is low considering the number of ship passengers that travel. However, incidents do happen. In April 2007 the cruise ship *Sea Diamond* sank off Santorini. Later that year, tourists on board the *Alexey Maryshev* were injured when a calving glacier caused a wave to hit the ship. [99] Closer to Australian shores, in 1999, the cruise ship *Sun Vista* sank in darkness off the coast of Malaysia.[100]

Countries, and the industry as a whole, have found the low 1974 limits to be 'politically embarrassing'[101] in the face of catastrophes like the *Estonia* and *Herald of Free Enterprise*. It would be unfortunate indeed if Australia had to face the victims of some such tragedy closer to home, to explain why the potential claim by passengers is limited to only AUD$80,000 per passenger and, at least on the face of it, must be pursued in a foreign country.

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[95] Davies & Dickey *Shipping Law* (3rd ed. Thomson Lawbook) 451.
[96] Subject to the overarching limits of the LLMCA, so high as to only apply where there is a mass casualty.
[97] Whether they are successful, particularly whether those conditions have been incorporated, is another question – see cases referred to in fn 6 above.
[98] Either by ratifying the 2002 Protocol, or by enacting (rather than ratifying) the 1990 Protocol to enable Australia to increase quantum limits – see text accompanying fn 28 above. Tsimplis also argues for the increase in the Uk limits in his paper, above fn7 at 125, 127.
[99] Both from article by Matt Illingworth, 'current issues affecting the cruise industry' 1 March 2008 Maritime Risk International (have referenced it newspaper style, I obtained it via online site but is only available by subscription.)
[100] See litigation in England between a passenger on the *Sun Vista* and his travel agent: *Lee v Airtours Holidays Ltd* [2004] 1 Lloyd's Reo 683. In the UK the cruise ship passenger liability is complicated by the existence of the EU Package Tours and Package Holidays Regulations 1992, which offers a 'parallel regime' to the Athens Convention: anonymous note in (Shipping and Trade Law 1 July 2004). In the *Lee* case it was decided that the travel agent could not rely on the Athens Convention to limit the claim by the client (which seems sensible, as it had nothing to do with the actual conduct of the voyage) and that the Athens Convention limits could not apply to claims brought under the Regulations. One can imagine that this will lead to claims against travel agents in preference to the cruise ship line, at least until limits under the Athens Convention are increased. There has been some difficulty reconciling the operation of the two regimes, which contain differing provisions on time limits and limitation amounts. See also *Norfolk v My Travel Group Plc* [2004] 1 Lloyd's Rep 106 and the discussion of both cases by Tsimplis in his article fn7 above, at 130 – 132.
[101] Graham Barnes, address at seminar 'possible implications of the new Athens Protocol' 5 December 2002 found at http://folk.uio.no/erikro/WWW/corrgr/Hamburg.pdf accessed 15 November 2009.

Appendix – Comparison of terms and conditions of cruise ship operators offering cruises from Australian ports.

Terms / Cruise line[102]	Law applicable/place of suit	Time limit	Limitation amounts	Notice of claim	Other notable clauses
Athens Convention	**Place of embarkation/disembarkation, place of business of carrier****	**2 years**	**1974/1976- 46,667 SDR PI and Death, cabin luggage – 833 SDR.** **1990 Protocol – 175,000 PI and Death, cabin luggage – 1800 SDR.** **2002 Protocol – 250,000 SDR PI (death strict liability), up to 400,000 SDR. Cabin luggage – 2250 SDR.**	**Only applies to luggage. Apparent damage to be notified at time of redelivery at latest. If not apparent, or lost, 15 days after disembarkation/delivery.**	
P&O Cruises[103]	New South Wales/New South Wales.	Not stated.	No explicit mention of a limit amount. Not liable for loss of, or damage to, any luggage or other belongings, sickness, injury or death, unless caused by proven negligence, subject to consumer laws & rights to reduce for contributory negligence.	All reasonable efforts to advise as soon as possible.	Not a healthcare provider and cant be held liable for negligence of medical staff. Booking agent only for shore tours etc.
Cunard Voyages	California, unless ship off Australia or in Australian port at the time, in which case NSW.	1 year, personal injury/death and cabin luggage	Athens 1974/1976	Death or personal injury – 30 days, cabin luggage, on board and then within 7 days. To be given in NSW or California.	Not to be read to modify or exclude TPA claims.

[102] Sailing from Australia.
[103] P&O Cruises – Terms and Conditions available from http://www.pocruises.com.au/html/p_ocruises_australia.cfm accessed 3 November 2009

Holland America Line[104]	Exclusive jurisdiction in USA (Seattle/Washington)	6 months (other claims)/ 1 year (death/ injury).	Athens 1974/1976.		Passenger assumes risk of using all equipment, and non HAL services
Royal Carribean Cruises[105]	Florida Courts. Passenger waives any venue or other objection. Claims other than PI/death are to be arbitrated exclusively in Florida. No express choice of law.	1 year to sue, and 120 days to serve.	*Athens Convention* 1974/76 limits apply. Personal property - claims limited to $300 per passenger unless higher value declared.	PI/death claims – within 6 months.	Medical providers, hairdresser, manicurist etc work directly for passenger. Carrier assumes no liability. Waiver of class action.
Orion Cruises[106]	Law of Australia. New South Wales courts.	1 year for PI and Death, 6 months for baggage claim.	Total exclusion of liability. If liable under TPA, then limited to resupply of service. If exclusion of liability invalid, then limits in *Athens Convention* 1974 *and all protocols to that convention in force at time of contract* apply.	Written notice of PI/death within 6 months. Notice of apparent cabin luggage loss/damage on disembarkation, or 15 days if not apparent.	Not to bring action against third parties including the vessel.[107] Not liable for medical personnel. Passengers assume risk of using vessel's adventure equipment & must sign indemnity and release.
Hapag Lloyd[108]	Hamburg, Germany.	1 year, unless German Civil Code provides otherwise	As per German Commercial Code or German Inland Waterways Act. Otherwise, claims for damages shall be limited or excluded. For claims other than personal injury, 3 times cruise fare or 4000 Euroes, which ever is	'Complaint' to be lodged immediately.	

[104] http://book.hollandamerica.com/policies/cruise.do (07/24/09) accessed 3 November 2009
[105] Cruise ticket Contract found at: http://www.royalcaribbean.com/customersupport/faq/details.do?pagename=frequently_asked_questions&pnav=5&pnav=2&faqSubjectName=After+You+Purchase&faqId=1079&faqSubjectId=323&faqType=faq accessed 19 November 2009.
[106] Passage terms and conditions found at: http://test.orioncruises.com.au/forms/Terms%20&%20Conditions.pdf accessed 19 November 2009.
[107] The drafter would seem to adhere to the personification theory of in rem proceedings.
[108] Hapag Lloyd Terms and Conditions of Travel (LV 05/2008), clause 22. Available online at http:www.hlkf.de (accessed 24 November 2009).

			lower.		

Other cruise ship lines that do not sail from Australia but are promoted within Australia:

MSC Cruises[109]	Law of Italy. Naples, Italy.	Personal injury & death – 2 years. Other claims – 6 months.	Athens 1974/1976. (46,667 SDRs for injury/death. 833 SDRs for cabin luggage)	PI – must be reported on board, then in writing within 6 months.	Waives right to arrest ship. TPA claims limited to resupply.
Star Cruises[110]	Malaysia or Singapore (carrier's option) and governed by Malaysian law.	2 year limitation	Athens 1974/1990 protocol. 175,000 SDRs, 1800 SDR per cabin luggage (but then applies 1974 limit in later provisions.)	30 days from occurrence. Guests agree not to bring class action.	

[109] Annual Brochure Nov 2009 – Dec 2010, Australia 1st Edition 136 - 138.
[110] Not available from Australian port, but from Asian ports.