

CRUISE SHIP PASSENGER CONTRACTS: THE TRIP OF A LIFETIME OR A VOYAGE THROUGH CLAUSES, CONVENTIONS AND CONFUSION?

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1 Introduction

Cruising is a global, multi-billion dollar industry.¹ The major corporate players boast fleets of multiple luxury vessels, accommodate thousands if not millions of passengers every year,² offer holidays and cruises across multiple continents, are listed on stock exchanges, and are answerable to their shareholders. Underneath all of this are the many thousands of contracts with individual passengers governing the legal conditions under which those passengers travel. These contracts are invariably standard form contracts offered by the cruise line to the passenger on a 'take it or leave it' basis. Although the standard contract terms of cruise passage contracts tend to address identical legal issues (such as the parties to the contract, cancellations and deviations, and exclusions and limitations of liability), the content of these contracts varies widely. Some contracts offer generous or at least objectively reasonable terms and conditions to passengers, while others exclude and limit the carrier's liability in almost all circumstances and attempt to extend those limitations to a long list of third parties. This paper analyses the standard terms and conditions of five of the major cruise operators³ with a view to ascertaining the commonality between the terms offered, the reasonableness or otherwise of these terms, and the differences between these standard conditions and the relevant international liability conventions. In addition to the express standard conditions, a passenger may also be subject to additional terms incorporated into the contract at common law, or to one or more international liability regimes, commonly the Athens Convention relating to the Carriage of Passengers and their Luggage at Sea 1974, as amended by the 1976 Protocol (Athens 1974), or the amended Athens Convention 2002 (Athens 2002). The contractual position of many passengers is thus a confusing web of competing contract clauses, common law rules, and international conventions. Suffice to say that a passenger who books a cruise may understandably have little or no idea as to what the terms of the cruise actually are, or even with whom contract is made. This situation would be much simplified if more countries, including Australia, signed up to Athens 2002, as this would provide greater certainty for passengers, cruise lines and the industry generally.

The following section 2 of this paper discusses basic contract formation issues, namely, the common law approach for determining when and where a cruise contract is made, the impact of electronic transactions on this issue, and express provisions on contract formation. Section 3 considers the documents that may comprise the contract, including tickets, brochures, emails and itineraries. Again, common express contract provisions on this issue will be considered. Section 4 briefly considers the parties to the contract. Section 5 then analyses the typical contract terms found in the standard carriage conditions of five of the major cruise operators, including exclusion clauses, limitation of liability clauses, time limitation clauses, and applicable law and jurisdiction clauses. The corresponding provisions of Athens 1974 and Athens 2002 will be considered throughout.

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¹ The 2017 Annual Report for Royal Caribbean Cruises Ltd boasted net income of \$1.6 billion for the year ended December 31 2016: <http://www.rclcorporate.com/content/uploads/2017-Form-10-K-RCL-ir.pdf> (accessed 28 June 2018). The 2017 Annual Report for Carnival Corporation reported revenues of \$17.5 billion: [file:///D:/Cruise%20article/Carnival%20Corporation%20&%20plc%202017%20Annual%20Report%20\(FINAL\).pdf](file:///D:/Cruise%20article/Carnival%20Corporation%20&%20plc%202017%20Annual%20Report%20(FINAL).pdf) (accessed 28 June 2018).

² The 2017 Annual Report for Royal Caribbean Cruises Ltd reported the cruise line had carried over 5 million passengers every year since 2014: <http://www.rclcorporate.com/content/uploads/2017-Form-10-K-RCL-ir.pdf> (accessed 28 June 2018). The 2017 Annual Report for Carnival reported it had carried over 12 million passengers that year alone: [file:///D:/Cruise%20article/Carnival%20Corporation%20&%20plc%202017%20Annual%20Report%20\(FINAL\).pdf](file:///D:/Cruise%20article/Carnival%20Corporation%20&%20plc%202017%20Annual%20Report%20(FINAL).pdf) (accessed 28 June 2018).

³ Carnival Plc (which trades under the names of P&O, Carnival, Princess Cruises and Cunard), Royal Caribbean Cruises Ltd (which owns and operates Royal Caribbean International, Celebrity Cruises and Azamara Cruises), Norwegian Cruise Line Holdings Ltd (which operates Norwegian Cruise Line, Oceania Cruises and Regent Seven Seas Cruises), Silversea Cruises, and Ponant.

2 Formation of the Contract: Where and When the Contract is Made

Many disputes concerning cruise passenger contracts involve basic contract law issues of offer and acceptance and incorporation of terms. In order for a contract to come into existence, the common law requires agreement, which has traditionally been said to comprise offer and acceptance, although some commentators have suggested it may be more appropriate to see the negotiation process as a continuum of commitment, weak at the beginning and stronger as the negotiations progress.⁴ In the context of passenger contracts, it is crucial to identify when and where the contract was formed for several reasons. First, Athens 1974/2002 will apply if the contract of carriage has been made in a state party to the Convention, or provides that the place of departure or destination is in a state party.⁵ Second, the place of acceptance may impact on conflict of law issues, including the proper law of the contract, as well as jurisdictional issues, such as the appropriate forum for the dispute to be heard. Third, and crucially, once an agreement has been formed, the parties cannot attempt to incorporate later terms into the contract. A large number of the reported cases concerning cruise ship passenger contracts are concerned with the time of contract formation and the enforceability of a term introduced after that time. The following section will examine the way in which these fundamental contract law principles apply to cruise contracts, how they have evolved, and the impact of modern technology.⁶

2.1 The 'Conventional Analysis' in Ticket Cases

Since the 1800s, sea carriers, railway companies and cloakroom operators have routinely printed terms and conditions of service onto tickets issued to customers. The early English ticket cases applied what has become known as the 'conventional analysis' to contract formation. The ticket and its terms were said to constitute an offer by the service provider to the customer, who then had the opportunity to consider the terms. If the customer retained the ticket and did not object to the terms, the customer was taken to have accepted the offer.⁷ The service provider could not then rely on additional terms that were only brought to the customer's attention after the contract was formed. In the case of automated ticket machines, the situation was slightly different: the offer was made when the proprietor held out the machine as being ready to receive money and the acceptance took place when the customer put the money into the slot, even though the ticket was issued later.⁸

The same reasoning was applied to cruise passenger contracts. It was accepted that the contract was formed when the money was paid and the ticket issued.⁹ Indeed, in *Cockerton v Naviera Aznar SA*,¹⁰ the court found that despite the plaintiffs reserving a place on the vessel, receiving a letter confirming the booking, and posting a cheque, the contract of carriage was not formed until the ticket was issued later because none of the contacting parties would have expected a contract to have come into existence until the ticket was received.¹¹ Consequently, the plaintiffs were bound by the exemption clause endorsed on the printed ticket.

2.2 The Current Common Law Approach to Formation of Cruise Contracts

It is now accepted that a passage contract may come into existence before a ticket is used. In *Hollingworth v Southern Ferries (The Eagle)*,¹² the Court declined to follow *Cockerton* and instead held that the ordinary rules of contract should apply to ticket cases. In that case, the plaintiff's agent booked the cruise over the telephone and paid a deposit. He later paid the balance and collected the tickets. The contract was made and 'perfected' before the ticket was issued, and the defendants could not 'rely upon the exclusion clause on the basis that the ticket was a contractual document'.¹³ However, the Judge did not explain why the contract was not formed on issuance or receipt of the tickets, or identify when precisely the contract was formed, although presumably it was when the booking was made and the deposit was paid.

⁴ N C Seddon, R A Bigwood, with M P Ellinghaus (eds), *Cheshire & Fifoot Law of Contract* (10th ed, 2012) 94.

⁵ Art 2.

⁶ A comprehensive consideration of formation of contract issues in the context of cruise passenger contracts can be found in Kate Lewins, *International Carriage of Passengers by Sea* (Sweet & Maxwell, 2016).

⁷ *Thornton v Shoe Lane Parking* [1971] 2 QB 163, 169 (Denning L); *Hood v Anchor Line* [1918] AC 837, 843 (Finlay L); *Parker v South Eastern Railway Co* (1877) 2 CPD 416; *Harris v Great Western Railway Co* (1876) 1 QBD 515.

⁸ *Thornton v Shoe Lane Parking* [1971] 2 QB 163, 170 (Denning L).

⁹ For example, *Hood v Anchor Line* [1918] AC 837, it was accepted that the contract was formed when the money was paid and the ticket issued. The real issue was whether or not the passenger was bound by the limitation of liability clause printed on the ticket.

¹⁰ [1960] 2 Lloyd's Rep 450.

¹¹ *Ibid*, 460 (Streatfeild J).

¹² [1977] 2 Lloyd's Rep 70.

¹³ [1977] 2 Lloyd's Rep 70, 75 (Judge Ogden).

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More clarity on these issues was provided in *Daly v General Steam Navigation Co (The Dragon)*.¹⁴ In that case, the plaintiff's husband, Mr Daly, booked a family summer holiday six months in advance of the intended travel dates. He paid a deposit and was issued with a receipt. He then received a 'Reservation Confirmation', which contained particulars of the voyage and a request for payment of the balance. Several months later he paid the balance and then received the tickets and the conditions of carriage. Justice Brandon found it was 'clear' the contract was concluded when the booking was made and confirmed, subject to Mr Daly paying the balance by the prescribed time, which he did.¹⁵ It was incorrect to say there was no concluded contract until Mr Daly received the ticket. Otherwise, the defendant could at any time before issuing the ticket have ended the contract by telling Mr Daly the whole thing was off, leaving him to organise passage with another carrier only one month before the holiday date. On that view, up until the ticket was issued, the parties were only negotiating a contract. This could not have been the intention of the parties.¹⁶ It followed the defendants could not rely upon the exclusion clause contained in the standard conditions of carriage. Rather than adopting the old 'conventional analysis', this case embraced a more flexible and common sense approach to contract formation in the context of a holiday booked many months in advance, by emphasising the time when the voyage was booked, the deposit paid and the details agreed upon, rather than when the ticket was later issued.

These principles were applied in Australia in *Fay v Oceanic Sun Line Special Shipping Company Inc*.¹⁷ The plaintiff and his wife booked a cruise in Greece through their travel agent, Mary Rossi Travel, who was based in New South Wales. The plaintiff was not issued with a ticket or other documentation before the cruise. Instead, Mary Rossi received 'Exchange Orders' from the sales agent of the defendant, which she presented once the tour party arrived in Athens. In return, she received the passage tickets and boarding passes. The issue was whether the exclusive jurisdiction clause requiring all disputes to be heard by a court in Athens, Greece, which was contained in the 'General Conditions' on the passage ticket, was incorporated into the contract. On the issue of contract formation, the trial judge Yeldham J found that the contract was complete when the balance of purchase money was paid to the defendant's agent and the relevant exchange voucher issued. The exchange voucher contained details of the passengers, the vessel, the precise cabin, travel dates and money paid and a promise that it would be exchanged for a Sun Line ticket when boarding the vessel. On appeal, McHugh J (with whom Glass JA agreed) found the contract was made in Sydney no later than the time when the defendant's agent issued the exchange order.¹⁸ In the High Court, Wilson and Toohey JJ agreed with the primary judge that the contract was made when the defendant's agent received the balance of money due and issued the exchange order.¹⁹ It defied common sense if, after paying the entire passage money and being allocated a particular cabin on a particular vessel, there was no contract between the parties obliging the carrier to issue the plaintiff with a ticket.²⁰ Brennan J expressly rejected the application of the conventional analysis to a ticket that a carrier is 'obliged to issue in exchange for an exchange order when a passenger is boarding a vessel'.²¹ In that circumstance, it cannot be the parties' intention for the ticket, given to the passenger on boarding, to be a mere offer.²²

In *Dillon and Ors v Baltic Shipping Co (The Mikhail Lermontov)*,²³ the plaintiff booked a cruise and paid a deposit. The plaintiff's travel agent issued a 'Booking Form' with all of the details of the cruise, the plaintiff's details, and the cancellation penalties to which the plaintiff would be subject if she cancelled the booking. It provided that the contract of carriage would only be made 'at the time of the issuing of tickets'. At first instance, Carruthers J held that the contract was concluded when the booking form was delivered inviting the plaintiff to pay the balance owing. This finding was rejected on appeal, with the Court of Appeal giving effect to the stipulation in the booking form that the contract was formed later, when the ticket was issued.²⁴ Gleeson CJ saw no reason to disregard that stipulation,²⁵ which rendered the 'conventional analysis' inapplicable. It also removed the possibility that the contract was made when the booking form was issued or the fare balance paid, as had occurred in *Fay*.²⁶ The consequence was that the contract was formed when the ticket was issued, not after it was received by the plaintiff.

¹⁴ [1979] 1 Lloyd's Rep 257.

¹⁵ *Ibid*, 262 (Brandon J).

¹⁶ *Ibid*.

¹⁷ *Fay v Oceanic Sun Line Special Shipping Company Inc* (Unreported, Supreme Court of New South Wales, Yeldham J, 9 September 1986).

¹⁸ (1987) 8 NSWLR 242, 266 (McHugh J), with whom Glass JA agreed. However, the Court of Appeal thought the contract did incorporate the 'General Conditions' because these were contained in the brochure.

¹⁹ (1988) 165 CLR 197, 205 (Wilson and Toohey JJ), 227 (Brennan J), 256 (Deane J), who was in 'general agreement' with the reasons of Wilson and Toohey JJ.

²⁰ (1988) 165 CLR 197, 206 (Wilson and Toohey JJ).

²¹ (1988) 165 CLR 197, 227 (Brennan J).

²² (1988) 165 CLR 197, 227-228 (Brennan J).

²³ (1989) 21 NSWLR 614.

²⁴ *Baltic Shipping Company v Dillon* (1991) 22 NSWLR 1.

²⁵ *Ibid*, 7 (Gleeson CJ).

²⁶ *Baltic Shipping Company v Dillon* (1991) 22 NSWLR 1, 7 (Gleeson CJ).

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However, as the plaintiff had not been afforded adequate notice of the terms of the carriage, the limitation clause did not form part of the contract.

Courts now analyse the content and effect of all documents provided to a passenger when considering questions of contract formation. In *Knight v Adventure Associates Pty Ltd & Ors*,²⁷ the plaintiff brought a claim for an injury she suffered while on a cruise on board a vessel owned by the third defendant. The travel agent initially provided the plaintiff with a brochure and a booking form, which the plaintiff completed and signed. The ticket, which contained no terms and conditions, was issued a month later. The shipowner sought a stay of the proceedings in reliance on an exclusive jurisdiction clause set out in another document headed 'Cruise Contract', which was provided to the plaintiff only weeks before the cruise. The Court found that the brochure and booking form was 'at least part of' any contractual relationship between the parties, because 'the material made provision for the payment of deposit, the balance and for cancellation penalties'.²⁸ By the time the plaintiff received the Cruise Contract, 'any contractual relationship had already been finalised' because 'the plaintiff had committed herself to the cruise' and 'had become subject to cancellation penalties'.²⁹

Similarly, in *Lightfoot v Rockingham Wild Encounters Pty Ltd*,³⁰ the plaintiff booked tickets online for a dolphin watching cruise. She received an email confirming the booking and setting out the details of the cruise, including the date, time, number of passengers and place of embarkation, and referring to cancellation conditions. The case turned on the significance of a waiver the plaintiff signed the following day, immediately before the cruise. Braddock DCJ did not hesitate in finding that the email 'clearly' evidenced the terms of the contract,³¹ and the contract was made the day before the cruise.³²

It is now beyond doubt that a contract may come into existence before the carrier issues a ticket or provides its terms of carriage to a passenger, and potentially months before. It is highly unlikely the conventional analysis of contract formation will apply to any but the most routine local trips, where the passenger requests, pays for and receives a passage ticket almost simultaneously.³³ In all other cases, a closer analysis of the circumstances is required. If the voyage has been booked, details of the cruise have been confirmed and the passenger has paid money towards the voyage and become subject to cancellation penalties, a contract will almost certainly have been formed even if no ticket has been issued, subject to any express provision to the contrary.³⁴ The case law has thus moved away from the old ticket cases towards a common sense, practical approach to contract formation, particularly in the context of travel arrangements that are often booked and the details agreed upon many months in advance, before a ticket is ever issued. The objective intention of the parties is also relevant, with the courts in both *The Dragon* and *Fay* observing that the parties could not have intended the result advanced by the cruise line. Of critical importance in ascertaining the terms of the cruise contract and the time of its formation are the nature and content of the preliminary documents and correspondence exchanged between the parties. Particular examples of such documents are considered in section 3 below.

2.3 Express Provision in the Contract

The terms and conditions of carriage will often expressly state when the contract is said to be formed. Commonly, this will be linked with the payment of money. For example, some conditions stipulate that a contract will come into existence when the carrier first receives 'payment',³⁵ which suggests payment of any sum is sufficient to bring a contract into existence. Other conditions provide the contract will be formed upon payment of 'the fare',³⁶ or when the passenger purchases 'the ticket',³⁷ which suggests payment of the full fare is required before a contract will be formed. Other contracts are vaguer still, and simply state that the contract arises 'upon booking the cruise',³⁸ which raises questions about when offer and acceptance occur, particularly if electronic communications

²⁷ [1999] NSWSC 861.

²⁸ [1999] NSWSC 861, [27] (Master Malpass).

²⁹ [1999] NSWSC 861, [28] (Master Malpass).

³⁰ [2017] WADC 62.

³¹ *Ibid*, [148].

³² [2017] WADC 62, [149].

³³ Cf. *Gill v Charter Travel Co* (Unreported, 16 February 1996, Supreme Court of Queensland, de Jersey J). In that case, the judge applied the 'conventional analysis' where the plaintiff paid for a cruise and received a receipt but did not receive any other documentation until the tickets were delivered. However, there is no description in the judgment of what was printed on the receipt, which presumably would have recorded at least some of the details of the cruise. The failure of the judge in this case to analyse the cases of *Oceanic*, *Baltic Shipping*, *The Eagle* and *The Dragon* has been criticised: Lewins, above n 6, 53.

³⁴ *Baltic Shipping Company v Dillon* (1991) 22 NSWLR 1.

³⁵ P&O *Booking & Travel Conditions* cl 2; *Carnival Ticket Contract* cl 4.

³⁶ *Azamara Information, Terms and Conditions* cl 2; *Norwegian Cruise Line Guest Ticket Contract* cl 2.

³⁷ *Silversea Passage Contract* cl 24.

³⁸ *Oceania Ticket Contract* cl 1.

or internet bookings are involved. The conditions of at least one carrier link the formation of a contract with the traveller signing a document.³⁹ Courts are inclined to give effect to contractual provisions that expressly state when the contract will come into existence.⁴⁰

Although these types of clauses may be clear as to *when* a contract is formed, and thus when the contract terms can be regarded as finalised, they do not necessarily clarify *where* the contract was formed. The place of contract formation will be simple to discern in the case of an over-the-counter booking but may become problematic when electronic bookings and payments are involved. These issues are considered below.

2.4 Impact of Electronic Transactions and Communications

The proliferation of the internet has had a major impact on the traditional rules of contract law, particularly issues of contract formation and incorporation of standard terms. It has also profoundly affected the way in which the cruise industry markets and sells its products, with passengers now able to purchase cruises online either directly from the cruise line itself, or through third parties such as travel agents or sales representatives. A passenger may also purchase a cruise online in a number of ways, from selecting and purchasing a cruise directly through a website within a matter of minutes, to negotiating and communicating with agents through email correspondence over a period of time. These methods of contracting affect when and where the cruise contract is formed. They also affect the terms that form part of that contract, since additional terms cannot be incorporated after the contract has been concluded and the place of formation may trigger the application of additional terms applicable in that particular jurisdiction.⁴¹ These issues are analysed in detail elsewhere,⁴² but are considered briefly below.

There are difficulties in applying the traditional ‘offer and acceptance’ analysis to online transactions and communications. The conventional analysis of offer and acceptance was rejected in *eBay International AG v Creative Festival Entertainment Pty Ltd*. In that case, tickets to a music festival were sold through various methods, including through the Ticketmaster website. The defendant argued that no contract was formed until the ticket arrived in the post several weeks later. Rares J rejected this submission and considered it was ‘quite unrealistic’ to regard the transaction as one where the purchaser could have returned the ticket, received potentially six weeks after the online purchase, and receive a refund.⁴³ His Honour found that the ‘parties were contracting on Ticketmaster online in writing’.⁴⁴ The online purchase was ‘a contract in writing signed by the parties’. His Honour did not need to consider the precise time or place the contract was formed, merely that it was formed before the ticket was issued, such that a clause that appeared on the printed ticket did not form part of the contract.

Applying the rules of offer and acceptance may be easier where a booking is made through email correspondence. In *Wilson v Addu Investments Private Ltd*,⁴⁵ the plaintiff was injured while on a sailing boat in the Maldives. On the issue of contract formation, the plaintiff argued he made a contractual offer when he sent an email from Sydney to the Operations Manager of the defendant, requesting to book the sunset cruise. This offer was accepted by the defendants when the Operations Manager emailed the plaintiff confirming the booking in Sydney.⁴⁶ This was an interlocutory hearing to determine whether New South Wales was an appropriate forum to hear the dispute and so the question of contract formation was a relevant consideration but did not need to be definitively determined. The Judge considered, on the probabilities, that the contract was concluded in Australia.⁴⁷

The *Electronic Communications Convention 2005*,⁴⁸ which has been enacted in Australia through the *Electronic Transactions Act 1999* (Cth) and equivalent State legislation,⁴⁹ attempts to address some of the issues created by online dealings. However, neither the Convention nor its enacting legislation attempts to define when offers and

³⁹ Ponant *General Terms and Conditions of Sale* cl 1.6, cl 2.1. However, the meaning of these clauses is unclear, as the document the traveller signs is the ‘Contract’, which is defined as ‘all the respective obligations incumbent upon [the carrier] and the Traveller, as specified on the invoice and the Tickets, as well as in the GTCs and the PTCS’, so it is entirely unclear which document (or documents) the passenger is required to sign before the traveler will be taken to have accepted the conditions.

⁴⁰ *Baltic Shipping Company v Dillon* (1991) 22 NSWLR 1.

⁴¹ Such as, in an Australian context, the *Competition and Consumer Act 2010* (Cth).

⁴² See for example Jeannie Marie Paterson, ‘Consumer Contracting in the Age of the Digital Natives’ (2011) 27 *Journal of Contract Law* 152 and Eliza Mik, ‘The Effectiveness of Acceptances Communicated by Electronic Means, or – Does the Postal Acceptance Rule Apply to Email?’ (2009) 26 *Journal of Contract Law* 68.

⁴³ [2006] FCA 1768, [51] (Rares J).

⁴⁴ [2006] FCA 1768, [48] (Rares J).

⁴⁵ [2014] NSWSC 381.

⁴⁶ *Ibid*, [13] (Garling J).

⁴⁷ [2014] NSWSC 381, [101] (Garling J).

⁴⁸ United Nations Convention on the Use of Electronic Communications in International Contracts (New York, 2005), art 10. See also the UNCITRAL Model Law on Electronic Commerce with Guide to Enactment 1996 with additional article 5 *bis* as adopted in 1998, art 15.

⁴⁹ Such as the *Electronic Transactions Act 2001* (Qld).

acceptances of offers become effective for the purposes of contract formation, but merely define when and where an electronic communication is ‘dispatched’⁵⁰ or ‘received’.⁵¹ The only clarification provided as to the applicability of traditional contract law principles is with respect to particular electronic proposals which are to be considered invitations to treat.⁵² In the case of acceptance by email, at least one commentator argues that acceptance should be effective not on receipt but on dispatch.⁵³ In the context of electronic transactions, issues of offer, acceptance and agreement, and the time and place of contract formation, therefore remain issues of domestic common law.

3 Documents Comprising the Contract

Identifying the documents that comprise the cruise contract is crucial in order to ascertain the terms of the contract. Athens 1974/2002 simply defines ‘contract of carriage’ as ‘a contract made by or on behalf of a carrier for the carriage by sea of a passenger or of a passenger and his luggage, as the case may be’.⁵⁴ When booking a cruise, a passenger may encounter a vast array of documents, from brochures and booking forms, to itineraries, receipts and tickets. Any one or more of these documents may be evidence of or comprise the contract of carriage, depending on the circumstances of the particular transaction and when, on the facts, the contract was formed. As mentioned above, it may be that the carrier’s standard terms and conditions, which would ordinarily be the obvious candidate for the primary contractual document, do not form part of the contract of carriage at all if the agreement was formed before those terms were provided to the passenger, or if the passenger did not receive adequate notice of those conditions. The time when the contract is formed therefore affects which documents comprise the contract and which terms bind the parties. More detailed consideration of the documents that typically form a cruise contract is provided below.

3.1 Express Provisions

Often, the carrier’s standard terms and conditions will specify the documents that comprise the contract. Some standard terms stipulate that only those terms themselves comprise the contract,⁵⁵ though reference may also be made to the Cruise Industry Passenger Bill of Rights.⁵⁶ Other standard contracts will state that the passenger’s ‘Booking Confirmation’ also forms part of the contract.⁵⁷ Presumably, the Booking Confirmation contains details of the particular cruise and the passenger’s personal details. Other standard terms seek to go even further, with the terms of one cruise line also capturing the company’s ‘General Information’ document and ‘Guest Conduct Policy’.⁵⁸ The terms of another say that the contract comprises the ‘General Terms and Conditions of Sale’, the ‘Particular Terms and Conditions of Sale’ applicable to either summer or winter cruises, the ‘Cruise Ticket’ and the ‘Passenger Ticket’, with the latter two documents said to prevail over the former two documents.⁵⁹

However, as noted above, a contract may be formed before the carrier’s standard terms and conditions are provided to the passenger. In this circumstance, the terms and conditions do not form part of the contract, so any stipulation in those conditions as to the documents said to comprise the contract would not be enforceable. Instead, the contract may be evidenced in preliminary documents such as a booking form or receipt,⁶⁰ or may even comprise an oral agreement between the parties.⁶¹ However, if the court is minded to give effect to an express stipulation in an earlier document as to when a contract is said to be formed, then this may be effective in giving the carrier’s standard terms and conditions contractual force.⁶²

⁵⁰ *Electronic Transactions Act 1999* (Cth) ss 14, 14B.

⁵¹ *Electronic Transactions Act 1999* (Cth) ss 14A, 14B.

⁵² *Electronic Transactions Act 1999* (Cth) s15B.

⁵³ Eliza Mik, ‘The Effectiveness of Acceptances Communicated by Electronic Means, or – Does the Postal Acceptance Rule Apply to Email?’ (2009) 26 *Journal of Contract Law* 68, 96.

⁵⁴ Art 1.2.

⁵⁵ For example, Norwegian Cruise Line *Guest Ticket Contract* cl 2; Oceania *Ticket Contract* cl 1.

⁵⁶ Norwegian Cruise Line *Guest Ticket Contract* cl 2; Oceania *Ticket Contract* cl 1; Royal Caribbean International *Cruise/Cruisetour Ticket Contract* cl 1; Silversea *Passage Contract* cl 24.

⁵⁷ P&O *Booking & Travel Conditions* cl 2; Carnival *Ticket Contract* cl 2.

⁵⁸ Azamara *Information, Terms and Conditions* cl 1.

⁵⁹ Ponant *General Terms and Conditions of Sale*.

⁶⁰ *Oceanic Sun Line Special Shipping Company Inc v Fay* (1988) 165 CLR 197; *Knight v Adventure Associates Pty Ltd & Ors* [1999] NSWSC 861.

⁶¹ In *McCutcheon v MacBrayne* [1964] 1 Lloyd’s Law Reports 16; 1 WLR 125, the contract was entirely oral and the terms of the receipt were not terms of the contract. It is inconceivable that a modern cruise contract would not be evidenced by at least one if not more documents.

⁶² *Baltic Shipping Company v Dillon* (1991) 22 NSWLR 1.

3.2 Brochures and Promotional Material

Often the first document a passenger comes across before booking a cruise is the cruise line's brochure. These brochures are typically glossy, professionally designed publications containing descriptions and itineraries of available cruises, layouts of the vessels, photographs of the destinations and onboard facilities, maps of the routes of the different voyages, pricing, and travel dates. Terms and conditions are almost invariably printed at the end of the brochure.

In the 1970s and 1980s, travel brochures were not considered contractual in nature. In *The Eagle*,⁶³ the travel brochure contained a reference to the defendant's conditions of carriage. The plaintiff's travelling companion, Colonel Bowley, who booked the cruise on her behalf, read the travel brochure. In the circumstances, simply reading the brochure before booking the cruise was not enough to make the terms referred to in the brochure part of the contract.

In *Fay v Oceanic*,⁶⁴ the cruise brochure contained a heading 'Things to know before you go', setting out a number of details concerning cancellation, refunds, itinerary changes and so on. It also referred to 'the general conditions of transportation set out in the carriage contract', and stated that the cruise was governed by the conditions printed on the 'passenger ticket contract'. On the contractual significance of the brochure, the trial judge Yeldham J found that the brochure 'was not contractual in nature and did not enter into or form any part of the relevant contract of carriage'.⁶⁵ The Court of Appeal disagreed, with McHugh JA (with whom Glass JA agreed) finding that the 'terms and conditions printed on the Passenger Ticket Contract' were incorporated into the contract by reason of the brochure.⁶⁶ However, on appeal to the High Court, Wilson and Toohey JJ agreed with the trial judge that the brochure was not contractual and was simply 'advertising material, available to anyone'.⁶⁷ The reference in the brochure to the terms and conditions printed on the passenger ticket 'was informative but not contractual'.⁶⁸ The result was that the plaintiff was not bound by the exclusive jurisdiction clause printed on the ticket.

In *Dillon and Ors v Baltic Shipping Co*,⁶⁹ the plaintiff booked a cruise after looking at the defendant's cruise brochure. The plaintiff's travel agent prepared a document titled 'Statement of Account', which set out a number of details including that the travel conditions were available on the relevant '**brochures, receipts and tickets**' (emphasis added). The brochure itself stated that 'all bookings are subject to CTC Cruises' terms and conditions...'. On the significance of the brochure, Carruthers J simply noted: 'It has now been authoritatively established by *Oceanic Sun Line Special Shipping Co Inc v Fay* that a promotional brochure of this kind is not contractual in nature'.⁷⁰

However, it now seems that a cruise brochure may form part of the contract between the parties and will certainly be significant when considering issues of incorporation of terms. In *Young v Insight Vacations Pty Ltd*, the terms and conditions of the contract were contained in the defendant's brochure under the heading 'Booking Conditions & Other Important Information'.⁷¹ This fact did not seem to be a controversial issue either at first instance or on appeal.⁷² The brochure contained a clause stating, 'This brochure represents the entire agreement between the passenger and the Operators.' Presumably there would have been a ticket or receipt or other similar documentation, but the published decision makes no mention of this and only refers to the brochure.

In *Knight v Adventure Associates Pty Ltd & Ors*,⁷³ the travel agent initially provided the plaintiff passenger with a brochure and a booking form, which the plaintiff completed and signed. The brochure provided for the payment of a deposit and the balance, contained cancellation and refund terms and had a section headed 'Terms and Conditions'. The ticket, which contained no terms and conditions, was issued a month later, and further documentation including a document headed 'Cruise Contract' was provided only weeks before the cruise. The

⁶³ [1977] 2 Lloyd's Rep 70.

⁶⁴ *Fay v Oceanic Sun Line Special Shipping Company Inc* (Unreported, Supreme Court of New South Wales, Yeldham J, 9 September 1986).

⁶⁵ *Ibid.*

⁶⁶ *Oceanic Sunline Special Shipping Co Ltd v Fay* (1987) 8 NSWLR 242, 266 (McHugh JA).

⁶⁷ *Oceanic Sunline Special Shipping Company Inc v Fay* (1975) 133 CLR 125, 208 (Wilson and Toohey JJ).

⁶⁸ *Ibid.*

⁶⁹ (1989) 21 NSWLR 614

⁷⁰ *Ibid.*, 637.

⁷¹ [2009] NSWDC 122, [33].

⁷² *Insight Vacations Pty Ltd v Young* (2010) 78 NSWLR 641, [1] (Spigelman CJ). The main issue on appeal was whether the plaintiff's damages should be reduced.

⁷³ [1999] NSWSC 861.

Court found that if there was a contractual relationship between the plaintiff and the owner of the vessel, the brochure and booking form formed ‘at least part of it’.⁷⁴

A likely reason for this shift towards giving brochures more contractual significance is because of the current practice of cruise lines printing their standard terms and conditions in the brochure. For example, the brochure for Ponant 2019 Cruises contains four pages of ‘General Terms and Conditions of Sale’ and a further page titled ‘Particular Terms and Conditions of Sale’. The Princess Cruises 2017-2019 Cruising From Australia & Asia brochure contains four pages of ‘Terms and Conditions’. Additionally, a page titled ‘How to book and Pay’ also refers to the terms and conditions and asks customers to ensure they have read the terms and conditions because these are deemed to be accepted when the customer first makes a payment towards the cruise. Even more significantly, the *Ticket Contract* for Norwegian Cruise Line provides that the cancellation charges are assessed pursuant to the terms of the cruise brochure,⁷⁵ thus directly incorporating provisions in the brochure into the contract. In contrast, the brochures in the earlier cases of *Fay* and *Baltic Shipping* simply referred to the company’s terms and conditions without expressly setting them out. The current practice of printing the conditions in the brochure thus makes it more likely that those conditions are incorporated into the contract and elevates the humble brochure to a position of greater contractual significance.

3.3 Booking Forms and Reservation Forms

Booking forms and reservation forms may also form part of the cruise contract. In *Knight v Adventure Associates Pty Ltd & Ors*,⁷⁶ the plaintiff completed and signed a booking form, which the Court found formed ‘at least part of’ the contractual relationship.⁷⁷ In *Baltic Shipping Company v Dillon*, the plaintiff’s travel agent issued a document titled ‘Booking Form CTC Cruises’, which contained details of the cruise, set out cancellation penalties, and provided that the contract would only be made when the tickets were issued. By giving effect to this particular provision in the Booking Form as to the time of contract formation, the Court of Appeal implicitly accepted the enforceability of the Booking Form as a contractual document. In *The Eagle*, the defendant’s brochure contained a reservation form, which referred to the defendant’s conditions of carriage. Had the plaintiff’s travelling companion filled out this form rather than booking the cruise over the telephone, then the plaintiff would have been bound by the defendant’s conditions.⁷⁸ Properly worded and completed, reservation forms may therefore be effective in incorporating conditions of carriage into the contract.

3.4 Tickets and Receipts

The ticket for the cruise is the obvious candidate for the primary contractual document. Indeed, the early ticket cases presumed that no contract was formed until the ticket was issued.⁷⁹ Some cases recognised that the ticket was simply evidence of a prior oral contract,⁸⁰ and at least one of the early cases suggested that a ticket was no more than a receipt for a contract already formed.⁸¹ In some circumstances, the contract will be perfected before the ticket is issued,⁸² in which case the ticket is not a contractual document and conditions printed on the ticket will not form part of the contract.⁸³ As discussed above, it is now accepted that a contract may come into existence before a ticket is issued, in which case the ticket will not form part of the contract of carriage.

3.5 Emails and Electronic Communications

Electronic documents and communications, including emails and attachments and material published on a website, may also form part of the contract of carriage. Indeed, it is entirely possible a cruise contract may comprise material exchanged and viewed entirely online. In *Lightfoot v Rockingham Wild Encounters Pty Ltd*,⁸⁴

⁷⁴ *Ibid*, [27] (Master Malpass).

⁷⁵ Norwegian Cruise Line *Ticket Contract* cl 15.

⁷⁶ [1999] NSWSC 861.

⁷⁷ *Ibid*, [27] (Master Malpass). The Booking Form available on Adventure Associates’ website requires the passenger to fill out their personal details including passport details, as well as the name of the cruise and the vessel and the type of cabin requested, as well as payment details: <https://adventureassociates.com/wp-content/uploads/2018/01/AA-booking-form-interactive-v5.pdf> (accessed 21 June 2018).

⁷⁸ [1977] 2 Lloyd’s Rep 70, 77 (Deputy Judge Ogden QC).

⁷⁹ *Cockerton v Naviera Aznar SA* [1960] 2 Lloyd’s Rep 450.

⁸⁰ *Henderson et al v Stevenson* (1875) LR 2 Sc 470. See also *McCutcheon v MacBrayne* [1964] 1 Lloyd’s Law Reports 16 in the context of a receipt.

⁸¹ *Henderson v Stevenson* (1875) LR 2 Sc 470, 477 (Chemsford L).

⁸² [1977] 2 Lloyd’s Rep 70, 75 (Ogden DJ).

⁸³ See *The Eagle* [1977] 2 Lloyd’s Rep 70.

⁸⁴ [2017] WADC 62.

the plaintiff booked tickets online and received an email confirming the booking and setting out the details of the cruise. Braddock DCJ did not hesitate in finding that the email ‘clearly’ evidenced the terms of the contract.⁸⁵ In *Wilson v Addu Investments Private Ltd*,⁸⁶ the cruise booking was requested and confirmed in email correspondence passing between the plaintiff and the Operations Manager of the resort.⁸⁷ It is likely that in the future, more and more cruise contracts will be formed exclusively online and passengers will only receive documents and communications electronically. Some cruise lines are leading this trend. For example, the Princess Cruises brochure says that Princess Cruises operates a ‘paperless documentation program’ which consists of a ‘series of information emails including a downloadable travel summary’. Travellers create an online ‘Cruise Personaliser’ account, where they can view copies of emails, and download boarding passes and luggage labels.⁸⁸ The context of an increasingly online world, the issues raised in section 2.4 above are apposite.

3.6 Itineraries

An interesting issue is whether the cruise itinerary forms part of the contract of carriage. Most consumers would probably assume that the cruise provider is obliged to provide a cruise with the precise route and destinations set out in the itinerary. Often the itinerary will accompany or form part of other contractual documents. For example, the itinerary is invariably printed in the brochure and may be set out in or attached to an email confirming the booking. However, it is usual for cruise lines to include a clause in their standard terms and conditions stating that published schedules and itineraries do not form part of the contract,⁸⁹ or at least that the carrier has wide discretion to deviate from the advertised route.⁹⁰ As the Athens Convention is only concerned with loss caused by ‘shipping incidents’, it does not deal with deviations, and there are few reported cases on this issue. In a recent Australian decision, *Moore v Scenic Tours Pty Ltd (No 2)*, the plaintiff successfully relied upon the guarantees in the Australian Consumer Law in a claim for damages when flooding significantly affected the itinerary and enjoyment of what was meant to be a luxury European river cruise.⁹¹ In another case, it seems the carrier’s sales agent voluntarily provided money and discounts to passengers when an outbreak of norovirus caused the voyage to be curtailed.⁹² Unless a passenger is able to take advantage of domestic legal remedies such as consumer law protections, or the cruise line voluntarily provides compensation, a passenger will be left to rely on general common law remedies for changes to the itinerary.

Although the itinerary may not, at least according to the carrier’s standard terms, be enforceable, it will be important in determining whether or not the Athens Convention applies. The Convention applies to ‘international carriage’, which is defined as ‘any carriage which, **according to the contract of carriage**, the place of departure and the place of destination are situated in two different States...’⁹³ (emphasis added). If the place of departure and destination are not set out in the other contractual documents, then the parties will need to have regard to the places identified in the itinerary.

4 The Parties to the Contract

4.1 The Passenger and the Carrier

A contract of carriage will typically be between a passenger and the contracting carrier. The ‘contracting carrier’ is the entity that enters into the contract of carriage, as opposed to the ‘performing carrier’, being the entity that actually performs all of part of the carriage.⁹⁴ Although this seems simple, the conditions of some cruise lines complicate the situation. For example, some cruise contracts define ‘passenger’ as including not only the person travelling under the ticket, but also any persons in their care, ‘together with their respective heirs and

⁸⁵ Ibid, [148].

⁸⁶ [2014] NSWSC 381.

⁸⁷ This case was focused on the procedural issue of whether the proceedings should more appropriately be heard in Maldives, so it may be that there were formal T&Cs but this was simply not mentioned in the judgment.

⁸⁸ Princess Cruises 2018-2019 *Cruising from Australia & Asia* 102 (accessed 21 June 2018).

⁸⁹ P&O *Booking & Travel Conditions* cl 3; Carnival *Ticket Contract* cl 2,

⁹⁰ For example, Royal Caribbean International *Cruise/Cruisetour Ticket Contract* cl 6a; Azamara *Information, Terms and Conditions* cl 36, Norwegian Cruise Line *Guest Ticket Contract* cl 6(c); Oceania *Ticket Contract* cl 9.

⁹¹ *Moore v Scenic Tours Pty Ltd (No 2)* [2017] NSWSC 733.

⁹² *Cruise and Maritime Services International Limited v Navigators Underwriting* [2017] EWHC 843 (Comm); [2017] 1 Lloyd’s Law Reports 575.

⁹³ Art 1.9.

⁹⁴ Art 1. Both the contracting carrier and performing carrier are subject to the Athens Convention: see articles 3.1 and 4.1.

representatives'.⁹⁵ Leaving aside privity of contract issues and the enforceability of such clauses, this broad definition potentially gives the carrier the right to pursue those other persons for unpaid charges, although it also presumably entitles those same persons to pursue claims under the contract on behalf of the passenger.

Similarly, identifying the contracting carrier should presumably be a simple exercise and the standard terms and conditions of the major cruise lines specify the corporate name of the contracting carrier. However, the conditions for one cruise line state that the 'operator' may, 'depending upon your actual sailing', be any one of four named corporate entities,⁹⁶ such that the passenger may not easily be able to identify the entity with whom they have contracted. Some contracts also define carrier broadly so as to include a number of related entities such as the carrier's subsidiaries, agents, assigns, the master and the crew, and the shipowner.⁹⁷ Like the broad definitions of 'passenger', this would potentially give these entities the same contractual protections afforded to the carrier, but theoretically also expose them to the same contractual liabilities. Such entities would unlikely be grateful for the latter, and the former can be achieved by a Himalaya clause (see below). The utility and indeed enforceability of such clauses is unclear. What should presumably be a simple matter of identifying the relevant named corporate entity is therefore not necessarily so, and a passenger may need to consider the corporate structure of the carrier carefully before commencing proceedings.

4.2 Agents and Booking Companies

Many cruise passenger contracts are made by agents acting on behalf of the passenger or the carrier. If a travel agent enters into a cruise contract on the passenger's behalf, the usual principles of agency will apply, and provided the agent was acting within the scope of his or her authority, the passenger and carrier will be bound by the contract of carriage. The passenger will also likely be subject to a separate agency contract containing the agent's own terms and conditions of service.

Many cruise lines also operate through their own travel or sales agents. In *Lee v Airtours Holidays Ltd*,⁹⁸ the plaintiffs commenced proceedings against the first defendant travel agent through whom they booked the cruise, and who acted as an agent on behalf of the second defendant tour operator. Interestingly, in that case the Judge found, *obiter dicta*, that had the Athens Convention applied, both defendants would have been 'carriers' within the meaning of that Convention.⁹⁹ In *Baltic Shipping Co v Dillon*, the cruise was booked through Jayes Travel Services Pty Ltd, who was the agent for the defendant carrier rather than the plaintiff.¹⁰⁰ Similarly, in *Fay v Oceanic*, JMA Tours acted as the general sales agent for Sunline cruises.¹⁰¹ It is clear that sales agents and marketers are not 'contracting carriers' under the Athens Convention.¹⁰²

Another issue relevant to cruise contracts is whether the carrier itself is contracting as principal to provide the carriage, or as agent on behalf of another party. In *Moore v Scenic Tours Pty Ltd (No 2)*, the defendant pleaded that the river cruises were provided by other entities, namely, Scenic Tours Europe AG and Luftner Cruises AG, as independent contractors. However, the defendant did not make any submission in argument or in writing that it should not be held liable for the actions of these 'contractors'. Justice Garling found that the 'plainest inference' from the evidence was that the defendant and Scenic Europe were 'operating jointly' and were 'closely associated', and that Luftner Cruises was also integral to the defendant's operations.

5 Typical Contractual Terms

The following section of this paper analyses the standard terms and conditions of several major international cruise companies. The terms of each company will be compared and contrasted with the corresponding terms of the other companies, and with the relevant provisions of Athens 1974 and Athens 2002.¹⁰³ I have attempted to

⁹⁵ See, for example, Royal Caribbean International *Cruise/Cruisetour Ticket Contract* cl 2; Norwegian Cruise Line *Guest Ticket Contract* cl 1; Oceanic *Ticket Contract* cl 2.

⁹⁶ Royal Caribbean International *Cruise/Cruisetour Ticket Contract* cl 18.

⁹⁷ Norwegian Cruise Line *Guest Ticket Contract* cl 1; Oceania *Ticket Contract* cl 2.

⁹⁸ [2004] 1 Lloyd's Rep 683.

⁹⁹ *Ibid*, 691.

¹⁰⁰ *Baltic Shipping Co v Dillon* (1991) 22 NSWLR 1, 37 (Mahoney J).

¹⁰¹ *Fay v Oceanic Sun Line Special Shipping Company Inc* (Unreported, Supreme Court of New South Wales, Yeldham J, 9 September 1986).

¹⁰² *Cruise and Maritime Services International Limited v Navigators Underwriting (The Marco Polo)* [2017] EWHC 843 (Comm); [2017] 1 Lloyd's Law Reports 575.

¹⁰³ The history, provisions, merits and shortcomings of Athens 1974 and Athens 2002 has been canvassed in detail by others, including Lewins, above n 6, and Nick Gaskell, 'The Athens Convention 2002: Creation and Basic Provisions' (Paper presented at Global Shipping Law Forum, Brisbane, 4 July 2018). In a specific Australian context, Kate Lewins, 'Cruise ship operators, their Passengers, *Australian*

analyse as broad a range of conditions as possible, including conditions of cruise lines based in different continents, and of corporate groups as well as privately owned companies. The result is a consideration of the conditions of the following cruise providers:

- P&O, Carnival, Princess Cruises and Cunard, which are all registered business names of Carnival PLC ARBN 107 998 443, an Australian company and which, unsurprisingly, have almost identical conditions of carriage. These conditions are all said to be governed by New South Wales law, make specific reference to the *Competition and Consumer Act 2010* (Cth), contain modest exclusion clauses (or at least modest in comparison to some other providers) and do not impose a cap on damages.
- Royal Caribbean International, Celebrity Cruises and Azamara Cruises, which are all owned and operated by Royal Caribbean Cruises Ltd, a company based in Florida.¹⁰⁴ The terms and conditions for Royal Caribbean International and Celebrity Cruises are almost identical. However, the conditions for Azamara are far more generous to passengers.
- Norwegian Cruise Line, Oceania Cruises and Regent Seven Seas Cruises, which are all operated by Norwegian Cruise Line Holdings Ltd, which is registered in Bermuda but has its principal executive offices in Miami, Florida.¹⁰⁵
- Silversea Cruises, a privately owned company based in Florida.¹⁰⁶
- Ponant, which is owned by Groupe Artemis, a French holding company and an investor in high value brands.¹⁰⁷

5.1 Common Exclusion Clauses

Clauses excluding liability in certain circumstances are ubiquitous in modern contracts. The most common exclusion clauses in cruise passenger contracts exclude the carrier's liability associated with the following:

- Services provided by onboard medical staff, or by onboard service providers generally.¹⁰⁸
- Acts or omissions of third parties, usually described as 'independent contractors' or 'other service providers', such as land tour providers.¹⁰⁹
- Events that occur off the vessel or launches, including onshore activities such as land tours.¹¹⁰
- Death or personal injury arising out of the passenger's participation in recreational activities¹¹¹ or use of recreational or athletic equipment.¹¹²
- Loss not caused by the carrier's negligence.¹¹³
- Force majeure events.¹¹⁴

In respect of most of the above scenarios, it is not objectively unreasonable for carriers to attempt to exclude their liability. Almost any contract of service would exclude liability for loss occasioned by an event of *force majeure*,

Consumer Law and State Civil Liability Acts – Part 1' (2015) 29 *ANZ Maritime Law Journal* 93; Kate Lewins, 'Cruise ship operators, their Passengers, *Australian Consumer Law and State Civil Liability Acts – Part 2*' (2016) 30 *ANZ Maritime Law Journal* 12; Kate Lewins, 'Australian cruise passengers travel in legal equivalent of steerage – considering the merits of a passenger liability regime for Australia' (2010) 38 *Australian Business Law Review* 127. On the implementation of Athens in the EU see Dr Simone Lamont-Black, 'Implementing Athens in the EU' (Paper presented at Global Shipping Law Forum, Brisbane, 4 July 2018).

¹⁰⁴ Royal Caribbean Cruises Ltd also enjoys part-ownership of several other cruise companies. See Royal Caribbean Cruises Ltd Quarterly Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934 for the quarterly period ended 31 March 2018, available on the United States Securities and Exchange Commission website:

<https://www.sec.gov/Archives/edgar/data/884887/000088488718000042/rc1-3312018x10q.htm>.

¹⁰⁵ Norwegian Cruise Line Holdings Inc Annual Report 2017 available at http://www.nxtbook.com/nxtbooks/ncl/annualreport_2017/index.php#/20 (accessed 5 June 2018).

¹⁰⁶ Silversea Cruises website: <https://www.silversea.com/about-silversea/the-company.html> (accessed 21 June 2018).

¹⁰⁷ Artemis Group website: <http://www.groupeartemis.com/en/participations/ponant/> (accessed 21 June 2018).

¹⁰⁸ P&O *Booking & Travel Conditions* cl 26; Carnival *Ticket Contract* cl 22; Royal Caribbean International *Cruise/Cruisetour Ticket Contract* cl 11b; Azamara *Information, Terms and Conditions* cl 40; Norwegian Cruise Line *Guest Ticket Contract* cl 8(a); Oceania *Ticket Contract* cl 10(g); Silversea *Passage Contract* cl 15.

¹⁰⁹ P&O *Booking & Travel Conditions* cl 27; Carnival *Ticket Contract* cl 25; Royal Caribbean International *Cruise/Cruisetour Ticket Contract* cl 4; Azamara *Information, Terms and Conditions* cl 22; Norwegian Cruise Line *Guest Ticket Contract* cl 8(b), cl 9; Oceania *Ticket Contract* cl 11; Silversea *Passage Contract* cl 11; Ponant *General Terms and Conditions of Sale* cl 12.13.

¹¹⁰ Royal Caribbean International *Cruise/Cruisetour Ticket Contract* cl 11b; Azamara *Information, Terms and Conditions* cl 26; Norwegian Cruise Line *Guest Ticket Contract* cl 5(a); Oceania *Ticket Contract* cl 5(a); Silversea *Passage Contract* cl 18; Ponant *General Terms and Conditions of Sale* cl 12.14.

¹¹¹ P&O *Booking & Travel Conditions* cl 31; Carnival *Ticket Contract* cl 29; Princess Cruises *Passage Contract* cl 31; Silversea *Passage Contract* cl 10A. In this regard, the standard conditions of the Australian Carnival plc cruise lines specifically refer to s 139A of the *Competition and Consumer Act* (Cth), which permits a carrier to exclude liability for the supply of 'recreational services' as defined.

¹¹² Royal Caribbean International *Cruise/Cruisetour Ticket Contract* cl 11b.

¹¹³ P&O *Booking & Travel Conditions* cl 24; Carnival *Ticket Contract* cl 30; Royal Caribbean International *Cruise/Cruisetour Ticket Contract* cl 11a; Azamara *Information, Terms and Conditions* cl 40; Oceania *Ticket Contract* cl 10(d); Silversea *Passage Contract* cl 10A.

¹¹⁴ Azamara *Information, Terms and Conditions* cl 40; Oceania *Ticket Contract* cl 10(c); Silversea *Passage Contract* cl 10A, cl 13; Ponant *General Terms and Conditions of Sale* cl 12.9.

or by an event not caused by the supplier's failure to exercise due care and skill. It is also usual for suppliers to negate liability for the acts and omissions of independent contractors not acting in the employ of the supplier, and for events that occur outside the scope of the main contract. Other, more controversial exclusions, are considered below.

5.1.1 Acts of Onboard Personnel

More controversial is the widespread attempt by carriers to exclude liability for services provided by onboard personnel, including medical staff, personal trainers, and massage and beauty therapists. The conditions of at least two cruise providers go so far as to acknowledge that the carrier is 'entitled to charge a fee and earn a profit for arranging such services', even though such persons are deemed to be acting as independent contractors and not as agents or representatives of the carrier.¹¹⁵ Under Athens 1974/2002, the contractual carrier is liable for the acts and omissions of the performing carrier 'and of his servants and agents acting within the scope of their employment'.¹¹⁶ This reflects the common law of vicarious liability, where an employer will be liable for the acts of an employee or servant if that person is acting within the scope of his or her employment. Whether or not the relationship between the contractual carrier and the onboard service provider is, to use the usual expression, a contract 'of' service or a contract 'for' service, depends on the factual circumstances of each case. It is entirely conceivable that an onboard service provider may be legally considered to be an employee of the contractual carrier, charterer or shipowner, whatever the contract of carriage with the passenger may say. This means that if Athens 1974/2002 applies, the carrier will be liable for the supplier's negligence, provided they were acting within the scope of their employment, since the Convention overrides any inconsistent contractual terms.¹¹⁷ If Athens does not apply, then the situation becomes less clear and the exclusion clause may well operate to exclude liability, depending on the applicable law. There do not appear to be any Australian cases directly on point,¹¹⁸ but there are several cases in the United States where the cruise ship operator has been found liable for the actions of an onboard medical practitioner,¹¹⁹ although it seems this remains the minority view.¹²⁰

5.1.2 Acts of Independent Contractors

Many cruise holidays offer the option of partaking in onshore excursions at the various ports of call. These excursions, which usually involve a bus or coach ride to a local place of interest, may be booked at the same time as the cruise, but are typically subject to a separate set of conditions imposed by the operator of the tour. The carriage contract of every major cruise operator includes a clause excluding liability for the acts and omissions of other service providers, sometimes described as 'other travel providers' or 'independent contractors', and sometimes specifically referred to as, for example, hotels, restaurants or guided tours.¹²¹ The conditions of one cruise contract state that arrangements with third parties are made solely for the passenger's convenience, even though the carrier may arrange the service and collect a fee.¹²² Another cruise contract specifically states that services provided by off-shore entities are subject to the terms and conditions of those service providers.¹²³ In practice, this means that if a traveller books a cruise with an Australian cruise company but is injured overseas while taking part in an onshore excursion booked separately to the cruise, any claim for that injury will be subject to the conditions of the tour provider, rather than those of the contracting carrier for the cruise. In some circumstances, the situation may be simpler, such as in *Insight Vacations Pty Ltd v Young*, where the plaintiff bought a European tour package from Insight Vacations Pty Ltd. The plaintiff was injured while travelling on a coach on route from Prague to Budapest, and successfully sued the defendant pursuant to the terms of the contract. Had the plaintiff been injured while partaking in a separate excursion not included as part of the tour package, the situation would likely have been different and the incident subject to the terms of a separate contract.

¹¹⁵ Royal Caribbean International *Cruise/Cruisetour Ticket Contract* cl 4b; Celebrity Cruises *Cruise/Cruisetour Ticket Contract* cl 4b.

¹¹⁶ Art 4.2.

¹¹⁷ Art 18.

¹¹⁸ In the Victoria decision in *Gordon v Norwegian Capricorn Line (Australia) Pty Ltd* [2007] VSC 517, the question was whether the plaintiff should be granted an extension of time to prosecute a claim for personal injury caused by the negligence of the onboard general practitioner. Interestingly, the judgment did not refer to any clause in the contract dealing with the relationship between the carrier and the treating doctor, although the terms of the Guest Ticket Contract available on NCL's website as at 13 June 2018 do contain such a clause.

¹¹⁹ *Carsisle v Carnival Corp* 864 So 2d, 1 (Fla 3rd Dist Ct App 2003), followed in *Huntley v Carnival Corp* 307 F Supp 2d 1372, 74 (SD Fla 2004), cited in Melissa Konick, 'Malpractice on the high seas: the liability of owners and physicians for medical errors' [2006] *International Travel Law Journal* 53, 58-59.

¹²⁰ See for example *Hesterly v Royal Caribbean Cruises* 515 F Supp 2d 1278 (2007).

¹²¹ P&O *Booking & Travel Conditions* cl 27; Carnival *Ticket Contract* cl 25; Royal Caribbean International *Cruise/Cruisetour Ticket Contract* cl 4; Azamara *Information, Terms and Conditions* cl 22; Norwegian Cruise Line *Guest Ticket Contract* cl 8(b), cl 9; Oceania *Ticket Contract* cl 11; Silversea *Passage Contract* cl 11; Ponant *General Terms and Conditions of Sale* cl 12.13.

¹²² Royal Caribbean International *Cruise/Cruisetour Ticket Contract* cl 5, and see also Norwegian Cruise Line *Guest Ticket Contract* cl 8(a).

¹²³ Norwegian Cruise Line *Guest Ticket Contract* cl 8(a).

In addition to exclusion clauses, cruise contracts usually also contain a Himalaya clause,¹²⁴ often extending to independent contractors the benefit of the exclusions and limitations set out in the contract.¹²⁵ Some such clauses are extremely broad, sometimes extending to the owners and operators of all shoreside properties at which the vessel may call,¹²⁶ and to ‘any other person’ who may be held responsible for the passenger’s loss.¹²⁷

5.2 Common Cancellation and Deviation Clauses

Cruise ship passenger contracts invariably include clauses setting out the circumstances in which the passenger and carrier may cancel the cruise, and the liberties of the carrier with respect to the cruise itinerary.

For cancellation by the passenger, the contract typically imposes a tiered rate of cancellation charges depending on the type of cruise the passenger has booked, the duration of the cruise, and the number of days before departure the passenger wishes to cancel the cruise. The cancellation fees vary greatly between different providers and this, combined with the fact that the fees are associated with particular types and lengths of cruises, makes it almost impossible to compare the reasonableness and equivalency of each carrier’s cancellation policies.

For cancellation by the carrier, the major cruise lines vary greatly as to the circumstances in which the carrier may cancel the cruise. Some conditions permit the carrier to cancel, shorten or vary the cruise for any reason,¹²⁸ while other contracts only permit such changes when necessary due to circumstances outside the carrier’s control.¹²⁹ Where there has been a mechanical failure, even the less consumer-focused contracts give the passenger the right to a full refund if the cruise is cancelled, or a partial refund if the cruise is shortened.¹³⁰ If the cruise is cancelled or the itinerary is significantly changed for some other reason, the more consumer-friendly contracts give the passenger the right to choose between a full refund or an alternative holiday.¹³¹ The passenger may also have a remedy at common law. In *Ferme & Ors v Kimberley Discovery Cruises Pty Ltd*,¹³² a clause permitting a cruise company to cancel a scheduled cruise and forfeit all fare paid was an ‘unfair term’ under the Australian Consumer Law and consequently void and unenforceable.

Cruise contracts also typically permit the carrier to deviate from the intended route. Many deviation clauses are extremely broad and give the carrier a discretion to deviate from the purchased voyage ‘for any purpose’,¹³³ and ‘at any time’.¹³⁴ For example, clause 6 of the *Cruise/Cruisetour Ticket Contract* for Royal Caribbean Cruises provides:

Carrier may for any reason at any time and without prior notice, cancel, advance, postpone or deviate from any scheduled sailing, port of call, destination, lodging or any activity on or off the Vessel, or substitute another vessel or port of call, destination, lodging or activity. Except as provided in Section 6(e) below, Carrier shall not be liable for any claim whatsoever by Passenger, including but not limited to loss, compensation or refund, by reason of such cancellation, advancement, postponement, substitution or deviation.

The conditions of other cruise lines are more measured, with the carrier undertaking to use ‘reasonable endeavours’ to provide a cruise in accordance with the published schedule but not providing any guarantees about the itinerary.¹³⁵ By comparison, deviation clauses in standard charterparties are narrower and give the carrier discretion to deviate only ‘for the purpose of saving life or property’.¹³⁶ As noted above, some contracts specifically state that the itinerary does not form part of the contract of carriage¹³⁷ and advise passengers not to plan important work commitments around the cruise. This would likely be surprising to most passengers, who

¹²⁴ *Adler v Dickson (The Himalaya)* [1954] 2 Lloyd’s Rep 267.

¹²⁵ Royal Caribbean International *Cruise/Cruisetour Ticket Contract* cl 2; Azamara *Information, Terms and Conditions* cl 2; Norwegian Cruise Line *Guest Ticket Contract* cl 2; Oceania *Ticket Contract* cl 2, cl 22; Silversea *Passage Contract* cl 11.

¹²⁶ Royal Caribbean International *Cruise/Cruisetour Ticket Contract* cl 2

¹²⁷ Oceania *Ticket Contract* cl 22.

¹²⁸ For example, Royal Caribbean International *Cruise/Cruisetour Ticket Contract* cl 6a; Oceania *Ticket Contract* cl 4; Silversea *Passage Contract* cl 15.

¹²⁹ For example, Norwegian Cruise Line *Guest Ticket Contract* cl 6(a), 6(f); Ponant *General Terms and Conditions of Sale* cl 11.

¹³⁰ Norwegian Cruise Line *Guest Ticket Contract* cl 6e; Norwegian Cruise Line *Guest Ticket Contract* cl 6(f); Oceania *Ticket Contract* cl 4e; Silversea *Passage Contract* cl 14.

¹³¹ Azamara *Information, Terms and Conditions* cl 36; P&O *Booking & Travel Conditions* cl 12; Carnival *Ticket Contract* cl 26.

¹³² [2015] FCCA 2384.

¹³³ Norwegian Cruise Line *Guest Ticket Contract* cl 6(c); Oceania *Ticket Contract* cl 9. See also the conditions for Silversea, which allow the carrier to make itinerary changes ‘if necessary’ and at its discretion: cl 13.

¹³⁴ Royal Caribbean International *Cruise/Cruisetour Ticket Contract* cl 6a; Oceania *Ticket Contract* cl 9.

¹³⁵ P&O *Booking & Travel Conditions* cl 3; Carnival *Ticket Contract* cl 2.

¹³⁶ See for example ASBATANKVOY cl 20(vii); GENCON cl 3; NYPE 93 cl 22.

¹³⁷ P&O *Booking & Travel Conditions* cl 3; Carnival *Ticket Contract* cl 2.

book a specific cruise after considering a range of possible options, choosing the cruise with the itinerary and shore visits they think will be most enjoyable, suitable and convenient for them.

It is understandable that a cruise may need to be cancelled or materially altered due to external events beyond the carrier's control, such as extreme weather or the local political situation in a port of call. Indeed, extreme weather events that prevent the advertised cruise from proceeding as planned may make cancellation the preferred outcome for passengers.¹³⁸ More troubling are clauses that attempt to give carriers a broad, unfettered discretion to cancel or alter a cruise for any reason whatsoever and with no obligation to compensate the passenger for loss caused as a result.¹³⁹ In those circumstances, the Athens Convention is of no assistance to passengers, since it is concerned with the liability of carriers for personal injury, death and loss of or damage to luggage, and does not invalidate what may objectively be considered unreasonable terms permitting the carrier to cancel the contract or deviate from the advertised route. Unless the passenger can prove the contracting carrier is in breach of contract, the passenger may be without a remedy unless domestic legislation operates to protect and provide compensation to the consumer.¹⁴⁰

5.3 Common Limitation Clauses

Cruise passenger contracts typically contain a multitude of limitation clauses. These can be conveniently categorised as either limitation of liability clauses, which impose a monetary cap on the carrier's liability, or time limitation clauses, which impose a time bar on a passenger's right to bring a claim. Both types of limitation clauses are considered below.

5.3.1 Limitation of Liability Clauses

Many cruise passenger contracts seek to invoke a bewildering array of limitation of liability regimes, from different iterations of the Athens Conventions and the Convention on Limitation of Liability for Maritime Claims 1976 (LLMC 1976), to domestic limitation regimes such as the United States Civil Code and the Australian *Civil Liability Acts*. Some contracts additionally impose, in respect of some types of claims, a monetary limit unique to that particular contract. For contracts that contain a mishmash of liability regimes, it is often difficult to extrapolate when one limit will apply rather than another, and even the most informed and astute passenger would not immediately be able to ascertain the maximum amount of damages to which they may be entitled.

To illustrate the medley of potentially competing limitation regimes a carrier may seek to invoke, the Azamara standard conditions refer to Athens 2002 (described as EC 392/2009), Athens 1974, legislation incorporating the LLMC 1996 into Australian domestic law, and the *Civil Liability Act 2002* (NSW), and also impose particular limits for some baggage claims. The Ponant standard conditions similarly also refer to EC 392/2009, LLMC 1996, and the French Transport Code. The contracts of the Carnival group are unique in that they do not impose any limitation of liability, but simply state that any liability will be reduced to the extent of the passenger's contributory negligence.¹⁴¹

International Limitation of Liability Regimes

The most common international limitation of liability regimes invoked in passenger contracts are Athens 1974, Athens 2002, the Convention on Limitation of Liability for Maritime Claims 1976 (LLMC 1976) and as amended by 1996 Protocol (LLMC 1996).

In general terms, Athens 1974 and Athens 2002 set out the circumstances in which a carrier (including both the contractual and performing carrier) will be liable under a contract for international carriage for the death or injury of a passenger, or the loss of or damage to a passenger's luggage. The Conventions entitle the carrier to limit its liability in such circumstances to a particular monetary amount. Athens 1974 limits a carrier's liability to 46,666 units of account (SDRs) per passenger for death or personal injury¹⁴² and 833 units of account for loss or damage

¹³⁸ See for example *Moore v Scenic Tours Pty Limited (No 2)* [2017] NSWSC 733 where flooding severely affected the plaintiffs' enjoyment of what had been advertised as a European river cruise.

¹³⁹ See for example *Royal Caribbean International Cruise/Cruisetour Ticket Contract* cl 6a, cl 7.

¹⁴⁰ For example the Australian Consumer Law: *Competition and Consumer Act* (Cth) sch 2, which assisted to provide passengers with a remedy in *Moore v Scenic Tours Pty Limited (No 2)* [2017] NSWSC 733.

¹⁴¹ P&O *Booking & Travel Conditions* cl 31; Carnival *Tick Contract* cl 30.

¹⁴² Art 7.1

to cabin luggage.¹⁴³ Athens 2002 increases those limits to 250,000 units of account for death or personal injury¹⁴⁴ (but the carrier may be liable for up to 400,000 units of account if the carrier was at fault or negligent)¹⁴⁵ and 2,250 units of account for cabin luggage.¹⁴⁶ Questions of liability and onus of proof are dependent on the cause of the incident. The 2002 Protocol came into force on 23 April 2014 for ratifying states, and was implemented by the European Union through EC Regulation 392/2009. Many passenger contracts consequently refer to the EC Regulation rather than Athens 2002, although to the same effect.

The standard conditions of almost all the major cruise companies either specifically refer to Athens 1974 or Athens 2002 (or both), or simply adopt the monetary limits in those conventions in the contract of carriage. These contracts tend to use the place of embarkation and disembarkation as the determinate for which of the Athens iterations will apply. For example, it is common for contracts to state that Athens 2002 applies to all cruises which embark or disembark from a port in an EU member state.¹⁴⁷ This of course simply reflects the position at common law, since Athens 2002 would automatically apply as a matter of law to those contracts anyway.¹⁴⁸ The carriage contracts that refer to Athens 1974 tend to refer to it as an exception and provide that it will apply where other regimes do not, such as cruises that do not embark or disembark from an EU member state port or a United States port,¹⁴⁹ or for domestic carriage between ports in the United Kingdom.¹⁵⁰

Even if the contract of carriage does not refer either to Athens 1974 or Athens 2002, one of these Conventions may still apply by force of law. Athens 1974 or Athens 2002 will be triggered if the ship is flying the flag of or is registered in a state party to the convention,¹⁵¹ or if the contract of carriage is made in a state party, or if the place of departure or destination is, according to the contract of carriage, in a state party.¹⁵² If Athens 2002 applies by operation of law but the contract seeks to impose the lower limits of Athens 1974, the contractual provision will be invalid and the passenger will be entitled to the higher limits of Athens 2002.¹⁵³ Conversely, if the contract provides for a higher limit than the passenger would be entitled to at law, then the higher contractual limit will be enforceable.¹⁵⁴ Interestingly, none of the conditions of the major cruise lines sets out the circumstances in which Athens 1974 or Athens 2002 will automatically apply. It is up to the passenger to ascertain their rights under the contract and under any of the international conventions.

Some passenger contracts also refer to LLMC 1976, which entitles shipowners to a global limit for all claims arising out of a distinct occasion. This is in contrast to the ‘per passenger’ limits applicable to claims under Athens 1974 and Athens 2002. The limitation amount for most claims under LLMC 1976 is calculated based on the ship’s tonnage.¹⁵⁵ For passenger claims for loss of life or personal injury against the shipowner, the limitation is calculated based on the number of passengers the ship is authorised to carry.¹⁵⁶ The original limits were increased by the 1996 Protocol (LLMC 1996) and again by the Amendments to the 1996 Protocol that came into force in June 2015. The standard terms of at least two of the major cruise providers refer to the LLMC 1976 or LLMC 1996 limits.¹⁵⁷ The Ponant conditions curiously state initially that the LLMC 1976 applies to the contract,¹⁵⁸ but later refer to LLMC 1996.¹⁵⁹

It is apparent that passenger contracts can and do refer to a multiplicity of international limitation of liability regimes and it is often uncertain, on the face of the contract, as to which regime will apply to a particular claim. For example, the standard terms of Ponant are initially seemingly clear in stating that, depending on their

¹⁴³ Art 8.1.

¹⁴⁴ Art 3.1.

¹⁴⁵ Art 7.

¹⁴⁶ Art 8.1. For the specific limits applicable to different types of luggage, see articles 8.2 and 8.3.

¹⁴⁷ Royal Caribbean International *Cruise/Cruisetour Ticket Contract* cl 11e; Azamara *Information, Terms and Conditions* cl 35 and cl 40; Norwegian Cruise Line *Guest Ticket Contract* cl 5(c); Oceania *Ticket Contract* cl 10a; Silversea *Passage Contract* cl 10A. Ponant *General Terms and Conditions of Sale* invokes EC Regulation 392/2009 (ie Athens 2002) “where applicable”.

¹⁴⁸ Art 2.1.

¹⁴⁹ Royal Caribbean International *Cruise/Cruisetour Ticket Contract* cl 11(d).

¹⁵⁰ Silversea *Passage Contract* cl 10A

¹⁵¹ The standard terms of only one major cruise line mention that the flag of the vessel may trigger Athens 1974: Azamara *Information, Terms and Conditions* cl 40. None of the contracts analysed in this article specify the country in which the cruise ships are flagged, although some websites publish this information (see for example Celebrity Cruises website (<https://www.celebritycruises.com/int>) which states ‘Ship’s Registry: Malta and Ecuador’ (accessed 27 June 2018).

¹⁵² Art 2.1.

¹⁵³ Art 18.

¹⁵⁴ Art 10.

¹⁵⁵ Art 6.

¹⁵⁶ Art 7.

¹⁵⁷ Azamara *Information, Terms and Conditions* cl 40, which reserve the right to limit pursuant to the *Limitation of Liability for Maritime Claims Act 1989* (Cth), which gave the LLMC 1996 force of law in Australia; Ponant *Terms and Conditions of Sale* cl 12.3.

¹⁵⁸ Ponant *Terms and Conditions of Sale* cl 3.1.

¹⁵⁹ Ponant *Terms and Conditions of Sale* cl 12.3.

respective scopes of application, either the EC Regulation 392/2009 or the French Transport Code will apply, but later state that the carrier shall also benefit from the LLMC 1996 limits and that ‘these limits shall prevail over any other limits determined by legislation where the application is not mandatory’. The meaning of this sentence is unclear, but the contract obviously attempts to take advantage of the limits provided by several regimes. Similarly, the Azamara conditions refer to Athens 1974,¹⁶⁰ but later specifically refer to Regulation 292/2009 (sic) if the place of departure or destination is a member state of the EU.¹⁶¹ The contract at least contains some clarity as to when a particular regime will apply, stating that the international conventions will only apply if they ‘are found applicable as a matter of NSW law’, and in all other circumstances the carrier’s liability will be limited pursuant to the *Civil Liability Act (NSW) 2000*. The contract then goes on to say that ‘nothing in these terms and conditions affects our right to limit our liability under the Limitation of Liability for Maritime Claims Act 1989’. Again, this illustrates how perplexing the limitation provisions in carriage contracts can be, and the clauses through which a passenger must potentially sift in order to discern the carrier’s liability cap.

A carrier’s attempts to cloak themselves with the benefit of multiple limitation caps may be successful. It is entirely possible for the limits in both Athens 1974/2002 and LLMC 1976/1996 to apply to a passenger claim if a state is party to both conventions and has retained the global limits under the LLMC as well as the liability caps under Athens.¹⁶² A passenger may therefore be subject both to a ‘per passenger’ limit and a global limit. This will be relevant if a passenger’s claim exceeds the Athens 1974/2002 monetary cap. In those circumstances, the carrier will be able to further limit its liability to the LLMC global limitation amount. If Australia implements Athens 2002, the legislature will need to decide how the Athens limits will interact with the LLMC limits, and whether to retain both limits (which has obvious disadvantages to passengers, particularly in the event of a major shipping incident) or whether to ‘opt out’ of one of the limits so as to retain either the ‘per passenger’ Athens limit, or the global LLMC limit.¹⁶³

Domestic Limitation of Liability Regimes

In addition to the international regimes, the majority of cruise contracts also refer to domestic limitation of liability legislation. Carriers based in the United States typically invoke the limitation caps set out in Title 46 of the United States Code, §30501 through to §30509 and §30511.¹⁶⁴ This chapter operates in a similar way to the LLMC, in that it entitles shipowners to limit their liability for various events, including loss of property and personal injury, capped to the value of the vessel and pending freight.¹⁶⁵ The standard conditions of Ponant, being owned by a French company, refer to the French Transport Code.¹⁶⁶ The conditions of Azamara are subject to the law of New South Wales and refer to the *Civil Liability Act 2002* of that State. This Act, like its counterparts in other Australian States, imposes minimum standards of care and caps on damages for personal injuries. The Carnival conditions, which are also subject to the law of NSW, do not mention limitation regimes at all and do not even refer to the domestic *Civil Liability Act 2002*.

The interaction between the international liability regimes and domestic regimes is a vexed question and a detailed consideration is beyond the scope of this paper.¹⁶⁷ In general terms, the international regimes will apply to international carriage and the domestic regimes will apply to domestic carriage. However, domestic regimes may also apply to aspects of an international voyage. For example, for a maritime tort, domestic legislation that applies mandatorily in the *lex loci delicti* may govern the claim.¹⁶⁸ Helpfully, the Azamara conditions provide that the *Civil Liability Act* (NSW) will only apply if the international conventions do not apply.¹⁶⁹ Similarly, the standard terms of Oceania state that the exemptions under the US Code will only apply to cruises that do not embark,

¹⁶⁰ Azamara *Information, Terms and Conditions* cl 40.

¹⁶¹ Azamara *Information, Terms and Conditions* cl 40.

¹⁶² Athens 1974 art 19. This a simplified analysis and the interaction between the two regimes is discussed in greater detail in Lewins, above n 6, 170-171. See also Patrick Griggs et al, *Limitation of Liability for Maritime Claims* (LLP, 4th ed, 2005) 42-43.

¹⁶³ There are other options possible too, for example, to increase either the Athens limit or the LLMC limit. A comparison of the merits of the various options are canvassed in Professor Nick Gaskell’s response to the Athens Convention 2002 Consultation document dated 22 December 2017, available at <https://infrastructure.gov.au/maritime/business/liability/files/Nicholas-Gaskell-Athens-Convention-Submission.pdf>.

¹⁶⁴ Royal Caribbean *Cruise/Cruisetour Ticket Contract* cl 11d; Norwegian Cruise Line *Guest Ticket Contract* cl 5(d); Oceania *Ticket Contact* cl 10b; Silversea *Passage Contract* cl 10A.

¹⁶⁵ Title 46 §30505 – General limit of liability.

¹⁶⁶ Ponant *Terms and Conditions of Sale* cl 12.1, cl 12.2.

¹⁶⁷ For a detailed discussion on conflict of law issues associated with the Athens Conventions, see Paul Myburgh, ‘A Successful Substantivist Carve-Out? The Athens Convention As Uniform International Law’ (Paper presented at Global Shipping Law Forum, Brisbane, 4 July 2018).

¹⁶⁸ Discussed in Myburgh, above n 164, 19-20.

¹⁶⁹ Azamara *Information, Terms and Conditions* cl 40; Oceania cl 10b.

disembark or call at any United States port and do not embark or disembark from an EU member state port.¹⁷⁰ However, other passenger contracts contain sweeping applicability provisions and attempt to give the carrier the benefit of both international limitation regimes as well as domestic legislation.¹⁷¹ Issues as to the interaction and application of international and domestic regimes may arise if, for example, a passenger suffers a personal injury onboard a vessel flagged in a state that has domestic liability legislation. Or a passenger may be injured while partaking in only the domestic portion of an international cruise. In those and other scenarios, complex conflict of law issues will arise and require consideration and resolution by the court.

Contractual Limitation Clauses

In addition to legislative regimes, some carriage contracts impose unique limits in relation to certain claims. For instance, a number of carriers limit their liability for lost or damaged property to only a few hundred dollars per passenger, unless the passenger declares the actual value of the property and pays a corresponding fee.¹⁷² Most carriers also disclaim any liability for lost or damaged valuables, such as cash or jewellery, unless the items are deposited with the carrier and the passenger pays a fee, in which case the carrier's liability remains limited to the standard amount for lost or damaged property.¹⁷³ Some standard contracts even contain inconsistencies within the contract itself. For example, the conditions of one cruise line provide that for items deposited with the vessel for safekeeping, the maximum liability is AU\$1,500 per guest,¹⁷⁴ but this appears to be with respect only to 'valueable and important items', because the contract later provides that liability for 'baggage' deposited with the ship is limited to AU\$1,100.¹⁷⁵

As noted above, Athens 2002 limits a carrier's liability for loss or damage to 'cabin luggage' to 2,250 SDRs per passenger.¹⁷⁶ As at 8 June 2018, this amounted to approximately AU\$1,206 or US\$1,585. The Athens 2002 limit for cash, jewellery and other valuables is 3,375 SDRs per passenger, or AU\$1,809 or US\$2,378.¹⁷⁷ If Athens 1974/2002 applies, the passenger will be entitled to either the contractual limit or the convention limit, whichever is higher.¹⁷⁸ If Athens 1974/2002 does not apply, then a passenger may receive only a few hundred dollars for lost or damaged luggage, even if due to the fault of the carrier.

5.3.2 Time Limitation Clauses

Like many standard form contracts, carriage contracts typically include a clause imposing a timeframe by which proceedings must be commenced. There are significant differences between the time limits imposed by the different cruise lines, with some far stricter than others, and many imposing different time limits and notice requirements depending on the subject matter of the claim. For example, many cruise lines require claims for personal injury, illness or death to be notified to the contracting carrier in writing within six months and proceedings commenced within one year from the date of the incident.¹⁷⁹ For all other claims, the claimant must give written notice within 30 days, and commence proceedings within six months.¹⁸⁰ There are variations both within and between contracts as to the date from which these limitation periods are to be calculated, with some calculated from the date of the incident, and others from the date of disembarkation. The Ponant time limits are more generous, with a one year limit for damage to property, and a two year limit for bodily harm, calculated from the date of disembarkation.¹⁸¹ The conditions for the Carnival group are unusual in that they do not impose a precise limit but simply require passengers to use 'reasonable efforts' to bring any claims or issues to Carnival's

¹⁷⁰ Oceania *Ticket Contract* cl 10a, cl 10b.

¹⁷¹ Royal Caribbean *Cruise/Cruisetour Ticket Contract* cl 11d; Norwegian Cruise Line *Guest Ticket Contract* cl 5(d).

¹⁷² Royal Caribbean International *Cruise/Cruisetour Ticket Contract* cl 3c (limit of \$300, or up to \$5,000 if value declared); Regent Seven Seas Cruises *Ticket Contract* cl 10d (limit of \$700, or up to \$7,000 if value declared); Norwegian Cruise Line *Guest Ticket Contract* cl 7(b) (limit of \$100, or up to declared value); Oceania *Ticket Contract* cl 10e (limit of \$500, or up to \$5,000 if value declared); Silversea *Passage Contract* cl 10B (limit of \$250, unless true value declared)

¹⁷³ Royal Caribbean International *Cruise/Cruisetour Ticket Contract* cl 3d; Regent Seven Seas Cruises *Ticket Contract* cl 10d; Oceania *Ticket Contract* cl 10e; Silversea *Passage Contract* cl 10B.

¹⁷⁴ Azamara, *Information, Terms and Conditions* cl 34.

¹⁷⁵ Azamara, *information, Terms and Conditions* cl 35.

¹⁷⁶ Art 8.1.

¹⁷⁷ Art 8.3.

¹⁷⁸ Art 10.

¹⁷⁹ Royal Caribbean International *Cruise/Cruisetour Ticket Contract* cl 10a; Celebrity Cruises *Cruise/Cruisetour Ticket Contract* cl 10a; Norwegian Cruise Line *Guest Ticket Contract* cl 10(a); Oceania *Ticket Contract* cl 27a; Silversea *Passage Contract* cl 12A. These limits reflect the provisions in the US Code 30508(b).

¹⁸⁰ Royal Caribbean International *Cruise/Cruisetour Ticket Contract* cl 10c; Celebrity Cruises *Cruise/Cruisetour Ticket Contract* cl 10c; Norwegian Cruise Line *Guest Ticket Contract* cl 10(b); Oceania *Ticket Contract* cl 27b; Silversea *Passage Contract* cl 12B.

¹⁸¹ Ponant *General Terms and Conditions of Sale* cl 15.3

attention ‘as soon as possible’.¹⁸² Athens 1974/2002 imposes a two year time bar for all claims, calculated from the date of disembarkation, or from the date when disembarkation should have taken place.¹⁸³

Relief may be available for some passengers through domestic legislation. For example, the *Limitation Act 1969* (NSW) gives a court discretion to extend the usual three year limitation period for personal injury cases by five years, if it is ‘just and reasonable to do so’.¹⁸⁴ Similarly, 30508(c) of the US Code provides relief for a claimant who has given notice outside of the time prescribed by the contract, if the vessel owner knew of the injury or death and has not been prejudiced by the failure to give notice, or there was a ‘satisfactory reason’ why the notice could not be given, or the owner does not object to the failure to give notice. If Athens 1974/2002 applies, passengers should be mindful that while the law of the court governs extension and expiration of limitation periods, Athens 1974/2002 still limits the period in which a claimant can commence proceedings to a certain number of years post-disembarkation,¹⁸⁵ which may be a shorter time period than would apply under domestic legislation. Thus, while some fortunate passengers who travel say under a Carnival ticket may not be subject even to the two year Athens limitation period, others are at risk of missing the extremely short periods stipulated in their particular contracts.

5.4 Applicable Law and Jurisdiction Clauses

It is beyond the scope of this paper to consider all of the conflict of law issues applicable to cruise ship passenger contracts, and some have already been mentioned above. It suffices to mention two clauses that commonly appear in cruise ship contracts, namely, express choice of law clauses and exclusive jurisdiction clauses.

5.4.1 Express Choice of Law Clauses

The standard conditions of all the major cruise lines contain a clause specifying the substantive law that governs the contract of carriage. The choice of municipal law is typically that of the country in which the cruise line is incorporated. For example, the conditions of the Carnival group, an Australian company, specify New South Wales law. The conditions of Royal Caribbean International and Celebrity Cruises, which are owned and operated by Royal Caribbean Cruises Ltd, which has its principal place of business in Miami, Florida,¹⁸⁶ specify United States law. Interestingly, Azamara, which is also owned and operated by Royal Caribbean Cruises Ltd, specifies New South Wales law. The cruise lines operated by Norwegian Cruise Line Holdings Ltd all specify United States law, as does Silversea. Ponant, which is owned by a French holding company, specifies French law.

Express choice of law clauses may be drafted in various ways, their scope may be narrow or broad, and they may be overridden by legislation.¹⁸⁷ However, the general position, at least in Australia, is that an express choice of law clause will be valid even if the chosen law is unconnected with the parties or the subject matter of the contract.¹⁸⁸ In practice, this means Australian courts will likely give effect to a choice of law clause in a contract, and may apply a foreign municipal law to a dispute litigated in Australia. However, if Athens 1974/2002 applies, then a choice of law clause will be struck down if it has the effect of limiting the carrier’s liability to a lower limit or standard than that prescribed in the Convention.

5.4.2 Exclusive Jurisdiction Clauses

Cruise carriage contracts also typically contain an exclusive jurisdiction clause, which specifies the court that has jurisdiction to hear matters arising under the contract, and typically mirrors the express choice of law clause. For instance, the Carnival contracts nominate the courts of New South Wales, whereas the conditions governed by United States law tend to nominate courts in Miami, Florida. The Ponant conditions nominate the District Court of Marseille, France. Although highly persuasive, such clauses are not necessarily binding on a court¹⁸⁹ and the passenger may be able to persuade an alternative court that it should hear the dispute.

¹⁸² P&O *Booking & Travel Conditions* cl 31; *Carnival Ticket Contract* cl 31; *Cunard Booking and passage Conditions* cl 30; *Princess Cruises Passage Contract* cl 32.

¹⁸³ Art 16.

¹⁸⁴ *Limitation Act 1969* (NSW) s 60A, s 60C. These provisions were considered in *Gordon v Norwegian Capricorn Line (Australia) Pty Ltd* [2007] VSC 517, where the court ultimately declined to exercise its discretion to extend the limitation period.

¹⁸⁵ Art 16.3.

¹⁸⁶ Although it is incorporated in the Republic of Liberia: see the Annual Report for the period ending 31 December 2017: <http://app.quotemedia.com/data/downloadFiling?webmasterId=101533&ref=12071691&type=PDF&symbol=RCL&companyName=Royal+Caribbean+Cruises+Ltd.&formType=10-K&dateFiled=2018-02-21> (accessed 6 June 2018).

¹⁸⁷ See for example *Carriage of Goods by Sea Act* (Cth) s 11.

¹⁸⁸ *Vita Foods Products Inc v Unus Shipping Co Ltd* [1939] AC 277. Cf. *Queensland Estates Pty Ltd v Collas* [1971] Qd 75.

¹⁸⁹ *The Eleftheria* [1970] P 94, 100 (Brandon J).

Athens 1974 and Athens 2002 give a claimant the option of bringing an action in any one of several named courts, including a court of the place of departure or destination, provided the court is also in a state party to the Convention.¹⁹⁰ If Athens 1974 or 2002 applies, then any exclusive jurisdiction clause in the contract that purports to restrict the passenger's choice of forum options under Article 17 will be invalid.¹⁹¹ Even if Athens 1974/2002 does not apply and the passenger commences proceedings in a jurisdiction other than that prescribed by the contract's express jurisdiction clause, the passenger's chosen forum may very well decline the carrier's application to have the proceedings transferred to the carrier's preferred forum. For example, in *Correa v Carnival Plc*,¹⁹² the cruise contract contained a clause requiring any action to be brought in a court in New South Wales. The plaintiff passenger commenced proceedings in Victoria but the Supreme Court declined Carnival's application to have the proceedings transferred to New South Wales. In arriving at its decision, the Court noted that an exclusive jurisdiction clause will carry less weight when it is contained in a standard form contract compared to where the parties were conscious of jurisdiction when the contract was formed.¹⁹³

Some passage contracts may also contain an arbitration clause, with the conditions of Royal Caribbean International, Celebrity Cruises, and of the Norwegian Cruise Line Holdings carriers, requiring claims other than for personal injury, illness or death to be resolved by arbitration in Florida pursuant to the New York Convention 1958. Again, such a clause would likely be struck down if Athens 1974/2002 applied, but the parties are free to agree, after an incident has occurred, to submit the claim to arbitration.¹⁹⁴

A final issue worthy of note is the widespread contractual prohibition of class actions. Many standard carriage contracts provide that a passenger may only bring an action on their own behalf and prohibit the passenger from commencing a class action.¹⁹⁵ Most passengers would likely take such a clause at 'face value' and assume they were unable to commence a class action, but these clauses would likely be struck down as unfair under consumer protection legislation.¹⁹⁶

6 Conclusion

The terms of many cruise ship passenger contracts are unclear, objectively unreasonable from the point of view of the passenger, and seek to take advantage of a perplexing array of limitation of liability regimes. A passenger who books a cruise subject to a standard contract of that nature will likely have little or no understanding of the terms actually governing the cruise and be surprised to learn they have either no or very limited relief available under the contract in the event of an incident. Further, the common law principles of contract formation mean that it is not necessarily even clear when the contract was formed and which documents comprise the contract. Electronic bookings and communications add a further level of uncertainty as to the time and place of formation and the proper law of the contract. All of these issues impact on other matters, such as the type and extent of any insurance the passenger may choose to take out, and the passenger's chances of recovering against the carrier for loss or damage, particularly if the passenger is unaware of stringent time bars imposed by the contract. Adopting Athens 2002 in Australia would ameliorate the inconsistency and uncertainty that currently exists throughout most of the industry.¹⁹⁷ The liability and limitation regime imposed by Athens would, at first glance, be disadvantageous to Carnival passengers, who currently enjoy generous conditions of carriage, but Carnival could of course leave its standard contracts unchanged, or impose higher limits than Athens, to the benefit of its passengers. Although questions associated with contract formation, incorporation of terms and electronic transactions would remain, embracing Athens 2002 more widely would protect passengers against unreasonable conditions of carriage and would bring welcome certainty to the industry.

¹⁹⁰ Art 17.

¹⁹¹ Art 18.

¹⁹² [2015] VSC 718

¹⁹³ [2015] VSC 718, [51] (Zammit J), approving *Andrew Kohn Pty Ltd v Mrs Mac's Pty Ltd* [2015] VSC 278.

¹⁹⁴ Article 17.2.

¹⁹⁵ Royal Caribbean International *Cruise/Cruisetour Ticket Contract* cl 9b; Silversea *Passage Contract* cl 20; Norwegian Cruise Line *Guest Ticket Contract* cl 10(c).

¹⁹⁶ Australian Consumer Law s 24.

¹⁹⁷ Kate Lewins, 'Australian Cruise passengers travel in the legal equivalent of steerage' (2010) 38 *Australian Business Law Review* 127, 136.