

The Proposed Implementation of the *Athens Convention*

By Pauline V. Gardikiotis

a Vancouver lawyer with Campney & Murphy

Since the theme of this month's edition celebrates the cruise ship industry, an article on the effect of Bill S-2, the proposed *Marine Liability Act*, on the cruise ship industry in terms of changes to the law of carriage of passengers by water seems appropriate. Bill S-2 was introduced in the Senate in January 31, 2000 and is identical to its predecessor, Bill S-17 which was introduced in March 2000 but was not passed before the recent federal election.

At present, passenger carriage is not regulated by legislation in Canada. Consequently, it is governed largely by the common law. There are six parts to the proposed legislation: personal injuries and fatalities, apportionment of liability, limitation of liability for maritime claims, liability for carriage of passengers by water, liability for carriage of goods by water and liability and compensation for pollution. This article will briefly highlight sections of Part 4 of the proposed legislation relating to Liability for Carriage of Passengers by Water and will then focus on the differences between the existing common law and the proposed legislation with respect to the enforcement of jurisdiction or forum selection clauses in the terms and conditions of cruise tickets.

Highlights

Section 37 of the proposed legislation incorporates Articles 1-22 of the *Athens Convention Relating to the Carriage of Passengers and their Luggage by Sea, 1974*, concluded at Athens on December 13, 1974, as amended by the *Protocol of 1990*, which was concluded at London on March 29, 1990.

The following is a summary of the highlights of Part 4 of the proposed legislation:

- Under the proposed legislation, Articles 1-22 of the *Athens Convention* applies to the contractual carriage by water of passengers and their luggage from one place in Canada to the same or another place in Canada, either directly or by way of a place outside of

Canada. This extended application appears to cover a common cruise line practice in British Columbia where passengers embark at Vancouver for voyages to Alaska then return to Vancouver to disembark.

- Article 3 states that the carrier is liable for damages suffered by death or personal injury or damage to luggage if the incident occurred during the course of carriage and was due to the “fault or neglect of the carrier or of his servants or agents acting within the scope of their employment”. While the onus of proof is on the claimant, fault or neglect is presumed unless proven otherwise if the injury or loss is caused by shipwreck, collision, stranding, explosion, fire or a defect in the ship.
- Article 6 preserves the notion of contributory negligence and allows for total or partial exoneration of the carrier from liability.
- A carrier’s liability for personal injury is limited to 175,000 SDRs per passenger per carriage (approx. Cdn \$350,000) and for loss or damage to cabin luggage is limited to 1800 SDRs per passenger per carriage (approx. \$3,600). It also contains limitations regarding loss or damage to vehicles and luggage carried in the vehicle up to 10,000 SDRs per vehicle per carriage (approx. \$20,000).
- Article 13 provides that the right to limit may be lost where the loss or damage was caused by an act or omission of the carrier done with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result.
- Article 15 sets out the timing within which notice of loss or damage to luggage must be given to the carrier.
- Article 16 requires that any action for damages arising out of death or personal injury or the loss or damage to luggage must be brought within two years and sets out the method for calculating the date from which the calculation of the two years begins to run.
- Article 19 states that the *Athens Convention* “shall not modify the rights or duties of the carrier, the performing carrier, and their servants or agents provided for in international conventions relating to the limitation of liability of owners of seagoing ships”. This

suggests that the *Convention* will not affect a carrier's general right to limit liability in respect of more significant marine occurrences (for example, death or personal injury or loss or damage to property occurring onboard or in connection to the operation of a ship, such as delay in carriage).

Jurisdiction Clauses

Under common law, the question of whether or not a foreign cruise operator can rely on a jurisdiction or forum selection clause in a cruise ticket to stay Canadian legal proceedings and force a claimant to proceed in the foreign jurisdiction. A jurisdiction or forum selection clause is a provision in the cruise ticket which attempts to confer exclusive jurisdiction on a particular court to resolve any dispute or claim arising out of or relating to the contract. It states that the contract is governed by the law of a foreign jurisdiction and any claims or disputes arising from the contract must be commenced in a foreign court.

In determining whether such clauses are enforceable, a court will consider whether the ticket constitutes part of the carriage contract and whether the terms of the ticket or brochure were brought to the passenger's attention before the contract was formed. Tickets are often not received until after a passenger has booked and paid for a trip and the terms set out in the ticket are usually of standard form and are not the subject of negotiation as between the carrier and the passenger. Therefore, Canadian courts will be reluctant to enforce such onerous terms unless a passenger has had notice of them before concluding the contract.

Under Canadian law, the court has the jurisdiction to stay a proceeding on the basis of a forum selection clause if it concludes that the foreign court is the most convenient forum. The onus of showing that the clause should not be enforced is on the plaintiff who has commenced the proceedings in Canada rather than the jurisdiction set out in the clause.

In the Ontario case *Trepanier v. Kloster Cruise Limited*, the plaintiff commenced legal proceedings in Canada for damages for injuries sustained when she ingested glass with her fruit cocktail during the meal on a cruise in the Bahamas. The ticket contained a clause which stated that the contract was governed by the laws of the State of Florida and that any legal actions had to be commenced before a court of proper jurisdiction in Dade County, Florida. Other relevant

provisions included an exemption of any warranty or undertaking with respect to any food or drinks supplied on board the ship, a limitation of liability to \$5,000 and a limitation period of one year in respect of any action for injury or death.

The court found that reasonable steps had not been taken to draw the plaintiff's attention to the term and conditions on the ticket and therefore, little weight should be attached to the jurisdiction clause. The court indicated that the terms of the ticket were onerous, complicated and their interpretation without the assistance of legal advice would have been difficult. Therefore, the defendants could not enforce the forum selection clause.

In recent decisions considering the enforcement of forum selection clauses, the courts have adopted the "real and substantial connection" test established by the Supreme Court of Canada in *Morguard Investments Ltd. v. De Savoye*. The test is whether there is a real and substantial connection to the forum chosen by the plaintiff. The indicia of a real and substantial connection include the place where the parties reside or carry on business, the location of witnesses and evidence, the law governing the relevant transaction, avoidance of the multiplicity of proceedings and whether the plaintiff will suffer the loss of a personal or juridical advantage if the action does not proceed in the domestic court.

In a recent decision, *Lemmex v. Bernard*, a Florida carrier was not permitted to enforce a clause in the contract of carriage which gave exclusive jurisdiction over the plaintiff's claim to a Florida court. The plaintiff was a resident of Ottawa and had purchased the package holiday through an Ottawa travel agent. The holiday included a week long cruise on an ocean liner operated by the Florida defendant and included a shore excursion in Grenada provided by a third party Grenadian company. During the shore excursion, the plaintiff allegedly suffered carbon monoxide poisoning while travelling on a dilapidated bus. The plaintiff commenced an action for damages in Ontario against the Florida carrier and the Canadian packager of the holiday. These defendants added the Grenadian company that supplied the shore excursion as a third party. The Grenadian company then applied for a stay of the proceedings on the basis that the Ontario court had no jurisdiction and was not a convenient forum. The court reviewed the facts and held that Ontario was the most convenient forum because the majority of the witnesses were from Ontario, almost all of the expert witnesses (primarily the plaintiff's treating physicians)

resided in Ontario and all of the medical records and accounting records which were relevant to the plaintiff's injury and claims of loss were in Ontario.

Under the proposed legislation, Article 17 of the *Athens Convention* sets out the competent jurisdiction and provides that, at the option of the claimant, an action may be commenced in any of the following courts provided the country is a party to the convention:

1. The court of the place of permanent residence or principle place of business of the defendant;
2. The court of the place of departure or that of the destination according to the contract of carriage;
3. A court of the state of the domicile or permanent residence of the claimant, if the defendant has a place of business in the subject jurisdiction in that state; or
4. A court of the state where the contract of carriage was made, if the defendant has a place of business and is subject to jurisdiction in that state.

Conclusion

The proposed legislation contains some significant changes to Canadian maritime law and, in particular, to the law governing passenger carriage by water. The Bill has undergone second reading in Senate and on February 23, 2001 was referred to the Standing Committee on Transport and Government operations. While the Bill may undergo additional changes through this process, it is doubtful that any significant changes will occur. It is fair to say that, given the broad application of Part 4 of the proposed *Marine Liability Act* to any vessel that carries people, there will be significant implications not only for cruise operators but also for smaller, tourism-based businesses such as whale watching operations.