TATLA

TRAVEL AND TOURISM LAWYERS' ASSOCIATION

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Regular readers of this Journal will know that the picture illustrations used in our header tend to the literal (we yield to no one in our lack of imagination). It would, therefore, be customary to insert a "Clip-art" Spring Lamb for this March edition, but – at the time of writing – the combined effect of "The Beast from the East" and "Storm Emma" seemed more apt for what appears above. We hope that you are all coping …

Despite the stress and inconvenience of this adverse weather, one can't help thinking that the tabloid press, in particular, has reacted to the snow with characteristic hysteria. Yesterday's front page of the Metro showed – *literally* – a cloud advancing on London.

Anyway, there is always the TATLA Newsletter to provide welcome distraction from yet-to-be gritted roads and rail replacement bus services.

Lawrence v NCL (Bahamas) Limited [2017] EWCA Civ 2222

This was a renewed application for permission to appeal to the Court of Appeal which was heard by Hamblen LJ. Factually, it arose out of a regulated package holiday which variously comprised a flight from the UK to Venice, Hotel accommodation in Venice and then a cruise in the Mediterranean on board MS "*The Norwegian Jade*". The Defendant was the tour operator for the package and, in Athens Convention terms, the "*carrier*" for the cruise element of the holiday.

The Claimant's claim arose out of a tripping accident; it was alleged that he tripped, fell and sustained personal injury as a result of a hazardous step (located between the weather and interior decks) on a tender vessel in the Greek island port of Santorini (which was intended to convey the Claimant from ship to shore). The Claimant brought an action against the Defendant in respect of his injuries. It was his case that the Defendant carrier was at fault within the meaning of Article 3 of the Athens Convention. It followed that it was the Claimant's case that his accident had occurred during the course of international carriage by sea to which the exclusive liability regime of the Athens Convention applied. The Trial of this action was heard by the Admiralty Registrar over 3 days. The Claimant's claim was successful. The Defendant sought to appeal and was refused permission on paper by the single Judge. The application was renewed before Hamblen J. The parties' arguments – at least as relevant to the grounds of appeal – were as follows. The Claimant's case was that he had entered into a contract of carriage with the Defendant, that the accident occurred during the course of "*carriage*" to which the Athens Convention applied and that the Union Boatmen of Santorini (being, the operator of the tender vessel) was acting as a "*performing carrier*" at the time of the accident. He further alleged that the Union Boatmen of Santorini and the Defendant were at fault or neglect for various reasons. By contrast, the Defendant argued that the Claimant had failed to prove that the Defendant was a contractual carrier, that the incident did not occur in the course of "*carriage*" within the meaning of the Convention and that, in any event, there was no fault or neglect. As indicated, the Defendant's arguments were conclusively rejected by the Trial Judge. The Defendant's argument as to its status in the contractual arrangements concluded by the Claimant relied on the fact that the Claimant had made a booking through "*Flights and Packages*": a travel agency. The Defendant's argument that Flights and Package was anything other than a Travel Agent and that it was anything other than a carrier was contradicted (so the Judge held, upheld on appeal) by its own Booking documentation and Booking Conditions. The fact that it was Flights and Packages who advertised the holiday; it was Flights and Packages with whom the Claimant arranged and booked the

holiday; it was Flights and Packages whom the Claimant paid, that this was done before anything was received and that the holiday included elements other than the cruise did not affect the proper analysis of the contractual documentation received after the booking was made (and the booking documentation made it clear that Flights and Packages was an agent and NCL, the Defendant, was a carrier). The single Judge's observation, refusing permission on the papers (upheld by Hamblen LJ), was as follows, "*The* [Trial] *judge was right to say that the defendant/applicant was the contractual carrier, at any rate, for the period of the voyage. That does not in any way preclude a contract coming into existence between the claimant and Flights and Packages Limited but that company could not be said to be the contractual carrier for the sea voyage, especially since it would hardly be for Flights and Packages Limited to start making sub-contracts with the Boatmen Union of Santorini*." The Defendant also contended that the accident did not occur during the course of carriage. The Athens Convention definition of "*course of carriage*" is as follows: "*with regard to the passenger and/or his cabin luggage, the period during which the passenger <u>and/or</u> his cabin luggage are on board the ship or in the course of embarkation or disembarkation and the period in which a passenger <u>and</u> his cabin luggage are transported to shore by water, land, ship or vice versa … .*" (emphasis added). The Defendant's submission was that the wording of the Athens Convention was, therefore, different in relation to disembarkation at port (where the carrier will be responsible for the passenger "*and/or*" his cabin luggage throughout) and where the passenger is being transported from the ship to port by water transportation. In the latter instance, so the Defendant argued, the carrier only remained responsible if the passenger "*and*" his cabin luggage are being transported to shore at the time (consistent with the start and finish of a cruise, but inconsistent with "*hop on, hop off*" transportation provided by local providers as in the Claimant's case). This ambitious argument was emphatically rejected by the Trial Judge and by the Court of Appeal (described by the latter as "*insensible*"). The Trial Judge said this, "*The defendant submitted that where this is being done by means of water transport then it is only included as a period of carriage if the passenger <u>and his cabin luggage</u> are the subject of such transportation. In my view such a literal construction of the Article would be contrary to a purposive construction of the Convention as it would mean that only disembarkation at the beginning and end of the voyage would be included. Further, and in any event, Art.1.6 defines 'cabin luggage' as not only including luggage which the passenger has in his cabin but also luggage which otherwise in his 'possession, custody or control'. The article does not provide that the passenger must be in the process of being transported with <u>all</u> his cabin luggage and if a*

literal approach is to be applied it would be enough that when the passenger was in the course of transportation he had some or any of his possessions with him. It is difficult to envisage any situation in which a passenger might wish to go ashore during the course of a cruise without taking any of his possessions with him." Hamblen LJ endorsed this approach and added that, "*The purpose of the reference to both the passenger and his cabin luggage in Article 1.8 is to ensure that there is responsibility for both during the periods of carriage identified. Responsibility does not depend on whether the passenger is being transported with his cabin luggage or whether they are being transported separately, nor would it make any sense for responsibility to be so dependent.*"

Condori Vilca & Others v Xstrata Ltd [2018] EWHC 27 (QB)

In this personal injury case the parties agreed that Peruvian law applied to the substantive issues in the litigation pursuant to the Rome II Regulation (No 864/2007). It was common ground that the claims were presumptively time barred pursuant to Peruvian law and it was held that time had not been interrupted according to Peruvian law. The Claimants contended that CPR 17.4(1)(b)(iii) applied to Rome II cases so as to permit the English Court to allow an amendment adding a new claim after the expiry of the applicable foreign limitation period. This was rejected by the Court: "*In the absence of any statutory or other provision suggesting that such claims would relate back … I reject the Claimants' submission that the amendments to introduce the Peruvian law claims in this case related back to the date on which proceedings were originally issued or served*."

This judgment is, perhaps, worth reading as an illustration of the difficulties that an English Judge can face in dealing with complex – and comtested – issues of foreign (here, Peruvian) law.

MATTHEW CHAPMAN