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## Carrier Liability for Damages Incurred by Ship Passengers: The European Union as a Trailblazer Towards a Global Liability Regime?

Stefan Kirchner

Grit Tüngler

Jan Martin Hoffmann

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CARRIER LIABILITY FOR DAMAGES INCURRED BY SHIP  
PASSENGERS: THE EUROPEAN UNION AS A TRAILBLAZER  
TOWARDS A GLOBAL LIABILITY REGIME?<sup>1</sup>

*Stefan Kirchner,<sup>2</sup> Grit Tüngler,<sup>3</sup> & Jan Martin Hoffmann<sup>4</sup>*

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<sup>1</sup> This text only reflects the private opinion of the authors and is not to be attributed to any institutions or authorities with which the authors are employed or related. In particular, not to the Federal Republic of Germany or any subdivisions, institutions or agencies thereof.

<sup>2</sup> Rechtsanwalt, Dr., MJJ, University Lecturer for Fundamental and Human Rights, University of Lapland, Faculty of Law, Rovaniemi, Finland.

<sup>3</sup> Assessorin jur., LL.M., Head of Shipping Law Section, International Liability Conventions, General Departmental Business, Federal Maritime and Hydrographic Agency, Hamburg, Germany.

<sup>4</sup> Dr. jur., MLE, Professor, Federal University of Applied Administrative Sciences, Departmental Branch of Financial Administration, Muenster, Germany.

## I. INTRODUCTION

In early 2012, three major disasters concerning passenger ships made the headlines: the widely reported *Costa Concordia*<sup>5</sup> sinking off the coast of Giglio, Italy, on January 13, 2012; the sinking of the vessel *Rabaul Queen*,<sup>6</sup> which had a far larger death toll than the *Costa Concordia*, off the coast of Finschhafen (Papua New Guinea) on February 2, 2012; and the *MV Shariatpur 1*<sup>7</sup> on March 13, 2012, which sank on the Meghna River in Bangladesh. These events in 2012 have exemplified how passenger safety has recently become an issue for the International Maritime Organization (“IMO”). However, the issue of compensation for passengers involved in such disasters is one that has been debated for several decades.

The particular risks of passenger transport on the seas are not limited to cruise ships.<sup>8</sup> A main concern revolves around roll on-roll off (Ro-Ro) ferries, which account for a disproportionately large percentage of lives lost at sea and

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<sup>5</sup> *Costa Concordia: What happened*, BBC NEWS (Feb. 10, 2015), <http://www.bbc.com/news/world-europe-16563562>.

<sup>6</sup> See Commission of Inquiry Report, *Commission of Inquiry into the Sinking of Rabaul Queen*, 1, 25 (June 28, 2012), available at <http://www.coi.gov.pg/documents/COI%20MV%20RABAU%20QUEEN/Rabaul%20Queen%20COI%20final%20report%20June%202012.pdf>.

<sup>7</sup> See Norman A. Martinez Gutierrez, *New European Rules on the Liability of Carriers of Passengers by Sea in the Event of Accidents*, 18 J. OF INT'L MAR. L. 293, 293 n.1-2 (2012); see generally *id.* at 293-305.

<sup>8</sup> See Kay P. Rodrega, *Neue EU-Verordnung für Kreuzfahrtsreisen*, 4 MONATSSCHRIFT FÜR DEUTSCHES RECHT 194, 194-197 (2013) (describing recent developments regarding specific EU legislation about cruise ships).

on overcrowded ships.<sup>9</sup> Until recently, there were only rules in place aimed at preventing the loss of human lives.<sup>10</sup> What was missing until now was an effective system to compensate victims and their families.

Soon after the event, the *Costa Concordia* disaster resulted in numerous lawsuits and legal action. Lawsuits were filed against the Miami-based *Carnival Cruise Lines*, the parent company of *Costa Crociere* (“Costa”)<sup>11</sup> – the carrier who operated the *Costa Concordia*<sup>12</sup> – with the expectation of facing large-scale litigation<sup>13</sup> and a large number of claims.<sup>14</sup> Yet, the contract between Costa and the passengers of the doomed vessel was anything but conducive to claims by victims or their relatives:

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<sup>9</sup> M. N. Tsimplis, *Liability in Respect of Passenger Claims and its Limitation*, 15 J. OF INT’L MAR. L. 125, 125 n.1 (1964).

<sup>10</sup> See e.g., INT’L MAR. ORG., INTERNATIONAL CONVENTION FOR THE SAFETY OF LIFE AT SEA (SOLAS), 1974, available at <http://www.imo.org/About/Conventions/ListOfConventions/Pages/International-Convention-for-the-Safety-of-Life-at-Sea-%28SOLAS%29,-1974.aspx> (last visited Sep. 4, 2015).

<sup>11</sup> John Schwartz, *Cruise Lines Use Law and Contracts to Limit Liability*, N.Y. TIMES (Jan. 18, 2012), [http://travel.nytimes.com/2012/01/19/world/europe/cruise-lines-use-law-and-contracts-to-limit-liability.html?\\_r=0](http://travel.nytimes.com/2012/01/19/world/europe/cruise-lines-use-law-and-contracts-to-limit-liability.html?_r=0).

<sup>12</sup> *Id.*

<sup>13</sup> Andrew Longstreth & Tom Hals, *Lawyers Jump Into Cruise Ship Disaster Cases*, INS. J. (Jan. 30, 2012), <http://www.insurancejournal.com/news/national/2012/01/30/233126.htm>.

<sup>14</sup> Curt Anderson, *U.S. Lawsuits Target Carnival in Italy Cruise Crash*, INS. J. (Sept. 13, 2012), <http://www.insurancejournal.com/news/international/2012/09/13/262902.htm>.

Cruise contracts are notoriously restrictive regarding the rights of passengers, and Costa's 6,400-word contract is no exception. The Costa contract sharply limits the kinds of lawsuits that can be brought, where those suits can be brought and how much the company can be made to pay. All such provisions have been upheld in the courts of the United States[.] Costa's contract states that the line will pay no more in cases of death, personal injury and property loss than about \$71,000 per passenger. It allows no recovery for mental anguish or psychological damages. It bars class-action suits . . . For cruises that do not involve a United States port, the contract states, any litigation must be brought in Genoa, Italy, and be governed by Italian law. But when it comes to liability, the contract says the company can take advantage of any limits set by international treaties or the laws of the United States, which are very generous to owners of vessels. If there is a conflict among the patchwork of laws and treaties regarding liability, it says, "the Carrier shall be entitled to invoke whichever provisions provide the greatest limitations and immunities to the Carrier."<sup>15</sup>

By 2009, the former European Community, which ceased to exist with the entry into force of the Lisbon

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<sup>15</sup> Schwartz, *supra* note 11, at A8.

Treaty,<sup>16</sup> had taken action with regard to liability for damages incurred by passengers onboard ships by enacting Regulation (EC) No. 392/2009.<sup>17</sup> This regulation aims at implementing the Athens Convention, which was ratified by the EU.<sup>18</sup> Since December 31, 2012, the EU has required this passenger liability regulation to be implemented by EU member states.<sup>19</sup> This has been a significant step forward in the improvement of passenger rights. However, it certainly should not be the last step in this development.<sup>20</sup>

Regulation (EC) No. 392/2009 is based on the 1974 Athens Convention,<sup>21</sup> which was also amended in 2002.<sup>22</sup>

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<sup>16</sup> Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, December 13, 2007, <http://eur-lex.europa.eu/legal-content/EL/TXT/PDF/?uri=CELEX:12007L/TXT&from=EN>.

<sup>17</sup> See generally Commission Regulation 392/2009, 2009 O.J. (L131) 24.

<sup>18</sup> See generally Council Decision 2012 O.J. (L8) 1; see also *id.* at (L8) 13.

<sup>19</sup> The Shipowners' Club, Entry into force of the Regulation (EC) No 392/2009 of the European Parliament and of the Council of 23rd April 2009 on the Liability of Carriers of Passengers by Sea in the Event of Accidents, 8 December 2012, <http://www.shipownersclub.com/12839/>; see also PLR Preamble, at para. 2.

<sup>20</sup> On Dec. 18, 2012, Regulation (EU) No 1177/2010 entered into force, which regulates passenger rights more widely. See *Fahrgastrechte im See- und Binnenschiffsverkehr*, 1 RECHT DER TRANSPORTWIRTSCHAFT at v (2013).

<sup>21</sup> INT'L MAR. ORG., ATHENS CONVENTION RELATING TO THE CARRIAGE OF PASSENGERS AND THEIR LUGGAGE BY SEA (PAL), available at [http://www.imo.org/en/About/Conventions/ListOfConventions/Pages/Athens-Convention-relating-to-the-Carriage-of-Passengers-and-their-Luggage-by-Sea-\(PAL\).aspx](http://www.imo.org/en/About/Conventions/ListOfConventions/Pages/Athens-Convention-relating-to-the-Carriage-of-Passengers-and-their-Luggage-by-Sea-(PAL).aspx) (last visited Nov. 4, 2015); see Tsimplis, *supra* note 9, at 126 (explaining more about the 1974 Athens Convention).

<sup>22</sup> INT'L MAR. ORG., ATHENS CONVENTION RELATING TO THE CARRIAGE OF PASSENGERS AND THEIR LUGGAGE BY SEA (PAL), [http://www.imo.org/en/About/Conventions/ListOfConventions/Pages/Athens-Convention-relating-to-the-Carriage-of-Passengers-and-their-Luggage-by-Sea-\(PAL\).aspx](http://www.imo.org/en/About/Conventions/ListOfConventions/Pages/Athens-Convention-relating-to-the-Carriage-of-Passengers-and-their-Luggage-by-Sea-(PAL).aspx) (last visited Nov. 4, 2015).

While it is not uncommon to refer to the Passenger Liability Regulation ("PLR") Annex I as the "Athens Convention," there are some differences between the actual text of the Athens Convention as amended by the 2002 protocol and the PLR Annex I, which will be addressed in more detail in Part III. C. Not only due to textual differences, but also because of the different legal natures of the PAL 2002 and PLR Annex I, it is imperative that these two texts, which are almost identical, be referred to in a manner that distinguishes them. Besides the substantive rules of the regulation itself, Regulation (EC) 392/2009 contains, as binding annexes, large parts of the 2002 Athens Convention, as well as related IMO Guidelines.<sup>23</sup> These annexes are integral parts of the regulation and therefore, have taken immediate effect.<sup>24</sup> Further, the PLR goes beyond the Athens Convention. Additional rules have been included (such as mobility equipment),<sup>25</sup> while some rules of the Athens Convention (e.g. regarding the scope of application, liability limitation rules, and jurisdiction issues) have been omitted from the PLR.<sup>26</sup> The PLR Annex I is almost identical to the Athens Convention as amended in 2002 (PAL 2002) while PLR Annex II transfers IMO Guidelines, which have also been established in EU law in the context of the PAL 2002. These annexes to the PLR are legally binding as well. They are based on Article 12, sentence 3 and Article 3 of the PLR. Furthermore, the EU ratified the PAL in 2002, making it the first convention concluded under the auspices of the IMO to

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<sup>23</sup> See Beate Czerwenka, *Neue Haftungs- und Entschädigungsregelungen in der Personenschiffahrt - Harmonisierung durch Europarecht*, 5 TRANSPORTRECHT 165, 167 (2010).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> See generally *id.*

which a regional organization has become a party.<sup>27</sup> While the PAL 1974 and its 1976 protocol have entered into force, the 1990 protocol to the Athens Convention never became binding law.<sup>28</sup> The PAL 2002 entered into force on April 23, 2014, one year after the necessary number of ratifications was reached.<sup>29</sup>

In this article, we will look at the substantive rules of the PLR and compare these rules to U.S. law. We will also pay attention to some of the challenges that result from the parallel implementation of the PLR and the PAL 2002 for those EU member states that ratify the PAL 2002, which the PLR is supposed to transfer to EU law.

## II. LIABILITY FOR DAMAGES INCURRED BY PASSENGERS UNDER U.S. LAW AND UNDER THE PLR

Cruise vessels hired that also depart from U.S. waters are known as common carriers according to Section 3(6) of the Shipping Act of 1984. 46 U.S.C. Sec. 1702 (6). It is commonly accepted that a common carrier is under a “special duty” beyond reasonable care to its vessel passengers. This special duty means that a cruise ship must see to it that

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<sup>27</sup> Cf. INT’L MAR. ORG., <http://www.imo.org/About/Conventions/StatusOfConventions/Documents/status-x.xls> (last visited Sept. 4, 2015).

<sup>28</sup> Tsimplis, *supra* note 9, at 126 n.6-7.

<sup>29</sup> INT’L MAR. ORG., ATHENS CONVENTION RELATING TO THE CARRIAGE OF PASSENGERS AND THEIR LUGGAGE BY SEA (PAL), *available at* [http://www.imo.org/en/About/Conventions/ListOfConventions/Pages/Athens-Convention-relating-to-the-Carriage-of-Passengers-and-their-Luggage-by-Sea-\(PAL\).aspx](http://www.imo.org/en/About/Conventions/ListOfConventions/Pages/Athens-Convention-relating-to-the-Carriage-of-Passengers-and-their-Luggage-by-Sea-(PAL).aspx) (last visited Nov. 4, 2015).



the cruise vessel vacationers get to the port of safety safely. The cruise liners must exercise the highest degree of care to protect passenger carried for hire against physical injuries and other types of harm . . . . The special relationship between a common carrier of passenger and its hire comes from the fact that the passengers are entrusting themselves to the cruise ship company's protection and care . . . . A cruise ship corporations [sic] has a duty of safe transport.<sup>30</sup>

Under the new EU rules, the claim for damages per incident and per victim is limited to 250,000 Special Drawing Rights ("SDR"),<sup>31</sup> which is equivalent to 351,862.50 USD.<sup>32</sup> This sum may seem small given that it is the maximum amount that can be claimed in the event of the death of a passenger, until it is contrasted with the current legal standard in the United States.

The Death on the High Seas Act ("DOHSA") is significantly more restrictive than the new EU rules.<sup>33</sup> While DOHSA gives claimants a right to action in U.S. courts regarding "the death of a person . . . caused by wrongful act,

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<sup>30</sup> EHLIN LAW FIRM P.C., *Cruise Ship Strict Liability Law* (Nov. 10, 2011), <http://cruiseshipaccident.ehlinlaw.com/strictliability/> (citations omitted).

<sup>31</sup> The current value of an SDR can be checked at [http://www.imf.org/external/np/fin/data/rms\\_sdrv.aspx](http://www.imf.org/external/np/fin/data/rms_sdrv.aspx).

<sup>32</sup> See INT'L MONETARY FUND, [http://www.imf.org/external/np/fin/data/rms\\_sdrv.aspx](http://www.imf.org/external/np/fin/data/rms_sdrv.aspx) (last visited Aug. 27, 2015) (allowing one to calculate the current value of an SDR).

<sup>33</sup> 46 U.S.C. §§ 30302-30308 *et seq.*

neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States,"<sup>34</sup> the claim is limited to "a fair and just compensation for the pecuniary loss sustained by the persons for whose benefit the suit is brought."<sup>35</sup> By limiting the claim to the pecuniary loss, the carrier will often only have to pay funeral costs, travel expenses for relatives, and similar expenses that result from the death of the victim.

In contrast, under the PLR, carriers are not only liable up to 250,000 SDR, the PLR goes beyond the PAL 2002 by requiring advance payments in cases of death or bodily injury to cover immediate expenses.<sup>36</sup> Where the death of a passenger results, this advance payment must amount to at least 21,000 EUR.<sup>37</sup> While the PAL 2002 and the PLR require carriers to maintain adequate war and non-war insurances to cover passenger claims<sup>38</sup> (which is a challenge in itself given the limit of 250,000 SDR per person involved in an incident and the large number of passengers on board major cruise ships), the necessary insurance cost can easily amount to one billion SDR per ship, often approaching or even exceeding the material value of luxurious cruise ships.<sup>39</sup> The PLR's

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<sup>34</sup> 46 U.S.C. §§ 30302.

<sup>35</sup> 46 U.S.C. §§ 30303.

<sup>36</sup> PLR at art. 6, para. 1.

<sup>37</sup> *Id.*

<sup>38</sup> PLR at Annex I, art. 4bis; PAL 2002 at art. 5.

<sup>39</sup> Jim Walker, "Titanic Dreams" - Royal Caribbean Wins "Worst Cruise Line in the World" Award, JIM WALKER'S CRUISE LAW NEWS (Nov. 3, 2009), <http://www.cruiselawnews.com/2009/11/articles/worst-cruise-line-in-the-world/titanic-dreams-royal-caribbean-wins-worst-cruise-line-in-the-world-award/> (Top of the line cruise vessels, like the *Oasis of the Seas* or the *Allure of the Seas*, are estimated to cost 1.5 billion USD.).

advance payment requirement is included in Article 6 of the PLR and is not covered by the insurances under Article 4bis of the PLR Annex I, which reflects the PAL 2002. Keeping in mind the potential number of passengers (and hence victims), the carrier of a cruise vessel with 4,000 passengers may face immediate claims in the range of 84 million SDR, which requires substantial liquidity, or additional insurances. The advance payment under the PLR, which is only the tip of the iceberg, essentially fulfills the same function as the compensation under DOHSA, thus indicating the benefit for potential victims associated with the European regulation, not only when compared to DOHSA, but also to the PAL 2002.

### III. THE PASSENGER LIABILITY REGULATION

#### A. BACKGROUND

While there is already a significant body of law concerning the rights of airline passengers,<sup>40</sup> until recently, the same could not be said with regard to ship passengers on the seas.<sup>41</sup> At the same time, the trend of supporting the implementation of more EU passenger legislation

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<sup>40</sup> For examples of airline passenger rights in the EU, see Jens Karsten, *Entwicklungen im EU-Passagierrecht 2011/2012 – Teil I*, 7 VERBRAUCHER UND RECHT 463, 465 (2012); Jens Karsten, *Das Weißbuch zur Verkehrspolitik und die Konsolidierung des EU-Passagierrechts*, 6 VERBRAUCHER UND RECHT 215, 216 (2011) [hereinafter *Das Weißbuch*].

<sup>41</sup> *Das Weißbuch*, *supra* note 40, at 218. The PLR and the PAL 2002 only apply to the transport of passengers on the seas, while the Athens II Regulation (Regulation (EU) No 1177/2010) applies to the transport of passengers on rivers with the exception of simple river cruises and short tourist trips.

continues.<sup>42</sup> In particular, due to the multimodal nature of many passenger transports, it has been important for the EU to strengthen passenger rights across the board.<sup>43</sup> However, as expressed by the Attorney General at the European Court of Justice, while there are similarities between different liability regimes for different modes of transportation, the comparability is limited.<sup>44</sup> It is against this background of diverse rules that, in 2009, the European Union decided to take action on behalf of passengers aboard ships.

While cruise ships gain the lion's share of media attention, the EU's new rules are by no means limited to cruise ships. Rather, these rules cover all ships that are permitted to carry passengers.<sup>45</sup> With that being said, for the time being, the EU regulates only ships within international transport,<sup>46</sup> although the member states are free to expand the rules to ships within national transport as well.<sup>47</sup> The EU has ratified the Athens Convention, and the PLR was meant to take effect the moment the Athens Convention became binding on the EU,<sup>48</sup> but no later than on December 31,

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<sup>42</sup> Jens Karsten, *Im Fahrwasser der Athener Verordnung zu Seereisenden: Neuere Entwicklungen des europäischen Passagierrechts*, 24 VERBRAUCHER UND RECHT 213, 214 (2009).

<sup>43</sup> Otmar Philipp, *Verbraucherrecht: Rechte von Benutzern verschiedener Verkehrsmittel*, 23 EUROPAUCHERRECHT: RECHTE VON BENUTZERN VERSC 884 (2012).

<sup>44</sup> Case C-509/11, *ÖBB-Personenverkehr* AG, 2013 (Mar. 14, 2013) (<http://curia.europa.eu>).

<sup>45</sup> While the insurance requirement under PLR Annex I, art. 4*bis* only applies to ships, which are licensed to carry twelve or more passengers, the PLR and PAL 2002 apply to all commercial transports of persons by sea.

<sup>46</sup> PLR at art. 2.

<sup>47</sup> *Id.*

<sup>48</sup> PLR at art. 12.

2012,<sup>49</sup> even though PAL 2002 had not yet entered into force at the time.

## B. DEVELOPMENT

“The rise of passenger law Regulations in [EU] transport law is one of the most dynamic consumer policy developments in recent years.”<sup>50</sup> In particular, the shipping sector has new legislative developments that have often been the product of major disasters.<sup>51</sup> At first glance, one might be tempted to think that the 2009 PLR was not immediately inspired by such a disaster, but in fact, the PLR can be seen as part of a process, which began with the *Herald of Free Enterprise* and *Estonia* disasters.<sup>52</sup> While safety issues were often addressed in the wake of these disasters, it took some time for passenger rights to develop in the maritime sector: “Compared to this avalanche of European safety regulation, establishing a (private law) liability regime for passengers is a slow process. Setting up an international framework on passenger rights in sea transport was first attempted in the

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<sup>49</sup> *Das Weißbuch*, *supra* note 40, at 214.

<sup>50</sup> Jens Karsten, *European Passenger Law for Sea and Inland Waterway Transport*, 2 Y.B. OF CONSUMER L. 201, 201 (2008).

<sup>51</sup> Nicholas Gaskell, *Compensation for Offshore Pollution: Ships and Platforms*, in *MARITIME LAW EVOLVING: THIRTY YEARS AT SOUTHAMPTON* 63, 63 (Malcolm Clarke ed., 2013), available at <https://books.google.fi/books?id=AITqAwAAQBAJ&pg=PT94&lpg=PT94&dq=maritime+law+reaction+disaster&source=bl&ots=GVblu0C9Tf&sig=kckZCfF1zuZ8oPICfXvVproq9eE&hl=en&sa=X&ved=0CBsQ6AEwAGoVChMInfGrjsuPyQIVhHNyCh19Vw0x#v=onepage&q=maritime%20law%20reaction%20disaster&f=false> (Gaskell fittingly refers to this phenomenon as the “disaster reaction syndrome.”).

<sup>52</sup> *Id.* at 204.

1960s.”<sup>53</sup> Yet, in the following decades, the development was slow at best.

The International Convention for the Unification of Certain Rules Relating to Carriage of Passengers by Sea and Protocol of 29 April 1961 had few adherents among States, and its update never even entered into force. More successful was the subsequent Athens Convention relating to the Carriage of Passengers and the Luggage by Sea of 13 December 1974 (abbreviated by the International Maritime Organization (IMO) as “PAL” that, with 32 signatories, entered into force on 28 April 1987 (and its protocol of 19 November 1976 on 30 April 1989) . . . . But [even by] ratification amongst EU Member States was limited to just six States.<sup>54</sup>

[. . .]

The protocol of 29 March 1990 to the 1974 Athens Convention with just five contracting States never had sufficient support for entering into force as it did not, in the eyes of many States, provide for a sufficiently high level of compensation. The [European] Commission expressed its discontent with this liability regime in its Maritime Passenger Safety Communication of March 2002 whilst outlining the features of more adequate rules for maritime transport, both international and

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<sup>53</sup> *Id.* at 205.

<sup>54</sup> *Id.* (footnotes omitted).

European. In the autumn [of] 2002 then, in an attempt to remedy the failures of its predecessors, inspired by the Montreal Convention and with the aim of truly arriving at the establishment of an international liability regime, a diplomatic conference held under the auspices of the IMO . . . succeeded on 1 November 2002 in updating the Athens Convention by a protocol. The new convention as amended by the 2002 London Protocol will replace the 1974 convention which is henceforth renamed the "Athens Convention relating to the Carriage of Passengers and their Luggage by Sea 1974, as last amended by the London Protocol 2002."<sup>55</sup>

The development of international rules on passenger rights has progressed at a slow rate, which has prompted Europe to take action on the EU level prior to the entry into force of the PAL 2002.

### C. THE PLR, ITS ANNEXES, AND THE PAL 2002

Since 2012, there has been a regional European legal regime that is nearly identical to the legal regime that came into existence after the 2002 amendments to the Athens Convention became binding globally in 2014. The EU's passenger law is heavily influenced by Public International

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<sup>55</sup> *Id.* at 207-208 (footnotes omitted).

Law.<sup>56</sup> Therefore, it hardly comes as a surprise that the PLR is based on an international treaty. What makes the PLR special is the fact that, while the Athens Convention had already entered into force, at the time the European authorities took action by adopting the PLR, it had not yet entered into force in the version that was ultimately implemented by the EU in 2012. At the time the PLR was created, Europe had already gone beyond its obligations under the Athens Convention and implemented the PAL 2002. Indeed, the PAL 2002 was not yet binding at the time PLR became applicable, let alone when PLR was created.

The international origin of the PLR is unusual from the perspective of consumer law, but it can be easily explained given the transboundary nature of modern travel.<sup>57</sup> In the member states of the European Union, regardless of the mode of transportation, passenger laws have become three-layered: consisting of domestic law, European law, and international law.<sup>58</sup> This can lead to a number of conflicts between different legal regimes, particularly because some EU member states have ratified the original 1974 Athens Convention<sup>59</sup> and the PLR went beyond the 1974 Convention and the PAL 2002.

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<sup>56</sup> Jens Karsten, *Passagierrechte und Passagierbegriff im Gemeinschaftsrecht und die Überarbeitung des Gemeinschaftlichen Besitzstandes im Verbraucherrecht*, 6 VERBRAUCHER UND RECHT 201, 202 (2008).

<sup>57</sup> *Id.* at 204.

<sup>58</sup> *Id.* at 205.

<sup>59</sup> For the current status of ratifications of Conventions in international shipping law, see *Status of multilateral Conventions and instruments in respect of which the International Maritime Organization or its Secretary-General performs depositary or other functions*, INTERNATIONAL MARITIME ORGANIZATION, <http://www.imo.org/en/About/Conventions/StatusOfConventions/Documents/Status%20-%202015.pdf> (last visited Nov. 5, 2015) (this



The European Union has now essentially copied the Athens Convention, as amended by the 2002 protocol, and has included it in an annex to the PLR.<sup>60</sup> In the transformation of Public International Law into EU law, the PLR follows the model set by regulations (EC) No 2027/97, (EC) 889/2002 on air travel, and (EC) No 1371/2007 on travel by railway.<sup>61</sup> At the same time, it has to be noted that the PLR is not a stand-alone document, rather it must be understood as being part of the EU's overall policy on transport.<sup>62</sup>

While it is said that the PAL 2002 has been included in the PLR as Annex I,<sup>63</sup> it has to be noted that PLR Annex I differs from PAL 2002 in several respects. For example, the PLR goes beyond the PAL 2002 by allowing for the application of the liability rules to domestic travels as well.<sup>64</sup> It might appear that the drafters of the PLR wanted to copy many substantial rules from the PAL 2002 but deliberately excluded some of them, yet in some cases small changes of a technical nature were necessary for the PLR to make complete sense. For example, the continued references to state parties to the PAL 2002 or technical aspects relevant

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document is updated regularly by the IMO, updated versions will be accessible through the link provided on <http://www.imo.org/en/About/Conventions/StatusOfConventions/Pages/Default.aspx>.

<sup>60</sup> PLR at Annex I.

<sup>61</sup> Karsten, *supra* note 40, at 214.

<sup>62</sup> Norman A. Martínez Gutiérrez, *New European rules on the liability of carriers of passengers by sea in the event of accidents*, 18 J. OF INT'L MAR. L. 293, 295 (2012).

<sup>63</sup> Cf. e.g. *id.*

<sup>64</sup> Beate Czerwenka, *Neue Haftungs- und Entschädigungsregelungen in der Personenschiffahrt - Harmonisierung durch Europarecht*, 5 TRANSPORTRECHT 165, 171 (2010).

only to PAL but not to the PLR have been omitted in PLR Annex I.<sup>65</sup> On the other hand, references to “this Convention”<sup>66</sup> were simply copied from PAL 2002 to PLR Annex I. This approach is understandable in so far as Annex I to the PLR is actually entitled “Provisions of the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea Relevant for the Application of this Regulation.”<sup>67</sup> The correct reference, though, should have been to ‘this Annex’ as PLR Annex I does not cover the entire text of PAL 2002, which is indicated by the aforementioned title of PLR Annex I.

The EC’s choice to replicate large parts of the PAL 2002 in the PLR Annex I indicates that there was not only a rush in the proliferation of passenger-related legislation, but also a lack of understanding as to the relationship between EU (formerly the EC) law and international law. While the EU is to be lauded for its efforts, it remains to be seen whether the EU will do a better job at implementing international maritime conventions for its member states. In relation to its size, Europe has a disproportionately long coastline. A large part of the EU’s citizens depend on the maritime industry directly or indirectly; passenger transportation by sea is booming,<sup>68</sup> despite a continued slump in other parts of the shipping industry.<sup>69</sup>

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<sup>65</sup> Cf. e.g. PLR at Annex I, art. 2(1).

<sup>66</sup> E.g. in PLR at Annex I, art. 2(2).

<sup>67</sup> PLR Annex I, Title.

<sup>68</sup> See e.g. *Vancouver's cruise ship season extended by worldwide boom*, CBC NEWS (Nov. 3 2015), <http://www.cbc.ca/news/canada/british-columbia/vancouver-s-cruise-ship-season-extended-by-worldwide-boom-1.3301561>.

<sup>69</sup> Jared Vineyard, *Is International Shipping Returning to Pre-Recession Levels?*, UNIVERSAL CARGO MGMT. (Sept. 16, 2014),

Furthermore, given the accession of Croatia to the EU in 2013,<sup>70</sup> the number of intra-EU passenger transports is likely to increase significantly. Yet, the EU still has to develop a coherent ocean-related vision. The PLR is a noteworthy example of how Europe can lead in the search for new legislative developments.

#### D. CONSEQUENCES OF THE ENTRY INTO FORCE OF THE PAL 2002

In particular, due to the indirect benefits for passengers beyond the compensation aspects, the entry into force of the PAL 2002 in 2014 was welcomed. The PLR's Annex I is similar to but, as described earlier, not identical to the PAL 2002. As the PLR entered into force before the PAL 2002, this led to particular consequences for those EU member states that had already ratified the PAL 2002, but that had already been required to implement the PLR more than a year prior to the eventual entry into force of the PAL 2002.

Essentially, the entry into force of the PAL 2002 in 2014 equates to existence of two separate legal regimes. Those EU member states that have ratified the PAL 2002 are now bound by both the PLR and the PAL 2002. While the EU's aim may be the creation of a coherent legal system, the question needs to be asked whether the changes introduced by the EC may have made it more difficult to reach this goal

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<http://www.universalcargo.com/blog/bid/103915/Is-International-Shipping-Returning-to-Pre-Recession-Levels>.

<sup>70</sup> *Croatia in the European Union*, EUROPEAN COMMISSION (Feb. 13, 2015), [http://ec.europa.eu/enlargement/countries/detailed-country-information/croatia/index\\_en.htm](http://ec.europa.eu/enlargement/countries/detailed-country-information/croatia/index_en.htm).

by essentially copying the PAL 2002 into European law. Had the PLR merely been an anticipation of the PAL 2002, there would have been no problem, but the European solution has created complications because not all of the rules of the PAL 2002 have been included in the PLR Annex I and, in particular, because the PLR Annex I takes precedence over national law *qua* European law while the PAL 2002 has to be implemented by the state parties to the PAL 2002. The only way to prevent the emergence of two different legal systems, which was not intended by either the EU or the drafters of the PAL 2002, would be to adopt a monist understanding which would see international and domestic law as one coherent legal order<sup>71</sup> and international law as self-executing. While a monist understanding of international law can be found, for example, in Dutch constitutional law,<sup>72</sup> it seems highly unlikely that the EC intended to adopt such an understanding of international law. It appears more likely that the potential problems are the result of an oversight on the part of the EC, rather than the consequence of a monist view.

This raises the question whether it is actually advisable for EU member states to ratify the PAL 2002. If the goal of a coherent system of passenger rights is to be achieved, those EU member states that have not yet done so should ratify the PAL 2002 as soon as possible. At the same time, those EU member states would be well advised to identify and prevent all potential conflicts between their domestic implementation of the PAL 2002 and the PLR, respectively, in the upcoming months.

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<sup>71</sup> See generally *The Pacquete Habana*, 175 U.S. 677 (1900).

<sup>72</sup> STATUUT NED [Charter] art. 91.

## IV. OUTLOOK

The Passenger Liability Regulation was an important step forward. The EU's implementation advanced the speed of ratifications of the Athens Convention and its 2002 Protocol by EU member states. The entry into force of the PAL 2002 also made this legal regime more attractive for non-EU member states. It remains to be seen how the similar, but slightly different, legal regimes under the revised Athens Convention and the Passenger Liability Regulation will interact with each other. While neither the EU's Passenger Liability Regulation nor the Athens Convention provide perfect solutions, the position of the victims' relatives is now significantly stronger than it is under U.S. law. So far the United States has ratified neither the original Athens Convention, nor the 2002 Protocol, making the EU's legislative activity in the realm of passenger rights to be rightly considered to amount to a "boom."<sup>73</sup>

More than anything else, the measures taken by the EU can serve as a model on how to increase the protection of passengers. Obligatory insurance schemes place both an indirect as well as a direct burden on carriers. The direct burden is the need to maintain insurance for carriers; the indirect burden means that carriers will also need to maintain minimum standards regarding the way they conduct their business because insurance companies will be reluctant to provide insurance to carriers that are using ships that are in poor condition or to carriers that are willing to accept overcrowding onboard their vessels. This economic pressure will also show its power where the state in question

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<sup>73</sup> Karsten, *supra* note 40, at 214.

is unwilling or unable to exert the necessary legal pressure on ship operators. Overcrowded ferries might become a thing of the past if the insurance costs significantly exceed the potential profits. Such an indirect regulatory effect is certainly far from perfect, but it could help in instances where there is even less of a direct (domestic) regulatory effect. In so far, the EU's Passenger Liability Regulation can provide an inspiration for other states to ratify and implement the Athens Convention in its revised form.

Unfortunately, doing so will not necessarily solve the problem that is more urgent in the developing world than in the EU: domestic voyages. Although EU member states are given the option to pass the PLR right away, the EU delayed the applicability of the PLR to domestic voyages for four years after the entry into force of the PLR<sup>74</sup> and in some cases even until December 31, 2018.<sup>75</sup> Often it is domestic voyages in developing nations that lead to the loss of human lives in large numbers.<sup>76</sup> The aforementioned *Rabaul Queen*, *Shariatpur 1*, and *Costa Concordia* incidents are only three in a long line of disasters that have claimed the lives of passengers at sea. In 2015, the IMO adopted guidelines to improve safety in domestic ferry operations.<sup>77</sup>

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<sup>74</sup> PLR at art. 11(1).

<sup>75</sup> PLR at Annex I, art. 11(2).

<sup>76</sup> For more detail, see e.g. Aleik Nurwahyudy, *Contemporary issues in domestic ro-ro passenger ferry operation in developing countries: identification of safety issues in domestic ferry operation based on accident investigation reports on ferry involved accidents in Indonesian waters, 2003 – 2013*, WORLD MARITIME UNIVERSITY DISSERTATIONS, Paper 463 (2014).

<sup>77</sup> Rebecca Gibson, *IMO adopts new guidelines to improve domestic ferry safety*, CRUISE & FERRY (Apr. 28, 2015), <http://www.cruiseandferry.net/articles/imo-adopts-new-guidelines-to-improve-domestic-ferry-safety#.Vkbs7K4rK5w>.

As predicted,<sup>78</sup> there have been some challenges in the context of the implementation of the PLR, but these challenges have been overcome in large part due to the insurance industry's willingness to actually offer PLR-compliant insurance policies and at least the few national administrations that were able to implement the PLR on short notice. The PLR will not dramatically ameliorate the situation of passengers overnight but it raises the standard. Given the economic importance of the European market, the obligatory insurance, and the resulting indirect pressure by insurers, technical and other standards can provide at least some contribution to the protection of the rights of passengers. The PLR is far from perfect and should be improved, but it is a step in the right direction and it provides an important impetus for the eventual ratification of the PAL 2002, which allowed the latter to take effect in 2014.

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<sup>78</sup> Tsimplis, *supra* note 9, at 148.