

The 1974 Athens Convention relating to the Carriage of Passengers and their Luggage by Sea and the 2002 Protocol

A study concerning the Shipowner's right to Limitation of Liability

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“Accidents will occur in the best regulated families.”

Charles Dickens (1812-1870)

1 Introduction

The purpose of this paper is to research the 1974 Athens Convention relating to the Carriage of Passengers and their Luggage by Sea¹, giving emphasis to the issue of the shipowner’s right to limit his liability exposure according to the provisions of the Convention, while also examining the consequences of the adoption of the 2002 Protocol².

1.1 Presentation and problem discussion

We will present a broad overview of the 1974 Convention and the 2002 Protocol in order to provide the reader with the essentials to understand the convention under discussion.

We shall, however, concentrate our efforts on the limitation of liability to which a shipowner is entitled in case a passenger should suffer injury or death on board his ship, or in case damage should occur to a passenger’s vehicle or luggage. We will look at historic aspects of limitation of liability in the shipping industry, and explore how it impacts the shipowner’s business, the provision of insurance coverage, and the relationship between the shipowner and his customers, i.e., the passengers.

¹ 1974Athens Convention relating to the Carriage of Passengers and their Luggage by Sea (PAL) (herein cited as the “Athens Convention” or the “1974 Convention”).

² The Protocol of 2002 to amend the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea (PAL), 1974. (herein cited as the “2002 Protocol”). Once the Protocol is adopted and ratified it will assume the status of Convention and be named the 2002 Athens Convention relating to the Carriage of Passengers and their Luggage by Sea.

We shall compare the different approaches regarding burden of proof, by examining the fault-based liability system in the 1974 Convention and the strict liability system in the 2002 Protocol. The impact of adopting strict liability will then be assessed, and we shall look into how that can affect limitation of liability. We shall also provide a brief comparative assessment between the systems of limitation of liability available in the 1974 Athens Convention and in the 1976 Convention on Limitation of Liability for Maritime Claims³ in order to examine the intricate relationship between those instruments.

In our view, the evidence brought forth in this paper shall contribute to establishing the Athens Convention as a reasonable instrument, and its model of shipowner's right to limitation of liability at least sensible and, we would argue, necessary to the sustainable development of both the shipping and marine insurance industries.

1.2 Sources and Studied Jurisdictions

We will present the different sources to which we have availed ourselves for the purpose of this study, namely:

- international and domestic legislation of leading maritime countries;
- international conventions concerning limitation of liability and carriage of passengers;
- legal literature, judgements and court decisions.

³ The 1976 Convention on Limitation of Liability for Maritime Claims herein mentioned as the "1976 LLMC".

We shall survey the state of affairs in signatory and non-signatory countries, by looking into how the principles of the Athens Convention were incorporated in the United Kingdom's national law after that country ratified the Convention; how some of the principles of the Athens Convention have been incorporated into the Norwegian Maritime Code⁴, even though Norway is not a signatory country; and finally how American Courts have occasionally respected the limitations provided in the Athens Convention in cases when a number of special conditions were in place (the passenger ticket has incorporated the Convention's provisions, the vessel did not fly under US flag, the incident did not take place in American waters, and the vessel did not call any American ports⁵), even though the United States have neither signed nor ratified the Convention.

⁴ Norwegian Maritime code Chapter 15 – Carriage of Passengers and their Luggage.

⁵ See *Becantinos v Cunard Line Ltd.* 1991 WL 64187 (S.D.N.Y) and *Wallis v. Princess Cruises*, 306 F.3d 827 (9th Cir. 2002).

2 The 1974 Athens Convention relating to the Carriage of Passengers and their Luggage by Sea (PAL)

2.1 Historic context

Whilst studying the history of Maritime Law one is surprised with the fact that legislators and the international community have, over the centuries, prioritised carriage of goods over carriage of passengers when dealing with transport by sea.

The first international convention to regulate the carriage of passengers by sea was only conceived after the second half of the 20th century. An emergent understanding about the shortcomings of the national and international legislation available at the time led to the adoption of the 1961 Passenger Convention⁶ and the subsequent 1967 Luggage Convention⁷. Neither of these conventions received a wide acceptance (so much so that the 1967 Luggage Convention never came into force). However, many of the rules contained in both conventions were eventually re-enacted and unified, giving birth to the 1974 Athens Convention.

⁶ International Convention for the Unification of certain Rules Relating to the Carriage of Passengers by Sea, adopted at Brussels, 29 April 1961 and entered in force June 4, 1965 (herein cited as the “1961 Passenger Convention”).

⁷ International Convention for the Unification of certain Rules Relating to the Carriage of Passengers’ Luggage by Sea, adopted at Brussels, 27 May 1967 but never entered in force (herein cited as the “1967 Luggage Convention”).

2.2 The 1974 Convention

The Convention adopted in Athens on 13 December 1974 came in force on 28 April 1987 and had the aim to consolidate and harmonise the two earlier conventions concerning carriage of passengers and luggage (i.e., the 1961 Passenger Convention and the subsequent 1967 Luggage Convention).

As per August 2005, the 1974 Athens Convention had been adopted by 31 countries, which accounted for 38.64% of the world's tonnage⁸.

In order to facilitate the reader's understanding of the 1974 Convention main characteristics, we state briefly herein the key points with which the convention deals:

- shipowner's fault-based liability towards the passenger;
- liability of the carrier and the burden of proof; and
- limitation of liability for personal injury and death and loss of or damage to luggage.

As an initial matter it is relevant to point out the differentiation made in article 4, between the "carrier" and the "performing carrier". The carrier, as defined in article 1(1)(a), is the one who or on whose behalf the contract is concluded. The "performing carrier", as defined in article 1(1)(b), is the one, other than the carrier, who actually performs the carriage. According to article 4 the carrier remains liable for the entire carriage, while the performing carrier is liable for the part of the carriage assigned to him.

For the purpose of this paper we shall not differentiate between the "carrier" and "performing carrier" when discussing liability. Bearing in mind that the system of limitation of liability presented in the Convention and in the 2002 Protocol does not

⁸ www.imo.org, Status of Conventions - Summary.

discriminate between these two parties, we shall simply refer to the carrier and performing carrier as the shipowner.

Furthermore, taking into consideration that in accordance with article 11⁹ the shipowner's servants and agents – when acting within the scope of their employment – are entitled to benefit from the same limits of liability as the shipowner, we shall not mention them in separate, but under the shipowner's entity.

Please note that this work will not address every point of difference between the 1974 Convention and the 2002 Protocol. We shall focus on the differences of approach in the documents concerning the shipowner's limitation of liability.

2.2.1 Shipowner's fault-based liability towards the passenger

The scope of application of the Athens Convention is intertwined with the terms and conditions of the contract of carriage¹⁰ made between the shipowner and the passenger. Shipowners belonging to States that have ratified the Convention generally introduce in their contract of carriage a clause establishing the applicability to that contract of the Athens Convention rules and limitations.

The Athens Convention applies to international carriage of passengers and their luggage if at least one of the following circumstances applies¹¹:

⁹ Article 11: "If an action is brought against a servant or agent of the carrier or of the performing carrier arising out of damage covered by this Convention, such servant or agent, if he proves that he acted within the scope of his employment, shall be entitled to avail himself of the defences and limits of liability which the carrier or the performing carrier is entitled to invoke under this Convention".

¹⁰ For the definition of "contract of carriage", see article 1(2) in the 1974 Athens Convention: "contract of carriage" means a contract made by or on behalf of a carrier for the carriage by sea of a passenger and his luggage as the case may be".

¹¹ See Article 2 of the 1974 Athens Convention.

- the ship flies under the flag of a contracting State;
- the contract of carriage was made in a contracting State;
- the port of embarkation or disembarkation is in a contracting State, as defined in article 1(9).

(NB: in all instances, “contracting State” means a State that has ratified the Convention.)

The shipowner’s liability is regulated in article 3(1)¹² of the Convention. Once the passenger is under the care of the shipowner, the latter is liable for personal injury, death, and damage or loss of luggage suffered by the passenger; provided that the incident causing the damage occurs in the course of the carriage and is due to the shipowner’s fault or neglect.

For the purpose of article 3(1) carriage means not only the voyage itself but also the period in the course of embarkation or disembarkation. For example, if the passenger should slip and fall on the gangway on his way to boarding the vessel, he may hold the shipowner liable for the incident and demand compensation for any damage or injury that might have occurred, as long as he can prove that there was a foreseeable defect on the gangway that caused him to fall.

It is further stated in article 3(3) that, if the loss or damage to luggage, death, or personal injury to passenger occurred due to or in connection with shipwreck, collision, stranding, explosion or fire, or defect in the ship; then fault or neglect of the shipowner shall be presumed.

The same provision applies if fault or neglect – which caused the damage or loss – can be attributed to the shipowner’s servants and agents while acting within the scope of

¹² Article 3(1) 1974 Athens Convention: “The carrier shall be liable for the damage suffered as a result of the death of or personal injury to a passenger and the loss of or damage to luggage if the incident which caused the damage so suffered occurred in the course of the carriage and was due to the fault or neglect of the carrier or of his servants or agents acting within the scope of their employment.”

their employment. In such instance, article 11 states that in case action is brought against the shipowner's servants or agents they shall be entitled to the same defences and limitations under the Convention as the shipowner, provided that he or she manages to establish that they have acted within the scope of their employment.

Thus it is clear that the shipowner shall be liable for any loss or damage suffered by the passenger whether concerning death and personal injury or his luggage and personal effects, as long as the damage has occurred in connection with the carriage and it can be traced as resulting from the shipowner's fault or neglect.

It is important, however, to point out that in article 6 of the Convention it is stated that if the shipowner is able to prove that the damage, loss or injury claimed by the passenger happened due to that passenger's own fault or neglect, the Court presiding the case has the power to either release the shipowner from liability in that matter or partly exonerate him from it, as the case may be, and in accordance with the *lex fori* of that State¹³.

2.2.2 Liability of the carrier and the burden of proof

The 1974 Athens Convention, as seen above, is based on a fault-liability system. This means that the burden of proof concerning the incident itself (as well as the extension of the loss or damage suffered) rests with the claimant (i.e., the passenger or his or her successors)¹⁴.

As noted before, there is an exception to this principle, which concerns "shipping incidents"¹⁵. Whenever damage or loss is suffered by the passenger due to shipwreck,

¹³ International Maritime and Admiralty Law (1st. Ed. 2002) Tetley, William at 541

¹⁴ Article 3(2) 1974 Athens Convention: "The burden of proving that the incident which caused the loss or damage occurred in the course of the carriage, and the extent of the loss or damage, shall lie with the claimant."

¹⁵ Even though "shipping incidents" were already recognised in the 1974 Athens Convention, the 2002 Protocol in article 3(5)(a) has now provided a definition of the term.

collision, stranding, explosion or fire, or defect in the ship, then, according to article 3(3), fault or neglect on the part of the shipowner is to be presumed.

It is relevant to point out that the incidents listed in article 3(3) are intrinsically of a shipping nature. What we mean by “shipping nature” is that those types of incidents are inherent to the operation of the vessel and the passenger has very little – if any at all – control of such occurrences. While the passenger has free access to most common areas in the ship, passengers are seldom allowed on the ship’s bridge and machinery room. Therefore it is only fair to accept that those “shipping incidents” would fall under the accountability of the one who is responsible for the operation of the ship, i.e., the shipowner.

Notwithstanding this exception to the fault-liability principle, we call to the reader’s attention that the above-mentioned list is exhaustive. For that reason, any incidents or occurrences whose nature falls outside the scope provided by article 3(3) shall be treated under the rule prescribed by the last sentence of paragraph 3: “In all other cases the burden of proving fault or neglect shall lie with the claimant”.

2.2.3 Limitation of liability for personal injury and loss of or damage to luggage

Articles 7 and 8 of the 1974 Convention ascertain the shipowner’s right to limit his liability for personal injury or death of a passenger (article 7), and also for loss or damage to a passenger’s luggage (article 8). The amounts provided by these articles have been amended by the 1976 Protocol to the Convention¹⁶ and are, to date, as follows:

¹⁶ The 1976 Protocol to the Convention was adopted in November 1976, making the unit of account the Special Drawing Right (SDR). It entered into force in 30 April 1989. Please note that the 1990 Protocol, whose focal point was to raise the amount of compensation available to passengers, has never entered in force and has now been superseded by the 2002 Protocol.

- compensation to a passenger in case of injury or death shall not exceed SDR¹⁷46,666 (approximately USD 68,766.00);
- compensation for loss or damage to cabin luggage shall not exceed SDR 833 (approximately USD 1,228.00); and
- compensation for loss or damage to a vehicle shall not exceed SDR 3,333 (approximately USD 4,917.00).

These limits have been the subject of intense discussions since the inception of the Athens Convention. Several countries have been reticent in adopting and ratifying the Convention exactly because they believe that the limits provided are too low. Indeed, the 1990 Protocol was adopted with the intention to raise the original figures, which would, for example, triple the amount for compensation in case of personal injury or death of a passenger. Yet, only five Member States have ratified the 1990 Protocol and the same has never come into force (being now superseded by the 2002 Protocol).

The course of discussing monetary figures concerning compensation for personal injury often brings forth a significant divergence of opinions. And the setting of an international convention is by no means different. The Member States recognized by the International Maritime Organization are very heterogeneous when measured by fleet size and economical power. SDR 46,666 may be considered as adequate compensation in some third-world countries, but is it not considered sufficient in European countries. The reason behind it is mostly that the average wages and currency values differ considerably from region to region.

¹⁷ SDR: Special Drawing Rights. The SDR is an international reserve asset, created by the International Monetary Fund (IMF) in 1969. The SDR also serves as the unit of account of the IMF and some other international organizations. Its value is based on a basket of key international currencies today consisting of the euro, Japanese yen, pound sterling, and U.S. dollar. The U.S. dollar-value of the SDR is posted daily on the IMF's website. It is calculated as the sum of specific amounts of the four currencies valued in U.S. dollars, on the basis of exchange rates quoted at noon each day in the London market. For current value see www.imf.org.

Hence, it is a challenge to reach agreement on a single amount that will please and satisfy such diversity of potential contracting States. Reaching such “magic” number has been one of the targets of the diplomatic conferences that worked on both the 1990 and 2002 Protocols. (Whether or not the 2002 Protocol has finally achieved this goal remains yet to be seen.)

Limitation of liability has been the primary issue surrounding criticism concerning the 1974 Convention. However, as Prof. Dr. Walter Müller – who was the President of the Diplomatic Conference which adopted the 1974 Athens Convention – has pointed out, “the critics of the Athens Convention should not forget that the liability system adopted at the time represented a milestone in the progressive development of maritime law. Prior to this, in virtually all countries, the contract of carriage of passengers was governed by the principle of freedom of contract, and the carrier used or abused this freedom to exclude liability.”¹⁸

It is now relevant to bring to attention article 13, which regulates the shipowner’s loss of right to limit liability. The shipowner will lose the limitation benefit if it is proved such damage or loss resulted from his act or omission. The purpose of this article is to cater for exceptional situations of negligence, and it can thus only be invoked as such. The shipowner must have acted recklessly or with intent, and with knowledge that the damage would probably result. The same applies in case of omission; he must have had knowledge that an incident was imminent or likely to happen, but chosen not to act in order to prevent the same from happening.

It is interesting to point out that neither the 1974 Convention nor the 1976 and 1990 Protocols have had a provision concerning the shipowner’s obligation to contract insurance in order to guarantee his liability towards the passenger. Nevertheless, it is

¹⁸ Müller, Walter: “Should the Athens Convention 1974 be modified?” at CMI 37th Conference – Singapore, February 2001.

safe to assume that most, if not all, international cruise operators have proper insurance cover regarding passenger incidents with P&I¹⁹ Clubs.

We shall further examine the above issues when discussing the 2002 Protocol.

2.3 The 2002 Protocol

Adopted on 01 November 2002, the Protocol will only enter in force 12 months after being accepted by 10 signatory States. (As per August 2005 only three countries have adopted the 2002 Protocol, namely: Albania, Latvia and the Syrian Arab Republic.)²⁰

The Protocol introduces a number of relevant innovations to the 1974 Convention, which we list hereunder for the benefit of the reader:

- Replacement of the fault-based liability system with a strict liability system;
- Significant increase of limits of liability towards the passenger;
- Compulsory insurance to cover passengers on ships;
- “Opt-out” clause; and
- New procedure for amendment of limits.

2.3.1 Replacement of the fault-based liability system with a strict liability system

The 2002 Protocol replaces the fault-based liability system contained in the 1974 Convention with a strict liability system for shipping related incidents. The definition of

¹⁹ P&I Clubs provide shipowners with protection and indemnity insurance. “P&I is a shipowner’s insurance cover for legal liabilities to third parties. It is usually arranged by entering a ship in a mutual insurance association, otherwise referred to as a club”. Thorp, Michael “An Introduction to Marine Protection and Indemnity Insurance”, published by Assuranceforening Skuld.

²⁰ www.imo.org – Status of Conventions.

“shipping incident” is provided in article 3(5)(a), and refers to incidents essentially related to the operation of the vessel, such as shipwreck, capsizing, collision or stranding of the ship, explosion or fire in the ship, or defect in the ship.

The 1974 Convention in its article 3 used only 3 paragraphs to determine the scope of the shipowner’s liability. The 2002 Protocol, under the same heading (article 3), has now 8 paragraphs. The relevance of our observation is not limited to simple numbers. Article 3 in the 2002 Protocol is considerably more thorough than its counterpart in the 1974 Convention.

At this point we call to the reader’s attention that the 1974 Convention’s fault-based liability with a presumption of fault is not the same as strict liability. Under the 1974 Convention, the shipowner can avoid liability if he can prove that he was not at fault. The 2002 Protocol went further in order to make sure that anyone interpreting the text of article 3 would understand that shipping incidents will result in strict liability. It will not make any distinction as to whether the shipowner could show that he is not to blame. He is liable regardless of fault.

By strict liability, we mean liability that arises without the presence of any culpable conduct.²¹ Therefore, the shipowner can be held responsible for the damages caused during the carriage²² regardless of fault. The claimant needs only to prove that the incident happened and caused damage, and that the shipowner can be deemed responsible, but does not need to show that the shipowner was at fault or was negligent.

The exception to strict liability in article 3 is regulated by paragraph (1)(a) and (b). The shipowner will not be liable for damage or loss suffered in case of a shipping incident in the following cases:

²¹ Scandinavian Maritime Law at 163 (2nd ed. 2004), Falkanger, Bull, Brautaset

²² As defined in Article 1(8) of both texts; the 1974 Athens Convention and the adopted consolidated text of the 2002 Athens Convention.

- (a) if the incident resulted from an act of war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional, inevitable and irresistible character;
- or
- (b) if the incident was wholly caused by an act or omission done with the intent to cause the incident by a third party.

However, concerning the so-called “hotel incidents” (i.e., incidents that are not inherently derived from the vessel’s operation, but could actually take place in a shore-based setting such as a hotel or a restaurant), the fault-based liability system shall continue to apply.

With the exception of major catastrophes, most incidents that result in personal injury or death of a passenger are not related to the operation of the vessel itself as means of transportation. Such incidents, more often than not, occur in combination with leisure activities that do not bear any significant difference when compared with land-based activities.

While it is correct to assume that the passenger has little or no control over “shipping incidents”, the same can not be said regarding the “hotel incidents”. A number of incidents involving passengers in the ship’s common areas can be traced to lack of attention on the part of the passenger, or even to excessive alcohol consumption. In cases where the passenger acted with fault or neglect, the shipowner should not be held liable.

Of course, if there can be found a trace of fault or negligence on the part of the shipowner that has contributed for the passenger’s loss or damage, even in cases where the incident resulted from the passenger’s own actions, the shipowner can not avoid his share of liability. However, the passenger’s portion of contributory fault must be taken into consideration when assessing the compensation for the damage or loss suffered²³.

²³ See LEG83/4/6 – submitted by the International Chamber of Shipping.

Therefore, in practical terms, we do not believe that the sole enactment of the strict liability system regarding “shipping incidents” should lead to a significant rise in the number of lawsuits brought forth by passengers against shipowners when the Protocol comes into force.

Nonetheless, one exception that comes to mind is passenger claims for compensation in case of collision. Since collision falls under the category of “shipping incident” as described in article 3(5)(a), a passenger is allowed to seek compensation for loss or damage against the shipowner with whom he sailed, even if the other vessel is exclusively to blame. With this issue in mind, the drafters of the 2002 Protocol introduced the provisions of paragraph 7, which ascertain the shipowner’s right of recourse against third parties.

2.3.2 Significant increase of limits of liability towards the passenger

Concerning the new limits of liability contained in the Protocol, it is relevant to point out that articles 7 and 8 set maximum limits to compensation to passengers in case of death and personal injury, or loss and damage to luggage. These limits provide a guideline to national courts when determining the proper compensation to be granted.

When the 2002 Protocol enters into force, the shipowner’s monetary limits of liability will be set as follows:

- compensation to a passenger in case of injury or death is limited to SDR 250,000 (about USD 325,000) per passenger on each distinct occasion²⁴. If the loss exceeds the limit, the carrier is further liable – up to a limit of SDR 400,000 (about USD 524,000) per passenger on each distinct occasion²⁵ – unless the

²⁴ See Article 3 of the adopted consolidated text of the 2002 Athens Convention.

²⁵ Article 7 of the adopted consolidated text of the 2002 Athens Convention.

carrier proves that the incident which caused the loss occurred without the fault or neglect of the carrier;

- compensation for loss or damage to cabin luggage is limited to SDR 2,250 (about USD 2,925) per passenger, per carriage²⁶;
- liability of the carrier for the loss of or damage to vehicles including all luggage carried in or on the vehicle is limited to SDR 12,700 (about USD 16,250) per vehicle, per carriage²⁷;
- liability of the carrier for the loss of or damage to other luggage is limited to SDR 3,375 (about USD 4,390) per passenger, per carriage²⁸.

As we can see, the 2002 Protocol compensation amounts have tripled concerning luggage in general, and are 5 to 8.5 times higher concerning personal injury and death. Yet, there is still controversy concerning how satisfactory those limits really are.

We have pointed out in 2.2.3 above how challenging it is to set internationally accepted limitation amounts concerning compensation for death and personal injury that can be considered adequate across borders. Aware of such complexities, the drafters of the 2002 Protocol decided to introduce the possibility of an “opt-out” clause in hope to remedy the issue. We shall discuss the “opt-out” clause in further detail in 2.3.4 below.

It is interesting to note the different provisions when comparing articles 3 and 7 in the 1974 Athens Convention and in the consolidated text of 2002 Convention brought forth by the 2002 Protocol. In the 1974 Convention, article 3 regulates the shipowner’s liability without providing a limitation amount for it. Limitation amounts are only regulated in articles 7 (for personal injury and death) and 8 (concerning loss or damage to luggage). The new 2002 Convention (resulting from the consolidation of the 1974 Convention and the 2002 Protocol), already in article 3, provides for a limitation

²⁶ Article 8 of the adopted consolidated text of the 2002 Athens Convention.

²⁷ *Idem*.

²⁸ *Ibid*.

amount concerning passenger's personal injury and death caused by a shipping incident. Article 7, then, raises the limit of liability provided in article 3(1) by 60% .

However, in relation to non-shipping incidents (which we have named in 2.3.1 above as "hotel incidents"), article 3 does not provide specific limitation amounts. Compensation for such incidents is regulated in article 7 alone.

This system has effectively resulted in a two-layer liability scheme. In cases where personal injury or death to passenger has resulted from a shipping incident, the shipowner's liability is limited to SDR 250,000. However, if the loss exceeds that amount, the shipowner is found further liable up to SDR 400,000. In cases where personal injury or death is related to "hotel incidents", the shipowner's liability towards the passenger is limited to SDR 400,000 and the first layer limitation does not apply.

Furthermore, the text of articles 3 and 7 in the 2002 Protocol included the phrase "on each distinct occasion" when regulating the compensation to be paid to a passenger in case of personal injury or death. In the 1974 Convention, article 7 set the limitation of liability to be per carriage. The introduction of the phrase "on each distinct occasion" was defended by the Norwegian delegation during the 83rd Session of the Legal Committee, in order to ensure consistency with the 1976 Convention on Limitation of Liability for Maritime Claims. The rationale behind the change in wording was that "calculating the limits [...] per incident (occasion) would provide the passenger with better insurance coverage in the event that he continues the voyage after already having suffered damage once"²⁹.

Whilst under the 1974 Convention all incidents suffered by a passenger are subjected to the limitation per carriage, under the 2002 Protocol the passenger may receive separate compensation for separate incidents that may have occurred during one single carriage. For example; an especially accident-prone passenger slips and falls on deck injuring his back. Then, while being taken to the ship's infirmary, he falls down the stairs and

²⁹ See LEG83/4/3 – submitted by Norway.

breaks his arm. Provided that the passenger can prove that both his falls were due to fault or neglect on the part of the shipowner, he can claim damages against the shipowner up to SDR 800,000 (i.e., SDR 400,000 per incident).

Scenarios like the one described above are not likely to happen frequently, as the Norwegian delegation pointed out³⁰. However, one cannot dismiss the possibility of a passenger suffering loss or damage resulting from a “hotel incident” and a “shipping incident” during the same carriage. In principle he would be entitled to compensation up to SDR 650,000 (assuming the shipowner was found liable for the “hotel incident”), and up to SDR 800,000 if the losses caused by the shipping incident exceed the SDR 250,000 first layer limit.

Concerning the shipowner’s loss of right to limit liability, article 13 remained unchanged. The shipowner will not be entitled to the benefit of limitation of liability if it is proved that damage or loss resulted from his act or omission. As we presented in 2.2.3 above, this article should be invoked in exceptional situations, where the shipowner has acted recklessly or with intent, and with knowledge that the damage would probably result. The same applies to loss or damage resulted from omission: he must have had knowledge that an incident was imminent, and chosen not to act.

We will further discuss the issue of limitation of liability in chapter 3.

2.3.3 Compulsory insurance to cover passengers on ships

Compulsory insurance is an innovation introduced by the new Article 4bis of the 2002 Protocol. When the Protocol enters into force, shipowners will be required to maintain insurance or other financial security in order to cover the limits established by the new Convention for strict liability towards passengers in case of death and personal injury. The minimum limit to be insured or guaranteed is SDR 250,000 per passenger on each

³⁰ Idem.

distinct occasion. The vessel must have a certificate confirming that insurance or other financial security is in force, in accordance to article 4bis (2) et seq.

Under the new Convention, State Parties receive specific instructions to ensure – through their national law – that any ship licensed to carry more than twelve passengers, which enters or leaves a port in their territory, has insurance or other financial security in force³¹. Furthermore, State Parties are entitled to request consultation with the issuing or certifying State, should they have reservations concerning the financial capacity of the insurer or guarantor named in the insurance certificate³².

A controversial issue introduced by the new article 4bis is the possibility of the passenger bringing a claim directly against the insurer³³. This is the first time that direct action is regulated in a Convention not related to the environment and pollution. In the past, only Conventions relating to environmental issues have had such provisions; for example the International Convention on Civil Liability for Bunker Oil Pollution Damage 2001.

According to paragraph 10 of article 4bis, the insurer's liability is limited to SDR 250,000 per passenger on each distinct occasion, even if the shipowner is not entitled to limitation of liability. In such case, the insurer is entitled to invoke the same defences the shipowner would be entitled to invoke, with the exception of bankruptcy and termination of business. Additionally, if there was wilful misconduct on the part of the shipowner, the insurer is entitled to invoke the same as a defence and can not be held liable by the injured party.

The delegations of Norway and Australia expressed during the International Conference³⁴ that they were not in agreement with the decision of allowing the insurer

³¹ Article 4bis (13) of the adopted consolidated text of the 2002 Athens Convention.

³² Article 4bis (9) *idem*.

³³ Article 4bis (10) *ibidem*.

³⁴ See LEG/CONF.13/9 submitted by Norway and Australia.

to use the shipowner's wilful misconduct as a defence. The joint delegations defended their opinion based on the fact that, although it is against public policy to allow the assured to benefit "by wilfully causing its own loss", the issue in this instance is actually to ensure that the passenger would receive the compensation due "even when the carrier has committed an act of wilful misconduct". In an earlier submission during the 83rd session of the Legal Committee³⁵, the Norwegian delegation had already defended the exclusion of the shipowner's wilful misconduct as a defence to be granted to the insurer. Neither submission met with enough support within the International Conference and the Legal Committee.

Here, it is important to point out that P&I Clubs have dealt with major incidents in the past, such as the Estonia, Scandinavian Star and Sleipner, without relying on policy defences.

The issue of compulsory insurance was broadly discussed within the Legal Committee during the IMO Diplomatic Conference on the revision of the Athens Convention. The International Chamber of Shipping (ICS) stated at the time that they believed it was very unlikely that international operators would trade without having their vessels insured, and that they were unaware of any passenger claims not compensated due to lack of insurance. The ICS supported the introduction of compulsory insurance, provided the liability system to be clearly defined³⁶. The International Council of Cruise Lines (ICCL) showed concern regarding the availability and capacity of the insurance market to provide such cover, especially in regards to P&I insurers.³⁷ The International Group of P&I Clubs addressed their concern regarding not only the limits of liability exposure, but also the issues of "direct action" against the insurer and the defences available to the insurer in such cases³⁸.

³⁵ See LEG/83/4/3 submitted by Norway.

³⁶ See LEG/83/4/6 submitted by the International Chamber of Shipping.

³⁷ For further discussion see LEG/83/4/5 submitted by the International Council of Cruise Lines (ICCL).

³⁸ For further discussion see LEG/83/4/4 submitted by the International Group of P&I Clubs.

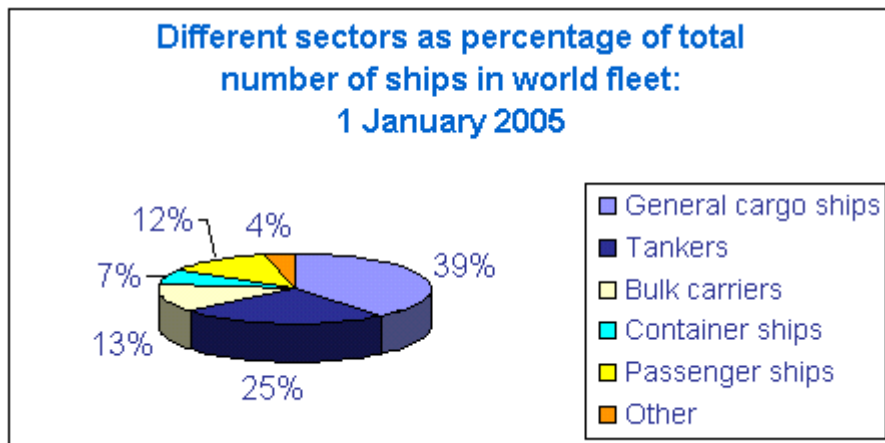
We found of particular interest the point made by the American delegation when submitting their opinion during the 83rd Session of the Legal Committee concerning compulsory insurance³⁹:

“If the passenger claimant pursues a direct action against the insurer, the insurer is exposed to more jurisdictions compared to other conventions permitting direct action, and precludes the insurer from raising any other defences it might have been entitled to invoke in proceedings between insurer and insured. All these provisions create a significant increase in protection on the passenger claimant’s behalf. The purpose of the Athens protocol, in the view of the United States, is to provide adequate passenger protection, but, in a manner that takes into account others interests. The purpose of the Athens protocol is not to shift all risk to the insurer”.

It is undeniable that the introduction of compulsory insurance brings benefits to all parties. As pointed out by the ICS, most (if not all) shipowners that operate internationally have their vessels insured, most likely with P&I Clubs belonging to the International Group. However, such availability of cover has only been possible due to the preservation of the system of limitation of liability.

It is not news for the ones acquainted with the marine insurance industry that a number of P&I Clubs have decided no longer to pursue the cruise business actively, since the exposure has proven to be considerably high. Even the mutuality character of the P&I structure may become endangered by it, given that, in comparison with the rest of the industry, cruise vessels represent just a small percentage of the world’s tonnage, as illustrated below:

³⁹ See LEG83/4/9, submitted by the United States.



*Illustration: relative low contribution of passenger ships to the world's tonnage.
Source: Lloyd's Register Fairplay January 2005.⁴⁰*

2.3.4 “Opt-out” clause

In article 7 paragraph 2, the Protocol allows a State Party to regulate by specific provisions of national law the limit of liability for personal injury and death, provided that the national limit of liability is not lower than the one prescribed in the Protocol.

A State Party that makes use of this option will be obliged to inform the IMO Secretary General about the particular limit of liability adopted, or as to whether they have decided to relinquish shipowner's limitation of liability altogether.

When allowing the State Parties to regulate individually (via national law) the monetary limitation of liability, the drafters of the 2002 Protocol may in fact have endangered the spirit of the convention. Not the Athens Convention *per se*, but the spirit behind the development of such conventions, which is to promote international guidelines to uniform procedures and facilitate not only international commerce but also the relationship between States and its citizens.

⁴⁰ <http://www.marisec.org/shippingfacts/keyfactsnoofships.htm>

We understand that an “opt-out” clause in an international convention dealing with limitation of liability (among other issues) aims at attracting countries that would not ordinarily be willing to become signatories of such conventions. However, we believe that the “opt out” provision works against the harmonization of the limitation of liability regime, which is one of the goals of the Convention.

This point was very well illustrated by the International Chamber of Shipping (ICS) when it stated that “[the ‘opt out’] provision would lead to claims being determined by location, the possibility of identical claimants receiving different treatment, a growth in forum shopping and delays in settlement”⁴¹. Unfortunately, in our view, the ICS’ argument did not meet with the support of the International Conference on the Revision of the 1974 Athens Convention.

Therefore, the State Members will run the risk of seeing the same claim being determined by location (instead of by the Convention), and to witness identical claimants receiving different treatment depending on where they have decided to file their lawsuits. The levels of compensation will vary, maybe even dramatically, and plaintiffs will feel encouraged to pursue “forum shopping”.

2.3.5 New procedure for amendment of limits

Under the rules to which the 1974 Convention is subjected, the limits of liability can only be raised by the adoption of an amendment. Such rules require that a certain number of States adopt and accept this amendment in order to bring it into force.

This procedure proved to be so lengthy and complex that the 1990 Protocol, which was intended to raise the Convention’s limits of liability, has never entered into force and will now be superseded by the 2002 Protocol.

⁴¹ See LEG/CONF13/13 submitted by the ICS.

It is then interesting to note that the drafters of the 2002 Protocol – recognising that there is a need for flexibility when dealing with matters that affect human life and service relationships – have inserted in the Protocol a mechanism for allowing limits to be raised more easily in the future.

The new procedure for amending the limits of liability under the Athens Convention, introduced by the 2002 Protocol, has the intention to allow future raises to be approved more promptly. It is a tacit acceptance system following the procedure described in article 23, and it is summarized below:

1. Any proposal to amend the limits must be requested by at least one-half of the State Parties to the Protocol.
2. The proposal must be sent for circulation to all IMO Member States and all State Parties and discussion in the IMO Legal Committee.
3. The proposal must be adopted by a two-thirds majority of the State Parties to the Convention as amended by the Protocol present and voting in the Legal Committee.
4. It will then enter into force 18 months after its deemed acceptance date. (Acceptance date: 18 months after adoption, unless, within that period, at least one fourth of the States that were State Parties at the time of the adoption of the amendment have communicated to the IMO Secretary-General that they do not accept the amendment.)

We can see in the above-described procedure that the possibility for amendments to the Convention has become considerably more straightforward. This should ease the concerns of the Parties concerning the devaluation of the limitation amounts provided in the Convention. The celerity promoted by article 23 should make possible for the State Parties to revise and update the compensation amounts in order to protect them against devaluation and depreciation.

2.3.6 Final remarks on the 2002 Protocol⁴²

As per August 2005 the 2002 Protocol had not yet entered into force. Once adopted and ratified, the 2002 Protocol (revised articles 1 to 22 of the 1974 Convention in addition to articles 17 to 25 of the Protocol and Annex) will constitute and be named the 2002 Athens Convention relating to the Carriage of Passengers and their Luggage by Sea. States ratifying the 2002 Protocol will be obliged to renounce the former Convention and Protocols, if the case might be.

We look forward to seeing how the innovations brought forth by the 2002 Protocol will affect in practice both the shipping industry as well as the marine insurance industry.

⁴² Further information concerning the 2002 Protocol to the Athens Convention, including transcripts from the Diplomatic Conference, articles and other materials, can be found in Prof. Rosæg's website at <http://folk.uio.no/erikro/WWW/corrgr/index.html>

3 Shipowner's liability towards passengers and its limitations

3.1 Historic overview of liability limitation concerning maritime claims

Limitation of liability is a well-established principle amongst maritime nations. One of the earliest accounts concerning the shipowner's right to limitation of liability is found in the Italian Amalphan Tables dating from the 11th century. However, academic researchers believe that the concept has actually originated as early as 454 AD⁴³. Historically, limitation of liability was broadly recognized by most maritime jurisdictions during the 16th and 17th centuries. The doctrine of limited liability has been discussed by Grotius as early as 1625⁴⁴.

However, the first international convention to regulate the carriage of passengers by sea – therefore regulating the shipowner's right to limit his liability towards passengers – was only conceived in the early 1960's⁴⁵. At that time there was a rising concern related to the absence of international legislation, which led to the adoption of the Passenger Convention of 1961⁴⁶ and the subsequent Luggage Convention of 1967⁴⁷. Neither of these conventions received a wide acceptance. The 1961 Passenger Convention was ratified by 12 countries and the 1967 Luggage Convention was ratified by only 2 (thus

⁴³ James J. Donovan, "The Origins and Development of Limitation of Shipowners' Liability", 53 Tul. L. Rev. 999, 1001 (1979).

⁴⁴ *Idem* at 1003 *Id.* see also *Limitation of Liability for Maritime Claims* (1st ed. 2001), Chen, Xia – Kluwer Law International at xiii.

⁴⁵ International Convention for the Unification of certain Rules Relating to the Carriage of Passengers by Sea, adopted at Brussels, 29 April 1961.

⁴⁶ See footnote 6.

⁴⁷ See footnote 7.

never coming into force). The 1974 Athens Convention combines in one instrument many of the rules introduced by those conventions.

3.2 The influence of the Athens Convention limitation system per country

3.2.1 United Kingdom

Limitation of liability under maritime law in the United Kingdom has only been provisioned after 1733, triggered by *Boucher v Lawson*⁴⁸. The earliest legislation relating to limitation of liability concerning maritime disputes is found in section 503 of the 1894 Merchant Marine Act. The United Kingdom is also a signatory country to the 1976 Convention on Limitation of Liability for Maritime Claims⁴⁹.

The 1974 Athens Convention was given force of law in the United Kingdom by virtue of section 14 of the 1979 Merchant Shipping Act, and was annexed as Schedule 3 to the Act. Section 14 brought the Convention into force in the UK on 30 April 1987. (Prior to that, the United Kingdom gave the Convention force of law domestically, with effect from 1981.)

The Athens Convention is now incorporated into UK law by sections 183 and 184 of the Merchant Shipping Act 1995. The text of the Convention is set out in Parts I and II of Schedule 6 to that act⁵⁰.

In general, British courts have upheld the Athens Convention limits of liability when the court finds that the convention is applicable to the matter. Such is the case in “The

⁴⁸ *Boucher v. Lawson*, (1734) CAS. Temp. Hardw.85, mentioned in Donovan, *ibid*, at 1007 *id* Chen at xiv.

⁴⁹ *Limitation of Liability for Maritime Claims* (3rd. Ed 1998), Griggs, Patrick – LLP – at 5.

⁵⁰ *Merchant Marine Legislation* (2nd. Ed. 2004), Fogarty, Aengus.

Lion” [1990] 2 Lloyd’s Rep. 144, where the court found that “the Athens Convention applied to the contract by virtue of s.16 of the Merchant Shipping Act 1979. The text of the Convention was set out in Part I of Schedule 3 and was to have effect under English law.” Therefore, continued the learned judge, the owners of the vessel were “entitled to rely on the provisions of the Athens Convention notwithstanding that they had failed to comply with the requirements of the Statutory Instrument”.

We believe, however, that it is interesting to advise the reader that there has been conflict, on occasion, between the provisions of the Athens Convention and the provisions of the Package Travel, Package Holidays and Package Tours Regulations of 1992. In such cases, it is up to the courts to decide which statute applies, taking into consideration the nature of the claim. Interesting examples of such decisions can be found in *Lee v Airtours Holidays Ltd.* [2004] 1 Lloyd’s Rep. 683 and *Norfolk v My Travel Group PLC* [2004] 1 Lloyd’s Rep. 106.

3.2.2 Norway

Norway is a signatory to, and has ratified the 1976 Convention on Limitation of Liability for Maritime Claims, which was incorporated in the Norwegian Maritime Code under Chapter 9⁵¹.

There can be found regulations concerning the carriage of passengers in the 1893 Norwegian Maritime Code. Later, in 1983, those rules were amended in accordance to the provisions of the 1974 Athens Convention, even though Norway has never ratified the same⁵². The main reason for Norway not to ratify the Athens Convention was that the liability limitation amounts provided in that instrument were not considered to be satisfactory.

⁵¹ Further information concerning the historical development of the limitation of liability rules under Norwegian law can be found in NOU1980:55 *Begrensning av rederansvaret*.

⁵² *Scandinavian Maritime Law*, Falkanger, Bull, Brautaset (2nd ed. 2004) at 179.

Shipowner's liability is limited according to the provisions in the Norwegian Maritime Code, Chapter 9. However, liability towards passengers concerning personal injury, death or luggage claims is limited in accordance to the provisions of Chapter 15⁵³. The provisions of Chapter 15 are based on the 1974 Athens Convention. Additional limitation in passenger cases may be possible under the provisions of Chapter 9⁵⁴.

Under Norwegian law, in section 422 of the Maritime Code, the liability of the shipowner in case of personal injury to passengers shall not exceed SDR 175,000 for each passenger. These limits are in alignment with the 1990 Protocol to the 1974 Convention⁵⁵.

Norway – as well the other Scandinavian countries, Germany, France, and the Netherlands – is among the few countries that have incorporated the 1974 Convention's liability system into their national law, but have chosen not to adopt or ratify the Convention.

As a general rule behind such phenomenon is the dissatisfaction of those countries concerning the liability limitation levels provided in the Convention.

3.2.3 United States of America

In the United States, the subject of limitation of liability was first introduced and regulated by the state legislation of Massachusetts in 1819 and Maine in 1821. Both statutes were based on the 1734 English statute. Later on, in 1851, the United States Congress, prompted by *New Jersey Steam Navig. Co. v The Merchants' Bank of*

⁵³ See Norwegian Maritime Code §§ 401-432 concerning the carrier's liability towards the passenger

⁵⁴ Scandinavian Maritime Law, Falkanger, Bull, Brautaset (2nd ed. 2004) at 179.

⁵⁵ For additional discussion concerning the limitation of liability amounts under Norwegian law see also Innst. O. nr.101(2004-2005).

Boston (The Lexington)⁵⁶, enacted the Limitation of Liability Act⁵⁷. The United States have not adopted the 1974 Athens Convention – indeed, the United States have never been part of any international maritime conventions on limitation of liability – and American law does not allow the shipowner to limit his contractual liability towards the passenger concerning personal injury and death⁵⁸.

Nonetheless, on occasion and in special circumstances, American courts have respected the limits of liability provided under the Athens Convention. If the contract of carriage is regulated by the Athens Convention and the amounts of limitation are clearly stated in the contract, provided that the vessel does not fly under American flag, has not touched American ports, and the incident did not happen in American waters, the courts have occasionally enforced the above-mentioned limits.

For example: in *Becantinos v Cunard Line Ltd.* 1991 WL 64187 (S.D.N.Y), the claimants had their contract of carriage issued in a contracting State to the Athens Convention, the voyage also started from a contracting State, and the damage in question occurred in the high seas. The court found that the terms of the Athens Convention, which were incorporated by reference into the contract of carriage, were binding on the claimants. And therefore, the limitation provided under the Convention was upheld⁵⁹.

It is relevant at this point to draw the reader's attention to the fact that, while American courts will usually not enforce the terms of the Athens Convention, it is not unusual for the same courts to enforce the forum selection clause stated in the contract of carriage

⁵⁶ *New Jersey Steam Navig. Co. v The Merchants' Bank of Boston (The Lexington)*, 47 U.S. (6 How.) 334 (1848) mentioned *ibid.* Chen at xiv.

⁵⁷ Act of March 3, 1851, ch. 43, 9 Stat. 653 (codified as re-enacted and amended at 46 U.S.C. App. 181-189).

⁵⁸ 46 U.S.C. app. § 183 c(a).

⁵⁹ Concerning the applicability of the Athens Convention in the American legal system see also *Chan v Society Expeditions, Inc.*, 39 F.3d 1398, 1409 (9th Cir. 1994) and *Wallis v. Princess Cruises*, 306 F.3d 827 (9th Cir. 2002).

(once again, provided that the vessel does not fly under American flag, has not touched American ports and the incident did not happen in American waters). If a suit is filed before an American court in this instance, the court shall dismiss the case for lack of jurisdiction⁶⁰. The principle is to safeguard the terms and conditions of the contract of carriage, even if the passenger chooses to ignore the forum selection clause provision when filing suit.

3.3 The 1976 Convention on Limitation of Liability for Maritime Claims

At this point it is important to be aware of the somewhat intricate relationship between the 1974 Athens Convention and the 1976 LLMC. These conventions provide very different limitation systems; the 1976 convention provides for a global limitation of liability for ships, whereas the Athens Convention establishes both liability and limitation of liability concerning passengers, within the scope of personal injury, death, and damage or loss of luggage. As observed in “Limitation of Liability for Maritime Claims” (1st ed. 2001) by Xia Chen, “any liability for passengers’ personal injury and death will be determined by the Athens Convention even though it may be limited in accordance with Article 7 of the 1976 Convention”⁶¹.

The 1974 Convention and the 1976 LLMC also apply different principles when providing the basis for calculating total limits of liability. Whereas the 1974 Convention employs the actual number of passengers carried onboard as the basis for establishing the total limit of monetary liability (i.e., the limitation is per carriage/per passenger, in accordance with article 7(1)), the total limit in the 1976 LLMC is established by multiplying the individual compensation by the number of passengers the vessel is

⁶⁰ See *Effron v Sun Line Cruises, Inc.* 67 F.3d 7, 8 (2nd Cir. 1995) and *Burns v Radisson Seven Seas Cruises, Inc.* 2004 Fla. App. LEXIS 2710.

⁶¹ *Limitation of Liability for Maritime Claims* (1st ed. 2001), Chen, Xia – Kluwer Law International at 90.

authorised to carry according to the ship's certificate, regardless of how many passengers were in fact onboard during the carriage⁶².

As per article 7, paragraph 1 of the 1976 LLMC (as amended by the 1996 Protocol which entered into force in 13 May 2004)⁶³, the limit of liability for claims for loss of life or personal injury to passengers has been increased from SDR 46,666 to SDR 175,000. Hence, compensation under the 1976 LLMC would be calculated by multiplying that amount by the number of passengers that the vessel is certified to carry. The 1996 Protocol to the 1976 LLMC has abolished the maximum limit of SDR 25 million per voyage, which had been originally ascribed by the Convention. The monetary maximum limit will be determined exclusively by the number of passengers that the vessel is authorised to carry according to its certificate. This means, in practical terms, that the shipowner of a vessel certified to carry 1,000 passengers will be entitled to limit his liability in SDR 175 million (approximately USD 257 million).

In case of conflict between the 1974 Athens Convention and the 1976 LLMC, article 19 of the Athens Convention regulates that "the convention shall not modify the rights or duties of the carrier, performing carrier, and their servants or agents provided for in the International Conventions relating to the limitation of liability of owners of seagoing ships". As a result, theoretically, a convention on global limitation (in this case, the 1976 LLMC) should, in case of conflict, prevail over the 1974 Convention. Here we call to the reader's attention that, in the jurisdictions researched, we were not able to find a court decision involving a conflicting situation concerning the application of liability limitation between the 1974 Athens Convention and the 1976 LLMC.

⁶² See articles 6 and 8 of the 1976 LLMC and articles 3 and 5 of the 1996 Protocol to the 1976 LLMC.

⁶³ Article 7 (1) of the 1976 LLMC: In respect of claims arising on any distinct occasion for loss of life or personal injury to passengers of a ship, the limit of liability of the shipowner thereof shall be an amount of 175,000 Units of Account multiplied by the number of passengers which the ship is authorized to carry according to the ship's certificate.

3.4 Limits for compensation under the Athens Convention and the 2002 Protocol

As we have listed above in 2.2.4 and 2.3.3, both the 1974 Athens Convention⁶⁴ and the 2002 Protocol⁶⁵ allow the shipowner to limit his liability exposure towards passengers in case of personal injury, death, delay and loss of or damage to luggage.

The 2002 Protocol, once in force, will substantially increase the limits of the shipowner's liability, as seen in the comparative table below:

⁶⁴ In articles 7 and 8 of the 1974 Athens Convention as amended by the 1976 Protocol.

⁶⁵ In articles 6 and 7 of the 2002 Protocol.

Type of Claim	1974 Athens Convention ⁶⁶ (How it is now)	2002 Protocol ⁶⁷ (How it will be)
Compensation to a passenger in case of injury or death.	Maximum of SDR 46,666 per passenger per carriage.	Maximum of SDR 250,000 per passenger on each distinct occasion. If the loss exceeds that limit, the carrier is further liable up to a limit of SDR 400,000 (about USD 587,000) per passenger on each distinct occasion, unless the carrier proves that the incident which caused the loss occurred without the fault or neglect of the carrier.
Compensation for loss or damage to cabin luggage.	The compensation is limited to SDR 833.	The compensation is limited to SDR 2,250 per passenger, per carriage.
Compensation for loss or damage to a vehicle.	The compensation is limited to SDR 3,333.	The compensation for loss of or damage to vehicles, including all luggage carried in or on the vehicle, is limited to SDR 12,700 per vehicle, per carriage.

⁶⁶ See articles 7 and 8 of the 1974 Athens Convention, as amended by the 1976 Protocol.

⁶⁷ See articles 6 and 7 of the 2002 Protocol.

There is still considerable discussion surrounding the limitation amounts. Several countries do not deem the above mentioned limits appropriate when dealing with compensation for injury or loss of life. While we understand the worth of this discussion, the purpose of this paper is not to argue whether or not the amounts currently set as limits for the shipowner's liability are adequate, but rather to examine the institution of limitation of liability within the Athens Convention.

To be sure – as we have stated earlier – we concur that monetary amounts are perceived differently from one country to another. The discernment may even vary within different regions in the same country. (As a claims handler, working for a Norwegian P&I Club, the writer has observed that even cultural elements play a considerable role when passengers claim compensation for incidents that took place onboard a vessel.) Yet, as we will further advocate later, we believe that the shipping and marine insurance industries depend, for their economic viability, on the limitation of liability institution, and we therefore support all efforts to harmonise and strengthen it.

Moreover, researching court decisions concerning incidents that resulted in death or personal injury to passengers in connection with sea carriage will lead to very few examples. Indeed, it is not the norm for passenger claims to end up in court. On the contrary, shipowners and their insurers (in this particular instance, P&I Clubs) prefer to settle the matter without litigation. It saves time and money on both sides and reduces the strain in the relationship between the passenger and the shipowner. This leads us to conclude that most passenger claims are dealt with on a case-by-case basis, and settled off-court within the established limitation amounts. (Of course, not all disputes can be resolved amicably, and in such cases litigation is unavoidable.)

Another issue that has caused concern to the IMO Legal Committee when dealing with the limitation amounts is inflation. Many countries participating in the conference and follow up discussions regarding the 2002 Protocol have uttered that, even if the

monetary limits set by the Protocol would be considered acceptable for now, in a few short years they would be significantly outdated⁶⁸.

We find this argument relevant and legitimate in principle. However, we do not regard raising the limitation amounts to figures so extremely high that could endanger the cruise industry as a sensible decision.

The Convention for the Unification of Certain Rules for International Carriage by Air, Montreal, 28 May 1999, in its article 24, has provided an interesting remedy against the inflation issue⁶⁹. It establishes that, every five years, the limits of liability shall be

⁶⁸ See LEG/CONF.13/8, submitted by Norway.

⁶⁹ Article 24 (and paragraphs) of the 1999 Montreal Convention: Review of limits .

1. Without prejudice to the provisions of Article 25 of this Convention and subject to paragraph 2 below, the limits of liability prescribed in Articles 21, 22 and 23 shall be reviewed by the Depositary at five-year intervals, the first such review to take place at the end of the fifth year following the date of entry into force of this Convention, or if the Convention does not enter into force within five years of the date it is first open for signature, within the first year of its entry into force, by reference to an inflation factor which corresponds to the accumulated rate of inflation since the previous revision or in the first instance since the date of entry into force of the Convention. The measure of the rate of inflation to be used in determining the inflation factor shall be the weighted average of the annual rates of increase or decrease in the Consumer Price Indices of the States whose currencies comprise the Special Drawing Right mentioned in paragraph 1 of Article 23.

2. If the review referred to in the preceding paragraph concludes that the inflation factor has exceeded 10 percent, the Depositary shall notify States Parties of a revision of the limits of liability. Any such revision shall become effective six months after its notification to the States Parties. If within three months after its notification to the States Parties a majority of the States Parties register their disapproval, the revision shall not become effective and the Depositary shall refer the matter to a meeting of the States Parties. The Depositary shall immediately notify all States Parties of the coming into force of any revision.

3. Notwithstanding paragraph 1 of this Article, the procedure referred to in paragraph 2 of this Article shall be applied at any time provided that one-third of the States Parties express a desire to that effect and upon condition that the inflation factor referred to in paragraph 1 has exceeded 30 percent since the previous revision or since the date of entry into force of this Convention if there has been no previous revision. Subsequent reviews using the procedure described in paragraph 1 of this Article will take place at five-year intervals starting at the end of the fifth year following the date of the reviews under the present paragraph.

reviewed, and the rate of inflation will be taken into consideration. This “inflation factor” is the average of the annual inflation rates in the Consumer Prices Indices of the States whose currencies comprise the Special Drawing Rights valuation.

An objection to this principle could be raised by stating that the countries whose currencies belong to the SDR basket suffer low inflation rates when compared, for example, with third-world countries, and hence the liability limits could become distorted over time across different jurisdictions. This objection fails to recognise that the SDR is a strong currency unit precisely because it is compounded by strong currencies, and that the exchange rate of those strong currencies will also experience considerable valuation against the currencies in countries with higher inflation. Hence, even if the monetary correction is modest, the liability limit should not be eroded by inflation in any significant way.

We believe, therefore, that the combination of employing an index comprised by strong currencies (the SDR) with the enhanced possibility for amendments to the limits in Convention made available by the provisions of Article 23 of the 2002 Protocol (as seen in 2.3.5 above) should suffice to enable the protection of the limitation limits from the effects of inflation. Nonetheless, we agree that a provision demanding periodic reviews of the limits (alas, not considered during the drafting of the 2002 Protocol) would have been beneficial.

3.5 The commercial importance of the liability limitation

There have been numerous discussions surrounding the issue of liability limitation, not only regarding rules, regulations and monetary aspects, but also questioning whether or not shipowners should have the right to limit their liability towards passengers at all.

It is our opinion that the limitation of liability plays an important role in the financial dependability of both the shipping and marine insurance industries, and thus any efforts to ensure it and harmonise it are of major significance. As Christopher Hill presented in “Maritime Law” (6 ed.) at 394:

“Centuries ago a serious maritime disaster would very likely have resulted in the instant bankruptcy of the shipowner.

[...]

“Recognition of the inescapable economic fact that aggrieved third-party claimants would not recover their losses where the shipowners’ adjudged liability far exceeded his assets was the essence of the pro-limitation argument. Looking at it from a creditor’s viewpoint, it is surely preferable to live in the certainty of obtaining a substantial percentage of the compensation due rather than face the uncertainty of not knowing whether or not they would receive the much larger sum to which they had a right.”

While it is true that almost all cruise ships and passenger ferries have some sort of insurance coverage agreement (most likely P&I insurance), the marine insurance industry relies on the limitation of liability rules provided in the different jurisdictions as a key factor when assessing the provision of coverage and calculating premium rates and deductible amounts. If the concept of limitation of liability were to be removed altogether, premium rates and deductible amounts would necessarily increase in order to provide the financial viability for the current levels of coverage. Either that, or insurers would have to reduce their provision of coverage.

If the limitation were to be relinquished only in regards to liability towards passengers – as some have suggested⁷⁰ – then, as we have argued, the mutuality aspect of P&I clubs could be at risk (since only 12% of the world’s tonnage would be affected), rendering the tonnage from passenger vessels even less attractive than it already is.

At the end of the day, even if insurers decided to uphold their provision of coverage by raising premium rates and deductible amounts, shipowners would have precious little

⁷⁰ See, for example, Haddon-Cave, Charles, in “Limitation Against Passenger Claims: Medieval, Unbreakable, and Unconscionable”, CMI Yearbook 2001 at, for instance, 242. See also his citing Lord Mustill’s 1992 speech at 240.

alternative in this situation but to pass that additional cost on to their customers (i.e., the passengers). Since the vast majority of cruise passengers never encounter the need to file a claim, the elimination of the system of limitation of liability would come, in our view, in their detriment, given that all passengers would have to carry the burden of the additional cost.

4 Conclusion

We have endeavoured in the preceding sections to provide the reader with an understanding of the institution of limitation of liability under maritime law and its implications when applied to the carriage of passengers. Our focus has been on the provisions concerning this subject brought forth by the 1974 Athens Convention and the 2002 Protocol.

Section 2 of this paper presented the Athens Convention itself. We started off by presenting the 1974 Convention and the 2002 Protocol, and outlining the points of difference between the two instruments. We observed the different approaches regarding systems of liability (i.e., fault-base liability in the 1974 Convention versus strict liability in the 2002 Protocol), while also exploring the implications concerning the issue of burden of proof and shipowner's scope of liability.

We then proceeded to examining the innovations drafted in the 2002 Protocol and their impact on the way of determining and limiting the shipowner's liability. The introduction of compulsory insurance and the possibility of passenger's direct action against the shipowner have been assessed and their consequences considered. We discussed the "opt-out" clause issue, defending that, although it may seem as a beneficial solution in theory, it goes against the spirit of harmonisation intended by international conventions in general. We have in addition pointed out that the new procedure for amendment of liability limits under the 2002 Protocol should ensure celerity to that process, and consequently diminish the risk of outdated limits.

In Section 3 we examined in further detail the subject of shipowner's limitation of liability. A historic outline of liability limitation within the scope of maritime claims was provided, in which we have shown that this institution can be traced as far back as

the 11th century, with some scholars postulating that it could have been originated as early as the 5th century. In demonstrating that the shipowner's right to limit his liability can be traced to medieval times, we have hopefully established that it is – at the very least – fair to assume that it will not easily cease to exist. (It is a commonly accepted principle that long-standing granted rights are rather difficult to remove.)

We have then advanced towards examining how the limitation of liability system from the Athens Convention has influenced three major maritime nations. We turned to the United Kingdom for a view on a country that has both signed and ratified the Convention; we looked into Norway and its peculiar decision of not ratifying the convention and yet implementing most of its regulations (with the notable exception of the actual limitation amounts); and finally we examined the stance of the United States of America, which, having neither signed nor ratified the Convention (and hence maintained consistency with their established position of not being part of maritime conventions on limitation of liability), have occasionally respected the Convention's limits of liability when some special circumstances were in place⁷¹.

The somewhat intricate link between the 1974 Athens Convention and the 1976 Convention on Limitation of Liability for Maritime Claims has then been investigated, and we observed that, even though any liability for passengers' personal injury and death is to be governed by the terms of the 1974 Athens Convention, cases of conflict between these two instruments will theoretically lead to the prevailing of the 1976 LLMC.

The liability limitation amounts instituted by the 1974 Convention (as amended by the 1976 Protocol, and as currently in force) were then compared side by side with the limits proposed in the 2002 Protocol (which significantly increases the limitation amounts). We have briefly mentioned the ongoing discussion regarding the adequacy of those limits and submitted that, even though the perception of monetary amounts may vary from country to country, the institution of liability limitation is nonetheless of

⁷¹ See *Becantinos v Cunard Line Ltd.* 1991 WL 64187 (S.D.N.Y.).

key importance to the industry, and should therefore be harmonised and strengthened. We have also observed that very few claims lead to actual lawsuits, and are thus settled within the currently enforced amounts.

The impact that inflation will have on the instituted amounts has then been considered, and our proposition has been that, while we consider this to be a valid point – and would have been in favour of a provision demanding periodic reviews of the limits – we trust that the combination of the provisions in article 23 (as introduced by the 2002 Protocol) with the employment of an index comprised of strong currencies (such as the SDR) should provide a sustainable platform for protecting the limits against the effects of inflation.

Finally, we have put forward our case for acknowledging the commercial importance of the institution of shipowner's limitation of liability. We have supplied a general view on how the limitation of liability provides a cornerstone for the entire marine insurance industry in its process of calculating coverage costs (i.e., premiums and deductibles), and explained why we believe that the elimination of such system would come to the detriment of most passengers, who – while never facing the need to file a claim – would have to carry their share of the additional insurance costs incurred by the shipowner.

While some sectors have defended the abolishment of the rules on limitation of liability by claiming that P&I insurers provide their Members with unlimited cover, we must call to the reader's attention that the insurers can only operate in such fashion because leading maritime countries have established in their national laws the system of limitation of liability. Once the shipowner has the right to limit his liability, the extent of such limitation is precisely what allows the insurer to offer the levels of coverage currently provided.

In other words, to point at the P&I insurers' "unlimited" coverage, and use it as an argument for abolishing the limitation of liability is to commit a logical fallacy, as the limitation of liability is a key element in the P&I insurance system, and the coverage is not in fact unlimited, but restricted by the shipowner's limitation of liability. Without

the limitation of liability, it becomes impossible for P&I insurers to maintain their coverage levels.

After the terrorist attacks of 11 September 2001 much was discussed about the capacity of the insurance and reinsurance industry. It was clear, at that point, that removing the limits of liability would put a massive burden on the marine insurer. Not only concerning the eventual compensations that would have to be paid to their assureds, but more importantly, the increase in premiums that would result in order to support those liabilities.

In “Marsden on Collisions at Sea” (13th ed.) at 591 we find the following assertion: “On a practical level limitation most directly benefits the insurers of shipowner’s liabilities and in turn, benefits the shipowners in the lower premiums they are required to pay for such insurance cover. Claimants also, paradoxically, gain the benefit of limitation in that they can be more confident that the shipowner will have been able to obtain insurance in respect of liabilities incurred and that there will be insurance funds available to satisfy their claims in part if not in full”.

As Leslie J. Buglass puts it, “The concept of unlimited liability ignores the problem of realistic insurable limits”.⁷²

We sustain that, without a limitation of liability system, serious repercussions in different economic and social sectors could follow. A worst-case scenario for the cruise industry could lead to circumstances where the shipowner would potentially not be able to bear the insurance costs without significantly raising the passenger-ticket prices.

The system of limitation of liability, however, can be threatened by the lack of international uniformity. Claimants may feel encouraged to “pick and chose” jurisdictions before filing a lawsuit, based solely on a jurisdiction’s particular limitation

⁷² Leslie J. Buglass, *Limitation of Liability from a Marine Insurance Viewpoint*, 53 Tul. L. Rev. 1364 (1979).

system, putting in check the principles of part autonomy. “Forum-shopping” contributes to “spreading out” claims, and hence raising the costs of defence and claims handling, not only on the side of the shipowner but also generating inconveniences for the claimants, contributing for delay in handling of claims and compromising the promptness of settlements.

As the American delegation pointed out during the 83rd Session of the Legal Committee⁷³: “The purpose of the Athens protocol [...] is to provide adequate passenger protection, but, in a manner that takes into account others interests. The purpose of the Athens protocol is not to shift all risk to the insurer”.

We worry, however, about a rising trend in behaviour, described (in a somewhat politically incorrect way) by Charles Haddon-Cave in his article entitled “Limitation Against Passenger Claims: Medieval, Unbreakable, and Unconscionable” (CMI Yearbook 2001). In it, Mr. Haddon-Cave points out that:

*“[...] there is a growing philosophy (which probably originated in Texas) that if somebody is hurt, then it must be somebody’s fault – and they should pay full compensation”*⁷⁴.

In our line of work, we have witnessed cases of passengers falling down stairwells while under heavy influence of alcohol; slipping and falling on deck *during* heavy rain, and then complaining that the shipowner was negligent because the deck was *wet*; and even scalding *both* feet in a bathtub that the passenger had just filled.

We believe that the passengers should be motivated to take responsibility for their own well being. Not only by acting responsibly while onboard the vessel, but also by taking private, extra, insurance to cover incidents during the carriage. Many cruise lines

⁷³ See LEG83/4/9, submitted by the United States.

⁷⁴ At 234.

encourage their passengers to take on private insurance for the voyage. We cannot see the rationale behind turning the shipowner into the passenger's sole insurer.

In the olden days of shipping, the carriage was referred to as the "sea adventure". The parties involved were aware of the risk that the sea voyage would entail.

Accidents happen. That is a fact. Even in today's highly advanced technological world, the design, programming and operation of computers and machines are in the hands of fallible human beings. For as long as the human factor endures, defects and malfunctions will continue to exist.

While it is true that as technology advances these defects and malfunctions decrease considerably, one can not reasonably expect perfection at all times. And that goes for the shipping industry too.

When liability can be ascribed to the shipowner, under the Athens Convention, the passenger has the right to receive compensation. That is a sound and good principle, and a legal achievement. But, by the same token, the shipowner has the right to limit his liability exposure. The magnitude and the worth of such limitation under the Athens Convention and the 2002 Protocol has been the focal point of our discussion in this paper.

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