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Abstract

This article seeks to analyse the 2002 Athens Convention in so far as direct action against the mandatory insurer is concerned. The author maintains that it is an exemption to the main rule of privity of contract. The article starts with an explanation of the legal sources of direct action, also taking into consideration the regional regime within the European Union and the European Economic Area (Regulation EC No. 392/2009). It also pays special attention to the coverage of war and terror risks and to the special regulation of these under the 2006 IMO Guidelines. Next, the article analyses the competent courts and the national law applicable to such direct action. Finally, it turns to looking at defences that can or cannot be invoked by the insurer against the claimant and also at insurance coverage limitations per passenger and per ship (1996 LLMC).

1. Legal regime

To begin, a clear and precise explanation is necessary regarding the relationship between the legal sources for direct action against the liability insurer of carriers of passengers by sea in the event of incidents. The legal sources to which we will refer are: the 2002 Athens Convention, which applies to international shipping; the 2006 IMO Guidelines, which recommend that the ratifying State makes a reservation to limit liability for war and terror; and Regulation (EC) No. 392/2009, which extends the scope of the 2002 Athens Convention to apply to national sea transport and also introduces a regional regimen within the European Union (EU) / European Economic Area (EEA), which applies in parallel to the 2002 Athens Convention.

First of all, the 2002 Athens Convention[1] establishes an international regime of liability for carriers of passengers by sea in the event of incidents, requiring compulsory liability insurance to cover death and personal injuries, and enabling direct action against the mandatory insurer. Any performing carrier operating a vessel licensed to carry more than twelve passengers must take out mandatory insurance (art. 4*bis* 2002 Athens Convention). In practice, it is usually the shipowner who takes out liability insurance for marine risks with a mutual P&I club. This is mainly done with one of the P&I clubs that are part of the so-called International Group of P&I clubs (hereinafter, the "IG P&I clubs").[2] Globally, these clubs insure most of the passenger vessels dedicated to

[1] The «2002 Athens Convention» is the consolidated text of the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 1974 and the Protocol of 2002 to the Convention. The Protocol was adopted on 1 November 2002 under the auspices of the International Maritime Organization (IMO). The 2002 Athens Protocol modifies the 1974 Athens Convention and establishes in Article 15 that the two instruments shall, as between the Parties to the Athens Protocol, be read and interpreted together as one single instrument.

[2] The IG P&I clubs has a permanent representation in the IMO. The reason for this cooperation between States and the insurance market is found in the leadership of these P&I clubs.

international transport.[3] However, the performing carrier can take out insurance with commercial insurers instead of IG P&I clubs (the so-called "alternative market"). In fact, art. 4*bis* 2002 Athens Convention even admits as valid "other financial security, such as the guarantee of a bank or similar financial institution".

Secondly, the 2006 International Maritime Organization Guidelines for the implementation of the 2002 Athens Convention (hereinafter, the "IMO Guidelines") must also be taken into consideration.[4] The standard P&I insurance from the P&I clubs included in the IG P&I clubs excludes coverage in case of liability of the insured carrier in the event of war or terrorism. It is therefore compulsory for the shipowner to take out other insurance. It would be possible to have only one liability insurance to cover marine and war risks.[5] However, both risks are usually covered by different insurers. The war market is even more specialised and has a more limited number of insurers.

Thirdly, Regulation (EC) No. 392/2009 of the European Parliament and of the Council of 23 April 2009 on the liability of carriers of passengers by sea in the event of incidents, is binding in its entirety and directly applicable in all Member States of the EU/EEA, irrespective of whether a State

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3 See its webpage igpandi.org

4 E Røsæg, 'The Athens Convention on passenger liability and the EU', in J Basedow and others (eds) *The Hamburg lectures on maritime affairs 2007–2008 (*Springer, Heidelberg Dordrecht London New York, 2010) 57, hightlights the "unorthodox solution" of the IMO Legal Committee issuing a set of guidelines that recommended that the prospective States Parties should make a reservation when ratifying the Convention. A. Dani, 'L'assicurazione obbligatoria e gli orientamenti dell'IMO' (2012) Diritto dei trasporti 655, remarks that this technique is not in accordance with International law concerning the formation of the treaties.

5 Section 2.2 IMO Guidelines says that "*war insurance shall cover liability, if any; for the loss suffered as a result of death or personal injury to passenger caused by: war, civil war, revolution, rebellion, insurrection, or civil strife arising there from, or any hostile act by or against a belligerent power; capture, seizure, arrest, restraint or detainment, and the consequences thereof or any attempt thereat; derelict mines, torpedoes, bombs or other derelict weapons of war; act of any terrorist or any person acting maliciously or from a political motive and any action taken to prevent or counter any such risk; and confiscation and expropriation*".

is a party to the 2002 Athens Convention.[6] Regulation (EC) No. 392/2009 shall apply from the date of entry into force of the Athens Convention for the Community,[7] and in any case, from no later than 31 December 2012 (art. 12). However, as regards national sea transport, art. 11 Regulation (EC) No. 392/2009 included transitional provisions: every single State could defer the application of this Regulation until 31 December 2016 for class A ships, and until 31 December 2018 for class B ships.

In principle, the provisions of Regulation (EC) No. 392/2009 would take precedence over the national laws of the EU/EEA States,[8] but some questions are not fully regulated by European law and need to be supplemented by domestic laws. For example, the absence of uniform rules determining the recoverable damage results in a threat to uniformity, as national law regimes governing recoverable damage differ to a significant extent.[9]

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6 Most of the EU/EEA States are parties to the 2002 Athens Convention (see status of conventions on imo.org).

7 According to art. 17.2.b and art. 19 of the Athens Protocol, Regional Economic Integration Organisations may conclude the Athens Protocol. The European Community approved accession to this Protocol through Decision 2012/22 on 12 December 2011, with the exception of articles 10 and 11, and through Decision 2012/23 on 12 December 2011, as regards articles 10 and 11 Protocol on jurisdiction and the recognition and enforcement of judgments. Accession by the European Union (EU) was effected by the deposit of an instrument on 15 December 2011 (see Imodocs PAL.4/Cir.5, 19 December 2011).

8 European Commission, 'Support study to the evaluation of the Regulation (EC) 392/2009. Final report' (2017) vi. Available in publications.europa.eu (accessed 17January 2018).

9 European Commission, 'Support study to the evaluation of the Regulation (EC) 392/2009. Final report' (2017) 35, adds that the Member States of the European Union can be categorised into four systems based on the civil liability legislation of the carrier: a) the French system (consisting of France, Belgium, Spain and Italy); b) the German system (consisting of Germany, Netherlands, Austria and Switzerland); the Common law systems (United Kingdom and Ireland); and d) Scandinavian systems. Each system sets out differences regarding the amount of compensation, the type of compensable damages and the compensation for personal injury. For example, in Spain, courts apply analogically the scale of road traffic incidents to personal injuries suffered in other areas, such as air incidents. E Olmedo Peralta, 'New requirements and risk distribution for the liability of carriers of passengers by sea in the event of incidents under Regulation (EC) no. 392/2009' (2014) 49 3 European Transport Law, 269, says that the same passenger incident can be addressed differently in each country.

2. The concept of direct action

The provisions of mandatory insurance and direct action included in the 2002 Athens Convention are part of the long tradition of other international treaties that have been agreed under the auspices of the IMO.[10]

Direct action against the insurer of the performing carrier of the passenger ship is a privilege recognised by art. 4*bis* 10 of the 2002 Athens Convention. In case of death or personal injury to passengers by sea under the Convention, any claim for compensation covered by insurance may be brought directly against the insurer. It is a procedural right of action conferred on an injured party by the 2002 Athens Convention upon the occurrence of an accident.

Direct action is an exception to the rule of privity of contract, given that the claimant is not a party to the liability insurance. It protects the injured and insures the payment of compensation.

The claimant has a right of action directly against the insurer *prior* to determination of the amount of the insured's obligation to pay. The exercise of direct action before the competent court usually comes after a period of negotiations. Talks can be carried out by the legal team of

[10] This is the case for the mandatory insurance and direct action for victims of maritime oil spills by oil tankers (1969 CLC and 1992 CLC). The mandatory insurance and the direct action were also approved for victims of oil pollution from fuel from vessels other than oil tankers (2001 Bunker Convention). Mandatory insurance with direct action was also imposed to protect the reimbursement rights of national authorities to cover the cost of removing ship wrecks in case of insolvency or cease to exist of ship owners (2007 Nairobi Convention). Strong attempts are being made to allow victims of maritime pollution due to substances other than oil to have the protection of the compulsory insurance and direct action (1996 HNS Convention and 2010 Protocol, not yet in force). As a result of the cooperation between the IMO and the International Labour Office, the 2014 amendment to the 2006 Maritime Labour Convention was agreed, requiring mandatory insurance for owners of vessels (other than fishing vessels) and enabling seafarers to file a direct action against the mandatory insurer in the event of injury or death on the job, as well as for repatriation costs and pending salaries in the event that the crew is abandoned.

the insurer itself, since the insurance usually includes legal defence.[11] For those injured parties whose claim is not agreed upon amicably and confidentially, they have the right to file an action for compensation against the insurer. Nowadays, class actions by a group of injured people are quite common.

Direct action due to death or injury of the passenger prevails over the so-called "pay to be paid" clause, by application of art. 4*bis* of the 2002 Athens Convention. Direct action is also an exception to the custom and contractual practices of the P&I clubs. Generally, these P&I clubs do not recognise rights of payment to a third party.[12] They only pay the indemnity to their insureds. Under the so-called "prior payment" or "pay to be paid" clauses, the insured is obliged to pay the damage to the injured party. It is only after this payment is made and proved, that the insured then has the right to be reimbursed by the P&I club. It is a type of liability insurance based on effective indemnity. The injured person assumes a serious risk when previous payment from the carrier does not take place.[13] The P&I club would not be obliged to pay either the insured or the injured third party. That is why the Spanish Supreme Court maintains a critical position regarding the configuration of P&I

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[11] E Sommers, 'The Costa Concordia Incident and Liability for Passenger Damage: An International and European Law Approach', in I Govaere and others (eds.), *The European Union in the World. Essays in Honour of Marc Maresceau* (Martinus Nijhoff Publishing, 2013) 362, remarks that the more generous/improved compensation schedule is actually already being provided on the basis of out of court agreements between the plaintiffs and the carrier, thus avoiding lengthy and expensive trial costs.

[12] Apart from cases in which direct action results from the application of the law, there are also cases in which the P&I club permits such action, commonly when a guarantee letter is issued to release the embargo of a registered vessel.

[13] The British House of Lords considers the prior payment clause as valid and enforceable against the third party, even when the owner is insolvent. See *Firma C. Trade S.A. v. Newcastle Protection and Indemnity Club*» (*The Fanti*) and *Socony Mobil Oil Co. Inc. v. West of England Ship Owners Mutual Insurance Association (London Ltd) (Padre Island n. 2*) (1990) LLR, 2, 191 (HL). In the United States, M J Pallay, 'The right of direct action: Issues proceeding directly against marine insurers' (2016) 41 *Tulane Maritime Law Journal* 58, also highlights the difficulties deriving from the State laws in filing a direct action against the liability maritime insurer.

insurance, highlighting the "devastating effect" on those injured parties when the carrier is insolvent or ceases to exist.[14]

To prove the satisfaction of the mandatory insurance requirement under art. 4*bis* of the 2002 Athens Convention, each liability insurer, both for marine and war risks, has to issue and sign the so-called "blue card" for the vessel in question. Through the blue card, every insurer certifies that there is an insurance policy in force satisfying the requirements of the 2002 Athens Convention, a requirement that exists, in respect of each and every ship and its ownership.

However, blue cards are not enough. Both the marine blue card and the war blue card must be shown to the competent public authority of the flag of the ship, party to the 2002 Athens Convention, which issues a certificate confirming that the obligation to have insurance is fulfilled. For foreign vessels, this is within the competence of the relevant State, party to this Convention (art. 4*bis* 2). Therefore, each State Party must verify the solvency of the insurer correctly. It is also common practice to pass a national regulation to determine which insurers are capable of issuing this type of blue card.

[14] Judgments of the Spanish Supreme Court of 3 July 2003 (RAJ 4324/2003) and of 14 January 2016 (Criminal chamber) (Cendoj 28079120012016100001). The latter relates to the incident and subsequent pollution caused by the tanker «Prestige» in Spain and France.

3. Who can sue

Art. 4*bis* 10 of the 2002 Athens Convention uses an impersonal form: "*any claim for compensation covered by insurance or other financial security pursuant to this Article may be brought directly…*". Therefore, the exercise of direct action is not limited to the passengers themselves for injuries or to their successors in the event of their of death. As a result, the insurer may be obliged to face several monetary claims from different people for the same incident.

Direct action could also be filed too by someone who has advanced compensation to the injured party and has been subrogated to their rights. The potential other claimants have derived their claim from the injured, for example, when the travel assistance insurer, the insurer of the carrier or the uninsured carrier, after payment, seeks reimbursement against the insurer of the performing carrier. In this case, direct action can be taken if subrogation is possible under the national law applicable to such action.[15]

[15] J L Uriarte Ángel and M Casado Abarquero, *La acción directa del perjudicado en el ordenamiento jurídico comunitario* (Fundación Mafpre, Madrid, 2013) 75.

4. Who can be sued

Art. 4*bis* 10 of the 2002 Athens Convention admits direct action against "*the insurer or other person providing financial security*" and adds that "*the defendant shall in any event have the right to require the carrier and the performing carrier to be joined in the proceedings*". As a result, parties not concerned in the initial proceedings may, by strategic decision of one of the litigants, be compelled to appear as co-defendants.[16] The incorporation of the carrier and of the performing carrier (if a separate person) into the proceedings, as well as a third party such as the contractual carrier, will therefore take place by requirement of the liability insurer of the performing carrier in case of direct action. In this case, it is then the liability insurer of the performing carrier who is the defendant against a direct action from the injured passenger or his/her heirs, who requests the performing carrier and/or the contractual carrier (if they are different persons) to be joined in the proceedings.

Since there are at least two insurances – one for war risks and one for marine risks – direct action will be exercised against one or other insurer, depending on the cause of the damage. It can also be brought against both insurers if the cause of death or injury is unclear. The most accepted criterion for attribution of responsibility between insurers is the proximate cause, that is to say, the cause considered as being the most likely under the circumstances of the death or personal injury to a passenger. In any event, each insurer should only be liable for its part (art. 2 of the IMO Guidelines), and the insurers are not jointly and severally liable (insurance certificate model of the IMO Guidelines).

[16] E Alcaraz Varó and B Hughes, *Diccionario de términos jurídicos. A dictionary of legal terms* (10th edition, Ariel, Madrid, 2007) 621.

5. Competent courts to solve the direct action

The consolidated text of art. 17 of the 2002 Athens Convention derives from art. 10 of the 2002 Protocol, which replaced the content of art. 17 of the 1974 Athens Convention. On the one hand, art. 17.1 of the 2002 Athens Convention includes a new list of exclusive competent courts to elucidate the liability of the carrier and the performing carrier in case of death or injury to the passenger.[17] On the other hand, art. 17.2 of the 2002 Athens Convention sets out that "*actions under art. 4bis of this Convention shall, at the option of the claimant, be brought before one of the courts where action could be brought against the carrier or performing carrier according to paragraph 1*".

Therefore, under the 2002 Athens Convention, the issue of where actions can be brought against the mandatory insurer depends on the particular carrier.[18] The liability insurer of the performing carrier has no security regarding the competent court where it can be sued because it depends on conditions related to its insured (performing carrier) and

[17] This paragraph says that "*an action arising under articles 3 and 4 of this Convention shall, at the option of the claimant, be brought before one of the courts listed below, provided that the court is located in a State Party to this Convention, and subject to the domestic law of each State Party governing proper venue within those States with multiple possible forums: a) the court of the State of permanent residence or principal place of business of the defendant, or (b) the court of the State of departure or that of the destination according to the contract of carriage, or (c) the court of the State of the domicile or permanent residence of the claimant, if the defendant has a place of business and is subject to jurisdiction in that State, or (d) the court of the State where the contract of carriage was made, if the defendant has a place of business and is subject to jurisdiction in that State*". This regime of exclusive jurisdiction of the 2002 Athens Convention is radically different from the law of the United States. The United States is not a contracting party to the 2002 Athens Convention. In cruises and passage trips in the U.S., the competent forum and the applicable national law are normally selected in the transport contract itself or else in the tourist package that includes a cruise. Although U.S. courts dispute the validity of this clause in consumer contracts, the general rule is for *lex private to prevail*, cf D Burke, 'Cruise Lines and Consumers, Troubled Waters', (2000) 37 I *American Business Law Journal* 699–700.

[18] E Røsæg, 'The Athens Convention on passenger liability and the EU', in J Basedow and others (eds) *The Hamburg lectures on maritime affairs 2007–2008* (Springer, Heidelberg Dordrecht London New York, 2010) 63.

even to those of a third party (non-insured carrier). For example, the insurer can be sued in the place where the contractual carrier (not its insured) has its place of business.

The contract of carriage or the contract of liability insurance cannot limit the selection of where the action will be filed with a court. According to art. 17 of the 2002 Athens Convention, the choice of court belongs to the claimant. In the event of more than one victim, the insurer may face claims in different countries for the same incident, given each victim's right to choose the court.

Art. 18 of the 2002 Athens Convention thus confirms that "*any contractual provision concluded before the occurrence of the incident which has caused the death of or personal injury to a passenger having the effect of restricting the options specified in art. 17, paragraph 1 or 2, shall be null and void, but the nullity of that provision shall not render void the contract of carriage which shall remain subject to the provisions of this Convention*".

Art. 17.3 of the 2002 Athens Convention adds that "*after the occurrence of the incident which has caused the damage, the parties may agree that the claim for damages shall be submitted to any jurisdiction or to arbitration*". For example, mainly in major incidents, there is an increasing prospect of criminal charges being brought for negligence in the event of death or injuries to passengers[19] (e.g. "Costa Concordia").[20] In these cases, civil action can be decided upon – if both parties agree – together with the criminal action being brought before the same criminal court.

Finally, Regulation (EC) No. 392/2009 excludes the jurisdiction rules of art. 17 of the 2002 Athens Convention. However, Recital 4 of Council Decision 2012/23/EU establishes that upon the accession of the European Union to the Athens Protocol, the rules on jurisdiction set out in its art. 10 (on jurisdiction) should take precedence over the relevant European

[19] S Veysey, 'Cruise ship growth ferrying new risks' (Oct 9, 2000) vol. 34 iss. 41 *Business Insurance* 11.

[20] Judgement Corte di Cassazione penale, sezione IV, 19 July 2017.

Union rules.[21] These rules are former Regulation (EC) 44/2001, *Brussels I*, now replaced by Regulation (EU) 1215/2012, *Brussels I(bis)*.

By contrast, Regulation (EU) 1215/2012 will prevail when the 2002 Athens Convention does not apply (for example, in domestic carriage).[22]

[21] By contrast, the rules on recognition and enforcement of judgments laid down in art. 11 of the Athens Protocol should not take precedence over the relevant rules of the Union

[22] European Commission, 'Support study to the evaluation of the Regulation (EC) 392/2009. Final report' (2017) 20. S Gahlen, 'Jurisdiction, recognition and enforcement of judgements under the 1974 Pal for passenger claims, the 2002 Protocol and EU Regulation 392/2009' (2014) 1 European Transport Law 16.confirms the precedence of the art. 17 2002 Athens Convention over those of the regulation (EU) n. 1215/2012.

6. National law applicable to direct action

The P&I rules normally contain a clause regarding the "law of contract", whereby the contract of insurance made between the P&I club and an owner states that the rules shall be governed by and construed in accordance with the specified national law (e.g. English law, Norwegian law).[23] This choice of law binds the contracting parties to the P&I insurance, but the claimant of the direct action is not a party to this contract. As a result, it is unclear whether the P&I club could invoke the application of the national law of the insurance contract against such a third party claimant, i.e. the injured passenger.

The national law applicable to resolving a direct action results from the rules of conflict of the international private law of the court where the direct action is filed.[24] However, there is no specific rule of conflict for direct action against the insurer.[25] Briefly, direct action could be considered as being an action arising out of either contract or action outside of a contract. Through application of the rules of conflict, whether for contractual or non-contractual obligations, the direct action will be resolved, according to national or foreign law. This is a somewhat controversial issue.

An interpretative solution to this void could be to connect the direct action against the mandatory insurer with the action that could be brought against the insured carrier. Where the claimant has a contract with the insured carrier, the national law applicable to the direct action against its insurer arises from the rule of conflict for contractual obli-

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23 For example, see rule 42 of law of contract, in Rules and Articles 2019 of UK P&I club (available in ukpandi.com, consulted on March 7, 2019).

24 Under Spanish law, the court hearing the direct action is required to apply the Spanish conflict rules (Article 12.6 Civil Code). These rules of conflict may lead to the dispute being resolved, either according to the *lex fori* or else according to the national law of a foreign country. In the latter case, the foreign law will be subject to proof, regarding its content and validity (art. 281.2 2000 Civil Procedure Act).

25 For example, in the European Union, Regulation (EC) 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I).

gations. Where there is no contract between the performing carrier and the injured passenger, the rule of conflict for non-contractual obligations will apply.

The cause of action against the liability insurer is essentially contractual, because it is dependent on the contract of carriage. It occurs when the performing carrier is also a contracting party to the contract of carriage with the passenger.

A contractual basis for the carriage also arises in cases where the passenger is on a cruise under a package holiday/package tour. The performing carrier is not a contracting party to the package holiday/tour. However, the performing carrier does issue a ticket for every cruise passenger. This ticket defines the entire relationship between the performing shipowner and the cruise passenger.[26] If this ticket is a contract,[27] the claim by the passenger against the performing carrier is then also contractual. In the event of direct action against its liability insurer, the national law that applies to this contract of carriage may then also be used to resolve direct action.

[26] Clause 11.a, "tickets of *carriage*" in the form of a contract to charter a cruise vessel, «Cruisevoy», by BIMCO, stated that prior to departure the owners were required deliver an owner's ticket of carriage in the form of a specimen ticket to the charterers for each passenger and member of charterer's staff. It is this ticket of carriage, and not the contract of the charter party, that defined the entire legal relationship between the owners and passengers.

[27] F Sparka, *Jurisdiction and arbitration clauses in maritime transport. A comparative analysis* (Springer Heidelberg Dordrecht London New York 2010) 58, 59; L Pulido Begines, 'Régimen jurídico de los cruceros turísticos: disciplina, normativa y elementos personales' (2000) XVII *Anuario de Derecho Marítimo* 124; E Olmedo Peralta, *Régimen jurídico del transporte marítimo de pasajeros. Contratos de pasaje y crucero* (Marcial Pons Madrid 2014) 345 s.

7. Defences that can be invoked by the insurer

Art. 4*bis* 10 of the 2002 Athens Convention also sets out the regime of defences that the insurer or guarantor of the performing carrier can invoke in the event of direct action.

The 2006 IMO Guidelines complete the regime of defences available to the insurer in relation to risks of war and terrorism, with a catalogue of defences that apply specifically to this field of insurance. However, these will only apply to the extent that the Contracting State has made the recommended reservation when ratifying or acceding to the 2002 Athens Convention.

If the 2002 Athens Convention applies, the national law cannot contradict the international rule. Some of the defences detailed in what follows do relate to the scope of the 2002 Athens Convention, but it is clearly the case that the insurer can invoke them as a defence against a direct action.

7.1 Lack of liability of the insured carrier in both shipping incidents and non-shipping incidents

Art. 4*bis* 10 establishes that the defendant may invoke the defences (other than bankruptcy or winding up) that the carrier referred to in paragraph 1 would have been entitled to invoke under the 2002 Athens Convention.[28]

Art. 3 of the 2002 Athens Convention sets out a different regime of liability of the carrier and the performing carrier, depending on whether the death or injury results from a "shipping incident" or a "non-shipping incident" under the 2002 Athens Convention. Art. 3.5.a adds that "*shipping incident means shipwreck, capsizing, collision or stranding of the ship, explosion or fire in the ship, or defect in the ship. In both shipping and non-shipping incidents, the attribution of responsibility over the performing*

[28] E Røsæg, 'The Athens Convention on passenger liability and the EU', in J Basedow and others (eds) *The Hamburg lectures on maritime affairs 2007–2008 (Springer,* Heidelberg Dordrecht London New York, 2010) 59.

carrier must be carried out in accordance with the terms and conditions of the 2002 Athens Convention" (art. 3).

In so far as a "shipping incident" is concerned, art. 3.1 of the 2002 Athens Convention says that the carrier shall be liable for the loss suffered as a result of the death of or personal injury to a passenger caused by a shipping incident, to the extent that such loss in respect of that passenger on each distinct occasion does not exceed 250,000 units of account. It is quite clear that – up to a limit of 250,000 SDR[29] per passenger and incident – the carrier assumes strict liability, that is to say, regardless of fault, for the death of or injuries to a passenger.[30] Therefore, it is irrelevant whether the insured carrier and its assistants were diligent or minimised the damage.[31] The insurer is consequently also liable for the death of or injury to the passenger. For example, imagine a shipping incident caused by the negligence of a port authority or a collision attributable to another shipowner, where the carrier is not itself at fault.

The 2002 Athens Convention does not apply the terms of this strict liability in certain circumstances detailed by the above-mentioned art. 3.1. There are only a limited number of exceptions available,[32] being restricted to where the carrier can prove that the incident: (a) resulted from an act of war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional, inevitable and unavoidable character; or (b) was wholly caused by an act or omission by a third party done with intent to cause

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29 SDR is defined and discussed in greater detail in Section 9 below.

30 E Røsæg, 'Passenger liabilities and Insurance: terrorism and war risks', in R D Thomas, *Liability regimes in contemporary maritime law*, (Taylor & Francis London 2007) 218; A Mandaraka-Sheppard, *Modern maritime law, vol. 2, Managing risks and liabilities* (third edition, Oxon/Nueva York, 2013) 792; M Piras, 'International recent developments: European Union – Maritime Passenger Transport?', Summer 2012 *Tulane Maritime Law Journal* 631. E Røsæg, 'The Athens Convention on passenger liability and the EU', in J Basedow and others (eds.) *The Hamburg lectures on maritime affairs 2007–2008* (Springer, Heidelberg Dordrecht London New York, 2010) 56, also uses the term 'liability without negligence'.

31 B A Garner (ed.), *Black Law's dictionary* (tenth edition, West Publishing Co, St. Paul, 2102) and S M Sheppard (ed.), *The Wolters Kluwer Bouvier Law Dictionary* (Wolters Kluwer, New York, 2011).

32 European Commission, 'Support study to the evaluation of the Regulation (EC) 392/2009. Final report' (2017) 23.

the incident. If and to the extent that the loss exceeds the above limit, the carrier shall be further liable, unless the carrier can prove that the incident which caused the loss occurred in the absence of any fault or neglect by the carrier.

The 2002 Athens Convention does not follow the terms of strict liability established in the 1999 Montreal Convention for the unification of certain rules for international carriage by air.[33] During the negotiations in the IMO headquarters of the 2002 Protocol to the 1974 Athens Convention, it was clear that shipowners and liability marine insurers were not ready to assume the extension of the air regulation and apply it to marine risks.

As for "non-shipping incidents", the 2002 Athens Convention follows a traditional system of fault-based liability for these damages.[34] Art. 3.2 of the 2002 Athens Convention states that in relation to loss suffered as a result of the death of or personal injury to a passenger which is not caused by a shipping incident, the carrier shall be liable if the incident which caused the loss was due to the fault or neglect of the carrier. The burden of proving fault or neglect shall lie with the claimant. In maritime practice, cases of death and passenger injury are most commonly caused by events unrelated to maritime navigation.[35] For example, incidents due to the lack of safety measures that allow a passenger to fall into the sea; the defective maintenance of the cabins that leads to a slip in the bathroom; incidents due to the negligence of persons employed by the carrier during recreational activities on board, among others.

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33 E Olmedo Peralta, 'New requirements and risk distribution for the liability of carriers of passengers by sea in the event of accidents under Regulation (EC) no. 392/2009' (2014) 49 3 European Transport Law 252, 256, 266–267

34 According to E. E. Jhirad – A. Sann – B. Chase, *Benedict on Admiralty, vol. 10, Cruise ships* (seventh edition Lexis-Nexis San Francisco, 2014) par. 1.1, the national law of the U.S. is always based on the carrier's fault, irrespective of shipping or other incidents.

35 See E. E. Jhirad – A. Sann – B. Chase, *Benedict on Admiralty, vol. 10, Cruise ships* (seventh edition Lexis-Nexis San Francisco, 2014) par. 5.7 and T A Dyckerson 'The cruise passenger's rights and remedies 2014: the Costa Concordia disaster: one year later, many more incidents both on board megaships and during risky shore excursions' (2014) 38 *Tulane Maritime Law Journal*, 532–539.

Finally, in the event of direct action, the liability insurer can invoke other defences that the carrier could use against the claimant. The liability of the carrier under art. 3 of the 2002 Athens Convention only relates to loss arising from incidents that occurred in the course of the carriage (art 3.6). The burden of proving that the incident which caused the loss occurred in the course of the carriage – and the extent of the loss – lies with the claimant (art. 3.6). The executing carrier is not responsible for death or injury, as these have occurred in non-maritime or accessory phases of the voyage (art. 1.8 of the 2002 Athens Convention).

Special consideration should be given to the case of damages suffered by passengers during an excursion from a cruise ship where organised by the performing carrier.[36] Liability of the carrier for such damages to the passenger is not regulated by the 2002 Athens Convention, and it is also excluded from the compulsory coverage. The P&I insurances of the IG P&I clubs also expressly exclude coverage for damages occurring away from the main maritime transport (shore excursions, as well as transfers before and after the maritime transport). Therefore, if the insured shipowner sells an excursion from the cruise ship, there is no coverage under standard P&I terms.[37]

Some P&I clubs offer an additional product to the P&I insurance that covers the responsibility of the carrier when it acts as a tour operator or sells shore excursions to passengers.[38] Direct action only proceeds when death or personal injury occurred in the course of the carriage (art. 3.6 of the 2002 Athens Convention). Art. 1.8.a 2002 Athens Convention says that "carriage", with regard to the passenger and his cabin luggage, covers the period during which the passenger and/or his cabin luggage are on board the ship or in the course of embarkation or disembarkation, as

[36] T A Dyckerson 'The cruise passenger's rights and remedies 2014: the Costa Concordia disaster: one year later, many more incidents both on board megaships and during risky shore excursions' (2014) 38 *Tulane Maritime Law Journal*, says that 'although there are problems on board cruise ships, it is generally safer to be on board than on a shore excursion'.

[37] See i.e. *rule* 57.b *Gard P&I Rules 2018* (in gard.no, accessed 1 February 2019).

[38] I.e. Gard P&I offers additional coverage (to the P&I) when the ship owner is a tour operator as well (in gard.no, accessed 1 February 2019).

well as the period during which the passenger and his cabin luggage are transported by water from land to the ship or vice-versa, if the cost of such transport is included in the fare or if the vessel used for this purpose of auxiliary transport has been put at the disposal of the passenger by the carrier. However, with regard to the passenger, the carriage does not include the period during which the passenger is in a marine terminal or station or on a quay or in or on any other port installation.

7.2 Wilful misconduct of the assured

Art. 4*bis*10 of the 2002 Athens Convention states that the defendant may invoke a defence in the event of direct action where "the damage resulted from the wilful misconduct of the assured". This exclusion of coverage was discussed during the negotiations of the 2002 Protocol within the IMO. Within the Legal Committee – which prepared the draft including this defence – the International Group of P&I Clubs said that clubs would not be prepared to provide direct action certificates covering the wilful misconduct of the shipowner. Many State delegations opposed this defence, expressing the concern that it might result in passengers becoming the innocent victims of a carrier's wilful misconduct, if the carrier became insolvent or ceased to exist. However, most delegations accepted the inclusion of the defence of wilful misconduct.[39] It was therefore included in the draft Protocol prepared by the Legal Committee of the IMO.[40]

Following this, delegates from Australia and Norway proposed that the wilful misconduct defence be removed from the draft Convention.[41] The proposal highlighted public policy considerations, stating that the defence that the assured should not benefit from wilfully causing its own loss, should not apply to passengers, who clearly have no influence or control over the carrier's conduct.

[39] Leg 83/14 23 October 2001, 11–12.
[40] Leg.Conf. 13/3, 5 March 2002.
[41] Leg.Conf. 13/9 30 August 2002.

However, the industry was in favour of retaining this defence. The IG P&I clubs confirmed its opposition to this removal.[42] Among other arguments, the IG said that English maritime law provides that the insurer is not liable for any loss attributable to the wilful misconduct of the assured (Marine Insurance Act 1906, section 55.2(a)). This defence is incorporated into English law as a matter of public policy, it being regarded as unacceptable for the assured to obtain insurance for liabilities arising out of his own deliberate wrongdoing. Similar provisions have been adopted, as a matter of public policy, in the insurance laws of many other countries. The International Chamber of Shipping (ICS) shared this view.[43] The International Council of Cruise Lines (ICCL) joined in the comments offered by the ICS and IG, by adding that no other international convention deprives an insurer of this defence.[44]

The questions to address are whether and why the protection of the passenger should also apply in cases where the policyholder (i.e. the performing carrier) intentionally causes damage or acts recklessly and knows what damage would probably result (for example, overload of the ship).

Indeed, in the case of wilful misconduct, the performing carrier must face liability and has no right to apply the limits of liability of the 2002 Athens Convention (art. 13, referring to arts. 7, 8 and 10.1).[45] Besides, as stated by the ICS, the defence is only applicable to the wilful misconduct of the assured. In other words, the conduct must be personally committed by the assured or, in the case of a corporate assured, by a representative of such corporate body. Wilful misconduct of the master or crew, without the complicity of the assured, would be covered by the P&I Clubs and they would be subject to direct action.[46]

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42 Leg.Conf. 13/11 30 August 2002.

43 Leg.Conf. 13/13 12 September 2002.

44 Leg.Conf. 13/14 18 September 2002.

45 B Soyer, 'Sundry considerations on the draft Protocol to the Athens Convention relating to the carriage of passengers and their luggage by sea 1974' (2002) 33 4 *Journal of Maritime Law and Commerce* 529, 533.

46 Leg.Conf. 13/13 12 September 2002.

7.3 Exclusions of coverage

In the event of direct action, the insurer cannot invoke a clause of the insurance contract that excludes coverage or liabilities for death or injury to the passenger under the 2002 Athens Convention. The blue card issued and signed by the insurer certifies that there is – in respect of the ship named on such card while remaining in the same ownership – a policy of insurance in force that meets the requirements of Article 4*bis* of the 2002 Athens Convention.

As an exception, the IMO Guidelines also expressly provide for several exclusions for typical coverage of the war marine insurance market. In particular, the insurer can invoke the exclusion of coverage exceptions for radioactive contamination, chemical, biological, biochemical and electromagnetic weapons, as well as excluding cyber attacks. The insurer can also object to the automatic cancellation of the contract in case of war between the great powers (Appendix A of the IMO Guidelines).

8. Defences that cannot be invoked by the insurer

In the case of direct action by the victim against the liability insurer of the carrier, art. 4*bis* 10 of the 2002 Athens Convention says that "the defendant (*which is the insurer in this case*) shall not invoke any other defence which the defendant might have been entitled to invoke in proceedings brought by the assured (*which is the performing carrier*) against the defendant". For example, the insurer cannot invoke the payment default of the premium or of a call under the insurance; failure by the performing carrier to meet the ship's safety conditions; possible renunciation by the insured of their right to claim against their insurer, and so on. As a result, the passenger is in a better position to claim.[47]

The insurer cannot prevent the claimant from being subject to the usual clauses of jurisdiction or arbitration of the insurance contract, in the event of direct action.[48]

[47] A Mandaraka-Sheppard, *Modern maritime law, vol. 2, Managing risks and liabilities* (third edition, Oxon/Nueva York, 2013) 811.

[48] The judgment of the Court of Justice of the European Union (eighth section), July 13, 2017 (ECLI: EU: C: 2017: 546, in curia.europea.eu, consulted on January 20, 2019) says that Regulation (EC) 44/2001, now repealed and replaced by Regulation (UE) 1215/2012, must be interpreted as meaning that the victim who has a direct action against the insurer of the author of the damage suffered is not bound by an attributive clause of competition concluded between the insurer and its insured. For claims from passengers, this right is expressly included in both art. 14.2 Regulation (CE) 44/2002 and also in the current art. 16.2 Regulation (EU) 1215/2012.

9. Per passenger limitation of insurance coverage for marine risks

Strict liability for shipping incidents of the 2002 Athens Convention is capped at 250,000 units of account per passenger for each incident (art. 3.1). Above this limit, the carrier is liable for shipping incidents in case of negligence up to 400,000 units of account per passenger and incident (art. 7.1).[49] A State Party may also regulate the limit of the liability prescribed in paragraph 1 by applying specific provisions under its national law, provided that the national limit of liability, if any, is not lower than that prescribed under paragraph 1. A State Party that makes use of the option provided for in this paragraph shall inform the EU Secretary-General of the limit of liability adopted or of the fact that there is none (art. 7.2 of the Athens Convention).

As a specific provision for the compulsory insurer, the 2002 Athens Convention introduced a per capita or per passenger limitation on insurance coverage. Art. 4*bis* 1 of the 2002 Athens Convention established that "the limit of the compulsory insurance or other financial security shall not be less than 250,000 units of account per passenger on each distinct occasion". The insurance contract can voluntarily extend the sum insured beyond 250,000 units of account and give a wider or full cover to the insured carrier. In the case of direct action, art. 4bis 10 adds that "the amount set out in paragraph 1 applies as the limit of liability of the insurer or other person providing financial security, even if the carrier or the performing carrier is not entitled to limitation of liability". Therefore, the mandatory insurance obligation under the 2002 Athens Convention is the total of 250,000 units of account multiplied by the number of passengers that the ship is authorised to carry.

[49] E Røsæg, 'The Athens Convention on passenger liability and the EU', in J Basedow and others (eds) *The Hamburg lectures on maritime affairs 2007–2008* (Springer, Heidelberg Dordrecht London New York, 2010) 57, highlights that they are quantities unheard of in the transport industry and, indeed, in any industry at all.

The sum being insured by the insurer, such as the compensation limits of the carrier, is expressed by reference to the "unit of account", and not to a specific national currency. The unit of account generally corresponds with the *Special Drawing Right* (hereinafter, "SDR") of the International Monetary Fund,[50] since the amounts mentioned in arts. 3.1, *4bis 1* (*emphasis added*), 7.l and 8 must be converted into the national currency of the State of the court seized of the case, based on the value of such national currency by reference to the Special Drawing Right on the date of the judgment or the date agreed upon by the parties (art. 9.1 of the 2002 Athens Convention). In January 2019, 1 SDR was worth 1.39 US dollars[51].

This does not mean that the insurer would always pay the maximum amount of 250,000 SDR for death or injury to each passenger. This amount is the maximum indemnity, but the insurer could invoke the defence that the real damage is smaller, according to the applicable national rules. This is an example of why the national law applicable to direct action is so important; it has a direct effect on the quantification of the damage.

The 2006 IMO Guidelines for the implementation of the 2002 Athens Convention recommend that the ratifying parties make a reservation to limit liability for terror and war risk. The 2006 IMO Guidelines contain specific and sectoral rules relating to liability and the sum insured for the carrier and its war insurer, further to the literal of art. 3 and 4*bis* of the 2002 Athens Convention.

Both the carrier and mandatory insurer can limit their responsibility for death or personal injury to a passenger caused by a war risk to the lower of the following amounts: 250.000 SDR in respect of each passenger on each distinct occasion, or 340 million SDR overall per ship on each distinct occasion (art. 1.6 IMO Guidelines). In the event that the claims of individual passengers exceed in aggregate the sum of 340 million

[50] The use of the SDR as a unit of account was brought into the 1974 Athens Convention by the 1976 Protocol, in force since April 30, 1989. It replaced the "Poincaré franc", based on the price of gold.

[51] See www.imf.org (accessed January 21, 2019).

units of account overall per ship on any distinct occasion, the carrier is then entitled to invoke limitation of his liability to the amount of 340 million units of account, always provided that: this amount should be distributed amongst claimants in proportion to their established claims; the distribution of this amount may be made in one or more portions to claimants known at the time of the distribution; and, the distribution of this amount may be made either by the insurer, or else by the Court or other competent authority seized by the insurer, in any State Party within which legal proceedings are instituted in respect of claims allegedly covered by the insurance (art. 2.2.2 IMO Guidelines).

10. Global limitations of liability

It is uncertain as to whether liability under the 2002 Athens Convention is subject to global limitation.[52] Art. 19 of the 2002 Athens Convention states that this Convention shall not modify the rights or duties of the carrier, the performing carrier, or their servants or agents, as provided for in international conventions relating to the limitation of liability of owners of seagoing ships. Although art. 19 does not explicitly refer to the International Convention on Limitation of Liability for Maritime Claims, 1976, as amended by the 1996 Protocol (hereinafter, the "1996 LLMC"), this provision is primarily understood as being a reference to the system of global limitation under the 1996 LLMC.

For EU/EEA countries, art. 5 of Regulation (EC) No. 392/2009 expressly takes into account the 1996 LLMC and specifies the central content of art. 19 of the 2002 Athens Convention. The above-mentioned article 5 states that this regulation shall not modify the rights or duties of the carrier or performing carrier under national legislation implementing the LLMC 1996, or any future amendment thereto. In fact, most of the European Union countries are parties to the LLMC 1996.[53] As a result, the performing carrier and its liability insurer (art. 1.6 of the LLMC 1996) can invoke the defence of global limitation of liability as set forth in art. 7 of the LLMC 1996:[54] in respect of claims arising on any distinct occasion

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52 E Røsæg, 'The Athens Convention on passenger liability and the EU', in J Basedow and others (eds) *The Hamburg lectures on maritime affairs 2007–2008* (Springer, Heidelberg Dordrecht London New York, 2010) 57.

53 Point 18 of the preamble to the regulation (EC) n. 392/2009 says that member States have taken the firm commitment in their Statement on Maritime Safety of 9 October 2008 to express, by no later than 1 January 2012, their consent to be bound by the LLMC 1996. According to the IMO, in January 2019, all States European Union States are part of the LLMC 1996, with the exception of Austria, Slovakia, Italy and the Czech Republic. Point 18 of the preamble to the Regulation (EC) No. 392/2009 adds that Member States may make use of the option provided for in Article 15(3*bis*) of LLMC 1996 to regulate, by means of specific provisions of this Regulation, the system of limitation of liability to be applied to passengers.

54 A Mandaraka-Sheppard, *Modern maritime law, vol. 2, Managing risks and liabilities* (third edition, Oxon/Nueva York, 2013) 791, 792.

for loss of life of or personal injury to passengers of a ship, the limit of liability of the shipowner shall be an amount of 175,000 SDR multiplied by the number of passengers which the ship is authorised to carry according to the ship's certificate. Therefore, the compensation that has to be paid still cannot be capped at the maximum figure of limited liability under the LLMC Convention 1976 or other national rules implementing lower limits than those of the LLMC 1996.[55]

Art. 5 of Regulation (EC) No. 392/2009 adds that, in the absence of any such applicable national legislation applying the LLMC 1996 Protocol, the liability of the carrier or performing carrier shall be governed *solely* (*emphasis added*) by art. 3 of this Regulation. This implies that only those per passenger and incident limits which are included in art. 3 of the 2002 Athens Convention will be applicable.

The issue of the coordination of the limits of the LLMC 1996 Convention by ship and loss, and of the 2002 Athens Convention by passenger and loss, has already been examined by some authors. The view has been expressed that both limits are enforceable against the injured party, at the convenience of the carrier.[56] We do not share this view. Each individual injured passenger has the right to be compensated according to the terms of the 2002 Athens Convention (art. 3, 7 and 18). It is only when the entire set of recognised claims exceeds, per claim and incident, the global limitation of the LLMC 1996, that the shipowner and its insurer will be able to set up a compensation fund under the LLMC 1996 and impose a *pro rata* distribution among the injured parties.

Art. 5.2 of Regulation (EC) No. 392/2009 states that, in respect of claims for loss of life or personal injury to a passenger caused by the war risks referred to in paragraph 2.2 of the IMO Guidelines, the carrier and

[55] See V van der Kuil, 'Limitation of Liability for Maritime Claims and Politics: Curse or Cure?', in C Ryngaert and others (eds.), *What's Wrong with International Law? Liber Amicorum A.H.A. Soons*, Brill-Nijhoff, 2015) 81, 82.

[56] F Ruiz-Gálvez, 'El contrato de pasaje en la Ley de navegación marítima', in *Comentarios a la Ley de navegación marítima* (Marcial Pons, Barcelona-Madrid-São Paulo, 2015), 256. B Soyer, '1996 Protocol to the 1976 Limitation Convention: a more satisfactory global limitation regime for the next millenium?' (2000) *The Journal of Business Law* 162, says that this global limitation of liability can be invoked in relation to a single passenger.

the performing carrier may limit their liability under the LLMC 1996. This limitation is mandatory for war risks, regardless of this international treaty has been ratified by the member States of the European Union.

Finally, article 5.2 of Regulation (EC) No. 392/2009 lacks a rule for the coordination of the global limits of the LLMC 1996 and the above-mentioned limit of the IMO Guidelines (340 million SDR per vessel). Both apply as being part of the Regulation (EC) No. 392/2009. In our opinion, the carrier and the insurer can use both limitations. For big ships where the limitation of liability for vessel and incident under the LLMC 1996 is usually higher than the 340 million SDR included in the IMO Guidelines, the carrier and its insurer may restrict the compensation to this latter lower figure. However, as may be the case with smaller ships, they can oppose the global limits established in the LLMC 1996, if these are lower than the 340 million SDR of the IMO Guidelines.

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