

**LIABILITY AND INSURANCE FOR THE CARRIAGE OF PASSENGERS BY SEA
UNDER REGULATION 392/2009:
PROVIDING A LIFELINE TO THE CRUISE INDUSTRY AND ENSURING PROPER
COMPENSATION FOR PASSENGERS IN THE EVENT OF ACCIDENTS**

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1. Introduction

The point that 'statistically, cruising is one of the safest ways to travel' is an essentially valid one that is often made and, with the addendum that 'of the 153 million passengers carried between 2002 and 2011, only six died in operational incidents',¹ an altogether impressive one. It is, however, a point that must be qualified with another consideration in the light of recent happenings, namely the grounding of the *Costa Concordia* in January² and the stranding of the *Costa Allegra* in February.³ While statistically safer than other means of transport, when things go wrong in the case of carriage by sea, the stakes may well be considerably higher than might be the case with other means of transport.⁴ Indeed, while the *Costa Concordia's* sinking was averted, had the ship not come to rest on rock and actually sank, it has been observed that 'the window for abandoning the ship would have closed quickly and thousands could have

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¹ Justice Thomas A Dickerson, 'The Cruise Passengers' Rights & Remedies: 2012' (2012) <http://www.nycourts.gov/courts/9jd/TacCert_pdfs/Dickerson_docs/CRUISEPASSENGERSRIGHTS_REMEDIES2012.pdf> accessed 27 August 2012.

² Aptly described by Adam Piore in the June 2012 issue of 'Conde Nast Traveler' (2012) <<http://www.cntraveler.com/cruises/2012/06/special-report-cruise-safety-regulations-costa-concordia>> - accessed 27 August 2012 as 'a haunting image: that of the [thirteen]-story luxury liner *Costa Concordia* half-submerged in the Tyrrhenian Sea last January after its captain piloted the ship and its 4,252 passengers and crew into a rock off the Tuscan coast, killing 32 on board.'

³ See Tom Kington, 'Costa Allegra cruise ship stranded in darkness off Seychelles' *The Guardian* (London, 27 February 2012).

⁴ Indeed, while modern day cruise ships may potentially carry thousands of passengers, in comparison, the Airbus A380, the world's largest commercial aircraft, may 'only' carry a maximum of 853 passengers <<http://www.airbus.com/aircraftfamilies/passengeraircraft/a380family/>> - accessed 27 August 2012.

died'.⁵ Shocking as it was, it has been well observed that while the *Costa Concordia* incident evoked much discussion regarding safety of cruise ships per se, discussion of the related topic that is the subject matter of this article has been somewhat sparser.⁶

Under present International Law, liability for the carriage of passengers is mostly governed by the Athens Convention Relating to the Carriage of Passengers and their Luggage by Sea 1974 as amended by the 1976 Protocol thereto. Given that Italy is not a party to this Convention and considering Article 2(1) of the same,⁷ in the context of a brief examination of the *Costa Concordia* incident, Martinez concludes that the Convention 'would only apply in the odd case where the contract of carriage was made in a State Party to the Athens Convention' effectively and somewhat sadly evidencing 'the fact that existing international conventions are of no use unless they are acceded to and implemented by States'.⁸ The scene, at least on the EU level, changed considerably as from the 31 December 2012, which is when Regulation 392/2009 became applicable within the EU.⁹ The latter has been adopted with the stated aim of 'ensur[ing] a proper level of compensation for passengers involved in maritime accidents'.¹⁰

Given word-count limitations, the author will limit the scope of this article to a discussion of liability and insurance for the carriage of passengers under Regulation 392/2009, focusing specifically on claims for death and personal injury and therefore excluding claims for loss or damage to luggage from the ambit of the present discussion. This choice of subject matter is inspired mostly by the consideration that 'while it is hard to justify the existence of limitation system, it is harder yet to justify the application of such a system to personal

⁵ Dickerson (n 1).

⁶ Norman A Martinez Gutiérrez, 'New European Rules on the Liability of Carriers of Passengers by Sea in the Event of Accidents' – draft article proposed to JIML and quoted with the kind permission of the author.

⁷ This Convention shall apply to any international carriage if:
a) the ship is flying the flag of or is registered in a State Party to this Convention, or
b) the contract of carriage has been made in a State Party to this Convention, or
c) the place of departure or destination, according to the contract of carriage, is in a State Party to this Convention.

⁸ Martinez Gutiérrez (n 6).

⁹ Regulation (EC) 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 accidents. The Regulation incorporates the provisions of the Athens Convention Relating to the Carriage of Passengers and their Luggage by Seas 2002 (hereinafter referred to as 'Athens Convention 2002' and the parts of the IMO Reservation and Guidelines attached to the Regulation as Annex II, effectively making them binding within the EU as of 31 December 2012.

¹⁰ Preamble to Regulation 392/2009.

injury or death claims'.¹¹ Indeed, given the Regulation's stated aim of ensuring a proper level of compensation for passengers, one instinctively ponders how necessary or otherwise the established limits actually are, and whether the said limits ensure adequate or, at the very least, reasonable compensation to passengers. How much more secure does the requirement for the ship-owner to have compulsory insurance and the possibility of direct action against the insurer make the prospect of the injured passenger obtaining compensation? Conversely, does Regulation 392/2009 secure an adequate balance of interests or does it at times place too much of a burden on ship-owners and the somewhat volatile insurance industry?

2. Liability

2.1 Introduction

Liability per se – in conjunction with the limits thereof and the burdens of proof established – is arguably the crux of the discussion that is the subject matter of the present essay. Matters such as insurance are somewhat corollary matters, even if also crucial in their own right to enhance the level of security of compensation that is effectively offered by the Athens Convention 2002.

With regards to how conscionable or otherwise the concept of limitation of liability is Hugo Grotius, the father of international law, was himself 'an early and powerful apologist for limitation of liability'.¹² He observed that the normal rule of Roman Law (which required the wrongdoer to effect full compensation), had been abandoned due to its being 'inequitable and injurious to the interests of trade'.¹³ This said, while the present author is inclined to entertain the argument which favours a reasonable sort of limitation, one must also point out the 'populist idea' that 'if somebody is hurt, then it must be somebody's fault'.¹⁴ Beyond the point of this populist idea being somewhat of an 'unruly [horse] to which the media and politicians have hitched their wagons',¹⁵ there is also a certain degree of merit to this form of argumentation and, indeed, this requires that an adequate balancing of all interests involved in the limitation of liability debate be achieved. Failure to strike a balance that equates to fairness (*vis à vis* the cruise and insurance industries on the one hand and the passenger on the other) and therefore providing a panache of justifiability, could potentially lead to a building up of political momentum in the direction of removing all forms of

¹¹ Xia Chen, *Limitation of Liability for Maritime Claims: a Study of U.S. Law, Chinese Law and International Conventions* (Kluwer 2001) 30.

¹² Charles Haddon-Cave QC, 'Limitation against Passenger Claims: Medieval, Unbreakable and Unconscionable' CMI Yearbook 2001 234.

¹³ *ibid.*

¹⁴ *ibid* 235.

¹⁵ *ibid.*

limitation when it comes to liability – an outcome that is undesirable on too many levels.

The quintessential question, therefore, is whether Regulation 392/2009 strikes the essential balance required and, at the end of the day, whether it ensures a proper level of compensation for passengers involved in accidents. With regards to the liability regime under Regulation 392/2009 one may summarily state, that once it is determined that an accident occurred in the course of the carriage,¹⁶ one must then differentiate between death or personal injury caused by a shipping incident and death or personal injury not caused by a shipping incident. With regards to the former a strict liability of up to 250,000 SDRs applies with two stated exceptions.¹⁷ Where losses exceed the 250,000 SDRs limit, the carrier is further liable (up to the 400,000 SDRs limit established by the Athens Convention 2002) unless he proves that the incident which caused the loss, occurred without the fault or neglect of the carrier.¹⁸ Conversely, where death or personal injury is not caused by a shipping incident, the burden of proof is placed onto the claimant who must prove that the incident occurred due to the carrier's fault or neglect.¹⁹

2.2 Limited remit of strict liability

Considering everything, the author humbly finds no difficulty in asserting his opinion that the exclusive limitation of strict liability to damages caused by a 'shipping incident' is a fair one. An attempt to strike comparisons with liability in the case of carriage by air would be inappropriate for a number of reasons. Firstly, carriage by air is inherently different and generally less prone to incidents than carriage by sea.²⁰ Secondly, Soyer observes that given the

¹⁶ Athens Convention 2002, art 3(6).

¹⁷ *ibid* art 3(1):

The carrier may, in this case, only avoid liability if he proves that the incident:

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

¹⁸ The burden of proof is here effectively and indeed rather fairly (given that the accident is here caused by a shipping accident as opposed to 'hotel type' accidents) placed on the carrier.

¹⁹ Athens Convention 2002 (n 16) art 3(2).

²⁰ Baris 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 *Journal of Maritime Law & Commerce* 519, 522.

Soyer observes that while in the case of carriage by air '[a]n air passenger must sit with his seat belt fastened' in the case of carriage by sea 'the passenger [...] is expected to circulate freely and use the vessel's facilities such as the swimming pool, bar and fitness centre'. A similar point is made by Dr M N Tsimplis in 'Liability in Respect of Passenger Claims and its Limitation' published

competition that subsists between the cruise and resort industry it would be somewhat nonsensical to impose strict liability *vis à vis* the hotel-like aspect of the cruise which is totally unrelated to shipping per se, given that '[h]oliday resort liability is certainly not strict liability.'²¹ Griggs, Williams and Farr then make the observation that those responsible for the drafting of the 2002 Protocol to the Athens Convention seem to have had this distinction between hotel and shipping-type accidents in mind in further defining the precise meaning of 'defect in the ship'.²²

2.3 Instances of imprecise drafting inherited from the Athens Convention

While the limitation of strict liability to shipping incidents is therefore commendable, much can be said about the vagueness postulated by the wording of the two exceptions to strict liability by Article 3(1) of the Athens Convention 2002. Baris Soyer makes an incisive observation in this regard.²³ With regards to the first exception,²⁴ in the eventuality that death or personal injury is caused by a combination of the elements delineated in the exception clause and a contributory fault on the party of the carrier, the carrier could, given the wording of Article 3(1) (which does not qualify the term 'caused' by 'wholly', as it does with regard to the second exception), be able to evade liability via the aforementioned exception clause. Such an outcome would evidently be undesirable from the passenger's point of view who, in terms of equity, should arguably be entitled to a portion of compensation equaling at least the contributory fault of the carrier.

Another potential problem postulated by imprecise drafting, is the definition of 'defect in the ship' provided by the Athens Convention 2002.²⁵ Given the crucial

in the *Journal of International Maritime Law* (2009) 15: 'cruisers are in essence floating hotels where passengers spend significant amounts of time, thus different considerations should arguably apply for accidents related to the non-shipping parts of the contract.'

²¹ Soyer (n 20) 523.

²² Patrick Griggs and others in *Limitation of Liability for Maritime Claims* (LLP 2005) assert that the intention behind the further definition of 'defect in the ship' [in the 2002 Protocol to the Athens Convention] is to make it clear that strict liability... only applies if the defect which gives rise to the claim is in the parts of the ship which are dedicated to navigation, propulsion, steering, handling and in the parts dedicated to passenger safety and evacuation.

He notes that '[t]he new definition does not embrace those parts of the ship which are devoted to hotel functions'.

²³ Soyer (n 20) 523.

²⁴ Whereby the carrier may avoid liability if he proves that the incident 'resulted from an act of war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional, inevitable and irresistible character'.

²⁵ 'Defect in the ship' is defined by art 3 of the Athens Convention 2002 as:

role played by this term in determining whether an incident is a shipping incident or not (and therefore whether strict liability can be said to apply) the definition is arguably not incisive enough. Soyer envisages and depicts a particular scenario²⁶ (and one can imagine other similar scenarios) whereby an accident which is evidently not a 'hotel-type' incident would not fall within the remit of the Convention's definition of an incident caused by a 'defect in the ship' with the consequence that strict liability would fail to apply in a scenario where, one imagines, those responsible for the drafting of the 2002 Protocol to the Athens Convention intended it to apply. Admittedly, what Regulation 392/2009 does is merely incorporate the provisions that constitute the text of the Athens Convention 2002. This said, considering that certain obscurities had already been highlighted and that the Regulation did introduce a number of exclusive provisions, one considers that certain modifications could indeed have been made 'with a view to clarifying the scope of the new liability regime'²⁷ for the European Union.

Clarification could also have been forthcoming with regards to the notable use of the term 'personal injury' and the question of whether this could be said to incorporate any mental injury sustained by the claimant in addition to physical injury.²⁸ While the term may be variously interpreted in different jurisdictions, it has rightly been pointed out that 'personal injury' is distinct from 'bodily injury' and, indeed, more capable of being said to include mental injury within its remit. Beyond the point that this lack of clarity might effectively impede uniformity within the EU,²⁹ one must consider also that if not to offer more adequate security to the passenger as claimant, clearer drafting would have served to better illuminate the passenger as to his position under the Regulation when it comes to claiming damages in terms of mental injury.

2.4 Possibility for states to adopt higher or unlimited liability

Questions may be asked with regards to the possibility made available to states to adopt higher or unlimited liability in the case of claims relating to death or

any malfunction, failure or non-compliance with applicable safety regulations in respect of any part of the ship or its equipment when used for the escape, evacuation, embarkation and disembarkation of passengers, or when used for the propulsion, steering, safe navigation, mooring, anchoring, arriving at or leaving berth or anchorage, or damage control after flooding; or when used for the launching of life saving appliances.

²⁶ Soyer (n 20) 525.

²⁷ Baris Soyer, 'Boundaries of the Athens Convention: What you see is not always what you get!' in Professor D Rhidian Thomas (ed), *Liability Regimes in Contemporary Maritime Law* (Informa 2007).

²⁸ *ibid* 193.

²⁹ *ibid* 195.

personal injury under Article 7(2).³⁰ Several authors have opined that this provision undermines the very aim of limitation conventions, i.e. uniformity.³¹ Moreover, while it may be thought that adopting a higher limit of liability would afford greater protection to passengers, this may not always be the case. Indeed, given that Protection and Indemnity clubs (P&I clubs) would typically limit their exposure to the limit of strict liability and that the traditional structure of shipping companies is to the effect of one ship per company, a carrier would generally 'not be in a position to respond to such claims, except perhaps by winding up.'³² Therefore, not only is the argument that the adoption of higher limits leads to better compensation for passengers a potentially flawed one: one must also recognise that a move towards higher limits could, in its own right, prove to be detrimental to a shipping company in the eventuality of a serious accident at sea involving a certain number of passengers. In such a case the lifeline offered by the Athens Convention 2002 (and therefore by Regulation 392/2009) to shipping companies would, essentially, be usurped as States opt to make use of Article 7(2).

2.5 Loss of right to limit liability: how easily can it happen?

Article 13 determines that the carrier loses the right to limit liability 'if it is proved that the damage resulted from an act or omission of the carrier done with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result'.³³ This has been indicated to mean that 'the wrongdoer must be proved actually to have known or reali[s]ed that damage would *probably* ([and] not just possibly) result'.³⁴ This position, Haddon-Cave notes, could well lead to the situation whereby 'a cruise liner captain's conduct could give rise to a charge of manslaughter but still be insufficient to break the limit under the Athens Convention'.³⁵ The conclusion here must perforce be, that the threshold that must be surpassed in order for

³⁰ Art 7(2) of the Athens Convention 2002 states that: "A State Party may regulate by specific provisions of national law the limit of liability prescribed in paragraph 1, provided that the national limit of liability, if any, is not lower than that prescribed in paragraph 1. A State Party, which makes use of the option provided for in this paragraph, shall inform the Secretary-General of the limit of liability adopted or of the fact that there is none."

³¹ See for example Frank Wiswall, '2002 Protocol to the Athens Convention: An Internationalist's Commentary' (2003) *Benedict's Maritime Bulletin* 17. See also: Bernd Kroger, 'Passengers carried by Sea – Should they be granted the same rights as airline passengers?' in *CMI Yearbook* 2001, 244: 'The Montreal convention speaks of 'bodily injury' instead of 'personal injury'. This is aimed at preventing claims for damages possible under some legal systems for mental injury... There is nothing comparable in the Athens convention [...] [where] the definition of damages is perceptibly wider.' Also, Soyer (n 20) 533.

³² Soyer (n 20) 534.

³³ Athens Convention 2002 (n 16) art 13.

³⁴ Haddon-Cave (n 12) 236.

³⁵ *ibid* 238.

the carrier's right to limit liability to be lost is too high, to an extent that it may be described as unfair in the confrontation of the passenger as a potential claimant. Indeed, this is very much a case where 'lawyers may weep, or breathe a sigh of relief, depending for whom [they] are acting at any particular time'.³⁶

2.6 Failure to make a move from adequate to reasonable compensation in certain cases

The liability limits of 250,000 SDRs and 400,000 SDRs established by Articles 3 and 7 respectively may generally be described as adequate compensation in the eventuality of death or personal injury to a passenger.³⁷ This being said, to describe the said limitations as allowing for reasonable compensation would, at least in certain instances, mean to unreasonably stretch the definition of reasonableness. Indeed, Haddon-Cave QC postulates the very valid question: '[i]s there any good reason why [...] the surviving wife and children of a breadwinner killed on board a passenger ferry or aircraft should not be fully compensated for the death of a husband and father according to national levels of damages?'³⁸

The most solid justification for introducing limitations to liability of the carrier is to protect the said carrier from financial ruin in the eventuality of an accident at sea involving a financial burden (in terms of claims for compensation) that is substantially larger than can be placed on the carrier's shoulders (if the latter is to avoid the scenario of having to wind-up). This said, one can envisage cases where compensation can be raised to higher levels than those specified by Articles 3 and 7 of the Athens Convention. Indeed, taking the cue from Haddon-Cave QC, the present author finds plausible the suggestion by the latter that '[i]f per capita limits are to be retained, there is no reason why a system should not be devised whereby the unused portions of funds are pooled and available to satisfy larger claims that exceed the per capita limit.'³⁹

Where it means that the interests of the cruise and insurance industries (and therefore, at the end of the day, also the interests of the passenger) are being safeguarded it can somehow be justified that the injured passenger or his relatives not be in a position where they are able to recover from the carrier or his insurer the full amount of the loss incurred by them. Where the injured passenger or his relatives can be offered full compensation without placing the

³⁶ *ibid.*

³⁷ At the present time of writing, i.e. on 29 August 2012, the IMF website lists 1 SDR as being the equivalent of 0.824 Euro and therefore this places strict liability of the carrier in the eventuality of death or personal injury occurring due to a shipping incident at a level of precisely €206, 000. The fault based limit of liabilities established by Article 7, in turn, equates to €329,600.

³⁸ Haddon-Cave (n 12) 235.

³⁹ *ibid* 243.

carrier at the risk of financial ruin, however, much can be said for making this move from an adequate to a more reasonable form of compensation.

Another suggestion that has been voiced is to the effect that it might not be at all unreasonable to expect passengers, in cases where “a higher economic interest” should be covered, to take upon themselves the initiative of obtaining additional insurance over and above that provided under the Athens Convention or, in this case, Regulation 392/2009. Indeed, it might have been a rather elegant solution had the said Regulation inserted an additional provision making compulsory in contracts of carriage an advisory clause pointing out the merits of such a course of action to passengers.⁴⁰

2.7 Advance payment and information to passengers

Two practical improvements that offer enhanced protection to passengers and which have been incorporated by the Regulation as extensions to the provisions of the Athens Convention 2002 are Articles 6 and 7 of the aforementioned Regulation. Indeed, Martinez Gutiérrez observes how Article 6 (which deals with advance payment) effectively ‘[extends] the provisions of the Convention’⁴¹ and lays down that:

Where the death of, or personal injury to, a passenger is caused by a shipping incident, the carrier who actually performed the whole or a part of the carriage when the shipping incident occurred shall make an advance payment sufficient to cover immediate economic needs on a basis proportionate to the damage suffered within [fifteen] days of the identification of the person entitled to damages. In the event of the death, the payment shall not be less than EUR 21 000.⁴²

Understandably, the Regulation goes on to provide that any such advanced payments do not constitute recognition of liability ‘and may be offset against any subsequent sums paid on the basis of [the] Regulation’.⁴³

Martinez also observes how Article 7 then postulates the requirement that ‘the carrier [...] [ensures] that passengers are provided with appropriate and comprehensible information regarding their rights under the Regulation’.⁴⁴ As indicated by the Regulation itself, an effective way to comply with the requirement imposed by the provision under consideration would be to provide

⁴⁰ Bernd Kroger, ‘Passengers carried by Sea – Should they be Granted the Same rights as Airline Passengers?’ CMI Yearbook 2001 244.

⁴¹ Martinez Gutiérrez (n 6).

⁴² Regulation 392/2009 (n 9) art 6(1).

⁴³ *ibid* art 6(2).

⁴⁴ Martinez Gutiérrez (n 6).

the passenger 'with at least the information contained in a summary of the provisions of this Regulation prepared by the Commission and made public'.⁴⁵

3. Insurance

3.1 Introduction

Essentially tracing their origins back to the Torrey Canyon disaster,⁴⁶ the provisions on compulsory insurance in a number of IMO Conventions are now almost a permanent fixture in IMO conventions dealing with liability. It can nowadays be said that 'six international treaties adopted under the auspices of the IMO provide that the owner of a ship registered in a contracting state shall be required to maintain insurance [...] to cover the risk of liability for certain kinds of damage'.⁴⁷ With regards to the Athens Convention 2002 in particular, the requirement of compulsory insurance can be said to be one directed towards ensuring that the concept of strict liability remains an effective one when it comes to ensuring more adequate protection to passengers in the eventuality of death or personal injury.⁴⁸

By way of summarising the central point in Article 4bis of the Athens Convention 2002, it may be said that where a ship is licensed to carry more than twelve passengers, the carrier who effectively performs the carriage faces a requirement of maintaining insurance covering loss of life and personal injury to passengers to the amount of not less than 250,000 SDRs per passenger on each distinct occasion,⁴⁹ therefore, covering the amount up to which the carrier can be strictly liable in the event of a death or personal injury resulting from a shipping incident. A certificate issued by a State Party in accordance with the model contained in the Annex to the Regulation and attesting that the necessary insurance has been obtained must be carried on board the ship.⁵⁰

3.2 Compulsory insurance: a desideratum to ship-owners and claimants alike

⁴⁵ Regulation 392/2009 (n 9) art 7.

⁴⁶ Dugu Damar, 'Compulsory Insurance in International Maritime Conventions' (2009) 15 JIML 151.

⁴⁷ Eliseo Sierra Noguero, 'Compulsory liability insurances against claims arising from the operation of a vessel' (2011) Journal of Business Law.

⁴⁸ Martinez Gutiérrez (n 41).

⁴⁹ Professor Erik Rosaeg, 'Passenger liabilities and insurance: Terrorism and war risks' in Professor D Rhidian Thomas (ed), *Liability Regimes in Contemporary Maritime Law* (Informa 2007) notes at 209 that 'for a 3,000 passenger ship, this would mean insurance of almost US\$1.2 billion, and for a 5,000 passenger ship, US\$1.9billion'. These amounts are evidently substantial and, Rosaeg goes on to point out, 'far [exceed] the compulsory insurance requirements under the CLC'.

⁵⁰ Regulation 392/2009 (n 9) art 4 bis (5).

In the context of carriage of passengers under the Athens Convention, the requirement of compulsory insurance is one generally considered as backed by the ratio that compulsory insurance is necessary for the protection of vulnerable passengers.⁵¹ In a context where it has become typical for ships to be owned by a company as a legal person distinct from its members and with no assets beyond the (generally one) ship itself and, therefore, a context where in the eventuality of a vast enough accident a ship owning company may find itself in a situation of insolvency, the argument that compulsory insurance enhances passenger protection is an accurate one. This said, by necessity of logic, there is a second facet to this argument: compulsory insurance '[secures] a measure of financial stability to shipping companies, at the same time that it, indirectly, protects their claimants'.⁵²

3.3 The merits and demerits of the right of direct action against the insurer

Griggs, Williams and Farr manage to capture the essence of how central a provision Article 4 *bis* 10 is as follows: 'tucked away in Article 4 *bis* 10 will be found the striking proposal that claimants may pursue their claims directly against the insurer or other person providing financial security'.⁵³ Three salient points may be made with regards to the ambit of direct action:

- i. The insurer is always entitled to limit liability, even in cases where the carrier has forfeited his right to limitation of liability;
- ii. The insurer may rely on any of the defences which the carrier would have been able to rely on had there been a direct action against the carrier; and
- iii. Thirdly, and rather controversially, the insurer may invoke the defence that the damage resulted from the willful misconduct of the carrier.

Griggs, Williams and Farr explain how the willful misconduct exception immediately proved to be 'a highly contentious issue'⁵⁴ and this is somewhat understandable, given that where death or personal injury results from an incident spurred by the carrier's willful misconduct, the passenger, through no fault of his own, faces a reduced level of protection when it comes to security of his claim against the carrier. This is, therefore, an evident blow to one of the main aims of the Athens Convention 2002 and implicitly of Regulation 392/2009: that of ensuring proper compensation to passengers in the eventuality of accidents. This said, Griggs, Williams and Farr note how 'a

⁵¹ See for example Soyer (n 20). Soyer, at 526 makes the definite assertion that 'The rationale for compulsory insurance is the protection of claimants'.

⁵² Soyer (n 20).

⁵³ Griggs (n 22).

⁵⁴ *ibid.*

number of delegations pointed out that it was contrary to public policy [...] for insurance companies to offer cover against the willful acts of the accused'.⁵⁵ Moreover, and indeed rather crucially, it is the author's considered opinion that in order for the Athens Convention 2002 to be able to garner the necessary support for acceptance and ultimate adoption by States it was necessary for the drafting to achieve a fair balance *vis à vis* all those involved, and this includes the P&I clubs who traditionally offer insurance cover. P&I clubs had already been burdened with strict liability and the possibility of direct action. An attempt to place an additional burden on the P&I clubs by leaving the possibility of liability open even in the case of the carrier's willful misconduct might have been an attempt too far – effectively risking losing the support of the said clubs.⁵⁶

Griggs, Williams and Farr indicate that while the concept of direct action had already entered the ambit of the CLC, HNS and Bunker Conventions, the concept was somewhat less welcome by the P&I clubs in the context of passenger claims where 'the burden of handling thousands of direct claims will not be easy'.⁵⁷ A similar argument is made by Damar who notes the fear that 'the thousands of claims resulting from a catastrophic accident would be unmanageable'.⁵⁸ The merits of direct action, on the other hand, are equally notable and of equally wide consequence *vis à vis* the passengers who will not only have more secure prospects of effectively managing to obtain compensation but also swifter means to obtain the said compensation – 'without the need to trace and pursue the carrier'.⁵⁹ This advantage to claimants could be secured by the drafters of the Athens Convention 2002 owing, arguably, to a shift in the perceived function of insurance in general. Indeed, while at an earlier stage in this article the author has pointed out that insurance also serves to protect the ship-owning company from reaching a situation of hopeless insolvency, the truth remains that 'nowadays insurance proceeds are viewed as for the benefit of the injured party rather than the protection of the assured'.⁶⁰

4. Reservation and Guidelines

While the position taken by certain policy setters in the field of liability is that, essentially, the more liability the better, in his article analysing insurance of passenger liabilities in the context of terrorism and war risks, Rosaeg begins

⁵⁵

ibid.

See also Soyer (n 20). Soyer, at 530 makes the point that 'it would be poor public policy to allow a ship-owner to insure against the consequences of his own wilful misconduct [...] [and] in some jurisdictions, providing such a cover is prohibited, for reasons of public policy".

⁵⁶ Soyer (n 20) 530.

⁵⁷ Griggs (n 22).

⁵⁸ Damar (n 46).

⁵⁹ ibid.

⁶⁰ Soyer (n 20) 528.

with a clear assertion that his starting point 'is *not* that the more liability or the more insurance, the better'.⁶¹ This is the case with liability and insurance in general, but it couldn't be truer with regards to insurance of liability *vis à vis* war and terrorism risks where, unless carefully handled, insurance requirements can prove to constitute too heavy a burden for the industry in general to be able to handle. There is such a thing as a reasonable limit on how much insurance can be required of carriers and the reason for this is simple: 'there is a cost to it'⁶² which ultimately concerns passengers as well. If insurance requirements are not adequately fixed, passengers might have to face the trickle down consequences in the shape of increased costs of carriage.

Regulation 392/2009 incorporates extracts of the IMO Reservation and Guidelines in Annex II and gives the said extracts a binding character.⁶³ In summary, paragraph 1.2 of the Reservation entitles Governments to limit liability in respect of death or personal injury to passengers caused by any of the risks mentioned in paragraph 2.2 of the Guidelines⁶⁴ to the lower of the following amounts:

- 250 000 units of account in respect of each passenger on each distinct occasion,
- or
- 340 million units of account overall per ship on each distinct occasion.

These limits apply also *vis à vis* any insurer or provider of financial security in regards of the same risks.⁶⁵ Considering everything, the author is of the opinion that these lower limits are rather reasonable (generally speaking)⁶⁶ and

⁶¹ Rosaeg in Thomas (n 48) 207.

⁶² *ibid.*

⁶³ Regulation 392/2009 (n 9) art 3(2): 'The IMO Guidelines as set out in Annex II shall be binding'.

⁶⁴ IMO Reservation and Guidelines, para 2.2 of the Guidelines – the said paragraph lists the following risks:

- 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,
- confiscation and expropriation.

⁶⁵ IMO Reservation and Guidelines, para 1.6.

⁶⁶ While this is arguably the case generally, one can imagine certain scenarios where, owing to the number of passengers and claimants involved, compensation cannot exactly be described as reasonable from the passengers' point of view.

equitable to carriers, the insurance industry and passengers alike. Moreover, Rosaeg notes that '[t]he cost of the extra war insurance is far from prohibitive [...] it has been estimated to be less than US\$0.10 per passenger per day or voyage'.⁶⁷ This said, this is by no means to say that the impact of this lowering of limits cannot be considered as substantial, especially in the case of larger ships. Indeed, it has been well calculated by Damar that 'the full amount of strict liability in respect of war risks will only be available for ships licensed to carry up to 1360 passengers'.⁶⁸ In the case of a cruise ship with 4,000 passengers, on the other hand, the maximum amount that can be paid out per passenger in a comparable situation is a shockingly low amount of 85,000 SDRs which equates to roughly €70,000.⁶⁹ Even if one were to stretch the definition of adequate compensation to cover as wide a plethora of compensation amounts as possible, compensation to the tune of €70,000 in the case of death couldn't possibly be described as adequate.

This said, Rosaeg, in his consideration of the capping of liability in this scenario at 340 million SDRs, notes that while this limitation was somewhat arbitrary it ought not to inspire much consternation (even if he doesn't specifically voice his approval of the reasonableness of the limit as set): rather, he points out that 'it is not of paramount importance that it is sustainable over time as long as the Guidelines can be revised if needed'.⁷⁰ More than anything, the reason why the limit of 340 million SDRs was adopted because it 'seemed feasible':⁷¹ by setting a higher limit and therefore creating a new demand for insurance, policy makers feared that they would be inviting a considerable increase in insurance premiums. Moreover, beyond these kinds of financial considerations, 'there is only one terrorist incident known at a passenger ferry in international trade, with only one life being lost'.⁷²

While the merits of limiting liability to 340 million SDRs may be questioned, a positive point that definitely serves to protect the interests of passengers as potential claimants is that, unlike with war insurance as typically taken out by ship-owners, the 340 million SDRs are 'designated to passenger claims only under the Convention'.⁷³ Also commendable, is the mechanism whereby pro

⁶⁷ Rosaeg in Thomas (n 48) 224.

⁶⁸ Damar (n 46).

⁶⁹ The '340 million units of account overall per ship on each distinct occasion' limit would here apply, considering that it would in this case result in a lower amount than the other potentially applicable limit of '250,000 units of account in respect of each passenger on each distinct occasion'. This situation results in terms of Regulation 392/2009 which determines that the lower of the two limits must apply.

⁷⁰ Rosaeg in Professor Thomas (n 48) 221.

⁷¹ *ibid.*

⁷² *ibid.*

⁷³ *ibid.* 222.

rata distribution is favoured to a first come first served approach when it comes to distribution of available funds.

A responsibility is placed on Member States to issue an insurance certificate covering liability both *vis à vis* war and non-war risks. It is understood that the former will be issued on the basis of an insurance undertaking by 'a special entity to be created particularly for this purpose' whereas the latter will be issued on the basis of an insurance undertaking by 'the [traditionally constituted] P&I Clubs'.⁷⁴

5. Conclusion

As important an international piece of legislation as it is, the Athens Convention 2002 has, up till now (August 2012), failed to garner the necessary support in order to enter into force at an International level. Feeling the somewhat pressing need 'to ensure a proper level of compensation for passengers involved in maritime accidents'⁷⁵ the EU has commendably opted to hasten a process that has stalled considerably and, via Regulation 392/2009, the Athens Convention 2002, as enshrined in the aforementioned Regulation, is set to become effective across the EU as from 31 December 2012.

Given the multitude of interests (sometimes conflicting) of the various stakeholders involved in the liability debate, the Athens Convention 2002 was always going to involve a trade-off of interests and a number of compromises. While strict liability and the right of direct action were adopted, for instance, there was no such thing as a *carte blanche* when it came to selecting the precise wording that today constitutes the text of the Athens Convention 2002 and therefore of Regulation 392/2009.

Indeed, while the interests of passengers are safeguarded and adequate protection effectively secured, the interests of carriers and the insurance industry too are taken care of. The introduction of strict liability was an important victory for prospective claimants. Its limitation to 250,000 SDRs and its exclusion in the case of non-shipping incidents, on the other hand, were considerable safeguards secured by the opposite camps.

Then again, it is almost inappropriate to speak of 'opposite' camps and conflicting interests. It is, in the case of liability for the carriage of passengers by sea, in the interest of all parties involved that an adequate balance is achieved. Indeed, a scenario where the ship owner is left insolvent on account

⁷⁴ Norman A Martinez Gutiérrez, 'Limitation of Liability in International Maritime Conventions: The relationship between global limitation conventions and particular liability regimes' (Routledge 2011) 142.

⁷⁵ Preamble to Regulation 392/2009 (n 10).

of his inability to pay off a vast number of compensation claims is hardly an ideal one for claimants. So too, a scenario where ticket prices for carriage by sea increase exorbitantly due to higher insurance premium costs being passed on to passengers.

It is precisely this delicate balance that is achieved by the Athens Convention 2002 which makes it such an important instrument in such a delicate field as is limitation of liability. This point seems to have been taken aboard by the European Union, as evidenced in terms of its adoption of Regulation 392/2009. It can now only be hoped that this gesture will create the necessary impetus to spur on the necessary international support for the Athens Convention 2002 to enter into force internationally and not just limitedly on a regional level.