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Topic VII

Protection of cruise ship passengers' rights and interests

Direct action against the liability insurer of carriers of passengers by sea in the event of accidents

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Abstract: It is widely known that the P&I clubs use the insurance clause of prior payment (considered as valid by the British House of Lords) to deny payment to the injured parties resulting from the operation of the insured vessel. However, co-operation between ship owners, insurers and States in the headquarters of the International Maritime Organization has given rise to some international treaties where direct action in favor of some injured parties is recognized. Among them, passengers on board of ships to which the 2002 Athens Convention applies and only in case of death or injuries. Direct action is of a key importance in shipping, as the carrier may at times be difficult to trace and/or unable to fully meet its financial obligations. This article deals with the legal regime of the direct action, competent courts, national law applicable to the liability of the performing carrier and his insurer and defences and limits of liability than can be invoked in front of a direct action.

1. The 2002 Athens Convention and 2006 IMO Guidelines and its incorporation into the European Union by reg. (EC) n. 392/2009

The so-called «2002 Athens Convention» or PAL Protocol 2002 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. Together with the 2006 IMO Guidelines for the implementation of the 2002 Athens Convention (hereinafter, «IMO Guidelines»)[1], are both incorporated into the European Union by the regulation (EC) n. 392/2009. This regulation shall be binding in its entirety and directly applicable in all Member States of the European Union and of the European Economic Area (as Norway), irrespectively whether every single country is party to the 2002 Athens Convention.

The 2002 Athens Convention and the IMO Guidelines establish a system on the liability of carriers of passengers by sea in the event of accidents. Legislator understands that, to be effective, this regime of liability needs to be

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[1] 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 according the International law concerning the formation of the treaties.

accompanied by a compulsory liability insurance[1]. The obliged person is the performing carrier operating a vessel licensed to carry more than twelve passengers (art. 4*bis* 2002 Athens Convention).

The insurance for marine risks is usually a mutual P&I Club, mostly one of those which are part of the so-called International Group of P&I clubs (hereinafter «IG Group») [2]. Globally, these clubs insure most part of the passenger vessels dedicated to international transport[3]. Performing carrier can contract the usual P&I insurance or other alternative insurance or financial guarantee.

Apart from an insurance for marine risks, performing carrier must contract a separate insurance to cover war and terrorism risks, according to the 2006 IMO Guidelines. It would be possible to have only one insurance to cover marine and war risks[4]. However, both risks are usually covered by different insurers. The war market is even more specialized and with a more limited number of insurers. The standard P&I insurance excludes coverage in case of liability of the insured in war or terrorism events.

2. Concept of direct action

The direct action is a privilege recognized by art. 4*bis*10 the 2002 Athens Convention. It allows to claim compensation to the war or marine liability insurer of the performing carrier in case of death or injury of the passenger. It means that the injured party can claim the payment to an insurer, with whom he has no contract. Direct action supposes an exception to the rule of privity of

[1] The scope of application of the compulsory insurance of the 2002 Athens Convention is, above all, European. Both for ships registered in these countries (art. 4*bis*12) and ships registered in third countries but visiting European waters (art. 4*bis*13). In the European Union, compulsory insurance applies since 2012 to any international carriage and to carriage by sea within a single Member State on board ships of classes A and B. However, to give time to small shipping companies operating national transport services, each single State could defer application of this Regulation until 31 December 2016 to ships of class A and until 31 December 2018 to ships of class B, as the most part of the countries did.

Apart from the European countries, the 2002 Athens Convention has been ratified only by Belize, Marshall Islands, Palau and Panama (see status of conventions in imo.org, accessed 16 July 2018).

The United States of America and the Asian countries are not so far parties to the 2002 Athens Convention.

[2] The IG Group has a permanent representation in the IMO. The reason of this cooperation between States and the insurance market is the leadership of these P&I clubs and the incapacity of the alternative market (commercial insurers and not IG clubs) to compete with these clubs.

[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, indicates that even though ar risks are generally exempted from insurance cover, liability for acts of terrorism that could have been prevented by the carrier remains. 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 (art. 2.2 IMO Guidelines).

contract.

Direct action is contrary to the custom and contractual practices of the P&I clubs. These P&I clubs generally do not recognize rights of payment to a third party[1]. They only pay the indemnity to their insureds. By virtue of the so-called "prior payment clause" or "pay to be paid" clauses, insured is obliged to pay the damage to the injured party. Only after this payment is done and proved, insured has a right to be reimbursed by the P&I club. It is a type of liability insurance based on the effective indemnity.

Injured person assumes a serious risk when previous payment from the carrier does not take place[2]. The P&I club would not be obliged to pay neither the insured nor the injured third party. That is why the Spanish Supreme Court maintains a critical position regarding the configuration of the P&I insurance, highlighting the "devastating effect" on those injured parties when the carrier is insolvent or untraceable[3].

That is why the 2002 Athens Convention is sensitive to the public interest in guaranteeing compensation in case of death or injury of the maritime passenger. Art. 4*bis* operates against the insurance practice of prior payment. This article imposes the direct action on the insurer, irrespectively of the terms of the insurance contract[4].

To prove the insurance and the fulfillment of the international law, the performing carrier has to ask his insurers (both marine and war risks) to issue

[1] 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.

[2] The usual reference to the English law, as the law of the insurance, in the rules of some of the P&I Clubs of the International Group, is also essential to protect insurers. The British House of Lords considers that the prior payment clause is valid and enforceable against the third party, even when the owner is insolvent. See *Firma C. Trade S.A. v. Newscastle 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 of America, M J PALLAY, 'The right of direct action: Issues proceeding directly against marine insurers' (2016) 41 Tulane Maritime Law Journal 58, highlights the difficulties derived from the State laws to file a direct action against the liability maritime insurer as well.

[3] Sentences Supreme Court of 3 July 2003 (RAJ 4324/2003) and of 14 January 2016 (Criminal chamber) (Cendoj 28079120012016100001). The last one regards the accident and subsequent pollution caused by the tanker «Prestige» in Spain and France.

[4] Direct action is also common in other international treaties that have been agreed within the International Maritime Organization. See mandatory insurance and direct action for victims of maritime oil spills by oil tankers (1969 CLC and 1992 CLC); mandatory insurance and direct action were also approved to victims of oil pollution from fuel of vessels other than oil tankers (2001 Bunker Convention); mandatory insurance with direct action was also approved to safeguard the reimbursement rights of national authorities to cover the cost of removing ship wrecks in case of insolvency or disappearance of ship owners (2007 Nairobi Convention). Strong attempts are being made to allow victims of maritime pollution due to substances other than oil to access the regime of compulsory insurance and direct action (1996 HNS Convention and 2010 Protocol, not in force yet). More recently, as an outcome of the cooperation between the IMO and the International Labour Office, the 2014 amendment to the 2006 Maritime Labour Convention imposes mandatory insurance for owners of vessels (other than fishing vessels) and direct action by seafarers in the event of injury or death on the job, as well as for repatriation costs and pending salaries in the event the crew is abandoned.

each one and sign the so-called blue card. Through the blue card, every insurer certifies that there is in force in respect of a particular ship and its ownership a policy of insurance satisfying the requirements of Article 4*bis* of the 2002 Athens Convention.

Both marine blue card and war blue card must be shown to the competent public authorities of the flag of the ship party to the 2002 Athens Convention. For foreign vessels, it is competent whatever State party to this Convention (art. 4*bis*2). Competent authority will issue certificate attesting that insurance or other financial security to each ship is in force in accordance with the provisions of the 2002 Athens Convention. Therefore, the State must verify correctly the solvency of the insurer or pass a national norm to determine which insurers are capable of issuing this type of blue cards.

The exercise of direct action comes usually after a period of negotiations. Talks can be carried out by the legal team of the insurer itself, since the insurance includes legal defence[1] . For those injured parties whose claim are not agreed amicably and confidentially, they have the right to go to the competent judicial courts and claim for compensation against the insurer through the direct action. Today class actions by a group of injured people are common.

3. Who can sue

Art. 4*bis* 10 Athens Convention 2002 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 the direct action is not limited to the passenger himself for injuries or his successors in case of death. As a result, the insurer may be obliged to face several monetary claims from different people and for the same accident.

Direct action could be filed by who has advanced compensation to the injured party and has been subrogated in their rights. For example, the travel assistance insurer, the insurer of the carrier or the uninsured carrier that, after payment, seeks reimbursement against the insurer of the performing carrier. This direct action depends if it is possible the subrogation in the national law applicable to such action[2].

[1] 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 better 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.

[2] 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 2002 Athens Convention admits direct action against "the insurer or other person providing financial security". Since there are at least two insurances, one for war risks and one for marine risks, the 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 not clear. The more accepted criterion of attribution of responsibility between insurers is the proximate cause, that is to say, the real cause of the death or personal injury to passenger. In any case, each insurer should only be liable for its part (art. 2 IMO Guidelines). And the insurers are not jointly and severally liable (model of certificate insurance of the IMO Guidelines).

Art. 4*bis* 2002 Athens Convention 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. Perhaps the national legislation applicable to direct action does impose a collective claim against the insurer and the insured. Admission or declaration of liability of the performing carrier would be a precedent condition of the payment by his liability insurer.

5. Competent courts

The 2002 Athens Convention contains a list of exclusive competent courts to elucidate the liability of the carrier and the performing carrier in case of death or injury of the passenger[1]. However, specially in larger accidents, there is an increasing prospect of criminal charges being brought for negligence in case of death or injuries to passengers [2] (i.e. "Costa Concordia)[3]. In these cases, civil action can be decided, if the claimant agrees, together with the criminal action before the same court.

Art. 17.1 2002 Athens Convention 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)

[1] This regime of exclusive jurisdiction of the 2002 Athens Convention is radically different from the law of the United States of America. This country is not a contracting party to the 2002 Athens Convention. In cruises and passage trips in the U.S.A., the competent forum and the applicable national law are normally chosen in the transport contract itself or in the tourist package that includes a cruise. Although American courts dispute the validity of this clause in consumer contracts, the general rule is the prevalence of *lex privata*, in D Burke, 'Cruise Lines and Consumers, Troubled Waters', (2000) 37 I American Business Law Journal 699-700.

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

[3] Sentenza della Corte di Cassazione penale, sezione IV, 19 July 2017.

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.

However, this article 17.1 refers only to an action before the «carrier» or the «performing carrier», not a direct action against the compulsory liability insurer of the performing carrier according to art. 4*bis* 2002 Athens Convention. For this reason, as a novelty of the PAL Protocol 2002, the direct action against the insurer of the art. 4*bis* is accompanied by the new art. 17.2 2002 Athens Convention: actions under art. 4*bis* 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* (emphasis added) according to paragraph 1. It depends on the carriers, and not of the insurer himself, which determine where actions can be brought against the insurer[1].

Therefore, the compulsory insurer of the performing carrier can be sued, for example, where the carrier (not his insured) has his place of business. It means that the liability insurer of the performing carrier has not security on the competent court where can be sued, because it depends on conditions related to his insured (performing carrier) and a third party (carrier). In fact, given the selection of the court by the victim, in case of plurality of them, the insurer may be obliged to face claims in different countries for the same accident.

The contract of carriage or the contract of liability insurance cannot limit the selection of court where to claim that belongs to the claimant. Art. 18 2002 Athens Convention confirms thus 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, par 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.

Unlike other parts of the 2002 Athens Convention, art. 17 is not incorporated into European Law by regulation (EC) n. 392/2009, but through the Council Decision 2012/23, 12 December 2011, concerning the accession of the European Union to the Protocol of 2002 to the Athens Convention, as regards arts. 10 and 11 thereof. The Decision 2012/22, of the same date, concerns the accession of the European Union to the other parts of the Protocol of 2002.

[1] 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.

Effectively, the European Union is party of the 2002 Athens Convention, irrespective of the fact that any single country has ratified the international Convention. While the regulation (EC) n. 392/2009 puts into effect the 2002 Athens Convention in the whole European Union, the Council Decision 2012/23 makes the same for articles 10 (competent jurisdiction) and 11 (enforcement and recognition). The reason of this different treatment is that jurisdiction, enforcement and recognition of foreign judgements are of the exclusive competence of the European Union, not of the European countries.

When it comes to which norm prevails with other European norms on jurisdiction, point 4 of the preamble of the Council Decision 2012/23/CE says that "upon accession of the Union to the Athens Protocol, the rules of jurisdiction set out in art. 10 2002 Protocol [1] should take precedence over the relevant Union rules". Particularly, arts. 17 2002 Athens Convention prevails over the forums of jurisdiction of the regulation (EU) n. 1215/2012 of the European Parliament and of the Council of 12 December 2012, on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters. Art. 67 reg. (EU) n. 1215/2012 confirms that this regulation shall not prejudice the application of provisions governing jurisdiction and the recognition and enforcement of judgments in specific matters which are contained in instruments of the Union or in national legislation harmonised pursuant to such instruments. 2002 Athens Convention will prevail as a *lex specialis* over the rules of jurisdiction of the reg. (UE) n. 1215/2012[2].

Art. 17.3 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.

6. National law applicable to direct action

The action for damages for the death of or personal injury to a passenger against a *carrier* or *performing carrier* (*emphasis added*) shall be brought in accordance with this Convention (art. 14 2002 Athens Convention). The same rule applies to the liability insurer of the performing carrier in case of direct action. Irrespective of the fact that art. 14 does not mention the insurer. This absence obeys the introduction of the direct action in the Athens Convention was in the version of 2002, while art. 14 comes from the 1974 version of the Athens Convention. However, we think that the system of liability of the insurer is always the 2002 Athens Convention and the 2006 IMO Guidelines and the special rules of the regulation (EC) n. 392/2009 in the European Union (for

[1] Art. 10 Athens Protocol 2002 contains the art. 17 2002 Athens Convention.

[2] 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 (UE) n. 1215/2012.

example, global limitations of liability per ship and incident). The reason is that compulsory insurance cover liability *under this Convention* (*emphasis added*) in respect of the death of and personal injury to passengers.

Another gap of the 2002 Athens Convention is that this is incomplete and needs to be supplemented by the national law of the EU and EEA States and/or of the States parties to the 2002 Athens Convention[1]. The lack of homogenization allows national regulations, so the same passenger accident can be solved differently in each country[2]. For example, rulings in Spain and Italy for the "Costa Concordia", where the same accident has given rise to different indemnities[3].

First of all, when the 2002 Athens Convention applies to a death or injury of a passenger, no national law of a State contracting party of the 2002 Athens Convention can deny direct action or contradict the terms of the international norm. For example, as far as defences are concerned, widening the number or type than could be invoked by the insurer against the claimant.
Secondly, the national law that will complete the 2002 Athens Convention results from the rules of conflict of the International Private Law of the court where direct action is filed. It is doubtful about the selection of the rule of conflict regarding contractual obligations or regarding in tort obligations, when there is not a particular rule of conflict for the direct action against the insurer[4]. An interpretative solution is to connect the direct action against the insurer with the action that can be brought before the insured carrier. As a solution, it appears that the rule of conflict is the contractual one if the injured party has a

[1] European Comission, 'Support study to the evaluation of the Regulation (EC) 392/2009. Final report' (2017) 29. Available in publications.europa.eu (accessed 17 June 2018).

[2] 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, 269.

[3] European Comission, '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 categorized into four systems on the civil liability legislation of the carrier: a) the French system (with France, Belgium, Spain and Italy); b) the German system, (with Germany, Netherlands, Austria and Switzerland); Common law systems (United Kingdom and Ireland); and, d) Scandinavian systems. Each of these systems is diverse in three essential aspects, according to the European Commission: the amount of compensation, the type of compensable damages and compensation for personal injury. For example, in Spain, the courts usually apply analogically the scale of road traffic accidents to personal injuries suffered in other areas, as air accidents. This system is unknown in other countries of the European Union.

[4] 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), does not says nothing about the rule of conflict applicable to determine the national law in case of direct action against the liability insurer of the responsible of the damage. In Spanish law, the court hearing the direct action has to apply the Spanish conflict rules (Article 12.6 Civil Code). These rules of conflict may lead to the dispute being resolved according to the *lex fori* or to the national law of a foreign country. In this last case, the content of the foreign law will be subject to proof as to its content and validity (art. 281.2 Civil Procedure Law 2000).

contract with the performing carrier insured or the claimant as subrogated the contractual rights against the insured carrier. The rule of conflict would be in tort in the other cases.

According to this interpretation, where the claimant has a transport contract with the performing carrier, he is exercising a contractual right and direct action shall be decided by the national law that applies to this contract. As a general rule, there is a contract between the performing carrier and the passenger, even when the passenger is part of a cruise ship with a contract relating to package travel. For this purpose, the ship owner normally issues a ticket to the passenger to define the entire relationship with each one[1]. Accepting that ticket as a contract[2], therefore, the claim by the passenger against the performing carrier and/or his liabitily insurer is contractual as well, not in tort.

The conflict rule would be in tort one if the claimant does not maintain any contract with the insured carrier. The rule is that the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur [art. 4.1 Regulation EC n. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II)].

7. Defences that can invoke the insurer

Art. 4 bis 10 2002 Athens Convention also contains the regime of defences that can be invoked by the insurer or guarantor of the performing carrier in the case of direct action. The IMO Guidelines complete the regime of defences in relation to the insurer of risks of war and terrorism, with a catalogue of defences that apply specifically in this insurance. The international rule cannot be contradicted by the national law applicable to the direct action.

(1) Lack of liability of the insured carrier in shipping accidents and non-shipping accidents

[1] Clause 11.a, "*passage tickets*" of the contract-form to charter a cruise vessel, «Cruisevoy», by BIMCO, says that prior to departure the owners shall deliver to the charterers for each passenger and member of charterer's staff an owner's passage ticket in the form of the specimen ticket. The passage ticket and not this charter party defines the entire legal relationship between owners and passengers.

[2] F Sparka, *Jurisdiction and arbitration clauses in maritime transport. A comparative analysis (Springer* Heidelberg Dordrecht London New York *2010) 58, 59.* Also L Pulido Begines, 'Régimen jurídico de los cruceros turísticos: disciplina, normativa y elementos personales' (2000) XVII Anuario de Derecho Marítimo 124 and E Olmedo Peralta, *Régimen jurídico del transporte marítimo de pasajeros. Contratos de pasaje y crucero* (Marcial Pons Madrid 2014) 345 s., consider this ticket as a contract and, therefore, the claim by the passenger against the performing carrier is contractual, not in tort.

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

In case of direct action, the war and/or marine insurer can object that the insured carrier is not responsible for the death or injury of the passenger according to the 2002 Athens Convention and 2006 IMO Guidelines. The imputation of the insured's liability is mandatory, either by own recognition or by judicial or arbitral declaration. If this is not the case, the insurer does not assume any obligation to compensate the injured party. In addition, the attribution of responsibility must be carried out in accordance with the terms and conditions of the 2002 Athens Convention (art. 3). For example, in the matter of presumption of guilt, burdens of proof, exoneration charges, etc. There is a different regime of liability depending of the death or injury results from a «shipping accident» or by a «non-shipping accident» under the 2002 Athens Convention.

On the one hand, art. 3.5. a 2002 Athens Convention identifies the shipping accidents as shipwreck, capsizing, collision or stranding of the ship, explosion or fire in the ship, or defect in the ship. Art. 3.1 2002 Athens Convention says that for the loss suffered as a result of the death of or personal injury to a passenger caused by a shipping incident, the carrier shall be liable to the extent that such loss in respect of that passenger on each distinct occasion does not exceed 250.000 units of account, unless the carrier 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. If and to the extent that the loss exceeds the above limit, the carrier shall be further liable unless the carrier proves that the incident which caused the loss occurred without the fault or neglect of the carrier.

The majority of authors interpret art. 3.1 2002 Athens Convention in the sense that, up to a limit of 250.000 SDR per passenger and accident, the carrier assumes strict liability, that it is to say, without fault, for the death or injuries to passengers[2]. Therefore, if the insured carrier and its assistants were diligent or

[1] 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, remembers that according to art. 4*bis*11 2002 Athens ConventionThe most important of such issues is that while the Athens Convention provides that the limitation amount shall not be seized from the trustee in the bankruptcy of the liable person regardless of choice of law rules.

[2] E Røsæg, 'Passenger liabilities and Insurance: terrorisme and war risks', i 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 2 *Tulane Maritime Law Journal* 631, highlight the change of model of liability between the 1974 and 2002 Athens Conventions.

minimized the damage is irrelevant[1]. It means that in shipping accidents, the insurer or guarantor is liable for the death or injury to the passenger, even when the damage is caused by the fault (not fraud) of a third party. For example, imagine a shipping accident caused by the negligence of a port authority or a collision attributable to another ship owner, without the carrier's own fault[2].

The regime of the 2002 Athens Convention does not correspond to the strict liability established in the 1999 Montreal Convention for the unification of certain rules for international carriage by air[3]. During the negotiations of the 2002 Protocol to the 1974 Athens Conventions in the IMO headquarters, it was clear that the ship owners and the liability marine insurers were not ready to assume the extension of the air regulation to marine risks. As a result, the 2002 Athens Convention recognizes that, even in a shipping accident causing death or injuries to passengers, act of war, natural phenomenon or that damage was wholly caused by an act or omission done with the intent to cause the incident by a third party. So, admitting that the 2002 Athens Convention means an advance in comparison to the regime of the 1974 Athens Convention, these defences do not allow to talk about a real strict liability[4]. It can be used more properly the term "liability without negligence"[5].

On the other hand, art. 3.2 2002 Athens Convention says that for the loss suffered as a result of the death of or personal injury to a passenger *not caused by a shipping incident* (*emphasis added*), 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. The 2002 Athens Convention follows for these damages a traditional system of fault-based liability[6]. In maritime practice, the most common cases of death and passenger injury are caused by events not related to maritime navigation[7]. For example, due to the lack of safety that allows a passenger to fall into the sea; by defective maintenance of the

[1] 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).

[2] This is without prejudice to the right of repetition that assists those who have paid the compensation against the party responsible for the damage. However, this third party's fault is not opposable to the passenger or his successors.

[3] 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.

[4] European Comission, 'Support study to the evaluation of the Regulation (EC) 392/2009. Final report' (2017) 24.

[5] 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.

[6] 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.A. is always based of the fault by the carrier, irrespective of shipping or not shipping accidents. This is a great difference to the 2002 Athens Convention.

[7] This is demonstrated by the analysis of the extensive experience in cruises in the United States of America, in to 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.

cabins that allows a slip in the bathroom; due to the negligence of the persons employed by the carrier during recreational activities on board, etc.

Finally, the liability insurer in case of a direct action can invoke other defences that could be used by the carrier against the claimant.

For example, that the executing carrier is not responsible for death or injury, as they have occurred in non-maritime or accessory phases (art. 1.8 Athens Convention 2002). When the damage occurs during an excursion out of the cruise ship organized by the performing carrier. Liability of the carrier for these damages to the passenger is not regulated by the 2002 Athens Convention and it is also excluded of the compulsory coverage[1]. The P&I insurances of the IG group expressly exclude coverage for damages occurred out of the main maritime transport (shore excursions and transfers prior and after the maritime transport). Therefore, if the insured ship owner agrees with the passenger an obligation during these phases, because he sells a special ticket, he does not compromise his club P&I[2]. Some P&I clubs offer an additional product that covers the responsibility of the carrier when he acts as tour operator or sells shore excursions to passengers[3].

Others defences can be, i.e., that the passenger is not part of a transportation contract (article 1.4.a); that the damage is attributable to an agent or employee of the carrier acting outside the exercise of his functions (art. 3.5); that the executing carrier is not responsible for actions, omissions or obligations assumed by the contractual carrier, unless he has given his consent (art. 4.3); that the damage is attributable to the negligence of the passenger (Article 6) [4]; that the action of liability has become time-barred (art. 16); that the courts chosen by the defendant are not competent (art. 17), among others.

(2) Willful misconduct of the assured

[1] 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, offers a complete analysis of American rulings, on which it reaches the following conclusion: "although there are problems on board cruise ships, it is generally safer to be on board than on a shore excursion" (519), due to the multiplicity of accidents suffered by passengers.

[2] See i.e. *rule* 57.b *Gard P&I Rules 2018* (in gard.no, accessed 16 June 2018).

[3] 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 17 June 2018).

[4] The International Chamber of Shipping, in its intervention in the Legal Committee of the IMO during the negotiation of the Protocol 2002, underlined that, unlike the air passenger, the maritime passenger can carry out more activities on board in which the damage is attributable to him (in LEG 81/11, of April 12, 2000, paragraph 118, in imodocs of imo.org). M. López de Gonzalo, 'La responsabilità del trasportista marittimo de persone dal Codice della Navigazione al Regolamento 392/2009' (2012) III Il Diritto Marittimo 752, says that, although the responsibility of the carrier is not excluded, the principle of self-responsibility of the passenger is required.

Furthermore, the defendant may invoke the defence that the damage resulted from the willful misconduct of the assured (art. 4*bis*10 2002 Athens Convention). This exclusion of coverage was an object of discussion during the negotiations of the Protocol 2002 within the IMO. The International Group of P&I Clubs refuse the coverage of the carrier's fraud, which was not included in the final text.
This legal exclusion could imply an unfair solution for the passenger when the death or injury 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 (for example, overload of the ship).

Certainly, in case of willful misconduct, the performing carrier has no right to apply the limits of liability of the 2002 Athens Convention (art. 13, referencing to arts. 7, 8 and 10.1) ([1]). But if the carrier is insolvent or cannot be found, no one will pay damages to the passenger, victim of the willful misconduct of the carrier. So, the regime of liability and insurance of the 2002 Athens Convention becomes absolutely useless. This unfair solution resulting from the exclusion of coverage for willful misconduct of the assured is, however, common in other branches of insurance.

(3) Exclusions of coverage

Insurer cannot invoke in case of direct action a clause of the insurance contract having the effect of excluding the coverage or liabilities for death or injury to the passenger under the 2002 Athens Convention. The blue card issued and signed by the insurer says that this document certifies that there is in force in respect of the above named ship while in the above ownership a policy of insurance satisfying the requirements of Article 4*bis* 2002 Athens Convention.

As an exception, the IMO Guidelines also provide expressly for several exclusions for typical coverage of the war marine insurance market. In particular, insurer can invoke the exclusion of coverage exceptions for radioactive contamination, chemical, biological, biochemical and electromagnetic weapons. Also the exclusion of cyber attacks, It can also oppose 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 case of direct action, the defendant shall not invoke any other defence which the defendant might have been entitled to invoke in proceedings brought by the assured against the defendant (art. 4 bis 10 2002 Athens Convention). The

[1] 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.

passenger is in a better position to claim[1]. For example, the insurer cannot invoke the lack of payment of the premium or call of the insurance; the lack of compliance by the performing carrier of the safety conditions of the ship; the possible renounce of the insured to claim his insurer, and so on.

Neither the insurer can oppose to the plaintiff the usual clauses of jurisdiction or arbitration of the insurance contract in case of direct action[2].

As a general rule, insurer cannot invoke in front of the injured third party the national law of the P&I rules or other insurance contract. This is forbidden by art. 4*bis* 10 2002 Athens Convention: the defendant shall not invoke any other defence which the defendant might have been entitled to invoke in proceedings brought by the assured against the defendant.

9. Per capita limitation

Individual claim cannot exceed, as a general rule, of 250.000 units of account per passenger and accident (article 4*bis*10, which refers to paragraph 1 of the same article of the Athens Convention 2002). The sum 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 corresponds generally with the *Special Drawing Right* (hereinafter, "SDR") of the International Monetary Fund[3], because the amounts mentioned in arts. 3.1, *4bis 1* (*emphasis added*), 7.I and 8 shall be converted into the national currency of the State of the court seized of the case on the basis of the value of that 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 2002 Athens Convention). In July 2018, 1 SDR worths 1,4 U.S. dollars[4].

It does not mean that the insurer would pay always the maximum 250.000 SDR for death or injury to each passenger. This quantity is the top of the indemnity, but the insurer could invoke that the real damage is smaller according to the

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

[2] This option coincides with the law of the European Union. The judgment of the Court of Justice of the European Union (eighth section), of July 13, 2017 (ECLI: EU: C: 2017: 546, in curia.europea.eu, consulted on February 27, 2018) indicates that the reg. (EC) 44/2001, now repealed and replaced by reg. (UE) 1215/2012 must be interpreted in the sense 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. In relation to claims from passengers, this right is expressly included in art. 14.2 reg. (CE) 44/2002 and in the current art. 16.2 reg. (EU) 1215/2012.

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

[4] See www.imf.org (accessed July 11, 2018).

applicable national rules. That is an example of why the national law applicable to the direct action is so important, because it has a direct effect on the quantification of the damage.

The judicial valuation of the death or injury of the passenger may be higher than 250.000 SDR. In fact, the liability of the carrier for the death of or personal injury to a passenger under art. 3 shall in no case exceed 400.000 units of account (SDR) per passenger on each distinct occasion (art. 7.1 2002 Athens Convention)[1]. 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 (art. 7.2 Athens Convention). The insurance contract can voluntarily extend the sum insured further than 250.000 SDR and give a wider o full cover to the insured carrier. It is clear the right to the carrier to claim to his insurer for this coverage. However, it appears that it is not excluded that the insurer may limit its liability in front of the third party to the 250.000 SDR, according to his right recognized in art. 4*bis* 1 and 10 2002 Athens Convention.

The IMO Guidelines for the implementation of the 2002 Athens Convention contains specific and sectorial rules of liability and sum insured for the carrier and his war insurer. Those can limit their responsibility for death or personal injury to a passenger caused by a war risk to the lower of the following amounts: to 250.000 SDR in respect of each passenger on each distinct occasion, or to 340 million SDR overall per ship on each distinct occasion (art. 1.6 IMO Guidelines). In the event the claims of individual passengers exceed in the aggregate the sum of 340 million units of account overall per ship on any distinct occasion, the carrier shall be entitled to invoke limitation of his liability in 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 by the insurer, or by the Court or other competent authority seized by the insurer in any State Party in 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

Liability under the 2002 Athens Convention may – or may not – be subject to

[1] 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 that they are quantities unheard of in the transport industry and, indeed, in any industry at all.

global limitation [1]. The 2002 Athens Convention does not include global limits of liability for ship and accident, as national laws usually do. The European Union, through regulation (EC) n. 392/2009, when incorporates to the European law the 2002 Athens Convention, also includes a special rule in art. 5 regarding "Global limitation of liability".

Art. 5 regulation (EC) n. 392/2009 says that this regulation shall not modify the rights or duties of the carrier or performing carrier under national legislation implementing the International Convention on Limitation of Liability for Maritime Claims, 1976, as amended by the Protocol of 1996 (hereinafter, «LLMC Protocol 1996», including any future amendment thereto. In fact, most part of the countries of the European Union are parties to the LLMC Protocol 1996[2]. As a result, the performing carrier and his liability insurer (art. 1.6 LLMC Protocol 1996) can invoke the defence of the global limitation of liability set up in the art. 7 LLMC Protocol 1996 [3]: in respect of claims arising on any distinct occasion for loss of life or personal injury to passengers of a ship, the limit of liability of the ship owner thereof shall be an amount of 175.000 SDR multiplied by the number of passengers which the ship is authorized to carry according to the ship's certificate. Therefore, the compensation that has to be paid still cannot be capped to the amount of the limited liability under the LLMC Convention 1976 or other national rule implementing lower limits of the LLMC Protocol 1996[4].

Art. 5 regulation (EC) n. 392/2009 adds that in the absence of any such applicable national legislation to apply the LLMC Protocol 1996, the liability of the carrier or performing carrier shall be governed *only* (*emphasis added*) by art. 3 of this Regulation. It means that there will be applicable only the limits per passenger and accident of the art. 3 2002 Athens Convention.

[1] 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.

[2] 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, no later than 1 January 2012, their consent to be bound by the LLMC 1996.
According to the IMO, in June 2018, all the States of the European Union are part of the LLMC Protocol 1996, with the exception of Austria, Slovakia, Italy and the Czech Republic. However, in the Italian case, the decreto legislativo. June 28, 2012, n. 1116, has introduced the limit of liability for damage to passengers, also in 175,000 SDR, multiplied by the number of passengers, such as the LLMC Protocol 1996, without making use of the power of increased limits, in P. Celle, 'I profili assicurativi della responsabilità del trasportista marittimo de persone nella Convenzione de Atene e nel Regolamento 392/2009' (2012) III Il Diritto Marittimo 778). Point 18 of the preamble to the regulation (EC) n. 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. Finland, Sweden and the United Kingdom have made use of the faculty granted in art. 15.3.bis LLMC Protocol 1996 and have reserved the right to regulate by national law the highest limits for death or injury of the passenger (in imo.org, consulted on February 5, 2018).

[3] A MANDARAKA-SHEPPARD, *Modern maritime law, vol. 2, Managing risks and liabilities (third edition,* Oxon/Nueva York, 2013) 791, 792.

[4] As it would be normally applicable in defect of the European regulation, 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.

Some authors have dealt with the coordination of the limits of the LLMC 1996 Convention by ship and loss and the 2002 Athens Convention by passenger and loss. It has been said that both limits are enforceable against the injured party, at the convenience of the carrier[1]. We do not share this opinion. The single injured passenger has a right to be compensated according to the terms of the 2002 Athens Convention (art. 3, 7 and 18). Only when the set of claims recognized per claim and accident exceed the global limitation of the LLMC Protocol 1996, the ship owner and his insurer may set up a compensation fund under the LLMC 1996 and impose the *pro rata* distribution among the injured parties.

Art. 5.2 reg. (CE) n. 392/2009 says 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 the performing carrier may limit their liability pursuant to the LLMC Protocol 1996. It lacks a rule for coordinating the abovementioned limit of the IMO Guidelines (340 millions SDR per vessel) and the global limits of the LLMC Protocol 1996. In our opinion, when the limitation of liability for vessel and accident of the LLMC Protocol 1996 is higher than the 340 million SDR of the IMO Guidelines, the carrier and its insurer may restrict the compensation to this figure. However, if they are inferior, as it happens with smaller ships, they can oppose the global limits of the LLMC Protocol 1996.

[1] F Ruiz-Gálvez, 'El contrato de pasaje en la Ley de navegación marítima', in *Comentarios a la Ley de navegación maritima* (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 front of a single passenger.