

**THE PROPOSED PROTOCOL TO THE
ATHENS CONVENTION RELATING TO THE
CARRIAGE OF PASSENGERS BY SEA**

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INTRODUCTION

The cruise industry has exploded in recent years. In the last two decades an estimated 60 million passengers worldwide have traveled on cruise ships. There are now approximately 243 cruise ships worldwide of which 139, representing 72% of total passenger capacity, operate in the North American market. In the North American market, 93% of the embarkation/disembarkation ports are in the U.S., most of them in Florida. Embarkations from these ports have increased by 70% over the last decade. The benefit to the U.S. economy is significant. For instance, direct spending of the cruise lines and passengers on U.S. goods and services was estimated at \$8.1 billion in 1999. Total wages generated for U.S. employees was estimated at \$7.0 billion. Total economic benefit of the cruise industry in 1999 has been estimated at \$15.5 billion and the growth is not over. By 2004 it is expected that 32 new ships will be put into service in the North American trade at a cost of approximately \$12.1 billion.¹

¹ See Cruise Industry News Annual 2001, p. 16; Study conducted by business Research and Economic Advisors and Associates, Inc., a detailed outline of which can be found here or on the website of the International Council of Cruise Lines at www.iccl.org/resources/econstudy99.htm. The views expressed here are those of the author and do not necessarily express the views or opinions of The Maritime Law Association of the United States or any other organization unless otherwise indicated.

Against this background, there is currently under consideration in the Legal Committee of the International Maritime Organization (IMO) a proposed amendment (a Protocol) to the 1974 Athens Convention Relating to the Carriage of Passengers and Their Luggage By Sea.² The United States has never been a party to this Convention, but the proposed amendments to the Convention have prompted renewed interest in some quarters of the U.S. government. Given the significant growth of the cruise industry, its impact on the U.S. economy, and the involvement of U.S. passengers, it is appropriate to examine the nature of the proposed amendments and what effect, if any, they would have if the U.S. government were to seek to incorporate into our law such an amended Convention.

BACKGROUND: THE 1974 ATHENS CONVENTION

² 6 Benedict on Admiralty, Doc. 2-2 (7th rev. ed.).

A Conference convened under the auspices of the IMO in Athens in 1974 adopted the Athens Convention Relating to the Carriage of Passengers and their Luggage By Sea. The Convention was designed to consolidate and harmonize two earlier Brussels conventions adopted in 1961 and 1967 dealing with the same subject. The purposes of the Convention were to establish a uniform liability framework for claims by passengers; to provide a reasonable limit on the amount of such claims; to prevent the imposition of harsh contractual terms limiting recovery by the carriers; and to establish reasonable venues for jurisdiction of suits by passengers.³ The Convention entered into force on April 28, 1987. A Protocol to the Convention changing the unit of account used to identify the limit of a carrier's liability from Poincare francs to Special Drawing Rights was adopted in November 1976 and entered into force on April 30, 1989.⁴ A Protocol raising the limit of liability amount for passenger deaths or injury from 46,666 SDR (about \$56,800) to 175,000 SDR (about \$214,000) was adopted on March 29, 1990.⁵ This 1990 Protocol has not yet entered into force. Although not embraced by all the major maritime powers, the 1974 Athens Convention as modified by the 1976 Protocol, is in force in such important maritime nations and flag states as the United Kingdom, Russia, Spain, Greece, the Bahamas, China, Liberia and Vanuatu. The United States is not now, and never has been, a party to the Convention.

1. Scope of Application

³ Although the Athens Convention concerns claims for damage to passenger luggage as well as passenger injury and death, this paper will deal only with the latter.

⁴ Benedict, supra note 2, Doc. 2-3.

⁵ Id. Doc. 2-3A.

The Athens Convention applies to international carriage by sea, that is, a carriage of passengers in which the place of departure and the place to destination are situated in two different states or in a single state if the contract of carriage provides for an intermediate port of call in another state. The Convention applies to such international carriage (1) if the ship is flying the flag of or is registered in a State Party to the Convention; (2) the contract of carriage has been made in a State Party to the Convention; or (3) the place of departure or destination is in a State Party to the Convention.⁶ Thus, the Convention would not apply to ferry operations operating between different ports in a single state.

2. Liability Regime

⁶ 1974 Athens Convention Relating to the Carriage of Passengers and Their Luggage By Sea, as amended by a Protocol adopted in November 1976 (hereafter ~~the~~ 1974 Athens Convention ~~is~~), Art. 2., para. 1.

The Convention's liability regime is fault based, that is, the carrier is liable for any death or personal injury to a passenger if the incident which caused the injury or death was due to the fault or neglect of the carrier or his agents and servants acting within the scope of their employment. The burden of proving fault on behalf of the carrier lies with the claimant unless the death or personal injury occurs in connection with a shipwreck, collision, stranding, explosion or fire, or defect in the ship.⁷ In such cases the negligence of the carrier is presumed, and the carrier will be liable unless it can prove otherwise. In other words, for shipping incidents the carrier has to prove it was not negligent, a reverse burden of proof. In any event, if the carrier can prove that the death or personal injury of the passenger was caused or contributed by the passenger's fault or neglect, the court can exonerate the carrier wholly or partly from its liability, as appropriate.⁸

3. Liability Limits

As noted above, under the Athens Convention currently in force the liability of the carrier for the death of, or personal injury to, a passenger is not to exceed 46,666 SDR (about \$56,800), although State Parties may fix a higher limit with respect to carriers who are nationals of such state. The 1990 Protocol raised the limit to 175,000 SDR (about \$214,000), but this protocol is not yet in force. The carrier loses its right to limit its liability if the claimant can prove that the passenger's injury or death resulted from an act or omission of the carrier done with intent to cause such damage, or recklessly and with knowledge that such damage would probably

⁷ Often referred to as shipping incidents and defined as such in the Proposed Draft Protocol. See page 8, infra.

⁸ 1974 Athens Convention, Art. 6.

result.⁹

4. Time Bar

⁹ Id. Art. 13.

Any claim by a passenger for death or personal injury is barred after a period of two years. The calculation of this period is, in the case of personal injury, from the date of disembarkation of the passenger. In the case of death of a passenger during carriage, the time is calculated from the date when the passenger should have disembarked. If the death occurs after the passenger has disembarked, the time is calculated from the date of the death, provided that this period does not exceed three years from the date of disembarkation. In addition, courts with jurisdiction over such cases have the right to apply any national laws that govern the grounds of suspension and interruption of a limitation period, but in no case can any action under the Convention be brought after the expiration of a period of three years from the date of disembarkation of the passenger, or from the date when disembarkation should have taken place, whichever is later.¹⁰

5. Jurisdiction

Claims under the Convention can be brought in the following courts located in a State Party to the Convention:

- (a) the court of the place of permanent residence or principal place of business of the defendant, or
- (b) the court of the place of departure or that of destination according to the contract of carriage, or
- (c) the court of the State of domicile or permanent residence of the claimant if the defendant has a place of business and is subject to jurisdiction in that State, or

¹⁰ Id. Art. 16.

- (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.¹¹

In addition, the parties can agree to any jurisdiction or to arbitration after the occurrence of the incident which caused the damage.¹²

6. Invalidation of Contractual Provisions

The Convention declares null and void any contractual provision made before the occurrence of the incident which caused the death or personal injury to a passenger which purports to relieve the carrier of liability toward the passenger, which prescribes a limit of liability lower than that fixed by the Convention, which purports to shift the burden of proof from the carrier in ~~shipping incidents~~, or which would limit the jurisdictional options set out above.¹³

7. Insurance

There is no compulsory insurance requirement in either the 1974 Athens Convention or any of its existing Protocols.

THE PROPOSED DRAFT PROTOCOL TO THE ATHENS CONVENTION

1. Background

¹¹ Id. Art. 17.

¹² Id.

¹³ Id. Art. 18.

A new Protocol amending the existing Athens Convention was discussed at the IMO Legal Committee in 1997.¹⁴ The purpose of the proposed changes is to encourage more countries to become a party to the Convention by raising the amount of the limit of liability and to provide some financial security for claims by passengers by requiring compulsory insurance. There was to be no change in the scope of the Convention, that is, the Convention would continue to apply only to international carriage by sea and not to carriage between different ports in a single state.

Influenced by a comprehensive revision being undertaken of the Warsaw Convention relating to the liability of air carriers for passenger claims, a number of delegations at the 76th Session of the IMO Legal Committee in October 1997 suggested consideration of a new liability regime for the Athens Convention. Specifically they suggested the possibility of unlimited liability on a legal basis other than strict liability, on top of a strict liability tier that would

¹⁴ IMO Report of the Legal Committee on the Work of its Seventy-Sixth Session, LEG 76/12, October 17, 1997 (hereafter "LEG 76/12").

apply for damages up to a limited amount, say approximately 100,000 SDR¹⁵. In discussions at various subsequent meetings of the IMO Legal Committee, it appeared that there was no consensus to change the liability regime from that contained in the 1974 Athens Convention. However, a number of nations, particularly Japan, persisted in their efforts to persuade delegations that a two tier system was appropriate. After an intersessional meeting and discussions during the summer of 2000, it appeared that a compromise had been reached among several delegations in favor of such a system. This appeared to find favor with a majority of the delegations at the 82nd Session of the Legal Committee which took place in October 2000, although a few continued to state their preference for maintaining the existing fault based liability system.¹⁶

2. **Liability Regime**

¹⁵ LEG 76/12, p. 5.

¹⁶ IMO Report of the Legal Committee on the Work of its Eighty-Second Session, LEG 82/12, November 6, 2000 (hereinafter "LEG 82/12").

As a result of the developments described above, the current draft Protocol proposes a two tier liability system. In the first tier, if the death or injury to a passenger is caused by a shipping incident~~✗~~ the carrier is strictly liable for such loss unless the carrier could prove that the incident occurred as a result of ~~✗~~an act of war, hostility, civil war, insurrection, natural phenomenon of an exceptional, inevitable and irresistible character~~✗~~ or ~~✗~~was wholly caused by an act or omission done with intent to cause the incident by a third party.~~✗~~¹⁷ The amount of the liability of the carrier in this case would not exceed a ~~✗~~to-be-determined~~✗~~ amount (the strict liability limit). To the extent that the loss exceeded such a limit, the carrier would be further liable unless it could prove that the incident occurred without its fault or neglect. In other words, with respect to shipping incidents, the carrier is strictly liable up to a certain amount, and is then subject to a reverse burden of proof for any loss above the strict liability amount.¹⁸ The draft Protocol proposal also provides that in non-shipping incidents, the carrier is liable unless it can prove that the incident which caused the loss was without its fault or neglect. In other words, the carrier would be subject to a reverse burden of proof for any amount of loss incurred in a non-shipping incident.¹⁹

While the term strict liability has been applied to the first tier of loss or damage caused by shipping incidents~~✗~~, the carrier would still have available as a defense the contributory fault of the passenger. The Draft Protocol contains no amendment to that provision of the Athens

¹⁷ Draft text for a Protocol to the Athens Convention, Annex, LEG 83/4, 13, August 3, 2001 (hereinafter ~~✗~~Draft Protocol~~✗~~), Art. 4, para. 1 (Attached hereto as an Appendix).

¹⁸ Id. Art. 4, para. 1.

¹⁹ Id. Art. 4, para. 1. A few delegations are urging that there be no reverse burden of proof for non-shipping incidents.

Convention that permits the whole or partial exoneration of the carrier if it can show that negligence or fault of the passenger contributed to his injury or death.²⁰ Thus, the impact of the first tier strict liability provisions for shipping incidents would be ameliorated if the carrier could show that the passenger was partially at fault with respect to the injury, or it could be exonerated completely from any such liability if it can show that the injury was caused wholly by the negligence of the passenger.

3. **Limitation of Liability**

²⁰ 1974 Athens Convention, Art. 6.

In addition to the strict liability limit, the Protocol proposes an overall liability limit.²¹ The amount of this overall liability limit has not been determined and, in all likelihood, will not be set until a diplomatic convention is called, assuming that the Protocol passes muster and is recommended by the IMO Legal Committee. However, it is anticipated that there will be a substantial increase from the current limits of the Athens Convention as well as the limits set out in the 1990 Protocol. Interestingly, however, the draft Protocol proposes that, notwithstanding this overall limit, a State Party ~~may~~ regulate by specific provision of national law the limits of liability, if any, to be applied to claims for loss of life or personal injury to passengers on a ship provided that the limit of liability is not lower than that prescribed by [the overall limit prescribed by the [convention]].~~✗~~²² The current Athens Convention provides that a State Party to the Convention may fix a higher per capita limit of liability than what is contained in the Convention.²³ The difference between these two provisions is subtle but important. The draft Protocol ●s proposed amendment to the Convention contemplates the possibility that a State Party may have no overall limit of liability for injuries that exceed the strict liability amount for shipping incidents and no overall limit for non-shipping incidents, as opposed to just a higher limit. This is important from the viewpoint of the United States because it has long been thought that one of the reasons that the United States has never ratified the Athens Convention is unhappiness with the limits of liability contained in the Convention.

4. Time Bar

²¹ Draft Protocol, Art. 6, para. 1.

²² Id. Art. 6, para. 2 (emphasis added).

²³ 1974 Convention, Art. 7, para. 2.

The draft Protocol would amend the current time bar provision in the Athens Convention by permitting courts with jurisdiction of a case to suspend or extend the two-year limitation period in the Convention to a period of three years from the date when the claimant knew or should have known of the injury, but not later than a period of ten years from the date when disembarkation should have taken place.²⁴

5. Jurisdiction Over the Carrier

The proposed protocol would add a new venue for jurisdiction of suits against a carrier by adding a new subparagraph (e) to Article 17 of the 1974 Athens Convention to read as follows:

²⁴ Draft Protocol, Art. 9.

(e) a court of the State of the domicile or permanent residence of the claimant, if the defendant provides services [for carriage of passengers by sea] to or from the State and is subject to jurisdiction in that State.²⁵

6. **Compulsory Insurance and Direct Actions Against the Insurer.**

²⁵ Id. Art. 17. The text in brackets is an alternative text still under discussion.

As one of the primary reasons for the proposed amendments to the Athens Convention is to ensure that there be some financial backing behind any liability of the carrier, the Draft Protocol provides for compulsory insurance to be provided by the carrier who actually performs the carriage, in whole or in part. The limits of such compulsory insurance have not yet been finalized and probably will not be until a diplomatic conference, but it is likely to be based on an amount per capita for each distinct occasion. A certificate attesting that insurance or other financial security is in force shall be required to be issued to each ship after the appropriate authority of the State Party has determined that the compulsory insurance requirements have been met.²⁶ The draft Protocol then goes on to provide for a direct action against the insurer or other person providing financial security in the event of an injury or death that gives rise to a claim for compensation covered by the security. The insurer may invoke any defenses which the carrier would have been entitled to invoke, other than bankruptcy or winding up, and shall have the right to require that the carrier and the performing carrier be joined in any proceedings against it.²⁷ The venues for jurisdiction against the insurer are similar to the ones against the carrier, i.e., (1) the principal residence or the principal place of business of the insurer, or, (2) the place of departure or that of destination according to the contract or carriage, or, (3) the domicile or personal permanent residence of the claimant if the insurer has a place of business subject to jurisdiction in that State, or, (4) the State where the contract of carriage was made if the insurer has a place of business and is subject to jurisdiction in that State, or, (5) the place of the state of the domicile or personal residence of the claimant if the insurer provides services in

²⁶ Id. Art. 4 bis.

²⁷ Id. para. 10.

the State and is subject to jurisdiction in that State.²⁸ Not yet decided is whether the insurer may invoke the defense that the injury or damage to the passenger occurred as a result of the wilful misconduct of the insured, but it will not be able to invoke any other defenses that the insurer could have invoked in proceedings brought by the insured against the insurer, in connection with the claim, such as, for instance, failure to pay premiums.²⁹

CURRENT U.S. LAW

1. Liability Regime

²⁸ Id. Art. 17, para. 1 bis.

²⁹ Id. Art. 4 bis, Options A & B.

The U.S. is not a party to the 1974 Athens Convention. Its liability regime for injury or death to passengers on vessels is based on traditional common law and maritime tort concepts, i.e., fault. The carrier is not an insurer of a passenger's safety. The carrier is only liable if it has been negligent or otherwise at fault in connection with the incident that causes the death or injury of the passenger. Ordinary principles of negligence law apply if the risk or condition is not peculiar to maritime travel.³⁰ A passenger must exercise reasonable care for his own safety, and the comparative negligence doctrine is applicable to passenger claims.³¹ The doctrine of seaworthiness, a form of liability without fault for certain conditions or defects aboard a ship of which the shipowner may have no knowledge or not otherwise be at fault, and which is applicable to seamen, is not applicable to passengers.³² Additionally, there is no reverse burden of proof as is found in the Athens Convention. The burden of proof that the carrier was negligent or otherwise at fault lies with the claimant without regard to the nature of the incident that causes him harm. However, in appropriate cases passengers may avail themselves of the doctrine of res ipsa loquitur.³³ This permits a plaintiff to obtain the benefit of a presumption of fault if certain prerequisites are met, i.e. (1) the accident was one that ordinarily does not occur in the absence of someone's negligence; (2) the accident was caused by an instrumentality within the defendant's exclusive control; and (3) the accident was not caused by any voluntary

³⁰ Nathaniel G. W. Pieper and David W. McCreadie, Cruise Ship Passenger Claims and Defenses, 21 J. Mar. L. & Com. 151, 175-178 (1990); 10 Benedict on Admiralty § 5.04e.

³¹ Pieper & McCreadie, supra at 177; Benedict, supra at § 4.04e.

³² Thomas J. Schoenbaum, 1 Admiralty and Maritime Law § 5-9, 214 (3d ed.).

³³ O'Connor v. Chandris Lines, 566 F. Supp. 1275 (D. Mass. 1983).

action or negligence on the part of the passenger.³⁴

2. **Liability Limits**

³⁴ Ashland v. Ling-Temco-Vought, Inc., 711 F.2d 1431 (9th Cir. 1983).

There are basically no liability limit under U.S. law for injury or damages to passengers, except to the extent that the carrier may avail itself of the provisions of the Limitation of Liability Act.³⁵ A shipowner who can show that it is without privity or knowledge in connection with the incident that caused a seagoing passengers ● injuries may, under the statute, limit its liability for such injuries or deaths to the value of the vessel and her pending freight, or an amount equal to \$420 times the gross tonnage of the ship, whichever is greater.³⁶ The statute further prohibits carriers from exonerating itself or limiting its liability from negligence in any contract of carriage.³⁷

3. **Jurisdiction**

³⁵ 46 U.S.C. § 183.

³⁶ Id. § 183(a) and (b).

³⁷ 46 U.S.C. App. § 183c.

Absent contract terms, the only limitation of the venue of the jurisdiction of a court by a passenger against a carrier under U.S. law are the limits imposed by due process. In short, absent contractual terms, the passenger may sue the carrier any place the carrier resides or is doing business or providing services to such an extent that suing him in that jurisdiction would not be a violation of due process.³⁸ However, almost every major cruise line that operates in the United States utilizes passenger ticket contracts that contain a choice of forum clause. Often this choice of forum is a court in the State of Florida. The Supreme Court has held that such choice of forum clauses in cruise ship passenger tickets are valid if the terms of such provisions are not unfair and have been reasonably communicated to the passenger.³⁹

4. Time Bar

Absent any contractual provisions contained in the passenger ticket, the time limitation period for bringing an action on behalf of the passenger or deceased passenger would be the standard maritime limitation provided by statute, which is three years from the date of the injury or death.⁴⁰ However, once again, most cruise line passenger tickets contain a clause providing that any such actions must be brought within one year of the date of the incident or the date of disembarkation of the passenger. As with the choice of forum provisions, these contractual time limitation provisions in passenger ticket contracts have been declared to be valid by U.S. courts

³⁸ Benedict, supra note 30, § 3.03.

³⁹ Carnival Cruise Lines v. Shute, 499 U.S. 585, 1991 AMC 1697 (1991); Benedict, supra note 30, § 4.01-4.02.

⁴⁰ 46 U.S.C. App. § 763a.

if they have been reasonably communicated to the passenger.⁴¹ A statute prohibits carriers operating from or between U.S. ports and foreign port to contract for a time bar period less one year from the date of any death or injury.⁴²

5. Insurance Requirements

⁴¹ Benedict, supra note 30, § 3.08.

⁴² 46 U.S.C. § 183b.

Cruise ships with accommodations for fifty or more passengers which embark passengers in the United States ports must establish financial responsibility under regulations prescribed by the Federal Maritime Commission to cover any liability for injury or death to passengers. This can be done by filing policies of insurance, but also can be satisfied by filing an surety bond, by qualifying as a self-insurer, or by giving other evidence of financial responsibility. The amount of the insurance or bond will vary with the size of the vessel, but, for instance, for a vessel with 3,000 accommodations, the amount of liability that must be covered by the bond or insurance would be \$30 million.⁴³

6. Interplay With Athens Convention

As stated above, the U.S. is not a party to the Athens Convention. In addition, U.S. law provides that for any cruise originating or terminating in the United States any contract provision which seeks to limit the liability of the carrier in any way is void.⁴⁴ Accordingly, any attempt by a carrier to impose the terms of the Athens Convention by contract on passengers by incorporating it into the terms of the passenger ticket would be ineffective insofar as such incorporation would seek to limit the liability or exonerate the carrier. However, for cruises not originating or terminating in the U.S., U.S. passengers may be bound by the terms of the Athens Convention if that Convention has been incorporated in the passenger ticket. Similarly, in such cases, even when the term isn't incorporated in the passenger ticket, if, under the U.S. choice of law rules, the law of a State Party to the Convention is deemed to be controlling, then a U.S.

⁴³ 46 U.S.C. § 817d.

⁴⁴ 46 U.S.C. App. § 183c.

passenger would be bound by the terms of the Athens Convention.⁴⁵

CRITIQUE OF THE PROPOSED DRAFT PROTOCOL

⁴⁵ Benedict, supra note 30, § § 4.04, 4.26.

The approach taken by the Draft Protocol to the 1974 Athens Convention is significantly different from current U.S. law and practice. The provisions on liability, burden of proof, time bar, and direct action against underwriters are vastly different from U.S. maritime law and, indeed, the general approach to transportation tort cases in most U.S. jurisdictions. As a consequence, the proposed Protocol has drawn criticism from a number of sources, including The Maritime Law Association of the United States and the International Council of Cruise Lines.⁴⁶ Significant criticisms are outlined below.

1. The Liability Regime

A. Strict Liability

⁴⁶ These comments may be found on the U.S. Coast Guard's IMO website, the address of which is <https://afls16.jag.af.mil/dscgi/view/collections-247>".

Under general maritime law, a cruise ship owner owes a duty of reasonable care to a passenger.⁴⁷ Indeed, U.S. Courts have specifically held that the doctrine of unseaworthiness, which is applicable to all seamen, and which can make the shipowner liable for defects of which it may have no actual knowledge, is not applicable to passengers.⁴⁸ Thus, in order to recover for injury or damage aboard the cruise ship, a passenger under U.S. law has the burden of showing that the cruise vessel owner or operator was guilty of some fault or knowledge that caused his injury. This is consistent with the approach Congress has taken with respect to maritime torts. The Death on the High Seas Act allows recovery for a death on the high seas, but only if the claimant satisfies his burden of proof that the carrier was at fault or negligent in some way which caused the death.⁴⁹ Similarly, the Jones Act allows recovery to seamen for injury only if the seamen can show negligence on the part of the shipowner.⁵⁰ The requirement that there be some

⁴⁷ See, pp. 12-13, supra.

⁴⁸ Everett v. Carnival Cruise Lines, 912 F.2d. 1355, 1991 AMC 700 (11th Cir. 1990); Gele v. Chevron Oil Co., 574 F.2d. 243 (5th Cir. 1978); Isham v. Pacific Far East Line, Inc., 476 F.2d. 855, 1973 AMC 1138 (9th Cir. 1973).

⁴⁹ 46 U.S.C. § 761 et seq.

⁵⁰ 46 U.S.C. § 688.

fault on the part of the shipowner or carrier is consistent with general principles of the U.S. common law tort system which imposes liability on a party only when it has been shown by the claimant that the party caused the claimant's injury as a result of some fault or negligence. The same is true for claims of injuries by passengers of taxicabs, buses and railroads.⁵¹

Accordingly, the imposition of a two-tier liability system that provides for strict liability for shipping incidents up to a ~~yet-to-be-determined~~ limitation amount is a drastic departure from current U.S. law. Strict liability, or liability without fault, has developed to cover those ultra-hazardous activities where a serious risk of harm to the public is such that it is appropriate to place the risk of loss on the entity engaging in such activity. Ultra-hazardous activity is generally defined as an activity involving (1) a high degree of harm or (2) one with a likelihood that the resulting harm will be significant and (3) that it is not a matter of common usage. For instance, blasting operations, testing of motor rockets, fumigating with poison, etc. have been found to be ultra-hazardous activities. But the operation of a cruise ship is not an inherently dangerous or ultra-hazardous activity which should give rise to strict liability. Similarly, strict liability has been applied to defectively manufactured products in order to spread the costs of injuries caused by these products to the manufacturers, as opposed to those injured who are unable to protect themselves. Here again, these principles have no application to the cruise industry. The cruise industry provides a service, not a manufactured product. The relationship between a passenger and a cruise operator is markedly different from that of a manufacturer and

⁵¹ See Dan B. Dobbs, *The Law of Torts* § 228, p. 581; 3 Harper, James & Gray, *The Law of Torts* § 16.14 (2d ed. 1986).

the purchaser of his goods.

What then is the rationale behind applying strict liability to cruise ship passenger injuries. The impetus for this comes from the Montreal Convention of 1999 for air passengers, recently drafted but not yet in force, which imposes a first tier strict liability regime for injuries or death to air passengers up to 100,000 SDR and a reverse burden of proof above that.⁵² But aircraft carriage and accidents are, as a general rule, significantly different from those aboard ship. Usually air flights are for relatively short periods and the passengers are not allowed to move about freely. On the other hand, cruise ship passengers live on the vessels for days, sometimes longer. A cruise ship is, in effect, a floating resort, and passengers move about at will and engage in many different shipboard activities that can result in injuries brought about by their own negligence, the negligence of other passengers or incidents for which the carrier is not at fault. Indeed, most cruise ship injuries are of the type not related to sea transport but could occur at any shore facility or resort, such as slipping or falling on a dance floor, in the shower, on a stairway, or as a result of playing games, engaging in other sport or swimming pool activities or drinking.⁵³ In short, air transportation and cruise ship transportation are significantly different. Most aircraft accidents involve major catastrophes that usually result in a loss of all life and as to which there are no live witnesses. The same is not true for shipboard accidents,

⁵² Montreal Convention for the Unification of Certain Rules Relating to International Transportation By Air of 1999, Arts. 17 and 21.

⁵³ See Pieper & McCreadie, *supra* note 30, at 179-190.

even the catastrophic ones. Accordingly, what may be a fair liability regime for air passengers should have no bearing on an appropriate and fair liability regime for shipboard passengers.

Another concern with respect to the imposition of strict liability is the Draft Protocol's definition of the term "shipping incidents," indicating that a defect in the ship could result in strict liability.⁵⁴ U.S. Courts have held that temporary conditions such as fish slime or spots of grease or defects in equipment unrelated to the propulsion and navigation of a vessel can cause the vessel to be unseaworthy thereby imposing a form of strict liability on the owner.⁵⁵ There is much equipment aboard a cruise ship which is in fact unrelated to maritime activity. For instance, medical equipment and products, spa and exercise equipment and products, entertainment and athletic products are all contained aboard cruise vessels. These have not been manufactured by the ship but by others. Under the "defect in the ship" principle, it is conceivable that U.S. courts could deem the vessel to be strictly liable for defects in such equipment even though the cruise operator has no knowledge of any such defects and did not manufacture the item. Similarly, many cruise ships employ doctors as independent contractors for the benefit of its passengers. Under current law, a cruise operator would not be liable for the negligence of such physician if it has used reasonable care in the selection of the doctor.⁵⁶ However, under the "defect in the ship" principle it is arguable that a U.S. court could find that there was a defect in the vessel by virtue of the malpractice of a negligent doctor, making

⁵⁴ Draft Protocol, Art. 4, para. 5.

⁵⁵ See 1B Benedict on Admiralty § 24 (7th rev. ed.).

⁵⁶ See, Pieper & McCreadie, *supra* note 30, at 193-194; Karen C. Hildebrandt, Personal Injury and Wrongful Death Remedies for Maritime Passengers, 68 *Tul. L. Rev.* 403, 414-416 (1994).

the cruise operator strictly liable therefor even if it had not been negligent in selecting the doctor. All of this would be a drastic, and, it is suggested, inappropriate change from current U.S. law.

The proposed Protocol does allow exoneration from a strict liability claim if the carrier is able to prove that the incident was wholly caused by an act or omission done with the intent to cause the incident by a third party.⁵⁷ Strangely enough, no such exoneration exists for the carrier if it can show that the incident was wholly caused by the negligence or fault of a third party. There is simply no good reason or logical explanation for imposing strict liability on a carrier if it could prove that the incident which gave rise to the loss or injury to the passenger was wholly caused by the negligence or fault of the third party, but not if it could show the incident was caused wholly by an intentional act of the third party. It is true that in such incidences the carrier would have an action over against any such third party if it were liable to its passenger, but why should the carrier be forced to go through another level of litigation if it could indeed show, in the first instance, that a negligent third party was wholly responsible for the incident.

B. Reverse Burden of Proof

⁵⁷ Draft Protocol, Art. 4, para. 1(b).

Under the Draft Protocol, a carrier is subject to reverse burden of proof with respect to any accident that may befall a passenger, including such ~~non~~non-shipping incidents~~✗~~ as garden variety slip and fall cases. But many passenger incidents at sea are unwitnessed. To reverse the burden of proof places the carrier in the untenable and unfair position of having to disprove an accident about which it is likely to have no knowledge. In the United States most injured passengers usually have the option to elect a jury trial. At such trial, the injured plaintiff invariably has the advantage of sympathy with lay persons on the jury. The offset to this is the fact that, under ordinary tort principles, the plaintiff has the burden of proof. A reversal of that burden of proof upsets the present balance at trial so that a defendant carrier would only prevail under exceptional circumstances. Additionally, an injured passenger has recourse to the doctrine of res ipsa loquitur if certain prerequisites are met.⁵⁸ This is not an alternative to the traditional fault based scheme which requires a plaintiff to prove a defendant's negligence. Rather, it permits a plaintiff to satisfy that burden by circumstantial instead of direct evidence.

There is no basis for singling out the cruise industry for treatment different with respect to burden of proof from that of any other tort case defendants in the United States.

2. Time Bar

⁵⁸ See, p. 13, supra.

The purpose of a time bar is to prevent the bringing of stale claims and to provide reasonable notice of claims to a defendant so that it can investigate and prepare a defense. Under general maritime law in the United States, the time bar period is three years after the date of the incident.⁵⁹ Congress has imposed such a three year time frame in the Death on the High Seas Act⁶⁰ and the Jones Act.⁶¹ Indeed, Congress has expressly provided that a contractual provision limiting the time frame for a passenger suit to one year is permitted.⁶²

The types of claims which are covered by the Athens Convention are not hidden claims. They are claims based on events known to the passenger at the time that they occur. It could be that, in some circumstances, the full extent of damage suffered may not be readily determined, but the fact of the basis of a claim is known. The draft Protocol would give courts the ability to extend the two year limitation period provided by the Athens Convention to a period of three years from the date from when the claimant knew or would reasonably to have known of his injuries but, no later than a period of ten years from the date of the passenger's disembarkation. There is no reason to provide such an extended period of limitation. Cruise operators and their insurers need to know within a reasonable time the nature and extent of exposure to damages arising from claims. This is particularly true in maritime cases, as opposed to land based ones as seafarers are transient and witnesses to any accident may be much harder to locate after such a passage of time. The time bar provisions set forth in the draft Protocol are unrealistic and

⁵⁹ 46 U.S.C. App. § 763a.

⁶⁰ 46 U.S.C. § 763a.

⁶¹ 46 U.S.C. § 688.

⁶² 46 U.S.C. § 183b.

unfairly penalize cruise operators.

3. Limitations of Liability

As noted above, it appears that the Protocol would authorize State Parties, including the United States, to have no limitation of liability with respect to claims by passengers. Currently passenger claims are limited only under the U.S. Limitation of Liability act.⁶³ Under the statute, as amended in 1984, a carrier's liability for passenger claims is limited to the greater of the value of the vessel and its impending freight or an amount equal to 420 times the gross tonnage of the vessel. Congress passed other amendments to the Limitation of Liability Act in 1996 without changing these limitation provisions. Thus, Congress having only recently considered the Limitation of Liability Act and has left intact the right of shipowners to limit in accordance with the Act.

It is not clear whether, if the United States were to adopt the Athens Convention as amended by the Draft Protocol, this would necessarily mean the ouster of the U.S. Limitation of Liability Act. Presumably, that would not be the case. Certainly, it is known that one of the reasons that the U.S. has never signed on to the Athens Convention is because of the limits of liability presently contained in the Convention. Even if the United States were to adopt the Athens Convention as modified by the draft Protocol, there should be no reason for any change or ouster of the current U.S. Limitation of Liability Act. In the context of personal injury cases, cruise operators and owners should not be treated any differently than any other vessel owners under U.S. law.

⁶³ 46 U.S.C. § 183.

4. **Direct Action Against Underwriters**

The imposition of a direct action against underwriters as put forth by the proposed Protocol is inconsistent with U.S. law. Few states allow direct action against underwriters. Many courts are wary of such suits because of the risk that evidence of an alleged tortfeasor's insurance may prejudice a defendant's case before a jury. Under U.S. law, cruise ships with accommodations of 50 or more passengers which embark passengers in the United States ports must establish financial responsibility under regulations prescribed by the Federal Maritime Commission which must cover any liability for injury or death to passengers. This can be done by surety bond, policies of insurance, qualifying as a self-insurer or giving other evidence of financial responsibility. The amount of insurance or bond is substantial.⁶⁴ Further, every major cruise ship operator that operates in the United States, carries insurance through Protection and Indemnity Associations (P&I Clubs).

Because of the financial soundness of these P&I Clubs and the Federal Maritime Commission insurance and bond requirements to secure liability for personal injuries, and because there have been no known situations in this country in which passengers who have legitimate claims against cruise ships have been unable to recover because of the insolvency or other financial difficulties of the cruise line, there is no basis for claiming a need for direct action against underwriters. Providing for a direct action against underwriters in addition to an action against the carrier merely increases the cost of litigation and the opportunity for multiple suits. Invariably, both carrier and insurer will be involved in any litigation which means the imposition of another set of costs and another layer of attorneys fees in connection with any claim. No such

⁶⁴ See pp. 15-16, supra.

right of direct action against underwriters exist with respect to other transportation tort cases in this country, and there would seem to be no reason to single out the cruise industry or its underwriters in this regard.

The argument in support of direct actions against underwriters is often connected with the P&I Club "pay to be paid" rule⁶⁵ under which, theoretically at least, a P&I Club is not liable to make any payment unless its insured carrier has first made a payment with respect to any claim or judgment. The fear is that if a carrier goes bankrupt and is unable pay any claim or judgment, the underlying insurance would be of no value to compensate the passenger. It would seem, however, that this could be cured by a means other than providing for a direct action against an insurer. For instance, the underwriters could be required to post a security in the form of a letter of undertaking upon the filing of a suit by a passenger in a fashion similar to the type of letter of undertaking that P&I Clubs post when vessels of their members have been arrested. Such letters of undertaking could specifically waive the "pay to be paid" rule and would provide the passenger claimants with sufficient security for their claims. In this country such letters would only be necessary where the amount of the claim exceeds any bond posted under requirements established by the FMC as set out above.⁶⁵ Another solution is the one proposed by the U.S. Delegation to the IMO Legal Committee that would permit direct actions only in certain limited circumstances.⁶⁶

U.S. DELEGATION POSITION

The United States Delegation to the IMO Legal Committee has taken most of these

⁶⁵ See pp. 15-16, supra.

⁶⁶ See, p. 27, infra.

criticisms to heart. In papers recently submitted to the Legal Committee, the United States has indicated that, while it does favor a two tier liability scheme based on the Montreal Convention, it recognizes the difficulty of including within the definition of shipping incidents those accidents caused by a ~~defect~~ defect in the ship ~~✗~~. Accordingly, to ameliorate this problem it has suggested that that term be defined as follows:

~~AA~~ Defect in the ship ● means any malfunction or failure in equipment, hull, structure, machinery or systems used for propulsion, steering, safe navigation, mooring, anchoring, leaving a berth or anchorage, flooding safety, stability, means of passenger escape, and the operation of emergency boat winches. ~~✗~~

In addition, the U.S. Delegation has indicated that it opposes a reverse burden of proof for non-shipping incidents, as well as any change to the current time bar provisions of the Athens Convention. With respect to direct action provisions, the U.S. has indicated that it generally supports a direct action provision. However, it proposes a more limited right of direct action than the one in the current draft proposal. Specifically, the U.S. proposes that a direct action claim may be brought against an insurer in only two circumstances: (1) when the passenger claimant has obtained a judgment that cannot be executed in whole or in part because of the insolvency of the defendant, or (2) when the claimant, after a diligent search, is unable to locate any carrier or performing carrier to sue.

With respect to the willful misconduct defense, the U.S. Delegation has recommended that this be retained as a defense available to underwriters.⁶⁷

⁶⁷ See, Submissions by the United States of America, LEG/83/4/?, 6 September 2001.

CONCLUSION

The move by the supporters of the of the current Draft to the 1974 Athens Convention to establish a two tier liability system, including a first tier with strict liability, and to provide for compulsory insurance with a right of direct action against underwriters is, at first blush, not a unique development in international or even U. S. domestic law. The assault on the ordinary maritime and common law tort principles, which base liability upon fault, has been going on for some years. Strict liability regimes, which also provide for compulsory insurance and direct action against underwriters, are to be found in such international conventions as the International Convention on Civil Liability for Oil Pollution (CLC Convention),⁶⁸ the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances By Sea (HNS Convention),⁶⁹ and the recent International Convention on Civil Liability for Bunker Oil Pollution Damage. In addition, in the United States we have seen the enactment of the Oil Pollution Act of 1990 (OPA 90),⁷⁰ which provides for strict liability and direct action against those providing financial responsibility, and the application of such strict criminal liability statutes as The Migratory Bird Treaty Act⁷¹ and The Refuse Act⁷² to oil polluters. In these instances the imposition of strict liability, compulsory insurance, and/or the right of direct action against underwriters have been justified by the

⁶⁸ 6A Benedict on Admiralty, Doc. 6-3.

⁶⁹ CMI Handbook of Maritime Conventions, Doc. 39.

⁷⁰ 33 U.S.C. § § 2702-2716.

⁷¹ 16 U.S.C. § § 703-712.

⁷² 33 U.S.C. § 407, 411.

catastrophic consequences that can follow serious oil or hazardous waste spills. What is different, and disturbing, about the application of such principles to the carriage of cruise ship passengers is that no such justification exists in such cases.⁷³

⁷³ The attempt to expand the strict liability/direct action against insurer regime is not restricted to cruise ship passengers. At a recent meeting of an ILO/IMO Joint Working Group discussing problems pertaining to Repatriation, Personal Injury and Death of Seamen, just such a regime has been promoted by some for seaman's personal injury and death. See, Report on the 2nd Session, Joint IMO/ILO Ad Hoc Expert Working Group on Liability and Compensation regarding Claims for Death, Personal Injury and Abandonment of Seafarers, para. 8.25 and Annex 4, para. 5.

While the need for higher limits of liability under the 1974 Athens Convention is generally conceded, there has never been a showing of need for a change in the liability regime to one of strict liability, nor has such need been shown for imposition of a right of direct action against underwriters. The cruise industry is a huge international business. A recent study shows that in 1998 some 4.3 million passengers were carried in the North American trade alone. Estimates are that more than 60 million people have traveled on cruise ships in the last two decades.⁷⁴ Despite this, there has never been any showing of any widespread or systemic failure to meet valid passenger claims. Indeed, such is not the case. Almost all major cruise ships carry substantial coverage through their Protection and Indemnity Clubs. Further, in the United States there is hardly any industry that is more heavily regulated than cruise ship vessels. Cruise ships calling in U.S. ports regularly undergo rigorous inspection by the U.S. Coast Guard and the U.S. Centers for Disease Control. In addition, these vessels are subject to regular inspection by their flag states and classification societies which audit compliance with this International Safety Management Code. As noted above, cruise ships are already required to provide proof of significant financial responsibility in this country.

Cruise ship passengers have a high level of protection, and the industry has an exemplary safety record. What, then, is the need to make such drastic changes to the liability regime. One can speculate that the real moving force behind the amendments has to do with concern over the safety of passengers on ferries. But that concern should be dealt with at a national level. Further, since any convention would only affect international carriage, it would have no effect on

⁷⁴ See, p. 1, supra.

most passenger ferry operations in the United States.

Whatever may happen with the draft Protocol at the IMO Legal Committee, or at a subsequent diplomatic conference, the United States should not ratify or accede to the 1974 Athens Convention as modified by the currently proposed Draft Protocol.

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APPENDIX