CARRIAGE OF PASSENGERS BY SEA: A CRITICAL ANALYSIS OF THE INTERNATIONAL REGIME

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For a considerable period of time, sea carriers have benefitted from the notion of "freedom of contract" when it comes to contracts concerning carriage of passengers by sea in international voyages. The legal position has changed dramatically when the international community devised a regime (the Convention relating to the Carriage of Passengers and their Luggage by Sea, also known as the Athens Convention 1974) establishing a minimum degree of protection for passengers. The Athens Convention, amended in 2002, not only applies in jurisdictions which have incorporated it into their legal system but can also be contractually made part of carriage contracts, which is often the case as far as the cruise industry is concerned. The purpose of this article is to evaluate the extent to which the Athens regime serves the needs of passengers in the twenty first century. To this end, problematic aspects of the Athens regime have been identified and evaluated in the light of the solutions adopted in the context of international regimes regulating carriage of passengers by air in international voyages. As a result of this analysis, it is intended: i) to provide guidance to courts in different jurisdictions on how to deal with problematic aspects of the Athens regime; and ii) to offer insights to governments that are not currently parties to the regime but might consider the ratification of the Convention as to potential ambiguities that need to be addressed as part of the implementing legislation.

I. Introduction

Contrary to international developments that other modes of transport have witnessed,[1] freedom of contract has been the dominant notion when it comes to regulating the carriage of passengers by sea until the latter half of the twentieth century. However, an international approach intending to offer a minimum degree of protection to passengers carried by sea has

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[1] For example, an international liability regime in relation to air passengers was established as early as 1929 by the Convention for the Unification of Certain Rules Relating to International Carriage by Air, *opened for signature* Oct. 12, 1929, 49 Stat. 3000, 137 L.N.T.S. 11 (Warsaw Convention) [hereinafter WC]. The Warsaw regime underwent substantial modifications in the years to follow, most notably in 1955 and 1961, and the entire web of instruments was codified into one instrument in 1999 known also as the Convention for the Unification of Certain Rules for International Carriage by Air, *opened for signature* May 28, 1999, 2242 U.N.T.S. 309 (Montreal Convention) [hereinafter MC]. Uniform Rules concerning the Contract of International Carriage of Passengers by Rail, June 19, 1999 (CIV), which is an appendix to the Convention concerning International Carriage by Rail, May 9, 1980, 1397 U.N.T.S. 76 (COTIF) performs a similar function for passengers carried on international voyages. This Convention has its roots in the late nineteenth century, and has been revised a number of times since then.

gradually prevailed, after a number of unsuccessful attempts made in 1960s[2] to devise such an international liability regime. Finally, the international community succeeded, in their third attempt, to devise an international regime that provides a basic legal framework for passengers carried on international sea voyages, with the adaptation of the Convention relating to the Carriage of Passengers and their Luggage by Sea on 13 December 1974 (Athens Convention 1974).[3]

It will be an overstatement to suggest that the Athens Convention 1974 has received worldwide approval, in particular in comparison with conventions designed to perform a similar function for passengers carried by other modes of transport.[4] However, it is true to say that it has been incorporated into the legal systems of more than thirty countries from all around the world.[5]

In a nutshell, the liability of the carrier is subject to a fault-based regime under the Athens Convention 1974. When the death of a passenger or injury to a passenger or the loss of or damage to his/her cabin luggage arises from a non-shipping incident, also known as a hotel type incident, to establish liability of the carrier, the passenger has to prove a causal connection between the incident and the damage, as well as actual fault attributable to the carrier, in order to recover.[6] When, on the other hand, the death of a passenger or injury to a passenger or the loss of or damage to his/her cabin luggage arises from a shipping incident, the burden of proof shifts from the passenger to the carrier.[7] In such cases, the carrier is presumed to be at fault, and, to avoid liability, must prove that it took all necessary precautions to avoid the accident. The carrier's fault is also presumed in respect of loss of or damage to luggage, other than cabin luggage, irrespective of the nature of the incident from which the loss or damage resulted.[8] The 1974 Convention allows carriers to limit their liability under the Convention,[9] although the limits are generally regarded as low (i.e., for personal injury and death claims the limit is set at 46,666 SDRs per passenger). The

[2] The International Convention for the Unification of Certain Rules relating to the Carriage of Passengers by Sea Apr. 29, 1961, 1411 U.N.T.S. 87; International Convention for the Unification of Certain Rules Relating to Carriage of Passanger Luggage at Sea, May 27, 1967, 1967 I.M.C.O. The later never entered into force. The former entered into force on June 1965, but with very few ratifications (Algeria, Cuba, France, Haiti, Iran, Madagascar, Morocco, Peru, Switzerland, Tunisia, United Arab Republic and Zaire ratified this Convention).

[3] Athens Convention Relating to the Carriage of Passengers and Their Luggage by Sea, Dec. 13, 1974, 1463 U.N.T.S. 19 [hereinafter Athens Convention 1974]. It would be wrong to deem this Convention as a consumer protection tool. The Convention regime goes much further than that and establishes a liability regime for certain types of claims that passengers can bring at the same time, allowing the carrier to limit their liability in monetary terms and defend claims on the basis of time bar restrictions.

[4] As of June 2017 the MC, *supra* note 1, has been ratified by 126 member states.

[5] As of June 2017, the member states are: Argentina, Bahamas, Barbados, China, Congo, Dominica, Egypt, Equatorial Guinea, Estonia, Georgia, Guyana, Jordan, Liberia, Libya, Luxembourg, Malawi, Nigeria, Poland, Russian Federation, Saint Kitts and Nevis, Switzerland, Tonga, Ukraine, Vanuatu, Yemen, Hong Kong-China (as associated member) and Macau-China (as associated member). The Athens Convention regime has been incorporated, sometimes with higher limits, into the national laws of some states, such as Canada and Vietnam, even though these states have not officially ratified the convention. It should be noted that several states have recently denounced Athens Convention 1974 and ratified the 2002 version of the Convention.

[6] *See* Athens Convention 1974, *supra* note 3, art. 3 §§ 1-2.

[7] A "ship related incident" has been defined in Athens Convention 1974, *supra* note 3, art. 3 § 3 as an incident arising from or in connection with the shipwreck, collision, stranding, explosion or fire, or defect in the ship.

[8] *See* Athens Convention 1974, *supra* note 3, art. 3 § 3.

[9] *See id.* arts. 7-8.

Convention also establishes that any action for damages arising out of the death of or personal injury to a passenger or for the loss of or damage to luggage shall be time-barred after a period of two years.[10] It also provides passengers a number of alternative jurisdictions to bring an action arising under this Convention, provided that the court is located in a State Party to the Convention.[11]

In an attempt to improve the rights of passengers under the Athens Convention 1974 and make the regime a more attractive proposition in terms of ratifications, the Protocol of 2002 to the Athens Convention[12] (Athens Convention 2002) was adopted in a diplomatic conference in London.[13] The Athens Convention 2002 introduces a compulsory insurance regime and allows direct actions against insurers.[14] Most importantly, the Athens Convention 2002 has also introduced fundamental changes to the liability regime.[15] The new regime provides for a two-tiered liability system for a passenger's death or personal injury caused by shipwreck, capsizing, collision or stranding of the ship, explosion or fire in the ship or defect in the ship. In the first tier, the carrier is strictly liable up to 250,000 SDRs,[16] unless the carrier proves that the accident was caused solely by an act of war; hostilities, civil war, insurrection or an exceptional natural phenomenon. Similarly, the carrier is exempted from liability were they to prove that the incident was wholly caused by an act or omission of a third party with the intent to cause the incident.[17] In the second tier (i.e., above the strict liability limit), the carrier is liable unless they can prove that the incident causing the loss occurred without their fault or neglect. Therefore, a reversed burden of proof is imposed on the carrier for losses between 250,000 SDRs and 400,000SDRs (i.e., the maximum liability expressed in the amended Article 7 of the Athens Convention).[18] The Athens Convention 2002 does not make any change in the liability regime for personal injury and death claims arising out of non-ship related incidents. For such claims, the claimant must still prove that the carrier's negligence has led to personal injury or death.

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[10] *Id.* art. 16.

[11] *Id.* art. 17. For a more comprehensive review of the Athens regime, *see* 1 FRANCESCO BERLINGIERI, INTERNATIONAL MARITIME CONVENTIONS: THE CARRIAGE OF GOODS AND PASSENGERS BY SEA § 4, at 259-293 (2014).

[12] Protocol of 2002 to the Athens Convention Relating to the Carriage of Passengers and Their Luggage by Sea, 1974, Nov. 1, 2002, IMO Doc.: LEG/CONF. 13/20 of 19 Nov. 2002, available at http://folk.uio.no/erikro/WWW/corrgr/dipcon/20.pdf [hereinafter Athens Convention 2002].

[13] For a discussion on the Athens Convention 2002, *see* Barış Soyer, Sundry Considerations on the Draft Protocol to the Athens Convention relating to the Carriage of Passengers and Their Luggage by Sea 1974, J. MAR. L. & COM. 519 (2002); Erik Røsæg, News under the Athens Sun—New Principles and Lost Opportunities of the Athens Convention 2002, 46 SCANDINAVIAN STUD. L. 153 (2004); Robert D. Peltz, The Athens Convention Revisited, J. MAR. L. & COM. 491 (2012).

[14] *See* Athens Convetion 2002, *supra* note 12, art. 4bis.

[15] *See id.* art. 3.

[16] The carrier is required to obtain compulsory insurance in respect of the death of and personal injury to passengers up to this figure (*id.* art. 4bis).

[17] *Id.* art. 4. Similar exceptions appear in other conventions adopting a strict liability regime; *see, e.g.*, International Convention on Civil Liability for Oil Pollution Damage 1992 art. III § 2, Nov. 27, 1992, 1956 U.N.T.S 255; International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea art.7 § 2, May 3, 1996, 35 I.L.M. 1406 (not yet in force).

[18] The other main changes that have been brought about by the protocol are: an increase of 25 percent on luggage claims; allowing the court seized to suspend the operation or interrupt the running of the two-year time limit; and the possibility for regional integration organisations, such as the EU, to sign the new Convention with the same rights and obligations as a nation state.

The Athens Convention 2002 entered into force on 23 April 2014,[19] and, perhaps more fundamentally, the European Union adopted it into EU law by virtue of Council Regulation 392/2009 before the Convention came into force internationally. The Regulation not only intends to provide a uniform liability regime for passengers carried by sea, but it also extends the scope of application of the Athens Convention 2002 to domestic carriage and inland waterways.[20]

To what extent the Athens Convention 2002 will achieve uniformity within the EU through the implementation of this Regulation is questionable, given that no attempt has been made in the relevant Regulation to iron out the uncertainties surrounding certain provisions. However, we do not intend to be involved in a discussion on the potential pitfalls of the Council Regulation.[21] Our enquiry goes much wider. Our objective is to analyse the extent to which the Athens Convention 2002 provides a sound and reliable liability regime for passengers carried by sea. To this end, the meaning and scope of several ambiguous provisions of the Athens Convention 2002 will be evaluated and critically analysed. In the course of this analysis, comparisons will be made with the international regimes dealing with the liability of air carriers to their passengers. The authors are well aware that the international air liability regimes have been developed against the backdrop of a different era and there are significant differences between these two modes of transport. However, it is also undeniable that legal jurisprudence on international air liability regimes is fertile. It is feasible that such a comparative approach could provide an impressive guidance as to how to resolve ambiguities in the Athens Convention 2002, especially with regard to provisions that have general applicability (i.e., provisions not dealing with issues unique to sea transport). It is hoped that the article will serve the following two objectives: i) providing guidance to courts in Contracting States on how to deal with problematic issues and provisions of the Athens Conventions; and ii) offering insights to governments (such as Australia and Singapore), that are not members to the Athens regime but might consider the ratification of the Athens Convention 2002, as to potential ambiguities that need to be addressed in the implementing legislation.

Considering that most cruise line conditions commonly seek to contractually incorporate the provisions of the Athens Convention 1974, it is evident that the deliberations in this article

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[19] As of June 2017, the member states to the Athens Convention 2002 are: Albania, Belgium, Belize, Bulgaria, Croatia, Denmark, Finland, France, Greece, Ireland, Latvia, Lithuania, Malta, Marshall Islands, Montenegro, Netherlands, Norway, Palau, Panama, Portugal, Romania, Serbia, Slovakia, Slovenia, Spain, Sweden, Syrian Arab Republic, United Kingdom and European Union.

[20] European Parliament and Council Regulation (EC) 392/2009 of Apr. 23, 2009, The Liability of Carriers of Passengers by Sea in the Event of Accidents, 2009 O.J. (L 131) 24 also makes the following major changes in this area:

- removal of the possibility for Member States under the Athens Convention 2002 to fix limits of liability higher than those provided for in the Convention (art. 4);
- making advance payment in the event of the death of, or personal injury to, a passenger (art. 5); and
- providing detailed pre-journey information to passengers (art. 6).

[21] A discussion of that nature has been carried out in Barış Soyer, *Boundaries of the Athens Convention: What You See is not Always What You Get*, in LIABILITY REGIMES IN CONTEMPORARY MARITIME LAW c. 11, at 183-206 (Rhidian D. Thomas ed., 2007).

could be relevant even in jurisdictions (such as the United States of America) that have not implemented the Athens regime into their legal system.[22]

Before analysing the problematic aspects of the Athens regime in Part III, Part II provides an overview of how the liability regime in the aviation sector has developed. It highlights the main differences with the Athens regime and provides some answers as to why the liability regime of the former has developed in a radically different fashion.

II- An Overview of the Development of the International Air Carriage Regime for Passengers

The liability of air carriers for the death or bodily injury of passengers sustained during their international carriage by air is regulated by the Warsaw Convention System (WCS) and the Montreal Convention 1999 (MC).

The WCS is a blend of the following international law instruments:

(i) the original Warsaw Convention 1929 (WC);[23]
(ii) the Hague Protocol 1955 amending the WC (WC/HP);[24]
(iii) the Guadalajara Convention 1961 supplementing the WC or the WC/HP (GC);[25]
(iv) the Guatemala City Protocol 1971 (GCP) amending the WC/HP;[26] and
(v) the Montreal Additional Protocols Nos. 1, 2, 3 and 4 of 1975 (MP1, MP2, MP3, MP4) amending the WC (MP1), the WC/HP (MP2 and MP4) and the GCP (MP3).[27]

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[22] The cruise sector is gigantic in North America. In 2016, 12.41 million passengers were carried by the North American cruise industry. This is larger than the total of cruise passengers carried in Europe, Australia, and Asia during the same period, which was 11.84 million (source: https://www.statista.com/statistics/301598/number-of-guests-of-the-global-cruise-industry-by-region/) (last tested 1 July 2017).

[23] WC, *supra* note 1.

[24] Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, Signed at Warsaw on 12 Oct. 1929, *opened for signature* Sept. 28, 1955, 478 U.N.T.S. 371 [hereinafter WC/HP].

[25] Convention Supplementary to the Warsaw Convention Relating to Unification of Certain Rules in International Carriage by Air Performed by a Non-contractual Carrier, Signed at Guadalajara on Sept. 18, 1961, 510 U.N.T.S. 31 [hereinafter GC].

[26] Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, Signed at Warsaw on 12 Oct. 1929, as Amended by the Protocol done at The Hague on 28 Sept. 1955, *opened for signature* Mar. 8, 1971,10 I.L.M. 613, ICAO Doc. 8932 [hereinafter GCP]. The GCP never came into force.

[27] Additional Protocol No. 1 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, Signed at Warsaw on 12 Oct. 1929, as Amended by the Protocol done at The Hague on 28 Sept. 1955, *opened for signature* Sept. 25, 1975, ICAO Doc. 9145 [hereinafter MP1]; Additional Protocol No. 2 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage

The MC was the long-awaited reaction to this assortment of laws. It is a stand-alone international convention that gradually replaces the WCS. It will take over when all the State Parties of the WCS ratify the MC.[28] Its overarching aim is to consolidate the liability system governing passengers and air carriers into one instrument and modernise it by tilting the balance in favour of passengers.

From the outset, it needs to be stressed that the international liability regime for air passengers was developed at a time when the aviation sector was going through a trial-and-error learning process. The technological mishaps of flying adversely affected passengers and, to a lesser extent, innocent bystanders on the ground. This inevitably led to the adoption of a protectionist approach when developing the WC in the 1920s. This was a time when sea carriers were still enjoying the benefits of the traditional freedom of contract which underpinned maritime law for centuries. This further explains why the liability of air carriers was based on a presumption of fault under the WC with limited contractual exclusions permitted,[29] whilst sea carriers could contractually exclude or limit their liability against their passengers. It took the international community half a century before making sea carriers subject to a similar liability regime, providing a minimal degree of protection to sea passengers with the introduction of the Athens Convention 1974.

With air travel becoming part of the mainstream, especially in the Western world, with the middle classes of Western countries being its main customers by the 1980s, the public's tolerance for technological mishaps causing substantial losses of life gradually disappeared. Media attention to the aftermath of aviation accidents contributed to this tendency, as it ensured that the international air liability regime was in the spotlight after each loss of an aircraft. Paradoxically, the insurance sector's attitude to liability issues gradually became more relaxed as accident data on individual air carriers, airports, routes and geographical areas of operations became easily available. Liability insurers began to calculate their maximum exposure with accuracy by making use of such data, which in turn enabled them to make provision for losses in terms of premium rates and investment return. These factors accelerated the adoption of a better liability regime for air passengers in the 1990s. Under the

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by Air, Signed at Warsaw on 12 Oct. 1929, as Amended by the Protocol done at The Hague on 28 Sept. 1955, *opened for signature* Sept. 25, 1975, ICAO Doc. 9146 [hereinafter MP2]; Additional Protocol No. 3 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, Signed at Warsaw on 12 Oct. 1929, as Amended by the Protocol done at The Hague on 28 Sept. 1955 and at Guatemala City on 8 March 1971, *opened for signature* Sept. 25, 1975, ICAO Doc. 9147 [hereinafter MP3]; The MP3 never came into force following the fate of the GCP. Additional Protocol No. 4 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, Signed at Warsaw on 12 Oct. 1929, as Amended by the Protocol done at The Hague on 28 Sept. 1955, *opened for signature* Sept. 25, 1975, reprinted in Sec. Rep. No. 105-20 [hereinafter MP4].

[28] MC, *supra* note 1, art. 55.

[29] Under the WCS the claimants had the burden of establishing that (i) there has been an "accident" which (ii) took place on board the aircraft or during the operations of embarking or disembarking and (iii) caused the passenger's death, or bodily injury (art. 17). The burden was then reversed to the carrier to establish the two available defences, namely that (i) it has taken all necessary measures to avoid the damage or that it was impossible for them to take such measures (art. 20 § 1); or (ii) the death/bodily injury was caused by or contributed by the passenger (art. 21).

MC, a two-tiered system of liability has been created. Air carriers are now strictly liable for death or bodily injury caused by accidents that take place on board an aircraft or in the process of embarkation/disembarkation, up to 113,000 SDRs.[30] Their only defence in this first tier is to prove that the damage was caused or contributed by the negligence or other wrongful act or omission of the claimant.[31] For damages exceeding this amount, the carrier bears unlimited liability, having the burden to establish the following three available defences: namely, that the damage was caused by or contributed to by the negligence or other wrongful act or omission of the claimant;[32] that the damage was not due to the negligence or other wrongful act or omission of the carrier or its servants or agents;[33] or that the damage was solely caused by the negligence or other wrongful act of a third party.[34]

The Athens Convention 2002 introduced a strict liability regime as well, yet only for personal injury and death claims arising from shipping incidents. Still, sea carriers and, in particular their liability insurers, were not prepared to accept a regime of unlimited liability. It is not within the realm of this article to elaborate why the sea carriage regime has been developed in a more conservative fashion compared to the air carriage regime. However, it can be safely said that the following two issues in particular were of major concern for liability insurers: i) the fact that a large cruise liner could carry up to 6,000–7,000 passengers;[35] and ii) passengers on board ships are likely to be more mobile compared to aircraft passengers and, therefore, the risk of a ship's passengers suffering personal injury is significantly greater.

However, as indicated above, the fact that aviation has adopted a different liability regime to that of sea does not mean that the latter has nothing to learn from the former's development of the law and practice. In fact, as illustrated in this Part, the development of the air carriage regime has influenced the evolution of the liability regime under the Athens Conventions. Therefore, the authors will refer, where necessary, to the solutions adopted by the air carriage regimes in their quest to identify how the Athens Convention 2002 can be modified or interpreted to provide a better global liability regime for passengers carried by sea.

[30] MC, *supra* note 1, art. 17 and art. 21 § 1 (The limit is currently set at 113,000 SDRs. Art. 24 provides that the limit is to be reviewed every five years by reference to an inflation factor; if the factor exceeds 10 percent, the limit will be increased accordingly, unless a majority of State Parties disapprove)
[31] *See id.* art. 20.
[32] *Id.* art. 20.
[33] *Id.* art. 21 § 2 (a).
[34] *Id.* art. 21 § 2 (b).
[35] *The Oasis of the Seas*, operated by Royal Caribbean International Ltd, could carry up to 7,144 passengers at maximum capacity.

III. Issues concerning Definition of Key Notions under the Athens Regime

A) Scope of the Athens Regime

Under the Athens regime (both 1974 and 2002), the Convention is applicable when a contract of carriage is made by or on behalf of a carrier for the carriage of a passenger, with or without his/her luggage on a ship.[36] Not surprisingly, the drafters made no attempt to define what a contract is, leaving its determination to the national laws of the Contracting States. This is likely to create difficulties, especially in common law jurisdictions, where it is necessary that both parties provide consideration for the contract.[37] Is there, for example, a contract of carriage, if a passenger is given a free ticket from the operators of the ship as a result of an advertising promotion?[38] The legislation incorporating the Athens Convention 1974 into UK law expressly stipulated that "any reference in the Convention to a contract of carriage excludes a contract of carriage which is not for reward."[39] This kind of clarification is useful, but problems could still arise in some cases. It is not uncommon practice for ferry operators to issue tickets free of charge to youngsters travelling with adults. In that case, would the ticket issued for the youngster come under the Convention regime? Technically the contract is not for reward, but it is also plausible to argue that a contract with a youngster is issued only when an adult ticket is purchased. In that case the passenger's payment for his/her ticket would provide adequate consideration for his/her contract and the contract of the youngster.[40]

A problem of this nature is unlikely to arise in the context of the air carriage conventions. This is because both the MC and the WCS provide that they are applicable to gratuitous carriage performed by an air transport undertaking.[41] The term "air transport undertaking" is not defined in the conventions, leaving its interpretation to national laws. In the UK the term is currently defined, for regulatory purposes, in the Transport Act 2000 as an undertaking that provides "services for the carriage by air of passengers or cargo for hire or reward", a definition that is not particularly helpful in our case.[42] The following more helpful definition was included in the Air Navigation Order 2005 (ANO 2005): "Air transport undertaking

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[36] By virtue of Athens Convention 1974, *supra* note 3, art. 2; Athens Convention 2002, *supra* note 12, art. 2, the voyage must be of an international character, but it is open to Contracting States to extend the application of the Convention to domestic voyages.

[37] Eleanor Thomas v. Benjamin Thomas (1842) 2 QB 851 (Eng.).

[38] Conversely, under Convention on the Contract for the International Carriage of Passengers and Luggage by Road, art. 1 § 1, Mar. 1, 1979, 1774 U.N.T.S. 109, a passenger has been described as "any person who, in the performance of a contract of carriage made by him or on his behalf, is carried either for reward or gratuitously by a carrier".

[39] Merchant Shipping Act 1995, c. 21, pt. II, sched. 6, § 9 (U.K.) [hereinafter MSA 1995].

[40] It is worth noting that the Canadian enactment of the Athens Convention extends the application of the Convention to all passengers of commercial or public craft carried by water, whether or not they are being carried pursuant to a contract (Marine Liability Act, 2001 S.C., c. 6, § 37(2) (Can.)). However, the Convention would not apply when a visitor makes use of a boat for accommodation purposes: Buhlman v. Buckley (2011), 330 D.L.R. 6th 755 (Can.).

[41] MC, *supra* note 1, art. 1 § 1; WC, *supra* note 1, art. 1 § 1.

[42] Transport Act 2000, c. 38, § 95(5) (U.K.).

means an undertaking whose business includes the undertaking of flights for the purposes of public transport of passengers or cargo."[43] However, the term has disappeared from the latest ANOs, namely of 2009 and 2016. Still, there is no doubt that a commercial air carrier would qualify as such and the transport of an under-two-year-old for free would trigger the application of the aviation conventions. A consensus seems to have developed among courts that to be an "air transport undertaking" for the Conventions, the relevant entity or person is required to "provide air carriage as part of a commercial enterprise even though aviation is not its principal activity";[44] or "even if air transport is only a small or subordinate part of the whole business".[45] It has even been suggested that the only flights excluded are "casual, isolated flights when a free ride is afforded by an owner not engaged in the business (enterprise) of flying".[46]

A more difficult question arises when a pregnant woman sustains injuries while she is carried on board a vessel that result in the child being later born with disabilities. There is no doubt that under English law the child would be able to bring an action against the carrier for personal injuries suffered, but it is debatable whether such claim can be brought under the Athens Convention or different national legal regime. The claim will fall under the Athens regime if the unborn child is carried as a passenger or if he/she can be viewed as a third-party beneficiary of a contract under the Contracts (Rights of Third Parties) Act 1999.[47] If that course of action fails, a claim by the unborn child could be brought under the Congenital Disabilities Act 1976. However, any action brought under the national legal system will be outside the Athens regime,[48] which means that the carrier will benefit from global limitation figures rather than those set out in the Athens Convention.[49] Courts might, of course, find it unacceptable that a mother who is injured during carriage is subjected to a different legal regime than her unborn child who is injured as a result of the same incident. Such policy argument might encourage them to find that the foetus has the status of a passenger under the Convention, but this outcome is far from certain.

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[43] Air Navigation Order 2005 (SI 1970/2005) §155 (U.K.).
[44] MONTREAL CONVENTION 1–20 (Elmar Giemulla et al. eds., 2008).
[45] SHAWCROSS AND BEAUMONT: AIR LAW, LEAFLET NO. 156, DIVISION VII, ¶ 312 (David McClean et al. eds., 2017).
[46] Bates Block v. Compagnie Nationale Air France, 386 F.2d 323, 333 (5th Cir. 1967), cert. denied, 392 U.S. 905 (1968).
[47] The Contracts (Rights of Third Parties) Act 1999, c. 31, § 1(3) (Eng.) stipulates: "The third party… need not be in existence when the contract is entered into."
[48] *See* Athens Convention 1974, *supra* note 3, art. 14.
[49] In maritime law, carriers can benefit from global limitation. This essentially allows carriers to limit their liability for all claims emerging from an incident. The Athens Convention, on the other hand, allows carriers to limit their liability with regard to each passenger claim (unit limitation). If a State is party both the Athens Convention and a global limitation regime, such as the Convention on Limitation of Liability for Maritime Claims, Nov. 19, 1976, 1456 U.N.T.S. 221 [hereinafter LLMC 1976], if the combined amount of all the claims exceeds the fund set by the global limitation regime, all the claims (including passenger claims under the Athens Convention) will be reduced proportionately. Protocol of 1996 to Amend LLMC 1976, May 2, 1996, 35 I.L.M. 1433 allow State parties to make a reservation with regard to passenger claims under the Athens Convention (96 art. 15bis.3). This means that the limits set by the Athens Convention will not be susceptible to further reduction under the global limitation regime.

The authors know of no reported cases of this nature under the aviation conventions. Yet, the recent decision of the CJEU on Air Baltic Corporation AS[50] might be relevant, as it confirmed that a contract of carriage by air can be concluded with a third party for the benefit of the actual passenger.[51] In this case the tickets were paid by the employer, but issued in the names of its employees, who were the actual passengers transported. The air carrier was held liable to the employer for damage occasioned by delay to the carriage of its employees.

Still, it will be an over-stretching of the boundaries of the aviation conventions to use this decision to argue that the unborn child is a beneficiary of the mother's contract of carriage. Firstly, case -law is clear that a passenger, gratuitous or otherwise, must have consented to the carriage in question by means of a contract. The existence of such consent explains why the aviation conventions have been held not to apply to "…stowaways, persons on the flight to be expelled from the State of departure, persons employed by the carrier to carry out routine maintenance, flight attendants, and student pilots... [T]hey have not contracted for carriage as such…". [52] What the CJEU decision seems to suggest is that, while it is irrelevant whether the third, contracting party is a passenger or not, the beneficiary must qualify as a passenger. Secondly, air tickets usually bear the name of the passenger and do not permit substitutions or transfers. As such, it is difficult to identify the unborn child as a member of a class or of a particular description per s. 1(3) of the Contracts (Rights of Third Parties) Act 1999.

If the action under the aviation conventions fails, it is doubtful whether a claim under the Congenital Disabilities Act 1976 would be successful. The concept of exclusivity is central to the application of the aviation conventions.[53] The prevailing view argues that the claimant is precluded from bringing a claim against the carrier under national law for an incident that took place during international carriage, even when the carrier is not liable under the Conventions. English courts have demonstrated remarkable consistency in the application of the exclusivity principle.[54] Most recently, the Supreme Court in the case of *Stott* v. *Thomas Cook Operators Ltd.* [55] dismissed the claim of a disabled passenger against the tour operator brought under the UK Disability Regulations. [56] The relevant incident took place on board the aircraft, yet the claim was brought under the Regulations because they permit recovery for injury to feelings, which is not recoverable under the MC (or the WCS). The Supreme Court was quick to dismiss the claim by applying the principle of exclusivity:

> Should a claim for damages for ill treatment in breach of equality laws as a general class, or, more specifically, should a claim for damages for failure to provide properly for the needs of a disabled passenger, be regarded as outside the substantive scope of the

[50] Case C-429/14, Air Baltic Corp. AS v. Lietuvos Respublikos Specialiųjų Tyrimų Tarnyba, 2016 ECLI 88; [2016] 1 Lloyd's Rep. 407.
[51] MONTREAL CONVENTION, *supra* note 44, at 1–26.
[52] MALCOLM A. CLARKE, CONTRACTS OF CARRIAGE BY AIR 38 (2nd ed. 2010) with reference to case law.
[53] MC, *supra* note 1 art. 29; WCS, art. 24.
[54] *See*, *e.g.*, Sidhu v. British Airways Plc. [1997] AC 430 (HL) (appeal taken from Scot.).
[55] [2014] UKSC 15, [2014] AC 1347 (appeal taken from Eng.).
[56] Civil Aviation (Access to Air Travel for Disabled Persons and Persons with Reduced Mobility) Regulations 1895/2007 implementing Commision Regulation (EC) 1107/2006 of Jul. 5, 2006, Concerning the Rights of Persons with Reduced Mobility when Traveling by Air, 2006 O.J. (L 204) 1.

> Convention? As to the general question, my answer is no… [W]hat matters is not the quality of the cause of action but the time and place of the accident or mishap. The Convention is intended to deal comprehensively with the carrier's liability for whatever may physically happen to passengers between embarkation and disembarkation.[57]

It is clear that the matter (i.e., whether the international carriage regime(s) should govern an action brought by an unborn child injured during the course of transit) remains unsolved under both the sea and the air convention regimes. It is fair to say that authorities in the context of carriage by air seem to suggest that the international regime should govern such an action. This would be the preferred solution of the authors under the Athens regime too.

Article 1(3) defines a ship that comes under the Athens Convention 1974/2002 as a "sea-going vessel, excluding an air-cushion vehicle". It is clear that air-cushion vessels, such as hovercraft, are excluded from the scope of the Athens Convention 1974/2002.[58] Yet, the Convention provides no further guidance as to the physical attributes a craft should carry to be considered as a "ship".[59] Similarly, it is not clear what the term "sea going" means. For example, would the Convention apply to passengers who purchase tickets for a ride on an inflatable raft?[60] The answer depends on i) whether such a craft can be considered a "ship" under national law[61] and ii) whether it is adequate that the craft is capable of proceeding to sea, or essential that it actually goes to sea.[62] If the latter is correct, a vessel operated within a harbour to provide sight-seeing tours for tourists will possibly not be regarded as sea-going. Therefore, there is a genuine possibility that in case of an accident, passengers who purchase a ticket for a ride on an inflatable raft in Barbados will be treated differently than those who enjoy a similar ride on the coast of Dominica (both of whom are parties to the Athens Convention 1974).

A final point on the scope of the Athens Convention 1974/2002 relates to the definition of "carrier". By virtue of Article 1 of the Convention "carrier" means a person by or on behalf

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[57] Stott v. Thomas Cook Operators Ltd. [2014] UKSC 15, at [60]-[61] (Lord Toulson) (appeal taken from Eng.)

[58] In the UK, the rights of hovercraft passengers and their baggage are covered by the Carriage by Air Act 1961, c. 27 as modified by sched. 1 of the Hovercraft (Civil Liability) Order 1986 (SI 1305/1986) as amended by the Hovercraft (Civil Liability) (Amendment) Order 1987 (SI 1835/1987).

[59] The position is different under some other international conventions. For example, under the International Regulations for Preventing Collisions at Sea, r. 3(a), Oct. 20, 1972, 1050 U.N.T.S. 17, a vessel is defined as "including every description of water craft… used or capable of being used as a means of transportation on water."

[60] It was held in McEwan v. Bingham (t/a Studland Watersports) [2000] CLY 2001 (Cty. Ct. Hove) (Eng.) that a seventeen-foot inflatable banana raft which was towed in a bay by a marine assault craft was not a vessel.

[61] As far as law that applies in England and Wales is concerned, the most general definition of the term can be found in MSA 1995, *supra* note 39, § 313. This section indicates that the term "ship" includes every description of vessel used in navigation. Over the years, British judges have equated navigation with controlled/planned travel over the water (Steedman v. Schofield [1992] 2 Lloyd's Rep. 163 (QB) (Eng.) and R. v. Goodwin [2005] EWCA (Crim) 3184, [2006] 1 Lloyd's Rep. 432 (Eng.)) and set their face against classifying crafts used purely for pleasure purposes (i.e., messing about in boats) as vessels capable of navigation (Curtis v. Wild [1991] 4 All ER 172 (QB) (Eng.)). *See* on the other hand, Michael v. Musgrave (The "Sea Eagle") [2011] EWHC (Admlty) 1428 (Eng.) where a rigid inflatable boat was treated as a ship within the scope of the Athens Convention 1974. *See also* Kathleen Feest v. South West Strategic Health Auth. et al. [2015] EWCA (Civ) 708 (Eng.).

[62] In Salt Union Ltd. v. Wood [1893] 1 QB 370 (Eng.) a steamer used to carry salt upon the rivers Weaver and Mersey from Windsor to Liverpool was held to be a non sea-going vessel as the steamer never set out to go anywhere other than inland waters. *See also Union S.S. Co. of New Zealand Ltd. v. Commonwealth* (1925) 37 CLR 130 (Austl.) and *Kirmani v. Captain Cook Cruises Pty Ltd. [No 1]* (1985) 159 CLR 351 (Austl.).

of whom a contract of carriage has been concluded, whether the carriage is actually performed by that person or by a performing carrier.[63] The definition of "carrier" is very wide, suggesting that anybody who has been involved in the process of establishing a contractual relationship with the passenger could possibly, regardless of their status, be regarded as the contractual carrier.[64] Therefore, a tour operator could be treated as "carrier" under the Convention although the actual sea transport is performed by another carrier.[65] This is not necessarily an adverse development for passengers, as it enables them to bring an action against tour operators in cases of mishaps occurring at the sea leg of a package holiday. However, legal complications might arise if national or EU law provides a different liability regime for package holidays. A question will arise whether the provisions of the Athens Convention or legislation which is designed to deal with package holidays would apply in such a case.[66] Any such difficulty can be easily avoided at the implementation level, if the legislator is aware that the definition of "carrier" under the Athens regime could possibly create a conflict with legislation dealing with package holidays.

The definitions of contracting and actual (performing) carrier are more detailed in the aviation conventions, yet not necessarily more restrictive. Both contracting and actual carriers are subject to the provisions of the MC (and the Guadalajara Convention of the WCS).[67] The contracting carrier is the person that "as **a principal** makes a contract of carriage governed by the Convention with a passenger… or with a person acting on behalf of the passenger";[68] the actual carrier is the person who "performs, **by virtue of authority from the contracting**

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[63] The same Article stipulates that "performing carrier" means a person other than the carrier, being the owner, charterer or operator of a ship, who actually performs the whole or a part of the carriage.

[64] *See* United Nations Convention on the Carriage of Goods by Sea art. 1 § 1, Mar. 31, 1978, 1695 U.N.T.S. 3, which provides a similar definition of the term "carrier".

[65] In Lee & Another v. Airtours Holidays Ltd. & Another [2004] 1 Lloyd's Rep. 683, at [32] (Cent. London Cty. Ct.) (Eng.). His Honour Judge Hallgarten QC made the following observation:

> … I do not consider that the [Athens] Convention is concerned with *status* at all: there is nothing which confines its application to concerns in the nature of shipping lines. Basically what emerge from the Convention are two categories:
> (1) the carrier—being the person by or on whose behalf a contract of carriage has been concluded; and
> (2) the performing carrier—being the person to whom such carriage is entrusted.
> As I see it, the essential question is whether, as between the claimants and the [tour operators] there was a contract of carriage by sea: if so then the [tour operators] assumed responsibilities as carriers, with the word carrier being used in a non-technical sense… The matter is very largely one of impression, but for my part I see no difficulty in saying that the [tour operators] were carriers, in that the agreement with the claimants included obligations pertaining to carriage by sea and to that extent, it represented a contract for the carriage by sea of the claimants by the [tour operators]…

See also Norfolk v. My Travel Grp. Plc. [2004] 1 Lloyd's Rep. 106 (Plymouth Cty. Ct.) (Eng.).

[66] The tension between The Package Travel, Package Holidays and Package Tours Regulations 1992 (SI 3288/1992) [hereinafter Package Regulation 1992] which was designed to implement Council Directive 90/314/EEC of Jun. 13, 1990, on Package Travel, Package Holidays and Package Tours, 1990 O.J. (L 158) 59 into UK law, and the Athens Convention 1974, *supra* note 3, was apparent in *Norfolk* [2004] 1 Lloyd's Rep. 106 and *Lee & Another* [2004] 1 Lloyd's Rep. 683 It is believed that now that the Athens Convention has been made part of EU law with a Council Regulation, Athens Convention will have priority in resolving any issue of conflict between these two pieces of legislation.

[67] *See* MC, *supra* note 1, arts. 39-48.

[68] *See id*. art. 39.

carrier, the whole or part of the carriage, but is not with respect to such part a successive carrier within the meaning of this Convention".[69] The definition of contracting carriers is wide enough to include tour operators. Yet, it would exclude travel agents issuing tickets on behalf of air carriers or tour operators. As was recently demonstrated in the West Caribbean case,[70] there is no requirement for a contracting carrier to operate aircraft: a US shell-company (Newvac) was found to be "a contracting carrier" under the MC for having leased aircraft and crew from the actual carrier (West Caribbean Airways) and in turn contracting for the seating capacity of the aircraft (and other holiday-related services) with a travel agent (Globe Trotter) which eventually sold the individual tickets to the passengers.

Furthermore, the court held that Globe Trotter was acting on behalf of the passengers, although none was identified at the time of its contract with Newvac: "Newvac and Globe Trotter clearly contemplated that Globe Trotter would procure passengers for the flights and the fully inclusive tour packages that were to be supplied by Newvac, and that Globe Trotter would act on behalf of the passengers in this regard...".[71]

Therefore, both international regimes provide for wide definitions of carrier that can be extended to cover tour operators. This is not necessarily a bad solution. Still, it is one that needs to be borne in mind, especially when states implement the Athens regime into their law to avoid any potential conflict with national law designed to deal with the legal position of tour operators.

B) Identifying the Basis of Liability

In both versions of the Athens regime, the liability regime that governs claims for personal injury or loss of life, or damage to or loss of luggage, depends on the source of the incident that gives rise to the claim. The Conventions draw a distinction between "shipping incidents" and "non-shipping incidents". In the 1974 version of the Convention, an incident is deemed to be shipping-related if the death of or personal injury to the passenger, or the loss of or damage to the cabin luggage, arose from or in connection with the "shipwreck, collision, stranding, explosion or fire, or defect in the ship".[72] It is evident that this definition is very general and could lead to disputes in many instances. For example, in its technical sense "collision" occurs only between two ships. Therefore, if the ship carrying passengers comes into contact with a fixed object, would that be treated as a shipping incident? Considering the ethos behind the relevant provision (i.e., providing a favourable liability regime for passengers in case of a casualty emerging from ship operations), one might be inclined to answer this question in a positive fashion. Still, it is possible that this issue might be the focus

[69] *Id.*
[70] *In re* West Caribbean Airways, SA et al. 619 F. Supp. 2d 1299 (S.D. Fla. 2007), aff'd, 584 F.3d. 1052 (11th Cir. 2009).
[71] *Id.*, at 1308.
[72] Athens Convention 1974, *supra* note 3, art. 3 § 3. A common cause of injuries on board is rough weather. The case law is clear that death/injury or damage to luggage arising from rough weather is not a shipping incident. *See, e.g.*, Hollingworth v. Southern Ferries Ltd. (The "Eagle") [1977] 2 Lloyd's Rep. 70 (QB) (Eng.). and Davies v. Stena Line [2005] EWHC 420 (QB), [2005] 2 Lloyd's Rep. 13 (Eng.).

of litigation. More challenging questions would surround the concept of "defect in the ship". As no further attempt has been made to clarify the meaning of this term, it is certainly arguable that food poisoning caused by corrosion of the stoves in the kitchen of the ship is attributable to a "defect in the ship". By the same token, injury caused by the malfunctioning of the sliding doors in the restaurant of a cruise ship could be attributable to a "defect in the ship". The authors do not believe that it was the intention of the draftsmen to attribute such a wide meaning to the term "defect in the ship". This kind of expansive construction has the potential of converting the hotel type of incidents into shipping-related incidents. Unfortunately, the wording is far from perfect and one can see how it can create confusion.

Appreciating the pitfalls of such lenient drafting, an attempt has been made in the 2002 version of the Athens Convention to offer a comprehensive definition of a shipping incident. The Athens Convention 2002 describes it as "shipwreck, capsizing, collision or stranding of the ship, explosion or fire in the ship, or defect in the ship".[73] The addition of the word "capsizing" is intended to clarify that an incident that does not necessarily cause damage or destruction to the ship, but nevertheless leads to personal injury or death as a result of the ship overturning keel up and deck down, will still be viewed as a shipping incident for the purpose of determining the relevant liability regime.[74] It is debatable whether the word "capsizing" would cover a situation where the ship takes a significant list, during which death of or injuries to passengers occur, and then comes back upright. Considering the justification for adding the word "capsize" to the definition, it is the view of the authors that this kind of incident (e.g. listing of the vessel) should be regarded as a shipping incident. It is also made explicit in the definition that the explosion or fire must be directly connected with the ship or her cargo. Interestingly, though, it seems that the definition does not make an inquiry as to the cause of the fire and explosion. Therefore, fire on board of the ship that causes personal injury or death should be treated as a shipping incident regardless of whether it has been started as a result of negligence of a group of passengers[75] or negligence of the cook!

More fundamentally, a defect in the ship has been described as "any malfunction, failure or non-compliance with applicable safety regulations in respect of any part of the ship or its equipment when used for the escape, evacuation, embarkation and disembarkation of passengers, or when used for the propulsion, steering, safe navigation, mooring, anchoring, arriving at or leaving berth or anchorage, or damage control after flooding; or when used for the launching of life saving appliances".[76] This is a thorough definition that possibly provides answers to the questions raised above under the 1974 version of the Convention. Still, there might be borderline cases where it is debatable whether the cause of the incident is shipping related or not. Think of a situation where the passenger, prior to the ship's sailing, steps into an open engine hatch left by contractors who were distracted by an impending emergency.

[73] Athens Convention 2002, *supra* note 12, art. 4 amends Athens Convention 1974, *supra* note 3, art. 3.
[74] The use of the word "chavirement" in the French text leaves no doubt that this was the intended outcome of the amendment.
[75] However, if carrier can prove that the loss was caused or contributed to by the fault or neglect of the passenger making a claim, the court seized may exonerate the carrier wholly or partly from their liability in accordance with the provisions of the law of that court by virtue of Athens Convention 1974, *supra* note 3, art. 6; Athens Convention 2002, *supra* note 12, art. 6.
[76] Athens Convention 2002, *supra* note 12, art. 4 amends Athens Convention 1974, *supra* note 3, art. 3.

There is no doubt that the incident is attributable to failure or non-compliance with safety regulations in respect of a part of the ship. However, the definition provides that the incident must also arise when the relevant part of the ship is used for the escape, evacuation, embarkation and disembarkation of passengers or for the propulsion, steering, safe navigation, mooring, etc. Given that the vessel, in our example, was not in the course of navigation and the relevant part was not used in embarkation, disembarkation, escape, evacuation, propulsion, or steering, the carrier might challenge any suggestion that the loss has resulted from a shipping incident.[77] A more difficult case is when a ship is attacked by pirates as a result of a security failure on the part of the crew, claiming the lives of passengers. It is possible to argue that the crew is part of the ship and their failure to comply with safety regulations to ensure safe navigation of the ship would mean that the loss relates to a shipping incident, even though the pirates are external to the ship.[78] These issues aside, it is undeniable that the definitions provided in the 2002 version of the Convention mark a huge improvement on the definitions that appear in the 1974 version of the Convention.

The aviation conventions do not make such fine distinctions. The liability of air carriers for the death or bodily injury of a passenger is governed by Article 17, which provides that "[t]he carrier is liable for damage sustained in case of death or bodily injury of a passenger upon condition only that the accident which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking." In that respect, their liability depends on the nature of the incident causing the death or bodily injury ("accident") and the location of the accident (from the moment of embarkation, while on board the aircraft and until disembarkation from the aircraft is completed).

Article 17 is arguably the most litigated provision of the Conventions, and a thorough examination of the jurisprudence is outside the scope of this paper. Yet, a few relevant thoughts are in order.[79] An "accident" for the purposes of the conventions has been defined as an "unexpected or unusual event or happening that is external to the passenger… [and not his/her] own internal reaction to the usual, normal and expected operation of the aircraft".[80] Courts initially linked the "unusual" event to the technical operation of the aircraft, rightly holding that heavy landings or aircraft crashes that result in death or bodily injury of passengers qualify as accidents under the conventions.[81]

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[77] If successful, this would mean that the carrier would face a fault-based liability regime in this instance rather than a strict liability regime.

[78] By virtue of Athens Convention 2002, *supra* note 12, art. 3 § 1(b) of the, the carrier is exonerated from liability only if it can prove that the loss was wholly caused by an act or omission done with the intent to cause the incident by a third party. In case of crew's negligence contributing to the piratical attack, it will be very difficult for the carrier to rely on this exception.

[79] It is important to note that the term "accident" did not necessarily entail considerations of fault and reasonable behaviour on the carriers' part. Otherwise, claimants would be required to delve into a prolonged evaluation of a little-known technology that was still developing. Also, such an inquiry would make the defence of "all necessary measures" redundant: the defence was designed to pose on the carrier the burden of proving that it was not at fault and behaved reasonably by taking all precautions that were available to it. In essence, it was the carrier that was required to produce an evaluation of what went wrong with the relevant technology and whether the mishap could have been avoided. *See* GEORGE LELOUDAS, RISK AND LIABILITY IN AIR LAW § 4.50 (2009).

[80] Air France v. Saks, 470 U.S. 392, 405-406 (1985).

[81] SHAWCROSS AND BEAUMONT, *supra* note 45, ¶ 691 with references to case law.

At the same time, courts looked for unusual events in the cabin and held that "a fall in an aircraft toilet caused by some slippery material, probably soap, on the floor [or] the fall onto a passenger of an object from an overhead locker" are accidents.[82] Still, courts declined to find an accident when a passenger fell in the cabin as a result of "shoes or blanket bags or rubbish on the cabin floor".[83] These items are routinely found in the cabin floor and there is nothing unusual regarding their position. Similarly, falling "on a plastic strip associated with the seat tracking" is not an accident as the strip is permanently placed on the floor of the aircraft.[84]

The prevailing definition of accident provides that the passenger's internal reaction to a normal flight cannot qualify as an accident.[85] This element has been used by courts to prevent recovery for death or bodily injuries caused by the passenger's medical condition during an uneventful flight, such as heart attacks, hearing loss caused by the normal depressurisation of the cabin during landing, or (deep vein) thrombosis caused by the cramped conditions of economy class.[86] In such situations, yet again, there was nothing untoward with the technical operation of the aircraft that might have caused the injuries in question.

Over the years, courts have interpreted the term "accident" in a flexible manner in two respects.[87] Firstly, they looked to the cabin crew as a potential source of unexpected behaviour. In that respect, "the supply of infected food, causing food poisoning… [and] the spilling of hot coffee into a passenger's lap (whether as a result of turbulence, mere inattention on the part of a member of the cabin staff or the acts of another passenger)" constitute accidents for the purposes of Art 17.[88] Most importantly, the refusal of cabin crew to assist a passenger with a health issue during flight, or the failure to divert a flight to a nearby airport following a medical emergency on board, have also been found to be unusual events triggering the liability of the air carrier.[89] Secondly, courts have rejected (admittedly reluctantly) the argument that Art 17 requires the injury-causing event to be a "risk characteristic" to air travel, what in the Athens regime would be described as a "shipping incident". This has opened the door for torts committed by fellow passengers to be considered accidents. Still, it is difficult to discern a principled approach by courts which, in general, will try to link the accident to the operation of the aircraft or the behavior of the crew. For example, sexual assaults by one passenger on another during flight triggered the application of Art 17 on the basis that "the close proximity of economy class passengers and the fact that they were in darkness" were characteristics of air travel.[90]

At the same time, courts tend to treat hijackings and other terrorism-related events as accidents although the air carrier is usually unable to foresee or prevent them[91]—in essence

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[82] *Id.* ¶¶ 693-694.
[83] *Id.* ¶ 694.
[84] *Id.*
[85] *Air France*, 470 U.S. at 406.
[86] SHAWCROSS AND BEAUMONT, *supra* note 45, ¶¶ 697-701 with references to case law.
[87] As instructed by the U.S. Supreme Court in *Air France*, 470 U.S. at 406 : "[t]his definition should be flexibly applied after assessment of all the circumstances surrounding a passenger's injuries".
[88] SHAWCROSS AND BEAUMONT, *supra* note 45, ¶ 693 with references to case law.
[89] *Id.* ¶ 697.
[90] *Id.* ¶ 695.
[91] MONTREAL CONVENTION, *supra* note 44, at 17–18.

ignoring the "all necessary measures" defence (in the WCS) and the fault-defences of the MC for claims above 113,000SDRs. This is the result of the Saks decision "reject[ing] the limitation that the event must be… unintentional" to qualify as an accident.[92]

What the colorful history of the interpretation of the term "accident" demonstrates is the misjudgment of setting up a liability system on a term that is susceptible to change alongside technological evolution and social perceptions. In the 1920s the term "accident" was representing the unknown that exceeds technological capabilities, whereas today there is no such thing as an "unpredictable" accident anymore.[93] Still, the attempts to replace the term "accident" with the less contentious "event" have always failed on the basis that such change will increase insurance costs, especially if recovery for personal injuries (as distinguished from bodily injuries) is also permitted. The side-effect of these decisions was to create disproportionate levels of litigation worldwide; a development that certainly defies the hailed aim of the MC as a convention for consumers.

In that respect, the drafting of the Athens Protocol is to be praised in two respects. Firstly, the term "incident" is less contentious than the term "accident", as it does not need to be sudden or unforeseeable, and it makes no difference whether it is a natural occurrence or the conduct of the carrier or a third party.[94] Secondly, a clear statement that shipping and non-shipping incidents are included in the cover of the Protocol, albeit under different liability regimes, is welcomed. Admittedly, this approach raises issues of delimitation with the claimants attempting to broaden the scope of what shipping-related incidents are to take advantage of the preferential liability regime. Yet, overall this structure avoids disputes over the question whether the incident shall be causally connected to the operation of the mode of transport.

C) Damages Recoverable

Under the Convention, the carrier is obliged to compensate a passenger for loss suffered as a result of the death of the passenger or personal injury suffered by him. However, the relevant provision makes no attempt to define the meaning of personal injury other than stating that "loss shall not include punitive or exemplary damages".[95] It has been apparently left to the national laws to determine what qualifies as personal injury. For example, would it be possible for a passenger to claim loss caused by mental (psychiatric) injury suffered as a result of a shipping-related casualty? Under common law, if a passenger is injured or loses his/her life during carriage, action for damages caused by pain and suffering, including suffering for distress, would be recoverable on the premise that such an action would be effective in tort as much as in contract.[96] However, with the introduction of the Athens regime into English law, and in particular considering that all claims against the carrier must

[92] PAUL S. DEMPSEY & MICHAEL MILDE, INTERNATIONAL AIR CARRIER LIABILITY: THE MONTREAL CONVENTION 1999, at 138 (2005).
[93] *See* LELOUDAS, *supra* note 79, § 4.168.
[94] MONTREAL CONVENTION, *supra* note 44, at 18–11.
[95] Athens Convention 2002, *supra* note 12, art. 3 § 5(d).
[96] Thompson v. Royal Mail Lines [1957] 1 Lloyd's Rep. 99 (QB) (Eng.).

be brought under the Convention by virtue of Article 14, the key issue is to establish what kind of damages would be recoverable as "personal injury" under the Convention. Courts in some Contracting States have already shown willingness to allow claims of this nature.[97] However, there is certainly no uniform view on the matter.

The drafters of the aviation conventions have rejected references to personal injury.[98] Instead they opted for holding "[t]he carrier liable for damage sustained in case of death or **bodily injury** of a passenger".[99] The reason behind such legislative choice was the concern that the litigation floodgates would open with the inevitable increase of the premium level. It was understood that "[t]he expression 'personal' injury would open the door to non-physical personal injuries such as slander, libel, discrimination, fear, fright, and apprehension…".[100]

In that respect, case law in the context of the aviation conventions both in the United Kingdom[101] and the United States of America[102] cannot be used as guidance in the interpretation of the Athens Protocol. Still a few thoughts are required to demonstrate the difficulties that courts have encountered in distinguishing between bodily injury and personal injury. The courts' main concern was to decide whether the term "bodily injury" would cover any kind of mental injury, an exercise that became more difficult following the disagreement over the scope of the original French term "lesion corporelle" in the original WC.[103] Following a number of (sometimes conflicting) decisions at both sides of the Atlantic, the consensus is that "there can be no recovery for psychic injury which is unaccompanied by physical injury"[104]—with "accompanied by" meaning that there is a causal link between the physical injury and the mental injury, and not the other way around.[105] Most importantly, it is obvious from the discussions over the scope of the term "bodily injury" that any change to "personal injury" (as in the case of the Guatemala City Protocol) would permit recovery for standalone mental injuries. Not surprisingly, aviation insurance policies also make distinctions along the same lines. Major air carriers would often define "bodily" injury in an extensive manner to cover standalone mental anguish, fright and shock, while policies

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[97] For instance, in Kotai v. The Queen of the North [2009] B.C.S.C. 1405 (Can.)it was presumed that compensation for physiological injuries is recoverable under the Marine Liability Act, 2001 S.C., c. 6 which incorporates the Athens Convention 1974.

[98] Except for the GCP, *supra* note 26, that never came into force. Its art. 17 provided that the "carrier is liable for damage sustained in case of death or personal injury of a passenger upon condition only that the event which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking". It also provided the qualification that the carrier will not be liable "if the death or injury resulted solely from the state of health of the passenger".

[99] MC, *supra* note 1, art. 17; WCS, art. 17.

[100] SHAWCROSS AND BEAUMONT, *supra* note 45, ¶ 704.

[101] King (AP) v. Bristow Helicopters Ltd. [2002] UKHL 7, [2002] 1 Lloyd's Rep. 745 (appeal taken from Scot.).

[102] It was held by the Supreme Court in Eastern Airlines Inc. v. Floyd, 499 U.S. 530 (1991) that the Warsaw Convention, *supra* note 1, art. 17 did not permit recovery for mental injury unaccompanied by physical injury. It should be borne in mind that at the Montreal Convention diplomatic conference in 1999, Sweden's proposal that there should be a separate head of claim for mental injury was withdrawn as a result of strong resistance coming from the airline and insurance lobby.

[103] The German and French delegates at the Conference leading to the drafting of the Montreal Convention 1999 argued that the term covers mental injuries. For more information on the debate, *see* SHAWCROSS AND BEAUMONT, *supra* note 45, ¶ 704.

[104] SHAWCROSS AND BEAUMONT, *supra* note 45, ¶ 706.

[105] *Id.* ¶ 708.

addressed to general aviation users (such as AVN1D) would define "bodily injury" as including "bodily injury, sickness or disease including death at any time resulting therefrom".[106]

A related but more difficult question is whether a passenger could claim damages for distress or vexation following breach of the contract of carriage from a non-shipping related incident. Imagine the position of a passenger who misses most of the sightseeing and trips after suffering from food poisoning as a result of a meal served at the restaurant of a cruise liner. As far as the English law is concerned, it has been confirmed by the highest judicial authority that this kind of damages for breach of contract can be awarded in a group of cases in which at least one of the "major and important" objects of the contract was to provide "pleasure, relaxation, and peace of mind".[107] It is hardly an overstatement to suggest that one of the major and important objects of a contract for a cruise in the Caribbean is pleasure and relaxation.[108] It is, therefore, plausible under English law that a passenger who is on a cruise and suffers distress as a result of a non-shipping related incident could bring an action for breach of contract. However, a similar outcome is highly unlikely with regard to other contracts of carriage concerning passengers. Also, a completely different outcome is possible in other Contracting States.

Claims for distress are destined to fail under the aviation conventions on the basis that the passenger in question has suffered no bodily injury. Claims for breach of the carriage contract (other than non-performance of the contract, which falls outside the scope of the conventions) or misrepresentation will also fail, since the conventions are the exclusive avenue for a passenger to claim against an air carrier by satisfying the requirements of Art 17. Any other interpretation would undermine the scope of the conventions as it would effectively allow the recovery of non-bodily damages. Such claims often originate from business class passengers who complain about the quality of the service offered by the air carrier. For example, a passenger brought a claim for misrepresentation (under English law) against SAA on the basis that, contrary to the carrier's adverts, his business class seat was not reclining fully.[109] His claim failed because he could not satisfy the requirements of Art 17. Similarly, a business class passenger recently claimed loss of amenity because Qantas did not offer the usual standard of service as a result of a strike in South Africa.[110] Yet again, the claim was dismissed on the basis that the claimant suffered no bodily injury. The authors believe that the example of the air law conventions shall be followed by the Athens regime; allowing such actions to run in parallel to the conventions would seriously undermine their effectiveness.

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[106] Definitions of AVN 1D, s.10.

[107] Farley v. Skinner [2001] UKHL 49, [24], [2002] 2 AC 737, 749-750 (Lord Steyn) (appeal taken from Eng.). This principle was also followed in Canada (Vorvis v. Ins. Comm'r of B.C. (1989), 58 D.L.R. 4th 193 (Can.) and also in New Zealand (Vyrne v. Auckland Irish Society Inc. [1979] 1 NZLR 351 (N.Z.)

[108] In Jarvis v. Swans Tours Ltd. [1973] QB 233 (Eng.), award for damage caused by distress was made against a package-tour operator who provided accommodation failing short of the standard promised and so spoilt their client's holiday.

[109] Gubay v. S. Afr. Airways (Manchester Cty. Ct., unreported, 2008).

[110] Teamoke v. Qantas Airways Ltd., CIV-2016-094-001606 reported in Condon & Forsyth LLP and IATA, Liability Reporter 8-9 (2017).

Courts have also accepted that the same is true with respect to delay claims under Art 19 of the aviation conventions, which reads as follows: "The carrier is liable for damage occasioned by delay in the carriage by air of passengers, baggage or cargo"; Art 19 does not permit the recovery of a passenger's psychological, emotional injury or inconvenience and loss of vacation caused by delay.[111]

Another grey area is the type of damages that can be claimed by passengers for the loss of or damage to cabin luggage. Article 1(7) of the Athens Convention 2002 provides that "loss of or damage to luggage includes pecuniary loss resulting from the luggage not having been re-delivered to the passenger within a reasonable time after the arrival of the ship on which the luggage has been or should have been carried, but does not include delays resulting from labour disputes." In common law, pecuniary loss arising out of breach of contract takes two main forms. First, there is what is called normal pecuniary loss—that is, loss that any claimant would likely suffer because of the breach. Essentially, this is the difference between the value of the performance as contracted for and its value as in fact tendered. In cases where the luggage is lost, this will be the value of the luggage; and in cases of damage to the luggage, this will be the diminution in its value. Secondly, there is consequential loss, which is the expenditure or loss of profit over and above the loss of or diminution in the value of the immediate subject matter of the contract. Given that the construction of the word "pecuniary loss" is left to national courts, it is debatable to what extent consequential loss of the latter type is recoverable. However, even if it is assumed that this kind of damages is recoverable, there is the burning question of whether this holds true in case of cabin luggage. The scenario which comes to mind is a passenger whose laptop computer is lost as a result of a shipping related incident. If the passenger proves that the laptop contained information that would have helped him/her to secure a lucrative contract, would he/she be able to claim compensation for consequential loss over the value of the laptop to the limitation amount specified in Article 8 of the Convention? The authors believe that this is unlikely. Cabin luggage has been described under Article 1(6) of the Convention as "luggage which the passenger has in his cabin or is otherwise in his possession, custody or control". As the terms "luggage" and "cabin luggage" have been described separately under the Convention[112] and Article 1(7) only refers to the former, it is logical to suggest that the intention of the draftsmen was to exclude cabin luggage from this provision.[113]

The aviation conventions use the generic term "damage" without clarifying the meaning of the term, leaving its interpretation to national courts. Case law suggests that consequential losses of the latter type are recoverable, subject to the prohibition of recovering punitive, exemplary or any other non-compensatory damages.[114] Yet, such an approach is not

[111] For extensive case law to that effect, *see* SHAWCROSS AND BEAUMONT, *supra* note 45, ¶ 1011.
[112] It should also be noted that the limitation amount for cabin luggage under Athens Convention 1974, *supra* note 3, art. 8 has been specified as distinct from the limitation amount for other luggage.
[113] It should be noted that the liability regime for cabin luggage is also different than the liability regime for other luggage. *See* Athens Convention 2002, *supra* note 12, art. 3 §§ 3-4.
[114] MC, *supra* note 1, art. 29 For case law, *see* SHAWCROSS AND BEAUMONT, *supra* note 45, ¶ 814 and MALCOLM, *supra* note 52, at 109.

compatible with the Athens regime as the wording of the aviation conventions is wider, leaving more leeway to national laws.

On the assumption that Article 1(7) of the Convention is not relevant in the context of cabin luggage, another interesting question is whether the passenger could claim damages for distress when the cabin luggage is not delivered by the carrier to a cruise ship passenger. Could a passenger, for example, claim that being deprived of his/her cabin luggage meant that he/she could not manage to attend formal dinners and various events on board the cruise liner, causing him/her anxiety and distress? There is no provision dealing with an eventuality of this kind in the Athens Convention, but neither is there any provision preventing an action of this nature. In practice, cruise operators offer passengers who find themselves in this kind of predicament vouchers that can be used to purchase their next cruise ticket at a discounted rate. However, the authors believe that courts in some Contracting States could entertain an action of this nature from passengers.

The consensus among courts is that damages for distress in case a baggage is lost or delayed are not recoverable under the aviation conventions. Yet courts occasionally divert from the this line and award damages for distress "on the basis that they… compensate them for the stress, inconvenience, frustration and disruption to their holiday occasioned… by the delay in the arrival of their baggage…".[115] Still, this is surely not a universal approach.

D) Contribution Claims

Naturally, the Athens Convention is designed to be the sole framework by which a passenger can claim against the carrier or the contractual carrier. Hence, Article 14 of the Convention stipulates:

> No action for damages for the death of or personal injury to a passenger, or for the loss of or damage to luggage, shall be brought against a carrier or performing carrier otherwise than in accordance with this Convention.

There is nothing extraordinary in this and it can be viewed as a price passengers need to pay in return for the protection that they are provided with by the Convention regime. However, could this Article ensure that the provisions of the Athens Convention apply when a claim is brought by a third party against the carrier? This was the central issue in *Kathleen Feest* v. *South West Strategic Health Authority et al*.[116] There, the claimant was injured on a boat trip that was arranged by her employers as part of a team building exercise. The claimant brought an action against her employers on the basis that they failed to undertake a proper risk assessment and/or implement a safe system of work for her on the occasion of this boat

[115] SHAWCROSS AND BEAUMONT, *supra* note 45, ¶ 1011 for case law supporting the majority view as well as Italian case law endorsing the minority view.
[116] [2015] EWCA (Civ) 708 (Eng.).

outing. After the expiry of the time bar provision in the Athens Convention,[117] the employers of the claimant brought a claim for contribution against the owners of the boat that the employee was on at the time of the incident (carrier). The carrier issued an application to strike out the third-party claim on the basis that Article 16 of the Athens Convention extinguished the cause of action, and, therefore, the limitation period had expired prior to the commencement of the third-party proceedings. Although it was held in lower courts that Article 16 had the effect of extinguishing the cause of action and struck out the third-party claim for contribution, the Court of Appeal disagreed, holding that: i) a claim for contribution under s. 1(1) of the Civil Liability (Contribution) Act 1978 was not a claim for damages for personal injury to a passenger brought against a carrier and therefore not within the scope of the Convention, and accordingly not subject to the time bar imposed by article 16(1) of the Convention; ii) the carrier's liability under the 1978 Act to contribute was nevertheless dependent on its liability to the claimant as the passenger, which was governed by Athens Convention. On true construction Article 16 of the Convention, although barring an action for damages brought after a period of two years, did not extinguish the right on which the action was based; and that, accordingly, since the claim for contribution was based on that right (and not on that action) it had not been extinguished by article 16(1).

The Court of Appeal was of the view that a claim for contribution brought by a third party to the carrier has a life of its own deriving from the relevant English domestic statute entitlement to contribution. This kind of reasoning severs the link between the Athens Convention and a claim for contribution. Effectively, it is suggested that a contribution claim has nothing to do with the Athens Convention and is not, therefore, subject to the time bar provisions of the Convention, although the liability of the carrier to contribute is critically on its own liability to the passenger, which in turn is governed by the provisions of the Convention! Taking this to its natural conclusion, the Athens Convention would be critical in determining the liability of the carrier and the limits of such liability, but its time bar provisions should simply be ignored and give way to the time bar provisions stipulated in national legislation.

The judgment clearly demonstrates that in some jurisdictions contribution claims by third parties against the carrier could potentially be treated as distinct from the Convention regime. The authors believe that this opens the door to bypass the Convention regime and make carriers subject to a different legal regime, an outcome which is clearly not in the spirit of Article 14. Still, this could have been avoided if the time bar provision in the Convention had been construed to have the effect of extinguishing the right for an action rather than simply barring the remedy of court proceedings. However, this was also rejected by the Court of Appeal. Although in continental jurisdictions time bar provisions usually have the effect of extinguishing the right for an action, the Court of Appeal was adamant that the wording used

[117] Athens Convention 1974, *supra* note 3, art. 16 § 1 reads: Any action for damages arising out of the death or personal injury to a passenger or for the loss of luggage shall be time-barred after a period of two years.

in Article 16(1) of the Athens Convention would not have the same effect under English law.[118]

The effect of the decision of the Court of Appeal is that a carrier who might otherwise have availed themself of a limitation defence under the Athens Convention in circumstances where the two-year limitation period has expired now could potentially face another route of claim brought against them by third parties as a claim for contribution. For a claim of this nature, clearly the time bar of the Athens Convention will not bite. The authors are firmly of the view that this outcome has the potential of undermining the Athens regime by allowing third parties to bring contribution claims from the backdoor that would have been barred under the Convention. However, problems of this nature might arise in other Contracting States and the authors believe that this is something that should be avoided at any cost.

Conversely, Article 29 of the Warsaw Convention and Art 35 of the Montreal Convention leave no doubt that the time bar provision extinguishes any right:

> The right to damages shall be **extinguished** if an action is not brought within a period of two years, reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the carriage stopped.

Courts have held that the right for an action is "completely destroyed and not merely rendered unenforceable by action. It follows that it cannot be relied upon by way of defence to an action brought by the carrier."[119] In that respect, the debate in *Kathleen Feest* would have been resolved in favour of the air carrier if such case had arisen in the context of the air liability conventions. However, matters get complicated when an indemnification action is filed from a liable carrier against third parties or is filed against the air carrier by a liable third party. The reason for such uncertainty is that there is little judicial consensus on how to treat such indemnification actions.

With the objective of achieving such consensus, Art 37 MC indicates that "[n]othing in this Convention shall prejudice the question whether a person liable for damage in accordance with its provisions has a right of recourse against any other person." The wording of Art 37 MC makes clear that actions of indemnification initiated by carriers against third parties which are not subject to the Convention do not come into the scope of the MC, which includes the two-year limitation period, leaving their determination to national laws.[120]

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[118] There are decisions of English courts which have construed time bar provisions drafted in similar fashion to Athens Convention 1974, *supra* note 3, art. 16 § 1 as baring the remedy only. For example, International Convention for the Unification of Certain Rules of Law with Respect to Collision Between Vessels art. 7, Sept. 23, 1910, 212 Consol. T.S. 178 was held to be barring the remedy only by Lord Wilberforce in Aries Tanker Corp. v. Total Transp. Ltd. (The "Aries") [1977] 1 Lloyd's Rep. 334 (HL) (appeal taken from CA) (Eng.). The relevant part of art. 7 stipulates: "Actions for the recovery of damages are barred after an interval of two years from the date of the casualty."

[119] SHAWCROSS AND BEAUMONT, *supra* note 45, ¶ 443.

[120] Under English law the limitation period would be governed by the Limitation Act 1980, c. 58, § 10 (Eng.) which provides that the limitation is "two years from the date on which that right accrued".

Still, the wording leaves open the question whether the MC applies to indemnification actions filed by liable third parties which are subject to the MC, such a ground-handler or a contracting carrier, against an actual carrier for damage falling into the MC (e.g., the death of a passenger on board an aircraft). With exceptions, a consensus seems to be developing under the MC with Courts in the US holding that such actions are not subject to the Convention on the basis that they take a life of their own and they are not any more actions for damages.[121] Still, these decisions have been criticised on the basis that they create an artificial distinction between action for damages and indemnification.[122] Under English law, s. 5(2) of the Carriage by Air Act 1961 provides that the limitation provisions of the aviation conventions do not apply "to any proceedings for contribution between persons liable for any damage to which any of the Carriage by Air Conventions relates". As such, s. 1(3) of the Civil Liability (Contribution) Act 1978 applies and provides that the carrier remains liable to contribute until its own liability under the aviation conventions is extinguished (i.e., replicates the two-year limitation period of the aviation conventions).

The WCS does not contain any provisions on the right of indemnification, with the decision of the Supreme Court of Ontario in *Connaught Laboratories Ltd. v. Air Canada* being influential with respect to claims between air carriers:[123]

> [s]uch claims are not included, nor does it appear that they are intended to be included, within the purview of The Warsaw Convention which… deals with the claims of passengers, consignors and consignees, and the liability of carriers therefore, it does not deal with the claims of carriers *inter se*.[124]

Still, there is no judicial consensus with respect to indemnity claims, with conflicting decisions been taken within the same jurisdiction:

> In a number of Warsaw Convention cases in the United States it was held that art 29 of that Convention applied to recourse actions against carriers and a French court, in a case in which the principal claim was against a handling-agent who sought contribution from a carrier, held that art 29 did apply, as it drew no distinction between principal and recourse actions. Some decisions of US District Courts have held art 29 applicable to claims for contribution against carriers and their handling agents; but it has been held in other District Court cases that the Convention rule does not apply to a claim by a carrier against its own handling-agent though it would to recourse actions against carriers. A decision of the French Cour de Cassation has held that the Convention limitation provision does not protect handling-agents in actions for contribution brought by carriers, even if the contract between the carrier and the handling-agent incorporated the Warsaw Convention in general terms.[125]

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[121] *See, e.g.*, Chubb Ins. Co. of Europe SA v. Menlo Worldwide Forwarding Inc., 634 F.3d 1023 (9th Cir. 2011), *United Airlines v. Sercel* [2012] NSWCA 24 (Austl.).
[122] Laurent Chassot, Le Domaine de La Responsabilité Du Transporteur Aérien International à La Lumière de Deux Dédisions Rédentes, REVUE FRANÇAISE DE DROIT AERIEN ET SPATIAL 5 (2016).
[123] Connaught Labs. v. Air Canada (1978), 94 D.L.R. 3d 586 (Can.).
[124] *Id.* at [26] (Robins, J.).
[125] SHAWCROSS AND BEAUMONT, *supra* note 45, ¶ 446.1.

Most recently, the French Cour de Cassation, in a heavily criticised decision,[126] confirmed that an indemnification action filed by the aircraft manufacturer against the air carrier (resulting from passengers' death claims covered by the original WC) is not subject to the two-year limitation period.

In the authors' view, indemnification claims should also come under the air liability regimes, as any contrary solution would have the effect of undermining the international liability regime. It is interesting to see that disputes regarding the scope of an international liability regime still arise, although it is expressly stipulated in the relevant Conventions that the right to damages shall be extinguished. The aviation experience on the issue of indemnification claims highlights that the failure of the Athens Convention regime to expressly stipulate the effect of its time bar provisions has invited controversy and possibly hindered the prospect of achieving uniformity. States considering the ratification of the Convention should consider seriously addressing this point in their implementing legislation.

E) Jurisdictional Issues

Article 17 of the Athens Convention 2002 is designed to provide a number of alternative forums for the passengers to bring their claim against the carriers (contractual or performing).[127] Accordingly, Article 17(1) stipulates:

> An action arising under Articles 3 and 4 of this Convention shall, at the option of the claimant, be brought before one of the courts listed below, provided that the court is located in a State Party to this Convention, and subject to the domestic law of each State Party governing proper venue within those States with multiple possible forums:
> (a) the court of the State of permanent residence or principal place of business of the defendant, or
> (b) the court of the State of departure or that of the destination according to the contract of carriage, or
> (c) the court of the State of the domicile or permanent residence of the claimant, if the defendant has a place of business and is subject to jurisdiction in that State, or
> (d) the court of the State where the contract of carriage was made, if the defendant has a place of business and is subject to jurisdiction in that State.

The authors are firmly of the view that a number of difficulties are likely to arise in determining which court (if any) would have jurisdiction to hear a claim brought by a passenger against the carrier. Let us assume that the carrier is a company that has its principal place of business in a tax heaven which is not a party to either version of the Athens Convention. Also, assume that the place of departure and destination according to the contract of carriage is not in a country to which the Athens regime applies. The passenger, on the other hand, is domiciled in a state which has implemented the Athens regime into its legal

[126] Cour de cassation [Cass.] [supreme court for judical matters] 1e civ., Mar. 4, 2015, Bull. civ. I, No. 327, (Fr.).
[127] There is no material difference between the 1974 and 2002 regimes on this point.

system and has purchased the ticket from an independent agent working on behalf of the carrier in the same jurisdiction. Would that be adequate to enable the passenger to bring an action against the carrier in the jurisdiction in which he/she is domiciled? The answer to that question depends on whether, for the purposes of Article 17(c) or (d), the defendant carrier could be deemed to have a place of business in that jurisdiction simply because it performs its business through the office of an independent agent registered in that jurisdiction. Or alternatively, is it necessary that the defendant carrier has an office registered in its name in that jurisdiction? In various jurisdictions, the actions of travel agents, although they are paid commission by the carrier for booking reservations, disseminating brochures and advertising magazines, were not deemed sufficient to confer jurisdiction over a foreign corporation.[128]

The WCS permits claims to be filed before the courts of the State Party in which the carrier is ordinarily resident, or has its principal place of business, or has an establishment by which the contract has been made, or is the final destination of the carriage in question.[129]

In MC these four grounds of jurisdiction are retained (with minor changes of the wording) and a fifth jurisdiction has been added. Article 33(2)MC provides that an action for damages arising from the death or injury of a passenger (no cargo claims) must be brought, at the option of the claimant, in the territory of the State Party "in which at the time of the accident the passenger had his or her principal and permanent residence and to or from which the carrier operates services for the carriage of passengers by air, either on its own aircraft, or on another carrier's aircraft pursuant to a commercial agreement, and in which that carrier conducts its business of carriage of passengers by air from premises leased or owned by the carrier itself or by another carrier with which it has a commercial agreement".[130]

Interestingly enough, the WCS does not permit claims to be filed before the court of the victims' residence, a deliberate omission to protect the carrier from facing claims arising from one accident in as many jurisdictions as the residences of passengers carried in the aircraft. Even during the drafting of the MC there was no consensus in adopting it as a forum. Yet, the insistence of the US, which strongly advocated that its inclusion will protect passengers, has paid off. The compromise was to include the "fifth jurisdiction" on the condition that the defendant carrier has a strong commercial presence (operates services alone or a commercial agreement such as code-sharing and owns or leases a place of business) in the place of residency of the victim. Courts have not examined the "commercial presence" requirements, yet the MC wording would have clarified Art 17(c) of the Athens Convention: performing the services via an independent contractor or a travel agent will not satisfy the requirement as the Article clearly requires the premises to be leased or owned by the

[128] Kauffman v. Ocean Spirit Shipping Ltd., [1993] AMC 179 (W.D. Mich., 1990); Duffy v. Grand Circle Travel Inc., 756 N.Y.S.2d 176 (App. Div. 2003). It must be borne in mind that these were not cases considered under the Athens regime.

[129] WCS, art. 28.1.

[130] For the purposes of art. 33 § 2 the Convention defines the term "commercial agreement" as "an agreement, other than an agency agreement, made between carriers and relating to the provision of their joint services for carriage of passengers by air". It also defines "principal and permanent residence" as "the one fixed and permanent abode of the passenger at the time of the accident" while explicitly disregarding the nationality of the passenger. (*See* MC, *supra* note 1, art. 33 § 3).

defendant carrier (independent contractors would fail this test) or at least by another carrier with whom the defendant has a commercial agreement (travel agents would not qualify as carriers).

Having said that, the aviation conventions could also contribute to the debate under Art 17(1)(d) of the Athens Convention. Both of them provide that the passenger can bring an action where the carrier has a place of business through which the contract has been made, provided it is located in a State Party.[131] Inevitably this provision has raised questions on the jurisdictional implications of air carriers cooperating with agents in various countries. The prevailing view in aviation cases (in common law jurisdictions) is that a "carrier's establishment" should not necessarily "be directly owned by the carrier, as is required in French decisions".[132] Still, conducting business via an "ordinary agent", such as an interline sales agent or an agent who sells tickets on a commission basis, would not be sufficient to qualify its establishment as the carrier's establishment. A closer business relation with the agent is required in order to confer jurisdiction over a foreign air carrier.

The matters could get more complicated in the scenario above if the ticket is purchased by the passenger through the Internet. There will be issues concerning where the contract is formed in that instance that will be determined by the application of national law. Yet more significantly, how will the place of business of the defendant be determined in that case for these purposes? There is little case examining this issue in the aviation conventions, despite the prevalence of electronic tickets under the MC. At the moment, it seems that "the preferred view in the US is that in the case of an Internet purchase, the place is where the purchasing passenger has received, through the Internet, confirmation of the purchase of the transportation…. In most cases this will be the residence of the purchasing person, even though the air carrier's Internet sales computer website may be located in another country."[133]

Last but not least, there is the issue of at what stage the defendant carrier must be subject to the jurisdiction of the courts for the purposes of this Article. Imagine a situation where the carrier has a place of business in the jurisdiction specified in Article 17(a), (c) or (d) at the time when the injury, loss or damage occurs, but it ceases to operate in that jurisdiction by the time the claim under the Convention is put forward. This is a difficult question to answer but it is possible that by ceasing to operate in that jurisdiction the carrier also ceases its capability to be involved in litigation as a claimant or defendant. At the same time, the application of the convention is determined by reference to the time of injury, death or loss rather than the time of filling the claim. As such, it is plausible (and arguably a fairer solutions) that the jurisdictional status of the carrier is determined by reference to the former moment.

[131] MC, *supra* note 1, art. 33 § 1; WCS, art. 28.1.
[132] SHAWCROSS AND BEAUMONT, *supra* note 45, ¶ 438.
[133] GEORGE N. TOMPKINS, JR., LIABILITY RULES APPLICABLE TO INTERNATIONAL AIR TRANSPORTATION AS DEVELOPED BY THE COURTS IN THE UNITED STATES 257 (2010).

F) Regime for Valuables

The Athens Convention creates a separate liability regime for valuables. Accordingly, Article 5 of the Convention stipulates:

> The carrier shall not be liable for the loss of or damage to monies, negotiable securities, gold, silverware, jewellery, ornaments, works of art, or other valuables, except where such valuables have been deposited with the carrier for the agreed purpose of safe-keeping in which case the carrier shall be liable up to the limit provided for in paragraph 3 of Article 8 unless a higher limit is agreed upon in accordance with paragraph 1 of Article 10.

The authors appreciate the justification for treating valuables in a different manner compared to other types of property, particularly in the light of the fact that passengers on lengthy cruise voyages might look for the cooperation of the carrier to protect their valuables. Yet, it is evident that the liability regime created by Article 5 is not entirely unproblematic. The authors wish to underscore three major complications. First, Article 5 is designed under the assumption that the passengers will be allowed by the carrier to deposit such valuables for safekeeping. It is not clear in the Convention what happens if the carrier refuses to provide a facility for the passengers depositing their valuables. The issue was considered, in passing, by Judge Hallgarten QC in *Lee* v. *Airtours Holidays*.[134] He expressed the view that in such an instance a separate cause of action would have arisen based on an implied contractual claim for non-provision of safekeeping facilities. The carriers would, therefore, have been liable under this separate cause of action, even if not under Article 5 directly. The measure of damages would have been the amount which the claimants would have otherwise recovered on the assumption that the Convention applied. Thus, the passengers could have claimed indirectly what Article 5 prevented them from claiming. Emanating from a County Court, the judgment does not have a binding effect but, nevertheless, the authors find its reasoning sound. Conceptually, there is no reason why Article 5 could not be the source of an implied contractual duty, considering that this Article stipulates that the carrier will only be responsible for valuables as long as they are deposited for safekeeping.

Second, the Article does not give an indication as to what the basis of liability of the carrier will be for valuables deposited for safekeeping. Would, for example, the liability of the carrier be strict or absolute? If the ship sinks as a result of terrorism, would the carrier be able to exonerate itself from liability for valuables deposited for safekeeping on the basis that the cause of the loss is occasioned from one of the exceptions stipulated in Article 3(1) of the Athens Convention?[135] Or would the carrier be liable to the passenger regardless? The language of Article 5 does not help in unpicking this conundrum. However, it should be noted that for valuables deposited for safekeeping, the carrier has ultimate control and is

[134] [2004] 1 Lloyd's Rep. 683, at [32] (Cent. London Cty. Ct.) (Eng.).

[135] It should be noted that under the Convention these exceptions apply only for personal injury and death claims. They can only be applied in this context by analogy.

expected to make use of a safe or similar facility that offers maximum degree of protection. Put differently, the care exercised for the safekeeping of such valuables is considerably higher than the care exercised for other types of property left in the care of the carrier. On that basis, the authors believe that the liability regime should be an absolute one with only a number of common law defences allowed (i.e., those allowed for common carriers): act of nature, act of public enemies, and fault or fraud by the passenger. That said, it is rather uncertain that the issue will be dealt with in the same manner in all Contracting States.

Last but not least, it is rather debatable whether the jurisdiction provisions of the 2002 version of the Convention, encapsulated in Article 17, would apply to disputes with regard to valuables. This is because the new version of the Article specifically stipulates that the jurisdiction provisions of the Convention applies to actions concerning personal injury or death or loss of or damage to property (Article 3 and 4 of the Convention), making no reference to Article 5 of the Convention which sets out the liability regime for valuables.[136] The *travaux préparatoires* do not make it clear whether this was simply an oversight or whether it was intended that jurisdiction arrangements of the Athens Convention do not apply with regard to valuables deposited for safekeeping to enable parties to make alternative jurisdictional agreements. There is no evidence that this matter was discussed during the build-up to the 2002 Convention, raising the suspicion that this was simply an oversight; but one can also see a counter argument being put forward in a coherent manner.

IV. An All Inclusive Passenger Regime?

The primary objective of the Athens regime is to provide a compensation regime for passengers travelling by sea for death and personal injury claims, as well as loss and damage to their luggage. In the previous parts of this article, aspects of the regime that could create uncertainty in Contracting States have been deliberated and suggestions have been made as to how such difficulties could be addressed with reference to various sources, in particular to other similar liability regimes used in other modes of transport. These issues apart, it is fair to say that the Convention is capable of providing a sound liability regime,[137] which is essential not only for the protection of passengers, but also for the smooth operation of an international liability insurance regime which is invariably provided by P & I Clubs.

However, no State considering the ratification of either version of the Convention should assume that the Athens regime provides a one-stop legal regime for all eventualities that can adversely affect experience of passengers carried by sea. The issues that would fall outside the Athens regime will be briefly mentioned below. The analysis intends to illustrate the areas that states implementing Athens Convention into their system should consider to regulate in order to improve the rights of passengers in their legal system.

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[136] This represents a significant divergence from the Athens Convention 1974, *supra* note 3, which stresses that any action under the Convention would be subject to jurisdiction provisions set out in art. 17.

[137] Arguably, Athens Convention 2002, *supra* note 12, provides a more comprehensive system by requiring carriers to obtain compulsory insurance and by allowing passengers to bring direct action to liability insurers.

A) Shore Excursions

On cruise ships, shore excursions—such as scuba diving, visits to archaeological sites, horseback riding, and parasailing—are promoted to passengers as they provide high profit margins for cruise liners. It is also worth noting that such tours are invariably delivered by independent contractors[138] and cruise liners often include into the contracts provisions disclaiming liability for any injuries that passengers might sustain during a shore excursion.[139]

The carrier is responsible under the Athens regime for personal injury and death claims during the period when the passenger is on board the ship or in the course of embarkation and disembarkation.[140] Given that the terms "embarkation" and "disembarkation" have not been qualified in any shape or form, it is very likely that the carrier's responsibility continues during the period when the passenger disembarks from the ship for a shore excursion or when he/she embarks on the ship on the way back. However, it is also evident that the carrier bears no responsibility during the period when the passenger is off the ship engaged in a shore excursion. Subject to the requirements of the law that applies to the contract,[141] there is no reason why the carrier could not exclude its liability for personal injury incurred during a shore excursion. That said, it should be borne in mind that in some jurisdictions attempts

[138] Cruise liners often hold out themselves as agents of such independent contractors.

[139] Unfortunately, such accidents are rather common.

[140] Athens Convention 1974, *supra* note 3, art. 1 § 8. In each case, whether "embarkation" or "disembarkation" is completed is a question of fact. In Collins v. Lawrence [2017] 1 Lloyd's Rep. 13 (Canterbury Cty. Ct.) (Eng.) on returning to shore from a fishing trip, the claimant disembarked by stepping from the boat onto a platform at the top of a set of free standing steps which led down onto the shingle. When the claimant stepped onto the shingle he slipped and fell, sustaining personal injury. The judge found that the accident was caused by the claimant's stepping onto a large plywood board that had been placed on the shingle at the foot of the steps. It was held that the "disembarkation" was not completed until the claimant was established safely on the shingle beach. The function of the plywood board was to aid the passenger's disembarkation down the steps onto the shingle. Accordingly, it was held that the accident occurred while the claimant was still disembarking from the boat, hence the Athens Convention was applicable. The terms "embarkation" and "disembarkation" are the subject of extensive case law in aviation, as the carrier is liable for an accident that causes death or bodily injury to the passenger from the moment he/she is in the course of embarkation, while on board and until disembarkation from the aircraft. Inevitably, the question of whether the passenger's movement is "controlled" by the air carrier becomes crucial with a number of tests being devised by Courts, especially in the US, to identify this moment. In a nutshell, cases in the US and the UK suggest that the passenger will be in the process of embarkation from the moment he/she is "called into the gate-lounge immediately prior to boarding…(even if the carrier acts through personnel employed by the airport)". Even when the passenger is subject to special assistance at the airport, accidents that take place while the passenger moves in the terminal building while waiting for the gate to open shall not be the responsibility of the air carrier. Similarly, case law in common law jurisdictions suggests that disembarkation is completed "once the passengers safely reach a point within the terminal". As a result, accidents that take place while the passenger walks on the apron towards the terminal building or while he/she is in the bus taking him/her from the aircraft to the terminal building fall into art. 17. The bus might be driven by an employee of the ground-handler, yet it will not absolve the carrier from liability towards the passenger; it might, though, give the carrier indemnification rights against the ground-handler. At the same time, accidents that take place at the baggage carousel (*e.g.*, while the passenger lifts her/his baggage), or while waiting for clearance from the border control authorities, have been held to be outside the scope of responsibility of the air carrier. For extensive case law on this matter, *see* SHAWCROSS AND BEAUMONT, *supra* note 45, ¶¶ 720-722.

[141] If the carriage contract is subject to English law; for example, the Consumer Rights Act 2015, c.15 (U.K.) might be relevant in this context.

have been made to hold cruise liners liable in addition to operators of shore excursions on the premise that the cruise liner is in breach of the duty to warn of dangerous environments[142] or has acted negligently in selection of shore excursion operators.[143] The extent to which such attempts have a chance to succeed varies from jurisdiction to jurisdiction, but the key issue here is that the carrier has no liability to passengers for personal injury sustained during shore excursions under the Athens regime.

B) Misrepresentation and Discomfort on Board a Ship

The Athens regime also does not attempt to provide a legal remedy for passengers complaining about deceptive marketing practices. For example, a passenger alleging that the accommodation provided on a cruise is rather different than what has been advertised will need to seek a remedy under the law that applies to the contract;[144] although interesting conflict of law issues could arise in cases where the ticket has been purchased through the Internet. Similarly, the Convention does not cover liability in respect of quality complaints which might arise in context of a cruise. Such matters need to be dealt with under the applicable national law.[145] As discussed above, claims for misrepresentation fall into the ambit of the air law conventions on the basis of the exclusivity principle. Such claims usually fail, as they do not meet the requirements of Art 17, with the exclusivity principle prohibiting such claims from being re-litigated under the cloak of a domestic cause of action.

C) Crew's Misconduct

As far as non-shipping incidents are concerned, under the Athens regime the carrier is responsible for the fault or neglect of its servants[146] as long as they act within the scope of their employment.[147] It is not unlikely, particularly on cruise ships, that the passengers might be subjected to verbal or even sexual abuse of the crew. It is submitted that the crew involved in misconduct of that nature cannot be held to be acting within the scope of their employment. If so, any claim that passengers would bring against such crew should be dealt with outside the Athens regime. This would naturally mean that the crew facing such an action will not have the benefit of limitation provisions that appear in the Convention. It is also worth noting that the jurisdiction provisions set out in the Convention[148] would be irrelevant in this context. In some jurisdictions outside the Athens regime, cruise liners have been occasionally held vicariously liable for the verbal and sexual misconduct of their

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[142] Chaparro v. Carnival Corp., 693 F.3d 1333, 1335 (11th Cir. 2012).
[143] Zapata v. Royal Caribbean Cruises, Ltd., No. 12-21897-Civ, 2013 WL 1296298 at *1 (S.D. Fla., 2013).
[144] *See, e.g.*, a case brought by the passenger on the basis that the cabins provided were much smaller than promised on marketing leaflets: Valery v. Bermuda Star Line, Inc., 532 N.Y.S.2d 965 (Civ. Ct. 1988).
[145] In cases where the cruise forms part of a package holiday, the passengers could bring an action against the tour operator under the Package Regulation 1992, *supra* note 66.
[146] The liability regime in this context is fault-based.
[147] Athens Convention 2002, *supra* note 12, art. 3 § 5(b).
[148] *See id.* art. 17.

employees.[149] However, the authors believe that this would be beyond the Athens Convention regime, which stresses that the carrier is responsible for the actions of its employees that are within the scope of their employment.

The matter might be more convoluted in instances where a shipping related incident is brought about deliberately by an employee. For example, if a collision occurs as a result of deliberate actions of the master, would personal injury claims put forward by passengers be within the scope of the Convention? The carrier under the Athens Convention 2002 is strictly liable for personal injury arising from a shipping incident unless the incident arises from an act of war, hostilities, etc. or was wholly caused by an act of omission done with the intent to cause the incident by a third party. On that basis, it is submitted that the carrier might be liable under the Athens regime for such claims.[150]

D) Cancellations

Perhaps an obvious point, but it is worth noting that the Athens regime does not deal with losses arising as a result of cancellations, port skipping or unannounced itinerary changes. In the absence of legislation dealing with the matter,[151] what happens in such instances is regulated by the contract or policies adopted by various cruise liners.

V. Conclusions

Given that the main focus of the article is problematic aspects of the Athens regime, one might be forgiven for thinking that the liability regime created by this international instrument is far from satisfactory. However, this does not reflect the view of the authors. It is submitted that the Athens regime provides a sound liability regime not only for passengers but also for carriers and their liability insurers. The comparison between international sea and air liability conventions illustrates that no regime is immune from litigation, and interpretation of provisions of international instruments may vary from one Contracting State to another.[152]

Of course, readers might legitimately ask two questions: i) Why is ratification of the Athens convention relatively low compared to international air carriage regimes?; and ii) Why is

[149] Stires v. Carnival Corp., 243 F. Supp. 2d 1316 (M.D. Fla. 2002); Doe v. Royal Caribbean Cruises Ltd., [2012] AMC 761 (S.D. Fla., 2011).

[150] The position might be different for loss of or damage to cabin luggage given that the liability regime for such claims is fault-based. The carrier could argue that deliberate actions of its employees that cause the collision is outside the scope of their employment.

[151] As far as the EU law is concerned, European Parliament and Council Regulation (EU) 1177/2010 of Nov. 24, 2010, 2010 O.J. (L 334) 1 specifically addresses the rights of passengers carried by sea and inland waterways in the case of delay or cancellation of scheduled trips. Similarly, European Parliament and Council Regulation (EC) 261/2004 of Feb. 11, 2004, 2004 O.J. (L 46) 1 establishes the rights of passengers in instances of denied boarding, flight cancellation and long delays.

[152] For a comprehensive analysis of rules applicable in different jurisdictions in this area, *see* KATE LEWINS, INTERNATIONAL CARRIAGE OF PASSENGERS BY SEA (2016).

there not much case law on the aspects of the Athens Convention in Contracting States? The answer to the first question is not straightforward. But one reason could be that air travel is a relatively new venture, and as indicated in Part II of this article, it has been viewed from the outset as a risky engagement. This led to the rapid development of legal rules attempting to provide a comprehensive liability regime, and states, presumably under political pressure, opted to be part of the set of international instruments developed. Sea carriers, on the other hand, have traditionally enjoyed freedom of contract, and even when international rules have been developed to regulate their carriers' liability, financial limits of liability imposed by the Athens regime have been the cause of discontent and certainly hampered much wider acceptance of the regime throughout the world. For example, the limits set by the Athens Convention 1974 were regarded as too low by most European states, Australia and Canada. To the contrary, some states in East Asia have eschewed the Athens Convention 1974 on the basis that the limits were too high.[153] Conversely, the answer to the second question is relatively easy and perhaps is an indication that the Athens Convention works relatively well in practice. The liability insurers, usually P & I clubs, which handle passenger claims on behalf of carriers, operate rather efficiently within the parameters set by the Athens regime; and in most instances an agreement is reached with the claimant passenger, making it unnecessary to take the case to the courts.[154]

On a more specific level, the conclusions of the authors are:

i) Certain aspects of the Athens regime are in need of further clarification, especially the following: scope of the regime, definition of "shipping incident", types of damages recoverable, legal position with regard to contribution claims, and jurisdiction provisions when the carrier uses agents or when the sale is concluded on the Internet. The solutions adopted by air liability conventions might shed light on some of these problems, but it is ultimately recommended that states considering the ratification of the Athens Conventions should address these issues in implementing legislation.

ii) It should be noted that the Athens regime does not deal with all legal matters concerning carriage of passengers by sea. To provide comprehensive coverage in this area, states need to consider supplementing the Athens regime with national legislation to deal with such issues as cancellations and delays.

[153] It needs to be borne in mind that in most states in East Asia, such as the Philippines, sea carriage is mainly undertaken by the state and tickets are heavily subsidised. In return, carriage contracts contain clauses exonerating the carrier from all liability.

[154] Some might suggest that sea passengers might not always have the financial resources to pursue their claims in court, but this is rather doubtful given that such passengers could seek support of personal injury lawyers who work on a "no win no fee" basis. Also, cruise passengers are often wealthy and would have no difficulty in accessing legal services.