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## *Sundry Considerations on the Draft Protocol to the Athens Convention Relating to the Carriage of Passengers and Their Luggage at Sea 1974*

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### I INTRODUCTION

A diplomatic conference is to occur in London from 28 October to 1 November 2002 at the headquarters of the International Maritime Organisation (IMO). The conference has been organized to consider a protocol to the Athens Convention Relating to the Carriage of Passengers and their Luggage by Sea 1974.<sup>1</sup> The origins of this protocol could be traced to a paper submitted by the UK Government to the seventy-fourth session of the IMO Legal Committee in October 1996. In that paper, Her Majesty's Government proposed a uniform international requirement that owners of all ships carry third-party liability insurance against all types of claims which might arise out of the operation of a ship.<sup>2</sup> To consider the feasibility of an international instrument in this area, the Legal Committee decided to establish a Correspondence Group. That group submitted a report on financial security to the seventy-fifth session of the Legal Committee in April 1997.<sup>3</sup> After rigorous discussions, the committee concluded that an international instrument on financial security

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<sup>1</sup>This convention has been ratified by 28 states, which represents only 34.64 % of the world's tonnage. As of July 2002, the member states are: Argentina, Bahamas, Barbados, China, Croatia, Dominica, Egypt, Equatorial Guinea, Georgia, Greece, Haiti, Ireland, Jordan, Latvia, Liberia, Luxembourg, Malawi, Marshall Islands, Poland, Russian Federation, Spain, Switzerland, Tonga, Ukraine, United Kingdom, Vanuatu, Yemen and Hong Kong-China (as associated member). The Athens Convention regime has been incorporated, sometimes with higher limits, into the national laws of some states, such as Denmark, Finland, France, Germany, Norway, Slovenia, Sweden and Vietnam even though these states have not officially ratified the convention.

<sup>2</sup>See IMO Doc. LEG 74/6/1.

<sup>3</sup>See IMO Doc. LEG 75/4/2.

was too ambitious and might jeopardize the wide acceptance and enforcement of both the existing liability regimes and those currently under consideration in the committee.<sup>4</sup> Instead, the committee found it appropriate to focus on the two specific priorities proposed in the report, namely, the development of rules on evidence of financial responsibility for passenger claims and on rules on the claims for which leading P & I clubs offer insurance. At its seventy-sixth session in October 1997, the Legal Committee decided that the matter of financial security in respect of passenger claims should be addressed as a matter of priority within the framework of a revision of the Athens Convention.<sup>5</sup> According to the committee, the convention's revision should include not only the incorporation of international rules on financial security, but also other modifications tending to encourage the convention's wider acceptance. In this regard, the Correspondence Group was tasked with considering other, related issues, such as the increase of liability limits.<sup>6</sup>

Discussions on a protocol to amend the Athens Convention 1974 commenced in the seventy-seventh session of the Legal Committee, with a report of the Correspondence Group.<sup>7</sup> The report contained draft articles on financial security and a regime of strict liability introduced by the delegation of Norway, co-ordinator of the group's work. Needless to say, the report and further discussions in this area were heavily influenced by the then ongoing work of the aviation industry in review of the Warsaw Convention 1929, which covers loss of life or personal injury to airline passengers.<sup>8</sup> Despite

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<sup>4</sup>One of the principal new liability regimes under discussion at the Legal Committee is the draft Wreck Removal Convention. This convention is intended to provide international rules on the rights and obligations of states and shipowners in dealing with wrecks and drifting or sunken cargo, which may pose a hazard to navigation and/or pose a threat to the marine environment. A diplomatic conference is expected to adopt this convention in 2004.

<sup>5</sup>The Committee agreed to maintain the Correspondence Group established in the 74th session, but the Group was required to focus solely on the subject of the possible revision of the Athens Convention.

<sup>6</sup>The limits set by the Athens Convention have been severely criticised and many believe that they are the main reason for the convention not gaining widespread international recognition. For instance, the limit for personal injury and death claims under the Athens Convention is 46,666 Special Drawing Rights (SDR). This limit has been increased to 175,000 SDR by the 1990 protocol, but having been ratified only by Croatia, Egypt and Spain, the 1990 protocol has not yet come in force. Note that, by using an option contained in the Athens Convention, the limit for death or personal injury has been increased to 300,000 SDR by the UK government for carriers whose "principal place of business" is in the UK. See, the Carriage of Passengers and their Luggage by Sea (United Kingdom Carriers) Order 1998 (SI 98/2917), which came into force in 1 January 1999.

<sup>7</sup>See IMO Doc. LEG 77/4/4.

<sup>8</sup>On 28 May 1999, an international air law conference called by International Civil Aviation Organisation (ICAO) adopted the Convention for the Unification of Certain Rules for International Carriage by Air, referred to as the Montreal Convention 1999, signed by 52 ICAO contracting states. Governments of 120 states were represented at the conference and 11 international organisations, including International Air Transport Association, sent observers. The major feature of the new legal instrument is unlimited liability. The Montreal Convention introduces a two-tier system: in the first tier, the carrier's

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substantial changes in the following three years,<sup>9</sup> it is fair to say that the draft articles produced by the Correspondence Group form the basis of the protocol to be discussed in the conference this month. This article has two parts: a critical evaluation of the substantial provisions of the draft protocol, in the course of which, reference will be made to Legal Committee discussions and views of parties interested in the proposed amendments, and some tentative conclusions regarding the possible success of this protocol in terms of achieving for the Athens Convention wider international acceptance.

## II SUBSTANTIVE PROVISIONS OF THE DRAFT PROTOCOL

### A. Basis of Liability

The liability of the carrier is subject to a fault-based regime under the Athens Convention, in its unamended form. When the death of a passenger, injury to a passenger's person, or the loss of or damage to his cabin luggage arises from a non-ship related accident, liability for the passenger's injury or loss is placed on the carrier. In such cases, the passenger has to prove both a causal connection between the incident and the damage and actual fault attributable to the carrier.<sup>10</sup> When, on the other hand, the death of a passenger, injury to a passenger's person, or the loss of or damage to his cabin luggage arises from a ship related accident, the burden of proof shifts from the passenger to the carrier.<sup>11</sup> In such cases, the carrier is presumed to be at fault, and, to avoid liability, must prove that he took all necessary precautions to avoid the accident. Fault is also presumed on the part of the carrier in respect of loss of or damage to the luggage, other than cabin luggage, irrespective of the nature of the incident from which resulted the loss or damage.<sup>12</sup>

Inspired from the Montreal Convention 1999, the Correspondence Group at the seventy-seventh session of the Legal Committee proposed to change the basis of the liability of the carrier under the Athens Convention to a regime of strict liability, with a view to protect the interests of sea passen-

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liability up to 100,000 SDR is irrespective of the carrier's fault. In the second tier, where there is no upper limit to the carrier's liability, the fault of the carrier is presumed.

<sup>9</sup>The proposed changes to the 1974 Athens Convention were considered in seven consecutive sessions, nos. 77 to 83, of the Legal Committee.

<sup>10</sup>See Arts. 3(1) and (2).

<sup>11</sup>A "ship related incident" has been defined in Article 3(3) as an incident arising from or in connection with the shipwreck, collision, stranding, explosion or fire, or defect in the ship.

<sup>12</sup>See Art. 3(3).

gers and to afford them a protection in law similar to that afforded to air passengers. This proposal attracted varying reactions from member states. A number of ship-owing nations, including Greece and Sweden, firmly rejected this proposal suggesting that introduction of compulsory insurance would be sufficient to protect passengers, so that alteration of the basic fault-based regime was unwarranted. On the other hand, some delegations, i.e. Japan, Norway and Belgium, argued that, because the law of air transport was moving toward strict liability, the law of marine transport should do the same. At the seventy-ninth session of the Legal Committee in February 1999, the delegation of Japan proposed a two-tiered liability regime, the first tier based on strict liability and the second based on fault liability with a reversed burden of proof.<sup>13</sup> Even though this proposal was rejected, the Japanese delegation brought the same proposal before the Legal Committee at the eighty-first session.<sup>14</sup> Most of the delegations appreciated the political sensitivity of this issue in light of the changes occurring in the liability regime relating to air carriage. A maritime disaster, involving, for example, a large passenger ferry, could bring the fault-based regime of the Athens Convention under spotlights and afford the tabloids and television the occasion for juicy comparisons between the air and sea carriage regimes. However, delegations were also aware of the real differences between these modes of transport that related to the assignment and measure of liability. An air passenger must sit with his seat belt fastened, at least during the critical phases of takeoff and landing, and, through their aircrews, airlines routinely recommend that passengers keeping their belts fastened during the whole flight. By contrast, the passenger aboard a ship is expected to circulate freely and use the vessel's facilities, such as the swimming pool, bar and fitness centre. In this respect, the typical marine passenger is exposed to danger more than the typical air passenger. Would it be fair to afford a strict liability regime for all incidents occurring on board a vessel? If, for example, a marine passenger injures himself while exercising in the fitness centre, should the carrier be held strictly liable? Nowadays sea cruises are regarded as products of the leisure industry and cruise ship operators are seen to be in direct competition with those operating holiday resorts ashore. Holiday resort liability is certainly not strict liability. Making cruise operators strictly liability regime for incidents that have nothing to do with shipping, would increase their financial cost, and thereby disadvantage them in their competition with spas and resorts. Furthermore, a strict liability regime for all types of incidents occurring on board a vessel would encourage frivolous claims, an outcome particularly unwelcome by the P & I clubs, which usually handle such claims.

<sup>13</sup>See IMO Doc. LEG 79/4/6.

<sup>14</sup>See IMO Doc. LEG 81/5/5.

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Taking all these factors into account, the Legal Committee achieved consensus that a strict liability regime ought to be adopted only for certain types of incidents and claims.<sup>15</sup>

Article 4 of the draft protocol replaces Article 3 of the convention, effecting the substitution of the new liability regime. In the new regime, there are two tiers to the liability of a carrier for loss from a passenger's death or personal injury caused by a shipping incident. In the first tier, the carrier is strictly liable up to a certain limit, which is currently under debate,<sup>16</sup> unless the carrier were to prove that the accident was caused by an act of war, hostilities, civil war, insurrection or an exceptional natural phenomenon.<sup>17</sup> Similarly, the carrier would be exempted from liability were he to prove that the incident was wholly caused by a third party, whose act or omission was with the intent to cause the incident.<sup>18</sup> It is clear, for example, that any loss caused by a terrorist attack or piratical attack would fall in this category simply because such attacks follow from the required sort of intent.

These exception clauses, particularly their descriptions of causation, could be better drafted. With regard to the first exception, what would happen if the master of a passenger ship were to make his vessel a target for warships by negligently sending wrong signals? The incident in that case could be attributed both to the negligence of master and to an act of war. Would the carrier be able to rely on the exception to escape liability? Since "caused" in this exception clause is not qualified with a word like "wholly," there is room for the carrier to argue that he is exempt from liability even though the factors permitting exemption did not cause the incident alone. In the second exception, the requisite causal link between a loss-triggering incident and an act or omission done with the intent to cause the incident by a third party is qualified by the modification of the word "caused" with the word "wholly." Assuming ordinary meanings for both words, this means that, if pirates were to attack through a hatch or door negligently left unfastened by the crew, for example, the carrier would not be able to rely on the exception because two causes led to the loss, one of which is not treated as an exception.

In the second tier, that is, above the strict liability limit, the carrier is liable unless he can prove that the incident causing the loss occurred without his

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<sup>15</sup>When asked whether they know of any cases in which a passenger has been unable to recover damages through application of the Athens Convention, all but two national associations answered negatively. The exceptions were those Ireland and the United Kingdom. See, IMO Doc. LEG 79/4/1. This clearly indicates that the liability regime of the original Athens Convention did not, in practice, act to the detriment of passengers.

<sup>16</sup>The amount proposed for the strict liability regime under the convention is 350,000 SDR. This issue will be considered further, *infra*, in Pt.2.C.

<sup>17</sup>See Art. 4 (1) (a) of the draft protocol.

<sup>18</sup>See Art. 4 (1) (b) of the draft protocol.

fault or neglect. Therefore, a reverse burden of proof is imposed on the carrier for losses between the strict liability limit and the maximum liability limit expressed in Article 7 of the convention.<sup>19</sup> A similar liability regime applies for the loss suffered as a result of the loss of or damage to cabin luggage caused by a shipping incident.<sup>20</sup> In such a case, the carrier will be able to discharge himself from liability by proving that the loss could not be attributable to his fault or neglect.

The position is completely different for personal injury and death claims arising from non-shipping incidents, for which the fault-based regime of the original Athens Convention has been retained. Accordingly, in cases where a passenger, due to negligence of the waitress, sustains a personal injury while dining in restaurant of the vessel, by virtue of Article 3(2) of the amended version of the Athens Convention, he needs to prove the negligence or fault of the carrier or his servants. To retain the fault-based liability regime for non-shipping incidents has become possible only after lengthy discussions in the eighty-third session of the Legal Committee. The draft protocol presented in that session proposed a reverse burden of proof even for claims arising from non-shipping incidents.<sup>21</sup> However, it was felt that adopting such a liability regime for non-shipping incidents would be inappropriate because it might encourage frivolous claims. Furthermore, non-shipping incidents are likely on cruises, where passengers enjoy a great deal of freedom and engage in numerous recreational activities such as swimming in the pool, exercising in the fitness centre, or shooting at the range. In this respect, there is not great difference between the positions of passengers on a cruise and guests at a land-based resort. The operators of holiday resorts do not face reversed burden of proof in cases where their guests sustain personal injury on their premises; neither therefore should cruise operators have to prove their innocence with respect to guest injuries in non-shipping incidents aboard their vessels. A similar regime has been adopted for the loss of or damage to cabin luggage. By virtue of Article 3(3) of the amended convention, the carrier would be liable when such a loss arises from a non-shipping incident only if the passenger proves the fault or neglect of the carrier. There has not been any change on the basis of liability for luggage other than cabin luggage. The carrier is liable unless he proves that the incident causing the loss occurred without his fault or neglect, irrespective of the nature of the incident that caused the loss or damage.<sup>22</sup>

<sup>19</sup>500,000 SDR is the amount proposed for the maximum liability of the carrier under Article 7. This point will be elaborated further, *infra*, in Pt. II.C.

<sup>20</sup>See Art. 4 (3) of the draft protocol.

<sup>21</sup>See, IMO Doc. LEG 83/4/2.

<sup>22</sup>See Art. 3(4) of the amended convention.

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One of the important features of the draft protocol is its distinction between “shipping” and “non-shipping” incidents in terms of the basis of liability. This makes the definition of the concept of “shipping incident” extremely important. The draft protocol defines a “shipping incident” as shipwreck, collision or stranding of the ship, explosion or fire in the ship, or defect in the ship. “Defect in the ship” is further defined as any malfunction or failure in any part of the ship or its equipment used for passenger escape, embarkation and disembarkation, for propulsion, steering, safe navigation, mooring, anchoring, leaving a berth or anchorage, or for flooding safety, and includes any malfunction or failure in the operation of emergency boat winches.<sup>23</sup> This formulation, too, is likely to cause uncertainty in cases where a number of factors contribute to a loss. Imagine a situation where a fire in the restaurant of a cruise vessel causes personal injuries to some passengers. Assume that the fire resulted from the negligence of another passenger, who discarded a cigarette on the floor. Suppose that the crew’s incompetence, in the form of their inability to fight against the flames, contributed to the final outcome. In such a case, would the loss be regarded as arising from a shipping incident? The protocol does not attempt to further define the degree of causal connection required in this context and this omission poses a risk that different outcomes for similar situations could be reached in different member states. The definition of “defect in the ship” is too narrow and restrictive. What happens if, due to a latent defect, the vessel’s jack-staff cracks and topples, injuring a passenger sun-bathing on the deck underneath? This is clearly an incident related to sea-carriage, rather than a hotel-type incident, but under the definition provided in the protocol, it is highly unlikely that the incident would be regarded as arising from a defect in the ship. Therefore, the carrier’s liability would depend on fault under the amended convention, and the injured passenger might not recover compensation because the defect was latent. Similar questions are prompted where a personal injury or death arises due to a defect in the anti-fire equipment or sprinklers? The current definition of “defect in the ship” does not possibly cover this kind of defect, so such incidents will be regarded as non-shipping incidents. The definitions suggested in the draft protocol are far from being clear, and may lead to open the way to hefty litigation, if approved in their current form. Further clarification, especially in the definition of “defect in the ship,” is needed from the forthcoming diplomatic conference.

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<sup>23</sup>This definition is based on the International Convention for the Safety of Life at Sea 1974 (SOLAS), Chap. II-1, Reg. 3, ¶ 5, and was added to the draft protocol in the last minute as a result of the persistence of the United States delegation, see, IMO Doc. LEG 83/4/8.

## B. Compulsory Insurance and Direct Action

Compulsory insurance, or requirements for financial security for maritime liabilities, is a rather new concept in international conventions, introduced in 1969, in the Civil Liability Convention. Since then, compulsory insurance has become of major importance in the development of new international law on maritime liability.<sup>24</sup> The rationale for compulsory insurance is the protection of claimants. Nowadays, most shipping companies are one-ship companies, with legal personalities distinct from the persons or companies that formed them.<sup>25</sup> The practical consequence is that, because the company's property, i.e. the ship, is owned by the company as a separate person, members of the company are not personally liable for the debts of the ship or the company.<sup>26</sup> While this insulates the company's members, it leaves the shipping company itself financially vulnerable, particularly in the face of a number of substantial claims. In such a situation, a company that does not have the financial support of its members might easily become insolvent, leaving its claimants with empty hands. Requiring shipping companies to have insurance cover for liabilities that might arise from the operation of their vessels insures a measure of financial stability to shipping companies, at the same time that it, indirectly, protects their claimants. Compulsory insurance may also contribute to enhancing shipboard safety, since it will be in the interest of the providers of financial security to conduct regular checks, and to require higher safety standards as a condition to their providing financial security.<sup>27</sup> These factors, when combined with political pressure on states to protect sea passengers, made it extremely easy to introduce financial security requirements into the draft protocol.<sup>28</sup>

The first paragraph of the new Article 4bis, requires vessels licensed to carry more than twelve passengers and registered in a state party to maintain

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<sup>24</sup>Provisions regarding compulsory insurance, for example, have been incorporated into the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea 1996 (HNS Convention). Similarly, there are provisions dealing with financial security in the draft Wreck Removal Convention, which is currently under consideration at the Legal Committee.

<sup>25</sup>*Salomon v. Salomon* [1897] A.C. 23 (H.L.).

<sup>26</sup>*J.H. Rayner (Mincing Lane) Ltd. v. Dep't of Trade* [1990] 2 A.C. 418 (H.L.).

<sup>27</sup>See Steven Shavell, *On the Social Function and the Regulation of Liability Insurance*, 25 *Geneva Papers on Risk and Ins. (Issues & Prac.)* 166 (2000), available as Harvard Law School Discussion Paper No. 278 (April 2000), at <[http://www.law.harvard.edu/programs/olin\\_center/](http://www.law.harvard.edu/programs/olin_center/)> (visited 09/15/02).

<sup>28</sup>Replies to the questionnaires circulated to the national associations by the Committee Maritime International (CMI) clearly demonstrate that majority of the states are in favour of compulsory insurance and financial security provisions in the context of carriage of passengers at sea, see IMO Doc. LEG 79/4/1. Fourteen associations (i.e., those of Belgium, Croatia, Finland, France, Germany, Ireland, Italy, Japan, the Netherlands, Norway, Slovenia, South Africa, Sweden, and the United Kingdom) declared that they would have no objection to the introduction of such a requirement. Only two associations (those of Denmark and Greece) opposed such a proposal.



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insurance or other financial security, such as the guarantee of a bank or financial institution, to cover their liability under the amended Athens Convention in respect of the death of and personal injury to passengers. It is the carrier who actually performs the part of the voyage in question, whether as owner, charterer or operator of the vessel, who is obliged to obtain insurance cover against the liabilities that might arise in relation to the vessel's operation. It should be noted that the carrier is required to have financial security only for claims of loss of life and personal injury and not for claims of loss of or damage to luggage. The limit of the compulsory insurance or other financial security is still under discussion, so it has been left in brackets in the draft protocol. In order to afford a realistic protection for the passengers, the amount of compulsory insurance should not be less than the limit of strict liability proposed for shipping incidents in Article 3(1) of the convention in its amended form.

There are detailed provisions in the draft protocol regarding the form of financial security certificates<sup>29</sup> and the process of their issue. By virtue of Article 4bis (2), a state party may authorise an institution or an organisation recognised by it to issue financial security certificates. Certificates issued or certified under the authority of a state party will be accepted by other state parties for the purposes of the Athens Convention. They will be regarded by other state parties as having the same force as certificates issued or certified by them, even if issued or certified in respect of a ship not registered in a state party.<sup>30</sup> Without a doubt, port state authorities will play a crucial role in the implementation of the financial security requirement, since they will be in a position to check the existence of such certificates for vessels visiting their ports.<sup>31</sup>

The purpose of making insurance compulsory is to insure that funds are actually available to compensate victims. Victims can pursue the liability insurer when they suffer loss or injury at the hands of a carrier. In the past,

<sup>29</sup>See Art. 4bis (2).

<sup>30</sup>See Art. 4bis (9).

<sup>31</sup>Port state control comes into play when shipowners, classification societies and flag state administrations fail to comply with the requirements of international maritime conventions. Although it is well understood that the ultimate responsibility for implementing conventions belongs to the flag states, port states are entitled to control visiting foreign ships to ensure that any deficiencies found are rectified before they are allowed to sail. Port state control is regarded as complementary to the flag state control.

The importance of port state control has been widely recognized in recent years, prompting movement in various regions toward a harmonised approach to the effective implementation of the control provisions. Memoranda of Understanding on port state control have so far been concluded for the following regions: Europe and the North Atlantic (at Paris), available at <http://parismou.org> (visited 09/25/02); Latin America (Acuerdo de Viña del Mar), available at [http://200.45.62/index\\_i.htm](http://200.45.62/index_i.htm) (visited 09/25/02); Asia and the Pacific (at Tokyo), available at [www.tokyo-mou.org](http://www.tokyo-mou.org) (visited 09/25/02); the Caribbean; the Mediterranean; available at [www.medmou.org](http://www.medmou.org) (visited 09/25/02); the Indian Ocean, available at [www.iomou.org](http://www.iomou.org) (visited 09/25/02); West and Central Africa (Abuja); and the Black Sea.

when insurance was regarded as a device to protect the person who paid for it and who was party to the contract of insurance, it would have been unacceptable to give a right of direct action to claimants against liability insurers. The social function of insurance has changed over the last couple of decades, however, and nowadays, insurance proceeds are viewed as for the benefit of the injured party rather than the protection of the assured. In line with this new approach, in the international arena, claimants are regularly allowed direct action against liability insurers,<sup>32</sup> and the same opportunity has been afforded in the protocol to sea in cases of death or personal injury.<sup>33</sup> Facing such a claim, the insurer or provider of financial security has been allowed a limited set of defences. The insurer cannot avail itself of any of the defences to which he might have been entitled in proceedings brought by shipowner. This inevitably means that policy defences, such as "pay to be paid"<sup>34</sup> or "unseaworthiness," would not be available to insurers against passengers. The insurer or provider of financial security could only invoke those defences that the performing carrier would have been entitled to invoke in accordance with this convention, including the defence that the damage resulted from the wilful misconduct of the assured.

Defences that would have been available to performing carrier under the convention have already been analysed above. The defence of wilful misconduct, however, deserves further attention, as it is likely to prompt debate during the diplomatic conference. The wilful misconduct defence stems from the Marine Insurance Act (MIA) of 1906.<sup>35</sup> Section 55 (2)(a) of that act excludes any loss from the policy, which is attributable to the wilful misconduct of the assured. While such conduct is not expressly defined in the MIA 1906, the case law has provided guidance as to the types of conduct that could amount to "wilful misconduct." As indicated by Lord Loreburn, the term "wilful" clearly imports that the misconduct should be deliberate, not merely a thoughtless act on the spur of the moment.<sup>36</sup> Therefore, deliberate, and possibly reckless, acts<sup>37</sup> fall within the definition of "wilful misconduct," while negligent ones do not. In this respect, in a case of the loss

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<sup>32</sup>See, e.g., International Convention on Civil Liability for Oil Pollution Damage (1992) Art. VII (8) and Draft International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea 1966, IMO Doc. LEG 67/3 (May 18, 1992) (HNS Convention) Art. 12 (8).

<sup>33</sup>See Art. 4bis (10).

<sup>34</sup>This is a P&I club rule to the effect that the club shall not be liable unless the assured shipowner actually has satisfied a liability.

<sup>35</sup>6 Edw. 7, ch. 41.

<sup>36</sup>*Johnson v. Marshall, Sons & Co. Ltd.* [1906] A.C. 409 (H.L.), at 411.

<sup>37</sup>See *Nat'l Oilwell (UK) Ltd. v. Davy Offshore Ltd.* [1993] 2 Lloyd's Rep. 582 (Q.B.) and *Wood v. Assoc. Nat'l Ins. Co. Ltd.* [1984] 1 Q. R. 507 (Austl.).

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of an overloaded vessel, the insurer would possibly be in a position to argue that the loss is attributable to wilful misconduct of the assured. However, it should be borne in mind that, if the insurer is to succeed on this defence, he must prove on balance of the probabilities not only that the vessel was deliberately cast away, but also that the whole event was occurred with the connivance of the assured. Since such allegations amount to an accusation of fraudulent and criminal conduct, the standard of proof that the insurer must attain to satisfy the court that his allegations are proved must be commensurate with the seriousness of the charge laid. Effectively, the standard will not fall far short of the rigorous criminal standard.<sup>38</sup> Despite being alien to civil law jurisdictions, it is not expected that the term will pose great difficulties for courts, should the amended convention be adopted in their law. Most civil law systems include similar provisions, albeit worded differently, in their insurance law rules.<sup>39</sup> Therefore, determining the meaning of the wilful misconduct defence in the amended convention should be a straightforward task for the courts.

There were spirited discussions in the eighty-third session of the Legal Committee as to the inclusion of the "wilful misconduct" defence into the draft protocol. Some delegations, particularly that representing Australia, were strongly opposed to its inclusion.<sup>40</sup> Admittedly, there is force in the argument that the wilful misconduct defence might operate to the detriment of passengers. In cases where the vessel is lost due to wilful misconduct of the carrier, i.e. deliberate overloading, passengers would be deprived of the opportunity of recovering from insurers, even though they themselves were innocent victims of the cynical act of the carrier. However, from a broader perspective, it looks like the success of the draft protocol may turn on this exception. As the providers currently of liability insurance in this area, P & I clubs feel that they have already made huge sacrifices by accepting strict liability for personal injury and death claims arising from shipping incidents and by submitting to direct action for this kind of claim. If pushed too far, the clubs could turn against the protocol. Removing the wilful misconduct defence from the protocol would concern the clubs in two respects. First, it would amount to an expansion in the cover provided by P & I clubs, exposing their members to further risks. It would be very difficult to justify this development to their members, particularly for those clubs in which only a small number of members are involved in carriage of passengers. Second,

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<sup>38</sup>Houghton (R.A.) and Mancon Ltd. v. Sunderland Mar. Mut. Ins. Co. Ltd. (The Ny-Eeasteyr) [1988] 1 Lloyd's Rep. 60 (Q.B.), at 62 (per Hamilton, QC).

<sup>39</sup>For instance, § 3-32 of the Norwegian Marine Insurance Plan 1996 reads: "If the assured has intentionally brought about the casualty, he has no claim against the insurer."

<sup>40</sup>See IMO Doc. 83/4/7.

removal of this defence would set a precedent and facilitate similar measures in other international conventions. Furthermore, it would be poor public policy to allow a shipowner to insure against the consequences of his own wilful misconduct. In some jurisdictions, providing such a cover is prohibited, for reasons of public policy. Those arguing that the wilful misconduct defence should be excluded from the draft protocol should keep in mind that P & I club cover is a flexible one, sensitive to political pressure. Some clubs might be very reluctant to invoke the wilful misconduct defence, particularly where the magnitude of a disaster makes it certain that the cases following will occupy the center of public and government attention.

Influenced by the submissions of observers from the International Group of P & I Clubs, the Legal Committee, decided to include this exception. However, the debate on this point is far from being over. The Norwegian delegation is prepared at the diplomatic conference to call for removal of the wilful misconduct defence from the compulsory insurance provisions in the draft protocol. It looks like heated discussions will take place on this point during the diplomatic conference.

When arguing the exclusion of wilful misconduct defence from the draft protocol, the Norwegian delegation heavily relies on the fact that such a defence does not form part of the Montreal Convention 1999. However, that convention, even though requiring the carrier to have adequate insurance,<sup>41</sup> does not allow any form of direct action against the insurer. Furthermore, it does not attempt to define the scope of insurance cover by depriving insurers of any coverage defence. The practical reality is that aviation insurers avail themselves of a myriad of coverage defenses.<sup>42</sup> In this respect, air passengers are not better protected than sea passengers. The draft protocol would afford sea passengers both financial security and direct action, and the potential success of this initiative should not be jeopardized by unacceptable demands, such as that for the exclusion of the wilful misconduct defense.

### C. Limitation of Liability

As indicated earlier, the liability limits expressed in the original form of Athens Convention have generally been regarded as low, and one of the

<sup>41</sup>See Montreal Convention 1999 Art. 50.

<sup>42</sup>The Standard Aircraft Liability Policy issued by Lloyd's, Form AVN1A, contains the following coverage exclusions, among others:

- (1) unlawful use of the aircraft, or for any purpose other than stated in the policy declarations; (2) use outside the prescribed operating limitations of the aircraft's flight manual; (3) operation in violation of the pilot's certificate or medical credential; (4) operation in violation of the civil aviation regulations with the carrier's knowledge; (5) operation absent a current airworthiness certificate or inconsistent therewith; (6) when the number of passengers exceeds the declared maximum; and (7) when the aircraft is operated by any person other than the pilot listed in the policy declarations.

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objectives of the draft protocol is to increase them to a level acceptable to both states and the public. In the Legal Committee, no agreement on limits has been reached, and the matter has been left to the diplomatic conference. Sharp discussions on this point should be expected. At the informal meeting on insurance and limits in the margins of eighty-fourth session of the Legal Committee which took place in April 2002. The following figures were suggested for discussion: 350,000 SDR in strict liability for death or personal injury claims (amended Article 3); 350,000 SDR in compulsory insurance or other financial security for death or personal injury claims (amended Article 4bis); and 500,000 SDR in liability for death and personal injury claims (amended Article 7). Discussion regarding limits for loss of or damage to luggage (amended Article 8) has not yet been carried out, but no dramatic changes are expected in those.

A protocol limit of 350,000 SDR to 500,000 SDR per passenger results in a possible maximum loss of approximately \$1.64 billion to \$2.34 billion from a single incident for a mega cruise vessel with a capacity of 3,500 passengers.<sup>43</sup> Considering that the maximum liability to which a P & I club could be exposed under the Civil Liability Convention 1992 (as amended in 2000), is approximately \$115 million, it is certain that the clubs would object to the proposed limits. If they are adopted, there is a strong possibility that the clubs will refuse to provide the necessary cover. The basis for such a decision would be the fact that the risk is too great and not mutual in nature, because passenger vessels constitute so small a share (around five per cent) of the tonnage entered in the clubs. Those favoring such high limits think that, should the clubs decide to withdraw from providing cover for passenger claims, no serious harm will follow. They are comforted with the fact that initial market research indicates insurance capacity to cover the risks laid down under the draft protocol on a fixed-term basis.<sup>44</sup>

A compromise ought to be reached to enable clubs to continue providing cover for passenger liabilities. There are various good reasons for this. First, even though insurance capacity now exists in the market, this might not be the case later. The impact of September 11, 2001 on the availability of liability insurance has been negative and the market could shrink further, should a similar event occur. It is very doubtful that commercial underwriters will provide enduring coverage in an uncertain risk environment. Mutual insurance, as available through club system, provides a more reliable source of cover because the member shipowners have a stake in the future of ship-

<sup>43</sup>On 17 July 2002, one SDR= US\$ 1.338930.

<sup>44</sup>See BankServe Insurance Services Ltd., An Opinion of the Feasibility of the Prospective Protocol to the Athens Convention Being Met, 9 May 2002, available at <<http://folk.uio.no/erikro/WWW/corrgr/insurance/Barnes.doc>> (visited 09/15/02).

ping. Whether commercial underwriters, whose investors have no such interest, are going to be as responsive to claims in the long term is rather doubtful. Finally, there could be delays in the process of issuing financial security certificates if financial security is provided by a variety of commercial underwriters, since the state parties would require some time to investigate the financial stability of the underwriters. This process is not likely to take long if the provider of financial security is a P & I club that is a member of International Group of P & I Clubs.

How could a compromise on limits be reached? Six maritime law associations, namely those of Denmark, Finland, Greece, Ireland, Italy and Slovenia, in their responses to the questioners circulated by the CMI, expressed the opinion that the limits of the 1990 protocol (175,000 SDR for claims regarding personal injury and death) would be adequate.<sup>45</sup> Those of the United Kingdom and Sweden, on the other hand, suggested a figure of 300,000 SDR, while that of Norway seemed to be in favour of increasing the limits of the 1990 protocol twofold. Surely, the figures expressed in the 1990 protocol would be a starting point for any discussion on this point. As various studies have shown, the purchasing power of the SDR erodes in relation to the erosion of the different currencies that compose it.<sup>46</sup> That erosion has been considerable. One study has revealed that, between 1976 and 1996, the purchasing power of the SDR dropped by around fifty eight per cent on average at a local level.<sup>47</sup> During the period between 1990 and 2001, inflation in the UK was 42.9 per cent; in the United States, 35.8 per cent, and in the OECD, 30 per cent.<sup>48</sup> It is natural therefore to expect any adjustment in the Convention limits to take these factors into account. Even if it is intended to preserve the 1990 limits, an increase of at least 30-35% seems essential to protect the passengers against the erosion in the limits caused by inflation. Accordingly, a compromise could be reached by increasing the limit for the first tier and for compulsory insurance up to 225,000 SDR (that is, by almost thirty per cent). This seems to be a fine compromise, protecting the interests of all concerned parties. States should be pleased with this solution because, not only does it preserve the real value of 1990 protocol limits, but it also affords passengers a direct action against insurers up to that amount. It should also be borne in mind that there will have been otherwise an improvement in the position of passengers since the protocol introduces a strict lia-

<sup>45</sup>See IMO Doc. LEG 79/4/1.

<sup>46</sup>See Les Ward, *The SDR in Transport Liability Conventions: Some Clarification*, 13 *J. Mar. L. & Com.* 1 (1981), at 4-5.

<sup>47</sup>Bari? Soyer, *1996 Protocol to the 1976 Limitation Convention: A More Satisfactory Global Limitation Regime for the Next Millennium*, 2000 *J.B. L.* 153, 155-56.

<sup>48</sup>International Monetary Fund, *The World Economic Outlook Database*, <<http://www.imf.org/external/pubs/ft/weo/2000/02/data/>> (visited 09/15/02).

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bility regime with limited defences available to the insurer in the shoes of the carrier. From the clubs' perspective, 225,000 SDR is a much more reasonable risk, \$1.054 billion for a vessel with a capacity of 3500 passengers. Apart from the compulsory insurance and strict liability limit, the carrier's ultimate liability for death and personal injury claims under Article 7 of the amended convention could be around 350,000 SDR. This would not prompt the objection of clubs since they have already declared that they would cap their exposures on the compulsory insurance level, if indeed they continue providing carriers with insurance for passenger liabilities. In that event, the carrier might obtain insurance from commercial underwriters on a fixed-term basis for liability exceeding the compulsory insurance level. Without a doubt, this would add an additional operation cost and be reflected to the prices of tickets.

Also likely to cause debate in the conference is Article 6 of the draft protocol. This provision adds a new paragraph to Article 7 of the convention, allowing individual nations to adopt higher limits of liability or unlimited liability for claims regarding death of or personal injury to a passenger.<sup>49</sup> It is obvious that this opt-out clause has been included into the protocol for political reasons, namely in order to encourage certain states, such as Japan, to ratify the protocol. However, such a clause could be questioned severely. It is apparent that this provision defeats the goal of establishing a uniform liability scheme. It might also encourage forum shopping. This is not a desired outcome from any liability insurer's point of view because claims might accumulate in a jurisdiction where the litigation process is very slow. It is also doubtful whether the possibility of allowing unlimited liability for personal injury and death claims would in practice afford any additional protection for passengers, in the light of the decision of the clubs to cap their liability on the compulsory insurance level. Even though the carrier would still be liable to the passenger for claims exceeding the compulsory insurance level, a carrier that did not take additional insurance would not be in a position to respond to such claims, except perhaps by winding up. The traditional structure of shipping companies, one ship per company, would not in such a case allow claimants to pursue satisfaction from any members of the company leaving those claims unsatisfied.

#### **D. Changes in Time Limits**

Article 9 of the draft protocol changes the provisions of the Athens Convention concerning suspension and interruption of limitation periods. In

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<sup>49</sup>See the submission of the Int'l Council of Cruise Lines to the 83rd session of the Legal Committee, which vigorously opposed inclusion of this clause. IMO Doc., LEG 83/4/5.

its present form, the convention limits the period for claims arising from the convention to years, after which, they are time-barred. Article 16(3) of the convention allows the court seized to suspend or interrupt the running of the time bar, but, in either case, the action under the convention must be brought within three years of the date of disembarkation or the date when disembarkation should have taken place, whichever is later. The time limits afforded by the convention have been criticised in the wake of reports from some jurisdictions of time-barred personal injury cases.<sup>50</sup> Increasing use of high-speed crafts, with the concomitantly increased chance of whiplash injuries, which can take longer to diagnose,<sup>51</sup> also persuaded the drafters of the protocol to extend time limits.

The protocol leaves unchanged the general limit of two years, but allows the court seized more latitude to suspend its operation or interrupt its running.<sup>52</sup> The protocol's amendment of Article 16(3) would allow courts to lengthen the time in which a claim is allowed up to three years from the date when the claimant first knew or ought reasonably to have known of the injury, but not beyond five years from the date of the passenger's disembarkation or when the disembarkation should have taken place, whichever is later.<sup>53</sup> Therefore, if a passenger were diagnosed with a whiplash injury four years after the date of disembarkation, he might be allowed, from that point, as much as a year to bring his claim.

Without a doubt, this amendment is intended to afford greater opportunity for passengers. On the other hand, P & I clubs would not be pleased with this development since extension of the limitation period would expose them to the risk of loss for a longer period of time. In the Montreal Convention 1999, which applies to air passengers, the limitation period is two years, and no authority to extend this period has been afforded to courts.<sup>54</sup> However, a stark fact about air travel ought to be borne in mind; that mere injuries to passengers, including those for which diagnosis might be delayed, are comparative-

<sup>50</sup>In the United Kingdom and Ireland, passengers occasionally have been denied recovery due to the time limits imposed by the Athens Convention.

<sup>51</sup>Whiplash injuries usually arise as a result of sharp whipping movement of the head and neck. The United States Highway Safety Administration has reported that 53% of people who were involved in a traffic accident in 1995 suffered from whiplash injury. Similarly, in Germany, during 1992, 396,462 traffic accidents were registered from which 197,731 persons suffered whiplash.

<sup>52</sup>The delegation of the United States objected severely to this amendment during the 83rd session of the Legal Committee, see IMO Doc. LEG 83/4/8. See also Maritime Law Association of the U.S., Position Paper on the Proposed Protocol to the 1974, July 16, 2001, available at <<http://www.mlaus.org>> (visited 09/15/02).

<sup>53</sup>The second figure, five years, is left in brackets and will be finally set during the diplomatic conference. At one point during discussions, a time limit of ten years was proposed, but this was rejected on the basis that such a long limitation period would not be desirable in international arena.

<sup>54</sup>See Montreal Convention 1999 Art 35.



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ly rare in aircraft accidents. The Montreal Convention therefore seems inapt as a basis for opposing change in the Athens Convention in this area.

### **E. Competent Jurisdiction and Recognition/Enforcement of Judgments**

Currently, an action arising from the convention could be brought before any of the following courts:<sup>55</sup> (a) the court of the state of permanent residence or principal place of business of the carrier; (b) the court of the state of departure or that of the destination according to the contract of carriage; (c) a court of the state of the domicile or permanent residence of the claimant, if the carrier has a place of business and is subject to jurisdiction in that state; and (d) a court of the state where the contract of carriage was made, if the carrier has a place of business and is subject to jurisdiction in that state. At one point during its discussions, the Legal Committee considered adding a fifth jurisdiction, where the carrier provides services for carriage of passengers by sea to or from that state, provided that the claimant is domiciled or has his permanent residency in that country.<sup>56</sup> The justification offered for adding such jurisdiction was that, through agents, some ferry operators run business to and from a certain state in which the claimant is domiciled without the operator necessarily having its principal place of business, but it seems superfluous in the light of the jurisdictional alternatives already available to passengers. For P & I clubs, there are practical problems in terms of claims handling when multiple jurisdictions were available to those with claims arising from the same incident. Fortunately, the provision allowing an additional jurisdiction option to claimants was deleted from the draft protocol in the eighty-third session of the Legal Committee.<sup>57</sup>

It should be noted that the draft protocol nevertheless offers some changes to the law in this area. First, by a paragraph proposed for Article 17(1) of the convention, the draft protocol makes possible direct actions against the providers of financial security before any of the courts where an action could be brought against the carrier or performing carrier. More significantly, the protocol, by adding another paragraph to Article 17, enables recognition in the court of any other state party of any judgment given by a court with jurisdiction under Article 17. This would certainly advantage passengers who

<sup>55</sup>Provided that the court is located in a state party to the convention.

<sup>56</sup>See the consolidated text of the Athens Convention and prospective protocol submitted by Norway to the 83rd Session of the Legal Committee, IMO Doc. LEG 83/4/2.

<sup>57</sup>The representative of the European Union explained that the proposed new provision on a fifth jurisdiction would create problems for members of the EU due to EU rules relating to recognition and enforcement of judgments. For more information on the reasons put forward by the EU, see IMO Doc. LEG 83/WP. 1.

obtain judgments against the carrier or provider of financial security under the convention.

### III WHAT DOES THE FUTURE HOLD?

In the beginning, no doubt, the states that pressed for changes in the Athens regime had reasonable goals: to ensure adequate protection for passengers on vessels and a minimum amount of insurance cover for their claims, regardless of the fortunes of the individual shipowner. A reasonable increase in the limits on a carrier's liability and the adoption of compulsory insurance, together with provision for direct action against liability insurers would have been sufficient to achieve these goals. However, the general feeling is that the amendments have come to exceed the reasonable expectations of most ship-owning nations and P & I clubs, which are providing satisfactory insurance opportunities against passenger liabilities. A strict liability regime is now proposed, in lieu of the existing presumed-fault regime for death and personal injury claims arising from shipping incidents. An opt-out clause allowing signatory nations to impose higher limits or even unlimited recovery has now been included. Furthermore, there are now proposals to increase limits to levels viewed as well beyond the capacity of established insurance markets. To make matters worse from P & I clubs' point of view, there are now also attempts to deny insurers the defense of wilful misconduct by the assured.

Even the Montreal Convention, a primary impetus for amending the Athens Convention, does not combine these onerous liability elements with such extraordinary levels of compensation and required insurance guarantees. Nor are the interests of railway passengers so preferred. The most recent protocol to the Convention concerning International Carriage by Rail 1980 (COTIF) sets an upper limit of 70,000 SDR per passenger in the event of death or personal injury,<sup>58</sup> and train operators retain various defenses, including, under certain circumstances, those based on the actions of third parties or passengers themselves.<sup>59</sup> It is tempting thus to ask just what makes sea carriage so different from other modes of transport when it comes to the apportionment of risk between passenger and carrier. To the contrary, statistics suggest that carriage of passengers by sea is as safe as carriage by other modalities of transport. For instance, in the year 2000, 1116 passengers lost

<sup>58</sup>See App. A, Art. 30.

<sup>59</sup>See *id.*, Art. 26. Similarly, the HNS Convention 1996, which was relied upon as a model for direct action against insurers in the draft protocol, permits insurers to invoke the defence that the damage resulted from the wilful misconduct of the owner. See Art. 12(8).

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their lives aboard a vessel. Bearing in mind that more than 704 million passengers were carried by sea during that year, this amounts to a risk of 1/630,824.<sup>60</sup> The figures are very similar for air carriage, where approximately 1300 fatalities occur per annum and the total of passengers carried is around 950 million.<sup>61</sup>

Right now, P & I clubs and carriers are watching with concern the build up to the diplomatic conference. They believe that they have done their part by agreeing to the change in the basis of liability and, in the case of the former, to direct action by passengers against them. The clubs are under pressure from members that do not engage in passenger carriage, for whom the new regime offers only a greater risk. How the diplomatic conference plays out will determine what sort of action will follow from the clubs, and in which direction. If limits such as 350,000 SDR per passenger in the first tier are agreed, their decision to cease cover for passenger liabilities should not surprise anyone. Even if cover could be obtained instead from commercial underwriters, the withdrawal of the clubs would certainly be to the detriment of carriers, and to passengers in the long term. But there is, as usual, as much pressure on governments to negotiate for the protection of carriers as there is to negotiate for protection of passengers. The pressure on the diplomatic conference has increased as a result of the declaration of the European Union that it would implement its own rules, which would be applied within the Union, if the diplomatic conference fails to produce a satisfactory scheme for sea passengers. Doubtless, such an outcome is not desirable from the point of view of the IMO, for an exercise of competence by the European Union in shipping matters would necessarily be at the expense of the IMO's position hitherto as the only international legislator respecting such matters. It is to be expected, therefore, that the IMO will work overtime in the next few months to bring the interested parties to acceptable compromise.

An instrument addressing the concerns of administrators, particularly the European Union, while, at the same time, offering a realistic and workable regime for the shipping industry, could attract wide-spread support and come into force quite quickly. Such an instrument could nevertheless provide a better liability regime for at least sixty per cent of the passengers carried by sea. After all, the European Union has committed itself generally to the implementation of the protocol, and indicated recently that it would

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<sup>60</sup>Calculations by the author using statistical information compiled by Roger Ingles of Elysian Insurance Services, available at <<http://www.elysian-insurance.com>> (visited 09/15/02).

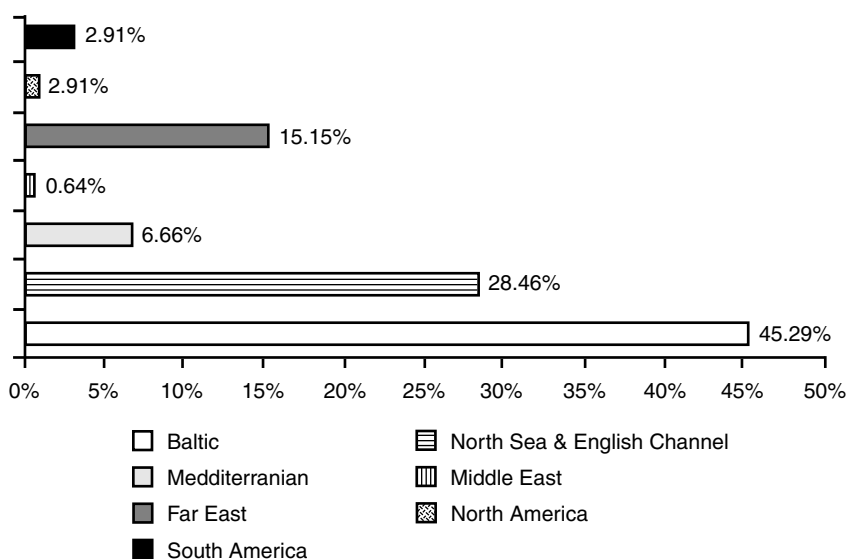
<sup>61</sup>1985 produced the highest ever number of passenger fatalities, 1,489. See Justyn Harding, David Hart, Philip Tiffin, & James Widdows, *The Aviation and Space Insurance Market*, August 2000, prepared for the 2000 General Insurance Convention of the Faculty and Institute of Actuaries, available at <[http://www.actuaries.org.uk/library/proceedings/gen\\_ins/2000gic/aviation\\_wp.pdf](http://www.actuaries.org.uk/library/proceedings/gen_ins/2000gic/aviation_wp.pdf)> (visited 09/15/02).

apply the amended version of the Athens Convention to domestic ferry operations.<sup>62</sup> Diagrams 1 and 2 below illustrate the percentage of ferry passengers carried in different regions of the world in 2000, and show that at least forty per cent of those passengers travel in or between regions where the European Union has jurisdiction.

Would, however, such an instrument produce a uniform international regime for passenger claims? That would be very unlikely. Some states, particularly in East Asia, have eschewed the Athens Convention 1974 for the reason that the limits set (i.e. 46,666 SDR for death or personal injury claims) are too high. The reality is that passenger carriage has a different social and political function in that part of the world. In the Far East, ferries operating between the mainland and islands, or between islands, particular-

**Figure 1.**

**International Ferry Passengers in Different Regions\***



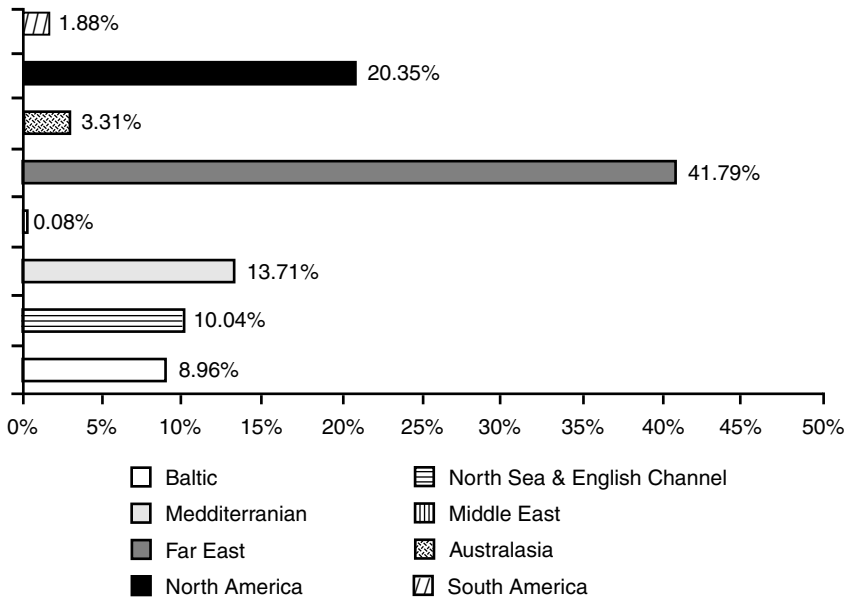
\*Source: Ferrynews (calculations are made by the author).

ly in archipelagic areas are usually run by the government or by government companies, and fares vary for political reasons, sometimes not even covering running costs or the costs of safety devices and services.<sup>63</sup> It is not realistic to assume that states in that position would be parties to an amended

<sup>62</sup>European Commission/Bahamas Shipowner meeting of 3 May 2002.

<sup>63</sup>See Walter Müller, *Should the Athens' Convention Be Modified?*, Papers Prepared for CMI's Singapore Convention I (2000), available <<http://www.comitemaritime.org/singapore/passengers/passengers.html>> (visited 25 July 2002).

**Figure 2.**  
Domestic Ferry Passengers in Different Regions\*



\*Source: Ferrynews (calculations are made by the author).

form of the Athens Convention that raises liability limits six to eight times higher than those in the original form, and requires as well compulsory insurance and the opportunity for direct action. At least forty per cent of the world's ferry passengers would therefore not be subject to an Athens Convention amended in this way.<sup>64</sup>

The United States' attitude towards ratification of the new protocol also does not bode well. The initial reaction of its maritime industry to the proposed changes is rather sceptical. Most provisions of the draft protocol have been severely criticised by the Maritime Law Association of the United States, and are regarded as unacceptable from American point of view.<sup>65</sup> Particularly objectionable to the Americans are the strict liability regime, the shifting of the burden of proof attached to the option of electing a jury trial in a civil action for bodily injury, extended time bars, and the opt-out clause.<sup>66</sup> Views of similar nature have also been voiced in the academic arena.<sup>67</sup> It

<sup>64</sup>See the diagrams 1 and 2 above.

<sup>65</sup>See MLA Position Paper, *supra* note 52.

<sup>66</sup>*Id.*

<sup>67</sup>See, e.g., Robert D. Peltz & Vincent J. Warger, *Amendments to Athens' Convention Threaten US Maritime Law*, [2001] 2 *Int'l Travel L. J.* 170.

seems unlikely that the United States would accept amendments of this sort. A decision by the United States not to adopt an amended Athens Convention would be a big blow to international uniformity, but it would not diminish the importance of a protocol for American passengers. The provisions of the amended convention could be given effect in the United States when incorporated by express reference in a ticket of passage between foreign ports,<sup>68</sup> unless one or more of them were found to contradict public policy.<sup>69</sup> Bearing in mind that around sixty per cent of all cruise passengers are American citizens,<sup>70</sup> it is highly likely that part or all of an amended Athens Convention would be applied by American courts as a result of contractual incorporation.

#### IV CONCLUSION

To sum up, negotiations before and during the diplomatic conference will determine the shape of this new instrument. If certain states and delegations insist on their unrealistic demands, they will jeopardise further participation of P & I clubs, which have so far provided a very satisfactory service in this area. This is not itself a desired outcome, and could lead to problems in finding the required insurance cover in the long run. Active lobbying by P & I clubs against the protocol could preclude ratifications sufficient in number to bring the protocol in force. If, on the other hand, a compromise can be reached and a protocol that satisfies all parties can be agreed, then passengers, particularly cruise passengers and those carried by ferries within Europe, will find themselves subject to a liability regime more satisfactory than any other relating to international carriage. Ferry passengers in the Far East, however, are likely to find themselves in exactly the same unsatisfactory position they are in now.

<sup>68</sup>*Becantinos v. Cunard Line Ltd.*, 1991 WL 64187 (S.D.N.Y. Apr. 18, 1991).

<sup>69</sup>See *Chan v. Society Expeditions, Inc.*, 123 F. 3d 1287, 1997 AMC 2713 (9th Cir. 1997), where the courts refused to apply the convention's limitation of wrongful death claims; and *Mills v. Renaissance Cruises Inc.*, 1993 AMC 131 (N.D. Cal. 1992), where the court refused to apply personal injury damage limitations.

<sup>70</sup>In the year 2000, 7,325,202 of 12,008,527 cruise passengers were American nationals. ShipPax, Statistics 01.