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**SOME REMARKS DERIVED FROM THE
PREPARATORY STAGES OF THE 1974 ATHENS
CONVENTION AND ITS 2002 PROTOCOL**

Abstract: The preparatory stages of the 2002 Athens Convention are helpful in finding answers to some of the questions of interpretation. Within this context, the observations and the decisions of the IMO Legal Committee, as well as the proposals and observations submitted by the delegations participating its sessions during the preparation of the draft text of the 2002 Protocol, might guide one to draw a conclusion. Among these questions exist the manner of application of the provision regarding the liability of the carrier in terms of the contributory fault or neglect of the passenger, or his or hers mental injury, or the possibility of maintenance of personal accident insurance. Additionally, the 1974 Athens Conference might also be regarded as helpful in order to interpret the rules relating to the performing carrier and the situation of the gratuitous carriage in terms of the Convention.

Keywords: 2002 Athens Convention, the carriage of passengers by sea, International Maritime Organization

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1. Introduction¹

The Protocol of 2002 to the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 1974 (hereafter the “2002 Protocol” and the “1974 Athens Convention”) was adopted on 1.11.2002, and the 2002 Athens Convention² entered into force on 23.4.2014. As of November 2019, there are 31 State Parties to the 2002 Athens Convention.³ The most important features of the Convention are: the introduction of the strict liability for the death or personal injury of the passenger arising from shipping incidents up to the limit of 250,000 Special Drawing Rights (hereafter “SDR”),⁴ and of the compulsory insurance in respect of the death of and personal injury to passengers, of which the limit shall not be less than 250,000 SDR.⁵ However, there are still some disputable subject matters which can occur during the application of the Convention, due to the lack of clarity within the provisions or the discrepancy between the 1974 and 2002 versions of the Convention. In this matter, the preparatory stages of the 2002 Protocol are helpful in finding answers to some of the questions of interpretation. Within this context, the observations and the decisions of the International Maritime Organization (hereafter “IMO”) Legal Committee, as well as the proposals

¹ This paper consists of selected views from the dissertation written by the author in Turkish language under the name “2002 Atina Sözleşmesi Çerçevesinde Deniz Yolu İle Yolcu Taşımalarında Zorunlu Sorumluluk Sigortası” [Compulsory Liability Insurance for the Carriage of Passengers by Sea under the 2002 Athens Convention] under LL.M. in the Private Law programme at Galatasaray University Graduate School of Social Sciences, defended and unanimously passed before the jury consisting of Prof. Dr. Samim Ünan, Doç. Dr. Serap Amasya (supervisor) and Dr. Cüneyt Süzelon on 20.4.2018 and published in Istanbul under the same title in October 2018.

² The consolidated text of the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 1974, and the Protocol of 2002 to the Convention will be mentioned as the “2002 Athens Convention” in this paper.

³ This number increased from 28 to 31 in 2019 following the accession of the Russian Federation, Georgia and Madagascar. For more detailed information relating the Convention, see IMO, Status of Treaties, Comprehensive information on the status of multilateral Conventions and instruments in respect of which the International Maritime Organization or its Secretary-General performs depositary or other functions, 31.10.2019, pp. 343 ff., available at <http://www.imo.org/en/About/Conventions/StatusOfConventions/Documents/Status%20-%202019.pdf> (accessed 7.11.2019).

⁴ 2002 Athens Convention Article 3(1); 2002 Protocol Article 4(1).

⁵ 2002 Athens Convention Article 4 bis(1); 2002 Protocol Article 5(1).

and observations submitted by the delegations participating its sessions during the preparation of the draft text of the 2002 Protocol, might guide one to draw a conclusion. Among these questions exist the manner of application of the provision regarding the liability of the carrier in terms of the contributory fault or neglect of the passenger, or his or hers mental injury, or the possibility of maintenance of a personal accident insurance (hereafter “PAI”). In addition to the preparatory works of the 2002 Protocol, the 1974 Athens Conference might also be regarded as helpful in order to interpret the rules relating to the performing carrier and the situation of the gratuitous carriage in terms of the Convention.

2. Some remarks derived from the preparatory stage

2.1. Performing carrier

The 1974 Athens Convention became the first international convention in maritime law which defines “performing carrier”.⁶ This idea became realised following the adoption the Convention Supplementary to the Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person other than the Contracting Carrier (hereafter “Guadalajara Convention”)⁷ introducing the term “actual carrier”. The expression of “performing carrier” can be found in the draft text submitted by the IMO Legal Committee to the 1974 Athens Conference, despite this person only being mentioned within the definition of “carrier” and not being defined exclusively.⁸ The definition was added to the text

⁶ Subsequently, Article 1(2) of the United Nations Convention on the Carriage of Goods by Sea of 31.3.1978 (hereafter “Hamburg Rules”), which entered into force on 1.11.1992, and Article 1(3) of the Budapest Convention on the Contract for the Carriage of Goods by Inland Waterway of 22.6.2001 (“CMNI”), which entered into force on 1.4.2005, included the definitions “actual carrier”. More recently, the Convention of Contracts for the International Carrying of Goods Wholly or Partly by Sea of 11.12.2008 (“Rotterdam Rules”), which is not yet in force, defines “performing party” and “maritime performing party” under its Article 1(6)(a) and (b).

⁷ Signed in Guadalajara on 18.9.1961, entered into force on 1.5.1964.

⁸ “Carrier” means the ship owner, charterer or operator of a ship or any other person who on his behalf has concluded a contract of carriage whether the transport is actually carried out by him by another person who shall be referred as “personal carrier”, IMO, LEG/CONF.4/4, Observations and Proposals by Governments on the Draft Articles for

following a proposal by the Netherlands⁹ during the Conference, according to which this person “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”.¹⁰

A glimpse at the 1974 Athens Conference helps one draw two consequences from the relevant definition, clarifying the differences from the two definitions of “actual carrier” under the Guadalajara Convention – repeated by the Convention for the Unification of Certain Rules for International Carriage by Air¹¹ (hereafter “Montreal Convention”) – and the Hamburg Rules, which regulate carriage by air and of goods by sea, respectively.¹² Firstly, opposite to the wording of the term “actual carrier” under the Hamburg Rules, it is much easier to claim that there is only one performing carrier under the 2002 Athens Convention, since it is stated that the this person means “a” person.¹³ This wording came out as a result of a deliberate choice of the Netherlands.¹⁴

an International Convention for the Unification of Certain Rules relating to the Carriage by Sea of Passengers and their Luggage, Part II: Proposed Amendments and Observations Thereon, 4.11.1974, p. 1.

⁹ IMO, LEG/CONF.4/SR.3, Summary Record of the Third Plenary Meeting, 3.12.1974 (31.1.1977), p. 5.

¹⁰ 2002 Athens Convention Article 1(1)(b).

¹¹ Signed in Montreal on 28.5.1999, entered into force on 4.11.2003.

¹² The mentioned definitions are as follows: “Actual carrier” means any person to whom the performance of the carriage of the goods, or of part of the carriage, has been entrusted by the carrier, and includes any other person to whom such performance has been entrusted.’ (Hamburg Rules Article 1(2)) “actual carrier” means a person other than the contracting carrier, who, by virtue of authority from the contracting carrier, performs the whole or part of the carriage (...)’ (1961 Guadalajara Convention Article I(c), see also Montreal Convention Article 39).

¹³ For the same opinion, see K. Atamer, 2002 *Atina Sözleşmesi’nde Türk Ticaret Kanunu Tasarısı’nda Deniz Yoluile Yolcu Taşıma Sözleşmesi i* [The Contract of Carriage of Passengers by Sea under 2002 Athens Convention and the Draft Turkish Commercial Code], ‘Banka ve Ticaret Hukuku Dergisi’ 2008, vol. 24, no. 3, p. 101, p. 133.

¹⁴ In IMO, LEG/CONF.4/4, *supra* n. 8, p. 2, the Netherlands demonstrated that: ‘Moreover, it deems it necessary to insert in the Convention a definition of “performing carrier”. This brings on the replacement of the words “another person who shall be referred to as the” by the word “a”. This statement was made during the stage where performing carrier was referred merely in the definition of “carrier” in the draft text submitted by the IMO Legal Committee. See also the other statement of the same delegation mentioned in *supra* n. 20.

Secondly, the performance of the carriage does not have to be entrusted *by the carrier* itself to that person, as under the Hamburg Rules. This consequence may also be reached with the help of the examination of the preparatory stages of Article 4 of the 2002 Athens Convention, which took place during the 1974 Conference. Article 4 regulating the liability under the carriage performed by a performing carrier in the submitted text by the IMO Legal Committee to the 1974 Athens Conference was amended following a joint proposal made by the Netherlands and the United Kingdom,¹⁵ which replaced the two separate proposals made by the same delegations. The proposal which had been submitted by the Netherlands before the joint proposal¹⁶ reflects the change in the wording of Article 4(1). This wording later was included in the joint proposal made with the UK as well and remained unchanged in the adopted text of the Convention.

According to the draft version of Article 4(1) submitted by the IMO Legal Committee, the carrier “*who has entrusted the performance of the carriage or part thereof to a performing carrier*” would remain liable.¹⁷ Besides this, the first proposal of the amendment made by the UK consisted of the phrase “[w]here the performance of the whole or a part of a contract of carriage has been entrusted *by a carrier* (...) to a performing carrier (...)”.¹⁸ However, the adopted version of Article 4(1) constitutes that the carrier shall be liable “[i]f the performance of the carriage or part thereof *has been entrusted* to a performing carrier”. The meaning of this change is that the carrier is not the person who must entrust the performance in order to be liable in terms of the Convention.¹⁹ The reason behind this change

¹⁵ For the proposal, see IMO, LEG/CONF.4/WP.26, Consideration of Draft International Convention for the Unification of Certain Rules relating to the Carriage by Sea of Passengers and their Luggage, Amended proposal by the Netherlands and the United Kingdom, 4.12.1974.

¹⁶ For the proposal submitted by the Netherlands solely, see IMO, LEG/CONF.4/4, *supra* n. 8, pp. 13-14.

¹⁷ For the draft version submitted by the IMO Legal Committee, see *ibid.*, p. 13.

¹⁸ See IMO, LEG/CONF.4/WP.2, Consideration of Draft International Convention for the Unification of Certain Rules relating to the Carriage by Sea of Passengers and their Luggage, Proposals and amendments submitted by the United Kingdom, 2.12.1974, pp. 1-3.

¹⁹ The wording of Article 4(1) of the 1974 Athens Convention was repeated in the Hamburg Rules Article 10(1), while Gualadajara Convention Article II and Montreal Convention Article 40 hold both the contractual and actual carrier liable “[i]f an actual carrier performs the whole or part of carriage”. However, one must

in Article 4(1) can be understood by looking at the observation submitted by the Netherlands regarding the need of the inclusion of the definition of “performing carrier”, along with the proposal of an amendment:

The Netherlands Government invites attention to the case where the contracting carrier arranged with another person to perform the carriage or part thereof and in such arrangement permitted this person to arrange for himself to have a part of the carriage done by another. It could be contended that the latter is not the performing carrier meant in the first sentence of paragraph 1 of this Article. The difficulty can be solve by a slight change of the first sentence.²⁰

Nevertheless, this statement still leaves the question of whether there is a need of a performance taking place “by virtue of authority from the carrier”, as under Guadalajara Convention, since the given example is of an arrangement between the carrier and a person permitting this person to arrange for the performance done by a different person. In other words, the example draws attention to a possibility where the carrier “permits” any third person to perform the carriage. Despite this fact, considering the abovementioned differences both in the definition of “performing carrier” and the wording in Article 4 from the provisions of the Gualadajara Convention, it seems difficult to look for a such a condition under the 2002 Athens Convention. This would means that a person might obtain the title of performing carrier and be held liable under Article 4 together with the carrier even without any knowledge of the carrier, provided that this person actually performs the carriage, which is unlikely under the two remaining abovementioned international conventions.

It is worth adding that the person who is referred to as performing carrier gained more importance following the entrance into force of the 2002 Athens Conventions, due to the compulsory insurance. Therefore, the person who shall maintain the compulsory insurance is “any carrier who actually performs the whole or a part of the carriage”. This person is specifically defined under the provision introduced by the 2002 Protocol,²¹

reconsider the definitions given for actual carrier by both Conventions while assessing the application of the liability provisions.

²⁰ IMO, LEG/CONF.4/4, *supra* n. 8, pp. 13-14. As the statement mentioned in *supra* n. 14, this observation was submitted in a stage where the performing carrier was also referred to merely in the definition of “carrier” in the draft text submitted by the IMO Legal Committee.

²¹ 2002 Athens Convention Article 1(1)(c); 2002 Protocol Article 2(1)(c).

which demonstrates that this person “means the performing carrier, or, in so far as the carrier actually performs the carriage, the carrier”. Under this provision, the performing carrier is under the obligation to obtain liability insurance, and in a case where the carrier does not perform any part of the carriage, the performing carrier remains the only person who shall be subject to this rule. Furthermore, there is no clue in the Convention about whether the liability insurance maintained by the performing carrier shall cover the liability of the carrier as well. It is understood by the reports of the meetings of the IMO Legal Committee that there is no such requirement, taking into consideration that the carrier might not be subject to a P&I insurance.²² This brings about the possibility of recourse actions by the insurers who compensate the damages within the framework of the Convention, against the carriers who act in fault or neglect, subrogating the rights of recourse of those assured, i.e. the performing carriers, against the carriers.²³ It should be added that this scenario might occur in a very rare occasion, as foreseen by the IMO Legal Committee.

²² See the statement in IMO, LEG 79/4/3, Provision of Financial Security, Submission by the Co-ordinator of the Correspondence Group, Annex 1, 12.2.1999, p. 2, n. 7:

This expression includes both the performing carrier as defined in Article 1, and the contracting carrier who performs the carriage him – or herself (who falls outside the definition of performing carrier); see Article 1, paragraph 1(c). The neutral term “person” has been purposely avoided to make sure that none other than the carriers shall be obliged to arrange insurance under this clause.

The effect of the wording is that a contracting carrier who does not perform the carriage is under no obligation to arrange for insurance, and that double insurance therefore is avoided. The duty to arrange for insurance rests with a person who is likely to have taken out P&I insurance.

²³ 2002 Athens Convention Article 4(5) stipulates that “[n]othing in [this] Article [4] shall prejudice any right of recourse as between the carrier and the performing carrier”. This means that in a such case, the relationship between the carrier and the performing carrier would be decisive in the conferral of a right of recourse. Moreover, the same possibility is foreseen under the 2001 Bunker Convention by scholars, where the channelling of liability does not exist due to numerous persons who are liable for the damage; however, the maintenance of the compulsory liability insurance is envisaged only for the registered owner of the vessel. For further information, see L. Zhu, *Compulsory Insurance and Compensation for Bunker Oil Pollution Damages*, Springer-Verlag, Berlin and Heidelberg 2007, p. 107; C. Süzöl, *Gemi Yakıtı Sözleşmesi 2001: Amac, Kapsamve Uygulama Alanı* [2001 Bunker Convention: Aim, Scope and Application], ‘Bahçeşehir Üniversitesi Hukuk Fakültesi Dergisi’ 2017, no. 151-152, p. 117, pp. 161-162.

2.2. Gratuitous carriage

One of the conspicuous features of the 2002 Athens Convention is the lack of clarity within the definition of “contract of carriage” in terms of any prerequisite of a consideration, as well as the commercial character, for such a contract, unlike the remaining Conventions on other modes of transport of passengers and their luggage.²⁴ The only express provision is Article 21, which states that “[the] Convention shall apply to commercial carriage undertaken by States or Public Authorities under contract of carriage within the meaning of Article 1”.

During the preparation of the 1974 Athens Convention, a proposal submitted by Liberia envisaged the addition of a conclusion to the definition of “passenger” under Article 1(4) that this person “(...) does not include a person carried accidentally, *gratuitously*, by force majeure, or by reason of official capacity”.²⁵ This proposal raised different opposing views between the Delegations, mainly by the United Kingdom and Norway.²⁶ While the United Kingdom supported the proposal, Norway drew attention to the differences between various legal systems, underlining that not all systems require a consideration for a valid contract of carriage.²⁷ Nevertheless, the proposal was rejected²⁸ and neither the term “contract

²⁴ “This Convention applies to all international carriage of persons, baggage or cargo performed by aircraft for reward. It applies equally to gratuitous carriage by aircraft performed by an air transport undertaking.” (Montreal Convention Article 1[1]) “These Uniform Rules shall apply to every contract of carriage of passengers by rail for reward or free of charge (...)” (Uniform Rules concerning the Contract of International Carriage of Passengers by Rail [CIV] – Appendix A to the Convention concerning International Carriage by Rail (COTIF) of 9.5.1980, as amended by the Vilnius Protocol of 3.6.1999), Article 1[1]). “[P]assenger means any person who (...) is carried either for reward or gratuitously by a carrier.” (Convention on the Contract of International Carriage of Passengers and Luggage by Road [CVR] done in Geneva on 1.3.1973, Article 1[2]).

²⁵ For the proposal, see IMO, LEG/CONF.4/WP.4, Proposal by the delegation of Liberia, Consideration of Draft International Convention for the Unification of Certain Rules relating to the Carriage by Sea of Passengers and their Luggage, 3.12.1974.

²⁶ See IMO, LEG/CONF.4/SR.4, Summary Report of the Fourth Plenary Meeting, 3.12.1974 (31.1.1977), pp. 2ff. It is worth mentioning that, at the same time, a different proposition made by France was under discussion, following which subpara. (b) was added to Article 1(4).

²⁷ These legal systems are mentioned as “Anglo-American and Nordic and continental legal systems”, see *ibid.*, 5.

²⁸ See IMO, LEG/CONF.4/SR.5, Summary Record of the Fifth Plenary Meeting, 4.12.1974 (31.1.1977), p. 2.

of carriage” nor “passenger” under Article 1 indicate any such condition. Hence, a conclusion derived from this development may be that this matter is left to national legal systems, therefore the court seized of the dispute shall decide on whether a consideration is one of the components of such contract, pursuant to the law applicable to the contract of carriage. Furthermore, different legal systems which adopted the provisions of the 1974 Athens Convention consist of divergent approaches.²⁹ A questionnaire sent by *Comité Maritime International* (hereafter “CMI”) to the National Associations during the preparation of the 2002 Protocol supports this conclusion as well.³⁰ One of the questions asked on this questionnaire was “[d]oes the Convention apply to a contract which is not

²⁹ For instance, in terms of the 1974 Athens Convention, the contracts of carriage which were not for reward were excluded in the United Kingdom under the Provisions having an effect in connection with Convention para. 9. These provisions were regulated as Part II of the Merchant Shipping Act 1995 Schedule 6. For the discussions regarding the term “reward” under this provision, see P. Griggs, R. Williams, J. Farr, *Limitation of Liability for Maritime Claims*, 4th ed., Informa Law from Routledge, Oxon and New York 2013, pp. 98-99; K. Lewins, *International Carriage of Passengers*, Sweet & Maxwell, London 2016, p. 99; B. Soyer, *Boundaries of the Athens Convention: What you see is not always what you get!*, [in:] D. R. Thomas (ed.), ‘Liability Regimes in Contemporary Maritime Law’, Informa Law from Routledge, London 2007, p. 183, p. 190. Despite the fact that the Dutch Civil Code (*Burgerlijk Wetboek*) Article 8:500 does not expressly indicate any rule, it is acknowledged that gratuitous carriages fall within the scope of the contract of carriage of passengers. For information, see K. F. Haak, *Part II. Maritime Law*, [in:] E. van Hooydonk (vol. ed.), R. Blanpain, F. Hendrickx (gen. eds), ‘Netherlands, IEL Transport Law’, Kluwer Law International BV, Alphen aan den Rijn 2007, p. 52, p. 95. For the translation of the Code, see www.dutchcivillaw.com/civilcodegeneral.htm (accessed: 7.11.2019). Another example is Norwegian Maritime Code (*Lov om sjøfarten*), which defines “carrier” as follows:

By the term carrier, in this Chapter, is meant a person who by contract, commercially or for remuneration, undertakes to carry passengers or passengers and their luggage by ship. The carrier can be a *reder*, a charterer (sub-carrier) or other person. (Article 401(1)).

As it is understood, the carrier may carry the passenger commercially, however without any remuneration. For the translation of the Code, see T. Solvang (ed.), *The Norwegian Maritime Code*, 24.6.1994 no. 39, with amendments, including the Act of 7 June 2013 no. 30, MarLusno. 435, Sjørettsfondet, Oslo 2014, available at <http://folk.uio.no/erikro/WWW/NMC.pdf> (accessed 7.11.2019).

³⁰ See IMO, LEG 79/4/1, Provision of Financial Security, Carriage of Passengers and their Luggage by Sea, The Athens Convention 1974 and its Protocols, Submitted by the Comité Maritime International (CMI), 10.2.1999. This inharmonious appearance which leads to the different application of the Convention by the courts in different States also faces some criticism, see Soyer, *op. cit.*, pp. 189-191.

for reward?”, and the answer showed up in different variations. While Croatia, Germany, Japan and the Netherlands responded affirmatively, the answers from Greece, Ireland, Slovenia, South Africa and the United Kingdom were negative.³¹ No amendment was made in the 2002 Protocol in the definitions “contract of carriage” or “passenger”; thus, this varying approach should be expected to carry on under the application of the 2002 Athens Convention.

2.3. Contributory fault or neglect of the passenger

Article 6 of the 2002 Athens Convention stipulates that: “[i]f the carrier proves that the death of or personal injury to a passenger or the loss of or damage to his luggage was caused or contributed to by the fault or neglect of the passenger, the Court seized of the case may exonerate the carrier wholly or partly from his liability in accordance with the provisions of the law of that court.” This provision might entail three questions: [1] whether the court has the discretion regarding the exoneration of the carrier or, in case of a contributory fault, the court shall apply Article 6 without any doubt; [2] whether Article 6 may be applied in a case where the carrier is strictly liable under Article 3(1); and [3] whether only the fault or neglect of the passenger enables the application of Article 6, or the court may exonerate the carrier taking into consideration other criteria under national law.

It can be said that the first question of the abovementioned three questions is the easiest one to answer, since Article 6 expressly makes it clear that the court seized of the case *may* exonerate the carrier wholly or partly.³² The same emphasis on that wording was made by the International Chamber of Shipping (hereafter “ICS”) during the preparation of the 2002

³¹ The synopsis of the replies given to CMI continues in IMO, *ibid.*, at p. 5 as follows: The MLAs of the Nordic countries answered this question on the basis of their domestic law: Denmark and Sweden in favour of the application, Finland and Norway in favour of the application if the carrier undertakes the carriage professionally or for reward. In Italy, there are special rules for the carriage of passengers without reward. Therefore, it is thought that the Convention will not be made applicable to such carriage, unless with certain amendments.

³² This also means that the court may hold the carrier liable in the case of the contributory fault of the passenger. For further information, see Atamer, *op. cit.*, pp. 186-187.

Protocol, paying regard to Montreal Convention Article 20, where it is stated that “the carrier *shall* be wholly or partly exonerated”.³³

The second question is about the possibility of the application of the Article 6 in occasions where the strict liability regime applies under Article 3(1). In the draft text of the 2002 Protocol, prepared during the 82nd Session,³⁴ Article 3(1) included the phrase “and without prejudice to Article 6 of this Convention”; however, this phrase was removed in the draft text submitted to the 83rd Session following an intersessional work³⁵ and did not appear on the adopted text of the 2002 Protocol. Nonetheless, the IMO Legal Committee acknowledged the application of the rule in cases of strict liability in the report of the same Session.³⁶

A different point worth mentioning in this subject is a rejected proposal made by Japan. Japan was the most determined delegation to support the adaptation of the two-tier liability regime envisaged in the Montreal Convention and thus made a proposal during the 81st Session of the IMO Legal Committee, including a liability scheme under Article 3.³⁷ Pursuant to the proposed text, one of the circumstances when

³³ See IMO, LEG 83/4/6, Provision of Financial Security, Amendments to the Athens Convention, Submitted by the International Chamber of Shipping (ICS), 11.9.2001, p. 3, para. 11.

³⁴ For the text, see IMO, LEG 82/4/3, Provision of Financial Security, Results of the intersessional work, Submitted by Lithuania, the Netherlands, Norway, Sweden, the United Kingdom and Hong Kong, China, Annex I, Draft Articles, 15.9.2000, p. 1. In the report of the same session, while the IMO Legal Committee shared information about the compromise reached on the strict liability regime for shipping incidents, the Committee also noted that “the maintenance of the contributory negligence clause contained in Article 6 of the parent Convention would help to ensure that the interests of all the parties were protected”, see IMO, LEG 82/12, Report of the Legal Committee on the Work of Its Eighty-Second Session, 6.11.2000, p. 7, para. 26.

³⁵ For the text, see IMO, LEG 83/4/2, Consolidated Text of the Athens Convention and prospective Protocol, Submitted by Norway, 3.8.2001, p. 3.

³⁶ The IMO Legal Committee made this statement following the concerns related to the application of Article 6 in IMO, LEG 83/14, Report of the Legal Committee on the Work of Its Eighty-Third Session, 23.10.2001, p. 9, para. 30:

A small informal group subsequently met to consider the matter and reported to the Committee that amendment of the text was unnecessary. The Committee agreed with this and noted that article 6 always had priority and would apply in the context of article 3, including in the context of strict liability.

For an opposing view, see Lewins, *op. cit.*, at p. 136.

³⁷ For the text of proposal, see IMO, LEG 81/5/5, Provision of Financial Security, Proposed amendment text of the Athens Convention, Submitted by Japan, 25.2.2000, p. 2.

the carrier is exonerated from the liability was “the damage suffered as a result of the death of or personal injury to a passenger resulted solely from the state of health of the passenger” under Article 3(3)(c). The reason of the inclusion of the mentioned subparagraph was expressed by Japan, as the state of health is out of the scope of Article 6 since it is not a fault or neglect of the passenger.³⁸ However, this provision did not appear in the draft texts submitted during later meetings, while the proposed two-tier liability scheme had been retained under the draft text during the 82nd Session, as well as made into the final text of the 2002 Protocol.

Additionally, at the very end of Article 6, an expression demonstrates that the court may exonerate the carrier “in accordance with the provisions of the law of that court”, i.e. *lex fori*. However, the same provision regulates that it is applied when the loss or damage “was caused or contributed to by the fault or neglect of the passenger”. One may then ask if it is possible for the courts to apply the relevant provision considering the criteria existing under national law other than the contributory fault, such as a consent given by the passenger to the action resulting with the injury or some circumstances (e.g. gratuitous carriage of the passenger, of course if such a carriage is deemed to fall within the scope of the Convention) which might lead to the reduction of the amount of the compensation under national law.³⁹ Despite the fact that there is no clear guidance in the Convention

³⁸ “Sub-paragraph (c) is necessary as the exoneration cause for death or personal injury resulted solely from the state of health of the passenger, because the state of health is not a fault or neglect of the passenger, although there is a contributory fault clause (article 6)”, *ibid*.

³⁹ For example the Swiss Code of Obligations (*Obligationenrecht*) of 30.3.1911 Article 44, which is adapted into the Turkish Code of Obligations (*Türk Borçlar Kanunu*) of 11.1.2011 (No. 6098) Article 52, stipulates that:

Where the injured party consented to the action which caused the loss or damage or circumstances attributable to him helped give rise to or compound the loss or damage or otherwise exacerbated the position of the party liable for it, the court may reduce the compensation due or even dispense with it entirely [para. 1]. The court may also reduce the compensation award in cases in which the loss or damage was caused neither wilfully nor by gross negligence and where payment of such compensation would leave the liable party in financial hardship [para. 2].

Pursuant to the relevant provision, the court has the right to exonerate the liable person wholly or partly not only in the circumstances of contributory fault of the injured party. For the English translation of the Swiss Code of Obligations, see <https://www.admin.ch/opc/en/classified-compilation/19110009/201704010000/220.pdf> (accessed 7.11.2019).

on this matter, it seems that it is more appropriate to interpret Article 6 narrowly, also taking into consideration the abovementioned remarks on the second question arising from Article 6.⁴⁰

Consequently, it seems that it is possible to understand Article 6 as applicable in the strict sense, i.e. only in cases where the passenger acts in fault or neglect, and the court shall not consider other criteria when the 2002 Athens Convention is applied. Besides this, it might be also possible to take into consideration the defence of the carrier related to the contributory fault of the passenger in order to e.g. reduce the amount of liability, even if the carrier is to be held strictly liable.

2.4. Mental injury

Another question might arise regarding the scope of the liability of the carrier under Article 3, which was amended by the 2002 Protocol Article 4, for “the loss suffered as a result of the death of or personal injury to a passenger”. Under the international regime for carriage by air, the terms “personal injury” and “bodily injury” are highly debated.⁴¹ The only express provision in the 2002 Athens Convention is Article 3(5)(d), which states that the “loss” shall not include punitive or exemplary damages’. Even though some scholars submit that the term “personal injury” under Article 3 of the 2002 Athens Convention should be interpreted wider than the term “bodily injury” under the Montreal Convention Article 17,⁴² it can be said that it still depends on the interpretation of the court seized of the dispute.⁴³ On

⁴⁰ On the other hand, Berlingieri claims that Article 6 provides for merely a rule on the burden of proof, see F. Berlingieri, *International Maritime Conventions, Volume I: The Carriage of Goods and Passengers by Sea*, Informa Law from Routledge, Oxon and New York 2014, p. 267.

⁴¹ While the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed in Warsaw on 12.10.1929, Article 17 consists of the term “personal injury”, and in the Montreal Convention Article 17, the preferred term is the “bodily injury”.

⁴² D. Testa, *Liability and Insurance for the Carriage of Passengers by Sea under Regulation 392/2009: Providing a Lifeline to the Cruise Industry and Ensuring Proper Compensation for Passengers in the Event of Accidents*, ‘ELSA Malta Law Review’ 2013, 3rd ed., p. 142, p. 147; B. Kröger, *Passengers Carried by Sea – Should They Be Granted the Same Rights as Airline Passengers?*, ‘CMI Yearbook’ 2001, p. 244, pp. 248-249.

⁴³ E. Røsæg, *News under the Athens Sun – New Principles and Lost Opportunities of the Athens Convention 2002*, ‘Scandinavian Studies in Law’ 2004, vol. 46, p. 153,

the other hand, the preparatory works of the 2002 Protocol indicate some remarks on that subject as well. During the preparation of the Protocol, the ICS submitted a proposal regarding the clarification of the terms “personal injury” and “loss”. According to the proposal, the clarification of the two terms were to be included in Article 3(5) under subpara. (c) and (d), respectively.⁴⁴ However, only the clarification for “loss” became part of the Convention under Article 3(5)(d), and the IMO Legal Committee decided to retain the term “purely emotional distress” in the draft text.⁴⁵ The rejected text of the proposed subpara. (c)⁴⁶ included the clarification as follows: “personal injury” shall not include purely emotional distress in the absence of any physical injury.’ According to the Report of the 83th Session of the IMO Legal Committee, “most delegations were of the view that the protocol should make provision for this kind of damage”.⁴⁷ In addition to this, the Committee also reminded that this type of damage had been within the scope of the 1974 Athens Convention and many national jurisdictions.⁴⁸

p. 172. This fact also leads authors to voice their concern about the risk of different interpretations of the courts from different States, see Kröger, *op. cit.*, p. 249; Soyer, *op. cit.*, pp. 193-194; N.A. Martínez Gutiérrez, *Limitation of Liability in International Maritime Conventions*, Routledge, Oxon and New York 2011, p. 131, n. 137.

⁴⁴ For the text of the proposal, see IMO, LEG 83/4/6, *supra* n. 33, p. 5, para. 24. The ICS demonstrated as follows:

ICS believes the Protocol should specify that the damages recoverable by a passenger do not include compensation for purely “emotional distress” in the absence of any physical injury. Given the myriad activities aboard cruise ships, for example, such clarification would protect passengers who have a legitimate basis to seek damages for distress, while discouraging the assertion of speculative or even frivolous claims. In this respect, we note that the Montreal Convention (article 17) refers to “bodily injury” rather than “personal injury”.

⁴⁵ IMO, LEG 83/14, *supra* n. 36, p. 9, para. 34.

⁴⁶ It should be reminded that in the adopted version of 2002 Athens Convention, Article 3(5)(c) defines the “defect in the ship”.

⁴⁷ *Ibid.*, p. 9 para. 32.

⁴⁸ “In this regard, it was pointed out that this type of damage was not excluded from the 1974 Convention, that it was a well-established head of damage in many jurisdictions and that the danger of frivolous claims being made under this head of damage was small.”, *ibid.*, p. 9, para. 33.

2.5. Personal accident insurance

The headline of Article 4 bis of the 2002 Athens Convention⁴⁹ is “Compulsory Insurance”, while Article 4 bis(1) envisages the maintenance of an “insurance or other financial security” as compulsory. “[O]ther financial security” is described as “such as the guarantee of a bank or similar financial institution” in the same provision. Moreover, this requirement shall be subject to “cover liability under this Convention in respect of the death of and personal injury to passengers”, which means that, at first glance, the type of the insurance under Article 4 bis(1) is understood as the liability insurance. It should be noted that Article 4 bis, dealing with compulsory insurance, mainly follows the pattern established by the 1969 International Convention on Civil Liability for Oil Pollution Damage (hereafter “CLC”) and its 1992 Protocol,⁵⁰ along with other Conventions⁵¹ adopted by the IMO in which the same provisions had more or less been repeated. However, the 2002 Athens Convention differentiates from all these Conventions by its subject matter – the liability arising from the contract of carriage, whilst other Conventions are on the liability for pollution damage. The claimant under the 2002 Athens Convention may be the party to a contract of carriage, i.e. the passenger who suffers loss, or at least his or her heirs or dependants. Thus, entering into a contract of PAI for the benefit of the passengers might be an efficient solution for the carriers in terms of compulsory financial security. However, the wording of Article 4 bis(1) leads to the question of whether it is possible to obtain PAI as the financial security to fulfil the requirement of the 2002 Athens Convention, or shall the only type insurance accepted be the liability insurance? In other words, it is not clear whether PAI falls within the meaning of “other financial security”, taking into consideration the emphasis on the liability insurance as the “insurance (...) to cover the liability” under Article 4 bis(1). Another interpretation could be the acceptance of PAI as the insurance covering the liability, where this interpretation might still remain questionable.

⁴⁹ 2002 Protocol Article 5.

⁵⁰ Protocol of 1992 to amend the International Convention on Civil Liability for Oil Pollution Damage, 1969, signed on 27.11.1992 and entered into force on 30.5.1996.

⁵¹ These are: International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996; International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001; and Nairobi International Convention on the Removal of Wrecks, 2007.

The answer to the abovementioned question can be given looking at the preparatory stage of the 2002 Protocol.⁵² During the beginning of this stage, the draft text included two options, one of which (“Option I”) explicitly accepted PAI as a financial security, and the second (“Option II”) explicitly excluding it.⁵³ Even though the Option II was subsequently adopted by the IMO Legal Committee, following subsequent discussions on the draft text,⁵⁴ the expression excluding PAI was removed from the text, and this provision remained on the adopted version of the 2002 Protocol⁵⁵. This solution appeared as a compromise between the opposing views, and the parties finally agreed on a provision which primarily features the liability insurance, but however leaves the door open for PAI.

⁵² Initially, CMI proposed that PAI should be the financial security stipulated under the Protocol, while other Delegations insisted on pursuing the liability insurance as the main type of financial security, since the same principle had been applied in other Conventions. However, at that stage, the question of PAI was left for further discussion. See IMO, LEG 78/11, Report of the Legal Committee on the Work of Its Seventy-Eighth Session, 2.11.1998, pp. 4-5, paras 18-19.

⁵³ For the texts including these two options, see IMO, LEG 79/4/3, Annex 1, *supra* n. 22, p. 3. On that stage, the International Chamber of Shipping was strongly opposed to including PAI as the financial security, see *ibid.*, p. 1. Therefore, the International Chamber of Shipping submitted a proposal according to its view, for the proposal, see IMO, LEG 79/4/7, Provision of Financial Security, Submission by the International Chamber of Shipping, Annex, 19.3.1999.

⁵⁴ The IMO Legal Committee took into consideration the abovementioned proposal made by ICS; however, the discussions on that subject went on. For the discussions and the decision of the IMO Legal Committee, see IMO, LEG 79/11, Report of the Legal Committee on the Work of Its Seventy-Ninth Session, 22.4.1999, p. 5, paras. 21-26. In the draft text submitted by Norway during the 80th Session of the Legal Committee, the expression excluding PAI was left in brackets and hence became a matter of discussion. For the mentioned draft text, see IMO, LEG 80/3, Provision of Financial Security, Draft text for a protocol to the Athens Convention, Submission by Norway, 6.8.1999, p. 2.

⁵⁵ It should be added that the limitation of the type of the insurance became subject to criticism in respect to the incompatibility with the rules of European Union competition law. For the relevant discussions and the decision of the IMO Legal Committee, see IMO, LEG 80/11, Report of the Legal Committee on the Work of Its Eightieth Session, 25.10.1999, pp. 6-7, paras. 21-24. Furthermore, such an exclusion is regarded as incompatible with the free movement of services under EU Law, see E. Røsæg, *Compulsory Maritime Insurance*, ‘Scandinavian Institute of Maritime Law Yearbook’ 2000, MarIus, no. 258, p. 179, p. 192.

3. Conclusion

To summarise, the above conclusions derived from the preparatory stages of the 1974 Athens Convention, as well as the 2002 Protocol, may be submitted as follows:

1. Pursuant to the Convention, there shall be only one performing carrier, either the owner, charterer or operator of the ship, depending on which one of them performs the carriage. Except the meeting the requirement envisaged by the definition under the Convention, there shall not be any additional criterion to be applied, such as the existence of an entrust by the carrier to this performance, or a performance to be carried out by virtue of the carrier. Furthermore, the performing carrier is the person who shall maintain the compulsory insurance; thus, there is no obligation to assign the carrier as the insured person along with the performing carrier under the compulsory insurance contract.
2. The contract of carriage, as defined under Article 1(2) of the 2002 Athens Convention, does not include any expression providing a clue regarding the prerequisite of a consideration for such a contract. Therefore, the preparatory works of the 1974 Athens Convention shows that the answer to this question was left blank by the will of the Delegations. The lack of any amendment under the 2002 Protocol means that the varying approach pursued by national legal systems towards the 1974 Athens Convention in terms of the meaning of the contract of carriage might continue following the entrance into force of the 2002 Protocol.
3. Article 6 of the 1974 Athens Convention, which is preserved by the 2002 Protocol, opens a way for the exoneration of liable parties, wholly or partly due to the contributory fault or neglect of the passengers. It is understood, from the observations of the IMO Legal Committee made during the preparatory stage of the 2002 Protocol, that this provision shall be applied even when the carrier and/or the performing carrier are strictly liable according to the Convention. However, it is suggested that it is more appropriate to not apply this provision by the courts when national rules also demonstrate, for the exoneration of the liable party, some criteria other than the fault or neglect of the injured party.

4. The 2002 Athens Protocol provides for the liability for loss resulting from “personal injury” under Article 3. The term “personal injury” is regarded as differing from the term “bodily injury”, which was introduced by the Montreal Convention regulating the contracts of carriage by air. Furthermore, it is observed that the IMO Legal Committee admitted the application of the liability provision of the Convention to mental injury. The aim of the continuity of this application under the 1974 Athens Convention led to the rejection of a proposal for an additional provision to the 2002 Protocol excluding “purely emotional distress” from the scope of the term “personal injury”. Therefore, the suggestion in this paper is that Article (3) of the 2002 Athens Convention shall be applied in cases where the passenger suffers mental injury.
5. Finally, the 2002 Athens Convention enables carriers and/or performing carriers to obtain personal accident insurance in respect of the compulsory insurance under Article 4bis of the Convention. The abolishment of the provision in the draft text of the 2002 Protocol excluding such possibility indicates that this option is left open to the person or persons who are under the obligation to obtain financial security.

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