

Carriers' liability for death or personal injury to passengers under the international maritime convention

The 2002 Athens Convention and 2006 IMO Reservations and Guidelines for implementation of the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea 2002.

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Dedication

In the loving memory of my father who taught me to keep focusing on what is important and who continues to inspire me in both law and life.

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1 Introduction

1.1 Topic and relevance

Shipping is international in character. During a voyage, a vessel may visit several countries, while sailing under the flag of a another country and potentially under contract with yet another country. This could have significant legal implications.¹ States therefore have recognized the need for international regulations in order to secure a unitary and sustainable system that ensures the safety of both providers and users.

The carriers within the passenger transport industry carry a substantial risk of catastrophic loss. In 2015, almost 23 million passengers² were transported by cruise ship, not including the numerous passengers aboard other means of transportation at sea. Considering the fact that some ships are able to handle up to 6,000 persons,³ there is a clear potential for devastating loss.

On 28 April 2014, the 2002 protocol of the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea entered into force, upon which several significant adjustments were made to the liability regime already in place. The protocol was accompanied by the 2006 IMO Reservations and Guidelines for the implementation of the Athens Convention to allow the limitation of liability in respect of claims relating to war or terrorism.

The subject of this thesis is the carrier's liability for bodily injury or death to passengers in accordance with the rules of the 2002 Athens Convention and the IMO Reservations and Guidelines. The purpose is to clarify the carrier's legal liability for personal injury or death to passengers. I will examine if and to what extent this liability is limited and evaluate the circumstances in which legal obscurity occurs.

1.2 Method

I will use the ordinary legal method based on the study and interpretation of law, conventional wording, and preparatory works. The aim of this thesis is to problematize the legal

¹ Falkanger, 2011, p. 24

² Cruise Maker Watch, *Growth of the Cruise Line Industry* (2015) <http://www.cruisemarketwatch.com/growth/>

³ Wikipedia, s.v. "List of world's largest cruise ships,"

https://en.wikipedia.org/wiki/List_of_the_world's_largest_cruise_ships

environment and the current relevant legal sources, thus clarifying the legal framework. When there is no clear legal position, I will attempt to highlight any gaps or ambiguities.

1.3 Legal source

After the agreement of the 2002 protocol to the Athens Convention the European Union(EU) expressed its approval. The EU did not pursue any plans for a regional regime; however, it encouraged member states to ratify the Protocol.⁴ The EU stated that parts of the Protocol were the exclusive competence of the European Union and therefore necessitate the EU becoming a Contracting Party to it⁵. To achieve a uniform passenger liability regime and make it fully enforceable in the EU, the Athens Protocol as well as the IMO Guidelines was incorporated into EU law by regulation and two council decisions⁶.

The scope of the Athens Convention is international carriage⁷, but only when the vessel is flying the flag of a State Party, the place of departure or destination is in a State Party or the contract of carriage has been made in a state party to the convention⁸. There is however nothing in the convention preventing states from applying the convention also on domestic carriage.

Norway has ratified the convention on independent grounds and is a State party to the convention. The convention including the IMO guidelines was adopted in to the Norwegian Maritime Code⁹ section 418¹⁰, and entered in to force on 1st of January 2014. Furthermore, the EU Regulation appendix XIII nr 56x¹¹ was adopted¹² by the Maritime Code, extending the scope of the convention to also include domestic passenger transport by sea¹³.

⁴ Røsæg, 2015, pp. 380 and Press release IP/03/884, Brussels, 24 June 2003, see http://europa.eu/rapid/press-release_IP-03-884_en.htm?locale=en

⁵ In accordance with 2002 Athens Convention article 19

⁶ Røsæg, 2015, pp. 395 and Regulation of the European Parliament and of the Council (EC) No. 392/2009 on the liability of the carriers of passengers by sea in the event of accidents (2009) OJ L131/24; Council decision 2012/22/EU concerning the accession of the European Union to the Protocol of 2002 to the Athens Convention relating to Carriage of Passenger and their Luggage by Sea, 1974, with the exceptions of articles 10 and 11 thereof (2012) OJ L8/1; and Council Decision 2012/23/EU concerning the accession on the European Union to the Protocol of 2002 to the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 1974, as regards articles 10 and 11 thereof (2012) OJ L8/13. The regulation is already in force (Art. 12)

⁷ 2002 Athens Convention article 2, in accordance with article 1.9

⁸ Ibid. Article 2.1(a)(b)(c)

⁹ The Norwegian Maritime Code. 24 June 1994 no. 39 (Sjøloven) last edited by law 7th of June 2013 nr. 30 from 1st of January 2014

¹⁰ The Norwegian Maritime Code Chapter 15, part III, section 418

¹¹ European Parliament and of the Council (EC) No. 392/2009 on the liability of the carriers of passengers by sea in the event of accidents (2009) OJ L131/24;

Moreover, Norwegian law is presumed to be in harmony with its international obligations.¹⁴ I will not examine further the EU ratification and implementation of the convention. In the following I presume that the conditions of application of the convention are met.

1.4 Structure of the thesis and demarcation

The dissertation is divided into four parts. The first part provides an overview of the legislative history of the Convention, which is the subject of this thesis. This information is important in order to understand the reasons for the rules set by the convention; it also provides guidance for the interpretation of these regulations. The second part gives an overview of the carrier's liability, and the third part outlines the limitations of this liability with a particular focus on the limitations made by the IMO guidelines, which are related specifically to the risks of war, radioactive contamination and cyber-attack. Finally, in the fourth part, I will evaluate briefly the state of the law and the legal implications of changing the regulations, specifically with regards to the Cyber Attack Exclusion.

The convention sets forth a compulsory insurance requirement. The preparatory work was largely influenced by this requirement. I will not examine the responsibility of the carrier to buy insurance or the legal implications and consequences of failing to do so. Nor will I examine if such insurance is necessary and, if so, to what extent.

I will limit the scope of the thesis to the death and personal injuries to passengers.

1.5 Definitions

In the 2002 Athens Convention articles 3 and 4, a differentiation is made between the "Carrier" and the "Performing Carrier." In accordance with article 1(a), "*the 'carrier' is the person by on or on behalf of whom a contract of carriage has been concluded.*" The performing carrier is the person who "*actually performs the whole or part of the carriage.*" See article 1(b). In the 2002 Protocol, a third definition was added in section 1(c), which refers to the one "*who actually performs the whole or part of the carriage.*" Depending on the circumstances, this would be the performing carrier or, in some cases, the carrier. The reason for this additional definition is to ensure that the compulsory insurance requirement in article 4bis subsection 1 applies to whomever performs the carriage whether he or she is the contracted carrier or a performing carrier.

¹² The Norwegian Maritime Code Chapter 15, part III, section 418

¹³ Ibid. article 1.2

¹⁴ Falkanger, 2011, p. 33

Article 4 states that the carrier shall be liable for the entire carriage, as well as the part of the carriage performed by the performing carrier. However, the performing carrier will be liable only for the part of the carriage performed by him.

The servants and agents of the carrier or performing carrier are entitled to invoke the same defense and limits of liability as the carrier and performing carrier as long as they act within the scope of their employment¹⁵.

For the purpose of this thesis, I will not differentiate between carrier and performing carrier or their servants or agents because the convention does not do so in discussing the extent and limitation of liability. Hence, the carrier and performing carrier hereinafter will be referred to as carrier.

2 Athens Convention of 2002 and IMO Reservations and Guidelines for implementation of the 2002 Athens Convention

2.1 Historical context

2.1.1 The International Maritime Organization (IMO)

The shipping industry has recognized the need for a permanent international body to promote maritime safety more effectively than in the past.¹⁶ In 1948, a United Nations Convention established the Inter-Governmental Maritime Consultative Organization (IMCO), which was renamed the International Maritime Organization (IMO)¹⁷ in 1982.

The purpose of these organizations is determined in the Convention article 1(a):

To provide machinery for co-operation among Governments in the field of governmental regulation and practices relating to technical matters of all kinds affecting shipping engaged in international trade; to encourage and facilitate the general adoption of the highest practicable standards in matters concerning the maritime safety, efficiency of navigation and prevention and control of marine pollution from ships; and to deal with administrative and legal matters related to the purposes set out in this Article.¹⁸

¹⁵ 2002 Athens Convention article 11

¹⁶ International Maritime Organization (IMO), 2016a

¹⁷ Hereinafter IMO

¹⁸ IMO Convention 1984

Today, the IMO consists of 171 member states, including Norway, the UK, and the US. The IMO also includes non- and inter-governmental organizations, such as the International Group of P&I Clubs (IGP&I)¹⁹ and the Organization for Economic Co-operation and Development (OECD).²⁰ The IMO has been instrumental in developing and establishing conventions on safety and security, the prevention of pollution, and liability and compensation.

2.1.2 First attempts

Historically, the potential for catastrophic loss in the industry of passenger transport is well known. Several major accidents have been public knowledge, amongst them the 1912 sinking of the *RMS Titanic*²¹ and the 1967 grounding of the *Torrey Canyon*.²² These and similar major incidents led to the adoption by IMO of a comprehensive international liability and compensation regime, resulting in significant changes to the international regulations with the intention of improving the general safety at sea. Regulations were given for not only damages caused by oil spills and the carriage of hazardous and noxious substances at sea but also claims for the death of, personal injury to, and loss of and damage to baggage of passengers carried at sea.²³ Despite these efforts, maritime incidents continue to happen. Several have resulted in catastrophic losses, both of human lives and property, such as the damage in 1987 to the *Herald of Free Enterprise*²⁴ and the fire in 1990 on the *M/S Scandinavian Star*²⁵.

History has shown that maritime accidents involving the loss of lives have a large effect on the legal environment, often leading to improvements in the regulation of safety at sea.²⁶ The first convention, which specifically regulated the Carriage of Passengers by Sea, was adopted

¹⁹ International Maritime Organization (IMO), 2016b

²⁰ International Maritime Organization (IMO), 2016c

²¹ The *RMS Titanic* collided with an iceberg on the 14 April 1912 and sank due to the damages to the hull. Out of the total of 2 200 passengers and crewmembers, 1,517 persons died. The tragic outcome of this accident led to the development of the first international regulation concerning the safety of merchant ships, referred to as the SOLAS convention. The convention is in force today, SOLAS 1974. [http://www.imo.org/en/About/Conventions/ListOfConventions/Pages/International-Convention-for-the-Safety-of-Life-at-Sea-\(SOLAS\)-1974.aspx](http://www.imo.org/en/About/Conventions/ListOfConventions/Pages/International-Convention-for-the-Safety-of-Life-at-Sea-(SOLAS)-1974.aspx)

²² The *Torrey Canyon* ran aground on 18 March 1967, resulting in the world's first oil tanker disaster. The accident was caused by a confluence of events, hereunder ship design, autopilot design, competence of the captain and crew, and time pressure. The severity of the disaster led to the creation of the Civil Liability Convention (CLC) in 1969 and the Fund Convention (1992). <http://www.professionalmariner.com/March-2007/Torrey-Canyon-alerted-the-world-to-the-dangers-that-lay-ahead/>

²³ IMO Document IMO/ILO/WGLCCS 7/2/5

²⁴ The *Herald of Free Enterprise* capsized in the English channel in March 1987; 193 passengers and crew members lost their lives. <http://www.ship-disasters.com/passenger-ship-disasters/herald-of-free-enterprise/>

²⁵ On 7 April 1990, 158 passengers lost their life on the *M/S Scandinavian Star* due to a fire on board the ship. <http://stiftelsen-scandinavianstar.no/om%20hendelsen.html>

²⁶ Gutiérrez, 2011, p. 113

in 1961.²⁷ Followed by the first Conventions relating to the Carriage of Passengers luggage by sea²⁸ in 1967. However, neither Conventions were recognized by a sufficient number of states, and therefore were never properly implemented. Consequently, for a long time the maritime sector was characterized by freedom of contract, which put the passengers in a vulnerable position because the carriers often used these contracts to limit their liability.²⁹

2.1.3 The 1974 Athens Convention and the 1979 Protocol to the Athens Convention

There was a persistent need for operative international conventions on the issues of passenger safety. In 1974, a sufficient number of states acknowledged this need. The Athens Convention relating to the Carriage of Passengers and their Luggage by Sea (PAL)³⁰ was adopted in December 1974, which finally established international regulations on these issues. The convention harmonized the two earlier conventions³¹ and entered into force on 28 April 1987. At the time, this convention was seen as “a milestone in the progressive development of maritime law,”³² putting an end to the low acceptance of the previous 1961 Passenger Convention and 1967 Luggage Convention.

The 1976 Protocol changed the unit of account from francs to SDR.³³ To facilitate the comparison, I will refer only to SDR in the following sections.

2.1.4 The 2002 Protocol to the Athens Convention

In an attempt to improve passengers’ security and to offer adequate compensation to claimants, in the 1990 Protocol³⁴ a proposal to increase the limits of liability was presented to the Convention. However because of the lack of acknowledgement, this Protocol was never

²⁷ The International Convention for the Unification of certain Rules Relating to the Carriage of Passengers by Sea, adopted at Brussels, 29 April 1961 and entered in force 4 June 4 1965 (herein cited as the “1961 Passenger Convention”).

²⁸ The International Convention for the Unification of certain Rules Relating to the Carriage of Passengers’ Luggage by Sea, adopted at Brussels, 27 May 1967, but never entered in force (herein cited as the “1967 Luggage Convention”).

²⁹ Gutiérrez, 2011, p. 117

³⁰ Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, herein cited as the 1974 Athens Convention.

³¹ 1961 Passenger Convention and 1967 Luggage Convention

³² Müller, 2000, p. 667

³³ International Monetary Fund, 2015. SDR is an international value asset, created by the International Monetary Fund (IMF) in 1969. The SDR also serves as unit of accounts in IMF and other international organizations. Its value is currently based on four currencies; US dollar, euro, Japanese yen and pound sterling. During the course of 2016 Chinese renminbi will be added to the currencies. Currently 1 SDR equals 1.377790 USD.

³⁴ Herein after cited as the 1990 Protocol

entered into force³⁵ and is now closed to ratification.³⁶ In 2002, a second attempt was made to improve the security of passengers. The 2002 Protocol to the Athens Convention made considerable changes to the established regime. One of the main features of the 2002 Protocol was the change from a fault-based liability system to a strict liability system for so-called “shipping incidents.” The features also included the requirement of compulsory insurance, an obligation that caused much concern in the international market.

In addition, the Protocol went further by increasing the minimum limits of liability and giving states the authority to impose unlimited liability. The general minimum was set at SDR 400,000 per capita. This was a significant increase from the 1974 Athens Convention, and it more than doubled the amount proposed in the 1990 Protocol. At the time, these per person limits were unheard of in the market, and they were well above normal requirements. However, the market was able to rearrange their agreements to fit the new demands³⁷. Lastly, the sustainability of the Convention was improved by establishing a regime for revision and amendments.³⁸

2.1.5 The 2006 IMO Reservations and Guidelines for implementation of the Athens Convention 2002

The work on the Athens Convention 2002 is characterized by the desire to ensure passengers correct and optimal security within a framework that is adapted to the sector and market within which they operate and therefore possible to implement.

These changes, specifically, those related to terrorism risks, were opposed on the grounds that they were not feasible. The insurance industry³⁹ argued that the extent of coverage requested, specifically terrorism-related risk, and the limits of liability requested were not insurable in the market because no insurer would provide the necessary capacity. The carrier would therefore not be able to meet the compulsory insurance requirements for terrorism-related risks, and implementing the Protocol 2002 would put their operation at risk.⁴⁰

In response to the concerns of the insurance industry, the state parties, in collaboration with the insurance industry and the IMO correspondence group, developed draft guidelines with

³⁵ Gutiérrez, 2011, p. 128

³⁶ 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 article 17-5 (c)

³⁷ Røsæg, Erik, The Athens Convention on Passenger Liability and the EU, I: *The Hamburg Lecture on Maritime Affairs 2007 & 2008*, Jürgen Basedo, Ulrich Magnus and Rüdiger, 16, 2009, p. 55

³⁸ 2002 Athens Convention article 22 and article 23

³⁹ IMO Documents LEG 90/6/2

⁴⁰ Ibid.

the intention of reducing the concerns related to acts of terrorism and damage caused by biochemical and electromagnetic weapons.⁴¹ The use of reservations was considered the preferred solution and in line with article 19 of the Vienna Convention.⁴²

The 2006 IMO Reservations and Guidelines for the Implementation of the Athens Convention 2002 were finally adopted by the legal committee during its 92nd Session. Included were three reservations to the convention, which were in line with the conditions set out by the insurance market:

- War Automatic Termination and exclusion;
- Institute Radioactive Contamination, Chemical, Biological and Electromagnetic Weapons Exclusion; and
- Institute Cyber Attack Exclusion Clause

2.2 Summary

In accordance with article 15.3 special provision, the consolidation of the convention and the protocol was established, and the convention was named the 2002 Athens Convention. The convention's main objective was to provide a concise international legal framework for the liability of the carriers. Hence, minimum standards of passenger security were established. The level of security set by the convention was high compared to other major international conventions, such as the Convention on Civil Liability for Oil Pollution Damage.⁴³ In accordance with the limits of liability set forth in the 2002 Athens Convention article 7, the exposure for a 3,000 passenger ship is almost USD 1.7 billion. In comparison, the very largest ULCC⁴⁴ under the CLC convention, including the TOPIA⁴⁵ contributions, would be less than USD 500 million.^{46,47}

⁴¹ IMO Document LEG 90/15, paragraph 355 et seq. and Assembly resolution A.988(24)

⁴² The Vienna Convention on the Law of Treaties, 1969. The 2002 Athens Convention poses no restriction with regard to the use of reservations.

⁴³ International Convention on Civil Liability for Oil Pollution Damage, 1992, hereinafter cited as CLC

⁴⁴ A ULCC is a Ultra Large Crude Carrier, for more details <https://en.wikipedia.org/wiki/ULCC>

⁴⁵ TOPIA stands for the Tanker Oil Pollution Indemnification Agreement 2006, see <http://www.iopcfunds.org/about-us/legal-framework/stopia-2006-and-topia-2006/> It is a voluntary agreement that was set up to indemnify the 1992 Fund and Supplementary Fund, respectively, for compensation paid above the ship owner's limit of liability under the 1992 CLC, up to certain amounts.

⁴⁶ The maximum amount under CLC article V is SDR 89,770,000. The compensation under TOPIA 2006 would come in addition. In accordance with TOPIA art. XVI the Supplementary Fund is indemnified for 50% of any amounts paid in compensation in respect of incidents involving tankers entered in the agreement. See <http://www.iopcfunds.org/about-us/legal-framework/stopia-2006-and-topia-2006/>. The maximum liability under the TOPIA would be 50 % of the difference between the maximum liability under the Convention on the Establishment of an International Fund for Oil Pollution Damage, 1992 (the Fund convention) which in accordance with article 4(4)(b) is SDR 203 million, and the maximum liability under the International Fund

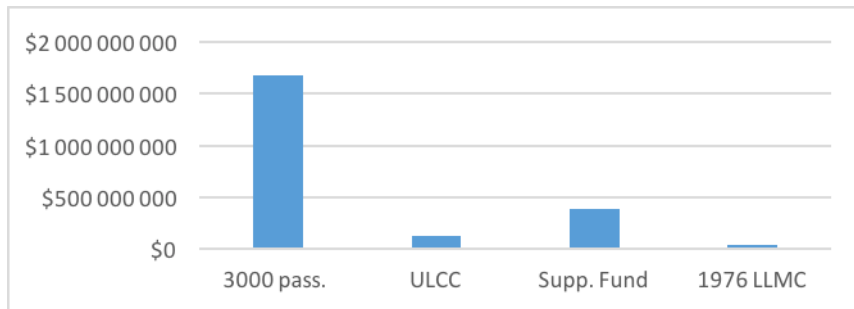


Figure 1. Comparison in USD⁴⁸

In addition to the increased limits of liability, two main factors contributed to the enhanced security of passengers. First is the introduction of strict liability, and second is the requirement of compulsory insurance.

For the most part, the revised convention was received well by the state parties. However, concerns were raised about the new and broader scope of liability. The international insurance providers argued that because they would not be able to provide the compulsory insurance coverage requested, the carriers businesses would be at risk. As a compromise, in order to facilitate the international acceptance and implementation of the convention, a set of reservations and guidelines for implementation were agreed.

The scope of the issues related to these guidelines are discussed later in this thesis.⁴⁹

3 Carriers' liability

3.1 Carriers' liability under the 2002 Athens Convention

3.1.1 Strict liability

Strict liability occurs when the law imposes absolute liability without fault, such as neglect or tortious intent. The fact that the damage has occurred is sufficient to establish liability provided that there is causality between the losses incurred and the incident.

for Compensation for Oil Pollution Damage, 1992 (Supplementary Fund protocol), which after article 4 is SDR 750 million. That would be 50 % of SDR 547 million.

⁴⁷ Thomas (2007), p. 209

⁴⁸ Ibid.

⁴⁹ See Section 5

In the 2002 Athens Convention article 3.1, the carrier is imposed strict liability for so-called “shipping incidents.” Shipping incidents are⁵⁰ defined as “*shipwreck, capsizing, collision or stranding of the ship, or explosion or fire in the ship, or defect in the ship.*”

Based on the natural understanding of language, shipping incidents will be incidents that by definition are related to shipping. Accidents such as shipwrecks and capsizing are unique to this industry and therefore comprise a natural part of the carriers overall risk. On the contrary, injury to passengers, such as by falling and hurting themselves, which could just as easily happen on land as it could at sea, is not included. The reason for imposing strict liability is to provide better protection to the public in areas where it is perceived that there is a need to provide such protection.

Moreover, for the types of accidents that fall into shipping incidents, it is assumed that the passengers have minimal or no power to cause, prevent, or influence the outcome. Legislators made an assessment of who was closest to bear the risk and found it fair to presume that these accidents could be a consequence of inadequate navigation or management of the ship, over which only the carrier, if anyone, had control or influence. If not, then the accident in any case would not be within the control of the passenger, and therefore the carriers were the closest to bear this risk.

The convention provides a definition of what constitutes a shipping incident; however, it does not give any definition about the cause of the incident. This could be interpreted as meaning that all accidents resulting in a shipping incident are covered, regardless of cause. The only definition is of shipping incidents resulting from a “defect in the ship.” These are defined as any “*malfunction, failure or non-compliance with applicable safety regulations.*”⁵¹ The intention underlying this definition was to clarify that the strict liability only applies when the defect that gives rise to the claim is related to parts of the ship and the operation of the ship, which are outside the control of the passenger. This would include navigation, propulsion, steering, handling, and to a large extent the parts dedicated to passenger safety and evacuation.⁵² In other words, shipping incidents are not defined by their cause, but by their outcome.

3.1.2 Exceptions to carriers strict liability

The P&I and hull markets have traditionally excluded war risk, including terrorism. Risks related to war and terrorism would then be covered under war risk insurance up to the value of

⁵⁰ 2002 Athens Convention article 3.5(a)

⁵¹ See article 3.5(c)

⁵² Griggs (2005), pp. 115

the hull. Because of the potential for P&I claims to exceed the value of the hull, the Clubs have agreed to provide excess insurance of up to USD 400 million in excess of hull value.

The 2002 Athens Convention sets forth two exceptions to the carrier's strict liability. Firstly, in accordance with article 3.1 (a), the carrier is exempt from strict liability where he or she can prove that the incident was caused by "*war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional, inevitable and irresistible character.*"

The war risk exclusion set forth in section 3.1(a) must be interpreted as fully excluding strict liability for all war related risks. However, the question is if the carrier could still be held liable under the fault-based rule. I will return to this issue in section 4.1.3.

Secondly, the carrier is exempt from strict liability when he or she can prove that the accident was "*wholly caused by an act or omission done with the intent to cause the incident by a third party.*" See section 3.1(b).

Similar to the war-risk exclusion, an issue arises in relation to terrorism risk and the lack of the full exclusion of terrorism. Concerns were raised several times by the P&I clubs that unlike the traditional structure of marine insurance, the 2002 Athens Convention is open to terrorism-related risks being covered by non-war insurers and that the limits of liability required for terrorism-related risk would far exceed the available coverage under war-risk insurance.

Terrorism is defined as "*the unlawful use of violence and intimidation, especially against civilians, in the pursuit of political aims.*"⁵³ Because the Athens Convention does not contain a definition of terrorism, it must be assumed that the general definition will apply. This definition is broader than the definitions made by the clubs in their corresponding war and terrorism exclusions⁵⁴. Based on the above, it is clear that acts of terrorism would fall within the scope of the exclusion in section 3.1(b) and thus, as a starting point, would be excluded from the coverage requested under the Convention.

However, a concern raised by the P&I clubs was that the wording would be open to interpretation and ambiguity in a claims situation and that in reality carriers would have a

⁵³Oxford dictionaries, s.v. "terrorism." <http://www.oxforddictionaries.com/definition/english/terrorism>

⁵⁴ See examples at <http://folk.uio.no/erikro/WWW/corrgr/insurance/terror.pdf>

problem using the defense in section 3.1(b).⁵⁵ The clubs claimed that the carriers could be held liable for the effects of terrorism because of minor errors in the preventive measures because the claimant could always argue that the carrier had to bear some of the responsibility for not preventing the act of terror. The consequence would be that the exclusion of acts “*wholly caused*” would often be unusable in losses caused by acts of terror.

In response to the concerns of the insurance markets, during the negotiations, a proposal⁵⁶ was presented to limit the carrier’s liability to fault-based liability. In accordance with the proposal, carriers would only be liable if they had made a “*major contribution to the damage*.”⁵⁷ The P&I clubs and the International Union of Maritime Insurance⁵⁸ raised concerns, pointing to the ambiguousness of the wording and potential issues related to claims handling. The main concern was the potential for different interpretations of the criteria “*major contribution*” in different jurisdictions, which could result in different coverage for different passengers suffering a loss from the same incident.⁵⁹ The suggestion was therefore rejected.

The consequence of the above is that the exposure for liability for terrorism arises where the carrier has not acted diligently with due care in preventing the passengers from being exposed to terror, such as insufficient security measures and poor control of passengers. Arguably, in such events the incident would not be caused entirely by the third party, and the carrier would not be exempt from liability.

The question is then whether the carrier had fulfilled his duties in securing the vessel. The International Ship and Port Security code (ISPS)⁶⁰ is assumed to set the minimum standard of obligations and due diligence for the carrier, and the carrier can use the fact that they have followed their obligations under the code as evidence of due diligence. However, actions in line with the code cannot be used as conclusive evidence, and each incident must be assessed individually. One of the main reasons is that the person responsible for ensuring sufficient security under the ISPS is not always the same as the liable party under the Athens Convention.⁶¹ Under the Athens Convention, the carrier is a party to the contract of carriage,

⁵⁵ IMO documents LEG/CONF.13/11

⁵⁶ IMO documents LEG 91/4/1

⁵⁷ Ibid. Annex, section 1.4 (option 2)

⁵⁸ Hereinafter cited as IUMI

⁵⁹ Submission by the International Group of P&I Clubs and the International Union of Marine Insurers 28.03.2006. See <http://folk.uio.no/erikro/WWW/corrgr/insurance/P&I28Mar06.pdf>

⁶⁰ International Ship and Port Facility Security Code, 2002

⁶¹ See the statement by the Swedish government to the IMO correspondence Group on 2 July 2004 at <http://folk.uio.no/erikro/WWW/corrgr/insurance/Sweden11jul.pdf>

whereas under ISPS, the responsible party could be the carrier or someone else, such as the performing carrier or the port authorities. Therefore, it could be the case that the carrier has no obligations under ISPS. In the preparatory work to the convention, an attempt was made to define the carrier's obligations to prevent terrorism; however, the attempt failed.⁶²

Because the exclusion in section 3.1(b) only applies to acts "wholly caused" by a third party, the article is also open to carrier's liability when the lack of security measures is due to the fault of the port authorities. Liability could also be imposed on the carriers for acts contributing to the lack of security measures, even when these acts do not amount to negligence. Liability would then be limited to SDR 250,000 per capita per incident under the strict liability rule.⁶³ The exclusion is also open to other acts of violence, such as piracy in which the motive for the act is monetary and not political, or when former employee causes an incident in an attempt to seek vengeance. If these acts do not result in shipping incidents, the question would then be whether the carrier could be held liable under the negligence rule.

Traditionally, the P&I clubs have not covered the carrier's liability for terrorism-related risks, or in any case not extended as described above.⁶⁴ In the attempt to mitigate the broad coverage, it was agreed to add three additional exclusions, which are the War Automatic Termination and Exclusion Clause, the Radioactive Contamination, Chemical, Biological, Bio-chemical and Electromagnetic Weapons Exclusion Clause, and the Cyber Attack Exclusion Clause⁶⁵. These clauses will be evaluated further in sections 5.3, 5.4, and 5.5.

3.1.3 Liability for negligence

With regard to all incidents, other than shipping incidents, no changes were made in the 2002 revision of the Convention. The basis of liability is negligence with the reverse burden of proof.⁶⁶

The most common accidents that would fall within the negligence rule would be accidents commonly referred to as "hotel accidents." These could include food poisoning due to bad food in the vessel's restaurants, slip and fall accidents due to lack of maintenance, and similar accidents. It has been argued and agreed that the carrier should not be imposed a stricter form of liability for these incidents than if he was a hotel owner onshore.

⁶² Thomas (2007), p. 211 (Erik Røsæg –Passenger liability and Insurance)

⁶³ 2002 Athens Convention article 3.1

⁶⁴ Article 3.1(b) and Thomas (2007) p. 211

⁶⁵ These clauses are found in Appendix A to the Athens Convention.

⁶⁶ See the 1974 Athens Convention article 3 and the 2002 Athens Convention article 3.2

In the 2002 Athens Convention article 3.6, the carrier is liable for damage suffered due to an incident that “*occurred in the course of the carriage*” and that is due to the “*fault and neglect*” of the carrier. There is a requirement of negligence by the carrier.

For all incidents, not shipping incidents, the burden of proof is on the claimant. In cases where claims resulting from shipping incidents exceed the limit of strict liability there is a presumption of fault.⁶⁷ The claimant only has the burden of proving that the incident occurred in the course of the carriage and the extent of the loss.⁶⁸

In accordance with article 3, carriers would be liable if the claimant could prove he or she is at fault. The article makes no exceptions to this rule, neither for war nor terrorism-related risks, or any other risks. This means that in addition to the liability as described above,⁶⁹ where the carrier can be blamed for not acting with diligence and due care in preventing terrorism, the carrier can also be held liable for incidents resulting from an act of war. These would include situations in which the vessel enters or fails to leave a war zone. It could however be argued that in this case the incident is the result of this failure and not the result of war, and therefore that the exception in article 3.1(b) would in any case not apply.⁷⁰ If so the carrier could also be liable under the strict liability rule.

The fault or neglect of the carrier includes the fault or neglect of the servants of the carrier acting within the scope of their employment.⁷¹

3.1.4 Contributory fault

The defense of contributory fault was retained in the 2002 Athens Convention.⁷² This means that if the claimant has contributed or wholly caused the incident, the liability of the carrier can be reduced or even ceased completely. This could typically be because of self-induced intoxication or general recklessness.

The rule of contributory fault gives the court freedom to exonerate the carrier from liability in accordance with law of that court. The rule applies regardless of the type of liability, which means that in theory, the carrier also could be freed from liability in shipping incidents. It is however debatable whether a passenger could cause a shipping incident unintentionally. If so,

⁶⁷ 2002 Athens Convention article 3.1

⁶⁸ 2002 Athens Convention article 3.6

⁶⁹ 2002 Athens Convention article 4.1.1

⁷⁰ Thomas (2007), p. 211 (Erik Røsæg –Passenger liability and Insurance)

⁷¹ 2002 Athens Convention article 3.5(b)

⁷² *Ibid.*, article 6

it could be argued that the carrier did not act with diligent care in failing to prevent the incident. If the act of the passenger was intentional, the carrier could be freed from liability in accordance with the exception in article 3.1(b).

3.2 Limits of liability

3.2.1 Limits per capita

The limits of liability for death or personal injury to passengers are regulated by the 2002 Athens Convention article 7. In accordance with article 7.1, strict liability is limited to the amount of 250,000 SDR per capita per incident. However, if the claimant can prove neglect on the carrier's side, the liability could be up to 400,000 SDR per passenger on each distinct occasion. This means that there is no overall aggregate of the limit but that the carrier's maximum potential liability would depend on the number of passengers the ship is licensed to carry.

The above set limit of liability is a combined single limit, which means that if a claim is brought against both the carrier and the performing carrier, the overall liability combined can never exceed this limit.⁷³

In the 1974 Convention, the liability was limited to the equivalent of SDR 46,666⁷⁴ per carriage. The increase in limit was more than 800%. At today's exchange rate in USD, the per capita limit was raised from approximately 64,000 USD to more than 550,000 USD. For a cruise ship carrying 3,000 passengers, this would mean a potential liability of 1,650 billion USD for death or personal injury to passengers. The carrier's own losses such as damage to the hull and machinery, loss of hire, and so on would be additional.

In accordance with the 2002 Athens Convention article 7.2, the state parties are free to regulate any specific provisions in national law to increase the limits of liability. The Convention requires a minimum limit of liability. The state parties are free to increase the limit or impose unlimited liability.

The Athens convention is implemented in Norwegian law, and the government has not opted to increase the limits of liability.

⁷³ 2002 Athens Convention article 12

⁷⁴ 1974 Athens Convention article 7.1. Liability was limited to franc 700 000 per carriage. The franc refer to a unit consisting of 65.5 milligrams of gold of millesimal fineness 900. See article 9.1

The carrier and passenger also have the freedom to agree to a higher limit of liability in contract.⁷⁵ Whether this will actually be applied in practice is uncertain. Historically, carriers have used the freedom of contract to limit their liability rather than to expand it, and it is doubtful that they would offer increased limits of liability, especially considering the level of compulsory limit.

3.2.2 Global limitation

The 2002 Athens Convention article 19 states that the conventions shall not “modify the right or duties of the carrier” with regard to the global limitation of liability. This means that the carrier’s liability could in any case be subject to the rules of global limitation in the states where these rules apply. However, the global limits of limitation have been drastically enhanced.⁷⁶ In the original Convention on the Limitation of Liability for Maritime Claims 1976,⁷⁷ the limit for passenger claims was set to a maximum of SDR 25 million⁷⁸. This convention was amended by the Protocol of 1996 to amend the Convention on the Limitation of Liability for Maritime claims, 1976.⁷⁹ The maximum of 25 million was abolished, and the limit of liability was increased to SDR 175,000 per passenger but without any general maximum.⁸⁰

The maximum limit of liability is set at 175,000 units of account multiplied by the total number of passengers the ship is allowed to carry.⁸¹ For a passenger ship licensed to carry 3,000 passengers, the maximum limit of liability would be 525 million SDR, which today would equal approximately 729 MUSD.⁸²

The LLMC 1996 opens up for the State parties to increase the limit of the carrier's liability.⁸³ Used in combination with the 2002 Athens Convention article 7, the limits of liability imposed by the state could be unlimited.⁸⁴

⁷⁵ See article 10.1

⁷⁶ Thomas (2007), p. 208

⁷⁷ Hereinafter referred to as 1976 LLMC

⁷⁸ 1976 LLMC article 7

⁷⁹ Hereinafter referred to as 1996 LLMC

⁸⁰ 1996 LLMC article 4

⁸¹ *Ibid.*, article 7.1

⁸² International Monetary fund, conversion of SDR, (20.04.16) see https://www.imf.org/external/np/fin/data/rms_sdrv.aspx

⁸³ LLMC 1996 article 6 subparagraph 1.

⁸⁴ Thomas (2007), p. 208

There were some misgivings about the fact that the overall limit of liability is governed by the number of passengers that the ship is allowed to carry. In practice, the carrier could then overfill the ship with passengers, without risking a higher overall limit of liability. It could be questioned whether overfilling the ship is an act of willful misconduct and whether the carrier should be cut off from limiting his liability. However, in order to deprive the carrier of limiting his liability, it is required that there is causality between the act or omission and the loss or damage incurred. In the case that no such causality occurs, the passengers could potentially receive less compensation because the overall compensation would have to be divided among them.

The global limitation is meant to secure the carriers against catastrophic loss. The limitation is dependent on the ships license, not the number of passengers suffering a loss. In practice, the passengers therefore have better security if they are one of a few passengers coming to harm than if several or all passengers suffer bodily injury or death.

In a passenger ship licensed to carry 3,000 passengers, the following illustration applies: If 10 passengers suffer bodily injury or death due to a shipping incident, the total maximum liability of the carrier would be SDR 4,000,000⁸⁵. All claimants could recover their entire losses up to 400,000 SDR. If the ship suffers a catastrophic incident, and all passenger die or are injured, the overall liability of the carrier under the Athens Convention would be SDR 400,000 multiplied by 3,000 passenger, which would be SDR 1.2 billion. The rules of global limitation however set an overall limit of liability at SDR 525 million for a ship licensed to carry 3,000 passengers.⁸⁶ Hence, potentially passengers could suffer up to SDR 675 million⁸⁷ in uncovered losses.

3.2.3 Loss of the right to limit liability

In any case, the carrier loses the right to limit his or her liability if it is proven that the loss occurred due to an intentional act or omission or that the carrier acted recklessly with the knowledge that such damage would probably occur.⁸⁸ The same liability applies to the agents and servants of the carrier.

⁸⁵ SDR 400 000 per passenger times the number of passengers hurt.

⁸⁶ LLMC 1996 article 7, liability for death and personal injury to passengers, is limited to SDR 175,000 multiplied by the number of passengers that the ship is authorized to carry according to the ships certificate. 175,000 multiplied by 3,000 equals 525 million SDR.

⁸⁷ The difference between the total limit of liability under the 2002 Athens Convention and the Global limitation limit under 1996 LLMC

⁸⁸ 2002 Athens Convention article 13 and 1996 LLMC article 4

3.3 Compulsory Insurance

The Convention imposes a compulsory insurance requirement⁸⁹ similar to other strict liability-based conventions, such as CLC⁹⁰, HNC,⁹¹ and the Bunker Convention.⁹²

The convention lays the responsibility for the insurance on the carrier, who “*actually performs the whole or part of the carriage,*”⁹³ that is, the performing carrier, or, in so far as the carrier actually performs the carriage, the carrier.⁹⁴ The certificate of insurance should be issued in respect of each ship⁹⁵. The insurance coverage needs to comply with the requirements of the convention covering the liability as described in order for the vessel to be seaworthy.

In contrast to the CLC⁹⁶, HNC,⁹⁷ and the Bunker Convention⁹⁸, the Athens Convention differentiates between the limit of liability and the required limit of insurance. The minimum limit of insurance equals the limit of strict liability set to SDR 250,000 per person per incident, whereas the carrier can be liable up to SDR 400,000 per capita per incident in the case of negligence.

During the preparatory negotiations of the Convention, one of the objections made by the insurers concerned the high limits of liability. In an effort to meet these concerns without breaking the intention of the convention work, the agreement was made to reduce the requirement of limit of liability in the insurance while keeping the higher limit of liability for the carrier.

4 Limitations in the carriers liability

4.1 Introduction

The requirement of the limits of liability, strict liability, and mandatory insurance is generally difficult to handle, and even more so with regard to terrorism and war risks⁹⁹.

⁸⁹ 2002 Athens Convention article 4*bis*

⁹⁰ CLC article VII

⁹¹ HNC article 12

⁹² Bunker Convention article 7

⁹³ 2002 Athens Convention article 4*bis*(1)

⁹⁴ *Ibid*, See definition in article 1(c)

⁹⁵ *Ibid*, See article 4*bis* (2)

⁹⁶ see. CLC article VII, subparagraph 1

⁹⁷ see. HNC article 12, subparagraph 1

⁹⁸ see. Bunker Convention article 7, subparagraph 1

⁹⁹ Thomas (2007), p. 210

Because the liability imposed on the carrier increased, some corrective actions were taken to limit the liability in order to ensure that the carriers and the insurance market would be able to handle the new demands.

In recent decades, terrorism risks have changed dramatically. The previous tendency of terrorist groups was to focus on governmental buildings, the army, and financial, political, and judiciary targets, whereas terrorists are now more likely to focus on civilian targets.¹⁰⁰ The terrorist attack on the US on 11 September 2001¹⁰¹ greatly influenced the 2002 Protocol to the Athens Convention. After this attack, the insurance market introduced several new exclusions that applied to both the insurance and the reinsurance markets.

During the preparatory works to the Convention, the P&I clubs argued that they would not be able to meet the requirements of the Convention and that liability would need to be limited. In response, the IMO legal committee issued a set of reservations to and guidelines for the implementation of the Convention. The insurance requirements were also modified to be commercially acceptable.¹⁰² Instead of initiating renegotiations, to save time and money, the IMO recommended that states adhere to the reservations of the Convention¹⁰³ in order to secure the implementation of the Protocol.

It is common for state parties to make reservations¹⁰⁴ when ratifying a convention. With the intention of preserving uniformity, the legal committee of the IMO provided a model reservation. The guidelines to the Convention also give the state parties the ability to modify the text to fit within the different legal traditions; however, the reservations should still apply as intended.¹⁰⁵

¹⁰⁰ Aon Risk Solutions, *Changing the face of terrorism (2015)*, <http://www.aon.com/unitedkingdom/products-and-services/industry-expertise/attachments/PublicSector-sep15Changing-face-of-Terrorism.pdf>

¹⁰¹ On 11 September 2001, 19 militants associated with the Islamic extremist group al-Qaeda hijacked four airliners and carried out suicide attacks against targets in the United States. Two of the planes were flown into the towers of the World Trade Center in New York City, a third plane hit the Pentagon just outside Washington, D.C., and the fourth plane crashed in a field in Pennsylvania. Over 3,000 people were killed during the attacks in New York City and Washington, D.C. See <http://www.history.com/topics/9-11-attacks>

¹⁰² Røsæg (2009), p. 55

¹⁰³ IMO Document assembly resolution A. 988(24), available at <http://folk.uio.no/erikro/WWW/corrgr/insurance/988.pdf>

¹⁰⁴ Vienna Convention 1969 article 19 et seq.

¹⁰⁵ 2006 IMO Guidelines paragraph 1.13

The IMO assembly passed a resolution¹⁰⁶ encouraging states to ratify the Convention with the reservations presented by IMO. This resolution does not provide any additional authority, but merely provides legitimacy to the model reservation.¹⁰⁷

The Athens reservations¹⁰⁸ can be amended, which means that the guidelines could be amended to fit the insurance market. In addition, the guidelines are given a flexibility that they would not have had if they had been an integral part of the Convention. However, it is important to note that the state parties do not have to follow the amendments.¹⁰⁹

4.2 Guidelines for the implementation of the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 2002

In Appendix A Insurance clauses referred to in the IMO Guidelines 2.1.1, 2.1.2 and 2.2.1 regarding the implementation of the Athens Convention to the Carriage of Passengers and their Luggage by Sea 2002, the legal committee encourages states to implement the 2002 Athens Convention with the reservations to the same effect “*concerning a limitation of liability for carriers and a limitation of compulsory insurance for acts of terrorism.*” The committee also specifically stated that the reason for these reservations was the “*current state of the insurance market.*”¹¹⁰

In the marine insurance market, it is common practice to buy war insurance from one insurer and non-war insurance from another insurer, which is recognized by the Convention.¹¹¹ The distinction is important because of the difference in the scope of cover, that is, the types of liabilities and losses covered by the insurance.

War insurance is based on the named perils listed in article 2.2 and includes the carrier’s liability for war, revolution, and terrorism to the extent of the liability set forth in the Convention. Non-war insurance is an all-risk insurance that covers every event not considered to fall within the war perils. The non-war insurance market is a large market that consists of both regular insurers and mutual P&I clubs. The clubs are organized as mutual insurance

¹⁰⁶ IMO Document assembly resolution A. 988(24), available at <http://folk.uio.no/erikro/WWW/corrgr/insurance/988.pdf>

¹⁰⁷ Thomas (2007), p. 213

¹⁰⁸ 2006 IMO Guidelines paragraph 1.13

¹⁰⁹ *ibid.*, paragraph 2.1.4.

¹¹⁰ IMO Document Circular letter No. 2758, 20 November 2006

¹¹¹ 2006 IMO Guidelines paragraph 2

associations that provide risk pooling.¹¹² The P&I policies cover the assureds liability, including the liability for loss of life or injury caused to passengers.

War risk underwriters represent a more limited market compared to non-war insurers. Insurance can be bought either through the London market or through mutual associations created by ship owners, such as the DNK.¹¹³ The Norwegian war insurance includes P&I, in addition to hull, machinery, and loss of hire.¹¹⁴

War risk insurance has special features: First, the insurers have the right to change the trading limits set on the policy at any time during the policy period.¹¹⁵ Second, the insurers can suspend coverage completely under certain critical circumstances, which was taken into account in the IMO guidelines to the Convention. The guidelines set forth a specific exclusion applying only to war insurance, the War Automatic Termination, and Exclusion Clause.¹¹⁶

In addition, the guidelines set forth two reservations that apply to both war and non-war insurance: the Institute Radioactive Contamination, Chemical, Biological, Bio-chemical and Electromagnetic Weapons Exclusion Clause (CL. 370) and the Institute Cyber Attack Exclusion Clause (CL. 380).

In section 5.3, I briefly describe the War Automatic Termination and Exclusion Clause before examining the Exclusions in Cl. 370 and Cl. 380 in sections 5.4 and 5.5.

4.2.1 Limitation of carriers liability

The guidelines provide no specific reservation for non-war risks. The limits of liability set forth by the convention apply.

¹¹² The members of the pool are also the owners and the assured. Each year the members pay premiums into the pool. At the end of the insurance year, the accounts are settled, resulting either in the return of premiums to the members or the obligation to pay additional premiums in order to replenish the pool.

¹¹³ Den Norske Krigsforsikring for Skib Gjensidige forening. Hereinafter cited DNK, it is a Norwegian insurance company that insures interests attached to vessels, drilling rigs, and similar movable units against war risk. DNK is organized as a mutual association in which the members are the assured.
<https://www.warrisk.no/about/>

¹¹⁴ See the Nordic Marine Insurance Plan (NMIP), Chapter 15. This is different from the English war insurance in which P&I has to be bought separately.

¹¹⁵ NMIP section 15.9 differentiates between areas designated “conditional” and “excluded.” An example is the terrorist attack on 9/11, which triggered the regulation of the trading limits.
<http://www.gard.no/web/updates/content/53305/war-risk-insurance>

¹¹⁶ Appendix A, see 2006 IMO Guidelines paragraph 2.2.1

With regard to war risk, the carrier's liability is limited to 250,000 SDR per capita and 340 million SDR per ship per incident.¹¹⁷ The extent of war insurance is defined in article 2.2. It includes, but is not limited to, war, revolution, and terrorism.

This limitation has two major consequences: First, the overall liability of the carrier will be the maximum of 250,000 SDR per capita, not 400,000 SDR per capita as per the Convention.¹¹⁸ Second, the total liability for the carrier can never exceed 340 million SDR per incident. The maximum liability is therefore not dependent on the number of passengers the vessel is licensed to carry, which it is for all other risks.

Another major differentiation is that the reservation and limitation apply regardless of the form of liability.¹¹⁹ The maximum limitation of liability is equal to that of the strict liability for shipping incidents under article 3.1 in the 2002 Athens Convention. This limitation mainly affects non-shipping incidents. The only exemption is where the carrier has waived the right to limit his or her liability, or has increased his or her liability in contract,¹²⁰ or has lost the right to limit his or her liability because he or she has acted with intent or reckless knowledge that such loss would probably result.¹²¹

4.2.2 Compulsory insurance and limitation of liability for insurers

The compulsory insurance requirements are adjusted accordingly.¹²² The guidelines for non-war risks provide no additional regulation, which means that the compulsory insurance requirements set forth by the convention apply.¹²³

The compulsory insurance requirements for war risk insurance are in line with the limitations of liability described above.¹²⁴ These includes the passengers' right of direct action,¹²⁵ which means that the passengers have right to claim directly against the liability insurer. If a suit is brought directly against the insurer, they have the right to use the same defense as would have been used in a suit against the carrier.

¹¹⁷ 2006 IMO guidelines paragraph 1.2

¹¹⁸ 2002 Athens Convention article 4

¹¹⁹ *Ibid.*, articles 3.1 and 3.2

¹²⁰ *Ibid.*, article 10

¹²¹ *Ibid.*, article 13

¹²² *Ibid.*, article 1.6

¹²³ 2002 Athens Convention article 4*bis* subparagraph 1

¹²⁴ 2006 IMO guidelines paragraph 1.6

¹²⁵ 2002 Athens Convention article 4*bis* subparagraph 10

4.3 War Automatic Termination and Exclusion

The facility of war risk may be desirable; however, insurers are free to decide not to offer insurance or to offer coverage only at high premiums. Because of the special character of war risk insurance that covers unknown catastrophic exposure, insurers seek to limit their exposure for sudden and substantial increase of risk.¹²⁶ The termination clause therefore provides some comfort for insurers in the sense that they are free to terminate coverage when there is an outbreak of war. The War Automatic Termination Clause¹²⁷ states that the insurance coverage provided shall terminate automatically upon the outbreak¹²⁸ of war between the so-called five powers.¹²⁹ It is not a subjectivity that a declaration of war has been given, which means that the validity of automatic termination would need to be assessed in each individual case. The equivalent applies in cases where the vessel has been requisitioned either for title or use in warfare.¹³⁰ However, exemptions from the automatic termination can be made upon agreement in contract between underwriters and the assured. Furthermore, the insurance in any case excludes¹³¹ liability arising from the same events mentioned above.

In the outbreak of war involving states other than the five powers, It is common in marine insurance policies that the War Automatic Termination Clause is followed by a subjectivity of seven days' notice. This means that in reality carriers are given seven days after the outbreak to leave the war zone. After the seven days, the insurance coverage terminates, leaving the carrier unprotected against potential liability for death or injury to passengers.

Such restrictions have not been set forth in the Guidelines Clause. The automatic termination and exclusion applies only in the case of war between the five great powers. Most wars would therefore fall outside the scope of the exclusion.

The exclusion of liability applies only to the insurance, which means that the carrier could still be held liable.

The question is whether the carrier can be held liable if, for example, the vessel is hit by a bomb as a part of warfare. If the vessel is hit by a bomb, it is likely that the damages caused will fall within the scope of a shipping incident. Depending on the size of the bomb and how

¹²⁶ Rose (2012), p. 355

¹²⁷ 2006 IMO Guidelines paragraph 2.2.1. See War Automatic Termination and Exclusion paragraph 1.1

¹²⁸ Ibid., subparagraph 1.1.1

¹²⁹ The United Kingdom, the United States of America, France, the Russian Federation, and/or the People's Republic of China

¹³⁰ Ibid., subparagraph 1.1.2

¹³¹ Ibid., paragraph 1.2

it hits, a likely outcome would be that the vessel capsizes or sinks. However, as shown above, the carriers are exempt from strict liability in the case loss as a result of war.¹³² The carrier is held liable only if he or she is found to have acted negligently.

In order for the carrier to be held liable, there needs to be causation between the negligence and the loss incurred. The starting point is that the carrier is not to be blamed and cannot affect the fact that there is an outbreak of war or that the vessel is hit by a bomb. However, if the carrier negligently fails to leave a war zone, it could be argued that he or she is to be held liable.

4.4 Institute Radioactive Contamination, Chemical, Biological, Bio-chemical and Electromagnetic Weapons Exclusion Clause (Institute Clause no. 370)

4.4.1 Definition

The Institute Clause 370 is broad in scope, listing several different triggers. Sections 1.1 to 1.4 provide a comprehensive list of nuclear risks that are excluded from coverage. The list includes nuclear fuel, waste, installation, reactor, assembly, components, fission/fusion, and any radioactive matter. The clause also lists the potential consequences of these risks. The language is general, indicating that the exclusions include, but are not limited to, the list of consequences.

In addition to this exclusion, the Athens Convention article 20 excludes nuclear damage as a consequence of operation of a nuclear installation, as this exposure is handled separately by the Paris¹³³ and Vienna Conventions¹³⁴.

Most insurance policies both within the marine and the non-marine insurance sectors contain a nuclear exclusion. On the other hand, the insurance market has accepted coverage of radioactive isotopes, other than nuclear fuel, when these are used for peaceful purposes, such as in agriculture, medicine, or science. The exclusion presents a buyback¹³⁵ for the use of the material with non-violent intentions.

¹³² 2002 Athens Convention article 3.1(a)

¹³³ Paris Convention of 29 July 1960 on Third Party Liability in the Field of Nuclear Energy as amended by its Additional Protocol of 28 January 1964

¹³⁴ Vienna Convention of 21 May 1963 on Civil Liability for Nuclear Damage

¹³⁵ CL 370 subparagraph 1.4

From this one can derive that the intention of the exclusion in section 1.1-1.4 in clause 370 is to exclude the potential for catastrophic loss and the extraordinary character of a nuclear incident.

The buyback for materials intended for peaceful purposes¹³⁶ indicates that there is a prerequisite that the intended use of the materials is harmful in order for the exclusion to apply. However, as the buy back has a limited scope we can interpret this to mean that the radioactive matter that fall outside this term in it self has a harmful character and would thus be excluded. This is supported by the fact that no requirement of harmful intent is explicitly stated in the clause.

Secondly, it could be asked whether incidents resulting from storing or handling these materials would fall within the scope of the exclusion. The general interpretation of the text imposes no requirement of the use of the material. The properties of the material are in themselves sufficient to fall within the scope of the exclusion.

The opening words of CL 370 subsection 1 are broad and displace the usual requirement of the loss as a proximate consequence of radioactive matter. The phrase “contributed to” can be interpreted broadly to mean that all losses also indirectly caused by this material would be excluded, it would in other words be sufficient for the insurers to show that the material is a remote cause of the loss.

Furthermore, the words “contributed to or arising from” imply that it is the characteristics of the materials and not the use of the materials that determines whether it is exempt from coverage or not. This is supported by the mild requirement of causation, and the fact that also loss as a indirect consequence would be exempt.

Also biological, chemical, bio-chemical, and electromagnetic weapons are excluded¹³⁷. Unlike the exclusion of radioactive materials, in order for the above exclusion to apply, there is a requirement that the materials are weapons or used as weapons. It is not sufficient that the loss is a result of the harmful properties of the materials in them selves.

The clause does not in it self include a definition of weapons, however weapons are generally defined as *“a thing designed or used as a means of inflicting bodily harm or physical*

¹³⁶ CL 370 subparagraph 1.4

¹³⁷ CL 370 subparagraph 1.5

damage."¹³⁸ The general understanding is that weapons presuppose a desire to cause harm. The words "as a means" indicate the requirement of intent.

The broad wording in subsection 1.5 does give some room for interpretation. It does not include any definition of biological, chemical or bio-chemical weapons, the scope of the exclusion would therefore have to be determined based on ordinary legal method.

NBC is a common term used to denote agents of nuclear, biological, and chemical warfare.¹³⁹ Biological warfare agents are microorganisms and their toxins are used as weapons to cause epidemics or poisoning. Chemical weapons are gases such as phosgene and mustard gas. The most ominous are the so-called nerve gases.¹⁴⁰

According to the English insurance market, the intention of CL 370 is to exclude losses that are a consequence of nerve agents and viruses such as those described above.¹⁴¹ The NBC are also more generally defined as weapons of mass destruction. What these have in common is their extraordinary character and potential for vast destruction.

However, as there is no definition provided by the wording itself the question is whether this could be interpreted to also include other chemical, biological, and bio-chemical substances. For example, if a passenger threatens to infect other passengers with a syringe containing HIV-virus, could it be considered a bio-chemical weapon?

According to the general principal of interpretation¹⁴² the general classes should be interpreted in light of the specific classes within the same clause, because they are understood to be of the same kind. Based on the above, because the exclusion provides a detailed list of the harmful properties of radioactive materials that in general are defined as weapons of mass destruction, these classes are to be considered of the same type as those specifically listed.

Furthermore, the use of this exclusion is common in both marine and non-marine insurance policies. A main reason for the insurance market reservation against this exposure is the uncertainty of the risk of catastrophic loss. The broad and general use of this exclusion implies that the intention is not to exclude all chemical and biological risks, but to exclude the use of chemical, biological, and bio-chemical properties in weapons of mass destruction. This

¹³⁸ Oxford Dictionaries, s.v. "weapon", <http://www.oxforddictionaries.com/definition/english/weapon>

¹³⁹ Hereinafter referred to as NBC

¹⁴⁰ Large Norwegian Encyclopedia, s.v. "ABC-våpen" <https://snl.no/ABC-v%C3%A5pen>

¹⁴¹ Commentary to the Nordic Marine Insurance Plan of 2013, *Version 2016*

¹⁴² Eiusdem generis

interpretation is supported by the English insurance market, see commentary to NMIP sections 2.8 and 2.9¹⁴³.

Weapons of mass destructions are defined as weapons that can cause widespread destruction and kill a large number of people indiscriminately.¹⁴⁴ Even though a HIV infection can cause major harm to the person infected, a single passenger attacking other passengers would not be able to cause harm in the sense of mass destruction. Such an attack would therefore fall outside the scope of the exclusion. Whether the carrier could be held liable for such an attack would depend on the specific situation and whether the carrier was to blame for the lack of prevention, either intentionally or negligently.¹⁴⁵

Lastly, loss and damage as a result of electromagnetic weapons are excluded from coverage. As the clause does not provide a definition the question remains of how the term electromagnetic weapon is to be understood.

The term electromagnetism is used in physical science to refer to the phenomenon of the interaction of electric current or fields and magnetic fields.¹⁴⁶ This definition is very broad and gives little guidance in interpreting the exclusion.

Because of this we must resort to general principals of interpretation. As shown above if one interprets the electromagnetic weapons exclusion in light of the other classes in the same clause the conclusion must be that the exclusion is meant for physical weapons that have the potential to cause mass destruction.

This is also supported by the fact that the insurance market has seen the need for a separate Cyber attack exclusion. This separate exclusion indicates that an electromagnetic weapon, on the contrary to cyber attack, refer to a physical weapon.

I have not been able to find a general definition of electromagnetic weapons; however, I have found several examples. One of the examples of an electromagnetic weapons is the so-called e-bomb. This generates a strong electromagnetic pulse in high-frequency waves of radiation that destroy electronic equipment temporarily or permanently, such as telecommunications

¹⁴³ Ibid.

¹⁴⁴ Global Britannica, s.v. “weapons of mass destruction”, <http://global.britannica.com/technology/weapon-of-mass-destruction>

¹⁴⁵ 2002 Athens Convention article 3.2

¹⁴⁶ Oxford Dictionaries, s.v. “Electromagnetism”, <http://www.oxforddictionaries.com/definition/english/electromagnetism>

systems or other vital systems.¹⁴⁷ On the contrary from a cyber attack that uses the internet as a means of inflicting harm, the e-bomb needs to be in closer proximity of its target and is a physical installation sending electromagnetic signals to its target.

4.4.2 Scope of the exclusion

The opening words of CL 370 subsection 1 are broad and displace the usual requirement of the loss as a proximate consequence of NCB or electromagnetic weapons.¹⁴⁸ The words “contributed to” indicate that it is sufficient for the insurers to show that the NCBE is a remote cause of the loss.

Furthermore, the clause is silent on the cause of the incident. It does not impose the requirement of any intent or purpose nor does it say whether the loss would need to be the consequence of an act or whether simply storing NCBE materials or weapons would be sufficient. The words “contributed to or arising from” indicate that it is the characteristics of the materials and not the use of the materials that determines whether it is exempt from coverage or not.

4.4.3 Liability

The exclusion in CL 370 is general and paramount to any insurance clause stating otherwise.

The wording states that “*in no case shall this insurance*”¹⁴⁹ cover damage to passengers. Thus, it can be derived that the carrier could still be held liable for injury to passengers. However, the reservations require state parties to apply the IMO guidelines, paragraphs 2.1.1¹⁵⁰ and 2.1.2,¹⁵¹ “mutatis mutandis” to such liabilities. The consequence is that even though CL 370 is an insurance clause, the exemption from liability also applies to the carrier’s legal liability.

4.5 Institute Cyber Attack Exclusion Clause (Institute clause no. 380)

¹⁴⁷ Large Norwegian Encyclopedia, s.v. “HPM-våpen”, <https://snl.no/HPM-v%C3%A5pen>

¹⁴⁸ Hereinafter referred to as NCBE

¹⁴⁹ CL 370 subparagraph 1

¹⁵⁰ CL 370

¹⁵¹ CL 380

4.5.1 Demarcation

In this section, I will examine only the general exclusion in CL 380 subparagraph 1. I will not assess the specific exclusion in subsection 2 related to the use of any computerized or other electronic system in the launch and/or guidance system and/or firing mechanism of any weapon or missile.

4.5.2 Relevance

The increased use of automation on board vessels and in ports has resulted in increased threats of cyber-attacks. In recent years, several attacks on different parts of the industry have been reported. In 2012, more than 120 ships, including Asian coast guard vessels, documented the malicious jamming of global positioning signals. Resent reports also showed increased attempts to gain unauthorized access to wireless networks and numerous denial-of-service attacks¹⁵² against ports.¹⁵³

Cyber threats take many different forms. Common treats are sabotage, software attacks, and information extortion in order to steal money. Virus, worm, or phishing attacks are common examples of software attacks.¹⁵⁴ Another example is the attack in the form of GPS spoofing.¹⁵⁵ A GPS spoofing attack attempts to deceive a GPS receiver by sending false GPS signals with the intention of leading a vessel off course. In 2013, researchers at the University of Texas demonstrated that it was possible to change a vessel's direction by interfering with its GPS signal to cause the on-board navigation systems to misinterpret a vessel's position and heading.¹⁵⁶ These types of attacks could potentially result in grounding, collision, or major other incidents.

Furthermore, pirates have begun to use new and increasingly sophisticated methods. In 2016 it was reported¹⁵⁷ that Somali pirates employed hackers to infiltrate a shipping company's cyber systems to identify vessels with valuable cargo and minimal on-board security passing through the Gulf of Aden, which led to the hijacking of at least one vessel.¹⁵⁸

¹⁵² Initiating a very high number of requests to a system to overwhelm it and cause it to cease operating. See MSC 94/4/1

¹⁵³ All examples are taken from a report submitted by Canada to the IMO in July 2014 MSC 94/4/1

¹⁵⁴ IMO Document MSC 94/4/1

¹⁵⁵ Wikipedia, s.v. "Spoofing attack", https://en.wikipedia.org/wiki/Spoofing_attack

¹⁵⁶ All examples are taken from a report submitted by Canada to the IMO in July 2014 MSC 94/4/1, See also <http://news.utexas.edu/2013/07/29/ut-austin-researchers-successfully-spoof-an-80-million-yacht-at-sea>

¹⁵⁷ Maritime Executive, 2016, <http://www.maritime-executive.com/article/case-study-pirates-hack-cargo-management-system>

¹⁵⁸ All examples are taken from a report submitted by Canada to the IMO in July 2014 MSC 94/4/1, see also http://www.joc.com/maritime-news/us-coast-guard-rolls-out-cyber-security-strategy_20150823.html

4.5.3 Cyber

In practice, the term “cyber” is used in a variety of contexts, and there is no uniform definition of the term. The Oxford English Dictionary defines cyber as “*relating to or characteristic of the culture of computers, information technology, and virtual reality,*”¹⁵⁹ whereas the Cambridge English dictionary defines it as “*involving, using, or relating to computers, especially the internet.*”¹⁶⁰ Both are comprehensive definitions, but it is questionable whether either provides a good description of the term.

In the various attempts to define the term cyber, general words such as technology, virtual and Internet have been used. The same trend can be seen in the Institute Clause no. 380.

The first paragraph of CL. 380 states:

(...) in no case shall this insurance cover loss damage liability or expense directly or indirectly caused by or contributed to or arising from the use or operation, as a means for inflicting harm, of any computer, computer system, computer software programme, malicious code, computer virus or process or any other electronic system.

The clause lists a number of different forms of the term cyber, but it is not exhaustive. In addition to the specific list, the clause includes “any other electronic system.” In other words, the exclusion applies to electronic systems that are the same kind as those listed in the clause.

Because the scope of this exclusion has not been tested in the courts, there is no case law to provide guidance in its interpretation. In order to determine the scope of this exclusion, the clause should be deconstructed and analyzed based on regular legal method.

4.5.4 Conditions for application of the exclusion

In CL 380, the first sentence of the exclusion states that it applies where the loss is a direct or indirect consequence of the attack or where the attack has contributed to the loss. The textual and ordinary meanings indicate that it is sufficient for the insurers to show that the attack was a remote cause of the loss. This is different from the usual basis of liability, in which the insurers need to prove the proximity between the cause and the loss.

¹⁵⁹ Oxford Dictionaries, s.v. “Cyber”, <http://www.oxforddictionaries.com/definition/english/cyber> (12.03.16)

¹⁶⁰ Cambridge Dictionaries, s.v. “Cyber”, <http://dictionary.cambridge.org/dictionary/english/cyber> (12.03.16)

To decide whether the incident is within or outside the chain of causation, the specific situation should be analyzed. The phrase “contributed to” can be interpreted broadly to mean that even though the cyber-attack was a contributory factor that indirectly caused the loss, the loss would be excluded and the carrier exempt from liability. Furthermore, the phrase “contributed to” indicates that an event where there are competing causes of loss would fall within the exclusion.

The question then arises whether it is sufficient that a cyber error is the cause of the incident. The heading refers to so-called “cyber-attacks.” The ordinary understanding of the term “attack” is that there is a requirement of intent to cause harm. In the technology industry, an attack is defined as the “*attempt to destroy, expose, alter, disable, steal or gain unauthorized access to or make unauthorized use of an asset.*”¹⁶¹ The general understanding would therefore be that a simple error would not be sufficient to trigger the exclusion.

This understanding is supported by the fact that the wording sets forth a requirement that the use of technology should be “*as a means for inflicting harm.*”¹⁶² The words “as a means” suggest that there is the condition that there is a purpose to inflict harm.

The next question is whether there needs to be a connection between the goal of the attack and the actual outcome. In other words, does the exclusion impose an intention to inflict the particular harm or is it sufficient with a general intention to inflict harm? The wording is silent on the matter, which suggest that a general intention to cause harm is sufficient.¹⁶³

Regarding the means of inflicting harm listed, reference is made to both non-malicious software programs and malicious codes and viruses. The wording suggests that the intention of the clause is that it applies to all types of software and malware. However, the requirements of intention to inflict harm should limit the applicability of the exclusion so that it does not apply to errors or defective software programs that lead to unexpected results.

Furthermore, the word “inflict” implies a deliberate act. In reality, this means that in order for the exclusion to apply, the motive for causing the damage is decisive. There needs to be intent of malice. In practice, a problem may arise in cases where the guilty party is not identifiable. How does one determine the state of mind of the culprit, if one does not know who it is?¹⁶⁴

¹⁶¹ Wikipedia, s.v. attack within computing, as defined in ISO/IEC 27000:2009 from ISO, via their ITTF website. [https://en.wikipedia.org/wiki/Attack_\(computing\)#cite_note-1](https://en.wikipedia.org/wiki/Attack_(computing)#cite_note-1)

¹⁶² CL 380 subparagraph 1

¹⁶³ http://www.maritimelondon.com/wp-content/uploads/2016/01/005_Cyber_Risks_Combined_110116.pdf

¹⁶⁴ See note 161

This ambiguousness of the wording has not been tested by the courts. The question must therefore be answered by using regular legal method. It is a general legal principal¹⁶⁵ that any ambiguity in the interpretation of wording will be construed against the person seeking to rely upon it. The consequence must therefore be that the insurer and the carrier would not be able to apply the exclusion where the intentions of the culprit are not clear.

4.5.5 Burden of proof

CL 380 provides no guidelines for the burden of proof. The starting point is therefore the Convention¹⁶⁶ article 3.1, which provides for the event in which the attack results in a shipping incident, and article 3.2 provides for other incidents. For shipping incidents, the convention imposes strict liability, whereas the burden of proving fault or neglect is on the claimant for all other incidents.¹⁶⁷

It is a general principle within civil law that the burden of proof is on the claimant. The claimant thus has the burden of proving the legitimacy of the claim. Similarly, when parties claim that they can limit their liability, they have the burden of proving that the exception or limitation is valid. If in the event of a cyber-attack, the carrier and the insurer claim that they are exempt from liability, the burden of proving the applicability of the exclusion also rests with them.

4.5.6 Liability

The wording of CL 380 is the same as CL 370 in this regard. It states, “*in no case shall cover loss, damage, liability or expense.*”¹⁶⁸ The clear language shows the intention of removing all coverage for cyber-attacks.

Furthermore, the exclusion refers to “*this insurance,*” which means that the exclusion in principle only applies to insurance coverage. However, the reservation requires state parties to apply the IMO guidelines in paragraphs 2.1.1¹⁶⁹ and 2.1.2¹⁷⁰ “*mutatis mutandis*” to such liabilities, which means that the exclusion also applies to the carrier’s legal liability.

¹⁶⁵ Contra Proferentem

¹⁶⁶ 2002 Athens Convention

¹⁶⁷ Ibid., article 3.2

¹⁶⁸ CL 380 subparagraph 1

¹⁶⁹ CL 370

¹⁷⁰ CL 380

5 Legal implications of removing the Cyber Attack Exclusion Clause

5.1 Introduction

Both the War Automatic Termination and Exclusion and the Radioactive Contamination, Chemical, Biological, Bio-chemical and Electromagnetic Weapons Exclusion Clause are standard market exclusions applied in most insurance policies in both the marine and non-marine insurance markets. These exclusions are generally accepted and agreed by both the insurer and the insured.

The cyber-attack exclusion clause stands in a different position because it was only recently introduced only in to insurance policies. This is natural due to the increased use of automation on board vessels and in ports, resulting in increasing numbers of threats of attack and increased concern in the insurance market.

However, the question remains of why this way of inhibiting or destroying the ship's navigation system or control mechanisms is put in a different position than if the same systems were physically damaged, leading to the same result.

One of the arguments may be that the carriers and crew are better equipped to control the physical facilities on board the ship. Most passenger vessels separate the passengers from the control centers of the ship, so it would be difficult for a passenger to access these areas in order to inflict harm.

However, the carriers should be able to meet these new challengers. by implementing the necessary security measures. Same as the attackers, the carriers should have access to sophisticated technology that is able to prevent or at least minimize the exposure to cyber-attacks. In the same way carriers are obligated to implement sufficient security measures to avoid other types of losses, they should be able to implement technological security measures.

As shown above, the Cyber attack exclusion clause was implemented in order to facilitate the reservations of the insurance markets. Two main factors have been highlighted by the insurance market as reasons for the requirement to include the exclusion in CL 380¹⁷¹.

Firstly, it was argued that the reinsurance market applies the same exclusion. Therefore, even though the direct carriers would agree to include cyber-attacks they would not be able to gain the necessary support from the reinsurance market; and therefore the net capacity provided would be insufficient. However, it is difficult to accept that the reinsurance market would not be able to adapt in the same way as the direct market. Both the direct and re-insurance markets are dependent on their customers and therefore should be able to adapt to the threats and needs their customers are faced with. Furthermore, the reinsurance market often has a higher attachment point, which should be considered a risk- mitigating factor.

Secondly, underwriting is based on experience, mainly loss experience, in deciding capacity, terms, conditions, and price. The insurance markets argued that while underwriters are fully aware of the main risks and exposures of traditional shipping activity, they have limited, if any, experience in determining the likelihood and potential liability and loss of a cyber-attack.

The problem with this argument is that the consequence is the risk being left with the passengers. The intention of insurance is to pulverize the risk. The insurance market should be more capable of handling potential losses than the individual passenger is. The insurers are already taking on large and more threatening risks. The argument that underwriters are not familiar with the risks should not be given priority over the necessity of insurance coverage and passenger security.

5.2 Legal implication

If the Cyber Attack Exclusion Clause were eliminated, the question then would be whether this liability would be strict liability or fault-based liability.

¹⁷¹ Willis Energy Market report (2014). The same arguments are applicable to the marine sector. See http://www.willis.com/documents/publications/industries/energy/20140404_Willis_Energy_Market_Review_2014.pdf

The carrier is imposed strict liability for shipping incidents. The Convention provides a definition of shipping incidents, including shipwreck, capsizing, and stranding.¹⁷² The clause imposes no requirements or restrictions on the cause of the accident. Based on the above, it must be derived that if a cyber-attack results in a shipping incident, the carrier can be held liable under the strict liability rule of the Convention.¹⁷³

The carrier could however be exempt from liability if the attack were a part of warfare or if the cyber-attack were “wholly caused” by a third party with the intention of causing harm. This would depend on the factors highlighted above in section 3.1.1 and 3.1.2.

The next question concerns whether the carrier could also be held liable under the fault-based rule. Failure to protect the ship sufficiently against cyber-attacks could be seen as negligence.¹⁷⁴

In both cases, the liability would be limited by the limitation rule in article 1.2¹⁷⁵ and the rule of global limitation.¹⁷⁶

6 Conclusion

The passenger’s position was substantially improved after the consolidation of the 2002 Athens Convention, which is mainly because of three factors. First, carriers were imposed strict liability for shipping incidents; second, there was substantial increase in the limits of liability; and third, the mandatory insurance requirement was introduced.

In general, the carrier’s legal liability is quite clear. The Convention provides for the regulation of both strict liability and fault-based liability under article 3 of the Convention, supplemented by the compulsory insurance requirement in article 4*bis*.

¹⁷² 2002 Athens Convention article 3.4(a)

¹⁷³ Ibid. article 3.1

¹⁷⁴ Ibid., article 3.2

¹⁷⁵ 2006 IMO Guidelines paragraph 2.1

¹⁷⁶ 1996 LLMC article 4

The convention is also broad in its wording. It does not explicitly exclude terrorism-related risks. In consequence, the carrier could be held liable for death or injury to passengers as a consequence of terrorism, where the carrier has not acted diligently with due care in preventing the passengers from being exposed to terror.

Because of the broad wording and extensions of coverage, the IMO Guidelines were introduced in order to meet the concerns of the insurance market and facilitate the implementation of the convention. Through these guidelines, three additional exclusions were introduced.

First, the War Automatic Termination and Exclusion gives insurers the right to terminate the insurance with immediate effect and exclude any losses as a consequence of war between the five great powers, United Kingdom, United States of America, France, the Russian Federation and the People's Republic of China. This condition is generally known and accepted, and it is limited to insurance coverage. Because the clause applies only in the case of the outbreak of war between the five great powers, the application is limited. The carrier could still be held liable under the fault-based rule and the insurance would apply in case of losses arising in consequence of war between all other powers.

Second, another common exclusion, the Radioactive Contamination, Chemical, Biological, Bio-chemical and Electromagnetic Exclusion (NCBE), was introduced. Similar to the War Automatic Termination and Exclusion, the NCBE is a commonly used and accepted exclusion in both the marine and non-marine insurance markets. The exclusion is paramount to any insurance clause stating otherwise, and it applies to both the insurance and the carrier's legal liability. The exclusion mainly apply to what is generally defined as weapons of mass destruction. Even though the exclusion is broad, it does not present a major gap in protection for the passengers, because of the extraordinary character of the materials excluded.

Lastly, a Cyber-attack exclusion was introduced to limit both the insurer's liability and the carrier's legal liability. The scope of the exclusion is broad, requiring only that the cyber-attack be a remote link in the chain of causation. However, the wording leads to an unclear position and is open to ambiguous and uncertain interpretations. Although it imposes a requirement of general purpose to inflict harm, it is limiting because it sets forth the requirement of intent. The exclusion's applicability therefore depends on the mind of the culprit party, and the burden of proof rests on the carrier.

Based on this it is questionable whether the cyber-attack exclusion could be used as intended because any ambiguousness should be interpreted against the person seeking to rely upon it, that is, the carrier or the insurer. Because of this uncertainty It could be argued that the cyber-

attack exclusion could be removed without having any practical effect on the legal liability of the carrier. Liability would then be dependent on the general rules of liability¹⁷⁷ in the 2002 Athens Convention.

In conclusion, as shown the guidelines are a compromise, and not an ideal solution. In particular, the Cyber Attack Exclusion Clause opens up for uncertainty in a potential claims situation. Arguably the carriers should be able to take the necessary precautions and implement the necessary security measures in order to prevent or at least limit the risk of cyber attacks. The uncertainty of the Cyber-attack exclusion clause and the potential of the exposure being left with the individual passenger is unfortunate.

Nevertheless, despite the additional restrictions set forth in the guidelines, the Convention is a success because it establishes an international framework for liability and limitation of liability as well as a uniform system of insurance. It accomplishes the main objective, which is an improved uniform and sustainable system that ensures the security of passengers.

¹⁷⁷ 2002 Athens Convention article 3.

7 Table of abbreviations

CLC	International Convention on Civil Liability for Oil Pollution Damage, 1992
DNK	Den Norske Krigsforsikring for Skib Gjensidige forening
HNC	International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 2010
IGP&I	International Group of P&I Clubs
IMCO	Inter-Governmental Maritime Consultative Organization
IMF	International Monetary Fund
IMO	International Maritime Organization
ISPS	International Ship and Port Facility Security Code, 2002
LLMC	Convention on limitation of liability for Maritime Claims
NBC	Nuclear, Biological and Chemical
NBCE	Nuclear, Biological, Chemical and Electromagnetic
NMIP	Nordic Marine Insurance Plan, 2013
OECD	Organization for Economic Co-operation and Development
P&I	Protection and Indemnity
PAL	Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 1974
SDR	Special Drawing Rights
SOLAS	International Convention for the Safety of Life at Sea
TOPIA	Tanker Oil Pollution Indemnification Agreement, 2006
ULCC	Ultra Large Crude Carrier

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Vienna Convention	Vienna Convention on the Law of Treaties, 1969
LLMC 1976	International Convention on Limitation of Liability for Maritime Claims, 1996
LLMC 1996	Protocol of 1996 to Amend the International Convention on Limitation of Liability for Maritime Claims, 1976
Passenger Convention 1961	International Convention for the Unification of Certain Rules Relating to the Carriage of Passengers by Sea, 1961
Luggage Convention 1967	International Convention for the Unification of Certain Rules Relating to Carriage of Passengers' Luggage by Sea, 1967
1974 Athens Convention	Athens Convention Relating to the Carriage of Passengers and Their Luggage by Sea, 1974
1990 Protocol	Protocol to the Athens Convention Relating to the Carriage of Passengers and Their Luggage by Sea, 1990
2002 Protocol	Protocol to the Athens Convention Relating to the Carriage of Passengers and Their Luggage by Sea, 2002
2002 Athens Convention	Consolidated Text of the 1974 Athens Convention Relating to the Carriage of Passengers and Their Luggage by Sea and the 2002 Protocol
IMO Convention 1948	Convention on the International Maritime Organization, 1948
CLC	International Convention on Civil Liability for Oil Pollution Damage, 1992
HNC	International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 2010
NMIP	Nordic Marine Insurance Plan of 2013, <i>Version 2016</i>
Commentary to NMIP	Commentary to the Nordic Marine Insurance Plan of 2013, <i>Version 2016</i>

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LEG 91/4/5	Follow-up on resolutions adopted by the International Conference on the Revision of the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 1974 Athens Convention, 2002 - remaining issues Submitted by the International Chamber of Shipping (ICS) and the International Council of Cruise Lines (ICCL)

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