



**IMO**  
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**REGULATIONS RELATING TO THE  
IMPLEMENTATION OF REGULATION (EC)  
NO.392/2009 ON THE LIABILITY OF  
CARRIERS OF PASSENGERS BY SEA IN THE  
EVENT OF ACCIDENTS**

**A Legislation Drafting Project submitted in partial fulfillment of the  
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# Explanatory Note

## a. Executive Summary

The sea today remains one of the main methods for the transportation of passengers and their luggage. Indeed, there has been an astounding rise in the carriage of passengers for touristic purposes through the emergence of giant cruise liners carrying thousands of passengers on each voyage. Over the past decades, accidents involving the loss of life of hundreds of people have made it necessary to enhance the law of maritime safety relating to the carriage of passengers.

Major maritime tragedies such as those involving the *Titanic*,<sup>1</sup> the *Herald of Free Enterprise*,<sup>2</sup> the *Estonia*,<sup>3</sup> the *Joola*,<sup>4</sup> the *Doña Paz*<sup>5</sup> and the most recent *Costa Concordia*<sup>6</sup> have demonstrated that although maritime technology continues to improve, the danger of life at sea remains real. It is therefore important to ensure that the compensation and liability regimes with respect to accidents relating to the carriage of passengers and their luggage are both fair and effective.

Malta is an island State which is dependent on maritime transport. The islands' geographical position in the middle of the Mediterranean, as well as the development of the cruise liner passenger terminal in Valletta, has allowed the country to develop a

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<sup>1</sup> On 14 April 1912, the British passenger liner the *RMS Titanic* sank in the North Atlantic Ocean after collision with an ice-berg. The disaster resulted in the loss of more than 1,500 lives. See Pamborides, George; *International Shipping Law: Legislation and Enforcement*, Kluwer, the Netherlands, 1999, p. 79.

<sup>2</sup> On 6 April 1987, the roll-on roll-off ferry, the *MS Herald of Free Enterprise* capsized just outside the Belgian Port of Zeebrugge killing more than 150 passengers and crew. See Department of Transport; *mv Herald of Free Enterprise: Formal Investigation (Report of Court NO. 8047, 1987)*, p. 1. Available <[http://www.maib.gov.uk/cms\\_resources.cfm?file=/hoffefinal.pdf](http://www.maib.gov.uk/cms_resources.cfm?file=/hoffefinal.pdf)> accessed 1 November 2012.

<sup>3</sup> On 28 September 1994, the passenger ferry the *MS Estonia* sank in the Baltic Sea causing a death toll of more than 850 passengers. See <<http://www.marineinsight.com/marine/marine-news/headline/the-ms-estonia-ship-disaster/>> accessed 1 November 2012.

<sup>4</sup> The Senegalese Ferry the *M/V Joola* sank off the coast of Gambia on 26 September 2002. The disaster resulted in the death of more than 1,800 persons. See <<http://www.marineinsight.com/marine/life-at-sea/maritime-history/3-passenger-ships-disasters-that-shook-the-maritime-world/>> accessed 1 November 2012.

<sup>5</sup> The *MV Doña Paz* collided with an oil tanker *MT Vector* off the coast of Dumali, Mindoro in the Philippines on 20 December 1987. The Doña Paz tragedy is considered to be the worst disaster in terms of loss of life in the history of commerce, causing a death toll of more than 4,000 persons. See: <<http://www.marineinsight.com/marine/life-at-sea/maritime-history/3-passenger-ships-disasters-that-shook-the-maritime-world/>> accessed 1 November 2012.

<sup>6</sup> The *Costa Concordia*, an Italian cruise liner partially sunk after hitting a reef off the Tuscan Coast killing more than 30 passengers on board. <<http://www.theglobeandmail.com/life/travel/activities-and-interests/did-the-costa-concordia-tragedy-change-anything-in-the-cruise-industry/article4854564/>> accessed 1 November 2012.

strong cruise liner industry. This business is becoming an important contribution to Malta's economic wellbeing, employing many jobs and contributing millions of Euro to the national economy.<sup>7</sup> In fact each year thousands of visitors embark and disembark in the islands' Grand Harbour; where the month of August 2012 alone, saw a staggering 99,062 visiting cruise passengers.<sup>8</sup>

The International Maritime Organization (IMO) has played an important role in contributing to the development of international response strategies designed to protect passengers at sea in the event of accidents. A major measure was the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 1974<sup>9</sup> (Athens Convention). This Convention established that a carrier is liable for damage or loss suffered by a passenger on seagoing vessels provided that the incident causing such damage or loss was due to fault or neglect on the part of the former and occurred during the course of the carriage.<sup>10</sup> However, in such cases the Convention allows the carrier to limit his liability<sup>11</sup> provided that the loss or damage was not caused due to his recklessness or intent to cause damage.<sup>12</sup> In the case of death or personal injury to a passenger the Convention sets out a maximum limitation of liability limit per passenger per carriage.<sup>13</sup> With respect to loss or damage to luggage, the carrier's liability depends on whether such loss or damage was done to cabin luggage, vehicle and or luggage carried on it or other luggage.<sup>14</sup>

However, since then there have been a number of developments in other branches of maritime law which have developed generally accepted principles such as those applied in the liability and compensation regimes dealing with environmental accidents.<sup>15</sup> In the

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<sup>7</sup>'Economy gains €62 million from Cruise liner industry', The Times of Malta (Malta, 16 October 2010) <<http://www.timesofmalta.com/Articles/view/20101016/local/economy-gains-62m-from-cruise-liner-industry.331531>> accessed 1 November 2012.

<sup>8</sup> National Statistics Office, News Release, 180/2012, 18 September 2012.

<sup>9</sup> The Athens Convention relating to the Carriage of Passengers and their Luggage by Sea was adopted on 13 December 1974. The Convention entered into force on 28 April 1987. As of April 2013, 35 States have acceded to the Convention. See Status of IMO Conventions available <<http://www.imo.org/About/Conventions/StatusOfConventions/Pages/Default.aspx>> accessed 4 April 2013.

<sup>10</sup><[http://www.imo.org/About/Conventions/ListOfConventions/Pages/Athens-Convention-relating-to-the-Carriage-of-Passengers-and-their-Luggage-by-Sea-\(PAL\).aspx](http://www.imo.org/About/Conventions/ListOfConventions/Pages/Athens-Convention-relating-to-the-Carriage-of-Passengers-and-their-Luggage-by-Sea-(PAL).aspx)> accessed 2 November 2012.

<sup>11</sup> Article 7 of the Athens Convention.

<sup>12</sup> Article 13 of the Athens Convention.

<sup>13</sup> Under Article 7 of The Athens Convention the maximum limit of liability of the carrier per passenger per carriage was set at 700,000 francs. However, the 1976 Protocol to the Convention substituted that amount to 46,666 SDRs.

<sup>14</sup> Article 8 of the Athens Convention.

<sup>15</sup> See The International Convention on Civil Liability for Oil Pollution Damage, 1969 as amended by the 1992 Protocol thereto.

efforts to improve the Athens regime these models were taken into account in order to ensure that passengers have access to adequate, prompt and effective compensation for damages suffered.<sup>16</sup> As a result the 1976 Protocol to the Athens Convention amended Article 7 of the Athens Convention, whereby the limits were set at higher amounts contributing to greater passenger right protection.<sup>17</sup> The Protocol of 1990 further increased such limits but never entered into force.

The latest revision of the Athens Convention took place through the 2002 Protocol to the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 1974 (2002 Protocol) adopted under the auspices of IMO.<sup>18</sup> This Protocol introduced new compensation regimes as well as compulsory insurance to cover passengers and also significantly raised the financial limits of liability to take into account the current economic developments. It is noteworthy that the 2002 Protocol replaced the “fault-based liability system” of the Athens Convention with the more equitable and effective strict liability system for shipping related accidents coupled with the requirement of compulsory insurance. Indeed, the 2002 Protocol also permits the passenger to bring a claim for compensation directly against the insurer.

Before proceeding further it has to be recorded that the Athens Convention and the 2002 Protocol are to be read together as one single instrument which is to be known as the ‘Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 2002 (Athens Convention 2002)’.<sup>19</sup>

On a European Union (EU) level, it was felt desirable to introduce the benefits of the Athens Convention 2002 throughout the European Union. This effort is reflected in the EU Regulation No.392/2009<sup>20</sup> (EU Regulation) on the liability of carriers of passengers

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<sup>16</sup> Shaw, Richard; “Carriage of Passengers” in Baatz, Yvonne (Ed.); *Maritime Law*, 2<sup>nd</sup> Edition, Sweet and Maxwell Press, London, 2011, p. 233.

<sup>17</sup> Protocol of 1976 to the Athens Convention, adopted on the 19 November 1976. The Convention entered into force on the 30 April 1989. As of April 2013 26 States have acceded to the 1976 Protocol. This Protocol substituted the maximum limit of liability of 70,000 francs of the carrier per passenger per carriage. See Status of IMO Conventions available at <<http://www.imo.org/About/Conventions/StatusOfConventions/Pages/Default.aspx>> accessed 4 March 2013.

<sup>18</sup> The 2002 Protocol was adopted in a diplomatic conference which took place at the IMO headquarters in London from the 21 October to the 1 November 2002 but has not yet come into force.

<sup>19</sup> See: Article 15(1) of the 2002 Protocol.

<sup>20</sup> Regulation (EC) No 392/2009 of the European Parliament and of the Council of 23<sup>rd</sup> April 2009 on the liability of carriers of passengers by sea in the event of accidents [2009] OJ L131/24.

by sea in the event of accidents, which has now become directly applicable as part of the domestic law of Member States including Malta as from the 31 December 2012.<sup>21</sup>

Apart from the inherent benefits of the Protocol described above, the EU Regulation now introduces a uniform approach to the problem of liability of carriers in respect of the transport of passengers throughout the EU. In fact EU citizens, including Maltese, will enjoy the same levels of compensation when travelling between different EU ports. Significantly the EU Regulation may go beyond the Athens Convention 2002, by covering all domestic transport of passengers.

Malta is not a Party to the Athens Convention 2002.<sup>22</sup> However, the EU Regulation will bring Maltese Law in line with the provisions of the 2002 Protocol, even before Malta accedes to the said Protocol.<sup>23</sup>

Nevertheless, it is proposed that Malta should accede to the 2002 Protocol for a number of reasons:

1) Given the incorporation of the EU Regulation, effectively Malta will have incorporated the 2002 Protocol, into its domestic law without benefiting from the multilateral advantages of the said Protocol.

2) The Athens Convention 2002 enters into force 12 months after the 10th Contracting Party adheres to it.<sup>24</sup> Despite its benefits and the current EU position, as of November 2012 only 9 States<sup>25</sup> have adhered to the Athens Convention 2002. Malta's adherence would therefore hasten the process by which the Convention is brought into force, thereby creating goodwill for the Maltese flag.

(3) Even if Malta does not accede to the 2002 Protocol, it would still be required to implement obligations under the said Protocol by virtue of the EU Regulation. For example, under the EU Regulation, Malta is obliged to have domestic legislation enabling its authorities to issue certificates to Maltese registered vessels by 31 December 2012, which would prove that carriers have acquired the necessary insurance cover to meet their obligations under the EU Regulation before the said Protocol enters into force.

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<sup>21</sup> Ibid at Preamble, Paragraph 2.

<sup>22</sup> Camillieri, Richard and Vella, Ivan; "Malta", in Griggs et al., *Limitation of Liability for Maritime Claims*, 4<sup>th</sup> Edition, Informa, London, 2005, p. 309.

<sup>23</sup> Cachia, Jeanelle; *The Liability of Carriers of Passengers by Sea in light of Regulation(EC) 392/2009 and the Effects on Maltese Legislation*, Faculty of Law, University of Malta, Malta, 2011, p. 150.

<sup>24</sup> Article 20(1) of Athens Convention 2002.

<sup>25</sup> Albania, Belize, Denmark, Latvia, the Netherlands, Palau, Saint Kitts and the Nevis, Serbia and Syria. See Status of IMO Conventions available at <<http://www.imo.org/About/Conventions/StatusOfConventions/Pages/Default.aspx>> accessed 4 March 2013.

4) The Athens Convention 2002 requires accession of 10 State parties before it comes into force, currently 9 States are parties. Should Malta accede to the Athens Convention 2002

It is proposed to submit a review of the international, European and domestic legislation relative to the limitation of liability with respect to carriage of passengers and their luggage by sea. The explanatory note will analyse what elements need to be introduced into Maltese law in order to create the proper legal infrastructure needed for the effective implementation of the EU Regulation. Attached to this explanatory note will be draft Regulations accompanied by a commentary explaining the purpose of each provision.

The explanatory note will also examine whether Malta should accede to the 2002 Protocol as well as deal with the question of Malta and its relation to the Athens Convention 2002. For although, Malta is not a Party to the Athens Convention and the Protocol, the European Union<sup>26</sup> is a Party.<sup>27</sup> This situation has a number of legal ramifications; Malta will implement the EU Regulation and indirectly the Athens Convention 2002 regime without benefitting from the totality of the said regime. This explanatory note will therefore propose that Malta should accede to the 2002 Protocol and propose a course of action as follows:

- a) The drafting of regulations under the authority of the Merchant Shipping Act, Chapter 234 of the Laws of Malta, which provide the necessary legal infrastructure for the implementation of the EU Regulation No. 392/2009 and the Athens Convention 2002.
- b) To accede to the 2002 Protocol, in this case permission has already been given to the Government of Malta as per section of the 357(1) of Merchant Shipping Act and therefore it is proposed that there will be issued a note verbale the IMO Secretary-General acting as a depository, announcing the consent of Malta to be bound by the said legal instrument.

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<sup>26</sup> Under Article 19 of the 2002 Protocol the European Union is considered “A Regional Economic Integration Organization, which is constituted by sovereign States that have transferred competence over certain matters governed by this Protocol to that Organization, may sign, ratify, accept, approve or accede to this Protocol”.

<sup>27</sup> See Council Decision 2012/22/EU of 12<sup>th</sup> December 2011 concerning the accession of the European Union to the Protocol of 2002 to the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 1974, with the exception of Articles 10 and 11 thereof [2011] L 8/1.

- c) The note verbale will make reservations in conformity with articles 17(3) of the Athens Convention 2002, with respect to the limitation of liability of carriers and compulsory insurance, limitation of liability of insurers and certification.
- d) The note verbale will also explain the ramifications of the European Union declarations of competence which was deposited by the European Union when acceding to the 2002 Athens.

## b. Used Terms

### **For the purposes of this Explanatory Note:**

- **The Athens Convention** refers to the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 1974.
- **The 2002 Protocol** refers to the Protocol of 2002 to the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 1974.
- **The Athens Convention 2002** refers to the consolidated text of the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 1974 as amended by the 2002 Protocol.
- **The EU Regulation** refers to Regulation (EC) 392/2009 on the liability of carriers of passengers by sea in the event of accidents.



- **The draft Regulations** refer to the Merchant Shipping (Liability of Carriers of Passengers and their Luggage by Sea) Regulations.
- **IMO Guidelines** refer to the IMO Guidelines for the implementation of the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 2002.
- **LLMC Regulations** refer to the Limitation of Liability for Maritime Claims Regulations.<sup>28</sup>
- In Malta the **unit of account** refers to Special Drawing Rights (SDRs). As of 28 March 2013, One Special Drawing Rights was worth approximately 0.854 Euro.<sup>29</sup>

### c. International Maritime Legal Framework

IMO has been active in promulgating international rules regulating liability for damage suffered by passengers and their luggage carried by sea. As explained above the original instrument promulgated in this respect was the Athens Convention, a major revision of which was carried out by the 2002 Protocol.

The principal changes introduced by the 2002 Protocol to the Athens Convention include:

(a) The 2002 Protocol raises the limits of liability for losses suffered as a result of death or personal injury to a passenger caused by a shipping incident to 250,000 SDRs per passenger for each distinct occasion,<sup>30</sup> with an overall maximum limit of liability of SDRs 400,000 per passenger.<sup>31</sup> Shipping incidents usually cover shipwreck, capsizing, collision, stranding of ship, explosion or fire in the ship or defect in the ship.<sup>32</sup>

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<sup>28</sup> Regulations, S.L.234.16.

<sup>29</sup> <[http://www.imf.org/external/np/fin/data/rms\\_five.aspx](http://www.imf.org/external/np/fin/data/rms_five.aspx)> accessed 3 November 2012.

<sup>30</sup> Article 3(1) of the Athens Convention 2002.

<sup>31</sup> Article 7(1) of the Athens Convention 2002.

<sup>32</sup> Article 3(5)(a) of the Athens Convention 2002.

It is interesting to note the two tier regime of liability<sup>33</sup> of a carrier for loss resulting from a passenger's death or personal injury caused by a shipping incident. Under the first tier of liability the carrier is now strictly liable up to 250,000 SDRs per passenger for each distinct occasion. However the carrier would be exempted from liability if the incident resulted from an act of war, hostilities, civil war, or a natural phenomenon, as well as if it was wholly caused the act or omission by a third party with intent to cause damage.<sup>34</sup>

In the second tier of liability the carrier is still liable, where the incident causing loss amounts to a figure above the strict liability limit of 250,000 SDRs (but limited to the maximum 400,000 SDRs) unless he proves that the incident occurred without his fault or neglect. Therefore, in such instances the burden of proof lies on the carrier. However in the case of loss suffered as a result of death or personal injury to a passenger not caused by a shipping incident, the carrier shall be liable if the incident which causes the loss was due to the carrier's fault or negligence. Moreover the burden of proving fault or negligence lies with the claimant.<sup>35</sup>

With respect to luggage the carrier is liable for loss or damage to cabin luggage if caused by the carrier's fault or negligence, which is presumed in the cases of loss caused by a shipping incident.<sup>36</sup> In the case of non-cabin luggage, fault or negligence is presumed and therefore the carrier is liable unless he can show the loss occurred without his fault or negligence.<sup>37</sup> In the case of cabin luggage liability is limited to the amount of 2,250 SDRs per passenger per carriage.<sup>38</sup> While in the case of vehicles or luggage in or on a vehicle, liability is limited to the amount of 12,700 SDRs per vehicle per carriage.<sup>39</sup> In the case of any other luggage liability shall not exceed the amount of 3,375 SDRs per passenger.<sup>40</sup>

(b) The 2002 Protocol introduced the requirement that the carrier must provide compulsory evidence of insurance in an amount of not less than 250,000 SDR per passenger per each distinct occasion.<sup>41</sup>

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<sup>33</sup>Martínez Gutiérrez, Norman A; *Limitation of Liability in International Maritime Conventions: The relationship between global limitation conventions and particular liability regimes*, Routledge, London, 2011, pp.131-132.

<sup>34</sup> Article 3(1)(a)&(b) of the Athens Convention 2002.

<sup>35</sup> Article 3(2) of the Athens Convention 2002.

<sup>36</sup> Article 3(3) of the Athens Convention 2002

<sup>37</sup> Article 3(4) of the Athens Convention 2002.

<sup>38</sup> Article 8(1) of the Athens Convention 2002.

<sup>39</sup> Article 8(2) of the Athens Convention 2002.

<sup>40</sup> Article 8(3) of the Athens Convention 2002.

<sup>41</sup> Article 4 *bis* (1) of the Athens Convention 2002.

(c) The 2002 Protocol introduced the requirement that the compulsory insurance cover required by the 2002 Protocol be verified by a certificate issued by the appropriate authority of the State party.<sup>42</sup>

(d) The 2002 Protocol provides a claim for compensation to be brought directly against the insurer up to a limit of 250,000 SDRs per passenger on each distinct occasion.<sup>43</sup>

(e) The 2002 Protocol allows a State to control by specific provisions of national law the limit of personal injury and death, provided that this limit is not lower than the one provided for in the Protocol.<sup>44</sup>

Subsequent to the 2002 Protocol, the IMO Legal Committee adopted a set of IMO Guidelines<sup>45</sup> which were designed to enable States to better implement the Athens Convention 2002.<sup>46</sup> Such IMO Guidelines<sup>47</sup> were in essence directed at providing limits for what is becoming a growing problem, claims relating to war or terrorism<sup>48</sup>

#### d. European Union Legal Framework

One of the fundamental bases of the European Common Transport Policy applying to all EU Member States is the implementation of measures designed to strengthen maritime transport. A feature of this policy relates to the common implementation of liability rules for damage caused to passengers by sea in the event of accidents. As previously mentioned, on the European level, matters relating to the liability of carriers in relation to passengers and their luggage are regulated through EU Regulation No. 392/2009 on the liability of carriers of passengers by sea in the event of accidents. This Regulation was adopted by the European Parliament and Council on the 23 April 2009.<sup>49</sup>

This EU Regulation essentially establishes the European Union's rules relating to the liability and insurance of passengers by incorporating:

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<sup>42</sup> Article 4 *bis* (2) of the Athens Convention 2002.

<sup>43</sup> Article 4 *bis* (10) of the Athens Convention 2002.

<sup>44</sup> Article 7(2) of the Athens Convention 2002.

<sup>45</sup> IMO Circular Letter No.2758 dated 20<sup>th</sup> November 2006 <<http://folk.uio.no/erikro/WWW/corrgr/13.pdf>> accessed 5 November 2012.

<sup>46</sup> Shaw, Richard; *op.cit.*, p. 234.

<sup>47</sup> IMO Circular Letter No.2758, Annex, Paragraph 1, Point 1.2.

<sup>48</sup> **Røsaeg**, Erik; "Passenger liabilities and insurance: Terrorism and war risks" in Thomas D.Rhidian(ed), *Liability in Contemporary Maritime Law*, Informa, London, 2007, Chpt.12, pp. 212-213.

<sup>49</sup> EU Regulation No.392/2009 formed part of the EU Third Maritime Safety Package, whose main aim was to restore competitiveness to the maritime sector whilst exclusively benefitting those ship operators who respect safety standards. In particular it was aimed at increasing pressure on sub-standard ship owners. <[http://ec.europa.eu/transport/modes/maritime/safety/third\\_maritime\\_safety\\_package\\_en.htm](http://ec.europa.eu/transport/modes/maritime/safety/third_maritime_safety_package_en.htm)> accessed 3rd November 2012.

(a) Provisions of the Athens Convention 2002

(b) The IMO Guidelines for implementation of the Athens Convention 2002

Such provisions include for example those relating to the liability regime and insurance rules in respect of passengers, luggage and their vehicles as governed by Article 1 and 1bis, Article 2(2) and Articles 3 to 16, Articles 18, 20 and 21 of the Athens Convention 2002 (as well the provisions of the IMO Guidelines).<sup>50</sup> However it is important to note that in certain cases the EU Regulation also extends the provisions of the Athens Convention 2002. For example, Article 6 extends the provisions of the Athens Convention 2002 as it requires in the event of death or personal injury to a passenger caused by a shipping incidents, the carrier responsible for all or part of the carriage shall make what is known as an “advanced payment”, proportionate to the damages suffered. However such advance payment in no way constitutes recognition of liability.

Furthermore the EU Regulation makes a distinction with respect to the geographical application of the said liability regime. Whilst the Athens Convention 2002 regime regulates only international transport, the EU Regulation may be extended under the said regime as within the internal market. Consequently, there is no distinction between national and international transport. The EU Regulation therefore may provide the same level and nature of liability in both international and national transport within the European Union. In fact under Article 2, the EU Regulation shall apply to any international carriage of passengers as defined by the Athens Convention 2002<sup>51</sup> and to carriage by sea within a single Member State onboard certain classes of vessels.<sup>52</sup>

In order for the EU Regulation to apply the vessel must be flying the flag of or registered in an EU Member State, a contract of carriage has been made in a Member State or the place of departure, or destination according to the contract of carriage is a Member State.<sup>53</sup> As referred to above under Article 2, the EU Regulation may allow Member States to apply its rules to all domestic seagoing vessels. Therefore, the EU Regulation may also extend the requirements of the Athens Convention 2002 relating to compulsory insurance to cover domestic maritime carriage.

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<sup>50</sup>Article 3(1) of the EU Regulation.

<sup>51</sup> Article 1(9) of the Athens Convention 2002.

<sup>52</sup> Article 4 of Council Directive 98/18/EC of 17 March 1998 on safety rules and standards for passenger ships [1998] OJ L144.

<sup>53</sup> Article 2 of the EU Regulation.

As has been seen this regime enhances the legal protection given to passengers carried by sea when there is an EU connection. It is therefore of vital importance to Malta as it will ensure that liability regime applies to Maltese registered vessels, to contracts of carriage which have been made in Malta; and to cases where according to the contract of carriage, Malta is a place of departure or destination. Bearing in mind the growing cruise liner passenger business and the increasing number of passenger ships registered in Malta, the EU Regulation will ensure that the levels of protection to passengers and their luggage provided under Maltese Law harmonises with international and European levels; and is both effective and protective.

In any event it should be recorded that given the legal nature of an EU Regulation under Community law,<sup>54</sup> it is compulsory for the Regulation to apply for all Member States automatically as part of their domestic law.<sup>55</sup>

As of the end of December 2012, passengers covered by the EU Regulation now have to be provided with appropriate information on their rights under the EU Regulation either prior to their journey or at the latest on departure.<sup>56</sup>

Although this insurance arrangement required by the EU Regulation, derived from the Athens Convention 2002, will put extra burdens on shipping companies, this is being done also in the interest of maritime transport operators for it; a) requires levels of protection which are common and therefore do not have a negative competitive effect; b) the limitation of the ship- owners or carriers is limited; and c) carriers applying these insurance standards should attract more passengers as they will be comforted by the level of protection being accorded. It should also be noted that the insurance arrangements which are now required under the EU Regulation may benefit insurance companies by providing new business but also by limiting their liability.

As has been stated above the provisions of the EU Regulation have now become part of Maltese law as from the 31 December 2012. Therefore there is no question of transposing it into Maltese law as this is an automatic procedure. However, this rule does not apply if the EU Regulation requires domestic law to enable the Government of Malta to apply it

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<sup>54</sup> Article 288 of the Treaty on the functioning of the European Union provides that a Regulation; ‘shall be binding in its entirety and directly applicable in all Member States’.

<sup>55</sup> See: C-34/73 Variola v Amministrazione delle Finanze [1973] ECR 981 which held that the direct application of a Regulation means that its entry into force and its application in favour of those subject to it are independent of any measure of reception into national law. Member states are under a duty not to obstruct the direct applicability inherent in regulation. Strict compliance with this obligation is an indispensable condition of simultaneous and uniform application of community regulations throughout the community.

<sup>56</sup> Article 7, of the EU Regulation.

effectively. The explanatory note will therefore propose those rules which are necessary for the effective implementation of the EU Regulation.

### e. Maltese Legal Framework

The protection of maritime safety and in particular that of passengers carried by Maltese registered vessels is one of the focal points of Malta's Merchant Shipping Legislation. The principal law dealing with maritime safety is the Merchant Shipping Act.<sup>57</sup> The Merchant Shipping Act provides definitions for both passenger and a passenger ship:

*"passenger" means any person carried in a ship except -*

*(a) persons employed or engaged in any capacity on board the ship on the business of the ship;*

*(b) a person on board the ship either in pursuance of the obligation laid upon the master to carry shipwrecked, distressed or other persons, or by reason of any circumstances that neither the master nor the owner could have prevented or forestalled; and*

*(c) a child under the age of one year;*

*"passenger ship" means any ship which carries more than twelve passengers;''<sup>58</sup>*

The said Act covers shipping activities<sup>59</sup> which includes not only carriage of goods but also carriage of passengers. It provides for inspection to ensure compliance with the rules regulating passenger safety.

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<sup>57</sup> Laws of Malta, Chapter 234.

<sup>58</sup> Ibid at Article 2.

<sup>59</sup> Under Chapter 234, Article 85 "shipping activities" means the international carriage of goods or passengers by sea or the provision of other services to or by a ship, as may be ancillary thereto or associated therewith including the ownership, chartering or any other operation of a ship engaged in all or any of the above activities or as otherwise may be prescribed.

It is significant that under Article 375(1) for the purpose of the Ratification of Treaties Act<sup>60</sup> the Government of Malta is empowered to ratify certain international maritime conventions including the Athens Convention; and the 1976, 1990 and the 2002 Protocol thereto;

*375. (1) For the purposes of the Ratification of Treaties Act, the Government of Malta is hereby empowered to ratify, or accede to the treaties or conventions (including protocols, annexes and appendices thereto) referring to merchant shipping listed in subarticle (2), and the Minister may upon the ratification or accession of any of the said treaties or conventions make regulations giving effect to the provisions thereof, and such power shall include the power to provide that any provision of this Act inconsistent with the provisions of any such treaty or convention shall no longer apply.*

*(2) The treaties and conventions to which subarticle (1) refers are the following:  
[...]*

*(c) Athens Convention relating to the Carriage of Passengers and their Luggage by Sea signed in Athens on the 13th December, 1974;*

*(d) Protocol to the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 1974 signed in London on the 19th November, 1976;*

*(e) Protocol of 1990 to amend the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 1974 signed in London on the 29th March, 1990; [...]*

*(ff) Protocol of 2002 to the Athens Convention Relating to the Carriage of Passengers and their Luggage by Sea, 1974 signed in London on 1 November, 2002; [...]*

Once Malta has acceded to any of these instruments the Minister may make regulations giving effect to the provisions thereof and such power shall include the power to provide that any provision of the Merchant Shipping Act which is inconsistent with the provisions of the said legal instruments shall no longer apply.

From this it transpires that the Government of Malta is empowered to accede to the 2002 Protocol without the need to submit to the procedures of the Ratification of Treaties Act. Furthermore, the Minister responsible for shipping is enabled under the authority of the Merchant Shipping Act to adopt regulations which would allow for the effective implementation of the EU Regulation, and the 2002 Protocol. Although the Merchant

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<sup>60</sup> Laws of Malta, Chapter 304.

Shipping Act empowers the Minister to pass regulations only with respect the 2002 Protocol, it is submitted that the Minister has the same power with respect to the EU Regulation for it is in effect implementing provisions of the 2002 Protocol.

Consequently, it is being proposed that subsidiary legislation will be drafted in the form of regulations entitled “Merchant Shipping (Carriage of Passengers and their Luggage by Sea) Regulations” under the authority of the Merchant Shipping Act, promulgated by the Minister in light of the powers granted to him. These regulations will come into force through a legal notice.

It is important to note that the doctrine of limitation of liability is not foreign to Maltese law. In fact, the International Convention on Limitation for Maritime Claims, 1976 (LLMC Convention) as amended by the Protocol of 1996<sup>61</sup> has been implemented through the LLMC Regulations.<sup>62</sup>

It is pertinent to note that Article 9 of the LLMC Regulations deals with limit of passenger claims on passengers in respect of non-seagoing ships<sup>63</sup>:

*(1) Paragraph (1)(a) of Article 2 of the Convention shall have effect as if the reference to "loss of life or personal injury" did not include a reference to loss of life or personal injury to passengers of seagoing ships.*

*(2) Article 7 of the Convention shall not apply in respect of any seagoing ship.*

*(3) Article 7 of the Convention shall have effect in respect of any ship which is not seagoing as if paragraph 1 thereof reads:*

*"In respect of claims arising on any distinct occasion for loss of life or personal injury to passengers of a ship, the limit of liability of the ship owner thereof in respect of each passenger shall be an amount of 175,000 Units of Account."*

*(4) The provisions of this regulation shall only apply to claims covered by the Athens Convention relating to Carriage of Passengers and their Luggage by Sea, 1974, or any amendment or Protocol to that Convention, which arise from occurrences which take place after the coming into force of that Convention as part of the Law of Malta.*

It has been observed by an authority on the subject that:

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<sup>61</sup> The International Convention on the Limitation of Liability for Maritime Claims was adopted on the 19th November 1976 and entered into force on the 1<sup>st</sup> December 1986. The Protocol of 1996 was adopted on the 3 May 1996 and entered into force on the 13<sup>th</sup> May 2004.

<sup>62</sup> Limitations of Liability for Maritime Claims Regulations, S.L.234.16.

<sup>63</sup> For a discussion on seagoing ships see Martínez Gutiérrez, Norman A; *op.cit.*, p. 37.



*“...although this provision seems to apply Article 7 of the amended LLMC Convention to non-sea going ships, this is not the case, namely because the Convention provides a “global” limit of liability, whereas Regulation 9(3) provides a per capita amount”.*<sup>64</sup>

In effect therefore under Maltese law there is no global limit of liability with respect to passenger claims if these claims arise from non-seagoing ships. Indeed the same author rightly points out that with the implementation of the EU Regulation this will also apply to seagoing ships. This argument is based on a reading of Regulation 9(2) and Regulation 9(4) of LLMC Regulations. For whilst the former excludes the application of Article 7 of the amended LLMC in respect of any seagoing ship the latter states:

*(4) The provisions of this regulation shall only apply to claims covered by the Athens Convention relating to Carriage of Passengers and their Luggage by Sea, 1974, or any amendment or Protocol to that Convention, which arise from occurrences which take place after the coming into force of that Convention as part of the Law of Malta.*

Since the Athens Convention 2002 has now become applicable under Maltese law through the EU Regulation, the said Article 7 no longer applies to seagoing vessels thereby removing the global limitation for claims imposed under current Maltese law and thereafter such claims are now governed by Article 3 of the EU Regulation.

It should also be noted that of 1 January 2012 the Government promulgated the Merchant, Shipping (Insurance for Maritime Claims) Regulations.<sup>65</sup> These Regulations impose on Maltese registered ships or ships entering Maltese ports, an insurance to cover maritime claims subject to limitation under the LLMC Regulations. These regulations adopt measures contained in Article 1(2) of the Merchant Shipping (Insurance for Maritime Claims) Regulations. The proposed draft Regulations will cover similar insurance obligations arising out of the Athens Convention 2002.

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<sup>64</sup> Martínez Gutiérrez, Norman A; ‘Regulation (EC) no. 392/2009 and the Maltese Cruise Industry’, (2012) [1](2) Journal of Malta Maritime Association 9 at 16.

<sup>65</sup> Chapter 234, Regulations, S.L 234.50.

## **f. Proposed Maltese Regulations to ensure the effective implementation of EU Regulation 392/2009**

The EU Regulation applies to international carriage of passengers. The international character of such carriage is determined by the contract, so irrespective of what class such vessels belong to, the draft Regulations will extend the EU Regulation coverage to such voyages wherein the port of departure and the port of arrival are to be found in two different Member States or if such carriage occurs within a single Member State but there is an intermediate port of call in another Member State. More problematic is the question of carriage occurring within a single Member State on board ships of Class A and B<sup>66</sup> where a) the vessel is flying a flag or registered in a Member State b) the contract of carriage is concluded in a Member State or c) the place of departure or destination, according to the contract of carriage is within a single Member State.

The EU Regulation holds that Member States may voluntarily extend its application to all domestic seagoing voyages. In other words not only to ships of Classes A or B but to all domestic voyages. In respect to Malta it is submitted that the only sizable meaningful passenger ships are those transporting passengers between Malta and Gozo. This seems to be in line with EU preferred option to extend the scope of the EU Regulation as widely as possible. In respect of this extension of domestic carriage, the draft Regulations will make it possible for the extension to be delayed until the Minister deems it advisable and feasible. This position is taken in the light of the fact that there are considerable costs that may be incurred on shipping services that can be described as “ life-line services”, such as those provided by the Gozo Channel Company, which operate because of social necessity rather the profit motive.

However whilst the additional costs may prove controversial because of applying burdens to domestic carriage, it is important that even passengers on such vessels enjoy an acceptable regime of liability for damages suffered.

The cost incurred to ensure that the owner’s liability is covered, is well worth the protection it accords to passengers. Furthermore, under the Athens Convention 2002 passengers who suffer such damages would have the right to claim compensation directly

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<sup>66</sup> According to Directive 98/18/EC Class A refers to a passenger ship engaged in a domestic voyage other than voyages covered by Classes B, C, D and Class B refers to a passenger ship engaged on domestic voyages in the course of which it is at no time more than 20 miles from the line of coast, where shipwrecked persons can land, corresponding to the medium tide height.

against the insurer, which right they do not have currently as they have to prove that the ship operator was at fault. This could entail a slower more complex and uncertain process in order to achieve adequate compensation. In the case of litigation with insurance companies, extra judicial settlements are common, in the case of the latter this is far less so. Moreover, insurance companies are usually financially secure and often undertake reinsurance.

Under the Athens Convention 2002, the limit of liability for death or personal injury shall not exceed 400,000 units of account per passenger per distinct occasion.<sup>67</sup> Furthermore the Athens Convention 2002 allows for each party to decide on a national limit above that set by the Athens Convention 2002<sup>68</sup>. The draft Regulations will therefore propose that for the time being the limits prescribed by the Athens Convention 2002 will be accepted. However the Minister will be given the power to increase the limit should the Government of Malta deem it is necessary.

The Athens Convention 2002, read in conjunction with the IMO Guidelines, allow parties to make a reservation with respect to the limitation of liability in respect of claims emerging from war or terrorism. In fact parties can reserve in such cases the right to limit liability to 250,000 units per passenger on each distinct occasion or 340 million units of account overall per ship on each distinct occasion. In fact the IMO Guidelines state;

*2.2. War insurance shall cover liability, if any; for the loss suffered as a result of death or personal injury to passenger caused by:*

- war, civil war, revolution, rebellion, insurrection, or civil strife arising there from, or any hostile act by or against a belligerent power,*
- capture, seizure, arrest, restraint or detainment, and the consequences thereof or any attempt thereat,*
- derelict mines, torpedoes, bombs or other derelict weapons of war,*
- act of any terrorist or any person acting maliciously or from a political motive and any action taken to prevent or counter any such risk,*
- confiscation and expropriation, and may be subject to the following exemptions, limitations and requirement<sup>69</sup>.*

Article 4bis of the Athens Convention 2002 requires carriers, licensed to carry more than 12 passengers, on international carriage and registered in a State party to possess the

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<sup>67</sup> Article 7(1) of the Athens Convention 2002.

<sup>68</sup> Article 7(2) of the Athens Convention 2002.

<sup>69</sup> Annex II of EU Regulation 392/2009 point 2.2.

necessary insurance or other financial security to cover liability under the Athens Convention 2002. The limits of such insurance or security must not be less than 250,000 units of account per passenger on each distinct occasion. Consequently, the ship owners must provide proof that there is insurance cover in accordance with the Athens Convention 2002 such as Blue Cards with respect to adequate insurance to cover both non-war and war and terrorism related risks.

The draft Regulations will provide for the administrative framework for the issuing of such certificates and designate the competent Minister i.e the Minister referred to in article 2 of the Merchant Shipping Act.<sup>70</sup> The Authority will be responsible for establishing the criteria which will be transmitted to ship owners and insurers, providing clear instructions as to what needs to be provided to the Authority before necessary certification under the Athens Convention 2002 and EU Regulation can be issued. This is necessary as the Athens Convention 2002 holds that a certificate confirming that the necessary or financial security is in force, will be issued to each ship after the competent authority decides that the said cover is available. Under the Athens Convention 2002, in cases where a ship is registered in a State party its competent authority issues the certification; in cases where the ship is not registered in a State party, the certification may be issued by any competent authority of a State party.

As previously stated, the EU Regulation now applies in Malta and consequently there will be a need to establish offences and sanctions to ensure it is complied with. The draft Regulations therefore propose offences and penalties which are reflected in other similar laws to ensure effectiveness and equivalence.

The draft Regulations will make it an offence for the carrier or the master of a ship carrying more than 12 passengers not to have a certificate attesting that it has insurance or other financial security in force in accordance with the relevant provisions of the Athens Convention 2002. A person guilty of this offence will be subject to a fine as may be determined by the Minister from time to time. A similar offence would occur if the ship fails to carry or the master fails to produce a certificate in such cases the master will be held personally liable. The draft Regulations will authorise the competent Authority to have the powers to cancel such certificates and to require them to be delivered up. The draft Regulations will make it an offence for a person who fails to deliver up a certificate.

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<sup>70</sup> Article 2, Chapter 234.

It will also be an offence under the draft Regulations if the carrier fails in his obligations under Article 7 of the EU Regulation; where the carrier is obliged to ensure that the passengers are provided with appropriate and comprehensive information about their rights under the EU Regulation. The draft Regulations will establish this obligation through a notice which will have to be delivered to the passengers. In this notice reference will be made to the relevant provisions of the Athens Convention 2002 and a warning that in most cases the carriers' liability for death or personal injury or loss of damage to luggage (including a vehicle) is limited. Furthermore, passengers are to be warned that luggage is presumed to have been delivered undamaged unless written notice is given.

The draft Regulations will also make it an offence of the carrier, if such notice is not given to passengers. These offences will also be applicable in respect of domestic seagoing voyages, in cases where the extension will be regulated. Further to the above sanctions, the draft Regulations will empower the appropriate authority to detain a ship if any one attempts to depart from Maltese port without the necessary certification. And if a vessel attempts to leave a Maltese port before the detention is lifted the master of ship will liable to an offence.

It is being proposed in the draft Regulations for practical and efficiency purposes that problems relating to certification would in the first instance be subject to arbitration particularly, with respect to the issue of detention of ships. Furthermore it will be possible to appeal from the decisions of the arbitration to the Civil Court, First Hall. Therefore, the draft Regulations will establish that where under the Athens Convention 2002 and EU Regulation reference is made to the made to "the Court seized"<sup>71</sup> in each case this shall be read and construed as a reference to the Civil Court First Hall. Therefore, the draft regulation will entrust the Civil Court First Hall to have jurisdiction to try and determine cases and actions that in accordance with the EU Regulation are brought to it.

Moreover, the draft Regulations will make it clear that where any claim under the Athens Convention 2002 or EU Regulation is brought in Malta before the Civil Court First Hall this shall be done by presenting a claim instituted in accordance with the Code of Organisation and Civil Procedure.<sup>72</sup> The draft Regulations will also declare that if the time limits imposed by the 2002 Protocol or The EU Regulation in respect of matters

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<sup>71</sup> See: Annex I to EU Regulation, Articles 6, 7, 9 and 16.

<sup>72</sup> Laws of Malta, Chapter 12.

falling under these instruments, conflict with the relevant provisions of Maltese law, the former shall prevail.

To ensure the proper workings of the draft Regulations and any future developments, the draft Regulations will also establish a review mechanism. A vital part of which, is a report by the Minister reviewing the implementation of the draft Regulations which review will be made public to ensure a transparent process. The Minister will also be required to take into account the measures taken by other European Members. This report should also be sent to the International Maritime Organization, London, and the European Commission, Brussels.

## **g. Accession to Athens Convention 2002 and Reservations**

As explained above, it is hereby recommended that in light of the EU Regulation 392/2009, Malta accedes to Athens Convention 2002, through the issuance of a note verbale to the IMO Secretary-General acting as a depository, in conformity with article 17(3) of Athens 2002, such accession should be subject to the following reservations in order to protect Maltese maritime interests:

1. Limitation of liability of carriers:
  - a. It is recommended that Malta reserves the right to and undertakes to limit liability under paragraph 1 or 2 of Article 3 of the said Convention, if any, in respect of death of or personal injury to a passenger caused by any of the risks referred to in paragraph 2.2. of the IMO Guidelines for Implementation of the Athens Convention to lower of the following amounts:
    - 250,000 units of account in respect of each passenger on each distinct occasion:
    - or
    - 340 million units of account overall per ship on each distinct occasion.
  - b. It is recommended that Malta reserves the right to and undertakes to apply the IMO Guidelines for Implementation of the Athens Convention paragraphs 2.1.1 and 2.2.2 *mutatis mutandis* to such liabilities.
  - c. It is recommended that the liability of the performing carrier pursuant to Article 4 of the Convention, the liability of the servants and agents of the carrier or the performing carrier pursuant to Article 11 of the Convention and the limit of the aggregate of the amounts recoverable pursuant to Article 12 of the Convention shall be limited in the same way.
  - d. It is recommended that the reservation and undertaking in paragraph 1 a will apply regardless of the tasks of liability under paragraph 1 or 2 of Article 3 and notwithstanding anything to the contrary in Article 4 or 7 of the Convention; but this reservation and undertaking do not affect the operation of Article 10 and 12.

## 2. Compulsory insurance and limitation of liability of insurers

- a) It is recommended that Malta reserves the right and undertakes to limit the requirement under paragraph 1 of Article 4bis to maintain insurance or other financial security for death or personal injury to a passenger caused by any of the risks referred to in paragraph 2.2 of the IMO Guidelines for Implementation of the Athens Convention to the lower of the following amounts:
- 250,000 units of account in respect of each passenger on each distinct occasion,
  - or
  - 340 million units of account overall per ship on each distinct occasion.
- b) It is recommended that Malta reserves the right to and undertake to limit the liability of the insurer or other person providing financial security under paragraph 10 of Article 4bis for death or personal injury to a passenger caused by any of the risks referred to in paragraph 2.2 of the IMO Guidelines for Implementation of the Athens Convention, to a maximum limit of the amount of insurance or other financial security which the carrier is required to maintain under paragraph 2.a of this reservation.
- c) It is recommended that Malta also reserves the right to and undertakes to apply the IMO Guidelines for Implementation of the Athens Convention including the application of the clauses referred to in paragraphs 2.1 and 2.2 in the Guidelines to all compulsory insurance under the Convention.
- d) It is recommended that the Republic of Malta reserves the right to and undertakes to exempt the provider of insurance or other financial security under paragraph 1 of Article 4bis from any liability for which he has not undertaken to be liable.



### 3. Certification

- a. It is recommended that Malta reserves the right to and undertakes to issue insurance certificates under paragraph 2 of Article 4bis of the Convention so as:
  - to reflect the limitations of liability and the requirements for insurance cover referred to in paragraphs 1.a, 2.a,2.b and 2.d; and
  - to include such other limitations, requirements and exemptions as it finds that the insurance market conditions at the time of the issue of the certificate necessitate.
- b. It is recommended that Malta reserves the right to and undertakes to accept insurance certificates issued by other State Parties issued pursuant to a similar reservation.

It is recommended that all such limitations, requirements and exemptions will be clearly reflected in the Certificate issued or certified under paragraph 2 of Article 4bis of the Convention.

### 4. Relationship between the Reservation and the IMO Guidelines for the implementation of the Athens Convention

It should be noted that the rights retained by this reservation should be exercised with due regard to the IMO Guidelines for Implementation of the Athens Convention or to any amendments thereto, with an aim to ensure uniformity. If a proposal to amend the IMO Guidelines for implementation of the Athens Convention including the limits has been approved by the Legal Committee of the International Maritime Organization those amendments will apply as from the time determined by the Committee. This is without prejudice to the rules of international law regarding the right of the Republic of Malta to withdraw or amend its reservation.

Moreover, the Secretary General of the IMO should also be informed through the note verbale that Malta adheres to the European Declaration of Competence and the European Union Declaration on Article 17bis(3) of the Athens Convention 2002.<sup>73</sup>

## **Annex A: Merchant Shipping (Carriage of Passengers and their Luggage by Sea) Regulations**

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<sup>73</sup> See: Annex E.

**Annex B: Draft Note Verbale to accede to the Protocol of  
2002 to the Athens Convention relating to the Carriage of  
Passengers and their Luggage by Sea, 1974**

**Annex C: Regulation (EC) No.392/2009 on the liability of carriers of passengers by sea in the event of accidents.**

**Annex D: Athens Convention relating to the Carriage of  
Passengers and their Luggage by Sea, 2002 (Consolidated  
text of the Athens Convention relating to the Carriage of  
Passengers and their Luggage by Sea, 1974 and the  
Protocol of 2002 of the Convention)**

**Annex E: Accession by the European Union to the Protocol  
of 2002 to the Athens Convention relating to the Carriage  
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**Annex F: Ratification of Treaties Act, Chapter 304 of the  
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## SUBSIDIARY LEGISLATION \_\_\_\_.

### MERCHANT SHIPPING (CARRIAGE OF PASSENGERS AND THEIR LUGGAGE BY SEA) REGULATIONS

[Date]

*LEGAL NOTICE* \_\_\_\_ of 2012.

1. The title of these regulations is the Merchant Shipping (Carriage of Passengers and their luggage by Sea) Regulations. Title.
  
2. (1) In these regulations unless the context otherwise requires – Interpretation  
“the Act” means the Merchant Shipping Act; Cap.234.  
“Convention Country” means a country in respect of which the Athens Convention Relating to the Carriage of Passengers and their Luggage by Sea, 2002 is in force;  
“competent authority” means the Authority for Transport in Malta established under the Authority for Transport in Malta Act; Cap.499.  
“Convention” means the Athens Convention Relating to the Carriage of Passengers and their Luggage by Sea, 2002;  
“Court” means Civil Court, First Hall;  
“EU Regulation 392/2009” means Regulation (EC) No. 392/2009 of the European Parliament and of the Council of 23 April 2009 on the liability of carriers of passengers by sea in the event of accidents;  
“insurance” means insurance or other financial security satisfying the requirements of Article 4bis of the Convention;  
“IMO Guidelines” means IMO Guidelines for the Implementation of the Athens Convention Relating to the Carriage of Passengers and their Luggage by Sea, 2002;  
“LLMC Convention” means the Convention on Limitation of Liability for Maritime Claims, 1976 as amended by the Protocol of 1996 thereto;  
“Maltese Ship” shall have the same meaning as is assigned to it in article 3 of

the Act;

“Member State” means a Member State of the European Union;

“Minister” shall have the same meaning as is assigned to it in article 2 of the Act;

“passenger” shall have the same meaning as is assigned to it in article 2 of the Act;

“ship owner” means the registered owner of a sea going ship, or any other person such as the bareboat charter who is responsible for the operation of the ship.

(2) Subject to the provisions of these regulations, words and expressions used shall have the same meaning assigned to them in the Convention.

3. (1) These regulations provide measures for the implementation of EU Regulation 392/2009 and the Convention, and are being issued in terms of Sections 374 and 375 of the Act.

Authority and purpose.

(2) These regulations shall come into force on the [...] <sup>74</sup>

(3) These regulations apply to ships and persons engaged in the carriage of passengers and their luggage by sea to which the EU Regulation 392/2009 and the Convention applies.

4. A ship may not enter or leave a port in Malta, nor if the ship is a Maltese ship in a port in any other country, <sup>75</sup> unless there is insurance in force, in respect of that ship and a certificate, or certificates complying with the provisions of regulation 5.

Application.

5. (1) The existence of the insurance is to be proved by a certificate or certificates in the form prescribed in (i) the Annex to the Convention or (ii) Appendix B of the Annex II to the EU Regulation 392/2009 showing that there is in force in respect of the ship insurance satisfying those requirements.

Insurance.

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<sup>74</sup> Such date is to be decided by the legislator. However it should be borne in mind as from 31 December 2012, the EU Regulation 392/2009 is already part of the laws of Malta.

<sup>75</sup> The proviso that extends the insurance and certification obligation on a Maltese Ship in any port outside Malta is necessary as the EU Regulation 392/2009 binds all Maltese registered Ships.

(2) The certificate must be –

(a) If the ship is a Maltese ship, a certificate issued by the Minister.

(b) If the ship is registered in an Convention Country (other than Malta) a certificate issued by or under the authority of the Government of that other Convention Country;

(c) If the ship is registered in a country which is not an Convention Country, a certificate issued by the Minister or under the authority of any Convention Country;

(d) If the ship is registered in a country which is not a Convention Country but which is a Member State of the European Union a certificate issued by, or under the authority of that Member State.

(3) The certificate must –

(a) be carried onboard the ship; and

(b) be produced on demand by the master to-

(i) the Minister or to any officer designated by the competent authority where the ship is a Maltese ship; or

6. (1) Subject to the provisions of sub-article 2 of this regulation, if the Minister is satisfied on application for such certificate as is mentioned in regulation 5 in respect of a Maltese ship or a ship registered in any country that is not a Convention Country, that there will be in force throughout the period for which the certificate is to be issued a contract of insurance or other financial security satisfying the requirements of Article 4*bis* of the Convention, the Minister may issue such certificate to the registered owner.

Issue of Certificates by the Minister.

(2) If the Minister is of the opinion that there is doubt as to whether-

(a) the person providing the insurance will be able to meet its obligations there under; or

(b) the insurance will not cover the registered owners' liability under the EU Regulation 392/2009 and the Convention;

the Minister may, after taking into account any other matters which appear to be relevant, refuse to issue the certificate.

- (3) Where at any time while a certificate is in force, the person to whom the certificate has been issued ceases to be the ship owner to which the certificate relates, the certificate shall be delivered up forthwith to the Minister or to any officer designated by the competent authority and in such case shall be cancelled by the Minister.
- (4) Where at any time while a certificate is in force, it is established in any legal proceedings that the contract of insurance in respect of which the certificate is issued is or may be treated as invalid the certificate may be cancelled by the Minister and if so cancelled, shall on demand be delivered up to the Minister or any officer designated by the person to whom it was issued.
- (5) Where at any time while a certificate is in force circumstances arise in relation to the issuer or guarantor named in the certificate (or where more than one is so named, any of them) such that if the certificate were applied for at that time, the Minister would have been entitled to refuse the application under regulation (2)(a) and (b) the certificate may be cancelled by the Minister and if so cancelled the certificate shall on demand be delivered up to the Minister by the person to whom it was issued.
- (6) If a person required to deliver up a certificate fails to do so he shall be liable to a fine not exceeding [...]
- (7) The Minister shall send a copy of any certificate issued under these regulations in respect of a Maltese ship to the competent authority which shall make the copy available for public inspection.

7. (1) A ship owner is guilty of an offence if-

Penalties.

- (a) A ship belonging to a ship owner enters or leaves a port in contravention of regulation 4 or if;
  - (b) anyone attempts to navigate that ship into or out of a port in contravention of that regulation.
- (2) If a ship owner is guilty of an offence under regulation (1) that ship owner is liable to a fine not exceeding [...]
  - (3) A master who fails to comply with regulation 5(3) is guilty of an offence and is liable to a fine not exceeding [...]
  - (4) Any document required to be served on a foreign company for the purpose of or the institution of (or otherwise in connection with) the

institution of proceedings for an offence under this regulation against the company as ship owner is to be treated as served on the company if the document is served on the master of the ship.

**8.** (1) A ship may be detained if any one attempts to navigate it out of port in contravention of these regulations. Power to detain.

(2) Article 371 of the Act on the detention of ships shall apply mutatis mutandis in the application of regulation 8(1).

(3) For the purposes of these regulations and officer or official detaining the ship referred to in article 371 of the Act, must serve on the master of the ship a detention notice which –

(a) states the reason for the detention; and

(b) requires the ship to comply with the terms of the detention notice until it is released by the competent authority

(4) where a ship is detained which is not a Maltese ship, the Minister must immediately inform, in writing-

(a) the ships' flag State administration; or, if this is not possible,

(b) the Consul of the State of the flag administration; or in the Consul's absence,

(c) the nearest diplomatic representative of the State of the flag administration.

(5) The written information referred to in regulation 8(4) must set out all the circumstances of the decision to detain the ship.

(6) Where regulation 8(4) applies the Minister must notify all relevant-

(a) nominated surveyors; or

(b) recognized organizations;

responsible for the issue of classification certificates.

**9.** (1) Any question as to whether the matters specified in relation to a ship in a detention notice constitute the valid basis for the competent authority's opinion must, if the master or ship owner so requires by notice given to the Arbitration.



competent authority within 21 days from the service of the detention notice be referred to a single arbitrator appointed by agreement between the parties for that question to be decided by the arbitrator.

(2) Where notice is given by the master or ship owner in accordance with regulation 9(1), the giving of notice does not suspend operation of the detention notice.

(3) The arbitrator may have regard to any matter not specified in the detention notice which appears to the arbitrator to be relevant as to whether or not the ship was or was not liable to be detained.

(4) Where the arbitrator decides, in respect of a matter to which the reference relates, that in all the circumstances the matter did not constitute a valid basis for the competent authority's opinion, the arbitrator must

(a) cancel the detention notice; or

(b) affirm it with such modifications as the arbitrator may in the circumstances deem fit.

(5) In any case other than one described in regulation 9(4) the arbitrator must affirm the detention notice in its original form.

(6) The decision of the arbitrator must include a finding whether there was or was not a valid basis for the detention of the ship.

(7) A person is not qualified for appointment as an arbitrator under this regulation unless they are:

(a) a person holding a certificate of competency as a master mariner or as marine engineer officer class 1, or a person holding a certificate equivalent to any such certificate;

(b) a naval architect;

(c) an advocate of at least 7 years standing; or

(d) a person with special experience of shipping matters, or of activities carried on within ports.

**10.** (1) If on a reference under regulation 9 relating to a detention notice, the arbitrator decides that the ship owner has proved-

Compensation for unjustified detention.

(a) that the matter complained of did not constitute a valid basis for the competent authority's opinion; and

(b) that there were no reasonable grounds for the issue of the detention notice;

the arbitrator must award the ship owner such compensation in respect of any loss suffered in consequence of the detention of the ship as the arbitrator deems fit.

- 11.** Appeals from the decisions of the arbitrator shall be submitted to the Court not later than 15 days from the date when the decision was delivered. Appeals.
- 12.**(1) The Court shall have jurisdiction, subject to the provisions of the EU Regulation 392/2009 and the Convention, to decide any claims relating to the death of or personal injury to a passenger or the loss or damage to his luggage; any such claim shall be instituted in accordance with the Code of Organisation and Civil Procedure. Jurisdiction.
- (2) If time limits imposed by the Convention, and the EU Regulation 392/2009 in respect of matters falling under these instruments, conflict with the relevant provisions of Maltese law, the former shall prevail.
- 13.** A carrier or performing carrier which fails to supply a passenger with the information specified in Article 7 of the EU Regulation 392/2009 is guilty of an offence and is liable to a fine not exceeding [...]; such information should include a warning that; Provision of information to passengers.
- (a) the carriers' liability for death or personal injury or loss or damage to luggage including a vehicle, is limited and,
- (b) that luggage is presumed to have been received undamaged unless written notice is given to the carrier.
- 14.** The Authority is hereby granted, in terms of Section 374 of the Act, to charge the fee of [...] Euro for the issue of a certificate under regulation 6. Fee.
- 15.** Subject to Section 375 of the Act, these regulations shall apply to ships registered in a Convention Country. Athens Convention.
- 16.** These regulations shall not apply to Maltese ships engaged in domestic voyages, unless the Minister by an order decides to extend such application. Domestic Voyages.
- 17.** In the event of a conflict between these regulations, in so far as they implement the EU Regulation 392/2009 and the Convention, and the Act, Conflict.

the said regulations shall prevail.

Review

**18.** (1) The Minister must from time to time;

(a) carry out a review of these regulations ,

(b) set out the conclusions of the review in the report; and

(c) publish the report.

(2) In carrying out the review the Minister must so far as is reasonable have regard to how the EU Regulation 392/2009 is applied in other Member States.

(3) The report must in particular-

(a) set out the objectives intended to be achieved by the regulatory system established by these regulations;

(b) assess the extent to which those objectives are achieved;

(c) assess whether those objectives remain appropriate and, if so, the extent to which they could be achieved with a system that imposes less regulation;

(d) transmit a copy to the European Commission, Brussels, and the International Maritime Organization, London.

(4) The first report under this regulation must be published before the end of the period of five years beginning with the day on which these regulations come into force.

(5) Reports under this regulation are afterwards to be published at intervals not exceeding five years.

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## Official Letter head

### NOTE VERBALE

The High Commission of the Republic of Malta in London presents its compliments to the International Maritime Organization in London, and has the honour to inform the Secretary General that the Government of Malta hereby accedes, in conformity with Article 17(3) of the Protocol of 2002 to the Athens Convention Relating to the Carriage of Passengers and their Luggage by Sea, 1974, to the said Protocol subject to the following reservations and declarations:

#### Reservations

5. Limitation of liability of carriers
  - a) The Republic of Malta reserves the right to and undertakes to limit liability under paragraph 1 or 2 of Article 3 of the said Convention, if any, in respect of death of or personal injury to a passenger caused by any of the risks referred to in paragraph 2.2. of the IMO Guidelines for Implementation of the Athens Convention to lower of the following amounts:
    - 250,000 units of account in respect of each passenger on each distinct occasion:  
or
    - 340 million units of account overall per ship on each distinct occasion.
  - b) The Republic of Malta reserves the right to and undertakes to apply the IMO Guidelines for Implementation of the Athens Convention paragraphs 2.1.1 and 2.2.2 mutatis mutandis to such liabilities.
  - c) The liability of the performing carrier pursuant to Article 4 of the Convention, the liability of the servants and agents of the carrier or the performing carrier pursuant to Article 11 of the Convention and the limit of the aggregate of the amounts recoverable pursuant to Article 12 of the Convention shall be limited in the same way.

d) The reservation and undertaking in paragraph 1 a will apply regardless of the tasks of liability under paragraph 1 or 2 of Article 3 and notwithstanding anything to the contrary in Article 4 or 7 of the Convention; but this reservation and undertaking do not affect the operation of Article 10 and 12.

6. Compulsory insurance and limitation of liability of insurers

e) The Republic of Malta reserves the right and undertakes to limit the requirement under paragraph 1 of Article 4bis to maintain insurance or other financial security for death or personal injury to a passenger caused by any of the risks referred to in paragraph 2.2 of the IMO Guidelines for Implementation of the Athens Convention to the lower of the following amounts:

- 250,000 units of account in respect of each passenger on each distinct occasion,  
or
- 340 million units of account overall per ship on each distinct occasion.

f) The Republic of Malta reserves the right to and undertake to limit the liability of the insurer or other person providing financial security under paragraph 10 of Article 4bis for death or personal injury to a passenger caused by any of the risks referred to in paragraph 2.2 of the IMO Guidelines for Implementation of the Athens Convention, to a maximum limit of the amount of insurance or other financial security which the carrier is required to maintain under paragraph 2.a of this reservation.

g) The Republic of Malta also reserves the right to and undertakes to apply the IMO Guidelines for Implementation of the Athens Convention including the application of the clauses referred to in paragraphs 2.1 and 2.2 in the Guidelines to all compulsory insurance under the Convention.

h) The Republic of Malta reserves the right to and undertakes to exempt the provider of insurance or other financial security under paragraph 1 of Article 4bis from any liability for which he has not undertaken to be liable.

## 7. Certification

- c. The Republic of Malta reserves the right to and undertakes to issue insurance certificates under paragraph 2 of Article 4bis of the Convention so as:
- to reflect the limitations of liability and the requirements for insurance cover referred to in paragraphs 1.a, 2.a, 2.b and 2.d; and
  - to include such other limitations, requirements and exemptions as it finds that the insurance market conditions at the time of the issue of the certificate necessitate.
- d. The Republic of Malta reserves the right to and undertakes to accept insurance certificates issued by other State Parties issued pursuant to a similar reservation.

All such limitations, requirements and exemptions will be clearly reflected in the Certificate issued or certified under paragraph 2 of Article 4bis of the Convention.

## 8. Relationship between this Reservation and the IMO Guidelines for the implementation of the Athens Convention

The rights retained by this reservation will be exercised with due regard to the IMO Guidelines for Implementation of the Athens Convention or to any amendments thereto, with an aim to ensure uniformity. If a proposal to amend the IMO Guidelines for implementation of the Athens Convention including the limits has been approved by the Legal Committee of the International Maritime Organization those amendments will apply as from the time determined by the Committee. This is without prejudice to the rules of international law regarding the right of the Republic of Malta to withdraw or amend its reservation.

### Declarations

The Government of the Republic of Malta, wishes record that in the implementation of the Athens Convention 2002 it adheres to:

a) The European Union Declaration of Competence

As regards matters covered by articles 10 and 11 of the Athens Protocol of 2002 to the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 1974, which come under article 81 of the Treaty on the Functioning of the European Union, the Member States of the European Union, with the exception of the Kingdom of Denmark, in accordance with articles 1 and 2 of Protocol (No 22) on the position of Denmark, annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union, have conferred competences to the Union. The Union exercised this competence by adopting Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

b) European Union Declaration on Article 17bis(3) of the Athens Convention, as amended by Article 11 of the Athens Protocol

1. Judgments on matters covered by the Athens Protocol of 2002 to the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 1974, when given by a court of the Kingdom of Belgium, the Republic of Bulgaria, the Czech Republic, the Federal Republic of Germany, the Republic of Estonia, Ireland, the Hellenic Republic, the Kingdom of Spain, the French Republic, the Italian Republic, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Grand Duchy of Luxembourg, the Republic of Hungary, Malta, the Kingdom of the Netherlands, the Republic of Austria, the Republic of Poland, the Portuguese Republic, Romania, the Republic of Slovenia, the Slovak Republic, the Republic of Finland, the Kingdom of Sweden or the United Kingdom of Great Britain and Northern Ireland, shall be recognised and enforced in a Member State of the European Union in accordance with the relevant rules of the European Union on the subject.

2. Judgments on matters covered by the Athens Protocol, when given by a court of the Kingdom of Denmark, shall be recognised and enforced in a Member

State of the European Union in accordance with the Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

3. Judgments on matters covered by the Athens Protocol, when given by a court of a third State:

(a) bound by the Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters of 30 October 2007 shall be recognised and enforced in the Member States of the European Union in accordance with that Convention;

(b) bound by the Lugano Convention on jurisdiction and the enforcement of judgments in civil and commercial matters of 16 September 1988 shall be recognised and enforced in the Member States of the European Union in accordance with that Convention.

The High Commission of Malta in London avails itself of this opportunity to renew to the International Maritime Organization the assurances of its highest consideration.

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Signature of High Commissioner and Official Seal.

London

1 April 2013