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The Athens Convention and Limitation of Liability in U.S. Federal Courts: While Communication Is Key, Some Things are Better Left Unsaid

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NOTES

The Athens Convention and Limitation of Liability in U.S. Federal Courts: While Communication Is Key, Some Things are Better Left Unsaid

Angelica L. Boutwell¹

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1. J.D. Candidate 2013, University of Miami School of Law; B.A. 2008, University of Miami. I would like to thank Professor Michael Sevel for his guidance, expertise, and insight throughout this process, my parents for their faith and endless encouragement, my colleagues on the Inter-American Law Review, and my dear friend, Zach Vosseler, without whom I would lack perspective and a sense of humor.

I. INTRODUCTION

Perhaps since the birth of economic markets, entities seeking to engage in trade have sought to limit their liability to third parties.² The desire for legal limitations of liability in the context of business transactions grew in prominence as industrial commerce became increasingly international in nature.³ In the admiralty and maritime context, the ability of shipping companies and carriers to limit their liability to clients and passengers is deeply entrenched in the legal systems of ship-owning nations.⁴ Not to be outdone, United States law contains provisions for such limits on ship owners' liability.⁵

It is important to note that any maritime limits of liability allowable under United States law are restricted in scope to voyages that in some way make contact with a port of the United States.⁶ Ambitious multinational treaties have arisen on the international landscape as the prime arbiters in pursuit of the goal of legal uniformity in the area of liability limitation. This article will focus on the emergence of one such convention in particular: the Convention Relating to the Carriage of Passengers and Their Luggage by Sea, colloquially referred to as the "Athens Convention."⁷

With its first ratification in 1974, the Athens Convention made certain limitations of liability available to any ship flying

2. Limitation of liability, generally, has been traced back to the eleventh century notion of the *contrat de commande*, a commercial device that allowed merchants to limit their liability in trade transactions to the value of the goods to be exchanged in that transaction. Note, *Limitation of the Liability of Shipowners*, 35 COLUM. L. REV. 246, 247 n.1 (1935).

3. As Mediterranean trade routes expanded during the fourteenth century, ship-owners were faced with burgeoning costs, higher risk of loss, and less control over the actions of the captains and crews manning their vessels. From these conditions arose the concurrent need to relieve ship-owners of liability for full damages for injuries resulting from employee misconduct beyond the scope of their supervision or control. *Id.* at 246.

4. See *The Main v. Williams*, 152 U.S. 122, 126 (1894) ("[H]owever the practice originated, it appears, by the end of the seventeenth century, to have become firmly established among the leading maritime nations of Europe. . .").

5. See generally 46 U.S.C. §§ 30501–30511 (2006).

6. 46 U.S.C. § 30509(a)(1) (2006) (providing that "[t]he owner, master, manager, or agent of a vessel transporting passengers between ports in the United States, or between a port in the United States and a port in a foreign country, may not include in a regulation or contract a provision limiting. . . (A) the liability of the owner. . . for personal injury or death caused by the negligence or fault of the owner. . .").

7. See Athens Convention Relating to the Carriage of Passengers and Their Luggage by Sea, Dec. 13, 1974, 14 I.L.M. 945 [hereinafter Athens Convention].

the flag of a signatory nation.⁸ The Athens Convention carries no legal force of its own in any court of the United States, because the U.S. is not a signatory to the Convention.⁹ However, several passenger cruise lines have incorporated, by reference, limitations of liability based on the Athens Convention in their ticket passage contracts. The terms that refer to the Athens Convention are incorporated into contract clauses applicable only to foreign voyages.¹⁰

Passenger carriers in the United States have long been able to limit the legal rights of passengers by way of terms and conditions incorporated into ticket contracts, provided those terms satisfy reasonable notice requirements in their communication to passengers.¹¹ Prime examples of these sorts of limitations are forum-selection and choice of law clauses.¹² A number of cruise companies have sought enforcement of Athens Convention liability limits in United States federal courts against passengers claiming injury on cruises that made no contact with a U.S. port and have argued that terms validly incorporated into a legitimate contract are enforceable so long as they are reasonably communicated to affected passengers.¹³ A greater number of major international cruise companies have incorporated limitation of liability provisions that invoke specific terms of the Athens Convention applicable to wholly non-U.S. cruises into their passage

8. *Id.*

9. *See* *Chan v. Soc'y Expeditions, Inc.*, 123 F.3d 1287, 1296 (9th Cir. 1997).

10. Meaning any cruise between the ports of two foreign nations, as 46 U.S.C. § 30509 prohibits the enforcement by U.S. courts of liability limiting provisions inserted into passenger carriers' ticket contracts.

11. *See generally* *Shankles v. Costa Armatori, S.P.A.*, 722 F.2d 861 (1st Cir. 1983).

12. A forum selection clause in any contract designates a particular state or court as the jurisdiction in which the parties will litigate disputes arising out of the contract and/or their contractual relationship. 17A AM. JUR. 2D *Contracts* § 259 (2012). Such clauses are *prima facie* valid unless a passenger shows insufficient notice of the clause's existence in the contract, or the clause is fundamentally unfair. 70 AM. JUR. 2D *Shipping* § 545 (2012).

A choice of law clause in a contract names a particular state and provides that the substantial laws of that jurisdiction will be used to determine the validity and construction of the contract, regardless of any conflicts between the laws of the named state and the state in which the case is litigated. 17A AM. JUR. 2D *Contracts* § 261 (2012).

13. *See* *Becantinos v. Cunard Line Ltd.*, No. 89 Civ. 0166, 1991 WL 64187 (S.D.N.Y. Apr. 18, 1991); *Mills v. Renaissance Cruises, Inc.*, No. C 91 3001 BAC ARB, 1992 WL 471301 (N.D. Cal. Aug. 17, 1992); *Wallis v. Princess Cruises, Inc.*, 306 F.3d 827 (9th Cir. 2002); *Ginsberg v. Silversea Cruises Ltd.*, No. 03-62141-CIV, 2005 WL 5654644 (S.D. Fla. May 17, 2005); *Henson v. Seabourn Cruise Line Ltd., Inc.*, 410 F.Supp. 2d 1246 (S.D. Fla. 2005).

contracts.¹⁴

While the United States Supreme Court has not had the occasion to rule on the legitimacy of incorporation of the Athens Convention into ticket contracts for cruises having no connection to the United States save a forum selection clause, there does exist precedent within the Ninth Circuit.¹⁵ More recently, this issue was explored by the United States District Court for the Southern District of Florida in a case that was ultimately denied interlocutory appeal to the Eleventh Circuit Court of Appeals.¹⁶

The strength of limitation of liability provisions that invoke the Athens Convention should be of preeminent importance to the cruise lines that utilize them, as it appears that federal courts

14. At the time of this writing, this group of major cruise companies, most with operations within the United States, includes (but is not limited to): *Passenger Ticket Contract*, OCEANIA CRUISES, <http://www.oceaniacruises.com/corporate/legal/ticketcontract.aspx> (last visited Mar. 29, 2012); *Cruise/Cruisetour Ticket Contract*, ROYAL CARIBBEAN CRUISE LINES, http://www.royalcaribbean.com/customersupport/faq/details.do?pagename=frequently_asked_questions&pnav=5&pnav=2&faqSubjectName=After+You+Purchase&faqId=1079&faqSubjectId=323&faqType=faq/content/en_US/pdf/CTC_Not_For_BR.pdf (last visited Mar. 29, 2012); *Ticket Contract*, CARNIVAL CRUISE LINES, http://www.carnival.com/cms/static_templates/ticket_contract.aspx (last visited Mar. 29, 2012); *Guest Ticket Contract*, NORWEGIAN CRUISE LINES, <http://www2.ncl.com/about/additional-terms-and-conditions#applicable> (last visited Mar. 29, 2012); *Passage Contract*, PRINCESS CRUISES, http://www.princess.com/legal/passage_contract/index.jsp (last visited Mar. 29, 2012); *Cruise/Cruisetour Ticket Contract*, CELEBRITY CRUISES LTD., http://media.celebritycruises.com/celebrity/content/pdf/Celebrity_CTC_Eff_08_01_10.pdf (last visited March 29, 2012); *Cruise Ticket Contract*, COSTA CRUISES, <http://www.costacruise.com/B2C/USA/Support/contract/contract.htm> (last visited Mar. 29, 2012); *Cruise Contract*, DISNEY CRUISE LINE, <http://disneycruise.disney.go.com/cruise-contract/?country=us> (last visited Mar. 29, 2012); *Cruise Contract*, HOLLAND AMERICA LINE, <http://www.hollandamerica.com/legalAndPrivacy/Main.action?tabName=Cruise+Contract> (last visited Mar. 29, 2012); *Cruise Contract*, SEABOURN, <http://www.seabourn.com/legalAndPrivacy/Main.action?tabName=Cruise+Contract> (last visited Mar. 29, 2012); *Passenger Contract Terms & Conditions*, SILVERSEA, <http://www.silversea.com/terms-conditions/passage-contract/> (last visited Mar. 29, 2012); *Terms and Conditions*, STAR CRUISES, http://www.starcruiises.com/media/232935/tnc_AP_20090622.pdf (last visited Mar. 29, 2012); REGENT SEVEN SEAS CRUISES, <http://www.rssc.com/legal/terms.aspx> (last visited Mar. 29, 2012); *Ticket Contract*, PAUL GAUGUIN CRUISES, <http://www.pgcruiises.com/ticket-contract> (last visited Mar. 29, 2012); *Terms and Conditions*, MSC CRUISES, http://www.msccruiisesusa.com/us_en/Terms-and-Conditions.aspx (last visited Mar. 29, 2012); *Terms & Conditions of Carriage*, LOUIS CRUISES, <http://louiscruiises.com/en/terms-a-conditions-of-carriage> (last visited Mar. 29, 2012).

15. See *Wallis v. Princess Cruises, Inc.*, 306 F.3d 827 (9th Cir. 2002).

16. See *Wajnstat v. Oceania Cruises, Inc.*, No. 09-21850-CIV-COOKE/TURNOFF (S.D. Fla. July 12, 2011) (order denying defendant's motion for partial summary judgment)[hereinafter *Wajnstat* Summary Judgment Denial]; see also *Wajnstat v. Oceania Cruises, Inc.*, No. 11-13670 (11th Cir. Aug. 12, 2011); *Wajnstat v. Oceania Cruises, Inc.*, 684 F.3d 1152 (11th Cir. 2012).

more closely examine such terms.¹⁷ This closer scrutiny may be based on a growing hostility toward passenger cruise companies' attempts to limit their liability to aggrieved passengers, or suspicion of foreign corporations generally. Invoking the liability limitation allowed under the earliest versions of the Athens Convention against passengers injured on wholly-foreign cruises may seem like a legitimate way for foreign cruise lines to sidestep federal law prohibiting the practice. However, this article will attempt to demonstrate that passage contracts that invoke the Athens Convention in this way stand to render these liability limiting provisions unenforceable in U.S. federal courts.

Part II of this article examines and explains the various versions of the Athens Convention in existence, focusing on the differences between its first ratification and subsequent amendments and protocols. Part III details the historic and current state of passenger carrier limitation of liability within the United States legal system, and moves on to examine judicial opinions where a limitation of liability based in the Athens Convention was at issue. Part IV focuses on the emergence of litigation over the enforceability of Athens Convention liability limiting provisions in passage contracts within the jurisdiction of the Eleventh Circuit Court of Appeals, and discusses the potential impact of an Eleventh Circuit decision affirming the unenforceability of liability limiting language used widely by foreign cruise lines operating in the United States. This portion of the article concludes with recommendations for how foreign cruise lines might increase the enforceability of their liability limits in the United States court system.

17. This point is perhaps best evidenced by noting the ever narrowing of the second prong of the reasonable communicativeness analysis employed by federal courts when construing contract provisions that explicitly favor the cruise line. Compare *Shankles v. Costa Armatori, S.P.A.*, 722 F.2d 861, 866 (1st Cir. 1983) (articulating the reasonable communicativeness test as requiring a case-by-case examination "not only of the ticket itself, but also of any extrinsic factors indicating the passenger's ability to become meaningfully informed of the contractual terms at stake"), with *Wallis v. Princess Cruises*, 306 F.3d 827, 837 (9th Cir. 2002) (characterizing a disincentive "to study the provisions of [a] ticket" as an extrinsic factor impeding "the passenger's ability to become meaningfully informed" as required under *Shankles*), and *Wajnstat* Summary Judgment Denial, *supra* note 16 (suggesting generally that any provision asserted in a cruise passage contract that contains no additional explanation where a passenger may reasonably be said to require legal knowledge or sophistication to understand the term is likely not reasonably communicative under *Shankles*).

II. THE VARIOUS ITERATIONS OF THE ATHENS CONVENTION

A. *Adoption and Ratification of the 1974 Convention*

The Athens Convention was first adopted during a conference held in Athens, Greece, in 1974.¹⁸ The Convention, as originally enacted, sought to set out parameters within which carriers could limit their liability to passengers for loss or damage to luggage, as well as for personal injury, illness, or death.¹⁹ Article 6 of the Convention, located immediately before the provision containing the limitation on carrier liability, allows carriers to exonerate themselves completely of any and all liability for any loss of or damage to luggage, and/or death or injury of a passenger if the carrier can prove that the damage or loss was in some way due to the fault, either total or contributory, of the passenger.²⁰ Article 7 of the 1974 Convention provides that the liability of a carrier for the death of or personal injury to a passenger will in no case exceed 700,000 francs (or approximately \$139,000.00) per carriage.²¹ Article 7 also allows any signatory to the 1974 Convention, to impose a higher limit on carriers' liability.²² Interestingly, Article 13 of the 1974 Convention precludes carriers from availing themselves of the liability limit contained in Article 7 if it is found that "the damage resulted from an act or omission of the carrier done with the intent to cause such damage, or recklessly with the knowledge that such damage would probably result."²³ The succeeding articles provide procedures by which claims may be made against carriers, including notice of claims and time bar provisions, and provide for matters outside the scope of this article.²⁴ These types of contractual terms set out procedures that allow passengers to bring claims against a cruise line, usually by requiring that a passenger provide the carrier with notice before filing, and that both the notification of intent to file suit and the formal complaint be filed within a specified period of time.²⁵

18. *Athens Convention relating to the Carriage of Passengers and their Luggage by Sea*, INTERNATIONAL MARITIME ORGANIZATION (Nov. 6, 2011, 8:17 PM), [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)

19. See Athens Convention *supra* note 7.

20. *Id.* at art. 6.

21. *Id.* at art. 7.

22. *Id.*

23. *Id.* at art. 13.

24. *Id.* at art. 14-28.

25. *Id.*

B. Protocols of 1976 and 1990

Despite the goals of the 1974 Convention, only ten nations signed and ratified it.²⁶ The United States was not among those nations. The 1974 Convention entered into force on April 28, 1987.²⁷ The Convention was subsequently amended by protocol in 1976, wherein the monetary unit used to limit carrier liability in Article 13 was changed to the Special Drawing Right (SDR).²⁸ Article 2 of the 1976 protocol limited carrier liability in the event of death of or personal injury to a passenger to 46,666 SDRs per carriage.²⁹

Another protocol to the Convention was attempted in 1990.³⁰ The protocol of 1990 sought to increase the liability limits of the original Convention, but never entered into force as it was superseded by the protocol of 2002.³¹ Up to the point when the 2002 protocol was proposed, the Convention's limitation regime had been incorporated, in some instances with higher limits, into the laws of nations including: Denmark, Finland, France, Germany, Norway, Slovenia, Sweden, and Vietnam.³²

C. 2002 Protocol

From October 28, 2002, to November 1, 2002, the International Maritime Organization held a conference in London to discuss a draft protocol to the Convention.³³ In light of the fact that the liability limits provided by the original Convention are gener-

26. The signatories to the 1974 Convention were Argentina, the Bahamas, the German Democratic Republic, Liberia, Poland, Spain, Union of Soviet Socialist Republics (USSR), the United Kingdom (UK), Tonga, and Yemen. Athens Convention Relating to the Carriage of Passengers and their Luggage by Sea, Dec. 13, 1974, 1463 U.N.T.S. 19.

27. Athens Convention, *supra* note 7.

28. Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, *supra* note 18. The International Monetary Fund defines SDRs as international units of account which the organization converts daily into the currencies of various nations, including U.S. dollars. See *Special Drawing Rights Factsheet*, INT'L MONETARY FUND [IMF], (Sept. 13, 2011), <http://www.imf.org/external/np/exr/facts/sdr.htm>; see also 6-II *Benedict on Admiralty*, Doc. No. 2-3 (Frank L. Wiswall, Jr. ed., 7th ed. 2010).

29. Athens Convention, *supra* note 7, art. 2.

30. Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, *supra* note 18.

31. *Id.*

32. Baris Soyer, *Sundry Considerations on the Draft Protocol to the Athens Convention Relating to the Carriage of Passengers and Their Luggage by Sea 1974*, 33 J. MAR. L. & COM. 519, 519 n.1 (2002).

33. *Id.* at 519.

ally regarded as too low, one of the main objectives of the 2002 protocol was to increase the caps.³⁴ In addition to raising the limitation of liability provided by the Convention, the 2002 protocol introduces compulsory insurance into the liability scheme.³⁵ The 2002 protocol also replaces the fault-based liability system imposed on carriers by earlier versions of the Convention with a strict liability regime for shipping-related incidents, personal injury and death claims.³⁶ Carriers under the rubric of the 2002 protocol must maintain adequate insurance to cover the heightened limit of strict liability per carriage for both shipping-related incidents and death of or personal injury to passengers.³⁷

The limits of liability were raised substantially under this most recent protocol.³⁸ The limit of the carrier to individual passengers in the event of injury or death is now 250,000 SDRs per incident.³⁹ The carrier is now liable unless it can prove the injury or death resulted from an act of war, hostilities, civil war, insurrection, or a natural phenomenon of an exceptional, inevitable and irresistible character, or was wholly caused by an act or omission done with the intent to cause the injury by a third party.⁴⁰ Additionally, if the loss to the passenger(s) exceeds the limit allowed by the 2002 protocol, the carrier is still liable up to a maximum of 400,000 SDRs unless it can prove that the injury or death was in no way due to its fault or neglect.⁴¹

34. *Id.* at 531 (noting that one of the objectives of the 2002 Protocol was to raise the limits allowable under the Convention to a level acceptable to states, ship-owners, and the public). Nations that were party to the drafting process struggled to reach a compromise as they had to strike a balance between resistance to higher caps by P&I clubs, which provide mutual insurance cover for shipping vessels and passenger ships, and the interests of nations with strong ties to maritime industry. According to Soyer's report on the events surrounding the drafting of the 2002 Protocol, maritime associations in countries such as Denmark, Finland, Greece, Ireland, Italy and Slovenia all pushed to retain the limits contained in the 1990 Protocol. Nations such as the United Kingdom and Sweden, on the other hand, pushed for a limit of 300,000 SDR – a figure considerably higher than the 250,000 SDR proposed in the draft protocol. *Id.* at 532.

35. *Athens Convention relating to the Carriage of Passengers and their Luggage by Sea*, *supra* note 18.

36. *Id.*

37. *Id.* at art. 4.

38. This constitutes an approximately 500% increase from the 46,666 SDR limit provided by the 1976 Protocol to the 250,000 SDR limit contained in the 2002 Protocol. Compare *Athens Convention*, *supra* note 7 with, *Athens Convention relating to the Carriage of Passengers and their Luggage by Sea*, *supra* note 18.

39. *Athens Convention relating to the Carriage of Passengers and their Luggage by Sea*, *supra* note 18.

40. *Id.*

41. *Id.*

An “opt-out” clause is also included in the 2002 protocol which would allow states that are party to the Convention to provide, by specific national laws, different limitations of liability for carriers to passengers so long as any adopted national limit is not lower than that prescribed by the Protocol.⁴² Finally, the 2002 protocol creates a procedure designed to increase the ease with which heightened limits on carrier liability may be adopted by signatory nations.⁴³ States that adopt the 2002 protocol must also abandon the terms of the 1974 Convention.⁴⁴ At the time of this writing the 2002 protocol to the Convention has not yet entered into force.⁴⁵

Although the refusal of the United States to ratify the 1974 Convention and any of the ensuing protocols and amendments hinders international efforts toward uniformity in this area of the law, it does not mean that the Convention bears no consequences for American passengers.⁴⁶ As will be further discussed in later sections, limitations of liability based on the Convention may be enforced in American courts when incorporated by express reference in a cruise line’s passage contract, so long as the cruise to which the provision applies does not come in contact with any port of the United States.⁴⁷ As a great majority of international cruise passengers are American citizens,⁴⁸ Americans, as parties to contracts that incorporate the Convention, are as likely to be sub-

42. *Id.*

43. *Id.*

44. Harry Duintjer Tebbens, *The European Union and the Athens Convention on Maritime Carriers’ Liability for Passengers in Case of Accidents: An Incorporation Adventure*, 61 RHDI 653, 655 (2008).

45. *Id.*

46. Soyer, *supra* note 33, at 541.

47. *Id.* at 540. For example, a passenger injured on a cruise from Spain to Italy could face limitation of his or her recovery by way of a valid incorporation of a limitation under the Athens Convention in their contract of passage. If the same passenger were injured on a cruise between Fort Lauderdale, Florida and New Orleans, Louisiana, no such limitation would be enforceable in a federal court of the United States. *See, e.g.,* Ginsberg v. Silversea Cruises Ltd., No. 03-62141-CIV, 2005 WL 5654644 (S.D. Fla. May 17, 2005) (denying cruise line’s motion for summary judgment seeking to limit its liability to a passenger pursuant to the Athens Convention where the passenger was injured on a cruise between Fort Lauderdale, Florida and New Orleans, Louisiana).

48. Based on current figures, approximately 15 million passengers embarked on a cruise in 2010. Approximately 11 million of those passengers were North American, with about 93% of that figure comprising U.S. passengers. *The Overview: 2011 CLIA Cruise Market Overview*, CRUISE LINES INTERNATIONAL ASSOCIATION, INC., (2011), <http://www.cruising.org/sites/default/files/misc/2011FINALOV.pdf>. *See also* *Cruise Industry Overview – 2011*, FLORIDA-CARIBBEAN CRUISE ASSOCIATION, http://www.fcca.com/downloads/2011-overviewbook_Cruise%20Industry%20Overview%20and%20Statistics.pdf (last visited Mar. 24, 2012).

jected to the liability limitation provided therein as if the U.S. had ratified the Convention. That is not to say, however, that there are not potential obstacles in the way of enforcing such limits against cruise passengers in federal courts of the United States.

D. Issues Surrounding Liability Limits Pursuant to the Athens Convention

With uniformity of ship owner liability as the main goal for negotiating nations, a number of international conventions exist that regulate the extent to which ship owners can limit their liability in a wide range of circumstances.⁴⁹ As suggested by the amounts set out by the 2002 protocol to the Athens Convention, the trend has been toward heightened liability caps for shippers and passenger carriers.⁵⁰ While passenger safety and property interests are undoubtedly of prime concern to international lawmakers, efforts to draft and ratify instruments like the Athens Convention are undertaken to reconcile the tension between those concerns and the need to provide shippers and passenger carriers with predictability for insurance purposes.⁵¹ Though ratification of the 2002 protocol to the Athens Convention faces many obstacles, perhaps chief among these obstacles is the increased burden it places on shippers and carriers to obtain appropriate liability insurance under the protocol.⁵² The increased potential maximum loss to a cruise company under the liability regime of the 2002 Convention makes it very possible that insurance providers will refuse to provide the necessary coverage.⁵³

Doubtless, each amendment or protocol to the Convention was initiated not only to gain accession of the majority of concerned nations, but particularly with the hope that the United

49. See Convention on Limitation of Liability for Maritime Claims, Nov. 19, 1976, 1456 U.N.T.S. 221; Protocol to the International Convention on Civil Liability for Oil Pollution Damage, Nov. 19, 1976, 1225 U.N.T.S. 355.

50. *Soaring hikes in liability limits a growing industry concern*, LLOYD'S LIST (October 31, 2005), <http://www.loydslist.com/ll/sector/Insurance/article107845.ece>.

51. See Soyer, *supra* note 33, at 537. Liability regimes traditionally serve two purposes: compensation and deterrence. See Muhammad Masum Billah, *Economic Analysis of Limitation of Shipowners' Liability*, 19 U.S.F. MAR. L.J. 297 (2006-2007). While compensation is definitely the more dominant purpose, according to Billah, the main problem with limitation of liability regimes is under-deterrence of ship owners. *Id.* at 307. Increased caps on allowable ship owner limitations of liability, therefore, work to increase the overall deterrence affected by liability regimes contained in international conventions like the Athens Convention. *Id.*

52. See Soyer, *supra* note 33, at 540.

53. *Id.*

States would finally ratify. However, according to a position paper written on behalf of the Maritime Law Association of the United States, the approach taken by the 2002 protocol is fundamentally at odds with current U.S. law and practice and “not justifiably so.”⁵⁴

The MLA primarily took issue with the liability regime proposed by the protocol. The MLA opposed the “reverse burden of proof” imposed by the protocol to shipping incidents, personal injury, and death claims, as well as the imposition of strict liability for passenger injury claims.⁵⁵ The MLA argued that strict liability was developed to (a) address the heightened risk of ultra-hazardous activities that pose harm so serious to the public that it is appropriate to place the risk of loss on the entity engaging in the activities; or (b) to spread risks from consumers to profit making industries, like the manufacturers of defective products.⁵⁶ According to the MLA, “[t]he operation of a cruise ship by a competent master with competent officers and crew exercising reasonable care is not an inherently dangerous or ultra-hazardous activity which should give rise to strict liability.”⁵⁷ Furthermore, the MLA argued, the cruise industry does not provide a product, but a service, and the relationship between the carrier and the passenger is different from that of a manufacturer and the purchaser of its goods.⁵⁸

As neither the U.S., nor many other nations, have adopted the 2002 protocol, it seems safe to say that the Convention has a long way to go toward widespread adoption and ratification. In light of the international shift toward higher potential payouts in damages to injured passengers, international cruise lines seek to both avail themselves of the lowest available liability limits, while

54. William R. Dorsey, III, *Position Paper on the Proposed Protocol to the 1974 Athens Convention Relating to the Carriage of Passengers and Their Luggage by Sea*, MARITIME LAW ASSOCIATION OF THE UNITED STATES (July 16, 2001), <http://mlaus.org/article.ihtml?id=604&folder+103>.

55. *Id.* at 2.

56. *Id.*

57. *Id.*

58. *Id.* at 3. Strict liability is a theory of liability typically applied to hold a manufacturer responsible for defects in its products. Strict liability law, overall, is based on the notion that the cost of physical injury or property damage to an individual may be monumental, but it is one that the producer or manufacturer can insure against. 72A C.J.S. *Products Liability* § 7 (2012). The general rule is that strict product liability does not extend to services. *Id.* Actions that arise out of services rendered are typically dealt with under a negligence liability regime, as negligence law tends to focus on the conduct of the defendant, and strict liability focuses on the condition of the product. 72A C.J.S. *Products Liability* § 6 (2012).

simultaneously defending themselves from passenger claims in friendly forums.⁵⁹ Cruise lines look to United States federal courts to offer the best of both worlds: the application of well-established and industry-friendly federal maritime precedent to passenger complaints, and the opportunity to contract around the application of federal statutes that are hostile to the low liability limits boasted by early versions of the Athens Convention.

III. ENFORCEABILITY OF PASSAGE CONTRACTS SUBJECT TO THE ATHENS CONVENTION

Despite the United States' refusal to ratify the Athens Convention from its earliest adoption to the present day, injured passengers who sue in federal courts may still be subject to the limitations of liability provided in the 1974 Convention. Although the Convention holds no force of law on its own in the U.S.,⁶⁰ a significant number of major cruise lines have taken to incorporating limitation of liability clauses into their passage contracts based on the provisions of the 1974 Convention.⁶¹

Pleasure cruise passenger tickets, naturally, seek to stack the legal deck in the favor of the ship owner. U.S. courts, with little deviation, seem to more closely scrutinize passenger ticket contract terms that seek to limit a carrier's liability pursuant to the Athens Convention. This portion of the article will explore reasons for this scrutiny. Part A will first focus on the background of limitations of liability for ship owners in the American legal system generally. Part B will move on to examine the small number of federal court opinions evaluating the validity of carrier limitations of liability based in the Athens Convention.

A. *Overview of historical development of limitation of ship owners' liability*

Before discussing the obstacles that may arise when a cruise

59. As has been stated, contract law is the medium through which cruise lines work to their greatest legal advantage. Contract law, because it generally calls for the enforcement of form contracts, allows cruise lines, as the drafters, to design and construct their own private law system. Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203, 1204 (2003).

60. See, e.g., *Chan v. Soc'y Expeditions, Inc.*, 123 F.3d 1287, 1296 (9th Cir. 1997) ("The United States has not acceded to or ratified the Athens Convention and the Convention's damage limitations therefore do not apply to actions under United States maritime law.").

61. See sources cited *supra* note 14.

ship company seeks the enforcement of Athens Convention limitation of liability provisions in its passage contract in a U.S. federal court, it is useful to understand the historical background on the limitation doctrine itself, and its place in the American legal system. Understanding the legal backdrop of limitations of liability allowed to ship owners under U.S. law helps to illuminate why foreign cruise companies seek to litigate passenger personal injury claims in U.S. courts while at the same time seeking to avoid being subject to U.S. law governing limitations of liability for ship owners.

Permitting a property owner to limit his liability to the value of his property has been traced to the Roman legal principle of *noxae deditio*, by which an owner could discharge his liability to another injured by his property by surrendering the property itself.⁶² The earliest known instance of a ship owner exercising the right to limit his liability is found in the Amalphitan Table, a commercial code developed in eleventh century Italy.⁶³ It was not until the 18th century that the English Parliament allowed limitation of ship owner liability.⁶⁴ Parliament was partially motivated by the knowledge that neighboring seafaring nations had enacted similar laws meant to encourage the development of maritime industry through the increased participation of investors and merchants in shipping and trade.⁶⁵ Parliament passed another act in 1813 that provided a limitation of ship owner liability for damages that resulted from negligence and collision.⁶⁶ The purposes of this act were substantially similar to those of the earlier act – to

62. James J. Donovan, *The Origins and Development of Limitation of Shipowners' Liability*, 53 TUL. L. REV. 999, 1000 (1979). Though the historical folklore surrounding the allegedly Roman origins of the doctrine of *noxae deditio* has since fallen by the wayside, the principle became engrained in American jurisprudence at an early date. See *The Rebecca*, 20 F. Cas. 373 (D. Maine 1831); *Sproat v. Donnell*, 26 Me. 185 (Me. 1846); *The Brig E.A. Barnard*, 2 F. 712 (E.D. Pa. 1880); *The T.A. Goddard*, 12 F. 174 (S.D.N.Y. 1882); *The New York*, 93 F. 495 (E.D.N.Y. 1899); *The Hoffmans*, 171 F. 455 (S.D.N.Y. 1909).

63. Donovan, *supra* note 62, at 1001.

64. *Id.* at 1007 n.55 (“The title of the statute (as cited in a later amended version) is ‘An act to settle how far owners of ships shall be answerable for the acts of the masters or mariners; and for giving further relief to the owners of ships.’”).

65. *Id.* at 1008.

66. *Id.* at 1009; see also, An Act to Limit Responsibility of Ship Owners in Certain Cases, 1813, 53 Geo. 3 c. 159, which provided, in relevant part:

That no person or persons who is, are or shall be owner or owners of any ship or vessel, shall be subject or liable to answer for or make good any loss or damage arising or taking place by reason of any Act, neglect, matter or thing done, omitted or occasioned without the fault or privity of such owner or owners, which may happen to

increase the number of ships in the English fleet and to encourage merchants and investors.⁶⁷

Massachusetts⁶⁸ and Maine⁶⁹ were the first U.S. states to provide the privilege of limits on ship owner liability via statute, in 1819 and 1821, respectively.⁷⁰ After an unfavorable ruling by the Supreme Court in *The New Jersey Steam Navigation Company v. The Merchants' Bank of Boston (The Lexington)*,⁷¹ the maritime industry lobbied Congress for industry-wide protection in the form of legislation.⁷² After much congressional debate, the United States Limitation Act was passed in 1851, and allowed for liberal limitation of liability so as to afford the greatest benefit to the ship owner.⁷³ The 1851 Act was unambiguously intended to equalize the economic position of American ship owners, but also to encourage investment in shipping.⁷⁴ Though the Act was passed in order "that the American marine should stand at home and abroad as well as the English marine,"⁷⁵ what ultimately resulted was a system that bestowed upon American ship owners *greater* economic benefits than their British ship owning counterparts.⁷⁶ The Supreme Court subsequently upheld the Act under both the Commerce⁷⁷ and Necessary and Proper⁷⁸ Clauses of the U.S.

any goods, wares, merchandise or other things laden or put on board the same ship or vessel.

67. Donovan, *supra* note 62, at 1009.

68. An Act to encourage Trade and Navigation within this Commonwealth, 1818 Mass. Acts ch. 0122 (repealed 1902).

69. An Act respecting the willful destruction and casting away of ships and cargoes; the custody of shipwrecked goods and trade and navigation, 1821 Me. Laws 78, §§ 7-10.

70. *Id.*

71. *The N.J. Steam Navigation Co. v. Merch.'s Bank of Boston*, 47 U.S. 344 (1848) (refusing to honor a contractual limitation of ship owner liability).

72. See Donovan, *supra* note 62, at 1012.

73. *Id.* at 1018.

74. *Id.* at 1019.

75. *Id.* at 1013.

76. *Id.* at 1027.

77. The text of the Commerce Clause provides that the United States Congress shall have power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST. art. I, § 8, cl. 3. See also *Lord v. Steamship Co.*, 102 U.S. 541, 545 (1880) ("The commerce regulated is expressly confined to a kind over which Congress has been given control."); *Providence & N.Y.S.S. Co. v. Hill Mfg. Co.*, 109 U.S. 578, 589 (1883) ("We have no doubt that [C]ongress had the power to pass the law. It is only a maritime regulation in its character, but it is clearly within the scope of the power given to [C]ongress 'to regulate commerce.'").

78. The text of the Necessary and Proper Clause provides that "[t]he Congress shall have Power – to make all Laws which shall be necessary and proper for carrying into Execution the forgoing Powers, and all other Powers vested by this Constitution

Constitution.

As time went on, however, opponents of the limitation of liability regime became increasingly dissatisfied with the Act's ability to greatly hinder the recovery of sometimes catastrophically injured plaintiffs or their estates. Growing outrage resulted in a 1935 amendment to the Limitation Act wherein Congress required ship owners to establish minimum limitation funds for personal injury or death claims of \$60 per ton.⁷⁹ A later modification to the Act was a section that invalidated contractual stipulations by ship owners that limited the giving of notice period and institution of suit period for personal injury and death claims to less than six months and one year.⁸⁰ Another amendment prohibited passenger carriers from incorporating into their passage contracts any clause that sought to exculpate them from liability for negligence, provided for liquidated damages, or that limited a claimant's right to file a complaint in a court of competent jurisdiction.⁸¹

Since the latter part of the twentieth century, courts have exhibited hostility to the Limitation Act specifically, and to limitations of liability by ship owners generally. One reason for this hostility might be that the conditions in the shipping industry that induced Congress in 1851 to pass the Limitation Act no longer exist.⁸² Yet despite the ongoing criticism, the Limitation Act remains in effect.

B. U.S. federal court rulings on Athens Convention limitations of liability

In the face of an international desire to increase the liability of ship owners to injured passengers, cruise lines have looked to passage contract drafting as a safe haven for their economic well-

in the Government of the United States, or in any Department or Office thereof." U.S. CONST. art. I, § 8, cl. 18. See also *Butler v. Boston & S. S.S. Co.*, 130 U.S. 527, 556-57 (1889); *Ex parte Garnett*, 141 U.S. 1, 12 (1891).

79. At the time, the applicable statute was 46 U.S.C. § 183(b), (c) (1976). This amendment is currently codified at 46 U.S.C. §§ 30508-09 (2011).

80. 46 U.S.C. § 30508(b).

81. 46 U.S.C. § 30509(a).

82. Kenneth H. Volk & Nicholas H. Cobbs, *Admiralty Law Institute: Symposium on American Law of Collision: Limitation of Liability*, 51 TUL. L. REV. 953, 984 (1977) ("Judicial expansion of the Limited Liability Act at this date seems especially inappropriate. Many of the conditions in the shipping industry which induced the 1851 Congress to pass the Act no longer prevail." (quoting *Md. Cas. Co. v. Cushing*, 347 U.S. 409, 437 (Black, J., dissenting))).

being.⁸³ Generally, so long as there are no statutes in effect to the contrary, a contract's terms and conditions are considered binding when they have been reasonably communicated to passengers.⁸⁴ Therefore, cruise lines take care to draft passage contracts that work to their greatest advantage, especially when it comes to any potential liability for incidents occurring on voyages between non-U.S. ports.⁸⁵ This type of legal cherry-picking, considered alongside a federal judiciary that is increasingly hostile to carriers' ability to limit their liability to passengers, makes well-drafted passage contract provisions to limit liability all the more important to cruise companies seeking to mitigate damage awards.

By coupling forum-selection clauses that require claimants to file suit in U.S. federal courts with limitations of liability pursuant to the 1974 Athens Convention, international cruise lines are able to avail themselves of advantageous U.S. federal maritime law, while precluding themselves from the strictures of 46 U.S.C. § 30509.⁸⁶ This pursuit of being held subject to the most advantageous laws in the most beneficial forum becomes all the more interesting – and potentially problematic – in light of the fact that although 75% of the world's passengers are U.S. citizens, the majority of cruise ships are registered in countries such as Panama, Liberia, and the Bahamas.⁸⁷ This portion of the article will examine the federal courts' treatment of contractual limitations of

83. See Korobkin, *supra* note 59, at 1204.

84. See 14 AM. JUR. 2D *Carriers* § 1208 (2011).

85. Cruise lines also engage in practices that help to legally insulate them, such as registering ships in countries with favorable or lax laws, thereby exempting themselves from disadvantageous laws and regulations. See source cited *infra* note 162 for discussion of these 'flag-of-convenience' practices.

86. 46 U.S.C. § 30509(a) (2011) provides:

1) "IN GENERAL. The owner. . . of a vessel transporting passengers between ports in the United States, or between a port in the United States and a port in a foreign country, may not include in a regulation or contract a provision limiting –
(A) the liability of the owner. . . for personal injury or death caused by the negligence of the owner. . . ; or
(B) the right of a claimant for personal injury or death to a trial by court of competent jurisdiction."

87. According to the Cruise Lines International Association, the world's largest cruise association that serves as a non-governmental consultative organization to the International Maritime Organization, nearly 90% of the commercial vessels that call on U.S. ports are not registered in the U.S. Even major U.S.-controlled shipping companies have chosen to register their ships under foreign flags. See *Maritime Industry Background*, CRUISE LINES INTERNATIONAL ASSOCIATION, <http://www.cruising.org/regulatory/resources/maritime-industry-background> (last visited Jan. 3, 2012).

liability founded in the Athens Convention, with an eye to factors important to the courts' analyses.

*The Majestic (1897)*⁸⁸

One of the earliest and most emblematic cases answering the question of limitations on ship owner liability pursuant to a passage contract, *The Majestic*, involved plaintiffs who traveled via steamship from Liverpool to New York City in 1892.⁸⁹ Upon disembarking, the claimants discovered that their luggage had been damaged by intruding sea water.⁹⁰ The complaint, filed in the Southern District of New York, alleged that the owner of the *Majestic* was negligent in the transportation of the claimants' belongings.⁹¹ The ship owner sought to discharge, or at least limit, its liability by way of a provision contained in the claimants' ticket.⁹²

There was no proof that the claimants had seen, read, or even knew of the contractual provisions the ship owner sought to invoke.⁹³ Chief Justice Fuller, deciding in favor of the claimants held that "when a company desires to impose special and most stringent terms upon its customers, in exoneration of its own liability, there is nothing unreasonable in requiring that those terms shall be distinctly declared and deliberately accepted."⁹⁴ This case arguably sowed the seed for the test by which modern courts eval-

88. 17 S. Ct. 597 (1897).

89. *Id.* at 598.

90. *Id.*

91. *Id.*

92. *Id.* The provision read:

"3. Neither the Shipowner nor the Passage Broker or Agent is responsible for loss of or injury to the Passenger or his luggage or personal effects, or delay on the voyage, arising from steam, latent defects in the Steamer, her machinery, gear, or fittings, or from act of God, Queen's enemies, perils of the sea or rivers, restraints of princes, rulers, and peoples, barratry or negligence in navigation, of the Steamer or of any other vessel.

4. Neither the Shipowner nor the Passage Broker or Agent is in any case liable for loss of or injury to or delay in delivery of luggage or personal effects of the Passenger beyond the amount of £10, unless the value of the same in excess of that sum be declared at or before the issue of this Contract Ticket, and freight at current rates for every kind of property (except pictures, statuary, and valuables of any description upon which one percent, will be charged) is paid."

Id. at 599.

93. *Id.* at 602 (finding that the claimants "did not sign [the notices], nor were they required to do so, nor was it contemplated that they should").

94. *Id.*

uate the enforceability of ticket provisions in cruise passage contracts: the reasonable communicativeness test.⁹⁵

*Silvestri v. Italia Societa Per Azioni Di Vanigazione*⁹⁶

In this case, decided by Judge Henry Friendly, the claimant sought recovery for an injury sustained as a result of a ship lurching during transit.⁹⁷ The claimant petitioned the Second Circuit to reverse the district court's grant of summary judgment to the cruise line for the claimant's failure to comply with a provision contained in his ticket contract.⁹⁸ One theory of the claimant's appeal was based on the ruling in *The Majestic*.⁹⁹ In his analysis of the different precedential approaches taken to issues of passenger notice, Judge Friendly found that "the thread that runs implicitly through the cases sustaining incorporation is that the steamship line had done all it reasonably could to warn the passenger that the terms and conditions were important matters of contract affecting his legal rights."¹⁰⁰ Judge Friendly further characterized the holding in *The Majestic* as requiring warnings like those at issue in this case to be significantly "eye-catching."¹⁰¹

*Shankles v. Costa Armatori, S.P.A.*¹⁰²

Shankles is the case from which most federal courts draw the reasonable communicativeness test. When an Italian cruise ship, the *Angelina Lauro*, was engulfed by flames in the port of St. Thomas in the U.S. Virgin Islands, most of the personal property of the passengers and crew was either lost, irreparably damaged, or subjected to vandalism and looting.¹⁰³ As the plaintiff in this case brought a claim for loss of personal property almost a year after the casualty, the cruise line sought summary judgment in the district court on the basis that the ticket contract limited the

95. See *Shankles v. Costa Armatori, S.P.A.*, 722 F.2d 861, 864 (1st Cir. 1983) ("The basic inquiry is whether, and to what extent, a passenger, who in almost all cases does not actually bargain for a particular term or condition of a contract of passage, but who nevertheless signs the ticket before embarkation, is bound by the fine print of the ticket.").

96. *Silvestri v. Italia Societa Per Azioni Di Vanigazione*, 388 F.2d 11 (2d Cir. 1968).

97. *Id.* at 12.

98. *Id.*

99. *Id.* at 13.

100. *Id.* at 17.

101. *Id.* at 17-18.

102. 722 F.2d 861, 864 (1st Cir. 1983)

103. *Id.* at 863.

period for filing suits to six months, and that the plaintiff had given it no notice of an intent to sue as required by the contract.¹⁰⁴ The district court ultimately granted summary judgment in favor of the cruise line.¹⁰⁵

On appeal, the plaintiff's most compelling argument was that ticket contract did not reasonably communicate its terms and conditions to passengers.¹⁰⁶ Guided by the reasoning in *The Majestic* and *Silvestri*,¹⁰⁷ the *Shankles* court undertook to evaluate whether the contract terms at issue had been reasonably communicated to passengers by the cruise line.¹⁰⁸

When analyzing whether the physical characteristics of the ticket supported its terms and conditions being of reasonable communicativeness, the court evaluates two facets of the ticket contract. First, the First Circuit here instructs other courts to assess features like size of typeface, conspicuousness and clarity of notice on the face of the ticket, and the ease with which a passenger can read the provisions in question.¹⁰⁹ Second, courts are required to look to the circumstances surrounding the passenger's purchase and subsequent retention of the ticket.¹¹⁰ The court here noted that

[a]lthough a passenger may almost never read all of the fine print on the ticket upon purchase, or as pleasure reading in the berth the first night at sea, the same passenger might very well be expected to consult the multifarious terms and conditions of the ticket/contract in the event of an accident resulting in a loss or injury.¹¹¹

104. *Id.* at 867. The contract provision asserted by the ship owner read as follows:

- (1) For property losses, notice of the claim [must] be filed with the company within 10 days of the loss and suit be commenced not later than 6 months therefrom.
- (2) For personal injuries, notice of the claim be filed within 6 months and suit be commenced within 1 year.

Id. at 863.

105. *Id.* at 863.

106. *Id.*

107. In contrast, the Third Circuit in *Marek v. Marpan Two, Inc.*, 817 F.2d 242 (3d Cir. 1987), commented that the *Silvestri* test, if taken literally, is too rigid. There is no "situation where, from hindsight, one could not imagine the shipowner doing some little bit more to draw attention to the limitation clause Thus, even though the courts continue to use the 'all it reasonably could' language, application of the standard involves notions of reasonableness and not hypothesizing some further step the shipowner could possibly have taken." *Marek*, 817 F.2d at 245.

108. *Shankles v. Costa Armatori, S.P.A.*, 722 F.2d 861, 864-67 (1st Cir. 1983).

109. *Id.* at 864.

110. *Id.* at 865.

111. *Id.*

The First Circuit further characterized this second part of the reasonable communicativeness test as requiring courts to analyze extrinsic factors indicating the passenger's ability to "become meaningfully informed of the contractual terms at stake."¹¹² Finally, the *Shankles* court defines the determination of whether or not a passage contract's terms give reasonable notice to passengers as a question of law for decision by the court.¹¹³

*Becantinos v. Cunard Line Limited*¹¹⁴

The earliest known instance of a U.S. federal court evaluating the enforceability of a limitation of liability provision pursuant to the Athens Convention, *Becantinos*, is a district court case dealing with an alleged breach of contract, breach of warranty, and negligence action.¹¹⁵ The plaintiff's complaint stemmed from damage to paintings he transported from Europe to the United States for sale on the defendant's cruise liner.¹¹⁶

The district court in this case ultimately decided that the Athens Convention liability limitation, as included in the defendant's passage contract at the time of the transatlantic voyage, was valid and enforceable despite the fact that the voyage terminated at a U.S. port.¹¹⁷ Perhaps a justification for the apparently erroneous decision in *Becantinos* can be found in the fact that evaluation of any passage contract term by a court is necessarily a case-by-case undertaking.¹¹⁸ The court in this case seems to have specifically

112. *Id.* at 866.

113. *Id.* at 867.

114. No. 89 Civ. 0166, 1991 WL 64187 (S.D.N.Y. Apr. 18, 1991).

115. *Id.* at *1.

116. *Id.*

117. Instead of applying U.S. law, as required under 46 U.S.C. § 30509, the Court here looks to Article 2 of the Convention and determines that the carriage here was international in nature, that the ship departed from a state or nation that had ratified the Convention, and that the ticket contract was purchased in a nation also party to the Convention. *Id.* at *1-2.

The court here also determined that cruise line contracts are not contracts of adhesion, also a misstatement of the law. See *Shankles v. Costa Armatori, S.P.A.*, 722 F.2d 861, 863-4 (1st Cir. 1983 ("Beginning . . . with the case of *The Majestic*, . . . courts have struggled to divine standards by which to determine whether steamship passengers are to be held bound by 'boilerplate' conditions located in the fine print of adhesion contracts of passage."); see also *Chan v. Soc'y Expeditions, Inc.*, 123 F.3d 1287, 1292 (9th Cir. 1997) ("Cruise passenger tickets are contracts of adhesion, and as such, ambiguities in them must be construed against the carrier." (citing *Rams v. Royal Caribbean Cruise Lines, Inc.*, 17 F.3d 11, 12-13 (1st Cir. 1994); *Lousararian v. Royal Caribbean Corp.*, 951 F.2d 7, 8 (1st Cir. 1991))).

118. See *Shankles*, 722 F.2d at 866 (articulating the reasonable communicativeness test as requiring a case-by-case examination "not only of the ticket itself, but also of

relied on precedent that found the defendant's passage contract reasonably communicative.¹¹⁹ As for the court's discussion of the Athens Convention, the decision seems to highlight the novelty inherent in the inclusion of reference to an international legal instrument like the Convention in a passage contract, and the federal system's reverence for the protection of the enforceability of valid contracts.¹²⁰ In the wake of more recent decisions involving Athens Convention limitations of liability, *Becantinos* is somewhat of an anomaly, yet instructive nonetheless in that it demonstrates the complexity of the issues facing federal courts in the United States when deciding these sorts of cases.

*Mills v. Renaissance Cruises, Inc.*¹²¹

Both parties in this proceeding moved for summary judgment on whether the passage contract worked to limit plaintiff's recovery against the defendants for negligence. The contested provision purported to incorporate article 9 of the Athens Convention.¹²² During a cruise from Spain to Italy, one of the plaintiffs fell and broke his leg.¹²³ The plaintiffs contended that the provision contained in their passage contract invoking a limitation of liability

any extrinsic factors indicating the passenger's ability to become meaningfully informed of the contractual terms at stake").

119. *Becantinos*, 1991 WL 64187, at *2 ("[T]he standard to apply to print size in maritime passage ticket contracts is one of 'reasonable communicativeness' In a number of cases, Cunard's Passage Contract has been found to have met this standard." (citing *Angello v. QUEEN ELIZABETH 2*, 1987 A.M.C. 1150 (D.C.N.J. 1987); *Hecht and Weingarten v. Cunard Line Ltd.*, 1982 A.M.C. 656 (2d Cir. 1982); *De Nicola v. Cunard Line Ltd.*, 1981 A.M.C. 1388, 1393 (1st Cir. 1981); *Siegelman v. Cunard White Star, Ltd.*, 221 F.2d 189 (2d Cir. 1955); *Horvath v. Cunard S.S. Co.*, 103 F. Supp. 356, 357 (E.D.N.Y. 1952); *Murray v. Cunard S.S. Co.*, 235 N.Y. 162 (N.Y. 1923))).

120. *Id.*

121. *Mills v. Renaissance Cruises, Inc.*, No. C 91-3001 BAC ARB, 1992 WL 471301 (N.D. Cal. Aug. 17, 1992).

122. *Id.* at *1. The provision at issue stated:

The Carrier shall not be liable for any such . . . injury . . . except the negligence of the Carrier or its employees' action within the scope of their Employment, and if such negligence be proven, the Carrier's liability therefore shall not exceed the following limitations per Passenger in Special Drawing Rights (S.D.R.) as defined in the amendment of 1978 to the Athens Convention, article 9:

Personal Injury or Death S.D.R. 46,666

The first S.D.R. 13 to be borne by the Passenger according to the Athens Convention, article 8.

Id.

123. *Id.*

for the defendant under the Athens Convention was unenforceable as a matter of law because it was not reasonably communicated, the nature of the passage contract as one of adhesion prevented them from rejecting that, or any other term in the ticket contract, and that the contract as written violated public policy.¹²⁴

Interestingly, the district court in this case rejected the plaintiffs' claim that the limitation provision was not reasonably communicated because it contained no information about the origin of the Athens Convention, nor did it define the meaning of SDRs or advise passengers as to where such information could be found.¹²⁵ Nevertheless, the district court found that the language provided by the defendant in its passage contract was sufficient to put plaintiffs on notice of the liability limitation.¹²⁶ The district court also determined that mere possession of a ticket contract provides a passenger with the ability to become meaningfully informed of the limitation of liability provision contained therein, and whether or not the passenger actually read the contract was irrelevant.¹²⁷

In support of their argument that the liability limiting provision at issue is void as against public policy, the plaintiffs cited 46 U.S.C. § 30509 (formerly § 183(c)).¹²⁸ The district court, citing to precedent,¹²⁹ refused to "wield the trump of American public policy," affirming that it "[does] not believe American public policy reaches the provisions of a contract of passage for an entirely foreign voyage Congress, in Sections [30508 and 30509] delimited the reach of American public policy to contracts of passage for voyages that touch the United States; [it] refuse[s] to supplement that Congressional choice with judicial embellishment."¹³⁰ As is probably apparent, the district court in *Mills* went on to hold that the passage contract provision at issue was valid and enforceable, and the court limited the plaintiffs' recovery accordingly.

Considering the forceful language used in the court's discus-

124. *Id.*

125. *Id.* at *2. Though the district court in this case did not find it necessary for the defendant cruise company to provide additional information about the Convention or SDRs, such omissions by the defendant in *Wallis v. Princess Cruises* would prove fatal to that defendant's case. See *infra* text accompanying notes 142-149.

126. *Mills*, 1992 WL 771301, at *2.

127. *Id.*

128. *Id.* at 3. Though it is apparent that § 30509 was inapplicable to this case because the subject cruise was entirely foreign, the plaintiffs argued the fact that Congress enacted the statute indicates a broader public policy, rendering the liability limitation at issue void. *Id.*

129. *Hodes v. S.N.C. Achille Lauro Ed Altri Gestoine*, 858 F.2d 905 (3d Cir. 1988).

130. *Mills*, 1992 WL 471301, at *3 (citing *Hodes*, 858 F.2d at 915).

sion of the applicability of public policy arguments to controversies in cases like these, it seems reasonable to conclude that the need to decide cases on objective analyses, and not on policy grounds weighs heavy on the courts' minds.¹³¹ That is not to say that policy does not potentially play a larger role in deciding cases like *Mills*. Furthermore, in matters involving international law or legal actors, it may be that courts, like that in *Mills*, are hesitant to blatantly decide on American public policy grounds out of respect for instruments of international law.¹³²

*Berman v. Royal Cruise Line, Limited*¹³³

First and foremost, it is important to point out that this case was decided by a county court, not a federal court. However, its analysis of a contract invoking the Athens Convention highlights the degree to which the law in this area was, and in many ways still is, unsettled. The cruise in this case began in Venice, Italy, and ended in Lisbon, Portugal.¹³⁴ In upholding the defendant's Athens Convention-based limitation of liability, the Court in *Berman* cited *Mills* and *Becantinos* as supporting precedent.¹³⁵ Here, as also seen in *Becantinos*, the court looked to the actual text of the Athens Convention in determining whether and to what extent its terms, as incorporated into the defendant's passage contract, would be enforceable.¹³⁶ The court in this case held the fact that the provision seeking to limit the defendant's liability did not contain any precise number of SDRs was not problematic, as the Convention itself requires no such notification to passen-

131. The *Mills* court strongly alluded to this point when it discussed and quoted *Hodes*. See *id.* In *Hodes*, the court "adamantly refuse[d] to wield the trump of American public policy," and cited to *The Bremen v. Zapata Off Shore Co.*, 407 U.S. 1, 9 (1972). *Hodes*, 858 F.2d at 915. When it did so, the *Hodes* court further stated:

We simply do not believe American public policy reaches the provisions of a contract of passage for an entirely foreign voyage, even should the contract be entered into within the United States. Congress, in Section 30509, delimited the reach of American public policy to contracts of passage for voyages that touch the United States; we refuse to supplement that Congressional choice with judicial embellishment.

Id.

132. Of further interest, and worth noting in *Mills*, is the court's reference, in a footnote, to the fact that its ruling as to the ambiguity of the liability limiting provision at issue before it might have been different had the 1990 Protocol to the Athens Convention been ratified. *Mills*, 1992 WL 471301, at *4 n. 7.

133. 1995 A.M.C. 1926 (*Cal. Super. Ct.* 1995).

134. *Id.* at 1927.

135. *Id.* at 1928-29.

136. *Id.* at 1929.

gers.¹³⁷ The court further concluded that it would be impractical for defendants to state precise dollar amounts for any limitation of liability under the Athens Convention, as SDR exchange rates are constantly in flux.¹³⁸ This conclusion is in direct conflict with the Supreme Court's holding in *The Majestic*, that where a carrier desires to limit or exonerate itself from liability, it should be required to do so in terms "distinctly declared and deliberately accepted."¹³⁹ Finally, the *Berman* court opined that were the defendant to provide in its ticket contract any additional information about SDRs, it would add no meaningful information to the contract.¹⁴⁰

*Wallis v. Princess Cruises, Inc.*¹⁴¹

In the realm of validity and enforceability of cruise lines' attempts to limit their liability to passengers by way of the Athens Convention, *Wallis* is the closest thing to controlling precedent. The plaintiff in this case appealed from a district court's grant of partial summary judgment to the defendant cruise company seeking to cap her recovery pursuant to an Athens Convention limitation of liability provision contained in its passage contract.¹⁴² The plaintiff's original claims against the carrier were for wrongful death under the Death on the High Seas Act,¹⁴³ intentional infliction of emotional distress, and breach of contract after her hus-

137. *Id.*

138. *Id.*

139. *The Majestic*, 17 S. Ct. 597, 602 (1892).

140. *Berman*, 1995 A.M.C. at 1929. A lack of information about SDRs contained in a limitation of liability provision invoking the Athens Convention was a sticking point for the Ninth Circuit in its decision in *Wallis v. Princess Cruises*. See *infra* text accompanying notes 142-149.

141. 306 F.3d 827 (9th Cir. 2002).

142. *Id.* at 829-30. The provision at issue read as follows:

Carrier shall be entitled to any and all liability limitations, immunities and rights applicable to it under the 'Convention Relating to the Carriage of Passengers and Their Luggage by Sea' of 1976 ('Athens Convention') which limits the Carrier's liability for death of or personal injury to a Passenger to no more than the applicable amount of Special Drawing Rights as defined therein, and all other limits for damage or loss of personal property. If the Athens Convention or such exemptions and limitations are held not to apply for any reason, then all the exemptions from and limitations of liability provided in or otherwise authorized by the laws of the United States (including Title 46 U.S. Code Sections [30501-30509, 30511]) will apply.

Id. at 831.

143. 46 U.S.C. §§ 30301-30308 (2012).

band mysteriously fell overboard during a cruise near Greece.¹⁴⁴

After briefly determining the ticket contract provision at issue passed the first prong of the reasonable communicativeness test, the *Wallis* court's analysis dealt chiefly with evaluating the extrinsic factors surrounding the purchase and retention of the ticket at issue.¹⁴⁵ The court noted that any passenger who read the term would need to look up the Athens Convention, research it and its protocols, figure out what an SDR was, realize that it could be converted into American currency, and finally discern how to determine the conversion rate from SDRs to dollars on a given day.¹⁴⁶ The court also thought it unreasonable that the average passenger would attempt to analyze the conditions under which the Athens Convention would or would not apply.¹⁴⁷

Characterizing the burden of this level of research as a disincentive to study the provisions of the ticket contract, the court considered it a relevant extrinsic factor that impeded the passenger's ability to become meaningfully informed of the terms of their passage with the defendant.¹⁴⁸ A passenger, according to the Ninth Circuit in this case, would also require some legal and financial sophistication to be able to properly comprehend the limitation sought by the defendant. The Ninth Circuit considered this requirement a further disincentive for the passenger to familiarize herself with the terms of her ticket contract.¹⁴⁹

The Ninth Circuit in *Wallis*, then, adds depth and substance to the requirements of the reasonable communicativeness test defined in *Shankles*. Instead of holding mere possession of a ticket contract to be sufficient to notify a passenger of limitations of carrier liability contained therein, the Ninth Circuit calls for lower federal courts to analyze such provisions in terms of whether they pose disincentives for a passenger to become meaningfully informed of their import. An average passenger's need to conduct extensive research, or to construe legal language or terminology, then, are considered to be disincentives under the Ninth Circuit's reasoning. Based on the decision in *Wallis*, what it means for a passenger to be "meaningfully informed" of limita-

144. *Wallis*, 306 F.3d at 831-32.

145. *Id.* at 836-37.

146. *Id.*

147. *Id.* at 837 ("We are persuaded that the average passenger has little incentive to invest sufficient effort to approximate the value of what she would be led to regard . . . as only a potentially binding term of the Passage Contract.").

148. *Id.*

149. *Id.*

tions on carrier liability in a cruise contract is much more than time and opportunity to read the relevant terms.

*Wajnstat v. Oceania Cruises, Inc.*¹⁵⁰

Though not the first time the Southern District of Florida has decided a case involving a contract provision referencing the Athens Convention,¹⁵¹ *Wajnstat v. Oceania Cruises, Inc.* is the first controversy requiring a district judge to undergo an analysis of such a provision according to the requirements of the reasonable communicativeness test.¹⁵² The plaintiff in this case alleged negligent hiring, supervision, and retention on the part of the defendant carrier with regard to its ship's doctor.¹⁵³ Among the plaintiff's allegations was that a misdiagnosis by the ship's doctor during a cruise from Istanbul, Turkey to Athens, Greece, resulted in his needing three abdominal surgeries and extensive hospitalization in a foreign country.¹⁵⁴ The subject cruise had no connec-

150. *Wajnstat v. Oceania Cruises, Inc.*, No. 09-21850-Civ-COOKE/TURNOFF (S.D. Fla. July 12, 2011) (order denying defendant's motion for partial summary judgment)[hereinafter *Wajnstat* Summary Judgment Denial].

151. *E.g.*, *Ginsberg v. Silversea Cruises Ltd.*, No. 03-62141-CIV, 2005 WL 5654644 (S.D. Fla. May 17, 2005) (holding the Athens Convention inapplicable under 46 U.S.C. § 30509 because the subject cruise departed from Fort Lauderdale, Florida and ended in New Orleans, Louisiana); *Henson v. Seabourn Cruise Line Ltd., Inc.*, 410 F. Supp. 2d 1246 (S.D. Fla. 2005) (holding the Athens Convention inapplicable to the case because the cruise itinerary, though never completed, showed the ship was scheduled to reach a port of the United States).

152. The contract provision at issue in this case read as follows:

Foreign voyages: On cruises which neither embark, disembark nor call at any U.S. port, Carrier shall be entitled to any and all liability limitations, immunities and rights applicable to it under the "Convention Relating to the Carriage of Passengers and Their Luggage by Sea" of 1974 as well as the "Protocol to the Convention Relating to the Carriage of Passengers and Their Luggage by Sea" of 1976 ('Athens Convention'). The Athens Convention limits the Carrier's liability for death of or personal injury to a Passenger to no more than 46,666 Special Drawing Rights as defined therein (approximately U.S. \$65,000 which fluctuates, depending on a daily exchange rate as printed in the Wall Street Journal). On such cruises, Carrier's liability shall further be subject to the provisions of the Convention on Limitation of Liability for Maritime Claims, 1976, with revisions, protocols and amendments. In addition, and on all other cruises, all the exemptions from and limitations of liability provided in or authorized by the law of the United States (including Title 46 U.S. Code Sections 30501-30509), [sic] 30511 will apply.

Wajnstat Summary Judgment Denial, *supra* note 150, at *2-3.

153. *Id.* at *3.

154. *Id.* at *1-2.

tion to the United States, save a forum selection clause contained in the cruise line's passage contract that required all claimants file suit in the Southern District of Florida.¹⁵⁵

After a relatively brief analysis of the physical characteristics of the defendant's passage contract, the district court determined that it passed the first prong of the reasonable communicativeness test.¹⁵⁶ The district court first made note of the distinction federal courts have drawn between a passenger's ability to read a passage contract and his or her ability to understand the terms at issue in those contracts.¹⁵⁷ Citing *Wallis*, the district court held that due to the problematic structure of the defendant's limitation of liability provision, as well as its invocation of multiple limits of liability with no delineation as to when each will or will not apply, the provision was unenforceable against the plaintiff.¹⁵⁸ Like the Ninth Circuit in *Wallis*, the court in *Wajnsat* determined that the limitation clause put too heavy a burden on the passenger to research and construe the Athens Convention.

IV. AFTER *WAJNSAT*: POTENTIAL RAMIFICATIONS OF AN ELEVENTH CIRCUIT AFFIRMANCE

Subsequent to the district court's decision, the defendants in *Wajnsat* petitioned the Eleventh Circuit Court of Appeals for interlocutory review.¹⁵⁹ The Eleventh Circuit ultimately dismissed the defendants' appeal for lack of jurisdiction, reserving the issue raised on appeal for after the final resolution of the case in the district court below.¹⁶⁰ Should the Eleventh Circuit eventually affirm the district court's decision, the implications could prove significant for the many foreign-owned cruise lines that contractually require that all suits for personal injury be filed in the Southern District of Florida, and depend on the limitations of liability included in such contracts.

155. See Plaintiff's Response in Opposition to Defendant Oceania's Motion to Dismiss First Amended Complaint and Memorandum of Law at IV(D), *Wajnsat v. Oceania Cruises, Inc.*, No. 09-21850-CIV-Cooke/Bandstra, 2010 WL 3900084 (S.D. Fla. Aug. 2, 2010).

156. *Wajnsat* Summary Judgment Denial at *6-7.

157. *Id.* at *9.

158. *Id.* at *10 ("Although the provision at issue here contains an approximate currency value for SDRs – thus curing the deficiencies present in *Wallis* – the provision nonetheless fails because it did not meaningfully inform the passenger of what law applies in what circumstances.").

159. Brief for Petitioner, *Wajnsat v. Oceania Cruises, Inc.*, 684 F.3d 1153 (11th Cir. 2011) (No. 11-13670-HH) 2011 WL 6741961.

160. *Wajnsat v. Oceania Cruises, Inc.*, 684 F.3d. 1153, 1157 (11th Cir. 2012).

As noted earlier, with few exceptions, cruise line corporations (or the corporations that own particular cruise lines) are not incorporated in the United States, nor are their ships registered in the United States or any of its territories.¹⁶¹ Registering ships under “flags of convenience” is a very common, if not standard, practice within the shipping and passenger vessel industries.¹⁶² By registering a particular ship in any of the “flag of convenience” nations,¹⁶³ ship owners benefit from often extremely lax laws. Nevertheless, the international cruise industry has a substantial presence in the United States, with many major cruise companies boasting headquarters in Miami, Florida.¹⁶⁴ In 2008, according to industry sources, passenger cruise lines benefited the U.S. economy in the amount of \$37.9 billion.¹⁶⁵

As it is the most profitable international outlet for passenger cruises, cruise companies take great pains to protect their interests in the United States. Protecting against litigation is doubtless among the cruise lines’ top priorities, as evidenced by the carefully crafted language in often labyrinthine passage contracts. After the Ninth Circuit’s decision in *Wallis*, major cruise lines whose passage contracts contained limitation of liability provisions based in the Athens Convention¹⁶⁶ changed the wording of these provisions to remedy the defect identified in the opinion.¹⁶⁷

161. *The Overview: 2011 CLIA Cruise Market Overview*, *supra* note 48.

162. Justin Samuel Wales, *Beyond the Sail: The Eleventh Circuit’s Thomas Decision and its Ineffectual Impact on the Life, Work, and Legal Realities of the Cruise Industry’s Foreign Employees*, 65 U. MIAMI L. REV. 1215, 1221 (Summer 2011) (emphasizing that about sixty percent of cruise ships are flagged in either the Bahamas, Panama, or Liberia).

163. See International Transport Workers’ Federation, an international trade union federation representing the interests of transport workers’ unions, for a list of nations considered “flags of convenience,” Listing available at <http://www.itfglobal.org/flags-convenience/flags-convenience-183.cfm> (last visited Sept. 23, 2012).

164. Carnival, Royal Caribbean, and Norwegian Cruise Lines tout headquarters in South Florida. These companies combine control over seventy-five percent of the North American cruise industry. Cruise Lines Int’l Assoc., *The Contribution of the North American Cruise Industry to the U.S. Economy in 2010* (Jun. 2011), http://www.cruising.org/sites/default/files/pressroom/2010EconomicStudies/EconStudy_Full_Report_2010.pdf.

165. *About CLIA*, Cruise Lines International Association (Sep. 23, 2012, 3:04 PM), <http://www.cruising.org/regulatory/about-clia>.

166. See *Wallis v. Princess Cruises, Inc.*, 306 F.3d 827 (9th Cir. 2002).

167. Recall that in *Wallis*, the Ninth Circuit held that the defendant’s failure to provide an approximate monetary limitation when referencing the Athens Convention in its passage contract does not meaningfully inform a passenger of the liability limitation, and therefore rendered the provision unenforceable against the passenger. *Wallis*, 306 F.3d at 840. At the time of this writing, the relevant portion of Princess Cruises’, the defendant in *Wallis*, passage contract reads as follows:

For the time being, *Wallis* is the only federal Circuit Court of Appeals decision on the validity of passage contract terms that seek to limit a cruise line's liability by way of the Athens Convention. However, the eventual decision from the Eleventh Circuit, which will likely affirm the district court's ruling, stands to place additional burdens on cruise companies in drafting and disseminating the information contained in their ticket contracts. As the reasonable communicativeness test is firmly engrained in U.S. law as it pertains to maritime contracts of adhesion, it is likely that the Eleventh Circuit will focus on the language selected by the cruise line, as well as the structure of the provision at issue on appeal to determine whether it requires of an aggrieved passenger too great a degree of sophistication, legal or otherwise, to discern how, under what circumstances, and to what extent the cruise line is able to limit its liability to allegedly injured passengers pursuant to the Athens Convention.

The proceeding portion of this article will focus on issues with the wording of these passage contract provisions, and will conclude with recommendations for drafting more readily enforceable limitation of liability provisions with an eye to curing the defects found in the contracts examined in *Wallis* and *Wajnstat*.

A. *Recommendations*

1. Eliminate Reference to the Athens Convention in Passage Contracts

First and foremost, referencing the Athens Convention by name in a passage contract seems to be problematic, and is not entirely necessary. Because the crux of the issue of determining whether limitation of liability provisions like that in *Wajnstat* are reasonably communicative, and not whether the Athens Convention itself is applicable to passengers, it is likely in the best interest of cruise lines to wholesale eliminate any reference to the Convention by name. By referring to the Athens Convention, both

"Cruises Outside the U.S.: On cruises which neither embark, disembark nor call at any U.S. port, Carrier shall be entitled to any and all liability limitations. . . applicable to it under the. . . [Athens Convention]. The Athens Convention limits the Carrier's liability for death of or personal injury to a Passenger to no more than 46,666 Special Drawing Rights as defined therein (approximate U.S. \$70,000 which fluctuates, depending on daily exchange rate. . .). . ."

Passage Contract, Princess Cruises (Sep. 23, 2012, 3:21 PM), http://www.princess.com/legal/passage_contract/index.jsp.

by its colloquial name and its formal international moniker, cruise companies invite federal courts examining their contracts to look more closely at the version of the Convention invoked by the passage contract, as well as subsequent amendments and protocols.¹⁶⁸ As the Convention itself is, and has been, a contentious point of international law, a point that will be apparent to an examining judge, it is likely not particularly helpful for cruise lines to incorporate it by name into their passage contracts. This point is highlighted by the attention the Ninth Circuit in *Wallis*, and the district court in *Wajnstat*, gave to the confusion surrounding passage contracts' incorporation of the Convention, SDR limits and conversions, and the relation of both to cruise lines' claims of limitations of liability under U.S. federal law.¹⁶⁹

Furthermore, through referencing the liability limitation allowed under the Athens Convention, cruise companies do not appear to intentionally incorporate the entire Convention into their passage contracts. Rather, cruise line operators seem to expressly reference the Athens Convention in an effort to legitimize the aggressive limits of liability contained in their passage contracts. Because many of the major cruise lines that refer to the Athens Convention in order to limit their liability simultaneously require that all claims for damages be filed in federal courts—often in one of the U.S. District Courts located in Florida¹⁷⁰—cruise lines place themselves in the precarious position of seeking to apply U.S. federal maritime law, generally favorable to carriers and shipping companies, while precluding the applicability of 46 U.S.C. § 30501 *et seq.*¹⁷¹ In other words, cruise lines want to have

168. See *Wajnstat* Summary Judgment Denial, *supra* note 150, at *10 (stating that in order to have the opportunity to understand the limitation of liability provision at issue, the plaintiff would have to research amendments and protocols to the Athens Convention); see also *Wallis*, 306 F.3d at 836-37 (asserting that, presumably from having done so, expecting the average individual to successfully research the Athens Convention's applicability and inapplicability to their factual situation is unrealistic).

169. See *Wajnstat* Summary Judgment Denial, *supra* note 150, at *10-11; *Wallis*, 306 F.3d 827, 836-37 (9th Cir. 2002).

170. See Cruise Contract, Disney Cruise Line (Sept. 18, 2012) <http://disneycruise.disney.go.com/cruise-contract/?country=us>. See also Cruise/Cruisetour Ticket Contract, Royal Caribbean (September 18, 2012) http://www.royalcaribbean.com/content/en_US/pdf/CTC_Not_For_BR.pdf; see also Cruise Ticket Contract, Costa (September 18, 2012) <http://www.costacruise.com/B2C/USA/Support/contract/contract.htm>; see also Terms and Conditions of Contract of Carriage, Regent Seven Seas Cruises (September 18, 2012) <http://www.rssc.com/media/hostedfiles/legal/US-TicketContract.pdf>; see also Legal Notice, Silversea Cruises (September 18, 2012) <http://www.silversea.com/legal-notice/>.

171. 46 U.S.C. § 30509 (2006) (prohibiting the enforcement of liability limiting

their cake and eat it too by avoiding U.S. law's prohibition of the deep limitations of liability allowed by the Athens Convention. Cruise lines may, based on the more recent federal cases discussed above, end up facing more resistance than conciliation in U.S. federal courts when the enforceability of these provisions is challenged.

Further complicating matters is the fact that the Athens Convention has never been adopted or ratified by the United States, a fact of which federal district courts are keenly aware.¹⁷² Attempting to enforce the liability limitations provided in the Convention through reference to them in a passage contract potentially calls its underlying legitimacy into question. If cruise lines simply claimed the limitation of liability allowed under the Athens Convention to be applicable to suits brought incident to completely non-U.S. voyages, without referring to the Convention by name, there is nothing to suggest that such a term would be any less enforceable as part of a valid contract than it would be if it referred to the Convention.

Through avoiding (or at least minimizing) the appearance of legal cherry-picking, not disallowed but definitely disfavored, cruise lines stand to eliminate the burden on passengers to research the Athens Convention held unacceptable in *Wallis*. At the same time, cruise lines will also increase the clarity and legitimacy of their limitation of liability provisions. Making this change would therefore improve the likelihood that, in the event of litigation, the limitation of liability provision would satisfy both prongs of the reasonable communicativeness test espoused in *Shankles*, and therefore be enforced as written.¹⁷³

2. Remove references to U.S. law from limitation of liability provisions

A majority of international cruise lines include an additional layer of potential ambiguity in their passage contracts by reserving the applicability of 46 U.S.C. § 30501 *et seq.* in addition to the limitation contained in the Athens Convention itself.¹⁷⁴ Assuming

provisions included in passage contracts provided the voyages such provisions may apply to come in contact with a port of the United States).

172. See *Chan v. Soc'y Expeditions, Inc.*, 123 F.3d 1287, 1296 (9th Cir. 1997) ("The United States has not acceded to or ratified the Athens Convention and the Convention's damage limitations therefore do not apply to actions under United States maritime law.").

173. *Shankles v. Costa Armatori, S.P.A.*, 722 F.2d 861, 866 (1st Cir. 1983).

174. See *supra* text accompanying note 147. For example, the following text is

a passenger did read his or her passage contract, invoking U.S. federal statutes “in addition” to the Athens Convention limit readily gives the impression that U.S. law is just as applicable as the Convention—exactly the result cruise lines seek to avoid when invoking the Convention’s limits to begin with. Recall that in *Wajnsat*, the district court found the layering of multiple and differing limits of liability both confusing and too burdensome for the average passenger to decipher.¹⁷⁵

A further cause for concern in “stacking” a limitation of liability provision applicable only to entirely foreign cruises based in the Athens Convention (whether referred to by name or not) on top of a reference to 46 U.S.C. § 30501 *et seq.* is that the two references, upon closer scrutiny, cancel each other out. By the very terms of § 30509,

“[t]he owner. . . of a vessel transporting passengers between ports in the United States, or between a port in the United States and a port in a foreign country, may not include in a regulation or contract a provision limiting. . . the liability of the owner. . . for personal injury or death caused by the negligence or fault of the owner or the owner’s employees or agents. . .”¹⁷⁶

Reference to § 30509 directly after claiming the liability limit allowed under the Convention is nonsensical, and confusing—because the U.S. Limitation of Liability Act only applies to “vessels transporting passengers between ports in the United States, or between a port in the United States and a port in a foreign country,”¹⁷⁷ it necessarily could not apply to any litigation involv-

repeated, almost verbatim, by nearly all of the major cruise companies in their passage contract’s limitation of liability provisions, including by the defendant company in *Wajnsat*:

In addition, and on all other cruises, all the exemptions from and limitations of liability provided in or authorized by the laws of the United States (including Title 46 U.S. Code Sections 30501-30509, 30511) will apply.

Wajnsat Summary Judgment Denial, *supra* note 150, at *2-3.

175. *Wajnsat* Summary Judgment Denial, *supra* note 150, at *10-11. (“Although the provision at issue here contains an approximate currency value for SDRs – thus curing the deficiencies present in *Wallis*—the provision nonetheless fails because it did not meaningfully inform the passenger of what law applies in what circumstances. . . . The passage contract provision at issue here, which references several foreign treaties and U.S. statutes without delineating when each will apply, does not meaningfully inform an average passenger about the cruise line’s liability limits.”).

176. 46 U.S.C. § 30509(a)(1)(A) (2006).

177. *Id.*

ing an entirely foreign cruise.¹⁷⁸ If the goal of such liability limiting contract provisions is enforceability in U.S. federal courts, according to the precedent found in *Wallis* and the cases that come before it, the provision must be reasonably communicative.¹⁷⁹ Based on the foregoing analysis of relevant case law, the more easily understood the terms of a maritime passage contract are, the more likely they will be deemed enforceable by a federal court.¹⁸⁰

Therefore, it is difficult to fathom a logical reason why major cruise lines, which are obviously aware of the requirements of the reasonable communicativeness line of cases, choose to incorporate the laws of the U.S. Limitation of Liability Act into sections of their passage contracts that explicitly apply to foreign voyages. Cruise lines may be better served, in the event of litigation, either separating out, or entirely omitting, such references to the Limitation of Liability Act. Either of the above alternatives will ensure, or at least increase the likelihood of, the enforcement of what might otherwise be valid limitations of liability.¹⁸¹

178. See *Mills v. Renaissance Cruises, Inc.*, No. C 91-3001 BAC ARB, 1992 WL 471301, at *3 ((N.D. Cal. Aug. 17, 1992) (“Congress, in [Sections 30508 and 30509] delimited the reach of American public policy to contracts of passage for voyages that touch the United States; [it] refuse[s] to supplement that Congressional choice with judicial embellishment.” (citing *Hodes v. S.N.C. Achille Laureo ed Altri-Gestione*, 858 F.2d 905, 915) (3d Cir. 1988))).

179. *Wallis v. Princess Cruises, Inc.*, 306 F.3d 827, 835 (9th Cir. 2002) (“The proper test of reasonable notice is an analysis of the overall circumstances on a case-by-case basis, with an examination not only of the ticket itself, but also of any extrinsic factors indicating the passenger’s ability to become meaningfully informed of the contractual terms at stake.” (quoting *Shankles v. Costa Armatori, S.P.A.*, 722 F.2d 861, 866 (1st Cir. 1983))).

180. See *Wajnsat* Summary Judgment Denial, *supra* note 150, at *9 (“Cruise contracts are contracts of adhesion and, as such, ambiguities in them must be construed against the carrier.” (quoting *Wallis*, 306 F.3d at 838)); see also, e.g., *Rams v. Royal Caribbean Cruise Lines, Inc.*, 17 F.3d 11, 12-13 (1st Cir. 1994).

181. It is also notable that, should a federal court, in the course of litigation, look to the legislative history of the Limitation of Liability Act, there exists little in the way of evidence that Congress intended to prohibit the inclusion of limitations of liability for passenger personal injury or death claims only to voyages that come into contact with a port of the United States. The bills that resulted in 46 U.S.C. § 183c (now § 30509), when discussed by both chambers prior to enactment, show both the House and the Senate sought to “put a stop to all such practices and practices of a like character.” See *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 597 (1991) (citing H.R. Rep. No. 2517, 74th Cong., 2d Sess., 6 (1936); S. Rep. No. 2061, 74th Cong., 2d Sess., 6 (1936)). Though the language of the statute refers directly to voyages that in some way reach a U.S. port, the time period in which the statute was enacted suggests that this seemingly geographical distinction was more an acknowledgment of the U.S.’s limited judicial jurisdiction over wrongs occurring on foreign-flagged vessels in foreign waters than it was a purposeful exclusion of foreign voyages from the auspices of U.S. law. See Robert D. Peltz & Lawrence W. Kaye, *The Long Reach of*

3. Proposed language for more enforceable liability limiting provisions

To illustrate the above suggestions, consider the following provision that was included in the cruise line's passage contract at issue in *Wajnstat*, and which has become almost standard language used in similar provisions by many major cruise lines:

"Foreign voyages: On cruises which neither embark, disembark nor call at any U.S. port, Carrier shall be entitled to any and all liability limitations, immunities and rights applicable to it under the "Convention Relating to the Carriage of Passengers and Their Luggage by Sea" of 1974 as well as the "Protocol to the Convention Relating to the Carriage of Passengers and Their Luggage by Sea" of 1976 ('Athens Convention'). The Athens Convention limits the Carrier's liability for death of or personal injury to a Passenger to no more than 46,666 Special Drawing Rights as defined therein (approximately U.S. \$65,000 which fluctuates, depending on a daily exchange rate as printed in the Wall Street Journal). On such cruises, Carrier's liability shall further be subject to the provisions of the Convention on Limitation of Liability for Maritime Claims, 1976, with revisions, protocols and amendments. In addition, and on all other cruises, all the exemptions from and limitations of liability provided in or authorized by the law of the United States (including Title 46 U.S. Code Sections 30501-30509), [sic] 30511 will apply."¹⁸²

Note, as outlined above, that the cruise line claims all "exemptions and limitations of liability" as provided in the U.S. Limitation of Liability Act at the very end of this provision, which itself explicitly applies only to "foreign voyages." If the defendant cruise company separated this language into a separate section of the contract, perhaps immediately following, with a different heading, this "stacked" provision would not have been deemed overly confusing for the average passenger to decipher. For example, if the contract provision read as follows:

"Foreign voyages: On cruises which neither embark, disembark nor call at any U.S. port, Carrier shall be entitled to any and all liability limitations, immunities and rights applicable to it under the "Convention Relating to the Carriage of Passengers and Their Luggage by Sea" of 1974 as

U.S. Law Over Crimes Occurring on the High Seas, 20 U.S.F. MAR. L.J. 199 (2007-2008).

182. *Wajnstat* Summary Judgment Denial, *supra* note 150, at * 2-3.

well as the “Protocol to the Convention Relating to the Carriage of Passengers and Their Luggage by Sea” of 1976 (‘Athens Convention’). The Athens Convention limits the Carrier’s liability for death of or personal injury to a Passenger to no more than 46,666 Special Drawing Rights as defined therein (approximately U.S. \$65,000 which fluctuates, depending on a daily exchange rate as printed in the Wall Street Journal). On such cruises, Carrier’s liability shall further be subject to the provisions of the Convention on Limitation of Liability for Maritime Claims, 1976, with revisions, protocols and amendments.

General limitation of liability: On all other cruises, all the exemptions from and limitations of liability provided in or authorized by the law of the United States (including Title 46 U.S. Code Sections 30501-30509), [*sic*] 30511 will apply.”

the cruise line’s invocation of the U.S. Limitation of Liability Act would have been more plain, and completely set off from any reference to the claims made to limitations under the Athens Convention or other treaty. Recall that in *Wajnstat*, the district court was concerned about the average passenger’s ability to determine whether and under what circumstances, based solely on reading the above provision, that the U.S. Limitation of Liability Act would and would not apply to their claims based on the concurrent (in)applicability of the Athens Convention limitation of liability.¹⁸³ In other words, the district court determined that including a wholesale reference to the limits under the Limitation of Liability Act, itself inapplicable to foreign voyages, under a provision explicitly applicable to foreign voyages, was too unclear and confusing to be enforceable. In the example above, by separating the reference to the limits that may be available under the Limitation of Liability Act from any reference to the Athens Convention, a reviewing court would be more likely to expect a passenger to understand that the two limits were not necessarily simultaneously applicable to subsequent personal injury or wrongful death claims. This is further accomplished by removing the first clause “In addition,” from the claim to limitation of liability pursuant to the U.S. Limitation of Liability Act, as illustrated above.

Also as mentioned above, cruise companies might consider omitting all mention of the U.S. Limitation of Liability Act in the

183. *Id.* at *10 (“Although the provision at issue here contains an approximate currency value for SDRs – thus curing the deficiencies present in *Wallis* – the provision nonetheless fails because it did not meaningfully inform the passenger of what law applies in what circumstances.”).

sections of passage contracts that pertain to foreign voyages. Such a provision would provide:

“Foreign voyages: On cruises which neither embark, disembark nor call at any U.S. port, Carrier shall be entitled to any and all liability limitations, immunities and rights applicable to it under the “Convention Relating to the Carriage of Passengers and Their Luggage by Sea” of 1974 as well as the “Protocol to the Convention Relating to the Carriage of Passengers and Their Luggage by Sea” of 1976 (‘Athens Convention’). The Athens Convention limits the Carrier’s liability for death of or personal injury to a Passenger to no more than 46,666 Special Drawing Rights as defined therein (approximately U.S. \$65,000 which fluctuates, depending on a daily exchange rate as printed in the Wall Street Journal). On such cruises, Carrier’s liability shall further be subject to the provisions of the Convention on Limitation of Liability for Maritime Claims, 1976, with revisions, protocols and amendments.”

Contract provisions that resemble the example above would increase cruise lines’ control over exactly what terms would and would not apply to passenger injury or wrongful death claims incident to a foreign voyage.

This sort of provision, by removing all reference to U.S. federal maritime law, would also likely increase the deference with which a federal court in the United States would treat the contents of the contract term overall. As demonstrated earlier, U.S. federal courts that have held limitations of liability based on the Athens Convention enforceable against passengers likely did so out of respect for the binding nature of contracts, as well as out of respect for foreign legal instruments like the Athens Convention.¹⁸⁴ The original version of the above provision, by including a specific reference to limitations under the U.S. Limitation of Liability Act, encourages a federal court to elevate U.S. law above the other limitations invoked in the provision, to the exclusion of the other limitations. This may be so regardless of the fact that limitations under federal law are not available for voyages that never make contact with a port of the United States. Omitting all mention of the U.S. Limitation of Liability Act in liability limiting provisions applicable to foreign voyages, as illustrated above, could minimize, or altogether eliminate, the possibility that federal

184. *Mills v. Renaissance Cruises, Inc.*, No. C 91-3001 BAC ARB, 1992 WL 471301, at *3 (N.D. Cal. Aug. 17, 1992) (citing *Hodes v. S.N.C. Achille Lauro Ed Altri Gestione*, 858 F.2d 905,915 (3d Cir. 1988)).

courts will enforce U.S. law against cruise lines instead of the preferable limitations claimed pursuant to the Athens Convention.

Finally, the following draft limitation of liability provision, based on the discussion of U.S. federal courts' treatment of these clauses in *Wallis* and *Wajnstat*, could prove most enforceable against passengers. Cruise lines may consider revising the language of their limitation of liability provisions as applied to foreign voyages to read as follows:

“Foreign voyages: On cruises which neither embark, disembark nor call at any U.S. port, Carrier shall be entitled to limit its liability for death of or personal injury to a Passenger to no more than 46,666 Special Drawing Rights as defined therein (approximately U.S. \$65,000 which fluctuates, depending on a daily exchange rate as printed in the Wall Street Journal). On such cruises, Carrier's liability shall further be subject to the provisions of the Convention on Limitation of Liability for Maritime Claims, 1976, with revisions, protocols and amendments.

General limitation of liability: On all other cruises, or in the event of inapplicability of the foregoing limitation, all the exemptions from and limitations of liability provided in or authorized by the law of the United States (including Title 46 U.S. Code Sections 30501-30509), [*sic*] 30511 will apply.”

The above suggested language omits any mention of the Athens Convention by name, and also separates mention of limitations under the U.S. Limitation of Liability Act from the section pertaining to foreign voyages. This way, a reviewing court should view the Athens Convention limitation in Special Drawing Rights as an “ordinary” contract term, followed by a reference to the U.S. Limitation of Liability Act as a fail safe rather than an equally permissible alternative.

Because there is no explicit reference to the Athens Convention in the above provision, an examining court would be unable to find the defect present in the contract in *Wallis*, wherein the Ninth Circuit held that a passenger should not be expected to research the Athens Convention. This provision also cures the other defect set out by the Ninth Circuit in *Wallis* by explaining what Special Drawing Rights are, and how they are converted into U.S. currency. Finally, this provision removes any mention of the limits that may be available under the U.S. Limitation of Liability Act from any section that pertains to foreign voyages, so as to be

mindful of the Act's inapplicability to any voyage not involving a port of the United States.

If cruise lines adopted the above provision, or similar language, passage contracts would avoid the construction issues that were the cause of confusion for those provisions considered in prior federal court opinions, especially *Wallis* and *Wajnsstat*. By removing the drafting defects discussed above, this new provision would more easily pass the second prong of the reasonable communicativeness test from *Shankles*. In doing so, the above provision would better serve the interests of cruise lines, as it would be more likely to be enforced by an examining federal court of the United States.

V. CONCLUSION

The Athens Convention was originally enacted to provide a framework of give-and-take wherein carriers would be allowed to predictably limit their liability in damages to passengers, while simultaneously guaranteeing compensation to injured passengers, where before carriers often contracted out of damages. While neither its original ratification nor its subsequent protocols and amendments have been adopted by the United States, the Convention yet stands to affect millions of Americans who embark on international cruises every year via incorporation into cruise ship passenger contracts at the discretion of cruise ship companies.

Though cognizant of the benefit and necessity of allowing passenger carriers to limit their liability in the event of catastrophic accident (rare nowadays) or mass injuries on a vessel, federal courts in the United States have progressively shifted toward placing an increased burden on foreign-owned carriers seeking to do so. This increased burden is found in the ever-narrowing of the reasonable communicativeness test as applied to cruise line passage contracts, especially as it pertains to contracts that invoke international law instruments like the Athens Convention. With this increased burden in mind, foreign cruise companies seeking to protect their interests from passenger claims for damages in U.S. courts should set out to strengthen the enforceability of their passage contract terms as they apply to wholly-foreign voyages. By abandoning reference to a treaty with a ratification history as unsettled and tumultuous as that of the Athens Convention, and not intermingling U.S. law with liability limits meant to apply only to foreign voyages, foreign cruise carriers stand to continue to

reap huge profits from American passengers, while minimizing potential losses in damages, or worse, negative precedent.