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The Athens Regulation and International Law

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I. Introduction

In ZEuP No 4 last year, Mr. Nicolai Lagoni argues that the proposal of the EU Commission[1] for a Regulation to implement the Athens Convention on maritime passenger liability[2] is in conflict with international law[3]. Although this sounds rather serious, it appears that the conflicts are non-existent or rather minor, and can be remedied either by adjusting the proposal or, in some cases, by adjusting other conventional regimes.

I have been involved with the negotiations of the Athens Convention, but I have not been particularly involved with the EU implementation process.

II. Alleged Conflicts with the Athens Convention

It is a point for the European Commission not only to implement the Athens Convention, 2002, but also to add to the regulations of the Convention in the implementation process. The idea is probably both to justify European regulation, clarify provisions when needed and to promote other policies than set out in the Convention. Mr. Lagoni argues that two of the provisions added actually contravene the Convention itself.

1. Advance payments

The first of the provisions that allegedly is in conflict with the Convention is the "advance payment" clause[4]. While the Convention sets out the basis and the limits for the carrier's liability, the advance payment clause provides that the carrier shall grant interim relief to passengers waiting for final settlement for their claims, and possibly implicitly that such interim relief shall be non-returnable in most cases.

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[1] COM(2005) 592 final (hereinafter the "EC Proposal").

[2] Protocol of 2002 to the Athens Convention Relating to the Carriage of Passengers and their Luggage by Sea, 1974. The Consolidated version of the Convention and the Protocol is called the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 2002 (pursuant to Art. 15 of the Protocol). This consolidation is hereinafter referred to as the "Convention".

[3] *Nicolai Lagoni*, Die Haftung des Beförderers von Reisenden auf See und im Binnenschiffsverkehr und das Gemeinschaftsrecht: Die EG auf Konfrontationskurs mit dem Völkerrecht", ZEuP 2007, 1079 et seq.

[4] COM(2005) 592 Art. 5.

The Convention does not mention any such advance payments, and then the starting point is that States Parties are free to implement provisions in this respect[5]. And when the States Parties are free to do so, they can also do so by means of the EU mechanism.

This freedom exists even though a provision on advance payment was proposed[6] and rejected during the negotiations of the Convention. The rejection and the reasons therefore are for some reason not reflected in the records of the Legal Committee. However, in my recollection, it was expressly mentioned by several speakers that those states that felt there was a need for such provisions, could provide for it in national law. This recollection is supported, inter alia, by the elaborate discussion of the issue by Denmark[7]. This view ties this issue closely to the issue of whether there was a compelling need for the International Maritime Organization (IMO) to address these issues; a line of argument that was very popular in the Legal Committee at the time on the basis of directives given by the IMO Assembly[8]. Thus, the reason why the proposal of an advance payment clause was rejected was not that such a clause would be incompatible with the other parts of the Convention.

While the advance payments are not problematic in relation to the Convention, perhaps a possible implicit rule that advances would be non-returnable would be more problematic. I am not sure that one would have to imply such a clause. But if one did, the effect of such provisions would be that the carrier will have to pay more than what the Convention obliges him to.

However, the better view is in any event that all issues of *condictio indebiti* are left to national law. If this view was not accepted, the Convention would allow that the carrier recovered compensation wrongfully paid in all instances, while virtually all legal systems have restrictions on such claims, e.g., when monies are received and used in good faith. Such issues were never discussed in the preparation of the Convention, and were clearly left to national law.

In conclusion, then, I do not think Mr. Lagoni is right when alleging that the advance payment clause in the European Commission's proposal contravenes the Convention.

2. Limits of liability for wheelchairs etc.

Another addition to the Convention proposed by the Commission is a special limit for liability in respect of "mobility equipment or medical equipment belonging to a passenger with reduced mobility"[9]. The limit is equal to the value of the equipment, thus only excluding consequential losses. The rule would apply to,

[5] Vienna Convention on the Law of Treaties Art. 31.
[6] IMO Document LEG 78/3/1 paras 29–34 (proposal by Norway).
[7] Letter from Denmark to me as the coordinator of the Intersessional Informal Correspondence Group 31 July 1998.
[8] See IMO Assembly Resolutions A.500(XII) and A.777(18).
[9] COM(2005) 592 Art. 2.

i.a., leg braces and wheelchairs, but apparently not, e.g., hearing aids unless the passenger also has reduced mobility (!).

In the Convention itself there are limits for

- death of or personal injury to a passenger (Art. 7)
- loss of or damage to cabin luggage (Art. 9)
- loss of or damage to vehicles (Art. 9)
- other luggage (Art. 9)

It seems clear that a separate limitation amount for medical equipment contravenes the Convention if any of the limits in the Convention include liability in respect of such equipment. However, in line with the assumption underlying the EC Proposal, I do not think it is appropriate to characterize medical equipment as luggage, at least when it is in use on board. And even though it is possible to characterize some types of equipment, such as a wheelchair, as a vehicle, that reading appears quite strained to me.

Also, there is no indication in the Convention that all kinds of losses necessarily shall be covered by one of the limitation amounts. If that had been the intention, one would probably have made a limitation amount for all other losses rather than for other luggage claims.

The consequence of *not* considering certain medical equipment as luggage would be that the liability for loss of or damage to such equipment would not be subject to limitation under the Convention. This is important, as the proposed limitation rule in addition to the Convention only limits liability in respect of some of the equipment (see the hearing aid example in the text above). Furthermore, if medical equipment is not considered luggage, etc., it falls outside the provisions of the Convention on the basis for liability (Art. 3) and compulsory insurance (Art. 4bis).

Although a bit messy, I believe it is defensible to clarify in the implementation legislation that medical equipment is not luggage. And when the clause first is adopted in the EU, chances are that an international tribunal – if it ever should come to that – would accept the underlying reading of the Convention because the majority or a large part of the States Parties have adopted the view, and because there are sound policy reasons in favor of allowing the disabled the same compensation for their ordinary luggage as other passengers, without deduction for their special equipment. Many State Parties may be reluctant to even raise the issue before an international tribunal because they are financing such equipment under socialized medical schemes, and thus themselves claimants that would benefit from higher limits.

Also on this point, I must respectfully disagree with Mr. Lagoni. The EC Proposal is well in line with the Convention.

III. Alleged conflicts between the EC Proposal and Inland Waterways Regimes

While I do not accept that there are conflicts between the EC Proposal and the Convention itself, I do accept that there are conflicts between the EU Proposal and some inland waterways regimes[10] because it extends the application of the Convention to inland waterways[11]. Mr. Lagoni points out that there may be conflicts in respect of[12]:

- Freedom of navigation and freedom from levies on the Rhine, which he alleges is incommensurable with the compulsory insurance requirements of the Athens Convention. He may be right, but to me it is not obvious that a requirement of this kind actually violates the provisions. Mr. Lagoni does not enter into a detailed discussion on this point.
- Jurisdiction of Rhine Courts, which he alleges is incommensurable with the jurisdiction provisions of the Convention. I tend to agree with Mr. Lagoni on this point.
- Limits of liability under the inland regimes, which he alleges is incommensurable with the limits under the Athens convention. This seems correct, as this is a global limitation regime and for some reason only global limitation regimes in respect of seagoing vessels are allowed under Art. 19 of the Athens Convention.

Although the extent of conflict may be discussed, it is well established that there are some incompatibilities between the EC Proposal and certain conventions relating to inland waterways[13]. However, this is not very dramatic. It happens all the time that existing regimes in national or international law must be changed because of new conventions on uniform laws; they are after all made because the current legal regimes are not satisfactory. The Athens Convention, 2002, is even explicit in this respect, providing that a list of conventions must be denounced by the States Parties[14].

It is unlikely that it would be impossible to carry out the necessary changes in international law in respect of inland waterways. The inland limitation regime includes an express denunciation clause[15]. The Revidierte Rheinschiffahrtsakte does not have an express denunciation clause, but has been amended a number of times

[10] Revidierte Rheinschifffahrtsakte with Protocols http://www.transportrecht.de/cgi-bin/public.cgi?SESSION=&GROUP=1029942550 and Straßburger Übereinkommen über die Beschränkung der Haftung in der Binnenschifffahrt (CLNI) http://www.transportrecht.de/transportrecht_content/1157984624.pdf.

[11] COM(2005) 592 Art. 4. The EU Council now favors the deletion on the inland waterways extension (see interinstitutional file 2005/0241 [COD]), but the matter is still pending. My web site http://folk.uio.no/erikro/WWW/corrgr/index.html will reflect the developments.

[12] See *Lagoni* (n. 3) 1079, 1089 et seq.

[13] Art. 2(2) of the Convention is supposed to resolve some conflicts of this kind (see below in IV.). But although it is made part of the Annex to the EC Proposal, it is overridden by Art. 2 of the EC Proposal. The Annex is attached for information purposes only, see COM(2005) 592 p. 11.

[14] Athens Protocol Art. 17(5); *Lagoni* (n. 3) n. 14.

[15] Straßburger Übereinkommen (n. 10) Art. 19.

and it is hardly conceivable that Switzerland, as the only non Member State that is a State Party to that convention, would create difficulties.

But even if not impossible, such changes may trigger political reluctance, so more flexible solutions should be considered. It is, of course, not necessary to force Member States to renegotiate old treaties. However, when Mr. Lagoni seems to suggest that the EU could not choose to be inflexible in this respect, I beg to differ.

It is correct that the Community owes a certain duty of loyalty to the Member States in that it should not create unnecessary difficulties for them to adhere to their treaty obligations[16]. However, the main rule is that the Member States must adhere to community law; even if that means that they would have to adjust their international commitments[17]. And it has not even been suggested in this case that there are special reasons that would make it disloyal of the Community to implement legislation that also affects the international inland waterways regimes. On the contrary, it would be an anomaly if different regimes for passenger liability should apply for vessels competing with each other on the Rhine, only because one is subject to the inland waterways regime and one is subject to the regime for carriage by sea.

IV. Conflicts between the Convention and Inland Waterways Regimes

Even more important than what is pointed out by Mr. Lagoni, is that there may also be a conflict between the inland waterways regimes and the Convention itself. This is so because the Convention applies to some situations governed by the inland waterways regimes, as it applies to international passenger voyages by seagoing vessels even if they start or end in, e. g., a Rhine port. Similarly, it may apply to passenger voyages by inland vessels that call in sea ports in the beginning or the end of the voyage.

Under the Convention it is the characteristics of the voyage rather than the characteristics of the ship that determines whether the Convention is applicable[18]. Under the German and international inland waterways systems, this is the other

[16] *Hermann-Josef Blanke*, in: Matthias Ruffert/Christian Calliess (ed.), Kommentar des Vertrages über die Europäische Union und des Vertrages zur Gründung der Europäischen Gemeinschaft – EUV/EGV, 2. Auflage, Neuwied, 2002, 2534, fn. 31; *Hans Krück*, in: Jürgen Schwarze (ed.), EU-Kommentar, 1. Auflage, Baden-Baden, 2000, Art. 307, comment 13; *Friedrich Meißner*, Das Recht der Europäischen Wirtschaftsgemeinschaft im Verhältnis zur Rheinschiffahrtsakte von Mannheim, Berlin, 1973, 124.

[17] *Blanke* (n. 16) 2554, in particular n. 27; *Christoph Vedder*, in: Eberhard Grabitz (ed.), Das Recht der Europäischen Union, 2. Auflage, München, 1990, Art. 234, comment 9.

[18] See the definition of "Contract of carriage" in Art. 1(2) of the Convention, which is used in the definitions of "Carrier" and "Passenger," which again are used in the operative part of the Convention. The limitation of the scope of the convention to carriages by sea is not fully reflected in the scope provision of the Convention, namely Art. 2.

way around[19]. Thus in the first of the above examples, there would be both a "carriage by sea" pursuant to the Convention and „Schiffahrt auf dem Rhein" pursuant to the Revidierte Rheinschiffahrtsakte[20, 21]. In the second example the inland water vessel would be subject to both the Convention and the Straßburger Übereinkommen über die Beschränkung der Haftung in der Binnenschifffahrt (CLNI) for the carriage by sea[22]. Therefore, the above conflicts would not necessarily be entirely resolved by *not* extending the Convention to inland waterways pursuant to the EC Proposal.

In this connection, it should be noted that the Athens Convention does not include a supersession clause. This is a clause that would have allowed States Parties to honor their existing treaty obligations, such as the obligation under the inland waterways regimes. However, this possibility was expressly rejected by the Legal Committee[23].

However, here Art 2(2) of the Convention may come to assistance. It provides that States Parties to the Athens Convention do not need to apply it to the extent it is in conflict with international mandatory provisions in respect of other modes of transport, presumably including inland waterways transport[24]. It is then perhaps right to say that the conflict scenario discussed above[25] arises because the European Commission has proposed to disallow the Member States to rely on Art 2(2) of the Athens Convention[26].

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[19] *Georg Schaps/Hans Jürgen Abraham*, Das Seerecht in der Bundesrepublik Deutschland, 4. Auflage, Berlin, 1978, 73 et seq.; *Otto Vortisch et al.*, Binnenschiffahrtsrecht, 5. Auflage, Berlin, 2007, 9 et seq.

[20] The Revidierte Rheinschiffahrtsakte (n. 10) does not include a scope provision, but it appears from Art. 1 that it applies to traffic on the Rhine.

[21] It seems like the draftsmen of the Athens Convention, 1974, had this in mind when they referred to embarkation or disembarkation "by water" rather than "by sea" in Art. 1(8)(a).

[22] Also the Straßburger Übereinkommen (n. 10) lacks a scope provision, but it appears that it applies to inland waterways vessels (Binnenschiffe) by the definition of "Schiff" in Art. 1(2)(b).

[23] See IMO Document LEG 79/11, paras 40–42.

[24] Art. 2 only applies to the extent that the other transport regime has "mandatory application to carriage by sea". Strictly speaking, then, Art. 2(2) does not apply if the conflict arises in inland waters because the Athens Convention applies there (because a *contract* for carriage by sea extends *beyond* the carriage by sea). The EC Proposal would make it necessary to take a stand on whether the wording should be taken at face value here.

[25] See above in III.

[26] See n. 13 above.