

Possible Implications of the New Athens Protocol



London
and
Hamburg

Address:

British Consulate
General
Harvestehuder Weg 8a
20148 Hamburg

Ince & Co
invite you to a seminar
“Possible Implications of the New Athens Protocol”
to be held at the
British Consulate General, Hamburg
on Thursday 5 December 2002
from 1800 to 2100

Seminar Programme

Chair - Jonathan Lux, Partner, Ince & Co, Hamburg

Chairman's Introduction

Outline of current position

Statement from IMO

Timescales for the Protocol to come into force

Chris Moore - Partner, Ince & Co, London
and

Dr Jan Hungar - Rechtsanwalt, Ince & Co Hamburg
Legal Issues arising out of the Protocol

Peregrine Massey, Director, UK P&I Club

New IMO Protocol, Consequences and Political Realities, Club's position

Graham Barnes - BankServe Insurance Services Limited
Conclusions and Possible Solutions

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Seminar starts
at 1800

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We invite you to attend the above seminar, will be followed by a Q&A session and
refreshments afterwards

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The Entry into Force of the Athens Convention, 2002¹

Professor Erik Røsæg, Director of the Scandinavian Institute of Maritime Law and chairman on the IMO Correspondence Group on Passenger Liability²

On 1 November, 2002, a Protocol to the Athens Convention on passenger claims against sea carriers was adopted by an IMO Diplomatic Conference. The Protocol created the Athens Convention, 2002, which enters into force when ratified by **10 states**. But when will that be?

It is difficult to predict the future. Some conventions enter into force after a number of years, when the limitation amounts have been greatly depreciated. Some conventions never enter into force. In this case, however, there are reasons to believe that the Convention will enter into force relatively soon. **The pivotal factor in this respect is the European Union.**

In March this year, the European Commission has stated that new legislation on passenger liability is an urgent priority issue. After the Diplomatic Conference, it has stated that the new Convention “**meets all the criteria set out by the European Commission.**”³ This means that the European Commission is likely to make sure that the Member States ratify the Convention. That again implies, of course, more than the 10 ratifications necessary for the Convention to enter into force.

Due to the EU law, which provides that both the 15 Member States and the European Community as such must ratify, this ratification process will happen in three steps:

- Step 1 is the political decision in EU – and not only its Commission – that the Community shall go for the Convention.
- Step 2 is the ratification of the European Community
- Step 3 is the ratification of the Member States, simultaneously; or individually, within a time limit decided by the Community.

Steps 1 and 2 could be carried out very soon; within weeks or months. Step three could take some more time. A deadline for ratification could be

¹ This paper was written to be read in my absence at an evening seminar in Hamburg, 5 December, 2002.

² See <<http://folk.uio.no/erikro/WWW/corrgr/index.html>>.

³ Press release IP/02/1631, 7 November 2002.

set to the P&I renewal in 2004 or 2005, as the matter is considered urgent, and to keep up the momentum in the insurance market.

There are several reasons why the ratification process of states is likely to be slower than the ratification by the EU itself. One is that states may need to go through new consultation procedures, draft implementation legislation and organize the enforcement of the new rules.

The usual procedure is that states first sign the convention, and then later ratify. For our purposes, it is the ratification that is of importance, and it is therefore important to distinguish between ratification – the important act - and signature.

When 10 states have ratified, the convention will enter into force one year thereafter according to its own rules. **This means that due to the EU process, the Convention may enter into force early 2005 or 2006.** From that time, all passenger ships calling at a EU port must have the Athens insurance certificate.

Besides the 15 EU states, also other states are likely to ratify sooner or later. Those states include the EEA states (Norway, Iceland and Liechtenstein), the states applying for EU membership (Cyprus, Estonia, Latvia, Lithuania, Czech Republic, Slovakia, Hungary, Poland, Slovenia and Malta); Japan, Canada, Australia and – perhaps –USA.

- *The 3 EEA states and the 10 applicant states* are likely to ratify because they would need to implement the rules sooner or later anyway to harmonize with the EU law.
- *Japan* already has quite strict rules on passenger liability, and usually joins liability conventions.
- *Canada* usually also joins conventions of this kind. However, the law on passenger liability has recently been amended, so it is likely that one would prefer to wait for a while before yet another bill is put on the table.
- *USA* is generally not a party to liability conventions with limitation of liability. However, the new Athens Convention does not require States Parties to limit the carrier's liability, and the law would definitely improve the position of US claimants. On the other hand, it will affect the strong US cruise industry, which may lobby against it.

The insurance industry has, of course, not yet determined how the new insurance should be arranged. It appears likely that this will be viewed as a practical issue more than a political issue. However, the P&I passenger cover has been under review for some time, and some changes seem inevitable. I have not received signals that the industry needs a postponement of the entry into force to make these changes. On the contrary, it may be advantageous also for the insurance industry to keep up the momentum.

Conclusions & Possible Solutions

Graham Barnes

Conclusions - No Surprises

- ✓ SDRs 46,666 liability limits for passenger deaths under the 1974 Athens Convention have been politically embarrassing following the *Herald of Free Enterprise*, *Estonia*, *Sleiper* & *Express Samina* casualties.
- ✓ 1990 Protocol increased limits to SDRs 175,000 but never came into force due to insufficient ratification - limits were considered too low.
- ✓ 1999 UK Government made cover for passenger liabilities to SDRs 300,000 compulsory for ships operating out of UK.
- ✓ There is now a degree of political hostility against all Limitation of Liability Conventions following the *Prestige* oil spill.

FERRY INCIDENTS WITH SIGNIFICANT PASSENGER LOSSES (13 Feb 02)

Year	Vessel	Loss	Location	Pax	Current	Strict Liabs
				Deaths	Pax Liabs \$	new Protocol \$
2000	Express Samina	Sinking	Aegean	77	4725570	25316000
1999	Sleipner	Grounding	Norway	20	1227420	6575600
1994	Estonia	Sinking	Baltic Sea	728	44678100	239366200
1991	Moby Prince	Collision	Livorno, Italy	141	8653300	64900600
1991	Salem Express	Sinking	Red Sea	1,400	85919400	460290850
1987	Herald of Free Enterprise	Capsizing	North Sea	150	9205650	49316880

SIGNIFICANT CRUISE SHIP LOSSES since 1974

MAJOR LOSSES: eg fire, collision, grounding etc

EXCLUDES INDIVIDUAL INCIDENTS eg slip & fall

Year	Vessel	Owner	Loss	Location	Passenger		
					Count	Deaths	Injury
2001	Nordic Empress	RCCL	Fire	Bermuda	1,566	0	0
2000	Celebration	Carnival Cruises	Fire	Gulf of Mexico	1,586	0	0
2000	Nieuw Amsterdam	HAL	Fire	Alaska	1,169	0	1
1999	Sun Vista	Sun Cruises	Sinking	Straits of Malacca	1,100	0	0
1999	Norwegian Dream	Norwegian Cruises	Collision	English Channel	2,400	1	24
1999	Tropicale	Carnival Cruises	Fire	Gulf of Mexico	1,096	0	0
1999	Norwegian Sky	Norwegian Cruises	Grounding	NE USA/Canada	1,924	0	0
1998	Ecstasy	Carnival Cruises	Fire	Miami	2,565	0	8
1996	Discovery I	Discovery Cruises	Fire	Bahamas	800	0	0
1996	Golden Princess	Princess Cruises	Fire	British Columbia	1,200	0	0
1996	Universe Explorer	New Commodore Cruises	Fire	Alaska	1,066	0	1
1995	Celebration	Carnival Cruises	Fire	San Salvador	1,900	0	0
1995	Star Princess	Princess Cruises	Grounding	Alaska	1,550	0	0

CRUISE SHIP LOSSES continued

Year	Vessel	Owner	Loss	Location	Passenger		
					Count	Deaths	Injury
1995	Regent Star	Regency Cruises	Fire	Alaska	875	0	2
1994	Achille Lauro	Achille Lauro	Fire	Indian Ocean	900	3	8
1992	QE2	Cunard	Grounding	Massachusetts	1,815	0	0
1991	Sovereign of the Seas	RCCL	Fire	Puerto Rico	2,100	0	0
1991	Starship Majesty	Disney	Fire	Bahamas	1,120	0	0
1991	CS Britanis	Chandris	Fire	Gulf of Mexico	740	0	0
1990	Regent Star	Regency Cruises	Fire	Delaware River	882	0	0
1990	Bermuda Star	Bermuda Star Cruises	Grounding	Rhode Island	688	0	0
1989	Celebration	Carnival Cruises	Collision	Cuba	1,580	0	0
1988	Scandinavian Star	Stena	Fire	Gulf of Mexico	439	0	2
1988	Jupiter	?	Collision	Greece	600	2	?
1986	Mikhail Lermontov	?	Sinking	New Zealand	?	1	0
1986	Emerald Seas	Eastern Steamship	Fire	?	1,296	0	41
1985	Achille Lauro	Achille Lauro	Terrorism	Mediterranean	400	1	0
1980	Prinsendam	HAL	Fire	Alaska	320	0	0
1979	Angelina Lauro	Achille Lauro	Fire	US Virgin Islands	669	0	0
1974	Cunard Ambassador	Cunard	Fire	Gulf of Mexico	?	0	0

P&I Clubs under Pressure on two fronts

- From the 95% majority of club members who do not operate passenger ships.**

Risk of Overspill Claims are too great with cruise ships in a higher passenger liability limit regime.

This particularly applies to carrying passengers in the US

- Cruise Lines and Ferry Operators look to their P&I Clubs to provide the cover they are required to have by law, at the minimum cost.**

In Conclusion

- ✓ **Ratification of the 2002 Protocol to the Athens Convention by just 10 states will be a serious matter for all operators of passenger ships.**
- ✓ **Serious consideration for their bankers either as Mortgagees, Corporate Lenders and particularly Lessors.**
- ✓ **The P&I Clubs' difficulties are more the guarantee of payment rather than capacity.**
- ✓ **Providing the required insurance will be expensive. I suggest \$300 to \$400 million, double the current cost of the Clubs existing R/I of \$2 billion in excess of \$30 million pool retention.**

Possible Solutions

- ✓ **IMO clearly favours the P&I Clubs of the International Group.**
- ✓ **P&I Club cover not confined to passenger liabilities but also include:**
 - ✓ **Collision, Crew, damage to port installations, pollution & removal of wreck.**
- ✓ **The P&I Clubs must find the solution.**

A Suggested Solution

A possible solution is for the P&I Clubs to have a specific R/I for Passenger Liabilities, separate from their general R/I programme.

- Limit reinsured could either be to strict limit under the Protocol of SDRs 250,000 (\$325,000) per passenger, for the ship licensed to carry largest number of passengers, being: \$1.25 billion, or
- The maximum limit under the Protocol of SDRs 400,000 (\$524,000) for the largest 3,700 passenger ship, being \$1.94 billion.

The premium cost of this R/I for passenger liabilities to be paid by passenger vessels operators to the limits each club member requires.

\$ 4.5 billion approx.

**Overspill
Catastrophe Call
Exposure**

**OVERSPILL EXPOSURE ON
ALL MEMBERS OR I.G. CLUBS
IN EXCESS OF REINSURANCE
LIMITS**

\$2.03 billion approx.

**International
Group R/I
Programme**

\$30 million

\$4.5 billion

Overspill
excluding
Passenger
Liabilities

\$2.03 billion

IGA R/I
Programme
excluding
Passenger
Liabilities

Specific R/I for
Passenger
Liabilities

\$1.95billion Protocol
Max for 3,700 pax

\$1.25 billion Strict
Liabs for 3,700 pax

Ferry passengers in year 2000

Compiled by Ferrynews

Region	Intl	Local	Total	Insurable
Baltic	49,910,000	51,013,000	100,923,000	b
North Sea & English Channel	31,363,000	58,888,000	90,251,000	b
Mediterranean	7,344,000	79,824,000	87,168,000	b
Middle East	705,000	447,000	1,152,000	
Far East	16,694,000	243,343,000	260,037,000	
Australasia		19,299,000	19,299,000	b
North America	979,000	118,478,000	119,457,000	b
South America	3,211,000	10,938,000	14,149,000	
Total	110,206,000	582,230,000	692,436,000	417,098,000

CRUISE INDUSTRY STATISTICS

	2000	1999	1998	1997
Cruise Passengers	12,008,527	10,668,341	9,460,417	8,322,258
Increase	12.60%	12.80%	13.70%	9.30%
Nationality				
American	61%	58%	59%	64%
European	22%	23%	26%	22%
Other	18%	19%	15%	14%
Embarkation				
America	58%	59%		
Europe	21%	22%		
Other	21%	19%		
Capacity (lower berths)	255,133	231,802	217,783	202,025

If each Passenger pays an additional \$1 on a Ferry ticket, or \$1 per day on a cruise ticket

- ✓ Assuming 350 million ferry tickets sold per annum are on insurable ferries, \$1 per ticket would raise \$350 million**
- ✓ Assuming 10 million cruise tickets sold per annum are on insurable ships, also assuming the average duration of a cruise is 5 days. \$1 per ticket per day would raise \$50 million.**
- ✓ Total \$400 million might cover the cost of the P&I Clubs specific Passenger Liability Reinsurance programme.**

"Athens Protocol" Seminar in the British Consulate of Hamburg on

Dec. 5th 2002

by Dr. J. U. Hungar, Ince & Co. Hamburg

(English translation)

Your Excellence, Ladies and Gentlemen,

It is a pleasure for me to speak to you this evening.

I was asked to deliver my speech in German. However if someone prefers to raise questions in English later on, he or she is welcome to do so.

The subject of my speech are the changes to the Athens Convention and their consequences in particular for Germany.

In London on 1 November 2002 a diplomatic conference of the IMO decided on a new protocol to amend the Athens Convention of 1974 regarding the carriage of travellers and their baggage by sea. This is already the third amendment to the Athens Convention. The protocol is to be ready for signature as from May 2003 and will come into force 12 months after it has been ratified by the first 10 states.

In a brief press release of the Federal Ministry of Transport of the same day (1 November 2002) it was said: "*Cruises and journeys by ferry on international waters represent a growing market and the protection of the*

passengers requires international treaties. The international protocol decided on today will considerably improve the legal position of passengers in the case of physical injury or loss of life or in the case of lost baggage. The carrier's liability will be extended and the maximum amount to be paid in the event of damage will be increased. In this way we are ensuring that competition in the market for cruises and ferry trips will not be to the detriment of the passengers' protection. The Federal Government is making all efforts to ratify the new treaty as soon as possible." (Thus the announcement)

Whether this is such a good idea and whether tougher competition among carriers might possibly have exactly the opposite effect seems at least questionable. However not only carriers, but insurers, in particular and also the lending banks will have to take considerable measures to adjust to the new rules. At any rate it has already provoked a lively discussion.

First of all I should like to comment that the Minister of Justice, who was also quoted in the ministerial announcement mentioned above, regrettably omitted to mention why it has become necessary to raise the amounts of liability. The reason she gave for why it is necessary to increase the liability were the lower amounts in the 1974 Convention. This reasoning proves to be faulty when we consider the fact that the maximum limits on liability under German law are already three times

higher than those of the 1974 Convention which was never ratified by Germany.

Now for the background: As I have just mentioned, the Federal Republic of Germany did sign the 1974 Convention, but never ratified it, because the limit on liability was considered to be too low. Instead of this, domestic provisions were created through the 2nd SÄG. These are ss. 664 of the German Commercial Code (HGB) plus Appendix consisting of 16 rules. These rules have the same contents as the provisions of the 1974 Convention, except for the higher amounts of liability and a higher limit on liability in the case of serious fault.

The same applies to the implementation of the Athens Convention in the Scandinavian countries. In view of the heavy ferry traffic across the Baltic, these countries also preferred to pass their own national laws with a higher level of liability.

The Protocol of 1990 was also signed by the Federal Republic, but never ratified. In the case of personal injury the maximum amounts of liability under domestic German law are about 20 % higher than those of the 1990 Protocol and in the case of baggage the domestic provisions roughly correspond to those of the 1990 Protocol.

The GDR, on the other hand, ratified the contents of the 1974 Convention in 1987. In view of a corresponding provision in the Treaty of Unification this meant that, unlike the rest of Germany, the provisions concerning a

higher limit on liability under domestic (west German) law do not apply in eastern Germany, but the provisions of the 1974 Convention do. After the ratification of the new 2002 Protocol, however, this odd German situation will have ceased to exist. *“Ladies and Gentlemen it is probably no longer worthwhile moving one's principal place of business to Rostock!”*

At the risk of repeating parts of the previous speech, I would like to sum up the ideas for the liability of maritime carriers for damage suffered by passengers:

- Raising the maximum amount of liability for personal injury in Germany (western Germany) from approx. € 164,000 per passenger (and the whole journey) to € 540,000 per passenger and damaging event.
- In the case of personal injury suffered on boat trips and cruises, such as a collision between ships, the carrier is strictly liable up to a sum of € 337,500 regardless of fault, an exception being wartime events, civil unrest, civil war, natural phenomena or terrorism. A further exclusion are the consequences of nuclear events.
- If the damage due to personal injury exceeds the sum of € 337,500, the carrier is also liable for the excess if it cannot prove that it was not at fault. In other words, there is a rebuttable presumption that the carrier is at fault.

- In the case of fault the carrier's liability is limited to a maximum of € 540,000 (per passenger and damaging event).
- In the case of personal injury which has not been caused by a boat trip or a cruise, such as food poisoning on board, the carrier is only liable if the injured party can prove that the carrier was at fault. Here there is therefore no presumption that the carrier is at fault. The maximum amount of liability, however, is € 540,000.
- As far as personal injury is concerned, the Treaty (probably with a view to the USA) allows the contracting states to raise the maximum amounts of liability through national laws.
- In the case of loss or damage to cabin baggage or other baggage or vehicles the carrier is only liable if at fault. In the case of baggage which has been lost or damaged due to boat trips or cruises, however, there is a rebuttable presumption that the carrier is at fault. In other cases there is no such presumption and the passenger bears the burden of proof.

Another remarkable feature is the introduction of a compulsory security. I am using the term, "compulsory security", and not "compulsory insurance" as the carrier, in addition to proving corresponding P&I coverage, may also provide a security in the form of a bank guarantee. Whether this alternative obtains great practical relevance, however, has yet to be seen. The sum of the compulsory security must cover the strict

personal liability, i.e. € 337,500 per passenger. The ships and boats must carry a document confirming this, although the exact administrative implementation is still unclear.

Furthermore a direct claim has been introduced for the passenger against the insurer or the provider of the security as regards the strict personal liability. The provider of the security can naturally defend itself against the claim using the carrier's objections, which does not help very much in view of the fact that liability is strict. Under insurance law such a direct claim is the exception rather than the rule, as the liability insurer (known as the passive insurer) provides compensation for the financial loss suffered by the insured "tortfeasor" (wrongdoer). However a direct claim is not unknown under German law. In the field of motor vehicle insurance, for instance, such a direct claim exists between a third party who suffers damage and the insurer for motor vehicle liability (s. 158 b VVG).

There now arises the question of what the changes mean for the addressees

1. Of course it will not be possible to buy a sea voyage on the current terms. The insurers/banks will pass on the costs of the compulsory security to the carriers who will then pass on these costs to the travellers (in as far as the market permits). Whether this is in the interests of the travellers, who have adequate insurance coverage anyway, is doubtful as the traveller pays the premium twice:

directly and then again indirectly by purchasing a ticket. It also has to be considered that due to the prohibition against enrichment under insurance law the damage can only be compensated for once. How the insurers will handle a possible double coverage among themselves is something that will also be followed with interest. However in certain cases there is a risk that the passenger's own insurer will first draw the passenger's attention to the new direct insurance claim of the carrier's insurer as soon as the insurer becomes aware that the damage has occurred on a sea voyage.

2. We must also wait to see the extent of the unfavourable effects that this has on the cruise industry. Whether and to what extent insurers will be willing and able to offer services in this new field of insurance also remains to be seen. This is not just about the problem of the unequal risk potential vis-à-vis other ship and boat owners and the resulting division of the risk community, but also about the form and the sum of the P&I insurance and an adjustment in the MII field (insurance of mortgage interests), but more about this later.

3. At all events the new convention will also have effects on using ships and boats as a security for a loan. In the terms of the loan and in the Deed of Covenants it is more necessary than ever to

make it clear that the requirements of the Athens Convention must be strictly adhered to, that the bank must also be provided with evidence of insurance and that there must be the corresponding MII coverage.

4. As regards the usual General Assignments of Insurance which the banks usually use to have all insurance claims in relation to the ship or boat assigned to themselves in order to secure the loan, the assignments of the P&I claims in this respect will largely come to nothing, as here the damaged party has a direct claim against the insurer or the provider of the security, at least for the strict passenger liability.

5. The Athens Convention will have no direct influence on ship mortgages (as this is a question of P&I claims), but it will have quite a considerable indirect influence. The reason for this is that the personal injury claims (now up to € 540,000.--) are secured by a maritime lien (ship creditor's right). The rights under a maritime lien (with a few exceptions in inland navigation which are not relevant here) have priority over ship mortgages (according to ss. 754 para. 1 no. 3, 755,) 761 of the German Commercial Code (HGB). This means that a claim based on a ship mortgage is more difficult to

enforce than the amounts which have priority and which are secured by a maritime lien. In the case of the liability limits in question here this might account for the entire value of the ship. The sums in question were already mentioned in the last speech. On the other hand these rights with priority are covered by the compulsory insurance. The personal claims secured by the maritime lien are thus satisfied in this respect. But it should still be remembered that the maritime lien passes to the paying insurer as a security right following the transfer of the claim.

6. It becomes particularly problematical for the mortgage creditor when the compulsory insurance (for whatever reasons) is in default and the insurer does not therefore have to pay benefits to third parties. Third parties who have suffered damage will then avail themselves of the ship creditor's rights so that the mortgage creditor will have to fear the loss of his mortgage security in view of the high amounts in question here. It is possible that additional rules will be codified in national legislation which will allow continuing liability towards third parties in certain cases even if a contract of insurance is in default, in a similar way to ss. 34, 36 et. seq. *SchiffsRG* in the field of ship rights (the well-known statutory insurance of mortgage interests) or s. 158 c *VVG* in the field of

motor vehicle insurance, which says: "*If the insurer is released from the obligation to pay benefits to the policyholder, either in part or in full, it is still obliged to pay benefits to the third party*". Otherwise the mortgage banks will probably have no other option than to cover their risk in respect of the mortgage interests, which is now higher, by a correspondingly adjusted and thus more expensive MII coverage. In principle this problem is already known, in connection with liability for oil and the risks that have to be covered in this connection. These costs will naturally be passed on to the carriers and to the passengers as well.

7. Whether and to what extent the German legislator will see a necessity to additionally codify continuing liability rules for this compulsory insurance is doubtful (and I do not hope that this will happen). As a rule the legislator considers it necessary to protect a participant in mass traffic. Thus it could be assumed that the legislator would also consider it necessary to introduce a rule in favour of the protected passenger regarding continuing liability. On the other hand the damaged passenger has securities in rem with higher priority, namely maritime liens. These continue as a right of attachment against the actual tortfeasor, even in respect of surrogate claims. The snag for the passenger who has suffered

damage is that ship creditor's rights do not continue in respect of substitute insurance claims and in this respect there is no surrogate security if the ship is lost. The creditors in respect of the ship mortgage, to whose mortgage liability volume these insurance claims belong (in the sense of a surrogate for the security that has been damaged or destroyed), benefit from this.

This has the somewhat astonishing result that the creditors in respect of the ship mortgage could be in a better position if the ship or boat is also lost when passengers are killed or injured.

On this note I finish my speech, with the knowledge that travelling by ship or boat is likely to become more expensive due to the ratification of the Athens Protocol. There will also be critical discussions in the areas I have mentioned before the contents of the Athens Protocol are incorporated into the national law of the Federal Republic of Germany.

Thank you very much for your attention. As I mentioned at the beginning, I will be pleased to answer any questions you may have (in German or in English).

Dr. Hungar