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The Athens Regulation and International Law

by Erik Rosseg, Oslo

I. Introduction

In ZEuP No 4 last year, Mr. Nicolai Lagoni argues that the proposal of the EU Commission1 for a Regulation to implement the Athens Convention on maritime passenger liability2 is in conflict with international law. 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. While the Convention sets out the basic 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.

1 COM(2005) 292 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 herein referred to as the "Convention".
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. 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 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 rejection is supported, inter alia, by the elaborate discussion of the issue by Denmark. 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. 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 contradicts 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”. The limit is equal to the value of the equipment, thus only excluding consequential losses. The rule would apply to,
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 because it extends the application of the Convention to inland waterways. Mr. Lagoni points out that there may be conflicts in respect of:

- 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. 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.

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. The Revidierte Rheinschifffahrtsakte does not have an express denunciation clause, but has been amended a number of times.

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 conflicts 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. Similiarly, 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. Under the German and international inland waterways systems, this is the other
way around. 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 Rheinschifffahrtsakte. In the second example the inland water vessel would be subject to both the Convention and the Strasbourg Übereinkommen über die Beschränkung der Haftung in der Binnenschifffahrt (CLNI) for the carriage by sea. 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.

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. It is then perhaps right to say that the conflict scenarios discussed above arise because the European Commission has proposed to exclude the Member States to rely on Art 2(2) of the Athens Convention.

19 The Revidierte Rheinschifffahrtsakte (ReRV) do not include a scope provision, but it appears from Art. 1 that it applies to traffic on the Rhine.
20 It seems like the draftsmen of the Athens Convention, 1974, had this in mind when they referred to "binnenhaftpflichtige Verkehrsflächen" rather than "by sea" in Art. 18(1)(a).
21 Also the Strasbourg Übereinkommen (SU) 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).
22 See BMD Discussion Paper 17-76/21, para 40-42.
23 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 waterway because the Athens Convention applies there (becauso a counter 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.
24 See above in III.
25 See n. 13 above.