Passengers carried by sea - should they be granted the same rights as airline passengers?

Paper by
Bernd Kröger
Singapore Conference, Comité Maritime International

15th February 2001

The legal committee of the IMO is currently discussing a revision of the Athens convention. That’s why in the CMI we are also coming close to asking the question: "Should passengers carried by sea be granted the same rights as airline passengers? The same question could be asked about passengers carried by railway, by road transport or by inland waterways. The law of liability is not only different for sea and air transport: It is different for all transport modes. A satisfactory answer to the question posed at the beginning can only be found if one looks to some principles. Why is liability law different for the various transport modes? Does liability law reflect the differing interests of those who are active in the various markets? Are the interests of passengers identical to those? Have the views of society changed, meaning that public policy is demanding a balancing out of transport laws? Is this public policy the same in all regions of the world? What is the connection with the insurance markets?

I will attempt to present short arguments about some of these questions. We can examine how important the arguments are in the discussion which follows.

1. In passenger transport law, there are three different basic regulatory frameworks:

   a) A liability for damages placed on the carrier, against whom the claimant has to prove a causal connection between the incident and the damage and also the actual fault of the carrier. We see this model in non-ship related accidents in passenger shipping.

   b) A liability for the presumed fault of the carrier, against which the carrier has the burden of proof that he took all necessary precautions to avoid the accident. We meet this model in air transport law when the liability amount of
100,000 SDR is exceeded. We also find this model in passenger transport by sea in connection with ship-related incidents.

c) Strict liability with the exemption that the damage is due to the negligence of the damaged party or is wholly caused by the act or omission of a third party. This model is also found in air transport law.

These models are partly connected with maximum liability amounts and sometimes with unlimited liability. The air carrier is liable up to 100,000 SDR on the basis of strict liability, but above this on the basis of negligence with a reversed burden of proof. This concept is very close to strict liability in the second stage as well.

2. How can this fundamental divergence in liability law for passenger transport be explained?

It can be partly explained in that development of liability law for the different transport modes was undertaken by separate international institutions. A perspective covering all transport modes is difficult given this start position.

But the main reason for the divergence lies first in the differing estimates of potential risks of the individual transport mode, second in the economic background of the markets in which they move and third in political influence on liability clauses. Political influence was especially seen in air transport. There was considerable state pressure in two large markets which caused the airlines to increase their own contractual liability framework in the IATA Inter Carrier Agreement substantially over the limits of the Warsaw convention. The Montreal convention built on this "voluntary" regulation.

A further element of public policy has to be added: If a mode of transport becomes used as a mass transport method, payment of damages due to accidents becomes an issue for a society. In this case the financial and social security of the passengers is the primary goal.

The number of accidents in road transport is an example of this. Third parties are mostly involved in these. Passengers make up only a small number of those involved. The main idea of liability law in road transport is to protect non-participating third parties as much as possible. Paying their damages becomes a task for society. The liability rules of passengers are regulated as an annex under
the principle of social safety. This means liability was set from the beginning at a
suitably strict level.

In shipping and air transport this was different. The primary aim was not to
regulate damages for third parties. Accident related damages of the passengers
themselves was the main focus. The more that air transport developed into an
essential transport mode for long distance flights and the more significantly the
numbers of passengers transported from all levels of society increased, so the
social dimension of air transport accident damages came to the forefront. In
liability law this means strict liability for the transport carrier with only a few
liability exemption clauses plus increased levels of maximum liability payments
up to unlimited liability.

3. How are these developments reflected in sea transport? To answer this question
you have to look firstly at the development of the markets. Intercontinental
passenger transport with ocean going ships from point A to point B was
completely replaced by air transport. Pure passenger transport is only carried out
on short distance routes by ferries. For ferries there are two market sectors:
Firstly national ferry transport with mostly small ships between a country's
mainland and nearby islands or between the islands. This often takes place
inside the territorial waters of one country. This transport is regulated by national
law. The public policy of the individual country decides whether the liability of the
transport carrier is regulated as an individual liability under sea transport law or
whether liability is brought to the same level as liability for land transport modes.
If ferries are also able to transport railway trains, parts of railway law can also
apply. A parallel to air transport generally does not exist.

A second market is international ferry transport linking two nearby countries, such
as the channel between England and France, in the Baltic Sea, in the
Mediterranean or in the Asian archipelagos. In this case there is a requirement
from shipping lines and the insurance market for standardised liability criteria,
which can be used as the basis for creating insurance concepts and for price
calculations. This transport requires international transport agreements such as
the Athens convention. From the economic viewpoint, these ferry links are
transport which replaces bridges. Parallels to air transport are not in the
foreground.

A clear requirement for international regulation exists in the section of sea
transport whose interests are in the foreground when the Athens convention and
its revision are being considered - I mean the cruise shipping market. This is a market sector which is by the structure of the customers, by the basis for economic calculations and by the competitive markets part of the tourism industry. Transport between two points is not the main goal. Transport by sea as such is the main performance provided during the trip. This performance is combined with a large number of additional services such as hotel accommodation on board, a wide spectrum of restaurants, an extensive programme of sport, leisure or entertainment programmes and generous - possibly maximum - freedom of movement on board the ship itself. Passengers use sport facilities on board from tennis courts to free climbing on artificial rock walls and skating rinks. They use wide-ranging entertainment programmes including night bars and dancing floors. They use staircases, lifts and hotel rooms. They are living on board. This is an environment which cannot be compared to other transport modes. In this environment a large role is played by self-responsibility, self-decision making, accepting the danger of actions you take and naturally the taking out of accident insurance. These factors play a larger role than in passenger transport with an aircraft or in all other transport modes.

This market involves almost 300 cruise ships which have together about 250,000 beds. That means, the cruise market still offers a fewer number of beds than hotels in Las Vegas alone. The fact that around 50 newbuildings with bed capacity of around 100,000 will come into market soon, does not make a lot of difference to the result that this market represents only a small percentage of the total leisure market. Among the 15 top-ranking cruise shipping companies are six lines from the United States, two from the United Kingdom, two from Monaco, the fourth largest is from Singapore and one each comes from Greece and Cyprus. There are others in Europe and Asia. The main flag countries are the Bahamas, Liberia, Panama and with a large gap Norway. The three big players hold about 70% of the market. The market's main focus is in North America far and away the biggest, Asia and Europe.

Sceptics see the new ships which will arrive in the markets as a build up of over-capacity. This means that cruise shipping companies are already aiming at reaching cost leadership and holding cost leadership. This involves exploiting all productivity reserves and to fully exploit the economies of scale of larger ships. Competition compels thoroughly-calculated price offers. Every cost position must be examined for possible savings. This includes insurance costs in the liability sector.
Competitor markets are not other sea transport markets, but markets in the leisure industry such as land-based holiday resorts. Their financial cost to cover liability risks is not orientated on the principles of air transport and not on the principles of a strict liability. Airlines play a role as feeder transport for these markets, not as a competitor during the sale of the product.

Finally, a special market is transport of passengers on cargo ships. This is an independent market sector without general cruise ship standards. This transport also offers passengers maximum freedom of movement. The passenger is in the first instance transported but he also lives on the ship. This transport mainly offers the experience of a sea voyage as such, linked with viewing the reality of life as a seaman. Both parties in the contract, carrier and passenger, are aware under the transport contract that residence on a ship whose role is primarily transport of freight and on which work is underway demands extra caution in behaviour on board to prevent accidents. This involves - more than the other transport categories - self-responsibility, taking action at your own risk and it is natural to take out your own accident insurance. These points are at the forefront of the transport contract. This contract is characterised not by the extensive requirement for social safety and compensation needed by the user of a mass transport mode, but taking responsibility for your own actions in the framework of an individual contract.

This is the social-economic environment in which the liability rules in sea transport must be embedded. In comparison with the transport of a passenger in an aircraft, the environment on board ships is completely different. It is not a case of "fasten your seat belt" if possible during the entire flight, but "enjoy yourself on board" which governs the behaviour of passengers.

4. What principles of liability would be best suitable for this special situation in shipping?

I believe it is the principles of the Athens convention which should be applied. They should in part be put into a more modern conception. This could satisfy the financial safety requirements of passengers without inappropriately changing the cost structure of the markets and the insurance capacity.

What does that mean?
a) In sea transport too, the burden of damages should be placed on the party which has primary responsibility for taking measures to prevent risks. This mainly applies to the shipping company. It should be responsible for all damages which are connected to the safety of its ships. The Athens convention provides in this area for liability for negligence with a reversed burden of proof. In practical terms such a proof of innocence would have little chance of success. The difference to strict liability is therefore small when practical factors are considered. Changing this liability for technical risks of ship operation into strict liability appears to me to be appropriate. This would bring the liability of the sea carrier in line with the principles of product liability and in line with the fundamentals of liability law of other transport modes. Such a sharpening of liability would make the claims procedure even more simple. The market structures would not be changed. At the same time the most essential elements of liability in sea transport would be brought in line with liability in air transport. Really substantial damages in air transport are always applied to causes which are in the sphere controlled by the carrier. All other factual conditions are not comparable with sea transport.

b) Specially there is a difference in comparison to those sectors on board ships whose potential for danger is not related to technical ship operation but to prudent or imprudent behaviour of the passenger himself. To care for the technical condition of facilities on board for leisure activities lies in the sphere controlled by the carrier. The use of the facilities lies in the sphere of control of the passenger. Many services are only activated through the participation of passengers and their behaviour. To introduce strict liability of the carrier in these sectors would not justifiably reflect the distribution of risk responsibility. These non-ship related incidents should be handled on the basis of normal liability for fault. Prima facie evidence provides sufficient ease of proof for the claimant, without transferring the entire risk of liability onto the carrier. This is also appropriate for another reason: The maintenance of a normal duty of care, as laid down in the Athens convention, encourages both responsible shipowners and responsible passengers.

If the interest of individual passengers is aimed at avoiding having to prove negligence of the carrier or at gaining an extraordinarily high financial settlement for damage then the taking out of a relevant accident insurance is reasonable. The shipping company can also be given a duty to place a clause recommending this in its conditions of transport. This could be connected with the offer to assist in arranging such insurance. In the
European legislation we find legal obligations for the carrier to inform passengers about the limits of liability. The European Union's regulation number 2027/97 of 9 October 1997, which regulates liability in European air transport, places a duty on carriers from third countries to give information when their liability limit is below specific European standards.

c) In comparing liability in air transport and sea transport you will find another interesting differentiation. The definition of damages in sea transport and air transport is not identical.

The Athens convention speaks of "damage suffered as the result of the death or personal injury to a passenger." The Montreal convention speaks of "bodily injury" instead of "personal injury". This is aimed at preventing claims for damages possible under some legal systems for mental injury, for loss of society, loss of companionship, loss of support, loss of inheritance and descendants' conscious pain and suffering. The preamble in Montreal refers to "the need for equitable compensation based on the elements of restitution." This again underlines that the definition of damages in this convention is intended to be narrowly interpreted. There is nothing comparable in the Athens convention. In Athens the definition of damages is perceptibly wider. So it is once again clear that every convention is a result of compromises and can only be valued when taken as a whole. "Cherry picking" or taking over individual clauses of a convention to apply to other transport modes is not appropriate.

d) Whether a maximum level of liability should be retained in sea transport and how high that should be depends on two further problems: Firstly from the viewpoint of society, that is whether public policy generally permits the setting of maximum liability levels. Secondly this depends on the structure and capacity of insurance markets for sea transport.

Public Policies are not following the same way of thinking in different jurisdictions. Overall limitations of liability with different actual limits have therefore been accepted in other modes of passenger transport as well. The preconditions to test the breakability of the limits are not the same either. In various national laws it is accepted as a principle that an overall limitation should be regarded as a quid pro quo for introducing strict liability. If IMO therefore is inviting member states to ratify a new protocol to the Athens
Convention on a world wide basis these principles have to be taken into account and political compromises will be inevitable.

To accept an overall limitation and to find compromises various questions have to be considered. Are we dealing with means of mass transportation or could the contract or the risk environment be individualised? What is the basis of liability? Is the liability connected with a special financial security system for the passenger by i.e. obliging the carrier to conclude a liability insurance? Is this insurance connected with a direct action in favour of the passenger? Is it reasonable for the customer to conclude an additional personal accident insurance? What are the consequences of a limited or unlimited liability especially for catastrophic risks for the structure, costs and prices on insurance markets?

These elements and maybe others taken together could justify sticking to an overall limitation. Then this limit should be high enough to cover at least the average damage or the „normal“ individual damage claim of a single passenger. In addition the limit should contribute to the demand to provide prompt compensation to passengers without having to rely on extensive judicial procedures. To achieve this one single overall limit would be more suitable than introducing a second or a third layer of a limitation fund connected with different precondition which have to be fullfilled for every layer. And finally it should be avoided to destroy the capacity and the structure of insurance markets if these markets are working efficiently and at reasonable costs.

Past experience shows that capacity of insurance markets grows according to demand for insurance cover. Experience has also shown that only a few cases of catastrophe are enough to reduce insurance capacity very rapidly or to make re-insurance markets so expensive that for economic reasons only limited use can be made of them. Even if insurance costs comprise only a small part of operating costs, the argument that the customer always pays in the end is only theoretically correct. In reality, competition restricts the price of the product. Competition decides whether the costs of individual operators can be passed on in the market or not. With increasing capacity in shipping markets this is not the case.

In practice the opposite may happen and that could lead to attempts to achieve savings on insurance costs. So it is understandable when the legal
committee of the IMO has expressed the demand that ship owners should be legally obliged to take out insurance against liability risks and have a duty to prove this to port state control and to flag states.

The further step, a direct action against the insurer who provided the insurance, is close here. This is increasingly found in newer international liability conventions. A direct action mostly concerns claims from third parties based on tort, not on contractual claims. For passengers, a direct action would make it possible to get economic and legal security for contractual claims. The Montreal convention does not recognise direct action. But introducing this in sea transport would strengthen the legal position of passengers. On the other hand a direct action could also make the claims procedure more complicated. According to the Athens convention, the contracting carrier and the performing carrier both have liability. The contracting carrier can be a land-based tour operator which does not own any ships. The performing carrier is the ship owner. Does it make sense to compel both to take out insurance and make both insurers open to direct action, or should attention be concentrated on the performing carrier? The insurance markets and the insurance structures can both be very different and the insurer can be situated in convention countries or non-convention countries. If it is possible to take direct action against every insurer in differing jurisdictions this would make a fast processing of claims more difficult. This especially applies when in cases of large damages a maximum level will be exceeded.

Liability insurance in passenger transport is also generally connected with deductibles. They reduce the premium levels and secure competitiveness in operating costs. Large shipping companies carry this risk themselves. Small companies cover the additional risk by purchasing insurance in open markets. This could create problems for direct action. Overall it can make processing of claims more difficult.

A direct action also means that the insurer must provide guarantees which can reach substantial levels and which may also have to be provided in differing places of jurisdiction, if claims against the insurer are to be made possible in different places of jurisdiction. This will place a burden on the capital and liquidity position of the insurer, will reduce financial capacity and also generally reduce the opportunities for cover on the market.
This is closely connected with the risk accumulation on board a single ship. The maximum capacity of a Jumbo jet is something like 400 passengers. The new Airbus, expected to be in service in 2006, will carry 555 passengers. Some cruise vessels can carry 2,000 passengers and the largest vessels entering service can carry more than 3,000 passengers.

Air passenger liabilities are generally insured in commercial insurance markets with carriers often purchasing cover from different insurers for different levels of liability. The P & I clubs in the International Group provide sea passenger liability insurance for the vast majority of cruise lines and ferries.

But the numbers involved in maritime transport therefore represent an enormous insurance risk if concentrated on a single ship. The shipping industry has responded by developing an insurance structure which spreads the risk among shipowners through the mutual system. On the other hand the number of ships engaged in passenger trades is so relatively small that the exposure is not easily mutualized.

The proposals to amend the Athens convention to allow unlimited liability therefore are likely to have a significant impact on the ability of shipowners to obtain insurance. Certain countries have unlimited liability under their domestic law. But in practice liability is limited to the amount of available P&I cover. In 1998, the International Group of P&I Clubs introduced a limit on its cover of about 4.25 billion dollars. It is not difficult to imagine a scenario which would result in a large proportion if not all of that total insurance being taken up. This would create instability in the insurance market. In fact some P&I clubs have already decided not to admit passenger ships on the basis that the risk is too great and especially because the risk is not mutual in nature because passenger vessels constitute such a small percentage of the world's tonnage.

Against this background, international legislators must be urgently advised to very carefully balance these inter-connecting factors before an inappropriately high or even an unlimited liability is agreed on. A world wide ratification of such an agreement would also be very difficult to achieve because of the international problems connected with it.
To prevent the devaluation of the maximum liability limit through inflation, a simple process to revise the liability amount could be introduced as has been undertaken in other liability conventions.

e) Finally a further important argument remains. This is the question of whether a high or unlimited liability provides the necessary incentive for a carrier to do everything possible to prevent accidents. This means using liability as an incentive to increase the safety standards of ships. This is a plausibly attractive but theoretical argument. In shipping, especially in passenger shipping and cruise shipping, the prevention of damage through liability law is displaced by safety standards imposed by public law. The IMO has implemented a detailed network of safety regulations for passenger ships which are constantly implemented into technical developments. It is especially rescue equipment, training of crews for a crisis management and the compulsion to implement the ISM code for passenger ships. This legal framework is laid down by flag states and is controlled by port states. Compliance with these standards is generally a precondition for insurance cover. Over and above this there is little room for pressure to comply with safety standards using liability law. This is already taking place using other methods.

4. In conclusion I believe

a) The differing, factual, economic and social fundamentals of sea and air transport of passengers prevents a standardisation of liability law between these two modes of transport. This means that the 1999 Montreal convention cannot simply be applied to sea transport.

b) The liability fundamentals of the Athens convention could lead to appropriate results. The Athens convention could and should be supplemented with the following additional points:

- A strict liability could be introduced for damage which could result in the exclusive sphere of the carrier. These are the Athens convention's ship-related incidents (shipwreck, collision, stranding, explosion, fire, defect in the ship).
- A legal obligation of the ship owner to take out liability insurance with sufficient cover and to prove that this has been done to flag and port states could be linked to the convention.

- The introduction of a direct action against the insurer would strengthen the legal position of passengers but could make the processing of damage claims more complicated.

- For the reasons given the principle of a maximum liability limit should be retained. In view of inflationary devaluation of the maximum liability amount, a simple revision procedure could be added to the Athens convention.

c) It is reasonable to expect that passengers in the leisure markets would take out an additional accident insurance if in individual cases a higher economic interest should be covered. In the interest of consumer protection, it could be made a requirement of the carrier to add such an advisory clause in its conditions of transport and to offer to assist in arranging such insurance.

d) It is in the economic interest of the carrier as well to include in his offer to his customers an appropriate compensation for possible accidents. This must take into account the special factual and socio-economic factors of the passenger transport at sea. These are different from air transport. In the revision of the Athens convention, an appropriate balance must be found between the interests of the passengers, the carriers, the insurance markets. This is possible without removing the established structures in the market. Experience shows that only when the markets share in the results of deliberations by international legislators a new Athens convention will be successful.

5 February 2001
D 4.01.21