

# RIGHTS OF PASSENGERS CARRIED BY SEA IN THE CASE OF ACCIDENTS

**Jasenko Marin**

University of Zagreb

Faculty of Law

Trg maršala Tita 14, HR-10000 Zagreb, Croatia

jmarin@pravo.hr

## ABSTRACT

The adequate protection of passengers on board ships is a key concern of the European transport policy. It is also one of the main concerns of the International Maritime Organization (IMO). Strengthening the rights of sea passengers became one of the top priorities of the worldwide shipping community following the occurrence of a number of tragic shipping accidents in past decades. There are two “legislative weapons” which have to be used in order to achieve this goal. The first is preventative – the modification of passenger ship safety rules. The other is palliative – the improvement of rules regulating the compensation of passengers (and other persons entitled to such compensation) for damage suffered as a consequence of an accident that occurs onboard a ship. This paper presents an overview of rules covering the matter of compensation of maritime passengers in the case of accidents. Important international agreements and other legal instruments that are currently in force shall be analysed as well as new instruments which are likely to come into force in the near future. Provisions of the Croatian Maritime Code (CMC) shall be compared to the solutions which relevant international agreements provide.

**Key words:** carriage of passengers by sea, liability of carrier, marine insurance

## 1 INTRODUCTION

Despite measures that have been taken in order to enhance the safety of passenger ships, an alarming number of shipping accidents have taken place in the few past decades in Europe as well as worldwide. For example, the accident involving the ship *Estonia* (1994) led to the death of 852 persons. In 1996, 283 passengers onboard the ship *Iohan* lost their lives as a consequence of a collision near Sicily. Eighty passengers did not survive the sinking of *Express Samina* near the Greek island of Paros in 2000. All of these mentioned ships were passenger ferries operating on their regular shipping lines between European ports. The so called “countries of the third world” are the most critical in this respect, as shipping accidents are frequently a direct consequence of ships being overcapacitated. When a tragic accident like those mentioned occurs, it is important that an adequate and effective regulatory system is available which is able to deal with the compensation of passengers or their families for the damage incurred.

Two grounds for compensation shall be analysed in this paper:

- compensation based on the contract of carriage of passengers by sea including the applicable provisions regulating the liability of the carrier for the damage caused by the death of or personal injury to a passenger;
- compensation based on the compulsory insurance of passengers in public transportation against the consequences of accidents.

## 2 CONTRACT FOR CARRIAGE OF PASSENGERS BY SEA AND LIABILITY OF THE CARRIER

The primary source of the legal relationship between a passenger and the carrier is the contract of carriage. Contractual provisions may, however, be overridden by international conventions and national statutes.

### 2.1 Athens Convention – application and liability of the carrier

Many contractual terms relating to injury, death and loss of and damage to passenger effects will be subject to the most important international source of law concerning this subject – the Athens Convention Relating to the Carriage of Passengers and their Luggage by Sea, 1974 (PAL 1974). The Athens Convention provides an international compensation regime for the death, injury and loss of or damage to the passengers' luggage between the states that have accepted the Convention.<sup>1</sup> The Athens Convention applies to international carriage (carriage in which the place of departure and the place of destination are situated in two different states, or in a single state if there is an intermediate port of call in another state) if at least one of the further conditions are met:

- The ship is flying the flag of, or is registered in, a convention state.
- The contract of carriage was made in a convention state.
- The carriage commences or terminates in a convention state

A passenger is defined as “any person carried in a ship under a contract of carriage or a person which, with the consent of the carrier, is accompanying a vehicle or live animals which are covered by a contract for the carriage of goods not governed by the convention. The carrier is the party with whom the passenger concludes the contract of carriage, whether or not that party actually performs all or any part of the contract of carriage himself. The carrier may arrange for another carrier (the performing carrier) to perform part (or all) of the contract. However, in this situation the contracting carrier still remains liable for the whole of the carriage to the passenger. The performing carrier will also be liable to the passenger for the part of the contract carried out by him.

The carrier (which in this context includes both the contracting and performing carrier) is liable if the death of or personal injury to a passenger is caused through their fault or neglect. The carrier will be liable for the acts and omissions of their employees or agents acting in the scope of their employment.

In cases of shipwreck, collision, stranding, explosion, fire or defect in a ship, fault or neglect will be presumed to exist and it will be up to the carrier to prove the contrary. In all other cases the passenger must prove fault or neglect. The passenger must always prove the fact that the accident took place during the carriage. The term carriage covers not only the period during which passengers are carried onboard the ship, but also the period of embarkation and disembarkation. The transfer of passengers from land to ship and *vice versa* is covered where such transfer is either included in the fare or is put at the disposal of the passenger.

The passenger must prove the extent of loss or damage, irrespective of the cause. The liability of the carrier can be reduced, in whole or in part, if the carrier can prove contributory fault on the part of the passenger.

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<sup>1</sup> The Athens Convention came into force on 28 April 1987. As of 31 March 2008 it had been accepted by 32 states, including Croatia.

The Athens Convention permits the carrier to limit his liability. Following the 1976 Protocol to the Athens Convention,<sup>2</sup> all limits are expressed in the Special Drawing Rights (SDR) as defined by the International Monetary Fund (IMF). The liability of the carrier for the death of or personal injury to the passenger cannot exceed 46,666 SDR per passenger (approximately 48,500 €).<sup>3</sup> The Athens Convention permits individual contracting states to increase (but not decrease) the death and personal injury limits in respect of carriers who are their nationals. The Athens Convention limits will be applicable unless the claimant proves that the death or injury resulted from the carrier's intentional act or omission or that the carrier acted recklessly and with the knowledge that such damage would be a probable result. Therefore, the claimant has a heavy burden of proof challenging the carrier's right to limit [1].

Any action for the death of or personal injury to passengers must be brought within two years from the date of disembarkation or when disembarkation should have taken place. Passengers can institute proceedings in the courts of any convention state that is:

- The principal place of business of the carrier.
- The place of departure or destination.
- The claimant's domicile or permanent residence state, if the defendant has a place of business and is subject to the jurisdiction of that state.
- The state where the contract of carriage was made, if the defendant has a place of business and is subject to the jurisdiction of that state.

After the occurrence of the incident which was the cause of the damage, the parties may agree that the claim for damages shall be submitted to any jurisdiction or to arbitration.

On 25 May 1990, a Protocol to the Athens Convention was adopted increasing the liability limits approximately threefold, from SDR 46,666 to SDR 175,000 (182,000 €) per passenger. However, this protocol has not been ratified by the required number of states and is therefore not yet in force.<sup>4</sup>

In the event of a major casualty the provisions of the Athens Convention will operate together with those of any other applicable limitation of liability convention, such as the 1976 Convention on Limitation of Liability of Maritime Claims (LLMC 1976). LLMC 1976 gives the carrier the right to limit liability regarding passenger claims, which is separate from and in addition to the per passenger limit in the Athens Convention. The limitation of liability under LLMC 1976 is SDR 46,666 multiplied by the number of passengers which the ship is authorised to carry, but not exceeding SDR 25 million irrespective of such a number of passengers. Where the sums of liability to individual passengers exceed that "overall" limit, individual claims would then be reduced on a pro rata basis.<sup>5</sup>

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<sup>2</sup> The 1976 Protocol entered into force on 30 April 1989. Not all Athens Convention states have acceded to the Protocol. As of 31 March 2008, the 1976 Protocol has been accepted by 25 states. States which have not accepted the Protocol still use the Gold Franc, the currency unit used in the Athens Convention prior to the 1976 Protocol.

<sup>3</sup> The Athens Convention also provides for compensation in respect of damage to or loss to passenger's luggage, which is defined as cabin luggage (in passenger's possession or control), vehicles and other luggage. In respect of loss to cabin luggage, the principles of the carrier's liability corresponds to the liability principles which apply in the case of the death of or personal injury to a passenger. In regards to liability for luggage other than cabin luggage, carrier fault or neglect will be presumed to exist. Carrier liability for cabin luggage cannot exceed 833 SDR per passenger; liability for vehicles cannot exceed 3,333 SDR per passenger; liability for other luggage cannot exceed 1,200 SDR per passenger. Passenger valuables (money, gold, jewellery) are generally not covered by the Athens Convention compensation system, unless entrusted to the carrier for safekeeping. In such cases, limits of liability may be set out by contractual provisions.

<sup>4</sup> The required number is ten. As of 31 March 2008, only six states (including Croatia) have accepted the 1990 Protocol.

<sup>5</sup> As of 31 March 2008, 51 states (including Croatia) accepted LLMC 1976. This Convention entered into force on 1 December 1986.

LLMC 1976 was amended by the 1996 Protocol. The limitation for passenger claims under this Protocol is SDR 175,000 multiplied by the number of passengers that the ship is authorised to carry, without any ceiling figure.<sup>6</sup>

## **2.2. Protocol of 2002 to the Athens Convention and IMO Guidelines for implementation**

Since 1996, the Legal Committee of the IMO has discussed proposals to further amend the Athens Convention [2]. As a result of these efforts, the new 2002 Protocol to the Athens Convention has been adopted [3].

The 2002 Protocol introduces compulsory insurance to cover passengers on ships and raises the limits of liability. It also introduces other mechanisms to assist passengers in obtaining compensation, based on well-accepted principles applied in existing liability and compensation regimes dealing with environmental pollution. These include replacing the fault-based liability system with a limited strict liability system for shipping related incidents (shipwreck, collision or stranding of the ship, explosion or fire on the ship, capsizing of the ship or defect of the ship) backed by the requirement that the performing carrier take out compulsory insurance to cover these potential claims as well as by the passenger's right to direct action against the insurer.

The 2002 Protocol establishes a two tier liability system in cases where death of or personal injury to a passenger is caused by a shipping incident. The carrier is liable for the death of or personal injury to the passenger up to the limit of SDR 250,000 (260,000 €) per passenger on any individual occasion, unless the carrier proves that the incident resulted from an act of war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional, inevitable and unavoidable character; or was wholly caused by an act or omission performed by a third party with the intent of causing the incident. Therefore, the 2002 Protocol introduces strict liability of the carrier for the death of or personal injury to the passenger up to the abovementioned limit (the first tier of liability).

If the loss caused by the shipping incident exceeds the limit of SDR 250,000 per passenger on any distinct occasion, the carrier is further liable - up to a limit of 400,000 SDR (416,000 €) per passenger on each distinct occasion - unless the carrier proves that the incident which caused the loss occurred without the fault or neglect of the carrier (the second tier of liability).

For the loss suffered as a result of the death of or personal injury to a passenger not caused by a shipping incident, the carrier is liable if the incident which caused the loss was due to the fault or neglect of the carrier. The burden of proving fault or neglect lies with the claimant. The carrier liability cannot exceed SDR 400,000.

The limits contained in the 2002 Protocol set a maximum limit, empowering - but not obliging - national courts to compensate for death, injury or damage up to these limits. The Protocol also includes an "opt-out" clause, enabling State Parties to retain or introduce higher limits of liability (or unlimited liability) in the case of carriers who are subject to the jurisdiction of their courts. A State Party, which makes use of this option, is obliged to inform the IMO Secretary General of the limit of liability adopted or of the fact that there is none.

The 2002 Protocol requires performing carriers to maintain insurance or other financial security, such as the guarantee of a bank or similar financial institution, to cover the limits for strict liability under the 2002 Protocol regarding the death of and personal injury to passengers.

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<sup>6</sup> As of 31 March 2008, the 1996 Protocol to LLMC 1976 has been accepted by 28 states (including Croatia). The 1996 Protocol entered into force on 13 May 2004.

The limit of the compulsory insurance or other financial security shall not be less than 250,000 SDR per passenger on each distinct occasion. Ships are to be issued with a certificate attesting that insurance or other financial security is in force and a model certificate is attached to the 2002 Protocol.

For the first time in an IMO international agreement, a regional economic integration organization (for example the European Union) may accede to the 2002 Protocol.

States that ratify the 2002 Protocol are required to denounce the 1974 Convention and its 1976 and 1990 Protocols, if they are obligated by the 1974 Athens Convention and those Protocols.

The objective of the 2002 Protocol is to enhance passenger remedy protection. Together, compulsory insurance and significantly increased liability limits could lead to very significant liability on the part of the insurer. The Protection and Indemnity Clubs (P&I Clubs) were strongly opposed to the amounts of liability prescribed in the 2002 Protocol. They particularly pointed out that the prescribed limits are too high, taking into consideration the situation on the insurance market and the danger of catastrophic incidents caused by acts of terrorism or other “acts of war”. The problem arises from the fact that 2002 Protocol does not contain explicit provisions reducing carriers’ (as well as insurers’) liability in cases where death of or personal injury to a passenger is caused by terrorism. Finally, P&I Clubs express their unwillingness to cover carriers’ liability as set out in the 2002 Protocol. The consequence is that only four states acceded to the 2002 Protocol as of 31 March 2008.

In order to solve the problem, new and lengthy discussions took place under the auspices of IMO, resulting in a new instrument - IMO Reservation and Guidelines for Implementation of the Athens Convention (IMO Guidelines) adopted in October, 2006. This document is considered as a *lex specialis* in relation to the 2002 Protocol. IMO Guidelines recommend that States which ratify or accede to the 2002 Protocol should include a reservation concerning a limitation of liability for carriers and a limitation for compulsory insurance for acts of terrorism, taking into account the current state of the insurance market. IMO Guidelines set out new provisions in respect to limits for carriers liability in respect to the death of or personal injury to a passenger caused by any war risks.<sup>7</sup> Under these provisions, carriers liability for the death of or personal injury to a passenger caused by war risks (terrorism included) cannot exceed lower of the following amounts:

- 250,000 SDR in respect of each passenger on each distinct occasion;
- or
- 340 million SDR overall per ship on each distinct occasion.

Under the IMO Guidelines, separate insurance cover is required covering liability for the death of or personal injury to a passengers caused by war risks limited to the abovementioned figures.

Additional insurance is required for covering carriers’ liability for the death of or personal injury to passengers caused by non-war risks. This insurance cover must be provided in accordance with the 2002 Protocol.

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<sup>7</sup> War risks include war, civil war, revolution, rebellion, insurrection or civil strife arising there from, or any hostile act by or against a belligerent power, capture, seizure, arrest, restraint or detainment, and the consequences thereof or any attempt thereat, derelict mines, torpedoes, bombs or other derelict weapons of war, acts of any terrorist or any person acting maliciously or from a political motive and any action taken to prevent or counter any such risk, confiscation and expropriation. Under IMO Guidelines, both war and non-war insurance may be excluded subject to the Institute Radioactive Contamination, Chemical, Biological, Bio-chemical and Electromagnetic Weapons Exclusion Clause as well as to the Institute Cyber Attack Exclusion Clause. Furthermore, insurance cover is subject to automatic termination upon the outbreak of war between any of the “Five Power States” (UK, USA, France, the Russian Federation, and the People’s Republic of China).

It should be hoped that IMO Guidelines represent an adequate solution for the problem raised and that the 2002 Protocol should come into force in the near future, leading to the strengthening of the position of the sea passenger.

### **2.3 European Community Approach**

The liability for damage caused to passengers carried by sea is not subject to completely harmonised rules on a European level. There is no Community legislation in this field and the protection of passengers varies between Member States, depending on what international conventions, and which amendments to them, have been ratified by the State in which the claim is settled. Some Member States ratified the 1974 Athens Convention (for example Belgium, Greece, Ireland, Luxembourg, Spain, United Kingdom, Poland). In addition, the Nordic States apply the substance of the 1974 Athens Convention but with the limits of its 1990 Protocol.

Following a long negotiation process, the Council of the European Union adopted the Political agreement on the Proposal for Regulation of the European Parliament and of the Council on the liability of carriers and passengers by sea in the event of accidents (“Athens Convention”) in December 2007 [4]. It contains the proposal that the liability regime regarding passengers carried by sea shall be governed by the provisions of the proposed Regulation and by the 2002 Athens Protocol as well as the IMO Guidelines. The proposed Regulation shall apply to any international carriage, as defined in the 2002 Athens Protocol and to carriage by sea within a single Member State onboard ships covered by Class A in accordance with Article 4 of Directive 98/18/EC, if:

- The ship is flying the flag of or is registered in a Member State, or
- The contract of carriage has been made in a Member State, or
- The place of departure or destination, according to the contract of carriage, is in a Member State.<sup>8</sup>

Furthermore, Member States may apply the provisions of this Regulation to all domestic sea-going voyages.

Under the proposed Regulation, the carrier who actually performed the carriage when the shipping incident occurred shall make an advance payment sufficient to cover the immediate economic requirements proportional to the damage suffered, within 15 days from the identification of the person entitled to damages. In the event of death, this payment shall not be less than 21,000 €. The provision in respect of advance payment shall apply if the incident occurred within the territory of a Member State, or occurred onboard a ship flying the flag of a Member State or is registered in a Member State. It will also apply if the carrier is established within the Community. There is no provision concerning advance payment in the 2002 Athens Protocol.

The Regulation is currently undergoing the EU legislative procedure.

#### **Croatian internal maritime legislation**

The carriage of passengers and luggage by sea is regulated by Articles 598-633 of the Croatian Maritime Code (CMC) [5]. In respect to principles of carriers’ liability for the death of and personal injury to a passenger, the CMC adopted the solutions of the 1974 Athens

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<sup>8</sup> In respect of carriage by sea within a single Member State onboard ship covered by Class A in accordance with Article 4 of Directive 98/18/EC, Member States may choose to defer application of the Regulation until four years after its date of application.

Convention. In respect to limits of liability, the CMC adopted the solutions of the 1990 Athens Protocol which is not in force at an international level.

Therefore, the present situation concerning the limits of carrier liability for the death of or personal injury to a passenger is as follows:

- If the carriage is international (carriage between a Croatian port and a port in another state), the Athens Convention 1974 as amended by 1976 Protocol is applicable which means that the liability of the carrier cannot exceed 46,666 SDR per passenger and carriage.
- If the carriage is internal (carriage between two ports located in Croatia), the CMC is applicable, meaning that the liability of the carrier cannot exceed 175,000 SDR per passenger and carriage.

In respect of global liability for passenger claims, the CMC adopts the solutions of the 1996 Protocol to the LLMC 1976. Croatia acceded to this Protocol.

### **3 RIGHTS OF PASSENGERS IN PUBLIC TRANSPORT**

In addition to the compensation available on the grounds of carrier liability, passengers in public transport are often entitled to compensation under the contract of compulsory insurance of passengers in public transport against accidents. This compulsory insurance is regulated by national law. This compensation is available to passengers in public maritime transport (including cruiser passengers) irrespective of carrier liability for the accident which caused the damage.

In Croatia, this type of insurance is regulated by the Compulsory Insurance in Traffic Act (CITA) [6]. Each undertaking which is entitled to perform the public transportation of passengers is obliged to conclude this type of insurance contract with the insurer. The beneficiary of the insurance is the passenger. The insurance covers the period whilst the passenger is onboard and the period of embarkation and disembarkation (including the period while the passenger is at the quay waiting for embarkation or disembarkation) [7].

This insurance covers damages for death or permanent disability of the passenger caused by an accident in public transport. When this damage is raised, the minimum compensation (insurance amounts available to the passenger or other beneficiaries) prescribed by CITA, is as follows:

- 40,000 HRK (approximately 5,500 €) per passenger in the case of his death, and
- 80,000 HRK (approximately 11,000 €) per passenger in the case of permanent disability and according to the degree of disability.

Under the 2006 Conditions for Compulsory Insurance of Passengers in Public Transport against the Consequences of Accidents (2006 Conditions), adopted by the Croatian insurers which are members of the Croatian Insurance Bureau, this insurance does not cover damages caused by earthquake, war risks, suicide of the passenger, criminal acts of the passenger, as well as by the impact of alcoholic, narcotic and psychotropic substances on the passenger.

### **4 CONCLUSION**

There is currently no international harmonisation in respect to legal rules regulating compensation for the death of or personal injury to maritime passengers. At an international level the 1974 Athens Convention, as amended by the 1976 Protocol, is in force. Limits of carrier liability provided in this Convention are too low. The legal principles of carrier

liability in the 1974 Athens Convention are unfavourable from the passenger's point of view. Legal regimes vary significantly between states and even between EU Member States.

The problem could be solved if the 2002 Athens Protocol, together with IMO Guidelines, enters into force in the near future. The latest legislative developments and political agreements which are taking place in the EU are encouraging.

Croatian regulation of this matter is subject to a kind of "dualism". Passengers in internal carriage are entitled to higher compensation than passengers in international trade due to different legal regimes which are applicable. This dualism should be displaced as soon as possible by denouncing the 1974 Athens Convention in order to apply higher CMC limits both in the internal and international carriage of passengers.

The limits prescribed in the Croatian Compulsory Insurance in Traffic Act for compensation on the grounds of compulsory insurance of passengers in public transport against the consequences of accidents should also be increased.

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