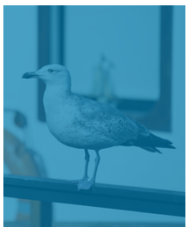
Cruise, Travel & Leisure

June 2014

CRUISE BULLETIN



Welcome to our inaugural Cruise Bulletin.

In this first issue of our Cruise Bulletin, we take the opportunity to consider some of the key issues facing the cruise industry at a time of increased regulatory scrutiny.

We begin by examining the current and impending environmental regulations governing the emissions from all merchant vessels both within EU waters and further afield, in environmentally sensitive sea areas, including a recent European Court of Justice (ECJ) decision on the applicability of EU regulations restricting passenger ships operating on regular services to or from any EU port.

We discuss the interlocking requirements of the proposed new EU Package Travel and Assisted Travel Arrangements Directive and the existing Athens Convention, and their respective effects on the contractual travel arrangements for cruise passengers and cruise providers' potential liabilities.

Finally, we consider current EU competition law restrictions in terms of prohibiting anti-competitive agreements, aimed at preventing abuse of dominant market position and merger control, which is of particular relevance to the cruise industry where, quite often, country specific brands are collectively held under the umbrella of a larger owning entity. This is set against the background of the increased unannounced inspections, or 'dawn raids', by the European Commission in all areas of the shipping industry.

HFW has many years of experience serving the cruise industry and we are a member of the Cruise Lines International Association (CLIA). Our capability is extensive in areas of litigation, casualty and transactional work. We have lawyers who can assist clients in Europe, the Middle East, Asia and Australia as well as Brazil. Details of those lawyers in our cruise group can be found on our website along with a full description of all our capabilities in this area.

Should you require any further information or assistance on any of the issues dealt with in this Bulletin, please do not hesitate to contact any of the contributors, or your usual contact at HFW.

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CLIA CRUISE LINES INTERNATIONAL ASSOCIATION, INC.

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The bleak outlook of reduced sulphur emissions

Against a background of growing global environmental consciousness, the International Maritime Organisation (IMO) has sought to introduce a number of environmental regulations in recent years to reduce emissions into the atmosphere. Whilst the ethical credentials are clear, the increased financial and logistical strain on cruise companies striving to comply with these regulations is a burgeoning concern.

Emission control is of course not a new topic. On 19 May 2006, the first Sulphur Emission Control Area (SECA) was introduced in the Baltic Sea, requiring all vessels within the prescribed geographical limits to burn fuel with reduced sulphur oxide (SOx). The Baltic Sea SECA has since been joined by the North Sea SECA and the United States and Caribbean and the North American Emission Control Areas (ECA), regulating nitrous oxide emissions (NOx) and particulate matter (PM) in addition to SOx, with the latter coming into force at the start of this year.

Collectively, these areas are now all referred to as ECAs for the purposes of the regulations established under MARPOL 73/78 and amended by Annex VI, which initially prohibited a fuel sulphur content in excess of 1.5%, reducing to 1.0% after 1 July 2010.

Because of the restricted availability of low sulphur bunkers and their corresponding relatively high expense, practically, this has meant cruise vessels carrying small parcels of low sulphur fuel in segregated bunker tanks to burn on entry into an ECA.

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CLAIRE WOMERSLEY, ASSOCIATE AND MASTER MARINER

Tightening regulatory regime

Apart from the ongoing threat of the Mediterranean becoming an ECA, which would have serious ramifications on the cost of cruising and route planning, the industry now faces the further reduction of SOx and PM emissions within the existing ECAs to just 0.10% from 1 January 2015, with current plans, depending on the outcome of a review to be concluded in 2018 as to the availability of low sulphur fuel oil (which might cause a deferral to 1 January 2025), also to limit these emissions outside of an ECA to 0.5% from 1 January 2020 (a 3% reduction from the current prescribed limit of 3.5%).

In tandem with the tightening IMO regime, the European Union enacted legislation requiring Member States to ensure that passenger ships operating on "*regular services*" to or from any EU port use fuel with a maximum SOx of 1.5%[1] (Directive 1999/32).

Passenger ships on regular services

The expression "*regular services*" was defined as meaning:

"A series of passenger ship crossings operated so as to serve traffic between the same two or more ports, or a series of voyages from and to the same port without intermediate cause, either: (i) according to a published timetable, or (ii) with crossings so regular or frequent that they constitute a recognisable schedule".

Although, at first blush, the Directive might appear to catch ferries rather than cruise vessels, the European Court of Justice (ECJ) recently held in *Manzi and Another v Capiteneria di Porto di Genova Case C-537-11* (an Italian case in which a preliminary ruling from the ECJ was requested), that Directive 1999/32 does apply to cruise vessels on the basis that the list of ports contained in the itinerary for a normal cruise would necessarily consist of at least two ports which could not be avoided, i.e. the port of arrival and port of departure.

1 Article 4a(4) of Council Directive 1999/32/EC of 26 April 1999, as amended by Directive 2005/33/EC of 6 July 2005

The transport was thus made between *the same two or more ports*, even where the transport ended at the port of departure. Further, the ECJ held that because not all EU Member States are contracting parties to MARPOL 73/78, it was not possible for the cruise line to argue that the provisions of Directive 1999/32 should be interpreted in light of the lesser requirements of Annex VI, which they were in fact adhering to in good faith.

With this in mind, owners need to be extra cautious of not only the implications of the existing Directive 1999/32, but the more stringent restrictions set to apply from January 2020 when the EU regulations will limit the SOx content of fuel used in all EU waters to maximum of 0.5%, regardless of whether the corresponding planned MARPOL Annex VI restrictions for fuel used outside of an ECA go ahead or not.

Options available to the cruise industry

The cruise industry is currently in a state of flux as various options are being considered to ensure compliance with the regulatory regimes. Although the wider shipping industry has sought to counter increased low sulphur fuel bunker costs by advocating slow steaming, this is often not an option to the cruise industry where high speed overnight runs, particularly in the Mediterranean, are required to ensure that a competitive itinerary can be offered to passengers with increasing expectations for the cruises on offer. An alternative of exhaust gas cleaning systems, or scrubbers, which can bring the emissions within the prescribed limits, have the advantage of allowing ships to use the cheaper, high sulphur fuel without falling foul of the regulations. Despite their high initial installation costs and dubious 'green credentials' (they increase power consumption, thereby increasing CO_2 emissions), they appear to be becoming an increasingly popular option with a number of cruise lines announcing plans to install scrubbers in newbuilds, delivering over the next few years, in conjunction with shipbuilders such as Meyer Werft. This is in addition to the retro-fitting schemes in place elsewhere.

The future

Aside from the obvious impact of fuel costs on the overall cost of cruising, as time passes, these regulations may prove one of the biggest hurdles for the cruise industry to overcome with the main challenge being whether the availability of low sulphur fuel bunkers and/or economically viable technological alternatives can keep pace with the constricting regulatory framework.

For more information, please contact Claire Womersley, Associate and Master Mariner, on +44 (0)20 7264 8023, or claire.womersley@hfw.com, or your usual contact at HFW.

Package travel - a new direction?

On 9 July 2013, the European Commission adopted a proposal for a new Directive on package travel and assisted travel arrangements to replace the Package Travel Directive[1] (the Directive) which has been long thought to have become outdated in the face of the growth of the internet and the "dynamic packaging" industry. Following extensive consultation with industry representatives and trade bodies, an amended version of the Commission's proposal was adopted by the European Parliament on 12 March 2014 (the Proposed Directive).

Discussions to agree the final wording of the Proposed Directive continue, but it is timely to consider some of the more important provisions and how they differ from the current regime.

Scope

As was expected, the Proposed Directive extends the existing coverage under the Directive by expanding the definition of package holidays and creating a new type of holiday, the *linked travel arrangement* (LTA), which crucially requires retailers of such products to maintain security in relation to insolvency. This new category is designed to capture within the scope of the Directive those "click-through" on-line sales which have hitherto, to a large extent, escaped the application of the existing package travel framework, although doubts remain as to the clarity and scope of the new definitions currently proposed.

1 (Directive 90/314/EEC)

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Cruises have always been considered a 'package' under the Directive and the Proposed Directive confirms that "*Cruises... should also be considered as package travel, as they combine transport, accommodation and catering*".

Contractual obligations

The Proposed Directive continues to permit, where the contract so provides, the revision of contract prices linked to the cost of fuel, taxes and relevant exchange rates provided that reciprocal provisions are included in the contract for upward and downward revision. However, unlike the Directive which contains no minimum threshold, the price can only be increased where there has been a price increase of more than 3%.

Under the Directive, the price cannot be increased less than 30 days before departure. Under the Proposed Directive any increase in price (up to a cap of 8%) must be justified to the traveller in writing together with a calculation, at least 20 days prior to departure. If the price is increased by more than 8%, the traveller must be informed in writing that they can terminate the contract (without penalty) or accept an alternative equivalent travel package and that if they do not exercise either option, the travel package at the higher price will be considered accepted.

Insolvency requirements

The Directive provides that the organiser and/or retailer party to the package contract shall provide sufficient evidence of security for the refund of money paid over and for the repatriation of the consumer in the event of insolvency. The Regulations which bring the Directive into effect require such retailer or organiser to establish security in the form of a bond, insurance or monies in trust.

Under the Proposed Directive, only organisers of packages or retailers facilitating the procurement of LTAs established in their territory will be responsible for the financial security arrangements. However, if an organiser is established outside of the EEA and a retailer established in a Member State facilitates the procurement of a package on their behalf, the retailer will be liable for providing insolvency protection unless it can be shown that the organiser already has adequate insolvency arrangements in place.

The proposed insolvency protection covers travellers who purchase packages irrespective of their place of residence, place of departure or where the package/LTA is sold. Rather than insolvency protection being linked to the place where the package/LTA is sold or offered for sale, the obligation instead is linked to the place of establishment of the organiser: EU Member States must require organisers established in their territory to put financial protection in place. So, under the new regime, the security arrangements must cover travellers who buy packages sold by a business established in a Member State and their repatriation to their place of departure, anywhere in the world. There are concerns relating to the potentially increased costs of coverage should this remain the position in the final version of the Proposed Directive. Some concern has also been expressed by, for example, the UK Department for Transport, that basing the insolvency protection requirements on place of establishment will lead to "forum shopping" by organisers seeking to establish themselves in those jurisdictions which have the least onerous schemes and that consumer protection, which is supposed to be enhanced by the Proposed Directive, may in fact be reduced. In the UK recently, similar issues arose in a fairly well-publicised case of an organiser moving its establishment from the UK to Spain, with doubts expressed as to the level of financial protection provided by the scheme in place in the Balearic Islands compared with that provided under the UK's ATOL scheme.

Whilst the Proposed Directive confirms that Member States must recognise the insolvency protection provided by other Member States and cannot require compliance with their own insolvency regime, doubts have been expressed as to whether there will be sufficient confidence in the protection required in all Member States. The draft also leaves some uncertainty as to how insolvency protection rules will be applied to those organisers established outside the EU, but which sell packages and LTAs in the EU. There is opposition amongst regulators to the insolvency protection rules as presently framed and a close eye should be kept on this aspect of the draft Directive as discussions on the legislation continue over the coming months.



Relationship with international conventions

As under the current regime, organisers should be able to rely on relevant international conventions to limit their liability, including the Athens Convention. In this regard, the global limits applied in the various Tonnage Conventions will continue to apply.

Timeframe

The Council of Ministers is currently considering the Proposed Directive and discussions between the Council, the European Parliament and the Commission (inevitably delayed by this May's EU elections) are generally expected to result in a final agreed Directive in 2015. Thereafter, implementation at national level in Member States is likely during 2017. Whilst the existing Directive has some time left, it is inevitable that preparatory work to comply with the new rules will be required and so the cruise industry should keep a close watch as the legislative process continues.

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Athens Convention 2002: increased burden on carriers and their insurers

All passenger carriers and operators must have regard to the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea 1974 (the Convention), which establishes a regime of liability for passengers carried on seagoing vessels, but allows carriers to limit their liability.

The 2002 Protocol (the Protocol) to the Convention came into force on 23 April 2014. The Convention, as significantly amended and added to by the Protocol, constitutes and is called the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea 2002.

Background to the Protocol

The Protocol significantly revises and updates the passenger liability regime under the Convention. The Convention applies to the international carriage of passengers and luggage where the ship is flying the flag of or is registered in a state party to the Convention, the contract of carriage has been made in a state party to the Convention or the place of departure or destination (according to the contract of carriage) is in a state party to the Convention.

The Convention renders a carrier liable for damage or loss suffered by a passenger where the incident giving rise to the damage occurred during the carriage and was caused by the fault and/or neglect of the carrier, but allows carriers to limit their liability except where the carrier acted with the intention of causing the damage, or recklessly and knowing that the damage that was caused was the likely result of its actions. In respect of liability for the death of, or personal injury to, a passenger, this limit was capped at 46,666 Special Drawing Rights (SDRs) per carriage (approx US$71,800 at current rates).

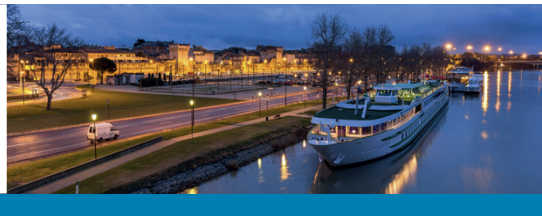
Key provisions of the Protocol

From 23 April 2014, the following new limits apply to the carrier's liability for passenger injury and death, per passenger, per occasion:

- Strict liability for injury or death claims of up to 250,000 SDRs (approx US$385,000), unless the incident was intentionally caused by a third party, or resulted from an act of war, hostilities, civil war, insurrection or force majeure.
- For claims above this limit, there is a further limit of 400,000 SDRs (approx US$616,000), unless the incident occurred without the fault or neglect of the carrier.

Cruise operators, in particular, should be aware that shore excursions may not be included within the scope of the Convention, and therefore there is a risk of exposure to higher liability.

ELEANOR AYRES, ASSOCIATE



The Protocol also increases the limits for loss of or damage to luggage or vehicles per carriage as follows:

- Cabin luggage claims limited to 2,250 SDRs per passenger (approx US$3,500).
- Vehicle claims (including all luggage carried in/on the vehicle) limited to 12,700 SDRs per vehicle (approx US$19,500).
- Other luggage claims limited to 3,375 SDRs per passenger (approx US$5,200).

Finally, the Protocol introduces compulsory insurance of 250,000 SDRs per passenger. The ship's registry must issue a certificate to evidence this, which is largely happening through the "Blue Card" system.

Effect of entry into force

The Protocol was ratified by the EU and has been in force in the EU since 31 December 2012 via the EU Passenger Liability Regulation 392/2009. Outside the EU, the Protocol has been ratified by Albania, Belize, Norway, Palau, Panama, Saint Kitts and Nevis, Serbia and Syria.

The most significant change introduced under the Protocol is undoubtedly the increase in passenger liability limits. Although some countries had already increased the limits for their own national carriers (including the UK), many countries had not and either relied on the limits set out in the Convention or on other national limits. The increases may therefore have a significant impact in increasing limits worldwide.

The Protocol will also affect insurers, given the compulsory cover requirement. It remains to be seen whether the Protocol is adopted more widely outside the EU, but in any event a wide number of carriers will be affected, particularly those involved in the ever-popular European cruise market, wherever the vessel is actually registered.

Effect of Athens Convention on shore excursions

Cruise operators, in particular, should be aware that shore excursions are often not included within the scope of the Convention, and therefore there is a risk of exposure to higher liability. The period of carriage, as defined under the Convention, includes the period the passenger and their luggage are on board ship, including when they are embarking and disembarking, and including any water transport from the shore to the ship. The Convention explicitly excludes any period while the passenger is in the port or terminal, and therefore it is highly likely that shore excursions will not be covered by the Convention limits.

Within the EU, however, such shore excursions, when sold as part of a package, will be covered by the Package Travel, Package Holidays and Package Tours Regulations 1992 (which gave effect to the Package Travel Directive 90/314/EEC), which means that the tour operator will be responsible to the passenger for any claims, even when such excursions are operated by a third party.

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hfw The cruise industry and competition law

Failure to comply with the provisions of competition law can result in heavy fines, actions for damages, unenforceable contracts, imprisonment, disqualification of company directors and reputational damage. The concentrated nature of the cruise industry means that it is likely to face greater scrutiny from regulators, and also from smaller market players who may feel that the potentially anti-competitive conduct of larger players is prohibiting their growth. It is therefore essential to have strong competition compliance procedures in place in order to address such concerns. Companies should also ensure that key staff are trained in the principles of competition law.

Competition law applies both to horizontal conduct between competitors and vertical agreements with a wide range of counterparties such as shipyards, suppliers, travel agents, franchisees and on-board concession holders. There is a competition law aspect to many of the commercial decisions a company takes on a day-to-day basis.

Any company which is active in the EU will need to ensure compliance with EU competition law which is focused on three areas, namely:

- The prohibition on anti-competitive agreements.
- The prohibition on abusing a dominant market position.
- Merger control.

Competition law applies both to horizontal conduct between competitors and vertical agreements with a wide range of counterparties such as shipyards, suppliers, travel agents, franchisees and on-board concession holders...

ANTHONY WOOLICH, PARTNER

The Prohibition on anti-competitive agreements

The EU prohibition on anti-competitive agreements is a broad one and extends to any agreement, decision or concerted practice between companies which has as its object or effect the prevention, restriction or distortion of competition within the EU's internal market. There does not need to be a written agreement for a breach of the EU's prohibition on anti-competitive agreements to be established; oral agreements or the exchange of commercially sensitive data between competitors may be enough to evidence a breach. Companies should be very careful in handling any communication with competitors, including through bodies such as trade associations.

Certain types of actions, known as 'hardcore restrictions', will generally be deemed to be in restraint of competition. Such actions cover practices such as price fixing or market allocation between competitors or the imposition of minimum pricing in vertical agreements, for instance with on-board retailers.

However, some agreements or co-operative arrangements that may appear on their face to be anti-competitive, for example the sharing of logistical information between competitors, may not fall foul of the prohibition on anti-competitive agreements provided that they promote technical or economic progress, allow consumers a fair share of the resulting benefit, and do not contain 'hardcore restrictions' or restrictions that are not indispensable to promoting technical or economic progress.

Abuse of a dominant market position

Abuse of a dominant market position occurs where a company acts outside normal market behaviour to eliminate competition, for instance by predatory pricing, or uses its market power to squeeze suppliers, for instance by imposing exclusivity clauses on them.

In the EU, a market share of over 50% is deemed to be dominant, although shares of 40% or more could be dominant. The European Commission has indicated that the relevant market in which cruise companies operate is the provision of oceanic cruises, and that the oceanic cruise market is divided into separate national markets[1]. Companies that have a small global market share, but which have a large share in one particular national market therefore also need to be aware of this provision, and plan their commercial strategy accordingly.

Merger control

More than 120 states in the world have some form of merger control procedure whereby government agencies may review the potential effects on competition of a merger or acquisition within that state, and if necessary prohibit mergers that have the potential significantly to reduce competition within a market.

The EU Merger Regulation of 2004, which operates in addition to the individual merger control regimes of Member States, will potentially apply where two or more previously independent companies merge, where a company acquires control of a whole or part of another company on a lasting basis, or where a "full function" joint venture is formed. The Regulation will only apply to mergers involving companies with turnovers that exceed certain global and EU-wide thresholds, and have a significant amount of business in more than one EU Member State. Mergers that meet the thresholds must be cleared by the European Commission prior to implementation, and if not, the Commission has the power to impose heavy fines for failing to pre-notify and obtain prior clearance.

1 Case No COMP/M.2706. Carnival Corporation/ P&O Princess.

Conclusion

Competition law is a tricky area for cruise companies as it seeks to control actions that could increase their profits, but at the detriment of suppliers and consumers. Cruise companies must ensure that the commercial decisions they take are for the benefit of all parties, and should seek advice where they are unsure whether an action raises competition law concerns.

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News

HFW have recently become a Global Executive member of the Cruise Lines International Association, Inc, and work closely with them.

CLIA CRUISE LINES INTERNATIONAL ASSOCIATION, INC.

hfw Conferences and events

Managing Maritime Accidents and Emergencies Seminar
London
16 – 17 September 2014
Presenting: Alex Kemp

IMCC
Dublin, Ireland
24 – 26 September 2014
Attending: Toby Stephens and Richard Neylon

Lawyers for international commerce hfw.com