



the global voice of  
the legal profession



INTERNATIONAL BAR ASSOCIATION CONFERENCE  
**VANCOUVER**  
3-8 OCTOBER 2010

# Maritime and Transport Law

## The Cruise Industry – Tales from Davy Jones' Locker

Wednesday, October 8<sup>th</sup> 2010

10:00 – 18:00 hrs Session

By Neil Klein

**McKASSONKLEIN**

2211 Michelson Drive, Suite 320

Irvine, CA 92612 USA

Tel 949.724.0200 Fax 949.724.0201

neilk@mckassonklein.com

**Tales from Davy Jones' Locker –  
Maritime, Insurance and Leisure Law issues that Arise from a Cruise Industry Disaster**

This case study discusses US law with regard to liability, limitation regimes and coverage issues arising from the (1) grounding of a cruise liner on an international voyage from Alaska to Canada, and (2) hijacking of her sister cruise ship by pirates, where a variety of nationalities, including US passengers, are on board.

**Scenario 1: “No Kissing on the Bridge”**

The cruise ship runs aground as a result of a failure by 2 deck officers to properly monitor her passage through a narrow straight because they were "distracted" by each other. Two lives are lost after the vessel hits rocks (and presumably other passengers are injured). How does the deck officers' behavior impact the legal liability of the ship owner?

**A. What International Conventions and/or Local U.S. Law Will Apply?**

The facts do not indicate if the incident occurred in U.S. or Canadian waters, or the flag of the cruise ship, which could impact what law will govern the various lawsuits that will surely follow. To determine the applicable law, U.S. courts will apply a *Lauritzen v. Larson* analysis (7 points of contact, with law of the flag being very important) and its progeny. For this scenario, we assume U.S. law applies.

The U.S. is NOT a signatory to the Athens Convention (1974, 1975 & 2002 Protocols) relating to cruise ships, and therefore U.S. courts will therefore consider general maritime law, Death on the High Seas Act (DOHSA) and the Jones Act (for seamen injuries, assuming crew members were also injured along with the other passengers)<sup>1</sup>.

**B. Are the Cruise Line Ticket Clauses Enforceable?**

Under U.S. general maritime law, a cruise ticket is considered a *maritime contract*, and therefore its terms and conditions will become effective once a passenger buys a ticket for this cruise from a U.S. port (in Alaska) to a foreign port (in Canada). As a result, those T&C (standard language in cruise tickets<sup>2</sup>) will govern the cruise line/passenger relationship. A cruise ticket usually includes the following clauses:

1. Choice of forum (usually Florida, California or Washington)
2. Time to give notice of claim
3. Time to file lawsuit
4. Limitation of liability to “special drawing rights” under Athens Convention (US\$70,000)

Are these clauses enforceable? The answer is yes – under U.S. general maritime law, once the passenger pays for and receives the ticket, he/she impliedly accepts all T&C associated with the ticket/contract. In *Schlesinger v. Holland America*, a CA appellate court in 2004 ruled that the T&C under a cruise line ticket were enforceable, since a copy of the ticket was provided online. Further, it did not matter that the passenger actually read the contract, only that the person had an *opportunity to read it*.

---

<sup>1</sup> In 1920, the U.S. Congress passed DOHSA and the Jones Act. DOHSA provides a remedy for wrongful death more than 3 miles from shore, to the decedent's immediate family but limits recovery to pecuniary damage, eliminates any contributory negligence bar to recovery, and preserves the ability to bring claims under the law of another country (displaces other remedies and creates “uniform remedy” for death on the high seas to exclusion of state law). 46 USCA §§30301-30308. The Jones Act allows the family of a deceased seaman to pursue survival claims on his behalf (“uniform system” of seaman's tort law). 46 USCA §30104. The two Acts are intended to work together and provide parallel remedies. *Bowoto v. Chevron Corp.* (9<sup>th</sup> Cir. 2010).

<sup>2</sup> Even though passengers do not receive their actual tickets until after they pay for them, the T&C can be reviewed on the internet, e.g. see those posted by *Carnival Cruises* and *Princess Cruises*.

Courts look to whether the T&C of a ticket were “reasonably communicated.” The 9th Circuit (federal courts on the U.S. West Coast & Hawaii) uses a two-prong test; under *Wallis v. Princess Cruises* (2002), the **first prong** focuses on the physical nature of the ticket i.e. font size, conspicuousness and clarity of notice on its face, and ease with which a passenger can read the clause in question. The **second prong** is more subjective and requires an evaluation of the circumstances surrounding retention of the ticket.

For example, the Princess Cruises ticket will probably satisfy both prongs: a copy can be found online (is therefore conspicuous); on its face, it clearly states “passage contract” and references “definitions and governing law” (meets clarity requirement); and the font or type size is satisfactory since it is typed in a regular font similar to other contracts. And since anyone can review the T&C online BEFORE purchasing, a passenger cannot claim he/she was forced to buy a ticket without an opportunity to review its terms.

In our case, the facts do not discuss the purchase and issuance of the tickets, but we assume the cruise line appointed smart maritime counsel to ensure the T&C were watertight (reasonably communicated).

### **Re 1: Forum Selection Clause**

Cruise line tickets usually contain some type of forum selection clause. They are enforceable as long as the passenger has received reasonable notice under a “reasonable communications” test. In *Walker v. Carnival Cruises* (Northern District of CA 1999), the court listed 3 reasons why a non-negotiated clause was allowed: first, it avoided possible litigations in multiple forums; second, it served judicial economy because courts would be spared motion practice to determine the appropriate forum; and third, passengers benefitted from it as it reduced the price of tickets.

Severe physical limitation or economic hardship alone is not enough to scuttle a forum selection clause. In *Pratt v. Silversea Cruises* (2006), a cold-hearted court ruled that an 83-year old woman who suffered a broken hip, torn ACL in her knee and severe ankle injuries was not allowed to bring her case in a convenient (home) court.

In our case, the passengers would have to file suit say in Los Angeles, CA to the exclusion of any other forum (tickets may also include a waiver clause i.e. whereby the passenger in purchasing a ticket waives any objections to the forum). The forum selection clause would be enforceable regardless of the nationality of the passenger and courts will not take into consideration the inconvenience of having to travel to the U.S. to sue the cruise line.<sup>3</sup>

### **Re 2 & 3: Notice of Claim & Statute of Limitations**

The required notice of claim and statute of limitations for claims against a cruise line are generally short, but enforceable (of course, they are set out in the T&C of the ticket).

Tickets often require notice of a claim to be given to the cruise line within 6 months for personal injury claims, and then require suit to be filed within a 1-year statute of limitations (SOL) period. A 1-year of SOL clause is enforceable.<sup>4</sup> In *Osborn v. Princess Tours* (Central District of CA 1996), plaintiff was barred from bringing an action when she did so after the 1-year period in her ticket had passed. The court stated that as long as the ticket satisfied the “reasonable communications” test, it was enforceable.

Property damage claims have a shorter trigger. Notice of claim is often required within 15-30 days and suit must be filed within 6-months. See *Barton v. Princess Cruises* (CA 2002).

In our case, the passengers would have to give notice of any property damage or personal injury claim promptly, and ensure they complied with the applicable SOL, or risk their claims being time barred.

---

<sup>3</sup> It is also unlikely a U.S. court would see itself bound by EU Package Travel Regulations.

<sup>4</sup> Similar to the 1-year SOL clause under US COGSA for filing of cargo claims.

#### Re 4: Money Limitation on Damages

Limitation of liability clauses in a cruise ticket are generally enforceable by U.S. courts for cruises that embark or disembark *outside* of U.S. ports. In *Wallis*, plaintiff took a Mediterranean cruise and brought a wrongful death action under DOHSA for damages based on the death of her husband. The cruise line relied on a clause limiting its liability under the “Athens Convention 1976” for death or personal injury to a passenger to “no more than the applicable amount of Special Drawing Rights as defined therein.” The court held this was sufficient notice and limited plaintiff’s damages to about \$60,000 based on the value of SDR at that time.<sup>5</sup>

In this case, since the cruise embarked at a U.S. port (in Alaska) there will be no enforceable limitations clause for any personal injury or property damage claims.

#### C. What about Wrongful Death Claims?

DOHSA provides recovery for the death of any person caused by “wrongful act, neglect or default” occurring on the high seas i.e. international waters more than 3 nautical miles from any U.S. shore (DOHSA claim can only be brought by a personal representative of the deceased on behalf of a spouse, child or parent or other financially dependent relative).

We suspect a court would find the deck officers distraction that led to the 2 deaths was a “wrongful act” (no matter how right it may have felt at the time). In this case, family [parents, children & spouses] of the deceased passengers could bring an action for wrongful death under DOHSA, due to the grounding based on crew member “distraction.”

DOHSA claims have limited recovery re damages, since they’re based on decedent’s age & occupation (not a penny for mental anguish, pain and suffering or punitives)<sup>6</sup>. However, due to the recent *BP Deepwater Horizon* explosion that killed several oil workers, Congress recently passed the SPILL Act (H.R. 5503) in July 2010, which removes the limitation of liability and amends DOHSA to permit families to recover increased compensation. It would also allow *foreign* seamen to seek recovery in the U.S. for wrongful death (alongside US seamen). It is awaiting ratification by the U.S. Senate (who knows when), but is being opposed by the cruise industry.

#### D. Duty of Care Owed by Cruise Line to Passengers

Cruise lines are “common carriers” that owe their passengers a duty of reasonable care under the circumstances or “safe transportation.” The standard of care will depend on the circumstances of the case. *Kermarec v. Campagnie General Transatlantique* (1958). In *Catalina Cruises v. Luna* (9<sup>th</sup> Cir. 1998), the court held that the cruise line owed a duty of care to all passengers on board. And since the captain knew about the bad weather conditions, but proceeded to embark on the journey anyway, the cruise line was negligent for the resulting injuries.

Plaintiffs have argued for a higher standard of care, especially for a common carrier that accommodates thousands of passengers each year. Nevertheless, in *Beard v. Norwegian Caribbean Lines* (6<sup>th</sup> Cir. 1990), the court stated that “reasonable care” did not imply the highest standard or greatest possible care (for example, a cruise ship could not be held responsible for routine dangers a passenger might meet daily in his home or office). And in *Keefe v. Baham Cruise Line* (11<sup>th</sup> Cir. 1989), the court stated that the cruise

---

<sup>5</sup> The U.S. has not ratified the Athens Convention, but cruise lines often incorporate its T&C by contract.

<sup>6</sup> Claims for the deaths of children or retired persons are not “high dollar” cases. In *Rux v. Republic of Sudan* (E.D. Va. 2007), the judge stated: “The court sympathizes greatly with plaintiffs, who continue to suffer terribly years after their loved ones died. But the court is bound to follow the legal precedent before it. Congress makes the law; courts merely interpret them. Whether to amend DOHSA to allow more liberal recovery in cases of death caused by terrorism on the high seas is a question for Congress alone.”

line had to provide a reasonably safe environment, and had a duty to warn passengers of dangers that may not be readily apparent from point of embarkation to debarkation. See also *Morton v. De Oliveira* (9<sup>th</sup> Cir. 1993) (cruise line absolutely liable for crew member rape assault on passenger).

In our case, the deck officers were “distracted” while they were supposed to be on deck and steering the cruise ship while on duty. It is clear they did not provide safe transportation or take reasonable care to ensure safe passage during the cruise. In fact, they were engaged in intentional behavior and their conduct would arguably follow the *Morton* case rationale (i.e. cruise line absolutely liable). It would make no difference that the deck officers were “acting outside the scope of their employment,” since a common carrier cannot rely on this defense.

#### **E. What About Claims for Emotional Distress?**

There is no basis for a claim under U.S. general maritime law for international infliction of emotional distress. However, in *Wallis*, the court stated federal courts in admiralty could look to state law e.g. the conduct had to be “extreme and outrageous” (not so in *Wallis*, since no one from the cruise line went out of their way to torment plaintiff and statements about how her husband died not directed at her). See also *York v. Commodore Cruise Line* (NY 1994) (standard not met where ship failed to notify authorities of cruise passenger’s rape claim, misrepresented examining doctor & misrepresented applicable law).

Therefore, proving extreme and outrageous conduct is difficult. In this case, it would be interesting to see how a plaintiff’s lawyer could try to spin the deck officers “distraction” into outrageous conduct.

#### **F. Can a Tour Operator or Travel Agent be Held Liable?**

##### **1. Tour Operator**

Tour operators can be held liable not only for their own actions, but also for the actions of their third party vendors. They have been found liable for injury, disease and illness suffered by passengers while on vacation, claims arising out of mistakes made during vacation arrangements, loss of enjoyment, harassment, property loss or damage, as well as adverse PR/damage to reputation. But tour operators are usually not held liable for harm caused by a third party (unless due to negligent selection or control).

In *Sova v. Apple Vacations* (OH 1997), plaintiff was injured on an optional excursion, but the tour operator was able to prove, via its travel guide, that it had no control over excursion activities. The court therefore held it had NO duty to warn passengers as to general safety precautions and/or obvious and apparent dangers. But see *Davies v. General Tours* (CT. 2001), a state court held that a tour operator *did* have a duty to warn passengers of a dangerous unknown condition, but known to the tour operator.

In our case, the 2 deaths (and we assume various injuries to other passengers) were caused by the negligence of the crew. But since a tour operator did not employ or have any control over the crew, they would not be liable for the death or injury to the passengers.

##### **2. Travel Agent**

Travel agents can be held liable for injuries, delays, cancellations, discrimination, lost, stolen or damaged baggage, deceptive port charges, and violation of general duties, fraudulent misrepresentation, and violation of applicable state regulations. They may also be liable for tour operators if there is evidence of ownership, operation or control. *Vermeulen v. Worldwide Holidays* (FL. 2006).

In *Walker*, a travel agent was held liable where he assured a disabled client the cruise was “wheel chair accessible” and the passenger discovered (after embarking) that neither his room nor the ship was wheel chair accessible. The court held that inaccurate information i.e. misrepresentation regarding the disabled accessibility of travel accommodations for disabled travelers deprived them of equal access to or full and enjoyment of the trip. See *Pellegrini v. Landmark Travel Group* (NY 1995) (travel agent liable

for negligent misrepresentation where he told customer they could cancel and receive full refund but then later refused to do so); but see *Ramage v. Forbes Int'l* (CA 1997) (travel agent's disclaimer effective to preclude liability for customer's injury due to independent contractor which agent did not own, operate, manage or control; also no negligent selection, as agent conducted prior investigation on independent contractor & found no report of similar injuries or accidents).

In this case, the passengers could only bring an action against the travel agent for negligent selection of the cruise line and/or false representation regarding the safety of the cruise line *if* the agent made such representations e.g. in a brochure or advertisement (generally, travel agents do not include statements regarding cruise line safety and crew professionalism in their brochures or advertisements<sup>7</sup>).

## **Scenario 2: "Take the Money & Run"**

A sister ship of the grounded vessel is hi-jacked by pirates on a cruise to Singapore. Owners pay ransom to the pirates to procure her release. However, as a result of adverse publicity due to the piracy and kidnapping threat, customers who previously booked a cruise on the sister-ship cancel their bookings. What is the legal status of the ransom payment? Can the ship owner recover the ransom monies? And how does an act of piracy affect their claims?

### **A. Is the Payment Illegal?**

To the extent ransom is paid by a vessel owner and such owner is governed by U.S. law (e.g. U.S. person or entity), it could be deemed illegal if the "pirates" were in fact a noted terrorist organization.

Restrictions on financing terrorism are contained in Title 18 of the U.S. Criminal Code. Under §2339B, all U.S. subjects are prohibited from conducting activities that would materially support or provide resources to terrorist organizations. The U.S. Secretary of State refers to a list of "foreign terrorist organizations" (FTO) and the burden is on the payer of ransom [i.e. the cruise ship owner, in this case] to make sure the recipient of ransom is not on the FTO list. A person will violate the Act if he or she has knowledge that the organization is a designated FTO which has engaged or engages in terrorist activities, but nevertheless pays the ransom.

Further, the U.S. President issued an Executive Order in April 2010 relating to ransom payments made to a list of Somali individuals and organizations. The Annex to the Order set out the names of specific individuals and organizations with whom all dealings are prohibited (the U.S. Secretary of the Treasurer and the Secretary of State have the power to add names to the list).<sup>8</sup>

While the April 2010 Executive Order does not contain an express prohibition on the payment of ransom, it explicitly deems "acts of piracy" as a threat to the peace, security and stability of Somalia, thereby opening the door to designation of known Somalia pirates as "specially designated nationals" pursuant to the Order. It also permits designation of those who "have assisted, sponsored or provided financial, material, logistical or technical support for activities or persons targeted under the Order."

In the context of piracy and hijacked vessels it is difficult to determine who will actually receive the ransom and what they will do with the money. In the absence of any U.S. connection, the Order does not extend to payments made by non-U.S. ship owners in currency other than U.S. dollars. U.S. authorities expect ship owners of hijacked ships to consult with them and obtain approval before

---

<sup>7</sup> It would be more interesting if the marketing materials on the specific cruise stated "best trained crew" or "safest cruise in the world" or "best safety record of all the cruise lines."

<sup>8</sup> It is similar to sanctions by U.S. Treasury Office of Foreign Assets Control (OFAC) regarding a list of "specially designated nationals." U.S. entities, citizens, permanent residents or persons in U.S. are prohibited from engaging in any direct or indirect dealings with SDNs. All assets of SDNs in the U.S. or within the control of U.S. persons (including banks & their foreign branches) are blocked or frozen and may not be dealt with by U.S. persons.

making any ransom payment. Knowing how slowly the “wheels of government” can turn, this may be problematic when there is a need to act swiftly and save lives and property by effecting quick payment. And there is no assurance the U.S. government will agree (prior to payment of the ransom to free captured crew) that it will not pursue civil or criminal action against the payor of the ransom.

In this case, we do not know if the pirates were on the FTO list, or what the pirates intend to do with the ransom money. As a prudent cruise ship owner, we would expect it to make enquiries and contact the US authorities *before* paying the ransom to avoid liability under US law. And since the U.S. has determined there is a link between piracy and terrorism financing, policy guidelines would be helpful!

### **B. Can Owners Recover the Ransom from Insurers?**

The cruise line vessel will be entered with a P&I Club. The answer will therefore depend on an analysis of the various policies e.g. hull & machinery; hull war risks; kidnap & ransom; and P&I insurance (not cargo coverage, since it carries passengers rather than cargo). In this case, it is unclear (among other things) whether the owners paid the ransom or if the funds came from insurers, and which policies were in place [not discussed in this paper].

### **C. How Would a Threat of “Piracy” Impact Owners Claims?**

To the extent U.S. law would apply, “kidnapping and ransom” is not defined, but piracy is a crime “defined by the law of nations” under 18 USC §1651 (“law of nations” is a body of law known as “customary international law”). In *United States v. Smith* in 1820, the Supreme Court held that piracy under the law of nations was “robbery on the sea.” See *Taveras v. Taveras* (6<sup>th</sup> Cir. 2007) (fundamental element of piracy is that acts of robbery or depredation must be committed on high sea); *United States v. Baker* (1861) (according to law of nations, pirates always compared to robbers, the only difference being the sea as theatre of operations, not land).<sup>9</sup>

As for **non-US law**, piracy is defined under 1958 Geneva Convention on the High Seas and 1982 United Nations Convention on the Law of Sea (“UNCLOS”) as “any illegal act of violence or detention, or any act of depredation, committed for private ends by crew or passengers of a private ship...on the high seas, against another ship...or against persons or property on board such ship” (intention to rob or act of robbing not required). While most countries have ratified UNCLOS, the U.S. has not done so.

There appears no court has harmonized the interpretations of UNCLOS. And enforcement actions against pirates are left to individual countries, which generally have differing penalties.<sup>10</sup> Further, even legal scholars disagree on whether there is an authoritative definition of piracy in the international law community. See Helmut Turek, *the Resurgence of Piracy: A Phenomenon of Modern Times*, 17 U. MIAMI INT’L & COMP. L. REV. 1, 10 (2009); George D. Gabel, Jr., *Smother Seas Ahead: The Draft Guidelines as an International Solution to Modern-Day Piracy*, 81 TUL. L. REV. 1433, 1434-35 (2007).

In this case, hi-jacking the sister-ship would likely be considered an act of piracy under U.S. law since the pirates went on board the vessel and robbed it by demanding and being paid a monetary ransom.

---

<sup>9</sup> Where pirates approached U.S. vessel in small skiff in Gulf of Aden and shot at vessel with a firearm, but did not actually board or attempt to go aboard, this did not constitute “piracy” under U.S. law. *United States v. Mohamed Ali Said* (2010). But such action is subject to fine and imprisonment under 18 USC §1659 (person on high seas or other waters within U.S. admiralty & maritime jurisdiction who by surprise or force “maliciously attacks or sets upon vessel belonging to another with intent unlawfully to plunder”); *Daeche v. United States* (1918) (person liable for conspiring to attack/plunder vessel based on plan to destroy Allied ammunition ships even if unsuccessful).

<sup>10</sup> For example, **Russia** has 5-10 year prison sentence if no weapon involved & 8-12 years if weapon involved, and 10-15 if by organized group or death occurs; **Mexico** has 15-30 years prison; and **Argentina** has 3-15 years prison or 15-25 if death occurs. Therefore, not every country considers piracy to be equally heinous.

## Biography

Neil Klein is a partner at McKasson & Klein LLP in California. He was born and raised in South Africa. He was admitted to the South African Bar as a solicitor in 1984 and practiced maritime and transportation law. He immigrated to the US a few years later and was admitted to the California Bar in 1989.

Neil's practice focuses on maritime and commercial litigation, with an emphasis on vessel arrests and attachments, maritime liens, charter party disputes, bunker claims, bills of lading and cargo claims. He is a frequent speaker at seminars and conferences, and has published several articles on international disputes, choice of law, Rule B and C issues, anti-suit injunctions, and "port of refuge" considerations.

Neil has been an expert witness on U.S. "choice of law issues" before the *Beijing First Intermediate Court*, and on California law issues before the *Supreme Court of the Bahamas*. He is a member of the International Bar Association (Maritime & Transport Law Section), as well as a Proctor member of the U.S. Maritime Law Association.



Neil was assisted in his paper by Nona Atoyan, a 2<sup>nd</sup> year student at Whittier Law School in California. Nona is a JD Candidate and a Candidate for a Certificate from the Center for International & Comparative Law in 2012. She was born and raised in Armenia, and came to the U.S. as one of 50-students chosen by Armenia's Future Leaders Exchange program. She obtained her Bachelor of Arts degree from California State University of Fresno in 2008.