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Admiralty Law

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The average practitioner is understandably confounded by the many aspects of foreign law that are triggered when an American traveler is injured overseas.

The Athens Convention

Passengers' claims typically involve personal injury or death as well as loss or damage to luggage. In the international arena, these matters are governed by The Athens Convention also known as The Carriage of Passengers and Their Luggage by Sea, 1974. The Athens Convention applies to most cases of cruise line accidents where the vessel does not call upon a U.S. port and is therefore adjudicated under foreign law. However, even admiralty practitioners may be out to sea when it comes to claims involving passengers injured overseas.

The convention is important for practitioners to understand because it may apply to 20 percent or more of U.S. cruise passengers that annually sail from, and back to, foreign ports, like a Mediterranean or Caribbean cruise. (Edelman, "The Athens Convention and American Lawyers," *The New York Law Journal*, May 29, 2003, p. 3.)

By its express terms, The Athens Convention only applies to an ocean carrier, owner, charterer, or operator of a ship. (Convention, Article 1, Definitions). The convention even defines a "ship" as any seagoing vessel, excluding an air-cushion vehicle. (Article 1, §3). For signatories to the convention, the right to claim against an ocean carrier for death or personal injury to a passenger, or for loss of or damage to luggage, is exclusively governed by the convention per Article 14, "Basis for Claims."

The United States is not a signatory to The Athens Convention. Because the United States has not acceded to or ratified the convention in suits commenced here against a cruise line for passenger injuries, if admiralty jurisdiction can be obtained, the governing substantive law will be general common-law rules developed by federal courts sitting in admiralty.

Limited Liability

Passengers on cruises that do not touch a U.S. port should be aware of the convention's provisions limiting the carrier's liability.

The Athens Convention presumes fault in the case of death or injury due to shipwreck, collision, stranding, explosion, fire or a defect in the ship.² The trade-off for this presumption of fault is that the carrier's liability is limited to about \$70,000, expressed in the convention as Special Drawing Rights (SDRs) per passenger for death or personal injury and fewer SDRs for loss or damage to baggage. (Article 7). The right to limit is lost if the damage results from an act or omission of the carrier done with the intent to cause damage or recklessly with the knowledge that damage would probably occur. (Article 13).³ The convention does not modify the rights or duties of a vessel owner provided for in international conventions relating to the limitation of liability of owners of seagoing ships.

The convention allows two years to commence an action with some allowance for extension of time in certain circumstances. A new protocol is awaiting acceptance and is not yet in force, but both Canada and the United Kingdom have made the protocol of 2002 domestic law, with absolute liability of around \$350,000 Canadian dollars in Canada and 250,000 pounds in the United Kingdom.

The Athens Convention has been enforced contractually in U.S. courts, particularly those of New York and California, where the passenger ticket explains what it is and expresses the limits of liability. *Berman v. Royal Cruise Line*, 1995 A.M.C. 1926 (Ca. Super. Ct. 1995); *Mills v. Renaissance Cruises*, 1993 A.M.C. 131 (N.D. Ca.1993); *Becantinos v. Cunard*, 1991 U.S. Dist. Lexis 5272 (S.D.N.Y. 1991); *Kirman v. Cie. Francaise de Crocieres*, 1994 A.M.C. 2848 (Ca. Sup. Ct. 1993) (petition for review denied (Ca. Supreme Ct. 1994)). The passenger ticket must explain the limits of liability or no limitation will be allowed. *Wallis v. Princess Cruises*, 306 F.3d 827 (9th Cir. 2002).

The Athens Convention has been read by the English courts to allow recovery of emotional distress damages. *Lee v. Air Tours*, [2002] I.T.L.J. 198.

Tour Operator Liability

Tour operators and Americans traveling in Europe take note. The law of the European Union, specifically E.C. Council Directive of June 13, 1990 (90/314/EEC) provides a "tour organizer" or a "tour operator" with the same liability for fault as a cruise line, airline or other type of transportation involving a tour - for example, when the tour bus rolls off a cliff in a foreign country as recently happened. The operative language of the directive is: "Whereas the organizer and/or retailer party to the contract should be liable to the consumer for the proper performance of the obligations arising from the contract"

The organizer means the person who organizes, packages and sells or offers for sale, whether directly or through a retailer. (Article 2, ¶2).

The E.C. Council directive also provides that member states shall take necessary steps to ensure that the organizer and/or retailer party to the contract is liable to the consumer for the proper performance of the obligations arising from the contract, despite whether such obligations are to be performed by the organizer and/or retailer or by other suppliers of services.

The language of the E.C. law makes the group organizer absolutely liable for the fault of the actual travel entity, be it a cruise line, airline, bus line, etc.

In an English decision, *Lee & Lee v. Air Tours Holidays, Ltd.*, [2002] I.T.L.J. 198 (Central London County Ct.), the claimants suffered psychiatric injury and loss of valuables when their cruise ship caught fire and sank. Psychiatric injury was found to be an element of damage. The case also held that the EC Package Travel Regulations (i.e., E.C. 90/314/EEC) made Air Tours liable both as "carrier" and "tour operator." The financial limits of liability of the Athens Convention were not applied to defendant as operator.

Club Tour v. Garrido involved a tour to a Greek hotel infested with wasps. The Portuguese court, Tribunal Judicial da Comarca do Porto, dated Jan. 17, 2002, explains the liability of a tour organizer, stating:

. . . the intention of the directive is to protect the consumer of tourism services by making the operators and travel agents responsible for losses due to improper performance of the contractual obligations

The Web site concerning the EC Directive states:

The Directive contains rules concerning the liability of package organizers and retailers who must accept responsibility for the performance of the services offered.

Alexander Anolik, a travel expert and author of books and articles for more than 30 years, appeared as an expert in *Forst v. Franzaroli*, Superior Court, Suffolk County, Massachusetts, Civil Action 02-0585G. The case involved suit against a Massachusetts-based tour group and travel agent for a bus accident in Italy using a local tour bus company. In an affidavit in the case, Mr. Anolik stated:

The EU Travel Directives mandate a 'proper tour' standard. This is basically a strict liability standard. Article 12 of the European Travel Directive (UNIDROIT) establishes that the travel organizer shall be responsible for the acts and omissions of the employees (Tour Manager) and agents when acting in the course of their employment or within the scope of their authority. The tour operator of the travel agent is liable for the proper performance of the travel services contract, regardless of who was responsible to deliver the special services. The tour operator or travel agent is responsible for the acts and omissions of the tour escort and driver.

Article 13 of the European Travel Directive establishes that the travel organizer shall be held liable for loss or damage caused to the traveler as a result of nonperformance. Article 15 sets forth that when a travel organizer entrusts to a third party the provision of transportation, he or she shall be liable for any loss or damage caused to the traveler.

Similarly, under European law, a Tour Operator is responsible for its employees and independent contractors.

Thus, for Americans traveling abroad, the liability for tour operators in Europe is governed by the E.U. Travel Directive which has a "proper tour" standard, basically a strict liability standard. Article 12 of the European Travel Directive (UNIDROIT) establishes that the travel organizer shall be responsible for the acts and omissions of the employees (tour manager) and agents when acting in the course of their employment or within the scope of their authority. The tour operator or the travel agent is liable for the proper performance of the travel services contract and, likewise, is responsible for the acts and omissions of the tour escort and driver as well. Article 15 of the European Travel Director provides that when a travel organizer entrusts the transportation to a third party, it shall be liable for any loss or damage caused to the traveler.

Other Bases for Tour Liability

Travel agents and group organizers may be found negligent under other theories. They may be held liable when further investigation reveals that they did not make a reasonable investigation as to a transportation provider's safety record or proper vetting of their employees. This involves not only the training of its navigation officers for a cruise line or airline in case of an accident, but also proper training in evacuation procedures which can endanger lives and cause unnecessary mental distress and injury.⁴ For example, in *Miller v. Group Voyagers, Inc.* 1996 WL 32119 (E.D. Pa. 1996), it was held that a group operator could be liable because a proper investigation would have revealed unsanitary conditions at one hotel and many thefts at another. *Winter v. I.C. Holidays, Inc.*, New York Law Journal, Jan 9, 1992 p.23, Col. 4 (N.Y. Sup. Ct. 1992) involved the negligent selection of a foreign bus company which was insolvent, unsafe and uninsured.

Conclusion

Travel abroad is on the rise and increasing substantially every year. A voyage may be by sea or air or abroad by bus or train. No matter the mode of travel, travel lawyers in the United States, including both plaintiff and defense admiralty practitioners, must be aware not only of U.S. law, but applicable foreign law and conventions as well.

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Endnotes:

1. *Keefe v. Bahama Cruise Line, Inc.*, 867 F.2d 1318 (11th Cir. 1989); *Beard v. Norwegian Caribbean Lines*, 900 F.2d 71 (6th Cir. 1990).
2. Schoenbaum, *Admiralty and Maritime Law* (2d ed. 1994) §5.5.
3. *Id.*
4. *Travel Law*, Hon. Thomas A. Dickerson, §5.49.