

Cruise liner liability



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SILINA PAVLAKIS
PAVLAKIS-MOSCHOS & ASSOCIATES LAW OFFICE
PIRAEUS - GREECE

Cruise Industry

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- Globally 20,3 millions passengers boarded cruise ships in 2012 and 20,97 millions in 2013
- 22% on cruises in the Mediterranean, 10% in Europe except Mediterranean, 35% in the Caribbean, 4,8% in Alaska, 3,4% in Asia, 5% in Australia and 16% other.
- Cruise ship industry is heavily regulated at international and European level, by Conventions and Regulations addressing issues of construction, safety, protection of the environment, crews and others.

The Athens Convention Relating to the Carriage of Passengers and their Luggage by Sea, 1974, (PAL)

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- **PAL 1974**. Ratified by **34 countries** (**45,88 %** of the gross tonnage of the world's merchant fleet). Entered into force in April 1987.
- Carrier is liable for damage or loss suffered by passengers on seagoing vessels for personal injury/death and luggage
- Incident due to **fault or negligence** of the carrier/his servants
- Assumed fault or neglect in cases of “shipping incidents” (shipwreck, collision, stranding, explosion, fire defect of the ship).
- Unless the carrier acted with intent or recklessly and with knowledge that the damage would result, he can **limit his liability for death/personal injury 700,000 francs per carriage** (65,5 mgrs of gold).

PAL Protocols 1976 and 1990

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- **PAL 1976 Protocol**. Ratified by **26 countries** (**45,44%** of world's gross tonnage). Entered into force in April 1989.
 - Raised the limits of carrier's liability to 46,666 SDR
- **PAL 1990 Protocol**. Ratified by **6 countries** (**0.85%** of the world's gross tonnage); Not yet in force and effectively superseded by PAL Protocol 2002.
 - Raised the limits of carrier's liability to 175,000 SDR

PAL Protocol 2002

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- **PAL 2002 Protocol**. Ratified by **10 countries**, as per IMO 31.7.2013 (**2,40%** of world's gross tonnage). Shall enter into force on **23 April 2014**.
- Increased limits of liability
- Established strict liability up to 250,000 per psg per incident
- Compulsory insurance and Direct action against the Insurer

Regulation (EC) 392/2009 on the Liability of carriers of passengers by sea in the event of accidents

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- EU acceded to the PAL Protocol 2002 at the end of 2011, but
- Majority of EU Members States have not yet individually ratified or acceded
- However, by force of **Regulation (EC) No 392/2009**, which largely incorporated the PAL Protocol 2002, it now applies **since 1/1/2013** mandatorily in all EU Member States

Regulation (EC) 392/2009 on the Liability of carriers of passengers by sea in the event of accidents

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- **Incorporates**

- the Athens Convention Protocol 2002

and

- the International Maritime Organization (IMO) Reservation and Guidelines for Implementation of the Athens Convention adopted by the Legal Committee of IMO on 19 October 2006

- **No action** for damages for the death of or personal injury to a passenger or for the loss of or damage to luggage shall be brought against a carrier or performing carrier **otherwise than in accordance with this Convention**

SCOPE of Regulation (EC) 392/2009

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- Carriage of passengers (and their luggage) by **sea**
- “**International**” carriage **and within a single Member State** for a certain category of ships and to all domestic sea carriages if a Member State so wishes
- Under a **contract of carriage**. Gratuitous carriage may be covered.
- Where:
 - 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

Who is liable for passenger claims

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- **Carrier** - for the entire voyage (contractual carrier)
- **Performing carrier** - only for the part of the carriage actually performed by him
- Joint and several liability.
- Both are liable for the acts and omissions of **their servants and agents** acting within the scope of their employment
- The carrier is also liable for the servants and agents of the performing carrier

Carrier's Liability

(1) Shipping Incident

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❖ “**Shipping Incident**” is shipwreck, capsizing, collision or stranding of the ship, explosion or fire in the ship or defect in the ship.

❖ *Is deficiency of the crew a defect in the ship?*

- **Strict Liability** up to **250.000 SDR** per passenger per distinct occasion.
- **Exonerated if:**
 - **act of war, hostilities, civil war, insurrection or a natural phenomenon** of an exceptional, inevitable and irresistible character, or
 - **act or omission by a third party** done with the **intent** to cause the incident

Carrier's Liability

(2) Non Shipping Incident

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“Inn-keeping” related incidents onboard

- The carrier shall be liable only if the incident that caused the loss was due **to fault or neglect of the carrier or his servants/agents**
- The **burden of proof** is now on the claimant

Carrier's Liability

(3) Overall Limit

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- Maximum limit of **400.000 SDR** per passenger per distinct occasion.
- The carrier shall be relieved for damages exceeding the strict liability 250,000 SDR limit, if he proves that the shipping incident occurred without his fault or neglect (**reversal of burden of proof**).
- **Interest and legal costs** not included in any limitation.
- The passenger's **contributory negligence** is always a defense for the carrier.

(4) Carrier's Unlimited Liability

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- No limitation applies in case of act or omission done **with the intent to cause the damage or recklessly and with knowledge that such damage would probably result.**
- *“Recklessly” means that the carrier could have avoided the damaging result, if he acted diligently, since he had previewed the probability (not merely possibility) of the damaging incident to happen, but did not act respectively, hoping that the damaging incident would not occur or that the damage would not happen*

(5) Global limitation of liability – the “LLMC Convention”

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- Overall limitation of liability available to the ***performing carrier***
- By application of the **national legislation implementing the International Convention on Limitation of Liability for Maritime Claims 1976 as amended by the Protocol 1996 (“LLMC Convention”)**

For damage caused by “war risks” (para 2.2 of the IMO Guidelines), the carrier can limit his liability under the LLMC even if it is not implemented in the national legislation that applies.

- The limit is **175.000 SDR per passenger multiplied by the number of passengers the ship is authorized to carry**

- An **example**: Carrier's liability for claims by all 300 passengers of a cruise ship may be limited:
 - Under Athens Convention/Regulation 392/2009 strict liability regime to 300 psg X 250.000 SDR/psg = **75.000.000 SDR**
 - Under the LLMC Convention the overall limitation will be 300 psg X 175.000 SDR = **52.500.000 SDR**

IMO Reservation and Guidelines 2006

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- Adopted by IMO Legal Committee in 2006
- To counter balance insurers' exposure for strict liability and the higher limits
- Incorporated and **made binding parts**, i.e. compulsory and not optional for the EU Member States

(Recital 8 of the Regulation (EC) 392/2009 the IMO Reservation and Guidelines)

(6) Special Limitation under the IMO Reservation

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- For risks covered under war insurance (**war, civil war, revolution, capture, seizure, acts of terrorist etc risks** - detailed under art 2.2 of the IMO Guidelines), **the carrier's liability and the compulsory insurance is limited** to the lower of the following amounts:
 - **250.000 SDR per passenger** per each distinct occasion, **OR**
 - **340 million SDR per ship** on each distinct occasion
- The 400,000 SDR overall limitation does not apply
- It does not affect **the unlimited liability of the carrier** in case of **intentional/reckless behavior**
- Unlimited liability for interest and legal costs remains unaffected.

- An **advance payment is due by the performing carrier**, in case of a shipping incident.
- Payable **within 15 days** of the identification of the person entitled to damages.
- In the event of death the payment cannot be less than **21.000 EUR**.
- Generally not refundable.

Compulsory Insurance – Direct Action

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- The **performing carrier** is obliged to maintain insurance or other financial security (such as bank guarantee)
- **Not less than 250.000 units of account per passenger on each distinct occasion** (the strict liability limit)
- Any claim covered by the insurance can be brought **directly against the insurer**
- The limit of liability for the insurer applies **even if the assured carrier is not entitled to limitation**

Insurer's Defenses

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- All **defenses** which **the carrier** would be entitled to invoke e.g. prescription, contributory fault, settlement etc,
- Not defenses under the contract of insurance, e.g. pay to be paid, misrepresentation, utmost good faith, breach of warranty, unseaworthiness etc
- **Wilful misconduct of the assured** relieves the insurer (*this has been heavily criticized*). Wilful misconduct of assured's servants is not a defense.

Passenger Damages

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- **Extent and titles of loss** to be determined by the **lex fori**

Economic Loss

- loss of income, maintenance, services
- costs/expenses medical, funeral, transportation, accommodation etc

Non Pecuniary damages, including pain and suffering, sorrow and grievance, loss of social, family, marital, parental life and enjoyment.

Any other provided for by the applicable law.

- **Punitive** or exemplary damages are expressly **excluded**

Who is entitled to damages ?

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- Also left to be determined by the lex fori
- Significant differences depending on the jurisdiction, especially in death cases.
- **Examples:**
 - Persons entitled to moral damages in case of death of passenger/dependent or not
 - Actions by secondary victims

Time bars

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- **Two (2) years from disembarkation** of the passenger who suffered personal injury or from the date he should have disembarked in case of death
- If **death resulted after disembarkation** due to personal injury sustained onboard, the time bar will be **two (2) years from death**, but **not later than three (3) years from disembarkation**
- **Suspension or interruption of limitation period** – lex fori
- Never **exceed five (5) years from disembarkation** or, if earlier, **three (3) years from the date the claimant knew or ought reasonably to have known** the injury and the loss or damage.

Jurisdiction – Recognition and Enforcement of Judgments

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- Action can be brought **against the Carrier and Performing carrier** in one of the following courts, at the option of the claimant
 - Permanent residence of Principal place of business of **defendant**
 - **Departure or Destination** acc. to the contract of carriage
 - Domicile or Permanent residence of **claimant**, if the defendant has a place of business and is subject to the jurisdiction of that State
 - State where the **contract** was made, if the defendant has a place of business and is subject to the jurisdiction of that State
- Provided the court is located in a State Party/Member State under the Regulation

Jurisdiction – Recognition and Enforcement of Judgments

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- Actions **against the Insurer** can be brought in one of the courts where action could be brought against the carrier under article 17
- Contractual provisions having effect on restriction of the art. 17 jurisdiction options are null and void **if concluded before the occurrence of the incident which caused the damage**
- **After the incident** the parties may agree any jurisdiction or arbitration.

Jurisdiction – Recognition and Enforcement of Judgments

- Articles 17 and 17bis of the Athens Convention/PAL 2002 are not reproduced in the text annexed to the Regulation 392/2009
- Acc. to Recital 11 of the Regulation, to the extent that these provisions affect the rules established by Regulation (EC) 44/2001, they will form part of the EU legal order when the Community accedes the Athens Convention (EU already acceded PAL Protocol 2002 at the end of 2011 which will enter into force 28/4/2014).

- **Why would a claimant be interested in “selecting” a forum to bring his suit, since in principle in all EU countries the same Regulation 392/2009 regime would apply?**
- **Because certain matters are not regulated and will have to be decided under the law of the court of the Member State that is seized of the claim**

Still to be decided by the lex fori (1)

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- Opt-out provision of the Regulation 392/2009 for Member States to determine higher limits of liability than the overall 400.000 SDR
- **Wilful misconduct** interpretation for exoneration of insurer
- Interpretation of “**recklessness**” of the **carrier** to support claim for unlimited liability
- **Circle of persons entitled** to damages
- **Extent and titles of loss** recoverable under the Regulation, e.g moral damage

Still to be decided by the lex fori (2)

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- Difference **between States where LLMC has been implemented** into national law (and therefore the overall limits of that Convention are available to the carrier) **and States which have not implemented the LLMC** and have to apply the Athens Convention limits
- Grounds for **suspension/interruption of prescription**
- **Interpretation of legal terms** such as “Domicile”, “Permanent residence”, “Permanent place of Business” and “Place of Business” of the carrier and insurer defendants, for the jurisdiction options of art. 17

Critical Overview

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- Enhances **certainty** for all parties involved
- Is in concurrency with the regulatory harmonization in the other transportation areas.
- Inevitably **impairs the human rights/civil rights' basic principle of full compensation** of the primary and secondary victims in personal injury/death cases. **But ...**
- Compulsory insurance and **direct action against insurer secures enforcement** up to the limit amount
- **Strict liability and reversal of the burden of proof favors the passenger**, who has **limited access to evidence** for proving liability of the carrier, e.g. violation of safety rules, defect of the ship, fault in navigation etc. and **limited possibilities regarding discovery and litigation funding**

Thank you

PAVLAKIS-MOSCHOS & ASSOCIATES LAW OFFICES

66 FILONOS STREET, PIRAEUS 18535, GREECE

lawoffice@pavlakis-moschos.gr

+30 210 41 80 700