

RECENT DEVELOPMENTS IN MARITIME LAW

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There have been several recent developments in maritime law as it relates to cruise passengers¹ including the passage of The Cruise Vessel Security and Safety Act of 2010 which seeks to protect cruise passengers from rapes, assaults and robberies, vigorous enforcement of the Americans With Disabilities Act, the dangers of risky shore excursions often delivered by foreign ground suppliers beyond the jurisdiction of U.S. courts, and the increasing number of litigation roadblocks being imposed by the Courts which make it very difficult, indeed, for injured cruise passengers to seek appropriate compensation in a convenient local court. For example, the enforcement of forum selection clauses, choice of law clauses, mandatory arbitration clauses, disclaimers of liability for the malpractice of ship's doctors and medical

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staff and disclaimers of liability for accidents that occur during shore excursions.

Growth Industry

The cruise industry grew rapidly from 2004 to 2010 ("The greatest cruise ship building boom in history-fueled by innovation and new technology"²). Bigger is better when it comes to cruise ships. In 2009 the Oasis of the Seas, the world's largest cruise vessel was launched which "measures 1,187 feet long and has seven themed 'neighborhoods', was built over two years at a reported cost of \$1.5 billion. Its 16 decks offer capacity for more than 5,000 guests and 2,000 crew members-as well as 12,000 plants "³.

Cruise Vessel Security and Safety Act of 2010

In response to growing number of reported rapes, assaults and robberies aboard cruise ships touching U.S. ports [e.g., a passenger was punched in the face and "Witnesses say the (aggressor's) girlfriend 'stomped' on Berner's face with her stiletto heel six or seven times "⁴, another passenger was sexually assaulted⁵ and yet another passenger was sexually assaulted verbally by the head waiter repeatedly calling her a

"puta"⁶] President Obama in July of 2010 signed into law the Cruise Vessel Security and Safety Act of 2010⁷ [the Act]. Section 2(13) provides in part:" To enhance the safety of cruise passengers, the owners of cruise vessels could upgrade, modernize and retrofit the safety and security infrastructure of such vessels in installing peep holes in passenger room doors, installing security video cameras in targeted areas, limiting access to passenger rooms to select staff during specific times and installing acoustic hailing and warning devices capable of communicating over distances". In addition the Act requires cruise vessel owners to maintain a log... which records "(I) all complaints of crimes... (ii) all complaints of theft of property in excess of \$1,000 and (iii) all complaints of other crimes...; and (B) make such log book available upon request to any agent of the (FBI)...". Further, the Act requires owners...to report to the (FBI) any incident involving "homicide, suspicious death, a missing United States national, kidnaping, assault with serious bodily injury...or theft of moneys or property in excess of \$10,000". The owner shall also "furnish a written report of the incident to an Internet based portal maintained by" the U.S. Coast Guard and "Each cruise taking or discharging passengers in the United States shall include a link on its Internet website⁸ to the (USCG) website".

Not Cruise Ship Specific

While such information is helpful it is neither cruise ship specific nor does it require the reporting of thefts which are between \$1,000 and \$9,999 in value. These problems may be resolved as follows. First, requiring owners to report thefts less than \$10,000 would allow local law enforcement to investigate and deter future crimes. Second, mandating owners to include the recorded thefts of property valued between \$1,000 and \$9,999 on the USCG website would allow prospective cruise passengers to better appreciate the risks associated with cruises⁹. An even more effective method would be to breakdown the USCG online reporting by individual cruise ships, rather than by cruise lines, as is currently required. In fact, the CDC's Monthly Cruise Vessel Sanitation Inspections are available online and ranked by cruise ship¹⁰. Such information would allow consumers to select specific cruise ships based not only on sanitation but the reported incidents of criminal activity.

Americans With Disabilities Act

All cruise ships touching U.S. ports are now subject to the requirements of the Americans with Disabilities Act¹¹ which has been enforced by passengers and advocates [Association For

Disabled Americans, Inc. v. Concorde Gaming Corp.¹² (crap tables too high for wheelchair-bound players did not violate ADA but handicapped toilet violated Title III); Access Now, Inc. v. Cunard Line Limited, Co.¹³ (settlement provided that cruiseline would spend \$7 million on "installing fully and partially accessible cabins, accessible public restrooms, new signage, coamings, thresholds, stairs, corridors, doorways, restaurant facilities, lounges, spas") and the Justice Department [consent decree wherein cruise line "agreed to pay \$100,000 to nine passengers...five deaf or hard-of-hearing passengers and four passengers who used wheelchairs during cruises of the Hawaiian Islands (and another \$40,000 in civil fines)"¹⁴].

Risky Shore Excursions

Modern cruise ships are best viewed as floating hotels that transport their guests from exotic port to exotic port where they stay a few hours for shopping, snorkeling, scuba diving, jet skiing, parasailing and touring. In fact, "[a]lmost half of all cruise passengers-some five million a year-participate in shore excursions"¹⁵. Cruise lines generate substantial revenues from the shore excursions they promote to passengers¹⁶ which are typically delivered by local independent contractors beyond the jurisdiction of U.S. courts and which may be uninsured,

unlicensed and unavailable¹⁷. Unfortunately, the cruise line which promotes ground tours may also disclaim liability for any injuries sustained by passengers on shore¹⁸.

There are, of course, plenty of accidents on shore involving *tour buses* (16 deceased passengers were part of " 64-member B'nai B'rith group that was traveling aboard the cruise ship Millennium...(who) had made a side excursion to see the mountains (in Chile) on a tour bus that tumbled more than 300 feet down a mountainside "¹⁹); *falling from a zip-line*²⁰; *jumping from a wall while exploring a cavern*²¹ ; *slip and fall during a catamaran ride*²² and *falling into the water during parasailing*²³.

Choosing A Shore Excursion

Cruise passengers who choose to participate in any shore excursion activity should ask themselves these three questions. First, is the local travel service provider insured, licensed and are its employees properly trained? Second, has the cruise line evaluated the reliability of the local provider which it recommends and from which it receives a commission? Third, has the cruise line assumed responsibility for [and provided insurance for] any injuries suffered by its passengers or has it disclaimed all liability for any injuries which passengers might sustain during the shore excursion?.

21st Century Cruise Ships; 19th Century Passenger Rights

While cruise ships get bigger and better the same cannot be said of passenger rights which haven't progressed much further than the 19th century. Although a cruise vacation may be the best travel value [if you don't have an accident] consumers should be aware that the cruise ship's duties and liabilities are governed not by modern, consumer oriented common and statutory law, but by 19th century legal principals, the purpose being to insulate cruiselines from the legitimate claims of passengers²⁴. The policy enunciated by the Second Circuit Court of Appeals nearly 60 years ago in Schwartz v. S.S. Nassau, 345 F. 2d 465 (2d Cir. 1965) a case involving a passenger's physical injuries, applies equally today, " The purpose of [46 U.S.C. 183c]...' was to encourage shipbuilding and (its provisions) ...should be liberally construed in the shipowner's favor `".

Traditional Litigation Roadblocks

Injured cruise passengers face daunting litigation roadblocks which discourage lawsuits and insulate cruise lines from liability. For example, injured passengers are subject to, inter alia, (1) short time limitation periods for physical injury claims on cruise ships that touch U.S. ports [six months to file

written claim and one year to sue)] and non-physical injury claims [six months or less to sue²⁵; (2) enforcement of forum selection clauses designating Miami, New York or Seattle²⁶ or remote foreign jurisdictions such as Italy²⁷ (Italy forum selection clause and Italian choice of law clause enforced) which may even benefit non-signatories²⁸; (3) enforcement of choice of law clauses for the 20% of cruises that do not touch U.S. ports such as the law of the Bahamas²⁹, China³⁰, Italy³¹ or England³², France³³ or of the Strasbourg Convention³⁴; (4) enforcement of disclaimers insulating the cruise ship from vicarious liability for the malpractice of ship's doctors³⁵ and (5) the negligence of shore excursion providers³⁶; and (6) limiting damages pursuant to the Athens Conventions³⁷ or (7) the Limitation of Vessel Owner's Liability Act³⁸.

New Roadblocks

Recent developments make it even more difficult for injured cruise passengers to litigate their claims. First, the Courts, and notwithstanding criticism³⁹, have decided that forum selection clauses which require that a lawsuit be brought in federal district court, to the exclusion of state courts, are enforceable [Garnand v. Carnival Corp.⁴⁰ (Florida forum selection clause providing that lawsuits " shall be litigated, if at all,

before the United States District for the Southern District of Florida in Miami " enforced). Such a clause may have the effect of eliminating jury trials otherwise available in state court and otherwise contravene the 'savings to suitors' clause of Judiciary Act of 1789⁴¹.

Second, in addition to forum selection and choice of law clauses, cruise lines have introduced mandatory arbitration clauses into their passenger tickets. Such clauses are quite common in consumer contracts and raise many issues as to enforceability⁴² including the high costs to the consumer, a lack of mutuality and unconscionability. In Hadlock v. Norwegian Cruise Line, Ltd.⁴³ the passenger made arrangements for a wheelchair accessible balcony which the cruise line promised to provide but did not. In the subsequent litigation the Court enforced a provision in the " Guest Ticket Contract " which provided that " Any and all disputes...in any way arising out of or connected with this Contract...shall be referred to and resolved exclusively by binding arbitration pursuant to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards ". In addition the Guest Ticket Contract stated that " this contract shall be governed in all respects by the General Maritime Law of the United States ".

ENDNOTES

1. The January 13, 2012 sinking of the Costa Concordia [about 3,200 passengers with a crew of 1,000] after running aground off the coast of Isola del Giglio in Italy and the resulting death of, at least, 17 passengers has raised many issues regarding cruise ship safety and the rights and remedies of passengers. See Higgins, So, Just How Safe Is Your Ship?, NYTimes.com February 6, 2012; Costa's Cruise Contract Constrains Cruisers' Claims, www.mouseprint.org January 23, 2012; Erlanger, Oversight of Cruise Lines at Issue After Disaster, NYTimes online January 17, 2012.
2. Molynaux, Era of Grand Innovation in Ship Design Waning, MiamiHerald.Com, Sept. 26, 2010.
3. Saltzstein, Berth of a Cruise Ship: World's Biggest Gets a Home, In Transit Blog-NYTimes.com, November 10, 2009.
4. Berner v. Carnival Corporation, 632 F. Supp. 2d 1208 (S.D. Fla. 2009).
5. Doe v. Celebrity Cruises, Inc., 2003 WL 22351426 (S.D. Fla. 2003), aff'd in part and rev'd in part, 394 F. 3d 891 (11th Cir. 2004).
6. Doe v. Celebrity Cruises, Inc., 2003 WL 22351426 (S.D. Fla. 2003), aff'd in part and rev'd in part, 394 F. 3d 891 (11th Cir. 2004).
7. Cruise Vessel Security and Safety Act of 2010, Public Law 111-207 (July 27, 2010).
8. www.uscg.mil/hq/cgis/CruiseLine.asp
9. See Wright, Crimes Takes a Vacation: Sea Marshals and Criminal Jurisdiction Over High Seas Cruise Ship Crimes, 7 Loy Mar. L.J. 1,9 (2009).
10. www.cdc.gov/nceh/vsp/default.htm
11. Spector v. Norwegian Cruise Lines, 545 U.S. 119 (2005).
12. Association For Disabled Americans, Inc. v. Concorde Gaming Corp., 158 F. Supp. 2d 1353 (S./D. Fla. 2001).

13. Access Now, Inc. v. Cunard Line Limited, Co., 2001 U.S. Dist. LEXIS 21481 (S.D. Fla. 2001).
14. See Govt and Norwegian Cruise Line reach agreement, www.washingtonpost.com October 25, 2010.
15. Carothers, Cruise Control, Stop Press, Conde Nast Traveler, July 2006, p. 56.
16. See e.g., Princess Cruise Lines. Ltd. v. Superior Court, 179 Cal. App. 4th 36 (Cal. App. 2010) (" In truth, the complaint alleges, Petitioner effectively controlled the operators of the shore excursions and ` inflated charges for shore excursions which exceeded the price the shore excursion providers were actually charging for those services "; summary judgment for defendant should be granted); Hernandez v. Holiday Inn, New York Law Journal, March 23, 1993, p. 21, col. 6 (N.Y. Sup.) (parasailing accident on hotel beach; relationship between hotel and parasailing operator described").
17. See Winter v. I.C. Holidays, Inc., NYLJ 1/9/1992, p. 23, col. 4 (NY Sup) (tourists injured in bus accident; foreign bus company insolvent, uninsured and irresponsible).
18. Henderson v. Carnival Corp., 2000 U.S. Dist. LEXIS 18821 (S.D. Fla. 2000).
19. Parry, Dead, Injured in Chilean Bus Crash Return Home, The Journal News, p. 7B (March 25, 2006).
20. Fojtasek v. NCL(Bahamas) Ltd., 613 F. Supp. 2d 1351 (S.D. Fla. 2009).
21. Skeen v. Carnival Corporation, 2009 WL 1117432 (S.D. Fla. 2009).
22. Oran v. Fair Wind Sailing, Inc., 2009 WL 4349321 (D.V.I. 2009).
23. Matter of the Complaint of UFO Chuting of Hawaii, Inc., 233 F. Supp. 2d 1254 (D. Hawaii 2001).
24. See Dickerson, The Cruise Passenger's Dilemma: Twenty-First Century Ships, Nineteenth Century Rights, 28 Tulane Maritime L.J. 447-517 (No. 2, Summer 2004).

25. Insoqna v. Princess Cruises, Inc., New York Law Journal, June 10, 2002, p. 37 (N.Y. Sup.).
26. Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 111 S. Ct. 39, 113 L. Ed. 2d 622 (1991).
27. Falcone v. Mediterranean Shipping Co., 2002 U.S. Dist. LEXIS 11392 (E.D. Pa. 2002).
28. Morag v. Quark Expeditions, Inc., 2008 WL 3166066 (D. Conn. 2008).
29. Kirman v. Compagnie Francaise, 1994 American Maritime Cases 2848 (Cal. Sup. 1993).
30. Jewel Seafoods Ltd. M/V Peace River, 1999 WL 166559 (D.S.C. 1999).
31. Falcone v. Mediterranean Shipping Co., 2002 U.S. Dist. LEXIS 11392 (E.D. Pa. 2002).
32. Morag v. Quark Expeditions, Inc., 2008 WL 3166066 (D. Conn. 2008).
33. Seung v. Regent Seven Seas Cruises, Inc., 2010 WL 3273535 (11th Cir. 2010).
34. Heinz v. Grand Circle Travel, 329 F. Supp. 2d 896 (W.D. Ky. 2004).
35. Carlisle v. Carnival Corp., 953 So. 2d 461 (Fla. Sup. 2007)].
36. Henderson v. Carnival Corp., 2000 U.S. Dist. LEXIS 18821 (S.D. Fla. 2000).
37. Wallis v. Princess Cruises, Inc., 306 F. 3d 827 (9th Cir. 2002).
38. Matter of Illusions Holdings, Inc., 78 F. Supp. 2d 238 (S.D.N.Y. 1999).
39. Eriksen, U.S. Maritime Public Policy Versus Ad-hoc Federal Forum Provisions in Cruise Tickets, The Florida Bar Journal, December 2006, p. 22 (" For all of the last century, and for most of the current one, nearly all major cruise carriers have

complied with the Saving to Suitors Clause by employing ticket provisions offering all passengers their ` historic option ` to sue the carrier in state court (subject of course to a defendant's right to remove an appropriate diversity case from state to federal court pursuant to 28 U.S.C. § 1441)”).

40. Garnand v. Carnival Corp., 2006 WL 1371045 (S.D. Tex. 2006).

41. Lischiniskaya v. Carnival Corp., 56 A.D. 3d 116, 865 N.Y.S. 2d 334 (2008)

42. See Dickerson, Consumer Law 2011 at www.nycourts.gov/courts/9jd/taxcertatd.shtml

43. Hadlock v. Norwegian Cruise Line, Ltd., 2010 WL 1641275 (C.D. Cal. 2010). See also: Dumitru v. Norwegian Grise Line, Ltd., 2010 WL 3034226 (S.D.N.Y. 2010)