

**CURRENT CANADIAN LAW ISSUES
AFFECTING THE CRUISE INDUSTRY**

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Introduction B An Expanding Maritime Activity

According to a recently-published study of the international cruise industry commissioned by a major European bank, in 2002 there were 223 cruise vessels in service worldwide. According to the same study, there are more than 40 new vessels, presently under construction or under firm contract with builders, which will enter service between 2002 and 2006. Of those scheduled to enter service in 2002, the largest were the *Star Princess*, with capacity of 2,758 passengers; the *Carnival Conquest*, with capacity of 2,974 passengers, and, scheduled for November, 2002, Royal Caribbean Lines= *Navigator of the Seas*, with the astounding capacity of 3,100 passengers.

In the aftermath of September 11, industry wisdom has held that there is a growing preference among affluent Americans B the mainstay of the cruise market in North America at least B for sea travel over air travel for purely vacation purposes. All signs point to a burgeoning world cruise fleet, some ships in which represent novel legal and operational concepts with which admiralty law may in the future need to come to grips. This paper identifies some existing, and some emerging, issues in Canadian maritime law and practice which are specific to the cruise industry.

Application of Canadian Maritime Law and Admiralty Practice

In this country, there is little doubt that the activities of cruise vessels are, and will remain, maritime matters subject to maritime law. Cruise vessels, regardless of the specifics of their ownership structures or operational characteristics, are unquestionably Aships@ as defined in relevant Canadian legislation (*Canada Shipping Act RSC 1985 c. S-9, s. 2; Federal Court Act RSC 1985 c. F-7 s. 2*).

It is submitted to be clear that the maritime activity in question (pure leisure travel without any component of transportation from a place of origin to a different place of destination), and the ships which are employed in that activity, are, as a matter of Canadian law, engaged in a maritime activity Awithin the modern context of commerce and shipping@ and so are subject to Canadian maritime law as set out in relevant jurisprudence of the Supreme Court of Canada.

To the extent that the issue may fall to be determined under Canadian law (a relatively low probability, given that this ship very seldom calls in a Canadian port) even a ship which may or may not (as is discussed below) be engaged in the carriage of Apassengers@ is submitted to be engaged in a maritime activity in a modern context, and so to be subject to Canadian maritime law

and Admiralty jurisdiction. The most unusual presently-existing Acruise@ vessel is probably the grandly-named *AThe World@*, which entered service in March, 2002. By way of accommodation, this ship consists of 110 apartments, Apermanent@ exclusive residency rights in respect of which has been or will be sold to private Aowners@, mostly wealthy individuals or families, and 88 smaller suites, right of occupancy of which has been retained by the shipowner and which the shipowner Arents@ out to its own customers. Each residency-right holder pays, in addition to a substantial initial purchase price, his or its monthly share of the cost of operating the ship. The ship=s itinerary is set, generally a year in advance, by vote of a management board which represents the collective of residency-right holders and, as presently published, is such that the ship=s residents will be on hand, in their floating residences, to take in such diverse activities as the America=s Cup trials off New Zealand, the Grand Prix of Monaco, the British Open in Edinburgh, and the Cannes film festival. This may be a maritime activity in which only a very privileged few are able to participate, but is submitted to be, nonetheless, a modern maritime activity.

Substantive Law Applicable to Cruise Vessels

Most modern cruise line operators stipulate in their passenger tickets mandatory choice of forum in which action is to be commenced in the event of disputes between the passenger and the carrier. It seems less common (although it is not unknown) for tickets to also contain choice of law provisions. Despite the fact that these are contracts of adhesion B in which the passenger has little practical choice but to accept the carrier=s standard terms and even less practical opportunity to negotiate those terms B both kinds of terms are generally upheld. In the United States, the jurisdiction in which many passengers purchase tickets, from which they embark, and in whose courts passengers, if injured, tend to sue, courts generally uphold choice of forum provisions in tickets unless it is shown to be unfair or unreasonable to do so: *Carnival Cruise Lines v. Shute* 1991 AMC 1697 (USSC, 1991); *Hodes v. Achille Lauro* 1998 AMC 2829 (3 Cir., 1988). By way of examples, this paper will refer to, and discuss in various contexts, standard passenger contract conditions used by Carnival Cruise Lines and by Princess Cruise Lines, two of the four dominant cruise operators worldwide and two of the (if not the two) largest cruise operators into eastern Canada. Neither of these lines expressly adopt the substantive law of any country as governing the contractual relationship between carrier and passengers. Both, however, stipulate that litigation, if any, must to be brought in the United States:

Princess Cruise Lines Conditions	Carnival Cruise Lines Conditions
All disputes and matters whatsoever arising out of or relating to Your Cruise, including for personal injury, illness or death, shall be litigated by You individually, and not as a member of any class. If you choose to sue Princess Cruises Lines, Ltd., then such claim must be litigated by You before	It is agreed by and between the Guest and Carnival that all disputes and matters whatsoever arising under, in connection with or incident to this Contract or the Guest's cruise, including travel to and from the vessel, shall be litigated, if at all, before the United States District Court for

a court located in the County of Los Angeles, California, U.S.A., to the exclusion of the courts of any other country, state, city or county.	the Southern District of Florida in Miami, or as to those lawsuits to which the Federal Courts of the United States lack subject matter jurisdiction, before a court located in Miami-Dade County, Florida, U.S.A. to the exclusion of the Courts of any other county, state or country.
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In any given dispute, there is some possibility that relations between the passenger and the cruise operator are governed by the law of the ship=s flag, regardless of the place of embarkation or the jurisdiction in which the passenger ticket was issued.

As a matter of Canadian law, in the absence of contractual stipulation, choice of applicable law in disputes between passengers and shipowners is arguably governed by s. 275 of the *Canada Shipping Act* (RSC 1985 c. S-9):

Where in any matter relating to a ship or to a person on board a ship there appears to be a conflict of laws, if there is in this Part any provision on the subject that is hereby expressly made to extend to that ship, the case shall be governed by that provision, but if there is no such provision, the case shall be governed by the law of the port at which the ship is registered.

It is said that this section Arguably@ applies the law of the flag because it is contained in Part 3 of the *Canada Shipping Act*, which part is headed ASeamen@. If the subject of the litigation is a dispute between a passenger and the ship (or shipowner) then there may be scope to argue that relations between those persons are not governed at all by that Part of the Act. It is also noted that this particular section was not re-enacted by the *Canada Shipping Act 2001* (SC 2001 c. 26).

In the cases of cruises which embark from, disembark at, or call at, any port in the United States (which will be the case for most cruise vessels calling anywhere in Canada), US statute (46 USC s. 183c) prohibits, as contrary to public policy, contractual terms which purport to limit or exclude carrier=s liability for death of or injury to passengers caused by Anegligence or fault@ of the carrier. When (as is common) litigation is commenced in the United States arising out of passenger injury or death, it is presumed that there is scope for argument whether US substantive law (including this prohibition), or some other substantive law, governs the claim. In non-passenger maritime cases, the US courts generally give Acardinal importance@ to the law of the flag in the matrix of choice-of-law factors (*Lauritzen v. Larsen* 345 US 571 (1953); *Hellenic Lines v. Rhoditis* 398 US 306 (1970)), and this preference is generally also followed in cases of passengers injured on cruises which do not call at US ports (*Kirman v. Compagnie Francaise de Croisiere* 1994 AMC 2848 (Cal Sup Ct, 1993)) and in cruise vessel litigation arising out of things other than passenger injury (*The Sundancer* [1994] 1 Lloyds Rep 183 (2 Cir, 1993), cert. denied 114 S.Ct 1399 (1994)).

Third Party Beneficiaries of Contractual Terms

In their standard passenger ticket conditions, the cruise lines purport to extend the benefit of certain contractual protections to certain third parties. This is typically done in part by employing an expanded definition of Acarrier@, and in part by expressly providing that certain third parties will take the benefit of certain contractual terms. See for example the following:

Princess Cruise Lines Conditions	Carnival Cruise Lines Conditions
<p>"Carrier" includes the ship named on the Passage Ticket (or any substituted ship), the ship's owners, operators, managers, charterers, and agents, any affiliated or related companies thereof and their officers, crew, pilots, agents or employees, and all concessionaires, independent contractors, shipbuilders and manufacturers of all component parts, launches, craft or facilities, whether provided at sea or on shore, belonging to any such ship or owned or operated by its owners, operators, managers, agents, charterers, contractors or concessionaires</p>	<p>Whenever the word "Carnival" is used in this Contract it shall mean and include, the Vessel, its owners, operators, employees, agents, charterers and tenders.</p>
<p>In selling tickets (including coupons or vouchers) or otherwise making arrangements for air, land or local water transportation, or shore excursions, tours or shoreside accommodations and meals, Carrier acts only as an agent for other service companies who provide such services as independent contractors. You agree that Carrier will not be liable in any way for and You release Carrier from any loss, death, injury, delay, or damage to person or property or disappointment arising from or in connection with such services. Any liability for such services will be governed by the terms and conditions of the passage contract and the other contracts and/or tariffs between You and such service companies. A service company shall have the benefit of every defense to which Carrier is entitled under this Passage Contract.</p>	<p>All rights, exemptions from liability, defenses and immunities of Carnival under this contract shall also inure to the benefit of Carnival's facilities, whether at sea or ashore, servants, agents, managers, affiliated or related companies, suppliers, shipbuilders and manufacturers of component parts and independent contractors, including, but not limited to, shore excursion or tour operators, ship's physician, ship's nurse, retail shop personnel, health and beauty staff, fitness staff, video diary staff, and other concessionaires, who shall have no liability to the Guest, either in contract or in tort, which is greater than or different from that of Carnival.</p>

Although Canadian maritime law generally recognizes, and gives effect to, AHimalaya clause@ third party benefits in the context of carriage of goods by sea, these cases generally involve sophisticated commercial parties who are in a position to allocate and manage commercial risks. There would be considerable scope to argue that in a carriage of passengers context, which is closer to a Aconsumer@ transaction, the Court should be less willing to extend the benefit of contractual protection to third parties, especially those actually at fault in causing passenger

injuries. There is not yet Canadian jurisprudence on these points in a passenger context.

The Athens Convention itself, discussed in detail below, purports also to extend the benefit of the carrier=s limitation of liability to carriers= servants and agents. See Article 11:

If an action is brought against a servant or agent of the carrier or of the performing carrier arising out of a damage covered by this Convention, such servant or agent, if he proves that he acted within the scope of his employment, shall be entitled to avail himself of the defences and limits of liability which the carrier or the performing carrier is entitled to invoke under this Convention.

By reason of the adoption of this convention into Canadian statute law (*Marine Liability Act*, SC 2001 c. 6 s. 37) it is more probable that courts will respect this particular third party protection.

Finally on these points, cruise lines attempt to contractually insulate themselves from liability to passengers arising out of the actions of third parties, both ashore and (in some cases) on board ship. Reference is made to the following:

Princess Cruise Lines Conditions	Carnival Cruise Lines Conditions
<p>All health, medical or other personal services provided in connection with Your Cruise are provided solely for the convenience and benefit of Passengers who may be charged for such services. You accept and use medicine, medical treatment and other personal services available on the ship or elsewhere at Your sole risk and expense without liability or responsibility of Carrier. Doctors, nurses or other medical or service personnel work directly for Passenger and shall not be considered to be acting under the control or supervision of Carrier, since Carrier is not a medical provider. Similarly, beauticians, masseurs, photographers, instructors and other service personnel shall be considered independent contractors who work directly for the Passenger.</p>	<p>Guest acknowledges that all Shore excursions/tours (whether conducted in the water, on land or by air), airline flights and ground transportation, as well as the ship's physician, nurse and on board concessions (including but not limited to, the gift shops, spa, beauty salon, fitness center, golf and art programs, video/snorkel concession) are either operated by or are independent contractors. Carnival neither supervises nor controls their actions, nor makes any representation either express or implied as to their suitability. ... Guest agrees that Carnival assumes no responsibility, does not guarantee performance and in no event shall be liable for any negligent or intentional acts or omissions, loss, damage, injury or delay to Guest and/or Guest's baggage, property or effects in connection with said services. Guests use the services of all independent contractors at the Guest's sole risk.</p>
<p>Pre and post cruise tours, shore excursions and any/all connecting ground, vessel or air transportation and other tours may be owned and/or operated by independent contractors and Carrier makes no representations and assumes no responsibility therefore. If You use the ship's athletic or recreational equipment or take part in</p>	

organized activities, whether on the ship or as part of a shore excursion, You assume the risk of injury, death, illness or other loss and Carrier is not liable or responsible for it. Carrier in no event is liable to You in respect of any occurrence taking place other than on the ship or launches owned or operated by Carrier.	
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Liability for Death or Injury of Passengers

The so-called Athens Convention Relating to the Carriage of Passengers and their Luggage by Sea, signed December 13, 1974 (as amended by Protocol signed at London March 29, 1990, and as may soon be further amended pursuant to a Protocol adopted in November, 2002) was incorporated into substantive Canadian law by way of reference in s. 37 of the *Marine Liability Act* SC 2001 c. 6. In its Canadianized form, the Convention applies to carriage of passengers on any water (whether or not Athe sea@) and applies to any person (other than crew) carried on board any ship Aoperated for a commercial or public purpose@ (that is, whether or not a specific injured or killed person has himself entered into a contract of carriage).

It is highly probable that the flag state of a cruise vessel will be a State Party to this Convention, and thus that the Convention will purport to apply, substantively, to litigation arising out of injury to or death of a passenger.

To give a very brief overview of the substantive rules contained in the Athens Convention:

- ! The Acarrier@ (defined as the entity on behalf of whom the contract of carriage has been entered) and the Aperforming carrier@ (defined as the owner, charterer or operator of a ship who actually performs the carriage) are jointly and severally liable to the passenger, with rights of contribution between the two being unaffected by the Convention (Article 4).
- ! Carriers= liability is fault-based; the plaintiff has the burden of proving that his injury was caused by an incident which occurred during the course of the carriage; there is a rebuttable presumption that the carrier was at fault if the damage was caused by shipwreck, collision, stranding, explosion, fire or defect in the ship; and in all other cases the plaintiff has the burden of proving the carrier=s fault or neglect (Article 3).
- ! A contributory fault defence is available to the carrier, and the court is empowered to apportion liability in accordance with respective degrees of fault (Article 6).
- ! Limit of the carrier=s liability in respect of injury to or death of any one passenger is 175,000 Special Drawing Rights (about C\$350,000) B higher limits may be imposed by

flag state domestic law or by the contract of carriage (Articles 7, 10).

- ! The carrier is disentitled to limit its liability if it is proved that the damage resulted from an act or omission of the carrier Adone with intent to cause such damage, or recklessly and with knowledge that such damage would probably result@ (Article 13).
- ! Action may be commenced in a court of any of the place of residence of the defendant; the place of embarkation or disembarkation; the place residence of the plaintiff if the defendant is subject to the jurisdiction of that place; or the place where the contract of carriage was made, again if the defendant is subject to the jurisdiction of that place (Article 17).

Under the 2002 Protocol, which is to come into force internationally 12 months after ratification by any ten countries, important amendments will be made to the Athens Convention. In brief summary, the protocol will require compulsory insurance (or other financial responsibility) to be carried by cruise line operators, with minimum limits of 250,000 SDR=s (about C\$500,000) per occurrence per passenger; will create a differential liability system: for certain Ashipping incidents@ (grounding, fire, Adefects in the ship@, etc.) the carrier is strictly liable, subject to what amounts to a *force majeure* defence, and the carrier=s strict liability for shipping incidents is limited to 250,000 SDR=s per passenger. In addition, the carrier is liable in excess of these limits, to a potential total limit of 400,000 SDR=s, if fault or neglect of the carrier is proved.

Cruise line operators seem to take a qualified approach to the incorporation of the Athens Convention into their standard passenger contracts:

Princess Cruise Lines Conditions	Carnival Cruise Lines Conditions
<p>On cruises which neither embark, disembark nor call at any U.S. port, Carrier shall be entitled to any and all liability limitations, immunities and rights applicable to it under the "Convention Relating to the Carriage of Passengers and Their Luggage by Sea" of 1974 as well as the "Protocol to the Convention Relating to the Carriage of Passengers and Their Luggage by Sea" of 1976 ("Athens Convention"). The Athens Convention limits the Carrier's liability for death of or personal injury to a Passenger to no more 46,666 Special Drawing Rights as defined therein (approximately U.S. \$60,000 which fluctuates depending on daily exchange rate as printed in the Wall Street Journal).</p>	<p>On cruises which neither embark, disembark nor call at any U.S. port, Carnival shall be entitled to any and all liability limitations and immunities provided under the Athens Convention Relating to the Carriage of Passengers and Their Luggage by Sea of 1974, as well as the 1976 Protocol to the Convention Relating to the Carriage of Passengers and Their Luggage by Sea ("Athens Convention"), which limits Carnival's liability for death or personal injury of a passenger to no more than 46,666 Special Drawing Rights as defined therein (approximately U.S. \$60,000 which fluctuates depending on daily exchange rate as printed in the Wall Street Journal), and all other limits for damage or loss to personal property.</p>
<p>In addition, and on all other cruises, all the exemptions from and limitations of liability</p>	<p>In addition to all the restrictions and exemptions from liability provided in this Contract, Carnival</p>

<p>provided in or authorized by the laws of the United States (including Title 46 U.S. Code Sections 181-186, 188) will apply.</p>	<p>shall have the benefit of all Statutes of the United States of America providing for limitation and exoneration from liability and the procedures provide thereby, including but not limited to Sections 4282, 4282A, 4283, 4284, 4285 and 4286 of the Revised Statutes of the United States of America (46 USCA Sections 182, 183, 183c (b), 183b, 184, 185 and 186); as well as all restrictions or exemptions from liability, when applicable, under the laws of any foreign nation. Nothing in this Contract is intended to nor shall it operate to limit or deprive Carnival or any such statutory limitation of or exoneration from liability under any applicable laws.</p>
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Security Issues

Although not a traditional concern of Admiralty law, passenger, vessel and port facility security is very much in the forefront of domestic and international marine policymaking, and has become a real practical concern for marine operators, and lawyers, in all contexts. The cruise industry (with the container industry, albeit for different reasons) is identified as an area of potentially high vulnerability, for essentially three reasons:

- ! The presence on board cruise vessels of large concentrations of affluent people, many of them American citizens, is felt to make the vessels themselves attractive targets for attack.
- ! There is precedent for cruise vessels being the target of successful politically-motivated violence B in October, 1985, the *Achille Lauro*, carrying 400 passengers and crew on a Mediterranean cruise, was boarded off the coast of Egypt, and briefly taken over, by four armed men, who demanded the release of a number of Palestinian prisoners. One passenger, an elderly, disabled American, was murdered before the hijackers eventually left the ship and were captured after landing in Sicily.
- ! The vessels could embark, and could themselves be used as platforms for acts of violence by, terrorists posing as passengers.

On this set of issues, the cruise lines appear to take divergent approaches in their standard ticket conditions to contractual treatment of these risks:

Princess Cruise Lines Conditions	Carnival Cruise Lines Conditions
Carrier visits a large number of ports in numerous	Carnival's vessels visit numerous ports in a

<p>countries around the world. At any given moment there are likely to be "trouble spots" in the world in terms of crime and/or war or terrorist actions. Accordingly, it may be necessary to change the published cruise or shore excursion itinerary. Any such changes are for Your safety and beyond our control. While Carrier endeavors to provide reasonable protection for Your comfort and safety onboard its ships, Carrier cannot guarantee freedom from all risks associated with war, terrorism, crime or other potential sources of harm. Carrier reminds all passengers that they must ultimately assume responsibility for their actions while ashore.</p>	<p>number of countries. Guests assume responsibility for their own safety and Carnival cannot guarantee Guest's safety at any time.</p>
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At a general level, the International Maritime Organization is developing proposals for various internationally-sanctioned security initiatives, including mandatory security plans for ships and ports, and greater transparency regarding the identity of ship managers. Specific to the cruise industry, there are proposals that passengers themselves should be pre-screened through personal background checks, before being permitted to embark. Presently in place are new severe restrictions on visitor access to cruise vessels while in port. Even deliveries of provisions must pass through security checkpoints, and actually be delivered from trucks to the ship by pre-screened longshore workers.

Aside from vulnerability to politically-motivated violence, there is potential for other, purely criminal, acts on board or in relation to cruise vessels. Arson killed 150 people on board the *Scandinavian Star* in the Baltic Sea in 1990. Piracy is still a very real, and very violent, threat in some parts of the world, but as a general statement those places are not popular cruise vessel destinations, and modern pirates, who tend to work in small groups from fast, small boats, would probably not be tempted to board a cruise vessel with its large crew.

Although the drafters of the Athens Convention, and the underwriters of cruise vessel liability risks, may not particularly have considered mass criminal acts as a potential cause of passenger injury, it is highly probable if such events occur claims will be asserted against shipowners and their insurers, and that the courts will hold cruise vessel operators to just as high a standard in protecting passengers from security risks as that to which they are held in protecting them from more obvious, and more traditional, perils of the sea.