



**THE PROPOSED PROTOCOL TO
THE ATHENS CONVENTION
RELATING TO THE CARRIAGE OF
PASSENGERS BY SEA**

CRUISE SHIP EXPLOSION

- 60 Million passengers last two decades
- 243 cruise ships
- 72% North American Market
 - 93% embark/disembark U.S. Ports
 - \$8.1 billion spending in U.S. 1999
 - \$7 billion total U.S. wages
 - \$15.5 billion total U.S. economic benefit
 - 32 new ships by 2004 – a cost of \$12.1 billion.

1974 ATHENS CONVENTION

- International Carriage
- Fault Based Liability Regime
- B/P Plaintiff except reverse B/P when “shipping incident”
 - shipwreck
 - collision
 - stranding
 - explosion or fire
 - defect in the ship
- Comparative negligence

1974 ATHENS CONVENTION **Continued....**

- Liability Limit
 - 1976 Protocol – 46,666 SDR (about \$56,867)
 - 1990 Protocol – 176,000 SDR (about \$213,255)
 - States may have higher limit
- Time Bar
 - Two years
 - National Law Suspension – 3 years

1974 ATHENS CONVENTION **Continued....**

- Jurisdiction
 - Defendant's residence/principal place of business
 - Place of departure or destination by contract
 - Domicile of claimant if defendant has place of business and is subject to jurisdiction in that State.
 - State where contract made if defendant has place of business and is subject to jurisdiction in that State.

1974 ATHENS CONVENTION **Continued....**

- Carrier cannot contract against
 - Liability
 - Liability Limits
 - B/P provisions
 - Jurisdiction Options
- Insurance
 - No compulsory insurance
 - No direct action against underwriter

DRAFT PROTOCOL TO ATHENS CONVENTION

- IMPETUS
 - Raise liability limit
 - Provide financial security claims
 - Follow Montreal Convention – strict liability tier

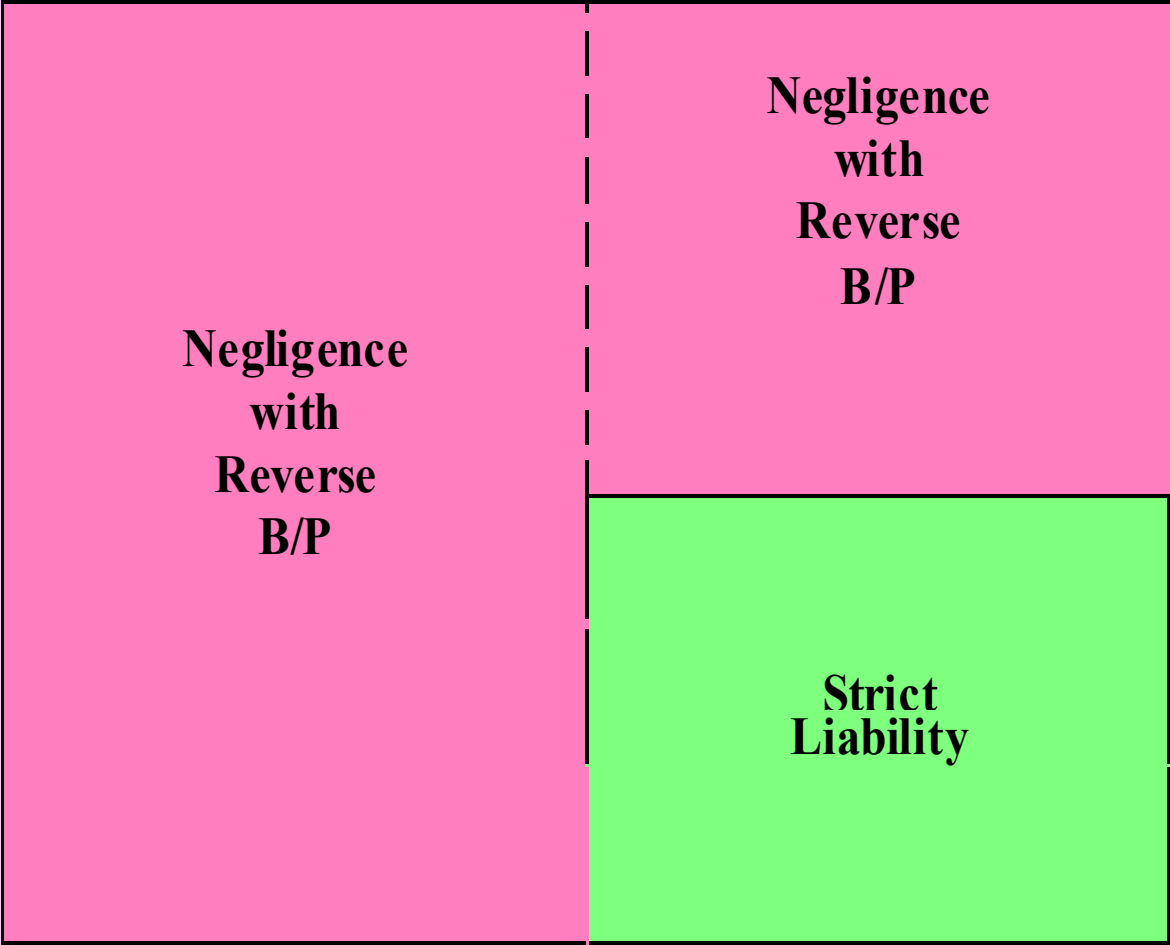
DRAFT PROTOCOL Continued....

- **LIABILITY**
 - **Shipping Incidents**
 - Shipwreck
 - Collision
 - Stranding
 - Explosion or fire
 - Defect in the ship
 - **Non Shipping**

MAJORITY VIEW

Non-Shipping

Shipping



**OVERALL CAP - Y SDRS
WITH OPTION TO BE
UNLIMITED**

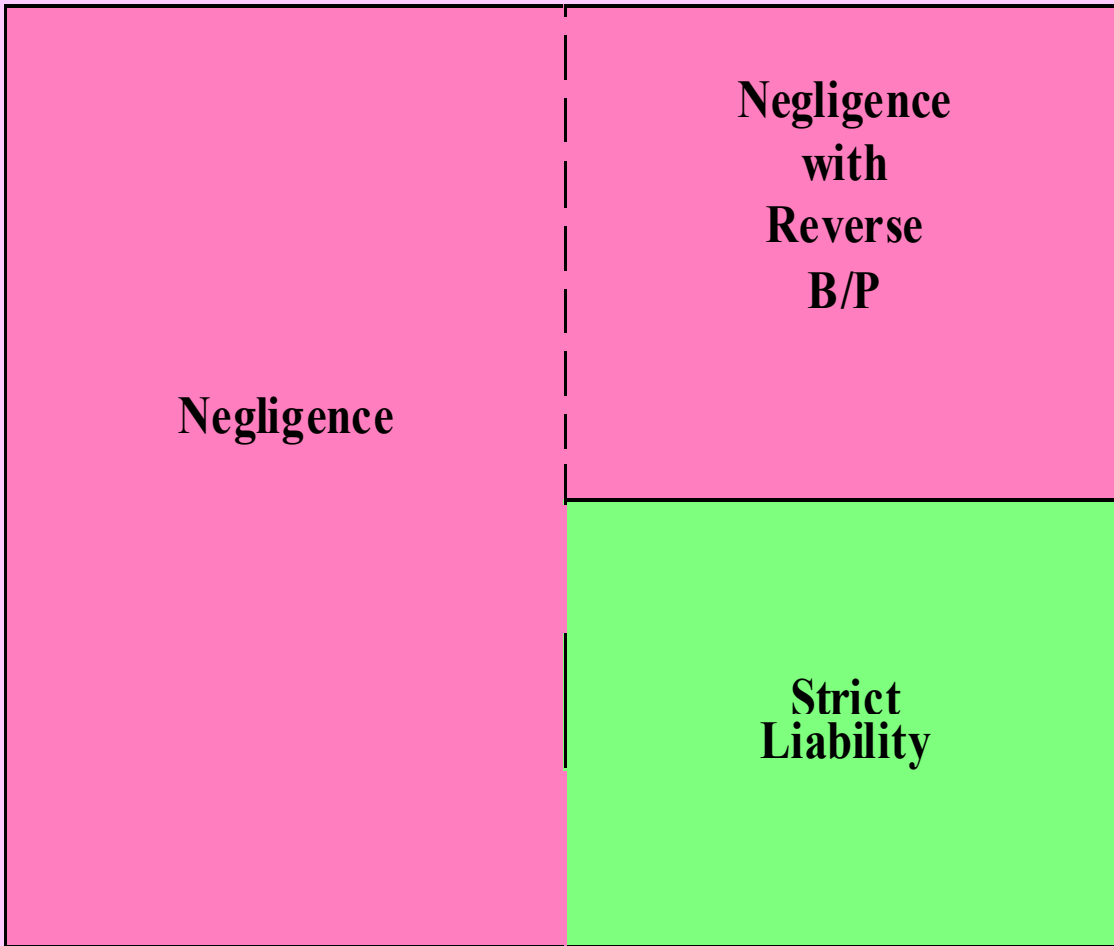


FIRST TIER CAP - X SDRS

MINORITYVIEW

Non-Shipping

Shipping



**OVERALL CAP - Y SDRS
WITH OPTION TO BE
UNLIMITED**



FIRST TIER CAP - X SDRS

DRAFT PROTOCOL **Continued....**

- DEFENSES
 - Force Majeure
 - Intentional Act of Third Party
 - Comparative Negligence
- LIMITATION AMOUNT
 - Strict Liability Limit
 - Overall Liability Limit
 - Opt out provision – No overall limit

DRAFT PROTOCOL **Continued....**

- **TIME BAR**
 - Same – two years
 - Suspension power enlarged
 - 3 years from time claimant knew or should have known
 - No later than 10 years after disembarkation in any event
- **JURISDICTION**
 - Add - State of Domicile/Residence if defendant provides services [for carriage of passengers by sea] to or from State and is subject to jurisdiction in State.

DRAFT PROTOCOL

Continued....

- **INSURANCE**
 - **Compulsory – Performing Carrier**
 - **Direct Action**
 - **Defenses**
 - **All that carriers could invoke except bankruptcy or winding up**
 - **Right to join carrier**
 - **Question – Wilful misconduct of insured**
 - **No other defenses insurer may have against insured, i.e., failure to pay premiums**
 - **No pay to be paid**

U. S. LAW

- LIABILITY

- Fault Based
- B/P on claimant
- Res ipsa loquitur
- Comparative negligence
- No unseaworthiness

- LIMITS

- None except Limitation of Liability Act, 46 U.S.C., App. §183.
 - **Higher value of vessel and pending freight or \$420 times gross tonnage of vessel**
 - **Not invoked since Titanic**

U. S. LAW

Continued....

- JURISDICTION
 - Due Process
 - Ticket Provision - Florida
- TIME BAR
 - Statute - 46 U.S.C. App. §763a - 3 years
 - Ticket Provisions - 1 year
 - Cannot be less than 1 year. 46 U.S.C. §183b.

U. S. LAW **Continued....**

- FINANCIAL RESPONSIBILITY
 - 46 U.S.C. §817(d)
 - Ships with over 50 passengers
 - Insurance policy, bond, self-insurer or other evidence
 - 3000 accommodations - \$30 million

U. S. LAW Continued....

- INTERPLAY WITH ATHENS
 - **U.S. not a party**
 - **Passenger ticket to cruise originating or terminating in U.S. may not limit liability.**
46 U.S.C. App. §183c
 - **For U.S. passengers on foreign cruises Athens may be applicable by ticket provision or under U.S. choice of law rules**

CRITIQUE

PROVISIONS ON LIABILITY, B/P, TIME BAR AND
DIRECT ACTION AGAINST UNDERWRITERS
MARKEDLY DIFFERENT FROM U.S. LAW

MLA and ICCL sharply criticize.

LIABILITY

Strict Liability

- General maritime law consistent with Congressional Statutes and common law tort regimes
 - DOHSA 46 U.S.C. §761 et seq.
 - Jones Act. 46 U.S.C. §688
- Strict liability utilized for ultrahazardous activities and manufacturers of defective products

1. Ultrahazardous Activities

- High degree of harm
- High likelihood of significant harm
- Not a matter of common usage
- Blasting operations, fumigation with poison

2. Manufacturers liable for defectively manufactured products

3. Neither applies to cruise operators.

3. Rationale: Montreal Convention

- Not Applicable

A. No survivors air accident - not true cruise accidents

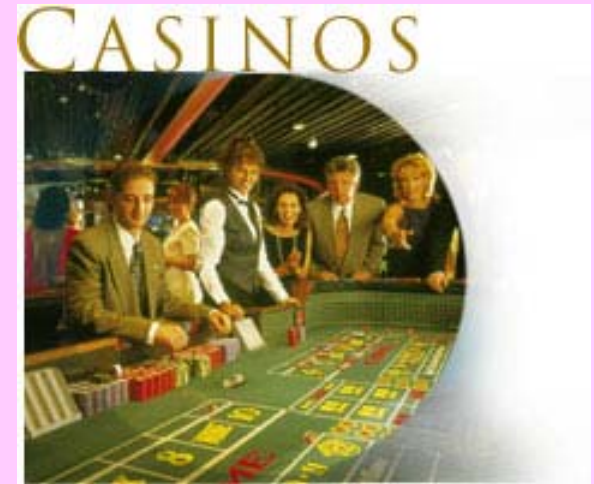
B. Air-short period, no movement v. cruise - long period, move about at will

C. Cruise ship moving resort

Rationale: Montreal Convention Continued...

D. Variety shipboard activities

- **Swimming**
- **Dancing**
- **Drinking**
- **Eating**
- **Spas**
- **Games**
- **Gambling**



Rationale: Montreal Convention Continued...

E. Much equipment not related to sea transport

- **Medical equipment**
- **Health and gym equipment**



4. Defect in the ship

- Akin to unseaworthiness
- Strict liability for equipment defects even though no knowledge and not manufactured by carrier
- Doctors independent contractors

5. Exoneration from accident wholly caused by third party intentional act, but not third party negligence. Why?

6. Reverse burden of proof

- Many accidents not witnessed
- Carrier position untenable
- Must disprove accident of which it has no knowledge
- Passenger has benefit *res ipsa loquitur* - gives presumption fault if accident
 1. Doesn't ordinarily occur without someone's negligence
 2. Caused by instrumentality solely within carrier's exclusive control
 3. Not caused by passenger's negligence or voluntary action

7. No basis for singling out cruise industry for different tort regime

TIME BAR

- Passenger claims not hidden claims - known to claimant
- Two years sufficient
- 3 years/10 years excessive
- Witness dispersal problem in maritime cases

LIMITATION LIABILITY

- How opt out affect U.S. Limitation Liability Act
- Do not treat cruise ship operators differently from other shipowners

DIRECT ACTION AGAINST UNDERWRITERS

- Few states allow
- No need
 1. FMC evidence financial responsibility
 2. Coverage by P&I
 3. No evidence valid claims haven't recovered because of insolvency or financial difficulties of cruise operator
- No such right in other transport cases
- P & I Club “pay to be paid” rule

CONCLUSION

