

COMITÉ MARITIME INTERNATIONAL

International Working Group (Polar Shipping)

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Working paper history	<ul style="list-style-type: none"> • Commissioned: CMI General Assembly Mexico City (October 2019) • Considered by the subgroup (2020-2022) • Considered by the IWG (October 2022) • Uploaded to CMI website: (2023) • Published in 2022 CMI Yearbook: (2023)

WORKING PAPER ON THE LEGAL FRAMEWORK ON SHIPPASSENGER RIGHTS IN ANTARCTIC WATERS

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The Passenger Rights sub-committee of the CMI International Working Group on Polar Shipping proposed the researching and writing of a preliminary report on the legal position of passengers' rights in Arctic and Antarctic shipping. This report consists of a preliminary study and compilation of materials addressing passenger rights in cruise shipping in Antarctic waters against the backdrop of international treaties and the national laws of states in the southern hemisphere from whose ports cruises are undertaken to Antarctica. The report draws on contributions by legal practitioners in those and other jurisdictions.

Preliminary Report



Source: https://www.nationsonline.org/oneworld/map/antarctica_map.htm

I. Introduction

Ships operating in the Arctic and Antarctic environments are exposed to unique risks. Poor weather conditions and the relative lack of good charts, communication systems and other navigational aids pose challenges for mariners. The remoteness of the areas makes rescue or clean up operations difficult and costly. Cold temperatures may reduce the effectiveness of numerous components of the ship, ranging from deck machinery and emergency equipment to sea suction. When ice is present, it can impose additional loads on the hull, propulsion system and appendages.¹

Sailings to the Antarctic for leisure started in the 1950 with Chile and Argentina carrying a few hundred passengers to the South Shetland Islands. The first expedition to Antarctica with travellers was in 1966 and led by Lars Eric Lindblad. The modern expedition cruise industry started in 1969, when Lindblad built the first expedition ship MS Explorer. Since 1970 tourist expeditions have regularly travelled to Antarctica every year.²

These days, Antarctica is successfully advertised throughout the travel industry as one of the last “adventures” people may experience, promising the thrill to enter literally uncharted waters as a member of an “expedition” on board a cruise vessel, (see e.g. Abercrombie & Kent’s “Antarctic Cruise Adventure: A Changing Landscape 2021³” or Quark Expeditions “the leader in Polar Adventures⁴”). 38,478 tourists visited Antarctica in 2015-2016⁵. More than 56,000 tourists visited Antarctica during the 2018-2019 season.⁶ IAATO’s⁷ visitor figures for the 2019/20 season show that this number almost doubled to 73,991 between October 2019 and April 2020.⁸ Of these who travelled with IAATO members 18,506 travelled on cruise-only vessels and did not set foot on the continent, while 731 travelled to deepfield destinations by aircraft, 125 by yacht and 4679 by air/cruise - travel programs.

The 2020-21 season of Antarctic tourism was heavily affected by the SARS CoV-2 pandemic. There was effectively nil seaborne tourism and one sailing yacht carrying nine tourists on board.⁹ IAATO’s preliminary estimates, representing the current best-case operating scenario for the 2021-22 seaborne tourism season are 46 vessels, 342 departures and 48,091 passengers¹⁰.

¹ <https://www.imo.org/en/OurWork/Safety/Pages/polar-code.aspx>

² <https://www.bas.ac.uk/about/antarctica/tourism/antarctic-tourism-frequently-asked-questions/> British Antarctic Survey – Natural Environment Research Council

³ <https://www.abercrombiekent.com/tours/luxury-expedition-cruises/2021/exploring-antarcticas-changing-landscape-cruise>

⁴ <https://www.quarkexpeditions.com/antarctic>

⁵ *Supra* 2

⁶ The New York Times <https://www.nytimes.com/2020/02/26/travel/antarctica-tourism-environment-safety.html>

⁷ International Association of Antarctic Tour Operators

⁸ <https://iaato.org/wp-content/uploads/2020/06/IAATO-on-Antarctic-visitor-figures-2019-20-FINAL.pdf> June 2020 IAATO Antarctic visitor figures

⁹ IAATO Overview of Antarctic Tourism: A Historical Review of Growth, the 2020-21 Season, and Preliminary Estimates for 2021-22 submitted 14 May 2021, Appendix 2

¹⁰ *Ibid*, jointly for Peninsula and Ross Sea

Updates on the 2021-22 season are planned for October 2021¹¹. The majority of visitors travel by cruise ship from ports like in Argentina (Ushuaia) or Punta Arenas, Chile.¹² A limited number of cruises depart from Hobart, Australia, Lyttelton, or Bluff, New Zealand.¹³

Increasing tourism in this extremely remote area coupled with Antarctica's unique geopolitical position raises the level of passenger safety issues and their legal protection against potential risks associated with ship-based tourism.

II. Scope of report: A study of passengers' rights when travelling in the Antarctic forleisure

In the light of this development, the Passenger Rights sub-committee of the CMI International Working Group on Polar Shipping suggested a report on passengers rights in Arctic and Antarctic shipping.

This report concerns cruise shipping in Antarctica, the specific risks to safety passengers may be exposed to and how these are addressed against the background of the status of Antarctica as a continent without sovereignty and territorial jurisdiction. The report describes the mechanism of the Antarctic Treaty as the internationally governing system of Antarctica and the role of IAATO as the tourist industry's private law self-regulating body. In the absence of a "local law" in Antarctica, safety regulations and passenger rights are addressed by reference to international conventions and EU legislation.

The special status of Antarctica required a deviation in the structure of this report from the Working Paper on the Legal Framework for Ship's Passenger's rights in Arctic Waters. In the absence of an Antarctic national law, passenger rights are governed by the law governing the contract with the respective carriers or tour operators, including international conventions on passenger rights and ship safety, if ratified by the flag state. Consequently, the legal regimes governing passenger rights are as numerous and diverse as there are jurisdictions worldwide and, unlike in the Arctic, these rights cannot be assessed from the perspective of Antarctic coastal states, as there are no such states. This preliminary report, therefore, does not include national policies. Instead, international conventions, insofar as they are relevant to passenger voyages to antarctic waters, are presented without a reference to a specific jurisdiction or, in the case of EU legislation, to a specific EU Member State.

By way of summary, these are the topics dealt with in the report:

- Antarctica's geopolitical position
- International Conventions on safety in polar waters

¹¹Ibid, Appendix 2

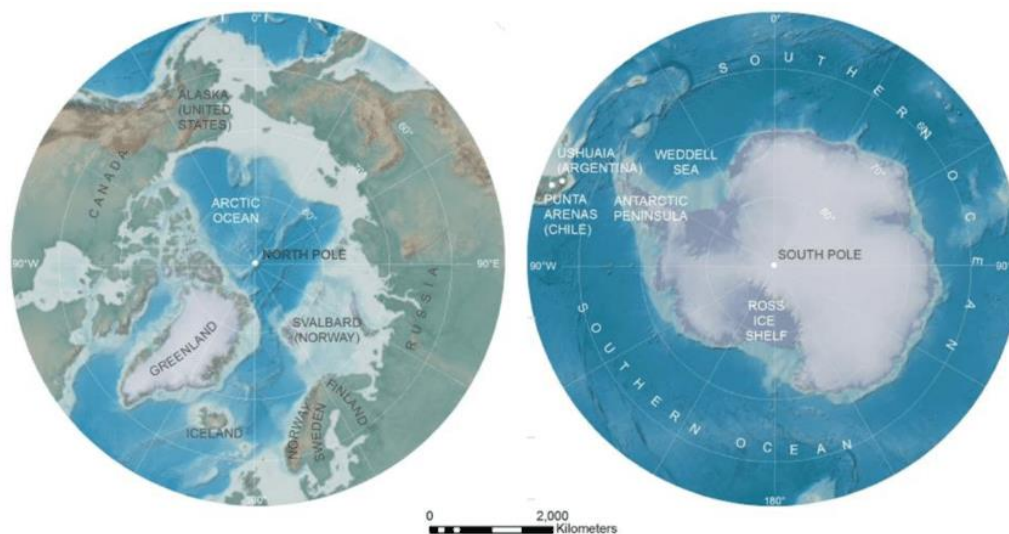
¹²Paige McClanahan, Tourism in Antarctica: Edging Toward the (Risky) Mainstream , New York Times, Feb. 26, 2020, <https://www.nytimes.com/2020/02/26/travel/antarctica-tourism-environment-safety.html>

¹³IAATO Frequently Asked Questions <https://iaato.org/faqs/>

- Description of particularities/special risks in Antarctic waters
- Tourism management in Antarctica; IAATO
- Passenger rights against the carrier
- Ticket standard terms and conditions
- Conclusions

III. Definition of the area to be analysed: Antarctica – geopolitical position

Antarctica is a continent surrounded by the Southern Ocean,¹⁴ No sovereign state falls within the Antarctic Circle, a line of latitude around the Earth, at 66°30'S. No single government has the authority to implement rules. It is not a state, it is international territory administered by sovereign states as signatories of the the Antarctic Treaty¹⁵ (AT). The Antarctic Treaty does not cover the surrounding seas (Antctic Treaty, Art. VI). According to UNCLOS¹⁶ Art 2, the sovereignty of a coastal state extends, beyond its land territory to an adjacent belt of sea, described as the territorial sea. In the absence of a coastal state, however, no territorial sovereign exists to exercise legislative or enforcement competence at sea.¹⁷ The high seas begin at the continent's edge¹⁸. Ships sailing on the high seas are subject to the exclusive authority of their flag-state pursuant to UNCLOS Art. 92.



Source:https://www.researchgate.net/figure/Map-of-the-Arctic-and-Antarctic-Regions_fig1_325763631

¹⁴ <https://climate.nasa.gov/blog/2861/arctic-and-antarctic-sea-ice-how-are-they-different/>

¹⁵ The Antarctic Treaty, 402 U.N.T.S. 71, entered into force June 23, 1961.

¹⁶ Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397.

¹⁷ Oxman, Bernard H. (1986) "Antarctica and the New Law of the Sea," Cornell International Law Journal: Vol. 19: Iss. 2, Article 4. <http://scholarship.law.cornell.edu/cilj/vol19/iss2/4>, p. 222

¹⁸ Hoefsmits, Christina A. (2010) "Southern Ocean Shakeup: Establishing Sovereignty in Antarctica and the Consequences for Fishery Management," Roger Williams University Law Review: Vol. 15: Iss. 2, Article 5, p. 548; http://docs.rwu.edu/rwu_LR/vol15/iss2/5

The Antarctic Treaty

The Antarctic Treaty (AT) was adopted in 1959 by twelve countries pursuing scientific activities in and around Antarctica during the International Geophysical Year (IGY) of 1957-58: Argentina, Australia, Belgium, Chile, the French Republic, Japan, New Zealand, Norway, the Union of South Africa, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland, and the United States of America¹⁹. The Treaty entered into force in 1961 and covers the area south of 60°S latitude (Art.VI). All member states of the United Nations can accede the Antarctic Treaty. The Secretariat supports the Antarctic Treaty Consultative Meetings and the Committee for Environmental Protection, facilitates the exchange of information among the Treaty Parties, and maintains records of Treaty and related meetings.²⁰

Among the original signatories of the AT were seven countries - Argentina, Australia, Chile, France, New Zealand, Norway and the United Kingdom - with territorial claims, sometimes overlapping. Territorial claims are not enforceable while the AT is in force.²¹

Since 1959, 42 other countries have acceded to the Treaty²². Pursuant to Art. IX.2, they are entitled to participate in the Consultative Meetings during such times as they demonstrate their interest in Antarctica by “conducting substantial research activity there”. Currently 54 states are parties to the Treaty, of which 29 are Consultative Parties. The other 25 Non-Consultative Parties are invited to attend the Consultative Meetings but do not participate in the decision-making.²³

The Antarctic Treaty Consultative Meeting ATCM

The original Treaty Parties and Consultative Parties meet annually at the Antarctic Treaty Consultative Meeting (**ATCM**) “for the purpose of exchanging information, consulting together on matters of common interest pertaining to Antarctica, and formulating and considering and recommending to their Governments measures in furtherance of the principles and objectives of the Treaty” (AT Art. IX)²⁴

The ATCM includes observers and invited experts:

Observers:

Currently the Scientific Committee on Antarctic Research (SCAR), within SCAR, the Standing Committee on the Antarctic Treaty System (SCATS), in charge of developing SCAR’s scientific advice to the ATCM;²⁵ The Committee on Environmental Protection (CEP), the Commission for

¹⁹ <https://www.bas.ac.uk/about/antarctica/the-antarctic-treaty/the-antarctic-treaty-1959/>

²⁰ <https://www.usap.gov/theantarctic treaty/>

²¹ <https://www.antarctica.gov.au/about-antarctica/law-and-treaty/history/antarctic-territorial-claims/>

²² <https://www.ats.aq/devAS/Parties?lang=e>

²³ *ibid*

²⁴ <https://www.ats.aq/e/atcm.html>

²⁵ <https://www.scar.org/policy/scats/>

the Conservation of Antarctic Marine Living Resources (CCAMLR), the Convention for the Conservation of Antarctic Seals (CCAS), and the Advisory Committee to the Agreement on the Conservation of Albatrosses and Petrels (ACAP), the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR) and the Council of Managers of National Antarctic Programs (COMNAP);

Invited Experts:

Currently, these are the Antarctic and Southern Ocean Coalition (ASOC) and the International Association of Antarctica Tour Operators (IAATO)²⁶ since 1994²⁷

Measures, Decisions and Resolutions, which are adopted at the ATCM by consensus, give effect to the principles of the Antarctic Treaty and the Environment Protocol and provide regulations and guidelines for the management of the Antarctic Treaty area and the work of the ATCM. Decisions, which address internal organisational matters of the ATCM, and Resolutions, which are hortatory texts, are not legally binding on Contracting Parties.²⁸

Measures are legally binding on the Consultative Parties once they have been approved by all Consultative Parties. However, since the continent has no governing agency, there is no authority who can actually enforce the Treaty. The Measures are implemented through the Consultative Parties' domestic laws and apply to their citizens and corporate entities based within their jurisdiction only when in Antarctica. Only the Consultative Parties take part in decision-making. Other participants in the meeting may contribute to the discussions.²⁹

The ATCM have adopted recommendations and negotiated separate international agreements, of which three are still in use. These, together with the original Treaty provide the rules, which govern activities in Antarctica. Collectively they are known as **the Antarctic Treaty System (ATS)**, namely the Convention for the Conservation of Antarctic Seals (1972), Convention on the Conservation of Antarctic Marine Living Resources (1980), Protocol on Environmental Protection to the Antarctic Treaty (1991)³⁰.

IV. International Conventions on Safety

POLAR CODE

The ATCM supported and advocated the POLAR CODE as per the adopted Antarctic Treaty Resolution 3 (2014):

²⁶ <https://www.ats.aq/e/atcm.html>

²⁷ <https://iaato.org/about-iaato/the-antarctic-treaty/>

²⁸ <https://www.ats.aq/e/atcm.html>

²⁹ *ibid*

³⁰ British Antarctic Survey <https://www.bas.ac.uk/about/antarctica/the-antarctic-treaty/>

“Recommending that their Governments:
encourage IMO Member States to continue as a matter of priority the important work of finalising the Polar Code pertaining to ship safety and environmental protection; and further encourage IMO Member States to consider additional safety and environmental protection matters in a second step, as to be determined by the IMO.”³¹

The Polar Code applies to ships operating in Arctic and Antarctic waters.

It covers the full range of design, construction, equipment, operational, voyage planning, communication, training, search and rescue and environmental protection matters relevant to ships operating in the waters surrounding the two poles. The Polar Code and SOLAS amendments were adopted during the 94th session of IMO’s Maritime Safety Committee (MSC), in November 2014.

The individual chapters heading best explain the areas it covers:

Safety Measures

- Chapter 1 -General
- Chapter 2 – Polar Water Operation Manual (PWOM)
- Chapter 3-Ship Structure
- Chapter 4- Subdivision and Stability
- Chapter 5- Watertight and Weathertight Integrity
- Chapter 6-Machinery Installations
- Chapter 7-Fire safety/Protection
- Chapter 8-Life Saving Appliances and Arrangements
- Chapter 9- Safety of Navigation
- Chapter 10-Communication
- Chapter 11- Voyage Planning
- Chapter 12- Manning and Training

Pollution Prevention Measures

- Chapter 1- Prevention of Pollution by Oil
- Chapter 2- Control of Pollution by Noxious Liquid Substances in Bulk
- Chapter 3- Prevention of Pollution by Harmful Substances Carried by Sea in Packaged Form
- Chapter 4- Prevention of Pollution by Sewage from Ships
- Chapter 5- Prevention of Pollution by Garbage from Ships

³¹ Antarctic Treaty database - Resolution 3 (2014) - ATCM XXXVII - CEP XVII, Brasilia

For the purpose of this report, reference is made to Chapter 3 (ice classes), Chapter 1, paragraph 1.2.7. (ETR Expected Time of Rescue) Chapter 8 (Live saving appliances) and Chapter 12 (Training and Manning) para. 12.3.2.

The full text of the Code is available here: <https://www.icetra.is/media/english/POLAR-CODE-TEXT-AS-ADOPTED.pdf>

The Polar Code entered into force on 1 January 2017.³² The Polar Code Part I forms an add-on to the SOLAS requirements. Part II considers the environmental protection of the Polar Regions and is implemented through amendments to MARPOL Annexes I, II, IV and V.³³ The Polar Code includes mandatory measures covering safety part (part I-A) and pollution prevention (part II-A) and recommendatory provisions for both (parts I-B and II-B).³⁴

Regardless of flag, the Polar Code applies to all ships carrying SOLAS certification that intend to operate in Polar Regions³⁵

In terms of what is meant by SOLAS Certificates, the interpretation is, if a ship is carrying a SOLAS Passenger Safety Construction Certificate, the Polar Code applies.³⁶

Part I applies to all vessels whose keel was laid on or after 1 January 2017, and to in-service vessels from their first intermediate or renewal survey after 1 January 2018. Part II applies to all vessels operating in Polar waters from 1 January 2017.³⁷

IMO uses “tacit acceptance” as the amendment procedure for most of its conventions. This means amendments to technical annexes of an IMO convention will enter into force after a certain period if a specified number of state parties do not oppose amendments within that period of time³⁸. This shows how IMO is important for Antarctica because the Antarctic Treaty System is not able to regulate all vessels operating in Antarctic waters³⁹

In accordance with its international obligations, member states must implement the provisions of Chapter XIV of SOLAS and the safety provisions in the Polar Code (which is incorporated into SOLAS by reference to it in Chapter XIV) into domestic law.

³²<https://www.imo.org/en/MediaCentre/HotTopics/Pages/Polar-default.aspx>

³³Lloyd’s Register <https://www.lr.org/en/resources-polar-code/>

³⁴<https://www.imo.org/en/OurWork/Safety/Pages/polar-code.aspx>

³⁵SOLAS does not apply to some specific categories of ships, including: cargo ships of less than 500 gross tonnage; pleasure yachts not engaged in trade; ships of war and fishing vessels (sometimes termed “non-SOLAS ships”).

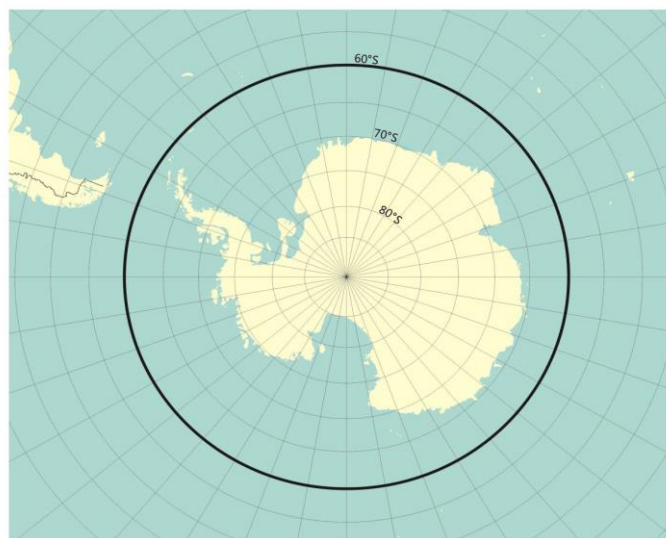
³⁶https://www.maritimecyprus.com/wpcontent/uploads/2019/07/the_polar_code_a_regulatory_interpretation_guide.pdf, p. 19

³⁷<https://www.lr.org/en/resources-polar-code/>

³⁸ <https://www.lr.org/en/resources-polar-code/o.org/en/About/Conventions/Pages/Default.aspx>

³⁹ <https://www.asoc.org/advocacy/antarctic-governance/international-maritime-organization>

According to the Polar Code, ‘Antarctic waters’ means those waters which are south of 60° S (see image below).⁴⁰



Source: MEPC 68/21/Add 1 Annex 10, p. 8

The applicability is to ships that have SOLAS Certificates and are intending to operate in Polar Regions. In terms of what is meant by SOLAS Certificates, Chapter I of SOLAS includes a number of certificate requirements. Generally the interpretation is, if a ship is carrying a SOLAS Cargo Safety Construction, or Passenger Safety Construction Certificate, the Polar Code applies.⁴¹

Polar Ship Certificate

A central safety element of the Polar Code is the Polar Ship Certificate.⁴² It defines the vessel’s polar operating capabilities and limitations, and confirms the flag state — or a recognized organization acting on its behalf (e.g., a classification society) — has inspected the vessel and determined its compliance with the relevant requirements of the Polar Code. Polar Ship Certificates classify vessels as one of the following (Part I-A, Definitions 2.1 – 2.4) and Chapter 3 Ship Structure:

- Category A – Capable of operating in at least medium first-year ice, which may include old-ice inclusions
- Category B – Capable of operating in at least thin first-year ice, which may include old-ice inclusions
- Category C – Capable of operating in open water, or ice conditions less severe than those qualified as Category A or B ships

⁴⁰ https://puc.overheid.nl/nsi/doc/PUC_1503_14/2/

⁴¹ Lloyd’s Register <https://www.lr.org/en/resources-polar-code/>

⁴² <https://oceanconservancy.org/wp-content/uploads/2017/06/Arctic-Vessel-Traffic-Report-WEB-2.pdf>

Polar Class (PC) means the ice class assigned to the ship by the Administration or by an organization recognized by the Administration based upon IACS Unified Requirements.⁴³

It is the responsibility of the Owner to select an appropriate Polar Class to match the requirements for the ship with its intended voyage or service.

PC 1	Year-round operation in all polar waters
PC 2	Year-round operation in moderate multi-year ice conditions
PC 3	Year-round operation in second-year ice which may include multi-year ice inclusions.
PC 4	Year-round operation in thick first-year ice which may include old ice inclusions
PC 5	Year-round operation in medium first-year ice which may include old ice inclusions
PC 6	Summer/autumn operation in medium first year ice which may include old ice inclusions
PC 7	Summer/autumn operation in thin first-year ice which may include old ice inclusions ⁴⁴

ETR Expected Time to Rescue

Paragraph 1.2.7 – Maximum expected time to rescue⁴⁵: The IMO, in the 1979 International Convention on Maritime Search and Rescue (the SAR Convention), defines rescue as “An operation to retrieve persons in distress, provide for their initial medical or other needs, and deliver them to a place of safety”.

The concept of the maximum Expected Time to Rescue (ETR) is based on an assumption that Polar Regions are more remote than other sea areas, that availability of search and rescue services is more limited and that the environmental conditions mean that deployment of search and rescue services is more difficult. As such the expected time to rescue is intended to be selected by the operator to reflect an increased length of time during which the ship and its crew will have to survive until rescued.

The maximum ETR must be no less than five days. (Part 1-A Safety Measures, Definitions 1.2.7 Maximum expected time of rescue means the time adopted for the design of equipment and system that provide survival support. It shall never be less than 5 days). This timescale was selected based on the length of time that the lifeboat rations currently required to be carried by SOLAS are intended to last.

⁴³ <https://www.icetra.is/media/english/POLAR-CODE-TEXT-AS-ADOPTED.pdf>

⁴⁴ <https://balticsearouteing.dk/media/9984/56-equivalence-of-ice-classification-rules.pdf>

⁴⁵ LLoxd’s Register <https://www.lr.org/en/resources-polar-code/>

The maximum ETR affects: – the functionality of any life-saving appliances used for safe evacuation (paragraph 8.2.2 Polar Code) – the provision of survival resources (habitat, protection, communication equipment) (paragraph 8.2.3.3 Polar Code) – the provision of emergency rations (paragraph 8.3.3.4 Polar Code) – the operability of communication on survival craft (paragraph 10.3.2.3 Polar Code). See also the commentary on survival resources in Chapter 8.

The specified ETR will therefore affect equipment and provisions carried on board. The shipowner specifies the maximum ETR at time of build. For voyage-planning purposes the maximum ETR should be considered when planning routes in remote areas. The maximum ETR is included on the PSC and as such, the ship is limited by it.

It should be taken into account, however, that distances between Antarctica and civilization are vast, which is perhaps the most formidable of all the challenges listed. Travel from McMurdo Station to the nearest city, 2,400 miles away in New Zealand, takes five hours by plane. The bases of the various nations are scattered, rudimentary and separated by thousands of miles of hostile expanse. This degree of isolation is unmatched by any other human settlement and causes inevitable delays and difficulties in mounting a Mass Casualty Incident Response response.⁴⁶

Chapter 8, para. 8.3.3 Survival: no lifeboat shall be of any type other than partially or totally enclosed type

Ice Pilots

Pursuant to paragraph 12.3.3 of Chapter 12 of the Polar Code the (Flag-State) Administration may allow the use of a person(s) other than the master, chief mate or officers of the navigational watch to satisfy the requirements of part I-A, Chapter 12 of the Polar Code, provided that this person(s) shall be qualified and certified in accordance with regulation II/2 of the STCW Convention and section A-II/2 of the S 2.8.3 Polar Code. This does not relieve the vessel's crew of their duties and obligations for the safety of the vessel. This "other person" may be an ice pilot or navigator, as stated in the Flag States Bahamas Maritime Bulletin⁴⁷ at para. 8: "pursuant to the conditions outlined in paragraph 12.3.2 of Part 1-A of the Polar Code, the BMA allows the use of navigational personnel other than the ship's crew, i.e. so-called "Ice Pilots". The use is voluntary.

SOLAS SAFE RETURN TO PORT (SRtP)

In the light of passenger ships carrying ever larger numbers of passengers and voyages to remote areas such as the Antarctic concerns were raised about passenger safety particularly the difficulty of safely evacuating large numbers of passengers, including the elderly and infirm, from ship to lifeboats to rescue vessels in the event of fire or flood emergency and the ensuing Search and

⁴⁶ Christopher N. Mills, MD, MPH* and Gregory H. Mills, MHS†Mass Casualty Incident Response and Aeromedical Evacuation in Antarctica <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3088372/>

⁴⁷ Bahams Maritime Bulletin No. 167 Revision No. 01 Issue Date 06 Oct 2017

Rescue challenges.⁴⁸ At its eighty-second session (29 November to 8 December 2006) the Maritime Safety Committee (MSC) adopted amendments to SOLAS designed to improve passenger ship safety, emphasising prevention of a casualty and that future passenger ships should be designed for improved survivability so that persons can stay safely on board as the ship proceeds to port⁴⁹ Additional information about the intended area of operation, the operating pattern or patterns (which may be used to define any intended speed/maximum distance for safe return to port) should be included in the ship's description⁵⁰.

There are two casualty thresholds defined under the SRtP regulations:

1. The fire casualty threshold is defined in SOLAS II-2/21.3 as being the loss of the space of the origin of the fire up to the nearest "A" class boundary if the space is protected by a fixed fire-fighting system or the loss of the space of origin and adjacent spaces up to the nearest A-class boundaries which are not part of the space of origin where no fixed fire-fighting systems are installed.
2. The flooding casualty threshold is the flooding of any single watertight compartment below the bulkhead deck.

If the casualty extends beyond the defined thresholds the ship must be abandoned which poses a severe challenge to passengers and SAR teams.

SOLAS regulations II-2 21, II-2 22, II-2 23 and II-1 8, ('Safe Return to Port (SRtP) Regulations') currently apply to passenger ships built on or after 1 July 2010 having a length of 120 m or more or having three or more main vertical zones.⁵¹ Fifteen years after adoption of the SRtP concept, it has become apparent to the co-sponsors that there is a lack of uniform implementation across the passenger ship sector and a need for numerous clarifications or interpretations. Certain key terms (e.g. "remain operational" and "manual actions") and acceptance criteria are not defined clearly, which has given rise to differing interpretations. On operational aspects, no uniform standard has been established between stakeholders. The co-sponsors are of the view that the verification of compliance and associated documentation of compliance should also be improved⁵². Bahamas, Panama, CLIA and IACS proposed a review of SOLAS provisions related to safe return to port⁵³ on aspects related to a wide range of systems and arrangements, including subdivision and stability but also fire protection systems, falling under the remit of both the Sub-Committee on Ship Systems and Equipment (SSE) and the Sub-Committee on Ship Design and Construction (SDC).⁵⁴

⁴⁸ https://www.redesigngroup.org/media/1282/safe-return-to-port_oct-2019.pdf

⁴⁹ https://www.redesigngroup.org/media/1282/safe-return-to-port_oct-2019.pdf

⁵⁰ MSC.1/Circ.1369 01-07-2010; para. 3.2

⁵¹ https://www.redesigngroup.org/media/1282/safe-return-to-port_oct-2019.pdf

⁵² <https://www.iacs.org.uk/media/8110/msc-102-21-12-proposal-for-a-new-output-to-review-guidance-on-the-application-of-solas-provisions-relate-bahamas-panama-clia-and.pdf>

⁵³ *ibid*

⁵⁴ *ibid*

V. Particularities/Special Risks in Antarctic waters

In 2013, the Antarctic Treaty Consultative Meeting (ATCM) formally recognised the Council of Managers of National Antarctic Programs (COMNAP) efforts “...to continue to foster collaborative discussions and vital sharing of information regarding SAR matters including through: holding triennial workshops on search and rescue...” (ATCM XXXVI Resolution 4 (2013)).

Under international maritime and aeronautical agreements, Rescue Coordination Centres (RCCs) of five countries (Argentina, Australia, Chile, New Zealand and South Africa) share responsibility for the coordination of Search and Rescue (SAR) over the Antarctic region.⁵⁵

COMNAP convened the first Antarctic SAR Workshop in Valparaiso, Chile, in August 2008. Two further workshops followed; SAR Workshop II (Buenos Aires, Argentina), 2009; and SAR Workshop III (Viña del Mar, Chile), 2016.⁵⁶

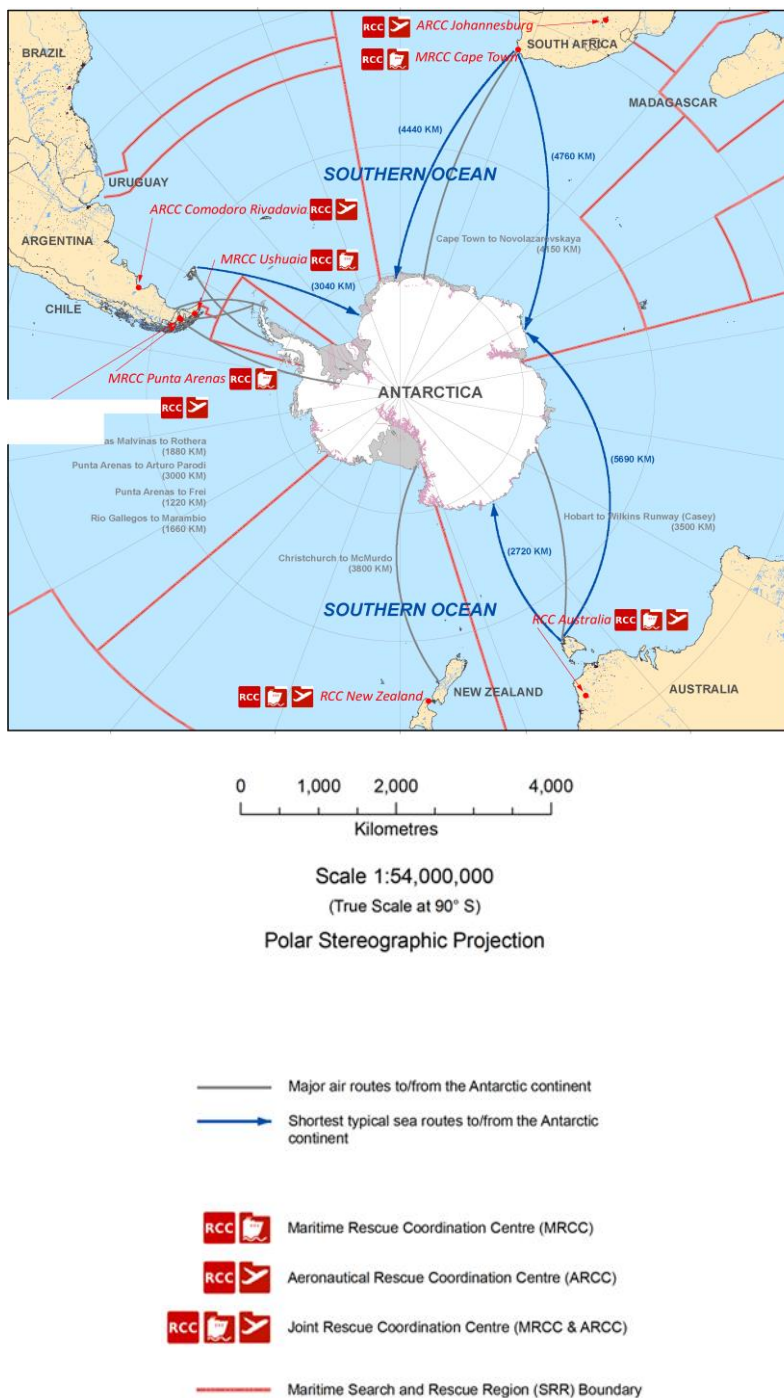
The overarching objective of the workshop was to continue to improve Search and Rescue (SAR) coordination and response in the Antarctic including engaging all participants in regional coordination and response to Mass Rescue Operations (MRO) scenarios.

The specific risks encountered in Antarctica are summarized in the final report of the most recent Workshop IV of 31 May 2019, based on the findings from the Rescue Coordination Centres (RCCs) of which the following is an extract:

⁵⁵ Antarctic Workshop Valparaiso 2008 <https://www.ats.aq> › att › Atcm32_att046_e

⁵⁶ https://documents.ats.aq/ATCM42/att/ATCM42_att095_e.pdf

*Antarctic Search & Rescue Coordination*⁵⁷



Source: <https://www.comnap.aq/publications/maps-and-charts/>

The RCC’s noted increases in activity related to science, tourism, fisheries and commercial aviation with routing that crosses below 60° south. More people in the Antarctic Treaty area, regardless of purpose of their activity, mean more probability of accident, incident or requirement for emergency response.

⁵⁷ <https://www.comnap.aq/publications/maps-and-charts/>

Increase in activities in the Antarctic Treaty area is at least partially due to reduction in sea ice in some areas. The perception that reduction in sea ice might be a reduction in risk is not completely true as removal of sea ice often creates increase in icebergs, fog, stronger or more persistent winds, and creates rapidly changing conditions that many are not aware of or prepared for. Ice-breaking capable vessels will still be required in order to respond to Antarctic SAR events.

Each Antarctic SAR region is different and has different characteristics. For example, for the Peninsula, the distances from South America to the Antarctic Treaty area are relatively short. For the three other SAR regions, the distances are larger. However, even in relatively short distances (that are never less than 1000-1200 Kms), the particular circumstances of Antarctica-its hydrometeorological and ice conditions, the scarcity of support points and the limited infrastructure-mean there is a complexity to deployment.

Time of arrival of SAR units is still very high compared to the expected survival time in the Antarctic.

Large distances in the Arctic do not mean having to wait for assistance for one or two days. In some cases, it would take five to six sailing days for a vessel to reach some areas of coastal Antarctica from outside the Antarctic Treaty area and this presumes good weather, and good sea and ice conditions.

Even though there are significant differences between the Polar Regions, there may be lessons Antarctic SAR agencies can learn from Arctic agencies. In some SAR situations, however, it says in the report, that it is simply not possible to provide any assistance.

In the report on the earlier Workshop towards Improved Search and Rescue Coordination and Response in the Antarctic in August 2008 in Valparaiso, Chile⁵⁸, hosted by the Chilean Directorate General of the Maritime Territory and Merchant Marine in collaboration with the Council of Managers of National Antarctic Programs (COMNAP) concern was voiced about incidents involving large passenger vessels:

“It was noted that accidents involving a significant number of persons were of extreme concern and as such required special consideration. Depending on the environment, the SRR and the SAR capability available even small numbers of persons can prove extremely challenging. Large passenger vessels and aircraft will pose a very difficult challenge. Experience with MV Explorer has already clearly demonstrated this problem.”⁵⁹

⁵⁸ Report of the Workshop Towards Improved Search and Rescue Coordination and Response in the Antarctic, Tuesday 12 - Thursday 14 August 2008, Valparaiso, Chile Prepared by workshop convenors Antoine Guichard and Ivan Valenzuela Final version – 26 November 2008

⁵⁹ *ibid*

“The current increase in maritime and air traffic can be of concern in relation both to the capability to respond and to the possible impact on National Antarctic Programs. Of particular concern are very large passenger vessels – their rescue would require considerable assets and resources and could cause major disruptions to nearby stations and vessels and the research programmes they support.”

*“Accidents are rare, but not unheard-of”*⁶⁰

A list of incidents involving passenger vessels sailing in Antarctic waters, based on various sources, including the IAATO reports on the 1991 – 2000 season and the 2011 – 2021 season are attached as Annex 1 to this report.

VI. Tourism

The Antarctic Treaty recognises tourism as a legitimate activity in Antarctica⁶¹, which is governed by a system of non-obligatory self-regulation⁶²

Accidents arising from tourism in the Antarctic raised concern amongst ATCPs. It was agreed, that all operators planning to conduct activities in the Antarctic must recognise and prepare adequately for the inherent dangers associated with operations conducted in this inhospitable and isolated environment, in particular:

- the health and safety of individuals participating in activities;
- the health and safety of rescuers and integrity of equipment used to undertake search and rescue operations in the Antarctic;
- the significant costs associated with the conduct of search and rescue, and medical care and evacuation operations in the Antarctic;⁶³

In 1991, the Antarctic Treaty Consultative Parties adopted the Protocol on Environmental Protection to the Antarctic Treaty, which designates the Antarctic as a natural reserve. The Protocol sets out environmental principles, procedures and obligations for the comprehensive protection of the Antarctic environment, and its dependent and associated ecosystems. The Consultative Parties

⁶⁰ Paige McClanahan Published Feb. 26, 2020, Updated Feb. 27, 2020 Tourism in Antarctica: Edging Toward the (Risky) Mainstream, The New York Times <https://www.nytimes.com/2020/02/26/travel/antarctica-tourism-environment-safety.html> ,

⁶¹ <https://www.bas.ac.uk/about/antarctica/tourism/>

⁶² Regulation Impact Statement (Australia) Measure 4 (2004)

Insurance and Contingency Planning for Tourism and Non-Governmental Activities in the Antarctic Treaty area, 27th Antarctic Treaty Consultative Meeting: Cape Town, 4 June 2004

⁶³ *ibid*

agreed that, pending its entry into force, as far as possible and in accordance with their legal system, the provisions of the Protocol should be applied as appropriate. The Environmental Protocol applies to tourism and non-governmental activities as well as governmental activities in the Antarctic Treaty Area. It is intended to ensure that these activities do not have adverse impacts on the Antarctic environment, or on its scientific and aesthetic value.⁶⁴

The Antarctic Treaty Consultative Meeting (ATCM) adopted non-obligatory “Recommendation Tourism and non-governmental activities” at the ATCM XVIII-1 in Kyoto in 1994, recommending in Annex 1⁶⁵ *inter alia* that:

- Operators ensure that activities are self-sufficient and do not require assistance from ATCPs unless such arrangements for assistance have been agreed in advance;
- Provide information to assist in the preparation of contingency plans for emergency situations including search and rescue, medical care and evacuation;
- Consider insurance⁶⁶
- Be safe; be prepared for severe and changeable weather.
- Ensure that your equipment and clothing meet Antarctic standards.
- Remember that the Antarctic environment is inhospitable, unpredictable and potentially dangerous
- Know your capabilities, the dangers posed by the Antarctic environment, and act accordingly. Plan activities with safety in mind at all times
- Key Obligations on Organisers and Operators:
- Provide prior notification of, and reports on, their activities to the competent authorities of the appropriate Party or Parties
- Provide for effective response to environmental emergencies, especially with regard to marine pollution
- Ensure self-sufficiency and safe operations

The Guidelines of 1994 were supplemented in 2004 with guidelines on contingency planning, insurance and other matters as Measure 4 (2004) and adopted in 2014.

However, for the time being, Measure 4 (2004) is not in force, as it requires to be approved by the 27 Consultative Parties present at the time of its adoption.⁶⁷

Measure 4 (2004) provides that ATCPs are to oblige operators under their jurisdiction to, *inter alia*, develop and put in place appropriate contingency plans and sufficient arrangements for health and safety, search and rescue, medical care and evacuation;

⁶⁴ Guidance for Visitors to the Antarctic https://documents.ats.aq/recatt/att245_e.pdf

⁶⁵ Appendix 1 Antarctic Treaty Recommendation XVIII-1; for the purpose of this report recommendations in the Annex to protect the environment are omitted.

⁶⁶ Supra 74

⁶⁷ Secretariat of the Antarctic Treaty <https://www.ats.aq/devAS/ToolsAndResources/SearchAtd?from=1/1/1958&to=1/1/2158&cat=0&top=0&type=0&stat=4&txt=&curr=0> ;

To put adequate insurance or other arrangements in place to cover any costs associated with search and rescue, medical care or evacuation operations, Ensure the contingency plans and arrangements are implemented before the activities commence; and that those plans and arrangements are not reliant upon the support of other operators or national Antarctic programs without prior express written consent.

Once in force, Measure 4 (2004) would apply to all parties to the Antarctic Treaty and consequently to their respective operators.⁶⁸

To offset risk to their operations – irrespective of whether they possess adequate insurance coverage – some operators may request individual consumers to sign a liability waiver and obtain individual travel insurance that covers search and rescue and medical care and evacuation in the Antarctic. Measure 4 (2004) does not compel individual consumers to obtain travel insurance that covers search and rescue and medical care and evacuation.⁶⁹

Noting that Measure 4 (2004) had not come into effect by 2017, and “desiring to take certain steps before it enters into effect to promote its objectives” the Representative Parties adopted Resolution 6 (2017) at the ATCM XL - CEP⁷⁰XX, namely “Guidelines on Contingency Planning, Insurance and Other Matters for Tourist and Other Non-Governmental Activities in the Antarctic Treaty Area”. The adoption occurred against the background of “potential impacts, including the imposition of additional costs, that tourist or other non-governmental activities may have on national programmes, and the risk to the safety of those involved in search and rescue operations”⁷¹. It is recommend that Parties should require those under their jurisdiction organising or conducting tourist or other non-governmental activities in the Antarctic Treaty area, to follow the Guidelines annexed to this Resolution.⁷²

The Guidelines mirror those contained in Measure 4 (2004) and provide in extract as follows:⁷³

1. Those organising or conducting tourist or other non-governmental activities in the Antarctic Treaty area should ensure:
 - a. that appropriate contingency plans and sufficient arrangements for health and safety, search and rescue (“SAR”), and medical care and evacuation have been drawn-up and are in place prior to the start of the activity. Such plans and arrangements should not be reliant on support from other operators or national programmes without their express written agreement; and

⁶⁸ Supra 74

⁶⁹ Australia Regulation Impact Statement March 2011 Measure 4 (2004) Insurance and Contingency Planning for Tourism and Non-Governmental Activities in the Antarctic Treaty Area, para. 4.26, p. 8

⁷⁰ Committee for Environmental Protection

⁷¹ Resolution 6 (2017) - ATCM XL - CEP XX, Beijing, <https://www.ats.aq/devAS/Meetings/Measure/664>

⁷² *ibid*

⁷³ Resolution 6 (2017) - ATCM XL - CEP XX, Beijing, https://www.ats.aq/devAS/Meetings/Measure/664_Annex

- b. that adequate insurance or other arrangements are in place to cover any costs associated with SAR and medical care and evacuation.
2. Competent authorities may specify the format in which they would prefer to receive information pertaining to paragraph 1a of these guidelines and the equivalent requirement in Measure 4 (2004).
 3. Where a competent authority so decides, a ship-based operator may provide a copy of the Polar Water Operational Manual required under the International Code for Ships Operating in Polar Waters (Polar Code), or relevant parts thereof, as part of demonstrating compliance with the maritime components of the requirements referred to in paragraph 2.
 4. The following guidelines should also be observed in particular by those organising or conducting activities without the supervision or support in the field of another operator or a national programme:
 - a. participants have sufficient and demonstrable experience appropriate for the proposed activity operating in polar, or equivalent, environments. Such experience may include survival training in cold or remote areas, flying, sailing or operating other vehicles in conditions and over distances similar to those being proposed in the activity;
 - b. all equipment, including clothing, communication, navigational, emergency and logistic equipment is in sound working order, with sufficient backup spares and suitable for effective operation under Antarctic conditions;
 - c. all participants are proficient in the use of such equipment;
 - d. all participants are medically, physically and psychologically fit to undertake the activity in Antarctica;
 - e. adequate first-aid equipment is available during the activity and that at least one participant is proficient in advanced first-aid.

Adventure Tourism

In the Final Report of the XXVI Antarctic Treaty Consultative Meeting in Madrid, Spain in 2003, the term “Adventure Tourism” in the context of Antarctic Tourism was debated and what kind of activities should fall under any legal framework regulating tourism. A distinction was suggested between commercial tourism and adventure tourism. Some Delegations launched a debate on what should be meant by "adventure tourism".⁷⁴

Some delegations considered that it was extremely difficult to draw a distinction between what might be considered adventure tourism or tourism in general. Some characteristics ascribed to adventure tourism were its high risk and the autonomy of the participants. Two main implications of adventure tourism were underlined: safety for those practices, which implied risks, and possible rescue operations by national operators and environmental impact.⁷⁵

⁷⁴ XXVI Antarctic Treaty Consultative Meeting Madrid 2003, para. 141, p. 33

⁷⁵ Ibid, para. 148, p. 35

Several delegations agreed on the need of discouraging and not giving support to these risky activities even in the framework of the ATS. It would be necessary to make the difference between responsible and irresponsible tourist activities, discouraging the latter.⁷⁶

Under the heading “recent trends” IAATO, in a paper called “Adventure Tourism in Antarctica”⁷⁷ produced at the 2003 ATCM, observed that pursuits such as kayaking, camping and climbing may now be available on selected voyages were being branded “Adventure Tourism”. Participation was possible through IAATO member cruise vessels. With regard to ship-based Adventure Tourism, IAATO states that over the last 5 years [i.e. since 1998] activities available aboard and from a cruise vessel had expanded and been developed to accommodate new and active travelers. Of those the majority is said to be small numbers of passengers, traveling with “reputable companies” who have experienced in these activities.⁷⁸

IAATO

The International Association of Antarctica Tour Operators (IAATO) was founded in 1991 by seven Antarctic tour operators: Adventure Network International, Mountain Travel Sobek, Paquet/Ocean Cruise Lines, Salén Lindblad Cruising, Society Expeditions, Travel Dynamics and Zegrahm Expeditions.⁷⁹ These days the membership is more than 100⁸⁰. According to the current IAATO member vessel directory, the passenger capacity range from 8 to 3,000⁸¹. A list incorporating vessels, including motor and sailing yachts currently registered with IAATO and provided courtesy of IAATO is attached to this report as Annex 2.

IAATO participates in the ATCM as an invited expert organisation (see above page 7)

IAATO was established out of the increasing need for standardisations of tourism operations in the light of rising tourism levels in Antarctica and applying the recommendations issued by the ATCM. The solution chosen was a self-regulatory organisation and operating through Bylaws⁸² and a Code of Conduct⁸³. IAATO promulgates regular Guidelines on land-and sea-based Antarctic tourism operations⁸⁴. However, IAATO cannot enforce rules vis a vis third parties, they “are not the police” as specifically stated in their Code of Conduct:

“IAATO is not the ‘police’, nor do we regulate tourism in the Antarctic; rather, we manage tourism within the parameters of international and national legal and policy requirements, including those of the Antarctic Treaty System. IAATO Operators also

⁷⁶ Ibid para.149, p.35

⁷⁷ IAATO Adventure Tourism in Antarctica ATCM XXVI 2003 Agenda Item 10

⁷⁸ ibid

⁷⁹ IAATO Bylaws April 2021 <https://iaato.org/about-iaato/our-mission/bylaws/>

⁸⁰ <https://iaato.org/who-we-are/vessel-directory/>; <https://iaato.org/who-we-are/member-directory/>

⁸¹ ibid

⁸² supra 80

⁸³ <https://iaato.org/agenda-item-10a-code-of-conduct>

⁸⁴ IAATO Overview of Antarctic Tourism: A Historical Review of Growth, the 2020-21 Season, and Preliminary Estimates for 2021-22 iaato.org/wp-content/uploads/2021/07/ATCM43_ip110_e

follow guidelines found in the IAATO Field Operations Manual, which often exceed the national or international required standards.”⁸⁵

Non-IAATO tourist vessels operating in Antarctica, if flagged to non-Parties to the Treaty do not fall under IAATO’s self-regulation measures.⁸⁶

IAATO Bylaws

Members can be expelled. Section III of the IAATO Bylaws allow for reprimand or change in membership status (e.g. probation or expulsion) after review by the Compliance and Dispute Resolution and Executive Committees and a vote by the members in good standing.⁸⁷

According to an IAATO paper on tourism growth, apart from small yachts (vessels carrying 12 or less), none of the passenger vessels operating in the Antarctic operated outside of IAATO in the 2019/2020 season⁸⁸.

There are three types of membership according to the IAATO Bylaws:⁸⁹

Operators: organisers that operate travel programs to the Antarctic and/or sub-Antarctic, have been Provisional Operator members for at least one year and have fulfilled the Bylaw requirements in Article III, Sections B and C, and Article X, as applicable.

Organisers: operate travel programs to Antarctica and/or sub-Antarctic and are expected to request Operator status in IAATO. These organisers are Provisional Operator members. Once the conditions in Article III, Sections B and C, and Article X are met, as applicable, these organisers can become Members. Applications for Provisional Operator membership will only be voted upon once per year at the IAATO Annual Meeting. To have their application voted upon, applicants must be present at the meeting.

Associate members: are defined as one of the following:

Tour operators, travel agents or organisers that do not operate Antarctic and/or sub-Antarctic tour programs themselves, but book into other Operators or Provisional Operators’ programs and/or companies, organizations or individuals with an interest in supporting Antarctic tourism and the IAATO objectives. These companies, individuals, operators, agents or organisers are Associate members.

⁸⁵ supra 85

⁸⁶ Chairman’s Report from the Miami Meeting (March 17-19, 2008) on Antarctic Tourism, iaato.org › uploads › 2020/03 › Atcm31_ip019_eiaatochairmans1, para. 2.2.2, p.6

⁸⁷ IAATO frequently asked questions <https://iaato.org/faqs/>

⁸⁸ IAATO and Tourism Growth <https://iaato.org> › wp-content › uploads › 2020/05

⁸⁹ Application for IAATO Membership updated 2020, p. 2; <https://iaato.org> › wp-content › uploads › 2020/12

As set out in the membership application, all Members, as a condition of Membership, are to participate in and be bound by the IAATO Rules of Procedure for Enforcing Compliance the IAATO Codes of Conduct relevant to their Activities, as adopted.⁹⁰

The membership application is detailed and includes comprehensive questionnaires for each category of members aimed at disclosing the applicant's company's details, the vessel details, previous experience in the Antarctic, previous incidents, if any, e.g.:

“As applicable, please include examples of all relevant pre-departure materials your company provides to clients with this application and be sure to list them to the right.

“As applicable, please describe what other methods you use to prepare/educate your clients in terms of their behavior, safety and well-being prior to departure.”⁹¹

According to Bylaws article X⁹²: Operational Procedures Section A, operators and their activities are grouped into the following categories:

1. Organisers of vessels carrying 13-200 passengers and making landings.
2. Organisers of vessels carrying 201-500 passengers and making landings.
3. Organisers of vessels making no landings (cruise only). This includes all vessels carrying more than 500 passengers.
4. Organisers of land operations.
5. Organisers of air operations with over-flights only.
6. Organisers of air/cruise operations.
7. Organisers of sailing or motor vessels that carry 12 or fewer passengers.

Section B provides that all Operators and Provisional Operators are to comply with the following operational conditions pursuant to the Antarctic Treaty System, including the Antarctic Treaty and the Protocol on Environmental Protection to the Antarctic Treaty, along with IMO Conventions and similar international and national laws and agreements:

Organisers are expected to maintain their vessels, aircraft, and equipment in suitable condition for safe and effective operation under Antarctic conditions.

Organisers are expected to have appropriate contingency plans for all aspects of their operations.

Organisers are expected to hire a sufficient number of expedition staff, at least 75% of whom have previous Antarctic experience, and to recommend strongly that all field staff in their employ take and pass the relevant IAATO online assessment module.

⁹⁰ Application for IAATO Membership updated 2020, Art. III, Section L, p. 18,

⁹¹ IAATO Membership Application 2020 p. 7 et seq. <https://iaato.org/wp-content/uploads/2020/12>

⁹² IAATO Bylaws <https://iaato.org/about-iaato/our-mission/bylaws/>

Organisers are to complete a Post-Visit Site Report upon the completion of each program and submit it to the IAATO Secretariat and the Organiser's National Authority, if applicable.

Organisers are to submit an End of Season Report to the IAATO Secretariat on completion of their Antarctic season.

Organisers are to adhere to other obligations as enacted by the Antarctic Treaty System and/or governments of sub-Antarctic islands.

Section C deals with additional conditions for vessel operations:

Operators and Provisional Operators who organise tourism activities using vessels are to comply with the following additional operational conditions pursuant to the Antarctic Treaty System, including the Antarctic Treaty and the Protocol on Environmental Protection to the Antarctic Treaty, along with IMO Conventions and similar international and national laws and agreements:

Organisers of vessels that carry more than 500 passengers are not permitted to make landings.

Organisers of vessels that make landings are not to have more than 100 visitors ashore at any one site at the same time. Visitors are defined as passengers and crew not assisting with the landing; this excludes expedition guides, leaders, and crew assisting with the landing.

Organisers of vessels carrying 201-500 passengers are to abide by stringent restrictions on time and place of landing activities.

Organisers of vessels of any size must coordinate site visits via the IAATO Ship Scheduler and the agreed ship-to-ship communication procedures so that not more than one vessel is at any one site at the same time.

Organisers who land visitors are to maintain a minimum expedition staff-to-visitor ratio of 1:20 while ashore.

Organisers operating vessels that will travel south of 60°S latitude are to have a Captain or appointed Ice Pilot with Antarctic experience suitable for the intended operation.

Depending on the intended operation, it may be necessary to have additional relevant Antarctic experience among the bridge officers.

Organisers are to update the IAATO Vessel Database on a regular basis.

Organisers are to incorporate into their own operating procedures the IAATO guidelines and operational procedures while operating in the Antarctic and, where appropriate, in the sub-Antarctic islands.

*IAATO Code of Conduct*⁹³

The Code consists of two parts: part one sets out the purpose and the scope:

“Purpose

The purpose of this Code of Conduct is to support important principles and expectations for professional conduct and best practices by all the Onboard Teams of IAATO Operators. While non-exhaustive, this Code is a shared statement of commitment to uphold the ethical and professional standards required to fulfill these principles and objectives.

This Code of Conduct is meant for and to be followed by all staff onboard vessels. It is the responsibility of the Captain and Expedition Leader to ensure this document is shared in pre-season briefings and is reviewed before the start of every voyage.

Where possible, those vessels who comply with SOLAS Chapter IX – Management for the Safe Operations of ships – should use and incorporate the IAATO Guidelines and Practices in their Safety Management Systems.

Scope:

This Code sets minimum expectations for personal and professional behaviour. More stringent requirements imposed by third parties (e.g. employing organizations, vessel or camp management) remain fully in effect.

This Code applies to all IAATO Operators and Associates, whether working on vessels or in the home office. We are ALL IAATO”

Part two addresses guiding principles, including Specific Practices:

“If a vessel is involved in activities in a narrow channel, upon hearing the “Securite” call, the vessel engaged in the activities should immediately respond over Channel 16 and notify the incoming vessel of any potential hazards/risks to navigation.

Be conscious of the ship wake when other vessels are around and offering activities. When sailing past a vessel engaged in activities, be sure to communicate your vessel’s intentions, and inquire what activities are in progress.

⁹³ IAATO Code of Conduct <https://iaato.org/agenda-item-10a-code-of-conduct>

Avoid disturbances such as waking, buzzing, bumping, or crowding other vessels. This is particularly important when Zodiacs/small boats and kayakers are on the water, as not only could a ship wake make kayaking less enjoyable, it could potentially cause an emergency.

Adhere to all applicable international and national legal and policy requirements, including those of the Antarctic Treaty System. 2. Support the mission of IAATO: advocate and promote the practice of safe and environmentally responsible private-sector travel to the Antarctic”

Vessel Emergency Contingency Plan

The IAATO-Wide-Emergency Contingency, Search, and Rescue Plan, “A Brief Summary of the Work in Progress”, is published on the current IAATO website⁹⁴; a paper produced in 2002 at the XXV ATCM.

In 2006-2007, the plan was reviewed first by IAATO’s Marine Committee and then presented to all ship operators for discussion and adoption. It was agreed by the membership that the plan was effective and only required additional supplemental text.⁹⁵

The IAATO Emergency Contingency Plan is presented as only giving a description of how to produce an Emergency Contingency Plan to be used for operations in Antarctica. It is referred to as a framework, on which to hang a specifically tailored emergency contingency plan peculiar to each vessel/operation.⁹⁶

Emergencies considered - apart from environmental pollution - were:

- Ice damage to the hull, propeller and rudder
- Heavy weather damage
- Medical emergencies
- Man overboard from the ship, Zodiacs, kayaks, etc.
- Grounding and stranding
- Mechanical and/or steering failure
- Power outage/blackout
- Fire
- Collision
- Security threat
- Explosion

⁹⁴ <https://iaato.org/information-resources/data-statistics/download-iaato-information-papers/>

⁹⁵ IAATO Vessel Emergency Contingency Plan 2006-2007 IAATO Operational Document <https://iaato.org/download/ip091-iaato-contingency>

⁹⁶ *ibid*

At the time (2006-2007) in place were the following according to the paper: ⁹⁷

- A well-established spreadsheet of vessel itineraries in the Antarctic and Sub-Antarctic
- Proven and effective communication between vessels
- An established medical evacuation plan
- A database detailing emergency equipment available on board all IAATO ships
- All ships are in compliance with ISM, MARPOL, SOLAS, etc.
- Agreement to assist each vessel in any emergency
- Adequate insurance coverage
- Engagement of only experienced and properly trained officers and crew, Ice Masters in compliance with Standards for Training, Certification and Watchkeeping (STCW)

In terms of “Future Work” item 6 in the paper amongst other items includes

- Increased medical emergency response capabilities in remote areas.⁹⁸

IAATO Member Emergency Medical Evacuation Response (EMER) action plan.

IAATO Emergency and Medical Evacuation Response (EMER) was established in 1998⁹⁹ together with IAATO founding member Adventure Network International in Punta Arenas, Chile (EMER)¹⁰⁰ is a key component of emergency response. It is contained in the IAATO Field Operations Manual (FOM¹⁰¹) and is posted on the “members only” page of the IAATO website (www.iaato.org).¹⁰³ The FOM is updated and circulated annually to IAATO operators, and contains all relevant international governance, including ATCM instruments as well as IAATO requirements, guidelines, standard operating procedures and other industry best practice.¹⁰⁴

IAATO Passenger Medical Questionnaire

The IAATO Passenger Medical Questionnaire is referred to as “Standard Operating Document”¹⁰⁵. Samples of the questionnaire published e.g. by Hurtigruten ¹⁰⁶

⁹⁷ *ibid*

⁹⁸ *Ibid.*

⁹⁹ Report of the International Association of Antarctica Tour Operators 2008-2009 <https://iaato.org/wp-content/uploads/2020/03>

¹⁰⁰ Report of the International Association of Antarctica Tour Operators (IAATO) XXII ATCM 1998

¹⁰¹ The FOM is updated and circulated annually to IAATO operators, and contained all relevant international governance, including ATCM instruments as well as IAATO requirements, guidelines, standard operating procedures and other industry best practice.

¹⁰² *Supra* 101

¹⁰³ *Supra* 101

¹⁰⁴ IAATO Field Operations Manual (FOM) XLII ATCM Prague, 2019

¹⁰⁵ Regulation of Antarctic Tourism--A Marine Perspective, Information Paper Submitted by IAATO at the ATCM 2008, Appendix 3, Index of IAATO Guidelines and Adopted Procedures

¹⁰⁶ 4b-IAATO Sample Medical questionnaire (revised 2015) <https://www.singlestravelintl.com/2017/11/FO...>

*IAATO Observer Programme*¹⁰⁷

At its 2019 Annual Meeting in Cape Town, South Africa, IAATO Operators voted unanimously to implement a scheme of periodic mandatory observations of all member operations to ensure Operators' and other stakeholders' compliance with all IAATO and Treaty policies and procedures¹⁰⁸. Under the Programme, all IAATO Operator companies are required to carry an IAATO-approved observer during the first Antarctic season of a new-build/newly converted vessel or during the first year of operation of a new deep field camp, unless exempted by the Executive Committee on the advice of the Membership Committee. The Programme includes an Annual Internal Review Checklist¹⁰⁹ to be completed once per season per operator and filed internally within each Member company on an annual basis. This checklist for vessel operators covers, *inter alia*,

To ensure that passengers -- whether booked through charterers, wholesalers, sponsoring organisations, or directly are requested to supply relevant medical information (as appropriate);

Passengers have adequate insurance cover (as appropriate);

Prior to arrival in Antarctica, passengers will receive a copy of Recommendation XVIII-1 Guidance for Visitors to the Antarctic and the IAATO safety and conservation briefing or company equivalent.

If operating a SOLAS Passenger vessel, ensure vessel tracking system operation planned and prepared to start tracking hourly while in Antarctic waters;

Ensure Master or Ice Pilot have appropriate Antarctic experience. Consider additional relevant Antarctic experience among the bridge officers, as appropriate.

Additionally, each IAATO vessel or deep field camp is required to be observed once every 5 years of Antarctic operation.¹¹⁰

The Operator's responsibilities include:

No less than three months prior to departure, the operator should send to the observer (a) all pre-trip information provided to passengers and (b) all forms, especially medical forms, required to be completed and returned by passengers.

¹⁰⁷ IAATO 2019 Annual Meeting Cape Town, South Africa April 30 – May 3, 2019

¹⁰⁸ IAATO Mandatory Observer Scheme Information Paper Submitted by IAATO 2019

¹⁰⁹ IAATO Enhanced Review/Observer Scheme Annual Internal Review Checklist [https://iaato.org › download › ip107-appendix-1-...](https://iaato.org/download/ip107-appendix-1-...)

¹¹⁰ Supra 108

No less than one month prior to departure, the Operator should send to the Observer and copy to IAATO's Director of Governance and Administration A complete list of expedition staff and their specific Antarctic experience.

The Observer's obligations include to provide the company with necessary documents consistent with all passengers' requirements, such as medical certificate, proof of emergency medical/evacuation/repatriation insurance coverage, etc.; submission of a report to the IAATO Secretariat and Operator member company within two-weeks of the conclusion of the expedition.¹¹¹

Observer Checklist

IAATO provides the Observer with the IAATO Observer Report Checklist with questions covering:

- Voyage Preparation and Documentation

Did the pre-departure material explain that conditions can be severe and inhospitable and point out the necessity for suitable clothing?

Were clients advised that sophisticated medical care is unavailable in the Antarctic, and encouraged to take out medical and evacuation insurance prior to their trip?

Did they have to provide a medical questionnaire prior to their voyage?

- Antarctic Treaty and Domestic Legislation

Did the operator receive all permits from government authorities required under domestic legislation in time of departure?

- Vessel Operation

Did the Captain or an appointed ice pilot have Antarctic experience suitable for the intended operation? Was there additional relevant Antarctic experience among the bridge officers?

Did the vessel, as far as reasonable and practical, comply with the Guidelines for Ships Operating in Polar Waters?

Did the vessel participate in the IAATO vessel tracking scheme and report hourly?

¹¹¹ Supra 109

Were current hydrographic charts for the area of operation available on the bridge at all times? Please indicate which charting authority charts were being used (e.g. UKHO, Chile HO, etc.).

Which Search and Rescue (SAR) measures were put in place for self-sufficient operations? Were there onboard drill schedules, which included regular damage control scenarios related to ice damage with control measures that considered the implications of cold weather environments?

Was there a comprehensive briefing on safety issues, including the mandatory lifeboat/safety drill, conducted in a timely manner, with all passengers in attendance, and translated for non-English speaking passengers?

Were passengers' and crew's attention drawn to the necessity for suitable clothing in conditions that can be severe and inhospitable? Were passengers strongly encouraged to observe the weekly crew abandon ship drill and fire drill?

Were the relevant officers and the expedition leader familiar with IAATO's Emergency Contingency Plan?

Please describe the medical facilities and list the number and qualifications of all medical personnel onboard.

Were the relevant officers and the expedition leader familiar with IAATO's Medical Evacuation Response Plan (EMER), and was there a copy on board? If not, please describe the Emergency Medical Evacuation Response that was in place.

Were passengers and crew advised to take precautionary measures to prevent accidents during particularly difficult weather conditions?

VII. Passenger Rights against the Carrier

Athens Convention relating to the Carriage of Passengers and their Luggage by Sea 1974 (PAL) and the 2002 Protocol

PAL was adopted within the IMO framework in 1974 and entered into force on 28 April 1987¹¹². The intention was to harmonise two earlier Brussels conventions dealing with passengers and luggage and adopted in 1961 and 1967.¹¹³

¹¹²[https://www.imo.org/en/About/Conventions/Pages/Athens-Convention-relating-to-the-Carriage-of-Passengers-and-their-Luggage-by-Sea-\(PAL\).aspx](https://www.imo.org/en/About/Conventions/Pages/Athens-Convention-relating-to-the-Carriage-of-Passengers-and-their-Luggage-by-Sea-(PAL).aspx)

¹¹³ Ibid

The text of PAL can be found here ¹¹⁴. Signatory states to PAL, including the EU, are listed in the UN Treaties list. ¹¹⁵

Scope of application

PAL Art. 2 defines the scope of application. It applies to international carriage only, i.e. not domestic cruises as defined in Art. 1 (9). First, there has to be an international carriage:

"international carriage" means any carriage in which, according to the contract of carriage, the place of departure and the place of destination are situated in two different States, or in a single State if, according to the contract of carriage or the scheduled itinerary, there is an intermediate port of call in another State”..

Considering that Antarctica is not a “State”, cruises that sail from ports in states to Antarctica, calling at an Antarctic port and returning to the port of embarkation do not qualify as “international carriage” as defined in PAL. PAL might apply if incorporated into the contract of carriage but it is a matter of construction under the law applicable to the contract if the missing element of the internationality of the carriage can be ignored when PAL is incorporated unamended.

If there is a call at an intermediate port in another “State”, making the voyage an “international carriage”, PAL applies by force of law without the need to be included in the contract ¹¹⁶, if, as set out in PAL Art. 2 (1):

- the ship is flying the flag of or is registered in a State Party to this Convention,
or
- the contract of carriage has been made in a State Party to this Convention,
or
- the place of departure or destination, according to the contract of carriage, is in a State Party to this Convention.

The Convention does not concern itself with claims for damages by passengers for lost holiday enjoyment due to quality complaints.¹¹⁷ It applies automatically, regardless of whether its terms are incorporated in the contract of carriage/the ticket.

¹¹⁴ <http://www.admiraltylawguide.com/conven/passengers1974.html>

¹¹⁵ <https://treaties.un.org/pages/showdetails.aspx?objid=08000002800cdbb3>

¹¹⁶ Rosemary Gibson CRUISE SHIP PASSENGER CONTRACTS: THE TRIP OF A LIFETIME OR A VOYAGE THROUGH CLAUSES, CONVENTIONS AND CONFUSION? p. 31; <http://138.25.65.17> › journals › ANZMarLawJl › 8.pdf

¹¹⁷ Sarah Prager, Jack Harding; “It’s all Greek to me: the importance of pleading the Athens Convention in Cruise cases”, [2010] Travel Law Quarterly, p. 24

Passenger

The party entitled to sue is the passenger who becomes a passenger under a contract of carriage (PAL Art. 1 (2) Definitions).

Carriage

Carriage covers the time from embarkation to disembarkation (PAL Art. 1 (8) Definitions). It does not cover shore excursions.

Contractual and Performing Carrier

The party liable is the actual and/or the performing carrier.

Pursuant to PAL Art. 1 (1) (a),(b) a “carrier” is a person by or on behalf of whom a contract of carriage has been concluded, whether the carriage is actually performed by him or by a performing carrier (contractual carrier). A "performing carrier" means a person other than the carrier, being the owner, charterer or operator of a ship, who actually performs the whole or a part of the carriage. In the premises, “carrier” may include a non-vessel owning tour operator¹¹⁸

PAL Art. 4 (1) provides that both are liable jointly and severally.

Fault

The liability regime is fault-based: the burden is on the claimant to prove fault or neglect by the carrier, or his servants or agents (PAL Art 3(2)) Fault is presumed unless the carrier is able to prove otherwise. The presumption arises when death, personal injury or loss of luggage occurred from or in connection with the shipwreck, collision, stranding, explosion or fire, or defect in the ship itself (PAL Art 3(3)).

Limitation of Liability

The carrier is entitled to limit liability expressed in Special Drawing Rights (SDR's). (PAL Arts 7-11). The carrier and the passenger may agree, expressly and in writing, to higher limits (PAL Art 10(1)).As to the actual limits applicable under the 2002 Protocol please see below, page 36. The limitation of liability applies per passenger

No limitation applies if the carrier acted with intent to cause damage, or recklessly and with knowledge, that such damage would probably result (PAL Art. 13).

¹¹⁸ *ibid*

Exclusive legal framework

PAL Art 14 states the exclusivity of the Convention as a basis for a Convention claim, providing that “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”.

Time-bar for actions

PAL Art. 16 provides:

1. Any action for damages arising out of the death of or personal injury to a passenger or for the loss of or damage to luggage shall be time-barred after a period of two years.
2. The limitation period shall be calculated as follows:
 - a) in the case of personal injury, from the date of disembarkation of the passenger;
 - b) in the case of death occurring during carriage, from the date when the passenger should have disembarked, and in the case of personal injury occurring during carriage and resulting in the death of the passenger after disembarkation, from the date of death, provided that this period shall not exceed three years from the date of disembarkation;
 - c) in the case of loss of or damage to luggage, from the date of disembarkation or from the date when disembarkation should have taken place, whichever is later.
3. The law of the court seised of the case shall govern the grounds of suspension and interruption of limitation periods, but in no case shall an action under this Convention be brought after the expiration of a period of three years from the date of disembarkation of the passenger or from the date when disembarkation should have taken place, whichever is later. (The expiration period was extended to five years under the 2002 Protocol, to which below on page 36).
4. Notwithstanding paragraphs 1, 2 and 3 of this Article, the period of limitation may be extended by a declaration of the carrier or by agreement of the parties after the cause of action has arisen. The declaration or agreement shall be in writing.

Competent jurisdiction

According to PAL Art. 17 a claimant has various options where to sue the carrier, always provided the court is located in a State Party to this Convention:

- The court of the place of permanent residence or principal place of business of the defendant, or
- The court of the place of departure or that of the destination according to the contract of carriage, or
- The court of the State of the domicile or permanent residence of the claimant, if the defendant has a place of business and is subject to jurisdiction in that State, or
- court of the State where the contract of carriage was made, if the defendant has a place of business and is subject to jurisdiction in that State.

The parties may agree to a different forum after the occurrence of the incident, which has caused the damage.

No contracting out

PAL Art. 18 stipulates that the Convention rules are mandatory:

“Any contractual provision concluded before the occurrence of the incident which has caused the death of or personal injury to a passenger or the loss of or damage to his luggage, purporting to relieve the carrier of his liability towards the passenger or to prescribe a lower limit of liability than that fixed in this Convention except as provided in paragraph 4 of Article 8, and any such provision purporting to shift the burden of proof which rests on the carrier, or having the effect of restricting the option specified in paragraph 1 of Article 17, shall be null and void, but the nullity of that provision shall not render void the contract of carriage which shall remain subject to the provisions of this Convention.”

1976 Protocol

Art. 9 of the Protocol of 19 November 1976, the Special Drawing Right (SDR) was introduced as unit of account, replacing the Poincaré franc¹¹⁹. Under art. 7 and 8 of the 1976 Protocol, the liability of the carrier for the death of or personal injury to a passenger was limited to 46,666 SDR's , the limit for loss of or damage to cabin luggage was limited to 833 SDRs, the limit for loss of or damage to vehicles to 3,333 SDRs and the limit for loss of or damage to luggage other than cabin luggage was 1,200 SDRs.

¹¹⁹ <https://www.i-law.com/ilaw/doc/view.htm?id=346789>

2002 Protocol - The Athens Convention 2002

The latest revision of the Athens Convention took place through the 2002 Protocol to the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 1974 (2002 Protocol) adopted under the auspices of IMO. It was adopted 1 November 2002 and entered into force on 23 April 2004. The 2002 Protocol and PAL are to be read together as one single instrument (Art. 15 (1) of the Protocol)¹²⁰

Liability regimes – strict and fault based

The Athens Convention 2002 substantially increased liability levels and sets out two liability regimes for shipping incidents, namely shipwreck, capsizing, collision, stranding, explosion or fire in the ship, defect in the ship PAL 2002 Art. 3 (5)(a). A strict liability regime is introduced up to a certain limitation beyond which the fault-based regime applies. Pursuant to PAL 2002 Art. 3 (1):

“For the loss suffered as a result of the death of or personal injury to a passenger caused by a shipping incident, the carrier shall be liable to the extent that such loss in respect of that passenger on each distinct occasion does not exceed 250,000 units of account, unless the carrier proves that the incident: a) resulted from an act of war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional, inevitable and irresistible character; or b) was wholly caused by an act or omission done with the intent to cause the incident by a third party.

If and to the extent that the loss exceeds the above limit, the carrier shall be further liable unless the carrier proves that the incident which caused the loss occurred without the fault or neglect of the carrier.”

PAL Art. 3 (2) provides:

“For the loss suffered because of the death of or personal injury to a passenger not caused by a shipping incident, the carrier shall be liable if the incident which caused the loss was due to the fault or neglect of the carrier. The burden of proving fault or neglect shall lie with the claimant”.

PAL 2002 Art. 7 sets the limit for fault based liability for death and personal injury at SDR 400,000:

“1. The liability of the carrier for the death of or personal injury to a passenger under Article 3 shall in no case exceed 400,000 units of account per passenger on each distinct occasion. Where, in accordance with the law of the court seized of the case, damages are awarded in

¹²⁰ Consolidated text of the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 1974 and the Protocol of 2002 to the Convention <https://www.travellawquarterly.co.uk/resources/other-legislation-and-treaties/athens-convention-relating-to-the-carriage-of-passengers-and-their-luggage-by-sea-2002/attachment/consolidated-text-of-the-athens-convention-1974-and-the-2002-protocol/>

the form of periodical income payments, the equivalent capital value of those payments shall not exceed the said limit.”

Article 13 of the Athens Convention 2002 provides

“The carrier shall not be entitled to the benefit of [those] limits of liability (...), if it is proved that the damage resulted from an act or omission of the carrier done with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result”. The revision included the following amendments of PAL 1974.

Compulsory insurance

The Protocol introduced new liability and limitation regime as well as compulsory insurance to cover passengers.¹²¹ All ships registered in a State party and licensed to carry 12 or more passengers, have to carry insurance at least up to the sum of 250,000 SDR per passenger on each occasion, which is the limitation for strict liability for claims arising out of death or personal injury (Protocol Art. 4 bis (1))

Direct action

To protect passengers in the event of insolvency¹²² of the carrier, claimants can pursue a direct action against the carrier’s insurers for any claim that may arise (Protocol Art. 4 bis (10)).

Time-bar for actions

Article 16, paragraph 3, of PAL is replaced by the following text:

The law of the Court seized of the case shall govern the grounds for suspension and interruption of limitation periods, but in no case shall an action under this Convention be brought after the expiration of any one of the following periods of time:

- a) A period of five years beginning with the date of disembarkation of the passenger or from the date when disembarkation should have taken place, whichever is later; or, if earlier
- b) a period of three years beginning with the date when the claimant knew or ought reasonably to have known of the injury, loss or damage caused by the incident..

¹²¹[https://www.imo.org/en/About/Conventions/Pages/Athens-Convention-relating-to-the-Carriage-of-Passengers-and-their-Luggage-by-Sea-\(PAL\).aspx](https://www.imo.org/en/About/Conventions/Pages/Athens-Convention-relating-to-the-Carriage-of-Passengers-and-their-Luggage-by-Sea-(PAL).aspx)

¹²² Aleka Mandaraka-Sheppard, Modern Maritime Law and Risk Management, Chapter 18, Passengers’ Claims and Limitation of Liability, para. 4.1.

PAL 2002: without prejudic to to other limitation regimes, e.g. LLMC

PAL Art. 19 provides that carriers may invoke other limitation of liability, e.g. Limitation of Liability Convention for Maritime Claims 1976 (LLMC) setting a global limit on all passenger claims arising from any particular incident as opposed to PAL, setting a limit for each passenger. The 1996 LLMC Protocol, as agreed by the IMO Legal Committee in 2012 and came into effect internationally in June 2015 through the Protocol's tacit acceptance procedure.

The limits for passengers are set out in LLMC Art.7:

In respect of Claims arising on any distinct occasion for loss of life or personal injury to passengers of a ship, the limit of liability of the shipowner thereof shall be an amount of 175,000 Units of Account multiplied by the number of passengers which the ship is authorized to carry according to the ship's certificate,

The LLMC provides a limitation of liability for passenger claims of up to SDR 175,000 multiplied by the number of passengers authorised to be carried according to the ship's certificate, in the event of an incident involving death or injury to passengers, or loss or damage to their luggage.¹²³

Under PAL 2002 limitation applies per injured passenger actually on board. The differences between the global limitation and PAL 2002 may be illustrated as follows:¹²⁴

If 10 passengers are injured on board a passenger ship certified to carry 3,000 passengers, due to a shipping incident, under PAL 2002 the total maximum liability of the carrier would be SDR 4,000,000. If all passengers perish or are injured, the overall liability of the carrier under PAL 2002 would be SDR 400,000 multiplied by 3,000 passenger, i.e. SDR 1.2 billion. By contrast, under the LLMC, the global limit in this scenario would be SDR 525 million so there would be up to SDR 675 million uncovered losses.

The Governments of Sweden and Finland have made use of the option in LLMC 1996 Protocol Art. 15 (3bis) and increased the LLMC limitation limit to align with PAL 2002.¹²⁵

¹²³ Andrew Kelly, Department for Transport, consultation on changes to domestic legislation implementing certain international maritime liability conventions, 22.12.2025, para. 1.3; https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/488012/maritime-legislation-consultation.pdf

¹²⁴ MM Slinde, "Carriers Liability for Death or Personal Injury under the International Maritime Convention"; Diss. Faculty of Law, Oslo, 2016, p. 17; Dr. Simone Lamont-Black, "Sea Passenger Rights and the Implementation of the Athens Convention in the EU", University of Edinburgh, School of Law, Research Paper Series No 2018/35., p. 19

¹²⁵ STATUS OF IMO TREATIES, 2009 LLMC Protocol, Declarations, Reservations and Statements; pp. 297, 402. <https://wwwcdn.imo.org> > StatusOfConventions

The European Union and the 2002 Protocol

The European Union adopted the Convention and the 2002 Protocol¹²⁶ (Regulation No 392/2009 – Passenger Liability Regulation or PLR) on 23 April 2009. According to Art. 12 of the Regulation,

” it shall apply from the date of the entry into force of the Athens Convention for the Community and in any case from no later than 31 December 2012.”

The PLR adopts most provisions of PAL as amended by the 2002 Protocol. The rules on jurisdiction as well as on recognition and enforcement (Protocol Art. 10 and 11) which are regulated in the Brussels Regulation (recast) are not included.¹²⁷

The Scope of application is extended from international carriage as defined in PAL to cover domestic carriage (PLR Art. 2) by Class A ships and as of 31 December 2018 to Class B ships (PLR Art. 11).¹²⁸ Member States that have made the Regulation applicable to Class C and D ships (e.g. Denmark, Sweden and the Netherlands) created exemptions to adopt certain provisions of the Regulation, as in the case of Denmark.¹²⁹

While PAL 2002 does not affect the availability of any applicable global limitation regimes (PAL Art. 19), under PLR Art. 5 only national law implementing global limitation in form of the Convention on Limitation of Liability for Maritime Claims (LLMC) 1976 as amended by the Protocol of 1996, including any further amendments thereof are allowed. In the absence of any such applicable national legislation, only PLR Art 3 shall govern the liability of the carrier or performing carrier.¹³⁰

Application of PAL to currently IAATO registered vessels

Of the flag state jurisdictions set out in Annex 2, all European countries apply PAL 1974 and the 2002 Protocol through Regulation (EC) No 392/2009 of the European Parliament and of the Council of 23 April 2009 on the liability of carriers of passengers by sea in the event of accidents.

The United Kingdom retained Regulation (EU) No 392/2009, as amended by Regulation 6 of the Merchant Shipping (Passenger Rights) (Amendment etc.) (EU Exit) Regulations 2019 (SI 2019/649) after Brexit. The amended version came into force on 31 December 2019. The

¹²⁶ Regulation (EC) No 392/2009 of the European Parliament and of the Council of 23 April 2009 on the liability of carriers of passengers by sea in the event of accidents [2009] OJ L 131, 28.5.2009, pp. 24-46 <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:131:0024:0046:EN:PDF>

¹²⁷ Regulation (EU) No 1215/2012

¹²⁸ As to classes of ships and the sea areas they are allowed to sail, see Directive (EU) 2017/2108 of the European Parliament and of the Council of 15 November 2017 amending Directive 2009/45/EC on safety rules and standards for passenger ships [2017]; OJ L 315, 30.11.2017 p. 40-51

¹²⁹ Support study to the Evaluation of Regulation (EC) 392/2009 Final Report 2017, ii, vii (<https://transport.ec.europa.eu/system/files/2017-10/2017-ex-post-evaluation-regulation-2009-0392-final-report.pdf>)

¹³⁰ Dr Simone Lamont- Black, Sea Passenger Rights and the Implementation of the Athens Convention in the EU, pp.42,43, <http://www.austlii.edu.au/au/journals/ANZMarLawJl/2018/9.pdf>

Regulations implement the Athens Convention 1974 relating to the Carriage of Passengers and their Luggage by Sea (as amended by the Protocol of 2002)¹³¹.

The Cayman Islands apply PAL 1974 and the 1976 Protocol¹³², as has Liberia¹³³.

The Marshall Islands acceded to the 1974 Convention and the 2002 Protocol¹³⁴

Brazil has not signed PAL 1974 but the 1976 Protocol¹³⁵

Saint Vincent & the Grenadines have not signed PAL 1974 or any Protocol thereto¹³⁶.

Liberia acceded to PAL 1974 and to the 1976 Protocol¹³⁷

The Bahamas acceded to PAL 1974 and the 1976 Protocol¹³⁸.

Norway acceded to the 2002 Athens Convention and the 2002 Protocol¹³⁹

Antigua & Barbuda has not signed PAL 1974 or any Protocol thereto¹⁴⁰. The same applies to Togo¹⁴¹

DIRECTIVE (EU) 2015/2302 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 25 November 2015 on package travel and linked travel arrangements ¹⁴²

Directive (EU) 2015/2302 on package travel and linked travel arrangements ('the PTD' or 'the Directive') was adopted 25 November 2015. It replaced Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours.

¹³¹ <https://www.gov.uk/government/publications/rights-of-passengers-travelling-by-sea-in-the-event-of-an-accident>

¹³² <https://www.cishipping.com/system/files/notices/documents/CIGN%202020%2003%20Rev%20%20-%20Conventions%20Extended.pdf?download=1>

¹³³ https://treaties.un.org/Pages/showDetails.aspx?objid=08000002800c3599&clang=_en

¹³⁴ <https://treaties.un.org/Pages/showDetails.aspx?objid=080000028053bf55>

¹³⁵ https://treaties.un.org/Pages/showDetails.aspx?objid=08000002800c3599&clang=_en

¹³⁶ <https://treaties.un.org/pages/showdetails.aspx?objid=08000002800cddb3>;
https://treaties.un.org/Pages/showDetails.aspx?objid=08000002800c3599&clang=_en;

¹³⁷ https://treaties.un.org/Pages/showActionDetails.aspx?objid=08000002800cdc55&clang=_en;
https://treaties.un.org/Pages/showDetails.aspx?objid=08000002800c3599&clang=_en

¹³⁸ <https://treaties.un.org/pages/showdetails.aspx?objid=08000002800cddb3>;
https://treaties.un.org/Pages/showDetails.aspx?objid=08000002800c3599&clang=_en

¹³⁹ https://treaties.un.org/Pages/showActionDetails.aspx?objid=080000028053c08a&clang=_en

¹⁴⁰ <https://treaties.un.org/pages/showdetails.aspx?objid=08000002800cddb3>

¹⁴¹ <https://treaties.un.org/pages/showdetails.aspx?objid=08000002800cddb3>

¹⁴² Directive (EU) 2015/2302 of the European Parliament and of the Council of 25 November 2015 on package travel and linked travel arrangements, amending Regulation (EC) No 2006/2004 and Directive 2011/83/EU of the European Parliament and of the Council and repealing Council Directive 90/314/EEC [2015] OJ L 326, 11-12-2015; p. 1-33

EU countries had to incorporate it into national law by 1 January 2018. It became applicable from 1 July 2018. The PTD sets out consumer rights in relation to package travel, in particular with regard to information requirements, the liability of traders in relation to the performance of a package, and protection against the insolvency of an organiser or a retailer.

The parties subject to the Directive are defined in PTD Art. 3:

- Traders as persons acting in relation to packages and linked travel arrangements for commercial purposes (and other purposes relating to their trade)
- Organisers as traders who combine and sell/offer packages directly or through another trader
- Retailers as traders other than organisers, who sell/offer packages combined by an organiser
- Travellers as persons seeking to conclude a contract or entitled to travel on the basis of a contract concluded.

The PTD applies to all sales, which include two or more different types of travel services for the same holiday, booked under a single contract with one supplier. Package travel also includes sales where services are booked with different suppliers under separate contracts, as long as one of the following conditions is met:

- The travel services are bought at a single point of sale (shop, call centre or website) where the customer selects the services before agreeing to pay, i.e. before he/she concludes the first contract.
- The services were sold at an inclusive price.
- The services were advertised/sold as a "package" or under a similar term.
- Customers are entitled to choose from a selection of travel services, for example a travel gift-box.¹⁴³

The PTD generally applies to cruises, as they are a combination of carriage of passengers and accommodation and sometimes additional travel services, unless they are shorter than 24 hours and do not include overnight accommodation.¹⁴⁴

Mandatory scope of application

Under the PTD, the organiser of a package is responsible for the performance of all services forming part of the package, irrespective of whether those services are performed by the organiser itself or by other service providers¹⁴⁵

¹⁴³ https://europa.eu/youreurope/business/selling-in-eu/selling-goods-services/package-travel/index_en.htm

¹⁴⁴ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/96742/8/package-travel-and-linked-travel-arrangements-regulations-2018.pdf

¹⁴⁵ The EU Commission, Report from the Commission to the European Parliament and the Council on the application of Directive (EU) 2015/2302 of the European Parliament and of the Council on package travel and linked travel arrangements (COM (2021) 90 final, 26.2.2021); para. 1.1. p. 1; <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52021DC0090&from=EN>

It applies to both European tour operators and foreign parties selling travel products to European travellers, be it directly or via a retailer.¹⁴⁶

PTD Art.23 (“Imperative nature of the Directive”) provides:

1. A declaration by an organiser of a package or a trader facilitating a linked travel arrangement that he is acting exclusively as a travel service provider, as an intermediary or in any other capacity, or that a package or a linked travel arrangement does not constitute a package or a linked travel arrangement, shall not absolve that organiser or trader from the obligations imposed on them under this Directive.
2. Travellers may not waive the rights conferred on them by the national measures transposing this Directive.
3. Any contractual arrangement or any statement by the traveller, which directly or indirectly waives or restricts the rights conferred on travellers pursuant to this Directive or aims to circumvent the application of this Directive shall not be binding on the traveller.

This means the Directive applies to all booking contacts, including those that select a non-EU law.¹⁴⁷ A contracting-out clause in ticket terms and conditions is invalid.

Pre-contractual information requirements by organiser and/or retailer

According to PTD Art. 5, Member States shall ensure that, before the traveller is bound by any package travel contract or any corresponding offer, the organiser and, where the package is sold through a retailer, also the retailer shall provide the traveller with the standard information by means of the relevant form as set out in PTD Part A or Part B of Annex I. This information is binding, unless the organiser reserves the right to make changes to those elements and unless such changes are clearly, comprehensibly and prominently communicated to the traveller before the conclusion of the package travel contract.¹⁴⁸ The Annex lists the so-called “key rights” under the PTA, which include:

- Travellers will receive all essential information about the package before concluding the package travel contract.
- There is always at least one trader who is liable for the proper performance of all the travel services included in the contract.

¹⁴⁶ <https://www.cbi.eu/market-information/tourism/how-work-new-2018-european-package-travel-directive>

¹⁴⁷ *ibid*

¹⁴⁸ Full text of Annex I of Part A and B of the PTA: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32015L2302&from=EN>

- Travellers are given an emergency telephone number or details of a contact point where they can get in touch with the organiser or the travel agent.
- Re-funds, termination and price reductions rights in the event of quality complaints
- The organiser has to provide assistance if the traveller is in difficulty.
- If the organiser or the retailer becomes insolvent, payments will be refunded.
- If the organiser or, where applicable, the retailer becomes insolvent after the start of the package and if transport is included in the package, repatriation of the travellers is secured.
- Information on the entity in charge of the insolvency protection, e.g. a guarantee fund or an insurance company. Travellers may contact this entity or, where applicable, the competent authority (contact details, including name, geographical address, email and telephone number) if services are denied because the operator's or the retailer's insolvency.

Content of the package travel contract and documents to be supplied before the start of the package

The contents of the package travel contract is regulated in PTD Art. 7 including, inter-alia:

- It shall set out the full content of the agreement
- information that the organiser is responsible for the proper performance of all travel services included in the contract in accordance with Article 13; and obliged to provide assistance if the traveller is in difficulty, in accordance with Article 16
- the name of the entity in charge of the insolvency protection
- the name, address, telephone number, e-mail address and, where applicable, the fax number of the organiser's local representative, of a contact point or of another service which enables the traveller to contact the organiser quickly and communicate with him efficiently, to request assistance when the traveller is in difficulty or to complain about any lack of conformity perceived during the performance of the package

Responsibility for the performance of the package

Recital (22) summarises the responsibilities set out in PTD Art. 13:

“The main characteristic of a package is that there is one trader responsible as an organiser for the proper performance of the package as a whole..... Whether a trader is acting as an organiser for a given package should depend on that trader's involvement in the creation of the package, and not on how the trader describes his business. When considering whether a trader is an organiser or retailer, it should make no difference whether that trader is acting on the supply side or presents himself as an agent acting for the traveller”

Under Art. 13, the organiser is responsible for the performance of the travel services included in the package travel contract, irrespective of whether those services are to be performed by the organiser or by other travel service providers. Under Article 13(3), if any of the travel services are not performed in accordance with the package travel contract, the organiser shall remedy the lack of conformity, unless it is impossible; or entails disproportionate costs, taking into account the extent of the lack of conformity and the value of the travel services affected, Article 14 shall apply.

As long as it is impossible to ensure the traveller's return as agreed in the package travel contract because of unavoidable and extraordinary circumstances, the organiser shall bear the cost of necessary accommodation, if possible of equivalent category, for a period not exceeding three nights per traveller. This limit does not apply to travellers with reduced mobility, as defined in lit. (a) of Article 2 of Regulation (EC) No 1107/2006, and any person accompanying them; pregnant women and unaccompanied minors, as well as persons in need of specific medical assistance, provided that the organiser has been notified of their particular needs at least 48 hours before the start of the package.

Termination

According to Art. 12, both the traveller and the tour operator can cancel the trip without penalty in the event of “unavoidable and extraordinary circumstances occurring at the place of destination or its immediate vicinity and significantly affecting the performance of the package, or which significantly affect the carriage of passengers to the destination.”

“Unavoidable and extraordinary circumstances” mean a situation beyond the control of the party who invokes such a situation and the consequences of which could not have been avoided even if all reasonable measures had been taken (PTD Art. 3 (12)). It includes, for example, wars, natural disasters, other serious security problems such as terrorism, significant risks to human health, such as the outbreak of a serious disease at the travel destination, or natural disasters such as floods, earthquakes or weather conditions which make it impossible to travel safely to the destination as agreed in the package travel contract ¹⁴⁹

Price reduction and compensation for damage; exclusion of compensation

PTD Art. 14 stipulates that the traveller is entitled to an appropriate price reduction for any period during which there was lack of conformity, unless the organiser proves that the lack of conformity is attributable to the traveller. The traveller shall be entitled to receive appropriate compensation from the organiser for any damage, which the traveller sustains because of any lack of conformity. Compensation should also cover non-material damage, such as compensation for loss of enjoyment of the holiday because of substantial problems in the performance of the relevant travel services.¹⁵⁰

¹⁴⁹ Dir. (EU) 2015/2302, Recital (31)

¹⁵⁰ Ibid, Recital (34)

PTD Art 14 (3):the traveller shall not be entitled to compensation for damage if the organiser proves that the lack of conformity is attributable to the traveller or attributable to a third party unconnected with the provision of the travel services included in the package travel contract and is unforeseeable or unavoidable; or due to unavoidable and extraordinary circumstances.

Limitation of Liability

The PTD does not affect the rights of travellers to claim both under the PTD and under other relevant EU legislation or international conventions, notably PAL (EC 392/2009) (PTD Art. 14 (5)).

To avoid overcompensation, compensation or price reduction granted under PTD and the compensation or price reduction granted under other relevant Union legislation or international conventions should be set off against each other.

Insofar as international conventions binding the Union limit the extent of or the conditions under which compensation is payable by a provider carrying out a travel service, which is part of a package, the same limitations shall apply to the organiser. Insofar as international conventions not binding the Union limit compensation to payable by a service provider, Member States may limit compensation payable by the organiser accordingly. Recital (35) states in this context.

“In order to ensure consistency, it is appropriate to align the provisions of this Directive with international conventions regulating travel services and with the Union passenger rights legislation. Where the organiser is liable for failure to perform or improper performance of the travel services included in the package travel contract, the organiser should be able to invoke the limitations of the liability of service providers set out in such international conventions as the Montreal Convention of 1999 for the Unification of certain Rules for International Carriage by Air, the Convention of 1980 concerning International Carriage by Rail (COTIF) and the Athens Convention of 1974 on the Carriage of Passengers and their Luggage by Sea”

PTD Art: 14 (4) provides on limitation (emphasis added):

Insofar as international conventions binding the Union limit the extent of or the conditions under which compensation is payable by a provider carrying out a travel service, which is part of a package, the same limitations shall apply to the organiser. Insofar as **international conventions not binding the Union** limit compensation payable by a service provider, Member States may limit compensation payable by the organiser accordingly. In other cases, the package travel contract **may limit compensation payable by the organiser** as long as **that limitation does not apply to personal injury** or damage caused intentionally or with negligence and does not amount to less than three times the total price of the package.

Insolvency protection

Organisers established in a Member State territory or offering or selling package travels in the Member State from a Third Country, must arrange for effective security for the refund of all payments made by or on behalf of travellers or, if the carriage of passengers is involved, for their repatriation, if the relevant services are not performed because of the organiser's insolvency (PTD Art. 17). The solvency of an organiser is of significant importance in relation to the costs of repatriation in the event of adverse circumstances (see e.g. ATCP Measure 4 (2004) above). Antarctic cruise tourism may not reach the dimensions of land-based package travelling as became manifest when Thomas Cook became insolvent in September 2019. The insolvency affected around 600 000 holidaymakers¹⁵¹, who either had to be repatriated or reimbursed the money they had paid in advance. To the extent that travellers had bought a package tour, they were covered by the relevant national insolvency protection schemes.¹⁵² The insolvency of Thomas Cook's German subsidiaries left around 140 000 travellers stranded abroad, who were repatriated with the help of the insolvency protection provider Zurich Versicherungen. However, insolvency protection, proved insufficient to fully cover the refunds of travellers not yet at their destination (estimated € 287.4 million), because the liability of the insurance provider was capped.¹⁵³ The German government committed to compensate all affected travellers.¹⁵⁴

A further aspect in the context of insolvency insurance was raised in the EU Commission Report on the PTD (see fn. 136). Business stakeholders represented in the PTD expert group and authorities expressed concerns that it may be increasingly difficult to find appropriate insolvency protection providers prepared and capable to cover the risks related to the insolvency of a large organiser. Travel guarantee funds and insurance companies providing insolvency protection are rare and are reportedly pulling out of the market, which increases the pressure to find a solid protection system, especially, since insolvency protection is mandatory for an operator under the PTA.

International Convention on Travel Contracts (CCV) (Brussels, April 23, 1970)

The CCV, a UNIODROIT document, was adopted in Brussels on 23.04.1970 and entered into force on 21.03.1976 with only six signatory states, including Italy.¹⁵⁵

According to the Acts of the Diplomatic Conference on the Travel Contract in Brussels, April 1970, published by J. Goemaere, Brussels, for the Belgian Ministry of Foreign Affairs and Foreign Trade,

“it was during the work of preparation of the draft Convention on the contract for the international carriage of passengers and luggage by road (C.V.R.), in 1958, that the

¹⁵¹ supra 133; para. 4.1, p. 10

¹⁵² *ibid*

¹⁵³ *ibid*

¹⁵⁴ *ibid*

¹⁵⁵ <https://www.unidroit.org/instruments/transport/ccv/status/>

attention of UNIDROIT was...drawn to elaborating uniform rules of private law concerning the legal relationships between travel agents and their clients.”¹⁵⁶

The CCV influenced later EU legislation: the first Package Travel Directive Directive 90/314/EEC, refers to the same classifications as contained in the CCV, e.g. the definition of "package" in Directive No. 90/314 corresponds to “the organised travel contract" as defined in the CCV¹⁵⁷as

“Any contract whereby a person undertakes in his own name to provide for another, for an inclusive price, a combination of services comprising transportation, accommodation separate from the transportation or any other service relating thereto”.¹⁵⁸

The performing person in the CCV is the “travel organiser”, meaning

“Any person who habitually or regularly undertakes to perform the contract..., whether or not such activity is his main business and whether or not he exercises such activity on a professional basis.”¹⁵⁹

In view of the low number of signatories the contribution of this convention to the protection of international tourists is considered limited.¹⁶⁰ However, Italy also ratified the CCV. It still is part of Italian law and exists alongside the PTD, which applies compulsorily in Italy as an EU Member State. It also forms part of ticket terms and conditions in passenger shipping (see below “Ticket Terms & Conditions”). As stated by professor Michele Comenale Pinto, this poses “the problem of coordination between EU law and international uniform law, with consequent problems of identification of appropriate norms to apply in a given situation.”¹⁶¹.

The conflict concerns, in particular, the travel organiser’s limitation of liability under the CCV limitation regime set out in CCV Art. 13:

1. The travel organiser shall be liable for any loss or damage caused to the traveller as a result of non-performance, in whole or in part, of his obligations to organise as resulting from the contract or this Convention, unless he proves that he acted as a diligent travel organiser.

¹⁵⁶ <https://www.unidroit.org/instruments/transport/ccv/overview/>

¹⁵⁷ Stefano Zunarelli, *Fordham International Law Journal*, Volume 17, Issue 3 1993 Article 2, Package Travel Contracts: Remarks on the European Community Legislation, pp. 492,492

¹⁵⁸ CCV Art.1 (2)

¹⁵⁹ CCV Art.1 (5)

¹⁶⁰ Hague Conference on Private International Law – Conférence de La Haye de droit international privé, www.hcch.net Council on General Affairs and Policy – March 2020, Report of the Experts’ Group on the Cooperation and Access to Justice for International Tourists (Tourism and Visitors Project), pp. 31,32

¹⁶¹ Michele M. Comenale Pinto, “Legal Profiles of Travel Packages and the Directive (EU) 2015/2302 of the European Parliament and of the Council of 25 November 2015; para. 3 “The CCV” <https://www.dirittoestoria.it/16/contributi/Comenale-Pinto-Legal-Profiles-Travel-Packages.htm>

2. Without prejudice to the questions as to which persons have the right to institute proceedings and what are their respective rights, compensation payable under paragraph 1 shall be limited for each traveller to:
- 50.000 francs for personal injury,
 - 2.000 francs for damage to property,
 - 5.000 francs for any other damage.

However, a Contracting State may set a higher limit for contracts concluded through a place of business located in its territory.

The “franc” referred to is the gold franc weighing 10/31 of a gramme and of a millesimal fineness of 0.900. (CCV Art. 24), also known as Germinal franc ¹⁶² with a gold content of 0.29032 gram¹⁶³. The conversion into currencies to calculate the respective limitations depends on the gold price.

The organiser shall be liable for any loss or damage caused to the traveller because of non-performance, in whole or in part, of his obligations resulting from the contract or the CCV, unless he proves that he acted as a diligent travel organiser. This is considered a liability of presumed fault ¹⁶⁴

Overlap and Conflict

CCV Art. 13 conflicts with PTD Art. 14 (4) in that as a convention non-binding on the EU it allows limitation for personal injury.

The CCV also overlaps and conflicts with Athens Convention as implemented in EU Law (PAL) as well as the Convention and the 2002 Protocol regarding death and personal injury. The CCV does not contain strict liability elements.

On overlap and conflict with EU law under EU law the position is that the principle of the primacy of EU law as developed over time by the CJEU ¹⁶⁵ Member State obligations on the international level cannot affect or suspend the validity of EU legislation. If an international treaty, entered into by one or more Member States after 1958, the year the Treaty of Rome came into force, collides with a Community measure, that treaty is considered national law and, because of the supremacy

¹⁶² UN Commission on International Trade Law, yearbook. Vol. XV, 1984, p. 297; [uncitral.un.org › files › media-documents › uncitral › yb_1984_e](http://uncitral.un.org/files/media-documents/uncitral/yb_1984_e),

¹⁶³ <https://www.bis.org/press/p960610a.htm>

¹⁶⁴ Stefano Zunarelli “Package Travel Contracts: Remarks on the European Community Legislation” Fordham International Law Journal Volume 17, Issue 3 1993, p. 497

¹⁶⁵ E.g. Judgment of the Court of 5 February 1963. - NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration. - Reference for a preliminary ruling: Tariefcommissie - Pays-Bas. - Case 26-62.

rule, will not apply¹⁶⁶. The precedence principle governs to all European acts, such as directives and regulations, with a binding force. Therefore, Member States may not apply a national rule, which contradict European law.¹⁶⁷

VIII Standard Terms and Conditions

The contractual relationship between the passenger and the cruise line as the carrier is governed by the contract of carriage, conventionally referred to as “the ticket”¹⁶⁸ or “passage contract”. Travel documents are also referred to as “cruise contract”, “holiday contract” or “booking terms and conditions”, if the cruise is booked through a party other than the line or with an organiser as opposed to the actual carrier. Standard terms and conditions invariably contains terms set by the carrier/then organiser as standard non-negotiated terms and conditions to be used for a multitude of similar contracts. The terms individually agreed are commonly limited to the price of the cruise and the cabin category.

Whether the terms and conditions are valid as such, respectively to what extent validly incorporated into the contract is a question of the (consumer protection) law applicable to the individual contract and is beyond the remit of this report. Indeed, documents issued by a cruise line referred to as “terms and conditions” may expressly state that they do **not** form part of any offer or contract (e.g. “Silversea Cruises”, below), yet they contain terms worded as obligations (“...must take out travel insurance...”) or exclusion rights (“...Silversea will not pay for claims...”). “Binding” terms are contained in the “Holiday Contract”.

Standard terms usually cover contract formation, rates, itineraries, deviations, cancellation policies, performance, obligations and liabilities, exclusion and limitations of liability pursuant to PAL, LLMC and EU legislation, force majeure, termination and law and jurisdiction. In the context of the carriage of passengers by sea the clauses concerning the passenger’s fitness to travel and disclosure of medical conditions and medical treatment on board, which are the responsibility at his risk and cost. In the context of Antarctic expeditions or adventure cruises some cruise line terms require or recommend that passengers take out evacuation insurance. Specific reference to the remoteness and associated risks to life or health feature in the tour operator is terms (Polar Latitudes, Quark expedition). Liability for emotional distress claims are excluded as is the right to arrest the ship or to join a class action.

Cruise lines who are members of CLIA may also refer in their ticket conditions to the Passenger Bill of Rights. In 2013, apparently in the wake of an engine fire on board a cruise vessel, leaving

¹⁶⁶ Jan Willem van Rossem “Interaction between EU law and international law in the light of Intertanko and Kadi: the dilemma of norms binding the Member States but not the Community, Centre for the law of EU external relations; Cleer working papers 2009/4; p.17

¹⁶⁷ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3A114548>

¹⁶⁸ Rosemary Gibson, “Cruise Ship Passenger Contracts: the trip of a lifetime or a voyage through clauses, conventions and confusion?” Global Shipping Law Forum, Brisbane, 4 July 2018 <http://138.25.65.17/au/journals/ANZMarLawJl/2018/8.pdf>, para. 3.4, p.24

passengers stranded at sea for various days¹⁶⁹Cruise Lines International Association (CLIA), announced the adoption of a "Cruise Passenger Bill of Rights"¹⁷⁰ for its members addressing safety, medical and refund issues resulting from mechanical failures in board. Please see Fn. ¹⁷¹ for the text of the Bill of Rights.

If the cruise is booked through a tour operator passengers will be issued with the tour operator's standard terms and conditions as additional travel documents to be distinguished from the contract of carriage as evidenced in the ticket. As set out above, at least under PAL, the tour operator may still be liable as the contractual carrier (alongside the cruise line as the actual carrier).

A selection of extract standard terms and conditions from cruise lines/tour operators/organisers whose operations include Antarctic cruises and different passenger source countries is attached as Annex 3 to this report. The terms address the identity of the parties, limitation and exclusion of liability, time for suit, clauses highlighting the specific challenges of Antarctic expedition cruises, medical information and law and jurisdiction clauses. The lines /tour operators are:

- Crystal Cruises
- Silversea Cruises
- Hurtigruten Antarctica Cruises
- Princess Cruises
- Costa Cruises
- Polar Latitudes
- Quark Expedition

IX Conclusions

1. Antarctica is not a sovereign state exercising authority within its territory. Rights and obligations of passengers, owners and operators are governed by the law of the flag of the vessel and the law governing the passenger ticket.
2. On the regulatory level, the implementation of the Polar Code has advanced (passenger) safety and security in Antarctic waters. This should prevent incidents like the grounding of the sub-standard equipped MV ENDEAVOUR in 2007.
3. The cooperation of stakeholders in the tourism business under the roof of the ATCM and IAATO, although voluntary and in the absence of enforcement options due to the Antarctic geo-political position, successfully manages cruise lines' and tour operators' safety standards for the benefit of passengers. Although the risk of serious shipping incidents remains, it can be reduced by best practices, as promulgated by IAATO. Obviously,

¹⁶⁹ <https://www.cruise critic.co.uk/articles.cfm?ID=3148&stay=1&posfrom=1>

¹⁷⁰ <https://abcnews.go.com/Travel/cruise-passenger-bill-rights-introduced/story?id=19250587>

¹⁷¹ <https://cruising.org/about-the-industry/policy-priorities/cruise-industry-policies/Other>

IAATO has no control over operations by cruise lines that are not IAATO members. Currently, however, all commercial SOLAS passenger ship operators conducting tourism activities in the Antarctic Treaty Area are members of IAATO.¹⁷²

4. The ticket terms and conditions reviewed for the purpose of this report contain warnings that “each Passenger acknowledges and voluntarily accepts and assumes the risks inherent in travel by sea,” They do emphasize the requirement of medical/physical fitness and the duty to disclose medical information prior to boarding. Some tour operators’ terms refer specifically to the physical challenges (“You understand and acknowledge that due to the remoteness of where we travel, emergency evacuation and/or search and rescue may be delayed or unavailable and that medical facilities and supplies may be limited and you acknowledge that it is your responsibility to assess the impact such limitations may have on any existing medical condition(s)”).¹⁷³

5. In the absence of Antarctic local law, passengers’ rights are determined by the law applicable to their contract of carriage and the conventions referred to in this report, as implemented under the respective legal regime of the flag state.

In summary, the IAATO system of self-governance of the cruise industry, the improvement of regulatory safety measures on an international level and international conventions promoting the passengers’ rights against the carrier or tour operator provide an adequate level of legal protection. Antarctica will remain a challenging environment. Excluding all risks would mean not to travel there at all, which appears an unrealistic option.

¹⁷² IAATO Overview of Antarctic Tourism: A Historical Review of Growth, the 2020-21 Season, and Preliminary Estimates for 2021-22, p. 6

¹⁷³ Annex 3, Standard Terms and Conditions, Polar Latitudes Inc, p. 25; Quark Expeditions, p. 26