Gómez-Acebo & Pombo

ANALYSIS

Corporate & Commercial

Shipowner and package travel organiser: on whether the limitations of liability under the Athens Convention apply

(CJEU, Case C-629/24, *Costa Crociere,* 4 June)

This matter was not addressed by the applicable rules: the injury is sustained by the passenger during carriage by sea, but the travel organiser is not a shipowner.

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1. The facts

Essentially, these are package travel operations within the meaning of Directive 90/314 (now repealed), which would also fall under the scope of Regulation (EC) No 392/2009 and, by reference, the 1974 Athens Convention relating to the carriage of passengers and their luggage by sea.

The tourism package is "sold" by a package travel wholesaler or retailer, but part of the package consists of a sea cruise provided by a maritime carrier. It so happens that the Travel Directive does not contain a regime limiting the liability of the organiser or the carrier, but the Athens Convention does contain such a regime when the traveller has sustained personal injury during the cruise, as was the case in the two proceedings that gave rise to the incidental question.

— In the first case (MH), on 18 January 2017, MH booked a cruise through the travel agency Blue Passion for an amount of EUR 12 038. That cruise was to start in Valparaiso (Chile) and end in Melbourne (Australia) and was to be provided on a ship belonging to Costa Crociere between 15 February and 17 March 2017. During the night of 17 to 18 February 2017, MH got out of bed without turning on the light, fell, and fractured the head of her humerus. She was subsequently repatriated to mainland France for treatment.

— In the second case (Costa Crociere), on 11 February 2016, DM purchased a holiday in the form of package travel from the travel agency Croisière Club for himself and his wife, DI, for the price of EUR 1 782. That holiday consisted of a cruise around the Greek islands departing from Marseille (France) with five stops along the way aboard a ship belonging to Costa Crociere. On 30 March 2016, DI fell and fractured her left humeral head after being struck by an unidentified person while she was trying to serve herself at the buffet on board the ship, which was still docked in the port of Marseille.

2. The questions

The referring court notes that the cour d'appel de Paris (Court of Appeal, Paris), the cour d'appel de Versailles (Court of Appeal, Versailles) and some legal academics are divided on whether Regulation No 392/2009 is applicable to cruises which have the characteristics of a tourism package for the purpose of Directive 90/314.

On the one hand, the liability of organisers of ocean cruises sold as package travel may come under the liability regime established by Directive 90/314. Regulation No 392/2009 does not provide for any derogation from the uniform rules stipulating that the organiser or retailer will automatically be liable which are established by that directive. In addition, that directive seeks to ensure better consumer protection. That regulation concerns only contracts relating to the maritime transport of passengers, and the reference in Article 7 of that regulation to Directive 90/314 is limited solely to the obligations of tour operators relating to the provision of information to passengers and does not in any way relate to the liability regime laid down by that directive.

On the other hand, the liability of the organiser of sea cruises sold as package travels could fall under the liability regime set forth in Regulation (EC) No. 392/2009, since Article 14 of the Athens Convention, to which Article 3 of that regulation refers, provides that no action for damages arising out of the death or personal injury of a passenger or the loss of or damage to luggage may be brought against a carrier or a performing carrier except in accordance with that convention; that no provision of that regulation has excluded cruises from its scope of application, and that Article 7 of that same regulation refers to Directive 90/314.

Moreover, some legal academics maintain that a distinction should be drawn according to whether an accident suffered by a passenger on a cruise relates to the carriage operation itself, in which case the carrier's liability would come within the scope of the Athens Convention, or to a tourist service provided in connection with that carriage, coming within the scope of Directive 90/314.

> *According to the court, the organiser of the package travel enjoys the privileges accorded to a non-contracting shipowner*

3. The Judgment (CJEU, Case C-629/24, *Costa Crociere*)

Where a cruise — defined by Article 3(t) of Regulation No 1177/2010 as "a transport service by sea or inland waterway, operated exclusively for the purpose of pleasure or recreation, supplemented by accommodation and other tourist facilities, exceeding two overnight stays on board" — is sold at an inclusive price to a consumer, that sale must be regarded as being a package within the meaning of Article 2(1) of Directive 90/314 and must therefore be governed by that directive.

In order to achieve the approximation referred to in Article 1 thereof, Directive 90/314 establishes a binding regime of contractual liability of package travel organisers to consumers who have concluded a contract with them for such travel. Article 5(1) of Directive 90/314 provides that Member States are to take the necessary steps to ensure that the organiser and/or retailer party to the contract is liable to the consumer for the proper performance of the obligations arising from that contract, irrespective of whether such obligations are to be performed by that organiser and/or retailer or by other suppliers of services. The first subparagraph of Article 5(2) of that directive provides that Member States are to take the necessary steps to ensure that the organiser and/or retailer party to the contract is liable for the damage resulting for the consumer from the failure to perform or the improper performance of the contract.

For its part, the Athens Convention, in the event of loss suffered as a result of the death of or personal injury to a passenger caused by such a shipping incident, provides that the carrier is to be liable where such loss in respect of that passenger on each distinct occasion does not exceed 250 000 units of account, which, according to Article 9 of Annex I, are Special Drawing Rights defined by the International Monetary Fund (IMF). If the loss suffered by the passenger does not exceed that limit of 250 000 units of account, the carrier may be exempted from liability only by proving that the shipping incident resulted from an act of war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional, inevitable and irresistible character or was wholly caused by an act or omission done with the intent to cause the incident by a third party. If the loss suffered by the passenger exceeds that limit of 250 000 units of account, the carrier is to remain liable unless it proves that the shipping incident occurred without the fault or neglect of the carrier.

Since a carrier is supplying services to an organiser of a cruise which has been sold to a consumer as package travel, that organiser, who may be held liable to the consumer, in application of Article 5 of Directive 90/314, for any non-performance or improper performance of the carriage by sea by that carrier, must also be entitled to the benefit of the limitations on compensation to which a carrier is entitled vis-à-vis a passenger under the Athens Convention where that convention applies to such carriage. With regard to any non-performance or improper performance of the services on board a cruise ship in the course of carriage which has caused the death or personal injury of a passenger, the organiser may rely on the limitations of liability to the passenger provided for in the Athens Convention which the carrier may invoke, without there being any need to distinguish between services relating to carriage, on-board accommodation or on-board recreation.

Consequently, the consumer has two options: (i) in accordance with Article 5 of Directive 90/314, the consumer may bring an action for damages against the organiser of the cruise in order to obtain compensation, but against such a claim for compensation, the organiser may rely on the limits of compensation to the passenger provided for in Articles 3 and 7 of the Athens Convention; (ii) the consumer may bring an action for damages on the basis of Regulation No 392/2009 directly against the carrier that actually carried out the carriage by sea, also subject to the limitations of liability set out in that regulation.

4. Commentary

Throughout the various historical versions of the Package Travel Directive, European lawmakers — and, by extension, national lawmakers — have failed to provide a definitive answer regarding the organiser's liability regime when performance failures are attributable to the providers of ancillary services included in the tourism package. According to Directive 90/314, "Member States shall take the necessary steps to ensure that *the organizer and/or retailer party to the contract is liable to the consumer for the proper performance of the obligations arising from the contract, irrespective of whether such obligations are to be performed by that organizer and/or retailer or by other suppliers of services without prejudice to the right of the organizer and/or retailer to pursue those other suppliers* of services". Directive (EU) 2015/2302 provided that Member States shall ensure "that *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*". Member States may maintain or introduce in their national law provisions under which the retailer is also responsible for the performance of the package. In that case the provisions of Article 7 and Chapter III, IV, and V which are applicable to the organiser shall also apply mutatis mutandis to the retailer. The text is kept in Directive 2026/1024. It would correspond to the current wording of Article 161(1) of Spain's Consumer and User Protection Act.

Historically, the matter at issue has been limited to considering how both retailers and organisers are liable.

Although it is never explicitly stated in this way, the organisers and the retailer are the parties obligated by the package travel contract, whose services they will provide, where applicable, *through independent agents* such as the shipowner or the organiser of the Nile cruise. This is a clear case of the application of Article 1596 of the Civil Code. The principal (debtor) is liable for the acts of dependent third parties or employees who perform all or part of the service. In this scenario, the debtor (organiser) should not be able to raise quantitative defences or other sector-specific limitations that the actual service provider could raise in a separate claim — and which the service provider could raise if the cruise had not been contracted as a package travel within the meaning of the directive. The limitation of liability would apply only to claims brought against the shipowner, whether they are independent claims or claims brought by the organiser for contribution. In such a case, the shipowner's limitations of liability would be at the expense and risk of the debtor-organiser and not of the aggrieved consumer, who could recover the full amount of liability from the shipowner without limitations. As we can see, the court reached a different decision.