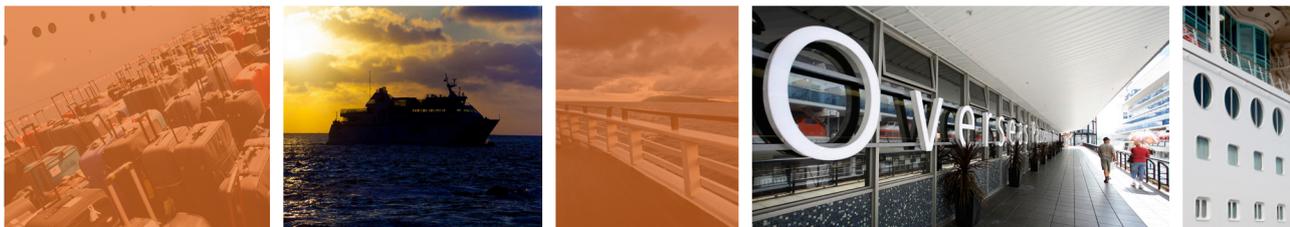




CRUISE BULLETIN



Welcome to the July edition of our Cruise Bulletin.

The cruise industry is watching developments closely following the UK referendum decision to leave the European Union and we are already assisting clients with their contingency plans. We are carefully considering the potential consequences of Brexit, including its potential impact on shipping, cruise travel and leisure. For more information, please see www.hfw.com/brexit. We would be pleased to discuss the issues.

The Brexit process is expected to take several years, during which the legal status quo is likely to remain. The new UK Government aims to preserve the Union within the UK and access to the EU single market. As most rules governing shipping are generated by the IMO (and not the EU) there is unlikely to be major legal change for shipping in any event. But commercial opportunities will arise from, for example, the fall of sterling and complications may in the future arise should, for example, the UK's environmental laws differ from those in force in the EU.

In the meantime, it is business as usual and we start this bulletin with an article concerning ship recycling and the impact that the Hong Kong Convention has had on the EU Regulations related to ship recycling.

Following this we look at the Port of Fremantle and the proposed sale and redevelopment of this port and its potential effect on the cruise industry in Western Australia. The article looks at the port's current infrastructure and the plans to change. It also reviews market research into the cruise industry in Australia.

Next we highlight a case evidencing the far reaching effect of EU regulation. The case relates to protections that exist under an EU Directive for employees when an employer becomes insolvent. The case went through the Greek courts to the Greek Council of State who asked the European Court of Justice (ECJ) for their ruling. The ECJ found that the employees were entitled to protection upon their employer's insolvency, even though the vessel on which they were employed was not EU flagged and the employer was not incorporated in the EU.

Finally we consider a case in the Central London County Court which may have shifted the balance in the cruise industry's favour when responding to norovirus claims. The claimants (passengers) argued that the cruise owners/operators should have warned that the previous cruise suffered norovirus, and/or failed to deep clean the vessel, and/or failed to allocate a ship that had not suffered an outbreak of gastric illness. Having considered the evidence and the Athens Convention the judge found against the claimants.





hfw Cruising to a well-earned recycling: the current legal regime for end of life passenger vessels

By comparison with many other classes of commercial vessel, the working lives of cruise ships are extremely long. Cruise ships are commonly passed for service long past their fifth special survey (i.e. 25 years). Indeed we have clients operating successful and profitable cruise ships built in the 1950s and 1960s, such vessels even attracting a loyalty from their passengers to which an accountant would, no doubt, ascribe a substantial goodwill value.

However where a vessel's continued retention is no longer economically viable, there is no buyer willing to continue to trade the vessel or its machinery and safety systems simply become outmoded to the point that considerations of safety arise, there comes a time when the romance has to end and a hard decision has to be made. At this point there is only one realistic option and that is to sell the vessel for recycling.

So, what needs to be considered by the owner of a cruise ship that has, so to speak, "had its day"? Before reaching for the phone to call the broker, it is important to consider the current regulatory regime as well as the potential impact on the owner's reputation that any decision on recycling might have.

For a business as public facing as a cruise line, any association with working practices that are injurious to the environment or to the safety of workers is to be avoided.



There has been much debate in recent years over the sustainability of ship recycling... In particular, focussing on the unregulated disposal of hazardous materials, the pollution of shorelines and water by chemical and oily sediments, and the dangerous working conditions of the personnel employed in the industry.

STEPHEN DRURY, PARTNER

Why ship recycling?

Even when no longer economically viable, a vessel retains an inherent value based on its constituent parts and dead weight of steel. However, the prices offered by the so called cash buyers for end of life tonnage vary depending on where in the world the vessel is to be recycled in and the recycling practices of the chosen yard.

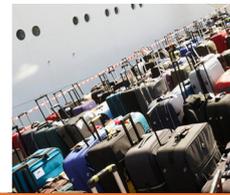
Ship recycling as a large-scale business is today practised only in India, Pakistan, Bangladesh and China. There are also substantial ship breaking facilities in Turkey, though generally the prices offered by cash buyers purchasing for delivery to Turkish yards are lower than they are when selling to yards in the Indian Sub-Continent. This is because the cost of recycling in Turkish yards is that much higher given their greener credentials.

The majority of vessels are therefore recycled in Indian Sub-Continent yards via the so called "beaching" method. There has been much debate in recent

years over the sustainability of ship recycling in this way. In particular, focussing on the unregulated disposal of hazardous materials, the pollution of shorelines and water by chemical and oily sediments, and the dangerous working conditions of the personnel employed in the industry.

Arguments put forward by the shipping industry in response, focusing on points such as the economic benefits of recycling machinery and materials, the many thousands employed in the industry and, most importantly, that the ship recyclers were efficiently doing a job that the developed world considered too dirty and costly to perform have largely been silenced.

Whilst a number of Indian facilities have been approved by recognised organisations as Hong Kong¹ Convention compliant, the beaching method of ship recycling remains in the spotlight and there have been several incidences of pressure groups forcing high profile ship owners to reverse plans to recycle this way. There



is a particular risk of this where the recycling of cruise ships is concerned.

The impetus for an enforceable international standard

Attempts have been made to regulate the ship recycling industry. The principal international regime covering the exporting of waste is the Basel Convention². It provides the framework for the international movement of hazardous wastes and all EU Member States have ratified it. It is given effect by the EU Waste Shipments Regulation³ (the WSR). The applicability of the WSR to the export of vessels is, however, a matter of debate and controversy.

The Hong Kong Convention

Because of such controversy the Hong Kong Convention was signed in 2009. It aims to remove the concept of “export and import” and instead impose responsibility for the surveying and certification of end-of-life vessels on the flag states and oblige them to issue “International Ready for Recycling Certificates” certifying that a ship recycling plan has been duly

authorised by the relevant agency in the recycling state⁴.

The Hong Kong Convention could prove more exacting than the Basel Convention by requiring the hazardous materials on board a vessel to be identified throughout that vessel's working life and not just at the time of its export at the “waste” stage. It also requires the prohibition of the installation or use of hazardous materials on both new ships and by repair yards on existing ships⁵.

The process of implementation and ratification

As at the date of this bulletin, the Hong Kong Convention has been ratified by only four states representing 2.2% of the world's gross tonnage. It will not take effect until it has been ratified by 15 states representing 40% of the world's gross tonnage and with a combined annual ship recycling volume of no less than 3% of their combined tonnage. The Hong Kong Convention is unlikely to be in force any time in the near future.

European Ship Recycling Policy

Following the signature of the Hong Kong Convention, the European Commission established a working party to examine the efficacy of the current regime (i.e. the Basel Convention and the WSR), which resulted in the entry into force of the EU Ship Recycling Regulation (the SRR) on 30 December 2013⁶. Although in force, it cannot be applied until the earlier of 31 December 2018 and the date which is six months after the EU Commission has approved a sufficient number of ship recycling facilities (the so-called “European List”).

The race for approval is on, with the issuance, in April 2016, by the European Commission, of a communication comprising technical guidance for those facilities seeking approval⁷.

Once in application the SRR will require all vessels flying the flag of an EU Member State and any vessel present in its waters at the time of its sale for recycling to establish and maintain an inventory of the hazardous materials (IHM) on board.

1 The Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships, 2009.

2 The Basel Convention on the Control of Trans-Boundary Movements of Hazardous Wastes and their Disposal, 1989. Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste.

3 Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste.

4 The Hong Kong Convention itself is remarkably short, just 21 articles of agreement requiring the signatory states to:

1. “...require that ships entitled to fly its flag or operating under its authority comply with the requirements set forth in this Convention and to take effective measures to ensure such compliance.”

2. “... require that ship recycling facilities under its jurisdiction comply with the requirements set forth in its convention and to take effective measures to ensure such compliance”.

To the Hong Kong Convention are attached, as an annex, regulations for safe and environmentally sound recycling of ships setting out the key contents of the so-called “green passport” and giving guidelines to state parties on factors deemed relevant for the authorisation of ship recycling facilities, namely “to establish management systems, procedures and techniques which do not pose health risks to the workers concerned or to the population in the vicinity of the ship recycling facility and which will prevent, reduce, minimise and to the extent practicable eliminate adverse effects on the environment caused by ship recycling, taking into account guidelines developed by the organisation”.

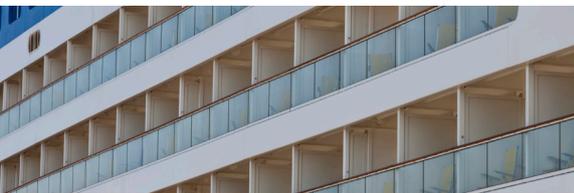
Particular emphasis is placed on the key steps to be taken to prevent death and injury, e.g. ensuring the establishment throughout the ship recycling process of safe-for-entry/safe-for-hot-work conditions and procedures and prevention of accidents; and from the environmental standpoint, proper procedures for identifying and labelling of potentially hazardous liquids/residues/sediments and hazardous materials such as PCBs, CFCs and asbestos.

The Hong Kong Convention also imposes quite onerous duties on the relevant flag states, which, for the purpose of the Hong Kong Convention means the flag state of the relevant “shipowner”: a duty which may well prove difficult if not impossible to fulfil if, as frequently occurs in the context of ship recycling, the “shipowner” is an entrepreneur or “cash buyer” of the vessel selling it to the eventual recycling facility rather than original operating shipowner.

5 The “Hazardous Materials” are listed in Appendix 1 (Control of Hazardous Materials) and include Asbestos, Ozone-depleting substances, Polychlorinated Biphenyls (PCBs) and Anti-fouling components and systems.

6 Full Title: Regulation (EU) No 1257/2013 of the European Parliament and of the Council on ship recycling, 20 November 2013.

7 Communication from the EU Commission on requirements and procedures for inclusion of facilities located in third countries in the European List of ship recycling facilities: Technical guidance note under Regulation (EU) No. 1257/2013 on ship recycling.



In addition vessels flying the flag of an EU Member State will have to be dismantled in one of the safe and environmentally sound ship recycling facilities included on the European list. It bans recycling via the beaching method for EU flagged vessels.

There are also requirements concerning preparation for recycling through minimising the amount of hazardous waste present on board, procuring a “Ready for Recycling Certificate”, developing a Ship Recycling Plan and carrying out surveys prior to delivery to a ship recycling facility.

As the SRR states, ships going for recycling under the new regulation will no longer be covered by the WSR and therefore there will be no question concerning whether ‘ships are/are not waste’.

Such requirements may put owners of EU flagged vessels at a competitive disadvantage. This may only serve to encourage the practice of flagging out of the EU before sale for demolition.

Recycling fund

Aware of this and the need to incentivise green recycling, the SRR requires the EU Commission to assess the feasibility of establishing a financial mechanism to facilitate the safe and sound recycling of vessels. There are six possible mechanisms under consideration. It is imperative that the chosen mechanism does not place EU shipowners at a commercial disadvantage or otherwise distort competition in terms of who paid. Of these options, the ship recycling fund is the apparent front runner at the moment. It would function as a levy applied to all ships calling at EU ports thereby not distorting competition. However, identifying beneficiaries of the fund might be difficult and again

care would need to be taken not to distort competition. It is likely to be a considerable amount of time before such a fund becomes a reality.

Where to go from here

The regulation of ship recycling is still developing with potentially conflicting regimes. For a cruise ship owner seeking to dispose of its end of life vessel, the challenge will be in adhering to its stated environmental policy and avoiding negative publicity by ensuring, as economically as possible, that the vessel is recycled according to appropriate standards by a facility that has the relevant “green recycling” credentials. This will require the owner to have an up to date IHM such that the eventual recycler can readily identify the location and quantity of any hazardous materials on board to ensure a safe environment during the breaking process.

There are various standard contracts used in the sale of vessels for recycling, in particular BIMCO’s Recyclecon, which can accommodate the concerns of the owner in these respects. However, given the relative paucity of cruise ships being sold for recycling, the sale of such vessels is, for many, an unfamiliar area. Given this, the complex regulatory regime and the public profile of cruise lines and their vessels, the guidance of an experienced professional adviser is recommended.

For more information, please contact [Stephen Drury](#), Partner, on +44 (0)20 7264 8395, or stephen.drury@hfw.com, or [William MacLachlan](#), Senior Associate, on +44 (0)20 7264 8007, or william.maclachlan, or your usual contact at HFW.

New passenger cruise terminal for the Port of Fremantle

The Government of Western Australia is considering the sale by long term lease of the Port of Fremantle. Holman Fenwick Willan has worked with the Port of Rotterdam, and others, in relation to this purchase. During the due diligence enquiries which were conducted on the port and its operation, it became apparent that various stakeholders with an interest in the operations of the Port of Fremantle are keen to see a new cruise passenger terminal at Victoria Quay in the Inner Harbour as cruise traffic steadily grows in Western Australia.

The City of Fremantle plans to seek State Government support for the redevelopment of the passenger terminal. How cruise passengers arrive in the old Fremantle town, finding their way through the historic village precincts and connection to the Fremantle metro rail station taking passengers to Perth are all areas for detailed consideration.

Improvements to the overall amenity of the port and the surrounding neighbourhood are an important consideration in the privatisation of the port. The Inner Harbour is planned to remain an active, working container port with container terminals on North Quay. The passenger terminal will remain on the south side of the port at Victoria Quay. It is intended that some bulk cargoes such as minerals and agricultural trades will progressively move from the Inner Harbour to new terminals in the Outer Harbour some 25 kilometres to the South at the Kwinana Bulk Terminal in Cockburn Sound.



The privatisation will be among the largest undertaken in Western Australia and is expected to raise more than AUS\$2 billion. However, the passage of the sale legislation through the Western Australian Parliament, has been delayed. This appears to be due to concerns raised by farmers and minerals exporters regarding wharfage rates and access terms and conditions following the privatisation. As a result, the government is expected to apply conditions to the sale limiting the buyer's opportunity to increase charges. Port charges for passenger cruising is expected to continue to enjoy a subsidy however the extent of that subsidy and how it will be delivered once the port is privatised is yet to be clarified.

The extent of port development and investment by new owners will follow the demand for and use of the new facilities. Passenger cruising seems to be increasing and very well supported with Fremantle being popular for passengers seeking to visit the Abrolhos Islands, Shark Bay and the pristine coasts of north west Western Australia.

The Australian cruise industry passed a major milestone in 2014 when for the first time passenger numbers exceeded one million in a calendar year. A total of 1,003,256 Australians cruised, representing a surge of 20.4% on the previous year's record of 833,348. The increase of almost 170,000 passengers is the largest jump in annual real numbers since the Cruise Industry Source Market Report was first compiled in 2002. (*CRUISE INDUSTRY SOURCE MARKET REPORT Australia 2014*).

The Western Australian Government, through Tourism WA, recently commissioned a study into the Passenger Cruising industry. The results show that mega cruise ship



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AMANDA DAVIDSON OAM, PARTNER

passengers typically lived outside of Western Australia, travelled as a couple and were aged 60 years or over. The majority of cruise passengers (92%) were experienced in cruising, having taken at least one other cruise before, particularly international passengers (96%). International passengers were predominately from the USA (33%) and UK (30%).

The inclusion of the specific Western Australian destination had some impact on passengers' decisions to book the cruise, predominately those cruise ships visiting Broome. The main factor driving the decision to visit was the general appeal and 'always wanting to visit the destination'. Passengers seek information about port destinations at multiple times – once on shore, prior to, and (most commonly) during the cruise.

Overall, the performance of ports in catering to passengers' needs was consistent across WA ports, with performance rated as 'high' across all ports and Fremantle and Geraldton rated the highest. Personal safety and security was an important factor,

however, other influential factors that can improve the overall experience for passengers are the signage, availability of information, and facilities at the port (i.e. seating, shopping/food/drink options). Based on feedback from respondents, Fremantle was the strongest performer on the majority of port features. (*This summary is extracted from research conducted by TRA and Tourism WA in partnership with Metrix Consulting. For the full Strategic Regional Report, please email tourism.research@ret.gov.au.*)

Holman Fenwick Willan is actively engaged in the ports and terminals sector in Australia and would welcome any enquiry into the structuring, regulation and development of all logistics supply chain infrastructure.

For more information, please contact [Amanda Davidson](mailto:amanda.davidson@hfw.com), Partner, on +61 (0)2 9320 4601, or amanda.davidson@hfw.com, or your usual contact at HFW.



hfw Flags of convenience offer no protection in insolvency law

In the recent case of *Greece v Stroumpoulis* on 25 February 2016, the European Court of Justice (ECJ) decided that EU protections under the Insolvency Directive apply to EU residents working in the EU, regardless of whether their employer is an EU company. The ECJ reached this decision based on the social objective of the Insolvency Directive, irrespective of the maritime waters on which the vessel sailed.

By this judgment, the ECJ demonstrated the extended reach of EU protections. It found that the Insolvency Protection Directive applied to Member State employees, hired in a Member State by a non-EU company with a head office in a Member State and working on a non-EU flagged vessel.

Background

In July 1994, seven Greek crew, including Mr Stefanos Stroumpoulis, were hired by Panagia Malta Ltd (Panagia Malta), a Maltese registered company, to work on a Maltese flagged cruise ship. In 1994 Malta was not a member of the European Union. Their employment contracts were governed by Maltese law. Unfortunately the vessel's charter was cancelled and the crew went unpaid between 14 July 1994 (the date when they were first engaged by Panagia Malta) and 15 December 1994 when the crew terminated their contracts as a result of non-payment.

The Court of First Instance in Piraeus ordered Panagia Malta to pay the crew outstanding wages, interest, expenses, holiday pay and compensation.

Unfortunately, Panagia Malta was declared insolvent due to a lack of realisable assets and the crew did not receive any payment in the insolvency. The crew applied to the Greek Employment Agency under Directive 80/987, the Insolvency Protection Directive (the Directive) for protection available to employees in the event of their employer's insolvency. Their application was refused on the grounds that they fell outside the scope of the Directive and were covered by other forms of guarantee.

The crew brought further proceedings in the Athens Administrative Court of First Instance and then the Athens Administrative Appeal Court arguing that the Greek State was liable to provide access to a guarantee institution, as required under the Directive, or provide equivalent protection. The Appeal Court found the head office of Panagia Malta was actually in Greece, that the flag flown by the cruise ship was a flag of convenience and that accordingly the Directive applied and that the crew were entitled to the protection provided by the Directive.

Rather than pay the sums due, the Greek Government appealed the decision to the Greek Council of State. The Greek Council of State asked the ECJ whether Directive 80/987 should be interpreted to provide protection to crew living in a Member State but working on a non-EU flagged vessel for a company with their registered office outside the EU but actual head office in the EU.

Judgment

The ECJ held that the crew were entitled to the protection of the Directive and that the sums guaranteed by the Directive must be paid. Crew living in a Member State, hired in that state by a company whose actual

head office is in that State are afforded the protection of the Directive on their employer being declared insolvent by a court in that Member State, regardless of their employment on board a vessel registered outside of the EU by a company incorporated in a non-Member State under an employment contract governed by non-Member State law.

The ECJ came to this decision based on a number of factors including:

- The Directive has a social objective (to guarantee minimum levels of protection).
- The waters on which the vessel sails are immaterial.
- The employer's registered office and the flag of the vessel are not relevant, just that the employment relationship retains a sufficiently close link with the territory of the EU.

It is important to note that the ECJ considered it irrelevant that the Greek State had failed to provide in its legislation that non-EU companies also had to contribute to the financing of the required insolvency guarantee scheme. As a result cruise lines that have previously escaped having to pay a contribution to Member States towards such schemes by employing crew through non-EU entities on board vessels flagged outside of the EU, may now have to contribute to such schemes as Member States realise that they are liable to guarantee crew wages and expenses.

For more information, please contact [Neil Adams](#), Partner, on +44 (0)20 7264 8418, or neil.adams@hfw.com, or your usual contact at HFW.



hfw The end is nigh for norovirus...

Despite the extensive efforts of the cruise industry outbreaks of norovirus and other similarly contagious stomach bugs remain a real issue and persistent source of litigation.

While the measures available to prevent the spread of norovirus are well understood by the cruise industry, these are less well understood or accepted by passengers. After all, if you have paid a few thousand pounds/dollars for a cruise, and are then confined to your cabin feeling unwell for two days of a seven day cruise, you are unlikely to have had a “positive” experience.

Unfortunately, for the cruise industry there is no magic cure to norovirus. Indeed in the first five months of 2016 according to the US Centre for Disease Control and Prevention nine cruise vessels reported incidences of Norovirus onboard¹.

However a case in the Central London County Court in 2015, reported in 2016², may have shifted the balance in the cruise industry’s favour.

The claimants were 43 passengers on the cruise ship *THOMSON SPIRIT* who embarked on 2 May 2009 for a cruise from Ibiza to Newcastle. During the voyage 217 people, including crew members, were affected by gastroenteritis.

The claimants initially alleged that their illness was as a result of food and drink being improperly prepared and served on board. However, they subsequently applied to amend their pleadings to allege that the infection was in the

alternative caused by norovirus. The defendants appealed this change, but were unsuccessful³.

The substantive case was then heard and the claimants alleged in relation to the personal injury claims the fault or neglect of the defendant within the meaning of article 3.1 of the Athens Convention 1974 (the Convention). The Convention states that:

The carrier shall be liable for the damage suffered as a result of the... personal injury to a passenger If the incident which caused the damage ... occurred in the course of the carriage and was due to the act or neglect of the carrier....

It was alleged that the defendant:

1. Failed to warn that there had been an incidence of norovirus on the immediately prior cruise.
2. Failed to carry out a deep clean prior to allowing claimants to embark.
3. Failed to allocate a ship that had not experienced an outbreak of gastric illness.

As the judge had to decide what the cause of the illness was, a detailed review of the symptoms of norovirus and food poisoning (campylobacter) was undertaken. Having heard from the experts and considered their reports the judge found that the passengers had suffered norovirus.

Looking at the three arguments raised by the claimants the judge found:

1. Under the Convention the act that was complained of, in this case the failure to warn, had to have arisen *in the course of carriage* (while



The claimants were 43 passengers on the cruise ship *THOMSON SPIRIT* who embarked on 2 May 2009 for a cruise from Ibiza to Newcastle. During the voyage 217 people, including crew members, were affected by gastroenteritis.

EDWARD WAITE, ASSOCIATE

the passengers were on board). However, for a warning to be effective it had to have been given before the passengers boarded. As the warning was not given prior to boarding the failure to give it also occurred prior to the boarding and therefore was not in the course of carriage. As a result the claimants were not entitled to rely on the Convention to bring this aspect of the claim.

2. The claimants argued that the cleaning of the vessel was defective both prior to boarding and once on board. As a result it was argued that this failure was a “defect in the ship” within the meaning of Article

1 <http://www.cdc.gov/nceh/vsp/surv/gilist.htm#2016>

2 *Nolan & Others v TUI UK Ltd* [2016] 1 LLR 211

3 [2013] EWHC 3099



3.3 of the Convention. The judge rejected this argument finding that “defect in the ship” means a failure in equipment, hull, machinery, structure etc. rather than a “defect” in the hotel management side of a cruise vessel, which was not found.

3. The outbreak on the previous cruise was barely above background level and had been contained. Given the numbers involved and the measures in place when the previous cruise came to an end there was no need to warn passengers or to provide another vessel.

This case emphasises the importance for cruise owners and operators to have clear and well documented instructions as to what steps should be taken by the crew should an outbreak of norovirus (or other infectious disease) occur. It also emphasises how important it is to be able to evidence that the necessary steps have been undertaken.

While having documented systems in place that are used to deal with infectious diseases will not guarantee that no claim will be brought, it is likely that they will make it more difficult for a claim to succeed.

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hfw HFW publications

Holidays in France - always strict liability?

In accordance with the High Court’s decision in *Committeri v Club Mediterranee SA*¹, it is in the interest of any companies that provide package holidays to France to ensure that the contracts between them and the buyers of the holidays are governed by English law. This will ensure that travel companies will not be strictly liable to provide compensation in the event of an injury during the holiday.

To read the full briefing please visit <http://www.hfw.com/Holidays-in-France-always-strict-liability-July-2016>

hfw Conferences and events

International Bar Association Annual Conference

Washington, USA
18-23 September
Attending: Various Partners, including Elinor Dautlich, who will be hosting a cruise related panel.

CLIA Ports & Destination Summit

Santa Cruz, Tenerife
20 September 2016
Attending: William MacLachlan

Seatrade Cruise Med

Santa Cruz, Tenerife
21-23 September 2016
Attending: William MacLachlan

Monaco Yacht Show 2016

Port Hercules, Monaco
28 September – 1 October 2016
Attending: the HFW Yachts team

CLIA Executive Partner Summit

Miami, USA
15 November 2016
Attending: William MacLachlan

Should you require any further information or assistance on any of the issues dealt with here, please do not hesitate to contact any of the contributors to this bulletin, or your usual contact at HFW.

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1 [2016] EWHC 1510 (QB)

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