



Compulsory insurance for cruise vessels as a preparation for the next pandemic: Law of the sea perspective

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ABSTRACT

During the COVID-19 pandemic, many port states faced difficulty when cruise vessels with COVID-19 patients tried to dock at their ports. Although they are basically not obliged to accept such vessels under international law, they cannot easily deny access because the refusal would be viewed as a lack of humanitarian consideration. On the other hand, accepting such vessels leads to the risk of exposing their own nationals to COVID-19 and incurring the financial cost of medical treatment for cruise passengers. In fact, in the cases of *Diamond Princess*, *Costa Atlantica*, and *Zaandam and Rotterdam*, the question of who should take on the financial burden for medical costs of crews and passengers on board these vessels was debated. The current international legal framework does not provide any answer to this question, and therefore, a new framework is needed. If the new framework allocates the economic burden to ensure the provision of tests and medical care so that an intolerably heavy burden is not imposed on port states, they will be more welcoming to cruise vessels with infected people. Such allocation could be realized by requesting that carriers provide a compulsory insurance system for medical care in a pandemic.

1. Introduction

After the COVID-19 outbreak, the law of the sea discourse has recognized the difficulty faced by port states when cruise vessels with COVID-19 patients try to call at their ports. These port states have to choose between either taking the risk of endangering their nationals to COVID-19 by respecting humanitarian concerns or abandoning the people on board [1–4]. If a port state declines, then they are leaving the people on board to their fate, and the state could be criticized as lacking humanitarian consideration [5], which is required in the law of the sea according to the jurisprudence of the UNCLOS Tribunals, such as *the Corfu Chanel Case* and *the M/V "SAIGA" (No. 2) Case* [6–9]. If the states accept, they could be responsible for the spread of COVID-19 in their territories, as happened in Australia when it accepted *Ruby Princess* [10]. Given that the existing international law is fragmented and does not manifest the general obligations of port states to accept such vessels [11, 12], they would not be receptive to accepting such vessels.

Moreover, if the accepting states need to cover the medical costs provided for passengers from such cruise vessels, then they would be reluctant to accept such vessels. This especially fits the case of cruise vessels for the following reasons. First, unlike merchants' vessels, which engage in the transportation of daily necessities, cruise vessels are not

recognized as essential for the local people of port states and cities, except those who have ties with the cruise business, such as the sight-seeing industry in port cities. Second, the number of people on board cruise vessels is much higher than that on merchant vessels. Merchant vessels have decreased the number of crews to the minimum level [13], even adopting autonomous systems to reduce human costs [14]. Meanwhile, cruise vessels have many passengers as well as crews who provide various services. The more people there are on board, the more vulnerable to epidemic diseases the vessels become [15]. Therefore, the medical cost of receiving cruise vessels with passengers infected with epidemic diseases would be much higher than receiving merchant vessels with the same disease.

The cruise industry has suffered from the negative impacts of COVID-19 [16], and for its recovery, a new framework that allows states to open ports is essential. The existing framework for cruise vessels is not as well developed as that for merchant vessels [17] and for the recovery of the cruise industry, customer perception of cruise travel must also be rehabilitated [18]. Against this background, this study attempted to establish a possible framework for allocating the financial burden for accepting such cruise vessels during a pandemic. For this purpose, Section 2 aims to summarize the reaction of the port authority to respond to COVID-19-infected cruise vessels and clarifies the problem of

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the existing framework. Then, Section 3 outlines the blueprint of a possible future framework that facilitates port states and cities to accept such infected cruise vessels. The conclusion of the paper follows.

2. Burden of port authority for medical cost when accepting infected cruise vessels

Most states provide (or provided) medical services free of charge for COVID-19 tests and care [19], since leaving out even a single person can be the cause of a breakout that could snowball into an epidemic, which would consequently cost a larger amount of money. Typically, public funds based on taxation and/or the national insurance system shoulder these costs. In this regard, the medical cost of infectious diseases is different from that of ordinary diseases, whose treatment private individuals must pay for by themselves in most cases. Public medical funds are generally available only to nationals and residents who contribute to such public funds.¹ For this reason, people are required to buy travel insurance when they go abroad [20]. In the case of Singapore, for example, even against COVID-19, the free medical coverage is limited to Singaporeans, permanent residents, and long-term passholders. Even against its own nationals, the Singaporean government has decided not to cover the medical bills of COVID-19 patients if they are not vaccinated by their own choice [21]. The state also requested travelers who come to Singapore to buy insurance to cover their medical costs for COVID-19 [22]. Understandably, local people are frustrated with foreign travelers who do not contribute to public medical funds but rely on them when afflicted with epidemic diseases.

2.1. *Diamond Princess*

Japan has faced such frustration twice during the COVID-19 pandemic. The first case was the arrival of *Diamond Princess* at the Yokohama Port. *Diamond Princess* is a vessel flying the UK flag and is owned and operated by a US company, Princess Cruises, a subsidiary of Carnival Corporation & plc. The vessel was engaged in a round trip from Yokohama to Hong Kong. It left Yokohama on January 20, 2020 and arrived in Hong Kong on January 25. It steered to Yokohama, but on February 1, one of the passengers disembarked in Hong Kong tested positive. This information was shared with the Japanese authorities, who decided to request that *Diamond Princess* stay off the coast of Yokohama on February 3. Subsequently, a quarantine policy was implemented, and medical services were provided to the passengers on board the *Diamond Princess*. A total of 712 out of the 3711 people on board (passengers and crew members) were found to be infected by the virus [23].

Regardless of the appropriateness of this Japanese response from the medical and administrative perspective [15,24], Japanese central and local authorities financially supported these medical services. This fact rose to the surface when Professor Wada demonstrated that the expense of hospitalization for some of the patients (342 out of 423 people, or almost 80% of patients in hospital) from *Diamond Princess* amounted to JPY 288 million, of which the public fund covered JPY 272 million [25]. As for 95% of the medical treatments not covered by medical insurance (USD 90,000), these were billed to Princess Cruises [26]. Almost 85% of the patients had an unclear status in terms of private insurance; therefore, hospitals accepting patients decided to bill the Japanese government instead of claiming from various private medical insurance companies [26].

¹ In the case of Japan, all residents (including foreign nationals with a residence card) must be enrolled in a health insurance program by law. World Health Organization, Regional Office for South-East Asia, Japan Health System Review (Health Systems in Transition. Vol 8, Number 1) (2018) p. 24.

2.2. *Costa Atlantica*

The second incident Japan faced was with the cruise vessel *Costa Atlantica*, which docked in the Nagasaki Port. *Costa Atlantica* flies the Italian flag and is operated by the Italian company Costa Cruises, which is also a subsidiary of Carnival Corporation & plc. The vessel was originally scheduled for repair of its hull at a Chinese port. However, as COVID-19 was ravaging China at the time, the vessel changed its schedule and arrived at the port of Nagasaki on January 29, 2020 to replenish supplies. On January 31, the vessel berthed at the Koyagi Plant East No. 3 quay of the Mitsubishi Heavy Industries Nagasaki Shipyard and Machinery Works [27]. Since it did not engage in cruise services, but in the repair of its hull, people on board did not include passengers, and all 623 people onboard were foreign crew members [27]. After receiving information that four crew members had high fever, the Nagasaki City Healthcare Center conducted PCR tests on April 20. One patient tested positive. Then, all 623 crew members were tested, and by April 25, 148 crew members tested positive [27]. Medical services were provided, and seriously ill patients were taken to hospital. In total, JPY 29 million was paid by Nagasaki Prefecture and JPY 24 million by Nagasaki City, although after the negotiation, Costa Cruises refunded all the costs covered by the prefecture and JPY 800,000 covered by the city.² This case of *Costa Atlantica* demonstrates that even infection only among crew members, that is, not among passengers, could be severe in the case of cruise vessels.

2.3. *Zaandam and Rotterdam*

Unlike Japan, the US did not have any financial burden, but it also suffered from having to decide who had the burden of medical care for passengers from infected cruise vessels, especially in the case of two cruise ships, *Zaandam* and *Rotterdam*. Both vessels fly Dutch flags and are operated by the US company Holland America Line, a subsidiary of Carnival Corporation & plc. On March 7, 2020, *Zaandam* left Buenos Aires for a routine trip around Cape Horn. However, after calling at Punta Arenas, Chile, on March 14, it would float for almost half a month. On March 17, one of the passengers showed symptoms of COVID-19, after which Chile, Peru, Ecuador, and Colombia did not allow the vessel to call at their ports [28]. Since COVID-19 had spread on board, approximately 1450 healthy passengers from *Zaandam* were evacuated to *Rotterdam* on March 26 [29]. Albeit temporarily, these two vessels were not allowed to transit the Panama Channel. They were finally allowed to arrive at Port Everglades in Broward County, Southeast Florida, on April 2.

During its voyage, *Zaandam* lost four passengers. At Port Everglades, 13 passengers and one crew member were medically evacuated and taken to local hospitals [30]. When accepting these two vessels, Broward County and Port Everglades agreed to a contract with Carnival Corporation & plc after several days of negotiation. According to the contract, "Carnival Corporation & plc shall be responsible for all costs incurred by Carnival, any member of the Unified Command, Broward County, BSO, or any other government entity or local health care facility directly arising or resulting from the activities required or permitted under this Agreement or the Carnival Plan" [31]. Such costs included medical services and transportation and administrative costs [31].

² Nagasaki Prefecture and Nagasaki City. Investigation report on the outbreak of novel coronavirus cluster aboard the cruise ship "Costa Atlantica," p. 7, <https://www.pref.nagasaki.jp/shared/uploads/2021/02/1613627203.pdf>, October 2020 (accessed 17 October 2022). At the time when the report was published, it was under negotiation with Costa Cruise. However, as the author interviewed with Nagasaki prefecture and city in 2021, it became evident that Costa Cruise finally refunded the costs.

2.4. Challenges of the existing framework

As shown in the above examples, if coastal states accept cruise vessels from a humanitarian perspective, they have to carry the burden of providing appropriate medical services to passengers. Coastal authorities may also negotiate with cruise companies, as done by Nagasaki Prefecture and City, and Broward County and Port Everglades. Certainly, in these two cases, the cruise companies incur the financial cost for local authorities, relieving them of the financial burden, though some administrative burdens, such as arranging transportation or hospitals, remain. However, in the case of *Costa Atlantica*, it must be noted that all people on board were crew members, and Costa Cruises had an incentive to cover their medical costs and might not cover the cost for ordinary passengers, if any. Moreover, given that even Broward County, a US local authority that has the same nationality as Carnival Corporation and shares the same language and culture, took several days for negotiation, public authorities in other states would face more difficulty in similar negotiations because of the language and cultural differences. The economic relations could also affect such negotiations between local authorities and cruise companies. Taking the case between small states and large cruise companies as an example, the former would face difficulty in denying the request to call at their ports by the latter. In fact, Carnival Cruise Line, a subsidiary of Carnival Corporation & plc, reportedly threatened to cease business with some island states if the latter denied access to the company's vessels and restricted cruise passengers' activities, including disembarkation [32]. Conversely, if small cruise companies operate a vessel, it would be difficult for them to find a port for embarkation.

Undeniably, port communities benefit from cruise vessels calling at their ports; therefore, they are expected to carry some burden [33]. However, these benefits are typically shared among multiple port cities, and therefore, an accepting state and city would be frustrated if they were to be the sole bearer of the financial burden of medical costs. Moreover, as widely pointed out, coastal states are under no universal obligation to accept such vessels [34]. Thus, if they deny access, they can avoid such burden without violating any obligations. Therefore, it is essential to establish a new framework for allocating among stakeholders such as passengers, cruise companies, insurance companies, and port authorities the financial burden of providing medical care to crew members and passengers of cruise vessels when epidemic diseases spread on board.

3. Blueprint of a new framework

3.1. Existing framework of compulsory insurance in the shipping industry

In order to reduce the burden of accepting states and cities and share such burdens with other beneficiaries, insurance is expected to work more effectively. After the start of the COVID-19 pandemic, the role of travel insurance became more important [35]. However, even if travel insurance prevails, the extent to which such insurance will be adequate in the initial stages of the next pandemic remains unclear, as in the case of *Diamond Princess*, wherein an effective vaccine was unavailable and people largely lacked preparedness. Once a new disease has been well researched and a vaccine has been created, the response to the disease changes from that in the initial stage. However, all future infectious diseases must go through an initial stage. Therefore, to ensure the cruise industry's sustainability, stakeholders should establish a system to deal with the initial stages of future pandemics by referring to the compulsory insurance system developed by the maritime industry as a benchmark. Two frameworks merit consideration: first, the framework for oil pollution by tankers, and second, the framework for shipping incidents of cruise vessels.

The framework for oil pollution by tankers was originally established by the International Convention on Civil Liability for Oil Pollution Damage in 1969 (1969 CLC). The 1969 Convention was concluded in the

aftermath of the Tory Canyon incident, which caused unprecedented damage to the maritime environment [36]. To compensate for the huge damage caused by the tanker incident, the 1969 Convention assigns the liability for such damage, up to a certain amount limit, exclusively to shipowners, who are required to maintain insurance or other financial security in sums equivalent to their total liability for one incident. In the case of oil pollution, the range of victims would be very wide: from the fishers who suffer from the loss of fishing income to the local government, which needs to clean up the pollution.³ Therefore, to provide an efficient remedy, the 1969 CLC, via Article VII(8), allowed victims to invoke compensation directly against the insurers. However, shortly after its adoption, the insufficiency of funds available to shipowners and their insurers became obvious. To relieve the shipowner of the burden and provide additional compensation, the 1971 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (1971 Fund Convention) established a fund exclusively provided by the cargo owners, namely, the oil industry, which also benefits from oil shipping [37].

The regime established by the 1969 CLC and 1971 Fund Convention was amended in 1992 by two protocols, and the amended conventions are known as the 1992 Civil Liability Convention and 1992 Fund Convention [38]. As the number of tankers increased, the number of incidents involving oil pollution also increased. For the purpose of enlarging the available fund, the International Supplementary Fund for Compensation to the 1992 Oil Pollution Compensation Fund Convention was established in 2003. In addition, to balance the burden between shipowners and cargo owners (the oil industry), the Small Tanker Oil Pollution Indemnification Agreement, which covers tankers of 29,548 gross tons or less, and the Tanker Oil Pollution Indemnification Agreement, which applies to tankers of 29,548 gross tons or more, came into effect in 2006. In accordance with these two agreements, the shipowners, especially tanker owners in this context, voluntarily take on the additional burden. Although these two arrangements were reviewed in 2016, it was decided to maintain the allocation of financial burden [39]. In this manner, the allocation of the financial burden for the case of tanker incidents among stakeholders has been negotiated and reviewed on various occasions since the adoption of the 1969 Convention. However, the rules consolidating the liability to the shipowner and requesting compulsory insurance have consistently been maintained. Although the nature of an oil spill differs from that of an infectious disease onboard vessels, the former's burden allocation mechanism and the method of establishing such mechanism can facilitate the development of a new framework for future pandemics.

Meanwhile, the framework for shipping incidents involving cruise vessels is provided by the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea (Athens Convention). The Athens Convention was originally adopted in 1974, and the protocol that amended the Convention was adopted in 2002 (the 2002 Protocol); therefore, the existing version of the Athens Convention is that adopted in 2002. As of October 2021, the 2002 Athens Convention has been ratified by 32 states, which accounts for 43.77% of the world's tonnage [40]. Like oil tankers, cruise vessels are also incapable of escaping "shipping incidents,"⁴ which cause a large amount of damage to passengers to the extent that responsible companies may not be able to

³ The damage caused by oil pollution incidents can be divided into four categories: (1) property damage, (2) costs of clean-up operations at sea and on shore, (3) economic losses suffered in the fisheries and tourism sectors, and (4) costs for restoration of the environment. See Måns Jacobsson, "The IMO: Liability, Compensation, and Global Ocean Governance" in D.J. Attard, R.P. Balkin, D.W. Greigpp (Eds.), *The IMLI Treatise On Global Ocean Governance: Volume III: The IMO and Global Ocean Governance*, 2018, pp. 61–65.

⁴ According to Article 3(5) of the Athens Convention (Article 4 of the 2002 Protocol), a "ship incident" is defined as covering shipwreck, capsizing, collision, or stranding of the ship, explosion or fire in the ship, or defect in the ship.

afford to compensate. Therefore, Article 3 of the Athens Convention places the liability on the carriers, not shipowners, since it would be the carriers who have information on passengers. According to Article 1(1) of the Athens Convention (which was amended by Article 2 of the 2002 Protocol), “carrier” is defined as “a person by or on behalf of whom a contract of carriage has been concluded, whether the carriage is actually performed by that person or by a performing carrier.” Furthermore, Article 4 bis of the Athens Convention (Article 5 of the 2002 Protocol) obliges the carriers to maintain insurance or other financial security to cover their liability. Therefore, even if the carriers themselves cannot afford to cover all the liabilities they owe in the case of shipping incidents, insurance companies would compensate for the damage suffered by the passengers. Currently, the liability of carriers is limited up to 250,000 SDR (Article 4 of the 2002 Protocol), but would be increased if necessary in the future [41]. Moreover, similar to the 1969 CLC, Article 4 bis (10) of the Athens Convention allows the claimant to submit a claim directly to an insurance company to receive relief [42].

3.2. Analysis of a possible new framework

In a possible new framework to allocate the economic burden of medical costs when accepting cruise vessels with infected passengers, carriers (not shipowners) should take liability, as the Athens Convention provides. In the cases of *Costa Atlantica* and *Zaandam*, ultimately, the carriers undertook the liability of medical treatment for the crews and passengers (again, in the case of *Costa Atlantica*, no passengers were on board). However, if the carriers involved are not economically strong or the amount of medical cost becomes too high, they may be unable to pay all the costs by themselves. In such cases, a compulsory insurance system should be introduced in situations where epidemic diseases spread on cruise vessels [43]. Put differently, the new framework should obligate the carrier to buy insurance or other financial security for all passengers in the event of their requiring medical services at the ports at which the vessels call. Such insurance prices may be subject to change depending on the measures undertaken by carriers to prevent the spread of infection.

If accepting states and cities need to provide medical services to cruise vessel passengers with infectious diseases, they should do so, and later they can claim for reimbursement from the carriers and their insurers. In this way, regarding the rules of a claimant, the 1969 CLC framework would serve as a more useful reference than the Athens Convention: while the former allows coastal states and communities who suffer damage to claim compensation, under the latter, claimants are supposed to be passengers themselves or their representatives. Regarding this, when allocating the economic burden of medical costs, the public authorities should be allowed to claim the cost they temporarily cover. As medical services are originally provided by hospitals, hospitals could be eligible to claim the medical fee from the carrier. However, as shown above, in the case of an epidemic, these costs are highly likely to be covered by public funds under each state’s municipal framework. Therefore, public authorities should cover the costs of hospitals and claim for damages from the carrier. Given this flow, in contrast to both the 1969 CLC and Athens Convention, the new framework would not need to provide a system of direct claims against insurers.

The fact that carriers have the obligation to buy insurance does not necessarily mean that the carriers would cover the entire cost of insurance. Overall, stakeholders can share the burden. For example, as shown above, for oil pollution damage, not only shipowners but also the oil industry covers the cost. Thus, cruise vessel carriers can request the cost of insurance from the passengers themselves by adding it onto the ticket price. In addition, given that port states and cities that unfairly carry the burden in the current framework also benefit from accepting cruise vessels, they could financially support carriers in buying insurance, such as that for crew members. As Liu and Chang emphasized the obligations of the home port—the port where a ship is based—to rescue people [15],

the home port may be expected to bear the financial burden to some extent. Meanwhile, Tirrell and Mendenhall argued that to reduce the burden of port authorities, flag states should be liable or responsible for the costs of disease outbreaks on ships flying their flag because they have exclusive jurisdiction over such vessels [44]. Given the fact that flag states are also beneficiaries of the cruise industry as they collect tax for the registered ships, their participation in the burden allocation system can be one option.

In any event, this framework cannot be established if the insurance company does not provide such an insurance program. Regarding this, the involvement of relevant private actors in the international law-making process is essential, and from this point of view, the International Maritime Organization (IMO) can be a good forum. This is because both the International Union of Marine Insurance, which represents national and international marine insurers, and the Cruise Lines International Association, the world’s largest cruise industry trade association, are granted consultative status with the IMO [45]. Therefore, if the new framework is negotiated under the IMO forum, the views of both the cruise and insurance industries can be reflected, in addition to relevant states, such as port and flag states.

Amendment to the Athens Convention is a possible option to introduce this new framework. However, the small number of parties to the Athens Convention has given rise to the concern that the application of the Convention would not be global, even if the new framework, as illustrated above, is adopted. Article 2 of the Convention provides that the Convention applies to “international carriage” that satisfies at least one of the following conditions: (1) the ship in question is registered to a state party, (2) the contract of carriage has been made in a state party, or (3) the place of departure or destination is in a state party. Article 1(9) defines “international carriage” as “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.” Therefore, even if the number of state parties is small, port states can benefit from the Convention by ratifying it, although they would owe obligations under the Convention at the same time.⁵ For example, although Australia is not a party to the Convention, cruise vessels flying the UK flag that depart or arrive at Australian ports are subject to the rules of the Athens Convention, since the UK is a party to the Athens Convention [46]. However, suppose that most States do not wish to be a party to the Athens Convention. If so, they may choose to adopt the new international treaty, which is completely separate from the Athens Convention and focuses on allocating the financial burden of medical costs, under the IMO forum.

Another possible forum to introduce the new framework might be the World Health Organization (WHO), under which the adoption of the pandemic treaty is currently being debated [47]. However, as confirmed in the working draft published on July 13, 2022, it might be unrealistic to expect the pandemic treaty to cover the issues of medical costs.⁶ Under such circumstances, the IMO would be the most appropriate forum to discuss and introduce the new insurance framework for cruise vessels. If the IMO needs assistance from the WHO for the purpose of coordinating the relationship between the pandemic treaty and the new framework, IMO should collaborate with WHO as it did in the COVID-19 pandemic situation [48,49].

⁵ Given the fact that a “flag of convenience” also prevails on cruise vessels, this expanding scope of application of the treaty is important. See C. Boy, S. Neumann, Regulatory frameworks of the cruise industry, in: M. P. Vogel, A. Papanthassis, B. Wolber (Eds.), *Business and Management of Ocean Cruises*, 2011, p. 37.

⁶ Working draft written to describe the issues to be discussed in the following intergovernmental negotiations. *Working draft, presented on the basis of progress achieved, for the consideration of the Intergovernmental Negotiating Body at its second meeting (A/INB/2/3)* (July 13, 2022).

4. Conclusion

The COVID-19 pandemic has had a substantial negative impact on the cruise industry, and the disease has also affected not only cruise companies but also related industries and communities, as indicated in a joint statement by the World Tourism Organization and IMO [50]. Several states and the cruise industry have already adopted measures for the safe resumption of cruise travel.⁷ Strengthening the cruise industry to the extent that it can be operated in a sustainable manner requires the establishment of a new international legal framework. Such a framework should include not only the rules to allocate the economic burden of medical costs equally, but also the rules to define the rights, obligations, and duties of both coastal states and flag states. Although the latter points remain to be studied, this paper concludes with the hope of contributing to an establishment of such a framework of equal burden sharing when accepting cruise vessels with infected persons.

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Data Availability

Data will be made available on request.

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Declaration of Interest statement

There are no conflicts of interest to declare.

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