JOINT CONFERENCE OF THE MARITIME LAW ASSOCIATION OF THE UNITED STATES AND INSTITUTO IBEROAMERICANO de DERECHO MARITIMO, FAJARDO, PUERTO RICO

THE QUEST FOR UNIFORMITY IN A GLOBAL CONTEXT

I. THE MLA

An introduction and explanation of the history, purposes, organization and activities of the Maritime Law Association of the United States ("MLA") is appropriate to present at the beginning of this panel discussion. The MLA was founded in 1899. Its formation was prompted by the Comite Maritime International ("CMI"). Approximately ninety years later, the MLA was incorporated in 1993. Its purposes are expressed in Article 4 of its then-adopted articles of incorporation, as follows:

> The Objectives of The Association shall be to advance reforms in the Maritime Law of the United States, to facilitate justice and its administration, to promote uniformity in its enactment and interpretation, to furnish a forum for the discussion and consideration of problems affecting the Maritime Law and its administration, to participate as a constituent member of the Comite Maritime International and as an affiliated organization of the American Bar Association, and to act with other associations in efforts to bring about a greater harmony in the shipping laws, regulations and practices of different nations.

Through its various committees, the MLA follows, in earnest, federal and state judicial decisions, legislation and regulations affecting the maritime arena. The MLA is not a lobbying or special interest organization. Each of the traditional groups, namely cargo, personnel and vessel interests, has many representatives within the MLA all united by their concern with maritime law and all its facets.

The MLA Membership consists of attorneys involved in maritime matters, judges active in matters involving admiralty issues, admiralty law professors and non-lawyers who are selected because they hold responsible positions in the maritime field and have rendered distinguished

service in the advancement of maritime law or its administration. The MLA is professional organization concerned with improvements in maritime law and which stands ready to help and assist to those interested in this area of law.

The MLA is an Affiliated Organization of the American Bar Association and is represented in the ABA House of Delegates. The ABA's Model Rules of Professional Conduct, adopted by the ABA House of Delegates on August 2, 1983, recognized that lawyers engaged in the practice of admiralty may be described by such designations as "Proctor in Admiralty" acknowledging the long historical tradition associating maritime commerce in the federal courts plus recognizing admiralty and maritime practice as a unique field of law.

Because the MLA's work has become so well known, its views are frequently sought by Congress and various government agencies. Some of MLA's more notable activities internationally over the past one hundred years have included:

1. Recommending, in 1912, that the CMI consider the formulation of rules governing carriage of goods under ocean bills of lading and participation in the formulation of such rules, as well as the drafting of the Convention and legislation embodying them. The MLA's recommendation was approved by the CMI but further consideration was interrupted by the outbreak of World War I in 1914. The work was not resumed until 1921. In that year, a meeting was held at the Hague, and International Law Association approved a set of rules formulated by the CMI, based upon the United States Harter Act of 1983, with several significant differences. The rules, which became known as the Hague Rules, were amended by the CMI at a meeting in London in 1922, and then submitted to the Diplomatic Conference of Maritime Law. The rules were adopted in 1924 as

an International Convention which entered into force in 1931 and has been in force ever since.

2. Members of the MLA were highly instrumental in the drafting of the Hague Rules and in persuading Congress to enact the Carriage of Goods by Sea Act of 1936, which is in almost all respects identical to the Convention. Congress ratified the Convention in 1937.
3. Unfortunately, despite the MLA's support for many, if not most of the Conventions drafted by the CMI, the United States Government's record for ratifying them has been poor.
4. The MLA is connected to, or interacts with, a number of international organizations such as the CMI, the International Maritime Organization ("IMO"), the United Nations Conference on Trade and Development ("UNCTAD"), and the United Nations Commission on International Trade Law ("UNCITRAL") (whose aim is to harmonize and unify international trade law). UNCITRAL was instrumental in the preparation of the 1978 Hamburg Rules and prepared the 1985 UNCITRAL Model Law on International Commercial Arbitration as well as the 2009 Rotterdam Rules on Carriage of Goods Wholly or Partly by Sea.

Domestically, the MLA has played a vital role in the development of progressive maritime legislation and improving the rules governing admiralty practice. The various statutes sponsored by the MLA are, among others, as follows: the Maritime Lien Acts of 1910, 1920, and Amendment of 1988, the Salvage Act (1912); the Death on the High Seas Act (1920); the Suits in Admiralty Act (1920); the Carriage of Goods by Sea Act ("COGSA"); the Longshore

and Harbor Workers Compensation Act (1927) and Amendments thereto of 1972 and 1984; the Jones Act (1920); and the Inland Rules Act (1981).

A group of very dedicated and determined MLA members has been an instrumental part of the United States Delegation to the UNCITRAL drafting group. UNCITRAL completed its Draft Convention in December 2007 and the General Assembly of the United Nations adopted the Convention on Carriage of Good Wholly or Partly by Sea during its 2008 session in New York. A formal sign-in ceremony was subsequently hosted at Rotterdam on September 23, 2009 at which twenty-one (21) countries, including the United States, signed their intent to ratification of the Convention, which became known as the Rotterdam Rules. Only a few countries have ratified the Rotterdam Rules to date and many other countries are awaiting the United States to ratify the Rotterdam Rules before their governments will similarly ratify it.

Additionally, the MLA has played a leading role in the 1966 merger of the former General Admiralty Rules of the Supreme Court and the Federal Rules of Civil Procedure. The MLA's Committee on Practice and Procedure worked closely with the government's Advisory Committee, which included several senior members of the MLA.

Much of the success of the MLA is due to the dedication and hard work of its members who participate in various committees set up and organized by the MLA. Not to diminish the importance of all the committees within the MLA, but to comment upon a few, are the following: Committee on Carriage of Goods; Committee on International Organizations, Conventions and Standards; Committee on Marine Ecology and Maritime Criminal Law; Committee on Marine Insurance and General Average; Committee on Offshore Industries; Committee on Salvage; Young Lawyers Committee; and the Committee on Uniformity of U.S. Maritime Law (the last of which I had the honor of chairing for the past five years).

The Uniformity Committee identifies and alerts the MLA Board of Directors to legal decisions that give rise to decisional conflicts among the United States Circuit Courts of Appeal and the District Courts. The Committee also identifies and monitors significant state court decisions which may conflict with the well-established principals of Federal Maritime Law. Not infrequently, at the request of the MLA President, the Uniformity Committee is sometimes called upon to provide research and legal analysis to assist the Board in considering requests for *Amicus Curae* by the MLA.

II. WHAT IS A VESSEL?

Besides the question as to "What is a COGSA package?" the next frequently litigated question in maritime law may be "What is a Vessel?". In 2005, the United States Supreme Court decided that for the purposes of the Longshore Harbor Workers' Compensation Act ("LHWCA") and the Jones Act, the definition of "vessel" would be guided by the definition contained in the United States Code. The United States Code defines "vessel" as including "every description of water-craft or other artificial contrivance used, or capable of being used, as a means of transportation on water." By adopting the broad definition of vessel, the Court sought to resolve conflict between the Circuit Courts regarding coverage under the LHWCA and the Jones Act, which often turned on the definition of "vessel". *Stewart v. Dutra Constr. Co.,* 543 U.S. 481, 125 S.Ct. 1118, 205 AMC 609 (2005).[1]

The structure that ultimately promulgated the new definition of "vessel" was the *SUPER SCOOP*, the dredging barge at issue in *Stewart v. Dutra*. The *SUPER SCOOP* was a dredge,

[1] Impact of *Stewart v. Dutra* on Seaman Status – A Follow up and Review of Cases Applying the New Definition of "Vessel", 4 Benedicts Maritime Bulletin, p. 24-28, McDermott & Meers
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which consisted of a floating barge equipped with a clam shell bucket used to scoop silt from the ocean floor and onto scows floating next to the dredge. The *SUPER SCOOP* only had limited means of self-propulsion and required the aid of a tug to move long distances. The *SUPER SCOOP* was operated by a Captain and crew that could move the barge short distances by manipulating its anchors and cables. Applying the Section 3 definition of "vessel", the Supreme Court found that the *SUPER SCOOP* was a vessel for purposes of LHWCA.

Using the Supreme Court's definition of a "vessel", several lower courts used the broad definition to address the question of what is a vessel in determining the seaman status of various claimants.

The first lower federal court to address the Supreme Court's ruling in *Stewart v. Dutra* was the Western District of Michigan, *Arnold v. Luedtke Engineering, Co.*, 357 F.Supp 2d 1019 (W.D. Mich. 2005), in which an employee had spent twenty-three years performing a variety of different maritime-related jobs for his employer. Arnold's most recent position with his employer was as a Project Foreman for a sea wall construction project. The court addressed the vessel status of three different structures used by Arnold in performing his job, namely, a floating work raft, a tug boat and a derrick boat. The court found that both the tug and derrick easily had vessel status. However, the court held that under *Stewart v. Dutra*, the floating work raft was not a vessel.

The Second Circuit Court of Appeals decided in *Uzdavines v. Weeks Marine*,418 F.3rd 138, 2005 AMC 2024 (2nd Cir. 2005) that the employee who worked on board a "bucket" dredge where he was allegedly exposed to asbestos which caused his cancer and subsequent death was a member of a crew, his widow sought death benefits pursuant to the LHWCA. The widow argued that despite the fact that he was a member of a crew of a vessel, the vessel was not in navigation

and that Mr. Uzdavines' connection to it was not substantial in duration and nature. The Second Circuit held that *Stewart* superseded the prior Second Circuit test requiring navigation to be the primary purpose of a vessel for it to be "in navigation".

In *Cain v. Transocean Offshore Deep Water Drilling, Inc.*, 2005 U.S. Dist. LEXIS 17643 (W.D. La. August 12, 2005), the West. Dist. of Louisiana found that an oil rig still under construction and undergoing sea trials constituted a vessel. The next circuit to follow *Stewart v. Dutra* was the Eighth Circuit in *Bunch v. Canton Marine Towing Co., Inc. (cite)* 419 F.3rd 868, 2005 AMC 2167 (8th Cir. 2005). In *Bunch*, the Eighth Circuit found that a cleaning barge moored to the bed of the Missouri River, with spud poles extending through the center of the barge, constituted a vessel and that an employee working aboard the barge as a "barge cleaner" was a seaman for purposes of the Jones Act.

In *Holmes v. Atlantic Sounding Co., Inc.*, 429 F.3d 174, 205 AMC 2612 (5th Circuit 2005), Addie Holmes brought a Jones Act claim in connection with her employment as a cook working on a structure called the *BT-213.* The *BT-213* was essentially a "floating dormitory" transported by tug and was used to house and feed employees during dredging projects at various locations. The Fifth Circuit issued its initial decision on October 5, 2005 concluding that the *BT-213* was not a vessel. Thereafter, in January 2006, the Fifth Circuit unanimously changed its decision. The court acknowledged that the *Stewart* decision "significantly enlarged the set of unconventional water craft that are vessels under the Jones Act and the LHWCA." (Id. at 18-9). In *Harvey's Casino v. Izenhour*, 2006 Iowa at App. LEXIS 124 (Iowa Ct. App. February 1, 2006), the Court addressed the status of two river boat casinos, the *KANESVILLE QUEEN* and the *AMERISTAR*, both were actually used to navigate on the Missouri River and the Court had no trouble determining that each was a vessel under the *Stewart* test.

Just when it appears that the courts had made a hard and fast rule as to what constitutes a vessel, the Supreme Court addressed the issue of whether a "floating home" is a vessel as defined by federal law and therefore subject to federal admiralty jurisdiction. *Lozman v. City of Riviera Beach, Florida*, 133 S.Ct 735 (2013). The Eleventh Circuit Court of Appeals had ruled that Mr. Lozman's floating home was a vessel using an analysis that was at odds with other federal circuit courts. Due to the conflict between the circuits and the continuing uncertainty surrounding the issue of vessel status, the U.S. Supreme Court accepted the case for review. Once again, the question of "what is a vessel?" was presented to the U.S. Supreme Court. The answer to the question is important in terms of which court the parties would have their day before and what law would apply. It will also determine which liability remedy, such as provided under the Jones Act and the General Maritime Law, would be available to an injured employee or whether an injured employee is limited to workers' compensation remedies. The question is also significant for property owners, especially floating water-front properties and construction work platforms in the context of remedies, liability and financing.

The Supreme Court once again looked at the language of 1 U.S.C. Section 3, the federal law which defines a vessel as "every description of water-craft or other artificial contrivance used, or capable of being used, as a means of transportation on water." The Supreme Court appears to have utilized a new test as to vessel status and now looks at the structure through the eyes of a "reasonable observer", paying closer attention to the practical attributes of water-craft or artificial contrivance. Obviously, this new test will result in a case-by-case approach. Judge Breyer, writing for the majority, looked upon the structure's lack of self-propulsion, its rectangular bottom, its inability to generate or store electricity and its construction details (non water-type doors or windows), suggesting that the structure was not designed to transport

anything other than its furnishings and the owner's personal effects. The dissent, however, characterized the court's new "reasonable observer" standard as too subjective. (Boating Briefs – MLA Committee on Recreational Boating, Spring 2013, Vol. 22, No. 1).

The Supreme Court pointed out that its decision in the *Lozman* case is consistent with its holding in *Stewart v. Dutra*, since the *SUPER SCOOP* dredge in that case, determined to be a vessel, "ordinarily served a water-borne transportation function" in that it regularly (not primarily) carried machinery, equipment and crew over water. I am of the opinion that the *Lozman* case appears to have narrowed the holding in *Stewart* in requiring practical consideration of many factors and determination of vessel status. This will undoubtedly lead to more litigation for maritime attorneys.

III. THE GROUNDING OF THE *COSTA CONCORDIA*: A COMPARATIVE STUDY OF APPLICABLE LAWS IN ITALY AND THE UNITED STATES

On May 2, 2012, Michael G. Chalos of Chalos O'Connor, LLP, gave a presentation to the Uniformity Committee Meeting discussing the incident surrounding the allision of the *COSTA CONCORDIA* and the potential consequences that might arise under Italian Law.

At the time of Michael's presentation, no official investigative reports were available for public consumption. In addition, the trial of Captain Schettino had not been scheduled. The trial was actually scheduled to start in July 2013. However, a lawyers' strike (which more than likely would not have happened in the United States) delayed the commencement of the trial. The trial

resumed on September 23, 2013, since courts in Italy do not hear cases in August.[2] What follows herein is the outline of the presentation by Mr. Chalos, which consisted of a study of the applicable laws in Italy and comparing that to the hypothetical question as "what if the incident had occurred within United States waters?"; namely, off the coast of Florida.

FACTUAL SUMMARY

The Vessel – *COSTA CONCORDIA*

- Owned and Operated by Costa Crociere S.p.A. – Subsidiary of Carnival Corp.
- Built in 1996 for US$585 million
- 114,137 gross tons and 951.8 feet long
- Carried more than 3,200 passengers and 1,000 crew

THE INCIDENT

- Occurred on Friday the 13th, January 2012
- Set sail from the Port of Civitavecchia, near Rome, Italy
- Scheduled for a seven (7) day cruise, calling at ports of Savona, Marseille, Barcelona, Palma, Cagliri and Palermo
- Departure at 7:33 p.m. local time
- Two hours into the voyage, at 9:40 p.m. local time, the vessel struck a rocky outcrop off the shore of the island of Isola del Giglio

DAMAGE TO VESSEL

- A 160-foot long gash tore into the port side of the vessel
- The vessel began flooding, lost power and started to list

[2] At the time of this writing, the trial was suspended as the Judge agreed to an examination of the vessel to seek further evidence.

- Without propulsion, she drifted back towards Giglio Island, where she grounded and listed onto her starboard side in shallow water[3]

REPORT TO ITALIAN COAST GUARD

- The first individuals to contact the Italian Coast Guard were passengers from their cell phones

- The Italian Coast Guard contacted the vessel's crew regarding the passenger's reports and were told the vessel was experiencing a "blackout"

- The vessel's crew failed to report the true nature of the casualty, which delayed the rescue response

ABANDONING SHIP

- The abandon ship order was given at 10:58 p.m.

- Most passengers disembarked via lifeboats

- Evacuation efforts were hampered by the severe list of the vessel and the Master's decision to delay reporting the incident to the Coast Guard

- Once the extent of the damage became known to the authorities, the Italian Coast Guard launched rescue boats and helicopters

- All but 32 of the 3,229 passengers and 1,023 crew were saved

THE MOLDOVAN DANCER

- A 25-year-old former dancer, Dominica Cemortan, from Chisinau, Moldova, has become a central figure in the investigation

- It has been reported that Miss Cemortan provided statements that appear to contradict statements by members of the crew that she had been invited onto the bridge by Capt. Schettino on the night of 13 January to watch him execute a sail-past in honor of a retired liner captain

- She told prosecutors the captain invited her to the bridge to see the ship perform a 'salute' of the island of Giglio

CAPTAIN SCHETTINO

- Captain Schettino was born in Castellammare di Stabia, South of Naples

[3] The vessel was successfully righted through a 19-hour parbuckling operation and now sits upright in 100 feet of water resting on a man-made platform.

- He joined Costa Cruises in 2002 and was promoted to Captain in 2006
- Immediately following the incident, he was arrested and held in prison on suspicion of manslaughter
- He has been released and is currently under house arrest
- His trial resumed on September 23, 2013 and then was adjourned for new expert examination

CAPTAIN SCHETTINO STATEMENTS AND ALLEGATIONS OF MISCONDUCT

- Captain Schettino allegedly stated the rocks struck by the vessel were not marked on the relevant charts
- He allegedly admitted he made a "judgment" error and that he ordered the turn "too late"
- He has blamed the helmsman for the incident and considers himself a hero
- He is accused of abandoning the vessel before all of the passengers were evacuated, in violation of Italian law
- Reports indicate approximately 300 passengers remained onboard when Schettino abandoned ship

POTENTIAL CRIMINAL CHARGES AGAINST THE MASTER IN ITALY

- On January 16, 2012, the Public Prosecutor sought the detention of the Master for three crimes
    - Causing a Shipwreck
    - Abandoning Ship
    - Manslaughter (multiple counts)
- On January 17, 2012, the Italian Court issued an Order summarizing the charges[4]

[4] Capt. Schettino's attorneys offered a plea bargain to the court and prosecution. The plea was rejected. Deals have been approved for five other defendants, including the helmsman and other ship officers who were on the bridge at the time and an official of the Cruise Line who was managing the crisis shoreside. The company agreed to pay a substantial fine.

CAUSING A SHIPWRECK – ITALIAN LAW

- Specifically, the Court summarized that the *"culpable behavior consisting of imprudence, negligence and incompetence and in violation of the regulations of the sector (and in particular of Art. 6 of Law No. 1085 of 27 December 1977, for having maintained a speed over 15 knots, even though in the proximity of obstacles, in a way such as not to be able to act in an appropriate and efficient manner so as to avoid collisions and to halt the craft within a distance appropriate to the circumstances and to the conditions of the moment), caused the shipwreck of the said Costa Concordia."*

- As a result of this charge, Capt. Schettino faces a possible term of imprisonment of 10 years

ABANDONING SHIP – ITALIAN LAW

- Article 591 of the Italian Penal Code provides that anyone who abandons a person incapable to fend for himself and which should have the custody or care, shall be punished by imprisonment of six months to five years. However, the sentence is increased to one to six years if the act derives a personal injury and three to eight years if it results in death

- Italian Navigation Code, Article 303 provides: "the Master cannot order the abandonment of the vessel in danger if not after having experimented without result all means prescribed by the nautical art for saving same and after having heard the advice of the deck officers or, in default, of at least two of the most experienced crew members. <u>The Master must be the last to abandon the vessel seeing to it that, as far as possible, the ship's papers and books, as well as the articles of value committee to his custody, are saved.</u>"

- Captain Schettino could be sentenced to six months to five years for each abandoned passenger who did not suffer an injury; one to six years for each abandoned passenger who suffered an injury; and three to eight years for those passengers who perished

- For the 300 passengers he is said to have abandoned and the 32 who perished, he could face a maximum sentence of over 1,700 years

MANSLAUGHER – ITALIAN LAW

- Manslaughter is defined in the Italian Criminal Code at Article 589. In summary, the statute defines manslaughter and its punishment as the action of causing the death of a person without intention, punishable with a sentence of between 6 months and 5 years. However, if there is more than one victim as a consequence of the same act, multiple counts will be added up to a maximum of 15 years imprisonment

WHAT IF IT HAPPENED IN THE U.S.?

- In the United States, every oil spill and every maritime casualty involving the loss of life, will result in a criminal investigation in the U.S., and potentially, prosecution

- Unlike Italy, the U.S. does not have a criminal statute for abandoning a ship or causing a shipwreck; however, the United States does prosecute every loss of life that is caused by a vessel or occurs on a vessel under the Seaman's Manslaughter Statute

SEAMAN'S MANSLAUGHTER STATUTE 18 U.S.C. §1115

- *Every captain, engineer, pilot, or other person employed on any steamboat or vessel, by whose misconduct, negligence, or inattention to his duties on such vessel the life of any person is destroyed, and every owner, charterer, inspector, or other public officer, through whose fraud, neglect, connivance, misconduct, or violation of law the life of any person is destroyed, shall be fined under this title or imprisoned not more than ten years, or both*

- *When the owner or charterer of any steamboat or vessel is a corporation, any executive officer of such corporation, for the time being actually charged with the control and management of the operation, equipment, or navigation of such steamboat or vessel, who has knowing and willfully caused or allowed such fraud, neglect, connivance, misconduct, or violation of law, by which the life of any person is destroyed, shall be fined under this title or imprisoned not more than ten years, or both*

- Therefore, the elements of the crime are:

    - 1) the defendant was of the vessel (*i.e.*, Master, Chief Engineer, Pilot, etc.);

    - 2) the defendant was guilty of misconduct, negligence or inattention to his duties on the vessel; and,

    - 2) that by reason of such misconduct, negligence, or inattention, someone died

- Based upon the current allegations against Capt. Schettino, and had the incident occurred in the U.S., he would likely be charged under the Seaman's Manslaughter Statute

- Because this statue criminalizes misconduct, negligence or inattention, it effectively holds the defendant strictly liable for any maritime accident resulting in a death

- This statute provides for a maximum term of imprisonment of 10 years and a fine

OTHER CRIMINAL STATUTES RELATED TO THE INVESTIGATION

- The U.S. Department of Justice often charges multiple courts to increase the possible sentence that will be imposed against seafarers, Owners and Operators of vessels

- DOJ regularly prosecutes the following statutes:

    - False Statement Act (18 U.S.C. §1001)

    - Conspiracy (18 U.S.C. §371)

    - Obstruction of Justice (18 U.S.C. §1505)

    - Tampering with Witnesses (18 U.S.C. §1512)

    - Sarbanes Oxley (18 U.S.C. §1519)

- During any U.S. Coast Guard investigation, if a crew member makes a false statement to any government investigator regarding a fact that is material to the investigation, the crewmember may be charged with obstruction of justice and/or making a false statement

- For example, had this incident occurred in the U.S., Captain Schettino's alleged statement that the rocks were not on the chart, or the crew's alleged statements to the Italian Coast Guard that they were experiencing a "blackout", would likely result in charges of obstruction of justice and making false statements to the Coast Guard, and, possibly, conspiracy

NOTICE OF MARINE CASUALTY

- Pursuant to 46 CFR §4.05-1, immediately after the addressing of the resultant safety concerns of a casualty, the owners, agent, master, operator, or person in charge, shall notify the nearest Sector Office, Marine Inspection Office or Coast Guard Office whenever a vessel is involved in a marine casualty

- In this context, any false statement made pursuant to the statutory duty could also render criminal liability for the crew under the False Statement Statute discussed above

- Again, the Master and Crew are alleged in the *COSTA CONCORDIA* matter to have possibly provided the Italian Coast Guard with knowingly false or misleading statements

- The crewmembers could also be charged with conspiracy if two or more crewmembers agreed that they would make false statements to the Coast Guard. If convicted of conspiracy, imprisonment of up to 5 years and/or fines are possible

- Similarly, if one crewmember attempted to influence another as to what to say to the Coast Guard, charges for obstruction of justice and tampering with a witness could be brought. If convicted of obstruction of justice, imprisonment of up to 8 years and/or fines are possible

- If any document material to the incident was concealed, destroyed or changed, the crewmember engaging in such conduct could face a charge of obstruction of justice under Sarbanes Oxley. If convicted of obstruction under Sarbanes Oxley, imprisonment of up to 20 years and/or fines are possible

- The maximum fine for any of the above crimes is $250,000 for an individual and $500,000 for a corporation

VICARIOUS LIABILITY FOR OWNER/OPERATOR

- Under the U.S. law, corporations are "legal persons," capable of suing and being sued, and capable of committing crimes

- Pursuant to the doctrine of *respondeat superior*, a corporation may be held vicariously criminally liable for the illegal acts of its directors, officers, employees, and agents

- To be held criminally liable for the criminal acts of its employees and/or agents, the government must establish that the employee's and/or corporate agent's criminal acts were committed: (1) within the scope of their employment or agency; and, (2) were intended, at least in part, to benefit the corporation

- A corporation may have direct criminal liability for the acts of its directors and officers

- A corporate officer/director may be found criminally liable just because of his/her position of responsibility

- The fact that the company and its employees, officers and/or directors are outside the U.S. is not a bar to the dogged efforts of U.S. prosecutors

RESPONSIBLE CORPORATE OFFICER

- Under the "Responsible Corporate Officer Doctrine," criminal liability for violations of U.S. laws can be imposed on corporate managers or officers who were in a position to know about and prevent a violation, even if they did not actually commit the alleged crime

- A person can be held liable as a responsible corporate officer based upon the person's ability or authority to influence the corporate conduct that constituted the violation

- The United States has used this doctrine to convict high-level officers of corporations, including presidents of corporations, for violations of U.S. laws committed by lower-level employees.

- There are three requirements to impose liability under the Responsible Corporate Officer Doctrine

- First, the individual must be in a position of responsibility, which allows the person to influence corporate policies or activities

- Second, the person, by reason of his corporation position, could have prevented or corrected actions that constituted the violation

- Third, the individual's actions or omissions must have facilitated the violation

OIL POLLUTION AND CRIMINAL LIABILITY

- If the maritime casualty results in a pollution incident, there are various statutes available to the Department of Justice to further prosecute for the pollution

- While the *COSTA CONCORDIA* has not yet spilled any oil, there remains a significant threat that it may

CLEAN WATER ACT

- The Clean Water Act (33 U.S.C. §1251) prohibits the discharge of any pollutant by "any person" into navigable waters of the United States except where permitted.

- A "knowing" violation of the Clean Water Act is a felony. A "negligent" violation is a misdemeanor

- The Clean Water Act also prohibits the discharge of oil or hazardous substances into the navigable waters of the United States, or into the waters of the United States, or into the waters of the contiguous zone in such quantities as the President determines may be harmful

- Failure to report a discharge is a Class D felony punishable by imprisonment of up to 5 years

- The Clean Water Act also provides that the term "person" includes any "responsible" corporate officer"

- The Clean Water Act has been held to be a public welfare statute and is strictly enforced against both individuals and corporations

- The Oil Pollution Act of 1990 (OPA '90) amended and supplemented the Clean Water Act's civil criminal penalty provisions

U.S. STRICT LIABILITY CRIMINAL STATUTES
IN THE EVENT OF A POLLUTION INCIDENT

- The Migratory Bird Act
- The Refuse Act
- The Refuge Act

Violations of these statutes are misdemeanors punishable by up to 1 year of imprisonment and a $200,000 find (per count)

NATIONAL MARINE SANCTUARIES ACT

- The NMSA authorizes the Secretary of Commerce to designate and protect areas of the marine environment as national marine sanctuaries
- The NMSA Makes it a criminal offense to destroy, or cause the loss of, or injure any sanctuary resource managed under the law or regulations of that sanctuary
- A person convicted under the NMSA may be fined or imprisoned for not more than 6 months
- The Act contains a forfeiture provision which permits the government to request the forfeiture of the vessel and its cargo

CIVIL SUITS

- Regardless of whether Italian or U.S. law would apply, injured passengers, Estates of deceased and damaged property owners are free to bring civil suits. Several suits brought in the U.S. were dismissed on jurisdictional grounds due in part to the forum selection clause in passenger's tickets
- The civil claims are being tried together with the criminal charges – something that would not occur in U.S. Courts

IV. CARRIAGE OF GOODS AND THE ROTTERDAM RULES

One of the most important areas in which maritime attorneys have sought global uniformity is in the area of carriage of goods by sea. This is the quintessential area in need of international uniformity for the enforcement of rules.

The Rotterdam Rules are the latest in a series of conventions, treaties, and all rules governing the carriage of goods. The Rotterdam Rules have not yet taken effect and will not until twenty nations have ratified them. To date, only two, namely, Spain and Togo, have formally ratified them. The Rules were signed in September 2009 by twenty-four nations.

Much has been written about the Rotterdam Rules and the efforts of representatives of the CMI and the MLA have been recognized in pushing these Rules forward. Special mention should be made to the efforts of Michael Sturley and Vincent DeOrchis, among several others.

To put the Rules into the present context, it is necessary to briefly review the history of Carriage of Goods. In 1893, the U.S. enacted the Harter Act, and it was principally generated by the fact that foreign flag carriers were able to absolve themselves from liability for a number of different causes, while U.S. carriers had the responsibility of being essentially insurers of the goods. The Harter Act was intended to put the international shipping trade to and from the United States on a more level playing field. Carriers were allowed certain defenses; however, causes which might lessen or void the liability with respect to certain obligations were considered to be invalid.

In 1924, the Hague Rules were enacted as a more detailed regime spelling out obligations of the carrier and shipper, as well as certain defenses in limitations. In 1936, the United States enacted the Carriage of Goods by Sea Act ("COGSA") as national law and adopted the Hague Convention. Thereafter, in 1968, the Visby Amendments to the Hague Rules were adopted by many countries in which the limitations of liability were increased. The United States failed to adopt the Hague-Visby Rules, leaving COGSA in place with a limitation of $500 per package or per customary freight unit. Just as we saw earlier with the question as to "what is a vessel", the

issue most litigated in the United States in the maritime arena is what is a package or customary freight unit.

The MLA sought to improve COGSA with respect to modifications which would consider and potentially clarify certain case law, recognize the advances in technology and increased value of cargo, and other issues such as foreign jurisdiction clauses. Despite the efforts of the MLA, the proposal did not pass muster with the United States Congress. Thereafter, the CMI undertook to consider the matter on an international basis. An important impetus for obtaining a global convention in the area of carriage of goods was the threat of regionalization. Various countries and regions, namely, Asia, Europe, South America, the U.S., etc. were threatening to have the onset of rules, which may have caused chaos in the international shipping world. UNCITRAL then considered the subject to be suited for United Nations activity and thereafter, in 2009, the Rotterdam Rules were signed in the Netherlands by twenty-four nations.

As we know from the delay in the United States' signing of the Hague Rules (proposed in 1924 and ratified in 1936), it is unknown as to when the Rotterdam Rules will actually come into effect. The U.S. Congress seems to encounter distractions on a regular basis. Several countries, namely, Denmark and Norway, have taken the position that ratification of the Rules will take place when the United States or the larger EU states ratify the rules.

The Rotterdam Rules (formally United Nations Convention on Contracts for the International Carriage of Goods Wholly or Party by Sea) is a treaty comprising of international rules that revises the legal framework for maritime carriage of goods. The Convention establishes a modern, comprehensive and uniform legal regime governing the rights and obligations of shippers, carriers and consignees under contracts for door-to-door shipments that

involve international sea transport. The primary aim of the Convention is to extend and modernize international rules already in existence and to achieve uniformity of admiralty law in the field of maritime carriage. The primary provisions and law changes found in the Rotterdam Rules include the following:

1. It extends the period of time that carriers are responsible for goods to cover the time between the point where the goods are received to the point where the goods are delivered.
2. It allows for more e-commerce and approves more forms of electronic documentation.
3. It obligates carriers to have ships that are seaworthy and properly crewed throughout the voyage. The level of care is set to due diligence, which is the same as provided in the Hague Rules.
4. It increases the limit of liability of carriers to 875 units of account per shipping unit or three units of account per kilogram of gross weight.
5. It eliminates the nautical fault defense which had prevented carriers and crewmen from being held liable for negligent ship management and/or navigation.
6. It extends the time that legal claims can be filed from one to two years following the day the goods were delivered or should have been delivered.
7. It allows parties to certain "volume" contracts to opt out of some liability rules set in the Convention.

See, the Rotterdam Rules by Michael F. Sturley, Tomotaka Fujita and Gertjan van der Ziel. London: Sweet & Maxwell 2010, 25 U.S.F.Mar. L.J. 189. See, also, Jurisdiction Under the Rotterdam Rules, Michael Sturley. www.rotterdamrules2009.com

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