• THE CRIMINALIZATION OF MARITIME ACCIDENTS AND MARPOL VIOLATIONS IN THE UNITED STATES

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Banged Up!

Every master’s nightmare comes true for Wolfgang Schroeder
Anger as master faces 10 years for quayside accident
By Katrin Berkenkopf in Cologne
Friday October 27 2006
Print Article

A GERMAN master jailed in the US and awaiting sentence of up to 10 years after a quayside worker was killed in an accident has become the focus of growing industry anger over the criminalisation of seafarers.

Wolfgang Schröder was guiding the 1,150 teu Zim Mexico III on March 2 this year out of the port of Mobile, Alabama, when the bowthruster failed.

The vessel, which is owned by Hamburg’s Rickmers Reederei and was chartered out to Zim at the time, hit a gantry crane onshore, causing it to collapse on an electrician who later died.

The master was arrested when the ship called at Houston. Capt Schröder was charged with criminal misconduct and denied release on bail. In October he was found guilty by a Alabama jury.

The sentence, which could be up to 10 years, is expected to be given by February at the latest.

• Published by Lloyd’s List
October 27, 2006
Fear grips masters after US conviction

A former captain from Germany awaits sentencing in Alabama, sending worldwide shock waves. Will Watson reports that the precedent-setting case stems from a fatal accident.
A Danish captain has confessed to deliberately ramming a US Coast Guard boarding party in North Carolina.

Villy Larsen, who is in custody in Wilmington, is said to have signed the confession admitting he was “in a fury” at the time of the incident in August, the Scandinavian Shipping Gazette reported.

The master was arrested on the 1,600-dwt general cargoship Danica White (built 1985), owned by Folmer of Denmark, after arriving in Wilmington.
$37m

Overseas Shipholding Group appears to be closing in on a record $37m settlement with the US Department of Justice to end its probe of oily water separator violations.

That sum is what OSG has now set aside after a $27m reserve taken last quarter. It would easily be the most ever paid by a shipowner in a waste-oil case, dwarfing the $25m payout by Taiwanese container giant Evergreen in 2005.

Published by Tradewinds
November 2, 2006
Big Mike makes hasty retreat to Singapore

By Nikko Dizon

THE BELEAGUERED husband of President Macapagal-Arroyo left yesterday morning for Singapore, delecting members of the media waiting for him at the Ninoy Aquino International Airport Terminal 1 in Pasay City. Jose Miguel "Mike" Arroyo requested early leave.

US makes 4 RP seamen rich as environment heroes

By Nikko Dizon

THE UNITED States not only heaped praises on them for their heroic deed. It also turned them into millionaires.

But the four Filipino seamen—instrumental in the conviction of violators of international and US environmental laws—chose to make only a brief appearance before the media at the US Embassy yesterday.

They disappeared as soon as the press conference was over.

Jonathan Sanchez, Jimmy Piamonte and Florencio Tolentino each received $75,000 (or an estimated P4.3 million) while Richard Santillan got $25,000 (P1.35 million) from the US Justice Department.

The reward was for their initiative in informing the US Coast Guard that their vessel, MV Katarina, had violated international and US environmental laws.

US Charge d'Affaires Joseph Musumeci handed them large "mock" checks in a brief ceremony at the embassy's Charles Parsons Ballroom. The embassy did not say when the real money was given to them.

Two of the seamen came with their wives:

"I know this is an inspiring story. But they are private citizens and they said they do not wish to be interviewed," US MAKES 4 R2
MARPOL Violation Prosecutions in US—Government’s Position

- Enforcement of US laws
- Punishment of Wrongdoer by Fines and/or Jail Time
- Deterrence of Wrongdoer
- Deterrence of Other Potential Wrongdoers
- Protecting the Environment for all
- Flag States Not Enforcing Marpol
The Reality

• Shipping industry is an easy target
• Shipping companies are perceived as having lots of money and will pay large fines rather than fight
• No political constituency
• No organized political muscle
• Good publicity for US government on Environmental enforcement
WHERE DO WE GO FROM HERE?

• Prosecutions obviously not working
• Government and industry must work together
• Owners/Operators must:
  – Provide better and more sophisticated equipment
  – Change culture of shipboard and shoreside personnel by better training and closer supervision of onboard activities
• Government and industry need to explore ways and means of developing more available reception facilities

• Government and industry need to work together on an EPA type of protocol agreement whereby industry agrees to establish and abide by certain best practices, compliance programs and initiatives and in return receives a “safe harbor”/non-prosecution consideration for any illegal conduct by rogue employees
BASIC ELEMENTS OF CRIMINAL LIABILITY-- MENS REA

• Generally to be guilty of a crime, a person must act with criminal intent or mens rea (i.e. prosecutions for MARPOL Regulations)

• For health and public welfare violations strict liability applies (i.e. accidental spills after a casualty)

• Strict liability means that an individual can be found criminally liable without having had any criminal intent, in the traditional sense.
US Strict Liability Criminal Statutes

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

Violations of these statutes are misdemeanors punishable by up to one year of jail time and a $200,000 fine per count.

Every spill and/or casualty involving loss of life will result in a criminal investigation in US and, potentially, prosecution.
Current Status of MARPOL Violation Prosecutions in US

• US DOJ and Coast Guard are well organized with task forces to investigate and prosecute shipowners, operators, managers and seafarers for Marpol violations
• Prosecutions are on the rise
• Security demands (monetary and maintaining crew during investigation) for release of vessel increasing and becoming more onerous
• Fines are getting larger
• Court ordered and enforced compliance programs
How and Why?

• OWS equipment do not always operate as advertised or as intended
• Poor culture for protection of environment and adherence to regulations
• Lack of maintenance of OWS equipment and poor training of crew in its use and in record keeping
• Lack of available reception facilities
• Aggressive US government investigations and prosecutions
• “Whistleblowers”- can get up to 50% of fine
Gov’t Authority for Marpol Violations Investigations

• The MARPOL Protocol (“MARPOL”) is an international treaty implemented in the United States by the Act to Prevent Pollution from Ships (“APPS”), 33 U.S.C. §§ 1901 et seq.

• APPS makes it a crime for any person to knowingly violate MARPOL, APPS, or the federal regulations promulgated under APPS. 33 U.S.C. § 1908(a).
• These regulations apply to all commercial vessels, including vessels operating under the authority of a country other than the United States, when these vessels are operating in United States waters or while at a port or terminal under the jurisdiction of the United States. 33 C.F.R. § 151.09.

• The United States has no jurisdiction over a foreign flag vessel for any violation of MARPOL that occurs outside the US 12 miles jurisdictional limit.
• The United States Coast Guard regularly inspects the Oil Record Book during port state inspections to determine compliance with United States law and the MARPOL Protocol and to assure that ships are not an environmental threat to United States ports and waters.

• The United States Coast Guard is charged with enforcing the laws of the United States and is empowered under 14 U.S.C. § 89(a) to board vessels and conduct inspections and investigations of potential violations and to seize evidence.
• If the Coast Guard finds evidence that a vessel is not in substantial compliance with MARPOL or APPS, the Coast Guard is empowered to deny a vessel’s entry to a United States Port or detain a vessel 33 C.F.R. §§ 151.07(b).

• The Coast Guard is also required to report to the United States Attorney’s office for the District in which the vessel is inspected all suspected violations of any US laws.
CRIMINAL STATUTES & SANCTIONS

• There are a broad array of criminal sanctions available to prosecutors against crewmembers, owning and managing corporations, and individuals in such corporations.

• Prosecutors can and will:
  
  • arrest, detain and/or confiscate vessels to obtain security and/or collect fines/penalties;
  
  • criminally charge and hold vessel personnel;
  
  • criminally charge owning/operating and/or management companies; and
  
  • criminally charge responsible corporate officers, as well as, managing company personnel.
CORPORATE LIABILITY

• A corporation can incur vicarious liability for the actions of its employees undertaken in the course of their employment if such actions are intended for the benefit of 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 US not a bar to the dogged efforts of US prosecutors.
Applicable Criminal Statutes

• False Statement Act (18 USC Sec.1001)
• Act for the Prevention of Pollution from Ships (APPS) (33 USC Sec 1901 et seq)
• Conspiracy (18 USC Sec 371)
• Obstruction of Justice (18 USC Sec 1505)
• Tampering with Witnesses (18 USC Sec 1512)
• The Clean Water Act (CWA) 33 USC Sec 1251
• Sarbanes-Oxley Act of 2002, 18 USC Sec 1519
“RED FLAGS”

• Flexible by-pass hoses in and around OWS
• Flange nuts and bolts around OWS and overboard discharge valve that show recent use
• Freshly painted piping, flanges, nuts & bolts
• Oil on valve stems on discharge side of OWS
• Oil in piping between OWS and overboard discharge valve
• Oil in overboard discharge valve
• Inoperable and/or malfunctioning OWS
Red Flags (Cont’d)

• Inoperable Incinerator
• Lack of spares or record of maintenance of OWS and/or Incinerator
• Engineering crew’s inability to operate OWS and/or Incinerator
• Improper and or missing ORB entries
• Amounts recorded as transfers exceed tank capacity
• Repeat entries
• Bilge soundings do not conform to ORB entries
Red Flags (Cont’d)

• Evidence of Oil Content Meter (or “15 ppm sensor”) not working properly or overridden
• Existing piping/valve arrangement does not match original piping diagrams
• Non-use or excessive use of Incinerator
• Unauthorized cross over valves and piping
• Whistleblowers
Crewmembers’ Rights in US

- No crewmember can be forced to speak to US authorities if there is a possibility that by doing so they will incriminate themselves (5th Amendment)
- Each crewmember is entitled to consult with counsel before speaking to authorities
- If a crewmember does choose to speak with authorities, such crewmember must be completely truthful
- If English is not the crewmember’s first language can ask for interpreter
WHAT TO DO TO AVOID CRIMINAL INVESTIGATIONS?

At all times:

• obey all international and US regulations and ensure that company procedures and directives are properly implemented and adhered to;

• ensure that all ISM and SMS requirements are in place and adhered to by the crews and shoreside personnel;

• ensure that crews and shoreside employees are well trained and proper reporting procedures are developed;
WHAT TO DO TO AVOID CRIMINAL INVESTIGATIONS (cont’d)?

- if the PSC inspection appears to be more than a routine inspection immediately notify the manager and/or the vessel’s port agent and/or the P&I Club’s local correspondent;
- once an investigation commences, do not under any circumstances remove or destroy any documents, piping, flanges or other potential evidence and do not give or accept any orders to do so.
Thank You for Your Attention

Michael G. Chalos