

## ADMIRALTY LAW

## Expert Analysis

# Italy Cruise Ship Lawsuits Unlikely to Survive

By  
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It has been a year since the tragic shipwreck of the *Costa Concordia*. On Jan. 13, 2012 (Friday the 13th), the modern cruise ship, carrying more than 4,200 passengers and crew, departed Civitavecchia, Italy, and less than three hours later slammed into a reef in Italian waters just off the Island of Giglio. The ship immediately took on water through a 230-foot gash in its hull and began to sink. There were 32 fatalities and multiple injuries. It is claimed that the ship was permitted to be navigated off course, and ventured dangerously close to shore to perform a “sail-by-salute” to the residents of the island. And if true, what a salute it turned out to be...the ship remains in position, lying on its side, still saluting. The *Concordia* (like the *Titanic*), is now a daily reminder of just how fragile a leviathan ship can be, when poor navigation collides with nature. Then, the lawsuits started.

Many civil lawsuits were filed in the United States by passengers and by residents of the Giglio island, including fishermen, property owners, business owners and those working in and around the island who claim damages to their businesses stemming from the wreck. Unlike the ship and the captain (destined to remain in Italy for a long time), many if not all of the lawsuits filed here will quickly depart the jurisdiction.

Several lawsuits commenced by Hungarian band members (one of whom died in the casualty) in the Southern District of New York were voluntarily

dismissed.<sup>1</sup> A class-action suit by 1,000 residents of Giglio Island filed in federal court in Florida was recently dismissed based on the forum non conveniens doctrine.<sup>2</sup> Passenger lawsuits in the United States for personal injury or wrongful death will likely suffer the same fate or be dismissed based on the passenger ticket’s forum selection clause that calls for Italian jurisdiction.

### Safety of Life at Sea

The captain of the ship has been widely criticized, and even accused of multiple criminal violations, for inter alia, being among the first to abandon ship after the casualty. He remains under house arrest. The captain’s duty on a sinking ship, and whether he or she must go down with the ship, is a fascinating topic to be addressed in another column. However, despite criticism for early abandonment of the ship, the captain’s post-casualty action in turning the ship after striking the reef and bringing it to rest on the rocks close to Giglio’s port, may have actually saved lives as many passengers and crew reportedly were able to swim ashore to safety.

At the time of the casualty, the ship had yet to perform a ‘muster’ or ‘lifeboat’ drill. The purpose of this drill is to prepare passengers for safe evacuation and to familiarize them with escape routes. Without the benefit of a drill, the newly embarked passengers



The *Costa Concordia* cruise ship leans on its side off the Tuscan Island, Isola del Giglio, Italy, in a photo from Jan. 19, 2012.

were in the dark as to what to do in the emergency, and had no clue where lifeboats or life rafts were located. The situation was described by a New York attorney in a news report as “absolute chaos” where Hungarian band members were allegedly leading the evacuation.<sup>3</sup>

As it turns out, however, the cruise line was not in violation of international law (Safety of Life at Sea Convention) which requires a lifeboat drill be conducted within 24 hours after leaving port since *Concordia* had only sailed about three hours prior to the casualty.<sup>4</sup> A change in that law has been approved and is awaiting ratification; it will require all passenger ships to perform the lifeboat drill before or immediately after the ship leaves port.

### Forum Selection Clauses

Forum selection clauses are enforceable in admiralty law. A passenger cruise ticket is a maritime contract and therefore governed by the general maritime law of the United States.<sup>5</sup>

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In federal courts in New York (and elsewhere), cruise lines' forum selection clauses have uniformly been found valid and enforceable.<sup>6</sup> The New York cases were all determined by reference to admiralty law. Indeed, even if diversity of citizenship were the basis for federal subject matter jurisdiction, it is of no moment because disputes relating to maritime contracts and injuries sustained aboard a vessel are governed by substantive maritime law.<sup>7</sup>

Concordia's 'Cruise Ticket Contract' contained a choice of forum clause for voyages that did not depart from, return to or visit a U.S. port. That clause required that "all claims, controversies, disputes, suits and matters of any kind whatsoever... shall be instituted only in the courts of Genoa, Italy, to the exclusion of the courts of any other country, state or nation." The clause also states that Italian law shall apply.

The enforceability of a forum selection clause in a cruise line contract was settled by the U.S. Supreme Court in *Carnival Cruise Lines Inc. v. Shute* in 1991.<sup>8</sup> The *Shute* case went up and down the various courts like a ship bobbing in the high seas until the dispute was finally settled by the Supreme Court holding that a forum selection clause in a cruise line's passenger ticket requiring litigation of disputes in Florida was reasonable and enforceable.

The rationale was that a reasonable forum selection clause even in a form contract is permissible so that a cruise line is not subject to litigation in several different forums. Such clause was considered to have the salutary effect of dispelling confusion as to where suits may be brought and defended, and may have the added benefit of reducing fares by reflecting the savings that cruise lines enjoy by limiting the forum in which it may be sued.<sup>9</sup>

The *Shute* court mentioned that a forum-selection clause in a form cruise line contract is subject to traditional scrutiny for fundamental fairness. Indeed, the U.S. Supreme Court had previously decided in 1972 in *M/S Bremen v. Zapata Off-Shore Co.*, enforcing a London forum clause in an offshore towing contract, that in light of commercial realities and expanding international trade, a forum selection clause in a maritime contract controls absent a strong showing that it should otherwise be set aside.<sup>10</sup> The *Bremen* court left open the possibility that a 'serious inconvenience of the contractual forum to one or both of the parties might carry greater weight in

determining the reasonableness of the forum clause."<sup>11</sup> Thus, the Supreme Court, in *Shute*, considered this argument but did not set aside a Florida forum selection clause because plaintiffs were allegedly physically and financially incapable of pursuing litigation in Florida, finding it an unsupported 'conclusory reference.'

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In any Costa Concordia cases filed here, a court will evaluate fundamental fairness by reference to the flag of the ship, the nationality of the ship's officers, the ports of departure and arrival, accident location, and the operator's (Costa Crociere S.p.A.) principal place of business. These all point to Italy.

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### Forum Non Conveniens

It is common knowledge that a plaintiff's choice of forum should rarely be disturbed. Nonetheless, a case may be dismissed on the basis of forum non conveniens when "trial in the plaintiff's chosen forum imposes a heavy burden on the defendant and where the plaintiff is unable to deliver any specific reasons of convenience supporting its choice."<sup>12</sup> Indeed, the class-action suit in Florida against the Concordia owners was dismissed in September 2012 on forum non conveniens grounds.

All criteria in the analysis pointed to Italy, namely that (1) an adequate alternative forum existed, (2) the public and private factors weighed in favor of dismissal, and (3) plaintiffs could reinstate the suit in Italy without undue inconvenience or prejudice.<sup>13</sup> The Florida district court found Italy to be a convenient forum and dismissed the case contingent upon, inter alia, that defendants'

consent to jurisdiction and service of process in Italy; waive any jurisdictional defenses; and agree to reinstatement of the suit in the United States if the Italian court did not accept the suits.<sup>14</sup>

The court observed the 'clash' of the experts as to whether Italy had a contingency fee system, but noted that even if such a system did not exist, it would not tip the balance to the United States and was considered a 'particularly weak' argument for opposing a dismissal on forum non conveniens grounds.<sup>15</sup>

### Conclusion

It seems odd for maritime cases stemming from a cruise ship casualty in Italian waters to be initiated in the United States, particularly the class-action of 1,000 residents of Giglio Island. Perhaps, plaintiffs believe the American courts will be more generous, but that may not necessarily be true, especially with the ship's wreckage looming as a constant reminder to citizens and judges in Italy. Bottom line is that the cases filed here will in all likelihood be shipped off to Italy well before the Costa Concordia is lifted off the rocks.

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1. *Csepi v. Carnival Corporation and Costa Crociere, S.P.A.*, 12-cv-3498 (Sept. 19, 2012).

2. *Giglio Sub S.N.C. v. Carnival Corporation, Costa Crociere, S.P.A.*, 2012 WL 4477504 (S.D. Florida 2012).

3. See Fox 5 News report link with release of video footage from inside the ship at <http://www.myfoxny.com/video?clipId=8025980&topVideoCatNo=238447&autoStart=true>.

4. International Convention for the Safety of Life at Sea, 1974 (SOLAS), Chapter III, Regulation 26 Practice Musters and Drills. T.I.A.S. No. 9700; 32 U.S.T. 47 (U.S. Treaty).

5. *Lurie v. Norwegian Cruise Lines*, 305 F.Supp.2d 352, 356 (S.D.N.Y. 2004).

6. *Lurie v. Norwegian Cruise Lines*, 305 F.Supp.2d 352 (S.D.N.Y. 2004) (case transferred to Florida, rather than dismissed); *Licensed Practical Nurses, Technicians and Healthcare Workers of New York v. Ulysses Cruises*, 131 F.Supp.2d 393 (S.D.N.Y. 2000) (transfer to Florida with proper remedy to enforce forum selection clause); *Melnik v. Cunard Line*, 875 F.Supp. 103 (N.D.N.Y. 1994) (transferred to Southern District of New York pursuant to cruise line's forum selection clause).

7. *Lurie v. Norwegian Cruise Lines*, id. at 356; see, e.g., *Melnik v. Cunard Line*, 875 F.Supp. 103, 106 (N.D.N.Y. 1994).

8. 499 U.S. 585, 111 S. Ct. 1522, 113 L. Ed. 2d 622 (1991).

9. Id. at 593-595.

10. *M/S Bremen v. Zapata Off-Shore*, 407 U.S. 1, 15; 92 S. Ct. 1907, 1916 (1972).

11. *M/C Bremen*, 407 U.S. at 17; 92 S. Ct. at 1917.

12. *Piper Aircraft v. Reyno*, 454 U.S. 235, 249 (1981).

13. Id. at 257.

14. *Giglio Sub S.N.C. v. Carnival Corp.*, 2012 WL 4477504 at \* 10 (S.D. Fla. 1012).

15. Id. at \* 19.