



BYNANE & CO

International and Maritime Law

The Polygram

Color of Law or Color of Money:

**Nine Tips for Shipowners and P & I Clubs
in dealing with some latter-day Pirates of the
Caribbean**

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F. Max Hardberger

Michael Bynane

Know the enemy and know yourself;

in a hundred battles you will never be in peril.

When you are ignorant of the enemy but know yourself,

your chances of winning or losing are equal.

If ignorant both of your enemy and of yourself,

you are certain in every battle to be in peril.

Sun Tzu

It is an unfortunate fact that there are certain countries and jurisdictions in the Caribbean, stretching from the West Indies to Central American, that have proved to be perennial trouble spots for shipowners and their P & I clubs. For a variety of reasons, the interests of owners and the clubs are particularly vulnerable in these countries to all manner of local intrigue, or even skullduggery, involving adverse, third, and even collaborative parties. Paradoxically, these modern day “Pirates of the Caribbean” often enjoy the protection of color of law. Things can function reasonably well for the clubs as long as they can rely on their long-time, trusted correspondents. However, with the continuing development of the Caribbean, ships are going into ports lacking traditional infrastructure, and where death, retirement, or other changes have deprived them of such tried and true resources, their vulnerability is perhaps greatest.

Cultural differences certainly account for some of the problems, together with language and communication issues. Often there is a critical disconnect between how European and North American P & I clubs understand the shipping business and the way that business is conducted in the more provincial areas of the Caribbean where their members’ ships call. In the least troublesome of situations this may involve little more than a lack of clear and effective communication, something that P & I club loss adjusters and TPA’s agree is their greatest problem. In many cases this may be

the result of local ideas of punctual and prompt communication falling below accepted business standards.

Of greater concern are shortcomings in something as basic as a routine survey report. Accuracy and transparency are both vital to such reports. But too often reports produced by surveyors hired by local correspondents (themselves frequently incapable of technical analysis) and routinely transmitted to the club’s adjusters are unprofessionally drafted, written in poor English, and sometimes completely incomprehensible. Further, the club will generally have no way independently to confirm the surveyor’s findings.

However, things can go from bad to worse when the deficiencies noted above are compounded by the all-too-frequent cases in which local counsel’s personal agenda diverge from the best interests of the club. In many of these jurisdictions there is an underlying culture and tradition of taking advantage of outsiders, even to the point that theft and extortion of foreigners is not considered morally wrong in certain circles of the shipping business. The result is that foreign-flag shipowners and their insurers can find themselves without the substantive and procedural protections to which they are accustomed in law-abiding port states.

In many of these jurisdictions, as incredible as it may seem, there is often a tacit understanding that the port, and indeed the town as a whole, can only

benefit from a vessel being seized or detained.

After all, the departure of a vessel means in practical terms the end of an owner's investment of the local economy. In that climate, there doesn't have to be an explicit agreement between legal representatives, local officials, and the courts to keep a vessel alongside; it is enough that there is a general understanding that it is simply best for all local interests.

As an example of how local situations can prejudice a shipowner and the vessel's P&I club, consider the following example, based on actual events experienced by us in our practice: The M.V. "CHIOS EXPRESS" has arrived in Port Royal, Hispaniola, with a cargo of 7,000 MT of No. 2 long-grain rice in 50-kilo bags, loaded in Freeport, Texas. The master files a Letter of Sea Protest on arrival in Hispaniola regarding very heavy weather conditions enroute. On opening, a large number of water-damaged bags are found in way of the No. 1 hatch square, finally totaling 1000 MT, by the receivers estimation. The master disputes the number and says that only about 100 tons were actually wetted.

The P&I club sends a surveyor that it has used before to the ship, and at the same time contacts its P&I correspondent. The cargo interest sends another surveyor. Before the cargo is discharged, the receiver goes to a Justice of the Peace in Nomás (an inland suburb of Port Royal) and has the vessel seized for a million-dollar claim, although the actual loss was approximately \$40,000. The

court refuses to accept a letter of undertaking from the P&I club and the club is forced to buy a million-dollar bond for the vessel to leave.

During the ensuing arbitration between the charterer and the ship, and the litigation in Hispaniola over the bond—the club's surveyor is unable to refute the receiver's claim that the wetting damage was caused by fresh water, since he did not test for chlorides or take a proper sample. Further, although the vessel was recently surveyed by class and passed a hose test before loading, the club's surveyor agrees with the adverse surveyor that the vessel's hatches were not in good condition. As a result, the club's correspondent says, he is unable to negotiate the claim down and ultimately the entire amount of the bond is forfeited by the court to the receiver (minus court costs, of course).

The club is not aware that, 1) their correspondent is married to the receiver's cousin and owes the receiver's father money; 2) their surveyor is both incompetent and corrupt, and accepted a small bribe from a trusted intermediary to fail to maintain a sample or to perform a test for chlorides; and 3) the receivers have specifically gone to a certain Justice of the Peace in Nomás because they have made an agreement with him to give them the ship after a pretense of notification, publication, hearings, etc., which can be done merely by denying the owner's and P&I club's motions and pleas and ordering a sale.

Although most maritime nations have signed international conventions regarding the bases upon which ships in international commerce may be arrested by port states in civil disputes, it is a regrettable fact that these conventions are often disregarded by many port authorities in certain Caribbean countries. In many of these countries local law allows magistrates, and even justices of the peace who may never have heard of international maritime law, to issue seizure orders for any debt whatsoever, even if disallowed by IMO convention. Further, if the court rejects a P & I letter of undertaking and the vessel goes to judicial sale, it is nearly impossible to contest the high bidder's application for registration.

The clubs of course are aware of the risk of illegitimate seizure and are usually not at risk, since indemnity does not cover the loss of the vessel herself. However, if the vessel is seized because a P & I letter of undertaking was rejected by the court and the vessel is sold to pay for allegedly damaged cargo, the club is obligated to defend the vessel and reimburse the owner for his loss to the limit of the policy or the value of the lost cargo. It is not uncommon to find that a routine cargo claim involving tens of thousands of dollar ultimately is inflated to encompass a loss in the seven figure range.

Faced with these concerns, it is obvious that prompt and resolute action is called for. Fortunately, there are things that a prudent owner

or its insurer can do at the first whiff of a claim that appears in any way suspect.

- Get a second opinion. Alert your correspondent at large as to the claim. Prudence here assumes that you have made prior arrangements with alternate counsel who are prepared to assume a "flying squad" approach to your problem and positioned to assume hands-on control of the situation in its early stages from a legal and maritime point of view, using essential local contacts already in place.
- This correspondent appoints a local protecting agent to perform a correspondent's traditional duties and assist the vessel's master in all aspects of the vessel's port call.
- The ship's master may be instructed to cease discharging the vessel until the arrival of the owner/insurer's independent surveyor.
- The independent surveyor conducts an appropriate inspection of the cargo, the vessel, and the circumstances surrounding the alleged loss, including photographs and video documenting his findings, leading to a formal survey report.
- Basic communications should be state of the art for purposes of reporting to concerned parties, including the owner, the adjuster, the charterer, and the broker. Frequent and timely updates as to the vessel's situation can be vital in terms of

making informed and timely decisions. The correspondent in the field should have the capability of supplementing routine email communications, both reports and photographs, with world-wide GSM and Iridium (satellite) telephone service. Further, when a process or procedure or operation (e.g., crane operation in a personal injury case) is at issue, a club adjuster might benefit most from the ability of the correspondent to provide, direct from the field, high quality, high speed, streaming video of the incident or the procedure in question. This technology exists to provide this kind of information from quite remote locations, for a very reasonable cost, and should be utilized wherever and whenever it is needed.

- On the legal front, simultaneously, the following steps are taken: (1) remove the case from the local Justice of the Peace to the superior court; (2) in the alternative, file for immediate rehearing of the seizure order; (3) file an emergency appeal to the superior court to dismiss the seizure based on lack of cause, or, in the alternative, to require acceptance of the P & I club's letter of undertaking; and (4) depending on flag, have the ambassador or consul file a formal protest with the national port authority.

- Local contacts are enlisted to research the claimant's background, to discover any history of fraudulent or collusive claims or seizures, and to

discover the nature of any relationship between the receivers and erstwhile correspondents.

- Initiate timely discussions with the receivers, armed with the true facts and guided by specific knowledge of local law and custom, to convince the receivers that in the "shipping jungle" there are "easier prey to stalk".

The reality is that there is no way to avoid completely the risk of seizure in those ports of certain jurisdictions where international treaties on vessel arrest are not fully honored. However, a prudent insurer of members whose vessels trade in these countries can adopt appropriate strategies to deal with these risks by recognizing from the outset the danger of illegitimate claims and seizures, helping to educate vessel masters in protecting their ship and its cargo, and being prepared to take bold and informed local action as soon as the possibility of a serious claim is discovered. When the proper steps are initiated, the receivers should realize that they will have to negotiate in good faith, knowing they can no longer count on a distant P & I club accepting anything they can pressure the club's correspondent to accept.

Strategic Key: Caveat mercator: Be on guard against all legal mountebanks operating under color of law but driven by the color of money (who are all too often found thriving where the warm trade winds blow and the palm trees sway).

LAWYER CONTACT

For further information, please contact your Firm representative or the lawyer listed below. General e-mail messages may be sent using our "Contact Us" form, which can be found at www.polycarpon.com.

Michael Bynane

Tel: +1.281.206.0002 (Houston)

+44 (0) 20 8144 6994 (London)

mcbynane@polycarpon.com

F. Max Hardberger

Tel: +1.818.574.7142

Cell: +1.985.264.9529

fmhardberger@polycarpon.com

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