

THE RESTRAINT OF PRINCES: Vessel Arrest in Rogue States

A Speech before the Association of Average Adjusters of the United States

by

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Good morning. Vessel arrest is as old as shipping. The very nature of international shipping demands that port states have a mechanism by which a vessel can be detained until local debts are paid. In countries with poorly developed legal systems, this mechanism is routinely employed to seize ships for fraudulent or other invalid claims. Every country has the right to protect its citizens' interests, so the real question is not why ships are seized, but why every ship that calls a rogue state isn't seized.

The answer is that most countries want to maintain a façade of respectability when they steal foreigners' assets. Occasionally countries like Bolivia and Venezuela seize foreigners' property without bothering to offer any kind of excuse, but in a shipping context it's easier just to structure the theft as a seizure for debts.

Essentially, the same dynamic that kept Carthage from seizing every ship that called its ports is still at work. Take Haiti, a country virtually without law. The only reason why every ship that calls Haiti isn't seized is because Haiti depends completely on imports for survival. Even sugar has to be imported. Every time a ship gets into trouble there, charter rates to Haiti go up. This doesn't do the individual shipowner much good when his ship gets seized, but he should remember that he's getting twenty percent more for taking the risk. In terms of *realpolitick*, a seizure in a rogue state isn't the end of the world; it's just a tactical matter to be resolved by negotiation.

We are all familiar with seizures for legitimate debts, but how does an illegitimate seizure work? Consider the case of a 10,000-ton freighter that was stolen out of the Dominican Republic. The thief suborned the vessel's crew to commit barratry and deliver her to a remote port in Haiti during the 2004 revolution. Then he had a bogus claim filed against the ship, and she was seized.

No valid claim against the ship was ever alleged, and Haiti is signatory to conventions on vessel arrest, but the man who stole the ship was an experienced ship thief. I should say *is*, for he still roams the Caribbean with impunity. He made sure that proper judicial procedure was followed even though the sale documents are jokes. I've seen copies. They don't make sense even in French. But there's the three publications in *L'Observateur* and the declaration that the Haitian claimant was the high bidder. If the ship had been in Haiti on the date of sale, the thief would have owned her free and clear.

Of course, a Haitian court sale will always be collusive, but this one was especially tough. No one representing the owner or the mortgagee could attend because the roads had been closed by bandits. The rebels had emptied all the jails, and it was pretty hairy driving around in those days. Just before the date of the auction, the mortgagee called me. I have a company called Vessel Extractions LLC, or VessEx, that gets ships out of situations like this, and I was brought in to extract her.

The auction was set for Thursday and I get her out on Tuesday. Two more days and the thief would have gotten record ownership of a 10,000-ton ship for a total outlay of probably about a hundred grand.

You see, it doesn't matter that the ship ended up in Haiti by theft. That's an issue for the port state's courts to decide, and under principles of national sovereignty, no foreign court can review their decisions, at least not in a matter like this. But a ship has to be physically within the court's jurisdiction at the moment of sale. The thief did try to register her with Panama, but we were able to show that the ship was in international waters on that date, and the sale was invalid. By the time the thief tried to register her, the ship was already under arrest in Freeport, and Panama said it would wait for the Bahamian court's decision. I assume that whoever bought her at the Bahamian auction was able to register her with that court's sale document.

There was a TV show about that operation on the series *Repomen*. You can watch it by going on the VessEx website, which is www.vesselextractions.com. Unfortunately, the Repomen cameramen got cold feet and left before the actual extraction, so the show is unintentionally funny at the point where they try to cover the gap, but it's still worth seeing.

A sad footnote to this story: of course the thief never paid the Ukrainian crew for stealing the ship out of Dom Rep, and he left them stranded with no money or food in Haiti after the ship was seized. Two of them died onboard, then the Seaman's Church repatriated the rest. The men who died are still buried in paupers' graves in Haiti.

I have a lot to say about the plight of European crewmen on Caribbean freighters, but that's the subject of another speech.

In the old days, if you wanted to steal a ship, all you had to do was get possession. You then destroy all documents bearing the vessel's previous names, grind off the build names and official number, and a brand-new ship enters the world charter market. In fact, if you want to run under your national flag—cabotage—you can probably still do it. In the days when I was captain on a ship running rice to Haiti, there was a Haitian-owned ship with a Colombian crew that used to call the same port. The Haitian owner got behind in crew wages one time too many, so the crew got together, decided on shares, and took the ship to Colombia to run her between the mainland and San Andres. Being Colombian, they didn't need any paperwork for national registration, and the last I heard she was still at work, presumably still on shares.

However, in international trade, the IMO has been able to discourage ship theft by getting flag states to agree to require a Deletion Certificate from the previous flag state before registering a vessel. This is undoubtedly why the thief in the Haiti operation resorted to a judicial seizure. In the old days, he would have simply taken her to a remote cove to grind off the build names and official number, throw away the ship's documents, and maybe even alter her profile. It's amazing what a little sheet metal work on the stacks will do.

Today it's easier and safer just to process the theft through the courts. It's not hard, and there are plenty of jurisdictions to choose from. In fact, it's kind of a cottage industry in the Caribbean. And here's the beauty of the scheme: everybody knows that a judicial sale wipes out prior ownership and debt. And in Haiti, like other rogue states, a fifty-million dollar ship can be seized by a Justice of the Peace for any reason

whatsoever, or no reason. Even in the US, Justices of the Peace don't have to have any legal education, but in Haiti, a JP doesn't even have to read and write.

So you have a fifty-million dollar ship being seized by a man who never heard of international conventions on the arrest of ships, and doesn't have to answer to any kind of ethical standard. In Haiti, the term "corrupt judge" is like the Department of Redundancy Department. Anyone who wants a ship can always find a JP to seize it. As long as the claimant's attorney can guide the judge in drafting a proper sale document, this same JP can sell the ship to the highest bidder. If the owner or mortgagee can't outbid the claim—assuming he even knows about the sale, since publication is usually the only notification—then the ship is gone.

What can be done about this kind of chicanery after the fact? Well, the first thing is file a protest to the vessel's present flag state, requesting that the vessel not be given a Deletion Certificate. Remember that when the owner wants to sell a ship, under modern IMO requirements, he must first obtain a Deletion Certificate from her present registry. This is primarily to make sure the ship owes no debts to the registry and has no liens filed. However, since a judicial bill of sale wipes out all debts, these reasons are obviated, and normally a judicial bill of sale is all that is necessary to register a ship.

The former owner should also protest to the vessel's new flag state that the judicial sale was corrupt, and request that the vessel be disenrolled. I have tried this a couple of times, but I've never gotten anywhere with it. You can get a flag state to put a hold on registration, but once a ship's been enrolled, it's hard to get her disenrolled. About the only evidence I know that would do the trick would be a notarized statement from the judge that he took a bribe.

In essence, if the claimant is smart enough to make sure that the sale document reflects proper procedure, a flag state will not disenroll a vessel merely because her former owner alleges, without proof, that the judicial sale was corrupt.

One of the most important early decisions is not legal in nature, but practical. How much is the ship actually worth? Often, the owner doesn't realize at first how much the whole affair is going to cost, and then, as expenses mount, he starts feeling that he's already spent too much to quit. These shipowners sometimes remind me of monkeys in Africa, the ones that can be caught with a nut in a coconut. They get their hand around that nut and can't pull it out, but they won't let go even when they see the trapper coming. So it's important to set a limit early-on as to how much will be spent to release the vessel from seizure. When this limit is reached without the prospect of imminent release, it's usually time to abandon ship.

Actually, the shipowner isn't always the victim in a ship-theft scheme. Sometimes, a clever shipowner will seek to clean a mortgage or other debt off his ship through a corrupt judicial sale. With the proper local contacts, he can send her to one of these rogue states and have a "straw man" file a claim against her. He can then have her sold for the claim, "buy" her from the claimant, and regain ownership free of the mortgage.

The heart of this scheme, like those of many maritime schemes, is the fact that no one really knows who owns a ship. Considering modern liability issues, this is as it

should be. A vessel has to have management, of course, but who can prove that the company claiming to be technical management actually belongs to the beneficial owner? And if you want a challenge, try identifying the real owners of a Panamanian ship registered to a Greek company held by a Ukrainian syndicate—in bearer shares.

So who are the rogue states of the Caribbean? In descending order of lawlessness, they are Haiti, the Dominican Republic, Trinidad, Venezuela, Colombia, and Honduras. That's not to say that the other maritime nations of the region are free of corruption, but the others at least maintain some pretense of following international conventions in the type of claim that gives rise to a maritime lien.

There are a number of ways that a shipowner and the ship's master can reduce the risk of seizure in any port. These are many and varied, but, briefly, they include tight control over chandlers and other shore suppliers, clearly drafted crew contracts, and proper "damage control" procedures for handling cargo claims. Certainly, it's better to time-charter into these ports than to voyage-charter, for if the vessel's going to be stuck in a foreign port, it's better for the lost time to be on the charterer's nickel.

An owner can add protective riders to the charter-party shifting some of the risk to the charterer. This is especially valuable if the charterer is local, since if he has a stake in the vessel's freedom he may be able to exert local pressure to void or reduce a third-party claim. Haitian charterers often agree to such provisions because otherwise they can't get ships.

But let's say that, despite the owner's best efforts, his ship has been seized. What to do now?

The first thing to discuss is the American Foreign Corrupt Practices Act of 1977 and the Anti-Bribery Act of 1998 as they apply to an interest-holder attempting to recover a vessel from a corrupt foreign seizure.

There are very few US laws governing the conduct of US citizens and residents in foreign countries, but the FCPA and its progeny are among them. An American can do something in a foreign country for which he runs no risk of local arrest—something common and accepted locally—but for which he may be criminally prosecuted on return to the US. The crime is bribery of a foreign official.

The FCPA is based on the quaint notion that there is something so distasteful about bribery that, like pedophilia and drug dealing—the only other foreign crimes I know of prosecutable in US courts—it warrants extraordinary legislation. However, it ignores the fact that in many Caribbean and Latin American countries, bribery is merely the mechanism by which governments expect underpaid officials to augment their incomes. It's easier to allow institutionalized *mordida* than to raise the taxes necessary to pay policemen and judges a living wage.

But not to worry. Congress was more worried about appearing to control freebooting Americans than effecting any real reform. After all, look at the bribery scandal that brought down the Fujimora government; to my knowledge, none of the Americans involved was ever charged. One reason is because the FCPA allows an American to pay a foreign official to do his duty, or, as one text puts it, "a payment may be made to an official to expedite his performance of the duties that he is already bound

to perform.” Now, that’s what I call an escape clause. It’s like passing a law saying you can’t commit murder unless it’s necessary.

So if you feel compelled to make a payment that could run afoul of the FCPA, just make sure it is for the purpose of getting someone to do that which he was already bound to do. Now, I don’t want to oversimplify the law, and obviously anyone with a stake in the matter would be well-advised to research it carefully, but I think a clever person can do pretty much what he wants in this regard as long as he knows how to structure the deal.

So your client’s vessel has been seized in a foreign port. The first thing is to get on the ground. You’re not going to be able to do anything from a distance. On arrival, start gathering intelligence. Keep a low profile. If the vessel doesn’t have a protecting agent, hire one. Research the claimant’s background and the claim itself. If it’s a cargo matter, make sure you get the best surveyors available, even if they have to be flown in. Too much rides on the surveyor’s reports to let unknown local surveyors—who can be suborned by the opposition--determine the facts of a cargo claim.

The vessel’s P&I club may have already appointed a correspondent in the matter. Many P&I correspondents in these ports are not maritime lawyers, and their professionalism and ethical standards vary wildly, so I wouldn’t blindly rely on the P&I correspondent. If you decide to get additional counsel, try to get some kind of recommendation. Look for membership in the Maritime Law Association. If nothing else, call me. Remember, though, that this person is critical because he’s the one who’ll be doing the necessary arranging, and once he learns the situation, it’ll be hard to get rid of him. In other words, you need the right man first off. And you might not want to let the P&I correspondent know that you’ve hired another lawyer until you get a good feel for the situation.

Another approach is to deal directly with the attorney who has filed the claim that underlies the seizure. Obviously, suborning an adversary’s attorney is unethical in the United States, and it may be unethical for an American attorney to do anywhere in the world. Happily, though, most shipowners aren’t lawyers—one can imagine the monkey-puzzle we’d have if they were--and are free to determine their own ethics. A layman is often free to do that which his attorney cannot advise. It’s like recording a phone conversation without advising the other party; in some states it’s legal, but it’s never ethical for a lawyer to do it, and a layman can’t do it at a lawyer’s behest. But if the client comes in with the tape, and it’s otherwise admissible, everything’s cool.

So let’s say the shipowner or other interest-holder approaches the opposition attorney through a local intermediary. If the claimant is also a foreigner, which is often the case in cargo claims and charter disputes, his attorney really has no reason to be loyal to him. After all, attorneys in rogue states routinely bribe judges for favorable verdicts, so they can hardly be expected to hold themselves to a higher standard. In any event the FCPA only covers payments to foreign officials, not to private individuals. A zealous prosecutor might argue that an attorney is an officer of the court, but I’ve never heard of the FCPA being stretched that far, or, for that matter, being stretched at all.

The opposition attorney certainly doesn’t have anything to fear from his bar association. In these countries, they exist primarily as guilds. They have no interest in

ethical standards. One can certainly make a complaint about a lawyer's ethics, but the primary effect would be some ribald humor at the association's next dinner meeting. I can tell you that I have never heard of an attorney in these countries getting in trouble for acting adversely to a foreign client's interests.

So if the opposition attorney knows he'll never meet his client, or even hear from him again, he may well find that the claim against your ship is less sure than he first thought. In fact, he may finally have to report to his client that the court has ruled against the claim and the ship has left port. Of course, there are outstanding legal fees for which prompt payment would be appreciated, so there's a good chance the attorney will never hear from his client again, and everybody (except the client) goes away happy.

Even so, the most common and direct way to lift a seizure is to go directly to the judge. Not directly of course, but through an intermediary. Judgments in these countries are never issued on the merits; instead, the judge will consider his decision's financial effects—first on himself, then on his associates, and finally on the local economy—before rendering a verdict.

Happily, it is rare for a judge to take money and then render an adverse judgment. That would be truly unethical, even in Haiti. The judge is expected to weigh the amounts offered by each party--and perhaps even to consider the equities in the case, if any—and then to advise the intermediary which bribe he'll take. He then gets his money and renders judgment for the prevailing party.

If an American involved in such a deal is ever charged under the FCPA, he can always argue that he paid the judge to do his duty. After all, isn't it the judge's duty to dismiss improper claims?

In closing, I'll mention a case some years ago where the judge violated even rogue-state ethical standards. Some years ago, I was hired to get a ship out of Puerto Cabello, Venezuela. Almost unbelievably, the ship had been seized by the receiver because the master had closed the hatches for non-payment of charter-hire. The receiver had no contractual relationship with the ship, and clearly no lien under international law, but he was able to have the ship seized, have the master and chief engineer taken off at gunpoint, and have the cargo discharged by force.

Adding injury to injury, the receiver then obtained a court judgment allowing him to operate the ship until judicial sale—actually to put his own crew onboard and run the vessel as his own. It seems incredible that a court would do this, but there was actually an article written about this seizure in *Florida Shipper Magazine*, in July of 1990, entitled “Commando Action Saves Ship.”

None of this is particularly shocking, but what was really unbelievable was that after the owner, my client, had paid an appellate judge to have the ship released, that judge promptly took sick leave and disappeared into the interior. His replacement then advised the owner—through an intermediary, of course—that he also believed in cooperation, but of course he would have to get his own payment.

The owner had already invested \$100,000 in the previous judge, so he got mad and called me instead. Those were the days of stateless vessels, so after I got the ship out, she got a whole new identity, and as far as I know she's still trading under it.

I'm sure there are those who would like to add me to a list of modern pirates of the Caribbean, but I feel that, within the confines of US law and my own bar association's ethical codes, I have the right to protect my clients' interests in places where the local courts refuse to do so. I believe that a lawyer's job is to know where the line is, and never to cross it, but to approach it as closely as zealous advocacy requires. Shipping in the Caribbean is a tough business, and buccaneers still hang about these rocky shores setting out false lights to lure mariners to disaster. In a business like this, being a bit of a pirate comes in handy, and it does make for an interesting life. Thank you.