

# UK CLUB

## Thomas Miller Americas - Bodily Injury Team

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This is the second issue of the TMA Bodily Injury Team Newsletter and serves also as an opportunity to introduce Louise Livingston from TMA San Francisco as Leader of the TMA Bodily Injury Team. Louise joined TMA in March 2002 and worked alongside personal injury expert John Ferrie in our San Francisco office until John retired in September of that year. Prior to joining TMA, Louise was a practicing attorney in San Francisco with well-known ship owner "defence" firms handling bodily injury claims. Louise also specializes in Loss Prevention for the Club's cruise ship members and participates as a

speaker at the UK Club's Cruise Operator's Conference hosted every two years by Phil Nichols and the London based Bodily Injury Specialists.

This edition underlines the need for Members to concentrate on Loss Prevention, important at all times but particularly when trading in high claims areas such as the USA. The USA accounts for approximately a quarter of the Club's major claims, the leading proportion of which relate to bodily injury to crew, stevedores or passengers.

The ongoing security concerns of US ports and terminals is preventing flexibility in crew travel. Recently we have seen instances of crew with valid US visas being ordered to fly home directly from a US port rather than routed through another US city. This has a significant impact upon repatriation costs. This will remain an issue for the foreseeable future. Members are advised to contact any of the TMA offices if in doubt about the practice or procedure at a particular port.

We are producing the TMA Bodily Injury Newsletter twice a year and will supplement this from time to time with important topical USA Loss Prevention information. The most recent bulletin produced by the Team with advice for crew when dealing with U.S. Law Enforcement Officers is also included in this issue for easy reference.

If any members require any further information on any of the issues in this Newsletter or indeed any other related subject, please do not hesitate to contact any of the TMA personnel whose contact details are listed on the back cover. Similarly, we would be interested to hear from any Members with ideas for topics for inclusion in this Newsletter.

Mike Jarrett  
President & CEO Thomas Miller (Americas) Inc.



## Visa restrictions causing problems for foreign crew-members

Travel for crew-members to, from or through the United States has become more difficult. Previously, crew-members could fly through the US while in transit to a foreign destination without obtaining a US visa, but that ended as of August 2, 2003. The Department of Homeland Security and the Department of State announced they had suspended two programs, the Transit Without Visa (TWOV) and the International to International (ITI) program. This allowed certain international air passengers, such as vessel crew-members, to travel through the US for transit purposes without first obtaining a visa. Suspension is a result of intelligence information which indicates certain terrorist organizations have identified the TWOV program in particular and the exemption from the visa program in general as a means to gain access to the United States or to gain access to aircraft en route to or from the United States, as a vehicle to cause destruction, injury and loss of life in the US. Now crew-members must have a US visa prior to arrival even if traveling through the US to a foreign destination. Members should keep this in mind when arranging crew changes. This suspension does not affect US citizens or citizens from visa waiving countries.

To add to the confusion, the Department of State has also made it harder for crewmembers to get US visas. They have adopted a rule (22 CFR Part 41) as of July 21 2004 eliminating crew list visas ("Documentation of Non-immigrants Under the Immigration and Nationality Act, as Amended - Elimination of Crew List Visas"). While there has always been a requirement for personal appearances before a consular officer when applying for either an immigrant or non-immigrant visa, for the last four decades the regulations have also allowed for certain applicants for non-immigrant visas, including crew-members, to be given Personal Appearance Waivers ("PAWs") by consular officers. Now, under the new rule, the authority of the consular officers to grant PAWs is more restricted and crew visas will no longer be issued without a personal appearance by the applicant. The Department of State notes that under prior statutory authorities the use of crew list visas was meant to be used only as a temporary or emergency measure until individual documents could be issued to each crew-member. They further note that under the Enhanced Border Security and Visa Entry Reform Act of 2002, all visas issued after October 26, 2004 must have a biometric indicator, which means crew list visas would have to be eliminated in any case. The Department of State also commented that the proposed ILO seafarers' identity documents would take years to be developed and adopted widely and would not address the US need for personal interviews.

Although a crew-member does not need a visa to sail to the United States, once there he will not be able to leave the vessel. The requirement to obtain a visa in person will be difficult for many crew-members. They may not live near consular offices nor do many have the funds to pay the application fee. However, if a crew-member does initially obtain a visa, if they seek reissuance of a non-immigrant visa in the same classification, within 12 months of the expiration, personal appearance can be waived. So it is likely a personal



appearance will only be needed once. The Department of State has indicated that processing time from application to issue, including interview, is generally less than 24 hours.

There has been some concern with regard to a seaman who becomes ill or injured - will they be refused treatment in the US without a visa? An ill or injured seaman will be given medical treatment in the US without a visa. However, the Department of Homeland Security must be advised immediately when the seaman is brought to a medical facility. Our experience has been as long as the crew-member's name is not on a terrorist watch list and he or she is not deemed a flight risk, medical parole will be granted. However, once treatment is completed, the crew-member is to be immediately repatriated under armed guard until they leave the US.

Following September 11, the US Department of State and the Department of Homeland Security began an exhaustive review of visa application and issuance procedures and non-visa travel within the United States. The focus is to ensure the visa process addressed current US security concerns. It is likely there will be many more changes in the future affecting travel to and from the US.

Karen C. Hildebrandt



## Dealing with law enforcement officers in the USA

This advice is to provide guidance to Members, in handling those maritime claims, which carry a threat of both civil and criminal penalties to the ship's personnel, ship owner and ship operators. The greatest exposure to criminal penalties will probably involve alleged pollution and serious maritime accidents in which there is loss of life. Given the increased risks, it may be necessary to engage both criminal and civil lawyers to defend the interests of all those concerned.

The enclosed guidelines pertain to US criminal investigations only. For guidance in dealing with other countries where US law does not govern, you will need the guidance of a local lawyer as arranged by the Club.

The purpose of this guide is to promote cooperation with law enforcement without waiving any legal rights during an investigation.

Nothing in this advice should be construed to excuse ship officers from reporting obligations to local authorities.

### Guidelines

1. You should notify owner/operator immediately of any inquiries made of you by any law enforcement office or agency.
2. Law enforcement officers in the United States can include the US Coast Guard, Immigration Authorities, FBI, EPA, State Police, US Attorney, District Attorney, Attorney General, US Customs.
3. You should ask to see proper identification of any law enforcement officer who comes aboard the ship or wishes to ask questions. Full details of the identification provided should be recorded by you.
4. Early involvement of a defence lawyer is essential. In most cases, owners/operators or the P&I Club will arrange for specialized input of criminal lawyers.
5. You have the right to remain silent and have the opportunity to consult with a lawyer before giving either written or oral statements to law enforcement and have a lawyer present during any questioning. If you choose to remain silent communicate that to law enforcement officials to the effect that, for example, "I understand that I have the right to remain silent and to consult with a lawyer, which I wish to do before saying anything more."
6. You cannot order crew-members not to speak to law enforcement but you should inform your crew-members that they have the right to remain silent and the right to consult with lawyers before they must decide whether to give statements to law enforcement officers concerning a criminal investigation.
7. If English is not your first language or that of your crewmembers, you each have the right to insist on utilizing the services of a qualified translator before responding to any interviews or questions.
8. It is a serious and separate crime to lie to a law enforcement officer. Accordingly, make sure that if you do say something, it is the truth.
9. Do not coach or tell your crewmembers what to say. If they have any doubts about how to respond to questions they should be directed to consult with the lawyer appointed to assist them.
10. Law enforcement officers may offer you immunity from criminal prosecution in exchange for your statement/testimony. Do NOT rely on promises made by law enforcement officers to the effect that what you or a crewmember says cannot be used against you in a criminal proceeding. Law enforcement officers do not have authority to make such promises. Any valid immunity from criminal prosecution must be approved by a Court and US Justice Department lawyers and be in writing. Law enforcement officers cannot threaten or intimidate you to make statements. If this occurs, be sure to notify and consult with the lawyer appointed to assist you.
11. The US Coast Guard may have the right to take certain ship documents from the ship when in port. If they insist on taking documents from the ship, be sure to ask for copies and an inventory of any documents or physical evidence removed from the ship.
12. Other than certain ship documents, the Coast Guard and law enforcement officers should need a search warrant signed by a judge to remove ship's machinery, equipment, or to search an officer or crewmembers' personal belongings. You do not have to consent to the removal of such items or search of personal belongings without being shown a search warrant. If you are asked to consent to a search of personal belongings or removal of ship's machinery or equipment, you should consult with the lawyer appointed to assist you. If you do not agree to the search, you should tell the law enforcement officers that "I do not consent to the search [or removal of items]."
13. While you may not consent to a search, you should not use force or physically prevent a law enforcement officer from taking or searching if they insist on proceeding despite your lack of consent. The legal validity of the search will be decided by a Court as long as you can demonstrate you did not consent. For that reason, if you do not agree to a search or removal of ship's equipment, you must:
  - Clearly tell the law enforcement officer conducting the search that you do not consent.
  - Keep a written record of the law enforcement officer's demands and your responses to those demands.
  - Record the areas of the ship visited and the locations searched.
  - A ship's officer should accompany any law enforcement officers searching the ship.
14. Under no circumstances should you tamper with, hide or destroy any documents or evidence aboard the ship. To do so is a serious crime under US law.

15. It is important to let the lawyer appointed to assist you to respond to official inquiries involving jurisdictional questions, i.e. the application of the law of the flag, the scope of territorial waters, etc. Your innocent statements could be misunderstood or taken out of context.
  16. On occasion, separate lawyers may have to be appointed, one to protect your individual interests and another to protect the ship's interests. The appointment of the lawyers to protect the ship's interests and your interests will be made by the owners in consultation with the P&I Club. This does not mean there can be no cooperation between these lawyers as often your interests and the ship's interests are the same.
  17. You should note that in the United States, there are pollution crimes based on strict liability and simple negligence. There does not have to be criminal intent for an individual to be liable for a pollution crime in the US.
  18. It is recommended that before responding to any media inquiries during a criminal investigation, the matter should be discussed with the home office to identify a spokesperson and to coordinate a proper response. This needs to be accomplished on a high priority basis.
  19. You and your crew should be familiar with and must follow all rules and regulation concerning your ship, including reporting requirements relating to notification of pollution, accident, or hazardous conditions.
  20. If you have any questions concerning these guidelines, please contact your home office.
- If Members have any questions concerning these guidelines, please contact the Club for further information.

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## The challenge of the US longshore injury claims

US longshore worker's claims can be particularly difficult for a ship owner, warranting special comment and caveats. The common scenario is the owner's receipt of suit papers commencing a lawsuit brought by a longshore worker who claims to have been injured on their ship in a US port up to three years before. The lawsuit is often the owner's first notice of a claim. Such lawsuits are vague, referring generally to the ship's "negligence", with little, if any, reference to how or where on the ship the accident is alleged to have occurred. The damages claims are equally vague and give no hint as to the actual nature of the plaintiff's injury, other than that he or she was made "sick, sore and lame." What is clear, however, is that the plaintiff claims to be totally and permanently disabled, unable to return to work on ships or to any gainful employment, and that he or she is looking for a large award from a jury to provide financial support for the rest of his or her life.

All too frequently owners have no record of a stevedore injury at the port alleged neither on the date in question, nor of any injury incident at all during the ship's call. As a result, there is no ship's accident report or report of investigation. Moreover, the prospective ship's witnesses may no longer be in the owner's employ and the memories of those witnesses who may still be available have naturally faded with time. The ship itself may have been re-fitted or even sold.

Owners understandably ask why the longshore worker's or the stevedore's failure to report the accident to the ship does not bar or nullify the claim. A longshore worker has no legal obligation to report an injury to the ship and the allegation alone, even though the crew or anyone else did not witness it, serves as sufficient evidence in the first instance that the event did occur. It is then up to the defendant owners to produce sufficient evidence that the accident did not occur, or could not have occurred in the manner alleged, or that even

if it did occur, the accident was solely the result of the longshore worker's own negligence, or that of a co-worker, or of the stevedore employer.

It is the stevedore employer who has primary responsibility for the safety of its longshore workers. It is now established law in most jurisdictions that it is up to the stevedore, for example, to provide portable lighting for the workers in the hold when needed and that the ship cannot be held liable for negligence for an allegedly dimly lit hold. Unsafe conditions that arise during the course of cargo operations are the responsibility of the stevedore in the first instance. It is only when the ship is put on notice of a condition and of the stevedore's inability to correct it that the responsibility shifts to the ship.

Unlike the more strict legal duty in the case of seamen, shipowners owe longshore workers only the duty to exercise ordinary care to have their ships and equipment in such a condition that stevedoring companies, exercising reasonable care, will be able to carry on their cargo operations with reasonable safety to their longshore workers. Shipowners also have a duty to warn stevedores of any hazards on their ships that are known or should be known to the shipowners if these hazards would not be obvious to or anticipated by a reasonably competent stevedoring company. This does not mean that the ship has to be made wholly "safe" for the longshoremen. It means only that the ship must warn of or correct any conditions a professionally competent stevedoring company could not reasonably be expected to discover or correct.

Although frustrating, such lawsuits can and often are successfully defended or reasonably settled. In order to avoid the surprise element of these claims and afford an opportunity for the P & I representative to carry out a timely investigation, the ship's officers and crew should be on special alert for any incidents or breaks in the routine during cargo operations. An ambulance or an injured man being carried off the ship will, of course, come to the ship's attention. But it is the subtle event, which bears reporting, and investigating as well. Examples include



the longshore worker who continues working after the incident or the injured worker who stops working and leaves the ship on their own. Longshore workers are well known for alleging that they complained to an unidentified crew-member about the manner of, for example, the operation of the ship's crane, that the unknown crew-member did not appear to speak English and that nothing was done about the problem. Those allegations make it impossible or at least difficult for shipowners to identify the ship's witness or to establish that no such complaint was made. Thus, any complaints or requests made by any longshore worker or longshore supervisory personnel to any crewmember should be immediately reported to the ship's command and investigated. If warranted, the condition should be corrected and an entry made in the ship's log, including the identity of crew-member to whom the complaint or request was made.

Even where the alleged accident was not reported or noticed and the claim is a surprise to owners, discrediting the plaintiff's version of events or the occurrence of the incident itself can still be achieved. Owners should first check their records to see whether the ship was in the port alleged on the date of the alleged incident. The P&I representative must likewise check the port and local agent's records to confirm whether the plaintiff was part of a stevedore gang onboard the ship on the date and at the time as alleged.

The lack of reporting to the ship or the fact that none of the ship's crew noticed anything out of the ordinary can serve to raise questions about the plaintiff's truthfulness when coupled with other doubtful circumstances. The plaintiff's liability claims can also be discredited by comparing plaintiff's statement on the stevedore accident report, to what plaintiff told the hospital emergency room personnel directly after the accident, to what plaintiff states in deposition testimony, to trial testimony, all of which can be different. The first two versions are likely to be more accurate than the second two, which frequently seem to be created by the plaintiff's attorney to match the needs of the plaintiff's liability case as the true shipboard conditions and circumstances

are revealed through litigation discovery. As a simple example, the longshore worker will tell the supervisor that they lost their balance while standing on a hatch coaming, a no liability incident. By the time deposition testimony is taken, the plaintiff will recall there was grease or oil on the coaming which caused the fall; or, in order to correct the failure to mention a foreign substance on the coaming to the supervisor, one of the co-workers will testify that he went to the aid of the plaintiff after the accident and observed some kind of grease or oil on the coaming.

Medical records can also be used to raise questions about a longshore worker's truthfulness by prior statement or failure to make a statement. For example, the longshore worker makes no mention of back pain at the time of the medical examination immediately or soon after the incident, but nonetheless claims for lumbar disc herniation when he has an MRI several months later. The point being that the onset of pain as the result of a herniation caused by the claimed incident would be immediate and is suspicious if claimed to have occurred weeks or months after the original incident. Emergency room records are of the utmost importance in this respect and can be most useful for the purpose of proving that the longshoreman tested positive for alcohol or drug intake.

Often the "facts" as related in plaintiff's deposition testimony, even if believed, fail to state a case on which shipowner liability can be found. Such a case may be one in which a motion for summary judgment can be made on behalf of the shipowner. Confident state or federal judges will grant such a motion ending the plaintiff's case, usually at a relatively nominal cost to owners. In our experience, federal judges are more inclined to make such decisions than are most state court judges; an important reason to have a longshore case removed from state to federal court when possible. The federal court generally provides a better forum for shipowners, with more knowledgeable judges, more conservative juries and considerably more streamlined practice and procedures.

A satisfying example of a UK Club Member's victory in a longshoreman's case ends our discussion: the ship irrefutably and negligently dropped a piece of ship's cargo handling equipment into an unmanned hold. The plaintiff longshoreman, who was not in the hold, was standing on another deck level above the hold with his back to the operation. On hearing a tremendously loud crash, he believed the ship's boom was falling and ran for safety running full force into the ship's bulwark, sustaining multiple and allegedly permanently disabling injuries. Did the ship owe a duty of reasonable care for the safety of this longshoreman? Certainly. Was it negligent of the ship to have dropped the piece of equipment? Undoubtedly. Did the ship breach its duty to this longshoreman by dropping the equipment into the hold? No. The dropped equipment did not create a dangerous condition as to this particular longshoreman. It was his mistaken belief rather than the crash itself that was the proximate cause of his injury. Summary judgment in favour of the shipowner was granted. Case closed!

Nancy L. Jennings



## The high cost of parting lines

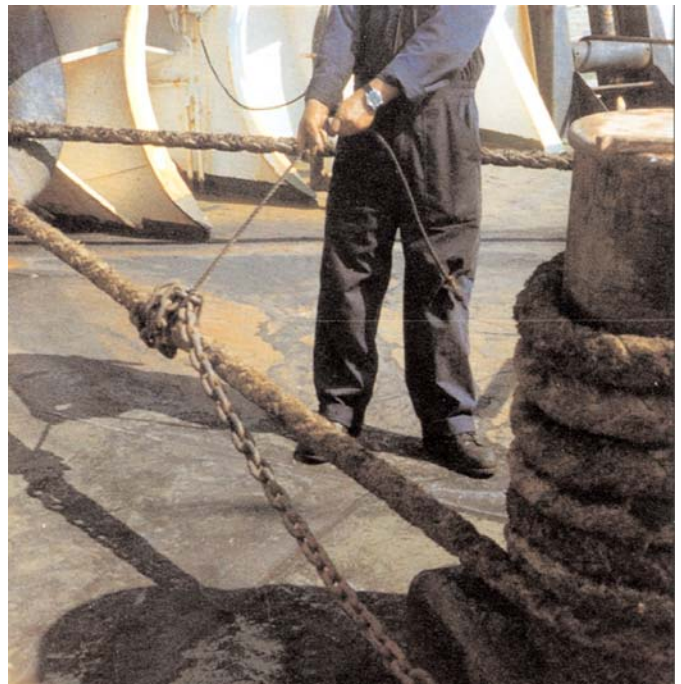
- In 2000, a 44 year-old American Chief Mate standing on the stern of a barge as the tug & barge approach a dock, a tow line parts, the line strikes the Mate in the head and neck and he dies at the scene.
- In 2001, a 51 year-old American First Assistant Engineer walking down the working side of the ship's deck on his way to dinner is struck in the lower leg by the end of a parted mooring line. His foot and ankle are 90% amputated and he sustains a severe fracture to his elbow.
- In 2002, a 19 year-old foreign apprentice engineer appears on deck to observe efforts to free a mooring line, which was hung up on a pad eye on the dock. The mooring line parts and strikes the apprentice in the head causing severe and permanent brain injuries.

Seafarers aren't the only ones at risk. Longshore workers, ship agents and technicians are also subject to injury from parting or over-stressed lines.

Parting ship's lines can cause death or serious bodily injury. Basic rules for prevention of such catastrophic accidents include staying clear of all lines under tension, in port or at sea; regularly inspecting lines for wear; properly stowing lines; ensuring the lengths of the leads are sufficient and the angles of lines are appropriate; and, avoiding dragging, overheating or over-loading lines. Record keeping is also important and should include when lines are purchased; when they are put into service; the details of the manufacturer and distributor as well as any informational literature they provide for the proper use, maintenance and care of their lines. More than likely such informational literature will have valuable safety information about the particular line and may have examples of causes of various types of wear on lines.

Most owners warn their officers and crew in safety management systems and other onboard handbooks to avoid being near ship lines under tension unless absolutely necessary to their duties. Warnings signs may also be placed about the ship in appropriate places. Nevertheless, because the risk of harm from parting lines is an infrequent hazard, it can easily be taken for granted or forgotten until it is too late.

In an addition to the immediate investigation necessary to determine the cause of the accident and potential exposure to the ship owner, portions of the line and any other equipment involved in the accident should be secured as evidence for testing. Such evidence should include the manufacturer and distributor information as well as the date of purchase and history of use. If there is suspicion that the line is defective, the ship owner may have a cause of action for products liability against the manufacturer, seller and distributor of the line or other defective equipment. Unfortunately, despite thorough investigations, the cause of parting lines cannot always be determined. The ship owner will nevertheless be held responsible.

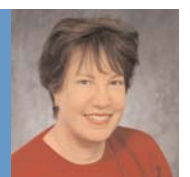


Claims arising from parting lines can present unusual difficulties in litigation. Depending on the circumstances, a ship owner may want to consider admitting liability for negligence and/or unseaworthiness but not causation of the injury or damages. Such a strategy can limit discovery to the nature and extent of damages and avoid a jury hearing evidence of the shipowners negligence or unseaworthiness of the ship. Comparative fault of the injured person also frequently plays a significant factor in their injury. But it is very difficult to make that argument before a jury who may construe it as a "blame the victim" tactic and subject the ship owner to an even greater judgment. A comparative fault argument may, however, achieve maximum value in a mediation setting.

Continued contact with the injured crewmember and his or her family is important to stay informed of the medical condition and needs of the injured crewmember or their family. Ensuring that the crewmember is receiving appropriate medical care is also essential to the defense. To that end, the services of a medical bill auditor and nurse care manager should be considered. Frequently, the injuries can be career-ending and the injured person's needs may range from round the clock nursing care and special transportation to intensive vocational rehabilitation training. Such issues can be addressed by a structured settlement expert at the time of settlement.

While the high cost of injuries and deaths caused by parting lines cannot be eliminated entirely, the risks can be minimized through repeated training, posting warning signs and best practice with the care and use of ship's lines.

Louise S. Livingston



## Brazil - fines imposed for sanitary regulations infractions

On 20 June 2003 the president of Brazil issued an order which changed the amounts for the different categories of fines, which the Port Health Authority of Brazil (PHA) may impose for sanitary infractions. While the fines are still categorized as infractions of three different types; light, serious and very serious, under Article 4 of law 6437 of 20 August 1977 the amount of the fines has increased appreciably as follows:

Light infractions: from 2,000 Brazilian reals to 75,000 reals (US\$ 694.50 to \$26,041.70 at the current exchange rate)

Serious infractions: from 75,000 Brazilian real to 200,000 reals (US\$26,041.70 to \$69,444.50 at the current exchange rate)

Very serious infractions: from 200,000 Brazilian reals to 1,500,00 reals (US\$69,444.50 to US\$520,083.40 at the current exchange rate)

We have discussed the matter with local correspondents and share their fear that the PHA will aggressively pursue this new approach to fines for sanitary infractions.

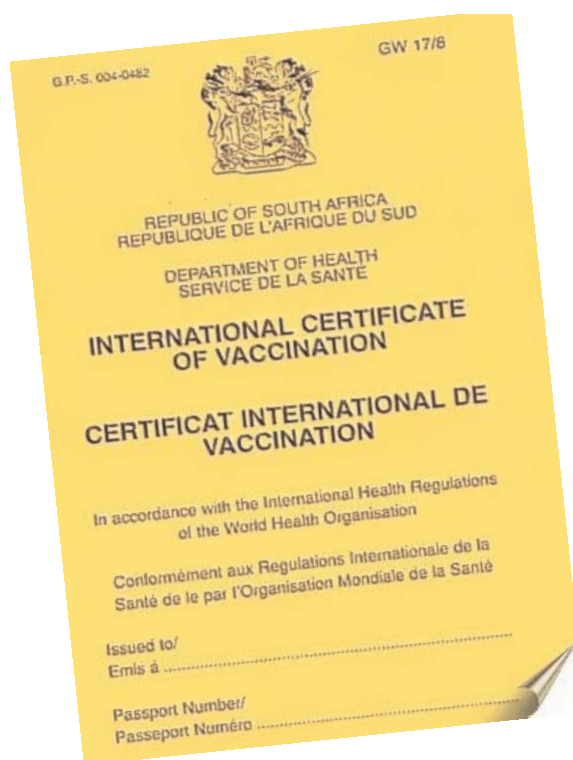
Agents are also very concerned because, according to Brazilian law, they are jointly responsible for the payment of the fines. Therefore, we can expect agents to begin asking for cash advances, transfers or Club guarantees before they agree to perform all the customary necessary functions to allow the vessel to sail. Aggravating the problem is the fact that the PHA usually takes more time to issue and inform agents of the amount of a fine than the time the vessel remains in port. Agents and their association are conducting meetings the outcome of which we await with interest.

It is important to note that sanitary infraction fines can be defended on an administrative level and in court, however, the chances of success are generally not good and a cash deposits need to be made.

In light of the foregoing, it is suggested that members exercise extreme care to ensure that all vessels entering Brazilian ports comply with the following requirements :

a) The entire crew must be in possession of a valid yellow fever certificate issued in the format recommended by the World Health Organization and without any erasures or alterations of any kind. Any amendment, or erasure, or failure to complete any part of the certificate, may render it invalid.

1. The certificate must be printed and completed in English and French and an additional language may be added.
2. The international certificate is valid only if the yellow fever vaccine used has been approved by the World Health Organization (WHO) and if the vaccinating centre has been designated by the national health administration for the area in which it is situated.



3. The date must be recorded in a sequence, which shows the day, month and year in that order, with the month written in letters.
  4. The certificate must be signed in his/her own hand by a medical practitioner or other person authorized by the national health administration and an official stamp is no substitute for a personal signature.
- b) Accommodations, galley and hospital must be clean and free of insects.
- c) All items in the vessel's infirmary medicine cabinets must be within the date of expiration.
- d) Fresh water tanks must be clean and a record kept on board of dates of disinfestation
- e) All provisions must be properly wrapped and all items within their expiration date.

The preceding list is not meant to substitute in any way international requirements for vessels but is simply intended to focus attention on matters frequently checked in Brazil by the PHA and highlight the importance of compliance with the requirements of the World Health Organization for yellow fever certificates.

Carlos De La Vega



## Bodily Injury Team



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