

# SABATINO PIZZOLANTE NEWSLETTER

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MARITIME AND PORT AFFAIRS - INTERNATIONAL TRADE - CUSTOMS

## SABATINO PIZZOLANTE - ASSOCIATED MARITIME CONSULTANTS

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### National Plan for Port Development: Is it needed?

One of the most significant features of the General Law on Ports is the introduction of the National Port System notion, since through it the whole number of national public and private ports, whichever its aquatic nature might be, are going to be regarded just as one system, ensuring that they all allow the expeditious handling of goods and movement of passengers between the different modes of transport.

The importance of this notion is linked to the characteristics of the Venezuelan port regime, where decentralization as implemented back in the 1990s, brought a resulting lack of coordination and anarchy in the development of this sector which is made up of a variety of ports, among them oil, steel, cement and chemical marine terminals, including of course the general cargo commercial ports, distributing their control between national and regional governments. It is obvious that following the enactment of the National Law on Ports, expectations arose regarding this matter, particularly when it is borne in mind that this national statute was intended to set up the principles according to which a *National Plan for Port Development* would be drawn. It is not a secret that ports of commercial use are drafting different plans which could result in duplication of efforts and resources.

Recently the President of the INEA publicly informed about the drafting of such a plan; it seems appropriate to remember that the aquatic authority should take into account particular plans for development of each port administrator, and more important to incorporate the opinions held by the maritime community, in the same way it was done during the discussions of the new maritime legislation ...

### SHIPPING

#### Indemnities under the Law for Prevention, Conditions and Environment of Work

In our Newsletter No. 8 (August 1999) attention was drawn to the impact of this law on shipping operators and stevedores, in cases of loss of life or personal injuries, both onboard as well as ashore. Now the Organic Law for Prevention, Conditions and Environment of Work (commonly known as LOPCYMAT) has suffered significant changes published in the Official Gazette No. 38.236 dated 26<sup>th</sup> July 2005. Although the law came into force on the date of its publication, the provisions concerning the financial indemnities provided by the Occupational Safety and Health System will be subject to the implementation by the Social Security Treasury.

The law is intended to establish the institutions, rules and guidelines for policies, and the agencies and entities which are aimed to guaranty the workers safety, health and comfortable conditions in an adequate work environment, favorable for the full exercise of their physical and mental faculties through the promotion of safe and healthy work, the prevention of work accidents and occupational illness, the integral redress of injuries suffered, and the promotion and incentives for the development of programs intended for recreation, use of leisure time, rest and social tourism. On the other hand, it regulates the rights and duties of workers and employers in connection with the safety and health of the work environment, as well as in connection with recreation, the use of leisure time, rest, and social tourism among other matters of administrative nature. However, a noticeable point is the introduction of a liability regime for employers applicable in case of working accidents, and the imposition of important penalties for the non compliance of its provisions.

It is still broad in its scope, so it applies to work performed under a dependency relationship on the part of an

employer, regardless of the nature, place of performance, or of whether or not it is for profit, public or private, in existence or to be established in the territory of the Republic, and generally, to any provision of personal services involving employers and workers, regardless of the form it might take with the exceptions expressly provided by this legal instrument.

It follows that said provisions are applied to working practices both onboard ships as well as within the port area, both to private and public sector alike, i.e. port operators, ship agencies and port administrators. This is the reason why careful attention must be paid to it, particularly in view of the obligations imposed on the employers, who must adopt such measures as may be required in order to guarantee their workers' satisfactory conditions at work, as well as recreation programs, use of leisure time, rest and tourism in their benefit.

Among the relevant obligations for employers particular attention deserves the one related to notification of workers, in writing, about the principles for prevention of unsafe or unhealthy conditions, both upon their hiring and upon the occurrence of any changes in the work process or in the job assigned, and the requirement to train and instruct them with respect to the promotion of health and safety, the prevention of accidents and occupational illness, as well as with respect to the use of personal safety and protection devices, and specially the requirement to notify the occurrence of any accident at work to the relevant authority (INPSASEL) within the following 24 hours.

Regarding amounts for indemnities, in the particular case of material and moral damages it will be for the Judge to decide the quantum for indemnity based on the facts. Nevertheless, the LOPCYMAT sets up in art. 130 that the indemnities shall be paid by the employer when there has been violation of the legal regulations committed by the employer.

To better understand these indemnifications, it is important to point out that according to the provisions of the law, the disabilities as a result of an accident of work or occupational illness can be classified as follows:

**Temporal Disability:** The temporal disability is the contingency that, as a result of an accident at work or an occupational illness prevents the worker from performing the work for a specific period of time. (art. 79)

**Partial Permanent Disability:** The partial permanent disability is the event wherein, as result of an accident at work or an occupational illness, this generates in the worker a partial and definitive diminution, minor than sixty seven percents (67%) of his total physical or intellectual aptitude for the work. (art. 80)

**Total Permanent Disability for the habitual work:** The total permanent disability for the habitual work is the event wherein, as result of an accident at work or occupational illness, this generates in the worker a diminution, greater or equal to the sixty seven percent (67%) of his total

physical or intellectual aptitude for work, or both, that prevents him from the performance of the principal labor activities inherent to the occupation or habitual occupation in which he was engaged. (art. 81)

**Absolute Permanent Disability for any type of labor activity:** The absolute permanent disability for any labor activity is the event wherein, as a result of an accident at work or occupational disease, this generates in the worker a total and definitive diminution, greater or equal to the sixty seven percent (67%) of his physical or intellectual aptitudes, or both, that prevents him from the performance of any type of labor activity. (art. 82)

**Great Disability:** The great disability is the event wherein, as consequence of an accident at work or occupational illness, it obliges the worker to have the support of other persons to be able to carry out the elementary activities of daily life. (art. 83)

The determination, classification and certification of origin of the disability is vested with the INPSASEL (governmental body called National Institute for the Labor Prevention, Health and Safety) through evaluations made to the worker as well as investigations. The LOPCYMAT also prescribes criminal punishments for the employer when the death or disability of the worker is the result of gross violation of the legal regulations related to safety and health at work. In case of death of the worker, the law prescribes from 8 to 10 years of imprisonment, whereas in case of disabilities the punishment may vary from 2 to 9 years of imprisonment. (art. 131)

Bearing in mind the above, the indemnifications for the workers by their employers are prescribed in art. 130 of the LOPCYMAT; thus, in case of occurrence of an accident at work or occupational illness as a consequence of the violation of legal regulations in respect of safety and health at work, on the part of the employer, this will be obliged to the payment of an indemnification to the worker or successors, in accordance with the degree of fault and the injury, equivalent to:

1.- The corresponding salary equivalent to no less than five calendar (5) years and no more than eight (8) calendar years counting from date of death of worker.

2.- The corresponding salary equivalent to no less than four (4) calendar years in case of absolute permanent disability for any type of labor activity.

3.- The corresponding salary equivalent to no less than three (3) calendar years, nor more than six (6) calendar years in cases of total permanent disability for the habitual work.

4.- The corresponding salary equivalent to no less than two (2) calendar years, nor more than five (5) calendar years, in case of partial permanent disability greater than twenty-five per cent (25 %) of total physical or intellectual capacity for the profession or habitual tasks.

5.- The corresponding salary equivalent to no less than one (1) calendar year, nor more than four (4) calendar years, in case of partial permanent disability of up to twenty-five per cent (25 %) of total physical or intellectual capacity for the habitual profession.

6.- The double of the salary corresponding to the days of rest in case of temporary disability.

7.- In case of great disability associated with the absolute permanent disability, the indemnification will be equivalent to the death of the worker. When the great disability is associated with the temporary disability, the indemnification will be equivalent to the triple of the salary corresponding to the days that the disability would have lasted. When the sequel or permanent deformations, caused by occupational illnesses or accidents at work, have damaged the human faculty of the worker, beyond the simple loss of his capacity of earnings, in the conditions and circumstances contemplated in the article 71 of the Law, the employer remains obliged to pay the worker indemnification in an amount of money equivalent to five (5) calendar years.

Finally, as per art. 3 of the LOPCYMAT the collective bargaining agreement (CBA) can establish a more favorable scheme of benefits / rights for the worker, but it cannot modify the safety and health work regime. It follows; that any awards / benefits based on the CBA would be deductible from the awards under this legal instrument.

## CUSTOMS

### New Customs Regulations in force

The Partial Regulations to the Organic Customs Law applicable to the arrival, warehousing and importation of goods through the Automated Customs System (SIDUNEA) passed on January 2002, has been now repealed by the so-called Partial Regulations to the Organic Customs Law related to the Automated Customs System published in the Official Gazette No. 37,967 dated 25<sup>th</sup> June 2004, aiming to application not only to importation but also to exportation activities and the special customs regimes. It should be borne in mind that following the implementation of the SIDUNEA for operation of customs back in 2002, the automated procedure was being applied only to the importation, so that exports and special regimes such as temporal admission were being handled through the usual manual procedure. Nevertheless, with the enactment of the new Regulations all operations will be effected through the SIDUNEA, although the application of it to the entire customs operations will be steadily introduced in each customs office, starting with La Guaira and later at Puerto Cabello

Some provisions of interests for the carrier can be outlined. Thus, according to art. 7 the carriers, through their ship agents must register the cargo manifest via

SIDUNEA, at latest on date of arrival or departure of the vessel.

Significant changes are introduced regarding transshipment, since the new regulations do not require an authorization to carry out this, which is instead replaced by a notification made by the ship agent via electronic e-mail (art. 20). The provisions do not make any difference between transshipment in domestic or international ports, and because of this it is understood that it applies to both. Of particular interest is art. 22, which obliges to proceed to transshipment in a period of time not exceeding 30 continuous days from notification; otherwise, the cargo will be considered legally abandoned from the customs' point of view. Again, this abandoned condition would also apply for cargo to be transhipped to a foreign port.

Unfortunately, the new regulations keep silence when dealing with the declaration to the customs office of cargo shortage or that discharge in excess. Non compliance may lead to the application of substantial fines as per art. 121, letter c of the Organic Customs Law. Although some offices consider this period as of 5 days according to art. 91 of the General Regulations dated 1991, other offices regard this period as the one referred to in art. 22 of the Organic Customs Law, the latest date considered as the following working day from date of unloading. The former creates uncertainty for carriers and their agents.

Therefore, it would be advisable to carefully monitor contents of cargo manifests and discharge to immediately notify the customs office about any discrepancy between unloaded vs. declared cargo, in order to avoid these fines, which may result in a time consuming exercise.

## MISCELLANEOUS

### Law on Unlawful Foreign Exchange implemented in Venezuela

The new Law on Unlawful Foreign Exchange was published in the Official Gazette N° 38,272 dated 14<sup>th</sup> September 2005, entering into force on the 14<sup>th</sup> October same year.

The Law sets up the fines and penalties applicable for violations of the foreign exchange control regime currently implemented in Venezuela, including violations to Exchange Agreements entered by the Republic and the Venezuelan Central Bank (Convenios Cambiarios). In addition, the Law sets up obligation to declare transactions involving foreign exchange.

As per art. 4 and 5, the following transactions must be declared to the Venezuelan exchange authorities:

- 1) The importation or exportation of foreign currency in amounts exceeding US\$ 10,000.00; and,
- 2) The exportation of goods and services when the operation exceeds US\$ 10,000.00, in which case the

responsible party must declare and sale the foreign currency to the Central Bank, through its particular bank office within 15 business days from the date on which the exportation was made.

However, dollar-denominated securities issued by the Republic and acquired by individuals, legal entities or non-resident foreigners who enter Venezuela for less than 180 days are exempted from the obligation to declare as prescribed by art. 4.

Similarly, the Republic, Petroleos de Venezuela S.A. (regarding its special regime of foreign currency administration set forth in the Venezuelan Central Bank Law) and those legal entities incorporated to engage in any of the activities referred to in the Hydrocarbon Law (within the limits and requirements set forth in the Exchange Agreements) are exempted from the obligation prescribed in art. 5.

Those in non compliance with the obligation of notification as required by articles 4 and 5, as well as those that despite notification supply inaccurate information in respect of the foregoing transactions, may be subject to a fine up to two times the undeclared amount.

The following activities are considered unlawful, in the light of the law:

- 1) The purchase, sale, transfer, offer, receipt, exportation or importation of foreign currency in amounts exceeding US\$ 10,000.00, in violation of any rule regulating the foreign exchange regime. The applicable sanction is a fine of up to two times the exceeding amount of the operations. The same unlawful activity but in amounts exceeding US\$ 20,000.00 is additionally subject to prison from two to six years. Nevertheless, transactions involving securities are exempted (art. 6);
- 2) The purchase of foreign currency in violation of the exclusive competence of the Venezuelan Central Bank to purchase and sell foreign currency in Venezuela;
- 3) The purchase of foreign currency through fraudulent means or by misrepresenting the use that will be given to the foreign exchange (art. 7); and,
- 4) The use of lawfully obtained foreign exchange amounts for purposes different from the purposes for which the foreign exchange was authorized (art. 8).

The law also prescribes aggravated penalties in those cases where the unlawful activity is committed through the use of electronic or computing means, or by public servants taking advantage of their positions.

In art. 14 the law sets up the following activities as administrative infractions:

- 1) The public or private offer of goods or services denominated in a foreign currency in violation of applicable laws, rules and regulations; and,

- 2) The public advertisement of the offer of goods or services denominated in a foreign currency, in violation of applicable laws, rules and regulations.

Following the enactment of the Law on Unlawful Foreign Exchange and the ambiguity of the majority of its provisions, uncertainty arose among those involved in the international trade. Some guidance, however, has been provided by CADIVI (Governmental entity in charge of the exchange control scheme), in the sense that the law is intended to make Venezuelans responsible for the obligation to declare before this office any transaction in foreign currency as required by the provisions, in order to avoid the sanctions and to protect the country's international reserves. CADIVI has made it clear through its website that any customs officer, either in ports or airports, is entitled to inspect personal belongings or baggage in order to determine the amount of foreign currency that is been taken in or out of the country. Also it is possible to effect the importation of goods with owned foreign currency lawfully obtained overseas, so there is no requirement to declare to the customs the origin of the foreign currency used for the importation. If the supplier of goods and services is located outside Venezuela, it is perfectly lawful for supplier to invoice in foreign currency, and even for the national company to pay the goods/services from its foreign bank account overseas. If the transaction is between national parties the situation is different, since invoicing as well as payment has to be made in domestic currency.

Consequently, in the case of shipping lines and port operators' services which are customarily handled in foreign currency, particular attention must be paid to this legal instrument, avoiding payments for the services either in cash or checks. Also shipping lines and their agencies should fully implement the charging of prepaid freights for importation, and collect freights for exportation.

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