

# SABATINO PIZZOLANTE NEWSLETTER

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*MARITIME AND PORT AFFAIRS - INTERNATIONAL TRADE - CUSTOMS*

## SABATINO PIZZOLANTE - ASSOCIATED MARITIME CONSULTANTS

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### The New Anti Smuggling Law....

As part of the policy implemented by the government through the SENIAT (National Internal Revenues and Customs Authority), fight against smuggling and fiscal evasion are on the table. It is true that the customs administration has been subject to important changes in terms of automation with the implementation of the so-called SIDUNEA system, but the authorities have also advanced a campaign to attack the tax and customs evasion that although not necessarily shared the means, it has undeniably introduced a new tributary culture and a subsequent increase of revenues for the national treasure. Presently, in line with the above, a new Anti-Smuggling Law has been passed, imposing huge penalties to the wrongdoer and specific procedures to apply the punishment for the application of penalties. Also it reincorporates the reward (obvencion) for customs officers who detect smuggling cases, as a way to encourage them to contribute to the combat. Because of the very nature of the work carried out by the customs and ship agents, the shipping lines, and port operators, these new anti-smuggling provisions may reach them with all the adversities this might imply; these provisions rightfully applied sometimes, but others based on the wrong interpretation of the facts. It would be desirable that the authorities are properly trained in the understanding of these provisions, and that they behave wisely when assessing the events, just to ensure a fair application of the law in the name of justice...

### SHIPPING

#### Rules applicable to Venezuelan maritime mortgages

The Law of Maritime Commerce which came into force in 2001 (with last amendment in January 2006) has introduced significant changes in respect of maritime mortgages as well as ship arrest to enforce it when necessary, mainly incorporating the provisions of the 1993 Convention on Mortgages and Maritime Liens and the 1999 Arrest Convention. Additionally, these matters are also governed by Decision 487 of the Andean Community on Maritime Guarantees (Mortgages and Maritime Liens) and Arrest of Ships. In any case, all matters related to a maritime mortgage will be dealt with by the First Instance Maritime Court, a specialized court created few years ago.

Art. 130 of the Law of Maritime Commerce states that a ship can be subject to a maritime mortgage provided it is registered in the Venezuelan Ship Registry (the so-called RENAVE). The mortgage is constituted by means of its inscription in RENAVE, and it will not be valid nor opposable to a third party until such inscription is not effected, being it necessary to make inscription of any act or contract modifying its terms or extinguishing it. On the other hand, art. 131 of the same Law of Maritime Commerce requires that when the maritime mortgage is constituted overseas, the form of the act will be ruled by the law of the place where it is constituted, by the law ruling the mortgage, by the law of the domicile of the grantor or that of the common domicile of its grantors. Nevertheless, for this maritime mortgage to have effect in Venezuela, it will be necessary to make the inscription of the mortgage document in RENAVE, containing the information needed as per the domestic legislation, the signatures of the grantors and Notary Public officer, all this duly legalized before a Venezuelan Consulate or with the Apostille on it. The mortgagee will be able to exercise his right against the mortgaged ship in any of the following cases: 1) On the maturity of the stipulated term

for the payment of the credit that the mortgage guarantees; 2) On the maturity of the stipulated term for the payment of the interests of the principal obligation; 3) When the mortgagor is declared insolvent; 4) When any of the mortgaged ships suffer deterioration that renders it useless to sail; 5) When the agreed conditions for resolution of the mortgage contract are fulfilled, as well as all those conditions that have the effect of making executable the obligation that the mortgage guarantees; and, 6) When there are two or more ships subject to the fulfillment of the same obligation, and the loss of anyone of the mentioned ships takes place, unless otherwise agreed.

As per art. 141 of the Law of Maritime Commerce on occurrence of any of the cases referred to in the precedent paragraph, as well as when the mortgagor may jeopardize the mortgaged ship, the mortgagee will have the right to take possession and to commercially operate it.

In order to take possession of the ship the mortgagee may request the arrest of the ship, by means of a petition to the First Instance Maritime Court. Having the arrest executed the competent Judge will order the delivery of possession of the ship in favor of the mortgagee. Equal procedure will be followed by the owner of the ship to take back possession, once the obligation has been totally paid.

On the other hand, the mortgagee may proceed with the direct sale of the mortgaged ship in the way agreed in the respective contract, in those cases of breach by the mortgagor. In the lack of agreement in this respect (direct sale) then the mortgagee will have the right to request the forced execution of the ship in accordance to the Civil Procedure Code, therefore it is advisable to expressly include the right of direct sale within the mortgage document.

For the mortgagee to take possession of the ship and to proceed with the direct sale, the mortgagee will have to request the arrest and subsequently, the Judge will order the delivery of the ship to the former.

### **Customs fines for permanence of container within national territory**

Art. 79 of the Regulations to the Organic Customs Law restricts the permanence of containers within the Venezuelan territory to three (3) months after arrival to the country: "To the effect of Article 16 of the Law, the Treasury Minister will decide that the containers, wagons and other implements, equipment, spare parts and accessories mentioned there, be temporally introduced to the country to be re-embarked within the three (3) months following its arrival...". This means that containers introduced to the country in the normal course of international trade, have to leave the territory within this period of time since, otherwise, these containers will be retained by customs police (National Guard) and a fine will be applied to the responsible party, i.e. carriers and agents.

Depending on the customs office where the matter is being handled, the opinion of customs' officers might be that the fine to be applied in these cases must be that in accordance with art. 118 of the Organic Customs Law, which reads: "The lack of re-exportation or legal nationalisation, within the allowed period of time, of goods introduced under temporal admission regime, or its use or destination for different purposes than those taken into account for the granting of the respective permit will be punished with fine equivalent to the total value of the goods". Nevertheless, this reasoning can be challenged upon the following arguments: 1) The fact that art. 118 of the Organic Customs Law does not apply to containers which are used as means of transport, as they are not merchandise; and, 2) The fact that in the case of containers entered into the territory stuffed with cargo, these are subject to a sui generis temporal admission as per art. 79 of the Regulations, a fact that makes formalities under that special customs regime not applicable to them.

Therefore, it could be advisable for shipping lines and their agents to keep strict equipment control to avoid the permanence of containers beyond the three months time period allowed; and to hold receivers responsible, if commercial convenience allows to do so, for the lack of stripping of units and their return to the line, before the expiration of the three months time period, and the reimbursement of eventual customs fines for breach of art. 79 of the Regulations.

## **CUSTOMS**

### **New Anti-Smuggling Law enacted**

The chapter related to smuggling contained in the Organic Customs Law has now been repealed by the provisions incorporated in the new Anti-Smuggling Law published in the Official Gazette No. 38,327, dated 2<sup>nd</sup> December 2005.

According to said legal instrument (Article 2) anyone that through actions or omissions evades or pretends to evade the custom's inspection or any type of control of the custom's authority by the introduction, extraction or transit of merchandise into the territory or outside the territory and other geographical spaces of the Bolivarian Republic of Venezuela incurs into smuggling and shall be penalized by imprisonment of four (4) to eight (8) years. Additionally, smuggling activities will be subject to fines equivalent to six times the cargo value as well as seizure of the same. The law states that the seizure of the aircraft, ship or vehicle of transport will apply, only if its owner has the condition of author, co-author, accomplice or concealer. For the purposes of determining the competent entity to deal with smuggling, article 5 states that those cases involving cargoes which customs value exceeds 500 Tributary Units (i.e. US\$ 7,813,00 roughly) will be subject to ordinary criminal jurisdiction; otherwise, the matter will be dealt with by the customs administration (SENIAT).

A list of different types of smuggling events can be found in article 3, namely:

1) Possession, deposit, transportation or circulation of foreign merchandise if the legal introduction of such into the territory and other geographical spaces of the Republic or its legal acquisition by means of licit trade in the country is not proved;

2) The possession or deposit of merchandise in non authorized places within the primary zone of the customs or, the storage or deposit of merchandise in authorized places or authorized deposits different from that merchandise for which regime such places or deposits have been authorized;

3) The storage or deposit of merchandise not reported or not formally notified before the customs as legally abandoned when customs' auxiliaries have the available information;

4) To hinder or prevent customs' control by hiding merchandise in containers or objects, or by any other different means, within the primary zone of the customs and other locations conditioned for customs' purposes;

5) The transportation, storage, possession or permanence of foreign merchandise in vehicles for coastal transportation, not authorized by the competent authority for combined traffic;

6) The transportation, deposit, possession or permanence of national or nationalized merchandise in vehicles for coastal transportation not complying with the custom's procedures legally established;

7) The transportation of foreign merchandise through routes or places different from those as expressly indicated by the customs authority;

8) Violation, rupture, alteration or destruction of lashings, seals, marks, doors, containers and other security means for the safekeeping of merchandise for which the custom's procedures have not been perfected or which are not destined to the country;

9) The transshipment of foreign merchandise within the national territory which has not been authorized by the custom authority of the respective jurisdiction;

10) The abandonment of merchandise in contiguous or nearby places to the frontiers of the territory and other geographical spaces of the Republic, except in fortuitous instances or because of force majeure;

11) The transportation of foreign merchandise on board vessels of any nationality in territorial waters or the unloading of said merchandise when it is not destined to legitimate traffic or commerce within Venezuela or any other nation;

12) The introduction into custom's territory of merchandise incoming from Free Zones, Frontier Zones, Free Ports, In Bond Customs Warehouses, Duty Free Shops and Special Custom's Regimes without previous

compliance with respective custom's control or when such respective custom's controls have been violated; and,

13) The transportation, possession and keeping of foreign merchandise on board of air transport vehicles which do not comply with due requirements that prove their legal introduction into the national territory.

Whereas the law in article 4, considers as aggravated smuggling, with the same penalty as provided in article 2 of the law incremented in one third up to one half, the following:

1) The dispatch or delivery of merchandise, without previous authorization from customs' authorities, when this is performed by customs auxiliaries of the customs administration in charge of its storage or deposit;

2) Loading, unloading or disposition of supplies, parts or provisions intended for use or consumption on board transportation vehicles, without the compliance of legal formalities;

3) The deviation, consumption, disposition or substitution of merchandise without previous authorization from competent officer and which is in process or submitted to warehousing regimes or customs' deposit, as well as that merchandise which transference to interested parties' premises has been authorized by customs' authorities;

4) Undue appropriation, retention, disposition, consumption, distribution or failure in delivery to competent authorities on the part of apprehenders or depositaries of merchandise which, by virtue of this law, is presumed to be the object of smuggling;

5) Depositions of any kind submitted before customs' authorities, using as support for taxable basis or legal basis a false, altered or forged commercial invoice, or an invoice not issued by the supplier or issued by the supplier but in irregular fashion, in complicity or not with tax payer in order to alter customs' duties, fiscal obligations, currency or exchange related obligations derived from custom's operation;

6) The declaration, presentation of electronic registry before custom's authorities using as support for declared origin a false, altered, forged or not validated certificate before authorized organisms or officer, or when such certificate is validated by the later in an irregular fashion, in complicity or not with tax payer in order to obtain a preferred treatment, evading the restrictions or other established measures in custom's regime or, in any case, in order to evade the juridical regime applicable to the merchandise;

7) The utilization, adulteration, possession or preparation of irregular seals or dies, or any other mechanisms of computerized and accounting systems which is false, forged or adulterated in substitution of those employed by the authorized entity, to the object of pretending payment of caution owed or in favor of the National Treasury;

8) Declaration, issuance, presentation of electronic registry or utilization of delegation, license, permit, inspection or verification reports, laboratory analysis reports, registries or any other requirement or document which is false, altered or forged, not issued by the authorized organism or functionary, or issued in an irregular fashion, in complicity or not with tax payer or presenter when the circulation, transportation, possession, introduction or extraction of the merchandise is conditioned to the presentation of such documents;

9) Physical, documental or electronic simulation of customs' regimes and customs' activities;

10) Destination to commercial activities, use and consumption within the national territory of merchandise in transit, in breach of regulating norms for this customs' regime;

11) Extraction from the national territory without the respective authorization and under any pretence, of goods considered to belong to the national and cultural patrimony of the nation, or goods of cultural interest to the nation and those other goods which are rated as such by the competent organism in charge of its safekeeping and guardianship;

12) To bring into the national territory goods that belong to the national patrimony of other countries, without the authorization of competent authorities when this is required to leave the country of origin;

13) The illegal re-introduction of goods with fiscal benefits;

14) The withdrawal or the exit from customs of merchandise patently different from that described in the documentation registered before the competent custom's authority when nationalization has been made through selective channels in automation processes. Also, when the offense is detected after the delivery of the merchandise has been authorized even when the merchandise has not left custom's premises, it will be considered smuggling;

15) The inclusion inside containers, the inclusion within bond or consolidated merchandise or the remittance through international couriers of merchandise not declared and which is detected during inspection or any other later control procedure which the merchandise might undergo; and,

16) The transportation, traffic, storage and possession of combustible, lubricants and other petroleum products outside the Bolivarian Republic of Venezuela as well as transportation of minerals without the compliance of the legal formalities required for the performance of these activities, without prejudice of that established in the Law that rules Hydrocarbons.

17) To bring into the national territory or to take out from the said territory, animal and plants species, their parts and products, minerals and derived products, without compliance of special and customs regulations, as well as

those formalities prescribed by the international treaties signed and ratified by the Bolivarian Republic of Venezuela;

18) To bring into the national territory or to take out from the said territory, art and archeology objects, without compliance of special and customs regulations, as well as those formalities prescribed by the international treaties signed and ratified by the Bolivarian Republic of Venezuela; and,

19) To bring into or out of the national territory in transit merchandise which is false or non lawful trademark merchandise, regarded as such by the Agreement on Aspects concerned with Rights on Intellectual Property related to Trade.

It is interesting to point out that the new law establishes the figure of the reward (obvencion) for those individuals, public bodies and officials apprehending or denouncing the smuggling, in which case 40% of the auction proceeds of the seized cargo will be distributed among them. This is said to encourage the combat of smuggling activities in the future. As a general observation, it could be said that the new anti-smuggling legislation is intended to clearly broaden the list of activities regarded as smuggling, and to increase the punishments. A clear example is the violation or rupture of container seals, since in the past (art. 104, letter e in the Organic Customs Law provision now repealed) despite the fact that the violation or rupture of seals were also considered as smuggling, there was an exception for force majeure, which is not the case anymore. It follows that carriers and port operators in charge of warehouses and container yards must be careful in the documentation and on time notification to the customs office about violated or missing seals. Also it is advisable to bear in mind the strict compliance with transshipment procedures and storage / deposit in customs authorized areas.

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