

# SABATINO PIZZOLANTE NEWSLETTER

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**MARITIME AND PORT AFFAIRS - INTERNATIONAL TRADE - CUSTOMS**

## **SABATINO PIZZOLANTE MARITIME & COMMERCIAL ATTORNEYS**

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### **Ports: huge volumes vs. poor performance....**

For second consecutive year Puerto Cabello is in the path to break the cargo volumes handled in recent years, perhaps reaching the 800,000 TEUs, and so occupying an important place within the ports of the region.

Nevertheless, the increasing cargo volumes do not find equal in the productivity figures, since a variety of factors are affecting the speedy handling of cargo through our ports.

The Automated Customs System (SIDUNEA) improved significantly the customs procedures, there is no doubt about it, but in practice the entrance of new regimes such as CADIVI, the body in charge of the control exchange system, requires physical inspection of cargoes, which in some cases are subject to more than one single inspection. This problem is made it even more serious when new rules by other authorities are introduced. Here reference is specifically made to, for instance, the lack of trucking, manning and cargo handling equipment.

During the last months a debate is on the table, i.e. whether this poor performance and so the resulting port congestion is due to lack of cargo handling equipment or, on the contrary, is resulting from the lack of coordination between the different bodies.

While public authorities such as SENIAT tends to point towards the first cause, private sector, particularly, the Chamber of Commerce of Puerto Cabello finds the explanation on the lack of coordination among the parties involved in the port activity, affecting the productivity and the logistics as a whole. The subject is then on the table, the discussion still open...

### **SHIPPING**

#### **Amendments to the Law on Maritime Commerce**

The Law on Maritime Commerce has suffered amendments now published in the Official Gazette N° 38,351 dated 6th January 2006, replacing the original text published in the Extraordinary Official Gazette of the Bolivarian Republic of Venezuela N° 5,551 dated 9th November 2001.

The amendments mainly introduced to make some of its provisions better understandable and more workable, particularly, in the light of the daily practice following its enactment.

Among the amended provisions, are worth to mention:

1. Article 18 is referred to the representation of the Master, according to which he is the representative of the shipowner or the operator of the vessel, whichever the case, and as such he represents the shipowner or the operator judicially or extra judicially, actively or passively. He is in addition, a representative of the shipper to the effects of preservation of the cargo and results of the voyage.

2. Article 29 was amended to clarify scope of the representation assigned to the ship agent. Previously the ship agent was regarded as having the active or passive representation of the shipowner or operator of the vessel, insofar all activities related to the maritime adventure before public entities and private parties; now the provision states that the shipping agent appointed to perform the necessary arrangements related to the attention of a vessel at a Venezuelan port before customs authority, port captaincy and port administrator has the judicial and extrajudicial representation of the vessel, active or passive, jointly or severally with Master, shipowner or operator when these are not domiciled in the location, in respect of all effects and liabilities that might arise from the voyage of vessel to that destination port and until there is another

written appointment made in order to substitute the initial ship agent.

3. Article 32 states that the Master, shipowner or operator may appoint as agent, a different person from the shipping agent, when the latter has been appointed by the charterer, pursuant to the provisions of the charter party. Such an agent also has the active or passive representation, judicial and extra judicial representation of Master, shipowner or operator, always when this designation can be supported by written nomination. In this case, when summoned the ship agent appointed by the charterer must wave participation, indicating name and domicile of the other representative appointed by the Master, shipowner or operator of the vessel.

4. Art. 97 is referred to the powers of the judge to grant the precautionary measure or arrest originally at his discretion, so the new provision states that when the claim is in respect of a maritime credit or lien prescribed by the Law on Maritime Commerce, and always when it is founded on a public instrument, acknowledged private instrument or construed as legally acknowledged, accepted invoices, charter parties, bills of lading or any other instrument that evidences the existence of a maritime credit or lien, the judge, at the request of the plaintiff "shall" order the arrest of vessel. In the other cases the judge may request that the plaintiff submits guaranty in an amount and terms as requested by tribunal in order to cover all damages that might be caused to the defendant, or he may be requested to present proof of solvency which would allow him to respond for the results of the arrest. That person who has submitted said sufficient guaranty in the amount and conditions as determined by tribunal may at any time request to the tribunal its reduction, modification or cancellation. Nevertheless, the amount of guaranty requested for the suspension of the arrest shall not exceed the value of vessel, determined in appraisal made by naval inspector.

5. Article 111 also is amended to clarify the application of other precautionary measures to claims not being maritime credit or lien, so irrespective of the arrest provisions they do not exclude the exercise of other precautionary measures of common law which might correspond to a creditor, in order to ensure the results of his pretensions for those cases which are not maritime credits, or a credit that is not entitled to a lien over a vessel.

6. Article 195 related to contract of affreightment per volume also deserved a conceptual revision, clarifying that this contract also called per volume or quantity is that in which the carrier undertakes to transport a determined volume of cargo in a determined period of time, without putting a specific vessel to the disposition of charterer wherein he may appoint one or several vessels with similar characteristics to transport each one of the shipments in exchange of payment of freight charges. The article added that for each one of the shipments owner and charterer shall subscribe a voyage charter party and in those cases where a contradiction is found between the former and the contract of affreightment per volume, the latter shall prevail. The charterer shall indicate to the owner the dates

on which shipments shall be made, and he may modify said dates previous notification given in writing.

7. Article 246 was reviewed in the light of the last general port strikes experienced by the country, particularly the distribution of costs in the event of the voyage interruption, so following the introduced amendment it is clear now that in the case when the voyage is interrupted, or the arrival is prevented or delayed, for any cause whatsoever, the carrier must proceed with the transshipment of cargo in order for it to be delivered at final destination. Costs for transshipment and freight in order to finalize the voyage and deliver the merchandise, when this interruption is not the consequence of a cause for exoneration of liability, are for the account of the carrier. This would allow the carrier in the event of a general strike closing the port, for instance, to recover such costs from receivers.

8. Article 259 was amended to include the right of retention for container demurrage, stating that the carrier by a court order may deposit the merchandise with a third party in order to guarantee payment of freight, delays in return of containers, demurrages, expenses and submittal of guarantees for general average contribution and signature of average compromises. The carrier may, once these requirements have been sufficed and the corresponding fiscal credit has been paid or guaranteed, and when no one appears to claim the merchandise, request the public auction of goods if they are perishable or of difficult conservation or when there has elapsed a period of sixty (60) calendar days after notification of deposit has been given.

9. Article 312 related to the tugboat contract was also subject to changes with significant critics by the private sector who previously had the powers to designate the tug company and the number of units to be used in the case of port operations. The amended provision now states that the towing contract is construed as that contract whereby the owner of a towing vessel undertakes to apply the power of the vessel in order to upgrade the propulsion or to allow the movement of another vessel in exchange for remuneration. In that towage intended to assist a vessel in manoeuvring, the appointment corresponds to the Port Captain of the respective aquatic judicial circumscription, taking into account the dimensions and characteristics of the vessels as well as the safety of navigation.

10. Article 334 states that in cases of collision of one or more vessel with fixed objects in the water or in the port, the shipowner or the responsible for the affected object shall estimate the amount of damages and will inform this to the wrongdoer, who is to constitute sufficient guarantee to the satisfaction of the victim in order to indemnify him, endeavouring to reach an extrajudicial solution that would guaranty the repair of damages within a term to be determined convenient by the parties.

11. Article 335 is also amended to clarify that the port administrator is the one to set the security, so when the damage is caused to berths or other elements of the port infrastructure or fixed premises, and when it is caused by a vessel or aircraft, the port administrator shall demand from

the shipowner or operator or from a representative of these, a guarantee to cover the repair expenses. The guaranty shall be retained until all expenses are paid or the inexistence of liability is established; in addition, the detention of the vessel or aircraft shall be demanded by summons and the dispatch of none of other vessel or aircraft owned, operated or exploited by the wrongdoer shall be permitted, in case the vessel has left the national jurisdiction. In the case of convoys, said obligation rests with the shipowner or operator of the vessel that caused the damage directly. Action to make effective the guaranty shall extinguish after six (6) months, counted from date of the event that originated the need for submittal.

### **Transshipment cargoes under new customs regulations**

According to the Partial Regulations to the Organic Customs Law related to the Automated Customs System (SIDUNEA) published in the Official Gazette No. 37,967 dated 25th June 2004, new provisions have been introduced in connection with transshipment.

Now it is not required an authorization from the customs office to carry out this activity, which is instead replaced by a notification made by the ship agent via electronic e-mail to the customs office (This is prescribed by art. 20, although not fully implemented in all customs offices). The provisions do not make any difference between transshipment in domestic ports or with destination to a foreign port, and because of this it is understood that it applies to both.

Of particular interest, however, is the content of art. 22, which obliges the carrier to proceed with transshipment of cargo 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.

Despite the content of art. 22, it is the opinion of this law firm that this provision should be regarded as unlawful due to the fact that it is contrary to legal provisions prescribed by the Organic Customs Law, specifically art. 66 stating that cargo become legally abandoned when either the consignee has not accepted the consignment, or when the declaration or withdrawal of the goods as the case might be, do not take place within the period of time prescribed by law, i.e. 35 days. This means that there are only two legal ways for the cargo to become legally abandoned under the customs law, and the Regulations can not contradict this legal provision; this would allow the exercise of an action against art. 22 in order to challenge its legality.

Some carriers have suggested the insertion of a clause in the B/L holding the shipper/receiver responsible for the costs in connection with this transshipment and even transferring the risks as associated with it, but some concerns about its legal effectiveness arise in this respect. Therefore, it would be advisable that until the above point is clear out,

transshipment is avoided, unless the feeder carrier is able to guarantee the shipment in 30 days, which it is unlikely, or is willing to hold harmless the ocean carrier in case cargo is lost as a result of the abandoned condition or for any incurred delay.

## **PORTS**

The Ministry of Infrastructure published Resolution N° 053, in Official Gazette N° 38.438 dated 05-17-06, whereby it is ordered to suspend, all over the national territory, the granting of concessions, habilitations and authorizations for building, maintaining, operating or administrating ports. The said ministerial resolution created great confusion in the sector, due to its ambiguous wording, to some extent affected by constitutional vices.

Pursuant to the Constitution of the Bolivarian Republic of Venezuela (1999) the distribution of competencies between the National Government and the States in respect of ports, is, as it could be said, a concurrent competency or at least, it is not the exclusive competency of the regional governments as it used to be while the 1961 Constitution and the Law for Decentralization, Delimitation and Transference of Competencies from National Government to the States were in force. The General Law on Ports acknowledged this principle seeking to balance power between National Government and that of the Regions, as it can be read in its Exposition of Motives

Concessions, habilitations and authorizations as provided for in Chapter III (art. 28 and following) of the General Law on Ports apply exclusively to private ports for private use and public ports of private use. Also, they apply to private ports of public use as provided in art. 40, these are the concessions of strategic nature. The Second Paragraph in art. 28 of the General Law on Ports excludes in express manner the application of the contractual types described above to "public ports of public and commercial use", i. e. those decentralized ports. This is so true that concessions and authorizations provided in articles 29 and 32 of the GLP are referred to private ports of private use the former, and to "berths, mooring or berthing facilities of local or particular interest", but not applicable to public ports of public use, also called ports for commercial use", the later.

From the above, it can be inferred that the contracts for concession, habilitation and authorization provided for in Chapter III of the GLP are contractual figures applicable to those ports under the jurisdiction of the state or dependant of the maritime authority (INEA), and not to decentralized ports. In fact, the States cannot grant habilitation contracts because these do not concern public ports of private use, on which the States don't have any competence.

For this reason all concessions and authorizations granted by regional ports are ruled by the corresponding regional port laws, as it has occurred since the entering into force of the General Law on Ports in 2001.

Consequently, this Ministry Resolution would not affect use authorization contracts in respect of yards which have

been entered by ports of commercial use (Carabobo, Zulia, Anzoategui, etc.), neither would it concern those that are granted in the future. And by no means would it apply to those authorization contracts agreed by shipping agents or port operators and port administrations for the purpose of their registration in corresponding registry as business associations for the rendering of port services and the development of their activities accordingly. Lastly, the Ministry of Infrastructure has now amended Resolution No. 053 through Resolution 079 published in Official Gazette N° 38,495 of 8th August 2006, such resolution temporarily suspending the bidding procedures in progress or about to begin in the whole national territory for the granting of concessions for the operation and administration of public, commercial and general interest ports. It can be said in general terms, that the new Ministerial Resolution No. 079 dated 7<sup>th</sup> August 2006, amends the former one whose wording was ambiguous. It is clear now that the said resolution suspends the bidding process either underway or about to begin, referred to concessions related to the operation and administration of public ports of public use, i.e. decentralized or ports of commercial use such as IPAPC (Puerto Cabello) La Guaira, Maracaibo, etc., until the National Plan for Port Development is concluded.

Therefore, the Ministerial Resolution No. 79 does not affect current "authorizations", for the operation of container yards within the port area, as this is not referred to operation and administration of a public port of commercial use.

## MULTIMODAL TRANSPORT

Venezuela does not have any specific internal legislation on the matter; however, as member to the Andean Community (Colombia, Bolivia, Ecuador, Peru and Venezuela) is subject to Decision 331 (modified by Decision 393) on Multimodal Transport, regional treaty incorporating mainly the 1980 Geneva Convention. Decision 331 applies not only to those multimodal transport contracts where the MTO takes cargo from one of the sub-regional members or delivers cargo to one of the sub-regional members, but also applies to all the MTOs operating between country members or from one country member to third countries and vice versa.

According to Decision 331 the responsibility of the MTO for the goods covers the period from the time he takes the goods in his charge to the time of their delivery (custody basis). Limitations and exonerations principles follow very much the Geneva Convention; however, the limits are the one prescribed by the Hague-Visby rules (666.67 SDR per package or unit or 2.00 SDR per kilogram); nevertheless, Decision 331 states that if the multimodal contract does not include the carriage by sea or interior navigation, then limitation will be equivalent to 8.33 SDR per kilogram of gross weight of the goods loss or damaged. It is important to point out that Decision 331 requires for the MTO (domestic and foreigner) to be registered in specific Registries held by each country member, requisite which despite the silence of the Decision about the consequences

of its non compliance, would appear to have the effect not to subject the multimodal contract to the terms of Decision 331, in which case would apply the terms of the law in tort.

## MISCELLANEOUS

### Pdvsa will buy 42 new ships for its oil fleet

Eva Peron will be the name of the first ship of the new Venezuelan oil fleet that will leave the Argentine shipyards, Santiago River, with a capacity of 47,000 tons, for the carriage of clean products, at a cost of 56 million dollars. A report of Asdrubal Chavez, director of Pdvsa, in charge of the Department of Commerce, Provision and Transport, stated that the Venezuelan oil industry wishes to have an own fleet of 58 ships for the beginning of 2012, with a capacity of 4.1 million tons of dead weight, to daily export 2.1 million barrels of crude oil. At the present time the oil corporation has 21 own ships and only 1.3 million tons of dead weight, and contracts 75% of the fleet for export. The ship has 6 tanks for products, autonomy of 12,000 nautical miles and 36 crew members.

In the report of Mr. Chavez it is indicated that at the present time, with Venezuelan flag 25% of the oil load are only transported and for the 2012 aspiration is to arrive at 45%.

In the document it is indicated that for the extension of the national fleet PDVSA works in strategic alliances with Spain, Brazil, China and Argentina. It is further explained that this extension is necessary for the diversification of the markets, that are being executed gradually, to arrive with its own ships to China, the second worldwide consumer and to other Asian countries to satisfy the increasing demand of energy.

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