

# SABATINO PIZZOLANTE NEWSLETTER

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MARITIME AND PORT AFFAIRS - INTERNATIONAL TRADE - CUSTOMS

## SABATINO PIZZOLANTE MARITIME & COMMERCIAL ATTORNEYS

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### Customs fines: The new way to collect money...

It is understandable that the customs legislation may prescribe fines in case of breach by those under the obligation to comply with it. As matter of fact this is common practice worldwide; however, it is hard to accept that fines become a mechanism for the customs authorities to collect money for the national treasury, instead of doing this through the customs duties levied from the ordinary and efficient movement of import and export goods. At least this is the impression caused by the conduct of some customs officials who in the last months have imposed huge fines to port operators and shipping lines, either because of the permanence of empty containers within the national territory beyond the allowed ninety days period after arrival, or due to an alleged cargo shortage or that cargo discharged in excess and not manifested within the prescribed period of time, as required by the regulations. Although in the first case the legislation is not clear about what the sanction is in case of breach of the allowed ninety days of permanence, customs authorities are applying a fine equivalent to the value of the equipment, which in practice can be a significant one when related to a large number of containers. In the case of the cargo shortage or of that cargo discharged in excess, the fine although duly prescribed by the law, may be astronomical and unfair, taking into account the discretionary criteria followed by the customs authority. Consequently, it is necessary that the customs authority (SENIAT) at Caracas level issues clear instructions about the application of these fines, to promote legal certainty, something quite important for those trading with our country...

### SHIPPING

#### Amendments to the Organic Law of Aquatic Spaces

Through Extraordinary Official Gazette N° 5,890 dated 31st July 2008, the Executive amended the Organic Law for Aquatic Spaces; from the analysis of the most relevant aspects related to the maritime and port sectors, the following comments are worth to mention:

##### 1. - Declaration of Public Use and Interest:

Contrary to a declaration in the former Law stating aquatic spaces being of public interest and having a strategic character, the new provision establishes in article 6, a declaration of Public Use and Interest for all that related to aquatic, insular and port spaces, especially in respect of national and international maritime transportation of goods and individuals, including the ports. The declaration of public use, in particular, could open doors for expropriations and nationalizations.

##### 2. - Designation of the Ministry of Infrastructure and Transportation as the organism governing maritime navigation and others and the inclusion of the Community in these governing attributions:

The present reform assigns to the Ministry of Infrastructure and Transportation governing functions in respect of maritime, fluvial and lacustrian navigation with indication to put into practice the policies of the government pertaining to this sector, and to supervise and survey competency and performance of the INEA and other organisms ascribed to the latter, thus centralizing the functions of this aquatic authority. The reform also provides the intervention of the communities in the public functions attributed to these entities, aligning these functions with the new social oriented policies established by the government. Nonetheless, it is not clear yet how

would the INEA foster the participation of the local social organizations and the recently established cooperatives and social units of production integrating them into the services rendered within the aquatic spaces.

### **3. - Determination of the Aquatic Authority:**

Contrary to what was established in the former LOEA, this present reform, within the competencies assigned, expressly attributes to the INEA the exercise of the Aquatic Authority (art. 73/1), a legal gap which gave rise to confusions in respect to governing functions assigned to the Ministry of ascription; however, it is also noticeable that the Bolivarian Navy has been attributed the same authority or competency in the text of the reformed Law for the National Bolivarian Armed Forces indicating: "To exercise maritime authority in the aquatic and insular spaces attributed by the laws" (numeral 12 in article 36). This circumstance could give rise to future conflicts of authority.

### **4. - Modifications in the Board of Directors of the INEA:**

The present reform keeps the number of the INEA Board of Directors in 5, and they are to be appointed by the Ministry of Infrastructure and Transport. The designation of the President and Vice-President which corresponded to the President of the Republic and to the Ministry of Infrastructure respectively as per the derogated law, now is also an attribution of the Ministry of Infrastructure and Transport and the ministries of Defence, Natural Resources and Production and Commerce are to appoint their representatives.

### **5. - New Fiscal Incentives or Exemptions for the Merchant Marine and customs duties exemptions are eliminated:**

A relevant and most important point in the reform in comment is the incorporation of exemptions to the Merchant Marine, provided in the extinct Law for the Reactivation of the Merchant Marine, ratifying exemptions "for the import of vessels .../... goods related to the naval and port industries". The foregoing is most important if it is borne in mind that previously the exemption of import duties only applied to vessels and not to port equipment. It is no less important to mention the elimination of customs tax charged besides import duties as per the derogated Law for Reactivation; this somehow distorted the initial spirit of incentives in said derogated Law given its onerous character by reason of the values sheltered by this fiscal incentive. Also, all the exemptions provided for recreation and sports marine were derogated. In practice, this means a significant increase in the flagging costs in the case of expensive vessels such as ferries, tankers, etc., as the customs duty at present is equal to 1% of the CIF.

Also important to mention is the fact that the income revenue (ISLR) rebate of 75% provided for new investments in the extinct Law for Reactivation was ratified, so the exemption of the VAT, as this is prescribed in the corresponding law is not modified.

### **6.- Coordination with States Administrations in respect of port competency is eliminated:**

The supervision and control of the activities in ports, piers and other premises shall be the exclusive competency of the INEA (art. 74/12), thus eliminating the coordination with State Administrations provided in the former LOEA which must be construed as another step towards well announced centralization of ports.

### **7. - Coastal Trade Transportation and Domestic Navigation are regulated:**

The reform, as well as the former law regulates coastal trade transport and domestic navigation understanding the later as different from coastal trade navigation performed within waters of same jurisdiction of jurisdictional waters of the Republic. Also, the INEA has the power to grant foreign flag vessels authorization to perform this type of navigation, costal and domestic, contrary to that provided in former Law which required previous consent from the Merchant Marine Committee.

### **8. - Regulates the creation of Maritime Tribunals and deletes provision for the creation of maritime tribunals in the different ports:**

The reform maintains the regulations on creation of maritime tribunals but deletes the norm that provided for the creation of maritime tribunals in the different aquatic circumscriptions, thus centralizing the maritime justice. Nonetheless, another interpretation could be that obviating the limitation of specialized tribunals, doors would be kept open for their creation when circumstances would so require with seat in any region or port.

### **9. - Ratifies enrolment of 50% of foreign crew on national vessels:**

The reform ratifies art. 123 of the former Law and allows for a national vessel to enrol 50% of foreign officers and crew and a novelty in contents is that it provides for the enrolment of superior nautical education students as trainees in those foreign vessels authorized to perform coastal trade navigation among national ports during the time of such authorization.

By way of conclusions it can be said that the reform to the LOEA has been fundamentally oriented to enhance the roll of the Ministry of Infrastructure and Transport as governing organism for the Aquatic policies of the State and the designation of the Board of Directors of the INEA subtracting competencies granted to the INEA; to grant the INEA bigger powers and faculties to act discretionarily in the exercise of functions such as those indicated in points 2 and 4: allow the incorporation of the communities in public functions abiding to the guidelines and social policies of the State; to define and note several aspects in respect of the regular functions and performance of the INEA.

Undoubtedly this circumstance, added to an eventual reform of the General Law for Ports pursuant to the

sentence of the Supreme Tribunal of Justice recognizing to the National Executive the right to intervene public ports of commercial use, shall ease the way to recentralization of public ports, even though it is only just to admit that a recentralization of ports (a process that might have been delayed for political reasons) could have been undertaken with no need to modify the LOEA. On the other hand, the flagging of vessels is affected because of the elimination of exemption of customs duties which is going to increase considerably the costs of flagging undermining our competitiveness in respect of other flags. Finally, perhaps one of the most delicate issues is the declaration of public use (art. 6) which applies to national maritime transport and ports among other sectors because this affects the private sector which is placed in situation of juridical uncertainty. It is worth to note that in the ports, because of the redaction of contracts, this has always been a present and possible risk since the process of centralization started (1991). Risk is now patent within the maritime transportation of goods and individuals which constitutes another element of uncertainty for the private sector.

### **Time-limit applicable to recourse actions under domestic legislation**

Contrary to the situation under English law, in domestic legislation there is not a contract time-limit. As per the Civil Code, there are prescriptions for obligations in general either personal ones (10 years) or real ones referred to property (20 years). Consequently, any action by the carrier against the port operator in connection with the existing contract would be subject to a time-limit of 10 years, to be counted usually from the date of breach.

Despite the above the domestic maritime legislation sets up specific provisions regarding the recourse/indemnity claims. Thus, according to the Law on Maritime Commerce (art. 254) any recourse action shall be exercised even after the expiration of the time-limit in respect of claims for loss or damage to cargo (1 year).

Curiously, unlike Hague/Visby or Hamburg under Venezuelan law this recourse action would appear to be open in time. Unfortunately the maritime provisions do not add too much to clarify as from what moment the time to exercise the recourse action begins to run, the reason being that again, contrary to Hague/Visby or Hamburg no reference is made to the date on which the person exercising the recourse action has first settled the claim, or got to acknowledge it.

Besides, the General Law on Ports (art. 104) states that any action against the port operator (stevedores) is subject to a prescription of one year, being the case that as per the same legislation prescription can be only interrupted by filing the writ.

The joint lecture of both articles (254 & 104) raises concern about the interpretation of time-limits when dealing with port operators. From the port operator's perspective it could be argued that in the case of an action by the carrier against him even after expiration of the

time-limit, the applicable specific law, i.e. General Law on Ports, prescribes a prescription of only one year, without any reference to recourse actions.

Unfortunately and because this is a relatively new legislation, no legal precedents on the matter are available yet.

When trying to protect the recourse action by the carrier against the port operator, the above ambiguity is overcome by way of a written statement whereby the port operator expressly undertakes to reimburse the carrier in case the latter is obliged to pay the claimant.

### **Enacted new law for maintenance of channels of navigation**

The Law on Canalization and Maintenance of Navigation Channels has been published in the Extraordinary Official Gazette N° 5,891 dated 31st July 2008, containing some provisions of interest for the maritime sector.

Art. 16 of this legal instrument states that the canalization and maintenance services to navigation channels comprise:

1. The study, inspection, development, maintenance and administration of navigation channels at State's expenses or by way of contracting, especially those that allow for vessels of important draught to access the Lake of Maracaibo and the fluvial passage Apure – Orinoco, as well as every other necessary accessory work or works somehow related with the construction, usage, services and maintenance of navigation channels already mentioned.
2. Maintenance and operational surveillance of the signaling systems of navigation channels.
3. All other channels and navigation courses which are assigned.

The law ratifies the National Institute of Canalizations (INC) as the governmental entity in charge of the managing of channels, and so according to article 8 the INC will administer the policies dictated by the rector organism and the National Plan for the Development and Maintenance of Navigation Channels, ascribed to the Ministry of Infrastructure and Transport. Seat shall be assigned by the rector organism and the Institute may create its own regional managements and agencies where works related to canalization and navigation channels are executed.

As per article 9, numeral 9, the INC will perform hydrographic activities, and the dredging and signalization of the navigation channels within the Republic that public or private organisms or entities require at port installations, oil terminals and mining terminals as well as at any other navigable course, and other activities of similar nature.

Particular provisions are inserted in the law, establishing tariff privileges according to each type of vessel. Article 18 prescribes that the transit of war and scientific vessel as

well as those foreign official vessels or those vessels under the custody of national, state or municipal entities shall pay a unique tax for entrance and exit equivalent to one hundred fifty tributary units (150 T.U.) for utilization of the navigation channels which are under the administration of the National Institute of Canalizations when and if they are not used for the activities described in article 16. Foreign vessels are exempted from payment when there is an agreed principle of reciprocity between the Bolivarian Republic of Venezuela and the foreign country. Article 19 states that the transit of war, scientific or official national vessels ascribed or under the custody of some organism or entity belonging to the National Public Administration, state or municipal, shall be exempted of any payment of taxes in respect of utilization of the navigation channel which is under the administration of the National Institute of Canalizations when and if it is not used for the activities described in article 16 of this present Decree with Rank, Value and Force of Law.

On the other hand, article 20 states that international cargo transportation made by Venezuelan vessels shall have a rebate of ten percent (10%) on taxes provided for in Article 16 of the present Decree with Rank, Value and Force of Law.

According to article 21 the coastal transportation in Venezuelan flagged vessels, made between points and ports within one navigation channel administered by the National Institute of Canalization shall have a rebate of twenty five per cent (25%) on taxes provided for in article 16.

Vessels on ballast over one thousand units (1000 GT) of gross tonnage shall pay taxes equivalent to one hundred (100 TU) tributary units, whereas vessels on ballast under one thousand (1000 GT) units of gross tonnage are exempted from payment of taxes, as per article 22 of the law.

Finally, article 23 prescribes that before the vessel sails, unless there exist contractual agreement indicating another modality, the owner, the ship agent, the representative of the owner or the Captain of the vessel are jointly liable for payment of taxes provided in respect of utilization the navigation channels administered by the National Institute of Canalizations.

## PORTS

### Plan for modernization of port of La Guaira

Venezuela and Portugal have signed an agreement for the modernization of the port of La Guaira, second port of the country serving Caracas and nearby areas, aimed to increase the number of berths from twelve to twenty two, adding 60,000 hectares for the reception, storage and handling of cargo. According to the authorities of PLG, S.A., the port administrator of this port, the Portuguese consortium Teixeira Duarte-Mota will be in charge of the basic engineering, while during the first quarter of 2009 the works of infrastructure should be taking place,

comprising demolitions, land reclamation, dredging and constructions.

The total investment is US\$ 640 millions to be executed in five years, through three stages: The first stage is referred to the modification of the berths East-South; the second comprises the modification of the berth North and the third relates to the construction of the berth West. The authorities have declared that the works will be advanced without affecting the normal activities of this important marine terminal which at the moment has eight berths out of use due to different reasons, while it only counts with seven berths for handling containers and one for handling bulk cargoes, insufficient for the volumes arriving to the port.

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