

SABATINO PIZZOLANTE NEWSLETTER

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MARITIME AND PORT AFFAIRS - INTERNATIONAL TRADE - TRANSPORT

SABATINO PIZZOLANTE ATTORNEYS' OFFICE - ASSOCIATED MARITIME CONSULTANTS

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Welcome!

For almost two decades **SABATINO PIZZOLANTE ATTORNEYS' OFFICE** has established itself as the only specialized maritime legal firm, not based in Caracas. The office keeps close relation with legal firms and specialized international agencies worldwide. The firm's services are available to all parties involved in the maritime field, in particular, shipowners, charterers, their P&I clubs, shipping agencies, port authorities, terminal and port operators.

THE SABATINO PIZZOLANTE NEWSLETTER is the result of our willingness to provide clients and friends, with up to date information concerning not only the developments of maritime and port law in Venezuela, but also to let them know the new opportunities for investment in the transport field of this country.

The mission of our firm has ever been to begin with every client an endless business relationship, able to grow up day after day by providing services on the basis of expertise, dedication and hard work. This Newsletter intends to be a vital link by which we can show you **our effort to achieve that goal.**

SHIPPING

Transshipment in the light of Customs Law

By application of article 40 of the Customs Law, enacted by the time when the doctrine in force was that of the protection of national merchant marines, all transshipment operations at Venezuelan ports, in connection with commodities in international transit, must be done in ships of national flags, unless an authorization from the Finance Ministry, through the national body in charge of collecting internal revenues (SENIAT) is obtained. In practice, this means that shipping agents should obtain the said authorizations in the capital of the republic (Caracas), and in a period of time that in many cases exceeds the necessary time for the arrival of the ship, reason for which many times the cargo in transit must remain in port awaiting the following ship, while obtained the authorization. Leaving aside the commercial implications that this rule has for those ports and carriers that aspire to take real advantages from the transshipment, serious legal objections could be made to the said rule.

On February 1995, Puerto Cabello Customs Authority did not authorize the transshipment of fifty containers in transit to Maracaibo, onboard a Danish flag vessel. PCCA argued that by virtue of article 40 of the Customs Law, such cargo should be only carried by national flags vessels to its final destination at the port of Maracaibo.

The carrier who intended to take the cargo to final destination, then brought an extraordinary injunction (Amparo Constitucional) against the PCCA, assisted by our law firm. The arguments put forward before the High Civil and Administrative-Contentious Court of the Judicial District of

the Mid-North Region by Sabatino Pizzolante, were that the act whereby the requested transshipment was denied by the Administrator of PCCA, was a violation of the rights of economic freedom and juridical security prescribed by the Constitution, because not being the operation a cabotage in the terms of the Customs Law, but a transshipment of goods in transit, then this carriage could be done by foreign flag vessels, since the said art. 40 of the Customs Law has been tacitly overruled by Decision 314 of the Cartagena Agreement which should be applied with preference to the mentioned article 40, taking into consideration its legal hierarchy of international convention.

Thus, on 23 February 1995, the court agreed to grant a preliminary injunction, ordering the immediate transshipment of cargo. After the hearing of the PCCA arguments, the court then confirmed on 9-3-95 the preliminary injunction, by decreeing definitive amparo in favor of the carrier, authorizing *inter alia* the performance of transshipment operations in vessels of foreign flag. Despite this court decision, it should be borne in mind that it benefits only to the petitioner.

Therefore, international carriers and their shipping agents, are strongly advised to get authorization from the Gerencia Nacional de Aduanas (SENIAT-CARACAS) for carrying out transshipment operations with foreign flag vessels at Venezuelan ports, otherwise cargo involved in such operations could be regarded as smuggling and, consequently, seized.

Applicability of Venezuelan Employment Law

The Civil and Mercantile Court of First Instance of Puerto Cabello, considered recently the applicability of domestic Employment Law (Ley Orgánica del Trabajo) to crew claims, even though the vessel involved was a foreign one, as well as the employment contract was entered into overseas. The lawyers of the TRADEWIND RIVER (The defendant) answered the claim brought by Mr. B (The plaintiff), who worked as second engineer onboard the vessel and claimed outstanding wages and damages for personal injury, by alleging lack of jurisdiction on the basis that "crew services were not rendered in the national territory, nor it was agreed such services within it".

On 11 November 1996, the court decided that by virtue of art. 10 of the Employment Law, such an legislation is of public order and territorial application, being applicable to venezuelan and foreigners with the occasion of services rendered or agreed within the country. The court then argued that as a consequence of the territorial principle mentioned above, then domestic employment law applies to: a) all the companies located within national territory; b) all the workers, national or foreigner, who perform services in Venezuela; c) all contracts entered into in Venezuela, despite the fact that services be rendered overseas; and d) employment contracts agreed or started overseas, but total or partial performed and finished in Venezuela.

Being the case that the TRADEWIND RIVER had been at Puerto Cabello for repairs that lasted more than a month, and Mr. B was hired to work as engineer onboard, then it was clear the applicability of the national employment law, and therefore the court had jurisdiction to hear the claim. Despite the fact that this decision is subject to appeal, the important issue here is that it clearly shows the criteria of local courts regarding crew claims in respect of contracts entered into outside Venezuela. It is no doubt a warning for foreign shipowners and their P&I clubs, among whom it is common belief that Venezuelan courts do not have jurisdiction to deal with claims of this sort.

SHIPPING AGENTS

Shipping Agent Discharged from Liability

A case handled by this law firm ("THE HORNESTRAND") raises the risks to which ship agents are exposed to, in the performing of its duties. The facts were as follows: the vessel had sailed to Ecuador, carrying a cargo of ammunitions, while there the captain following intructions of shipowners headed to Puerto Cabello, since there was a prospective buyer for the cargo there. The vessel anchored closed to Puerto Cabello, within territorial sea on 6-1-96.

Afterwards, National Guard boarded the vessel to search it, claiming that the cargo was a smuggling of ammunitions, seizing the vessel on the basis of illegal introduction of ammunitions into the national territory, according to the Law of Arms and Explosives, due to the fact that shipping documents did not mention Puerto Cabello as port of discharge, not it had been such a cargo announced before customs and military bodies as usual. The crew of the vessel, ship agents's representatives and persons concerned with the cargo went through many hours of interrogatory, being the case that after 15 days the crew was exonerated, cargo seized and one of the ship agent's partners (Mr. M) as well as people concerned with the cargo were arrested. Mr. M responsibility according to the National Guard, derived from his condition of agent who presumptively had access to shipping documents and, therefore, knew that the cargo would be introduced to national territory.

In the criminal trial it was shown that the ship agent complied with his normal duties, that it was beyond his knowledge the nature of cargo, by the time the vessel was seized and, that it was not his fault the entering of the vessel into territorial waters. At the beggining of August 1996, the ship agent was exonerated from liability.

This case illustrates very well, the risks to which ship agents are exposed in their daily operations, and the importance of having proper insurance with defense coverage, to face proceedings that sometimes may get cumbersome and expensive.

PORTS

Puerto Cabello Plans to Build Specialized Container Terminal

Puerto Cabello continues ahead with its plan to develop a specialized container terminal that it is expected to have 1,5 thousand meters of lineal berth, with draft of 55 feet, as well as eight post-panamax gantry cranes.

Last year, the Trade Development Agency (TDA) from the USA gave to Puerto Cabello Port Authority US\$ 500,000 to back the feasibility project for this new port facility.

It is not known yet what will be the mechanism for the administration of this terminal, nor what the investors are, although it seems to be that Stevedoring Services of America (SSA) could be one of them.

Puerto Cabello is nowadays the public port number one in terms of vessels served and cargo handled, with more than 2,000 vessels a year and a cargo throughput of 7 million tonnes, in the form of dry bulk, breakbulk and some 200,000 boxes.

New Port Developments Announced

PDVSA the state-owned oil company has announced early this year, that it is planning to build a commercial port with an initial investment of US\$ 200 million to furthering trade of eastern regional states with Brazil, the Caribbean and european ports.

The announcement was made after a meeting held in the National Congress between PDVSA's President, Mr. Luis Giusti, and congressmen from the state of Monagas. Mr. Giusti said that taking into account the importance of Monagas as an oil state, PDVSA will participate in the development of the new port facilities technically and financially.

On the other hand, Zulia State, an important oil field of Venezuela, has said that it is its intention to build a port in the Gulf of Venezuela, in the western part of this country.

Privatization of Port La Guaira Stand-By

Despite the fact that privatization of port La Guaira, was announced for first time in 1992, until now it has been not possible to achieve it. The Venezuelan Investment Fund (FIV), body in charge of implementing privatization program, has the port scheduled for privatization this year; however, this will depend on the ability to overcome political barriers.

Port La Guaira is located in the North of Venezuela, on the Caribbean sea coast. The port serves Caracas, the capital, which is also the political, financial, commercial and cultural center of the country. It is the country's most important maritime passenger port and the country's second largest cargo port, with an annual income of 690 million Bolivars (1US\$: Bs. 477) Under Decree No. 1,316, published in the Official Gazette dated May 15 1995, The Government passed over the administration and maintenance of the Port

of La Guaira to a company called **Puertos del Litoral Central, S.A.** The Decree authorizes a Concession Contract in which the franchise assumes its rights and established obligations. The port has 140 employees, its tariffs are regulated by the Ministry of Transport and Telecommunications (MTC). Its infrastructure belongs to the State, under the control of the MTC, deeming it not to be a company asset.

The process for the privatization of it, will be the sale of its share capital that at the moment belongs 100% to the FIV.

PORT OPERATORS

Delivery of Cargo without Production of Original Bills of Lading

One of the most difficult aspects regarding the new set of liabilities arising out from the current port reforms that took place in Venezuela, has to do with the reception and delivery of cargo, particularly, when we come to deal with the customs rules, enacted under the old port regime, i.e. when port services were performed by the public sector through the state-owned national port authority. Instead, from 1991 onwards after privatization, the reception and delivery of cargo has turned to be a complicated matter, since with very few exceptions cargo goes to private operators who run warehousing or storage facilities within public ports.

The opinion of customs authorities in Venezuela (SENIAT) is that by effect of article 7 of the Customs Law, all cargo coming to public ports are under customs control (Potestad Aduanera), and consequently it is the customs authority the one ordering to whom deliver the cargo, once customs formalities have been complied with. As a consequence of this view, what happens in practice is that customs agents (agentes aduaneros), acting on behalf of consignees, usually request from customs authorization to take the cargo, either from the ship agent/port operator in order to leave the port, or to move it to a warehouse within the same port; this is done by means of a "transference order" (order de transferencia) given by the customs authority.

The problem, nevertheless, is that such transference orders are usually given to the customs agents or receivers on the basis of 1) a written request and a copy non negotiable bill of lading, or 2) a written authorization of the consignee to take the cargo out, this means that customs authorities not necessarily asked for the original bill of lading to authorize the transference of cargo.

Many clients of this law firm has approached to us for advise on this matter, and our recommendation has been not to deliver cargo without production of an original bill of lading, even when the receivers are authorized by a "transference order", this in view of the existing gaps in the

customs legislation. There has been cases where receivers have used a Commercial Court to practice judicial inspections as well as the Customs Police (Guardia Nacional), trying to intimidate port operators to deliver the cargo; however, at the end of the day and after talking to local customs authority about the legal implications of delivering cargo to a customs agent that is not able to show an original bill of lading despite that he had been given customs clearance, customs authorities have forced receivers/customs agents to produce the original bill of lading.

Therefore, to avoid or minimize the risks on this matter, it would be advisable for carriers: a) To instruct their agents not to deliver cargo without the presentation of the original bill of lading, even where there has been customs clearance; b) It could be advisable to use agents that has been granted authorizations for having terminals, and not those who use common storage areas belonging to the port itself, since agents operating terminals has put into place reliable procedures to avoid misdeliveiy of cargo because they have proper control over a delimited area; and, c) Where possible to insert in the in the place of delivery in the bill of lading, the sentence “release as per custom of the port”, which it could be used as a defense for the canier in case of a claim brought for delivery of cargo to a non holder of the original bill of lading.

Sabatino Pizzolante Moves to New Location

Sabatino Pizzolante is moving its office to a new location the coming month of April. The new address will be: Centro Comercial “PARECA”, 2 piso, Ofic. 2-A, Av. La Paz, Puerto Cabello, 2024, Estado Carabobo, VENEZUELA, P.O. Box 154.

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