

# SABATINO PIZZOLANTE NEWSLETTER

August 2000

IV - N° 11

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

## SABATINO PIZZOLANTE - ASSOCIATED MARITIME CONSULTANTS

Centro Comercial Inversiones Pareca, Piso 2, Ofic. 2-08/2-09, Av. Salom, Urb. Cumboto Sur, Puerto Cabello 2024,  
Estado Carabobo, VENEZUELA, P.O. BOX 154

Phones: +58-42-641801/641798/641026-Fax: +58-42-640998 - Mobiles: +58-16-6420036/6420555

E-mail: mail@sabatinop.com - <http://www.sabatinop.com>

### Towards the Organic Law for Aquatic Spaces....

The Law for Reactivation of the National Merchant Marine has given rise to a revision of the whole maritime legislation, in order to bring it up to date. It should be borne in mind that proviso 8 of this law, prescribed a 90 days period following its publication, to elaborate the principles governing the aquatic policies of the state, as well as recommendations to review the maritime legislation. To that purpose the Dirección General de Transporte Acuático set up a number of commissions that are currently working.

Never before in the maritime sector, it has been witnessed such an enthusiasm where professionals and students alike, lawyers, engineers, sailors, etc. meet every afternoon to discuss and propose amendments to the maritime legislation. It is true that these laws will have to be submitted to the National Assembly (Legislative branch) and there is no guarantee that they will be passed at the end of the day, but there is no doubt that the proceedings of these commissions will be of help at some point in time.

The cornerstone of these set of laws will be the Organic Law for Aquatic Spaces, prescribing the general principles that will guide the development of the maritime and port industry in the years ahead. The lack of an appropriate legislation will not be an excuse any more for the maritime community to justify the inertia in this sector. No doubt that the relevant authorities and the investors have a good chance to take advantage of this new legislation....

### SHIPPING

#### Law for Reactivation of the National Merchant Marine entered into force

On 26<sup>th</sup> June 2000 was published in the Official Gazette No. 36,980 the "Law for Reactivation of the National Merchant Marine", recently passed by the *Congresillo*, the so-called temporary legislative body of Venezuela. This short piece of legislation should have great impact on domestic shipping business, taking into consideration that its provisions are going to complement the changes already introduced in the "Law for Navigation" as well as in the "Law for the Protection and Development of the Merchant Marine", that allows for a 100% foreign participation in national flag vessels and their inscription in the national registry of vessels under bareboat charter or leasing.

Articles 4 and 5 deserve particular attention, since temporal or definitive importation of ships (including tug boats) are declared exempt of payment of Tax on Added Value (IVA), as well as investments in the shipping sector are entitled to a rebate on Income Tax equivalent to seventy five percent (75%) of the amount assigned to new investment for the acquisition or leasing of new ships (including tugs) or accessories for navigation, for a period up to three (3) years. These benefits equally apply to accessories for navigation (e.g. barges), including drilling platforms. Generally speaking, it has been said that until now a conservative estimate for vessel registration in Venezuela is in the order of 25% of the vessel value, a situation that will change with the enactment of the new legislation.

Undoubtedly the Law for Reactivation of the National Merchant Marine is of paramount importance to the maritime sector; however, it would be *naive* to think that this legal instrument will ensure alone the development of a national fleet in the short term. It is, by all means, a good

start since this law has been able to gather all the players within the maritime activity, making them realise the importance of the issues, and making them all move in one direction, i.e. the need to develop the merchant marine.

Fortunately, this time, there are reasons to believe that the incentives prescribed by the law will work. To illustrate this point it may suffice to say that the amendments to the Law for Navigation and the Law for the Protection and Development of the Merchant Marine made back in 1998, were intended to open the national flag to foreign investors, this by lifting foreign participation restrictions, allowing the flagging of bareboat chartered vessels and of those under leasing agreements and, finally, exonerating them from payments of VAT and other taxes. What happened in practice was that between 1998 and until very recently, the national flag registry did not grow at all; actually, the tax exoneration (VAT) prescribed by proviso 152 of the Law for Navigation in the event of inscription in the national flag registry was useless, being the reason that for the drafting of this amendment the SENIAT's (Customs Authority) opinion was not taken into account by the law drafters, bringing as a result that the customs procedures operated against the registry of vessels. On the contrary, this aspect was duly taken into account this time, this to ensure the effective application of the incentives. This time the Bill was sufficiently discussed with the SENIAT, drawing its attention to the importance of implementing the incentives. As a matter of fact, the recent amendment to the VAT law (published in the Official Gazette No. 37,002 of 28<sup>th</sup> July 2000) included the exoneration of this tax for definitive and temporal importation of vessels, something that was imperative to make the Law for Reactivation effective. Even more, the importation of port cargo handling equipment has been exonerated from the payment of VAT by this recent amendment, just as a way to foster the renewal and modernisation of port cargo handling equipment within ports.

Nevertheless, the Law for Reactivation needs to be accompanied by others elements, namely a set of clear governmental policies, the pursuit of specific objectives as well as the updating of the legislation, particularly, the employment law.

In line with the above, one of the aspects that worries this law firm most, for instance, is the lack of clear understanding by some people at governmental and private levels as to what the Law for Reactivation stands for. In the opinion of some people it should be an instrument to foster a flag of convenience; in the mind of others there rests the idea that this law will help the alleged 54,000 unemployed sailors to get onboard. There are even others who, although in silence, seem to be looking forward to revive CAVN's past times.

This law firm is of the particular opinion that the reactivation of the merchant marine should have as cornerstone the *cabotage*, since there is an interesting volume of domestic cargoes, particularly, oil, steel and bulk products, that are able to ensure a market for many players but, once again, whether or not the *cabotage* will

be that cornerstone depends very much on the rules to be drafted by the Dirección General de Transporte Acuático as national maritime authority. There is no traffic without cargo, that is the reason why it is of utmost importance to have clear rules for cargo access within *cabotage* traffic.

### **Customs Fine applicable to Containers within Venezuelan 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.

It has been the opinion of customs' officials that the fine to be applied in these cases must be that in accordance with art. 118 of the Organic Customs Law, according to which: "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, it is possible to claim the application of art. 115 of the Organic Customs Law, that states: "The non compliance of the duties and conditions under which an authorisation, delegation, permit, license, suspension or liberation would have been granted, will be punished with a fine equivalent to the double of the import duties legally caused, without prejudice of the application of the confiscation...". This could be a mechanism to minimise the fine amount to be applied in such cases.

This law firm has successfully filed petitions on behalf of carriers and ship agents, requesting the reduction of these fines and subsequent re-exportation of the containers; however, in practice these procedures have proved to be lengthy and time consuming, for which reason carriers should keep strict equipment control to avoid the permanence of containers beyond the 3 months time allowed, instructing also their agents to take the necessary steps for the stripping of containers with cargo in declared abandoned condition pursuant to customs regulations, so as to be able to ship containers timely.

### **Venezuelan Courts have Jurisdiction over Foreign Bills of Lading**

A recent decision from the Supreme Court of Justice — held pursuant to Law for International Private Law and the

Constitution of the Bolivarian Republic of Venezuela— in the case *El Gran Blanco C.A vs. Nedlloyd Lijnen BV Rotterdam and Nedlloyd Maritime de Venezuela C.A.* sustained once again that Venezuelan courts have jurisdiction over foreign bills of lading. In this case, consignees filed a lawsuit against the carrier and its agent for damages suffered as a consequence of the loss of a refrigerated shipment that arrived in poor condition to Venezuelan port. The carrier's agent, as usual, alleged lack of jurisdiction of Venezuelan courts to hear and decide the present action, citing as basis for this allegation a clause in the bill of lading stating that all derived actions from it "should be presented before Rotterdam Courts, and no other Court would have jurisdiction with respect to such action, unless the carrier appeals to other jurisdiction or submits voluntarily to it".

The Supreme Court of Justice, in sentence dated 30<sup>th</sup> May 2000, decided that Venezuelan courts did have jurisdiction to hear and decide the demand in dispute.

In the analysis of the jurisdiction clause contained in the bill of lading which remitted all actions to the Courts of Rotterdam excluding any other jurisdiction unless carrier appealed to some other jurisdiction or submitted voluntarily to it, the Political-Administrative Division of the Supreme Court stated: "Even though derogation of Venezuelan jurisdiction may be admitted through the contractual figure, it cannot be accepted that in adhesion contracts, where both parties do not participate in the establishment of clauses, jurisdiction might be a subject under discussion. The above is strengthened by the principles on access to Justice which are now found in the New Constitution of the Bolivarian Republic of Venezuela, which are referred to, among others, in Article 26 of this Fundamental Text. To consent that clauses admitting exclusion of Venezuelan jurisdiction may be part of adhesion contracts like bills of lading, preventing their nationals from satisfying their legitimate pretensions and obtaining justice because of contractual demands from issuer of contract, would detract from such constitutional postulates and would misarticulate the whole judicial system that depends on these principles".

From above case it may be observed that there is a trend on the part of our highest Court, to claim jurisdiction in the cases of claims derived from transport contracts, even when these may contain attributive clauses of foreign jurisdiction. Nevertheless, the reasoning of the Political-Administrative Division in the case of *Corporation El Gran Blanco, C.A. versus Nedlloyd*, sets forth one interrogation, i.e. what would have been the Court's decision in the event of a contractual relationship stipulated in a charterparty (of typical use in tramp traffic), where the bill of lading would be in the possession of the charterer, that is, the initial holder of the bill of lading?. Undoubtedly, in this hypothesis the will of the parties is contained in the charter agreement, the bill of lading been only a receipt for the merchandise and a negotiable title, and therefore, any clause on foreign jurisdiction that might exist in the charter agreement would have to be acknowledged by our courts as valid.

## Commercial Code under Review

As required by proviso 8 of Law for Reactivation of the National Merchant Marine recently enacted, maritime and port legislation has come under review. The said provision states that the Ministry of Infrastructure, with the National Council of Merchant Marine, after hearing opinion of all entities related to the Marine sector, shall set forth, within ninety days following publication of the law in the Official Gazette, (being the dead line 26<sup>th</sup> September 2000) the Government Aquatic Policies and they shall present the proposals to be developed in the project for the Organic Law for Aquatic Spaces, providing insertion of the National Maritime Legislation into the Constitution of the Bolivarian Republic of Venezuela. In line with this legal mandate, the old provisions of the Commercial Code dealing with maritime affairs are being reviewed so as to update and consolidate them in the new Law for Maritime Commerce.

The Law for Maritime Commerce will incorporate the main provisions governing aspects such as maritime jurisdiction, carriage of goods, limitation of liability, arrest of vessels, salvage, etc., based on the international conventions not ratified by Venezuela by the time being. As a matter of fact the new law is intended to repeal Book II of the Commercial Code.

Among the main features of the Law for Maritime Commerce we find: The creation of a High Maritime Court (*Tribunal Superior Marítimo*) based in Caracas, and jurisdiction attributed to Venezuelan courts at major ports, to hear all maritime claims; arrest provisions including the *in rem action*, for which it was adopted the list of credits of the 1999 Arrest Convention. The arrest will proceed against any vessel within Venezuelan jurisdiction, irrespective of its nationality; flexible rules for vessel's registration, including the creation of an administrative vessel registration office, that will replace the old system requiring inscription of vessel in the Public Registry; provisions for the carriage of goods by sea, adopting a mixed regime (*Hague-Visby/Hamburg*), i.e. nautical fault defence, period of responsibility based on custody, two years prescription, etc.

No doubt that the Law on Maritime Commerce will be an important step ahead for a country like Venezuela, seeking to revive its merchant marine.

## OIL POLLUTION

### Nissos Amorgos master appeals

THE master of the tanker *Nissos Amorgos*, involved in the 25,000 barrel oil spill in the Gulf of Venezuela in 1997, is appealing against his 16 month Maracaibo court sentence. The judgement claimed that Cap. Constantine Nicola Spiropoulos was guilty of acting imprudently by sailing in adverse weather conditions while knowing that three of the ship's seven tanks were in an unacceptable state of repair. "The judge covered up the evidence," the defence

claims. There are studies showing that the real cause of the accident was the bad condition of the channel due to lack of dredging and the consequent lack of depth where the ship ran aground. The most alarming is the fact that the government knew about these conditions. Four months before the oil spill, government declared this navigation channel in state of emergency. Greek Consul Constantine Hadjis said The sentence violates norms of the international treaties to which Venezuela is signatory. The lawyers point to other causes for the oil spill, such as displaced buoys and the submerged metal object that finally broke the ship's hull. Although the country has avoided two attempts of international embargoes provoked by the captain's detention, there may be a third attempt if the sentence is not revoked.

Needless to say that INTERTANKO has noted with concern the decision handed down against Konstantinos Spiropulos, as a matter of fact, this entity acted vigorously to ensure that the true facts of this case came into the public domain, sending representatives to Venezuela on more than one occasion to establish the facts and support its member and Captain Spiropulos. Although it is not INTERTANKO's policy or role to interfere in the judicial processes of Sovereign States, in this case it was noted that the decision is under appeal on the grounds that, amongst other things, much of the technical evidence was either misapprehended or ignored by the Court.

The Venezuelan outcome raises the point over criminal prosecution of qualified and experienced seafarers involved in accidents for which blame may lie with others, or in accidents in which their roles do not reasonable justify a criminal process, and as a result INTERTANKO will attempt to draw the attention of the International Maritime Organisation (IMO) about this matter, with a view to promoting clear guidelines as to how such matters should be handled in a consistent manner with regard to human rights and fair practice.

## PORTS

### Port of La Guaira will not be closed

Port of La Guaira will not be closed for maintenance as it has been commented these past weeks, although the need to make repairs to the highway between this port and the city of Caracas may affect the normal flow of cargo and so the port itself.

Cap. Alfredo Viso Hernandez, Port Captain of the of Port of La Guaira, declared to the national press that the port will not be closed for maintenance, adding that the dredging will be ready between December 2000 and January 2001. He also said that at this moment, they are attending a total of 100 vessels and that they will be rising this number to 115 attended vessels per month in the future.

On the other hand, the national customs authority (SENIAT) will implement the automation for port of La Guaira as a way to fight customs fraud, with an investment

of USD 790,000 and the support of UNCTAD; the modernisation will include an on-line system connecting importer, exporter and the SENIAT, according to National Customs Superintendent Pedro Rodriguez.

The process will facilitate control of import activities including checking on prices, documentation and the accuracy of customs declarations, and is intended to cut down customs clearance time from the present five to seven days to a maximum of two. Once the pilot plan in La Guaira is put into place, the new system will be installed in the country's other ports, at an overall cost of about USD 10 millions.

### National Ports Law is being drafted

A National Ports Law has been drafted and is expected to be passed shortly. The legislation is based on the new Constitution principles that grant powers to the central government to set up the port regime and its infrastructure; while regional States' governments are empowered to carry out the administration and maintenance of ports of commercial use. The new law will apply to public and private ports alike nation wide, covering aspects such as concession contracts for private terminals and ports as well as authorisations for public ports of private use; constitution of port's boards at regional ports, including taxation treatment and distribution of port revenues; port operators' liability regime, based on the 1991 United Nations Convention on the Liability of Operators of Transport Terminals in International Trade, and the set up of a National Port Authority to monitor the activity of the different marine terminals throughout the country, including the regional ports serving international trade.

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