

# SABATINO PIZZOLANTE NEWSLETTER

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**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: +58-12-4210036/6420555

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

### A Significant Year for the Shipping Business...

No doubt that year 2000 has been a significant one for the shipping business. Following enactment of the Law for Reactivation of the Merchant Marine, and the mandate therein, to elaborate the principles governing the aquatic policies of the state, as well as recommendations to review the maritime legislation, the results can now be seen in the final draft of the Organic Law for Aquatic Spaces, Merchant Marine Law, National Ports Law and Law for Maritime Commerce discussed by the National Council of the Merchant Marine. These new laws are scheduled to be passed by the President, based on special powers to legislate recently granted to him by the National Assembly; if the schedule published by the Vice-President of the Republic does not suffer delay, the new maritime legal framework should come into force by the middle of next year. Obviously, the implementation of the new regulations will not be an easy task, taking into consideration the bureaucracy, gaps and old rules in the remaining non-maritime legislation —particularly customs legislation— and the reluctance of foreigner to invest, but with the right long term policies the government could encourage the private sector to take the lead in the port and shipping business.

In the meantime, the new maritime legal framework paves the road to the juridical security needed to risk capitals in the country, an aspect in which future maritime courts will play a role of paramount importance. Let's hope maritime Judges are clever enough to understand this...

### SHIPPING

#### Transshipment in the light of the current shipping legislation

Until very recently transshipment operations made by foreign vessels between domestic ports, could be carried out by means of an authorisation granted by the SENIAT. This was possible due to the fact that customs legislation stated that all transshipment operations at Venezuelan ports, in connection with commodities in international transit, had to be done in ships of national flag, unless an authorisation from the Ministry of Finance, through the national body in charge of collecting internal revenues (SENIAT) was obtained. Even after the 1978 Organic Customs Law was repealed by that of 1998, the practice was for foreign shipping lines to request through their agents the said authorisations in the capital of the republic (Caracas). Needless to say that this procedure became a time consuming exercise and such authorisation was obtained in a period of time that in many cases exceeded the necessary time for the arrival of the ship, reason for which many cases went well beyond the date of ship arrival; therefore, in a significant number of times cargo in transit had to remain in port awaiting the following ship, while due authorisation was obtained.

This practice has ceased following enactment of the Law for the Reactivation of the National Merchant Marine in June 2000, since art. 2 has restricted cabotage and transshipment operations of nationalised and non-nationalised (transit) cargo between domestic ports only to national flag vessels.

This law firm on behalf of the National Shipping Association and a number of foreign carriers made a petition to the National Council of the Merchant Marine, in order to obtain temporal waivers to carry out transshipment operations; however, it was only possible to

get authorisation just to move remaining containers through October 2000. The National Council for the Merchant Marine argued that there was national tonnage able to perform domestic container transportation. Nevertheless, on 22<sup>nd</sup> November 2000 the maritime administration (Dirección General de Transporte Acuático) issued an Opinion stating that foreign vessels are allowed to perform domestic empty container transportation, for logistic purposes, if boxes are owned or leased by the shipping line.

Therefore, shipping lines and their agents are advised that transshipment between domestic ports is restricted to national flag vessels, and that foreign vessels could be subject to fines in case they carry out this type of operations.

### **High Maritime Court to be created by the Law for Maritime Commerce**

An important issue to be found in the draft of the Law for Maritime Commerce is that related to maritime courts. The draft prescribes the creation of a High Maritime Court based in Caracas, whereas a particular commercial court at each main port would be granted jurisdiction to hear maritime affairs. Proviso 24 of draft under review establishes that all claims and disputes in excess of 10,000 SDR would be heard by the High Maritime Court, while matters below this figure would be heard by a First Instance Commercial Court with maritime jurisdiction in each port. Same limit has been included for the exercise of the right to limit liability in proviso 105, since in the event that the limitation fund is in excess of the amount of 10,000 SDR, the limitation fund will have to be set up before the High Maritime Court.

Despite the fact that an improvement might be expected in the administration of justice, following creation of this High Maritime Court, the opinion of this law firm is that the limit initially assigned to this court is inconvenient to a proper development of the maritime law in Venezuela. Also, the intended limit could be a barrier for the exercise of the arrest of vessels and the constitution of the limitation fund. The existence of just one specialised maritime court that will concentrate a considerable number of cases in Caracas, is against the decentralisation process that the country has experienced in the last decade, along with the fact that this will not contribute to the development of the maritime law practice in the province.

Venezuela has several other very important shipping centres such as Orinoco River, Lake Maracaibo, Jose Complex and Puerto Cabello that would justify the creation of at least three specialised maritime courts, namely: Maracaibo, with jurisdiction over port of la Ceiba and Guaranao; Puerto La Cruz, with jurisdiction over Cumaná and Pto. Ordaz and Caracas, with jurisdiction over Puerto Cabello and La Guaira. The formers would act as courts of appeal, whereas first instance commercial courts at each one of the major ports would hear cases independently from claim's quantum. This proposal was the one submitted by Sabatino Pizzolante to the

consideration of the National Council of the Merchant Marine when dealing with the provisions concerning the creation of domestic maritime courts.

## **CUSTOMS**

### **Storage and Freight charges at risk in the event of Public Auction by Customs**

Cargo arrived to Venezuelan ports may be subject to abandonment in customs terms, either because the consignees manifest their willingness not to nationalise it or because the 35 days period after arrival has expired and the nationalisation process has not taken place. In the first case the cargo is said to have been voluntarily abandoned, while in the second case it is referred to as legal abandonment. The former does not mean that consignees lose their right to nationalise the cargo, since by virtue of proviso 430 of the Organic Law of the Public Exchequer, they can interrupt the abandonment status, proceeding with the nationalisation. However, if this is not so, customs authority (SENIAT) can assign the cargo to the National Treasure for social reasons (Food, Construction Material, etc.) or arrange for the public auction of the cargo to particulars, in order to satisfy credits due to the National Treasure.

The outstanding question here is what happens to storage and freight charges in cases when cargo is sold in public auction, particularly in the light of a recent Opinion issued by the SENIAT on 2<sup>nd</sup> November 2000 according to which cargo sold in public auction by the customs authority, does not make the buyer responsible for the payment of these charges.

The reasoning behind the SENIAT's opinion is that warehousing facilities and terminal operators within port area are subject to customs power (Potestad Aduanera) and so they should contribute with the National Treasure by exonerating any charges due. Also, it is a fact that in proviso 33 of the Regulations to the Organic Customs Law it is prescribed that "storage dues" will not be incurred in cases when cargo is in declared abandonment status, unless the cargo is going to be nationalised by consignees. No doubt that the argument set forth by the customs authority is contrary to the interests of port operators and carriers that in some cases would lose what they are entitled to receive for storage and freight services.

Nevertheless, it should be borne in mind that article 35 of the Regulations to the Organic Customs Law states that "the use of the warehouses, storage areas and other dependencies assigned or pertaining to public or private organisms different from the customs, and the payment of this service, will be governed by the special law as well as respective tariffs". The legal proviso referred to is the basis for this law firm to argue that the cargo in abandonment status does not produce storage dues when the cargo is deposited in warehouses which are the property of customs authorities; but when private warehouses are used, a storage tariff is due by the buyer of the auctioned cargo to

that private warehouse, irrespective of cargo abandonment status. A review of the Opinion issued by the SENIAT regarding this matter, is being currently petitioned by this law firm.

## PORT OPERATORS

### Investigation of Seals currently underway

Police bodies at Puerto Cabello are currently investigating some port operators, in connection to cargo shortages detected and found that there is at least one local shop equipped with machinery to make seals. After interrogation of the person in charge, it was clear that seals were being made without any sort of control about serials; actually, they were copying seals at request!!! Usually there is complicity from terminals personnel (security and operation people), who take away cargo breaking seals overnight and replacing them with new seals made locally with same serial number. At time of customs clearance, consignees then found the container in apparent good order. This was happening at least in three container terminals at Puerto Cabello. The seals type was the ordinary bottleneck model, without shipping line identity plastic coverage, like the one used by P&O Nedlloyd. It would be desirable then the use of non-traditional seals (bottleneck type) that make it difficult to copy them. It has also been found that shipping lines, as well as port operators sometimes do not keep seals under lock, nor do they keep a proper seals inventory, making them easily available to anybody for unlawful purposes. Therefore, it is advisable that port operators keep seals under locked and implement good seals inventory procedures, assigning a responsible employee to handle the seals within the organisation and to monitor security and operational personnel at the terminals.

### New Liability Regime in the draft of the National Ports Law

Stevedores and warehousemen's liabilities is a complex subject in Venezuela because of the lack of a proper legal framework. Despite the fact that port legislation is relatively new, there are no specific rules governing the liabilities of these port operators; as a matter of fact, regional port authorities (known as port administrators) have shifted eventual liabilities for loss or damage of cargo to the private sector. In practice, this means that there is little chance to bring legal action in pursue of a possible indemnification, not even in those cases where the very nature of the responsibilities, such as maintenance of navigation channels and adequate dredging, condition of berths, security, etc. undoubtedly point to the port authorities as liable party. Therefore, it is the private sector in the shape of port operators, those that are subject to a broad range of claims in the exercise of their activity, with the disadvantage that in the absence of legal precedence and clear criteria concerning the validity of the Himalaya clause, they are often placed in the most difficult situation.

Despite the above, the draft of the National Ports Law could bring this situation to an end, since Title IV is related to the Liabilities of Port Operators and Port Administrators. The whole Title is based on the 1991 United Nations Convention on Liability of Operators of Transport Terminals in International Trade; however, some of the provisions have been reviewed to adjust them to our particular domestic port practices.

The draft defines the "Port Operator" as any legal entity different from the carrier who in the exercise of an authorisation or contract granted by the port administrator, undertakes to take in charge goods that were carried or shall be carried by water, in order to perform or to procure the performance in respect of those goods services such as storage, loading, unloading, stowage, trimming, dunnaging, lashing, transfer and warehousing. Besides, "Port Administrator" is defined as the legal entity that has the representation and control of any port.

Regarding the period of responsibility the draft prescribes that the port operator is responsible for the goods from the time he has taken them in charge until the time he has handed them over to or has placed them at the disposal of the person entitled to take delivery of them, according to the applicable customs regulations. It should be borne in mind, however, that Title IV goes far beyond the scope of the 1991 Convention, since it applies not only to loss or damage to goods in international trade but also to cabotage, as well as damage to vessels.

Insofar as limitation of liability is concerned, the draft prescribes a twofold regime: when the port operator is appointed by the carrier, he shall be entitled to invoke the exonerations and limitations that may be invoked by the carrier pursuant to the Law for Maritime Commerce, i.e. 666.67 SDR per package or other shipping unit or 2.5 SDR per kilogramme of gross weight of the goods lost or damaged, whichever is the higher; on the other hand, when the port operator is appointed by the cargo interest, then the former shall be entitled to limit liability to an amount not in excess of 2 SDR per gross kilogramme of the goods lost or damaged. The draft also states that by the time of reception of goods, the port operator will issue in writing the necessary documents or at least an "Act of Reception", identifying the goods, acknowledging his receipt of the goods and the date thereof, and stating condition and quantity of goods.

The liability of the operator for delay in handing over the goods is also dealt with, in which case the port operator may limit liability to an amount equivalent to two and a half times the charges payable to the operator for his services in respect of the goods delayed, but not exceeding the total of such charges in respect of the consignment of which the goods were a part. According to the draft, delay in handing over the goods occurs when the port operator does not deliver the goods to the person entitled to receive them within 25 continuous days after receiving a request of delivery from said person. Like in the Convention, the defences and limits of liability provided for in the draft apply in any action against the operator in respect of loss of or damage to the goods, as well as delay in handing

over the goods, whether the action is founded in contract, in tort or otherwise.

The draft states that all actions under Title IV are time-barred after one year to be counted from the day the operator hands over the goods or part thereof to a person entitled to take delivery of them, or places them at the disposal of such person; or, in cases of total loss of the goods, on the day the person entitled to make a claim receives notice from the operator that the goods are lost, or on the day that person may treat the goods as lost.

## PORTS

### Security raises concern in Port of Guanta and Puerto Cabello

Port of Guanta, located in the eastern part of Venezuela, has become a dangerous port for vessels either berthed in the port facilities or even anchored in the peaceful Pozuelos Bay, awaiting for free berth at that port. Following the m.v. "Tropic Quest" incident last August, when anchored vessel was boarded by 4 robbers who managed to break in some containers, and injure a crew member with a hand-made gun (locally called chopo), the Anzoátegui Shipping Association and the Venezuelan Shipping Association have complained before the relevant authorities. In the last months, there has been a significant number of reported cases of vessels attacked by small boats manned by armed men with long knives and even guns who threatened vessel's crews, usually taking away cargo with them. The authorities argue that the existence of fishing villages close to the port of Guanta may contribute to the problem, but others claim that the causes for these attacks is the lack of proper surveillance by the coast guard and national guard, as well as the inefficient security systems implemented at this port. Port of Puerto Cabello is also confronting security problems, although these incidents occur mainly when vessels are berthed. As a matter of fact, in the last months there have been reported cases of vessels and crew members robbed within the port area.

In view of the above, during calls at these two ports, carriers are strongly advised to use reliable security companies that may be supplied by their ship agents to watch access to the vessel, and while anchored, to post crew members to watch overnight.

### Stowaways Figures at the port of Puerto Cabello released by the Port Authority

Security department of Puerto Cabello Port Authority (IPAPC) has recently released figures related to stowaways at this port for year 1999 and mid-2000. Thus, the department in charge of security in this port disclosed that for 1999, a number of 42 stowaways were detained, 31 of these persons were found on board and 11 ashore within the port area. Of this number, 35 were Colombians while the rest were found to be Dominicans, Africans and

Brazilians. Regarding the mid-2000 figures, the Security department revealed that there is a trend towards the increase of this number since just during the first six months of this year, the number of stowaways reached 31 persons compared to the 13 found in the same period for year 1999. The chief of the Security department announced that they have been able to dismantle an organisation that used the port of Puerto Cabello as boarding point for Colombians; the *modus operandi* was to introduce the stowaways with forged port passes making them appear as dockworkers. Besides, the Port Authority's Security department is working in co-ordination with the local immigration office and other security bodies, to identify similar organisations and to strengthen the measures aiming to prevent an easy access to the port area. In view of the above, at this port as well as any other Venezuelan port, carriers are strongly advised to implement the standard preventive measures to tackle the stowaways problems as recommended by the P&I Clubs, particularly, to carry out a systematic search of the whole ship before leaving port, and to request from ship agents the use of reliable security companies or personnel to watch the gangways and sides of the ship to prevent stowaways from coming onboard.

## MISCELLANEOUS

### Sabatino Pizzolante launches Editorial Fund

Our law firm has launched an editorial fund called "Nautilus", as a way to promote the publication of maritime related works. The editorial fund will sponsor not only works of legal nature but it will also be directed to works such as poetry and essays. This initiative is the result of the commitment of Sabatino Pizzolante to fostering the work of those involved in this field. The first book is entitled "*Como si el Mar fuera Palabra*" a poetry book written by Asdrúbal González with illustrations of Fritz Küper.

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