

SABATINO PIZZOLANTE NEWSLETTER

April 2001

V - N° 13

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: +58-242-3641801/3641798/3641026-Fax: +58-242-3640998 - Mobiles: +58-12-4210036/3420555

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

The Port-Customs Relationship: A Key for Success....

The topic of Port-Customs relationship was recently discussed at the II Working Group on Port Affairs of the Andean Community, held at Bogotá, Colombia. The opportunity was a good one to know the experience of countries such as Spain and Colombia which customs are said to be today models of efficiency, as well as the reality of other countries where customs face old rules, bureaucracy and corruption. The main conclusion to be drawn from the discussion is that international trade would benefit very much if ports and customs worked together, harmonising procedures, something that in practice becomes difficult indeed. Another point that was clear after the analysis is that modernisation of the port sector without introducing changes in the customs field makes such modernisation worthless and viceversa.

This conclusion that would appear to be quite obvious is hampered by the idea resting in the mind of many governmental officials, that customs should prevail over ports due to the fact that the interest of the national treasure is involved. This consideration is equally applied to the shipping and port business. Nevertheless, the experience shows that international trade is equally influenced by customs as well as port and shipping practices.

It would be desirable that now that the government is talking about the drafting of an Organic Customs Code, the opinion of the port and shipping sector could be taken into account to harmonise the legislation for the benefit of users and the international trade as a whole...

SHIPPING

Draft of the Law on Merchant Marine introduces new concepts in domestic legislation

In the context of the revision of maritime legislation, following enactment of the Law for Reactivation of the National Merchant Marine, the maritime administration is currently drafting the General Law for the Merchant Marine, a piece of legislation that is expected to foster the shipping business.

Among the main features of the draft are: The introduction of the concept of Aquatic Authority, as the body that will be in charge of exercising the regulation and policing of the sector; the widening of the Merchant Marine concept referred now not only to the transportation of goods or persons by water, but also including sporting, recreational, tourist and fishing activities; the adoption of a new concept of vessel term that will be applied to all floating constructions able to sail by water, no matter if they have or do not have their own means of propulsion; the introduction of mechanisms to co-ordinate with the Fuerza Armada Nacional a permanent safety system, establishing rules and proceedings to control these activities, contemplating the training of the personnel involved, including salvage activities; the prescription of rules establishing the ship owner's obligations regarding the demarcation and patrolling of the zones and the removing of the shipwrecks, as well as the reimbursement of the expenses incurred in if this is not carried out by the owner himself; and specific provisions regulating the activities of the National Institute of Channel Dredging, Hydrography Service, Oceanography, Meteorology and Nautical Cartography as it is currently spread in others laws.

No doubt, however, the outstanding issue included in the draft is that dealing with vessel registration. Current

maritime legislation prescribes a double determination system of vessels' property, i.e. a double registry system that credits the property with the inscription in the Subaltern Registry and another inscription in the Registry of the Merchant Marine at the Port Captaincy. On the contrary, the draft set up the Venezuelan Navy Registry (RENAVE), the one that will concentrate all the matters related to the constitution, transmission, modification, and extinction of rights on vessels, therefore ending with this double system of registration.

Provisions of the International Convention on Arrest of Ships enacted in the Andean Community through Decision 487

In December 2000 the Andean Community adopted Decision 487 on Maritime Guarantees and Arrest of Ships, a significant advance in the update of the maritime legislation within the region. The Decision 487 is based on the 1993 International Convention on Maritime Liens and Mortgages as well as the 1999 International Convention of Arrest of Ships.

Regarding the provisions related to the arrest of ships it is important to point out that Decision 487 adopted the extensive list of maritime claims as prescribed by the 1999 Convention. Thus, for the purposes of the Decision a "Maritime Claim" means a claim arising out of one or more of the following causes:

- a) Loss or damage caused by the operation of the ship;
- b) Loss of life or personal injury occurring, whether on land or on water, in direct connection with the operation of the ship;
- c) Salvage operations or any salvage agreement, including, if applicable, special compensation relating to salvage operations in respect of a ship which by itself or its cargo threatened damage to the environment;
- d) Damage or threat of damage caused by the ship to the environment, coastline or related interests; measures taken to prevent, minimize, or remove such damage; compensation for such damage; costs of reasonable measures of reinstatement of the environment actually undertaken or to be undertaken; loss incurred or likely to be incurred by third parties in connection with such damage; and damage, costs, or loss of a similar nature to those identified in this subparagraph (d);
- e) Costs or expenses relating to the raising, removal, recovery, destruction or the rendering harmless of a ship which is sunk, wrecked, stranded or abandoned, including anything that is or has been on board such ship, and costs or expenses relating to the preservation of an abandoned ship and maintenance of its crew;
- f) Any agreement relating to the use or hire of the ship, whether contained in a charter party or otherwise;
- g) Any agreement relating to the carriage of goods or passengers on board the ship, whether contained in a charter party or otherwise;
- h) Loss of or damage to or in connection with goods (including luggage) carried on board the ship;
- i) General average;
- j) Towage;
- k) Pilotage;
- l) Goods, materials, provisions, bunkers, equipment (including containers) supplied or services rendered to the ship for its operation, management, preservation or maintenance;
- m) Construction, reconstruction, repair, converting or equipping of the ship;
- n) Port, canal, dock, harbour and other waterway dues and charges;
- o) Wages and other sums due to the master, officers and other members of the ship's complement in respect of their employment on the ship, including costs of repatriation and social insurance contributions payable on their behalf;
- p) Disbursements incurred on behalf of the ship or its owners;
- q) Insurance premiums (including mutual insurance calls) in respect of the ship, payable by or on behalf of the shipowner or demise charterer;
- r) Any commissions, brokerages or agency fees payable in respect of the ship by or on behalf of the shipowner or demise charterer;
- s) Any dispute as to ownership or possession of the ship;
- t) Any dispute between co-owners of the ship as to the employment or earnings of the ship;
- u) A mortgage or a "hypothèque" or a charge of the same nature on the ship; and,
- v) Any dispute arising out of a contract for the sale of the ship.

Similarly to that specified in the 1999 Convention, "Arrest" means any detention or restriction on removal of a ship by order of a Court to secure a maritime claim, but does not include the seizure of a ship in execution or satisfaction of a judgement or other enforceable instrument.

Article 37 states that a ship may be arrested or released from arrest only under the authority of a Court of the State Party in which the arrest is effected. Besides, article 38 of the Decision states that a ship may be arrested for the

purpose of obtaining security notwithstanding that, by virtue of a jurisdiction clause or arbitration clause in any relevant contract, or otherwise, the maritime claim in respect of which the arrest is effected is to be adjudicated in a State other than the State where the arrest is effected, or is to be arbitrated, or is to be adjudicated subject to the law of another State.

Article 40 states that the procedure relating to the arrest of a ship or its release shall be governed by the law of the State in which the arrest was effected or applied for.

Article 41 states that the arrest is permissible of any ship in respect of which a maritime claim is asserted if:

- a) The person who owned the ship at the time when the maritime claim arose is liable for the claim and is owner of the ship when the arrest is effected; or
- b) The demise charterer of the ship at the time when the maritime claim arose is liable for the claim and is demise charterer or owner of the ship when the arrest is effected; or
- c) The claim is based upon a mortgage or a "hypothèque" or a charge of the same nature on the ship; or
- d) The claim relates to the ownership or possession of the ship; or
- e) The claim is against the owner, demise charterer, manager or operator of the ship and is secured by a maritime lien which is granted or arises under proviso 22 of the Decision.

Article 42 states that the arrest is also permissible of any other ship or ships which, when the arrest is effected, is or are owned by the person who is liable for the maritime claim and who was, when the claim arose:

- a) owner of the ship in respect of which the maritime claim arose; or
- b) Demise charterer, time charterer or voyage charterer of that ship.

However, this provision does not apply to claims in respect of ownership or possession of a ship.

Article 44 states that a ship which has been arrested shall be released when sufficient security has been provided in a satisfactory form, save in cases in which a ship has been arrested in respect of any of the maritime claims enumerated in proviso 1, items 1 s) and t). In such cases, the Court may permit the person in possession of the ship to continue trading the ship, upon such person providing sufficient security, or may otherwise deal with the operation of the ship during the period of the arrest.

Article 45 of the Decision states that in the absence of agreement between the parties as to the sufficiency and form of the security, the Court shall determine its nature

and the amount thereof, not exceeding the value of the arrested ship. Article 50 deals with the protection of owners and demise charterers of arrested ships. Thus, the Court may as a condition of the arrest of a ship, or of permitting an arrest already effected to be maintained, impose upon the claimant who seeks to arrest or who has procured the arrest of the ship the obligation to provide security of a kind and for an amount, and upon such terms, as may be determined by that Court for any loss which may be incurred by the defendant as a result of the arrest, and for which the claimant may be found liable, including but not restricted to such loss or damage as may be incurred by that defendant in consequence of:

- a) The arrest having been wrongful or unjustified; or
- b) Excessive security having been demanded and provided.

Besides, article 51 states that the Courts of the State in which an arrest has been effected shall have jurisdiction to determine the extent of the liability, if any, of the claimant for loss or damage caused by the arrest of a ship, including but not restricted to such loss or damage as may be caused in consequence of:

- a) The arrest having been wrongful or unjustified, or
- b) Excessive security having been demanded and provided.

The liability, if any, of the claimant shall be determined by application of the law of the State where the arrest was effected. If a Court in another State or an arbitral tribunal is to determine the merits of the case in accordance with the provisions of article 54 and 55, then proceedings relating to the liability of the claimant in accordance with paragraph 2 of this article may be stayed pending that decision. In any case, the person providing such security may at any time apply to the Court to have that security reduced, modified or cancelled. Article 52 deals with issue of jurisdiction on the merits of the case, by stating that the Courts of the State in which an arrest has been effected or security provided to obtain the release of the ship shall have jurisdiction to determine the case upon its merits, unless the parties validly agree or have validly agreed to submit the dispute to a Court of another State which accepts jurisdiction, or to arbitration. Despite the former, the Courts of the State in which an arrest has been effected, or security provided to obtain the release of the ship, may refuse to exercise that jurisdiction where that refusal is permitted by the law of that State and a Court of another State accepts jurisdiction.

Decision 487, unfortunately, has a significant drawback and that is within the definitions included in Article 1, for "ship" or "vessel" referred to as of any floating construction with its own means of propulsion of more than 500 GTR and able to sail by water. No doubt this restrictive concept leaves aside an important number of constructions, particularly, barges, that should be included for the purposes of the application of the said Decision.

COMMERCIAL LAW

Law on Data Messages and Electronic Signature enacted

The Law on Data Messages and Electronic Signatures (Ley sobre Mensajes de Datos y Firma Electrónica) was enacted on 22nd February 2001. This legislation is based on the proposed Model Law for Electronic Signatures prepared by the United Nations Committee on International Law (UNCITRAL). The purpose of the law is to recognise the legality, validity and enforceability of data messages, electronic signatures and other information in electronic format, prescribing also the rules for certification of signatures and the qualification of signature certification agencies, as well as the creation of the Superintendency of Electronic Certification Services. Therefore, electronic messages will have the same legal effects than a written document, and printed messages received through electronic means, the same effects as a photocopy. Regarding the contract formation provisions contained within the law, the parties to a contract can agree on offers and acceptances made through data messages. The parties can also agree on the procedure for sending and receiving data messages, the need of a receipt of acknowledgement at the time on which a data message is deemed sent or received, in order to determine the place and time of origin of a contract. In the absent of previous agreement of the parties, the provisions of the law will then apply. An electronic signature, under this law, is any information created by the user that is associated with the data message and allows others to attribute the authorship of the message to a particular person. A certified signature is a signature certified by a properly authorised certifying company. A provider of certification services, or certifying company, must be qualified by the Superintendent of Electronic Certification Services. Foreign companies can be qualified as certification companies. To accredit a company as a certifying company, an application must be made before the Superintendent of Electronic Certification Services. The Superintendent's main function will be to keep a registry of companies that are properly qualified to act as signature certification agencies.

CUSTOMS

Decree on Customs Emergency is awaiting for green light

The customs authority has drafted a Decree on Customs Emergency intended to provide the administration with the necessary flexibility to organise the service, to fire personnel with disciplinary files opened and to carry out the modernisation of the customs throughout the country. It seems to be that there is some opposition by the Ministry of Finance regarding the enactment of this decree, but it has received acceptance by the President of the Republic. According to the decree in question, the National Superintendency of Customs will have a new structure and centralize a number of functions at present attributed by law to the President of the Republic, the Ministry of

Finance and to the SENIAT through its Gerencia Jurídico-Tributaria. Among the powers granted by the decree to the National Superintendent of Customs are:

- a) To elaborate technical studies on customs and to formulate recommendations to define a customs policy and its impact on international trade.
- b) To exercise judicial and extra-judicial actions to collect the credits in favour of the National Treasure, demanding from the domestic courts the implementation of necessary measures to guarantee such credits.
- c) To authorise, suspend and revoke licenses to customs agents, bonded warehouses, consolidators, etc. at present, this is a function vested with the Ministry of Finance.
- d) To deal and decide the different *recursos jerarquicos* filed with the customs administration, currently dealt with by the Gerencia Jurídico-Tributaria of SENIAT.
- e) To participate in the elaboration of the Community's integration policies and international trade and in the application of the instruments derived from it.
- f) To plan, execute, co-ordinate, monitor and assess the activities of the customs police.
- g) To assign to the National Treasure and to dispose of those goods subject to seizure, retention, legal and voluntary abandonment, etc.
- h) To participate in the bidding procedures required by the customs service.
- i) To enforce the Regulations to the Organic Customs Law.

The SABATINO PIZZOLANTE
NEWSLETTER is published for free distribution three times a year by Sabatino Pizzolante Maritime & Commercial Attorneys and its sister company Associated Maritime Consultants. The Newsletter is not designed to provide legal advice on the matters referred to, for which reason should you need any assistance or detailed information regarding specific issues dealt with, the firm would be pleased to help you. If you would like to receive additional copies of it, please write, fax or send an e-mail to Mr. José Alfredo Sabatino Pizzolante, Sabatino Pizzolante Maritime & Commercial Attorneys, Puerto Cabello, 2024, Estado Carabobo, VENEZUELA, P.O.Box 154. This Newsletter can also be read on the Internet at http://www.sabatinop.com