

# SABATINO PIZZOLANTE NEWSLETTER

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

## **SABATINO PIZZOLANTE - ASSOCIATED MARITIME CONSULTANTS**

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### **The Review of the New Maritime Legal Framework.....**

Following the enactment of the new maritime legal framework, prepared by the President of the Republic last year through the enabling law, i.e. the so-called "Ley Habilitante", now the task ahead is the review of some of these legal instruments to amend a number of provisions that may need review in light of the Constitution. In respect of the 49 laws enacted under the enabling law, there have been different reactions from the private sector. Fedecámaras, for instance, the institution that unifies most of the private capital of the national economy, including the regional chambers of commerce throughout Venezuela, brought an action before the Supreme Court of Justice to ask for the nullity of these laws, arguing that they were contrary to principles contained in the Constitution. Although it has to be admitted that some provisions within these laws need to be reviewed, perhaps the best course of action would be to ask for its review before the National Assembly. For the moment, the Organic Law for Aquatic Spaces, the General Law on Ports and the Coastal Law are scheduled to come under analysis at the National Assembly during the next months. It is important that during this process of revision, the good sense prevails and serious proposals are made, this to avoid any loss of time and to ensure that the new set of maritime laws work all together for the benefit of the maritime community and the country...

### **SHIPPING**

#### **New procedure for ship registration**

From the administrative point of view the shipping registration process has improved with the enactment of the General Law on Merchant Marine and Related Activities, since the dual registration procedure (which required inscription of documentation before the maritime authority as well as the public registry office) was repealed by the now enacted legislation. Thus, the Venezuelan Shipping Registry, the so-called RENAVE office, is located within the National Institute of Aquatic Spaces (Ministry of Infrastructure), with branches at the different port captaincies throughout the country. Ships built or under construction of tonnage equal to or over 500 gross tonnage must be registered before the RENAVE office located in Caracas (art. 100); vessels under 500 gross tonnage must be registered in the particular branch of RENAVE located in the respective port captaincy where the ship is to be registered (art. 101).

Article 132 of the General Law on Merchant Marine states that the President of the National Institute of Aquatic Spaces (INEA) shall issue the Temporary Patent of Navigation for ships whose gross tonnage are equal to or over 500 gross tonnage. In the case of ships between 150 gross tonnage and 500 gross tonnage, the said Patent shall be issued by the Port Captain where the registry takes place. The owner or charterer will have a 60 continuous days period to submit the complete documentation required by law. Once the said documentation is submitted and found in order by RENAVE, and a 90 days period has elapsed from the date of registry, the President of INEA or the Port Captain, as the case might be, shall issue the definitive Patent of Navigation valid for 5 years. As per art. 133 of the same legislation, the Patent of Navigation is the document that proves the Venezuelan nationality of the ship, authorising it to sail under Venezuelan flag. This document states the name of the ship and the registry number, the

name of the natural person or legal entity in whose favour the ship is registered, the tonnages and the main characteristic of the ship. Article 135 of the General Law on Merchant Marine, states that ships less than 150 gross tonnage registered in RENAVE shall need a Navigation Licence issued by the Port Captain, valid for 2 years.

Regarding the documents/information required for *temporary* patent or registration, according to art. 104 of the General Law on Merchant Marine, when the inscription of a ship in is requested before RENAVE, documentation or titles to prove rights on the ship, tonnage certificate if required, technical specifications and the plans of ship must be submitted. Also, it has to be proved that legal requirements and regulations related to construction and safety have been complied with. When the inscription is related to a foreign ship, a document issued by the maritime administration of the country of registry is required, stating that the ship has been deleted of the said registry or temporarily suspended, or that this will take place on the date the new registry becomes effective.

To summarise, the basic documentation to submit to RENAVE is a) the *Application* made before the maritime administration for inscription of the vessel at the Venezuelan Naval Registry, b) copy of the articles of incorporation of the company acting as owner/charterer, c) presentation of the deletion, suspension of the previous registration or equivalent document, d) vessel's document of ownership or bareboat/leasing agreement as the case may be, duly translated into Spanish and e) plans and technical characteristics of the ships, including former gross tonnage certificate.

### **New Fishing Law restricts activities within six nautical miles from the coastline**

Published in the Official Gazette No. 37,323 of 13<sup>th</sup> November 2001, this law is intended to foster the fishing and aquaculture sectors by introducing principles towards the rational use of fishery resources within the framework of sustainable development, the reinforcement of small-scale fishing, being this an activity on which a large part of the coastal population depends and so important for internal consumption and the establishment of regulations concerning drag-net fishing and the ecocidal practices of industrial fisheries.

According to art. 16 the vessels used in the fishing activities have to be registered in the Venezuelan naval Registry (RENAVE), without prejudice to prescriptions of the fishing conventions signed by the Republic. Nevertheless, the National Executive will determine if exceeding resources exist, in which case and by way of exception, foreign fishing vessels will be allowed to participate from those exceeding resources located in the exclusive economic zone. (art. 17)

The law states (art. 21) that for the strategic food interest of the country, specific species are reserved for the artisanal or traditional fishing (*pesca artesanal*), among them, sardine, oysters, the species of the aquatic fauna in

areas under special regimen, the shrimp and crawfish distributed in harbours, lakes and coastal humid soils and rivers, as well as the fishery resources next to the coastline within an area up to six nautical miles.

The Fishing Law also requires that every natural or legal person seeking to dedicate to fishing, aquaculture or other related activity, must obtain the corresponding authorisation issued by the National Institute of Fishing and Aquaculture, new body in charge of the co-ordination of this sector, stating also that these authorisations are not transferable. (art. 45) According to art. 46 these authorisations comprise the following:

#### 1.- License for Fishing:

a.- Artisanal fishing: issued to the fishing vessels dedicated to the small-scale or traditional fishing. The license will have a duration of five (5) years with renewable character.

b.- Industrial: issued to the fishing vessels dedicated to the industrial fishing, such as: tuna fishing, trawler, longline fishing and other modalities to be developed in the future. The tuna and longline fishing licenses will have a duration of ten (10) years and the trawler fishing shall be for three (3) years. The issuance of new licenses as well as its renewal will depend on the evaluation of the exploitation of the fishery resources.

2.- Concessions: Issued to natural or legal persons to carry out traditional fishing or aquaculture in public lands or in national and jurisdictional water. The concession of traditional fishing will have a duration of five (5) years and the aquaculture concession of fifteen (15) years, both with renewable character.

#### 3.- Permits: Issued to natural or juridical persons

a.- Commercial Fishing: To carry out the capture of organisms allowed by regulations, in the authorised zones and season, all this in harmony with the criteria for the managing and conservation of the hydro-biological resources. In the said permit, the port of registry where the product is disembarked will be determined, in order to guarantee the recollection of statistical data. This permit will have a duration of one (1) year with renewable character.

b.- Sport Fishing: Intended for the capture of specific species in authorised areas, provided this activity does not interfere with other fishery.

c.- Processing and commercialisation: For the acquisition, transportation, processing, importation and exportation of fishing and aquaculture products. This permit will have a specific duration per each operation to be performed.

d.- Aquaculture: To the development and operation of aquaculture project in public or private property zones. This permit will have a variable duration, depending of the type of activity and it will also have renewable character.

e.- Specials: To carry out fishing or aquaculture activities, different from the ones stated above, such as didactic, scientific, etc. This permit will have a duration of one (1) renewable year.

4.- Approvals: For projects to be executed in the context of the application of the Fishing Law, and which refer to the construction or modification of fishing vessels over 50 gross tonnage, in national or international drydocks, the purchase of fishing vessels overseas, or the development of fishing or aquaculture projects of national, foreign and mixed capital.

5.- Certifications: For the execution of any activity derived from the fishing or aquaculture that may need to be authorised by the National Institute of Fishing and Aquaculture. This permit will have a duration of one (1) year.

Title VIII, Chapter II of the law deals with the technical aspects of navigation to be met by fishing vessels. Thus, art. 69 states that the National Institute for Fishing and Aquaculture must require from fishing vessels over thirty (30) gross tonnage, the installation of devices, equipment or positioning systems in order to guarantee responsible fishing and to improve the living conditions of crews. On the other hand, according to art. 70 the granting of the different authorisations issued by the National Institute of Fishing and Aquaculture, in those cases of fishing vessels over sixty (60) gross tonnage, is subject to the presentation of a insurance police for damages to third parties. Art. 72 states that the construction of a vessel over thirty (30) gross tonnage for the use of fishery resources in the country, as well as the incorporation of vessels over thirty (30) gross tonnage to the national fishing fleet, must be approved by the National Institute of Fishing and Aquaculture, before requesting the respective permit or registry before the Aquatic Authority. Express prohibitions are included in art. 73, in respect of possession on board of fishing vessels of substances such as dynamite, gunpowder or any other explosive, acids or any other chemical or natural element that may cause damages to the hydro biological resources. The employment of such substances in the performance of fishing activities is also banned. The new law requires (art. 77) that the master of a fishing vessel over thirty (30) gross tonnage must carry a logbook duly updated with indication of location and time of catches, characteristics of fishing gears, etc., the entries of the said logbook having the character of oath declaration, whereas art. 78 states that the master can only carry out landings in foreign ports, subject to the authorisation of owner, in which case it must be reported to the relevant national fishery authority in the next following five days from the landing.

From the reading of art. 89 and 102 it is inferred that the fishery or aquaculture product obtained without the corresponding authorisation may give rise to the confiscation of the products as well as the fishing gears, without prejudice to the applicable fines.

Although it can be concluded that the new Fishing Law seems to be inspired in reasonable principles of

conservation, some provisions therein —as the one requiring trawlers, longliners and tuna vessels to work at least six miles from the coast to make room for small fishermen— have been attacked by the industrial fishing sector, arguing that this law does not allow the national fleet to compete with ships of other nations in the same activity.

## COMMERCIAL LAW

### Jurisdiction clauses under the Law on Maritime Commerce

Jurisdiction is one of the issues that suffered significant changes in light of the newly enacted Law of Maritime Commerce (published in the Official Gazette No. 5,551 Extraordinaria, dated 9 November 2001). The law prescribes rules for the carriage of goods by sea documented under charterparties and bills of lading, as well as the transport of passengers (Title V). The following articles deserve particular attention, to discuss the jurisdiction issue:

“Article 2°.- The provisions of this Decree-Law apply to national or foreign vessels and to hydroplanes that are on jurisdictional waters of the Republic; to the national vessels that are in high sea or on jurisdictional waters of another country; to any floating construction able to sail without owned propulsion that operates in the aquatic space, or auxiliary of navigation bound to or not to that; to the artificial islands, installations, structures located in the National aquatic space, except express provision to the contrary established in the law”.

“Article 10°.- It pertains to the Venezuelan jurisdiction to hear without derogation whatsoever about the actions on the contracts of carriage of goods or persons that enter to the Venezuelan territory”.

As it can be seen from the articles referred to, when dealing with the jurisdiction issue, the new legislation states that the provisions therein apply to foreign vessels that are within jurisdictional waters of the Republic, in which case the Venezuelan jurisdiction will necessarily deal with the actions derived from the contracts of carriage of goods, i.e. bill of lading, entering to the national territory. On the other hand, Chapter III (Title V) of the Law of Maritime Commerce when dealing with the carriage of goods by water, states that:

“Article 198°.- The provisions of this Chapter shall apply to the contracts of carriage by water, provided that:

1. The port of loading or discharge stated in the contract, is located in the national aquatic space.

2. One of the facultative ports of discharge stated in the contract, is the effective port of discharge and it is located within the national aquatic space.

3. The bill of lading or any other document that may be proof of the contract, states that it is subject to this Chapter”.

“Article 199°.- The provisions of this Chapter shall apply whatever the nationality of the ship, carrier, effective carrier, shipper, consignee or any other interested person might be”.

From the above mentioned articles, it is clear that any shipment to or from Venezuela under liner traffic will be subject to the provisions of the new legislation in terms of the liability regime, exoneration and limitation of liability, time-bar, etc., irrespective of the nationality of the ship or the persons involved.

Considering that the importation or exportation shipments under liner traffic, are subject to the provisions for the carriage of goods by water (Chapter III of the Title V) as stated by the Law of Maritime Commerce, along with the fact that as prescribed by article 10 of the said law it pertains to the Venezuelan jurisdiction to hear about any action derived from the contract of carriage, there is no doubt that any “foreign jurisdiction clause” or specific clause containing an express waiver to the Venezuelan jurisdiction is of little use to avoid the domestic jurisdiction. As a matter of fact, it might be argued that the inclusion of a clause to that end as well as an express waiver, could be regarded by domestic courts as a way to exonerate or lessen the liability of the carrier, in which case such clause would be null and void, by virtue of article 219 of the Law of Maritime Commerce:

“Article 219°.- It is absolutely null every clause in the contract of carriage by sea or bill of lading that exonerates or lessens the liability of the carrier, owner or charterer of the vessel, or they as a whole, for loss or damages suffered by the goods, or that modifies the burden of proof, in a different way from that prescribed in this Chapter...()...”.

“Article 244°.- When a bill of lading or any other document evidencing the contract of carriage of goods by water is issued, a declaration shall be incorporated stating that the carriage is subject to the provisions of this Decree-Law, and that all provisions to the contrary, that may prejudice the shipper or the consignee, will be null...()...”.

Therefore, it can be concluded that following the experience of countries like Argentina, the aim of the new legislation is to submit the actions derived from carriage of goods under liner traffic to the domestic jurisdiction. Nevertheless, in light of article 11 of the Law of Maritime Commerce, it is possible to agree the avoidance

of this jurisdiction, but only once the event giving rise to the action has occurred:

“Article 11°.- In those cases where is admitted, the jurisdiction that pertains to the Venezuelan courts can be derogated to the favour of foreign courts, or submitted the matter to an arbitration procedure, only once produced the event originator of the action”.

This means that once the legal action is brought against the carrier, the parties can agree about the submission of the matter to foreign courts or arbitration. It is important to point out that the Law of Maritime Commerce entered into force on 9<sup>th</sup> February 2002. Commercial courts will be hearing about the actions related to the carriage of goods, this until that the new aquatic jurisdiction as prescribed by the Organic Law of Aquatic Spaces is implemented. According to article 109 of the said legal instrument, three (3) Superior Maritime Courts are going to be created with jurisdiction over all national aquatic spaces, all vessels registered in the Venezuelan Naval Registry, independently from the jurisdiction of the waters where they may be located, and over foreign vessels located in waters under national jurisdiction; and also, rights and actions derived from operations taking place in port areas and any other activities as indicated in the law. On the other hand, article 110 states that Maritime Courts of First Instance are created with the same jurisdiction as assigned to Superior Courts. As per article 113, First Instance Maritime Courts are competent to hear about controversies arising from civil and mercantile actions related to commerce and maritime traffic, as well as those related to maritime activity at ports and those activities following by virtue of use of intermodal/container transportation because of maritime commercial activity. However, it may take one year until these maritime courts are opened due to bureaucracy and problems with the necessary budget to operate.

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