

# SABATINO PIZZOLANTE NEWSLETTER

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

## SABATINO PIZZOLANTE - ASSOCIATED MARITIME CONSULTANTS

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### **Making the new customs and aquatic legislation work.....**

The political turmoil that led to the exchange control imposed in February 2003, had damaging effects on the country's international trade with a visible reduction in the tonnage handled by the commercial ports as well as the number of vessels attended, compared to the figures of the previous year. After the implementation of the new scheme to obtain dollars at official rate, and the simplification of the CADIVI's procedures, importers and exporters have become accustomed to the exchange control regime, this to the benefit of the international trade that is recovering according to the statistics released by customs and port administrations. This increasing international trade, however, is desperate to have clear rules and what's more important, to observe the existing rules work properly. It is true that in the last three years the country has seen a new set of aquatic laws and customs regulations enacted, but some erratic practices still remain awaiting for the effective application of the law —pilotage and towage are a good example of these— since the performance of these services is still subject to old practices affecting its costs and reliability. Within the customs field the SIDUNEA, the automated customs system, as well as the customs legislation are awaiting for the full implementation of the former and drafting of updated regulations, to take advantage of that new automated system. Time is of the essence, even in the international trade...

### **SHIPPING**

#### **New collision rules incorporated within the Law on Maritime Commerce**

The old rules related to collision inserted in the repealed Book II of the Code of Commerce, are replaced now by a set of comprehensive provisions that can be found in Title VI of the Law on Maritime Commerce, based on the 1910 Convention for the Unification of Certain Rules of Law with respect to Collisions between Vessels.

As per article 320 of this law, collision is defined as the violent material contact between two or more vessels, navigating or capable of navigation in aquatic spaces.

Apportionment of liability is found in article 321 according to which damages are borne for those parties suffering them, when collision is due to fortuitous cause or force majeure, or when there exists doubt in respect of causes for collision. Article 322, on the other hand,, prescribes that if there exists common fault, the liability of each vessel shall be in proportion to the degree of the faults respectively committed. If circumstances do not allow for the proper assessment of the proportion of faults, or when it is equivalent, liability shall be distributed in equal parts. Damages caused, whether to ships, cargoes, luggage, effects or any other crew property, passengers' property or any other person's property on board, shall be borne by the vessels in fault, in the proportion indicated before, with no liability to third parties other than said proportion of such damages.

Article 323 states that vessels in fault are jointly liable to third parties when the damage is caused in the form of death or bodily injuries, without prejudice to the legal action for payment brought by the vessel that has paid a larger sum than that which, pursuant to article 322, must ultimately pay. According to article 324 when a vessel collides with another, because of the exclusive fault of a

third vessel, the later is to be held solely liable. If more than one vessel is declared in fault, liabilities shall be distributed pursuant to that established in articles 322 and 323.

As prescribed by article 325, the liabilities imposed by the new collision rules attach in cases where the collision is caused by the fault of a pilot. Article 326 states that in case of collisions with another vessel, the convoy constituted by the towing vessel and the vessel or vessels which are been towed is considered one sole vessel, in respect of liability towards third parties, when the direction of operations falls in the towing vessel, without prejudice to the right of recourse among them, according to the proportion of fault of each one. The liability towards third parties falls on the vessel that is been towed, when this is in charge of the convoy's maneuvers, also without prejudice to the right of recourse among the vessels.

As prescribed by the Convention, article 328 states that the collision rules extent to reparation of damages caused by a vessel to other vessel or vessels; or to the property or persons that might be on board of these, even if a collision has not actually taken place and these damages are caused by the execution or non-execution of a maneuver, or by the non observance of the law.

Contrary to that stipulated in the old legislation there is no need to file a sea protest in the event of collisions in order to protect the rights and defenses. Thus, in the light of article 329 the right of action for the recovery of damages resulting as consequence of a collision is not conditioned to the entering of a sea protest, nor to any other special formality.

Regarding the time-bar under the new legislation, article 330 states that legal actions for the recovery of damages arising from a collision must be brought within two (2) years after the date of the casualty. In the case of joint liability among the vessels, or among the parties in a convoy, the time-bar for legal actions to exercise the right of recourse by reason of sums paid in excess of those that are payable, shall be one (1) year to be counted from the date of payment.

Articles 331 and 332 deal with the applicable law and jurisdiction issues respectively. Under domestic law, collision is ruled by the law: a) Of the country on which jurisdictional waters it occurred; b) Of the law of nationality of vessels, when this nationality is common to vessels involved, and when the collision occurs on non-jurisdictional waters; c) The terms and regulations of the country under which flag each one of the vessels is sailing, when the collision occurs on non-jurisdictional waters and the vessels are of different nationalities; and, d) By the norms contained in conventions, treaties, arrangements and agreements, when collision occurs among vessels that sail under the flag of countries that are signatories of these conventions or have adhered to them.

Irrespective of the rules above mentioned, domestic courts shall have jurisdiction to hear about cases of collision occurred on Venezuelan jurisdictional waters, and those

occurring on non-jurisdictional waters when: a) One of the vessels involved is registered in Venezuela; b) One of the vessels involved is subject to arrest by reason of such collision, or when a bond to release the vessel has been granted at a Venezuelan port; and c) When after the collision, a Venezuelan port is the first port of call, or when the vessel eventually arrives to a Venezuelan port.

It is important to point out, however, that art. 333 states that only in the cases where one of the vessels involved is subject to arrest by reason of such collision, or a bond to release the vessel has been granted; a Venezuelan port is the first port of call, or when the vessel eventually arrives to a Venezuelan port, after the collision occurs; and the Venezuelan jurisdiction applies because the defendant has been personally summoned within the Territory of the Republic, only in these cases Venezuelan courts may discretionally decline their jurisdiction, at the request of the defendant, and in favor of another country's court in which same legal action is been heard, for the same facts and causes, if and when the plaintiff is granted equal warranties that such a court may respond for the results of the suit filed in that other country. In any case, Venezuelan courts shall take into account the connection that the parties, vessels, insurers and crew may have with the foreign jurisdiction in order to reach a decision.

A noticeable point is that the new collision regulations now include the collision of vessels against fixed objects. Thus, article 334 prescribes that in the cases of collision of one or more vessels with a fixed or fixed objects, on the waters or at the port, the owner or the person responsible for the affected item shall estimate the damage and make it known to whom has caused the damages, being the later under the obligation to submit a bond, sufficient and to the satisfaction of the former, for the purpose of indemnity, so as to try to reach an out of court agreement that might guarantee the repair of damages caused within the period of time that the parties might deem convenient. When a period of thirty (30) continuous days has elapsed and an agreement between the parties has not been reached, the owner or the person responsible for the affected object, may attend to court to make his claim prevail.

Finally, the rules are clear as to what the procedure should be in the case of security requested by port authorities, in the case of damages to the infrastructure. Article 335 entitles the Aquatic Authority when such damages are caused by a vessel or aircraft, to ask from the ship owner, or to the Captain or the ship agent, on his behalf, a bond in order to cover the repair expenses. The bond shall be maintained until expenses are paid or until non-liability is determined, and it shall be demanded under caution for detention of ship or aircraft, and non allowance for the dispatch of any other ship or aircraft belonging to or exploited by that same owner, when this has left national jurisdiction. In the case of convoys, the obligation to provide the bond falls upon the ship owner of the vessel that directly caused the damage.

Action to make effective this bond shall expire if it is no filed within a six (6) months period of time counted from

the date of occurrence of the events that made mandatory the constitution of such bond.

### **Cargo description on the bill of lading**

A question recently put forward to this law firm was related to the cargo description on the bill of lading, particularly, in the light of the customs regulations within the automated customs system (SIDUNEA) implemented by the Venezuelan customs authorities. Specifically, the issues of whether domestic legislation forbids the use of generic description such as "Mercancia Seca General" and the eventual penalties imposed by the domestic legislation for mis-declaration in the description within the B/L were raised in the question, for which reason some comments on the subject seems to be worth.

Article 18 of the Organic Customs Law (Official Gazette Extraordinary No. 5,353 dated 17-06-1999) refers to the Regulations when dealing with formalities and requisites related to the documentation to be registered at time of vessel's arrival. On the other hand, article 67 of the Regulations to the Organic Customs Law (Official Gazette Extraordinary No. 4,273 dated 20-05-1991) states that the cargo manifest shall contain, among other things, number of bills of lading, marks, number of packages, classes, quantity, weight and content of packages according to the B/L. Besides, article 68 of the same Regulations states that the bill of lading must be submitted in copy, containing at least the following information: name of the shipper and consignee, place of loading and destination, mark, numeration, class, weight, content of packages, type of freight agreed and its amount.

Besides, article 6 of the Regulations on the Automated Customs System (SIDUNEA) published in the Official Gazette No. 37,368 dated 21-01-2002, prescribes that the carrier shall register the cargo manifest in the database of SIDUNEA, using the format of the respective carrier module, according to the specifications given by the customs office. It is understood from the specifications, although the Regulations do not mention it, that together with the transmission of the cargo manifest, the copies of the bills of lading are to be submitted as well. However, there is no particular specification about cargo description other than that prescribed in article 68 above mentioned.

On the other hand, the Law on Maritime Commerce (Official Gazette Extraordinary No. 5,551 dated 09-11-2001) prescribes in article 234, point 1, that in the Bill of Lading the following information is to be included: General nature of the merchandise, marks and distinctive necessary for its identification, if required, an express declaration about its dangerous nature, number of packages or pieces and the weight of the merchandise or its quantity stated in another way; these particulars are to be stated as they have been provided by the shipper. It is important to point out that different from that stated by our previous domestic maritime legislation, this Law on Maritime Commerce incorporates in articles 232 to 245 — mainly based on the Hamburg Rules — updated provisions related to the bills of lading.

Having mentioned the above legal background applicable to the bills of lading in Venezuela, it may be said that the customs and maritime legislations are very clear about the way in which cargo should be described in the bill of lading. Thus, article 67 of the Regulations to the Organic Customs Law, and art. 234 of the Law on Maritime Commerce both give clear guidance to this end; however, up to this date, there is no express prohibition for the use of generic cargo description in the B/L in the customs field. This is not strange if it is borne in mind that customs authorities, even today, pay very little attention to the content of the B/L; as a matter of fact, in some ports original and non negotiable B/Ls are treated as equivalent for the clearance process, something that has profound impact in the process of delivery of cargo. It has been learned that some officials of SENIAT (national customs authority) are asking for advice in connection with the drafting of a *Circular* or *Order*, aimed to regulate some aspects of the bills of lading, among them, cargo description. No doubt that at some point in time, the SENIAT will regulate this matter, driven by a similar policy followed by US Customs with the implementation of the 24 Hour Advance Manifest Rule (which forbids the use of the STC and FAK clauses in the B/L), as well as with the adoption of the ISPS Code in Venezuela. It is known that SENIAT is now forming part of a national commission working in the implementation of the ISPS Code throughout national ports, and this will be a topic certainly to be discussed.

The lack of proper cargo description in the B/L, of course, raises concern because of the eventual customs fines, specially when considering the long list of penalties prescribed by the Organic Customs Law; however, there is no express sanction applicable to this matter.

It is true that the willfully mis-description in the B/L with the intent to hide cargo, could lead to the introduction of cargoes into the national territory diverting from the intervention of customs authority, something that is regarded as smuggling by article 104 of the Organic Customs Law; also it is regarded as aggravated smuggling to make it difficult by way of simulation (willfully mis-description) the fulfillment of the powers granted to the customs authority (article 105, letter e, of the Organic Customs Law). Even so, these penalties are likely to be imposed to the cargo interest rather than to the carrier/agent. Other fines are stipulated equivalent to the double of the fiscal damage that such declaration may have caused, like the one prescribed by art. 120, letter e, of the Organic Customs Law, applicable when the declaration related to marks, quantity, specie, nature and origin are false or incorrect; but again, this is applicable to the cargo interest. It is unknown whether a fine to a carrier or to its agent in connection with this matter has ever been imposed. When reviewing the list of penalties for the carrier or port operator in the customs context, contained in article 121 of the Organic Customs Law, it is found that there exist no express penalties for lack of proper cargo description.

It can be concluded then, that at least for the time being, the use of generic descriptions in the B/L would not appear

to be forbidden by domestic customs regulations, and no specific penalties are imposed for this practice by said regulations.

## PORTS

### Are pilots entitled to nominate a second tugboat to enter Venezuelan ports?

Prior to the enactment of the new maritime legislation, in Venezuelan ports it was compulsory the use of two tugboats for a vessel over 139 meters in length; besides, it was common practice that the nomination of the tugboats to be used was made by the pilots.

Nowadays, towage is governed by the Regulations of the Towage Service published in the Official Gazette No. 37,577 dated 25-11-02, whose main features are: a) Performance of the towage service under concessions, something that is still awaiting for the INEA to organize the different bidding process; b) The right of the ship owner, shipping agent, owner's representative and the vessel's master to nominate the tugboat company to be used, notifying in writing such nomination to the Port Captain of the respective aquatic circumscription, in accordance with article 4 of the Regulations; and, c) The use of one tugboat for vessels over 139 meters in length, where there exists a bow thruster system, as prescribed by article 10 of the Regulations. It is important to point out that based on the content of article 4 of the Regulations, some liner shipping companies or ship agents on their behalf, have entered into service contracts with particular tugboat companies.

Despite the changes introduced within the governing regulations, in the main Port Captaincies official pilots insist to perform their services subject to the old practices, i.e. To nominate a second tugboat in the case of vessels having an operative bow thruster, and what is worse, they refuse to use the tugboat/tugboats nominated by the ship owner or ship agent in pursuant to article 4 of the Regulations, alleging for that safety concerns. Pilots intend to justify their practice based on article 7 of the Regulations of the Pilotage Service, according to which "When the pilot considers that in the course of the navigation or maneuvering the vessel could be exposed to an accident that may cause damages to the environment, installations or put at risk the security of the vessel or the crew, due to any circumstance related to the vessel, the crew or caused by an external agent, he must inform to the Master of the assisted vessel in this regard; should there some consequence arise, he shall report it immediately to the Port Captain presenting within the twenty four (24) hours following the end of the maneuvering, a written report detailing the accident, unless that for duly justified causes, he is unable to deliver said report within the established time".

From the review of the towage regulations, however, it can be observed that as prescribed by article 10, the only person/entity entitled to nominate a second tugboat or others, as the case may be, is the Port Captain of the

respective aquatic circumscription, when the circumstances justify to do so, in which case he shall inform to his immediate superior (INEA), in writing or by any other means, the reasons why he took said decision.

It follows then that if pilots are nominating the tug boats according to the practice above referred to, it is because some of them are arguing technical deficiencies of the tugboats working within commercial port, and also the lack of dredging and navigation marks, such nomination being a breach of the regulations in force, and in some cases with the support of some Port Captains.

Pursuant to article 7 of the regulations governing pilotage service, it should be borne in mind that the pilot must "inform" to the master of the vessel, about any navigation or maneuvering that could result in damages to the environment, installations or exposition of the vessel to risk affecting the safety of the vessel or crew. Nevertheless, the regulations do not entitle the pilot to nominate any second tugboat, nor to overrule the initial nomination made by those who are legally entitled to make it, vg. Ship owner, ship agent, owner's representative or the vessel's master.

In view of the above, this law firm acting on behalf of a foreign liner shipping company, filed a complaint before the INEA, against the pilotage service and the Port Captaincy of Puerto Cabello, to request the opening of an enquiry as well as to instruct named Port Captaincy in respect of the strict application of the regulations. Surprisingly, no answer has been obtained. While the matter is duly treated by the INEA, it has been suggested to our clients that the master of the vessel in coordination with the ship agent, refuses the nomination of an eventual second tugboat or the change of the chosen tugboat company for the specific maneuvering, by adding a written statement in the pilot slip making it clear that the second tugboat/or nominated tugboat company is solely at the request of the acting pilot.

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