

# SABATINO PIZZOLANTE NEWSLETTER

August/December 2004

VIII - N° 21 / N° 22

MARITIME AND PORT AFFAIRS - INTERNATIONAL TRADE - CUSTOMS

## SABATINO PIZZOLANTE - ASSOCIATED MARITIME CONSULTANTS

Centro Comercial Inversiones Pareca, Piso 2, Ofic. 2-08/2-09, Av. Salom, Urb. Cumboto Sur, Puerto Cabello 2050,  
Estado Carabobo, VENEZUELA, P.O. BOX 154

Phones: +58-242-3641801/3641798/3641026-Fax: +58-242-3640998 - Mobiles: +58-412-4210036/3420555

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

### Port Congestion: A key issue to be solved by the public and private sector...

Once the *Referendum* was over, the political, and more important the economical stability seems to be gaining space. International trade is resuming its dynamics, fostered by an exchange control regime that now allows more flexible rules to get the necessary foreign currency for the transactions. Port statistics are a good thermometer to assess the recovery of international trade, since it is believed that an increase of at least 50% in cargo volume has been experienced by public commercial ports. Unfortunately, this increase has brought a huge congestion at the private terminals for dispatch of cargo. Public authorities such as SENIAT (Customs) and CADIVI (Exchange Control Administrator) blame the private port operators, adducing lack of enough cargo handling equipment and insufficient area to carry out the customs inspections, whereas port operators argue that some unexpected events, such as the heavy rains and floods that took place in Puerto Cabello last November, caused a significant number of containers to be trapped. Besides, they argue that the double inspection carried by these mentioned authorities force an extra handling of units with the resulting congestion. The truth is that no matter whoever may be right in their arguments, the fact is that the port is not being efficient. This could be a serious concern for the new port authorities of the port of Puerto Cabello, to evaluate the matter and to mediate between SENIAT/CADIVI and the private sector to find out prompt solutions, in order to insure that the port will be capable to handle the increasing cargo volumes that, as it is said, are to be incremented this year and the year after...

### SHIPPING

#### Arrest of vessels under Venezuelan jurisdiction

The arrest of ships in Venezuela is governed: a) By the provisions of Decision 487 on Maritime Guarantees and Arrest of Ships, issued by the Andean Community, based on the 1993 International Convention on Maritime Liens and Mortgages as well as the 1999 International Convention of Arrest of Ships; and, b) By the provisions contained within the Law on Maritime Commerce (LMC) enacted in November 2001. For a review of the said Decision 487, we refer our readers to the Sabatino Pizzolante Newsletter No. 14 (August 2002).

However, specific provisions on the subject are found in the LMC, therefore it seems appropriate to briefly review its Title III. Thus, article 93 contains the list of maritime claims giving rise to an arrest (*embargo preventivo*) of a ship: 1) Loss or damage caused by the operation of the ship; 2) Loss of life or personal injury occurring, whether on land or on water, in direct connection with the operation of the ship; 3) Salvage operations or any salvage agreement, including, if applicable, special compensation relating to salvage operations in respect of a ship which by itself or by reason of its cargo threatens to damage the environment; 4) 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; 5) 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; 6) Any agreement relating to the use or hire of the ship, whether contained in a charter party or otherwise; 7) Any

agreement relating to the carriage of goods or passengers on board the ship, whether contained in a charter party or otherwise; 8) Loss of or damage to or in connection with goods (including luggage) carried on board the ship; 9) General average; 10) Towage; 11) Boating (Lanchaje); 12) Pilotage; 13) Goods, materials, provisions, bunkers, equipment (including containers) supplied or services rendered to the ship for its operation, management, preservation or maintenance; 14) Construction, reconstruction, repair, converting or equipping of the ship; 15) Port, canal, dock, harbour and other waterway dues and charges; 16) 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; 17) Disbursements incurred on behalf of the ship or its owners; 18) Insurance premiums (including mutual insurance calls) in respect of the ship, payable by or on behalf of the ship owner or demise charterer; 19) Any commissions, brokerages or agency fees payable in respect of the ship by or on behalf of the ship owner or demise charterer; 20) Any dispute as to ownership or possession of the ship; 21) Any dispute between co-owners of the ship as to the employment or earnings of the ship; and, 22) A mortgage or a "hypothèque" or a charge of the same nature on the ship.

The provisions set by the LMC allow the arrest of the ship in respect of which the maritime claim arose, as well as the arrest of a sister ship. On the other hand, art. 97 of the LMC states that the court, as a condition to decree the arrest of the ship may request from the claimant, the submission of a guarantee in the amount and subject to the conditions determined by the former, for the claimant to answer for the damages that might be caused as a consequence of the arrest. As per art. 98 of the LMC the defendant may oppose the arrest or request the lifting of it, if in the opinion of the court sufficient security has been provided, save in cases in which a ship has been arrested in respect of any of the maritime claims enumerated in numbers 20) and 21) of art. 93 above mentioned.

It is interesting to point out that together with the exercise of the arrest of a ship in terms referred to in previous paragraphs, art. 103 of the LMC includes another mechanism for guarantying a maritime claim. Thus, the article in question prescribes that the holder of a maritime claim in respect of a ship, may request from the competent court a "precautionary measure of prohibition from sailing", in order to guarantee the existing maritime claim. The court shall agree on the petition without major formality, provided antecedents are submitted from which it can be inferred presumption of the right that is being claimed. If these antecedents are not sufficient, the court may request a guarantee to decree this precautionary measure. Art. D6 of the LMC states that after thirty continuous days following the arrest of the ship, without the ship owner's attendance to the proceedings, the court at the request of the claimant, may order the anticipated auction of the ship, subject to the claimant's submittal of sufficient guarantee, provided that the claim exceeds the 20% of the value of the ship and same is exposed to ruin,

obsolescence or deterioration. Generally speaking, it could be said that the rules related to the arrest of ships in Venezuela have improved significantly with the enactment of the Law on Maritime Commerce.

To some extent, the notion of an *action in rem* has been included in the LMC, in the sense that actions can be exercised against the ship and her Master, and it is not necessary to make mention of the owners (art. 15), whereas the writ can be served or handed over to anyone onboard the ship, or same purpose may be accomplished by fixing one cartel in the ship in the presence of two witnesses, even if there is not anybody onboard (art. 110).

## PROCEDURE

### New features of the maritime proceedings

Significant changes in maritime procedural rules were introduced with the enactment of the Law on Maritime Procedures, published in the Official Gazette Extraordinary No. 5,554, dated 13-11-2001, which set up the ordinary procedural rules to be followed by the judges of the aquatic jurisdiction.

These rules will govern the proceedings at the First Instance Maritime Courts as well as Superior Maritime Courts, where main features are now oral proceedings and abbreviation. To this end article 4 of said law states that for the purposes of the presentation of claims, decrees, granting and lifting of precautionary measures, as well as any other urgent action, all days and hours are considered valid. Also an important improvement has to do with the representation, since art. 18 allows the use of the electronic Power of Attorney, in line with the need to facilitate the access to domestic courts to those trading with Venezuela.

Chapter III deals with the Procedure as such, which in the First Instance Court is as follows: Claim will be brought in written manner, also attaching any proof documentation and the name of the witnesses to participate in the oral hearing; answer to the claim or submission of precedent matters will take place, within the following 20 court days as from the date the writ has been served. For the purposes of serving the writ, article 17 states that besides the formalities prescribed by the Civil Procedure Code, in cases arising from maritime credits or maritime liens, the writ of summons can be served by delivering it to any crew member that is on board the ship, in the presence of two witnesses.

The new maritime procedure incorporates the so called "discovery". Thus, as per article 9 after answering the claim, and once precedent matters presented by defendant have been amended or decided, anyone of the parties may request, within a period of five days, that the Court orders the other party: 1) Exhibit documents, records or registers under the other party's control or custody, related to the subject claim, or to allow for these documents, records or registers to be reproduced by any means; and 2) To allow access to a ship, pier, dry dock, warehouse, facility or port

area, in order to perform an inspection of ships, merchandise or any other object or document; or in order to measure, photograph or reproduce them.

As per article 10, the Judge shall request from the required parties to exhibit documents, recordings or registers, and to allow for access referred to in article 9, requiring compliance with court orders within a period of 20 court days following the issuance date of the order. This period may be extended pursuant to agreement by the parties or because of justified cause as decided by the court. Within the first 5 days of said period, the requested party may oppose to the totality or part of the contents of order, alleging illegality, impertinence or reason of public order. The Judge shall resolve in respect of allegation within a period of no more than 3 court days. Opposition shall suspend the term of compliance. When opposition is decided upon, the period shall continue in respect of those probatory elements requested and admitted.

Even before the claim is brought, any interested party may request a judicial inspection from court, in order to certify the state of persons, things, sites or documents, as it is established by the provisions of Chapter VII, Title II, Second Book of the Code for Civil Procedure. To achieve this, those persons to whom such proof will be opposed shall be summoned in advance, except in those cases when, by reason of the urgency this results impossible, and in that case, they will be assigned a court appointed defence counsel who is to attend to the inspection (Article 16).

Another significant feature of the new proceedings is that pursuant to art. 11, the plaintiff is allowed the amendment to the claim, within a period of 5 court days following decision of court in respect of termination of proceedings as referred to in articles 9 and 10. Under this supposition, the defendant may answer this reform within the 5 court days following due date given for the reform of the claim. If the plaintiff has not amended it, the defendant may reform the answer to the claim. With the amendment of the claim or the answer to the claim, the parties must ratify all documentary evidence originally submitted, the list of witnesses that are to be taken deposition during oral hearing and also, the parties must present additional documents intended to be validated, and the names and domiciles of new witnesses that are going to declare.

In any case, after the claim is amended or once the answer to the claim is effected, the court will schedule any of the following five court days for the preliminary oral hearing. Article 12 states that at any opportunity, previous to the oral hearing, the parties may promote any witness, judicial inspection, expertise or recognition, as long as they justify the urgency for such procedure by virtue of imminent danger of disappearance of probatory evidence. Under this supposition, the Judge shall fix an opportunity which may not be in less than two court days, and the other party must be notified in advance.

After probatory steps have been complied with, the court will schedule any of the following thirty calendar days for the oral hearing to take place, and hearing may be

extended as the case might be, to another day or days to complete the matter, in which case the Judge will proceed to give judgment.

## CUSTOMS

### Customs regime applicable to tank containers

The period of time that containers may stay within Venezuelan territory, is prescribed by article 79 of the Regulations to the Organic Customs Law, according to which the permanence of containers is restricted to three months after arrival to the country. Therefore, containers arriving to the country in the normal course of international trade and used as elements of transportation, are required to leave the territory within that period of time since, otherwise, these containers will be retained by the customs administration, and a fine will be applied.

The above legal background has been the basis to argue that any container or similar unit used as “element of transportation” is subject to this three months allowance for staying. On the contrary, when the containers and similar units are not an element of transport, they would be subject to taxes, dues and other requisites for the importation/exportation of cargo, as prescribed by art. 80 of the Regulations to the Organic Customs Law.

Nevertheless, during these last months, the customs administration has been sustaining a different view and for this reason tank containers or isotanks are being required the compliance with the temporal admission formalities to enter the country. These formalities are referred to the filing with the customs office of a bond to guarantee the customs dues, as well as the need to re-export the unit once the cargo has been emptied, subject to customs’ authorization to release the bond and re-export, something that in practice may become a cumbersome procedure by all means illegal. The arguments of the customs administration to support this view, is that the three months allowance for staying prescribed by art. 79 referred to, apply to container and isotanks only when these units are owned by the carrier, and not when these units belong to different parties such as, for instance, a tank operator.

This explains why some customs officials have even retained isotanks for non compliance with the temporal admission regime. This is what happened to a tank operator in December 2003, whose isotanks were retained by the customs office of Puerto Cabello. Consequently, a Constitutional Injunction was brought by the tank operator, joined later on by other operators —assisted by this law firm— for violation of the rights of due process, defence, economical freedom and property, which was aimed to prevent the customs office to interfere with their normal operations. It is important to point out that in October 1998 this tank operator had, in fact, requested an opinion from the customs administration (SENIAT) about the legal regime for the isotanks, opportunity in which the former held the view that the isotanks for liquid were special containers to be treated as those referred to by art.

79 under comment. To make things worse, in the course of the constitutional proceedings, the customs office of Puerto Cabello submitted an opinion issued by the legal department of the SENIAT (Gerencia Juridico Tributaria), stating that containers and isotanks were different, and so the later were not subject to the application of art. 79.

On the 8<sup>th</sup> of June, 2004 the First Court of First Instance (Juzgado Primero de Primera Instancia) of Puerto Cabello gave its judgment in favour of the claimants, ordering to the customs office not to retain tank containers or isotanks, as they are comprised within the units referred to by art. 79 of the Regulations to the Organic Customs Law. The court in the reasoning further stated that from the reading of art. 79 no grounds are found to make any distinction regarding ownership of the units by the carrier, as a condition to fall under the terms of art. 79 in question. Besides, the court rejected the view of the legal department of the SENIAT in the sense that containers and isotanks were different, this rejection based on technical definitions and internal regulations such as the COVENIN rules which incorporate the ISO rules in the country. The court decision under review went for revision to the Superior Court for Contentious Tributary Matters (Tribunal Superior de lo Contencioso Tributario) of central region, which ratified the sentence issued by the lower court stating that in the legislation, no elements can be found to differentiate the containers from the isotanks, and that they are the same for the purposes of art. 79 under discussion. Although some tank operators are able to continue their business protected by the Constitutional Injunction obtained, particularly, through the customs office of Puerto Cabello, the problem has remained unaltered for other tank operators in this port, and for all operators in the rest of the ports. In the meantime, as a result of the requirement of temporal admission formalities by the customs administration, some shipping lines are now refusing to take the tank containers out of the country, unless it is shown to them that the said customs regime has been complied with.

In November 2004 this matter was treated among the private sector and the customs authorities at the Chamber of Commerce of Puerto Cabello, and there was agreement about the need to review these customs regulations to facilitate the regular operations with the isotanks, and it was even agreed to set a working group to draft a proposal; however, up to this date there has been no further development. No doubt the matter is still on the table.

## JURISDICTION

### Maritime Courts formally opened in Venezuela

Courts of the aquatic jurisdiction entered into functioning with the formal opening of the Superior Maritime Court and the First Instance Maritime Court, both located in Caracas and vested with national jurisdiction, with which civil and commercial courts ceased to hear maritime cases, submitting all the existing court files they are currently dealing with to the new maritime courts. As it will be recalled the Organic Law of Aquatic Spaces, published in

the Official Gazette No. 37,330 dated 22<sup>nd</sup> November 2001, in its Title XVI set up the aquatic jurisdiction, an old desire of the maritime community. The said aquatic jurisdiction comprises the establishment of three Superior Maritime Courts located in Caracas (Central Region), Barcelona (Eastern Region), and Maracaibo (Western Region); and five Maritime Courts of First Instance to be located in the following ports: La Guaira, Puerto Cabello, Puerto Ordaz, Maracaibo and Puerto La Cruz. On the other hand, these maritime courts will hear all maritime actions and conflicts related to maritime, port and multimodal field, which may arise in connection with 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 subject to the General Law on Ports.

On 18<sup>th</sup> August 2004 the Supreme Court of Justice issued Resolution No. 2004-0010, published in the Official Gazette of 13<sup>th</sup> September 2004, by which the Superior Maritime Court and the First Instance Maritime Court, both located in Caracas and vested with national jurisdiction are created. The Judges appointed to run the new courts are Dr. Freddy Belisario Capella and Dr. Francisco Villarroel, respectively, both with professional experience in the area, holding also Master degrees in maritime law. Nevertheless, it will not be until mid January 2005 when the maritime courts entered into functioning, after some administrative and infrastructure issues are completed. It is understood that budgetary considerations prevailed to proceed only with the opening of these two courts, whereas the rest of the courts of the special aquatic jurisdiction, among them, the First Instance Maritime Court of Puerto Cabello, will be opened in the future.

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, 2050, Estado Carabobo, VENEZUELA, P.O.Box 154. This Newsletter can also be read on the Internet at <http://www.sabatinop.com>