

# SABATINO PIZZOLANTE NEWSLETTER

*September 1997*

*I - N° 3*

*MARITIME AND PORT AFFAIRS - INTERNATIONAL TRADE - TRANSPORT*

## **SABATINO PIZZOLANTE ATTORNEYS' OFFICE - ASSOCIATED MARITIME CONSULTANTS**

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### **Venezuelan Ports and Drug Smuggling: A Problem to take care of...**

The recent seizure of 4,000 tons of cocaine on board the Panamanian flag, m/v "Ricky II", docked at Puerto Cabello, as well as another finding of 2,500 tons on board m/v "Lady L'Belle", at the port of Guanao (Falcon State) raises concern about the increasing use of Venezuelan ports either as transshipment points or as a way to camouflage routes coming from Colombian ports. In both cases the national security services in collaboration with the Drug Enforcement Agency (DEA) were successful; however, it is clear that those are not isolated cases and instead, drug cartels are innovating more and more ways to get their product to their principal markets in the US and Europe, as recently pointed out by Fairplay Shipping Weekly.

Undoubtedly, national authorities are putting into place procedures to optimise the surveillance within ports, in fact, port authorities like Puerto Cabello have bought specialised scanners to contribute with bodies in charge of combating drug trafficking. Besides, an agreement between US and Venezuela was signed last July, authorising coast guard personnel of both countries to board vessels carrying their national flags in international waters, when there is reasonable grounds to believe there are drugs on board. All these mechanisms are necessary

to tackle such sensitive issue. Nevertheless, we hope that national authorities use their power in a reasonable way too, since the case might be that of security forces abusing their statutory powers to the detriment of non-responsible shipowners, brokers, exporters and importers. This is particularly true in our country, where the State rarely answers in tort for damages to particulars....

## **SHIPPING**

### **Signed Agreement to tackle drug smuggling between United States and Venezuela**

Authorities from both countries signed on 23rd July an agreement to allow US Coast Guard personnel to board Venezuelan vessels suspected of carrying drugs in international waters. Similarly, Venezuelan authorities will be allowed to board US vessels under the same circumstances. This agreement is an important step towards the combat of drug trafficking, since in the past, Venezuelan Navy had been reluctant to board civil vessels, arguing that such a role was outside the scope of it. This can be clearly observed, as in 1996 when at least four times the Venezuelan Navy refused to board vessels suspected of carrying drugs.

According to the agreement signed as to enhance the terms of the United Nations Convention against Drug Traffic of 1988, the personnel aboard vessels from United States and Venezuela is authorized to board vessels of both flags, provided that there are reasonable grounds for suspicion of such vessels, allowing them to inspect the vessels and

adopt all the required measures with respect to people, vessel and cargo. The parties, however, bear international responsibility resulting from the boarding and inspection carried out, as well as the States are liable in tort for any damages as a result of acts beyond the scope of the agreement.

## TRANSPORT

### Time Bar limits and Limitation of Liability under Venezuelan transport legislation

Time bar rules in a particular jurisdiction are an important element to deal with, to ensure the enforcement of claims. Likewise, limitation of liability rules. Therefore, this law firm has prepared this brief summary, to assist overseas colleagues and clients when considering to bring action under domestic transportation legislation.

#### I. Maritime Shipments:

1.1 Venezuela is not a party to the Hague, Hague-Visby or Hamburg rules. Maritime shipments in Venezuela are governed primarily by the rules of the Commercial Code, in which case the carrier would be liable in full, based on fault.

##### Time for Suit:

a) For non-delivery, the action is time barred after one year of the vessel's arrival, provided the vessel has been lying at anchor at the port of unloading for, at least, a 15 day period within the following year.

b) For damages, the action becomes extinct (caducity) if a protest is not made and notified within the 72 hour time period to be counted from the receipt of the merchandise. Similarly, legal action mentioned before becomes extinct (caducity) in case a claim having been filed and notified, but legal proceedings are not commenced within 30 days following such notification.

##### Limitation of Liability:

Under the rules of the Commercial Code, the carrier is not entitled to any limitation of liability other than the shipowner's right to abandon the vessel.

1.2. Nevertheless, it should be borne in mind that by application of the freedom of contract, Venezuelan courts recognize the provisions inserted in contracts of carriage, i.e. contract of affreightment and bill of lading. In these cases, Paramount and Himalaya Clauses could be applied and so, the rights, defenses and limitations available to the carrier under the statute or convention applicable by effect of the Paramount Clause.

#### II. Inland Shipments:

Inland shipments are governed by the Commercial Code.

##### Time For Suit:

- a) Shipments within Venezuela - 6 months.
- b) Shipments to or from Venezuela - 1 year

##### Limitation of Liability:

The market value of the cargo at the place of destination.

#### III. International Air shipments:

Venezuela is a signatory to the Warsaw Convention.

##### Time for Suit:

Two (2) years.

##### Time to Claim for Damages:

- a) Luggage - 7 days; Cargo - 14 days
- b) Delay - 21 days

##### Limitation of Liability:

US\$20.00 per kilo

#### IV. Local Air Shipments:

##### Time for Suit:

Loss/Damage to Luggage/Cargo: 180 days

##### Time to Claim:

Claim should be done within 30 days following date of delivery or that in which it should have been delivered luggage/cargo.

##### Limitation of Liability:

##### Damages to Cargo:

Loss: 3 U.T. per Kg. of gross weight. (1 U.T. equivalent about US\$ 10.4)

Delay: an amount equal to the price of freight

##### Damages to Baggage:

Loss or Damage to 3 U.T. per Kg. of gross weight

#### V. Warehouses (Including Customs Warehouses):

Time for Suit: Ten (10) years

Time to claim: None

Limitation of Liability: liable in full, i.e. *ad valorem*.

## OIL POLLUTION

### Fiscalía General de la República takes action in the "Nissos Amorgos" case

The Public Prosecutor office has made formal accusation against the Master of m/v "Nissos Amorgos", Konstandinos Nikolaos Spiropulos, for faulty spillage or discharge of oil, an offense prescribed by art. 30 of the Environmental Criminal Code, reason for which the Master faces from 1 to 3 years imprisonment.

On the other hand, the Public Prosecutor has brought a claim against the owners of the tanker and its P & I, Glafki Hellas Maritime and Gard, respectively, for about US\$ 57,000,000.

## PRIVATIZATION

## Rules for Concessions of Public Works and Services

A new Public Works and Services Concessions Law was approved by President Rafael Caldera in 1994. Bearing in mind the privatisation processes currently underway, it seems appropriate to make some comments on it.

Under this Decree-Law concessions may be granted for expressways, railroads, ports, bridges, viaducts, electricity generation, hydraulic works, cleaning services, public monuments and buildings, airports, urban and long-distance transportation, among other public works and services.

The Ministry of Transport and Communications (MTC), has the largest number of works and services suitable to be granted as concessions and the most developed organisation for implementing such schemes. The ministries of Environment and Renewable Natural Resources, Urban Development, and Health and Social Assistance, have relatively fewer works and services that could be granted in concession.

Regarding the legal framework, one of the principal characteristics of the Concessions Law, published in Official Gazette No. 4719 of April 1994, is its status as an organic law. Article 75 of the Law states that its provisions take precedence over all other legal instruments including the Privatisation Law. This means that any undertaking made under the Concessions Law has preference in the event of a conflict with any other legal instrument. Hence, investors have no need to check for other laws that might override the principles agreed in a contract with the state. The Concessions Law provides the basis for a lasting alliance between the concessionaire and the Republic of Venezuela. Any change in this Law would require a decision by Congress with a majority vote of at least 60%. The win-to-win philosophy of doing business is present throughout the text of the law, as is the effort to establish clear rules. Each side is given reasonable rights and obligations and a clear explanation of the undertakings and risks involved.

The concession schemes are founded on the premise that the concessionaire company should be able to earn a reasonable rate of return on its investment. Article 38 of the Decree establishes that the investor must be allowed to receive a fair profit from the operation of a concession. The government is responsible for establishing the criteria on which bidders formulate their plans and economic-financial projections.

These criteria must be based on the principle that the charges made for the use of installations or delivery of a public service constitute the concessionaire's principal source of income. The charges are calculated and revised according to the formulas and procedures established in the concession agreement and take effect after publication in the Official Gazette. The Law also provides for the

possibility of international arbitration if required by the concessionaire.

Tax breaks and tariff exemptions are also included in the Law. In fact, the Presidential Decree for the first concession to be granted under the Law provides a tax exemption for the entire period (30 years) as well as tariff exemptions for imported equipment and machinery.

The Concessions Law and the mechanisms included in the bidding documents and agreements incorporate various options or combinations of options designed to adjust for inflation, market fluctuations, force majeure and other factors. The options include modification of tolls and charges, extension of the period of the concession, subsidies, tangible provisions (land, data, equipment, etc.). The mechanisms should also resolve problems caused by devaluation.

Articles No. 46 and No. 47 of the Law authorise the Republic of Venezuela to guarantee bonds issued by the concessionaire up to 75% of the value of the investment without prior approval from Congress and 90% with such approval. This credit facility is of great benefit in negotiations aimed at obtaining finance for concession projects. Concessionaires are selected by competitive bidding which begins after publication of the decree that authorises the government to grant the works or services on concession. The decree stipulates the characteristics and conditions of the project. This procedure guarantees fair competition and well defined terms of reference.

The bidding process has two stages: first, the pre-qualification stage in which the legal and financial situation of the participants is evaluated. This stage usually concludes with a short list of participants. In the second stage, the final proposals are evaluated and the contract is awarded. Negotiations with the successful consortium then begin.

## PORTS

### New Proposal for Gantry Cranes at Puerto Cabello

Following the proposal made by Crowley American Transport through Venezuelan Containers Cranes, C.A. ("VENCO"), to install two to four gantry cranes at berths No. 25, 26 and 27 of the port of Puerto Cabello, a new proposal has been put forward by H.L. Boulton —the biggest port operator at Puerto Cabello— in partnership with the American shipping operator SeaLand.

This has forced Puerto Cabello Port Authority to evaluate other mechanisms to authorize the operations of the gantry cranes in this port, one of which could be to set up a mixed company, with the port authority holding 51% of the shares, and the private operators the rest. Nevertheless, still there is no clear opinion about it.

## Relocation of oil terminals at Lake Maracaibo

After a significant number of casualties at Lake Maracaibo including the grounding of the vessels "Nissos Amorgos", "Olimpic Sponsor", "Korelis", "Velebit" and "Catatumbo" it has become evident the need to relocate the largest oil terminals within the lake to the western coast of the Gulf of Venezuela, thus to avoid further spillage that may affect the environment in the lake. Two million barrels of oil go through the channel every day, and up to the present date has meant more than eighty thousand barrels spilled during 1997. The Ministry of Energy and Mining, Erwing Arrieta Valera, said recently the relocation would be the best way to avoid the risks associated to the operation of these terminals, and that the proposal would be presented to President Caldera soon.

## Port of La Guaira to be Privatised at last?

Once again representatives of Port of La Guaira has announced that it will be privatised before the end of this year. The port is administered by a company called "Puertos del Litoral Central, S.A.", whose shares are currently in the hands of The Venezuelan Investment Fund (FIV). Port officials have said that the bidding process will shortly begin, the interested companies have fifteen days, to be counted after publishing the bidding announcements in the press, to present the "informative package". Later on, a technical committee would analyse the documentation making a pre-qualification. The pre-qualified companies will be invited after to visit the Data Room. In a rather optimistic interview a port official has said that bidding process would last two and a half months. The concessionaire will run the port for 25 years, with the exoneration to pay taxes for 12 years and a half, while it will pay only 50% of taxes for the remaining years of the concession. Additional information regarding the terms of the concession is available at request.

## Sabatino Pizzolante Attorneys' Office has already moved to new location

**SABATINO PIZZOLANTE ATTORNEYS' OFFICE** is pleased to announce that it has already moved to its new location of CENTRO COMERCIAL INVERSIONES PARECA. Phones and fax numbers have changed, reason for which we will let our clients know the new ones in due time.. **ASSOCIATED MARITIME CONSULTANTS**, the sister company of Sabatino Pizzolante Attorneys' Office, on the other hand, is enhancing its activities in response to our clients that look every day for expertise and prompt answers, keeping costs down. If you would like to get more information about AMC's services, then a brochure is available on request, otherwise you could see our homepage in the following address <http://www.seanet.co.uk/classifi/lawyers/sabat/sabat1.htm>

## Season's Greetings

**SABATINO PIZZOLANTE NEWSLETTER** has completed one year of circulation, and we want to thank those who have conveyed to us their support and comments. We hope to carry on with it next year, backed by a publishing fund (Fondo Editorial "Nautilus") that will be in charge of it as well as of publishing legal transport related books. As we look forward to 1998, **SABATINO PIZZOLANTE ATTORNEYS' OFFICE** wishes to all our readers a happy Christmas and New Year 1998.

The **SABATINO PIZZOLANTE NEWSLETTER** is published for free distribution three times a year by Sabatino Pizzolante Attorneys' Office and its sister company Associated Maritime Consultants. The Newsletter is not designed to provide legal advice on the matters referred to, reason for which 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 this issue, please write, fax or send an e-mail to Mr. José Alfredo Sabatino Pizzolante, Sabatino Pizzolante Attorneys' Office, Puerto Cabello, 2024, Estado Carabobo, VENEZUELA, P.O.Box 154. This Newsletter can also be read in the Press Release section of SeaNet (<http://www.seanet.co.uk>).