

SABATINO PIZZOLANTE NEWSLETTER

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MARITIME AND PORT AFFAIRS - INTERNATIONAL TRADE - TRANSPORT

SABATINO PIZZOLANTE ATTORNEYS' OFFICE - ASSOCIATED MARITIME CONSULTANTS

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A Second Anniversary servicing Shipping Interests and their P&I Clubs....

Throughout the years Sabatino Pizzolante Attorneys' Office has devoted itself to servicing the shipping industry, in the most effective and professional way. Our understanding of the business has let us prove to shipowners, charterers and their P&I Clubs how important it is to have local expertise, particularly, in the context of the recent changes taking place in the maritime, port and customs field.

With this issue the SABATINO PIZZOLANTE NEWSLETTER arrives at its second year of life, currently being the leading publication of this type in Venezuela. Although it was intended only as a brief vehicle of communication with our clients, the welcoming of it and continuing support given by shipping interests, overseas law firms and especially P&I Clubs has encouraged us to improve it, in our willingness to provide the international community with up-to-date information regarding the Venezuelan forum.

It is, therefore, a responsibility for us to keep a quality standard for this Newsletter, something that no doubt will be achieved since we are committed to go on by assisting the shipping industry, particularly, the P&I Clubs that have found in our companies a quick and reliable response to their needs and those of their Members.

SHIPPING

Fines Updated under Amendments to the Navigation Law

Amendments to the Navigation Law have been recently published in the Official Gazette No. 5,263 of 17 September 1998. An important point concerning this reform is the updating of the fines prescribed for this legal instrument which have been worked out in Tributary Units (T.U.) equivalent at the moment to Bs. 7,400 (US\$ 12.98).

Therefore, it seems appropriate to consider art. 135 of the amended law, where the fines and new values are:

- a) In an amount from Ten tributary units (10 T.U.) to Fifty tributary units, (50 T.U.) to those individuals (crew from national or foreign vessels, any other person/persons on board the said vessels, employees or representatives of shipping agencies, dockworkers, etc.) who in each case, do not comply with summons to appear before maritime authority, i.e. Port Captaincy.
- b) In an amount from Ten tributary units (10 T.U.) to Twenty Five tributary units (25 T.U.) to that owner that might have not requested corresponding registration at the Port Registry Office.
- c) In an amount from One Hundred tributary units (100 T.U.) to Two Hundred and Fifty tributary units (250 T.U.) to each of those individuals that unduly apply to obtain national Registry for a foreign vessel, as well as all those employees and public servants that participate in any simulated transfer of vessels. Same fines shall be applied to those Captains that might

benefit from any National Registration obtained in the above manner.

- d) In an amount from One Hundred tributary units (100 T.U.) to One Thousand tributary units (1.000 T.U.) to that Captain or Agent of that vessel that fails to appear at national ports during one (1) year, or fails to report to the Port Captaincy of its domicile over a period of six (6) months, without justified cause.
- e) In an amount from Ten tributary units (10 T.U.) to One Hundred tributary units (100 T.U.) to that Captain or owner of a vessel that fails to exhibit, loses or deteriorates Ships Registration Papers, License or Permit, without justified cause.
- f) In an amount from Ten tributary units (10 T.U.) to Fifty tributary units (50 T.U.) to that Captain that fails to submit, when requested to do so before maritime or consular authority, master list; and when this list appears to be increased or decreased without justified cause.
- g) In an amount from Twenty Five tributary units (25 T.U.) to One hundred tributary units (100 T.U.) to that Captain who fails to renew master list when obligatory.
- h) In an amount from Fifty tributary units (50 T.U.) to Five Hundred tributary units (500 T.U.) to that Captain, owner or Agent of vessel that infringes Article 43 of the Law, i.e. the anchoring or berthing of vessels of any nationality in areas not authorized for trading.
- i) In an amount from Twenty Five Tributary Units (25 T.U.) to Five Hundred tributary units (500 T.U.) to the Captain, owner, Agent or crew member that does not comply with instructions or orders issued by Venezuelan maritime or consular authorities pursuant to their legal attributions.
- j) In an amount from Fifty tributary Units (50 T.U.) to Five Hundred tributary units (500 T.U.) to the Captain, owner or Agent of a vessel carrying cargo or passengers in excess or those quantities fixed.
- k) In an amount from Fifty tributary units (50 T.U.) to Two Hundred and Fifty tributary units (250 T.U.) to the Captain, owner or Agent of such vessel that fails to load necessary food supplies for all crew members and passengers.
- l) In an amount of Twenty Five tributary units (25 T.U.) to One Hundred tributary units (100 T.U.) to the Captain of national vessel that does not carry on board all the documentation referred to in art. 54 of the Law (i.e. Certificate of Registry, License of Navigation, etc.) and in an amount from Ten tributary units (10 T.U.) to Fifty tributary units (50 T.U.) in such cases as in Unique Paragraph of same Article (i.e. fishing

vessels, those engaged in lake and river navigation, etc.)

Unique Paragraph: in the cases of lack of documentation as required by sanitary authorities, the corresponding maritime authority shall retain Ship's Registry until vessel is provided with said sanitary documentation.

- m) In an amount from Five tributary units (5 T.U.) to Twenty Five tributary units (25 T.U.) to the Captain of a national vessel that is not carrying on board the Codes, Laws, Books and Regulations referred to in Article 55 of the Law.
- n) In an amount of Ten tributary units (10 T.U.) to One Hundred tributary units to that Captain that unduly carries crew members, or does not comply with formalities established for performance on board, according to Chapter XIII of the Law.
- ñ) In an amount from Fifty tributary units (50 T.U.) to One Hundred tributary units (100 T.U.) to the Captain of a vessel that does not comply with established stipulations for flag usage.
- o) In an amount from Ten tributary units (10 T.U.) to Twenty Five tributary units (25 T.U.) to the Captain, owner or Agent of a vessel not carrying the signs or special marks indicated by the corresponding Port Captain.
- p) In an amount from Twenty Five tributary units (25 T.U.) to One Hundred tributary units (100 T.U.) per each day of delay, to the Captain, owner or Agent of a vessel that does not apply for permit to sail; or, that does not sail without justified cause, during the fixed term established in the corresponding permit.
- q) In an amount from Ten tributary units (10 T.U.) to Fifty tributary units (50 T.U.) to the Captain of a vessel that fails to appear before diplomatic or consular authorities of the Republic, after an obligatory arrival at a foreign port.
- r) In an amount from Fifty tributary units (50 T.U.) to One Thousand tributary units (1,000 T.U.) to the Captain of a vessel that fails to provide required help or assistance to another vessel.
- s) In an amount from Fifty Tributary Units (50 T.U.) to One Thousand tributary units (1,000 T.U.) to that owner or builder of a vessel that fails to obtain authorisation referred to in Article 121 of the Law.
- t) In an amount from Twenty Five tributary units (25 T.U.) to One Hundred tributary units (100 T.U.) per each individual, that Captain of a vessel that refuses to accept on board Venezuelan seamen abandoned at foreign ports or Venezuelan citizens repatriated.
- u) In an amount from Twenty Five tributary units (25 T.U.) to Fifty tributary units, (50 T.U.) to that Captain of a national merchant vessel that, at a foreign port, does not deposit at Venezuelan consular offices, the documents referred to in Article 142 of the Law.

- v) In an amount from Five tributary units (5 T. U.) to Twenty Five tributary units (25 T.U.) to that Captain that fails to submit before maritime authorities or consular authorities, requested master list or the passenger list.
- w) In an amount from Fifty tributary units (50 T. U.) to One Thousand tributary units (1,000 T.U.) to the owner or person responsible for the construction work, that fails to obtain required authorisation, under the obligation to dismantle such construction if explicitly ordered to do so.
- x) In an amount from Fifty tributary units (50 T.U.) to Two Thousand tributary units (2,000 T.U.) to the person or persons that performed, or ordered to perform, without due permit, the drawing of coastal charts, ports, bays, channel, rivers and lakes; plus seizure of all instruments, objects and studies, used or performed; and
- y) In an amount from Twenty Five tributary units (25 T.U.) to One Hundred tributary units (100 T.U.) for any transgression to this Law and Rules which is not expressly sanctioned.

In particular this last fine (letter y) looks too broad, and it could be applied by Port Captancy in many instances; in fact, it has been reported to have been already applied to a foreign vessel that was painting the vessel's name, after completing a charter party, this without authorization of the Port Captancy.

No Guarantee or Bond is required to grant an Arrest Order

Arrest of vessels in Venezuela is a difficult subject, due to the lack of a comprehensive set of rules applicable to it. Venezuela is not a member of the 1952 Arrest Convention, for which reason rules dealing with the arrest of vessels are governed basically by general regulations that may be found in the old Commercial Code, Code for Civil Procedure and the Law on Maritime Liens and Mortgages. Generally speaking the arrest of a vessel is achieved by requesting from courts to decree a precautionary measure called "embargo". Nevertheless, under Venezuelan law and by virtue of art. 587 of the Code for Civil Procedure, precautionary measure of embargo can only be exercised upon goods (vessels) that are property of the defendant. It is not enough to be in possession of the vessel; otherwise, the measure could give rise to a wrongful arrest. Where the embargo does not apply for the reason explained before, then the claimant will still have the possibility of requesting from courts an order to prevent vessel from sailing, this by asking the court an undetermined precautionary measure based on art. 588 of the Code for Civil Procedure, according to which the court could decree the measures it may consider suitable, when there is fear that one of the parties may cause serious damages to the right of the other. For courts to grant either a precautionary measure of embargo, or an undetermined one, like for instance prohibition of sailing, it is practice by the majority of courts to ask from

the claimant a security. The amount of the security will be worked out at a sum equivalent to the double of the claim value, plus the 30% of that claim value, i.e. the maximum legal fees allowed by legislation.

Sometimes, however, it is possible to have these arrest orders without requiring any guarantee or bond. This was the case of the *Kaylin Star*, a car carrier that was arrested at Puerto Cabello in October 1997; the arrest order was granted by the Second Parochial Court of Puerto Cabello, on the basis of an alleged unpaid invoice for ship supplies amounting US\$ 1,000. Later, it became clear that such invoice was related to a different vessel, belonging to another shipowner. This law firm acting on behalf of the *Kaylin Star's* owners filed an opposition motion asking for the immediate vessel release arguing that the alleged debt did not arise with respect to the arrested vessel, and that an undetermined measure to prevent the vessel from sailing, must be granted provided sufficient guarantee is supplied by the claimant. The judge agreed to release the vessel, taking into consideration that the debtor was indeed a different company than the owner of the *Kaylin Star*. Nevertheless, on delivering judgment regarding the opposition motion, the judge used an argument that it is very dangerous. It was said that the precautionary measures (e.g. prohibition of sailing) rest now on the discretion of the judge, in attention to the prudent determination of equity. In other words, according to this criterion the judge can use his prudent will backed by the justice and impartiality to arrest a vessel in protection of the claimants contentions!!

However, this is not the view applied by the majority of the commercial courts in Venezuela, which usually ask for bonds to grant the said precautionary measure.

ARBITRATION

Foreign Arbitration Clauses and their Enforcement under Venezuelan Law

In principle Venezuelan courts can exercise jurisdiction upon entities not domiciled in the country by virtue of art. 53, 2°) of the Code for Civil Procedure, dealing with Procedural International Competence (De la Competencia Procesal Internacional), according to which Courts of the Republic will be competent to know of claims against individuals or entities not domiciled in the Republic, although not in its territory when:

- 1) It is a claim upon property located in the territory of the Republic.
- 2) It is related to obligations derived from contracts or activities verified in the territory of the Republic, or such contracts or activities must be executed within it.
- 3) When the parties submit themselves expressly or tacitly to the jurisdiction of the Republic.

Nevertheless, where sales and purchase Terms and Conditions used by the parties, include clauses which call

for arbitration in a different country (e.g. New York) as well as the application of the law of that country to the contract and to any disputes which may arise, it could be argued that Venezuelan courts should be prevented from dealing with any dispute arising from the contract. Thus, in *Interamericana de Aviación, C.A. vs. Agro Air Associates Inc.* (30 March 1995) it was held by the Supreme Court that if it is true that Venezuelan courts can exercise jurisdictions over claims against individuals or entities not domiciled in the Republic of Venezuela, when a) Suits are made upon property located in the territory of the republic and b) Suits are made in respect of obligations derived from activities verified in the territory of the republic; however, these rules have two exceptions according to which Venezuelan courts have not jurisdictions when a) Suits are made upon overseas property and b) the contracting parties have expressly agreed upon the jurisdiction of the courts they will submit their conflicts.

Therefore, where a lawsuit is brought in Venezuela and the contract provides for Arbitration elsewhere, the likelihood would be that the Venezuelan court will decide this point upon request of the defendant, who will have to file a motion asking for the lack of jurisdiction of the Venezuelan court in view of the existence of an arbitration clause. To illustrate this point, for instance, in *Merril Lynch and others vs. Felipe Penfold and others* (21 March 1996), the Supreme Court had to decide upon the application of a clause stating an express submission of any controversy or conflict to a foreign court, in particular, "The Federal and State Courts of New York", in view of which the defendants filed a motion asking for the lack of jurisdiction of Venezuelan courts (Cuestión Previa de Falta de Jurisdicción). It was held that by inserting such a clause, the parties had agreed contractually to submit their controversies in respect of the contract, to the jurisdiction of New York Courts. Therefore, the Supreme Court declared the lack of jurisdiction.

It is important to point out that it would appear that is for the defendant to file this motion for lack of jurisdiction since, otherwise, he could see himself tacitly submitted to the Venezuelan jurisdiction. In *Telecomunicaciones Telenesa, S.A. vs. Itec International, Inc.* (29 May 1995), a foreign company with domicile in the USA was sued in the Venezuelan jurisdiction by a Venezuelan company. It was held by the Supreme Court that Venezuelan courts may hear claims against entities not domiciled in the republic, when the parties submit themselves either expressly or tacitly to the jurisdiction of the republic. The Supreme Court stated that the rules concerning express or tacit submission are regulated by art. 321 and 322 of the Bustamante Code ratified by Venezuela. Therefore, it is understood that a party accepts jurisdiction when he brings a suit in particular jurisdiction and the another admits it by attending to trial, and carrying out any diligence other than to ask for the declination of jurisdiction. In both cases a tacit submission takes place.

PORTS

Privatization of Falcón Ports

The government of Falcón State has announced that privatization of its ports will be carried out, in an attempt to bring private capital for expansion of the existing port facilities. Concessions for 20 years on port administration will be awarded, which would include the responsibilities in the expansion and the enhancement of the port services infrastructure. According to an informative brochure published by the Falcón State each of the ports will be developed in accordance to its vocation: the Guaranao International Port is suitable for the development of projects related to petrochemical, saline, charcoal and manufacture industries, while the Muaco Terminal has a potential for tourism services as well as the handling of minor load, and developing the logistical support that the oil industry requires for the exploitation of oil outside coast.

MISCELLANEOUS

Nauticom Ò: A system to improve Sabatino Pizzolante and Associated Maritime Consultants services

In order to improve our time of response in the handling of claims as well as to monitor in a better way an everyday growing number of claims, this law firm has implemented a tailored system made under our particular needs.

Sabatino Pizzolante Brief Papers on the Internet

Readers may find now the Sabatino Pizzolante Brief Papers on the Internet, just in the section of Publications of our website. The first issue entitled "The New Law for Commercial" Arbitration has been well received by our readers and we are just completing the next one.

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