

SABATINO PIZZOLANTE NEWSLETTER

April 1999

III - N° 7

MARITIME AND PORT AFFAIRS - INTERNATIONAL TRADE - TRANSPORT

SABATINO PIZZOLANTE ATTORNEYS' OFFICE - ASSOCIATED MARITIME CONSULTANTS

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A New Customs Legislation: Will it Solve the Problems?

After twenty years since its enactment the Organic Customs Law has now been repealed by a new one, with profound changes in the procedures and fines currently being applied. According to congressmen and other governmental officials the new piece of legislation will bring benefits, due to the fact that it will speed up customs clearance avoiding, at the same time, smuggling as a result of the heavy fines prescribed for it.

The reading of the new law reveals that together with positive aspects such as the selective "reconocimiento" of merchandise and use of electronic data interchange, some drawbacks also exist, particularly, the heavy fines imposed on all parties involved in the customs operations, as well as the powers given to the National Guard, acting as customs police; the rules contained in the new law are said to be very severe especially with the carriers, their agents and port operators, either because the direct liability to the National Treasury that has been introduced, the quantum of the fines or the incorporation of new activities regarded as smuggling.

The answer to the many uncertainties created by the enacted law, will obviously have to be solved in its Regulations still under elaboration. The maritime community through the Venezuelan Maritime Shipping Association should pay attention to it, in order to guarantee that the implementation of the Organic Customs Law renders benefits to everybody and not only to cargo interests and the National Treasury to

the detriment of carriers, ship agents and port operators.

SHIPPING

Recent Amendments to the Navigation Law and the Law for the Protection and Development of the Merchant Marine

Changes introduced in the Navigation Law and the Law for the Protection and Development of the Merchant Marine were published in the Official Gazette No. 5,263 of 17 September 1998, according to which Venezuelan registry is opened to foreign investors, since article 15 of the new Law states that for a vessel to be registered in the Venezuelan registry, it must be:

- a) Property of Venezuelan citizens;
- b) Property of legal entities duly incorporated and domiciled in the country;
- c) Property of foreign legal entities that comply with the regulations applicable to the participation of foreign capital, duly incorporated and domiciled in this country;
- d) Foreign registry bareboat chartered for periods of time over two (2) years for any of the persons mentioned in the points a), b) and c);
- e) Vessel given under leasing agreement to any of the persons mentioned in the points a), b) and c);
- f) Vessels or accessories of navigation (e.g. Barges) built in national drydocks.

Besides, according to article 152, ship registration is now exempted from payment of the 16.5% of IGV, a tax that used to be applied plus import duties on vessels for registration.

New Rules for Pilotage come into force

The new Pilotage Law was published in the Official Gazette No. 36,558 of 13 October 1998, its main features being:

- (a) In art. 2, a Unique Paragraph has been introduced allowing the possibility for a Captain of the vessel, the First Mate or any other Captain with his respective Pilot Certificate to navigate within a pilot area without pilot licence in cases of emergency or when the pilot authority (Harbour Master) does not have an available certified pilot for any reason. This Paragraph did not exist in the previous Law; however, it is not clear the Harbour Master's role in this situation, neither what is understood for "Captain with his respective Pilot Certificate", something that will have to be necessarily clarified through the Regulation before implementing this article.
- (b) Article 34 updates pilotage tariff that now are worked out in Tributary Units equivalent to Bs. 7,400 (1 US\$= Bs. 570). Vessels will pay the pilotage dues for every "navigation cycle", i.e. the round trip within the pilotage area comprising the activities of anchoring, lifting anchor, berthing, unberthing and other manoeuvrings. Tariff to be paid is:

Vessels up to 2,000 GTR: 16 T.U.

Vessels from 2,001 GTR to 5,000 GTR: 25 T.U.

Vessels from 5,001 GTR to 10,000 GTR: 40 T.U.

Vessels from 10,001 GTR to 30,000 GTR: 100 T.U.

Vessels from 30,001 GTR to 50,000 GTR: 130 T.U.

Vessels over 50,001 GTR: 150 T.U.

The former tariff is set up for Normal Working Hours (0700 to 1100 and 1300 to 1700 MON THRU FRI) and one round trip (in/out). Services rendered during overtime hours, holidays, Saturdays and Sundays will be subject to an overcharge equivalent to 50% of the applicable tariff.

- (c) Article 39 prescribes a penalty applicable in those cases where pilotage service suffers a delay more than one hour from the time it was requested, equivalent to 40% overcharge to the ordinary tariff and overtime. In the same way, pilotage tariff will be reduced by 40% when the delay is attributable to the pilotage service. This means that when a service for pilotage has been already requested either to dock or undock and for any reason other than one attributable to pilotage service, the service has to be postponed or aborted, a 40% of the tariff will be added as a penalty for having made a pilot standby.

CUSTOMS

Changes Introduced in Customs Legislation

Amendments to the Organic Customs Law were published in the Official Gazette No. 36,575 of 5 November 1998.

Changes are basically intended to speed up customs procedures as well as to reduce smuggling. Impact of the new rules on the reception and delivery of cargo in Venezuelan ports will be found in another section of this Newsletter; however, among the main provisions concerning the carriers the following could be mentioned:

- (a) According to article 22 the cargo shall be delivered by the carriers to those in charge of authorised areas, warehouses and bonded deposits, public or private, or to whom it is duly shown to be the owner or authorised representative of the consignee, not later than the next working day after discharge, with the precise specification of cargo shortage and that discharged in excess (bultos faltantes y sobrantes), which have to be notified to the customs.
- (b) Art. 24 states that once the cargo has been received, the responsible party shall elaborate a detailed relation of the goods effectively delivered, with precise indication of the elements for identification in quantity and quality and the number and date of the document of transport, the said relation shall be concluded and notified to the customs not later than the second working day after reception of cargo.
- (c) An important change is the one inserted in article 27, according to which when the document of transport does not indicate the warehouse of delivery, the merchandise could remain deposited while the respective customs diligence and prior to the compliance of the conditions prescribed by the Regulation, in the places indicated by the seller or shipper, the consignee, exporter or sender, unless the competent customs authority decides the contrary or when the interested party does not manifest his willingness in that respect, in which case the merchandise will be deposited in the primary zone immediate to the customs.
- (d) Article 46 prescribes that the cargo for importation, exportation or transit, shall be transhipped in national customs offices, in compliance with the relevant Regulation.
- (e) Article 57 states that customs dues will be payable even where there has been shortage of cargo or where merchandise presents damages, decomposition signals, failures, losses or other irregularities.

PORT OPERATORS

Reception and Delivery of Cargo under the Amendments to the Organic Customs Law

Amendments to the Organic Customs Law (OCL) came into effect on 4 January 1999. Despite the fact that changes are basically intended to speed up customs procedures as well as to reduce smuggling, it is also clear that the new rules will have an important impact upon the **Reception and Delivery of Cargo** within Venezuelan ports, a topic of great concern both for carriers and port operators.

This is not the first time this law firm deals with this subject; as a matter of fact in the SABATINO PIZZOLANTE NEWSLETTER No. 4 (January 1998), an article was published with additional comments referring to another short article on *Delivery of Cargo in Venezuela* prepared by our office in 1997, and reproduced by the Gard News later that year. The same article has been also reproduced recently by P&I International magazine, and no doubt that in view of the recent amendments to the customs legislation, a revision of the content of these articles is now compulsory.

As mentioned there are some provisions under the amended law that modify considerably the reception and delivery of cargo under the old rules.

According to article 22 of the OCL, for instance, “cargo shall be delivered by the carriers to those in charge of authorised areas, warehouses and bonded deposits, public or private, or to whom it is duly shown to be the owner or authorised representative of the consignee, not later than the next working day after discharge, with the precise specification of cargo shortage and that discharged in excess (bultos faltantes y sobrantes), which have to be notified to the customs”. This means that now carriers through their agents must deliver cargo to “whom it is duly shown to be the owner or authorised representative of the consignee” not later than the next working day after discharge, if it is so requested, notifying the customs about cargo shortage and that discharged in excess.

The obligation to notify the customs authority about cargo shortage and that discharged in excess is now imposed upon the port and terminal operator as well as the warehouse, since art. 24 of the OCL states “that once the cargo has been received, the responsible party —port or terminal operator— shall elaborate a detailed relation of these goods effectively delivered, with precise indication of the elements for identification in quantity and quality and the number and date of the document of transport, the said relation shall be concluded and notified to the customs not later than the second working day after reception of cargo”.

Perhaps the most relevant provision dealing with the place of storage within the port area for the cargo being discharged, is inserted in art. 27 of the OCL according to which when the document of transport (Bill of Lading) does not indicate the warehouse or place of delivery, the merchandise could remain deposited while the respective customs diligence and prior to the compliance of the conditions prescribed by the Regulation, in the places indicated by the seller or shipper, the consignee, exporter or sender, unless the competent customs authority decides the contrary or when the interested party does not manifest his willingness in that respect. In other words, when the B/L does not indicate the place of delivery, then the consignee will have the right to indicate in which warehouse or terminal the cargo will be placed, which would appear to be a risk, since in this way carriers may

lose control upon the custody of the cargo, increasing the possibility of loss or theft of it within the port area.

The amended version of the Organic Customs Law is strict when dealing with the payment of the customs dues, this is because under article 57 “customs dues will be payable even where there has been shortage of cargo or where merchandise presents damages, decomposition signals, failures, losses or other irregularities”. To understand the implications of this new provision suffice it is to say that under the old legislation there is a possibility to request from the customs authority the adjustment of the payable customs dues, where there has been shortage of cargo or where merchandise presents damages, decomposition signals, failures, losses or other irregularities, something that is done through a second recognition. This is a very important matter from the port operators’ point of view, taking into consideration the practice of “reconocimientos en mesa” incurred by many cargo receivers —who consequently have paid the corresponding cargo dues in full— that once at the port or terminal area find their cargoes presenting damages, shortages and even find it missing. In these cases, when cargo receivers claim from port operators, damages or losses to cargo, including customs dues already paid to the National Treasury, it is possible to reject the reimbursement of the customs dues on the basis that the customs law provides consignees with a mechanism to adjust it in proportion to the loss, but the fact being that a “reconocimiento en mesa” took place, then it would appear that receivers have tacitly waved their right to request such adjustment.

A new set of fines is included in the amended customs legislation (art. 121), the ones that now are worked out in tributary units (T.U.) at the moment worth US\$ 12.98. There are two fines that deserve particular mention, in view of the amount of them: a) when cargo (bultos) is discharged in more or less quantity than the figures annotated in the cargo manifest, not declared to the customs within the period indicated by the Regulations, in which case the fine will be equivalent to Five tributary units (5 T.U.) per gross kilogram in excess or shortage. The same fine —states the proviso— will be applicable to the depot or warehouse that do not declare timely to the customs the cargo in excess or shortage in the delivery; and b) When the exercise of the customs control (Potestad Aduanera) is prevented or delayed, in which case the fine could range between One Hundred tributary units (100 T.U.) and One Thousand tributary units (1,000 T.U.)

In view of the recent amendments to the Organic Customs Law —irrespective of the fact that the Regulations to this Law is still unknown— carriers trading to and from Venezuela are strongly advised to take into account the following actions:

1.- To avoid that cargo goes to terminals, warehouses or even common areas within the port, in respect of which no control exists or reliability of port operator is unknown, then carriers should indicate in their bills of lading if

possible, as allowed by art. 27 of the OCL, the “place of delivery”, i.e. the name of the terminal or warehouse operated by the particular port operator being used by the carrier at the port of discharge.

2.- Attention should be paid to cargo documentation (manifests, bill of lading, etc.) in order to detect on time shortage of cargo and that discharged in excess; in fact, ship agents should be instructed to make an accurate relation of cargo with indication of its condition to be presented to the customs authority, all this to avoid the application of undesirable fines. In this sense, it is important to bear in mind that the new law requires cargo documentation to be presented to the customs authority on arrival of vessel, otherwise, a fine will be imposed. It is clear that where ship agents are not able to present proper documentation to the customs authority, due to carrier’s fault, then any fines imposed upon them will be, in turn, transferred to the carrier.

3.- Carriers should take care that their cargoes go to “terminals” under control of private port operators, since in practice this will benefit the integrity of cargo.

4.- It is evident that taking into account the fines and liabilities upon carriers/shipping agents as a result of the amended customs rules, carriers must instruct their port and terminal operators not to release cargo only against customs document (FORMA C-80), but also asking together with it, an original bill of lading or a certified copy of a non-negotiable one. Instructions should be also given to shipping agents, to examine the customs document (FORMA C-80) very carefully, this to detect forged documents with the adverse consequences this might bring.

PORTS

Port of La Guaira to be decentralised?

On 10 February 1999 the Port Law of Vargas State, where the port of la Guaira is located, was introduced in the regional parliament in compliance with the procedure prescribed by the Law for Decentralisation. According to this legal instrument an Autonomous Institute will be set up to be acting as landlord authority, with a Board of Directors accountable to the Governor of the State.

The introduction of this port law gives rise to uncertainty as to what will happen with the privatisation process being handled by the Venezuelan Investment Fund (FIV), shareholder of the PLC, S.A. the public company that runs the port under a concession given by the central government.

Concession of Port of Guanta under Investigation

The Governor of the State of Anzoátegui has decided to take control of the Port of Guanta that was being managed by a private company called Puertos Internacionales, S.A. (PISA). The measure was adopted as a result of alleged irregularities by PISA that after the public bidding through which took over control of the port, set up another company to deviate financial obligations. Consequently, the Governor appointed Dr. Alejandro Gómez as new President of the state-owned port company, known as Puertos de Anzoátegui, S.A. (PASA) who will have the responsibility to investigate the concession granted by the former administration, and to conduct this important marine terminal.

MISCELLANEOUS

Conferences Sponsored by Sabatino Pizzolante Attorneys’ Office

Our law firm aware as it is about the need to promote within the maritime community, the study of different aspects of the business, has recently sponsored two conferences given by Dr. José María Alcántara González, senior partner of the Spanish law firm AMYA from Madrid. “The Legal Implications of the ISM Code” and “The Maritime Arbitration as a Mechanism for Resolution of Conflicts” were the subjects dealt with by Dr. Alcántara at the High School for the Merchant Marine (Caracas) and the Chamber of Commerce of Puerto Cabello.

New E-mail address for Sabatino Pizzolante

Our former Internet provider ceased to operate in Venezuela by December 98, in view of which our E-mail has changed to: mail@sabatinop.com

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