

November 1, 2016

## Legal Update

### *Court of Appeals Annuls Regulation that Allows the Ports Authority to Collect From Cargo Importers an Enhanced Security Fee*

For years now, the Ports Authority together with the Department of the Treasury of Puerto Rico have been collecting an enhanced security fee (“ESF”) over all cargo entering the ports of San Juan. Purportedly, this ESF would permit the scanning of containerized cargo to help prevent contraband and potential terrorist acts. But since the enhanced security fee is collected over all cargo entering the port and only a fraction of it is subject to scanning (because bulk cargo is never scanned and scanners are placed in only three entry points), a firm and final federal decision upheld by the Court of Appeals for the First Circuit prohibits the collection of the fee from any shipper whose cargo is not subject to scanning. Reichard & Escalera represented plaintiffs, a group of shippers and merchants, in that successful litigation.

Now the collection of the enhanced security fee has received another blow.

On October 28<sup>th</sup>, 2016 the local Court of Appeals issued a judgment regarding the Ports Authority administrative regulation for the collection of the ESF. This decision is unrelated to the federal decision referred to above.

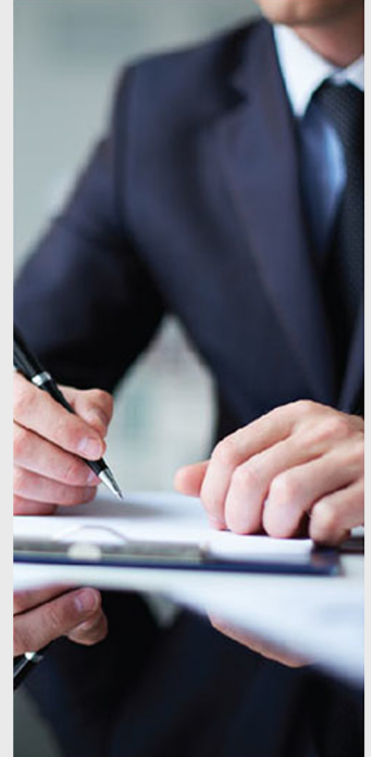
The local case was initiated by the Cámara de Mercadeo Industria y Distribución de Alimentos (“MIDA” by its Spanish language acronym) under the local Uniform and Administrative Procedure Act (“LPAU” by its Spanish language acronym). The case challenged the way in which the regulation that allows the Ports Authority to collect the ESF was extended beyond its expiration date. Several points warrant attention.

First, the court rules that any party can use the LPAU to challenge the procedural requirements necessary for the valid enactment of an administrative regulation. In other words, the judicial review mechanism of LPAU to question approval irregularities is available to all.

Secondly, the court rules that in this case the regulation in place had a specific expiration date of June 30<sup>th</sup>, 2014. The Ports Authority did nothing to extend that expiration period before the conclusion of the same although it was specifically authorized to act in such a way. The Ports Authority waited several months after the expiration of the original term to then invoke a special procedure under the law to have the Governor order the extension of the regulation as a matter of emergency.

The Court of Appeals concludes that by the time the Ports Authority decided to act it was not authorized to do so since the regulation had already expired and did not exist, thus was not subject to extension.

The result of all this is that the Court of Appeals declared the extension of the regulation null and void and also annuls the registration of the same before the



For more information on this Legal Update, please contact:

#### **Rafael Escalera**

[escalera@reichardescalera.com](mailto:escalera@reichardescalera.com)  
787.777.8877

#### **Sylmarie Arizmendi**

[arizmendis@reichardescalera.com](mailto:arizmendis@reichardescalera.com)  
787.777.8824

Department of State expressly prohibiting the Ports Authority from acting in any way to execute any procedure under the regulation whose radical nullity has been declared.

This decision is of course of great importance to all entities bringing cargo into the San Juan Port. Although the decision is subject to review by the Puerto Rico Supreme Court it is possible the Ports Authority will not be entitled to continue collecting the ESF. Latest information is that the Ports Authority seeks to continue collecting the ESF. Cargo importers should review their internal invoice handling procedures to account for the above.

Lastly, the procedural mistake that the Ports Authority made can be easily corrected with the proper enactment of a new regulation. Of course, the same would be subject to hearings and objections in which the impact of the federal decision on collection practices can be raised. Notably, after years of scanning the inspection has yet to produce detection of one single incident of contraband, drug smuggling or terrorist acts.

---

This communication is for information purposes only and does not constitute legal advice. This communication may be based on authorities that are subject to change and is not a substitute for professional advice or services. You should consult a qualified professional advisor before taking any action based on the information herein. This communication does not create an attorney-client relationship between Reichard & Escalera and the recipient.

[Unsubscribe.](#)