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SABATINO PIZZOLANTE MARITIME & COMMERCIAL ATTORNEYS

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Commercial Ports on the focus again...

The recentralization of ports finally came into effect, following the amendments to the Law of Decentralization and the General Law on Ports passed by the National Assembly. The legislative body answered in this way to the request made by the Supreme Court of Justice in sentence of 15th April 2008 to amend the said legal instruments, in order to acknowledge that the Executive had the powers to intervene the port services and even to revert the public ports from the regions' administration to the central government, in a rather strange interpretation of the Constitution. Shortly after the amendments were in effect, the legislative body agreed on the reversion of the ports, so that the regional states lost control over them, now under the control of a company called Bolivariana de Puertos, S.A. which was incorporated to carry out the administration and maintenance of the reverted public ports. Port productivity and operations in general were experiencing significant problems in the last years, leading to lessened port performance and congestion; so changes were needed and no one can deny that; however, there has been lack of information about the scheme the new centralized port authority has in mind, giving raise to a great degree of uncertainty within the maritime community. It is not clear what will happen to the private sector rendering stevedoring and storage services for almost two decades, and there is no indication about the degree of freedom that the local ports will have to run daily activities. Let's hope the new scheme is able to introduce the needed changes to improve port services and productivity, avoiding policies which may be a remembrance of the old days of the National Institute of Ports...

SHIPPING

The Organic Law that Reserves for the State Assets and Services related to Oil Primary Activities allows the expropriation of vessels at Lake Maracaibo

The Organic Law that Reserves for the State Assets and Services related to Oil Primary Activities (Ley Orgánica que Reserva al Estado Bienes y Servicios Conexos a las Actividades Primarias de Hidrocarburos), published in Official Gazette No. 39,173 dated 7th May 2009, is fully enacted.

Through the newly enacted law (Article 1) the activities described there are reserved to the State, and will be executed directly by the Republic, PDVSA or filial companies to be designated, or mixed companies under the control of PDVSA.

As per article 2 the assets and services under the scope of the law are:

1. Water, steam and gas injection facilities that enhance reservoir recovery.
2. Gas compression.
3. Assets linked with activities in Lake Maracaibo: Boating for the transport of personnel, divers and maintenance, barges for the transport of supplies, diesel, industrial waters, etc., tugs and barges for the laying of pipes and cables, workshops for maintenance of vessels and dry docks of any nature.

The Ministry of Petroleum will determine, via a resolution, which assets and services of companies or services will fall under the reservation prescribed by the Law. According to article 3 contracts relating to the assets and services subject to this reserve shall be deemed as

administrative law contracts. Such contracts will automatically expire upon the enactment of the resolution that lists the assets and services that fall under the reserve set forth in the Law.

As per article 4, following enactment of this legal instrument, PDVSA will enter into possession of the assets and will take control of the operations referred to.

Pursuant to article 5 assets and services connected to primary oil activities are declared public utility, while article 6 states that the National Executive through PDVSA could expropriate partially or totally the shares and the property of the companies rendering the services above mentioned, through the Law of Expropriation for Public or Social Utility, subject to the payment of the value in books of the goods, deducting the labor and environmental passives.

Loss of profit will not be compensated. Time of possession of the assets will be taken into account to calculate the compensation. Payment may be made in cash or with delivery of governmental debt or bonds. The assets will be transferred on a tax-free basis.

Ministry of Petroleum will determine which employees PDVSA or its affiliates will retain as a consequence of the asset transfer, as stated in article 10.

Finally, as per article 11 the facts, activities and contracts object of the present law will be governed by the laws of the Bolivarian Republic of Venezuela and the controversies will be dealt with exclusively and in excluding way by the domestic courts.

On 8th May 2009 the Ministry of Petroleum published in Official Gazette No. 39,174, Resolution No. 051 with the first list of specific assets and services related to primary oil activities subject to the reservation prescribed by the Organic Law Reserving for the State Assets and Services related to Oil Primary Activities. This list would be completed by Resolution No. 067 published by the Ministry of Petroleum in the Official Gazette No. 39,183 dated 21st May 2009. A total of 73 companies were affected with the new regulations and consequently PDVSA entered into possession of its assets (personnel and supply boats, tugs, barges, etc) undertaking the operations.

The process through which PDVSA entered into possession of the vessels belonging to the different affected companies was rather traumatic, and the consequences difficult to assess as there is lack of reliable information at hand.

There are press reports according to which following seizure of assets by PDVSA a significant number of boats for personnel had its engines out of order due to negligence of the crew and the lack of expertise of new masters in charge, but again these are press reports not confirmed yet.

PORTS

Amendments to the Law for Decentralization and the General Law on Ports allow the reversion of administration of commercial ports by regional States.

The port scheme adopted in Venezuela towards the end of 1991, gave rise to regional port bodies acting as “landlord port authorities” with the presence of “port operators” in charge of stevedoring and warehousing or terminal services. Consequently, carriers are obliged to handle cargo to a registered private port operator, since the public port authority does not perform handling operations. Generally speaking since then port operators are free to arrange their stevedoring and warehousing services, they have also being able to agree with the carriers on procedures for reception and delivery of cargoes, entering into terminal contracts to this end. This mechanism, on the other hand, allows for the carriers to recover unpaid freight, demurrage and other charges as well as to ensure delivery of cargo to the person entitled to.

On 17th March 2009 amendments to the Law of Decentralization, Delimitation and Transference of Competences of National Public Powers, as well as to the General Law on Ports were published in the Official Gazette No. 39,140. Said amendments aimed to enhance the powers of the National Executive to: 1. Revert the control over regional public ports such as Puerto Cabello, Maracaibo and Guamache, among others, to the central government for strategic reasons, merits, opportunity or convenience; and, 2. Intervene the assets and services in order to guarantee the quality of services and to safeguard constitutional rights.

Consequently, pursuant the above amended laws the National Assembly agreed to revert the port infrastructure of the port of Puerto Cabello (Carabobo State), Maracaibo (Zulia State) and Guamache (Nueva Esparta State) to the power of the State, a reversion process published in the Official Gazette No. 39,143 dated 20th March 2009. The National Assembly also agreed on the reversion of the port of La Guaira (Vargas State) as published in the Official Gazette No. 39,196 dated 9th June 2009. Public ports of Guanta and Guanao still remain under the control of the regional states of Anzoategui and Falcon respectively.

The National Executive, now controlling the reverted public ports of Puerto Cabello, Maracaibo, Guamache and La Guaira has established a national company called Bolivariana de Puertos, S.A. (Ascribed to the Ministry of Public Works and Housing) in charge of the administration, development, maintenance and conservation of these public ports, which organizational structure is depicted in the Official Gazette No. 38,146 dated 25th March 2009.

As part of the reversion process, regional port authorities have been replaced by Commissions of Reversion at the ports of Puerto Cabello, Maracaibo and Guamache, although port operations are still in the hands of the private

port operators with little variations with the exception of Maracaibo as it will be explained below.

Nevertheless, it is important to point out that reception and delivery of cargo and the operations in general may be subject to important changes in the coming months, as the Venezuelan port system is advancing through significant organizational changes.

Thus, on 10th June 2009 the Ministry of Public Works published the Resolution No. 112 (Official Gazette No. 39,197) whereby a process of revision of the existing contracts for warehouses and container terminals within the ports is in effect. At the port of Maracaibo, for example, Bolivariana de Puertos instead of advancing a process for the revision of the said contracts has simply proceeded with the intervention of the terminals, taking complete control of the operations a few days ago, to the extent that the procedures for reception and delivery of cargo in that port are under review. In other words, in the port of Maracaibo storage is now being performed by the public port authority, the so called Bolivariana de Puertos, S.A. and it is not in the hands of the private sector anymore. Therefore, it is suggested to shipping lines to discuss with local agents the changes for reception and delivery of cargo in this port, insurance aspects, etc. following the intervention of the yards.

It is unknown whether the same will happen at other ports such as Puerto Cabello and La Guaira, but the possibility might be for private terminals to disappear or to reduce in number, since at the port of Puerto Cabello there are 30 warehouses and container yards within the port area, whereas at the port of La Guaira the number is 42.

However, it is important to point out that the new port authorities at Puerto Cabello have insisted that there will be no intervention process like the one that took place at Maracaibo; instead, the authorities there are said to be embarked in the revision of the existing contracts for a period of 30 days and after this they will take decisions which may involve the permanence of few port operators or the taking over of full control of operations by the public port authority.

If this is the case, and only if container yards come under control of Bolivariana de Puertos, S.A. no doubt the whole process for reception and delivery of cargo will need to be reviewed in the rest of the ports, and the carriers are suggested to discuss this matter with their agents as a matter of urgency, as an increase in cargo loss (pilferage) and damages might be expected, and in the early stages it is unlikely that Bolivariana de Puertos, S.A. has proper insurance.

Again, as port operations at Puerto Cabello and La Guaira are still in the hands of the private port operators there are literally no changes, but this could vary overnight.

There have been some conversations advanced by the Venezuelan Shipping Association with Bolivariana de Puertos, S.A. to discuss operational aspects of the new scheme, although no clear guidelines have come up yet.

US imposes security restrictions to vessels coming from Venezuela

The Coast Guard has determined that ports in Venezuela are not maintaining effective anti-terrorism measures. Consequently, on 9th January 2009 the US Homeland Security published in the Federal Register a new regulation imposing conditions of entry on vessels requesting entry into the United States arriving from Venezuelan ports. The Coast Guard has been the agency appointed to monitor the restriction. With effect from 23rd January 2009, the following restrictions will be imposed on vessels that include a Venezuelan port in last five port calls:

- 1) Vessels must implement measures for the ship's security plan equivalent to Security Level 2 while in a Venezuelan port;
- 2) Vessels must ensure that each access point to the ship is guarded and that the guards have total visibility of the exterior (both land-side and waterside) of the vessel while in a Venezuelan port;
- 3) Guards may be provided by the ship's crew, however, additional crew members should be laced on the ship if necessary to ensure that limits on maximum hours of work are not exceeded and/or minimum hours of rest are met, or provided by outside security forces approved by the ship' master and Company Security Officer;
- 4) Vessels must attempt to execute a Declaration of Security while in a Venezuelan port;
- 5) All security actions must be entered in the ship's log;
- 6) Actions taken must be reported to the cognizant US Coast Guard Captain of the Port prior to arrival into US waters;
- 7) Based on the findings of the Coast Guard boarding or inspection, vessels may be required to ensure that each access point to the ship is guarded by armed private security guards and that they have total visibility of the exterior (both land-side and waterside) of the vessel while in US ports. The number and position of the guards has to be accepted by the cognizant Coast Guard Captain of the Port prior to the vessel's arrival.

The regulation under comment further states that procedures outlined must be followed by vessels that are in a Venezuelan port on the date coming into affect or that arrive in a Venezuelan port after that date.

CUSTOMS

Fines commonly applied to carriers under Venezuelan law

Fines applicable to carriers are basically prescribed by article 121 of the Organic Customs Law, dealing with the sanctions to the so-called auxiliaries of the customs

administration, comprising transport operators, freight forwarders, carriers, customs agents, international couriers, storagemen and warehousemen. Six events are described as giving rise to the application of fines; of these two are of particular interest to carriers.

The first one is that prescribed by article 121, numeral 3, related to cargo shortage or that cargo discharged in excess and not declared or declared beyond the period prescribed by the regulations. The absence of or an untimely declaration is subject to a fine equivalent to five (5) tributary units per kilogram of gross weight; therefore, the kilos difference is multiplied by 5 T.U, and then the figure is worked out in its equivalence into Bolivars. The tributary unit (T.U.) is worth at the moment Bs.F. 55.00 or US\$ 25.58. Needless to say, that this fine may reach outrageous levels.

It is to be considered that international carriers must be represented before the customs office by a ship agent who is vicariously liable, as per art. 13 of the Organic Customs Law, then the fine is liquidated and notified upon this agent.

Unfortunately, the lack of clear criteria and guidelines at the different customs offices has led to the unjust application of this fine. For instance, it has been applied not only to cargo shortage or cargo discharged in excess, but also to cases of letters of correction of bills of lading, involving discrepancies in kilos and packages, so once cargo has arrived to the port, letters of corrections have been filed with the customs office, and taking into account that this may result in differences in kilos and packages, the said fine is imposed. In this specific case, there have been serious doubts about the rightful application of this, since the event is not a case of cargo shortage or that discharged in excess as defined by customs legislation (“sobrantes” and “faltantes”); instead, it would appear that the case has to do more with a material error in the bill of lading. Unfortunately, there are contradicting interpretations made by the different customs offices of the country about the scope of this fine since the customs law was enacted back in 1998. For instance, the fine has been imposed to a carrier who unloaded a defective reefer and did not notify the authority about it until he was requested to ship it to continue the voyage. Therefore, carriers are advised to discuss with their local agents any correction of bills of lading needed at the request of shippers or consignees.

Another fine of interest for carriers is that prescribed by article 121, numeral 6, related to acts which may prevent or delay the exercise of the customs powers, equivalent to a figure ranging between 100 to 1,000 tributary units, and which initially applied the middlemost i.e. 550 tributary units. This fine can be applied in those cases where carriers incur in conducts that prevent or delay customs clearance and so, the exercise of the customs powers by the authority.

Recently, and besides the above sanctions, carriers have been subject to the application of a customs fine for the permanence of containers within the national territory

beyond the allowed 90 days following arrival, taking into account that article 79 of the Regulations to the Organic Customs Law restricts the permanence of containers within the Venezuelan territory to three (3) months after arrival to the country: This means that containers introduced to the country in the normal course of international trade, have to leave the territory within this period of time since, otherwise, these containers will be retained by customs and a fine will be applied to the responsible party, i.e. carriers and agents. According to the criterion followed by the Seniat the breach of the former provision gives rise to the application of the sanction prescribed by article 118 of the Organic Customs Law, according to which: “The lack of re-exportation or legal nationalisation, within the allowed period of time, of goods introduced under temporal admission regime, or its use or destination for different purposes than those considered for the granting of the respective permit, will be sanctioned with fine equivalent to the total value of the goods”. The customs generally assigns to a 20’ box a value of US\$ 1,800.00 and to a 40’ box US\$ 2,500.00, so this fine may also reach significant levels.

Nevertheless, it is important to point out that this reasoning by the customs authority has been already successfully challenged in court by this law firm, arguing the fact that article 118 does not apply to containers which are used as means of transport, not being merchandise.

Therefore, it could be advisable for carriers and their agents to keep strict equipment control to avoid the permanence of containers beyond the three months allowed time, seeking legal advice to exercise the legal remedies to annul the fine or to reduce it.

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