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SABATINO PIZZOLANTE MARITIME & COMMERCIAL ATTORNEYS

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Re-think the commercial ports...

Those criticizing for years the port decentralization process for being a constant exercise of trial and error, now see with concern that in the months following the re-centralization of ports, same philosophy has prevailed to the detriment of the service. A precious time has been lost, important assets at risk and even so the port authority does not disclose that it will be done to resolve the situation. We may not share the unconstitutional way that wiped out the previous scheme, as well as the unorthodox manner as the private sector was deprived of its assets, but an undeniable fact is that like never before this is a paramount opportunity to establish a new port model, to overcome the errors of the past, that is the operational, labor and pricing distortions to make way for efficient and competitive ports, generating wealth for the people and the cities. As it might be expected changes would be difficult, but it is also worth to ask ourselves: Why it had to be so traumatic? Some believe that this was the only way to allow the ports to rebirth as the phoenix. Others think it could be done differently, pursuing the same goal: modern ports and capable of fulfilling its economic and social role.

Great expectations have now the maritime community with the appointment of the new President of the agency in charge of the port affairs, the so-called Bolivariana de Puertos, S.A. Let's wait again...

SHIPPING

Carriage of Passengers under Venezuelan law

The Law on Maritime Commerce published in Official Gazette No. 38,351 dated 6th January 2006, has incorporated the provisions of the Athens Convention in its Chapter V, governing the contract for carriage of passengers which is defined as that celebrated between the carrier or on his behalf in respect of carriage by water of one or more persons and their luggage in exchange for a consideration.

As per article 278 "carriage of passenger" comprises the following periods:

1. In respect of passenger and his cabin luggage, the period while this is on board of the vessel or on any vehicle or devise of access to come on board or disembark, and that period in which the passenger and his cabin luggage are carried by water from or to the vessel, always when the price of this service is included in the passenger's ticket or the vehicle used to perform this carriage has been put to the disposition of the passenger by the carrier;
2. In respect of the passenger, the period of carriage does not include that period when the passenger is at a terminal, maritime station, berth or any other port premises; and,
3. In respect of luggage which is not cabin luggage this includes the period starting when the carrier, his employees or agents have taken care of the luggage while ashore or on board through the time when this luggage is returned to the owners.

Provisions state that the carrier must hand to the passenger a ticket as proof of the contract and a bill of transport wherein that luggage which is not cabin luggage is properly described. The omission of these obligations shall

prevent the carrier from exercising a limitation of liability in respect of damages to the passengers and their luggage, whichever were the documents that the carrier omitted to deliver (Art. 279).

Resolution of the contract for carriage of passengers is also prescribed in Section II. Thus, according to article 282 if departure of the vessel from port of sail is delayed or the transport is definitely interrupted, the contract shall be resolved and the carrier must reimburse the price of the ticket at the request of the passenger. On the other hand, if the delay or definite interruption occurs during the voyage, the contract shall be resolved after the passenger has paid proportionately for the portion of the voyage effectively performed, except in those cases imputable to the carrier when the latter shall reimburse the entirety of the ticket price (Art. 283). If before sailing or during the voyage a temporary interruption occurs, the passenger is entitled to lodging and food on account of the carrier. Besides, in all cases when an interruption or delay occurs, the parties may agree the transshipment to another vessel for the culmination of the voyage, which does not imply any additional payment from the passenger. Article 286 states that in those cases related to interruption or delay, if the causes are imputable to the carrier, his agents or employees, the passenger may claim indemnification for damages. Even so, article 288 prescribes that the carrier is entitled to cancel the sailing of the vessel and this cancellation shall entitle the passenger to request reimbursement of payments made or indemnification for damages, except in those cases when this is due to fortuitous cause or force majeure.

Article 291 states that the carrier shall be liable for damages in respect of death or personal injuries occurred to a passenger or loss or damages to his luggage, if the incident which caused the damage occurred in the course of the carriage and the causes are imputable to negligence of the carrier, his employees or agents. The claimant must prove the damages and that the cause that originated them occurred during the course of the carriage.

Regarding the liabilities of the carrier as per article 295 the performing carrier shall not be liable for losses or damages in respect of monies, negotiable securities or precious objects unless they have been deposited with the carrier for safekeeping, custody or deposit. In this case carrier shall be responsible for up to one thousand two hundred (1,200) special drawing rights. Article 296 states that if the carrier proves that fault or negligence of the passenger has been the cause of death or personal injuries, loss or damages to luggage, and that this fault or negligence has contributed to the reason for claim, the tribunal deciding the cause may exonerate the carrier or lessen his liability, which ever corresponds, whereas the provisions also prescribe that indemnity paid by carrier in cases of death or personal injuries to a passenger may not exceed the amount of forty six thousand six hundred and sixty six (46,666) special drawing rights tributary units.

The limits of liability both for contractual and non-contractual liability of carrier in respect of loss or damages

to the luggage are found in article 299, indicating that it shall not exceed the following:

1. For cabin luggage, eight hundred thirty three (833) special drawing rights per passenger and per voyage;
2. Per vehicle, including luggage being carried inside the vehicles or on top of it, three thousand three hundred and thirty three (3,333) special drawing rights per vehicle and per voyage; and,
3. Per luggage, different from that mentioned in numerals above, one thousand two hundred (1,200) special drawing rights per passenger and per voyage.

Contractual and non-contractual liability of the carriers in those cases covered by articles 286 and 288 of the law shall not exceed three thousand (3,000) special drawing rights per passenger. Interests produced by the sum of damages and judicial costs shall not be included in the limitation of liability stipulated in the article under comment.

According to article 300 the carrier's or the performing carrier's employee or agent against whom an action for indemnification for damages is entered as provided in Chapter V, may exercise the same defenses and limitation of liabilities to which carrier or performing carriers are entitled whenever they can prove they acted within the scope of their employment, whereas article 302 the carrier nor the performing carrier or their employees and agents are not entitled to the benefit of limitation of liability if it is proved that death; loss or damages were the consequence of actions or omissions performed with the intention to cause such damages.

It is important to point out that the regime for liabilities shall be applicable notwithstanding that the action is founded in contractual liability, non contractual liability or any other cause (Art. 303).

Notifications of claim are prescribed by article 304 which requires the passenger to notify the carrier or his agent in writing of any loss or damage to the luggage, pursuant to the following dispositions:

1. If the damage is visible and affects the cabin luggage the passenger must make the notification while on board or before disembarking. This communication must be made before luggage is returned or at the moment when this occurs;
2. In the case of non visible damage or loss of the cabin luggage or luggage the communication must be made within the fifteen (15) days following the date of disembarking, the return of the luggage or the date when this return should have occurred;
3. If the passenger fails to comply with the disposition in this article the luggage shall be deemed to have been received in good conditions; and,

4. Written notification shall not be necessary when the cabin luggage or luggage is jointly inspected by the interested parties to determine its condition and it is found in satisfactory conditions.

The provisions are clear in establishing that the rights in favor of the passenger cannot be waived, to the extent that all stipulations pretending to exempt or lessen the carrier's liability or invert the burden of proof shall be deemed void and this shall not affect the existence of the contract or the contractual validity. The carrier and the passenger may agree, expressly and in writing, higher limits of liability than those established in the provisions.

Also, the carrier and the passenger may agree that the liability of the carrier is subject to a deduction which is not to exceed one hundred seventeen (117) special drawing rights in cases of loss or damage to the luggage. This amount shall be deducted from the amount of the loss or damage.

Time bar is set up by article 308, so the right to exercise any action for damages due to death or personal injuries or for the loss or damages to the luggage or to the cabin luggage shall prescribe after two (2) years have elapsed:

1. In the case of personal injuries, from that date when passenger disembarked;
2. In case of death or disappearance of the passenger occurring during the carriage, from the date that the passenger should have disembarked;
3. In case of personal injury occurred during the carriage which becomes the cause of death after the passenger disembarks, from the date of death, always when this lapse does not exceed three (3) years counted from the date passenger disembarked; and,
4. In case of loss or damages occurred to the luggage or cabin luggage, from date of disembarking or from that date when disembarking should have occurred, if this is a later date.

Articles 309 and 310 regulate other aspect of the time bar. It is stated that to determine reasons for the suspension or interruption of the prescription terms established, the law that rules the type of obligation shall apply. In no case an action may be entered pursuant to the chapter under comment after expiration of the three (3) years counted from disembarking of passenger or the date when disembarking should have occurred, if this is a later date.

On the other hand, the prescription period is interrupted by previous statement of the carrier or by agreement between the parties made after the cause giving rise to the action occurred, statement or agreement which must be made in writing.

Finally, article 311 states that the carrier may not retain the luggage on board as a guaranty for payment of ticket price.

Does the Venezuelan Law prohibits the release of a container if the original B/L is missing?

Insofar as maritime legislation there is no specific provision dealing with this subject, so there is no prohibition as such to deliver a container if the original BL is missing. It would be possible to use a non negotiable copy certified by the local ship agency or even written instructions to the terminal.

Nevertheless, from the customs point of view the situation is different, as domestic legislation (Art. 98 of the Regulations to the Organic Customs Law) requires that for receivers to be able to manifest the cargo before the customs office an original BL is needed; however, said provisions state that when the consignee has not received the original BL, cargo manifestation can be done through the submission of a statement proving payment of merchandise issued by the bank or the seller. Art. 103 of the Regulations further state that if the original BL is not available the withdrawal of cargo can be made by submitting a bond or the value of goods, plus freight and insurance, in which case one the original BL is submitted the bond is released or the money returned.

Note that this mechanism is rarely used and to some extent conditioned by the new practices, as today the automated customs system (Sidunea) allows to transmit electronically the BL even in cases where only a non negotiable copy is in the hands of the customs agents. If shipment is green color there will be no need to present original documentation to the customs office, and even if there is need to do it, there is the possibility to make arrangements there to by pass the need to present the original BL to the customs officials.

In any case the only guarantee that the carrier has in this event it is to instruct its terminal nowadays Bolipuertos, S.A., to request the original BL for delivery of cargo, or at least a certified copy of a non negotiable issued by ship agents upon instructions by the carrier of course.

PORTS

Nationalization of Warehouses, Silos and Yards within public ports

In our *Sabatino Pizzolante Newsletter* No. 35 it was reported content of Resolution No. 112 issued by the Ministry of Public Works and Housing empowering the new national port authority —Bolivariana de Puertos, S.A.— to initiate the revision of all contractual arrangements between the port operators and the repealed regional port authorities through which they had control on warehouses and container yards.

As a result of this process of revision Bolivariana de Puertos, S.A. has now taken over control of all warehouses, silos and yards within public ports of Puerto Cabello, La Guaira, Maracaibo and El Guamache, pursuant Resolution No. 192 published in the Official Gazette No.

39,231 dated 30th July 2009. Consequently, the day after and in a rapid move, commissions showed up at each warehouse and container yard to replace the acting manager by a public officer in charge of the facility, informing all the personnel about the taking over process and inviting them to be part of the staff of Bolivariana de Puertos, S.A., and signing a document for delivery of the facility with inventory of existing furniture, machinery and cargo.

According to Resolution No. 192, and for the purposes of ensuring continuity of service, Bolivariana de Puertos, S.A. shall take all necessary steps to that end, with broad powers to ensure that all assets destined for the operations relating to warehouses, silos and yards such as machinery, elevators, forklifts, etc. are "temporarily retained to continue an efficient service". Under this provision port operators have been deprived from their assets, now under the care and custody of the public port authority, until defining its legal status according to the guidelines of the National Executive.

A noticeable point is that this "temporal retention" of assets cannot be regarded as a confiscation, taking into consideration that article 5 of the resolution states that in respect of the port equipment, Bolivariana de Puertos, S.A. is authorized to purchase or lease some of the retained equipment, for which negotiation can be advanced with the owners, otherwise the expropriation process would take place. Assets could be also returned to the owners as prescribed by the resolution.

It should be noted that the said Resolution No. 192 authorizes Bolivariana de Puertos, S.A. to take over only the warehouses, silos and yards, from which a strict reading would lead to conclude that the loading and unloading of ships or stevedoring services in general will continue at least for now in the hands of the private port operators; nevertheless, there are no clear rules as to how they will carry out these tasks as their equipments are retained by the port authority, and what it is more worrying there are already reported cases showing that Bolivariana de Puertos, S.A. is offering stevedoring services preventing private port operators from doing so.

No doubt that this process of nationalization of warehouses and container yards will affect the reception and delivery of cargo at Venezuelan ports as well as the stevedoring services, and the existing contracts between shipping lines and port operators, for which reason the shipping lines are strongly suggested to discuss this matter with their agents and port operators.

Puertos del Alba, S.A. established by law

Decree No. 6839 dated 28th July 2009, creates the legal entity Puertos del Alba, S.A., whose two partners are Bolivariana de Puertos, S.A. (51%) and the Cuban entity ASPORT (49%), the company aiming to modernizing, equipping and construction of ports in Venezuela and in Cuba, and the development of engineering projects, development plans and managing funds for such purposes.

It is necessary to point out that the administration of Venezuelan ports and the provision of port services, still continue entrusted to the company Bolivariana de Puertos, S.A., who has the control of public commercial ports such as Puerto Cabello, La Guaira and Maracaibo, among others.

Puertos del Alba, S.A., on the other hand, replaces the former Bolivariana de Puertos, S.A. with the same object and the Venezuelan-Cuban participation was created in 2007 through Decree No. 5380 published in the Official Gazette No. 38793 dated 12th June 2007.

Therefore, it is not correct to argue that the public ports throughout the country or 49% of them, have been transferred to Cuba, following the taking over of warehouses and yards last July, as this process was exclusively carried out by Bolivariana de Puertos, S.A. who has participation now in Puertos del Alba S.A.

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