

# SABATINO PIZZOLANTE NEWSLETTER

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**MARITIME AND PORT AFFAIRS - INTERNATIONAL TRADE - CUSTOMS**

## **SABATINO PIZZOLANTE MARITIME & COMMERCIAL ATTORNEYS**

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### **Merchant Marine: A New Anniversary...**

In the 1970s Venezuela had a national shipping company, corner stone of its merchant marine, the so called Compañía Anonima Venezolana de Navegacion (CAVN), which was clever enough to take advantage of the cargo reservation policies and other restrictions on foreign capital imposed to the shipping industry, much in vogue at the time contained in the Law on Protection of National Merchant Marine. It seems contradictory that the cargo reservation policies originally designed as the ideal mechanism to allow access to new suppliers to the maritime transport services, introducing competition in the market, eventually ended up giving rise to shipping companies relying on such privileges rather than rendering good and competitive services. The Andean merchant marines were unable to develop their fleets, which disappeared mainly with the liquidation of state-owned shipping companies, including the CAVN whose performance was characterized by bad management and rampant corruption. These also were unable to cope with the intensive capital that characterizes the carrying of containers, failing to understand the dynamics of this traffic. Blaming the big liner companies for the disappearance of the regional fleets, instead of assessing the mistakes incurred in the past, is a simplistic and quite ignorant way to evaluate the issue. Plenty to think for the advocats of the cargo reservation law, who insist that this will ensure the rebirth of our merchant marine.

### **SHIPPING**

#### **Provisions governing the legal regime for carriers or NVOCCs operating containers intermodally to inland destinations**

Some shipping lines as part of their services may arrange the sale of freights with inland place of delivery, to this end it is often the use of related logistic companies or sub-contracting such transportation to third parties. Consequently, it is worth to look at the domestic applicable legal regime. In Venezuela there are no special provisions for carriers or NVOCCs operating containers to inland destinations. Inland transportation can be freely arranged by the former, sub-contracting the trucking service either on behalf of the carrier, or the cargo interest. As there is no specific provisions to this field, loss of cargo and/or containers are subject to general rules concerning civil law.

However, it is important to point out that land transportation arranged by ship operators or NVOCCs in the context of a through B/L will usually find a practical problem in the customs legislation. Thus, when cargo moves in transit through the national territory, the consignee must present the guarantee to cover the forwarding of goods to final destination (art. 45 of the Organic Customs Law). The former is usually done by depositing a cash amount for the duties and taxes or by using a permanent bond filed with the customs administration; in other words, the law does not allow the carrier to file this guarantee, for which reason some shipping lines offer the trucking service once cargo has been subject to customs clearance.

Generally speaking it could be said that liability for trucking companies as per domestic law is "ad valorem". No specific limitation of liability is prescribed by legislation for cargo loss or damage in land transportation. However, liability can be reduced by the terms and

conditions included in the transportation contract (carta de porte). Art. 156 of the Commercial Code states that this "carta de porte" may contain "the indemnity by the carrier for delay if prescribed, as well as any other condition agreed between the parties. The practice, however, supersedes the theory, since in rare occasions this "carta de porte" is issued, instead a "guia de despacho" is used with very little wording regarding limitation or liability aspects.

According to general rules of civil law, it can be argued that armed robbery could be regarded as a force majeure circumstance, provided such event is unforeseeable and unavoidable. Therefore, the facts leading to the robbery in itself should be carefully assessed. Unfortunately, domestic jurisprudence gives very little guidance about the matter, but there is legal basis to support this view from the doctrine standpoint, as well as some provisions included in our civil legislation, as the one prescribed by article 1272 of the Civil Code: "The debtor is not obliged to pay damages when as a consequence of a force majeure or act of god, is not able to give or to do that to which he was obliged to...". Furthermore, article 1271 of the Civil Code, prescribes the principle what it is known as "strange cause not imputable" (causa extraña no imputable), within which the force majeure and the "act of a third party" are included as mechanisms to exonerate the debtor for the execution of the obligation, as well as the delay in the execution.

It is important to point out that in the particular case of land transportation, the Commercial Code states in article 173, that the carrier is responsible for the loss or damage to goods, or the delay in the carriage, unless it is proven that such loss, damage or delay are the result of a force majeure event, or due to vices of goods, etc. The last part of this article goes on by defining the *Acts of Force Majeure* are "those adverse accidents that can not be foreseen nor avoided, by the prudence and the proper means of the men engaged in the respective profession".

The same article 173 states that the carrier is responsible, however, if his fault would have contributed to the occurrence of the force majeure event; if he would have not employed all the diligence and skill to mitigate the event; and if in the transport and custody of the goods, he would not have proceeded with the diligence and care accustomed by the intelligent and cautious carrier. Therefore, in the case of theft involving armed robbery (commonly taking place in land transportation) the force majeure argument could be raised as a line of defence.

In addition to the above, it is customary for small trucking companies or "one single truck" companies to use a statement in the haulage receipt according to which "cargo travels at consignees' risk", condition which is usually rejected by cargo interest.

It is unlikely the use of the limitation of liability/defenses under a through B/Lading in the event of cargo loss or damage, due to the lack of express provisions and legal precedents. Only port operators are entitled to invoke the limitation and defenses prescribed in Title IV of the General Law on Ports, when trucking is hired on behalf of

the carrier or the cargo owner, but this provision is still waiting for the regulations to be workable.

With regard to insurance cover against third party liabilities arranged by truckers, in the event of the container being involved in a road mishap, the domestic legislation is vague when dealing with the compulsory insurance for land transportation due to recent legislation enacted in this filed, entitled "Law Transit and land Transportation". Article 35 of this legal instrument states that every vehicle destined to land transportation must have a third party policy to cover damages to the State or to individual or particulars; nevertheless, the Regulations to this law, which have not been enacted yet, are the ones which will set up the types and minimum amount of securities for each vehicle and use. Despite this, it is possible that some trucking companies may have insurance cover to protect against third parties, but in most case when dealing with "one single truck" companies this cover is rarely at hand.

From our experience, in case of accidents owners/operators of the container/chassis may be exposed to an investigation by the prosecutor office, as well as to a lawsuit, the basis for this is the liability in respect of carrying unit; claimants usually try to get involved the strongest financial party, and this is usually the owner of the container/chassis. Obviously there are ways to argue these actions in legal terms, but in any case it would be advisable to carry out/arrange this inland transportation operation through a separate company aimed to the logistics side, different than the agency.

Theft is still a serious problem in the case of land transportation, although minimized nowadays by using escort services. Nevertheless, this problem can be tackled through good practices based on a sound monitoring. The practice by shipping companies offering inland transportation in Venezuela, it is to offer trucking services in short routes which can be accomplished during the day, avoiding haulage during the night.

### **Prohibition of cleaning/painting of hulls at Lake Maracaibo**

On 5<sup>th</sup> April 2010 the Harbour Master of the Port of Maracaibo, Captain Miguel A. Figueroa Adrian, issued an instruction to ship owners, managers, masters, ship agencies, navigating pilots, manoeuvring pilots and other users of the channel, prohibiting the cleaning of hull within the Lake Maracaibo, in compliance of provisions of the Law on Waters. Circular No. AJZL 003/2010 states, among other things, that considering that the Lake Maracaibo in one of the main hydrographical river basin of the country; that the Lake Maracaibo is a body of superficial waters subject to degradation by action and effect of introducing materials or substances that lead to induce conditions in this body of waters which directly or indirectly may result in damage to ecological balance and consequently develop in contamination of these waters; that at the Lake Maracaibo vessels' hulls are presently cleaned, hulls that are impregnated with hydrocarbons residues picked up while operating at Oil Terminals and

which are removed by chemical substances or some sub products of petroleum, that this activity implies spillage of substances into the waters which real effect its quality has not yet been analyzed by the competent organisms; and, that the removal of hydrocarbons residues from the hull of vessels as well as those of paint and upper works in port areas represents a technical activity known within what is called Integral Handling of the Waters on which the aquatic authority has not available the technical procedures, the methodology nor adequate normative, then it is necessary to establish and maintain appropriate guideline handbooks in respect of preservation and pollution of the waters.

Consequently, the Harbour Master decided to address to all the parties concerned, the following instructions with effect on 12<sup>th</sup> April 2010 onwards:

1. Cleaning and removal of hydrocarbons residues attached to the hull of vessels is not permitted while vessels are in operation or remain anchored in the waters of the Lake Maracaibo.
2. Scraping and painting of hulls of vessels operating in port areas is not permitted while vessels are in operation or remain anchored in the waters of the Lake Maracaibo except in those cases where repainting of draft or the name of the vessel is performed and this, with previous authorization of the aquatic authority.
3. The shipping agencies or the representatives of the vessel shall be responsible to divulge the contents of the said instructions.
4. Non compliance of the above provisions shall be cause for imposition of the corresponding administrative sanctions.

The Circular No. AJZL 003/2010 has caused some concerns among those navigating within Lake Maracaibo and calling at its different terminals (La Salina, Bajo Grande and Puerto Miranda) due to reported oil slicks found on the surface of the lake, staining the hull of ships which subsequently need to be cleaned up prior to departure. Although it has been learned of meetings between PDVSA and the maritime authority (INEA) to discuss the matter, it is not clear yet the available options to ships facing this specific problem.

The order is said to be aimed, however, to prevent that cleaning/painting takes place in the inner part of the lake, diverting such activities to be performed closed to the terminals' anchorage areas. As far as we know PDVSA has continued to undertake the cleaning up of hulls following the issuance of the instruction under comment. Ships trading in this area are suggested, therefore, to properly document/inspect the hull's stains and to report the matter immediately to the terminal for subsequent action.

## PORTS

### **Bolipuertos signs maintenance contract with Liebherr**

As it has been reported in the past, commercial public ports such as Puerto Cabello and La Guaira are under control of a new centralized state-owned company called Bolivariana de Puertos, S.A. which has been entrusted with the administration and operation of the marine terminals. In line with this, cargo handling equipment (shore cranes, RTGs, reach stackers, etc.) belonging to private port operators were retained by the former back in July 2009, pursuant to the regulations contained in Ministerial Resolution No. 192, in order to ensure the continuity of cargo handling operations, although according to the said provisions a process for the purchase, renting or expropriation of the equipments should be advanced at some point in time, still this is a pending step. Months after the taking over by Bolipuertos, S.A. many of the equipments are currently out of order or idle due to lack of maintenance and spare parts, causing serious operational problems. Fortunately, the new port administrator has recently announced that a maintenance contract has been signed with the manufacturer Liebherr, who will take care of the repairs, supply spare parts and to implement a maintenance program.

## MISCELLANEOUS

### **Electricity Crisis in Venezuela**

The international press has widely dealt with the electricity crisis experienced by the country in the last months. Although the government claims that Venezuela's electricity crisis is mainly caused by a drought linked to the "El Niño" phenomenon, some specialists also underline that the electricity sector has suffered for years of underdevelopment seriously impacting the country's hydroelectric power generation. The explanation lies upon the fact that 73 percent of electricity is coming from the "Guri" dam, which has seen a significant reduction of water levels to historic lows as a result of the drought, causing the dam to shut down some of its operations. The government has tackled the problem by implementing significant cuts in electricity production, and also promoting a national campaign for the good use of electricity, an important issue if it is borne in mind that its usage in Venezuela has increased 25% in the last five years. Thus, a rapid increase in demand, the lack of maintenance and investment in infrastructure and the driest season in years have combined to diminish the power generation.

Despite the efforts to reduce the consumption, and while new plants and generators powered by diesel, natural gas or fuel oil are bought by the government, President Chavez declared at the beginning of February a national emergency aimed to get more effective results. Thus, rationing measures have been introduced under daily basis through two to four hours power cuts in industrial,

commercial and residential sectors; however, the government's resolution to achieve results is backed with sanctions, penalizing households and businesses that consume more than a certain level with fines and suspensions, although the scheme also provides incentives for those able to cut energy consumption. Obviously, the plan is severely affecting the industrial production both in the public and private sectors, and also the commercial one, the state-owned aluminium and steel companies being particularly affected.

It is expected that with the coming raining season, the reduction in the consumption and the acquisition of the new power plants the country may overcome the crisis. Even so, the Minister of Electrical Energy, Mr. Ali Rodriguez Araque, announced that the electricity emergency plan will be extended for at least six months. However, it is important to point out that commercial ports, oil and dry bulk terminals as public utilities, have not been affected by the power cuts, and are normally working without affecting shipping activities.

### **New Exchange Rates implemented in Venezuela**

Since 2003 the government has implemented a rigid exchange control in the country aimed to regulate and impose restrictions on foreign currency exchange rates and the procedures used to obtain foreign currencies. For the administration of this scheme the so-called CADIVI was established, governmental agency with authority to sell US\$ to individuals and corporations. Up to 10th January 2010, US\$ sold by CADIVI used to have an official exchange rate of Bs.F. 2.15/US\$ 1.00. Nevertheless, in the Official Gazette No. 39,342 dated 8th January 2010 the Exchange Agreement No. 14 was published, through which the local currency Bs.F. was in practice devaluated, with application from 11th January onwards. The only one exchange of rate of Bs.F. 2.15/US\$ 1.00 is now replaced by a system with two types of exchange rates, in attention to the destination of the currency and the nature of the person using it, i.e. public or private sector. The first one was fixed at Bs.F. 2.5935/US\$1.00 for purchase and Bs.F. 2.60/US\$1.00 for sale; and the second one was fixed at Bs.F. 4.2893/US\$1.00 for purchase and Bs.F. 4.30/US\$1.00 for sale.

Generally speaking article 1 of the Exchange Agreement No. 14 sets up a rate of exchange of Bs.F. 2.60/US\$ 1.00 for the sale of foreign currency intended for imports of food, health, education, machinery and equipment and science and technology sectors, according to the commercial policy established by the national executive; remittances to relatives living overseas; payments on account of expenses of students overseas; payments in connection with health, sports, culture, scientific research, and other cases of special urgency to be considered by CADIVI; payments to retirees living abroad; and acquisition of foreign currency by diplomatic representations and foreign representatives of international agencies. A rate of Bs.F. 2.60/US\$ 1.00 was also established for the sale of foreign currency intended for the payments of the public sector other than the oil sector,

including the payment of the foreign public debt. A rate of Bs.F. 2.5935/US\$ 1.00 was established for the purchase of foreign currency obtained by the public sector other than PDVSA.

On the other hand, a rate of Bs.F. 4.30/US\$ 1.00 was established for the sale of foreign currency prescribed in the existing Exchange Agreements for transactions other than those prescribed in art. 1, whereas a rate of Bs.F. 4.2893/US\$ 1.00 was established for the purchase of foreign currency derived from the exports of the public sector other than the oil sector and also de exports of the private sector.

Since the introduction of the new scheme of exchange rates last January, there have been great confusion in the port and shipping sector as to what rate should be used for the conversion or calculation of port dues (usually established by the port tariffs in dollars), navigational aids dues, container demurrage and services in general. While ports now under the administration of centralized entity Bolivariana de Puertos, S.A. are using the rate of Bs.F. 2.60/US\$ 1.00 to charge for the port dues, OCHINA (Navy entity administering buoys, lighthouses, etc.) is using the rate of Bs.F. 4.30/US\$ 1.00. On the other hand, governmental entities importing goods such as PDVAL and Corporacion La Casa has directed the shipping lines to use the rate of Bs.F. 2.60/US\$ 1.00 for the container demurrage invoiced to them, contrary to what it should be the applicable rate of Bs.F. 4.30/US\$ 1.00 taking into account that this is a charge ancillary to the contract of carriage, i.e. definitely a service contract. Consequently, there is a significant degree of discretion by the public sector about the exchange rate to be used, for which reason weeks ago the Venezuelan Shipping Association requested a legal opinion from CADIVI to give some guidance on this matter, the one which is pending for answer. However, it has been generally accepted that for the purposes of conversion of Bs.F./US\$ for services rendered by ship agents to foreign carriers, the exchange rate to be applied is Bs.F. 4.30.

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