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MARITIME AND PORT AFFAIRS - INTERNATIONAL TRADE - TRANSPORT

SABATINO PIZZOLANTE - ASSOCIATED MARITIME CONSULTANTS

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Merchant Marine and National Policy....

In this country everybody seems to agree on the need for having a developed merchant marine, but few people seem to have the right formula for it. The *Congresillo*, the temporal legislative body until general elections take place in May, is currently considering the possibility of passing a piece of legislation entitled "Law for the Reactivation of the Venezuelan Merchant Marine", intended to set the general principles for the fostering of this sector. The proposed legislation reinforces the importance of shipping for the development of the country, seeking the exoneration of taxes to encourage the flagging of vessels in the national registry, among other measures. It is evident that a legislation like this has to be welcomed, particularly, in a country that has seen the vanishing of a fleet of more than 85 vessels in the last decade; however, it would be naive to think that the problem of our merchant marine will be solved just with an eventual tax exoneration. The taxation problem, of course, is very important but also the access to cargoes from the state-owned industries (oil, petrochemical and steel products), clear rules for registration, cabotage and transshipment, update of maritime legislation, etc.

More than a new piece of legislation, the country urgently needs a National Policy for the development of the merchant marine, able to harmonise the shipping and port interest, in the context of a well designed strategy for transportation. Time will tell us if this is possible....

SHIPPING

Vessel registration under Venezuelan flag

Vessel registration in Venezuela is governed by the rules inserted in the Navigation Law as well as Law for the Protection and Development of the Merchant Marine and its Regulation, the latter not yet amended. 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 17th 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 points a), b) and c);
- e) Vessel given under leasing agreement to any of the persons mentioned in points a), b) and c);
- f) Vessels or accessories of navigation (e.g. Barges) built in national drydocks.

This article overruled a former provision requiring that in the case of foreign legal entities, duly incorporated and domiciled in the country, not less than 80% of shares should be in the hands of national interest. Consequently, following reforms of the Navigation Law and the Law for the Protection and Development of the Merchant Marine, vessels operated under bareboat and leasing arrangements, now eligible for registration at the national flag, are

allowed to be engaged not only in international trade but also in cabotage operations. In the case of registration of vessels under bareboat or leasing agreements, then the relevant document will have to be submitted to the Ministry of Infrastructure (Dirección General Sectorial de Transporte Acuático).

According to article 152 of the Navigation Law amended in 1998, ship registration is exempted from payment of taxes, plus import duties on vessels for registration. Nevertheless, in practice these tax exemptions did not operate due to the gaps within the legislation, changes of it as well as the criteria followed by the customs authorities. It is expected that the enactment of the Law for Reactivation of the National Merchant Marine will settle this matter. Nevertheless, generally speaking, it has been said that a conservative estimate for vessel registration costs in Venezuela, is in the order of 21% of the vessel value.

In the case of vessels under bareboat or leasing agreements, since they will not be a definitive importation then the customs treatment to be applied is rather different. A recent legal *Opinion* prepared by the national Customs Office (Gerencia Aduanera - SENIAT) has clarified the customs treatment for these cases. Thus, in the event of registration of bareboat chartered vessels or those under leasing the applicable customs regime will be that of *Temporal Admission*, whereby the import duties will be suspended up to two years. The SENIAT has suggested that in those cases of bareboat over a two-year period of time, then the vessel can be re-exported before the expiration of that period of time, for instance to a near foreign destination and then brought again immediately as temporal admission. The SENIAT has further stated that in order to obtain the temporal admission authorisation for a foreign vessel under bareboat or leasing agreement, it is not a requirement to have it registered in the national registry. This means that in practice the vessel under bareboat or leasing agreement intended to be registered under Venezuelan flag, can be brought to the country to ask for the *Temporal Admission* to the customs office, and proceeding then with the steps to register the vessel at the Merchant Marine Registry.

Customs Fine for alleged cargo shortage lack of notification

The facts of this claim are related to a consignment of electrical appliances loaded into a container, initially manifested for a domestic port but not discharged following the instructions of the US Customs Authorities. As customary, the Master of the vessel proceeded to cancel or delete the particular consignment (B/L) from the Cargo Manifest by using a stamp, taken also the relevant bill of lading, all this before delivering the documentation to the local customs authority.

The former was regarded by the local authority as a customs infringement, due to the lack of notification of a cargo shortage within the period of time prescribed by law. Thus, proviso 121 of the domestic Customs Law (OCL)

prescribes that “infringement of customs rules made by haulage, consolidators, **Carriers**, depot and warehouse operators, customs brokers, international couriers, will be fined as follows:

c) When cargo (bultos) discharged in more or less quantity than the figures annotated in the cargo manifest, is not declared to the customs within the period indicated by the Regulations, with fine equivalent to Five Tributary Units (5 T.U.) per gross kilogram in excess or shortage...”.

A Tributary Unit (T.U.) is equivalent at the moment to Bs. 9,600 (roughly US\$ 16.13), but it should be borne in mind that this T.U. may be increased from time to time by the government. Consequently, a fine for US\$ 570,000.00, was applied pursuant proviso 121, letter c of the OCL. It is important to point out that from the legal point of view the fines prescribed by the OCL are quite strict in the sense that once verified the activity described in the rule, there is very little room to reject or fight it. Nevertheless, this particular case raises an important issue concerning the existence or not of a cargo shortage, taking into consideration the particular facts.

Shortage of cargo in the light of the customs legislation (*faltante*), technically speaking, takes place only when there is a difference between the cargo included in the manifest and that effectively discharged, either in shortage or excess. In this particular case, the consignment was cancelled from the cargo manifest, the respective bill of lading taken out from the set of B/Ls accompanying the manifest and the container remained onboard. Therefore, there was not any shortage of cargo, at least in the terms of the customs practice. The Venezuelan customs authority went on with the application of the fine, however, on the basis that the cancellation of the consignment in the cargo manifest, “was not valid to prove the willingness of the carrier for not having that shipment as embarked”.

Consequently, an action was brought against this fine by the carrier who contended, among other things, that cargo was discharged following instructions by the US Customs, for which a written confirmation was presented to the Court, as well as the non existence of a cargo shortage in the terms of the customs legislation. This matter is now awaiting for a court decision.

CONSTITUTIONAL LAW

New Venezuelan Constitution came into force

Venezuela has a new National Constitution, as approved by a referendum held on 15th December 1999, and published in Official Gazette No. 36,860, dated 30th December 1999. The new Constitution comprises three hundred and fifty (350) articles and eighteen (18) transitional provisions. Taking into account the impact that it might have upon Venezuela’s affairs it seems appropriate to have a brief view of it.

The Constitution changes the political and juridical structure of the country, which is now called the “BOLIVARIAN REPUBLIC OF VENEZUELA”; strengthens civil rights and guarantees, especially human, social and environmental rights and the rights of ethnic groups; accepts double nationality; expands the political rights of naturalised citizens; provides for referenda for consultation with and revocation by the people; creates new branches of government: the Citizens' and the Electoral; changes the legislature to a single house called the National Assembly; creates a Federal Government Council; changes the judicial system; sets the president's term in office at six (6) years, which may be followed by immediate re-election for no more than one additional term; establishes the office of Executive Vice-President; grants the members of the national armed forces the right to vote; establishes a single police force and changes the bodies in charge of security; and, in the area of economics, defines socio-economic, fiscal and monetary policies; and it enhances the role of the state in the economic life of the country, reserving certain activities for the state. The transitional provisions in the Constitution mention a number of issues that are not covered in the main body of the document, stating that they are to be dealt with in other laws. As a matter of fact the National Assembly is required to amend the main laws of the country within the time periods specified, i.e. from six (6) months up to two (2) years.

Given these changes in the political structures, new elections for President of the Republic, members of the National Assembly, governors, mayors, members of the state legislatures and municipal councils must be held on 28th May 2000.

Among the new features of the Constitution are:

1.- Economic Rights

The basic economic rights found in Chapter VII are:

Economic Freedom

The economic freedom granted by the Constitution allows everybody to engage in the economic activity of his preference and provides for government promotion of private enterprise.

Property Rights

The right to own property is guaranteed; this includes the right to enjoy, use and dispose of property. Properties of any kind may only be expropriated for reasons of public use or social interest, by means of a final court decision and timely payment. Confiscation of property is banned, except in the specific cases listed in the Constitution, i.e. property acquired as a result of crimes against the public treasury and from activities related with the unlawful trafficking of psychotropic substances and narcotics.

Monopolies

Monopolies and abuse of a dominant position are prohibited, and economic crimes, speculation, hoarding, usury and establishment of cartels are to be severely punished.

Consumer Protection

The Constitution includes provisions for the protection of consumers, who have the right to quality goods and services, adequate and non-deceitful information regarding the contents and characteristics of products and services.

2.- Socio-economic System

Title VI deals with the socio-economic system, based on a set of basic principles: social justice, efficiency, democratisation, free competition, environmental protection, productivity and solidarity, and mentions the following fundamental aspects:

Promoting Economic Development

It fosters joint endeavours by the government and private enterprise to promote harmonious economic development.

Activities Reserved for the State

The following activities are reserved for the state alone:

Use of trade policy in defence of the economic activities of public or private domestic companies; oil and other industries involving the extraction, services and goods that are in the public interest or are considered strategic. These activities are to be reserved by means of an organic law; all stock in PDVSA —the public state-owned company in charge of oil business— except for stock in subsidiaries, strategic associations, companies incorporated or to be incorporated in the course of PDVSA's business.

Foreign Investment Policy

Under the new Constitution foreign investors may not benefit from policies that are more favourable than those applied to nationals, and foreign investments will be subject to the same conditions as domestic investments.

Protection and Promotion of Activities

The state is to protect and promote the following activities:

Domestic manufacture of raw materials from non-renewable natural resources extracted in the country as a means for assimilating, creating and innovating technologies, creating jobs and well-being; agriculture and rural development; small and medium business, cooperatives, savings plans and community associations for work, savings and consumption; tourism, which is considered to be a priority and an activity that is in the national interest.

Policy on Latifundia

The latifundia system is declared contrary to the national interest and the Constitution calls for laws taxing uncultivated land and the measures necessary to turn such land into productive economic units.

3.- Contracts in the National Interest

Title IV, on the Fundamental Provisions on Government, includes a section with the rules governing contracts in the public interest, which are basically the following:

Requirements and Terms

- a) National public interest contracts must be approved by the National Assembly in the cases specified by law.
- b) National Assembly approval is required for contracts in the municipal, state or national public interest that are signed with or assigned to foreign states or official agencies or with corporations not domiciled in Venezuela.
- c) Certain conditions involving nationality, domicile or other requirements, or special guaranties may be required by law in the case of public interest contracts.

Immunity

The new Constitution provides for relative immunity of jurisdiction, with the same wording used in the 1961 Constitution:

"Public interest Contracts will be deemed to include, unless it were to be inappropriate given the nature thereof, and even if not expressly stated, a clause whereby any doubts or disputes that may arise in connection therewith and that are not amicably settled by the parties thereto shall be decided by the courts of competent jurisdiction of the Republic, pursuant to the laws thereof, and they may not give rise to foreign claims for any reason or cause whatsoever".

4.- Arbitration

Title V, Chapter III on the Judicial Branch and Justice System, provides constitutional backing for arbitration, settlement and mediation.

5.- Environment

The new Constitution contains a number of provisions on environmental rights and duties, among them:

The right to a safe, healthy and ecologically balanced environment; mandatory environment education at all levels in the educational system; protection of the environment, biological and genetic diversity, ecological processes, national parks and natural monuments and other ecologically important areas; the fundamental obligation of the government, with the active participation of society, to guarantee a pollution-free environment where the air, water, soil, climate, ozone layer, living species are awarded special protection under the law; development by the government of a territorial management policy that is based on ecological reality, among other factors; the obligation to present environmental impact and social and cultural studies in the case of any activities that could cause damage to ecosystems; the government's obligation to prevent toxic and hazardous waste from entering the country and to prevent the manufacture of nuclear, chemical or biological weapons; regulating the use, handling, transportation and storage of toxic or hazardous waste by means of laws.

PORTS

Port of La Guaira recovers from catastrophe

Operations at the port of La Guaira are getting into shape after completion of the repair works of the internal traffic ways, that divided the port into two sections. Recovery can be seen from the movements of 59 vessels served by the end of February and an increased number by the end of March. At least 10 Cruise vessels have arrived at the port after closure, and it is said that 11,000 containers were handled. Electricity problems have been solved and reefers stations are now working. Port and Harbour Master authorities claim that shipping lines are reassuring their calls at the port. Despite this recovery, however, security is still the main concern within the port area; in fact, there have been unofficial reports of at least one crew member murdered ashore. Therefore, it would be advisable for Members using this port, to warn crew members to go ashore with caution.

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