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SABATINO PIZZOLANTE - ASSOCIATED MARITIME CONSULTANTS

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The Aquatic Authority: Civil or Navy Responsibility....

According to an early draft of the Organic Law for Aquatic Spaces, the Ministry of Infrastructure is the entity in charge of the national aquatic and port policies, and the National Institute of the Aquatic Spaces (INEA) is being created to carry out such activities jointly with Port Captaincies. The INEA will regulate and control the aquatic navigation and port policies, therefore, it will plan, supervise, control and monitor all activities related to operations of ship of any nationality within the aquatic spaces and ports under national jurisdiction. However, one of the most widely discussed issues in the last months, has to do with the scope of responsibilities for the new aquatic authority to be set up by the Organic Law for Aquatic Spaces, and in particular, whether this entity is to remain in the civil sector, i.e. the Ministry of Infrastructure or, instead, whether it should be assigned to the Ministry of Defence under Navy's jurisdiction. As a matter of fact, a new draft of the law states that the aquatic authority will be vested with the Ministry of Defence through the Navy, and this has provoked an angry reaction from the Merchant Marine sector. What is to be the outcome of this whole situation is still unknown, but no doubt it would be most desirable that both parties find the right way out from the impasse in order to benefit our new born national merchant marine....

SHIPPING

Is there any restriction for foreigners in the ownership of a shipping agency

Changes introduced in the Law for the Protection and Development of the Merchant Marine were published in the Official Gazette No. 5,263 of 17th September 1998. Proviso 4 of the said legal instrument states that if the ship agent is a legal entity, at least 50% of the capital must be contributed by Venezuelans. It should be borne in mind that before the amendment made in 1998, foreign participation in ship agencies was restricted to just 20% of the capital.

Nevertheless, contrary to the treatment applicable to the company acting as ship agency (where there is this restriction for foreign capital), in the light of the Law for Navigation in connection with the Law for Protection and Development of the Merchant Marine, the company acting as shipowner/charterer can be owned in a 100% by foreign citizens. As mentioned before, from the reading of proviso 15 of the Law for Navigation is quite clear on the fact that a domestic company will be needed to register the vessel. Thus, article 15 of the Law for Navigation states that to register a vessel 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 the points a), b) and c); f) Vessels or accessories of navigation (e.g. Barges) built in national drydocks.

From the reading of letter c) and d) it is clear then that leaving aside the case of vessels which are the property of Venezuelan citizens and legal entities or bareboat chartered to them, the only way by which foreign registry vessels may be registered under national flag would be when those vessels are bareboat chartered by a foreign legal entity duly incorporated and domiciled in the country and chartered for a period over 2 years.

This law firm reminds foreign companies of the restriction prescribed by proviso 4 of the Law for Protection and Development of the Merchant Marine, whereby at least 50% of the shares must remain in national hands; otherwise, problems will arise during the process of registry of incorporation documents before the Commercial Registry and eventual review of the said documentation by the maritime administration may proceed.

1993 Andean Community issued Decision 487 on Maritime Guarantees (Mortgages and Maritime Liens) and Arrest of Ships

The 1993 Convention on Mortgages and Maritime Liens as well as the 1999 Arrest Convention have been incorporated to the Andean Community by Decision 487. Some of the main features of this Convention on Mortgages and Maritime Liens are briefly described below.

Chapter I deals with maritime mortgages. Thus, article 2 states that seagoing vessels may be subject to mortgages, provided that such mortgages have been effected and registered in accordance with the law of the State in which the vessel is registered. Article 3 prescribes that mortgages are effected through public document and must be deposited with the ship registrar to produce the effects that the Decision recognizes. The mortgages will not be valid nor enforceable before third parties until the deposit with the ship registrar is complied with.

Article 5 prescribes the elements that the mortgage document must contain, among them: (a) the name and address of the person in whose favor the mortgage has been effected or that it has been issued to bearer; (b) name and registration details of the ship; (c) GRT and characteristics of the ship; (d) the maximum amount secured and the date and nature of the contract through which the mortgage is effected.

Articles 13 prescribes the right for the mortgagee to take control of the ship. Accordingly, when the conduct of the mortgagor might jeopardize the mortgaged ship, the mortgagee will have the right to take possession and to commercially operate the vessel. In order to take possession of the ship, the mortgagee could arrest the vessel. Article 14 states that the mortgagee in possession of the ship is responsible for her loss or deterioration, even in those cases of *force majeure*.

Chapter II, on the other hand, deals with maritime liens. Thus, article 21 states that maritime liens charge the vessel

in special way without requiring public registration, and they follow the ship irrespective of changes of ownership, registration or flag, except where the ship has been subject to a forced sale.

Maritime liens are dealt with by article 22, stating that the following credits shall be secured by a maritime lien on the vessel:

(a) claims for wages and other sums due to the master, officers and other members of the vessel's complement in respect of their employment on the vessel, including costs of repatriation and social insurance contributions payable on their behalf;

(b) claims in respect of loss of life or personal injury occurring, whether on land or on water, in direct connection with the operation of the vessel;

(c) claims for reward for the salvage of the vessel;

(d) claims for port. canal. and other waterway dues and pilotage dues;

(e) claims based on tort arising out of physical loss or damage caused by the operation of the vessel other than loss of or damage to cargo, containers and passengers' effects carried on the vessel.

However, article 23 states that no maritime lien shall attach to a vessel to secure claims as set out in letters (b) and (e) arising out of or the result from: (1) damage in connection with the carriage of oil or other hazardous or noxious substances by sea for which compensation is payable to the claimants, pursuant to international conventions or national law providing for strict liability and compulsory insurance or other means of securing the claims; or (2) the radioactive properties or a combination of radioactive properties with toxic, explosive or other hazardous properties of nuclear fuel or of radioactive products or waste.

Priority of maritime liens is prescribed by article 24, according to which the maritime liens set out in article 22 shall take priority over registered mortgages, and any other credit. The maritime liens set out in the said articles shall rank with arrangement to the following rules: (1) Maritime liens securing claims for reward in respect of salvage of the vessel shall take priority over all other maritime liens which have attached to the vessel prior to the time when the operations giving rise to the said liens were performed; (2) The maritime liens set out in each of subparagraphs (a), (b), (d) and (e) of article 22 shall rank *pari passu* as between themselves; (3) The maritime liens securing claims for reward for the salvage of the vessel shall rank in the inverse order of the time when the claims secured thereby accrued. Such claims shall be deemed to have accrued on the date on which each salvage operation was terminated.

According to article 25 the maritime liens set out in article 22 shall be extinguished after a period of one year unless, prior to the expiry of such period, the vessel has been

arrested or seized, such arrest or seizure leading to a forced sale. The one-year period referred to shall commence: (a) with respect to the maritime lien set out in article 22, paragraph (a), upon the claimant's discharge from the vessel; (b) with respect to the maritime liens set out in article 22, paragraph (b) to (e), when the claims secured thereby arise.

Finally, Article 26 states that the caducity terms referred to before shall not be subject to suspension or interruption provided, however, that time shall not run during the period that the arrest or seizure of the vessel is not permitted by law.

Compensations or damages under domestic legislation owed by employers to national seafarers

One of the common questions put forward by foreign companies seeking to employ national seafarers is that dealing with the potential exposure resulting from the application of domestic legislation, in cases of labour accidents and compensation therein, and we find this a reason to devote some time to discuss this topic.

Despite of the many risks of the shipping activity and the protectionism that might be found in the employment legislation in our country, we have found no significant cases in which high amounts of compensation or damages have been paid by shipping interest in Venezuela. It is our experience that many labour claims for compensations or damages are settled before they reach a sentence, for amounts significantly lower than those originally claimed. This is due to the fact that employees are usually in desperate need of money or may be to their hopelessness before legal proceedings that may take years, because of the inefficiency of our domestic judicial system.

Regarding the possibility of seafarers having a severe accident or illness and the subsequent liabilities for the employer, it is important to make reference to the content of the Organic Law for Prevention, Condition and Environment of Work due to the impact that that this law may have on shipping in case of loss of life or personal injuries accidents. It prescribes a number of sanctions for the employer, in case of accidents suffered by employees that might happen during working hours, should the employer fail to properly instruct and warn the worker about the nature of the risks he is exposed to, as well as to provide him with the safety means to perform his job. Insofar as the obligations of the employers are concerned, no worker may be exposed to the action of physical agents (e.g. adaptation of workers to the work environment), psycho-social risks, presence of chemical or biological products, or other agents that may cause problems to the worker without a prior warning given in writing, or by any other means appropriate to the nature of the risk. Instructions must also be given on how to avoid harmful consequences.

Any person who attempts to minimise the danger of any of these risks, and creates a false sensation of safety in the

mind of the worker, may be charged with intentionally violating the Law for his own benefit. Other legal obligations of the employer, include: reporting illness and accidents to the social security agency (IVSS); instructions to workers on health and safety; access to medical attention for workers (in industrial, agricultural and livestock establishments); acceptance of written suggestions and complaints from workers on infractions and taking of appropriate measures. Workers who make suggestions or complaints may not be dismissed or penalised in any way. While the employer has a clear obligation to take action in cases of infractions, there does not seem to be any obligation to adopt suggestions that are unreasonable or ineffective.

The law prescribes serious sanctions:

a) Prison sentences: Employers who violate the Law, in the full knowledge that the safety of workers could be affected, are punishable with imprisonment if the worker is injured or dies due to causes attributable to the violation. When the employer is a corporation, its legal representative, agent or manager is held responsible for the violation and is liable to a prison term of between two (2) years in cases of temporary disability of the worker, and six (6) years for permanent disability. In case of the death of the worker, the term is from seven (7) and eight (8) years.

b) Compensation for death or disability: The Law provides for a payment based on the degree of liability and a prison sentence. For example, if a worker dies in an industrial accident as the clear result of violation of the Law by the employer, the employer must pay the worker five (5) years' wages. As the Law does not repeal the Organic Employment Law or the Social Security Law, it is arguable that a worker (or his legal beneficiaries, in the case of death of the worker) is entitled to receive the benefits provided in the Law, in addition to those from the government under the Social Security Law, and from the employer under the Organic Employment Law (compensation of two (2) years' pay up to a maximum of twenty-five (25) minimum wages).

c) Civil and criminal penalties for mental and emotional Disturbance: When an occupational accident or illness causes disfigurement or an illness causes mental or emotional disturbance that prevents the worker from earning his living, the employer can be sentenced to five (5) years of prison and payment of five (5) years' wages to the worker.

However, according to this law when the death or injury to the worker is caused by an occupational accident as opposed to an occupational illness, the employer (or the directors, executives or administrators of the company) may be released from liability if the accident was due to *force majeure* or misconduct on the part of the worker.

Taken into consideration the many risks involved in the shipping activity, there is no doubt that this law should be borne in mind when handling seafarers in the domestic shipping business, this to avoid potential exposures.

INTERNATIONAL PRIVATE LAW

Jurisdiction under the International Private Law

From the reading of recent court cases it may be argued that there is a trend on the part of our highest Court, to claim jurisdiction in the cases of claims derived from transport contracts, even when these may contain attributive clauses of foreign jurisdiction. It is for this reason that a brief review of the jurisdiction issue as stated in the International Private Law seems to be appropriate.

The International Private Law statute was enacted in Venezuela, on 6th August 1998 and published in the Official Gazette No. 36.511. This statute states in article 1 that issues of fact related to foreign legal systems shall be governed by the rules of Public International Law, in particular those established in international treaties in force in Venezuela; in lack thereof, Venezuelan rules of Private International Law shall be applied; in lack thereof, use of analogy shall be made and, finally, generally accepted principles of Private International Law shall govern. Chapter IX deals with the jurisdiction and competence issues. Thus, article 39 states that additionally to the jurisdiction being vested by law on the Venezuelan Courts in actions filed against persons with domicile in the national territory, the Courts of the Republic shall have jurisdiction in actions filed against persons having their domicile abroad in those cases contemplated in articles 40, 41 and 42.

Under article 40, Venezuelan Courts shall have jurisdiction to hear in trials resulting from the filing of actions in property:

1) When the actions at issue should relate to the disposition or holding of personal or real property located in the territory of the Republic; 2) When the actions at issue should relate to obligations to be complied within the territory of the Republic or deriving from contracts entered or facts verified in said territory; 3) When the defendant should have been personally served within the territory of the Republic and 4) When the parties should expressly or tacitly submit to their jurisdiction.

Under article 41, Venezuelan Courts shall have jurisdiction to hear in trials resulting from the filing of actions related to estates [or universal assets]:

1) When Venezuelan Law is competent, under the provisions hereof to govern the substance of the litigation; 2) When property which is an integral part of the estate [or the universal assets] is located in the territory of the Republic.

On the other hand, under article 42, Venezuelan Courts shall have jurisdiction to hear in trials resulting from the filing of actions on the status of persons or on family relationships:

1) When Venezuelan Law is competent, under the provisions hereof, to govern the substance of the litigation;

2) When the parties expressly or tacitly submit to their jurisdiction, provided the cause should have some effective link.

Finally, article 47 states that jurisdiction corresponding to Venezuelan Courts, under the former provisions may not be waived conventionally in favour of foreign Courts or of arbitrators deciding abroad, in those cases where the issue refers to disputes related to rights in rem on real property situated in the territory of the Republic, or when dealing with issues not admitting settlement or affecting essential principles of Venezuelan public policy.

MISCELLANEOUS

Sabatino Pizzolante sponsors climbing to volcanos in Ecuador

In February 2001, the Venezuelans Xavier Garriga, Andre Vancampenhoud, Ivan Calderon and Franklin Salcedo travelled to Ecuador to climb two of the highest volcanos in the world. The first of the two objectives was the 5,897 mts Cotopaxi, this the second highest active volcano in the world and its summit has a perfect cone shape. The team made a successful climb although the lack of oxygen at this altitude made it very hard to move along with low temperatures and strong winds. The second climb took place on the 6,310 mts Chimborazo. This is the highest volcano in Ecuador and its summit has the particularity of being the farthest point from the center of the earth and the closest point to the sun. Mr. Garriga is a claims handler working with Panamericano Venezolano, for which reason his adventure was sponsored by different companies working in the Venezuelan shipping industry, such as as Maersk Sealand, Intershipping, Intermarca, Panamericano Venezolana and Sabatino Pizzolante. The team now is preparing for next year projects which could include the 6,950 mts Aconcagua in Argentine.

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