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The New Venezuelan Aquatic Legislation.....

No doubt that year 2001 will be remembered as one of great changes for the national maritime legislation. It could be said that almost overnight our out of date and obsolete maritime laws were replaced by a comprehensive set of laws, that are expected to foster our merchant marine to the benefit of international trade. As required by article 8 of Law for Reactivation of the National Merchant Marine enacted in year 2000, maritime and port legislation came under review; the said article required that the Ministry of Infrastructure, with the National Council of Merchant Marine would set forth, the governmental Aquatic Policies, drafting the legislation to that end. In line with this legal mandate, the Organic Law of Aquatic Spaces, General Law on Merchant Marine, General Law on Ports, Law on Maritime Commerce, Fishing Law, Coastal Law and Law on Maritime Procedures were enacted.

It is true that some of the provisions inserted in these legal instruments may not be agreed by the whole maritime community, but no doubt that there will be opportunities to amend them. The truth is that from the oldest maritime legislation, the country has jumped to a modern one.

In the meantime, while legislation should not be an excuse for us anymore, the new maritime administration —the so-called INEA— will have the difficult task to implement this set of laws, to ensure the fostering of the shipping and port business. Let's hope it is so...

SHIPPING

Organic Law of Aquatic Spaces reorganises the Maritime Administration and create the aquatic jurisdiction

Originally published in Official Gazette No. 37,290 of 25th September 2001, and later on re-printed in the Official Gazette No. 37,330 of 22nd November 2001, this law — from now on referred to as the LOEA (its abbreviated name in Spanish: Ley Orgánica de Espacios Acuáticos e Insulares)— set up the general principles governing the shipping and port business throughout the country, reorganising also the maritime administration.

As prescribed by article 1 of the LOEA, the aim of the law is to regulate the sovereignty, jurisdiction and control of aquatic and insular spaces of the Republic of Venezuela, according to domestic and international law. The scope of application is, therefore, broader as “aquatic space” comprises in the context of this law, all those maritime, river and lake areas of the national geographic space (art. 2). The law underlines the importance of the aquatic spaces declared by art. 7 as of “public interest”, also stating the strategic character of all activities related to the aquatic spaces, especially, national and international maritime transport of goods and passengers.

Titles III to XII of the LOEA deal with the concepts related to the international law of the seas, such as territorial sea, innocent passage, continental shelf, exclusive economic zone, high sea and the sea bed, including regulations applicable to sub-aquatic archaeological remains and delimitation of marine and sub-marine areas as well as scientific research in aquatic spaces. Title XIII reorganises the maritime administration, until recently vested with the Ministry of Infrastructure through the Dirección General de Transporte Acuático. Thus, article 77 of the LOEA creates a National Council of the Merchant Marine, with participation of various

ministries, to act as an advisory body to the National Executive on matters such as fostering and development of the merchant marine, naval industry, development of navigation channels, training, etc. Art. 82, on the other hand, states that the aquatic authority will rest with the Ministry of Infrastructure through a national body named "Instituto Nacional de los Espacios Acuáticos" (INEA), based in Caracas, that will exercise its functions locally through the Port Captaincies. The INEA will have among its activities (art. 85) the exercise of the aquatic administration, the planning and supervision of ports and terminals, the execution of the shipping and port policies, the Venezuelan naval Registry (RENAVE), the promotion of policies for the financing of the aquatic sector, etc. To that end, the INEA will organise and supervise important activities such as pilotage, towage, salvage, ship's registration, among others. The activities of the INEA, by way of illustration, will be financed through revenues coming from tariffs paid by the pilotage and towage companies (ranging between 28% to 40% of the gross revenues of these companies), naval registry fees and concessions of ports and marine and river terminals, as prescribed by art. 87 of the LOEA.

An important feature of this law is that it assigns to the INEA a fund (art. 93), the so-called Fund for the Development of Aquatic Spaces, aimed to finance projects to fostering the shipping and port industry, as well as related activities such as constructions of ports, purchase of port equipment, construction and repairs of ships, training, etc. As per art. 99 of the LOEA, the fund will receive, among others revenues, those monies arising in connection with a percentage based on the gross tonnage of national and foreign ships engaged in international traffic, and the foreign flag ships that by way of exception may be engaged in cabotage traffic (Art. 99, numeral 3 of the LOEA). The relevant percentages to be paid are set in article 100; however, Venezuelan flag ships engaged in international trade are subject to a rebate of 50% of this payment, and in all cases it is needed to obtain authorisation to set sail from the Port Captaincy. It is important to point out that this is a one payment per voyage to the country, irrespective of the number of national ports the vessel is calling at.

Title XVI deals with the Aquatic Jurisdiction. Article 109 states that three (3) Superior Maritime Courts are created with jurisdiction over all national aquatic spaces, all vessels registered in the Venezuelan Naval Registry, independently from the jurisdiction of the waters where they may be located, and over foreign vessels located in waters under national jurisdiction; and also, rights and actions derived from operations taking place in port areas and any other activities as indicated by law. On the other hand, article 110 states that Maritime Courts of First Instance are created with the same jurisdiction as assigned to Superior Courts. The Superior Maritime Courts must be established in Caracas (Central Region), Barcelona (Eastern Region), and Maracaibo (Western Region); and five Maritime Courts of First Instance to be located in the following ports: La Guaira, Puerto Cabello, Puerto Ordaz, Maracaibo and Puerto La Cruz.

Obviously, the creation of the maritime courts is quite significant for Venezuela's international trade, since importers, exporters and the main actors of the shipping and port industry will have the possibility to solve their controversies in a specialised jurisdiction, saving time and money; unfortunately, it is not clear yet when these courts will be opened, due to bureaucratic and budgetary steps to comply with, but it might be expected that before the end of the year, at least some of them will be working.

A final aspect to be mentioned is that related to the incentives for the shipping and port industry, since the LOEA, departing from the original wording of the draft, does not prescribe express exonerations for the importation of ships, something that could be regarded as contrary to the development of the domestic merchant marine. Thus, in the light of art. 127, the President of the Republic in Council of Ministries, and in the exercise of the powers granted to him by the taxation and customs legislation, could grant total or partial exonerations in connection with the definitive or temporal importation of ships, materials, machinery, equipment, spare parts and all accessories related to the shipping and port activity, as well as the enrichments derived from the activities of the merchant marine, naval industry, ports and marinas and activities related to the sector. It should borne in mind that the LOEA does not repeal the Law for the Development of the National Merchant Marine, enacted in June 2000, for which reason the incentives prescribed by articles 4 and 5 of the said law, are still in force.

Undoubtedly, the LOEA will have a significant impact upon the shipping and port industry, not only for the introduction of new concepts but also due to the adjustments of tariffs. Nevertheless, many Regulations, currently under drafting, are still needed to better understand the new legislation.

General Law on Merchant Marine and Related Activities set up rules for the administrative regime of navigation

This piece of legislation was published in the Official Gazette No. 37,321 of 9th November 2001. As referred to by art. 1, its aim is to regulate the exercise of the maritime authority in connection with the administrative regime of navigation and seafarers, activities of national ships in domestic and international waters, setting the general principles applicable to the merchant marine and related activities, and co-ordinating the public and private sectors' involvement. For the purposes of the law (art. 2) the term "national marine" comprises the ships of the National Military Force, the merchant marine of goods and passengers by sea, rivers and lakes, as well as the fishing, tourist, sporting, leisure and research marine.

Title II is concerned with the administrative aspects of navigation including the ship definition. It is important to point out that for the purposes of the General Law on Merchant Marine (art. 17), "ship" is deemed to be any floating construction able to sail by water, whatever its classification and dimension might be. Therefore, in the light of the domestic legislation the term also includes barges as well as any other accessory of navigation. Other

aspects regulated by this Title include all related to powers of the Port Captaincies, certificates, discipline onboard, reception and dispatch of ships, etc.

All aspects dealing with vessel registration are regulated by Title III, rules that are complemented by those inserted in the Law for Reactivation of the National Merchant Marine, published in the Official Gazette No. 36,980 of 26th June 2000, insofar as incentives are concerned. From the administrative point of view the shipping registration process has improved, since the dual registration procedure (requiring inscription of documentation before the maritime authority as well as the public registry) was repealed by the now enacted legislation. Thus, the Venezuelan Shipping Registry, the so-called RENAVE office, is located within the National Institute of Aquatic Spaces (Ministry of Infrastructure), with branch offices in the different port captaincies throughout the country. Ships built or under construction of tonnage equal or over 500 gross tonnage will be registered before the RENAVE office located in Caracas (art. 100); vessels under 500 gross tonnage will be registered in the particular branch office of RENAVE located in respective port captaincy where the ship will be registered (art. 101).

According to article 129 of the General Law on Merchant Marine, national ships are deemed to be all those registered in the Venezuelan Shipping Registry (RENAVE). On the other hand, Venezuelan registry is fully opened to foreign investors, since in the light of article 130 a ship may be wholly owned by foreign interest, the only requirement is the incorporation of a domestic company but, once again, 100% of the shares may be wholly owned by foreigners.

Title IV is referred to the related activities of the merchant marine such as pilotage, towage, dredging, hydrography, oceanography, meteorology and nautical cartography. Chapter VIII (art. 912 to art. 213) is quite significant as it deals with the pilotage service, being the innovative feature that by virtue of art. 195 the pilotage could be performed by particulars through concessions. Art. 212, on the other hand, states that national ships are only subject to the payment of 50% of the normal pilotage tariff. Chapter XIX (art. 214 to art. 218) is referred to the towage service, the one that could also be performed by particular through concessions, and the service is subject to the same rebate in tariff in the case of national ships.

Finally, Title V and VI contain regulations concerning titles and certifications of seafarers, as well as the fines, liabilities and procedure aspects.

COMMERCIAL LAW

Law on Maritime Commerce incorporates into domestic legislation main international conventions

Published in Official Gazette No. 5,551 of 9th November 2001, this law repeals the Book II of the Commercial

Code. The Law on Maritime Commerce incorporates the main provisions governing aspects of private law, such as maritime jurisdiction, carriage of goods, limitation of liability, arrest of vessels, salvage, etc., based on the international conventions not yet ratified by Venezuela.

No doubt, Title I contains one of the main features of the Law on Maritime Commerce, i.e. the jurisdiction issue. In the light of article 2 the provisions of the law in question apply to national or foreign vessels and to hydroplanes that are in jurisdictional waters of the Republic. Besides, article 10 states that it pertains to the Venezuelan jurisdiction to hear without derogation whatsoever about the actions on the contracts of carriage of goods or persons that enter the Venezuelan territory. As it can be seen from the articles referred to, when dealing with the jurisdiction issue, the new legislation states that the provisions therein apply to foreign vessels that are within jurisdictional waters of the Republic, in which case the Venezuelan jurisdiction will necessarily deal with the actions derived from the contracts of carriage of goods, i.e. bill of lading, entering to the national territory. Nevertheless, in the light of article 11 of the Law on Maritime Commerce, it is possible to agree the avoidance of this jurisdiction, but only when the event giving rise to the action has occurred. To that end, article 11 states that in those cases where it is admitted, the jurisdiction that pertains to the Venezuelan courts can be derogated to the favour of foreign courts, or submitted the matter to an arbitration procedure, only when the event originator of the action has taken place. This means that once the legal action is brought against the carrier, the parties can agree about the submission of the matter to foreign courts or arbitration.

Title II is referred to the subjects of navigation: Master, ship agent and ship owner, including rules for the limitation of liability as well as the applicable procedure, based on the International Convention on Limitation of Liability. A noticeable point here is that the 50% restriction to foreign capital for ship agencies, prescribed by the repealed legislation was lifted, so it is possible for a foreigner to own 100% of the shares in a ship agency.

Title III, on the other hand, deals with the arrest of vessels, for which it was incorporated the provisions of the Decision 487, enacted by the Andean Community on Maritime Guarantees and Arrest of Ships, based on the 1999 arrest convention. Therefore, the arrest will proceed against any vessel within Venezuelan jurisdiction, irrespective of its nationality.

Title IV is referred to the maritime guarantee, while Title V is related to the contracts for exploitation of vessels such as charter-parties and bills of lading, updating and including regulations non prescribed by domestic legislation before (e.g. Bareboat charters). The Law on Maritime Commerce contains provisions for the carriage of goods by sea, adopting a mixed regime (Hague-Visby/Hamburg), i.e. nautical fault defence, period of responsibility based on custody, two years prescription, etc. Title VI deals with accidents of navigation, including rules for collisions, salvage and general average, while Title VII updates regulation for marine insurance.

PORTS

General Law on Ports seeks to shape a modern and efficient national port system

The General Law on Ports Law (Ley General de Puertos) was enacted through Decree-Law No. 1,436 of 30th August 2001, published in the Official Gazette No. 37,292 of 27th September 2001, and later on re-printed in Official Gazette No. 37,331 of 23rd November 2001.

Title I introduces a number of concepts such as port, port infrastructure, zone and port space, among others, prescribing clear criteria for the classification of ports into categories, namely: public and private ports; ports of public and private use; commercial ports; ports of general and local interest, all these categories quite significant to establish the sphere of powers between the Central Government and the regional States. As stated in art. 1, the law is intended to introduce general principles related to the *Ports Regime* and Infrastructure, governing public and private ports nationwide, to ensure co-ordination between central and regional governments (States) in order to consolidate a modern and efficient national port system. Port activity, on the other hand, is declared of public interest (art. 8), for which reason the National Executive through the National Institute of Aquatic Spaces will be in charge of the planning, supervision and control of all ports and port constructions, including the settling of technical procedures for the construction and maintenance, conservation, administration and exploitation of the said ports.

Title II set up the principles for the exercise of the port powers by the central government and regional governments. Thus, the law also introduces in art. 15, the concept of "National Port System", defined as the sum up of public and private ports and terminals, located in sea, lake and river spaces, that allow the movement of goods and passengers through different modes of transport. Art. 16 underlines the need to co-ordinate the powers of the National Executive and the regional States to shape a modern and efficient national port system. Chapter III and IV of the said Title II ratify the constitutional right of the regional States to run the "ports of commercial use", i.e. those of public ports of public use, under the principle of decentralisation, so that the administration, conservation and maintenance is vested with each of the States (e.g. port Puerto Cabello and Maracaibo located within Carabobo and Zulia State, respectively). However, all those ports which do not fall under the category of ports of commercial use, e.g. oil, steel and cement terminals, will be under the control of the Central government through the National Institute of Aquatic Spaces (INEA), establishing the concession, habilitation and authorisation as the contractual instrument through which the INEA will allow these terminals to operate. Despite the fact that decentralised ports are free to set their tariffs, the General Law on Ports prescribes an express list of the port dues to be applied by these ports, including specific exoneration and rebates for national flag ships as well as cargo moved in cabotage. Also a mechanism to transfer to the States the administration, conservation and exploitation of others

ports originally under the control of central government, e.g. ports that have reverted to the Republic when concluded the private concession, is included in the ports law.

Title III (art. 70 to art. 80) prescribes the powers vested with the port administrator, including definitions and regulation for port operations, registry mechanism to allow the private sector to work within ports. "Port Administrator" is defined by art. 70 as the legal entity that has the representation and control of any port. On the other hand, the law defines the "Port Operator" (art. 77) as any legal entity different from the carrier who in the exercise of an authorisation or contract granted by the port administrator, undertakes to take in charge goods that were carried or shall be carried by water, in order to perform or to procure the performance in respect of those goods services such as storage, loading, unloading, stowage, trimming, dunnaging, lashing, transfer and warehousing. Finally, Title IV of the law deals with the liability regime of port operators and port administrators, and it is expected to introduce significant changes in this field, being based on the 1991 United Nations Convention on Liability of Operators of Transport Terminals in International Trade; however, some of the provisions have been reviewed to adjust them to our particular domestic port practices, whereas others have been introduced to prescribe situations that the Convention does not deal with. Insofar as limitation of liability is concerned, the law prescribes a twofold regime: when the port operator is appointed by the carrier, he shall be entitled to invoke the exoneration and limitation of liabilities that may be invoked by the carrier pursuant to the Law for Maritime Commerce, i.e. 666.67 SDR per package or other shipping unit or 2.5 SDR per kilogram of gross weight of the goods lost or damaged, whichever is the higher; on the other hand, when the port operator is appointed by the cargo interest, then the former shall be entitled to limit liability to an amount not in excess of 2 SDR per gross kilogram of the goods lost or damaged.

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