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Difficult times for shipping and ports...

Following the general strike that took place last December, the political and economical situation of Venezuela still looks uncertain.

As it should be remembered said strike was agreed by the Confederation of Venezuelan Workers (CTV), the Coordinadora Democratica grouping the main Venezuelan opposition parties and Fedecamaras grouping the chambers of commerce and industrials nationwide, which were joined later by the top management and a significant number of workers of Petroleos de Venezuela (PDVSA), the state-owned oil company.

The rigid exchange control established shortly after the strike was over, has caused significant hindrance to the country's international trade, affecting the shipping and port business alike. Shipping lines have seen an important reduction in the import volumes, while the export of goods have experienced an increment in the hope of domestic industrials to get dollars.

Nevertheless, this has meant in any case, the cancellation of existing regular services and number of calls. On the other hand, commercial ports have suffered a reduction of 50% in their traffic compared to last year's figures.

It is important that now with international reserves back to normal by far, the government understands that the time has come to implement flexible exchange control procedures, and to foster political stability for the reactivation of the economy. If these times come again, no doubt that shipping and ports will be ready to play their part, as important elements of the logistic chain.

SHIPPING

New fines under the Merchant Marine Law and Related Activities

Title VI of the Law on Merchant Marine and Related Activities, which last amendment was published in the Official Gazette No. 37,570 dated 14th November 2002, contains provisions concerning liabilities, fines and procedures in connection with these activities. Compared to the old legislation, the law sets up a number of new fines applicable to national and foreign ships operating within the aquatic space of the country.

The administrative sanctions, in particular, are prescribed by article 287 which includes a huge number of fines that are regarded as minor, serious, more serious and most serious infractions, according to their nature, payable in Tributary Unit (T.U.), which at the moment is valued in Bs. 19,400 (equivalent to about US\$ 13). Among the new fines that could be applied by the Port Captaincy, the following are worthy to be mentioned:

1. Minor infractions:

From two tributary units (2 T.U.) to fifty tributary units (50 T.U.):

(a) To crew members or to those persons related with the maritime activity when they are summoned before Aquatic Authorities and they do not appear, except in those cases when there is justifiable cause for such non appearance.

(d) To those ships that are not furnished with all certificates, documents and diaries as established by this Law.

(g) To the ship that, when entering into Venezuelan waters or port, does not comply with the obligation of rising flag, or when this occurs in the presence of a ship belonging to the Armed Forces.

(h) To that Captain, Chief Engineer, First Official or any other person acting on their behalf, who does not present a written report to the authorities, in the event of loss, ship wreck, fire, collision or fouling of ships, breakdown or average.

(l) To the Captain that does not comply with the obligation to provide proper hostage, maintenance and treatment of official to the pilot.

(m) To the Captain who fails to notify to Port Captainty of any navigation accident occurred to the ship under his command and that of the Pilot who is assisting him.

2. Serious Infractions :

From fifty one tributary units (51 T.U.) to one hundred and fifty tributary units (150 T.U.):

(a) To those responsible for activities or operations not authorized by Aquatic Authorities.

(b) To those ships which anchor at zones not conditioned for such anchoring, without a previous consent given by the Aquatic Authority.

(c) To those ships which sail without previous consent given by the Aquatic authorities.

(d) To the Captain or Officials that may impede the performance of inspections to the ship when this is so required by the Aquatic Authority.

(g) To those ships that do not sail when said cause of force majeure has disappeared.

(j) To those ships that fail to comply with the obligation for piloting services.

(k) To those that dispose of ballast, debris or any garbage on Venezuelan territorial waters, including ports, docks and navigation channels.

(l) To those natural or juridical persons that operate communication equipments in non admitted terms or improper language.

3. More Serious Infractions :

From one hundred and fifty one tributary units (151 T.U.) to five hundred tributary units (500 T.U.):

(j) To the Captain that fails to notify the Aquatic Authority and other local authorities in respect of an offence or criminal act occurred on board.

(k) To the Captain that fails to notify the competent consular authority and the local authorities of any death occurred on board.

(o) To the Captain, Engineer in Chief, First Official or any person substituting them, in the case of loss, shipwreck, fire, collision or fouling of ships, breakdown or average of ship, who fail to submit a report on such events.

(u) To those who damage or deteriorate means or components of the National System for Aquatic Signaling.

(v) To those responsible for spillage of oil or its derivatives, residual water from minerals, chemical products or any other toxic or dangerous elements, of any nature, which may cause damage or prejudice to Venezuelan jurisdictional waters, including ports, anchoring grounds, and navigation channels.

4. Most Serious Infractions :

(a) To that ship that having made an arrival allegedly due to force majeure, and on such an arrival the Aquatic Authority determines later that it was not sufficiently justified, a penalty from five hundred tributary units (500 U.T.) to one thousand tributary units (1.000 T.U.) shall be applied.

(b) To that ship destined to passengers' transportation that fails to comply with the prohibition to transport explosive, flammable, corrosive, dangerous or pollution generating products, a penalty from five hundred tributary units (500 T.U.) to one thousand tributary units (1.000 T.U.) shall be applied.

(c) To the Captain of a ship who has refused, under no justified cause, to assist other ships that might be in peril, a penalty from one thousand tributary units (1.000 T.U.) to three thousand tributary units (3.000 T.U.) shall be applied.

(d) To the ship owner who fails to comply with the obligation in respect of marking the obstructions in navigation channels or passages, a penalty from one thousand tributary units (1.000 T.U.) to two thousand tributary units (2.000 T.U.) shall be applied.

(e) To the ship owner of a ship that has caused an obstruction and fails to comply with obligations in respect of the removal of such obstructions in navigation channels or passages, a penalty of two tributary units (2 T.U.) per each unit of gross ship tonnage of the ship causing such an obstruction shall be applied.

On the other hand, art. 289 states that without prejudice to the provisions of international conventions, national laws and regulations on oil pollution, the ship owners, captains or those responsible for installations, as the case might be, will be vicariously liable and punished with fines between five hundreds tributary units (500 T.U.) and ten thousand tributary units (10,000 T.U.), when they wilfully or negligently cause damage to the aquatic space. Article 291 further states that the quantum of the fine will be based on the external consequence of the conduct, the degree of negligence or intention of the responsible party, the number of infractions, etc. In any case, if such aggravating or attenuating circumstances are not clear then the fine will be applied in its middle term as prescribed by article 297.

This law firm has been dealing with recently applied fines related to alleged activities or operations not authorized by the Aquatic Authority, as well as alleged damages to the

aquatic space for oil pollution, the result being that there is room for discretionary conduct on the part of certain officials at the Port Captaincies, and for this reason it is advisable for ships and agents to be clearly aware of the obligations imposed by the Law on Merchant Marine and Related Activities.

COMMERCIAL LAW

Termination of contract clauses under Venezuelan law

One of the usual questions made during the last general strike that took place in the country last December, which brought as a consequence the closure of commercial ports, was that dealing with the ability to bring the contract of carriage to an end, and its effect under domestic legislation.

Many liner bills of lading include clauses declaring the contract of carriage “terminated” in cases of *force majeure*, making the goods available to the merchant at any safe and convenient place, with provisions to collect full freight plus additional costs of carriage, including delivery and storage at such a safe or convenient place or port. However, the application of this clause has to be assessed in the light of the current domestic legislation. The Law on Maritime Commerce enacted in November 2001, prescribes rules for the carriage of goods by sea documented under bills of lading. From the reading of articles 2, 10, 198 and 199 of said legal instrument, it can be concluded that any shipment to or from Venezuela under liner traffic will be subject to the provisions of the new legislation in terms of the liability regime, exoneration and limitation of liability, time-bar, etc., irrespective of the nationality of the ship or the persons involved, pertaining also to Venezuelan jurisdiction to hear about any action derived from the contract of carriage, no matter if a “foreign jurisdiction clause” has been inserted in the relevant bill of lading.

According to article 246 of the Law on Maritime Commerce, in case of “interruption” of the carriage that may prevent or delay its completion, the carrier will proceed to the transshipment of the cargo in order to deliver it at the agreed destination port, being the rule that charges such as transshipment and freight costs to complete the carriage must be covered by the carrier; unfortunately, the wording of the said article does not match the original wording of the draft for this law, where the charging of such costs to the cargo interest was duly prescribed in those cases where the interruption of the carriage was the result of a cause giving rise to an exoneration of liability for the carrier. In that specific case art. 206, number 9, of the Law on Maritime Commerce (strikes or lockouts or stoppage or restraint of labour from whatever cause). Article 152 of the Law on Maritime Commerce, on the other hand, states that the carrier could bring the contract of carriage to an end (resolution of contract) if unpredictable events make the performance of the contract too onerous, in which case written notification to the

receivers is needed, this resolution not affecting the tasks already performed. While it could be agreed that in case of *force majeure*, a shipping line could invoke the relevant clause inserted in the B/L to declare the contract of carriage “terminated”, charging to the merchant the extra freight and storage costs, it is important to point out that the content of article 246 of the Law on Maritime Commerce, already mentioned, could be used by some consignees as the legal basis to force the carrier to bring the cargo to final destination, with the carrier bearing the costs involved. Taking into account the unfortunate wording of the said article as well as the fact that bills of lading are now subject to domestic legislation, no doubt a local court could protect receivers arguing this point of law.

Therefore, it would be advisable that in cases where the shipping line decides to declare the contract of carriage “terminated”, pursuant to the terms of the B/L, the said declaration must be primarily based on article 152 of the Law on Maritime Commerce, since it is evident that unpredictable events have made it too onerous —due to storage and extra freight costs— for the carrier to complete the contract. Nevertheless, it should be borne in mind that such notification must be done before arrival of cargo to Venezuelan ports, consignees always having the possibility to negotiate with the carrier the transport to final destination.

PORTS

Import cargo clearance in the light of customs regulations

One of the common problems faced by carriers calling at domestic ports is that dealing with the containers’ devolution and subsequent demurrage, particularly when the cargo is legally abandoned from the customs standpoint. It seems appropriate then to consider the customs regulations related to the import cargo clearance under Venezuelan law, and how long is the time allowance under domestic legislation for such clearance before the cargo is confiscated by the State if not delivered to the consignees.

According to article 30 of the Organic Customs Law published in Extraordinary Official Gazette No. 5.353 dated 17th July 1999, cargoes subject to customs operations must be declared to the customs office by those proving to be the consignees or exporters, within the five (5) working days following the entrance of cargo to the storage or warehousing areas duly authorized, the relevant article 30 states as follows:

“The cargoes subject to customs operations must be declared to the customs office for those proving to have the legal character of consignee, exporter or sender within the five (5) working days following the entrance of cargo to the storage or warehousing areas duly authorized, as the case

might be, subject to the documentation, terms and conditions determined by the Regulations.

Those who have declared the cargoes will be considered, to the effects of the customs legislation, as the owners of the cargoes and they will be subject to the obligations and rights arising as a result of the respective customs operations.

When cargoes subject to a customs operation have been object of liberalization or suspension of customs taxes and dues, licenses, permits, delegations, restrictions, registries or any other customs requisites, the acceptor consignee or exporter or sender, shall be the receiver or real owner of those”.

Besides, article 66 of the same legal instruments further provides that if consignees or exporters have not accepted the shipment, or when they have not declared or withdrawn the cargoes as the case might be, this within the following thirty (30) continuous days to be counted as from the expiration of the period of time prescribed by article 30 of the Organic Customs Law already mentioned, then cargo becomes legally abandoned. Once this takes place, then abandoned cargo is subject to public auction or assignment to the State by reason of necessity or social interest, the relevant article 66 states as follows:

“The legal abandonment will take effect when the consignees, exporters or senders have not accepted the consignment or when they have not declared or withdrawn the cargoes, as the case might be, within the following thirty (30) continuous days to be counted as from the expiration of the time period prescribed by article 30 or from the date of recognition. The National Executive could modify this period of time by decree.

When cargoes are under the regime of customs warehouse or deposit, the legal abandonment will take effect once the maximum time period for staying under such regime has expired, according to the procedure prescribed by the present Chapter”.

Having mentioned the above, it could be said that once the thirty-five (35) prescribed days as stated by articles 30 and 66 of the Organic Customs Law has elapsed, following discharge without the consignees or receivers having accepted the consignment, cargo becomes legally abandoned and therefore, subject to confiscation by the

State in which case the public auction or assignment to the State by reason of necessity or social interest may apply. Once the cargo has become legally abandoned, it could remain in the port operator’s premises (container yard or warehouse), but in some ports the cargo can be taken to areas under control of the customs administration, this is certainly the case of Puerto Cabello; however, it is possible for consignees - even in the case of cargo becoming legally abandoned - to suspend such status by manifesting their wish to nationalize the cargo, in which case they must proceed to pay the customs’ dues; this is done with arrangement to article 430 of the Organic Law of National Public Finance (Ley Organica de Hacienda Pública Nacional).

The practical effect of the above is that carriers and their agents are to some extent deprived from the containers, making it impossible for the carriers to charge for the demurrage and sometimes, to get the containers back, whereas port operators are unable to charge the incurred storage costs. Unfortunately, the mismatch between the customs and port provisions contributes to the fostering of this situation.

Therefore, some recommendations could be made while legislative reforms are proposed: 1) Carriers should instruct their agents, where possible, to request from the customs administration the stripping of containers before sending them to customs’ controlled areas, to avoid unnecessary delays in the returning of the boxes; 2) Port operators should request from customs authorities written orders for transfer of containers, and to document container conditions and other observations; and 3) Ship agents/port operators should monitor the permanence of abandoned cargo while under customs administration’s custody to force consignees, through customs administration and invoking art. 430, to proceed with nationalization and to pay demurrage and storage costs prior to delivery of cargo.

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