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MARITIME AND PORT AFFAIRS - INTERNATIONAL TRADE - TRANSPORT

SABATINO PIZZOLANTE ATTORNEYS' OFFICE - ASSOCIATED MARITIME CONSULTANTS

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"Nissos Amorgos": Two lessons to be learned.

The recent disaster of the "Nissos Amorgos", the 86,380 dwt tanker that ran aground in the Lake Maracaibo navigation channel, spilling 25,000 barrels of oil, has occupied the headlines of the national and international press during the last two months. Besides the still unclear reasons as to what may have caused the accident, there seem to be two lessons that can be learned from the incident.

The first being the need for Venezuela to have judges properly trained in maritime affairs, bearing in mind that the country has more than 2,800 kilometers of coastline. Early decisions in this case made it clear that there was a lack of sound criteria to deal with an event of this nature. For this reason, the Judiciary must pay attention to this fact, and the Venezuelan Association of Maritime Law (AVDM) should address this need to the relevant governmental agencies. The second lesson to be learned is that the executive, legislative and judicial branch of the government, should commit themselves to the compliance of the treaties ratified by Venezuela. This not only to prove our reliability as a country where the legal system works efficiently, but it is also an assurance for foreign nations that they can trade and invest in this country without any concern. Venezuela has ratified few international

conventions concerning maritime affairs, and has not been able to comply with the ones of which it is member. Such is the case of the Civil Liability Convention (CLC) and the Fund Convention. Despite the fact of having the particulars a specific procedure to get legal remedy, the court has not paid attention to it, and has proceeded to arrest the vessel and detain the Captain. Let's hope that the "Nissos Amorgos" disaster opens a debate, for the benefit of our international trade and good name....

SHIPPING

Are carriers entitled to ask guarantees from consignees for their containers/trailers?

The Venezuelan - American Maritime Association (VENAMA) has recently put into practice a special demurrage program aimed to tackle the problems arising from the delay in the returning of containers/trailers to carriers, and consequential demurrage costs; this law firm was asked to give legal opinion to support the possibility to require from consignees, who often delay in the redelivery of equipment, a guarantee to take containers/trailers outside the port area.

It was the opinion of Sabatino Pizzolante that the basis for asking guarantees in these cases, rests on a kind of "right of retention" to protect the carriers for the use of their equipment outside the port area, this being different from the right of retention on the cargo for non-payment of freight (article 716 of the Venezuelan Commercial Code, as well as included in the wording of bills of lading). On the

contrary, this program implies the request of occasional guarantees or bonds filed by consignees, who often delay in redelivering the equipment or who have outstanding debts for demurrage. The property right of consignees rests upon the cargo, but not upon the container, the carrier undertakes to transport the cargo from one port to another and to that end the freight is paid, and thus the request for that guarantee seems justified.

While the implementation of this program is found to be reasonable —since it would be a "condition" for the use of equipments owned or leased by the carrier— the point under discussion has to do with the mechanism in order to implement the policy in reference. This is because of the way in which the freight has been concluded; for example, a House to House shipment could give rise to certain confusion with respect to the obligations for the payment of such a guarantee. The reason being that it would not make sense to force the consignee to put forward a guarantee in a transport modality where the carrier is supposed to take the cargo to the consignee's premises. Nevertheless, this problem could be overcome by avoiding the use of the statement "House to House" in the bill of lading. The point is how this mechanism should be incorporated into the contract of transport, i.e. bill of lading. This law firm was of the opinion that it would be possible to insert such conditions by using an additional clause, according to which the withdrawal of the equipment should be done once a bond has been filed; a "clause" of this kind should be construed by Venezuelan courts as another condition of the contract of carriage. On the other hand, a clause like the one proposed to be inserted in the bill of lading would not be contrary to, for example, the Hague-Visby Rules (Art. III-8) which prohibit clauses lessening liability under the Rules, since it has to do only with a condition for the use of equipments as a result of the contract of carriage.

It is interesting to mention that this demurrage program is now fully implemented, and satisfactory results have been achieved, since importers are returning equipments almost on time, reducing demurrage time. Besides, on 2 May 1997, the Gerencia Aduanera Nacional (Customs Authority- SENIAT), gave their approval of the program, on the basis that the asking of such guarantees even where there is customs clearance, it is not contrary to the "Potestad Aduanera", but a condition arising from a private law business relation.

SHIPPING AGENTS

Vicarious liability for Shipping Agents with respect to damages to docks by shipping operators

In March of this year, the General Manager of Puerto Cabello Port Authority sent a Circular to shipping agents (Port Operators), holding them vicariously liable for

accidents or damages to docks caused by their principals. The reasoning behind such a measure, as stated in the above-mentioned Circular, is that the regional port law only establishes a legal or business link between the port authority (IPAPC) and the port operator, and not with the vessel/shipowners. This measure taken by the IPAPC will no doubt solve the problem for the port authority, as to get indemnity for damages to docks or fenders; however, shipping agents should pay attention to it because of the legal implications involved.

The only existing vicarious liability between port operator and port authority, in the light of the port law governing Puerto Cabello, is that concerning the payment of port dues. Besides, it is true that shipping agents, under regional port legislation, undertake some financial responsibilities before the port authority, on behalf of their principals (shipping operators), this by means of a contractual authorization concluded between port authority and port operator but here, once again, these obligations are concerned with a) Port dues owed by their principal, b) Money owed by the port operator, for instance, in the case of storage areas that have been leased to him, or c) Indemnity by the shipping agent to the port authority, for possible claims from third parties *as a result of negligent activities by their employees, for which port operators are obliged to have insurance coverage up to Bs. 2,500,000 (US\$1/Bs. 484)*. Nevertheless, can a shipping agent be held vicariously responsible for the negligence or extra-contractual liability of his principal? This is a good point to be discussed, particularly, when there is legal precedent or jurisprudence that has made it clear that shipping agents cannot be held responsible for wrongful acts committed by the persons in whose name they are performing their duties.

Thus, in *Seguros Avila vs. Nopal and Becoblohm* an action in subrogation was brought by insurers against the carrier and agents, to recover the amount paid to the assured for shortage of cargo. It was held that Becoblohm as the shipping agent could not be considered responsible for acts over which it had no control at all, since it was only a representative of the principal (carrier); the shipping agent pays to the port administration port dues, but it does so as an incidental activity to carry out their business.

Therefore, the action against the shipping agent was dismissed. It would not make sense for a port authority to try to hold a shipping agent responsible for damages to docks or fenders. Let's think, for instance, a collision causing damages worth US\$500,000!!, and what about environmental damages for prohibited discharges. Can shipping agents undertake obligations that by their very nature rest with their principals? Shipping agents at Puerto Cabello, therefore, are advised to examine the content of this Circular very closely, and submit arguments to the port authority in order to illustrate the absurdity of such a measure.

OIL POLLUTION

The Nissos Amorgos spillage and legal developments

On 28 February 1997, this tanker under Greek flag ran aground in Lake Maracaibo, spilling 25,000 barrels of oil. Soon an oil slick about four miles long formed in the Gulf of Venezuela. It is not clear yet what the possible causes for the accident are: Glafki Hellas Maritime, the owner of the tanker, has said that the accident was caused by lack of maintenance of the channel which caused the vessel to collide with an uncharted submerged object. The dredging national company (INC), however, claims that the channel is in good condition and that the accident was caused by the captain's negligence. The case went to the Seventh Court of First Instance of Maracaibo, which specializes in drugs and environmental issues. The first two decisions taken by the judge in charge was an order of detention against the Captain of the tanker, and as a precautionary measure it was issued an Instruction to the Harbour Masters of Maracaibo and Las Piedras, not to allow the entrance of vessels without double hull. This prohibition being applicable after the expiration of 30 days from the date it was issued!!! Fortunately, later on, the judge changed his mind. The Attorney General of Venezuela brought a claim against the tanker, its owners and the insurance company for US\$46 million, followed by another claim by the Venezuelan Federation of Fishermen. It is interesting to note that all these developments have taken place, despite the fact that Venezuela is a signatory to the CLC and Fund Conventions, covering liability and compensation for oil spill damages and what makes it unacceptable is that in the case of Nissos Amorgos the ship was arrested and court proceedings instituted against her master. Undoubtedly, this case has turned into a political affair rather than a legal one, perhaps that would be the explanation for the steps taken by some authorities since the accident took place.

CLASSIFICATION SOCIETIES

Do classification societies owe a duty of care to third parties, under Venezuelan law?

Under Venezuelan law there are no special provisions concerning classification societies. Carriage of goods by sea are basically regulated by the Commercial Code, enacted in 1955, but strongly influenced by French legislation that can be traced back to the beginning of XIX century.

One of the few references concerning classification societies in domestic legislation, may be found in the "Law for the Protection and Development of the National Merchant Marine", which was passed in 1973; this legal instrument prescribes (art. 1) that for a vessel to be registered in the National Registry of the Merchant Marine,

it must be duly classified to the satisfaction of the Ministry of Transport. Besides, the "Navigation Law" states by virtue of art. 39 that for a merchant vessel to be able to set sail from a Venezuelan port, it must have a seaworthiness certificate. The same article states that overseas seaworthiness certificates will be valid in Venezuela, provided they have been issued by competent authority or classification society in countries, where Venezuelan certificates are recognized with the same validity or such certificates would have been issued at the request of the Venezuelan government.

Despite the fact that there is no jurisprudence upon the matter, it could be said that under Venezuelan law it is possible for cargo interests/charterers as third parties, to bring an action in tort against classification societies, as a result of its negligence. In other words, the legal basis to make them liable would be an action in tort due to its fault in issuing classification certificates with respect to unseaworthy vessels, what might be the cause of damages to a third party. Thus, according to art. 1.185 of the Civil Code, who willfully, negligently or imprudently causes a damage to another is obliged to repair it. Taking into account the lack of jurisprudence and particular legislation on the matter, it is evident that under Venezuelan law, classification societies could be held liable since they owe duties of care in tort, to those who suffer loss as a result of the negligent performance of its functions. Nevertheless, it should be borne in mind that liability in tort will only arise where there is a causation link between the fault and the damage, this means that the tortuous act must be the effective cause of the damage caused to a third party. Regarding the limit of time within which proceedings must be commenced against classification societies, since there is no special provision on the matter, then the applicable time bar is the ordinary prescription of 10 years prescribed by art. 1.977 of the Civil Code.

PORTS

Gantry Cranes for Puerto Cabello

Crowley American Transport through a company called Venezuelan Containers Cranes, C.A. ("VENCO"), has made formal presentation to Puerto Cabello Port Authority of a project to install two to four gantry cranes at berths No. 25, 26 and 27, with an investment of at least 13 million dollars. According to the profile of the project, VENCO's lawyers claim that the installation of these cranes could be done by means of authorization contract given by the port authority, without the need of calling for a public bid to grant a concession; the arguments of lawyers against using a public bidding procedure are that cranes should not be regarded as "fixed installations" (in which case a concession would be required under the rules of regional port legislation), together with the fact that those cranes will not be of exclusive use by Crowley's vessels but of preferential use, not hampering the free competition among port operators.

Sabatino Pizzolante does not share this view, and for this reason a brief report on this topic has been produced that is available on request.

New Port at Maracaibo is justified following “Nissos Amorgos” disaster

According to press information, the Ministry of Environment as well as PDVSA, the state-owned oil company, has announced that a study will be carried out, in order to determine the costs of building a new port that allows them to abandon transport operation thorough the navigation channel of Lake Macaraibo. Two million barrels of oil go through the channel every day, threatening the environment.

At the moment, the terminals where oil is loaded are within the lake itself (Las Salinas, El Bajo, Puerto Miranda). One of the proposals would be to concentrate oil in Puerto Miranda the outer terminal in the lake, by means of oil pipelines. A more expensive proposal would be to construct a floating dock close to Zapara Island.

DIANCA (Diques y Astilleros Nacionales, C.A.) scheduled for privatisation

This important dry-dock, the largest in the country, is located at Puerto Cabello. The company's main function is the maintenance, construction and rebuilding of shipping vessels for the petroleum, navy, national and foreign merchant marine and fishing fleet as well as service facilities for refineries and offshore oil platforms. It has two docking systems: syncrolift with a capacity to lift up to 5,000 tons (125 meters in length, 27 meters in width and six docking areas) and a dry dock (bay) for 30,000 ton vessels (220 meters in length, 32 meters in width).

Associated Maritime Consultants a good alternative for the maritime community

ASSOCIATED MARITIME CONSULTANTS is a project that has been carried out after carefully analysing what the needs of the maritime community are concerning legal, surveying and investigation services. The establishment of AMC is justified, on one hand, by the importance of Puerto Cabello as the main Venezuela's commercial port; and on the other, because of the need for having a team of lawyers, surveyors and investigators able to work together and with co-ordination, in the best interest of the client.

ASSOCIATED MARITIME CONSULTANTS, a sister company of Sabatino Pizzolante Attorneys' Office, is the response to our clients that look every day for expertise and prompt answers, keeping costs down. If you would like to get more information about AMC's services, then a brochure is available on request, otherwise you could see our homepage in the Trading Area of SeaNet, typing <http://www.seanet.co.uk>.

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