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SABATINO PIZZOLANTE - ASSOCIATED MARITIME CONSULTANTS

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The Maritime Courts: Reality or Illusion...

After two and a half years, the commercial courts are still hearing maritime cases, as the specialized courts have not been opened yet, pursuant to the Organic Law for Aquatic and Insular Spaces. The Law sets a court system scheme comprising three Superior Maritime Courts that must be established in Caracas, Barcelona and Maracaibo, and five Maritime Courts of First Instance that must be opened in La Guaira, Puerto Cabello, Puerto Ordaz, Maracaibo and Puerto La Cruz. In other words, a nationwide competent court system for the maritime community, that will hear all shipping and port cases. Unfortunately, arguments of a budgetary nature are hampering the implementation of this scheme, to the extent that the opening of just one Superior Maritime Court in Caracas with national jurisdiction to hear in appeal, and one Maritime First Instance Court in La Guaira with jurisdiction at least in the Distrito Capital (Caracas), Vargas and Miranda State is now under the consideration of the Supreme Court of Justice. Commercial courts would continue to hear maritime cases in the rest of the country, until the respective specialized court is opened. If this is to be so, it would be desirable that at least one of the commercial courts in these ports is chosen exclusively to hear maritime cases as a previous step towards the opening of the future maritime court. Let's hope this happens soon as the novel maritime regulations are desperate for wise judgments...

SHIPPING

Obligations and liability of the carrier for the carriage of goods by water

When dealing with the provisions for the carriage of goods by water, contained in Chapter III, Title V, the Law on Maritime Commerce adopts a mixed regime (i.e. Hague-Visby/Hamburg rules) for its regulation.

Article 198 states that the provisions of that Chapter shall apply to the contracts of carriage by water, provided that: 1. The port of loading or discharge stated in the contract is located within the national aquatic space; or, 2. One of the facultative ports of discharge stated in the contract, is the effective port of discharge and it is located within the national aquatic space; or, 3. The bill of lading or any other document that may be proof of the contract, states that it is subject to said Chapter.

Article 199 makes it clear that the provisions of Chapter III shall apply whatever the nationality of the ship, carrier, effective carrier, shipper, consignee or any other interested person might be. Nevertheless, according to article 201, these provisions do not apply to charter-parties, unless a bill of lading is issued pursuant to that C/P, and it governs the relationship between the carrier and the holder of the bill of lading, not being the charterer. It follows that any shipment to or from Venezuela under liner traffic will be subject to the provisions of Chapter III, in terms of the liability regime, exoneration and limitation of liability, time-bar, etc., irrespective of the nationality of the ship.

Articles 202 through 226 of the Law on Maritime Commerce regulate the obligations and liability of the carrier, in connection with the carriage of goods by water. Insofar as the period of responsibility is concerned, article 202 states that it covers the period during which the goods are under the custody of the carrier at the port of loading, during the actual carriage, and at the port of discharge.

According to article 203 the goods are deemed to be under the custody of the carrier, from the moment he receives the goods from the shipper or the person acting on his behalf, or from any other competent authority through a document issued to such effect, until that time when he has delivered the goods: 1. To the consignee. In those cases when the consignee does not receive the goods from the carrier, carrier shall make them available to consignee pursuant to contract, law or common commercial practice at the port of discharge; 2. To an authority or a third party to whom goods must be delivered, pursuant to contract, law or common commercial practice at the port of discharge.

As per article 204, the carrier shall be bound —before the beginning of the voyage by water— to: 1. Make the ship seaworthy; 2. Properly man, equip and supply the ship, and 3. Make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are to be carried, fit and safe for their reception, carriage and preservation.

According to article 205 neither the carrier nor the ship shall be liable for loss of cargo arising from lack of seaworthiness, if and when it is proved that all providences prescribed by article 204 have been taken; in this case the burden of proof shall be on the carrier or any other person claiming exoneration from liability.

The events causing exoneration from liability are found in article 206 which states that neither the carrier nor the ship shall be responsible for loss, damage or delay arising or resulting from:

1. All acts or neglect resulting from the negligence or fault of the Captain, crewmembers or other servants of the carrier, or the pilot in the navigation and technical management of the ship, which are not related to the obligations mentioned in Article 204.

2. Fire, unless caused by actual fault or negligence of the carrier, charterer of ship or ship owner, which has to be proved by the parties that invoke them.

3. Perils, dangers and accidents at sea or other navigable waters.

4. Armed conflicts.

5. Piracy.

6. Detentions and seizures.

7. Delays or quarantine restrictions.

8. Act or omission of the shipper or owner of the goods, his agent or representative.

9. Lockouts, strikes, stoppage or restrains of labour from whatever cause.

10. Interior or external commotions.

11. Saving or attempting to save life or property at sea, or change in route which is made to that same effect, and which is not no be considered non compliance of contract.

12. Wastage in bulk or weight or any other loss or damage arising from inherent defect, quality or vice of the goods.

13. Insufficiency or inadequacy of packing.

14. Insufficiency or inadequacy of marks.

15. Latent defects of vessel.

16. Act of God.

17. Any other cause arising independently from the actual fault of the carrier, his agents or subordinates. Nevertheless, who ever alleges exoneration of liability shall have the responsibility to prove that neither the carrier, ship owner, charterer, nor their agents have caused or contributed to cause such losses or damages.

Limitation of liability is found in article 211, according to which the liability of carrier or the ship in respect of losses or damage to goods, in no case shall exceed the limit of six hundred and sixty six point sixty seven (666.67) units of account per package or per any other unit of cargo been transported, or two point fifty (2.50) units of account per kilogram of gross weight of goods lost or damaged, whichever is the higher, unless shipper has declared before shipment, the nature and value of merchandise, and that such declaration has been incorporated to the bill of lading and that same has not been an administrative imposition of the country of loading or discharge. This declaration constitutes presumption in respect of the value of the goods, unless the carrier can produce proof to the contrary. All packages or units included in the bill of lading for a container, pallet or any other equipment used to consolidate goods, are deemed to be packages or units in the sense of this article.

Article 212 states that the delay in delivery occurs when the goods are not delivered at the port of discharge within the period of time provided in the contract for carriage of goods by water, or in the absence of this, within that period of time which has been agreed upon by the carrier and the shipper.

Article 213 prescribes that the liability of the carrier for delay in delivery shall be limited to an amount equivalent to two and a half times the value of freight which must be paid for the goods in delay, but not in excess of the total amount for freight payable under the contract of carriage by water. As per article 216, the exoneration and limitation of liability which may be invoked by the carrier are also to be enjoyed by its agent and port operator appointed by the carrier, provided that it is proved that they have acted within the scope of their employment.

The loss of the right to limit liability is regulated by article 218 which states that the carrier, his employees, agents and port operators nominated by the carrier may not invoke the limitation of liability, as provided in Chapter III, if it is proved that the loss, damage or delay in delivery resulted from an act or omission with the intent to cause such loss, damage or delay or gross negligence.

Finally, in the light of article 219, any clause in the contract of carriage by sea or bill of lading that exonerates or lessens the liability of the carrier, owner or charterer of the vessel, or of them as a whole, for the loss or damages suffered by the goods is considered absolutely null, the same as any other clause that modifies the burden of proof in a different way from that prescribed in Chapter III.

Electronic Power of Attorney allowed by the Law on Maritime Procedures

One of the innovative features of the Law on Maritime Procedures (published in the Official Gazette Extraordinary No. 5,554, dated 13-11-2001), aimed to set the procedural rules to be used in the aquatic jurisdiction, is that contained in article 18 related to the use of the electronic power of attorney, in line with the need to facilitate the access to domestic courts to those trading with Venezuela.

According to the said provision, for the purposes of submittal and admission of a lawsuit or any other petition, representation of the plaintiff may be proved by written or electronic means, provided it is accompanied by a guarantee of 10,000 units of account. Nevertheless, it is important to mention that the same article requires that within the ten days following admission of the writ, the original document proving legal representation, i.e. the original POA, must be submitted to the court, in compliance with the formalities of law; otherwise, the court may declare the action extinguished and will execute the guarantee filed with the court. On the contrary, when the original POA is submitted, the court shall release the guarantee in question.

There is no doubt that this mechanism allows for foreigners to act promptly in court, while awaiting for the POA to be properly granted or in compliance with the Apostille formalities, since it is important to point out that Venezuela is signatory to the 1961 Hague Convention abolishing the Requirement of Legalization of Foreign Public Documents.

CUSTOMS

Customs fines applied for cargo shortage and that cargo discharged in excess

By virtue of article 20 of the Organic Customs Law (OCL), Carriers/Agents must register with the corresponding customs office the cargo manifest, not later than the date of arrival or departure of the vehicle. Cargo manifest could also be filed with the customs before arrival of the vehicle. On the other hand, any discrepancies and exceptions that are discovered during discharge, must be notified by carriers through their agents to the customs office not later than the date following working day of discharge, this in the light of article 22 of the same law, although in practice the customs authority could accept the notification of cargo shortage or that cargo discharged in excess within the 5 working days following the discharge of the vessel, as prescribed by the old Regulations to that law. On the other hand, following enactment of the Regulations to the OCL related to the electronic transmission for imports (Sidunea), it would appear that the period of time to notify cargo shortage or that discharged in excess is now the following working day after discharge. It is important to keep in mind that there is a heavy fine for cargo discharged in excess (sobrante) or in shortage (faltante) which is not declared to the customs office within the period of time prescribed by the

Regulations, i.e. 5 Tributary Units (1 T.U. is equivalent to Bs. 24,700 or US\$ 12.86 at the exchange rate of 1US\$=Bs. 1,920) for gross kilogram discharged in excess or in shortage, as stated in article 121, letter c) of the Organic Customs Law. Customs fines for this concept have been applied by different customs offices throughout the country, both to bulk and containerised cargoes resulting in huge fines of up to US\$ 300,000!! It should also be borne in mind that this fine is imposed to the Carrier and not to the cargo receivers as prescribed by the article 121.

From the review of the different fines imposed by customs offices for this concept, it can also be observed that there appear to be no clear guidelines for customs offices in respect of the application of fines prescribed by the art. 121, letter c) of the OCL. The legal remedy at hand can be achieved by filing a "Recurso Contencioso Tributario" before the competent court, in order to challenge the lack of formalities affecting the due process and the right of defence, as well as the merits of the fine itself for being contrary to the law. As a matter of fact, this law firm is, at present, handling at least four cases in respect of similar fines to the one in comment, and in all cases a favourable judgment has been obtained in first instance courts, and very recently, in the Superior Court for one of them. It is also important to mention that this law firm, acting on behalf of the Venezuelan Shipping Association, has brought an action of nullity and petition of Constitutional Injunction, against article 121, letter c) for its confiscatory nature. The matter is currently being dealt with by the Supreme Court of Justice.

Consequently, carriers and their agents are advised to notify on time to the customs office, of any cargo shortage or cargo discharged in excess, the latest, on the following working day after discharge. Special attention must be paid to any amendment on the bill of lading required by the shippers since, in some instances, this could be regarded by the customs office as a circumstance leading to the application of the said fine.

PORTS

ISPS Code implementation in Venezuela

The implementation of the ISPS Code (International Ship and Port Facility Security Code) in Venezuela is vested with the National Institute of Aquatic Spaces, known colloquially as the INEA, a national body in charge of shipping and port affairs nationwide. In order to comply with the requirements of the Code, the INEA has authorized, during the first semester of this year, fifteen (15) Recognized Security Organizations (RSO) to undertake the security assessments and the elaboration of the security plans. On the other hand, certification shall be carried out by the INEA itself, both for national flag vessels and port facilities. It is important to point out that the state-owned oil company, PDVSA, chose to register itself as a RSO, for the purposes of elaborating security assessments and plans for ships and terminals which belong to the oil industry.

Although the INEA is working on the implementation of the ISPS Code since the beginning of this year, it was not until very recently that Executive Decree No. 2,920 was published in Official Gazette No. 37,943 dated 21st May 2004, legally empowering the aquatic authority as the only body to coordinate, supervise, control and certify all necessary actions leading to the application of the Code. (Article 1) The Decree further states in Article 2 that the port administrators as well as port operators shall present to the INEA the port facility security plans prior the 1st May 2004; the same deadline is given for submittal of ship and mobile platform security plans. Finally, the Decree states that the Ministry of Infrastructure (to which the INEA belongs) and the Ministry of Defense are in charge of the execution of these plans. It is peculiar to note that the Decree was published late in May this year, and even so, it requires that the security plans be submitted prior to that month.

To ensure the effective response of the different authorities and users involved in the shipping and port business, in the application of the mechanisms prescribed by the ISPS Code, the INEA has instructed each Port Captaincy the elaboration of a specific Port Protection Plan, outlining the duties of each party involved, according to the security level which is being applied. Particular reference has to be made in the case of the domestic public commercial ports such as Puerto Cabello, La Guaira, Guanta, etc. where private port operators perform cargo handling activities and management of container yards and other specialized facilities. In these cases, port administrators, i.e. Instituto Puerto Autónomo de Puerto Cabello or IPAPC (Puerto Cabello), Puertos del Litoral Central, S.A. (La Guaira), Secretaría de Puertos del Gobierno del Estado Anzoátegui, S.A. (Guanta), etc. are obliged to elaborate their Port Facility Security Plan in order to obtain the ISPS Code certification. Nevertheless, private port operators have been required to prepare their individual security assessments and security plans to be submitted directly to the port administrator. Therefore, it could be said that in the case of the commercial public ports, the certification is granted to the port administrator and not to the private port operator, although there may be exceptions. In the specific case of the Puerto Cabello area, the following terminals are required for certification: IPAPC, Borburata, Holcim (Cementos Caribe), Vopak (Venterminals), Terquimca, Ocamar and El Palito.

According to information issued by the INEA, in its website, 41 public and private port facilities throughout the country, as well as 35 Venezuelan flag vessels have been already inspected and found in compliance with the requirements of the ISPS Code, consequently, being certified.

Sucre State passes its Ports Law

Sucre, a State located in the eastern part of Venezuela became the first State to pass its own regional Ports' Law in accordance to the requirements of the General Ports Law, enacted near the end of 2001. Despite the fact that Second Transitory Provision of the national ports law

requires that those States having public commercial ports within its territory must adequate the existing ports law, up to this date only Sucre has proceeded to do so. This Ports Law was published in the Extraordinary Official Gazette of the Sucre State No. 824, dated 18-12-03 and applies to Puerto Sucre and the port of Güiria. It is important to point out that from the reading of the new law, there is no express prohibition for the public port administrator to perform port services, so the case might be that stevedoring and warehousing could be performed by the public sector, in what it could be regarded as a step back in the process of privatisation occurred in respect of port services which began in 1991. On the other hand, to complement the regional ports law, Sucre State passed the Port Dues Law, regulating the different dues payable for the use of the port facilities and services, as well as the mechanism for paying such dues to the port administrator and the filing of complaints in this respect.

Plan sponsored by the TDA for the Port of Guanta

A plan for increasing the productivity of the port of Guanta, sponsored by the Trade and Development Agency (TDA) of the United States has been recently presented. A feasibility study for the rehabilitation and modernization of this public commercial port, located in Anzoátegui State, was carried out by the Port of Houston Authority International Corporation. The plan sets the different aspects to be developed to ensure the modernization of the infrastructure and operations of this port, divided into stages to be completed by year 2020. Although the regional port administrator is still looking for financing to implement the plan, it is said that its first stage is ready to begin next year with the improvement of the security, recovering of the container yards and the acquisition of cargo handling equipment totaling an investment of US\$ 11 millions.

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