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An Old Maritime Legislation for a New Venezuela…

Towards the end of this year, Venezuela will have general elections, and for this reason in the coming months we will listen to the usual promises from the candidates that aspire to lead this country into the new century. Therefore, it seems interesting to draw the attention of all candidates representing the different parties, about the need to include in their programmes the urgent reform of our maritime legislation.

Despite the implementation of the privatisation programme and the port decentralisation process, the strategic associations in the oil industry, the steady growth of the non-traditional exports, and the moderate recovery of our economy, the country does not have an updated maritime legislation that may have a positive impact in our international trade as a whole.

Nevertheless, it should be borne in mind that this situation has nothing to do with the lack of proposals from relevant entities, particularly the Venezuelan Association of Maritime Law, since the truth is that many bills have been presented to the Congress for its approval, but politicians seem not to understand the importance of this matter. The maritime rules inserted in the Commercial Code, Navigation Law, Law for the Protection of the Merchant Marine, Organic Customs Law, to mention but a few, are awaiting a complete revision. Similarly, urgent is the adoption of the international conventions governing the carriage of goods by sea, arrest of vessels and limitation of liabilities, among many other international conventions.

No doubt, then that candidates should understand the urgency of this matter, undertaking before the maritime community the compromise to carry out a complete reform of the maritime legislation, for the benefit of international trade in the context of a new Venezuela….

SHIPPING

Have the carriers a duty to announce the arrival of goods at the port of destination?

Towards the end of 1995 an importer shipped twelve (12) containers from USA to Puerto Cabello. Two containers arrived without any problem. On 26/12/96, the consignees were notified by the carrier that two more containers had arrived. It is important to state that by that time there was no notice about the rest of the containers embarked in USA. Two weeks later, the consignees contacted the carrier, seeking information on the whereabouts of the eight containers, opportunity in which the importer did not have any answer about its query. Later it became clear that containers had effectively been shipped, and some of those containers were already at the port of destination. As a matter of fact, four containers had arrived in the same vessel and voyage with the 2 containers mentioned at the very beginning. The lack of reliable and precise information from the carrier on the shipments in question did cause

extra storage costs. As might be expected then, demurrage charges were incurred to the detriment of receivers, all amounting up to US$ 10,000!!!

The case raises the issue on whether the carrier has a duty to announce the arrival of goods at the port of destination. Thus, it seems necessary to point out that under Venezuelan law there is no rule concerning notification of cargo arrival. The carrier has the duty to notify the consignee on cargo arrival; however, it is customary to make the cargo manifest available to Venezuelan importers for them to trace their cargoes, but this custom does not relieve the carrier from its primary duty to notify.

Nevertheless, even assuming that consignees are obliged to rely on cargo manifest to know about the arrival of cargo, the case might be that of one cargo manifest — usually published by the local Chamber of Commerce— that does not include all the cargo that actually arrived in a particular vessel. In fact, in the case referred to the cargo manifest only showed that two containers and not the rest of the boxes had arrived. Therefore, it had been impossible for the consignees to know that the rest of the boxes were already at the port. Undoubtedly, it was a mistake not imputable to receivers.

It is true that under the terms of certain bills of lading, failure to give notification of cargo arrival shall not involve for the carrier any liability, nor relieve the merchant of his obligations. Nevertheless, it is important to state that under Venezuelan legislation, the "Law for the Protection of Consumers and Users", passed by the Congress in 1995, gives to consignees as "users" the right to attack such clauses or any other terms included in the bill of lading, as an adhesion contract that certainly it is.

Therefore, it would be advisable for carriers to instruct their agents to set up reliable procedures for the notification of cargo arrival, this in order to avoid possible claims by receivers in case of demurrage and storage costs resulting from the lack of prompt notification.

PORT OPERATORS

Is the carrier entitled to ask for an original bill of lading to deliver cargo?

Gard News has kindly reproduced an article on delivery of cargo in Venezuela, that was originally published in our Newsletter of January 1997. The opportunity has proved to be worthwhile dealing once again with this significant topic, particularly, in the light of the old rules of the Organic Customs Law and its Regulations, as well as the existing "practices" in some customs areas, since the experience has shown that today more than ever carriers and their agents should ask for together with the FORMA C-80 (that supposed to prove customs clearance) an original bill of lading or any other document they consider suitable to deliver cargo to receivers, this in the benefit of both carriers and agents.

The new port scheme adopted in Venezuela towards the end of 1991, gave rise to regional port bodies acting as "landlord port authorities", reason for which the presence of the private sector was required in the shape of the "Port Operators" in order to perform the handling of cargo in general. It is true that port operators have carried out, since then, all the operations that take place within the ports; it should be borne in mind, therefore, that in Venezuela carriers are obliged to handle cargo to a registered port operator (private one), since the public port authority does not perform handling operations anymore. The case might be that the cargo is taken to a delimited area controlled by the port operator (called sometimes "terminals") or to common areas or areas that are controlled by the port authority itself.

In all cases, cargo placed either in a terminal or a common area, will remain to the order of the customs authority, this by virtue of art. 20 of the Organic Customs Law. Under art. 20 of the Organic Customs Law, "….When the reception is vested in a public or private body other than the customs (for instance, port operators or port authorities), then the goods will be to the order of the customs authority, under the conditions set up by the regulation…". Cargo must remain deposited in the authorized areas, until customs procedures are complied with. It is then when cargo is authorized by the customs authority to leave the terminal as well as the port. (art. 21 OCL)

The current problem, however, is that procedures prescribed by the Organic Customs Law are not carried out all the time and, what is worse, may differ from one port to another. For instance, the physical inspection of cargo or "recognition" does not occur due to bad practices at the Customs Authority; as a matter of fact, in many cases the physical inspection or recognition of cargo does not take place; instead, importers are familiarized with the "reconocimientos en mesa" by which customs documents are stamped and approved by the relevant officials without inspection at all. On the other hand, it is true that cargo should not leave the port without having customs formalities complied with; however, a port operator may deliver a cargo within the port area, simply because the receiver through his broker is going to move it to another terminal or warehouse, and here it is not necessary to have all the formalities done, it is only necessary to have a "transference order" whose requisites for obtaining it may vary from one customs area to another.

In view of the comments mentioned above, the following conclusions could be pointed out, to clarify to carriers the old customs rules still in force:

a.- In the context of the new port organization in Venezuela, Customs Authorities do not have a prevailing involvement in the delivery of cargo;

b.- Carriers deliver cargoes to private port operators or in few cases to port authorities. They also deliver shipping documents (cargo manifest, bill of lading, etc.) to Customs Authority; however, by virtue of art. 20 of the Organic Customs Law, cargoes within ports are to the order of the Customs Authority who grants the documentary release of the cargo (customs clearance), hopefully when the customs formalities have been fulfilled. Therefore, it could be said that while the Customs Authority seems to have a documentary control of cargo within port areas, Port Operators have the actual physical control of that cargo;

c.- According to the particular internal procedures put into practice, Port and Terminal Operators may release cargo not only against customs document (FORMA C-80), but also asking together with it, an original bill of lading and other documents proving payment of storage, freight and so on; and,

d.- In view of the existing gaps within the customs legislation still in force, and the lack of clear wording applicable to port operators, then carriers should instruct their agents not to deliver cargo only on the basis of customs documents. In fact, there is an increasing number of port operators that either by recommendation of our firm, or from the instructions of their principals, are asking for together with the FORMA C-80, an original bill of lading, or a certified copy of a non-negotiable one. Otherwise, the receiver will not be able to take delivery of his cargo. This is the case in Puerto Cabello, the most important general cargo port in Venezuela, and the port of La Guaira.

Limitation of liability prior to shipment of goods.

Port Operators usually rely on exemption and limitation clauses inserted in the bill of lading issued by the carrier, this by means of a "Himalaya Clause". Nevertheless, cases might be where port operator will not be able to invoke such clauses. A recent case handled by this law firm is a good example. Thus, the port operator had received in its terminal a container for exportation loaded with bottle glasses. During loading operations when the container was going to be put onboard it fell down from a top lifter with the resulting total loss of the cargo.

From the analysis of the case, it was found that booking's note and dock's receipt used by the member did not include any clause that could extend the terms of bill of lading prior to the issuance of it. Although this seems to be the practice elsewhere, domestic port operators do not use such clauses in their documents with the result that they are not able to claim any limitation of liability, in case of cargo damages.

In view of the above, it would be advisable for port operators to include a clause of this sort in booking's note and dock's receipt. The clause in question could be drafted as follows:

"IT IS AGREED THAT THE CARGO DESCRIBED IN THE PRESENT DOCUMENT, IS SUBJECT TO ALL THE TERMS AND CONDITIONS INCORPORATED IN THE RESPECTIVE BILL OF LADING THAT MAY HAVE BEEN ISSUED AND EVEN OF THAT NOT ISSUED BUT USUALLY USED BY THE CARRIER; REASON FOR WHICH THE CARRIER, THEIR AGENTS, TERMINAL AND PORT OPERATORS, AND/OR STEVEDORES AND SUB-CONTRACTORS IN GENERAL, WILL BE PROTECTED BY THE EXEMPTIONS, DEFENSES AND LIMITATIONS INCLUDED IN THE SAID BILL OF LADING".

It is true that a clause of this sort does not ensure that a port operator will be able to limit his liability, but it could be an effective tool in the case of claims for damages to cargo prior to shipment.

PRIVATIZATION

Concession for the Port of Guanta

The State of Anzoátegui has decided to privatise the administration of the port of Guanta, an important commercial port located in the eastern part of the country. Up to this date port of Guanta has been administered by a public company called "Puertos de Anzoátegui, C.A."; however, the poor performance of the former has obliged the regional government to look for new ways of running this port, which has a strategic location because of its proximity to the most important steel industries today also privatised. The scheme designed for this privatisation is the bidding of the port through a concession for twenty years, whose details came out early this year. At least six companies has been said to be interested in participating in the public bidding, among them, Puerto of Bilbao (Spain). There have been complaints by the port operators working in this port, in the sense that the pre-calification stage should be cancelled because of some gaps in the regional port legislation. Nevertheless, the regional government refused to do so setting up for 9th February the opening of envelopes.

PORTS

Port State Control implemented in Venezuela

Venezuela is signatory of the Acuerdo de Viña del Mar of 1992, by which Port State Control was implemented in Latin America. PSC, on the other hand, is carried out in the country by the Coastguard, a branch of the Navy. PSC was primarily the responsibility of the Ministry of Transport, whose representative signed the Acuerdo; however, it was not until 1996 when the program was assigned to the Ministry of Defense through an Inter-Ministerial Agreement between both governmental departments. From that time onwards, the Coastguard has been in charge of the implementation of PSC, irrespective of the fact that for

diplomatic purposes the Ministry of Transport is the relevant department dealing with this Acuerdo. Documentary and physical inspection of vessels is accomplished through eight Coastguard stations located alongside the Venezuelan coastal line. Every station has two officials to comply with the duties assigned, in some cases inspectors are merchant marine officials with experience in the field of commercial trade. According to the Inter-Ministerial Agreement, in case of substandard conditions or deficiencies being noted, the Coastguard inspectors will elaborate a report to be sent to the Division of Maritime Safety, a department of the same Coastguard. This office will send a letter to the Harbour Master stating the observations they have, and it is for the latter to instruct a surveyor to determine the extension of the deficiencies. It is important to point out that the Harbour Master is the only maritime authority recognised by law, reason for which it is the only one with powers to appoint surveyors. Once deficiencies have been corrected then Harbour Master will send the surveyor to check it out, informing of this to the Coastguard, otherwise, the vessel should be detained. As prescribed by the Acuerdo de Viña del Mar, PSC inspectors look for the compliance of the following instruments: LOAD LINES 1966, SOLAS 74 and Protocol 78, MARPOL 73/78, STCW 1978 and COLREG 1972. In the light of the data obtained from Coastguard at Puerto Cabello, it was established that last year 242 vessels were inspected. It was learned that the most common deficiencies were related to lack of certificates prescribed by MARPOL, LOAD LINES and SOLAS Coventions. Nevertheless, under domestic legislation Coastguard has no powers to detain vessels and to that end the collaboration of the Harbour Master and the Port Authority is required. Therefore, due to the lack of a comprehensive legal framework governing the activities of different agencies in the maritime field, PSC in many instances is affected in its development. This law firm is completing a report on Port State Control in Venezuelan Ports, including statistics concerning number of inspections, category of vessels and number of detentions, underlining the common problems faced in the implementation of this program. Should you be interested in receiving a copy of this report, please write, fax or send an e-mail to us.

New Port Law for Port of Guanta

The Port Law of Anzoátegui has been reformed in order to carry out the privatization of its administration, since this scheme was not included in the original wording of this law. Nevertheless, the Venezuelan Shipping Association and port operators working in this port had complaints about the new wording of this law, arguing that in many cases it is unlawful. The Venezuelan Association of Maritime Law, on the other hand, through its President, Dr. Omar Franco, and one of its members, Dr. José A. Sabatino P., has formulated a number of observations to the new law that has been considered a legal instrument that does not encourage the private sector to be involved in the privatization process. The new law prescribes, for instance, that the company that undertakes the administration will have to bear the contractual obligations with the employees and to guarantee stability of this personnel; this law also seems to be contrary to the free competence among port operators, since it requires that the company in charge of the administration approves any modification of tariffs set up by port operators.

Congressmen assess convenience of new oil terminal in the Lake Maracaibo

PDVSA, the state-owned oil company, made a presentation to the Deputy Chamber´s Commission of Economy regarding the construction of a new oil terminal in Lake Maracaibo, particularly, in the area known as Pararu. The project has been supported by Carbozulia subsidiary of the oil company, in charge of the exploitation of coal mining. This new terminal located in the outer part of the Gulf of Venezuela would help to avoid further environmental risks in the Lake Maracaibo, and at the same time the terminal would be linked by a railway of 80 kilometers with the mines of Guasare, allowing it to handle more than 20 million tons of coal a year. However, a system of oil pipes would be needed to move the oil from Puerto Miranda to Pararu. The remaining aspect to deal with is the financing of this or any other project, since the Ministry of Transport has said that there is no money to carry out its construction, reason for which the State would have to use the scheme of a concession with the participation of PDVSA.

Recent appointment as correspondents

We are pleased to announce that Associated Maritime Consultants have been recently appointed by North of England and Newcastle P & I Club as correspondents in Puerto Cabello. Besides, Sabatino Pizzolante Attorneys´ Office was listed in the book of correspondents by British Marine P & I as well as Skuld from Norway. Our firm was already acting as correspondents for Charterers P & I Club and TTClub (Thomas Miller Miami).

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