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The Law for Commercial Arbitration: A Breakthrough for Venezuela in the Resolution of Conflicts?

Venezuelan justice is famous for the cumbersome that a process may be, to the detriment of all the parties involved. Besides, the resolution of maritime conflicts in this country is even a more difficult subject to deal with, since in practice not only our maritime legislation is out of date, but also because the little knowledge judges have on the subject. Despite the fact that arbitration has been a powerful tool for the resolution of conflicts in the maritime field, that has not been the case in our country, the reason being that arbitration as such was conceived by the Code of Civil Procedure as a contentious procedure to be guided by the judiciary, which in practice made it of little value.

Nevertheless, this situation could change with the enactment of the Commercial Arbitration Law, passed by the National Congress on March of this year, allowing particulars to submit their conflicts to an arbitration court that now is autonomous to reach an award, that by itself is a decision that can be enforced by law, in case the losing party does not voluntarily comply with it.

No doubt, the maritime community should welcome this legal instrument, since it opens an opportunity for a breakthrough in the resolution of conflicts in the maritime business; the experience has shown how damaging for shipowners may result the arrest of

their vessels in the Venezuelan forum, in particular, when cargo-owners take advantage of our outdated legislation to delay the release of such vessels. Besides, cargo interests are reluctant indeed to accept foreign arbitration, because of fears related to dealing with a strange forum as well as the resulting costs. Therefore, it could be worth thinking about the possibility of using domestic arbitration as a way to solve some controversies in case of cargo claims, quickly and keeping costs down. There must be a beginning and this new law could pave the way.

SHIPPING

New Rules for Foreign Investments in Venezuelan Shipping Sector

Generally speaking vessel registration in Venezuela is a rather rigid system. The relevant rules can be found in the Law for the Protection and Development of the Merchant Marine and its Regulation, according to which for a vessel to be registered under national flag has to comply with the following requirements: a.- If the owner is an individual, he must be Venezuelan and domiciled in this country; if the vessel is owned by a partnership or jointly, more than eighty per cent (80%) of its value must belong to Venezuelans domiciled in this country; b.- If the owner is a partnership, it must be incorporated in Venezuela, pursuant to National Laws, and have its domicile, and real and effective headquarters and the principal object of its exploitation in this Country. The President, the Manager, or whomsoever acts for them, and not less than three-fourths of the directors and administrators must be Venezuelan; and more than eighty per cent (80%) of the shares or

participation must belong to Venezuelan companies in which more than eighty per cent (80%) of the Capital Stock belongs to Venezuelan individuals. Together with the restrictions regarding foreign participation in the equity, 90% of the crew must be Venezuelan, whereas a 16.5% IGV (Tax) plus import duties are imposed on vessels for registration.

These rules for vessel registration are expected to change with the new bills currently being considered by the Venezuelan Congress, since such reforms open the Venezuelan Registry to foreign investments. In March 1998 the Venezuelan Chamber of Deputies approved amendments to the Navigation Law and the Law for the Protection and Development of the Merchant Marine. Thus, according to the proposed amendments, foreign ownership of up to 80% will be allowed in the case of ships registered in Venezuela. Further, vessels leased to companies established in Venezuela with up to 80% foreign ownership will also be allowed to register. On the other hand, ships imported for registration will be exempted from the 16.5% IGV.

There is a remaining aspect that has not been touched by the proposed reforms, and this is the labour regime to which Venezuelan vessels are subject; however, there is no doubt that the reforms should have a positive impact in the shipping sector. These bills still require Senate approval which is expected to take place shortly.

ARBITRATION

Law for Commercial Arbitration Passed by the Venezuelan Congress

Arbitration as prescribed by the Code for Civil Procedure to date is absolutely inoperative. Among other reasons, because commercial arbitration was established as an especially contentious procedure, that should run in ordinary jurisdiction, and not as a mechanism delegated to private administration (an arbitrator), who is to judge on certain "issues" if it is so agreed by the parties in conflict. All this situation made it compulsory to update legislation concerning arbitration, in order to adapt it to the new demands from the national and international markets. This is the reason for the recent approval, by Venezuelan Congress of the Law for Commercial Arbitration.

The law in question is based on the Model Law for International Commercial Arbitration approved in 1985 by UNCITRAL. The aim is to set up a framework giving legal certainty to national and foreign investors, by having the freedom to submit their disputes to arbitration, this according to the most convenient procedure rules, reducing costs and without going through a time consuming process.

The new law is related only to commercial arbitration, excluding any other arbitrations concerned with civil matters which remain subject to the rules of the Code for

Civil Procedure (Art. 1). Article 3 of the law legalises institutional arbitration —through specialised arbitration centers, national and international— as well as independent arbitration —especially ruled by the parties— with no intervention from these centers. This open criteria is one of the strongest points of the law, along with the fact that not only the Chamber of Commerce in Caracas may perform these types of services, but all other specialised centers, commercial associations and qualified lawyers. This promotes competition and guarantees the best type of services. Art. 6 states that the arbitration agreement should appear in writing, in any document or block of documents which state the willingness of the parties to submit to arbitration, whereas art. 7 deals with the independence of the arbitration clause, prescribing that the arbitration court is empowered to decide on its own competency, including exemptions with respect to the existence or validity of the arbitration agreement. Consequently, the arbitration agreement which is included in a contract, shall be considered independently from the rest of the stipulations in same contract, for which reason the decision of the arbitration court on nullity of the contract does not imply nullity of the arbitration agreement.

Regarding the language to be used in the arbitration, art. 10 allows the parties to “agree freely on the language or languages that shall be used in the arbitrators' records, in lack of such an agreement, the arbitration court shall determine the language or languages to be used. This agreement shall apply, except agreed otherwise by the parties, to all written documents from the parties, to all the hearings and to the final arbitration award, decision or communication of any sort issued by the arbitration court. The arbitration court may order that the documents presented to its consideration should be accompanied by a translation to the language, or languages agreed upon by the parties, or determined by same arbitration court”.

Another significant feature of the law is that by virtue of art. 26, and unless it is otherwise agreed by the parties, the arbitration court may rule safeguard measures regarding the object in dispute. Besides, art. 48 introduces an important change in respect of arbitration award as stated in the Code for Civil Procedure, insofar as *exequatur* is concerned, by stating that final arbitration award, whichever the country where it is issued, shall be recognised by ordinary justice as entailing and unappealable, and on presentation of written petition to the competent Court of First Instance, it shall be executed obligatorily by such court with no requirement of *exequatur*, according to that established in the Code for Civil Procedure for the compulsory execution of judicial decisions. To that end, the party that demands the execution of an arbitration award, must accompany this demand with a certified copy of such award, issued by the arbitration court, with a translation to the Spanish Language, should this be necessary.

For the maritime community the recent enactment of the Law for Commercial Arbitration, could mean an important breakthrough in the resolution of conflicts within the

maritime trade involving Venezuela. It is true that at this early stage it would be difficult to assess the viability of it, but it is clear that the new law has introduced changes that could deprive arbitration from the drawbacks resulting from the application of it in the terms of the Code for Civil Procedure, that in practice meant to have a process equally affected by rigid rules and guided by the judiciary. The fact that now the law has brought the possibility to set up the institutional arbitration, by means of arbitration centers like the Chambers of Commerce, gives rise to foreseeing a new scenario where these institutions could play an important role in the resolution of conflicts arising from the maritime transport.

MARINE POLLUTION

Environmental Legislation Applicable to Marine Activities

Venezuela is member to the Civil Liability Convention 1969 and its Protocols of 76 and 84, as well as the Fund Convention 1971, after the country adopted these international regimes in 1991 (Official Gazette No. 4,340, Extraordinary, of 28 November 1991). As a matter of fact, it could be said that being Venezuela an oil exporter country, it was almost compulsory the adoption of them, one of the few maritime conventions the country has ratified. Venezuela adopted these conventions in its original wording, therefore, no further comments it would deserve. Nevertheless, from the oil pollution point of view two important domestic legislations are worthwhile mentioning: the Organic Environmental Law and the Environmental Criminal Law.

The Organic Environmental Law

The Organic Law on Environment (Official Gazette N° 31,004 of 16 June 1976) is intended to establish the guiding principles for the conservation, defence, and improvement of the environment, with a view to improving the quality of life, within the context of the nation's comprehensive development policy (Art. 1). It declares the conservation, defence, and improvement of the environment a matter of "public utility" in order to make expropriations possible (Art. 2). Under the Law, activities which might degrade the environment are subject to "control" by the National Executive, acting through the appropriate agencies (Art. 19). In principle, the agency in charge is the Ministry of the Environment and Renewable Natural Resources itself.

The activities defined by the Law as capable of degrading the environment are (art. 20):

- 1.- Those which directly or indirectly pollute or cause a deterioration of the air, water, seabed, soil, or subsoil, or which have an unfavorable impact on fauna or flora;
- 2.- Harmful alterations of topography;
- 3.- Harmful alterations of natural water flows;
- 4.- Sedimentation of water courses and bodies of water;
- 5.- Harmful changes in the beds of

- 6.- Introduction and utilisation of non-biodegradable substances;
- 7.- Those which provoke disturbing or harmful noise;
- 8.- Those which provoke a deterioration of natural landscapes;
- 9.- Waters which modify the climate;
- 10.- Those which emit ionising radiation;
- 11.- Those which result in a build up of residues, garbage, waste and discarded materials;
- 12.- Those which lead to eutrication of lakes and ponds;
- 13.- Any other activities capable of altering natural ecosystems and provoking negative effects on human health and well-being.

The Environmental Criminal Law

This law has a profound effect on oil pollution affairs. The law applies to incidents that may take place in the republic's territory, including rivers, lakes, channels, beaches, territorial sea, seabed and exclusive economic zone. Needless to say that this legal instrument applies to vessels engaged in maritime trade.

The Environmental Criminal Law (Official Gazette N° 4,358 of 3 January 1992) defines acts which violate the legal provisions for environmental conservation, defence, and improvement as offences, and stipulates punishments for those violations. It also authorises the Courts to order preventive, restrictive, and relief measures when appropriate (Art. 1).

If the punishable act defined by the law is committed abroad, the person responsible for it is subject to penalty when that act has harmed or endangered a legal good protected by the law in Venezuela. In this case, the accused must have come to Venezuelan territory and the Public Prosecutor's Office must take action against him. Additionally, the accused must not have been tried by any foreign Court unless, having been so tried, he has evaded execution of the sentence (Art. 2). The penalties prescribed by the Environmental Criminal Law are classified as principal and accessory (Art. 5). The principal penalties are: 1) imprisonment; 2) arrest; 3) fine; and 4) community service work. The accessory penalties, applicable at the court's discretion, are: 1) disqualification for performance of public functions or holding of public employment for up to two (2) years after completing the principal penalty, in the case of punishable acts committed by public officials; 2) disqualification for practice of a profession, art, or industry for up to one (1) year after completing the principal penalty, in the case of punishable acts committed by the convicted person involving abuse of his industry, profession, or art or in violation of any of the duties inherent therein; 3) publication of the decision, at the convicted person's expenses, in a nationwide circulating newspaper; 4) the obligation to destroy, neutralise, or treat all substances, materials, instruments, or objects manufactured, imported, or offered for sale and capable of causing damage to the environment or human health; 5) suspension of the permit or authorisation with which the convicted person acted for up to two (2) years after completion of the principal penalty; 6) suspension of his holding executive and

representative positions in corporate entities for up to three (3) years after completing the principal penalty; and 7) prohibition against contracting with the Public Administration for up to three (3) years after completing the principal penalty. The law makes seizure of the equipment, instruments, substances, or objects with which the punishable act was committed necessarily accessory to another principal penalty, unless they belong to a third party uninvolved in the act and the effects derived therefrom. The seized objects and instruments are to be sold, if their sale is legal, and the proceeds of their sale are to be applied to the satisfaction of the convicted person's civil liability.

The offences against the lake, coastal and maritime environments may be found in the Chapter II, among which it is important to point out:

- 1.- Polluting discharges in lakes, coast and marine environments, as a result of the non compliance of the technical rules in force. (Art. 35)
- 2.- Pollution of lakes, coast and marine environments, as a result of leaks or discharges of oil and others products caused by the Captain of a vessel. (Art. 38) It is true that the damage must be caused by the Captain's acts; however, the shipowner could be vicariously liable to pay the fine as well as damages if any.
- 3.- The omission by the Captain of a vessel not to give notice about an accident, in which his vessel may be involved causing pollution.

The penalty in the cases mentioned above ranges between 3 months and 3 years of arrest or imprisonment, as well as fine equivalent to a figure from 300 a 3,000 days of minimum wages. Besides, by virtue of this law, the following steps could be taken as precautionary measures: Detention of the vessel, occupation of vessel, interruption of activities and retention of substances and objects.

The time-bar for the actions arising from this law (Art. 19) are a follows:

- a.- 1 year in cases of penalty of arrest under 6 months.
- b.- Three (3) years in cases of penalty of imprisonment less than 3 years or arrest over 6 months.
- c.- Five (5) years in cases of penalty of imprisonment over three years.

In case of civil liabilities that may derive from incidents described by this law, then the time bar will be 10 years; however, in case of oil pollution at sea, the applicable time bar is the one prescribed by the CLC or the Fund Convention as the case might be. One important point to be mentioned is that courts with jurisdiction to deal with these sorts of incidents, are the Criminal Courts. The current problem is that judges are not well trained to handle these cases with negative consequences. For instance, in the Nissos Amorgos case, where a Greek tanker grounded at Lake Maracaibo discharging over 25,000 barrels of oil, despite the fact that shipowners set up the limitation fund,

the Criminal Court decided to arrest the Captain of the vessel by virtue of Art. 38.

PORTS

Outstanding figures for the Port of Puerto Cabello

The port figures for the year 1997 have been released by the Port Authority, showing an outstanding performance in relation with the year before. The port was visited by 2,593 vessels, traffic in which containerhips are numerous. The port handled 8.8 million tonnes of cargo, of which 3.5 million tonnes were related to containerised cargo. The number of containers rose up to 385,107 TEUs, with a significant 62,516 TEUs accounting for transhipment.

MISCELLANEOUS

Brief Papers launched as an additional service to our clients

Next June our law firm will launch *Sabatino Pizzolante Brief Papers*, to deal with topics that by their very nature deserve to be treated in some more detail. These *Brief Papers* have been conceived basically as a vehicle to provide our clients with a quick look at a relevant topic or the text of a new piece of legislation. The first one will be entitled *The New Law for Commercial Arbitration*. Should you like to receive a copy of it, please do not hesitate to contact us.

Sabatino Pizzolante in the World Wide Web

Our Web at Internet is now completed and fully readable. It is not only designed to provide readers with a profile of our services, but also to create a permanent link between us and those needing legal and technical information on Venezuelan maritime affairs. As a matter of fact, the section of Publications is intended to serve our clients and those seeking general information, with a huge amount of literature such as newsletters, papers and articles.

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