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New Customs Rules: The Uncertainty Remains...

The enactment of the Organic Customs Law (OCL) has proved in the early months since it came into force, that it is not enough a set of rules embodied in a new legal instrument to solve the old barriers and vices in the customs activity, if there is not a real commitment on the part of authorities to apply it with the flexibility that its many gaps demands. It should be borne in mind that the application of these new customs rules, has been even more difficult now, taking into consideration that the regulations to the law are still being drafted. Needless to say, that all this entire situation operates to the detriment of the shipping community, importers and exporters alike.

Perhaps the best example of the above mentioned, could be found in the transshipment operations. The former customs law required that transshipment operations on cargo in transit, should take place in national flag vessels, unless the SENIAT (National Customs Authority) authorised the transshipment in foreign flag vessels; as a result, shipping lines had to obtain a special authorisation every three months, to be able to carry out such operations. That old provision was repealed by the new law, something that was very welcomed; however, SENIAT is not willing to lose control of these transshipment operations, still asking for the authorisation as the only way in which such operations could be allowed by local customs authorities; the reasoning for this, according to customs officials, is that although customs law does not require the said authorisation

anymore, "art. 3 of the Law for the Protection and Development for the Merchant Marine requires for cabotage operations to be done in national flag vessels..""!!!

Is transshipment and cabotage in the terms of the domestic customs law the same? That and many others are the questions awaiting for a prompt answer. Let's hope the coming regulations to the OCL will help to find the right answers...

SHIPPING

Convention between Venezuela and the United States of America for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and Capital

Shipping and Air companies from both countries are expected to enjoy the benefits derived from this Convention, that has already received approval by the National Congress and now is awaiting for the approval of its counterpart in the USA. Article 8 of the Convention deals with Shipping and Air Transport; within which the main benefits are:

1.- Profits of an enterprise of a Contracting State from the operation of ships or aircraft in international traffic shall be taxable only in that State.

2.- For the purpose of Article 8, profits from the operation of ships or aircraft include profits derived from the rental of ships or aircraft on a full (time or voyage) basis. They also include profits from the rental of ships or aircraft on a bareboat basis if such ships or aircraft are operated in

international traffic by the lessee, or if the rental income is incidental to profits derived from the operation of ships or aircraft in international traffic. Profits derived from an enterprise from the inland transport of property or passengers within either Contracting State shall be treated as profits from the operation of ships or aircraft in international traffic if such transport is undertaken as part of international traffic.

3.- Profits of an enterprise of a Contracting State from the use, maintenance, or rental of containers (including trailers, barges, and related equipment for the transport of containers) used in international traffic shall be taxable only in that State.

4.- The provisions of points 1 and 3 shall also apply to profits from participation in a pool, a joint business, or an international operating agency.

Protocol to the Agreement to Suppress Illicit Traffic of Narcotic Drugs and Psychotropic Substances by Sea

In July 1997 a Protocol to the Agreement to Suppress Illicit Traffic of Narcotic Drugs and Psychotropic Substances by Sea was signed, between Venezuela and the United States of America.

The Agreement in reference was celebrated at Caracas in 1991, in order to regulate the boarding and inspection of any suspect vessel engaged in drug activities, flagged in either State, provided such vessel is out of the territorial sea of each country, and no navy vessels are near to the suspect vessel. Besides, paragraph 7 of the Agreement prescribed that boarding and inspection powers were vested with the Navy personnel/water and air craft.

According to the Protocol, paragraph 7 has been widened by stating that boarding and search activities may be carried out by the personnel of both countries from warships or other ships, including embarked small boats and aircraft, that are clearly marked and are identifiable as being on Government service of the Governments of other States that may be agreed to in writing by the Contracting Parties, and that are duly authorized to that effect by those Governments. On the other hand, boarding and search activities shall be carried out exclusively by the personnel of the Contracting Parties on board such ships and aircraft, and shall be subject to the conditions set forth in the Agreement and article 17 of the 1988 United Nations Convention Against Illicit Traffic of Narcotic Drugs and Psychotropic Substances. Regarding possible claims for injury, damage or loss resulting from this boarding and inspection activities, paragraph 4 of the Protocol states that "The Party whose personnel carried out boarding and search activities under the Agreement or this Protocol shall process, consider, and if merited, resolve in favor of the claimant, in accordance with its procedures and in a manner consistent with International Law, any claim submitted for damage, injury or loss resulting from such boarding and

search activities. Neither Party thereby waives any rights it may have under international law to raise a claim with the other Party through diplomatic channels".

Venezuelan Courts have Jurisdiction over Foreign Bills of Lading

The recent decision in the m.v. "Jans" case (Seguros Avila, C.A. vs. Thos & Jas Harrison Ltd., and Others - Court File No. 12,379, Ruling No. 815) raises concern about the ability for carriers to effectively invoke foreign jurisdiction clauses inserted in their bills of lading, as a way to avoid lengthy proceedings before domestic courts, particularly, in those cases of claims brought against them for loss or damage to cargo.

This decision was taken in an action by Seguros Avila as subrogated cargo insurer against CGM, Harrison Line and Royal Mail Line, in connection with the sinking of m.v. "Jans" at the port of la Guaira. The three carriers, among other defences, contended that the Venezuelan courts lacked jurisdiction based on the existence of a Foreign Jurisdiction Clause in each of the bills of lading, providing that claims under the contract of carriage had to be brought in France and the UK. The Supreme Court of Justice then argued that in those circumstances where there are connecting factors involving Venezuela, for instance, a Venezuelan receiver or an agent acting on behalf of a carrier, the so-called gravity centre theory should apply. Therefore, the Court ruled that unless there has been an express Venezuelan jurisdiction waiver in the bill of lading, claims against the carrier can be brought before the Venezuelan courts, despite the existence of a foreign jurisdiction clause. The implications of this decision, obviously, are rather worrying for foreign shipping operators and their P&I clubs, taking into consideration the lack of experience of local courts insofar as maritime affairs are concerned, as well as time consuming judicial proceedings. It might be expected, on the other hand, that this decision could encourage local cargo receivers and insurers to bring legal actions before domestic courts.

However, the relevant point to be underlined from this decision is the reasoning applied by the SCJ when considering the so-called "Gravity Centre" theory. Thus, after considering the function of the bill of lading as well as its value as contract of carriage in the liner traffic, the SCJ went on by analysing the jurisdiction issue, stating that it "should be subject to detailed study as this is inherent to territorial sovereignty of each State. In consequence, the Venezuelan State (as it has been admitted by law and doctrine) is enabled to determine, absolutely and unilaterally —disregarding any similar, foreign judicial dispositions or body of laws— and to establish, the limits of its own jurisdiction; and only when the special case in consideration can be subject to foreign codes of law or regulations without prejudice to said sovereignty, may the State decline. By virtue of the above, each dispute should be analysed with respect to all elements involved and each

connecting factor such as domicile, place, place of execution, nationality, should not be assessed by judges independently but as a whole, or as a group of particular circumstances by judges, in order to decide accordingly and to the best interest of justice. If, at completion of study, it is determined that jurisdiction corresponds to a different State than that specified in contract-bill of lading, the clause of selection of forum is irrelevant and unacceptable; which in legal doctrine is known as "Gravity Centre" theory, a theory specially enforced by courts deciding on maritime cases".

The court found that in the given case, there was a marked connection with Venezuelan territory, among other things, because the obligations derived from contract of carriage should have been performed in Venezuela; the location where loss occurred was a Venezuelan port and to the effect of legal proceedings there was a company acting as ship agency as representative of carriers.

Regarding the existence of the jurisdiction clauses inserted in the bills of lading, attributing jurisdiction to foreign courts, the SCJ stated: "It is the judgement of this Court that even though article 47 of the Code for Civil Procedure, as well as articles 321 and 322 of the Bustamante Code authorise the parties to choose a "Special Domicile", this selection is concurrent but not exclusive, unless parties decide on the contrary. Therefore, in order for this special domicile to be considered exclusive, a clause must be written in such a form that the parties expressly waive any other domicile that, by connection, might result qualified to hear the dispute. In the present case, even though it is true that the parties selected the figure known as "law of autonomy" in the sense that they do not choose the contract law but locate the contract in a chosen country thus inferring applicable law; it is not less true that in said clauses appear no waiver to Venezuelan jurisdiction; therefore, considering the connecting factors that this case maintains with Venezuelan territory, this present case shall be tried and decided upon by the Venezuelan Courts and so it is declared".

There was a dissenting opinion from one of the judges regarding this decision on the basis that the SCJ was invading the "contractual freedom" of the parties, since they could well decide to refer their conflicts to a foreign jurisdiction, taking into consideration that the subject matter of the claim was not on real property nor contrary to public order, the only restrictions as stated by art. 2 of the Civil Procedure Code; however, this dissenting opinion does not affect the ruling in itself, the reason being that it is not binding.

A significant conclusion to be drawn from the decision referred to, is that for carriers to be able to avoid local jurisdiction by virtue of this ruling, they are advised to include in their bills of lading, if possible, an express Venezuelan jurisdiction waiver. It is true that in future decisions the SCJ may apply or not the connecting factor test as stated in the m.v. "Jans" case, but the use of this

express waiver seems to be the safest way to tackle this matter.

In the meantime, as mentioned above, there is no doubt that this ruling will encourage cargo receivers and insurers to bring actions against foreign carriers in the Venezuelan forum, in which case carriers and their P&I clubs should consider to take advantage of the new Law for Commercial Arbitration, passed in 1998, as a way to solve some controversies in case of cargo claims, quickly and keep costs down.

PORT OPERATORS

The Organic Law for Prevention, Conditions and Environment of Work and its Impact on Loss of Life and Personal Injuries

Very little attention has been often paid to this legal instrument, despite the fact that it might have a significant impact on shipping operators and stevedores, in case of loss of life or personal injuries accidents, both onboard as well as ashore. The "Law for the Prevention, Conditions and Environment of Work" (Organic Law of Prevention, Conditions and Environment of Work), prescribes a number of sanctions for the employer, in case of accidents suffered by employees that may happen during the working time, should the employer fail to properly instruct and warn the worker about the nature of the risks he is exposed to, as well as to provide him with the safety means to perform his job. These sanctions may take the shape of fines or even arrest if it is proved that the employer was aware of the danger to which the employee was exposed to, at the time he was performing his work. Accidents involving loss of life or personal injuries that take place at ports and ships, could well be the result of the employer's negligence to instruct and warn his employees about the risks concerned with the task assigned. Thus, a stevedoring company could be held liable, because of its failure to warn a dockworker about the risk he was facing during working time, in particular, if he was not wearing safety equipment and there was lack of supervision in the area. In this event, the stevedoring company could be sued pursuant the provisions of this law, action that even could be directed to the vessel if, for instance, accident takes place onboard or involves a ship's crane.

In case of loss of life, the Venezuelan Organic Employment Law (Proviso 62) prescribes a time-bar for this labour accident of two (2) years from the accident date, within which the relatives of the deceased worker (wife, concubine, children and ascending relatives) could bring a claim or action to get indemnity for working accidents. In case of relatives bringing a lawsuit within this period of time, the lawsuit could be brought not only against the stevedoring company, but also against the vessel (shipowners, charterers, etc.), requesting as a precautionary measure the arrest of the vessel involved in the accident (or any other property of the defendant),

claiming a privilege credit in view of the Proviso 4, numeral 3 of the Law of Privileges and Naval Mortgages (rights against the shipowner, for loss of life or personal injuries, as a result or with occasion of the ship's operation). According to the same legal instrument, the privileged credit follows the vessel irrespective of changes in ownership or registry. In view of the above, it is advisable to bear in mind that dockworkers should be duly trained and warned about the risks associated to stevedoring activities, documenting all this in order to be used as evidence in the event of lawsuits brought in accordance to this law. Liner/Tramp operators, on the other hand, should take care that their stevedores comply with the provisions of this legal instrument, in order to avoid undesirable actions, subsequent delays and extra costs.

PORTS

Marine Terminal Fined by the Superintendence for the Promotion and Protection of Free Competence

The Superintendence for the Promotion and Protection of Free Competence (SPPFC) fined VENTERMINALES, a private marine terminal belonging to the Holland Chemicals International (HCI) group, for the amount of Bs. 55.766.194,29 (1US\$/Bs. 610). The fine was imposed after the SPPFC found that VENTERMINALES had carried out abusive conducts of its dominion position in the market, applying discriminatory commercial conditions to a company called PROQUIM, C.A., affecting so free competence and hampering the entrance of the former to the distribution of heavy Sodium Carbonate in the domestic market. Therefore, PROQUIM/DEPOQUIM group brought an action against VENTERMINALES for discrimination of prices and application of unequal commercial conditions in the discharge of Sodium Carbonate, these conducts prohibited on Article 13, 1 and 4 of the Law for Promotion and Protection of the Exercise of Free Competence. VENTERMINALES is said to be the leading company in the discharge of Sodium Carbonate, a product that is not produced in Venezuela so that the companies that require it on their process of production or other intermediaries are forced to import it, so they are also consequently users of the discharge process of the product. The Fine by the SPPFC was based on a) The existence of a Dominion Position by VENTERMINALES, who was found not to have competitors able to offer effective services for the discharge of Sodium Carbonate; and b) The existence of abuse in the exercise of that Dominion Position, once it was found that VENTERMINALES did not give the same commercial price treatment to DEPOQUIM, since they were offered discharge rates of Sodium Carbonate less favourable than other customers, as it was the case of Holanda de Venezuela company, which like VENTERMINALES belonged to Holland Chemicals International (HCI) group. This conduct hampered the entrance of DEPOQUIM in the domestic market, as a new competitor of Holanda de

Venezuela in the distribution of Sodium Carbonate, resulting in the imposition of the fine.

New Container Terminal for Puerto Cabello

Plans for the construction of a container terminal have been revealed by Puerto Cabello Port Authority (IPAPC). The project which promises, according to the President of the port, to simultaneously increase operational efficiency and the port's overall attendance capacity in the coming years, includes a container terminal equipped with a dozen gantry cranes, an additional 1,550 meters of berth and a dredging program which will increase channel depth, enabling the port to cater to larger deep draft vessels. Puerto Cabello's advantageous geographical location makes it one of South America's ideal container transshipment centers. With this fact in mind the IPAPC will concentrate on boosting container transshipment operations with a new container terminal. Such operations currently account for twenty percent of the port's overall movement. The project, to be completed within ten years, will be carried out in three phases, thus allowing completed zones to be operational while construction continues on others. Planners estimate that the container terminal, covering over 14.4 hectares, will require approximately US\$386 million in investment. Multinationals will account for 51 percent of this total with the remaining 49 percent coming from national firms. The first phase of the project, requiring US\$197 million in investment, includes the construction of access roads, 750 meters of dock space, part of the container storage terminal, administrative buildings, the installation of 6 gantry cranes, and a dredging program to increase depth to 13 meters. The second phase, counting on US\$149 million, will aim to complete the container terminal, the construction of 750 meters of additional dock space, and install 6 more shore cranes. Approximately US\$40 million is deemed necessary to complete the third and final stage of the project which will include a more vigorous dredging program to increase port depth to 15 meters.

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