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MARITIME AND PORT AFFAIRS - INTERNATIONAL TRADE - TRANSPORT

SABATINO PIZZOLANTE - ASSOCIATED MARITIME CONSULTANTS

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New Constitution, New Hopes....

On 15th December Venezuelans massively voted for a new *Constitution*, that is said to be the fundamental instrument for the establishment of the V Republic, whose aim is to amend the mistakes and vices of the past, by giving rise to a modern state where justice, honesty and social security will be the rules. Taking into account these promising objectives, the port and shipping sector look to the future with expectations too, because of the particular provisions included in this text.

In the last two decades Venezuela has witnessed the vanishing of its merchant fleet, to the detriment of the importers and exporters, to the extent that even many of the vessels belonging to the oil industry have been flagged out in Panama, all this due to the absence of a well designed plan and policies to promote a national fleet. On the other hand, it is true that following the port decentralisation process started in 1991, this sector improved quite a lot, in terms of productivity and relatively good management; however, the harmonic development of the port system as a whole was prevented by the lack of a proper legal framework, able to ensure the co-ordination between the central and regional governments, the effective privatisation of the ports and the design of long term strategies, in the context of a national transport plan.

The new *Constitution*, hopefully, could help to overcome decades of darkness, paving the way to review the current port administration system.

It is time now for government officials to understand the importance of the port and shipping sector, and to use the new *Constitution* to wisely introduce the necessary changes to fostering our international trade.

SHIPPING

Applicable Fines for Prohibited Disposal of Garbage from Ships

A recent vessel inspected at the port of Puerto Cabello by the Navy (Coastguard), in charge of the Port State Control, was intended to be charged with a fine for US\$ 60,000 as a result of an alleged disposal of garbage in a non authorised area. After reviewing the garbage book, the inspector found that three disposals had taken place outside territorial waters. This law firm acting on behalf of the shipowners managed to deal with the authorities, in order to reduce the fine to a reasonable level. It is true that Venezuela is signatory to the MARPOL convention, and that under Port State Control (Acuerdo de Viña del Mar) vessels have to be inspected regarding the compliance, among others, of this regulation, but at the moment it is not clear what domestic fine is to be imposed in case of a breach of it.

It is important to mention that Coastguard is empowered to carry out the inspection of vessels under PSC functions, but not to apply any sanction, due to the lack of particular provisions. Therefore, where inspections take place and any non compliance of regulations is detected, an

administrative procedure at the Port Captaincy will follow, in order to complete a file to be forwarded to the relevant department at IMO, all this through the Ministry of Transport. Nevertheless, some Port Captaincies in the absence of a particular fine to be imposed, consider that art. 135, letter j, of the Navigation Law could apply to these cases.

In view of the above, shipowners and charterers are advised to take care about the compliance of the regulations prescribed per Annex V of MARPOL 73/78 Regulation 5, bearing in mind that despite the fact that no fine can be applied locally by the Coastguard at the moment, detentions may become time and money consuming.

Average Guarantees under Venezuelan Law

This law firm has been recently asked to give opinion about an idea according to which in Venezuela the average bonds were only valid for six months from the date of the casualty and the need to have them constantly renewed, certainly a mis-interpretation of the domestic legislation. Thus, by virtue of proviso 889 of the Venezuelan Commercial Code, the actions related to the contribution to general average, will be time-bar in six months to be counted from the date of the effective delivery of the cargo subject to contribution. This means that under domestic legislation, the ship interest will have six months to request from cargo interest the contribution to general average; over this period of time, cargo interest could invoke the prescription as stated by the said provision. However, it is important to mention that this provision has nothing to do with the validity of the "guarantee" issued in the event of a General Average. Once the Average Bond/Guarantee Bond have been put forward to cargo interest and their insurance company and they have signed it, it could be said that the six-month period of time (prescription) as stated in proviso 889 does not apply, the reason being that in pursuant to the general average contribution such bonds have been requested, and because of the "freedom of contract" cargo and ship interest are bound by the contract of carriage terms, including the wording of the bonds issued in accordance with the York/Antwerp Rules incorporated therein. The remaining question has to do with the prescription time for the mentioned bonds. Regarding this point, it could be said that according to proviso 893 of the Commercial Code the prescription time would be five years, taking into consideration that there is no special time-bar for this matter.

In any case it is advisable to include in the wording of the Average Guarantee an express clause stating "that any period of prescription whether provided by statute law, contract or otherwise, shall commence to run from the date upon which the general average adjustment is issued".

PORT OPERATORS

Is it cargo delivered to a public authority at Venezuelan Ports?

The matter referred to in the heading is an issue many times raised in Venezuela, in the event of loss of cargo through mis-delivery. It should be borne in mind that the topic of reception and delivery of cargo at domestic ports have to be assessed on a *case to case* basis, taking into account that port and customs procedures may differ from one port to another.

The new port scheme adopted in Venezuela towards the end of 1991, gave rise to regional port bodies acting as "landlord port authorities", for which reason 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; however, this does not mean that public authorities, in particular, the port authorities have ceased to be involved in the custody of cargo as well as in its delivery, in this light the customs legislation remains the same as that applied in the times of the Instituto Nacional de Puertos. (INP)

Carriers deliver cargoes to private port operators or to port authorities. The case might be that the cargo is taken to a delimited area controlled by the port operator (sometimes called "terminals") or to common areas or areas that are controlled by the port authority itself. They also deliver shipping documents (cargo manifest, bill of lading, etc.) to customs authority; however, by virtue 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.

It has been said that in all cases, cargo remains to the order of the customs authority, in this light the Organic Customs Law, and cargo must remain deposited in the authorised areas, until customs procedures are complied with. It is then that cargo is authorised by the customs authority to leave the terminal as well as the port. In any event, by virtue of the REGULATIONS ON CUSTODIANSHIP OF THE CUSTOMS DUTIES (OFFICIAL GAZETTE No. 25.394 / 29-6-1957) —provisions ratified by the new OCL— goods within the port area are under the vigilance of the National Guard, the customs police.

This is perhaps a sound point to argue the involvement of a public authority in the present Venezuelan port scheme. It is true that in some cases cargo remains in the hands of private port operators, but this is only because they act as operative bodies, in view of the landlord role of the port authorities. Apart from this, port practices have changed very little from the times of the INP, since for the cargo to leave the terminal or even the port area, customs authorisation is required.

The argument that port procedures may differ from one port to another, is better appreciated if we take the case of

the Port of Maracaibo and that of Puerto Cabello. In the first case indeed there is little difference between the procedure for the release of cargo under the new decentralised scheme and that enforced when the port was run by the INP. By that time cargo was discharged and taken to a warehouse or a yard managed by the INP; to this end an “Acta de Recepción” was issued, signed by the port authority, and once the cargo had obtained customs clearance, then the INP gave the release of cargo through a “Pase de Salida”.

Today the situation has not varied very much. Under the new decentralised scheme, after cargo is discharged it is taken to a yard, either a delimited one under the control of the port operator, or a common one under the control of the port authority, or even cargo can be taken to one of the warehouses within the port, that up to recently have been administered by the port authority. In all these cases, an “Acta de Recepción” is issued which is signed by the port authority as well as the private port operator. For a consignee to take delivery of the cargo, he must then go to a port operator with the invoice by which he proves that all costs concerning cargo have been duly paid; the personnel in the terminal issues an Equipment Interchange Receipt (EIR) handing over the cargo. The consignee then has to go to a control office of the port authority where he has to provide the port authority with the EIR, customs documents to be able to obtain the “Pase de Salida” that is signed by the port authority.

There is also an common area called “La Cañada” that is run by the port authority where port operators deposit special cargoes like machinery, project cargo, etc., here the port authority issues an “Acta de Recepción”.

The situation is quite different from the one existing in Puerto Cabello, because soon after the decentralisation process took place, the port authority had to face some big claims for loss of cargo, and fearing that this would get worse then decided not to issue more “Pases de Salidas” as a way to avoid responsibility and, therefore, the issuance of it was left to the private port operators who, of course, have to ask also for the customs documents to deliver the cargo.

The fact that even today, after giving delimited areas to port operators, the port authority in Maracaibo also signs and stamps these documents, may prove that not only cargo is to the order of the customs authority, but also somehow under the control of the port authority.

MARINE POLLUTION

The Impact of the new Criminal Procedure Code on Oil Pollution Cases

The “Nissos Amorgos” disaster is the best example of how difficult and unpredictable, oil pollution cases are in Venezuela, due to the lack of clear criteria by the judiciary, particularly, Criminal Courts the one in charge of dealing with this matter, as well as rigid procedure rules. A reminder of this case will suffice to show that in the case referred to, despite the fact that shipowners set up the limitation fund, the Criminal Court decided to arrest the Captain of the vessel with arrangement to the Environmental Criminal Law.

Despite the above, criminal proceedings could become less cumbersome with the enactment of the new Criminal Procedure Code that was enforced last July. The main feature is, of course, the elimination of the secret stage — the so-called “sumario”— and the shortening of the proceeding. Thus, the figure of the Unipersonal Judge has been introduced, who will deal with crimes implying less than four (4) years of imprisonment; they will be dealing with oil pollution cases, taking into consideration the penalties imposed by the Environmental Criminal law. Once the file is sent to the Unipersonal Judge, a hearing will be called within the following 10 to 15 days; in this opportunity the Fiscal Public (Fiscal Publico) will present the accusation, within a term not less than ten (10) days and not greater than twenty (20) days. Fiscal Public now has an important role to play. Before the hearing called by the Judge, the Master or accuser could propose in writing, a Repairable Agreement (Acuerdo Reparatorio) . Once the day of the hearing has arrived, this will be the act in which the parties will present the fundamentals of their petitions. In this same act once the hearing is completed, the judge will decide with the presence of the parties about the request of the repairable agreement. the repairable agreement, must count on the will or consent of the parties involved, the acceptance of the same will bring to an end the criminal action. It is important to point out that in those cases where a repairable agreement has been accepted by the court, the process will be suspended until the effective repair or fulfilment of the agreement is carried out. It will be necessary, obviously, to wait until criminal courts apply the new provisions of the Code, but no doubt this should have a positive impact on oil pollution cases.

PORTS

Port of La Guaira Badly Affected by Heavy Rains and Mudslides.

Although at least eight states of the twenty four forming part of Venezuela, have been suffering strong rains and flooding during the last two weeks, the port of La Guaira was the most badly hit when on Thursday 16th December, residential areas, beaches, marinas and the port itself were covered in mud that in many cases reached the fourth floor

level of buildings and buried houses and shops along the streets. The scene was hard to describe as no food, electricity and telephone services were available, public roads vanished isolating towns throughout the coastline. The number of deaths is difficult to determine, but press reports state 40,000 dead and 160,000 homeless.

The port of La Guaira is closed to commercial activity as the mudslide covered its area, causing severe damages to warehouses, yards and offices. In fact, a huge number of containers were swept away by the flooding, many of them were reported to be floating in the sea, while handling equipment and containers were seen buried in mud.

Soon after the catastrophe people avalanched over containers in search of food: apples, hams and grapes were taken from the containers. However, the press has reported that goods other than food, were being stolen in the port area, amidst the confusion, and security personnel and National Guard did very little to avoid that situation. According to the Associated The Port of La Guaira will be closed at least for several weeks, even months, until the mud is removed and public roads are opened again. Even then, the port will have serious traffic restrictions since the road up to Caracas was also badly damaged. It is also said that dredging will be required before the port begins operations again.

Vessels are being deviated to the port of Puerto Cabello that has not been affected by the rains and flooding. Port Authority and Harbour Master have announced that the port is able to serve this demand.

Consortio Guaritico III Fined by the Superintendence for the Promotion and Protection of Free Competence

The Superintendence for the Promotion and Protection of Free Competence, organism appointed to the Treasury Department fined for the amount of Bs. 42.616.139,00 to CONSORCIO GUARITICO III, which through a concession contract granted by the Government of State Nueva Esparta, has the administration of the International Port "El Guamache".

The sanction was imposed for considering that the CONSORCIO GUARITICO III abused its dominion position in the market applying commercial conditions discriminatory to the companies SERVICIO DE CARGA AEREA Y TERRESTRE (SCAT), C.A. GARCIA HOYER AND ASSOCIATES, C.A. and TRANSPORTADORA MARGARITA, C.A. (TRANSMARCA), affecting the free competence and hampering their business within the market for rental of storage of full and empty containers. CONSORCIO GUARITICO III as concessionaire of the port "El Guamache", is the only company offering leasing of land for container storage, so that port operators wishing to carry out storage services within the port area, must contract with the former, the leasing of land. The fine was set by such organism, due to the denounce filed by SERVICIOS DE CARGA AEREA Y TERRESTRE (SCAT), C.A., GARCIA HOYER AND ASSOCIATES,

C.A. and TRANSPORTADORA MARGARITIA, C.A. TRANSMARCA, who alleged that that CONSORCIO GUARITICO III was involved in conduct and practices that hamper the development of business under equal conditions, by offering SACOPORT company better terms for the leasing of storage areas, which shows the dominion position of CONSORCIO GUARITICO III in the market, and the abuse of such position to the prejudice to the companies denouncing this practice, these conducts are prohibited on the Article 13, ordinals 1° and 4° of the Law for Promotion and Protection of the Exercise of Free Competence.

Such denounce based on the application by CONSORCIO GUARITICO III, of commercial conducts and practices that hampered the development of the commercial activities of these companies into the port installations, and benefit to SACOPORT company, to grant to this last one better conditions in the adjudication and contract of the land areas, allowing SACOPORT to offer to their clients the most beneficial price conditions for the rental of spaces to the storage or stock of full and empty containers, which shows the dominion position of CONSORCIO GUARITICO III in the market and the abuse of such position in prejudice of the companies filing the denounce and in benefit of SACOPORT, this conduct prohibited in Article 13, ordinals 1° and 4° of the Law for Promotion and Protection of the Exercise of Free Competence.

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