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New Liability Regime for Port Operators prescribed by the General Ports Law

The General Ports Law (Ley General de Puertos) was enacted through Decree-Law No. 1,436 of 30th August 2001, published in the Official Gazette No. 37,292 of 27th September 2001. It introduces general principles related to the *Ports Regime* and Infrastructure, governing public and private ports nationwide, to ensure co-ordination between central and regional governments in order to consolidate a national port system. This law firm acted as advisor to the Ministry of Infrastructure in the drafting of this legal instrument.

Title IV of the law deals with the liability regime of port operators and port administrators, and it is expected to introduce significant changes in this field.

The whole Title IV is based on the 1991 United Nations Convention on Liability of Operators of Transport Terminals in International Trade; however, some of the provisions have been reviewed to adjust them to our particular domestic port practices, whereas others have been introduced to prescribe situations that the Convention does not deal with.

Generally speaking, stevedores and warehousemen's liabilities is a complex subject in Venezuela because of the lack of a proper legal framework. Despite the fact that port legislation is relatively new, there are no specific rules governing the liabilities of these port operators; as a

matter of fact, regional port authorities (known as port administrators) have shifted eventual liabilities for loss or damage of cargo to the private sector. In practice, this means that there is little chance to bring legal action in pursuance of a possible indemnification, not even in those cases where the very nature of the responsibilities, such as maintenance of navigation channels and adequate dredging, condition of berths, security, etc. undoubtedly point to the port authorities as liable party. Therefore, it is the private sector in the shape of port operators, those that are subject to a broad range of claims in the exercise of their activity, with the disadvantage that in the absence of legal precedents and clear criteria concerning the validity of the Himalaya clause, they are often placed in the most difficult situation.

Nevertheless, it is expected that Title IV of the General Ports Law may bring this situation to an end, by prescribing particular provisions to apply.

The law defines the "Port Operator" as any legal entity different from the carrier who in the exercise of an authorisation or contract granted by the port administrator, undertakes to take in charge goods that were carried or shall be carried by water, in order to perform or to procure the performance in respect of those goods services such as storage, loading, unloading, stowage, trimming, dunnaging, lashing, transfer and warehousing. Besides, "Port Administrator" is defined as the legal entity that has the representation and control of any port.

Regarding the period of responsibility the law prescribes that the port operator is responsible for the goods, from the time he has taken them in charge until the time he has handed them over to or has placed them at the disposal of the person entitled to take delivery of them, according to the applicable customs regulations. It should be borne in mind, however, that Title IV goes far beyond the scope of the 1991 Convention, since it applies not only to loss or damage to goods in international trade but also to cabotage or coastal trade, as well as damage to vessels.

Insofar as limitation of liability is concerned, the law prescribes a twofold regime: when the port operator is appointed by the carrier, he shall be entitled to invoke the exoneration and limitation of liabilities that may be invoked by the carrier pursuant to the Law for Maritime Commerce, i.e. 666.67 SDR per package or other shipping unit or 2.5 SDR per kilogram of gross weight of the goods lost or damaged, whichever is the higher; on the other hand, when the port operator is appointed by the cargo interest, then the former shall be entitled to limit liability to an amount not in excess of 2 SDR per gross kilogram of the goods lost or damaged.

The law also states that by the time of reception of goods, the port operator will issue in writing the necessary documents or at least an “Act of Reception”, identifying the goods, acknowledging his receipt of the goods and the date thereof, and stating condition and quantity of goods.

The liability of the operator for delay in handing over the goods is also dealt with, in which case the port operator may limit liability to an amount equivalent to two and an half times the charges payable to the operator for his services in respect of the goods delayed, but not exceeding the total of such charges in respect of the consignment of which the goods were a part. According to the law, delay in handing over the goods occurs when the port operator does not deliver the goods to the person entitled to receive them within 25 continuous days after receiving a request of delivery from said person. Like in the Convention, the defences and limits of liability provided for in the law apply to any action against the operator in respect of loss of or damage to the goods, as well as delay in handing over the goods, whether the action is founded in contract, in tort or otherwise.

Another important feature of this legal instrument is contained in article 97, whereby the prescribed liability regime is extended to areas located outside the port itself such as inland depots and container terminals.

The law states that all actions under Title IV are time-barred after one year to be counted from the day the operator hands over the goods or part thereof to a person entitled to take delivery of them, or places them at the disposal of such person; or, in cases of total loss of the goods, on the day the person entitled to make a claim receives notice from the operator that the goods are lost, or on the day that person may treat the goods as lost.

Finally, according to article 107 claims arising out under the General Ports Law as well as the regional ports law will be dealt with by the maritime jurisdiction recently created by the Organic Law of Aquatic Spaces, a significant feature that it is expected to have positive impact in terms of time and costs.

A free translation of the whole Title IV of the General Ports Law may be found below for further analysis:

Official Gazette No. 37,292 of 27th September 2001
General Ports Law – Excerpts
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Title IV
 About the Liability Regime

Priority of applicable provisions

Article 81.- The responsibility of the port operators shall be subject, in order of priority:

1. To the international conventions on the matter duly signed by the Republic.
2. To the provisions of this Decree-Law.
3. To the contractual provisions provided they do not contradict this Decree-Law.
4. To the commercial legislation.
5. Commercial uses and customs.

Responsibility of port operator

Article 82.- The port operators are responsible for the goods from the time they have taken them in charge until the time they have handed them over to or have placed them at the disposal of the person entitled to take delivery of them, according to the applicable customs procedures. When the shipper or the carrier hand over the goods consolidated in a container, pallet or similar article of transport or where they are packed, the term goods includes such article of transport or packaging.

The port operator is equally responsible for the damages to the ships, caused as a result of the loading and unloading operations that may be attributable to him.

The responsibility for personal damages will be subject to the common legislation and the applicable international conventions.

Limits of liability

Article 83.- In those cases where the port operator is appointed by the carrier, he may invoke the exoneration and limits of liability to which the former is entitled to, subject to the provisions of the law.

In the rest of the cases, the port operator liability resulting from loss of or damage to goods is limited to an amount not exceeding 2 units of account per kilogram of gross weight of the goods lost or damaged.

The amount to be indemnified will not exceed the invoice value of the goods lost or damaged.

By unit of account is meant the special drawing right as defined by the International Monetary Fund. The amount of it will be taken as from the moment in which the loss or damaged occurs.

Responsibility of port administrator

Article 84.- In those ports where the port administrator directly performs the services referred to in article 77, this will be responsible in the same terms of this Decree-Law than the port operator, for the loss or damage that may be caused to the goods.

Responsibility for damages to ships

Article 85.- The port operator and the port administrator may limit their liability for loss or damage to ships, subject to the following amounts:

1. One hundred and sixty seven thousand (167,000) units of account, in the case of ships up to five hundred dead weight tonnage (500 dwt).
2. In the case of ships over five hundred dead weight tonnage (500 dwt), the amount as stated below, plus the one mentioned in the former numeral:
 - a. From five hundred and one (501 dwt) to thirty thousand (30,000 dwt) dead weight tonnage, one hundred and sixty seven (167) units of account per each ton.
 - b. From thirty thousand and one (30,001 dwt) to seventy thousand (70,000) dead weight tonnage, one hundred and twenty five (125) units of account per each ton.
 - c. From each ton exceeding seventy thousand (70,000 dwt), eighty three (83) units of account.

Procedure to limit liability

Article 86.- In order to exercise the limitation of liability prescribed by the former articles, the relevant procedure prescribed by the Law of Maritime Commerce will be followed, insofar it is applicable.

Issuance of receipt

Article 87.- On receipt of goods the port operator may acknowledge his receipt of the goods by signing the necessary documents or, at least, an only act of reception or a partial one duly signed, identifying the goods, acknowledging his receipt of the goods and the date thereof, stating their condition and quantity, the said document may incorporate the general conditions of the bill of lading used by the carrier.

Presumption of good condition

Article 88.- If the operator does not issue the documents referred to in the former article, he is presumed to have received the goods in apparent good condition, unless it is proved otherwise.

Means for issuance of documents

Article 89.- The issuance of the document referred to in the former articles, may be issued in any form which preserves a record of the information contained therein. When the customer and the port operator have agreed to communicate electronically, the said documents may be replaced by an equivalent electronic data interchange message.

The signature may be a hand written signature, its facsimile or an equivalent authentication effected by any other means.

Exclusion of liability

Article 90.- The port operator is liable for loss resulting from loss of or damage to the goods, as well as from the delay in handing over the goods, if the occurrence which caused the loss, damage or delay took place during the period of the operator's responsibility for the goods as prescribed by this Decree-Law, unless he proves that he, his servants or agents or other persons of whose services the port operator makes use for the performance of the port service took all measures that could reasonably be required to avoid the occurrence and its consequences.

Concurrent causes

Article 91.- When the port operator, his servants or agents or other persons of whose services the port operator makes use for the performance of the service, do not take the measures referred to in the former article, and it combines with another cause to produce loss, damage or delay, the port operator is liable only to the extent that the loss resulting

from such loss, damage or delay is attributable to that failure, provided that the port operator proves the amount of the loss not attributable thereto.

Concept of delay in the delivery

Article 92.- Delay in handing over the goods occurs when the port operator fails to hand them over to or place them at the disposal of a person entitled to take delivery of them within twenty five (25) continuous days to be counted from the day that person requested such delivery. There will be no delay in the delivery of goods, when such goods having been placed at the disposal of the person entitled to take delivery within such period of time, the same is not withdrawn.

Limits for delay in the delivery

Article 93.- The liability of the port operator for delay in the delivery of the goods is limited to an amount equivalent to two and a half times the charges payable to the port operator for his services in respect of the goods delayed, but not exceeding the total of such charges in respect of the consignment of which the goods were a part.

Presumption for the loss of goods

Article 94.- If the port operator fails to hand the goods over to or place them at the disposal of a person entitled to take delivery of them within a period of thirty five (35) continuous days, after receiving from that person the request of delivery prescribed by article 92, the goods can be deemed lost for the legal purposes.

Notice of loss, damage or delay

Article 95.- The carrier, consignee or any other person entitled to receive the goods from the port operator, is given three (3) working days from the date when the goods were received, to give notice for loss, damage or delay, specifying the general nature of the loss, damage or delay suffered.

Is it prima facie evidence, unless otherwise proved, that the port operator has handled the goods over as described in the document issued by him in accordance to article 87 of this Decree-Law, or in good condition, if no such document was issued.

Survey or inspection to goods

Article 96.- In the case notice of loss or damage is given as prescribed by the former article, the port operator, the carrier and the person entitled to take delivery of the goods shall give all reasonable facilities to each other for inspecting and tallying the goods.

Nevertheless, if the port operator and the person entitled to take delivery of the goods participated in a survey or inspection of the goods at the time when they were handed over to the last one, all this documented by means of an act signed by both parties, the regime of notice and presumption as stated in the former article will be omitted.

Extension of limits of liability

Article 97.- The exoneration and limits of liability prescribed by the present Title may be applicable to the areas located outside ports, such as inland depots, container terminals, multimodal depots and similar, provided they are under the administration and control of the port operator or port administrator. Such exoneration and limits of liability will be equally applicable to those cases where the haulage is contracted on behalf of the carrier or the owners of goods.

Extra-contractual liability

Article 98.- The defences and limits of liability provided for in this Title apply to any action against the port operator or port administrator, in respect of loss of or damage to

the goods, as well as delay in handing over the goods or damages to ships, whether the action is founded in contract, in tort or otherwise.

Loss of right to limit liability

Article 99.- The port operator is not entitled to the benefit of the limitation of liability if it is proved that the loss, damage or delay resulted from an act or omission of the port operator himself or his servants or agents done with the intent to cause such loss, damage or delay, or recklessly and with knowledge that such loss, damage or delay would probably result.

This provision is equally applicable to the servant or agent of the port operator or another person of whose services the operator makes use for the performance of the services, to whom liability is directly asked for, if it is proved that the loss, damage or delay resulted from an act or omission of such servant, agent or person done with the intent to cause such loss, damage or delay, or recklessly and with knowledge that such loss, damage or delay would probably result.

Special rules on dangerous goods

Article 100.- If dangerous goods are handed over to the port operator without being marked, labelled, packaged or documented as such, or if at the time the goods are taken in charge by him, the operator does not otherwise know of their dangerous character, he is entitled:

1. To take all precautions the circumstances may require, including, when the goods pose an imminent danger to any person or property, destroying the goods, rendering them innocuous, or disposing of them by any other lawful means, without payment of compensation for damage to or destruction of the goods resulting from such precautions, for which he will follow the procedures established by the competent authority.
2. To receive reimbursement for all costs incurred by him in taking the measures referred to in the former numeral, from the person who failed to meet any obligation under such applicable law or regulation to inform him of the dangerous character of the goods.

Right to retain the goods

Article 101.- The port operator has a right of retention over the goods under his custody for the price in connection with the services performed by him in respect of the goods, and the costs incurred accordingly, unless agreed otherwise in the contract through which services are performed.

Guarantee or bond

Article 102.- The right of retention over the goods will cease when a sufficient guarantee to the satisfaction of the port operator is given, or if the sum claimed is deposited at the court.

Executive Auction

Article 103.- The port operator may request to the competent judge, the executive auction of all or part of the goods over which he has exercised the right of retention provided for by the former articles, this for the satisfaction of his credit.

This right does not apply to containers, pallets or similar articles of transport or packaging which are owned by a party other than the carrier or the shipper and which are clearly marked as regards ownership except in respect of claims by the operator for the cost of repairs of or improvements to the containers, pallets or similar articles of transport or packaging.

From the amount collected as a result of the auction, once paid the privileged debts according to the law, and deducted the sums due and other costs incurred by the port operator, the balance will be put by the court to the owner of the goods.

Limitation of actions

Article 104.- Any action under this Title is time-barred within a period of one year.

The prescription is interrupted with the filing of the lawsuit effected in accordance to the law.

Commencement of the limitation period

Article 105.- The limitation period commences:

1. On the day the port operator hands over the goods or part thereof to, or places them at the disposal of, a person entitled to take delivery of them.
2. In cases of total loss of the goods, on the day the person entitled to make a claim receives notice from the operator that the goods are lost, or on the day that person may treat the goods as lost in accordance with article 94 of this Decree-Law, whichever is earlier.

Contractual stipulation null and void.

Article 106.- Any stipulation in a contract concluded by a port operator or in any document signed or issued by the port operator pursuant to the prescribed by this Decree-Law, in order to establish a more favourable responsibility regime, is null and void.

Nevertheless, the port operator may agree to increase his responsibilities and obligations under this Decree-Law.

Competent jurisdiction

Article 107.- All actions derived from this Decree-Law and the regional laws passed by the Regional Legislative Council, with the exception of those referred to the taxation matter, will be dealt with by the maritime jurisdiction.

Should you need any assistance or further information regarding the topic stated above, please feel free to contact:

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