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Cargo Reservation: Can this be the right path?

Again the cargo reservation mechanism is on the table, as a state policy to promote the national merchant marine. The Committee of Merchant Marine, with representation of the public and private sectors, advisory body to the National Institute of the Aquatic Spaces (INEA) has prepared a draft of the bill to be passed for the consideration of the Ministry of Infrastructure which might be shortly enacted by President Chavez. As per the reading of the exposition attached to the bill, its justification is explained by several reasons, one of them the fact that freights for international maritime transport are currently set by the transnational companies according to their particular interests, not having the country a national merchant fleet that would play the role of regulator for the costs of those freights. We may wonder, however, if the escalate of freights experienced by the Venezuelan market are also the consequence of the costs at our port services, specially of those in connection with services controlled by the INEA. In any case, the bill rests on the old theory advocating for cargo reservation and the restriction to foreign capital participation, as a tool for fostering the national merchant marines of many Latin American countries, which negative results are well known throughout their experiences in past decades.

Perhaps it is time to seek the explanation for the poor performance of the domestic merchant marine in other adverse factors: legal uncertainty, lack of proper employment and customs legislations, and even the absence of a comprehensive and national policy for the development of this strategic sector...

SHIPPING

Draft of the Decree on Cargo Reservation

At the moment, the Executive is considering the enactment of a Decree on Cargo Reservation, in order to foster the Venezuelan merchant marine, this in addition to the incentives already in place.

According to a draft released for the maritime community's consideration, the main features of this Decree are:

- a) Imports and exports are reserved to ships registered under Venezuelan flag (RENAVE), either owned by the State or private companies or those where at least 80% of shares are owned by Venezuelan companies or individuals, duly registered and domiciled in the country. This means that ships under bareboat charter would not qualify to carry reserved cargo.
- b) Cargo reservation applies not only to cargo owned or imported by the State, but also to private import and export operations enjoying financial, customs or exchange control benefits, so it might be expected to be applied to more than 75% of the total cargo moved by international trade, if the operations subject to dollars at official exchange rate granted by CADIVI are included.
- c) A waiver mechanism is prescribed by the Decree, by means of a so-called computerized system in those cases where there is no national flag ship available. The waiver must be requested from the National Institute of the Aquatic Spaces (INEA) and it is an obligation for the importer/exporter.
- d) Fines are prescribed by the Decree and are applicable to the importer/exporter and public servants in those cases not complying with the Decree provisions. In connection with the draft some critics have put forward that it seems to contradict current domestic legislation, e.g. Case of

ships registered at RENAVE under the bareboat charter mechanism, used by many private companies. In these cases where the ships are not “owned” by a Venezuelan company, they would not be able to carry reserved cargo, although at least under the current legal provisions they would be able to carry cargo in cabotage, including transshipment of cargo between domestic ports. Also, the waiver mechanism has been criticized because some remembrance is found in respect of those times when corruption was the rule to obtain them.

There have been three recent Colloquiums (Caracas, Valencia and Puerto Ordaz) with the participation of carriers, importers and exporters to analyse the contents of the draft, and some recommendations have arisen, e.g. To extend cargo reservation not only to ships owned but also chartered by the State or private companies, to eliminate the restriction to foreign capital in Venezuelan companies registering a ship and to include a waiver mechanism which would allow that in case of the aquatic administration remaining silent (not giving answer for instance in a period of 24 hours) then the waiver can be regarded as authorized.

Besides, the observations and the recommendations referred to were recently submitted by Dr. Jose Sabatino in representation of the Chamber of Commerce of Puerto Cabello, to the Committee of the Merchant Marine at the INEA, and it was suggested that the same should be submitted in writing to the National Council of the Aquatic Spaces which is called twice a year. Consequently, the Chamber of Commerce of Puerto Cabello is submitting these observations/recommendations to the relevant governmental authorities.

JUDICIAL DECISIONS

Under the contract of carriage, in those cases of cargo recovery, the insurer is subject to the same time-bar than the assured. (Maritime Court of First Instance - Court File: 2005-000084)

Facts: Cargo Insurer indemnified damages to cargo, and later on, acting in subrogation, brought an action for recovery against the carrier, beyond the one year time-bar, arguing the three years time-bar prescribed by Law on Insurance Contracts referred to the actions between insurer and assured derived from the said contract.

Held: When the insurer pays an indemnity to the assured, the former takes the same position than the one where the later was, for which reason the claimant cannot pretend to bring an action that belongs to their assured as alleged consignee of the merchandise, with that subrogated action to bring later a lawsuit invoking the rights derived from the contract of transport, pretending afterwards and far from any logic, to apply to the case a time-bar provided for in the insurance contract, in respect of which the defendant and alleged agent for the damage was not a party.

The time period provided for in article 104 of the general law on ports, refers to prescription and not to caducity. (Superior Maritime Court - Court File: 2005-000017)

Facts: Cargo insurer indemnified cargo owners for contamination damages to cargo stored at the tanks of the defendant, later on bringing an action in subrogation for the alleged damages.

The claimant argued to have interrupted the one year prescription time as provided for in art. 104 of the General Law on Ports whereas the defendant argued that the said period, similar to that in the contract of carriage, was a caducity term and so not subject to interruption.

Held: The pretension of the claimant evidenced from the writ falls within the claim of a determined type of behavior which was conducted or not, and which is in line with the exercise of a right to which he is entitled to, pretending its compliance by jurisdictional way and through a legal action. Within this context, the meaning of the provision provided for in article 104 of the General Law on Ports, must be construed in coherence with that argument supra.

When the provision states: “All actions under this title prescribe after one year”, this must be connected to contents of provisions in common law and the interpretations that have arose and consolidated on this respect. In this respect, the analysis made by the a-quo to the situation becomes clear,; the interpretation that must be given to articles 194 and 105 of the General Law on Ports is the one which originated in the true wording of said norm, this been the reason that compels this court to confirm sentence issued by the a-quo.

The lawsuit must be filed against the vessel and her master, pursuant to article 14 of the law on maritime commerce (Maritime Court of First Instance - Court File: 2005-000059)

Facts: A lawsuit is brought by a ship agent against the vessel, to recover costs in connections with services and supplies rendered, without indication as to whom the owners of the vessel are.

Held: From the transcribed provision it may be inferred that the claimant cannot bring the action only against the vessel, the lawsuit must be filed against the Master at the same time. Additionally, the claimant cannot propose the action against the vessel and jointly against her operator or owner.

On the other hand, when the law maker allowed for the action to be brought against the vessel and her Master, it is intended that the later communicates with the operator or owner, having in mind that the Master has the representation provided for in article 18 of the Law on Maritime Commerce, so that each one of them appears and exercises due defenses in the court proceedings.

CONSTITUTIONAL LAW

Reforms to the Constitution seek to introduce significant changes to political and economical structures

Venezuela has had 26 different constitutions since its independence in 1811, and now there could be room for a new one. On 15th August 2007 President Chavez announced proposed reforms to the Venezuelan Constitution during a speech to the National Assembly. Soon after, a commission to study the reforms was set up by the National Assembly, under the absolute control of the governmental party, and the Assembly was declared in permanent session.

The proposal submitted by President Chavez is being criticized by making the legal argument that the proposed modifications are "reforms" rather than "revisions," allowing the President to avoid the creation of another constituent assembly and send his proposals directly to the National Assembly for review. Constitutional reforms in Venezuela may be proposed either by the President of the Republic, the National Assembly, or 15% of registered voters organized through petition.

Articles 342, 343, 344, and 345 of the 1999 Constitution state that the reform proposals must be debated three times in the National Assembly, modified if needed, and then each reform must be approved by two-thirds of its members in order to move forward. Those reforms/changes approved must then be voted no later than thirty days by the public, in a national referendum. In this final stage, reforms can only be ratified if supported by a majority of the voting population through a referendum.

Consequently, the reforms would affect about 33 of the 350 articles comprising the 1999 Constitution. The most controversial reform is a proposal to add one year to the current six-year presidential term and to allow for continual reelection (Article 230). Reform to Campaign financing is also addressed through Article 67 which would prohibit political associations or candidates from accepting funds or resources from foreign governments and public or private bodies. The State would be responsible for financing all electoral activities.

Meanwhile and as this is being written, the most discussed reform is that which would reduce the workday from eight hours to six hours.

From the economical standpoint, the proposed reform to article 112 related to the free enterprise is said to have a huge impact on the economical life of the country and its citizens, so it is to be altered to allow for a "social economy" to replace existing economic policies, which for decades have favored privatization and neo-liberal economics; social production through a more communal economy is also included in the draft reforms to this article. Current article 112 reads as follows: "The State shall promote private initiative, guaranteeing the creation and fair distribution of wealth, as well as the production of goods and services that meet the needs of the common

people freedom of work, enterprise, commerce, industry, without prejudice to the power of the State to promulgate measures to plan, rationalize and regulate the economy and promote the overall development of the country"; whereas the proposal for art. 112 states: "The State shall promote the development of an independent, diversified and intermediate productive economic model, based on humanistic values such as the cooperation and the preponderance of common interests that guarantee the fulfillment of the social needs of the people, social and political stability and happiness. Furthermore, the State will promote several forms of companies and economic units of social production (direct or communal economic units, indirect or state economic units) as well as social production or/and distribution companies or economic units".

Additionally, Article 113 would officially prohibit monopolies and the consolidation of economic resources.

The major change however, affects Venezuela's Central Bank, which would no longer be independent of the government. Article 318 would hand over the Bank's primary task to elected officials: the control of monetary policy, largely through short-term interest rates. The government currently makes decisions on tax and spending policy and economic development. The proposed reform would increase the government's ability to effectively coordinate economic policies by mandating the Executive and the Central Bank to work closely together to increase economic growth and development.

The definition of property would be impacted, and under Article 115 it would expand to include five specific categories: public, social, collective, mixed, and private property. Public property is that which belongs to state entities, social property belongs to citizens (either directly or indirectly through the state), collective property belongs to people or social groups (either in social or private form), mixed property is based on both public and private ownership, and private property belongs to individuals and private entities. Property law would continue to guarantee that, "Only for reasons of public benefit or social interest by final judgment, with timely payment of fair compensation, may the expropriation of any kind of property be declared." As in the past, private property would only be retrieved by the state in the interest of the public good welfare and fair compensation would accompany it.

Venezuela's military structure would also be affected by the reforms. Specifically, it is proposed that Venezuela's National Guard be included as one of five branches of the armed forces under the new name "Bolivarian Popular Militias." Under Chavez's administration, the National Guard has taken on an important role in disaster relief and development projects. Changes would assign the new National Guard a role in national defense, in addition to maintaining internal order. Venezuela's armed forces would also be renamed the Bolivarian Armed Forces.

Article 329 of the Constitution would be affected, which currently establishes that "The Army, Navy and Air Force

have as their essential responsibility, the planning, execution and control of military operations as required to ensure the defense of the Nation."

Further, Article 11 would incorporate Venezuela's maritime regions into its sovereign territory and would allow military regions to be appointed to carry out specific activities ranging from counter narcotics operations to national defense.

There is no doubt that the proposed reforms introduce significant changes to the constitutional text that are far beyond a mere "reform" as argued by President Chavez and his followers. The new provisions, instead, call for the revision of fundamental principles and as such should be subject to the creation of another constituent assembly (Asamblea Constituyente) with representation of all sectors.

Therefore, Venezuela seems to be moving from a free market democracy to a socialist democracy, although with communist patent elements which results are still difficult to assess.

MISCELLANEOUS

Currency redenomination process implemented in Venezuela

As part of the price stability policy undertaken by the Central Bank of Venezuela (BCV) and the government, a currency redenomination process is underway from 1st October 2007 onwards. The "currency redenomination" is a process by means of which zeros are eliminated from the national currency of a country, so that starting from a specific date, all amounts of money will be expressed in a new and smaller monetary scale. In Venezuela, the redenomination will be implemented by eliminating three zeros from the current currency, which is an experience that is being carried out for the first time in the contemporary history of the country. The currency redenomination process is said to pursue greater efficiency in the payments systems, aiming to reduce the per capita holdings of paper currency, simplify the calculation of economic transactions, facilitate the accounting record of transactions and simplify the financial and budgetary management of the country.

Article 1 of the Decree-Law of Currency Redenomination establishes that as of 1st January 2008, the Venezuelan official currency will experience a changeover (redenomination) to a unit equivalent to Bs. 1,000.00 current Bolivar. The Bolivar resulting from this redenomination will continue being represented with the "Bs." symbol and will be divisible in one hundred (100) cents. Therefore, charges expressed in national currency before that date shall be converted into the new currency by dividing them by 1,000 and then rounding the amount off. The regulation also establishes that if the fraction resulting from this changeover is less than zero point five (0.5) cents, it shall be rounded down to the nearest cent;

but if it is equal or higher to zero point five (0.5) cents, it shall be rounded up to the nearest cent.

From 1st October up to 31st December 2007, there is a process of general information to the public in order to educate the population about the use of the new monetary scale, especially in respect of the current currency, so that prices will be exhibited in current bolivares (Bs.) and in bolivares fuertes (Bs.F.) Two examples may be of help to understand the system: 1) In the case of corn flour, it will be indicated that 1 Kg (2.2lb) costs Bs. 1,400 or Bs.F. 1.40; and 2) A liter of 95 octane gasoline costs Bs. 97. If 30 liters are bought, the total amount to be paid would be Bs. 2,910. As of January 1st, 2008, after implementing currency redenomination, the price of a liter of gasoline will be re-expressed with three decimals; that is to say, Bs.F. 0.097 and the total amount to be paid for those 30 liters would be Bs.F. 2.91. Nevertheless, as of 1st January 2008 the country will have a new family of banknotes and coins that, for a period of transition, will be called Bolivar Fuerte and will be represented as "Bs.F". As it has been explained by the BCV, currency redenomination doesn't boil down to a simple process of issuing new currency (banknotes and coins) or eliminating others (demonetization), it also implies a redenomination of the nominal prices of goods and services, wages and salaries, loans and debts, adjustments in accounting processes and in calculation systems, among others.

The redenomination process does not entail devaluation of the Bolivar, as the same conversion factor of 1 to 1,000 will be applied to foreign exchange operations, i.e. There will be no difference in the relationship between the Bolivar and other currencies. It is also expected that the introduction of this process does not lead to inflation, taking into account that as claimed by the BCV this only implies the redenomination of the currency, not affecting the level of prices at all.

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