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MARITIME AND PORT AFFAIRS - INTERNATIONAL TRADE - CUSTOMS

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Decentralization vs. Recentralization: Who is right?

No one should question the present significance of the port decentralization process in Venezuela. It is only fair to admit that our “commercial ports” are in far better conditions today than when they were run by the National Port Institute (INP is the Spanish acronym). However, the result of this port decentralization was the beginning of a legal and constitutional framework which instead of guaranteeing forthright development of the national port system, it has fragmented the same. Be that as it may, we still believe that there have been interesting advances in the sector, including increased productivity, extended working days, acquisition of modern machinery for handling cargo and professionalization of the stevedoring sector.

“Decentralization” has then played a fundamental role in triggering these reforms. Yet, on the other hand, it must be brought to attention that its true worth has been blown out of proportion by political rhetoric attempting to give this reform all the credit for the goals achieved, when the truth is that the success of these reforms has been linked to the privatization of port operations even prior to the verification of the effective decentralization of the main regional ports; and also the disbanding of the unions.

The above should be borne in mind by the supporters of the recentralization of ports, who should insist on the revision of the port decentralization to improve it, rather than reviving the times of the INP and the central handling of ports, which by the way is not precisely the best example to follow...

SHIPPING

Prescriptions under domestic law

Prescriptions or time bar limits for maritime actions are found in the Law on Maritime Commerce (LMC) as well as in the Law on General Ports (LGP); a resume of these is set below for the guidance of our readers.

1. Bareboat or charter party

Article 156 LMC.- All actions derived from the bareboat charter or charter party prescribe at the end of one (1) year counted from the end of contract, the termination of the voyage or the interruption in the execution of the contract, whichever occurs first. This lapse shall be counted from the date following the date of occurrence of the foregoing events.

2. Carriage of goods by water

Article 253 LMC. - All actions derived from the contract of carriage of goods by water prescribe after one (1) year, counted from date of delivery of the merchandise by carrier to the consignee, or the date when the merchandise should have been delivered.

3. Passenger personal injuries, death, loss and damage to luggage

Article 308 LMC.- The right to exercise any action for indemnification of damages for death or personal injury to a passenger or loss or damages to luggage or cabin luggage shall prescribe after two (2) years counted from:
1. Date of disembarking of passenger, in those cases of personal injury; 2. Date on which the passenger should have disembarked, in those cases of death or disappearance of passenger occurred during the voyage; 3. Date of death, in those cases when personal injury to a passenger during the voyage causes death of passenger after disembarking, provided that this lapse is not in excess of three (3) years; 4. In cases of loss or damage occurred to

luggage or cabin luggage, from date of disembarking or date on which passenger should have disembarked, if this is later.

Article 309 LMC.- In order to determine motive for suspension and interruption of the prescription periods, the pertinent law regulating the obligation shall apply. In no case an action pursuant to the relevant Chapter may be filed after three (3) years counted from date of disembarking of passenger, or the date on which disembarking should have occurred, if this date is later.

4. Towage

Article 319 LMC.- Actions derived from towage contract prescribe once a year has elapsed, this period counted from the date when towing operation ended or from that date provided for culmination.

5. Collision

Article 330 LMC. - Actions derived from collision prescribe once two (2) years have elapsed counted from occurrence. In those cases of both to blame, or when there is shared responsibility among vessels in a convoy, the recourse actions for improper payment or sums in excess of the corresponding amount, prescribe after a year payment was made.

6. General Average

Article 369 LMC.- In those cases where a general or common average compromise has not being signed, anyone party alleging a legitimate interest in the voyage may exercise an action in order to obtain payment of respective contributions within a period of one year, counted from time of occurrence of the event.

Article 370 LMC. - In those cases where a general or common average compromise has been signed, the liquidation will be practiced. In case of disagreement or not compliance with what decided in the liquidation, the parties may attend to the judiciary, in which case the matter will be decided according to the Brief Procedure as stated in Civil Procedural Code. This action will prescribe in the lapse of two (2) years, to be counted from the manifestation of disagreement, or the verification of the non compliance, whichever occurs first.

7. Cargo recovery

Article 457 LCM.- In the case of recovery actions which the insurer exercises against third parties, the lapse for prescription is the same than for the action of the assured in whose right is subrogated.

8. - Loss or damage of cargo / ships by Port Operators/ Port Administrators

Article 104 GLP. - Any action will prescribe in one (1) year. The prescription is interrupted with the filing of the lawsuit performed according to the law.

Article 105 GLP.- The prescription 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 case of total loss of the goods, on the day the person entitled to make a claim receives notice from the port operator that the goods are lost, or on the day that person may treat the goods as lost pursuant to the port law, whichever is earlier.

Amendments to the Fishing Law

The Fishing Law enacted in 2001 has now been amended to adapt it to the socialist principles proclaimed by the government of President Chavez. Published in the Official Gazette Extraordinary No. 5,877 of 14th March 2008, this law is intended to regulate the fishing and aquaculture sectors in order to guarantee alimentary sovereignty of the nation, especially the sufficient and stable availability of products, to serve in steady manner the needs of the population.

According to art. 10 the exploitation of the hydro-biological resources in the aquatic spaces under jurisdiction of the Republic, can only be effected by natural persons or legal entities under the authorization regime for fishing and aquaculture activities. The legal entities must be legally established in the country, and the foreign natural persons must also be domiciled there. The vessels used in the fishing activities have to be registered in the Venezuelan Naval Registry (RENAVE), without prejudice to prescriptions of the fishing conventions signed by the Republic. Nevertheless, sport and recreational fishing will be allowed for Venezuelan or foreign natural persons domiciled or not in the country, subject to authorization by the competent authority.

Like in the past, the law states (art. 25) that for the strategic alimentary interest of the country, specific species are reserved for the artisanal or traditional fishing (pesca artesanal), among them: sardine, oysters, the species of the aquatic fauna in areas under special regime, the shrimp and crawfish distributed in harbours, lakes and coastal humid soils and rivers, as well as the fishery resources next to the coastline within an area up to six nautical miles.

The Fishing Law also requires that every natural person or legal entity seeking to dedicate to fishing, aquaculture or other related activity, must obtain the corresponding authorisation issued by the now so called Socialist Institute of Fishing and Aquaculture, body in charge of the co-ordination of this sector, stating also that these authorisations are not transferable, (art. 40). According to art. 41 these authorisations comprise the following:

1. - License for Fishing:

a. - Artisanal fishing: Issued to the fishing vessels dedicated to the small-scale or traditional fishing. The license will have duration of five (5) years with renewable character.

b. – Industrial fishing: Issued to those fishing vessels dedicated to the industrial fishing, namely: tuna fishing, or long line fishing and other modalities to be developed in the future. The tuna and long line fishing licenses will have duration of three (3) years. The issuance of new licenses as well as its renewal will depend on the evaluation of the exploitation of the fishery resources.

2. - Permits: Issued to natural or juridical persons

a. - Commercial Fishing: To carry out the capture of species allowed by regulations, in the authorised zones and season, all this in harmony with the criteria for the handling and conservation of the hydro-biological resources. In the said permit, the port of registry where the product is disembarked will be stated in order to guarantee the recollection of statistical data. This permit will have duration of one (1) year with renewable character.

b. - Sport and Recreational Fishing: Intended for the capture of specific species in authorised areas, provided this activity does not interfere with other fishery. This permit will have duration of one (1) year with renewable character.

c. - Processing interchange and commercialisation: For the acquisition, transportation, processing, importation and exportation of fishing and aquaculture products. This permit will have a specific duration per each operation to be performed.

d. - Aquaculture: To the development and operation of aquaculture project in public or private property zones. This permit will have a variable duration, depending of the type of activity and it will also have renewable character.

e. - Specials: To carry out fishing or aquaculture activities, different from the ones stated above, such as didactic, scientific, etc. This permit will have duration of one (1) renewable year.

3.- Approvals: For projects to be executed in the context of the application of the Fishing Law, and which refer to the construction or modification of fishing vessels over 50 gross tonnage, in national or international dry-docks, the purchase of fishing vessels overseas, or the development of fishing or aquaculture projects of national, foreign and mixed capital. This will have A specific duration per each operation to be performed.

4. - Certifications: For the execution of any activity derived from the fishing or aquaculture that may need to be authorised by the Socialist Institute of Fishing and Aquaculture. This permit will have duration of one (1) year.

Title III, Chapter III of the law deals with the technical aspects of navigation to be met by fishing vessels. Thus, art. 36 states that the Socialist Institute for Fishing and Aquaculture must require from fishing vessels over ten (10) gross tonnage fishing vessels, the installation of devices, equipment or positioning systems in order to guarantee responsible fishing and to guarantee the safety

of crews. Art. 38 states that the construction and acquisition of fishing vessels must have the previous authorization of the Socialist Institute of Fishing and Aquaculture, in attention to the availability, preservation and rational use of the hydro biological resources. Express prohibitions are included in art. 39, in respect of having on board of fishing vessels substances such as dynamite, gunpowder or any other explosive, acids or any other chemical or natural element that may cause damages to the hydro biological resources. The employment of such substances in the performance of fishing activities is also banned.

The law requires (art. 69) that the master of an over thirty (30) gross tonnage fishing vessel must carry a logbook duly updated with indication of location and time of catches, characteristics of fishing gears, etc., the entries of the said logbook having the character of a declaration under oath, whereas art. 71 states that the master can only carry out calls at foreign ports, subject to the authorisation of owner, in which case this must be reported to the relevant national fishery authority in the next following five days from the unloading of products.

From the reading of art. 79 and 82 it is inferred that the fishery or aquaculture product obtained without the corresponding authorisation may give rise to the confiscation of the products as well as the fishing gears, without prejudice to the applicable fines which have been increased accordingly.

A noticeable point to be underlined with regards to the amendment is that as per art. 23 of the Fishing Law the industrial activities of trawlers fishing within the territorial sea as well as the exclusive economic zone are expressly banned. This prohibition will come into effect after one year of publication of the law. The controversial article, of course, has full support of artisanal fishermen who claim that trawling is killing off fish species, despite the statistics from the Industrial Trawl-Fishing Association (AVIPA) indicating that its members supply 70,000 tons of fish a year. In any case the prohibition should have a significant impact on this industry, involving 263 trawling vessels, 6,500 people in the industry and some 26,000 indirect workers.

CONSTITUTIONAL LAW

Supreme Court of Justice recognizes for the Executive absolute power of intervention over regional ports

According to the 1999 Constitution of the Bolivarian Republic of Venezuela, commercial ports, i.e. public ports for public use, are subject to two levels of power. Thus, as per art. 156 numeral 26 of the constitutional text, the national State is vested with the regime of ports and its infrastructure, while art. 164 numeral 10 states that regional States have the exclusive administration, conservation and enjoyment of incomes of commercial ports in coordination with the National Executive. It was

not clear from the very beginning what the meaning of the word “coordination” was in the context of this distribution of powers; however, the matter has been recently dealt with by the Constitutional Chamber of the Supreme Court of Justice, that decided an interpretation petition made by the General Attorney in connection with the extinction of the concession contract of port La Ceiba, located in Trujillo State, and its later transference to the Ministry of Infrastructure for administration and enjoyment of benefits.

The decision by the Constitutional Chamber dated 15th April 2008 grants to the National Executive an exorbitant power, so that the administration in the exercise of such empowerment may directly undertake the conservation, administration and enjoyment of benefits of the national high-roads and highways, as well as the ports and airports of commercial use, in order to maintain and protect the rights of the users to quality public services. Consequently, the court held that it corresponds to the National Executive through the President of the Republic at Council of Ministers to decree the intervention for undertaking the rendering of services and assets in the national high roads, as well as in the ports and airports of commercial use, in cases in which despite the competencies have being transferred, the rendering of services or usage of these assets on the part of the regional States is deficient or inexistent, based on articles 236 and 164 numeral 10 of the constitutional text.

In line with the former reasoning, the Constitutional Chamber exhorted the National Assembly to proceed with the revision and modification of the related laws to amend them to the principles outlined in the judgment. The National Assembly has complied with this order, modifying the Law for Decentralization and the General Law on Ports, in order to eliminate the “exclusive competence” that the regional States hold on the administration and maintenance of their ports of commercial use, as well as to modifying the General Law on Ports and attribute to the INEA as the aquatic authority, the competency to initiate and ensue proceedings of intervention at state ports. These amendments have not come into force yet, as a further discussion is needed by the legislative body.

This decision, however, is in clear contradiction with another decision of the Constitutional Chamber dated 19th December 2006, when it was held that the competencies or powers that are held at national and state level in respect to service of the commercial ports are exclusive and excluding. Therefore, it is incomprehensive how the Supreme Court of Justice recognizes to the National Executive an absolute power for intervention and not the faculty to intervene by way of exception and in a transitory manner in benefit of the users and to guaranty the quality in port services. Besides, the fact that the Constitutional Chamber has exhorted the National Assembly to amend the Law for Decentralization in order to revert the exclusive competency that regional States hold on commercial ports could be regarded as an exhort to breach the Constitution itself, taking into account that it is an irrefutable fact that the administration, conservation and

enjoyment of benefits are the “exclusive” competency of the regional States by virtue of article 164 numeral 10. Therefore, only through a modification of the constitutional text could the above referred system of distribution of powers be altered.

MISCELLANEOUS

Venezuela to have new time zone (4:30 GMT)

From 9th December 2007 the Bolivarian Republic of Venezuela will have a new time zone, which according to governmental authorities is aimed to improve the Venezuelan’s performance of their daily activities. Up to this date, the official time of the country had been five hours ahead of the Greenwich Meridian Time (GMT).

The new time zone of Venezuela will be determined by meridian 66° (Rio Chico meridian), which crosses the national territory, passing through the half of the country so that in practice, clocks will have to be adjusted by delaying 30 minutes. Consequently, Venezuela is now four hours and a half (4:30 hours) ahead of the international hour established by the Greenwich Meridian (meridian 0°) and not five hours as from 1965.

As per information given by the Minister of People’s Power for Science and Technology, Hector Navarro, he explained that by delaying these thirty minutes to the current hour, Venezuelans will wake up with the sunlight further adding “It is a metabolic effect in which the human brain is conditional on the sun’s rays”. Therefore, the new time zone will improve the Venezuelans’ performance of their activities, especially those of children attending school who have to wake up in the darkness.

With this change Venezuela joins the list of countries with fractional hour in respect of the meridian, among them, Canada, India, Australia, New Zealand and Iran.

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