

1st HEMISPHERIC SEMINAR ON PORT LEGISLATION

"FACING GLOBAL TRENDS IN PORT LEGISLATION"

PANEL

"Legal aspects of Port Management and Operations"

SPEAKER

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TOPIC

"The granting of permits and licenses as a tool to manage the public property"

ARGENTINE PORT MODEL

The Argentine Port Model is the result of a slow evolution that went through several distinct stages.

This analysis focuses on the last one, which starts from the State Reform Act.

1989

STATE REFORM ACT No. 23.696

Under this law, the major public service companies and industrial or commercial activities that were operated by the state were declared subject to privatization, including the General Administration of National Ports, which until then had centralized the management of all ports in Argentina.

1992

PORT ACTIVITIES LAW N ° 24.093

The inefficiency of the port management system prior to the State Reform Act, based on a strong bureaucratic centralization, made it necessary to carry out an extensive transformation process in the port sector, which led to the enactment of the Port Activities Law No. 24.093 and its Regulatory Decree 769/93.

The law for Port Activities established that, as a request by the provinces in whose territories ports were owned and/or managed by the national government, or by the Municipality of Buenos Aires city, the National State would transfer to them (free of charge) the domain and port management.

In case of a Jurisdiction listed in the previous paragraph demonstrated no interest in the transfer of ownership or management of these ports, the Government could keep them under the auspices of the National State, transfer them to the private sector or leave them in a state of disaffection.

LEADING WIRES OF THE PORTS LAW

- **Decentralization.** The ownership of ports was transferred from the National State to the Provinces.
- **Deregulation.** Regulatory restrictions that hinder the development of port activities were eliminated. The economic autonomy and financial self-sufficiency of ports was promoted.
- **Privatization.** The transfer of the operation on ports to the private sector was encouraged.

THE LEGISLATOR MANDATE IN THE CASE OF MAJOR PORTS

- In the special case of the ports of Buenos Aires, Rosario, Bahía Blanca, Quequén and Santa Fe, it was imposed as a condition for the transfer from the National State to the provinces, that they previously had constituted private societies or non-state public entities that would be responsible for managing each of these ports.
- It was ordered that these entities were organized in a way that would ensure the participation of private stakeholders in port operations, taking into account: operators, service providers, producers, users, workers and others connected with the activity.
- The Port of Buenos Aires continued to be administered by the General Administration of Ports.
- In the other mentioned cases, it was decided to create a non-state public entity for the port administration through the consortia of port management.

CHARACTERISTICS OF A NON-STATE PUBLIC ENTITY AS A LEGAL FORM

- ✓ It has its own legal personality.
- ✓ It is "Public" for the tasks that it develops, which are delegated by the State.
- ✓ It exercises administrative functions by designation.
- ✓ While exercising administrative functions, it is ruled by the public law.
- ✓ It dictates administrative acts.
- ✓ It is "non-state" because it does not integrate the context of the public administration, neither central or decentralized.
- ✓ While not exercising an administrative function, it is ruled by the private law.
- ✓ Its employees are ruled by the law of contract work not by the law of public employment.
- ✓ It manages the state assets, but possesses its own funds.
- ✓ It does not apply the line items of the law of national or provincial budget.

THE GRANTING OF PERMITS AND LICENSES AS A TOOL TO MANAGE THE PUBLIC PORT DOMAIN

In general, the statutes of Management Consortium established between its purpose and functions, to administer and operate ports granting concessions, leases, permits or pledges. This under a respective legal system in force for industrial, recreational or commercial exploitation of port terminals, existing piers or piers to be built in its scope.

SPECIAL USE OF THE PUBLIC PROPERTY

Permits and concessions are techniques to grant the special use of public property to individuals.

Through them, the only and exclusive use of spaces belonging to the public port domain is assigned, both maritime and terrestrial spaces.

THE USE OF PERMITS FROM THE THEORY PERSPECTIVE

Among the doctrine of administrative law there is a consensus, with different nuances, which holds the following characteristics of permits:

- It is a unilateral act of state.
- It involves merely tolerance by the authority.
- It gives a precarious title.
- Therefore, it assigns weak and unstable powers to the holder.
- It is not subject to a term.
- The administration may revoke it at any time without compensation, within the limits of legality and reasonableness.
- It could be free or not.
- It is used for minor economic and social objectives.
- It does not require to make entity investments.

THE USE OF CONCESSIONS FROM THE THEORY PERSPECTIVE

On the other hand, the doctrine characterizes concessions as follows:

- It is an administrative contract, i.e. a bilateral legal act.
- It generates a perfect and stable law that incorporates property rights of the holder.
- It is granted for a specified period.
- Its early termination for reasons not attributable to the concession holder generates the right to indemnification .
- The concession holder has to pay a canon for the occupation
- It is used for activities of economic and social importance.
- Usually it requires the realization of investments.

PERMITS AND CONCESSIONS IN THE LEGAL SYSTEM OF BUENOS AIRES PROVINCE

- In the case of the Province of Buenos Aires, the notes that so clearly differentiate -according to the doctrine- permits from concessions on the theoretical level, become blurred with regards to the existing legislation, turning both definitions in almost the same thing.
- We understand that this has been a result of the attempt by the legislature to surround the permit of further formalities and guarantees in the presence of a deviation in the use of this tool by the administration. For years, permits were used to hide real concessions weakening the rights of holders.

COMPARATIVE ANALYSIS

Under the current regulation:

- Both permits and concessions are granted for a specified period, putting in crisis the idea of the instability that characterizes the first definition.
- Whereas a period of approximately ten years is generally anticipated for permits and an even longer period for concessions (30 or 50 years), in several port authority regulations the first ones are indefinitely renewable. Thus, permits can comfortably last for 30 years for which concessions are granted.
- Generally for the granting of concessions, open tender is used as a mean of selecting a contractor (while this requirement is not regulated for permitting). In most of the current regulations, strict publicity and transparency are anticipated for the granting of permits through complex procedures to ensure they almost become real open tenders. This weakens the unilateralism that doctrinally characterizes the permit.

COMPARATIVE ANALYSIS

- The current regulation sets strict requirements for the evaluation of projects and investments to be made under the use of permits, which are usually substantial in terms of economic importance. This contrasts with the precariousness of the grant.
- Against this backdrop, it is difficult to imagine the idea of revoking a permit in advance without a compensation to the owner.
- The jurisprudence of the National Supreme Court of Justice has repeatedly forced to indemnify the permissioner in the cases when early revocation takes place.

CONCLUSIONS

- Legal Uncertainty. The existence of legal concepts that despite their different names (permit / concession) are substantially similar in the practice.
- The costs of the state contracts raise up as a consequence of the fact that contractors are bound to cover eventualities risks to which they are subject in the absence of a clear legal framework.
- Therefore, the starting point of a doctrinal characterization should be to analyze the convenience of booking the “permission” figure in the cases where the use of public domain objects is granted to poor economic and social significance, which do not require investment and do not exceed periods of two years (colloquially called “little permissions”).
- In all other cases, it should be proposed that the granting of the exclusive use of the public domain is always surrounded by formalities and guarantees that characterize the signing of a real administrative contract: the right to use public assets under the state control.

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