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Proinde Circular 23-04-2020: Supreme Court rules there is no time bar for environmental damage claims

1. Legal framework

According to the Federal Constitution, the environment is a collective asset to be preserved for the sake of present and future generations. Conducts or activities considered harmful to the environment, such as oil spills, give rise to an array of criminal and civil liabilities.

The Union and the states legislate concurrently on liability for environmental damage. At the federal level, the main statutes are Law 9,605 of 1998 (the so-called 'Environmental Crimes Law'), which regulates criminal and administrative sanctions against individuals and companies, and Law 9,966 of 2000 (known as the 'Oil Law')), which deals with prevention, control and civil sanctions for discharge of oil and other hazardous or noxious substances by vessels and platforms operating in Brazilian waters.

Brazil did sign the 1969 Convention on Civil Liability for Oil Pollution Damage (CLC 69) in 1977 but have not yet ratified the protocols nor is a party to the International Oil Pollution Compensation Funds (IOPC Funds).

2. Liabilities for shipboard pollution

Law 9,605/1998 provides for fines and prison sentences of up to five years for anyone wilfully or culpably causing pollution, including piercing of the corporate veil, while Law 9,966/2000 institutes fines and other sanctions under the polluter’s strict civil liability. However, neither federal statute provides for specific time bars for compensation for environmental claims.

The relevant regulation (Decree 4,136/2002) establishes fines ranging from BRL 1,000 (today around USD 183) to BRL 50 million (USD 9.2 million), without prejudice to criminal liabilities and the obligation to redress the damages, regardless of fault.

3. Civil claims

Sanctions for damage to the environment may be brought against anyone who contributes directly or indirectly to the pollution, including shipowner, operators, shipmasters, and crews.

While the fines are imposed by the maritime authority or by the state or federal environmental authority, claims for compensation for damage to the environment are entertained by way of civil public actions brought to the federal court system by public prosecutors on behalf of the society. There is no limitation of liability available under environmental laws; hence, damages must be fully redressed, inclusive of interests and monetary restatement.

3. Time bar

There has always been a great deal of uncertainty about whether civil claims for environmental damages are subject to time bars and, if so, what the limitation periods would be.

Some maritime lawyers argue that, in the absence of specific stipulations, time bars for environmental claims should be determined by the Civil Code, which provides for three years' time bar for civil reparation in general, and ten years for unspecified issues. On the other hand, recent jurisprudence and law doctrine sustain that, since the environment is a fundamental and inalienable diffuse right essential to life, the damage caused protracts over time, affecting society collectively; therefore, there should be no time bar limitation at all.

4. Supreme Court decision

In a judgement session held on 16 April 2020, the Federal Supreme Court (STF) recognised the limitation period for environmental claims as a matter of general repercussion[1]. The question was decided in the proceedings of Extraordinary Appeal (RE 654833), which deals with damage caused by loggers who exploited indigenous lands in northern Brazil in the 1980s.

The appeal filed by the loggers challenged the previous judgments of the Superior Court of Justice (STJ), Brazil's highest court for non-constitutional issues, which had repeatedly ruled that environmental damage cannot be barred by the passage of time. By majority of votes, the STF plenary established the legal thesis with a binding effect that "***the claim for civil reparation of environmental damage is imprescriptible***".

5. Conclusion

Now that the question is resolved and the issue pacified, we expect that there will be a uniformization of jurisprudence following the legal thesis of general repercussion just set by Brazil's constitutional court.

It is not uncommon that civil public actions for shipboard pollution are commenced many years after the event. Therefore, shipowners, operators and their liability insurers must keep their records on incidents that may potentially lead to an environmental claim safety stored for as long as the company exists.

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[1] The "issue of general repercussion" was introduced to the Federal Constitution through Amendment No. 45 and is incorporated in the Civil Procedure Code of 2015. Such an issue must involve relevant matters from an economic, political, social or legal point of view, beyond the subject interest on the lawsuit, that is, the solution of the issue raised must be beneficial not only to the parties in the concrete case but also for the interest of the society and it has a binding effect on all Brazilian courts