GARRIGUES
Newsletter

Transport & Shipping

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Contents

I. Important transportation legislation in general state budget law 22/2013, of December 23, 2013

On September 26, 2013, General State Budget Law 22/2013, of December 23, 2013, for the year 2014 was published in the Official State Gazette and among other provisions updates various tax law elements relevant to transportation which are traditionally amended in the budget law.

With regard to port dues, the law establishes the applicable reductions to occupancy, ship, passenger and cargo fees at ports of general interest, in accordance with the Revised State Ports and Merchant Navy Law, approved by Legislative Royal Decree 2/2011, of September 5, 2011 ("RSPMNL").

Accordingly, the reductions set out in articles 182 and 245 of the RSPMNL to be applied by the port authorities in 2014 to occupancy, ship, passenger and cargo fees and, the terms and conditions, if any, governing their application, will be those specified in Annex X to the law.

The law also reduces the basic amounts of some of the port dues established in the RSPMNL , notwithstanding the review rules for occupancy and activity fees laid down in that same law.

In addition, article 88 of the Budget Law contains a chart detailing the corrective multipliers provided for in article 166 of the RSPMNL to be applied by the port authorities to ship, cargo and passenger fees.

The airport levies of a public nature have been pushed up by 2.5 percent over the amounts payable in 2013. In addition, effective March 1, 2014 for an indefinite term, article 86 of Law 22/2013 pushes up the airport levies of a public nature charged by Aena Aeropuertos S.A., as established in Title VI, Chapters I and II of Air Safety Law 21/2003, of July 7, 2003, by 0.9 percent over the amounts payable in 2013. The minimum amount payable per transaction in respect of landing and of aerodrome traffic services, contained in article 75.4 of Air Safety Law 21/2003, of July 7, 2003, at the Madrid Barajas, Barcelona El Prat, Alicante, Gran Canaria, Málaga Costa del Sol, Palma de Mallorca and Tenerife Sur airports, will be reviewed in accordance with the provisions of subarticle one, whereas for other aerodromes the minimum amount is established in the articles of the budget law itself.

Lastly, regarding railway transportation, effective January 1, 2014 for an indefinite term, article 91 of the law amends letter d) of article 216 of the RSPMNL. It also amends the amounts of railway royalty payments, which are utility taxes in nature, and has therefore brought about an increase in the percentage at which revenues cover railway costs.

II. Creation of the special register of Spanish Fishing Vessels operating outside community waters

Order AAA/2406/2013, of December 24, 2013, creating the Special Register of Spanish Fishing Vessels for vessels that operate exclusively outside Community waters was published in the Official State Gazette on December 24, 2013. The purpose of the Order is to create the Special Register of Spanish Fishing Vessels (the "RESAE" after its initials in Spanish) for vessels that operate exclusively outside Community waters, and to lay down the minimum conditions that the enterprises mentioned in article 3 must fulfill to qualify for aid in the form of tax and social contribution incentives.

The ultimate aim of the RESAE is to boost the competitiveness of Spanish fleets compared with those of other countries, by allowing them to take a number of tax and social contribution incentives, in accordance with EU legislation, to discourage them from relocating to third countries.

The RESAE, which will be attached to the Office of the Secretary-General for Fisheries of the Ministry of Agriculture, Food and Environment, will be set up as a computer database, managed by the Ministry of Agriculture, Food and Environment. The structure and operating rules for the RESAE will be implemented subsequently by regulations.

Although the rules for granting the tax and social contribution incentives attached to the RESAE have not as yet been implemented by regulations, the order announces that the owners of fishing vessels, flying the Spanish flag and registered on the Community fishing fleet register and on the RESAE, which fish for tuna or tuna-like species exclusively outside Community waters and beyond 200 nautical miles from the baselines of the member states, could be entitled to the aid described in point 4.5 of the Guidelines for the examination of State aid to fisheries and aquaculture (2008/C84/06) or such provision as may replace it.

III. New legislation on recreational sailing and on the special tax on certain means of transportation

As announced in previous Newsletters, Law 16/2013, of October 29, 2013, establishing certain measures in the area of environmental taxation and adopting other tax and financial measures was published in the Official State Gazette on October 30, 2013.

Among other tax-related measures, the law amends the special tax on certain means of transportation, to set out the exemption from the tax on the first registration or, as the case may be, on the circulation or use of recreational or water sports craft to be used by enterprises exclusively for chartering activities regardless of their length.

The aim of this measure, according to the preamble to the law, is to bring Spanish taxation into line with that of other EU member states, thereby boosting the recreational sailing industry and fueling other productive industries, with the resulting increase in the ability to generate wealth and jobs.

Specifically, it amends article 66 of the Excise and Special Taxes Law to remove the length requirement for applying the exemption, which will now be applied regardless of the length of the recreational or water sports craft or vessels that are actually and only used for chartering activities.

A number of conditions have been kept in place, namely, compliance with the limits and the requirements established for the rental of vehicles. And under no circumstances will a rental activity be deemed to exist where the craft is made available by its owner for chartering, where the owner or a person related to him receives by any means a right to full or partial use of the craft or of any other craft owned by the charterer or a person related to the charterer.

The exemption will also apply to recreational or water sports craft or vessels that are owned by water sports schools officially recognized by the Directorate-General of the Merchant Navy and actually and only used in teaching activities by watersports and boat handling schools.

In addition to the above, General State Budget Law 22/2013, of December 23, 2013, for the year 2014 introduces other changes into Excise and Special Taxes Law 38/1992 of December 28, 1992, effective January 1, 2014 for an indefinite term, such as the exemption from the tax on the first final registration or, as the case may be, the circulation or use in Spain, of means of transportation

registered in another member state and which are chartered to a supplier from another member state by persons or entities resident in Spain for a period not exceeding three months, provided that the exemption in letter c) of article 66.1 of Law 38/1992 does not apply to them.

The exemption will be subject to prior recognition by the tax authorities in the manner that will be determined by regulations.

The use of the means of transportation in the territory where the tax applies for a longer period of time than was notified without any adjustment being made by the taxpayer will trigger an assessment of the tax liability calculated in accordance with the provisions of Article 70.1 *bis* less the amount previously paid over.

In addition, an article 70 *bis* is added to Law 38/1992 which sets the tax liability, where means of transportation are registered in another member state and are rented to a supplier from another member state by individuals or entities resident in Spain for a period exceeding three months, for each month or fraction thereof that the means of transportation are intended to be used in the territory in which the tax applies. The article also stipulates a percentage for calculating the tax liability.

Lastly, as regards government guarantees and financial transactions, and within the €500,000,000 reserved for the guarantees that the central government may provide in fiscal year 2014 for no other specified purpose, the law sets a ceiling of €40,000,000 for guaranteeing obligations arising from borrowing transactions arranged by shipping enterprises domiciled in Spain for the purpose of renewing and modernizing the Spanish merchant fleet by acquiring merchant vessels that are new, under construction or used but not more than five years old, by way of a purchase, or a lease or finance lease with a purchase option.

Applications for guarantees that are submitted six months after the perfection date of the acquisition of the vessel will not be considered.

The enforceability of a guarantee granted before the perfection date of the acquisition of the vessel will be conditional on the perfection date occurring within the six months following the notification date of the provision of the guarantee.

IV. Roundup: Approval of the maritime shipping bill

On November 22, 2013, the Council of Ministers approved the decision to lay the Maritime Shipping Bill before the Spanish Parliament. This Bill updates the general rules on maritime shipping traffic to remove the existing inconsistencies between the international conventions in force in Spain and Spanish legislation, which is basically led by Title III of the 1885 Commercial Code.

The Maritime Shipping Bill is based on the draft preliminary bill approved by the General Codification Commission in 2004. It contains 524 articles and has a three-fold aim:

- To bring the legal system into line with international shipping law as adopted by the members of the European Union and OECD, a key element in traffic characterized by transnationality;

- To provide legal certainty by ensuring coordination between Spanish and European legislation and the international conventions in force, in both public and private law, thereby enabling the courts to interpret these rules uniformly; and

- To reflect the current practical reality of maritime transport, having regard to the economic and other consequences that may arise from the amendments made and providing solutions that are more balanced than those available under the law currently in force.

The Bill provides a set of legal rules governing vessels and their registration. It also controls shipbuilding contracts, and introduces significant new provisions on contracts for the sale and purchase of ships while harmonizing the rules on maritime liens, with reference to the 1993 Geneva Convention.

Its provisions also cover the parties involved in shipping and the various liability systems. And it controls contracts for the use of ships: ship leases; charter contracts; carriage contracts, with special emphasis on passenger rights; towage contracts; and sailboat charter agreements, appearing in the law for the first time in view of the importance of recreational sailing. It also establishes the ancillary shipping contracts, including ship management contracts. The new legislation is based on observance of parties' freedom of contract while also determining clearly the liability rules applicable to them.

The Bill provides that shipping accidents will be governed by reference to the applicable conventions on this subject, in cases of collision, serious damage, salvage, shipwrecked or sunken cargo, and civil liability for pollution.

On civil liability for pollution, the Bill applies the international legislation in the 1992 International Convention on Civil Liability for Oil Pollution Damage (CLC), the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (FUND) and the International Convention on Civil Liability for Bunker Oil Pollution Damage (BUNKERS 2001).

As regards recognition of the ability of the parties involved in shipping to limit their liability, it applies the conventions in force in Spain: the London Convention of 1976 and its 1996 Protocol. It also closes a loophole concerning the procedural rules applicable to exercising the right to limit liability under a specific procedure.

With respect to maritime insurance, the Bill seeks to modernize the rules on maritime insurance contracts.

Lastly, in relation to salvage rules, the Bill refers to the International Convention on Salvage, done in London on April 28, 1989. The Bill contains a catch-all definition of salvage as any act undertaken to assist or aid a vessel, boat or naval artifact, or to safeguard or recover any other property in danger in any navigable waters whatsoever, except for continental waters that have no connection with the sea and are not used by seagoing ships, not including any assistance provided to property that is permanently and intentionally fixed to the coastline and operations having underwater cultural heritage as their subject-matter.

V. Abolition of the Spanish shipbuilding authority

September 26, 2013 saw the publication in the Official State Gazette of Royal Decree 701/2013, of September 20, 2013, on rationalizing the public sector. The measures included in that Royal Decree include the abolition of the Spanish Shipbuilding Authority, whose resources will be subsumed into the Ministry referred to below which will take over the public functions of the Authority.

Since the Office of the Secretary General for Industry and SMEs is responsible for the Spanish Shipbuilding Authority and, furthermore, the administrative proceedings conducted by the Directorate-General for Industry and SMEs are requested and reported through the Spanish

Shipbuilding Authority, the Royal Decree provides that the Authority's resources, together with all of its aims and objectives, will be taken over by the competent body of the Ministry for Industry, Energy and Tourism.

VI. Directive on flag state responsibilities for compliance with and enforcement of the maritime labor convention (MLC), 2006

Directive 2013/54/EU of the European Parliament and of the Council of November 20, 2013, concerning certain flag State responsibilities for compliance with and enforcement of the Maritime Labor Convention, 2006 ('MLC 2006') was published in the Official Journal of the European Union on December 10, 2013.

The Directive follows the entry into force of MLC 2006 (discussed in previous Newsletters) and seeks to facilitate the uniform compliance with and application of that Convention in all member states, to which end it lays down a number of provisions.

Among other things, the Directive requires member states to ensure that effective and appropriate enforcement and monitoring mechanisms, including inspections at the intervals provided for in MLC 2006, are in place to ensure that the living and working conditions of seafarers on ships flying their flag meet, and continue to meet, the requirements of the relevant parts of MLC 2006.

With respect to ships of less than 200 gross tonnage not engaged in international voyages, member states may, in consultation with the shipowners' and seafarers' organizations concerned, decide to adapt, pursuant to article II, paragraph 6 of MLC 2006, monitoring mechanisms, including inspections, to take account of the specific conditions relating to such ships.

When fulfilling their obligations under this article, member states may, where appropriate, authorize public institutions or other organizations, including those of another member state, if the latter agrees, which they recognize as having sufficient capacity, competence and independence, to carry out inspections.

Each member state must provide the International Labor Office with a current list of any recognized organizations authorized to act on its behalf, and must keep this list up to date

Furthermore, each member state must ensure that, in its laws or regulations, appropriate on-board complaint procedures are in place.

VII. Directive on recreational craft and personal watercraft and repealing directive 94/25/EC

On December 28, 2013, Directive 2013/53/EU of the European Parliament and of the Council of November 20, 2013, on recreational craft and personal watercraft and repealing Directive 94/25/EC, was published in the Official Journal of the European Union. In order to take account of technological developments in the market that have raised new issues with respect to the environmental requirements of Directive 94/25/EC, and to provide clarification on the framework within which products covered by it may be marketed, the Directive aims to ensure a high level of environmental protection and safety. The Directive also aims to guarantee the functioning of the internal market by setting harmonized requirements for products covered by it and minimum requirements for market surveillance. It applies to recreational craft (with a hull length of 2.5 to 24 meters), personal watercraft and propulsion engines installed on or in watercraft.

The Directive seeks to involve all economic operators, mainly manufacturers, distributors and importers who play a role in the product supply and distribution chain, in taking appropriate measures to ensure that those products comply with the Directive and do not endanger the health or safety of persons, property or the environment when correctly constructed and maintained. The Directive imposes specific rules and conditions on the affixing of the CE marking, which indicates the conformity of a product under Regulation (EC) No 765/2008, being the visible consequence of a whole process comprising conformity assessment.

In addition to the Directive's environmental objectives, through the limitation of exhaust emissions (CO, HC, NOx and particulates) and noise levels, also notable is the important new classification of design categories (A, B, C and D), which will be based on the essential environmental conditions for navigation, namely wind force and significant wave height.

Member states must transpose and comply with this Directive by January 18, 2016.

A transitional period has been set so that manufacturers and other economic operators have sufficient time to adapt to the requirements set out in the Directive. During that period, products may be placed on the market if they comply with Directive 94/25/EC.

VIII. Ship recycling regulation

On December 10, 2013, Regulation (EU) No 1257/2013 of the European Parliament and of the Council of November 20, 2013, on ship recycling and amending Regulation (EC) No 1013/2006 and Directive 2009/16/EC was published in the Official Journal of the European Union. Its aim is three-fold:

- to enhance safety, the protection of human health and of the Union marine environment throughout a ship's life-cycle and ensure that hazardous waste from such ship recycling is subject to environmentally sound management;
- to lay down rules to ensure the proper management of hazardous materials on ships; and
- to facilitate the ratification of the Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships ('the Hong Kong Convention')

This Regulation, which will be phased in from December 31, 2015 onwards (in accordance with the schedule set out in the Regulation) will apply, with the exception of certain provisions, to ships flying the flag of a member state, imposes a number of limitations and restrictions on such ships, such as the prohibition or restriction on using on ships the hazardous materials referred to in Annex I of the Regulation (such as asbestos and anti-fouling compounds and systems), and the obligation to keep an inventory of hazardous materials on board a ship, which must identify at least the hazardous materials referred to in Annex II of the Regulation (such as cadmium and mercury compounds).

The Regulation also lays down a number of obligations concerning the preparation of ship-specific ship recycling plans prior to any recycling as well as other requirements with respect to the recognition and certification of such plans.

It should be noted that article 12 of the Regulation also requires ships flying the flag of a third country to have on board an inventory of hazardous materials when calling at a port or anchoring in Community waters. However, access to a specific port or anchorage may be permitted by the relevant authority of a member state in the event of force majeure or overriding

safetyconsiderations, or to reduce or minimize the risk of pollution or to have deficiencies rectified, provided that adequate measures to the satisfaction of the relevant authority of that member state have been implemented by the owner, the operator or the master of the ship to ensure safe entry.

Lastly, the Regulation lays down certain requirements – in accordance with the relevant Hong Kong Convention provisions and taking into account the relevant guidelines of the IMO, the ILO, the Basel Convention, the Stockholm Convention on Persistent Organic Pollutants and other international guidelines – that must be met in order for a ship recycling facility to be included in the European list of approved facilities, and sets out the authorization process for Community ship recycling facilities.

IX. Supreme Court Judgment (Civil Chamber) of December 3, 2013. Sea carriage. Action for liability against a cargo carrier brought by an insurer via subrogation

In its judgment of December 3, 2013, the Supreme Court dismissed a cassation appeal lodged by a shipping company against a judgment handed down by the Provincial Appellate Court. The Provincial Appellate Court had upheld a claim for damages by the cargo owner as a result of a breach of the shipping contract. The claim had been lodged by the cargo insurer – through subrogation pursuant to article 780 of the Commercial Code – against the cargo carrier for the loss of part of the cargo while it was being carried by sea from France to Las Palmas de Gran Canaria.

The appellant argued that the Provincial Appellate Court had misinterpreted article 3.4.II of the Hague-Visby Rules, as this provision was intended to protect third parties acting in good faith and holding a bill of lading against possible disputes as to the form in which the cargo was received aboard. The bill of lading provides absolute proof that the cargo was loaded onto the ship as described therein. However, the Appeal Chamber applied that presumption to the delivery of the cargo to the recipient, disregarding the fact that delivery is governed by its own set of rules, namely article 3.6, which does not make any distinction between whether or not the recipient is a third party acting in good faith. It is presumed that the cargo was delivered as it appears in the bill of lading, unless an objection is raised upon receipt. This presumption falls if an objection is raised, but article 3.4.II does not prevent the carrier from invoking the grounds for exemption from and limitation of liability laid down in the rules against a third party acting in good faith.

The Supreme Court dismissed the ground for the cassation appeal as the judgments relied on to evidence the cassation interest had nothing to do with the facts found to be proven in this case. Moreover, the insurer, purchaser of the consignment of wheat, who was the final recipient of the consignment, was not a party to the carriage contract, in which case the applicable law is that relied on in the judgment under appeal, article 3.4 of the 1968 Hague-Visby Rules, according to which proof to the contrary is not admissible when the bill of lading has been transferred to a third party acting in good faith. The presumption has the effect conferred on it by Article 385.3 of the Civil Procedure Law, *in fine*, as proof to the contrary is not admissible *"when expressly prohibited by [that Law]"*, which is the case in this lawsuit.

X. Supreme Court Judgment (Civil Chamber) of September 13, 2013. Land transportation. Statute of limitations on an action to recover freight from a freight forwarder

In its judgment of September 13, 2013, the Supreme Court dismissed two appeals filed, respectively, by a freight forwarding company and its client (an importer) against an appeal judgment which applied the six-month statute of limitations period under article 951 of the

Commercial Code to an action for the recovery of freight and costs in connection with carriage organized by the freight forwarder. The appeal judgment also dismissed a counterclaim brought by the importer seeking reimbursement from the freight forwarder of the excess paid.

The freight forwarder had concluded a forwarding or dispatch agreement under which it was required, in exchange for a price, to provide the various forwarding services for goods carried by sea to its client (an importer). As such, it established itself as a freelance or independent contractor in the field of the international carriage of goods (including carriage by sea). It did not confine itself to receiving and consigning carried goods, and making them available to its client, but also provided services involving the arrangement – by contract – of shipping in its own name with both shippers and the actual carriers.

In light of the application, in both instances, of the principle of negative prescription under article 951 of the Commercial Code to its right to action for the recovery of freight, the freight forwarder argued in the cassation appeal that the negative prescription of the action for costs it had brought in the claim could not have occurred because the statute of limitations period under article 951 did not apply to the complex legal relationship it had with its client. It further argued that the statute of limitations period was in fact fifteen years, i.e. the period applying to personal action not subject to a specific period under article 1964 of the Civil Code as read with article 943 of the Commercial Code.

The Supreme Court rejected that line of argument on the ground that Article 126.1 a) of the Land Transportation Law provides that, when arranging transportation contractually, the freight forwarder steps into the shoes of the carrier *vis-à-vis* the defendant, not only for the purposes of its obligations and liabilities, but also regarding its rights. Accordingly, the judgments of the lower courts had correctly applied article 951 to the action for the recovery of freight and costs resulting from transportation organized by the plaintiff who, in view of the foregoing, was not a commission agent but rather the contractual carrier.

In addition, by means of a counterclaim the importer argued that the freight forwarder had charged it higher freight than the amounts agreed by the freight forwarder with the actual carrier. It therefore sought reimbursement from the freight forwarder of the amounts it had incorrectly received. In their judgments, the lower courts had dismissed the counterclaim, by applying the statute of limitations period under article 951 of the Commercial Code to the action for reimbursement of the excess paid from the freight forwarder.

The Supreme Court dismissed the cassation appeal lodged by the importer and held that, even though the rules on the statute of limitations period applying to the action for contribution in respect of the unduly paid freight was not governed by article 951 of the Commercial Code, the lower courts were right to dismiss the counterclaim as the amounts paid over by the importer in respect of freight were the amounts stipulated by the parties in the contract governing their relationship, the validity of which had not been challenged.

XI. Supreme Court Judgment (Judicial Review Chamber) of September 27, 2013. Calculation of reductions for scheduled sea carriage services for passengers to and from mainland Spain

In its judgment of September 27, 2013, the Supreme Court dismissed a cassation appeal lodged by a shipping company against a judgment handed down by Madrid High Court dismissing a challenge directed at a decision of the Deputy Director-General for Administrative Management and

Coordination, a decision which was confirmed by the Director-General of the Merchant Navy. The decision in question calculated the appellant's reductions for scheduled sea carriage services for passengers to and from the Spanish mainland during the first quarter of 2008.

The appellant considered, *inter alia*, that vehicle traffic and the associated tariffs had not been taken into account, and that the reductions could only be lowered by the sales promotions offered by the shipping company itself, not those offered by third-parties. Thus, the appellant claimed that it should not suffer a loss as a consequence of the activities of a third party (a travel agency) which had absolutely nothing to do with it.

The Supreme Court referred to the analysis conducted by the lower court of Royal Decree 1340/2007, of October 30, 2007, amending Royal Decree 1316/2001, of November 30, 2001, on reductions to the tariffs for scheduled air and sea transportation services for residents of the autonomous communities of the Canary and Balearic Islands and of the Cities of Ceuta and Melilla. It went on to find that in the field of carriage by sea, the reduction to be refunded to shipping companies is determined by reference to the actual price of the ticket and that the result of applying the reduction only to those tariffs is implicitly to subsidize the transport of vehicles travelling with passengers, as the rules on subsidies are established for the transport of persons, not property.

Thus, if promotion is carried out for the transportation of vehicles or other additional services, the cost thereof must be deducted from the price of the ticket because that amount affects vehicles rather than passengers. That is why the promotional part of the transaction must be deducted, as required under the rules, as the recipients of the reduction are passengers, not their property.

The Supreme Court also held that, as regards promotions offered by third parties not involved in the transportation *per se* (agencies), the plaintiff had not evidenced either that the amount relating to promotions only and always related to offers by agents rather than by the shipping company. The origin of these deductions is obvious, as the rules dictate that amounts in respect of promotions must be deducted, no matter who offers them.

In short, the reduction is calculated only for the benefit of passengers, not shipping companies, which means that any decrease in the calculation of the amounts not charged to passengers entitled to the reduction on account of promotions offered by third parties cannot, in any circumstances, entail a loss for the shipping companies.

In view of the foregoing, the Supreme Court dismissed the cassation appeal lodged by the shipping company and expressly awarded cassation costs against the appellant.

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