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European Commission decision of July 17, 2013 on the Spanish "tax lease" (Case SA.21233)

On July 17, 2013, the European Commission adopted its final decision on the investigation procedure in state aid case no. SA.21233 brought in June 2011 against Spain for the tax regime applicable to certain finance lease agreements (the Spanish "tax lease" system) and which we looked at in previous Newsletters.

In its decision, the wording of which has not yet been published in the OJEU (the confidential version is expected to be published towards the end of this year), the Commission concluded that the "tax lease" system was an lawful state aid scheme incompatible with the single market, and ordered Spain to recover the aid from those who had benefited from it, namely, the investors of the economic interest groupings, rather than the maritime transport companies or shipyards, except for the aid deemed compatible with the single market.

The system, which was set up in 2002, was not notified by Spain to the European Commission for prior authorization, as required. According to the Commission, the system conferred a selective advantage on economic interest groupings (EIGs) and their investors over their competitors. Having regard to article 14 of Council Regulation (EC) no. 659/1999, the beneficiaries must now repay the aid to the Spanish state. In accordance with the principle of legal certainty, the Commission will not require the repayment of aid granted between the start of the scheme in 2002 and April 30, 2007, when the Commission publicly declared a similar French scheme incompatible.

In the Commission's view, the reduction in the purchase price of the ships passed on to the maritime transport companies contributed to an extent to achieving the objectives of common interest set out in the Guidelines on state aid for shipping. To that extent alone, the aid was compatible with the single market.

The Spanish authorities must, in accordance with the Commission decision, identify the investors who benefited and determine the amounts of incompatible aid to be recovered from them. The Commission decision does not allow the beneficiaries to pass on the repayment obligations to third parties (such as the shipyards), even under existing contracts. Although the exact terms of the decision have yet to emerge, a legal debate has opened over whether they can render void any remedies to seek contribution or indemnity from third parties under contractual clauses agreed on between the parties to each "tax lease" system, or whether their validity must be examined on a case-by-case basis.

According to different media, on September 25th 2013 Spain has filed an action of annulment against the decision at the General Court (GC) without applying for injunctive relief that could stop the execution of the recovery decision. The action does not stay its effects per se.

Any individual or legal entity affected by the decision has standing to bring an action for annulment at the GC before the time limit set in article 263 of the Treaty on the Functioning of the European Union ("TFEU"). Moreover, any national action against any potential recovery orders issued by the Spanish Tax Agency is unlikely

to succeed if beneficiaries with standing to do so have not brought an action for annulment at the GC.

Entry into force of the 2006 Maritime Labour Convention

August 20, 2013 marked the entry into force in Spain, and in many other countries, of the Maritime Labour Convention (in accordance with Article VIII of the Convention), adopted in Geneva on February 23, 2006 by the General Conference of the International Labour Organization (ILO) ("MLC 2006"), the instrument ratifying which was published by Spain in the Official State Gazette on January 22, 2013.

We think that the most original and important aspect of MLC 2006 is the implementation by the States Parties of a system which, while to some extent inspired by existing port State control of safety and environmental protection, establishes for the first time in the shipping industry a minimum international labor standard required for all ship crews regardless of the flag they fly. MLC 2006 will not only require compliance with its requirements by ships flying the flag of a State Party, but also by all ships, whatever their flag, located in the territorial waters of any country that has ratified MLC 2006. Until now, and subject to minor exceptions, the minimum labor standard required for a ship's crew was only that required by the legislation of its flag State.

Accordingly, States Parties can certify that ships flying their flag comply with the minimum requirements imposed by MLC 2006 with a view to avoiding or minimizing any inspection of the vessel in question by a State Party other than the vessel's flag State.

With regard to the actual implementation of MLC 2006, on the one hand, note the recently-approved Royal Decree 572/2013, of July 26, 2013, amending Royal Decree 452/2012, of March 5, 2012, implementing the basic hierarchical structure of the Ministry of Development, published in the Official State Gazette on August 31, 2013, which states that the Directorate-General of the Merchant Navy is responsible for issuing and renewing (after a report from labor and social security inspectors and the Social Institute of the Navy) the Maritime Labour Certificate and Declaration of Maritime Labour Compliance referred to in MLC 2006.

On the other hand, it is worth mentioning the publication in the OJEU on August 14, 2013 of Directive 2013/38/EU of the European Parliament and of the Council of 12 August 2013 amending Directive 2009/16/EC, of 30 May 2013, on port State control, which precisely seeks to ensure a harmonized approach to inspections in Member States, both in the flag State and in the port State, particularly in the wake of MLC 2006 recently entering into force.

Entry into force of Law 9/2013, of July 4, 2013, amending the Land Transportation Law and the Air Safety Law

As discussed in earlier Newsletters, July 5, 2013 saw the publication in the Official State Gazette of Law 9/2013, of July 4, 2013, amending Land Transportation Law

16/1987, of July 30, 1987 (“LOTT”) and Air Safety Law 21/2003, of July 7, 2003, which partly entered into force on July 25, 2013.

Generally speaking, the LOTT has been amended due to the numerous changes that have taken place in recent years in the market for the carriage of passengers and goods by land, both in Spain and across the EU.

Apart from the multiple changes to the LOTT commented on in previous Newsletters, article 2 of the new Law also amends Air Safety Law 21/2003, of July 7, 2003, the provisions of which are set to enter into force on October 5, 2013.

The amendments to the Air Safety Law include most notably the creation of a new air safety levy for air safety supervision and inspection activities and services engaged in and provided by the State Air Safety Agency (“AESA”), and payable by outbound passengers boarding at Spanish airports, regardless of any subsequent intermediate stopovers by the flight or its final destination.

The levy will become chargeable as soon as the passenger boards the flight and will be settled by the substitute party liable to pay the levy (the private citizen, public authorities, agencies or airline, with whom the passenger has arranged the transportation or hire) to the airport manager before the aircraft carrying the passenger departs, or, if so agreed by the airport manager with AESA’s approval, within the first 10 days of each month with regard to amounts that became chargeable in the previous month.

The levy will be 0.58 euros per departing passenger, although the reductions envisaged for the public-domain airport security service provided in the Canary Islands, Balearic Islands and Ceuta and Melilla will be made to the amount of this levy.

Summary: Environmental Assessment Law – Penalties for bunkering and fracking

On August 30, 2013, the Council of Ministers decided to lay before parliament the Environmental Assessment Bill, which unifies under one single statute the primary legislation on strategic environmental assessment (namely, Law 9/2006, of April 28, 2006, on Assessment of the Effects of Certain Plans and Programs on the Environment) and on environmental impact assessment (namely, Legislative Royal Decree 1/2008, of January 11, 2008, approving the Revised Project Environmental Impact Assessment Law, amended by Law 6/2010, of March 24, 2010, amending the Revised Project Environmental Impact Assessment Law approved by Legislative Royal Decree 1/2008, of January 11, 2008).

The main goals of the Environmental Assessment Bill, which it is sought to fast-track through parliament using the urgent procedure for enactment, are: to ensure maximum protection of the environment, simplifying and expediting the environmental assessment process and enabling the same standard legislation to apply across Spain; to penalize bunkering using permanently moored tankers and banned land fill; and to introduce the obligation to consider climate change in environmental assessments. Moreover, for the first time, fracking projects (i.e.,

projects requiring the use of hydraulic fracturing techniques) are made subject to environmental impact assessment.

In the case of bunkering, the Bill introduces a number of changes into the enforcement/penalties regime established by Natural Heritage and Biodiversity Law 42/2007, of December 13, 2007, to ensure that activities that create environmental risks in protected areas and in areas within the Natura 2000 network can be penalized. Thus, bunkering, using permanently moored tankers, or discharges of banned types of land fill, are expressly defined as infringements.

In particular, these practices will be penalized as "very serious infringements" where the damage exceeds €100,000 and "serious infringements" in other cases. The specific wording of the Bill has not yet been published.

This type of infringement was already included in the specific context of the Strait of Gibraltar in Royal Decree 1620/2012, of November 30, 2012, declaring Site of Community Importance ES6120032 *Estrecho Oriental* in the Mediterranean biogeographical region of the Natura 2000 network as a Special Area of Conservation and approving the related conservation measures. The provisions of that Royal Decree prohibit land reclamation using as land fill materials extracted from the seabed or elsewhere, and bunkering in the waters of the protected area.

The Bill amends the enforcement/penalty regime established by the National Heritage and Biodiversity Law precisely to define these infringements and facilitate the enforcement of penalties.

Future modification of the special tax on certain means of transportation in the case of recreational craft charters

On June 28, 2013, the Council of Ministers decided to lay before parliament a Bill Establishing Certain Measures on Environmental Taxation and Adopting Other Tax and Financial Measures. It has been sought to fast-track the Bill through parliament using the urgent procedure for enactment.

The Bill modifies the so-called "registration tax" or special tax on certain means of transportation ("IEDMT") in the case of recreational craft used solely for the charter business.

In particular, it amends letter g) of article 66.1 of Excise and Special Taxes Law 38/1992, of December 28, 1992, which regulates the IEDMT exemption for first registration or, as the case may be, for the use of recreational craft or nautical sports vessels by enterprises solely for the charter business, so that the exemption will now apply regardless of their hull length (at present, it only applies to craft with a maximum hull length of fifteen meters).

The exemption will remain subject to the limitations on, and compliance with the requirements established for, vehicle hire. In any case, it will be deemed that there is no charter business if the craft is made available by the owner for charter and the owner, or a person related to the owner, receives for any consideration a total or partial right to use the craft or any other owned by the charterer or a person related to the charterer. For the purposes of applying letter g), persons who fulfill

the conditions set forth in article 79 of the Value Added Tax Law will be deemed to be "related persons."

Obligations on airlines to assist accident victims in Royal Decree 632/2013 of August 2, 2013

Royal Decree 632/2013, of August 2, 2013, on assistance to civil aviation accident victims and their relatives and amending Royal Decree 389/1998, of March 13, 1998, regulating the investigation of accidents and incidents in civil aviation was published in the Official State Gazette on August 3, 2013.

The Royal Decree seeks to comply with the provisions of Regulation (EU) No. 996/2010 of the European Parliament and of the Council of 20 October 2010 on the investigation and prevention of accidents and incidents in civil aviation and repealing Directive 94/56/EC. Among other matters, the Royal Decree establishes the minimum obligations of airlines as regards assistance to victims and their relatives and, correlatively, the minimum terms of plans for assistance to victims and their relatives in the event of a civil aviation accident that were introduced as an obligation on airlines by Law 1/2011, of March 4, 2011, establishing the State Program on Operational Safety for Civil Aviation. It also establishes the assistance measures that airport self-protection plans should have in place in this connection.

Accordingly, Chapter III of the Royal Decree imposes on airlines holding a Spanish operating license the obligation to have in place a plan for assistance to civil aviation accident victims and their relatives that must include at least the assistance measures provided for in the Chapter.

The minimum obligations of airlines include most notably the following:

- providing the contact person with information on the list of people on board the aircraft suffering the accident and, if appropriate, details of the person designated by passengers as their contact in the event of an accident, in accordance with article 20 of Regulation (EU) No. 996/2010 of 20 October 2010;

- making available toll-free telephone lines, manned in Spanish and English and sufficient to provide basic information, gather information received on family contact persons, and answer queries on passengers involved in the accident;

- providing relatives of people on board the aircraft suffering the accident with an adequate place to receive assistance and information in sufficient privacy, both at the points of departure and arrival of the flight and at the scene of the accident;

- providing transportation to relatives of the persons on board to and from the scene of the accident, and accommodation and meals for as long as is necessary depending on progress with rescue efforts and the tasks of identification and, as the case may be, repatriation of the accident victims; offering the victims and their relatives such psychological support as may be objectively necessary to come to terms with and get over and through the accident and subsequent grieving process.

The Royal Decree also provides that the airline is responsible for the custody, cleaning and return of personal effects to their owners or their relatives, unless such effects are retained for the purposes of the accident safety or court investigation.

Investigation into the Alvia train crash in Santiago de Compostela

The Rail Accident Investigation Commission ("CIAF") has been tasked with investigating the Alvia train derailment that occurred in Santiago de Compostela, Galicia, on July 24, 2013 under case no. 0054/2013.

This specialist body, which reports to the Ministry of Development, began operating on December 11, 2007 and is regulated in Royal Decree 810/2007, of June 22, 2007, approving the Regulations on Traffic Safety on the General-Interest Rail Network and, specifically, in Title III, which deals with the investigation of rail accidents.

Based on this legal mandate, the CIAF is responsible for investigating serious rail accidents taking place on the General-Interest Rail Network, and other rail accidents and incidents occurring on that network where it sees fit, although it must do so independently from the Directorate-General of Railways, the Rail Infrastructure Manager and any rail company.

The CIAF's brief is to investigate rail accidents in order to determine their causes and the circumstances in which they took place, so as to prevent any recurrence in the future. Under no circumstances does its brief include apportioning blame or liability. The CIAF investigation is independent from any judicial investigation, although in practice the courts can, and usually do, have regard to the CIAF's reports to determine liability.

At the moment, the investigation is still in progress, although a series of recommendations by the CIAF to the Ministry of Development have emerged in the media, including, for instance, managing the roll-out of ASFA (automatic braking and signal notification) beacons controlling train speeds so as to ensure immediate braking if the speed limit is exceeded.

Judgment dated June 12, 2013 rendered by the Supreme Court (civil chamber): boatbuilding – limitation period and tolling of such period

In a judgment dated June 12, 2013, the Supreme Court dismissed the cassation appeal filed by the borrower of a loan used to pay the price for building a boat, against the judgment handed down by the Madrid Provincial Appellate Court in a laim for damages brought by the contractual party commissioning the fishing boat in question.

When the borrower defaulted on the loan, the lender sought foreclosure, the result being that the vessel was acquired by a third party.

In the original complaint filed in the proceeding leading to the cassation appeal, the borrower blamed the contractor for breach of the obligation to deliver it the completed boat within the time period stipulated in the contract. The borrower also argued that the lender, charged with paying the boatyard on behalf of the commissioning party on the basis of the percentage of completion of the boat, was in breach of its duty of care in paying the installments of the purchase price without previously checking whether the boatbuilding project was substantially behind schedule. In short, the plaintiff sought a ruling that both defendants indemnify it jointly and severally up to a certain amount of the loss and damage it allegedly sustained as a result of foreclosure.

The Madrid Provincial Appellate Court identified the date on which the lender made the payment indicated as the source of the complaint as the date on which time started to run under article 1964 of the Spanish Civil Code as regards the lender’s liability. As for the boatbuilder’s liability, time started running when the borrower stated its intention to terminate the boatbuilding contract and, therefore, consider itself released from all obligations under it.

In addressing the matter of the start date of the limitation period for legal action, the Supreme Court recalled that determining it was a highly factual issue, which prevented its scrutiny in cassation. In any case, the identification by the lower-instance appeal court of the start date for the limitation period indicated in article 1964 of the Civil Code for actions in contract brought in the complaint was correct, so long as it reflected duly established factual data.

As for the purported tolling of the limitation period, the Supreme Court also recalled that an out-of-court claim, which, pursuant to article 1973 of the Civil Code, stopped time running in the limitation period, did not need to be in a specific form, but had to outwardly manifest the intention to recover payment of the amounts owed and, precisely, the debt to which the subsequent action referred. The tolling of the limitation period was a factual issue as far as cassation was concerned, meaning that any such finding was a matter for the lower-instance courts.

The judgment appealed against expressly rejected the argument that the indemnification obligations referred to in the complaint had been claimed in the letter of intent or in the talks referred to in the related legal ground. Accordingly, the Supreme Court held the lower-instance appeal court had reached the right conclusion in rejecting (in light of the proven facts) the effect of the statements of intent in tolling the limitation period for the remedies sought in the complaint.

Judgment dated July 1, 2013 rendered by the Supreme Court (civil chamber): International Sale of Goods. Usage and custom. Contract formation

In a judgment dated July 1, 2013, the Supreme Court upheld a cassation appeal filed by a wheat seller which had brought an action for breach of contract against the purchaser of 9,000 tonnes of wheat in an international sale of goods formalized in a sale note drawn up by a broker, ordering the purchaser to pay the price of the goods duly delivered but never collected by it.

Among the matters at issue, given that the purchaser denied at the two lower court instances that the contract had been validly formalized, the Supreme Court examined whether or not the sale of the wheat could be deemed to have been perfected, as it was a transaction performed through a third-party intermediary which even issued a note "confirming the sale" and setting out the minimum details identifying the seller and purchaser, the subject matter of the purchase, the price, the time periods for delivery of the goods, the place where they were to be made available (Tarragona port) and some remarks.

Referring to the UN Convention on Contracts for the International Sale of Goods done at Vienna 1980 ("CISG") applicable to the transaction and, specifically, to articles 4, 9 and 11, the Supreme Court held that the issuance of a note such as that drawn up by the broker in the course of acting as an intermediary in the sale, and the absence of any complaint by either of the parties after its receipt, constituted their acceptance of a commercial practice in the cereal market, which was why the note was proof of the existence of an oral sale agreement (made by telephone), having regard to the general principle of freedom of form in the conclusion of contracts enshrined in article 11 CISG.

As far as the Supreme Court was concerned, the same conclusion would be reached even if the CISG were applied directly, since the same practices also applied in Spanish law, as did the general principle of freedom of form (article 1278 of the Spanish Civil Code) and there was no special requirement as to form for transactions of this type.

Judgment dated June 12, 2013 rendered by the Supreme Court (civil chamber): Hull marine insurance. Interpretation of particular policy conditions

In a judgment dated June 12, 2013, the Supreme Court held that no cassation appeal by the policyholder of hull insurance for a fishing boat that sank in Senegal due to a leak lay against the judgment handed down on appeal by the Provincial Appellate Court, which dismissed the claim by the insured against the insurer as a result of the latter's refusal to accept coverage of the marine casualty.

The insurer refused to accept the economic losses of the marine casualty on the ground that the fishing boat was not classified by an authorized society and the policyholder had represented the contrary when taking out the policy. The particular conditions of the policy stated that the risks covered were those included in the Institute Fishing Vessel Clauses and one of them established the automatic termination of cover in the event of suspension or discontinuance of the vessel's class or a change of the vessel's classification society.

The courts at first instance and on appeal held that although the policy did not expressly state the requirement that at the time of arranging the insurance, the boat was classified by an authorized classification society, a proper interpretation of the terms of the transaction deemed such a requirement to be included and the policyholder was being willfully inaccurate when it represented to the insurer that the boat had been classified, and this was a misrepresentation that was material to the insurance contract.

The insured filed extraordinary appeals for procedural infringements and cassation against the Provincial Appellate Court's decision, although leave was only give to proceed with the latter on grounds including the following: the literal wording of clause 4 of the Institute Fishing Vessel Clauses regulated the consequence (automatic termination of insurance) which was linked to events subsequent to the arrangement of the insurance, namely, suspension, discontinuance, withdrawal or expiry of the vessel's class, but did not refer to the absence of the vessel's class when the insurance was perfected. Accordingly, the interpretation of the clause by the Provincial Appellate Court would be contrary to the literal wording agreed on.

The Supreme Court dismissed this argument, ruling that, over and above the consequence that the interpretation of the contract was a matter for the lower-instance courts and not the cassation chamber, despite the appellant's arguments, the rule in paragraph 1 of article 1281 of the Civil Code on the literal interpretation of provisions had not been misapplied by the Provincial Appellate Court in construing that the clause in question released the insurer from the obligation to indemnify if there was no class at the time the insurance was arranged.

The last rule in article 1281 established that the interpretation only had to be in keeping with the literal wording of the clauses of the contract if the clauses did not leave open to doubt what the parties' intention was, since if the wording used did not reflect (even by omission) that common intention, such common intention would prevail over that wording. According to the Supreme Court, the Provincial Appellate Court had rightly looked beyond the wording used by the parties, or referred to by them, to the true intention of the contract, and held that linking the penalty of automatic termination of insurance to the suspension or discontinuance of the vessel's class after the contract was concluded implied that such class existed at the material time when the insurance was arranged.

In view of all the above, the Supreme Court dismissed the cassation appeal and confirmed the lower-instance appeal judgment.

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