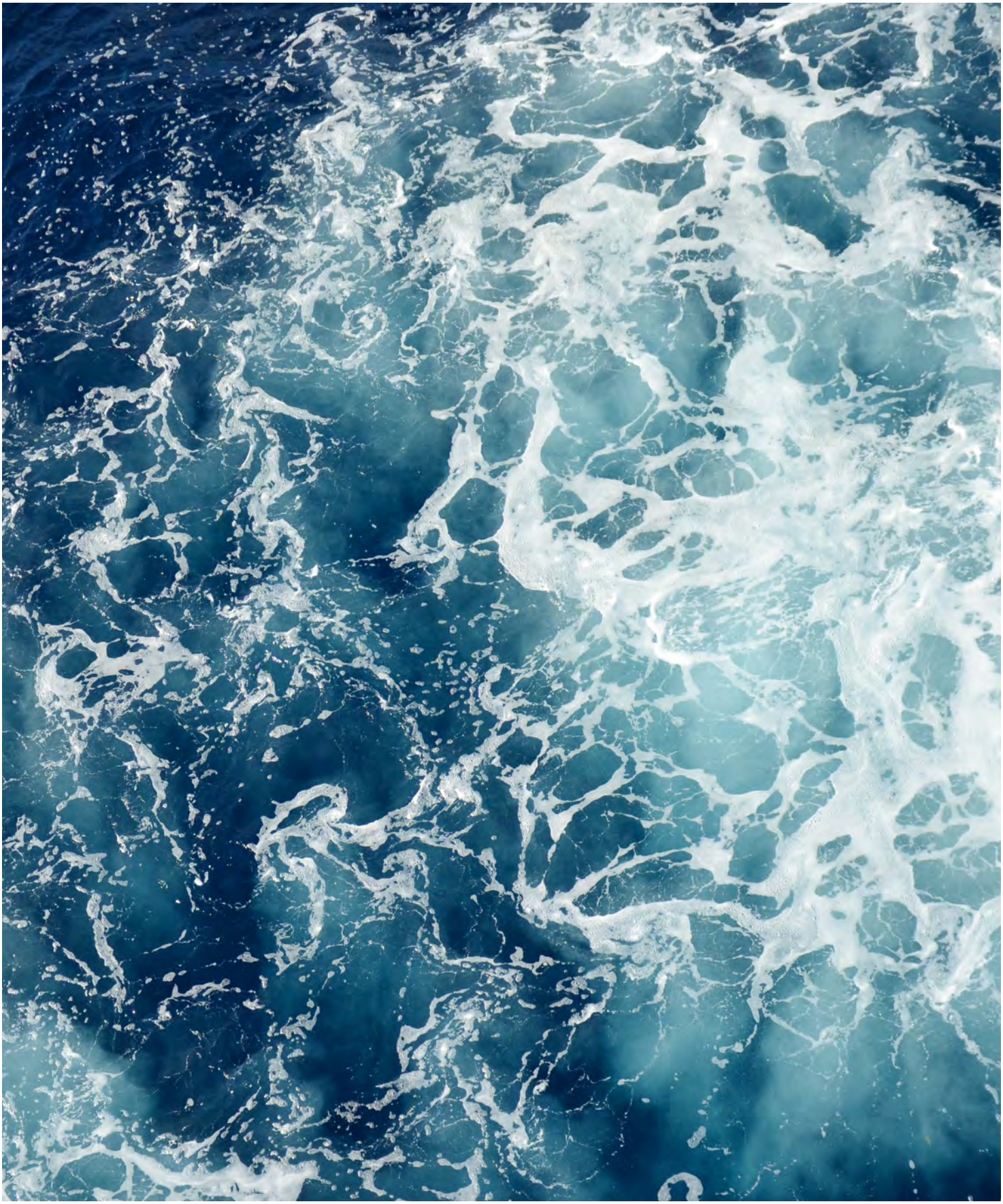
GARRIGUES

TRANSPORT AND SHIPPING

JULY 2016



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1941-2016 GARRIGUES

TRANSPORT AND SHIPPING

01 EUROPEAN UNION AND INTERNATIONAL

1.1. LEGISLATION AND LEGISLATIVE DEVELOPMENTS

1.1.1. Entry into force of the requirement to verify the gross mass of packed containers

The requirement for shippers to verify, document and communicate the gross mass of packed containers, according to the amendments to Chapter VI of the Safety of Life at Sea (SOLAS) Convention approved by the International Maritime Organization's (IMO) Maritime Safety Committee in Resolution MSC 380 of November 21, 2014 came into force on July 1, 2016.

Those IMO amendments were approved after it was determined that the main cause of recent maritime shipping accidents was the existence of material discrepancies (in some cases up to 10% higher or lower) between the actual gross weight of packed containers (loaded onto ships) and their declared weight.

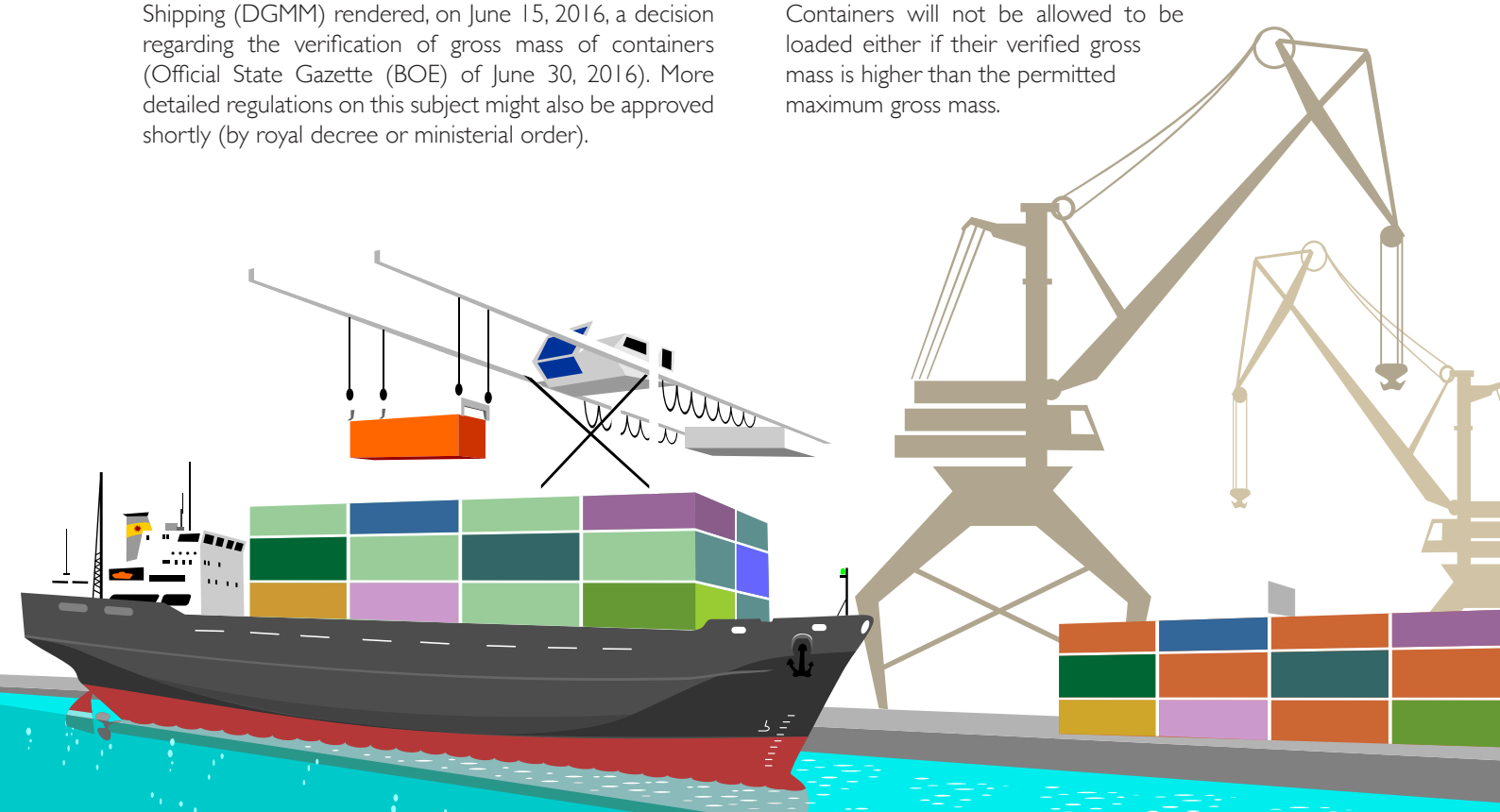
With a view to establishing a common approach for the implementation, enforcement and interpretation of these IMO amendments, and to concretize and channel the Guidelines regarding the verified gross mass of a container carrying cargo (Circular MSC.1/Circular 1475 of the IMO Committee), the Directorate-General for Merchant Shipping (DGMM) rendered, on June 15, 2016, a decision regarding the verification of gross mass of containers (Official State Gazette (BOE) of June 30, 2016). More detailed regulations on this subject might also be approved shortly (by royal decree or ministerial order).

The DGMM's decision referred to above applies to any packed containers shipped on or after July 1, 2016. It does not, therefore, apply to containers in transit after the decision came into force if they were shipped before that date, even if they have not been loaded,

The requirements regarding the verification of the gross mass of packed containers apply to all containers governed by the International Convention for Safe Containers (CSC), 1972 and having to be loaded on to a ship subject to Chapter VI (Carriage of cargoes and oil fuels) of the SOLAS Convention.

Those requirements do not, however, apply to containers having to be loaded on board a ship to be carried between two national ports (cabotage), or to containers to be carried on a chassis or a trailer where the containers are driven on or off a ro-ro ship engaged in short international voyages (as defined in regulation III/3 of chapter III of the SOLAS Convention).

The shipper is responsible for obtaining, documenting and communicating the verified gross mass of a packed container. Packed containers cannot be loaded on to a ship (subject to chapter VI SOLAS) unless the master or his representative and the representative of the terminal have first obtained the container's verified actual gross mass. Containers will not be allowed to be loaded either if their verified gross mass is higher than the permitted maximum gross mass.



To obtain the verified gross mass of a packed container, the shipper can either weigh the packed container after filling and sealing it (Method 1), or weigh all the cargo items (plus the pallet mass, pallet wood, dunnage and other packing material) and add the tare mass of the container (Method 2).

The scale, weighbridge, lifting equipment or other devices used to verify the gross mass of the containers must be calibrated by a laboratory certified by the National Certification Entity (ENAC) or other recognized entity for these purposes.

1.1.2. Review and update of the York Antwerp Rules 2016 on general average cases

On May 10, 2016, the plenary session of Comité Maritime International (CMI) approved the new 2016 York Antwerp Rules on general average cases (YARs), which update the previous 1994 and 2004 rules.

The new YARs 2016 include a number of minor changes, which, with some exceptions (salvage, etc.), are qualifying rather than substantive, and as such, are simply intended to speed up the settlement procedures, clarify the documents and related items of proof and make other similar adjustments (interest rates, and the like).

Although the new YARs 2016 were approved with the consensus of the international maritime industry, it remains to be seen whether they will actually replace the 1994 rules which continue to be the rules used and preferred by members of the shipping industry. Remember that the YARs are neither law nor an international convention, but rather simply rules freely drawn up by the shipping industry (like the Incoterms, for example) and the members of the shipping industry voluntarily decide whether to apply them by incorporating them in contracts (chartering contracts, bills of lading, contracts of carriage, and the like).

1.1.3.- What Brexit could mean for Spain's shipping industry

Once the United Kingdom's decision to leave the European Union has been implemented and brought into effect legally (which could take longer than 2 years), the main effects of that decision on the Spanish shipping industry, which will ultimately depend on the terms that are negotiated (over which nothing is definite as yet), could, in principle, be the following:

- UK-flagged vessels would cease to be EU vessels, and therefore would:
  - not be able to make voyages within Spain's internal waters or engage in cabotage in Spain, without a waiver where there is no EU vessel fit to be used and available for the voyage in question (EU Regulation 3577/1992 and article 257 of the revised State Ports and Merchant Shipping Law (TRLPEMM));
  - be able to continue making international voyages, including intra-Community voyages, although intra-Community voyages would not benefit from any of the customs, tax and other EU benefits; and
  - not qualify as an EU vessel for Spanish tonnage tax purposes.
- UK national seafarers would qualify as non-Community foreigners, and therefore:
  - would be counted as such to determine the legally permitted crew of Spanish ships for registration on both the Traditional Register (RT) or the Special Canary Island Register (REC) on registration;
  - could not be masters of Spanish flagged-ships either on the RT or on the REC (article 162 of Maritime Shipping Law 14/2014 and article 253 and additional provision 16.6 of the revised State Ports and Merchant Shipping Law); and
  - would not be entitled to the tax and social security incentives applicable to seafarers enrolled on ships entered on the REC and working on scheduled passenger services between EU ports (articles 75 and 78 of Law 19/1994 on the Canary Island Economic and Tax Regime).

1.2.- RECENT CASE LAW

1.2.1- Tax lease. The CJEU backs the current Spanish tax lease

In a judgment delivered April 16, 2016, on case C-100/15, the Court of Justice of the European Union (CJEU) dismissed the cassation appeal brought by Dutch shipyards against the current Spanish tax lease (approved by the currently in force Law 16/2012 adopting various tax measures).

The cassation appeal was brought against the previous judgment of the General Court of the European Union (GCEU) which, as you may remember, had confirmed the European Commission's earlier decision giving the green light to the current Spanish tax lease.

In the cassation appeal, centering mainly on procedural matters rather than substantive or fact-based arguments, it was asserted that the European Commission should have opened a formal investigation procedure so that it could have heard the Dutch shipyards, and if need be, examined whether there had been state aid to the Spanish shipyards.

The CJEU's judgment has made the European Commission's approval of the current Spanish tax lease final and definite, and therefore the beneficiaries of that tax lease can invest without having to worry about the risk associated with the hitherto unsettled appeal.

This finding in Spain's favor comes on top of the earlier CJEU judgment, of December 17, 2015 (see point 1.2 in our March 2016 Newsletter), which annulled Commission Decision 2014/200/EU, of July 17, 2013, on the previous Spanish tax lease which, as you may remember, required the economic interest companies (EIGs) and investors to refund the aid they had received.

1.2.2.- Dock workers. New decision against the classic pool system for dock workers

In a judgment delivered on April 19, 2016, the European Free Trade Association (EFTA) Court found that the monopoly for unionized Norwegian dock workers is incompatible with EU competition rules.

Though not an EU member state, Norway does belong to the European Economic Area and as a result applies the same fundamental principles of EU law, which is why this recent EFTA Court judgment is also very important for the EU.

Briefly, the judgment held that the classic pool systems at Norwegian ports (relatively similar to the Spanish systems due to the role of the management companies, Sociedades Anónimas de Gestión de Estibadores Portuarios -SAGEP-) are contrary to fundamental EU principles because they violate, among others, the principle of freedom of establishment. Similarly, the judgment found that European competition rules apply to the collective labor agreements for the pools of dock workers and therefore the dock workers in those pools cannot have priority for being hired over others.

This judgment considerably strengthens the effect of similar earlier judgments including the CJEU judgment of December 11, 2014, which, you may recall (see point 2.2 of our January 2015 Newsletter) held that the Spanish system in force for dock workers is contrary to the principle of freedom of establishment.

Spain was, and continues to be, required to adopt the necessary measures to enforce that CJEU judgment, which, in short, implies amending the Spanish legislation in force (Legislative Royal Decree 2/2011 approving the revised State Ports and Merchant Shipping Law -TRLPEMM-) in the manner laid down by the judgment. Because the

European Commission considers that Spain has not appropriately addressed the problems identified in that judgment (according to a press release on April 28, 2016) it has referred Spain to the CJEU for failing to comply with that judgment, as a result of which Spain could soon be facing a seven figure fine upwards.

02 SPAIN

2.1. LEGISLATION AND LEGISLATIVE DEVELOPMENTS

2.1.1. Consequences of failure to transpose the procurement directives

In Instruction 16/V delivered in April 2016, the Spanish Since April 18, 2016 so-called "direct effect" of various components of Directive 2014/23/EU of the European Parliament and of the Council, of February 26, 2014, on the award of concession contracts and of Directive 2014/24/EU of the European Parliament and of the Council of the same date on public procurement and repealing Directive 2004/18/EC has been in place, because they have not been completely transposed into Spanish law. This was flagged up in the Decision of March 16, 2016, by the Directorate-General for State Property, publishing the Recommendation of the Consultative Panel on Government Procurement, on the direct effect of the new EU directives on public procurement.

The recommendations, intended as guidelines to secure uniform application by all contracting authorities, refer to various interpretation aspects of the directives and of domestic law on public procurement, such as the types of public contracts, the publicity rules, the negotiated procedure or the rules on null and void contracts and special administrative appeals.

2.1.2. Authorization rules for mega trucks

In Instruction 16/V delivered in April 2016, the Spanish traffic authority approved the issue of special licenses for European modular system combinations (also known as "mega trucks") which are 25.25m in length and weigh 60 tonnes.

Applications for these licenses, which will be for a term of up to one year, may be made from April 12, 2016. The interested party must be registered on the Register of Carriers and Carriage Businesses organized by the Ministry of Development (REAT) and hold a driving license for motorized road vehicles with express authorization from the owner (if the applicant is not the carrier).

Additionally , the Instruction lays down that favorable reports must be obtained from the owners of the thoroughfares, which may be motorways, dual carriageways or conventional highways with separate lanes for traffic in each direction.

The Subdirectorate-General for Mobility Management will be the authority in charge of coordinating the procedure for issuing the special licenses for mega trucks.

2.2. RECENT CASE LAW

2.2.1. The right to be indemnified for emotional distress for Spanish Costa Concordia cruise victims

In a judgment delivered on April 22, 2016, the Supreme Court, Civil Chamber, settled a cassation appeal brought by the Association of Spanish Victims (22 victims) of the Costa Concordia Cruise accident (on January 13, 2012, in Italian waters). After confirming the earlier judgment on this case by the Madrid Provincial Appellate Court, the judge ordered the shipping company owning the Costa Concordia cruise ship to pay to those victims:

- A sum of indemnification for personal injury and damage to luggage under the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea; and

- An additional and separate sum of indemnification for emotional distress, equal to €12,000 per passenger irrespective of whether they had suffered bodily injury, in view of the upset, anxiety, anguish and enormous stress experienced during that accident.

2.2.2. Exclusion clauses relating to unloading work in carriage insurance policies may be detrimental and therefore invalid

LIn a decision delivered on April 22, 2016, the Supreme Court, Civil Chamber, dismissed an appeal concerning a procedural infringement and a cassation appeal against the

judgment deciding to grant indemnification to the insured under a carriage insurance policy they had been taken out, after concluding that this policy contained a clause limiting the insured's rights, which failed to satisfy the legal requirements for it to be valid.

The Chamber held that Law 15/2009, of November 11, 2009 on the Contract of Carriage of Goods by Land, which provides that the loading and unloading activities would be the responsibility of the shipper and receiver, respectively, unless the carrier has expressly accepted liability, did not apply because it was published later.

It confirmed the view adopted by the second-instance court that the clause at issue is a detrimental clause in that it considerably reduces the insured's right and to a disproportionate extent, by emptying the right of all content, and making access to any cover for the loss practically possible. It prevents, in short, the policy from having any effect.

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