

**TAX**

*NEWS REGARDING THE SHIFTING OF VAT IN UNCOLLECTABLE CREDITS*

Royal Decree-Law 6/2010, of 9 April 2010, relating to measures to foster economic recovery and employment, came into effect on 14 April. This Royal Decree-Law includes a series of provisions of tax relevance. In our opinion, one of the ones that will have most relevance at a practical level is the simplification of the requirements for recovering VAT in the case of uncollectable credits. As of the entry into effect of this Royal Decree-Law, the taxable base of VAT may be amended when the credits corresponding to the amounts shifted are completely or partially uncollectable. To this effect, the following requirements have been established for a credit to be considered to be uncollectable: that a year has elapsed since the accrual of the shifted tax without all or part of the credit having been collected (6 months if the credit holder's volume of operations for the previous year was not greater than 6,010,121.04 euros), that it has been recorded in the Ledgers, that the debtor acts as an entrepreneur or professional or that the taxable base of the operation is greater than 300 euros and that the taxpayer has filed for payment by means of court action or, and this is the big piece of news, by means of simple notarial requirement. The above reduction of the taxable base must be made within the three months following the end of the period set out in the first requirement and the Spanish Tax Authorities must also be notified. It is also important to highlight that this reduction will not apply if the debt is guaranteed or secured or in cases where the debtor is a public agency.

**BANKRUPTCY**

*NEW REFORM OF THE BANKRUPTCY LAW 22/2003*

A Commission of Experts has been appointed by the Justice Ministry for the reform of the Bankruptcy Law 22/2003, made up of representatives from the private sector, experts from the administration, Mercantile and Crown Court magistrates and chairs in Bankruptcy Law, with a view to adjusting the current Bankruptcy Law, which, despite coming into effect in 2004 and being subsequently amended in March 2009, has proven to have serious shortcomings in order to tackle the current economic crisis. Generally speaking, it is not a new law but a one-off reform of specific aspects of it, although in particular it will amend

specific aspects of the law, although in particular it will be an in-depth amendment of the stages to be followed in cases of insolvency of private individuals.

The amendment introduced in the last reform, to which we referred, will also be reinforced as the prior communication procedure regulated in Article 5.3 of the Bankruptcy Law will have greater effectiveness by protecting the debtor not only from the necessary bankruptcy but also from claims of individual enforcement and from the collection office of the Public Administration.

For the present, these are the most significant reforms we have, although for obvious reasons – approval by the Commission, parliamentary stage – it does not appear to be prudent to give any more advance news, so we will return to the subject as soon as they are approved.

**INTELLECTUAL PROPERTY**

*THE TEU ATTORNEY GENERAL RULES THAT THE DIGITAL FEE APPLIED IN SPAIN IS ILLEGAL*

Barcelona Crown Court posed a preliminary issue of law to the Court of Justice of the European Union (TEU) relating to fair recompense for private copying, which was ruled on by the Attorney General of the TEU, Verica Trstenjak, who on 11/05/10 ruled that the digital fee that is applied in Spain is illegal because it is imposed indiscriminately on all reproduction equipment and material and not just on those that will presumably be used for making private copies.

The ruling states that “a national system that foresees the application of a fee for private copying on all digital reproduction equipment, machines and material indiscriminately (as occurs in Spain) is not compatible with community rules.”

The conclusions refer to the litigation between the Spanish General Society of Authors (SGAE) and the PADAWAN company, which sells electronic storage devices, including CD-R, CD-RW, DVD-R and MP3 machines. The SGAE demanded payment by PADAWAN of a fixed-fee compensation for private copying of 16,759.23 euros for the storage devices sold by PADAWAN between September 2002 and September 2004.

In her ruling on Tuesday, the Attorney General of the TEU highlighted that “there should be a sufficiently close relationship between the use of the law and the corresponding economic recompense for private copying,” in such a way that the digital fee only matches community legislation if it is applied solely to “equipment, machines and material” that “will presumably be used for making private copies.”

## TAX

### NEW CRITERION CONCERNING THE EXTINGUISHMENT OF TAX PENALTIES

The ruling by the Judicial Review Court of the Spanish Central Criminal Court of 4<sup>th</sup> February 2010 has established a new interpretative criterion concerning the extinguishment of tax penalties. The ruling states specifically that "it is not admissible that actions outside disciplinary proceedings may interrupt the extinguishment of subsequent penalties." As a result of this ruling, actions which occur during an inspection procedure do not interrupt the calculation of the extinguishment timeline of the right of the Public Administration to issue a penalty. This ruling serves as a reminder that the inspection procedure is not of a penalising nature and therefore given that disciplinary proceedings have to be carried out separately, the actions within the verification procedure undertaken by the Inspection do not interrupt the calculation of the extinguishment timeline of the right to issue a penalty.

## BANKRUPTCY

### BARCELONA OR MADRID

Notification of the ruling by Court 1 of the Spanish Supreme Court is expected within the next few days that will finally rule on the differences in criteria between the Crown Courts of Barcelona and Madrid regarding the liability of Administrators, and therefore unifying the case law in a way that once a ruling has been passed as to which of the liability calculation criteria will prevail, subjective or objective. In other words, this will clarify whether the liable party will be the company, as defended to date by the Barcelona Crown Court judges, or whether it will be the individual representative, as argued by the Madrid Crown Courts.

## PINTÓ RUIZ & DEL VALLE

The owner for Spain of the well known German franchise Engel & Völkers, the leading company in the property mediation sector, has selected lawyer Raimundo Clar Barceló, a Pintó Ruiz & Del Valle partner based in Palma de Mallorca, to run training courses covering legal aspects for franchisees. These seminars will be held in both the Balearics and Barcelona, with the main priority being to maintain proven quality standards of service and offer clients initial advice that meets their needs.

## PANNONE LAW GROUP

A new session of the Board of Directors of the international lawyers' group PANNONE LAW GROUP (PLG), of which our firm is a founder member, was held on 20 March in Geneva (Switzerland). This Board meeting was attended on behalf of PINTO RUIZ & DEL VALLE by María del Mar Martín and Alfonso Abadía Jordana. A new meeting of the Board of Directors of the young lawyers of the group (Young PLG) was also held at the same head office on 19 March 2010, chaired by PINTÓ RUIZ & DEL VALLE lawyer Yago Vázquez Moraga, at which there was a presentation of the Sports Arbitration Court. A number of different working meetings according to speciality were also held parallel to each session of the Board of Directors, which were attended in person by M<sup>a</sup> Jesús Yubero in the Employment Law group, Christa Helwig and Eva Ochoa in the Intellectual Property group, Yago Vázquez in the Arbitration group and Cristina Abilleira in the Mergers and Acquisitions group, and in which Rafael Abadía Jordana in the Arbitration group and Raimundo Clar and Eduardo de Olano in the Mergers and Acquisitions group took part via video conference.

## SPORT

### SPORTS LAW

On 22 April, our Chairman José Juan Pintó gave a paper at the LFP-UNAFUT 2010 Conference on International Football Law, organised by the Spanish National Football League and the Costa Rica League and held in San José de Costa Rica. The conference discussed Audiovisual Rights in professional football. On 6 and 7 May, he also visited Mexico City to give a course on International Sports Law at the University of Mexico City.

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## TRANSPORT NEWSLETTER

### **New Law on Contracts for the Transport of Goods by Land.**

Law 15/2009, of 11 November 2009, relating to contracts for the transport of goods by land, published in the Official Gazette of the Spanish State No. 273, dated 12.11.2009, updates the legal system of the contract by adapting the Spanish Law on Contracts for the Transport of Goods by Land to the model of the International Agreement on the Transport of Goods by Road (CMR) and Uniform Rules CIM/1999, especially with regard to the right to avail of the goods, to the impediments of the transport, to the delivery and its timescale, to the liability of the carrier for losses, breakdowns and delay, and to their reasons for exoneration.

It highlights the unitary regulation of the contract for the transport of goods by road and rail, as well as the detailed regulation of all matters concerning the conditioning and delivery of the goods to the recipient and of the obligations of loading and unloading, although it eliminates the dichotomy between full and split loads.

With regard to the obligation to pay transport costs, the law innovates by establishing the subsidiary liability of payment assumed by the loader in cases where it has been agreed that the consignee will pay carriage costs. Similarly, in the event of non-payment of the cost, the carrier may refuse to deliver the goods, unless they have been guaranteed payment by means of surety. Should this be the case, they should request, via legal or arbitration channels, the deposit of the goods or their alienation to cover the cost of carriage and other expenses within a maximum of 10 days.

The new law also obliges so-called transport intermediaries always to enter into a contract under their own name and to assume the role of carrier.

Lastly, it regulates contracts for multimodal transport and contracts for removals.

### **Extended types of access to work as a customs representative and reduced administrative procedures required for its performance.**

The principles introduced by Law 17/2009, of 23 November 2009, regarding free access to services activities and their performance has led to the revision of the regulatory framework of a number of sectors through Law 25/2009, of 22 December 2009, with a view to the definitive suppression of obstacles to the free provision of services with clear economic objectives.

Within this framework, Royal Decree 335/2010, of 9 March 2010, which regulates the right to make declarations to customs and the figure of the customs representative (Official Gazette of the Spanish State No. 90, dated 14.04.2010), deregulates the customs representation sector by extending the types of access to the activity of customs representatives and reduces the administrative procedures required to perform it. Following its entry into effect on 15 April 2010, all individuals or organisations who meet the requirements set out in the Community Customs Code may make customs declarations under their own name and on their own behalf or through a customs representative.

The Royal Decree establishes the conditions needed to work as a customs representative as being an individual with legal residence in any EU member state, who has successfully passed a series of minimum aptitude or knowledge tests on tax and customs matters and who is registered in the Customs Representatives Registry. However, the status of customs representatives and exemption from passing the aptitude tests applies to Customs Agents and Commission Agents; those authorised by the Customs and Special Taxes Department; those who during the three years leading up to the entry into effect of the Royal Decree had signed declarations as proxy holders and maintained an employment relationship with persons and bodies authorised by the Customs and Special Taxes Department; customs representatives legally established in any EU member state who meet the requirements set out in Article 14, points a) to d), of Regulation (EC) No. 450/2008, of 23 April 2008. In any event, economic operators will also be given this consideration.

## Measures that help improve road safety.

Ruling PRE/52/20/10, of 21 January 2010, which amends Appendices II, IX, XI, XII and XVIII of the General Vehicle Regulation, approved by Royal Decree 2822/1998, of 23 December 1998 (Official Gazette of the Spanish State No. 20, dated 23.01.2010), adopts a series of measures to improve road safety.

On the one hand, vehicle transporters, tow trucks used to remove vehicles involved in an accident or which have broken down and vehicles which transport closed containers approved for combined or intermodal transport are allowed to be on the road if their maximum authorised height does not exceed 4.50 metres, including load.

It also stipulates the technical specifications and the positioning of the V-23 sign to increase visibility and recognition of long and heavy vehicles, as well as their trailers, both at the rear and on the side of the vehicle, depending on the maximum volumes, lengths and categories, as established by Regulation CEPE/ONU 48R. A regular strip or a series of approved reflective strips should be put in place to identify its outline or, where this is not possible, its length and total width.

## The Rotterdam Rules on maritime transport.

To date, 21 States have signed the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, more commonly known as the Rotterdam Rules. The importance of this international instrument lies in the fact that it will unify the law on the international maritime transport of goods in which two or more methods of transport are used, where at least one is by sea. Therefore, the Agreement has modernised regulation of the sector and constitutes a very important tool for one part of multimodal transport.

The scope of application of the Convention is limited to the existence of a contract for the international carriage of goods wholly or partially by sea and irrespective of whether or not there is a bill of lading and of the nationality of the ship, of the carrier, the executing parties, the loader, recipient or any other interested party. However, charter transport contracts are excluded from the application of the Convention, as are contracts for the use of the vessel or the spaces on board.

Besides this, the Convention also regulates the use and efficacy of electronic transport documents, it establishes the basic obligations of the carrier, the containerisation of the cargo and when on-deck transport is permitted, as well as its applicable system.

In terms of the carrier's liability for the goods transported, the Convention establishes the period of liability, which will start when the goods for transport are received and will conclude when delivery is complete; it removes the unseaworthiness of the vessel and negligence at sea from the list of exonerations of liability; it raises the limits of the carrier's liability due to non-fulfilment of its obligations to 3 units of account per kilogram of the gross weight of the goods, unless the loader has declared the value of the goods and the declaration has been included in the contract details or when the carrier and the loader have agreed a limit in excess of the established limit of liability; it limits liability caused by delay to an amount equivalent to two and a half times the freight owed by the transport of the delayed goods. With regard to the exercising of legal actions, this is extended to two years.

However, the Convention will come into effect one month after the period of one year has expired following the date when the twentieth instrument of ratification, approval, adhesion and acceptance has been deposited, without any signatory State having deposited it to date.

**Increased minimum insurance cover with regard to liability for luggage and cargo.  
(DOUE L87/19, 7.4.2010)**

To ensure that consumers receive an adequate minimum level of insurance to cover airlines' liability regarding luggage and cargo in commercial operations, the minimum insurance requirements established by Regulation (EC) No. 785/2004 have been adapted to the limits of liability revised by the International Civil Aviation Organisation, in accordance with the Montreal Convention, which has been in effect since 31 December 2009.

Commission Regulation (EU) No. 285/2010, of 6 April 2010, establishes the minimum insurance cover regarding liability due to destruction, loss, fault or delay for luggage at 1131 DEG per passenger and for cargo at 19 DEG per kilogram, replacing Article 6, Sections 2 and 3 of Regulation No. 785/2004, relating to the requirements of airline companies and airline operators which established minimum insurance cover at 1,000 DEG per passenger in terms of luggage and at 17 DEG per kilogram in terms of cargo.

**Passengers on delayed flights put on equal footing with those on cancelled flights for the purposes of applying the right to compensation.**

In a Ruling of 19 November 2009, the Court of Justice of the European Communities (Court Four) stated that Articles 5, 6 and 7 of Regulation No. 261/2004 must be interpreted in such a way that passengers on delayed flights are put on an equal footing with passengers on cancelled flights for the purposes of applying the right to compensation when they suffer a loss of time equal to or in excess of three hours or more, i.e. that they reach their final destination three or more hours after the arrival time initially established by the airline, as the damages that airline passengers suffer in the event of a cancellation or major delay to flights are similar, which means that passengers on delayed flights cannot be treated differently to passengers on cancelled flights.

However, this delay does not mean that passengers have the right to compensation if the airline can prove that the major delay was due to extraordinary circumstances that could not have been prevented, even if all reasonable measures had been taken, i.e. circumstances outside the effective control of the airline. Similarly, it established that the concept of "extraordinary circumstances" used in Article 5, Section 3 of Regulation No. 261/2004 does not apply to a technical problem which occurs in aircraft causing a flight to be cancelled or delayed, unless this problem is derived from events which, due to their nature or origin, are not inherent to the normal exercising of the activity of the airline in question and are outside the effective control of this airline.

**Rules regarding the location of the provision of services and VAT refunds supported in other Member States.**

The main new features introduced by the Ruling of 23 December 2009, of the General Tax Directorate, relating to the application and interpretation of certain community directives regarding Value Added Tax, published in the Official Gazette of the Spanish State No. 313, dated 13.12.2009, refer to the location where the provision of services takes place, to the VAT refund procedure supported in Spain by non-established entrepreneurs and professionals and to the procedure for recovering VAT supported in other Member States by entrepreneurs and professionals established in Spain.

As of 1 January 2010, it is generally established that the location where the provision of services takes place in operations between entrepreneurs is the headquarters of the economic activity of the recipient, including the intracommunity transport of goods and services, as well as mediation services and accessories for the intracommunity transport of goods. In operations where the recipient is a private individual, the location where the provision of services takes place will be the headquarters of the economic activity of the provider of the service.

In terms of refunds for VAT payments supported in other Member States, the interested party can submit a telematic claim to their Tax Administration for a refund by means of a declaration using the forms established for this purpose. Besides this, entrepreneurs and professionals who are not established in Spain but who are established in another EU Member State may apply by telematic means for a refund of payments supported in Spain through the Member State where they are established.

## Simplification of requirements to recover VAT in the event of uncollectable credits.

Through Royal Decree 6/2010, of 9 April 2010, relating to measures for the promotion of economic recovery and employment, published in the Official Gazette of the Spanish State No. 89, dated 13.04.2010, the Spanish government has published a series of measures that help streamline the requirements for recovering VAT in the event of non-payment of invoices and to reduce timelines in smaller companies.

In this order of things, Article 7 of the Royal Decree establishes the possibility that in order to modify the VAT taxable base, the taxpayer files for their payment through a notarial requirement. Similarly, and when the debtor is a Public Body, the taxpayer should obtain a certificate from this Body that confirms the recognition of the obligation and its amount.

The timescale is also reduced from one year to six months as of the moment when the VAT is accrued in order to qualify a credit as uncollectable and so recover the VAT. This measure applies only to companies or professionals whose turnover has not exceeded 6,019,121.04 euros during the preceding calendar year. The timescale for completion of this modification to the VAT taxable base is three months.

## Immigration infringements and its penalty system in relation to transport professionals.

The infringement classification framework contained in the LOEX, among the so-called “very serious” infringements (Article 54.2 LOEX), includes certain events that directly affect the transport by professionals of persons, by air, sea or, lastly, land.

It establishes that individuals responsible for transport may be penalised in the following circumstances:

The transport of foreigners, by air, sea or land, to Spain, without having proven the validity of the passports, tickets or relevant identity documents, and, as the case may be, relevant visa, that foreigners must hold. This infringement carries a fine that varies between 5,000 and 10,000 euros per passenger transported or a minimum of a fixed rate of 750,000 euros, irrespective of the number of passengers transported.

Following on from this, any transporter who fails to fulfil the obligation of responsibility, without any loss of time, for any foreign persons, who, because they are missing some of the documentation mentioned above, have not been authorised to enter Spain, as well as foreigners transported in transit who have not been taken to their destination country or who have been returned by the authorities of that country, as they have not been authorised entry, will constitute an independent infringement. This obligation means that the transporter or transporter company will have to cover the costs involved in returning foreigners to the destination country in cases where this has been requested by the authorities in charge of entry control. Failure to comply with this obligation may result in a fine ranging from 10,001 to 100,000 euros.

Finally, certain formal obligations imposed on airlines and hauliers which carry a penalty and are considered to be very serious have also been included and consist basically of communicating information to the Spanish authorities relating to the passengers being transported on certain routes from outside the Schengen Space, irrespective of whether the transport is in transit or has Spain as its final destination. This obligation also extends to sea and land transport. The information communicated may include the name and surnames of each passenger, nationality, date of birth, passport number or even the number of return tickets unused by passengers who had previously been transported to Spain, irrespective of whether the transport is in transit or final destination, of routes originating outside the Schengen Space.

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