SQUIRE SANDERS

SPANISH LEGAL UPDATE

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First effects as a result of the Gambling Act: Blow to internet betting without licence

A Court in Madrid ordered the preventive cessation of the gambling activity on the Internet betting web site miapuesta.com due to the lack of online gambling license. The decision is one of the first judgements concerning Internet gambling following the approval of the Gambling Act in Spain thus, it is significant because it was issued without a previous Hearing.

The claimant is also a company targeted to online gambling in Spain. In its request, it was reported that the web miapuesta.com violated the rules of the new Gambling Act that came into force in May 2011.

Specifically, the claimant sought an urgent preventive cessation of the aforementioned online gambling site because the owner apparently provided online gambling services from off-shores institutions which do not cooperate with the Spanish authorities. Likewise, the urgency was evidenced by the delay to achieve the appropriate translations of the documents to be notified to summon the owner of the betting web site.

Furthermore, it was alleged that the site operated under a .com domain and not under a .es domain.

Finally, it was alleged that the defendant did not possessed the appropriate license to operate in Spain.

The Gambling Act is in force for over a year and has established a licensing system to operate in Spain. The Act states that the licenses that might be granted in other countries shall not be considered valid in Spain.

Moreover, it requires a domain name .es to operate, even if the online gambling is exercised from a different country.

The applicant claimed the breach of advertising regulation in Spain, which establishes the obligation to achieve the corresponding specific license to be entitled to advertise gambling activities.

Finally, it was also claimed the violation of the law on personal data protection because the defendant collected personal data illegally.

The violations mentioned above also involved a violation of the rules of unfair competition.

The Court considered that due to both, the evidentiary breach of the aforementioned regulation as well as for the continuous activity performed, it should be applied the preventive measures upon the payment of a deposit of € 100,000.

The measures consisted on the cessation and prohibition of the online gambling activities. It also banned the advertising and processing of personal data of the defendant customers.

To implement such decision the Court ordered to Internet service providers registered in Spain the cessation of transmission and access to telecommunications networks.

It was also agreed to require to the credit or debit payment's entities to put the payment transactions on hold.

In short, the decision is a remarkable setback for online betting companies that have been operating in Spain which were protected by the lack of regulation in our country until last year.

Fernando González

The new Spanish law of Mediation

Since last March, there is in force a New Spanish Act of Mediation in Spain. The Royal Decree has incorporated to the Spanish Legislation the UE Directive dated May 21st 2008, and establishes the general rules applicable to any mediation that could take place in Spain whether for civil and commercial matters except for the mediation in relation with consumers, employment, public Administration or criminal issues.

The Act shall be applicable in cross-border mediation when at least one of the parties holds his address in Spain and the mediation takes place in Spain.

The new Act states as general principle that the mediation is voluntary. If there is a mediation clause in a contract, parties must make an attempt of mediation in good faith, but none of the parties could be obliged to continue the mediation or to reach an agreement.

Other general principles are that both parties will be in equal conditions in the mediation proceedings. The mediation proceedings and all documents managed by parties thereto will be confidential. And, in the event there is a mediation proceeding in place, parties could not bring legal actions or start another alternative measures on the same matter.

In regards to the proceeding, the Act states that the mediation could be brought by both parties jointly or just by one of the parties if there is a clause of delegation to mediation previously agreed.

In the first case, parties shall submit a request to the mediator agreed or appointed by them, and the submission must include the place of the mediation and the language of the proceedings.

As a first step, the mediator has to call upon the parties to a meeting in order to inform them about the proceedings. If both parties agree to go ahead with the proceeding, the mediator will take the minutes of the meeting in which it has to be included the identification of the parties, the mediator, the object of the conflict, the course of action, the maximum length of the proceedings, the formal declaration from the parties to voluntarily submit their conflict to mediation as well as the place and language of the proceedings.

Since that time onwards, it will be scheduled as many meetings as necessary to solve the conflict. If finally there is an agreement, it will binding for the parties. Any of the parties could incorporate the agreement into a Public Deed, and the Public Deed shall be enforceable at the Courts.

If during the proceedings, one of the parties asks for the termination of the proceedings, or the maximum term fixed by the parties has been exceeded, or the mediator considers that there is impossible to reach an agreement, then, the mediator will declare the proceedings concluded.

The costs of the mediation will be shared between parties, even when it has been impossible to reach an agreement.

The new Acts governs the requirements that have to fulfil the mediators. They have to pass specific courses including knowledge of law, psychology, communication and negotiation skills and ethics.

Finally, the Act establishes how foreign mediation agreements could be enforced in Spain. If the agreement of mediation is enforceable in the foreign country because a Public Authority with similar functions to the Spanish Authorities has granted it the enforceability, then, the agreement shall be enforceable in Spain without any further conventions. Otherwise, the agreement could be enforceable in Spain if both parties jointly incorporate the agreement in a Public Deed in a Spanish Notary.

Jesús Carrasco

Validity of the clause concerning the imposed obligation by some airlines to print the boarding pass.

The judgment of the Regional Court of Barcelona dated October 5th 2011 dealing with the appeal of a lawsuit filed by a passenger against "Ryanair Limited", which is based on the imposition of a fine of 40 euros due to the fact that the user did not carry the printed boarding pass and did not hand it in at the counter.

The claimant seeks the reimbursement of the fine and request that the clause included as general condition of the agreement is declared null pursuant to the legislation governing the protection of consumers and users. The claimant considers the clause is unfair and contrary to Article 3 of the Convention of Montreal on the airlines liabilities, stating that the airline is obliged to issue the boarding pass to its clients.

The Court of First Instance dealt with the claim and considered that this causes an imbalance between the benefits, it limits consumer's rights and determines a lack of reciprocity so that the airline alters its basic contractual obligations, causing a negative impact in the passenger and charging a penalty for an obligation that the company should be responsible for.

Ryanair appealed to the Court, and the considerations from Court were the followings: Firstly, the Court states its disagreement in regards to the compliance with Article 3 of the Convention of Montreal, given that in this case, the company does provide the traveler with their boarding pass, the only difference rises in the "modus operandi", since it is not delivered at the counter as it is in the traditional way. The boarding pass is available to the passenger two weeks before the flight takes place and it is stored on the Ryanair website with specific instructions for the user who can easily print it out and bring it to the airport displaying it at the gate. According to the Court, this system is not contrary to the legal dispositions established in the Convention of Montreal, furthermore, it speed up the shipping process, it involves cost savings for the company and also time for the passenger and therefore, it shall not be considered as detrimental for the user in any way.

Secondly, in regards to the annulment of the clause for being considered unfair and contrary to the legislation that protects consumers and users, the Court does not consider that the obligation to print the card, which is sufficiently warned in advance, would be contrary to Section 82 of Royal Decree (RDL as per its Spanish acronyms) 1/2007, which specifies the figure of unfair and abusive terms. The Court states that the fact of printing out the boarding pass does not causes a disproportionate burden, does not involve a significant imbalance in benefits neither causes an unreasonable limit to their rights pursuant to Section 82 of the Royal Decree 1/2007.

Furthermore, the Court considers that the penalty clause of 40 Euros assumed by the passenger in the event of default is not excessive or disproportionate. It could be considered excessive or disproportionate if, for instance, the passenger were denied to board.

Thus, according to the Court it shall be considered as a disposition pursuant to the Freedom to Contract included in Section 1255 of the Spanish Civil Code, and the passenger is sufficiently informed about the conditions whose implementation can be avoided by easy steps on the website of Ryanair.

Therefore, the Court upheld the appeal brought by Ryanair and revokes part of the judgment issued in first instance, which claims the declaration of the contract clause as null and void.

However, one of the judges, Mr. Juan F. Garnica Martín, issued a dissenting opinion as he considers that the appeal should not be upheld, alleging that the clause shall be considered abusive and unfair. He states that there is an alteration of the system of obligations established under the positive law which usually weighs on the company, forcing the passengers to use certain devices to print out the boarding pass. Furthermore, the unfairness of the disposition still remains even if the passenger knows in advance the conditions upon the agreement and even if these conditions are accepted. It would not be considered unfair and abusive if it had been individually negotiated (Section. 82-1 of the Revised Text of the General Law for the Protection of Consumers and Users), which does not occur in this case.

Ignacio Triguero

Judgment issued by the European Court of Justice dated December 1st 2011. References for a preliminary ruling in joined Cases C 446/09 and C 495/09. Requirements for customs warehousing of goods from non-member States which are imitations or copies of goods protected in the European Union by Intellectual Property Rights.

The judgement under discussion solved two applications for a preliminary ruling concerning the interpretation of Council Regulation (EC) no. 3295/64, in which it is established the measures concerning the entrance into the Community and the export and re-export from the Community of goods infringing certain intellectual property rights. These applications were submitted within the framework of the litigation process between Philips (C-446/09) and Nokia (C-495/09) vs. Lucheng which is the manufacturer, Far East Sourcing, the carrier, and Röhlig, the forwarding agent, in regards to the entrance into the customs territory of the European Union of goods in transit supposedly infringing designs and trademarks of Philips and Nokia.

Both cases involve goods that were in transit, but in the Phillips case the Belgium custom authorities retained the goods on the basis of the fiction that goods such as those under discussion, that are being held in a customs warehouse in the territory of the Kingdom of Belgium and retained there by the Belgium customs authorities, are deemed to have been manufactured in that Member State, all accordingly with Article 6(2)(b) of Regulation No 3295/94. In contrast, in the case of Nokia, the British authorities did not retain the goods, alleging that these should not be retained in cases where there is no evidence that the goods would be diverted onto the European Union market.

In these circumstances two **references for a preliminary ruling** were raised in order to resolve both issues. The Court resolved that the Regulation (EC) no. 3295/94 **must be interpreted as meaning that goods coming from a non-member State which are imitations of goods protected in the European Union cannot be classified as 'counterfeit goods' or 'pirated goods' within the meaning of those regulations merely on the basis of the fact that they are brought into the customs territory of the European Union under a suspensive procedure.**

However the Court clarified that those goods may be **classified as 'counterfeit goods' or 'pirated goods' in those cases where it is proven that they are intended to be put on sale in the European Union.** In this sense, it is understood that they are intended to be put on sale in the European Union when it turns that the goods have been sold to a customer in the European Union or offered for sale or advertised to consumers in the European Union, or in those cases in which there are documents or correspondence concerning that the goods might be diverted to European Union consumers.

Additionally the Court ruled that the relevant authority to take a substantive decision must suspend the release or detain those goods as soon as there are indications which might lead to suspect that such infringement is in place. The aim of this decision is that the authority may examine properly the existence of such proof and the other elements involving an infringement of the intellectual property right.

Amongst those indications, the Court considers that it may include the fact that the destination of the good is not declared despite the regime under suspension applied requests such declaration, the lack of precise or reliable information as to the identity or address of the goods' manufacturer or consignor of the goods, a lack of cooperation with the customs authorities or the evidence of documents or correspondence concerning the goods in question suggesting that there is liable to be a diversion of those goods to European Union consumers.

Ignacio Gurpegui

Right of first refusal in Urban Property Lease.

The right of first refusal in urban leases raises several problems, having been considered recently by the High Court by means of two different Judgments.

The first one, dated May 9th, 2011, makes its considerations in regards to the validity of previous waiver to use the right of first refusal in business lease.

Having agreed in a contract under the Urban Leasing Act of 1964 the waiver of rights of first refusal, in all cases of sale, donation or award, the tenant exercised the right of redemption. In response, the Lessor, alleged lack of standing as a result of such waiver and decided to counterclaim by terminating the agreement for contract works without his consent.

The Judgment issued by the Court of first instance rejected the claim as considered valid the resignation and upheld the counterclaim, thus, terminating the lease agreement.

The Lessee appealed this judgment and the Court of Appeal reversed this judgment, considering the claim and dismissing the counterclaim, based on the premise that the waiver shall not be considered valid as it has not been included in the heritage of the holder, following the meaning of the High Court decision in October 11th, 2001 where it is considered as a curtsey right.

This decision was appealed to the High Court.

It is alleged, the breach of Section 1.6 of the Civil Code, so it is based in only one decision, but this reason is dismissed since a single judgment may have value as binding case law.

It also alleged violation of Article 6.3 of the Urban Leases Act of 1964 as it rules the possibility of waiving in advance all rights except the obliged extension of the contract.

In this sense, the High Court considered that it is necessary to state the difference between the rental housing, that needs greater protection than the business rentals, where prevails freedom of agreements and includes the anticipated waiver of all rights but the forced extension.

The High Court concludes that there is no similarity with the decision alleged of 2001 which contains a generic clause of resignation more suitable for a accession agreement, while in this case there is a specific waive of rights so it is necessary to review the Criteria of that decision.

Therefore, the Court decides to revoke the decision of the Regional Court and considers the waiver as valid, but without hearing on the counterclaim, sending the case again to the Regional Court for their decision.

On the other hand, the judgment of the High Court of April 4th,2011, rules about the rights of first refusal in Urban Leases even if it is a result of a public auction.

In this sense, even though the judgments of first and second instance dismissed the lawsuit, The High Court decided in a different way and revoked the previous decision as it follows:

One of the issues raised in this litigation is whether the object of the contract was a housing or a commercial lease. In the first instance it is concluded that it was a housing lease but it is considered that the Lessee can't use the right of first refusal when there is an auction, and we are in a proceeding where the Lessee was aware about it but decided not to be present in that proceeding and in which the award was worth considerably less comparing it with the market price.

Against this decision, the Regional Court mentions a novation of the agreement so the Lessee has changed his address during the contract so it does not decide about the validity of the redemption at such a low price.

The High Court considers that it is dealt with a housing agreement and revoke the previous decision establishing that to consider that it has been applied a novation in the lease agreement, it is necessary an unequivocal willingness of both parties entering the novation of the lease agreement.

Regarding the validity of the redemption as a result of a public auction and the price of it, it is considered that it is perfectly valid, being recognized in our legal system and the low price does not change this decision and it is not considered as abuse of right.

Under that judgment, we would find many cases in which the mortgagee, usually a bank, is awarded by auction house for 60% of its appraised value and following, the Lessee exercises the redemption of such value, which is below the market price.

Silvia Ara

Liability direct actions by Corporate Directors causing damages to third parties.

The matter subject to this analysis is the decision taken by the Court of Appeal of Zaragoza dated January 19th 2012.

This ruling discusses the concurrence of the legal factors required for liability direct actions by corporate directors according to the claim filed against them by some creditors of the administered entity, by considering that they have failed to fulfil its contractual obligations diligently, thus, causing them a harmful results to their interests with the actions performed as this have prevented them from obtaining the payment of their credits.

As the Court of First Instance ruled in favour of the claimants, the directors proceeded to file a writ of appeal alleging the lack of causal relation between any unlawful behaviour by them committed and the damages claimed at Court by the other party, stating that there has been no direct damage to the claimants.

Therefore the Court of Appeal begins its Judgement by analyzing the concurrence of such legal factors, starting by valuing whether the committed acts shall be considered as unlawful or not.

Firstly the judgement analyses the agreement for the purchase of shares of a third company in a time in which the administrated company had corporate debts for the amount of 6,000,000 €, stating that, taking into account that the permanent own capital of the company was positive and exceeded at that time nine times the debt owed, such action should be deemed absolutely diligent and therefore in no case unlawful.

Secondly the Court analyzes the following sale of the aforementioned shares prior to its expiration, as it was not possible to pay them, using this amount for the preferential and immediate payment of the bank entity that financed the mentioned purchase.

In this case, the Court of Appeal considers that given that at the time of the later sale the administrated company was in situation of cause of dissolution by losses and therefore in a state of absolute insolvency, the corporate director's actions should have been the settlement of the company, or the declaration of bankruptcy proceedings.

Such omission means for the Court a reprehensible act, and thus states that the continuity of the activity of the company in such a situation, making payments to some creditors with preference to others, should be defined indeed as an unlawful and guilty act.

Given the aforementioned information, the Court of Appeal proceeds secondly to determine whether such acts caused direct damages in the defendants assets, and therefore if there was a causal relation between the unlawful behaviour and the claimed damages.

In this case the Court concludes that the damage caused has been an indirect damage for creditors and only direct for the company, whose assets' release would had prevent the creditors from obtaining the payment of their credits.

Thus, the Court considers that if the social directors would have acted correctly, in duly compliance with the Companies Regulation, this would have meant the liquidation of the company or the bankruptcy solution, but in any case, both with an unexpected result regarding the payment of the debt of the parties involved.

Accordingly, the Appeal Court rejects the appeal brought by the creditors considering inappropriate direct action in the present case, stating that the parties should have address to the liability social actions included in Section of article 134 on the regulation of public limited companies (TRLSA as per its Spanish acronyms).

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