BARTOLOME & BRIONES

Legal Status in Spain

APR 17, 20

1) Foreign Investment
2) Litigation
3) Employment

1. Foreign Investment in Spain

Foreign Investment in Spain

Please find listed below the recent developments in the area of foreign investment in Spain, first enacted by Royal Decree-Law 8/2020 of 17th March, and then extended and complemented by Royal Decree-Law 11/2020 of 31st, March.

Final Provision Fourth of Royal Decree-Law 8/2020, of March 17th, amends Law 18/2003 related to capital movements and transactions abroad, by including Article 7 bis, which suspends the liberalization scheme for certain types of foreign investment upon the moment in which of the Ministers Agreement lifts such suspension.

In this regard, the following aspects are worth highlighting:

1. Article 7 bis, Section 1 provides that foreign direct investment in Spain shall include any investment in which the investor has a holding of 10% or more of the capital share of the Spanish company, or in which, as a result of a corporate transaction an effective participation in the management or control of that company take place, provided that one of the following circumstances applies:

(a) The investment is carried out by residents of countries outside the European Union and the European Free Trade Association;

(b) The investment is carried out by residents of European Union or European Free Trade Association countries whose final ownership belongs to residents of countries outside the European Union and the European Free Trade Association. It will be understood that such real ownership exists when these residents held or control, directly or indirectly, a percentage of more than 25% of the investor's share capital or voting rights, or when such control is directly or indirectly exercised over the investor by other means.

2. For the purpose of limiting foreign investment, a first limitation is established by considering the industry in which the target company operates and a second limitation which takes into consideration the investor:

(a) The sectors in which the suspension of the liberalization of foreign investment applies are detailed in Article 7 bis, which are:

(i) Critical infrastructures, whether physical or virtual, including energy, transport, water, health, communications, media, data processing or storage, aerospace, defence, electoral or financial infrastructures, and sensitive facilities;

(ii) Critical technologies and dual-use items as defined in Section 1 of Article 2 of Council Regulation (EC) No 428/2009, including artificial intelligence, robotics, semiconductors, cyber-security, aerospace, defence, energy storage, quantum and nuclear technologies, and nanotechnologies and biotechnologies;

(iii) Supply of key inputs, energy, raw materials and food security in particular;

(iv) Sectors with access to sensitive information, personal data in particular;

(v) The media.

(b) Regarding to the limitation in consideration of the investor, section 3 of Article 7 bis of Law 18/2003 provides that the regime of liberalization of foreign direct investment in Spain is suspended in the following cases:

(i) If the foreign investor is controlled directly or indirectly by the government, including public bodies or the armed forces of a third country; the criteria set out in Article 42 of the Commercial Code shall be applied for the purpose of determining the existence of such control.

(ii) If the foreign investor has made investments or participated in activities in sectors affecting security, public order and public health in another Member State.

(iii) If administrative or judicial proceedings have been filed against the foreign investor in another Member State or in the country of origin or in a third State for engaging in criminal or illegal activities.

(c) Finally, section 4 of Article 7 bis provides that the Government may suspend the liberalization regime for foreign direct investment in Spain in those other sectors not covered by section 2 of Article 7 bis, when they may affect public security, public order and public health, in accordance with the procedure established in Article 7 of Law 18/2003.

3. Section 5 of Article 7 bis establishes that the suspension of the liberalization regime detailed above entails that the aforementioned investment transactions - both those in point (a) and those in point (b) of Number 2 above - shall be subject to its prior authorization. The same section establishes that investment transactions carried out without such prior authorization shall not be deemed validity executed and its legal effects shall not take place until they are legalized in accordance with the provisions of Article 6 of Law 18/2003.

Notwithstanding the foregoing, section 1 of Article 7 bis establishes that by means of the relevant regulations may established the amount underw which foreign investment transactions are exempt from the abovementioned prior authorization regime. In this regard, section 3 of the Second Transitional Provision of Royal Decree 11/2020 of March 31st establishes that, on a transitional basis and until the minimum amount indicated is established by regulation, investment transactions for an amount below Euro 1,000,000.00 shall be exempt from such prior authorization regime.

4. Finally, and also in relation to the execution of investment transactions executed in contravention of the new applicable regulations detailed above, Royal Decree-Law 8/2020 of March 17th has amended section 2 of Article 8 of Law 18/2003 for the purpose of classifying the execution of investments without requesting the relevant prior authorization as very serious infringement of the such law.

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2. Litigation

Litigation

The current State of Alarm means that it is impossible to comply with certain contracts related to companies' ordinary activities and this is likely to lead to an increase in litigation, either legal claims filed against defaulting suppliers or customers, or received for a breach of contract by one's own business.

These claims can be of various types even though the cause is the same:

1. Claims for termination of contract due to frustration of its object.

These are cases in which one party to the contract has sought its termination due to the frustration of its object, that cannot be complied with due to the exceptional situation, and the other party to the contract has not accepted this termination.

We must consider that all Royal Decrees and Orders that have been approved since March 14 refer to the suspension of activities, which denotes a temporary situation. Therefore, this situation would justify a suspension of the contracts, but not their definitive termination. This is precisely the interpretation that the Supreme Court has made of the *rebus sic stantibus* doctrine, such that in the event of force majeure that frustrates the object of the contract, an attempt should initially be made to apply the suspension or temporary modification of its conditions.

However, if such a suspension frustrates a party's expectations in an irreversible and irreparable manner, such that if it had not occurred, the contract would not have been signed, then the party may seek to terminate the contract. In this regard, the Supreme Court has left the door open to that possibility, although as an exceptional option and restrictive in interpretation.

Furthermore, it is important to analyze whether specific rules have been issued for the sector concerned or the type of contract, in order to assess the possibilities and risks in each case. For example, if the contract for the purchase of air tickets or the agreed travel contract has been expressly regulated, then what is indicated in the rules should be applied in those cases.

2. Claims for damages for breach of contract.

There may be situations of breach of contract in which one of the parties considers that the situation does not justify the breach of contract by the other party, and thus seeks to claim damages arising from this breach.

This situation does not necessarily involve a definitive termination of the contract but could rather entail its suspension or partial breach of the contract in force.

In these cases, the defendant will offer a defense claiming the existence of force majeure, i.e. that their breach is not voluntary and is not their responsibility, but rather that it is a forced breach derived from external agents.

We must bear in mind that while the current situation may justify a breach of contract, this does not mean that the defaulting party should not take the appropriate measures to try to make the

breach as minimal as possible for the contractual object and expectations of the parties. If the breaching party does not take the appropriate steps in this regard, they may be accused of negligence and claim compensation for damages.

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3. Employment

Employment

Exceptional measures for maintenance or renovation work on existing buildings.

The recent publication in the BOE of Order SND/340/2020 of 12 April suspends certain activities related to maintenance and renovation work in existing buildings in which there is a risk of contagion by COVID-19 for people not involved in this work.

This directly affects the construction sector in that it limits the carrying out of its activities in buildings in which there are people present unrelated to the work (tenants, employees, among others) and which involve sharing certain common spaces for the movement of workers or materials.

This restriction does not apply to those activities where such people are not present and where the work to be carried out can be sectorised or separated within the building concerned. Furthermore, work related to urgent repairs to installations, breakdowns or surveillance tasks in the building itself is permitted.

This order shall remain in force until the end of the State of Alarm and its possible extensions, or until there is a new order that amends the terms of the present one.

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