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LIABILITY AND SKI SLOPES: CONTRACTUAL OR IN TORT SAFEGUARD?

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1. INTRODUCTION

The subject of liability in crashes between skiers falls within the wider field of civil and criminal offence.

Practicing of sports, as any human activity, involves risks and damages that can affect the well-being of the persons involved.

In some cases, the risk linked to the sports activity is higher compared to regular human activities, due to the methods according which some types or sports are practiced and the deep commitment towards the activity.

There are some sports activities where the participants can risk also their life. This occurs for example in boxing and auto racing, where sometimes it may happen in the former case that one of the two rivals loses his life due to the violent blows received or, in the latter case, due to high speed.

There are other sports activities that involve a lower risk, such as *rugby* or *football*, where the regulations of these games foresee physical contact and often the participants suffer injuries due to these violent games.

Regarding activities that could jeopardize the physical well-being and in some cases life as well, juridical systems outline three types of attitude.

First of all, sports could be considered as any other human activity. A solution of this kind would bring about thinking that all sports that allow potentially detrimental conducts to physical well-being as boxing should be forbidden and any fact which is detrimental to personal well-being, occurred while performing a sports activity, should be treated as a fact occurred while performing any human activity. In this case, the person practicing sports would be subject to the ordinary regulation of civil and criminal liability.

Considering a second hypothesis, the order would consider sports as a separate juridical system, exclusively regulated by its own regulations. This condition could bring about an absolute indifference towards state systems regarding sport order. The offending conducts occurring while practicing sport activities would be juridically insignificant in a civil and criminal proceeding, and would be eventually sanctioned only within the sports framework.

Finally, in a third hypothesis, the order could acknowledge as legitimate, some forms of violence implicit in some sports disciplines, should these be deemed necessary and functional to such type of sport and carried out in compliance with the regulations of the game.

The solution of the Italian order is based on the latter mentioned order. Currently, the liability for offending facts occurred during the performance of a sports activity is subject to the regulations of common law.

Whoever, during the sports activity, in our case skiing, causes a damage to others is generally liable according to the regulations of common law that regulate civil and criminal liability, that is to say articles 1218 of the c.c. and subsequent, and 2043 of the c.c. and subsequent for liability and articles 43, 589 and 590 of p.c. for penal liability. It must therefore be remembered that in some cases, law 363/03 regulates specifically the type of liability to ascribe to the offending party in case of accident on ski slopes.

Regarding skiing, the problem of liability mainly concerns damages caused by a skier to others while circulating on ski slopes, as a consequence of collisions.

FIRST PART: LIABILITY RELATED TO ACCIDENTS AMONG SKIERS

2. LIABILITY: APPLICATION OF ARTICLES 2050, 2051, 2054 OF THE C.C.

Since skiing became a “mass” sport, considering the remarkable increase of the number of persons practicing this activity, one of the major problems has been that to

allow the damaged party to obtain refunding of the damages suffered due to the conduct of another inconsiderate skier. Due to the difficulties to ascertain fault, the law gradually made an effort to ease the burden of the evidence weighing of the damaged party for two reasons:

- 1 allow the latter obtaining in any case indemnification of assets;
- 2 avoid the uncertain judgment regarding fault.

It was firstly attempted, starting since the 60s, to include the damage caused by skiing accident within the framework of the so-called dangerous activities and as a consequence under the provisions in accordance with art. 2050 of the c.c.. According to this regulation, ski fell among licit activities, although dangerous.

According to art. 2050 of the c.c. “whoever causes damages to others while carrying out a dangerous activity, due to its nature or the nature of the means used, shall be liable to indemnification towards others, if the former doesn’t prove to have adopted all suitable measures to avoid the damage”.

Nevertheless, it was difficult to affirm that skiing was intrinsically dangerous, for its nature or the nature of the means adopted, since this would also depend on the difficulties of the ski slopes and skiers' skills.

A second theory attempted instead to ascribe the skier’s liability within the framework of liability related to objects in custody in accordance with art. 2051. This article establishes that “each individual is responsible for the damage caused by objects in custody, except if the latter proves that it was a fortuitous event”. According to Cassation, this provision would satisfy the requirements of distributive justice; it is not admissible, in fact, that the damaging consequences deriving from an inanimate object fall on a third, innocent person suffering from them, rather than on whom had the duty to supervise and safeguard the object, in his position of owner or user.

This article is used to regulate the rare hypotheses of skis being detached from the skiers, or the damage caused by the improper use of the ski pole.

In any case, it was pointed out that the discipline in question was dealing with

marginal hypotheses of collisions among skiers. In addition, in this abstract particular instance assumed by the article in question, the damage was not due by the conduct of the user's object, but to the circumstance that such damage occurred within the framework of the so-called "innate dynamism" of the object itself, or by the development of damaging agent that arose in itself.

Another part of the discipline and some isolated jurisprudential decisions finally attempted to include the skier's liability in the discipline in accordance with art. 2054 of the c.c. by putting on the same level the trinomial "skiing, ski slope, skis" with the trinomial "circulating, road, vehicle", so that the party injured would benefit from the assumption of liability that the law ascribes to the driver. As for other special hypotheses of fault or liability, also in this case the discipline differentiates liability due to objective fault or liability. The formula used in the article is similar to that of art. 2050 of the c.c.. It limits to remind that the dispute concerns the meaning to be given to the expression "if the person concerned doesn't prove to have done all that was possible to avoid the damage".

Article 2054 of the c.c. is supported by the regulations of the Highway Code. According to part of the doctrine, these regulations should be made reference to obtain the notions of "road, vehicle, and circulation".

The special instances regulated by articles 2050, 2051 and 2054 of the c.c. allowed the party causing damage to prove having adopted all measures or having done what was possible to avoid the damage.

These solutions, which can be juridically questionable and doubtful even with respect to equity, have been, or even better had been, abandoned by part of the jurisprudence after numerous sentences of the Supreme Court that had specified:

- 1 the inapplicability of art. 2050 of the c.c., considering that skiing is not dangerous towards third parties due to its nature or the nature of the means used; it does not have permanent and perpetual offensive potentials, but it is generally harmless; it may nevertheless assume some characteristics of danger when particular imprudent and unfit acts outside the essence of the activity render it hazardous;

- 2 the inapplicability of art. 2051 of the c.c., since damage is not caused by the object in custody, which operates through its own dynamism, but by the conduct of the skier who handles the object;
- 3 the inapplicability of art. 2054 of the c.c., assuming that skiing can accomplish the task of vehicle in the common sense of the term, as means to transport a person from one place to another, but not in a juridical sense, in view of a historical-systematic interpretation that considers the close connection between art. 2054 of the c.c. and the Highway Code.

It is useful here only to mention - since the consideration will be developed hereafter – how the applicability of art. 2054 of the c.c. in the skiing framework is as it is commonly said “gone out the window” thanks to the sentences of the Supreme Court and then re-entering from the “main door” through the intervention of the legislator by means of art. 9 l. 363/2003.

3. LIABILITY IN ACCORDANCE WITH ART. 2043 OF THE C.C.

Due to lack of regulations, it was almost impossible to consider the event damaging with respect to accidents on ski slope as being of “specific fault”, that is to say fault deriving from violations of laws, regulations, orders or disciplines and the attempts of systematic legislative regulations of the phenomenon met considerable resistance

Considering the continuous development of this phenomenon, there was the need to find a criterion able to distinguish a licit from an illicit activity in case of accident. Conduct regulations were necessary which through their compliance, would have allowed the skier to be relieved from liability in case of accident and which violation would have certainly integrated the extremes of the fault, as it occurs for example for damages related to road circulation.

It appears obvious that, within the framework of particular sport activities characterized by a high risk of damage, fault will be reasonably and legitimately acknowledged only by making reference to precautionary regulations, prescribed or only advised, the knowledge of which may be possible to be known in advance.

Therefore, reflections were then carried out more carefully on the liability due to skier's fault in accordance with art. 2043 of the c.c., trying at the same time to explain the concept of the regulations that would regulate the conduct on ski slopes.

4. CONDUCT ON SKI SLOPES: THE SKIER'S DECALOGUE

The high number of skiers and the complicated interlacing of interests involving the skiing world brought about with increasing urgency issues related to the regulations and discipline of the phenomenon. This aspect, until coming into effect of law 363/03 was regulated by the Regional Legislation which made laws considerably and sometimes inappropriately even within the framework of Private Law.

The several Regional Laws regulated sometimes jointly and sometimes separately ski facilities and ski slopes. The scheme, more or less the same for all, contained a preamble, the definition of cableway or of a ski slope, the explanation with characteristics and the *iter* for licensing or authorization. It pointed out the subjects with the certificates to present the application in order to become "managers" and established rights and duties. In many cases, the problem of models to refer to in order to point out the dangerousness of conducts or eventual fault remained open.

This reference, starting from the end of the sixties, was found in the Skier's Decalogue.

Considering the persistent silence of the state legislator, various municipal administrations, since after the second world-war, attempted to regulate the subject through municipal provisions that imposed precise conduct obligations for skiers present on the ski slopes located within the territory of that particular municipality, "for the

purpose of safeguarding order, security, and public safety". For legitimating purposes, these orders appealed art. 152, No. 3 of Law dated 4 February, 1915 No. 148 which grants the mayor powers to "supervise everything that concerns public order" and to "provide actions relative to the interest of public safety".

There were several criticisms about the legitimacy of these actions, since "to keep watch" means "supervising" and not "issuing provisions"; and "provide actions" means "issuing extraordinary provisions", but not "issuing juridical regulations of general order and at indeterminate time".

From a practical point of view, the efficacy of these orders was questioned even more so, considering that these actions were valid only on the territory of the municipality that issued them, while a ski slope may concern territories of different municipalities and skiers that attend a specific slope may be, and for the majority of cases actually are, citizens of a different municipality.

Between 1960 and 1970, the skiers' community, feeling the impelling need to adopt regulations that would regulate conduct on ski slopes, started a self-standardization process that, through research and studies discussed in various international conventions on a later date, ended up being included and summarized in the so called "Skier's Decalogue".

The originality of F.I.S. (Italian Skiing Federation) Regulations consisted in the fact that they were the result of the entire previous juridical experience of all the countries in which skiing was practiced. These described the proper and improper skier's conduct on the ski slopes world-wide and were directed to skiers for their compliance and to jurisdictional bodies to evaluate if a skier had complied or not

In a few years, the Decalogue acquired the strength to place itself as a valid reference point for the judgment of fault, even with respect to persons practicing sports who did not belong to any national federation of winter sports that had adopted it through the International Federation.

In many sentences, the Decalogue's relevance and pertinence were even taken from granted, and the regulations contained in it were taken as reference point for evaluating the skier's conduct on ski slopes by various Courts, not only Italian, but throughout the entire Alpine region.

In numerous sentences, the conviction became consolidated that, in case that the skier had complied with the conduct regulations in accordance with the F.I.S., in case of accident, the former had certainly complied also with the minimum *standard* of diligence required by the practice of the said sport.

The principles contained in the Decalogue were obviously not binding for judges but in order to deviate from them, the latter had to give a valid and logic reason and as a consequence, prove that these regulations were neither logic nor reasonable and that, within their application framework, were not able to satisfy the precautionary purpose for which they had been envisaged.

The first important sentence of the Supreme Court that ensured this orientation was issued by the VI criminal chamber on 23 February, 1966.

This line was subsequently confirmed in another sentence of 1976 of the Supreme Court.

The principles of the above mentioned sentences were re-used by the Court of Cassation, and also by Courts that conformed by attributing, *de facto*, to the Decalogue an acknowledgment that placed it on an actual juridical level, even if it was not regulation issued by the legislator.

5. SKIER'S CONDUCT IN ACCORDANCE WITH LAW No. 363 DATED 2003

During the 90s, the requests by mountain operators to the Legislator became ever more pressing, so that the Legislator would discipline, through national regulations, the practice of skiing and other winter sports in a standardized manner throughout the entire territory. These continuous pressures by mountain operators brought about issuing of Law

dated 24 December, 2003, No. 363.

This law, with the title “Regulations on the subject of safety when practicing winter sports on ski slopes and cross-country”, consists by 23 articles grouped up in four items.

Among the most relevant novelties, art. 8 is worth mentioning, which imposes subjects under fourteen years of age to wear a protective helmet compliant to the characteristics in accordance with the Ministry of Health. In case of violation of these provisions, administrative sanctions from 30.00 to 150.00 Euro are envisaged.

The novelties of item 3, compared to previous conduct codes, concern the introduction of some regulations of "road circulation" as indicated in art. 9 “speed that must be particularly moderate in scarce visibility segments, near buildings or obstacles, crossings, junctions, in case of fog, haze, scarce visibility or over-crowding, narrowing and when ski beginners are present”, which recalls articles 141 and 142 of the Highway Code.

In addition, as disciplined by art. 2054, paragraph 2, it is established that in case of collision, unless proven otherwise, it is assumed that both skiers have contributed equally in causing possible damages.

Already in the past, jurisprudence tried to bring the subject on skiing closer to that of automobile circulations but considering the various jurisprudential contrary sentences, this hypothesis was deemed no longer feasible.

For this reason, it seems quite strange the Legislator’s recall (see articles 9 and 19) to road conducts inferred from the Code after the previously mentioned sentence of the Court of Cassation which had clearly established the incompatibility between the two activities.

The absence of the obligation of insurance coverage within the skiing framework, in the presence of article 19, which seems to be the identical copy of art. 2054, paragraph two, could cause substantial problems in case of accidents where witnesses are not present.

In order to make the skier responsible, it is foreseen that neither the manager nor the licensee are liable for accidents occurred in paths outside the ski slopes which are served by lift facilities (art. 17). This apparently interesting provision, however, brings about a doubt of interpretative character concerning the need that the managers (or licensees) of the facilities shall indicate the paths to be considered outside their slopes.

Ski slopes are not only attended by expert skiers able to easily distinguish exterior paths from an ordinary slope and often on the mountains, climatic conditions change suddenly, thus rendering difficult, in the presence of fog or a snow storm, to identify clearly exterior paths rather than slopes not much used. For these reasons, part of the law doctrine deems dutiful that the manager shall take the necessary measures so that signs are easily understandable to users and do not leave doubts to interpretation.

Another relevant novelty is described in article 14, according which, except for cases foreseen by article 593 of the penal code "whoever, when practicing skiing or other sports on snow, should finds a person in difficulty and does not provide the needed assistance or notifies immediately the manager about the accident, is subject to a sanction from 250.00 to 1,000.00 Euro".

In case of accidents occurred on ski slope concerning collisions between skiers, where the manager is not responsible, it would be proper to foresee a third party liability insurance for damages caused to other skiers, to be sold compulsorily together with the ski pass.

This solution is valid unless the manager of the slope is directly liable with no fault, for the risk concerning any type of accident which occurs on the slope, whether caused by lack of maintenance or collision between skiers.

The advantage would be that of being able to conveniently insure the risk with a general policy, thus guaranteeing immediate refund for damage to victims and fully eliminating the serious problem of identifying who is guilty. Some authors, after issuing the law, spoke about "*legislative fury*" towards skiers, deeming that there are numerous restrictions for the users that are therefore bound not to be respected.

It must also be reminded that a law which would regulate the skier's conduct was dutiful and necessary, and some regulations could have also been drawn up more clearly or by simply copying what is according with the skier's Decalogue.

A clarifying example may be given by article 9 of the law, in which it is established that "the skier must hold a conduct that, based on the characteristics of the slope and the environmental conditions, does not constitute a hazard for the safety of other persons".

The Legislator's re-examination appears to be an unsuccessful outcome, since article 2 of the Decalogue establishes a more suitable criterion for the speed choice: "every skier must keep a pace and a conduct suitable to own skills and also to general conditions and weather". In the new law, since no reference is made to the control of speed based on one's own skills, it could be said through a restrictive, almost paradoxical interpretation, that persons that do not know how to ski, during a sunny day and with perfect snow conditions, could freely throw themselves on the slope, since they are relieved from fault in case of accident and since the "characteristics of the slope" and the "environmental conditions" allowed it.

SECOND PART: MANAGER'S LIABILITY OF THE EQUIPPED SKIING AREAS

6. DISTINCTION BETWEEN TRANSPORT MEANS AND CARRIER'S LIABILITY

The most accredited law doctrine and part of jurisprudence distinguish two types of relations which can be established with the manager of ski lift facilities.

On one hand, there are the transfers from valley to the top of the mountain through cableways, chair lifts and similar cable systems, execution of an independent transport agreement between passenger and manager finalized with the purchase of the ticket, and to which the relative discipline which safeguards the contracting party particularly exposed to risks of accidents is applied.

On the other hand, lifting carried out through *ski lifts*, sledge lifts or other systems defined as "self-transport". In these cases, some authors sustain that the manager only supplies the slope for ascending, the traction energy and the aid for hooking up (through suitable staff), while the passenger should provide the rest, through a diligent and expert conduct, suitable to allow the latter to reach the selected destination

Therefore, the assumptions are lacking to refer this agreement to transport, since the collaboration of the transported person is essential for the good outcome of the latter's transfer from the valley to the top of the mountain. The contractual relation would thus be ascribed to agreements relative to services under compensation (of the *do ut facias* type) to which art. 1681 of the c.c. cannot be applied.

Therefore, the manager is liable for the damages occurred to the user while ascending only if violation of diligence is proven, which is requested by the nature of the activity performed and therefore, for damages which are the direct consequence of lack of adoption of those precautionary measures of the latter's direct competence.

Differently from transport, the user is in this case exposed to the risk of not being able to provide proof (exclusively of the latter's competence) of the manager's fault, which would have as consequence, the absence of any refunding reintegration.

This distinction between the means of transport, even if it is authoritatively supported, generates anyhow some doubts.

When identifying the content of the transport agreement, art. 1678 of the c.c. refers to the carrier's obligation, behind payment, to "transfer persons from one place to another", thus assigning the carrier a typical obligation of result, since what is relevant is the good outcome of the transfer and not the instrumental effort to attain this purpose.

This notion of the transport agreement, which is also correct within the framework of compulsory relations based on "the result" in this case, questions the thesis based on which ascending through ski lift, sledge lift or other means can be inferred from art. 1678 of the c.c., and brings forward a nameless agreement.

Whether in cases of cableway, chair lift and similar, and also in case of ski lift, and sledge lift, the carrier has the same obligation, with the same intensity, to transfer the user in a good state from the valley until the top of the mountain, based on the typical methods of the selected means. Denying this would mean ignoring the parties' will, shown by conclusive facts (one through service offer, and the other through the ticket purchase), to introduce compulsorily an agreement which falls within the legislative scheme. But the thesis is not persuasive even under another point of view.

According to its supporters, regarding flowing transport such as ski lifts or sledge lifts, the attainment of the result of the transfer from valley to the mountain's top can only be attained with the actual collaboration of the transported person since the latter and the carrier operate on an equal level which does not allow the carrier only to take responsibility, that competes equally also to the transported person.

This statement does not comply with normative reality. The transport agreement is characterized by the double nature of the transported person: subject and object of transport. The passenger must indeed collaborate and act so that transport takes place through selected methods and means.

The above mentioned differentiation attempt seems to distinguish collaboration methods pertaining to the transported person, based on the quantity and quality of the collaboration, which is not supported in the normative framework.

The legislator, within art. 1681 of the c.c., did not provide a more substantial safeguard to whoever fully relies on the carrier and the latter's means to transport the former from one place to another.

In any case, acknowledging that transfer through sledge lift or ski lift falls within the regular transport agreement cannot set aside the statistic datum according to which the number of accidents that occur on these systems is quite high, often due to users' inexperience or negligence. Greater skills are requested on lift facilities, but the carrier must anyhow guarantee users' conditions of maximum safety based on the type of transport selected.

The systems' manager, even if not bound to ascertain full compliance by transported persons of current precautionary regulations or their abilities, must anyhow prevent hazardous situations, since not being able to exclude beforehand whether this will be used by an inexperienced or negligent skier.

In addition, since risk of accident is higher on these systems, the manager, in accordance with art. 1681 of the c.c., must provide all suitable measures to avoid damages to skiers' well-being, taking into consideration the peculiarities of these means and the possibility of error-inability of the users.

Therefore, in case of an accident occurred to a skier during transport on one of these means (falls due to the detachment of the flowing means are frequent), in order to void liability, the system's manager shall prove to have adopted all suitable precautions to avoid damage, and therefore to have properly compacted the slope, located visible signs relative to slope level and difficulty of the slope itself, not to have run the means in excess of, or irregular, speed, and to have equipped the system of sufficiently diligent staff to service the starting platform. All these circumstances (and others as well) shall be ascertained by the competent judge, in order to reach the redeeming proof in accordance with art. 1681 of the c.c..

7. MANAGER'S LIABILITY FOR ACCIDENTS OCCURRED WHILE DESCENDING

In the doctrine of law and jurisprudence, it is asserted that the liability of the manager of the ski slopes is based on the violation of the regulation established by art. 2043 of the c.c. relative to *neminem laedere*. Rarely this liability is supported by other regulations, as a consequence of what was classified as dangerous activity only on rare cases; usually jurisprudence tends to exclude that the activity carried out by the manager of the slopes falls within the discipline in accordance with articles 2050 or 2051 of the c.c..

Fault, as it can be inferred by law 363/2003, will be determined in details, mainly by the violation of regulations which have specific precautionary purposes. Indeed, there are several regulations that impose the holder of the authorization to prepare and setup ski slopes to keep a conduct suitable to avoid the occurrence of accidents, despite the existence of a contractual agreement related to this.

Fault can also be due to the lack of adoption of those particular precautions that the situation imposed to assume, for example lack of signals, lack of positioning retaining meshes in segments exposed to fall hazards, lack of elimination or in any case lack of coating and protection with softening materials of obstacles, according with the general principles in force on the subject of in tort liability and could therefore be assumed as "fault of omission".

In actual fact, the situation is not well defined. The regulations on the subject are not standardized and law 363/03 did not bring about the desired homogeneity. It is questioned how far the manager's duty extends regarding prevention of accidents to third parties, particularly regarding to an activity that certainly involves risks for whoever practises it.

8. MANAGER'S LIABILITY OF EQUIPPED SKIING AREAS IN ACCORDANCE WITH LAW 363/03

Before coming into force of law 363/2003, the single Regions were treating the skiing activity in a fragmentary manner and often with contrasting regulations. The relevant novelty of this law is to have regulated mountain sports activities at national level.

In accordance with articles 3, 4, 5, 6 and 7 of law 363/2003 it is possible to infer how a diffuse and generalized obligation of protection towards users burdens the managers, in particular art. 3 paragraph 1 ensures "users the practice of sports and recreational activities under conditions of safety, by ensuring safety on ski slopes according to what is established by the Regions". In addition "managers have the obligation to protect users from the obstacles present along the ski slopes by using suitable protections and signs to warn about dangerous situations".

Article 3, paragraph 2 regulates the obligation for managers to "ensure first aid and the transport of injured persons along ski slopes, in places accessible by the closest health or first aid centres".

Subject that the fact constitutes a crime, the violation of the provisions in accordance with paragraph 2 involves the application of the administrative sanction of payment of an amount from 20,000.00 to 200,000.00 Euro. Under article 7 paragraph 4 is also indicated the obligation to close the ski slopes in case of danger or non practicability and, also in this case, subject that the fact constitutes a crime, non compliance involves the payment of an administrative sanction included from 5,000.00 to 50,000.00 Euro.

To guarantee the solvency of the manager of the lift facility, in case of a sentence to indemnify the damage, it is interesting to point out that under art. 4 paragraph 1 it is stated that facilities may be opened only if managers have previously stipulated relative insurance agreements "*for liability related to damages caused to users and third parties by facts deriving from the manager's liability*" in relation to the use of equipped ski areas.

In any case, prevention remains the essential element to avoid tragedies on ski slopes. Examples of preventive safety measures may consist in placing avalanche protections in locations where the greatest quantities of snow is formed near slopes, or micro-loading or gas systems capable of sliding snow towards the valley when lifting facilities are closed.

The managers of facilities must fulfil two obligations: on one hand, that of installing suitable and well visible signs on ski slopes, for the purpose of indicating ground disruptions or closing, in this manner warning the user about the presence of dangers (the repeated non compliance of this provision may involve the revocation of the authorization); on the other hand, that of providing for ordinary and extraordinary maintenance of ski slopes (art.7).

9. THE SKI PASS AGREEMENT

During the years immediately following the coming into force of the civil code, the atypical agreement represented a residual phenomenon and of scarce interest; in the last twenty years instead, these agreements have been increasingly diffusing in all fields, especially in that relative to transports.

Indeed, mainly to the new emerging requirements of operators and users of the transport sector, the various coded contractual types have proven to be inadequate to fulfil the various needs expressed on the subject. For this reason, atypical agreements have arisen, conceived by private parties, able to react efficiently to the rigidity of the juridical system.

Until the Eighties, a trend by the jurisprudence was observed to turn atypical forms into typical. The reasons for such “forced standardisation” are found, on the part of law doctrine:

- ? firstly in the safeguard of the weakest contracting party (especially in presence of standard modules, the content of which cannot be renegotiated);
- ? secondly, in the greater efficacy and completeness of standards relative to typical agreements compared to those regulated by agreements in general; finally, in the better ease of the standards regarding the typical agreements
- ? finally, in relation to the difficulty to classify atypical agreements and consequently, to determine which type of legal discipline shall be applied to them.

If it is true that there exists a national law regarding mountain activities, it is also true that this has only partially standardized the various already existing regulations. The main matters upstream of all problems relating to skiing on ski slopes have not been dealt with: the problems of indemnifying damages regarding the substantive right and expense of proof with regards to procedural law.

The matter was dealt in the past and solved partially by the law doctrine and jurisprudence with the elaboration of the so-called “*ski pass* agreement” or “white agreement”, an atypical agreement.

Nowadays, purchasing a *ski pass* for accessing skiing gives the right to ascend with the mechanical mean: this agreement, as mentioned above, sets forth a transport agreement regulated by regulations foreseen by the Civil Code in article 1678 and subsequent.

In case of accidents occurring during transport, regardless of the means used, it appears right to say that the manager of the facility is relieved from liability only if the latter proves to have adopted all suitable measures to avoid damage.

Nevertheless, the discipline applicable to the aspect most related to skiing remains ambiguous: descent on the ski slope.

According to the opinion of the past in jurisprudence, the ski slope does not fall within the contractual relation between the skier and the manager of the ski slopes areas.

The purchase of the ski pass takes place through a tacit manifestation of willingness (a concluding behaviour). The parties, according to this orientation, stipulate an agreement the purpose of which is simply represented by the skier's transfer from the valley to the top of the mountain, by payment of a fee. According to this theory, only the "lifting right" would be purchased. The fact that the skier shall stipulate such agreement in order to be able to ski, constitutes therefore a mere reason, and as such, juridically irrelevant.

Another orientation deems instead that the purchase of the ticket does not involve only a transport agreement, but also an agreement that allows using the skiing area. This agreement has as purpose, the availability of a series of slopes and systems, which can be freely used.

This is the so-called "*ski pass*" or "white agreement" that at the moment is not recognized by any positive regulation, but it is interpreted by the most innovative jurisprudence as an atypical agreement.

The assignment of the manager's liability in the quality of guardian of the ski slopes can fall in this context. We can say that in this case, indemnifying is agreed to the benefit of the damaged party in accordance with art. 2051 of the c.c., but the result aimed to be reached does not change substantially.

The purpose, in this agreement, is not transport itself but the entire activity which consists in being able of "ascending and descending", that is to say in a "functional transport for skiing activities on safe ski slopes". This is the breaking point with the past, the separation that allows unifying ascent and descent as "package", a group of services that the manager commits to offer upon payment of a fee.

Jurisprudence could choose different routes, from that of bidding to that of applying art. 2054 of the c.c., from that related to liability for dangerous activities exerted by the manager, to that of atypical agreement. It has recently preferred using the discipline in accordance with art. 2051.

This attitude may be interpreted as an additional step forward while waiting to finally see the actual impact of law 363/03 in future sentences of the Supreme Court.

Should the agreement be interpreted as atypical (something that has already occurred in the past), the discipline shall be identified in the general regulations of the agreement (art. 1323 and subsequent of the c.c., among which art. 1341) and fulfilment (art. 1218 and subsequent, 1175 and 1176, paragraph 1 c.c.), in regulations of specific agreement, applicable due to similarity (art. 1678 and subsequent of the c.c.) and art. 1374 of the c.c., due to integration. The orientation of the standardized contractual relation was admitted by the Court of Modena (T. Modena 12.11.1990, in *Dir. Trasporti*, 1992, 579) which established that managers of lift facilities who issue the *ski pass* assume the role of carrier and are contractually responsible also during descent on ski slopes for which the latter provides maintenance.

The consequences of this juridical figure are extremely important, since they directly influence the possibility of applying or not the skier's rights during a proceeding, and because they directly modify regulations relative to providing proof.

In case that such "*ski pass*" or "white" agreement is acknowledged by the legislator, the user that purchases a *ski pass* would not acquire only a transport ticket but would acquire the possibility to ascend through the facilities and descend on the ski slopes.

In this case, we are strictly in the presence of contractual liability, and the burden to provide evidence would be much facilitated for the skier, who would only need to prove the objective circumstances of the relation; the manager of the ski slopes on the other hand, shall prove to have taken all necessary measures to avoid the accident.

After the innovative sentence of the Court of Modena which remained quite isolated, followed the sentence of the Court of Cassation (C. 15.2.2001, No. 2216) which – deciding on the basis of an appeal submitted by a skier who slipped on a grassy area and was injured – unfavourable to a sentence of the Court of Appeal of Turin stated, *incidenter tantum*, that the skier's transport agreement is atypical "*since it is not only related to transport, but to functional transport in order to ski on safe ski slopes*". The Supreme Court then rejected the appeal proposed by the skier since it did not deem the decision of the Court of Appeal of Turin censurable, which excluded in this case the existence of "*clause (even implicit) or integrative safety provision (with hetero-integration effect) of the relation's content*" from which infer the assumption of the manager's contractual liability for the maintenance of ski slopes. The orientation that sees a standardized package of services offered to the skier by the manager is that proposed recently by jurisprudence which foresees the manager's liability for maintaining skiing areas. Specifically, it may be recalled how the Court stated that: "(the cableway Company) assumes the additional obligation of maintaining the ski slope under conditions of use with no hazards for the users of the system that used it for ascending"¹.

Regarding this point, the provisions of law 363/2003 are also relevant namely that in art. 2, through a wide-range interpretation, define the equipped skiing area and ratify how this includes ski slopes, lifting facilities and snowing.

Therefore the agreement stipulated with the manager of these areas does not have only the purpose of transport but also and mainly, the use of ski slopes inside the entire equipped area.

¹ Cass. Section III, 10.02.2005, No. 2706.

In this way it seems possible to state that the legislator adhered to the thesis of uniqueness of the contractual relation. Therefore it seems possible to state that the legislator does not deem descent foreign to the purpose of the agreement.

10. MANAGER'S LIABILITY FOR CUSTODY OF FACILITIES

The Supreme Court recently declared the liability of the manager for the custody of the ski slopes in various sentences². This subject constitutes the basis for dealing with the various options expressed on the nature of liability and to verify which influences were obtained on this point by law of 363/2003.

According to the recent orientations or law doctrines and jurisprudence, within the framework of liability of the manager of ski slopes, it must be deduced the impossibility, which had been already mentioned, to use as criterion to assign liability in accordance with art. 2050 related to liability for dangerous activity. It does not indeed appear fair to deem dangerous the management activity of a ski slope only because the activity carried out on it may be dangerous.

² The liability of the manager of a lift facility regarding a ski slope must be ascertained, by verifying the dangerousness of the system and considering the fortuitous event that, according to article 2051 of the Civil Code, excludes the manager's liability and may also consist in the conduct of the damaged party. (In this case, it was excluded the manager's liability because the accident did not occur along the ski slope or the stopping area, but in an area reserved for resting and transit of skiers towards the parking and nearby lifting facilities areas in which the injured skier burst in at high speed and not suitable for the conditions of the place). (Civil Cassation, section III, 18/01/2006, No. 832). In a ski slope attended by users with different levels of technical skills, loss of balance and uncontrolled movements can therefore be foreseen, in order to configure the manager's liability for maintaining the lifting facility, since all obstacles are abstractly dangerous, it must be verified the actual exclusion of dangerousness, based on their characteristics and the materials used. (In this case, the Court of Cassation abrogated the relative sentence considering that also in a slightly inclined ski slope and easy path, with good visibility, the existence of a fence supported by wooden, non padded poles, may constitute danger for the skier, depending on the state, places and use of the ski slope). (Civil Cassation, section III, 10/02/2005, No. 2706).

The recent sentences of the Supreme Court aim instead in assigning liability of the manager in accordance with art. 2051 of the c.c. based on the responsibilities of objects in custody. Regarding this, it must be remembered that previous judicial precedents are not lacking, and also favourable items in lawdoctrine.

In sentence 2706 dated 2005, the Supreme Court passes judgement on the appeal of a skier who was injured while descending a ski slope by crashing into a fence supporting pole, delimiting the fence.

The injured party, during the proceedings, claims indemnification for the damages incurred from the company that built the fence, and also from the company managing the ski slope, as custodian of the facilities.

In reconstructing the fact, at the basis of the indemnification claim, the plaintiff mentions the object in custody, the ski slope and the pole erected at its margins, and the accident as cause-effect relation in virtue of which liability for damage falls on the custodian of the facilities (that is to say the manager).

The first and second instances exclude this liability deeming that the defendants did not hold any negligent conduct and identify the victim's imprudence and inexperience as the only cause of damage.

The damaged party appeals therefore in the Court of Cassation that admits five complaint reasons. In particular, the appeal has as object, the court's conclusions regarding the impossibility to acknowledge a negligent conduct of the defendants and states how the custodian's liability should have not been excluded.

The Supreme Court admits the appeal proposed by the skier, identifying how the sentence excluded the possibility of acknowledging the plaintiff's liability, with reference in this instance and in accordance with art. 2043 of the c.c. and to the different cases foreseen by art. 2051 of the c.c. based in both cases on the absence of negligent conduct by the defendants themselves.

It must be clarified, in order to conclude the analysis of this case which seems to open new perspectives, as the sentence object under our attention, travels on a double track: on one hand the liability in accordance with art. 2043 of the c.c., and on the other hand the custodian's liability in accordance with art. 2051 of the c.c..

In the former case, the court objects the reasoning methods that brought about exclusion of the fault of the companies managing the skiing facility; in the latter case, with reference to the case and in accordance with art. 2051 which is the only one that can be applied in the actual case the court states how "the assumed absence of custodian's fault is irrelevant for the purpose of denying liability".

The explanation relative to the analysis of this court is simple: this liability (art. 2051 of the c.c.) is not based on an *iuris tantum* assumption of fault, but on the fact that the custodian of the facilities may be liable for damages not related to fortuitous events, therefore according to an objective liability criterion.

Another objection of the Court to the appealed sentence concerns the attribution of redeeming efficacy (within the liability from custody in accordance with art. 2051 of the c.c.) in order to ascertain the imprudence and inexperience of the damaged party. The victim's negligence may indeed relieve the custodian of the facilities only when this is a fortuitous case, therefore an "unforeseen and unexpected element that, falling within a series of circumstances out of any possible custodian's control, render inevitable the occurrence of the event, since it is the only cause that provoked it".

On the contrary, if it is not possible to ascertain, as in this case, that the event regarding the damaged party was fortuitous, the victim's negligent conduct may be valid only to reduce the entity of the indemnification that the custodian must pay during liquidation and in accordance with art. 1227 of the c.c., the amount of indemnification being at the custodian's charge.

It is obvious that in the case of liability due to illicit fact, the provision in accordance with art. 2051 of the c.c. establishes the general criterion to ascribe liability for damages caused by objects. Regarding damages not caused by an object but by a person with an object, the liability is ascribed as foreseen by other regulations, mainly by art. 2043 C.C..

The basis to reach the conclusions in view of the sentence being examined and of Law 363/03 is obvious. It is useful to remember, that this law leaves a sense of gap in the legislators that deal with activities on the mountains. It is enough taking into consideration art. 4 of the above mentioned law to further clarify the matter, or better to clarify the confusion that may arise.

When the legislator establishes that "the managers of equipped skiing area (...) are civilly responsible for the regularity and safety of ski slopes" it must be questioned whether the entire work brought forward by lawdoctrines and jurisprudence, and the discussions of these last few years, engaging at times, to conceive a clear and fair discipline and whether costs shall be paid by the entrepreneur/manager or user/skier, are not even listened to and taken into consideration.

The legislator seems to definitely leave the role of whoever regulates and disciplines, and seems to tell us that the matter has been solved, in accordance with art. 4. Whoever knows – it seems appropriate to say it in this framework– the "mountains" of documents written on this subject knows perfectly well that this it is not so.

Great was the sense of gap or at least the disappointment, consequent to the discovery that the promise contained in the provision - solution of the doctrinal and jurisprudential debate– is solved only by imposing the manager, the insurance obligation for civil liability and by threat of punishment in case of non compliance.

It is with regret that the nature of this liability is not mentioned, if it is a contractual or extra-contractual liability.

Precisely in this discussion, jurisprudence, through the sentence under examination, integrates what was left in doubt by the legislator. Once the link between object (in our case a pole) and event of damage is clarified and verified the manager's influence on the same, the latter's liability in case of custodian cannot be doubted.

It appears that the sentences which exclude the manager's liability regarding this are based on the lack of proof of some of the elements in accordance with art. 2051 of the c.c., or on the pacific identification of actual and clear negligent profiles, and therefore liability based on the requirements and in accordance with art. 2043 of the c.c.

In short, the following are the main cases now of non contractual liability that we can see more often in case of disputes on ski slopes. Law 363 seems to boost this spread conviction of custodian role carried out by the manager as per articles 3, 7 and 16.

The matter relating to liability is not concluded since it involves problems also at contractual level.

We have previously dealt with the matter relating to the transport agreement. The skier's transport from valley to the top of the mountain, even if functionally related to the descent on the ski slope, was deemed according to jurisprudence, not suitable to configure forms of contractual liability of such subject for accidents occurred during descent. This exception was valid in relation to what is in accordance with art. 1681 of the c.c., since accidents occurring to the skier on the ski slopes take place after the "travel", object of the agreement

However aware of the recent judicial orientation proposed by the already mentioned Court of Modena in 1990 and then by the Supreme Court through the renowned sentence on the "grassy area" of 2001, it was deemed that the services object of the agreement should not be limited to travel only, but be extended to the subsequent descent phase.

The assignment of contractual liability to the manager is based on this. However, two criticisms have been brought up against this theory: the former is relative to the impossibility to identify the continuation of the transport agreement or an independent relation when using the slope. It is easy to reply to this criticism by mentioning what is in accordance with art. 2 of law 363/03 which includes "slopes, lifting facilities and snowing" inside the equipped skiing area. Therefore, the agreement between manager and skier will have as an object, not only the services relating to lifting facilities, but also those relating to the descent.

The second criticism concerns the fact that the descent by the user wearing skis, who reached the top of the mountain through the use of transport means provided by the manager of the equipped skiing areas, is only a possibility and falls within the framework of reasons and therefore not relevant to the future validity of the agreement. It is obvious that, in case the descent is the main purpose at contract level, the agreement, in case of dispute arose on matters relating to the descent, would be influenced and subject to consequences. Also in this case, it would be enough to recall what is in accordance with law 363/03, art. 15, which forbids to descent ski slope on foot and therefore descending ski slopes in any other way.

Considering that the objections to the theories relating to the contractual liability or liability from custody, could have been overcome also due to the lack of the legislator's interventions, it shall be asked why jurisprudence objected in various cases hypotheses of liability which favoured the injured party with regards to proof.

Once the link to causality has been in fact clarified and once the manager of the ski slopes' influence has been verified, such to state that the latter has the exclusive control, the latter's liability as a custodian does not seem being in doubt

Many people ask themselves whether the doubt concerning the jurisprudential resistance to safeguard hypotheses and greater advantages in favour of the injured party loses its relevance, in view of the need not to hinder tourist companies, avoiding that these are burdened by further insurance and protection expenses directly on skiers through the increase of the *ski pass* price.

With regards to this focal point, we find in law 363/2003, art. 4 the reading and development key of the matter: the insurance. If, in fact, the manager's insurance fee will influence the cost of service, it is also true that differently from indemnifying costs, those relating to the insurance, since they can be estimated and foreseen, will allow to better plan and determine in advance the price of service.

We know that many times the solution must be searched for in the means. Considering that the legislator decided not to give an expression on the matter, the integration and the discipline of whoever applies the law has instead provided a point, which will probably become a reference point, in recent Court of Cassation sentences on liability relating to the custody. The issue relating to the liability linked to custody since being able to bring closer the interests of the managers of skiing areas and users of ski slopes.

To this regard, the sentence of the Supreme Court of 2006 which considers the skier's imprudent conduct as a fortuitous event and therefore in contrast with the 2005 sentence, appears to go in this direction.

While waiting that the jurisprudential contrast may be remedied with a decision of the Unified Appeals Division, a greater normative precision could be a good reference point for the subsequent sentences.