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THE EUROPEAN SKI PASS CONTRACT

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I. INTRODUCTION

Best wishes and thank you. In the first place, my best wishes for the coherence of the effort. Good ideas are important because without them the word would not progress, but if these were not used they would be worthless. The organisers of this *III European Juridical Forum on Snow* have demonstrated not only of having brilliant ideas, but of knowing how to place them into practice effectively. Congratulations to the Bormio, Valtellina people for everything that they have achieved. After the best wishes, my thanks not only for having invited me as reporter, but for having given me, once again, the opportunity of continuing by learning and working in favour of the standardisation of the European Law on snow.

1. Setting up

By following my suggestion, the organisers have accepted that I would deal with the *European ski pass Contract* argument. There are three reasons for this.

a) The first reason is because today the practice of skiing is not conceived without a contract drawn up between the skier and the managing body of the skiing plants. It is an evident fact that at present off-track skiing is in the minority, and excluded this manner of skiing, skiing needs almost always the use of mechanical means belonging to a manager. It may be stated without exaggeration that practically **all** skiers and all skiing plant managers draw up contracts of this type. Undoubtedly, the other countless arguments faced in this Forum, also very important, deal with precise questions, the frequency of which, however, is infinitely lower. For example, by making a comparative evaluation, avalanches, accidents, sponsors, homologation of the titles, sport competitions, the use of mechanical means on the ski slopes, refereeing and including the problems related to the applicable legislation and the Court having jurisdiction, are isolated and sporadic questions that are not always present. Instead, all skiers using the ski slopes draw up a contract with the plant manager. This means

that we are talking of a contract that is drawn up yearly by millions of skiers in Europe.

b) Secondly, the **little or no attention** given to it is against the importance of this institute, both from the legal point of view, (lack of specific and complete regulations) ⁽¹⁾, and doctrinal. To my knowledge, there does not exist – in Spain – a complete study that analyses the rich fundamental problems of the *subscription* contract for skiing ⁽²⁾.

c) Thirdly, the most important reason, and I already disclose the conclusion of my report. **There is no contract of the European type**, even if it is convenient, since there are no technical reasons preventing adoption of a uniform contract in all European countries. We would make progress towards juridical safety and economic progress ⁽³⁾. In any case, it can be demonstrated that the contractual clauses are often homogeneous notwithstanding the diversity of the plants, municipality, regions and countries where these are applied. In other terms, the autonomy of will has produced a contractual “*corpus*” sufficiently uniform, notwithstanding the theoretical normative diversity.

On the other hand, once asserted the lack of uniformity, the study of this question should be, with the help of the **comparative method** (analysing the analogies and the differences, for example, in the obligations of the manager or in the rights of the skier, among Italy, Austria, Switzerland, etc. and Spain, but unfortunately with fifteen minutes at one’s disposal it becomes an impossible task. For this reason, object of my report is nothing more than offering the guidelines of the ski pass contract and fixing the ways that can be taken in subsequent Congresses.

II. CONCEPTS AND CHARACTERISTICS

2. The institutional duality. Contract and credit title

From a juridical point of view, subscription shows a two-faced structure: it is a contract and a credit title. As a contract it binds two parties which recognise reciprocal rights and obligations. As a credit title it is a document incorporating a series of rights, but its peculiar characteristics render it qualified as an improper credit title or a legitimising document. Therefore, it does not have, so to say, the nature of a credit title: it is essentially a transmissible, literal and autonomous document.

3. Definition

The ski pass, or skiing all-in pass, is a contract drawn up between the managing body of the skiing plants, which is obliged to supply all the necessary services so that the other party, the skier, practices the skiing sport safely and for the duration or the agreed term, against payment of a corresponding amount (the price).

4. Characteristics

It is a contract by mutual consent, bilateral, onerous, at periodic or continuous

¹ In Spain it is not regulated, and in Italy law 363/2003, of 24 December, does not define it nor does it discipline the contract. Undoubtedly, it contains some precise references under articles 2 (definition of the skiing area), 3 (obligations of the manager of the plants) and 4 (manager’s liability).

² Cf. In Italy DI SABATO, Daniela: *Il contratto di skipass (The ski pass contract)*, in *I contratti di somministrazione di servizi (The contracts of supply of services)*, by Roberto Bocchini, presentation by Pietro Resigno, G. Giappichelli Editor – Turin, 2006, page 812 to 827.

³ It is a clear principle that the normative and jurisdictional diversity is a peril both for the juridical safety and for the development of international commerce, which is one of the elements of the economic progress. The EU is a good example of this statement.

service.

a) *Mutual consent*, because it improves by the consent of the parties. Therefore, subject to the doctrine on the imperfections of will. The consent must be manifested freely, and by a skilful person. Minors, even though they benefit by the contract, must be accompanied by a person who exercises on them the powers of a tutor, or by a representative (instructor or escort). The subscription or the document (the membership card) is not an essential condition for improving the contract because, as mentioned previously, it does not concern in this particular instance a solemn or real contract, which is improved by issuing of a determined document or it requires delivery of something (the membership card) for binding the parties to its fulfilment (4).

b) *Bilateral* because it binds two parties, the manager and the skier. Bilaterality is not altered in this circumstance where the “skiing/consumer party” is a group (for instance: the members of the Catalan Pyrenees mountain club), and the “Manager” a consortium among several independent entrepreneurs, with the only aim of offering a greater skiing space depending on the geographic conditions inserted in the contract. This can be considered a phenomenon always more frequent for obvious competition reasons.

c) *Onerous and synallagmatic*, enforced freely, because there exist obligations for both the contracting parties: the payment of the price or the subscription by the skier and the space at his disposal, the operation of the ascending plants and the other additional services necessary for practicing skiing, by the manager. Naturally, the non-fulfilment of the contract gives rise either to the request of fulfilment or the cancellation of the contract with the obligation of compensation for damages (5).

d) *Of periodic or continuous character* because the main service of the manager does not end with the delivery, but it extends for the whole contracted duration (day(s), week(s), month(s) or the whole season). In addition, the manager is obliged to keep the plants open and in a condition to enable practicing skiing in full safety (permanent operation of the ascending plants, continuous maintenance of the snow and of the machines, signalling, and personnel assigned to rescue and transport of the injured). From a temporal point of view it is characterised by duration and periodicity.

e) *Standard* since the contract is not the result of a negotiation between the parties, but it contains general conditions prepared by the companies and imposed by the manager. Furthermore, it must be added that the membership card (subscription or ski pass) includes only the essential conditions, since it must be completed with the by-laws or other general conditions making part of the Company name of the managing body of the plants, thanks to the reference or incorporation clause. It concerns a requirement due to the high increase of the number of the skiing enthusiasts, transformed by now into a popular sport; therefore the application of standard contracts becomes easier. This, allows the application of the law on the General Conditions of Contract (6) and the regulations and protection and defence of

⁴ To this effect it is better recalling that the contractual procedures are various and normally the contract occurs at the foot of the skiing slope, at the ticket counter where the subscription is requested (just like at the cinema), but there are no inconvenients, and it is always more frequent, drawing it up outside from the skiing zone, for instance, in the office of the company headquarters, or by fax or internet. This is how it happens for drawing up contracts for groups, or by the travel agent who organises a more complete vacation plan. The same happens when the contract is for an entire season or in any case for a period longer than a day or a week.

⁵ Tacit condition of resolution ex art. 1.124 of the Spanish Civil Code.

⁶ Cf. Law 7/1998, 13th of April, on the General Conditions of Contracts (BOE No. 89, of 14th of April), incorporating the 93/13/EEC Directive, of the Council, of 5th of April 1993, concerning unlawful clauses in the contracts entered with the consumers.

the consumer (7).

5. The Parties

In the ski pass contract the parties are two, the skier and the managing body of the ascending plants and ski slopes.

a) *The skier* is the individual status person, holder of the rights acknowledged by the contract. As for the insurance contract, the contracting party is not necessarily the insured or whoever enters into a contract for a membership (the ski pass membership card). Normally it is the same person, but sometimes, the contracting party may be a person other than the skier who is the beneficiary of the rights deriving from the contract. This situation occurs when one enters into a contract in the name and on behalf of a third party or in favour of a third party. An example could be the group contract, that is to say the contract entered with an association or included by a travel agent offering a complete packet for a winter vacation, including in the tourist service contract also (in addition to the journey, accommodation, maintenance, transfers, equipment, instruction courses, insurance against accidents, etc.) access to the ski slopes. An obligation founded on the delivery of the subscription (ski pass).

Concerning the skier, it is important to underline that the subjective conditions are fundamental with respect to the juridical effects. It is enough to consider that skiing is a sport practiced by a great number of minors, by elderly persons and by incompetents. In addition, not all skiers are of the same skiing ability level: there are beginners, experts and professionals. These are subjective conditions that involve juridical effects, for instance, on the subject of liability.

b) The managing body of the plants. We have previously seen that it can consist by only one manager or by an aggregation of several managers that come into agreement for the purpose of offering a wider service (skiing zone) (8). The nature of this relation was subject to discussion with reference to the subject of liability. In fact, if the skier has drawn up a contract with only one manager, a member of the skiing zone, and since all the managers make part of the contract, they are liable with solidarity, unless it is expressly established otherwise (9).

III. THE JURIDICAL SYSTEM

6. The juridical nature. Transport against supply of services.

The doctrine on the subject of ski pass contract is divided. In fact, there are the supporters of the thesis that frames the ski pass contract as a contract for transport, and the supporters of the thesis that frame it as a contract for supply of services.

a) As a contract for transport of persons, the carrier (the manager) is bound to transport from one place to another the skier against payment of the agreed price (the subscription). Actually, the carrier by using mechanical means (ski lift) assumes the obligation of transporting the skier from a place of origin to another (from valley to mountain). In this way, the manager assumes an obligation leading to a result: arrival to destination(s). The obligation of the carrier does not concern the means (use of the means with all due diligence), but the result: transferring from one point to another. As it occurs in the contract for transport, the manager assumes three obligations: transfer, safekeeping and punctuality, which represents three different types of

⁷ Law 26/1984, of 19th of July, General for the protection of consumers and users, modified by Ad. Prov. 1st. - of Law on the General Conditions of Contract, *supra cit.* note 5.

⁸ Cf. In doctrine the description of this phenomenon is in PRADI, M.: *Sci alpino (Alpine skiing)*, item of *Dig. Disc. Priv. (civil section)*, XVIII volume, Turin, 1998, pp. 163 and subs.

⁹ The question is not trivial, because on many occasions the skiing zones belong to municipalities, regions and different nations, with the normative and jurisdictional diversity problems. This stresses the necessity for a harmonisation of the law.

liability.

The manager, as carrier, is liable for ⁽¹⁰⁾:

- not carry the passenger to destination
- damages caused to the passenger (death or personal injuries) during transport
- the delay (not to fulfil the obligation with regard to the agreed times).

Undoubtedly, there is no shortage of arguments against this position of the doctrine that frames the ski pass contract as a contract for transportation. We have two main arguments: in addition to transport there are further essential services in the ski pass contract. In fact, besides transport (existence and correct operation of the plants), the manager is bound to keep the ski slope in conditions of:

- practicing skiing (sufficient snow, artificial snow producing system, maintenance of the ski slopes, signalling, etc.) ⁽¹¹⁾;
- skiing in safety (outfit of personal and material means for the purpose of offering first aid in case of situations of emergency or accidents);
- offering distractions and entertainment (hotel installations and services, and resting areas on the ski slope), since skiing is not only a sporting activity, but also a game and entertainment activity; and
- allowing a comfortable arrival and access to the plants (parking, resting areas, etc.).

b) What has been mentioned in the previous point has brought about the framing of the ski pass contract as a contract of performance of services, and more specifically, a contract of supply ⁽¹²⁾. Undoubtedly, a real element of the supply contract is the duration. This contract in fact is characterised for being a contract of duration, because the performance of the service does not end with one and only single act, but remains in time (one day, several days, week(s), month(s) or the entire winter season). This gives rise to a contract with periodical or continuous performance of services, which are the typical elements of the contract of supply ⁽¹³⁾. In addition, it must be added that the ski pass contract is not limited only to the practice of skiing in the narrow and sporting sense, but includes a whole series of subsidiary services related to games and entertainment activities (hotel services, resting areas, bars, cafeterias, restaurants, etc.).

Previously, the nature of this contract has been discussed with respect to whether it concerns a sale or of a performance of services contract, and whether it can be considered a tender contract. An important discussion which arose for lack of concrete

¹⁰ The important subject of liability has previously been dealt in. Cf. ARROYO, Ignacio: Spain: *Legislazione, giurisprudenza e bibliografia sul diritto della neve (Legislation, jurisprudence and bibliography on the law on snow)* in "The Juridical Forum on snow", Bormio, 2005; ID.: *L'assicurazione contro gli incidenti di sci (Insurance against ski accidents)*, "The Juridical Forum on snow", Bormio, 2006; ID.: *El seguro contra los accidentes de la práctica de esquí*, "Revista General del Legislación y Jurisprudencia (General review of Legislation and Jurisprudence)", 2006, No. 4, octubre-diciembre (October-December), from page 527 to 559.

¹¹ The ski definition must be interpreted in the broader manner because today besides Alpine skiing also *snow board, big foot, easy carving, jumps*, etc., are practiced that require a special adaptation of the ski slopes and the service.

¹² ALONSO SOTO, Ricardo: *El contrato de suministro*, in Uría y Menéndez (Coordinatori): *Curso de Derecho Mercantil*, vol. II, 2001, pp. 214 and subs.

¹³ It is defined as the contract with which one party is bound, against payment of a price, to execute in favour of the party, periodical and in a continuous manner servicing of things. Cf. SSTS 30 November 1985, 24 February 1992 and 2 December 1996 and others. The flow of services is the note that justifies its usefulness for both the contracting parties, for one in order to be able to plan, for the other in order to have the guarantee or continuity of the service.

regulations in this subject, and therefore the blanks must be filled out by making reference to the contractual figure most consistent with its juridical nature. The prevailing doctrine frames it within the services contract category, abandoning any reference to the sale contract.

Finally, it must be added that the ski pass contract is a mixed nature contract of transport and of supply of services, and therefore the manager is bound for the performance of both the contractual cases. Consequently, the legal provisions relative to transport and supply are applicable in the wake of lack of contractual clauses ⁽¹⁴⁾.

7. Contents

The contents of the contract refer to the rights and obligations of the parties.

Since it concerns of a bilateral, onerous and synallagmatic contract, the rights and the obligations of each party are reciprocal. The skier's right corresponds to the obligations of the contacting manager. The manager's right is that of receiving payment for the price of the ski pass membership card from the skier.

The skier, against payment of the subscription, has the right of using the ski slopes for the duration and the conditions established in the contract. Concretely, this right is divided in four specific performance services:

- The right to **transport** or the use of the plants for ascending ⁽¹⁵⁾.
- The right to descend on **skiing** slopes (presence of snow, artificial snow producing machines, paths, etc.);
- The right to ski in **safety** conditions (signalling, information on the conditions of the ski slope, first aid service, etc.); and
- The right of access to places of **entertainment** and distractions located on the ski slopes.

The conditions of place and of duration deserve special attention. The duration is foreseen by the contract, which is fixed unilaterally by the managing body and with different options, and accepted by the skier. I make reference both to the calendar and the time and days of opening. The procedures are various, it depends on the manager, in addition the administrative provisions may foresee respecting minimum times.

The space, in a geographical sense, is established by the contract. Normally the membership card describes the area and the zone where it is possible to ski; this can also be announced publicly on boards located in visible places, both at the entrance and in strategic points distributed within its own skiing zone.

It is becoming ever more frequent that managers of neighbouring skiing plants draw up collaboration agreements aiming at widening the skiing spaces, the offer and the

¹⁴ cf. The Spanish law is lacking of a normative with respect to this subject, except for a reference on the Law on public State contracts (*Ley de Contratos del Estado*). It concerns a contract of commercial nature because one of the parties, the supplier, is an entrepreneur (art. 326.1 Commerce code, the qualification of commerce). Undoubtedly, there exists a very broad jurisprudence with respect to this subject, see, SSTS in ALONSO SOTO, *op. loco cit.*; art. 1570 The Italian civil code allows applying the provisions referred in the specific performances of the supply services.

¹⁵ In doctrine it is discussed whether the collaboration of the skier in the performance of the service of transport alters the real meaning of transport by making it lose the real characteristics. The skier is not a passive subject whose inactivity is necessary in order that the carrier may accomplish his obligation. On the contrary, without the active collaboration of the skier transport is impossible, behaviour that extends for all the duration of transport. Even though this circumstance occurs, to a lesser degree, also in the transport of persons (for instance, in ships where the passenger moves freely on the ship, with the consequent increase of risk), it is certain that in our ski contract the transfer is an accessory and secondary element to the real finality (economic-social cause of the contract), because the real wish of the skier is skiing (moving about on the ski slope) and not as much as using the mechanical ascending plants. If he could, he would not consider them altogether.

quality of the service. The skiing area is described in the contract ⁽¹⁶⁾. The skier must keep in mind the closing times in order not to find himself in a hazard condition at the time of his return due to the excessive distance from the point of departure. Obviously, the managers are not obliged to foresee means of transport external to their own skiing area in order to facilitate the return of the skiers to their point of departure.

8. Continued. Special reference to insurance

With reference to insurance, a distinction must be made between the skier's insurance and the insurance of the managing body of plants. The former is voluntary, while the latter is compulsory.

The subscription contract cannot impose on the skier the obligation of insuring his person for damages against himself or against third parties derived from the practice of skiing. Therefore, the skier is not obliged to insure himself, in spite of the fact that we deem it is preferable. Not being obliged by law, the imposition in virtue of the drawn up ski pass contract, it would be invalid for the application of the regulations on the free competition law (doctrine of bounding contracts).

Regarding the managing body, the law imposes the obligation of drawing up an insurance contract for civil liability against skiers and third parties ⁽¹⁷⁾.

9. The membership card as improper credit title

It was previously mentioned that the ski pass membership card issued to the skier at the moment of drawing up the contract shows a double aspect: that of a probative document of the contract and that of a credit title.

As a document it has a probative effectiveness notwithstanding that it indicates only the main performance: the paid price, the skiing area and the duration.

The membership card as a credit title shows greater interest. It concern analysing if actually it is a document that shares the same particular characteristics of a credit title: literality, autonomy, legitimising and transferability.

a) *Literality* means that the rights and the obligations of the parties are described in the document. It must be noted that the membership card must be considered an incomplete document ⁽¹⁸⁾, because actually it does not bear in a complete manner all the rights and all the obligations of the parties, but reference must be made to the general conditions of the manager in virtue of the reference clause present or implicit in the membership card.

b) *Autonomy* means that the rights and the obligations are those contained inside the document; actions and exception in defence of the rights and obligations of the parties are independent of the contract and have a separate life in virtue of the document having been issued. It concerns a questionable characteristic, because it is virtually in the progressive disappearance of the thesis of the abstraction at the benefit of

¹⁶ These types of agreements are more and more in a great number for competition reasons. Many are the examples that I can cite to this effect: In Spain, the same pass (subscription) is used for skiing in the Molina station and of the Masella (in the Catalan Pyrenees). In Italy: Plan Coronas Kronplantz, managed by the Skirama consortium; Cortina d'Ampezzo, managed by the Consorzio Esercenti Impianti in Fune Cortina, San Vito di Cadore, Auronzo, Misurina and Dolomiti Super Ski.

Let us leave aside the problem of juridical nature of this type of agreement, which must be analysed in the light of the right of free competition. (These are restrictive parts and therefore, forbidden by the European law of competition, ex art. 81 and subs. EU Treaty).

¹⁷ Cf. Art. 4th Italian Law No. 363/2003

¹⁸ Even shares are incomplete credit titles, because reference must be made to the Company by-laws for knowing the real and effective rights of the shareholder.

causality, both the manager and the skier can coin for their defence all the actions or exceptions deriving from the contract, even though they are not included in the document.

c) By *Legitimising* is intended the entitlement that is shown with the simple possession of the document as if it is a bearer title. The answer is not unambiguous and depends from the contracted procedure. If it is daily, the answer would be in the affirmative. In all the other cases it would be negative, because the membership card is nominative notwithstanding that the identification occurs by the photograph of the contracting party and neither the name, nor the address, nor the identity card number, appear. In addition, it is a common practice to include the clause of “personal and not transferable”.

d) *Transferability* concerns the essential characteristics of the credit title that originates and is justified for being transferable. The greatest transferability guarantee is offered by the bearer titles which circulate and are transferred with the simple delivery of the title. As previously mentioned, normally the membership cards show the prohibition of transfer or cession. In addition, the non-fulfilment of this condition is reason for cancellation of the contract for serious non-fulfilment; therefore it concerns an essential condition. The matter is questionable, in fact, of whether, for example, a membership card would be transferred at the beginning of a season or, in extreme cases, on the first day of use, it would become excessive that this non-fulfilment should cause loss of right of using the ski slopes for the whole season. The Courts would recognise the right of the manager to a simple compensation for damages (payment of the cost of one day's use).

The conclusion that has been reached is that it is not included in the category of the credit titles, but in the category of the so-called improper titles or legitimising documents ⁽¹⁹⁾.

IV. CONCLUSIONS

First – The contract, object of the present study, is the most important juridical figure of the ski law. All skiers who want to have access to the ski slopes must draw up a contract of this type. Millions of skiers enter into this contract every year.

Second – Paradoxally, the importance of this contract contrasts with the scarce attention that the legislator and the doctrine have given on this matter. It lacks of a concrete regulation and there are no monographies that deal with this matter.

Third – Due to lack of concrete regulations, the ski pass contract is subject to the principle of the autonomy of will. By way of exception, the regulations on the General Conditions of Contract are applied since it falls into the category of the contracts in series.

Fourth – The ski pass contract is a mixed contract; it can be qualified as a contract of supply of services with some of the typical notes of the transport contract. It cannot be qualified as a transport contract, neither of sale and nor of tender.

Fifth – The membership card is an improper credit title, or legitimising title.

Sixth – There are no technical reasons that prevent a uniform European regulation.

¹⁹ Cf. ARROYO, Ignacio: *Reflexiones en torno a los denominados títulos de crédito impropios y documentos de legitimación*, en “Revista de Derecho Mercantil”, 1993, pp. 1189 e ss.