

Applicable law and competent jurisdiction in case of an accident on the ski slopes

The French situation with respect to the evolution of the European normative and protection of the consumer

Part 1

Towards a rationalised competence that privileges the jurisdiction of the Courts and the application of the law of the place where the accident occurs

I. The EC normative No. 864/2007 of the European Parliament and of the Council of 11 July 2007.

1. General outline of Normative No. 864/2007:

- Object of article 655 b) of the EC Treaty is to render compatible the rules applicable in the Member States on the subject of conflict among laws and jurisdiction.
- Important previous agreements:
 - Rome (I) Convention of 1980 on contractual obligations.
 - Tampere: 1999, on the reciprocal recognition of sentences and other judicial decisions.
 - 2000: implementation programme of the principle of reciprocal recognition established by the Commission and by the Council.
 - 5 November 2004: Hague programme adopted by the European Council, recommending carrying on, with determination, the works on the rules of conflict of laws for non contractual obligations.
- This normative of 11 July makes part of the works in course within the framework of the European Union with the purpose of creating a real European space of freedom and justice. It concerns of bringing about that the Courts of all the Member States apply the same law in case of trans-national controversy on the subject of civil liability, in this manner facilitating the reciprocal recognition of the judicial decisions within the Union.

- According to Commissioner Franco Frattini : «*It concerns a fundamental text both for the completion of the European justice space and for the correct operation of the internal market*».
- Up to date, the States did not have at their disposal common rules for designating the applicable law on the non contractual subject and consequently each Court applied its own national rules.
- In this case, seen that the juridical solutions involve necessarily the risk of varying from country to country, the parties could be induced to bring up the controversy before the Court that will apply to them the most favourable law, that is to say the « forum shopping ».

2. Contribution of Normative No. 864/2007

- The principle «*lex loci delicti commissi*» constitutes the basic solution on the subject of the non contractual obligations in almost all the Member States. The concrete application of this principle in case of variability of the criteria of aggregation varies in the different countries. This situation is source of uncertainty with respect to the applicable law.
- The aggregation to the place where the direct damage occurred («*lex loci damni*») creates **a right balance** between the interests of the person whose liability is claimed and those of the injured person, and in addition corresponding to the modern concept of the civil liability law and to the development of the objective liability systems, (preliminary comment of the normative).

Article 4. 1: « the applicable law to a non contractual obligation, which results from a damaging fact, is the law of the country where the damage occurs whichever is the country in which the fact occurred and which has generated the damage, and whichever is the country or the countries in which occurred indirect consequences of such a fact».

Article 4. 2: However, when a person whose liability is claimed and the damaged person have their residence in the same country at the time when the damage occurred, the law of that country is applied.

Article 4. 3: If, as a whole of the circumstances, it results that the damaging fact has connections obviously closer with a country other than the country of which under paragraphs 1 or 2, the law of this other country is applied. A connection obviously closer with another country could be based, in particular, on a previously existing relation between the parties, such as a contract, which has a close connection with the damaging fact in question.

According to the preliminary comments of the Normative, art 4.2 must be considered such as to create an exception to this general principle since it establishes a special aggregation. Art 4.3 must be intended as a clause creating an exception to articles 4.1 and 4.2.

3. Procedures of application of Normative No. 864/2007

- It is applied in the situations that involve a conflict of laws, with non contractual obligations depending from the civil and commercial matter.

It is not applied, in particular, on fiscal customs and administrative matters, neither in the liability incurred by the State for acts or omissions perpetrated in the exercise of the public power («*acta iure imperii*») (art. 1).

- The damage must be intended as an injury resulting from a damaging fact, from enrichment without reason, from a management of business, or from a «*culpa in contrahendo*» (art. 2).

- The regulation leaves freedom of choosing the law applicable to the non contractual obligation to the parties, with an agreement subsequent to the fact that generated the damage, or with a previous agreement when both parties exercise a commercial activity (art. 14).

- However, this choice cannot prejudice the applications of the imperative provisions of the Community law.

- The law applicable to a non contractual obligation governs, in particular: the conditions and the framework of liability, the reasons for exemption; the limitation and the sharing of the liability; the nature and the evaluation of the damages; the transmissibility of the right to obtain a compensation for damages; etc.; (art. 15).

- The provisions of the present normative do not compromise the application of the provisions of law of the law-court, which imperatively rule the situation, whatever is the law applicable to the non contractual obligation. (art. 16).

- For the purpose of evaluating the behaviour of the person whose liability is claimed, the safety regulations in force in the place and at the date when occurred the fact involving liability are taken into consideration as elements of fact and as much as necessary (art. 17).

- The injured person may act directly against the insurer of the person liable for compensation for damages, if the applicable law to the non contractual obligation or the law applicable to the insurance contract foresees it (art. 18).

- Date of the application of the normative: 11 January 2009 (art. 32).

II. Compatibility with the principles of protection deriving from the consumer law.

- In Italy, if it results that the territorial jurisdiction is that of the domicile of the consumer (art 18.2 of the Civil Procedure Code [CPC], Court of Appeal SU No. 14669/03 and Court of Appeal No. 13642/06) of French law, art. 42 of the New Civil Procedure Code (NCPC) provide that: the competent territorial jurisdiction is, unless otherwise provided, that of the place of residence of the defendant.

Whenever there is more than one defendant, the plaintiff applies, at his choice, to the jurisdiction of the place of residence of one of them.

In accordance with Decree No. 81-500 of 12 May 1981, art. 7, only if the defendant does not have a known domicile or residence, the plaintiff may apply to the jurisdiction of the place of his residence or to the jurisdiction of his choice, if his residence is abroad.

Generally speaking, it is therefore the place of the accident which will determine the jurisdiction, coherently with the law determined by the normative of 11 July 2007.

In the EC normative of 11 July 2007 compatibility with the protection of the consumer appears resolved with art. 4, par. 2, which considers the implementation of a cascade system of aggregation factors at the end of which the law of the country in which occurred the fact generating the damage may eventually be discarded if the damaging fact has connections obviously closer with another country.

Part 2

Ski slopes-related issues in French law

I. Establishing administrative and judicial jurisdiction

Contrary to the Italian situation, for example, whose law of 24 December 2003 has proclaimed the singleness of the liability issues on ski slopes, French jurisprudence has established a system on the basis of a double jurisdiction concurring between the judicial courts and the administrative courts.

1. The skiing areas are under the jurisdiction of administrative law

- Skiing areas are those that are accessible by gravity starting from the plants for ascending or in the vicinity or that refer to the station.

- With regard to a Ministerial circular of 4 January 1978, administrative jurisprudence defines these areas as «all the territory of the Commune where it is possible that people can indulge to the practice of skiing», making the following distinctions:

- Areas being served by plants for ascending (ordinance by the Mayor, classification of the ski slopes and liability)
- Areas reserved for mountain skiing and touring (information regarding meteorology with a specific system for rescues and liability).

- The Mayor's liability falls within the administrative framework:

Art. L 2212.1: city police is under the Mayor's own jurisdiction.

Art. L 2212.2: the mission of the city police is to ensure public safety, which includes in particular the obligation to prevent, with appropriate precautions, accidents, landslides, avalanches, etc.

- The Commune's liability can be based on two fundamental points: damage by public works and the fault of the police authority. However, the State Council has considered that the ski slope does not constitute a public work (EC 12 December 1986), and therefore this excludes the hypothesis of damage by public works.

Consequently, a victim may only take as basis for suing a Commune the fault of the police authority.

- The Mayor's liability is the result of a non-fulfilment, for example in not installing barriers, protective nets, signalling boards. The victim must demonstrate that the absence of signalling or of protection has constituted a hazard higher than that against which a skier must protect himself and that therefore there exists a connection of causality between the Mayor's fault and the occurring accident.

- The ski slope is not considered a public works structure that would justify before the Administrative Court the power of claiming the presumption of liability of the public community (EC 12 December 1986)

- In order that the presumption may be considered, it is necessary to find oneself in the presence of a surrounding installation (stairway, handrail, snow-producing cannon, tunnel, etc.), with a maintenance or design defect.

- Example of jurisprudence:

- EC 27 September 1991: declares the Commune as liable for having omitted of signalling the presence of a stream along a passage used by skiers, with the result that one of them drowned.

- EC 4 March 1991: sentences the Commune for having left open a dangerous and frozen ski slope.

- The administrative jurisprudence has recently completed the aggregation conditions of the ski slope to the State property:

- requesting a sufficient arrangement so that it may be integrated to the State property (LYON Court of Appeal of 3 February 2005).

- «some levelling works» do not render the ski slope a State property (LYON Court of Appeal of 17 November 2005), (sentence annexed to the record).

2. Situation in case of management granting.

- Article L. 342-9

«The service of the plants for ascending, if need be, extended to the plants necessary for the management of the ski slopes, is organised by the Communes in the territory where the plants are located, or by groups of communes, or by the Department to which they can entrust the organisation or the setting-up of the service, through a convention, within the limits of a defined geographical perimeter.

The Communes or the groups of Communes may be associated to the Department, at their request, for organising this service».

This may be achieved:

- by means of a Communal direction. In this case, jurisdiction will be in principle that of the administrative order and of the Administrative Court, unless it is not considered that there exists in this way the organisation of an industrial and commercial service (SPIC: Industrial and Commercial Public Service)
- by means of granting to an industrial and commercial public service, only for the part of plants for ascending, or for the entire management of the skiing areas (maintenance of ski slopes and means for ascending, more safety).

The relations between SPIC and the user are under the jurisdiction of the judicial order.

- **an ordinance of the Grenoble Court of Appeal of 14 November 2005** : «the liability of SPIC must be sought on the contractual basis, by virtue of the contract that binds it to the user for as much as it concerns the correct maintenance of the skiing areas». «This safety obligation is a halfway obligation, since the skiing activity involves a part of commitment and of risk. The manager's fault in carrying on his own obligation must therefore be demonstrated by the user».

- **Supreme Administrative Court, 15 December 2003:**

The judicial courts are the only having jurisdiction for judging a controversy opposing a SPIC against a skier victim of a fall being attributed to the ski slope conditions.

3. Principle of double jurisdiction.

- **Chambéry Court of Appeal, 14 March 2006:** «*the circumstance that the Mayor is invested of police power on public roads, which he cannot delegate, does not prevent the judge from seeking whether the licensee of the technical and commercial management of a public space, during the course of his mission, commits an error that can be separated from the Communal service*».

> In this case, the concessionaire company (3 Vallées) therefore commits an error, in accordance with article 1382 of the Civil Code, for having omitted from equipping the ski slope with a means suitable of avoiding the fall of a skier into a gorge.

- **Nancy Court of Appeal of 14 December 2006** : «*The Court acknowledges a fault connected to lack of police authority, the Mayor should have made arrangements for a protection of the ski lift bank banged into by the victim*» «*That liability of management of ski slopes, considered an industrial and commercial public service, cannot be sought to be in agreement before the administrative courts, since the capacity attraction of the damage due to public works is not applicable to the relations between the SPIC and its user (Supreme Administrative Court, 24 June 1954 Galland)*».

> This sentence does not mean that the ski slope service is not liable, but invites the victim to bring the dispute before the judicial jurisdiction for as much as concerns his action with respect to the ski slope service.

- Nancy Court of Appeal of 17 May 2005:

In this particular instance, an accident occurred, since the victim passed under a safety net before falling into a stream.

«In the case of a public service grant of the plants for ascending, which includes also the availability of prepared and signalled skiing areas, the concessionaire company assumes at its charge a safety obligation which entails guaranteeing the safety of the skiing slopes».

The manager's liability is therefore held before the judicial courts.

And the Court adds *«This safety obligation is distinct from the police powers exercised by the Mayor on the territory of his own Commune»*. Does this therefore allow the possibility to the victim to appeal against the Commune before the administrative Courts?

According to a constant principle, the appeal before judicial jurisdictions does not exclude appealing before administrative jurisdictions, and neither the power of suing the Commune for compensation prevents prosecuting the manager (Criminal Court of Appeal, 9 November 1999, Criminal Court of Appeal. 14 March 2000)

PERSPECTIVES

Concluding, concerning more particularly the disputes related to skiing accidents, the normative of 11 July 2007 constitutes a considerable progress in the implementation of space for freedom and safety.

Regarding the actions taken within the framework of the protection of the consumer, the question appears to be resolved by art. 4, par. 2, which considers the implementation of a cascade system of aggregation factors at the end of which the law of the country in which occurred the fact which generated the damage may eventually be discarded if the damaging fact has connections obviously closer with another country.

On this matter, only a pre-existing contractual relation between the parties could justify it.

At present, in the French law, the normative allows supporting the application of the law of the «law-court» and, in this particular instance, the very protective issues of our system, which allows the user of seeking in conjunction the liability of the skiing areas' manager and the public forces.

For the future, this rationalisation should favour the approach of the applicable legislations, in particular for the compensation issues that involve considerable differences, (moral prejudice, evaluation of the physical integrity offence, etc.) that will be always less accepted by the users.

Michel BAILLY