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THE «COMBINED TRIP» IN THE RDLG 1/2007 (REVISED TEXT OF THE GENERAL CONSUMERS ACT) AND COMPLEMENTARY LEGISLATION

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The Royal Legislative Decree 1/2007 of November 16th (*BOE* [Official Gazette No. 287 of November 2007) through which was approved the Revised Text of the *Ley General para la Defensa de los Consumidores y Usuarios y otras leyes complementarias* [General Law for the Defence of Consumers and Users and other complementary laws] (hereinafter, the Revised Text) was published on November 30th 2007.

Among the regulations incorporated into the Revised Text —in Chapter II, Title I of Book IV, dedicated to combined trips— stands out the Law 21/1995 of July 6th on combined trips (hereinafter, LCT), as this is an EC directive transposition regulation which has become a part of the ***acquis communautaire*** about consumer protection and which establishes a specific legal regime for contracting with consumers that is not affected by the sectorial state (national) regulations on tourism.

Indeed, CE Law has very early sensed the condition of consumer that corresponds to tourists. There is no difficulty to assign this ambivalent character to them. Therefore, if we consider it from this point of view, the protection of tourists must be placed within the broader framework of consumer and user protection. After all, the tourist is a consumer and a user, with no specificity other than the demand of a series of specific services, those which have come to be known as 'tourism services'. The previous statements obviously presuppose the consideration of the tourist as a consumer or user in the technical sense, that is, in the one which triggers the protection process. In other words, when the regulations are not exactly in tune regarding the field of application, normative hypothesis and legal consequences, it becomes necessary to proceed to revise and analyse each one of the competing regulations so that we can at least know which one is the most beneficial to the consumer and should accordingly be applied. This last operation is nothing but the consequence of the existence of the ***favor consommatoris*** principle.

All the above leads us to conclude that, although tourists can easily benefit from the protection foreseen by the legislation for every consumer, it is advisable, if not essential, to stipulate specific measures for their protection. Furthermore, the combined trip contract is characterised by the doctrine as a 'consumer contract', which is why the legislator demands certain formalities and a thorough regulation in order to check the contents of the contract drawn up by the firm beforehand. After all, the tourism activity is a rich breeding

ground as far as general conditions are concerned. Nearly all tourism contracts with users are standard-form contracts with general conditions: transport tickets, contracts related to accommodation or tourism intermediation (agency, packaged tours…), etc.

With this purpose in mind, the present paper focuses on the key aspects of the legal regime for the combined trip contract, as it stands after its interpretation within the Revised Text as a whole. Our reference is a number of legal decisions which give us an idea of the most common problems arising between private parties in relation to tourism (transport, accommodation, organised trips, etc.). However, we will not deal with another essential aspect in the combined trip contract, namely the subjective element within the contract and the possibility to implement it by electronic means. In this respect and taking into account the characteristics of this publication, we refer the reader back to our forthcoming work **«Electronic contracting of tourism services and on-line travel agencies».**

The Revised Text includes within its field of application the most overwhelmingly frequent tourist manifestation, namely the one which is displayed through the contracting of a 'package tour' or, more precisely, of a 'combined trip', i.e. that in which, according to Art. 151 a): at least two of the following three elements are present: transport, accommodation and non-incidental tourism services which constitute a significant part of the trip; that which lasts more than 24 hours and which is offered for an overall price, though the last aspect does not necessarily entail the joint invoicing of all the elements which form part of a combined trip.

In keeping with the preceding legal concept, the Revised Text does not regulate each and every one of the elements mentioned when they appear separately. Nevertheless, this does not mean that 'tourism' or 'tourism activity' cannot exist outside or beyond the combined modality. On the contrary, tourists often travel on their own means or contract transport and accommodation directly and independently. In any case, regardless of the extent to which this 'non-combined' tourism is exceptional or a minority type, that can never mean that this kind of tourists is unprotected. They are not included within the responsibility system established by the Revised Text though.

The pre-contractual information supplied to the consumer is binding for the businessman, which means that the former can urge the latter to fulfil all the conditions specified in the offer, previous promotion and advertising, even if they do not appear in the contract. The principle for the integration of advertising into the contract, consolidated via case-law, was legally established by Article 8 of the *Ley General de Defensa de los Consumidores y Usuarios* [General Law for the Defence of Consumers and Users]. The current Revised Text also includes the said principle by stipulating that both the content of the package and the promotion or advertising, as well as the legal or economic conditions or guarantees offered, can be formally requested by consumers and users even if they do not appear explicitly in the contract signed or in the document or proof of payment received, and will have to be taken into account when determining the principle of agreement with the contract (Article 61.2). However, should the contract contain more beneficial clauses, the latter would prevail over the content of the offer, promotion or advertising (Art. 61.3).

The treatment of information in the Revised Text does not end here though. This principle of agreement with the contract is applied to specific matters. For instance, as far as combined trips are concerned, the Revised Text equally pays special attention to this aspect

in its Article 152 and establishes that the information contained in the programme-package has a binding character for the organiser and retailer. As for commercial guarantees, Article 125 of the Revised Text also settles the obligation for whoever acts as the guarantor, under the conditions stipulated in the guarantee document and in the corresponding advertising campaign.

The Text provides a detailed description of all the information that the retailer, or otherwise the trip organiser, must make available to the consumer in the programme or in the informative brochure. The price plays an outstanding role in this respect. The combined trip programme and package published in the brochure has to contain the final overall price of the combined trip, including taxes, and the estimated price of the optional excursions. Should there be additional costs corresponding to services delivered during the combined trip which have to be assumed by the consumer and which are not paid to the organiser or retailer, information has to be provided about their existence and about the amounts involved, if they are known (Art.152.1.f).

The imposition of the written form introduced by Article 154 is not new within the consumer protection legislation. As some have already done, one can speak about a return to formalistic criteria in this respect, which seeks to favour the consumer by facilitating the proof of existence and content of the contract, particularly in relation to the minimum content. The precept fails to clarify the nature of the form or the effects derived from its non-compliance, although this is an irrelevant issue in our opinion, as one can hardly imagine the omission of this obligation, especially bearing in mind the close relationship existing between form and content that is highlighted in Art. 154 of the Revised Text. In effect, the same as with the form, the imposition of a minimum content for contracts is another of the classical ways to protect the interests of the weakest contractors. Of course, it responds to compliance with information duties, but also to the need of clearly expressing certain general and particular conditions, that is to say, to a clarification and fixation regarding their fulfilment and exigibility. This is why Art. 154 contains a long list of elements that must be obligatorily included in the contract. Nevertheless, in our view, what has no justification in the current Revised Text is the introduction of a series of innovations related to the content which, despite actually seeking maximum protection for the consumer, seem very unlikely to be implemented in practice. The Revised Text incorporates two new obligations. The first one is to break down the management costs in the price of the combined trip. And the second one is to specify the cancellation expenses duly broken down as well.

The fit between what has been agreed in the contract and its execution had two important way-outs, formerly in the LCT and now in the Revised Text. One is established in the interests of the consumer: withdrawal. This is a faculty which can be freely exercised by the consumer but is, however, subject to a compensation for the organiser or retailer in percentages of the total price of the trip which can vary according to how long in advance the said faculty has been exercised. The other is the possibility —granted to the organiser— to modify some essential element in the contract before the departure —giving the user the faculty to terminate the contract as a result of non-compliance *simili modo* to the one foreseen and established in Art. 1124 of the Civil Code.

The Revised Text (Article 158) stipulates that if the organiser is forced to modify an essential element in the contract to a significant extent before the departure, he will have to inform the consumer and user immediately. In that case, and unless the parties agree otherwise in individually negotiated clauses, the consumer and user will be able to choose between terminating the contract with no penalties or accepting a modification of the contract where the variations introduced and their effect on the price is specified. The consumer and user will have to tell the retailer, or the organiser, which decision he has adopted within three days of being informed about the modification which this Article 158 refers to. Should the consumer and user not notify his decision in the terms indicated, it will be understood that he has chosen to terminate the contract with no penalties.

If the trip is cancelled for a reason that can be attributed to the organiser or because the customer has decided to cancel the trip after a modification of an essential element in the trip, the consumer «will be entitled to demand the reimbursement of the amounts paid to the businessman who received them, who will have to give them back to the consumer sticking to the periods and conditions foreseen in Article 76». In this case, the count for the period will start since the notification made by the consumer and user about the decision to terminate the contract or since the moment in which the circumstances that led to the cancellation arose» (Art. 159.1). That is to say, in these cases, the consumer can demand from the agency the reimbursement of the amounts paid for the trip in accordance with the stipulations foreseen in Article 76. One of them is that the reimbursement will have to be made as soon as possible and, in any case, within a maximum of 30 days since the notification of the decision to terminate the contract or since the occurrence of the circumstances which caused the cancellation. The other one says that, if the amount is not reimbursed within the period established above, the consumer will be entitled to request twice the amount he paid, without that excluding the possibility to receive further compensation for the damages that might have been caused to him.

This study additionally seeks to clarify the premises for the obligation to pay compensation, which are two and clearly stem from the Revised Text; one, the damage suffered by the consumer must be the result of the non-compliance or faulty compliance with the contract, and two, the non-compliance or faulty compliance must be attributed to the organiser and/or retailer, as long as he cannot accredit the concurrence of any exempting causes. The Revised Text refers to two exempting causes. There will be no obligation to pay compensation when the trip cancellation is due, firstly, to the fact that the number of customers registered for the combined trip does not reach the minimum required, which will have to be communicated to the consumer in writing before the deadline, and secondly when, except for the case of overbooking, it is due to *force majeure* reasons, understanding as such those circumstances which are alien to the person invoking them, abnormal and unforeseeable, and the consequences of which could not have been avoided even acting with due diligence. Another related issue which, despite its great practical relevance, has not been treated in the Directive or the LCT or now in the Revised Text (Art. 162.2) is the scope of the compensation claim. They only point out the following: «2. the organisers and retailers of combined trips will equally respond for the damages caused to the consumer and user as a result of the non-execution or deficient execution of the contract». Before this loophole (silence), the paper suggests that it would be necessary to consult the general

rules of the Civil Code in matters of compensable damages (Arts. 1101 to 1107). The key problem in this case is to determine whether or not the consumer really has the right to seek redress for the moral damage derived from the non-compliance or inappropriate delivery of the services supposedly included in a combined trip.

We finally stop at one of the central aspects of the legal regime for combined trip contracts, namely the responsibility of organisers and retailers as it stands after its interpretation within the Revised Text as a whole. To that end, we have sought references in a large number of legal rulings which will give us an idea of the problems arising the most often in practice. The reason for this «litigiousness» lay on some 'ambiguous' legal aspects which open the door to disparate interpretations. Indeed, Art. 11 of the LCT did not dare to establish the solidarity between organisers and retailers (and the legal solution was reprehensible in this case, since it did not favour the interests of users, i.e. of tourists). It did, however, for the case in which there are several organisers or several retailers, but always within their respective internal environments: organisers between themselves and retailers between themselves. For the rest of possible cases, which were the most frequent, the law chose *pro parte* responsibility: organiser and retailer respond «in accordance with the obligations corresponding to them for their respective involvement in the management of the combined trip», though, of course, regardless of whether those obligations must be assumed by themselves or by other service deliverers. This legal solution is highly controversial because, in practice, it forced the consumer or user to sue the organiser and the retailer at the same time, since they had doubts or simply did not know who was really responsible for faulty compliance or for the damages caused, with the complexity, difficulty and slowness that are inherent to this kind of processes.

This problem seems to have been solved in the Revised Text (Article 162.1). It is indeed one of the most important modifications introduced in the new regulation since, following it, the responsibility between the agency which organises the trip and the one who sells it is jointly and severally assumed by both, which of course does not exclude the right to repetition that is recognised in the same article.

This means that customers can address their claim either to the trip organiser or to the trip retailer regardless of the reason for the claim, and both of them are obliged to answer. However, the right exists for the agency which has responded before the customers to pass the amounts reimbursed on whoever is responsible for the damages caused. This is a far-reaching modification as far as travel agencies are concerned since, according to this new wording, the responsibility between the agency which organises the trip and the one selling it is shared, without that excluding the right to repetition foreseen in the same article. In other words, the wholesaler and the retailer respond jointly and severally before the customer, which is why the latter can interchangeably address his claim to the trip organiser or to the trip retailer.