

Modification And Resolution Of The Contract Of Trip Combined: Cancellation Of The Trip By The Organizer And Right Of Withdrawal Of The Tourist


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ABSTRACT

The present study aims to consider in parallel the different legal consequences, rights and obligations of the involved subjects in a contract of travel combined in the case of modification, cancellation and withdrawal of the contract. On the one hand, the modification or cancellation by the Organizer will allow analysis of avoidance of the contract at the request of the consumer, who does not accept the significant modification of some essential element of the contract the organizer has been forced to introduce. Be on the other hand, when it is the consumer who decides that the trip not be effect or as the law says "nullifies the services requested or contracted" we taken the existence of a "right of withdrawal" and its consequences. Ultimately, the possibility of cancellation by the organizer and the consequent rights of refund or completion of another trip and the right to compensation for breach of contract will be weighed with the reflection on the existence of a real right of withdrawal of the tourist to subject certain penalties is obliged to justify its decision. The doctrine will be used to achieve this goal, and recent within the regime of safeguards jurisprudence for the tourist and the consumer is regulated in specific legislation.

Keywords: Travel Combined; Tourist; Modification; Cancellation; Resolution; Withdrawal of the Contract

1. INTRODUCTION

 Contracts in general and the tourist in particular, package travel contracts widely in Spanish society that agrees with the value of the tourism sector in the Spanish economy. This justifies the special protection that the law empowers the tourist consumer, recognizing him among other rights of unilateral withdrawal ad nutum, i.e. without just cause that contrasts with the onerous consequences than for the business involves the cancellation of the trip without a just cause.

Package travel are regulated in articles 150 to 165 of Royal Decree legislative 12007, on 16 November, which approves the revised text of the General Law for the defence of consumers and users and other complementary laws. They were previously regulated by law 211995, of 6 July, which was the transposition into law Spanish of the 1990/314/CEE directive of 13 June 1990, package travel, package holidays and package tours. It means combined trip, the previous combination, sold or offered for sale pursuant to an inclusive price, with delivery that exceed 24 hours or include overnight stay, at least two of the following elements: a) transportation, b) accommodation, c) other tourist services not accessory to transport or accommodation and which constitute a significant part of the package. (art. 151 LGDCU).

This legislation regulates various measures to enhance the protection of consumers. Article 160 of the TR specifically provides that the consumer or user can withdraw, at all times, of the services requested or contracted, thus enabling the extinction of the compulsory relationship linking it to the organizer or retailer. If the consumer exercises the right of withdrawal shall be entitled to repayment of the sums they had paid, but will also be obliged to pay to the organizer or retailer of travel compensation that includes the cost of management, the cancellation if any,

and the penalty, the amount of which is fixed according to the amount of the trip and the time in which the withdrawal takes place. However, the consumer is released from its obligation to compensate if the withdrawal is caused by force majeure.

The consumer must be informed, before the conclusion of the contract, of the content of the contractual clauses and will receive a copy of the contract when you formalize. On the other hand, the contract must be in writing and must also contain detailed information on ends of the realization of the trip (article 154 TR), others include the reference to the cancellation fees, if any and they can calculate is reasonably in advance or the indication that it can received, if they cannot be known in advance. On the other hand, in relation to prices, should be noted that according to article 157 TR the prices fixed in the contract not can be revised, unless it expressly mentions that possibility and defining precise modalities for the calculation. The review can only be made to incorporate changes in the price of transport, including the cost of fuel, taxes relating to certain services and exchange rates applied to the organized tour. In addition, revision of prices upward in the 20 days prior to the date of departure of the trip (art. 157 LGDCU) is considered void.

The right to consumer information during the previous phase of Kharitonov to the contract is the budget for the exercise of other rights, in particular the power to dissociate itself from the contract and to conclude the same, through the right of unilateral withdrawal (Diez-Picazo, 1993), without cause any that will be discussed on the one hand, as opposed to the cancellation at the request of the Agency and on the other hand, with the Faculty of attributable to the Organizer, when the tourist does not accept the modification of an essential element of the contract or resolution well for definitive breach of the employer. To do so, will be taken into account in a comparative way the general regulation on the content of the right of withdrawal in the TRLGDCU and EU 201183 Directive.

2. MODIFICATION OF THE CONTRACT. ATTRIBUTABLE TO THE ORGANIZING RESOLUTION. CANCELLATION OF THE TRIP

Compulsory relations are to become extinct. However, between birth and extinction the relationship may suffer changes or conversions, both with regard to the subject, object or content as it refers to subjects. In accordance with article 1204 of the Civil Code, "so that an obligation is extinguished by another to replace need that this be declared strictly by the parties or that the old and the new are absolutely incompatible". Therefore, apart from the modifications made prior, written agreement, between the Contracting Parties, those made unilaterally require the consent of the other party, even if they only go concerning content in the brochure. This is because the information contained in the prospectus is integrated in the contract and shall be binding on the travel agency (article 152.1). Why support only the modifications made by the Agency when the changes in the information communicated to the consumer before the conclusion of the contract and the possibility of change has been mentioned in the program-offer (article 153 TR). In this way, the Organizer forced to alter significantly any essential element of the journey has to immediately inform the consumer.

It should be noted, however, and in order to protect the consumer, the limitation established in terms of the time, before the departure of the trip; excluding, therefore any possibility of modification once started it, there likewise is a restriction the review or variation of the price (SAP of Jaén on October 28, 2003 (AC 2003, 2293) thus, prices may not be revised, unless the contract provides, in a explicit and detailed in its mode to operate, the possibility of revision both at the rises to the bottom.) Indeed, the review of prices can only be achieved in relation to variations in the price of transport, the price of fuel, taxes and fees and exchange rates applied to the organized tour. In any case, the review of prices upward in the 20 days immediately preceding the date of the departure will be deemed void.

Apart from prices, when the modification affects significantly any essential element of the contract, namely, accommodation, transportation or other services not complementary amendments and they are not due to the simple voluntariness or arbitrariness of the Organizer if not that there are justified reasons requiring it to perform them. If the two circumstances outlined in the first place the organizer shall inform the amendment affected consumers, the law does not lay down any requirement of form for communication but yes requires that it carry out immediately and must be clear and understandable. Once communicated the change Agency and consumer can

reach an agreement to solve the new situation to which the trip is subject. If an agreement is not achieved the consumer has a minimum term of 3 days counting from the date of notification of the amendment of the contract assuming introduced variations. The protection of the consumer justifies that the consequences of the modifications of essential elements equate to contractual non-compliance or defective compliance with insubsanable. Therefore it must be understood that the amendment will be important when having been introduced in advance the consumer had not engaged the trip. In fact, they come to constitute the frustración of the purposes of the tourist with the conclusion of the contract that justifies the power of resolution. Thus, unless pacte otherwise, consumer may choose to terminate the contract without penalty or accept the modification, specifying introduced variations and the impact on the price. The consumer must communicate his decision within three days to be notified of the modification. If it not manifests itself in this period, means that it chooses to the resolution without penalty (art. 158 TR).

The consumer to resolve the contract, you are entitled since there is the avoidance of the contract, the reimbursement of all amounts paid or the realization of another package of equivalent or higher quality, if the organizer or retailer can provide. The computation of the time limit will begin from notification of the consumer and user of your choice by resolution or that the circumstances of the cancellation occurred. I offer you a trip of lower category, the organizer or retailer must refund the consumer the price difference. A significant assumption with regard to this right of withdrawal is trial by the SAP of Vizcaya of 25 September 2000 (JUR 2000, 304355), which consisted of the aircraft and the days schedule change. Likewise in the SAP Madrid, 20 May 2008 (AC 2008, 1140) on cruise honeymoon is cancelled before the date of departure, the recruitment of a different journey should not be assumed charge, according to the Court, moral damages compensated with free enjoyment for actors in another cruise.

This same law it will have the consumer when it not getting confirmation of the reservation and also when the Agency decides to cancel the trip before the date of departure, why not imputable to the consumer as it can be seen in article 159 TR, under the heading: "Resolution of the contract for reasons imputable to the organizer or cancellation of the trip". In this case, it should be noted that there is no obligation to compensate when the cancellation is due to that has not reached the minimum number of persons required to travel and communicate in writing to the consumer before the deadline set for this, which at least will be 10 days prior to the commencement of the trip. It should likewise not be compensated when the cancellation, except for overbooking, is due to force majeure, namely circumstances beyond whom it invokes them, abnormal and unpredictable, the consequences cannot be avoided despite acting with due diligence (article 159 TR). According to article 1105 of the civil code: "outside the cases expressly mentioned in law, and the in that the obligation to declare so it made, no one shall be liable for those events which could not have foreseen, or that, as expected, be inevitable." Our Supreme Court requires that the fact be unpredictable, inevitable, insurmountable, irresistible, that is not due to the will of the alleged debtor and that between this result and the event that produced there is a nexus of efficient causality (SSTS of 7 April 1965,[RJ 1965, 2118], STS of 20 July 2000 [RJ 2000, 67549]). Why not recognized this circumstance in the breakdown of the engine that motivates the cancellation of the flight being obliged to pay the wholesale Agency.

The protection that in the analyzed cases enjoys the tourist of a combined trip contrasts with the same cases trying to lose services, in this sense include the SAP Madrid March 24, 2009 (AC 2009, 773) that in the case of cancellation of flight by airline reservation, estimated diligent performance of the defendant Agency to inform of the change of date and give options to travel the next or the previous day and be customer accepted by the actor's advancement to the previous day. It describes service loose in regime of Commission services on behalf and on behalf of others.

3. WITHDRAWAL BY THE TOURIST

He is a measure more than protection of the consumer together tourist that also agrees with the general rules contained in chapter II of title I, under the heading "Right of withdrawal", the second book (articles 68 to 79) where you configure a general regime applicable "in those contracts which provides for such a right" in the absence of special legal provision or Covenant. Its provisions, however, do not have a general scope because this right is also regulated in the sections dedicated to different modalities of sale. Article 68.1 of the TR notes that "the right of withdrawal from a contract is the Faculty of the consumer and user of rescind the contract concluded, notifying you as well to the other Contracting Party in the period established for the exercise of this right, without having to justify

its decision and without penalty of any kind". In article 101 "contracts concluded at a distance" (Faculty request direct cost of the return) and exceptions to the exercise of the right and in article 110 on "contracts concluded outside commercial establishments" (7 calendar days and specific documentation)

In the field of package travel article 160, located in chapter I (resolution of the contract or cancellation), title II (provisions concerning the resolution of the contract and responsibilities), book IV (package travel), establishes specific rules for avoidance of the contract by the consumer and user. As it has been said, the consolidated text has lost the opportunity to generalize the right of withdrawal to all contracts concluded with consumers (Zurilla, 2008)

With regard to the legal nature of this figure on the possibility of the consumer to end a valid contract when the Faculty completed a compulsory relationship is not based on a special case the doctrine refers interchangeably to the terms complaint, revocation, resolution, unilateral withdrawal or recess of the relationship (Díez-Picazo y Gullón, 2003). As measure of consumer protection, as it has been exposed, the law obliges the Agency to report on the existence of this right, both in the booklet and the contract, corresponding proof of the fulfilment of this obligation to the employer (article 69 TR). Is so that if this information is missing the tourist is empowered to rescind the contract, as happened in the case prosecuted by the SAP Las Palmas 10 May 2009 (AC 2009, 1009) on journey hired by the user that not could carry it out by a hypertensive crisis suffered on the eve of the departure of the flight and that lingered long after the output of the plane the next day. Recognizes the Faculty of resolution for inappropriate breach of its contractual obligations by the defendant company, who did not properly prove that among the conditions of the supply of flight was the impossibility of cancellation.

It's a legislative option puts in such cases the consumer's right about the employer of travel and that it has to respect as a member of the risk inherent in their business. That is why it has been said that "does not relieve her which agencies offered insurance to customers which can cover the restitution of the amount of the price in case of trip cancellation, because it is a supplementary benefit the traveller can accept or not to change an additional price, but that not it will exclude, if you decide not to subscribe"", their right to restitution if the reason for the withdrawal is force majeure" (SAP Leon 17 July 2009 [AC 2009, 1657])

Empower consumer tourists to exercise their right to withdraw from the contract at any time, in contrast to article 71 of the TR which establishes the term of 7 working days, term which applies to distance contracts, not for the celebrated outside the establishment in which the term is seven calendar days. You are granted the right to rescind the services requested or contracted, bearing right to the repayment of the sums they had paid.

4. DISCUSSION

It should be noted that while it is true that the standard quoted granted to the consumer the power to desist "at all times", it is also that only provided for the assumption of a withdrawal before the start of the journey, here the SAP of Murcia, 16 November 2010 (AC 2010, 2310) notes that do not have the legal obligation to wholesalers of returning any amount for services not enjoyed. There is no, therefore no solution for those cases where, for various reasons, the consumer wants to withdraw after having begun the journey. As noted by the doctrine, it should have been referred to as you cannot force anyone to continue a journey against their will and in such a case should establish a legal response to the "decisive cause of the same" regime (Gomez Street, 1998). Configures the withdrawal as "an entirely free, exercisable power without having to rely on reason any that is not nor dependent upon a prior breach nor of the possibilities of redress for the employer" (SAP Baleares of 25 September 2003 [JUR 2004, 74599], is not necessary to justify decision (SAP Alava on June 19, [JUR 2007, 337463]). The exercise of this right is not subject to any formality, being admitted any form admitted in law. (Article 70 TR, articles 1258 and 1278 CC), proof of the exercise of this right of withdrawal is up to the consumer (article 72 TR). The final day for the period of delivery of the thing or delivery of service by establishing a penalty which increases as on the date of completion of the contract.

Consumer and user can at any time terminate the contract, bearing right to the repayment of the sums pay, but must compensate to the organizer or retailer in the following amounts, unless the resolution is by force majeure (art. 160 LGDCU). Will be credited the cost of management, cancellation, if any, and a penalty of 5 per cent of the

total amount of the trip if the cancellation occurs more than 10 and less than fifteen days prior to the date of the beginning of the journey; the 15 per cent between three days and ten, and 25 per cent within forty-eight hours prior to the departure. Not to stand out, the consumer must pay the total amount of the trip, paying, in his case, the amounts outstanding, unless agreed against the parties. If the package were subject to special economic conditions of recruitment, as freight aircraft, ships or special rates, cancellation costs shall be established in accordance with the conditions agreed between the parties.

The penalty enshrined in law contrasts with the general regime declaring the nullity of void clauses that impose on the consumer and user criminalization by the right of withdrawal. However, it should be noted that this penalty operates as a limit, so could not be admitted more serious consequences for the consumer than those laid down in the law. In fact, this could not admit a contractual clause that criminalized in terms other than those provided by law, the withdrawal of the user carried out in advance, i.e. before 15 days provided for in the law. On this issue should be noted the SAP of Barcelona on January 26, 2006 (AC 2006, 166) against this clause underlining the imperative character of the law based on the purpose to «provide greater protection to consumers.» Also there is no reference to the possibility that the parties agreed to different consequences in case of withdrawal of the user, unlike other precepts of the law itself so provides for that contingency (Mesa, 2006). Even could say that having been provided should have been accepted in writing. Why might say in such a clause it would be abusive (paragraph II.14 of the D.A. 1st. LCGC 98), as limiting rights and therefore null and void. In this way the SAP Madrid 30 June 2010 (JUR 2010, 3041111) recognizes the tourist full restitution of the reserve realized the withdrawal more than 15 days in advance without the travel agency has also credited cancellation fees.

Should be noted a tendency favourable to the recognition of force majeure which legitimises the consumer to demand the total restitution of what that paid by reason of the voyage contracted in the sudden appearance of a serious illness or unforeseen worsening, either in the person of the contractor or a very close relative of yours (SSAAPP Valencia 13 June 2007 [JUR 2007, 258924], Sta Cruz de Tenerife 31 October 2005 [JUR 2005, 272040], Zaragoza 1 April 2005 [AC 2005, 665] and SAP Leon 17 July 2009 [AC 2009, 1657], latter on the death of the plaintiff's sister and sister-in-law of actor after surgical intervention, however the existing disease at the time of the conclusion of the contract. In these cases, recognizes the burden or joint and several liability to the wholesale and retail (SAP Zaragoza, April 1, 2005 [AC 2005, 665]).

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