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Clauses of Ryan Air are declared null and void

The object under analysis in this article is the Judgment dated September 30th 2013 issued by the Madrid Commercial Court nº 5 that has been published by legal condemns in a number of media numbers of the national press.

This decision is remarkable because for the first time in Spain a court comes to assess the validity of part of the General Contracting conditions included in the accession agreements signed with the Irish airline Ryan Air.

The ruling responds to a procedure initiated by the Spanish Consumer Organisation (OCU as per its Spanish acronyms) that, in the scenario of verbal proceedings, filed an action requesting cessation of certain clauses deemed unfair, and consequently that applied for such clauses to be considered as not included.

On the basis of the criteria of consumer's protection supported by recent caselaw of the Court of Justice of the European Union, that allows national judges to examine ex officio the unfairness of contractual clauses aimed at consumers, the national court comes to analyse the disputed terms.

It is outstnading the participation of the public prosecution in these proceedings, which supported the annulment of some of the clauses subject to analysis.

Thus, after the appropriate verbal proceedings held between the parties, the judge makes a detailed analysis of the various clauses denounced and as a result some of the clauses and terms that were reported are declared null and void, and resolves the controversy that some of them were causing.

Most of the clauses declared null and void are well known clauses of the famous low cost company that, for the first time in Spain, are declared abusive.

Specifically, the clauses declared null are the following:

Clause G1 from article 2.4 1 regarding the Submission to Irish Law and Courts

Based on the European Directive 93/13 and on the basis of article 90 of the Spanish General Act for the defence of consumers and users (hereinafter referred to as TRLGDCU), the judge declares the invalidity of a clause that establishes the submission to the Irish jurisdiction and applicable law when affects to consumers resident in Spain, taking into account that the business statement was issued in Spain.

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On the whole, the court considers that this clause generates a significant imbalance between the rights and obligations of both parties and declares it null and void.

Clause G2 from article 3.1 1 regarding booking and documentation

Under consideration that the airlines are not entitled to restrict national security measures, considering that this is a right of the States, and taking into account the Spanish National Plan of Security (PNS as per its Spanish acronyms) that determines the official identification documents, understands the Court that a clause that restricts these rights cannot be admissible.

It is therefore declared null based on article 86.7 of the TRLGDCU.

Clause G6 from article 6.1, 6.2 y 6.3 regarding booking and bording

It is also declared null and void the clause that states a penalty of 40 euros per boarding pass printing, for those passengers who forgot to print it in advance.

In this case the nullity is based on article 85.6 of the TRGDCU by considering it a disproportionate penalty while Ryan Air did not provide sufficient evidence that justify this amount.

Clause G7 from article 7.1.1 y 8.1 regarding refusal of transport and luggage

These clauses that freely allow the company to refuse the carriage of the passenger or of his baggage if he has previously informed, is also declared null and void.

The judge based such decision on article 9 of the Retail Trade Management (hereinafter referred to as the LOCM) and the article 85 of the TRLGCU by considering that the clause goes against the legal obligation to sell to all dealers and assumes the connection of the contract to the will of the employer, in addition to limiting the rights of consumers.

Clause G10 from article 8.3 regarding Luggage, and non-acceptable objects in it.

Again, based on article 86.7 of the TRLGDCU, the judge declares null this clause that prohibits transporting in baggage certain objects, such as money, keys, cameras, computers, medications, eyeglasses, contact lenses, watches, mobile phones, cigarettes, passports and other documents by considering it limits the rights of consumers.

Clause G13 from article 8.8.1 regarding the pickup of luggage

This clause is declared null according to an undetermined charge that is established in favour of the company in case of luggage not collected within a reasonable period of time.

Clause G14 from article 9.1 regarding timetable adjustments

The court declares null and void this clause that allows unilateral adjustments of the time table scheduled by Ryan air without right of withdrawal by the consumer in such circumstances.

Clause G15 from article 18 regarding cash transactions

Finally this clause is also declared void by understanding that again, there is a restriction of the rights of consumers with violation of article 86.7 of the TRLGCU pursuant to article 1170 from the Spanish civil code that allows the legal currency in Spain as a way of legal payment.

Paula Casado

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The term advertising with reference to the use of domain names and Meta elements

On July 11th, 2013, the Court of Justice rendered its decision on Case C-657/11 regarding a preliminary ruling on the interpretation of the term advertising concerning misleading and comparative advertising in relation to the use of a domain name and that of metatags in a website's metadata.

The reference arose from a proceeding between two companies, namely BEST and Visys that are producers, manufacturers and distributors of sorting machines and sorting systems incorporating laser-technology. BEST was established in 1996 and Visys was established in 2004 by a former employee of BEST.

On 2007 Visys registered the domain name www.bestlasersorter.com. The content of the website hosted under that domain name is identical to that of Visys' usual websites.

It could be evidenced that when the words 'Best Laser Sorter' were entered in the search engine www.google.be, the second search result to appear, right after BEST's website, was a link to Visys' website.

BEST brought proceedings against Visys, seeking an order prohibiting those by alleging inter alia, the infringement of the law on comparative and misleading advertising. However, its claim was rejected in first and second instances.

BEST lodged an appeal on a point of law against the second instance judgment before the High Court of Appeal who decided to interrupt proceedings and to refer the following question to the Court:

"Is the term 'advertising' in Article 2 of [Directive 84/450] and in Article 2 of [Directive 2006/114] to be interpreted as encompassing, on the one hand, the registration and use of a domain name and, on the other, the use of metatags in a website's metadata?"

The Court answered the question submitted stating firstly, that with regard to the registration of a domain name, it should be noted that, the registration is nothing but a formal act. The mere registration of a domain name does not automatically mean that it will be used afterwards to create a website and that therefore, it will be possible for internet users to become aware of that domain name.

Therefore, such a purely formal act which, in itself, does not necessarily imply that potential consumers can become aware of the domain name and which is therefore not capable of influencing the choice of those potential consumers, cannot be considered to constitute a representation made in order to promote the supply of goods or services of the domain name holder, and cannot be considered within the meaning of advertising.

In regard with the use of a domain name, as such use makes reference to certain goods or services or to the trade name of a company, and constitutes a form of representation that is made to potential consumers and suggests to them that they will find, under that name, a website relating to those goods or services, or relating to that company, the Court stated that the term 'advertising' covers the use of the domain name.

Finally, with reference to the metatags in a website's metadata, the Court stated that such metatags, consisting of keywords which are read by the search engines when they scan the internet to carry out referencing out of the high number of sites found, constitute one of the factors enabling those engines to rank the sites according to their relevance to the search term entered by the internet user.

Given that in most of cases, an internet user entering the name of a company's product or a company's name as a search term is looking for information or offers on such specific product or such specific company and its range of products. Therefore, the Court stated that also the term 'advertising' covers the metatags in a website's metadata.

Jesús Carrasco

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Courts cannot prevent the claimant to exercise legal actions in a different suit to those claimants who did not bring a counterclaim

A Judgment issued by the Constitutional Court last May 6th has admitted an appeal against a series of judicial decisions in which it was understood that it was mandatory to counterclaim in order to avoid claims preclusion that the defendant may have against the plaintiff.

The Court has stated that this interpretation was damaging the right to effective judicial protection by disproportionately restricting the defendant's right to decide not to counterclaim.

In the case that gave rise to the action and subsequent Judgment, the defendant accepted the charges included in the claim and decided not to counterclaim. When the defendant initiated another lawsuit over claims other than those covered by the first claim but related to it, the Courts determined that those claims should have been exercised in the first proceedings by means of a counterclaim.

First, the Court considered the question in light of the principle of the right to obtain a judicial decision on the merits, included in the right to effective judicial protection included in Section 24 of the Spanish Constitution. The Constitutional Court has held that the appealed decisions have wrongfully prevented the appellant from obtaining a Judgment on the merits of their claims.

The Constitutional Court interprets that Section 406 of the Civil Procedure Act does not require the defendant to submit the claims that he may consider fit by means of a counterclaim, but that the Section uses the word "may". Hence, the Court held that what is stated in Section 406 does not consider it as an obligation but as a right of the defendant in a lawsuit against the claimant.

In this regard, the contrary interpretation of the meaning of Section 406 is to consider that the counterclaim is necessary to avoid the preclusion of the claim that the defendant may have against the plaintiff.

And despite it is true that Section 222 of the Civil Procedure Act extends the effects of res judicata to the claims made in the writ of claim as well as to the counterclaim, the Court considered that if the defendant decides not to counterclaim, then, Section 222 cannot be applied.

In short, despite the obvious relationship between the two legal proceedings, the Court, taking into account that claims to be exercised in the second lawsuit remained not-decided, provided constitutional protection to the plaintiff and declared invalid the decisions that dismissed the proceedings by allowing the appellant, therefore, to continue its claim.

Fernando González

Group of companies in insolvency proceedings

The Bankruptcy Act qualifies as subordinated those credits which are owned by individuals related to the debtor, being considered included within this concept those companies part of the same group of the company which has been declared in insolvency and their common partners.

The matter raised is to determine what is meant by companies of the same group, which is the subject of the decision of the Regional Court of Barcelona dated October 4th, 2012 that provides a comprehensive analysis of the case distinguishing between the position taken into account before and after the reform of Section 42 of the Commercial Code by Act 16/2007 dated July 4th.

The above mentioned decision arises from a previous claim issued by the creditor within the bankruptcy proceeding as his credit was classified as subordinated considering that the creditor was part of the same group as the insolvent company and therefore, a person connected with the debtor. Thus, the judgment

issued by the Court of First Instance concludes that it was appropriate to classify such credit as subordinate, taking into account that there was a sole management and decision Board, referring to the concept of group in a horizontal and vertical point of view.

Against this, the Judgment of the Regional Court distinguishes between the concept covered by the First Instance Court and stated in Section 42 of the Company Code prior to the reform introduced by Act 16/2007, and the one which is regulated after the reform, replacing the criteria of sole management and decision board for the concept of corporate control.

This way, according to the new criteria, the horizontal or peer groups shall be excluded from this classification thus, just the vertical groups in which there is a management position shall be included in this classification.

This new concept established in the Company Code is also extrapolated to the Bankruptcy Act after the reform by Act 38/2011 which introduces the sixth additional provision referring to the concept of group ruled in Section 42 of The Company Code for bankruptcy proceedings purposes.

In the case of this proceeding, the insolvent company is under the control of the same partners who in turn are members of one of the two companies which are co-owners of the creditor of the bankrupt.

However, the other owner of the creditor company is an independent company and subject to control different from such co-owners who are present at the insolvent company and also in the other company co-owner of the creditor.

According to the Court, this means that there is no group between bankrupt and creditor if it is controlled simultaneously by two separate companies, noting that the joint decision or the control of a company over another one is incompatible with the existence of a third company whose consensus is necessary because in that case there is no control of a company over another, or decision-making unit, but equality power for two independent companies, resulting from a company agreement that generates joint control over creditor company.

The Judgment states that the power that any of those companies have to prevent the other from taking some decisions is not the jointly decision that would identify a group of companies, and therefore if there is not a group, there is not subordinate credit and they will deserve the proper regime according to their nature.

Silvia Ara

Jurisdiction in cases of violation of the economic rights of an author through Internet sales

This judgment resolves a preliminary ruling which aims the interpretation of article 5, point 3, of the Regulation 44/2001 of the Council, of 22 December 2013, on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, which reads:

"A person domiciled in a Member State may, in another Member State, be sued in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur."

The main proceedings from which derived the prejudicial issue was initiated by a natural person domiciled in France holder of intellectual property rights of a series of musical works. The cited individuall sued in France the Austrian company Mediatech after discovering that this company reproduced without his authorization his works on CDS, which were later sold over the Internet by British companies Crusoe and Elegy and that may be acquired from France.

The defendant alleged in response the lack of jurisdiction of the French courts to hear such acts. Those allegations were dismissed by the French first instance Court arguing that an individual could acquire those cd's through a website accessible to the French public, which in

his opinion was enough to establish a substantial link between the facts and the damages alleged, which in summary justified the competence of the French Court. Later on the appeal the Court considered that the French Court was not competent to meet the subject, estimating that the place of domicile of respondent is in Austria and consequently the place where the damage occurred cannot be placed in France. This decision was again appealed and in this context, a preliminary ruling by the Court of Cassation was raised to determine whether under that article was or not competent French court.

The decision analyzes the related case law, which stipulates that the place of the materialization of the damage may vary depending on the nature of the right violated, taking into account also that the right whose violation is alleged must be protected in the Member State where the damage is materialized and which Court can better appreciate the alleged violation.

In this context and taking into account that the economic rights of an author should be protected by virtue of the Directive 2001/29, in an automatic way in all the Member States, the Court understood that the article should be interpreted in the sense that in the event of alleged infringement of copyrights protected by the Member State of the court seised, the latter has jurisdiction to hear an action to establish liability brought by the author of a work against a company established in another Member State and which has, in the latter State, reproduced that work on a material support which is subsequently sold by companies established in a third Member State through an internet site also accessible with the jurisdiction of the court seised. That court has jurisdiction only to determine the damage caused in the Member State within which it is situated.

Ignacio Gurpegui

Interpretation of the term abusive related to the legal interest

The decision of the Provincial Court of Barcelona 28th January 2013, result from a claim filed by a bank against a real estate developer company that was dismiss on first instance. The judge of the first instance consider that the interest for late payment applied by the financial entity (more or less 20.5 %) was abusive because exceed the maximum laid down in art. 19 of the Consumer Credit Law (Ley 7/1995, de 23 de marzo, de Crédito al consúmo) set at two point five the legal interest of the money. This reference is taken by the judge of first instance pursuant to the doctrine emanating from the European Court of Justice concerning the obligation of the national court assess ex officio the unfairness of a contractual clause in contracts concluded with consumers.

However, the bank appeals the decision arguing firstly that the Spanish Legal System doesn´t allow to declare by the judge in the execution, the unfairness of the interest for late payment established in the enforcement title and secondly less if the claim company was not a consumer because it is a real estate company constituted in the form of a limited company.

Regarding the first argument, the Provincial Court means that the Court of first instance may not value before admitting to process the claim, the unfair nature of the penalty interest agreed, but such issue must be raised in the corresponding judgment. However, following the decision of the European Court of Justice on June 14, 2012, the Court reconsiders its decision not only in terms of the order for payment procedure but makes also it extensible to the foreclosure proceedings since the causes of opposition are very limited.

However, this ability to examine ex officio the unfairness is made in order to protect the consumer as set out in the Directive 93/13 of 5 April 1993 on unfair terms in contracts concluded with consumers, so in case of not being in the case of a consumer, the ex officio examination would not be possible.

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In this sense the Court takes into account the liberal scheme of the Spanish Civil Code and the autonomy of private contracting of the parties (as set in the art. 1255 of the Spanish Civil Code); and also consider that even though the case law reserves the possibility of nullity ex officio in case of acts contrary to the moral, law, and public order, it does not seem to be the present case, with a clause agreed by the parties including a moratorium interests in a deed of mortgage signed between two entities authorized by a public notary.

Consequently the main interest of this ruling focuses on the possibility for a real estate company to be considered as a consumer regarding the abovementioned definitions. For this purpose, the Provincial Court take in to account the arguments of Spanish Supreme Court in a similar case reasoning (decision of the Spanish Supreme Court June 18, 2012); the decision firstly analyses the Royal Legislative Decree 1/2007 of 16 November, which approves the revised text of the General Law for the defense of consumers and users, that defines the consumer as a "final recipient" excluding those who uses such good or service to integrate them into a processes in connection with the market. At the same time, the Preamble of this Royal Legislative Decree, notes that the intervention of this final recipient in the consumption relations should respond to "private purposes" in accordance with European case-law, that establish in a more restrictive way referring to the act of consumption regarding "the personal or family needs".

Based on this reasoning, the Provincial Court understands that the real estate company that receive a mortgage credit for the execution of works, can hardly be regarded as consumer since the credit in question is granted to the company in order to finance not a personal purpose but a business need. In consequence, the legislation of consumers cannot be applied to a company.

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