

RAIL PASSENGERS' RIGHTS UNDER REGULATION (EC) NO 1371/2007 AND THEIR IMPLEMENTATION IN SPAIN: DOES THE SPANISH RAIL SECTOR REGULATION COMPLY WITH THE ACQUIS COMMUNAUTAIRE?

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Regulation (EC) No 1371/2007 of the European Parliament and of the Council, of 23 October 2007, on Rail Passengers' Rights and Obligations, contains the basic EU rules regarding the protection of passengers in rail transport, both on a domestic and an international level. Similarly to what happens in carriage by air (Regulation No 2027/1997, as amended by Regulation No 889/2002) and sea (Regulation No 392/2009), the Rail Passenger Regulation refers—in its Articles 4, 11 and 15—to an international Convention, the Uniform Rules concerning the Contract of International Carriage of Passengers by Rail (Appendix A to the 1999 COTIF Convention). However, it introduces some additional rights that do not always fit easily into the framework designed by the Rules, especially as regards the liability of the carrier in case of delay, missed connections and cancellation. The only judgment of the European Court of Justice on this issue (Case C-509/11, ÖBB-Personenverkehr) addresses only part of the problem, in particular, the compensation of the ticket price in case of delay. Furthermore, Regulation No 1371/2007 does not prohibit the existence of national measures that improve the passengers' protection, so domestic law has to be taken into account, too. In Spain, the relevant legislation was adopted in 2004 and has not been amended after the Regulation came into force, so some of its provisions are clearly

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*inconsistent with the *acquis communautaire*. The paper seeks to describe the exact content of the passengers' rights under Regulation No 1371/2007 and to identify those domestic rules that cannot be applied any more since they are contrary to European Union law and should therefore be repealed.*

*Keywords: Rail transport, *acquis communautaire*, Spanish rail sector regulation, passenger protection*

I. INTRODUCTION

More than a decade ago, in its 2001 White Paper "European Transport Policy for 2010: Time to Decide"¹ the European Commission set as an objective the introduction of measures for the protection of passengers in all modes of transport. Since then, considering the passenger as a consumer, and thus as the weak part of the contract of carriage, has been a constant feature in Community legislation that, faced with certain undesirable practices carried out by transport undertakings, has established minimum rights that are to be respected in any case.² Although the air transport sector pioneered in establishing the first passenger protection regulation³, the measures adopted therein have been extended in a similar way to other modes of transport.⁴ As regards rail transport, the Community enacted Regulation (EC) No 1371/2007 of the European Parliament and of the Council, of 23 October 2007, on rail passengers' rights and obligations, which entered into force on 3 December 2009.⁵

¹ COM (2001) 370 *final*, of 12 September 2001.

² European Commission (2002), *Communication to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions: "Consumer Policy Strategy 2002-2006*, COM (2002) 208 *final*, para. 3.1.5.1.

³ Regulation (EC) No 261/2004 of the European Parliament and of the Council, of 11 February 2004, establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91 (*O.J.* L 46, 17 February 2004).

⁴ Regulation (EU) No 1177/2010 of the European Parliament and of the Council, of 24 November 2010, concerning the rights of passengers when travelling by sea and inland waterway and amending Regulation (EC) No 2006/2004 (*O.J.* L 334, 17 December 2010); Regulation (EU) No 181/2011 of the European Parliament and of the Council, of 16 February 2011, concerning the rights of passengers in bus and coach transport and amending Regulation (EC) No 2006/2004 (*O.J.* 55, 26 February 2011).

⁵ *O.J.* L 315, 3 December 2007. A synoptic overview of its content can be seen, *e.g.*, in Amerio, S. (2010), *La tutela del viaggiatore nel trasporto ferroviario: un'occasione*

This Regulation contains the EU legal regime on carrier liability in rail passenger transport by implementing the relevant part of the Uniform Rules concerning the Contract for International Carriage of Passengers and Luggage by Rail (CIV UR), Appendix A to the Convention concerning International Carriage by Rail (COTIF) of 9 May 1980, as amended by the Vilnius Protocol of 3 June 1999 (Art. 6 § 1.a).⁶ Apart from the traditional liability for death and injury in case of accident, and for delays and incidents with the baggage (loss, damage and delay), particular attention is now paid to frequent cases of breach of contract: cancellations, missed connections, delays or overbooking. It is precisely the obligation of the carrier and the correlative rights of passengers in such cases that shall be analysed in the present study. To this purpose, rail passenger rights according to Regulation (EC) No 1371/2007 shall be examined, with special reference to Spanish domestic legislation, in particular, the 2003 Rail Sector Act (RSA)⁷, developed by the 2004 Rail Sector Regulation (RSR)⁸, as well as the 1987 Land Transport Organization Act (LTOA)⁹, all of which have been modified on repeated occasions. As a matter of fact, the draft of a new Rail Sector Act¹⁰ is being debated in Parliament at this moment, although it remains unclear whether it will be passed before the end of the present legislature.

ne (forse) perduta, *Contratto e Impresa/Europa*, Vol. 15 (1), pp. 491-499; Piloñeta Alonso, L. M. (2014), El contrato de transporte terrestre de personas, in: Menéndez, P. (Ed.), *Régimen jurídico del transporte terrestre: carreteras y ferrocarril* (pp. 855-940), Cizur Menor, Thomson Reuters-Aranzadi, pp. 864 et seq.

⁶ The EU itself joined the COTIF by an Agreement between the European Union and the Intergovernmental Organization for International Carriage by Rail on the Accession of the European Union to the Convention concerning International Carriage by Rail (COTIF) of 9 May 1980, as amended by the Vilnius Protocol of 3 June 1999 (*O.J. L 51*, 23 February 2013). The possibility that “regional economic integration organizations” access the Convention is expressly envisaged by Art. 38 COTIF. Spain, on its part, had already ratified the Convention on 7 June 2002 [published in the Spanish Official Journal (*B.O.E.*) No 149, 23 June 2006].

⁷ Act No 39/2003, of 17 November (*B.O.E.* No 276, 18 November 2003).

⁸ Enacted by Royal Decree No 2387/2004, of 30 December (*B.O.E.* No 315, 31 December 2004).

⁹ Act No 16/1987, of 30 July (*B.O.E.* No 182, 31 July 1987), developed by the Regulation enacted by Royal Decree No 1211/1990, of 28 September (*B.O.E.* No 241, 8 October 1990).

¹⁰ *B.O.C.G.* Series A, No. 152-1, 14 May 2015.

II. THE RULES CONTAINED IN REGULATION (EC) No 1371/2007

I. Scope of application

According to its Article 2.1, Regulation (EC) No 1371/2007 shall apply immediately to all rail journeys and services throughout the Community, both intra-Community and domestic, provided by one or more licensed¹¹ railway undertakings.¹² However, while this is true for some of the rules envisaged by the Regulation (Art. 2.3)¹³, paragraphs 4 and 5 of Article 2 allow for the Member States to grant, among other things: *a*) a temporary exemption (for a period of no longer than five years, which may be renewed twice for a maximum period of five years on each occasion) from the application of the remaining provisions of the Regulation to all domestic rail passenger services¹⁴; and *b*) an exemption without any temporary limit from the application of the remaining provisions of the Regulation to urban, suburban and regional rail passenger services.¹⁵

¹¹ The rules on licensing of railway undertakings are contained as of today in Chapter III of the Directive 2012/34/EU of the European Parliament and of the Council, of 21 November 2012, establishing a single European railway area (*O.J.* L 343, 14 December 2012), which replaced as of 15 December 2012 the Directive 95/18/CE, mentioned in Art. 2.1 of Regulation (CE) No 1371/2007.

¹² For the definition of the term “railway undertaking”, Art. 3.1 of Regulation (EC) No 1371/2007 refers to Directive 2001/14/EC of the European Parliament and of the Council, of 26 February 2001, on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure and safety certification (*O.J.* L 75, 15 March 2001). However, the latter has also been repealed by the mentioned Directive 2012/34/EU. As of today, the expression “railway undertaking” is defined as “any public or private undertaking licensed according to this Directive, the principal business of which is to provide services for the transport of goods and/or passengers by rail with a requirement that the undertaking ensure traction; this also includes undertakings which provide traction only” (Art. 3.1 of Directive 2012/34/EU).

¹³ In particular, the availability and distribution of tickets (Art. 9); the liability regime for damage in case of accident and incidents with the baggage (Art. 11); the mandatory liability insurance (Art. 12); the rules related to the right to transport and information for disabled persons and persons with reduced mobility (Arts. 19 and 20.1); or the settlement of security measures (Art. 26).

¹⁴ As defined in Art. 3.11: passenger services which do not cross a border of a Member State.

¹⁵ These terms are defined in Art. 3 of Directive 2012/34/EU [which repeals Directive 91/440/EEC, of 29 July 1991, on the development of the Community’s railways (*O.J.* L 237, 24 August 1991)]: 1) “urban and suburban services” are those trans-

Spain has indeed made use of this possibility by virtue of an Agreement of the Council of Ministers of 5 March 2010.¹⁶ Thereby, urban and regional rail passenger services¹⁷ have been exempted from the obligation to use the Computerised Information and Reservation System for Rail Transport (CIRSRT)¹⁸, envisaged by Article 10 of Regulation (EC) No 1371/2007. Furthermore, during a period of five years, urban and regional services were declared exempted from the application of the provisions contained in Articles 21 to 24 of Regulation (EC) No 1371/2007, namely, the rights of disabled persons and persons with reduced mobility; during the same period, all national services were relieved from the obligations regarding the complaint handling mechanism for the rights and obligations covered by the Regulation, provided for in Article 27.

Without prejudice to these exemptions, the second of which expired in March 2015, the entire content of the Community Regulation applies to intra-

port services whose principal purpose is to meet the transport needs of an urban centre or conurbation (including a cross-border conurbation), as well as the transport needs between such centre or conurbation and surrounding areas; and 2) “regional services” are those transport services operated to principally meet the transport needs of a region (including a cross-border region).

- ¹⁶ Resolution of 22 May 2010, of the Directorate General of Land Transport, that publishes the Agreement of the Council of Ministers of 5 March 2010, adapting the rail transport the Regulation (EC) No 1371/2007, of the European Parliament and of the Council, of 23 October 2007, on rail passengers’ rights and obligations, to the current situation (*B.O.E.* No. 106, 1 May 2010).
- ¹⁷ Urban rail services are defined by the Agreement of the Council of Ministers as those whose aim is to meet “intensive and recurrent mobility, in order to provide connections both within metropolitan areas and between large cities and their areas of influence, characterized by a high concentration of the demand during certain periods of time as a consequence of productive mobility”. Regional rail services, on their part, address “the satisfaction of intermediate mobility, connecting medium-sized cities with each other and with the capital of the Autonomous Region, or with that of one or more contiguous Regions, or between those cities and the small towns of its area of influence, usually outside the scope of metropolitan areas, where they exist. In certain areas, this need of transport manifests itself with the features of recurrent and necessary mobility”.
- ¹⁸ CIRSRT is defined in Art. 3.14 of Regulation (EC) No 1371/2007 as: “a computerised system containing information about rail services offered by railway undertakings; the information stored in the CIRSRT on passenger services shall include information on: *a*) schedules and timetables of passenger services; *b*) availability of seats on passenger services; *c*) fares and special conditions; *d*) accessibility of trains for disabled persons and persons with reduced mobility; *e*) facilities through which reservations may be made or tickets or through tickets may be issued to the extent that some or all of these facilities are made available to users”.

Community and domestic rail transport in Spain. The situation differs considerably in other Member States, a situation that hampers the consecution of a level playing field for railway undertakings and a high level of protection for passengers in the EU.¹⁹

2. Minimum passengers' rights in case of delay, missed connection and cancellation

Regulation (EC) No 1371/2007 contains a number of rail passenger rights that may not be limited or waived, notably by a derogation or restrictive clause in the transport contract (Art. 6.1). However, an *enhancement* of rights either on the part of the railway undertaking (Art. 6.2) or on that of the respective Member State remains possible. The rights awarded by the Regulation have thus the character of a minimum protection that has to be offered in any case.

The legal regime laid down in Regulation (EC) No 1371/2007 is confusing and sometimes obscure. On the one hand, it provides for specific rules in case of certain types of breach of contract (delays, missed connections and cancellations) in its Chapter IV (Arts. 16-18). On the other hand, Article 15 generically refers to Chapter II of Title IV of the CIV Uniform Rules (enclosed as Annex I to the Regulation), which surprisingly contains only one provision (Art. 32 CIV UR), on liability of the rail carrier in case of failure to keep the timetable, *i.e.*, delay (here referred to as "late running"), missed connections and cancellations. Article 32 CIV UR is thus to be applied to domestic rail transport services also, which as a rule are excluded from the scope of application of the Convention (*ex* Art. 1 CIV UR).

A. Passenger protection in case of delay

The minimum protection offered to passengers in case of delay is contained in Article 16 of Regulation (EC) No 1371/2007. The concept of delay can be drawn from the provision in Article 16.1 and it occurs when arrival at the final destination takes place after the time scheduled in the transport contract.

¹⁹ See European Commission (2015), *Report to the European Parliament and the Council: "Exemptions granted by Member States under Regulation (EC) 1371/2007 on rail passengers' rights and obligations"*, COM (2015) 117 final, according to which "it can be said that Member States granted extensive exemptions during the first years of application of [the Regulation], and only very modest improvements can be expected in the near future".

However, the legal consequences of delay differ according to whether there is an *actual* delay upon arrival or whether it is *reasonable to expect* that a delay at the final destination will occur. Furthermore, not every delay over schedule gives rise to protection rights on the side of passengers. The delay rather has to be of a considerable duration to be taken into account: 60 minutes or more, irrespective of the length of the trip.²⁰ Nevertheless, the Regulation does not qualify this time span as “long delay”, “serious delay” or “significant delay” like other Community legal instruments do.²¹

Where the (expected) delay exceeds 60 minutes, the Regulation establishes certain obligations of the carrier and the corresponding passenger rights: information; reimbursement or re-routing; assistance; and compensation.

a) The *duty of information to passengers about their rights* is contained in Article 29 and aims at protecting passengers by ensuring that their rights are effective. The protection for the passenger would actually be of little use if he was not aware of his rights and of the means to enforce them.²² This duty of information does not affect only railway undertakings but also station managers²³ and tour operators. To this aim, a summary of the provisions of the Regulation, prepared by the Commission itself²⁴, may be used by the undertakings and contact information of the appropriate national enforcement body in the relevant Member State in charge of the enforcement of the Regulation (in Spain,

²⁰ A measure that has been criticized by Demarchi, P. G. (2010), I disagi nel trasporto ferroviario: ritardi, lesione e morte del passeggero, in: *id.* (Ed.), *I diritti del consumatore e la nuova class action* (pp. 188-202), Torino, Zanichelli, p. 197.

²¹ Thus, respectively: the title itself of Regulation (EC) No 261/2004; recital 13 of Regulation (EU) No 1177/2010; and recital 16 of Regulation (EU) No 181/2011.

²² Piras, M. (2005), Il rifiuto di trasportare e il ritardo del vettore aereo nella nuova disciplina comunitaria, in: Deiana, M. (Ed.), *Studi su negato imbarco, cancellazione del volo e ritardo nel trasporto aereo nella nuova disciplina comunitaria* (pp. 155-184), Cagliari, Edizioni AV, p. 164; Brignardello, M., *La tutela dei passeggeri in caso di negato imbarco, cancellazione del volo e ritardo prolungato. Normativa vigente e prospettive di riforma*, Torino, Giappichelli, p. 129.

²³ In this sense, the Court of Justice (First Chamber) established in its judgment of 22 November 2012, Case C-136/11 (*Westbahn Management GmbH v ÖBB-Infrastruktur AG*), that Art. 8 of the Regulation must be interpreted as meaning that the infrastructure manager is required to make available to railway undertakings, in a non-discriminatory manner, real time data relating to trains operated by other railway undertakings, in so far as those trains constitute main connecting services.

²⁴ European Commission (2009), *Railway passengers in the EU have new rights as from today*, DG Mobility and Transport, retrieved on 30/07/2015 from http://ec.europa.eu/transport/themes/passengers/rail/doc/summary-of-rail-passenger-rights_en.pdf.

the Ministry of Transport) shall be supplied (Art. 29). Strikingly, however, the Regulation does not establish whether this information has to be publicised, how and where, or whether, on the contrary, that duty is complied with by providing information at the request of the passenger.

Furthermore, Article 7 of the Regulation requires railway undertakings or, where appropriate, the competent authorities responsible for public service railway contracts, to provide information concerning decisions to discontinue services. In this respect, the provision — in too vague a way — requires to make “public by appropriate means, and before their implementation, decisions to discontinue services”. Moreover, the reference to Parts I and II of Annex II (minimum information to be provided before and during the journey) in Article 8 merely requires that the passengers be informed of the activities likely to disrupt or delay services, and of delays during the journey.²⁵

The right to information is more specifically determined in Article 18 by establishing an obligation of timely and continuous information, although its location is quite unfortunate. In the case of delay in arrival or departure, passengers shall be kept informed of the situation and of the estimated departure and arrival time by the railway undertaking or by the station manager as soon as such information is available. Compliance with that obligation is essential for passenger protection, in order for him or her to exercise the right to reimbursement or re-routing provided for in Article 16.²⁶ In any case, the duty to supply information envisaged by the Regulation is insufficient²⁷ if compared with the situation in other transport modes.²⁸

²⁵ Surprisingly, the European Commission (2013), *Report of 2013 to the European Parliament and to the Council on the Application of Regulation (EC) No 1371/2007*, COM (2013) 587 *final*, considers that this information consists of general contract conditions and information on fares and journeys.

²⁶ Demarchi, P. G. (2010), *op. cit.* note 20, p. 199.

²⁷ *Contra*, Amerio, S. (2010), *op. cit.* note 5, p. 494.

²⁸ See Arts. 16 and 23 of Regulation (EU) No 1177/2010 that compel the sea and inland waterway carrier or, where appropriate, the terminal operator, to inform passengers departing from port terminals of the situation as soon as possible and *in any event no later than 30 minutes after the scheduled time of departure*. See also Art. 20.1 of Regulation (EU) No 181/2011: “as soon as possible and in any event no later than 30 minutes after the scheduled departure time”. A similar obligation of continuous and updated information about events and flight status can be found in the Proposal amending Regulation (EC) No 261/2004 [COM (2013) 013]: “In the event of cancellation or delay in departure, passengers shall be informed by the operating air carrier of the situation as soon as possible and in any event no later

b) The *rights to reimbursement and re-routing* are regulated in Article 16. They arise when it is reasonable to expect that the delay in the arrival at the final destination under the transport contract will be more than 60 minutes. It is in fact not necessary that there be an *actual* delay at the place of destination; it suffices if the carrier has reason to believe that the duration of the transport might exceed the scheduled period in more than 60 minutes. Timely and accurate compliance by the railway undertaking with its obligation to provide passengers with information about the delay is thus a prerequisite for the application of this rule. This seems logical since only then the passenger has enough time to choose among the options envisaged by the Regulation.²⁹

As to the content of the right, the railway undertaking has to provide, at the passenger's choice, either: a) reimbursement of the full cost of the ticket for the part or parts of his or her journey not made and for the part or parts already made if the journey is no longer serving any purpose in relation to the passenger's original travel plan, together with, when relevant, a return service to the first point of departure at the earliest opportunity; or b) continuation or re-routing to the final destination "under comparable transport conditions" and at the earliest opportunity³⁰; or c) continuation or re-routing, under comparable transport conditions, to the final destination at a later date at the passenger's convenience.

c) In contrast to the rights to reimbursement or re-routing (where a reasonably expected delay is enough), the *right to assistance* recognized in Article 18 requires an *actual* delay of more than 60 minutes. It consists of: 1) meals and refreshments in reasonable relation to the waiting time, if they are available on the train or in the station, or can reasonably be supplied; 2) hotel or other accommodation, and transport between the railway station and the place of accommodation, in cases where a stay of one or more nights or an additional

than 30 minutes after the scheduled departure time, and of the estimated departure time as soon as this information is available" (Art. 14.5).

²⁹ Demarchi, P. G. (2010), *op. cit.* note 20, p. 197.

³⁰ As the European Commission (2013), *op. cit.* note 25, puts it: "many railway undertakings tend to interpret restrictively the notion of 'comparable transport conditions' in Article 16(b) and re-route only on their own services but not on other services (notably high-speed trains) or transport modes". On its part, the European Commission (2015/1), *Interpretative Guidelines on Regulation (EC) No 1371/2007 of the European Parliament and of the Council on Rail Passengers' Rights and Obligations*, O.J. C 220, 4 July 2015, pp. 1-10, at p. 6, recommends a series of "good practices" in order for an alternative service to be rendered under comparable conditions.

stay becomes necessary, where and when physically possible; and 3) if the train is blocked on the track, transport from the train to the railway station, to the alternative departure point or to the final destination of the service, where and when physically possible.

From what has been said it becomes clear that Regulation (EC) No 1371/2007 gives rise to the same uncertainties as those under the remaining EU Regulations governing the protection of passengers in other modes of transport. For instance, the vagueness of the expression “in reasonable relation to the waiting time”³¹ raises special problems in those cases in which the railway undertaking does not provide for maintenance and it is borne by the passenger who subsequently requests reimbursement. When are these expenses to be considered excessive? Or what happens if the passenger has no evidence of their payment?³² Similarly, it is objectionable that maintenance and accommodation are only due if it can reasonably be supplied or if it is physically possible, since the obligation seems to be easily avoidable and requires an assessment of its “reasonableness” or “possibility”.³³

d) The fourth right of passengers — and corresponding duty for the rail carrier — is *the right to request financial compensation* in case of late arrival. It is regulated in Article 17 and its purpose is to ensure automatic and prompt compensation to the passenger, without having to prove the damage.³⁴ At the same time, it serves to curb breaches of contract by the carrier, although the amounts set out in this Regulation, like in Regulation (EU) No 1177/2010,

³¹ The same expression can be found in Art. 9 of Regulation (EC) No 261/2004, in Art. 17 of Regulation (EU) No 1177/2010 and in Art. 21.a) of Regulation (EU) No 181/2011.

³² See Petit Lavall, M. V. (2015), in: Morillas, M.J.; Petit, M. V.; Guerrero, M. J., *Derecho aéreo y del espacio*, Madrid, Marcial Pons, p. 638.

³³ For passengers travelling by sea see Zunarelli, S. (2012), Il Regolamento (UE) n. 1177/2010 sui diritti dei passeggeri che viaggiano per mare: obblighi di vettori e di operatori dei terminali e problemi applicativi, *Il Diritto Marittimo*, Vol. 114 (III), pp. 779-785, at p. 784; González Cabrera, I. (2013), Retraso, cancelación y denegación de embarque: un análisis comparado de su tratamiento en el Derecho de la navegación marítima y aérea, *Revista de Derecho del Transporte*, Vol. 11, pp. 81-114, at pp. 91, 106 and 111; Petit Lavall, M. V. (2013), El Reglamento (UE) n° 1177/2010 y la protección de los pasajeros que viajan por mar, *Revista de Derecho del Transporte*, Vol. 12, pp. 11-29, at p. 18.

³⁴ The Spanish, Italian and German versions of Art. 17 refer to “indemnity” (“indemnización”, “indennità” and “Entschädigung”, respectively), which is not quite correct from a dogmatic point of view, since there is not necessarily any measurable “damage” that has to be compensated.

are not as deterrent as those provided for in air transport.³⁵ By virtue of said article, the carrier is obliged to compensate at least: a) a 25 % of the ticket price for a delay in the arrival of 60 to 119 minutes; or b) a 50 % of the ticket price for a delay of 120 minutes or more.

The right to compensation arises whenever the delay is equal to or greater than 60 minutes, regardless of the transport distance. However, as an exception, calculation of the period of delay shall not take into account any delay occurred outside the territories in which the Treaty establishing the European Community is applied, the burden of proof of which corresponds to the railway undertaking (Art. 17.1 *in fine*).

It seems to follow from the Spanish translation of Article 17.1 (“el viajero que vaya a sufrir un retraso”) that the right to obtain financial compensation arises when a delay of at least 60 minutes is *foreseeable* and that it does not necessarily have to take place. However, other language versions make it clear that this is not the case and an actual delay has to have occurred.³⁶ Be that as it may, the passenger can request compensation and is entitled to it, provided that he or she has not opted for a ticket refund according to Article 16.a), *i.e.*, when he or she has decided to continue the journey. Furthermore, Article 17.4 establishes that the passenger shall not have any right to compensation if he or she is informed of the delay before buying the ticket, or if the delay in spite of the continuation on a different service or re-routing remains below 60 minutes. In other words, the passenger is entitled to compensation whenever he or she is not informed of the possible delay before the conclusion of the contract and, by contrast, the right to is not enforceable when the ticket is bought after having been informed on the delay.

Where the transport contract is for a return journey, compensation for delay on either the outward or the return leg shall be calculated in relation to half of the total price paid for the ticket (Art. 17.1). This provision seeks to prevent that compensation would be reduced in cases where the delay occurs on the return journey, as the price of a return ticket purchased in the framework of a

³⁵ Correctly in this sense, Piras, M. (2012), *International Recent Development: European Union-Maritime Passenger Transport*, *Tulane Maritime Law Journal*, Vol. 36, pp. 627-639, at pp. 636 and 637.

³⁶ See especially the German (“wenn [der Fahrgast] eine Verspätung erleidet”), the French (“le voyageur qui subit un retard”) and Italian (“in caso di ritardo”) versions. The slightly different Spanish wording probably stems from an inadequate translation of the English text (“a passenger [who] is facing a delay”).

round-trip transportation is often lower.³⁷ In the same sense, the price for a delayed service under any other form of transport contract that allows travelling several subsequent legs shall be calculated in proportion to the full price. Thus, by calculating the financial compensation with respect to the ticket price and therefore to the entire journey — that may integrate several successive transports —, the rail regulation improves the system provided for air transport in Regulation (EC) No 261/2004. The latter establishes compensation in relation to the “flight” and not to the “journey”, which has been causing problems of interpretation and, in fact, the Proposal amending Regulation (EC) No 261/2004 aims at replacing the term “flights” by the expression “travels”.³⁸

Article 17.1 also envisages the possibility that compensation is requested by passengers who hold a travel pass or season ticket and encounter recurrent delays or cancellations during its period of validity. However, the Regulation limits itself to a reference to the railway undertaking’s compensation arrangements, which shall state the criteria for determining delay and for the calculation of the compensation; a compensation that has to be, in any case, “adequate”. The regulation accordingly refers to the contractual conditions of the carrier or, if any, to the relevant rules of each State, that are to contain a system of compensation in the event of delay. It follows from Article 6 that the said regime must respect the rules laid down in the Regulation itself.³⁹

Compensation for delay shall be calculated in relation to the price the passenger actually paid for the delayed service (Art. 17.1), *i.e.*, in relation to the total amount satisfied and not to the price of the ticket. That is why it cannot be reduced by financial transaction costs such as fees, telephone costs or stamps.⁴⁰ However, Article 17.3 recognizes that the carrier may introduce a minimum threshold under which no payments for compensation will be made, provided this threshold does not exceed four euros. Although the wording of the provision is not quite clear, it seems that this minimum amount refers to compensation and not the price paid for the transport.⁴¹

In a correct manner, the Regulation requires the compensation of the ticket price to be paid within one month after the submission of the corresponding

³⁷ A provision that has been incorporated subsequently in Art. 19.4 of Regulation (EU) No 1177/2010. See Petit Lavall, M. V. (2013), *op. cit.* note 33, p. 20.

³⁸ Petit Lavall, M. V. (2015), *op. cit.* note 32, p. 642.

³⁹ A rule that has also been introduced in Art. 19.2 of Regulation (EU) No 1177/2010.

⁴⁰ This was clearly established later in Art. 19.3 Regulation (EU) No 1177/2010.

⁴¹ In this sense, Casanova, M.; Brignardello, M. (2012), *Diritto dei Trasporti*, II, *La disciplina contrattuale*, 2nd ed., Milano, Giuffrè, p. 165.

request and it may be paid in vouchers and/or other services if the terms are flexible (in particular, regarding the validity period and destination)⁴², albeit the compensation shall be paid in money at the request of the passenger (Art. 17.2). The same conditions apply to the reimbursement of the cost of the ticket according to Article 16.a). To facilitate the exercise of the right to compensation, Article 18.4 requires railway companies to certify on the ticket at the request of passengers that the rail service has suffered a delay, led to a missed connection or that it has been cancelled, as the case may be.⁴³

B. Passenger protection in case of cancellation and missed connections

Even though Chapter IV of the Regulation is entitled: “Liability for delays, missed connections and cancellations”, only Article 17 — when regulating the right to compensation — contains a paragraph that expressly refers to *cancellation*. It provides that “passengers who hold a travel pass or season ticket and who encounter recurrent delays or *cancellations* during its period of validity may request adequate compensation in accordance with the railway undertaking’s compensation arrangements”. Something similar happens in case of missed connections, which are not even referred to in the Regulation (beyond the fact that such a circumstance has to be certified by the carrier on the ticket: Art. 18.4).

There are, however, some obligations of the carrier related to interruptions of the transport service. On the one hand, Article 18 provides that, if the railway service cannot be continued anymore, railway undertakings shall organize as soon as possible alternative transport services for passengers (para. 3). On the other hand, if the train is blocked on the track, passengers shall have the right to be transported from the train to the railway station, to an alternative departure point or to the final destination of the service, “where and when physically possible” (para. 4). In any case, the fact that the service has been cancelled or led to a missed connection has to be certified by the carrier on the ticket (Art. 18.4).

Faced with the illogical silence of the Regulation, the question of what rights assist the passenger in such cases necessarily arises. But this surprisingly

⁴² Demarchi, P. G. (2010), *op. cit.* note 20, p. 199, rightly understands that they must be valid at least during several months.

⁴³ On the difficulties of its compliance see Demarchi, P. G. (2010), *op. cit.* note 20, pp. 197 and 198.

has not prevented the Commission from stating in its Report of 2013 to the European Parliament and to the Council on the Application of the Regulation (EC) No 1371/2007 that “there was no systematic non-compliance or major ambiguities with any provision of the Regulation”.⁴⁴

However, on the one hand, it cannot be overlooked that the rule seeks to ensure a minimum level of protection for passengers and that the disorders he or she suffers are similar in case of delay and in case of cancellation or missed connection.⁴⁵ On the other hand, it would seem meaningless that Chapter IV of the Regulation expressly incorporates cancellation and missed connections into its title but ignores them in the text (beyond the reference to Art. 32 CIV UR we will come back to later in the text). Therefore, it has to be understood that the passenger—even in case of cancellation or missed connections—has the right to timely and continuous information under Article 18; the right to reimbursement or re-routing where a delay in arrival of over 60 minutes is reasonably to be expected (Art. 16); the right to assistance (Art. 18) when the waiting time due to delay, cancellation or a missed connection exceeds 60 minutes (Art. 16); and the right to compensation (Art. 17) when the cancellation or the missed connection causes an actual delay in the arrival of at least 60 minutes (excluding periods of delay due to cancellations or missed connections outside the territory of the EU).⁴⁶

C. The incorporation of the regime contained in Article 32 CIV UR

As already seen, Article 15 of Regulation No 1371/2007 incorporates the CIV UR provision on liability of railway undertakings where they fail to comply with the timetable, *i.e.*, in case of cancellations, delays or missed connections. Unlike Articles 16 to 18 of the Regulation, Article 32 CIV UR (that forms part of Annex I to the Regulation) does not contain a regime of protection for passengers. It rather sets up a system of liability of railway undertakings com-

⁴⁴ European Commission (2013), *op. cit.* note 25.

⁴⁵ This has been stated for air transport by the Court of Justice in its judgements of 19 November 2009 (Fourth Chamber), Joined cases C-402/07 and C-432-/07 (*Sturgeon*); and of 23 October 2012 (Grand Chamber), Joined cases C-581/10 and C-629/10 (*Nelson*).

⁴⁶ Puetz, A.; Bleda Rodríguez, J. (2015), Los contratos de transporte de pasajeros, in: Franch Fluxá, J. (Ed.), *Manual de contratación turística* (pp. 137-166), Barcelona, Atelier, p. 159. See also European Commission (2015/1), *op. cit.* note 30, p. 6, albeit referred only to cancellations.

plementing the minimum passenger rights, although in a somewhat confusing way.⁴⁷

Thus, whereas Article 18.2.b) establishes the obligation of the railway undertaking to *provide* free accommodation in cases where a stay of one or more nights or an additional stay becomes necessary (where and when it is physically possible), Article 32 only obliges to *reimburse* the “reasonable” costs of accommodation when — due to the cancellation, the late running of a train or a missed connection — the journey cannot be continued (or could not reasonably be required to continue because of given circumstances) the same day. To be added is the reimbursement of the costs occasioned to the passenger by having to notify persons expecting him at the station of destination (an aspect not mentioned in Art. 18 of the Regulation). On the contrary, Article 32 CIV UR omits any reference to the supply of reasonable meals and refreshments, or the transport between the railway station and the place of accommodation (Art. 18 of the Regulation).

However, Article 32 CIV UR does not prohibit that damages for harm other than accommodation and notification costs be claimed from the carrier (*e.g.*, maintenance, or even lost profits or moral damages⁴⁸), but it subjects such actions to national law (Art. 32 § 3 CIV UR). What is much more important is that Article 32 § 2 CIV UR establishes a series of cases in which the railway undertaking shall be relieved from liability.⁴⁹ However, it is not clear whether these grounds for relief shall apply also when compliance with one of the rights

⁴⁷ Some authors integrate both regimes and admit the grounds for exemption laid down in Art. 32 CIV UR in any case. See Górriz López, C. (2010), Transporte por ferrocarril (I). Introducción. Derecho nacional, in: Martínez Sanz, F. (Ed.), *Manual de Derecho del transporte* (pp. 267-289), Madrid, Marcial Pons, p. 284. This also seems to be the opinion of Piccinini, V. (2010), L'entrata in vigore del Regolamento CE N. 1371 del 2007 sui diritti e gli obblighi dei passeggeri nel trasporto ferroviario, *Giurisprudenza di Merito*, Vol. 42, (7/8), pp. 1773-1780, at pp. 1778 and 1779.

⁴⁸ *Contra*, apparently, Zubiri de Salinas, M. (2010), La responsabilidad del transportista de personas en los Reglamentos comunitarios relativos al transporte aéreo, ferroviario y marítimo, *Revista de Derecho del Transporte*, Vol. 4, pp. 67-100, at p. 83, when she states that the provision contains, apparently, an indirect restriction of the amount to be compensated.

⁴⁹ These are: circumstances not connected with the operation of the railway which the carrier, in spite of having taken the care required in the particular circumstances of the case, could not avoid and the consequences of which he was unable to prevent; fault on the part of the passenger; or the behaviour of a third party which the carrier, in spite of having taken the care required in the particular circumstances of the case, could not avoid and the consequences of which he was unable to prevent.

laid down in Regulation No 1371/2007 is claimed. In our opinion, this is not possible and the obligations to reimburse the ticket price or to offer an alternative transport; to provide assistance; and to compensate according to Articles 16 to 18 of the Regulation have to be fulfilled even if the delay, cancellation or missed connection are due to *force majeure* or to fault of a third party. Not only does the Regulation not contemplate such grounds⁵⁰, neither directly or indirectly; they are also minimum rights that cannot be limited or waived (Art. 6). Furthermore, this is the solution given by the Court of Justice (First Chamber) in its judgement of 26 September 2013⁵¹, which grants the right to compensation *ex* Article 17 (partial reimbursement of the ticket cost) always and in any case, even if the delay in arrival is due to *force majeure*. As the Court rightly states: “The carrier’s grounds of exemption from liability provided for in Article 32(2) of the CIV Uniform Rules cannot be considered applicable in the context of Article 17 of Regulation No 1371/2007. That interpretation is supported by the *travaux préparatoires* for Regulation No 1371/2007, from which it is apparent that, whilst the EU legislature has chosen to bring the provisions relating to the liability of railway undertakings in the case of delays, missed connections and cancellations into line with the corresponding chapters of the CIV Uniform Rules, it has, in addition, considered it necessary to include in that regulation specific provisions governing reimbursement and re-routing, compensation and the obligation to provide passengers with assistance in the event of delay”.⁵²

In this respect, the objectives of Regulation No 1371/2007, contained in its preamble, have necessarily to be taken into account: safeguard rail passenger rights by strengthening the rights of compensation and assistance in the event of delay, missed connection or cancellation of a service with respect to those envisaged by CIV UR. Hence, two are the aims pursued by the various provisions of the Regulation, which are not inconsistent with each other. Articles 16 to 18 grant passengers minimum inalienable *rights*. Article 32 CIV UR then adds a system of *liability* of the rail carrier, so passengers can seek compensation, both under Article 32 CIV UR itself and according to applicable national law.

⁵⁰ Puetz, A.; Bleda Rodríguez, J. (2015), *op. cit.* note 46, p. 159.

⁵¹ Case C-509/11, *ÖBB-Personenverkehr AG*.

⁵² See, however, European Commission (2015/1), *op. cit.* note 30, p. 6, according to which “the Commission will examine the possibility to give the rail sector the same treatment as in other transport modes, *i.e.* not to compensate passengers for delays in cases of unforeseen and unavoidable events”.

III. THE (NON-)COMPLIANCE OF SPANISH DOMESTIC LEGISLATION WITH EUROPEAN UNION LAW

Passenger rights are regulated in a very deficient manner in Spanish domestic law. On the one hand, the legislative act that deals with such rights in some detail, the already mentioned Rail Sector Regulation (RSR), was enacted before Regulation No 1371/2007 was passed and it has not been modified since in order to adequate its provisions to the wording of the Community legal text.⁵³ On the other hand, the only provision that acknowledges the existence of the EU Regulation, Article 23.6 LTOA⁵⁴, merely states something that is obvious: “The liability of the carrier, in the case of rail passenger transport, shall be determined according to Regulation (EC) No 1371/2007, on rail passengers’ rights and obligations.” The resulting legal regime could not be more distressing. Determined the validity in Spain of Regulation (EC) No 1371/2007 — an aspect that, as shown, could not have been discussed either —, the regulation of rail passenger rights in the Spanish Rail Sector Regulation⁵⁵ is sometimes blatantly inconsistent with the Community instrument.⁵⁶

But there is more: as has been seen, Regulation (EC) No 1371/2007 refers to the CIV Uniform Rules regarding the liability of the railway undertaking in case it fails to comply with the timetable, *i.e.*, when there is a delay or a cancellation, or a connection is missed. It has also been said that the level of

⁵³ It is true that Art. 88 RSR has been modified, precisely, in 2007, by virtue of Royal Decree 810/2007, of 22 June (*B.O.E.* No 162, 7 July 2007), but the reform is not only previous to the enactment of Regulation No 1371/2007, it does not even affect the matter before us. It merely introduces a stylistic improvement in paragraph 1 and adds a new paragraph 3 that allows railway undertakings that have paid compensation to a passenger to take recourse against the infrastructure manager if he considers that the latter is responsible for the cancellation or the interruption (or delay, it should be added) of the service.

⁵⁴ Modified in this sense by Act No 9/2013, of 20 December (*B.O.E.* No 305, 21 December 2013).

⁵⁵ Which is mostly reproduced in the general terms and conditions of the major Spanish railway undertaking.

⁵⁶ The situation will not change even if the new Rail Sector Act, which is actually being debated in Parliament, were passed. Little more than nothing is said to this respect in Art. 62.1 of the draft instrument, according to which “[t]he users will have the right to use rail transport services in compliance with the terms established in the regulation of the European Union and other rules that apply to the subject matter and, as the case may be, in the contracts they celebrate with railway undertakings”.

protection conferred by Article 32 CIV UR is clearly insufficient, since it only envisages the *reimbursement* of reasonable accommodation costs (and those the passenger might have made in order to notify persons expecting him at the place of destination) when —as a consequence of delay, missed connections or a cancellation — the journey cannot be continued (or a continuation could not reasonably be required) on the same day. Furthermore, the provision establishes a series of grounds for relief, which are identical to those that apply in case of death or personal injury of the passenger (Art. 32 § 2 CIV UR). However, the compensation of other types of damage that differ from those mentioned in the provision has to be determined according to national law.

The conjugation of the provisions contained in the CIV Uniform Rules and in the Rail Sector Regulation with the minimum rights of passengers on a Community level is far from easy, since it requires a comprehensive interpretation of all three bodies of law. The lack of coordination between them should lead to a profound reform of the legal texts in force; a reform that is all the more necessary due to the fact that, as has already been said, both the CIV Uniform Rules and the Community Regulation limit themselves to establishing *minimum* and inalienable rights of the passengers and referring, for any other question, to domestic law.

1. Passenger protection in case of delay in the arrival

The legal regime that applies to delay in rail passenger transport is contained in Articles 88 and 89 RSR. The first of them starts enouncing that “[t]he railway undertaking that offers passenger transport services by rail is obliged to carry out the transport within the scheduled time limit” (Art. 88.1 RSR). Although there is no definition of the term “delay” (unlike what happens with respect to cancellation and interruption), it derives from the cited provision that such a delay takes place when the service is performed *without* respecting the timetable. If that is the case, the railway undertaking is liable for the resulting damage, *unless the delay is due to force majeure* (Art. 88.2 RSR). Apparently, the liability of the rail carrier can thus only be declared if the event that caused the damage (*hic*, the delay) is imputable to him.

This seemingly simple regime raises, however, a great amount of questions as regards its interpretation in the light of Regulation (EC) No 1371/2007. In the first place, the Spanish provision only refers to delay *in the arrival*, but is silent on the consequences of a delay *in origin*. Obviously, that does not deprive passengers of their rights, since they can invoke directly the wording of

Article 18 of the Community Regulation. In the second place, the provision is outright incompatible with the requirement, laid down in Article 17 of Regulation (EC) No 1371/2007, that passengers are to be compensated for the ticket price in case of delays in the arrival. Certainly, the compensation envisaged by Article 89.2.c) RSR equals or even surpasses the one established in Community law: the railway undertaking is obliged to pay a “financial compensation equivalent to a fifty per cent of the price of the ticket used” in case there is a delay that exceeds one hour⁵⁷; a compensation that rises to the full price of the ticket where the delay is superior to one hour and a half. However, the reference contained in Article 89.1 RSR to the regulation in Article 88 — which, as has been said, exempts the railway undertaking of liability in case the delay has been caused by *force majeure* — means that the compensation of the ticket price is enforceable only, as a matter of principle, when the event that caused the damage is due to fault of the carrier.

As has been pointed out by the Court of Justice in its above mentioned judgment in Case C-509/11 (*ÖBB-Personenverkehr AG*), such a rule is incompatible with Article 17 of Regulation 1371/2007, which envisages an instance of strict liability that does not allow for grounds for exemption. In application of the principle of supremacy of Community legislation, the railway undertaking is thus obliged to satisfy the compensation even where the delay is due to *force majeure*. However, this does not necessarily mean that the domestic regulation is devoid of meaning. On the one hand, Regulation (EC) No 1371/2007 envisages *minimum* rights of the passenger that can be enhanced by domestic regulations. In this sense, there should be no inconvenience to admitting higher percentages (a 50 and a 100 %, compared to a 25 and 50 %, respectively) or lower time limits (one hour and a half, compared to two hours). The compensation the passenger is entitled to shall thus be calculated according to the rules laid down in domestic legislation. There is no problem either with declaring that these *additional* rights are not enforceable when the delay is due to *force majeure*. What is not possible, in change, is to pilfer the passengers their right to obtain compensation in case of *force majeure*: in such cases, Article 17 of Regulation (EC) No 1371/2007 applies directly.

From what has been said, in the present legislative landscape in Spain there are arguably two situations that have to be clearly distinguished. If the delay

⁵⁷ As has been seen, where the delay exceeds one hour, the railway undertaking is furthermore obliged to provide assistance to the passengers according to Regulation (EC) No 1371/2007 (information, maintenance, accommodation, etc.).

is due to *force majeure*, the passenger may invoke Article 17 of the Community Regulation, and he is entitled to a refund of 25 % (where the delay is 60 minutes or longer) or 50 % (if it is 120 minutes or more) of the ticket price. On the contrary, where the delay is due to a fault of the carrier (or, as shall be seen later in the text, a merely fortuitous event: *casus*), the compensation to be paid rises to 50 or 100 %, respectively, with the particularity that the full ticket price has to be reimbursed where the delay is of only one and a half hour.

However, the fact that (mainly) negligent causation of the delay entails an augment of the compensation due by the carrier raises a second question that does not admit an easy solution either, namely, what happens when the delay is caused, not by the railway undertaking but by the infrastructure manager. If that were so (and it will be the case in many occasions), it is worth considering whether the railway undertaking has to face a higher compensation or whether it can invoke, as the case may be, the inevitable character⁵⁸ of the act of a third person (the manager) as a ground for relief. Certainly, Article 51 CIV UR⁵⁹ imposes liability on the railway undertaking for the acts and omissions of the persons whose services the carrier makes use of for the performance of the carriage, and includes the “managers of the railway infrastructure” among them. But it remains unclear whether the provision can be invoked in a context like the present, where the liability of the carrier is based exclusively on national law. It is not possible either to take recourse to Article 47 of Act No 15/2009, of 11 November, on the contract of carriage of goods by rail, since it does not apply to passenger transport. However, it is a common opinion that there is a general principle under Spanish law that prevents a debtor from getting relief when he alleges that the damage is due to the fact that his auxiliaries have neglected their contractual obligations.⁶⁰ No obstacles should therefore exist to establish

⁵⁸ As shall be seen, according to Article 1.105 of the Spanish Civil Code, the concept of “caso fortuito” o *casus* comprises all “those events that could not be foreseen or those that, foreseen, were inevitable”. Foreseeability, albeit mentioned in the provision, is thus not an indispensable condition when assessing whether the event is fortuitous or not.

⁵⁹ This provision forms part of the Articles incorporated by Regulation (EC) No 1371/2007 and appears in its Annex I.

⁶⁰ See, e.g., Jordano Fraga, F. (1994), *La responsabilidad del deudor por los auxiliares que utiliza en el cumplimiento*, Madrid, Civitas, pp. 488 *et seq.* As regards rail transport, see Emparanza Sobejano, E. (2003), *El transporte internacional de mercancías por ferrocarril (COTIF-CIM)*, in: Concepción Rodríguez, J. L. (Ed.), *El contrato de transporte*, Madrid, Consejo General del Poder Judicial, p. 42; *id.* (2003/1), *El concepto de porteador en el transporte de mercancías*, Granada, Comares, p. 42, note 97, for whom

the aggravated liability of the railway undertaking under such circumstances, too, without prejudice to the right of the railway undertaking to take recourse against the infrastructure manager (Art. 88.3 RSR⁶¹).

A last question that deserves to be analysed is the extension of the — only — ground for relief envisaged by Article 88.2 RSR, *i.e.*, “*fuerza mayor*” or *force majeure*. Article 1.105 of the Spanish Civil Code defines a somewhat different concept, “*caso fortuito*” or *casus*, as “those events that could not be foreseen or that, foreseen, were inevitable”. Although both expressions (those of *casus* and *force majeure*) are in many cases employed synonymously⁶², this is not necessarily so when the provision invoked only refers to *force majeure* as a ground for relief.⁶³ If under such circumstances one considers⁶⁴ that *force majeure* only comprises those events, which could not be avoided whatever the diligence employed — while *casus* in a strict sense refers to those cases where the damage could not be prevented employing the *diligence required in any specific case*⁶⁵ —, it turns out that only those events giving rise to a delay that are, *by their nature*, inevitable would free the carrier of its (aggravated) liability.⁶⁶

the liability of the carrier for the acts and omissions of its auxiliaries is “a specific example in the field of rail transport of the *indirect contractual liability* consecrated implicitly by our legal system”. See also Puetz, A. (2012), *Derecho de vagones. Régimen jurídico-privado de la utilización de vagones de mercancías en tráfico ferroviario*, Madrid, Marcial Pons, p. 314.

⁶¹ In fact, this provision (see note 53) would be meaningless if the railway undertaking were not responsible for the acts and omissions of the infrastructure manager.

⁶² An example, precisely in the field of transport, can be found in Art. 1.602 of the Civil Code.

⁶³ Which would be the case, once more, in transport matters: see Art. 1.601 of the Civil Code that, on its turn, remits to Art. 1.784 of the Code.

⁶⁴ As does, *e.g.*, Badosa Coll, F. (1991), Comentario al art. 1.105, in: Paz-Ares, C. *et al.* (Eds.), *Comentario del Código Civil* (pp. 42-44), Madrid, Ministerio de Justicia, pp. 43 *et seq.*

⁶⁵ That is, where the damaging event is not inevitable as such, but avoidance would have demanded a diligence higher than that required for the fulfilment of the contractually assumed obligation. Specifically, the diligence that has to be employed is the one established in the obligation itself or, where this is not the case, that of a “prudent man” (“*buen padre de familia*”), adapted to the nature of the obligation and the circumstances of the persons, the time and the place (Art. 1.104 of the Civil Code).

⁶⁶ Certainly, “armed robbery” —cited expressly in Art. 1.784 of the Civil Code as an example of *force majeure*— does not seem to serve as an example in the case of delay, but one might think of natural disasters or, as the case may be, adverse meteorological conditions as events that relieve the carrier from liability.

The burden of proving that the delay is due to *force majeure* lies, in our opinion, with the railway undertaking, for the following reasons. On the one hand, such conclusion results from Article 88.2 RSR that starts by saying that “[e]xcept in cases of *force majeure*, the railway undertaking is liable” according to the terms established in Article 89 RSR. Just like in other branches of transport law, a presumption of liability is set up that has to be refuted by the carrier by proving the concurrence of any one of the grounds for relief established by law (or in the contract), with the particularity that, in this case, there is only one: *force majeure*.⁶⁷ On the other hand, a correct interpretation of the distribution of the *onus probandi* in obligations of result⁶⁸ should lead to the same conclusion: the failure to achieve the promised result (or its defective execution, for being extemporaneous) determine *per se* a breach, and it is the only fact that has to be proven by the creditor.⁶⁹ Once the breach has been established, the liability of the debtor is presumed and it is the latter who has to prove those facts that extinguish the claim⁷⁰, *i.e.*, that the breach is not imputable to him or her (*hic*, the concurrence of *force majeure*).

2. Passenger protection in case of cancellation and interruption of a rail service

As has been seen, Regulation (EC) No 1371/2007 establishes that, where it is reasonably expected that there will be a delay in arrival of more than 60 minutes (including those cases where the expected delay is due to cancellation or a missed connection⁷¹), the passenger shall immediately have the choice between: *a*) resigning his right to transport against reimbursement of the tic-

⁶⁷ In our opinion, contributory negligence of the passenger would have to be taken into account also, but it seems highly unlikely in most of the cases under examination, *i.e.*, delays and cancellations, although it might become relevant in case of missed connections.

⁶⁸ *I.e.*, those where the debtor promises to achieve the bargained result, in contrast to obligations of means or conduct (or best efforts obligations), where the debtor merely assumes an obligation to act prudently and with diligence, but without promising a specific result.

⁶⁹ Jordano Fraga, F. (1987), *La responsabilidad contractual*, Madrid, Civitas, pp. 266 *et seq.*, 294 *et seq.* In the field of (goods) transport, Puetz, A., *Comentario al artículo 47* (pp. 547-577), in: Duque Domínguez, J.; Martínez Sanz, F. (Eds.), *Comentarios a la Ley de Transporte Terrestre*, Cizur Menor, Thomson-Aranzadi, pp. 556 *et seq.*

⁷⁰ Díez-Picazo, L. (2008), *Fundamentos del Derecho civil patrimonial*, Vol. II, 6th ed., Cizur Menor, Thomson-Civitas, p. 745.

⁷¹ European Commission (2015/1), *op. cit.* note 30, p. 6.

ket price; or *b*) continuing his journey or being re-routed, under comparable transport conditions, at the earliest opportunity or at a later date at his or her convenience (Art. 16). It does not seem possible for the railway undertaking to acquit itself of its obligation to reimburse the ticket price or to provide an alternative transport in no case whatsoever, not even where the delay, the cancellation or the missed connection is due to *force majeure*: the Regulation does not envisage any ground for relief and does not establish any time limit with respect to the notification of the cancellation to the passenger, either.

Spanish domestic legislation only refers to cancellation and interruption of a service, and even in these cases the protection conferred to the passengers is lower than under Community law. In contrast to what happens under Regulation (EC) No 1371/2007, there is a legal definition of what has to be understood by *cancellation* of a service in Article 88.2 RSR: “the impossibility to initiate [the journey] in the conditions laid down in the transport document”; an *interruption*, on its side, is defined as “the paralysation of [the service] while it is being performed”.

A. Cancellation

Where a service is *cancelled*, the content of the rights that accrue to the passenger depends on how far in advance the incidence is notified to the passenger. If such notification takes place within 48 hours prior to scheduled departure, the passenger has the right to choose between reimbursement or re-routing, either on another train or a different transport mode, under similar transport conditions. However, if the passenger is notified within 4 hours prior to departure, he will be entitled, additionally, to compensation equivalent to double the amount of the ticket price [Art. 89.2.a) RSR⁷²].

The cited provision cannot be considered to be compatible with Article 16 of Regulation (EC) No 1371/2007, for the following reasons. In the first place, it does not seem possible to limit the right to reimbursement or re-routing to those cases where the cancellation is notified to the passenger within 48 hours prior to the scheduled departure of the train. Were this the case, there would be an unjust enrichment on the part of the railway undertaking that eventually

⁷² See also Art. 23 of the *General Terms and Conditions of the Alta Velocidad and Larga Distancia Passenger Transport Contract* (GTC) of RENFE-Operadora (high speed and long distance), by far the biggest railway undertaking in Spain.

did not perform that service.⁷³ Furthermore, it should also be noted that the right to re-routing is not established in the same terms as under Community law either, since nothing is said about the right of the passenger to choose between travelling at the earliest opportunity or at a later date.

In the second place, as in the case of a delay in the arrival, Article 88.2 RSR excludes the obligation to provide alternative transport or to reimburse the ticket price if the cancellation is due to *force majeure*, an aspect that is not envisaged by Community law.⁷⁴ It is certainly true that Regulation (EC) No 1371/2007 refers to Article 32 CIV UR in order to determine the liability of the carrier for delays, cancellations and missed connections, but it does so “subject to the provisions of this Chapter” (Art. 15), *i.e.*, Chapter IV, which comprises Articles 16 to 18 of the Regulation. Furthermore, just like all other international transport conventions, CIV Uniform Rules do not envisage remedies for breach different from the liability of the carrier for the damages that have been caused. Particularly, they neither refer to the claim for fulfilment, embodied by the right to demand alternative transport, nor do they contemplate the termination of the contract for breach with restitution of the benefits already received, *i.e.*, the reimbursement of the ticket price (Art. 1.124 of the Spanish Civil Code).⁷⁵ This is why, in our opinion, the grounds for relief envisaged by Article 32.2 CIV UR do not apply to the passenger protection rights in Article

⁷³ Although it is not a frequent issue in practice (at least in rail transport), it cannot be discarded that the cancellation of the service is due to opportunity reasons, *e.g.*, when the journey is suspended because the number of tickets sold does not cover the expenses incurred. The undifferentiated treatment given to this issue under the Rail Sector Regulation (and in the transport GTC of RENFE-Operadora) would lead to a situation in which, even in such cases, the passenger is not entitled to reimbursement if the cancellation is notified more than 48 hours prior to the scheduled departure of the service.

⁷⁴ In the same sense, Art. 23.1 of the *General Terms and Conditions* of RENFE-Operadora, according to which the concurrence of *force majeure* even prevents the situation from being considered a cancellation: “The journey will be considered to have been cancelled, provided that there are no cases of *force majeure*, when it cannot be started in the conditions envisaged on the ticket”. By contravening an imperative rule of law (contained in Regulation No 1371/2007), the clause has to be considered null and void (see Art. 8.1 of Act No 7/1998, of 13 April, on General Terms and Conditions).

⁷⁵ Arguably, in the absence of a special rule, one could also invoke Art. 1.590 of the Code that establishes in relation to works contracts (the contract of carriage is a subtype thereof) that the ensuing impossibility of performing the work frees the debtor of its obligation, but he is not entitled to the price.

16 of Regulation (EC) No 1371/2007, nor to those that stem from domestic law. What is more, since Community law does not envisage *any* ground for relief the railway undertaking might invoke, reimbursement and re-routing can be requested in any case, even where the cancellation is due to *force majeure*.

A different question is what happens with the remaining financial consequences of a cancellation. Inasmuch as Article 15 of Regulation (EC) No 1371/2007 refers to Article 32 CIV UR which, in turn, invokes domestic law, there should be no obstacle to applying Article 89.2.a) RSR, which awards the passenger an indemnity (*rectius*, an automatic compensation) equivalent to double the amount of the ticket price when the service is cancelled within 4 hours prior to the scheduled departure time. However, since this question has not been harmonized on the European level, the Spanish legislator is free to declare that the compensation does not accrue when the cancellation is due to *force majeure*. The situation is similar when the passenger requests compensation for the damages actually caused by the cancellation. Apart from the cases expressly mentioned in Art. 32 CIV UR, recourse has to be taken to the general rules in the field of contractual liability⁷⁶ that permit the railway undertaking to avoid liability when the cancellation is due, not only to *force majeure*, but also to *casus* (Art. 1.105 of the Civil Code).

Finally, although the Rail Sector Regulation does not mention this issue, the cancellation of a service obliges the carrier to provide assistance according to Article 18 of Regulation (EC) No 1371/2007. In particular, if as a result thereof there is a delay in origin or in the arrival that exceeds 60 minutes, passengers are entitled to maintenance and accommodation free of charge.

B. Interruption

When there is an *interruption*⁷⁷ of the service, Article 89.2.b) RSR obliges the railway undertaking to offer the passenger, at the earliest convenience, carriage in another train or transport mode, under similar conditions to those established in the contract. Where the interruption exceeds 60 minutes, the railway undertaking is also obliged to provide maintenance and, as the case may be, accommodation to the passengers. The cited definition of “interrup-

⁷⁶ In this sense, Art. 89.4 RSR states that, “[i]n any case, the passenger may resort to the courts or, as the case may be, to arbitration for compensation of the damages caused by the cancellation of the service or the delay in the arrival”.

⁷⁷ Or “stopping”, in terms of the RENFE-Operadora GTC that, once more, consider that there is no such interruption when it is due to *force majeure*.

tion” in Article 88.2 RSR is rather vague (apart from tautological) and does not count on an exact equivalent in Regulation (EC) No 1371/2007. It would have been more useful to define the term “viaje” (journey), which is likely to raise greater interpretative doubts. In particular, it is not clear whether it refers to every single leg of a multi-segment trip or, to the contrary, it designates the transport as a whole. It thus remains subject to discussion whether the provision applies when the passenger misses a connection due to a cancellation or delay on a previous segment. In relation to this issue, the European Commission holds that “separate tickets sold under a single contract should be understood as a ‘through ticket’, when they represent a ‘transport contract of successive railway services operated by one or several railway undertakings’ [Art. 3.10 of Regulation No 1371/2007]. Passengers holding separate tickets under a single transport contract are entitled to the rights granted under Articles 16 and 17 if their delay in arriving at their final destination is more than 60 minutes, even if delays in the individual segments are each less than 60 minutes”.⁷⁸

Furthermore, as explained with respect to the cancellation of a service, it is not admissible either that the railway undertaking is only obliged to provide the abovementioned assistance in case the interruption is not due to *force majeure*. Confronted with these multiple interpretative doubts, the surest way is to take direct recourse to Articles 16 and 18 of Regulation (EC) No 1371/2007, considering that domestic legislation does not envisage in this point any enhancement whatsoever of the protection awarded to the passenger.

IV. CONCLUSIONS

Regulation (EC) No 1371/2007 employs a technique increasingly common when regulating the rights of passengers in a certain transport mode: the reference to provisions of the relevant sectoral convention in force. As regards rail passenger transport, this causes delicate problems of delimitation, not only because the amplitude of protection is different in either case, but because even after the entry into force of the Community Regulation there are continuous references to national laws of the Member States, which may lead to a certain lack of coordination.

In the Spanish case, the resulting situation is especially criticisable, since the only provision that expressly refers to passenger protection, the Rail Sector Regulation, dates back to 2004, long before Regulation (EC) No 1371/2007

⁷⁸ European Commission (2015/1), *op. cit.* note 30, p. 5.

was enacted. It cannot be denied that, in some specific issues, the protection conferred by Spanish domestic law is broader than that envisaged by the Community Regulation. However, it is also true that, by establishing a general limit to the liability of the railway undertaking (*force majeure*), most of its provisions are inapplicable because they contravene a superior rule of law. A modification of the Rail Sector Regulation (and the General Terms and Conditions employed by the biggest Spanish railway undertaking) in order to adapt to the legal framework in force today is thus absolutely necessary.

Sažetak

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**PRAVA PUTNIKA U ŽELJEZNIČKOM PRIJEVOZU PREMA
UREDBI (EZ-a) BR. 1371/2007 I NJIHOVO OSTVARIVANJE U
ŠPANJOLSKOJ: JE LI ŠPANJOLSKO UREĐENJE ŽELJEZNIČKOG
SEKTORA USKLAĐENO S PRAVNOM STEČEVINOM EU-a?**

Uredba (EZ-a) br. 1371/2007 Europskog parlamenta i Vijeća od 23. listopada 2007. o pravima i obvezama putnika u željezničkom prijevozu sadržava osnovna pravila EU-a za zaštitu putnika u željezničkom prijevozu na nacionalnoj i na međunarodnoj razini. Slično kao i u zračnom (Uredba br. 2027/1997, kako je izmijenjena i dopunjena Uredbom br. 889/2002) i morskom prijevozu (Uredba br. 392/2009), Uredba o željezničkom prijevozu u svojim člancima 4., 11. i 15. upućuje na Jedinствена pravila za Ugovore o međunarodnom željezničkom prijevozu putnika (dodatak A Konvenciji COTIF iz 1999.). Međutim, ta Uredba uvodi i neka dodatna prava koja se ne uklapaju uvijek lako u okvir Pravila, posebno u pogledu odgovornosti prijevoznika u slučaju kašnjenja, propuštenih veza i otkazivanja.

Jedina presuda Europskog suda vezana uz taj problem (Predmet C-509/11, ÖBB-Personenverkehr) odnosi se samo na dio problema, odnosno na refundaciju cijene karte u slučaju kašnjenja. Nadalje, Uredba br. 1371/2007 ne zabranjuje uvođenje nacionalnih mjera za poboljšanje zaštite putnika, pa tako valja uzeti u obzir i nacionalno zakonodavstvo. U Španjolskoj je relevantno zakonodavstvo usvojeno 2004. te nije izmijenjeno nakon što je Uredba stupila na snagu, pa su tako neke njezine odredbe neusklađene s pravnom stečevinom EU-a.

U ovome ćemo izlaganju pokušati opisati točan sadržaj prava putnika prema Uredbi br. 1371/2007 i identificirati ona nacionalna pravila koja se više ne mogu primjenjivati jer nisu u skladu s pravom EU-a, pa ih stoga treba ukinuti.

*Ključne riječi: željeznički prijevoz, *acquis communautaire*, španjolska regulacija željezničkog sektora, zaštita putnika*

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