Temporary business partnership, Adif and rail operators: economic harm caused by the suspension of train services

(Judgment of the Supreme Court, First Chamber, of 18 January 2024)

Projection of *Renfe/Gornal* case law on infrastructure creation and management contracts.

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1. Stoppage of rail traffic without damage to infrastructure

Various entities of the Renfe group filed a claim against the companies belonging to the temporary business partnership awarded the contract for the remodelling work on the Gornal railway tunnel (Barcelona) and their insurance companies for compensation for the harm resulting from the interruption of rail transport through the tunnel during the time when a deficient execution of the work commissioned by Adif, the entity that owns the railway line, had to be repaired. As a result of the landslide, several companies of the Renfe group were unable to provide their services as normal, had to pay compensations and lost business opportunities. The affected assets - the material damage - were not owned by Renfe, which had not contracted the work either. There was no relationship between the harmed parties and the construction companies responsible for the harm other than that derived from the harm itself for which Renfe claimed compensation. Adif was not sued by the claimants because the railway sector legislation shielded the infrastructure owner from the claims of rail operators. The

Judgment of the Supreme Court, First Chamber, of 18 January 2024, rejected the appeal lodged by AIG and the temporary business partnership, on the grounds that the harm to Renfe was included in the concept of non-contractual compensable financial losses and covered by the temporary business partnership's insurance policy in application of the direct action under Article 76 of the Insurance Contract Act ("LCS").

The judgement is of notable importance in Spanish tort law because it establishes the liability of the material tortfeasor for purely financial losses suffered by third parties other than the owner of the harmed material assets, third parties who were not contractually bound to the former. The reasoning of the judgement is not clear because the main and apparently decisive reasoning is drawn - I believe inappropriately - from the existence of a direct action against the insurer. That is to say, as if the cover by the tortfeasor of purely financial losses of third parties were based exclusively on Article 76 LCS, and would therefore cease to be valid when the defendant was not an insurance company. However, it can be concluded from the context of the appeal that the doctrine does not limit its impact to the liability of the insurer, which, in essence, could never be affirmed if the liability of the indirect tortfeasor (the temporary business partnership) were not also upheld. The Supreme Court does not go to great lengths to justify finding the temporary business partnership companies liable.

2. Criticism of the judgment

2.1. In my view, the chain of harm and compensation that this judgment leads to is disjointed. It is inefficient and unfair. In the end, the cost of all harm borne by the construction temporary business partnership, which is not the party that can internalise it in the cheapest way, which cannot calculate such costs in advance and which, even if it could, would be unable to channel and distribute them through the construction contract with Adif; in other words, it could not convert them into commercially productive costs. Adif is a monopoly operator and, moreover, it is the State. Infrastructure builders have no bargaining power to incorporate into the contract price the unexpected and incalculable costs of having to respond to the purely economic harm (paralysation of service) suffered by transport operators.

Adif has such bargaining power that - being both regulated and regulator - rail transport legislation prevents transport companies from passing on to the infrastructure operator economic harm resulting from rail infrastructure failures. Of course, it would then seem fair that in the same contract *it* should *assign* to these operators the claims for construction work contracts against the temporary business partnership members. But it does not do so, because in fact it no longer has such claims. The infrastructure construction contract is subject to the Public Procurement Act (´LCSP´); contractors are obliged to provide guarantees of all kinds and to assume responsibility for proper completion. When the guarantee periods expire, Adif will no longer have claims to assign to transport operators, not only because of the lapsing of such claims, but also because Adif will not have suffered the *harm due to the lack of commercialisation of transport* at the time of the breakdown. The claims that in any case would remain

residually in Adif after the guarantees are extinguished would be limited to claims derived from the subsequent ruin, but not to claims for the financial losses of the transport business (*cf.* Arts. 243 and 244 LCSP).

2.2. The judgment relates to events which occurred when Renfe was the sole operator. Now there is fierce competition between several transport operators competing to provide services on the same track - a reasonable explanation for the recent rail chaos. In current lawsuits, all those who exist and may exist as long-distance service operators could be in line to claim compensation for economic losses from the heretofore builders. And, for that matter, also the passengers, whose purely economic harm is no different in nature from that suffered by the transport operators. It is sufficient for transport contracts (general terms and conditions of transport tickets) to include in their clauses the release from liability for delays caused by infrastructure malfunctions or inoperability, which they may well do, since Adif is not the *ancillary in performance* of Renfe, Iryo or Ouigo in such a way that the track availability conditions were an obligation of the former towards *customers* through Adif as a third party. However, as this is not the case, the appropriate general releasing condition in the clauses would not be unconscionable for the customer, because the quality of the track is not an obligation incumbent on the railway transport companies vis-à-vis their customers.

2.3. The members of the temporary business partnership are the least able to internalise the costs resulting from such compensation because they can neither foresee them nor can they be incorporated into depreciable costs. These costs should be included in the equation of the network use toll contracts. It is a matter for the transport operators, as they will never obtain from Adif a guarantee of compensation for their purely business harm. Therefore, transport operators have to "eat" these costs, unless they can contractually shift them to other parties. And they can shift them. This cost should then be passed on in the price of the toll paid to Adif because all operators could push downwards if they had to internalise such harm as their own. And, if such a thing were not materially possible, given Adif's bargaining power, transport operators would have to pass these costs downstream in the ticket price. Ultimately, it would be the passengers who would end up paying for the purely economic harm. And this is not the worst solution, because then we reach the final stage where these costs are collectively distributed and their impact is more bearable.

2.4. Note the irrationality of the legal outcome when the remuneration for track tolls is becoming increasingly lucrative for Adif as a result of increased competition in traffic, but the costs of potential harm associated with this increased traffic are borne by the historic infrastructure manufacturers, who neither share in the benefits of the doubled traffic nor appropriate them in any way whatsoever.

2.5. Of course, it seems to me that this would not be the end of the story. Operators, who compete fiercely on price, would end up accommodating in one way or another that economic harm among their own overhead costs which are not entirely passed on in prices, with absorption of the profit mar-

gin. Finally, most of the purely economic harm suffered by the lack of service would end up being located where it should always have been: in the operators who suffer it, who will only be able to pass it on to third parties if existing competition allows them to incorporate it into the price.

2.6. This is the fairest solution. The Supreme Court's argument that, given that the law prevents this harm from being passed on to Adif, this must be so because it may be passed on to third parties further away from the chain of harm (7th Point of Law) is absurd.

2.7. This does not mean that the temporary business partnership will not be held liable for any harm suffered by transport operators or passengers. It will when there is harm to property (trains) or to an absolute good (personal injury) because such are per se harm to legal interests protected against third-party harmful causality thanks to a rule of liability in tort that goes beyond the boundaries of contracts. Loss of business, on its own, is not harm of this kind; if it is not caused by malice, it is not harm that can be redressed by means of a rule of non-contractual liability. Not for any compelling technical reason, but for the pragmatic consideration that such harm, being potentially incalculable and not touching an absolute good, should preferably remain in the pocket in which it occurs, unless the harmed party can pass it on by contract to a third party, not only to an insurer, but to any third party who was contractually bound to the harm party to prevent or absorb such harm itself.

2.8. Insurers will undoubtedly react to the impact of this judgement by drafting the inclusions and exclusions of cover more clearly. It is true that the wording of the policy under consideration was very deficient. But it will be corrected in the future. However, the members of the temporary business partnership will not be able to do anything in their contracts to alleviate the amount of this new liability.

3. Other similar scenarios

3.1. Although railways and trains do not constitute a reproducible scenario in other sectors of economic operations, the structure of the harm chain is perfectly replicable in contexts of harm caused in trilateral arrangements in which A produces or manufactures infrastructure for B by means of a construction work contract and B puts this infrastructure at the service or use of C by means of rent or toll, in the event that C suffers financial losses due to interruptions or suspensions in the lucrative activity that have their origin in defects or breakdowns in B's infrastructure attributable to a lack of conformity in A's performance.

A is contractually liable to B for defects of conformity that become apparent within the statutory or contractual warranty periods. Given the contractual relationship between them, B can pass on to A even purely economic harm resulting as loss of earnings from the breach of contract. ¨Non-performance" makes it possible to capture within the scope of the contract this purely economic harm. B will ordinarily be liable to C for defects or impairments in the possibility of useful use, and, according to the classic rental model, regardless of whether the shortfall in use is attributable to the owner's own fault. Here, too, it would not always make sense for B to assign its

own defence actions to C because it may be the case that they are time-barred or that the idiosyncratic harm suffered by C is not envisaged in B's actions (obvious, B does not own or operate its own trains, so it cannot suffer harm due to the closure of the travelling business). And, if it does not have a specific action to assign, C could only break the contractual veil by means of a direct action, which in this case Spanish law does not grant.

Loss of business without material damage is not indemnified out of contract

3.2. If there were no special clauses in the respective contracts, C would have no cause of action against A. Although it is not a perfect model of comparison, this logic of release can be seen in the structure of harm designed by the Building (Regulation) Act. The contractor is liable to the developer who hires him and, by special consideration of the case of the home purchaser, also to the subsequent purchaser (not the user) of the asset, but *only for material damage in the right of tangible property*. It will be doubtful whether and how it will be liable for purely economic harm against the developer and for consequential harm (which originates from an objective harm) suffered by the purchaser. But it is clear that it will not be liable for the purely economic harm suffered by these purchasers.