

Booking your holiday on-line: which law applies?

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When booking their holiday, consumers progressively use the Internet. Doing so, contracts are increasingly concluded with foreign touristic services providers without the intervention of an intermediary located in the consumers country. When cross-border contracts relating to touristic services are booked on-line, the question arises which law is applicable. This paper deals with the question from a consumer's viewpoint. It will show 1) that different rules of private international law apply depending on the type of holiday which is booked (which makes it all very complicated for consumers), and 2) that not all rules of private international law, which are important in the context of the provision of touristic services, protect consumers sufficiently, i.e. allow the consumer to invoke the protection which is incorporated in the law of his own country. Finally, it will be argued that, although within the European Union consumer protection law has been harmonized to a large extent, this finding is still important.

Introduction

Consumers booking their holiday (on-line) can choose from a wide variety of services, including package holidays consisting of at least two different services (e.g. accommodation and transport), transport services (e.g. flight only), hotel accommodation, holiday home rentals, local excursions, car rental services and even timesharing. These services can either be booked directly at the service provider's website (e.g. using the hotel's website or the carrier's website), or can be booked through an intermediary's website (such as booking.com or cheaptickets.com). Whenever contracts relating to touristic services are booked with foreign service providers, the question arises which law applies.

First, this paper will show that within the European Union different rules of private international law apply, depending on the type of contract concluded, which makes it for a consumer very hard to predict whether he will be able to invoke the protection incorporated in the law of his own Member State. Secondly, this paper will illustrate that rules of private international law not always protect consumers (booking their holiday online) sufficiently (e.g. with regard to contracts of carriage). Finally, this paper indicates to what extent rules of private international law still matter, taking into account the harmonization which has taken place within the European Union.

1. Determining the law applicable to the contract

Within the European Union, the law applicable to the contract must be determined on the basis of the Rome I Regulation (Council Regulation (EC) nr. 593/2008 of 17 June 2008 on the law applicable to contractual obligations (Rome I) (*OJL* 177, 4 July 2008, p. 6). The basic principle incorporated in the Rome I Regulation is that parties are free to determine the law which governs their contract (art. 3 Rome I, see also consideration nr. 11). If the parties did not decide on the law applicable to the contract, article 4 Rome I provides for the applicable law. However, several exceptions to these basic principles exist. With regard to touristic services provided to consumers article 6 Rome I - containing a specific rule for consumer contracts - and article 5 Rome I - containing a specific rule for contracts of carriage - are of particular importance.

The rules determining the law applicable to a contract were intended to be (as much as possible) consistent with the rules on jurisdiction laid down in the Brussels I Regulation (Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (*OJL* 12, 16 January 2001, p. 1) (Recital nr. 7 Rome I). Therefore, when interpreting the Rome I Regulation, one can and must - at least to a

certain extent - also take into account the jurisprudence of the Court of Justice of the EU with regard to the Brussels I Regulation (and sometimes even with regard to the preceding Convention of 27 September 1968 (EEX-Convention)). In this context it is worth mentioning that on 10 January 2015 a new Regulation (Regulation (EU) 1215/2012 of the European Parliament and the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (*OJL* 351, 20 December 2012, p. 1), will entry into force, repealing the Regulation of 2000. However, the changes made to the Regulation cannot have an impact on the interpretation of the Rome I Regulation.

1.1 The scope of the rules of private international

In order to determine the law applicable to a cross-border contract relating to touristic services which is concluded over the Internet by a consumer, primarily a distinction must be made whether the contract falls under the scope of application of the specific rule of private international law for consumer contracts, which is included in article 6 of the Rome I Regulation. The importance of this question cannot be underestimated since article 6 Rome I ensures consumers that they will be able to invoke the protection which is offered to them by their country's mandatory provisions.

First, this section indicates which type of contracts are excluded from the scope of application of article 6 Rome I. Secondly, it examines which requirements must be met for other (not-excluded) contracts concluded on-line, in order to fall under the specific rule of private international law incorporated in article 6 Rome I.

1.1.1 Contracts excluded from the specific rule of private international law for consumer contracts

As mentioned, several types of contracts are excluded from the scope of the specific rule of private international law for consumer contracts (art. 6.4 Rome I). The exceptions relevant to this paper are:

(a) contracts for the supply of services where the services are to be supplied to the consumer exclusively in a country other than that in which the consumer has his habitual residence

Although this exception only applies if the service is exclusively supplied in another country than the one in which the consumer has his habitual residence, it is not hard to find examples of this exception with regard to touristic services. For instance, this exception will apply if a Dutch consumer books a room in an Italian hotel [1], a German consumer books an excursion with a service provider for an ascent of the Mount Blanc [2], and if Belgian consumer rents a car from a Greek car rental agency. In order for the exception to apply, it is not necessary that the service provider has his residence in the country where the services are actually supplied.

(b) carriage contracts, with the exception of contracts relating to package travel in the meaning of the Council Directive 90/ 314/EEC of 13 June 1990 on package travel, package holidays and package tours (OJ L 158, 23 June 1990, p. 59) [1,2]

With regard to the exclusion of carriage contracts (e.g. airline, train or boat tickets), a distinction must be made whether the transport forms a part of a package in the meaning of the Package Tours Directive (which the European Commission propose to reform). If so, the specific rule of private international law for consumer contracts can apply (insofar the other requirements, mentioned hereafter in 1.1.2 are met); if not, it falls under the exclusion of carriage contracts. Therefore, it is important to determine what a package actually means. Article 2.1 of the Package Tour Directive defines the concept as the pre-arranged combination of not fewer than two of the following services: transport, accommodation and other tourist services not ancillary to transport or accommodation and accounting for a significant proportion of the package. Further a package requires that these services are sold or offered for sale at an inclusive price and that the services cover a period of more than twenty-four hours or include overnight accommodation.

It is clear that a consumer booking an airline ticket online at the airline company's website or through an intermediary's website such as cheaptickets.com and booking his accommodation directly at the hotel's website or through an accommodation provider such as booking.com, will not be able to invoke the specific protection of article 6.2 Rome I. On the contrary, a consumer booking a flight and hotel accommodation at an inclusive price through the website of a traditional tour operator will be protected (insofar the specific application criteria of article 6 Rome I are met).

When airline companies "offer" accommodation at certain hotels on their website (or after booking a flight) it must be examined whether, in case the passenger also books the accommodation, a package deal is concluded. Most often, this will not be the case since the airline company will not commit itself to provide the accommodation. The airline company merely provides information by including a hyperlink to certain hotels at their website. If the consumer, after

clicking on this link, makes a reservation, a contract is concluded directly between the hotel owner and the consumer (President Commercial Court Namur, 10 March 2010, *Droit de la Consommation* 2011, 108 and 146 (two decisions), note R. STEENNOT). Therefore, only if the airline company commits itself to provide accommodation - which is moreover not complementary to the flight operated (*infra*) - and this in addition to the carriage of the passenger by air and at an inclusive price, a package deal comes into play.

With regard to situations where the accommodation and the transport are integrated in one deal (e.g. on a cruise around the Mediterranean), the Court of Justice argued in the *Pammer*-case (C.J. 7 December 2010, C-585/08, *Peter Pammer v. Reederei Karl Schlüter GmbH & Co. KG*), that a contract concerning a voyage by freighter, is a contract of transport which, for an inclusive price, provides for a combination of travel and accommodation (recital nr. 45). Therefore, it must be considered as a package as defined in the Package Tours Directive. However, a service mainly consisting of transport and only providing accommodation in order to increase the passenger's comfort (e.g. night train, night bus, hotel accommodation in the case of a cancellation of a flight), cannot be regarded as a package and therefore falls under the scope of the exclusion of art. 6.4 b) Rome I [1,3]. In the case the transport services are only complementary to an accommodation contract (e.g. when the hotel arranges transport from the airport to the hotel), it cannot be considered a carriage contract which is excluded from the scope of article 6 Rome I [3].

(c) contracts relating to a right in rem in immovable property or a tenancy of immovable property with the exception of a contract relating to the right to use immovable properties on a timeshare basis within the meaning of the Directive 2008/122/EC of 14 January 2009 on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts (OJ L 33, 3 February 2009, p. 10), [1, 2].

This rule excluding contracts relating to a tenancy of immovable property implies that consumers renting a holiday home directly from its owner, will not be able to invoke the specific protection offered by article 6 Rome I. However, taking into account the jurisprudence of the Court of Justice relating to the former EEX Convention (C.J. 26 February, C-280/90, *Elisabeth Hacker and Euro-Relais GmbH*, [1992] ECR I-1111), it becomes clear that this exclusion must not be applied in the case where a *tour operator*, which has his seat in the same State as the consumer's residence, undertakes to procure for that consumer the use for several weeks of holiday accommodation, *not owned by the tour operator*, in another state *if the tour operator also books the travel arrangements* [3]. When the tour operator organizes the travel *from the consumer's country* to the holiday destination, article 6.4 a) Rome I clearly doesn't apply. Therefore, the specific rule of private international law for consumer contracts is applicable, insofar the application conditions incorporated in article 6.1 Rome I are satisfied (see: 1.1.2).

With regard to the Brussels I Regulation, the German *Bundesgerichtshof* (BGH 23 October 2012, <http://www.bundesgerichtshof.de>), has gone even further and decided that the specific rule on exclusive jurisdiction with regard to tenancy of immovable property (art. 22.1 Brussels I) only applies if a consumer rents the property directly from the owner of the property himself. The *Bundesgerichtshof* didn't bother to ask for a preliminary ruling by the Court of Justice, surprisingly since in a similar case an Austrian court decided to the contrary. The court in Innsbruck stated that the scope of article 22.1 Brussels I is not limited to contracts where the house is rented from its owner but also applies to short-term rentals of holiday homes *from tour operators, unless the contract includes further services of the tour operator* (LG Innsbruck 2 February 2012, *ReiseRecht aktuell* 2012, 251). The latter interpretation is clearly less consumer friendly.

Even if one follows the interpretation of the German *Bundesgerichtshof* relating to the Brussels I Regulation, it is not sufficient to decide whether or not the contract can be considered a tenancy of immovable property as far as the determination of the applicable law is concerned. If the contract does not qualify as a tenancy, one must still take into account article 6.4, a) Rome I. If the services are exclusively to be supplied by the tour operator in a country where the consumer does not have his habitual residence (e.g. the tour operator only provides for accommodation in another country than then one where the consumer has his habitual residence), the contract is excluded from the scope of article 6 Rome I. However, this is not necessarily the case (BGH 12 October 1989, *Betriebsberater*, 1990, 658). If the contract is concluded over the Internet with a tour operator from the consumer's country, one could argue that the service is not exclusively to be provided in another country than the consumer's country, since the provision of services includes (next to the provision of the accommodation) the advertising and conclusion of the rental agreement in the consumer's country [1,4].

If the contract is a timesharing agreement within the meaning of the Timesharing Directive, this exception relating to immovable property does not apply and the specific rule of private international law, which is incorporated in article 6 Rome I remains applicable (off course insofar the requirements mentioned in 1.1.2 are met). More specifically, the Timesharing Directive amongst others applies to timeshare contracts and long-term holiday product contract. A timeshare contracts is a contract of a duration of more than one year under which a consumer, for consideration, acquires the right to use one or more overnight accommodation for more than one period of occupation. A long-term holiday product contract is a contract of a duration of more than one year under which a consumer, for consideration,

acquires primarily the right to obtain discounts or other benefits in respect of accommodation, in isolation or together with travel or other services (see art 2, a) and b) of the Timesharing Directive.

1.1.2 Specific requirements for the application of the specific rule of private international law for consumer contracts

The specific rule of private international law for consumer contracts only applies if several requirements are met: first, the contract must be concluded by a natural person for a purpose which can be regarded as being outside his trade or profession (the consumer) with another person acting in the exercise of his trade or profession (the professional). Secondly, the professional must pursue his commercial or professional activities in the country where the consumer has his habitual residence, *or* by any means, direct such activities to that country or to several countries including that country, *and* the contract must fall within the scope of such activities [2,5,6].

In the past, the Court of Justice has interpreted the notion of a consumer in a narrow way. In the *Gruber*-case (C.J. 20 January 2005, Case C-464/01, *Johann Gruber v. Bay Wa AG*, [2005] ECR-I, 439), the Court stated that a person who concludes a contract for goods intended for purposes which are in part within and in part outside his trade or profession may not rely on the special rules, unless the trade or professional purpose is so limited as to be negligible in the overall context of the supply, the fact that the private element is predominant being irrelevant in that respect. Therefore, a business man combining business and pleasure will not be able to invoke the protection offered by article 6 Rome I [7].

With regard to the requirement of pursuing or directing commercial activities in or to the consumers country, the joined *Pammer/Alpenhof*-cases (C.J. 7 December 2010, C-585/08, *Peter Pammer v. Reederei Karl Schlüter GmbH & Co. KG* and C-144/09, *Hotel Alpenhof GesmbH v. Oliver Heller*, [2010] ECR I-12527), although relating to the Brussels I Regulation, are particularly interesting for bookings over the Internet [8,9]. Before discussing these cases, it is however interesting to emphasize that it is irrelevant by which means the professional directs its activities to the consumer's country and to stress that it is not necessary that the consumer can prove the existence of a causal link between the means used to direct the commercial activity to the consumer's country and the conclusion of the contract (C.J. 17 October 2012, Case C-218/12, *Lokman Emrek v. Vlado Sabranovic*, [2013], not yet published in ECR).

In the *Pammer* and *Alpenhof* cases, the Court states that in order to determine whether a professional whose activity is presented on its website (or on that of an intermediary) can be considered to be 'directing' its activity to the Member State of the consumer's domicile, it must be ascertained whether, before the conclusion of any contract with the consumer, it is apparent from those websites and the professional's overall activity that the professional was envisaging doing business with consumers domiciled in one or more Member States, including the Member State of that consumer's domicile, in the sense that it was intended to conclude a contract with them.

Such will to conclude contracts with consumers from other Member States can not only be derived from an explicit statement on the professional's website, but also from certain indications. More specifically, following matters - the list of which is not exhaustive - are capable of constituting evidence from which it may be concluded that the professional's activity is directed to the Member State of the consumer's domicile: the international nature of the activity, use of a language or a currency other than the language or currency generally used in the Member State in which the professional is established with the possibility of making and confirming the reservation in that other language, mention of telephone numbers with an international code, outlay of expenditure on an internet referencing service in order to facilitate access to the trader's site or that of its intermediary by consumers domiciled in other Member States, use of a top-level domain name other than that of the Member State in which the trader is established, and mention of an international clientele composed of customers domiciled in various Member States. On the other hand, the mere accessibility of the professional's or the intermediary's website in the Member State in which the consumer is domiciled is insufficient. The same is true of mention of an email address and of other contact details, or of use of a language or a currency which are the language and/or currency generally used in the Member State in which the professional's is established.

Although, it is for the national courts to decide whether the service provider has directed its activities to the consumer's country, it is clear there will be many situations where this will be the case when consumers book their holiday online. More specifically, this will for example be the case when a tour operator indicates prices in the currency of the consumer's country (not being the currency of the tour operator's country) (e.g. a British tour operator also indicating its prices in euro), advertises the possibility to depart from an airport within the consumer's country (e.g. a German tour operator enabling consumers to depart from Brussels) or explains on its website how consumers from another country can reach the airport of the tour operator's country (e.g. a Dutch tour operator mentioning on his website how to drive from Antwerp, Ghent and Brussels (Belgian cities) to Schiphol airport (Amsterdam)).

Finally, it is important to stress, that a consumer cannot invoke this specific rule of private international law if the professional has clearly indicated on his website that he does not wish to conclude contracts with consumers from a given country (Opinion of Advocate General Trstenjak, Joined cases C-585/08 and C-144/09). However, this is rather uncommon in the context of contracts relating to touristic services.

1.2 The law applicable to consumer contracts falling under the scope of article 6 Rome I

Article 6 Rome I determines that the law of the consumer's habitual residence applies if the parties did not choose the law applicable to the contract. If they did choose the law applicable to the contract (which is quite common in cross-border consumer agreements), the chosen law (most often the law of the service provider's habitual residence) cannot deprive the consumer of the protection which is offered to him according to the provisions in his own legal system from which the parties cannot derogate by agreement.

Since provisions on consumer law are typically mandatory in the meaning of article 6 Rome I (they cannot be derogated from by contract), this specific rule of private international law implies that the consumer will always be able to invoke the additional protection offered by his own legal system [1]. Therefore, if the foreign touristic services provider has chosen for his own law, the consumer will have the possibility to choose for the most advantageous provisions from the service provider's law and from the law of his own country [5]. For example, if a French consumer has concluded a contract with a Belgian tour operator and the contract meets all requirements to apply the specific rule of private international law and the contract contains a choice of law clause stating that Belgian law is applicable, the French consumer can opt for the application of Belgian law, where Belgian law offers more protection than French law, and for the application of French law, where French law offers more protection than Belgian law. Therefore, the rule, which is incorporated in article 6.2 Rome I Regulation is clearly more beneficial than a rule which would simply state that the law of the consumer's habitual residence applies in case its requirements to apply are met.

1.3 The law applicable to accommodation contracts and the rental of holiday homes

1.3.1 Choice of law clauses and their limits

As well in the case of hotel accommodation contracts, as in the case of a tenancy of a holiday home, the parties are free to choose the applicable law (art. 3 Rome I), since article 6.2 Rome I does not apply in these situations (art. 6.4 Rome I). Moreover, it is not necessary to choose for the law of the country where the hotel or holiday home is located [5]. For example, if a Dutch consumer rents a holiday home in Italy, the parties can choose to apply German law (which could for example be the case if the owner is German).

However, the right to choose is not without limits [2, 3].

First, if all other elements relevant to the situation at the time of the choice are located in a country other than the country whose law has been chosen, the choice of the parties cannot prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement (art. 3.3 Rome I). For example, if a German consumer books a room in a German hotel owned by a German company through the hotel's website, the parties can choose to apply Greek law, but the application of Greek law cannot deprive the consumer from the possibility to invoke German mandatory provisions (not even if the application requirements of article 6 Rome I are not met).

Secondly, the parties' choice of applicable law other than that of a Member State cannot prejudice the application of provisions of Community law (where appropriate as implemented in the Member State of the forum) which cannot be derogated from by agreement, if all other elements relevant to the situation at the time of the choice are located in one or more Member States of the EU (art. 3.4 Rome I). For example, when a French consumer books a hotel in Sicily through the website of the Italian hotel owner, the choice for Turkish law (which is valid as such) cannot deprive the consumer from the application of 'mandatory' rules of consumer protection incorporated in European Regulations and in European Directives, as implemented in the law of the forum (in this example most probably Italy).

1.3.2 The law applicable in the absence of a choice of law clause

If the parties did not choose the applicable law, article 4 Rome I determines the law which must be applied. A distinction must be made between a contract relating to the provision of hotel accommodation and a contract relating to the rental of a holiday home.

In the case of hotel accommodation, one must apply article 4.1, b) Rome I, which determines that in the case of a *contract for the provision of services*, the contract is governed by the law of the country where the service provider has his habitual residence [3]. Therefore, the law of the country where the hotel is located applies. Even if the hotel is owned by a service provider from another country than the one in which the hotel is located, the law of the place where the hotel is located should be applied, since article 4.3 Rome I determines that where it is clear from all the circumstances of the case that the contract is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country applies.

In the case of a contract relating to a tenancy of immovable property, the contract is governed by the law of the country where the property is situated (art. 4.1 b) Rome I). However, if a tenancy of immovable property is concluded for temporary private use for a period of no more than six consecutive months (which is usually the case when a holiday home is rented), this contract is governed by the law of the country where the landlord has his habitual residence, provided that the tenant is a natural person *and has his habitual residence in the same country* (art. 4.1 c) Rome I). If the latter is not the case, the law of the country where the property is located applies. Suppose that a Belgian consumer rents a holiday home in Spain for two weeks from a landlord who has his habitual residence in Belgium. In that case, Belgian law will apply. However, if the same holiday home, rented by the same Belgian consumer for the same period, is owned by a landlord who has his habitual residence in the Netherlands, Spanish law will apply. As was already mentioned, a choice of law clause, determining that Dutch law applies, in the latter case would be valid.

1.1.3 Weak protection at the level of private international law

It is clear that in most cases the law applicable to the contract will not be the law of the consumer's country, either because the contract contains a choice of law clause, either because article 4.1 Rome I leads to the application of the law of the service provider (hotel accommodation) or the law where the property rented (tenancy contract) is located.

The protection offered to consumers booking hotel accommodation outside a package deal, or renting a holiday home, is clearly less extensive than in case the specific rule of private international law applies. Even when a hotel offers its services through websites like booking.com (which are directed to consumers worldwide), when a hotel puts reviews from travelers from the consumer's country on-line or translates its website in the language of the consumer's country, the hotel owner must not fear the application of measures from the consumer's country offering additional protection. Moreover, the hotel owner must not necessarily choose the law of the country where the hotel is located, which the consumer, not being able to invoke his own national legislation would expect.

1.4 The law applicable to carriage contracts

Article 5 Rome I makes a distinction between contracts of carriage of goods and contracts of carriage of passengers. When consumers go on a holiday, the carriage contract relates to passengers as well as their baggage. However, the carriage of baggage clearly being complementary to the carriage of passengers - i.e. not being the main purpose of the contract (cfr. recital 22 Rome I) - rules relating to the carriage of passengers must be applied.

1.4.1 Choice of law clauses

In the case of a contract for the carriage of passengers, the parties can choose the law applicable to the contract for the carriage. However, the choice is "restricted" to the law of the country where: (a) the passenger has his habitual residence; or (b) the carrier has his habitual residence; or (c) the carrier has his place of central administration; or (d) the place of departure is situated; or (e) the place of destination is situated. As one can see, one can hardly speak of a real limitation of the possibility to choose the applicable law, since the carrier has the possibility to choose for the law of the country where he has his habitual residence or his place of central administration (art. 5.2 Rome I). In practice, most contracts contain a choice of law clause, implying that consumers will not be able to invoke the law of their own country [7]. One again, it is clear that article 6.2 Rome I is far more beneficial than the rule governing contracts of carriage of passengers (art. 5.2), which in the event of a choice for the professional's law does not enable a passenger to invoke additional protection that is offered to him by the mandatory provisions of the country where he has his habitual residence.

1.4.2 Law applicable in the absence of choice of law clauses

Only if the parties did not choose the law applicable to the contract (which is very uncommon), the law of the country where the passenger has his habitual residence applies, *but only* if either the place of departure or the place of destination is situated in the country where the consumer has his habitual residence. If these requirements are not met, - i.e. when the passenger has his residence in another country than the place of departure or the place of destination - once again the law of the country where the carrier has his habitual residence applies (art. 5.1 Rome I). Where it is clear from all the circumstances of the case that the contract, in the absence of a choice of law, is manifestly more closely connected with another country than that indicated in art. 5.2 Rome I, the law of that other country applies.

1.4.3 The importance of international conventions

In the context of international carriage contracts it is also important to emphasize that the Rome I Regulation does not prejudice the application of international conventions (art.25 Rome I), such as those seeking to regulate carriage by a particular mode of transport by imposing a uniform set of rules [3]. With regard to the international carriage of passengers and their baggage *by air*, one needs to take into account the Montreal Convention (Convention for the Unification of Certain Rules for International Carriage by Air, *OJL* 194, 18 July 2001, p. 39), which determines in article 46 that any clause contained in the contract of carriage by which the parties purport to infringe the rules laid down by the Convention, *whether by deciding the law to be applied, or by altering the rules as to jurisdiction*, are to be considered null and void. It is clear that the Convention, being directly applicable, does not leave any room for the application of other rules, *where a Convention provision is applicable* [3].

More specifically, amongst others provisions, the Montreal Convention contains rules on:

- 1) the liability of the carrier in the event of i) death or injury of passengers, ii) loss or destruction of or damages to baggage and iii) delay in the carriage of passengers or baggage (articles 17 and 19);
- 2) the compensation to be paid in case of liability for death or injury of passengers (art. 21) and
- 3) the limitation of liability in case of delay in the carriage of passengers or loss, destruction of or damages to baggage (art. 22).

Contrary to the European Airline Passengers Regulation (Regulation (EC) No 261/2004 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 (*OJL* 46, 17 February 2004, p.1)¹, which contains a uniform set of rules with regard to airline's passengers rights in the case of denied boarding, cancellation or delay, the Montreal Convention does not contain any provisions on liability in the event of denied boarding and cancellation of a flight².

1.5 Packages not meeting the requirements of article 6.1 Rome I

Finally, the question arises which law applies to packages in case the application criteria of article 6.1 Rome I are not met, i.e. when a foreign tour operator has not directed its activities to the consumer's country.

Packages cannot be considered as mere carriage contracts. They consist of several services, which implies that in the absence of a choice of law clause, the law of the habitual residence of the service provider (tour operator) must be applied [1]. The place where the accommodation is located is in this regard not relevant.

1.5 Overriding mandatory provisions

As well with regard to contracts for the provision of hotel accommodation, contracts relating to the tenancy of an immovable property, carriage contracts, as with regard to packages not meeting the requirements of article 6.1 Rome I, we have concluded that the consumer will normally not be able to invoke the protection which is offered by the mandatory provisions of the country in which he resides, since these contracts either fall outside the scope of the specific rule of private international law, either do not meet its application requirements. Only to the extent that certain provisions of consumer law could also be considered *overriding* mandatory in the meaning of article 9.1 Rome I, the consumer might be able to invoke the additional protection incorporated in his own law.

Overriding mandatory provisions are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organization, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under the Rome I Regulation (art. 9.1 Rome I) [10]. Although it is clear that most rules protecting a travelling consumer cannot

¹ The European Commission has proposed some changes to the existing Regulation. The proposal clarifies legal grey areas and introduces new rights where necessary. See: http://europa.eu/rapid/press-release_MEMO-13-203_en.htm.

² This paper will not focus on the relation between the Montreal Convention and the European Regulation, in particular in the event of a delayed flight. Reference is only made to the jurisprudence of the Court of Justice of the EU entitling the passenger to a compensation in the event a flight reaches its final destination more than three hours late (insofar delay is not due to unforeseeable circumstances): Case C-402/07, *Sturgeon Christopher Sturgeon, Gabriel Sturgeon and Alana Sturgeon v Condor Flugdienst GmbH*, and Case C-432/07, *Stefan Böck and Cornelia Lepuschitz v Air France SA* [2009] ECR- I, 10923; Case C-581/10, *Nelson v Deutsche Lufthansa AG* and Case C-629/10, *TUI Travel v Civil Aviation Authority*, not yet published in ECR. See also Case C-413/11, *Germanwings v. Thomas Amend*, not yet published in ECR.

be regarded as such *overriding* mandatory provisions, examples of overriding mandatory provisions can be found. Next to provisions relating to consumer's safety and security, the rules incorporated in the Airline Passengers Regulation may for example be considered as overriding mandatory.

The fact that some rules can be considered as *overriding* mandatory provisions is important since the law applicable to the contract cannot restrict the application of the overriding mandatory provisions of the forum (art. 9.2 Rome I). In other words, if the courts of the country where the consumer has his habitual residence deal with the case, they can always – and often will – apply the overriding mandatory provisions of the forum protecting the consumer. But how likely is it that the courts of the country where the consumer resides will be competent in cases where the consumer cannot rely on article 6 Rome I to invoke the mandatory provisions of the law of his own country? Well, with regard to contracts relating to hotel accommodation concluded on-line, this is quite likely, since the specific rule for consumer contracts - implying that the consumer can bring the case for the courts in his own country if the trader has directed its activities to the consumer's country (art. 15-16 Brussels I) - contrary to article 6.2 Rome I, applies to contracts where the services are to be supplied to the consumer exclusively in a country other than that in which the consumer has his habitual residence. However, the importance of this finding may not be overestimated, taking into account the fact that most provisions protecting consumers, cannot be considered as overriding mandatory.

Other courts, outside the consumer's country, may also give effect to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, in so far as those overriding mandatory provisions render the performance of the contract unlawful (art. 9.3 Rome I). In most cases this provision will not benefit the travelling consumer.

2. To what extent does private international law really matter ?

Do rules of private international law really matter, taking into account that consumer law and passenger rights have been harmonized to a large extent by the European legislator? Answering this question, it is first of all necessary to have a brief look at the harmonization techniques which have actually been used by the European legislator with regard to touristic services offered to consumers.

2.1 Harmonization techniques used with regard to touristic services

Consumer's rights relating to carriage contracts have been harmonized by several Regulations, the most famous one being the Airline Passenger Regulation. Being directly applicable within the national law of the Member States, the rules are identical in all Member States. Moreover, the European Court of Justice ensures that the rules are interpreted in a uniform way all over the EU. As far as disputes with regard to the liability of the carrier in the event of death or injury of passengers, loss or destruction of or damages to baggage and delay in the carriage of passengers or baggage are concerned (carriage by air), the already mentioned Montreal Convention of 1999 applies.

With regard to other topics, such as package travel and timesharing, Directives have been used to harmonize the law of the Member States. Directives can be based either on full harmonization (e.g. Timesharing Directive), either on minimum harmonization (Package Tour Directive). In the case of minimum harmonization, European Directives only determine the minimum level of protection that must be offered to consumers. Member States, when implementing the Directives, retain the possibility to maintain and even introduce measures which offer additional protection to consumers, the only requirement being that additional protection measures do not violate the principle on the free movement of goods, or in our case services (C.J. 12 July 2012, Case C-602/10, *SC Volksbank România SA*, <http://curia.europa.eu>) [10, 11]. Directives based on full harmonization do not only determine the minimum level of protection which must be offered to consumers, but also the maximum level of protection that can be offered, at least within the field harmonized by the Directive. Therefore, in the case of full harmonization, Member States do not have the possibility to incorporate or even preserve additional protection measures into their national legislation [11,12].

Talking about consumers booking holidays online, other consumer protection Directives also play an important role. Especially, the Directive on unfair contract terms (Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, 95 *OJL* 21 April 1993, p. 29) plays an important rule. This Directive is based on minimum harmonization.

2.2 Where does it matter?

It is clear that in the case harmonization has taken place using a Regulation or even a Directive based on full harmonization, rules of private international law no longer play a(n) (important) role, at least not within the harmonized

field of law. Therefore, in the case of full harmonization, the importance of rules of private international law is limited to questions not falling under the scope of the Directive or questions not being harmonized by the Directive (C.J. 12 July 2012, Case C-602/10, *SC Volksbank România SA*, <http://curia.europa.eu>). For example, the Consumer Rights Directive (Directive 2011/83/EU of the European Parliament and the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and the Council, *OJL* 304, 22 December 2011, p. 64) does not apply to passenger transport services. However, Member States are free to decide, within the limits imposed by the free movement of services, to apply the rules that are incorporated in the Consumer Rights Directive to contracts relating to passenger transport services. The Belgian legislator for example has chosen to apply the information requirements which are incorporated in the Consumer Rights Directive to passenger transport services, which implies that for Belgian consumers it can matter whether or not Belgian law is applicable.

In the case of minimum harmonization, rules of private international law remain important whenever the legislator of the consumers' country has chosen to apply additional protection measures (e.g. with regard to unfair contract terms or package deals).

Further, it is evident that the harmonization which has taken place at the European level can only protect consumers when the EU legislation (as implemented by the national legislators) applies. This will not always be the case. For example, if a Belgian consumer books a flight with American Airlines, the Airline Passengers Regulation, determining the consumer's rights in case of denied boarding, cancellation or long delay of the flight, will not apply to the flight from New York to Brussels.

Conclusion

Rules of private international law determining the law applicable in case consumers book their holiday online are rather complicated. Since different rules of private international law apply depending on the type of service provided, it will be very hard for a consumer to determine – or even to explain to an average consumer - when he will be able to invoke the mandatory provisions incorporated in the law of the country where he has his habitual residence.

Although harmonization cannot always guarantee that the law of the touristic services provider contains the same protection as the law of the consumer's country, the European legislator has not chosen to protect the consumer at the level of private international law (except for certain types of contracts (packages, timesharing) and only insofar certain application requirements are met). When booking a hotel room, renting a holiday home, booking a means of transportation or booking an excursion, the consumer will not be protected at the level of private international law. Since parties are free to choose the law applicable to the contract, the consumer is not even certain that the law of the country where the hotel or holiday home is located or where the service is provided will apply [5]. The European legislator has clearly been protective to transporters and other touristic services providers, the main arguments being that these service providers would otherwise be obliged to respect the laws of all states [3] and consumers should not be entitled to protection at the level of private international law when they choose themselves to go to another country [1].

References

- [1] Martiny, D. 2010. *Münchener Kommentar Bürgerliches Gesetzbuch*. Verlag C.H. Beck, pp. 522 and 700-713.
- [2] Belohlavek, A. 2010. *Rome Convention Rome I regulation*. Juris, pp. 704-708, 1029-1036, 1127-1136; 1158-1167.
- [3] Dickey, Morris & Collins. 2012. *The Conflict of Laws*. Sweet & Maxwell, pp. 1031-1033, 1319, 1827-1836, 1900-1912, 1917-1923, 1948-1976.
- [4] Lindacher, W. 1990. "Anmerkung unter BHG 12 October 1989", *Betriebsberater* 45(10):661.
- [5] Lopez-Tarruella Martinez, A. 2008. "International consumer contracts in the new Rome I Regulation: how much does the regulation change?", *European Journal of Consumer Law* 12(3):345-385.
- [6] Francq, S. 2009. "Le Règlement "Rome I" sur la loi applicable aux obligations contractuelles – De quelques changements...", *Journal du Droit International*, 136 (1):62-65.
- [7] Kenfack, H. 2009. "Le règlement (CE) n° 593/2008 du 17 juin 2008 sur la loi applicable aux obligations contractuelles ("Rome I"), navire stable aux instruments efficaces de navigation?", *Journal du Droit International* 136(1) :3-39.
- [8] Alvarez Armas, E. and Dechamps, M. 2011. "Arrêt Pammer et Hotel Alpenhof: L'équilibre entre consommateurs et professionnels dans l'e-commerce", *European Journal of Consumer Law*, 15 (2):447-453.
- [9] Posnow Wurm, M. 2011. "La protection des consommateurs en droit international privé européen suite aux arrest Pammer – Hotel Alpenhof: la notion d' "activité dirigée"", *Tijdschrift@IPR.be* 10 (1) : 162-180.

- [10] HARRIS, J. 2009. "Mandatory Rules and Public Policy under the Rome I Regulation". *Rome I Regulation, The Law Applicable to Contractual Obligations in Europe*, Sellier, pp. 269-342.
- [11] Mak, V. 2009. "Review of the Consumer Acquis: Towards Full Harmonization?", *European Review of Private Law* 17 (1): 58-59.
- [12] Twigg-Flesner, C. 2007. "No sense of purpose or direction? The modernization of European Consumer Law", *European Review of Contract Law* 3 (2):204.