1. INTRODUCTION

1. In 2009, Johan ERAUW, who has been a colleague of mine at Ghent University for several years, commented on the rule of private international law relating to contracts of carriage of passengers, which is incorporated in article 5.2 of the Rome I-Regulation. Johan particularly argued that (own translation):

“Although the European legislator aimed to protect consumers adequately, it did not reach this objective. More specifically, this is due to the fact that the contractual parties are given the possibility to agree that the contract is governed by the law of the country where the carrier has his habitual residence or his place of central administration. Since choice of law clauses are included in the general terms and conditions and since passengers do not have the possibility to negotiate the content of these terms, in reality the carrier has the possibility to determine that his own law is applicable to the contract. Therefore, passengers aren’t protected at all.”

2. In this article, I will focus on contracts of carriage of airline passengers. More specifically, I will address two questions. On the one hand, I will discuss to what extent consumers concluding an airline’s contract of carriage are less protected than “ordinary” consumers in the field of private international law. On the other hand, I will indicate to what extent this lack of protection really matters, taking into account the harmonization that has taken place with regard to airline’s contracts of carriage within the European Union and at the international level. Prior to addressing these two questions, it is, however, necessary to discuss very briefly article 5.2 of the Rome I-Regulation relating to contracts of carriage of passengers and its relation to international Conventions containing uniform rules on contracts of carriage.

2. RULES OF PRIVATE INTERNATIONAL LAW WITH REGARD TO CARRIAGE CONTRACTS

3. Article 5 Rome I makes a distinction between contracts of carriage of goods and contracts of carriage of passengers. In the case of an airline’s contract of carriage, the carriage contract relates to passengers as well as their baggage. However, the carriage of baggage being complementary to the carriage of passengers - i.e. not being the main purpose of the contract - rules relating to the carriage of passengers must be applied to airline’s contracts of carriage.

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2 J. DE MEYER & J. ERAUW, “Het recht van toepassing op verbintenissen uit overeenkomst volgens de nieuwe Rome I-Verordening” (2009), in Nieuw Internationaal Privaatrecht: meer Europees, meer globaal. XXXVste Postuniversitaire Cyclus Willy Delva, Mechelen, Kluwer, p. 318, nr. 72. This article is the written report of an oral presentation, which Johan held in Ghent, as well as in Antwerp. I vividly recall we drove to Antwerp together, having a pleasant and interesting discussion, amongst others on private international law and consumer protection.
In 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 actual 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 reality, the general terms and conditions contain such a choice of law clause, implying that passengers adhering to the general terms and conditions will not be able to invoke the law of the country in which they reside.

If the parties did not choose the law applicable to the contract (which is uncommon), the law of the country where the passenger has his habitual residence applies, insofar either the place of departure or the place of destination is situated in the country where the passenger 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. 5.2 Rome I). Only where it is clear from all the circumstances of the case that the contract is manifestly more closely connected with another country than that indicated in art. 5.2 Rome I, the law of that other country applies (art. 5.3 Rome I).

4. In the context of international carriage contracts it is 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. With regard to the international carriage of passengers and their baggage by air, one needs to take into account the Montreal Convention, 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.

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

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

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8 DICEY, MORRIS & COLLINS, ibidem, note nr. 5, pp. 1923.
Contrary to the European Regulation No 261/2004 (Airline Passengers Regulation), 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 flight.

3. RULES OF PRIVATE INTERNATIONAL LAW WITH REGARD TO CONSUMER CONTRACTS

5. In order to determine whether airline passengers are less protected than consumers in general at the level of private international law, it is necessary to take a closer look at article 6 Rome I that contains a specific rule of private international law for consumer contracts. As will be illustrated below, article 6.2 Rome I offers additional protection to consumers insofar certain conditions are met.

In the following sections, I will indicate the content of the protection offered to consumers, the conditions which must be met in order to apply this specific protection and finally the extent to which this specific protection is applicable to airline passengers qualifying as a consumer.

3.1. THE ACTUAL PROTECTION

6. Article 6.2 Rome I determines that in the absence of a choice of law clause, a consumer contract is governed by the law of the country where the consumer has his habitual residence. In the case the parties have chosen to apply another law (most often the law of the country where the professional is established), this choice of law can not deprive the consumer from the protection which is offered to him by the “mandatory” provisions – i. e. provisions that can not be derogated from by agreement - incorporated in the law of the country where the consumer has his habitual residence. It is clear that most rules, which aim to protect consumers, are mandatory within the meaning of this provision.

Therefore, the consumer will find himself in an favorable position in case the professional has chosen to apply the law of the country where the professional is established. If the professional’s law offers additional protection compared to the consumer’s law, the consumer can invoke the provisions incorporated in the professional’s law, since this law has been chosen. If the law of the consumer’s country offers additional protection, the consumer will be able to apply his own law. He gets the best out of two worlds. Therefore, this rule is definitely

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10 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.

11 D. MARTINY, ibidem note nr. 3, pp. 709-710.
more beneficial than a rule which would simply state that in all cases falling under the scope of article 6 Rome I, the consumer’s law must be applied.\footnote{A. LOPEZ-TARRUELLA MARTINEZ, “International consumer contracts in the new Rome I Regulation: how much does the regulation change?” (2008) 12 EJCL (European Journal of Consumer Law) pp. 361. See also: J. BASEDOW, “Consumer contracts and insurance contracts in a future Rome I-Regulation”, in Enforcement of International Contracts in the European Union: Convergence and Divergence between Brussels I and Rome I, Antwerp 2004, pp.281-280; D. MARTINY, ibidem note nr. 3, pp. 710.}

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. Only to the extent that certain provisions can also be considered \textit{overriding} mandatory in the meaning of article 9.1 Rome I\footnote{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 this Regulation (art. 9.1 Rome I). See for example: J. HARRIS, “Mandatory Rules and Public Policy under the Rome I Regulation”, in Rome I Regulation, The Law Applicable to Contractual Obligations in Europe, Sellier, Munich 2009, pp. 269-342; D. MARTINY, ibidem note nr. 3, pp. 803-808.}, the passenger might be able to invoke the additional protection incorporated in his own law (see art. 9 Rome I). In my view, next to provisions relating to passenger’s security, the rules incorporated in the Airline Passengers Regulation can be considered as overriding mandatory. Once they apply according to the Regulation (\textit{infra} nr. 14), passengers can invoke these rules independent of the choice of law made.

\section*{3.2. REQUIREMENTS WHICH MUST BE MET TO APPLY ARTICLE 6.2 ROME I}

\subsection*{7.} It is important to emphasize that this specific rule of private international law can only apply if certain conditions 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, \textit{or} by any means, direct such activities to that country or to several countries including that country, \textit{and} the contract must fall within the scope of such activities (art. 6.1 Rome I)\footnote{A. BELOHLAWEK, Rome Convention Rome I regulation. Juris, 2010, pp. 1145-1146; A. LOPEZ-TARRUELLA MARTINEZ, ibidem note nr. 12, pp. 354.}.

\subsection*{8.} In the past, the Court of Justice has interpreted the notion of a \textit{consumer} in a narrow way. In the \textit{Gruber}-case\footnote{Case C-464/01, Johann Gruber v. Bay Wa AG, [2005] ECR-I, 439, para. 46. See for example: G. HOWELLS, “The scope of European consumer law”, (2005) 1 ERCL (European Review of Contract Law), pp. 360-361.}, 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 travelling abroad and combining business and pleasure would never be able to invoke the protection offered by article 6 Rome I\footnote{H. KENFACK, ibidem note nr. 3, nr. 45.}.

\subsection*{9.} A professional pursues his activities within the consumer’s country if he (or his representative) has actually travelled to the country where the consumer resides or when he
opens a temporary or permanent establishment in that state. However, the specific rule of private international law only applies when the contract falls within the scope of this activity. This will for instance not be the case if a German professional has a branch in Belgium, but the Belgian consumer concludes the contract at a German branch.

10. If not pursuing any activities in the consumer’s country, the consumer will still be able to invoke the protection offered by article 6.2 Rome if the professional has directed its activities to the consumer’s country. First, it is important to emphasize that the scope of application of this provision is not limited to contracts which are concluded at a distance. Also, it is irrelevant by which means the professional directs its activities to the consumer’s country. For example, a professional clearly directs its activities to the consumer’s country when he advertises in the local newspapers of the consumer’s country or on the radio or television channels of the consumer’s country. Recently, the Court of Justice acknowledged that in order to apply the specific rule of private international law, 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.

In this context the question arises when a professional directs its commercial activities to the consumer’s country when he offers goods and services over the Internet. In this context the joined Pammer/Alpenhof-cases are particularly interesting. In these cases, the Court of Justice of the EU decided 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 intention 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, the following indications - the list is not exhaustive - may constitute evidence supporting the conclusion 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,

17 DICEY, MORRIS & COLLINS, ibidem, note nr. 5, pp. 1953; A. LOPEZ-TARRUELLA MARTINEZ, ibidem note nr. 12, pp. 354.
19 A. LOPEZ-TARRUELLA MARTINEZ, ibidem note nr. 12, pp. 354.
use of a top-level domain name other than that of the Member State in which the professional 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 for the mere mentioning of an email address and of other contact details, or the use of a language or a currency that is the language and/or currency generally used in the Member State in which the trader is established.

Although it is for the national courts to decide whether the professional has directed its activities to the consumer’s country, it is clear that - if this rule would apply to airline’s contracts of carriage (infra nr. 12) - there would be many cases where consumers booking their flight online would be able to invoke their own law. More specifically, this would for example be the case when prices are indicated on the airline’s website in the currency of the consumer’s country (not being the currency of the airline’s country) (e.g. British Airways also indicating its prices in euro), the airline’s website uses the language of the consumer’s country, not being the language of the airline’s country (e.g. the webpage of www.airfrance.be is in Dutch), advertises the possibility to depart from an airport within the consumer’s country (e.g. Lufthansa enabling consumers to depart from Brussels) or explains on its website how consumers from another country can reach the airport of the airline’s country (e.g. KLM mentioning on his website how to drive from Antwerp, Ghent and Brussels (Belgian cities) to Schiphol airport (located at Amsterdam in the Netherlands).

Finally, it is important to stress, that a consumer can of course not 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. However, this is rather uncommon in the context of airline’s contracts of carriage.

11. In conclusion, if the specific rule of private international law would apply to airline’s contracts of carriage, there would be many situations in which a passenger, that can be considered a consumer, would be able to invoke this specific rule of private international law. But, as we will illustrate immediately, airline’s contracts of carriage are often excluded from the specific rule of private international law for consumer contracts.

3.3. APPLICABILITY OF ARTICLE 6.2 ROME I TO AIRLINE’S CONTRACTS OF CARRIAGE

12. The specific rule of private international law protecting consumers does not apply to carriage contracts (art. 6.4 Rome I). Therefore, a consumer booking an airline ticket will be less protected than a consumer concluding another cross-border contract with a professional who has pursued or directed his activities to or in the consumer’s country.

However, not all contracts relating to the carriage of passengers are excluded from the scope of article 6 Rome I. A distinction must be made whether the transport forms a part of a

23 Opinion of Advocate General TRSTENJAK, Joined cases C-585/08 and C-144/09, para 92
25 P.A. NIELSEN, ibidem note nr. 3, pp. 107; D. MARTINY, ibidem note nr. 3, pp. 643. Also excluded from the specific rule of private international law are 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 (6.4 a) Rome I).
package in the meaning of the Package Tours Directive. If so, the specific rule of private international law for consumer contracts can apply (insofar the other requirements, mentioned earlier are met, supra nrs. 8-10); 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 site such as www.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 6.1 Rome I are met).

With regard to situations where the accommodation and the transport are integrated in one deal, the Court of Justice argued in the Pammer-case, that a contract concerning a voyage by freighter, is a contract of transport that, for an inclusive price, provides for a combination of travel and accommodation. 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. an overnight flight or 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.

An interesting question relates to the fact that many airline companies, on their websites or after booking an airline ticket, “offer” accommodation at certain hotels. In this context it must be examined whether, in case the passenger also books 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. Therefore, only if the airline company commits itself to provide accommodation - which is moreover not complementary to the flight operated (e.g. accommodation for the night between connecting flights) - and this in addition to the carriage of the passenger by air and at an inclusive price, a package deal comes into play.

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28 On 9 July 2013 the Commission proposed a reform of the Package Travel Directive to bring it up to date with the developments in the travel market. While still focusing on ‘packages’, it is wider in scope and clearly includes new, commonly used combined travel arrangements.
30 D. MARTINY, ibidem note nr. 3, pp. 702.
31 President Commercial Court Namur, 10 March 2010, (2011) 92-93 DCCR (Droit de la Consommation – Consumentenrecht), pp. 108 and 146 (two decisions), note R. STEENNOT.
13. In conclusion, airline’s passengers, which can be considered a consumer, will not be able to invoke the specific protection at the level of private international law, when merely booking a flight and are therefore at the level of private international law less protected than “ordinary” consumers. However, when the flight is a part of a package and the tour operator has pursued its activities within the consumer’s country or has directed its activities towards the consumer’s country, the consumer will be protected at the level of private international law.

4. TO WHAT EXTENT DOES PRIVATE INTERNATIONAL LAW REALLY MATTER?

14. Do rules of private international law really matter, taking into account the European Airline Passengers Regulation and the Montreal Convention? Being directly applicable within the national law of the Member States, the rules on denied boarding, cancellation and delay of flights (Regulation) and the rules on liability in case of death or injury or loss of destruction of baggage are identical in all Member States. Moreover, the Court of Justice of EU is competent to interpret the rules incorporated in the Regulation and the Montreal Convention.

First of all, it is important to emphasize in this context that important questions with regard to passenger’s rights, such as liability of the airline company in event of denied boarding and in case of cancellation are not dealt with in the Montreal Convention. In addition, not all flights booked by European consumers fall within the scope of the Airline Passengers Regulation. More specifically, the Regulation applies to 1) flights departing in a Member State of the European Union and 2) flights departing outside the European Union to an airport situated in the territory of a Member State, insofar the operating air carrier of the flight concerned is a Community carrier. Therefore, the Regulation for example does not apply in case of cancellation of a flight from Cape Town to Brussels operated by South African Airlines. This contract will normally include a choice for South African law (see art. 5.2 Rome I), which might offer less protection than the law of the European country where the consumer resides.

15. Furthermore, talking about passenger’s rights, other consumer protection Directives are also important. Especially, the Directive on unfair contract terms, prohibiting unfair contract clauses in contracts with consumers, plays an important role. This Directive is based on minimum harmonization, which implies that Member States, when implementing the Directive, retained 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.

Therefore, in case of minimum harmonization, rules of private international law remain important whenever the legislator of the consumers’ country has chosen to maintain or introduce additional protection measures. Research has shown that with regard to unfair

32 ‘Community carrier’ means an air carrier with a valid operating license granted by a Member State in accordance with the provisions of Council Regulation 92/2407/EEC of 23.07.1992 on licensing of air carriers (Art 2(c)).
33 Taking into account the auto-limitative character of the Regulation, the protection incorporated in the Regulation can not apply, not even if the law of the consumer’s country would be applicable to the contract.
36 Case C-205/07, Lodewijk Gysbrechts and Santurel Inter BVBA, [2008] ECR I-09947, para 34.
contract clauses, many Member States have used the possibility to incorporate additional protection measures, implying that the law of the consumer’s country might offer more protection against unfair contract terms than the law of the carrier’s central administration.

However, Directives can also be based on full harmonization. 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)37. 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 Directive38. Interesting to mention in this context is that the Consumer Rights Directive39 does not apply to 1) package contracts in the meaning of the Package Tour Directive and 2) contracts for passenger transport services40 (art. 3.3). Once again, private international law remains important, since differences between the law of the Member States can remain.

CONCLUSION

16. This paper has shown that passengers who merely book a flight are far less protected at the level of private international law than ordinary consumers, who can - at least if the professional has pursued his activities in or directed his activities to the consumer’s country - invoke additional protection measures that are incorporated in the law of the country where they reside. Only if the flight is part of a package in the meaning of the Package Tour Directive, passengers will at the level of private international law be protected in the same way as other consumers.

As far as passengers’ rights in the event of cancellation, delay or denied boarding (Airline Passengers Regulation) or in the event of death or injury of passenger or loss or destruction of baggage (Montreal Convention), are concerned, it is important to understand that due to the harmonization of air passenger’s rights in most cases identical rules apply if consumers residing in the EU book a flight. However, it is equally important to understand that the rules incorporated in the Airline Passengers Regulation are not always applicable, since the Regulation does not apply to flights departing outside the European Union to an airport situated in the territory of a Member State, if the operating air carrier of the flight concerned is not a Community carrier. Furthermore, with regard to the unfairness of contractual terms, significant differences remain between the law of the Member States due the fact that the Unfair Contract Terms Directive is based on minimum harmonization41. The lack of protection at the level of private international law with regard to airline’s contracts of carriage can therefore still be criticized.

37 Ibidem note nr. 35. See also: Case C-261/07, VTB-VAB versus Total Belgium, [2009] ECR I-2949, para 52.
40 With the exception of Article 8(2) and Articles 19 and 22 of the Directive.