

The law applicable to contracts relating to touristic services booked over the Internet

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ABSTRACT

Consumers progressively use the Internet when booking their holiday. Doing so, an increasing amount of contracts are concluded with foreign touristic services providers, without the intervention of an intermediary located in the consumers country. Within this context, the question arises which law is applicable to online consumer contracts relating to touristic services. This paper will show on the one hand that different rules of private international law apply depending on the type of holiday which is booked (which makes it all very complicated, especially for consumers), on the other hand that not all rules of private international law, which are important in the context of the provision of touristic services, protect consumers. Finally, it is examined as to what extent this finding really matters, taking into account the harmonization of consumer protection law within the European Union.

INTRODUCTION

Consumers booking their holiday (over the Internet) 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 (booked directly at the hotel or through an intermediary, such as booking.com), holiday home rentals, local excursions, car rental services and even timesharing. When concluding these types of contracts with service providers from another country, 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). 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.

DETERMINING THE LAW APPLICABLE TO HOLIDAY CONTRACTS

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. As far as touristic services provided to consumers are concerned 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)).

The SCOPE OF APPLICATION of the rules of private international

In order to determine the law applicable to a contract relating to touristic services (which is concluded online 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 (art. 6 Rome I, which ensures that consumers 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 under which conditions, other (not-excluded) contracts concluded over the Internet, fall under the specific rule of article 6 Rome I.

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 (e.g. a Dutch consumer booking a room in an Italian hotel [1], a German consumer booking an excursion with a French service provider for an ascent of the Mount Blanc [2], a Belgian consumer renting a car from a Greek car rental agency only allowing the consumer to drive the car in Greece);
- (b) carriage contracts, such as airline, train and boat tickets (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) which do fall under the scope of application of article 6 Rome I [1,2] and

(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), which falls under the scope of article 6 Rome I [1, 2].

The latter exclusion 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 recently 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 not having his habitual residence in the consumer's country only provides for accommodation), 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].

With regard to the exclusion of carriage contracts, a distinction must be made whether the transport forms a part of a 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 hereafter 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].

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].

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 cases 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)).

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 chose the law applicable to the contract. If they did chose the law applicable to the contract (which is quite common in cross-border consumer agreements), the chosen law (most often the law of the trader'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 touristic services provider has chosen for his own law, the consumer will have the possibility to choose the most advantageous provisions from the service provider's law and form the consumer law of his own country [5].

The law applicable to ACCOMODATION CONTRACTS and the RENTAL of HOLIDAY HOMES

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).

However, the right to choose is not absolute [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 Belgian consumer books a room in a Belgian hotel owned by a Belgian 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 Belgian mandatory provisions (not even if the application requirements of article 6 Rome I are not met). Secondly, 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, 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 (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 the rules of consumer protection incorporated in European Directives, as implemented in the law of the forum (probably Italy).

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 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.

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.

It is clear that in most cases the law applicable to the contract will not be the law of the consumer's country. 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.

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 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.

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].

Only if the parties did not choose the law applicable to the contract, 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, 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.

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.

TO WHAT EXTENT DOES PRIVATE INTERNATIONAL LAW REALLY MATTER ?

Do rules of private international law really matter, taking into account that consumer law has 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.

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 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). Being directly applicable within the national law of the Member States, the rules are identical in all Member States, as far as harmonization has taken place. 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, the Montreal Convention of 1999 also 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 maximum 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 [10,11].

Talking about consumers booking holidays online, other consumer protection Directives are also important. 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 role. This Directive is based on minimum harmonization.

Where does it matter?

It is clear that in the case harmonization has taken place using a Regulation or even a Directive based on maximum 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 maximum 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>). 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.

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].

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