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Rules of jurisdiction and conflict rules relating to online cross-border contracts concerning touristic services provided to consumers

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ABSTRACT

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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 consumer's country. In the case of cross-border contracts relating to touristic services booked on-line, the question arises which courts are competent and which law is applicable. This paper will show 1) that different rules of jurisdiction and conflict rules apply depending on the type of holiday which is booked (which makes it all very complicated for consumers), and 2) that not all of these rules, which are important in the context of the provision of touristic services, protect consumers sufficiently, i.e. allow the consumer to bring the case before a court in his own country or to invoke the protection which is incorporated in the law of his own country. In order to improve the consumer's position, simpler and more consumer friendly rules of jurisdiction and conflict rules are proposed at the end of this paper.

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1. 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 courts are competent to decide on the case and which law applies.

First, this paper will show that within the European Union different rules of jurisdiction and conflict rules (determining the law that is applicable to the contract) apply, depending on the type of contract concluded, which makes it for a consumer very hard to predict whether he will be able to bring the service provider in the court in his own country and will be able to invoke the protection incorporated in the law of his own Member State. Secondly, this paper will illustrate that rules of jurisdiction and conflict rules not always protect consumers (booking their holiday online) sufficiently (e.g. with regard to contracts of carriage). Finally, alternative rules of jurisdiction and conflict rules, which are less complicated and more consumer friendly, are proposed.

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2. Rules of jurisdiction: which court is competent?

Within the European Union, the question which court is competent to decide on conflicts relating to contracts concerning touristic services booked online must be answered on the basis of the Brussels Ibis Regulation¹. Article 4 of this Regulation contains as a basic principle that persons domiciled in a Member State can always be sued in the courts of the Member State where they are domiciled. This rule is not however of much help for a consumer that has booked touristic services online and wants to sue the touristic service provider, since it obliges the consumer to sue the touristic service provider in the Member State where the service provider is domiciled.

In addition to this general provision, the Brussels Ibis Regulation contains many other rules of jurisdiction. Relevant to the case where touristic services are booked online with a touristic services provider that is domiciled in another country, are the rules of special jurisdiction (art. 7), the specific rules of jurisdiction on consumer contracts (art. 17–19), the rules of exclusive jurisdiction (art. 24) and the possibility for the parties to insert jurisdiction clauses in the contract, determining the court that will have jurisdiction (art. 25). With regard to the latter it is important to stress 1) that jurisdiction clauses cannot derogate from rules of exclusive jurisdiction, 2) that the possibility to incorporate jurisdiction clauses is rather limited in case the specific rule of jurisdiction for consumer contracts applies (art. 19) and 3) that the ECJ has made it clear that the application of the rules on unfair contract terms² in consumer contracts can result in the non-binding nature of a jurisdiction clause determining that only the courts of the place where the service provider is domiciled are competent³.

2.1. Special jurisdiction: the courts of the place where services were provided or should have been provided

According to article 7 Brussels Ibis Regulation, a person domiciled in a Member State may be sued in another Member State in the courts for the place of performance of the obligation in question⁴. In the case of the provision of services, the place of performance of the obligation in question is, unless otherwise

agreed, the place in a Member State, where under the contract, the services were provided or should have been provided. For the consumer wanting to sue the touristic service provider this rule is not beneficial, since it normally leads to the same result as article 4 Brussels Ibis-Regulation. Suppose that a Belgian consumer has booked a room in a Greek hotel, directly at the hotel owner's website. In such case the courts of the Member State where the service provider is domiciled (Greece) shall have jurisdiction. Only if the touristic service provider with whom the consumer has booked the touristic service is not domiciled in the Member State where the service was or should have been provided (e.g. a Belgian consumer concludes an agreement relating to the provision of a touristic service in Greece online with a service provider domiciled in Germany), the consumer will have the possibility to choose between the courts of the touristic service provider's domicile (Germany) and the courts of the Member State where the services were provided or should have been provided (Greece). However, the consumer does not obtain the possibility to sue the foreign touristic service provider in the courts of the Member State where the consumer is domiciled (Belgium).

The touristic service provider on the other hand will benefit from article 7 Brussels Ibis Regulation, since, on the basis of article 7 he obtains the possibility to sue the consumer in the Member State where the services are or should have been provided (e.g. the Greek hotel owner on whose website the consumer booked can sue the consumer in Greece). Moreover, the rules of jurisdiction incorporated in article 7 can be derogated from by jurisdiction clauses, implying that in case the services are to be provided in another Member State (e.g. Greece) than the one in which the service provider is domiciled (e.g. Germany), jurisdiction clauses can provide for the exclusive competence of the courts of the Member State where the foreign service provider is domiciled (Germany)⁵.

In the case of contracts of transport one has to take into account the decision of the ECJ in *Peter Rehder*, in which the ECJ decided that in the case of air transport of passengers from one Member State to another Member State, carried out on the basis of a contract with only one airline, which is the operating carrier, the court having jurisdiction to deal with a claim for compensation founded on that transport contract is that, at the applicant's choice, which has territorial jurisdiction over the place of departure or place of arrival of the aircraft, as those places are agreed in that contract⁶. It speaks for itself that the same solution can be applied to other modes of transport where the consumer travels with one operating carrier from one Member State to another. This implies that article 7 Brussels Ibis Regulation makes it possible for the consumer to sue a carrier in the courts of the Member State where he is domiciled, insofar the consumer is domiciled in the Member State where the flight departs or arrives. However, the importance of this finding may not be exaggerated, since article 7 Brussels Ibis Regulation can be derogated from by a jurisdiction clause (*infra*).

¹ 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 [2013] OJ L 351/1. This Regulation, which applies to claims introduced after 10 January 2015, has repealed 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 [2002] OJ L 12/1). However, with regard to the question dealt with in this article the provisions in both Regulations are the same.

² Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [1994] OJ L, 95/29.

³ E.g.: Case C-243/08 Pannon GSM Zrt. v. Erzsébet Sustikné Györfi [2010] ECR-I 04713.

⁴ Article 7 does not apply in case a consumer wants to sue a touristic service provider which is not domiciled in a Member State. If the defendant is not domiciled in a Member State, the jurisdiction of the courts of each Member State must be determined by the law of that Member State (art. 6.1).

⁵ As already mentioned, such jurisdiction clauses will be not-binding when they must be considered unfair.

⁶ Case C-204/08 Peter Rehder v. Air Baltic Corporation [2009] ECR-I, 06073.

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