

## **Consumer protection in international relations**

### **Belgian Report**

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#### **Introduction**

In the modern information society means of distance communication, such as the Internet and e-mail, are used more and more to conclude contracts. This implies that international contracts can be concluded by consumers through a simple mouse click while sitting in their chair. Therefore, consumers no longer need to travel abroad to enter into an international agreement.

In respect of international contracts the question arises which court (or alternative dispute settlement body), in case of a dispute, is competent to deal with the case and which law is applicable to the contract. These questions are solved using rules of private international law. This article only deals with rules of conflict applicable to consumer contracts and does not discuss substantial consumer protection law.

In many cases rules of private international law are incorporated in European Regulations and Directives. However, this paper, originally the Belgian Report for the 18th International Congress of Comparative Law in Washington, will mention these rules only briefly and focus on Belgian legislation.

#### **I. General framework**

The Belgian constitution does not contain any provisions on consumer protection. Rules on consumer protection are most often incorporated in legal acts (often implementing European Directives) or royal decrees (implementing legal acts) or, in some cases in European Regulations.

Being a Member State of the European Union, many rules on consumer protection find their origin in European Regulations and Directives. European Regulations are directly applicable in the Belgian legal order (as in the legal order of any other Member State). The following

two Regulations are of great importance in respect of rules of private international law relating to consumer contracts:

- Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters<sup>1</sup>, which entered into force on 1 March 2002.
- Regulation (EC) No 593/2008 of the European Parliament and the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I)<sup>2</sup>. This Regulation only applies to contracts concluded after 17 December 2009. Contracts which are concluded before this date fall under the scope of application of the Rome Convention of 19 June 1980 on the law applicable to contractual obligations, which entered into force on 1 April 1991. However, most articles of this Convention were already applicable in Belgium as from 1 January 1988.

In the past, the European legislator has often used Directives to increase consumer protection within the Member States. Contrary to a Regulation a Directive is not directly applicable and must be transposed into national legislation. Most important Directives on consumer protection are (in chronological order):

- Directive 2008/122/EC of the European Parliament and of the Council of 14 January 2009 on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts.
- Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC.
- Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council.

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<sup>1</sup> *Official Journal* 16 January 2001, L 012, 1.

<sup>2</sup> *Official Journal* 4 July 2008, L 177, 6.

- Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC.
- Council Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees.
- Council Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts.
- Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts.
- Council Directive 92/59/EEC of 29 June 1992 on general product safety.
- Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours.
- Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises.

Some of these Directives (i.e. Distance Selling Directives, Unfair Contract Terms Directive, Directive on Consumer Guarantees, Consumer Credit Directive) determine that the Member States must ensure that the protection offered by the Directive is not set aside by choice of law clauses, in which the parties agree to apply the law of a third country, not being a Member State of the European Union, if the agreement has a close link with the territory of any Member (see also *infra* about the transposition of this rule into Belgian legislation). The timesharing Directive contains a different rule: where the applicable law is that of a third country, consumers cannot be deprived of the protection granted by the Directive, as implemented in the Member State of the forum if any of the immovable properties concerned is situated within the territory of a Member State<sup>3</sup> (this Directive was not yet transposed into Belgian legislation).

## **II. Jurisdiction and judgment enforcement**

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<sup>3</sup> In the case of a contract not directly related to immovable property, the consumer cannot be deprived from the protection offered by the Directive if the trader pursues commercial or professional activities in a Member State or, by any means, directs such activities to a Member State and the contract falls within the scope of such activities.

Being a Member state of the European Union, the specific provisions on jurisdiction regarded to international consumer's transactions find their origin in European Regulations, which are directly applicable in the Belgian legal order. Concerning the jurisdiction, the main Regulation is the above mentioned Council Regulation (EC) N° 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, which entered into force on 1 March 2002 (but the content of which has its origin in the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of september 27<sup>th</sup>, 1968).<sup>4</sup>

The Scope of the N° 44/2001 Regulation covers all the main civil and commercial matters apart from certain well-defined matters.<sup>5</sup> There must also be a link between proceedings to which the Regulation applies and the territory of the Member States bound by the Regulation. The rules provided by the Regulation apply, according to common rules on jurisdiction, when the defendant is domiciled in one of the Member States.

The Regulation contains a specific set of provisions governing "Jurisdiction over consumer contracts" (section 4), whereby the consumer is defined as a person who has concluded a contract *"for a purpose, which can be regarded as being outside his trade or profession"*. This definition is perfectly in line with the definition provided by the European Court of Justice<sup>6</sup> and as provided by the article 5 of the Rome Convention (see *infra*), as replaced by article 6 of the Rome I Regulation. Mixed contracts are only covered by the specific provisions protecting consumers to the extent that the professional purpose can be regarded as extremely limited (up to the point that, considering the global context of the transaction, it is of no importance whatsoever).<sup>7</sup> The scope of the Regulation is extended to cases where a consumer enters into a contract with a party who is not domiciled in the Member State but has a branch, agency or other establishment in one of the Member States, in which case *"that party shall, in disputes arising out of the operations of the branch, agency or establishment, be deemed to be domiciled in that State"* (art. 15.2 of the Regulation).

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<sup>4</sup> *Official Journal* 31 December 1972, L 299, 32. On 16 september 1988 Member States of the European Union and EFTA States concluded the Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, which is a parallel Convention to the 1968 Brussels Convention.

<sup>5</sup> According to article 1.2, the Regulation does not apply to (a) the status or Legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills and succession, (b) bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings, (c) social security and (d) arbitration.

<sup>6</sup> C.J., 21 June 1978, C-150/77, *Bertrand / Paul Ott, Rec.*, 1978, p. 1450.

<sup>7</sup> C.J. 20 January 2005, C-464/01, *Gruber / Bay Wa AG, Rec.*, p. I-439.

The specific provisions on international consumer transactions of Section 4 of the Regulation protect the consumer by favoring the jurisdiction of the Member State where the consumer is domiciled, as distance is generally considered as an obstacle to access to justice. This basic rule is expressed under article 16.2 of the Regulation which states that "*Proceedings may be brought against a consumer by the other party to the contract only in the courts of the Member State in which the consumer is domiciled*". If however the consumer is bringing the proceedings in the courts against the other party to a contract, he may choose to bring them either in the courts of the Member State in which the defendant is domiciled or in the courts of the place where he himself is domiciled (art. 16.1 of the Regulation). This regulation does not affect the right to bring a counter-claim in the court in which, in accordance with section 4, the original claim is pending (art. 16.3.).

The specific provisions on consumer protection however only apply if certain conditions are met. More specifically, this specific rule only applies when the contract:

- a. is a contract for the sale of goods on instalment credit terms *or*
- b. is a contract for a loan repayable by instalments, or for any other form of credit, made to finance the sale of goods *or*
- c. in all other cases, the contract has been concluded with a person who pursues commercial or professional activities in the Member State of the consumer's domicile *or*, by any means, directs such activities to that Member State or to several States including that Member State, *and* the contract falls within the scope of such activities.

The latter condition will for instance be met if a company has a branch in the consumer's country and the consumer concludes an agreement with that company through its branch in the consumer's country. In a situation like this, the company employs its activities in the consumer's country. Secondly, the specific rule on consumer contracts applies if the person who pursues commercial or professional activities, directs commercial activities, *by any means*, to the Member State of the consumers domicile or to several States including that Member State. Although these criteria are not limited to online activities, they are of particular relevance for these kind of activities. More specifically, this rule implies that a consumer will have the possibility to invoke this specific rule of private international law when he has concluded an agreement with the professional using the professional's website. The mere fact that a website is accessible in Belgium, does not imply that the consumer will

be entitled to invoke this specific rule of private international, but if the website makes it possible for the consumer to order goods or services on-line or for example by phone, this is sufficient to apply this rule protecting the consumer. Professionals, selling goods or services on-line, that don't want to be sued in a given Member State of the European Union will have to determine on their website that they do not sell to consumers from certain countries. Also they will need procedures which ensure – at least to a certain extent - that contracts are not concluded with consumers from these countries.

According to art. 17 of the Regulation, a forum selection clause for international consumers' transaction is allowed in three specific cases. The provisions of Section 4 of the Regulation may be departed only by an agreement (1) which is entered into after the dispute has arisen or (2) which allows the consumer to bring proceedings in courts other than those indicated in Section 4 or (3) which is entered into by the consumer and the other party to the contract, both of whom are at the time of conclusion of the contract, domiciled or habitually resident in the same Member State, and which confers jurisdiction on the courts of that Member State, provided that such an agreement is not contrary to the law of that Member State. This last case is destined not to surprise the reasonable expectations of the professional if the professional and the consumer are both established in the same Member State, but the consumer moves to another Member State after the agreement has been concluded. In such case, an agreement conferring jurisdiction to the courts of the Member State where both were initially established will be valid, although it departs from the provisions of Section 4 and provided it is not contrary to the law of that Member State. The question if such a clause is to be considered as unfair in the sense of the Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts remains discussed.<sup>8</sup> It seems however that the simple fact that the agreement is valid according to article 17 of the Regulation does not mean in itself that the terms of this agreement are fair.<sup>9</sup>

The n° 44/2001 (CE) Regulation contains a set of provisions on recognition and enforcement of foreign judgments in general based on the rule of "home-country control" and mutual recognition. The Regulation does not contain a specific set of provisions for recognition and enforcement of foreign judgments in consumer matters.

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<sup>8</sup> See Gent, 4 april 2007, *NjW*, 2008, 174. In France, questions have also been raised about the fairness of such a clause, see H. GAUDEMONT-TALLON, *Compétence et exécution des jugements en Europe*, 3ème éd., Paris, L.G.D.J., 2002, n° 292.

<sup>9</sup> C.J. 27 June 2000, *Océano Grupo Quintero and R. Murciano Quintero*, C-240/98 – C-244/98, *Rec.*, I-4941.

### **III. Choice of Law**

With regard to the law applicable to consumer contracts it is necessary to make a distinction between contracts concluded until and after 17 December 2009. Whereas the first are governed by the 1980 Rome Convention, the latter are governed by the Rome I Regulation. It is interesting to mention that the conditions which must be met to apply this specific rule of private international law are different in the Rome Convention and the Rome I-Regulation. According to article 5 of the Convention a choice of law made by the parties can not deprive the consumer of the protection afforded to him by the mandatory rules of the law of the country in which he has his habitual residence. When the contract does not contain a choice of law, the law of the country where the consumer has habitual residence is applicable. However, article 5 is only applicable if certain conditions are met. More specifically:

- the contract must relate to the supply of goods or services or the provision of credit;
- the contract must be concluded with a consumer and
- the conclusion of the contract must be preceded in the country where the consumer has habitual residence by a specific invitation addressed to the consumer or by advertising, and the consumer must have taken in his own country all the steps necessary on his part for the conclusion of the contract (<sup>10</sup>).

The aim of this rule is to protect the so-called passive consumer, i.e. the consumer who hasn't taken the initiative to contact a supplier, established in another country. When a contract is concluded over the Internet it is not always easy to determine when the conclusion of the contract was preceded by a specific invitation or advertising in the consumer's country. We believe that this is the case when the consumer received an unsolicited e-mail from the supplier, inviting him to conclude a contract (<sup>11</sup>), also when the supplier employed the services of a marketing firm in order to display a banner, referring to the supplier's website, whenever a certain word is typed in on the website of a search engine

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<sup>10</sup> The specific rule also applies in some other situations. However these are not relevant for contracts concluded on-line.

<sup>11</sup> R. SHU, "The applicable law to consumer contracts made over the internet: Consumer protection through private international law", *Int. Journ. Law Inf. Tech.*, Vol. 5, 210-211.

(<sup>12</sup>). Finally, we believe that it is possible to apply article 5 when a hyperlink to the website of the foreign supplier is displayed on the website of another supplier, established in the consumer's country. In all other cases – it concerns more specifically the situation in which the consumer has surfed directly to the website of the foreign supplier or the situation in which the consumer has typed in the name of the foreign supplier on the website of a search engine – it seems not possible to apply the rule, incorporated in article 5.

Article 6 of the Rome I Regulation contains the same rule where it determines that the contract is governed by the law of the country where the consumer has his habitual residence if no choice of law has been made and that, in the case of a choice of law, such a choice may not have the result of depriving the consumer of the protection *afforded to him by provisions that cannot be derogated from by agreement by virtue of the law* which, in the absence of choice, would have been applicable. The conditions to apply this rule are however completely different, since the rule applies as soon as the contract has been concluded with a person who pursues commercial or professional activities in the Member State of the consumer's domicile *or*, by any means, directs such activities to that Member State or to several States including that Member State, *and* the contract falls within the scope of such activities. As we can see, the conditions to be met are the same as those incorporated in the Brussels I Regulation. It is clear that consumer contracts will sooner fall under the scope of application of the specific rule of private international law incorporated in the Rome I Regulation than under the scope of the rule incorporated in the Rome Convention. Indeed, the mere fact that the consumer has been able to conclude the agreement on-line will be sufficient to apply the specific rule of private international law.

Apart from the specific provision laid down in the Rome Convention and the Rome I Regulation, the Belgian legal system does not contain *general* rules, limiting the possibility to incorporate choice of law clauses in international consumer contracts. However it must be stressed that specific laws can limit the possibility to choose the law applicable to the contract.

Article 33 §2 of the Act on Trade Practices<sup>13</sup>, which relates to unfair contractual terms, determines that a choice of law clause must be considered as not written, i.e. not be taken

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<sup>12</sup> Zie ook: L. ROLIN JACQUEMINS en T. VERBIEST, "L'offre de services et produits financiers sur internet", *R.D.A.I.* 2000, 5; F. SWEERTS, "Internet - Les sites bancaires veulent s'ouvrir au consommateur européen", *Bank Fin.* 2000, 262.

<sup>13</sup> A new Act on Market Practices has been voted. However, this Act, which was not published yet at the time of writing, will not change the content of the rules we discuss in this paper. Only the article numbers change.



into account, when the parties have chosen to apply the law of a country which is not a Member State of the European Union and if, in the absence of a choice of law, the law of a Member State would apply and this law offers the consumer more protection than the law chosen by the parties.

First, it must be stressed that this rule can only be applied if the parties have chosen to apply the law of a third country, not being a Member of the European Union. Therefore, when the parties have chosen to apply the law of a Member State, for instance German law, this rule cannot be used to set the choice of law clause aside.

Secondly, it is interesting to see what a Belgian judge must do, when he must judge the (un)fairness of a term incorporated in a consumer contract containing a choice of law clause in which the parties agree to apply the law of a third country. In a situation like that, the judge must first find out which law would be applicable to the contract in the absence of a choice of law, applying the rules of private international law incorporated in the Rome Convention and the Rome I Regulation. If the application of these rules results in the application of the law of a Member State, the judge must compare the protection offered by both legal systems. If the protection in the Member States' law exceeds the protection in the country chosen, the choice of law clause cannot be taken into account<sup>14</sup>. Although not entirely clear, we believe that the judge must not compare the rules on unfair terms in general, but find out whether the applicable law offers more protection than the chosen law with regard to that specific type of contractual term, being the object of dispute<sup>15</sup>. For example, if the fairness of a penalty clause is challenged, the judge must only compare the protection both legal systems offer with regard to penalty clauses<sup>16</sup>.

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<sup>14</sup> See also: P. CAMBIE, *Onrechtmatige bedingen*, Brussel, Larcier, 2008, 433-434; M. FALLON, "Le droit applicable aux clauses abusives après la transposition de la Directive nr. 93/13 du 5 avril 1993", *Revue Européen de droit de la consommation* 1996, 14; R. STEENNOT, "Artikel 33 WHPC", in *Artikelsgewijze Commentaar Handels- en Economisch Recht*, Mechelen, Kluwer, 33-13.

<sup>15</sup> R. STEENNOT, "Grensoverschrijdende consumentenovereenkomsten: welke wet beheerst het contract?", in *Nieuw internationaal privaatrecht: meer Europees, meer globaal. Postuniversitaire Cyclus Willy Delva 2009*, Kluwer, 2009, nr. 37.

<sup>16</sup> R. STEENNOT, "Grensoverschrijdende consumentenovereenkomsten: welke wet beheerst het contract?", in *Nieuw internationaal privaatrecht: meer Europees, meer globaal. Postuniversitaire Cyclus Willy Delva 2009*, Kluwer, 2009, nr. 36.

Article 33 §2 of the Act on Trade Practices as such does not guarantee that the consumer will receive the same protection with regard to unfair terms as incorporated in the Belgian Act on Trade Practices as a consumer entering into a purely domestic agreement. As indicated, article 33 §2 does not apply in case the parties chose to apply the law of the Member State in which the seller or service provider is established (since the parties did not chose to apply the law of a non Member State). Since the Directive on Unfair Terms in Consumer Contracts is based on the principle of minimum harmonization and Belgium has used the possibility to offer more protection than the one incorporated in the Directive<sup>17</sup>, this rule cannot guarantee that Belgian consumers concluding international contracts will, with regard to unfair terms, receive the same protection as consumers entering into a national contract. But it ensures that Belgian consumers will receive as a minimum the protection incorporated in the European Directive<sup>18</sup>.

Article 33 §2 of the Act on Trade Practices transposes article 6.2 of the Unfair Terms in Consumer Contracts Directive, which determines that Member States must take the necessary measures to ensure that the consumer does not lose the protection granted by the Directive by virtue of the choice of the law of a non-Member country as the law applicable to the contract *if the latter has a close connection with the territory of the Member States*. In the past, the Court of Justice argued that although concrete effect may be given to the deliberately vague term 'close connection' chosen by the Community legislature by means of presumptions, it cannot, on the other hand, be circumscribed by a combination of predetermined criteria for ties such as the cumulative conditions as to residence and conclusion of the contract referred to in Article 5 of the Rome Convention<sup>19</sup>. Therefore we doubt that the Belgian Act is compatible with the Directive<sup>20</sup>.

More specifically one could argue that for instance there is a close connection with the territory of a Member State if the consumer has his habitual residence in Belgium and received the offer in Belgium. However, if in a situation like this, the specific rule of private

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<sup>17</sup> See for example: art. 32, 15° of the Act of Trade Practices.

<sup>18</sup> J. STUYCK, "Overeenkomsten op afstand", in *Recente wetswijzigingen inzake handelspraktijken*, Antwerpen, Kluwer, 2000, 151.

<sup>19</sup> C.J. 9 September 2004, zaak C-70/03, *Commission versus Spain*, <http://www.curia.eu.int>.

<sup>20</sup> R. STEENNOT, "Consumentenbescherming. Overzicht van rechtspraak (2002-2007)", *Tijdschrift voor Privaatrecht* 2009.

international law concerning consumer contracts (art. 5 Rome Treaty, art. 6 Rome I Regulation) is not applicable and the professional is established in a third state, the law of that third state, in the absence of a choice of law would apply. This implies that according to the Belgian legislation it is impossible to set the choice of law clause aside, since in the absence of a choice of law clause, rules of private international law would not lead to the applicability of the law of a Member State. The rule in the Directive on the contrary would enable the judge to set aside the choice of law clause. We provide an example to clarify this. A consumer, having his residence in Belgium receives, within the Belgian territory, an offer from a company, established in Canada considering touristic services to be performed on the Turkish territory. The contract contains a choice of law clause, which determines that Turkish law is applicable. The specific rule of private international law concerning consumer contracts incorporated in the Rome I Regulation does not apply because the consumer has to go to Turkey to receive the services offered (art. 6.4 Rome I Regulation). Although there is a close connection with the territory of a Member State (Belgium), article 33 §2 of the Act on Trade Practices does not allow the judge to set aside the choice of law clause, because in the absence of a choice of law clause Canadian law would be applicable (and not the law of a Member State).

Article 83*decies* §3 of the same Act on Trade Practices, which relates to distance contracts, contains a similar provision<sup>21</sup>. Therefore we can refer to the discussion on article 33 §2 of the Act on Trade Practices.

Although the scope of the above mentioned articles is limited to unfair terms and distance contracts, they apply in many cases. The rules on unfair terms are applicable to all contracts concluded between sellers (this notion includes the provider of services) and consumers (art. 31 Act of Trade Practices). The rules on distance contracts apply to all contracts that have been concluded within an organized scheme for the distance selling of goods or services run by the supplier, using exclusively means of distance communication up to the time of conclusion of the contract (art. 77 Act of Trade Practices) (eg. where the contract is concluded over a website).

Apart from these rules, there are also provisions, limiting the possibility of choice of law clauses, incorporated in legal acts applying to specific types of contracts. For example the

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<sup>21</sup> See also: E. TERRY, "Article 83*decies* WHPC", in *Artikelsgewijze Commentaar Handels- en Economisch Recht*, Mechelen, Kluwer, 2-3; J. STUYCK, "Overeenkomsten op afstand", in *Recente wetswijzigingen inzake handelspraktijken*, Antwerpen, Kluwer, 2000, 150-151.

rules relating to the sale of goods to consumers contain the same limitation in respect of choice of law clauses as the one resulting from the articles 33 §2 and 83 *decies* §3 of the Act on Trade Practices (art. 1649 *octies* Civil Code).

A completely different rule is laid down in the Act of 16 February 1994 governing package holidays and contracts concluded through a travel agency. Article 2 determines that the Belgian law applies to all package holidays which are sold or offered for sale in Belgium. This rule implies that, whatever law the parties have chosen to apply, the Belgian rules, which are mandatory, will apply, if the holiday is sold or offered for sale in Belgium<sup>22</sup>. In this context two questions arise. When is a package holiday sold or offered for sale in Belgium and how does this rule relate to the one incorporated in the Rome I Regulation?

It is accepted that a package holiday is sold in Belgium whenever a foreign touroperator uses a Belgian travel agent to sell package holidays<sup>23</sup>. However, if the foreign touroperator sells holidays over the Internet, things get more complicated. In the past authors argued that a package holiday is sold in Belgium when the consumer was contacted by e-mail or has visited the website of the foreign tour operator after clicking on a banner displayed on a Belgian website. If the consumer, on the other hand went directly to the website of the foreign tour operator or got there because the website merely was suggested by a search engine, the package holiday was not sold or offered for sale in Belgium<sup>24</sup>. This view was clearly inspired by the rule of conflict relating to consumer contracts, and its interpretation, under the Rome Convention<sup>25</sup>. It is not clear whether this view can be maintained

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<sup>22</sup> F. VAN BELLINGHEN, "Artikel 2 Reiscontractenwet", in *Artikelsgewijze Commentaar Bijzondere overeenkomsten*, Kluwer, 1.

<sup>23</sup> F. VAN BELLINGHEN, "Artikel 2 Reiscontractenwet", in *Artikelsgewijze Commentaar Bijzondere overeenkomsten*, Kluwer, 1.

<sup>24</sup> R. STEENNOT and S. DEJONGHE, *Handboek Consumentenbescherming en Handelspraktijken*, Antwerp, Intersentia, 2008, 564.

<sup>25</sup> K. BROECKX en B. DE GROOTE, "Grensoverschrijdend contracteren en procederen in een virtuele wereld", in *Privaatrecht in de reële en virtuele wereld*, Kluwer, 2002, 611; B. DEPOORTER, "Het internationaal privaatrechtelijk probleem op Internet : bevoegde rechter", in *Telekom & Internet*, Gent, Mys & Breesch, 1998, 398 ; C.J. SANDER, "De consument op de elektronische snelweg: een inleiding naar Nederlands en Duits recht", *Tijdschrift voor Consumentenrecht* 1997, 197 L. ROLIN JACQUEMYS en T. VERBIEST, "L'offre de services et produits financiers sur internet", *Revue de Droit des Affaires Internationales* 2000, 5; F. SWEERTS, "Internet - Les sites bancaires veulent s'ouvrir au consommateur européen", *Droit Bancaire* 2000, 262. Compare also: Commission notice - Guidelines on Vertical Restraints (13 October 2000), *Official Journal* 13 October 2000, 291, 1.

considering that under the Rome I Regulation, the specific rule of private international law concerning consumer contracts applies as soon as the website of the professional enables the consumer to conclude the contract online (art. 6 Rome I Regulation and consideration 24 of that Regulation).

Anyhow, it is obvious that the rules incorporated in the Belgian Act cannot precede the ones laid down in the Rome I Regulation. More specifically, one needs to apply the rules of private international law laid down in the Rome I Regulation first<sup>26</sup>. For example, if a Belgian consumer directly goes to the website of a German tour operator, and the contract determines that German law is applicable, the consumer having his residence in Belgium cannot by virtue of a choice of law clause be deprived from the protection which is offered by the Belgian mandatory rules. Indeed, article 6 of the Rome I Regulation implies that in case a contract is concluded over an interactive website (a website which enables the consumer to conclude the contract online, see also consideration nr. 24 of the Rome I Regulation), the chosen law cannot deprive the consumer from the additional protection offered to him by mandatory rules laid down in the legal system of the country where the consumer has his habitual residence. Therefore, only if the European rules do not lead to the applicability of Belgian mandatory provisions, one needs to apply article 2 of the Act on package holidays. However, with regard to contracts falling under the scope of the Rome I Regulation, it is hard to imagine a situation where the Regulation would not and article 2 of the Belgian Act on package holidays would lead to the application of the Belgian legislation.

#### **IV. Alternative Dispute Resolution**

In Belgium there are no specific rules regarding the possibility to settle *international consumer* disputes by arbitration, which implies that the rules that determine whether a national consumer dispute can be settled by arbitration, apply. The Belgian legislation must be used to determine the validity of the arbitration clause if the contract itself is governed by Belgian law<sup>27</sup>.

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<sup>26</sup> Compare: F. VAN BELLINGHEN, "Artikel 2 Reiscontractenwet", in *Artikelsgewijze Commentaar Bijzondere overeenkomsten*, Kluwer, 2.

<sup>27</sup> H. VAN HOUTTE, *The Law of International Trade*, Londen, Sweet & Maxwell, 2002, 388.

In this context it is especially relevant to mention that the European Directive on Unfair Terms in Consumer Contracts determines that terms excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, *particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions* may be regarded as unfair (art. 3.3 in combination with point q) of the indicative list of unfair terms). However, article 32 of the Belgian Act on Trade Practices which contains a list of terms that, under all circumstances, must be considered as unfair (so-called black list) does not prohibit such terms *explicitly*. The question arises whether other rules prohibit contractual terms that force consumers into arbitration.

Article 32, 19° prohibits clauses, in which the consumer, in case of a dispute, waives every right to recourse. According to the courts<sup>28</sup> and most literature<sup>29</sup>, this rule does not enable the judge to annul clauses that force consumers into arbitration, because clauses that force consumers into arbitration do not imply that consumers waive *every* right to recourse. They only imply that consumers cannot go the court. The consumer retains the possibility of applying for an independent decision from the arbiters.

Next to article 32 of the Act on Trade Practices article 31 of this Act determines that terms which create a significant imbalance between the rights and obligations of the parties under the contract must be considered unfair. Such an unfair term is null and void (art. 33 Act of Trade Practices). In the past, it has been argued that clauses, forcing the consumer into arbitration, cannot be prohibited on the basis of article 31 of the Act on Trade Practices<sup>30</sup> and we did not find any decision where such terms were declared null and void because they violate article 31 of the Act on Trade Practices. In 2005 however, the Court of Justice made very clear that such arbitration clauses can harm the consumer, where it decided that the Unfair Contract Terms Directive must be interpreted as meaning that a national court seized of an action for annulment of an arbitration award must determine whether the arbitration agreement is void and annul that award where that agreement contains an unfair term, even though the consumer has not pleaded that invalidity in the course of the arbitration

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<sup>28</sup> Mons 6 June 2000, *Droit de la Consommation* 2000, 357.

<sup>29</sup> P. CAMBIE, *Onrechtmatige bedingen*, Brussel, Larcier, 2008, 193; M. PIERS, *Sectorale arbitrage*, Antwerp, Intersentia, 2007, 100; A. THILLY, "Clauses d'arbitrage et contrats de voyage", *Droit de la Consommation* 1996, 315.

<sup>30</sup> M. FLAMÉE, "De onrechtmatige bedingen", in *Handelspraktijken. Het nieuwe in de wet van 14 juli 1991 betreffende de handelspraktijken en de voorlichting en bescherming van de consument*, Brugge, Die Keure, 1995, 107; J. STUYCK, *Handelspraktijken, in Beginselen van Belgisch Privaatrecht*, Story-Scientia, 2004, 335.

proceedings, but only in that of the action for annulment<sup>31</sup>. Therefore, we believe that article 31 of the Act of Trade Practices must be interpreted as prohibiting terms which force consumers into arbitration, these terms creating a significant imbalance between the rights and obligations of the parties. According to our view such interpretation is best compatible with the European legislation<sup>32</sup>. Contractual terms which offer the consumer the choice between arbitration and a procedure before the courts are of course permitted<sup>33</sup>.

The fact that clauses which force consumers into arbitration were not regarded by the courts as incompatible with article 31 of the Act on Trade Practices does not mean that they were always accepted. One also needs to examine whether the arbitration clause is not contrary to the general principles on arbitration incorporated in the procedural code. For example, article 1678, 1 of the procedural code determines that an arbitration clause is null if one of the parties has a privileged position when nominating the arbiter(s)<sup>34</sup>. It has been decided in Belgium that this is for instance the case if the consumer doesn't have any influence when nominating the arbiters and the professional has, even though indirectly, through its professional association<sup>35</sup>.

Finally we can mention that here are no specific provisions in Belgium for an alternative method for dispute settlement applicable to *international consumers' transactions*. Also there are no specific procedures in Belgium on consumer claims or particularly applicable to consumer claims for international dispute settlement. Finally, there is no specific procedural tool particularly available for international consumer disputes. However, a law reform is currently in process destined to introduce in Belgium a kind of class-action. The scope of this class-action would also – but not solely – cover international consumers' transactions and would be, in principle, an opt-out system on Belgian level. If the claimant joining the class-

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<sup>31</sup> C.J. 26 Oktober 2006, C-168/05, *Mostaza Claro*, <http://curia.eu.int>

<sup>32</sup> This view is shared by: P. CAMBIE, *Onrechtmatige bedingen*, Brussel, Larcier, 2008, 193-194; I. DEMUYNCK, "De bescherming van de consument tegen een onrechtmatige bevoegdheidsbeding", *Jaarboek Handelspraktijken 1999*, 219-220; M. PIERS, *Sectorale arbitrage*, Antwerp, Intersentia, 2007, 102. See also: Commission Recommendation of 4 April 2001 on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes, *Official Journal* 19 April 2001, L. 109, 56.

<sup>33</sup> Prés. Trib. Commercial Brussels 16 juni 2003, *Droit de la Consommation* 2004, afl. 63, 88; *Revue de Droit Commercial* 2003, 901.

<sup>34</sup> H. VAN HOUTTE, *The Law of International Trade*, Londen, Sweet & Maxwell, 2002, 388.

<sup>35</sup> Juge du paix Gand 9 March 1998, *Droit de la consommation* 1999, 59, note J. SPEYBROECK.

action is domiciled outside Belgium, he would, under the proposed system, still benefit from the protection of international rules on applicable law and jurisdiction and he would have to opt-in.

## **V. Co-operation of authorities**

Belgium participates in the European Consumer Centers Network (ECC-Net)<sup>36</sup>. The goal of this network is to promote consumer confidence by advising citizens on their rights as consumers and to help them in getting the appropriate redress in case of a violation of their rights as consumers in cross-border transactions. More specifically, the European Consumer Center - Belgium advises consumers on out-of-court-settlement procedures throughout Europe.

## **VI. Legal scholarship and legal education**

Consumer law is, in Belgian universities, mainly taught (1) as part of commercial law(compulsory) on the level of the Bachelor degree and (2) as part of an optional program on the level of the Masters degree. More specific aspects of consumer law are however integrated in the courses to which they are related, such as contract law, law of obligations, banking and financial law etc.

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<sup>36</sup> See: European Consumer Centres Network (ECC-Net)



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