THE POWER OF LAW

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Travel and Tourism Contracts
Design of Sustainable Tourism Systems

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ANTEZZA
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This book aims at giving an overview of the role of private autonomy in the regulation of all forms of tourism\(^1\). It also takes into account some recent issues arising from the theory of sustainable development.

The book is divided into five chapters and includes an introduction. The first chapter is dedicated to private tourism law sources. In this part we underline the role of private autonomy in regulating both business-to-consumer contracts and business-to-business contracts. Companies and individuals determine the rules of their relationships within the framework of national law (with specific regard to consumer law) and within international law. These rules include some fundamental international principles, most importantly, hospitality. Hospitality is the fundamental principle of tourism law. It signifies extending a welcome to others, guaranteeing their rights and status in accordance with the fundamental principles of solidarity and living together.

\(^1\) I would like to thank Sarah Bernstein for helpful comments on a previous version of the book. The usual disclaimer applies.
The second chapter is dedicated to business-to-consumer contracts (like hotel contracts, timeshares, tourist apartment rentals; home exchanges), travel packages and transport contracts. Tourism is a matter of being elsewhere and it implies the use of transport that can be considered the necessary precondition of tourism itself.

The third chapter concerns business-to-business contracts and in particular, contracts regulating structural formulas such as management contracts and franchising contracts. These are new types of business governance structures and can be defined as a part or a whole of the collaborating parties’ activities performed in order to achieve a common goal. Because of the parties’ interdependence, cooperation, trust, reliance, mutuality, resolution of problems by consent represent the real foundations for the B2B relationship.

The fourth chapter focuses on fairness in commercial practices taking into account both B2B and B2C relationships. Eventually we will hypothesize about some conclusions, from a juridical point of view, regarding the risk of B2C and B2B relationship divisions. Both enterprises and consumers are part of the market and their fair interplay aims at achieving common goals in terms of competitiveness, higher production levels and market evolution while also taking into consideration ecological and social sustainability.

The fifth chapter is dedicated to sustainability and the methods in which it is possible to develop sustainable tourism through contracts. We are going to consider how private autonomy can match public interests including the actualization of sustainable development.

This book is also intended for students from the School of Economics. For this reason at the end of the book we have included an appendix of legal documents (International Treaties, European Directives, etc.) with the purpose of facilitating the reading and comprehension of the norms to which the book refers.

The book’s methodology is characterized by strict attention to practice and in particular, to case law and clauses generally included in tourism contracts. We think that such a perspective is necessary because tourism law, as well as tourism itself, is mainly a product of society.

Particular attention is placed on the uniform law processes among which it is possible to include European Union Law. Tourism contracts are generally international contracts. The determination of the applicable national law, according to the rules of international private law, it is not a satisfactory solution. The presence of different national laws can cause disparities, uncertainties and barriers affecting business. These problems can be solved in the harmonization processes in progress and in particular, through conventions designed to develop a uniform system.
Tourism is one of the forms of recreation along with sports, hobbies and other uses of leisure time.

Different definitions have been provided. Tourism could be defined as the movement of people away from their normal place of residence. This definition is incomplete. Similarly, purpose and distance are determining factors of the phenomenon of tourism.

The Institute of Tourism in Britain suggests the following definition: “Tourism is the temporary short term movement of people to destinations outside the places where they normally live and work, and the activities during their stay at these destinations; it includes movement for all purposes, as well as day visits or excursions”. According to International Conference on Leisure Recreation Tourism held in Cardiff in 1981 “tourism may be defined in terms of particularal activities selected by choice and undertaken outside the home environment. Tourism may or may not involve overnight stays away from home”.

All the above definitions are more or less general. The concept of tourism must be defined broadly in order to embrace all forms of the phenomenon.

Of course it is possibile to draw a technical definition just for statistical studies, but to define the concept of tourism is a difficult task and it may
not be necessary.

In fact, from a juridical point of view this phenomenon is created by different situations ruled in different ways and by different sources of law (acts of parliament, customary law, contracts).

Perhaps it is more important to focus on some of tourism’s peculiarities of tourist products. It has commonly been said that “selling holidays is selling dreams”. When someone books an hotel room, a travel, an holiday package, he is also buying the temporary use of a particular environment including new geographical features, cultural benefits, services, atmosphere, hospitality and other intangible benefits. So it is correct to say that tourism is largely psychological and it is an instrument of individual personal identity development. Therefore, it is right to affirm that tourism is not only a matter of economics.

The word tourism comes from the word tour that was associated with the idea of a voyage or peregrination or a circuit. The word tourism did not appear until the early nineteenth century.

Historical studies usually distinguish three principle epochs: the first starts with the railway age (about 1840); the second covers railway age itself; the third covers the years between the two world wars characterized by the significant development of private motor cars, buses, coaches etc. (1).

To these epochs we have to add at least another one, starting after 1950, characterized by mass tourism, an increase of business travel and a significant differentiation in tourism products’ offered. Mass tourism in the 1930s and early 1950s was just a domestic business (2).

Of course before the industrial revolution people used to travel for pilgrimages, business and official purposes.

For example, the Greeks hosted international visitors during the first Olympic Games, held in 776 BC, and the Romans travelled on holiday as far away as Egypt. Spas were also well established during the Roman Empire.

From the end of sixteen century individuals travelled for educational purposes and to satisfy the desire to know foreign countries and their inhabitants.

But we have to consider that in such periods there was a different concept of tourism, because there was a different concept of leisure time.

Before the Industrial Revolution foreign travel was a part of an aristocratic man’s education. The majority of the population hardly travelled beyond their village.

The contemporary idea of leisure time didn’t exist, because there was no division of working day and holiday.

The Industrial Revolution brought about changes in the economy and the society. Until the eighteenth century travelling by horse was the most
common form of transportation. In the eighteenth century the increasing demand for travel and the improvement of new forms of transportation and of road systems were associated with an increase in coach services.

The evolution of the railways and road system deeply affected the kind and the number of accommodations used in conjunction with travel. Accommodation for travellers may be generally viewed in two ways: terminal accommodation or transit accommodation. At the destination accommodation, catering and entertainment constituted the primary tourist services.

In the second half of the nineteenth century in the main cities in Europe and in America, the management of the larger hotels began to pass from the hand of a single owner and his family to company organization. Hotel companies and hotel chains appeared on the scene with several establishments with a common management and usually a common name.

When there were numerous transport undertakings, special organizers started assembling the travellers’ more complex journeys on their behalf by issuing tickets as agents for the transport companies.

During the time between the two world wars, governments began to recognize the economic importance of tourism especially in regards to the balance of payments. Many western countries established networks of tourist offices and invested massively in advertising and in tourism literature.

As result of the above considerations we can underline some interesting tourism peculiarities from a juridical perspective.

Firstly, tourism is a global phenomenon. Many people choose to travel to learn about different cultures. Not only pleasure travel allows visitors to enjoy historic and culturally significant sites: business travel also represents an occasion for cultural experiences (3).

Tourism is one of the largest sources of income particularly for the poorest countries. For that reason, governments and multilateral policies in multiple countries, working together on a specific issue, can have an impact on tourist activities. Governments can encourage tourism through regulations, official statements, collaborations, and incentives across multiple governmental bodies. The United Nations World Tourist Organization (UNWTO) serves as a global forum for tourism policy issues, helping developing countries with sustainable tourism policies and provides technical and financial assistance to countries seeking to attract foreign tourists.

As we have seen tourism is also a phenomenon constantly in evolution. It is difficult to regulate and a large national regulation could represent a burden for tourism industry. So many governments decide against regulating the private tourism laws according to a policy of minimal regulation.

Thus the main sources of tourism private laws are customary law and
private autonomy that obviously are limited by national law (i.e. consumer protection laws, environmental protection laws, etc.) and fundamental international principles. In fact, tourism can impact fundamental rights (i.e. sex tourism) (4), on the fundamental principle of solidarity and in particular, on the principle of hospitality.

**Hospitality** is not synonymous with aid or charity. It simply means extending a welcome to others, who have rights and who must be guaranteed a status and a stability of existence in accordance with the fundamental principles of living together.

Moreover tourism can impact environmental sustainability. Natural tourist attractions might be destroyed by the multitudes of visitors. Governments must stimulate awareness that natural environments need protection from pollution caused by economic activity that then can ensure that the enjoyment of the environment is accessible to many people.

**Sustainable tourism and ecotourism** are two possible ways to address the many environmental and social problems associated with tourism. The UNEP (United Nations Environment Programme) and the UNWTO list 12 principles of sustainable tourism: economic viability, local prosperity, employment quality, social equity, visitor fulfillment, local control, community well-being, cultural richness, physical integrity, biological diversity, resource efficiency, and environmental purity (5).

As result of these considerations we can say that private tourism law is mainly composed by rules arising not from institutions, but from the instances of the changing society (customary law and contracts) according to the principles of hospitality and of environmental sustainability (6).
Notes


2) *The Business of Tourism* by J.C. Holloway, Pitnam: London, 1989, p. 22 and p. 33: “Although the nineteenth century produced a considerable change in the size and nature of tourism, it was not until well into the twentieth century that “mass” tourism can truly be said to have come about. There were two main periods of growth. A) First between the two World Wars the European countries in particular underwent a period of social upheaval out of which came higher expectations by the masses of holiday entitlement, incomes and material living standards…B) In the 1950s and 1960s pre-war growth was resumed but spread much more widely so that international tourism began to reach mass markets in many countries”.


4) See particularly *Human Rights in Tourism: Conceptualization and Stakeholder Perspectives*, by Babu P. George Vinitha Vargheese, in *EJBO Electronic Journal of Business Ethics and Organization Studies*, 2007, p. 40. This paper is an attempt “to integrate the concept of human rights into the mainstream tourism discourse. In the name of development, human rights are often neglected while there are definite long-term advantages to be gained by actively promoting it. The paper examines the human rights perspectives of the major stakeholder groups in tourism to finally arrive at a comprehensive picture. Implications of some of the general principles and proclaimed guidelines of human rights for tourism are discussed. It is concluded that sustainable development of tourism is not possible until human rights as a relevant category (are) recognized by all the stakeholders. In addition, a case study is provided as an account to make the readers understand the ways in which tourism practice can potentially violate the human rights of a destination community”.
5) UNEP has a long history of contributing toward the development and implementation of environmental law. DELC is the focal Division within UNEP which oversees the many facets of this global legal framework. Hence, the role of DELC within the framework of UNEP is primarily to ensure the progressive development of environmental law across different environmental sectors and levels of governance.

At a global level, DELC has been pivotal in the facilitation of intergovernmental platforms for the promotion and implementation of multilateral environmental agreements (MEAs) and defining international environmental norms.

6) See particularly *Tourism and the environment: a sustainable relationship?*, by C. HUNTER E H GREEN, Routledge: London, 1995,

The book explores the area of sustainability in tourism development. “The relationship between environmental quality and tourism success is discussed, focusing on ways to protect the world’s tourism destinations for future generations. Tourism’s environmental impacts on the natural, built and cultural heritage and environments are examined, an assessment model is constructed, and various international case studies are used in illustration”.

Chapter 1: The Sources of Tourism Law

Contents: 1- National Law; 2 International Conventions and Cooperation; 3 Customary Law; 4- Private Autonomy; 5- The role of Courts and Legal Scholars

1. National Law

As we have said, national legislators define and regulate tourism management in terms of relationships between the state, municipalities and other entities in tourism-related activities. Governments usually determine state policies in the sphere of tourism. Then state institutions use their powers to execute state policies and to create conditions for its development.

The aim of tourism law is to: ensure conditions for tourism development and distinguish it as an economic sector of major importance; introduce unified criteria for the provision of tourism services; ensure consumer protection in the sphere of tourism; determine the rights and obligations of
all entities involved in the sphere of tourism; regulate control over tourism activities and over the quality of the tourism product

Tourism law regulates tourism as a totality of specific business activities, trips, participations in culture events, forums and other events executed in tourism sites and other locations that target the creation, presentation and consumption of goods and services that form the national tourism product.

The following are considered tourism activities: the activities of tour operators and tourism agents; hotel and restaurant activity; the provision of additional tourism services

The law generally considers tourism sites: shelters and accommodation premises like hotels, hostels, villa and tourism complexes; other shelters like hostels, rest stations, family hotels, apartments, rooms, villas, houses, bungalows and camping; entertainment spots and restaurants, fast food places, cafés, bars and sweet shops; places used for the provision of information, tour operator and tour agency activities; beaches near sea, rivers and lakes and beaches near artificial water bodies like dams and swimming pools; ski tracks for the practice of various winter sports among which alpine skiing, snowboarding and ski running; centers offering additional tourism services like spa, sports and entertainment options; museums, cultural monuments as well as culture institutes; national parks, nature parks, preserves, protected areas and nature landmarks as defined in protected territory laws; huts, instruction centers, tourism shelters and feeding places inside huts and mountain shelters.

The law considers several types of tourism: vacation; cultural and historic; ecological; health and spa; sport; rural; business and conventional etc.

States execute policies in the sphere of tourism through: cooperation in the development of the sector and its recognition as economic activity of major importance; creation of a legal framework needed for the development of tourism, in accordance to international norms, regulations and practices; the guarantee of financial resources and execution of marketing and promotional campaigns that popularize national tourism products; the creation of conditions for the development of vacation, cultural and historic, eco, health, spa, sport, rural, conventional and other types of tourism; the management and tourism quality control; the involvement in international cooperation in the sphere of tourism.

In all European countries, European directives have had a deep impact on national tourism laws. The European Union law has significantly affected national private law systems with special regard to the impact of European directives on private law (such as consumer laws, insurance laws, etc.) (1).

As well known, a directive is a legislative act of the European Union
that “shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods” (art. 288 of “The Treaty on the Functioning of the European Union”).

We can not understate the relevance of the Charter of Fundamental Rights of the European Union (known as the Charter of Nice), that illustrates the whole range of civil, political, economic and social rights of European citizens and all persons resident in the EU. The Charter of Nice is now part of the Lisbon Treaty signed in 2007.

According to Article 51 of the Charter: “The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application there of in accordance with their respective powers”. Most of the principles asserted by the Charter have a deep impact on tourism private law system such as dignity, equality…etc.

Thanks to the Treaty of Lisbon, tourism now has its own legal basis.

Part One of the Treaty on the Functioning of the European Union (TFEU) provides that tourism falls within those actions designed to ‘support, coordinate or supplement the actions of the Member States’.

According to art. 195 “The Union shall complement the action of the Member States in the tourism sector, in particular by promoting the competitiveness of Union undertakings in that sector.

To that end, Union action shall be aimed at: (a) encouraging the creation of a favourable environment for the development of undertakings in this sector; (b) promoting cooperation between the Member States, particularly by the exchange of good practice. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall establish specific measures to complement actions within the Member States to achieve the objectives referred to in this Article, excluding any harmonisation of the laws and regulations of the Member States.”

However the Treaty does not change the nature of the Union’s powers in this area.

The first Council Resolution on tourism, dated April 10, 1984, acknowledged the importance of tourism in European integration and invited the Commission to make proposals.

In April 1999 it published a paper entitled ‘Enhancing tourism’s potential for employment’ [COM(1999)0205].

The Council Resolution of May 21, 2002 stressed the economic importance of tourism, and established to increase its recognition at European level and to integrate it into other EU policies.

On this basis, the Commission subsequently implemented many measures
and activities. In particular an annual European Tourism Forum has been held since 2002. Representatives from the tourism industry, EU institutions and EU Member State governments attend this annual forum.

Between 2001 and 2010 the Commission published five reports on its policy guidelines for tourism sector development. In particular the June 2010 report, titled ‘Europe, the world’s No 1 tourist destination’ analyses the relevant factors and the obstacles to the competitive and sustainable development of tourism: demographic and climate change, shortage of energy and water resources, and even certain examples of *force majeure*. The main objective is to improve tourism competition, while maintaining its quality and its compatibility with sustainable development.

In addition, the Court of Justice of the European Communities (CJEC) has significantly affected national private law. CJEC ensures that the EU legislation is interpreted and applied in the same way in all EU countries. But the judgments of CJCE have also had an important role in the innovation of national private law. In fact several CJEC judgments have raised questions about some fundamental dogmas of contract laws particularly regarding to the evolution of consumers’ contract law according to European directives.

There can be another relationship between European Law and Private Law. As Christian Joerges has recently noted it could be to wonder whether the European law has affected national private law systems or on the contrary, whether the national private law systems of the European Union member States are of any relevance for European integration (2). We can refer to the Common Core Project involving more than one hundred scholars mostly from Europe and the United States. They are trying to derive the common core of the European private law from the various legal systems of European Union member states.

With specific regard to European directives on tourism we can remember the 1990 Travel Package Directive (90/314/EEC) protecting European consumers booking pre-arranged package holidays. It protects European consumers going on holiday and covers pre-arranged package holidays combining at least two of the following: (a) transport, (b) accommodation (c) other tourist services such as sightseeing tours (sold at an inclusive price and when the service covers more than 24 hours or includes an overnight stay).

The Directive provides protection covering: information requirements, liabilities for services and protection (reimbursement of sums paid or repatriation) in the case of a tour operator or airline going bankrupt. Over the last years, the development of the Internet and the emergence of low-cost air carriers have revolutionised holiday organization: an increasing number of EU citizens now put together their holidays themselves.

Thus the overall proportion of holidaymakers booking traditional package
holidays, protected by the Directive, has fallen. The Commission is therefore examining three main options: modernising the current legislation, leaving it as it is, or scrapping it entirely.

The Commission launched a public consultation on the revision of the Directive in November 2009 that focused on possible ways of solving the main limitations of the existing package travel rules. It also aimed to quantify the impact of various possible legislative options. At the moment the Directive is still under revision.

2. International Conventions and Cooperation

As we have just said, states execute policies in the sphere of tourism by creating the legal framework needed for the development of tourism, in accordance to international norms, and by becoming involved in international cooperation.

First of all we have to remember that tourism is founded on the international principle of hospitality. It is well know that Immanuel Kant talked about a cosmopolitan right as a guiding principle to protect people from war and morally founded this cosmopolitan right on the unwritten principle of universal hospitality. Jacques Derrida provided a theoretical framework on hospitality regarding the relationships between people in their everyday lives. In particular he talked about the proximity of the other as an important part of Levinas’s concept: for Derrida, the foundation of ethics is hospitality as the acceptance of the other as different but of equal standing (3).

The two fundamental international conventions on tourism are the International Convention on Travel Contracts (CCV) signed in Brussels, April 23, 1970 and the Convention on the Liability of Hotel-keepers concerning the Property of their Guests signed in Paris on 17th December 1962.

An international convention (also known as “treaty”) is an express agreement under international law entered into by sovereign states and international organization actors in international law.

The CCV rules on both organized travel contracts and intermediary travel contracts. It provides general obligations of travel organizers, intermediaries and of travellers: Travel Organizers and Intermediaries shall safeguard the rights and interests of the traveller according to general principles of law and good usages in this field. The traveller shall, in particular, furnish all necessary information specifically requested from him and comply with the regulations relating to the journey, sojourn or any other services (4).

The Convention on the Liability of Hotel-keepers sets out a list of
provisions under which hotel-keepers are liable for the property of their guests. In particular the liability of the hotel-keeper is engaged for any damage to or destruction or loss of property brought to the hotel by any guest who stays at the hotel and has sleeping accommodation put at his/her disposal. This liability is limited (until to the equivalent of 3,000 gold francs). However, the liability of hotel-keepers is unlimited where the property has been deposited with them or where they have refused to receive property which they are bound to receive for safe custody. The Convention provides that Parties can, under some conditions, limit the liability of the hotel-keeper. Particularly any notice or agreement purporting to exclude or diminish the hotel-keeper’s liability given or made before the damage, destruction or loss has occurred shall be null and void (5).

With regard to international cooperation we have also to consider the role of international organizations such as the World Tourism Organization (UNWTO) the United Nations agency responsible for the promotion of responsible, sustainable and universally accessible tourism.

UNWTO’s membership includes 156 countries, 6 Associate Members and over 400 Affiliate Members representing the private sector, educational institutions, tourism associations and local tourism authorities (6).

The World Tourism Conference 1980 convened in Manila with the World Tourism Organization and included the participation of 107 state delegations and 91 observer delegations.

The Declaration of Manila touches upon all aspects roles of tourism and considers the responsibility of states for the development and enhancement of tourism as more than a purely economic activity. It states that ‘tourism does more harm than good to people and to societies in the Third World’. Most importantly, point 18 of the Agreement recognises that ‘The satisfaction of tourism requirements must not be prejudicial to the social and economic interest of the population in tourist areas, to the environment or, above all, to natural resources which are the fundamental attraction of tourism, and historical and cultural sites’.

The General Assembly resolution of November 19, 1981 concerns the outcome of the conference. In particular the resolution, “Recognizing the new dimension and role of tourism as a positive instrument towards the improvement of the quality of life for all peoples, as well as a vital force for peace and international understanding,… urges States to give due attention to the principles of the Manila Declaration while formulating and implementing, as appropriate, their tourism policies, plans and programmes, in accordance with their national priorities and within the framework of the programme of work of the World Tourism Organization; requests the World Tourism Organization to continue its efforts towards the future development and promotion of tourism, especially in the developing countries, bearing
in mind the implementation of the principles and guidelines contained in the Manila Declaration; requests international, intergovernmental and non-governmental organizations directly or indirectly interested in tourism to extend their assistance, in consultation and co-operation with the World Tourism Organization, towards the implementation of the Manila Declaration”.

UNWTO promotes tourism offering leadership and support to the sector in advancing knowledge and tourism policies worldwide. Moreover UNWTO encourages the implementation of the **Global Code of Ethics for Tourism**, which is a comprehensive set of principles designed to maximise the sector’s benefits while minimising its potentially negative impact on the environment, cultural heritage and societies across the globe.

The code provides 10 principles covering all the economic, social, cultural and environmental components of travel and tourism:

- **Tourism shall contribute to mutual understanding and respect between peoples and societies**
- **Tourism shall be a vehicle for individual and collective fulfilment**
- **Tourism shall be a factor of sustainable development**
- **Tourism shall be a user of the cultural heritage of mankind and contributor to its enhancement**
- **Tourism shall be a beneficial activity for host countries and communities**
- **Tourism professionals have an obligation to provide tourists with objective and honest information on their places of destination and on the conditions of travel, hospitality and stays; they should ensure that the contractual clauses proposed to their customers are readily understandable as to the nature, price and quality of the services they commit themselves to providing and the financial compensation payable by them in the event of a unilateral breach of contract on their part;**
  - **Right to tourism**
  - **Liberty of tourist movements**
  - **Rights of the workers and entrepreneurs in the tourism industry**
- **The public and private stakeholders in tourism development should cooperate in the implementation of these principles and monitor their effective application.**

This code can be classified as “soft law”. Soft law is commonly distinguished from “hard law”. The term “hard law” indicates all rules legally binding. Therefore “hard law” may be a superfluous term. Every law is hard but we may use the term “hard law” to distinguish this kind of law from the so-called “soft law”.

Soft law is rapidly developing in private law systems. The term “soft-law” refers to a great variety conduct rules that haven’t the same law power: declarations of principles, codes of practice, recommendations, guidelines,
standards, charters, resolutions, etc. Although all these kinds of rules are not legally binding, there is an expectation that they will be respected and practiced by the community of individuals.

**Soft law** has had a deep impact regarding the protection of consumer interests (7).

Principles of consumer protection were officially stated in European law in 1975 by the April 14, 1975 resolution on a preliminary program of the European Economic Community for a consumer protection and information policy.

The program included the right to protection of health and safety, the right to financial interest protection, the right to compensation for damages, the right to information and education, and the right of representation. Since then, the Community policy on consumer protection has been increasing. Consumers’ interests have been specifically identified in various normative contexts on both national and community levels.

Regardless, it is a matter of fact that consumers’ interests are not only under the protection of the law. At the present time we have also to consider the interplay between consumer law and the rules contained in business conduct codes ordered to enhance customer satisfaction.

Companies take continuous efforts to maintain high customers’ satisfaction levels. Customer satisfaction is important for the success of firms because it permits repeat purchases levels and word-of-mouth recommendations. It is also the most reliable indicator of the service quality offered to customers.

Business organizations need to find new strategies to compete in addition to the traditional ways. Today they are responding to these challenges by establishing more collaborative relationships with their customers.

Companies ask their consumers for feedback about their products, services, slogans, logos, etc. They ask questions verbally or in questionnaire form.

As with any other branch of science, a rigorous approach needs to be taken in designing and executing questionnaire studies.

The results of customer satisfaction questionnaires have been used also to formulate and implement business conduct codes.

Making rules to meet high quality standards is part of the customer satisfaction process. Companies practice business ethics by adopting codes of conduct (or ethic codes). It’s important to create good relationships with business partners, both suppliers and customers, in order to benefit from fair business together and to ensure customer satisfaction through high quality products, good pricing, on-time delivery and excellent service.

Of course all directors, officers and employees must respect and obey applicable laws and regulations. **Conduct codes** are just a particular type of policy statement. It is a set of principles of conduct within an organization.
that guide decision-making. Usually these codes are binding on directors, officers and employees. In case of violations, sanctions will be applied by the organization itself.

Business ethics emerged as a specialty in the 1960s in the tracks of the “social responsibility” movement. More recently, it has been emerging the influence of corporate social responsibility on customers’ satisfaction.

Companies have been writing business conduct codes for decades, but the role of these codes is changing. The focus is shifting away from writing a system of norms to regulate conduct within a company to leveraging a code of values that inspires a good performance among employees, management and executives according to consumers’ interests too.

With regard to international law and tourism we can’t minimize that tourism contracts are mainly international contracts that relate to the cross-border dealings of individuals or companies.

International contract law concerns the legal rules relating to cross-border agreements. When parties coming from different countries enter into a contract, international contract law governs them unless they agree to adopt the laws of one country. International contract law is broadly based on the idea of **good faith and fair dealing in contracts** including fair negotiations, an obligation to cooperate and good faith when terminating a contract. It also ensures that unfair contracts or deals are not enforceable. One key element of international contract law includes the provision that the parties’ nationality does not play any role when applying the law, thereby placing all parties on an equal playing field. Rules of the contracts are interpreted by what a reasonable person would consider fair and appropriate given the circumstances.

### 3. Customary Law

Another important source of tourism private law is the customary law that we find when a certain **legal practice** is practiced and the relevant actors consider it to be the law. So **opinio juris** is an essential element of customary law that differs from the mere usages.

Usually customary law can be applied only when an act refers to customary laws. Moreover, customary law can fill in gaps in the written law (8).

Customary law has to be distinguished from **conventional customs** that lead the parties to an agreement. A conventional custom is a fixed practice that is binding because it has been expressly or impliedly incorporated in a contract. Some European civil codes (such as Italian civil code, art. 1340) refer to conventional customs as source of integration for a contract (9).

We have to distinguish general customary law from **international**
customary law that concerns those aspects of international law deriving from customs. Along with general principles law and treaties, international customs are considered by the international Court of Justice, the United Nations, and its member states to be among the primary sources of international law.

The International Court of Justice (ICJ) is the principal judicial organ of the United Nations (UN). It was established in June 1945 by the Charter of the United Nations and began work in April 1946. The Court settles, in accordance with international law, legal disputes submitted to it by States and gives advisory opinions on legal questions referred to it by authorized United Nations organs and specialized agencies.

According to art. 38 of the Statutes of the International Court of Justice “The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; b. international custom, as evidence of a general practice accepted as law;

c. the general principles of law recognized by civilized nations…”

With regard to customary tourism law, it is important to remember hotel overbooking rules. National courts generally seem to agree that in many instances overbooking is necessary to overcome problems of no-show and late cancellations. They hold hotel overbooking to be a customary justifiable practice to offset losses from no-shows.

Of course many hotels have adopted a pledge that requires their assistance in securing comparable accommodations, if, for any reason, a room should not be available for a client who holds a valid confirmed reservation. A few countries have enacted legislation that addresses hotel overbookings, such as Florida’s law that makes the hotel responsible for “every effort” to find alternate accommodations and up to a $500 fine for each guest turned away because of the over-booking. Other countries, like Italy, have no specific written laws regulating overbooking.

Thus overbooking problems are solved by private autonomy, according to contractual conditions contained in hotel contract, or by customary law. In Italy customary laws are collected by Commercial Chambers of the different Italian Provinces.

4. Private Autonomy

One of the modern fundamental principles of private law is that the parties are free to manage their economic relationship according to their private autonomy (10).
National laws provide general contract principles and also provide for specific types of agreements (so called typical contracts). However, many norms regulating typical contracts can be modified by an agreement between the parties. Moreover, according to the principle of freedom of contract, parties can also make contracts that are not included in those specifically regulated by the law (so called atypical contracts) if such contracts are directed to the realization of interests worthy of protection according to the legal order. Thus some scholars say that private autonomy is a source of law.

Among atypical contracts we can remember that national law usually does not cover hotel contracts. Courts generally consider such contracts worthy according to the principle of hospitality and because of the economic and social value of the hospitality industry.

Every contract is founded on an agreement having a specific object, a form and a reason that justifies the promise and the obligation.

The existence of agreement is determined objectively on the basis of the parties’ words and actions.

The objective evidence of agreement is traditionally the existence of an offer and of corresponding acceptance.

An offer is an expression of willingness to contract without further negotiation. An offer needs to be communicated to the other party.

It is important to distinguish an offer from a mere invitation. An invitation is not an offer. It is just a manner to stimulate interest, to achieve more information and to go on with negotiation. Generally speaking, advertisement, brochures etc. are just invitations.

Acceptance is the answer to a specific offer, made with a binding intention. It must to be communicated to the other party and conform to the offer.

An acceptance must be unconditional and compliant with the exact terms proposed by the proponent. When the recipient alters the terms contained in the offer or adds a new term, that response is not an acceptance. It constitutes a counter offer.

Cases of termination of offers are: 1-Lapse of time. Usually offers have a determined duration; 2-Death of the proponent; 3- Revocation. A Proponent may expressly terminate an offer.

It is for the parties to make their agreement and ensure that the terms are sufficiently certain to be enforced. Courts will generally refuse to fill any gap. Therefore courts, in practice, fill the gaps if some evidence is available. In particular, courts can take in to account commercial practice and previous performance.

As a general principle, when an essential term is missing, the agreement will be too uncertain to be enforced. When the law states that a contract is enforceable only if recorded in a particular way, the rule is described
as a requirement of form. The general rule is that there is no requirement that contracts be made in writing and parties may decide whether written evidence is necessary. In commercial dealing written evidence is almost inevitably available taking into account the complexity and the value of obligations.

Contracts need to be compliant with **imperatives norms**. In some case there could be also a **control of the substantive content of contract**, such as in case of unfair terms with specific regard to consumers contracts (11). The most common types of unfair terms are exclusion clauses providing the right of one party to exclude his/her liability arising under the contract. The law restricts the use of such terms. In American law the protection comes from the common law, that could be defined as the collection of judicial previous. In European countries national legislators have adopted specific rules regarding consumers’ contracts according to the European Directive 93/13/CEE. Also in Asian Countries we have specific rules. For instance art. 10 of the Japanese Consumer Contract Act enacted in 2000 and amended in 2006 provides that: “Clauses which restrict the rights of consumers or expand the duties of consumers beyond those under the provisions unrelated to the public order applicable pursuant to the Civil Code, the Commercial Code and such other laws and regulations and which, impair the interests of consumers unilaterally against the fundamental principle provided in the second paragraph of article 1 of the Civil Code, are void”. The Australian Consumer Law’s unfair contract provisions have found their way into Australian law, and the starting-point can be found in an EU Directive (12).

Parties are bound by the terms of their contract. A contract is legally enforceable if there are mechanisms of **enforcement of contractual obligations**. It is important to identify the standard of performance required in relation to each contractual obligation since a failure to perform to the required standard constitutes a breach (13).

Every breach of contract will give rise to a right to claim damages. A breach of contract will occur where, without lawful excuse, a party either fails or refuses to perform a contractual obligation.

A contract is discharged by the perfect performance by both parties. A contract could be also discharged by agreement between parties.

The purpose of the contract is the performance of the parties; performance means the exact fulfilment of the promises made. So it is important to determine the content of promises. According to principles of subjective **interpretation**, interpreters might search the common will of parties also beyond the literal meaning of the contractual content (14).

Moreover agreements must be executed in good faith. **Good faith** in the execution of the contract is generally defined as the expressions of the duty of loyalty by each party of the contract so as not to offend the
Chapter 1

The Sources of Tourism Law

1. Confidence that gave rise to the contract. According to the good faith rule, for instance, the debtor is obliged also to duties (such as duties of care or duties of information) not textually included in the contract but necessary to the fulfillment of the promises made (15).

The principle of good faith is of fundamental importance particularly with regard to consumers’ contracts. For instance the directive 93/13/CE, on unfair clauses in consumers contracts (i.e. contracts between a consumer and a supplier), establishes that a contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer.

In the following chapter we are going to consider the most common tourism contracts divided in B2C (business to consumers) contracts and B2B (business to business) contracts.

“Consumer” generally means any natural person who is dealing for purposes that are outside his trade, business or profession.

A “Business” generally means any natural or legal person who is dealing for purposes relating to his trade, business or profession, whether publicly owned or privately owned.

5. The Role of Courts and Legal Scholars

During the last century the approach to solve juridical problems has been widely dogmatic and positivistic particularly in civil law systems traditionally based on written normative acts in contraposition to common law systems mainly based on the judicial precedents (16). Civil codes and written acts have had a central task and there has been the presumption that the law is a coherent system of rules by which it is possible to find the solution to any specific question.

If we consider the function of courts in law sources, also with regard to civil law systems, we wonder whether judges draw their decisions from legal rules and principles, or if they decide cases in the light of what is fair by examining the facts at hand.

We can note a crisis of Brocard law “in claris non fit interpretatio”. The legal language is ambiguous because legal terms generally can have two or more distinct meanings. The clarity of the text is the result of an interpretation, not the premise to elude interpretation. In such a perspective all norms need to be interpreted and revisited by judges.

Of course civil codes usually recognize the possibility for interpreters to create law by the analogy rule. According to this principle, in situations of
two similar cases, judges can decide the case that does not have its own rules, by applying the rules provided for the other, similar case.

Nevertheless, it is correct to say that even civil law systems judges create laws not only by applying the interpretation rule of analogy.

The main referent of Law is The Society. Judges decide cases not only by reading the abstract provisions contained in legal statutes, they also determine fairness through the examination of the facts at hand and through the creation of law.

Therefore it is now widely accepted that court decisions should be considered as a source of law also in civil law systems.

Something similar could be said about the role of legal scholars.

The object of study for most legal scholars is still positive national law, but scientific products are also notes under court decisions, papers and monographs, that offer an interpretation of law. Generally speaking regarding the crisis of formalism in the new European legal culture Hesselink concludes that also “in a code system the courts and the scholars together master the gap between the abstract rules and the specific cases (concretisation) that legislator has left. Legislator (necessarily) provides abstract rules, the scholars are the expert on what their specific implication are, and the courts (inspired by these scholars) decide what they mean in specific case” (17).
Notes


6) http://www2.unwto.org/en/content/who-we-are-0


8) Addressing customary law as a source of law within the civil law tradition, John Henry Merryman notes that, though the attention it is given in scholarly works is great, its importance is “slight and decreasing”. See *The Civil Law Tradition* by John Henry Merryman, Stanford University Press: Stanford CA, 2d Ed. 1985, p. 23.

9) http://www.icj-cij.org/homepage/index.php


We have to consider the differences among national legislations on private law and particularly on contract law. “Considering foreign legal models is a process that requires full understanding of the foreign legal system in its totality, as well as acknowledgement of the differences between such a system and the system which desires to adopt the foreign regulation as a model.

At the same time, an understanding approach to foreign law, as can be acquired by applying the methods of comparative law, is becoming more and more important in the process of legislative reforms. Maintaining or enhancing local peculiarities of each legal system represent an obstacle to international business and trade, and it should be the ambition of every system to extend the process of globalisation of the economy also to the legal regulation thereof…. The categories, or families, of law have been developed as a tool to classify legal systems. Various classifications may be proposed; a classical distinction is between systems of Common Law, systems of Civil Law, systems of Islamic law, and socialist systems. The classification into families is useful as long as it permits us to treat under one category different legal systems that have various features in common, and to distinguish them from other systems that have other characteristics. The relevance of a division into families will, therefore, depend on the features that the observer is focusing on from time to time. If the focus is, for example, on the state organization, the criteria for building families might be whether the states are organized as federations or as unitary systems, or whether the systems are secular or religious. In this case, the grouping into families might probably be different than if the focus is on commercial contracts. In the context of commercial contracts, the classic division between Common Law and Civil Law might be very useful, even if it does not cover all the major legal systems of the world (it leaves out, for example, the Islamic system).

The division between Common Law systems and Civil Law systems is traditionally based on the different sources of law, respectively the judicial precedent and the statutes. In the context of contracts, however, I deem it more relevant to focus primarily on the different way of interpreting a contract and on the different role that the legal system plays in integrating the contract; this, in turn, influences the way contracts are drafted in the respective legal traditions. Further classifications are possible: for example, within what is usually considered to be Civil Law, it is possible to distinguish between systems based on the French Code Napoleon, systems...
based on the German Pandects and Scandinavian … From the point of view of international contracts, therefore, the most interesting classification is that between Common Law and Civil Law: this is particularly true in view of the widespread use of English contract models even for transactions that are governed by a Civil Law system. When a contract is drafted on the basis of a model developed under the Common Law system, but it is regulated by the law of a Civil Law system, it becomes important to understand the main features that distinguish the Common Law from the Civil Law. In this way, it is easier to understand why certain contractual provisions have been inserted or written in that certain way in the original model that was meant to operate under a Common Law system. It is also easier to understand how those provisions should be interpreted or rewritten to obtain the same results under the governing Civil Law system.”: see Lectures on comparative law of contracts, by GIUDITTA CORDERO MOSS, Publications Series of the Institute of Private Law, University of Oslo, No 166, 2004, p. 35 ff.


To the right of the merchants PIETRO PERLINGIERI (Il diritto civile nella legalità costituzionale, Napoli, 1991) opposes the values of solidarity, the welfare state and guaranteed social rights.

“While measures designed better to inform consumers about the terms of their contracts are important, they do not resolve concerns about the substantive fairness of those terms. Consumers do not fit the model of the competent and rational contracting party presumed by classical contract theory. Decisions to accept onerous or unbalanced contract terms are not necessarily a calculated risk assumed by consumers in return for a concession in price. Rather, the insights of behavioural economics suggest that there are significant limitations on the decision-making processes of consumers relating to ‘rational, social, and cognitive factors’, which are not necessarily improved by consumers being provided with more information about the incidental terms of their contracts. Such measures may not ensure that these terms become part of the decision by consumers to enter into a standard form contract in any meaningful sense.”: The Australian Unfair Contract Terms Law: The Rise of Substantive Unfairness as a Ground for Review of Standard Form Consumer Contracts, by Jeannie Paterson, in Melbourne University Law Review, (2009) 33, p. 934.

About the Directive 93/13/EC see:

http://ec.europa.eu/consumers/cons_int/safe_shop/unf_cont_terms/index_en.htm

“Directive 93/13/EC:
Article 1
1. The purpose of this Directive is to approximate the laws, regulations and administrative provisions of the Member States relating to unfair terms in contracts concluded between a seller or supplier and a consumer.
2. The contractual terms which reflect mandatory statutory or regulatory provisions and the provisions or principles of international conventions to which the Member States or the Community are party, particularly in the transport area, shall not be subject to the provisions of this Directive.

Article 2
For the purposes of this Directive:
(a) ‘unfair terms’ means the contractual terms defined in Article 3;
(b) ‘consumer’ means any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business or profession;
(c) ‘seller or supplier’ means any natural or legal person who, in contracts covered by this Directive, is acting for purposes relating to his trade, business or profession, whether publicly owned or privately owned.

Article 3
1. A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer.
2. A term shall always be regarded as not individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term, particularly in the context of a pre-formulated standard contract.
   The fact that certain aspects of a term or one specific term have been individually negotiated shall not exclude the application of this Article to the rest of a contract if an overall assessment of the contract indicates that it is nevertheless a pre-formulated standard contract.
   Where any seller or supplier claims that a standard term has been individually negotiated, the burden of proof in this respect shall be incumbent on him.
3. The Annex shall contain an indicative and non-exhaustive list of the terms which may be regarded as unfair.”

   The ACL has been introduced after a process of cooperation between the Federal Government and the States and Territories. It draws on conclusions

As the ACL will be a law of the Commonwealth, as well as a law of the States and Territories, the provisions contained within the ACL will apply to the activities of all businesses in Australia, regardless of whether or not they meet the relevant criteria to be classed as corporations under the TPA. Perhaps the most significant of the changes being implemented by the ACL is the introduction of national provisions governing unfair contract terms. The goal of the provisions is to improve protection for consumers by removing unfair terms in standard form contracts. The unfair term provisions apply to standard form contracts entered into on or after 1 July 2010 and to terms of existing such contracts as renewed or varied after this date: *An Overview and Analysis of the National Unfair Contract Terms Provisions*, by DAN JERKER B. SVANTESSON and LOREN HOLLY, in *Commerce law quarterly*, (2010) 24/3, pp. 3-14.

13) See *The role of formal contract law and enforcement in economic development*, by M.TREBILLCOCK / J. LENG, in *Virginia Law Review*, (2006) 92, p. 1517 and *Institutions, Institutional Change and Economic Performance*, by D.C. NORTH, Cambridge University Press: Cambridge-New York- Cape Town-Melbourne-Madrid, 1990, p. VII “The evolution of institution that creates an hospitable environment for cooperative solutions to complex exchange provides for economic growth”. “Contracts may be characterised by either informal or formal contract enforcement mechanisms. North links the role of institutions in determining economic performance directly to the quality of a countries’ institutions. Self-enforcement constitutes the primary feature of contracts used in tribes, primitive societies and close-knit small, ethnically homogeneous communities. Informal enforcement mechanisms appear to encourage and support repeat and/or long term relational exchanges, but fail to be effective in a globalised world where contracting is generally characterised by impersonal simultaneous exchanges.5 Accordingly, a credible formal regime of third-party enforcement is essential. North defines “third-party enforcement” as the development of the State as a coercive force able to monitor property rights and enforce contracts effectively. Third-party enforcement makes provision for certainty and predictability, inspiring parties to enter into non-simultaneous exchanges. Parties appear to be more willing to enter into contracts with partners from States which act as credible third-party enforcers of contracts concluded within their jurisdiction. In an attempt at realising such enforcement regimes, the promotion of rule of law reform in developing countries and transition economies has experienced
extensive support from international agencies.

However, apart from the contract-formalist approach, an alternative paradigm has emerged which finds support for its non-formalist contract enforcement approach in relational contract theory. This paradigm emphasises the role played by social norms and networks which effect contract enforcement without a third party enforcement mechanism. Relational contract theory explains the nature of long-term contracts as opposed to discrete exchanges.”: Communication: Harmonisation of Contract Law Characterized by Formality and Strong Enforcement Mechanisms Imperative for Economic Development, by Luanda Thomas-Hawthorne, in Rev. dr. unif., 2008, p. 507.


“Major theme of this article is that the interpretation of contracts—their possible amplification, correction, and modification by adjudicators—is in the interests of contracting parties. The reasons are no doubt well-appreciated in at least a general sense: interpretation may improve on otherwise imperfect contracts; and the prospect of interpretation allows parties to write simpler contracts and thus to conserve on contracting effort.

As background, we know from common experience that parties may fail to provide for certain events in their contracts (suppose that they overlook the possibility of a leap year) and that they often employ broad terms that do not reflect their wishes in particular circumstances (suppose that they specify that material A should be used in construction but that they would really prefer substituting material B if an unusual problem arises with A). To explain why parties write such incomplete contracts, it is frequently suggested that many eventualities are hard to anticipate or describe in advance and that leaving out details saves time and effort.

We also observe that the courts actively engage in the interpretation of contracts. The courts fill gaps in contracts, resolve conflicts and ambiguities of language, and sometimes replace the parties’ express terms with the courts’ terms (such as to permit substitution of material B if a problem with A occurs) ... 

Moreover, the interpretation of contracts is widely understood to influence how parties write contracts: the more closely the courts’ interpreted contracts resemble the parties’ true wishes, the more willing the parties are to leave gaps and to write fairly general terms, whereas parties are more willing to take extra pains to write more detailed contracts when courts refrain from interpreting terms or interpret terms in ways that run counter to their true desires.

Given this motivation, the writing of contracts and the courts’
interpretation of them is examined here in a basic model of contracting, and the optimal method of interpretation is investigated. The conclusions about the optimal method of interpretation can be summarized as follows. First, some method of interpretation of contracts is always socially desirable: the optimal method of interpretation is strictly superior to literal enforcement of contracts as written. This is true because there exists, at the least, a way of filling gaps that allows some parties to reduce the number of terms in their contracts.”


“Good faith and fair dealing in contractual relations has deep roots extending back as far as Roman law.

It likewise has long been part of the law of countries such as Germany that follow a “civil code.”

Under some civil-code systems, the duty encompasses not only the generalized obligation of contracting parties to act reasonably but requires a relationship of trust based on commercial dealings of the transacting parties.

Some jurisdictions, in fact, impose the duty not only on contractual performance but also on contractual negotiation, allowing for a claim in tort for any breach as well as otherwise rendering any term or agreement contrary to “good faith” void and unenforceable.

The development of the duty of good faith and fair dealing in American law, including Massachusetts, has been more circumscribed. Nonetheless, very early Massachusetts recognized that “good faith” had a role in contractual relations. In 1808, Justice Sedgwick of the Supreme Judicial Court observed that “not only good morals, but the common law, requires good faith, and that every man in his contracts should act with common honesty.”

Good faith emerged in the early common law’s willingness to “imply” both promises and terms to contractual relations. Implied promises were found to render enforceable transactions or obligations that would otherwise not be due to lack of mutuality or consideration.

According to the Supreme Judicial Court, in 1841: [V]ery many equity principles have been adopted by courts in modern times, allowing actions
to be maintained on implied promises by the party to do what justice and equity require to be done, where there is no [enforceable] express contract.

The most famous “implied promise” case, of course, is Justice Cardozo’s decision in Wood v. Lucy, Lady Duff-Gordon. Decided in 1917, Justice Cardozo found an agreement to market clothing designs enforceable as it implicitly required “reasonable efforts” and as the court would not “suppose that one party was to be placed at the mercy of the other.” According to Justice Cardozo: The law has outgrown its primitive stage of formalism when the precise word was the sovereign talisman, and every slip was fatal. It takes a broader view today. A promise may be lacking and yet the whole writing may be “instinct with an obligation,” imperfectly expressed.

In addition to recognizing implied promises, courts often would supply terms to a parties’ bargain. This power was utilized when the parties’ express agreement did not resolve the dispute because the agreement was either silent or ambiguous about the post-formation conduct at issue. This was seen as a necessary gap-filling role in order to effectuate the common, albeit unexpressed, expectations of the parties.”: The Duty of Good Faith and Fair Dealing in Commercial Contracts in Massachusetts, by T. A. Weigand, in Massachusetts Law Review, 2004, p. 174.

16) See above note 10.

CHAPTER 2
CONSUMER CONTRACTS AND TOURISM

Contents: 1- Consumer Protection; 2- Standard Contracts and Consumer Autonomy; 3- Consumer Protection Remedies; 4- B2C Contracts in Tourism Markets; 5- Hospitality Industry; 5.1 -Hotel Accommodation Contracts; 5.2 Allotment Contracts; 5.3 Tourist Apartment Rentals; 5.4 Time Shares; 5.5. Home Exchange and Tourism; 6- Transportation Contracts; 7- Travel Contracts; 7.1. International Convention related to Travel Contracts (CCV); 7.2- Travel Packages and European Union Law; 7.3 - Damages for Loss of Enjoyment of the Holidays; 7.4 Travel Insurance; 8- Mediation and Arbitration in Tourism Disputes Resolution.

1. Consumer Protection

National laws usually provide special dispositions aimed at consumer protection that have a specific impact on tourism contracts (i.e. travel package contracts, time share contracts, unfair terms, unfair commercial practices).
A study conducted by Office of Fair Trading (OFT), with regard to UK consumers published on February 2011(1), found that consumers rarely read contracts in full before entering them. Thus they are usually unaware of some of the terms to which they are agreeing. Consumers can also make mistakes in interpreting terms and conditions of which they are unaware.

Moreover we have to consider other factors related to the contract:

- **Lengthy boilerplate terms are often in fine print and written in a technical and complicated legal language**;
- **Access to the full terms** may be difficult or impossible before acceptance. Often the document being signed is not the full contract;
- There may be social **pressure to sign**. For instance the salesperson may imply that the customer is being unreasonable if he reads the terms. If the purchaser is at the front of a queue there could be additional pressure to sign quickly. Sometimes suppliers give customers a gift (also small), which socially obliges the customer to be co-operative and to conclude the transaction.
- **Information asymmetry** could be another disadvantage for consumers. Firms usually know the distribution of tastes and prices across consumers. At the same time, individual consumers are unaware of this distribution. In the market with such information asymmetry, a firm is able to maximize its profits by setting the price to attract consumers who would give the product a high rating (2).

Many consumer purchases are problematic, whether or not written or in complex oral terms and when conditions are involved.

Also personal and social conditions play a relevant role. Young people are especially likely to have problems with their contracts, while older consumers use prior experience and knowledge as a source of understanding. Consumers with higher incomes, in higher social classes and those consumers who have a higher education level reported more problems. Maybe because they are accustomed to driving a hard bargain (3).

Moreover the purchase method is significant as a transaction can be conducted face-to-face, over the phone, or via Internet. The purchase method can influence consumers’ understanding of terms and conditions. This may depend on the different nature and degree of interaction between the parties of the contract, the accessibility and presentation of terms and conditions, the timing of when information is presented, and the time available to assess information and make a decision.

According to the results achieved by OFT the most common problems were related to goods and services not meeting expectations. Sometimes there could be a contract problem: 78 per cent consumers stated that terms were in dispute between the consumer and the trader, and in over half of these cases consumers felt the trader had interpreted terms to their own
advantage. Other contract-specific problems included unexpected terms and conditions (34 per cent), cancellation problems (28 per cent) and unreasonable charges and penalties (27 per cent).

2. Standard Contracts and Consumer Autonomy

Usually consumer contracts are standard contracts (sometimes known as adhesion or boilerplate contracts): these are contracts between two parties where the terms and conditions of the contract are set by one of the parties, and the other party has a little or no ability to negotiate terms. It is commonly said that the other party is placed in a “take it or leave it” position (4).

There is a debate whether, and to what extent, courts should enforce standard form contracts. On one hand, they undeniably have an important role of promoting economic efficiency since they reduce transaction costs. On the other hand, unjust terms could be accepted by signatories in these contracts. For instance, terms might be considered unjust if they allow the seller to avoid all liability or unilaterally modify terms or terminate the contract. Such terms are not only unjust from a juridical point of view, but they also might be economically inefficient if they place the risk of a negative outcome on a consumer who is not in the best position to take precautions. Moreover, standard form contracts are usually drafted by lawyers who are instructed to minimize the firm’s liability, and not necessarily drafted to implement managers’ competitive decisions.

There are a number of reasons why such terms might be accepted: standard form contracts are rarely read; standard form contracts may exploit unequal power relations and may not have enough information about the product purchased.

Some contend that in a competitive market (5), consumers have the ability to shop around for the supplier who offers them the most favourable terms. However in case of oligopolies consumers may still have access to form contracts only with similar predetermined terms and no opportunity for negotiation. Moreover, in a competitive market, there could be no real opportunity for negotiation. Many people do not read or understand the terms so there might be very little incentive for a company to offer favourable conditions.

As we have said in many countries there are laws protecting consumers from unfair terms. In American law the protection comes mainly from the common law (6). In European Union countries specific rules have been adopted by national legislators according to the European Directive 93/13/CEE on unfair clauses in consumer contracts. Also Asian Countries have specific rules for B2C contracts. Let’s consider the Japanese Consumer

According to Directive 93/13 a contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer. A term shall always be regarded as not individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term, particularly in the context of a pre-formulated standard contract. Unfair terms are considered to be void and without effects.

Article 3 of the Directive 93/13 contains an indicative and non-exhaustive list of the terms that may be regarded as unfair.

Among them, also in regard to hospitality industry, we can remember clauses:

a) excluding or limiting the legal liability of a seller or supplier in the event of the death of a consumer or personal injury to the latter resulting from an act or omission of that seller or supplier;

b) inappropriately excluding or limiting the legal rights of the consumer vis-à-vis the seller or supplier or another party in the event of total or partial non-performance or inadequate performance by the seller or supplier of any of the contractual obligations, including the option of offsetting a debt owed to the seller or supplier against any claim which the consumer may have against him;

c) making an agreement binding on the consumer whereas provision of services by the seller or supplier is subject to a condition whose realization depends on his own will alone;

d) permitting the seller or supplier to retain sums paid by the consumer where the latter decides not to conclude or perform the contract, without providing for the consumer to receive compensation of an equivalent amount from the seller or supplier where the latter is the party cancelling the contract;

e) requiring any consumer who fails to fulfil his obligation to pay a disproportionately high sum in compensation;

f) authorizing the seller or supplier to dissolve the contract on a discretionary basis where the same facility is not granted to the consumer, or permitting the seller or supplier to retain the sums paid for services not yet supplied by him where it is the seller or supplier himself who dissolves the contract;

g) enabling the seller or supplier to terminate a contract of indeterminate duration without reasonable notice except where there are serious grounds for doing so;

h) automatically extending a contract of fixed duration where the
consumer does not indicate otherwise, when the deadline fixed for the consumer to express this desire not to extend the contract is unreasonably early;

(i) irrevocably binding the consumer to terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract;

(j) enabling the seller or supplier to alter the terms of the contract unilaterally without a valid reason which is specified in the contract;

(k) enabling the seller or supplier to alter unilaterally without a valid reason any characteristics of the product or service to be provided;

(l) providing for the price of goods to be determined at the time of delivery or allowing a seller of goods or supplier of services to increase their price without in both cases giving the consumer the corresponding right to cancel the contract if the final price is too high in relation to the price agreed when the contract was concluded;

(m) giving the seller or supplier the right to determine whether the goods or services supplied are in conformity with the contract, or giving him the exclusive right to interpret any term of the contract;

(n) limiting the seller’s or supplier’s obligation to respect commitments undertaken by his agents or making his commitments subject to compliance with a particular formality;

(o) obliging the consumer to fulfil all his obligations where the seller or supplier does not perform his;

(p) giving the seller or supplier the possibility of transferring his rights and obligations under the contract, where this may serve to reduce the guarantees for the consumer, without the latter’s agreement;

(q) 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, unduly restricting the evidence available to him or imposing on him a burden of proof which, according to the applicable law, should lie with another party to the contract.

3. Consumer Protection Remedies

In regard to consumer protection remedies we can remember a famous distinction: preventive measures, restitution and punishment (7).

The promulgation of codes of conduct inspired by customers’ satisfaction principles could be considered a preventative measure. Moreover many existing consumer legislations are based on the presumption that consumers should have the necessary information in order to compare products in market place. This kind of measure can be considered a preventative
Restitution is usually defined as reparations made by providing an equivalent product or compensation for loss damages or injury caused, restoration of property rights previously taken away.

We can consider, about restitution, invalidity of contracts in violation of imperative norms or rescission of contracts in case of misrepresentation (a false statement of fact made by one party to another party), invalidity or violability of contracts in case of mistake (it is an erroneous belief, at contracting, that certain facts are) and consequently refunds of payments. Consumers can also claim damages in case of violation of their rights.

Actual damages are monetary compensation awarded to an injured party in order to compensate the individual for losses. When monetary compensation goes beyond that which is necessary to compensate the individual for losses we have a sanction issued to punish the wrongdoer (so called punitive damage).

Punitive damages (also known as exemplary damages) may be awarded by a judge (or a jury) in addition to actual damages, which compensate a plaintiff for the losses suffered due to the harm caused by the defendant. Punitive damages are a measure of punishing the defendant in a civil lawsuit recognized in some American States (8). In other countries, such as Italy and in Germany, punitive damages are not provided (9).

About this issue we can remember some cases of damages awarded for delayed baggage and for delayed flights.

In a Scottish case (O’Carroll v Ryanair, Sheriff Court, 2008) the Sheriff Court awarded damages against an airline for “stress, inconvenience, frustration and disruption” to holiday as a result of delayed baggage of the claimant. The appeal was to the Sheriff Principal of Grampian, Highland and Islands at Aberdeen. The airline argued in the appeal that the court did not have jurisdiction and that the basis of the award for damages were not permissible under Articles 19 and 29 of the Montreal Convention. In particular, according to art. 29, “in the carriage of passengers, baggage and cargo, any action for damages, however founded, whether under this Convention or in contract or in tort or otherwise, can only be brought subject to the conditions and such limits of liability as are set out in this Convention without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights. In any such action, punitive, exemplary or any other non-compensatory damages shall not be recoverable.” The Sheriff Principal rejected the airline’s appeal assessing that the award of damages for stress and inconvenience was available under Scots Law and was not excluded by Article 29 of the Montreal Convention as it did not amount to punitive, exemplary or non-compensatory damages.

In the case Brunton v Cosmosair (Keighley County Court, 25 November
2002), the claimant had booked a holiday for himself and his family in Mallorca. On arrival, he discovered that two of his bags were still in the UK. In addition to replacement costs, he claimed compensation for loss amenity of the holiday, discomfort and loss of enjoyment. The district judge rejected the latter on grounds that this was not recoverable under the Warsaw Convention which is an international treaty governing certain incidents that occur on board an aircraft during flights between signatory nations. This convention was modified by the above Montreal convention.

In the case *Lucas v Avro (Sheffield County Court, 15 March, 1994)*, Lucas booked a flight-only holiday from Avro, but a mistake was made on the tickets issued: the return flight was in fact 24 hours later than indicated. The district judge rejected a claim for damages for mental distress on grounds that a flight-only contract did not include an obligation to provide peace of mind or freedom from distress.

In the case *Parker v TUI UK Travel (Central London County Court, 30 October 2006)* P. claimed damages for delayed flight to Heathrow in accordance with the Regulations. The court held that the contract was just a contract of carriage, not a contract for a holiday. It was not therefore a contract for enjoyment and therefore the claim for loss of enjoyment failed.

Among punitive remedies we can remember particularly penalties awarded by Administrative Authorities in case of Unfair Commercial Practice according to the directive 2005/29/EC.

4. **B2C Contracts in Tourism Markets**

The term B2C commonly indicates a transaction that occurs between a company and a consumer, as opposed to a transaction between companies (called B2B).

In the economic language a **consumer** is generally a person or group of people who are the final users of products and or services generated within a social system.

We can say something different taking in to account the juridical meanings of the word “consumer”. Legal definitions merely stipulate as they depend on political choices of legislators. One of the most common legal definitions of “consumer” is provided in the European directives 93/13/CE.

According to such directives the term “consumer” means any natural person who is dealing for purposes that are outside his trade, business or profession.

With regard to tourism market we have to consider that customers sometimes deal for purposes that are both outside and inside their trade, business or profession. Let’s think about business travellers. The tourism
industry can be divided into leisure tourism and business tourism that can be defined as the provision of facilities and services to delegates who attend meetings, congresses, exhibitions, and business events. The fact is that many times business and leisure travel worlds collide. Also business travellers like, during short part of their trip, to break routines, do something new, try out new activities.

So it is difficult to make a clear distinction between leisure travellers and business travellers.

From the juridical point of view this conclusion could be problematic in case of application of consumer contract law.

For instance Italian Law on consumer contracts according to European directive 93/13/CE on unfair terms (art. 33 of consumers code –dlgs 206/2005) is applicable only in case of contract between a supplier and a natural person who is dealing for purposes that are outside his trade, business or profession. Is it also applicable in the case of a contract between a company (for instance an hotel company) and a business traveller? We think that in this case consumer interest should prevail in accordance with the principle laid down under the heading of the 93/13/Directive: ‘Protection of the economic interests of the consumers’. As stated in those European programmes: ‘acquirers of goods and services should be protected against the abuse of power by the seller or supplier, in particular against one-sided standard contracts and the unfair exclusion of essential rights in contracts’ (10). With regard to that point we have to remember that the proposal of the Directive on travel packages issued on July 9, 2013 offers a different level of protection to business travellers: as it is not appropriate to grant the same level of protection to business travellers whose travel arrangements are made on the basis of a framework contract concluded between their employers and specialised operators often offering, on a business-to-business basis, a level of protection similar to the one stemming from this Directive (so-called managed business travel), such travel arrangements are excluded from the scope’.

5. Hospitality Industry

The hospitality industry is part of the service industry and includes hotel, resorts, bed and breakfasts, camping, restaurant, cruise lines, airlines, other forms of travel, event planning etc. (11).

One of this sector’s most important organizations is IHAR. It is a very old professional union. In January 1869, 45 hoteliers gathered in Koblenz, Germany to create an alliance under the name of ALL HOTELIER ALLIANCE (AHA) to defend their interests, to grow and to organize.
In April 1921 various local European, African, and Latin American hotel associations decided to merge into a new international Association: INTERNATIONAL HOTELS ALLIANCE (IHA). In November 1947, after the end of the Second World War and the creation of the United Nations, Hoteliers from International Hotels Alliance met together with The European Aubergistes Association and the Asian Innkeepers Association and decided to merge into a large International Association to defend the private sector worldwide from governments, the public sectors, military etc… thereby creating the INTERNATIONAL HOTELS ASSOCIATION (IHA) established in London. In October 1960, The New York Hotels Association asked to join IHA. On November 1, 1997, IHA merged with International Organization of Hotels and Restaurants and together, they became a single legal entity named the INTERNATIONAL HOTELS AND RESTAURANTS ASSOCIATION (IHRA) still active today.

This association has various purposes. It aims at providing a full and complete platform for formation of industry positions, international representation, information dissemination and international connections in the hospitality industry worldwide. IHRA promotes the hospitality industry’s various points of view and updates standards and various technical issues for hospitality worldwide. It also aims at developing eco-tourism by promoting sustainability among their members, fighting the climate change various issues and promoting measures ordered to reduce the emissions of CO2.

Hotels represent the main source of income and hotel accommodation contracts could be considered the standard form of hospitality industry contracts. Norms regulating hotel-keepers liability are generally applicable also to other forms of hospitality industry (Agritourisms, Restaurants, etc.).

Another increasing source of income are Agritourisms. They have different definitions in different parts of the world. They are generally defined as any agricultural-based operation or activity that brings visitors to a farm or a ranch and sometimes refers specifically to farm stay. Agritourisms usually include a variety of activities: buying produce direct from a farm stand, navigating a corn maze, picking fruit, feeding animals, or staying at a B&B on a farm (12).

Agritourisms development could be considered as part of European policy on sustainable rural development as detailed in the European regulation 1257/1999 which establishes the framework for Community support for sustainable rural development. In fact, this regulation establishes that support for rural development, related to farming activities and their conversion, may particularly concern: the improvement of structures in agricultural holdings and structures for the processing and marketing of agricultural products, the conversion and reorientation of agricultural production potential, the
diversification of activities with the aim of complementary or alternative activities, the maintenance and reinforcement of viable social fabric in rural areas, the development of economic activities and the maintenance and creation of employment with the aim of ensuring a better exploitation of existing inherent potential, the preservation and promotion of a high nature value and a sustainable agriculture respecting environmental requirements.

**Bed and Breakfasts** (well known as B&Bs) are considered to be part of Agritourisms, but now this hospitality industry phenomenon is not limited to only rural areas. B&Bs are small lodging establishments that offer overnight accommodation and breakfast. Usually bed and breakfasts are private homes with fewer than 10 bedrooms available for commercial use.

The hospitality industry has been strongly innovated by new form of tourism such as medical tourism and sport tourism.

Medical tourism is typically a movement from highly developed nations to other areas of the world for medical care to find treatment at a lower cost. Medical tourism is different from the traditional model of international medical travel where patients generally journey from less developed nations to major medical centres in highly developed countries for treatments that are unavailable in their own communities. Services typically sought by travellers are joint replacement, dental surgery and cosmetic surgeries. However every type of health care, including psychiatry, alternative treatments, convalescent care and even burial services are available.

Typical lodging in case of medical tourism are clinics and spa. The term spa comes from the name of the Belgian town of Spa, whose name is known back to Roman times, when the location was called *Aquae Spadanae*. Spa towns or spa resorts are lodgings associated with water treatment (as balneotherapy), typically offering various health treatments. The belief in the curative powers of mineral waters goes back to prehistoric times and it is popular worldwide.

Also sport tourism is a phenomenon worldwide popular due to famous international events such as Olympic Games or Super Championships. It is right to say that there is an important connection between sports and tourism: contribution to the execution of development plans, promotion of national and international friendship and understanding between people and communities.

Sport tourism refers to travel involving athletes and observing or participating in a sporting event. Therefore, sport tourism requires special lodgings near sporting event locations and functional to the sporting event organization (13).

Also **food service** is considered as part of hospitality industry. An increasing phenomenon of this sector are catering and banqueting contracts.

A catering contract is an agreement between a hiring party and a company
offering catering services. This contract typically includes prices, terms and conditions of payment, information on food and beverage served as well as the time of the event and how long food and beverage will be available. It will also specify whether the meal will be served seated or buffet style and indicate whether or not the caterer will provide trays of food circulating among guests.

We need to distinguish catering from banqueting. The term banqueting means the activity of food and drink preparation in the organization of a banquet. Thus banqueting provides drink and food cooked directly at the place with a chef. The banqueting activity is connected to the preparation of the tables, waiter services, the supply of tables, chairs, napkins, tablecloths, tableware, dishware etc.

Another source of hospitality industry is event planning. It is important to draw a careful event planning contract that is an agreement between an event planner and a client for the planning, organization, and management of an event.

The agreement will contain information about the party and the event (location, time, a detailed description of all services to be performed by event planner). The event planner will act as planner of the event and will provide the services as indicated in a detailed description contained in the contract. Usually such a description is drawn in a separate document attached to the contract.

The event planner will be responsible for the planning, organization and management of all details necessary for the performance of the services outlined in the description, including but not limited to the event site, negotiating any leases or obtaining any permits or licenses, parking, insurance, the rental or leasing of any equipment and the negotiating of fees and services to be provided by any contractor, vendor or other service provider.

In case of events organized for the promotion of a company the event planner agrees to use the company’s name, logo or trademark in any material used by the event planner in promotion of the event, including but not limited to any public announcements in newspapers, magazines, billboards, tickets or television or radio announcements. The event planner further agrees to only use the company’s name, logo or trademark in connection with the event and for no other purpose or purposes without the prior written consent of the company. In case of such promotional events special clauses will be insert with regard to the preparation of any promotional document or promotional materials.

The event planner agrees that all works conducted at the event site shall be performed in accordance with all applicable laws of the governing jurisdiction to provide a safe working environment for the event workers.
and the general public.

The parties acknowledge that the event planner is an independent contractor with respect to the client and has no authority or power to incur debts, obligations or commitments of any kind whatsoever for or on behalf of the client, or to bind the client to any contract, agreement or employment agreement, unless specifically requested in writing by company.

Special conditions provide payment terms and conditions.

Event planners shall be paid in full usually no later than two weeks before the event. Payments may be via cash, check, or money order. The event planner usually asks for a deposit at the moment of conclusion of the agreement.

If the client shall cancel this agreement a certain number of days (usually 90) before the event date, any payments made to event planner shall be refunded in full. A predetermined cancellation fee shall be applied if the client cancels within a certain number of days (usually 30) before the event date. After that period of time the client usually has to pay the entire amount.

5.1 Hotel Accommodation Contracts

The rights and obligations of hotel and other tourist lodgings customers are provided in special regulations published by professional unions (see above chap. I § 3), in general legislative provisions and in particular, in contracts. As we have underlined, accommodation contracts are generally atypical contracts (14). The rights and the obligations of customers and hotelkeepers are usually ruled conventionally by standard contracts that usually contain the above regulations published by professional unions.

We can make a list of rules that commonly regulate accommodation contracts. The hotelkeeper is compelled to rent the empty rooms of his hotel to any customer, to allocate and to provide all comforts advertised by the hotel (e.g. swimming pool, sports, night club, etc). The hotelkeeper can deny the rental, if the customer: a) is sick; b) is intoxicated c) is dirty d) could be dangerous for other guests of the hotel.

On the other part the customer is bound: a) to accept the room that was booked by himself or with his command via a third person, unless this is not in accordance with his order; b) to maintain the room up to the end of the period that was agreed, otherwise he is compelled to provide compensation to the hotelkeeper; c) to pay the price.

Moreover the customer is compelled: a) to sign all corresponding documents at his entry to the hotel; b) to deliver the key of his room to the reception while exiting the hotel; c) to meet his visitors at the public premises of the hotel. Visitors can enter in the rooms only with the approval
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The following is usually prohibited: a) cooking of meals in the rooms of the hotel, by the customers, as well as dining in them, except for customers who have ordered room service; b) washing of clothing in the rooms; c) placement of all kinds of baggage in the corridors of the hotel; d) movement of furniture in the rooms and the creation of holes in the walls for the hanging of photographs or other objects; e) keeping of all kinds of domestic animals without the permission of hotel keeper; h) gambling; i) music and all kinds of gatherings that cause noise or nuisance to the other customers; j) use of towels, etc. outside of the rooms.

The customer is compelled to behave politely towards hotel personnel and report to the manager any complaint against them; in turn, they are bound to satisfy the customer to the greatest possible extent.

We usually have booking procedures regarding the formation of accommodation contracts. The consumer makes a specific and unconditional offer (providing dates in/out, rates, hotel, type of bedroom) to stay and to pay. The hotel keeper is compelled to provide a written answer by electronic methods quickly (usually within 3 days), that he accepts or declines the room request that has been communicated to him in written form, by phone or by fax, and in an affirmative case, is entitled to ask for a percentage of the price (usually 25%) of an overnight stay for all the days of stay that have been requested.

The reservation request is considered valid with the receipt of a deposit that was determined as above or with the written acceptance of reservation by the hotelkeeper.

Sometimes customers prefer to make online reservations through a website knowing hotel standard, dates, type of room but not knowing the exact identity of hotel in order to obtain a cheaper rate.

From the point at which customers make a reservation, the website acts solely as an intermediary between them and the accommodation provider, transmitting the details of reservation to the relevant accommodation provider and sending to customer a confirmation email for and on behalf of the accommodation provider.

By making a reservation with an accommodation provider, customers accept and agree to the relevant cancellation and no-show policy of that accommodation provider, and to any additional (delivery) terms and conditions of the accommodation provider that may apply to reservation or during the stay, including for services rendered and/or products offered by the accommodation provider.

By completing a booking, customers usually agree to receive an email which the website may send shortly prior to the arrival date, giving information on the destination and providing with certain information and
offers relevant to the booking and the destination.

Booking a hotel online is very easy and cheap but customers can find some surprises at the end of their stay if they do not read all of the information carefully on the website.

In the case of Frainier v. Priceline.com, No. B225920, Calif. App. 2nd Dist. Div. 3, 2012, Frainier and other online users of Priceline.com’s online hotel booking services filed a suit against Priceline.com claiming that the online company quoted them with a “total charges” price that did not include an additional per-night “resort fee” charged by the hotel. Plaintiffs alleged breach of contract, fraudulent inducement, negligent misrepresentation and violation of the unfair competition law, and other cause of actions under state law. The district court granted summary judgment for Priceline.com and the plaintiffs appealed. The court of appeals held that although Priceline.com omitted the “resort fee” charges from the “total charges” page, it had disclosed those fees elsewhere in its website. The court noted that Priceline.com placed a bold-faced, large-type notice saying “important information,” just below the “total charges” line. When users clicked on that important information notice, users were taken to a new page containing a disclosure that was short and contained a message stating that additional hotel fees or charges could apply. Thus the court affirmed “this disclosure clearly stated that the offer price did not include mandatory resort fees charged by the hotel to the customer at checkout. Priceline did not represent to customers that they would pay nothing in addition to the ‘total charges.’ Instead, it expressly stated that hotels might make additional charges, some which might be mandatory (such as resort fees) and some of which might be optional (parking, phone calls, or minibar charges).”

Special norms rule no-show and hotel overbooking.

The hotelkeeper must offer the rooms that have been accepted in a written or fax request or by contract with the customers. In an opposite case he is compelled to ensure their stay in another hotel of at least the same quality and in the same city, that would offer the same comforts and conditions of stay (sea, sports, etc), as those that are advertised for his own hotel.

In this case the hotelkeeper owes to cover from his own expenses the transport and the difference of price that by any chance exists between his own and the other hotel. Provided that the above are not possible, the hotelkeeper is compelled to compensate the customer with the total of the cost of the stay.

Whoever books rooms to use for predetermined time period and does not use for all or part of the period, owes the hotel keeper a percentage of the price (usually half the price) that was agreed for the period that he did not use the rooms. If however the customer warned the hotelkeeper in advance (usually 48 hours before the arrival date), then he is exempted from the
compensation and the hotelkeeper is compelled in the direct return of the advance that was collected.

The customer is eligible to make use of: a) the room or apartment that is rented; b) the communal areas of the hotel that are intended for the customers.

Room rental is considered to be for one day, unless otherwise, explicitly, it is agreed between hotelkeeper and customer. The rental is considered to be renewed reciprocally for each next day, provided that the hotelkeeper informs the customer that the hire expires or the customer informs the hotelkeeper that he will not continue the hire. This notice should be made from the previous day, otherwise it is not in effect for the same day, but for the next one.

In the event that the hiring of a room is terminated, according to the previous article, the customer is compelled to vacate the room usually up to the 12th hour. A stay beyond this hour compels the customer in the partial payment of the price.

If the room is let for a certain time, the hotel keeper is not entitled to interrupt the hire before the time that was agreed passes, unless the customer: a) violates contractual obligations; b) becomes sick from contagious illness or other illness that causes nuisance to the remaining customers of the hotel c) violates the common morals.

Special provisions are contained in the convention on the liability of hotelkeepers concerning the property of their guests signed in Paris, on December 17, 1962.

A hotelkeeper shall be liable for any damage to or destruction or loss of property brought to the hotel by any guest who stays at the hotel and has sleeping accommodation put at his disposal.

Property is defined as: everything which is at the hotel during the time when the guest has the accommodation at his disposal; everything which the hotelkeeper or a person for whom he is responsible takes charge outside the hotel during the period for which the guest has the accommodation at his disposal; or everything which the hotelkeeper or a person for whom he is responsible takes charge whether at the hotel or outside it during a reasonable period preceding or following the time when the guest has the accommodation at his disposal; shall be deemed to be property brought to the hotel.

The liability shall be generally limited. The liability of a hotelkeeper shall be unlimited: where the property has been deposited with him; where he has refused to receive property which he is bound to receive for safe custody. A hotel-keeper shall be bound to receive securities, money and valuable articles; he may only refuse to receive such property if it is dangerous or if, having regard to the size or standing of the hotel, it is of excessive value or
cumbersome.

The hotelkeeper shall be liable and shall not have the benefit of the limitation on his liability where the damage, destruction or loss is caused by a wilful act or omission or negligence, on his part or on the part of any person for whose actions he is responsible.

Any notice or agreement purporting to exclude or diminish the hotelkeeper’s liability given or made before the damage, destruction or loss has occurred shall be null and void.

The provisions shall not apply to vehicles, any property left with a vehicle, or live animals.

A hotelkeeper shall not be liable in so far as the damage, destruction or loss is due: to the guest or any person accompanying him or in his employment or any person visiting him; to an unforeseeable and irresistible act of nature or an act of war; to the nature of the article.

This Convention shall apply to the metropolitan territories of the contracting parties. Many countries have ratified this convention. Among them are Belgium, France, Germany, Ireland, Italy, Lituania, Luxembourg, Malta, Poland, Serbia, Slovenia, and the United Kingdom.

5.2 Allotment Contracts

Accommodation contracts could be concluded by the tourist or by a travel agency or by a tour operator on behalf of the tourist. Travel agencies and tour operators are able to offer rooms at cheap prices through allotment.

Allotments are used to designate a certain block of pre-negotiated hotel rooms (but also carrier seats) that have been bought out and held by a travel agency or a travel organizer, tour operator. Allotments can be purchased for a specific period of time, part of a season or for any single dates and then resold to travel partners and final customers.

National law rarely regulates allotment contracts. Their content is usually regulated by business practices (see the code of practice on relations between hoteliers and travel agents drawn up by –IHRA and UFTAA) or by private autonomy. Allotment contracts are related to the bookings of specific capacity (certain number of beds, hotel rooms or carrier seats).

According to the allotment contract, and in case of hotel allotment, the hotelkeeper undertakes the duty to provide availability of certain number of beds or rooms established in the contract to the travel agency, to provide services to the travel agency’s guests, and to pay a certain commission to the travel agency. In exchange, the travel agency undertakes the obligation to make the bookings or notify the hotelkeeper about the impossibility to comply with the contractual terms and pay the cost of services, if the travel
agency used the contracted accommodation.

We can distinguish two kinds of allotment contracts: i) allotment contracts with the right of unilateral withdrawal from the contract (the real allotment contract), and ii) allotment contract with the guarantee charge (the allotment contract ‘full for empty’).

The hotelkeeper is liable for any damage due to breach of the allotment contract. His liability is commonly divided into two types: i) general liability - that derives from the agency hotelkeeper’s contract and ii) special liability - characteristic only for the allotment contract. In case of liability for breach of the allotment contract, the hotelkeeper will reimburse the total pecuniary and non-pecuniary damage to the travel agency or its guest.

The hotelkeeper’s compensation of pecuniary damage to guests and travel agencies includes loss of profits. The most significant non-pecuniary damages, which the agency may suffer, include first of all a violation of reputation. The most common cases of non-pecuniary damages that the guest may suffer from the allotment contract’s breach include: i) failed vacation ii) missing the goals of the guest’s sojourn; iii) various types of discomfort, discontent and distress (15).

### 5.3 Tourist Apartment Rentals

With regard to tourist rental contracts (or lease contracts) we have to remember that lease contracts are strongly regulated by national law in the interest of lessee.

The term lease indicates a transfer of the right to possession and use of good for a term in return for consideration. **A lease contract is an agreement** with respect to the lease, between two parties: the lessor, who is a person transferring the right to possession and use of good under a lease, and the lessee, who is a person acquiring the right to possession and use of good under a lease.

Tourist rental contracts allow the renter (lessee) the availability of the structure, with the agreement of the owner (lessor) for a certain period. Arrival and departure dates are provided in the contract.

The contract contains all rental conditions including usually the following: the description of the structure, the cost per week, the total to be paid including utilities, bed linens and bath towels and extra costs (i.e. extra bed for an adult; extra bed for infant, heating, etc.)

Also the formation of this contract is usually composed by booking and definitive contract.

To confirm the reservation clients should deposit a percentage of the total amount due (usually 25%). The receipt should be sent along with the
reservation. Payment of the balance due should be paid in cash upon arrival.
A deposit for the house is usually to be given to the owner at the beginning of the stay. This sum will be given back at departure, if there was no damage to the house, furniture or property.

The renters are responsible for the house, the furniture and all the accessories. All problems, damage or missing objects and/or accessories should be communicated immediately to the owner so that these problems can be resolved during the renters stay. The renters must abide by the rules that should be found in the house.

In case of cancellation, the advance for confirmation (deposit) will be fully retained.

In the case of early departure the clients are responsible of the entire price of the booking period accorded with the owner.

5.4 Timeshares

The timeshare concept was born in Europe in the late 1960’s. The timeshare industry grew in the 70’s and 80’s around the world and it was very prominent in the U.S. particularly in places such as Florida and Hawaii.

Initially timeshare properties were marketed as investments. Timeshares are not in fact investments and one should not buy a timeshare with the expectation of reselling it for a profit. However beginning in the 1990s the timeshare industry experienced a renaissance because people were realizing that the concept of timeshare is a real vacation option. Timeshares have become a very popular option for many tourists who love going back to the same destination, and enjoy the place as well as the apartment they visited in the previous years. But in many cases consumers’ organizations assess problem of misleading or deceptive conduct of sellers.

For instance the clients simply sign a contract with the purpose of buying the right to stay in a specific apartment during a certain period, but the contract includes another agreement concerning time sharing exchange that mediates the stays in other facilities. This, however, incurs additional costs.

In European countries timeshares are regulated according to the last directive 2008/122/EC of the European parliament and of the council of January 14, 2009 on the protection of consumers in respect of certain aspects of timeshares, long-term holiday products, resale and exchange contracts.

This directive aims particularly at regulating new holiday products and certain transactions related to timeshares, such as resale contracts and exchange contracts, that are not covered by the first Directive on Timeshares 94/47/CE.
In fact, since the adoption of Directive 94/47/EC of the European Parliament and of the Council of October 26, 1994 regarding the protection of purchasers from certain aspects of contracts relating to the purchase of rights to use immovable properties on a timeshare basis, timeshares have evolved and new holiday products similar to them have appeared on the market.

According to the Directive 2008/122 a ‘timeshare contract’ means a contract lasting more than one year under which a consumer, for consideration, acquires the right to use one or more overnight accommodation for more than one period of occupation. A ‘long-term holiday product’ contract is an agreement lasting more than one year under which a consumer, for consideration, acquires primarily the right to obtain discounts or other benefits in respect of accommodation, alone or together with travel or other services. A ‘resale contract’ means a contract under which a trader, for consideration, assists a consumer to sell or buy a timeshare or a long-term holiday product. An ‘exchange contract’ is a contract under which a consumer, for consideration, joins an exchange system which allows that consumer access to overnight accommodation or other services in exchange for granting to other persons temporary access to the benefits of the rights deriving from that consumer’s timeshare contract.

The Directive 2005/29/EC of the European Parliament and of the Council of May 11, 2005 concerning unfair business to consumer commercial practices in the internal market (Unfair Commercial Practices Directive) prohibits misleading, aggressive and other unfair commercial business-to-consumer practices. Given the nature of the products and the commercial practices related to timeshares, long-term holiday products, resale and exchange, it is appropriate to adopt more detailed and specific provisions regarding information requirements and sales events. In particular the commercial purpose of invitations to sales events should be made clear to consumers. Member States shall ensure that the contract is in writing.

In order to provide consumers with the opportunity of fully understanding their rights and obligations under the contract, they should be allowed a period during which they may withdraw from the contract without having to justify the withdrawal and without bearing any cost. A right of withdraw was provided in Directive 94/47CE.

The length of this period varies between Member States, and experience shows that the length prescribed in Directive 94/47/EC was not long enough. The period should therefore be extended in order to achieve a high level of consumer protection and more clarity for consumers and traders. The length of the period, the modalities for and the effects of exercising the right of withdrawal should be harmonised.

According to art. 6 of directive 2008/122 Member States shall ensure that
the consumer is given a period of 14 calendar days to withdraw from the timeshare, long-term holiday product, resale or exchange contract, without giving any reason. The withdrawal period shall be calculated: (a) from the day of the conclusion of the contract or of any binding preliminary contract; or (b) from the day when the consumer receives the contract or any binding preliminary contract if it is later than the date referred to in point.

Member States shall ensure that, where the consumer exercises the right to withdraw from the timeshare or long-term holiday product contract, any exchange contract ancillary to it or any other ancillary contract is automatically terminated, at no cost to the consumer. An ‘ancillary contract’ is a contract under which the consumer acquires services which are related to a timeshare contract or long-term holiday product contract and which are provided by the trader or a third party on the basis of an arrangement between that third party and the trader.

Consumers should have effective remedies in the event that traders do not comply with the provisions regarding pre-contractual information or the contract. In addition to the remedies existing under national law, consumers should benefit from an extended withdrawal period where traders have not provided information. The exercise of the right of withdrawal should remain free of charge during that extended period regardless of what services consumers may have enjoyed. It is obvious that the expiration of the withdrawal period does not preclude consumers from seeking remedies in accordance with national law for breaches of the information requirements.

5.5 Home Exchange and Tourism

We can include in the hospitality industry also the phenomenon of house swapping commonly known as home exchange. This has become an alternative kind of vacation as part of the collaborative consumption movement (16).

The term home exchange refers to the swapping of homes on a temporary or more permanent basis.

With regard to B2C contracts we can consider some international associations having the purpose of home swapping. Home exchange communities are non-profit organisations that have pioneered the global experience of home exchange holidays since the early 1950’s.

To use the service offered by such associations, membership is required. Presently such organizations provide services via Internet to their members. To become member of a home exchange community it is necessary to subscribe to a contract providing that “the Community” will allocate a username and password to the members to access the “Members only”
area of the site. The members will be required to use their username and password each time they log on to the site accessing to information available about accommodations.

The use of the site and information on the site is at own risk of members. The information appearing on the site is for general information only and is subject to change. “The Community” does not warrant that information contained on the site is complete, accurate, or up-to-date. Any aspect of the site may be changed, supplemented, deleted or updated without notice at the sole discretion of “the Community”.

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Members acknowledge that all information they provide on the Community’s web site including personal information is complete, accurate and current.

It is a condition of the Agreement that information uploaded by members does not contain any viruses, worms, Trojans or other programs or materials that have the ability to alter, delay, damage or interfere with the operation of the site, are not false or misleading and do not contravene any law, statute or regulation.

It is a condition of the Agreement that member’s information does not contain text, images or website URLs that promote, either implicitly or explicitly, any product or service that is provided by individuals, companies or organizations other than the “the Community”.

Special conditions concern the Privacy Policy and membership termination.

“The Community” reserves the right to suspend or terminate membership and access to or use of the site, the information and/or the services, at any time, if members breach any of their obligations under the Agreement.

6. Transport Law

As we have underlined in the introduction, transport is the necessary precondition of tourism and the different eras of tourism are to be identified with particular modes of transport. Tourism is a matter of being elsewhere and that implies the use of transport. Therefore it is a matter of fact that the evolution of tourism is strictly connected to the development of modern transport and other aspects of tourism have followed the evolution of modes of transport.

The connection between transport and tourism transformed also transport
Transport law is to be complemented by a series of norms giving rights to passengers. Therefore it is right to say that such regulations are giving to transport law a consumer dimension (17).

A **transportation contract** is an agreement between a Carrier and a Passenger, who is any person transported based on a voyage ticket issued by the carrier and/or agencies authorised thereto. The object of the agreement is the provision of transport. The carrier undertakes to transport the passenger and/or luggage, vehicles etc. under the general conditions, which the Passenger undertakes to examine and observe in their entirety prior to the purchase and/or booking of the voyage ticket. Also the formation of this contract is in fact usually composed by booking and definitive contract.

The transport service refers to the route indicated on the ticket, sometimes inclusive of accommodation on board.

Transportation will be regulated by transport law that include all national and international laws governing the conveyance of passengers or goods, especially as a commercial enterprise, pertaining to both the method and the means. It includes highways, mass transit, aviation, rail, and maritime and motor carriers.

Usually transportation contracts are regulated by the following general conditions:

- The voyage ticket is personal, may not be transferred and is valid solely for the voyage indicated on the ticket. The passenger is required to retain carefully the ticket to justify entitlement to travel and to exhibit it to any Officer of the Ship or personnel of the Company who may request it.
- The price indicated on the voyage ticket is the current tariff of the carrier in force on the date of issue. The tariff is not fixed and may be subject to increases or decreases.
- In case of accommodation on board the passenger shall occupy the cabin or seat indicated in the ticket and where the ticket does not indicate any cabin or seat this will be indicated by the captain or the on-board purser. Special disposition regulate the check-in time. Passengers who do not attend for check-in at the established time, or who do not board the ship indicated on the boarding card will generally not be entitled to any refund of the price paid and must instead complete payment of the price of the voyage if they have not paid in full.
- No refunds will be made also in the following cases: (i) embarkation refused for safety reasons, even if the passenger attends within the above indicated times; (ii) if the passenger holds documentation which is unsuitable for disembarking at the destination port; (iii) if the Passenger, after having checked in does not attend for embarkation at a suitable time; (iv) if the passenger is not indicated as the ticket holder.
- Refunds are usually provided in case of cancellations. Cancellations must
be notified by the passenger to the company directly or via the travel agent within the terms reported in general condition and with application of the penalties indicated in the general conditions.

In some cases passengers accept, prior to departure, that changes can be made to the timetable reported on the voyage ticket. The Company, in case of situations of its own need and/or force majeure, has the option to cancel the indicated departure time, or to add or omit stopovers and to begin the voyage from a different place than expected.

In the event of cancellation of a voyage, or an extended delay, passengers shall be entitled to refreshments and meals depending on their waiting time. These provisions shall apply in relation to the anticipated length of the delay and the distance of the destination. In addition, the carrier shall provide accommodation, if necessary, and transport to the place of accommodation. Passengers will be informed by the carrier on preparations relating to acquiring refreshments, transport and hotel (or on board another ship) accommodation.

The carrier is not liable for damages caused to passengers by the delay or the failure to perform the transport should such circumstance derive from chance, force majeure, adverse weather conditions, strikes or any technical breakdowns arising through force majeure or other cause not attributable to it and in any event in compliance with the provisions.

Since the passenger is the weaker party in the transport contract, passengers’ rights in this respect should be safeguarded. Thus, national and international law regulate delayed departure, cancellation and overbooking.


The protection of passengers should cover not only passenger services between ports situated in the territory of the Member States, but also passenger services between such ports and ports situated outside the territory of the Member States, taking into account the risk of distortion of competition on the passenger transport market.

Carriers should provide for the payment of compensation for passengers in the event of the cancellation or delay of a passenger service based on a percentage of the ticket price, except when the cancellation or delay occurs due to weather conditions endangering the safe operation of the ship or to extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken.

Passengers should be fully informed of their rights under this Regulation in formats that are accessible to everybody, so that they can effectively exercise those rights. They should be able to exercise their rights by means
of appropriate and accessible complaint procedures implemented by carriers and terminal operators within their respective areas of competence or, as the case may be, by the submission of complaints to the body or bodies designated to that end by the Member State concerned.

At European Union law level with regard to Air Transportation the main rules are contained in Regulation 889/2002 amending Council Regulation (EC) No 2027/97 on air carrier liability in the event of accidents.

At the international level, a Convention for the Unification of Certain Rules Relating to International Carriage by Air was agreed in Montreal on May 28, 1999 setting new global rules on liability in the event of accidents for international air transport replacing those in the Warsaw Convention of 1929 and its subsequent amendments. The Montreal Convention provides for a regime of unlimited liability in the case of death or injury of air passengers.

The regulation 889/2002 has been issued because it was necessary to amend Council Regulation (EC) No 2027/97 of October 9, 1997 on air carrier liability in the event of accidents in order to align it with the provisions of the Montreal Convention, thereby creating a uniform system of liability for international air transport.

All provisions of the Montreal Convention relevant to such liability shall govern the liability of a Community air carrier in respect of passengers and their baggage. The obligation of insurance set out in Article 7 of Regulation (EEC) No 2407/92 as far as it relates to liability for passengers shall be understood as requiring that a Community air carrier shall be insured up to a level that is adequate to ensure that all persons entitled to compensation receive the full amount to which they are entitled in accordance with this Regulation.


This Regulation governs denied boarding (for instance in case of overbooking) and cancellation or long delay not restricting the rights of the operating air carrier to seek compensation from any person, including third parties, in accordance with the law applicable.

In case of denied boarding the air carriers call for volunteers to surrender their reservations, in exchange for benefits, instead of denying passengers boarding, and by fully compensating those finally denied boarding.

Passengers denied boarding against their will should be able either to cancel their flights, with reimbursement of their tickets, or to continue them under satisfactory conditions, and should be adequately cared for while
awaiting a later flight. Volunteers should also be able to cancel their flights, with reimbursement of their tickets, or continue them under satisfactory conditions.

In case of cancellation preventive measures should be adopted. In order to avoid trouble and inconvenience to passengers caused by cancellation of flights, carriers must inform passengers of cancellations before the scheduled time of departure and in addition to offer them reasonable rerouting, so that the passengers can make other arrangements.

Air carriers should compensate passengers, if they fail to do this, except when the cancellation occurs in extraordinary circumstances that could not have been avoided even if all reasonable measures had been taken.

Passengers whose flights have been cancelled should be able either to obtain reimbursement of their tickets or to obtain re-routing under satisfactory conditions, and should be adequately cared for while awaiting a later flight.

Passengers should be fully informed of their rights in the event of denied boarding and of cancellation or long delay of flights, so that they can effectively exercise their rights.

International level passengers’ rights are recognized by a code of conduct recently adopted by IATA (International Air Transport Association) that is the trade association for the world’s airlines, representing some 240 airlines covering the 84% of total air traffic.

At the 69th IATA AGM in June 2013, the industry unanimously adopted a set of core principles for consumer protection legislation. Air Transport Contracts are usually complaint with the rules contained in IATA code of conduct.

According to such principles passengers should have clear, transparent access to the following information:

- fare information, including taxes and charges, prior to purchasing a ticket;
- the airline actually operating the flight in case of a codeshare service;

A basic principle is that there should be no compromise between safety and passenger rights protection.

Passenger entitlements enshrined in regulations should reflect the principle of proportionality and the impact of extraordinary circumstances. Thereby safety-related delays or cancellations, such as those resulting from technical issues with an aircraft, should always be considered as extraordinary circumstances such as to exonerate air carriers from liability for such delays and cancellations.

The company recognizes the right to re-routing, refunds or compensation in cases of denied boarding and cancellations, where circumstances are within the carrier’s control. In case of delay the company recognizes the
right to re-routing, refunds or care and assistance to passengers affected by delays where circumstances are within the carrier’s control.

Regarding rail transportation at European level we have regulation (EC) no 1371/2007 of the European parliament and of the council of 23 October 2007 on rail passengers rights and obligations.

According to such regulation users rights to rail services include the receipt of information regarding the service both before and during the journey.

Whenever possible, railway undertakings and ticket vendors should provide this information in advance and as soon as possible.

More detailed requirements regarding the provision of travel information will be set out in the technical specifications for interoperability (TSIs) referred to in Directive 2001/16/EC of the European Parliament and of the Council of March 19, 2001 on the interoperability of the conventional rail system.

Railway undertakings should cooperate to facilitate the transfer of rail passengers from one operator to another by the provision of through tickets, whenever possible.

The provision of information and tickets for rail passengers should be facilitated by the adaptation of computerised systems to a common specification.

Railway undertakings should be obliged to be insured, or to make equivalent arrangements, for their liability to rail passengers in the event of accident.

At the international level we have the Convention concerning International Carriage by Rail (COTIF) signed in Bern on May 9, 1980 and amended by the Protocol for the modification of the Convention concerning International Carriage by Rail of June 3, 1999 (the so called Vilnius Protocol). The entry into force in 1985 of the 1980 Convention concerning International Carriage by Rail (COTIF) marked the birth of the Intergovernmental Organisation for International Carriage by Rail, known today as OTIF.

7. Travel Contracts and International Law

The acronym IT stands for “inclusive tour”, i.e. a tourism product consisting of transport from the generating area to the destination, accommodation at destination and other possible recreational or business tourist services. All these products are purchased by a firm called “tour operator” which combine and sell them at a single price to tourists.

According to a common opinion, Thomas Cook’s operations in 1850s and
in 1860s were inclusive tours. In fact Cook put together all the elements of his excursion and sold them as a single package (18).

IT industry flourished after World War II for several reasons:
- a new mass tourism generation thanks to economic and social conditions founded on principles of equality;
- many military aircrafts were converted to civilian use;
- the desire of consumer to move away from a period of austerity;
- new legal and economic policy having the purpose of develop tourism.

In this perspective, The Diplomatic Conference on the Travel Contract (CCV) meeting in Brussels in 1970, assessing the development of tourism and its economical and social role and recognizing the need to establish uniform provisions relating to travel contracts, signed an international convention on travel contracts.

7.1 International Convention relative to the Contract of Travel (CCV)

According to the international convention on contract of travel signed in Brussels on April 23, 1970, travel contract “ means either an organized travel contract or an intermediary travel contract: an “Organized Travel Contract” is any contract whereby a person undertakes in his own name to provide for another, for an inclusive price, a combination of services comprising transportation, accommodation separate from the transportation or any other service relating thereto; an “Intermediary Travel Contract” is any contract whereby a person undertakes to provide for another, for a price, either an organized travel contract or one or more separate services rendering possible a journey or sojourn. “Interline” or other similar operations between carriers shall not be considered as intermediary travel contracts.

According also to international rules we used to distinguish a “Travel Organizer” who is any person habitually or regularly performing organized travel contracts, whether or not such activity is his main business and whether or not he exercises such activity on a professional basis; and a “Travel Intermediary” (or the “seller”) who is any person habitually or regularly performing the intermediary travel contract, whether such activity is his main business or not and whether he exercises such activity on a professional basis or not.

Travel contracts are regulated by norms prevailing in the respective country where travel services are affected. Special rules are contained in the International Convention relating to the contract of travel (CCV) signed in Brussels on April 23, 1970.

This Convention shall apply to any travel contract concluded by a travel
organizer or intermediary, where his principal place of business or, failing any such place of business, his habitual residence, or the place of business through which the travel contract has been concluded, is located in a Contracting State.

This Convention shall apply without prejudice to any special law establishing preferential treatment for certain categories of travellers.

In regard to the general obligations of travel organizers and intermediaries and of travellers the Convention provides that the travel organizer and intermediary shall safeguard the rights and interests of the traveller according to general principles of law and good usages in this field.

On the other hand the traveller shall, in particular, furnish all necessary information specifically requested from him and comply with the regulations relating to the journey, sojourn or any other service.

The travel organizer shall issue a travel document bearing his signature, but instead of the signature, a stamp may be affixed. The travel document shall include the following:

- place and date of issue;
- name and address of the travel organizer;
- name of the traveller or travellers and if the contract was concluded by another person, the name of such person;
- places and dates of beginning and end of the journey as well as of the sojourns;
- all necessary specifications concerning transportation, accommodation as well as all ancillary services included in the price;
- where applicable, the minimum number of travellers required;
- the inclusive price covering all the services provided for in the contract;
- circumstances and conditions under which the traveller may cancel the contract;
- any clause providing for arbitration, agreed upon under the conditions of Article 29;
- a statement that, notwithstanding any clause to the contrary, the contract is subject to the provisions of this Convention;
- any other terms the parties may agree upon.

The travel document shall be evidence of the terms of the contract. A breach of contract by the travel organizer shall affect neither the existence nor the validity of the contract which shall remain subject to this Convention. The travel organizer shall be liable for any loss or damage resulting from such breach.

Unless the parties agree otherwise, the traveller may substitute another person for the purpose of carrying out the contract provided that such person satisfies the specific requirements relating to the journey. Special right of cancellation are provided.

The traveller may at any time cancel the contract in whole or in part. In this case he has to compensate the organising travel agent in accordance with domestic law or the provisions of the contract.

The travel organizer may, without indemnity, cancel the contract, in whole
or in part, if before the contract or during its performance, circumstances of an exceptional character manifest themselves of which he could not have known at the time of conclusion of the contract, and which, had they been known to him at that time, would have given him valid reason not to conclude the contract.

The travel organizer may also, without indemnity, cancel the contract if the minimum number of travellers stipulated in the travel document has not been reached, provided the traveller has been informed thereof at least fifteen days before the date on which the journey or sojourn was due to begin.

In case of cancellation of the contract before its performance, the travel organizer shall refund in full any payments received from the traveller. In the event of cancellation of the contract during its performance, the travel organizer shall take all necessary measures in the interest of the traveller; furthermore, the parties shall compensate each other in an equitable manner.

The price is determined by the contract but price increasing is possible as a consequence of changes in rates of exchange or in the tariffs of carriers, and provided that this possibility has been anticipated in the travel document. If the increase in the inclusive price exceeds ten per cent, the traveller may cancel the contract without compensation or reimbursement. In that event, the traveller shall be entitled to a refund of all sums paid by him to the travel organizer.

Special norms regulate organizer’s liability.

The travel organizer shall be responsible for the acts and omissions of his employees and agents when acting in the course of their employment or within the scope of their authority, as if such acts and omissions were his own. The travel organizer shall be liable for any loss or damage caused to the traveller as a result of non-performance, in whole or in part, of his obligations to organize as resulting from the contract or this Convention, unless he proves that he acted as a diligent travel organizer.

Also where the travel organizer entrusts to a third party the provision of transportation, accommodation or other services connected with the performance of the journey or sojourn, he shall be liable for any loss or damage caused to the traveller as a result of total or partial failure to perform such services, in accordance with the rules governing such services. The travel organizer shall be liable in accordance with the same rules for any loss or damage caused to the traveller during the performance of the services, unless the travel organizer proves that he has acted as a diligent travel organizer in the choice of the person or persons performing the service.

In this case, in so far as the travel organizer has paid compensation for loss or damage caused to the traveller, he shall be subrogated in any rights
and actions the traveller may have against a third party responsible for such loss or damage.

Without prejudice to the questions as to which persons have the right to institute proceedings and what are their respective rights, compensation payable shall be limited for each traveller to:
- 50,000 francs for personal injury,
- 2,000 francs for damage to property,
- 5,000 francs for any other damage.

However a Contracting State may set a higher limit for contracts concluded through a place of business located in its territory.

With regard to the intermediary travel contract this convention provides that any contract concluded by a travel intermediary with a travel organizer or with persons providing separate services, shall be deemed concluded by the traveller.

The travel intermediary shall be liable for wrongful acts or default he commits in performing his obligations, wrongful acts or default being assessed having regard to the duties of a diligent travel intermediary.

Without prejudice to the questions as to which persons have the right to institute proceedings and what are their respective rights, compensation payable shall be limited to 10,000 francs for each traveller. However, a Contracting State may set a higher limit for contracts concluded through a place of business located in its territory.

The travel intermediary shall not be liable for non-performance, in whole or in part, of journeys, sojourns or other services governed by the contract.

Private autonomy in travel contract is limited by this convention. In fact any stipulation which would directly or indirectly derogate from the provisions of this Convention shall be null and void, in so far as it would be detrimental to the traveller. In particular, any clause assigning to the travel organizer or intermediary the benefit of insurance taken out by the traveller, or shifting the burden of proof shall be null and void. The nullity of such a stipulation shall not imply the nullity of the other provisions of the contract.

7.2 Travel Packages and European Union Law

On July 9, 2013 the Commission proposed a reform of the Travel Packages Directive 90/314 to bring it up to date with the developments in the travel market.

The adoption of Directive 90/314/EEC on package travel in 1990 created important rights for European travellers purchasing package holidays, typically consisting of passenger transport and accommodation. This particular directive ensures that consumers receive essential information before and after signing a package travel contract. It provides that organisers
and/or retailers are responsible for the proper performance of the package, even if the services are provided by subcontractors, and regulates what happens if there are changes to the package travel contract. It also provides that travellers receive a refund of pre-payments and are repatriated in the event of the organiser’s and/or retailer’s insolvency.

The Directive 90/314 reflects an old reality of travel market: in 1990 the structure of the travel market was much simpler than today and the Internet did not exist.

Of course the directive has been innovated by CJEU ruling. The judgment of European Court of Justice “Club-Tour Case C-400/00 of 30 April 2002” clarified that the notion of “pre-arranged combination” covers also travel services combined by a travel agent at the customer’s express request just before the conclusion of a contract between the two.

Despite the abovementioned CJEU ruling, it remains unclear to what extent modern ways of combining travel services are covered by the Directive.

During the last decade the Commission undertook a comprehensive review of the consumer acquisitions leading to the adoption of Directive 2008/122/EC on timeshares and Directive 2011/83/EU on consumer rights. The revision of Directive 90/314/EEC is part of this revision program.

In particular the proposal of directive contains a new definition of travel package in accordance with the case law of the Court of Justice.

In accordance with the case law of the Court of Justice of the European Union with regard to the interpretation of the directive 314/1990, since travel services may be combined in many different ways, the European Commission affirms that is necessary to consider as packages all combinations of travel services that contain features which travellers typically associate with packages, notably that separate travel services are put together into a single travel product for which the organiser assumes responsibility for exact performance. It should make no difference whether travel services are combined before any contact with the traveller or at the request of or according to the selection made by the traveller. The same principles should apply irrespective of whether the booking is made through a high street travel agent or online.

At the same time travel packages should be distinguished from assisted travel arrangements, where online or high street agents assist travellers in combining travel services leading the traveller to conclude contracts with different providers of travel services, including booking processes, which do not contain those features and in relation to which it would not be appropriate to apply all obligations applying to packages.

According to article 2 of Directive 314/1990 “package means the pre-arranged combination of not fewer than two of the following when sold or
offered for sale at an inclusive price and when the service covers a period of more than twenty-four hours or includes overnight accommodation: (a) transport; (b) accommodation; (c) other tourist services not ancillary to transport or accommodation and accounting for a significant proportion of the package. The separate billing of various components of the same package shall not absolve the organizer or retailer from the obligations under this Directive”.

Art. 3 of the proposal says that the term “package means a combination of at least two different types of travel services for the purpose of the same trip or holiday, if:

(a) those services are put together by one trader, including at the request or according to the selection of the traveller, before a contract on all services is concluded; or

(b) irrespective of whether separate contracts are concluded with individual travel service providers, those services are:

(i) purchased from a single point of sale within the same booking process,
(ii) offered or charged at an inclusive or total price,
(iii) advertised or sold under the term ‘package’ or under a similar term,
(iv) combined after the conclusion of a contract by which a trader entitles the traveller to choose among a selection of different types of travel services, or

(v) purchased from separate traders through linked online booking processes where the traveller’s name or particulars needed to conclude a booking transaction are transferred between the traders at the latest when the booking of the first service is confirmed.”

Art. 3 contains also a more strict definition of ‘travel service’ that means:”

(a) carriage of passengers, (b) accommodation other than for residential purpose, (c) car rental or (d) any other tourist service not ancillary to carriage of passengers, accommodation or car rental”.

According to art. 3 a travel package needs to be distinguished from an ‘assisted travel arrangement’, that is “a combination of at least two different types of travel services for the purpose of the same trip or holiday, not constituting a package, resulting in the conclusion of separate contracts with the individual travel service providers, if a retailer facilitates the combination: (a) on the basis of separate bookings on the occasion of a single visit or contact with the point of sale; or

(b) through the procurement of additional travel services from another trader in a targeted manner through linked online booking processes at the latest when the booking of the first service is confirmed.”

In order to clarify the purpose of the new definition of travel package contained in art. 3 of the proposal we can remember a leading case of the CJEC c-400/00 Club-Tour, Viagens e Turismo SA v.Alberto Carlos Lobo
Gonçalves Garrido.  
Mr Lobo Gonçalves Garrido purchased from Club-Tour, for inclusive price, a holiday consisting of air tickets and accommodation for two weeks, full board, in the holiday village of Gregolimano (Greece).  
For that purpose, Club-Tour bought a holiday from the travel agency Club Med Viagens Ld.a (‘Club Med’). It was Club Med that undertook to make the necessary reservations at the holiday village of Gregolimano for accommodation, meals and transfers, organised and published the holiday programme, and fixed the overall price.  
On their arrival at the holiday village, Mr Lobo Gonçalves Garrido and his family noticed that it was infested by thousands of wasps, which prevented them — throughout their stay — from fully enjoying their holiday. Moreover, the immediate request by Mr Lobo Gonçalves Garrido for the transfer of himself and his family to another village could not be dealt with by Club-Tour, as the Club Med that it contacted stated that it was not possible to arrange appropriate alternative accommodation.  
Thereby, on his return home, Mr Lobo Gonçalves Garrido refused to pay the price of the holiday agreed with Club-Tour. Before the Tribunal Judicial da Comarca do Porto, Club-Tour denied that the Directive applied to the present proceedings, arguing that the holiday sold was outside its scope and asked for the payment of the holiday price.  
The Tribunal Judicial da Comarca do Porto referred the following questions to the European Court of Justice for a preliminary ruling: “Does a package organised by the agency, at the request and on the initiative of the consumer or a strictly defined group of consumers in accordance with their wishes, including transport and accommodation through a tourism undertaking, at an inclusive price, for a period of more than 24 hours or including overnight accommodation, fall within the scope of the concept of “package travel” as defined in Article 2(1)?  
May the expression “pre-arranged” which appears in the directive be interpreted as referring to the moment when the contract is entered into between the agency and the customer?”  
With regard to the first question, the CJEC affirms that the word ‘package’ used in Article 2(1) of the Directive 314/1990 must be interpreted as including holidays organised by a travel agency at the request of and according to the specifications of a consumer or a defined group of consumers.  
“The Directive, which is designed amongst other things to protect consumers who buy ‘package’ holidays, gives a definition of that term in Article 2(1) whereby it is enough, for a service to qualify as a ‘package’, if, first, the combination of tourist services sold by a travel agency at an inclusive price includes two of the three services referred to in that paragraph (namely transport, accommodation and other tourist services not
ancillary to transport or accommodation and accounting for a significant proportion of the package), and, second, that service covers a period of more than 24 hours or includes overnight accommodation.”

There is nothing in the definition of travel package contained in art. 2 of the directive 314/1990 suggesting that holidays organised at the request and in accordance with the specifications of a consumer or a defined group of consumers cannot be considered as ‘package’ holidays within the meaning of the Directive.

With regard to the second question the Court affirms that, taking in to account the purposes of the directive 314/1990 the term ‘pre-arranged combination’ used in article 2(1) of the Directive must be interpreted as including combinations of tourist services which are put together at the time when the contract is concluded between the travel agency and the consumer.

7.3 Damages for Loss of Enjoyment of the Holidays

Another important aspect of travel package law concerns non-material damages in case of loss of enjoyment of holiday.

In the field of package holidays, there exists in some countries an obligation to provide compensation for non-material damage that would cause significant distortions of competition.

In Italy, for instance, art. 47 of the Italian Tourism code (legislative decree May 23, 2011, n. 79) introduces the concept of “damage for ruined holiday” (Danno da vacanza rovinata) comprehensive of non-material damage.

A solution has been found in the proposal of the new travel packages directive and before that in the case law of CJEC regarding European Union Law.

According to art. 12 of the directive proposal, price reduction and compensation for both material and non-material damages are provided in case of breach of travel contract: “Member States shall ensure that the traveller is entitled to an appropriate price reduction for: (a) any period during which there was lack of conformity; or (b) where the alternative arrangements as referred to in paragraphs 3 and 4 of Article 11 result in a package of lower quality or cost.

The traveller shall be entitled to receive compensation from the organiser for any damage, including non-material damage, which the traveller sustains as a result of any lack of conformity.

The traveller shall not be entitled to price reduction or compensation for damages if: (a) the organiser proves that the lack of conformity is: (i)
attributable to the traveller, (ii) attributable to a third party unconnected with the provision of the services contracted for and is unforeseeable or unavoidable, or (iii) due to unavoidable and extraordinary circumstances or (b) the traveller fails to inform the organiser without undue delay of any lack of conformity which the traveller perceives on the spot if that information requirement was clearly and explicitly stated in the contract and is reasonable, taking into account the circumstances of the case.”

The provision contained in the directive 314/1990 generated an interpretation problem regarding the non-material damage compensation. According to art. 5 of this directive “Member States shall take the necessary steps to ensure that the organizer and/or retailer party to the contract is liable to the consumer for the proper performance of the obligations arising from the contract, irrespective of whether such obligations are to be performed by that organizer and/or retailer or by other suppliers of services without prejudice to the right of the organizer and/or retailer to pursue those other suppliers of services. With regard to the damage resulting for the consumer from the failure to perform or the improper performance of the contract, Member States shall take the necessary steps to ensure that the organizer and/or retailer is/are liable unless such failure to perform or improper performance is attributable neither to any fault of theirs nor to that of another supplier of services, because: - the failures which occur in the performance of the contract are attributable to the consumer; - such failures are attributable to a third party unconnected with the provision of the services contracted for, and are unforeseeable or unavoidable; - such failures are due to a case of force majeure …., or to an event which the organizer and/or retailer or the supplier of services, even with all due care, could not foresee or forestall. …In the matter of damages arising from the non-performance or improper performance of the services involved in the package, the Member States may allow compensation to be limited in accordance with the international conventions governing such services. In the matter of damage other than personal injury resulting from the non-performance or improper performance of the services involved in the package, the Member States may allow compensation to be limited under the contract. Such limitation shall not be unreasonable….The consumer must communicate any failure in the performance of a contract which he perceives on the spot to the supplier of the services concerned and to the organizer and/or retailer in writing or any other appropriate form at the earliest opportunity. This obligation must be stated clearly and explicitly in the contract.”

The new norm proposed by the European Commission takes in to account the problems of interpretation related to the above disposition and the case law of CJEC.
One of the most important case on that subject is C-168/00 Simone Leitner v. TUI Deutschland GmbH & Co. KG.

Simone Leitner and her family booked a package holiday (all-inclusive stay) with TUI at the Pamfiliya Robinson club in Side, Turkey for the period July 4 to 18, 1997.

On July 4, 1997 Simone Leitner, who was 10 years old, and her parents arrived at the club. There they spent the entire holiday and there they took all their meals. About a week after the start of the holiday, Simone Leitner showed symptoms of salmonella poisoning attributable to the food offered in the club. In fact many other guests in the club also fell ill with the same illness and presented the same symptoms.

The illness, which lasted beyond the end of the holiday, manifested itself in a fever of up to 40 degrees over several days, circulatory difficulties, diarrhoea, vomiting and anxiety. Her parents had to look after her until the end of the holiday.

After the end of the holiday a letter of complaint concerning Simone Leitner’s illness was sent to TUI. Since no reply to that letter was received, Simone Leitner, through her parents, brought an action for damages in the sum of ATS 25,000.

The Austrian court of first instance awarded the claimant only ATS 13,000 for the physical pain and suffering caused by the food poisoning and dismissed the remainder of the application, which was for compensation for the non-material damage caused by loss of enjoyment of the holidays.

That court considered that, if the feelings of dissatisfaction and negative impressions caused by disappointment must be categorised, under Austrian law, as non-material damage, they could not give rise to compensation because there is no express provision in any Austrian law for compensation for non-material damage of that kind.

The claimant appealed to the Landesgericht Linz, which assesses that the text of Article 5 of the Directive 314/1990 is not precise enough to draw any definite conclusion about non-material damage in case of loss of enjoyment of holiday. Thus the Landesgericht Linz decided to stay proceedings and to refer a question to the Court for a preliminary ruling.

By its question the national court seeks to ascertain whether Article 5 of the Directive must be interpreted as conferring, in principle, on consumers a right to compensation for non-material damage resulting from failure to perform or the improper performance of the obligations inherent in the provision of package travel.

The CJEU assesses that it is clear from the second and third recital in the preamble to the Directive 314 that its purpose is to eliminate the disparities between the national laws and practices of the various Member States in the area of package holidays which are liable to give rise to distortions of
competition between operators established in different Member States. It is a matter of fact that, in the field of package holidays, the existence in some Member States but not in others of an obligation to provide compensation for non-material damage would cause significant distortions of competition. In fact, as the Commission has pointed out, non-material damage is a frequent occurrence in that field.

Given that the Directive is designed to offer protection to consumers and compensation for non-material damages arising from the loss of enjoyment of the holiday is of particular importance to consumers, the CJEC concludes that Article 5 of the Directive, implicitly, recognises the existence of a right to compensation for damage other than personal injury, including non-material damage.

The problem of non-material damage in case of loss of enjoyment of holiday is diffused worldwide. We can remember a famous and recent English case Milner v. Carnival Plc (Milner v Carnival Plc [2010] 3 All ER 701).

On June 19, 2006 Mr and Mrs Milner booked a cruise with Carnival that was the maiden voyage around the world of the Queen Victoria vessel. The vessel was to depart from Southampton on January 6, 2008, to cruise around the world for 106 nights, and to return to Southampton on April 22, 2008. During the voyage the couple were to be accommodated in cabin 7083, which is a Princess Grade cabin situated on deck 7. They chose that location, refusing a free upgrade to a superior cabin, because this is the area least affected by movement of the ship in poor weather.

Unfortunately the convex metal floor plate in the Milners’ room flexed loudly, particularly as the vessel reached open seas causing the noise and vibration in the cabin. After two sleepless nights, Mr and Mrs Milner were provided with alternative accommodation in the form of suite 6083 with no natural light. Moreover their luggage remained in suite 7083, so that it was necessary for them to move between the two cabins: sleeping in suite 6083 and dressing in suite 7083.

After that they have to change cabins multiple times to make way for the passengers who had originally booked it. Eventually they disembarked the Queen Victoria at Honolulu. They remained in Hawaii until 25th March, when they boarded the Queen Elizabeth II.

The trial judge awarded the claimants £2,500 each in respect of diminution in value of the holiday; £7,500 each in respect of distress and disappointment and £2,000 in respect of the wasted expenditure on gowns which were unlikely to be worn.

The Court of Appeal assesses damages by comparing the expectations raised by the defendant tour operator against the reality of the experience actually provided. In the Milners’ case the expectations were ‘sky high’, as
the Court said. The cruise was advertised to be ‘… a legendary experience exceeding expectations’ and an ‘… unprecedented event in Cunard’s long and illustrious history’. Using this approach the Court concluded that the value of the cruise was diminished by about one third when evaluating what was had overall to that which was not provided balanced against that which was enjoyed. It therefore awarded Mr and Mrs Milner £3,500 (19).

We think that this judgment focuses on some important issues of loss of enjoyment of vacation: i) contracts for holidays vary on their facts very greatly. It would be a grave mistake to look at the facts in similar case and compare those facts with the facts in another case as a means of establishing the measure of damages; ii) in assessing damages judges have to take in to account the type of holiday (so that a special occasion, such as a honeymoon, should attract more damages than an ordinary package holiday), the features of the holiday which were regarded as the primary features will make a difference (so a traveller, who is sports fanatic, will suffer gross disappointment in case of impossibility to use the promised sport facilities); the distance between the expectations raised by the tour operator and the reality of the experience actually provided. All these considerations move from a basic feature of tourism product: “selling holidays is selling dreams”.

### 7.4 Travel Insurance

Tourism law provides many hypothesis of mandatory insurance: article 7 of Regulation (EEC) No 2407/92 provides mandatory insurance for air carrier; national law usually provides mandatory insurance for travel agency. Moreover travellers usually buy optional travel insurance that generally covers medical expenses, financial default of travel suppliers, and other losses incurred while traveling, either within one’s own country, or internationally. Temporary travel insurance can usually be arranged at the time of the booking of a single trip to cover exactly the duration of that trip, but is possible also to buy a “multi-trip” policy covering an unlimited number of trips within a set time frame.

The most common risks covered by travel insurance are:

- Medical emergency both in case of accident and sickness
- Emergency evacuation
- Repatriation of remains
- Return of a minor
- Trip cancellation
- Trip interruption
- Accidental death, injury or disablement benefit
• Overseas funeral expenses
• Lost, stolen or damaged baggage, personal effects or travel documents
• Delayed baggage (and emergency replacement of essential items)
• Flight connection was missed due to airline schedule
• Travel delays due to weather

8. Mediation and Arbitration in Tourism Dispute Resolution

Conflicts can be solved in different ways. **Litigation** is the most traditional and formal form of dispute resolution. Litigation is based on a trial system, where one side is pitted against the other, and only one side will prevail. Legal counsel usually represents both parties. Formal rules of evidence and procedure are followed. Ultimately the judge - or a jury (it depends on the legal system) renders a decision, in accordance with specific applicable law. That decision can be appealed, and then, usually, appealed even further to a still higher court.

**Arbitration** is a voluntary dispute resolution process in which the parties select a third party, called the arbitrator, who makes a decision regarding their dispute. Arbitration is a less formal type of dispute resolution. It is similar to litigation in several respects: it is an adversarial process and also the arbitrator will eventually render a decision, which may or may not be binding, depending on what the parties have agreed to in advance of the hearing.

The arbitrator typically hears evidence at a hearing conducted in an office or other informal setting. The arbitration process is conducted in accordance with any previous agreement of the parties or according to applicable national arbitration rules depending on what the parties have agreed to in advance of the hearing.

**Mediation** is a voluntary dispute resolution process in which the parties use the help of a neutral third party, called the mediator who tries to reach a mutually satisfactory solution to their dispute. Unlike a judge or an arbitrator, a mediator does not listen to a formal presentation of witnesses and evidence and then impose a decision on the parties. A mediator is trained in facilitative skills, and assists the parties to communicate and negotiate, identify common interests and goals, and resolve underlying issues so that the parties are able to come to an agreement themselves.

Thus it is right to say that mediation works as a problem-solving process because the parties participate voluntarily and in good faith. Any of the parties, even the mediator, may withdraw from the mediation at any time.
and for any reason.

The parties meet with the mediator in an office to discuss their respective positions to the dispute and to negotiate a mutually agreeable solution. When the parties reach a settlement at the mediation, they put in writing their agreement that becomes a binding contract.

In many cases **multistep clauses** (so called “arbitration and mediation clauses”) are provided in the contract.

We can remember one of the most common forms of such clauses:

“The parties shall attempt to resolve any dispute arising out of or relating to this contract through negotiations between senior executives of the parties, who have authority to settle the same.

If the matter is not resolved by negotiation within 30 days of receipt of a written ‘invitation to negotiate’, the parties will attempt to resolve the dispute in good faith through an agreed Alternative Dispute Resolution (ADR) procedure.

If the matter has not been resolved by an ADR procedure within 60 days of the initiation of that procedure, or if any party will not participate in an ADR procedure, the dispute may be referred to arbitration by any party. The seat of the arbitration shall be….. The arbitration shall be governed by ……as agreed between the parties.”

The first useful measure to solve dispute is negotiation between plaintiff and defendant. Recognizing the importance of responding fairly and efficiently to clients’ disappointment in the marketplace, many businesses have established effective and innovative systems for resolving consumer complaints.

Experience shows that consumers who complain about products and services continue to frequent the businesses and buy the products they complain about if they believe the complaint was resolved fairly.

Such results stress the importance to business of a **complaint management system** that is well publicized and easily accessible.

It is important to receive all complaints not only in order to find a solution avoiding judiciary costs but also in order to collect information about the level of customer satisfaction. In fact complaints offer businesses an opportunity to correct immediate problems and provide constructive ideas for improving products, adapting marketing practices, upgrading services, or modifying promotional material and product information.

Big companies usually have a dedicated complaints handling management department.

Complaints Handling Management’s responsibility begins with the preparation of written policies and procedures for speedy and fair complaint resolution. These policies and procedures should be put in writing and communicated to all appropriate departments, emphasizing the
accountability of individual employees to resolve complaints courteously and fairly.

The Complaints Handling Management department of a company should regularly review and, when necessary, find ways to improve complaint-management procedures, paying particular attention to refining communication and coordination between the complaint-management and operating departments (20).
Chapter 2 Consumer Contracts and Tourism

Notes


2) See Asymmetric Information in consumer Contracts: the challenge that is Yet to be Met, by S.I. Becher, in American Business Law Journal, 2008, 45

“Consumer policy increasingly places emphasis on the role of information in allowing consumers to protect themselves and promoting a competitive economy. Increasing the information available to consumers is undoubtedly beneficial, but this article cautions that the limitations of consumer protection though information also have to be recognized. In particular, emphasis is placed on the insights provided by behavioural economics which suggests that consumers may not always respond to information provided as rationally as traditional economic models sometimes assume. One implication of this is that the way information rules are framed needs to be revisited. Other consumer policy approaches (altering the default rules, using bans and regulations, and risk sharing) need to be considered alongside a strategy of information provision. To analyse which approach should be adopted or to find the appropriate balance between different approaches requires policy makers to engage more fully with the legal and consumer policy research community”: The Potential and Limits of Consumers empowerment of Information, by G. Howells, in Journal of Law and Society, 2005, p. 349 ff. See also Party Autonomy and the Role of Information in the Internal Market by S. Grundmann, G. Kerber, and S. Weatherill, (eds.), De Gruyter: Berlin-New York, 2001; The Role of the Informed Consumer in European Community Law, by S. Weatherill, in Consumer Law J. (1994) 2, p. 49; Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis, by A. Schwartz and L. Wilde, in University of Pennsylvania Law Rev., (1979) 127 pp. 630-638; The Functions of Disclosure Regulation in Consumer Transaction by W. Whitford, in Wisconsin Law Rev,1973, p. 400.; Libertarian Paternalism is not an Oxymoron’, by C. Sunstein and R. Thaler in University of Chicago Law Rev. (2003) 70, p. 1159.


6) “Most nations today follow one of two major legal traditions: common law or civil law. The common law tradition emerged in England during the Middle Ages and was applied within British colonies across continents. The civil law tradition developed in continental Europe at the same time and was applied in the colonies of European imperial powers such as Spain and Portugal. Civil law was also adopted in the nineteenth and twentieth centuries by countries formerly possessing distinctive legal traditions, such as Russia and Japan, that sought to reform their legal systems in order to gain economic and political power comparable to that of Western European nation-states. To an American familiar with the terminology and process of our legal system, which is based on English common law, civil law systems can be unfamiliar and confusing. Even though England had many profound cultural ties to the rest of Europe in the Middle Ages, its legal tradition developed differently from that of the continent for a number of historical reasons, and one of the most fundamental ways in which they diverged was in the establishment of judicial decisions as the basis of common law and legislative decisions as the basis of civil law. Before looking at the history, let’s examine briefly what this means. Common law is generally uncoded. This means that there is no comprehensive compilation of legal rules and statutes. While common law does rely on some scattered statutes, which are legislative decisions, it is largely based on precedent, meaning the judicial decisions that have already been made in similar cases. These precedents are maintained over time through the records of the courts as well as historically documented in collections of case law known as yearbooks and reports. The precedents to be applied in the decision of each new case are determined by the presiding judge. As a result, judges have an enormous role in shaping American and British law. Common law functions as an adversarial system, a contest between two opposing parties before a judge who moderates. A jury of ordinary people without legal training decides on the facts of the case. The judge then determines the appropriate sentence based on the jury’s verdict. Civil Law, in contrast, is codified. Countries with civil law systems have comprehensive, continuously updated legal codes that specify all matters capable of being brought before a court, the applicable procedure, and the appropriate punishment for each offense. Such codes distinguish between different categories of law: substantive law establishes which acts are subject to criminal or civil prosecution, procedural law establishes how to determine whether a particular action constitutes a criminal act, and penal law establishes the appropriate penalty.
In a civil law system, the judge’s role is to establish the facts of the case and to apply the provisions of the applicable code. Though the judge often brings the formal charges, investigates the matter, and decides on the case, he or she works within a framework established by a comprehensive, codified set of laws. The judge’s decision is consequently less crucial in shaping civil law than the decisions of legislators and legal scholars who draft and interpret the codes": The Robbins collection, The common law and the civil law tradition, in http://www.law.berkeley.edu/library/robbins/CommonLawCivilLawTraditions.html. See also chapter 1, note10.


8) Punitive damages are a settled principle of common law in US. They are generally a matter of state law although we have some important judgments of the U.S. Supreme Court. In particular the U.S. Supreme Court, in BMW of North America v. Gore, 517 U.S. 519, 116 S. Ct. 1589, 134 L. Ed. 2d 809 (1996), also developed guidelines for assessing punitive damages. The Court held that the “degree of reprehensibility of defendant’s conduct” is the most important indication of reasonableness in measuring punitive damages. In 1993 the U.S. Supreme Court in the case TXO Productions Corp. v. Alliance Resources Corp., 509 U.S. 443, 113 S. Ct. 2711, 125 L. Ed. 2d 366 (1993), stated that the DUE PROCESS CLAUSE of the fourteenth Amendment to the U.S. Constitution prohibits a state from imposing a “grossly excessive” punishment on a person held liable in tort. Whether a verdict is grossly excessive must be based on an identification of the state interests that a punitive award is designed to serve. If the award is disproportionate to the interests served, it violates due process. See also particularly Punitive Damages Overview: Functions, Problems and Reform, by DAVID G. OWEN, in Villanova Law Review (1994),39 (March).

9) See “U.S. Punitive Damages Before German Courts: A Comparative Analysis with Respect to the Ordre Public,” by M. TOLANI, in Annual Survey of International & Comparative Law, (2011) Vol. 17, p. 1 ff. The comparative analysis of this paper will identify parallels between U.S. punitive damages and German damages and will show penal elements within the German civil law. The unenforceability of punitive damages in Germany depends on the German point of view towards punitive damages.

Law, Vol. 18, No. 18, 2010, pp. 57-102. As he notes, “On 8 October 2008 the European Commission published its proposal for a consumer rights directive. The proposed directive is the provisional outcome of the review of the consumer acquis that the Commission launched with its Action Plan in 2004. The aim is to revise the four directives that according to the Commission regulate ‘the contractual rights of consumers,’ namely the directives on doorstep selling, unfair contract terms, distance contracts, and the sale of consumer goods and guarantees. The overall purpose of this review, according to the Commission, is to achieve ‘a true internal market for “business-to-consumer” trade (b2c).’ The proposal contains nothing about business-to-business (b2b) agreements and refers to ‘a new beginning in the area of the contractual rights of consumers.

The proposed directive fits very well with a sharp distinction between b2c and b2b contracts and comprises several features that - especially as a combination - provide an optimal basis for a future European consumer (contract) code. The same characteristics that make the directive a good preliminary step toward a European consumer law code progressively complicate implementation of consumer contract law in the Civil Code by the national legislator. Still, nothing in the directive renders further distinction between b2c and b2b compulsory. National legislators may extend the scope to other parties (e.g. sole traders and small businesses), when it is of the opinion that they merit the same protection, and even to all parties, by including the directive in general private law. Nor is the European legislator bound to further deepen the distinction between b2c and b2b at the European level: EC Treaty Article 95, the intended legal basis of the directive, does not demand such a measure. Both the directive and its implementation are thus matters of political choice. This raises the question as to whether a rigid, categorical distinction between rules governing b2c and those governing b2b contracts is desirable. No substantive ground justifies such a categorical distinction. Non-consumers, especially small businesses, often encounter situations identical to those usually invoked to justify consumer protection. In such cases the equality principle requires that the legislator extend the protection prescribed for consumers to include this group. The European legislature is unlikely to elect this option. The Commission, the Council and the Parliament have already expressed support (without substantiating this position) for distinguishing between b2c and b2b contracts. On the other hand, certain Member States probably still favour preserving the unity of private law, their layered system with various levels of abstraction and the associated lex specialis idea. In this respect greater transparency may be expected from the European Commission. How does the Commission view the future: does a European Code of Consumer Law lie ahead? The Council of the European Union
and the European Parliament should ask the Commission for guidance here and should adopt a clear position themselves. This is important for two reasons. The first is that prior to transposition of this directive, Member States should know what to expect. The second is that if a European Code of Consumer Law ever materializes, it will need to be the outcome of a deliberate decision to this effect.”

11) About hospitality industry innovation see Service innovation and customer choice in the hospitality industry, by L. Victorino, R. Verna, G. Plaschka, C. Dev, in Managing Service Quality, 2005, pp. 555 ff. The paper focuses on the impact service innovation and on customers’ choices within the hotel and leisure industry. The paper also discusses the influence of the creation of new services on both service development and operational strategy. “The emergence of “boutique” hotels during recent years is an excellent example of an innovative offering in an otherwise standardized industry. The boutique hotel typically features a contemporary or minimalist décor while also offering many additional lifestyle amenities. Hotel guests tend to perceive boutique hotels as a stylish locations for which they are willing to pay premium room rates for…Another example of innovation in hotel services is the use of information technology. One study determined which of the recent technological innovations were most beneficial, least beneficial, and had future benefits for hotels. The technological innovations that were found to be most beneficial included: a wake up system, electronic door locks, in-room pay-per-view, video cassette players, multiple phone lines, video library, personal computers, voice mail, computer modem connections, video check out, electronic in-room safes, and a software library…. Customizing the service experience for hotel guests is another means of service innovation. Some examples of service customization include: allowing guests to have flexible check in/out times, personalizing room décor, or having child care options available. Customized options adapt the hotel’s service offering to each individual guest’s preferences. However, customization is not easy to implement due to the operational capabilities of the firm. For example, a flexible check in/out policy could lead to labor scheduling problems.”

12) See the paper The importance of organic agriculture in tourism rural, by D. Privitera http://anubis.kee.hu/pdf/szakir/alapelv_farmer/Agroturism.pdf: “Many farmers, in addition to normal farming activities, have already turned to agrotourism as a source of additional farm income and opportunities. There are numerous benefits to be gained from the development of agrotourism: it may strengthen local economy, create job opportunities and new businesses; develop and promote training and
certification programs to introduce young people to agriculture and the environment. Literature on agritourism development suggests the mix of economic and social motivations of farm tourism operators for agritourism entrepreneurship. Agritourism helps preserve rural lifestyles and landscapes, including strengthening local networks, culture and traditions (Ventura, Milone, 2000). Moreover, it provides additional outlets for the sale of local crafts and food items (typical products). Agritourism also offers the opportunity to provide “sustainable” or “green” tourism or “farm tourism” (Busby, Rendle, 2000). It also includes educational tours, tasting events, agricultural museums, commodity festivals, wildlife, etc. All of these examples can be considered opportunities for consumers and farms to generate a meaningful exchange of values.” See also The transition from tourism on farms to farm tourism, by Busby G., Rendle S., in Tourism Management, 2000, 21, pp. 635–642; Nature-Based Tourism & Agritourism Trends: Unlimited Opportunities, by Maetzold J. (2002):www.kerrcenter.com/publications/2002proceedings/agritourism.pdf.; Motivation for agritourism entrepreneurship, by McGehee, N.G., & Kim, K., in Journal of Travel Research, (2004) 43, 161–170;


14) “In the field of international law there is no unified legal source that would regulate the hotel-keeper’s contract and edit any guest’s liability for damage due to breach of direct hotelkeeper’s contract. The reasons for this are different solutions of individual countries regarding the contract, difference in basic understanding of a hotel-keeper’s contract and its arrangement in the two legal systems (circles); Anglo- American, where the institute is covered by numerous precedents and special laws, and European Continental, where the hotel-keeper’s contract is based mainly on the business practices and very few legal solutions of individual countries in that circle.

The problem of creating an international convention on the unification of decisions on direct hotel-keeper’s contract began by UNIDROIT
(International Institute for the Unification of Private Law) in 1977 at the meeting in Rome, and in 1979 the first text of the draft convention on the hotel-keeper’s contract was created. The draft was discussed until 1986, when the idea of making the convention on the hotel-keeper’s contract ceased to exist due to the impossibility of formulating clauses that would satisfy all the countries in the same way. Draft Convention on the hotel-keeper’s contract regulated all relevant issues regulated by the direct hotel-keeper’s contract: 1) the field of contract application (articles 1 and 2), 2) the term of the contract (article 3), 3) the duration of the contract (article 4), 4) the hotel-keeper’s liability (article 5 and articles 11-15) and 5) the liability of the guest (article 6) and his obligation of payment the services (articles 9 and 10): Hotel Guest’s Liability for Non-Payment of Hotel Services in Comparative Law, by RADOLOVIĆ OLIVER, in World Academy of Science, Engineering and Technology, 2010, p. 1093 ff.


As he notes “At the level of European business practice, the hotel-keeper’s liability due to violation of the obligation to pay a commission to the travel agency in the allotment contract derives from the provisions of articles 5-7 of the ECTAA-HOTREC Code of Conduct. There are obligations wherein the violation represents the hotel-keeper’s liability for proprietary and non-proprietary damage such as: 1) the obligation not to change prices of services, 2) the obligation to pay a commission (commission) and to inform about its amount and 3) the obligation of restraining from persuading the guest to become a direct customer.

The hotel-keeper is liable to the travel agency for proprietary and non-proprietary damage if it changes the price of services in relation to the contract or price list without the consensus of the agency (article 5). The Hotel-keeper is not liable for damage to the travel agency only in three cases of unilateral changes in the prices of services (article 5): 1) in the long-term contracts, 2) in the changes necessary because of public taxes, VAT, exchange rates or similar, and 3) in the case of new taxes (other than the above) on non-concluded allotment contract (shall not affect confirmed reservations or contracts already concluded).

The Hotel-keeper’s liability for proprietary and non-proprietary damage in the allotment contract exists even if he does not pay the commission or if he does not inform the travel agency about the amount of commission in time (article 6). The travel agency pays the service price minus the amount of commission, and when the guest pays the price of services directly (payment is made directly by client) the hotel-keeper must pay
the travel agency commission within 30 days from the date of payment of services (article 6.4). Written obligation to inform the travel agency about the commission amount includes (article 6.2.): 1) which services will be commissionable 2) statement whether the commission includes VAT, and 3) whether commissions are payable for any agreed extension of stay. The hotel-keeper will be liable for proprietary and non-proprietary damage to the agency resulting from any persuasion of the agency guest (refrain from soliciting the client to become a direct client) to become a direct client (article 7.2.). ECTAA-HOTREC Code defines one specificity: in the allotment contract the commission must be agreed upon (article 21.2.), while the agency hotelkeeper’s contract establishes a common provision in the net commission amount of 10% (article 1. of the additional clauses)...

At the international law (business practice) level, the contractual liability for non-payment of agency commission is incorporated in several clauses (articles 13-14) of the International IH&RA-UFTAA Code of Practice. It is a contractual hotel-keeper’s liability for proprietary and non-proprietary damage to the tourist agency due to violations of two contractual obligations: 1) the obligation to pay commission and 2) the obligation of a clear understanding of the commission. The hotel-keeper is liable to the travel agency for proprietary and non-proprietary damage if he does not pay in full and on time the commission for paid allotment services (article 13). The rule of international business practice is that the travel agency alone pays the price of hotel services rendered minus the commission, unless explicitly agreed that the price will be paid directly by the allotment guest, in which case the hotel-keeper guarantees the payment of the commission to the travel (tourist) agency.

The IH&RA-UFTAA Code does not specify the period within which the hotel-keeper, in the allotment contract, must pay the commission to the travel agency in case the guests themselves pay directly the price of hotel (allotment) services. In case that the deadline is not contracted, the author assumes that the hotel-keeper should pay the commission immediately upon the request of the agency or in the subsequently contracted deadline. The hotel-keeper is liable for any damage arising from non-payment of the commission, which guest paid directly the price of confirmed services (article 13.d). The hotel-keeper’s liability for not giving all relevant information to the travel agency about an amount of commission includes compensation for proprietary and non-proprietary damage (art. 14). The commission is determined before or during the contract (article 14.1.). The hotel-keeper’s constant obligation is to inform the agency about the commission amount. Data delivered by the hotel-keeper to the agency about the commission include (article 14.2.): 1) whether a commission will be paid and on which services, 2) the commission’s rate and 3)
commission payable on any extension of stay agreed. On the international law (international business practices) level, there is a specificity related to contractual hotel-keeper’s liability for non-payment of a commission to the travel agency in the allotment contract (article 14.2.). According to this provision, the hotel-keeper is required, in the allotment contract, to pay to the travel agency a commission for an extended guest stay in the hotel, as well (commissions are payable on any extension of stay agreed), if the travel agency guarantees payment for such extended stay (where the payment is guaranteed by the travel agent).”

16) The term “collaborative consumption” was coined by MARCUS FELSON and JOE L. SPAETH in their paper “Community Structure and Collaborative Consumption: A routine activity approach” published in 1978 in the journal American Behavioral Scientist. See also What’s mine is yours. How collaborative consumption is changing the way we live, by R. BOTSMAN – R. ROGERS, in Harper Collins Publisher: New York, 2010.


Hamari and Ukkonen observe that “in recent years, attitudes towards consumption have shifted, with increasing worry over its ecological, societal, and development impact. On one hand, concern about climate change and, on the other, a yearning for more social meaning embedded in goods and services in such forms as localness and communal consumption have made sharing economies an appealing alternative for many consumers.

Increased reliance on IT-based e-commerce systems has further facilitated sharing through technological platforms for “collaborative consumption” of goods and services, such as Couchsurfing, Zipcar, Neighbourgoods, and Sharetribe. A similar development can be seen in communities of free information exchange, among them Wikipedia, Open Source software, and the recent open-data movement.

In this paper, we refer by collaborative consumption (CC) to activities surrounding sharing, swapping, or trading of goods and services within a collaborative consumption community (CCC). Usually the community is formed within an online service that functions as the coordinating center for sharing activities. While traditional rental services and access-based consumption in general (see, for example, the work of Bardhi & Eckhardt) share some elements with our definition of CC, we are interested mainly in situations wherein consumers engage in sharing and trading among themselves in the absence of a central owner of all goods being shared (such as a car-rental company).
Collaborative consumption systems have thus far been investigated primarily from the service design perspective. Of the systems, Couchsurfing, a community for sharing accommodation among travelers, and one of the most successful sharing services to date, has received the most attention. In another vein of research, sharing has been studied in the context of digital goods (e.g., music files) and Open Source software (OSS). For example, Shang et al. and Huang study norms and motivations associated with peer-to-peer music-sharing, while Zentner focuses on the effects of music-sharing on record sales. As for OSS development, Roberts et al., Lakhani & Wolf, and Oreg & Nov study motivational factors contributing to developers’ participation in OSS projects. Finally, in the context of information-sharing, Nov examines motivations for Wikipedia editors and Nov et al. address them in online photography-sharing.

However, there remains a dearth of quantitative studies on motivational factors that affect consumers’ attitudes and intentions towards collaborative consumption. The context is of especially great interest since participation in CCCs is generally characterized as driven by obligation to do good for other people and for the environment (sharing, helping others, and engaging in sustainable behavior). However, CC may also provide economic benefits (saving money, facilitating access to resources, and free-riding), which constitute a more individualistic reason for taking part. This possible discrepancy between motivations and their effect on attitudes and behavior warrants an interesting context for research.”

17) See Passengers, consumers, and travellers: The rise of passenger rights in EC transport law and its repercussions for Community consumer law and policy, by Jens Karsten, in J Consum Policy, (2007) 30, pp.17–136: “EC transport law is set to be complemented by a series of Regulations giving rights to passengers for almost every mode of transport. These Regulations not only give transport law a distinct consumer dimension but also add new elements to European private law. This paper attempts to provide a horizontal, or intermodal, survey of these Regulations, adopted and proposed. It is argued that passenger law, although originating separately and remaining a sector distinct from other fields of law, has become part of a wider, three-stranded notion of European consumer policy deserving due attention as the force most dynamically expanding the area of Community law of contracts and of torts. The paper will point to the elements of consumer contract law and the law on travel and tourism related to passenger transport and elaborate on the basics for finding a common notion of the key terms like “passenger” and “damage” for Community law. It concludes with some points for further reflection.”
COOK, THOMAS (1808-1892) was tourist agent. “His father died when he was four years old; he left school at ten, and was employed in the gardens of the Melbourne estate and helped his mother, whose only child he was, to eke out her earnings from a small village shop. Having a strong desire to better himself, he became the apprentice of his uncle, John Pegg, who was a wood-turner. After his apprenticeship he went to Loughborough in Leicestershire, where he was employed by Joseph Winks, a printer, and publisher of books for the General Baptist Association. Cook’s religious training led him to become an active member of the Association of Baptists, and in 1828 he was appointed bible reader and missionary in Rutland. In 1829 he traversed 2,692 miles on missionary duty, 2,106 of them on foot.

Cook married the daughter of a Rutland farmer named Mason in 1832, taking up his abode in Market Harborough, and beginning business as a wood-turner, with the intention of acting as a missionary also. When Father Mathew passed from Ireland into England as an apostle of temperance, Cook became one of his converts, and his zeal in the cause led to his appointment as secretary to the Market Harborough branch of the South Midland Temperance Association. In 1840 he founded the ‘Children’s Temperance Magazine,’ the first English publication of the kind. A gathering of members of the temperance society and their friends was appointed to be held in 1841 at Mr. W. Paget’s park in Loughborough. It occurred to Cook that the Midland railway between that place and Leicester might be utilised for carrying passengers to the gathering, and he arranged with Mr. J. F. Bell, the secretary, for running a special train. On 5 July 1841 this train, being the first publicly advertised excursion train in England, carried 570 passengers from Leicester to Loughborough and back for a shilling. Owing to the success of the venture Cook was requested to plan and conduct excursions of members of temperance societies and Sunday-school children during the summer months of 1842, 1843, and 1844.

Cook’s business of wood-turning had to be given up. Removing to Leicester, he continued to print and publish books there. In 1845 he made the organising of excursions a regular occupation, arranging with the Midland railway for a percentage upon the tickets sold. One of the first pleasure trips under this condition was made from Leicester to Liverpool on 4 Aug. 1845, a ‘handbook of the trip’ being compiled by Cook, who visited beforehand the places at which stoppages were to be made, and he arranged with hotel-keepers for housing the pleasure seekers. Afterwards Cook issued the coupons for hotel expenses which are now familiar to travellers. An excursion to Scotland was next undertaken, 350 persons journeying from Leicester to Glasgow and back for a guinea each. They went by rail to Manchester and Fleetwood, and by steamer from Fleetwood to Ardrossan. At Glasgow they were welcomed with salutes from cannon and music from
bands, while both there and in Edinburgh they were publicly entertained. The publisher William Chambers (1800-1883) [q. v.] delivered an address of welcome to the Scottish capital, which was afterwards published with the title ‘The Strangers’ Visit to Edinburgh.’

Soon afterwards Cook issued a monthly magazine called ‘The Excursionist.’ He wrote in 1850: ‘I had become so thoroughly imbued with the tourist spirit that I began to contemplate foreign trips, including the continent of Europe, the United States, and the eastern lands of the Bible.’ In 1865 he crossed the Atlantic, issuing beforehand a circular letter to the editors of the press in the United States, and Canada, wherein he said, ‘Editors of, and contributors to, many of the principal journals of England and Scotland have generally regarded my work as appertaining to the great class of agencies for the advancement of Human Progress, and to their generous aid I have been indebted for much of the success which has crowned my exertions’ (The Business of Travel, pp. 42-7).

Cook’s only son, John Mason (see below), became his partner in 1864, and next year (in 1865) the head office was removed from Leicester to London, owing to the rapid growth of the tourist business. While hundreds of persons visited the continent under Cook’s guidance and enjoyed themselves, others objected to the new industry, and Charles Lever writing as ‘Cornelius O’Dowd,’ said that the parties of tourists under Cook’s care were convicts whom the Australian colonies refused to receive, and were sent to Italy by the English government to be gradually dropped in each Italian city. The Italians did not understand that the statement was a joke, and Cook appealed to Lord Clarendon, then foreign secretary, for redress, receiving in return the sympathy, which was all that could be given (ib. pp. 151-7)”: in Dictionary of National Biography, by W.F. Rae, London, 1901, 55.

19) The Assessment Of Damages In Holiday Cases: The Impact Of Milner V Carnival Plc, by Sarah Prager, in Travel Law Quarterly, 2011, p. 13 ff. “Prior to the decision of the Court of Appeal in Milner, County Courts throughout England and Wales were struggling to assess damages in holiday claims in a way which was consistent and proportionate. As a result of regional variations, it was extremely difficult for practitioners to advise their clients as to the likely value of their quality complaint cases. The Appellant in Milner invited the Court of Appeal to provide detailed guidance in the form of brackets relating to different types of claim, suggesting that figures be provided for wedding holidays, honeymoons, holidays of a lifetime and the like, as well as the more standard annual package holiday. The Court of Appeal did not accede to this invitation, feeling, perhaps understandably, that there is an infinite variety of holidays
Nevertheless, the Court was prepared to provide some guidance to the lower courts and to practitioners in this field. That guidance tends to decrease the sums to be awarded in holiday cases, not least because any comparison with claimants who have suffered a recognised psychiatric injury, or the bereavement associated with the death of a close relative or spouse, will cause a judge to come to the conclusion that a spoilt holiday is not the end of the world. It will now be rare indeed for a ruined holiday to attract an award in excess of £2,000, unless it falls into one of the exceptional categories of cases identified by Lord Justice Ward.

It is, furthermore, now absolutely clear that although awards for diminution in value are linked to the cost of the holiday, awards for loss of enjoyment are not. The two heads of loss are conceptually distinct and must be approached separately. First, one determines the proportion of the holiday spoiled by the breach complained of; then, an arithmetical calculation is made to determine the monetary value of that proportion. This provides the value of the claim for diminution in value. Secondly, a determination is made of the extent of the distress caused by the breach, and the financial value to be placed on this distress (bearing in mind awards made in other areas of the law and in other holiday claims). This figure is to be awarded in respect of loss of enjoyment. Third, however, the court must examine the resulting damages figure and decide whether it is either excessive or inadequate compensation for the breaches complained of. The total award may then be adjusted to render it appropriate.

The higher courts are unlikely to revisit the assessment of damages in holiday claims in the near future. All the guidance that can be given in such a wide area has, it is thought, now been given. It is now for the County Courts to apply the principles set out in the judgment. Early indications are that they are doing so, and that as a result awards are decreasing, particularly in respect of diminution in value of the holiday. More care is also being taken to guard against double recovery in respect of the overlap between the two heads of loss, which was, historically, considerable, but which is now thought to be diminishing. In the author’s opinion the Court of Appeal would be pleased to note that awards are becoming more consistent and predictable and that as a result it is easier for practitioners to advise their clients and therefore for meaningful and appropriate offers of settlement to be made at an early stage.”

We can remember also a very particular American case held in the State of Barbados. Supreme Court of judicature – high court – civil jurisdiction n. 1691/2002 - David Thomas v. Michael Marshalll and Kenneth Jones. The Plaintiff testified that in early November 2001 he, his wife and other relatives arrived in Barbados on holiday. On 10 November 2001 the Plaintiff
was on the beach in the company of his wife and relatives when they were approached by the First Defendant who offered them a ride on the jet ski for $100. That offer was accepted by the Plaintiff. The First Defendant then gave the Plaintiff instructions on how to operate the jet ski, provided the Plaintiff and his wife with life jackets and instructed them to follow him into the water. There were other people on the beach and in the water at the time. The First Defendant then started to pull the jet ski into the water and the Plaintiff followed. As the First Defendant was pulling the jet ski, he stumbled and let go of it. The jet ski then came towards the Plaintiff who held out his hands to stop it, it stopped temporarily but then crashed onto the Plaintiff’s leg. The Plaintiff found himself sitting in shallow water and when he looked down he saw his left leg flapping about in the water.

The Court recognizes, among other general damages, also damages for Loss of Enjoyment of Holiday: “The accident occurred while the Plaintiff was on holiday with his relatives and he was unable to go sight seeing as planned. In the case of Ross v Bowbelle & Marchioness [1997] 1W L R 1159 an award of £2,500 was made for a ruined European Holiday. I would award the Plaintiff the sum of $3,500 under this head.”

Also in Australia we have some important cases of damages for ruined holiday. See Spoiled Holidays: Damages for Disappointment or Distress, by PHIL EVANS, in Tourism industry, 2004, vol. VI, p. 1 ff. “Generally damages for disappointment or distress following a breach of contract will not be awarded to the innocent party under common law. However where the object of the contract is to provide relaxation or enjoyment, for example, an ocean cruise or a package holiday, damages may be recoverable for disappointment or distress. Damages of this type may also be awarded where there is a breach of the consumer protection provisions of the Trade Practices Act 1974 (Cth). This paper discusses a number of ‘spoiled’ holiday cases where damages were awarded for disappointment or distress. The liability of travel service providers under the Trade Practices Act 1974 (Cth) is also discussed.”

20) See Complaints management system, by SANDRA McQUEEN, in ADR Bulletin, 1998, p. 1: “An organisation that wants to be regarded as a good corporate citizen is committed to the welfare and environment of the community and recognises that customer satisfaction is essential to doing business.

Satisfying customers is not an innovation: it is the foundation of any successful organisation. In a customer-driven business it makes sense to have in place mechanisms that capture information (both positive and negative) that identifies what adds or takes away value to the customer and therefore to the business. This can be classed as a complaints management
system (CMS).

A CMS demonstrates a business’s commitment to achieving a high level of customer loyalty; its genuine desire to listen, act upon and resolve customer issues and to utilise complaints as a mechanism for business improvement opportunities.”
CHAPTER 3
TOURISM INDUSTRY BUSINESS CONTRACTS

Contents: 1- Tourism Industry Business Contracts; 2- Tourism Industry Contracts and Structural Formulas: Management and Ownership; 2.1. Hotel Leases; 2.2 Franchising; 2.3 Management Contracts


Business contracts are an essential part in building relationships between companies and business partners. Contracts specify the terms of agreements, services or products to be exchanged and any deadlines associated with the partnership.

We have to consider both contracts of the so-called “passive cycle” of the company (i.e. supply contracts, service contracts, tender contracts), distribution agreements (also allotment could be considered a B2B distribution agreement. See above chapter 2, par. 5.2) and the organization of competitive management structure contracts (i.e. management contracts
and franchising contracts) within the tourism industry.

Such contracts are typically B2B contracts that can range from a simple one-page purchase order for the sale of goods useful for tourism activity, to an extremely complex hundred-page document for a trade level agreement between international companies such as an international franchising contract.

A B2B contract is commonly characterized by the following phases:

- **Pre-contractual phase**: one party identify products or services and possible sources necessary for the commercial activity.
- **Contractual phase**: creation of a formal relationship between parties, covering contract negotiation and validation operations;
- **Logistics phase**: this phase is important particularly for supply contracts and it consists in placing of purchase orders, delivery of goods and services;
- **Settlement phase**: invoicing, payment authorization and payment, execution of contractual obligations;
- **Post-processing phase**: gathering information for management reports, i.e. statistical research.

During the **pre-contractual phase** we usually have a preliminary agreement, letters of intent, and agreement in principle (1).

Also according to Article 2.1 of the Unidroit principle [principles of international commercial contracts (2)] a contract may be considered concluded either by the acceptance of an offer or by conduct of the parties that is sufficient to show agreement. When negotiating complex and high-value transactions, negotiations generally proceed in stages and the agreement is reached only bit by bit, with the parties exchanging writings known by a variety of names, such as “letters of intent”, “agreements in principle”, “memoranda of understanding”, “heads of agreement” etc. While the preliminary writings do not represent the final agreement, their precise nature and legal effects remain unclear.

What if, for instance during the negotiations, the parties sign an informal “Preliminary agreement”, containing the terms of the agreement so far reached, and declare their intention to sign a definitive contract at a later stage, by including expressions such as “Subject to contract” or “Formal agreement to follow”?

What are the nature and the legal effects of such an agreement? A general principle of contract law, also provided in UNIDROIT principle, (article 2.1.15) is the parties’ duty to negotiate in good faith. A party who negotiates or breaks off negotiations in bad faith is liable for the losses caused to the other party, who may recover the expenses incurred in the negotiations and may also be compensated for the lost opportunity to conclude another contract with a third party.

The **contractual phase** is characterized by clauses governing the life of
the contractual relationship. B2B contracts are usually long-term contracts also called “relational contracts”. The term relational contracts signifies a contract based upon a relationship of trust between parties and an on-going duty to cooperate in order to allow each party to perform its obligations properly (3). All explicit contractual terms are just an outline as there are implicit terms and understandings.

As a consequence, such contracts are subject not only to the usual risks of a breach by one of the parties or of supervening events making performance impossible or excessively more onerous, but also to the risk of an irreparable breakdown of the parties’ mutual trust and confidence, making the continuation of their relationship unsustainable. In practice, such contracts frequently include so-called termination clauses that define the contingencies in which the contract may be terminated and specifying how the right to terminate may be exercised: by mere notice to the other party or by a court decision; whether termination takes effect immediately or only after a certain period of time, whether the terminating party or the other party is entitled to damages, etc...

In the settlement phase we have payment clauses or a separate payment agreements that are written agreements, commonly called a promissory notes, between a promisor and a payee. The promisor is the party paying a specific amount of money to another party known as the payee. Such payment agreements or clauses usually include information about terms and means of payment, repayment and any penalties for defaulting on the agreement.

In commercial agreements parties may agree that, should one party fail to perform in accordance with the terms of the agreement, the other party should be entitled to receive a specified penalty or measure of damages. A stipulation of this nature in an agreement is commonly known as a penalty clause. The agreement usually states that damages are claimable in addition to the penalty where the penalty is insufficient to compensate for the damages suffered by the non-breaching party (4).

Another important clause usually included in this part of the contract is the arbitration or multi step clause (5).

In general essential elements of contract will appear in a business contract as clauses covering:
- The description of parties involved, including: names, addresses, roles etc.;
- The definition and interpretation of terms used in the contract;
- In case of international contract the law and the jurisdiction under which the validity, correctness, and enforcement of the contract will operate;
- The duration, territory of the contract, which defines the times and places in which the contract is in force;
- The nature of obligations fees, services rendered, goods exchanged, rights granted, etc. This part includes terms and conditions for invoicing and payment such as warranties, delivery, liability, rejection, termination and accounting provisions.

The typical contract model is composed as follows:
- A preamble that outlines the parties involved in the contract and the nature of the consideration;
- A list of contract clauses that are organized in logical groups (such as duration, terms of payment etc.).
- An approval section that enumerates whom from each party approved the contract;

In some business environments it would be highly difficult and costly if the terms of every contract had to be newly settled for each transaction. Significant savings can be achieved by using general standard form contracts for newly established contract agreements. As we have said regarding consumer contracts, one party can dictate the terms of such standard contracts.

Also in the case of B2B contracts it is possible to have a strong party who determines the content of the contract, and a weak party, who can just “take or leave it” (6).

Some national laws provide norms to prevent companies with a dominant position in their economic sector from abusing this position and from distorting competition. This aim requires preventive intervention to investigate company mergers, since these may create dominant positions.

Special dispositions are provided in European Union Law in the art. 82 of Eu Treaty. The Court of Justice of the European Community defined the concept of the dominant position in the United Brands case (27/76 of February 1978). A dominant position is “a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained in the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of consumers”. The main indicators of dominance are: a large market share; the economic weakness of competitors; the absence of latent competition and control of resources and technology. Moreover in judgment on the Hoffmann-LaRoche case (85/76 of February 13, 1979), the Court of Justice of the European Community stated that abusive exploitation of a dominant position is “an objective concept”. It is “recourse to methods different from those which condition normal competition in products and services on the basis of the transactions of commercial operators”, with the effect of further reducing competition in a market already weakened by the presence of the company concerned.

Art. 82 (now art. 102 of the consolidated version of the treaty on the
functioning of the European Union) establishes that “Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States”

Article 82 of the Treaty does not define dominance, but merely gives examples of “abusive practice”:

(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
(b) limiting production, markets or technical development to the prejudice of consumers;
(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

Abusive practices may take various forms. In addition to those mentioned in the Treaty, the Commission and the Court have identified others:
• geographical price discrimination,
• loyalty rebates which discourage customers from using from competing suppliers,
• low pricing with the object of eliminating a competitor,
• unjustified refusal to supply,
• refusal to grant licences.

As recently noted “it is clear that anti-competitive practices within globalized industries have a clear and damaging impact on developed as well as developing countries and that appropriate analysis and instruments should be designed to reduce these practices.

If such damaging anti-competitive activities occur in sectors where operators are global, they are likely to affect negatively the tourism industry since this industry is typically a globalized industry. Here, the global tourism industry should be understood in a broad sense, considering the different stages of its added-value chain. The tourism industry is a major source of the creation of wealth with many high-skilled jobs both in developed and developing countries. This industry can in fact be considered in its vertical dimension, associating very different specialties as will be seen in the next section” (7).

In order to understand the peculiar reasoning of Courts and National Competition Authorities in case of violation of rule on abuse of dominant market position we can consider an interesting Decision of the Irish Competition Authority o. E/02/001 on the Reduction in Travel Agents’
Commissions by Aer Lingus plc (Case: COM/15/02).

The Competition Authority received a complaint in January 2002 with regard to Aer Lingus plc (“Aer Lingus”).

The activities of Aer Lingus are the provision of operation passenger and cargo air transportation services to the UK, mainland Europe, and the US and within Ireland. Aer Lingus distributes its tickets through its website, travel agents and reservations staff. The closure of all Aer Lingus Travel Shops was announced on 15 January 2002. Aer Lingus was trying to move towards booking over the Internet.

The complaint alleges that Aer Lingus plc (“Aer Lingus”) had abused its dominant position in the full service airline market in the State by unilaterally reducing the commission on ticket sales from 9% to 5% effective 1 February 2002. It was claimed that this would reduce the number of travel agents in the State leading to reduced competition among travel agents.

The unilateral reduction in profit margins by Aer Lingus would result in travel agents going out of business and thus consumers would lose an important source of impartial advice and information.

Because of the reduction in travel agent numbers new full service airlines would have difficulty entering the Irish market.

From the point of view of consumers the reduction of travel agents would adversely affect elderly persons who tend not to have credit cards.

The subject is covered by Section 5 of the Irish Competition Act 2002 and reads as follows, according to art. 82 of EU Treaty:

“(1) Any abuse by one or more undertakings of a dominant position in trade for any goods or services in the State or in any part of the State is prohibited.

(2) Without prejudice to the generality of subsection 1, such abuse may, in particular, consist in-

(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions,

(b) limiting production, markets or technical development to the prejudice of consumers,

(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage,

(d) making the conclusion of contracts subject to the acceptance by other parties of supplementary obligations which by their nature or according to commercial usage have no connection with the subject of such contracts.”

In order to establish that there is a breach of Section 5 of the Act, the Authority must demonstrate that the undertaking in question: holds a dominant position in a relevant market; and, has abused that dominant position.

The creation or existence of a dominant position does not breach the Act;
rather it is the abuse of that position that constitutes the breach.

The European Court of Justice formulated the following test for dominance: “The dominant position thus referred to by Article [82] relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers.”

In assessing dominance the Authority takes into account if and to what extent an undertaking encounters constraints on its ability to behave independently. Those constraints might, for example, be entry barriers that make it difficult for potential competitors to compete effectively.

Based on data provided in the complaint the market share of Aer Lingus would appear to be between 40% and 50%. In the Virgin/British Airways case BA was found to be dominant with a market share of 39.7% in 1998.

The market share of Aer Lingus, based on information in the complaint, is well above BA’s 39.7%. However, it appears that the market share of Aer Lingus is only four (not eight) times that of its closest rival.

There would appear to be sufficient competitive constraints on Aer Lingus that would prevent it from acting independently of its rivals by, for example, raising prices above the competitive level. Regarding the market position abuse, it could be argued that Aer Lingus is using its buyer power to dictate excessively low commissions. In a commission levels survey Aer Lingus’ levels did not seem out of line with other national flag carriers. Thus there is insufficient evidence to suggest that Aer Lingus is exerting any market power it had to set excessively low commissions.

Regarding a possible reduction in competition, the complaint argued that there would be less competition due to the decline in the number of travel agents. However, a decline in the number of outlets does not necessarily lead to a decline in competition.

We can remember also an American case, for certain aspects similar to the Aer Lingus case, decided by the Fair Trade Commission of the Barbados. The Commission received a report from the Travel Agents Association of Barbados (TAAB) alleging that LIAT (1974) Ltd. had engaged in anti-competitive practices with respect to the sale of airline tickets. LIAT was enabling its own retail ticket outlets to offer certain benefits and privileges to customers while not permitting travel agents the opportunity to offer the same.

In January 2009 the Commission completed its investigation into this matter and found that; the airline could not be defined as a direct competitor of the travel agents, and so could not be said to have acquired market share at the expense of travel agents as alleged. Moreover LIAT’s conduct was directly aimed at enhancing the production of the product and consumers
were allowed a fair share of the benefits in the form of lower ticket prices. In this case however, LIAT’s market position is significant, no distortion of competition arises from the conduct of the air company respect to the travel agents, because travel agents are not direct competitors of the company and because such company conduct is complaint with consumer interests. According to the Fair Competition Act of the State of Barbados there was no abuse of dominant position.

Another typical problem in B2B relationships is delayed payment of supplier by big firms such as big hotel companies for which national laws try to provide solutions. In European Union countries this issue is ruled by Directive 7/2011 of February 16, 2011 on combating late payment in commercial transactions. A number of substantive changes are to be made to the previous Directive 2000/35/EC of the European Parliament and of the Council of June 29, 2000 on combating late payment in commercial transaction. As noted by the European Commission although a supplier delivers the goods or performs the services, many corresponding invoices are paid well after the deadline. It is a matter of fact that late payments negatively affect liquidity and the financial management of undertakings undermining their competitiveness and profitability when the creditor needs to obtain external financing because of late payment. It is obvious that the risk of such negative effects strongly increases in periods of economic downturn. According to paragraph 13 of this Directive “provision should be made for business-to-business contractual payment periods to be limited, as a general rule, to 60 calendar days. However, there may be circumstances in which undertakings require more extensive payment periods, for example when undertakings wish to grant trade credit to their customers. It should therefore remain possible for the parties to expressly agree on payment periods longer than 60 calendar days, provided, however, that such extension is not grossly unfair to the creditor”.

Another characteristic of B2B contracts in tourism sector is that they are usually incomplete contracts because of some peculiarities of market demand in this sector: seasonality and uncertainty.

The term incomplete contract indicates the limitations of contracts that fail to specify not only investment levels, but also many of the other contingencies that a complete contract might include. The reason for this failure is usually bounded to the fact that some contingencies cannot be imagined or to the cost of writing complex contracts (8).

As economists have noted, the tourism market demand is stochastic because it depends on stochastic and exogenous variables (natural resources, institutional aspects, social and cultural elements, economic and political conditions, psychological factors). Further goods in this industry are typical experience goods and the consumption is time intensive. As
result of the above considerations, it is right to say that the demand, the reservation price, the frequency and the duration of holidays are all stochastic variables. Another important characteristic of tourism sector is that the tourist product is a non-storable good because the product supplied to the customer is not a physical good, but an immaterial service-good (9).

2. Tourism Industry Contracts and Structural Formulas: Management and Ownership

Business ownership forms are a business’s legal structures. The most common forms of business ownership are the sole proprietorship, partnership and corporation, cooperatives and societies.

It is important to not confuse business ownership forms with business types, such as retail, service, etc.

Business ownership form choice is one of the most important decisions that one will make when starting a business because each form of business ownership has its own liabilities and responsibilities. If a corporation is more expensive to form and maintain, it provides the business owner with more personal liability protection than the sole proprietorship or common partnership form of business ownership.

Moreover the form of business ownership will affect many aspects of business’ operations including attracting potential clients.

It should also be noted that it is not necessary to keep the same form of business for the life of a business. Many small businesses start out as sole proprietorships, for example, and then become corporations later on.

The form sole proprietorship is a business owned and operated by one individual who is personally responsible for all the liabilities and obligations his business incurs. This means that if the business fails, any of his assets can be seized to discharge the liabilities owing. On the positive side, a sole proprietorship is the easiest form of business to set up.

A general partnership is defined as a business arrangement between two or more individuals who share the profits and liabilities of the business. However, general partnerships are not the only types of partnership arrangements that can be formed. In many countries Limited Liability Partnership are possible.

Corporations create a distinct legal entity separate from its owners (shareholders). The extended liability protection is one of the main reasons that businesses choose corporation form: in general no member of the company can be held personally liable for the debts, obligations, or acts of the company. A shareholder is only liable for the unpaid portion of shares owned.
It is also possible to separate ownership from management though contracts like lease and management.

2.1 Hotel Leases

A lease contract is an agreement for leasing real estate and apartments, manufacturing and farming equipment, and consumer goods such as automobiles, televisions, stereos, and appliances. A lease is a contract between the property owner (lessor) and a lessee (or tenant) who obtains the right to possess and use the property owned by the lessor for a certain period of time without gaining ownership. Tenant agrees to pay rent and a deposit. Upon regaining possession of the property, Landlord shall refund to Tenant the total amount of the deposit less any damages to the property, normal wear and tear expected, and less any unpaid rent.

The agreement contains special provisions on contract renewal regarding contract duration. Generally it is provided that at the expiration date, the lease will automatically be renewed for a certain period of time unless either party notifies the other of its intention to terminate the lease at least usually one month before its expiration date.

Usually lease contracts provide that:
- tenant shall not sublease nor assign the premises without the written consent of the Landlord;
- the lessor may not enter the premises without having given tenant at least 24 hours’ notice, except in case of emergency. The owner may enter to inspect, repair, or show the premises to prospective buyers or tenants if notice is given.
- tenant agrees to occupy the premises and shall keep the same good condition, and shall not make any alternations thereon without the written consent of the landlord.
- the lessor agrees to regularly maintain the building and grounds.

In all countries, leases dealing with commercial goods and services (such as a hotel lease) are strictly regulated by statute. Commercial lease laws govern the rights and duties of lessors and lessees in leases that involve commercial goods. Most states have enacted, also with regard to commercial lease contract, the Uniform Commercial Code (UCC) that is a set of suggested laws relating to commercial transactions. The UCC was one of many uniform codes enacted by the late nineteenth-century movement toward uniformity among state laws (10).

Regarding commercial leases, it is important to distinguish the bare rent of real estate use by the lessee for a certain commercial activity specified in
the lease contract from a lease of a business or of a branch of a business. It is possible to own a business without having to do the initial start-up work through leasing of a business from an established business owner.

A lease agreement is almost like ownership and is frequent used in hotel business. The hotel company rents a building and runs the entire operation, paying rent every month or every year.

Lease agreements are not particularly popular among big operators, because they are quite risky and costly. It is right to say that ownership and leasing are an “asset heavy” way to develop a business. In fact, hotel companies cannot develop a large number of properties with lease agreements; otherwise the balance sheet becomes too heavy and risky. In the last financial crisis, for instance, companies that were heavily leveraged with leases and ownership were on the edge of bankruptcy, because they had to keep on paying the rent.

Moreover it is important to consider owner’s cost and responsibility. Often the tenant is responsible for general repairs and maintenance, but structural repairs and capital items are generally excluded from the tenant’s obligations. To be specific about which items the owner is responsible for we can remember: the roof, gutters, downpipes, walls, air-conditioning and any other plant and equipment that is, or becomes, the property of the landlord. Also underground power, sewerage works, and fixtures and fittings related to services such as gas, electricity, water or drainage.

Lease contracts sometimes include redevelopment clauses or early termination clauses. Such clauses entitle the owner to terminate a lease, before the end of the lease, in order to carry out major works to renovate or redevelop the building (in case of redevelopment clause). It’s a matter of fact that without premises, a business may be forced to close or suffer a loss in sales and unforeseen expenses if required to relocate.

If a tenant decides to agree to a redevelopment clause, it is strongly advised that the clause should provide for compensation for the loss of goodwill.

In commercial leases, the institution of compensation for loss of commercial goodwill is of fundamental importance as compared to the company’s ability to generate profits in those places through past and ongoing contacts with the public, and leading to recognize the company’s assets taken as a whole, higher value. In Italy, for instance, according to art. 34 of the Act of 1978, a rental agreement termination that does not involve termination for breach, termination or withdrawal of the conductor, gives rise to the conductor’s right to compensation for loss of goodwill, consisting of a sum to be equal to eighteen month’s rent paid (and twenty-one months in the case of the hotel business).

Management contracts and franchising agreements are other contractual
instruments to separate ownership from management.

A management contract is an agreement between a hotel owner and hotel management company under which, for a fee, the management company operates the hotel in the hospitality industry.

A management agreement is substantially an agency agreement: the hotel management operates the hotel, making all the day-to-day decisions on behalf of the owner. The hotel management company appoints a general manager, who will generally come from its own system. The general manager will hire the staff, and will control costs and revenue, food costs, will apply brand standards, and will generally supervise the management of the hotel.

A franchise agreement will cost less for an owner than a management agreement, but at the same time he will receive fewer services, because a franchise agreement usually provides only sales services, as well as purchasing, sales tools, a brand, a reservation system, a network, international advertising and exposure for the hotel operator. Essentially the franchisor is a supplier who allows an operator, or a franchisee, to use the supplier’s trademark and distribute the supplier’s goods. In return, the operator pays the supplier a fee.

Most groups attempt to have a balanced portfolio with the right amount of lease agreements, the right amount of ownership, the right amount of management and the right amount of franchise agreements. In this way, business should be sustainable in case of bad times and profitable in good times.

2.2 Franchising

A franchise contract is an agreement under which one party (the franchisor) grants another party (the franchisee) the right to carry on a business supplying goods or services under a specific system or marketing plan. The business is associated with a particular trademark, advertising or a commercial symbol owned, used, licensed or specified by the franchisor.

The franchisee is required to pay, or agree to pay a fee to the franchisor before starting or continuing the business.

The term franchise means the rights granted by a party (the franchisor) authorising and requiring another party (the franchisee), in exchange for direct or indirect financial compensation, to engage in the business of selling goods or services on its own behalf under a system designated by the franchisor which includes know-how and assistance, prescribes in substantial part the manner in which the franchised business is to be operated, includes significant and continuing operational control by the
franchisor, and is substantially associated with a trademark, service mark, trade name or logotype designated by the franchisor.

The term franchisee includes a sub-franchisee in its relationship with the sub-franchisor and the sub-franchisor in its relationship with the franchisor. At the same time the term franchisor includes the sub-franchisor in its relationship with its sub-franchisees.

In the pre-contractual phase the franchisor is obliged to send to the franchisee a disclosure document (document containing the information required under the national law, see for instance article 3 of the Italian Franchise Law (Act May 6, 2004, n. 129), the franchise agreement, and a copy of the franchising conduct code adopted. In Europe, one of the most important franchising conduct codes is of the European Franchise Federation (EFF), which is an international non-profit Association constituted in 1972 (11). Its members are national Franchise Associations or Federations established in Europe.

Regarding the pre-contractual duty of disclosure it is important to determine the information required to be disclosed i.e. all data that can reasonably be expected to have a significant effect on the prospective franchisee’s decision to acquire the franchise.

In order to establish franchisor obligation it is fundamental to define the concept of know how that is part of the franchisor’s obligation.

According to the European Franchise Federation (EFF) the term “know how” in a franchising contract: means a body of non-patented practical information, resulting from experience and testing by the Franchisor, which is secret, substantial and identified”.

“Secret” means that the know-how, as a body or in the precise configuration and assembly of its components, is not generally known or easily accessible; it is not limited in the narrow sense that each individual component of the know-how should be totally unknown or unobtainable outside the Franchisor’s business;

“Substantial” means that the know-how includes information which is indispensable to the franchisee for the use, sale or resale of the contract goods or services, in particular for the presentation of goods for sale, the processing of goods in connection with the provision of services, methods of dealing with customers, and administration and financial management; the know-how must be useful for the Franchisee by being capable, at the date of conclusion of the agreement, of improving the competitive position of the Franchisee, in particular by improving the Franchisee’s performance or helping it to enter a new market.

“Identified” means that the know-how must be described in a sufficiently comprehensive manner so as to make it possible to verify that it fulfils the criteria of secrecy and substantiality; the description of the know-how can
either be set out in the franchise agreement or in a separate document or recorded in any other appropriate form.”

The **obligations of the franchisor** shall be:
- to have operated a business concept with success, for a reasonable time and in at least one pilot unit before starting its franchise network,
- to own, or have legal rights to the use, of its network’s trade name, trade mark or other distinguishing identification,
- to provide the individual franchisee with initial training and continuing commercial and /or technical assistance during the entire life of the agreement.

On the other side the **obligations of the franchisee** are:
- to devote its best endeavours to the growth of the franchise business and to the maintenance of the common identity and reputation of the franchise network;
- to supply the franchisor with verifiable operating data to facilitate the determination of performance and the financial statements necessary for effective management guidance, and allow the franchisor, and /or its agents, to have access to the individual franchisee’s premises and records at the franchisor’s request and at reasonable times;
- neither during nor after termination of the agreement.

The minimum content of a franchising contract shall contain: the rights granted to the franchisor; the rights granted to the individual franchisee; the goods and/or services to be provided to the individual franchisee; the obligations of the franchisor; the obligations of the individual franchisee; the terms of payment by the individual franchisee; the duration of the agreement which should be long enough to allow individual franchisees to amortize their initial investments specific to the franchise; the basis for any renewal of the agreement; the terms upon which the individual franchisee may sell or transfer the franchised business and the franchisor’s possible pre-emption rights in this respect; provisions relevant to the use by the individual franchisee of the franchisor’s distinctive signs, trade name, trademark, service mark, store sign, logo or other distinguishing identification; the franchisor’s right to adapt the franchise system to new or changed methods; provisions for termination of the agreement; provisions for surrendering promptly upon termination of the franchise agreement any tangible and intangible property belonging to the franchisor or other owner thereof.
2.3 Management Contract

A management contract is an agreement under which a company (called operator or provider) runs a business on behalf of a third party (called owner) in return of a fee. In this arrangement the responsibilities and rewards of owning and operating are divided in accordance with the contract drawn up between the parties.

In short we can say that a management contract is an onerous agreement under which a company assigns its management to another company.

It is well known that the method of management contracts was developed in British Empire during the 19th century as form to manage enterprises in overseas territories on behalf of domestic British enterprises (12).

The nature of the relationship is that the operator is responsible for the day-to-day running of the business including hiring and firing employees. As well as providing accommodation, and additional functions such as conference facilities, the operator will take reservations and conduct the marketing and promotion of the business. The operator will be responsible for routine maintenance and will procure other capital projects needed for the business, although these will typically be authorised and paid for by the owner.

The owner may be an individual or a company (such as a Bank or an Insurance Company) that wishes to own a business usually as a long-term property investment. The owner typically benefits from the management expertise, skills, know-how and often, commercial structure of the operator, which would otherwise not be available to an owner attempting to operate the business itself.

The main benefits to the operator are:

- to have the possibility to expand its scope of operations and brand diffusion with little or no capital outlay.
- to cover marketing and central management costs by way of a management charge through the ‘base fee’ paid by the owner and other charges.

The large variety of such contract arrangements is continuously in evolution. In the early days of management contracts, the remuneration of the operator consisted of a base fee and an incentive fee generally based on gross operating profit (GOP) (13). GOP is calculated by deducting operating costs from gross revenue. Owners began to realize that this remuneration left them substantially with all the risk. In many cases, other measures of performance are taken in to account such as RevPAR (revenue per available room) or ROR (room occupancy rate). In some cases the operator may be required to guarantee a minimum return to the owner on its invested capital.

Capital improvements will usually be divided into:
• routine capital improvements, required to maintain revenues and profits at their present levels;
• discretionary capital improvements, to generate more revenue.

If the owner elects to postpone a required repair, this will not eliminate or save the expenditure but merely defer the payment. For instance if a hotel has operated with a lower than normal maintenance budget, it is likely to have accumulated a considerable amount of deferred maintenance. An insufficient reserve will eventually undermine the standard of the property, and may also lead to a decline in the hotel’s performance and its value.

The negotiation of the management agreement, focusing on the respective rights and obligations of the owner and the operator, is critical to the financial success of the business and the return on the owner’s investment. The first draft of the agreement will usually be offered by the prospective of the operator. The operator will usually seek a long-term right to operate the business under its brand and according standards commonly used across operator’s firm or group.

The owner will try to negotiate the terms of the agreement introducing some balance, giving the owner rights and remedies.

The main obligations of the owner are: fee payment and obligation for operator’s integration into the owner’s structure.

We have just seen the two main kinds of fees: base fee and incentive fee. In addition to these, other fees are usually provided:

• a commitment fee, to be paid in case of special pre-agreements or when the agreement includes construction clauses. This fee generally operates as an advance payment.
• a termination fee, paid upon termination of the agreement or with the termination of construction period. It usually acts as a safety clause, in case the management company does not comply with its obligations.
• a special services fees, for additional services provided within the agreement framework such as construction work, leasing of specific rights of industrial property, maintenance services provisions and technical support, public relation services and advertising, mediation for loan credits, etc.
• fees paid for expenses and costs made by the management company during the agreement period and due to business management services provision.

The obligation for operator’s integration into the owner’s structure arises from the goal of management relationship itself. As we have already said, the purpose of a management contract is to undertake the management of another company. To achieve this, the management company needs to become part of the owner’s structure. This means that the owner has to allow the operator’s intervention within its own structure. In this way
the operator obtains control from the owner but, according to the mutual obligation of cooperation and collaboration (see infra), such control should be based on owner’s initial and continuous consent.

The main obligations of the operator are related to its fiduciary duties. Other obligations refer to the exact goal assumed by the provider or represent implicit means to achieve the scope of the relationship:

• assignment of management staff and staff training. After signing the agreement the management company selects, detaches and places competent managerial and administrative staff in the assigning company. Managerial skills and know how improvements are expected. Staff training is also part of the provider’s obligation. Management agreements usually include a special appendix about terms and procedure for know-how transfer and staff training.

• respect for the managed company’s policy. Any action from the management company needs to comply with the philosophy and the scope of the managed company. For instance in the case of tourism enterprise, the management company has to respect its local and/or ecological character.

• obligation to integrate the managed company in the provider’s business network. The provider commonly assumes the obligation to incorporate the managed company into its business network comprehensive of its strategic alliances and partnerships.

Management agreements are usually long and sometimes complex, but many of the same issues frequently arise.

In particular, the owner should be careful not to accidentally create a tenancy under which the operator will enjoy the rights of a business tenant. This risk arises because the management agreement, if not correctly drafted, can have the basic features of a lease: exclusive possession of the premises for a defined period of time.

Moreover operators typically prefer long initial terms and several long renewal periods exercisable by the operator. The owner may prefer a shorter duration without specific renewal rights.

It should be noted that the relationship between owner and operator is usually governed not only by the traditional management agreement but also by parallel arrangements such as licence, royalty or service agreements.

Differences emerge in practice between the terms of management agreements entered into as part of a ‘sale and manage back’ transaction and those management agreements which are entered into by operators on a standalone basis, for example in relation to a new development.

The management agreement should clearly distinguish between the responsibilities to be assumed by each of the owner and operator, and should specify what each party needs to provide to enable the other to perform its part of the agreement.
A part the above typical owner obligations (fee payment, integration of operator in its structure) and of the operator (transfer of management, staff training, etc.), other terms and conditions are usually negotiated in management relationships.

The owner should limit the operator’s ability to be involved in other business that competes for the same business of the owner.

The owner will not want to have the possibility to manage the operations but should have the ability to oversee and, in appropriate circumstances, manage the incurrence of costs and expenses so as to preserve the return on its investment. The operator should prepare, deliver and keep to operating, capital expenditure and budgets approved by the owner. Flexibility to adjust these budgets to meet changing circumstances should be considered.

Operators who run the business under their own brand will likely demand the right to incur expenditure so as to preserve the brand reputation associated with its goodwill and common operating standards. Such agreements could be onerous for the owner. Where such right of the operator is provided, the owner could incur in not preventable costs. For instance if the operator’s hotel group decides to introduce a swimming pool in all its branded hotels, the owner could be forced to agree to the building of a new pool complex at its hotel.

The operator should provide complete, detailed and accurate financial data to the owner, who may reserve the right to audit the books from time to time. Accounting book oversight should be in accordance with accepted accounting standards.

The owner should have the right to terminate if the operator defaults under the agreement. The owner may also have the right to terminate if the operator fails to meet defined performance measures detailed in the management agreement, or if the operator experiences change.

He may also reserve the right to terminate without cause, but in this case the operator usually requires payment of a termination fee equivalent to its anticipated return over the unexpired duration of the contract.

Business continuity on termination is important and the management agreement should provide for a smooth transition on termination or expiry.

Ownership of intellectual property rights in the management processes, computer systems and branded materials should be addressed in the management agreement. If the operator retains these rights, there should be adequate protection for the owner in terms of business continuity in the case of termination or expiry of the agreement.

Taking the above into consideration in order to determine the characteristics of such contracts, we can say that management contracts are mainly used as means of cooperative development between companies. In fact, the goal of a management contract is the transfer of the management
of an enterprise or corporation or business unit or facility from the owner to the management company, called operator or provider.

So management contracts, along with franchising contracts, are types of new business governance structures and a part or the whole of activities management of the collaborating parties is performed according to a common objective achievement.

Since the operator runs the management under the name and on behalf of the owner, it means that the profits, damages, rights and liabilities, emanating from the operator’s activity, are upon the owner who also takes the risk for the success or the failure of management. At the same time it is normally stated in the contract that the manager’s payment will be determined according to management results. As we have seen it is usually provided an incentive fee calculated on the profits.

It is a matter of fact that the above conditions determine a strong interplay between the position of the owner and the position of the operator.

Not only is the operator controlled by the owner, but the operator’s interests become attached to the owner’s interests as well, not only because of the management fees, which are usually partially determined by the management’s results, but also because of the owner’s integration in the business networks of the provider. It’s right to say that parties share common goals and a common structure.

In this way it is possible to underline another key element of management contracts: their fiduciary content. A fiduciary duty arises from management contract. It can be determined as the duty of the operator to adopt the objectives of the owner. Such fiduciary element obviously varies depending on the obligations provided in the contract, the duration and the significance of the specific relation (14). Due to such fiduciary duties a continuous dialog and a constant negotiation between parties about the main management choices is required (15).

A constant negotiation is also required in order to solve conflicts conventionally avoiding termination of contract that is not an easy process and may involve high risks and losses for both parties while agreement’s benefits are usually observable only after years of cooperation. Another key element of management agreement is its long duration.

A management contract is also a typically incomplete agreement because it is not possible to determine in advance all the aspect of the relationship, but many aspects need to be constantly negotiated because of the above considerations (16).

Because of parties’ interdependence cooperation, trust, reliance, mutuality, resolution of problems by consent represent the real foundation for the relationship between owner and operator.

Fiduciary duties can be specified in several bilateral obligations.
Firstly, the element of trust created by the management contract imposes upon both parties, and particularly on the operator, the obligation of confidentiality that means to keep secret any confidential information known due to the management relationship.

Such obligation is commonly explicit in most management contracts. In any case this obligation derives from the fact that the operator acts as a manager for the owner.

The fiduciary nature of the management agreement also determines a bilateral duty of disclosure: the operator has to inform the owner about management development and other issues arising from management. On the other hand the owner has to inform the operator about the financial, managerial and structural status of the enterprise.

One of the most typical terms of the agreement is the prohibition of right and liability transfer. That means that parties are not allowed to transfer to a third party right or liability arising from management relationship.

Some authors talk also about the existence of a bilateral obligation of collaboration composed by single obligations (duty of disclosure, duty of integration of the provider in the owner’s structure, constant negotiation, etc.) arising from the fiduciary nature of management relationship. A peculiarity of the obligation of collaboration as a duty of constant negotiation is that it is usually not clearly predefined.

It is an open term that needs to be defined according to the concrete circumstances and needs of each case. Such a duty is determined only with regard to its purpose: it always aims to the effective performance of the duties by the contracting party and to the best possible implementation of the agreement scope.

Such obligation may not result textually in the contract. In many cases it simply arises from the interpretation of the agreement as implied term. Moreover, social mores may favour behaviour of collaboration.

A duty of non-competition is part of the above obligation of collaboration.

In the management agreement, the company undertaking the management is informed about any strong and weak points of the owner because of the managerial merge between the parties.

It is obvious that the management company by acquiring full access to such details concerning the managed company may be found in an extremely favourable and advantageous position in terms of competition.

The obligation of non-competition constitutes the major restrain of the parties’ powers and of their business freedom.

According to that duty they are obliged to avoid any financial or commercial activity that could determine competition between them falling in the spectrum of competition, thus limiting their business freedom. But the reason for such a restraint represents the foundation of management
relationship that is “the preservation of the relation, the enhancement of mutuality, the achievement of the relational goals and the emphasis on long-term mutual interest than on short-term individual profit.

Therefore, contractual solidarity/preservation of the relation, creation and restrain of power, harmonisation of the relational conflict, harmonisation with the social matrix, reciprocity and supracontract norms are related to this kind of bilateral obligation” (17).
Notes

1) “There is great difficulty with situations where the parties spend a long time in an area where there are obligations and understandings but not yet a fully completed contract. This article considers an important development that attempts to deal with this difficulty. That is the increasing use by contracting parties of what may be called umbrella agreements…. Umbrella agreements between parties are private arrangements that provide a framework of clauses which regulate future contracts. Generally, they are not concerned with immediate contractual decisions but rather they explicitly spell out the principles that guide future contractual decisions. There are two “tests” that we can use in order decide whether a private arrangement is an “umbrella agreement” or not. The first test concerns the “selection processes”. Umbrella agreements are arrangements that do not predetermine future selection processes”: From Contract To Umbrella Agreement, by S. Mouzas and M. Furmston, in The Cambridge Law Journal, (2008) 67, pp 37 50.

2) UNIDROIT Principles (the Principles) were published in 1994 and they were considered to be “soft law” and hence not binding on the courts. Indeed, the intention of the UNIDROIT Working Groups was to develop a set of norms suited to accommodate the needs of the international commercial community. See particularly Principles of European Contract Law and UNIDROIT Principles: Moving form Harmonisation to Unification?, by OLE LANDO, in UNIF. L. REV., (2003) 8, p. 123; The UNIDROIT Principles and the Law Governing Commercial Contracts in Southeast Asia, by Bayu Seto Hardjowahono, in UNIF. L. REV., 2002, p. 1005 http://www.unidroit.org/english/principles/contracts/main.htm.

3) See the fundamental paper Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical, and Relational Contract Law, by R. Mc. Neil, in Northwestern University Law Review (1978) 72, p.854. “Firms are riddled with relational contracts: informal agreements and unwritten codes of conduct that powerfully affect the behaviours of individuals within firms. There are often informal quid pro quos between co-workers, as well as unwritten understandings between bosses and subordinates about task-assignment, promotion, and termination decisions. Even ostensibly formal processes such as compensation, transfer pricing, internal auditing, and capital budgeting often cannot be understood without consideration of their associated informal agreements. Business dealings are also riddled with relational contracts. Supply chains often involve long-run, hand-in-glove supplier relationships through which the parties reach accommodations when unforeseen or uncontracted-for events occur.”
Similar relationships also exist horizontally, as in the networks of firms in the fashion industry or the diamond trade, and in strategic alliances, joint ventures, and business groups. Whether vertical or horizontal, these relational contracts influence the behaviors of firms in their dealings with other firms”: *Relational Contracts and the Theory of the Firm*, by G. Baker, R. Gibbons, K. J. Murphy, in *Quarterly Journal of Economics*, 2001, p. 1.


5) See above chapter. 2 par 8.

The following terms and conditions are generally contained in B2B supply contracts:

1. Definitions and Interpretations

   Price, …. is a reference to the currency of the [Country] unless otherwise stated.

   This agreement is governed by [Country] law and the parties hereby agree to submit to the jurisdiction of the Courts of the [Country] with respect to this agreement.

2. Commencement and Completion

   The commencement date is scheduled as [date].

   The completion date is scheduled as [date].

3. Purchase Orders

   3.1 The (Purchaser) shall follow the (Supplier) price lists.

   3.2 The (Purchaser) shall present (Supplier) with a purchase order for the provision of (Goods) within 7 days of the commencement date.

   3.3 The purchase order shall nominate the method of delivery as defined in Section 4.

   3.4 Purchase orders are to be sent …(via fax or electronically), and are to be interpreted under standards and guidelines outlined in annex A.

4. Delivery

   4.1 The (Purchaser) shall arrange for delivery to be made according to one of the following terms:

      (a) The shipping and insurance of the (Goods) shall be the sole responsibility of and entirely at the expense of the (Purchaser).

      (b) The shipping and insurance of the (Goods) shall be the responsibility of the (Supplier). The (Purchaser) shall provide the (Supplier) at least [days] days notice and pay the carriage and insurance costs from the (Supplier) delivery price list.
5. Payment
5.1 The payment terms shall be in full upon receipt of invoice. Interest shall be charged at [percentage] on accounts not paid within … days of the invoice date. The prices shall be as stated in the sales order unless otherwise agreed in writing by the (Supplier).
5.2 Payments are to be sent ...(usually electronically), and are to be performed under standards and guidelines outlined in annex B.

6. Rejection
If the (Goods) do not comply with the Order or the (Supplier) does not comply with any of the conditions, then the (Purchaser) shall at its sole discretion be entitled to reject the (Goods) and the Order. The (Purchaser) shall return the rejected (Goods) to the (Supplier) at the (Purchaser) risk and expense or notify the (Supplier) to collect the (Goods). The (Supplier) may use its discretion to replace the (Goods) according to the invoice or refund any monies paid.

7. Termination
If (Purchaser) fails to carry out any of its obligations and duties under this agreement (Supplier) may issue a notice specifying the breach and request that it be remedied within 14 days after receipt of such notice.
If (Purchaser) fails to provide adequate remedy within the specified 14 days the agreement may be terminated forthwith.

8. Disputes
(Supplier) and (Purchaser) shall attempt to settle all disputes, claims or controversies arising under or in connection with the agreement through consultation and negotiations in good faith and a spirit of mutual cooperation.
This method of determination of any dispute is without prejudice to the right of any party to have the matter judicially determined by a [Country] Court of competent jurisdiction.

9. Amendment
This agreement may only be amended in writing signed by or on behalf of both parties.

This paper considers the main possible reasonings for judicial control of unfair contract terms (unequal bargaining, distributive justice, market failure, paternalism, the ethos of the market, comparative law, and the nature of an optional instrument) and concludes that none of them requires
a distinction between business to consumer (B2C) and business to business (B2B) contracts.

He concludes “None of the policy reasons for the control of standard terms requires a limitation to B2C contracts or a different test for B2B contracts. In this respect, we could speak here of an ‘overlapping consensus’.51 Some of them even positively require identical treatment of all B2C and B2B contracts. An interesting option is the idea of a ‘cap’ pursuant to which terms in contracts with a particularly high economic value are excluded from control. The provisions on unfair terms in contracts between businesses in the optional instrument as drafted by the expert group were the result of a compromise, as it often happens with political texts. In this case, there was a difference of opinion between those, on the one hand, who thought that in relation to unfair terms commercial contracts should be treated in exactly the same way as consumer contracts and those, on the other, who were of the opinion that the control of contract terms for unfairness should be limited exclusively to consumer contracts. The result was a text where terms in B2B contracts are subject to unfairness control but on the basis of a different test, which is less strict (for the parties) than the one applicable to B2C contracts.52 The first and most important part of that compromise - ie the personal scope of unfairness control - is fully supported by the main rationales for unfair terms control that we saw. The second part - the different tests - is not. However, that is not necessarily a problem. Choices of this kind do not necessarily have to be made entirely in the abstract (and certainly not by an expert group alone). As the judicial experience in Germany and other countries with the indirect effect of the grey and black lists on B2B contracts shows, courts applying differently formulated rules have no great difficulty in exploring, on a case by case basis, in how far any analogy between them is justified. Similarly, it is entirely thinkable that prudent European judges who are interpreting Art 85 of the instrument and see no relevant difference in certain cases with the B2C context would draw inspiration from the experience with analogous cases decided under Art 81. It is true that the purpose of having two different definitions of unfairness would be frustrated if they always led to identical outcomes. But, in view of any plausible rationale for the review of unfair terms, it would be equally surprising if the implications of the two tests would always (or even most of the time) be different. On the other hand, however, in determining the right degree of indirect effect courts may differ from one Member State to another. This main lead to divergences that may undermine the usefulness of the optional instrument.”

7) Passport to Progress: Competition Challenges for World Tourism and Global Anti-Competitive Practices in the Tourism Industry, by F. SOUTY,


They observe that “in the tourism sector it is very difficult to observe complete contracts. The typical tourism incomplete contracts regulating the business relationship between the Tour Operator and the Hotel are the Free Sale and the Allotment contracts. In this paper we analyze these incomplete contracts into a microeconomic perspective and within an optimal contract design approach. In particular through optimal contract design and incomplete contract approaches we analyze the design and efficiency consequences of imperfections resulting from contractual incompleteness”.

10) The National Conference of Commissioner on Uniform State Laws (NCUSL) is a non-governmental body formed in 1892 upon the recommendation of the American Bar Association for the purpose of promoting “uniformity in state laws on all subjects where uniformity is deemed desirable and practicable.” Made up of lawyers chosen by the states, the Conference oversees the preparation of proposed laws, “Uniform Laws” which the states are encouraged to adopt. For over a century this process, carried out through committees that prepare successive drafts for review and ultimate approval by the full Conference has continued to function. By the moment the Commissioners have approved more than two hundred uniform laws, of which more than 100 have been adopted by at least one state. A few have been widely adopted and have, as a consequence, approached the hoped for uniform national law on their subject.

Commercial lease contract is regulated by article 2A of the UCC. See http://www.law.cornell.edu/ucc/2A.


The two authors briefly summarize the history and growth of franchising
in the United States, and then describe many aspects of the franchising relationship, including how financial terms in franchise contracts have changed over the last quarter century. This paper also summarizes “some other changes that have occurred in franchise contracts as this mode of organization has become more mature. In particular, some sources of franchisor-franchisee conflict have arisen or become more pronounced over time, and contracting practices have evolved to remove, or at least reduce, such conflict. Also, the legal status of some contract clauses has been clarified or challenged by new statutes and court decisions, leading to additional changes in franchise contracts and their terms.”


“Franchising contracts are designed to bring together two kinds of entrepreneurs, the franchiser and the franchisee, and to maintain their relationship in the long run. In contrast to standard exchange contracts in law, which are specifically designed to bring about the completion of an exchange efficiently, franchise contracts are designed to make it possible for the entrepreneurs to initiate, to maintain, and to eventually terminate their relationship without dispute. The research reported in this article is an attempt to see how the dual purpose of franchising contracts are achieved. The article first describes the internal organization of franchise contracts (what we called the micro-contractual aspects) and how different kinds of rights and obligations are allocated to accomplish these multiple ends. The second part of the article provides an empirical examination of 30 franchise contracts to see if the internal organization of the contracts influence both the expansion of the franchise operations through new franchises and the amount of dispute between the two sides of franchise contracts.

Every franchise contract includes a set of provisions that define the commencement, termination, and ongoing operations of franchise relations. The internal organization of franchise contracts specifies what kinds of rights and obligations are distributed to the parties and the nature of this allocation within each domain of provisions. We argue that the commencement and termination aspects of franchise contracts are usually written in order to make the relationship between the parties clear, and the contingencies specific. In these provisions, the contract is written in discrete terms in which each party’s rights and duties are specifically delineated. The contractual provisions dealing with the ongoing operations and the conduct of the parties, on the other hand, cannot be made specific because it is impossible to define all the future contingencies and possible business opportunities. Under these conditions, the contract is usually written in relational terms in which each party’s rights and obligations are defined in
terms of powers and liabilities towards each other rather than in terms of
specific duties and rights.

One critical consequence of writing contracts that include powers and
liabilities, however, is that it may lead to disputes and undesirable conflict
that are detrimental to the success of the franchise. In order to deal with
these conflicts among the parties, the contract needs to specify conflict
resolution mechanisms that are an integral part of franchise contracts.

These general arguments are tested with the use of 30 randomly selected
franchise contracts from a diverse set of businesses. Our results show that,
indeed, different parts of franchise contracts allocate rights and obligations
differently and the more relational a contract becomes the more likely that
it would include various dispute resolution mechanisms. We also found that
the success of a franchise contract, which is measured by the number of
legal disputes it generates and the growth of franchised units, is influenced
by the existence of relational provisions and the explicit dispute resolution
mechanisms included in the contract.

We recommend that franchise contracts should be written to make the
commencement and termination aspect of the relationship as discrete as
possible. The operations and conduct provisions of the contract, on the
other hand, should be written in relational terms to give the parties the
ability to respond to changes in business conditions without renegotiating
the contract.

It is usually the tendency on the part of franchise lawyers to write discrete
contracts that attempt to specify every conceivable contingency to avoid
future disputes. We argue here that a better strategy is to limit the discrete
aspects of the contract to the commencement and termination clauses and
to concentrate more on the dispute resolution mechanisms that can become
an integral part of the contract. Thus, we also recommend that various
dispute resolution mechanisms, such as franchisee associations, franchisee
councils, and third party arbitration should be set up within the contract
to address the possible disputes early on rather than to wait for potentially
very costly court proceedings for both parties.”

A franchise contract is an agreement under which the franchisor grants
the franchisee the right to carry on a business supplying goods or services
under a specific system or marketing plan. The business is associated with
a particular trademark, advertising or a commercial symbol owned, used,
licensed or specified by the franchisor.

About intellectual property in tourism sector see *Role of Intellectual
Property in Enhancing the Competitiveness of the Tourism Industry,*
*by* Tamara Nanayakkara, in [www.wipo.int](http://www.wipo.int):

“The tools of the intellectual property system are amply applicable to
the tourism sector. Broadly speaking, developing and exploiting brands is particularly appropriate to the service sector and thus to the tourism sector. Core to developing and exploiting a brand are trademarks, geographical indications (certification marks, collective marks or a *sui generis* system) or industrial designs as well as other intellectual property rights such as patents, copyrights and trade secrets which contribute to the whole brand image...All of these different tools of the Intellectual Property system which provide an exclusive right of exploitation and of preventing unauthorized third parties from benefiting from that right are amply useful for the tourism sector.

Recent efforts to brand places also known as “destination branding” has at its core a trademark, whether by virtue of a registered logo or tagline. As indicated earlier branding is more than the registered logo or tagline but it is its bedrock. Also, creating a fancy logo or catchy tag line is not enough for trademark purposes. They should ideally be registered in the relevant national or regional register for trademarks and, depending on a variety of factors, should also be registered internationally. Many cities, regions and countries are realizing the importance of differentiating themselves from the rest, creating a niche market and an individual appeal that will translate into more tourist arrivals.

The Swiss mountain resort St Moritz was one the first to register the name “St Moritz” and the tag line “Top of the World”, not only in Switzerland but also in the Office of Harmonization for the Internal Market, the Trademark Office of the European Community.

Similarly “Kerala – Gods Own Country” has been registered as a trademark in India. These are a few examples of many such examples of towns and regions using the intellectual property system to differentiate themselves from other such towns or regions and to market themselves as offering a unique and distinct “product”. A trademark such as “St. Moritz” is confined to a small mountain village in Switzerland but whether it relates to a small town or a large province or region it is trying to capture the essence of that particular place. Such destination brands are often trying to accomplish the task of communicating a single message that would embrace a variety of very different products and as such performs the function of an “umbrella brand”. That is to say, a particular place may have, for example, elements of cultural, nature and religious tourism and a single destination brand will try to bring all of those experiences under one logo or slogan. Trying to capture in a single message a variety of different experiences building up to a composite whole is the essence of having an umbrella brand. Many of these authorities that own such a destination brand allow tourism operatives in the area to apply the brand in addition to or in place of a brand of their own. For doing so, stringent guidelines have been put in
place on how the trademark should be used, how it should be depicted, the font, the color, etc and often written guidelines are provided and users have to submit examples of their intended usage for prior approval.

The ... registered trademark owned by “Tourism Australia” of the government of Australia allows third parties to apply the mark on goods and services indicated according to the guidelines provided and in particular followed by the “™ Trade Mark of Tourism Australia”. The applicant is required to provide every example of the way the mark is intended to be used and in every situation in which it is used, including that it should not be used in situations likely to damage the reputation of Tourism Australia... If a particular entity has in its view complied with its stated criteria on fair trade, such as fair wages and working conditions, fair operations and purchasing, fair distribution of benefits, ethical business practice and respect for human rights, culture and environment, the entity is certified and has the right to apply the trademark. Given the increasing importance of the concept of fair trade, particularly in the markets of the developed economies a certification that the particular entity is deemed to have complied with the standards of fair trade would give it a competitive edge, once again a way of adding value and differentiating.

The Green Globe Certification is a global “eco-tourism label” that promotes sustainable tourism..

Geographical indications have become an engine of growth of agri-tourism by strengthening tourism in rural areas where the focus is agriculture. They may reside within an umbrella brand applicable to a whole region or they may be an independent and stand alone brand which is the destination brand. Earliest and best examples of such tourism are built around the wine industry. Wine produced by a collection of small production entities have been able to market themselves more effectively by selling under a single mark referred to as a geographical indication pertaining to the geographical region in which they are situated and the wine is grown. Such a mark may be a collective mark used by a cooperative of producers, a certification mark where using of the mark denotes that the product emanated from a certain geographical region and adhered to certain quality or other standards or it may be a sui generis right, which allows the producer to apply the mark if it adheres to pre-defined criteria which would usually include that the wine was produced in that area, using particular methods and applying certain specific know how. Agri-tourism around such products is now a fast growing segment of the tourism industry. This would include experiencing the product by sampling it in the local restaurants and wine yards, visiting the production facilities, participating in festivals and staying in local wineries. The bedrock of this whole experience is the product protected by a geographical indication...A logo could also be protected under copyright
law as it is often a work of artistic creation. Copyright would also offer protection to the promotional materials that most such businesses would rely on. Whether we speak of guide books, leaflets and a variety of other material that tourists rely on to inform themselves of their destination are creative works that would warrant copyright protection. Further, many of these different rights and copyright in particular would become relevant in the context of websites which most companies today, and companies in the tourism sector are no exception, would be relying on.

All companies rely on confidential business information for their business success. In the tourist industry, customer identities and preferences, vendors, product pricing and discounting systems, marketing plans and strategies, company finances, booking systems, personnel evaluations, research data and analysis would be the kind of information that companies could consider confidential and would lose their competitive advantage if accessed by competitors.”


15) Relational contract theory and management contracts: A paradigm for the application of the Theory of the Norms, by M. DIATHESEPOULOS, Cambridge, 2010, p. 90: “Therefore, there is an obligation for collaboration of both parties and especially for preparing the recipient to include the provider in the legal and business structure of business management provision. However, the meaning of collaboration obligation does not only consist of the obligation for provider’s inclusion in the recipient’s structure. It also includes provision of information from one party to the other. As stated above information must be provided both by the management company to the recipient and by the recipient to the management company; this is a compulsory term for their collaboration and for the success of the agreement. Moreover, according to the duty of care, which characterises the parties’ fiduciary relation, especially as an assignment of such an important responsibility like management and as a means for a company to fully invest in another, it is obvious that even if such an obligation is not mentioned in the
agreement, both parties are obliged to consult each other before performing any action provided by the agreement and make any possible effort for a continuous collaboration with each other, in order to take the best possible decision”.

16) “This relation is determined by the special role and function of corporate management. Management not only is the controlling and major activity of every corporation, always linked with its institutional self-existence, but it also constitutes a very complex activity related to every aspect of a corporation and affecting every matter of it. The relation between the parties involves issues concerning asset control, separation of control and ownership, roles in decision making, allocation of risk, link of provider’s fees and recipient’s results, careful planning, transfer of know-how and intangible assets, integration of provider’s staff in the recipient’s structure, allocation of responsibilities, obligations and liability. Thence, every management contract is characterised by a controversy: it can never be complete enough as the management’s object cannot be fully determined in advance, while it must have a detailed content that should try to cover as much as possible aspects of the relation. Nevertheless, in every case, the object of transfer should be limited to a more or less extensive degree, as it cannot reach the full separation of the recipient from its own management. Furthermore, the actual value of the exchanges that the relation involves cannot be easily quantified and measured. The measurement and evaluation of the provider’s performance is a very difficult task and it is usually approximately conducted; that is a matter directly affecting the need for detailed initial planning of the relation as it could evolve to a source of future conflict.”: Ibidem, p. 40.

1. Marketing and Commercial Practices in Tourism Sectors

According to the Chartered Institute of Marketing “Marketing is the management function which organizes and directs all those business activities involved in assessing customer needs and converting customer purchasing power into effective demand for a specific product or service, and in moving that product or service to the final consumer or user so as to achieve the profit target or other objective set by the company or other organization” (1).

Marketing involves activities of:
- Market planning that is needed to meet short term and long-term
objectives of tourism companies (achieving a certain level of sales, increasing the profitability, reducing business risk, for instance, by diversifying the product range, obtaining a measured increase in the return on capital invested by the company).

- Market research that is the planned and systematic collection and analysis of data designed to help the management organization to take decisions and to monitor the results of the decisions taken. Market research aims at understanding needs and wants of consumers taking into accounts all variables affecting human needs. Variables affecting the demand for goods and services may be divided into two categories: demographic variables and psychographic variable (such as lifestyle and personality) (2).

- Determining product policy that means getting the right product. This process involves products differentiation, creation of a particular image or “personality” for the company and its products, launching a new product etc.

- Pricing the product that means determining the price of a product. It is well known that the price of a product says something about the product to consumers and that by manipulating price in combination with the qualities of the product; it is possible to orientate sales.

- Designing marketing communications. The marketing manager has in particular four ways of communicating its promotional messages to consumers: - by advertising the product through selected media such as televisions or the press; by using its staff; by engaging in sales promotion activities.

**Marketing communication** is a significant part of the relationship between tourism companies (hotel, travel agencies, tour operators etc.) and consumers. Consumers can be reached at three different levels by communication processes:

- at a cognitive level, clients must be made aware of the product. The company has to convince the consumers that its product serves their needs. Moreover it is important to turn the consumer into a loyal user of company’s products. The objects of this process can be summarizing through DAGMAR model: Defining Advertising Goals for Measured Advertising Results (DAGMAR) that is an advertising model proposed by Russel H. Colley in 1961 (3).

- At affective level, communication must make the client sympathetic to the product and/or the company and here, social and cultural influences play very relevant roles. Social influence causes new products and fashions to spread through society. Culture is the key element that unites the group. Cultural values can influence the way people choose tourism products.

- the message must affect consumers’ behaviour, by motivating them to buy the product. It is important to consider the five main components
in tourism product: destination attractions and environment; destination facilities and services; accessibility of the destination; image of the destination; price to consumers. These tourism product components largely determine consumer’s choice and influence buyer’s motivation.

According to DAGMAR, each purchase prospect goes through four steps: 1. Awareness; 2. Comprehension; 3. Conviction; 4. Action

These steps, also known as the ACCA advertising formula, derive from the AIDA advertising formula that is an acronym used in marketing and advertising describing a common list of events that may occur when a consumer engages with an advertisement:

- **A** - Attention (Awareness): attract the attention of the customer.
- **I** - Interest: raise customer interest by focusing on and demonstrating advantages and benefits (instead of focusing on features, as in traditional advertising).
- **D** - Desire: convince customers that they want and desire the product or service and that it will satisfy their needs.
- **A** - Action: lead customers towards taking action and/or purchasing.

Colley identifies about 50 objectives; with regard to tourism marketing it could be sufficient to list these:
- Those associated with informing customers about the product;
- Those ordered to persuade clients to buy;
- Those whose purpose is to remind the customers of the product and/or the company.

**Designing the message to consumers**, the Marketing Manager has to take into account the following factors: the source of the message; the message appeal; the channel to be used (4) and the target audience.

The major factor will be the source by establishing the credibility of the message and its effectiveness. A message gains credibility for instance if the person delivering the message is seen as an expert on the subject, as a friend or as someone closely associated with the product, etc.

While designing a marketing process it is important to consider juridical limits to commercial practices.

A commercial practice is a conduct, a commercial communication and all forms of advertising (direct marketing and product package included) that a company uses to promote, sell or provide goods or services to consumers.

Law generally consider a commercial practice as unfair when it is contrary to the requirements of **professional diligence** and it materially distorts or is likely to materially distort the economic behaviour of the average consumer whom it reaches or to whom it is addressed.

Also advertising is part of commercial practice and it refers to forms of communication that are distributed at the initiative of economic operators through media (such as television, radio, newspapers, banners, mail,
Internet, etc.) as part of an intentional and systematic means to affect individual attitudes and choices in relation to the consumption of goods and services.

This advertising notion still includes also forms of communication that promote a business image as perceived by consumers, even when no immediate form of sales of specific goods or services is involved.

Advertising methods and means of distribution are continuously evolving thanks to the imagination of advertisers, technological developments and the development of new marketing techniques. New advertising channels, such as the Internet, continue to emerge alongside traditional distribution methods, like television, dailies and periodicals, banners, direct marketing (mailings, phone calls and door-to-door sales), radio, cinema and product packaging itself.

Also advertising, through ICT evolution, can represent a means to persuade consumers into commercial transactions that they might otherwise avoid. Thus many governments worldwide regulate and control false, deceptive or misleading advertising, moving from the basic principle that customers have the right to know what they are really buying.

Advertising could be unfair also having regard to the principle of fair competition between companies. Generally speaking advertisements must not unfairly discredit, disparage or attack other products, services, advertisements or companies, or exaggerate the nature or importance of competitive differences.


Some kinds of advertising models can represent unfair commercial practices regarding B2B relationships. Generally speaking, advertising means the making of a representation in any form in connection with a trade, business, craft or profession in order to promote the supply of goods or services, including immovable property, rights and obligations.

Given that advertising is a very important means of giving information to the market about goods and services, a competitive internal market needs to have some basic provisions governing the form and content of advertising particularly in regard to comparative advertising. If conditions of fairness are met, this form of advertising will help demonstrate objectively the merits of the various comparable products. Comparative advertising, when it compares material, relevant, verifiable and representative features and is not misleading, may be a legitimate means of informing consumers of their advantage.

So it is right to say that comparative advertising can stimulate competition
between suppliers of goods and services to the consumer’s advantage.

On the contrary, misleading and unlawful comparative advertising can lead to distortion of competition within the internal market. Advertising is considered misleading when it deceives or is likely to deceive the persons to whom it is addressed or whom it reaches and by reason of its deceptive nature, is likely to affect their economic behaviour and/or, for those reasons, injures or is likely to injure a competitor (5).

Conditions of permitted comparative advertising, as far as the comparison is concerned, are established at national law level in order to determine which practices relating to comparative advertising may distort competition, be detrimental to competitors and have an adverse effect on consumer choice. Such conditions of permitted advertising generally include criteria of objective comparison of the features of goods and services.

It is obvious that differences between the state laws on misleading advertising hinder the execution of advertising campaigns beyond national boundaries and affect the free circulation of goods and services.

For these reasons at the European level directives exist in order to harmonize the national advertising laws in Member States. Regulating advertising is necessary for the proper functioning of the internal market. The adoption of a Directive is the appropriate instrument because it lays down uniform general principles and at the same time allows the Member States to choose the form and appropriate method by which to obtain these objectives in accordance with the principle of subsidiarity.


According to article 3 of this Directive, in determining whether advertising is misleading, shall be taken into account all its features, and in particular any information concerning:

“(a) the characteristics of goods or services, such as their availability, nature, execution, composition, method and date of manufacture or provision, fitness for purpose, uses, quantity, specification, geographical or commercial origin or the results to be expected from their use, or the results and material features of tests or checks carried out on the goods or services;

(b) the price or the manner in which the price is calculated, and the conditions on which the goods are supplied or the services provided;

(c) the nature, attributes and rights of the advertiser, such as his identity
and assets, his qualifications and ownership of industrial, commercial or intellectual property rights or his awards and distinctions.”

Article 4 lists the hypothesis of fair comparative advertising:

(a) when the comparison is not misleading within the meaning of Articles 2(b), 3 and 8(1) of this Directive or Articles 6 and 7 of Directive 2005/29/EC (“Unfair Commercial Practices Directive”);

(b) when advertising compares goods or services meeting the same needs or intended for the same purpose;

(c) when advertising objectively compares one or more material, relevant, verifiable and representative features of those goods and services, which may include price;

(d) when advertising does not discredit or denigrate the trademarks, trade names, other distinguishing marks, goods, services, activities or circumstances of a competitor;

(e) for products with designation of origin, advertising relates in each case to products with the same designation;

(f) when advertising does not take unfair advantage of the reputation of a trade mark, trade name or other distinguishing marks of a competitor or of the designation of origin of competing products;

(g) when advertising does not present goods or services as imitations or replicas of goods or services bearing a protected trade mark or trade name;

(h) when advertising does not create confusion among traders, between the advertiser and a competitor or between the advertiser’s trademarks, trade names, other distinguishing marks, goods or services and those of a competitor.

Member States shall ensure adequate and effective means to prevent misleading advertising and enforce compliance with the provisions on comparative advertising in the interests of traders and competitors.

Such means shall include legal provisions under which individuals or organizations regarded under national law as having a legitimate interest in fighting misleading advertising or regulating comparative advertising. In particular, individuals or organizations may:

(a) take legal action against such advertising; or (b) bring such advertising before an administrative authority competent either to decide on complaints or to initiate appropriate legal proceedings.

Also the evolution of ICT has had a deep impact on commercial practice. Effective and high-speed ICT infrastructure and software applications in the travel and tourism industry are crucial for tourism development. ICTs allow customer–management relations and supply chain management to be combined into a single source facilitating operations such as product selection, ordering, fulfilment, tracking, payment and reporting. ICT cuts also costs by enabling the provider to be in direct contact with the consumer.
and also impact employment through the need for required maintenance of ICT equipment.

The development of ICTs has also produced some changes in demand and supply. It has led to a higher demand for flexible, individualized options. Through new technology and social and economic ratings (e.g., social media platforms like Facebook, Twitter, and blogs) customers have the possibility to share information on destinations, quality of service in hotels, restaurants, means of transport, etc. A number of hotels have strengthened their brand image and communicate directly with their customers promoting a new package through social networks.

Some web-based resources recommend or disapprove hotels and restaurants according to their level of commitment to sustainability.

Especially in developed countries, customers are increasingly using ICTs for travel information and making reservations with travel distribution systems.

Regarding this last point, we can remember a recent litigation. In 2010 the union of French hoteliers took legal action against user review TripAdvisor and Expedia over “unfair commercial practices”.

French hoteliers advocate that visitors to these websites, hotel guests and hospitality professionals were deceived by false information provided on these sites.

In short, Synhorcat (the French national union of hoteliers) said that visitors to TripAdvisor had been misled because they were often directed to Expedia for more information rather than the hotel’s website.

Moreover the travel-booking site Expedia and its subsidiaries TripAdvisor and Hotels.com were accused of displaying a hotel as “full on requested dates”, when in fact rooms were available, and suggesting other nearby available properties that had better commercial terms with Expedia.

The alleged unfair practices included: incorrectly displaying hotel phone numbers so users could not call a hotel directly; announcing special promotional rates when the final price was actually just a standard rate.

The French government and its Directorate General later supported the action for Competition, Consumption and Repression of Fraud (DGCCRF), an intervention seen by some as unprecedented in France.

Expedia has been hit by a Paris court order to pay a Euro 367,000 ($484,000) fine for “misleading marketing practices”.


National law combats unfair commercial practices, including unfair advertising, which directly harm consumers’ economic interests and thereby
indirectly harm the economic interests of legitimate competitors with regards to B2C contracts. A commercial practice is commonly considered unfair in B2C relationship when directly ordered to mislead consumers’ transactional decisions in relation to products. As we have seen previously, all commercial communications can influence consumer’s behavior, but according to the principle of proportionality they cannot be considered unfair.

As the European Commission noted in 2005, the laws of the Member States relating to unfair commercial practices showed differences which can generate mechanisms of distortions of competition and obstacles to the smooth functioning of the internal market. In the field of advertising, Council Directive 84/450/EEC of September 10, 1984 concerning misleading and comparative advertising established minimum criteria for harmonizing legislations on misleading advertising, but in any case such directive does not prevent the Member States from retaining or adopting measures which provide more extensive protection for consumers.


This Directive establishes a single general prohibition of those unfair commercial practices distorting consumers’ economic behavior. It also sets rules on aggressive commercial practices.

According to article 5 “A commercial practice shall be unfair if: (a) it is contrary to the requirements of professional diligence, and (b) it materially distorts or is likely to materially distort the economic behavior with regard to the product of the average consumer whom it reaches or to whom it is addressed, or of the average member of the group when a commercial practice is directed to a particular group of consumers.”

Misleading practices, including misleading advertising, which by deceiving the consumer prevent him from making an informed and thus efficient choice, this Directive classifies misleading practices into misleading actions and misleading omissions. Unfair omissions are characterized by lack of information which the consumer needs to make an efficient transactional decision (such as the main characteristics of the product, the geographical address and the identity of the trader, the price inclusive of taxes, the arrangements for payment, delivery, performance and the complaint handling policy).

According to article 6 a commercial practice shall be considered
misleading “if it contains false information and is therefore untruthful or in any way, including overall presentation, deceives or is likely to deceive the average consumer, even if the information is factually correct”, in relation to one or more of the elements, and particularly: (a) the existence or nature of the product; (b) the main characteristics of the product; (c) the extent of the trader’s commitments; (d) the price or the manner in which the price is calculated, or the existence of a specific price advantage.

A commercial practice shall also be regarded as misleading if, taking into account its factual context, all its features and circumstances, it causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise.

According to this directive, national provisions on aggressive commercial practices should cover those practices which significantly impair the consumer’s freedom of choice. Those are practices using harassment, coercion, including the use of physical force, and undue influence.

According to article 9 “in determining whether a commercial practice uses harassment, coercion, including the use of physical force, or undue influence, account shall be taken of: (a) its timing, location, nature or persistence; (b) the use of threatening or abusive language or behavior; (c) the exploitation by the trader of any specific misfortune or circumstance of such gravity as to impair the consumer’s judgment, of which the trader is aware, to influence the consumer’s decision with regard to the product; (d) any onerous or disproportionate non-contractual barriers imposed by the trader where a consumer wishes to exercise rights under the contract, including rights to terminate a contract or to switch to another product or another trader; (e) any threat to take any action that cannot legally be taken.”

Persons or organizations having a legitimate interest in the matter must have legal remedies for initiating proceedings against unfair commercial practices, either before a court or before an administrative authority which is competent to decide upon complaints or to initiate appropriate legal proceedings.

A particular role has been recognized to conduct codes, which enable traders to apply the principles of this Directive effectively in specific economic fields. In sectors where there are specific mandatory requirements regulating the behavior of traders, it is appropriate that these will also provide evidence as to the requirements of professional diligence in that sector. The trader or group of traders, who are responsible for the formulation and revision of a code of conduct, should monitor compliance with the code by those who are bound by it. Such control exercised at national or Community level may eliminate unfair commercial practices. This could avoid the need for recourse to administrative or judicial action and therefore should be encouraged. Maybe a higher level of consumer
... protection could be achieved if consumers’ organizations could be informed and involved in the drafting of codes of conduct.

According to article 6, 2 of this Directive “commercial practice shall also be regarded as misleading if, in its factual context, taking account of all its features and circumstances, it causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise, and it involves … non-compliance by the trader with commitments contained in codes of conduct by which the trader has undertaken to be bound, where: (i) the commitment is not aspirational but is firm and is capable of being verified, and (ii) the trader indicates in a commercial practice that he is bound by the code.” Moreover article 10 underlines that this Directive does not exclude the control of unfair commercial practices by code owners and recourse to such bodies by the persons or organizations regarded under national law as having a legitimate interest in combating unfair commercial practices.

3.1 Unfair Commercial Practice and Unfair Terms

Commonly, scholars distinguish the legislation and the phenomenon of Unfair Commercial Practice from the legislation and the phenomenon of Unfair Terms. The latter concerns the contractual phase and particularly contracts containing terms that directly or indirectly limit (or attempt to limit) the rights of the counterparty (such as a consumer) protected under contract law, establishing a significant imbalance, to the consumer’s detriment, between the rights and obligations of the contracting parties in opposition to the principle of good faith. These terms are considered unfair and thus not binding.

Unfair commercial practice concerns a different moment of relationship between parties; it involves the pre-contractual phase during which the trader tries to persuade the consumer in doing a certain transactional choice.

On the contrary it has been noted, with regard to European Union Law, that unfair term directive not only contains provisions relevant to contract law but it also introduces provisions relevant to unfair commercial practices law (6).

We can remember the norm contained in article 7 of Directive 93/13/CE on unfair terms, according to which Member States were required to adopt adequate and effective means to prevent the ‘use’ or ‘continued use’ of unfair contractual terms by traders. It is evident that the conduct of using unfair terms is an unfair commercial practice according to the definition provided by the Directive 2005/29/CE on unfair commercial practice In fact article 5 of this Directive says that “A commercial practice shall be
unfair if it is contrary to the requirements of professional diligence…” and, according to article 2, “professional diligence means the standard of special skill and care which a trader may reasonably be expected to exercise towards consumers, commensurate with honest market practice and/or the general principle of good faith in the trader’s field of activity”.

Another case of intersection between Unfair Terms and Unfair Practice could be the use of unfair, and thus invalid, terms. In fact the average consumer will not consider whether a clause is binding or not and he could held as part of the contract also those terms that are invalid because of their unfairness. So the use of invalid clauses may distort consumers’ awareness of their contractual rights or duties and thus their economic behaviour (7).

Moreover, according to Directive 93/13/CE, terms that are not drafted in plain and intelligible language (non-transparent terms) shall be held as unfair.

According to article 5 “In the case of contracts where all or certain terms offered to the consumer are in writing, these terms must always be drafted in plain, intelligible language. Where there is doubt about the meaning of a term, the interpretation most favourable to the consumer shall prevail.”

The use of terms defining the services or goods or the price or remuneration under the contract not drafted in plain and intelligible language should also be considered an unfair commercial practice, and particularly a misleading omission pursuant to Article 7 of 2005/29/CE Directive (8).

As result of the above considerations we can say that there is no strict distinction between rules governing the contractual phase and rules governing the pre-contractual phase of private relationships. Moreover it could be misleading to lose the sight of the common purpose of consumers’ protection laws: consumer’s awareness and freedom of transactional choices.

3.2 Case Studies

Let us consider some cases regarding unfair commercial practice in B2C relationships.

The first one is a decision of 28.1.2001 held by the President of the Polish Office for Competition and Consumer Protection.

The decision concerns the use of the term “hotel”.

Mrs Małgorzata Pokrzywnicka conducts commercial activities under the name “Biuro Usług Turystycznych POK-TURIST” and she exploits a hotel-like place of residence.

She recommended the residence through advertisements that created the impression that this residence was a hotel within the four-star category. Such
qualification was made by using a golden plate placed on the building’s façade, through website advertisements, and in distributed leaflets.

In actuality, she was not authorized to use the word “hotel” with regard to the place where she provided the accommodation services and she was well aware of this violation as she was already held liable by the criminal courts for such activity.

The President ruled that the defendant breached the prohibition on unfair commercial practices by using the word “hotel” for a place of residence that was not been approved as such. In particular, the President assessed that the defendant violated Art. 5 sec. 1 and 2 in connection with Art. 4 sec. 1 and 2 of the Polish Unfair Commercial Practices Act through which the European Directive 2005/29/CE has been enacted (9).

The President assessed that the fact that a particular place has been qualified as a hotel, within the meaning of the relevant law provisions, guarantees that it is complaint with standards relating amongst others to safety and quality of services provided to the consumers. Such qualification is an objective indication for the consumer of what type of services and of what quality may be obtained in a particular place.

The prices offered in the defendant’s place of residence were lower than in other hotels. Hence, the consumer might get the impression that the prices offered by the defendant are attractive in relation to quality of the services offered in the event the residence had actually been a four-star hotel.

Since the word “hotel” was used unlawfully, the consumers had a false impression regarding the type of transaction into which they entered.

As a result of the above assessment, the President decided that using the word “hotel” with regard to a place of residence which has not been duly recognized as a hotel in accordance with applicable national legislation, constitutes an unfair commercial practice as it deceives the average consumer and it is likely to affect consumers behavior.

The President ordered the defendant to publish the information about the decision and its content in a local newspaper. No financial penalty was imposed.

Secondly, we can consider the Case C-435/11 CHS Tour Services GmbH v. Team4 Travel GmbH and the opinion written by NILS WAHL (Advocate General of European Court of Justice) on June 13, 2013.

This case concerns a B2B relationship but it has an impact on distortion of consumers’ behaviour and involves the application of directive 2005/29/CE.

The Oberster Gerichtshof (Supreme Court of Austria) requested guidance from the European Court of Justice on the following issue:

If a commercial practice turns out to mislead consumers, does it matter whether the trader has done what he could to prevent that from happening?
As we have seen Article 5 of Directive 2005/29/EC reads:

‘1. Unfair commercial practices shall be prohibited.
2. A commercial practice shall be unfair if:
(a) it is contrary to the requirements of professional diligence, and (b) it materially distorts or is likely to materially distort the economic behaviour with regard to the product of the average consumer whom it reaches or to whom it is addressed, or of the average member of the group when a commercial practice is directed to a particular group of consumers.

In particular, commercial practices shall be unfair which:
(a) are misleading as set out in Articles 6 and 7, or (b) are aggressive as set out in Articles 8 and 9.

Moreover Annex I contains the list of those commercial practices which shall in all circumstances be regarded as unfair. The same single list shall apply in all Member States and may only be modified by revision of this Directive.’

According to Articles 6 and 7 of the Directive a commercial practice shall be regarded as misleading if it contains false information and is therefore untruthful or in any way, including overall presentation, deceives or is likely to deceive the average consumer, even if the information is factually correct, in relation to one or more of certain elements (and particularly of the main characteristics of the product, such as its availability), and in either case causes or is likely to cause him to take a transactional decision that he would not have taken otherwise:

The case concerns two Austrian travel agents, CHS Tour Services GmbH (‘CHS’) and Team4Travel GmbH (‘Team4Travel’), who organise and provide skiing courses and winter holidays in Austria for groups of schoolchildren from the United Kingdom.

In Team4Travel’s English sales brochure a symbol indicating ‘exclusive’ was placed next to a certain number of the listed accommodation establishments. According to the brochure, the term ‘exclusive’ is to be understood as meaning ‘[a]ccommodation that is exclusively available to [Team4Travel] parties at half term or half term and Easter or throughout the whole winter season’. The Austrian court explains in this connection that the use of that expression meant that the accommodation establishment had a fixed contractual relationship with Team4Travel and that other tour operators would not be in a position to provide accommodation at that establishment on specified dates. According to the observations submitted by CHS, Team4Travel’s price list also stated that ‘[a]ll prices highlighted… indicate that [Team4Travel] holds all beds exclusively on this date’.

For unspecified dates in the reference order covering certain periods in 2012, Team4Travel concluded contracts for bed quotas with several
accommodation providers. Those contracts contained a clause that stated that the specified bedroom quotas would be kept available without restriction for Team4Travel and that the provider could not repudiate that stipulation without Team4Travel’s written consent. A booking would become final 28 days before the corresponding arrival. In order to secure exclusivity, Team4Travel stipulated cancellation rights with the accommodation provider and also a contractual penalty.

However, it emerged that, in spite of the abovementioned contracts, CHS reserved bed quotas in the same accommodation establishments as Team4Travel for overlapping booking periods. The Austrian court mentions, moreover, that the reservations were made after Team4Travel had concluded the exclusive contracts. Consequently, the accommodation providers were in breach of their contractual obligations towards Team4Travel.

The accommodation providers informed Team4Travel that no reservations had yet been made by other tour operators. Furthermore the director of Team4Travel took care to ensure that, because of the lack of available accommodation, no other tour operators would be able to find room in the hotels. She was not aware of the existence of other reservations until legal proceedings were initiated.

As CHS nevertheless managed also to book all or part of the available accommodation for the period of time during which operate the Team4Travel “exclusivity”, it considered the declarations on exclusivity to be incorrect and to constitute an unfair commercial practice. CHS therefore applied for an injunction before the Landesgericht Innsbruck (Innsbruck Regional Court) (Austria) to prevent Team4Travel from stating that Team4Travel offered specific accommodation for a particular arrival date on an exclusive basis.

The Landesgericht Innsbruck refused to grant an injunction, as it held the exclusivity claim to be correct in view of the irrevocable reservation contracts concluded beforehand by Team4Travel.

The Oberlandesgericht Innsbruck (Innsbruck Higher Regional Court of Austria) upheld the decision given at first instance on the grounds that Team4Travel had complied with the requirements of professional diligence and could legitimately expect that its co-contractors would respect their contractual obligations.

CHS subsequently lodged an appeal on a point of law before the Oberster Gerichtshof.

The referring court considers the outcome of the proceedings to depend on the correct interpretation of Article 5(2) of the Directive. The Oberster Gerichtshof submitted two different interpretations for consideration by the European Court of Justice:

1- the effect of the reference in Article 5(4) of the Directive to misleading
or aggressive practices, as set out in Articles 6 to 9, is that such practices are, per se, inconsistent with the duty of professional diligence under Article 5(2). In fact Articles 6 to 9 do not mention the duty of professional diligence under Article 5(2)(a).

2- if the reference in Article 5(2)(b) of the Directive to distortion of a consumer’s economic behaviour were to be understood as being clarified by the more specific provisions in Articles 6 to 9, Article 5(2)(a) would still be applicable. As a consequence, a misleading practice under Article 6 would require, in addition, a breach of the duty of professional diligence under Article 5(2)(a).

The Advocate General took position on the relevance of the duty of professional diligence for the concept of ‘misleading commercial practice’

As per the structure of the Directive, it is clear that the notion of ‘unfair commercial practices’, which are prohibited under Article 5(1), covers three categories of conduct: (i) practices which fulfill the two cumulative requirements set out in Article 5(2); (ii) pursuant to Article 5(4), misleading or aggressive practices as in Articles 6 to 9; and (iii) pursuant to Article 5(5), the practices referred to in Annex I to the Directive (the so called blacklist) which are automatically to be considered unfair, without any need for an individual appraisal of all the relevant circumstances.

As the Advocate General says, article 5(4) of the Directive textually clarifies this structure. In accordance with that provision, commercial practices which are misleading (Articles 6 and 7) or aggressive (Articles 8 and 9) are, ‘in particular’, unfair. The statement ‘in particular’ shows not only that misleading and aggressive practices are specific sub- categories of unfair commercial practices but, more importantly, that they also constitute unfair commercial practices. Thus, on the basis of a structural as well as a literal analysis, he doesn’t share the view that Articles 6 and 7 (or Articles 8 and 9) of the Directive merely provide specific examples of distortion of a consumer’s economic behaviour, with the effect that Article 5(2)(a) remains applicable, as would follow from the second interpretation proposed by the national court.

The same conclusion is confirmed by examining the background and objective of the Directive. In particular, the observations contained in the Commission proposal regarding misleading and aggressive commercial practices unequivocally point out that the criterion relating to professional diligence under Article 5(2) (a) of the Directive does not play a separate role.

In the light of the foregoing considerations, the Advocate General concludes, “the fact that a trader may have complied with the duty of professional diligence under Article 5(2) (a) of the Directive is of no significance in the presence of misleading (or aggressive) commercial
practices. CHS and the Austrian, German, Hungarian, Swedish and UK Governments all share this view, as does the Commission; moreover, that view is also consistent with the first interpretation proffered by the national court.”

Thus the Advocate General proposes that the European Court of Justice answer the Oberster Gerichtshof (Austria) as follows:

“Article 5 of 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 and Regulation (EC) No 2006/2004 is to be interpreted as meaning that, where a commercial practice falls within the scope of Article 5(4) of that Directive, it is of no relevance whether the criteria under Article 5(2) a and or Article 5(2)b are also fulfilled”

The third case concerns an Italian antitrust authority decision.

Some airlines have been sanctioned for unfair commercial practices towards consumers and in particular, for deceit, weak transparency, inadequacy and even the outright lack of information about ticket prices, which in some cases lack any indication of various predictable and unavoidable fees that are not added in until the moment of credit card payment.

Investigations were launched in response to numerous complaints received from consumers and consumer organizations.

The specific unfair practices are the following:

1. Deceptive advertising distributed in print and via Internet to promote offers that users found to be in fact “unobtainable”.
2. Air fares lacking any indication of various add-on fees (e.g., on-line check-in fees, credit card fees and the VAT applied to national flights) that are added in automatically during the on-line booking process to result in significantly higher ticket prices;
3. Difficulty or outright impossibility of receiving post-sale assistances for ticket refunds (full or partial) in case of flight abandonment, whether for reasons attributable to the airline or by passenger choice, and in specific the necessity of using a toll number or paying high fees;
4. Publication of the general terms and conditions of transport and general information for Italian consumers in the English language;
5. Unjustified additional charges for making changes in dates, times, passenger names or routes or reissuing boarding cards at the airport.
4. Final Considerations

The cases considered in the previous paragraphs point out some assessments.

Firstly, it is not possible to sectorize law by dividing rules on B2C relationships and rules on B2B relationships. Both businesses and consumers are part of the market and their fair interplay aims at reaching common goals in term of competitiveness, increase of production, market evolution.

By dividing these areas of interests, we risk losing sight of the purpose of market regulation. It is also important to remember that fair trade does not only mean more competition and production but also market evolution in terms of economic, ecological, and social sustainability.

Additionally, the European Union looks at internal markets not only as places where economic interests are sole and dominant.

According to article 2 of the Lisbon Treaty amending the European Union Treaty and the European Community Treaty, signed in Lisbon, on December 13, 2007: “The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance.”

The subject considered in this last paragraph concerns a matter mainly regulated by national law and controlled by national public authority while, as we have seen in the introduction, the principal sources of tourism law are international law, private autonomy and customary law. So we can say that tourism law, as well as tourism itself, is mainly a product of society. In any case, private autonomy and customary law are not to be left to bear decisions of individuals and organizations, but they need to conform to some international rights and principles: human rights protection, principles of environmental protection (particularly eco-sustainability), and the principle of hospitality.

Nevertheless, national law regulates some aspects of tourism (like authorization procedures, permits and licences, etc.). National law also regulates consumer protection regarding contract law, (travel packages, time shares, unfair commercial practices, unfair terms, etc.).

The problem arises from the fact that B2C tourism contracts are mostly international. Generally speaking “with the opening of markets to foreign products and services, with increasing economic integration, regionalization of trade, transportation facilities, mass tourism, growing telecommunications, computer network connections, and electronic
commerce, there is no way to deny that consumption already crosses national borders. Foreign goods are on supermarket shelves, services are offered by providers with overseas telemarketing headquarters, using television, the radio, the Internet, and mass advertising in the day-to-day lives of most citizens in the cities of our regional metropolises. One needs no longer travel to be an active consumer, a tourist consumer. One needs no longer go anywhere to be a consumer who contracts internationally or deals with suppliers in other countries. The very methods of production and assembly are now international. International consumer contacts and tourism have become activities of the masses” (11). Thus it is right to say, “consuming internationally is typical of our times” (12).

The individuation of the national law applicable in international contracts depends on the rule of international private law that is a set of procedural norms determining which legal systems and which jurisdictions apply to a given dispute. These rules usually apply when a legal dispute has a “foreign” element such as in case of a contract agreed by parties from different jurisdictions (13).

The determination of the applicable national law it is not a satisfactory solution. The presence of different national laws can cause disparities and uncertainty and create many barriers affecting business and consumers increasing the cost to business of exercising market freedoms, in particular when businesses wish to engage in cross border marketing, advertising campaigns and sales promotions. Such barriers also make consumers uncertain of their rights and undermine their confidence in the market.

Applying one national legal system instead of another may never be a satisfactory approach. Applying a law conceived within international realities involved in the actual situation better protects the parties’ interests. At the European law level, this problem finds solution in the harmonization process through European Directives (14). At the international level, the Hague conference on Private International Law, that is a treaty organization, oversees conventions designed to develop a uniform system.

As Jan Kropoller in 1978 affirmed, in order to offer effective and adequate protection to the weaker party through Private International Law, this system of norms must evolve toward a set of rules “imbued with social values” (15).

As we have seen, such goal could be entirely achieved only by the active participation of interpreters: both Courts and Legal Scholars.
Notes

1) See Marketing for Tourism, by J.C. Holloway- R.V. Plant, Pitman publishing: London, second edition, 1992, p 4: “marketing is about anticipating demand, recognising it, stimulating it and finally satisfying it. It is understanding what can be sold, to whom, when, where and in what quantities.”

2) “Successful new strategic tourism planning initiatives will require that decision makers not only understand historical and contemporary trends and movements in the business environment but will require the ability to predict new key emerging developments and shifts – this will lead to the development of innovative and effective strategies...Tourism is essentially a social phenomenon and, although like all industries it is influenced by the society in which exist, tourism is unusual in that it involves a large-scale, if temporary, transfer of individuals between different societies...One of the most important demographically related changes is the *democratization* of tourism...Global urbanization is another significant demographic shift starting in the 20th century and one that has a variety of effects for tourism providers. Resulting increases in congestion, pollution, poverty, unemployment and crime can all have a significant impact on the demand for tourism...Having regard to lifestyle) research carried out in several countries, in particular a large-scale study by the Standford Research Institute in California, USA, indicates that there is a clearly defined trend away from an outward-directed lifestyle towards inward-directed and integrated values. Several recent studies indicate that post-materialistic values, in other words, growing non materialistic needs, environmental care, diminishing concerns about career, prestige and status, etc. will gain importance....New luxuries will become time and simplicity, stillness and peace of mind – intangible like purpose, meaning, fulfilment and quality of life are gaining importance...This movement will need to be reflected in the type of tourism products offered”: Strategic Management in Tourism, by L. Moutinho, Cabi: Wallingford-UK, 2011, pp. 2-5.


4) “ICT (information and communication technology) was first used to speed up the processing and communication of information within companies, then between the company and its trade partners, and more recently, through the Internet, between company and its end user customers. This has had a powerful effect in service industries, such as tourism,


A particular case of misleading advertising concerns eco-tourism. The terms “sustainable” and “nature” are barely used in marketing material produced by tourism corporations. Legal actions for misleading advertising may be brought under fair trading legislation.

Ecolabels in tourism are commonplace but uncoordinated. If ecolabels contribute to informed tourist choice, they could be a valuable environmental management tool, but only if critical conditions are met. The paper *Tourism ecolabels*, by R. BUCKLEY, in *Annals of Tourism Research* 2002 Vol. 29 No. 1 pp. 183-208 reviews some of the more significant issues which influence what ecolabels can achieve in tourism and under what circumstances, and whether existing ecolabels are likely to live up to this potential. The paper discusses: the context for effective ecolabels; the evolution of ecolabel schemes; examples of effective ecolabel schemes (Green Globe 21 and the National Ecotourism Accreditation Programme for Australia); equity and efficiency of ecolabels; and ecolabels and international trade. It is concluded that the substantive criteria for any ecolabel must include the environmental parameters considered; the ways in which they are to be measured; and the thresholds required to qualify for the ecolabel. See chapter 5.

On 14.3.2013 the European Commission noted that “extension of the Directive on unfair commercial practices beyond B2C transactions has been raised mainly in relation to three types of situations. Excluded from the scope of the Directive are transactions between businesses (‘B2B’), between consumers (‘C2C’) or when consumers sell or supply a product to a trader (‘C2B’). While Member States remain free to regulate these relations, most of them have chosen to implement the UCPD by keeping to its original scope.

*Business-to-business transactions:* Only four Member States currently apply, with some modulation, the UCPD also to B2B relations. The extension, at EU level, of the scope of the UCPD to B2B relations has been mooted in the past by some stakeholders mainly with a view to solving the problem of the practices of Misleading Directory Companies affecting
mainly small enterprises and independent professionals. Such practices are currently forbidden by Directive 2006/114/EC on misleading and comparative advertising (‘the MCAD’). In its recent Communication on the overall functioning of the MCAD, the Commission concluded that the available crossborder enforcement means should be strengthened and the current legal framework reviewed in order to better combat such schemes”:


7) “The use of invalid terms should also be deemed capable of materially distorting the economic behaviour of the average consumer during the performance of the contract (second element). In this respect, it seems correct to observe that the average consumer, faced with contractual forms drafted by the trader, which do not precisely reflect the legally binding clauses (since they contain some non-binding clauses), would usually be unclear about the parties’ rights and obligations arising under the contract, and would normally believe himself to be bound by all clauses. For the same reason, the trader would in practice be able to enforce the rights and powers literally provided in his favour by the unfair contract terms, even if such terms are legally non-binding and in principle unenforceable, thus profiting from the ignorance of the average consumer about the precise legal value (i.e. the non-binding character) of those terms.

The use of invalid terms is therefore capable in the above circumstances of materially distorting the economic behaviour of the average consumer in relation to the exercise of his ‘contractual rights”: Ibidem, p. 30.


See article 7 Directive 29/2005/EC on Misleading omissions:

“1. A commercial practice shall be regarded as misleading if, in its
factual context, taking account of all its features and circumstances and the limitations of the communication medium, it omits material information that the average consumer needs, according to the context, to take an informed transactional decision and thereby causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise.

2. It shall also be regarded as a misleading omission when, taking account of the matters described in paragraph 1, a trader hides or provides in an unclear, unintelligible, ambiguous or untimely manner such material information as referred to in that paragraph or fails to identify the commercial intent of the commercial practice if not already apparent from the context, and where, in either case, this causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise.

3. Where the medium used to communicate the commercial practice imposes limitations of space or time, these limitations and any measures taken by the trader to make the information available to consumers by other means shall be taken into account in deciding whether information has been omitted.

4. In the case of an invitation to purchase, the following information shall be regarded as material, if not already apparent from the context:
   (a) the main characteristics of the product, to an extent appropriate to the medium and the product;
   (b) the geographical address and the identity of the trader, such as his trading name and, where applicable, the geographical address and the identity of the trader on whose behalf he is acting;
   (c) the price inclusive of taxes, or where the nature of the product means that the price cannot reasonably be calculated in advance, the manner in which the price is calculated, as well as, where appropriate, all additional freight, delivery or postal charges or, where these charges cannot reasonably be calculated in advance, the fact that such additional charges may be payable;
   (d) the arrangements for payment, delivery, performance and the complaint handling policy, if they depart from the requirements of professional diligence;
   (e) for products and transactions involving a right of withdrawal or cancellation, the existence of such a right.

5. Information requirements established by Community law in relation to commercial communication including advertising or marketing, a non-exhaustive list of which is contained in Annex II, shall be regarded as material.”

9) Article 5 (1) of Unfair commercial practices Polish Act says that “ A
commercial practice shall be regarded as misleading if it in any way causes, or is likely to cause, the average consumer to take a transactional decision that (s)he would not have taken otherwise.

2. In particular, the following practices may be misleading:
   1) disseminating untrue information;
   2) disseminating true information in a way that may mislead;
   3) product launch activities which may be misleading in terms of the products or their packaging, trademarks, trade names or other designations individualising the business or its products, in particular comparative advertising within the meaning of Article 16(3) of the Action to Combat Unfair Competition Act of 16 April 1993 (Journal of Laws 2003/153, item 1503, as amended);
   4) failure to comply with a code of good practice which the trader endorsed voluntarily, if the business has indicated within the framework of commercial practice that is bound by this code.

3. In particular, misleading practices may concern:
   1) the product’s existence, nature or availability;
   2) the product’s characteristics, in particular its geographical or commercial origin, quantity, quality, manufacturing process, components, date of manufacture, fitness for purpose, capabilities and expected results of its use, additional equipment, tests and the results of tests or checks carried out on the product, licences, awards or honours obtained by the product, and the risks and benefits associated with the product;
   3) the trader’s obligations in connection with the product, including service and complaint procedures, supplies, essential services and parts;
   4) consumer rights, in particular the right to have the product repaired or replaced with a new one or the right to a price reduction or to withdraw from the contract;
   5) the price or the manner in which the price is calculated, or the existence of a specific price advantage;
   6) the nature of the sale, the reasons why the trader applied commercial practices, declarations or symbols in relation to direct or indirect sponsorship, information on the economic situation or legal status of the trader or of its representative, including its name(s) and assets, qualifications, status, licences held, membership or relationships, intellectual and industrial property rights and awards or honours.

4. When assessing whether a commercial practice is actively misleading, all of its elements and the circumstances of the product launch, including the way in which it was presented, should be taken into account.

10) The Court has only had the opportunity to deal with this issue in an indirect manner. In Case C-453/10 Pereničová and Perenič [2012] ECR
I-0000, it held – in response to a question on the impact that a finding of unfair commercial practice would have on the assessment of the fairness and validity of a contractual term under Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29) – that the practice in question was misleading under Article 6 of the Directive, and did not go on to undertake an analysis as to whether there was also a breach of the duty of professional diligence (see paragraphs 40, 41 and 43, and point 2 of the operative part of that judgment). However, Advocate General Trstenjak has expressed such a view on numerous occasions (see her Opinions in VTB-VAB and Galatea, points 78 and 79; in Plus Warenhandelsgesellschaft, points 73 and 74; in Mediaprint Zeitungs- und Zeitschriftenverlag, points 65 and 66; and in Pereničová and Perenič, points 104 to 107).


14) See above Chapter I, par. 2.

**CONTENTS:** 1-Towards Sustainable Tourism; 2- The Worldwide Concept of Sustainability; 3- Sustainability and Tourism Contracts; 4- Public Interests and Private Autonomy.

1. **Towards Sustainable Tourism**

Sustainability is becoming a keyword also within tourism. This term is used more in the sense of human sustainability on Earth and eco-sustainability is the most common definition of sustainability. This definition is just a part of the wider concept of sustainable development, which means the development of human activity, including industrial and economic activity that meets the needs of both the present and the future generations.

As we have seen in the introduction, tourism can affect environmental sustainability. Natural and historical attractions and tourism sites might be damaged by the multitude of tourists visiting them.
Governments are aware of this and recognize the importance that special economic incentives may provide to tourism industry growth according to eco-sustainability principles.

As we have already seen, sustainable tourism and ecotourism are two possible ways to address the many environmental and social problems associated with tourism.

Individuals are generally aware of their impact on the environment regarding tourism. Tourists tend to choose tourism offers that are marketed as ecological or sustainable.

As it has been noted (1) the terms “sustainable” and “nature” are used more and more in marketing material produced by the tourism industry. The degree to which the use of such terms can affect, in the present time, consumer purchasing decisions and corporate environmental performance is largely unknown.

Eco-tourism, as well as sustainable tourism, could be considered commonplace. Such concepts need to be determined through some basic standards recognized worldwide. Established by individual companies, industry associations, voluntary organizations and government agencies, eco labels range in scale from single villages to worldwide sites, from single activities to entire destinations; and they include voluntary codes, awards, and accreditation and certification schemes. Such eco-standards should be well defined and transparent. An effective framework of environmental regulation, independent audits and penalties for non-compliance should also be provided. The use of terms like eco-tourism and sustainable tourism in brochures, advertising materials etc without respecting the ecological criteria should be considered a case of unfair commercial practice.

We intend to consider some basic concepts used in sustainability definitions recognized at international levels.

Many projects concerning sustainable forms of tourism have been proposed, but here we would like to underline the role of private autonomy and contracts in designing forms of sustainable tourism development.

2. The worldwide concept of sustainability

In ecology, sustainability is commonly defined as the capacity of biological systems to remain diverse and productive over time. Eco-sustainability for humans is something more complex. It could be defined as the long-term maintenance of well-being while also considering economic, political, social and cultural dimensions.

The word sustainability in economic terms involves ecological economics where social, cultural, health aspects on one side, and monetary/financial
aspects, on the other side, are integrated.

The concept of sustainable development is commonly referred to in a statement of the report elaborated by Brundtland Commission of the United Nations on March 20, 1987 that reads: “sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs.” (2).

The Commission, recalling its resolution 38/161 of December 19, 1983 on the preparation process for the Environmental Perspective to the Year 2000, welcomed the establishment of a special commission, which later came to be called the World Commission on Environment and Development, to make a report available on environment and the global issues to the year 2000 and beyond, including proposed strategies for sustainable development.

Moreover, the Commission recognized its instrumental role in revitalizing and reorienting discussions and deliberations on environment and development. It emphasized the necessity of a new approach to economic growth, as an essential prerequisite for eradication of poverty and for enhancing the resource base on which present and future generations depend.

At the 2005 World Summit on Social Development it was noted that sustainability requires the reconciliation of environmental, social, and economic demands. These are the “three pillars” of sustainability. Such pillars have served as a common ground for numerous sustainability standards and certification systems in recent years (3).

During the world summit our common fundamental values were strongly reaffirmed, including freedom, equality, solidarity, tolerance, respect for all human rights, respect for nature and shared responsibility are essential to international relations.

Current developments and circumstances require a consensus on major threats and challenges. Peace, security, development and human rights are the pillars of the United Nations system and the foundations for collective security and well-being. These values are interlinked and mutually reinforcing. Of course, development is a central goal by itself and sustainable development in its economic, social and environmental aspects constitutes a key element of the framework of United Nations activities.

The Earth Charter is another central document to help us understand sustainable economy.

The Earth Charter speaks of “a sustainable global society founded on respect for nature, universal human rights, economic justice, and a culture of peace” (4). This Charter is a declaration of fundamental ethical principles for building a just, sustainable and peaceful global society. The Earth Charter Secretariat, Earth Charter Commission members, National
Committees, partner organizations and many other groups, organized consultations focused on the ideas and principles to be included in the Earth Charter. These meetings took place over a five-year period from 1995 to 2000. The recommendations and comments generated by these consultations were forwarded to a drafting committee created by the Earth Charter Commission in December 1996. Professor Steven C. Rockefeller was appointed by the Commission to chair this committee.

This Chart is a document written with the purpose of creating new opportunities to build a democratic and human world.

To realize these aspirations, the Chart underlines the necessity to live with a sense of universal responsibility, identifying us with the whole Earth community as well as our local communities. Everyone shares responsibility for the present and future well-being of the human race and the larger living world.

Such standards are particularly developed in food industry, but something is changing in other sectors such as tourism sector.

The UNEP (United Nations Environment Programme) and the UNWTO list 12 principles of sustainable tourism: economic viability, local prosperity, employment quality, social equity, visitor fulfilment, local control, community well-being, cultural richness, physical integrity, biological diversity, resource efficiency, and environmental purity (5).

According to such principles sustainable tourism can be defined as: “tourism that takes full account of its current and future economic, social and environmental impacts, addressing the needs of visitors, the industry, and the environment and host communities”.

Sustainable tourism development guidelines and management practices are applicable to all forms of tourism in all types of destinations. Sustainability principles refer to the environmental, economic, and socio-cultural aspects of tourism development, and a suitable balance must be established between these three dimensions to guarantee sustainability.

As result of the above considerations sustainable tourism should:

1) Make optimal use of environmental resources maintaining essential ecological processes and helping to conserve natural heritage and biodiversity.

2) Respect the socio-cultural authenticity of host communities; the tourism industry must conserve their built and living cultural heritage and traditional values, and contribute to inter-cultural understanding and tolerance.

3) It is important to provide socio-economic benefits to all stakeholders that are fairly distributed, including stable employment and income-earning opportunities and social services to host communities, and contributing to poverty alleviation.
4) Sustainable tourism development requires the informed participation of all relevant stakeholders.

5) Sustainable tourism should also maintain a high level of tourist satisfaction and ensure a meaningful experience to the tourists, raising their awareness about sustainability issues and promoting sustainable tourism practices amongst them.

Moreover, achieving sustainable tourism is a long-term process. It is a continuous process and it requires constant monitoring of the impact of tourism activities on the environment, introducing the necessary preventive and/or corrective measures whenever necessary.

We can’t understate that sustainable development as defined by the UN is not accepted worldwide without criticism.

Some economists are sceptical about the possibility of a sustainable development and consider this term an oxymoron (6).

Other authors think that the definition of sustainability is improving the quality of human life; sustainability is a task in progress and therefore a mere political process, so some definitions of the concept of sustainability set out common goals and values (7). It implies responsible and proactive decisions that minimize negative impact while balancing social, environmental, and economic growth to ensure desirable needs in the future. For these reasons “sustainability” is also considered as an “unfocused concept” like “liberty” or ”justice” that merely describes a “dialogue of values that defies consensual definition” (8).

Maybe it is possible to propose an alternative definition of sustainability with respect to the UN’s “three pillars”. Some authors, in contrast with the three common criticisms of the concept of sustainability (it is vague, attracts hypocrites and fosters delusions), argue for an approach to sustainability that is integrative, action-oriented, goes beyond technical fixes, incorporates a recognition of the social construction of sustainable development and engages local communities in new ways. As Robinson in 2004 underlined: “if sustainability is to mean anything, it must act as an integrating concept. In particular, it is clear that the social dimensions of sustainability must be integrated with the biophysical dimensions… Clearly the very concept of sustainability is predicated on a need to think across temporal scales. And both the social and ecological dimensions of the term bring to the fore the need for spatial integration. The disciplinary division of knowledge in the university system means that many cross-scalar issues get lost in the ‘white spaces’ between disciplines. The concept of sustainability may have a role in helping to bridge some of those gaps” (9). In this perspective it is necessary to move beyond concepts and towards action.

Another definition arises from the measurement of sustainability (including the sustainability of environmental, social and economic domains, both
individually and in various combinations). This term indicates indicators, benchmarks, audits, standards and certification systems like Fairtrade.

The World Sustainability Society (10) estimates the quality of sustainability governance for individual countries using the Environmental Sustainability Index and the Environmental Performance Index.

We think that the last two concepts (Robinson’s theory from concepts to actions and the sustainability measurement theory) are similar and they could interplay in creating sustainability.

Here below we are going to consider examples of sustainable economies taking into account some possible actions whose results can be measured through benchmarks, standards, etc.

We can, for example, consider the impacts of human consumption on the environment. This impact is reduced not only by consuming less, but also by making the full cycle of production more sustainable by taking into account the effects of individual lifestyle choices and spending patterns, the resource demands of specific goods and services, and the impact on the global economy.

The average per capita consumption in the developing world could be considered sustainable but population numbers are increasing and individuals are aspiring to high-consumption Western lifestyles. Consumerism in developing countries should raise the standard of living without increasing its environmental impact. This objective can be achieved by using strategies and technology that permit economic growth while avoiding environmental damage and resource depletion. For instance, we can think of the promotion of the so called “short distribution chain”. It expresses the proximity between the producer and the consumer.

This reduces the negative impact of human consumption on the environment and in particular, it permits a consistent reduction of carbon footprints. A carbon footprint commonly indicates the total greenhouse gas emissions caused by an organization, event, product or person.

Such results could be measured through the creation of a sustainable consumerism standard. We have to consider that calculating the total carbon footprint is impossible because of the large amount of data required and the fact that carbon dioxide can also be produced by natural events. In any case scientists have found a conventional way to quantify carbon footprints (11).

Sustainable actions and their measurement criteria should be determined according to principles shared at an international level. We cannot underestimate the importance of UN policy on sustainable consumerism in determining the main goal of sustainable development and the interaction between sustainability, human rights and other fundamental international principles specifically regarding tourism such as the principle of hospitality. In 2010 the International Resource Panel hosted by the United Nations Environment...
Programme (UNEP), published the first global scientific assessment on the impacts of consumption and production (12).

The International Resource Panel was established in 2007 to provide independent, coherent and authoritative scientific assessment on the sustainability and the environmental impacts of resource use. The information contained in the International Resource Panel’s reports is intended to be policy relevant.

Sustainability issues are also expressed in ethical terms and consist in implementing social change: urban planning and transport, local and individual lifestyle and ethical consumerism. “The relationship between human rights and human development, corporate power and environmental justice, global poverty and citizen action, suggest that responsible global citizenship is an inescapable element of what may at first glance seem to be simply matters of personal consumer and moral choice” (13).

Strategies for more sustainable social systems include: improved education and the political empowerment of women, especially in developing countries; greater regard for social justice, notably equity between rich and poor both within and between countries; and intergenerational equity.

These purposes can be thought in term of measurable actions designed to achieve them. As we have seen with regard to the reduction of carbon footprints, it is possible to find conventional systems of measurement even if the actions are complex and composed by a plurality of factors.

UNWTO is also trying to coordinate principles and indicators of sustainability deriving from the three dimensions of sustainable development:

1. Make optimal use of environmental resources that constitute a key element in tourism development, maintaining essential ecological processes and helping to conserve natural resources and biodiversity.

2. Respect the socio-cultural authenticity of host communities, conserve their built and living cultural heritage and traditional values, and contribute to inter-cultural understanding and tolerance.

3. Ensure viable, long-term economic operations, providing socio-economic benefits to all stakeholders that are fairly distributed, including stable employment and income-earning opportunities and social services to host communities, and contributing to poverty alleviation.

The use of indicators is an effective tool in addressing sustainability principles, programmes and projects at international level.

For these reasons the World Tourism Organisation has been promoting the use of sustainable tourism indicators since the early 1990s, as essential instruments for policy-making, planning and management processes at destinations. WTO has developed together with Rainforest Alliance and the United Nations Environment Programme (UNEP), “The Global Sustainable
Tourism Criteria” (GSTC), that are a set of 37 voluntary standards representing the minimum that any tourism business should aspire to reach in order to protect and sustain the world’s natural and cultural resources while ensuring tourism meets its potential as a tool for poverty alleviation (14).

The process of creation of GSTC counts more than 40 leading public, private, non-profit, and academic institutions joined together to analyse thousands of worldwide standards and engage the global community in a broad-based stakeholder consultation process.

The Global Sustainable Tourism Criteria have come to a common understanding of sustainable tourism, and represent the minimum that any tourism organisation should aspire to reach. Criteria are organised around four main themes:

1. Effective sustainability planning;
2. Maximising social and economic benefits for the local community;
3. Enhancing cultural heritage;
4. Reducing negative impacts to the environment.

Also the European Commission has also been developing and testing a list of key indicators for measuring sustainability of tourism policies starting from the work conducted by the UNWTO. In particular we have to mention two specific schemes implemented by the European Commission: QUALITEST and ECOLABEL.

The QUALITEST tool has been designed for evaluating the quality performance of tourist destinations and their related services.

ECOLABEL is a voluntary certification for environmentally friendly tourist accommodations indicating that the Tourist Accommodation Service:

- Limits energy consumption.
- Limits water consumption
- Reduces waste production
- Favours the use of renewable resources and of substances which are less hazardous to the environment
- Promotes environmental education and communication.

3. Sustainability and Tourism Contracts

Researchers have achieved various results with regards to the implementation of the purposes expressed in the concept of sustainable tourism: environmental compatibility, promotion of nature conservation and benefits for the local population (15).

Many projects have been proposed. We can consider a tourism project
in Mexico. It consisted of territorial planning that boosted sustainable development in the city of Toluca and the surrounding valley region.

The project derives from an analysis of the urban planning problem in Mexico and Latin America. The causes are demographic explosion and continuous migration from the countryside to the city (16).

It is essential to modify such movements through sustainable practices, which could be summarized in some basic principles of sustainable urbanism, such as: pedestrianization of the cities, better urban connectivity and sustainable transport, diversity in housing and trade, more quality in architecture and urban design, renovation and maintenance of traditional structure of human settlements, increased urban density, better quality of life for the inhabitants.

In the Toluca Valley ethnic groups, such as Matlazinca, Otomí and Mazahua peoples, dating back from pre-Columbian eras, take advantage of the richness of natural resources.

Promoted in the 1940’s in the countryside and in the 1950-1960’s within Mexico and in the Toluca Valley, the process of industrialization of Toluca is the main factor for transformations that have deteriorated the valley’s resources.

As a result, the ecosystems have disappeared altering the population’s lifestyle.

Urban growth has been chaotic; there isn’t an organized system of roads and of public transport resulting in traffic and pollution problems.

The concept of sustainable development is very general and is quite difficult to define. At the same time it provides the opportunity to identify different goals of sustainability.

In the case of Toluca, these goals are: to reduce the negative impact of the productive activities on the environment; to restore degraded ecosystems; gradually substitute the most aggressive activities for the environment; to modify the extravagant and consumerist lifestyle, to improve the conditions of life of the population, especially the marginalized groups, and to conserve biodiversity.

“Harmonic Tourism” is tourism integrated in the local environment and proposes actions that boost local and urban development. It strives to improve the quality of life through a rational use of environmental and cultural resources, favouring the conservation of the ecosystems and their basic biological processes to generate social and economic benefits for the population.

“The cites do not have to be condemned to be an immense concentration with no identity, full of contradictions and parasites of their surroundings, they may and must be transformed into a space composed by a mosaic of integrated communities, with better conditions of habitability,
communication and cultural identity, where the tourist activity can be developed focused on the benefit of the tourist, however, fundamentally on the benefit of the very inhabitants of said communities, where harmony between visitors and hosts is promoted, and between new technologies and traditional technologies, between natural and socio-cultural environments as well”.

In this context, harmonic tourism becomes the fostering element of economic activities under a scheme of restoration, rehabilitation, conservation, protection and advantageous use of natural resources, as well as the rescue and valuing of the local culture for the benefit of the visitor and resident.

In this example we can see how sustainable tourism can be a purpose and a means to achieve social, cultural and urban sustainability at the same time.

As of now we have considered sustainable actions created by designing a particular system of distribution, production, urbanization etc.

We think that contracts can also play a relevant role in designing a sustainable tourism.

As we have seen before, tourism operator organizations contribute to sustainability through strategy and policy development. For instance IHRA (International Hotel and Restaurant Association) is an association with various purposes. It also aims at developing eco-tourism by promoting sustainability among their members, fighting the various issues of climate change and by promoting measures ordered to reduce the emissions of CO2.

It is possible to introduce clauses in the statutes of these associations by imposing all members, or all of those members who want to cover a particular position, to be compliant with predetermined targets of sustainable development.

For instance, IHRA has created the Emeraude Hotelier Certification.

IHRA has considered that almost the eighty percent of all hotels are small and medium enterprises (SMEs), at different stages of organizational development, and only 20% consist of large enterprises. There are only few international standards for the hospitality industry, and national regulations differ greatly from one nation to another. It seems necessary to find universally recognized standards that meet the different needs of hotels worldwide.

The creation of Emeraude Hotelier Certification addresses this issue. Hotels will be awarded with the Emeraude Hotelier recognition if they successfully implement the guidelines stipulated to enhance sustainable tourism.

Such certification should serve to motivate hotel management as well as
staff to continuously develop sustainable practices.

The Emeraude Hotelier certification is based on a three-level scale. According to the number of criteria the hotel fulfils, it will be awarded with one, two or three Emeraudes.

Another use of contracts as an instrument to achieve high standard of sustainability involves business partners of tourism companies.

For instance, in franchising contracts special conditions usually contain obligations for franchisors to achieve the same standards, including the sustainability standards the Franchisee. Special penalties or the resolution of the franchising contract will be provided for the case of violation of such conduct rules.

More generally it is possible to include special “sustainability clauses” in other B2B contracts of tourism industry.

Let’s think about supply contracts, tender contracts, and service contracts. It is possible to introduce special clauses providing that the suppliers or the tenders (or generally speaking the counterparty of the tourism enterprise) shall guarantee particular standards of sustainability in supply contracts, as well as in other B2B contracts.

Also in this case special penalties or contract resolutions will be provided for in case of violation of such conduct rules.

Until now we have given examples regarding B2B contracts. Something similar could be said with regard to B2C contracts where special conditions could be reserved to clients who choose sustainable consumption, such as reducing the use of energy or adopting more environmentally sound means of transport.

4. Public Interests and Private Autonomy

This book focuses on private tourism law and in particular, on contracts. The Oxford Legal Dictionary defines private law as “the part of the law that deals with such aspects of relationships between individuals that are of no direct concern to the state. It includes the law of property and trust, family law, the law of contract, mercantile law and the law of tort.”

Thus private law should concern private interests while public interests are regulated by public law.

Accepting such definition, we could assert that there is a strict distinction between private and public spheres.

As result of what we have said, particularly in the last paragraph, the above division needs to be revisited.

Private contracts could be considered means to achieve goals of public interest such as sustainability. Special clauses in tourism operators’
association contracts can provide systems of certification of sustainable tourism enterprises. “Sustainable clauses” could be provided especially in B2B contracts.

New approaches in the distinction between private and public spheres are recognized worldwide, even in countries like Italy, where such distinctions take into account the different rules regulating private autonomy and public administration activity. Art. 118 of Italian Constitution reads: “administrative functions are attributed to the Municipalities, unless they are attributed to the provinces, metropolitan cities and regions or to the State, pursuant to the principles of subsidiarity, differentiation and proportionality, to ensure their uniform implementation… The State, regions, metropolitan cities, provinces and municipalities shall promote the autonomous initiatives of citizens, both as individuals and as members of associations, relating to activities of general interest, on the basis of the principle of subsidiary.”

The subsidiary principle states that a wider and greater body, such as a government, should not exercise functions that can be carried out efficiently by a smaller one, such as an individual or a private group, acting independently.

So individuals, associations or other private legal entities, acting independently according to the rules of the private legal system, could provide public interest solutions and the State, regions, metropolitan cities, provinces and municipalities shall promote these autonomous initiatives.
Notes


   http://www.who.int/hiv/universalaccess2010/worldsummit.pdf

   http://www.earthcharterinaction.org/content/pages/Read-the-Charter.html


9) Squaring the circle? Some thoughts on the idea of sustainable


10) See http://www.worldsustainable.org/

11) Wright, Kemp, and Williams, writing in the journal Carbon Management, have suggested the following practicable definition of carbon footprint:

“A measure of the total amount of carbon dioxide (CO₂) and methane (CH₄) emissions of a defined population, system or activity, considering all relevant sources, sinks and storage within the spatial and temporal boundary of the population, system or activity of interest. Calculated as carbon dioxide equivalent (CO₂e) using the relevant 100-year global warming potential (GWP100).”


13) Understanding Sustainable Development, by J. Blewitt. Earthscan: London, 2008, p. 96. A recent UNEP report proposes a green economy that “improves human well-being and social equity, while significantly reducing environmental risks and ecological scarcities”: it “does not favour one political perspective over another but works to minimise excessive depletion of natural capital”. The report makes three key findings: “that greening not only generates increases in wealth, in particular a gain in ecological commons or natural capital, but also (over a period of six years) produces a higher rate of GDP growth”; that there is “an inextricable link between poverty eradication and better maintenance and conservation of the ecological commons, arising from the benefit flows from natural capital that are received directly by the poor”; “in the transition to a green economy, new jobs are created, which in time exceed the losses in “brown economy” jobs. However, there is a period of job losses in transition, which requires investment in re-skilling and re-educating the workforce”: United Nations Environmental Program (2011). Towards a Green Economy: Pathways to Sustainable Development and Poverty Eradication – A Synthesis for Policy Makers.

14) The Guidebook on Indicators of Sustainable Development for Tourist Destination, published in 2004, is the most comprehensive resource on this
topic, the result of an extensive study on indicator initiatives worldwide, involving 62 experts from more than 20 countries. The publication describes over 40 major sustainability issues, ranging from the management of natural resources (waste, water, energy, etc.), to development control, satisfaction of tourists and host communities, preservation of cultural heritage, seasonality, economic leakages, or climate change, to mention just a few.

For each issue, indicators and measurement techniques are suggested with practical information sources and examples. The publication also contains a procedure to develop destination-specific indicators, their use in tourism policy and planning processes, as well as applications in different destination types (e.g. coastal, urban, ecotourism, small communities). Numerous examples and 25 comprehensive case studies provide a wide range of experiences at the company, destination, national and regional levels from all continents.

UNWTO organized a series of regional and national workshops on sustainable tourism indicators to train tourism officials and professionals on their application, using a demonstration technique and participatory approach at pilot destinations:

UNWTO is working on setting up Sustainable Tourism Observatories to promote the use of indicators in policy-making and planning processes at the national and local destination levels, following examples of similar UN initiatives.


16) Harmonic Tourism, Factor of Sustainable Development In the City of Toluca, Mexico, by Serrano Barquín R., Hernández Moreno S. and Serrano Barquín R., in Theoretical and Empirical Researches in Urban Management (2009) 4/13. They propose the following interventions:

“To achieve sustainable urban development the city must be environmentally planned, to do so their regional surrounding and other regions it has relations with must be taken into account (Serrano-Barquín, 2003). This is why integrative participative planning is proposed, which emphasizes the necessity to integrate the different sectors of the economic activity into a plan of sustainable development, where diverse (federal, state, municipal and local) dependencies and spheres of the government partake; that from a model of environmental ordering of the territory the sectorial programs which complement each other, not opposed to the principles of sustainability or other sectors, are proposed, in a parallel manner it is based
upon the participation of the multiple actors of the community under study and the neighboring communities, all this considered within the regional context. Among the main characteristics presented by participant integrative participation as a flexible and efficient instrument to make decisions, in addition to the aforementioned ones as principles of Sustainable Urbanism, one finds:

The new environmental management that proposes an efficient and sustainable management of the available resources for regional development.

Consider the entire reality, including natural, social, economic and political aspects in an integral manner, not sectorial.

Take into account the international and national spheres, yet emphasizing the local and regional conditions.

Establish objectives and goals in the long term, in addition to short and intermediate terms.

Promote social participation

Select and retake appropriate technology in function of the environmental characteristics of each place, including natural, social and cultural aspects.

Therefore the fundamental premises are:

Overcome sectorial approach when analyzing urban problems through interdisciplinary and inter-sectorial work, particularly between the Secretariats of Urban Development, of Water, Public Works and Infrastructure for Development, Economic Development (industrial, agricultural, mining, artisanal fomentation), Environment and Tourism; as well as their peers in the municipal and federal spheres.

Make compatible and complement the plan of urban development with the Program of Ecologic

Ordering of the Territory of the State of Mexico, and related programs, especially Tourism, in order to make the policies, actions and criteria of soil use and other resources congruent.

Overcome the municipal perspective that allows visualizing urban development in the metropolitan, regional and national spheres to promote with the corresponding federal and state instances decentralization policies that reorient migratory movements.

Greater autonomy for local governments and propitiate social participation.

Boost local-regional development to improve rural population’s level of life, as this would favor the retention of the populations in their communities and decrease emigration toward urban centers.

Emphasize the generation and diffusion of environmental ethic values.

Respect the cultural identity of every community.

Consider, effectively, the geographic conditions of the region that limit or favor urban development: geological substrate, topography, weather, edaphic conditions, soil use, vegetation, water availability.
Consider the city as an integrant part of the region to achieve ecological balance and self-sufficiency.

As specific proposals for the sustainable urban planning, the city of Toluca considering the tourist perspective, besides the general framework already pointed out, the following is added:

Establish a Council of Inter-disciplinary Participation, in charge of developing the plan of urban development of Toluca, in permanent communication with the rest of municipalities and the corresponding federal and state instances, within the framework of a Metropolitan Plan of Development.

Identify the image of the Urban Image of each barrio or community that compose the city, which allows identifying them from the rest and generate the tourist resource susceptible to be taken as advantage.

Rescue Verdigel River and turn it into a pedestrian and commercial zone in the center of the city as a tourist attraction. This means to separate the sewer system and uncover the river, let it flow out of pipes for everyone to see, restore it and guarantee a minimal permanent stream with water-gathering works in the hydrologic basin it belongs to.

Elaborate integral programs of infrastructure (supply of water, sewer system, rain-water collection, energy and roads) and intelligent public transport.

Restructure public transport system from the negotiation with the diverse companies and visualize interconnected routes that do away with the indiscriminate flow of buses along the main roads of the city, while new means of collective transport, in which the current companies can partake, are incorporated.

Incorporate mixed uses of soil in the city in order to generate integral zones with all the services or suburban centers and decrease the commuting of population.

Establish agro-ecological zones that favor the restoration of the ecological balance through the refill of the aquifer, control of the wind, decrease pollution (carbon capture) and noise, with which the urban image would be improved.

Respect the identity of each community.

Observe environmental criteria in the construction of the city, for instance: paving with permeable materials in secondary roads, increase green areas and median strips to favor the refill of the aquifer; orient the edifices in function of the geographic localization and climatic conditions that save energy of heating and airing; separate waste and pluvial water, construct systems of water collection, among other.

Foment a new urban culture that emphasizes the ethical values based on respect for nature, yet mainly on mankind itself.
Promote consensus on the image of the city.
Sustainability requires a new approach of environmental management where several instances take part, either public or private associations, in a self-financeable process with a territorial vision that strengthens the making of decisions.”
ANNEX
Convention on the Liability of Hotel-keepers concerning the Property of their Guests
Paris, 17.XII.1962

The signatory governments of the member States of the Council of Europe,
Considering that the aim of the Council of Europe is to achieve closer unity between its members, *inter alia* by the adoption of common rules in legal matters;
Believing it expedient to harmonise certain rules relating to the liability of hotel-keepers concerning the property of their guests,
Have agreed as follows:

Article 1
1. Each Contracting Party undertakes that, within twelve months of the date of entry into force of the present Convention in respect of that Party, its national law shall conform with the rules on the liability of hotel-keepers concerning the property of their guests set out in the annex to this Convention.
2. Each Contracting Party shall nevertheless remain free to impose greater liabilities on hotel-keepers.
3. Each Contracting Party shall transmit to the Secretary General of the Council of Europe the official text of any legislation concerning the matters governed by the Convention. The Secretary General shall transmit copies of the texts to other Parties.

Article 2
Each Contracting Party retains the option:

a. notwithstanding the provisions of paragraph 3 of Article 1 of the annex, to limit the liability of the hotel-keeper to at least 100 times the daily charge for the room;

b. notwithstanding the provisions of paragraph 3 of Article 1 of the annex, to limit the liability in respect of any one article to an amount which is not less than the equivalent of 1 500 gold francs or, where the preceding paragraph of this article applies, to a minimum of 50 times the daily charge for the room;

c. to adopt the rule laid down in paragraph 2 of Article 1 of the annex only in respect of property which is at the hotel;

d. notwithstanding the provisions of Article 6 of the annex, to permit hotel-keepers to reduce their liability, in cases to which paragraph 1.a of Article 2 or Article 4 of the annex apply, not being cases where intent or fault tantamount to intent is involved, by an agreement with the guest signed by him and containing no other terms; the liability of the hotel-keeper may
not, however, be reduced to an amount which is less than that provided in
the relevant legislation enacted in pursuance of this Convention;
e. notwithstanding the provisions of Article 7 of the annex, to apply the
rules in the annex to vehicles, property left with them and live animals, or
to regulate the hotel-keeper’s liability in this respect in any other way.

Article 3
1. This Convention shall apply to the metropolitan territories of the
Contracting Parties.
2. Any Contracting Party may, when signing this Convention or when
depositing its instrument of ratification, acceptance or accession, or at any
later date, declare by notification addressed to the Secretary General of
the Council of Europe, that this Convention shall apply to the territory
or territories, mentioned in the said declaration, for whose international
relations it is responsible or for which it is empowered to legislate.
3. Any declaration made in accordance with the preceding paragraph may,
in respect of any territory mentioned in such declaration, be withdrawn
according to the procedure laid down in Article 6 of this Convention.

Article 4
1. This Convention is open to signature by the members of the Council
of Europe. It shall be ratified or accepted. The instruments of ratification
or acceptance shall be deposited with the Secretary General of the Council
of Europe.
2. The Convention shall come into force three months after the date of the
deposit of the third instrument of ratification or acceptance.
3. In respect of a signatory government ratifying or accepting subsequently,
the Convention shall come into force three months after the date of the
deposit of its instrument of ratification or acceptance.

Article 5
1. The Committee of Ministers of the Council of Europe may invite any
State not a member of the Council to accede to this Convention.
2. Accession shall be by deposit with the Secretary General of the Council
of an instrument of accession which shall take effect three months after the
date of its deposit.

Article 6
1. A Contracting Party may not denounce this Convention within less
than five years from the date on which the Convention entered into force
in respect of that Party. Such denunciation shall be effected by notification
addressed to the Secretary General of the Council of Europe.
2. The denunciation shall take effect for the Contracting Party concerned
six months after the date on which it is received by the Secretary General
of the Council of Europe.
Article 7
The Secretary General of the Council of Europe shall notify members of the Council and the government of any State which has acceded to this Convention of:
(a) any signature and any deposit of an instrument of ratification, acceptance or accession;
(b) the date on which the Convention enters into force in respect of any State;
(c) notifications which may be received in pursuance of the provisions of Articles 3 and 6.
In witness whereof, the undersigned, being duly authorised thereto, have signed this Convention. Done at Paris, this 17th day of December 1962, in English and in French, both texts being equally authoritative, in a single copy which shall remain deposited in the archives of the Council of Europe. The Secretary General shall transmit certified copies to each of the signatory and acceding governments.

Annex

Article 1
1. A hotel-keeper shall be liable for any damage to or destruction or loss of property brought to the hotel by any guest who stays at the hotel and has sleeping accommodation put at his disposal.
2. Any property:
   (a) which is at the hotel during the time when the guest has the accommodation at his disposal;
   (b) of which the hotel-keeper or a person for whom he is responsible takes charge outside the hotel during the period for which the guest has the accommodation at his disposal; or
   (c) of which the hotel-keeper or a person for whom he is responsible takes charge whether at the hotel or outside it during a reasonable period preceding or following the time when the guest has the accommodation at his disposal;
shall be deemed to be property brought to the hotel.
3. The liability shall be limited to the equivalent of 3,000 gold francs.
4. The gold franc mentioned in the preceding paragraph refers to a unit consisting of sixty-five and a half milligrammes of gold of millesimal fineness nine hundred.

Article 2
1. The liability of a hotel-keeper shall be unlimited:
   (a) where the property has been deposited with him;
   (b) where he has refused to receive property which he is bound to receive
for safe custody.

2. A hotel-keeper shall be bound to receive securities, money and valuable articles; he may only refuse to receive such property if it is dangerous or if, having regard to the size or standing of the hotel, it is of excessive value or cumbersome.

3. A hotel-keeper shall have the right to require that the article shall be in a fastened or sealed container.

Article 3

A hotel-keeper shall not be liable in so far as the damage, destruction or loss is due:

a. to the guest or any person accompanying him or in his employment or any person visiting him;

b. to an unforeseeable and irresistible act of nature or an act of war;

c. to the nature of the article.

Article 4

The hotel-keeper shall be liable and shall not have the benefit of the limitation on his liability laid down in paragraph 3 of Article 1 of this annex where the damage, destruction or loss is caused by a wilful act or omission or negligence, on his part or on the part of any person for whose actions he is responsible.

Article 5

Except in any case to which Article 4 of this Annex applies, the guest shall cease to be entitled to the benefit of these provisions if after discovering the damage, destruction or loss he does not inform the hotel-keeper without undue delay.

Article 6

Any notice or agreement purporting to exclude or diminish the hotel-keeper’s liability given or made before the damage, destruction or loss has occurred shall be null and void.

Article 7

The provisions of this Annex shall not apply to vehicles, any property left with a vehicle, or live animals.

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 95 thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Economic and Social Committee [1],

Acting in accordance with the procedure laid down in Article 251 of the Treaty [2],

Whereas:

(1) Since the adoption of Directive 94/47/EC of the European Parliament and of the Council of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis [3], timeshare has evolved and new holiday products similar to it have appeared on the market. These new holiday products and certain transactions related to timeshare, such as resale contracts and exchange contracts, are not covered by Directive 94/47/EC. In addition, experience with the application of Directive 94/47/EC has shown that some subjects already covered need to be updated or clarified, in order to prevent the development of products aiming at circumventing this Directive.

(2) The existing regulatory gaps create appreciable distortions of competition and cause serious problems for consumers, thus hindering the smooth functioning of the internal market. Directive 94/47/EC should therefore be replaced by a new up-to-date directive. Since tourism plays an increasingly important role in the economies of the Member States, greater growth and productivity in the timeshare and long-term holiday product industries should be encouraged by adopting certain common rules.

(3) In order to enhance legal certainty and fully achieve the benefits of the internal market for consumers and businesses, the relevant laws of the Member States need to be approximated further. Therefore, certain aspects of the marketing, sale and resale of timeshares and long-term holiday products as well as the exchange of rights deriving from timeshare contracts should be fully harmonised. Member States should not be allowed to maintain or introduce in their national legislation provisions diverging from those laid down in this Directive. Where no such harmonised provisions exist, Member States should remain free to maintain or introduce national
legislation in conformity with Community law. Thus, Member States should, for instance, be able to maintain or introduce provisions on the effects of exercising the right of withdrawal in legal relationships falling outside the scope of this Directive or provisions according to which no commitment may be entered into between a consumer and a trader of a timeshare or long-term holiday product, nor any payment made between those persons, as long as the consumer has not signed a credit agreement to finance the purchase of those services.

(4) This Directive should be without prejudice to the application by Member States, in accordance with Community law, of the provisions of this Directive to areas not within its scope. Member States could therefore maintain or introduce national legislation corresponding to the provisions of this Directive or certain of its provisions in relation to transactions that fall outside the scope of this Directive.

(5) The different contracts covered by this Directive should be clearly defined in such a way as to preclude circumvention of its provisions.

(6) For the purposes of this Directive, timeshare contracts should not be understood as covering multiple reservations of accommodation, including hotel rooms, in so far as multiple reservations do not imply rights and obligations beyond those arising from separate reservations. Nor should timeshare contracts be understood as covering ordinary lease contracts since the latter refer to one single continuous period of occupation and not to multiple periods.

(7) For the purposes of this Directive, long-term holiday product contracts should not be understood as covering ordinary loyalty schemes which provide discounts on future stays in the hotels of a hotel chain, since membership in the scheme is not obtained for consideration nor is the consideration paid by the consumer primarily for the purpose of obtaining discounts or other benefits in respect of accommodation.


(9) 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 (Unfair Commercial Practices Directive) [5] prohibits misleading, aggressive and other unfair commercial business-to-consumer practices. Given the nature of the products and the commercial practices related to timeshares, long-term holiday products, resale and exchange, it is appropriate to adopt more detailed and specific provisions regarding information requirements and sales events. The commercial purpose of invitations to sales events should be made clear to consumers. The provisions concerning pre-contractual information and the contract
should be clarified and updated. In order to give consumers the possibility to acquaint themselves with the information before the conclusion of the contract, it should be provided by means which are easily accessible to them at that time.

(10) Consumers should have the right, which should not be refused by traders, to be provided with pre-contractual information and the contract in a language, of their choice, with which they are familiar. In addition, in order to facilitate the execution and the enforcement of the contract, Member States should be allowed to determine that further language versions of the contract should be provided to consumers.

(11) In order to provide consumers with the opportunity of fully understanding their rights and obligations under the contract, they should be allowed a period during which they may withdraw from the contract without having to justify the withdrawal and without bearing any cost. Currently the length of this period varies between Member States, and experience shows that the length prescribed in Directive 94/47/EC is not sufficiently long. The period should therefore be extended in order to achieve a high level of consumer protection and more clarity for consumers and traders. The length of the period, the modalities for and the effects of exercising the right of withdrawal should be harmonised.

(12) Consumers should have effective remedies in the event that traders do not comply with the provisions regarding pre-contractual information or the contract, in particular those laying down that the contract should include all the information required and that the consumer should receive a copy of the contract at the time of its conclusion. In addition to the remedies existing under national law, consumers should benefit from an extended withdrawal period where information has not been provided by traders. The exercise of the right of withdrawal should remain free of charge during that extended period regardless of what services consumers may have enjoyed. The expiration of the withdrawal period does not preclude consumers from seeking remedies in accordance with national law for breaches of the information requirements.


(14) The prohibition on advance payments to traders or any third party before the end of the withdrawal period should be clarified in order to improve consumer protection. For resale contracts, the prohibition of advance payment should apply until the actual sale takes place or the resale contract is terminated, but Member States should remain free to regulate the possibility and modalities of final payments to intermediaries where resale contracts are terminated.
(15) For long-term holiday product contracts, the price to be paid in the context of a staggered payment schedule could take into consideration the possibility that subsequent amounts could be adjusted after the first year in order to ensure that the real value of those instalments is maintained, for instance to take account of inflation.

(16) In the event of a consumer withdrawing from a contract where the price is entirely or partly covered by credit granted to the consumer by the trader or by a third party on the basis of an arrangement between that third party and the trader, the credit agreement should be terminated at no cost to the consumer. The same should apply to contracts for other related services provided by the trader or by a third party on the basis of an arrangement between that third party and the trader.

(17) Consumers should not be deprived of the protection granted by this Directive where the law applicable to the contract is that of a Member State. The law applicable to a contract should be determined in accordance with the Community rules on private international law, in particular Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) [7]. Under that Regulation, the law of a third country may be applicable, in particular where consumers are targeted by traders whilst on holiday in a country other than their country of residence. Given that such commercial practices are common in the area covered by this Directive and that the contracts involve considerable amounts of money, an additional safeguard should be provided in certain specific situations, in particular where the courts of any Member State have jurisdiction over the contract, to ensure that the consumer is not deprived of the protection granted by this Directive. This concept reflects the particular needs of consumer protection arising from the typical complexity, long-term nature and financial relevance of the contracts falling within the scope of this Directive.

(18) It should be determined in accordance with Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [8] which courts have jurisdiction in proceedings which have as their object matters covered by this Directive.

(19) In order to ensure that the protection afforded to consumers under this Directive is fully effective, in particular as regards compliance by traders with the information requirements both at the pre-contractual stage and in the contract, it is necessary that the Member States lay down effective, proportionate and dissuasive penalties for infringements of this Directive.

(20) It is necessary to ensure that persons or organisations having, under national law, a legitimate interest in the matter have legal remedies for initiating proceedings against infringements of this Directive.
(21) It is necessary to develop suitable and effective redress procedures in the Member States for settling disputes between consumers and traders. To this end, Member States should encourage the establishment of public or private bodies for settling disputes out of court.

(22) Member States should ensure that consumers are effectively informed of the national provisions transposing this Directive and encourage traders and code owners to inform consumers about their codes of conduct in this field. With the aim of pursuing a high level of consumer protection, consumer organisations could be informed of, and involved in, the drafting of codes of conduct.

(23) Since the objectives of this Directive cannot be sufficiently achieved by the Member States and can therefore be better achieved at Community level, the Community may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to eliminate the internal market barriers and achieve a high common level of consumer protection.

(24) This Directive respects the fundamental rights and observes the principles recognised in particular by the European Convention on Human Rights and Fundamental Freedoms and the Charter of Fundamental Rights of the European Union.

(25) In accordance with point 34 of the Interinstitutional agreement on better law-making [9], Member States are encouraged to draw up, for themselves and in the interests of the Community, their own tables, which will, as far as possible, illustrate the correlation between this Directive and the transposition measures, and to make them public,

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Purpose and scope

1. The purpose of this Directive is to contribute to the proper functioning of the internal market and to achieve a high level of consumer protection, by approximating the laws, regulations and administrative provisions of the Member States in respect of certain aspects of the marketing, sale and resale of timeshares and long-term holiday products as well as exchange contracts.

2. This Directive applies to trader-to-consumer transactions.

This Directive is without prejudice to national legislation which:
(a) provides for general contract law remedies;
(b) relates to the registration of immovable or movable property and conveyance of immovable property;
(c) relates to conditions of establishment or authorisation regimes or
licensing requirements; and
(d) relates to the determination of the legal nature of the rights which are
the subject of the contracts covered by this Directive.

Article 2
Definitions
1. For the purposes of this Directive, the following definitions shall apply:
(a) “timeshare contract” means a contract of a duration of more than
one year under which a consumer, for consideration, acquires the right to
use one or more overnight accommodation for more than one period of
occupation;
(b) “long-term holiday product contract” means a contract of a duration
of more than one year under which a consumer, for consideration, acquires
primarily the right to obtain discounts or other benefits in respect of
accommodation, in isolation or together with travel or other services;
(c) “resale contract” means a contract under which a trader, for
consideration, assists a consumer to sell or buy a timeshare or a long-term
holiday product;
(d) “exchange contract” means a contract under which a consumer, for
consideration, joins an exchange system which allows that consumer access
to overnight accommodation or other services in exchange for granting to
other persons temporary access to the benefits of the rights deriving from
that consumer’s timeshare contract;
(e) “trader” means a natural or legal person who is acting for purposes
relating to that person’s trade, business, craft or profession and anyone
acting in the name of or on behalf of a trader;
(f) “consumer” means a natural person who is acting for purposes which
are outside that person’s trade, business, craft or profession;
(g) “ancillary contract” means a contract under which the consumer
acquires services which are related to a timeshare contract or long-term
holiday product contract and which are provided by the trader or a third
party on the basis of an arrangement between that third party and the trader;
(h) “durable medium” means any instrument which enables the consumer
or the trader to store information addressed personally to him in a way
which is accessible for future reference for a period of time adequate for the
purposes of the information and which allows the unchanged reproduction
of the information stored;
(i) “code of conduct” means an agreement or set of rules not imposed
by law, regulation or administrative provision of a Member State which
defines the behaviour of traders who undertake to be bound by the code in
relation to one or more particular commercial practices or business sectors;
(j) “code owner” means any entity, including a trader or group of traders,
which is responsible for the formulation and revision of a code of conduct
and/or for monitoring compliance with the code by those who have undertaken to be bound by it.

2. In calculating the duration of a timeshare contract or a long-term holiday product contract, as defined in points (a) and (b) of paragraph 1 respectively, any provision in the contract allowing for tacit renewal or prolongation shall be taken into account.

Article 3
Advertising

1. Member States shall ensure that any advertising specifies the possibility of obtaining the information referred to in Article 4(1) and indicates where it can be obtained.

2. Where a timeshare, long-term holiday product, resale or exchange contract is to be offered to a consumer in person at a promotion or sales event, the trader shall clearly indicate in the invitation the commercial purpose and the nature of the event.

3. The information referred to in Article 4(1) shall be available to the consumer at any time during the event.

4. A timeshare or a long-term holiday product shall not be marketed or sold as an investment.

Article 4
Pre-contractual information

1. In good time before the consumer is bound by any contract or offer, the trader shall provide the consumer, in a clear and comprehensible manner, with accurate and sufficient information, as follows:

(a) in the case of a timeshare contract: by means of the standard information form as set out in Annex I and information as listed in Part 3 of that form;

(b) in the case of a long-term holiday product contract: by means of the standard information form as set out in Annex II and information as listed in Part 3 of that form;

(c) in the case of a resale contract: by means of the standard information form as set out in Annex III and information as listed in Part 3 of that form;

(d) in the case of an exchange contract: by means of the standard information form as set out in Annex IV and information as listed in Part 3 of that form.

2. The information referred to in paragraph 1 shall be provided, free of charge, by the trader on paper or on another durable medium which is easily accessible to the consumer.

3. Member States shall ensure that the information referred to in paragraph 1 is drawn up in the language or one of the languages of the Member State in which the consumer is resident or a national, at the choice of the consumer, provided it is an official language of the Community.
Article 5
The timeshare, long-term holiday product, resale or exchange contract

1. Member States shall ensure that the contract is in writing, on paper or on another durable medium, and drawn up in the language or one of the languages of the Member State in which the consumer is resident or a national, at the choice of the consumer, provided it is an official language of the Community.

However, the Member State in which the consumer is resident may require that in addition:
(a) in every instance, the contract be provided to the consumer in the language or one of the languages of that Member State, provided it is an official language of the Community;
(b) in the case of a timeshare contract concerning one specific immovable property, the trader provide the consumer with a certified translation of the contract in the language or one of the languages of the Member State in which the property is situated, provided it is an official language of the Community.

The Member State on whose territory the trader carries out sale activities may require that, in every instance, the contract be provided to the consumer in the language or one of the languages of that Member State, provided it is an official language of the Community.

2. The information referred to in Article 4(1) shall form an integral part of the contract and shall not be altered unless the parties expressly agree otherwise or the changes result from unusual and unforeseeable circumstances beyond the trader’s control, the consequences of which could not have been avoided even if all due care had been exercised.

These changes shall be communicated to the consumer on paper or on another durable medium easily accessible to him, before the contract is concluded.

The contract shall expressly mention any such changes.

3. In addition to the information referred to in Article 4(1), the contract shall include:
(a) the identity, place of residence and signature of each of the parties; and
(b) the date and place of the conclusion of the contract.

4. Before the conclusion of the contract, the trader shall explicitly draw the consumer’s attention to the existence of the right of withdrawal, the length of the withdrawal period referred to in Article 6, and the ban on advance payments during the withdrawal period referred to in Article 9.

The corresponding contractual clauses shall be signed separately by the consumer.

The contract shall include a separate standard withdrawal form, as set out
in Annex V, intended to facilitate the exercise of the right of withdrawal in accordance with Article 6.

5. The consumer shall receive a copy or copies of the contract at the time of its conclusion.

Article 6
Right of withdrawal

1. In addition to the remedies available to the consumer under national law in the event of breach of the provisions of this Directive, Member States shall ensure that the consumer is given a period of 14 calendar days to withdraw from the timeshare, long-term holiday product, resale or exchange contract, without giving any reason.

2. The withdrawal period shall be calculated:
   (a) from the day of the conclusion of the contract or of any binding preliminary contract; or
   (b) from the day when the consumer receives the contract or any binding preliminary contract if it is later than the date referred to in point (a).

3. The withdrawal period shall expire:
   (a) after one year and 14 calendar days from the day referred to in paragraph 2 of this Article, where a separate standard withdrawal form as required by Article 5(4) has not been filled in by the trader and provided to the consumer in writing, on paper or on another durable medium;
   (b) after three months and 14 calendar days from the day referred to in paragraph 2 of this Article, where the information referred to in Article 4(1), including the applicable standard information form set out in Annexes I to IV, has not been provided to the consumer in writing, on paper or on another durable medium.

In addition, Member States shall provide for appropriate penalties in accordance with Article 15, in particular in the event that, on expiry of the withdrawal period, the trader has failed to comply with the information requirements set out in this Directive.

4. Where a separate standard withdrawal form as required by Article 5(4) has been filled in by the trader and provided to the consumer in writing, on paper or on another durable medium, within one year from the day referred to in paragraph 2 of this Article, the withdrawal period shall start from the day the consumer receives that form. Similarly, where the information referred to in Article 4(1), including the applicable standard information form set out in Annexes I to IV, has been provided to the consumer in writing, on paper or on another durable medium, within three months from the day referred to in paragraph 2 of this Article, the withdrawal period shall start from the day the consumer receives such information.

5. In the event that the exchange contract is offered to the consumer together with and at the same time as the timeshare contract, only a single
withdrawal period in accordance with paragraph 1 shall apply to both contracts. The withdrawal period for both contracts shall be calculated according to the provisions of paragraph 2 as they apply to the timeshare contract.

**Article 7**

*Modalities for exercising the right of withdrawal*

Where the consumer intends to exercise the right of withdrawal the consumer shall, before the expiry of the withdrawal period, notify the trader on paper or on another durable medium of the decision to withdraw. The consumer may use the standard withdrawal form set out in Annex V and provided by the trader in accordance with Article 5(4). The deadline is met if the notification is sent before the withdrawal period has expired.

**Article 8**

*Effects of exercising the right of withdrawal*

1. The exercise of the right of withdrawal by the consumer terminates the obligation of the parties to perform the contract.

2. Where the consumer exercises the right of withdrawal, the consumer shall neither bear any cost nor be liable for any value corresponding to the service which may have been performed before withdrawal.

**Article 9**

*Advance payment*

1. Member States shall ensure that in relation to timeshare, long-term holiday product and exchange contracts any advance payment, provision of guarantees, reservation of money on accounts, explicit acknowledgement of debt or any other consideration to the trader or to any third party by the consumer before the end of the withdrawal period according to Article 6, is prohibited.

2. Member States shall ensure that in relation to resale contracts any advance payment, provision of guarantees, reservation of money on accounts, explicit acknowledgement of debt or any other consideration to the trader or to any third party by the consumer before the actual sale takes place or the resale contract is otherwise terminated, is prohibited.

**Article 10**

*Specific provisions relating to long-term holiday product contracts*

1. For long-term holiday product contracts, payment shall be made according to a staggered payment schedule. Any payment of the price specified in the contract otherwise than in accordance with the staggered payment schedule shall be prohibited. The payments, including any membership fee, shall be divided into yearly instalments, each of which shall be of equal value. The trader shall send a written request for payment, on paper or on another durable medium, at least fourteen calendar days in advance of each due date.
2. From the second instalment payment onwards, the consumer may terminate the contract without incurring any penalty by giving notice to the trader within fourteen calendar days of receiving the request for payment of each instalment. This right shall not affect rights to terminate the contract under existing national legislation.

Article 11
Termination of ancillary contracts
1. Member States shall ensure that, where the consumer exercises the right to withdraw from the timeshare or long-term holiday product contract, any exchange contract ancillary to it or any other ancillary contract is automatically terminated, at no cost to the consumer.

2. Without prejudice to Article 15 of Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers [10], where the price is fully or partly covered by a credit granted to the consumer by the trader, or by a third party on the basis of an arrangement between the third party and the trader, the credit agreement shall be terminated, at no cost to the consumer, where the consumer exercises the right to withdraw from the timeshare, long-term holiday product, resale or exchange contract.

3. The Member States shall lay down detailed rules on the termination of such contracts.

Article 12
Imperative nature of the Directive and application in international cases
1. Member States shall ensure that, where the law applicable to the contract is the law of a Member State, consumers may not waive the rights conferred on them by this Directive.

2. Where the applicable law is that of a third country, consumers shall not be deprived of the protection granted by this 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, or,
   - in the case of a contract not directly related to immovable property, 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.

Article 13
Judicial and administrative redress
1. Member States shall ensure that, in the interests of consumers, adequate and effective means exist to ensure compliance by traders with this Directive.

2. The means referred to in paragraph 1 shall include provisions whereby
one or more of the following bodies, as determined by national law, shall be entitled to take action in accordance with national law before the courts or competent administrative bodies to ensure that the national provisions for implementing this Directive are applied:

(a) public bodies and authorities or their representatives;
(b) consumer organisations with a legitimate interest in protecting consumers;
(c) professional organisations with a legitimate interest in taking such action.

Article 14
Consumer information and out-of-court redress

1. Member States shall take appropriate measures to inform consumers of the national law transposing this Directive and shall encourage, where appropriate, traders and code owners to inform consumers of their codes of conduct.

The Commission shall encourage the drawing up at Community level, particularly by professional bodies, organisations and associations, of codes of conduct aimed at facilitating the implementation of this Directive, in conformity with Community law. It shall also encourage traders and their branch organisations to inform consumers of any such codes, including, where appropriate, by means of a specific marking.

2. Member States shall encourage the setting up or development of adequate and effective out-of-court complaints and redress procedures for the settlement of consumer disputes under this Directive and shall, where appropriate, encourage traders and their branch organisations to inform consumers of the availability of such procedures.

Article 15
Penalties

1. Member States shall provide for appropriate penalties in the event of a trader’s failure to comply with the national provisions adopted pursuant to this Directive.

2. Those penalties shall be effective, proportionate and dissuasive.

Article 16
Transposition

1. Member States shall adopt and publish, by 23 February 2011, the laws, regulations and administrative provisions necessary to comply with this Directive. They shall forthwith communicate to the Commission the text of those provisions.

They shall apply those provisions from 23 February 2011.

When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how
such reference is to be made.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

**Article 17**

**Review**


If necessary, it shall make further proposals to adapt it to developments in the area.

The Commission may request information from the Member States and the national regulatory authorities.

**Article 18**

**Repeal**

Directive 94/47/EC shall be repealed.

References to the repealed Directive shall be construed as references to this Directive and shall be read in accordance with the correlation table in Annex VI.

**Article 19**

**Entry into force**

This Directive shall enter into force on the 20th day following its publication in the Official Journal of the European Union.

**Article 20**

**Addressees**

This Directive is addressed to the Member States.

Done at Strasbourg, 14 January 2009.

For the European Parliament

The President

H.-G. Pöttering

For the Council

The President

A. Vondra


(Omissis)

---------------------------------------------
COUNCIL REGULATION (EC) No 2027/97 of 9 October 1997 on air carrier liability in the event of accidents

THE COUNCIL OF THE EUROPEAN UNION,
Having regard to the Treaty establishing the European Community, and in particular Article 84 (2) thereof,
Having regard to the proposal from the Commission (1),
Having regard to the opinion of the Economic and Social Committee (2),
Acting in accordance with the procedure laid down in Article 189 (c) of the Treaty (3),
(1) Whereas, in the framework of the common transport policy, it is necessary to improve the level of protection of passengers involved in air accidents;
(2) Whereas the rules on liability in the event of accidents are governed by the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on 12 October 1929, or that Convention as amended at The Hague on 28 September 1955 and the Convention done at Guadalajara on 18 September 1961, whichever may be applicable each being hereinafter referred to, as applicable, as the ‘Warsaw Convention’; whereas the Warsaw Convention is applied worldwide for the benefit of both passengers and air carriers;
(3) Whereas the limit set on liability by the Warsaw Convention is too low by today’s economic and social standards and often leads to lengthy legal actions which damage the image of air transport; whereas as a result Member States have variously increased the liability limit, thereby leading to different terms and conditions of carriage in the internal aviation market;
(4) Whereas in addition the Warsaw Convention applies only to international transport; whereas, in the internal aviation market, the distinction between national and international transport has been eliminated; whereas it is therefore appropriate to have the same level and nature of liability in both national and international transport;
(5) Whereas a full review and revision of the Warsaw Convention is long overdue and would represent, in the long term, a more uniform and applicable response, at an international level, to the issue of air carrier liability in the event of accidents; whereas efforts to increase the limits of liability imposed in the Warsaw Convention should continue through negotiation at multilateral level;
(6) Whereas, in compliance with the principle of subsidiarity, action at Community level is desirable in order to achieve harmonization in the field of air carrier liability and could serve as a guideline for improved passenger protection on a global scale;
(7) Whereas it is appropriate to remove all monetary limits of liability
within the meaning of Article 22 (1) of the Warsaw Convention or any other legal or contractual limits, in accordance with present trends at international level;

(8) Whereas, in order to avoid situations where victims of accidents are not compensated, Community air carriers should not, with respect of any claim arising out of the death, wounding or other bodily injury of a passenger under Article 17 of the Warsaw Convention, avail themselves of any defence under Article 20 (1) of the Warsaw Convention up to a certain limit;

(9) Whereas Community air carriers may be exonerated from their liability in cases of contributory negligence of the passenger concerned;

(10) Whereas it is necessary to clarify the obligations of this Regulation in the light of Article 7 of Council Regulation (EEC) No 2407/92 of 23 July 1992 on licensing of air carriers (4); whereas, in this regard, Community air carriers should be insured up to a certain limit laid down in this Regulation;

(11) Whereas Community air carriers should always be entitled to claim against third parties;

(12) Whereas prompt advance payments can considerably assist the injured passengers or natural persons entitled to compensation in meeting the immediate costs following an air accident;

(13) Whereas the rules on the nature and limitation of liability in the event of death, wounding or any other bodily injury suffered by a passenger form part of the terms and conditions of carriage in the air transport contract between carrier and passenger; whereas, in order to reduce the risk of distorting competition, third-country carriers should adequately inform passengers of their conditions of carriage;

(14) Whereas it is appropriate and necessary that the monetary limits expressed in this Regulation be reviewed in order to take into account economic developments and developments in international fora;

(15) Whereas the International Civil Aviation Organization (ICAO) is at present engaged in a review of the Warsaw Convention; whereas, pending the outcome of such review, actions on an interim basis by the Community will enhance the protection of passengers; whereas the Council should review this Regulation as soon as possible after the review by ICAO,

HAS ADOPTED THIS REGULATION:

Article 1
This Regulation lays down the obligations of Community air carriers in relation to liability in the event of accidents to passengers for damage sustained in the event of death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board an aircraft or in the course of any
of the operations of embarking or disembarking.

This Regulation also clarifies some insurance requirements for Community air carriers.

In addition, this Regulation sets down some requirements on information to be provided by air carriers established outside the Community which operate to, from or within the Community.

**Article 2**

1. For the purpose of this Regulation:
   (a) ‘air carrier’ shall mean an air transport undertaking with a valid operating licence;
   (b) ‘Community air carrier’ shall mean an air carrier with a valid operating licence granted by a Member State in accordance with the provisions of Regulation (EEC) No 2407/92;
   (c) ‘person entitled to compensation’ shall mean a passenger or any person entitled to claim in respect of that passenger, in accordance with applicable law;
   (d) ‘ecu’ shall mean the unit of account in drawing up the general budget of the European Communities in accordance with Articles 207 and 209 of the Treaty;
   (e) ‘SDR’ shall mean a Special Drawing Right as defined by the International Monetary Fund;
   (f) ‘Warsaw Convention’ shall mean the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on 12 October 1929, or the Warsaw Convention as amended at The Hague on 28 September 1955 and the Convention supplementary to the Warsaw Convention done at Guadalajara on 18 September 1961 - whichever is applicable to the passenger contract of carriage, together with all international instruments which supplement, and are associated with, it and are in force.

2. Concepts contained in this Regulation which are not defined in paragraph 1 shall be equivalent to those used in the Warsaw Convention.

**Article 3**

1. (a) The liability of a Community air carrier for damages sustained in the event of death, wounding or any other bodily injury by a passenger in the event of an accident shall not be subject to any financial limit, be it defined by law, convention or contract.

   (b) The obligation of insurance set out in Article 7 of Regulation (EEC) No 2407/92 shall be understood as requiring that a Community air carrier shall be insured up to the limit of the liability required under paragraph 2 and thereafter up to a reasonable level.

2. For any damages up to the sum of the equivalent in ecus of 100 000 SDR, the Community air carrier shall not exclude or limit his liability by
proving that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures.

3. Notwithstanding the provisions of paragraph 2, if the Community air carrier proves that the damage was caused by, or contributed to by, the negligence of the injured or deceased passenger, the carrier may be exonerated wholly or partly from its liability in accordance with applicable law.

Article 4
In the event of death, wounding or any other bodily injury suffered by a passenger in the event of an accident, nothing in this Regulation shall
(a) imply that a Community air carrier is the sole party liable to pay damages; or
(b) restrict any rights of a Community air carrier to seek contribution or indemnity from any other party in accordance with applicable law.

Article 5
1. The Community air carrier shall without delay, and in any event not later than fifteen days after the identity of the natural person entitled to compensation has been established, make such advance payments as may be required to meet immediate economic needs on a basis proportional to the hardship suffered.

2. Without prejudice to paragraph 1, an advance payment shall not be less than the equivalent in ecus of 15 000 SDR per passenger in the event of death.

3. An advance payment shall not constitute recognition of liability and may be offset against any subsequent sums paid on the basis of Community air carrier liability, but is not returnable, except in the cases prescribed in Article 3 (3) or in circumstances where it is subsequently proved that the person who received the advance payment caused, or contributed to, the damage by negligence or was not the person entitled to compensation.

Article 6
1. The provisions contained in Articles 3 and 5 shall be included in the Community air carrier’s conditions of carriage.

2. Adequate information on the provisions contained in Articles 3 and 5 shall, on request, be available to passengers at the Community air carrier’s agencies, travel agencies and check-in counters and at points of sale. The ticket document or an equivalent shall contain a summary of the requirements in plain and intelligible language.

3. Air carriers established outside the Community operating to, from or within the Community and not applying the provisions referred to in Articles 3 and 5 shall expressly and clearly inform the passengers thereof, at the time of purchase of the ticket at the carrier’s agencies, travel agencies or check-in counters located in the territory of a Member State. Air carriers
shall provide the passengers with a form setting out their conditions. The fact that only a liability limit is indicated on the ticket document or an equivalent shall not constitute sufficient information.

**Article 7**

No later than two years after the entry into force of this Regulation, the Commission shall draw up a report on the application of the Regulation which, inter alia, takes into account economic developments and developments in international fora. Such report may be accompanied by proposals for a revision of this Regulation.

**Article 8**

This Regulation shall enter into force one year after the date of its publication in the Official Journal of the European Communities.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Luxembourg, 9 October 1997.

For the Council
The President
M. DELVAUX-STEHRES


(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 80(2) thereof,

Having regard to the proposal from the Commission(1),

Having regard to the opinion of the Economic and Social Committee(2),

Following consultation of the Committee of the Regions,

Acting in accordance with the procedure laid down in Article 251 of the Treaty(3),

Whereas:

(1) In the framework of the common transport policy, it is important to ensure a proper level of compensation for passengers involved in air accidents.

(2) A new Convention for the Unification of Certain Rules Relating to International Carriage by Air was agreed at Montreal on 28 May 1999 setting new global rules on liability in the event of accidents for international air transport replacing those in the Warsaw Convention of 1929 and its subsequent amendments(4).

(3) The Warsaw Convention will continue to exist alongside the Montreal Convention for an indefinite period.

(4) The Montreal Convention provides for a regime of unlimited liability in the case of death or injury of air passengers.

(5) The Community has signed the Montreal Convention indicating its intention to become a party to the agreement by ratifying it.

(6) It is necessary to amend Council Regulation (EC) No 2027/97 of 9 October 1997 on air carrier liability in the event of accidents(5) in order to align it with the provisions of the Montreal Convention, thereby creating a uniform system of liability for international air transport.

(7) This Regulation and the Montreal Convention reinforce the protection of passengers and their dependants and cannot be interpreted so as to weaken their protection in relation to the present legislation on the date of adoption of this Regulation.

(8) In the internal aviation market, the distinction between national and international transport has been eliminated and it is therefore appropriate to have the same level and nature of liability in both international and national transport within the Community.

(9) In compliance with the principle of subsidiarity, action at Community
level is desirable in order to create a single set of rules for all Community air carriers.

(10) A system of unlimited liability in case of death or injury to passengers is appropriate in the context of a safe and modern air transport system.

(11) The Community air carrier should not be able to avail itself of Article 21(2) of the Montreal Convention unless it proves that the damage was not due to the negligence or other wrongful act or omission of the carrier or its servants or agents.

(12) Uniform liability limits for loss of, damage to, or destruction of, baggage and for damage occasioned by delay, which apply to all travel on Community carriers, will ensure simple and clear rules for both passengers and airlines and enable passengers to recognise when additional insurance is necessary.

(13) It would be impractical for Community air carriers and confusing for their passengers if they were to apply different liability regimes on different routes across their networks.

(14) It is desirable to relieve accident victims and their dependants of short-term financial concerns in the period immediately after an accident.

(15) Article 50 of the Montreal Convention requires parties to ensure that air carriers are adequately insured and it is necessary to take account of Article 7 of Council Regulation (EEC) No 2407/92 of 23 July 1992 on licensing of air carriers(6) in complying with this provision.

(16) It is desirable to provide basic information on the liability rules applicable to every passenger so that they can make additional insurance arrangements in advance of travel if necessary.

(17) It will be necessary to review the monetary amounts set down in this Regulation in order to take account of inflation and any review of the liability limits in the Montreal Convention.

(18) To the extent that further rules are required in order to implement the Montreal Convention on points that are not covered by Regulation (EC) No 2027/97, it is the responsibility of the Member States to make such provisions,

HAVE ADOPTED THIS REGULATION:

**Article 1**

Regulation (EC) No 2027/97 is hereby amended as follows:

1. the title shall be replaced by the following: “Regulation (EC) No 2027/97 on air carrier liability in respect of the carriage of passengers and their baggage by air.”;

2. Article 1 shall be replaced by the following: “Article 1
This Regulation implements the relevant provisions of the Montreal Convention in respect of the carriage of passengers and their baggage by
ANNEX

air and lays down certain supplementary provisions. It also extends the application of these provisions to carriage by air within a single Member State.

3. Article 2 shall be replaced by the following: “Article 2

1. For the purpose of this Regulation:

(a) ‘air carrier’ shall mean an air transport undertaking with a valid operating licence;

(b) ‘Community air carrier’ shall mean an air carrier with a valid operating licence granted by a Member State in accordance with the provisions of Regulation (EEC) No 2407/92;

(c) ‘person entitled to compensation’ shall mean a passenger or any person entitled to claim in respect of that passenger, in accordance with applicable law;

(d) ‘baggage’, unless otherwise specified, shall mean both checked and unchecked baggage with the meaning of Article 17(4) of the Montreal Convention;

(e) ‘SDR’ shall mean a special drawing right as defined by the International Monetary Fund;

(f) ‘Warsaw Convention’ shall mean the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on 12 October 1929, or the Warsaw Convention as amended at The Hague on 28 September 1955 and the Convention supplementary to the Warsaw Convention done at Guadalajara on 18 September 1961;


2. Concepts contained in this Regulation which are not defined in paragraph 1 shall be equivalent to those used in the Montreal Convention.”;

4. Article 3 shall be replaced by the following: “Article 3

1. The liability of a Community air carrier in respect of passengers and their baggage shall be governed by all provisions of the Montreal Convention relevant to such liability.

2. The obligation of insurance set out in Article 7 of Regulation (EEC) No 2407/92 as far as it relates to liability for passengers shall be understood as requiring that a Community air carrier shall be insured up to a level that is adequate to ensure that all persons entitled to compensation receive the full amount to which they are entitled in accordance with this Regulation.”;

5. the following Article shall be inserted: “Article 3a

The supplementary sum which, in accordance with Article 22(2) of the Montreal Convention, may be demanded by a Community air carrier when a passenger makes a special declaration of interest in delivery of their baggage at destination, shall be based on a tariff which is related
to the additional costs involved in transporting and insuring the baggage concerned over and above those for baggage valued at or below the liability limit. The tariff shall be made available to passengers on request.”;

6. Article 4 shall be deleted;

7. Article 5 shall be replaced by the following: “Article 5

1. The Community air carrier shall without delay, and in any event not later than fifteen days after the identity of the natural person entitled to compensation has been established, make such advance payments as may be required to meet immediate economic needs on a basis proportional to the hardship suffered.

2. Without prejudice to paragraph 1, an advance payment shall not be less than the equivalent in euro of 16000 SDRs per passenger in the event of death.

3. An advance payment shall not constitute recognition of liability and may be offset against any subsequent sums paid on the basis of Community air carrier liability, but is not returnable, except in the cases prescribed in Article 20 of the Montreal Convention or where the person who received the advance payment was not the person entitled to compensation.”;

8. Article 6 shall be replaced by the following: “Article 6

1. All air carriers shall, when selling carriage by air in the Community, ensure that a summary of the main provisions governing liability for passengers and their baggage, including deadlines for filing an action for compensation and the possibility of making a special declaration for baggage, is made available to passengers at all points of sale, including sale by telephone and via the Internet. In order to comply with this information requirement, Community air carriers shall use the notice contained in the Annex. Such summary or notice cannot be used as a basis for a claim for compensation, nor to interpret the provisions of this Regulation or the Montreal Convention.

2. In addition to the information requirements set out in paragraph 1, all air carriers shall in respect of carriage by air provided or purchased in the Community, provide each passenger with a written indication of:

- the applicable limit for that flight on the carrier’s liability in respect of death or injury, if such a limit exists,
- the applicable limit for that flight on the carrier’s liability in respect of destruction, loss of or damage to baggage and a warning that baggage greater in value than this figure should be brought to the airline’s attention at check-in or fully insured by the passenger prior to travel;
- the applicable limit for that flight on the carrier’s liability for damage occasioned by delay.

3. In the case of all carriage performed by Community air carriers, the limits indicated in accordance with the information requirements of
paragraphs 1 and 2 shall be those established by this Regulation unless the Community air carrier applies higher limits by way of voluntary undertaking. In the case of all carriage performed by non-Community air carriers, paragraphs 1 and 2 shall apply only in relation to carriage to, from or within the Community.”;

9. Article 7 shall be replaced by the following: “Article 7
No later than three years after the date on which Regulation (EC) No 889/2002(7) begins to apply, the Commission shall draw up a report on the application of this Regulation. In particular, the Commission shall examine the need to revise the amounts mentioned in the relevant Articles of the Montreal Convention in the light of economic developments and the notifications of the ICAO Depositary.”;

10. the following Annex shall be added:

“ANNEX
Air carrier liability for passengers and their baggage
This information notice summarises the liability rules applied by Community air carriers as required by Community legislation and the Montreal Convention.

Compensation in the case of death or injury
There are no financial limits to the liability for passenger injury or death. For damages up to 100000 SDRs (approximate amount in local currency) the air carrier cannot contest claims for compensation. Above that amount, the air carrier can defend itself against a claim by proving that it was not negligent or otherwise at fault.

Advance payments
If a passenger is killed or injured, the air carrier must make an advance payment, to cover immediate economic needs, within 15 days from the identification of the person entitled to compensation. In the event of death, this advance payment shall not be less than 16000 SDRs (approximate amount in local currency).

Passenger delays
In case of passenger delay, the air carrier is liable for damage unless it took all reasonable measures to avoid the damage or it was impossible to take such measures. The liability for passenger delay is limited to 4150 SDRs (approximate amount in local currency).

Baggage delays
In case of baggage delay, the air carrier is liable for damage unless it took all reasonable measures to avoid the damage or it was impossible to take such measures. The liability for baggage delay is limited to 1000 SDRs (approximate amount in local currency).

Destruction, loss or damage to baggage
The air carrier is liable for destruction, loss or damage to baggage up to
1000 SDRs (approximate amount in local currency). In the case of checked baggage, it is liable even if not at fault, unless the baggage was defective. In the case of unchecked baggage, the carrier is liable only if at fault.

Higher limits for baggage
A passenger can benefit from a higher liability limit by making a special declaration at the latest at check-in and by paying a supplementary fee.

Complaints on baggage
If the baggage is damaged, delayed, lost or destroyed, the passenger must write and complain to the air carrier as soon as possible. In the case of damage to checked baggage, the passenger must write and complain within seven days, and in the case of delay within 21 days, in both cases from the date on which the baggage was placed at the passenger’s disposal.

Liability of contracting and actual carriers
If the air carrier actually performing the flight is not the same as the contracting air carrier, the passenger has the right to address a complaint or to make a claim for damages against either. If the name or code of an air carrier is indicated on the ticket, that air carrier is the contracting air carrier.

Time limit for action
Any action in court to claim damages must be brought within two years from the date of arrival of the aircraft, or from the date on which the aircraft ought to have arrived.

Basis for the information
The basis for the rules described above is the Montreal Convention of 28 May 1999, which is implemented in the Community by Regulation (EC) No 2027/97 (as amended by Regulation (EC) No 889/2002) and national legislation of the Member States.”

Article 2
This Regulation shall enter into force on the day of its publication in the Official Journal of the European Communities.

It shall apply from the date of its entry into force or from the date of the entry into force of the Montreal Convention for the Community, whichever is the later.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 13 May 2002.
For the European Parliament
The President
P. Cox
For the Council
The President
J. Piqué I Camps
(1) OJ C 337 E, 28.11.2000, p. 68 and
(2) OJ C 123, 25.4.2001, p. 47.
**Convention for the Unification of Certain Rules for International Carriage by Air, Montreal May 28, 1999**

THE STATES PARTIES TO THIS CONVENTION,

RECOGNIZING the significant contribution of the Convention for the Unification of Certain Rules to International Carriage by Air signed in Warsaw on 12 October 1929, hereinafter referred to as the “Warsaw Convention”, and other related instruments to the harmonization of private international air law;

RECOGNIZING the need to modernize and consolidate the Warsaw Convention and related instruments;

RECOGNIZING the importance of ensuring protection of the interests of consumers in international carriage by air and the need for equitable compensation based on the principle of restitution;

REAFFIRMING the desirability of an orderly development of international air transport operations and the smooth flow of passengers, baggage and cargo in accordance with the principles and objectives of the Convention on International Civil Aviation, done at Chicago on 7 December 1944;

CONVINCED that collective State action for further harmonization and codification of certain rules governing international carriage by air through a new Convention is the most adequate means of achieving an equitable balance of interests,

HAVE AGREED AS FOLLOWS:

CHAPTER I
General provisions

**Article 1**
**Scope of application**

1. This Convention applies to all international carriage of persons, baggage or cargo performed by aircraft for reward. It applies equally to gratuitous carriage by aircraft performed by an air transport undertaking.

2. For the purposes of this Convention, the expression international carriage means any carriage in which, according to the agreement between the parties, the place of departure and the place of destination, whether or not there be a break in the carriage or a transhipment, are situated either within the territories of two States Parties, or within the territory of a single State Party if there is an agreed stopping place within the territory of another State, even if that State is not a State Party. Carriage between two points within the territory of a single State Party without an agreed stopping place within the territory of another State is not international carriage for the
purposes of this Convention.

3. Carriage to be performed by several successive carriers is deemed, for
the purposes of this Convention, to be one undivided carriage if it has been
regarded by the parties as a single operation, whether it has been agreed
upon under the form of a single contract or of a series of contracts, and
it does not lose its international character merely because one contract or
a series of contracts is to be performed entirely within the territory of the
same State.

4. This Convention applies also to carriage as set out in Chapter V, subject
to the terms contained therein.

Article 2
Carriage performed by State and carriage of postal items

1. This Convention applies to carriage performed by the State or by
legally constituted public bodies provided it falls within the conditions laid
down in Article 1.

2. In the carriage of postal items, the carrier shall be liable only to the
relevant postal administration in accordance with the rules applicable to the
relationship between the carriers and the postal administrations.

3. Except as provided in paragraph 2 of this Article, the provisions of this
Convention shall not apply to the carriage of postal items.

CHAPTER II
Documentation and duties of the Parties relating to the carriage of
passengers, baggage and cargo

Article 3
Passengers and baggage

1. In respect of carriage of passengers, an individual or collective
document of carriage shall be delivered containing:

(a) an indication of the places of departure and destination;
(b) if the places of departure and destination are within the territory of
a single State Party, one or more agreed stopping places being within the
territory of another State, an indication of at least one such stopping place.

2. Any other means which preserves the information indicated in paragraph
1 may be substituted for the delivery of the document referred to in that
paragraph. If any such other means is used, the carrier shall offer to deliver
to the passenger a written statement of the information so preserved.

3. The carrier shall deliver to the passenger a baggage identification tag
for each piece of checked baggage.

4. The passenger shall be given written notice to the effect that where this
Convention is applicable it governs and may limit the liability of carriers
in respect of death or injury and for destruction or loss of, or damage to,
5. Non-compliance with the provisions of the foregoing paragraphs shall not affect the existence or the validity of the contract of carriage, which shall, nonetheless, be subject to the rules of this Convention including those relating to limitation of liability.

**Article 4**

**Cargo**

1. In respect of the carriage of cargo, an air waybill shall be delivered.

2. Any other means which preserves a record of the carriage to be performed may be substituted for the delivery of an air waybill. If such other means are used, the carrier shall, if so requested by the consignor, deliver to the consignor a cargo receipt permitting identification of the consignment and access to the information contained in the record preserved by such other means.

**Article 5**

**Contents of air waybill or cargo receipt**

The air waybill or the cargo receipt shall include:

(a) an indication of the places of departure and destination;

(b) if the places of departure and destination are within the territory of a single State Party, one or more agreed stopping places being within the territory of another State, an indication of at least one such stopping place; and

(c) an indication of the weight of the consignment.

**Article 6**

**Document relating to the nature of the cargo**

The consignor may be required, if necessary, to meet the formalities of customs, police and similar public authorities to deliver a document indicating the nature of the cargo. This provision creates for the carrier no duty, obligation or liability resulting therefrom.

**Article 7**

**Description of air waybill**

1. The air waybill shall be made out by the consignor in three original parts.

2. The first part shall be marked “for the carrier”; it shall be signed by the consignor. The second part shall be marked “for the consignee”; it shall be signed by the consignor and by the carrier. The third part shall be signed by the carrier who shall hand it to the consignor after the cargo has been accepted.

3. The signature of the carrier and that of the consignor may be printed or stamped.

4. If, at the request of the consignor, the carrier makes out the air waybill, the carrier shall be deemed, subject to proof to the contrary, to have done
so on behalf of the consignor.

**Article 8**

**Documentation for multiple packages**

When there is more than one package:

(a) the carrier of cargo has the right to require the consignor to make out separate air waybills;

(b) the consignor has the right to require the carrier to deliver separate cargo receipts when the other means referred to in paragraph 2 of Article 4 are used.

**Article 9**

**Non-compliance with documentary requirements**

Non-compliance with the provisions of Articles 4 to 8 shall not affect the existence or the validity of the contract of carriage, which shall, nonetheless, be subject to the rules of this Convention including those relating to limitation of liability.

**Article 10**

**Responsibility for particulars of documentation**

1. The consignor is responsible for the correctness of the particulars and statements relating to the cargo inserted by it or on its behalf in the air waybill or furnished by it or on its behalf to the carrier for insertion in the cargo receipt or for insertion in the record preserved by the other means referred to in paragraph 2 of Article 4. The foregoing shall also apply where the person acting on behalf of the consignor is also the agent of the carrier.

2. The consignor shall indemnify the carrier against all damage suffered by it, or by any other person to whom the carrier is liable, by reason of the irregularity, incorrectness or incompleteness of the particulars and statements furnished by the consignor or on its behalf.

3. Subject to the provisions of paragraphs 1 and 2 of this Article, the carrier shall indemnify the consignor against all damage suffered by it, or by any other person to whom the consignor is liable, by reason of the irregularity, incorrectness or incompleteness of the particulars and statements inserted by the carrier or on its behalf in the cargo receipt or in the record preserved by the other means referred to in paragraph 2 of Article 4.

**Article 11**

**Evidentiary value of documentation**

1. The air waybill or the cargo receipt is prima facie evidence of the conclusion of the contract, of the acceptance of the cargo and of the conditions of carriage mentioned therein.

2. Any statements in the air waybill or the cargo receipt relating to the weight, dimensions and packing of the cargo, as well as those relating to the number of packages, are prima facie evidence of the facts stated; those
relating to the quantity, volume and condition of the cargo do not constitute evidence against the carrier except so far as they both have been, and are stated in the air waybill or the cargo receipt to have been, checked by it in the presence of the consignor, or relate to the apparent condition of the cargo.

**Article 12**

**Right of disposition of cargo**

1. Subject to its liability to carry out all its obligations under the contract of carriage, the consignor has the right to dispose of the cargo by withdrawing it at the airport of departure or destination, or by stopping it in the course of the journey on any landing, or by calling for it to be delivered at the place of destination or in the course of the journey to a person other than the consignee originally designated, or by requiring it to be returned to the airport of departure. The consignor must not exercise this right of disposition in such a way as to prejudice the carrier or other consignors and must reimburse any expenses occasioned by the exercise of this right.

2. If it is impossible to carry out the instructions of the consignor, the carrier must so inform the consignor forthwith.

3. If the carrier carries out the instructions of the consignor for the disposition of the cargo without requiring the production of the part of the air waybill or the cargo receipt delivered to the latter, the carrier will be liable, without prejudice to its right of recovery from the consignor, for any damage which may be caused thereby to any person who is lawfully in possession of that part of the air waybill or the cargo receipt.

4. The right conferred on the consignor ceases at the moment when that of the consignee begins in accordance with Article 13. Nevertheless, if the consignee declines to accept the cargo, or cannot be communicated with, the consignor resumes its right of disposition.

**Article 13**

**Delivery of the cargo**

1. Except when the consignor has exercised its right under Article 12, the consignee is entitled, on arrival of the cargo at the place of destination, to require the carrier to deliver the cargo to it, on payment of the charges due and on complying with the conditions of carriage.

2. Unless it is otherwise agreed, it is the duty of the carrier to give notice to the consignee as soon as the cargo arrives.

3. If the carrier admits the loss of the cargo, or if the cargo has not arrived at the expiration of seven days after the date on which it ought to have arrived, the consignee is entitled to enforce against the carrier the rights which flow from the contract of carriage.
Article 14
Enforcement of the rights of consignor and consignee
The consignor and the consignee can respectively enforce all the rights given to them by Articles 12 and 13, each in its own name, whether it is acting in its own interest or in the interests of another, provided that it carries out the obligations imposed by the contract of carriage.

Article 15
Relations of consignor and consignee or mutual relations of third parties
1. Articles 12, 13 and 14 do not affect either the relations of the consignor and the consignee with each other or the mutual relations of third parties, whose rights are derived either from the consignor or from the consignee.
2. The provisions of Articles 12, 13 and 14 can only be varied by express provision in the air waybill or the cargo receipt.

Article 16
Formalities of customs, police or other public authorities
1. The consignor must furnish such information and such documents as are necessary to meet the formalities of customs, police and any other public authorities before the cargo can be delivered to the consignee. The consignor is liable to the carrier for any damage occasioned by the absence, insufficiency or irregularity of any such information or documents, unless the damage is due to the fault of the carrier, its servants or agents.
2. The carrier is under no obligation to enquire into the correctness or sufficiency of such information or documents.

CHAPTER III
Liability of the carrier and extent of compensation for damage

Article 17
Death and injury of passengers - damage to baggage
1. The carrier is liable for damage sustained in case of death or bodily injury of a passenger upon condition only that the accident which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking.
2. The carrier is liable for damage sustained in case of destruction or loss of, or of damage to, checked baggage upon condition only that the event which caused the destruction, loss or damage took place on board the aircraft or during any period within which the checked baggage was in the charge of the carrier. However, the carrier is not liable if and to the extent that the damage resulted from the inherent defect, quality or vice of the baggage. In the case of unchecked baggage, including personal items, the carrier is liable if the damage resulted from its fault or that of its servants
or agents.

3. If the carrier admits the loss of the checked baggage, or if the checked baggage has not arrived at the expiration of 21 days after the date on which it ought to have arrived, the passenger is entitled to enforce against the carrier the rights which flow from the contract of carriage.

4. Unless otherwise specified, in this Convention the term “baggage” means both checked baggage and unchecked baggage.

**Article 18**

**Damage to cargo**

1. The carrier is liable for damage sustained in the event of the destruction or loss of, or damage to, cargo upon condition only that the event which caused the damage so sustained took place during the carriage by air.

2. However, the carrier is not liable if and to the extent it proves that the destruction, or loss of, or damage to, the cargo resulted from one or more of the following:
   
   (a) inherent defect, quality or vice of that cargo;
   
   (b) defective packing of that cargo performed by a person other than the carrier or its servants or agents;
   
   (c) an act of war or an armed conflict;
   
   (d) an act of public authority carried out in connection with the entry, exit or transit of the cargo.

3. The carriage by air within the meaning of paragraph 1 of this Article comprises the period during which the cargo is in the charge of the carrier.

4. The period of the carriage by air does not extend to any carriage by land, by sea or by inland waterway performed outside an airport. If, however, such carriage takes place in the performance of a contract for carriage by air, for the purpose of loading, delivery or transhipment, any damage is presumed, subject to proof to the contrary, to have been the result of an event which took place during the carriage by air. If a carrier, without the consent of the consignor, substitutes carriage by another mode of transport for the whole or part of a carriage intended by the agreement between the parties to be carriage by air, such carriage by another mode of transport is deemed to be within the period of carriage by air.

**Article 19**

**Delay**

The carrier is liable for damage occasioned by delay in the carriage by air of passengers, baggage or cargo. Nevertheless, the carrier shall not be liable for damage occasioned by delay if it proves that it and its servants and agents took all measures that could reasonably be required to avoid the damage or that it was impossible for it or them to take such measures.

**Article 20**

**Exoneration**
If the carrier proves that the damage was caused or contributed to by the negligence or other wrongful act or omission of the person claiming compensation, or the person from whom he or she derives his or her rights, the carrier shall be wholly or partly exonerated from its liability to the claimant to the extent that such negligence or wrongful act or omission caused or contributed to the damage. When by reason of death or injury of a passenger compensation is claimed by a person other than the passenger, the carrier shall likewise be wholly or partly exonerated from its liability to the extent that it proves that the damage was caused or contributed to by the negligence or other wrongful act or omission of that passenger. This Article applies to all the liability provisions in this Convention, including paragraph 1 of Article 21.

**Article 21**

**Compensation in case of death or injury of passengers**

1. For damages arising under paragraph 1 of Article 17 not exceeding 100000 Special Drawing Rights for each passenger, the carrier shall not be able to exclude or limit its liability.

2. The carrier shall not be liable for damages arising under paragraph 1 of Article 17 to the extent that they exceed for each passenger 100000 Special Drawing Rights if the carrier proves that:
   (a) such damage was not due to the negligence or other wrongful act or omission of the carrier or its servants or agents; or
   (b) such damage was solely due to the negligence or other wrongful act or omission of a third party.

**Article 22**

**Limits of liability in relation to delay, baggage and cargo**

1. In the case of damage caused by delay as specified in Article 19 in the carriage of persons, the liability of the carrier for each passenger is limited to 4150 Special Drawing Rights.

2. In the carriage of baggage, the liability of the carrier in the case of destruction, loss, damage or delay is limited to 1000 Special Drawing Rights for each passenger unless the passenger has made, at the time when the checked baggage was handed over to the carrier, a special declaration of interest in delivery at destination and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless it proves that the sum is greater than the passenger’s actual interest in delivery at destination.

3. In the carriage of cargo, the liability of the carrier in the case of destruction, loss, damage or delay is limited to a sum of 17 Special Drawing Rights per kilogram, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of interest in delivery at destination and has paid a supplementary sum if the case so
requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless it proves that the sum is greater than the consignor’s actual interest in delivery at destination.

4. In the case of destruction, loss, damage or delay of part of the cargo, or of any object contained therein, the weight to be taken into consideration in determining the amount to which the carrier’s liability is limited shall be only the total weight of the package or packages concerned. Nevertheless, when the destruction, loss, damage or delay of a part of the cargo, or of an object contained therein, affects the value of other packages covered by the same air waybill, or the same receipt or, if they were not issued, by the same record preserved by the other means referred to in paragraph 2 of Article 4, the total weight of such package or packages shall also be taken into consideration in determining the limit of liability.

5. The foregoing provisions of paragraphs 1 and 2 of this Article shall not apply if it is proved that the damage resulted from an act or omission of the carrier, its servants or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result; provided that, in the case of such act or omission of a servant or agent, it is also proved that such servant or agent was acting within the scope of its employment.

6. The limits prescribed in Article 21 and in this Article shall not prevent the court from awarding, in accordance with its own law, in addition, the whole or part of the court costs and of the other expenses of the litigation incurred by the plaintiff, including interest. The foregoing provision shall not apply if the amount of the damages awarded, excluding court costs and other expenses of the litigation, does not exceed the sum which the carrier has offered in writing to the plaintiff within a period of six months from the date of the occurrence causing the damage, or before the commencement of the action, if that is later.

Article 23

Conversion of monetary units

1. The sums mentioned in terms of Special Drawing Right in this Convention shall be deemed to refer to the Special Drawing Right as defined by the International Monetary Fund. Conversion of the sums into national currencies shall, in case of judicial proceedings, be made according to the value of such currencies in terms of the Special Drawing Right at the date of the judgement. The value of a national currency, in terms of the Special Drawing Right, of a State Party which is a Member of the International Monetary Fund, shall be calculated in accordance with the method of valuation applied by the International Monetary Fund, in effect at the date of the judgement, for its operations and transactions. The value of a national currency, in terms of the Special Drawing Right, of a State Party which is not a Member of the International Monetary Fund, shall be
calculated in a manner determined by that State.

2. Nevertheless, those States which are not Members of the International Monetary Fund and whose law does not permit the application of the provisions of paragraph 1 of this Article may, at the time of ratification or accession or at any time thereafter, declare that the limit of liability of the carrier prescribed in Article 21 is fixed at a sum of 1500000 monetary units per passenger in judicial proceedings in their territories; 62500 monetary units per passenger with respect to paragraph 1 of Article 22; 15000 monetary units per passenger with respect to paragraph 2 of Article 22; and 250 monetary units per kilogram with respect to paragraph 3 of Article 22. This monetary unit corresponds to 65,5 milligrams of gold of millesimal fineness nine hundred. These sums may be converted into the national currency concerned in round figures. The conversion of these sums into national currency shall be made according to the law of the State concerned.

3. The calculation mentioned in the last sentence of paragraph 1 of this Article and the conversion method mentioned in paragraph 2 of this Article shall be made in such manner as to express in the national currency of the State Party as far as possible the same real value for the amounts in Articles 21 and 22 as would result from the application of the first three sentences of paragraph 1 of this Article. State Parties shall communicate to the depositary the manner of calculation pursuant to paragraph 1 of this Article, or the result of the conversion in paragraph 2 of this Article as the case may be, when depositing an instrument of ratification, acceptance, approval of or accession to this Convention and whenever there is a change in either.

_**Article 24**_

**Review of limits**

1. Without prejudice to the provisions of Article 25 of this Convention and subject to paragraph 2 below, the limits of liability prescribed in Articles 21, 22 and 23 shall be reviewed by the Depositary at five-year intervals, the first such review to take place at the end of the fifth year following the date of entry into force of this Convention, or if the Convention does not enter into force within five years of the date it is first open for signature, within the first year of its entry into force, by reference to an inflation factor which corresponds to the accumulated rate of inflation since the previous revision or in the first instance since the date of entry into force of the Convention. The measure of the rate of inflation to be used in determining the inflation factor shall be the weighted average of the annual rates of increase or decrease in the Consumer Price Indices of the States whose currencies comprise the Special Drawing Right mentioned in paragraph 1 of Article 23.
2. If the review referred to in the preceding paragraph concludes that the inflation factor has exceeded 10 per cent, the Depositary shall notify States Parties of a revision of the limits of liability. Any such revision shall become effective six months after its notification to the States Parties. If within three months after its notification to the States Parties a majority of the States Parties register their disapproval, the revision shall not become effective and the Depositary shall refer the matter to a meeting of the States Parties. The Depositary shall immediately notify all States Parties of the coming into force of any revision.

3. Notwithstanding paragraph 1 of this Article, the procedure referred to in paragraph 2 of this Article shall be applied at any time provided that one-third of the States Parties express a desire to that effect and upon condition that the inflation factor referred to in paragraph 1 has exceeded 30 per cent since the previous revision or since the date of entry into force of this Convention if there has been no previous revision. Subsequent reviews using the procedure described in paragraph 1 of this Article will take place at five-year intervals starting at the end of the fifth year following the date of the reviews under the present paragraph.

Article 25
Stipulation on limits
A carrier may stipulate that the contract of carriage shall be subject to higher limits of liability than those provided for in this Convention or to no limits of liability whatsoever.

Article 26
Invalidity of contractual provisions
Any provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in this Convention shall be null and void, but the nullity of any such provision does not involve the nullity of the whole contract, which shall remain subject to the provisions of this Convention.

Article 27
Freedom to contract
Nothing contained in this Convention shall prevent the carrier from refusing to enter into any contract of carriage, from waiving any defences available under the Convention, or from laying down conditions which do not conflict with the provisions of this Convention.

Article 28
Advance payments
In the case of aircraft accidents resulting in death or injury of passengers, the carrier shall, if required by its national law, make advance payments without delay to a natural person or persons who are entitled to claim compensation in order to meet the immediate economic needs of such
persons. Such advance payments shall not constitute a recognition of liability and may be offset against any amounts subsequently paid as damages by the carrier.

**Article 29**

**Basis of claims**

In the carriage of passengers, baggage and cargo, any action for damages, however founded, whether under this Convention or in contract or in tort or otherwise, can only be brought subject to the conditions and such limits of liability as are set out in this Convention without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights. In any such action, punitive, exemplary or any other non-compensatory damages shall not be recoverable.

**Article 30**

**Servants, agents - aggregation of claims**

1. If an action is brought against a servant or agent of the carrier arising out of damage to which the Convention relates, such servant or agent, if they prove that they acted within the scope of their employment, shall be entitled to avail themselves of the conditions and limits of liability which the carrier itself is entitled to invoke under this Convention.

2. The aggregate of the amounts recoverable from the carrier, its servants and agents, in that case, shall not exceed the said limits.

3. Save in respect of the carriage of cargo, the provisions of paragraphs 1 and 2 of this Article shall not apply if it is proved that the damage resulted from an act or omission of the servant or agent done with intent to cause damage or recklessly and with knowledge that damage would probably result.

**Article 31**

**Timely notice of complaints**

1. Receipt by the person entitled to delivery of checked baggage or cargo without complaint is prima facie evidence that the same has been delivered in good condition and in accordance with the document of carriage or with the record preserved by the other means referred to in paragraph 2 of Article 3 and paragraph 2 of Article 4.

2. In the case of damage, the person entitled to delivery must complain to the carrier forthwith after the discovery of the damage, and, at the latest, within seven days from the date of receipt in the case of checked baggage and 14 days from the date of receipt in the case of cargo. In the case of delay, the complaint must be made at the latest within 21 days from the date on which the baggage or cargo have been placed at his or her disposal.

3. Every complaint must be made in writing and given or dispatched within the times aforesaid.

4. If no complaint is made within the times aforesaid, no action shall lie
against the carrier, save in the case of fraud on its part.

**Article 32**

**Death of person liable**

In the case of the death of the person liable, an action for damages lies in accordance with the terms of this Convention against those legally representing his or her estate.

**Article 33**

**Jurisdiction**

1. An action for damages must be brought, at the option of the plaintiff, in the territory of one of the States Parties, either before the court of the domicile of the carrier or of its principal place of business, or where it has a place of business through which the contract has been made or before the court at the place of destination.

2. In respect of damage resulting from the death or injury of a passenger, an action may be brought before one of the courts mentioned in paragraph 1 of this Article, or in the territory of a State Party in which at the time of the accident the passenger has his or her principal and permanent residence and to or from which the carrier operates services for the carriage of passengers by air, either on its own aircraft, or on another carrier’s aircraft pursuant to a commercial agreement, and in which that carrier conducts its business of carriage of passengers by air from premises leased or owned by the carrier itself or by another carrier with which it has a commercial agreement.

3. For the purposes of paragraph 2,
   (a) “commercial agreement” means an agreement, other than an agency agreement, made between carriers and relating to the provision of their joint services for carriage of passengers by air;
   (b) “principal and permanent residence” means the one fixed and permanent abode of the passenger at the time of the accident. The nationality of the passenger shall not be the determining factor in this regard.

4. Questions of procedure shall be governed by the law of the court seised of the case.

**Article 34**

**Arbitration**

1. Subject to the provisions of this Article, the parties to the contract of carriage for cargo may stipulate that any dispute relating to the liability of the carrier under this Convention shall be settled by arbitration. Such agreement shall be in writing.

2. The arbitration proceedings shall, at the option of the claimant, take place within one of the jurisdictions referred to in Article 33.

3. The arbitrator or arbitration tribunal shall apply the provisions of this Convention.

4. The provisions of paragraphs 2 and 3 of this Article shall be deemed
to be part of every arbitration clause or agreement, and any term of such clause or agreement which is inconsistent therewith shall be null and void.

Article 35
Limitation of actions
1. The right to damages shall be extinguished if an action is not brought within a period of two years, reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the carriage stopped.
2. The method of calculating that period shall be determined by the law of the court seised of the case.

Article 36
Successive carriage
1. In the case of carriage to be performed by various successive carriers and falling within the definition set out in paragraph 3 of Article 1, each carrier which accepts passengers, baggage or cargo is subject to the rules set out in this Convention and is deemed to be one of the parties to the contract of carriage in so far as the contract deals with that part of the carriage which is performed under its supervision.
2. In the case of carriage of this nature, the passenger or any person entitled to compensation in respect of him or her can take action only against the carrier which performed the carriage during which the accident or the delay occurred, save in the case where, by express agreement, the first carrier has assumed liability for the whole journey.
3. As regards baggage or cargo, the passenger or consignor will have a right of action against the first carrier, and the passenger or consignee who is entitled to delivery will have a right of action against the last carrier, and further, each may take action against the carrier which performed the carriage during which the destruction, loss, damage or delay took place. These carriers will be jointly and severally liable to the passenger or to the consignor or consignee.

Article 37
Right of recourse against third parties
Nothing in this Convention shall prejudice the question whether a person liable for damage in accordance with its provisions has a right of recourse against any other person.

CHAPTER IV
Combined carriage

Article 38
Combined carriage
1. In the case of combined carriage performed partly by air and partly by
any other mode of carriage, the provisions of this Convention shall, subject to paragraph 4 of Article 18, apply only to the carriage by air, provided that the carriage by air falls within the terms of Article 1.

2. Nothing in this Convention shall prevent the parties in the case of combined carriage from inserting in the document of air carriage conditions relating to other modes of carriage, provided that the provisions of this Convention are observed as regards the carriage by air.

CHAPTER V
Carriage by air performed by a person other than the contracting carrier

Article 39
Contracting carrier actual carrier
The provisions of this Chapter apply when a person (hereinafter referred to as “the contracting carrier”) as a principal makes a contract of carriage governed by this Convention with a passenger or consignor or with a person acting on behalf of the passenger or consignor, and another person (hereinafter referred to as “the actual carrier”) performs, by virtue of authority from the contracting carrier, the whole or part of the carriage, but is not with respect to such part a successive carrier within the meaning of this Convention. Such authority shall be presumed in the absence of proof to the contrary.

Article 40
Respective liability of contracting and actual carriers
If an actual carrier performs the whole or part of carriage which, according to the contract referred to in Article 39, is governed by this Convention, both the contracting carrier and the actual carrier shall, except as otherwise provided in this Chapter, be subject to the rules of this Convention, the former for the whole of the carriage contemplated in the contract, the latter solely for the carriage which it performs.

Article 41
Mutual liability
1. The acts and omissions of the actual carrier and of its servants and agents acting within the scope of their employment shall, in relation to the carriage performed by the actual carrier, be deemed to be also those of the contracting carrier.

2. The acts and omissions of the contracting carrier and of its servants and agents acting within the scope of their employment shall, in relation to the carriage performed by the actual carrier, be deemed to be also those of the actual carrier. Nevertheless, no such act or omission shall subject the actual carrier to liability exceeding the amounts referred to in Articles 21, 22, 23 and 24. Any special agreement under which the contracting carrier
assumes obligations not imposed by this Convention or any waiver of rights or defences conferred by this Convention or any special declaration of interest in delivery at destination contemplated in Article 22 shall not affect the actual carrier unless agreed to by it.

**Article 42**

*Addressee of complaints and instructions*

Any complaint to be made or instruction to be given under this Convention to the carrier shall have the same effect whether addressed to the contracting carrier or to the actual carrier. Nevertheless, instructions referred to in Article 12 shall only be effective if addressed to the contracting carrier.

**Article 43**

*Servants and agents*

In relation to the carriage performed by the actual carrier, any servant or agent of that carrier or of the contracting carrier shall, if they prove that they acted within the scope of their employment, be entitled to avail themselves of the conditions and limits of liability which are applicable under this Convention to the carrier whose servant or agent they are, unless it is proved that they acted in a manner that prevents the limits of liability from being invoked in accordance with this Convention.

**Article 44**

*Aggregation of damages*

In relation to the carriage performed by the actual carrier, the aggregate of the amounts recoverable from that carrier and the contracting carrier, and from their servants and agents acting within the scope of their employment, shall not exceed the highest amount which could be awarded against either the contracting carrier or the actual carrier under this Convention, but none of the persons mentioned shall be liable for a sum in excess of the limit applicable to that person.

**Article 45**

*Addressee of claims*

In relation to the carriage performed by the actual carrier, an action for damages may be brought, at the option of the plaintiff, against that carrier or the contracting carrier, or against both together or separately. If the action is brought against only one of those carriers, that carrier shall have the right to require the other carrier to be joined in the proceedings, the procedure and effects being governed by the law of the court seised of the case.

**Article 46**

*Additional jurisdiction*

Any action for damages contemplated in Article 45 must be brought, at the option of the plaintiff, in the territory of one of the States Parties, either before a court in which an action may be brought against the contracting carrier, as provided in Article 33, or before the court having jurisdiction at
the place where the actual carrier has its domicile or its principal place of business.

**Article 47**  
**Invalidity of contractual provisions**  
Any contractual provision tending to relieve the contracting carrier or the actual carrier of liability under this Chapter or to fix a lower limit than that which is applicable according to this Chapter shall be null and void, but the nullity of any such provision does not involve the nullity of the whole contract, which shall remain subject to the provisions of this Chapter.

**Article 48**  
**Mutual relations of contracting and actual carriers**  
Except as provided in Article 45, nothing in this Chapter shall affect the rights and obligations of the carriers between themselves, including any right of recourse or indemnification.

**CHAPTER VI**  
Other provisions

**Article 49**  
**Mandatory application**  
Any clause contained in the contract of carriage and all special agreements entered into before the damage occurred by which the parties purport to infringe the rules laid down by this Convention, whether by deciding the law to be applied, or by altering the rules as to jurisdiction, shall be null and void.

**Article 50**  
**Insurance**  
States Parties shall require their carriers to maintain adequate insurance covering their liability under this Convention. A carrier may be required by the State Party into which it operates to furnish evidence that it maintains adequate insurance covering its liability under this Convention.

**Article 51**  
**Carriage Performed in Extraordinary Circumstances**  
The provisions of Articles 3 to 5, 7 and 8 relating to the documentation of carriage shall not apply in the case of carriage performed in extraordinary circumstances outside the normal scope of a carrier’s business.

**Article 52**  
**Definition of days**  
The expression “days” when used in this Convention means calendar days, not working days.
CHAPTER VII
Final clauses

Article 53
Signature, ratification and entry into force
1. This Convention shall be open for signature in Montreal on 28 May 1999 by States participating in the International Conference on Air Law held at Montreal from 10 to 28 May 1999. After 28 May 1999, the Convention shall be open to all States for signature at the Headquarters of the International Civil Aviation Organization in Montreal until it enters into force in accordance with paragraph 6 of this Article.

2. This Convention shall similarly be open for signature by Regional Economic Integration Organisations. For the purpose of this Convention, a “Regional Economic Integration Organisation” means any organisation which is constituted by sovereign States of a given region which has competence in respect of certain matters governed by this Convention and has been duly authorized to sign and to ratify, accept, approve or accede to this Convention. A reference to a “State Party” or “States Parties” in this Convention, otherwise than in paragraph 2 of Article 1, paragraph 1(b) of Article 3, paragraph (b) of Article 5, Articles 23, 33, 46 and paragraph (b) of Article 57, applies equally to a Regional Economic Integration Organisation. For the purpose of Article 24, the references to “a majority of the States Parties” and “one-third of the States Parties” shall not apply to a Regional Economic Integration Organisation.

3. This Convention shall be subject to ratification by States and by Regional Economic Integration Organisations which have signed it.

4. Any State or Regional Economic Integration Organisation which does not sign this Convention may accept, approve or accede to it at any time.

5. Instruments of ratification, acceptance, approval or accession shall be deposited with the International Civil Aviation Organization, which is hereby designated the Depositary.

6. This Convention shall enter into force on the sixtieth day following the date of deposit of the thirtieth instrument of ratification, acceptance, approval or accession with the Depositary between the States which have deposited such instrument. An instrument deposited by a Regional Economic Integration Organisation shall not be counted for the purpose of this paragraph.

7. For other States and for other Regional Economic Integration Organisations, this Convention shall take effect 60 days following the date of deposit of the instrument of ratification, acceptance, approval or accession.
8. The Depositary shall promptly notify all signatories and States Parties of:
   (a) each signature of this Convention and date thereof;
   (b) each deposit of an instrument of ratification, acceptance, approval or accession and date thereof;
   (c) the date of entry into force of this Convention;
   (d) the date of the coming into force of any revision of the limits of liability established under this Convention;
   (e) any denunciation under Article 54.

Article 54

Denunciation

1. Any State Party may denounce this Convention by written notification to the Depositary.
2. Denunciation shall take effect 180 days following the date on which notification is received by the Depositary.

Article 55

Relationship with other Warsaw Convention Instruments

This Convention shall prevail over any rules which apply to international carriage by air:
1. between States Parties to this Convention by virtue of those States commonly being Party to
   (a) the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw on 12 October 1929 (hereinafter called the “Warsaw Convention”);
   (b) the Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929, done at The Hague on 28 September 1955 (hereinafter called The Hague Protocol);
   (c) the Convention, Supplementary to the Warsaw Convention, for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person Other than the Contracting Carrier, signed at Guadalajara on 18 September 1961 (hereinafter called the Guadalajara Convention);
   (d) the Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929 as Amended by the Protocol Done at The Hague on 28 September 1955 signed at Guatemala City on 8 March 1971 (hereinafter called the Guatemala City Protocol);
   (e) Additional Protocol Nos 1 to 3 and Montreal Protocol No 4 to amend the Warsaw Convention as amended by the Hague Protocol or the Warsaw Convention as amended by both the Hague Protocol and the Guatemala City Protocol signed at Montreal on 25 September 1975 (hereinafter called
the Montreal Protocols); or
2. within the territory of any single State Party to this Convention by virtue of that State being Party to one or more of the instruments referred to in subparagraphs (a) to (e) above.

**Article 56**

**States with more than one system of law**

1. If a State has two or more territorial units in which different systems of law are applicable in relation to matters dealt with in this Convention, it may at the time of signature, ratification, acceptance, approval or accession declare that this Convention shall extend to all its territorial units or only to one or more of them and may modify this declaration by submitting another declaration at any time.

2. Any such declaration shall be notified to the Depositary and shall state expressly the territorial units to which the Convention applies.

3. In relation to a State Party which has made such a declaration:
   (a) references in Article 23 to “national currency” shall be construed as referring to the currency of the relevant territorial unit of that State; and
   (b) the reference in Article 28 to “national law” shall be construed as referring to the law of the relevant territorial unit of that State.

**Article 57**

**Reservations**

No reservation may be made to this Convention except that a State Party may at any time declare by a notification addressed to the Depositary that this Convention shall not apply to:

(a) international carriage by air performed and operated directly by that State Party for non-commercial purposes in respect to its functions and duties as a sovereign State; and/or

(b) the carriage of persons, cargo and baggage for its military authorities on aircraft registered in or leased by that State Party, the whole capacity of which has been reserved by or on behalf of such authorities.

IN WITNESS WHEREOF the undersigned Plenipotentiaries, having been duly authorized, have signed this Convention.

DONE at Montreal on the 28th day of May of the year one thousand nine hundred and ninety-nine in the English, Arabic, Chinese, French, Russian and Spanish languages, all texts being equally authentic. This Convention shall remain deposited in the archives of the International Civil Aviation Organization, and certified copies thereof shall be transmitted by the Depositary to all States Parties to this Convention, as well as to all States Parties to the Warsaw Convention, The Hague Protocol, the Guadalajara Convention, the Guatemala City Protocol, and the Montreal Protocols.

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 71(1) thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Economic and Social Committee [1],

Having regard to the opinion of the Committee of the Regions [2],

Acting in accordance with the procedure laid down in Article 251 of the Treaty, in the light of the joint text approved by the Conciliation Committee on 31 July 2007 [3],

Whereas:

(1) In the framework of the common transport policy, it is important to safeguard users’ rights for rail passengers and to improve the quality and effectiveness of rail passenger services in order to help increase the share of rail transport in relation to other modes of transport.


(3) Since the rail passenger is the weaker party to the transport contract, passengers’ rights in this respect should be safeguarded.

(4) Users’ rights to rail services include the receipt of information regarding the service both before and during the journey. Whenever possible, railway undertakings and ticket vendors should provide this information in advance and as soon as possible.

(5) More detailed requirements regarding the provision of travel information will be set out in the technical specifications for interoperability (TSIs) referred to in Directive 2001/16/EC of the European Parliament and of the Council of 19 March 2001 on the interoperability of the conventional rail system [5].

(6) Strengthening of the rights of rail passengers should build on the existing system of international law on this subject contained in Appendix A — Uniform rules concerning the Contract for International Carriage of Passengers and Luggage by Rail (CIV) to the Convention concerning International Carriage by Rail (COTIF) of 9 May 1980, as modified by the Protocol for the modification of the Convention concerning International Carriage by Rail of 3 June 1999 (1999 Protocol). However, it is desirable to extend the scope of this Regulation and protect not only international passengers but domestic passengers too.
(7) Railway undertakings should cooperate to facilitate the transfer of rail passengers from one operator to another by the provision of through tickets, whenever possible.

(8) The provision of information and tickets for rail passengers should be facilitated by the adaptation of computerised systems to a common specification.

(9) The further implementation of travel information and reservation systems should be executed in accordance with the TSIs.

(10) Rail passenger services should benefit citizens in general. Consequently, disabled persons and persons with reduced mobility, whether caused by disability, age or any other factor, should have opportunities for rail travel comparable to those of other citizens. Disabled persons and persons with reduced mobility have the same right as all other citizens to free movement, freedom of choice and to non-discrimination. Inter alia, special attention should be given to the provision of information to disabled persons and persons with reduced mobility concerning the accessibility of rail services, access conditions of rolling stock and the facilities on board. In order to provide passengers with sensory impairment with the best information on delays, visual and audible systems should be used, as appropriate. Disabled persons and persons with reduced mobility should be enabled to buy tickets on board a train without extra charges.

(11) Railway undertakings and station managers should take into account the needs of disabled persons and persons with reduced mobility, through compliance with the TSI for persons with reduced mobility, so as to ensure that, in accordance with Community public procurement rules, all buildings and rolling stock are made accessible through the progressive elimination of physical obstacles and functional hindrances when acquiring new material or carrying out construction or major renovation work.

(12) Railway undertakings should be obliged to be insured, or to make equivalent arrangements, for their liability to rail passengers in the event of accident. The minimum amount of insurance for railway undertakings should be the subject of future review.

(13) Strengthened rights of compensation and assistance in the event of delay, missed connection or cancellation of a service should lead to greater incentives for the rail passenger market, to the benefit of passengers.

(14) It is desirable that this Regulation create a system of compensation for passengers in the case of delay which is linked to the liability of the railway undertaking, on the same basis as the international system provided by the COTIF and in particular appendix CIV thereto relating to passengers’ rights.

(15) Where a Member State grants railway undertakings an exemption from the provisions of this Regulation, it should encourage railway
undertakings, in consultation with organisations representing passengers, to put in place arrangements for compensation and assistance in the event of major disruption to a rail passenger service.

(16) It is also desirable to relieve accident victims and their dependants of short-term financial concerns in the period immediately after an accident.

(17) It is in the interests of rail passengers that adequate measures be taken, in agreement with public authorities, to ensure their personal security at stations as well as on board trains.

(18) Rail passengers should be able to submit a complaint to any railway undertaking involved regarding the rights and obligations conferred by this Regulation, and be entitled to receive a response within a reasonable period of time.

(19) Railway undertakings should define, manage and monitor service quality standards for rail passenger services.

(20) The contents of this Regulation should be reviewed in respect of the adjustment of financial amounts for inflation and in respect of information and service quality requirements in the light of market developments as well as in the light of the effects on service quality of this Regulation.

(21) This Regulation should be without prejudice to Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [6].

(22) Member States should lay down penalties applicable to infringements of this regulation and ensure that these penalties are applied. The penalties, which might include the payment of compensation to the person in question, should be effective, proportionate and dissuasive.

(23) Since the objectives of this Regulation, namely the development of the Community’s railways and the introduction of passenger rights, cannot be sufficiently achieved by the Member States, and can therefore be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Regulation does not go beyond what is necessary in order to achieve those objectives.

(24) It is an aim of this Regulation to improve rail passenger services within the Community. Therefore, Member States should be able to grant exemptions for services in regions where a significant part of the service is operated outside the Community.

(25) Railway undertakings in some Member States may experience difficulty in applying the entirety of the provisions of this Regulation on its entry into force. Therefore, Member States should be able to grant temporary exemptions from the application of the provisions of this Regulation to
long-distance domestic rail passenger services. The temporary exemption should, however, not apply to the provisions of this Regulation that grant disabled persons or persons with reduced mobility access to travel by rail, nor to the right of those wishing to purchase tickets for travel by rail to do so without undue difficulty, nor to the provisions on railway undertakings’ liability in respect of passengers and their luggage, the requirement that undertakings be adequately insured, and the requirement that those undertakings take adequate measures to ensure passengers’ personal security in railway stations and on trains and to manage risk.

(26) Urban, suburban and regional rail passenger services are different in character from long-distance services. Therefore, with the exception of certain provisions which should apply to all rail passenger services throughout the Community, Member States should be able to grant exemptions from the application of the provisions of this Regulation to urban, suburban and regional rail passenger services.

(27) The measures necessary for the implementation of this Regulation should be adopted in accordance with Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission [7].

(28) In particular, the Commission should be empowered to adopt implementing measures. Since those measures are of general scope and are designed to amend non-essential elements of this Regulation, or to supplement it with new non-essential elements, they must be adopted in accordance with the regulatory procedure with scrutiny provided for in Article 5a of Decision 1999/468/EC,

HAVE ADOPTED THIS REGULATION:

CHAPTER I
GENERAL PROVISIONS

Article 1
Subject matter
This Regulation establishes rules as regards the following:
(a) the information to be provided by railway undertakings, the conclusion of transport contracts, the issuing of tickets and the implementation of a Computerised Information and Reservation System for Rail Transport,
(b) the liability of railway undertakings and their insurance obligations for passengers and their luggage,
(c) the obligations of railway undertakings to passengers in cases of delay,
(d) the protection of, and assistance to, disabled persons and persons with reduced mobility travelling by rail,
(e) the definition and monitoring of service quality standards, the management of risks to the personal security of passengers and the handling of complaints, and

(f) general rules on enforcement.

**Article 2**

**Scope**

1. This Regulation shall apply to all rail journeys and services throughout the Community provided by one or more railway undertakings licensed in accordance with Council Directive 95/18/EC of 19 June 1995 on the licensing of railway undertakings [8].

2. This Regulation does not apply to railway undertakings and transport services which are not licensed under Directive 95/18/EC.

3. On the entry into force of this Regulation, Articles 9, 11, 12, 19, 20(1) and 26 shall apply to all rail passenger services throughout the Community.

4. With the exception of the provisions set out in paragraph 3, a Member State may, on a transparent and non-discriminatory basis, grant an exemption for a period no longer than five years, which may be renewed twice for a maximum period of five years on each occasion, from the application of the provisions of this Regulation to domestic rail passenger services.

5. With the exception of the provisions set out in paragraph 3 of this Article, a Member State may exempt from the application of the provisions of this Regulation urban, suburban and regional rail passenger services. In order to distinguish between urban, suburban and regional rail passenger services, Member States shall apply the definitions contained in Council Directive 91/440/EEC of 29 July 1991 on the development of the Community’s railways [9]. In applying these definitions, Member States shall take into account the following criteria: distance, frequency of services, number of scheduled stops, rolling stock employed, ticketing schemes, fluctuations in passenger numbers between services in peak and off-peak periods, train codes and timetables.

6. For a maximum period of five years, a Member State may, on a transparent and non-discriminatory basis, grant an exemption, which may be renewed, from the application of the provisions of this Regulation to particular services or journeys because a significant part of the rail passenger service, including at least one scheduled station stop, is operated outside the Community.

7. Member States shall inform the Commission of exemptions granted pursuant to paragraphs 4, 5 and 6. The Commission shall take appropriate action if such an exemption is deemed not to be in accordance with the provisions of this Article. No later than 3 December 2014, the Commission shall submit to the European Parliament and the Council a report on exemptions granted pursuant to paragraphs 4, 5 and 6.
Article 3
Definitions
For the purposes of this Regulation the following definitions shall apply:
1. “railway undertaking” means a railway undertaking as defined in Article 2 of Directive 2001/14/EC [10], and any other public or private undertaking the activity of which is to provide transport of goods and/or passengers by rail on the basis that the undertaking must ensure traction; this also includes undertakings which provide traction only;
2. “carrier” means the contractual railway undertaking with whom the passenger has concluded the transport contract or a series of successive railway undertakings which are liable on the basis of this contract;
3. “substitute carrier” means a railway undertaking, which has not concluded a transport contract with the passenger, but to whom the railway undertaking party to the contract has entrusted, in whole or in part, the performance of the transport by rail;
4. “infrastructure manager” means any body or undertaking that is responsible in particular for establishing and maintaining railway infrastructure, or a part thereof, as defined in Article 3 of Directive 91/440/EEC, which may also include the management of infrastructure control and safety systems; the functions of the infrastructure manager on a network or part of a network may be allocated to different bodies or undertakings;
5. “station manager” means an organisational entity in a Member State, which has been made responsible for the management of a railway station and which may be the infrastructure manager;
6. “tour operator” means an organiser or retailer, other than a railway undertaking, within the meaning of Article 2, points (2) and (3) of Directive 90/314/EEC [11];
7. “ticket vendor” means any retailer of rail transport services concluding transport contracts and selling tickets on behalf of a railway undertaking or for its own account;
8. “transport contract” means a contract of carriage for reward or free of charge between a railway undertaking or a ticket vendor and the passenger for the provision of one or more transport services;
9. “reservation” means an authorisation, on paper or in electronic form, giving entitlement to transportation subject to previously confirmed personalised transport arrangements;
10. “through ticket” means a ticket or tickets representing a transport contract for successive railway services operated by one or several railway undertakings;
11. “domestic rail passenger service” means a rail passenger service which does not cross a border of a Member State;
12. “delay” means the time difference between the time the passenger
was scheduled to arrive in accordance with the published timetable and the time of his or her actual or expected arrival;

13. “travel pass” or “season ticket” means a ticket for an unlimited number of journeys which provides the authorised holder with rail travel on a particular route or network during a specified period;

14. “Computerised Information and Reservation System for Rail Transport (CIRSRT)” means a computerised system containing information about rail services offered by railway undertakings; the information stored in the CIRSRT on passenger services shall include information on:
   (a) schedules and timetables of passenger services;
   (b) availability of seats on passenger services;
   (c) fares and special conditions;
   (d) accessibility of trains for disabled persons and persons with reduced mobility;
   (e) facilities through which reservations may be made or tickets or through tickets may be issued to the extent that some or all of these facilities are made available to users;

15. “disabled person” or “person with reduced mobility” means any person whose mobility when using transport is reduced due to any physical disability (sensory or locomotory, permanent or temporary), intellectual disability or impairment, or any other cause of disability, or as a result of age, and whose situation needs appropriate attention and adaptation to his or her particular needs of the service made available to all passengers;

16. “General Conditions of Carriage” means the conditions of the carrier in the form of general conditions or tariffs legally in force in each Member State and which have become, by the conclusion of the contract of carriage, an integral part of it;

17. “vehicle” means a motor vehicle or a trailer carried on the occasion of the carriage of passengers.

CHAPTER II
TRANSPORT CONTRACT, INFORMATION AND TICKETS

Article 4
Transport contract
Subject to the provisions of this Chapter, the conclusion and performance of a transport contract and the provision of information and tickets shall be governed by the provisions of Title II and Title III of Annex I.

Article 5
Bicycles
Railway undertakings shall enable passengers to bring bicycles on to the train, where appropriate for a fee, if they are easy to handle, if this does not
adversely affect the specific rail service, and if the rolling-stock so permits.

**Article 6**

**Exclusion of waiver and stipulation of limits**

1. Obligations towards passengers pursuant to this Regulation may not be limited or waived, notably by a derogation or restrictive clause in the transport contract.

2. Railway undertakings may offer contract conditions more favourable for the passenger than the conditions laid down in this Regulation.

**Article 7**

**Obligation to provide information concerning discontinuation of services**

Railway undertakings or, where appropriate, competent authorities responsible for a public service railway contract shall make public by appropriate means, and before their implementation, decisions to discontinue services.

**Article 8**

**Travel information**

1. Without prejudice to Article 10, railway undertakings and ticket vendors offering transport contracts on behalf of one or more railway undertakings shall provide the passenger, upon request, with at least the information set out in Annex II, Part I in relation to the journeys for which a transport contract is offered by the railway undertaking concerned. Ticket vendors offering transport contracts on their own account, and tour operators, shall provide this information where available.

2. Railway undertakings shall provide the passenger during the journey with at least the information set out in Annex II, Part II.

3. The information referred to in paragraphs 1 and 2 shall be provided in the most appropriate format. Particular attention shall be paid in this regard to the needs of people with auditory and/or visual impairment.

**Article 9**

**Availability of tickets, through tickets and reservations**

1. Railway undertakings and ticket vendors shall offer, where available, tickets, through tickets and reservations.

2. Without prejudice to paragraph 4, railway undertakings shall distribute tickets to passengers via at least one of the following points of sale:

   (a) ticket offices or selling machines;
   (b) telephone, the Internet or any other widely available information technology;
   (c) on board trains.

3. Without prejudice to paragraphs 4 and 5, railway undertakings shall distribute tickets for services provided under public service contracts via at least one of the following points of sale:
(a) ticket offices or selling machines;
(b) on board trains.

4. Railway undertakings shall offer the possibility to obtain tickets for the respective service on board the train, unless this is limited or denied on grounds relating to security or antifraud policy or compulsory train reservation or reasonable commercial grounds.

5. Where there is no ticket office or selling machine in the station of departure, passengers shall be informed at the station:
   (a) of the possibility of purchasing tickets via telephone or the Internet or on board the train, and of the procedure for such purchase;
   (b) of the nearest railway station or place at which ticket offices and/or selling machines are available.

Article 10
Travel information and reservation systems

1. In order to provide the information and to issue tickets referred to in this Regulation, railway undertakings and ticket vendors shall make use of CIRSRT, to be established by the procedures referred to in this Article.

2. The technical specifications for interoperability (TSIs) referred to in Directive 2001/16/EC shall be applied for the purposes of this Regulation.

3. The Commission shall, on a proposal to be submitted by the European Railway Agency (ERA), adopt the TSI of telematics applications for passengers by 3 December 2010. The TSI shall make possible the provision of the information, set out in Annex II, and the issuing of tickets as governed by this Regulation.

4. Railway undertakings shall adapt their CIRSRT according to the requirements set out in the TSI in accordance with a deployment plan set out in that TSI.

5. Subject to the provisions of Directive 95/46/EC, no railway undertaking or ticket vendor shall disclose personal information on individual bookings to other railway undertakings and/or ticket vendors.

CHAPTER III
LIABILITY OF RAILWAY UNDERTAKINGS FOR PASSENGERS AND THEIR LUGGAGE

Article 11
Liability for passengers and luggage

Subject to the provisions of this Chapter, and without prejudice to applicable national law granting passengers further compensation for damages, the liability of railway undertakings in respect of passengers and their luggage shall be governed by Chapters I, III and IV of Title IV, Title VI and Title VII of Annex I.
Article 12

Insurance
1. The obligation set out in Article 9 of Directive 95/18/EC as far as it relates to liability for passengers shall be understood as requiring a railway undertaking to be adequately insured or to make equivalent arrangements for cover of its liabilities under this Regulation.
2. The Commission shall submit to the European Parliament and the Council a report on the setting of a minimum amount of insurance for railway undertakings by 3 December 2010. If appropriate, that report shall be accompanied by suitable proposals or recommendations on this matter.

Article 13

Advance payments
1. If a passenger is killed or injured, the railway undertaking as referred to in Article 26(5) of Annex I shall without delay, and in any event not later than fifteen days after the establishment of the identity of the natural person entitled to compensation, make such advance payments as may be required to meet immediate economic needs on a basis proportional to the damage suffered.
2. Without prejudice to paragraph 1, an advance payment shall not be less than EUR 21000 per passenger in the event of death.
3. An advance payment shall not constitute recognition of liability and may be offset against any subsequent sums paid on the basis of this Regulation but is not returnable, except in the cases where damage was caused by the negligence or fault of the passenger or where the person who received the advance payment was not the person entitled to compensation.

Article 14

Contestation of liability
Even if the railway undertaking contests its responsibility for physical injury to a passenger whom it conveys, it shall make every reasonable effort to assist a passenger claiming compensation for damage from third parties.

CHAPTER IV

DELAYS, MISSED CONNECTIONS AND CANCELLATIONS

Article 15

Liability for delays, missed connections and cancellations
Subject to the provisions of this Chapter, the liability of railway undertakings in respect of delays, missed connections and cancellations shall be governed by Chapter II of Title IV of Annex I.

Article 16

Reimbursement and re-routing
Where it is reasonably to be expected that the delay in the arrival at the
final destination under the transport contract will be more than 60 minutes, the passenger shall immediately have the choice between:

(a) reimbursement of the full cost of the ticket, under the conditions by which it was paid, for the part or parts of his or her journey not made and for the part or parts already made if the journey is no longer serving any purpose in relation to the passenger’s original travel plan, together with, when relevant, a return service to the first point of departure at the earliest opportunity. The payment of the reimbursement shall be made under the same conditions as the payment for compensation referred to in Article 17; or

(b) continuation or re-routing, under comparable transport conditions, to the final destination at the earliest opportunity; or

(c) continuation or re-routing, under comparable transport conditions, to the final destination at a later date at the passenger’s convenience.

Article 17
Compensation of the ticket price

1. Without losing the right of transport, a passenger may request compensation for delays from the railway undertaking if he or she is facing a delay between the places of departure and destination stated on the ticket for which the ticket has not been reimbursed in accordance with Article 16. The minimum compensations for delays shall be as follows:

(a) 25 % of the ticket price for a delay of 60 to 119 minutes,

(b) 50 % of the ticket price for a delay of 120 minutes or more.

Passengers who hold a travel pass or season ticket and who encounter recurrent delays or cancellations during its period of validity may request adequate compensation in accordance with the railway undertaking’s compensation arrangements. These arrangements shall state the criteria for determining delay and for the calculation of the compensation.

Compensation for delay shall be calculated in relation to the price which the passenger actually paid for the delayed service.

Where the transport contract is for a return journey, compensation for delay on either the outward or the return leg shall be calculated in relation to half of the price paid for the ticket. In the same way the price for a delayed service under any other form of transport contract allowing travelling several subsequent legs shall be calculated in proportion to the full price.

The calculation of the period of delay shall not take into account any delay that the railway undertaking can demonstrate as having occurred outside the territories in which the Treaty establishing the European Community is applied.

2. The compensation of the ticket price shall be paid within one month after the submission of the request for compensation. The compensation may be paid in vouchers and/or other services if the terms are flexible (in
particular regarding the validity period and destination). The compensation shall be paid in money at the request of the passenger.

3. The compensation of the ticket price shall not be reduced by financial transaction costs such as fees, telephone costs or stamps. Railway undertakings may introduce a minimum threshold under which payments for compensation will not be paid. This threshold shall not exceed EUR 4.

4. The passenger shall not have any right to compensation if he is informed of a delay before he buys a ticket, or if a delay due to continuation on a different service or re-routing remains below 60 minutes.

Article 18

Assistance

1. In the case of a delay in arrival or departure, passengers shall be kept informed of the situation and of the estimated departure time and estimated arrival time by the railway undertaking or by the station manager as soon as such information is available.

2. In the case of any delay as referred to in paragraph 1 of more than 60 minutes, passengers shall also be offered free of charge:
   (a) meals and refreshments in reasonable relation to the waiting time, if they are available on the train or in the station, or can reasonably be supplied;
   (b) hotel or other accommodation, and transport between the railway station and place of accommodation, in cases where a stay of one or more nights becomes necessary or an additional stay becomes necessary, where and when physically possible;
   (c) if the train is blocked on the track, transport from the train to the railway station, to the alternative departure point or to the final destination of the service, where and when physically possible.

3. If the railway service cannot be continued anymore, railway undertakings shall organise as soon as possible alternative transport services for passengers.

4. Railway undertakings shall, at the request of the passenger, certify on the ticket that the rail service has suffered a delay, led to a missed connection or that it has been cancelled, as the case might be.

5. In applying paragraphs 1, 2 and 3, the operating railway undertaking shall pay particular attention to the needs of disabled persons and persons with reduced mobility and any accompanying persons.
CHAPTER V
DISABLED PERSONS AND PERSONS WITH REDUCED MOBILITY

Article 19
Right to transport
1. Railway undertakings and station managers shall, with the active involvement of representative organisations of disabled persons and persons with reduced mobility, establish, or shall have in place, non-discriminatory access rules for the transport of disabled persons and persons with reduced mobility.

2. Reservations and tickets shall be offered to disabled persons and persons with reduced mobility at no additional cost. A railway undertaking, ticket vendor or tour operator may not refuse to accept a reservation from, or issue a ticket to, a disabled person or a person with reduced mobility, or require that such person be accompanied by another person, unless this is strictly necessary in order to comply with the access rules referred to in paragraph 1.

Article 20
Information to disabled persons and persons with reduced mobility
1. Upon request, a railway undertaking, a ticket vendor or a tour operator shall provide disabled persons and persons with reduced mobility with information on the accessibility of rail services and on the access conditions of rolling stock in accordance with the access rules referred to in Article 19(1) and shall inform disabled persons and persons with reduced mobility about facilities on board.

2. When a railway undertaking, ticket vendor and/or tour operator exercises the derogation provided for in Article 19(2), it shall upon request inform in writing the disabled person or person with reduced mobility concerned of its reasons for doing so within five working days of the refusal to make the reservation or to issue the ticket or the imposition of the condition of being accompanied.

Article 21
Accessibility
1. Railway undertakings and station managers shall, through compliance with the TSI for persons with reduced mobility, ensure that the station, platforms, rolling stock and other facilities are accessible to disabled persons and persons with reduced mobility.

2. In the absence of accompanying staff on board a train or of staff at a station, railway undertakings and station managers shall make all reasonable efforts to enable disabled persons or persons with reduced mobility to have access to travel by rail.
Article 22
Assistance at railway stations
1. On departure from, transit through or arrival at, a staffed railway station of a disabled person or a person with reduced mobility, the station manager shall provide assistance free of charge in such a way that that person is able to board the departing service, or to disembark from the arriving service for which he or she purchased a ticket, without prejudice to the access rules referred to in Article 19(1).

2. Member States may provide for a derogation from paragraph 1 in the case of persons travelling on services which are the subject of a public service contract awarded in conformity with Community law, on condition that the competent authority has put in place alternative facilities or arrangements guaranteeing an equivalent or higher level of accessibility of transport services.

3. In unstaffed stations, railway undertakings and station managers shall ensure that easily accessible information is displayed in accordance with the access rules referred to in Article 19(1) regarding the nearest staffed stations and directly available assistance for disabled persons and persons with reduced mobility.

Article 23
Assistance on board
Without prejudice to the access rules as referred to in Article 19(1), railway undertakings shall provide disabled persons and persons with reduced mobility assistance free of charge on board a train and during boarding and disembarking from a train.

For the purposes of this Article, assistance on board shall consist of all reasonable efforts to offer assistance to a disabled person or a person with reduced mobility in order to allow that person to have access to the same services in the train as other passengers, should the extent of the person’s disability or reduced mobility not allow him or her to have access to those services independently and in safety.

Article 24
Conditions on which assistance is provided
Railway undertakings, station managers, ticket vendors and tour operators shall cooperate in order to provide assistance to disabled persons and persons with reduced mobility in line with Articles 22 and 23 in accordance with the following points:

(a) assistance shall be provided on condition that the railway undertaking, the station manager, the ticket vendor or the tour operator with which the ticket was purchased is notified of the person’s need for such assistance at least 48 hours before the assistance is needed. Where the ticket permits multiple journeys, one notification shall be sufficient provided that adequate
information on the timing of subsequent journeys is provided;

(b) railway undertakings, station managers, ticket vendors and tour operators shall take all measures necessary for the reception of notifications;

(c) if no notification is made in accordance with point (a), the railway undertaking and the station manager shall make all reasonable efforts to provide assistance in such a way that the disabled person or person with reduced mobility may travel;

(d) without prejudice to the powers of other entities regarding areas located outside the railway station premises, the station manager or any other authorised person shall designate points, within and outside the railway station, at which disabled persons and persons with reduced mobility can announce their arrival at the railway station and, if need be, request assistance;

(e) assistance shall be provided on condition that the disabled person or person with reduced mobility present him or herself at the designated point at a time stipulated by the railway undertaking or station manager providing such assistance. Any time stipulated shall not be more than 60 minutes before the published departure time or the time at which all passengers are asked to check in. If no time is stipulated by which the disabled person or person with reduced mobility is required to present him or herself, the person shall present him or herself at the designated point at least 30 minutes before the published departure time or the time at which all passengers are asked to check in.

Article 25
Compensation in respect of mobility equipment or other specific equipment
If the railway undertaking is liable for the total or partial loss of, or damage to, mobility equipment or other specific equipment used by disabled persons or persons with reduced mobility, no financial limit shall be applicable.

CHAPTER VI
SECURITY, COMPLAINTS AND QUALITY OF SERVICE

Article 26
Personal security of passengers
In agreement with public authorities, railway undertakings, infrastructure managers and station managers shall take adequate measures in their respective fields of responsibility and adapt them to the level of security defined by the public authorities to ensure passengers’ personal security in railway stations and on trains and to manage risks. They shall cooperate and exchange information on best practices concerning the prevention of acts, which are likely to deteriorate the level of security.
**Article 27**

**Complaints**

1. Railway undertakings shall set up a complaint handling mechanism for the rights and obligations covered in this Regulation. The railway undertaking shall make its contact details and working language(s) widely known to passengers.

2. Passengers may submit a complaint to any railway undertaking involved. Within one month, the addressee of the complaint shall either give a reasoned reply or, in justified cases, inform the passenger by what date within a period of less than three months from the date of the complaint a reply can be expected.

3. The railway undertaking shall publish in the annual report referred to in Article 28 the number and categories of received complaints, processed complaints, response time and possible improvement actions undertaken.

**Article 28**

**Service quality standards**

1. Railway undertakings shall define service quality standards and implement a quality management system to maintain service quality. The service quality standards shall at least cover the items listed in Annex III.

2. Railway undertakings shall monitor their own performance as reflected in the service quality standards. Railway undertakings shall each year publish a report on their service quality performance together with their annual report. The reports on service quality performance shall be published on the Internet website of the railway undertakings. In addition, these reports shall be made available on the Internet website of the ERA.

**CHAPTER VII**

**INFORMATION AND ENFORCEMENT**

**Article 29**

**Information to passengers about their rights**

1. When selling tickets for journeys by rail, railway undertakings, station managers and tour operators shall inform passengers of their rights and obligations under this Regulation. In order to comply with this information requirement, railway undertakings, station managers and tour operators may use a summary of the provisions of this Regulation prepared by the Commission in all official languages of the European Union institutions and made available to them.

2. Railway undertakings and station managers shall inform passengers in an appropriate manner, at the station and on the train, of the contact details of the body or bodies designated by Member States pursuant to Article 30.
Article 30
Enforcement

1. Each Member State shall designate a body or bodies responsible for the enforcement of this Regulation. Each body shall take the measures necessary to ensure that the rights of passengers are respected.

Each body shall be independent in its organisation, funding decisions, legal structure and decision-making of any infrastructure manager, charging body, allocation body or railway undertaking.

Member States shall inform the Commission of the body or bodies designated in accordance with this paragraph and of its or their respective responsibilities.

2. Each passenger may complain to the appropriate body designated under paragraph 1, or to any other appropriate body designated by a Member State, about an alleged infringement of this Regulation.

Article 31
Cooperation between enforcement bodies

Enforcement bodies as referred to in Article 30 shall exchange information on their work and decision-making principles and practice for the purpose of coordinating their decision-making principles across the Community. The Commission shall support them in this task.

(Omissis)
International Convention on Travel Contracts (CCV)
Brussels, April 23, 1970

The States Parties to this Convention,
Noting the development of tourism and its economical and social role,
Recognizing the need to establish uniform provisions relating to travel contracts,

HAVE AGREED AS FOLLOWS:

CHAPTER I
SCOPE OF APPLICATION

Article 1
For the purpose of this Convention:
1. “Travel Contract” means either an organized travel contract or an intermediary travel contract.
2. “Organized Travel Contract” means any contract whereby a person undertakes in his own name to provide for another, for an inclusive price, a combination of services comprising transportation, accommodation separate from the transportation or any other service relating thereto.
3. “Intermediary Travel Contract” means any contract whereby a person undertakes to provide for another, for a price, either an organized travel contract or one or more separate services rendering possible a journey or sojourn. “Interline” or other similar operations between carriers shall not be considered as intermediary travel contracts.
4. “Price” means any remuneration in cash, in kind or in the form of direct or indirect benefits of any kind whatsoever.
5. “Travel Organizer” means any person who habitually or regularly undertakes to perform the contract defined in paragraph 2, whether or not such activity is his main business and whether or not he exercises such activity on a professional basis or not.
6. “Travel Intermediary” shall be any person who habitually or regularly undertakes to perform the contract defined in paragraph 3, whether such activity is his main business or not and whether he exercises such activity on a professional basis or not.
7. “Traveller” means any person who benefits from an undertaking defined in paragraph 2 or 3, whether the contract is concluded or the price paid by himself or by another person for him.

Article 2
1. This Convention shall apply to any travel contract concluded by a travel organizer or intermediary, where his principal place of business or,
failing any such place of business, his habitual residence, or the place of business through which the travel contract has been concluded, is located in a Contracting State.

2. This Convention shall apply without prejudice to any special law establishing preferential treatment for certain categories of travellers.

CHAPTER II
GENERAL OBLIGATIONS OF TRAVEL ORGANIZERS AND INTERMEDIARIES AND OF TRAVELLERS

Article 3
In the performance of the obligations resulting from contracts defined in Article 1, the travel organizer and intermediary shall safeguard the rights and interests of the traveller according to general principles of law and good usages in this field.

Article 4
For the purpose of performing the obligations resulting from contracts defined in Article 1, the traveller shall, in particular, furnish all necessary information specifically requested from him and comply with the regulations relating to the journey, sojourn or any other service.

CHAPTER III
ORGANIZED TRAVEL CONTRACTS

Article 5
The travel organizer shall issue a travel document bearing his signature; instead of the signature, a stamp may be affixed.

Article 6
1. The travel document shall include the following:
   (a) place and date of issue;
   (b) name and address of the travel organizer;
   (e) name of the traveller or travellers and if the contract was concluded by another person, the name of such person;
   (d) places and dates of beginning and end of the journey as well as of the sojourns;
   (e) all necessary specifications concerning transportation, accommodation as well as all ancillary services included in the price;
   (f) where applicable, the minimum number of travellers required;
   (g) the inclusive price covering all the services provided for in the contract;
   (h) circumstances and conditions under which the traveller may cancel the contract;
(i) any clause providing for arbitration, agreed upon under the conditions of Article 29;
(j) a statement that, notwithstanding any clause to the contrary, the contract is subject to the provisions of this Convention;
(k) any other terms the parties may agree upon.

2. In so far as particulars required in paragraph 1 appear in whole or in part in a prospectus supplied to the traveller, the travel document may simply make a reference thereto; any modification to such a prospectus must be set out in the travel document.

Article 7

1. The travel document shall be prima facie evidence of the terms of the contract.
2. A breach by the travel organizer of the obligations incumbent upon him under Articles 5 or 6 shall affect neither the existence nor the validity of the contract which shall remain subject to this Convention. The travel organizer shall be liable for any loss or damage resulting from such breach.

Article 8

Unless the parties agree otherwise, the traveller may substitute another person for the purpose of carrying out the contract provided that such person satisfies the specific requirements relating to the journey or sojourn, and that the traveller compensates the travel organizer for any expenditure caused by such substitution, including non-reimbursable sums payable to third parties.

Article 9

The traveller may at any time cancel the contract in whole or in part, provided he compensates the organising travel agent in accordance with domestic law or the provisions of the contract.

Article 10

1. The travel organizer may, without indemnity, cancel the contract, in whole or in part, if before the contract or during its performance, circumstances of an exceptional character manifest themselves of which he could not have known at the time of conclusion of the contract, and which, had they been known to him at that time, would have given him valid reason not to conclude the contract.
2. The travel organizer may also, without indemnity, cancel the contract if the minimum number of travellers stipulated in the travel document has not been reached, provided the traveller has been informed thereof at least fifteen days before the date on which the journey or sojourn was due to begin.
3. In event of cancellation of the contract before its performance, the travel organizer shall refund in full any payments received from the traveller. In the event of cancellation of the contract during its performance, the travel
organizer shall take all necessary measures in the interest of the traveller; furthermore, the parties shall compensate each other in an equitable manner.

**Article 11**

1. The travel organizer may not increase the inclusive price, except as a consequence of changes in rates of exchange or in the tariffs of carriers, and provided that this possibility has been anticipated in the travel document.

2. If the increase in the inclusive price exceeds ten per cent, the traveller may cancel the contract without compensation or reimbursement. In that event, the traveller shall be entitled to a refund of all sums paid by him to the travel organizer.

**Article 12**

The travel organizer shall be responsible for the acts and omissions of his employees and agents when acting in the course of their employment or within the scope of their authority, as if such acts and omissions were his own.

**Article 13**

1. The travel organizer shall be liable for any loss or damage caused to the traveller as a result of non-performance, in whole or in part, of his obligations to organize as resulting from the contract or this Convention, unless he proves that he acted as a diligent travel organizer.

2. Without prejudice to the questions as to which persons have the right to institute proceedings and what are their respective rights, compensation payable under paragraph 1 shall be limited for each traveller to:
   - 50,000 francs for personal injury,
   - 2,000 francs for damage to property,
   - 5,000 francs for any other damage.

   However a Contracting State may set a higher limit for contracts concluded through a place of business located in its territory.

**Article 14**

Where the travel organizer himself provides transportation, accommodation or other services connected with the performance of the journey or sojourn, he shall be liable for any loss or damage caused to the traveller in accordance with the rules governing such services.

**Article 15**

1. Where the travel organizer entrusts to a third party the provision of transportation, accommodation or other services connected with the performance of the journey or sojourn, he shall be liable for any loss or damage caused to the traveller as a result of total or partial failure to perform such services, in accordance with the rules governing such services. The travel organizer shall be liable in accordance with the same rules for any loss or damage caused to the traveller during the performance of the services, unless the travel organizer proves that he has acted as a
diligent travel organizer in the choice of the person or persons performing the service.

2. Where the rules referred to in paragraph 1 do not provide for a limitation of liability, compensation payable by the travel organizer shall be set in accordance with Article 13, paragraph 2.

3. In so far as the travel organizer has paid compensation for loss or damage caused to the traveller, he shall be subrogated in any rights and actions the traveller may have against a third party responsible for such loss or damage. The traveller shall facilitate the recourse of the travel organizer by providing him with the documents and information in his possession and, as the case may be, by assigning his rights to him.

4. The traveller shall have a right of direct action against a responsible third party, for total or complementary compensation of the loss or damage caused to him.

**Article 16**

The traveller shall be liable for any loss or damage caused by his wrongful acts or default to the travel organizer or persons for whom the latter is responsible under Article 12 as a consequence of non-compliance with the obligations incumbent upon him under this Convention or under contracts subject thereto, wrongful acts or default being assessed having regard to a traveller’s normal behaviour.

**CHAPTER IV**

**INTERMEDIARY TRAVEL CONTRACT**

**Article 17**

Any contract concluded by a travel intermediary with a travel organizer or with persons providing separate services, shall be deemed to have been concluded by the traveller.

**Article 18**

1. Where the intermediary travel contract relates to an organized travel contract, it shall conform to the provisions of Articles 5 and 6, but in addition to the name and address of the travel organizer, it shall include the name and address of the travel intermediary together with a statement to the effect that the latter is acting as intermediary of the former.

2. Where the intermediary travel contract relates to the provision of a separate service rendering a journey or sojourn possible, the travel intermediary shall issue the traveller documents relating to such service, bearing his signature; instead of the signature, a stamp may be affixed. These documents or the invoice relating thereto shall mention the amount paid for the service and contain a statement that notwithstanding any clause to the contrary, the contract is subject to the provisions of this Convention.
**Article 19**

1. The travel document and other documents referred to in Article 18 shall be *prima facie* evidence of the terms of the contract.

2. A breach by the travel intermediary of the obligations incumbent upon him under Article 18 shall affect neither the existence nor the validity of the contract which shall remain subject to this Convention. In the event of a breach of his obligations under Article 18, paragraph 1, the travel intermediary shall be deemed to be a travel organizer. In the event of a breach of his obligations under Article 18, paragraph 2, the travel intermediary shall be liable for any loss or damage resulting from such breach.

**Article 20**

The traveller may at any time cancel the contract, in whole or in part, provided he compensates the travel intermediary in accordance with domestic law or the provisions of the contract.

**Article 21**

The travel intermediary shall be responsible for the acts and omissions of his employees and agents when acting in the course of their employment or within the scope of their authority, as if such acts and omissions were his own.

**Article 22**

1. The travel intermediary shall be liable for wrongful acts or default he commits in performing his obligations, wrongful acts or default being assessed having regard to the duties of a diligent travel intermediary.

2. Without prejudice to the questions as to which persons have the right to institute proceedings and what are their respective rights, compensation payable under paragraph 1 shall be limited to 10,000 francs for each traveller. However, a Contracting State may set a higher limit for contracts concluded through a place of business located in its territory.

3. The travel intermediary shall not be liable for non-performance, in whole or in part, of journeys, sojourns or other services governed by the contract.

**Article 23**

The traveller shall be liable for any loss or damage caused by his wrongful acts or default to the travel intermediary or to persons for whom the latter is responsible under Article 21 as a consequence of non-compliance with the obligations incumbent upon him under this Convention or under contracts subject thereto, wrongful acts or default being assessed having regard to a traveller’s normal behaviour.

(Omissis)
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