

Maria Goretti Sanches Lima

Traveller Vulnerability in the Context of Travel and Tourism Contracts

A Comparison of Brazilian and EU Law

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For Noé
A paragon of rationality

Foreword

A comparative legal analysis between Brazil and the European Union must build bridges. Whilst a European jurist firstly thinks with the keywords ‘travel’ and ‘right’ regarding vacation packages and the recently reformed Package Travel Directive of 25 November 2015, in Brazil and in the rest of Latin America and in North America¹ vacation packages do not play a significant role. Instead, other types of contracts are more prominent in contractual relationship with carriers and hoteliers. Even the liability of the travel agency has a different meaning when a tour operator is in the background. The contracts concluded with the service providers often have a cross-border component—unlike the contract of ‘package tour’, which is concluded with the tour operator based in the same country. In the EU, if the person books a trip to a country where the arrangements were not satisfied, the applicability of foreign law will protect its citizens because of international process of private law (Brussels IA Regulation, Rome I Regulation). The process is fast, in the countries where the legal procedures apply. In other words, the structure of travel law is completely different. In order to find similarities and differences through a comparison, a challenging effort has to be made.

Even consumer law has no comparable structure. Nevertheless, both legal systems recognise the existence of strong signs of jurisdictional field with that name. For Europeans, it is understood that a consumer must be a natural person, who enters into a transaction for a private purpose. In Brazil, it is different, mainly as it includes the understanding of legal person, who acquires goods and services for purposes other than for resale. For that, we would use the economic term ‘end consumer’. Of course, the protection of consumers must be bounded by other criterion—the vulnerable consumer, a new discovery in the European consumer law that has been known in Brazil for a long time. By discussing consumer

¹Cf. Stenzel (2008).

protection issues, the work is interesting; it touches fundamental issues on the protection of the weaker contracting party.

The actual problems, which require legal solutions, are similar because even Brazilians travel. Travelling is no longer a luxury product accessed by a few people. Brazil has a relatively large middle class, which is often not quite perceived from a European perspective because of the extreme differences between the rich and the poor.

Considering the huge legal differences, the comparative approach is a significant challenge, which is further enhanced by the fact that the author could not write the thesis in her native language. She defines 'Europe' as the European Union. Therefore, it not addresses the rights of Member States or EU law as an example of transposition or implementation of the legal requirements of European Union law. It seems that the European Union appears more consistent from the outside rather than inside.

The work is divided into three main parts, preceded by a detailed introduction. The two main parts consist in a country report on Brazil and the European Union. The third and final part is the 'Analysis' and 'Conclusion'.

(...)

In both analysed legal systems, the work goes beyond the comparison of travel regulations. The author aims to identify general principles on consumer protection and compare them. On that, she succeeded in an outstanding degree. Travel law serves rather to illustrate how these principles materially affect a certain jurisdictional field. Here, the notion of consumer plays a fundamental role. It is clear that in the analysed jurisdictional system, not only the consumer concept is different, but even the concept of protection differs. In Brazil, the vulnerability of the consumer is more prominent than in the EU, where the concept of confident consumer is dominant in both courts and legislation. However, the recent discussions in the European Union related to vulnerable consumer show that the 'confident consumer' no longer represents an advanced concept. The author insists with good reasons on the concept of protection that is found on her domestic legal system.

The author observes the notion of consumer, according to an ongoing discussion, at a high level of analysis and knows how to contribute to that debate. The discussion from the Brazilian perspective would enlarge and extend the horizons of the European reader, not only from a transatlantic horizon but also because it provides arguments for an intra-European debate on the notion of consumer (consumer rights directive), particularly questions on keywords such as 'from consumer to user' or 'vulnerable consumer'.

Nonetheless, it has to be noted that the author should not have restricted the research concerning EU law to several documents from the European institutions. The development of the notion of consumer in the EU law is accompanied by a lively debate, particularly in the English literature. However, it is remarkable that the results are correct. The documents offered a support to deepen the contribution of the author's arguments, which highlights the work's autonomy.

Overall, the work is an extraordinary achievement on a high level, which contains not only a comparative law perspective but also significant new ideas to the debate of consumer rights. That is to say, it is a debate that ‘travel law’ plays a particular and significant role in. The further debate on ‘vulnerable consumer’ should not miss this work.²

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Reference

Stenzel U (2008) Comparison of American and European travel law. Verlag Dr. Kovac, Rostock

²The text was originally written in German. English version authorised. The English version is an edited extract from the original text. It provides a partial account of the full text.

Preface

Undertaking the task to write this book was a huge and overambitious pretension. Not only by reason of language barrier but also because there are transnational legal questions such as: how to compare two different cultures and legal systems and how to identify the universal principles on the ‘travel and tourism’ field? Would be vulnerability a universal principle feasible to apply worldwide in ‘travel and tourism’ issues?

The case herein is somehow peculiar because of the distinguished legal structure of the European Union related to the Brazilian legal structure, this is to say, Brazil with exclusive territorial sovereignty³ on one side and on the other side the EU, which respects national sovereignty and territorial integrity of the Member States but at the same time has its own legal system and sovereignty as well. Actually, the first manuscript had included chapters attempting to demonstrate both legal systems, including the types of instruments.⁴ However, to put straightforward focus on the title, the conclusion was to cut it off.

By the time the work started, EU law did not recognise traveller with ‘legal status’. With the new Travel Package Directive and Linked Travel Arrangements, the traveller did acquire ‘legal status’ after November 2015. Nevertheless, the work did not lose power as it took into account the proposal of the Package Travel Directive, and later the book was updated to reflect the topics of the current Directive on Package Travel and Linked Travel Arrangements. Fundamentally, the terms consumer, traveller and tourist are subjected to several discussions concerning individuals’ rights. The ‘legal status’ is one important aspect of ‘travel and tourism’. The debate on the field of law is even bigger. ‘Travel and tourism’ is a portion of consumer law. There are those, however, who think different—that ‘travel and tourism’ has an independent structure. Others stress the intertwined aspect between consumer law and ‘travel and tourism’.

³The country has 26 federal states and one Federal District—Brasilia.

⁴For example: EU: Directives, Regulations and so on—Brazil: Legal Statutes, Decrees and so on.

Thus, beyond the discussion on ‘legal status’ and the ‘field of law’, there is the phenomenon of vulnerability. Two categories of vulnerability emerge from the literature, namely, vulnerability that relates to personal characteristics of the consumer and a broader notion that takes into account the transactional situations in which consumers find themselves.⁵

The work enters in such analysis, and the findings are incredibly interesting. It points out the differences between the EU and Brazil regarding vulnerability that affects the concepts of ‘confident consumer’ and ‘weaker party to the contract’.

Because of vulnerability, it is unavoidable to recognize that the traveller needs protection. The work emphasises that *if the consumer is always in a weaker bargaining position than the supplier, there is more reason to pay attention to the traveller, who usually is out of his domicile and jurisdiction. The traveller, mainly the international one, faces cross-border barriers such as different language, cultural differences and foreign currency. So often, he or she is victim of xenophobia, racism or any other bias. The most experienced traveller always faces several difficulties abroad. The traveller is a vulnerable person, which usually is under vulnerable situations.*

Actually, the traveller struggles to fit into the visited country to acquire goods and services, barely knowing the rules of interaction. Travellers behave in the visited country as they behave back home. It is not easy to recognise the cultural schemes and scripts as rules of interaction. This is one spectrum of vulnerability.

Another point related to vulnerability is the difficulty faced by the traveller to pursue an action against a supplier located abroad (as far as the EU is concerned, it is located in a non-member State) in case of non- or improper performance of the contract. In a modern high-technology society, the traveller has the convenience to contact directly the hotel, the car rental, the restaurant, the travel agency established in another country, concluding the contract through electronic means. There is no party autonomy as the contract is offered in terms of a ‘take it or leave it’ basis. If things go wrong, usually the traveller can file a claim. Nevertheless, the question is how to enforce a foreign judgment? Cross-border traveller relationship is not compatible with the framework of national consumer protection. Because of the need to protect the consumer who travels, UNWTO (United Nations World Tourism Organization) and HCCH (Hague Conference on Private International Law) have captured the core of the problem initiating an exhaustive work toward an international agreement regarding protection. On behalf of IFTTA (International Forum of Travel and Tourism Advocates), John Downes and I have attended the UNWTO’s Working Group providing contributions from IFTTA’s members to the draft convention. This book has a topic regarding international law in Chap. 4.

There were some years in Germany and some years in Brazil. Meanwhile, annual conferences and workshops by IFTTA took place around the world. IFTTA’s

⁵See: European Commission, ‘Consumer vulnerability across key markets in the European Union’ (January 2016) available online at: http://ec.europa.eu/consumers/consumer_evidence/market_studies/docs/vulnerable_consumers_exec_sum_27_01_2016_en.pdf.

conferences provided the opportunity to observe the environment of ‘travel and tourism’ internationally, as well as to get in touch with colleagues in many levels of interaction from different cultures.⁶ Hope that this investigative legal work can be useful as a contribution to the field of ‘travel and tourism’ that is constantly developing.

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Reference

Kolani D (2016) Discursing the legal aspects of travel and tourism – IFTTA. In: Marques CL, Wei D (eds) The future of international protection of consumers. UFRGS, Porto Alegre, p 104

⁶See the article written by the President Emeritus and co-founder of IFTTA, Dov Kolani in Marques, C. L. & Wei, D. (2016). The Future of International Protection of Consumers. Porto Alegre, UFRGS, p. 104.

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Acronyms, Abbreviations and Notes⁷

ABNT	Brazilian National Standards Organization
ANAC	Brazilian National Civil Aviation Authority
ANTT	Brazilian National Rail and Road Authority
B2B	Business-to-business contracts
B2C	Business-to-consumer contracts
BGB	German Civil Code (Bürgerliches Gesetzbuch)
BRICS	Brazil, Russia, India, China and South Africa
C2C	Consumer-to-consumer contracts
CA	Code of Aeronautics (Brazil)
CADE	Administrative Council for Economic Defense
CC	Civil Code (Brazil)
CCV	International Convention on Travel Contracts
CDC	Consumer Defence Code (Brazil)
CESL	Common European Sales Law
CGM	Consumer-generated media
CJEU	Court of Justice of the European Union
CNAE	National Classification of Economic Activities (Brazil)
CONMETRO	National Council of Metrology, Standardization and Industrial Quality (Brazil)
CPC	Code of Civil Procedure (Brazil)
CPC	Consumer Protection Cooperation Regulation (EU)
CPF	Registration of individual in the Tax Department (Brazil)
CGC	Registration of companies in the Tax Department (Brazil)
CRD	Consumer Rights Directive
DN	Deliberação Normativa (Brazil—administrative rule)

⁷The acronyms are disclosed in the original language.

ECJ	European Court of Justice (ECJ may also refer to Court of Justice of the European Union, although in English, it is still most common referring to the court as the European Court of Justice (ECJ). The Treaty of Lisbon (2007/09) changed the ECJ's official name from the 'Court of Justice of the European Communities' to the 'Court of Justice', which is known as Court of Justice of the European Union (CJEU).)
EMBRATUR	Brazilian Tourism Institute (public agency tied with the Ministry of Tourism)
EU	European Union
EU <i>acquis</i>	The accumulated legislation, legal acts and court decisions, which constitute the body of European Union law
FDI	Foreign direct investment
GATS	General Agreement on Trade in Services
GDP	Gross domestic product
HCCCH	Hague Conference on Private International Law
IBGE	Brazilian Institute of Geography and Statistics
ICCA	International Congress and Convention Association
ICP	International Comparison Program (World Bank)
IMF	International Monetary Fund
IMO	International Maritime Organization
ISIC	International Standard Industrial Classification
LICC	Introduction Law to the Civil Code
LOBP	Linked online booking process
LTA	Linked travel arrangements
MS	Member State (EU)
NEB	National Enforcement Body (EU)
NPD	National Democratic Party of Germany
Non-EU MS	Non-EU Member State country
PPC	Purchasing power currency
PPP	Purchasing power parities
PPS	Purchasing power standard
PRM	Person with reduced mobility
PROCON	Public administrative agency (It inspects and monitors the market activities in Brazil, imposing penalties and or restrictions to irregular business. So far, there are 838 administrative agencies placed on 27 geographical units.)
PTD	Package Travel Directive
REP	Die Republikaner (Germany)
SCN	National account system
SDR	Special Drawing Right (International Monetary Fund)
SMEs	Small and medium-sized enterprise
SNDC	Consumer Protection National System
STF	Supreme Federal Court of Justice

STJ	Superior Court of Justice
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TJRS	Rio Grande do Sul Court of Appeal
TJSP	Sao Paulo Court of Appeal
TRF	Federal Regional Court
UGC	User-generated content
UNWTO	United Nations World Tourism Organization
WTO	World Trade Organization

Notes on Linguistic

- The word **supplier** is used in a broad sense, meaning retailer, trader, organiser, seller, offeror, provider, enterprise, business, company or tourist service provider; each of them is synonymously used to denote supplier. When required, the context stresses the distinction accordingly.
- The wording ‘**product or service**’ (*produto ou serviço*), which better fits into Brazilian Portuguese, was translated to ‘**goods or services**’, which better fits into English. Therefore, Article 3 § 1 of the CDC may also be translated as follows: *Products are any goods, portable or not, material or immaterial.*
- The laws protecting consumers are known worldwide as Consumer Protection Code or Consumer Code. In Brazil, the terminology that suits the statute of consumer protection is the **Consumer Defence Code** (Código de Defesa do Consumidor), Act 8.078/90. This latter terminology provides a better comprehension of the Brazilian *mens legis*.
- *Tourist Services Provider* is the terminology that better complies with the provisions of the Brazilian tourism statute rather than *Tourism Services Provider*.
- The expressions ‘goods *and* services’ and ‘goods *or* services’ must be understood in the context in which they were expressed.
- The titles of Brazilian statutes and decrees were translated into English. The Brazilian references and court cases remain in Brazilian Portuguese.

Chapter 1

Introduction: Is the Traveller a Consumer?



Which role does the consumer play when travelling? Is the traveller a consumer that consumes goods and services as a regular consumer, or does he/she consume specific goods and services under specific conditions that demand specific attention? In the latter case, describing the differences between consumer and traveller that affect the consumption of goods and services demanding accurate legislation is one issue of this book.

Another issue is the uniqueness of the travel and tourism phenomenon and what differs travel/tourism contracts from other service contracts concerning Brazilian and European laws. Is the travel and tourism field a clear field of law?

Over the last decades, travelling, for business, private or official purposes, has been the focus of particular attention from authorities of several countries. If the consumer, in general, is always in a weaker bargaining position than the supplier, then there is more reason to pay attention to the traveller, who usually is out of his/her domicile and jurisdiction when he/she is consuming goods or services.

The traveller, especially the international one, faces cross-border barriers such as different language, cultural differences and foreign currency. So often, he/she is also victim of xenophobia, racism or any other bias. The most experienced traveller has always several difficulties abroad. It means that in such conditions, the traveller is a vulnerable person.

Insofar as the vulnerability of the consumer comes from the uneven relationship between two parties,¹ it seems far more reasonable and consistent with principles of law to extend such understanding of vulnerability to the traveller in a more specific legal framework.

Classic writer Mark Twain believed in something fragile about the traveller, who he named as an 'innocent abroad'. One might say that what before was innocent may be better described nowadays as vulnerable.

¹This is because the consumer is not in a position of equal bargaining power mainly because of difficulties in obtaining accurate information.

With the growth of the travel and tourism industry, more people travel in their own country or from their own country to another country with different purposes. A wide range of travel services and facilities has been developed in a number of areas of trade, including the supply of transport, accommodation, food and insurance travel facilities. Therefore, at each border, the traveller is still inadvertently subjected to a change of the applicable liability rules.

Thus, it is equally obvious, although more difficult to demonstrate legally, that the *traveller is a 'special consumer'*.

Europe, for instance, endeavours to establish a coherent legal framework regarding 'consumer protection'. The Consumer Rights Directive (CRD) enacted in 2011 set forth that the harmonisation of certain aspects of consumer distance and off-premises contracts is necessary for the promotion of a real consumer internal market striking the right balance between a high level of consumer protection and the competitiveness of enterprises.² Article 25 of the CRD contains a conflict-of-law provision aiming to protect the consumer against opt-out clauses with regard to third countries.³

Until recently, the traveller was not explicitly mentioned in the EU directives or other EU legislation, and no specific and exclusive travellers' rules pertaining to traveller protection existed. The former Directive 90/314/EEC on package travel did not provide a definition for traveller at all. With a view to an overarching EU travel law, there are studies commissioned by the EU that have advised to protect at least the person who travels. The former Package Travel Directive 90/314/EEC defined the consumer as being the one who concluded the contract and not necessarily the one who travels.⁴

On 25 November 2015, the European Parliament and the Council of the European Union launched the Directive on package travel and linked travel arrangements, amending Regulation (EC) 2006/2004, Directive 2011/83/EU, and repealing Council Directive 90/314/EEC. It brings the EU package travel rules into the digital age and stresses that the majority of *travellers* buying packages or linked travel arrangements are consumers within the meaning of Union consumer law. At the same time, it is not always easy to distinguish between consumers and representatives of small business or professionals who book trips related to their business or profession through the same booking channels as consumers. Such travellers often require a similar level of protection.⁵

One striking aspect of the EU legislation is the need to reach cohesion within the 28 countries. Because of differences of national laws, suppliers and consumers are often uncertain about their rights in cross-border situations. One of their main concerns is what remedies they have when a product (or service) sold and purchased from another Member State is not in conformity with the contract. Many consumers are therefore discouraged to purchase outside their domestic market.⁶

²Directive 2011/83/EU, (4).

³Reich et al. (2014), p. 310.

⁴IP/A/IMCO/ST/2011-17, 2012, p. 23.

⁵Directive 2015/2302/EU, (7).

⁶COM (2011) 635, pp. 3–4. Note: See comments on chapter II. Europe (5).

Therefore, the EU has sought to develop the mechanisms of cohesion to rely largely on a change, from the minimum standard principle to the full harmonisation principle. So far, directives providing a minimum standard that do not prevent the Member States from having more favourable rules have shown to be unsatisfactory, leading the EU to legislative changes on the basis of a full harmonisation principle.⁷

In Brazil, the Consumer Defence Code,⁸ which is the main legislation concerning ‘consumer protection’, stresses the word ‘consumer’ in wide definition by three articles.⁹ Therein, the consumer definition is not limited solely to an individual perspective but also implies the business traveller, the tourist traveller and a group of travellers. This legislation does not make a distinction between the consumer of goods and services and the user of goods and services,¹⁰ including also the professional or legal entity¹¹ that usually consumes. However, the traveller is not explicitly described as a consumer, and there is no special statute on package travel.

The Tourism National Statute—Act 11.771/08, which is the cornerstone of the travel and tourism sector—regulates the relationship between the government and the suppliers rather than private contractual relationship between the consumer (traveller) and the supplier of goods or services.

Although the *consumer* in a literal sense buys goods or services, for the purposes of consumer law, the term ‘consumer’ in Europe has a narrower meaning, which is based on the capacity in which the consumer and the supplier of goods or services have acted.¹² The consumer means any natural person who, in contracts covered by the Consumer Rights Directive, is acting for purposes that are outside his trade, business, craft or profession.¹³ On the contrary, the term consumer in Brazil has a broader meaning based on the grounds of the consumer relationship. It has three distinctions: (1) a natural person or legal entity that purchases or uses goods or services as a final addressee, including a collective of individuals,

⁷Directive 2008/122/EC Recital (3): “...rights deriving from timeshare contracts should be fully harmonised.”; Directive 2011/83/EU, Art 4: “Level of harmonisation, Member States shall not maintain or introduce, in their national law, provisions diverging from those laid down in this Directive, including more or less stringent provisions to ensure a different level of consumer protection, unless otherwise provided for in this Directive.” Also the amended proposal for the new PTD will enlighten the need of harmonization Directive 2015/2302/EU, 2013/0246 (COD) Recital (5): “In accordance with Article 26 (2) of the Treaty, the internal market is to comprise an area without internal frontiers in which the free movement of goods and services and the freedom of establishment are ensured. **The harmonisation of the rights and obligations arising from package contracts and linked travel arrangements is necessary** for the creation of a real consumer internal market in that area, striking the right balance between a high level of consumer protection and the competitiveness of businesses.”

⁸Act 8.078, 1990.

⁹Idem, Art 2, 17, and 29.

¹⁰Benjamin et al. (2010), p. 83.

¹¹Act 8.078, 1990, Art 2: “A consumer is any natural person or **legal entity** who purchases or uses goods or services as a final addressee.”

¹²Oughton and Lowry (2000), p. 1.

¹³Directive 2011/83/EU, Art 2 (1).

(2) all victims of accidents (bystander) and (3) persons incidentally exposed to commercial practices.¹⁴

On the other hand, as further explained, neither traveller nor ‘consumer traveller’ has a particular definition prescribed by law. The *traveller*, in a literal sense, is ‘a person who is travelling or who often travels’ or ‘a person who does not live in one place but travels around, especially as part of a group’.¹⁵ Thus, for the purpose of a pragmatic observation, simply in this context, any person who travels obviously buys goods or services. Hence, in a broad sense, the person who travels consumes.

Although it might appear as a superficial observation, the liaison between ‘consumer’ and ‘traveller’ shows the existence of reasonable grounds demanding an accurate legal approach and that consumer and traveller are as individuals exercising their personal freedom as a fundamental right.¹⁶ Nevertheless, *the traveller is prompted into a more fragile condition than the regular consumer when buying goods and services because he/she is out of his domicile or jurisdiction*, usually for a medium or short period of time.

Whilst ‘consumer’, by definition, includes us all and any action or proposals in the interest of consumers are in the interest of us all,¹⁷ the traveller, on the other hand, is reduced to a specific economic group in the economy, affecting and being affected by almost every economic decision. Like the consumer, the traveller usually is not organised to claim his rights and very often not heard by the authorities. Broadly speaking, it is possible to say that all travellers are consumers but not all consumers are travellers. In strict sense, there are those travelling in extreme vulnerability such as “asylum seeker” the refugees. They are travellers too, but hardly in the concept of consumption. They have a reason for travelling, but not a reason for consumption.

With the increasing number of activity in the travel and tourism industry, the term traveller in the Brazilian legislation is still doubtful from a legal perspective. So far, in Brazil, there is strong legislation dealing with consumer’s rights, but there is not a piece of legislation dealing particularly with the traveller’s right. Conversely, since November 2015 through the Directive on package travel and linked travel arrangements, the traveller has achieved a legal status in the EU.

In this context, one might think that there is a problem here. It is the debate about what is a consumer. This debate has not reached a conclusion over the years.

¹⁴Act 8.078, 1990, Art 2, 17, 29.

¹⁵Oxford (2005).

¹⁶Note: Europe—In 2009, the Treaty on European Union and the Treaty on the Functioning of the European Union resulted from the amendments introduced by the Treaty of Lisbon, which was signed on December 13, 2007 in Lisbon and which entered into force on December 1st, 2009 it embraces the term “**Freedom to travel**” under Chapter 2: Polices on Border Checks, Asylum and Immigration, Article 77 (2) (c). In Brazil—This fundamental right is implicit in the Federal Constitution under the following wording: “Art 5, item XV—**it is free in time of peace the movement** (of persons) within the national territory, and **any person may**, under the terms of the law, **enter it, remain therein or leave it** with her/his assets”.

¹⁷Kennedy (1962).

Inasmuch as being a citizen is one of the bases to provide an individual with certain rights (e.g., citizen rights), the subsequent question has arisen about the passenger, traveller, business traveller, user and, of course, consumer because they no longer remained only an individual person, in terms of a natural person under the law, but they are persons created by law.

In addition to the consumer traveller, there are also consumer groups that are more likely to experience detriment than others. It is unlikely that everyone who falls into one of these categories faces the same level of risk. They are the children, the elderly and the disabled who also travel.

Then how should vulnerability be understood, and how has been it conceptualised by the legal systems addressed to the traveller?

Whilst the approaches of consumer vulnerability are different in Brazil and the EU, certain features of this circumstance are remarkably consistent. One hallmark of such features is that they reveal the dependencies between legal spheres that often are studied and discussed in isolation from one another.

Contract law, for example, is largely consumer law. Hence, consumer law also affects the harmonisation of contract law. It makes visible the linkages between parties in a contract (B2C), and the component of vulnerability may be accounted for a qualitative consumer relationship in contractual terms, where one party is weaker than the other and thus in need of protection. This may influence the law applicable to contractual obligations in the relation between two parties, which may differ depending on the person's rights.

Based on the principle of equality, the weaker party shall be protected by rules more favourable to his/her interest than the general rules provide for. 'Equality' or 'equal' signifies correspondence between a group of different persons with the same qualities in at least one respect but not all respects. 'Equally' signifies a qualitative relationship. It is a fiction of law for establishing the criterion of proper rules. That is why consumers are protected by law from unequal bargaining power because often there is a lack of meaningful choice as in the case of a form contract heavily weighted in favour of one party in terms of a 'take it or leave it'¹⁸ basis.

For instance, if a contract contains unfair standard contract terms (EU terminology) or abusive clauses (Brazilian terminology) inserted by suppliers creating an imbalance to the detriment of the consumer, the consumer is not bound by them, although the contract itself usually remains valid. Where there is doubt about the meaning of a term (or clause), the interpretation most favourable to the consumer shall prevail under both laws: the EU¹⁹ and Brazil.²⁰

¹⁸The expression is primarily found into Courts decisions from U.S.A. such as: *Carlson v General Motors Corp.* 883 F 2d 287 (4th Cir. 1989), *Campbell Soup v Wentz*, 172 F2d 80 (3rd Cir. 1948).

¹⁹Directive 93/13/EEC, Recital: "Whereas contracts should be drafted in plain, intelligible language, the consumer should actually be given an opportunity to examine all the terms and, if in doubt, the interpretation most favourable to the consumer should prevail", and Art 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."

²⁰Act 8.078, 1990, Art 47: "Contract clauses will be interpreted in such a way as it is most favourable to the consumer."

It might be feasible that in this respect, the EESC (European Economic and Social Committee) is opposed to any steps, such as the optional system, which would allow for a review of the existing protection to safeguard consumers, who are the weaker parties to the contract and who do not always have the means for seeking help.²¹

In Brazil, the consumer relationship focuses on the vulnerable party.²² The vulnerability is the core principle of the National Policy of Consumers Relations prescribed in Article 4 (I) of the Consumer Defence Code, and usually no discussion takes place in the field to assert the concept of vulnerability. All consumers are vulnerable, mainly because they are not in a position to have equal bargaining power because of difficulties in obtaining accurate information from the supplier/retailer. The same holds true for hypervulnerable persons,²³ but it is also not quite the same framework as regular consumers because the hypervulnerable persons have special protection by special laws and a distinct approach taken by the courts. When they are acting as a consumer, not only do the CDC apply but also their particular law, such as the statute of disabled person.

On the other hand, in the EU, although recognising that the consumer is the weaker party to the contract,²⁴ the consumer is considered an average consumer who is reasonably well informed and reasonably observant and circumspect.²⁵ The vulnerable consumers are those whose characteristics make them particularly vulnerable to unfair commercial practices, such as age, physical or mental infirmity or credulity. These characteristics make these consumers particularly susceptible to a commercial practice or to the underlying product and economic behaviour. In the EU, only such consumers are likely to be distorted by the practice in a way that the trader can reasonably foresee.²⁶

Consumer vulnerability is one of the key challenges to be tackled in the near future.²⁷ Protection of vulnerable consumers has been the subject of reports by the European Parliament²⁸ and consumer organisations.²⁹ It seems that the EU has chosen a different approach than before, looking more at the reaction of the average consumer, which so far has been perceived as active and rational. Contrary to this view, there are findings that challenge the notion of the ‘average consumer’ and raise questions about what can reasonably be expected of the average consumer and what makes the consumer especially vulnerable.³⁰

²¹INT/608-CESE 802/2012-2011/0340 (COD), 3.13.

²²STJ REsp 476.428/SC, j.2005.

²³Elderly, children, disabled, etc.

²⁴Regulation (EC) 44, 2001, Recital (13): “In relation to insurance, **consumer contracts** and employment, the **weaker party** should be protected by rules of jurisdiction more favourable to his interests than the general rules provide for.”

²⁵Directive 2005/29/EC, Recital (18), Unfair business-to-consumer commercial practices.

²⁶Idem, Recital (19).

²⁷TNS Opinion & Social, Special Eurobarometer n°342 (2011).

²⁸Resolution 2011/2272 (INI), P7_TA(2012)0209.

²⁹ANEC-CHILD-2011-G-111/ANEC-DFA-2011-G-071 (2011).

³⁰Minor (2012).

‘Vulnerable consumer’ is a well-known expression, but there is no commonly accepted or widely agreed legal definition for it by reason of the heterogeneity of this group.³¹ Therefore, the EU Consumer Programme covering the period 2014–2020 has addressed in the Regulation on consumer programme issues linked to vulnerable consumers.³²

In other words, whilst in Brazil every consumer is conceived vulnerable per principle (Article 4 (I) CDC) and hypervulnerable persons are special groups of consumers embedded by special laws,³³ in the EU the term vulnerability, *inter alia*, stems from Directive 2005/29 on Unfair Commercial Practices. Vulnerable persons in the EU are those individuals or groups of consumers who are vulnerable because of their mental or physical infirmity, age or credulity, rather than all consumers.

This leads, *inter alia*, to questions whether a public policy is needed to deal with the negative externalities created by the current consumer environment that places the consumer in a vulnerable situation. Consequently, questions that are more practical may arise. For instance, if the supplier is located outside of the home country of the consumer having provided to the consumer transport, accommodation and other tourist services in the way of package travel, that is to say, a complete travel package, who is liable for non/or improper performance of the contract? It is difficult for the consumer to pursue an action against a supplier in case of non/or improper performance of the travel contract. The supplier may be the tour operator, who offered and sold the tour, or the travel agent, who advised and recommended the tour to the traveller and booked the trip on his/her behalf.

If the tour operators and travel agents are located in the traveller’s country of residence, they are subject to the same jurisdiction, and usually the consumer may sue them in the home country and file a claim under his or her national law. Consequently, it is vital in contract terms to clearly determine the contractual parties. On the other hand, if they are located in another country, international jurisdiction may be the issue in determining the court.

It may be possible for a consumer who travels to have more than one country of habitual residence. However, this situation indicates that there are more than one set of laws, and each of them is performed in a specific country of habitual residence. Can the traveller be able to choose which state’s law apply? Moreover, there are cross-border procedures for small amounts of money. These are discouraged for a consumer who seeks a solution to the travel damage. This is because under national ordinary or simplified procedures, the costs of litigation are disproportionate to the value of the claim, and/or the judicial procedures are too lengthy.

Based on this situation, the EU introduced an alternative procedure concerning claims, which do not exceed €2000,³⁴ and Brazil relies on small-claims courts as an

³¹Opinion ECCG (2013).

³²Regulation (EU) 254, 2014.

³³Elderly, children, disabled, etc.

³⁴Regulation (EC) 861, 2007. This Regulation is under revision to increase the threshold up to EUR 10,000, COM (2013) 794 final.

alternative to solve claims with reduced complexity if the amount does not exceed 40 times the minimum wage,³⁵ calculated at around €12,266 in January 2015.

Further issues, such as delay and cancellation, lost/damage or stolen luggage, misinformation, overbooking and timesharing are problems faced by travellers with regard to breach of contract.

Hereby not only norms on private contractual law were analysed but also those on administrative law enforceable as a whole affecting the consumer market.

The aim of this work, after describing consumer law evolution, the travel and tourism sector, and the travel and tourism contracts in Brazil and in Europe, is to analyse the feasibility of placing the traveller as a consumer in a strict sense because of the ‘specific vulnerability’ of the traveller at the time he/she is travelling. The answer will be positive.

References

- ANEC-CHILD-2011-G-111/ANEC-DFA-2011-G-071 (2011) How to protect vulnerable consumers?
- Benjamin AH, Marques CL, Bessa LR (2010) Manual de Direito do Consumidor, 3rd edn. Rev. dos Tribunais, São Paulo
- INT/608-CESE 802/2012-2011/0340 (COD). Proposal for a regulation of the European Parliament and of the council on a Consumer Programme 2014-2020
- Kennedy JF (1962, March 15) Special message to the congress on protecting the consumer interest. Retrieved August 20, 2012, from The American Presidency Project: <http://www.presidency.ucsb.edu/ws/?pid=9108>
- Minor J (2012) Consumer protection in the EU: searching for the real consumer. *Eur Bus Organ Law Rev* 13(02):163–168
- Opinion ECCG (2013) On consumers and vulnerability. European Consumer Consultative Group
- Oughton D, Lowry J (2000) Textbook on consumer law, 2nd edn. Blackstone Press Limited, London
- Oxford (2005) Advanced learner’s dictionary of current english, 7th edn. Oxford University Press, Oxford
- Reich N, Micklitz HW, Rott P, Tonner K (2014) European consumer law. Intersentia, Cambridge
- STJ REsp 476.428/SC. (j.2005). *Agiliquigas S/A v Gracher Hotéis e Turismo Ltda.* rel. Nancy Andrichi
- TNS Opinion & Social, Special Eurobarometer n°342 (2011) Consumer empowerment. Brussels

³⁵Note: According to the Sao Paulo State Act 15.624/14 the minimum wage is R\$920,00.