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## Case Details

**Case Details**

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| National ID | link |
| Member State | Belgium |
| Common Name | C. and others / Schmidt Travel and Ecu Travel |
| Decision type | Other |
| Decision date | 07/05/2001 |
| Court | Collège arbitral de la commission litige voyages (Others) |
| Subject | |
| Plaintiff | |
| Defendant | |
| Keywords | |

### Directive Articles

Package Travel Directive, Article 1 Package Travel Directive, Article 2, 5. Package Travel Directive, Article 5, 1. Package Travel Directive, Article 5, 2. Package Travel Directive, Article 5, 4.

### Headnote

1. When a travel contract has been entered into in Belgium by a Belgian travel agency and nationals of another EU Member State, the parties are free to determine the applicable law to the contract. By citing in the general conditions the Belgian Act of 16 February 1994 regulating the package travel contracts and the travel intermediation contracts ("Travel Act"), the parties chose the Belgian law as the law applicable to the contract.
2. The contract in which a travel agency commits itself to supply a number of performances to a group of travellers, engaging on the one hand an airline company and on the other hand a provider of local services, cannot be characterised as a travel organisation contract because it does not concern the supplying of a pre-arranged combination, nor as a travel intermediary contract because the contract does not concern the supply of separate performances which allow to complement a trip or a stay. Moreover, the contract is to be characterised as a travel contract tailored to the parties' instructions or à la carte which falls under the scope of the general rules of law. Because of the adventurous nature of the trip, the performances due by the travel agency can solely be qualified as an obligation of means.
3. The travellers who prove that the supplied performances are not in conformity with the contract, without any specific circumstances justifying the shortcomings, can demand the reimbursement of a part of the price of the trip. The traveller's action can however only be initiated against the other party to the contract and not against the party addressed by the latter, because there is no contractual relationship between the travellers and that party.

### Facts

On 16 April 1999, C., the first claimant, acting as an agent for 28 travellers, the other claimants, signed a travel contract with Schmidt Travel, the first defendant. The trip did however not meet the expectations as it was not in conformity with the description in the brochure.

Therefore, the 29 claimants demand damages from the two defendants (the second defendant being Ecu Travel).

### Legal issue

Concerning the law applicable to the contract:

The first article of the general conditions, contained in an annex to the travel contract of 16 April 1999, states: ”these general conditions are applicable to travel organisation contracts and to travel intermediary contracts, as defined in the Act of 16 February 1994 regulating the package travel contracts and the travel intermediation contracts”. By citing the latter Act explicitly, the parties chose the Belgian law as the (sole) applicable law to the contract. After all, when a travel contract has been entered into in Belgium by a Belgian travel agency and nationals of another Member State, the parties are free to determine the law applicable to the contract. The arbitrators are required to apply this law to the specific situation according to Article 7 of the European convention on international commercial arbitration and the annex of 21 April 1961.

Concerning the qualification of the contract

It is up to the Arbitration Board to decide on the legal nature of the facts submitted, irrespective the parties’ characterisation of the contract.

With regard to the first defendant:

According to Article 1 No 1 and No 2 of the Travel Act, travel organisation contracts and travel intermediary contracts are defined as follows:

Travel organisation contract: any contract in which a person commits himself, in his own name, towards another, at an inclusive price, to supply at least two of the following services:
a. transport
b. accommodation
c. other tourist services not ancillary to transport or accommodation

in a pre-arranged combination organised by him or by a third party, when the service includes overnight accommodation or covers a period of more than 24 hours.

Travel intermediary contract: any contract in which a person commits himself towards another, at a price, to supply either a travel organisation contract or one or more separate performances which allow to accomplish a trip or a stay.

In the present case, the transport, the accommodation and the travel route were not arranged before the conclusion of the contract between the claimants and the first defendant. Hence, the contract in question cannot be qualified as a travel organisation contract within the meaning of Article 1 No 1 of the Travel Act.

Also, the contract in question cannot be qualified as a travel intermediary contract within the meaning of Article 1 No 2 of the Travel Act. The first defendant did not commit herself to supply, at a price, one or more separate performances which make a trip or a stay performable, but solely to organise trips or incentives in accordance with the program made up by the first claimant.

As a result, the contract in question is to be qualified as a contract sui generis: a travel contract tailored to the parties’ instructions or à la carte. Such a contract falls within the scope of the general rules of law and not within the range of application of the Travel Act.

With regard to the second defendant:

The first defendant did neither commit herself to supply to the claimants a travel organisation contract with the second defendant, nor did she commit herself to supply one or more separate performances to be provided by the second defendant.

As a result, the claimants have no contractual relationship with the second defendant, because neither a travel organisation contract nor a contract as to general domestic law is on hand. Hence, the second defendant is to be considered as a third party towards the claimants.

Concerning the liability:

With regard to the first defendant:

The claimants argue that the first defendant did not respect their initial program.

To determine on which party rests the burden of proof, the nature of the first defendant's performance needs to be analysed. When that performance can be labelled as an obligation of results, the fault of the first defendant shall be presumed when the claimants prove the existence of the contract and the fact that the result thereof has not been achieved. When the performance qualifies as an obligation of means, the claimants have to actually prove that the first defendant has committed a fault.

In the present case, the parties accepted the adventurous nature of the trip and the stay. As a result, the performances of the first defendant with respect to the contract must be qualified as an obligation of means because the execution thereof could depend on coincidences.
Furthermore, the claimants provide sufficient proof of the fact that the trip and the stay did not pass as planned in their initial program.

Seen that Article 1134 of the Civil Code indicates that a contract has the same binding force between parties as legislation and that the first defendant knew or should have known that the execution of the initial program was essential for the claimants, the first defendant committed a contractual fault by not respecting that program.

With regard to the second defendant:

The claimants omit to indicate on which legal basis they address the second defendant to reimburse a part of the price paid to the first defendant. The claim is therefore inadmissible (Article 17 of the Judicial Code).

## Decision

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