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ARTICLE

Choice of Law and Ex-Post Effects of Pre-Contractual Information—A View (Not Only) of the *Amazon* Case

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Abstract
Choice of law clauses are a central instrument for safeguarding party autonomy. At the same time, it must be ensured that consumers are protected and sufficiently informed, particularly with regard to the applicable law. The CJEU has established important principles in this regard in the Amazon decision. Based on the principles of choice of law in private international law, the article takes a closer look at the protection of the weaker party. The Amazon decision is placed in the system of private international law and justified by taking into account the various functions of information duties.

Keywords: Applicable law; contractual obligations; consumers; CJEU

A. Introduction

Freedom of choice of law plays an important role in the context of informed dispute resolution. First of all, the parties can influence the procedure for settling their disputes by means of jurisdiction agreements, arbitration agreements and various types of litigation agreements.[1] An informed decision is already highly relevant for these procedural steps,[2] as the choice of forum is of great importance with regard to the applicable procedural law and the relevant conflict of laws rules.[3] However, the parties can also determine the applicable substantive law by means of a choice of law agreement.[4] It is of particular interest here that the Court of Justice of the European Union (CJEU) established certain transparency requirements and information duties for such a choice of law agreement in the area of consumer law some time ago.[5] Although the court's decision in the

[1]*See* John F. Coyle, *Insufficient Notice and No Knowing Consent as Grounds for Refusal to Enforce Choice-of-Jurisdiction Clauses*, in this issue; Hannah Buxbaum, *Statutory Anti-Waiver Provisions and Their Effect on Jurisdictional Choice*, in this issue; Marta Pertegás Sender, *Consent to Jurisdiction under Brussels Ia and The Hague Choice of Court Regime*, in this issue; Nancy S. Kim, *Consent and Dispute Resolution Clauses*. *See also* Stefan F. Thönissen, *The Effectiveness of Arbitration Agreements in Germany*, in this issue.

[2]*See* Coyle, *supra* note 1 (providing an American perspective on the matter).

[3]*See* REINHOLD GEIMER, INTERNATIONALES ZIVILPROZESSRECHT n. 319 (9th ed. 2024) (Ger.) (explaining that courts apply the procedural rules of the country they are situated in, forum regit processum); *see also* Einführungsgesetz zum Bürgerlichen Gesetzbuch [EGBGB] [Introductory Act to the Civil Code] Aug. 18, 1896, BUNDESGESETZBLATT [BGBL], as amended October 23, 2024, art. 3 (Ger.), https://www.gesetze-im-internet.de/bgbeg/BJNR006049896.html [hereinafter EGBGB] (from which follows that courts furthermore apply the conflict of law rules of the forum).

[4]*See* Section B.

[5]Case C-191/15, Verein für Konsumenteninformation v. Amazon EU Sàrl, ECLI:EU:C:2016:612 (July 28, 2016), paras. 61–71, https://curia.europa.eu/juris/liste.jsf?num=C-191/15 [hereinafter CJEU]; *see* Section C. *I*.

Amazon Case has been much criticized for its rather vague reasoning,[6] this Article attempts to justify the information obligations postulated therein against the background of a change of perspective away from the ex-ante information function and towards the ex post dimension of pre-contractual information obligations.

For this purpose, the freedom of choice of law as a core element of European private international law will first be analyzed (in Section B). The focus is on the choice of law in the area of contractual obligations; a distinction is made between general contract law and consumer contract law. This is followed by an analysis of choice of law agreements and the transparency requirement in the realm of consumer contracts (in Section C). The case law of the CJEU in the *Amazon* decision is analyzed as well as its integration into the system of private international law and a teleological justification based on the assumption of an ex-post dimension of pre-contractual information obligations. The Article ends with a conclusion and the identification of further open questions (in Section D), in particular regarding the extent to which the transparency requirements for a choice of law agreement also exist beyond the consumer area.

B. Freedom of Choice as Core Element of Private International Law—Even for Consumers

I. Choice of Law Clauses as Core Principle in Private International Law

Freedom of choice of law is a core component of private international law.[7] It is prominently realized in Article 3 of the Rome I Regulation[8] concerning contractual obligations. However, the possibility of choice of law was already recognized under the former Article 27(1) sentence 1 EGBGB.[9] Historically, the determination of the applicable law by mutual consent of the parties is a relatively new development that spread in the course of the 19th century.[10] Today, the possibility of choice of law is not only found in international contract law, but is also recognized to a limited extent in international tort law (Article 14 Rome II[11]) and also to a limited extent in international family and inheritance law.[12] For the purposes of this Article, the focus will be on the choice of law in the area of contract law, including the special features of a choice of law by consumers.

[6]*See, e.g.*, Gisela Rühl, *The Unfairness of Choice-of-Law Clauses, Or: The (Unclear) Relationship of Art. 6 Rome I Regulation and the Unfair Terms in Consumer Contracts Directive*, 55 Common Mkt. L. Rev. 201, 207–18 (2018); Peter Mankowski, *Verbandsklagen, AGB-Recht und Rechtswahlklauseln in Verbraucherverträgen*, 69 Neue Juristische Wochenschrift [NJW] 2705, 2706–08 (2016) (Ger.); Wulf-Henning Roth, *Datenschutz, Verbandsklage, Rechtswahlklauseln in Verbraucherverträgen: Unionsrechtliche Vorgaben für das Kollisionsrecht*, 37 Praxis des Internationalen Privat- und Verfahrensrecht 449, 455–463 (2017) (Ger.); Frederick Rieländer, *Die Inhalts- und Transparenzkontrolle von Rechtswahlklauseln im EU-Kollisionsrecht*, Recht der Internationalen Wirtschaft 28, 32–37 (2017) (Ger.); *see* Section C. *II*.

[7]*See generally* Symeon C. Symeonides, Keynote Speech at the Informed Consent to Dispute Resolution Agreements Conference: Party Autonomy Then and Now (Jun. 20, 2024), https://www.uni-bremen.de/fileadmin/user_upload/fachbereiche/fb6/fb6/Forschung/IfH/PDF/ICtDRA_Conference_Flyer_2024-04-08.pdf.

[8]Regulation 593/2008, art. 3, 2008 O.J. (L 177) 6–16 (EC) [hereinafter "Rome I"] (setting forth the law applicable to contractual obligations).

[9]*See* Gerhard Kegel & Klaus Schurig, Internationales Privatrecht 652–53 (9th ed. 2004) (Ger.) (regarding the former legal situation).

[10]Giesela Rühl, Statut und Effizienz 325–26 (ed. 2011) (Ger.); Christian von Bar & Peter Mankowski, Internationales Privatrecht 1 [International Private Law], Band I Allgemeine Lehren, § 7 n. 68–69 (2nd. ed. 2003).

[11]Regulation 864/2007, art. 14, 2007 O.J. (L 199) 40–49 (EC) [hereinafter "Rome II"].

[12]*See, e.g.*, Council Regulation 1259/2010 (Rome III), 2010 O.J. (L 343), art. 5 (regarding divorce); Hague Conference on Private International Law, *Protocol on the Law Applicable to Maintenance Obligations*, art. 8 (Nov. 23, 2007), https://www.hcch.net/en/instruments/conventions/full-text/?cid=133; Regulation 650/2012, 2012 O.J. (L 201) (EU), art. 22 (regarding succession by reason of death). *See also* Jan von Hein, Münchener Kommentar zum Bürgerlichen Gesetzbuch: Internationales Privatrecht I, Einl. IPR, n. 35 (Jürgen Säcker et al., 9th ed. 2024) (providing an overview); Stefan Arnold, *Gründe und Grenzen der Parteiautonomie im Europäischen Kollisionsrecht*, *in* Grundfragen des Europäischen Kollisionsrechts, 23, 40–42. (Stefan Arnold ed., 2016) (providing an overview of the freedom of choice of law in the area of international family and inheritance law but noting that a special characteristic of international family and inheritance law is that the choice of law only permits a limited scope of selectable rights); Brigitta Lurger & Martina Melcher, Handbuch des internationalen Privatrechts n. 1/79 (2d ed. 2021).

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II. General Principles of Choice of Law Clauses Pursuant to Article 3 Rome I—Functions, Limitations, Validity

1. Functions of Choice of Law Clauses—Party Autonomy

The subjective connection by means of choice of law fulfills a number of important functions.[13] Firstly, at the level of the applicable law, it realizes the orientation towards the principle of private autonomy that characterizes private law.[14] Terminologically, however, the term "party autonomy" is used in the context of conflict of laws.[15] Party autonomy gives the parties the opportunity to determine the applicable law according to their will, whereas private autonomy refers to the conclusion and content of the legal transaction in question.[16] Freedom of choice of law tends to be granted if there is also a high degree of private autonomy in terms of substantive law.[17] Party autonomy—as well as private autonomy—serves to realize the principle of self-determination or the development of free will and therefore enable individuals to shape their legal relationships according to their needs and in freedom.[18] The possibility of choosing the law goes further than the substantive part of private autonomy, as it is also possible to opt out of mandatory law within certain limits.[19] Further advantages of the choice of law relate to legal certainty and clarity with regard to questions of the applicable law,[20] as there is no need to resort to sometimes controversial rules of objective connection. It should only be briefly noted that the choice of law is also convincing from an economic perspective.[21] Market-based solutions are promoted, as the parties are enabled to choose the legal system that appears to be the most suitable for their purposes.

2. Limitations of Choice of Law Clauses—Cross-Border Element

At the same time, the choice of law underlies several restrictions. Just as private autonomy is subject to a number of limitations and restrictions, the freedom of choice of law is not unlimited either. For international contract law, Article 3(3) Rome I and Article 3(4) Rome I contain some

[13] *But see* KEGEL & SCHURIG, *supra* note 9, at 653 (providing a less convincing characterization of it as a stopgap solution ("Verlegenheitslösung")). *See also* Stefan Leible, *Parteiautonomie im IPR—Allgemeines Anknüpfungsprinzip oder Verlegenheitslösung*?, *in* FESTSCHRIFT FÜR ERIK JAYME 485 (2004); JAN KROPHOLLER, INTERNATIONALES PRIVATRECHT 296 (6th ed. 2006).

[14] *See* ANDREAS SPICKHOFF, *Die Rechtswahl und ihre Grenzen unter der Rom I-VO*, *in* EUROPÄISCHE KOLLISIONSRECHTSVEREINHEITLICHUNG 117 (Oliver Remien & Eva-Maria Kieninger eds., 2012) (Ger.); Matthias Wendland, *Article 3 Rom I-VO*, BECK-ONLINE.GROSSKOMMENTAR, art. 3, n. 20 (Beate Gsell et al. eds., 2024), https://beck-online.beck.de; ULRICH MAGNUS, KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH, Rom I-VO art. 3, n. 28 (Julius V. Staudinger ed., 2021); *see also infra* Section B Kermit Roosevelt III, *The State Whose Law is Selected,* in this issue.

[15] *See, e.g.*, VON BAR & MANKOWSKI, *supra* note 10, at § 7 n. 67 (providing clear terminology). *See* Kropholler, *supra* note 13, at 292–93 (providing more detailed information).

[16] *See* Wendland, *supra* note 14, at n. 20.

[17] *See* LURGER & MELCHER, *supra* note 12, at n. 1/74 (diving deeper into this interaction between private and party autonomy). *See also* KROPHOLLER, *supra* note 13, at 296.

[18] *See* JÜRGEN BASEDOW, THE LAW OF OPEN SOCIETIES 142–43 (2015) (demonstrating the possibility of the choice of law on the basis of freedom and the natural will with recourse to philosophers of the Enlightenment such as Locke, Rousseau and Kant); Wendland, *supra* note 14 (mentioning the self-determination in this context). *Cf.* Arnold, *supra* note 12, at 28–30 (relativizing this and relying more on the assumption that party autonomy serves the realization of international private law justice and is rooted in this). *See generally* Gralf-Peter Calliess, *Reflexive Contract Law—Party Autonomy and the Constitutional Right to a Remedy*, in this issue (exploring the role of party autonomy and reflexive contract law).

[19] *See, e.g*, KROPHOLLER, *supra* note 13, at 296–297; VON BAR & MANKOWSKI, *supra* note 10, at § 7 n. 69. *See* Felix Maultzsch, *Rechtswahl und ius cogens im Internationalen Schuldvertragsrecht,* 75 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 60–101 (2011) (detailing the relationship between the freedom of choice of law and mandatory law). *See* Sections B. *II.2.* and B. *III* (explaining the limitations of the freedom of choice of law in purely national situations and for certain consumer contracts).

[20] *See* Maultzsch, *supra* note 19, at 64 (highlighting this concept); DIETER MARTINY, MÜNCHENER KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH, art. 3 n. 8 (Jürgen Säcker et al., 9th ed. 2025); Wendland, *supra* note 14, at n. 23; MAGNUS, *supra* note 14, at n. 28.

[21] RÜHL, *supra* note 10, at 343–53; BASEDOW, *supra* note 18, at 139–42.

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general boundaries. Furthermore, there are special boundaries to the choice of law for transport contracts under Article 5(2) subparagraph 2 Rome I, consumer contracts under Article 6(2) Rome I, insurance contracts under Article 7(3) Rome I and individual employment contracts under Article 8(1) Rome I. Consumer contracts are dealt with separately.[22]

In addition, the ordre public reservation (Article 21 Rome I) and overriding mandatory provisions (Article 9 Rome I) represent a significant restriction on the freedom of choice of law. However, these are general restrictions that also disrupt the system of objective connection and are therefore not analyzed in detail here.[23]

2.1 Purely Domestic Situation Pursuant to Article 3(3) Rome I

According to Article 3(3) Rome I:

> [W]here all other [objective[24]] elements relevant to the situation at the time of the choice are located in a country other than the country whose law has been chosen, the choice of the parties shall not prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement.

In other words, a choice of law in a purely domestic situation does not have the effect of superseding the mandatory law of the state with which the situation is objectively connected; the subjective choice of law is not sufficient for this.[25] The purpose of this provision is to prevent the parties from circumventing the mandatory law of a country by opting out, even though the contractual relationship has no objective connection to the chosen law.[26]

The decisive question is in which cases a situation has an objective link to a foreign country or is merely to be classified as a domestic situation within the meaning of Article 3(3) Rome I. There is a consensus, that, if there is an objective connecting factor within the meaning of Article 4 Rome I, there is a sufficient foreign connection.[27] In many cases, it is also considered sufficient, if at least one element, which is the connecting factor of a conflict rule of the Rome I Regulation, is located abroad.[28] However, purely subjective foreign links based on a party agreement are not sufficient.[29] Generally, a foreign connection relevant to the facts of the case is required,[30] and therefore one

[22]*See* Section B. *III*.

[23]*See* Symeonides, *supra* note 7.

[24]Christian von Bar & Peter Mankowski, Internationales Privatrecht, *in* Band II Besonderer Teil § 1 n. 205 (2nd. ed. 2019) (stating clearly this does not follow from the wording, but indirectly from the norm, as the subjective choice of law is not sufficient).

[25]von Bar & Mankowski, *supra* note 24, at § 1, n. 206 (accentuating this observation). *See, e.g.*, Heinz-Peter Mansel, *Parteiautonomie, Rechtsgeschäftslehre der Rechtswahl und Allgemeinen Teil des europäischen Kollisionsrechts*, *in* Brauchen wir eine Rom-0-Verordnung? 241, 269 (Stefan Leible & Hannes Unberath eds., 2013) (illustrating this observation). *See also* Jan von Hein, Europäisches Zivilprozess- und Kollisionsrecht vol. 3, Rom I-VO art. 3, n. 100 (Thomas Rauscher, 5th ed. 2023) (on the historical background to this provision).

[26]*See, e.g.*, von Hein, *supra* note 25, at n. 100; Wendland, *supra* note 14, at n. 227; Franco Ferrari, Internationales Vertragsrecht: Article 3 Rom I-VO n. 49 (Eva-Maria Kieninger et al., 3d ed. 2018); Bundesgerichtshof [BGH] [Federal Court of Justice] Nov. 29, 2023, 77 Neue Juristische Wochenschrift—Rechtsprechungsreport [NJW-RR], 2024, 140 para. 16 (Ger.).

[27]*See* BGH, *supra* note 26, at para. 17; Martiny, *supra* note 20, at n. 91.

[28]von Bar & Mankowski, *supra* note 24, at § 1 n. 206; Magnus, *supra* note 14, at n. 137; von Hein, *supra* note 25, at n. 107; Ferrari, *supra* note 26, at n. 51; Andreas Spickhoff, *Beck'scher Online-Kommentar BGB,* Rom I-VO art. 3, n. 37 (69 ed. Hau et al., eds., 2024).

[29]Magnus, *supra* note 14, at n. 137; Wendland, *supra* note 14, at 230; BGH, *supra* note 26, at para. 17.

[30]von Hein, *supra* note 25, at n. 107 (finding that this results in particular from the English language version, according to which it is required that "all other elements relevant to the situation must lie in a law other than the chosen law.").

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that has a certain weight in terms of conflict of laws.[31] Ultimately this comes close to an overall assessment.[32]

The specific connecting factors that can establish the necessary objective link to a foreign country are the subject of controversial debate in case law and among scholars. The provision of services abroad can establish the necessary foreign connection.[33] Particularly in the case of immovable contractual objects, their location can be taken into account.[34] The conclusion of a contract abroad is predominantly regarded as sufficient, although an exception can be made in the case of manipulative relocation, as the relevance of the foreign connection is then lacking.[35] It is often considered sufficient if one party is domiciled abroad.[36] In this respect it should however be noted that pursuant to Article 19(2) Rome I, in case of a domestic establishment, where the contract was concluded or which is responsible for the fulfilment of the contract, only the place of this establishment is relevant and therefore there is no objective foreign connection.[37] Generally, the mere foreign nationality of one of the contracting parties is not considered sufficient, as this is—at least in isolation—not decisive for the objective connection under the system of the Rome I Regulation.[38] It is also not sufficient if the contract is drafted in a foreign language or if the contract is based on international model contracts.[39] Otherwise, the parties could escape the objectively applicable mandatory law by choosing a foreign language or a model contract and thus on the basis of subjective elements.[40] In this regard, however, it should be noted that this question is decided to the contrary by the English courts;[41] there is no judgement from the European Court of Justice.

2.2 Purely Internal Market Case Pursuant to Article 3(4) Rome I

A parallel provision to Article 3(3) Rome I is provided for in Article 3(4) Rome I regarding a situation where all objective elements are located in one or more Member States of the European Union.[42]

[31] VON HEIN, *supra* note 25, at n. 107; MAGNUS, *supra* note 14, at n. 138; MARTINY, *supra* note 20, at n. 91; Patrick Ostendorf, *Anforderungen an einen genuinen Auslandsbezug bei der Rechtswahl im Europäischen Kollisionsrecht*, *in* PRAXIS DES INTERNATIONALEN PRIVAT-UND VERFAHRENSRECHT 630, 632 (2018); LURGER & MELCHER, *supra* note 12, at n. 1/75.

[32] *See* Wendland, *supra* note 14, at n. 231 (demanding this). *Cf.* BGH, *supra* note 26, at para. 18 ("Würdigung aller Umstände des Einzelfalls.").

[33] *See* VON BAR & MANKOWSKI *supra* note 24, at § 1, n. 206 (noting that an abstract place of performance where no exchange of services takes place is not included). *See also* VON HEIN, *supra* note 25, at n. 105; Wendland, *supra* note 14, at n. 234; MARTINY *supra* note 20, at n. 91.

[34] *See* BGH, *supra* note 26, at para. 21; VON HEIN, *supra* note 25, at n. 116; FERRARI, *supra* note 26, at 51; MAGNUS, *supra* note 14, at n. 138.

[35] *See* Wendland, *supra* note 14, at n. 235 (providing further references).

[36] *See* VON BAR & MANKOWSKI, *supra* note 24, at n. 206; VON HEIN, *supra* note 25, at n. 108. *But see* BGH, *supra* note 26, at para. 25 (detailing a more reserved approach, at least in the case of a rental agreement concerning a property located in the domestic country, but leaving this open in the result and rejecting the foreign connection due to the provision of Article 19(2) Rome I BGH).

[37] BGH, *supra* note 26 (basing its decision on such a constellation, and therefore, the decision at para. 25 rejected the assumption of a foreign element in this context). *See also* VON HEIN, *supra* note 25, at n. 108 (referring to the special nature of Article 19(2) Rome I in this context).

[38] Wendland, *supra* note 14, at n. 237–38 (providing further details); VON HEIN, *supra* note 25, at 107; BGH, *supra* note 26, at para. 42 (emphasizing urgent restraint).

[39] *See also* Robert Magnus, *Der grenzüberschreitende Bezug als Anwendungsvoraussetzung im europäischen Zuständigkeits- und Kollisionsrecht,* 26 ZEITSCHRIFT FÜR EUROPÄISCHES PRIVATRECHT 507, 535 (2018); VON HEIN, *supra* note 25, at 117; MAGNUS, *supra* note 14, at n. 140; BGH, *supra* note 26, at para. 44; VON BAR & MANKOWSKI, *supra* note 24, at n. 205 (describing generally, with regard to the problem of creating a foreign reference by "fabricating" connecting factors).

[40] *See* MAGNUS, *supra* note 39, at 535 (elaborating on this); BGH, *supra* note 26, at para. 44. *See also* Ostendorf, *supra* note 31, at 632.

[41] Dexia Crediop S.P.A. v Comune di Prato [2017] EWCA (Civ) 428 (Eng.); Ostendorf, *supra* note 31, at 630.

[42] *See, e.g.*, SPICKHOFF, *supra* note 14, at 129 (emphasizing the parallelism of Article 3(3) and Article 3(4) Rome I); Wendland, *supra* note 14, at n. 237; VON BAR & MANKOWSKI, *supra* note 24, at § 1 n. 211, 214; MAGNUS, *supra* note 14, at n. 149.

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Mandatory law enacted by the European Union cannot be deselected in this respect either. This applies in particular to Directive 86/653/EEC[43] regarding self-employed commercial agents and Directive 2011/7/EU[44] regarding combating late payment in commercial transactions.[45] In a case without reference to third countries, the parties can therefore not opt out of these mandatory provisions. With regard to the problem of when such an internal market situation exists, similar questions arise as explained above with regard to Article 3(3) Rome I. Reference is made to those explanations in this respect.

3. Agreements on Choice of Law and Requirements of Validity

According to Article 3(1) sentence 2 Rome I, the choice of law agreement can be made expressly. Such an express agreement can also be made in the context of general terms and conditions,[46] whereby the validity must be examined separately.[47] It is further possible to declare the choice of law implicitly or tacitly, as Article 3(1) sentence 2 Rome I shows. However, this is subject to the condition that it is "clearly demonstrated by the terms of the contract or the circumstances of the case." Various indications for the assumption of such an implied choice of law are discussed in case law and in the literature.[48] Possible options include a jurisdiction agreement,[49] an arbitration clause[50] or a reference by the parties to a specific law.[51] However, the circumstances of each individual case must be taken into account.[52]

Pursuant to Article 3(5) Rome I "[t]he existence and validity of the consent of the parties as to the choice of the applicable law shall be determined in accordance with the provisions of Articles 10, 11 and 13."[53] Article 10(1) Rome I refers to the chosen law; thus "existence and validity of the consent of the parties"[54] with regard to the choice of the applicable law are determined by the chosen law. Consequently, the formation and validity of the consent of the parties must be considered separately and examined separately in accordance with the chosen law.[55] However, pursuant to Article 10(2) Rome I the party denying a consent to such choice "may rely upon the law of the country in which he has his habitual residence if it appears from the circumstances that it would not be reasonable to determine the effect of his conduct in accordance with the law specified in paragraph 1."[56] This provision is to be interpreted rather narrowly and only refers to cases where it is questionable whether or not a party consented to a choice of law agreement—for example, if no explanatory mark was set beyond silence.[57] In addition, it must be examined to

[43]Council Directive 86/653, On the Coordination of the Laws of the Member States Relating to Self-Employed Commercial Agents, 1986 O.J. (L 382) art. 17 (EC).

[44]Council Directive 2011/7, Combating Late Payment in Commercial Transactions, 2011 O.J. (L 48) art. 1 (EU).

[45]*See* Peter Mankowski, *Die Rom I-Verordnung—Änderungen im europäischen IPR für Schuldverträge*, INTERNATIONALES HANDELSRECHT 133, 136 (2008); MAGNUS, *supra* note 14, at n. 152; FERRARI, *supra* note 26, at n. 51.

[46]*See, e.g.*, VON HEIN, *supra* note 25, at n. 6 (stressing this in the given context).

[47]See the next paragraph with reference to Art. 3(5) Rome I.

[48]VON BAR & MANKOWSKI, *supra* note 24, at n. 206; MAGNUS, *supra* note 14, at n. 74; VON HEIN, *supra* note 25, at n. 17.

[49]*See* Recital 12 of Rome I; VON HEIN, *supra* note 25, at n. 20 (providing more detail on this and on the history of its origins). *See, e.g.*, Bundesgerichtshof [BGH] [Federal Court of Justice] Feb. 4, 1991, 44 NEUE JURISTISCHE WOCHENZEITSCHRIFT (NJW) 1991, 1420 (from the case law of the Federal Court of Justice on the old law).

[50]*See* MARTINY, *supra* note 20, at n. 52–53 (providing further details); VON BAR & MANKOWSKI, *supra* note 24, at § 1, n. 131 (providing further descriptions).

[51]*See, e.g.*, MAGNUS, *supra* note 14, at n. 88 (detailing further information).

[52]*See* VON HEIN, *supra* note 25, at n. 18 (depicting an "Gesamtbetrachtung aller relevanten Indizien" by the court—and thus in the individual case consideration). *See also* Wendland, *supra* note 14, at n. 137.

[53]Regulation 593/2008, *supra* note 8, art. 3(5).

[54]*Id.*

[55]FERRARI, *supra* note 26, at n. 6; MARTINY, *supra* note 20, at n. 101.

[56]Regulation 593/2008, *supra* note 8, art. 10(2).

[57]*See* MARTINY, *supra* note 20, at n. 105.

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what extent the validity of the choice of law for certain contracts can still be examined separately in accordance with a transparency control; this will be returned to.[58]

III. Choice of Law Clauses in the Realm of Consumer Contracts

1. General Principles

Contracts between professionals and consumers are often subject to numerous protective provisions of substantive law.[59] Article 6 Rome I continues these ideas at the level of conflict of laws. Article 6(1) Rome I modifies the objective connection under Article 4 Rome I in favor of the law of the country where the consumer has his habitual residence, the home law of the consumer. However, Article 6(1) Rome I asks that the professional "(a) pursues his commercial or professional activities in the country where the consumer has his habitual residence, or (b) by any means, directs such activities to that country or to several countries including that country."[60] Consequently, the objective link pursuant to Article 4 Rome I is only modified in cases where the trader actively operates on the consumer's market or, in other words, where the consumer passively enters into the cross-border element. As a result, "[t]he active consumer, in turn, who on its own initiative approaches a business in a foreign market has to be aware of the fact that his home-law does not travel in his rucksack: for 'when in Rome, do as the Romans do.'"[61] Finally, the exceptions to the scope of application under Article 6(4) Rome I must be taken into account.[62]

2. The System of Article 6(2) Rome I

Even though Article 6 Rome I establishes a rather strict regime of protecting consumers in a conflicts of law situation it does provide for limited choice of law mechanism. Pursuant to Article 6(2) sentence 1 Rome I "the parties may choose the law applicable to a contract which fulfils the requirements of paragraph 1, in accordance with Article 3."[63] Therefore, even in the case of a consumer contract, "[t]he existence and validity of the consent of the parties as to the choice of the applicable law"[64]– are in principle determined by the chosen law, since the reference to Article 3 also includes its paragraph 5 and thus Article 10 is decisive.[65] The question of whether the exceptions made by the CJEU in this respect with regard to the application of the transparency control and further information obligations are convincing, must be examined separately.[66]

Furthermore, this freedom of choice is noticeably limited by Article 6(2) sentence 2 Rome I. Pursuant to this provision the choice may not "have the result of depriving the consumer of the protection afforded to him by provisions that cannot be derogated from by agreement by virtue of the law which, in the absence of choice, would have been applicable on the basis of paragraph 1."[67] This second sentence of paragraph 2 was already known in Article 5(2) Rome Convention.[68] It establishes a "preferential-law" approach (*Günstigkeitsvergleich*) in favor of the consumer.

[58] *See* Section C.

[59] *See inter alia* Marina Tamm et al., Verbraucherrecht (3rd ed. 2020); Martin Schmidt-Kessel & Malte Kramme, Handbuch zum Verbraucherrecht (2023).

[60] Regulation 593/2008, *supra* note 8, art. 6(1).

[61] *See* Gralf-Peter Calliess, Rome Regulations Commentary, Article 6 Rome I n. 5 (Gralf-Peter Calliess & Moritz Renner eds., 3rd ed. 2020).

[62] *Id.* at n. 58; Oliver Remien & Sören Segger-Piening, Bürgerliches Gesetzbuch—Kommentar, Article 6 Rome I n. 25 (Hanns Prütting et al., 19th ed. 2024).

[63] Regulation 593/2008, *supra* note 8, art. 6(2).

[64] Regulation 593/2008, *supra* note 8, art. 3(5).

[65] *See* Calliess, *supra* note 61, at n. 73; Magnus, *supra* note 14, art. 6, n. 134; Frederick Rieländer, *Treuhandverträge über Geschäftsanteile: Stärkung des Verbraucherkollisionsrechts und Präzisierung des sachlichen Anwendungsbereichs der Rom I-VO*, *in* Praxis des Internationalen Privat- und Verfahrensrecht 224, 230 (2020); Arnold, *supra* note 12, at 45.

[66] *See* Section C., especially C. *II.*, *III.*

[67] Regulation 593/2008, *supra* note 8, art. 6(2).

[68] See Calliess, *supra* note 61, at n. 19.

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Nevertheless, this preferential law approach only relates to "provisions that cannot be derogated from by agreement"—that is, mandatory law. Thus, a non-mandatory provision of the domestic law of the consumer could be displaced by the chosen law, even if that non-mandatory provision would be favorable for the consumer. For this reason it is not correct to state, "a choice of law clause in a consumer contract ... can only work in favor of the consumer."[69] Such a statement only holds true for mandatory provisions, but not for non-mandatory provisions.

Overall, Article 6(2) Rome I Regulation is a comparatively balanced provision. On the one hand, the consumer has the option of choosing the applicable law. Thus, voices in the legislative process that rejected such a choice of law for consumers as a whole were unable to prevail.[70] Against the background of the high value of party autonomy, particularly in connection with contractual obligations, this is a welcome development.[71] On the other hand, the consumer receives the protection of domestic mandatory provisions. In this respect, a certain minimum level of consumer protection is maintained. Beyond these mandatory provisions, however, a choice of law can also lead to a deterioration of the substantive legal situation for consumers, namely if the chosen dispositive law is disadvantageous for the consumer compared to the otherwise applicable dispositive law.

In this context, the control of terms and conditions is challenging. There is agreement that the control of general terms and conditions in accordance with the directive on unfair terms in consumer contracts[72] is mandatory within the meaning of Article 6(2) Rome I.[73] In addition to the special prohibitions on terms in §§ 308, 309 BGB[74] and the corresponding reference in the Annex to the directive, § 307(1) sentence 1 BGB also contains the general provision that general terms and conditions are invalid "if, contrary to the requirement of good faith, they unreasonably disadvantage the party contracting with the user." According to § 307(2) Number 1 BGB, such unreasonable disadvantage is to be assumed in case of doubt "if a provision is not compatible with essential principles of the statutory provision from which it deviates." However, which statutory provisions are meant in the event that a consumer contract within the meaning of Article 6 Rome I contains a choice of law in favor of the law of a third country? Consequently, it must be assumed that the content of this examination with regard to the dispositive provisions is based on the chosen law. This is because the reference to statutory provisions in § 307(2) Number 1 BGB refers to provisions of German law, but against the background of the parallel application of both mandatory provisions of the consumer's home law and dispositive provisions of the chosen law, the special situation arises here that provisions of the dispositive chosen law form the basis for determining an unreasonable disadvantage within the meaning of the mandatory German control of general terms and conditions. If the chosen dispositive law conflicts with mandatory provisions of the consumer's home law, a clause that declares those mandatory provisions to be decisive can certainly not be categorized as unreasonable. A flexible examination of the individual case is therefore required here.

A sharp distinction must be made between this categorization of §§ 305–310 BGB as a mandatory provision from the question of the extent to which the validity of the choice of law is to

[69]Calliess, *supra* note 61, at Rome I art. 3, n. 29; Rühl, *supra* note 6, at 208 ("As a result, a choice of a foreign law can make consumers only better, but never worse off."). *See also* Gisela Rühl, *Article 6 Rom I-VO*, beck-online.GROSSKOMMENTAR, art. 6, n. 251 (Beate Gsell et al. eds., 2024) (saying, that a valid choice of law agreement gives a consumer the possibility to rely on the more favorable provisions of the chosen law, but also neglecting that the consumer in return may not rely on the ore favorable dispositive provisions of his own law), https://beck-online.beck.de.

[70]*See* Rühl, *supra* note 6, at n. 19 (with further references); Calliess, *supra* note 61, at n. 19–20.

[71]*See also* Calliess, *supra* note 61, at n. 20.

[72]Council Directive 93/13 of 5 April 1993 On Unfair Terms in Consumer Contracts, O.J. (L 95) (EC).

[73]*See* CJEU, C-455/21, OZ v. Lyoness Europe AG, ECLI:EU.C:2023:455 (June 8, 2023), n. 38–46; Segger-Piening & Remien, *supra* note 62, at n. 23; Martiny, *supra* note 20, Rome I art. 6, n. 65.

[74]Bürgerliches Gesetzbuch [BGB] [Civil Code], §§ 308, 309, http://www.gesetze-im-internet.de/englisch_bgb/index.html (Ger.).

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be assessed in accordance with the transparency requirement contained in Article 5 Unfair Terms Directive or corresponding implementation provisions. This question was addressed by the CJEU in the *Amazon* decision, which is discussed in the following section.

C. Transparency of Choice of Law Agreements in Consumer Contracts—A Justification

The already considerable complexity of the application of the law in accordance with Article 6(2) Rome I is noticeable increased by the decision of the CJEU in the case *Verein für Konsumenteninformationen v Amazon*.[75] First, it will be shown that the CJEU established a review of choice of law agreements based on the requirement of transparency and also established information obligations in this sense (under Section C.I). Afterwards it will be scrutinized how such a transparency control together with information obligations can be integrated into the system of private international law (under Section C. II) and what kind of transparency standard is asked for by the CJEU (under Section C. III). Finally, the ex-post dimension of pre-contractual information obligations will be established as a teleological justification for the judicature of the CJEU (under Section C. IV).

I. The Decision of the CJEU—Review of the Choice of Law Clauses Based on the Requirement of Transparency

The background to the CJEU's decision was an Austrian case between the Austrian Verein für Konsumenteninformationen (VKI) on the one hand and Amazon EU SARL, that is, a company under Luxembourg law, on the other.[76] The VKI had filed an action for an injunction pursuant to the directive on injunctions for the protection of consumers' interests and complained, among other things, that Amazon had applied the following general terms and conditions in contracts concluded with consumers until mid-2012: "Luxembourg law shall apply, excluding [the United Nations Convention on the International Sale of Goods]."[77] In this regard, the Austrian Supreme Court (*Oberster Gerichtshof*) wanted to know, among other things, how the law applicable to the action for an injunction should be determined and whether the choice of law clause already cited was unfair within the meaning of Article 3(1) Unfair Terms Directive.

The CJEU differentiated between the law applicable to the corresponding action for an injunction on the one hand and the law applicable to the assessment of the terms in question on the other.[78] The CJEU quite rightly assumed that the law relating to the action for an injunction—that is a breach of legal provisions "aimed at protecting consumers' interests with respect to the use of unfair terms in general terms and conditions"—is to be recognized as a non-contractual obligation in accordance with the Rome II Regulation.[79] After all, it is not claims arising from a contract between a consumer association and the opponent of the action for an injunction that form the connecting factor, but rather a non-contractual obligation attributable to competition law. Therefore, the allocation to Article 6 Rome II Regulation is correct. However, the preliminary question of the extent to which an unfair contractual term exists must be separated from this. The question of unfairness is addressed separately in accordance with the contractual statute.[80] Such an

[75]CJEU, *supra* note 5.

[76]*Id.* at paras. 29–34.

[77]*Id.* at para. 30.

[78]*Id.* at para. 52–60; Bundesgerichtshof [BGH] [Federal Court of Justice] Jul. 9, 2009, 62 NEUE JURISTISCHE WOCHENZEITSCHRIFT (NJW) 2009, 3371, Guiding principle 2 (using such an approach); Thomas Pfeiffer, *Transparenzkontrolle von Rechtswahlklauseln—Pharmazeutische Beratung über Callcenter*, LMK 2013, 343552; Mankowski, *supra* note 6, at 2705.

[79]CJEU, *supra* note 5, at para. 58.

[80]Mankowski, *supra* note 6, at 2705 (using the term "preliminary question" ("Vofrage")).

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approach ensures in particular that the corresponding contractual clauses are assessed according to the same legal standards in collective action proceedings and individual proceedings.[81]

Of particular interest are the CJEU's comments on the extent to which the choice of law agreement in Amazon's general terms and conditions is valid.[82] The CJEU begins its examination with a direct application of the provisions of the Unfair Terms Directive.[83] After the general requirements of an unfair term under Article 3(1) Unfair Terms Directive and the classification of a contractual term as a general term under Article 3(2) Unfair Terms Directive were established,[84] the CJEU emphasized the need for a case-by-case examination to determine the unfairness of a term under Article 4(1) Unfair Terms Directive.[85] It is for the national court to determine this.[86] The court then states that choice of law clauses are generally permissible in accordance with Article 6(2) Rome I.[87] For the clause in question, unfairness could arise "from a formulation that does not comply with the requirement of being drafted in plain and intelligible language set out in Article 5 Unfair Terms Directive."[88] The court emphasizes that this requirement must be interpreted broadly due to the consumer's lower level of knowledge compared to the trader.[89] In addition,

> where the effects of a term are specified by mandatory statutory provisions, it is essential that the seller or supplier informs the consumer of those provisions . . . . That is the case of Article 6(2) of the Rome I Regulation, which provides that the choice of applicable law must not have the result of depriving the consumer of the protection afforded to him by provisions that cannot be derogated from by agreement by virtue of the law which would have been applicable in the absence of choice.[90]

Finally, the court states that a term is unfair

> in so far as it leads the consumer into error by giving him the impression that only the law of that Member State applies to the contract, without informing him that under Article 6(2) of the Rome I Regulation he also enjoys the protection of the mandatory provisions of the law that would be applicable in the absence of that term, this being for the national court to ascertain in the light of all the relevant circumstances.[91]

The last passage of the judgment in particular is of considerable importance. In this respect, a duty of the trader to inform the consumer is established with regard to the effects of Article 6(2) sentence 2 Rome I. The CJEU has now confirmed the control of choice of law clauses in accordance with the transparency requirement several times.[92]

This result is exceptional from several points of view. Firstly, it remains completely unclear how such an interpretation is to be integrated into the system of private international law.[93] According

[81]CJEU, *supra* note 5, at paras. 53–58.
[82]*Id.* at paras. 61–71.
[83]*Id.*
[84]*Id.* at paras. 61–63.
[85]*Id.* at para. 64.
[86]*Id.* at para. 65.
[87]*Id.* at para. 66.
[88]*Id.* at para. 68.
[89]*Id.*
[90]*Id.* at para. 69.
[91]*Id.* at para. 71.
[92]Case C-272/18, Verein für Konsumenteninformation/TVP Treuhand- und Verwaltungsgesellschaft für Publikumsfonds mbH & Co KG, ECLI:EU:C:2019:679 (Oct. 3, 2019), paras. 58–60; Case C-821/21, NM v. Club La Costa (UK) plc, sucursal en España ua, et al. ECLI:EU:C:2023:672 (Sep. 14, 2023), paras. 71–76.
[93]*See* Section C. *II*.

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to which law should such a transparency control as well as a duty to inform be applied with regard to the choice of law clause? The transparency standard used by the CJEU must also be scrutinized.[94] In itself, Amazon's choice of law clause is not necessarily incomprehensible. Finally, the legal and teleological justification of such a transparency control and information obligation with regard to a choice of law clause must also be addressed. Does it really make sense to establish further information obligations towards consumers or is this another case of a failure of mandated disclosure?[95] To what extent can the CJEU's considerations be transferred to teleologically perhaps comparable issues in transport contracts, employment contracts and overriding mandatory provisions?[96] The *Amazon* decision of the CJEU raises more questions than it answers. This Article attempts to answer the latter.

II. Integration of Transparency Control and Information Obligations into the System of Private International Law

With regard to the integration of transparency control and information obligations into the system of private international law, it should again be recalled that the assessment of the existence and validity of the consent of the parties as to the choice of the applicable law is carried out in accordance with the chosen law, as set out in Article 6(2) sentence 1 Rome I in conjunction with Article 3(5) and Article 10(1) Rome I.[97] But how can the transparency requirement of the Unfair Terms Directive apply to this choice of law?[98]

1. Recourse to the Chosen Law Pursuant to Article 3(5), 10 Rome I

Some authors assume that a transparency check in accordance with Article 3(5), 10(1) Rome I can be based on the chosen law, provided that this is the law of a member state.[99] In these cases, the chosen law also includes the national implementation of the Unfair Terms Directive. Therefore, the effectiveness of the choice of law clause can be reviewed in accordance with the national implementation of the transparency requirement. Against the background of the obligation to interpret the law in accordance with European law, the relevant rulings of the CJEU will also have to be taken into account. In these cases, a review of the choice of law clause in accordance with the transparency requirement and the corresponding case law of the CJEU can therefore be easily integrated into the system of private international law.

Insofar as it is sometimes argued that transparency control is not covered by the validity of the consent of the parties,[100] this is less convincing. After all, the question of the extent to which consent is valid also includes the question of the extent to which the consent meets the standards of transparency control if the choice of law is made in the context of general terms and conditions.[101]

[94] *See* Section C. *III.*

[95] *See* Section C. *IV.*

[96] *See* Section D.

[97] *See* Section B. *II.3.*

[98] *See supra* note 6 (for the critical voices of Rühl, Mankowski, Roth and Rieländer).

[99] Thomas Pfeiffer, *Transparenz von Rechtswahlklauseln in Verbraucherverträgen*, LMK 2017, 393442; Peter Georg Picht & Caroline Kopp, *Aktuelle Praxisfragen der Rechtswahl nach den Rom I-/Rom II-Verordnungen*, PRAXIS DES INTERNATIONALEN PRIVAT- UND VERFAHRENSRECHT 16, 25 (2024); Peter Huber, *Der Coradanzug von Amazon—Hinweispflichten bei Rechtswahl und Gerichtsstandsvereinbarung*, *in* NATIONAL, INTERNATIONAL, TRANSNATIONAL—FESTSCHRIFT FÜR HERBERT KRONKE, 215, 218 (Christop Benicke & Stefan Huber ed. 2020); CALLIESS, *supra* note 61, Rome I art. 3, n. 29.

[100] Rühl, *supra* note 6, at 211–12; Rieländer, *supra* note 6, at 33–34 (considering a review in accordance with the transparency requirement also permissible in accordance with Article 3(5), Article 10(1) Rome I).

[101] Wulf-Henning Roth, *Rechtswahlklauseln in Verbraucherverträgen—eine schwierige Sache?*, *in* PRAXIS DES INTERNATIONALEN PRIVAT- UND VERFAHRENSRECHT 515, 522 (2013). *Compare also* Rieländer, *supra* note 6, at 34–35.

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2. Recourse to the Domestic Law via Article 6(2) Sentence 2 Rome I?

However, cases in which the law of a third country is chosen are challenging. In these cases, recourse to the chosen law does not help, as the law of a third country does not recognize a transparency requirement within the meaning of the Unfair Terms Directive as currently interpreted by the CJEU.[102] Thus, the analogous application of Article 6(2) sentence 2 Rome I is considered.[103] Accordingly, the validity of the potential choice of law clause should also be examined in accordance with the consumer's home law. However, it is rightly objected to this approach that Article 6(2) sentence 2 Rome I already assumes a valid choice of law and therefore cannot itself be used for the validity check.[104] Rather, this validity check is carried out according to the system of Article 3(5), 10 Rome I.[105] In this respect, there is little room for an analogous application of Article 6(2) sentence 2 Rome I.

3. Special Choice-of-Law Rule in Article 6(2) Unfair Terms Directive

One solution to this supposed dilemma can be seen in in searching for special conflict-of-law rules beyond the Rome I Regulation that lead to a direct application of the transparency requirement of Unfair Terms Directive.[106] In this respect, it should first be emphasized that, pursuant to Article 23 Rome I, "this Regulation shall not prejudice the application of provisions of Community law which, in relation to particular matters, lay down conflict-of-law rules relating to contractual obligations."[107] Such a provision is Article 6(2) Unfair Terms Directive.[108] Thereafter,

> Member States shall take the necessary measures to ensure that the consumer does not lose the protection granted by this Directive by virtue of the choice of the law of a non-Member country as the law applicable to the contract if the latter has a close connection with the territory of the Member States.[109]

Such a close connection exists if, without the choice of law, the consumer's home law would apply in accordance with Article 6 (1) Rome I.[110]

Some object to this solution, arguing that Article 6(2) of the Unfair Terms Directive already presupposes a valid choice of law and therefore cannot be the basis for a transparency check of the choice of law.[111] In this respect, however, it should be noted that the Directive specifically asks "that the consumer does not lose the protection granted by this Directive by virtue of the choice of the law."[112] Thus, the question whether or not the choice of law is valid in terms of transparency is no prerequisite for the application of Article 6(2) Unfair Terms Directive.

[102]This also applies to the United Kingdom. Although the directive still applies there, https://www.legislation.gov.uk/eudr/1993/13/body, the CJEU no longer has the authority to interpret it.

[103]Roth, *supra* note 101, at 519; Roth, *supra* note 6, at 456–57; Rieländer, *supra* note 6, at 33; Rieländer, *supra* note 65, at 230, n. 65; Francis Limbach, jurisPK-BGB, INTERNATIONALES PRIVATRECHT UND UN-KAUFRECHT, Art. 6 Rom I n. 61 (Maximilian Herberger et al., eds., 2023).

[104]Rühl, *supra* note 6, at 208; Picht & Kopp, *supra* note 99, at 25–26; CALLIESS, *supra* note 61, art. 3, n. 29b.

[105]*See* Section B. *II. 3.*

[106]*See also* Rühl, *supra* note 6, at 216–17; CALLIESS, *supra* note 61, art. 3, n. 29b; Roth, *supra* note 6, at 456.

[107]Regulation 593/2008, *supra* note 8, art. 23.

[108]*See also* Matthias Fervers, BECK-ONLINE.GROSSKOMMENTAR, art. 23 Rome I n. 51 (Beate Gsell et al. eds., 2024), https://beck-online.beck.de; Rühl, *supra* note 6, at 216–17.

[109]Council Directive 93/13/EEC *supra* note 72, art. 6(2).

[110]*See* EGBGB, *supra* note 3, art. 46b(2). *See also* Fervers, *supra* note 108, at n. 52.

[111]*See* Fervers, *supra* note 108, at n. 54–55.

[112]Council Directive 93/13/EEC, *supra* note 72, art. 6(2).

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III. Transparency Standard - Additional Information

Although the classification into the system of private international law can be achieved with some effort, it still seems questionable why a violation of the transparency principle should be assumed in the present case. The clause itself is comparatively simple and clearly formulated in that it states: "Luxembourg law shall apply, excluding [the United Nations Convention on the International Sale of Goods]."[113]

Pursuant to Article 5 sentence 1 Unfair Terms Directive the transparency principle requires that "terms must always be drafted in plain, intelligible language."[114] Plain language requires the information to be non-contradictory and precise.[115] Intelligible language on the other hand requires the trader to use comprehensive and rather simple language.[116] The focus is on the ability of the reasonably well-informed average consumer.[117]

According to this standard, it seems questionable why this clause should violate the transparency principle.[118] In any case, the information is not contradictory and is also sufficiently precise. With regard to the average consumer, it should be emphasized that although the clause uses a legal term with reference to the exclusion of the UN Sales Convention, such terms are already subject to clear and comprehensible information in accordance with the information obligations resulting from the Consumer Rights Directive,[119] so that their existence does not automatically lead to a lack of comprehensibility. If the standard were set too high here, it would ultimately not be possible to govern any legally significant circumstances in general terms and conditions, as only very few consumers will have a concrete idea of a "choice of law" or the fact that Luxembourg law applies to the exclusion of the UN Sales Convention.

However, such a view would be insufficient. It must also be taken into account that the clause does indeed give the impression that only the law of Luxembourg applies. In this respect, it is also expedient, particularly with regard to clarity and precision of the information as well as the average consumer, to additionally point out that the choice of law does not lead to the consumer being deprived of the protection of the mandatory provisions of his home law. Otherwise, the impression is created that these mandatory provisions are not additionally applicable. This could prevent consumers, particularly in a situation after conclusion of the contract, from asserting mandatory protective provisions to which they are entitled under their home law. The lack of transparency of the clause therefore does not result from its incomprehensible or unclear wording, but from a content that tends to be misleading, but in any case does not take into account the capabilities of the reasonably informed average consumer.[120] In order for the average consumer to be able to correctly understand the content of the choice of law clause, it is imperative to provide information with regard to the mandatory provisions of the home law that remain applicable in addition. In this respect, the CJEU's decision is initially convincing in light of the fact that the transparency requirement has not been met. Transparency may also require that certain circumstances are actively explained if the consumer would otherwise run the risk of being misled.

[113]CJEU, *supra* note 5, at para. 26.

[114]Council Directive 93/13/EEC, *supra* note 72, art. 5.

[115]*See* Matthias Wendland, Kommentar zum Bürgerlichen Gesetzbuch, § 307, n. 187 (Julius von Staudinger, 2019); Bundesgerichtshof [BGH] [Federal Court of Justice] Feb. 23, 2011, 64 Neue Juristische Wochenschrift—Rechtsprechungsreport [NJW-RR], 2011, 1144; Bundesarbeitsgericht [BAG] [Federal Labour Court] Oct. 24, 2007, 61 Neue Juristische Wochenschrift (NJW), 2008, 680.

[116]*See generally* Christiane Wendehorst, Münchener Kommentar zum Bürgerlichen Gesetzbuch, § 312d, n. 80 (Jürgen Säcker et al., 9th ed. 2022); Philipp Hacker, Verhaltensökonomik und Normativität 461 (2017).

[117]Gregor Thüsing, Kommentar zum Bürgerlichen Gesetzbuch § 312 n. 78 (Julius v. Staudinger, ed. 2019); Wendehorst, *supra* note 116, at 80.

[118]*But see* Mankowski, *supra* note 6, at 2706.

[119]Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, art. 6(1), 2011 O.J. (L 304) 64 (illustrating a reminder of the existence of a legal guarantee for conformity of goods must be provided).

[120]*See also* Roth, *supra* note 101, at 522; Mankowski, *supra* note 6, at 2706.

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If the transparency requirement is therefore aimed at preventing the consumer from being misled, the consumer should also be free to adhere to the choice of law in the absence of such information.[121] This is because in the event that the chosen law is more favorable than the consumer's home law, the consumer should be able to invoke the chosen law despite the lack of information. The risk of being misled does not exist if consumer know that they can also assert the invalidity of the choice of law.

IV. The Ex-Post Dimension of Pre-Contractual Information Obligations as a Teleological Justification

Pre-contractual consumer information and disclosure in general are a widely discussed and disputed area.[122] The traditional approach focuses on giving the consumer the needed pre-contractual information for making the "right," well-informed choice ex ante in relation to the moment of the conclusion of the contract.[123] This ex-ante perspective is the core of pre-contractual information and disclosure. Pursuant to *Ben-Shahar* and *Schneider* "[mandated disclosure] aspires to improve decisions people make in their economic and social relation-ships ...."[124] On the other side, it has been shown that consumers are often not reasonably well informed and observant. They rather tend to generally ignore pre-contractual information, underlie cognitive capacity boundaries, are subject to cognitive errors and much more.[125] Even though the details of this inadequate information processing are not always clear, the doctrine of pre-contractual information is in demand for justification.

1. The Concept of Ex-Post Consumer Protection Through Information Duties

One excusatory cause is provided by the concept here named "self-enforcing" information and disclosure. It focuses on an ex-post dimension of consumer protection. Starting point of this concept are rules according to which the pre-contractual information automatically becomes part of the contract. They shall be referred to as "inclusion rules" from now on. Article 6 Consumer Rights Directive in matters of distance and off-premises contracts provides a prime example. Pursuant to Article 6(5) Consumer Rights Directive pre-contractual information as stipulated in Article 6(1) Consumer Rights Directive shall form a part of the contract unless the parties explicitly agree otherwise.[126] Of course, the consumer does not have to read or process the information for it to become relevant and binding. But is this helpful for the consumer? What would be the effect?

[121] *See also* Remien & Segger-Piening, *supra* note 62, at n. 22; Roth, *supra* note 6, at 455.

[122] *See* for the conference Peter McColgan, Talk: *A Farewell to the Information Model in Standard Form Contracts*, at the Informed Consent to Dispute Resolution Agreements Conference: Party Autonomy Then and Now (Jun. 20, 2024), https://www.uni-bremen.de/fileadmin/user_upload/fachbereiche/fb6/fb6/Forschung/IfH/PDF/ICtDRA_Conference_Flyer_2024-04-08.pdf. See further the following references in notes 123–125.

[123] *See* Leonieke Tigelaar, *How to Sanction a Breach of Information Duties of the Consumer Rights Directive?*, 27 Eur. Rev. Priv. L. 27, 30 (2019)(stating: "Information Duties Aiming to Support Decision-Making"); Thomas Wilhelmsson & Christian Twigg-Flesner, *Pre-contractual information duties in the acquis Communautaire*, 2 Eur. Rev. Cont. L. 441, 449, (2006)(talking about a "duty to protect the real consent of the party"). *See also* Michael Martinek, *Unsystematische Überregulierung und kontraintentionale Effekt im Europäischen Verbraucherschutzrecht oder: Weniger wäre mehr*, *in* Systembildung und Systemlücken in Kerngebieten des Europäischen Privatrechts 518 (Stefan Grundmann ed., 2000).

[124] Omri Ben-Shahar & Carl Schneider, *The Failure of Mandated Disclosure*, 159 U. Pa. L. Rev., 647, 649 (2011). *See also* Geneviève Helleringer & Anne-Lise Sibony, *European Consumer Protection Through the Behavioral Lens*, 23 Colum. J. Eur. L. 607, 627–68 (2017).

[125] *See* Ben-Shahar & Schneider, *supra* note 124, at 649; Segger-Piening, *No Need to Read: 'Self-Enforcing' Pre-Contractual Consumer Information in European and German Law, in* Consumer Law and Economics 89, 92 (Klaus Mathis & Avishalom Tor eds., 2020) (discussing the matter more thoroughly).

[126] Segger-Piening, *supra* note 125, at 108.

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One intention is to prevent the trader from changing the pre-contractual information to the disadvantage of the consumer due to the use of general terms and conditions.[127] However, this kind of regulation does more. Its effects become visible once the pre-contractual information duties it is combined with are further analyzed. One group of information duties governed by Article 6(1) DCR refers to product related information, namely littera a) regarding the main characteristics of the product and littera r) and s) regarding the functionality and interoperability of digital content. This product-related information, which must be disclosed ex ante, can shape the ex-post remedies of the consumer, since it is a general principle in European law[128] that a remedy can be made use of if the product does not conform to the contractual description and part of this description is the pre-contractual information due to the inclusion rule. Besides situation-oriented distance and off-premises contracts, this remedy shaping effect also occurs at different sectoral consumer contracts, namely: package travel, timesharing and consumer construction contracts.[129]

A second group of information duties included in Article 6(1) littera l), m) DCR obliges the trader to inform the consumer about his legal rights. At the ex post level this information—that is part of the contract via the inclusion rule—can promote private law enforcement, since the consumer might use the information in case his product has a malfunction.[130] In the ex-ante situation before concluding the contract it is in accordance with human behavior to ignore at least some of the provided pre-contractual information. The information overload effect by itself is a valid cause. By shifting the protective dimension scrutinized towards the ex-post level, however, it seems to be much more in accordance with behavioral insights to look for specific information regarding legal rights once the product has a malfunction. The assumption that in case of a real problem information is going to be sought after seems rather legitimate.

In an abstract way this concept represents a shift from the ex-ante perspective, where information shall help in making the "right" decision, to an ex post perspective, where information is used inter alia to promote and shape the remedies one has in regard to the product. Therefore, the information duty becomes self-enforcing.

2. Application of the Ex-Post Concept to Transparency of Choice of Law Agreements

The ex-post dimension of pre-contractual information obligations can also serve as a teleological justification for the transparency control of choice of law clauses and pre-contractual information obligations in this regard. It is certainly true that consumers will probably not take note of any information regarding the effects of a choice of law clause before concluding the contract. However, in the ex-post situation, after the contract has been concluded, this may change. Just as consumers will have an interest in the legal remedies to which they are entitled in the event of a product defect after the contract has been concluded, they will also have an interest in the applicable law in this respect after the contract has been concluded. After all, the content of the respective legal remedies depends on the applicable law. In particular, it could encourage consumers to enforce their rights if they learn that the mandatory consumer protection provisions of their home law remain in place. Otherwise, consumers could be deterred from asserting any rights, as they must fear that they will only have legal remedies in accordance with the foreign

[127] *Id.*

[128] *See, e.g.*, European Parliament Draft Common Frame of Reference [DCFR] Book IV.A. § 2:301(a), Outline Edition (2008), https://sakig.pl/wp-content/uploads/2019/01/dfcr.pdf; Regulation of the European Parliament and of the Council on a Common European Sales Law [CESL], COM/2011/0635, art. 99(1)(a); United Nations Convention on Contracts for the International Sale of Goods [CISG] art. 35, Apr. 11, 1980; Bürgerliches Gesetzbuch [BGB] [Civil Code], § 434, http://www.gesetze-im-internet.de/englisch_bgb/index.html (Ger.).

[129] *See* Segger-Piening, *supra* note 125, at 102–12.

[130] *See* Segger-Piening, *supra* note 125, at 95–101.

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law.[131] This deterrent effect is mitigated by the information on the applicability of the mandatory provisions of the consumer's home law.

A special feature compared to pre-contractual information in accordance with the Consumer Rights Directive is that the choice of law in the context of general terms and conditions does not require an inclusion rule. Instead, the pre-contractual information obligation relates directly to a clause of the contract and is therefore part of the contract anyway.

D. Conclusion and Open Questions

The possibility of choice of law is a core element of private international law.[132] It is therefore to be welcomed that such a choice of law is also possible for consumer contracts.[133] At the same time, the weaker party needs to be protected. In this respect, Article 6(2) Rome I contains a balanced provision. It ensures that consumers do not lose the protection of the mandatory provisions of their home law. An effective protection regime for consumers is therefore realized in private international law.

However, a certain protection gap remains regarding the agreement of the choice of law in the context of general terms and conditions. According to the Rome I system, the control in this respect is based on the chosen law itself.[134] If the law of a member state is chosen, it is therefore comparatively unproblematic to resort to the transparency requirements of the Unfair Contract Directive.[135] In particular, the trader must inform consumers that they can continue to rely on the mandatory provisions of his home law. The situation is more difficult if the law of a third country is chosen.[136] In these cases, it is convincing to see Article 6(2) of the Unfair Terms Directive as a special conflict rule and therefore to measure the choice of law clause against the transparency requirement. Thus, even in this constellation, information is required about the possibility for the consumer to invoke the mandatory provisions of his home law in addition to the chosen law.

However, it seems questionable to what extent such an information obligation is of any use to the consumer. In this respect, it is first necessary to consider the different protective functions of information obligations.[137] On the one hand, pre-contractual information duties should enable an informed conclusion of the contract ex ante. On the other hand, they also have an ex-post effect after the conclusion of the contract: they promote private law enforcement and, through their inclusion in the contract, also determine the performance owed. This dual approach is suitable to counter the criticism based on behavioral economics, especially with regard to a lack of knowledge of the pre-contractual information. At the same time, this approach is also suitable for providing a consistent explanation for the CJEU's *Amazon* decision: only from a perspective after the conclusion of the contract does it make sense, against the background of an already existing information overload, to inform consumers comprehensively also about the limits of the choice of law.

Open questions remain in particular with regard to the extension of the transparency requirements and information obligations to other types of contracts, which also only allow a limited choice of law in favor of the weaker party. It seems worth considering to also provide for a corresponding duty to inform in the case of individual employment contracts, as there are major parallels to consumer contracts.[138] In particular, the employee retains the protection of the

[131] Mankowski, *supra* note 6, at 2707.
[132] See Section B. *I.*
[133] See Section B. *III.*
[134] See Section B. *II.3.*
[135] See Section C. *II.1.*
[136] See Section C. *II.2.*, 3.
[137] See Section C.*IV.*
[138] Ansgar Staudinger, *Article 8 Rom I-VO*, Internationales Vertragsrecht, n. 13a (Eva-Maria Kieninger et al., 3d ed. 2018). *But see* Rieländer, *supra* note 65, at 231.

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mandatory provisions, as Article 8(1) sentence 2 Rome I shows. However, direct recourse to Article 6(2) Unfair Terms Directive is not possible since employees do not fall within the personal scope of the Unfair Terms Directive as it's Recital No. 10 as well as it's Article 2 littera b) show. On the other hand, it seems conceivable to continue to recognize the employee as a consumer in national law[139] and thus to maybe rely upon on Article 46b(1), (3) number 1 EGBGB. In the end, only a referral to the CJEU will provide a certain solution. In the case of transportation contracts, a corresponding duty to inform is less convincing, as other protection mechanisms exist there.[140] Nevertheless, the legal situation is not clear either. Furthermore, it remains to be seen to what extent the *Amazon* case law can also be applied to choice of court agreements.[141]

In any case, transparency requirements and information obligations for choice of law and jurisdiction agreements will continue to be the subject of future court rulings and academic writing.

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[139]GREGOR BACHMANN, MÜNCHENER KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH, § 13 BGB n. 204 (Jürgen Säcker et al. 10th ed., 2025).

[140]*See* REMIEN & SEGGER-PIENING, *supra* note 62, art. 5, n. 4 (arguing for a limited information obligation regarding remedies pursuant to the Air Passenger Rights Regulation).

[141]Huber, *supra* note 99, at 221–26.

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