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Arranging and Concluding Contracts on the Internet

– Choice of Law and Consumer Protection –

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A. Introduction

It is clear to all those involved that the development of e-commerce is dependent upon consumer's confidence in this new type of selling. The European Commission sees e-commerce as a pacemaker for the Single European Market. But, in particular, trans-border contracts are also concluded with third-country suppliers. The Commission is aiming at global agreement, particularly with the US. The consumer's legal situation, even when contracts are signed with interlocutors within the EU, depends in the complete absence of any harmonisation, on which law is applicable to the contract.

It should be noted that, for the supplier, the problem of applicable law in internet contracts only arises if the consumer wishes to press claims for performance or repayment. At that point, it is clear that the supplier has entered into a contract. If there is no contractual agreement or any declaratory indication of applicable law, then the consumer must rely on the fact that he can at least determine the supplier's commercial domicile. Only then is he in a position to prepare for the application of a specific foreign legal system. Even in that case, the problem remains unsolved that the consumer does not know the applicable regulations and possibly must spend money on obtaining information.[1]

The following article will describe under what conditions and to what extent German courts have recognised the argumentation of suppliers in opting for foreign law or to what extent, seen from the opposite vantage point, a consumer can ward off application of a foreign legal system that is unknown, and/or disadvantageous, to him.

B. Recognition by German courts of the choice of law in pre-printed consumer contracts

I. Admissibility

Under the Rome Convention, consumer protection is not to be achieved, as it is in the case of the agreement on jurisdiction by means of a far-reaching[2] or, as in Swiss law,[3] a complete ban on any choice of specific law, but by correcting its ramifications or limiting its effect.[4] For consumer contracts as well, a choice of law is not therefore barred. Where the connection with foreign jurisdictions is non-existent or unrecognisable, the effects of the choice of law is limited to waiver of the optional law of the consumer's State of residence.[5] Mandatory consumer protection regulations of the State of residence remain inapplicable (choice of jurisdiction of substantive law).[6]

II. Validity of choice of law clauses in Standard Business Terms

1. Rome Convention standards

The Convention itself only regulates statements on the admissibility of an implied choice of law, in regard to va-

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[31] Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 on a Community framework for electronic signatures, in OJ L 13/12, 19 January 2000.

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[1] *Wilmovsky*, Der internationale Verbrauchervertrag im Binnenmarkt. Europarechtlicher Gestaltungsspielraum im kollisionsrechtlichen Verbraucherschutz, in: ZeuP, 1995, at 735-768 (739).

[2] Cf. the far-reaching banning of jurisdiction agreements in protected consumer contracts (Articles 15, 17(4)) or of prescribed form in Article 17 of the European Convention on Jurisdiction and Enforcement of Judgments.

[3] On Article 120 of the Private International Law Act and problems associated with the Swiss solution, see *Siehr*, in: *Brunner/Rehbinder/Stauder* (eds.), Jahrbuch des schweizerischen Konsumentenrechts (JKR), 1998, at 155-201 (177). He advocates correcting the regulation since it does not take account of the case where the consumer is put in an advantageous position by the choice of law.

[4] *Rauscher* rightly voices the criticism that this solution, for instance, leaves the intimidating effect of jurisdiction option clauses intact since for the consumer the limitation of effects is not immediately obvious from the contract; *Rauscher*, Gerichtsstandsbeeinflussende AGB im Geltungsbereich des EuGVÜ, in ZZP, 104 (1999), at 270-320 (316).

[5] Article 3(3) of the Rome Convention.

[6] *Leible*, Rechtswahlfreiheit und kollisionsrechtlicher Verbraucherschutz, in: Privatautonomie und Ungleichgewichtslagen – Jahrbuch der Verenigung junger Zivilrechtswissenschaftler, Stuttgart/Munich/Hanover 1995, at 245-269 (255).

lidity it defers to the legal system chosen.[7] It must be possible to determine the choice of law with sufficient certainty (Article 27(1), sentence 3 of the Act to Introduce the Civil Code). Particularly inadmissible is supplementing the (main) contract through recourse to the hypothetical intention of the parties as practised before the Rome Convention was implemented.[8] It would frequently entail enforcement of the rights of the stronger party.

2. Applicability of the Standard Business Terms Act to questions on admissibility

In practice, the choice of foreign law occurs in the form of choice of law clauses. Where German law is opted out, the question of inclusion or content control under the Standard Terms and Conditions Act is raised.

The actual significance of the controversy over applicability of the Standard Terms and Conditions Act's inclusion prerequisites[9] is negligible, since the inclusion prerequisites under Articles 2 and 3 of the Standard Terms and Conditions Act can also be derived from general regulations on contractual agreement. The ECJ proceeds accordingly when subjecting jurisdiction agreements to scrutiny under Article 17 of the European Enforcement Convention.[10] Linkage via the special collision norm of the Standard Terms and Conditions Act would be feasible. However, it must be taken into account that the legislator, when implementing the Rome Convention, took into consideration that according to its design the choice of law is basically admissible and protection of the consumer should be accomplished with other means. Accordingly, the legislator deleted the prohibition on jurisdiction agreements in the absence of a recognisable interest (Article 10, No. 8 of the old version of the Standard Terms and Conditions).

3. Inclusion prerequisites

In what follows, it will be assumed that the autonomously determined inclusion prerequisites correspond to those proposed in regard to Articles 2 and 3 of the Standard Business Terms Act.

There is far-reaching unanimity that presentation of Standard Business Terms is needed on the website. Sending it with the goods is not enough. However, a printed copy of the electronic order form is not required. The supplier must indicate its intention on the order form of making Standard Terms and Conditions a part of the contract. He must facilitate, by means of a hyperlink, access to a page where the Standard Terms and Conditions are published which is independent of the electronic order form. The consumer cannot reasonably be expected to look for the Standard Terms and Conditions on the supplier's web pages.[11]

The necessity of a presentation of the screen indirectly limits the length of the Standard Terms and Conditions since taking note of an excessively long document cannot be reasonably expected.[12] The supplier cannot refer the consumer to printing out extensive Standard Terms and Conditions before sending the order, since the web page is set up for immediate conclusion of a contract without the assistance of additional media. The supplier is under the obligation to inform, not the consumer,[13] who may not be saddled with risks linked to transmission.

Presentation in the language of negotiation is sufficient according to an overwhelming consensus since the supplier can assume that the consumer commands it.[14] To this one can object that the regulation object of Standard Terms and Conditions, even with transparent phrasing, requires better understanding of the foreign language than the agreement on *essentialia negotii* by means of a pre-prepared order form.

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7 Article 3(3) of the Rome Convention, "anticipatory linkage," no circle, *Siehr*, Die Parteiautonomie im Internationalen Privatrecht, in: *Forstmoser/Giger/Heini/Schluep* (eds.), Festschrift für Max Keller zum 65. Geburtstag, Zurich 1989, at 485-510 (493).

8 Cf. BGH (D), 30 May 1983 (II ZR 135/82), LM ZPO Article 38, No. 22 (hypothetical party intention) and modification of court practice due to implementation of the Rome Convention: BGH (D) 15 December 1986 (II ZR 34/86); BGHZ 100, at 207 (208 et seq.); *Erman/Hohloch*, para. 11 on Article 27 of the Act to Introduce the Civil Code; *Martiny*, Münchner Kommentar zum BGB, vol. 10, 3rd ed., Munich 1995, para. 41 et seq. on Article 7 of the European Enforcement Convention.

9 For inclusion control via Article 7(2) of the Rome Convention, Article 34 of the Act to Introduce the Civil Code, *Meyer-Sparenberg*, Rechtswahlvereinbarungen in Allgemeinen Geschäftsbedingungen, in: RIW, 1989, 347 (349); *Rauscher* (see above, fn. 4), at 316.

10 ECJ 20 February 1997 – C-106/95, *inter alia* in: Forum International (E), 1-2/1997, at 14 et seq. and most recently in IPRax, 1999, at 31. See hereon *Langer*, Initiation and Conclusion of Contracts on the Internet, Forum International (E), 1/1999, at 1-18 (13, fn. 52).

11 *Gruber*, Vertragsschluss im Internet unter kollisionsrechtlichen Aspekten, in: Der Betrieb 1999, at 1437-1442 (1439); *Rüssmann*, Verbraucherschutz im Internet, in: Kommunikation und Recht 1998, at 129-137 (135); *Taupitz/Kritter*, Electronic Commerce – Probleme bei Rechtsgeschäften im Internet, in: JuS, 1999, at 839-846 (844).

12 The orders are to be drawn wider than in the case of screen text since graphic presentation possibilities on the Internet make an easily-scanned presentation possible, *Gruber* (see above, fn. 11), at 1440.

13 *Mankowski* points this out, cf.: Das Internet im Internationalen Vertrags- und Deliktsrecht, in: RabelsZ 63 (1999), at 203-294 (212). He considers that even exceeding the length of one page as crucial.

14 *Gruber* (fn. 11) at 1440; *Taupitz/Kritter* (see above, fn. 11), at 644. The final version of remote sales regulation maintains that regulation of language falls within the competence of Member States (consideration reason No. 8).

Surprising jurisdiction option clauses are supposed to be void according to the legal thinking of Article 3 of the Standard Terms and Conditions.[15]

This is not the case if the consumer can recognise that he is dealing with a foreign supplier.[16] If the link to a foreign State is not recognisable, then only the optional provisions of German law are held to have been opted against (Article 3(3) of the Rome Convention, Article 27(3) of the Act to Introduce the Civil Code).

4. Absence of form requirements

The validity of the choice of law is, in principle, not contrary to form requirements applying to the main contract. In spite of external unity, according to a commonly held view this involves two separate contracts. Unlike Belgian law[17] and Italian law,[18] German law has no requirements for the form of jurisdiction agreements. Agreement on a foreign law is considered less dangerous than waiver of the jurisdiction of a domestic court. If the form regulation serves to completely repeat the agreements, then the choice of law clause must be phrased accordingly since the choice of law clause constitutes an ancillary agreement to the main contract.[19]

5. Control of contents

Whether or not the Rome Convention permits control of unilaterally provided choice of law clauses for inappropriateness under the provisions of *lex fori* is disputed. The prohibition on a choice of law agreement in Standard Terms and Conditions in the absence of a recognisable interest (Article 10, No. 8 of the Standard Terms and Conditions Act), abolished when the Rome Convention went into effect, remained largely without any function.

According to an overwhelming consensus and taking cognisance of the Rome Convention's principled decision for free choice of law, control of contents under Article 9 of the Standard Terms and Conditions Act is no longer possible.[20] But the Commission stuck to its conviction that a choice of law clause can be seen as abusive under Directive 93/13/EEC.[21] To that extent, the priority of harmonised Community law prior to the Rome Convention can be argued (Article 20 of the Rome Convention).

A legitimate interest of the foreign supplier in having his own national law agreed was not disputed while Article 10, No. 8 of the Standard Terms and Conditions Act (older version) was still in effect.[22] The agreement of the supplier's own national law would in any case stand the test of a control on contents. But this is normally dispensable since the objective link in the normal case entails application of the legal system of the supplier's commercial domicile. If one goes solely according to the wording of Article 29 of the Act to Introduce the Civil Code, Article 5 of the Rome Convention, then the consumer is even better off by not contesting the clause. The special protective provisions are only applicable if the supplier's environmental law is applied on the basis of a choice of law. If objective linkage is created due to choice of law being void, the consumer then loses the protection of the Rome Convention; even special norms on collision of legal systems based on Community law specifications normally do not provide for any protection in case of unfavourable objective jurisdictional linkage.

On the other hand, agreement on third-State law seems to be a greater problem. An interest in opting for the law of a third State can be justified by the fact that that legal system is particularly advanced in the field in question. This is not to be assumed by any means in the case of consumer contracts unless law fails to deal unambiguously with the typical imbalance obtaining between the parties.

But reservations also emerge in such cases when the law of another EU Member State is chosen by linking a choice of law clause with a demand by the supplier for advance payment. The latter has then largely eliminated any litiga-

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15 *Mankowski* (see above, fn. 13), at 210; *Martiny* (see above, fn. 8), para. 38 on Article 27 of the Act to Introduce the Civil Code; *Soergek/von Hoffmann*, BGB Bürgerliches Gesetzbuch, Einführungsgesetz, vol. 10, 12th ed., Stuttgart 1996, para. 33 on Article 27 of the Act to Introduce the Civil Code.

16 *Rüssmann* (see above, fn. 11), at 135.

17 On the requirement of a signature in Belgian law: *Brulard/Demolin*, Les transactions commerciales avec les consommateurs sur internet, in: *Montéro Etienne* (ed.), Internet face au droit, Brussels: Story (Cahiers du Centre de Recherches Informatique et Droit de l'Université de Namur, CRID), Brussels 1997, at 1-64 (21).

18 Article 1341 II Civil Code; *Meyer-Sparenberg* (see above, fn. 9), at 349.

19 *Rauscher* (see above, fn. 4), at 316; for the case of the Consumer Credit Act, see *Siehr* (see above, fn. 3), at 178.

20 *Ulmer/Brandner/Hensen/Schmidt*, AGB-Gesetz, Kommentar zum Gesetz zur Regelung der Allgemeinen Geschäftsbedingungen, 8th ed, Cologne 1997, Appendix on Articles 9-11 of the Standard Terms and Conditions Act, para. 577; *Sieg*, Allgemeine Geschäftsbedingungen im grenzüberschreitenden Geschäftsverkehr, in: RIW 1997, at 811-819 (816); *Taupitz/Kritter* (see above, fn. 11), at 842. On the other hand, see *Rauscher* (see above, fn. 4), at 316, who correctly points out that limiting the effects of the choice of law cannot eliminate the intimidating effect of Standard Terms and Conditions.

21 European Commission, US Perspectives on Consumer Protection in the Global Electronic Market – Comments by the European Commission, Brussels, 21 April 1999, at 18.

22 *Kropholler*, Das kollisionsrechtliche System des Schutzes der schwächeren Vertragspartei, in: RabelsZ 42 (1978), at 634-661 (647).

tion risk by taking payment in advance. With the choice of law clause, the supplier in particular facilitates his defence against non-performance, damage compensation and warranty claims by the consumer. The consumer's access to law is limited by the necessity of informing himself about the foreign law. This also applies even if he can press claims in a court in his own State of residence. Reference to this situation can also justify choice of law clauses being inappropriate unilateral disadvantagement of the consumer to the extent that the supplier shields himself from litigation risks in the main contract by demanding payment in advance.

Application of Article 6 of the Act to Introduce the Civil Code / Article 16 of the Rome Convention (*ordre public*) can counteract this situation as well as the abusive agreement of third-State law for the purpose of putting the consumer at a disadvantage.[23]

III. Implied choice of law in consumer contracts

Where choice of law clauses are not subject to consumer contract form requirements in their capacity as essential ancillary agreements, what applies without restriction[24] for consumer contracts as well is that the choice of law can be assumed from other contract clauses or from the parties' behaviour at and after the conclusion of the contract. Otherwise, validity is basically to be judged according to the law opted for (Article 29(4) of the Act to Introduce the Civil Code, Article X of the Rome Convention).[25] Nonetheless, a party may invoke Article 8(2) of the Rome Convention, Article 31(2) of the Act, to the effect that requirements on implied consent under the laws of the State of residence are not met where judging the effect of his behaviour according to the legal system chosen appears to be inequitable. The significance of the rule is reduced by the fact that a judge, when applying the law chosen, would not be allowed to interpret the statement of a foreigner with faulty knowledge of the language as consent.[26] By invoking Article 8(2) of the Rome Convention, alternatively Article 31 of the Act to Introduce the Civil Code, a German consumer can claim to have lacked the awareness of making a statement and that is thus contesting the choice of law.[27] In favour of judging the binding effect under the law of the State of residence is the fact that a German consumer[28] normally has no experience with foreign contracts[29] and in the cases relevant to us as yet had no contact with the foreign party and thus habitual customs could have been formed.[30] This is precisely what strengthening electronic commerce is supposed to change.

The consumer cannot argue against this that he lacked an awareness of the statement due to a lack of knowledge of the language. Article 8(2) of the Rome Convention only makes it possible to take into account by way of exception that one of the parties normally does not know foreign (interpretive) rules[31] on the consequences of a party's outward behaviour,[32] the provision is not there to distribute the language risk.

1. Derived from venue of action agreements

The agreement of an exclusive jurisdiction by a foreign court or an arbitration panel agreement are held by a wide consensus to be a strong indication of an implied choice of law.[33] In particular, it is presumed that the agreement of foreign court jurisdiction was based on substantive law considerations (the so-called parallel principle).[34] Against this conclusion is the fact that contractual regulation would in such cases have suggested the applicable law but had (explicitly) not been reached.[35] Further reservations

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23 For control of contents and rejection in case an objective link to a third State is lacking, cf. *Rauscher* (see above, fn. 4), at 316.

24 Cf. Article 11(2) of the Austrian Private International Law Act of 15 June 1978 (BGBl. No. 304/1978) which bars implied choice of law with negotiation of the matter, cf. *Siehr*, in: Festschrift für Max Keller (see above, fn. 7), at 496.

25 Article 27 IV, 31 I of the Act to Introduce the Civil Code.

26 Spellenberg, Münchner Kommentar zum BGB, vol. 10, 3rd ed., Munich 1995, para. 74 on Article 31 of the Act to Introduce the Civil Code.

27 BGHZ 91, at 324, 330. In a later decision by BGH (D) on implicit agreement (BGH of 12 December 1990 – VIII ZR 332/89) the issue of a solution in case of a lack of awareness of statement is not taken up, because it obtained in that case, in: NJW 1991, at 1292 et seq. In case of non-transparent wording of Standard Terms and Conditions, damage claims analogous to Article 122 of the Civil Code are barred. Claiming lack of will is governed, despite its proximity to the case of lack of awareness of statement, according to the legal system opted for, *Spellenberg* (see above, fn. 26), para. 63 on Article 31 of the Act to Introduce the Civil Code.

28 In particular when applying Standard Business Terms, *Spellenberg* (see above, fn. 26), para. 115 on Article 31 of the Act to Introduce the Civil Code.

29 The growth of e-commerce will confront many consumers with foreign contract patterns for the first time.

30 *Erman/Hohloch*, Handkommentar zum BGB, 9th ed., Münster 1993, para. 16 on Article 31 of the Act to Introduce the Civil Code.

31 *Freitag*, Sprachzwang, Sprachrisiko und Formenforderung im IPR, in: IPRax 1999, at 142-149 (145).

32 Basically, the adversary of the imposer of standard terms and conditions bears costs and risks on foreign law, cf. *Wilmovsky* (see above, fn. 1), at 739.

33 *Ulmer/Brandner/Hensen/Schmidt* (see above, fn. 20), para. 24 before Article 2 of the Standard Terms and Conditions Act; *Sonnenberger*, Münchner Kommentar zum BGB, vol. 10, 3rd ed., Munich, para. 43 on Article 27 of the Act on Standard Terms and Conditions.

34 *Rauscher* (see above, at 4), at 272; cf. also *Mankowski* (see above, fn. 13), at 213.

35 *Sieg* (see above, fn. 20), at 815; the parties would "precisely not" have reached accord on applicable law. Criticism as well in

stem from the fact that waiver of domestic court jurisdiction in protected consumer contracts is subject to major restrictions. Waiver of domestic court jurisdiction admittedly mitigates the consumer's access to law more radically than the agreement of foreign law, which in any case inside the European Union guarantees a minimum of protection. At least one would have to demand that an implied choice of law agreement can only be derived from a valid agreement on court jurisdiction.[36] Where agreement on a court remains admissible because the consumer is not deprived of domestic court jurisdiction, it can, according to the prevalent view, not be validly agreed on the Internet due to requirements of written form.[37] An admissible agreement, however, leaves the consumer with the court jurisdiction of his own State of residence and thus does not allow for any definitive conclusion about opting out of that State's legal system. The planned recognition of electronically concluded court jurisdiction agreements[38] will thus not change anything in this matter.

2. The orientation of Standard Terms and Conditions to a formal legal system

Explicit citations of foreign legal systems in Standard Terms and Conditions are suited to make their imposer's adversaries aware that the imposer is generally striving for application of the legal system cited.[39] However, most of the time it can only be gathered from the citation that the imposer is assuming the applicability of that legal system but not that he wishes to have it agreed. Manifestation of this view does not suffice to agree upon a choice of law.[40] If one were to obligate the supplier to indicate the law applicable in his opinion, one would only create additional confusion. In such cases, there would still be objective linkage even if the information given was wrong.[41]

Reference to the use of specific technical expressions is not sufficient if the distance to non-legal language is not clear.[42] To that extent, it can no longer be assumed that the consumer was able to recognise that here the application of foreign law was implicitly being requested.[43]

3. Trial conduct

To be consistent, one must conclude that there has been an intention of choosing a specific law if foreign standards and norms have been indicated in documentation and if the application of foreign law has been accepted without objection.[44] According to Austrian law, this is precisely what is barred (Article 11(2) of the Austrian Private International Law Act). The decision of the Austrian legislator is proof of the fact that with presumptions of an (initially or retrospectively) implied choice of law, special caution is called for.[45]

4. Conclusion

Implied choice of law can only be considered in rare cases due to the stiffening of requirements by the Rome Convention. Trying to derive it from court jurisdiction agreements fails on the point that the latter either cannot be validly agreed or do not permit any unambiguous conclusions about the choice of applicable law. From references to foreign standards and norms it can frequently only be concluded that the imposer of the Standard Terms and Conditions assumes their validity on the basis of objective linkage. Caution is particularly called for if the agreement is to be derived from subsequent trial conduct.

Rauscher (see above, fn. 4).

36 *Junker*, Internationales Vertragsrecht im Internet, in: RIW 1999, at 809-818 (817) with reference to *Mankowski* (see above, fn. 13), at 213.

37 Cf. *inter alia*, *Junker* (see above, fn. 36), at 813, on the ramifications of the planned directive on digital signatures as well. An unofficial version of the agreement between the Council and the Parliament is retrievable at the following Internet site: http://www.ispo.cec.be.

38 However, this situation is supposed to change in the future according to the ideas advanced by the EU Commission and the Special Commission of the Hague Conference, cf. the proposal for a Council decree on court jurisdiction and recognition and enforcement of decisions in civil and commercial cases dated 14 July 1999, COM (1999), at 348, finally Article 23(3): "Making the court jurisdiction agreement visible on the screen" should suffice. Cf. also the modified directive proposal on certain legal aspects of electronic commerce, COM (1999), at 427, final.

39 The Convention imposes the information risk on the party imposing the Standard Terms and Conditions. Compensation for this is achieved by limiting the effects, cf. *Wilmovsky* (see above, fn. 1), at 739.

40 *Martiny* (see above, fn. 8), para. 41 on Article 27 of the Act to Introduce the Civil Code.

41 *Martiny* (see above, fn. 8), para. 42 on Article 27 with reference to linkage under the exception clause in Article 28(5) of the Act to Introduce the Civil Code. Since the supplier will normally state, given the general position of interests, that his domestic law is applicable, the question of protection of the consumer's justified expectations is practically not raised.

42 *Martiny* (see above, fn. 8), para. 47 on Article 27 of the Act to Introduce the Civil Code, "technical legal clauses," more generally Waldenberger, Grenzen des Verbraucherschutzes beim Abschluss von Verträgen im Internet, Betriebs-Berater 1996, at 2365-2371 (2371).

43 On claiming a lack of awareness of statement via Article 8(2) of the Convention, Article 31(2) of the Act to Introduce the Civil Code, cf. references in fn. 27 and 31.

44 Cf. BGH (D) 12 December 1990, VIII ZR 332/89, in: NJW 1991, at 1292 (1293); *Martiny* (see above, fn. 8), para. 48 on Article 27 of the Act to Introduce the Civil Code.

45 *Siehr*, in: Festschrift für Max Keller (see above, fn. 7), at 496.