

Judicial Decisions on Private International Law

Court of Justice of the European Union 28 July 2016, Case C-191/15
Verein für Konsumenteninformation v. Amazon EU Sàrl
ECLI:EU:C:2016:612

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Abstract In *Amazon* the CJEU decided which conflict rules applied to a claim in collective proceedings that was initiated by a consumer organization to prohibit allegedly unfair terms contained in the general terms and conditions of a seller. The terms were used in electronic b2c contracts, where the seller targeted consumers in their home country. The CJEU distinguished between the conflict rule concerning collective action, Article 6(1) Rome II, and the conflict rule concerning the fairness of the term, Article 6(2) Rome I. In addition, the CJEU introduced a new test to assess the fairness of a choice-of-law term under Directive 93/13 on unfair contract terms. In the note, it is argued that the CJEU's distinction between those two conflict rules is unnecessary and that the test that the CJEU formulated to assess whether a choice-of-law term is unfair, is less favourable to the consumer than the tests formulated in prior decisions.

Keywords Conflict rules · Collective action · Unfair terms in b2c contracts · Unfairness choice-of-law term

1 Introduction

In the general conditions of Amazon Europe Core Sàrl, a company established in Luxembourg, which owns and exploits Amazon.de, a choice-of-law clause for Luxembourg law is included.¹ A similar text was the subject of preliminary

¹ The English translation of the text under scrutiny was: 'These conditions are governed by and construed in accordance with the laws of the Grand Duchy of Luxembourg, and the application of the United Nations Convention of Contracts for the International Sale of Goods is expressly excluded. [...]'. CJEU 28 July 2016, Case C-191/15 *VKI v. Amazon* ECLI:EU:C:2016:612, para. 30.

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questions which the Austrian Supreme Court, the *Oberster Gerichtshof* (OGH), referred to the Court of the Justice of the European Union (CJEU or the Court). It asked, amongst other things, whether Article 4 Rome II² governed a collective action started by an Austrian consumer organization, *Verein für Konsumenteninformation* (VKI). It sought an injunction to prohibit terms in the general conditions of a Luxembourg company that directed its activities at Austrian consumers through a website in German. VKI considered the clauses to be contrary to the law.

To have a better understanding of the issues raised, the facts and the decisions by the Austrian courts at first instance and on appeal will also be discussed. Subsequently, the CJEU's decision will be commented upon. These comments will focus on the choice-of-law clause in general conditions in business to consumer contracts (b2c contracts).

2 Facts and the Decisions by the Austrian Courts

Amazon EU Sàrl (Amazon),³ a company established in Luxembourg, owned and exploited the website Amazon.de. This website in German addressed consumers, who had their habitual residence in Austria. Moreover, Amazon concluded electronic contracts with those consumers in Austria. Up until mid-2012, it used the general terms and conditions under scrutiny. Term 12 of those terms and conditions concerned a choice of law for Luxembourg law, the legal system of Amazon's place of establishment.⁴

VKI started a collective action against Amazon and requested an injunction within the meaning of Directive 2009/22⁵ to prohibit the use of some of the general terms and conditions, because VKI considered them to be against the law.⁶ The proceedings before the CJEU focused, in particular, on the choice-of-law clause.

Since it concerned an international situation, it had to be determined which conflict rule or rules applied in the case of a collective action against a trader who targeted consumers in their country of habitual residence and in which an injunction was sought to prevent the use of allegedly unfair terms. Both the court at first instance and the court of appeal held that this issue fell within the scope of Rome I, the Regulation on the law applicable to contractual obligations.⁷ However, they applied different provisions.

² Regulation (EC) No. 864/2007 on the applicable law to non-contractual matters (Rome II) [2007] OJ L 199/40 (hereafter: Rome II).

³ The company that now exploits the website Amazon.de is Amazon Europe Core Sàrl. Amazon EU Sàrl was the defendant in the proceedings that led to the CJEU's decision.

⁴ See n. 1.

⁵ Directive 2009/22 on injunctions for the protection of consumers' interests [2009] OJ L 110/30 (hereafter: Directive 2009/22).

⁶ Under Austrian law, the clauses are considered to be contrary to legal prohibitions or accepted principles of morality.

⁷ Regulation (EC) 59/2008 on the law applicable to contractual obligations (Rome I) [2008] OJ L177/6 (hereafter: Rome I).

The court at first instance applied Article 6 Rome I, which provides a specific conflict rule with respect to consumer contracts. To be applicable, certain requirements must be met. First, it must concern a b2c contract, which means a contract between a seller or a service provider, that acts in the course of his trade or professional activity (the professional), and a consumer who acts outside his trade or profession. Secondly, only the consumer who is addressed by the professional in the country of his habitual residence will be protected (the passive consumer).⁸ Both Amazon and VKI acknowledged that the Austrian consumer was addressed by Amazon in Austria.

Under Article 6(2) Rome I, a choice of law is allowed, but it cannot deprive the consumer of the protection of the mandatory rules of the legal system of his habitual residence.⁹ In other words, it concerns a qualified choice of law. In the absence of a choice of law, the legal system of the consumer's habitual residence applies. Thus, in this case, a choice for Luxembourg law cannot set aside the mandatory rules of Austrian law. Applying this rule, the court at first instance held that the choice-of-law clause was invalid and that the contract was subject to Austrian law. Consequently, Austrian law governed the validity of the conditions included in the general terms and conditions.

Both Amazon and VKI appealed against this decision. On appeal, the court held that Article 10 Rome I should be applied with respect to the validity of the choice-of-law clause. Under this provision, the validity of a choice-of-law clause must be assessed according to the legal system which would have been applicable under Rome I, had the clause been valid. In this case, it resulted in the application of Luxembourg law. However, the Court of Appeal also held that if the term was valid under Luxembourg law, the court at first instance, to which it referred the case, should make a comparison between Luxembourg and Austrian law. The rule which is most favourable to the consumer must be applied.

VKI appealed against this decision to the OGH, which referred preliminary questions to the CJEU. The OGH referred to the CJEU's case law with respect to international jurisdiction, in particular the ECJ's decision in *Henkel*.¹⁰ It asked whether this claim for an injunction by a consumer organization should not fall within the scope of Article 4 Rome II, because of the absence of a contractual relationship between VKI and Amazon.¹¹

⁸ There is a body of case law as to the notion of a passive consumer in the case of an electronic contract with respect to the Brussels I Regulation. It is generally accepted that these decisions are also relevant with respect to Rome I, since the Brussels I Regulation and Rome I include the same definition of a consumer. See for instance: CJEU 7 December 2010, Joined Cases C-585/08 and C-144/09 *P. Pammer v. Reederei Karl Schlüter GmbH & Co. KG, Hotel Alpenhof GesmbH v. O. Heller* ECLI:EU:C:2010:740; CJEU 14 November 2013, Case C-478/12 *A. Maletic, M. Maletic v. Lastminute.com GmbH, TUI Österreich GmbH* ECLI:EU:C:2013:735; CJEU 6 September 2012, Case C-190/11 *D. Mühlleitner v. A. Yusufi, W. Yusufi* ECLI:EU:C:2012:542; CJEU 17 October 2013, Case C-218/12 *L. Emrek v. Sabranovic* ECLI:EU:C:2013:666.

⁹ Hereafter the law of the legal system of the consumer's habitual residence will also be referred to as the consumer's law.

¹⁰ CJEU 1 October 2002, Case C-167/00 *Henkel* EU:C:2002:555. The OGH also referred to the German decision: BGH 9 July 2009, Xa ZR 19/08, NJW 46/2009, 3371.

¹¹ See the referral for a preliminary ruling, OGH 9 April 2015, 2 OB 204/14k.

The OGH also asked whether the choice-of-law clause should be regarded as unfair within the meaning of Article 3 Directive 93/13 on unfair terms in consumer contracts¹² (UCTD) taking into account the CJEU's case law and in particular, *Océano*,¹³ where a forum choice for the seller's place of establishment was considered to be unfair.

3 The Decision of the CJEU

3.1 The Applicable Law

The CJEU rephrased the questions posed by the *Oberste Gerichtshof* as follows:

how Rome I and Rome II Regulations should be interpreted for the purpose of determining the law or laws applicable to an action for an injunction within the meaning of Directive 2009/22 brought against the use of allegedly unlawful contractual terms by an undertaking established in one Member State which concludes contracts by way of electronic commerce with consumers resident in other Member States, in particular in the State of the court seised.

In its answer, the CJEU distinguished between the law applicable to the claim for an injunction within the meaning of Directive 2009/22 to prohibit the use of unfair terms in general conditions and the law applicable to the unfairness of the term at stake.¹⁴ First, the conflict rule with respect to the claim concerning an injunction will be discussed and, subsequently, the conflict rule concerning the assessment of the terms.

Neither Rome I nor Rome II includes a specific rule with respect to a collective action. Consequently, it had to be determined which regulation had to be applied. Decisive are the notions of a 'contractual obligation' and a 'non-contractual obligation'. A claim based on a contractual obligation falls within the scope of Rome I, whereas a claim based on a non-contractual obligation falls within the scope of Rome II. The Court held that these notions had to be interpreted autonomously. Moreover, according to recital 7 of both regulations, these interpretations should be consistent with each other and Brussels I.¹⁵ Both Brussels I and Brussels Recast¹⁶ distinguish between matters relating to a contract (Article 5(1) Brussels I; Article 7(1) Brussels Recast), on the one hand, and matters relating

¹² Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [1993] OJ L 95/29-34 (hereafter also: UCTD).

¹³ Cases C-240/98-C-244/98 *Océano Grupo Editorial SA v. Roció Murciano Quintero; Salvat Editores SA v. José M. Sánchez Alcón Prades, José Luis Copano Badillo, Mohammed Berroane, Emilio Viñas Feliú* [2000] ECR I-4941, ECLI:EU:C:2000:346.

¹⁴ Case C-191/15 *Amazon* ECLI:EU:C:2016:612, para. 52.

¹⁵ Regulation No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L 12/1 (hereafter: Brussels I).

¹⁶ Regulation No. 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) [2012] OJ L 351/1 (hereafter: Brussels I Recast). This regulation applies to proceedings started on or after 10 January 2015 (Art. 66).

to tort, delict and quasi-delict, on the other (Article 5(3) Brussels I; Article 7(2) Brussels Recast). The CJEU held that a claim similar to the one at stake is a matter relating to tort, delict or quasi-tort within the context of Brussels I.¹⁷ Consequently, a consistent interpretation of Rome I, Rome II and Brussels I required the claim to be classified as non-contractual and Rome II determined the applicable law.

Despite the OGH's reference to Article 4 Rome II, the CJEU applied Article 6(1) Rome II, the provision on unfair competition. The use of allegedly unfair terms in a contract by a seller who targeted consumers in a specific country fell within the scope of Article 6(1) Rome II, because it affected 'the collective interests of consumers as a group'. Consequently, it influenced 'the conditions of the competition on the market'.¹⁸ The CJEU specified that in the case of an injunction, the country where the collective interests of the consumers are affected is the country of the habitual 'residence of the consumers to whom the undertaking directs its activities'¹⁹ and whose interests are defended by the consumer organization's activities. The CJEU also held that Article 6 Rome II is a *lex specialis* of Article 4 Rome II, which includes the general rule. However, Article 4(3) Rome II cannot be applied in this situation. This provision includes a rule for the situation where it is clear from all the circumstances that the tort is manifestly more connected with another country, rather than with the legal system of the country to which Article 4(1) Rome II refers the tort. If Article 4(3) is applicable, the rationale of Article 6(1) Rome II would be undermined, since its aim is to protect the collective interests of consumers, whereas Article 4(3) Rome II relates to 'the personal connections' between the parties.²⁰

The next issue which the CJEU discussed, concerned the conflict rule governing the unfairness of terms in general conditions. The CJEU held that the unfairness of terms in general conditions is submitted to the conflict rules included in Rome I irrespective of whether it concerns either an individual or a collective action. If the assessment of the term is governed by the provisions in Rome II, different legal systems could be applicable in the case of a collective and an individual action. This could result in different levels of protection, since the UCTD concerns minimum harmonization (Article 8 UCTD) and some Member States have included more stringent rules in their national legislation to protect the consumer.

3.2 Unfair Choice-of-Law Clause in General Conditions in b2c Contracts

Another preliminary question concerned the fairness of a choice-of-law clause for the seller's legal system within the meaning of Article 3 UCTD. The *Oberste Gerichtshof* referred to *Océano*,²¹ where the CJEU held that a choice for the court of

¹⁷ Case C-191/15 *Amazon* ECLI:EU:C:2016:612, para. 38. The CJEU referred to *Henkel*, above n. 10, and CJEU 13 March 2014, Case C-548/12 *Brogstetter v. Fabrication de Montres Normandes EURL, K. Frässdorf* EU:C:2014:148. It is submitted that *Henkel* was rendered within the context of the Brussels Convention, which includes the same distinction.

¹⁸ Case C-191/15 *Amazon* ECLI:EU:C:2016:612, para. 42.

¹⁹ Case C-191/15 *Amazon* ECLI:EU:C:2016:612, para. 43.

²⁰ Case C-191/15 *Amazon* ECLI:EU:C:2016:612, para. 45.

²¹ See Cases C-240/98-C-244/98 *Océano* ECLI:EU:C:2000:346.

the seller's residence is unfair, and suggested that a choice-of-law term for the legal system of the seller is unfair within the meaning of Article 3 UCTD by way of analogy.

The CJEU decided differently. After having established that the choice-of-law term fell within the scope of the UCTD, the CJEU held that 'a term must meet the requirements of good faith, balance and transparency'.²² A choice-of-law clause for the legal system of the seller's establishment is only unfair:

in so far as it displays certain specific characteristics inherent in its wording or context which cause a significant imbalance in the rights and obligations of the parties.²³

The CJEU also referred to the transparency requirement (Article 5 UCTD) which requires a clause to be in plain and intelligible language. This requirement must be interpreted broadly and if the effects of a term are laid down in mandatory rules, the consumer must be informed of those rules, the Court held.²⁴ Its conclusion was that a choice-of-law term for the seller's law

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.²⁵

4 Comment

4.1 Introduction

(1) This judgment is striking in many respects. First, the CJEU rendered its decision less than two months after the Advocate General had delivered his opinion.²⁶ Secondly, the CJEU ruled which conflict rules governed a collective action for an injunction to forbid the use of allegedly unfair terms in general conditions in b2c contracts when the trader targets consumers in the country where they have their habitual residence. Finally, the CJEU applied new yardsticks to determine whether a clause is unfair within the meaning of the UCTD.

²² Case C-191/15 *Amazon* ECLI:EU:C:2016:612, para. 65.

²³ Case C-191/15 *Amazon* ECLI:EU:C:2016:612, para. 67.

²⁴ Case C-191/15 *Amazon* ECLI:EU:C:2016:612, paras. 68 et seq.

²⁵ Case C-191/15 *Amazon* ECLI:EU:C:2016:612, para. 72.

²⁶ Opinion of Advocate General Saugmandsgaard Øe 2 June 2016 ECLI:EU:C:2016:388.

4.2 Applicable Legal Systems: A Double Test in the Case of a Collective Action

(2) The issue as to which legal system governs the fairness of a choice-of-law clause in general conditions in a b2c contract in a collective action is a complex one, because neither Rome I nor Rome II includes a specific rule in this respect. Consequently, rules that are not specifically drafted for that situation had to be applied. From the courts' decisions in this case it follows that there is no clear answer.²⁷ The OGH and the Advocate General suggested to apply Rome II, whereas the lower Austrian courts applied Rome I.²⁸ The CJEU applied both Rome II and Rome I. The OGH and the Advocate General differed in their opinion as to which provision of Rome II had to be applied. The OGH suggested to apply Article 4,²⁹ whereas the Advocate General argued in favour of Article 6(1).³⁰ Also different provisions of Rome I were applied by the courts. The court at first instance applied Article 6(2) Rome I, the court of appeal Article 10 Rome I together with Article 6(2) Rome I. Finally, the CJEU held that Article 6(1) Rome II and Article 6(2) Rome I had to be applied.³¹

(3) Crucial in the CJEU's ruling is the consistent interpretation of Brussels I, Rome I and Rome II. In *Amazon*, the CJEU followed its ruling in *Henkel* very closely. The *Henkel* decision was rendered in 2002 and concerned the interpretation of Article 5(1) and 5(3) of the Brussels Convention,³² the predecessor of Brussels I. In *Henkel*, the ECJ held explicitly that its ruling was also relevant for the application of Brussels I.³³ The facts in *Henkel* were similar to those in *Amazon*. VKI had started the proceedings and had sought an injunction to forbid the use of allegedly unfair terms in consumer contracts against a trader, Henkel, established in Germany. Henkel concluded contracts with consumers in Austria. The issue was whether a collective action concerned a contractual matter or a matter relating to a 'tort, delict or quasi-delict'. In the case of the former, Article 5(1) Brussels Convention would apply, whereas in the case of the latter Article 5(3) Brussels Convention was applicable. According to Article 5(1) Brussels Convention the forum of the seller's country of establishment had jurisdiction,³⁴ whereas according to Article 5(3) Brussels Convention this was the forum of the country where the harmful event occurred. The Court held that the collective action fell within the scope of Article 5(3) Brussels Convention. The ECJ also added: '[...] that is the only interpretation

²⁷ Cf. on the validity of a choice-of-law clause: Tang (2015), p. 165.

²⁸ Germany and the Commission argued in favour of Rome I. Opinion of Advocate General Saugmandsgaard Øe, ECLI:EU:C:2016:388, para. 42.

²⁹ VKI, Austria and the UK argued in favour of Rome II. Opinion of Advocate General Saugmandsgaard Øe ECLI:EU:C:2016:388, para. 42.

³⁰ Case C-191/15 *Amazon* ECLI:EU:C:2016:612, paras. 35, 42, 69 et seq.

³¹ Case C-191/15 *Amazon* ECLI:EU:C:2016:612, paras. 35, 42, 69 et seq.

³² 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, consolidated version [1972] OJ L 299/32-42.

³³ Case C-167/00 *Henkel* EU:C:2002:555, para. 49.

³⁴ Hereafter: the legal system of the country of the seller's establishment is also referred to as the seller's or trader's law.

consistent with the purpose of Article 7 of Directive 93/13',³⁵ according to which Member States must 'ensure [...] adequate and effective means [...] to prevent the continued use of unfair terms in contracts' between consumers and sellers or suppliers. In *Henkel*, the rules on consumer protection in the Brussels Convention, Article 13 and following, were not discussed, because this protection only concerned instalment sales or loans.

(4) In *Henkel* the Court drew the conclusion that the Austrian court had jurisdiction to hear the claim after reasoning in an orthodox way. However, this decision can also be considered from a different angle. First, it must be remembered that the Brussels Convention does not include a specific rule on a collective action.³⁶ Secondly, let us presume that the Court merely considered the facts³⁷ in *Henkel* and drew the conclusion that the proper administration of justice required the jurisdiction of an Austrian court. If that were the situation the Court did not have any other option than to apply Article 5(3) Brussels Convention, because the other provisions would not provide jurisdiction to the Austrian court.

(5) As said before, neither Rome I nor Rome II includes a specific conflict rule with respect to a collective action. If the facts in *Amazon* are considered without taking into account any conflict rule, the conclusion can be drawn that the majority of the facts point to Austria. An Austrian consumer organization defends the interests of Austrian consumers against a Luxembourg trader that targets consumers in Austria by means of a website in German. As a result, Austrian law should be applied.³⁸ This result can be achieved by applying Article 6(1) Rome II as Advocate General Saugmandsgaard Øe proposed. He followed the reasoning in *Henkel* and considered that the claim at issue did not concern a 'contractual obligation'. Consequently it fell outside the scope of Rome I. A contractual obligation required 'an actual and existing commitment', which was missing in the case of an injunction because of its preventive character.³⁹ Advocate General Saugmandsgaard Øe did not propose to submit the term's fairness to the conflict rules included in Rome I, as the CJEU did.

(6) The other way to draw the conclusion that Austrian law applies to the case at hand is to apply Article 6(2) Rome I. Under Article 6(2) Rome I, the parties cannot contract out of the mandatory rules of the consumer's law by a choice of law for another country. The rules on unfair terms in b2c contracts are mandatory in the EU Member States insofar as they concern the transposition of the UCTD. Consequently, the consumer's law applies to unfair terms, because they are mandatory provided the consumer has his habitual residence in a EU Member State. In this

³⁵ Case C-167/00 *Henkel* EU:C:2002:555, para. 43.

³⁶ Neither Brussels I nor Brussels I Recast provides for a rule with respect to a collective action. See Tang (2015), p. 284, who argues in favour of a specific rule on mass actions.

³⁷ An Austrian consumer organization that defended the interests of Austrian consumers against a German trader that actively approached the consumers in Austria and concluded contracts with those consumers.

³⁸ The application of Austrian law could be argued from different theoretical perspectives. It could be defended from the perspective of interest analysis or from the perspective of the legal system most closely connected.

³⁹ Opinion of Advocate General Saugmandsgaard Øe, ECLI:EU:C:2016:388, para. 50.

case, it implies that Austrian law governs the fairness of the choice-of-law term and other terms in the general conditions.

(7) The CJEU held that both Article 6(1) Rome II and Article 6(2) Rome I had to be applied in this case and both resulted in the application of Austrian law. The Court's argument for applying Article 6(2) Rome I in addition to Article 6(1) Rome II is to guarantee the application of the same legal system in an individual and a collective action. However, it is difficult to imagine a situation where Article 6(1) Rome II and Article 6(2) Rome I would lead to different legal systems, especially since the CJEU held with respect to Article 6(1) Rome II:

[...] the country in which the collective interests of consumers are affected within the meaning of Article 6(1) of the Rome II Regulation is the country of residence of the consumers to whom the undertaking directs its activities and whose interests are defended by the relevant consumer protection association by means of that action.⁴⁰

Thus, in this situation, the connecting factor in Article 6(1) Rome II corresponds to the one in Article 6(2) Rome I: i.e. the country of the habitual residence of the consumer that is targeted by the trader. Considering the above, I wonder why it is necessary to apply both Article 6(1) Rome II and Article 6(2) Rome I. The argument that otherwise different legal systems apply in a collective and an individual action is hard to grasp, since both rules result in the same applicable legal system.

This may be different in the case of active consumers who are not protected by Article 6(2) Rome I, because in that case the applicable law pursuant to Article 3 Rome I governs the contract. However, their interests were not discussed in this decision.

(8) Authors and courts do not agree upon the underpinning of Article 6 Rome I. Some argue that it is based on the *favor* principle, according to which the law most favourable to the consumer must be applied.⁴¹ In the case of a choice of law, this implies a comparison between the legal system chosen and the mandatory substantive rules of the legal system of the seller's habitual residence. The rules most favourable to the consumer must be applied.

Others argue that the legal system of the consumer's habitual residence must be applied, because it is presumed that the consumer is best protected by the legal system he is most familiar with. This is the legal system of the consumer's habitual residence.⁴²

(9) In its decision, the CJEU did not dwell upon the underpinning of Article 6 Rome I explicitly. However, in consideration 59, the CJEU held that a choice of law could not deprive the consumer of the protection offered by the legal system of his habitual residence. This could imply that the rationale of Article 6(1) Rome I is not grounded on the *favor* principle, because the CJEU did not elaborate on a

⁴⁰ Case C-191/15 *Amazon* ECLI:EU:C:2016:612, para. 43.

⁴¹ See for instance: OGH 13 December 2012, 1 Ob 48/12h; Kramer and Verhagen (2015), 10-III 2015/663 et seq., 867 et seq.; Lurger and Melcher (2013), no. 4/53; Stone (2010), p. 253.

⁴² See for instance Strikwerda (2015), no. 174; Tang (2015), p. 160 et seq.

comparison between the rules chosen and the mandatory rules of substantive law of the consumer's habitual residence.

4.3 Assessment of the Fairness of a Choice-of-Law Term in General Conditions

(10) The CJEU also considered whether a choice-of-law term in general conditions in a b2c contract is unfair. This issue concerned the interpretation of the Directive on unfair terms in consumer contracts. This directive does not distinguish between passive and active consumers as Rome I does. It applies to any term in general conditions in a b2c contract, which the parties have not negotiated (Articles 1 and 3 UCTD).⁴³

(11) A term is unfair if it does not meet the requirements of good faith, transparency or if it results in a significant imbalance in the parties' rights and obligations to the consumer's detriment. The CJEU formulated tests in its case law to assess whether these requirements are met.⁴⁴ Strikingly, the CJEU did not allude to this body of case law nor did it apply those tests.⁴⁵ Instead, it held that a choice-of-law term is unfair if the term leads the consumer to believe that only the law chosen will be applicable without being informed that also the mandatory rules of his habitual residence would apply as indicated in Article 6(2) Rome I.

(12) The CJEU's ruling raises certain questions. First, what would have been the outcome had the CJEU applied those tests to assess the unfairness of the choice-of-law term? Secondly, what is the relevance of this decision in the case of a contract between an active consumer and a trader that includes a choice-of-law term in his general conditions for the legal system of the country of his establishment?

(13) In *Aziz*, the CJEU formulated a test to assess whether a term results in an insignificant imbalance between the parties to the detriment of the consumer and a test to assess whether a term is contrary to good faith.⁴⁶ The significance test implies the following. The contract without the term concerned is compared to the contract with the term. If the contract with the term results in a significant imbalance to the detriment of the consumer, there is a strong indication that a term is unfair. The significant imbalance may result from a quantitative economic evaluation, but also from a restriction of the consumer's rights or their exercise or if the consumer is

⁴³ See for instance CJEU 30 May 2013, Case C-488/11 *D.F. Asbeek Brusse, K. de Man Garabito v. Jahani BV* ECLI:EU:C:2013:341; CJEU 19 November 2015, Case C-74/15 *D. Tarcău, I.B.Tarcău v. Banca Comercială Intesa Sanpaolo România SA and others* ECLI:EU:2015:772.

⁴⁴ CJEU 14 March 2013, Case C-415/11 *M. Aziz v. Caixa d'Estalvis de Catalunya, Tarragona/Manresa (Catalunyacaixa)* ECLI:EU:C:2013:164; Case C-488/11 *Asbeek Brusse* ECLI:EU:C:2013:341; CJEU 3 April 2014, Case C-342/13 *K. Sebestyén v. Zsolt Csaba Kővári, OTP Bank, OTP Faktoring Követeléskezelő Zrt., Raiffeisen Bank Zrt.* ECLI:EU:C:2014:1857. See about this test: Gerstenberg (2015), p. 605; Iglesias Sánchez (2014), p. 955; Micklitz and Reich (2014), p. 771; Rutgers (2014), p. 279.

⁴⁵ It is submitted that the CJEU referred to *Kásler* (CJEU 30 April 2014, Case C-26/13 *Á. Kásler, H. Káslerné Rábai v. OTP Jelzálogbank Zrt.* ECLI:EU:C:2014:282), *Van Hove* (CJEU 23 April 2015, Case C-96/14 *Van Hove v. CNP Assurances SA* ECLI:EU:C:2015:262). However, the references to *Kásler* and *Van Hove* only concern minor details of these decisions.

⁴⁶ Case C-415/11 *Aziz* ECLI:EU:C:2013:164, para. 69.

burdened with additional obligations.⁴⁷ The good faith test, which the CJEU formulated, is as follows.⁴⁸ A term is considered contrary to good faith if a consumer who had been able to negotiate about the term, would not have agreed to that term. These tests must be applied together with all the circumstances present at the time of the contract's conclusion (Article 4 UCTD).

(14) If the good faith test is applied to a choice-of-law term, it is questionable whether a consumer who had negotiated on the applicable law would have agreed to the seller's legal system. In this respect it is relevant, as the Advocate General indicated, that the consumer is likely to be more familiar with his own legal system than with the seller's law. Moreover, this legal system is more easily accessible to him.⁴⁹ This all points in the direction of a negative answer.

(15) As to the significance test, in the absence of a choice-of-law term, the legal system of the consumer's habitual residence would have been applicable. This is considered to be beneficial to the consumer, because of the reasons brought forward by the Advocate General. If the seller's law is chosen to govern the contract, the consumer is, in fact, burdened with additional obligations. They do not concern obligations in a legal sense, but it will be more difficult for the consumer to find out what his rights entail. In short, if the *Aziz* tests are applied, there seems to be a strong indication that a choice-of-law term in general conditions in a b2c contract is unfair.

(16) The transparency test points in a similar direction. Under Article 5 UCTD a term must be in plain and intelligible language. This implies that not only the linguistic context of the term must be taken into account, but the consumer must also be able to foresee the economic consequences of the term in question taking into account the term and the contractual framework.⁵⁰ It is debatable whether a consumer can foresee the consequences of a foreign legal system. The CJEU held with respect to the UCTD that a court must apply those rules of its own motion, since a consumer may not be aware of his rights.⁵¹ If a consumer is not aware of his rights in a national situation, it is unlikely that he will be aware of his rights under another legal system. Moreover, if the consumer does not know his rights and obligations, he will not be able to foresee them either.

(17) The fairness of a choice-of-law clause is policed under the UCTD without any distinction between an active and a passive consumer. If the line of reasoning as discussed above is followed, it would also lead to an unfair term in the case of an active consumer, who is not protected by Article 6 Rome I. In its decision, the CJEU does not explain why it does not apply the *Aziz* tests nor the tests which it formulated concerning the transparency principle. The outcome of the CJEU's

⁴⁷ CJEU 16 January 2014, Case C-226/12 *Constructora Principado SA v. José Ignacio Menéndez Álvarez* ECLI:EU:C:2014:10, para. 24.

⁴⁸ Case C-415/11 *Aziz* ECLI:EU:C:2013:164.

⁴⁹ Opinion of Advocate General Saugmandsgaard Øe, ECLI:EU:C:2016:388, para. 100.

⁵⁰ Case C-342/13 *Sebestyén* ECLI:EU:C:2014:1857; Case C-26/13 *Kásler* ECLI:EU:C:2014:282; CJEU 26 February 2015, Case C-143/13 *B. Matei, I.O. Matei v. SC Volksbank România SA* ECLI:EU:C:2015:127; Case C-96/14, *Van Hove* ECLI:EU:C:2015:262, 47; Loos (2015), pp. 179–194.

⁵¹ See Cases C-240/98-C-244/98 *Océano* ECLI:EU:C:2000:346; Case C-488/11 *Asbeek Brusse* ECLI:EU:C:2013:341.

decision is therefore disputable, especially since the application of those tests results in a different outcome.

4.4 Practical Consequences

(18) The CJEU held that a choice-of-law clause in standardized terms will not be considered unfair if the choice-of-law clause also includes a reference to the mandatory rules of the legal system of the consumer's habitual residence. To avoid an unfair choice-of-law term, it suffices to refer to the mandatory rules of the consumer's law in addition to the chosen legal system. The CJEU followed its Advocate General in this respect. Therefore, it does not seem likely that a more detailed reference is necessary. In response to Amazon's remark that a detailed reference to the consumer's law would be an excessive requirement, the Advocate General answered that a mere reference is sufficient.⁵²

(19) In the absence of a reference to the mandatory rules of the consumer's law, the CJEU's decision will result in the following. First, it must be assessed which legal system governs the fairness of a term under Rome I. If it is established that a term is unfair according to the applicable law, it must be established whether the use of unfair terms in general conditions will result in unfair competition pursuant to the applicable legal system after having applied Article 6(1) Rome II.

4.5 Conclusion

(20) Amazon provides a rule for the situation when a trader established in an EU Member State targets consumers in their country of habitual residence which is also an EU Member State and a consumer organization which is established in that Member State starts a collective action against the trader. In other words, these proceedings only concerned the situation of the passive consumer in a b2c contract.

(21) The CJEU distinguished between the conflict rule that governed the collective action, Article 6(1) Rome II, and the conflict rule that governed the fairness of the term, Article 6(2) Rome I.

It is not clear why the CJEU did this, since in this case both provisions will submit the case to the same legal system. The CJEU held that the country where the collective interests of the consumers are affected under Article 6(1) Rome II is the country where the consumers, who are targeted by the trader, have their habitual residence. This is also the connecting factor which Article 6(2) Rome I employs. Consequently, if merely Article 6(1) Rome II had been applied to this case, the same legal system would have applied as to the fairness of an unfair term in a collective action as in an individual situation, because both result in the same applicable legal system. It would have been preferable if the CJEU had only applied Article 6(1) Rome II or Article 6(2) Rome I, since applying both provisions renders the situation unnecessarily complicated.

(22) The CJEU also introduced a new test to assess the fairness of the choice-of-law term under the Directive on unfair contract terms, which differs from the tests

⁵² Opinion of Advocate General Saugmandsgaard Øe, ECLI:EU:C:2016:388, para. 104.

the CJEU formulated in its earlier case law. The CJEU held that a choice of law for the trader's law is fair insofar as a reference is also made to the substantive rules of the consumer's law. However, if the CJEU's other tests had been applied, there would have been a strong indication that a mere choice of law for the trader's law is unfair.

(23) In the case of an active consumer, a choice-of-law term for the seller's law in general conditions is fair if the reasoning in *Amazon* is followed. However, arguably a choice-of-law term for the seller's law in general conditions is unfair if the tests formulated in the Court's earlier case law are applied.

(24) To sum up, this decision does not simplify matters, because a new test is introduced to test the fairness of a choice-of-law clause in general conditions in b2c contracts which involve a passive consumer. Moreover, the CJEU applied two different conflict rules to a collective action in which the fairness of a choice-of-law clause is challenged. It is not really clear why two conflict rules must be applied, because both conflict rules include the same connecting factor in this particular case and result in the same applicable system.

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