Nudging in private international law:
The design of connecting factors in light of behavioural economics

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ABSTRACT Amending the traditional economic analysis of law and its assumption of rationality, this paper suggests that behavioural economics can inform a more realistic understanding of private international law, which has been missing to date. Acknowledging the psychological biases which private parties are facing when dealing with complex cross-border cases, the paper introduces a new perspective on the design of connecting factors in EU private international law which are to be conceived as nudges that steer the applicable law and international jurisdiction to counteract bounded rationality. Objective connecting factors can be perceived as default rules, whereas the framework for exercising party autonomy can be construed as choice architecture of subjective connecting factors. Revealing the underlying libertarian paternalism of connecting factors requires addressing existing concerns about nudging, which is insightful for establishing the requirements of a transparent and choice-preserving design. Behavioural economics prove to be particularly suitable for explaining the restriction of choice and other connecting factor modifications for consumer protection in private international law.

In Fortentwicklung der traditionellen ökonomischen Analyse des Rechts und ihrer Rationalitätsannahme schlägt dieser Beitrag vor, dass die Verhaltensökonomie ein realistischeres Verständnis des Internationalen Privatrechts vermitteln kann, das bisher nicht untersucht worden ist. Parteien sind gerade in Bezug auf komplexe grenzüberschreitende Fälle in ihren Entscheidungen durch ‚bounded rationality' beeinflusst (eine durch psychologische Umstände beeinträchtigte Rationalitätsvorstellung). Dies zugrunde legend entwirft der Beitrag eine neue Sicht auf die gesetzgeberische Gestaltung von Anknüpfungsmerkmalen im europäischen Kollisions- und Internationalen Zivilverfahrensrecht. Die Gestaltung lässt sich als ‚nudging' (eine Art Stupsen) verstehen, womit die Bestimmung des anzuwendenden Rechts und der internationalen Gerichtszuständigkeit gesteuert werden, um der beschränkten Rationalität entgegenzuwirken. Objektive Anknüpfungsmerkmale können als ‚default rules' (Standardregeln) aufgefasst werden, während der Rahmen für die Ausübung der Parteiautonomie mittels subjektiver Anknüpfungsmerkmale als ‚choice architecture' (Entscheidungsarchitektur) verstanden werden kann. In diesem Zusammenhang wird auch der den Anknüpfungsmerkmalen innewohnende libertäre Paternalismus aufgedeckt und es bedarf der Stellungnahme zu bestehenden Bedenken gegen ‚nudging', was aufschlussreich ist für die Bestimmung der Anforderungen an ein transparentes und ‚choice-preserving' Design ist (also die Bewahrung von Entscheidungsfreiraum). Die Verhaltensökonomie erweist sich zudem als besonders geeignet, die Modifikationen der Rechtswahlfreiheit und anderer Anknüpfungsmerkmale für den Verbraucherschutz im Internationalen Privatrecht zu erklären.

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I. Introduction

Cross-border disputes are particularly complex due to the challenges involved in understanding and deciding on the applicable law and international jurisdiction. Contrary to this reality, it is commonly assumed that all private parties are capable of rational choices in pursuit of efficiency, which however disregards the fact that humans are not always guided by rationality but can be affected by psychological biases. Acknowledging 'bounded rationality' in cross-border cases calls for reconsidering the way private international law determines which law shall apply and which court may hear the case. In particular, it requires analysing connecting factors from this new perspective, thus appreciating the significance of how bounded rationality affects private parties in choosing a law or court or abstaining from choice.

This paper pursues such a new approach based on the insights of behavioural economics, which have been neglected in private international law to date. Looking at the existing EU instruments, the paper suggests that the connecting factors of the Rome and Brussels Regulations are designed to 'nudge' private parties towards a particular jurisdiction, both with regard to subjective and objective connecting factors. Special consideration has to be given to the requirements of nudging to justify its libertarian paternalism. Particularly illustrative is the application of behavioural insights to the paradigmatic area of consumer protection.

The new approach ties into modern jurisprudence, which is less prone to see legal scholarship strictly focused on the proper interpretation and application of the law, but has rather developed towards a discipline which includes explaining the proper design of legal norms in order to contribute to a better comprehension and achievement of lawmaking. Well-designed law can, together with other important purposes, minimise or even prevent that private parties suffer from their own fallibility and that their biases and consequential suboptimal conduct are exploited by others,[1] which is perhaps most important in the challenging context of cross-border legal relations.

[1] *Eyal Zamir / Doron Teichman*, Behavioral Law and Economics (2018), 162ff.

To explore the idea of nudging in private international law, the paper will establish the relevant foundations of behavioural economics in the following Part II. Then, looking at cases where no subjective choice is permissible or validly made, Part III will posit that objective connecting factors can be characterised as default rules. It will be shown how private parties are nudged towards a predetermined applicable law and international jurisdiction. Making individual choices about the law and jurisdiction is addressed in Part IV, which will suggest that the design of subjective connecting factors can be understood as choice architecture. Part V will discuss the requirements for nudging, namely transparent and choice-preserving design, in response to existing criticism against behavioural economics and libertarian paternalism; this will include an excursus about the concept of a mandated choice system, which will however be rejected as unsuitable for private international law. To illustrate the behavioural insights of bounded rationality in a specific area, Part VI will examine how choice architecture and default rules are modified through semi-compulsory rules to nudge consumers and to counteract their biases when they deal with professional parties across borders. The conclusion in Part VII will summarise how, in terms of behavioural economics, the regulation of choice and the configuration of defaults in private international law influence to which law and court a cross-border case is subjected.

II. Foundations of Behavioural Economics in Private International Law

Adding a new behaviourally informed perspective to the analysis of private international law can be best outlined in an approach that takes the current economic analysis of (private international) law as a starting point and demonstrates the potential for adopting an amended understanding which draws on the idea of nudging.

The traditional or 'neoclassical' economic analysis of law has been based on the assumption of rational choice, striving on this basis for the increase of efficiency and welfare. It has introduced the use of economic concepts to legal analysis in order to economically explain the effects of laws on rational people and to assess which legal rules are economically efficient in this regard. It has, for instance, been generally advocated by *Posner*,[2] and studied with respect to specific areas of substantive law, such as tort law and the cost of traffic accidents.[3] Notably,

[2] *Richard Posner*, Economic analysis of law (1973), [9] (2014).
[3] *Guido Calabresi*, The Costs of Accidents (1970).

neoclassical economic analysis has also been applied to private international law at the turn of the last millennium,[4] and has since been more extensively researched.[5]

However, the main problem of the neoclassical model is its assumption of rationality, which cannot really accommodate non-rational human behaviour. This should not suggest that humans would necessarily or regularly act irrationally, but that they are affected by psychological biases, which have been described by *Kahneman* and *Tversky*.[6] The reasons can be manifold, and have increasingly been recognised and examined in general terms and in relation to substantive law, but not yet with respect to private international law:[7] for instance, when it comes to making choices, over-optimism and, in turn, loss aversion are biasing factors to be considered.[8] Individuals overestimate the prospects of positive outcomes and underestimate the prospects of negative ones; however, the relative impact generated by a loss tends to be seen higher than the impact generated by a comparable gain because losses seem to loom larger than gains.[9] This can affect whether and how private parties make a choice of law or court. When looking at available options for choice, the endowment effect and, somewhat related, the hindsight bias can influence the outcome.[10] Whilst a greater value is placed on objects and entitlements which are already in somebody's possession than on objects and entitlements which could be acquired, confusingly the chances of a particular event (such as the chances of

[4] *Erin A. O'Hara* / *Larry E. Ribstein*, From Politics to Efficiency in Choice of Law, 67 U. Chi. L. Rev. 1151–1232 (2000).

[5] *Horatia Muir Watt*, Aspects économiques du droit international privé, Rec. des Cours 307 (2004), 25–383; *Giesela Rühl*, Statut und Effizienz (2011); *Michael J. Whincop* / *Mary Keyes*, Policy and Pragmatism in the Conflict of Laws (2001). See also *Toshiyuki Kono*, Efficiency in Private International Law, Rec. des Cours 369 (2014), 361–511, 409ff. See further *Jürgen Basedow / Toshiyuki Kono* (eds, in cooperation with *Giesela Rühl*), An economic analysis of private international law (2006).

[6] *Daniel Kahneman / Amos Tversky*, Prospect Theory: An Analysis of Decision under Risk, Econometrica 47 (1979), 263–291; *Daniel Kahneman / Paul Slovic / Amos Tversky*, Judgement under uncertainty: Heuristics and biases (1982).

[7] For an overview aimed at private international law: *Horst Eidenmüller / Johanna Stark*, Behavioural economics and private international law, in: Encyclopedia of Private International Law, ed. by Jürgen Basedow et al. (2017), 170–179, 172ff.

[8] On over-optimism: *Jennifer Arlen*, Comment: The Future of Behavioral Economic Analysis of Law, 52 Vand. L. Rev. 1765–1788, 1773ff., 1781ff. (1998); *Christine Jolls / Cass R. Sunstein / Richard Thaler*, A Behavioral Approach to Law and Economics, 50 Stan. L. Rev. 1471–1550, 1524f. (1998); *Russell B. Korobkin / Thomas S. Ulen*, Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics, 88 Cal. L. R. 1051–1144, 1091ff. (2000). On loss aversion: *Cass R. Sunstein*, Behavioral Law and Economics: A Progress Report, 1 Am. L. & Econ. Rev. 115–157, 131ff. (1999); *Cass R. Sunstein*, Choosing Not to Choose (2015), 44ff.

[9] Cf *Eyal Zamir*, Law and Behavioral Economics, in: Encyclopedia of the Philosophy of Law and Social Philosophy, ed. by Mortimer Sellers / Stephan Kirste (2018), <https://doi.org/10.1007/978-94-007-6730-0> (13 April 2021).

[10] On endowment: *Arlen*, Behavioral Economic Analysis of Law (n. 8) 1771f., 1777ff.; *Jolls / Sunstein / Thaler*, Behavioral Approach (n. 8) 1497ff., 1505ff.; *Korobkin / Ulen*, Law and Behavioral Science (n. 8) 1107ff.; *Sunstein*, Behavioral Law and Economics (n. 8) 132f.; *Richard H. Thaler*, Misbehaving – The making of behavioral economics (2015), 12ff. On hindsight: *Jolls / Sunstein / Thaler*, Behavioral Approach (n. 8) 1523ff.; *Korobkin / Ulen*, Law and Behavioral Science (n. 8) 1095ff.; *Doron Teichman*, The hindsight bias and the law in hindsight, in: The Oxford Handbook of Behavioral Economics and the Law, ed. by Eyal Zamir / Doron Teichman (2014), 354–373; *Zamir / Teichman*, Behavioral Law and Economics (n. 1), 38f.

acquiring or losing an object or entitlement) are estimated higher once that event has occurred.[11] Especially in cross-border cases, parties might not be aware of the possibility or might not be able to deviate from what they have done previously or what is allocated to them in the first place. They might, for non-rational reasons, continue (not) to choose a certain law or court, simply because they have done so in the past and it does not appeal to them to reconsider. Lastly, to give another example, which does not complete the list of potential biases, the framing effect can influence how choices are made or not made, because the behaviour of private parties might depend on how a setting is presented to them and regarded by them.[12] If it is presented to be desirable to make a particular choice in an international setting, such as of a presumably beneficial jurisdiction allegedly known for its low-cost efficiency, private parties might do so even without being rationally convinced of it; conversely, parties might not actively consider to insist on a rationally beneficial choice simply because it is not made obvious or it is not presented as advantageous.

Considering these and other biases affecting human behaviour, a more realistic foundation for the economic analysis of law is to accept the idea of 'bounded rationality', which was first described by *Simon*[13] and has been adopted by behavioural economics.[14] Rationality of humans is considered to be bounded due limitations of thinking capacity, available information, and time.[15] Accepting bounded rationality changes the way law and economics are understood, and this has paved the way for a 'debiased' analysis of law in behavioural economics.[16]

One of the most important concepts within behavioural economics is 'nudging', a term which was introduced by *Thaler* and *Sunstein*.[17] Nudging is one of the means by which the

[11] Cf *Zamir*, Law and Behavioral Economics (n. 9).

[12] On the framing effect: *Daniel Kahneman*, Maps of Bounded Rationality: Psychology for Behavioral Economics, 93 Am. Econ. Rev. 1449–1475, 1458ff. (2003); *Korobkin / Ulen*, Law and Behavioral Science (n. 8) 1105; *Sunstein*, Behavioral Law and Economics (n. 8) 123, 129.

[13] *Herbert Simon*, Models of man (1957), 198.

[14] An early paper, based on Kahneman and Tversky's prospect theory, is: *Richard Thaler*, Toward a Positive Theory of Consumer Choice, 1 Journal of Economic Behavior & Organization 39–60 (1980). Cf, for instance, *Jolls / Sunstein / Thaler*, Behavioral Approach (n. 8); *Korobkin / Ulen*, Law and Behavioral Science (n. 8); *Zamir / Teichman*, Behavioral Law and Economics (n. 1). Collective works, for instance: European Perspectives on Behavioural Law and Economics, ed. by Klaus Mathis (2015); Oxford Handbook of Behavioral Economics and the Law (n. 10). Specifically on substantive private law: *Antonios Karampatzos*, Private Law, Nudging and Behavioural Economic Analysis (2020). On public international law: *Doron Teichman / Eyal Zamir*, Nudge goes international, EJIL 30 (2019), 1263–1279; *Anne van Aaken*, Behavioral International Law and Economics, 55 Harv. Int'l. L. J. 421–481 (2014). See also *Georgios Dimitropoulos*, Behavioural Regulation in International Trade, in: Nudging – Possibilities, Limitations and Applications in European Law and Economics, ed. by Klaus Mathis / Avishalom Tor (2016), 263–287.

[15] *Herbert Simon*, Models of bounded rationality (1982), 291ff.

[16] On debiasing, see for instance *Daniel Pi / Francesco Parisi / Barbara Luppi*, Biasing, Debiasing, and the Law, in: The Oxford Handbook of Behavioral Economics and the Law, ed. by Eyal Zamir / Doron Teichman (2014), 143–166, 152ff.

[17] *Richard H. Thaler / Cass R. Sunstein*, Nudge: Improving decisions about health, wealth, and happiness (2008); see also *Cass R. Sunstein*, Why Nudge? (2014). Cf, for instance: Nudging – Possibilities, Limitations and Applications (n. 14).

lawmaker can affect people's decisions through 'choice architecture'.[18] The aim is to design the legal environment for individuals, who make (or do not make) decisions on the basis of their bounded rationality, in a way which is likely to induce outcomes that the lawmaker as architect wishes to promote; at the same time, nudges are 'choice-preserving' and more widely acceptable because they do not limit options.[19] The concept of nudging does not have to be as narrowly construed as the figurative meaning of the term might suggest; instead of having to push private parties gently (towards certain decisions), it can encompass techniques of lawmaking which simply encourage private parties (to make certain decisions) in a way that is gentle rather than forceful or direct.

Indeed, there is a variety of different ways in which nudging can be achieved by the lawmaker in principle. The two most significant ones for present purposes are the following: first, the obvious way to steer people's choices is by regulating the available choices. This is particularly relevant in private international law with respect to choice of law and choice of court. Providing and regulating subjective connecting factors is an important part of any private international law regime and can thus be seen as choice architecture. However, it is unimaginable without underlying 'backup' rules, which provide for objective connecting factors that are relied upon if there is no valid choice. So, secondly, when regulating choice can be understood as one side of the coin, setting defaults is to be seen as the other side of the coin. Defaults embody an opt-out model (or presumed-consent model) as opposed to an opt-in model requiring explicit choice.[20] Whilst the traditional economic analysis perceives default rules as a means of enhancing efficiency, by reducing Coasean transaction costs[21] and inducing information sharing,[22] well-crafted default rules can achieve more than just enhancing efficiency: taking the behavioural insights seriously, default rules can fulfil a steering function which can be expected to benefit people and society and which counteracts inactivity and indecisiveness.[23] At the same time, since people are allowed to opt out of the defaults, such rules hardly curtail individual freedom and autonomy.

[18] *Thaler / Sunstein,* Nudge (n. 17), 6, 81ff.; *Richard H. Thaler / Cass R. Sunstein / John P. Balz,* Choice Architecture, in: The Behavioral Foundations of Public Policy, ed. by Eldar Shafir (2013), 428–439.

[19] *Thaler / Sunstein,* Nudge (n. 17), esp. 72ff. See also *Thaler*, Misbehaving (n. 10). Further, for instance, *Clemens Latzel,* Verhaltenssteuerung, Recht und Privatautonomie (2020), 80ff.; *Robert Neumann,* Libertärer Paternalismus (2013), 84ff.

[20]

arampatzos, Nudging (n. 14), 23f.

[21] *Ronald Coase,* The Nature of the Firm, 4 Economica 386–405, 390ff. (1937), established that, in addition to actual costs such as for production, there are costs in making any trading transaction when participating in a market (e.g. for making, executing, and changing plans and decisions).

[22] Cf *Zamir / Teichman,* Behavioral Law and Economics (n. 1), 179. Cf *Ian Ayres / Robert Gertner,* Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules, 99 Yale L. J. 87–130 (1989).

[23] *Sunstein*, Choosing not to choose (n. 8), 34ff. See also *Karampatzos,* Nudging (n. 14), 25.

In turn, this new perspective neither attempts to suggest that all rules of private international law should inevitably be conceived as nudges, nor does it claim to be the one-and-only analytical perspective on private international law. Such extreme attempts would not only do a disservice to the concept of nudging, they would also ignore that under certain conditions the legislator provides for objective connecting factors which are mandatory and intentionally prohibit any choice and deviation. For instance, international jurisdiction for rights *in rem* in immovable property is typically exclusive,[24] which means it is not a default connecting factor subject to a derogation agreement, but rather is strictly compulsory. These occasionally interventionist rules of private international law are not discussed further in this paper, which focuses on areas where choice is permitted but guided by the legislator and which suggests that the legislator is doing so through nudging.

Nudging and its specific relevance in private international law can only be seriously considered after some clarification about the steering of human behaviour in the wider context of (libertarian) paternalism. The reason is that the justification of nudging is often challenged, and not only by advocates of economic liberalism.[25] Without doubt, nudging is very different from the traditional form of paternalism, which is defined as the interference by a state with individuals *against* their will.[26] Nudging is more appropriately characterised as a form of libertarian paternalism,[27] because nudging seeks to counteract psychological biases by subtly influencing choices so that private parties are more likely to exercise their autonomy in a way that is beneficial for them.[28] As libertarian paternalism is less intrusive than state interventionism like compulsion and coercion, it is generally more acceptable. Yet, this does not neglect that libertarian paternalism requires justification in order to comply with the fundamental principles of democracy, the rule of law, and the protection of individual freedoms,

[24] Art. 24 para. 1 Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("Brussels Ia Regulation"), OJ 2012 L 351/1.

[25] Monographic critiques include: *Sarah Conly*, Against Autonomy: Justifying Coercive Paternalism (2013); *Ricardo Rebonato*, Taking Liberties: A Critical Examination of Libertarian Paternalism (2012); *Mario J. Rizzo / Glen Whitman*, Escaping Paternalism – Rationality, Behavioral Economics, and Public Policy (2019); *Mark D. White*, The Manipulation of Choice – Ethics and Libertarian Paternalism (2013). Also see, for instance, *Gregory Mitchell*, Libertarian Paternalism is an Oxymoron, 99 Nw. U. L. Rev. 1245–1277 (2005); *Hans-Bernd Schäfer / Claus Ott*, Lehrbuch der ökonomischen Analyse des Zivilrechts[5] (2012), 118ff.

[26] See, for instance, *Gerald Dworkin*, Paternalism, in: Stanford Encyclopedia of Philosophy (2020), <https://plato.stanford.edu/archives/fall2020/entries/paternalism/> (13 April 2021).

[27] *Richard H. Thaler / Cass R. Sunstein*, Libertarian Paternalism, 93 Am. Econ. Rev. 175–179 (2003). Also see, for instance, *Neumann*, Libertärer Paternalismus (n. 19), 30ff.; *Horst Eidenmüller*, Liberaler Paternalismus, JZ 2011, 814–821, 816ff.; *Klaus Ulrich Schmolke*, Grenzen der Selbstbindung im Privatrecht (2014), 219f.

[28] *Cass R. Sunstein / Richard H. Thaler*, Libertarian Paternalism Is Not an Oxymoron, 70 U. Chi. L. Rev. 1159–1202 (2003); *Thaler / Sunstein*, Nudge (n. 17), 4ff. See also *Colin F. Camerer* et al., Regulation for Conservatives: Behavioral Economics and the Case for "Asymmetric Paternalism", 151 U. Pa. L. Rev. 1211–1254 (2003); *Johannes Cziupka*, Dispositives Vertragsrecht (2010), 490ff.; *Sunstein*, Why Nudge? (n. 17), 57ff.

including the general principle of proportionality.[29] However, the purpose of this paper is to investigate the suggestion that reconsidering private international law in the light of behavioural economics can add an insightful perspective; this new analytical approach neither questions nor endorses any underlying libertarian paternalism or its justification, but rather elucidates the idea that the design of connecting factors *can* be conceived as nudging.[30]

Having established the general concept of nudging and its place in relation to libertarian paternalism, the next two Parts will demonstrate how objective and subjective connecting factors are used to nudge private parties. Subsequently, the requirements of transparent and choice-preserving design of connecting factors will be discussed as a response to existing criticism against nudging, followed by an illustration of the behavioural insights with respect to the paradigmatic area of consumer protection in private international law.

III. Objective Connecting Factors as Default Rules

Reimagining the purpose and function of objective connecting factors and their underlying policy considerations, this Part will show how the existing provisions can be understood as nudges towards specific jurisdictions by way of default rules. The necessity to nudge private parties through objective connecting factors results from the fact that, due to the complexity of determining the applicable law and international jurisdiction, private parties can easily be overwhelmed by cross-border disputes and therefore unable to make beneficial choices themselves.[31] This will augment the explanation why according to the design of the objective connecting factors of the seized court's private international law regime,[32] in the absence of a valid choice of court or law, a cross-border case is submitted to domestic or foreign courts and is subjected to the laws of the court's or a foreign jurisdiction. The discussion will first establish selected policies and rules of EU private international law for both international contracts and torts, whose design will then be construed as nudging which amends traditional explanations especially by neoclassical economics. Although nudging in private international law is neither

[29] *Mark Schweitzer*, Nudging and the principle of proportionality, in: Nudging – Possibilities, Limitations and Applications in European Law and Economics, ed. by Klaus Mathis / Avishalom Tor (2016), 93–119. Cf *Eidenmüller,* Liberaler Paternalismus (n. 27), 819f.

[30] The difficulty of separating libertarian paternalism and nudging, and their interrelation, is discussed by *Pelle Guldborg Hansen*, The Definition of Nudge and Libertarian Paternalism: Does the Hand Fit the Glove, EJRR 2016, 155–174. Also see *Latzel,* Verhaltenssteuerung (n. 19), 87; *Florian Möslein*, Privatrechtliche Regelsetzung, Governance und Verhaltensökonomik, Austrian Law Journal 2014, 135–143, 140.

[31] On the correlation of factual complexity and the effect of bounded rationality see, for instance, *Eidenmüller,* Liberaler Paternalismus (n. 27), 818.

[32] *Heinz-Peter Mansel*, Connecting Factor, in: Encyclopedia of Private International Law, ed. by Jürgen Basedow et al. (2017), 441–452, 441f. Also see *Adrian Briggs*, The Conflict of Laws[4] (2019), 173ff; *Paul Torremans* et al, Cheshire, North & Fawcett on Private International Law[15] (2017), 73; *Lord Collins of Mapesbury* et al, Dicey, Morris & Collins on the Conflict of Laws[15] (2018), nos. 7R-001ff.

perceived as limited to the area of cross-border obligations (and reference will also be made to some other areas) nor to EU instruments, the regime for obligations and the harmonisation of this regime have historically developed in such a way (especially by permitting party autonomy to be discussed in Part IV) which allows introducing the new perspective of behavioural economics most profitably.

In the European conflict of laws, since it was postulated by *von Savigny*, objective connecting factors have generally been employed to seek the legal seat of a relationship in order to declare its law applicable.[33] Similarly, the closest connection has been identified as the intention, which underlies objective connecting factors.[34] This was explicitly recognised in the European harmonisation of the conflict of laws by the 1980 Rome Convention on the Law Applicable to Contractual Obligations:[35] insofar as the applicable law is not validly chosen, "the contract shall be governed by the law of the country with which it is most closely connected."[36] In the succeeding and current EU conflict of laws regime for contracts, the Rome I Regulation,[37] the objective of the closest connection is still relied upon as residual connecting factor.[38]

The closest connection for contracts is further specified and elaborated in the individual factors which the Rome I Regulation stipulates for the various contractual relations. Lawmakers have dissociated in the conflict of laws from the medieval idea applying the law of the place where the contract is concluded (*lex loci contractus*),[39] and also from *von Savigny's* ideal of the place where the contract shall be fulfilled (*lex loci solutionis*).[40] Instead, objective connecting factors for international contracts have proven to be more suitable insofar as they acknowledge the characteristic contractual obligation,[41] which calls for the applicability of the law at the

[33] *Friedrich Carl von Savigny*, System des heutigen Römischen Rechts, vol. VIII (1849), 108, 118.

[34] *F. Vischer*, The Principle of the Typical Performance in International Contracts and the Draft Convention, in: Harmonisation of Private International Law by the E.E.C., ed. by K. Lipstein (1978), 25–31; *Symeon C. Symeonides*, The American Choice-of-Law Revolution (2006), 33.

[35] Convention on the law applicable to contractual obligations opened for signature in Rome on 19 June 1980 (80/934/EEC) ("1980 Rome Convention"), OJ 1980 L 266/1.

[36] Art. 4 para. 1 of the 1980 Rome Convention.

[37] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations ("Rome I"), OJ 2008 L 177/6.

[38] Art. 4 para. 4 Rome I Regulation.

[39] *Ole Lando*, Contracts, in: International Encyclopedia of Comparative Law, vol. III, chp. 24, ed. by Kurt Lipsetin (1977), section I.

[40] *von Savigny*, System (n. 33) 207f.

[41] *Lawrence Collins*, Contractual Obligations – The EEC Preliminary Draft Convention on Private International Law, ICLQ 25 (1976), 35–57, 44ff.; *Hans Ulrich Jessurun d'Oliveira*, "Characteristic Obligation" in the Draft EEC Obligation Convention, 25 Am. J. Comp. L. 303–331 (1977); *Friedrich K. Juenger*, The European Convention on the Law Applicable to Contractual Obligations: Some Critical Observations, 22 Va. J. Int'l L. 123–154, 132ff. (1981); *Dennis Solomon*, The Private International Law of Contracts in Europe: Advances and Retreats, 82 Tul. L. Rev. 1709–1740, 1712f. (2008).

place of the party who owes the non-monetary obligation.[42] For instance, the law of the country where the seller is habitually resident applies to a contract for the sale of goods according to Article 4(1) number 1 Rome I Regulation.

In the conflict of laws for tort, parallel to the usually applicable criminal law, seeking the closest connection has been promoted through the policy of *lex loci delicti* since the days of the canonists and statutists.[43] Whilst its exact meaning had been interpreted by national regimes in different ways, varying mainly between referring to the place of conduct and the place of injury,[44] these differences only have a significant effect in cases where the tortious action and its resulting injury occur in separate jurisdictions.[45] In line with modern developments, the Rome II Regulation[46] concurs with the emphasis on locating the injury or direct damage,[47] and stipulates that "the law of the country in which the damage occurs" shall primarily apply.[48] This is clarified by the addition that it is "irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur".[49] Alternatively, as a residual objective connecting factor under the Rome II Regulation, another closer connection can be relied upon where the tort is clearly linked with another country.[50]

Looking at the international jurisdiction of courts of EU Member States to adjudicate cross-border contracts and torts according to the current Brussels Ia Regulation, and previously likewise under the 1968 Brussels Convention,[51] heads of jurisdiction rely heavily on objective connecting factors as well. Insofar as the parties did not agree a valid choice of court, the international jurisdiction to hear and decide the case is determined objectively: unless specific provisions take precedence, for contractual disputes the court at "the place of performance of

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[42] *Mario Giuliano / Paul Lagarde*, Report on the Convention on the law applicable to contractual obligations, OJ 1980 C 282/1, 20; *Torremans* et al, Private International Law (n. 32), 732; *Vischer*, The Principle of the Typical Performance (n. 34), 25.

[43] *Ernst Rabel*, The Conflict of Laws^2, vol. II (1960), 235.

[44] *Symeon C. Symeonides*, Rome II and Tort Conflicts: A Missed Opportunity, 56 Am. J. Comp. L. 173–222, 186ff. (2008).

[45] *Ulrich Magnus*, Article 4, in: European Commentaries on Private International Law, vol. III: Rome II Regulation, ed. by Ulrich Magnus / Peter Mankowski (2019), no. 66. See also *Torremans* et al, Private International Law (n. 32), 810.

[46] Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations ("Rome II"), OJ 2007 L 199/40.

[47] This is obvious from the Recital 17 Rome II Regulation: "… the country in which the damage occurs should be the country where the injury was sustained or the property was damaged respectively."

[48] Art. 4 para. 1 Rome II Regulation. See further, for instance: *Richard Fentiman*, The Significance of Close Connection, in: The Rome II Regulation on the Law Applicable to Non-Contractual Obligations, ed. by John Ahern / William Binchy (2009), 85–112, 86ff.

[49] Art. 4 para. 1 Rome II Regulation.

[50] Art. 4 para. 3 Rome II Regulation. *Fentiman*, Significance of Close Connection (n. 48), 88ff.

[51] 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, Consolidated Version OJ 1972 L 299/32.

the obligation in question", and for claims in tort the court at "the place where the harmful event occurred" have international jurisdiction over a defendant domiciled in another Member State.[52] Although these jurisdictional connecting factors differ in substance from the ones discussed above for the conflict of laws insofar as they focus on different factual conditions, they still seek to determine the closest connection and enforce this neutral standard.[53] The substantive differences to objective connecting factors in the conflict of laws are explicable by the different functions they have to fulfil in establishing international jurisdiction. Striking a fair balance between enabling access to courts on the one side, and avoiding exorbitant competence on the other side, jurisdictional objective connecting factors have overcome considerations of territorial power and sovereign allegiance; nowadays, they are based on proximity of both the parties and their dispute to the forum.[54]

If one perceives these objective connecting factors as nudges in the shape of default rules, this differs significantly from the traditional view expressed by neoclassical economics, which explain objective connecting factors with the help of the "hypothetical consensus test".[55] This test promotes the law (or court) which the parties would have autonomously chosen if they had made a choice. It emphasises the importance of party autonomy and seeks to effectuate this freedom even where this can only be achieved hypothetically. However, the fundamental problem of this hypothesis is very similar to the prerequisite of actual choice: either the hypothetical consensus test adopts the assumption of rationality, but this assumption is not what can be expected from all private parties in reality; or the hypothetical consensus test does not actually refer to decisions which rational individuals would have made if they had made a choice, but rather has to admit that the choices are made for the individuals by the intervening lawmaker. Moreover, directly applied, the hypothetical consensus test is too imprecise to decide what the parties would hypothetically have agreed upon because many outcomes are imaginable, but not verifiable.[56] Uncertainty and indeterminacy can already be demonstrated

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[52] Art. 7 para. 1 lit. a and para. 2 Brussels Ia Regulation; previously Art. 5 para. 1 and para. 3 1968 Brussels Convention.

[53] *Mansel*, Connecting Factor (n. 32), 450.

[54] For an overview, with further reference, of a general theory of jurisdiction see *Ralf Michaels*, Jurisdiction, foundations, in: Encyclopedia of Private International Law, ed. by Jürgen Basedow et al. (2017), 1042–1051, 1047ff. Proximity has also been emphasised by the Court of Justice of the European Union since its interpretation of the provisions in the Brussels Convention: CJEU, 20 May 1982 – Case 133/81 (*Ivenel v. Schwab*), [1982] ECR 1891, nos. 11 and 15; CJEU, 22 March 1983 – Case 34/82 (*Peters v. ZNAV*), [1983] ECR 987, nos. 11f.; CJEU, 11 January 1990 – Case C-220/88 (*Dumez France v. Hessische Landesbank*), [1990] ECR I-49, no. 17.

[55] *O'Hara / Ribstein*, From Politics to Efficiency (n. 4), 1190f.; *Erin O'Hara / Larry E. Ribstein*, Rules and Institutions in Developing a Law Market: Views from the United States and Europe, 82 Tul. L. Rev. 2147–2180, 2158 (2008); *Michael Whincop / Mary Keyes*, Economic Analysis of Conflict of Laws in Torts Cases: Discrete and Relational Torts, 22 Melb. U. L. Rev. 370–395, 390ff. (1998)

[56] *Rühl*, Statut und Effizienz (n. 5), 364ff. See further *Jürgen Basedow*, Lex Mercatoria and the Private International Law of Contracts in Economic Perspective, in: An Economic Analysis of Private International Law,

by reference to the scholarly disaccord over whether, for instance with regard to the conflict of laws, parties would hypothetically agree on the law which provides a "comparative regulatory advantage"[57] or on the law which results in the lowest costs overall.[58] In addition, this hypothetical consensus would still ignore externalities affecting third parties, and it could not fulfil governmental interests, which public institutions are required to take into account. Accordingly, it is quite telling that most of the EU Regulations on the conflict of laws do not expressively contain any legislative intention to achieve economic efficiency.[59]

Against this background, behavioural economics can better explain objective connecting factors as nudges in the shape of default rules. Importantly, this understanding does not need to disguise the libertarian paternalisms incorporated in objective connecting factors, which are steering people intentionally for their own good. As demonstrated above, the lawmaker nowadays provides for specific objective connecting factors and, as an underlying safety net, for the residual objective connecting factor of the closest connection or of proximity. The specific factors may be determined in line with certain policy considerations, such as efficiency (according to Pareto[60] or Kaldor-Hicks[61] if this is the aim), but it can be openly acknowledged that the default rules are liberally paternalistic insofar as their result-orientation is intended to make private parties being better off than otherwise judged by themselves. This is where the significant difference can be found in comparison to the neoclassical hypothetical consensus test.

Accepting the underlying libertarian paternalism expressed in the objective connecting factors also means being honest about individuals' problems of transaction costs, which anyway often prohibit effective choices on a case-by-case basis. In turn, defaults do not limit rational people who want to minimise transactional costs further and who are in a socioeconomic position to opt out in order to make individual arrangements according to their rational

ed. by Jürgen Basedow / Toshiyuki Kono (2006), 57–72, 69ff.; *Jürgen Basedow*, The Law of Open Societies (2015), no.237.

[57] *O'Hara / Ribstein*, From Politics to Efficiency (n. 4) 1190ff. and 1216ff.; *O'Hara / Ribstein*, Rules and Institutions (n. 55) 2158.

[58] *Ralf Michaels,* Two Economists, Three Opinions? Economic Models for Private International Law – Cross-Border Torts as Example, in: An Economic Analysis of Private International Law, ed. by Jürgen Basedow / Toshiyuki Kono (2006), 143–184, 153ff.; *Hans-Bernd Schäfer / Katrin Lantermann,* Choice of Law from an Economic Perspective, in: An Economic Analysis of Private International Law, ed. by Jürgen Basedow / Toshiyuki Kono (2006), 87–120, 98f.

[59] *Giesela Rühl,* The Role of Economic Efficiency in European Private International Law, in: General Principles of European Private International Law, ed. by Stefan Leible (2016), 45–60, 52f. (the only identified exceptions are Arts. 5 and 6 Rome II Regulation in light of Recitals 20 and 21).

[60] *Vilfredo Pareto,* Manual of Political Economy (1906).

[61] *J. R. Hicks,* The Foundations of Welfare Economics, Economic Journal 49 (1939), 696–712; *Nicholas Kaldor*, Welfare Propositions of Economics and Interpersonal Comparisons of Utility, Economic Journal 49 (1939), 549–552.

insights.[62] Yet, at the same time, these defaults ensure that those other people whose actions are determined by bounded rationality and who usually stick to the status quo are not lost and disadvantaged.[63] The crucial characteristic is that defaults are both choice-preserving and, since they are not spontaneous individual decisions affected by bounded rationality but professionally developed and legislative adopted in adequate processes, debiasing without being coercive.[64]

This might, especially against the background of libertarian paternalism, raise concerns about the relationship between state authority and individual freedom. However, in the context of a well-ordered market, where the defaults set by objective connecting factors are democratically legitimised, they are ideally equivalent to "majoritarian default rules".[65] This term stems from the neoclassical economic analysis and – in its original meaning – describes rules which replicate the result of the hypothetical bargain, as suggested by the above-mentioned and criticised 'hypothetical consensus test'. However, breathing new meaning into this term with behavioural economics in mind, majoritarian default rules can be understood as the nudges which the lawmaker, who is democratically legitimated by the majority, has designed in order to determine the governing law or international jurisdiction by default for the benefit and on behalf of the parties if they have not made an actual valid choice.

Consequently, with the above analysis of objective connecting factors in mind, it is reasonable that the characteristic contractual obligation is selected for the default rule to determine the applicable law for cross-border contracts. It nudges the parties, who have not validly made an independent choice, towards the jurisdiction which most likely has the closest connection, and it ensures neutrality, predictability, and legal certainty, from which third parties may also benefit. Similarly, in the conflict of laws for torts, making the law of the place where the damaged occurred the default is justified due to the fact that the parties involved presumably had no previous intention to get in contact with one another, as they met most likely by 'accident' in the true sense of the word. The place of damage is the only objective link between them, so that they are suitably nudged towards the tort law of that place. In terms of international jurisdiction, the concept of proximity most importantly ensures fairness in determining the

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[62] *Michael J. Whincop / Mary E. Keyes*, Statutes' Domains in Private International Law: An Economic Theory of the Limits of Mandatory Rules, 20 Sydney L. Rev. 435–456, 436ff. (1998) differentiate mandatory and the various default rules; *Michael J. Whincop / Mary E. Keyes*, Towards an Economic Theory of Private International Law, 25 Austl. J. Leg. Phil. 1–36, 17ff. (2000); *Whincop / Keyes*, Policy and Pragmatism (n. 5), 35ff.

[63] See also *Russell Korobkin*, Status Quo Bias and Contract Default Rules, 83 Cornell L. Rev. 608–687, 668ff. (1998) and similarly *Russell Korobkin*, Behavioral Economics, Contract Formation and Contract Law, in: Behavioral Law and Economics, ed. by Cass R. Sunstein (2000), 116–143, 139f.

[64] *Christine Jolls / Cass R. Sunstein*, Debiasing through Law, 35 J. Legal Stud. 199–242 (2006). Cf *Philipp Hacker*, Verhaltensökonomik und Normativität (2017), 574ff.; *Latzel*, Verhaltenssteuerung (n. 19), 268ff.; *Schmolke*, Grenzen der Selbstbindung (n. 27), 228f.

[65] *Whincop / Keyes*, Policy and Pragmatism (n. 5), 35ff. See also *Rühl*, Statut und Effizienz (n. 5), 361.

internationally competent courts. Moreover, nudging the litigating parties in this direction is also beneficial in practical terms, such as for taking evidence, and it might increase the chances that the law of the forum coincides with the applicable law, and that the judgment to be rendered will be recognisable and enforceable in another jurisdiction.

Summing up the findings about objective connecting factors in the absence of a valid choice, it is submitted that they can be understood as nudges towards specific jurisdictions both with regard to the applicable law and the international competence of courts to adjudicate.

IV. Regulating Choice of Law and Choice of Court as Choice Architecture

When private parties make a choice of law or court for their cross-border legal relationship instead of relying on objective connecting factors discussed so far, then they make use of the framework of subjective connecting factors which the lawmaker enacted to accommodate party autonomy. From the perspective of behavioural economics, this Part will suggest that the existing regulation of choice of law and court can be innovatively understood as 'choice architecture' which nudges private parties in terms of how they can exercise the granted autonomy. It will be shown that, on the one hand, subjective connecting factors are choice-enabling nudges because party autonomy is given priority over the default objective connecting factors, and that, on the other hand, the parties' ability and scope to choose is however fundamentally dependent on the design of the legal regime which enables and recognises their autonomy.

As an invention of the 19th century, party autonomy in private international law can be seen as a result of the philosophical, political and economic ideas of individualism and libertarianism.[66] Accordingly, autonomous choice is nowadays widely recognised in the conflict of laws for contracts, and to a limited extent for torts and other non-contractual legal obligations, just as it is provided for establishing international jurisdiction.[67] The European harmonisation of the conflict of laws for contracts has granted choice of law since the 1980 Rome Convention, which stipulated that "a contract shall be governed by the law chosen by the parties" as the primary connecting factor.[68] The same wording was adopted in the Rome I Regulation,[69] which additionally emphasises in its recitals that party autonomy is considered

[66] Cf *Alex Mills*, Party Autonomy in Private International Law (2018), 29ff.
[67] Ibid, 91ff. and 313ff.
[68] Art. 3 para. 1 1980 Rome Convention.
[69] Art. 3 para. 1 Rome I Regulation.

"one of the cornerstones of the system of conflict-of-law rules in matters of contractual obligations."[70]

More recently, choice of law has also been permitted with respect to certain non-contractual legal obligations:[71] most importantly, the Rome II Regulation lets the parties choose the law governing those obligations which are within its scope (tort/delict, unjust enrichment, *negotiorum gestio*, or *culpa in contrahendo*),[72] but non-commercial parties may only make a choice after the damage has occurred.[73] Even for particular areas in family and succession law, choice of law has been recognised.[74] However, for property law, choice is still widely rejected in light of the potential effects on third parties.[75]

Choice of court is so widely recognised as a principle determining international jurisdiction in civil and commercial matters that it is even considered to be customary international law.[76] Out of deference for party autonomy, its justification draws on the ease and effectiveness which come with a *forum conveniens* due to the parties' agreement.[77] Building on the relevant provision of the 1968 Brussels Convention, which originally harmonised the requirements for prorogation in Europe,[78] the current Brussels Ia Regulation stipulates that the parties can agree on jurisdiction of Member State courts to settle any disputes in connection with a particular legal relationship; this agreement is enforced unless it does not meet the requirements set by the Regulation and the substantive law of the chosen jurisdiction.[79] However, in contrast to the framework for commercial matters, the Brussels IIa Regulation does not provide for prorogation of international jurisdiction in matrimonial matters, except in matters of parental

[70] Recital 11 Rome I Regulation.

[71] Cf *Basedow*, Law of Open Societies (n. 56), nos.262ff.; *Felix Maultzsch*, Party autonomy in European private international law: uniform principle or context-dependent instrument?, Journal of Private International Law, 12 (2016), 466–491, 470ff.

[72] Art. 2 para. 1 Rome II Regulation.

[73] Art. 14 para. 1 Rome II Regulation.

[74] Arts. 22ff. Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, OJ 2016 L 183/1, and similarly in the Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships, OJ 2016 L 183/30; Arts. 5ff. Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation ("Rome III"), OJ 2010 L 343/10. Art. 22 Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession, OJ 2012 L 201/107.

[75] *Mills*, Party Autonomy (n. 66), 425ff. See also, for instance: *Louis d'Avout*, Property and proprietary rights, in: Encyclopedia of Private International Law, ed. by Jürgen Basedow et al. (2017), 1428–1436, 1429f.; *Pippa Rogerson*, Conflict of Laws[4] (2016), 383ff. and 388.

[76] *Andreas F. Lowenfeld*, International Litigation and the Quest for Reasonableness (1996), 200.

[77] *Mary Keyes*, Jurisdiction in International Litigation (2005), 197f.

[78] Art. 17 1968 Brussels Convention.

[79] Art. 25 para. 1 Brussels Ia Regulation.

responsibility, where an agreement is possible to a very limited extent;[80] choice of court in matters of matrimonial property are also very restricted.[81] Similarly strict prorogation rules apply in matters of maintenance and, to some extent, succession.[82]

When one understands choice of law and choice of court in the sense of choice architecture, this amends the traditional explanations and puts the provision and regulation of party autonomy on a new footing. It has the potential to overcome the limited jurisprudential perspective that has so far justified party autonomy in private international law by analogy to private autonomy in substantive law, based either on a naturalist or positivist understanding of the law.[83] Such a "proper law" doctrine might have seemed plausible and pragmatically appealing; however, it cannot explain the priority of subjective over objective connecting factors in cases where the chosen law is objectively lacking any connection,[84] and it neglects more generally the differences of cross-border and purely domestic cases in terms of the availability and regulation of choice.

The neoclassical economic analysis of private international law has then suggested that granting private parties autonomy promotes efficiency and wealth increase: it relies in microeconomic terms on the market-orientated freedom and in macroeconomic terms on the free competition of legal systems.[85] Yet, again, this presupposes rational behaviour of the parties for them to make well-informed, efficient and beneficial choices. Considering the bounded rationality of human behaviour, it is difficult to find the neoclassical economic explanation fully convincing. The effects of choice of law and court, in particular, are hardly

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[80] Art. 12 para. 1 Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility ("Brussels IIa"), OJ 2003 L 338/1.

[81] Art. 7 Council Regulation (EU) 2016/1103, and similarly in the Council Regulation (EU) 2016/1104.

[82] Art. 4 Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, OJ 2009 L 7/1; Art. 5 Regulation (EU) No 650/2012.

[83] *O. Kahn-Freund*, General Problems of Private International Law (1976) 195ff. For a more recent account see, for instance: *Adrian Briggs*, Agreements on Jurisdiction and Choice of Law (2008), no. 2.30; *Michael McParland*, The Rome I Regulation on the Law Applicable to Contractual Obligations (2015), no. 9.04.

[84] *F. A. Mann*, The Proper Law of the Contract, Int'l LQ 3 (1950) 60–73, 62ff.; *Rabel*, The Conflict of Laws (n. 43), 367f.

[85] *Francisco J. Garcimartín Alférez*, Regulatory Competition: A Private International Law Approach, Eur. J. L. & Econ. 8 (1999) 251–270, 258ff.; *Kazuaki Kagami*, The Systematic Choice of Legal Rules for Private International Law: An Economic Approach, in: An Economic Analysis of Private International Law, ed. by Jürgen Basedow / Toshiyuki Kono (2006), 15–32, 15, 26ff.; *O'Hara / Ribstein*, From Politics to Efficiency (n. 4); *Erin O'Hara / Larry E. Ribstein*, The Law Market (2009), 65ff.; *Erin O'Hara O'Connor / Larry E. Ribstein,* Conflict of Laws and Choice of Law, in: Encyclopedia of Law and Economics[2], vol. VIII, ed. by Chris William Sanchirico (2012), 85–115, 97ff.; *Larry E. Ribstein*, Choosing Law by Contract, 18 J. Corp. L. 245–300 (1993); *Larry E. Ribstein*, From Efficiency to Politics in Contractual Choice of Law, 37 Ga. L. Rev. 363–471 (2003); *Whincop / Keyes*, Policy and Pragmatism (n. 5) 38ff.; *Whincop / Keyes*, Economic Theory (n. 62), 14ff. See also *Philip J. McConnaughay*, The Scope of Autonomy in International Contracts and Its Relation to Economic Regulation and Development, 39 Colum. J. Transnat'l L. 595–656, 610ff. (2000) with reference to the New York Convention, for instance.

calculable and predictable for individuals and sometimes even for corporations. Therefore, it is more than questionable whether completely rational choices can be made given the sheer quantity of available options, considering all the legal systems around the world, let alone their qualitatively different characteristics.

However, from a behaviourally informed perspective, granting and regulating party autonomy through providing for subjective connecting factors is to be seen as a construction of choice architecture. As a counterpart to default rules, subjective connecting factors create the space which permits private parties to make their own choices freely, yet within the lawmaker's limitations that steer the possible choices. Admitting and accepting that the lawmaker pursues libertarian paternalism through designing a suitable and legitimised choice architecture, it is no longer necessary to establish a naturalist or positivist origin of party autonomy as the basis for subjective connecting factors. Rather, this new perspective on the one hand allows accounting for the necessity of enabling and recognising deviations by private parties from defaults as well as for the necessity of restrictions by the lawmaker on private choice in principle; on the other hand it allows debating the resulting issue of a proportionate relation between private freedom and the discretion of restriction granted to the lawmaker. Consequently, the emphasis is put on the design comprising the defaults and the space for choice of the private international law framework in realistic acknowledgment of bounded rationality.

Adopting this new perspective does not contradict the valid intentions which underpin neoclassical economics ensuring that parties may, where possible, choose the law or court when they believe, correctly or not, that they will benefit from their choice. The parties may appreciate the popularity, impartiality, reliability of the chosen law or court,[86] which behavioural economics do not seek to deny or rectify if the (un)biased choice is meeting the legal requirements for consensual choice agreements. However, behavioural economics vigorously disagree with the neoclassical assumption that all parties are rational and have to be unrestricted in principle because they always know perfectly well what they are doing and which law or court they should choose to achieve efficiency.[87] What seems to be insufficiently

[86] *O'Hara / Ribstein*, Law Market (n. 85), esp. 65ff.; *Whincop / Keyes*, Economic Theory (n. 62), 21. See also *Ribstein*, From Efficiency to Politics (n. 85), 403; *Whincop / Keyes*, Economic Analysis (n. 55), 527.

[87] On this assumption and its conceptualisation, see for instance: *Emanuela Carbonara / Francesco Parisi*, Bargaining for Legal Harmonization, in: Internationalization of the Law and its Economic Analysis, ed. by Thomas Eger et al. (2008), 339–352, 345ff.; *Garcimartín Alférez*, Regulatory Competition (n. 85) 255ff.; *Horatia Muir Watt*, Choice of Law in Integrated and Interconnected Markets: A Matter of Political Economy, 9 Colum. J. Eur. L. 383–409, 387f. (2003); *O'Hara / Ribstein*, From Politics to Efficiency (n. 4) 1152f.; *Ribstein*, Choosing Law (n. 85); *Ribstein*, From Efficiency to Politics (n. 85) 390ff.; *Giesela Rühl*, Party Autonomy in the Private International Law of Contracts, in: Conflict of Laws in a Globalized World, ed. by Eckart Gottschalk et al. (2011), 153–183, 176f.; *Schäfer / Lantermann*, Choice of Law from an Economic Perspective (n. 58), 92ff.; *Whincop / Keyes*, Economic Analysis (n. 55), 515; *Whincop / Keyes*, Policy and Pragmatism (n. 5) 38ff.

taken into account by neoclassical economics is that the lawmaker engaging in choice architecture has to accommodate the consequences of psychological biases affecting private parties as well as the interests of third parties, the general public and the state; balancing these needs and interests ensures that private parties are protected from fallibility and exploitation by others and that negative externalities are avoided.[88]

It is therefore understandable that, in principle, both choice of law and court in contractual matters are most widely permitted by the lawmaker as choice architect granting party autonomy. The regulating design sets the standards for choosing to ensure that the parties are certain about their choice. This nudges them towards a beneficial agreement in the sense that it does not harm them, but otherwise there is no need for restriction by the lawmaker. In matters other than obligations, where third parties are concerned, however, choice has to be more narrowly designed by a more restrictive choice architecture, such as for torts and even more so for property and matrimony. Such design seeks to prevent negative externalities arising for others, and it nudges the parties to an applicable law and international jurisdiction which is mainly determined by objective connecting factors.

V. Requirements of Transparent and Choice-Preserving Design

Adopting the perspective of behavioural economics in private international law and understanding objective connecting factors as defaults and subjective connecting factors as choice architecture requires a response to existing criticism levelled against nudging. The two most prominent lines of criticism will first be introduced and then be addressed with regard to the conception of the connecting factors in the Rome and Brussels Regulations. This will demonstrate that nudges need to be designed in a transparent and choice-preserving manner.

To start with the strongest criticism, nudges are seen by some as secret manipulation, abusing people's cognitive limitations and exploiting their imperfections and weaknesses, which is deemed to be more threatening to their autonomy than overt coercion.[89] This stark

[88] Specifically for private international law: *Eidenmüller / Stark*, Behavioural economics (n. 7), 176. See also *Basedow*, Law of Open Societies (n. 56), no. 238. This problem has already been recognised in the neoclassical economic analysis: *Kagami*, Systematic Choice of Legal Rules (n. 85), 27f.; *Schäfer / Lantermann*, Choice of Law from an Economic Perspective (n. 58), 100ff.; *Michael J. Whincop / Mary Keyes*, The Market Tort in Private International Law, 19 Northwestern J. Int'l L. & Bus. 215–271, 250 (1999).

[89] This is addressed by *Thaler / Sunstein*, Nudge (n. 17), 244ff. with reference to John Rawls' publicity principle. Further: *Luc Bovens*, The Ethics of Nudge, in: Preference Change, ed. by Till Grüne-Yanoff / Sven Ove Hansson (2009), 207–219, 216f.; *Daniel M. Hausman / Brynn Welch*, Debate: To Nudge or Not to Nudge, 18 J. Pol. Phil. 123–136, 128ff. (2010); *Evan Selinger / Kyle Whyte*, Is There a Right Way to Nudge? The Practice and Ethics of Choice Architecture, 5 Soc. Compass 923–935, 928ff. (2011). Also see, for instance, *Markus Englerth / Emanuel V. Towfigh*, Verhaltensökonomik, in: Ökonomische Methoden im Recht[2], ed. by Emanuel V. Towfigh / Niels Petersen (2017), 237–276, 269f.; *Hacker*, Verhaltensökonomik (n. 66), 273ff. For a very critical account,

allegation however raises the important point that nudges need to be transparent, otherwise nudging would most likely be futile, if not inappropriately intrusive. Although nudges are intended to subtly influence people's behaviour, the subtlety of their effect on people should not be mistaken for justifying secrecy of their enactment by the lawmaker. Rather, nudges should be clearly and openly adopted where suitable for the design of default rules and the regulation of choice. Nudging cannot be used as an excuse for reducing the attention legal prescription receives from the lawmaker and in the public debate; enacting a legal ruleset as choice architecture or as a default rather than as a mandatory regime does not make justification dispensable.[90] However, the requirement of legislative and public awareness does not necessarily need to correspond with individual cognisance by a private party in the specific case. Private parties may or may not be aware of being nudged; this can be openly acknowledged when accepting the existence of bounded rationality, which is precisely to be counteracted by nudging, and it is acceptable if nudging is transparently enacted.

The second criticism, less blatant but perhaps even more important for the application in private international law than the issue of transparency, demands that the lawmaker has to take into consideration that default rules are potentially 'sticky'.[91] Due to the omission bias and endowment effect, i.e. people's tendency to avoid active choices, default arrangements may have a strong direct distributive effect.[92] This can lead to problematic outcomes in situations where private parties who could have done better did not take action.[93] Moreover, due to socioeconomic constraints, the costs of opting out can be a burden for weaker parties.[94] Therefore, the design of default rules has to accommodate the need to provide sufficient opportunity for breaking away from them, so that they are not too restrictive.[95]

These two major concerns about nudges can be translated into the requirements that private international law needs to contain transparent default rules and to engage in choice architecture which allows deviating from the defaults. The following sections will explore how the current regime in EU private international law can be understood as addressing these requirements, and

see: *Till Grüne-Yanoff*, Old wine in new casks: libertarian paternalism still violates liberal principles, Soc. Choice & Welfare 38 (2012), 635–645, 636ff.

[90] Cf *Ryan Bubb / Richard H. Pildes*, How Behavioral Economics Trims Its Sails and Why, 127 Harv. L. Rev. 1593–1678, 1616ff. (2014), who critically discuss the example of retirement policy.

[91] Ibid, 1647ff.; *Zamir / Teichman*, Behavioral Law and Economics (n. 1), 179f. Also, from a neoclassical economic perspective: *Omri Ben-Shahar / John A. E. Pottow*, On the stickiness of default rules, 33 Fla. St. U. L. Rev. 651–682 (2006). Further, for instance, *Cziupka*, Dispositives Vertragsrecht (n. 28), 332ff.

[92] *Mitchell*, Libertarian Paternalism (n. 25), 1269ff.; *Schmolke*, Grenzen der Selbstbindung (n. 27), 234; *Zamir / Teichman*, Behavioral Law and Economics (n. 1), 181.

[93] *Brigitte C. Madrian*, Applying Insights from Behavioral Economics to Policy Design, 6 Ann. Rev. Econ. 663–688, 668ff. (2014). See also *Bubb / Pildes*, Behavioral Economics (n. 90) 1616ff.

[94] *Zamir / Teichman*, Behavioral Law and Economics (n. 1), 181.

[95] Ibid, 182.

they will point out which additional insights can be gained from behavioural economics for future amendment. What will also be considered – but will be rejected – is the introduction of a mandated choice system.

In terms of the current design, transparency of defaults in private international law is in principle accomplished by providing for both specific (or primary) and general (or residual) objective connecting factors. Specific objectives factors predetermine the applicable law or international jurisdiction for certain areas, such as the Rome I Regulation's default that the law of the country where the seller is habitually resident shall apply to an international contract for the sale of goods. In this respect, the sector-specific default for international contracts and similarly other specific factors for other areas not only help private parties to anticipate the governing law and likewise the international jurisdiction; but, most importantly from the perspective of behavioural economics, the specific defaults can help private parties to determine for themselves whether they would prefer to opt out and choose a different law or court. The specific defaults are supplemented by general connecting factors, which refer, for instance, to the closest connection or other factors of proximity and are residual compared to primary objective factors. This setup not only ensures that the safety net does not have any holes and that private parties are not lost in cases where no specific objective connecting factor is applicable; it also generally informs private parties about the steering direction set by the lawmaker and thereby ensures predictability for cases which have not received specific attention.

In turn, by establishing clear validity requirements for exercising party autonomy, the choice architecture of EU private international law contributes to transparency of nudging and creates opportunities for deviating from the defaults: the Rome I Regulation and the Rome II Regulation stipulate that "the choice shall be made expressly" (or "shall be expressed", respectively), and allow alternatively that it is sufficient for the choice to be "clearly demonstrated" (or "demonstrated with reasonable certainty", respectively) by the terms of the contract or the circumstances of the case.[96] The Rome I Regulation further sets out detailed requirements, such as for partial choice and future amendments,[97] and it submits the issue of consensual agreement about the choice to the chosen governing law;[98] these specifications are deemed to apply analogously under the Rome II Regulation.[99] Additionally, the Rome II Regulation requires that the choice agreement is made "after the event giving rise to the damage

[96] Art. 3 para. 1 Rome I Regulation; Art. 14 para. 1 Rome II Regulation.
[97] Art. 3 para. 1 and Art. 3 para. 2 Rome I Regulation.
[98] Art. 3 para. 5 Rome I Regulation.
[99] *Andrew Dickinson*, The Rome II Regulation (2010), no. 13.18.

occurred", unless "all the parties are pursuing a commercial activity".[100] These validity requirements set out a clear and not overly restrictive framework for a deviating choice of law whilst contributing to debiasing that choice.

Correspondingly, the Brussels Ia Regulation sets out in some detail the formal criteria for prorogation. Although the condition of a written agreement or evidence in writing seems strict at first,[101] there are plenty of possible alternatives which simplify breaking away from the defaults and accommodate the needs of international commerce: "communication by electronic means which provides a durable record of the agreement shall be equivalent to 'writing'",[102] and it also suffices to obey "a form which accords with practices which the parties have established between themselves" or "which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned."[103] The additional requirement of the Brussels Ia Regulation that the substantive validity of the prorogation agreement is to be determined in accordance with the law of the chosen jurisdiction might not instantly seem transparent; yet this requirement is the most choice-preserving way of setting substantive standards which have to be fulfilled by the parties' choice because these standards are essentially included in the choice and not objectively set by the choice architect.

Looking beyond this current state, it is worthwhile considering how the design of the choice architecture can further counteract the default 'stickiness'. Insofar as the design of defaults itself is concerned, reducing stickiness could additionally benefit, for instance, from putting the cost of deviation onto the cheapest cost avoider, which usually is the stronger party. This will, as indicated above, accommodate the need to counteract socioeconomic disadvantages of a weaker party in addition to psychological biases. In the extreme, this approach could suggest introducing a "penalty default rule"[104] design, which intentionally disadvantages the stronger party and requires it to provide information and to initiate the necessary steps for a valid deviation working to its advantage. However, the inherent common problems with this approach (who is stronger?, which information has to be provided?)[105] cannot easily be resolved

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[100] Art. 14 para. 1 Rome II Regulation.
[101] Art. 25 para. 1 lit. a Brussels Ia Regulation.
[102] Art. 25 para. 2 Brussels Ia Regulation.
[103] Art. 25 para. 1 lit. a and lit. b Brussels Ia Regulation.
[104] *Ayres / Gertner*, Economic Theory (n. 22) 95ff.; *Whincop / Keyes*, Economic Analysis (n. 55), 524ff., 535f. See also *Benjamin E. Hermalin / Avery W. Katz / Richard Craswell*, Contract Law, in: Handbook of Law and Economics, vol. I, ed. by A. Mitchell Polinsky / Steven Shavell (2007), 3–138, 88; *Whincop / Keyes*, Policy and Pragmatism (n. 5) 36ff.
[105] Cf *Whincop / Keyes*, Economic Theory (n. 62), 439f., 448.

by the lawmaker as choice architect, given that the lawmaker sets abstract-universal rules. Only if it was ensured that the costs related to providing information and settling on a choice of law or court were not disproportionate to the potential benefit from making a deviating choice, the default stickiness could be further reduced; otherwise, the imbalance would just swing the other way.

Another way of addressing the stickiness of defaults might be to increase choice-stimulating design. This could lead to a general discussion how the default design in EU private international law could promote more active choice, but it should not be misconstrued as forcing private parties into making choices. Beyond the current state of setting defaults and regulating the preserved space for choice, behavioural economics might open up the debate about how to increase the chance for rational and fair negotiation between the parties on a level playing field, so that defaults only have to be maintained as ultimate backups and as a real safety net. This would enable the parties to actively seek better solutions for their individual relationship if, and to the extent, they choose to do so. Without doubt, this requires further research into the benefits and risks of such amendments; yet this is outside the foundational aim of this paper, which seeks to establish the behaviourally informed perspective in private international law in principle.

Promoting greater active choice could go as far as suggesting that a mandated choice system is recommendable;[106] this must not be confused with the concept of 'overriding mandatory provisions' which apply regardless of the governing law and whether or not the law is chosen. Under a mandated choice system, parties would be further limited in their freedom insofar as they would be asked directly which available option they would prefer. They would choose a foreign law or jurisdiction only after having explicitly consented; otherwise, they would be requested to mandatorily 'choose' the option of submitting their legal relationship to the jurisdiction determined by an objective connecting factor. It is conceded that such a system would require extensive intellectual support of private parties in general and additional specific information in every individual instance.[107]

However, apart from the obvious practical challenges of implementing these accompanying measures effectively, a mandated choice system would limit individual freedom more than is necessary without a compensating benefit for the individuals or the public. It would

[106] Suggested, for instance, by *Karampatzos*, Private Law (n. 14), 77ff. Modelled on organ donation systems: *P. Chouhan / H. Draper*, Modified mandated choice for organ procurement, J. Med. Ethics 29 (2003), 157–162; *Ann C. Klassen / David K. Klassen*, Who Are the Donors in Organ Donation? The Family's Perspective in Mandated Choice, 125 Ann. Intern. Med. 70–73 (1996).

[107] Cf, for a critical discussion with further examples: *Jens Damgaard Thaysen / Andreas Albertsen*, Mandated Choice Policies: When Are They Preferable?, Political Research Quarterly [forthcoming].

make cross-border relations even more complex, making it mandatory to choose instead of relying on the otherwise objectively applicable law and on objectively determined international jurisdiction in the absence of a truly voluntary choice. Private parties might not even realise that they are interacting cross-border, which is not a problem if they can easily rely at any time on the safety net of defaults; yet, under a mandated choice system, a complication arises if a mandatory choice was missed or turns out to be imperfect. Therefore, state intervention would be required more often, even preventatively, and this would most likely be stipulating stricter formal requirements for the mandatory choice, which would significantly increase transaction costs and reduce transaction speed. Finally, introducing a mandated choice system in private international law is not even attractive for the legislator. Asking individuals to make a mandatory choice about their cross-border legal relationship would produce the wrong impression that the lawmaker is promoting derogation from its national substantive law and jurisdiction.

All these disadvantages of a mandated choice system are avoided by nudges which come in the shape of open defaults accompanied by an accessible choice architecture. As long as the design is transparent and choice-preserving, it is capable of facilitating beneficial outcomes for the parties through nudging, without disproportionately restrictive intervention by the state.

VI. Connecting Factor Modifications for Consumer Protection

Applying behavioural economics to private international law, it is particularly illustrative to analyse the example of consumer protection and the modifications in the design of default rules and choice architecture for this area. Although consumers are not the only group receiving special attention in the conflict of laws and international jurisdiction (others include employees,[108] for instance), their protection is worth examining not only because of the high practical importance of the topic. First and foremost, it seems fair to say that they are most prone to be affected by the consequences of bounded rationality in cross-border cases, which can help to explain why they receive the most refined normative protection in comparison to the ordinary rules of EU private international law. The semi-compulsory regime for consumer protection in EU private international law can be construed as nudging them in a way which prevents (potentially biased) choices to the consumers' detriment, yet does not restrict their freedom to agree to a beneficial choice.

[108] Art. 8 Rome I Regulation; Arts. 20ff. Brussels Ia Regulation.

Choice of law for consumer contracts is restricted in terms of substance, a restriction established on the European level by the 1980 Rome Convention[109] and was developed further in the Rome I Regulation.[110] The restrictions apply if a professional contracting party pursues its activities in the country of the consumer's habitual residence or has directed its activities to that country.[111] Then the choice is, in principle, limited by the semi-compulsory regime insofar as the choice may not result in depriving the consumer of the protection granted by mandatory provisions of the law which would apply if there was no choice.[112] This requires an issue-by-issue analysis of the individual case,[113] so that a combined regime is essentially applicable to the individual case.[114] Where the subjectively chosen law is less advantageous for the consumer concerning one particular issue, the governing law is not the chosen one but rather objectively determined, which means that the law of the country where the consumer is habitually resident is applicable.[115] However, where the validly chosen law favours the consumer, the choice takes priority over any objective determination. What has to be noted is that this preferential treatment is limited because under the choice architecture of the Rome I Regulation certain types of contracts are excluded from this sketched regime of consumer protection, for instance most real estate and tenancy contracts.[116] Outside the scope of these restrictions, the ordinary objective connecting factors determine the applicable law, namely subjectively the chosen law or objectively the law of the place of the party performing the characteristic obligation or, as a last resort, the law of the closest connection.[117]

Similarly, for international jurisdiction over consumer contracts, the Brussels Ia Regulation establishes rules in favour of the consumer provided that, in principle, the contract has been concluded by the consumer with a professional party who pursues activities in the Member State of the consumer's domicile or directs its activities to that Member State.[118] Then, the "consumer may bring proceedings against the other party to a contract either in the courts of the Member State in which that party is domiciled or, regardless of the domicile of the other

[109] Art. 5 1980 Rome Convention. On the historic background, see: *Ole Lando*, Consumers Contracts and Party Autonomy in the Conflict of Laws, Nordic Journal of International Law 19 (1972), 208–219.

[110] Art. 6 Rome I Regulation.

[111] Art. 6 para. 1 lit. a and lit. b Rome I Regulation.

[112] Art. 6 para. 2 Rome I Regulation. On this, see for instance: *Richard Plender / Michael Wilderspin*, The European Private International Law of Obligations[5] (2019), nos. 9-064ff.

[113] *Giesela Rühl*, Consumer Protection in Choice of Law, 44 Cornell Int'l. L. J. 569–601, 591 (2011).

[114] *Giesela Rühl*, The Protection of Weaker Parties in the Private International Law of the European Union: A Portrait of Inconsistency and Conceptual Truancy, J. Priv. Int. L. 10 (2014), 335–358, 352.

[115] Art. 6 para. 1 Rome I Regulation.

[116] Art. 6 para. 4 Rome I Regulation.

[117] Art. 6 para. 3 and Art. 4 Rome I Regulation.

[118] Art. 17 para. 1 lit. c Brussels Ia Regulation; the only counter-exceptions lit. a and lit. b relate to special cases of payment by instalments.

party, in the courts for the place where the consumer is domiciled."[119] Conversely, however, proceedings against the consumer may only be brought "in the courts of the Member State in which the consumer is domiciled".[120] Deviation from either of these consumer jurisdiction provisions by way of a choice of court agreement is, in principle, only valid if the choice is made "after the dispute has arisen",[121] unless both the consumer and the other party choose the courts of the Member State in which they are both domiciled at the time[122] or the chosen courts are only extending the possible jurisdictions.[123]

For torts and similar non-contractual obligations, whilst there are no protective jurisdictional provisions for consumers, the choice of law is comparably restricted in terms of time by the Rome II Regulation.[124] Where not all parties to a non-contractual obligation are pursuing commercial activities – essentially where a consumer is involved – the governing law may only be chosen "after the event giving rise to the damage occurred". The wording of the Regulation does not refer to the term 'consumer', but the personal scope of the time restriction is roughly congruent with the consumer protection idea;[125] the reason is that consumers do not commit torts in their 'consuming' capacity.

However, despite the apparent acceptance of consumer protection as an important and valid policy also in private international law, its justification has been less clear so far. Consumers are commonly referred to as requiring protection because they are seen as the "weaker" parties when dealing with parties who act in a professional or commercial capacity.[126] Drawing on lines of reasoning that have been pursued to date, consumers are considered to be put at a potential disadvantage due to information asymmetries and lack of negotiating and bargaining power.[127] Therefore, due to market failure, negative externalities arise to the detriment of the consumer.

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[119] Art. 18 para. 1 Brussels Ia Regulation.
[120] Art. 18 para. 2 Brussels Ia Regulation.
[121] Art. 19 para. 1 Brussels Ia Regulation.
[122] Art. 19para. 2 Brussels Ia Regulation.
[123] Art. 19para. 3 Brussels Ia Regulation. Cf *Rühl*, Protection of Weaker Parties (n. 114), 355f.
[124] Art. 14para. 1 Rome II Regulation.
[125] *Dickinson*, Rome II Regulation (n. 99), no. 13.37; *Rühl*, Protection of Weaker Parties (n. 114), 340.
[126] See, particularly, Recital 23 Rome I Regulation and Recital 31 Rome II Regulation. Cf *María Campo Comba*, The Law Applicable to Cross-border Contracts involving Weaker Parties in EU Private International Law (2021), 15ff.
[127] *Shmuel I. Becher*, Asymmetric Information in Consumer Contracts: The Challenge That Is Yet to be Met, 45 Am. Bus. L. J. 723–774 (2008); *Fernando Gomez*, EC Consumer Protection Law and EC Competition Law: How Related are They? A Law and Economics perspective, in: The Forthcoming EC Directive on Unfair Commercial Practices, ed. by Hugh Collins (2004), 187–208, 198ff.; *Rühl*, Protection of Weaker Parties (n. 114), 343f.; *Rühl*, Party Autonomy (n. 87), 153, 180ff.; *Giesela Rühl*, Consumer Protection (n. 113) 573ff.; *Thomas Wein*, Consumer Information Problems – Causes and Consequences, in: Party Autonomy and the Role of Information in the Internal Market, ed. by Stefan Grundmann / Wolfgang Kerber / Stephen Weatherill (2001), 80–97.

Indeed, particularly in private international law, gaining knowledge and making rational decisions about the applicable law or international jurisdiction is highly complex, and consumers will almost never have sufficient information. Seeking expert advice in order to climb onto a level playing field with the professional counterparty is often impossible or, speaking in economic terms, only available at disproportionate cost to the individual product value or the benefit of the cross-border legal relation. Requiring professional parties to provide information to the consumer, assuming this could be sufficiently debiasing and enabling for the consumer,[128] is most likely counterproductive because the requisite amount of information can well be overwhelming; the good intentions would backfire and result in an information overload, which would leave the consumer stuck with the paradox of choice.[129] In any case, information about all the available options might even lead to disadvantageous or sub-optimal choices.[130] This risk is particularly high where it would, even by rational standards, be inefficient to read and follow vast quantities of given information when rational ignorance is preferable.[131]

From the perspective of behavioural economics, the necessity of a modified choice regime for consumers may be better explained. Accepting the bounded rationality of humans, and particularly of consumers,[132] the lawmaker can be seen to counteract it by providing for specially designed nudges. As providing information does not guarantee beneficial outcomes, there is the need for well-designed default rules and choice limitations.[133] Such a framework

[128] *O'Hara / Ribstein*, Conflict of Laws and Choice of Law (n. 85), 103; *Ribstein*, Choosing Law (n. 85) 257f.

[129] *Shmuel I. Becher*, Behavioral Science and Consumer Standard Form Contracts, 68 La. L. Rev. 117–179, 167ff. (2007); *Edward Cartwright*, Behavioral Economics[3] (2018), 468; *Gillian K. Hadfield / Robert Howse / Michael J. Trebilcock*, Information-Based Principles for Rethinking Consumer Protection Policy, J. Consum. Policy 21 (1998) 131–169, 145; *Barry Schwartz*, The Paradox of Choice (2004).

[130] *Russell Korobkin*, Bounded Rationality, Standard Form, Contracts, and Unconscionability, 70 U. Chi. L. Rev. 1203–1295 (2003). Also see *Stefan Bechtold*, Die Grenzen zwingenden Vertragsrechts (2010), 48ff.; *Horst Eidenmüller*, Der homo oeconomicus und das Schuldrecht: Herausforderungen durch Behavioral Law and Economics, JZ 2005, 216–224, 221; *Hacker*, Verhaltensökonomik (n. 66), 116ff.; *Herbert Wiedemann / Rolf Wank*, Begrenzte Rationalität – gestörte Willensbildung im Privatrecht, 340–345, 345.

[131] *G. Marcus Cole*, Rational Consumer Ignorance: When and Why Consumers Should Agree to Form Contracts without Even Reading Them, 11 J. L. Econ. & Pol'y 413–462 (2015). Specifically for private international law: *Eidenmüller / Stark*, Behavioural economics (n. 7), 171.

[132] Specifically for private international law: *Eidenmüller / Stark*, Behavioural economics (n. 7), 177. See also *Becher*, Behavioral Science (n. 129); *Edward L. Glaeser*, Paternalism and Psychology, 73 U. Chi. L. Rev. 133–156 (2006); *Alan Schwartz*, How Much Irrationality Does the Market Permit?, 37 J. Leg. Stud. 131–159 (2008). Further *Richard A. Epstein*, Behavioral Economics: Human Errors and Market Corrections, 73 U. Chi. L. Rev. 111–132 (2006).

[133] For an overview of imaginable policies and models, see: *Jonathan Hill*, Cross-Border Consumer Contracts (2008), nos. 12.10ff.; furthermore *Campo Comba*, The Law Applicable to Cross-border Contracts (n. 126), 100ff. Generally on behavioural economics and the problem of providing information for consumer protection: *Oren Bar-Gill*, Consumer Transactions, in: The Oxford Handbook of Behavioral Economics and the Law, ed. by Eyal Zamir / Doron Teichman (2014), 465–490, 478ff. See also *Rainer Baisch*, Nudging: Information, Choice Architecture and Beyond, in: Nudging – Possibilities, Limitations and Applications in European Law and Economics, ed. by Klaus Mathis / Avishalom Tor (2016), 217–246, 225 ff.; *Anne-Lise Sibony*, Can EU Consumer

enables consumers to make better decisions because they can rely on a safety net and can focus on a limited set of options. It is in line with this approach that the law or jurisdiction of the habitual residence or domicile of the consumer is set as default for contracts and related litigation.[134] It turns the cross-border scenario into a 'home game' for the consumer, which either automatically reduces any existing information asymmetries or shifts the burden to the stronger professional contracting party, who can better deal with any challenges, as this party usually is the cheapest cost avoider.[135]

However, behavioural economics do not suggest unlimited consumer protection. Rather, a fair balance has to be struck between the need for special protection against exploitation of the consumer's bounded rationality on the one hand and the legitimate interests of a professional party to trade freely on the other hand. Different paths are viable in order to achieve a balanced choice architecture. For instance, timing can be crucial for making sensible decisions. Taking the example of the restrictions on choice of law for cross-border torts involving a consumer, a temporal limitation naturally cannot influence the place of the tort and subject the case to the consumer's home jurisdiction, but it can potentially prevent a detrimental decision made in advance that is affected by the consumer's over-optimism. Therefore, it does matter for consumers that their choice is only valid if made after the damage occurred.[136] Such design features of the choice architecture also protect third parties and the general public,[137] and they can additionally help to protect against manipulation of the factual basis by the professional party.

Choice architecture can also ensure a well-balanced consumer protection by taking account of the place of the transaction, namely where the professional activities are pursued or directed to. This is applied with regard to choice of law and court for consumer contracts. If the activities leading to the transaction are pursued in or directed to the consumer's jurisdiction by the professional party, then it is reasonable to protect the consumer, who has not sought to act across borders, against a detrimental choice of law or court by imposing strict limitations.

Law Benefit From Behavioural Insights? An Analysis of the Unfair Practices Directive, ERPL 6 (2014), 901–941, 902ff.

[134] *Hill*, Cross-Border Consumer Contracts (n. 133), nos. 12.16ff.; *Peter Mankowski*, Consumer Contracts under Article 6 of the Rome I Regulation, in: Le nouveau règlement européen Rome I relatif à la loi applicable aux obligations contractuelles, ed. by Eleanor Cashin Ritaine / Andrea Bonomi (2008), 121–160, 142f; *Francesca Ragno*, The Law Applicable to Consumer Contracts under the Rome I Regulation, in: Rome I Regulation, ed. by Franco Ferrari / Stefan Leible (2009), 129–170, 144ff.

[135] *Mankowski*, Consumer Contracts (n. 134), 142.

[136] *Th. M. de Boer*, Party Autonomy and Its Limitations in The Rome II Regulation, Yb. Priv. Int'l L. IX (2007) 19–29, 27f.; *Dickinson*, Rome II Regulation (n. 99), nos. 13.34ff.; *Symeon C. Symeonides*, Rome II: A Centrist Critique, Yb. Priv. Int'l L. IX (2007) 149–174, 170f.

[137] *Dickinson*, Rome II Regulation (n. 99), no. 13.27; *Thomas Kadner Graziano*, Freedom to Choose the Applicable Law in Tort – Articles 14 and 4(3) of the Rome II Regulation, in: The Rome II Regulation on the Law Applicable to Non-Contractual Obligations, ed. by John Ahern / William Binchy (2009), 113–132, 122f.

Otherwise, if the consumer is intentionally reaching out to a foreign professional party, the consumer cannot expect special protection; in that case, the jurisdictional safety net only consists of the ordinary connecting factors which are applicable to everybody and accommodate basic protection against negative effects of bounded rationality. Particularly in comparison to the more restrictive choice regime for consumer contracts under US-American private international law,[138] and in comparison to the original suggestion of the European Commission to prohibit choice of law for consumer contracts,[139] the adopted EU semi-compulsory regime does not one-sidedly discriminate against international business for the sake of counteracting bounded rationality of consumers.[140]

VII. Conclusion

Amending the traditional economic analysis and its assumption of rational decision-making in pursuit of efficiency, behavioural economics contribute a more realistic understanding of private international law. It acknowledges psychological biases which private parties are facing when dealing with complex cross-border cases. From this new perspective, the connecting factors employed in EU private international law to determine the applicable law and international jurisdiction can be construed as nudges, through which the lawmaker influences the objectively or subjectively made decision about which law or court a case is subjected to. This paper has shown how the lawmaker engages in a design of the connecting factors to counteract bounded rationality through the configuration of default rules and choice architecture.

Objective connecting factors in the Rome and Brussels Regulations, such as the habitual residence or domicile of a particular party to the case in addition to more specific factors, are relied upon in the absence of a valid choice of law or court by the parties. These objective connecting factors can be understood as the lawmaker's nudges towards a predetermined jurisdiction for the benefit of the parties, and not merely for the sake of individual efficiency. Behavioural economics appreciate that objective connecting factors are majoritarian default rules, but unlike the traditional economic understanding of this term and its hypothetical consensus explanation, the new perspective can openly acknowledge that default rules are set by the lawmaker, who is legitimised by the majority, as a form of libertarian paternalism. Yet,

[138] Cf *Jacques Delisle / Elizabeth Trujillo*, Consumer Protection in Transnational Contexts, 58 Am. J. Comp. L. 135–164, 144ff. (2010); *Rühl*, Party Autonomy (n. 87), 167ff.

[139] European Commission, Proposal for a Regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I), COM(2005)650 final, Art. 5 para. 1.

[140] See also *Karampatzos*, Private Law (n. 14), 60f.

because of their characteristic as a safety net, which still allows the parties to make deviating arrangements, the objective connecting factors are defaults which are both choice-preserving and debiasing decisions without being coercive.

Subjective connecting factors, which enable and regulate party autonomy with regard to choice of law and court, are to be conceived as choice architecture from the perspective of behavioural economics. This understanding is to be preferred to previous explanations which draw on a naturalist or positivist reasoning in analogy to substantive private autonomy or solely proclaim individualist freedom striving for efficiency. By ensuring a choice-preserving design which complements the default rules, the lawmaker can be understood to pursue nudging by providing for a suitable and legitimised choice architecture that steers the choice of law and court. From this perspective, the regulation and limitations of party autonomy are to be seen as measures of libertarian paternalism which intend to protect private parties from their own fallibility and from exploitation by others when making choices.

In response to existing criticism against nudging as a form of libertarian paternalism, the requirements of transparent and choice-preserving design have proved particularly important. They are met by providing for specific and general defaults (sector-specific and residual objective connecting factors) alongside a choice architecture with clear validity requirements for deviation from the defaults. Default stickiness can potentially be further reduced by counteracting the socioeconomic burden of deviation and shifting it onto the cheapest cost avoider, perhaps by considering the introduction of proportionate penalty default rules. Additional measures can be imagined enabling rational and fair negotiations between private parties on a level playing field. However, the concept of a mandated choice system under which parties are made to choose does not fit into private international law; it would put undue pressure on individual freedom and would give the false impression to private parties that the state recommends choosing a foreign jurisdiction, instead of ensuring that those private parties who do not want to make choices can rely on defaults as a safety net.

Applying behavioural economics in private international law has proved particularly useful in the area of consumer protection because it can better explain why the choice of law and court is restricted by the Rome and Brussels Regulations. Amending the traditional justifications, which are only concerned with information asymmetries and lack of negotiating and bargaining power, behavioural economics appreciate that limitations need to be placed on consumers who are most prone to be affected by bounded rationality when making decisions about cross-border cases. Beyond prescribing duties to provide information, modified default rules and the corresponding choice architecture enable consumers to make better decisions because the cross-border scenario is turned into a ‘home game’ by default, with a limited scope for deviation. The balance between consumer and international business interests is struck by taking account of the timing of a deviating choice or by considering whether it is the professional party who pursues its activities in the country of the consumer’s residence rather than the consumer engaging in transactions abroad.