

Schwerpunktbereich

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LL.M. Exam Paper in Private International Law (Conflict of Laws)

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Increasingly, German law faculties offer modules in English in their Schwerpunkt or LL.M. programmes. In order to support students taking Private International Law, this two-hour exam paper showcases a typical problem question and recommends a way of answering the various issues concerning the conflict of laws. Similar to the syllogistic Gutachtenstil used for exams written in German, the model answer adopts the equivalent IRAC style (Issue, Rule, Application, Conclusion).¹ In line with the Continental tradition of Civil Law, the modal answer is primarily based on the application of the relevant statutory law and supplements this with case law and scholarship in the footnotes.

Keywords: Private International Law, Conflict of Laws, Problem Question, LL.M. Exam Paper, Applicable Law, Rome Regulations

PROBLEM QUESTION FACTS

M, an Austrian company with offices in Vienna, Berlin and Madrid, operates an online movie streaming service, Maxfix. M's standard terms and conditions include a clause that any disputes shall exclusively be decided by the courts in Vienna.

S, who is Nigerian and moved to Berlin to complete her LL.M. in international dispute resolution, signed up to Maxfix in October last year. M offered several tariffs, for in-

stance the Basic tariff for 9€/month, which allows customers to use the service on one personal device at a time in standard definition video quality, and a Commercial tariff for 635€/month with much more extensive screening possibilities and 4K high definition video quality. S chose the Basic tariff when signing up.

From time to time, S helps out in a bar near the university. One evening, after talking to some guests about her favourite movie of all times, she logs into the bar's smart TV to show them the best scenes. The following nights, this becomes quite a regular event and more and more people attend.

S is very surprised when she receives a letter from M demanding payment of 635€ for the month. The letter states that M detected commercial use of Maxfix at the bar through the account of S, for which the higher amount would be due because of an adjustment of the contractual tariff category and M's intellectual property rights. S asserts that, under German law in contrast to Austrian law, the rules on standard terms and conditions do not permit charging a higher contract price unless this has been explicitly agreed.

Task: Determine the law(s) applicable to the dispute between M and S, which is brought before the court of Vienna.

Note: Austria, Germany, the Netherlands, and Spain are EU Member States and CISG Contracting States; Nigeria is neither. The jurisdiction of the Viennese court is accepted by S and Austrian procedural law permits concurrent claims in contract and tort. Assume that no international convention on intellectual property rights is relevant in this case.

MODEL ANSWER

M sues S for payment of 635€ in the court of Vienna, whose jurisdiction to adjudicate the claim has been accepted, Article 26 Brussels Ia Regulation.² For this cross-border dispute,

¹ See, for instance, Charles R Calleros and Kimberly YW Holst, *Legal Method and Writing I* (9th edn, Wolters Kluwer 2022) 86 ff.

Article note: A modified version of this exam paper was set for the students of the course on Private International Law as part of their LL.M. degree in International Dispute Resolution at Humboldt University Berlin, 2023.

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² 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 (recast) ('Brussels Ia Regulation') [2012] OJ L351/1; see further Andrea Bonomi, 'Jurisdic-

the applicable law(s) will have to be determined in accordance with the conflict of laws regime of the court seized, unless international uniform law applies.

I. Characterisation of M's claim(s)

In order to identify relevant instruments of international uniform law and/or the relevant conflict of laws instrument, the claim(s) pursued by M will have to be characterised first. Since the subsequent analysis will mainly draw on EU Regulations, the relevant concepts and terms have to be understood and interpreted in a European-autonomous manner in line with the EU provisions and the case law by the Court of Justice of the European Union (CJEU).

M demands the payment of 635 €, according to the letter sent to S, »because of an adjustment of the contractual tariff category and M's intellectual property rights.« On the one hand, M claims a remedy for violation of obligations to which S freely consented. This suggests that there is a contractual claim.³ On the other hand, M seeks payment as compensation for the alleged infringement of intellectual property, which can be characterised as a non-contractual claim.⁴

According to the procedural *lex fori* of the Viennese court, M can pursue both claims concurrently (as long as there is no double compensation).⁵ The law applicable to each claim will have to be determined in turn.

tion over Consumer Contracts', in Andrew Dickinson et al (eds), *The Brussels I Regulation Recast* (OUP 2015), para 6.89. Therefore, it does not have to be discussed here whether S has entered into the contract with M as a consumer or not.

³ In the context of Art. 1(1) 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') [2008] OJ L177/6, see CJEU, Joined Cases C-359/14 and C-475/14 *ERGO Insurance v If P&C Insurance and Gjensidige Baltic v PZU Lietuva* ECLI:EU:C:2016:40, para 44.

⁴ In the 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') [2007] OJ L199/40, there are specific provisions in Art. 8, see below.

⁵ In contrast to, for instance, French courts, which follow the *non cumul* principle, see comparatively Christian von Bar and Ulrich Drobnig, *The Interaction of Contract Law and Tort and Property Law in Europe* (Sellier 2004), 198 ff.; the criticism by Adrian Briggs, 'Choice of choice of law?' [2003] LMCLQ 12 is, for instance, addressed by Sagi Peari and Marcus Teo, 'Justifying Concurrent Claims in Private International Law' (2023) 82 Cambridge Law Journal 138 in the light of the recent CJEU decision on jurisdiction in Case C-59/19 *Wikingerhof v Booking.com* ECLI:EU:C:2020:950.

II. M's contractual claim

For M's contractual claim, it will be briefly analysed first whether the international uniform law of the Convention on Contracts for the International Sale of Goods (CISG) might apply to this contract.⁶ If not, the Viennese court might employ the Rome I Regulation to determine the national law governing the claim of contractual liability.

1. CISG

Territorially, the CISG has been ratified by both Austria and Germany, where M and S are respectively resident, Article 1 (1)(a) CISG. It is irrelevant that S is a citizen of Nigeria, which is not a Contracting State of the CISG.

Substantively, the CISG only applies to contracts for the sale of goods (Article 1(1) CISG) and, to some extent, to contracts for the supply of goods to be manufactured or produced (Article 3 CISG). 'Goods' do not necessarily have to be corporeal, which means that the CISG can also apply, for instance, to contracts for the sale of software products if the property over the software is permanently transferred to the buyer; the CISG, however, does not apply to arrangements where the customer only gets a temporary benefit from the provision of a service in exchange for the payment of a subscription fee.⁷ The streaming contract between M and S falls into the latter category and is thus outside the scope of the CISG. Hence, the CISG does not apply here.

Therefore, it does not have to be discussed whether the CISG would personally apply to the contract between M and S, who might or might not have entered into the contract for personal or household use, which would lead to an exclusion of the CISG's applicability under Article 2(a) CISG.

2. Rome I Regulation

The Viennese court might rely on the Rome I Regulation to determine the governing law.

This Regulation applies territorially to the claim pursued in the courts of Austria as an EU Member State, Article 288 Treaty on the Functioning of the European Union

⁶ United Nations Convention on Contracts for the International Sale of Goods (adopted 11 April 1980, entered into force 1 January 1988) 1489 UNTS 3 (CISG).

⁷ Ingeborg Schwenzer and Ulrich G. Schroeter, 'Article 1 CISG: Sphere of application' in Ingeborg Schwenzer (ed), *Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods (CISG)* (4th edn, Oxford University Press 2016), para 17 ff.

(TFEU). Since the claim has been characterised as concerning contractual obligations in civil and commercial matters (Article 1(1) Rome I Regulation), which are not excluded (Article 1(2) Rome I Regulation), and since the contract was concluded after 17 December 2009 (Article 28 Rome I Regulation), the Regulation applies both substantively and temporally, too.

The Regulation provides in principle for the determination of the applicable law either through choice of law by the parties, i.e. subjectively (Article 3 Rome I Regulation), or through objective connecting factors (Article 4 Rome I Regulation). Since a valid choice of law takes priority over any objective determination,⁸ the subjective determination will be addressed first. There are, however, modifications and limitations to both the subjective and objective determination of the applicable law in Articles 5–8 Rome I Regulation, which will have to be considered as far as relevant. Moreover, overriding mandatory provisions might be of relevance, Article 9 Rome I Regulation.

a) Subjective determination of the applicable law

For a valid choice of law, both an external and an internal agreement are required.

In terms of the external dimension, Article 3(1) Rome I Regulation stipulates that the agreement can be made expressly or implicitly (»clearly demonstrated by the terms of the contract or the circumstances of the case«). M and S have not included an express choice of law clause in their contract.

However, they did include a clause that any disputes shall exclusively be decided by the courts in Vienna. The exclusive choice of Viennese courts (prorogation) is a prime indication of an implicit choice of Austrian law. This is supported by Recital 12 of the Rome I Regulation, which can be drawn on for the interpretation of the Regulation: it states that »[a]n agreement between the parties to confer on one or more courts or tribunals of a Member State exclusive jurisdiction to determine disputes under the contract should be one of the factors to be taken into account in determining whether a choice of law has been clearly demonstrated.« It follows the assumption of *qui eligit forum vel iudicem eligit ius*.⁹ There are no other factors mentioned in the fact pat-

tern which would contradict the intention to make the law of the chosen Viennese court the applicable law. Therefore, an implicit choice of Austrian law can be inferred here.

In terms of the internal dimension of the agreement, the existence and validity of the consent of the parties as to the choice of the applicable law is to be determined in accordance with the law which would govern the contract if the choice was valid, Articles 3(5) and 10(1) Rome I Regulation. In other words, the putative law determines whether or not the choice is valid. In the present case, Austrian law is (implicitly) chosen and thus gets to decide whether or not the choice is materially valid. There is no indication to the contrary in Austrian law. Thus, it can be concluded that the choice is accepted by Austrian law. The choice of Austrian law is hence validly agreed upon by the parties in principle. This also means that it is unnecessary to consider any residual objective determination of the applicable law under Article 4 Rome I Regulation.

b) Modifications and limitations of the chosen law

However, the choice of Austrian law is potentially modified or limited by special rules of the Rome I Regulation. In particular, it has to be examined whether the rules on consumer protection in Article 6 Rome I Regulation apply. Article 6 Rome I Regulation applies if it is not substantively excluded and if the personal and situational requirements are met. If it applies, it restricts the effect of the choice of law. This is particularly important here since S has asserted that, under German law in contrast to Austrian law, the rules on standard terms and conditions would not permit charging a higher contract price unless this would have been explicitly agreed.

aa) Applicability of Article 6 Rome I Regulation

(1) Substantive exclusions

Initially, it has to be discussed whether Article 6 Rome I Regulation cannot be applied by virtue of its paragraph 4, which lists certain substantive exclusions. The only potentially relevant exclusion is subparagraph (a), which pertains to services contracts. Such contracts are excluded from Article 6 Rome I Regulation »where the services are to be supplied to the consumer exclusively in a country other than that in which he has his habitual residence.«

The Rome I Regulation defines the criterion of »habitual residence« only for businesses and natural persons acting in the course of their business activities at the place of

⁸ See Art. 4(1) Rome I Regulation: »To the extent that the law applicable to the contract has not been chosen in accordance with Article 3 ...«.

⁹ He who chooses the forum or the judge, chooses the law. See further Peter Mankowski, 'Article 3' in Ulrich Magnus and Peter Mankowski (eds), *European Commentaries on Private International Law: Rome I*, vol. 2 (Otto Schmidt 2017) para 122 ff.

their central administration or place of business in Article 19(1); a definition for natural persons is missing.¹⁰ What matters though is to identify the person's »centre of interests of a stable character.«¹¹ As Article 19(3) Rome I Regulation clarifies, «[f]or the purposes of determining the habitual residence, the relevant point in time shall be the time of the conclusion of the contract.»

S moved to Berlin for her LL.M. studies, and not only for a visit on a short-term basis. Spending an academic year to complete the course means that she has moved her centre of interests on a sufficiently stable basis to Germany. Her Nigerian citizenship is not relevant in this regard. Hence, the habitual residence of S is Germany.

M provides the online movie streaming service not only in Austria, but also in Germany. Thus, the service is not exclusively provided in a country other than Germany. The exclusion of Article 6(4)(a) Rome I Regulation does not apply, which means that the analysis of Article 6(1) and (2) Rome I Regulation can go ahead.

(2) Personal requirements

In terms of the personal requirements, Article 6 Rome I Regulation applies where »a contract [is] concluded by a natural person for a purpose which can be regarded as being outside his trade or profession (the consumer) with another person acting in the exercise of his trade or profession (the professional)«, Article 6(1) Rome I Regulation.

It has to be analysed first whether S has been acting as a consumer in a non-professional capacity. A consumer contract is European-autonomously defined by the CJEU as a contract »concluded for the purpose of satisfying an individual's own needs in terms of private consumption.«¹² On the

other hand, pursuing a professional activity is characterised by having an »immediate commercial aim and impact.«¹³ Offering services to third parties in return for remuneration is a strong indication of a professional activity. The burden of proof lies with the person seeking to establish that he or she acts in a non-professional capacity and thus qualifies as a consumer.¹⁴ Being a consumer and being a professional is mutually exclusive.¹⁵ A person who acts partly within and partly outside his or her professional role is considered to fall within the professional category, except where the professional aspect is negligible in the overall context.¹⁶ The relevant point for determining the contractual purpose is in principle at the time when the contract is concluded; however, if the initial consumer status changes later, akin to constituting a new contract,¹⁷ then the professional capacity might be affirmed.

As stated in the fact pattern, S chose the Basic tariff when signing up to Maxfix, which allows her to use the service on one personal device at a time in standard definition video quality only in contrast to the Commercial tariff with more screening possibilities and 4K high definition video quality. Also, the monthly charge of 9€, although technically irrelevant for determining the consumer capacity,¹⁸ is very moderate. This suggests that S – at least initially – acted in a non-professional capacity at the time when entering into the contract with M.

The critical question is whether this has changed when she started helping out in the bar near the university. In particular, the fact that she logged into the bar's smart TV to show customers some movie scenes on an increasingly regular basis, which has attracted more and more attendees, might suggest that her status has changed. However, there are several reasons why it is most plausible that she should still be regarded as a consumer. First, the professional aspect seems fairly negligible since using the streaming service in the bar is merely ancillary to using it for her personal enjoyment as a consumer. Secondly, it is important

10 Michael McParland, *The Rome I Regulation on the Law Applicable to Contractual Obligations* (Oxford University Press 2015) para 5.62 ff.

11 *Wrigley v Wood* [2014] EWHC 3684 (Comm), para 16; similarly, Francisco J Garcimartín Alférez, 'The Rome I Regulation: Much Ado about Nothing?' [2008] European Legal Forum I-61, I-69. Rule 19 in Lord Collins of Mapesbury (ed), *Dicey, Morris & Collins: The Conflict of Laws* (16th edn, Sweet & Maxwell 2022) states that 'an adult is, in general, habitually resident in the country in which he or she has established a residence which is his [or her] permanent or habitual centre of interests.' Without doubt, the concept of habitual residence has to be interpreted European-autonomously.

12 CJEU, Case C-269/95 *Benincasa v Dentalkit* ECLI:EU:C:1997:337, para 17; Case C-464/01 *Gruber v Bay Wa AG* ECLI:EU:C:2005:32, para 36; Case C-419/11 *Česká spořitelna v Feichter* ECLI:EU:C:2013:165, para 34; Case C-498/16 *Schrems v Facebook Ireland Ltd* ECLI:EU:C:2018:37, para 30; Case C-630/17 *Milivojević v Raiffeisenbank St Stefan-Jägerberg-Wolfsberg eGen* ECLI:EU:C:2019:129, para 88; Case C-208/18 *Petruchová v FIBO Group Holdings Ltd* ECLI:EU:C:2019:825, para 42; Case C-500/18 *AU v Reliantco Investments Ltd* ECLI:EU:C:2020:264, para 48; Case C-774/19 *AB v Personal Exchange Inter-*

national Ltd ECLI:EU:C:2020:1051, para 30 (all cases concern the Brussels regime on jurisdiction).

13 CJEU, Opinion of AG Bobek in Case C-498/16 *Schrems v Facebook Ireland Ltd* ECLI:EU:C:2017:863, para 59.

14 CJEU, Case C-464/01 *Gruber v Bay Wa AG*, para 46.

15 CJEU, Case C-498/16 *Schrems v Facebook Ireland Ltd*, paras 30–31, 39; Case C-774/19 *AB v Personal Exchange International Ltd*, paras 31, 38.

16 CJEU, Case C-464/01 *Gruber v Bay Wa AG*, paras 39 ff.; Case C-498/16 *Schrems v Facebook Ireland Ltd*, para 32; Case C-630/17 *Milivojević v Raiffeisenbank St Stefan-Jägerberg-Wolfsberg eGen*, paras 90 ff.

17 Lord Collins of Mapesbury (n 11) para 33-156.

18 CJEU, Case C-208/18 *Petruchová v FIBO Group Holdings Ltd*, paras 50–51; Case C-774/19 *AB v Personal Exchange International Ltd*, paras 33 ff.

to note that she is only occasionally helping out in the bar; the fact pattern does not suggest that she is employed there on a regular basis. It is neither suggested that she receives remuneration from the bar owner. Although she is showing movie scenes to third parties, namely the customers of the bar, she is neither paid by them directly nor benefits herself financially from creating any increase in the bar's popularity (and turnover). Thus, S is a consumer for the purposes of Article 6 Rome I Regulation.

M is acting in a professional capacity, providing the online movie streaming service.

(3) Situational requirements

Lastly, in terms of the situational requirements, the professional party must have directed its activities towards the country where the consumer is habitually resident, either by pursuing its commercial activities there or by directing its activities thereto (potentially among other countries), Article 6(1) Rome I Regulation. Furthermore, the contract must fall within the scope of such activities. It is generally accepted that a professional party »directs« its activities to the country of the consumer's habitual residence if it carries out those activities at a permanent or temporary place of business there.¹⁹

M not only operates in Austria; it also has offices in Germany (and Spain). Since S was habitually resident in Germany when signing up for Maxfix, it can be affirmed that M has directed its activities to the country of the consumer's habitual residence. It is therefore unnecessary to discuss further the details of what it means to direct activities thereto by other means.²⁰

Additionally, as mentioned, it is required that the contract must fall within the scope of such activities. This seems to be the case. Importantly, it is not necessary to show that there is a »causal link« between the means employed to direct the professional activity to the country of the consumer's habitual residence and the conclusion of the contract with that consumer.²¹ In other words, it does not matter whether S signed up to Maxfix via the German office of M (for instance, by using a website with the country domain «.de» for Germany) or via the Austrian headquarter office (using a website with the domain «.at» for Austria). Hence, the situational requirements are also fulfilled.

In conclusion, Article 6 Rome I Regulation applies.

bb) Restrictive effect of Article 6 Rome I Regulation on the choice of law

The effect of Article 6(2) Rome I Regulation is that it potentially restricts the applicability of the chosen law. While the professional party and the consumer are in principle free to choose the applicable law, as M and S have done here, the choice may essentially not have the result of depriving the consumer of the protection afforded to him or her by mandatory rules of the law of his or her habitual residence, Article 6(2) sentence 2 Rome I Regulation. Mandatory rules in this sense are rules which cannot be derogated from by agreement (but are not yet overriding mandatory provisions in the sense of Article 9(1) Rome I Regulation which are regarded as so »crucial by a country [...] that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable«).²² This means that the consumer may rely on either the rules of the chosen law or the mandatory rules of the law of his or her habitual residence, whichever are the more favourable to him or her.²³ In other words, Article 6(2) Rome I Regulation ensures that the consumer is protected by the mandatory rules which he or she is familiar with at his or her habitual residence despite his or her agreement to the choice of another law to govern the contract generally. The mandatory rules of the consumer's country of habitual residence provide the minimum standard of protection that must be afforded to the consumer. The analysis of *which* specific rule is more beneficial for the consumer requires »an issue-by-issue comparison between the chosen law and the mandatory law of the consumer's habitual residence«.²⁴ In consequence, if some mandatory rules are taken from the law of the consumer's habitual residence and the remaining rules are from the chosen law, Article 6(2) Rome I Regulation leads to a situation of a »law mix«²⁵ or *dépeçage* in the applicable law.

As established above, S is habitually resident in Germany. She has asserted that the German rules on standard terms and conditions do not permit charging her the higher Commercial tariff instead of the Basic tariff since only the

¹⁹ Lord Collins of Mapesbury (n 11) para 33-160.

²⁰ See Joined Cases C-585/08 and C-144/09 *Pammer v Reederei Karl Schlüter GmbH & Co KG* and *Hotel Alpenhof GesmbH v Heller* ECLI:EU:C:2010:273, paras 66 ff.

²¹ CJEU, Case C-218/12 *Emrek v Sabranovic* ECLI:EU:C:2013:666, paras 20 ff.

²² See Recital 37 Rome I Regulation.

²³ Michael Wilderspin, 'Article 6' in Ulrich Magnus and Peter Mankowski (eds), *European Commentaries on Private International Law: Rome I*, vol 2 (Otto Schmidt 2017) para 76.

²⁴ Giesela Rühl, 'Consumer Protection in Choice of Law' (2011) 44 *Cornell International Law Journal* 569, 591. In detail, see Lord Collins of Mapesbury (n 11) para 33-179.

²⁵ Giesela Rühl, 'Art. 6' in Christine Budzikiewicz, Marc-Philippe Weller and Wolfgang Wurmnest (eds), *Beck-Online Großkommentar – Rom I-VO* (CH Beck 2023) para 260.

Basic tariff was explicitly agreed upon. Indeed, it seems very likely that, under German law,²⁶ the unilateral tariff change by M due to suspected commercial use of the online movie streaming service by S is prohibited. The chosen Austrian law appears to be less preferential for the customer in this regard.²⁷ Without having to go into the details of both national laws in this conflict of laws analysis, it is thus arguable that the German rules, which cannot be derogated from by agreement and thus are mandatory,²⁸ get to govern this particular issue instead of the otherwise governing Austrian law. If the Viennese court follows this argument, then, under the rules of the German law that apply insofar, M was not permitted to change the contract's tariff category unilaterally and to charge S the higher monthly price of 635 €.

c) Irrelevance of considering Articles 9 and 21 Rome I Regulation

For purposes of clarification, it should be noted that it is thus unnecessary to debate whether the German rules on standard terms and conditions would qualify as overriding mandatory provisions in the sense of Article 9(1) Rome I Regulation which could be superimposed onto the governing Austrian law regardless of the preferential law analysis under Article 6(2) Rome I Regulation. This is a contentious issue since it has been suggested that the unfair terms legislation can amount to overriding mandatory provisions;²⁹ this is supported by observations by the CJEU that the protection which the Unfair Contract Terms Directive³⁰ confers on consumers is in the public interest and a matter of public policy.³¹ However, in Germany, the view that the national rules on standard terms and conditions qualify as overriding mandatory provisions has been rejected, certainly in respect of instances where the German rules go beyond the

pure transposition into national law of the minimum requirements set out by the Directive.³²

The public policy exception in Article 21 Rome I Regulation cannot be considered at all in the situation of the facts at hand. It could only be used to refuse the application of a provision of the governing law, in this case Austrian law, if such application was manifestly incompatible with the public policy (*ordre public*) of the forum, which in this case is the Viennese court. An Austrian court would not hold that its own substantive law incompatible with its own public policy. The public policy exception of the Rome I Regulation does not permit giving effect to other laws (for instance, the German rules discussed above) since it only acts like a shield and not like a sword.

3. Conclusion

The contractual claim by M against S is governed by Austrian law in principle, apart from the issue of the change in tariff, which is governed and prohibited by German law.

III. M's non-contractual claim

In addition to the contractual claim, M may in the Austrian court concurrently pursue a non-contractual claim for the alleged infringement of its intellectual property. Materially, this is particularly important since the contractual claim is most likely going to fail, as discussed above, which means that M has to resort to non-contractual liability of S in order to claim the loss of 635 €.

In line with the note to the fact pattern, it shall be assumed that no international convention on intellectual property rights is relevant in this case. Thus, it is unnecessary to conduct an analysis of whether international uniform law might have priority in application over the determination of the applicable national law with the help of the conflict of laws.

The law applicable to M's non-contractual claim will thus have to be determined by the Rome II Regulation. Since the non-contractual obligation in question is a civil and commercial matter, which is not excluded from the Regula-

²⁶ Section 307(1) German Civil Code (Bürgerliches Gesetzbuch); section 309(1) is inapplicable here.

²⁷ Austrian law also bans charging higher prices than agreed in principle but allows charging higher prices if the different tariffs are set out in the contract terms and a change of tariff is not dependent on the professional party, section 6(1)(5) Austrian Consumer Protection Act (Konsumentenschutzgesetz); section 879(3) Austrian Civil Code (Allgemeines bürgerliches Gesetzbuch) is inapplicable.

²⁸ Rühl (n 25) para 262.1.

²⁹ See, for instance, Andrea Bonomi, 'Article 9' in Ulrich Magnus and Peter Mankowski (eds), *European Commentaries on Private International Law: Rome I*, vol 2 (Otto Schmidt 2017) para 80.

³⁰ Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [1993] OJ L95/29.

³¹ CJEU, Case C-168/05 *Mostaza Claro v Centro Móvil Milenium*, ECLI:EU:C:2006:675, para 38; Case C-40/08, *Asturcom Telecomunicaciones v Rodríguez Nogueira*, ECLI:EU:C:2009:615, para 52.

³² German Federal Court of Justice (Bundesgerichtshof), judgment of 9 July 2009, case Xa ZR 19/08, published in BGHZ 182, 24, para 32; Felix Maultzsch, 'Art. 9' in Christine Budzikiewicz, Marc-Philippe Weller and Wolfgang Wurmnest (eds), *Beck-Online Großkommentar – Rom I-VO* (CH Beck 2023) para 281; Karsten Thorn, 'Art. 9 Rom I-VO' in Thomas Rauscher (ed), *Europäisches Zivilprozess- und Kollisionsrecht: Rom I-VO, Rom II-VO*, vol 3 (5th edn, Otto Schmidt 2023) para 57.

tion's scope and has arisen due to an event after 11 January 2009, the Rome II Regulation applies substantively and temporally; the claim is pursued in an Austrian court, which makes the Regulation also territorially applicable.

1. Subjective determination of the applicable law

Even for non-contractual claims, it is possible in principle that the parties agree on the applicable law, Article 14 Rome II Regulation. Insofar as such subjective determination would be permissible and validly agreed upon, it would take priority over any residual objective determination. Since M and S have implicitly chosen Austrian law for their contractual obligations due to the choice of court agreement, as established above, it has to be considered whether the same choice of law in respect of their non-contractual obligations would be imaginable. For a valid choice of law, both an external and an internal agreement are required.

In terms of the external dimension, Article 14(1) sentence 2 Rome II Regulation stipulates that the agreement can be made expressly or implicitly (»demonstrated with reasonable certainty by the circumstances of the case«).³³ Although M and S have not made an express choice of law regarding their non-contractual obligations, their implicit choice of law agreement in their contract might extend to their non-contractual obligations. It can be presumed that, where the contractual choice of court/law agreement covers all claims arising out of the relationship between the parties, the choice of court/law also covers concurrent non-contractual claims.³⁴ The contract between M and S does not suggest anything else, especially since there is no limitation to contractual matters only. So, in principle, the implicit choice could be understood to extend to their non-contractual obligations.

However, in contrast to Article 3 Rome I Regulation, the rules in Article 14(1) Rome II Regulation are much more restrictive with regard to the point in time and the form of agreeing on a choice of law for non-contractual claims. First of all, Article 14(1) Rome II Regulation distinguishes, in its subparagraphs (a) and (b), agreements made before the event from agreements made after the event giving rise to the (alleged) damage. Since the implicit agreement is included in the contract, which was concluded when S signed

up to Maxfix, it was made long before S used the online movie streaming service and committed the alleged infringement giving rise to the damage. This means that subparagraph (a), which deals with ex post agreements, is inapplicable. According to the hence relevant subparagraph (b), the agreement is only valid if »all the parties are pursuing a commercial activity« and if the »agreement [was] freely negotiated«. It was established above that S does not pursue a commercial activity but rather qualifies as a consumer, at least at the relevant point in time when contracting with M. Even if the above analysis was incorrect, the choice of court agreement was included in M's standard terms and conditions and not freely negotiated. Hence, under subparagraph (b), there is no valid external agreement on the choice of Austrian law for the non-contractual claim in the end.

2. Objective determination of the applicable law

In order to determine the applicable law objectively, the general rule would be Article 4(1) Rome II Regulation that calls for the application of »the law of the country in which the damage occurs 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.« This might be difficult to determine for the economic loss alleged by M, but the general rule is in any event displaced if a special rule governs the issue at hand (*lex specialis derogat legi generali*).³⁵ Indeed, for the infringement of intellectual property rights, Article 8 Rome II Regulation stipulates much more specific connecting factors.

The term 'intellectual property rights' must be defined autonomously as a term of European Union law and, at the same time, broadly enough to cover all kinds of exclusive rights possibly characterised as intellectual property.³⁶ In line with Recital 26 of the Rome II Regulation, it »should be interpreted as meaning, for instance, copyright, related rights, the sui generis right for the protection of databases and industrial property rights.« This covers the alleged infringement of the usage granted to S of the online movie streaming service Maxfix operated by M.

³³ On implicit choice of law agreements in the context of the Rome II Regulation, see further Peter Mankowski, 'Article 14' in Ulrich Magnus and Peter Mankowski (eds), *European Commentaries on Private International Law: Rome II Regulation*, vol 3 (Otto Schmidt 2019) para 23ff.

³⁴ Ibid 56.

³⁵ The special law displaces the general law. Martin Illmer, 'Art. 8' in Peter Huber (ed), *Rome II Regulation* (Sellier 2011) para 2.

³⁶ Axel Metzger, 'Article 8' in Ulrich Magnus and Peter Mankowski (eds), *European Commentaries on Private International Law: Rome II Regulation*, vol 3 (Otto Schmidt 2019) para 9.

Article 8(1) Rome II Regulation lays down the *lex loci protectionis* principle according to which «[t]he law applicable to a non-contractual obligation arising from an infringement of an intellectual property right shall be the law of the country for which protection is claimed.» A different rule would only apply if the case concerned a non-contractual obligation arising from an infringement of a unitary Community intellectual property right (such as Community Designs³⁷), Article 8(2) Rome II Regulation; this is not the case here. Article 8(3) Rome II Regulation sets out that a deviation by choice of law is impermissible; although it has been suggested that this prohibition should be limited to instances where the dispute has the potential to threaten third party or common interests,³⁸ it does not have to be discussed further here since there is no choice of law agreement between M and S which would meet the requirements of Article 14(1) Rome II Regulation. In contrast to Article 4 Rome II Regulation, a common habitual residence would also be irrelevant under Article 8 Rome II Regulation.³⁹

According to the principle of Article 8(1) Rome II Regulation, which is the relevant rule here, the claimant has it in its hands to determine according to which law the court should find for infringement.⁴⁰ Despite the prohibiting rule in Article 8(3) Rome II Regulation, this connecting actor in Article 8(1) comes close to a subjective determination of the

applicable law in disguise.⁴¹ Oftentimes, it points to the law of the country where the defendant allegedly infringed the intellectual property legislation, but it can also be the law of the country where the claimant seeks compensation for the alleged infringement by the defendant that has occurred via the internet in another country.⁴² In the dispute between M and S, it is up to M to ‘choose’ whether to pursue the non-contractual claim under Austrian and/or German law. Either law or, for the respective damage in each country, both laws can be applied (without creating a risk of resulting in double compensation⁴³).

3. Conclusion

The non-contractual claim by M against S is governed by Austrian and/or German law.

IV. Summary

M’s concurrent claims against S for payment of 635 € in the court of Vienna are governed on the one hand by Austrian contract law in principle, apart from the issue of the change in tariff, which is governed by and prohibited by German contract law, and on the other hand by Austrian and/or German law for the alleged infringement of intellectual property rights. The respective laws govern the assessment of compensation through damages.⁴⁴

³⁷ Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs [2002] OJ L3/1.

³⁸ Ivo Bach, ‘Art. 14’ in Peter Huber (ed), *Rome II Regulation* (Sellier 2011) para 3 and fn 4, with reference to Stefan Leible, ‘Rechtswahl im IPR der außervertraglichen Schuldverhältnisse nach der Rom II-Verordnung’ [2008] *Recht der internationalen Wirtschaft* 257, 259.

³⁹ Metzger (n 36) paras 1, 55.

⁴⁰ *Ibid* 26.

⁴¹ Illmer (n 35) para 29.

⁴² Metzger (n 36) para 26.

⁴³ Illmer (n 35) para 31.

⁴⁴ Art. 12(1)(c) Rome I Regulation and Art. 15(d) Rome II Regulation.