

**LAW AND PRACTICE OF CONSUMER PROTECTION
ONLINE IN THE EUROPEAN UNION,
THE UNITED STATES AND KAZAKHSTAN:
COMPARATIVE ANALYSIS AND CASE STUDIES**

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ABSTRACT

Unprecedented expansion of international online sales in the recent years essentially led to the evolution of consumer protection rules. While it became obvious for every state that online market opportunities bring new risks, the extent and the means of consumer protection have been developing based on country-specific legal background. As a result, consumers using the same website may enjoy different legal rights, depending on their place of residence. The EU, generally providing a harmonized regulatory approach to consumer protection kept up the high level of consumer care in online dealings. The U.S. following business oriented approach and lacking uniform legal regulation failed to employ certain protective mechanisms used in the EU at the legislation level. Kazakhstan borrowed the best from both systems, however, the effective enforcement of consumer rights (effective and affordable court system, ADR) is missing there. These differences could not have been unknown to the businesses, and created perfect environment for discrimination between the more and less protected consumers.

The question of this research is whether given the different level of consumer protection for online-shoppers there is a trend to discriminate less protected consumers, or rather a common tendency towards the top of the protection level?

The research compares legal requirements to online sales in the EU, U.S. and Kazakhstan to determine the level of consumer protection. Comparative analysis is followed by a case study of several online sellers, which reveals the influence of the varying levels of consumer protection on the sales policies of the major sellers.

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INTRODUCTION

Unprecedented expansion of international online sales in the recent years essentially led to the evolution of consumer protection rules. While it became obvious for every state that online market opportunities bring new risks, the extent and the means of consumer protection have been developing based on country-specific legal background. As a result, consumers using the same website may enjoy different legal rights, depending on their place of residence. The EU, generally providing a harmonized regulatory approach to consumer protection kept up the high level of consumer care in online dealings. The U.S. following business oriented approach and lacking uniform legal regulation failed to employ certain protective mechanisms used in the EU at the legislation level. Kazakhstan borrowed the best from both systems, however, the effective enforcement of consumer rights (effective and affordable court system, ADR) is missing there. These differences could not have been unknown to the businesses, and created perfect environment for discrimination between the more and less protected consumers.

The question of this research is whether given the different level of consumer protection for online-shoppers there is a trend to discriminate less protected consumers, or rather a common tendency towards the top of the protection level?

The research compares legal requirements to online sales in the EU, U.S. and Kazakhstan to determine the level of consumer protection. Comparative analysis is followed by a case study of several online sellers, which reveals the influence of the varying levels of consumer protection on the sales policies of the major sellers.

The first chapter will focus on a comparative analysis of regulation of the electronic consumer contracts in the chosen jurisdictions. The items to be analyzed include means of contract formation,

notions of offer and acceptance in the online trade, requirements as to e-contract accessibility, provision of information, warranties, liability and withdrawal.

The second chapter will address the major points of the jurisdiction and choice of forum in consumer contracts, as well as alternative (online) dispute mechanisms. The analysis under the first two chapters should highlight the divergence areas that may potentially lead to discrimination of consumers in one or another jurisdiction due to the different levels of protection.

Finally, third chapter will be devoted to the case study, focusing on the analysis of the available information on e-commerce contracts concluded by consumers with major online sellers. The research will focus on three examples of online sellers, each originating from one of the chosen jurisdictions. The comparison will be made between the contracts each seller concludes with the consumers within its place (state) of business and those concluded with international consumers. All three examples will then be compared with each other to identify more and less consumer favorable sellers and jurisdictions.

In view of the practical focus of the research and the page limit the research will not go into details related to consumer data protection requirements, but rather, will focus on contract related aspects of electronic consumer contracts, as described above.

The goal of the analysis is to identify, whether, given the different level of consumer protection for online-consumers in the EU, the U.S. and Kazakhstan, is there a trend to discriminate less protected consumers, or rather a common tendency towards the top of the protection level.

Chapter I

CONTRACT FORMATION

1.1. Acceptable electronic means of contract formation

The existing rules governing e-commerce are generally very flexible about the means of electronic contract formation. “Electronic means” are usually being defined in a broader manner aimed at covering any existing technical tools and methods, or those that may come to existence in the future.

The whole concept of e-commerce regulation in general is based on understanding that legal rules should keep up with the speedy development of technology. Whereas adoption of the new rules for each step in technological development may not be fast enough or, more importantly, practical, the existing approach is to keep legal definitions open to include future developments¹. This is often being referred to as technological neutrality, where the law focuses on the objectives without discriminating in favor of, the use of a particular type of technology to achieve them². This principle is reflected in the MLEC, as well as in the EU and US legislation.

Definition of electronic means is a clear example of this approach. Electronic means of concluding an electronic contract are never narrowly defined as clicking an “okay” button, inserting digital signature or sending an e-mail. Rather, the recognized means of entering into an electronic contract are tend to be defined in abroad manner. For the purpose of comparison, we will now refer to the

¹ See, for example, commentary to Section 2(5) of the Uniform Electronic Transactions Act, National Conference of Commissioners on Uniform State Laws, p.8 (1999).

² Van der Haar, Ilse M. "Technological neutrality; What does it entail?." (2007), p.2.

UNCITRAL Model Law on Electronic Commerce³ (“MLEC”), adopted in 67 countries, including most of the U.S. states (in a form of state statute on electronic commerce), United Kingdom, Canada and Australia⁴, etc., Uniform Electronic Transactions Act (“UETA”)⁵ – a uniform act adopted by the vast majority of the U.S. states⁶, and EU Law, namely, E-commerce Directive and the Directive concerning provision of information in the field of technical standards and regulations.

MLEC envisages legal recognition of the “data messages” as sufficient means of contract conclusion⁷. Data message definitions according to MLEC is not exhaustive, and includes, among other things, “information generated, sent, received or stored by electronic, optical or similar means electronic data interchange (EDI) [i.e. “electronic transfer from computer to computer of information using an agreed standard to structure the information”], electronic mail, telegram, telex or telecopy”⁸. With this “all inclusive” approach it may seem that parties to the contract should rather be cautious about accidentally concluding a contract but some of these means, than about the validity of electronic means.

³ UNCITRAL Model Law on Electronic Commerce, United Nations Publication, Sales No. E.99.V.4 (1996).

⁴ According to the UNCITRAL website, data available at http://www.uncitral.org/uncitral/en/uncitral_texts last accessed on 4 April 2017.

⁵ Uniform Electronic Transactions Act, National Conference of Commissioners on Uniform State Laws (1999), available at <http://www.uniformlaws.org/Act.aspx?title=Electronic%20Transactions%20Act> last accessed on 4 April 2017.

⁶ Data available at: <http://www.uniformlaws.org/Act.aspx?title=Electronic%20Transactions%20Act> last accessed on 4 April 2017.

⁷ Article 11.1 of the UNCITRAL Model Law on Electronic Commerce, *supra* note 3.

⁸ Articles 2 (a) and 2 (b) of the UNCITRAL Model Law on Electronic Commerce, *supra* note 3.

Still, there are limitations and safeguards, to prevent such accidents. The parties may contractually agree, that some, or all the data messages may not be acceptable for the purposes of expressing offer and acceptance⁹. This, however, implies acceptability of data messages for contract formation, unless the parties fail to agree otherwise. There are other presumptions under MLEC – presumption of the data message being sent by the proper sender (originator), and the contents of the message being what the sender intended to send¹⁰. The limits for these presumptions are reasonable case standard and additional agreements between the parties¹¹.

UETA also provides similar all-inclusive definitions of “electronic” relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.”)¹². However, it does is more focused on the parties’ awareness of entering into a contract by electronic means.

Thus, the scope of the UETA is limited to transactions where the parties themselves agreed to the use of such electronic means¹³. No written acknowledgement of such an agreement is formally required, however, it should be confirmed by the context, circumstances and conduct of the parties¹⁴. Reference to the context and circumstances (parol evidence) is also made with respect to

⁹ Article 11.1 of the UNCITRAL Model Law on Electronic Commerce, *supra* note 3.

¹⁰ Article 13(3) and 13 (5) of the UNCITRAL Model Law on Electronic Commerce, *supra* note 3.

¹¹ *Id.*

¹² Section 2 (5) of the Uniform Electronic Transactions Act, *supra* note 5.

¹³ Section 5 (b) of the Uniform Electronic Transactions Act, *supra* note 5.

¹⁴ Section 5 (b) of the Uniform Electronic Transactions Act, *supra* note 5.

attribution of electronic records to a person¹⁵ including the cases of “click-through” transactions¹⁶. Therefore, the UETA does not exclude the use of extrinsic evidence under the common law concept of parol evidence rule, which would potentially create difficulties with interpretation of international contracts, especially with the parties from civil law countries¹⁷. The use of extrinsic evidence is demonstrated, for example, by the case *Yolanda G. Kerr v. Dillard Store Services, Inc.*¹⁸, under section 16-1609 of the Kansas Statute¹⁹, which copies Section 9 of the UETA.

EU Law uses a very similar definition of “electronic means” – “sent initially and received at its destination by means of electronic equipment for the processing (including digital compression) and storage of data, and entirely transmitted, conveyed and received by wire, by radio, by optical

¹⁵ Section 9 (b) of the Uniform Electronic Transactions Act, *supra note 5*.

¹⁶ Commentary to Section 9 (b) of the Uniform Electronic Transactions Act, p.33, para. 5, *supra note 5*.

¹⁷ Alberto Luis Zuppi, The Parol Evidence Rule: a Comparative Study of the Common Law, the Civil Law Tradition, and Lex Mercatoria, Georgia Journal of International and Comparative Law Volume 35 (2007) Number 2 p. 235-237.

¹⁸ *Yolanda G. Kerr V. Dillard Store Services, Inc., et al.*, 2009 WL 385863 (D.Kan.), para. 4 (I) (2009).

¹⁹ Kansas 2014 statute is available at:

http://kslegislature.org/li_2014/b2013_14/statute/016_000_0000_chapter/016_016_0000_article/016_016_0009_section/016_016_0009_k/ last accessed on 4 April 2017.

means or by other electromagnetic means.”²⁰. It also includes general principle of recognition of the contracts concluded by electronic means²¹.

In practice this results in new types of expressing consent in electronic contracts, the most popular forms of it being browse-wrap and click-wrap agreements.

Click-wrap (or “click-through”) agreements, the most popular contract type for online trade, involve expression of assent to be bound by the contract through accepting the terms provided online by clicking a specified button to confirm the acceptance²². As opposed to the click-wrap agreements, which require at least a click to enter into, browse-wrap or “non-click” agreements are accepted by simply using the website, without the express manifestation of acceptance²³. This type of contract assent is often used for the terms of use and privacy policies of the websites, which are deemed to be accepted by any person using the website²⁴.

²⁰ Article 1.2 (a) of the Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998 amending Directive 98/34/EC laying down a procedure for the provision of information in the field of technical standards and regulations.

²¹ Art. 9.1. of the Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce').

²² Christina L. Kunz, Maureen F. Del Duca, Heather Thayer and Jennifer Debrow, Click-Through Agreements: Strategies for Avoiding Disputes on Validity of Assent, *The Business Lawyer*, Vol. 57, No. 1, American Bar Association (November 2001), pp. 401.

²³ *Id.*

²⁴ *Id.*

1.2.Offer and acceptance in click-wrap and browse-wrap agreements

Generally, the relaxed requirements to the means of concluding electronic contracts result in various forms of offer and acceptance being allowed. The examples may include placing a sales ad online, clicking “I agree” button, sending a message via chatbot, etc.

However, even though technically offer and acceptance may be very diverse, all of them are still subject to the ordinary contract law requirements as to their contents. These requirements may vary from jurisdiction to jurisdiction, therefore, an ideal offer for an international seller should comply with all applicable regulations.

For the purposes of browse-wrap and click-wrap agreements the notion of offer may not always be easy to define, especially with the online-shops that contains numerous pages with information on separate and grouped goods for sale, more and less detailed information on each type of goods and several pages preceding the “confirm and buy” button. Some of these pages present advertisement, while other contain data which will become part of the contracts. It is important to distinguish between these elements, for both the buyer and the seller.

On the seller’s part, it is important to avoid assuming excessive unwanted obligations under irrevocable public offers. The most effective way to do so is to clearly indicate in the terms of sale provided on the website, that the catalogue items are only advertisement inviting the consumers to make offers and that fulfilment of such orders is subject to the availability of the goods. On the consumer’s part, it is vital to make sure that the important characteristics of the goods are part of the binding contract, not just an advertising tool or puffery.

It is somewhat easier to identify the offer with browse-wrap agreements such as terms of use or privacy policies which are visible at a single page, often reflect a clear contract structure including

reference to the parties (usually – a specific service provides and an abstract consumer), rights and obligations of the parties, applicable law, arbitration clause, etc.

One of the important features of the general terms and conditions which usually govern the relationship between online seller and the consumers is that they are generally not subject to any negotiations. Basically, the consumer is put into ‘take it or leave it’ position. In this respect, there is little doubt as to the contents of the offer –the standard text posted by the seller/ service provider. The offer should be considered to be made once the agreement is available on the seller’s website and silently accepted by all the users of the website²⁵.

It is somewhat trickier to determine when does the binding offer take place for the online sales agreements concluded via multistep click-through mechanism. Civil law and common law systems may have different approach in defining the point a binding offer is made. For example, the approach existing in the US case law is not to consider the offeror automatically bound by the public proposals (advertisements), so that not to impose a liability beyond such offeror’s reasonable capacity²⁶. An offer should be distinguished from advertisements based on the wording of the proposal, which should not create unreasonable uncertainty, that would make the author bound for any amount the addressees of the advertisement may order²⁷.

However, if the public proposal does contain limitation clauses such as ‘first come – first served’ or ‘subject to prior sale’, it may be considered certain enough and would consider a binding offer

²⁵ Christina L. Kunz auth., *supra* note 22.

²⁶ Gerald Spindler, Fritjof Börner, *E-Commerce Law in Europe and the USA*, Springer Science & Business Media (2013) p. 687.

²⁷ *MOULTON v. KERSHAW and another*, Wis. 316; 18 N.W. 172 (1884).

subject to such limitations²⁸. Such an approach may be viewed as business oriented, since it provides certain protection for the sellers.

In Kazakhstan, only the general rule on offer and acceptance in e-contracts is established. The contract becomes affective when an offer at the moment when acceptance is received, provided the receipt is within the timeline envisaged by the offer²⁹.

1.3.Information requirements

EU law imposes specific information requirements on the information service providers. Online sellers, qualifying as entities providing information services under the EU Law, must comply with these requirements.

E-commerce directive requires online seller to provide at least the following information to the consumers: its name, geographic address of its establishment, contact e-mail address, registration number, VAT number (if applicable), information on any authorization and (or) licenses if they are required³⁰, and the detailed information about the price of the goods, including any applicable taxes and delivery costs³¹. Obligation to indicate purchase price in a clear, unambiguous and clearly identifiable manner is also envisaged by the Price Indication Directive³².

In addition to that consumer should be informed about the technical steps they need to follow to conclude the contract, whether the concluded contract will be filed by the service provider and whether it will be accessible, technical means for identifying and correcting input errors prior to

²⁸ Lefkowitz v. Great Minneapolis Surplus Store, 86 N.W.2d 689 (1957), cited in Spindler, supra note 26, p. 688.

²⁹ Clause 14 of the Rules on Electronic Commerce approved by the order of the Minister for National Economy of the Republic of Kazakhstan No. 720 (25 November 2015).

³⁰ Article 5.1. of the Directive on electronic commerce, supra note 21.

³¹ Article 5.2. of the Directive on electronic commerce, supra note 21.

³² Articles 3.1. and 4.1. of the DIRECTIVE 98/6/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 16 February 1998 on consumer protection in the indication of the prices of products offered to consumers.

the placing of the order, and the languages offered for the conclusion of the contract³³. These requirements can be contractually excluded by the parties who are not consumers, however, the default rule is to provide the above information, unless agreed otherwise³⁴. Finally, online sellers are required to acknowledge the receipt of the consumers order³⁵.

Consumer rights Directive contains similar information requirements and additionally requires indication of the main characteristics of the goods and services, reference to the time of delivery, seller's complaint handling policy, legal guarantee of conformity of the goods, consumer's right of withdrawal and distribution of the related costs³⁶. The last two points are especially important, since under the Directive in case the consumer is not duly notified about the right of withdrawal, it should be extended to 12 months after the expiry of the standard 14 days³⁷. Moreover, when the consumer is not duly notified about having to bear the costs of returning the goods it shall not bear them³⁸.

These information requirements are not EU specific, they are repeatedly referred to by at least the two other analyzed jurisdictions. Compliance with them does not seem especially burdensome for international sellers and, in fact is usually provided by many international online sellers.

In the U.S. the requirement to disclose information about the name, address and identity of the seller and the nature of the goods are envisaged, for example, for the warrantors (i.e. seller

³³ Article 10.1 of the Directive on electronic commerce, *supra* note 21.

³⁴ *Id.*

³⁵ Article 11.1 of the Directive on electronic commerce, *supra* note 21.

³⁶ Article 6.1 of the DIRECTIVE 2011/83/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council

³⁷ Article 14.1 *Id.*

³⁸ Articles 6.6 and 14.1 *Id.*

providing a warranty to the consumers) under the Magnuson-Moss Warranty Act³⁹. Even though many online seller expressly exclude and warranties in their standard terms of sale, information requirements are usually complied with.

In Kazakhstan similar information requirements are imposed by the Consumer Protection Law. The information to be disclosed includes all the details about the seller, including its name, address, references to a trademark and/ or license⁴⁰. Another portion of the data for mandatory disclosure includes the details about the sold items, including their names, essential characteristics, intended use, price, number, availability of a guarantee, country of origin, etc.⁴¹

1.4.Accessibility requirements

UETA brings special requirements to the use of electronic records where a written form is required⁴². Such records should be accessible for storing and printing, otherwise the record may be considered unenforceable⁴³. This condition, generally, may not be contractually excluded (unless specifically allowed by the law)⁴⁴. This requirement should be kept in mind, however, in practice most of the online records are printable without any additional costs/ efforts on behalf of either party. Therefore, unless a party to electronic contract specifically intends to prohibit printing/ storing of the record, which is not usually the case, no substantial problems should arise from this above requirement.

³⁹ Section 23-02 of the Magnuson-Moss Warranty Act (§15 USC 2301-2311) available at: <https://www.law.cornell.edu/uscode/text/15/chapter-50> last accessed on 4 April 2017.

⁴⁰ Article 26 of the Law of the Republic of Kazakhstan on Consumer Protection No.274-IV ZRK (4 May 2010).

⁴¹ Article 25 Id.

⁴² Section 8 (a) of the Uniform Electronic Transactions Act, *supra* note 5.

⁴³ Section 8 (c) of the Uniform Electronic Transactions Act, *supra* note 5.

⁴⁴ Section 8 (d) of the Uniform Electronic Transactions Act, *supra* note 5.

The EU law, instead, only requires the seller to indicate, whether the contract will be accessible after the placement of the order⁴⁵. However, under the EU Law the buyer should be given an opportunity to review and edit errors before placing the order⁴⁶, a condition that is EU specific.

Kazakhstan Rules on Electronic Commerce also require the sellers to provide access to the terms of electronic contracts in a form allowing their storage and reproduction by the consumers⁴⁷.

1.5. Timeline. Mailbox rule.

Electronic means of concluding a contract allow speeding up the process substantially. Without the need for the parties to actually meet each other, to print out and sign the agreement or to even leave their houses conclusion of the contract can take minutes, and, with certain online options such as one click purchase option provided by Amazon, even seconds. The said option allows the consumer to only make 1 click to confirm the order and pay, using the stored information about the consumer's credit card and shipping address⁴⁸.

However, the use of electronic means brings additional questions. In particular, where and when does the process of data transfer do offer and acceptance take place? The response of the e-commerce law is a projection of the so-called "mailbox rule", first established by the famous *Adams v. Lindsell* case⁴⁹, under which "acceptance of an offer is binding to the offeror when the offer is dispatched"⁵⁰, e.g. put into the mailbox.

⁴⁵ Article 10.1 (b) of the Directive on electronic commerce, *supra note 21*.

⁴⁶ Article 11.2 of the Directive on electronic commerce, *supra note 21*.

⁴⁷ Clause 15 of the Kazakhstan Rules on Electronic Commerce, *supra note*.

⁴⁸ <https://www.amazon.com/gp/help/consumer/display.html?nodeId=468482> last accessed on 4 April 2017.

⁴⁹ *Adams v. Lindsell* 106 ER 250 (1818).

⁵⁰ Black's Law Dictionary, data available at <http://thelawdictionary.org/mailbox-rule/> last accessed on 4 April 2017.

The common grounds of the electronic “mailbox rule” are that the message (including offer and acceptance) is being sent once it leaves the information system of the sender. There are, however, certain divergences and specifics under each legal act. Under MLEC, dispatch of a data message occurs when it enters an information system outside the control of the originator⁵¹. Similar rule is provided by the UETA, however, in addition, the message has to be addressed to an information processing system of the recipient in a form capable of being processed by that system⁵².

The receipt of the message is linked to the moment when the data message enters the designated information system⁵³, for UETA – the message should also be in a form capable of being processed by that system⁵⁴ (for the purpose of this research the information system is usually automatically designated within browse-wrap and click wrap agreements). Both MLEC and UETA allow to contractually agree on the different order of determining the time of dispatch/ receipt of the messages^{55,56}.

Under the EU Law the messages relevant for e-commerce contract formation (placement of order and receipt acknowledgement) are deemed to be received once they are accessible to the respective addressees⁵⁷. Receipt acknowledgement is an important mandatory feature of the EU Law (with

⁵¹ Article 15.1 of the UNCITRAL Model Law on Electronic Commerce, *supra* note 3.

⁵² Article 15(a)(1) of the Uniform Electronic Transactions Act, *supra* note 5.

⁵³ Article 15(2) of the UNCITRAL Model Law on Electronic Commerce, *supra* note 3.

⁵⁴ Article 15(a)(2) of the Uniform Electronic Transactions Act, *supra* note 5..

⁵⁵ Articles 15.1 and 15.2 of the UNCITRAL Model Law on Electronic Commerce, *supra* note 3.

⁵⁶ Article 15(a) and 15(b) of the Uniform Electronic Transactions Act, *supra* note 5.

⁵⁷ Article 11.1 of the Directive on electronic commerce, *supra* note 21.

respect to consumer contracts)⁵⁸. Unfortunately, E-commerce Directive⁵⁹ fails to specify if there is a link between the acknowledgement and the contract formation, so the decision in each case depends on the national courts (see, for example, French approach below). Under the MLEC such an acknowledgement is also mentioned but as a purely optional condition, which may be agreed by the parties⁶⁰.

These rules may have different practical effect on determining the exact time of the contract conclusion, depending, in each case, on the national contract laws. For example, in Belgium, a contract is deemed to be concluded when an information system of the offeror **receives** the message confirming the acceptance, regardless of the fact whether such a message has been read⁶¹. Similar rule exists in Germany – contract formed over the Internet at the moment of acceptance of the offer, where the offer is the placement of the order, and the acceptance is the seller's confirmation, unless such a confirmation is not expected under the market practices⁶².

In France, the approach is very protective of the consumers even compared to the EU Law, since it envisages contract formation only after (i) placement of the order (ii) confirmation (receipt acknowledgement) of the order by the seller and (iii) confirmation of the acceptance by the consumer⁶³.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ Article 14(1) of the UNCITRAL Model Law on Electronic Commerce, *supra* note 3.

⁶¹ Spindler, *supra* note 26, p. 27.

⁶² Spindler, *supra* note 26, p. 166.

⁶³ I. Renard and M.A. Barberis in Spindler, *supra* note, p. 81.

In the U.S. (and other common law countries) there is a third element to contract formation – consideration⁶⁴. In the typical online sales contracts this element is usually clearly identifiable as the performance of payment for the purchased goods. The moment of contract formation under the U.S. law may depend on whether the acceptance is made through a promise, or a performance⁶⁵. Acceptance through performance (for example such as payment of the purchase price in an online shop) means the offeror is bound once the full performance is received, whereas in case of acceptance through a promise a notification of the seller on such an acceptance may be required⁶⁶. Variations between the moment of contract formation may seem minor, especially given the fact that the transfer of messages and even transfer of payment in online trade may take less than seconds. They may become of importance, however, if at a certain point the respective data message is delayed/ damaged, or, for example, when a transaction is abandoned by the buyer after accepting the terms but before the payment.

1.6. Place of the contract formation

Place of the contract formation will be determined in each case by the same token as the time of formation – depending on the contract law of each country. However, the important points to define that place would be the place of sending and receiving messages containing declarations of intent (offer and acceptance).

⁶⁴ Spindler, *supra* note 26, p. 689.

⁶⁵ Spindler, *supra* note 26, p. 688.

⁶⁶ *Id.*

Under MLEC the message is deemed to be sent and received and the places of business/ habitual residence of the sender and the recipient respectively⁶⁷. Similar approach is reflected in the UETA⁶⁸. This means that the location of information systems of either party is considered no relevance, which makes perfect sense given that the parties may have no control and/ or even knowledge of the location of information systems involved in the transaction⁶⁹. There is no respective rule in the E-commerce directive. In any case, depending on how the moment of contract formation is defined in the national law, the place of such formation may vary between, for example, the place of acceptance and the place of accepting notification on the acceptance.

Given that the place of the contract formation is usually important for the courts to determine the applicable law, it may be defined differently in each case, depending on the jurisdiction deciding the dispute. Additional room for the court's discretion is provided in the cases of multiple places of business of one of the parties (which is often the case with the multinational online sellers). MLEC and UETA refer the courts to the principles of closest connection with the transaction, which opens doors for a broad range of interpretations^{70,71}. Finally, under both document the parties may contractually agree on the place of sending/ receiving the messages⁷². This part could be potentially used against the consumers to provide for the jurisdiction favorable to the sellers. In the

⁶⁷ Article 15(4) of the UNCITRAL Model Law on Electronic Commerce, *supra* note 3.

⁶⁸ Article 15(d) of the Uniform Electronic Transactions Act, *supra* note 5.

⁶⁹ Comment to Article 15(d) of the Uniform Electronic Transactions Act, *supra* note 5, p.47.

⁷⁰ Article 15.4(a) of the UNCITRAL Model Law on Electronic Commerce, *supra* note 3.

⁷¹ Article 15(d)(1) of the Uniform Electronic Transactions Act, *supra* note 5.

⁷² *Id.*

EU, the respective provisions, however, would be overruled by consumer protection requirements, as shown in Chapter 2.

1.7.Warranties

EU Law requires the sellers to provide consumer goods in conformity with the contract and establishes certain rules for the consumer goods to be in conformity with the contract⁷³. The goods should show the quality and performance normally expected from the similar types of goods, have to comply with the description provided, and need to be good for the purposes similar type of goods is usually used for as well as any specific purpose indicated by the consumer and known to the seller⁷⁴. Non-conformity entitles the consumer to require replacement, reparation or reduction of the purchase price⁷⁵. The time limitation for the discovery of non-conformity is 2 years⁷⁶. These basic warranties are, therefore, assumed by the sellers as a default rule and any provisions restricting them shall not be binding on the consumer⁷⁷.

In the U.S., the U.S.C. provides for a detailed definition and regulation of express and implied warranties, which in principle create a favorable environment for consumers. However, since both types of warranties may be contractually excluded, in reality in most online sales the goods are sold “as they are”. Express warranties under the U.S.C. do not actually require the sellers to use the word ‘warranty’⁷⁸. Any description provided for an item entails an express warranty of conformity with the description⁷⁹.

In addition to express warranties, the goods should by default comply with the implied warranties of merchantability⁸⁰ and fitness for particular purpose⁸¹. Even though in mass market online sales

⁷³ Article 2.1. of the Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees

⁷⁴ Article 2.2. Id.

⁷⁵ Article 3 Id.

⁷⁶ Article 5.1. Id.

⁷⁷ Article 7.1 Id.

⁷⁸ 15 U.S.C. § 2-313.2

⁷⁹ 15 U.S.C. § 2-313.1(b)

⁸⁰ 15 U.S.C. § 2-314.1

⁸¹ 15 U.S.C. § 2-315

it there is usually no opportunity for the consumers to select a particular purpose for the purchased goods, the merchantability warranty still provides a broad range of protection. It includes fitness for the ordinary purpose, conformity with the fair average quality, adequate packaging, etc.⁸² – the requirements basically resembling those existing in the EU.

However, the conditions for excluding both types of warranties are far from burdensome, and, therefore, the disclaimer of warranties is one of the boilerplate provisions of standard terms of online sale. For express warranties, the words creating them and the words limiting them should be consistent with

each other and the limiting construction should not be unreasonable⁸³. Excluding implied warranties should be conspicuous, which requirement is satisfying by using expressions as simple as “as it” or “with all faults”⁸⁴.

Kazakhstan Consumer Protection Law mentions the general consumer’s right to receive goods of the due quality⁸⁵, which includes (i) fitness for a particular purpose which was provided to the seller at the conclusion of the contract⁸⁶ and (ii) conformity of the goods with the description⁸⁷.

1.8. Withdrawal

Consumer rights directive allows the EU consumers to return the goods and withdraw from the contract within the period of 14 days from the purchase, without any specific grounds⁸⁸. The seller is required to promptly return the money received from such consumer and to reimburse all the

⁸² 15 U.S.C. § 2-314.1.

⁸³ 15 U.S.C. § 2-316.1.

⁸⁴ 15 U.S.C. § 2-316.2 and § 2-316.3(a).

⁸⁵ Article 7.1.6 of the Kazakhstan Law on Consumer Protection, *supra* note 40.

⁸⁶ Article 13.4 of the Kazakhstan Law on Consumer Protection, *supra* note 40.

⁸⁷ Article 13.4 of the Kazakhstan Law on Consumer Protection, *supra* note 40.

⁸⁸ Article 9.1. of the Directive on consumer rights, *supra* note 36.

costs incurred thereby within 14 days from the date of withdrawal⁸⁹. The exception could be made for the costs of returning the goods, exceeding the costs of the least expensive method of delivery⁹⁰. There are several exceptions from the general withdrawal right for specific categories of goods, for example – perishable goods and sealed goods, not suitable for return for health or hygiene reasons⁹¹.

In the U.S., on the federal level a very limited withdrawal rule exists only with respect to the “door-to-door” sales, which mean sales outside the seller’s place of business, such as consumer’s homes, hotel rooms, restaurants and convention centers (rented by sellers for a short period of time)⁹². The period for withdrawal is limited to 3 days, and there are monetary thresholds of at least \$25 for the sales at consumer’s home, and \$130 for other door-to-door sales⁹³. The effect of this rule, however, does not apply to online sales. States law may provide more extensive rights, for example, California civil code provides for 7 days return period, however, it is limited to the sales in stores and may be excluded by the sellers⁹⁴. Nevertheless, many online sellers include the right of withdrawal into their own terms of sale⁹⁵, as will be shown by the case studies in Chapter 3. The reasons behind it are explained by the positive economic effect of the consumer’s ability to get to know about the goods they are about to purchase, yet, protecting the sellers from the depreciation of the goods by limiting the categories of non-returnable goods⁹⁶.

⁸⁹ Article 13.1. *Id.*

⁹⁰ Article 13.1. *Id.*

⁹¹ Articles 16 (d) and 16(e) *Id.*

⁹² Trade Regulation Rule Concerning Cooling-Off Period for Sales Made at Homes or at Certain Other Locations, 16 CFR Part 429, Federal Trade Commission, Federal Register 1329 Vol. 80, No. 6 (9 January 2015), p.1329.

⁹³ *Id.*

⁹⁴ California Civil Code, §1723, available at:

http://leginfo.ca.gov/faces/codes_displaySection.xhtml?sectionNum=1723.&lawCode=CIV last accessed on 5 April 2017.

⁹⁵ Ben-Shahar, Omri, and Eric A. Posner. "The right to withdraw in contract law." *The Journal of Legal Studies* 40, no. 1 (2011): 115.

⁹⁶ *Id.*, p.143-145.

In Kazakhstan, there is no unequivocal right to withdraw from the contract, however, it is possible to either return or require replacement of a purchased item (with the similar item of different size, color, etc.)⁹⁷ within the period is 14 days⁹⁸. The civil code establishes the following standards with regard to the condition of the returnable goods: they have to be unused and retain the consumer value⁹⁹. Consumer protection law provides further qualifications by envisaging a list of goods which cannot be returned replaced. These include food, medicaments, underwear, socks and stockings and any goods, animal and plants, as well as fabric, fur and other materials sold by square meter pieces¹⁰⁰.

1.9.Unfair clauses

Unfair clauses present one of the major clashes between consumer treatment in the EU and the U.S. The EU Law following its general maximum consumer protection approach provides for extensive list of unfair clauses. The list below includes several examples of unfair clauses, the most relevant for online sales:

- excluding or limiting the legal liability of a seller in the event of the death/ personal injury of a consumer resulting from an act or omission of the seller;
- inappropriately excluding or limiting the legal rights of the consumer vis-d-vis the seller in the event of total or partial non-performance, including the option of offsetting a debt owed to the seller against any claim which the consumer may have against him;

⁹⁷ Art. 454.1 of the Civil Code.

⁹⁸ Art. 30.1 of the Consumer protection law supra note 40.

⁹⁹ Art. 454.3 of the Civil Code.

¹⁰⁰ Art. 30.1 of the Consumer protection law supra note 40.

- permitting the seller to retain sums paid by the consumer where the latter decides not to conclude or perform the contract, without providing for the consumer to receive compensation of an equivalent amount from the seller where the latter is the party cancelling the contract;
- authorizing the seller to dissolve the contract on a discretionary basis where the same facility is not granted to the consumer, or permitting the seller to retain the sums paid for services not yet supplied by him where it is the seller himself who dissolves the contract;
- enabling the seller to alter the terms of the contract unilaterally without a valid reason which is specified in the contract¹⁰¹;
- enabling the seller to alter unilaterally without a valid reason any characteristics of the product or service to be provided;
- providing for the price of goods to be determined at the time of delivery or allowing a seller of goods or supplier of services to increase their price without in both cases giving the consumer the corresponding right to cancel the contract if the final price is too high in relation to the price agreed when the contract was concluded;
- excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions, unduly restricting the evidence available to him or imposing on him a burden of proof which, according to the applicable law, should lie with another party to the contract.

The Directive prohibited a number of clauses normally used by the standard terms of use of the U.S. companies, which resulted in them having to amend such standard terms and/or preclude the EU consumers from shopping on their websites.

¹⁰¹ Paragraph 1 of the Annex to the COUNCIL DIRECTIVE 93/ 13/EEC on unfair terms in consumer contracts (5 April 1993).

U.S.

The U.S. also provides certain degree of consumer protection from unfair terms, however, less centralized in terms of sources and much less transparent. Certain states (California, for example), have more protective consumer laws containing provisions similar to those existing in the EU. Case law differs state by state, establishing different shades of protection.

In addition to unfair terms, unfair practices exercised by the businesses including internet fraud, financial pyramids, “cramming”, unsolicited commercial e-mails containing false and/ or misleading claims as well as data privacy violations are under control of the Federal Trade Commission, which is an administrative authority responsible for consumer right protection ¹⁰².

The general principle for the protection from unfair terms is unenforceability of unconscionable clauses, envisaged by section 2-302 of the UCC¹⁰³. The UCC fails to provide a definition of unconscionability, causing extensive criticism for the ambiguity¹⁰⁴. Elements and criteria of an unconscionable term are provided by the doctrine and the case law. Usually, an unconscionable term appears in the form of either “unfair surprise” for the consumer, with special emphasis on “fine print” (concealed) terms affecting the value of the deal or the rights of the consumer, or in the form of “oppression” meaning the seller’s refusal to bargain on a disclosed unfavorable term¹⁰⁵. These two elements correspond to the two criteria determining whether a term is unconscionable under the principle of “circle of assent” ¹⁰⁶. “Apparent assent” requires full understanding of the

¹⁰² Graubert, John, and Jill Coleman. "Consumer Protection and Antitrust Enforcement at the Speed of Light: The FTC Meets the Internet." *Can.-USLJ* 25 (1999): 283-385.

¹⁰³ UCC §2-302.

¹⁰⁴ Larry A. DiMatteo & Bruce Louis Rich, A Consent Theory of Unconscionability: An Empirical Study of Law in Action, 33 FLA. ST. U. L. REV. 1067, 1085 (2006), cited in McCullough, Colleen. "Unconscionability as a Coherent Legal Concept." *U. Pa. L. Rev.* 164 (2015): 779.

¹⁰⁵ Speidel, Richard E. "Unconscionability, Assent and Consumer Protection." *U. Pitt. L. Rev.* 31 (1969): 359.

¹⁰⁶ Murray Jr, John E. "Unconscionability: Unconscionability." *U. Pitt. L. Rev.* 31 (1969): 1, explained in Speidel, Richard E. "Unconscionability, Assent and Consumer Protection." *U. Pitt. L. Rev.* 31 (1969): 361-362.

clearly disclosed term¹⁰⁷. “Real assent” includes a 3-step analysis to estimate the possible oppression: (a) the consumer should have an opportunity to choose the goods from a selection available at the market via reasonable shopping efforts; (b) in lack of such opportunity it should be established whether the goods are of necessity (as opposed to “frills”) and (c) if the goods are indeed a necessity, then the term should be commercially reasonable¹⁰⁸. Types of assent described above are also referred to as substantial and procedural unconscionability, respectively¹⁰⁹.

The case law defines unconscionability as unfairness resulting from the absence of meaningful choice, which may often stem from the little bargaining powers and lack of understanding the consumers have¹¹⁰. The unfairness tests referred to by the court include considering "in the light of the general commercial background and the commercial needs of the particular trade or case" whether the terms are "so extreme as to appear unconscionable according to the mores and business practices of the time and place."¹¹¹. Terms that can be considered unconscionable include, for example disparity between the contractual price and market value¹¹², unilateral changing of the terms of a contract¹¹³, waiver of a class action right by virtue of exclusive arbitration clause¹¹⁴.

In theory, these criteria provide no limits to the application of unconscionability doctrine to all the matters listed as unfair in the EU law. Effectively, several of the detailed protective rules existing in the EU, listed in paragraph 1 above, are not recognized by the U.S. courts as unconscionable. For example, in the U.S. unilateral change of the agreed performance by the seller without a reason

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ Joe Douglas v. United States District Court for the Central District of California, 495 F.3d 1062, *2007 U.S. App.

¹¹⁰ Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965).

¹¹¹ Corbin, Contracts § 128 (1963), Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69, 84-96, 75 A.L.R.2d 1 (1960) and Mandel v. Liebman, 303 N.Y. 88, 100 N.E.2d 149 (1951) cited in Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965), *Id.*

¹¹² Jones v. Star Credit Corp., [22 Ill.59 Misc. 2d 189, 298 N.Y.S.2d 264 \(Sup. Ct. 1969\).](#)

¹¹³ [Union Pac. R.R. v. Chi., Milwaukee, St. Paul & Pac. R.R., 549 F.2d 114, 118 \(9th Cir. 1976\).](#)

¹¹⁴ Joe Douglas v. United States District Court for the Central District of California, 495 F.3d 1062 (9th Cir. 2007).

expressly stated in the contract, such as change to the delivery method, would be allowed¹¹⁵, unlike in the EU, where such changes are expressly prohibited¹¹⁶. Another example is the seller's obligation to be bound by the statements made by its agents, which cannot be excluded under the EU Law¹¹⁷, but can be contractually disavowed in the U.S. in a clear and inconspicuous manner¹¹⁸. This may create situations similar to the AOL and Dell cases, where the U.S. lawful terms of use have been found to be in breach with consumer protection requirements, and, therefore, had to be amended¹¹⁹.

Additional consumer protection granted by the EU usually means increasing costs and risks of for the sellers which will inevitably affect the prices placing additional financial burden on consumers.

¹¹⁵ The Journal of consumer affairs, volume 38, number 1 (Summer 2004), p.158

¹¹⁶ Clause (j) of the Annex to the Unfair Terms Directive.

¹¹⁷ *Id.*

¹¹⁸ The Journal of consumer affairs, volume 38, number 1 (Summer 2004), p.158.

¹¹⁹ Winn, Jane K., and Mark Webber. "The impact of EU unfair contract terms law on US business-to-consumer internet merchants." *Bus. Law.* 62 (2006): 209; AOL France v. UFC Que Choisir, R.G. N° 04/05564, Cour d'appel [CA] [regional court of appeal] Versailles, le ch., Sept. 15, 2005, J.C.P IV 150905, cited *Id.*

CHAPTER II

2.1. Jurisdiction in the U.S.

In the U.S., there is no specific conflict of law rule for consumer contracts, therefore the courts interpret the general rules on personal jurisdiction on a case-by-case basis, to decide whether the consumer's claim can be reviewed in the state where it was filed. In other words the court needs to decide, whether it has personal jurisdiction over the seller in the case at hand.

Personal jurisdiction maybe specific, where it emerges from the relation between the cause of action and the minimum connections between the seller and the foreign state, or general, where the seller has "continuous and systematic" contacts (more extensive than the minimum required by the specific jurisdiction) with the foreign state without relation to the specific cause of action¹²⁰.

Therefore, the court at the seller's place of business will most often have general personal jurisdiction, whereas the court at the consumers place of residence may not have any. Case law related to the online interaction usually focuses on specific personal jurisdiction, since the required threshold of required contacts with a foreign state is not usually proven by claimants.

The cornerstone of limiting the seller's being subject to the jurisdiction of a foreign state lies with the traditional distribution of jurisdiction between the states and corresponding principles of "fair play and substantial justice"¹²¹. Despite the development of Internet and respective deterritorialization of internet transactions, the U.S. Supreme Court refuses to dismiss the existing constitutional limits over Stat's power to exercise jurisdiction over a foreign citizen¹²². Therefore, the default rule is that nobody should be subject to litigation in another state. The exception should

¹²⁰ ALS Scan, Inc. v. Digital Service Consultants, Inc, 293 F.3d 707, 2002 U.S. App. 1174563 U.S.P.Q.2D (BNA) 1389.

¹²¹ Reynolds, 23 F.3d at 1117 cited in Compuserve, Incorporated v. Richard S. Patterson, 89 F.3d 1257, p.2.

¹²² ALS Scan supra note 121; Hanson v. Denckla, 357 U.S. 235 cited *Id.*

only be made if a person has *purposefully availed* itself of the foreign state's jurisdiction. This rule arose from the interpretation of the Due Process clause of the 14th amendment to the U.S. Constitution¹²³. The case law is consistent with this approach, and even though the specific personal jurisdiction is rather often justified by 'purposeful availment', its exceptional character and limited application is always underlined by the courts.

Generally, the courts refuse to recognize that the mere placement of an item for sale on a website for everyone's access entails personal jurisdiction in any state where the "stream-of-commerce" takes the item¹²⁴. Instead, the grounds for granting personal jurisdiction are assessed in each case based on several criteria, established by the case law:

(a) Whether the seller purposefully availed itself of the privilege of acting/ causing a consequence in the forum state

As applied to online sales, the case law shows that the physical presence in the state is not required for purposeful availment¹²⁵.

Whether the seller will be subject to the foreign state's jurisdiction in a consumer sale may depend heavily on how interactive the selling website was towards the consumers of such a foreign state, as estimated based on the 'sliding scale' of such interactivity which has been developed by the courts based on several consequent cases¹²⁶. The websites varied from a simple advertisement page about a club in one state (not a sufficient connection)¹²⁷, which never attracted a consumer from another state; to an online software producer who had only a few consumers in a foreign state and

¹²³ Compuserve, Incorporated v. Richard S. Patterson, 89 F.3d 1257, p.2

¹²⁴ ALS Scan, supra note 121.

¹²⁵ Burger King Corp., 471 U.S. at 475, 105 S.Ct. at 2183-84, cited in Compuserve, supra note 124.

¹²⁶ Zippo Mfr. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119 (W.D. Pa. 1997) cited in ALS Scan, supra note 121.

¹²⁷ Bensusan Restaurant Corp. v. King, 937 F.Supp. 295 (1996).

a written contract with a foreign intermediary website (sufficient connection¹²⁸). The courts emphasize that the seller's efforts have been "purposefully directed" towards foreign consumers, since the software was **only** advertised in the foreign state¹²⁹. Also, the quantity of the sales is of no importance, provided they satisfy the "quality contact" requirement¹³⁰. The opposite of a 'quality' contact with the state is "random" or "fortuous" connections¹³¹.

Zippo 'sliding scale' was redefined in *ALS Scan* to focus on the matter of targeting and its effects¹³²: "State may, consistent with due process, exercise judicial power over a person outside of the State when that person (1) directs electronic activity into the State, (2) with the manifested intent of engaging in business or other interactions within the State, and (3) that activity creates, in a person within the State, a potential cause of action cognizable in the State's courts"¹³³.

In a typical online sales contract it may be difficult to prove that the sale was purposefully directed at consumers of a certain state, unless they are exclusively advertised there. This 'direction' test generally resembles the EU approach, and, therefore, the matters of the languages used may be also considered by courts.

(b) Whether the cause of action arise from the Seller's activities in the forum state;

¹²⁸ Compuserve, supra note 124.

¹²⁹ *Burger King Corp.*, 471 U.S. at 475, 105 S.Ct. at 2183-84 cited in *Compuserve*, supra note 124.

¹³⁰ *Reynolds*, 23 F.3d at 1119, cited in *Compuserve*, supra note 124.

¹³¹ *Burger King Corp.*, 471 U.S. at 475, 105 S.Ct. at 2183-84, cited in Cordera, Michael. "E-consumer protection: A comparative analysis of EU and US consumer protection on the internet." *Rutgers Computer & Tech. LJ* 27 (2001): 231.

¹³² Gillies, Lorna E. *Electronic commerce and international private law: A study of electronic consumer contracts*, Ashgate, England (2008), p. 147-149.

¹³³ *ALS Scan*, supra note 121.

The cause of action in the foreign state exists if the contacts with the state, established under ‘purposeful availment’ test are in relation to the controversy underlying the dispute arises¹³⁴. In Compuserve such a relation between copyright infringement and connections with Ohio was confirmed by the fact that the software subject to infringement was placed on Ohio-based system, it was marketed **only** there, the revenues from the sales were passing through Ohio; moreover, the dispute actually arose from the threats of a lawsuit to an Ohio-based company¹³⁵.

This criterion, however, does not provide a clear answer for a case where the advertisement is made globally, the revenues flow from all over the world, and the seller does not threaten the consumers.

(c) The acts of the Seller or consequences caused by the Seller must have a substantial enough connection with the forum to make the exercise of jurisdiction over the defendant reasonable¹³⁶

As mentioned by the courts, this third criterion usually follows suit, if the first two are established. The main points of assessment are: “the burden on the defendant, the interest of the forum state, the plaintiff’s interest in obtaining relief, and the interest of other states in securing the most efficient resolution of controversies”¹³⁷. The reasonability threshold will most often be met, based on each state’s interest in resolving the dispute involving its citizen and its laws¹³⁸.

Overall, the U.S. and the EU courts consider similar factors when assessing the reasonability of the seller’s exposure to the foreign jurisdiction and determining whether the sales are being ‘directed’ to the consumers in a given country. However, the emphasis in the EU is, as always, on the consumer, the general rule being his right to choose the forum. In the U.S. the courts pay special

¹³⁴ Reynolds, 23 F.3d at 1116-17 cited in Compuserve, supra note 124.

¹³⁵ Compuserve, supra note 124.

¹³⁶ Reynolds, 23 F.3d at 1116 cited in Compuserve, supra note 124.

¹³⁷ American Greetings Corp., 839 F.2d at 1169-70 cited in Compuserve, supra note 124.

¹³⁸ American Greetings Corp., 839 F.2d at 1170 cited in Compuserve, supra note 124.

attention to the constitutional limitation of jurisdiction over a foreign citizen which shall not be affected by the technological development¹³⁹. This may lead to a different outcome of cases with similar fact pattern, which would be, perhaps, less favorable for consumer in the U.S.

2.2. Choice of law in the U.S.

Basic rules on the choice of law are summarized by the Restatement (Second) on Conflict of Laws, which generally allows the parties to a contract to select applicable law, however, provides certain limitations. Application of the chosen law to a particular issue may be limited in cases, where the choice of law for such an issue is outside the scope of the party autonomy¹⁴⁰. Even in that case, application of the chosen law will only be limited if (a) there is no substantial relationship between such law and the parties or the transaction or other reasonable basis, or (b) application of the chosen law would be contrary to a fundamental policy of a state which has a materially greater interest¹⁴¹.

Case law helps to identify the practical grounds for limiting application of the chosen law. State laws aimed to “protect a weaker party against the unfair exercise of superior bargaining power by another party”, which prohibit contractual waiver of the respective protection are generally recognized as fundamental policies which cannot be altered by virtue of choosing a foreign law¹⁴². However, a requirement to have a signed contract as a condition for opening a bank account does not meet the ‘fundamental’ threshold¹⁴³. Also, arbitration clauses in conjunction with a waiver of class action right are not considered unconscionable, in view of the official tendency to favor arbitrability¹⁴⁴.

¹³⁹ ALS Scan supra note 121.

¹⁴⁰ Restatement (Second) on Conflict of Laws, § 187(2).

¹⁴¹ *Id.*

¹⁴² Bush, 139 Wis. 2d at 644-45 cited in Coady v. Cross Country Bank, 729 N.W.2d 732 (2007).

¹⁴³ Jackson v. Pasadena Receivables, 921 A.2d 799 (Md. 2007).

¹⁴⁴ Medtronic AVE, 247 F.3d at 55, cited in Gay v. CreditInform, 511 F.3d 369. (3d Cir. 2007).

2.3. Jurisdiction in the EU

EU regulation contains harmonized provisions on jurisdiction in consumer contracts and allow the consumer to choose whether to sue in either its own domicile or, alternatively, at the seller's place of business¹⁴⁵. This rule, however, is not absolute, and is qualified by the criteria of either pursuing or "directing" activities towards the consumer's state of domicile¹⁴⁶. The seller, in turn, may only initiate proceedings against the consumer in the state of the latter's domicile¹⁴⁷. Contractual amendment of these rules is only allowed in a limited number of cases: (a) amendment agreed after the dispute has arisen; (b) it allows the consumer to sue in other states, or (c) the parties and the chosen court are in the same jurisdiction). These exceptional cases do not allow including relevant provision limiting default jurisdiction rules (such as an arbitration award) in the terms of sale.

2.4. Choice of law in the EU

Choice of law matter for consumer contracts is also harmonized in the EU, in a manner resembling certain features of both jurisdiction issue in the EU and U.S. restatement rules on the choice of law. The default applicable law to the consumer contracts is the law of the consumer's domicile, provided the seller pursued and/ or directed its activities towards such state of domicile¹⁴⁸. Contractual alteration of applicable law is allowed, however, it may not deprive the consumer of the protection provided by mandatory provisions of the law of its domicile, which cannot be contractually waived¹⁴⁹.

¹⁴⁵ Article 16 of the Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (2000).

¹⁴⁶ Article 15(c) *Id.*

¹⁴⁷ Article 16.2 *Id.*

¹⁴⁸ Article 6.1. of the 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).

¹⁴⁹ Article 6.2 *Id.*

2.5. Choice of law and jurisdiction in Kazakhstan

Kazakhstan rules on jurisdiction allow the consumer to choose the location for suing the seller from 3 options: (a) consumer's domicile; (b) place of conclusion of the contract or (c) place of contract performance¹⁵⁰. As discussed at Chapter 2, place of conclusion and place of performance could be rather hard to identify for e-contracts concluded and sometimes performed in the cyberspace. Kazakhstan law provides no guidance in this regards. As concerns applicable law, Kazakhstan civil code establishes the general principle of party autonomy on this matter¹⁵¹, however, it can be overruled by application of the imperative norms of a state having close connection with the transaction, where such norms should apply regardless of the contractual arrangements¹⁵².

¹⁵⁰ Article 30.9 of the Civil Procedural Code of the Republic of Kazakhstan No. 370-V-ZRK (2015).

¹⁵¹ Article 1112 of the Civil Code of the Republic of Kazakhstan No. 409-I (1999).

¹⁵² Article 1091, *Id.*

CHAPTER III

In this chapter we will compare the consumer protection mechanisms used by online sellers in the U.S., the EU and the Republic of Kazakhstan. We will look at two examples of international clothes retailers operating in all selected jurisdictions: Zara – Spain based company selling clothes, shoes and accessories at its website, and Victoria’s Secret – a U.S. based company specializing in underwear, body care and fragrances for women, which can be ordered internationally. Finally, the third example is a solely Kazakhstan based online shop of computers and electronic gadgets – “Belyi Veter” (the “White Wind”), further referred to as “BV”.

We will analyze the electronic contract formed at the time of online purchase in each case following similar matrix, and then compare the results.

Our analysis of each case will cover the following major points:

1. Terms of the Sales agreement. Contents and accessibility
2. Means of contract formation. Offer and acceptance
3. Unfair clauses
4. Information provided to consumer
5. Returns and withdrawal
6. Warranties and limitation of liability
7. Jurisdiction and forum
8. Dispute resolution.

As a result of the analysis we should come to the conclusion about either presence or absence of discrimination against consumers residing in the countries with the lower level of statutory consumer protection.

1.1. Victoria's Secret

Victoria's Secret ("VS") website <https://www.victoriassecret.com/> was accessed from Hungary on 25 March 2017¹⁵³.

1.1.1. Terms of the Sales agreement. Contents and accessibility

Purchases of VS goods from the EU (and several other countries including Australia, Hing Kong, Singapore, etc.) take place with the assistance of a third party intermediary seller – eShop World, a company registered in Ireland. VS website notifies the consumers about the transaction being redirected to the third party website, and that it's own rules should apply, right before the checkout. In order to proceed, the consumer should click the button "Continue to e-shop World", which entails agreement with the latter's terms and conditions, which are available in a separate window by clicking on the link provided next to the button. However, there is no need to browse through the terms to proceed with the transaction.

As a result, the contract is formed between the consumer and eShop World, as confirmed by the latter's terms of use. Moreover, the contract is not simply for the sale and purchase of goods. Instead, further to the consumer's order eShop World purchases the ordered items from the 'retailer' for the sole purpose of reselling them to the consumer. Terms of use contain numerous limitations of liability of eShop World, since it should not be held responsible for the delays caused by the retailer or its failure to supply the goods. This could potentially hinder the consumer's rights, since it has not contractual means of holding the retailer (in this case – Victoria's Secret) liable for such delay/ failure.

¹⁵³ <https://www.victoriassecret.com/>, last accessed on 5 April 2017.

The terms of eShop World are more restrictive than the policies on VS website. For instance it includes certain restrictions with respect to the returns, extensive limitation of liability clauses, etc. as described in details in the respective sessions.

However, since it is an Irish Entity, the EU consumer will still be entitled to any privileges granted by the EU law. Terms of use of eShop World are clearly EU tailored, and contain specific provisions on the possibility to check and correct errors before checkout, envisage acknowledgement of the order receipt and 14 days “cooling-off” period.

U.S. and the rest of the world purchase directly from VS website.

VS website does not contain the separate terms of the sale and purchase agreement. The Terms of use, available at the website, rather contain the consumer’s obligations regarding the use of the website, such as refraining from copyright, trademark and patent infringement, etc. Terms of use envisage browse-wrap form of assent, assumed to be expressed through the simple use of the website.

The Terms of Use also indicate, that the website is controlled from Ohio, and that the content of the website should not be deemed to be appropriate outside of the U.S. The consumers are assumed be citizens of the U.S. and the use of the website from outside the U.S. should be at the consumers own risk. Such international consumer is required to “ensure compliance with the local laws”.

For international consumers this should mean that their potential claims to VS regarding the use of the website may not be successful. In fact, since the sales contract is not concluded with the VS itself, this should not limit the consumer’s right to address the claims to e-Shop world. However, given the extensive disclaimers contained in the e-Shop world’s Terms of use, international consumers may have limited rights as compared to the U.S. consumers.

1.1.2. Means of contract formation

Terms of use of the VS website are a typical browsewrap agreement, they are deemed to be accepted by any user of the website. The link to the website is provided at the bottom of the homepage. EShop World terms are accepted by clicking the “Enter eShopworld” button, required for checkout. The link is available right next to the button, but there is no need to browse through the terms to proceed. The terms are also an example of a clickwrap agreement.

Online purchase process includes several click-through pages which differ, depending on the chosen country of shipping. A user can easily choose one country or the other regardless of the actual location.

Standard procedure available for shipping to the U.S. and to Kazakhstan provides a notification on the possible import duties and taxes, which should be borne by the consumer. After filling in shipping details and choosing delivery option (total price includes shipping costs), the consumer is requested to enter the bank details and only after that review the order (the card should not be charged at that stage). Final stage of the purchase is “Place the order” button.

The checkout process is slightly different for EU consumers. They should put item into bag, fill in shipping details, choose delivery option (delivery costs indicated), then review/ correct the order, press “Continue to eShopworld” button where the order can be reviewed again, and then bank details and press “Confirm and pay”. The process reflects the price including shipping costs already at the beginning check-out, however, there is no mentioning customs duties/ taxes.

Theoretically, the question which step exactly is an offer and which is an acceptance could depend on each country’s contract rules and may be hard to identify given that click-through purchase involves quite a lot of confirmation clicks, confirmation of order and confirmation of shipment.

Most likely, the site offerings would be viewed as an open advertisement, the placement of the order would serve as an offer, accepted via order confirmation. Practically, the no return point for the U.S. consumer would be between order confirmation and shipping date, when the return option could basically allow to avoid the contract without any transportation costs. For EU consumers this point is only reached 14 days after the purchase, which are available to withdraw from the contract without any expenses.

1.1.3. Unfair clauses

VS terms of use and the purchase process itself do not seem to contain unfair terms for the consumers under neither US nor EU Law.

eShopWord's terms and conditions, however, even though seemingly designed specifically for the EU consumers, include several provisions that may be questioned under the EU Directive on unfair terms.

First, the terms envisage the possibility of unilateral amendments of the terms which should be binding on the consumer. It is not clear from the terms, whether the updated conditions should be binding with respect to the subsequent purchases or whether they should also apply to the existing purchases. In the latter case, such a provisions would hardly be enforceable¹⁵⁴.

Second, extensive limitation of liability due to the retailer's failure to supply the goods may be viewed as excluding consumer's legal rights to claim respective damages in cases of non-performance¹⁵⁵. However, the wording of the disclaimers probably mitigates this risk, limiting its application with the extent allowed by the law.

¹⁵⁴ Article 6.1. and Clause 1(j) of the Annex to the COUNCIL DIRECTIVE 93/ 13/EEC of 5 April 1993 on unfair terms in consumer contracts.

¹⁵⁵ Clause 1(b) of the Annex to the COUNCIL DIRECTIVE 93/ 13/EEC of 5 April 1993 on unfair terms in consumer contracts.

1.1.4. Compliance with information requirements

VS website reflects the brand name on each page. Consumer support section provides for the telephone numbers and a live chat option, however, there is no apparent indication of the geographic address (other than that of the copyright claims department).

The website provides description of the chosen item, major characteristics, such as color, size, quantity, accompanied by pictures and the link to the return/ exchange section.

The initial description only displays the price of the item. Presumably, the taxes are included, but there is no indication of that on the website. Shipping costs are reflected at the later stage of checkout, but before placement of the order.

EShopworld's terms of use do provide the address and company details of the seller in accordance with the EU requirements.

Overall, this difference is of formal nature, since the consumers willing to sue the VS directly may use the address of any of the thousands VS shops, available via store locator on the website.

1.1.5. Withdrawal and returns

The website provides separate return policies for the U.S. consumers and for the rest of the world, varying by country. The link to the returns and exchange information is provided even before the item is put into shopping cart.

The website does contain a specific reference to the right of withdrawal, specifically for the EU consumers. However, in reality, the level of consumer protection provided by the VS to all consumers is even higher than the EU Law standards.

VS policies allow for the purchased goods to be returned without limitation of the term. One of the ads on the website even says, that **any goods** that the consumer simply did not like can be returned

at any time. However, browsing slightly deeper in the policies shows that the refund is only available within 90 days from the date of purchase. Afterwards, the payback is only possible in a form of a merchandise card. Shipping costs of the returned goods are to be born by the consumers.

The policies on the website do not include any qualifications as to the type/ condition of the returned goods, which is especially peculiar, since underwear, being the major part of the VS goods, is on the list of non-returnable goods in many countries, including the EU and Kazakhstan¹⁵⁶. Unofficial sources confirm this policy being followed by VS¹⁵⁷.

E-shop world's terms and conditions include a general reference to the return policies of the retailer (i.e. VS), however, they require that the returned goods are in new condition, with tags attached and accompanied by the original invoice. The terms also contain specific rules for the "cooling-off" period. The consumer is entitled to cancel the contract, and to be compensated for all the costs incurred, including any taxes, duties and transportation costs (with the least expensive delivery method). However, the goods should be in "perfect resalable condition".

This rule provides the highest level of consumer protection established by the Consumer contracts directive. In fact, the seller could have shifted the return shipping costs on the consumers by expressly indicating in the Terms¹⁵⁸. The withdrawal right is only available for the EU, Norway and Switzerland consumers only.

¹⁵⁶ Article 16(e) of the DIRECTIVE 2011/83/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 25 October 2011 on consumer rights.

¹⁵⁷ <http://www.businessinsider.com/victorias-secret-underwear-return-policy-shredding-2015-3> last accessed on 2 April 2017.

¹⁵⁸ Articles 9.1. and 14.1. of the Directive on consumer rights, *supra* note 36.

1.1.6. Warranties. Limitations of Liability

Neither the website nor eShop World terms of use contain any information on the warranties with respect to the goods. Purchase from the U.S. website is processed without any disclaimers. However, eShop World terms contain extensive limitation of liability clauses.

First, the terms include a disclaimer paragraph in capital letters, disclaiming any warranties and excluding any liability for any damages to the fullest extent permitted by applicable law, except for the cases of death or personal injury caused by the negligence of employees/ representatives.

Second, the terms provide a broad list of ‘events outside control’, which should also exclude liability. In addition to the standard force majeure events, the list includes delays caused by the retailer.

The terms also point out that any product descriptions, express or implied, are provided by the Retailer and thus eShopWorld cannot be held liable. However, since international consumers only have contract with eShop World this would mean that there is no one they could hold liable for the non-conformity of goods with the descriptions, their failure to be fit for the purposes and to provide the quality expected of the similar types of goods. Under the EU law such an effect of any limitations of liability should be unenforceable. In practice, however, the generous return and withdrawal policy protects the consumers from the respective risks without the necessity to claim nonconformity, therefore, the risk of the claims as to the content of the contents is minimal.

1.1.7. Jurisdiction and Applicable law

US terms of use simply mention that the site is controlled from Ohio. No indication of the law applicable to the sale, or dispute resolution mechanism is provided by the terms of use. For the U.S. consumers the principles of personal jurisdiction would most likely allow suing VS in their

state of residence, since not only does it allow online sales, but also has stores in most states. This is confirmed by the past lawsuits against VS filed both in Ohio and in other U.S. states¹⁵⁹.

For international consumers, however, it could be problematic to sue VS directly. First of all, the purchase process clearly indicates that the sales contract is concluded with another entity, therefore, cause of action could be missing. Second, terms of use on VS website (browsewrap agreement) ask the users to confirm being U.S. citizens. Therefore, for international consumers it could make more sense to sue eShop world. On the other hand, when accessed from Hungary, for example, the website automatically indicates Hungary as the place of shipment and used Hungarian forints as the shopping currency. Despite the fact that the website was displayed in English (there is an option to switch to French, German and Spanish only), forints being Hungary-specific currency, this could be viewed as targeting, especially given that the website is highly interactive.

Eshop world terms are governed by Irish Law, Irish courts should have non-exclusive jurisdiction. Given the EU rules on consumer lawsuits, the consumers should be entitled to sue in Ireland or in their country of residence, provided the “targeting” requirements are met. However, this last point could be problematic, since Eshop world website itself is barely interactive, allows no sales mechanism and basically makes available terms and conditions and privacy policy.

In order to provide maximum protection for international consumers, the purchase process should be viewed as a whole, the contract formation involving public advertisement at VS website targeted with the use of respective currency, shipping and returns information tailored to address different countries, followed by product description and photographs, and completed with accepting eShop

¹⁵⁹ <https://www.law360.com/articles/67376/victoria-s-secret-sued-over-injurious-bras> last accessed on 2 April 2017.

world's terms and conditions. Otherwise, the contract not reflect the product qualities which where decisive for the consumer's decision to contract.

If that approach is applied, then the EU consumers should be able to sue eShop World in their own place of residence, on the matters including failure of the goods to comply with the descriptions.

Being EU tailored, eShop World section on VS website provides a brief description of EU alternative dispute resolution process and provides a link to the European Commission Online Dispute Resolution website. As first steps, however, the consumers are advised to contact eShop World directly via e-mail, and, in case this does not suffice, contact VS consumer service via phone or e-mail. Other consumers, including U.S. and Kazakhstan residents are not advised on dispute resolution process.

1.2. ZARA

Zara website accessed on 28 March 2017.

1.2.1. Terms of sale and means of contract formation

Zara provides standard click-through shopping mechanism similar to that of VS. However, the terms of sale are available by a link at the bottom of the webpage. The terms are deemed to be accepted by all user, however, any purchase requires ticking a box confirming such acceptance. Purchase process does not require browsing through the terms, but provides a link to them.

The terms of use are very different for the EU and U.S. consumers. EU terms follows closely the legal requirements on disclosure of information, right of withdrawal, jurisdiction, etc. as described in detail below.

US Terms are a not a mere modification of the EU terms, but a completely different document. One of the first eye-catching details about these terms is their plain and understandable “story

mode” language. Necessary parts, including disclaimers and waivers are in capital letters. Acceptance of the terms is similar to that to the EU terms.

Interestingly, the U.S. terms also directly explain the process of contract formation to the consumers. According to them, the order confirmed by the consumer constitutes an offer. Acceptance of the offer by Zara is expressed by shipping of the goods. Therefore, consumer’s credit card is only charged upon shipment. This scheme minimizes the risks of the seller’s liability due to the unavailability of the goods. The exception is made for PayPal payments which are withheld at order confirmation by Zara. However, PayPal provides for buyer protective refund mechanisms and therefore minimizes consumer’s risks related to paying for the contract which is not yet concluded¹⁶⁰.

1.2.2. Unfair clauses

EU Terms are drafted carefully to avoid unfair terms. For example, they clearly state that any amendments will only be binding on subsequent sales.

As to the U.S. Terms, through the prism of EU unfair clauses Directive some provisions could be found unfair. For example, the terms require the consumers to waive a number of their legal rights¹⁶¹, including the right to take part in a class action, the right to jury trial, appeal and to a court proceeding (arbitration is mandatory).

¹⁶⁰ <https://www.paypal.com/hu/webapps/mpp/buyer-protection> accessed on 30 March 2017.

¹⁶¹ Clause 1(b) of the Annex to the COUNCIL DIRECTIVE 93/ 13/EEC of 5 April 1993 on unfair terms in consumer contracts.

1.2.3. Compliance with information requirements

Both EU and U.S. Terms disclose all the required information about the Seller, including company details, geographic address, phone number and e-mail. Click-through purchase provides detailed description of each item, including pictures, used materials, link to the return options, etc.

1.2.4. Accessibility

EU Terms specifically mention that they remain available to any purchased via a link provided in the order confirmation. In addition to that, they may simply be copied from the website. U.S. Terms do not specifically cover the matter of accessibility, but they are also easily obtainable from the website.

1.2.5. Withdrawal and returns

Returns policy under the EU terms refers consumers to the 14-days right of withdrawal where the consumers bears no expenses, and provides additional 30-days period when the goods may be returned, but the consumer may incur the mailing costs. Unlike VS website, Zara allows direct returns to any shop in a country where an item was purchased or, alternatively, an option of item being collected from the consumer by Zara courier (free of charge). These options allow completely cost free returns in much bigger number of cases. However, Zara website requires the goods to be returned together with all the original packaging, and in case the value of an item is diminished beyond what is necessary to estimate its the nature, characteristics and functioning, the consumer may be held liable. Moreover, Zara's terms do not exclude the limitation on returns of the goods due to hygiene reasons, therefore, the consumers may have less success returning underwear.

In any case the level of protection is in line with the EU Law, and, in fact, provides additional preferences as compared to the legal minimum.

U.S. consumers are granted a 1 month free return period. Return options are the same as in the EU terms, therefore, the consumers need not incur any transportation expenses. However, U.S. terms require slightly more in terms of conditions of the returnable goods, which have to be “in the same condition as they were at the time of delivery or which have been used beyond the mere opening of the package”. Even though this requirement seems similar to that in the EU Terms, in practice it may allow a much wider margin of discretion for refusing the returns, since it does not envisage the reasonable necessity to test the characteristics and functioning of the goods. Either way, the U.S. returns policy is also more generous than the default rule under the EU Law.

1.2.6. Warranties. Limitation of Liability

Limitation of liability in the EU terms is neatly worded not to trigger any limitations of the EU Law. Liability cap is established at the level of the price paid for each item, product descriptions are to be viewed “as is”, however each paragraph carefully repeats that it should only apply to the extent permitted by the law. Effectively, as mentioned above in Chapter 1, enforcement of such limitations may be very limited due to the mandatory warranties established by the EU Law.

The same applies to the massive disclaimers in the U.S. Terms, that limit all possible liability associated with the use of the website, including accuracy of product descriptions, to the fullest extent permitted by the law. It is characteristic, however, that the U.S. terms themselves discriminate between the U.S. states, making a note that for the residents of New Jersey the disclaimers should not apply.

1.2.7. Jurisdiction and Applicable law

EU Terms are governed by Spanish law, with non-exclusive jurisdiction of the Spanish courts over any arising disputes, however, there is a specific reference for the statutory rights of the consumers

being a priority. The Terms also refer the consumers to the European Commission online dispute resolution mechanism.

U.S. Terms require application of the New York law, and for the disputes to be resolved in arbitration, however it provides for an extremely consumer friendly regime, where Zara obliges to pay the fees for arbitrators' services as well as additional fees that would make arbitration cost-prohibitive as compared to the litigation. In certain cases, this approach could turn out even more (or at least not less) cost-efficient for the consumer in the U.S. than litigation in the EU.

1.3. Belyi Veter

Website accessed on 29 March 2017

Belyi Veter (“BV”) website is also following the standard click-through purchase mechanism and order confirmation via e-mail. The nature of the goods is slightly different from previous examples – offered items include laptops, desktop computers, accessories and associated devices. The average price level is notably higher than that of VS and Zara, and so is the expected exploitation period. Hence, many items have guarantee period for several years. Information about the guarantee, returns, delivery and detailed description of characteristics is provided on the website.

1.3.1. Sales agreement

Instead of the terms of sale the website provides access to the text of the so-called ‘public agreement’ or ‘public offer’ between the BV and the buyers. The agreement is very concise as compared to the previous examples and contains numerous references to the default and/ or mandatory provisions of the Kazakhstan law. This is a typical approach to contract drafting in Kazakhstan, which tends not to duplicate the legislative provisions, which are deemed to be included. In the following sections we will analyze such default provisions as well.

Kazakhstan Consumer protection law requires the terms of the consumer contracts to be in plain and simple language. In fact, the agreement may be less of a story mode text as compared to the U.S. Terms used by Zara, however, it contains much less specific legal terminology which is applied, for example, to describe limitations of liability, disclaimers, waivers of the legal rights, etc.

1.3.2. *Means of contract formation*

1. This agreement proclaims to be an offer, which is accepted by the consumer by paying the purchase price. Legal precision of such a mechanism is questionable for two reasons. First, the agreement does not mention, that the conditions about the character, quality, quantity and price of the purchase goods also form a part of the agreement (the essential part, actually). One may argue that the sales agreement itself and agreement on the terms of sale are two separate instruments. Even though one would not make sense without the other, it would thyn be more logical to make the “Public agreement” binding on all users of the website, or at least link the acceptance and confirmation of offer by the consumer.

Second, the agreement provides for an option of paying upon delivery and even delayed payment under credit arrangement with a partner bank (options for several years are available). Technically, in these cases the BV may not have a sales agreement in force at the moment when the goods are being delivered, and hence no grounds to reimburse transportation expenses. Moreover, it may not have an effective agreement up until the end of the consumer’s credit arrangement with the bank. In addition to that the agreement being a public offer it contains no limitations on the BV’s obligation to sell the goods (which expressly assumed in the agreement), regardless of its capacity. There is also no default rule in the legislation that would provide reasonable limits to such an obligation. Had the Kazakhstan consumers been more proactive, they could have used this omission against the BV. All of the above disadvantages of the terms are, however, rather technical omissions than a reflection of Kazakhstan legal mechanisms.

Nevertheless, the concept of ‘public offer’ is used in the Civil Code and is one of the options for exactly the type of contracts described above. The other option, more similar to the EU and U.S. sellers is a concept of invitation to make offers, which is followed by the consumer’s offer and the

seller's acceptance. Legally, such a mechanism is workable in Kazakhstan, and it would allow more protection (availability of an enforceable contract at an earlier stage) and flexibility (option to avoid the contracts when the goods are unavailable for shipping) to the sellers. For the consumer's however, the existing mechanism used by the BV is more favorable.

1.3.3. Unfair clauses

There are no clauses in the agreement that would qualify as unfair under the EU Law. This is easily explained by the facts that Kazakhstan consumer protection law contains a number of very similar grounds for finding a provision of a consumer contract to be violating consumer rights. The law provides a list including identical or similar provisions to those contained in paragraphs (a),(e), (f), (j)-(p) of the unfair clauses Directive¹⁶². Such terms should not be included into the contract, and if they are the seller should be liable for any damages caused by their application¹⁶³.

1.3.4. Compliance with information requirements

The agreement provides all the necessary details about the seller and the items sold. This is line with the Kazakhstan consumer protection law, which includes an extensive description of information duties of the seller in consumer contract, as described in Chapter I.

1.3.5. Accessibility

The text of the agreement is easily accessible on the website, even though there is statutory requirement on that.

¹⁶² Article 8-1 of the Kazakhstan Consumer Protection Law, *supra* note 40.

¹⁶³ Article 8-3, Id.

1.3.6. Withdrawal and Returns

Returns are not governed by the agreement, however, statutory provisions of consumer protection law apply by default.

1.3.7. Warranties. Limitation of Liability

The agreement does not regulate the matter of the seller's liability. The default provisions allow the consumer to claim the damages in case of defects, missing parts, failure of the goods to perform, etc¹⁶⁴. As mentioned above, many of the items have a contractual guarantee period within which the consumers is entitled to free repair or replacement of the non-performing item, at the discretion of the seller. The guarantee period can be more or less than the default statutory term of 2 years¹⁶⁵.

The consumers litigation rights are not limited in any manner. The Consumer protection law contains a list of such rights, which include the right to be compensated for any damages caused by the seller.

1.3.8. Jurisdiction and Applicable law

The agreement is governed by the Kazakhstan law, however, there is no indication of a dispute resolution mechanism. By default the procedural law requirement allow the consumer (as well as any claimant) to file the claim at the residence of the BV, or

There is no practice of online dispute resolution or use of arbitration for consumer disputes. However, the Consumer protection law provides for another mechanism to mitigate the shortcoming of consumer lawsuits being overly burdensome and cost-inefficient. It envisages the option of creating NGO's focused at consumer protection which are entitled to represent consumers

¹⁶⁴ Art.7.8 of the Consumer protection law supra note 40.

¹⁶⁵ Art. 17.2 of the Consumer protection law supra note 40.

in the state bodies and to actually file lawsuits on consumers' behalf¹⁶⁶. Such lawsuits can be files free of the statutory filing fee¹⁶⁷.

¹⁶⁶ Art. 41.6 (6) and (7) of the Consumer protection law supra note 40.

¹⁶⁷ Art. 42 Art. of the Consumer protection law supra note 40.

CONCLUSION

Comparison between the practical protective measures available to the consumers in the U.S., EU and Kazakhstan shows, that despite the divergences in the regulation the degree of uniformity of online sales process is extremely high. Click-through screens, detailed descriptions, pictures and all other necessary information, which allows reviewing and correcting errors and is followed by order confirmation is well known to consumers in all three jurisdictions. The process of online contract formation, thus, is similar, complying with the highest standards, established by the EU. It became a business practice to keep the consumer well-informed about the goods, aware of the steps of the purpose, related costs and withdrawal rights.

Protection from unfair clauses may appear to be different in the three legal systems, however, effectively, terms of use rarely include provisions that may be found unenforceable (as unfair or unconscionable) in either of them.

The major exemption concerns the strong favor for arbitration in the U.S., however, as shown by the case study, the businesses may be willing to shield the consumer from excessive arbitration costs at their own expense. This practice, unfortunately does not yet protect Kazakhstan consumers, which only save the costs of filing claims against seller, but not the procedural costs.

As to the liability and warranties, despite the fact that the extent of their contractual limitation varies between the EU and the U.S., the disclaimers in practice look completely similar, limiting everything to the extent allowed by the law. The factual scope of liability which may not thus be limited will have to be defined by the courts in each case. This part is not applicable to Kazakhstan, where the sellers rather fail to provide limitation of liability clauses, thus leaving statutory remedies unchanged to the benefit of consumers.

Finally, choice of law and jurisdiction, in spite of slight divergences in legal rules generally tilt towards allowing the consumer to sue in its own place of residence at least.

To summarize, this research did not reveal the trend for the businesses to exploit the existing differences in the protection level of the consumers. Rather, the new business realities require the sellers to strengthen consumer loyalty by providing all the necessary information, protecting consumers from excessive costs and allowing generous return policies. Competition between businesses now being global, doing otherwise would have undermined consumer trust and, thus, would be economically inefficient.

This consumer favorable policy is balanced with the limitations of the seller's risks, such as exception from return policies for perishable or otherwise non-resalable goods and limitation of liability clauses. This balance allows to provide favorable conditions for the consumers and at the same time ensure profits for the businesses.

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