

# E-CONSUMER PROTECTION IN THE US – THE SAME JUNGLE AS IN EUROPE

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*Abstract: With use of the Internet, a new form of contract has appeared: the electronic contract, which is concluded online. In most cases, two parties are present: a consumer, who is in a relatively exposed position and a business entity. This article focuses on the protections given to consumers in the US in these cases – i.e. electronic consumer law in the US – at both federal and state level (with special regard to New York state). Principal questions are the following: do consumers in the US receive the same protections as consumers in Europe when purchasing goods online? When we buy goods from the US here in Europe through the Internet and have them shipped over, do we receive the same protections as in Europe? And what options exist for protecting ourselves? What are the rules and remedies that help us? Last, but not least: what can we learn from the US system, if anything? Summarising substantive US provisions that may be relevant for Europe is also beneficial with an eye to putting continuously evolving European directive law into a broader perspective.*

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## I. INTRODUCTION

Recently, with widespread usage of the Internet, a special field of contract law has emerged, especially strongly in the last decade: the law of electronic contracts. If we review the latest achievements, we realize that there are numerous cases and statutes in the United States on this subject and the situation is similar in the European Union. Consumers conclude contracts via the Internet in our countries every day: they buy goods, reserve hotel rooms, download music from websites and (hopefully) pay for it, they purchase other services, etc. Online consumer purchases have strong growth throughout the world’s major and minor economies. In 2012, Amazon’s revenues were \$61.0 billion, and total online sales in the US not including travel amounted to \$343.4 billion, which is about three times as much as in 2009.<sup>1</sup>

Beside its beneficial effects, such commercial relations may harbor risk for the unaware customer since the Internet is an effective tool for someone who wants to hide behind its anonymity. There is a well-known caricature available on the Internet, first published in *The New Yorker* magazine. The drawing shows a

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<sup>1</sup> Statistics were taken from *Plunkett’s E-Commerce & Internet Business Almanac* (2010) and (2013).

dog sitting in front of a computer with a paw on the desk, with the caption “on the Internet nobody knows you’re a dog”.<sup>2</sup> Developed societies have been regulating e-contracts stemming from the realization that fraudulent conduct is easier in such an environment. Often, the parties do not know each other, and may be a great distance apart.

In researching this article, I wanted to know more about the position of European consumers when purchasing goods from a US business entity. Years ago, a friend of ours bought a \$10,000 guitar from the US on the Internet. The guitar arrived in good shape in Hungary. However, the transaction raised several questions: what if the guitar had been damaged? Could our friend have sent it back? Is our friend’s position similar in Europe as it would have been in the US? Could he have received the same protections and the same remedies?

Beyond modeling such a transaction, I was sure that Europe and the US have a lot to learn from each other in this area. In general, the US tends to be proactive in applying new technologies and in following, or often driving, the latest developments in the world. On the other hand, Europe has a tradition – one that is continuously eroding, but still present – of making clear rules with which the public can get relatively easily acquainted. I also wanted to know whether the protections a consumer receives in the EU is unique to Europe or a worldwide standard. In other words, I wanted to find out whether the European costumer was over-protected or merely receiving generally the same level of protection consumers get in other parts of the world. In Europe – as usual – a new wave of legislation in consumer law and contract law is currently in progress. A new law for consumer contracts was adopted at the end of 2011<sup>3</sup> and a common European

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<sup>2</sup> Available at <http://www.unc.edu/depts/jomc/academics/dri/idog.html>

<sup>3</sup> 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 Text with EEA relevance. OJ L 304, 22.11.2011, 64-88. Cf. Micklitz, H.-W. and Reich, N. “Crónica de una muerte anunciada: The Commission Proposal for a Directive on Consumer Rights.” *Com. M. L. Rev.* (2009): 471-519.;

sales law proposed.<sup>4</sup> I found these legislative processes a golden opportunity for researching deeper background knowledge into the US legal environment in these areas.

I came to realize during this study that US legislation is founded on starkly different approach to ours: in Europe, the core problem of consumer contracts and e-contracts is the remedial section of the legislation, with numerous publications on this topic. On the contrary, in the US, reviewing the remedies related to e-commerce and e-consumer contracts is not in the mainstream. US jurisprudence is occupied with the formation problems of e-contracts and – in the wake of the economic crisis – with the problem of consumer loans, alongside certain other issues. I have reviewed several fundamental books about e-commerce and had to realize that in most of these – albeit outstanding – works there is no guidance on what remedies may be available to the consumer.<sup>5</sup> The cause of this absence lies in the differing philosophy, evolution and architecture of US law, which will be shown later, and which also has a strong effect on jurisprudential thinking. Therefore I hope that our paper may contain some novelty even for those who are already familiar with the topic.

Beyond the above, it is important to stress that in striving to throw light on the rules governing the sale of goods via the Internet, the provisions concerning other types of contract were generally not examined. Furthermore, I concentrated on consumer sale contracts: the laws applicable to other, private contracts may contain differing provisions. Last, but not least, I am strongly focused on “only one side of the coin”: I investigate the system of remedies available for buyers (consumers) of certain goods, and deal far less with the rights of the seller.

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Van Boom, W. H. “The Draft Directive on Consumer Rights: Choices Made & Arguments Used.” *J. Of Cont. Res.* (2009): 452-462.

<sup>4</sup> Proposal for a regulation of the European Parliament and of the Council on a common European sales law. COM (2011) 0635 final.

<sup>5</sup> On the other hand, lots of publications are available on the general rules of consumer contracts and consumer sales.

## II. SOME GENERAL REMARKS

### 1. INJUNCTION VS. CLAIMS FOR DAMAGES

A European lawyer planning to research the system of remedies in US law faces a complex task. In Europe, even at a general level, there is a broad, varied system of these available to the parties in case there is breach of contract. Asking for money is just one of the remedies at hand: beside (and beyond) it, the parties may demand repairs, a discount off the price of the goods or replacement. Of course, the application of these rules in general contract law is diverse among EU member states (see later).<sup>6</sup> However, it is also true that a general right to use other injunctions (e.g. to force a party to do something) is generally not granted to the courts.

If we review US criminal law, we find that there are by far more remedies available than in Europe: the *nulla poena sine lege* principle is interpreted in a very different way in the US.<sup>7</sup> Analogously, we might expect there to exist more “complex” remedies for breach of contract as well. However, this is not the case: in the US, the general rule is to provide money if a breach occurs: a rule rooted in old English common law. “The common law courts did not generally grant specific relief for breach of contract. The usual form of relief at common law was substitutional, and the typical judgment declared that the plaintiff recover from the defendant a sum of money. This, in effect, imposed a new obligation on the defendant for the breach of the old. This new obligation could be enforced without cooperation on the defendant’s part.”<sup>8</sup> An injunction, i.e. a court order commanding or preventing an action was an exceptional tool: it could only be

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<sup>6</sup> Smits, J. M. “Diversity of Contractual Law and the European Internal Market” *The Need For A European Contract Law – Empirical And Legal Perspectives*. Ed. Jan Smits. 2005. 156-163; Lando, O. “Performance and Remedies in the Law of Contracts.” *Towards A European Civil Code* 1994. 201-222.; Tallon, D. “Breach of Contract and Reparation of Damage.” in: *Towards A European*. *supra* note 6. at 223-237.

<sup>7</sup> E.g. convicted criminals have to wear a T-shirt with the text “I am a registered sex offender”, their data is put onto the Internet, some criminals are forced to do social work or other jobs, get psychiatric help, etc.

<sup>8</sup> Farnsworth, A. E. *Contracts*. 3<sup>rd</sup> ed. (1999) 765-766.

used if the complaint showed that there was “no plain, adequate, and complete remedy at law and that an irreparable injury would result unless the relief was granted.”<sup>9</sup> The typical case widely cited in Anglo-Saxon literature is the old English Lumley-Wagner case<sup>10</sup> from the middle of the 19<sup>th</sup> century. In the case, Johanna Wagner, an opera singer breached a contract: she should have sung for one theater but chose to perform at another. The breach could not be prevented since the court did not have the right to force her to sing. On the other hand, the court could prohibit her from going to sing at another theater in the UK.<sup>11</sup> This same approach is revealed across the whole US legal system: even if it has come in for criticism, for example, in the aspect of law and economics,<sup>12</sup> the injunction is not generally used – only in cases where there would not be equitable relief granted.<sup>13</sup> Since our topic is consumer law, and specifically e-consumer law, it is clear that in this general regard, the exceptional rules on injunction cannot be applied. If the buyer (consumer) still has a right for injunction, it is commonly based on two circumstances:

- The parties may agree that a special remedy will also be available to the buyer, e.g. the seller provides repair. This case is optional for the seller: generally, the business entity is not obliged to grant such a right (see later the analysis of U.C.C. and the Magnusson-Moss Warranty Act), or
- There are some state laws and exceptional federal laws that provide the buyer with more rights than he/she would otherwise have. The application of such laws is obligatory: the seller may not deviate from them. In most cases, these laws are the states’ U.C.C.s or consumer

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<sup>9</sup> *Black’s Law Dictionary* 9<sup>th</sup> ed. 2009. on the term “Injunction”.

<sup>10</sup> *Lumley v. Wagner* [1852] EWHC (Ch) J96

<sup>11</sup> Farnsworth *On Contracts*. supra note 8. at 223-237., 771.

<sup>12</sup> White, James J. & Summers, Robert S. *Uniform Commercial Code*. 5<sup>th</sup> edition. 2006. 426. et seq.

<sup>13</sup> The usage of such remedies is typical in the fields of sports law and entertainment law, see e.g. *Triple-A Baseball Club Associates v. Northeastern Baseball, Inc.* U.S. Court of Appeals, First Circuit 832 F.2d 214 (1987). Cf. Epstein David G. and Markell, Bruce A. and Lawrence Ponoroff, *Making And Doing Deals: Contracts In Context*. 2002. 830 et seq. For a typical case under NY law see e.g. *Prospect Park & Coney Island R.R. v. Coney Island & Brooklyn R.R.* 39 N.E. 17 (N.Y. 1894). Moreover, in certain instances, injunction can be issued if a substitute for the goods is not available. Land is handled as unique regardless of the value, see *Farnsworth On Contracts*. supra note 8. at 776. et seq.

laws related to the purchase of certain goods such as cars, mobile phones (their analysis follows below).

The next question arises from the above-mentioned issues: if paying damages is the general remedy, which kinds of losses can be recovered? The answer is that compensation is generally based on the injured party's expectations. The injured party has to be put into a situation as if the contract had been performed. When determining the particular amount of damages, all circumstances of the contract have to be taken into consideration: the party's own needs, opportunities, personal values and even idiosyncrasies.<sup>14</sup> However, in case of a contract, no punitive or exemplary damages are generally applied. In order for such damages to be awarded, a tortious breach of contract must have occurred (i.e. tort must also have occurred in the legal relationship between the parties).<sup>15</sup> In continental (civil law) legal systems, the concept of punitive-exemplary damages does not exist – we do not use this kind of remedy in most parts of Europe.

Compensation in the US should cover the following:

- The loss in value (e.g. someone has bought a used product instead of a new one)
- Other (consequential) loss:
  - Loss caused by the goods to the buyer
  - Other costs incurred, e.g. the goods having had to be repaired urgently because the buyer was using it
  - Other losses, e.g. if the buyer wanted to resell the goods (in case of consumer contracts this is not a valid problem).

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<sup>14</sup> Farnsworth On Contracts. *supra* note 8. at 784. *et seq.*

<sup>15</sup> *Cf. Farnsworth On Contracts. supra* note 8. at 788. *et seq.*; Travaglio G. M. and Nordstrom, R. M. and Clovis, A. L. *Nordstrom On Sales And Leases Of Goods*. 2000. 860. For its use in product liability cases, see Ghiardi, James D. „Punitive Damages in Strict Liability Cases.” *Marquette Law Review* (1977): 245.; Roddy, N. E. “Punitive Damages in Strict Products Liability Litigation.” *Wm. & Mary L. Rev.* (1981): 333. For an overview of the history of exemplary damages, see Rice, D. A. “Exemplary Damages in Private Consumer Actions.” *Iowa L. Rev.* (1969-1970): 307. However, it is important to emphasize once again that such damages fall outside the scope of our research since they are usually connected with a tort or with a fraud, i.e. they are related to non-contractual obligations.

It is very important that according to Restatement (Second) of Contracts, “damages are not recoverable for loss that the party in breach did not have reason to foresee as a probable result of the breach when the contract was made”.<sup>16</sup>

As another general remedy, besides asking for compensation, in certain conditions the contracting party may also cancel the contract and ask for restitution. However, restitution is not available in cases of partial breach, only for total breaches of contract.<sup>17</sup>

## 2. THE STRUCTURE OF SOURCES: GENERAL CONTRACT RULES, CONSUMER LAW RULES AND AUTONOMOUS RULES ON E-CONTRACTS

As we delve deeper into the US legal system, we will realize that with regard to consumer contracts, its basic architecture is similar to that of European legislation. In the US, just like in Europe, there are general rules for contracts at the state level. Consumer law rules can be viewed as special rules, partly codified in various state laws. The sources applicable to electronic contracts – just as in Europe – are ambivalent: there are some laws which constitute special rules, but for the most part the general rules of consumer contracts have to be applied to these contracts as well. This approach raises several questions because of the special nature of these contracts.

Above all these provisions, a fragmented federal-EU level exists. With certain exceptions, the provisions of the latter focus on specific areas and generally do not cover a wide scope of contractual relations.

## 3. SOME BASIC CONCEPTS: “CONSUMER PRODUCT”, “CONSUMER”, AND “CONSUMER CONTRACT”

According to most federal laws, e.g. to the Magnuson-Moss Warranty Act (see later), the term “consumer product” refers to “any tangible personal property

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<sup>16</sup> Restatement (Second) of Contracts §351. *Cf. Hadley v Baxendale* [1854] EWHC J70.

<sup>17</sup> Calamari and Perillo *On Contracts* (2003) 623.

which is distributed in commerce and which is normally used for personal, family, or household purposes.”<sup>18</sup>

According to U.C.C. (see later) § 2-103. “Consumer” means an individual “who buys or contracts to buy goods that, at the time of contracting, are intended by the individual to be used primarily for personal, family, or household purposes”.

“Consumer contract” means a contract between a merchant seller and a consumer.

The European law uses the same definitions, and even though there may be differences among the rules, the main definitions of consumer contracts are consistent on both sides of the ocean.

### III. SUPRA-STATE LEVEL: FEDERAL LAWS AND UNIFORM RULES

#### 1. THE RULES OF U.C.C.

##### A. Basic Observations

Besides the above-mentioned, general common law rules, which are entrenched in US law, the provisions of the U.C.C. are also very interesting for us, especially for sales contracts. The rules of the U.C.C. are to be applied to e-contracts as well.<sup>19</sup> Please note that in case there is no other special rule, the states’ U.C.C must be applied.

If we check the system of remedies in the U.C.C, we realize that the common law tradition has had a strong effect on the Code. Even though the Code should also apply to consumer contracts, the repair of goods and the diminution of price still have no important role. The basic architecture of the main remedies is as follows:

- Monetary (financial) remedies

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<sup>18</sup> Magnuson-Moss Warranty Act, 101 (3).

<sup>19</sup> Even though it has nothing to do with remedies, I will also discuss the problem of e-signatures later.

- Cancelling the contract and asking for restitution (i.e. recovery of the purchase price)
- Recovery of damages
- Asking for cover
- Non-monetary remedies
  - Specific performance (in case of unique goods or “other proper circumstances”)
  - Recover Goods From Seller and replevin (identified goods, if the buyer is unable to cover)

#### B. Warranties

Before entering into a detailed description of the above-mentioned sanctions, I have to make some statements about the quality standards of the goods as regulated by the U.C.C. As a comparison with Europe, we can state that the US system of warranties has both similar and differing instruments – notwithstanding the fact that the architecture and legal thinking behind warranties is significantly different across the Atlantic. In most EU member states, there exist two kinds of warranty. The language of this article’s author (Hungarian) even has distinct words (*szavatosság & jótállás*) for the two. The first kind of warranty is a general warranty covering quality and title, used for every transaction that includes the sale of goods. Consequently, when anyone sells goods, this warranty must be provided. The second type of warranty usually has a commercial-consumer law aspect: this type grants the buyer more rights, provides for longer periods in which to execute his/her rights, alters the burden of proof, etc. (for further details, see the EU section of this article). In Europe, remedies are closely tied to the types of warranties.

It is easy to see that the US system and the legal thinking behind its “warranty” are significantly different. In the interpretation of the U.C.C., a warranty is a promise made by the seller that the article has certain qualities and the seller has a title to sell it.<sup>20</sup> However, this definition is useless for us, since in

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<sup>20</sup> Williston On Sales. 2006. 3.

general, “to say warranty is to say nothing of legal effect”,<sup>21</sup> and this latter problem is of greater interest to us.

According to the U.C.C., there are different kinds of warranties (or, to be more precise, different grounds which create a warranty) available to the buyer:

- “Express warranty”: if the warranty arises from “some form of representation”<sup>22</sup> by the seller
- “Implied warranty”: automatically arises from every sale of goods<sup>23</sup> between a merchant<sup>24</sup> and a buyer, i.e. including consumer contracts and e-consumer contracts
- “Implied warranty of fitness for particular purpose”: applies when the buyer bought the goods for a particular purpose, and the seller knew about this purpose
- “Warranties of title and against infringement”: just like in Europe, the seller has to have a title to be able to sell the goods.

Clearly for us, the second type of warranty is particularly relevant, unless the merchant provides the consumer with an express warranty. The implied warranties automatically arise between a merchant and a buyer. It is essential to highlight that according to the U.C.C. the seller has the right to narrow, i.e. to limit or disclaim the warranty.<sup>25</sup> However, such a right is limited by other rules,

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<sup>21</sup> *Llewellyn, Karl* cited by Murray J. E. & Fletchner H. *Sales, Leases And Electronic Commerce*. Eagan, MN: Thomson/West Group. 2003. 104.

<sup>22</sup> Greenberg, Harold, *Rights And Remedies Under U.C.C. Article 2*. 1987. 180 et seq.

<sup>23</sup> The fact of whether the goods were new or used is not relevant, see *Williston On Sales. supra* note 20. 196 et seq.

<sup>24</sup> According to U.C.C. §2-104 »”**merchant**” means a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill«.

<sup>25</sup> Greenberg, Harold, *Rights And Remedies Under U.C.C. Article 2. supra* note 22. at 224. Cf. U.C.C. §2-316;

“(1) Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but subject to the provisions of this Article on parol or extrinsic evidence (Section 2-202) negation or limitation is inoperative to the extent that such construction is unreasonable.

(2) [...] to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that ‘There are no warranties which extend beyond the description on the face hereof.’

(3) [...]

such as the Magnuson-Moss Warranty Act (see later). In this approach, it is not the remedies that are limited but rather the basic obligation that forms the basis of the remedies. Furthermore, liquidation or limitation of damages and the contractual modification of remedies are also available to the parties (see U.C.C. §2-718 & 2-719).<sup>26</sup>

The exclusion and limitation of warranties and remedies in case of consumer contracts are foreign for us Europeans. In Europe, parties generally have a right to determine the content of their contracts. Yet for consumer contracts, there are mainly strict (mandatory) rules adopted by the European Union, which the parties cannot limit/disclaim/alter in their contract. This is also true in regard of damages arising out of failed or improper performance. However, as mentioned before, the Magnusson-Moss Act has certain rules that can override the provisions of the U.C.C. in order to give a higher level of protection to consumers, but these rules still give the parties more freedom than EU rules do (see later).

### C. Cancelling the Contract and Asking For Restitution

As a first sanction, we must review the rules for cancelling a contract and asking for restitution. According to U.C.C §2-711, the buyer may cancel the contract when the seller fails to make delivery or repudiates or when the buyer

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(a) unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like “as is”, “with all faults” or other language which in common understanding calls the buyer’s attention to the exclusion of warranties and makes plain that there is no implied warranty; and

(b) when the buyer before entering into the contract has examined the goods or the sample or model as fully as he desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him; and

(c) an implied warranty can also be excluded or modified by course of dealing or course of performance or usage of trade.”

<sup>26</sup> In our case, i.e. for e-contracts it is important that the exclusion or limitation of implied warranty can be done both in oral or in written form. If it is in writing, it must be conspicuous. Moreover, the text has to mention the word “merchantability” in order to achieve the legal effect: see *Nordstrom On Sales. supra* note 15. at 435. *et seq.*

rightfully rejects or revokes acceptance<sup>27</sup> of the contract.<sup>28</sup> In such cases, the buyer may ask for recovery of any part of the purchase price that has been paid. The buyer may reject acceptance if the goods are not conformant in every respect. Since this is a high standard, the rule is also called the perfect tender rule in legal literature.<sup>29</sup> Even though the rule seems strongly beneficial for the customer, its application according the U.C.C. is difficult: changes to the Code<sup>30</sup> and the courts' interpretations have eroded its great importance.<sup>31</sup>

After delivery, under the U.C.C., the buyer may not cancel the contract unless there is an essential breach.<sup>32</sup> If the main features including the value of the goods are similar to what was specified in the contract, the performance of the buyer cannot be considered an essential breach.

#### D. Recovery of Damages

Concerning damages, the general common law approach has to be applied. Liability for damages may be excluded – and in fact, most companies selling consumer goods do so. Consequently, any liability for punitive and consequential damages may also be excluded.<sup>33</sup> However, damages may be liquidated in the

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<sup>27</sup> For rejection and revoking of acceptance, see the summary of the proper tender rule below.

<sup>28</sup> The buyer also has the right to accept a part of the performance and reject the rest, See *White & Summers On The Uniform Commercial Code*. *supra* note 12. at 545.

<sup>29</sup> Schmitt, M. A & Frisch, D. "The Perfect Tender Rule - An Acceptable Interpretation" *U. Tol. L. Rev.* (1981-1982): 1375; Lawrence, W. H. "Appropriate Standards for a Buyer's Refusal to Keep Goods Tendered by a Seller." *Wm & M. Law Review* 1635. (1994).

<sup>30</sup> According to U.C.C. § 2-602, the rejection is only permitted if the "non-conformity substantially impairs the value of the installment", and to U.C.C. § 2-504 late delivery is also permitted unless "material delay or loss ensues".

<sup>31</sup> *White & Summers on U.C.C.* *supra* note 12. at 313. et seq.

<sup>32</sup> U.C.C. §2-608. Revocation of Acceptance in Whole or in Part.

"(1) The buyer may revoke his acceptance of a lot or commercial unit whose non-conformity substantially impairs its value to him if he has accepted it

(a) on the reasonable assumption that its non-conformity would be cured and it has not been seasonably cured; or

(b) without discovery of such non-conformity if his acceptance was reasonably induced either by the difficulty of discovery before acceptance or by the seller's assurances."

<sup>33</sup> To be more precise, such damages are generally excluded by the Code and may only be applied if other legal sources on sales allow for it.

agreement only at a value that is reasonable.<sup>34</sup> Moreover, according to § 2-718(1) U.C.C., in consumer law disputes, damages for personal injury may not be excluded. The text of the code says:

“(3) Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not.”

#### E. Substitutes from Third Parties

After the breach, the buyer may – has the right, but is not obliged – to “cover” with any reasonable purchase of goods in substitution for those due from the seller [U.C.C. § 2-711(1) & § 2-712]. Such cover has to be made in good faith and without unreasonable delay.

Moreover, if choosing this option, the buyer has the right to the difference between the cost of the cover and the contract price, together with any incidental or consequential damages [U.C.C. § 2-712(2)]. In a consumer law case the application of this rule can be interesting: if the consumer finds a similar good which is more expensive and buys it, the seller who breached the contract must pay the difference between the price of the original good and the price of the replacement.

#### F. Recovery of Goods From Seller and Replevin of Goods

Please note that contrary to other cases and to the general rules of the U.C.C. – which would force the buyer to sue for damages – in certain cases the buyer has the right to recover goods from the seller.<sup>35</sup> In these cases the goods

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<sup>34</sup> U.C.C. § 2-718(1). *Cf. Nordstrom On Sales*. supra note 15. at 857. *et seq.*

<sup>35</sup> U.C.C. § 2-502.

“Buyer's Right to Goods on Seller's Repudiation, Failure to Deliver, or Insolvency  
(1) Subject to subsections (2) and (3) and even though the goods have not been shipped a buyer who has paid a part or all of the price of goods in which he has a special property

have to be have been bought for personal, family, or household purposes, and they have to be identified as special property.<sup>36</sup> However, in our opinion, for consumer law cases and especially in e-consumer law cases where the parties are located far away from each other, identification of goods can be problematic and less than realistic.<sup>37</sup>

Under the conditions above, the buyer has the right to replevin. In general, replevin is a legal procedure for claiming personal property rights over a good from someone who does not have personal property rights over the subject of the action. The U.C.C. § 2-716(3) specifies three cases when the buyer has the right to replevy goods (I have to emphasize: in each case, identified goods are the subject of the contract):

- If the buyer is unable to effect cover for such goods after reasonable effort, or
- The circumstances reasonably indicate that such effort will be unavailing, or
- The goods have been shipped under reservation and satisfaction of the security interest in them has been made or tendered.

In all cases, the same problem appears concerning identification as mentioned above. Consequently, if someone buys a product through the Internet, identification of the goods is unlikely.

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under the provisions of the immediately preceding section may on making and keeping good a tender of any unpaid portion of their price recover them from the seller if:

(a) In the case of goods bought for personal, family, or household purposes, the seller repudiates or fails to deliver as required by the contract; or

(b) In all cases, the seller becomes insolvent within ten days after receipt of the first installment on their price.

(2) The buyer's right to recover the goods under subsection (1)(a) vests upon acquisition of a special property, even if the seller had not then repudiated or failed to deliver.”

For a case concerning insolvency *cf.*, Francis J. & D. Frisch, Alces, P. A. *Commercial Contracting: Sales, Leases, And Computer Information*. Bedford NS, Canada: Castle Rock. 2004. 609 *et seq.* thereby reviewing the case *In Re Csy Yacht Corporation* 42 B.R. 619. (Bankr. M.D. Fla 1984).

<sup>36</sup> The buyer's acquisition of a special property occurs upon identification of the goods to the contract.

<sup>37</sup> Mootz and Frisch and Alces, *Commercial Contracting: Sales, Leases, And Computer Information*. *supra* note 35. at 611.

### G. Specific Performance

Just as in general common law, specific performance under the U.C.C. is also extremely rare. According to U.C.C. § 2-716(1), it may only be decreed where the goods are unique or “in other proper circumstances”. In the case of mass consumer contracts, the goods are certainly not unique. The other phrase, “other proper circumstances” could be more interesting, since under these circumstances the buyer may apply for specific performance even if the goods are not unique. The phrase is not explained further in the text of the U.C.C. and its official commentary is also not helpful. We can see that some courts have granted specific performance based on the plaintiff’s financial position in cases when no other solution was available,<sup>38</sup> when it would have caused considerable expense or trouble to find a new contracting party,<sup>39</sup> or if otherwise the result would have been “chaos and irreparable damage”<sup>40</sup>. It is also warranted when a replacement would be “difficult to obtain or cannot be obtained in the market except at an exorbitant increase over the contract price”,<sup>41</sup> if the seller is bankrupt<sup>42</sup> or if the buyer has paid the full purchase price and the seller refuses to deliver.<sup>43</sup> Conceivably, in an everyday e-consumer contract the latter condition may have some significance. However, its application by the courts varies and we cannot find too many cases in which specific performance was ordered by the courts based on these grounds.

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<sup>38</sup> *White & Summers on Uniform Commercial Code. supra* note 12. at 424. For a detailed review of the following few cases see *ibid* 425-426.; *Stephan’s Machine & Tool Inc. v. D & H Machinery Consultants Inc.*, 65 Ohio App.2d 197, 417 N.E.2d 579 (1979).

<sup>39</sup> *Laclede Gas Co. v. Amoco Oil Co.*, 522 F.2d 33, 17 U.C.C. 447 (8th Cir. 1975), reviewed as 531 F.2d 942 (8th Cir. 1976). For a thorough review with respect to our topic, see Kunz, K. L. & C. L. Chomsky, *Contracts – A Contemporary Approach*. Eagan, MN: Thomson/West Group. 2010. 1055-1060.

<sup>40</sup> *Eastern Air Lines Inc. v. Gulf Oil Corp.*, 415 F.Supp. 429, 19 U.C.C. 721 S.D.Fla. 1975).

<sup>41</sup> *Greenberg, H. Rights And Remedies Under U.C.C. Article 2. supra* note 22. at 341.; *Sedmak v. Charlie’s Chevrolet, Inc.*, 622 S.W.2d 694, 31 U.C.C. Rep. 851 (Mo. Ct. App. 1981)

<sup>42</sup> *Proyectos Electronicos, S.A. v. Alper*, 37 Bankr. 931, 37 U.C.C. Rep. 1142 (Bankr. E.D. Pa. 1983)

<sup>43</sup> *Greenberg, H. “Specific Performance under Section 2-716 of the Uniform Commercial Code: A “More Liberal Attitude” in the “Grand Style.” New Eng. L. Rev.* (1982): 321-354., for court rulings and liberalizing remedies esp. 344-352 *ibid*.

## 2. THE MAGNUSON-MOSS WARRANTY ACT

### A. Full v Limited Warranties

The Magnuson-Moss Warranty Act (hereinafter referred to as "*Magnusson-Moss Warranty Act*", or in this section only as "*Act*") gives rise to system that for Europeans is fascinating yet alien. Generally, the "post-*laissez-faire* approach" which underlies the provisions of the U.C.C. also has a remarkable effect on the Act. In fact, the Act does not require any business to offer a written warranty on a consumer product.<sup>44</sup> Moreover, the Act leaves the task of defining several important expressions such as "implied warranty" and the terms and conditions of implied warranties up to states. On the other hand, if a business does offer a written warranty, this must comply with the Act. Consequently, the Act has an informative role<sup>45</sup> and does not provide strict, paternalistic protection for consumers.

According to the Act, two kinds of warranties can be given: full or limited. All written warranties must be designated as either full or limited warranties.<sup>46</sup> In the case of a full warranty, the business guarantees that if a product or one of its components is found to be defective within the warranty period, it will be repaired or replaced at no cost to the purchaser, and damages of the consumer will be reimbursed without limitations. On the contrary, in case of a limited warranty, the business incorporates various limitations into the contract. These limitations usually concern the purchaser's rights to damages (e.g. consequential or punitive damages), or there may be limitations to the first purchaser of the product. A "blend" of the two kinds of warranties is also possible (e.g. 1 year full warranty and extra 2 years limited warranty).

### B. Limitations and remedies

Generally, if a business provides a limited warranty, it may not disclaim implied warranties provided by state laws, but there are no other minimal

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<sup>44</sup> Clark, B. & C. Smith *The Law Of Product Warranties*. Eagan, MN: Thomson/West Group. 2007. §16:1

<sup>45</sup> Clark & Smith, *The Law Of Product Warranties*. supra note 44. at §16:2

<sup>46</sup> Magnuson-Moss Act §103(a), 15 U.S.C. §2303(a) (1996).

standards. Consequently, such warranties may be limited in duration to the duration of a written warranty,<sup>47</sup> i.e. even the duration of the implied warranty may be limited.

Contrary to limited warranties, §104 precludes a supplier from either disclaiming implied warranties or limiting their duration. The reason that most suppliers don't provide full warranties<sup>48</sup> can be found in §104(a)(2), which says in regard of full warranties that

“...such warrantor may not impose any limitation on the duration of any implied warranty on the product...”

Moreover, “a business which provides a full warranty may not exclude or limit consequential damages for breach of any written or implied warranty on such a product, unless such exclusion or limitation conspicuously appears on the face of the warrant.”

The basic thinking behind the remedy section of the Act is not different from that of the U.C.C. However, unlike the U.C.C., we find little guidance on the types of remedies.<sup>49</sup>

The remedies mentioned are the following:

- Monetary (financial) remedies
  - Compensatory damages (including consequential and incidental damages)
  - Scope for limitation of damages for injury<sup>50</sup>

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<sup>47</sup> See 15 U.S.C.A. § 2308, 15 USCA § 2308

<sup>48</sup> *Nordsstrom On Sales And Leases Of Goods.* supra note 15. at 876.

<sup>49</sup> For the system see e.g. Clark & Smith, *The Law Of Product Warranties.* supra note 44. at §20:28 *et seq.*; *Nordstrom On Sales.* supra note 15. 890. *et seq.* Cf. 15 U.S.C.A. § 2310, 15 USCA § 2310.

<sup>50</sup> 15 U.S.C.A. § 2311(b)(2): “Nothing in this chapter (other than sections 2308 and 2304(a)(2) and (4) of this title) shall (A) affect the liability of, or impose liability on, any person for personal injury, or (B) supersede any provision of State law regarding consequential damages for injury to the person or other injury”.

In fact, a limitation of liabilities for personal injuries is available. On the other hand, please note that – as also seen in the text – state laws may change this rule. Cf. *Nordsstrom On Sales.* supra note 15. at 893.; *Boelens v. Redman Homes, Inc.*, 748 F.2d 1058, 1068 (5th Cir.1984); *Washington v. Otasco, Inc.*, 603 F.Supp. 1295 (D.Miss.1985); *Boelens v. Redman Homes, Inc.*, 748 F.2d 1058, 1068 (5th Cir.1984); *Washington v. Otasco, Inc.*, 603 F.Supp. 1295 (D.Miss.1985); For an opposite view see *Hughes v. Segal Enterprises, Inc.*, 627 F. Supp. 1231 (W.D. Ark. 1986).

- No punitive damages (states' general rules apply)
- Non-monetary remedies
  - "Other, equitable relief" e.g. injunction (only if state law allows it<sup>51</sup>)

Without going into deeper analysis of these provisions, we can establish that the Magnuson-Moss Warranty Act does not force businesses to provide repairs to or exchange of goods as it is generally done by European rules.

### 3. UNIFICATION OF SOURCES IN SPECIAL FIELDS: UCITA, THE PRINCIPLES OF LAW OF SOFTWARE CONTRACTS, UETA AND THE E-SIGN ACT

Since this article wants to focus on the sale of hard goods and not especially on the sale of softwares, it only shortly recaps some of the most important features of two rules, namely those of the Uniform Information Transaction Act created by the National Conference of Commissioners on Uniform State Laws (NCCUSL) and the ALI's Principles of Law of Software Contracts. Software contracts have some special features and the related provisions could be discussed very lengthy. The basic thinking behind these agreements are different of other, general consumer contracts.

Beside softwares, since it is also an issue of electronic contracting and unification of provisions, it seems worth to discuss UETA and the federal E-sign Act. in order to have a broad scope at our topic.

#### A. UCITA

The NCCUSL voted to approve the Uniform Information Transaction Act (UCITA)<sup>52</sup> on July 29, 1999. The Act had been intended to become a modification, a new Article 2B of the U.C.C. In its early stages, the American Law Institute also supported the effort, but the document was eventually adopted

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<sup>51</sup> *Sadat v American Motors Corp.* 104 Ill. 2d 105, 470 N.E.2d 997 (1984)

<sup>52</sup> The original text was modified in 2000 and 2002. *Cf. Ballon, I. C. E-Commerce And Internet Law.* Volume 2. Little Falls NJ: Glasser LegalWorks 2001. 20-17 *et seq.*; Delta, G. B. & J. H. Matsuura, *Law Of The Internet.* Aspen: Aspen Publishers. 2011. 13-97 (§13.07) *et seq.*

independently by the NCCUSL. As also mentioned before, the Act creates special rules for software licenses and transactions. However, at the time it was only adopted by two states, Maryland and Virginia.<sup>53</sup> In 2003, after harsh criticism,<sup>54</sup> the NCCUSL withdraw UCITA from consideration for endorsement by the American Bar Association.

The rules of UCITA were generally made for software licenses, but its scope covers the sale of software as well. In a mixed transaction, where computer information and goods (e.g. a computer system) are sold together, UCITA may only be applied to the software part of the transaction unless the primary subject matter is the sale/license of software.<sup>55</sup>

UCITA introduces the term “implied warranty” for “quiet enjoyment”: a type of warranty that was introduced to protect the licensee in exercising its rights. There are also other, new types of warranties such as warranty of merchantability, implied warranty of informational content, implied warranty of system integration and licensee’s purpose (the latter is similar to the U.C.C. warranty for fitness for a particular purpose). Surprisingly, all implied warranties may be disclaimed.<sup>56</sup> §406 of the act governs in detail the way a disclaimer should be prepared. Furthermore, for free software no implied warranties are granted (§410).

Just as for implied warranties, the remedies for breach of contract can also be waived. A licensee may reject or later revoke acceptance if some nonconformity in the software is a material breach of the contract.<sup>57</sup> We can see

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<sup>53</sup> On the other hand, more than a dozen states have introduced versions of UCITA without ever adopting them, see Hart, Jonathan D. *Internet Law: A Field Guide*. 2008 501.

<sup>54</sup> “Writing a law which makes it almost impossible to sue software publishers for defects is a poor way to manage the escalating level of customer dissatisfaction with bad software and bad support.” Kaner, Cem and Pels, David L. *Ucita: a bad law that protects bad software*. *Network World*. Web. 01.06.2013.

<sup>55</sup> Delta & Matsuura. *Law Of The Internet*. *supra* note 52. at 13-99. (§13.07).

<sup>56</sup> Delta & Matsuura. *Law Of The Internet*. *supra* note 52. at 13-104. (§13.07).; Ballon. *E-Commerce*. *supra* note 52. at 20-54 *et seq*. I must note that I don’t know how the authors of the UCITA would put this rule into national legislation since in case of consumers, it is contrary to the Magnuson-Moss Warranty Act, see above.

<sup>57</sup> UCITA § 701(c-d)

“A breach of contract is material if:

that this rule is contrary to the perfect tender rule applied in the U.C.C. and gives consumers less protection. Also, §801 of the Act controversially states that

“the remedies provided in this [Act] are cumulative, but a party may not recover more than once for the same loss.”

The Act has some extra rules on remedies in addition to those of the U.C.C. First of all, it allows the parties to substitute, modify or add to the remedies it provides. Secondly, we find a special remedy, the so-called “electronic self-help”.<sup>58</sup> According to this rule, the licensor may electronically prohibit the licensor from using the software if it believes that the contract has been breached. Beyond these, the licensor may limit or exclude consequential or incidental remedies unless such limitation or exclusion is unconscionable.

I have read differing opinions about UCITA, some of which state that it is a “reasonably fair and balanced set of uniform rules for transferring information, and many states are likely to enact some version of it.”<sup>59</sup> However, I do not agree with such views. It is possible that this is mainly because we are used to our “paternalistic” European system, but we must note that the rules of UCITA cut back on most of the consumer’s rights, in some cases – seemingly – without a valid and necessary objection. This is the reason, why several states introduced so called “bomb shelters” to protect their citizens. The introduced legislations were designed to avoid the application of UCITA through a choice of law. The bomb

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- (1) The contract so provides;
  - (2) The breach is a substantial failure to perform a term that is an essential element of the agreement; or
  - (3) The circumstances, including the language of the agreement, the reasonable expectations of the parties, the standards and practices of the business, trade, or industry, and the character of the breach, indicate that:
    - (A) The breach caused or is likely to cause substantial harm to the aggrieved party; or
    - (B) The breach substantially deprived or is likely substantially to deprive the aggrieved party of a significant benefit it reasonably expected under the contract.The cumulative effect of nonmaterial breaches may be material.”

<sup>58</sup> Ballon. *E-Commerce. supra* note 52. at 20-92. *et seq.*

<sup>59</sup> Delta & Matsuura. *Law Of The Internet. supra* note 52. at 13-109 (§13.07).

shelter legislation “voids any contractual choice of law provision that would result in the application of UCITA to an agreement”.<sup>60</sup>

### B. The Principles of the Law of Software Contracts

After pulling back from the works on UCITA, the ALI started a new project in 2004 and adopted the Principles of the Law of Software Contracts, an independent set of principles on software contracts in 2010. Its aim was to provide a set of principles for courts to consider and not to create a completely new restatement or a model code. Several rules of the principles are similar to those of the UCITA: electronic self-help is allowed, the general system of warranties is modified, etc. However, because the time passed is not enough to evaluate the applicability and necessity of the principles and other literature<sup>61</sup> is available to overview its provisions, I hereby disregard of analysing it more deeply.

### C. UETA & the Federal E-Sign Act

UETA and the Federal E-sign Act<sup>62</sup> are both rules for electronic signatures.<sup>63</sup> The adoption of these acts was important because of the numerous cases that posed problems involving electronic signatures – i.e. signatures done via the Internet.<sup>64</sup> However, since this is a procedural aspect of our topic, I will not deal with it here.

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<sup>60</sup> Classen, H. W. *A Practical Guide To Software Licensing For Licensees And Licensors*. American Bar Association. 2007. 162. Such states are Iowa (Iowa Code § 554D.104), North Carolina (N.C. Gen. Stat. § 66-329) and West Virginia (W. Va. Code § 55-8-15).

<sup>61</sup> Cf Hillman Robert A. & O'Rourke M. “Principles of the Law of Software Contracts: Some Highlights” *Tulane Law Review* (2010): 1519 et seq. Trevis H. “The Principles of the Law of Software Contracts: At Odd With Copyright, Consumers and European Law?” *Tulane Law Review*. (2010) 1. et seq.

<sup>62</sup> Ballon, E-Commerce. *supra* note 52. at 20-04 et seq.

<sup>63</sup> Hart J. D., *Internet Law – A Field Guide*. Arlington VA: BNA Books. 2008. 463.

<sup>64</sup> A typed signature at the bottom of a vendor's email satisfies the requirements of the statute of frauds because the vendor's act of typing his name at the bottom of the email manifested his intent to authenticate the transmission. (See e.g. *Rosenfeld v. Zerneck*, 4 Misc.3d 195-96 (Sup. Ct. Kings. Co. 2004) For the latest case law concerning e-signatures see Hart, *Internet Law, A Field Guide. supra* note 63. at 497-498. For the statute of fraud in U.C.C. see Spindler, G. & F. Börner. Eds. *E-Commerce Law In Europe And the USA* Berlin: Springer 2002. 697. Cf. Robertson, R. J.

#### 4. THE FEDERAL TRADE COMMISSION (FTC)

##### A. The FTC as a Defender of Consumers

For European observers, the Federal Trade Commission (hereinafter referred to as: “*FTC*” or “*Commission*”) is also an interesting institution with somewhat different authority from that customary in Europe.<sup>65</sup> The FTC was established in 1914 to protect market competition from unfair methods of competition in commerce. In this regard, it is similar to many competition watchdogs (e.g. in the author’s Hungarian legal system, the Hungarian Competition Authority). Section 5 of the FTC Act declared unfair methods unlawful. During its development, the Commission started to promulgate rules in order “to educate the business community and prevent deception before it occurred”.<sup>66</sup> From the 1960s, the FTC concluded that it had the inherent authority to promulgate rules that – as the FTC, the courts and (partly) Congress has reinforced – have the force of law.<sup>67</sup>

Regarding the Commission it is very important to mention that the FTC Act does not contain any private remedies for the injured party (in our case, the e-consumer) in case an unlawful act is performed. However, the FTC may take certain steps. The remedies available are as follows:

- Cease and desist orders
- Civil penalties payable to the government<sup>68</sup>
- Restitution for injured costumers
- Injunctions

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“Electronic Commerce on the Internet and the Statute of Frauds.” *South Carolina Law Review* 787. (1998): 820-821; *Law Of The Internet. supra note 63.* at §1.05.; §13.08

<sup>65</sup> For a review of the history and activity of the FTC and the FTC Act with regard to consumer protection, see Michael M. Greenfield. *Consumer Law – A Guide For Those Who Represent Sellers, Lenders, And Consumers* New York: Little, Brown and Co. 1995. 57-107.

<sup>66</sup> Greenfield. *Consumer Law. supra note 65.* at 59.

<sup>67</sup> In this regard, even without the concrete legal authorization, the function of the FTC is similar to the European Commission, which also has authority to adopt laws if the Council of the European Union delegates its authority to it, or if it is signed into the primary legal sources of the European Union.

<sup>68</sup> In these cases, FTC sues the party who has engaged in unlawful acts, Greenfield. *Consumer Law. supra note 65.* at 106.

Because our topic is narrowly focused on contract law remedies for the buyer, I hereby set aside a thorough review of the above.<sup>69</sup>

#### B. The FTC Cooling Off Rule and the FTC Mail or Telephone Order Rule

The FTC has successfully adopted some important rules on cooling off periods and the protection of consumers.

First of all, its rule on cooling off periods for doorstep sales states that a consumer has the right to cancel a contract until midnight of the third business day after the contract was signed.

Secondly, according to the mail or telephone order rule,<sup>70</sup> if someone orders goods by mail, phone, computer or fax, the latter rule requires that the seller ship to the buyer within the time promised or, if no time was stated, within 30 days. If the seller cannot ship within these periods, he must send the buyer a notice with a new shipping date and offer the option of canceling the order and being issued a refund, or accepting the new date. If the buyer opts for the second deadline but the seller can't meet it, the buyer must be sent a notice requesting their signature to agree to a third date. If the buyer then does not return this notice, the order must be automatically canceled and the purchase price refunded. The seller must issue the refund promptly, within seven days if the buyer paid by check or money order, or within one billing cycle if the buyer charged the purchase.<sup>71</sup>

### 5. LEMON LAWS

Beyond the above-mentioned rules, special provisions exist for the sale of cars (Federal Lemon Law), which stipulates special canceling periods and

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<sup>69</sup> For FTC's activity regarding Internet transactions see Ballon. *E-Commerce And Internet Law. supra note 52. at 31-8 et seq.*

<sup>70</sup> For deeper analysis into the technical matters and the wording of the law, see FTC's A Business Guide to the FTC's Mail or Telephone Order Merchandise Rule. Web. 1 May 2013. <http://business.ftc.gov/documents/bus02-business-guide-mail-and-telephone-order-merchandise-rule>

<sup>71</sup> The basics of this summary were taken from Conway, Joseph N. *Consumer Law Help Manual*. Web. 1. May 2013. [http://www.orangecountygov.com/filestorage/124/826/1278/Consumer\\_Law\\_Help\\_Manual\\_-\\_Contracts.pdf](http://www.orangecountygov.com/filestorage/124/826/1278/Consumer_Law_Help_Manual_-_Contracts.pdf) (Feb 1, 2012)

warranty durations. However, in electronic contracts the sale of cars is not particularly common – consequently, I do not wish to analyze these rules.

#### IV. STATE LEVEL – THE NEW YORK RULES

As an example of state legislation, I hereby wish to briefly introduce the New York laws. Please note that I will only highlight differences, i.e. the additional content of New York law extending the Federal legislation.

##### 1. NEW YORK STATE’S U.C.C.

When talking about contracts, it is important to mention that under New York law, based on the U.C.C.’s provisions, all contracts with an underlying value of \$500 or more must be in writing, otherwise they are not binding on the parties.<sup>72</sup> Similarly in other regards, the NY U.C.C. follows the solutions of the U.C.C.

##### 2. NEW YORK STATE’S GENERAL BUSINESS LAW

Beside the NY U.C.C., other acts such as the General Business Law (hereinafter referred to as: “*GBL*”) are also relevant. However, surprisingly for European scholars, we rarely find in these acts provisions intended to protect consumers with a broad scope of application, or ones that would provide us with a clear system of warranties. Evidently, in this regard the American solution is significantly different from the European one. There are numerous provisions for consumer sales, but most of these deal with special subjects – such as selling certain goods, e.g. telephones.<sup>73</sup> The GBL orders that any seller of such equipment, except equipment sold in place, shall provide written warranties of not less than one year for new residential telephone equipment, not less than ninety days for rebuilt residential telephone equipment and not less than sixty days for

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<sup>72</sup> N.Y. UCC § 5-701(a)(1).

<sup>73</sup> Cf. Smits, J. “The Right to Change Your Mind? Rethinking the Usefulness of Mandatory Rights of Withdrawal in Consumer Contract Law” *Maastricht European Private Law Institute Working Paper*. 3. (2011), also published in *Penn State International Law Review*. (2011): 671-684.

used residential telephone equipment. All warranties shall guarantee that the equipment so warranted is fit for the use for which it is intended.

Consequently, the provisions of the General Business Law dealing with warranties seem fragmented, and deal only with certain types of goods.

#### A. Deceptive Acts and Practices, False Advertisement

Some other provisions of the GBL limit their scope to certain prohibited actions or abuses. One of the most popular grounds for filing a suit in New York<sup>74</sup> can be found in Article 22A (§ 349 and 350) GBL. Beyond injured consumers validating personal claims (i.e. actual damages), the personal attorney general may also start proceedings in the name and on behalf of the people of New York.<sup>75</sup> In addition to this right of action granted to the attorney general, any person who has been injured by reason of deceptive acts or practices may bring an action in his own name to enjoin such unlawful act or practice. The aim of this process is to recover his damages. As a kind of punitive damages, according to GBL § 349(h) the court may, at its discretion, increase the award of damages to an amount not to exceed three times the actual damages up to one thousand dollars, if the court finds that the defendant has willfully or knowingly violated the rules.

Beside deceptive acts and practices, GBL § 350 declares that any person who engages in false advertisement shall be liable to a civil penalty of not more than \$5,000 for each violation.

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<sup>74</sup> A well-structured compendium of New York consumer law cases collected by Justice Dickerson, Thomas A. (Associate Justice of the Appellate Division, Second Department of the New York State Supreme Court) is available on the Internet year to year. For the year 2011 see Justice Dickerson, T. A. *Consumer Law 2011 Update*. Web. 1. May 2013. <http://www.nysba.org/Content/NavigationMenu21/CommitteePages/ClassAction/CONSUMERLAW2011.pdf>.

<sup>75</sup> GBL 349 b)

“Whenever the attorney general shall believe from evidence satisfactory to him that any person, firm, corporation or association or agent or employee thereof has engaged in or is about to engage in any of the acts or practices stated to be unlawful he may bring an action in the name and on behalf of the people of the state of New York to enjoin such unlawful acts or practices and to obtain restitution of any moneys or property obtained directly or indirectly by any such unlawful acts or practices. In such action preliminary relief may be granted under article sixty-three of the civil practice law and rules.”

Beside the above-mentioned amounts, there are special additional remedies of up to \$10,000 which must be applied if the deceptive act or false advertisement has misled elderly persons [GBL 349(c)].

The parties have three years to start proceedings from the date of original delivery of the goods to the consumer.

#### B. “No Cash Refund, No Exchange” policies v. Extra Cooling Off Periods

Generally speaking in New York, consumers do not have the right to return goods and cancel their contract. If they purchase something, they are not granted special rights to a cash refund. Neither is a seller required to offer exchanges. If there’s a refund policy, the consumer may have the refund within 20 days. On the other hand, the term “No cash refund” may be deceptive: if a product is defective, the consumer may have the right to revoke acceptance and receive a full cash refund.

Beside the general rules, as mentioned above, there exist in the GBL several cooling off periods for certain types of goods and services. There are special rules for “home food service plan sales” (3 days), “home improvement contracts” (3 days) and “telephone sales contracts” (3 days).

#### C. Some Extra Rights

In certain instances involving defective items, the consumer may return the goods and ask for his/her money back. Such a case is the sale of animals, however, with our focus, these rules are not practically relevant.

### 3. THE LAW ON PERSONAL PROPERTIES

As mentioned earlier and surprisingly for European scholars, there is no general rule on warranties in New York. The extra warranties that provide more protection than the U.C.C. or the Magnusson-Moss Warranty Act can be found across several laws, and they do not cover a wide range of goods.

Beside the above mentioned acts, another example is the Law on Personal Properties, which states the following in connection with farm equipment:

“§ 697-A – Warranty to consumers [...]

Every supplier of new farm equipment which is sold within or outside of this state shall provide a fair and reasonable warranty on all new farm equipment that shall be of no less duration than twelve months following the date of original delivery of the farm equipment to the consumer”.

Such a solution is typical in connection with the sale of certain kind of goods.

#### 4. WARRANTIES FOR CARS – NEW YORK LEMON LAWS

Beside the general rules on contracts, there are also special rules that can be relevant. One such example is New York’s used and new car lemon laws, which provide consumers with special warranties. However, since buying a car over the internet is not particularly common, we will not go into the details of the provisions.

#### 5. RELEVANCE OF SERVICE CONTRACTS

As a consequence of the US legislation, consumers and businesses tend to conclude service contracts. The usage of such contracts is also present in Europe but they are used more widely in the US, since through these the consumer can gain the greater protections he would not have based on the statutes. On the other hand, concluding a service contract costs consumers extra, and they regularly pay more than they would do without such a contract.

#### V. CITY LEVEL – THE NEW YORK CITY RULES

Interestingly, in New York City we can find some relevant provisions on the sale of goods. In NYC, the Consumer Protection Law (1969) applies to consumer disputes. This act sets some additional rules for consumer disputes. First of all, just as in Europe, limitations or conditions of contracts must be

disclosed clearly and conspicuously in print advertising, TV or radio. The fee for cancelling contracts for goods may be a maximum of 5% of the purchase price, and as an enhancement to the general New York State 20 days refund limit, refunds must be available within 10 days of purchase. For service contracts, costs may not be more than 20% of the purchase price.

A contract may not be described as non-cancelable: such terms may only be used with a fee or penalty of cancellation: “This contract is not cancelable unless you pay a fee of \$50.”

Last but not least, if no cash refund is available for non-defective products, this fact has to be signed at the cash register, at the store entrance or at the point where the goods are displayed. If there’s no sign, a refund must be obtainable for 30 days. It a good question how this rule should be applied in electronic commerce – with our knowledge, I expect that in e-commerce cases this rule will not protect consumers.

## VI. CONCLUSIONS

In conclusion, I have established that there are significant differences between US and European legislation in this area. Determining which of the two systems is more favorable for everyday people and more ideal for society is not an easy task, therefore I will attempt to answer the principal questions I feel are relevant for this determination.

### 1. DIFFERENT INSTITUTIONS IN EUROPE – ARE THEY REASONABLE?

As I have seen, there are generally fewer obligatory remedies available in the US for breaches of contract in most cases. This fact raises numerous questions about the provisions and thinking in Europe.

First of all, is contract cancellation (which is called withdrawal in EU legislation) an instrument not commonly applied in the US, a fair and useful one

in Europe?<sup>76</sup> Is it a proactive measure to protect the consumers' rights and interests? In certain instances it certainly can be a protection. But is this true for all sales of consumer goods? Practically, the European system allows the consumer to "leave the obligation" without trying to keep him bound. No reasoning and no real cause is obligatory to be proven, and we find in the latest rules that withdrawal is becoming more and more relevant in Europe – a general 14-day withdrawal period will be granted to consumers in several instances.<sup>77</sup>

Secondly, there is another question raised by the solution used in the US: has repair as a sanction a role to play in Europe? Are we certain that repairing goods is beneficial for the masses of consumers, as stated several times by EU legislators? In our point of view, in certain cases the repair option, widely used in Europe, may really be harmful for them. If I buy a mobile phone and it crashes after a month, I need a new one, not repeated repairs that take time, after which the value of my phone will have decreased. This raises another question: would it be feasible to prefer exchanging goods instead of repairing them? And what effect would this have on the environment with the increased levels of disposal it would surely bring? Deeper analysis of these questions would lead us into the field of law and economics, an area that lies outside our current research with no obvious answers to these questions.

## 2. CONTRACTUAL FREEDOM AND ITS INTERPRETATIONS

Looking at the American solution, it is clear that contractual parties (including consumers) have greater freedom than parties in Europe. In contrast to the paternalistic European system, US consumers are treated as adults. The effect of general contract law is stronger. Fewer special rules make the system more transparent. On the other hand, consumer law in Europe was given the structure that it has in order for states to grant protections to consumers. In this regard, the US system chooses an easy option: there are generally by far fewer special rules

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<sup>76</sup> The same question was raised in Smits, *The Right to Change Your Mind?*, *supra*, note 73.

<sup>77</sup> *Cf.* the rules of the new consumer law directive.

and general contractual rules apply – inherently resulting in less “help” for the consumer.

All this gives parties broader freedom to write their own contracts. This can also have disadvantages: certainly, large companies can more strongly influence contracts than consumers, consumer protection agencies, NGOs or branches of government.

### 3. THE PROBLEM OF WARRANTIES IN THE US – TIME LIMITS, EXCLUSIONS AND LIMITATIONS

The first question that I found problematic at the core of consumer law was the problem of warranty durations in the US. As we have seen, warranties in the US can be limited or excluded very easily. It is conceivable this reduces purchase prices somewhat, but consumers’ rights may also be limited by this approach.

As a result, if someone buys goods via the Internet, we cannot be sure that he will receive the same level of protections as in Europe. His rights can be very easily excluded or limited to a short period in most cases, leaving the consumer practically without any kind of protection.

### 4. THE FRAGMENTATION OF THE SYSTEMS

Another problem is deeply rooted in the philosophies of our legal systems. It is obvious that for the simple consumer, the simpler the laws are, the easier it is to know his rights and obligations. It must be admitted that the fragmented nature of European legislation and its complexity raise many issues. The authors of this article have frequently criticized this aspect in past articles.

In the US, fragmentation is even worse than in Europe. Traditionally, the federal government does not like to deal with consumer law – the states’ governments adopt laws in this area. This leads to a chaotic, heterogeneous system, in which consumers can face serious difficulties if they want to exercise their rights.

5. CONSUMER CLASS ACTION & SMALL CLAIMS COURT:  
LIKEABLE TRADITIONS

Due to certain legal instruments, US companies are forced to be careful with customers. One of these is class action litigation: cases abound in which corporations have had to pay off thousands of their customers. Class action suits make the system more “alive” and active, as if there were a centralized organization trying to control corporations.

The same is true of small claims courts: lacking in most European countries, such forums are worth applying to for consumers, potentially granting them a decision easily without the formidable expense of traditional litigation.

6. DIFFERENT SYSTEMS – NOT BETTER OR WORSE

In summary, we cannot state that either the European or the US system of legislation is better than the other. There are differences, advantages and disadvantages. Which of the two approaches we find more beneficial will depend on our preferences and values.