Consumer contracts Q&A: US

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US - specific information concerning the key legal and commercial considerations when drafting a consumer contract.

This Q&A provides country-specific commentary on *Practice note, Consumer contracts: Cross-border overview*, and forms part of *Cross-border commercial transactions*.

General contract law framework

1. What are the requirements under national law for a valid contract to exist?

The United States does not have a general national law of contracts. Instead, each state (as well as the US territories and the District of Columbia) has its own contract law. While many of the principles discussed in this guide are shared by different states, it is important to determine:

- Which state's law governs the contract.
- The specific requirements of the laws in that particular state.

(*Restatement (Second) Conflicts of Laws* §188.)

Parties can include a choice-of-law provision in their contract if they want it to be governed by the law of a particular state. Generally, choice-of-law provisions are enforceable provided both:

- The chosen state has a "substantial relationship to the parties or their transaction" or there is some "other reasonable basis for the parties' choice of law".
- The choice of law is not contrary to a "fundamental policy" of a state with a "materially greater interest than the chosen state in the determination of the particular issue".

  (*Nedlloyd Lines B.V. v. Super. Ct., 3 Cal. 4th 459 (1992) (quoting Restatement (Second) of Conflict of Laws §187(2))*.)

While the basic framework of contract law comes from judge made common law, statutes have played a larger role in recent years, in particular:

- **At the state level**:
  - Article 2 of the Uniform Commercial Code (UCC) is the most important statute covering the sale of goods and has been implemented across several states in whole or with small variations;
  - other model statutes exist in related areas, for example, the Uniform Deceptive Trade Practices Act (UDTPA), which deals with consumer protection.

- **At the federal level**, there are statutes regulating specific aspects of contracts, for example:
  - the Federal Arbitration Act (which covers arbitration clauses); and
  - the Magnuson-Moss Warranty Act (which covers written warranties and some aspects of implied warranties on consumer products).

Statutory law supersedes common law where they conflict. The UCC, however, does not displace the common law completely, but instead incorporates common law principles relating to:

- Capacity to contract.
- Principal and agent.
- Estoppel.
- Fraud.
- Misrepresentation.
- Duress.
- Coercion.
- Mistake.
- Bankruptcy, and other "validating or invalidating cause".

  (*UCC § 1-103(b)*.)

For contracts relating to interstate commerce, federal law, when applicable, supersedes conflicting state law, whether common or statutory. For example, the Federal Employees Health Benefits Act, which authorises the federal government to contract with private carriers for federal employees' health insurance, overrides state law barring

contractual subrogation and reimbursement (*Coventry Health Care of Missouri, Inc. v. Nevils, 137 S. Ct. 1190 (2017)*).

At common law, forming a contract requires two elements:

- **Assent.** This typically takes the form of an offer and acceptance. It must be "sufficiently definite to assure that the parties are truly in agreement with respect to all material terms." However, "not all terms of a contract need to be fixed with absolute certainty." In judging assent, courts look to "objective" manifestations of assent. (*Exp. Indus. & Terminal Corp. v. N.Y. State DOT, 93 N.Y.2d 584, 589 (1999)*.)
- **Consideration.** In the typical consumer contract, there is consideration because the consumer receives a good or service, while the seller receives payment.

  (*Restatement (Second) of Contracts § 17(1)*.)

The UCC focuses on assent and does not emphasise consideration. Therefore, a "contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract." (*UCC § 2-204*.)

Even when a contract is formed, it may be void or voidable, for example:

- Contracts may be void if they are illegal or violate public policy.
- Contracts may be voidable:
  - by parties lacking the capacity to contract, such as minors and persons under guardianship due to mental illness or defect; or
  - by one or more parties for other reasons such as mistake, misrepresentation, duress, undue influence, or unconscionability.

For the defences of mistake and misrepresentation, see *Question 5* and *Question 6*. For the defence of unconscionability, see *Question 12*.

2. Does national law make a distinction between an offer and an invitation to treat? Are the circulation of price lists, catalogues, advertisements for sale and the display of items in a shop treated as an offer or as an invitation to treat?

States distinguish between an offer and an invitation to treat. An offer may be accepted and become a contract, while an invitation to treat may not. The key difference is that an offer "involves giving the addressee the apparent power to conclude a contract without further action by the other party", while an invitation to treat does not (*Arbor Hill Concerned Citizens Neighborhood Ass'n v. Cnty. of Albany, 369 F.3d 91, 95 (2d Cir. 2004) (quoting Restatement (Second) of Contracts § 24) (emphasis omitted)*).

Many courts consider three factors in determining whether something is an offer or a mere invitation to treat:

- The terms of any previous inquiry.
- The completeness of the terms of the suggested bargain.
- The number of persons to whom a communication is addressed.

  (*D'Agostino v. Fed. Ins. Co.*, 969 *F. Supp. 2d 116, 128 (D. Mass. 2013) (quoting Restatement (Second) of Contracts § 26 cmt. c)*; *see also Nordyne, Inc. v. Int'l Controls & Measurements Corp.*, *262 F.3d 843, 846 (8th Cir. 2001) (citing same provision).*)

Price lists, catalogues, advertisements, and the display of items are "ordinarily" considered invitations to treat, not offers. (*Leonard v. PepsiCo, Inc.*, *88 F. Supp. 2d 116, 122-23 (S.D.N.Y. 1999) (quoting Restatement (Second) of Contracts § 26 cmt. b); see also Mesaros v. United States*, *845 F.2d 1576, 1580-81 (Fed. Cir. 1988) (citing same provision).*)

They may be considered offers, however, if there is "some language of commitment or some invitation to take action without further communication." (*Zanakis-Pico v. Cutter Dodge, Inc.*, *47 P.3d 1222, 1237 (Haw. 2002) (quoting Restatement (Second) of Contracts § 26 cmt. b).*) For example, an advertisement for a customer rewards programme was considered to be an offer when it called itself an "offer" and invited consumers to save and redeem coupons "without further communication, and leaving nothing for negotiation." (*Sateriale v. R.J. Reynolds Tobacco Co.*, *697 F.3d 777, 787 (9th Cir. 2012).*)

In addition, many states have consumer protection laws that give advertisements some binding effect. The UDTPA, as adopted in several states, prohibits:

- Advertising goods or services with intent not to sell them as advertised.
- Advertising goods or services with intent not to supply reasonably expectable demand, unless the advertisement discloses a limitation of quantity.

  (*Cal. Civ. Code § 1770(a) (California); Tex. Bus. & Com. Code § 17.46(b) (Texas); 73 P.S. § 201-2(4) (Pennsylvania); O.C.G.A. § 10-1-393 (Georgia).*)

These statutory provisions mean that advertisers may be bound by their advertisements in certain situations even if those advertisements do not formally qualify as offers.

Similarly, in the UCC context, an advertisement containing specific “affirmations of fact” can be binding. For example, affirmations of fact in an advertisement concerning a vehicle’s condition and model number were deemed to create “express warranties” that bound the advertiser (*Hubbard v. AASE Sales, LLC, 104 N.E.3d 1027 (Ohio Ct. App. 2018)*).

3. Is it necessary for the price of goods or services to be clearly stated for a contract to exist?

Whether a contract must state the price to be valid varies by state and the type of contract, and also depends on the context and the other terms of the parties' agreement. Under the UCC, the parties "can conclude a contract for sale [of goods] even though the price is not settled." (*UCC § 2-305(1).*) In that case, the price defaults to "a reasonable price at the time of delivery if" the parties do not agree on some other price for the goods (*id.*).

Similarly, at common law, in some states, “open price provisions are enforceable in sales contracts.” (*Am. Trading & Prod. Corp. v. Fairfax Cnty. Bd. of Supervisors, 200 S.E.2d 529, 532 (1973) (collecting cases)*).

In both contracts for the sale of goods and services “involving an open price term,” the courts may impute a “reasonable” price if the parties do not specify one of their own (*Oglebay Norton Co. v. Armco, Inc., 556 N.E.2d 515, 519-21 (1990)*). A reasonable price will typically mean the item’s fair market value, or a price established by the parties’ previous course of performance.

Price can be a required term in at least two circumstances:

- "The parties intend not to be bound unless the price be fixed or agreed." In this case, there will be no contract if the parties do not agree on the price or it is not fixed (*UCC § 2-305(4)*).
- The contract is also missing other important terms and the lack of a price may make the contract too indefinite to enforce. For example, New York's highest court has refused to enforce a contract that lacked duration as well as price (*Exp. Indus., 93 N.Y.2d at 590-91*). Other courts have also declined to enforce contracts lacking price terms along with other important terms (*for example, ATA Airlines, Inc. v. Fed. Express Corp., 665 F.3d 882, 885-88 (7th Cir. 2011)*; *White Sands Grp., L.L.C. v. PRS II, LLC, 998 So.2d 1042, 1052 (Ala. 2008)*; *see also Conkling v. Turner, 18 F.3d 1285, 1301 (5th Cir. 1994)*).

4. Is it necessary for a contract for the sale of goods or supply of services to be in writing for it to be valid? Are any formalities necessary?

Most contracts do not have to be in writing. Under the UCC and at common law, a contract for the sale of goods can be oral or inferred from the conduct of the parties (*UCC § 2-204(1) and Restatement (Second) of Contracts § 4*).

However, most states have enacted "statutes of frauds", which require certain types of contracts to be in writing. For example:

- The UCC's statute of frauds requires any sale of goods for the price of USD$500 or more to be in writing unless:
  - the goods are to be specially manufactured for the buyer and are not suitable for sale to others in the ordinary course of the seller's business and the seller, before notice of repudiation is received and under circumstances which reasonably indicate that the goods are for the buyer, has made either a substantial beginning of their manufacture or commitments for their procurement;
  - the party against whom enforcement is sought admits in their pleading, testimony or otherwise in court that a contract for sale was made; or

    - the contract deals with goods for which payment has been made and accepted or which have been received and accepted. (*UCC § 2-201(3)*).

- Other broader statutes of frauds, most common in real estate transactions, typically require contracts for selling real property or leasing real property for more than one year to be in writing (*for example, Cal. Civ. Code § 1624(a)(4) (California); Tex. Bus. & Com. Code § 26.01 (Texas)*).
- The statutes can also apply to contracts regarding other types of goods or supply of services as well, for example:
    - New York's statute of frauds requires certain contracts to assign insurance policies or pay compensation for negotiation services to be in writing (*N.Y. CLS Gen. Oblig. § 5-701*);
    - California requires certain contracts related to "invention development services" to be in writing (*Cal. Bus. & Prof. Code § 22372(a)*).

- Most states also require contracts to be in writing if they are not to be performed within one year of being made (*for example, Va. Code Ann. § 11-2 (Virginia); Tex. Bus. & Com. Code § 26.01(b)(6) (Texas)*; *see also Restatement (Second) of Contracts § 110 (listing common contracts subject to statutes of frauds)*).

5. Does national law allow for a contract to be declared void in the event of mistake by one or both of the parties? Are any other remedies available?

Mutual mistake. In most states, a contract may be voided based on mutual mistake by both parties if three conditions are met:

- The mutual mistake was made as to a basic assumption on which the contract was made.
- The mistake has a material effect on the agreed exchange of performances.
- The adversely affected party should not bear the risk of the mistake.

  (*Winter v. Skoglund, 404 N.W.2d 786, 793 (Minn. 1987) (quoting Restatement (Second) of Contracts § 152(1)*).)

Unilateral mistake. Most states also allow a contract to be voided based on a unilateral mistake by one party, but only if one of the following requirements is met in addition to the above three:

- The effect of the mistake is such that enforcement of the contract would be unconscionable.
- The other party had reason to know of the mistake or its fault caused the mistake.

  (*Donovan v. Rrl Corp., 27 P.3d 702, 716-17 (2001) (quoting Restatement (Second) of Contracts § 154).*)

In *Donovan*, for example, the California Supreme Court declined to enforce a contract where the seller inadvertently printed a price that was USD12,000 less than the intended and originally advertised price, finding that enforcing the mistaken price would be unconscionable (*Donovan, 27 P.3d at 724-25*).

However, a party cannot void a contract based on mistake (mutual or unilateral) if that party bears the risk of mistake. This can occur in at least three situations:

- The parties agree to allocate the risk to that party.
- The party knows, at the time the contract is made, that it only has limited knowledge of the facts to which the mistake relates, but treats that limited knowledge as sufficient.
- The risk is allocated to that party by the court on the grounds that it is reasonable in the circumstances to do so.

  (*Donovan, 27 P.3d at 717 (quoting Restatement (Second) of Contracts § 154).*)

The UCC adopts these common law standards for mistake (*UCC § 1-103(b)*).

Under some circumstances, contracts may also be interpreted against parties that knew of a mistake by their counterparty. In particular, if two parties assign a different meaning to a contract term, and only one party is aware of the other's meaning, the courts may adopt the unaware party's meaning (*Restatement (Second) of Contracts § 201(2)*).

6. Does national law allow for a contract to be declared void in the event of misrepresentation by one of the parties? Are any other remedies available? Can silence constitute misrepresentation?

At common law, misrepresentation generally makes a contract voidable by a party if that party's "manifestation of assent is induced by either a fraudulent or material misrepresentation by the other party on which the recipient is justified in relying." (*Restatement (Second) of Contracts § 164.*) Therefore, to void a contract on grounds of misrepresentation, a party must generally show that:

- A misrepresentation was made.
- The misrepresentation was either fraudulent or material.
- The misrepresentation induced the party to enter into the contract.
- The party was justified in relying on the misrepresentation.

  (*Archdiocese of Milwaukee v. Doe, 743 F.3d 1101, 1105-06 (7th Cir. 2014) (citing Restatement (Second) of Contracts § 164 cmt. a).*)

As with mistake, the UCC adopts the common law standards for fraud and misrepresentation (*UCC § 1-103(b)*).

Non-contract remedies may also be available for misrepresentation in certain states. For example, some states allow victims of fraudulent misrepresentation to sue for tort, in addition to breach of contract, and so recover more damages than would be available in a standard breach of contract suit (*for example, Lazar v. Super. Ct., 909 P.2d*

981 (Cal. 1996) (California); Formosa Plastics Corp. U.S. v. Presidio Eng'rs & Constrs., 960 S.W. 2d 41 (Tex. 1998) (Texas)).

Most states have also enacted consumer protection or unfair trade practices statutes allowing consumers to recover damages for misrepresentation and other unfair practices. For example, California's statute allows any "consumer who suffers any damages as a result" of an unfair trade practice to bring suit to recover:

- Actual damages.
- An order enjoining the methods, acts, or practices.
- Restitution of property.
- Punitive damages.
- Any other relief that the court deems proper.

(*Cal. Civ. Code § 1780(a).*)

Massachusetts has an even more generous consumer protection statute, allowing consumers to recover treble damages and attorney's fees for unfair or deceptive trade practices (*Mass. Gen. Laws ch. 93A § 9(3A)*).

In addition to consumer protection statutes, misrepresentations may also violate state advertising or unfair competition statutes (*for example, Cal. Bus. & Prof. Code § 17500 (creating penalties for "untrue or misleading" advertising) and § 17200 (declaring false advertising to be unfair competition)*).

The Second Restatement identifies four situations where silence can constitute misrepresentation:

- The party knows disclosure of the fact is necessary to prevent some previous statement from being a misrepresentation or from being fraudulent or material.
- The party knows disclosure of the fact would correct a mistake of the other party as to a basic assumption on which that party is making the contract and non-disclosure of the fact amounts to a failure to act in good faith and in accordance with reasonable standards of fair dealing.
- The party knows disclosure of the fact would correct a mistake of the other party as to the contents or effect of a written document, which verifies or embodies an agreement in whole or in part.
- The other party is entitled to know the fact because of a relation of trust and confidence between them.

(*Harley-Davidson Motor Co. v. Powersports, Inc., 319 F.3d 973, 991 (7th Cir. 2003)* (*quoting Restatement (Second) of Contracts § 161*).)

7. Is it possible to exclude liability for misrepresentation?

Contractual terms excluding liability for misrepresentation are valid unless they are unreasonable (*Restatement (Second) of Contracts § 196*). While states define unreasonableness in different ways, a common approach is to distinguish between innocent and intentional misrepresentations.

Parties often seek to exclude liability for innocent misrepresentations by including a "merger clause" stating that the contract is the complete expression of the parties' agreement. Under both the UCC and the common law, such a merger clause triggers the parol evidence rule, which prohibits parties from contradicting their contract with evidence of past agreements or contemporaneous oral agreements (*UCC § 2-202; Restatement (Second) of Contracts § 213*). The parol evidence rule therefore shields parties from liability due to any innocent inconsistencies between the contract and the party's past statements. It does not, however, prohibit introduction of evidence regarding fraudulent misrepresentation (*Restatement (Second) of Contracts § 214; see, for example, Bird Lakes Dev. Corp. v. Meruelo, 626 So.2d 234, 238 (Fla. Dist. Ct. App. 1993) (quoting Restatement (Second) of Conracts, §§ 213-17)*).

Performance obligations

8. Does national law impose any general principles of fair commercial practices?

Both federal and state law impose general principles of fair commercial practices applicable to consumer contracts.

Federal law

The Federal Trade Commission Act regulates fair commercial practices for consumers. In particular, the Act prohibits "unfair or deceptive acts or practices in or affecting [interstate] commerce." (*15 U.S.C. § 45(a)(1).*) Under the Act, the Federal Trade Commission (FTC) has the authority to define a practice as unfair if it "causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition." (*15 U.S.C. § 45(n).*)

The FTC has issued numerous guides interpreting the prohibition on unfair or deceptive acts in the context of different industries and practices (*16 C.F.R. § 17 et seq.*). Many of these guidelines are very specific. For example, 16 C.F.R. § 24.3 addresses when leather and imitation leather products may be defined as waterproof. For other consumer statutes and regulations enforced by the FTC, see *Statutes Enforced or Administered by the Commission*.

State law

Many states have also enacted consumer protection statutes. These statutes vary significantly by state. Some state consumer protection laws are general, and do not define many specific types of prohibited acts. New York's statute, for example, merely prohibits "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state." (*N.Y. Gen. Bus. Law § 349(a).*)

By contrast, many other state consumer protection statutes list a large number of specific unfair practices. For example, Pennsylvania's statute lists 21 specific unfair practices, California's lists 27, and Texas's lists 33. Many of these statutes follow the UDTPA and therefore list the same types of practices. For example, there are 12 overlapping unfair practices in the Pennsylvania, California, and Texas statutes:

- Passing off goods or services as those of another.
- Misrepresenting the source, sponsorship, approval, or certification of goods or services.
- Misrepresenting the affiliation, connection, or association with, or certification by, another.
- Using deceptive representations or designations of geographic origin in connection with goods or services.
- Representing that:
    - goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have; or
    - a person has a sponsorship, approval, status, affiliation, or connection which they do not have.
- Representing that goods are original or new if they have deteriorated unreasonably or are altered, reconditioned, reclaimed, used, or second hand.
- Representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another.
- Disparaging the goods, services, or business of another by false or misleading representation of fact.
- Advertising goods or services with intent not to sell them as advertised.
- Advertising goods or services with intent not to supply reasonably expectable demand, unless the advertisement discloses a limitation of quantity.
- Making false or misleading statements of fact concerning reasons for, existence of, or amounts of price reductions.
- Representing that a part, replacement, or repair service is needed when it is not.

(*Cal. Civ. Code § 1770(a); see Tex. Bus. & Com. Code § 17.46(b); 73 P.S. § 201-2(4)*).)

In addition to these common unfair practices, some states also list specific unfair practices that other states do not. California's statute, for example, makes it unfair to advertise "furniture without clearly indicating that it is unassembled if that is the case" or to insert "an unconscionable provision in the contract." (*Cal. Civ. Code § 1770(a)*.)

Although state laws vary and are not required to follow federal law, many states follow the FTC in interpreting their own unfair trade practices acts (*for example, O.C.G.A. § 10-1-391 (Georgia)*; *Mass. Gen. Laws ch. 93A § 2 (Massachusetts)*). Accordingly, practices listed as unfair by the FTC may also be considered unfair under state law in some states.

9. Does national law imply any terms into:

- Contracts for the sale of goods to a person dealing as a consumer?
- Contracts for the supply of services to a person dealing as a consumer?

States typically imply the following terms into most consumer contracts:

- The implied warranties of merchantability and fitness for a particular purpose.
- The more general duty of good faith and fair dealing.

As defined by the UCC, the implied warranty of merchantability applies to any contract for the sale of goods where "the seller is a merchant with respect to goods of that kind." (*UCC § 2-314(1)*.) The implied warranty requires that the goods meet six requirements:

- Pass without objection in the trade under the contract description.
- In the case of fungible goods, are of fair average quality within the description.
- Are fit for the ordinary purposes for which such goods are used.
- Run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved.
- Are adequately contained, packaged, and labelled as the agreement may require.
- Conform to the promise or affirmations of fact made on the container or label if any.

(*UCC § 2-314(2)*.)

The implied warranty of fitness for a particular purpose applies where the seller at the time of contracting has reason to know:

- Any particular purpose for which the goods are required.
- That the buyer is relying on the seller's skill or judgment to select or furnish suitable goods.

In that case, there is "an implied warranty that the goods shall be fit for such purpose." (*UCC § 2-315*.)

These implied warranties, however, may be waived (*UCC § 2-316(2)*). For the requirements for waiving these warranties see *Question 13*.

In addition to the implied warranties, both the UCC and the common law of most states impose a more general duty of good faith and fair dealing (*UCC § 1-304*). For merchants, the UCC defines good faith as "honesty in fact and the observance of reasonable commercial standards for fair dealing in the trade." (*UCC § 2-10(1)(b)*.)

The duty of good faith and fair dealing is more difficult to define precisely at common law. The US Supreme Court has cautioned that: "While most states recognize some form of the good faith and fair dealing doctrine, it does not appear that there is any uniform understanding of the doctrine's precise meaning." (*Northwest, Inc. v. Ginsberg, 134 S. Ct. 1422, 1431 (2014)*.) Some states allow parties to waive the duty of good faith, while others do not.

Examples of conduct that would violate the duty of good faith at common law include:

- Evasion of the spirit of the bargain.

- Lack of diligence and slacking off.
- Wilful rendering of imperfect performance.
- Abuse of a power to specify terms.
- Interference with or failure to cooperate in the other party's performance.

(*Jang v. Boston Scientific Scimed, Inc.*, *729 F.3d 357, 365-67 (3d Cir. 2013) (quoting Restatement (Second) of Contracts § 205 cmt. d)*.)

10. What liability exists for breach of an express term of a contract?

The UCC provides detailed guidelines regarding liability for breach of a contract for the sale of goods. If a buyer breaches the contract by rejecting the goods or refusing to pay, the seller has six choices:

- Withhold delivery of the goods.
- Stop delivery by any bailee.
- Salvage or resell goods still unidentified to the contract.
- Resell and recover damages.
- Recover damages for non-acceptance or in a proper case the price.
- Cancel.

(*UCC § 2-703*.)

Likewise, if a seller breaches the contract by failing to make delivery or giving the buyer grounds to revoke acceptance, the buyer can cancel and recover the price paid. In addition, the buyer can either:

- Buy substitute goods and recover damages based on the difference between the contract price and the price of the substitute goods.
- Recover damages based on the difference between the contract price and the market price at the time of breach.

(*UCC §§ 2-711, 2-712, 2-713*.)

At common law, damages are the standard remedy for breach of contract. Damages are typically awarded based on the injured party's expectations and are intended to "put the promisee in the same position as if the promisor had performed the contract." (*Duncan v. TheraTx, Inc.*, *775 A.2d 1019, 1022 (Del. 2001)*.) Under a typical formulation, the non-breaching party's damages are calculated as:

- The loss to the non-breaching party.
- Plus any other loss, including incidental or consequential loss, caused by the breach.

- Minus any cost or other loss that he has avoided by not having to perform.

  (*VICI Racing, LLC v. T-Mobile USA, Inc., 763 F.3d 273, 293-94 (3d Cir. 2014) (citing Restatement (Second) of Contracts § 347).*)

At common law, damages are also limited by the duty to mitigate. Under that duty, "damages are not recoverable for loss that the injured party could have avoided without undue risk, burden or humiliation." (*Restatement (Second) of Contracts § 350.*) However, if the injured party made "reasonable efforts . . . to avoid loss," then it may recover damages even if its reasonable efforts were ultimately unsuccessful (*Restatement (Second) of Contracts § 350*). In addition, damages may not be recoverable for losses that were unforeseeable at the time the contract was made (*Restatement (Second) of Contracts § 351*).

State consumer protection laws may also amplify damages in certain contexts, see *Question 6*.

Less commonly, a court may order a party to comply with the contract (specific performance). Courts award this remedy only if “the subject matter of the contract is unique” such that there is too much “uncertainty of valuing it” for purposes of assigning damages (*Van Wagner Adver. Corp. v. S & M Enters., 493 N.E.2d 756, 760 (N.Y. 1986)*). Moreover, courts will not order specific performance if it would “be an undue hardship” on the breaching party (*Van Wagner, 493 N.E.2d at 761*). The UCC follows this approach, allowing specific performance only “where the goods are unique or in other proper circumstances”, subject to “such terms and conditions . . . as the court may deem just.” (*UCC § 2-716*).

Contracts may also set their own damages, such as through fixed early termination fees. These provisions are known as liquidated damages provisions. But unreasonably large liquidated damages are "unenforceable on grounds of public policy as a penalty." (*UCC § 2-718(1); see Restatement (Second) of Contracts § 356(1) (same).*)

11. What liability exists for breach of an implied term of a contract?

Generally, there is no difference in legal effect between an express and implied contract (*Restatement (Second) of Contracts § 4 cmt. a*). Therefore, the answer to this question is the same as under *Question 10*.

Control of unfair contract terms

12. How does national law regulate the inclusion of unfair terms in a consumer contract?

Under both the UCC and the common law, states may refuse to enforce consumer contract terms that are unconscionable (*UCC § 2-302*).

Courts typically consider both procedural unconscionability and substantive unconscionability when determining if a contract is unconscionable. Some states, like California, require that both types are present to void a contract, but "they need not be present in the same degree." Rather, "the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa." (*Baltazar v. Forever 21 Inc., 367 P.3d 6, 11 (Cal. 2016); see De La Torre v. CashCall, Inc., 422 P.3d 1004 (2018).*) But in other states, like Illinois, unconscionability "can be either 'procedural' or 'substantive' or a combination of both." (*Razor v. Hyundai Motor Am., 854 N.E.2d 607, 622 (Ill. 2006).*)

Procedural unconscionability

Procedural unconscionability exists when there is a big disparity in information or bargaining power between the parties. Some states, like California, consider all consumer contracts of adhesion to "contain a degree of procedural unconscionability." (*Baltazar, 367 P.3d at 11*). Other states, like New Jersey, do not (see *Stelluti v. Casapenn Enters., LLC, 1 A.3d 678, 687-88 (N.J. 2010)*). In *Gillman v. Chase Manhattan Bank*, the New York Court of Appeals listed several factors to consider when determining procedural unconscionability:

- The size and commercial setting of the transaction.
- Whether deceptive or high-pressured tactics were employed.
- The use of fine print in the contract.
- The experience and education of the party claiming unconscionability.
- Whether there was disparity in bargaining power.

(*Gillman v. Chase Manhattan Bank, 534 N.E.2d 824, 828 (1988).*)

Substantive unconscionability

Substantive unconscionability exists when a contract term is "so one-sided as to 'shock the conscience.'" (*Sanchez v. Valencia Holding Co., LLC, 353 P.3d 741, 748 (Cal. 2015).*) In judging substantive unconscionability, courts look at "the terms of the contract . . . in light of the circumstances existing when the contract was made", as well as "the mores and business practices of the time and place." (*Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 450 (D.C. Cir. 1965).*)

13. To what extent does national law permit the use of terms that limit or exclude the liabilities to which a party to a consumer contract would otherwise be subject?

In consumer contracts, the enforceability of releases or limitations of liability depends on what is being released or limited. The UCC contains different rules depending on whether the releases exclude liability for implied warranties, breach, or consequential damages.

Implied warranties
Consumer contracts for the sale of goods may exclude implied warranties as long as they do so conspicuously and using clear language (*UCC § 2-316(2)*). The UCC gives three examples of effective language:

- "There are no warranties which extend beyond the description on the face hereof."
- "As is."
- "With all faults."

Such warranties may not, however, be excluded if the federal Magnuson-Moss Warranty Act applies (*15 U.S.C. § 2301, et seq.*). The Act provides that sellers offering a written warranty on the sale of goods cannot exclude the implied warranty of merchantability. For other requirements for warranties under the Act, including requirements related to disclosure, pre-sale availability, and dispute settlement procedures, see 15 U.S.C. § 2301, *et. seq.* and 16 C.F.R. Parts 701 and 702.

Limitations of remedies
A contract may contain terms that limit the remedy for breach. For example, a term may "limit the buyer's remedies to return of the goods and repayment of the price or to repair and replacement of non-conforming goods or parts." (*UCC § 2-719(1)(b).*) But if the remedy is so limited that it "fail[s] of its essential purpose", then the limitation will not be valid (*UCC* § 2-719(2)). For example, if a contract limits a consumer's remedy to repair, but repeated repairs fail to solve the problem, then "the limited remedy failed of its essential purpose" and will not be enforced (*Razor*, *854 N.E.2d at 625*).

Consequential damages
A contract may include terms that limit or exclude consequential damages "unless the limitation or exclusion is unconscionable." (*UCC § 2-719(3).*) "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." (*UCC § 2-719(3).*) Moreover, these limitations may not be enforced unless they are "prominently, conspicuously, and clearly set forth." (*Gladden v. Cadillac Motor Car Div., Gen. Motors Corp.*, 416 A.2d 394, 402 (N.J.1980).)

Arbitration clauses
In addition to provisions limiting substantive liability, consumer contracts may contain arbitration clauses limiting the consumer's right to litigate disputes in court or pursue class action proceedings. These provisions are generally enforceable only if they are not unconscionable. Accordingly, consumer contracts that limit class action or litigation rights should have other provisions to ensure that consumer complaints can be heard. For example, the United States Supreme Court enforced a class action waiver in an arbitration clause when the clause provided that the company would pay the consumer a minimum of USD7,500 and twice the consumer's attorney's fees if the consumer obtained an arbitration award greater than the company's last settlement offer (*AT&T Mobility v. Concepcion*, *563 U.S. 333, 352 (2011)*). However, more recently, the Court enforced a class action waiver in an arbitration clause even though the plaintiff's cost to individually arbitrate its claim exceeded its potential recovery. (*Am. Exp. Co. v. Italian Colors Rest., 570 U.S. 228 (2013).*)

Distance contracts

14. How does national law regulate contracts made at a distance (that do not involve face-to-face contact between the buyer and seller)?

No specific laws regulate contracts made at a distance, but these contracts may pose questions regarding how and when a party accepts an offer.

As to accepting offers, the common law typically provides that, "[u]nless circumstances known to the offeree indicate otherwise, a medium of acceptance is reasonable if it is the one used by the offeror or one customary in similar transactions at the time and place the offer is received." (*Restatement (Second) of Contracts § 65*.) The UCC takes an even broader approach, providing that unless the offer "unambiguously" indicates otherwise, it may be accepted "in any manner and by any medium reasonable in the circumstances." (*UCC § 2-206*.)

Acceptances generally take effect on dispatch, as long as they are made in the manner invited by the offeror (*Restatement (Second) of Contracts § 63(a)*). Therefore, under the Restatement, an acceptance sent in a proper manner creates a binding contract (other than an option contract), even if it never reaches the offeror. (*Restatement (Second) of Contracts § 63(a).)*

Federal and state laws also facilitate distance contracts by allowing for electronic signatures, under the federal Electronic Signatures in Global and National Commerce (ESIGN) Act (15 U.S.C § 7001 et seq,) and the state Uniform Electronic Transactions Act (UETA). Both laws require, for example, that:

- The signing party manifest its intent to sign electronically.
- The parties consent to do business electronically.
- The electronic signature record is capable of retention and reproduction by all parties to the agreement.

15. How does national law regulate door-to-door selling?

No national laws regulate door-to-door selling. This issue is typically regulated on a more local level by counties or cities within states. For example, the county containing Las Vegas, Nevada recently passed a law requiring most door-to-door salesmen to carry identification, respect certain signage, and operate only during the daytime (*Clark Cnty. Ordinance No. 4374*).

Any such state or local laws must comply with the US Constitution's guarantee of freedom of speech. As the US Supreme Court explained, commercial speech is constitutionally protected if it is not unlawful or misleading (*Cent*.

Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 566 (1980)). Therefore, the government must show that its regulation "directly advances" an "asserted government interest [that] is substantial", and that "it is not more extensive than is necessary to serve that interest." (*Cent. Hudson, 447 U.S. at 566.*)

Enforcement

16. Who is responsible for enforcing consumer protection legislation? What powers do enforcement authorities have?

Federal level

The Federal Trade Commission is the largest federal agency responsible for consumer protection. The FTC has authority to target "unfair or deceptive acts or practices in or affecting [interstate] commerce." (*15 U.S.C. § 45(a).*) The FTC may also define a practice as unfair if it "causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition." (*15 U.S.C. § 45(n).*) Other federal agencies may also play a role in consumer protection. For example, in 2011, the federal government formed the Consumer Financial Protection Bureau, which protects consumers of financial products and services.

To enforce its consumer protection mandate, the FTC has the authority to bring complaints against alleged violators and, after a hearing, order violators to cease and desist (*15 U.S.C. § 45(b)*). The FTC can then enforce those final orders by levying a civil penalty of up to USD10,000 per violation, and the Attorney General of the United States can sue in court to collect those penalties (*15 U.S.C. §§ 45(l), (m)*).

State level

State attorneys general are the primary enforcers of consumer protection legislation, although some states may give partial or primary enforcement authority to a different agency as well. Each agency's exact enforcement powers vary by state. Unlike the FTC, many state agencies do not have the power to levy administrative penalties on their own, but must instead bring claims for damages and injunctive relief in court. For example, New York's statute permits the attorney general to sue in court on behalf of the people of New York, after giving notice to the allegedly offending party (*N.Y. Gen. Bus. Law § 349(b)*).

In addition to administrative agencies, state courts play an important role in consumer protection through their enforcement (or non-enforcement) of contract terms. As discussed in previous sections, courts may refuse to enforce consumer contracts that (among other things) result from misrepresentation, are unconscionable, or require unreasonable liquidated damages. Courts may also protect consumers through enforcing a duty of good faith and fair dealing, or by construing ambiguous terms in a contract in favour of consumers.

State consumer protection rules may be invalid if they conflict with federal law and in recent years the US Supreme Court has declared invalid:

- California's rule holding that most consumer class action waivers are unconscionable because that rule violated the Federal Arbitration Act (*AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 352 (2011)*).
- Minnesota's application of its mandatory duty of good faith and fair dealing to an airline's rewards program because that application violated the Airline Deregulation Act (*Northwest, Inc. v. Ginsberg, 134 S. Ct. 1422, 1433 (2014)*).

The opinions and views set forth herein are the personal views or opinions of the author; they do not necessarily reflect views or opinions of the law firm with which she is associated or any client. Benjamin G. Minegar, a Business and Tort Litigation associate in the Pittsburgh office of Jones Day, provided substantial assistance in drafting and preparing this guide.

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