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Transnational Consumer Protection in E-Commerce:

Lessons Learned From the European Union and the United States

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ABSTRACT

This article deals with the protection of consumers when they enter e-commerce transactions with foreign companies. Most states reacted to the growing importance of e-commerce by enacting data protection and consumer protection legislation and by requiring registration of e-businesses. Companies have found a way to circumvent the consumer legislation by offering the consumers to agree to a choice of foreign courts and laws which are included in their terms and conditions. Consumers give away the protection of their home state simply by clicking to accept the general terms and conditions on the company's website. The purpose of this article is to examine if the solutions and the experience from the United States and the European Union could serve as a model for transnational protection of consumers in e-commerce. The authors discuss the different levels of protection offered in the United States and the European Union and consider unification of the standards by a multilateral convention.

KEYWORDS

Choice-of-Court, Choice-of-Law, Consumer Protection, E-Commerce, Jurisdiction

INTRODUCTION

With the creation of the internet and making it open to the public in 1991, a new type of commerce has emerged. This has helped both companies and customers to conduct a new type of commercial activities that will be called later 'e-commerce'. This has a significant role in accelerating of economic productivity and growth. For example, the internet helps companies to adopt new type of business processes that called e-business and to conduct new commercial activities such as marketing and selling on the web - this type of business also allows companies to collect, store, process and transfer

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personal information that they get from the users or customers who use their business websites (Lichtenthaler, 2021).

The emergence of digital technology and software required for launching e-commerce projects helped e-commerce to grow quickly (Schneider, 2017). In parallel with economic growth, e-commerce activities grew significantly to form an important part in the general economy (Schneider, 2017). This success is attributed in the first place to the nature of e-commerce as an international commerce (Neogi, 2021). The international nature of e-commerce activities enabled companies to expand their activities beyond the borders of state, attract new customers, build new relationships with new suppliers globally, increase sales and generate profits (Turban et al., 2015). When company uses the Web to expand its activities, it will become directly an international business and operate in a global environment – so by developing and implementing a website, a company will create its online identity and it will have a new way of communication.

Due to this nature, e-commerce provides convenience, liberty and autonomy to shoppers in enabling them to complete online transactions based on their own interest, whenever and wherever they want (Laudon & Traver, 2007; Chaffey & Ellis-Chadwick, 2012). Even during the recession years that started in 2008, the e-commerce sector has proved its merit as e-commerce activities contracted less than most of the economy. Schneider (2017) has confirmed:

As the general economy has expanded and contracted, electronic commerce has consistently expanded more in the good time and contracted less in bad time than other economic sectors (p.5).

The emergence of e-commerce created new opportunities, where new businesses have emerged, such as the sale of digital products (videos, music and games). Moreover, the use of the internet for commercial purposes with emerging mobile commerce devices and social commerce helped companies to grow their businesses and expand their activities specially in countries with large populations such as China and India, where the proportion of the online B2C sales in Asia Pacific reached about $1.057 billion, exceeding those in the USA which were ranked second- for $ 644 billion (Statista, 2018). Using the net has also helped enabling new methods of commercial communication based on the use of smart phones and social networks – which have become the engine of e-commerce activities. The number of online buyers increased in a significant way due to these tools; and the number of online shoppers was expected to be 2.14 billion digital buyers worldwide in 2021 up from 1.66 billion global digital buyers in 2016 (Statista, 2018).

It is often advocated that online activities in general and e-commerce transactions in particular acquire a cross-border dimension, where relevant laws and legislations become inoperative in dispute cases (Meskic & Jevremovic, 2021; Adams & Albakjaji, 2016). Such activities and transactions do take place outside the realm of traditional boundaries of time and space that form the basis of tort laws and state authority and the role of business ethics becomes more important (Santos et al., 2022; Albakjaji et al., 2020). In this regard, Wynn and Katz (1997) have pointed out that cyberspace has enabled asynchronous communication, which is distinguished from the synchronous communication which occurs inside the real time-space. This has been confirmed by Matusitz (2014):

The cyberspace put an end to geography. Businesspeople are only a mouse click away from Web users in Vietnam or Guatemala. This also implies the death of the time. So, the era of three-dimensional public sphere may become passé. (p. 717)

Gradually, the cyberspace or the Internet has become the most important space for global businesses (Mahony, 2011), which rely on saving, storing, and transferring data. This kind of business is supported by using smart devices and cloud computing (see Atzori et al., 2010; Tene & Polonetsky, 2012). The business case for cyberspace activities was always justified for their capabilities, such as: reducing costs, using resources more efficiently, sharing information, expanding customer base (Sohaib et al., 2019), becoming unbounded in terms of time and space, and speeding up business processes. Nevertheless, the cyberspace has become a source of users' concern where the extent of cyberattacks has made the data's privacy more vulnerable (Feltus, 2019). This will be attract the

attention of both regulators, and companies in order to build the trust which has become as a vital elements that all relevant parties require (Tripathy & Mishra, 2017).

The proliferation of the internet of things (IoT), and the new technology allowed the online companies to collect large amount of data including private customer data (Guerbouj et al., 2019). One of the challenges generated by this technology is data privacy, where companies look for providing a smart contemporary business model that depends on data (Belkeziz & Jarir, 2020). The previous research has shown that the customer data is very important to provide sustainable competitive advantage for business organizations (Krimpmann & Stühmeier, 2017). Mizuno and Odake (2017), argued that personal data should be stored and managed in highly secure and structured systems such as Personal Data Service. However, this is not well established in the practice (Albakjaji et al., 2020).

Background and Literature Review

The significance of E-commerce has led to a global movement of legislating its various aspects: registration of e-businesses, consumer protection, data protection, e-contracts, but it also impacted the procedural laws especially on the question of jurisdiction for cross-border e-commerce and conflict of laws. In this paper the authors will address the problems of consumer protection in cross-border e-commerce, especially in countries that just started to develop their e-commerce legislation. The authors use the EU and U.S. legislation as a potential model for countries whose e-commerce cross-border protection is in early stages of development. As an example, the authors mention the E-Commerce legislation in the Kingdom of Saudi Arabia (KSA), who just adopted its first E-commerce law on 26 July 2019. However, in KSA there is neither a Consumer Protection Act, nor a Private International Law Act, nor any other statute with consumer specific provisions on jurisdiction or conflict of laws which could save this protection also in cases of cross-border disputes and there is also no literature on this topic thus far. Acts on consumer protection and conflict of laws have been announced by the KSA authorities and are expected to be adopted in 2022. The literature review on the use of the EU and U.S. transnational consumer protection in e-commerce as a model reveals that some publications deal with certain areas, such as jurisdiction or applicable law (Wang, 2010; Healy, 2009), but not on creating a comprehensive protection in all relevant areas.

Hypothesis

Legislations globally react to the growing importance of e-commerce by regulating some of the key features in the basic E-commerce law, the Data protection law and possibly a Consumer protection law, as it is announced in KSA. Nevertheless, by leaving conflict of laws unregulated and without introduction of consumer protection in the regulation of jurisdiction, applicable law and recognition and enforcement of foreign judgments, the buyers and consumers can be left without protection very easily. Simply, any online seller can impose on its website that the buyers accept its general terms and conditions and the seller may include in such terms the choice of a foreign jurisdiction and foreign applicable law.

When analyzing the comparative law, in concrete the EU and U.S. law, the authors found a triple protection for buyers. The sellers firstly may not be allowed to impose on the buyers any choice of foreign law, and secondly any choice of foreign jurisdiction, either by choice of law in the general terms and conditions or otherwise. Thirdly, any judgment of the foreign court issued in violation of the first two principles should not be recognized in the consumer's state.

H1: Buyers require triple protection in cross-border contracts concluded visa e-commerce: 1. Control over the choice of foreign jurisdiction; 2. control over the choice of foreign law; 3. non-recognition of foreign judgments issued in violation of the first two principles.

Instead of adopting national legislation which will be different and uncoordinated creating uncertainty for consumers who shop cross-border online, in such new emerging areas it would be

beneficial to the online market to adopt uniform solutions. So far, no such convention has been in preparation on international level.

H2. A uniform convention for cross-border e-commerce is a valuable solution to provide safety for consumers and businesspersons.

Methodology

The normative method was used to identify legislation in EU and U.S. and case law of the CJEU and U.S courts on consumer protection in cross-border e-commerce. This method also included a comparative analysis as EU and U.S legislation and case-law are analyzed in order to draw conclusions and recommendations for states without such legislation, such as the KSA. The dogmatic method was used to understand the reasons why and how the EU and U.S. courts and legislators protect consumers in cross-border e-commerce. In particular, which criteria is used to identify in which situations and which types of websites the courts and legislators provide protection from foreign jurisdiction and laws. The analytical method is used to draw conclusions on the quality and transferability of the U.S. and EU solutions to other jurisdictions.

Hypothesis Testing and Discussion

The EU Legislation as a Model Legislation

a) Jurisdiction for e-commerce consumer contracts absent a choice-of-court clause

Consumer protection is primarily governed by Arts. 17-19 regarding jurisdiction and Art. 45 (1)(e) the Brussels I Regulation no. 1215/2012 (recast) regarding recognition and enforcement of foreign judgments (2012). The level of consumer protection in these provisions, as will be explained further below, is rather high. To find the right balance, the EU legislator narrowed down the potential number of consumers who can enjoy the protection, so that protection is provided only in situations where the contractual balance is distorted.

The regulation of who is a consumer and when he/she enjoys protection under Brussels I Regulation (recast) is rather complex. Firstly, the Brussels I Regulation (recast) applies only to defendants with domicile in a Member State of the EU (Art. 4 Brussels I Regulation), otherwise the national rules on jurisdiction of each Member State apply. Following this rule, consumers would only enjoy protection of the Brussels I Regulation if the trader they are filing a claim against has its domicile in the EU. This would of course be an open invitation for traders to avoid EU jurisdiction, simply by placing their place of business outside of EU, especially in case of online contracts. Therefore, Art 18 of the Brussels I Regulation, specifically for consumer contracts extends the protection to cover consumers' claims against traders domiciled outside of the EU, simply by allowing consumers to file the claim in the courts of the EU where the consumer has its domicile.

However, a natural person may only rely on the provisions of the consumer protection under the Brussels I Regulation "if (the) contract (is) concluded by a person, the consumer, for a purpose which can be regarded as being outside his trade or profession" (art 17 (1) Brussels I Regulation). In addition, the consumer enjoys protection only if he/she concludes a contract with person "who pursues commercial or professional activities in the Member State of the consumer's domicile or, by any means, directs such activities to that Member State or to several States including that Member State, and the contract falls within the scope of such activities".

The condition that the trader pursues commercial in consumer's state or, by any means, directs such activities to that state, is based on the idea that the trader is "chasing" consumers either by a targeted approach in the state of consumer's domicile or by advertising in that state (Nielsen, 2011,

p. 316; Hanaysha et al., 2021). The criteria of pursuing commercial or professional activities does not require opening of a branch in that state, but makes it sufficient that the trader actively participates in the market of that state, e.g. by providing services in that state (Staudinger, 2003, p. 191). Apart from its main scope of application to advertisement in the consumer's state, the criteria of "directing activities" is flexible enough to encompass all current and future forms of e-commerce. Under certain conditions a website of a trader directed towards the consumer's state replaces the need for a branch of that trader "in the real world". The indefinite formulation of the criteria of "directing" offers flexibility when applying to electronic means of communication and business, but also causes unjustified risks of establishing court jurisdiction for traders who never intended to do direct the website towards that particular jurisdiction. When determining "direction of activities" a differentiation known from U.S. courts between passive and active website shall be taken into account, whereas the passive websites do not offer the possibility of registration or direct purchase, but only transmit information and replace a classic form of advertisement (Muminovic, 2006, p. 76). Even passive website may be directed towards a specific state if they offer a possibility of direct purchase by dialing a free telephone or fax number (Staudinger, 2003, p. 193). The intent of the trader to conclude a contract with consumers by its website is decisive (German Supreme Court, 2011). In the *Pammer* decision the Court of Justice of the EU (CJEU) stated that evidence for an activity "directed" towards a certain consumer's state may be assessed based on the following criteria: "the international nature of the activity at issue, such as certain tourist activities; mention of telephone numbers with the international code; use of a top-level domain name other than that of the Member State in which the trader is established, for example '.de', or use of neutral top-level domain names such as '.com' or '.eu'; the description of itineraries from one or more other Member States to the place where the service is provided; and mention of an international clientele composed of customers domiciled in various Member States, in particular by presentation of accounts written by such customers" (CJEU, *Pammer*, para. 83; Pilich, 2011, p. 178). By applying a combination of the mentioned criteria, it is important to reach the conclusion that the trader did not only offer an opportunity to consumers to conclude a contract, but also expressed its intent to enter into a commercial transaction with them (CJEU, *Pammer*, para. 80).

Once the criteria of "directing activities" towards consumer's state is fulfilled, a consumer who files a claim against a trader may choose to do so in the state of his own or the trader's domicile under Art 18 (1) of the Brussels I regulation. Thereby the consumer may decide to use the advantages of raising a claim in its own place or avoid potential problems on enforcement of foreign judgments and raise the claim in trader's state (Staudinger, 2003, p. 197). A further option for the consumer is to raise the claim in the place here the trader has its branch or establishment, if the dispute arises out of its activity (Art 17 (2) of the Brussels I Regulation). On the other hand, the trader is only allowed to bring a claim against the consumer in consumer's state of domicile (Art 18 (2) of the Brussels I Regulation).

b) Choice-of-court clauses in consumer e-commerce contracts

The consumers are allowed to deviate from the jurisdictional rules of Art 17 ad 18 of the Brussels I Regulation by choice-of-court agreements, but only under very difficult criteria (Stanivukovic, 2004, p. 268). The most important limitation is set by Art 19 (1) of the Brussels I Regulation which invalidates choice-of-court agreements concluded before the dispute has arisen. This provision primarily aims to eliminate the possibility to conclude choice-of-court agreements in standards terms and conditions. If the consumer wants to conclude a choice-of-court agreement, he/she may do so only after the dispute has arisen, because only then he/she is able to understand the consequences of such agreement (Geimer, 2010, p. 348). Exceptionally a choice-of-court agreement concluded prior to the dispute may be valid, but only if it offers to the consumer the possibility to raise a claim in additional states, before courts which would not be available to the consumer under Art 17 and 18 Brussels I Regulation (Art 19 (2) Brussels I Regulation). However, the clause may only provide

additional opportunities for the consumer, not the trader, who may not rely on it to file a claim in a state other than consumer's place of domicile (Nielsen, 2011, p. 324). The only situation in which the trader is allowed to rely on a choice-of-court clause is when the trader and consumer choose a court in their common place of domicile, but the consumer later changes its domicile. It would be unfair towards the trader to declare the choice-of-court agreement null and void, just because the consumer changed its domicile.

In addition, choice-of court agreements which were not individually negotiated need to pass the fairness test of Art. 3 Directive 93/13/EEC on unfair terms in commercial contracts. The Directive 93/13/EEC contains a list of unfair contractual clauses (the so called "grey list") which represents an "indicative and non-exhaustive list of clauses which may be considered unfair" (Meskic & Brkic, 2010, p. 74). Under 1.q of the list a clause is unfair if it is "excluding or hindering the consumer's right to take legal action or exercise any other legal remedy", which puts choice-of-court clauses and arbitration clauses in the focus of review. In *Océano Grupo* (para. 23 and 25) the CJEU decided that the fairness test needs to be applied by the courts on their own motion (ex officio), so even without any objection from the consumer.

c) Recognition and enforcement of judgments arising out consumer e-commerce contracts

The Brussels I Regulation applies only to recognition and enforcement of inter-EU judgments, whereas to judgments rendered outside of the EU each EU Member State applies its own rules. Within the system of the Brussels I Regulation the courts will not recognize any decision on a consumer contract which was adopted by a court in violation of Arts 17-19 Brussels I Regulation (Art 45 (1)(e) Brussels I Regulation). Insofar, the jurisdictional rules of the Brussels I Regulation for consumer contracts are considered to provide for exclusive jurisdiction of consumer's courts and may not be violated (Stanivukovic, 2004, p. 268). The only exception is the possibility of the consumer as defendant enters an appearance before a court chosen by the trader or based on a choice-of-court agreement, without objecting to jurisdiction. In such situation the European courts have the obligation to explain to the consumer that he/she has the right to object to jurisdiction as well as the consequences of such jurisdiction under Art 26 (2) of the Brussels I Regulation. If the consumer even after receiving the instructions from the court decides to appear before court, the jurisdiction will be valid and the decision shall be recognized (Kropholler, 2002, p. 324). The consumer is allowed to enter into appearance after the dispute arises, because in such situation the consumer would have been allowed to sign a choice-of-court agreement as well.

d) Choice-of-law in consumer e-commerce contracts

The inter-coordinated Rome I Regulation on the law applicable to contracts (No. 593/2008) and Brussels I Regulation ensure consumer protection by providing jurisdiction of the courts of the member state in which the consumer is domiciled under Brussels I Regulation, irrespective of the fact whether the consumer is claimant or defendant, and these courts then apply domestic law of the consumer under the Rome I Regulation. Consumer protection in EU choice-of-law regulation is mainly based on Art. 6 of the Rome I Regulation and the provisions on conflict of laws in EU Consumer Directives. In order to provide cross-border protection for consumers Art. 17 Brussels I Regulation and Art. 6 Rome I Regulation contain a common criterion essential for e-commerce contracts, that the professional "directs his activities" to the state of consumer's domicile/habitual residence and the contract falls within the scope of such activities. In these cases, pursuant to Art. 6 (1) Rome I Regulation, the law of the country of consumer's habitual residence would apply, regardless of the fact whether it lies within the territory of a member or a non-member state of the EU. Furthermore, according to Art. 6 (2) Rome I Regulation a choice-of-law clause would be enforceable to the extend

it provides a higher level of consumer protection than the "internal" mandatory provisions of the state of consumer's habitual residence. When the contract does not fall under the scope of application of Art. 6 Rome I Regulation, according to Art. 3 (3) and (4) Rome I Regulation in case when all elements of the situation lie within one (member) state, its "internal" mandatory rules apply regardless of a choice of law clause in favor of a law of another (member or non-member) state. Finally, the CJEU in *Ingmar* additionally suggests that some national consumer protection provisions which transpose the consumer directives may be regarded as "international" mandatory rules and apply regardless of the applicable law determined by the Rome I Regulation (CJEU, *Ingmar*; Meskic, 2009, p. 1017).

The U.S. Legislation as Model Legislation

The analysis in this section will address the jurisdiction and choice-of-law in e-commerce consumer contracts before U.S. courts. The question of recognition and enforcement of foreign judgments will not be addressed, as U.S. courts have a rather complex and not-uniform approach that is heavily criticized and cannot at its current stage of development be used as a model for other countries (Strong, 2014).

a) Jurisdiction for consumer e-commerce contracts absent a choice-of-court agreement

In the U.S. when a court examines its jurisdiction in any case, it muss assess two criteria cumulatively: 1. Did the legislator of the particular state adopt a "long-arm" statute that gives the power to the court to exercise jurisdiction over non-residents in such situation; 2. Would the exercise of the jurisdiction violate the Due Process Clause under the Fourteenth Amendment (Chik, 2002, p. 250.) The question of jurisdiction for cross-border consumer disputes in e-commerce evolves around the second criteria – which criteria shall the court use to assess if the exercise of the jurisdiction would be in line with the due process clause. The traditional test used was established in *International Shoe* in 1945, when the Supreme Court ruled that personal jurisdiction over a defendant is given when the defendant has certain "minimum contacts" with the forum state.

The U.S. courts developed the "minimum contacts test" towards a more diverse approach to personal jurisdiction in cross-border e-commerce cases. The most commonly used standard is established in Zippo Mfg. Co. v. Zippo Dot Com, Inc. in 1997. The court based its decision on personal jurisdiction on the distinction between three types of websites: a passive website which only makes information available to consumers; a website "integral to the business" where the company clearly does business over the internet on a particular territory; and the middle solution is an "interactive website" where consumers can exchange information with the host (*Ahn*, 2015, p. 2335). The test established is called a "sliding scale test" or "Zippo test" where the court examines the commercial activity exercised by the company over the internet. The court established that "the likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet". The Zippo test seems to be vulnerable to subjective understanding of the courts if a website is "interactive" or "integral to the business", rather than to the reality of the manner in which the user employs the internet (Gladstone, 2003, p. 149).

Due to the lack of precision of the Zippo-test, some courts still use an older "effects test" established in *Calder v. Jones* in 1984). One of the essential features of the effect test is the intent of the company to conduct business on a certain territory. In Calder v. Jones, which was a defamation case, the Supreme Court held that the company conducted "intentional actions" (..) "expressly aimed at California". The test established based on a defamation case where intent is clearly required is of course more difficult to apply in cases arising purely out of commercial activities. Further, the effects-test has proven to be more difficult to apply in B2B cases involving companies, because it is much more difficult to establish where a multi-national company has been "hurt" (Wang, 2010, p. 70). In Cybersell, Inc v. Cybersell the Appellate court established that a "corporation "does not suffer harm in a particular geographic location in the same sense that an individual does".

The science interpreted the U.S. courts to have also developed a "targeting test" as third path and response to the weaknesses of the "sliding scale test" and the "effect test". The targeting-based approach focuses on and requires that a defendant "specifically aim[ed]" his or her online activities at a forum state for personal jurisdiction to be proper (Boone, 2006, p. 266).

The approach of the U.S. courts on personal jurisdiction for cross-border e-commerce disputes from the "minimum contacts" and "Zippo" tests, towards the "effects" and "targeting" tests shows significant similarities to the EU test on "directing activities" towards the consumer's state. Nevertheless, there is an important difference. The U.S. courts do not differentiate between consumer (B2C) and business contracts (B2B). The consumer, just like any businessperson, has to prove that that the business purposefully targeted its activities via its website to the place where the consumer is domiciled or resident at the time the parties entered into a contract with each other Wang, 2010, p. 74).

b) Choice of forum in e-commerce disputes before U.S. Courts

Traditionally, the U.S. courts had a hostile view towards choice of forum clauses and refused to enforce them, regardless if they were in B2B or B2C contracts (Noles, 1981, p. 698). The Supreme Court reversed this position in 1972 in *MIS Bremen v. Zapata Off-Shore Company* where two companies agreed on a forum selection clause. The Supreme Court held that forum selection clauses "are prima facie valid and should be enforced unless enforcement is shown by the resisting party to be unreasonable under the circumstances" (*(407 U.S. at 10)*. The Supreme Court specified that the forum-selection clause was not unreasonable if it was "unaffected by fraud, undue influence, or overweening bargaining power" *(407 U.S. at 12),* thus applying an unconscionability analysis (Mullenix, 2015, p. 743). However, the Zapata case arose out of a dispute over a forum-selection clause between two companies. The applicability of the Zapata test to forum selection clauses concluded in consumer contracts was famously assessed in the *Carnival Cruise Lines, Inc. v. Shute* in 1991. In this case a Washington resident purchased a cruise ticket trough a travel agent and the ticket was sent to the customer with a choice-of-forum clause on the back in favor of the courts in Florida. Carnival is a Panamian corporation with offices in Florida. Court of Appeals for the Ninth Circuit applied the Zapata reasonableness test and concluded that the forum-selection-clause should not be enforced because it was not subject to free bargain and it was presented to the purchaser on a take-it-or-leave-it basis (Shute v. Carnival Cruise Lines, Inc., 897 F.2d 377, 387, 389 (9th Cir. 1990)). However, the Supreme Court reversed by emphasizing on the potential cost savings for customers if companies are allowed to reduce the potential forum to the one selected in the choice-of-forum clause, rather then having the risk of being sued in any state of a customer. Following the Supreme Court's analysis, a choice-of-forum clause contained in a non-negotiated standard consumer contract is not automatically invalid, because "passengers who purchase tickets containing a forum clause like that at issue in this case benefit in the form of reduced fares reflecting the savings that the cruise line enjoys by limiting the fora in which it may be sued" (499 U.S. 585, at 25). This theory of cost effectiveness gained some prominent support in U.S. conflict lawyers (Brand, 2014). However, the majority criticizes the judgment holding that until today empirical studies have not demonstrated such economic pass-along to consumers (Mullenix, 2015, p. 756; Bruch, 1992). In his dissenting opinion to Carnival Cruise Lines judge Stevens held that the enforceability of such forum-selection-clauses is likely to make many plaintiffs unable to bring their lawsuit in Florida. Ironically the cost savings for the company may come from the fact that customers are less likely to sue in another state (Julie, 1992, p. 344). In fact, the Supreme Court has enabled companies to use geography as a litigation weapon, with planned and universal exploitation of the burdens of distance in a methodical manner against consumers, who are exposed consumers to enormous costs for a small amount dispute (Purcell, 1992, 436) Some authors go further and name the Carnival Cruise Line decision the worst decisions in the history of the Supreme Court (Mullenix, 2012).

The general enforceability of forum-selection-clauses in standard contracts has been transferred to e-commerce consumer contracts. The focus shifts in e-commerce to the main question if the consumer actually consented to the standard terms on the website. According to a New York Court in Tradecomet. Com LLC v. Google reasonableness-test established in Zapata in e-commerce contracts encompasses the test if the choice-of-forum clause was "reasonably communicated" to the consumer. In another case the court refused to enforce an otherwise enforceable forum selection clause available at the website only when the consumer visits the "About us" site which was not brought to his/her attention and clicks on "Terms of sale" which contain a choice-of-forum clause in favor of the Florida courts (Jerez v. JD Closeouts, 2012). On the other hand, in Song fi, Inc., et al. v. Google Inc. and YouTube, LLC the Californian court in 2014 upheld a choice-of-forum clause contained in standard terms to which YouTube presented a link and required from all users before opening an account to check the box "I agree to the Terms of Use and Privacy Policy." In order to prove offer an acceptance of online terms of sale in e-commerce contracts regardless if they contain choice-of-forum or choice-of-law clauses, or both, the seller should make sure that: (1) the end-user, especially a consumer, was clearly presented at the outset with prominent notice of standard terms that would govern use of the site and bind the user, (2) a link to the standard terms were conspicuously and proximately placed in the same context as that notice, such that it stood out from other content on the applicable website page, (3) the standard terms link took the user directly to the standard terms (one click) and (4) the standard terms themselves were clear and unequivocal, and prominently highlighted (such as by all caps or bold type) any material rights being waived by the user, such as liability limits and exculpation, mandatory arbitration and warranty disclaimers (Werbin, 2016, p. 48).

c) Choice-of-law clauses in e-commerce consumer contracts

The U.S. courts traditionally do not differentiate between choice-of-law clauses concluded in consumer or business contracts. For all types of contracts, the choice-of-law clause will be enforceable unless the chosen law has no substantial relationship to the parties or the transactions or violates the public policy (§187 of the Second Restatement of Conflict of Law). Contrary to the EU approach in the Rome I Regulation, the choice of law is limited to states with substantial relationship to the transaction or the parties. In 2001 the American Law Institute introduced a reform of the Uniform Commercial Code (UCC) in 2001, based on the EU solutions in the Rome I Convention (which was later replaced with similar provisions in Rome I Regulation). In the then newly proposed Section 1–301 UCC the choice-of-law was no longer limited to a substantially related state, but would only not be allowed to violate the public policy. However, for consumer contracts it was limited to a reasonably related state and the consumer may not be deprived of the protection granted under the mandatory provisions of the state of consumer's principal residence or if the transaction is a sale of goods, of the state in which the consumer both makes the contract and takes delivery of those goods. So, Section 1–301(e) UCC introduced a double limited choice-of-law for consumer contracts, where the chosen law must have a reasonable relationship to the transaction and additionally will apply only insofar as it provides a higher level of protection than the mandatory provisions of consumer's state of residence, or the place where the contract of sale is concluded and the good were to be delivered. However, already until 2005 none of twenty-one state legislatures who implemented the revised UCC, also implemented the newly reformed Section 1–301 UCC and the reform of the choice-of-law for contracts failed (Graves, 2005). One of the main reasons for the failure was again the concern of the industry groups that the approach in favor of consumer-oriented protections would add significant costs to consumer transactions (Healy, 2009, p. 555). The newly revised version of Section 1-301 in essence went back to the old text and now requires a reasonable relation of the chosen law to the transaction for all the contracts and does not contain specific provisions for consumers. Therefore, the consumer protection from choice-of-law clauses in favor of the domicile of the businessperson is again limited to the public policy exception, which causes uncertainty and lower level of protection.

In e-commerce, as already explained for choice-of-forum clauses, the focus usually shifts to the evidence of offer and acceptance of standard terms in online transactions.

Uniform Convention on Cross-Border e-Commerce Consumer Protection

Consumers would feel more safety and trust when using transnational e-commerce if they knew that the same universal standards would apply regardless of the website or app they are using (Rahman et al., 2022; Sun & Li, 2022). This would be beneficial also for the sellers as the e-commerce market would grow even more than it already has. One way to achieve that would be by agreeing on a multinational treaty. Multilateral treaties (conventions) are usually adopted within the United Nations General Assembly or at international codification conferences where the right to attend is given to all States in the world, irrespective of their eventual membership in various international governmental organizations. Unification of various principles, standards and provisions are orderly done through progressive development and so-called legislation of general international law through codification conventions – for instance, international conventions could be used in order to unify domestic law rules (Degan, 2011, pp. 151, 19), particularly in areas such e-commerce as the new common legal area with similar challenges for all States.

However, creation of unified international standards that would be applied by all States in the world in the same or similar manner, represent a process that is not easy to achieve. Unification of domestic laws by one international treaty takes time. The characteristics of treaties with this aim are as follows: they ought to be preferably concluded in international codification conferences for an indefinite period of time, having majority of States in international community be bound by them on a treaty or customary basis, and, lastly, to consist of abstract, general and principle provisions where the commentaries and other rules are needed for them to be fairly and adequately implemented in state practice. Until today, there are no international conventions providing for transnational consumer protection in e-commerce, although the need for such an instrument has been recognized. The OECD has issues guidelines as "soft law" for consumer protection in e-commerce which include a rather vague recommendation asking for "fairness to consumers" on jurisdiction and applicable law. The UNCITRAL Model Law on Electronic Commerce of 1996, that has also influenced the law in Saudi Arabia and 78 other jurisdictions, does not specifically address consumer protection. The conventions which aim at unifying rules on jurisdiction, applicable law and recognition and enforcement, foremost Hague conventions, all apply only to commercial contracts and explicitly exclude consumers from their scope of application, because states were reluctant to extend their application to consumers (Hague Choice of Court Agreement Convention of 2005). The Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters of 2019 covers only a small aspect of it.

However, even if there would be a multinational convention it would only be as successful as the number of State Parties to the convention. Only exceptionally the rules of one convention could have created rules of general customary international law that would bind non-party States on that basis. This is, usually, from the practical perspective, quite difficult to achieve with various obstacles involved. However, when this process is possible, the restrictions and prohibitions of one convention would constitute *jus cogens* (Degan, 2011, 783). Currently, we are very far away from any uniformity on consumer protection in transnational e-commerce.

Conclusion and Recommendations

The EU legislator provides for a high level of triple consumer protection in transnational e-commerce: 1. The jurisdiction; 2. applicable law; and 3. Recognition and enforcement of foreign judgments. All legislators seeking to impose a very high level of protection, may take an example in the EU approach to jurisdiction, applicable law and recognition and enforcement on e-commerce consumer contracts. Contracts concluded by consumers online will fall under the jurisdiction and the applicable law of the consumer's domicile if the seller used the website to direct its business activity towards

the consumers' state. Another jurisdiction imposed on the consumers by making them agree to the standard terms of sale on the website will be invalid and a choice of foreign law will only apply if the foreign law provides for a higher level of consumer protection. Foreign judgments issued in violation of these rules will not be recognized in the EU. On the other hand, the U.S. provides for a lower level of protection as it did not adopt any special standards for consumers with regards to the choice of foreign jurisdiction or choice of foreign law. While the jurisdiction may quite similarly to EU law also in the U.S. be determined by the seller's targeting the consumer's state, it is widely accepted that the seller may impose the jurisdiction and law of its own state on a consumer, simply by making them agree to general terms of sale on its website. This may save costs to the company, as it can calculate its transaction costs to be the same for a business with a consumer from any foreign state, but it certainly makes it very expensive for consumers when they have to file their (usually) small claims in another state. The only safeguard for consumers is to rely on public policy, which again brings insecurity to both businesspersons and consumers as it may be interpreted very differently from court to court. Insofar the U.S. model is more cost-friendly for businesses but does not provide a high level of protection for consumers.

National legislators who consider adopting consumer protection for cross-border e-commerce contracts, such as the KSA, would be well advised to do so in one set of legislation including jurisdiction, applicable law and recognition of foreign judgments. The integration of the EU model in such legislation would clearly offer a high level of protection to consumers. Opting for the U.S. model would save some transaction costs for the businesses but would also have the negative effect of maintaining higher litigation costs on consumers who are the weaker party. A multilateral convention offering the triple protection to consumers, would create a safe online environment and more trust for consumers and thereby benefit both consumers and traders, but such solution in currently not initiated.

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