

## **Memo on Contracts Hypo for the Week of Labor Day 2016**

### **The Question:**

Zco is a developer of multiplayer games, which are mostly played online. However, Zco's most recent game uses a combination of real world and virtual experiences to enhance the game and to combat arguments that playing online games is anti-social and unhealthy. One component of the game is that players are invited to look for specific items in the real world and upload pictures of those items to Zco's database. Some of the specified items are relatively easy to find, but others are much harder. A game player who succeeds in finding the hard to find items and uploading pictures of them gains large numbers of points in the game.

Website W operates a market in items for the game. Game players can buy items through the website or they can buy digital pictures of items or lease items or even ask W to search for specific items. Game players must become members of the W marketplace in order to buy items and benefit from W's services, and they become members by clicking a tab on the website which states: "I apply for W membership." The website shows prominently testimonials from happy customers. Right at the bottom of the front page of the website in the corner of the page the word "Terms" appears. This is meant to be a hyperlink to the W marketplace terms and conditions, which include a requirement to pay a set monthly membership fee, a requirement that members give 3 months' notice of their intention to terminate their membership, and an arbitration agreement with a class action waiver. For the first 6 months of 2016 the hyperlink to the terms and conditions was not functional. Once people become members of the W marketplace they sign in to use the market. On the sign in page and also on the pages where the members order items there are links to the Terms which have at all times been functional.

Victor became a member of W in January 2016. He is an avid player of the game and sometimes live streams his sessions in the game (he has a number of fans who enjoy watching these sessions). He has bought and leased a number of items through the W marketplace. Two days ago Victor placed an order with W for a very expensive item, a very rare book for which he expects to pay \$1000 plus W's search costs. At the time of placing the order Victor paid a deposit of \$300. Yesterday (August 31) he discovered that he could obtain the same item at a very much lower cost from another marketplace. He thinks he has been a fool and has been overpaying W for months. He immediately canceled the order and terminated his W membership. He has not paid the September membership fee, although W informed him that he was required under the W terms and conditions to pay the membership fee for three months because of the requirement to give three months' notice of termination of his membership. W also says that when they find the book Victor will have to pay for it.

### **Comments:**

#### **1. Is Victor bound to pay three months of membership fees because of the 3 month's notice requirement in W's Terms?**

Resolving this question involves considering the issues raised by Meyer v Kalanick. The facts state that "For the first 6 months of 2016 the hyperlink to the terms and conditions was not functional." Because Victor signed up to W in January 2016 he did so at a time when the hyperlink was not functional. So Uber v Kalanick does suggest a basis for finding that the Terms

were not binding on Victor. In that case Judge Rakoff cited *Specht v Netscape*: “[r]easonably conspicuous notice of the existence of contract terms and unambiguous manifestation of assent to those terms by consumers are essential if electronic bargaining is to have integrity and credibility.” In *Meyer v Kalanick* the customer was presented with a Register button which could be clicked without the customer seeing the terms and conditions. In the facts of the hypothetical the customer clicks a link which states “I apply for W membership.” This is different from clicking a button that states “I agree to the W Terms.” The Terms were impossible to access from that page at the time Victor signed up. So, based on *Meyer v Kalanick*, Victor seems to have a good argument that he should not be regarded as being bound by the Terms when he became a W member. However, he interacted with W over a period of time and was presented with functional links to the Terms when he signed in to the site and when he placed orders through the site. Perhaps this makes a difference. In addition the term at issue in *Meyer v Kalanick* was an arbitration clause with a class action waiver which the judge saw as implicating the constitutional right to a jury trial and said was on the bottom of the seventh page of “nine pages of highly legalistic language that no ordinary consumer could be expected to understand.” Terms as to payment are of a different character. Victor has been paying the monthly membership fee and now wishes to avoid paying the three months of fees in lieu of three months’ notice of termination. Perhaps there is not the same sort of reason to refuse to see this as part of the terms and conditions of Victor’s contract with W. Note that at the beginning of September you had not learned about the liquidated damages/penalty issue, but the facts do raise this issue. To the extent there might be a mitigation of damages issue, W is probably a lost volume seller with respect to its memberships.

## **2. Is Victor required to pay for the book when W finds it?**

Subject to the issues discussed in the answer to question 1 (what are the terms of Victor’s relationship with W) Victor seems to have made a contract with W to buy a book for \$1000 (the fact that he has paid a deposit of \$300 supports the idea that we should see this as a binding contract. A book is a moveable good under UCC §2-105(1), therefore W will seek to recover damages from Victor based on UCC Art. 2. The first question to ask is how much, if any, of the deposit Victor may recover. Under UCC §2-718(2) W is entitled to retain 20% of the total performance for which the buyer is obligated under the contract (here \$200) or \$500, whichever is smaller. But the \$100 which Victor would expect to recover under this provision is subject to offset to the extent that W can claim damages under another provision of Art. 2. The question here involves issues similar to those raised in *Neri*, although W is not a lost volume seller - at least with respect to the book, as there is no hint of an unlimited supply (it is possible that W might be a lost volume seller with respect to some of the other items it sells). So W would have a right to damages based on the difference between the contract price of the book and the market price at time and place for tender (UCC §2-708(1)) or resale price (UCC §2-706) plus incidental damages less any expenses saved in consequence of Victor’s breach. The question does not give enough information to calculate what such damages might be. Even though W is not a lost volume seller it might be that a lost profits remedy under §2-708(2) would be appropriate in this case.

