

Is Binding Arbitration Just A Click Away: The Use of Click-Wrap Arbitration Clauses in E-Commerce¹

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At this stage in development of the information economy, the use of shrinkwrap³ and click-wrap⁴ agreements is extensive, if not near-universal. Many of these agreements contain clauses calling for arbitration of disputes. Several courts have considered whether such clauses are enforceable as part of shrink-wrap agreements. To date, however, only one court has specifically addressed the enforceability of such a clause in a click-wrap agreement.

This Article summarizes the state of the law on the enforceability of these types of arbitration clauses, and suggests the direction that courts are likely to follow when considering arbitration clauses in click-wrap agreements. Part I addresses some of the reasons for the choice of arbitration as a method to resolve e-commerce disputes. Part II reviews some of the important decisions concerning shrink-wrap agreements. Part III provides a prediction regarding treatment of arbitration clauses in click-wrap agreements. Part IV offers practical suggestions for improving the likelihood that an arbitration clause will be considered enforceable in a click-wrap agreement.

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³ The "shrink-wrap" agreement gets its name from the fact that many retail software packages are covered in plastic or cellophane "shrink-wrap." Many vendors provide that the agreements that pertain to such software become effective as soon as the customer tears the wrapping from the package.

⁴ The term "click-wrap" is derivative of the term "shrink-wrap," and is a natural result of the fact that the computer industry began using one, and then the other, form of agreement in rapid succession. Unlike shrink-wrap agreements, where a customer learns the terms of the agreement after buying the product, the terms of a click-wrap agreement are typically provided to a user on-line, during a visit to a web-site. The user manifests assent to the agreement on-line, often by clicking on an icon indicating "I Accept" the terms of the agreement.

L The Advantages of Arbitration

The traditionally-recognized advantages of arbitration over litigation in court are several. Arbitration may be faster, and less costly, than litigation. The general absence of motion practice and intensive discovery means that arbitration is less lawyer-dominated, and more business-like. Indeed, the tone of most arbitration proceedings is much less adversarial than in-court litigations. The ability to choose an arbitrator may mean that the decision-maker has more specialized skill and experience, appropriate to the individual case. Arbitration is generally private, and the results of arbitration proceedings are generally kept confidential. For many businesses, these advantages may be enough to justify the choice of arbitration over litigation.⁵

In the new economy in particular, however, arbitration may be an especially attractive method of dispute resolution. The new economy, for one thing, knows no borders. Absent an agreed choice of forum, a business could find itself subject to suit in virtually any part of the world. Preemptive suits by a company in a preferred jurisdiction (e.g., suits for declaratory relief), may not prevent litigation in another hostile, foreign jurisdiction. Indeed, where different jurisdictions are preferred by different parties, there is a real prospect of a “race to the courthouse” and wasteful, expensive “dueling” litigations.

An express choice of forum provision may not solve a company’s global litigation problems. Such provisions may be invalidated, for any number of reasons. Foreign jurisdictions, moreover, may not choose to recognize the validity of a forum selection clause. Even where a forum selection clause is binding, the effectiveness of any judgment acquired in a particular country’s courts is a matter of comity and discretion when it comes to enforcement of the judgment in the courts of another country.⁶

Ironically, the only near-universal international agreement on dispute resolution concerns private arbitration awards, not judgments rendered after litigation in court.⁷ The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, to which more than 100 nations (including the United States) are parties, essentially provides that each nation will recognize and enforce

⁵ See Thomas E. Carbonneau, *The Law And Practice Of Arbitration 2* (2d Ed. 2000) (summarizing “Arbitration’s Appeal to the Commercial Community”).

⁶ See generally Llewellyn Joseph Gibbons, *Rusticum Judicium? Private “Courts” Enforcing Private Law and Public Rights: Regulating Virtual Arbitration In Cyberspace*, 24 Ohio N.U. L. Rev. 769, 786-87 (1998) (summarizing difficulties in enforcement of judgments, and noting that “[t]he need for easily enforceable judgments is particularly important in cyberspace where national borders are merely speed bumps on the path of commerce”).

⁷ The apparent irony is perhaps lessened by the practical reality that, in international commerce, because parties may not be able to agree on a choice of forum, and of applicable law, the only real solution may be to choose an a-national forum (arbitration), which may apply more-or-less universal rules of international trade. See Steven C. Bennett, *Book Review*, 10:1 Am. R. Int’l Arb. 159 (1999) (reviewing Thomas E. Carbonneau, *Lex Mercatoria And Arbitration* (1998)).

agreements to arbitrate, and will refer parties to arbitration (rather than litigation) when a valid arbitration agreement is present. Further, the Convention provides that awards from arbitrators will be recognized as binding and enforceable in the courts of all signatory nations. Challenges to arbitral awards, under the Convention, are limited to only a few specific conditions. The Convention has created a more or less uniform, world-wide system for dispute resolution, through arbitration.⁸ Use of that system may be an important part of a company's plan for global business development.

For many businesses in the new economy, another key to success may be mass marketing. With mass marketing comes the risk of mass litigation over problems that arise from the conduct of the business (alleged breaches of contract, misrepresentations, product liability, etc.). The aggregation of mass claims into a single litigation, in the form of a class action, presents a unique danger for a business. A single jury verdict, in a single case, can result in an award of compensatory (and sometimes punitive) damages that may adversely affect the financial viability of a company. The mere possibility of such awards, moreover, may cause a business to settle claims for more than they are worth, and may drive insurance premiums ever higher.

The choice of arbitration, rather than proceedings in court, effectively forecloses the possibility of class actions.⁹ A court, moreover, may not compel parties to agree to "consolidated" arbitration of claims, where the arbitration agreement and the rules of the pertinent arbitration-sponsoring organization do not so provide.¹⁰ As a result, one of the significant benefits of use of arbitration clauses is

⁸ See W. Michael Reisman, W. Laurence Craig, William Park & Jan Paulson, *International Commercial Arbitration* 148 (1997) ("[T]he selection of arbitration as a solution to the jurisdictional problem provides a restraint on efforts at judicial hijacking and may be viewed as a particularly attractive solution to the jurisdictional problem in international transactions.")

⁹ See, e.g., *Thompson v. Illinois Title Loans, Inc.*, No. 99 C 3952, 2000 WL 45493 at *4 (N.D. 111. Jan. 11, 2000) ("In agreeing to arbitrate, plaintiffs did not sign away their ability to pursue substantive rights . . . but only their ability to use the procedural device of the class action in a judicial forum."); *Zawikowski v. Beneficial Nat'l Bank*, No. 98 C 2178, 1999 WL 35304 at *2 (N.D. Ill. Jan. 11, 1999) ("Nothing prevents the Plaintiffs from contracting away their right to a class action."); *Hunt v. Up North Plastics, Inc.*, 980 F. Supp. 1046, 1051 (D. Minn. 1997) (granting motion to dismiss class action claims, and referring claims to arbitration); see generally Samuel Estreicher and Kenneth J. Turnbull, *Class Actions And Arbitration*, N.Y.L.J. May 4, 2000, at 3, col. 1 ("Pursuant to the mandate of Sec. 4 [of the FAA], courts have refused to allow plaintiffs to avoid agreements to arbitrate by asserting a public policy argument favoring class claims.") (summarizing authorities).

¹⁰ See, e.g., *Champ v. Siegel Trading Co.*, 55 F.3d 269, 275 (7th Cir. 1995) (section 4 of the FAA forbids federal judges from ordering class arbitration where the parties arbitration agreement is silent on the matter"); *American Centennial Ins. Co. v. National Cas. Co.*, 951 F.2d 107, 108 (6th Cir. 1991) ("a district court is without power to consolidate arbitration proceedings, over the objection of a party to the arbitration agreement, when the agreement is silent regarding consolidation"); *Herrington v. Union Planters Bank, NA.*, No. CIV. A. 2:98CV 231GR, 2000 WL 424232 at *7 (S.D. Miss. Jan. 21, 2000) (because arbitration provision did not "expressly provide" for consolidated arbitration, plaintiffs were not entitled to arbitrate as a class); see generally Estreicher and Turnbull, *supra* note 9 (Most courts have held that compelling classwide arbitration in the absence of express authorization by the parties

that the risk that a single class action jury verdict could result in a ruinous judgment may be avoided.¹¹

Finally, although this is not a factor unique to businesses in the new economy, many courts, in many jurisdictions in the United States, are now requiring that parties consider alternative dispute resolution (“ADR”) (settlement conferences, early neutral evaluation, mediation, non-binding arbitration, and the like). In effect, even if a litigant prefers to proceed in court, some judges are forcing parties to engage in ADR processes.¹² One of the most effective ways for a potential litigant to avoid the potential cost and burden of an unwanted court-ordered ADR procedure is for the litigants to choose their own ADR procedure, which (for some or all of the reasons outlined above), might be binding arbitration. At a minimum, good practice for businesses in the new economy should include consideration of whether selection of arbitration as a method for dispute resolution will best serve the interests of the business.

II. Shrink-Wrap Arbitration Clauses

As a general matter, it is fairly well established that shrink-wrap agreements can be enforced. In *ProCD, Inc. v. Zeidenberg*,¹³ for example, the Seventh Circuit Court of Appeals held that a shrink-wrap license included with software was binding on a buyer. The *ProCD* court noted that transactions in which the exchange of money precedes the communication of detailed terms are “common.”¹⁴ The court further observed that, with off-the-shelf software, a shrink-wrap license is perhaps the only practical method of dealing.¹⁵ The court concluded that “[n]otice on the outside, terms on the inside, and a right to return the software for a refund if the terms are unacceptable . . . may be a means of doing business valuable to buyers and sellers alike.”¹⁶ The court noted, moreover, that the risk that an unfair term would be imposed upon an unsuspecting consumer was not present, since the consumer had a

would violate the FAA’s clear directive to require arbitration ‘in accordance with the terms of the agreement’”) (summarizing authorities).

¹¹ See J.T. Westermier, *How Arbitration Clauses Can Help Avoid Class Action Damages*, 5 Computer L. Strat. 1 (1997) (arbitration clauses are a means of managing risk, “especially the risks of class actions”).

¹² See generally Steven C. Bennett, *Court-Ordered ADR: Promises And Pitfalls*, 7:12 Met. Corp. Counsel 11 (1999). The Y2K Act, recently passed by Congress in response to the threat of massive lawsuits resulting from the Year 2000 “bug,” for example, contains specific encouragement for the use of ADR, rather than litigation, to resolve disputes. See Steven C. Bennett, *The Y2K Act: Notification Tricks And Traps*, 2:6 Mealey’s Year 2000 Report 24 (1999).

¹³ 86 F.3d 1447 (7th Cir. 1996).

¹⁴ *Id.* at 1451 (citing examples of insurance binders, airline tickets, and tickets to concerts).

¹⁵ *Id.* at 1450 (“Vendors can put the entire terms of a contract on the outside of a box only by using microscopic type, removing other information that buyers might find more useful (such as what the software does, and on which computers it works), or both.”).

¹⁶ *Id.* (citing authorities for proposition that standard forms can facilitate mass production and distribution).

right to return the software package for a refund.¹⁷ The court also distinguished some earlier cases, which suggested a contrary result.¹⁸

Federal¹⁹ and state courts²⁰ have generally followed the reasoning in the *ProCD* decision. Indeed, research to date has not uncovered any case in which a court has held that a shrink-wrap agreement was invalid merely because the means by which the consumer manifested his assent to the agreement was to open a package and keep a product after being given the opportunity to review the terms of the agreement.²¹

In *Hill v. Gateway 2000, Inc.*,²² the Seventh Circuit extended the *ProCD* holding to arbitration clauses in shrink-wrap agreements. The court reaffirmed its view that “[practical considerations]” justified the use of agreements with “[p]ayment preceding the revelation of full terms[.]”²³ If the buyers did not wish to form a contract in that manner, they could either have chosen not to buy a software box with additional terms inside, or could have returned the product after examining the terms.²⁴ The court noted, moreover, that under the terms of the Federal Arbitration Act (“FAA”) a contract of arbitration must be enforced in the same

¹⁷ *Id.* at 1452 (“Ours is not a case in which a consumer opens a package to find an insert saying ‘you owe us an extra \$10,000’ and the seller files suit to collect. Any buyer finding such a demand can prevent formation of the contract by returning the package, as can any consumer who concludes that the terms of the license make the software worth less than the purchase price.”).

¹⁸ *See id.* at 1452 (distinguishing *Step-Saver Data Systems, Inc. v. IVyse Technology*, 939 F.2d 91 (3rd Cir. 1991); *Vault v. Quaid Software Ltd.*, 847 F.2d 255 (5th Cir. 1988); *Arizona Retail Systems, Inc. v. Software Link, Inc.*, 831 F. Supp. 759 (D. Ariz. 1993)).

¹⁹ *See Peerless Wall & Window Coverings, Inc. v. Synchronies, Inc.*, 85 F. Supp.2d 519, 526 (W.D. Penn. 2000) (“The recent weight of authority is that ‘shrink-wrap’ licenses which the customer impliedly assents to by, for example, opening the envelope enclosing the software distribution media, are generally valid and enforceable.”) (citing *ProCD* and other authorities).

²⁰ *See, e.g., Rinaldi v. Iomega Corp.*, No. 98C-09-064-RRC, 1999 WL 1442014 at *5 (Del. Super. Ct. Sept. 3, 1999) (“The commercial practicalities of modern retail purchasing make it eminently reasonable for a seller of a product such as a Zip drive to place a disclaimer of the implied warranty of merchantability within the plastic packaging. The buyer can read the disclaimer after payment for the Zip drive and then later have the opportunity to reject the contract terms . . . if the buyer so chooses.), *KIA. Mortenson Co. v. Timberline Software Corp.*, 970 P.2d 803, 809 (Wash. Ct. App. 1999) (approving “accept-or-return” shrink-wrap license agreement, and noting that “[w]e find the Seventh Circuit’s reasoning persuasive”), *affid.*, No.67796-4, 2000 WL 550845 (Wash. May 4, 2000).

²¹ Section 19 of the Restatement (Second) of Contracts generally provides that manifestation of assent to a contract may be made “wholly or partially by written or spoken words or by other action or by failure to act.” Section 2-204 of the Uniform Commercial Code similarly provides that a contract for the sale of goods may be made “in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of a contract.”

²² 105 F.3d 1147 (7th Cir. 1997), *cert. denied*, 522 U.S. 808 (1997).

²³ *Id.* at 1149 (“Cashiers cannot be expected to read legal documents to customers before ringing up sales. If the staff at the other end of the phone for direct-sales operations such as GaUwav s had to read the four-page statement of terms before taking the buyer’s credit card number, the droning voice would anesthetize rather than enlighten many potential buyers. Others would hang up in a rage over the waste of their time.”).

²⁴ *Id.* at 1150.

manner as other contracts.²⁵ Thus, even though the buyers claimed that they had not noticed the arbitration clause in the shrink-wrap agreement, the clause was enforceable.²⁶

The *Hill* approach has been adopted wholesale in at least one other case.²⁷ Another court, although agreeing with the rationale in *Hill*, found that the particular shrink-wrap arbitration clause was invalid, on other grounds.²⁸ The trend, if one can call this handful of cases a “trend,” is certainly in the direction of holding that shrink-wrap arbitration clauses are valid.

III. Click-Wrap Arbitration Clauses

As is generally true for matters of contract law, the enforceability of click-wrap agreements will depend upon the law of the individual state.²⁹ At least one federal circuit court, applying Ohio law, has suggested that a click-wrap agreement can be enforceable. In *CompuServe, Inc. v. Patterson*,³⁰ the Sixth Circuit held that a subscriber to a network service was subject to personal jurisdiction in the service provider’s home state. The court implicitly held that the click-wrap contract between provider and subscriber was valid.³¹

Similarly, in *Hotmail Corp. v. VanS Money Pie Inc.*,³¹ a federal district court in California granted a preliminary injunction, based in part on the likely finding that the defendants had violated the terms of their click-wrap subscription

²⁵ *Id.* at 1148 (“[A]n agreement to arbitrate must be enforced ‘save upon such grounds as exist at law or in equity for the revocation of any contract.’”) (quoting FAA, 9 U.S.C. §2).

²⁶ *Id.* at 1148 (“A contract need not be read to be effective; people who accept take the risk that the unread terms may in retrospect prove unwelcome.”).

²⁷ See *Westendorf v. Gateway 2000, Inc.*, No. 16913, 2000 WL 307369 at *3 (Del. Ch. Mar. 16, 2000) (“same rationale” applies as in *Hill*).

²⁸ See *Brower v. Gateway 2000, Inc.*, 676 N.Y.S.2d 569, 571 (1st Dep’t 1998) (citing *Hill* with approval).

²⁹ Uncertainty regarding the enforceability of click-wrap agreements would, of course, be eliminated if uniform legislation were adopted on this subject. In 1994, the National Conference of Commissioners on Uniform Laws and the American Law Institute began work on a new Uniform Commercial Code Article, 2B (“Software Contracts and Licenses of Information”), which would have provided specific legislative authority for click-wrap agreements. During the drafting process, however, Article 2B came under criticism from several groups. In April 1999, ALI withdrew its support for the model legislation. In July 1999, the National Conference proposed a new uniform law, specific to electronic transactions, entitled “Uniform Computer Information Transactions Act,” or “UCITA.” The terms of UCITA are nearly identical to the proposed terms of UCC Article 2B. Individual states must now decide whether to adopt UCITA. For the text of UCITA, see www.law.upenn.edu/library/ulc/ucita/citam99.

³⁰ 89 F.3d 1257 (6th Cir. 1996).

³¹ See *id.* at 1260-61 (at time of on-line registration, subscriber typed “AGREE” at various points in filling out registration); *id.* at 1264 (“There is no question that [the subscriber] himself took actions that created a connection with Ohio in the instant case. He subscribed to CompuServe, and then he entered into the Shareware Registration Agreement . . .”); *id.* at 1266 (“[Subscriber] entered into a contract which expressly stated that it would be governed by and construed in light of Ohio law.”).

³² No. C-98 PVT ENE, C 98-20064 JW, 1998 WL 388389 (N.D. Cal. Apr. 16, 1998).

agreement with an internet service provider.³³ The conclusion that the defendants had likely violated the agreement rested on the implicit assumption that the click-wrap agreement was valid. Given this authority, and given that at least to date it appears that no court has yet invalidated a click-wrap agreement merely because of tire form by which the agreement was completed, one may fairly predict that such agreements will likely be accepted by other courts.³⁴

Further, at least two courts have held that forum selection clauses in click-wrap agreements are valid. In *Caspi v. Microsoft Network, L.L.C.*,³⁵ subscribers to the MSN Network were required to click "I Agree" at appropriate points in approving a membership agreement. No charges would be incurred unless the subscriber agreed to the proffered terms.³⁶ The New Jersey appellate court concluded that there was "no significant distinction" between this form of forum selection clause, and the forms presented in other standard agreements.³⁷ Similarly, in *Groff v. America Online, Inc.*,³⁸ AOL subscribers were required to click "I Agree" to terms of service, if they wished to become subscribers. The Rhode Island trial court held that the forum selection clause in the click-wrap agreement was "prima facie valid,"³⁹ and that the plaintiffs assertion that he had not knowingly agreed to tire clause was insufficient, given that he had clicked "I agree" twice in approving the

service agreement.

Research to date, however, has uncovered only two cases in which a click-wrap arbitration clause was reviewed. In *Lieschke v. RealNetworks, Inc.*,⁴¹ a federal district court in Illinois considered a case in which free RealNetworks software packages were available on the company's web-site. The software permitted users to see and hear audio and video products on the Internet, and to dow nload, record and play music. Before users could install the software packages, they were required to accept the terms of a license agreement. The agreement provided, among other tilings, that any unresolved disputes arising under the license agreement would be

³³ *Id.* at *2 ("To become a Hotmail subscriber, one must agree to abide by a Service Agreement]] '); *id.* at*6 ("defendants obtained a number of Hotmail mailboxes and access to Hotmail s services; . . . in so doing defendants agreed to abide by Hotmail's Terms of Service').

³⁴ See Susan D. Rector, *Clickwrap Agreements: Are They Enforceable*, 6 Intel. Prop. Strat. 1 (1999) ("The law, whether interpreted by the courts or adopted by state legislatures, is likely to uphold the enforceability of shrinkwrap and clickwrap agreements as forms of mass-market licenses.).

35 732 A.2d 528 (N.J. App. Div. 1999).

³⁶ *Id.* at 530.

³⁷ *Id.* at 532.

³⁸ No. PC 97-0331, 1998 WL 307001 (R.I. Super. Ct. May 27, 1998).

³⁹ *Id.* at *3 (quoting *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10 (1972) (forum selection clauses are prima facie valid unless shown to be "unreasonable" by resisting party)).

⁴⁰ *Id.* at *5. A very brief decision in a New York trial court reached the same conclusion^ See *DiLorenzo v. America Online, Inc.*, No. 605867 (N.Y. Sup. Ct. Jan. 22, 1999), summarized in N.Y.L.J. Feb. 8, 1999, at 25 col. 1 (forum selection clause in on-line service contract upheld).

⁴¹ No. 99 C 7274, 99 C 7380, 2000 WL 198424 (N.D. Ill. Feb. 11, 2000).

submitted to arbitration in the State of Washington.⁴² Applying a “presumption in favor of arbitrability,” the court rejected the plaintiff’s contention that the use of the term “disputes arising under” the agreement was not broad enough to encompass their claims, or that the claims were not appropriate for arbitration.⁴³ Further, the court rejected the contention that the cost of individually arbitrating the claims of all the potential claimants was not consistent with the purpose of the FAA.⁴⁴ Thus, the court granted the defendant’s motion to stay class action proceedings, pending arbitration.

The *Lieschke* opinion did not cite any other case in which a click-wrap arbitration clause had been held enforceable. The opinion, moreover, was quite brief, and did not specifically address any questions about the validity of a click-wrap form of agreement to arbitration. The *Lieschke* decision, moreover, represents only one lower court opinion, from one jurisdiction. Nevertheless, it is quite likely that the *Lieschke* opinion, which suggests that a click-wrap arbitration clause can be valid, will be followed in other cases.

First, the “presumption in favor of arbitrability,” referenced in *Lieschke*, is very well-established. The central purpose of the FAA was to ensure that “private agreements to arbitrate are enforced according to their terms.”⁴⁵ Under the FAA, “any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration[.]”⁴⁶ Thus, as in *Lieschke*, general allegations that issues surrounding a click-wrap agreement are somehow inappropriate for arbitration should not suffice.

Second, there are many decisions recognizing the validity of arbitration and forum selection clauses in standard forms.⁴⁷ The *Caspi* and *Groff* decisions (summarized above) suggest that click-wrap forum selection clauses are valid. Arbitration is a specialized type of forum selection clause.⁴⁸ Thus, it is likely that courts confronted with the issue would uphold click-wrap arbitration agreements.

⁴² *Id.* at *1. The opinion did not state whether the user was affirmatively required to type “I accept” in response to the presentation of a license agreement, or whether the user could merely click through an “accept” button in response.

⁴³ *Id.* at *2. The opinion did not state the precise nature of the claims asserted by the plaintiffs. The complaint grew out of the plaintiffs’ discovery that RealNetworks software might be used to monitor the usage habits of individuals who had down-loaded the software.

⁴⁴ *Id.* at *3 (FAA requires courts to compel arbitration “even where the result would be the possibly inefficient maintenance of separate proceedings”) (quotation omitted).

⁴⁵ *Mastrobouno v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 53-54 (1995).

⁴⁶ *Id.* at 62 n.8 (quoting *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983)); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985) (“any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability”); see *Shearson/American Express v. McMahon*, 482 U.S. 220, 225-26 (1987) (party challenging validity of arbitration clause bears burden to establish why the clause should not be enforced).

⁴⁷ See, e.g., *Vimar Seguros y Reaseguros, SA v. MV Sky Reefer*, 515 U.S. 528, 541 (1995) (bills of lading); *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 594 (1991) (ticket attachments).

⁴⁸ See *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974) (arbitration is “in effect, a specialized kind of forum-selection clause that posits not only the situs of the suit but also the procedure to be used in resolving the dispute”).

Finally, by comparison to shrink-wrap clauses, a click-wrap arbitration agreement may seem even more fair and appropriate. With a click-wrap agreement, the user typically is allowed to review the agreement before buying anything. Because of the nearly-instantaneous availability of competitive options on the Internet, if the user finds the proffered terms unacceptable, it may be quite easy to back out of the transaction, without facing any cost or burden in returning merchandise, or losing a service after it has become a matter of dependence. Further, the typical click-wrap agreement requires the user to take some affirmative step (typing "I Agree," or clicking on an "I Agree" icon) after reviewing the agreement. These actions are arguably more powerful indicia of actual consent than mere failure to reject an agreement (after breaking the shrink-wrap on a box, and discovering the terms of an agreement inside).

The recent opinion in *Specht v. Netscape Communications Corp.*,⁴⁹ issued after this Article was first published, however, illustrates that a click-wrap arbitration agreement may be unenforceable where insufficient evidence of assent to the agreement exists. In *Specht*, users downloaded free software from a Netscape website. The software was purportedly subject to a free license agreement. Before downloading, however, users were not required to click on any icon indicating assent to the agreement, or even to review the agreement. Terming this a "browse-wrap," rather than a true "click-wrap" agreement,⁵⁰ the court held that the plaintiffs were not bound by the arbitration provision in the license agreement,⁵¹ because they had not performed "an affirmative action unambiguously expressing assent" to the agreement, or shown an understanding that a contract was being formed.⁵²

Any web-site developer who wishes to implement a binding click-wrap arbitration agreement should pay careful attention to the problems illustrated in the *Specht* decision. The practical suggestions that follow aim, in part, to avoid some of those problems.

⁴⁹ Nos. 00 Civ. 4871, 00 Civ. 6219, 00 Civ. 6249, 2001 WL 755396 (S.D.N.Y. July 5, 2001).

⁵⁰ The court noted that "[t]he few courts that have had occasion to consider click-wrap contracts have held them to be valid and enforceable." *Specht*, 2001 WL 755396 at *6. By contrast, the court noted, at least one other court had suggested that a browse-wrap agreement might not be enforceable. *See id.* at *7 (citing *Pollstar v. Gigmania Ltd.*, No. C1V-F-00-5671, 2001 WL 33266437 (E.D. Cal. Oct. 17, 2000)).

⁵¹ Plaintiffs argued that, because the arbitration agreement was not binding, they should be permitted to pursue a class action for alleged electronic surveillance of user activities on the internet. As a result of the invalidation of the arbitration agreement, the court permitted the plaintiffs to make a class certification motion. *See Specht*, 2001 WL 755396 at *10.

⁵² *Specht*, 2001 WL 755396 at *7.

IV. Some Practical Suggestions

Construction of a click-wrap arbitration clause must be considered in the context of the overall contractual needs of a site owner.⁵³ The first issue in that regard is what purpose the click-wrap agreement is meant to serve. Many on-line commerce sites may pursue a number of different contractual arrangements. These could include:

(1) A site-use agreement, under which the user of the site agrees to terms concerning access to the web-site. Such an agreement may, for example, set forth limitations on representations, warranties and liabilities of the site owner. The agreement may also specify what the user can and cannot do with information contained in the site.

(2) A contract for sale of goods offered through the site. Such an agreement may contain many of the terms and conditions (concerning payment, shipping arrangements, risk of loss, rejection and return, etc.) that a traditional sales contract would contain. The agreement may also contain some special provisions (e.g., how to handle out-of-stock items) that may be unique to ordering goods online.

(3) A contract for services offered through the site. Services may be ancillary to the sale of goods (e.g., maintenance, training, software support), or may be stand-alone services. Again, a mix of traditional and unique provisions will likely be required.

(4) A privacy policy for information gathered from users of the site.

The site owner may choose, for many reasons, to keep these various forms of agreement separate. For example, because a privacy policy concerns a subject that is essentially different from all the other commercial issues related to operation of a web-site, many site owners choose to list their privacy policies as separate documents.⁵⁴ Separation of documents on different issues, moreover, may make it easier to update and revise the documents.

The important point here is that if the choice is made to offer separate agreements, then careful attention must be paid to what issues an individual click-wrap agreement covers, and what it does not cover. In particular, an arbitration clause in one click-wrap agreement (on terms of sale, for example) may not automatically apply to disputes that arise under another agreement (on site-use, for example), even though the agreements are offered on the same site.⁵⁵

⁵³ Several web-sites offer advice, and sample forms, of click-wrap agreements. See, e.g., www.abanet.org/buslavv/catalog/pubindex;www.loundy.com;www.balough.com.

⁵⁴ See generally Steven C. Bennett and Suzanne L. Telsey, *Do You Need A Data Privacy Policy?*, 2:18 *Marketing News*, May 8, 2000 at 42.

⁵⁵ Under some circumstances, incorporation of an arbitration clause by reference in one contract to another may suffice, even where the contracts are otherwise separate. See generally Fredrick E. Sherman and Steven C. Bennett, *Binding Nonsignatories To Arbitrate: The Limits Of The Federal Arbitration Act*, 102 *Commercial L. Advisor* 10 (1996).

A second general point, aimed at increasing the likely enforceability of a click-wrap agreement, concerns the notice given to users and buyers about the terms of the agreement, and the gathering of clear evidence of assent to those terms. Commentators suggest that, among the “best practice” principles in this regard are the following:⁵⁶

(1) Make sure that the click-wrap agreement is the only form of agreement offered. Avoid separate correspondence or other communications that might be construed as establishing contractual obligations that are separate from the click-wrap agreement.

(2) Make sure that promotional materials and preliminary offers clearly state that the final click-wrap agreement on the site is the exclusive source for terms of any actual transaction.

(3) Conspicuously display the click-wrap terms to prospective users. At a minimum, at the first opportunity in a site visit, provide notice that use of the site is subject to the terms and conditions of an agreement. Offer an immediate link to the terms of the agreement. The notice should include conspicuous warnings about the conduct that will be deemed acceptance of the agreement, e.g., “use of this site constitutes acceptance of the terms of this agreement.”

(4) The terms of the agreement should be clear and concise, so that the average person can understand them. If the agreement contains terms that are uncommon in the industry, or that are likely to surprise the user or buyer, such terms should be highlighted and explained, if necessary.

(5) Require users to manifest their assent to the terms of the click-wrap agreement with some affirmative action. Methods may include: (a) Typing the words “I Agree,” or “I Consent” in response to the agreement; (b) Clicking on icons with the same words; or (c) Typing the user’s name in a space provided, such as completion of the sentence: “I _____, hereby agree to the terms of this contract.” To provide additional evidence that the user has had an opportunity to review the terms of the agreement before providing assent, place the “I Agree” prompt, icon or fill-in-the-blank at the end of the terms (requiring the user to scroll through the agreement before manifesting assent).

(6) Provide for the alternative of rejection. The user should have the option to terminate the process of registration at any point before final acceptance of the click-wrap agreement. If the user rejects the terms of the agreement, the process of entry into the site should be terminated. Users should not be permitted to purchase products or gain further access to the web-site unless consent has been manifested.

(7) If the site operation involves delivery of a product, it may be worthwhile to provide a restated copy of the click-wrap sales agreement along with

⁵⁶ This list is not intended as a recipe for contract terms in every click-wrap agreement, nor is a fully valid and enforceable agreement may exist without any number of these terms. These suggestions may, however, be used as a checklist for a particular click-wrap agreement, to be adapted as necessary, and the law in a given jurisdiction, dictate.

the shipment of the product. As with a shrink-wrap agreement, the buyer may be reminded that use of the product constitutes further acceptance of the terms. The buyer may be offered the option of a refund on return of the goods, if he or she decides to reject the terms. The buyer should be provided with an easy method of returning the purchase.

(8) Provide reminders, where appropriate, throughout the site that use of the site is subject to the terms of the click-wrap agreement. Many web-sites include hyperlinks to the terms of the agreement at various points, along with a running notice that use of the site is subject to the click-wrap terms.

(9) Maintain accurate records of the user's acceptance of terms. Standard terms may change from time to time. Records of acceptance should indicate the specific terms that were accepted by a particular user, and the date of such acceptance.

The foregoing suggestions should generally enhance the prospects for enforcement of a click-wrap agreement. More specifically, what can be done to enhance the prospects for enforcement of an arbitration clause in a click-wrap agreement?

The FAA generally makes arbitration clauses as valid and enforceable as any other contractual commitment. Under the FAA, a state cannot adopt a rule invalidating arbitration agreements on grounds that would not be applicable to other forms of contract.⁵⁷ In theory, then, if the click-wrap agreement as a whole is enforceable, so should the arbitration clause be.

Indeed, arbitration agreements are generally considered "separable" from and independent of the main contracts in which they appear. This separability doctrine means that general allegations of contractual invalidity made against the main contract do not necessarily affect the validity of the arbitration clause. A challenge to the arbitration clause requires a showing that the arbitration clause itself is invalid.⁵⁸ Thus, for example, a general claim that a defendant has acted fraudulently in selling a defective computer system would not suffice to establish that the arbitration provision in the contract for sale of the system was itself fraudulently induced.⁵⁹

Nevertheless, states may regulate contracts generally, and may provide methods for "protecting consumers against unfair pressure to agree to a contract with

⁵⁷ See *Doctor's Assoc., Inc. v. Casarotto*, 517 U.S. 681, 686-87 (1996) ("Courts may not, however, invalidate arbitration agreements under state laws applicable only to arbitration provisions."); *Allied-Bruce Terminix Co. v. Dobson*, 513 U.S. 265, 281 (1995) (FAA makes unlawful any state policy that would "place arbitration clauses on an unequal 'footing'").

⁵⁸ See *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403-04 (1967) ("[I]f the claim is fraud in the inducement of the arbitration clause itself—an issue which goes to the 'making' of the agreement to arbitrate—the federal court may proceed to adjudicate it. But the statutory language does not permit the federal court to consider claims of fraud in the inducement of the contract generally.").

⁵⁹ See *Hayes Children Leasing Co. v. NCR Corp.*, 43 Cai. Rptr.2d 650, 656-57 (Cai. App. 1995).

an unwanted arbitration provision.⁶⁰ Perhaps the most likely basis for a challenge to a click-wrap arbitration clause would involve claims that the clause is the product of adhesion, and unconscionable. Standard form, take-it-or-leave-it contracts of adhesion are not *per se* unconscionable. Indeed, they may have a number of social benefits.⁶¹ Yet, where the procedure by which a clause is adopted is suspect, or where the terms of the clause are egregiously unfair, claims of unconscionability may arise.

As a general matter, the “best practice” principles for click-wrap agreements (outlined above) should go a long way toward ensuring that a click-wrap arbitration clause is enforceable. Even though no more should be required, some further procedural safeguards might be considered to make it even more clear that a web-site user has reviewed, understood, and agreed to the terms of a click-wrap arbitration clause. Such procedures could include:

(1) The arbitration clause may be highlighted in some form (bold, all capitals, or with an “Important” heading for the clause).⁶²

(2) The meaning of the clause may be explained to the user. For most laypersons, perhaps the most significant point to be explained is that arbitration means that the user is forgoing rights to sue in court, and to seek a judgment from a judge or jury.

(3) The user’s assent to the arbitration clause may be separately solicited. Users could be required to type “I Agree,” or click on an icon, in a location that makes clear that they have read the arbitration clause, and specifically agreed to it.

(4) Special care should be taken if the arbitration agreement is to be introduced as an amendment to an existing agreement. Some courts have held that continued use of a service after notice of a change in terms of the service (to provide for arbitration) may justify a finding that the arbitration clause is binding.⁶³ Where the original terms of service do not suggest that amendments might include *post facto* adoption of arbitration, however, the clause might not be binding. Before

⁶⁰ *Allied-Bruce*, 513 U.S. at 281.

⁶¹ *Stiles v. Home Cable Concepts, Inc.*, 994 F. Supp. 1410, 1418 (M.D. Ala. 1998) (unconscionable contract is one which “no man in his sense and not under delusion would make on the one hand, and as no honest and fair man would accept on the other”) (quotation omitted).

⁶² At least one court has held that no such highlighting of terms is required. *See Dorsey v. H.C.P. Sales, Inc.*, 46 F. Supp.2d 804, 808 n.5 (N.D. Ill. 1999) (arbitration clause in same font and type-size as remainder of contract was sufficiently conspicuous).

⁶³ *See, e.g., Herrington*, 2000 WL 424232 at *5 (plaintiffs accepted arbitration clause in revised deposit agreement by “continuing to utilize their accounts”); *Stiles*, 994 F. Supp. at 1416 (arbitration clause in amendment to account agreement was binding absent account-holder’s because he maintained the account after the effective date of arbitration clause); *see also Hunt*, . Supp. at 1050 (purchaser’s receipt of series of confirmatory documents containing arbitration clause, a failure to object, deemed to constitute consent to arbitration) (citing cases).

⁶⁴ *See Badie v. Bank of America*, 79 Cal. Rptr.2d 273, 287 (Cal. App. 1998) (“Here is nothing about the original terms that would have alerted a customer to the possibility that the Bank might one day

attempting retroactive implementation of an arbitration scheme, careful review of the original agreement should be conducted (especially any specific provisions regarding the amendment process). The notice to users of the change in terms should also be as clear as possible.

Aside from procedural safeguards, the substance of the arbitration clause should be considered. Although it is impossible to predict what a particular judge might consider to be “fair,” there again are some “best practices” to consider:

(1) A New York appellate court has held that the filing fees charged by the International Chamber of Commerce were, in light of the value of the equipment at stake, so high as to make the arbitration clause in a shrink-wrap agreement unconscionable.⁶⁵ Some courts, however, have discounted the problem of fees.⁶⁶ The choice of an arbitration-sponsoring organization thus may be important. The American Arbitration Association, for example, offers a procedure under which fees may be waived. Some courts have specifically held that arbitration clauses with the possibility of fee waiver are not unconscionable.⁶⁷

(2) It may be desirable to include, as part of the arbitration provision, a choice of the location where arbitration proceedings will take place. Typically, arbitration at the site owner’s principal place of business, or at another location reasonably connected to the transaction, should be considered appropriate.⁶⁸ Choice of arbitration in a location at great distance from the user, especially one with no connection to the site owner or the transaction, might be subject to challenge.

(3) A general charge of bias against an industry-sponsored arbitration organization is not likely to succeed.⁶⁹ Where the web-site owner has too close a relationship with the potential arbitrators, however, specific claims of bias may give a court pause.⁷⁰ Selection of a reputable, independent arbitration-sponsoring organization will almost certainly avoid this potential problem.⁷¹

in the future invoke the change of terms provision to add a clause that would allow it to impose ADR on the customer”).

⁶⁵ See *Brower*, 676 N.Y.S.2d at 571, 574 (ICC required \$4,000 deposit, of which \$2,000 was non-refundable; average damage claim would not exceed \$1,000).

⁶⁶ See, e.g., *Thompson*, 2000 WL 45493 at *5 (plaintiffs cannot escape contractual duty to arbitrate by complaining about cost); *Dorsey*, 46 F. Supp. 2d at 807-08 (“Whatever may be said pro and con about the cost and efficiency of arbitration ... is for Congress and the contracting parties to consider.”).

⁶⁷ See, e.g., *Dobbins v. Hawk’s Enter.*, 198 F.3d 715 (8th Cir. 1999); *Herrington*, 2000 WL 424232 at *8; *Thompson*, 2000 WL 45493 at *5.

⁶⁸ *Central Park Electronics, Inc. v. Hyundai Electronics Am.*, No. 95 CIV 4201, 1996 WL 537660 at *4 (S.D.N.Y. Sept. 20, 1996) (agreement governed by California law properly subject to arbitration in California, despite claims of forum non conveniens); *Brower*, 676 N.Y.S.2d at 574 (“we do not find that the possible inconvenience of the chosen site (Chicago) alone rises to the level of unconscionability”).

⁶⁹ See *Nagel v. ADM Investor Serv., Inc.*, 65 F. Supp.2d 740 (N.D. 111. 1999) (Easterbrook, C.J., sitting by designation) (general claims of bias insufficient; challenging party must show “evident partiality” on part of chosen arbitrator).

⁷⁰ See *Floss v. Ryan’s Family Steak House, Inc.*, No. 99-5099, 2000 WL 508656 at *6, 8 (6th Cir. May 1, 2000) (court expresses “serious reservations” about arbitration service based on “uncertain

(4) Under at least some state laws, contracts need not be reciprocal to be enforceable. Thus, it is possible that an arbitration clause could provide for arbitration of claims by the site user, but not of claims by the site owner against the user.⁷² Because a “one-sided” clause risks claims of unfairness, however, such a clause should not be adopted without careful consideration of the risk that the clause could be invalidated.

Where several potential procedural or substantive fairness problems appear in the same agreement, an arbitration clause may be particularly at risk. In *Powertel, Inc. v. Bexley*,⁷³ for example, the court held that an arbitration provision in a cellular telephone service agreement was unconscionable because (1) the arbitration provision was not in the original service agreement,⁷⁴ (2) the amended arbitration provision was contained in a pamphlet, which arrived along with the customer’s bill for service, (3) the amended arbitration clause was not conspicuous, and was indistinguishable from other advertisements and inserts consumers typically receive in their monthly bills,⁷⁵ and (4) although consumers could reject the amendment, by canceling service, such cancellation would result in loss of investment in purchased telephone equipment, and loss of the user’s assigned telephone number.⁶ These, and other problems, when piled one on top of the other, resulted in a finding of unconscionability.

The background, purpose, terms and practical implications of any arbitration clause should always be considered as a whole, rather than looking at any single part of an arbitration clause in isolation. The goal, where possible, is to make the arbitration procedure practical, balanced and fair under the circumstances. The more “tried and true” the terms, the more likely they are to pass muster.

Conclusion

As the new e-economy has grown, it has become clear that shrink-wrap and click-wrap agreements are here to stay. The trend, for courts and practitioners, and perhaps soon for legislatures, is toward extending and enhancing the usefulness of such agreements. One important step in that direction may be the increased recognition of the desirability and validity of arbitration clauses in such agreements. It is hoped that this Article may assist, in some small way, in facilitating this new, vital form of commerce.

relationship” with employers; arbitration agreement held unenforceable because rules to be applied by arbitration service were too “indefinite”).

⁷¹ Typically, such organizations have rules regarding disclosure of potential conflicts involving arbitrators selected from their rosters. The availability of this disclosure and challenge procedure protects against claims of bias.

⁷² See *Thompson*, 2000 WL 45493 at *3.

⁷³ 743 So.2d 570 (Fla. Dist. a. App. 1999).

⁷⁴ *Id.* at 572.

⁷⁵ *M.* at 573.

⁷⁶ *Id.* at 574.