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ENFORCEMENT OF CONTRACTUAL TERMS IN CLICKWRAP AGREEMENTS: COURTS REFUSING TO ENFORCE FORUM SELECTION AND BINDING ARBITRATION CLAUSES

Rachel Cormier Anderson¹

Abstract

In three recent cases, courts have invalidated portions of consumer clickwrap agreements containing either forum selection or binding arbitration clauses. In the first case, the Washington State Court of Appeals invalidated a forum selection clause found in a clickwrap agreement because the clause was contrary to state consumer protection policies. In the second case, the California Court of Appeals rejected a clickwrap agreement calling for binding arbitration in a specified forum when the plaintiff sought to bring a class action claim. Finally, the U.S. Court of Appeals for the Fifth Circuit recently declared a binding arbitration clause because it was unconscionable. Although these cases address a relatively new form of contracting known as "clickwrap agreements," the essential issue in each case was not new. These cases suggest that courts are willing to accept the validity of clickwrap agreements in general, but have invalidated specific clauses based on traditional contract doctrines such as unconscionability and public policy. This Article examines these recent cases in light of existing precedent concerning the enforceability of clickwrap agreements.

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INTRODUCTION

<1>Three recently decided cases appear to question the enforceability of consumer clickwrap agreements — electronic boilerplate contracts requiring electronic consent from the consumer — containing forum selection and binding arbitration clauses. In late 2005, the Washington Court of Appeals decided *Dix v. ICT Group Inc.*,² and invalidated a forum selection clause found in America Online, Inc.'s user agreement. The California Court of Appeals, in *Aral v. EarthLink Inc.*,³ invalidated a binding arbitration clause that contained a forum selection clause and a waiver of class action rights. Finally, in 2004, the U.S. Court of Appeals for the Fifth Circuit invalidated one telecommunications company's binding arbitration clause in *Iberia Credit Bureau v. Cingular Wireless LLC*.⁴ These cases involve contracts that were formed through clickwrap agreements, whereby consumers entered into the contracts online and assented to standard terms and conditions by clicking a button or icon marked "I agree".

<2>Although several courts refused to enforce terms contained in clickwrap agreements, these cases do not call into question the enforceability of clickwrap agreements. Rather, they illustrate the fact that courts will look at the actual terms of such agreements and may invalidate specific terms based on traditional contract concepts and their application to a new generation of contracts.

CLICKWRAP AGREEMENTS IN CONTEXT

<3>The term "clickwrap" refers to electronic contracts requiring users to express their consent by clicking on an "I accept" button, or an equivalent, before completing their purchase, accessing the material they want to download or installing software they have purchased.⁵ Clickwrap agreements are standardized contracts whereby consumers assent to a boilerplate set of terms and conditions. Even if consumers take the time to read the agreement, they must assent to the terms if they want to consummate a particular transaction online, such as downloading software, or purchasing goods or services.⁶ As with traditional contracts of adhesion, clickwrap contracts provide an efficient way for those selling downloadable products or services to provide online contracts to their customers.

<4>The first case in which a court upheld the validity of

clickwrap agreements was *Hotmail Corp. v. Van\$ Money Pie Inc.*⁷ This case arose when Hotmail brought suit in federal court against customers who were sending spam messages and falsifying e-mails to make it appear that the spam originated from a Hotmail account. Hotmail alleged in part that these actions were a violation of the Terms of Service agreement that each customer must assent to when opening an email account. In granting the injunction in favor of Hotmail against the consumers, the court found that Hotmail was likely to succeed on its breach of contract claims. Although the court's treatment of the merits was limited, this case was important because it held that a Terms of Service contract in clickwrap format could be enforceable in court.⁸

<5>Another court was more explicit in its reasoning relating to the validity of clickwrap agreements. In *i.LAN Systems, Inc. v. Netscout Service Legal Corp.*⁹, a federal district court upheld a clickwrap contract. In this case, i.LAN provided a network monitoring service to customers and purchased software from Netscout. Netscout and i.LAN signed an agreement allowing i.LAN to resell Netscout's software to customers. However, i.LAN wanted to rent the software to customers: a practice Netscout claimed was not allowed under the clickwrap license contained in the software itself. In reaching its decision, the court focused on whether clickwrap licenses as a rule were enforceable.¹⁰ The court held that they were and that by clicking on "I agree," i.LAN had overtly consented to the terms.¹¹ This explicit assent was key to the court's determination that the clickwrap agreement was not invalidated by the earlier purchase order agreement between the parties.¹²

<6>In addition to acceptance among courts, state and federal legislation gives statutory support to these new contract forms. This movement is evidenced in the federal Electronic Signatures in Global and National Commerce Act ("E-Sign") as well as in the Uniform Electronic Transaction Act ("UETA"). These acts were designed to make electronic commerce more efficient and give legal effect to electronic records and signatures.¹³ Thus, the general enforceability of clickwrap agreements is becoming more commonplace.¹⁴

HISTORY OF ARBITRATION AND FORUM SELECTION CLAUSES

<7>It is important to note that forum selection and mandatory arbitration clauses are the two types of clauses embedded in clickwrap agreements that have recently been found unenforceable by courts. These substantive additions to

consumer contracts have become quite common in recent years.¹⁵ They each have histories in contract law distinct from each other and from that of clickwrap agreements.

<8>Congress passed the Federal Arbitration Act (“FAA”) in 1925.¹⁶ The FAA mandated that courts enforce arbitration clauses the same way that they would enforce any other contract clause.¹⁷ The FAA creates a general presumption and public policy in favor of arbitration, and courts since the passage of the FAA have upheld such clauses.¹⁸ Despite the willingness to enforce arbitration clauses, some courts may be more skeptical of such clauses when they appear in consumer contracts of adhesion, where one party may be viewed as lacking significant bargaining power.¹⁹

<9>The second type of clause at issue in recent cases is a forum selection clause. These clauses mandate that any dispute that arises out of the agreement will be adjudicated in a particular jurisdiction — usually, a business’s home state.²⁰ A business may benefit from more favorable laws in its chosen jurisdiction or may simply seek to avoid defending suits all over the country.²¹ Such clauses are facially valid and will be enforced unless such enforcement is unreasonable.²² The United States Supreme Court in *M/S Bremen v. Zapata Off-Shore Co.*²³ held that the parties — a German tug company and an American oil company — had bargained for their terms and entered freely into a contract.²⁴ Despite the fact that the towing company’s alleged act of negligence toward the oil company’s drilling rig took place off of the coast of Florida, the clause mandating that the suit take place in London was thereby upheld.²⁵ In the context of consumer contracts, the U.S. Supreme Court has also found that forum selection clauses are enforceable in contracts of adhesion. For example in *Carnival Cruise Lines v. Shute*, the Supreme Court upheld the enforcement of a forum selection clause that was printed on the back of a customer’s cruise ticket — which she did not receive until after the trip was purchased.²⁶

HISTORICAL EXAMPLES OF FORUM SELECTION AND ARBITRATION CLAUSES IN CLICKWRAP AGREEMENTS

<10>Although courts tend to examine arbitration clauses appearing in contracts of adhesion more carefully, arbitration clauses in agreements that are legally analogous to clickwrap agreements tend to be upheld.²⁷ In *Hill v. Gateway 2000, Inc.*, the U.S. Court of Appeals for the Seventh Circuit faced an

agreement that contained an arbitration clause.²⁸ This clause was in a contract between a buyer and a computer company. It stated the terms of the contract became binding if the buyer did not return the computer within 30 days. The court refused to invalidate the contract because the customer had the opportunity to opt out of the terms by returning the computer and had failed to do so.²⁹ It also upheld the arbitration clause despite the fact that it was not specifically highlighted in the contract text. Significantly, the court held that the arbitration clause must be treated to the same scrutiny as any other clause.³⁰ Though this case is often cited in support of shrink wrap³¹ contracts in general, similar contracts have been invalidated by state courts.³²

<11>As with arbitration clauses, forum selection clauses in clickwrap agreements have been challenged and are usually upheld by courts. *Forrest v. Verizon Communications, Inc.* upheld a forum selection clause despite the plaintiff's inconvenience in accessing it.³³ The plaintiff argued that he would have had to scroll through a thirteen-page document, only a small section of which was visible at one time, to read the forum selection clause, i.e. he did not have adequate notice of the clause.³⁴ The court rejected this claim, finding that under traditional contract law the plaintiff was bound by the terms of the contract since he had an opportunity to read it before consent.³⁵

EMERGING ISSUES IN CLICKWRAP AGREEMENTS CONTAINING FORUM SELECTION CLAUSES AND ARBITRATION CLAUSES

<12>Recent cases that have invalidated certain arbitration and forum selection clauses in clickwrap agreements do not represent a conceptual departure from cases that found such clauses enforceable. However, by highlighting situations where courts have found that companies contracting practices have gone too far, they help identify the limits to when arbitration or forum selection clauses may be enforceable in the clickwrap context.

<13>*Dix v. ICT Group Inc.* highlights the impact that consumer protection laws can have on the enforceability of forum selection clauses. The plaintiff in this case brought suit in Washington State claiming that AOL billed her for additional accounts that she did not create.³⁶ AOL moved to dismiss based on a forum selection clause in the Terms of Service Agreement that all customers assented to through a clickwrap format. The contract specified that all disputes would be litigated in Virginia.³⁷

<14> The Washington Court of Appeals found that the Washington Consumer Protection Act³⁸ provided significant protection to Washington consumers that would not be available under Virginia laws. Most notably, Virginia law would not allow consumers to file class action suits, while Washington law specifically provides for such relief. The individual damage claims of consumers were small; without class action status, the consumers would be unlikely to travel to Virginia to litigate their claims.³⁹ The court held that enforcing the forum selection clause against these customers would result in a violation of the Consumer Protection Act's aim of protecting the state's citizens from unfair and deceptive practices.⁴⁰

<15> The Washington court looked to several other jurisdictions and found that states are split on the issue of whether AOL's forum selection clauses are invalid pursuant to state consumer protection acts. In *America Online, Inc. v. Superior Court*, a California case decided in 2001, the court held that the forum selection clause was unenforceable as "a contractual waiver of the consumer protections under" the California consumer protection laws.⁴¹ California's Consumers Legal Remedies Act (CLRA) specifically contains a provision voiding any purported waiver of rights as contrary to public policy.⁴² The court found that enforcement of a forum selection and choice of law clause would amount to a waiver of rights under the CLRA and was therefore void. Beyond this reasoning, the court focused on the fact that the litigation would take place in Virginia, where the laws provided significantly less consumer protection and would not provide plaintiffs with class action status. The rights lacking from the Virginia statute were so significant to the court that it found that enforcement of the forum selection clause would violate public policy. By contrast, in *Koch v. America Online, Inc.*, a Maryland court held that the unavailability of class action lawsuits in Virginia was not fatal to AOL's forum selection clause.⁴³ The Maryland court found that while the plaintiff would have a class action option in Maryland that was not available in Virginia, that did not violate Maryland's public policy of allowing residents access to the judicial system.⁴⁴ Unlike the California plaintiffs, Koch did not appeal to a specific consumer protection clause, and Maryland's laws were not as protective as California's. The split among jurisdictions illustrates that the enforceability of forum selection clauses is largely dependent on an individual state's consumer protection laws and may be impacted significantly by the emphasis placed by an individual state on class action rights.⁴⁵

<16> While the lack of consumer bargaining power alone does not

tend to invalidate arbitration clauses, *Iberia Credit Bureau v. Cingular Wireless LLC* indicates that one-sided mandates in such clauses may be found unconscionable. This suit involved three cellular-telephone providers (Cingular Wireless, Sprint Spectrum, and Centennial Beauregard) who were sued by customers over allegedly deceptive trade practices and breaches in customer service agreements.⁴⁶ All three companies sought to dismiss the suits against them and compel arbitration. Each company required customers to sign an agreement at the time they opened their accounts or when they added extra phones to the plan. Alternatively, they received information stating that by activating their phones, customers would be demonstrating implicit assent to those terms and conditions. These terms contained arbitration clauses. Though these contracts do not exactly fit the definition of a clickwrap agreement. They operate in a similar fashion when the customers are "bound" by contract terms when they activate their cell phone service.

<17> In *Iberia* the court looked at each defendant and its respective contract separately. Pursuant *Hill v. Gateway* and the Federal Arbitration Act, the court did not regard the arbitration agreements any differently than other contract terms.⁴⁷ Cingular and Sprint's arbitration terms withstood this scrutiny despite being contained in an adhesion contract.

<18> Centennial's arbitration clause, on the other hand, was held unenforceable. Centennial's contract language appeared to only bind the customer to arbitration while allowing the provider to seek litigation in disputes. The court focused on one critical sentence in the clause: "You agree that instead of suing in court, you will arbitrate any and all disputes and claims arising out of this Agreement of the Service."⁴⁸ The court found that this sentence made the clause one-sided despite the fact that the rest of the paragraph refers to "you" and "we." The court found this one-sidedness in the contract's terms to be unconscionable under Louisiana law and therefore refused to enforce the arbitration requirements against the customers suing Centennial.⁴⁹

<19> The issues in *Aral v. Earthlink Inc.* relate to both *Dix* and *Iberia*. In *Aral*, the court invalidated terms of a clickwrap agreement based on general notions of unconscionability as well as specific state consumer protection laws. The plaintiff in this case brought suit against Earthlink Inc. claiming that Earthlink had improperly billed him for high-speed Internet service from the date of the order rather than the date when he actually received equipment to use the service.⁵⁰ The plaintiff brought suit in California and sought class action status for similarly situated customers.

<20> Earthlink moved to dismiss the action based on two provisions contained in the clickwrap agreement. It claimed that the plaintiff assented to these terms when setting up his DSL service. The first provision expressly stated that there could be no class action arbitration for any disputes. The next provision called for arbitration for any dispute and mandated that the arbitration would be held in Atlanta, Georgia.⁵¹

<21> The California Court of Appeals upheld the arbitration mandate, but found that the waiver of class action rights was invalid under the FAA and California's consumer protection laws. The court reasoned that the FAA specifically allows state laws to invalidate arbitration clauses if the clauses violate general state contracting principals. Furthermore the court found that the contract's requirements of arbitration and exclusion of class action rights violated the state's laws, which specifically names waivers of class action rights as unconscionable. The court was clear to point out that this analysis would apply whether this was in an arbitration agreement or in any other contract.⁵² The court also noted the procedural unconscionability of the contract arising from the fact that consumers were sent the product and the contract with no opportunity to opt out. Though the court notes that this is "quintessential procedural unconscionability"⁵³ it is not clear if this would be enough to invalidate the clause without the substantive unconscionability. Lastly, the court found that the forum selection clause was unreasonable and unenforceable because it was not appropriate to require customers with small monetary claims to travel across the country to settle their claims.⁵⁴

<22> Both *Aral* and *Dix* emphasize the important role of class action rights provided in consumer protection laws. In both cases the existence of a strong state protection of class action rights contributed significantly to the court's invalidation of the individual contracts, class action rights in particular were significant to both courts. When drafting clickwrap contracts, businesses need to be aware of the possible interaction with other states' consumer protection and class action statutes. If drafters select a state that has relatively less protective consumer laws or class action rights, they run the risk of having forum selection or arbitration clauses invalidated in other states.

CONCLUSION

<23> Clickwrap agreements are a relatively recent development in contract law, but they have become a legally enforceable staple in modern business. Businesses drafting clickwrap

agreements can be secure in forming these new contracts, but they cannot forget the importance of traditional contract concepts as they apply to all agreements. Recent cases invalidating clickwrap agreements did not attack the contracts on their form, but rather on their substance. The fact that the courts invalidated these contracts based on traditional contractual concepts re-emphasizes that clickwrap agreements have become an accepted form of contracting that do not require special analysis. In each of these cases the specific terms were invalidated because the courts found them to be unenforceable on traditional contract grounds. The individual clauses invalidated were either contrary to public policy because they went against state consumer protection clauses (in Washington and California) or because the contract was unconscionable. It is unclear whether these courts were reacting to the substance of the contractual terms solely or whether the form in which the companies secured consumer assent also factored in to their decision.

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Footnotes

1. Rachel Cormier Anderson, University of Washington School of Law, Class of 2007. Thank you to my husband for his support. Special thanks to Mr. Jonathan Franklin and Ms. Kaustuv Das for their insight and assistance and to the Shidler Staff for their editorial skill.
2. *Dix v. ICT Group, Inc.*, 125 Wash. App. 929 (Wash. App. Div. 3, 2005), *petition for cert. granted*, *Dix v. ICT Group, Inc.*, 155 Wash.2d 1024 (Wash. Nov, 30, 2005) (No. 77101-4).
3. *Aral v. EarthLink Inc.*, 134 Cal. App. 4th 544, 36 Cal. Rptr. 3d 229 (Cal. App. 2 Dist., 2005).
4. *Iberia Credit Bureau v. Cingular Wireless, LLC*, 379 F.3d 159 (5th Cir. 2004).
5. Jane K. Winn & Benjamin Wright, *The Law of Electronic Commerce Glossary GL-4* (4th ed. 2001 & Supp. 2007). Defines clickwrap terms as, "Standard form contract terms presented to a visitor to an internet commerce site to which the visitor manifests assent by 'clicking' with a mouse on a graphical user interface."
6. Contracts of adhesion have been defined in several ways, including: "(1) a printed form of many terms;

(2) drafted by one party; (3) who routinely enters such transactions; (4) offered on a take-it-or-leave-it basis; (5) signed by the adherent; (6) who is not a repeat player; (7) whose principal contract obligation is that payment of money of money to the contract drafter." Todd D. Rakoff, *Contracts of Adhesion; An Essay in Reconstruction*, 96 Harv. L. Rev. 1174, 1177 (1983).

7. Hotmail Corp. v. Van\$ Money Pie Inc., No. C-98 JW PVT ENE, C 98-20064 JW, 1998 WL 388389 (N.D. Cal., 1998).
8. *Id.* at 6.
9. i.LAN Systems, Inc. v. NetScout Service Level Corp., 183 F. Supp. 2d 328 (D. Mass. 2002).
10. *Id.* at 338.
11. *Id.* at 336- 338.
12. *Id.* at 339.
13. UETA was adopted in 1999 by the National Conference of Commissioners on Uniform State Laws to try and deal with changes in business caused by the Internet. As of 2005, the act has been adopted in 43 states and Washington, D.C. E-Sign was a federal law attempting to create a national equivalent of UETA. The federal government hoped to ensure uniformity among the states and provide some of the same effects in states that had not adopted UTEA. For a full discussion of E-Sign and UETA and their application, *see*, Dennis Campbell, Center for the International Legal Studies, E-Commerce and the Law of Digital Signatures (Oceana Publications, Inc, 2005).
14. For A further discussion of the history of clickwrap agreements as well as the particular elements that courts look for in enforcing them please *see* Winn & Wright, *The Law of Electronic Commerce* § 6.02[A][4] (4th ed. 2001 & Supp. 2006). Further cases involving the enforceability of clickwrap agreements include the following: Scarcella v. America Online, Inc., 2005 N.Y. Slip Op. 25553, 2005 WL 3542868 (N.Y. App. Term 2005) (upholding ruling finding that AOL's forum selection clause located in electronic membership agreement was unenforceable); Hubbert v. Dell Corp., 835 N.E.2d 113 (Ill. App. Ct. 2005) (reversing trial court's

decision refusing to enforce Dell's binding arbitration clause located within its terms and conditions of sale located both by hyperlink on the website and within the computer packaging); Mortgage Plus, Inc. v. DocMagic Inc., No. 03-2582-GTV-DJW, 2004 WL 2331918 (D. Kan. 2004) (finding that forum selection clause in a software license agreement was unenforceable, even though the licensee's use of the software was necessary to obtain services within a separate contract with licensor); DeJohn v. The .TV Corp. Int'l., 245 F.Supp.2d 913 (N.D. Ill. 2003) (upholding clickwrap contract disavowing any warranty despite confirmation email that could have created implied warranty).

15. Shirley A. Wiegand, *Arbitration Clauses: The Good, The Bad, the Ugly*, 47 Okla. L. Rev. 619, 619 (1994).
16. 9 USCS §§ 1-16 (2006).
17. 9 USCS § 2 (2006).
18. Joseph T. McLaughlin, *Arbitrability: Current Trends in the United States*, 59 Alb. L. Rev. 905, 907 (1996).
19. Anne, Brafford, *Arbitration Clauses in Consumer Contracts of Adhesion: Fair Play or Trap for the Weak and Unwary?*, 21 J. Corp. L. 331, 348 (1996).
20. David H. Taylor, *The Forum Selection Clause: A Tale of Two Concepts*, 66 TMLR 785 (1993); Michael E. Solimine, *Forum-Selection Clauses and the Privatization of Procedure*, 25 Cornell Int'l L.J. 51, 51-52 (1992).
21. Kaustuv M. Das, Ph.D., *Forum-Selection Clauses in Consumer Clickwrap and Browsewrap Agreements and the 'Reasonably Communicated' Test*, 77 Wash. L. Rev. 481, 487 (2002).
22. Lateef Mtima, *Protecting and Licensing Software: Copyright and Common Law Contract Considerations*, ALI-ABA 5th Course of Study Intellectual Property Licensing Today, SM049 ALI-ABA 81, 95-96 (2006).
23. *M/S Bremen v. Zapata Off-Shore Company*, 407 US 1, (1972).
24. *Id.* at 12-14.
25. *Id.* at 16.

26. Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585 (1991).
27. Clickwrap agreements are often analogized to shrink-wrap agreements, a term applied to license terms that the customer cannot read until they have purchased the product and opened the 'shrink-wrap' packaging. The term clickwrap was drawn from shrink-wrap agreements. For a further discussion of the history of shrink-wrap and clickwrap agreements, see Winn & Wright, *supra* note 14, at §6.02[A][3]-[A][4].
28. Hill v. Gateway 2000, Inc., 105 F.3d 1147 (1997).
29. *Id.* at 1150.
30. *Id.* at 1148.
31. For a definition and discussion of shrinkwrap licenses, see Nathan Smith, *The Shrinkwrap Snafu: Untangling the "Extra Element" in Breach of Contract Claims Based on Shrinkwrap License*, 2003 BYU L. Rev. 1373 (2003).
32. See Klocek v. Gateway, Inc., et al., 104 F. Supp.3d 1332 (D. Kan., 2000). In *Klocek*, the court invalidated the same contract upheld under *Hill* on the grounds that under Missouri or Kansas law (it was unclear where the final act completing the contract took place) contract terms received with a product do not become part of the parties' agreement.
33. Forrest v. Verizon Communications, Inc., 805 A.2d 1007 (2002).
34. *Id.* at 1010.
35. *Id.*
36. *Dix*, 125 Wash. App at 932.
37. *Id.*
38. RCW 19.86 *et al.* (2006).
39. *Dix*, 125 Wash.App. at 937.
40. *Id.*
41. *Id.* at 935-936.
42. America Online, Inc. v. Superior Court, 90 Cal. App.4th 1, 4 (Cal. App. 2001).

43. *Dix*, 125 Wash.App at 936.
44. *Koch v. America Online, Inc.* 139 F.Supp.2d 690, 695 (D.Md. 2000).
45. Drafters of clickwrap agreements should also be aware of The Class Action Fairness Act (CAFA), 28 U.S.C. §§1332(d), 1453, 1711-1715, (2005). This new law is aimed at protecting plaintiffs in class action lawsuits and at generally reforming the system. Most notably, the law now provides for expanded federal district court jurisdiction over class action lawsuits. It is unclear how this new law might impact contract clauses that limit class action rights, but there is a possibility that it could provide another avenue for customers to challenge such clauses. However, the law may also provide a way for businesses being sued in state court to remove the suit to federal court if their own forum selection clause is not enforceable. For further discussion see John C. Coffee, Jr., *New World of Class Actions: CAFA, Exxon, and Open Issues*, N.Y.L.J., July 21, 2005, at 5.
46. *Iberia*, 379 F.3d at 162.
47. *Id.* at 166.
48. *Id.* at 168.
49. *Id.* at 169-170.
50. *Aral*, 134 Cal. App. 4th at 548.
51. *Id.*
52. *Id.* at 553-555.
53. *Id.* at 557.
54. *Id.* at 561.