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DIGITAL AGE STANDARD FORM CONTRACTS UNDER AUSTRALIAN LAW: “WRAP” AGREEMENTS, EXCLUSIVE JURISDICTION, AND BINDING ARBITRATION CLAUSES

JOHN ADAMS[†]

Abstract: Despite the widespread use of end user agreements (“EULAs”) within international e-commerce, their enforceability under Australian law has yet to be adjudicated. Legislative reform and judicial clarification of contract standards may be required for Australian courts to validate the methods of standard form contracting used in the digital age. While existing Anglo-Australian rules regarding contract formation may be adequate to enforce EULAs, the doctrine of privity presents an unnecessary and outdated barrier to the enforcement. Accordingly, the Australian legislature should abolish the doctrine of privity. In addition, Australian courts must clarify what type of notice is required for onerous contractual terms.

Australian law also must develop standards for enforcing especially controversial clauses found within EULAs. Although exclusive jurisdiction and binding arbitration clauses have become increasingly important in international e-commerce, their enforceability against consumers in mass-market contracts presents troubling public policy questions. U.S. and E.U. law offer potential models for development of Australian law governing business-to-business and business-to-consumer adhesion contracts. Implementation of a stronger enforcement policy with respect to jurisdiction clauses in the business-to-business context, while maintaining a consumer protection approach for jurisdiction clauses in the consumer context, would be the optimal course of action for Australia. For binding arbitration clauses, Australia law should promote fair arbitration procedures for consumers by empowering judges to amend unfair aspects of consumer arbitration clauses.

I. INTRODUCTION

The enforceability of “end user license agreements” (“EULAs”) is a subject that has generated significant debate in recent years, giving a new lease on life to the old controversy surrounding standard form contracts. Those who oppose the use of shrink-wrap, click-wrap, and browse-wrap agreements in software transactions and e-commerce transactions argue that such contracts lack true consent and facilitate the imposition of unduly one-sided terms.¹ Those who favor the validity of such agreements argue that EULAs in no way differ from other standard form contracts, such as warranty agreements, insurance policies, and contracts of passage, which

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¹ See, e.g., David A. Szwak, *Uniform Computer Information Transactions Act [U.C.I.T.A.]*: *The Consumers Perspective*, 63 LA. L. REV. 27, 30-33 (2002).

have existed for over a century.² Proponents of such contracts argue that these licenses present a practical way of doing instantaneous business over the Internet.³ Indeed, click-wrap agreements have become the predominant kind of standard form contract used in the sale of goods and services over the Internet.

Despite the widespread use of shrink-wrap, click-wrap, and browse-wrap agreements, the enforceability of such documents under Australian law has yet to be resolved. One may look to U.S. courts to discern judicial trends elsewhere regarding such agreements. Over the past decade, U.S. courts have seen a proliferation of litigation over EULAs and, after initial resistance, have accepted their validity as a necessary incident of the information economy. Although recent U.S. cases demonstrate that EULAs may be *prima facie* enforceable, it is more difficult to tell whether certain typical clauses contained within such agreements will be enforced. In addition to clauses that purport to authorize the use of intellectual property, EULAs often include terms such as limitations of liability, exclusive jurisdiction clauses, binding arbitration clauses, and clauses that purport to restrict uses of information that would otherwise be legitimate under national copyright laws. Such clauses, especially when found in consumer contracts, have been controversial and have at times been found void due to considerations of public policy or unconscionability.⁴

This Article considers the enforceability of EULAs under Australian law and argues that legislative reform is likely required for Australia to keep pace with the methods of standard form contracting used in the information age. Part II illustrates that the judicial reasoning behind the enforcement of EULAs in the United States is virtually identical with the reasoning employed in Anglo-Australian cases addressing the enforceability of ticket terms. Despite this close legal parallel, it is probable that the doctrine of privity will rear its ugly head to deny EULA enforcement in Australia, except where a software company directly sells its product to the purchaser. Although the common law contractual principles of “incorporation by notice” and “acceptance by conduct” are adequate to deal with the question

² See, e.g., John J.A. Burke, *Reinventing Contract*, 10 MURDOCH U. ELEC. J.L. 2, para. 18 (2003), available at http://www.murdoch.edu.au/elaw/issues/v10n2/burke102_text.html (last visited May 21, 2004).

³ ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1451-52 (7th Cir. 1996).

⁴ See, e.g., *Comb v. PayPal, Inc.*, 218 F. Supp. 2d 1165 (N.D. Cal. 2002) (holding an arbitration agreement in a consumer contract unconscionable under the circumstances). *America Online, Inc. v. Superior Court of Alameda County*, 108 Cal. Rptr. 2d 699 (Cal. Ct. App. 2001) (finding an exclusive jurisdiction clause in a consumer online service agreement void due to public policy and unconscionability).

of assent to a EULA, abrogation of the privity doctrine may be necessary for software developers to gain the benefit of EULAs.

Because the consideration of every typical EULA term that consumer groups abhor is beyond the scope of this Article, Part III focuses on the enforceability of two kinds of contract terms that have resurged in the transnational context of e-commerce: exclusive jurisdiction and binding arbitration clauses.⁵ In international transactions, such clauses have been widely used among merchants for centuries to facilitate certainty in dispute resolution by electing, for example, a neutral forum or a more efficient dispute resolution process. Through the Internet, however, long distance retail sales are likely to become more prevalent than ever before. Therefore, a different approach may be warranted where a party to such a clause is a consumer who has limited bargaining power and lacks the resources to engage in foreign litigation.

This Article concludes by arguing that that in comparison with U.S. and E.U. law, Australia's approach to enforcing exclusive jurisdiction clauses is outdated and does little for certainty in the dispute resolution process. With respect to business-to-business transactions, Australia should adopt a test that more closely tracks the U.S. model, which is similar to the E.U. model. However, in the business-to-consumer context, it is suggested that E.U. law forms the better model for Australia because it acknowledges that consumers need to be protected from foreign litigation arising as a result of retail e-commerce transactions. In relation to consumer arbitration, U.S. and E.U. approaches are quite polarized. Adoption of a moderate approach that accounts for the benefits that arbitration offers in a dispute between distant parties would be preferable in Australia.

II. THE GENERAL ENFORCEABILITY OF EULAS IN THE UNITED STATES AND AUSTRALIA

In all common law systems, contract formation is largely based on the legal constructs of offer and acceptance.⁶ At common law, an offer is an unequivocal statement of a willingness to be bound by certain terms,⁷ and a

⁵ This Article addresses the enforcement of jurisdiction and arbitration clauses by the grant of a stay of proceedings or summary dismissal when litigation is pursued in breach of the clause. Enforcement of such clauses through damages awards, anti-suit injunctions and orders compelling arbitration is beyond the scope of this Article. Furthermore, this Article does not consider non-exclusive or optional arbitration clauses because it is highly unlikely that a court would grant a stay in the face of litigation brought in breach of such clauses.

⁶ G. TREITEL, *THE LAW OF CONTRACT* 8 (10th ed., 1999).

⁷ *Id.*

contract is formed when the offeree accepts those terms without variation.⁸ An acceptance that varies the terms of the offer is construed as a counter-offer under common law rules.⁹

This offer and acceptance approach was, however, ideally suited only to freely negotiated contracts. Since the late nineteenth century, the advent of standard form contracting required courts to adapt to the reality of the “battle of the forms” in commercial negotiations and the notion of “acceptance by conduct” and “incorporation by notice” in consumer contracts.¹⁰ This purposive approach to the issue of contract formation is best reflected in Article 2-204(1) of the U.S. Uniform Commercial Code (“U.C.C.”), which provides that “a contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract”.¹¹ While Australian law lacks a similar codification, Australian courts take the same substantive approach under the common law.¹²

EULAs are likely to be the most modern class of standard form mass-market contract. Their validity has yet to be tested under Australian law. This Part analyzes whether current Australian contract law is adequate to deal with EULAs and what kind of reforms, if any, are required to give such agreements full legal effect. While no Australian court has yet adjudicated the enforceability of a EULA, the United States has, over the past ten years, developed a substantial body of case law on the subject. Because of the strong similarity between U.S. and Australian contract law, an examination of U.S. case law provides valuable insight into the legal issues that may arise when a EULA comes before an Australian court.

A. *U.S. Law Regarding EULAs*

In the United States, the debate over the validity of EULAs has been divisive. Most of the controversy has centered on the proposed U.C.C. Article 2B and its progeny the Uniform Computer Information Transactions Act (“UCITA”).¹³ This law was developed in light of the perception that Article 2 of the U.C.C. was inappropriate and inadequate for addressing

⁸ *Id.* at 18-19.

⁹ J.W. CARTER & D.J. HARLAND, *CONTRACT LAW IN AUSTRALIA* 24 (4th ed., 2002).

¹⁰ *Id.* at 45.

¹¹ U.C.C. §2-204(1) (2003).

¹² CARTER & HARLAND, *supra* note 9, at 24-27.

¹³ NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, *UNIFORM COMPUTER INFORMATION TRANSACTIONS ACT (UCITA) (2001)*, available at <http://www.law.upenn.edu/bll/ulc/ucita/ucita01.htm> (last visited May 21, 2004) [hereinafter UCITA].

software transactions.¹⁴ UCITA's main purpose was to regulate the contractual aspects of the information economy.¹⁵ It purported to validate EULAs and to legitimize practices such as licensee "self help."¹⁶

Due to the ardent lobbying of consumer groups, business users of software and states' Attorneys General, the main sponsors of the UCITA have formally abandoned their endorsement of the proposal.¹⁷ Despite the Act's lack of legislative progress, the UCITA represents the most detailed articulation of the contractual aspects of the information economy.¹⁸ Accordingly, the UCITA is worth considering as it provides a readily transplantable body of law should it be found that Australian law requires reform. The U.S. common law position in relation to shrink-wrap, click-wrap, and browse-wrap agreements is considered first, followed by a comparison of the provisions of the UCITA. It must be noted that the UCITA leaves arbitration agreements to be regulated by other statutes.¹⁹

1. U.S. State Common Law and Article 2 of the Uniform Commercial Code

a. Shrink-wrap agreements

Shrink-wrap licenses derive their name from the manner by which they purport to bind licensees. Software boxes are often wrapped in clear plastic wrapping. Beneath this wrapping lies a notice that informs the

¹⁴ Phillip Johnson, *All Wrapped Up? A Review of the Enforceability of "Shrink-wrap" and "Click-wrap" Licenses in the United Kingdom and the United States*, 25(2) EUR. INTELL. PROP. REV. 99-100 (2003).

¹⁵ UCITA, *supra* note 13, Prefatory Note.

¹⁶ The principle of "self-help" generally allows software developers to embed "logic bombs" in software that terminate the operation of the program in order to facilitate control of the use of software post-sale and to ensure that payment terms are met. Szwak, *supra* note 1, at 39-40.

¹⁷ On August 1, 2003, the National Conference of Commissioners on Uniform State Laws (NCCUSL) discharged the standby committee of the Uniform Computer Information Transactions Act at its 112th Annual Meeting in Washington, DC. See Press Release, Uniform Law Commissioners, UCITA Standby Committee is Discharged (Aug. 1, 2003), available at <http://www.nccusl.org/nccusl/DesktopModules/NewsDisplay.aspx?ItemID=56> (last visited May 21, 2004). The UCITA had encountered strong resistance from various consumer interest groups, the Federal Trade Commission, states' Attorneys General and the American Bar Association. The Act's passage into law was defeated in numerous states and was only accepted in Virginia and Maryland. See Americans for Fair Electronic Commerce Transactions, *History of the UCITA*, available at http://www.ucita.com/what_history.html (last visited May 21, 2004).

¹⁸ Jacques De Werra, *Moving Beyond the Conflict Between Freedom of Contract and Policies: In Search of a New Global Policy for On-line Information Licensing Transaction*, 25 COLUM. J.L. & ARTS 239, 295-96 (2003). De Werra further highlights that the UCITA is a "likely candidate to become a model of regulation for global electronic commerce transactions." *Id.* at 295.

¹⁹ See UCITA, *supra* note 13, § 110, cmt. 1.

purchaser that by removing the shrink-wrap from the box, the purchaser assents to the terms of the enclosed license. Opponents of shrink-wrap agreements argue that such licenses purport to bind users to terms that they cannot read prior to sale. However, this Article illustrates that U.S. courts are unlikely to enforce a shrink-wrap license that the user has not had a prior opportunity to read unless the licensor provides a grace period for the return of the software if the user finds the license terms unacceptable.

In the United States, two conflicting lines of authority exist in relation to the enforceability of shrink-wrap contracts. In *Step-Saver Data Systems v. Wyse Technology*,²⁰ the U.S. Court of Appeals for the Third Circuit reasoned that a shrink-wrap form is a proposal for additional terms made subsequent to contract formation. Under this approach, a shrink-wrap agreement is unenforceable because business-to-consumer contracts require specific assent to the new terms, and business-to-business contracts require specific assent to new terms that materially alter the agreement.²¹ On the other hand, the U.S. Court of Appeals for the Seventh Circuit provided a forceful economic rationale for the enforcement of shrink-wrap agreements in *ProCD v. Zeidenberg*.²² The court reasoned that the use of a shrink-wrap agreement in a software transaction is no different from any other “buy now, terms later” transaction such as an airline ticket, a contract for insurance, or a warranty agreement, which are uniformly enforced.²³ As a result, the contract is concluded not when the purchase money is paid, but when the

²⁰ 939 F.2d 91 (3d Cir. 1991). See also *Klocek v. Gateway, Inc.*, 104 F. Supp. 2d 1332 (D. Kan. 2000); *Arizona Retail Sys., Inc. v. Software Link, Inc.*, 831 F. Supp. 759 (D. Ariz. 1993).

²¹ U.C.C. § 2-207 subsections (1) and (2) provide that:

[a] definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon . . . [t]he additional terms are to be construed as *proposals for addition* to the contract. *Between merchants* such terms become part of the contract unless . . . they materially alter it (emphasis added).

Although the appropriateness of applying the U.C.C. Art. 2—primarily a “sale of goods” law—to information transactions has been questioned, it has been judicially noted that courts have applied and will continue to apply the U.C.C. to software transactions because that is what the parties reasonably expect. *I.Lan Sys., Inc. v. Netscout Serv. Level Corp.*, 183 F. Supp. 2d 328, 332 (D. Mass. 2002).

²² 86 F.3d 1447 (7th Cir. 1996). See also *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1997); *O’Quin v. Verizon Wireless*, 256 F. Supp. 2d 512 (M.D. La. 2003); *Westendorf v. Gateway 2000, Inc.*, 41 U.C.C. Rep. Serv. 2d 1110 (Del. Ch. 2000); *Rinaldi v. Iomega Corp.*, 41 U.C.C. Rep. Serv. 2d 1143 (Del. Super. Ct. 1999); *Levy v. Gateway 2000, Inc.*, 33 U.C.C. Rep. Serv. 2d 1060 (N.Y. Sup. Ct. 1997); *Brower v. Gateway 2000, Inc.*, 246 A.D.2d 246 (N.Y. App. Div. 1998); *M.A. Mortenson v. Timberline Software Corp.*, 140 Wn.2d 568 (Wash. 2000).

²³ *ProCD*, 86 F.3d at 1451.

consumer assents to the terms by not returning the product in the grace period provided in the contract.²⁴

The *ProCD* approach to shrink-wrap agreements has proven the most influential.²⁵ This influence is due to the forceful economic reasoning that underlies it. Simply put, the *Step-Saver* approach makes it difficult to introduce standard terms into mass-market transactions. Under the *Step-Saver* approach, the only way to incorporate such terms is by asking the purchaser for a signature, or by providing the purchaser with actual notice of the terms, at the time of sale. The drawbacks of such a requirement are illustrated by the detrimental effect the *Step-Saver* approach would have on the operation of warranties accompanying consumer goods. Under the Magnuson-Moss Warranty Act,²⁶ a written limited warranty can limit the implied warranty of merchantability—that a good is fit for its ordinary purpose—to the duration of the limited warranty.²⁷ The *Step-Saver* approach would require all retailers to orally inform the consumer at the time of the purchase that the implied warranty of merchantability was limited by duration; otherwise, the limited warranty is an unassented proposal for varying the agreement.²⁸ In the absence of this express oral warning, the retailer would be bound by the duration of the implied warranty of merchantability for as long as state law statutes of limitation allow an action.²⁹ The result would be that implied statutory warranties would generally trump contractually based warranties.

In *ProCD*, the court noted the absurdity of the above position, stating that “no state disregards warranties furnished with consumer products” and that the *Step-Saver* reasoning in consumer contracts would mean that the seller makes “a broad warranty and must pay consequential damages for any shortfalls in performance, two ‘promises’ that if taken seriously would drive

²⁴ *Id.* at 1452-53.

²⁵ The author is aware of only one case since *ProCD* that declined to follow that opinion by holding a shrink-wrap license agreement void against the user for want of proper agreement. See *Klocek*, 104 F. Supp. 2d at 1332. In *Softman Products Co. v. Adobe Systems, Inc.*, 171 F. Supp. 2d 1075, 1087-88 (C.D. Cal. 2001), the court indicated that a shrink-wrap agreement, unlike a click-wrap agreement, may not bind the parties, due to lack of true assent. However, these comments must be treated with caution as the case involved the question of whether a distributor, as opposed to a user, is bound by a shrink-wrap license.

²⁶ 15 U.S.C. § 2301-2312 (2003).

²⁷ *Id.* § 2308(b).

²⁸ Without incorporation of the disclaimer either orally or by the signature of a standard form at the time of sale, the customer does not see the warranty disclaimer until after the conclusion of the sale.

²⁹ The limitation period for an action arising under a breach of express or implied warranty is, in most states, four years after the purchase date. See Federal Trade Commission, *A Businessperson's Guide to Federal Warranty Law*, available at <http://www.ftc.gov/bcp/conline/pubs/buspubs/warranty.htm> (last visited May 21, 2004).

prices through the ceiling or return transactions to the horse-and-buggy age.”³⁰

While there seems to be broad judicial acceptance that shrink-wrap agreements should be enforced like any other standard form contract, circumstances do exist, especially between merchants, where such a document will not be binding under U.S. law. For example, if the supplier receives notice that the buyer does not wish to comply with the license but nonetheless continues to proceed with the sale, § 2-207 of the U.C.C. will apply.³¹ The facts of *Step-Saver* relate precisely to this scenario. In *Step-Saver*, the defendant had sold the plaintiff software on numerous prior occasions. Throughout their business relationship, the plaintiff's president had repeatedly objected to the box-top license terms and twice refused to sign agreements that would formalize the terms of the license.³² Despite this notice, the supplier continued to sell the software to the plaintiff. Consequently, the U.S. Court of Appeals for the Third Circuit applied § 2-207 of the U.C.C. and excluded the license from governing the transaction. Thus, the enforceability of shrink-wrap agreements is fact-dependant. In consumer cases, where there is an isolated sale and the purchaser is aware at the time of sale that the sale is governed by a shrink-wrap license, a U.S. court is likely to apply the *ProCD* rationale and hold the license terms prima facie enforceable. However, between merchants, in cases of a true “battle of the forms,” a shrink-wrap agreement will be unenforceable if a supplier proceeds with the sale despite the purchaser providing notice that it does not intend to be bound by the license.

b. *Click-wrap agreements*

Click-wrap agreements present their terms on a digital display and are characterized by an “I Agree” button that the user clicks to indicate assent to the terms. The “I Agree” button is closely proximate to the terms and the user will generally be unable to complete the transaction unless the “I

³⁰ *ProCD*, 86 F.3d at 1451-52.

³¹ U.C.C. § 2-207(3) provides that conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In *Step-Saver*, the court stated that “[w]hen the parties” conduct establishes a contract, but the parties have failed to adopt expressly a particular writing as the terms of their agreement, and the writings exchanged by the parties do not agree, U.C.C. § 2-207 determines the terms of the contract.” *Step-Saver Data Sys., Inc. v. Wyse Technology*, 939 F.2d 91, 98 (3d Cir. 1991). Thus, if the overall transaction is not revoked by the licensor upon receiving notice of explicit rejection of the license by the licensee, U.C.C. § 2-207 provides that there is a contract despite the written license term that requires return of the software in the event of the licensee rejecting the terms.

³² *Step-Saver*, 939 F.2d at 102-03.

Agree” button is clicked. Originally, the click-wrap format was a type of EULA that was presented to a software licensee during software installation. Unless assent was indicated, the licensee could not install the program. However, the click-wrap format is now widely used in the sale of goods and services online and has thus become an important means by which standard form contracts are entered into over the Internet.

In the United States, no case has yet limited the enforceability of click-wrap contracts for want of true assent.³³ This could be due to the fact that such agreements generally require an unequivocal positive act: clicking an “I Agree” button on a software program or webpage, as opposed to the assent by omission in shrink-wrap agreements. Furthermore, one case suggests that use of a click-wrap agreement precludes the possibility of a party’s reliance on U.C.C. § 2-207 to exclude an unwanted EULA provision.³⁴

In *I.LAN v. Netscout*,³⁵ the court reasoned that clicking an “I Agree” button was explicit acceptance sufficient for the inclusion of new material terms under U.C.C. § 2-207.³⁶ The defendant, Netscout, sold software that monitored network usage and the plaintiff, i.LAN, sold network-monitoring services. i.LAN entered into a value-added reseller agreement whereby it could rent Netscout’s software to customers.³⁷ In claiming that their damages were not contractually limited, i.LAN tried to rely on the purchase order—which contained no limitations of liability—as the basis of the agreement.³⁸ i.LAN argued that the *Step-Saver* reasoning should apply to the click-wrap EULA in order to exclude the operation of a limited liability clause contained in the click-wrap agreement. The court rejected this argument, noting that every time i.LAN installed the software on a client’s

³³ For cases addressing the validity of click-wrap agreements, see *Forest v. Verizon Communications, Inc.*, 805 A.2d 1007 (D.C. Cir. 2002); *CompuServe, Inc. v. Patterson* 89 F.3d 1257 (6th Cir. 1996); *DeJohn v. The .TV Corp.*, 245 F. Supp. 2d 913 (C.D. Ill. 2003); *Comb v. PayPal, Inc.*, 218 F. Supp. 2d 1165 (N.D. Cal. 2002); *I.Lan Sys., Inc. v. Netscout Serv. Level Corp.*, 183 F. Supp. 2d 328 (D. Mass. 2002); *Lieschke v. Real Networks, Inc.*, 2000 U.S. Dist. LEXIS 1683 (N.D. Ill. Feb. 10, 2000); *Koch v. America Online, Inc.*, 139 F. Supp. 2d 690 (D. Md. 2000); *Kilgallen v. Network Solutions, Inc.*, 99 F. Supp. 2d 125 (D. Mass. 2000); *Hotmail Corp. v. Van\$ Money Pie, Inc.*, 1998 WL 388389 (N.D. Cal. Apr. 16, 1998); *1-A Equip. Co. v. Icode, Inc.*, 2003 Mass. App. Div 30 (Mass. App. Div. 2003); *Caspi v. Microsoft Network, L.L.C.*, 732 A.2d 528 (N.J. Super. Ct. App. Div. 1999); *Groff v. America Online, Inc.*, 1998 WL 307001 (R.I. Super. Ct. May 27, 1998); *Barnett v. Network Solutions, Inc.*, 38 S.W.3d 200 (Tex. App. 2001).

³⁴ See *supra* note 21 and accompanying text.

³⁵ 183 F. Supp. 2d 328.

³⁶ *Id.* at 338.

³⁷ *Id.* at 330.

³⁸ *Id.*

computer, i.Lan explicitly accepted the terms of the click-wrap by clicking the "I Agree" button.

c. *Browse-wrap agreements*

Browse-wrap agreements are similar to shrink-wrap agreements in that they rely on acceptance by conduct to bind the user. The conduct indicative of assent in browse-wrap agreements is the licensee making use of a website in some way. Some browse-wraps purport to bind the user upon merely visiting the site, while others require more positive acts, such as the submission of a database query or the download of a particular file. Typically, the terms and conditions of a browse-wrap are accessible via a "terms and conditions" link on the homepage. Unlike click-wrap agreements, browse-wrap licensees are not forced to click on an "I Agree" button proximate to the terms in order to access the desired information. Rather, the licensee can access the information without being exposed to the terms. It is this lack of proximity between use of the contracted service and display of the terms that makes browse-wrap agreements vulnerable to impeachment for lack of assent.

U.S. courts appear more hostile to browse-wrap agreements than other wrap agreements. The reported cases indicate the enforcement of browse-wraps in the United States is highly fact-specific. The enforceability of a browse-wrap agreement will likely turn upon whether the user was reasonably aware of, and had an opportunity to review, the terms and conditions prior to the transaction. In *Specht v. Netscape*,³⁹ and *Ticketmaster v. Tickets.com*,⁴⁰ browse-wrap agreements failed for lack of assent in the circumstances. However, a browse-wrap agreement managed to survive a motion to dismiss in *PollStar v. Gigimania*,⁴¹ where District Judge Coyle stated:

³⁹ 306 F.3d 17 (2d Cir. 2002). In *Specht*, the U.S. Court of Appeal for the Second Circuit refused to enforce an arbitration clause contained within a browse-wrap agreement. The browse-wrap agreement was found behind a link that stated "Please review and agree to the terms of the Netscape SmartDownload software license agreement before downloading and using the software." *Id.* at 23. This link was located at the bottom of the download page such that the user had to scroll-down the webpage to view it. *Id.* The download link, however, was located at the top of the page and made no reference to any terms and conditions governing the download. The court concluded that the link was not readily apparent to users and that under the circumstances the user could hardly have assented to the arbitration clause. *Id.* at 32.

⁴⁰ No. 99CV7654, 2000 WL 1887522 (C.D. Cal. Aug. 10, 2000). In *Ticketmaster*, the breach of contract claim was dismissed as lacking "sufficient proof of agreement." *Id.*

⁴¹ 170 F. Supp. 2d 974 (E.D. Cal. 2000).

While the court agrees with *Gigimania* that the user is not immediately confronted with the notice of the license agreement, this does not dispose of Pollstar's breach of contract claim. The court hesitates to declare the invalidity and unenforceability of the browse wrap license agreement at this time. Taking into consideration the examples provided by the [*ProCD* court]—showing that people sometimes enter into a contract by using a service without first seeing the terms—the browser wrap license agreement may be arguably valid and enforceable.⁴²

However, *Gigimania's* interlocutory nature provides a somewhat shakier foundation to support browse-wrap agreements, especially due to the reservations expressed by the court in relation to the inadequacy of the notice of the terms and conditions.⁴³ *Register.com v. Verio*⁴⁴ provides stronger support for the enforcement of browse-wrap agreements in circumstances where the license terms are prominent on the website.⁴⁵

Manifestation of assent will be very difficult to prove where a software distributor or online service provider solely uses a browse-wrap agreement to govern its on-line dealings. The scant authority available provides little clarification as to the circumstances that will allow enforcement of a browse-wrap agreement. The UCITA, which is discussed below, was an attempt to clarify the circumstances under which a browse-wrap contract may be enforced.

2. *Uniform Computer Information Transactions Act*

The UCITA provisions on agreement in standard form EULAs are a clear reflection of the post-*ProCD* U.S. case law. As in *ProCD*, the "right to

⁴² *Id.* at 982.

⁴³ *Id.* at 981. The court indicated that the user may not be fully aware of the terms and conditions because the notice was "in small gray print on a gray background" [sic] and the link was not underlined, which is the usual way of distinguishing text links from other text. *Id.*

⁴⁴ 126 F. Supp. 2d 238 (S.D. N.Y. 2000), *aff'd*, 356 F.3d 393 (2d Cir. 2004).

⁴⁵ In *Register.com*, the district court enjoined a defendant from extracting data from a WHOIS database for commercial purposes. *Id.* at 238. A clause in *Register.com's* browse-wrap for the WHOIS database stated that the identification and contact details contained within the database could not be used for the purposes of mass unsolicited commercial advertising. *Id.* at 242. *Verio* extracted the information for that purpose. This clause was displayed every time a WHOIS query was submitted. *Id.* at 248. Consequently, *Verio* could not argue that it was unaware of the terms and only argued that it did not manifest assent by a positive affirmation—that is, a click of the mouse. *Id.* The court noted that the terms and conditions were clearly posted and that the act of submitting the WHOIS enquiry was clearly indicated as the method of acceptance. *Id.*

a return” is a fundamental requirement if the licensor is solely using a shrink-wrap agreement that precludes the licensee from having an opportunity to review the terms before purchase.⁴⁶ The right to return can be avoided altogether if the vendor trades over the Internet and gives the purchaser an opportunity to review the license terms before sale.⁴⁷ Section 211, which clarifies the “opportunity to review” requirement in relation to Internet-based transactions, validates the use of click-wrap agreements in online ordering processes. An opportunity to review is provided if the supplier:

- (1) makes the standard terms of the license readily available for review by the licensee before the information is delivered or the licensee becomes obligated to pay, whichever occurs first, by:
 - (A) displaying *prominently and in close proximity* to a description of the computer information, or to instructions or steps for acquiring it, the standard terms or a reference to an electronic location from which they can be readily obtained; or
 - (B) disclosing the availability of the standard terms in a *prominent place on the site* from which the computer information is offered *and promptly furnishing a copy of the standard terms on request* before the transfer of the computer information; and
- (2) does not take affirmative acts to prevent printing or storage of the standard terms for archival or review purposes by the licensee.⁴⁸

In addition to validating click-wrap agreements, UCITA § 211 also provides clearer guidance than the common law and the U.C.C. as to what circumstances allow enforcement of browse-wrap agreements. It seems that

⁴⁶ If the license is presented only after payment and delivery, UCITA § 112(e)(3) provides that there must be a “right to a return” the software if the purchaser rejects the terms of the agreement.

⁴⁷ UCITA, *supra* note 13, § 108 provides that a party adopts the terms of a standard form contract by manifesting assent. UCITA § 112(a) provides that manifestation of assent can be explicit or implicit after there is “opportunity to review” the terms.

⁴⁸ *Id.* §211 (emphasis added).

to maximize the possibility of enforcing a browse-wrap agreement, a website's terms and conditions link must indeed be prominent—a no nonsense, “in your face” link—that could prove to be, aesthetically speaking, an ugly option for website proprietors. The official comment to the UCITA indicates that the requirement of proximity is to ensure that the reasonable person would have sufficient notice of the terms. Furthermore, the link must also be proximate to the transaction. For example, a prominent terms and conditions link on a home page may not effectively govern the use of distributed software if the download page omits that link.

Despite the UCITA's acceptance of some browse-wrap agreements, this proposed law provides little protection to vendors. Given the UCITA's tenuous status, online goods and service providers would be prudent to use click-wrap agreements in the course of every online transaction they wish to govern contractually.

B. *Australian Law's Capacity to Enforce EULAs*

There is no direct authority on the enforceability of EULAs in Australian law.⁴⁹ This section argues, however, that Australian courts should enforce shrink-wrap, click-wrap and browse-wrap agreements where the purchaser has had a reasonable opportunity to review the terms prior to assuming binding obligations. There is nothing inherent in EULAs that warrants different treatment from other types of mass-market standard form contracts. Just as U.S. courts have found that there is no difference between EULAs and other “buy now, terms later” contracts, Australian courts may employ legally analogous contracts to enforce wrap agreements. Specifically, Anglo-Australian cases addressing the enforceability of ticket terms could be employed in the context of wrap contracts. To do otherwise would be to take legal doctrine a step backward by implying that the only method of concluding a written contract would be by signature or by explicit oral recitation of the terms prior to the time of sale. The weight of authority in the ticket cases strongly suggests that Australian law is adequately prepared to deal with a EULA should a court be faced with the question of its enforceability.

⁴⁹ While a Scottish case upheld the enforceability of a licensee's “right to return” against the distributor in a software manufacturer's shrink-wrap agreement, the case depended on a Scottish exception to the doctrine of privity—*ius quaesitum tertio*—that is not yet applicable in Australian law. *Beta Computers (Europe) Ltd. v. Adobe Systems (Europe) Ltd.* [1996] S.C.L.R. 587. The licensee's “right to return” refers to a standard shrink-wrap clause, which provides a grace period after the purchase of the software, but before the license becomes binding, where the licensee can return the software if they find the terms of the license objectionable.

There are, however, two features of Australian contract law that pose obstacles to the enforceability of EULAs. Firstly, Australian courts require “special notice” for “onerous terms.” Unfortunately, Australian courts’ current articulation of this rule is inexact, forcing licensors to formulate their own conclusion as to which contractual terms are onerous. The consequent unpredictability is highly unfair to licensors and leads to increased litigation costs. To provide certainty in this area of law, the Australian legislature should follow the United States, which has clearly identified when and how special notice is required.

Secondly, the doctrine of privity may prevent the enforceability of EULAs. The doctrine of privity provides that only when a software company sells direct to the licensee will the licensee be bound. To give their EULAs any effect, software companies are forced to either not use resellers, or make their resellers enter into complex agency agreements. This complication could have a chilling effect on software distribution in Australia. As shown below, Australian adherence to the privity doctrine is out of touch with the position in the United States and the United Kingdom and must be abolished by the legislature.

1. *Australian Ticket Cases: A Close Legal Analogy to U.S. EULA Law*

The Anglo-Australian case law determining the enforceability of contractual terms written on tickets bears a striking similarity to Judge Easterbrook’s analysis of a shrink-wrap agreement in *ProCD*. This similarity is based on the legal construction at the time of formation; the issuance of the ticket is an offer that is accepted when the purchaser does not reject the ticket after having a reasonable opportunity to read its terms.

The Anglo-Australian ticket cases provide that for a statement of terms to be incorporated this way, first, reasonable notice of the terms must be given and, second, there must be a reasonable opportunity to review and reject the terms prior to the formation of binding obligations.⁵⁰ If applied to EULAs, this rule has the same effect as the assent provisions of the UCITA; the licensor must provide the licensee with a reasonable opportunity to review the terms before any purported conduct can indicate acceptance. Consequently, a right of return is required if the opportunity to review

⁵⁰ CARTER & HARLAND, *supra* note 9, at 210. Reasonable notice encompasses the notion that the recipient must be aware that the contract handed to him contains terms and conditions. *Causer v. Browne* (1952) V.L.R. 1, 5 (Austl.). This notice is determined objectively by ascertaining whether it would be obvious to the reasonably prudent recipient that the document contained the terms and conditions. *Parker v. South Eastern Railway Co.* (1877) 2 C.P.D. 416, 429 (United Kingdom).

occurs post-sale. While this close legal parallel between U.S. law regarding EULAs and the law expounded in the Anglo-Australian ticket cases indicates that EULAs should be enforceable under Australian law, the later ticket cases have added a further requirement that makes matters less certain for software licensors.

2. *Special Notice for Onerous Terms: An Ambiguous Legal Requirement*

Later Anglo-Australian ticket cases introduced the requirement that where a ticket includes onerous terms, “special notice” must be made to bring these terms to the attention of the other party. Unfortunately, the cases do not elaborate upon what constitutes an onerous term. In *Thornton v. Shoe Lane Parking*,⁵¹ the objectionable term excluded liability for personal injury due to the service provider’s negligent acts.⁵² All three judges held that this term required special notice. One judge considered it a term “so wide and so destructive of the plaintiffs’ rights”,⁵³ another regarded it as “unusual”⁵⁴ and the third spoke in terms of it being stringent.⁵⁵ In *Interfoto Picture Library v. Stiletto Visual Programmes*,⁵⁶ the invalidated term applied “steep” late fees for failing to return borrowed photographs by the due date and was in substance a penalty clause.⁵⁷ One judge noted that special notice should be given to “onerous or unusual” terms,⁵⁸ and the other judge spoke in terms of the extent to which they were not “common form or usual terms regularly encountered in the business.”⁵⁹

Likewise, the special notice that is required for an onerous term may be equally difficult to quantify. In *Thornton*, Lord Denning provided what seems to be the sole dicta clarifying this requirement when he stated that such a term must be brought to the attention of the other in the “most explicit way”.⁶⁰ For instance, “[i]n order to give sufficient notice, [the term] would need to be printed in red with a red hand pointing to it—or something equally startling.”⁶¹

⁵¹ (1971) 2 Q.B. 163 (United Kingdom).

⁵² *Id.* at 167-68.

⁵³ *Id.* at 170 (Denning, M.R.).

⁵⁴ *Id.* at 172 (Megaw, L.J.).

⁵⁵ *Id.* at 174 (Sir Gordon Wilmer).

⁵⁶ (1989) Q.B. 433 (United Kingdom).

⁵⁷ *Id.* at 436.

⁵⁸ *Id.* at 439 (Dillon, L.J.).

⁵⁹ *Id.* at 445 (Binham, L.J.).

⁶⁰ *Thornton*, (1971) 2 Q.B. at 170.

⁶¹ *Id.* This dicta was cited approvingly in *Interfoto* [1989] Q.B. at 437 (Dillon, L.J.).

In contrast, U.S. law provides much clearer guidance in relation to when special notice must be given and what type of notice is required. Under the U.C.C., contractual clauses purporting to disclaim the implied warranties of merchantability and fitness are required to be “conspicuous”.⁶² The UCITA similarly requires conspicuous documentation of terms that disclaim implied warranties,⁶³ terms that prohibit the re-sale of the license,⁶⁴ and terms that “opt-out” of the UCITA as the governing law of the contract.⁶⁵ However, the UCITA goes further than the U.C.C., providing that in order to be enforced, a term need not be conspicuous unless the UCITA expressly so requires.⁶⁶

Both the UCITA and U.C.C. provide that a conspicuous term is one presented in such a manner that a reasonable person ought to have noticed it.⁶⁷ The UCITA provides the following non-exclusive definition of a conspicuous term:

- (i) a heading in capitals in a size equal to or greater than, or in contrasting type, font, or color to, the surrounding text;
- (ii) language in the body of a record or display in larger or other contrasting type, font, or color or set off from the surrounding text by symbols or other marks that draw attention to the language; and
- (iii) a term prominently referenced in an electronic record or display which is readily accessible or reviewable from the record or display.⁶⁸

The clear guidance provided by the U.C.C. and UCITA as to what terms require special notice is invaluable to the licensor and should be adopted in Australia. While it is beyond the scope of this Article to examine what kinds of terms should be given special notice, and what form this notice should take, certainty and predictability in this area is required. Under Australian law, software companies and online service providers simply do not know when special notice is required. While this conclusion

⁶² U.C.C. § 2-316(2).

⁶³ UCITA, *supra* note 13, § 406(1-3).

⁶⁴ *Id.* § 503(4).

⁶⁵ *Id.* § 104(3).

⁶⁶ *Id.* § 106(d). However, the UCITA subordinates itself to state consumer protections statutes that may require other terms be conspicuous. *Id.* § 105(c).

⁶⁷ U.C.C. § 1-201(10); UCITA, *supra* note 13, § 102(14).

⁶⁸ UCITA, *supra* note 13, § 102(14). U.C.C. § 1-201(10) and UCITA, *supra* note 13, § 102, cmt. 12, provide that the question of conspicuousness is a judgment to be made by the court having regard to all the circumstances of the case.

may be obvious in respect of exclusion clauses and penalty clauses, there are other contentious terms that could arguably fall into the onerous category. Potentially onerous terms could include exclusive jurisdiction clauses, binding arbitration clauses, and anti-reverse engineering clauses.

The lack of legal certainty regarding onerous terms also makes it easy for a judge to apply his or her own values regarding what terms require special notice in standard form contracts. For example, an Australian court could find a foreign jurisdiction clause onerous in the consumer context if it required the consumer to travel half-way around the world to litigate a small sum. However, a court could also find this requirement valid on the basis that such a term is ordinarily used in every standard form contract entered into over the Internet. Unless licensors make every term that substantively affects the licensee's legal rights "conspicuous," there is no principled way of guaranteeing compliance with Australia's special notice rule. To avoid arbitrariness and uncertainty, Australian law should follow the United States' clear articulation of when and how terms must be displayed conspicuously. The prescriptive aspect of this legal development makes the change more amenable to legislative intervention by parliament than judicial pronouncement.

3. *The Privity Doctrine: An Anachronistic Impediment to Wrap Agreements*

The doctrine of privity represents a second formidable obstacle to the enforceability of EULAs under Australian law. Under the privity doctrine, only a person who has provided consideration, and is therefore a party to the contract, can judicially enforce those contractual terms in court.⁶⁹ The doctrine of privity has been widely criticized as unjust because it can work against the obvious intentions of the parties where they intend to benefit a third party.⁷⁰ It allows unscrupulous parties to break the contract, knowing that the third party beneficiary cannot sue. While U.S. law has long recognized the right of third party beneficiaries to sue on a promise intended for their benefit,⁷¹ this reform is only recent in the United Kingdom,⁷² and has yet to be implemented in Australia.

⁶⁹ *Coulls v. Bagot's Executor and Trustee Co.* (1967) 119 C.L.R. 460, 494-8 (Austl.) (Windeyer, J.).

⁷⁰ *Trident Gen. Ins. Co. v. McNeice Bros.* (1988) 165 C.L.R. 107, 116-8 (Austl.).

⁷¹ See *RESTATEMENT (SECOND) OF CONTRACTS*, ch. 14 (1981).

⁷² *Contracts (Rights of Third Parties) Act*, 1999, § 1 (Eng.).

Privity has been described the “most significant legal barrier to the enforceability of software licenses under Australian law.”⁷³ Under the doctrine of privity, unless a software company directly sells its goods to the licensee, the software company is not considered a party to the contract, and therefore cannot enforce any provisions therein in litigation with the licensee. To enforce its information rights, the software company must rely exclusively upon the concepts of intellectual property law. Warranty disclaimers, limitations of liability, and jurisdiction clauses in wrap agreements are all rendered useless. Due to the Australian adherence to privity, one writer has cast the possibility of the software manufacturer’s terms actually being incorporated into the contract with the licensee as “rather remote”.⁷⁴

It may be arguable that on the basis of a 1988 Australian High Court decision that the privity doctrine may not in fact render software licenses unenforceable. In *Trident General Insurance v. McNeice Brothers*,⁷⁵ it was recognized by all seven judges of the High Court that the privity doctrine can cause substantial injustices. Three of the seven justices agreed that in contracts of public liability insurance, the injustice caused by adherence to the doctrine of privity clearly precipitated the need to abolish the doctrine.⁷⁶ While the three justices sought to confine their decision to the context of third party beneficiaries under public liability insurance policies, it was recognized that the decision may have an impact on other forms of contract.⁷⁷ While privity may provide a legal reason for a judge to deny the software maker the benefit of a EULA provision, the judicial hostility to privity expressed by the High Court in *Trident* may well provide a vehicle for a lower court judge to decide the other way.⁷⁸

Despite the strong judicial hostility to privity evidenced in *Trident*, without legislative action, the privity doctrine presents a barrier to the enforceability of EULAs where there is no direct sales contract between the licensor and the licensee. Two justices noted in *Trident* that privity is so entrenched in Australian law that only an act of parliament could abolish it.⁷⁹

⁷³ David Lindsay, *Copyright, Contract and Mass Market Agreements*, (2002), available at <http://www.copyright.com.au/reports.htm> (last visited May 21, 2004).

⁷⁴ J.W. Carter, *Article 2B: International Perspectives*, 14 J. CONT. L. 54, 67 (1999), available at <http://www.cisg.law.pace.edu/cisg/biblio/carter.html> (last visited May 21, 2004).

⁷⁵ (1988) 165 CLR 107.

⁷⁶ Mason, CJ, Wilson and Toohey, JJ. Deane and Gaudron, JJ. proceeded on a different doctrinal basis, deciding in favor of the third party.

⁷⁷ *Trident* (1988) 165 CLR at 171-72 (Toohey, J.).

⁷⁸ Carter and Harland note that, due to *Trident*, the doctrine of privity in Australia is in a “state of flux”. CARTER & HARLAND, *supra* note 9, at 340.

⁷⁹ *Trident* (1988) 165 CLR at 125-142 (Brennan, J.). *Id.* at 155-162 (Dawson, J.).

The Australian legislature should respond to the invitation in *Trident* to reform the privity doctrine. The legislature is better suited than the judiciary to select between the numerous policy choices that such a reform would require.⁸⁰ Until such reform takes place the status of shrink-wrap and click-wrap EULAs in Australia remains—just like the status of the doctrine of privity itself—unacceptably uncertain.

III. EXCLUSIVE JURISDICTION CLAUSES AND BINDING ARBITRATION CONTRACTS IN EULAs AND ONLINE SERVICE AGREEMENTS

If Australian courts recognise the enforceability of EULAs and online service agreements, they must further determine the enforceability of typical terms found within such agreements. Some of these terms already have legislation or judicial precedent that qualifies or prohibits their use.⁸¹ However, the digital age has necessitated other controversial clauses within EULAs that have not yet been addressed by remedial legislation. A good example of a new type of clause that has emerged in EULAs is a clause that prohibits uses of copyright information that would otherwise be legal under copyright law.⁸² Other types of clauses to rise in significance are exclusive jurisdiction clauses and binding arbitration clauses. While merchants have used these clauses for centuries to facilitate predictable dispute resolution, their use by online traders to hedge the risk of exposure to numerous jurisdictions has become most controversial in recent years, especially in the consumer context.

This Part focuses on the enforceability of exclusive jurisdiction clauses and binding arbitration clauses in EULAs and online services agreements under U.S., E.U., and Australian law. These controversial clauses are by far the most litigated clauses in U.S. EULA litigation over the past ten years.⁸³ When a EULA eventually comes before an Australian

⁸⁰ For a good summary of the policy considerations involved see *id.* at 162 (Dawson, J.).

⁸¹ A notable example is the prohibition of certain limitations of liability in consumer contracts. For example, Section 68 and 68A of the Trade Practices Act, 1974 (Austl., CTH) prohibit all exclusion clauses in consumer contracts that limit liability for consequential and incidental loss of a breach of an implied warranty due to the good or service provider's negligence. U.C.C. § 2-719 also provides that "[l]imitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable."

⁸² For an illustration of these types of terms see Copyright Law Review Committee, *Copyright and Contract* App. E, available at <http://www.law.gov.au/www/ctrHome.nsf/AllDocs/C3D3380F891C1DC1CA256C4F001BDFAB?OpenDocument> (last visited Apr. 30, 2004). Some terms purport to prohibit quotation for the purpose of criticism, prohibit reverse engineering for the purposes of interoperability and prohibit the re-sale of software. See *id.*

⁸³ Binding arbitration clauses were an issue in a number of cases. See, e.g., *Specht v. Netscape Comm. Corp.*, 306 F.3d 17 (2d Cir. 2002); *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1997);

past ten years.⁸³ When a EULA eventually comes before an Australian court, it is highly likely that enforcement of the dispute resolution clause will similarly be an issue.

U.S., E.U., and Australian law adopt different approaches to exclusive jurisdiction and binding arbitration clauses. The U.S. approach to such clauses emphasizes freedom of contract, the E.U. approach emphasizes consumer protection, while the Australian approach emphasizes judicial discretion. Of the three approaches, Australia is unquestionably the most unwelcoming toward contractual forum selection. This section argues that Australian law should abandon the outdated discretionary approach to the enforcement of exclusive jurisdiction clauses and adopt the E.U. approach, which provides mandatory enforcement at the business-to-business level, while creating a consumer's right to sue in his or her home state. In relation to binding arbitration clauses at the consumer level, Australia should ignore the extreme positions taken by the United States and European Union and go

⁸³ Binding arbitration clauses were an issue in a number of cases. See, e.g., *Specht v. Netscape Comm. Corp.*, 306 F.3d 17 (2d Cir. 2002); *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1997); *O'Quin v. Verizon Wireless*, 256 F. Supp. 2d 512 (M.D. La. 2003); *Comb v. PayPal, Inc.*, 218 F. Supp. 2d 1165 (N.D. Cal. 2002); *Lieschke v. Real Networks, Inc.*, 2000 U.S. Dist LEXIS 1683 (N.D. Ill. Feb. 10, 2000); *Klocek v. Gateway*, 104 F. Supp. 2d 1332 (D. Kan. 2000); *Thompson v. Handa-Lopez, Inc.*, 998 F. Supp. 738 (W.D. Tex. 1998); *Westendorf v. Gateway 2000, Inc.*, 2000 WL 307369 (Del. Ch. Mar. 16, 2000); *Levy v. Gateway 2000, Inc.*, 1997 WL 823611 (N.Y. Sup. Ct. Aug. 12, 1997); *Brower v. Gateway 2000, Inc.*, 246 A.D.2d 246 (N.Y. App. Div. 1998).

Exclusive jurisdiction clauses were considered in the following cases: *Forest v. Verizon Communications, Inc.*, 805 A.2d 1007 (D.C. Cir. 2002); *DeJohn v. The .TV Corp.*, 245 F. Supp. 2d 913 (C.D. Ill. 2003); *Koch v. America Online, Inc.*, 139 F. Supp. 2d 690 (D. Md. 2000); *Kilgallen v. Network Solutions, Inc.*, 99 F. Supp. 2d 125 (D. Mass. 2000); *America Online, Inc. v. Superior Court of Alameda County*, 108 Cal. Rptr. 2d 699 (Cal. Ct. App. 2001); *America Online Inc. v. Booker*, 781 So.2d 423 (Fla. Dist. Ct. App. 2001); *Mgmt Computer Controls, Inc. v. Charles Perry Const. Inc.*, 743 So.2d 627 (Fla. Dist. Ct. App. 1999); *1-A Equip. Co. v. Icode, Inc.*, 2003 Mass. App. Div. 30 (Mass. App. Div. 2003); *Williams v. America Online, Inc.*, 43 U.C.C. Rep. Serv. 2d 1101 (Mass. Super. 2001); *Caspi v. Microsoft Network*, 732 A.2d 528 (N.J. Super. Ct. App. Div. 1999); *Groff v. America Online*, 1998 WL 307001 (R.I. Super. May 27, 1998); *Barnett v. Network Solutions, Inc.*, 38 S.W.3d 200 (Tex. App. 2001).

Warranty disclaimers and other limitations on liability were considered in the following cases: *Step-Saver Data Sys., Inc. v. Wyse Technology*, 939 F.2d 91 (3d Cir. 1991); *I.Lan Sys., Inc. v. Netscout Serv. Level Corp.*, 183 F. Supp. 2d 328 (D. Mass. 2002); *Peerless Wall & Window Coverings, Inc. v. Synchronics, Inc.*, 85 F. Supp. 2d 519 (W.D. Pa. 2000); *Ariz. Retail Sys., Inc. v. Software Link Inc.*, 831 F. Supp. 759 (D. Ariz. 1993); *Rinaldi v. Iomega*, 41 U.C.C. Rep. Serv. 2d 1143 (Del. Super. Ct. 1999); *M.A. Mortenson Co. v. Timberline Software Corp.*, 140 Wn.2d 568 (Wash. 2000).

Clauses that purported to prohibit the commercial use of factual information in a database were considered in the following cases: *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996); *Ticketmaster Corp. v. Tickets.com, Inc.*, 2000 WL 1887522 (C.D. Cal. Aug 10, 2000); *PollStar v. Gigimania Ltd.*, 170 F. Supp. 2d 974 (E.D. Cal. 2000); *Register.com, Inc. v. Verio, Inc.*, 126 F. Supp. 2d 238 (S.D. N.Y. 2000).

In *Hotmail Corp. v. Van\$ Money Pie, Inc.*, 1998 WL 388389 (N.D. Cal. Apr. 16, 1998) the clause at issue purported to ban the defendants from using the plaintiff's "web-mail" facility to send spam. The clause at issue in *Softman Prods. v. Adobe Sys.*, 171 F. Supp. 2d 1075 (C.D. Cal. 2001) restricted the circumstances in which the software could be re-sold. In *Bowers v. Baystate Techs., Inc.*, 320 F.3d 1317 (Fed. Cir. 2003), the clause at issue prohibited reverse engineering of the licensed software.

its own way. Courts should advocate and emphasize the use of fair arbitration procedures. Instead of refusing to enforce an unfair arbitration clause, Australian courts should be empowered to rewrite arbitration clauses to reach a fair outcome.

A. *Exclusive Jurisdiction Clauses*

1. *Exclusive Jurisdiction Clauses in the United States: Advancing a Strong Enforcement Policy*

a. *U.S. common law position*

U.S. law has developed a strong enforcement policy in relation to exclusive jurisdiction clauses. Formerly, U.S. courts considered exclusive jurisdiction clauses violative of public policy because these clauses purported to oust the authority of all courts other than those identified in the contract.⁸⁴ This hostility has been withdrawn in light of the realities of international trade and commerce, which require predictability and neutrality in dispute resolution.⁸⁵

In *The Bremen v. Zapata Off-Shore*,⁸⁶ the U.S. Supreme Court held that forum selection clauses are presumptively valid and should be enforced unless shown to be unreasonable under the circumstances.⁸⁷ Although the Court did not precisely determine what constituted an “unreasonable” forum selection clause, it suggested that a stay would be denied where: (1) enforcement would violate a strong public policy of the forum in which the dispute is brought;⁸⁸ (2) the chosen forum is “so gravely difficult and inconvenient that [the plaintiff] will for all practical purposes be deprived of his day in court”;⁸⁹ or (3) the clause is invalid for reasons such as fraud, undue influence, or overweening bargaining power.⁹⁰ The Court stated that

⁸⁴ *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9 (1972).

⁸⁵ The U.S. Supreme Court has stated that such clauses are “an almost indispensable precondition to achievement of the orderliness and predictability essential to any international transaction.” *Scherk v. Alberto-Culiver*, 417 U.S. 506, 507 (1974).

⁸⁶ 407 U.S. 1. *The Bremen* concerned a London jurisdiction clause in a contract for the long distance ocean towing of an oilrig. The contract was the result of free bargaining between two well-resourced parties. *Id.*

⁸⁷ *Id.* at 10.

⁸⁸ *Id.* at 15.

⁸⁹ *Id.* at 18.

⁹⁰ *Id.* at 15.

serious inconvenience would very difficult to establish in a freely bargained-for jurisdiction clause.⁹¹

The strong enforcement policy espoused in *The Bremen* was eventually extended to consumer contracts and now applies with equal force in both the business-to-business and business-to-consumer contexts. In the immediate wake of *The Bremen*, numerous lower court decisions confined the case's operation to freely negotiated contracts.⁹² The Supreme Court, in a widely criticized decision,⁹³ applied the *Bremen* approach to a standard form agreement in the consumer context. In *Carnival Cruise Lines v. Shute*,⁹⁴ the plaintiffs suffered injury on a cruise ship off the coast of Mexico.⁹⁵ The passenger ticket stipulated that all disputes relating to the voyage were to be adjudicated in Florida, where the defendant had its principal place of business.⁹⁶ When the plaintiffs sued in Washington—their home state—the trial court dismissed the action on a *forum non conveniens* basis. Although the court of appeals reversed the district court,⁹⁷ the Supreme Court upheld the lower court dismissal, holding the exclusive jurisdiction clause enforceable. The Supreme Court held that the Shutes had not discharged their “heavy burden of proof” required to demonstrate inconvenience under the *Bremen* test. The Court noted that Florida was not a “remote alien forum” and that the dispute was not more amenable to litigation in Washington rather than Florida.⁹⁸ Although the Court stated that forum selection clauses in standard form passage contracts were subject to additional scrutiny for fairness, there was no bad-faith on part of the defendant by selecting the forum where their business was primarily based.⁹⁹

In *Carnival*, the Supreme Court decided that a jurisdiction clause that designates a party's home state as the venue for litigation in a standard form

⁹¹ *Id.* at 16.

⁹² GARY BORN & DAVID WESTIN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 245 (2d ed. 1994).

⁹³ See, e.g., Lee Goldman, *My Way and the Highway: The Law and Economics of Choice of Forum Clauses in Consumer Form Contracts*, 86 NW. U.L. REV. 700 (1992) and Edward A. Purcell, Jr., *Geography as a Litigation Weapon: Consumers, Forum-Selection Clauses, and the Rehnquist Court*, 40 UCLA L. REV. 423 (1992).

⁹⁴ 499 U.S. 585 (1991).

⁹⁵ *Id.* at 588.

⁹⁶ *Id.* at 587-88.

⁹⁷ *Id.* at 588. The court of appeals reversed the decision holding that: (1) a standard form jurisdiction clause was unenforceable because it was not freely bargained for; and (2) there was “evidence in the record to indicate that the Shutes are physically and financially incapable of pursuing [the] litigation in Florida.” *Id.* at 589 (internal quotations omitted).

⁹⁸ *Id.* at 594.

⁹⁹ *Id.* at 595.

passage contract is generally reasonable.¹⁰⁰ To support this decision, the Court provided a number of economic rationales. First, a carrier has a legitimate interest in limiting the potential venues where it can be sued.¹⁰¹ Second, a forum selection clause provides predictability in dispute resolution, reducing the time and expense involved in pre-trial jurisdiction litigation.¹⁰² Third, the Court noted that it is likely that the costs saved by the jurisdiction clause would be passed on to consumers by way of reduced fares.¹⁰³

U.S. courts have liberally applied the *Bremen* test in the context of shrink-wrap and click-wrap agreements.¹⁰⁴ In consumer contexts, U.S. courts generally enforce jurisdiction clauses, suggesting that the burden of proof to establish inconvenience is indeed “heavy.”¹⁰⁵ The cases illustrate that forum selection clauses designating the software manufacturer’s or online service provider’s home state as the venue for litigation are prima facie reasonable and will generally be enforced.

U.S. courts’ propensity to enforce jurisdiction clauses within wrap agreements is vividly illustrated in litigation determining whether a jurisdiction clause can be used to effectively hedge the risk of consumer class actions. Specifically, a number of shrink-wrap and click-wrap cases involve challenges to forum clauses of Virginia companies that select Virginia as the proper venue for litigation. Virginia is one of the only two states that do not allow class action suits.¹⁰⁶ The majority of courts have

¹⁰⁰ *Id.* at 593.

¹⁰¹ *Id.*

¹⁰² *Id.* at 593-94.

¹⁰³ *Id.* at 594.

¹⁰⁴ Forum selection clauses were enforced in a number of cases. See *Forest v. Verizon Comm. Inc.*, 805 A.2d 1007 (D.C. Cir. 2002); *DeJohn v. The .TV Corp.*, 245 F. Supp. 2d 913 (C.D. Ill. 2003); *Koch v. America Online, Inc.*, 139 F. Supp. 2d 690 (D. Md. 2000); *Kilgallen v. Network Solutions, Inc.*, 99 F. Supp. 2d 125 (D. Mass. 2000); *America Online, Inc. v. Booker*, 781 So.2d 423 (Fla. Dist. Ct. App. 2001); *Management Computer Controls, Inc. v. Charles Perry Const., Inc.*, 743 So.2d 627 (Fla. Dist. Ct. App. 1999) (applying the forum clause only to contract claims, not to the statutory claims, which were severable); *1-A Equip. Co. v. Icode, Inc.*, 2003 Mass. App. Div. 30 (Mass. App. Div. 2003); *Caspi v. Microsoft Network*, 732 A.2d 528 (N.J. Super. Ct. App. Div. 1999); *Groff v. America Online, Inc.*, 1998 WL 307001 (R.I. Super., May 27, 1998); *Barnett v. Network Solutions, Inc.*, 38 S.W.3d 200 (Tex. App. 2001).

¹⁰⁵ Forum selection clauses were enforced in a number of consumer cases. See *Forest v. Verizon Comm. Inc.*, 805 A.2d 1007 (D.C. Cir. 2002); *DeJohn v. The .TV Corp.*, 245 F. Supp. 2d 913 (C.D. Ill. 2003); *Kilgallen v. Network Solutions, Inc.*, 99 F. Supp. 2d 125 (D. Mass. 2000) (rejecting a claim that enforcing a forum selection clause would be unreasonable as it would do considerable damage by forcing a small business to pursue the claim interstate); *America Online, Inc. v. Booker*, 781 So.2d 423 (Fla. Dist. Ct. App. 2001); *Caspi v. Microsoft Network*, 732 A.2d 528 (N.J. Super. Ct. App. Div. 1999); *Groff v. America Online, Inc.*, 1998 WL 307001 (R.I. Super. May 27, 1998); *Barnett v. Network Solutions, Inc.*, 38 S.W.3d 200 (Tex. App. 2001).

¹⁰⁶ See *Forest*, 805 A.2d at 1011.

upheld the validity of Virginia jurisdiction clauses regardless of the consequent denial of class action procedures.¹⁰⁷ These cases emphasize that the plaintiffs enjoy individual remedies in Virginia's small claims courts under the Virginia Consumer Protection Act of 1977. It seems that the class action institution is generally not considered a "fundamental policy of the forum" that, under *The Bremen*, allows a plaintiff to proceed in breach of a forum selection clause. This weight of authority indicates that under the *Carnival* approach, U.S. courts will send an aggrieved plaintiff to the other end of the country to recover a small claim from an online or software transaction gone bad, even when the size of the claim is smaller than the cost of travel.

It must be noted that none of the shrink-wrap or click-wrap cases decided thus far has determined the enforceability of exclusive jurisdiction clauses in the international context. While it is clear that *The Bremen* applies to international commercial contracts, it is uncertain whether *Carnival* would permit the enforcement of an international jurisdiction clause in a consumer context. Although *Carnival* expounds a very liberal approach to forum selection clauses, the dissenting opinion noted that the majority did not make clear whether the clause would apply if the Shutes were required to sue in Panama, Carnival's place of incorporation.¹⁰⁸ Even if exclusive jurisdiction clauses are held unenforceable against consumers in an international context, they undeniably impose a significant burden on consumers in a domestic context.

b. UCITA: Section 110

The UCITA's rule on forum selection formalizes the post-*Carnival* position under U.S. law in respect of mass-market EULAs. Section 110 of the UCITA provides that "[t]he parties in their agreement may choose an

¹⁰⁷ See generally, *id.* See also *Koch*, 139 F. Supp. 2d 690; *Booker*, 781 So.2d 423. However, in *America Online, Inc. v. Superior Court of Alameda County*, 108 Cal. Rptr. 2d 699 (Cal. Ct. App. 2001) the court held that an exclusive Virginia jurisdiction clause in a click-wrap contract was unenforceable. In support of its decision, the court noted that the California Consumers Legal Remedies Act ("CLRA") contained a provision that voids any purported waiver of rights under the CLRA as contrary to California public policy. *Id.* at 702. The court held that enforcement of the forum selection clause would be the functional equivalent of a contractual waiver of the consumer protections under the CLRA and therefore prohibited under California law. *Id.* at 710. The court based its rationale largely on the fact that under the CLRA there was a right of class action that was effectively denied if the consumer had to sue under the Virginia Consumer Protection Act. *Id.* at 712. In *Williams v. America Online, Inc.*, 2001 WL 135825 (Mass. Super. Ct. Feb. 8, 2001) the court applied similar reasoning as in *America Online v. Superior Court* in refusing to enforce a Virginia exclusive jurisdiction clause.

¹⁰⁸ *Carnival*, 499 U.S. at 604 n.6 (Stevens, J. dissenting).

exclusive judicial forum unless the choice is unreasonable and unjust.”¹⁰⁹ The official comment provides that “[c]hoice of a forum at a party’s location is ordinarily reasonable.”¹¹⁰ The comment notes that this approach is largely justified due to the inherent uncertainty that underlies e-commerce, in that a business is exposed to the jurisdictions of “all states and all countries.”¹¹¹ Citing the reasoning of the Supreme Court in *Carnival* with respect to passenger tickets, the importance of jurisdiction clauses in e-commerce is highlighted because of their capacity to mitigate potential costs of multi-jurisdictional exposure.¹¹²

While the U.S. position under the UCITA and common law is clear and predictable for business, the strong enforcement policy at the consumer level must be questioned. Because consumer claims are typically small, the cost of travel is likely to be prohibitively expensive in relation to the sum in dispute. In such cases, the enforcement of the jurisdiction clause will usually determine the outcome of the entire dispute, leaving the consumer without redress. If Internet consumers realize that their access to civil justice is attenuated the further they shop from home, there is a real risk that they will start shopping locally, discriminating against foreign retailers or service providers. The clarity and predictability for business that is a result of strong enforcement policy under U.S. law comes at the expense of uncertainty and risk for the consumer.

2. *Exclusive Jurisdiction Clauses in the European Union: Protecting Consumer Rights*

Unlike U.S. law, E.U. law recognizes that consumers must be protected against the risk of international litigation. At the business-to-business level, the enforcement of a valid jurisdiction clause is mandatory under E.U. law. However, if one of the parties is a consumer, the clause has no effect. The result is that the burden of international litigation is squarely placed on the licensor or online service provider.

At the business-to-business level, E.U. law provides an enforcement policy to exclusive jurisdiction clauses that matches that of the United States. The Brussels Regulation¹¹³ and Lugano Convention¹¹⁴—which apply

¹⁰⁹ UCITA, *supra* note 13, § 110(a).

¹¹⁰ *Id.* § 110 cmt 3.

¹¹¹ *Id.* Emphasis in original.

¹¹² *Id.*

¹¹³ Council Regulation 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2001 O.J. (L 12) 1 [hereinafter Brussels Regulation].

between members of the European Union and other European countries—are the only functional international treaties that address the use of jurisdiction clauses. The default position under these treaties is that a defendant must be sued in its domicile or the place of performance of its contractual duties.¹¹⁵ The treaties provide that where the parties use a jurisdiction clause, the venue specified in that clause “shall” have exclusive jurisdiction over the matter.¹¹⁶ If one of the parties is domiciled in the selected jurisdiction, enforcement of the clause is mandatory; there is no residual discretion for the specified court to decline jurisdiction or for other courts to accept jurisdiction.¹¹⁷

The Brussels Regulation and Lugano Convention provide protection for the consumer against the risk of international litigation. In relation to consumer contracts, a jurisdiction agreement has no effect unless it is entered into after the dispute has arisen.¹¹⁸ Without a post-dispute agreement, consumers are allowed to sue in either their home state or the defendant’s home state.¹¹⁹ This consumer protection provision is subject to either of the following requirements, which are substantially equivalent to the requirement of “purposeful availment” under U.S. law:¹²⁰ (1) the “contract has been concluded with a person who pursues commercial or professional activities in the [venue] of the consumer’s domicile or, by any means, directs such activities to that [venue]”;¹²¹ or (2) the “contract was preceded by a specific invitation addressed to [the consumer] or by advertising”.¹²²

E.U. law emphasizes consumer protection over freedom of contract in its regulation of exclusive jurisdiction clauses. Although such an approach is likely to expose a business to more jurisdictions and thus entails greater

¹¹⁴ 88/592/EEC, Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 1998 O.J. (L319) 9 [hereinafter Lugano Convention].

¹¹⁵ Brussels Regulation, *supra* note 113, arts. 5(1)(a) & 6; Lugano Convention, *supra* note 114, arts. 5(1) & 6.

¹¹⁶ Brussels Regulation, *supra* note 113, art. 23(1); Lugano Convention, *supra* note 114, art. 17(1).

¹¹⁷ SMITHS CONFLICT OF LAWS 254 (John O’Brien, ed., 2d ed. 1999). See also DICEY AND MORRIS THE CONFLICT OF LAWS 425 & 441 (Lawrence Collins, ed., 13th ed. 2000), where the author discusses the lack of discretion under article 17 of the Lugano Convention and article 17 of the Brussels Convention. The Brussels Convention is the predecessor to the Brussels Regulation. Article 17 of the Brussels Convention is virtually identical to article 23 of the Brussels Regulation.

¹¹⁸ Brussels Regulation, *supra* note 113, art. 15; Lugano Convention, *supra* note 114, art. 14.

¹¹⁹ Brussels Regulation, *supra* note 113, art. 17; Lugano Convention, *supra* note 114, art. 15.

¹²⁰ See Assad Siddiqui, *Welcome To the City of Bytes? An Assessment of the Traditional Methods Employed in the International Application of Jurisdiction over Internet Activities — Including a Critique of Suggested Approaches*, 14 N.Y. INT’L L. REV. 43, 82-83 (2001).

¹²¹ Brussels Regulation, *supra* note 113, art. 15(1)(c).

¹²² Lugano Convention, *supra* note 114, art. 13(3)(a).

business to jurisdiction in “all states and all countries.” A business is only exposed to jurisdictions where it directs its business or advertising.

3. *Exclusive Jurisdiction Clauses in Australia: Unacceptable Legal Uncertainty*

In contrast to the strong enforcement policy that exists in the United States and European Union, Australian law gives a plaintiff more scope to avoid an exclusive jurisdiction clause. This extra scope is largely due to the discretion Australian judges retain to not enforce such clauses because of the public policy rationale that a court’s jurisdiction cannot be ousted by agreement.¹²³ In light of the progressive approaches of the United States and the European Union, the retention of this judicial discretion is parochial and does little for certainty and predictability in e-commerce transactions.

Under Australian law, judicial discretion will be exercised in favor of the plaintiff if the plaintiff can demonstrate that there are “strong grounds” or “exceptional circumstances” that justify a continuance of proceedings in the forum.¹²⁴ In a widely cited passage, Justice Brandon in *The Eleftheria*¹²⁵ summarized the factors that Anglo-Australian courts have tended to take into account in determining whether to invalidate an exclusive jurisdiction clause:

- (a) In what country the evidence on the issues of fact is situated, or more readily available, and the effect of that on the relative convenience and expense of trial as between the English and foreign courts;
- (b) Whether the law of the foreign court applies and, if so, whether it differs from English law in any material respects;
- (c) With what country either party is connected, and how closely;
- (d) Whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages;
- (e) Whether the plaintiffs would be prejudiced by having to sue in the foreign court because they would—

¹²³ *Id.*

¹²⁴ *See Akai Pty. Ltd. v. People’s Ins. Co.* (1996) 141 A.L.R. 374, 394.

¹²⁵ *The Eleftheria* [1969] 2 All E.R. 641.

- (e) Whether the plaintiffs would be prejudiced by having to sue in the foreign court because they would—
- (i) be deprived of security for that claim,
 - (ii) be unable to enforce any judgment obtained
 - (iii) be faced with a time-bar not applicable in England,
or
 - (iv) for political, racial, religious or other reasons be unlikely to get a fair trial.¹²⁶

These factors are not exhaustive; courts take into account all the circumstances of a particular case.¹²⁷ In the same vein, it has been noted by Justice Dixon in *Huddart Parker v. The Ship Hill Mill*,¹²⁸ that the “discretion has not been restricted by any exclusive definition of the circumstances which will warrant a refusal of a stay.”¹²⁹

Despite the doctrinal requirement that “strong grounds” are required to negate an exclusive jurisdiction clause, Australian cases illustrate that courts regularly refuse to enforce such clauses on the grounds that the balance of procedural convenience favors a trial in the local forum.¹³⁰ Where a plaintiff can demonstrate that the majority of witnesses reside in the forum, a court is unlikely to enforce an exclusive jurisdiction clause.¹³¹ Additionally, if the plaintiff can demonstrate that the foreign forum is unlikely to apply an Australian mandatory remedial rule,¹³² or that the plaintiff will lose a legitimate juridical advantage,¹³³ the clause will be deemed unenforceable even if the parties are large commercial entities with equal bargaining power.

The two reported cases that have considered an exclusive jurisdiction clause in a non-negotiated standard form context give little guidance as to the circumstances when they will be enforced. In *Hopkins v. Difrex Societe Anonyme*,¹³⁴ the court refused to enforce a French jurisdiction clause in an employment contract because most of the witnesses resided in Australia and

¹²⁶ *Id.* at 645.

¹²⁷ *Id.*

¹²⁸ (1950) 81 C.L.R. 502.

¹²⁹ *Id.* at 509.

¹³⁰ See Richard Garnett, *The Enforcement of Jurisdiction Clauses in Australia*, 21(1) U. NEW S. WALES L.J. 1, 11 (1998).

¹³¹ *Id.* at 11-16.

¹³² See *Akai Pty. Ltd. v. People's Ins. Co.* (1996) 141 A.L.R. 374, 375.

¹³³ See Garnett, *supra* note 130.

¹³⁴ [1966] 1 N.S.W.R. 797.

Australian law was to govern the dispute. Garnett suggests that the court might have been influenced by the disparate bargaining power between the two parties.¹³⁵ However, in *Oceanic Shipping v. Fay*,¹³⁶ it was indicated by Justice Brennan that he would have sent a consumer plaintiff to Athens if an exclusive jurisdiction clause had been properly incorporated into a cruise ticket:

In my opinion, had the plaintiff been bound by the clause, there would have been no reason the relief to which the plaintiff was entitled should not have been determined by the Athenian courts. Before a court can refuse to enforce a contractual stipulation in order to allow a plaintiff a right to sue which he has bargained away the court must have substantial grounds prevailing over what Dixon J. in *The "Mill Hill"* (at 509) called "a strong bias in favour of maintaining the special bargain."¹³⁷

This conclusion is clearly obiter dicta in that, as the clause was not part of the contract, the case was decided on *forum non conveniens* grounds in the plaintiff's favor. Furthermore, Brennan's comments must be considered in light of the fact that two of the five justices were prepared to order a stay without the jurisdiction clause being incorporated in the contract.¹³⁸

It has been observed that where there is a discrepancy in bargaining power, Australian courts have a greater willingness to invalidate foreign jurisdiction clauses to aid weaker plaintiffs.¹³⁹ This observation is difficult to justify because of the scant authority on the point and the obiter dictum from Justice Brennan in *Oceanic* that suggests otherwise. The conclusion seems to be based on the assumption that if forum selection clauses are relatively easy to avoid where the parties are commercial entities and the plaintiff shows that procedural convenience is best served by litigation in the forum, then *a fortiori*, a weak plaintiff who can demonstrate the same

¹³⁵ Garnett, *supra* note 130, at 15.

¹³⁶ (1988) 165 C.L.R. 197. The facts of *Oceanic* are similar to *Carnival*; the plaintiff suffered injury on a cruise ship in the Greek Islands and an exclusive jurisdiction clause on the back of the ticket limited litigation to Athens. An important difference between two cases is that the court in *Oceanic* considered the clause not to be a part of the contract because the ticket was not given to the plaintiff until after his arrival in Athens two days before the cruise. This fact precluded any reasonable notice of the terms.

¹³⁷ *Id.* at 231.

¹³⁸ A stay was denied by majority judgement of 3-2. *Id.* at 197-99.

¹³⁹ See Copyright Law Review Committee, *supra* note 82, at 188. See also Transnational Jurisdiction in Cyberspace Project, *Comment—Australia* 69, available at <http://www.kentlaw.edu/cyberlaw/docs/foreign/Australia-Swinson.html> (last visited May 21, 2004).

convenience should be able to avoid the clause. Although this assumption may have some merit, Justice Brennan's comments in *Oceanic* suggest that it may be hard to argue that a weaker local plaintiff should be able to proceed in breach of a foreign jurisdiction clause where the balance of procedural convenience favors the contractually designated forum.

The current Australian case law does not provide guidance on whether exclusive jurisdiction clauses will be enforced in the e-commerce context. While some cases have emphasized "a strong bias in favour of maintaining the special bargain"¹⁴⁰ other cases demonstrate that "Australian courts have, at times, excessively sought to protect their residents from having to litigate overseas."¹⁴¹ Such uncertainty encourages parties to engage in wasteful litigation over whether jurisdiction clauses should be enforced.

4. *Jurisdiction Clauses: Advocating a New Australian Position*

When compared to the U.S. and E.U. positions on exclusive jurisdiction clauses, Australian law is undeniably the most unwelcoming toward contractual forum selection. Australian courts need to more strictly enforce exclusive jurisdiction clauses in business-to-business transactions in order to bring Australian law in line with the laws of other developed countries. However, in the business-to-consumer context, the burden of international litigation should be placed on the software company or online service provider.

In order to align Australian law with the laws of other developed countries, Australian courts must more strictly enforce commercial exclusive jurisdiction clauses. Furthermore, Australia's discretionary enforcement of international exclusive jurisdiction clauses does not make sense in light of the mandatory enforcement of international binding arbitration clauses under Australia's International Arbitration Act 1974 (Cth).¹⁴² In business-to-business transactions, rather than adhering to the unpredictable "strong reasons" approach, this Article suggests that Australian courts adopt a stricter test. U.S. jurisprudence provides a potential guide for Australian courts; the "unfair and unreasonable" test under U.S. law provides a more predictable test by casting a heavier burden of proof on the plaintiff who wishes to invalidate the clause.¹⁴³ Furthermore, the U.S. test considerably

¹⁴⁰ See *supra* note 137 and accompanying text.

¹⁴¹ Garnett, *supra* note 130.

¹⁴² Bond Corp. Pty. Ltd. v. Thiess Contractors Pty. Ltd. (1987) 14 F.C.R. 193.

¹⁴³ The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 16 (1972).

reduces the scope for the judge to overrule a jurisdiction clause on the basis that procedural convenience favors trial in the local forum.¹⁴⁴

In the business-to-consumer context, Australian law should adopt the protective policy of the European Union. U.S. law inappropriately places the risk of international litigation on the consumer. U.S. common law and the UCITA essentially allow software manufacturers and online service providers to specify their place of business as the venue for litigation. Given the rules of forum selection articulated in *Carnival*, it is unlikely that a U.S. firm engaging in mass-market online transactions would choose a venue other than its home state. By deeming such a selection “ordinarily reasonable,” U.S. law burdens the consumer with the risk of international litigation.

The inadequacy of the U.S. approach is revealed by critically considering the largely economic reasoning employed by the U.S. Supreme Court in *Carnival* within an e-commerce context.¹⁴⁵ The argument that a software manufacturer or online service provider has a legitimate interest in limiting the venues where it can be sued is inadequate to support exclusive jurisdiction clauses. This argument is somewhat truistic and applies equally to consumers who have a legitimate interest in limiting the venues where they may have to make their claims. In other words, plaintiffs and defendants both have an equal interest in being able to sue in their own backyards. The *Carnival* approach simply places the risk of foreign litigation of the consumer, who is unlikely to anticipate such a risk or be in a position to take steps to insure against it.

Exclusive jurisdiction clauses arguably ensure predictability by reducing litigation over the forum in which parties may advance their claims. However, strictly enforcing consumer jurisdiction clauses will have a minimal effect on the volume of preliminary jurisdictional hearings in consumer cases. Instead of hearing motions by the defendant based on “minimum contacts” or *forum non conveniens* considerations, Australian courts would hear arguments by plaintiffs who claim that such clauses effectively deny them their day in court, or deny them the benefit of a substantive or procedural rule.

Finally, the notion that software manufacturers and online service providers will pass on their savings to consumers is hard to justify in the

¹⁴⁴ The plaintiff must show that the inconvenience is so great that they would be “denied their day in court.” *Id.* at 18.

¹⁴⁵ See *Carnival Cruise Lines v. Shute*, 499 U.S. 585, 593-94 (1991). See *supra* notes 101-103 and accompanying text. This reasoning was cited approvingly in the official comment to the forum selection section of UCITA.

context of the Internet economy. It may be true that in a perfect market, as a result of robust competition, a vendor may be forced to pass on to the consumer whatever savings it may incur. However, the information economy is characterized by the existence of large monopolies that are strengthened by “network effects.”¹⁴⁶ One only needs to look at the markets for PC operating systems and office applications, online auction services, and online retail to see that they are dominated by the likes of Microsoft, eBay, and Amazon respectively. Against this monopolistic backdrop, it is more likely that cost savings will primarily be passed on to shareholders rather than consumers.

Australia should adopt the consumer protection approach to the enforcement of jurisdiction clauses evinced in the Brussels Regulation and Lugano Convention. This approach places the risk of foreign litigation on software companies and online service providers who are more likely to be able to insure against it. Predictability for consumers in the online environment would be further increased, making e-commerce a more attractive purchasing avenue.

B. Binding Arbitration Clauses

Arbitration clauses are similar to jurisdiction clauses in that both clauses aim to provide a predictable forum for dispute resolution. Furthermore, both clauses are used to limit the risks of international litigation by specifying a court that shall have jurisdiction or the seat of arbitration. Arbitration clauses additionally limit the risk of protracted litigation by streamlining certain procedural aspects. For example, discovery may be limited in duration and witness examination may be conducted informally.

Unlike jurisdiction clauses, arbitration clauses are supported by a strong international framework that provides for the recognition of both arbitration agreements and arbitration awards—the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.¹⁴⁷ Article 2 of the Convention provides that:

¹⁴⁶ See Lindsay, *supra* note 73, at 111-15.

¹⁴⁷ Recognition and Enforcement of Foreign Arbitral Awards, opened for signature June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3 [hereinafter New York Convention]. In relation to jurisdiction agreements, The Hague Conference on Private International law produced a preliminary draft convention in 1999. *Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters*, Oct. 30, 1999, available at <http://www.hcch.net/e/conventions/draft36e.html> (last visited May 21, 2004). The Draft Hague Convention deals with numerous jurisdictional issues and issues related to the enforcement of foreign judgements. However, the possibility of the Draft Hague Convention coming into

[e]ach contracting state shall recognize an agreement under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

Article 2(III) further stipulates that:

[t]he court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, *shall*, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.¹⁴⁸

Article 2 provides a mandatory enforcement procedure for arbitration agreements—unless the agreement is “invalid” or “inoperative” the court must enforce it.¹⁴⁹ The New York Convention has been ratified by 134 nations and is perceived as representing customary international law.¹⁵⁰ However, the convention permits signatories to enact a commercial reservation—a signatory can “declare that it will apply the Convention only to differences arising out of legal relationships . . . which are considered as commercial under the national law of the State making such declaration.”¹⁵¹ The commercial reservation is intended to exclude, among other things, consumer contracts from the scope of the New York Convention.¹⁵² Approximately one-third of the signatories have applied this commercial reservation, including the United States.¹⁵³

force anytime soon is in doubt in light of strong opposition coming from the United States. Mary Shannon Martin, Note, *Keep it Online: The Hague Convention and the Need for Online Alternative Dispute Resolution in International Business-to-Consumer E-Commerce*, 20 B.U. INT'L L.J. 125, 143-47 (2002).

¹⁴⁸ New York Convention, *supra* note 147, art. II § 3 (emphasis added).

¹⁴⁹ Richard Garnett, *International Arbitration Law: Progress Toward Harmonisation*, 3(2) MELBOURNE J. INT'L L. 400, 403 (2002).

¹⁵⁰ *Id.* See also United Nations Commission on International Trade Law, *Status of Conventions and Model Laws*, available at <http://www.uncitral.org/english/status/status-e.htm> (last visited May 21, 2004) [hereinafter UNCITRAL].

¹⁵¹ New York Convention, *supra* note 147, art. 1(3).

¹⁵² Karen Stewart & Joseph Matthews, *Online Arbitration of Cross-Border, Business to Consumer Disputes*, 56 U. MIAMI L. REV. 1111, 1135-36 (2002).

¹⁵³ Jane L. Volz & Roger S. Haydock, *Foreign Arbitral Awards: Enforcing the Award Against the Recalcitrant Loser*, 21 WM MITCHELL L. REV. 867, 879 & 888 (1996).

Despite the settled nature of the enforceability of commercial arbitration agreements, the enforceability of these contractual terms remains debatable in some jurisdictions when found within consumer contracts. While U.S. law is very receptive to consumer arbitration clauses, E.U. law effectively imposes an outright ban. Currently, Australian law does not afford consumers additional protection from arbitration clauses, and it would seem that, at the international level, enforcement of a consumer arbitration clause is mandatory. This section argues that Australia should go its own way and not follow the extreme positions taken by the United States and European Union. Australian courts should be empowered to rewrite arbitration clauses to reach a fair outcome. An outright ban on consumer arbitration clauses ignores the procedural benefits that arbitration provides, while a blanket pro-enforcement policy ignores the fact that arbitration clauses can be drafted in a way that unfairly prejudices a consumer's right of redress.

1. Binding Arbitration Clauses in the United States: Strict Enforcement of Arbitration Agreements

In the United States, the common law was generally hostile to arbitration clauses, as they were perceived to be ouster agreements and hence contrary to public policy.¹⁵⁴ However, legislative developments in state, federal, and international law generally provide that arbitration agreements should be enforced like any other contract. Section 2 of the Federal Arbitration Act ("FAA")¹⁵⁵ provides that an arbitration clause "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."¹⁵⁶ The FAA applies to all written contracts involving interstate or foreign commerce and is thus highly applicable to e-commerce.¹⁵⁷ The FAA also enacts the New York Convention into U.S. domestic law.¹⁵⁸ However, because the United States has applied the commercial reservation, the FAA does not apply to non-commercial consumer transactions in the international context.¹⁵⁹ The FAA still applies, nevertheless, to consumer transactions in the domestic context.

¹⁵⁴ *Comb v. PayPal, Inc.*, 218 F. Supp. 2d 1165, 1170 (N.D. Cal. 2002).

¹⁵⁵ 9 U.S.C. § 2 (2004).

¹⁵⁶ *Id.*

¹⁵⁷ 9 U.S.C. § 1 provides that the title applies to contracts arising from "commerce among the several States or with foreign nations".

¹⁵⁸ *Id.* § 201.

¹⁵⁹ *Id.* § 202. *Stewart & Matthews, supra* note 152, at 1133.

The FAA evinces a “strong federal policy supporting arbitration.”¹⁶⁰ The FAA does not provide for broad judicial discretion to not enforce domestic or international arbitration clauses. Rather, courts are compelled to order a stay when confronted with a valid arbitration agreement.¹⁶¹ Under the FAA, the only way to invalidate an arbitration agreement is to demonstrate that an equitable or legal contract rule vitiates that agreement.¹⁶² To avoid the clause, the plaintiff must, for example, prove lack of proper assent or that the clause is void due to unconscionability, duress, or undue influence. U.S. federal courts are very unreceptive to arguments that the agreement is void due to public policy, or that dispute is not amenable to arbitration.¹⁶³

In the context of EULAs and e-commerce standard forms, state and federal courts in the United States have generally upheld the pro-arbitration policy underlying the FAA and have enforced arbitration clauses.¹⁶⁴ The recent reported cases all involve consumers and have generally considered clauses that only permit individual, rather than class actions.¹⁶⁵ However, two consumer cases demonstrate that unconscionability arguments leveled at arbitration clauses may be invoked successfully, although with quite different possible outcomes. One court chose to entirely invalidate the arbitration agreement while the other chose to enforce the agreement after correcting the unconscionable aspect.

The judgment of the federal court in *Comb v. PayPal*¹⁶⁶ indicates that an arbitration clause may be wholly invalidated on the basis of unconscionability. The defendant, PayPal, provided a consumer-to-consumer payment service that would debit a payer’s nominated credit card or bank account and provide the payee with a PayPal account to access the money.¹⁶⁷ In 2001, PayPal’s usage boomed from ten thousand to twelve million users, causing severe staffing shortages. Mismanaged customer

¹⁶⁰ THOMAS CARBONNEAU, ALTERNATIVE DISPUTE RESOLUTION: MELTING THE LANCES AND DISMOUNTING THE STEEDS 107 (1989).

¹⁶¹ *Id.* at 106.

¹⁶² 9 U.S.C. § 2.

¹⁶³ Donna M. Bates, *A Consumer’s Dream or a Pandora’s Box: Is Arbitration a Viable Option for Cross-border Consumer Disputes?*, 27 FORDHAM INT’L L.J. 823, 874-77 (2004).

¹⁶⁴ Arbitration clauses were enforced in a number of cases. See *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1997); *Lieschke v. Real Networks*, 2000 U.S. Dist LEXIS 1683 (N.D. Ill. Feb. 10, 2000); *O’Quin v. Verizon Wireless*, 256 F. Supp. 2d 512 (M.D. La. 2003); *Westendorf v. Gateway 2000, Inc.*, 41 U.C.C. Rep. Serv. 2d 1110 (Del. Ch. 2000); *Levy v. Gateway 2000, Inc.*, 33 U.C.C. Rep. Serv. 2d 1060 (N.Y. Sup. Ct. 1997).

¹⁶⁵ All the cases cited *supra* note 164 involve consumer transactions.

¹⁶⁶ 218 F. Supp. 2d 1165 (N.D. Cal. 2002).

¹⁶⁷ *Id.* at 1166.

service resulted in a backlog of over 100,000 unanswered complaints.¹⁶⁸ The plaintiffs argued that PayPal had profited from their negligence by retaining funds from complaints that have been abandoned because of consumer frustration.¹⁶⁹ PayPal's click-wrap user agreement had a binding arbitration clause that (1) prohibited consolidation of claims, (2) selected Santa Clara County in California as the place of dispute, and (3) selected the American Arbitration Association rules to govern the dispute settlement.¹⁷⁰

The court held that the arbitration agreement was a contract of adhesion and thus procedurally unconscionable. The court further held that the arbitration agreement was substantially unconscionable firstly, due to a lack of mutuality, and secondly, due to the practical effects of the arbitration clause in relation to consolidation of claims, costs of arbitration, and venue.¹⁷¹ The court noted that precluding the consolidation of small claims was substantially unconscionable because of the small nature of the disputes at issue.¹⁷² Another strike against the clause was the fact that arbitration was to follow the American Arbitration Association's commercial, as opposed to consumer, rules and thus would require the plaintiffs to pay their own costs.¹⁷³ Finally, PayPal's choice of venue was unconscionable given that its customers were located all over the country and the average transaction was only US\$ 55.¹⁷⁴

PayPal stands in isolation from and is out of line with existing U.S. authority. Counsel for PayPal highlighted federal cases where arbitration agreements barring consolidation of individual claims were enforced.¹⁷⁵ The court ignored this line of authority and relied instead on a recent California decision *Szetela v. Discover Bank*¹⁷⁶ to bolster its position.¹⁷⁷ However, *Szetela* has since been overturned on appeal in favor of the federal line of authority cited by counsel for PayPal.¹⁷⁸ *PayPal*'s finding in relation to choice of venue seemingly ignores the *Carnival* holding that there is nothing inherently unreasonable about choice of venue in a defendant's jurisdiction.

¹⁶⁸ *Id.* at 1167.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 1170.

¹⁷¹ *Id.* at 1172-77.

¹⁷² *Id.* at 1175.

¹⁷³ *Id.* at 1176.

¹⁷⁴ *Id.* at 1177.

¹⁷⁵ See, e.g., *Champ v. Siegal Trading Co*, 55 F.3d 269 (7th Cir. 1995) and *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), cited in *Paypal*, 218 F.Supp. 2d at 1176.

¹⁷⁶ 118 Cal. Rptr. 2d 862 (Cal. Ct. App. 2002).

¹⁷⁷ *Paypal*, 218 F. Supp. 2d at 1176.

¹⁷⁸ *Discover Bank v. Superior Court of Los Angeles County*, 105 Cal. App. 4th 326 (Cal. Ct. App. 2003).

Additionally, *PayPal* is unlikely to be useful authority in avoiding a class action arbitration waiver because there were significant other grounds in the case, such as the lack of mutuality, to hold the agreement unconscionable.¹⁷⁹

Another U.S. case indicates that if the designated arbitral process is unconscionable, the court may appoint a different arbitrator to decide the dispute or to otherwise correct the deficiencies in the arbitration clause. In *Brower v. Gateway 2000*,¹⁸⁰ the impugned aspect of the clause was the appointment of a relatively expensive arbitrator—the International Chamber of Commerce. The court deemed that the International Chamber of Commerce’s arbitration filing fees were prohibitively expensive considering the amounts claimed and were therefore unconscionable.¹⁸¹ However, instead of allowing the action to proceed in court, as in *PayPal*, the matter was referred back to the trial court to seek appointment of a cheaper arbitrator pursuant to section 5 of the FAA.¹⁸² It is submitted that this is the preferable judicial approach when dealing with an arbitration clause that has burdensome procedural rules for a particular party. To simply deny the clause any validity when only one aspect of it is onerous frustrates the pro-arbitration policies of the FAA.

2. *Binding Arbitration Clauses in the European Union: Protecting Consumer Rights*

Unlike U.S. law, E.U. law is extremely hostile to the use of arbitration clauses in consumer contracts. Because most European countries have enacted the New York Convention, arbitration clauses in international commercial contracts are generally enforceable.¹⁸³ However, regardless of whether the New York Convention’s commercial reservation has been employed, arbitration clauses in consumer contracts are rendered void under

¹⁷⁹ In relation to the lack of mutuality, although the arbitration clause permitted either party to gain a preliminary injunction in relation to assets in dispute prior to arbitration, another clause allowed PayPal to unilaterally suspend accounts, and freeze funds within, during the course of an investigation. The court reasoned that the costs of gaining an injunction to unfreeze the account are prohibitively expensive in relation to the amount frozen. *Paypal*, 218 F.Supp. 2d at 1174-75. The contract also lacked mutuality in respect of PayPal’s ability to unilaterally alter the agreement. PayPal did not demonstrate any “commercial realities” under the circumstances of the business that required such one-sidedness. *Id.* at 1174-75.

¹⁸⁰ 246 A.D.2d 246 (N.Y. App. Div. 1998).

¹⁸¹ *Id.* at 254-255.

¹⁸² *Id.*

¹⁸³ See UNCITRAL, *supra*, note 150.

the Unfair Terms in Consumer Contracts Directive (“UTCCD”).¹⁸⁴ Article 3(1) of the UTCCD provides that:

[a] contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer.

Article 6 requires E.U. member states to enact laws that render unenforceable unfair terms against a consumer. The Annex to the UTCCD provides a non-exhaustive list of terms that may be regarded as unfair. A term is considered unjust if it has the effect of

excluding or hindering the consumer’s right to take legal action or exercise any other legal remedy, particularly by requiring the *consumer to take disputes exclusively to arbitration not covered by legal provisions*, unduly restricting the evidence available to him or imposing on him a burden of proof which, according to the applicable law, should lie with another party to the contract.¹⁸⁵

Although the meaning of “arbitration not covered by legal provisions” is unclear, the U.K. Office of Fair Trading interpreted the above passage to bar the use of compulsory arbitration clauses in consumer contracts.¹⁸⁶ Likewise, French law takes a similar position when an arbitration clause purports to exclude a consumer’s recourse to the courts.¹⁸⁷

¹⁸⁴ Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts, available at http://www.europa.eu.int/comm/consumers/policy/developments/unfa_cont_term/uct01_en.pdf (last visited May 21, 2004).

¹⁸⁵ Emphasis added.

¹⁸⁶ See Office of Fair Trade, *Annexe A: Examples of Fair and Unfair Terms* 134-35, Feb. 2001, available at <http://www.of.gov.uk/Business/Legal+Powers/unfair+guidance.htm> (last visited May 21, 2004).

¹⁸⁷ See Christopher Kuner, *Legal Obstacles to ADR in European Business-to-Consumer Electronic Commerce*, available at <http://www.kuner.com/data/pay/adr.html> (last visited May 21, 2004).

3. *Binding Arbitration in Australia: No Explicit Consumer Protection, Plenty of Discretion in the Domestic Context*

Unlike the European Union, Australian law does not generally recognize that consumers need protection from arbitration clauses. In fact, because Australia has not implemented the commercial reservation to the New York Convention,¹⁸⁸ international arbitration clauses in a consumer context require mandatory enforcement. From this aspect alone, one might conclude that Australia has a strong enforcement policy in relation to arbitration agreements. This conclusion would be wrong, however, because in a domestic context, judges are given broad discretion to not enforce arbitration agreements.¹⁸⁹

Australian law treats domestic arbitration clauses and international arbitration clauses very differently. The former are governed by the state Commercial Arbitration Acts,¹⁹⁰ which give the courts wide discretion in determining whether to order a stay.¹⁹¹ Although there is a formal bias toward enforcing an arbitration agreement, a plaintiff only needs to demonstrate that a "sufficient" reason exists for denying a stay.¹⁹² Such reasons have included allegations of fraud or professional impropriety.¹⁹³ Sometimes a stay is granted simply because the case involves complicated questions of law that the court can handle better than a selected arbitrator.¹⁹⁴ Furthermore, courts are unlikely to require arbitration if it would result in a multiplicity of proceedings.¹⁹⁵

However, in regards to an international arbitration agreement, there is no wide discretion for a court to refuse a stay. The International Arbitration Act 1974 (Cth) ("IAA") implements the New York Convention and generally provides that a stay is mandatory if it falls under the act. Section 7 provides that an arbitration agreement falls under the act if one of the following applies:

¹⁸⁸ See UNCITRAL, *supra* note 150.

¹⁸⁹ See *infra* note 191 and accompanying text.

¹⁹⁰ Commercial Arbitration Act, 1990 (Austl., QLD); Commercial Arbitration Act, 1986 (Austl., ACT); Commercial Arbitration Act, 1986 (Austl., SA); Commercial Arbitration Act, 1986 (Austl., TAS); Commercial Arbitration Act, 1985 (Austl., NT); Commercial Arbitration Act, 1985 (Austl., WA); Commercial Arbitration Act, 1984 (Austl., NSW); Commercial Arbitration Act, 1984 (Austl., VIC).

¹⁹¹ The Commercial Arbitration Acts allow a court to grant a stay if there is "there is no sufficient reason why the matter should not be referred in accordance with the agreement." § 53(1)(a).

¹⁹² *Id.*

¹⁹³ *Conagra Int'l Fertiliser Co. v. Lief Investments Pty. Ltd.* (1997) 141 F.L.R. 124.

¹⁹⁴ *O'Neill & Clayton Pty. Ltd. v. Ellis & Clark Pty. Ltd.* (1978) 20 S.A. St. R. 132.

¹⁹⁵ *Bond Corp. Pty. Ltd. v. Thiess Contractors Pty. Ltd.* (1987) 14 F.C.R. 193.

- (a) The arbitral procedure is governed by another convention country;
- (b) The arbitral procedure is governed by a non-convention country and one of the parties is domiciled in Australia;
- (c) One of the parties a government of another convention country; or
- (d) One of the parties is domiciled in another convention country.

If one of the above requirements is satisfied, and a party commences an action in breach of the agreement, section 7(2) provides that, on application of the other party, “the court shall, by order, upon such conditions (if any) as it thinks fit, stay the proceedings or so much of the proceedings as involves the determination of that matter”. There is no discretion under this provision.¹⁹⁶ The only way that a plaintiff can avoid an arbitration agreement within the scope of the IAA is by demonstrating that the agreement is contrary to a mandatory rule of the forum, the dispute falls outside the scope of the agreement as a matter of construction, or the agreement is otherwise “null and void, inoperative or incapable of being performed.”¹⁹⁷ Unlike the United States, Australia has not effected the commercial reservation,¹⁹⁸ meaning that the IAA applies equally to consumer contracts. However, because section 7(2) of the IAA allows a court to impose “such conditions (if any) as it thinks fit” the court may be empowered to change the seat of arbitration in favor of the consumer.

D. Arbitration Clauses: Providing a Fairer Means to Resolve International Business-to-Consumer E-Commerce Disputes

While the mandatory enforceability of valid arbitration clauses in international commercial contracts has largely been settled by the New York Convention, it is clear that the approaches taken by the European Union and the United States in relation to arbitration clauses in consumer contracts are polarized.¹⁹⁹ The United States has a strong bias in favor of consumer arbitration while the European Union seems to reject it outright.²⁰⁰ The

¹⁹⁶ *Hi-Fert v. Kiukiang Maritime Carriers* (1997) 145 A.L.R. 500.

¹⁹⁷ See Richard Garnett, *The Current Status of Arbitration Agreements in Australia*, 15 J. CONT. L. 29, 47-51 (1999).

¹⁹⁸ See UNCITRAL, *supra* note 150.

¹⁹⁹ See generally, Christopher Drahozal, *Unfair Arbitration Clauses*, 2001 U. ILL. L. REV. 695 (2001).

²⁰⁰ See *supra* notes 164 and 185 and accompanying text.

arguments in favor of arbitration are that it fosters a neutral and efficient way of resolving disputes by abrogating inefficient procedural rules found in court litigation. However, it is this abrogation of procedural rules that most troubles consumer interest groups.²⁰¹ These groups argue that arbitration abrogates “procedural rights” such as a trial by jury, the prospect of large punitive damages and the avenue for class actions.²⁰² Arbitration further limits discovery and the right of appeal. Given that class actions, punitive damages, trial by jury, and protracted discovery are as integral to the Australian legal system as within the U.S. legal system, the argument that arbitration clauses abrogate “procedural rights” is unconvincing.

Instead of adopting the European Union’s outright ban on arbitration agreements or the United States’ strong faith in consumer arbitration, Australian law should promote the use of fair and appropriate arbitration in consumer cases. While courts should be encouraged to enforce arbitration clauses in almost all circumstances, judges should also have the means to modify proposed arbitration proceedings in the interests of justice.

Arbitration is potentially the fairest way to resolve international business-to-consumer disputes arising from software and Internet transactions. The need for oral testimony—an indispensable feature of ordinary litigation—can be dispensed with in consumer arbitration proceedings. Because proceedings can be conducted by deposition or even via telephone, arbitration can be venue neutral.²⁰³ Venue neutrality in arbitration proceedings means that instead of allocating the risk of international litigation to the consumer or the retailer, the burden is effectively shared between the parties. While no one gets to sue in his or her own backyard, no one gets hauled halfway across the globe either.

When faced with a potentially unfair venue in a consumer arbitration clause, rather than denying the clause any effect on grounds of unconscionability or public policy, courts may arguably simply change the venue or order a venue neutral proceeding. The power to rewrite an arbitration clause to ameliorate its unfair effects must be grounded in a statute because, under the common law, Australian courts are only

²⁰¹ See Drahozal, *supra* note 199, at 705.

²⁰² *Id.* at 705-21.

²⁰³ See, e.g., American Arbitration Associations, *Supplementary Procedures for Consumer Related Disputes*, July 1, 2003, available at <http://www.adr.org> (last visited May 21, 2004), which allow hearings to be conducted over the telephone with a filing fee of US\$ 125, which can be awarded to the consumer if the claim is successful.

empowered to wholly sever an invalid term.²⁰⁴ This remedial power to change arbitration agreements is arguably extant under Australia's IAA.

Australia's decision to implement the New York Convention without the commercial reservation was made at a time when the potential for cross-border consumer transactions was relatively weak.²⁰⁵ The proliferation of international retail over the Internet may warrant amending the IAA to exempt commercial transactions from mandatory enforcement. That said, it is possible that Australian courts could promote the use of appropriate arbitration procedures without change to the IAA. The IAA provides that enforcement of an arbitration clause in an international consumer transaction is mandatory, but allows a court to impose "such conditions (if any) as it thinks fit". In the same way the New York Supreme Court in *Brower* enforced an arbitration clause after ameliorating its unconscionable elements,²⁰⁶ Australian judges should make liberal use of this provision for conditions in the IAA. In business-to-consumer software and Internet transactions, such a condition should be the imposition of a forum-neutral, consumer-friendly arbitration process such as those provided under the consumer rules of the American Arbitration Association.²⁰⁷ By advocating the use of just arbitration procedures, Australian courts can help ensure fair and efficient dispute resolution within e-commerce transactions.

IV. CONCLUSION

Australian law should enforce EULAs and other online goods and services agreements where the purchaser has had a reasonable opportunity to review the terms prior to the assumption of binding obligations. Such agreements, whether they be in the shrink-wrap, click-wrap or browse-wrap format, are no different than other types of mass-market standard form contracts. Indeed, the weight of authority in Anglo-Australian ticket cases

²⁰⁴ See CARTER & HARLAND, *supra* note 9, at 634-35. A good example of a statute that allows a court to effectively rewrite an invalid term is the Restraints of Trade Act, 1976, § 4(1) (Austl., NSW), which provides that an invalid restraint of trade clause be enforced to the extent that it is valid. However, this statute is limited in that it only allows the term to be rewritten if it involves a reading-down process: CARTER & HARLAND, *supra* note 9, at 638-41. The proposed power for a court to rewrite an unfair arbitration clause discussed above goes beyond a power that would merely allow a court to enforce the fair elements only. The proposed power to rewrite arbitration clauses may involve the court importing new elements extrinsic to the original clause.

²⁰⁵ The IAA commenced operation in 1975. *International Arbitration Act Notes*, available at http://www.austlii.edu.au/au/legis/cth/consol_act/iaa1974276/notes.html (last visited May 21, 2004).

²⁰⁶ See *supra* note 182 and accompanying text.

²⁰⁷ See *supra* note 203 and accompanying text.

strongly suggests that Australian law is adequately prepared to deal with a EULA should a court be faced with the question of its enforceability.

However, two features of Australian contract law pose obstacles to the enforceability of EULAs. Firstly, the doctrine of privity entails that only when a software company sells directly to the licensee will the licensee be bound. To give their EULAs any effect, software companies must either not use resellers, or make their resellers enter into complex agency agreements. This complication could have a chilling effect on software distribution in Australia. The Australian adherence to the doctrine of privity is outdated in light of the positions of the United States and United Kingdom and must be abolished by the legislature. Secondly, the “special notice” for “onerous terms” rule is too uncertain in Australia for the compliance of licensors. The rule forces licensors to create their own conclusions as to which terms in a contract are onerous. While these conclusions may be obvious in respect of exclusion and penalty clauses, exclusive jurisdiction clauses, binding arbitration clauses, and other standard clauses could be considered onerous. While the uncertainty surrounding the “onerous terms” rule is not fatal to the enforcement of EULAs like the privity doctrine, the consequent unpredictability is highly unfair to licensors. The Australian legislature should follow the U.S. example and clearly identify when and how special notice is required.

The realities of international trade over the Internet require a more modern approach to be taken in respect of exclusive jurisdiction and arbitration clauses. In relation to exclusive jurisdiction clauses, Australian law should abandon the discretionary approach in favor of rules that facilitate certainty. While it may be argued that a discretionary approach helps facilitate the administration of justice in individual cases, such an approach also facilitates parochialism and gives too much discretion for a judge to discriminate against a foreign defendant in the interests of a local plaintiff. At the business-to-business level, the enforcement of jurisdiction clauses should be mandatory. Commercial entities are often sufficiently resourced to handle foreign litigation. Furthermore, jurisdiction clauses in the business-to-business context are more likely to have arisen from actual negotiations. However, in business-to-consumer transactions, the burden of international litigation should always be placed on the commercial entity. Consumers neither have the resources to enter into foreign litigation nor are they likely to anticipate, or insure against, the risk of foreign litigation.

With respect to consumer arbitration, Australia should decline to follow the extreme approaches taken by the United States and European Union. Rather, Australia should encourage forum-neutral, consumer-

friendly arbitration in a dispute between distant parties. Courts can advocate fair arbitration procedures if they are given the power to effectively rewrite unfair arbitration clauses. Such a power may already exist in relation to both international arbitration clauses under the IAA,²⁰⁸ and domestic arbitration clauses under the Commercial Arbitration Acts.²⁰⁹ Instead of wholly refusing to enforce an unfair arbitration clause, a court should make liberal use of the power to attach “conditions” or give “directions” to the conduct of the arbitration. Such an approach takes into account both the practical advantages arbitration offers in a dispute between distant parties, and the fact that arbitration clauses can often be drafted in a way that unfairly prejudices a consumer’s right of redress.

²⁰⁸ Section 7(2) of the IAA provides that, on application of the other party, “the court shall, by order, upon such conditions (if any) as it thinks fit, stay the proceedings or so much of the proceedings as involves the determination of that matter” (emphasis added).

²⁰⁹ Section 53(1) of the Commercial Arbitration Acts, *supra* note 190, empowers the court to “give such directions with respect to the future conduct of the arbitration as it thinks fit.”