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I. INTRODUCTION

{1} With the explosion of the information age, the subject of many transactions has become what is known as "digital property." [1] The most obvious property of this sort is purchased every day in the form of software. However, unlike many forms of property, software is generally not sold; it is licensed. [2] Also, as a result of the internet and the information age, the parties to a transaction may not even be from the same country. Software companies responding to the unique needs of the software developer attempting to protect his/her intellectual property rights have began to use a mass-market license attached to the front of the box in which the software is purchased. This license is generally referred to as a "shrink-wrap" license. [3] These licenses contain terms which basically limit the uses to which a purchaser can put the software. [4] As contract law normally requires mutual assent for a contract to be binding, the terms of the "shrink-wrap" license state that the opening of the cellophane wrapping on the boxed software will act as an act of assent, thus binding the purchaser of the software to the terms of the license. [5] In short, the purchaser of the software has a take-it-or-leave-it contract where the simple act of opening the box binds them to the terms of the license. This is by definition, an adhesive contract. [6]

{2} These contracts, which arise in the absence of arms-length dealing between two equally powerful

parties are not unknown in American law. Contracts of adhesion have been prevalent in American life for many years. Every time someone takes their clothes to the cleaners, they enter into an adhesive contract. Generally speaking, adhesion by itself, is not a sufficient basis for voiding the terms of the contract. [7] However, the issue becomes more problematic when the contract is between parties which are of different nationalities, and when the terms of the contract include an arbitration clause.

{3} To make the problem associated with arbitration clauses clearer, let's examine the following hypothetical: a Finnish software development company sells its new encryption package to an office manager of a small American on-line publishing firm. This American company has bought one copy of the software, and enclosed in the terms of the software license is an arbitration clause stating the situs of the arbitration will be in Helsinki, and the administers of the arbitration will be the International Chamber of Commerce (ICC.) The license also contains the provision that the software may only be run on one computer unless additional licenses are purchased for the other computers on which the copies will be run. The American company grows quickly and adds to its publication staff one-hundred and fifty more people. As the software is one of the best on the market, the American company wishes to continue using the application. However, the licenses for commercial use of the software are several hundred dollars per license. The American company erroneously decides that they have purchased the software (when in fact they have only licensed it), consequently, they decide that they can use it throughout their operations. The American company proceeds to install the program on all one hundred and fifty new machines and goes on about its business. The Finnish software company learns about the misuse of its software, checks its records and sees that the American company has only one license for one computer. Consequently, the Finnish company files a complaint with the ICC for arbitration of the breach of the terms of the license.

{4} The American company now has a problem. It is being compelled to arbitrate in Helsinki, under ICC rules. Needless to say, the American company does not want to go through arbitration in Finland. Now the Finnish software company goes to an American court to compel the American company to arbitrate. What are the problems the Finnish company will encounter? Better yet, what are the problems the American company will encounter? This paper will attempt to lay out the issues which will arise in the Finnish company's bid to enforce the arbitration clause embedded in the "shrink-wrap" licenses. Part II will give a basic background in arbitrability and what defines arbitrability. Part III of this paper will address the traditional view of arbitration taken by American courts in light of the Federal Arbitration Act. Part IV will address the international treaties which deal with arbitration and how the presumption of enforceability has seemed to arise under these international treaties. Part V will address the underlying issues of adhesion and public policy to determine if adhesion is even an issue which needs to be dealt with. Finally, Part VI will conclude in determining when adhesive arbitration clauses will be enforced in international transactions.

II. ARBITRABILITY

{5} Before one can ask if arbitration is enforceable, one must first determine what arbitration is and what arbitration can be applied to. Arbitration, at its most basic, is a binding, non-Article III resolution of a dispute between parties. Because of the confidentiality concerns [8] and the court's limited review of arbitration decisions, some causes of action have been determined to be improper for arbitration because of public policy concerns. [9]

{6} So what can be arbitrated? This question can most easily be answered by looking at the controlling statutes. In the United States, the Federal Arbitration Act (FAA) [10] is the controlling law. Like most arbitration laws, the FAA requires the agreement to arbitrate to be in writing. [11] The New York and

Panama [12] Conventions on the enforcement of foreign arbitration awards also require an agreement to arbitrate to be in writing. [13] While these statutes and treaties do differ in what constitutes a writing, all require some memorial of the agreement which can be shown to a court where enforcement is wished. [14] Unfortunately, the treaties and statutes do not discuss what goes into making a binding arbitration agreement. [15] Apparently, one can simply insert a clause stating that all disputes arising from this contract will be resolved by arbitration and that such a clause will be deemed to be a binding arbitration clause. [16]

{7} How does one determine the scope of an arbitration clause? Hopefully, the drafter of the clause will have included items like situs, choice of substantive contract law, administrating body (or if the arbitration is ad hoc, the method of choosing the arbitrator(s) and the procedural rules which will control the arbitration), and realm of issues to be covered under the arbitration clause. [17] However, if any of these items are not included in the arbitration agreement, the existing treaties do have some default provisions. The Panama Convention has default provisions for administered arbitration using the Inter-American Council of Commercial Arbitration. [18] Unfortunately, the FAA and New York Conventions do not have similar default provisions. The absence of these default positions, therefore may require court action by the party wishing to enforce arbitration. [19] However, what is clear, is that where there exists a recognized writing, memorializing an arbitration agreement, an arbitration agreement will be legally recognized under statute.

III. LEGAL STANDING OF ARBITRATION - AMERICAN LAW

{8} Now that we know the answer to arbitrability, the next question is: how do the courts enforce the recognized agreements? Initially, the American judiciary was not very hostile toward enforcing arbitration agreements of any kind. The courts felt that an arbitration agreement was restricting a party's right to relief from the courts. [20] Such relief, it was felt, was a constitutional right which could not be waived. [21] Consequently, many courts did not uphold arbitration agreements under the guise that they were thought to be against public policy. [22] Responding to judicial resistance to arbitration, the federal government enacted the Federal Arbitration Act (FAA). [23] Since the enactment of the FAA, the Supreme Court has developed an interpretation of this statute which all but requires any type of arbitration clause to be upheld. [24] Prior to the enactment of the FAA, the courts were reluctant to demand the parties engage in arbitration. In *Almacenes Fernandez, S.A. v. Golodetz,* [25] the Second Circuit held that an institution of a lawsuit in the courts could act as a waiver of a party's right to arbitrate. [26] The Circuit's decision in *Golodetz* seems to point out that arbitration is simply another mechanism in contract formation. Arbitration's importance in this case seems to be somewhat less than what the Supreme Court's later position on arbitration became. [27] Even after the implementation of the FAA, the federal courts still held that the right to arbitration could be waived if a judicial remedy were sought by a party. The Seventh Circuit found in *Bank of Madison v. Graber*, [28] similar waiver concepts that later ignored in *Sky Reefer*. [29] Consequently, the position of *per se* enforcement of arbitration clauses did not appear until much later. Even after the enactment of the FAA, the Supreme Court still found the States could exercise discretion in determining under what circumstances arbitration would be allowed. [30]

{9} The greatest movement toward the per se rule of arbitration clause enforcement was *Prima Paint v. Flood & Conklin Mfg.*. [31] In *Prima Paint*, the Supreme Court developed the doctrine of separability, which increased the likelihood of enforcement of an arbitration clauses. This doctrine operates to separate the arbitration clause from the actual contract when the underlying contract is held to be void due to fraud, duress, or other legal or equitable grounds. [32] As a result of *Prima Paint*, an arbitration clause in a contract had to be attacked as a separate agreement. Merely voiding the underlying contract

did not also cause the arbitration clause to be considered void as well. [33] The arbitration clause would only be considered void if there was fraud in the inducement, or other such grounds at law or equity, which would serve to void the *arbitration clause not the underlying contract.* [34] Requiring the plaintiff to, in effect, attack two separate agreements greatly undermined the ability to avoid the arbitration agreement as evidence about the intent of the defendant, while present regarding the underlying contract, would be scarce regarding the arbitration agreement. Even though *Prima Paint* entrenched the validity of arbitration clauses, arbitration still did not hold the favored position that it has today. The States could still require certain causes of action to be heard before the judiciary. In fact, the federal courts required many classes of statutory actions to be heard by an Article III tribunal. [35]

{10} It was not until the early 1980's, that the Supreme Court began to develop a federal common law regarding arbitration which, operates as an almost per se rule for the enforcement of arbitration clauses. In 1983, the Supreme Court directly stated that where there are doubts as to the scope of the arbitration clause, those doubts should be resolved in favor of arbitration. [36] Later, in *Southland Corp. v. Keating,* [37] the Supreme Court overturned a California statute requiring the judicial consideration of franchise agreements. [38] The California Supreme Court had upheld the California Franchise Investment Law, which required that the judiciary review all complaints arising out of franchise agreements. [39] The U.S. Supreme Court disagreed with the Supreme Court of California's holding. In overturning the California court, the Supreme Court found that the FAA superceded state law pronouncements and was to be applied to every transaction involving interstate commerce. [40]

{11} In *Keating*, the franchise agreement was between parties residing in multiple jurisdictions, thereby placing the contract within interstate commerce. [41] Because the California statute directly conflicted with the federal statute, the Supreme Court held that Federal Law superceded state law and thus, the California statute was preempted. [42] Thus, the end result of *Keating* was to establish the supremacy of the FAA over State law pronouncements governing arbitration. The Supreme Court did not stop with *Keating*. In 1985, two cases were decided which put an end to many plaintiff's arguments as to the enforceability of arbitration clauses.

{12} In another Supreme Court case, *Dean Witter Reynolds v. Byrd,* [43] the Court held that even where a multiplicity of proceedings may result from the enforcement of an arbitration clause, the interest in judicial efficiency is not enough to outweigh the interest in promoting arbitration. [44] Prior to *Byrd*, a plaintiff could argue that the enforcement of an arbitration clause would result in additional proceedings, thus further delaying the ultimate decision and resulting in additional hardships being placed on the parties. Such inefficiency seemed to fly in the face of the reason for the FAA's enactment. However, the Supreme Court did not agree with this observation and found that the interest in promoting arbitration was more important than mere efficiency. [45] Also in 1985, the Supreme Court began to undermine the public policy arguments against arbitration. In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth,* [46] the Court removed the ban on anti-trust actions being decided by arbitration. [47] Due to *Mitsubishi*, areas which, on the basis of public policy in the past have been viewed as improper subject matter for arbitration, are now subject to arbitration. [48] Congress now allows patent questions to be decided by arbitration. [49] The securities exception has been overruled, [50] and the ERISA exception has been buried. [51] While there are subject areas which the Supreme Court still feels demands Article III consideration due to public policy concerns, [52] the trend toward permitting and enforcing arbitration clauses has been unmistakable.

{13} Only lately has there been a slight reversal in the Supreme Court's approach to enforcing arbitration agreements. In *Volt Info. Sciences v. Board of Trustees of Leland Stanford Jr. Univ.*, [53] the Supreme Court decided that the FAA was not designed to preempt the entire field of arbitration, and as long as

the State law favors arbitration, that State law can be used instead of Federal law. [54] While *Volt* has not been widely followed, it does demonstrate the Supreme Court's willingness to step back from the hard-line stance of enforcing all arbitration agreements pursuant to the FAA. Still, current caselaw squarely favors the enforcement of arbitration. While *Volt* holds that States may regulate arbitration, the States still have to conduct such regulation in such a manner so as not to impede the institution of arbitration proceedings. [55]

IV. LEGAL STANDING OF ARBITRATION - INTERNATIONAL LAW

{14} The most telling evidence demonstrating the enforceability of arbitration agreements exists in the international treaties and model laws which have been adopted by the majority of the countries in the world. Only nine nations reported in the ITA Scorecard [56] that they have no form of arbitration treaty in their legal infrastructure. [57] The vast majority of the countries reported have adopted either the New York, Panama, or ICSID conventions. [58] One can draw the conclusion from the widespread acceptance of these conventions that the resolution of international disputes via arbitration is an important part of foreign policy for most of the world.

{15} However, the issue is still enforceability. How are other countries going to enforce arbitration agreements? The easiest way to answer this question is to look at the text of the Panama and New York Conventions. Both of these treaties basically state that where an arbitration agreement is deemed to exist, any award entered by the arbitrators will be binding. [59] There are some provisions that discuss the unenforceability of arbitration awards, but most all of those provisions concern the public policy of the country where the award is being enforced. [60] Basically, where the public policy of a country will not be infringed, an arbitration award must be enforced under the New York and Panama conventions. [61] The concept of public policy is where the real question of enforceability becomes prevalent. For example, Germany maintains that an arbitration agreement must be a separate document, and any adhesiveness in the bargaining process will void the arbitration agreement on the basis of public policy. [62] France and England, on the other hand, tend to be more accepting of arbitration agreements which may be adhesive. [63] Thus, the adhesivness/enforceability answer ultimately depends on the public policy notions of the jurisdiction in which a party is attempting to compel arbitration.

{16} Germany's legal infrastructure is more protective of its consumers with regard to equality of bargaining power. Section 1025 of the Zivilprozessordnug (ZPO) regulates arbitrability. [64] The ZPO is very restrictive as to what constitutes a binding arbitration agreement. First, the arbitration agreement must be a document separate from the underlying contract. [65] Second, the agreement must expressly state the legal relation to which it refers. [66] Both of these requirements, coupled with the normal requirements for contract validity, gave the German consumer much more notice than an American consumer. [67] It is much more difficult to bury an arbitration clause in boilerplate contractual language when the clause must be enumerated in a separate document. Not only does Germany regulate the form which an arbitration agreement must take, German law also addresses the difficulty of unequal bargaining power between parties to an arbitration agreement. [68] German law specifically abhors the use of economic or social superiority to introduce an arbitration agreement into a transaction. [69] If a party uses such superiority to impose an arbitration agreement, that arbitration agreement will subsequently be held void. [70] The German courts have generally applied this part of the ZPO to situations where one of the parties is financially unable to arbitrate, and is thus removed from access to the court system because they are bound to arbitrate. [71] An individual's economic freedom seems to play a much more important role in German public policy decisions. Consequently, adhesive contracts may be looked on more negatively in Germany than in the United States, especially those contracts which contain arbitration agreements.

V. ADHESION AND PUBLIC POLICY

{17} Since the hypothetical in this paper has a Finnish software company attempting to compel arbitration in the United States, this paper will focus on the United States' approach to public policy and adhesiveness. This focus is in part because the New York and Panama Conventions allow "public policy" to be the only major loophole that may undermine the enforcement of foreign arbitrage awards. Consequently, it is important to know just what "public policy" is in the jurisdiction where enforcement is sought. The FAA provides that an arbitration agreement may be held void under such grounds which exist at law or statute regarding any other type of contract. [72] The Supreme Court has further found that statutes which treat arbitration clauses differently than other contracts are preempted by the FAA. [73] Consequently, while an arbitration agreement is generally presumed valid, it may be attacked under traditional contract avoidance doctrines. Of course, this begs the question: what are the traditional contract avoidance doctrines? And are these State or Federal doctrines?

{18} Because international transactions generally fall under the Federal commerce power, [74] the initial answer is that Federal common law controls avoidance. However, when discussing the validity of a *specific* contract, State law controls, and the doctrines which allow for avoidance of an arbitration agreement are those state doctrines which provide for contract avoidance. [75] While a motion to compel arbitration may be heard in Federal District Court, that court is ultimately going to apply state common law to determine the validity of an arbitration clause. [76] While specific state laws will vary depending on the jurisdiction, there is some underlying consistency as to the doctrines that can be used to invalidate arbitration clauses.

{19} In this paper's hypothetical, the purchaser of the Finnish company's software was probably not aware of the presence of the arbitration clause in the shrink-wrap license. In all probability, the office manager of the American publisher went to a retail computer store and bought the software off the shelf. As a result of such a purchasing environment, there is a question as to the awareness of the license terms by the buyer. Still, if the buyer were aware of the terms of the license, is there any meaningful choice present to the buyer? These types of questions arise when the courts are asked to address mass-market licenses.

{20} In general, the courts have not taken circumstances into account when determining enforceability of contract terms. [77] One commentator noted that a signature is virtually conclusive evidence of consent to the terms of a contract. [78] There are many instances which demonstrate the use of adhesion contracts. When one buys a cruse ship ticket, [79] a stock purchase agreement with a broker, [80] and now, Bank of America is including arbitration clauses in its bank account agreements. [81] Each of these instances gives an example of the use of arbitration where the buyer has no option to remove the arbitration clause from the contract. However, in all of these circumstances, the arbitration clause will be found to be enforceable. [82] Generally, only the most compelling evidence of duress or fraud will cause the arbitration clause to be invalidated. [83] In fact, the courts sometimes end up with a rather absurd result in their predisposition toward arbitration. In *Hodes v. Achille Lauro et Altri-Gestione*, [84] the federal court found that the provision on the back of a boarding pass required the passengers who were taken hostage aboard the cruse ship *Achille Lauro* to bring their claims in Naples, Italy. [85] It is highly questionable that the passengers even thought to turn their boarding passes over to notice the contractual terms included. While the *Hodes* case is an example of the extreme, the basic premise is still present in federal enforcement of arbitration clauses. [86] Several commentators have questioned this approach. [87] Is the rigidly formalistic enforcement of arbitration clauses in the public's best interest?

{21} One of the standard arguments against enforcing arbitration agreements which are contained in

adhesion contracts is the lack of equality in bargaining power. [88] The traditional theory of contract has two equally matched parties, negotiating at arms length for a mutual benefit. [89] Unfortunately, this ideal does not match the current economic reality. The vast majority of contracts are consumer purchase agreements for goods or services, and the consumer is at a great disadvantage in bargaining power relative to the vendor. [90] While the vendor will argue that the customer only need go elsewhere to avoid the adhesive contract, the truth of the matter is that there is often no other vendor to turn to that does not use a similarly restrictive contract formulation. [91] This lack of meaningful choice as to the terms of the agreement is especially apparent within the banking community, and it is rapidly becoming true in the software industry.

{22} For the most part, arbitration agreements have been considered the same way most other clauses in a contract have been considered. The only real difference is the federal common law requirement to resolve doubts as to the scope of the arbitration clause in favor of arbitration. [92] Consequently, fraud, duress, coercion, incapacity, unconscionability, and other such defenses have been available to the party not wishing to submit to arbitration. [93] The most obvious defense to the arbitration agreement in our hypothetical publishing company's problem is adhesion. The argument being: there was no true consent to the terms since the terms were never read, and even if they were read, the terms could not have been modified; also, no signature is required to demonstrate a reading and understanding of the duties and obligations. [94] Unfortunately for the American publisher, the courts have never recognized a doctrine of adhesion as a defense to contractual terms. [95] What generally results is the courts discussing the concept of adhesion in relation to doctrine of unconscionability. [96] Since the heart of the issue therefore turns on the issue being unconscionability, as opposed to simply adhesion, the entire question suddenly becomes much more complex.

{23} Unconsionability comes in two forms: procedural unconscionability, and substantive unconscionability. [97] The first of these two forms relates more to the circumstances surrounding the entry into the transaction. [98] Generally, procedural unconsionability is a factual issue whereby contractual terms are buried in the body of a contract under pages of boilerplate language. [99] This is the type of unconscionability which is most similar to adhesion. The software vendor places a license on the front of the boxed software, containing the entire license on one page. To do this, the type has to be small; the more clauses that are included, the smaller the type must be to fit within the allotted space. The ultimate result of this comprehensive document being compressed into a space smaller than a single sheet of paper, is that the purchaser of the software does not bother to read the terms of the license agreement. Included in these license terms is an arbitration agreement. Is this situation unconscionable? Has the buyer of the software consented to a binding arbitration agreement to which he/she should be held subject to?

{24} Where the unconsionability is only procedural, it is likely that the clause in question will be held valid. [100] The courts have generally required both procedural *and* substantive unconscionability to find a contractual term invalid. [101] Substantive unconscionability, on the other hand is the notion that the actual agreement itself is grossly unfair or unreasonable. [102] Where there is substantive unconscionability the courts have been more suspect of the contractual terms. [103] If a term is inherently unfair or oppressive, the term may be declared invalid. This is especially true where procedural unconscionability is also present and there is not any meaningful choice among similar products to which the consumer can turn. [104]

{25} While arbitration can theoretically be attacked under the same doctrines which exist at law or equity to attack any contract, the Supreme Court has seemed to answer each question regarding the validity of an arbitration clause with a strong favoritism toward arbitration. Lack of meaningful choice is

seen as absent from the modern marketplace, inconvenient location of situs has been overlooked as insufficiently oppressive, and inequality of bargaining power is simply ignored. Not much is left to stand on to dispute an arbitration unless the facts of the case are so obvious that some form of fraud or duress can be evidenced.

{26} So how does this favoritism for arbitration fit into the framework of international shrink-wrap licenses? American courts have only had the opportunity to decide one case regarding the enforceability of terms included in a shrink-wrap license. [105] However, the Supreme Court has had the opportunity to address adhesive arbitration clauses in international maritime transactions. [106] When taken together, these two cases should prove instructive as to the enforceability of arbitration clauses in international shrink-wrap software licenses.

{27} The current stance of the Supreme Court regarding adhesive international arbitration agreements can be found in *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer.* [107] The facts of this case are relatively simple. A purchaser of a fruit shipment sued the charterer of the ship M/V Sky Reefer because the charterer failed to properly stow a shipment of fruit, which shifted during transit, causing over $1 million in damage. [108] The charterer moved to compel arbitration in Tokyo, Japan, as provided for according to the back of the bill of lading. [109] However, the buyer of the fruit had not negotiated the bill of lading, but had simply been tendered the bill of lading upon purchase of the fruit. [110] The District Court granted the motion to compel and, of course, the buyer appealed. [111] This arbitration agreement was typical of the classic adhesive situation. Either the fruit buyer took the bill of lading, or went elsewhere for its fruit. The Supreme Court, in upholding the motion to compel arbitration, gave some very interesting reasons for the validity of adhesive arbitration agreements.

{28} Prior to the *Sky Reefer* case, forum selection clauses were held to increase liability of a maritime carrier. [112] This increase in liability was considered to be in violation of the Carriage of Goods by Sea Act (COGSA) [113] and was consequently held invalid. [114] This premise had been well entrenched in American admiralty law for more than twenty years. [115] However, when applied in conjunction with the FAA and the New York Convention, the Supreme Court found that the arbitration clause contained in the bill of lading was enforceable. [116] The reasons for the upholding of the arbitration clause seemed to lie mostly with international concerns. The Supreme Court relied heavily on the fact that of the 66 signatories to the Hague Convention (which is the treaty that COGSA codified in the U.S.), not on[illegible]ad interpreted their domestic codification of the Convention to stop the use of foreign forum selection clauses. [117] The Court especially relied on the fact that England had expressly rejected a ban on foreign forum selection clauses some fifty years earlier. [118] Consequently, the court held that since the United States is a member of the international community, the United States needs to follow the traditional custom of the rest of the world in allowing foreign forum selection clauses. [119] The presence of *jus commune* and the international obligations of the United States arising out of the New York and Panama conventions seemed to demand that the Supreme Court enforce an adhesive arbitration agreement. [120] And yet, neither the New York or the Panama conventions deal with the validity of an arbitration agreement. The two conventions only discuss what form an arbitration agreement must take. [121] The public policy of each individual country is still a factor in determining validity and may be called on to invalidate an otherwise valid arbitration agreement. [122] However, in spite of this local public policy notion, the Supreme Court still found a need to uphold an adhesive arbitration agreement.

{29} For the most part, adhesive arbitration agreements have been held to be enforceable. However, with the advent of mass-market licensing, a new issue raises its ugly head. So far we have looked at arbitration agreements which included some sort of active assent to the terms. Either via signature, or

acceptance of a tendered bill of lading, there has been some sort of action which can be legally construed as voluntary consent to be bound by the terms of the agreement. In dealing with software licenses, consent to the terms of the license is not so clear.

{30} As digital property continues to increase in value, attempts to protect digital property have also increased. One of these attempts has been the mass-market software license. By using a license, a software vendor can control distribution and modification of the software. Prior to the implementation of a software license, once a person bought a piece of software, they could decompile the program, change the program, and then copy and sell the modified program while never having to incur the initial development costs which the original software developer had to incur. Other difficulties inherent to the protection of software is due to the fact of the ease to which it can be reproduced. It is a relatively simple procedure to copy a software program and place the copied program on a number of computers. Such activity dilutes the market for a particular program, and cuts into the software developer's profits. Also, under the doctrine of "first sale" a buyer of copyrighted material can turn around and sell the work to a third party. [123] Because copyright protection is so limited, software developers began to use licenses to restrict the activities of the software users to a greater extent than the activities that the copyright statute permits a user to do. A software license also can include protective clauses which restrict the user from decompiling the object code (and thus discovering the software developer's trade secrets), as well as including forum selection/arbitration clauses. There is just one small problem with software licenses: there is no signature attesting to the purchaser's assent to the terms of the license. Under a traditional contract framework, this lack of verifiable assent makes the license unilateral, and somewhat unenforceable. To correct this problem, software vendors have included a term in the license making the act of opening the cellophane wrapper an act of assent to the terms of the software license.

{31} The courts have only recently addressed this means of contract formation. The *ProCD v. Zeidenberg* [124] decision finally addressed the issue of shrink-wrap licenses directly. The facts of the case are relatively simple. Defendant Zeidenberg purchased a computer program from plaintiffs which allowed defendant to download telephone listings stored on plaintiff's CD-ROM (which was a part of the software package.) Defendant then proceeded to write his own search engine for the data downloaded from the plaintiff's CD-ROM and post the data on the internet. The data removed from plaintiff's CD-ROM was not protected by copyright as the data was simply telephone listings, consequently there was no direct copyright infringement. [125] The plaintiff sold the software with a user guide which included a series of terms entitled a "Single User License Agreement." The primary issue in this case is the enforceability of the license agreement. [126]

{32} Unfortunately, the facts surrounding the placement of the license are not quite the same as the traditional "shrink-wrap" license as the terms of the *ProCD* license were inside the software box, and not on the face of the packaging. However, the opinion of the district court actually addresses the effectiveness of the more common "shrink-wrap" license. The district court found the *ProCD* license unenforceable, but only because there was no opportunity to inspect or consider the terms of the license. [127] Yet, the dicta of the district court seems to point to the enforceability of a license where the terms of the license are observable before purchase. [128] If the license terms are plainly apparent on the front of the box, a buyer can inspect and consider the terms before purchasing the software. [129] Under this reasoning, a shrink-wrap license which is attached to the front of the a software program box is an enforceable license, since the purchaser has the opportunity to inspect and consider the license terms prior to actual purchase. [130] Fortunately, the questions raised by the district court were answered upon appeal. The Seventh Circuit reversed the district court's holding and found the license enforceable. [131] Interestingly enough, the appellate court did not focus on the opportunity to review as a condition precedent to enforceability. All that was required for the license to be enforceable was that the terms not

be objectionable under general contract principles. [132] Under the appellate court's analysis, even less obvious licenses which are inside the box, and not placed on the outside cover of the box are binding. In fact, the appellate court recognized the difficulty of putting a license on the front of a box and found that such requirement is not really appropriate. [133] The banking industry, along with the securities, architectural, and medical professions, has already made widespread use of the form arbitration clause. [134] The query has now become: if the consumer has no other option, is the arbitration clause really assented to? Or, is the idea of meaningful choice totally lost?

{33} The courts seem to think that the need for meaningful consumer choice regarding arbitration clauses is not as important as it is in other types of adhesive contract provisions. [135] Several courts and commentators have noted that arbitration is not inherently oppressive. [136] Because of the ability of arbitration to 1) reduce the costs of litigation, and 2) to allow the parties determine what is fair, an arbitration clause seems to be enforceable, even where there is doubt as to the voluntariness of the consent by one of the parties. [137] Some commentators even go further and propose arguments in support of adhesive contract provisions. [138] The basic principle of this argument is that adhesive contract clauses, not just arbitration clauses, decrease the transaction costs for any particular contract. [139] With decreased transaction costs, both parties benefit; the buyer receives a lower purchase price, and the vendor has some measure of consistency as to the numerous transactions they enter into daily. The concept at work is denominated as "fairness." [140] It is important not to equate "fairness" with "equality", however, because the "fairness" concept is a better representation of the actual marketplace and its inherent variance in bargaining power. [141] The market envisioned under this fairness "model" however, does have one underlying supposition which may not be entirely accurate given marketplace realities. The assumption that the consumer is not required to enter into any particular contract, and that they have the freedom to chose different vendors, who all use different commercial practices, may be misleading. [142] In situations where the consumer has no meaningful choice as to different vendors of a particular object and the object of the transaction is what is generally known as a "necessity," [143] the issue of adhesion would be appropriately equated to unconscionability. [144] However, such use of adhesion as a proxy of unconscionability should be used sparingly, since most consumers are not dealing with "necessities" when it comes to the purchase of software products, and in fact, do have a wide range of vendors among which to patronize.

{34} Meaningful choice, however, is only one way unconscionability can be asserted. It can also be argued that the forum which is required under the arbitration agreement is an unconscionable term. While the Supreme Court rejected the Montana Supreme Court's decision in *Doctor's Associates v. Casarotto*, [145] the reasoning of the Montana Court is instructive regarding the concept of what is unconscionable. [146] One of the factors in the Montana court's consideration of the facts of *Casarotto*, was that the franchise agreement required the respondents, who were Montana residents, to arbitrate in Connecticut. [147] So, while the Montana Court was overruled, the reasoning for the overruling was the fact that the FAA preempted the Montana law regulating the form of an arbitration agreement. [148] The reasoning regarding the location of the arbitration's situs was not addressed. However, under the *Sky Reefer* case, location of situs may not be an issue. [149] Much of the U.S. Supreme Court's decisions take the position that location is not a sufficient reason to hold an arbitration clause unconscionable. [150] Still, each determination should be based on the facts of the specific case, and there may be instances where the choice of situs will be considered unconscionable. With the resolution to disallow seriously (grossly) inconvenient locations under a claim of unconscionability, there is little left upon which to base an attack against an adhesive arbitration agreement.

IV. CONCLUSION

{35} The seeming effect of most of American caselaw is the arbitration clause included in a mass-market shrink-wrap type license is enforceable. The *Sky Reefer* case notes that international transactions involving goods will be effected by the FAA and the component treaty (depending on which country the parties belong to.) Because of the strong support arbitration has in the caselaw interpreting the FAA, if the arbitration agreement is not unconscionable, or was not entered into via duress, fraud, or other form of coercion, the arbitration agreement is valid. Also, because of the current trend equating the opening of a box as evidence of assent to a license agreement contained within that box, it seems that the terms of the license, including any arbitration clause, is agreed to when the customer breaks the cellophane wrapper of the software's packaging. Assenting to the license agreement also signifies assent to its component arbitration agreement clause. Consequently, the arbitration agreement is binding under American law. While this may not be the state of the law in Germany, adhesive arbitration agreements are not seen as inherently oppressive, because they still offer a remedy for the injured party. The inequality of bargaining power argument has not had much success in American courts. As such, the doctrine of adhesion, to be successful in attacking an arbitration agreement, must have something more. This something more will almost always have to be substantive unconscionability, unless there was fraud or duress in the formation of the arbitration agreement. It is not an easy task to find grounds to have an arbitration agreement declared invalid in the United States. Most of the arguments against enforcement have been removed, and all that is left seems to hinge upon the facts of each specific case. Unfortunately, because of the rapidly changing topography of the digital market place, results which were reasonable ten years ago can now cause potentially disastrous results to smaller companies dealing with digital property. Thus, the Federal courts should rethink their hard-line stance as to the enforcement of "shrink-wrap" arbitration clauses.

ENDNOTES

[1] *See* Raymond T. Nimmer & Patricia Krauthouse, *Electronic Commerce: New Paradigms in Information Law*, 31 IDAHO L. REV. 937, 961-64 (1995) (describing and discussing information and computer data as product); Raymond T. Nimmer, *Information Age Law: New Frontiers in Property and Contract*, 68 N.Y. ST. B.J., May/June 1996, at 28, 28-29 (noting how information is now property).

[2] *See* Kent H. Roberts, *Software Licensing Fees and Royalties*, 1996 10TH ANNUAL COMPUTER & INFO. LAW INST. 7-1, 7-6 (discussing use of licenses in intellectual property contexts).

[3] *See* Joel R. Wolfson, *An Information Provider's View of the Proposed UCC Article 2B: Come On In, The Waters Fine*, 1996 10TH ANNUAL COMPUTER & INFO. LAW INST. 23-1, 23-18 (articulating coverage of shrink-wrap licenses in new UCC-2B).

[4] *See* Kent H. Roberts, *Software Licensing Fees and Royalties*, 1996 10TH ANNUAL COMPUTER & INFO. LAW INST. 7-1, 7-6 - 7-8.

[5] *See* Joel R. Wolfson, *An Information Provider's View of the Proposed UCC Article 2B: Come On In, The Waters Fine*, 1996 10TH ANNUAL COMPUTER & INFO. LAW INST. 23-1, 23-18.

[6] *See* JOHN D. CALAMARI & JOSEPH M. PERILLO, CONTRACTS, § 9-44, at 418-19 (3d ed. 1987).

[7] *See* E. ALLEN FARNSWORTH, CONTRACTS § 4.28 (2d ed. 1990) (expanding on adhesion

defense to contract); Anne Brafford, Note, *Arbitration Clauses in Consumer Contracts of Adhesion: Fair Play or Trap for the Weak and Unwary?*, 21 J. CORP. L. 331, 348 (1996); Jeffrey W. Stempel, *A Better Approach to Arbitrability*, 65 TUL. L. REV. 1377, 1414 (1991) (discussing adhesion and unconscionability attacks on contract).

[8] AMERICAN ARBITRATION ASSOCIATION, INTERNATIONAL ARBITRATION RULES, Art. 35 (Nov. 1, 1993).

[9] *See* UNITED NATIONS CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS, 21 UST 2517, TIAS No. 6997 (1958) (codified in 9 USC § 201 (1996)) [hereinafter the "New York Convention"] Art 5(2)(b).

[10] The Federal Arbitration Act, 9 USC § 1, *et seq.* (1996) [hereinafter the "FAA"].

[11] FAA § 2.

[12] THE INTER-AMERICAN CONVENTION ON INTERNATIONAL COMMERCIAL ARBITRATION (1975) (codified in 9 USC § 301 (1996)) [hereinafter the "Panama Convention"].

[13] *See* New York Convention, Art. 2 § 1; Panama Convention Art. 1.

[14] *Compare* New York Convention, Art 2, § 2 (describing writing as being evidenced by paper contract, letters, or telegrams) with Panama Convention, Art. 1 (describing writing as being evidenced by paper contract, letters, telegrams, or telex communications).

[15] *See* FAA § 2; New York Convention, Art 2 § 2; Panama Convention, Art 1

[16] *See* AMERICAN ARBITRATION ASSOCIATION, INTERNATIONAL ARBITRATION RULES, at 3 (Nov. 1, 1993).

[17] *See Arbitration Clause Checklist,* 10 Alternatives, Dec. 1992, at 192.

[18] *See* Panama Convention, Art. 3.

[19] *See generally* 9 USC §§ 1-16 (1996).

[20] *See* Southland Corp. v. Keating, 465 U.S. 1, 13-14 (1984); Jeffrey W. Stempel, *Pitfalls of Public Policy: The Case of Arbitration Agreements*, 22 ST. MARY'S L.J. 259 (1990) (noting judicial dislike for removal of recourse to courts).

[21] *See* Wilko v. Swan, 346 U.S. 427 (1953) (finding waver of substantial rights as improper and thus voiding arbitration agreement).

[22] *See* Stephen J. Ware, *Arbitration and Unconscionability After Doctor's Associates, Inc. v. Casarotto,* 31 WAKE FOREST L. REV. 1001, 1004-05 (1996).

[23] *See* Anne Brafford, Note, *Arbitration Clauses in Consumer Contracts of Adhesion: Fair Play or Trap for the Weak and Unwary?*, 21 J. CORP. L. 331, 334 (1996); Stephen J. Ware, *Arbitration and Unconscionability After Doctor's Associates, Inc. v. Casarotto*, 31 WAKE FOREST L. REV. 1001, 1004 (1996).

[24] *See* Michael Z. Green, *Preempting Justice Through Binding Arbitration of Future Disputes: Mere Adhesion Contracts or a Trap of the Unwary?*, 5 LOY. CONSUMER L. REP. 112, 112 (1993).

[25] 148 F.2d 625 (2d Cir. 1945).

[26] *See* Id.

[27] *Compare* Almacenes Fernandez, S.A. v. Golodetz, 148 F.2d 625 (2d Cir. 1945) (finding against arbitration) with Moses H. Cone Mem. Hosp. v. Mercury Const. Corp., 460 U.S. 1 (1983) (finding duty to resolve doubts in favor for arbitration).

[28] 158 F.2d 137 (7th Cir. 1946).

[29] *See* Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer, 115 S. Ct. 2322, 2330 (1995) (discussing waiver of substantive rights).

[30] See United States v. Paramount Pictures, 334 U.S. 131, 176 (1948) (allowing district court discretion to allow arbitration).

[31] 388 U.S. 395 (1967)

[32] *See Id.*, at 400.

[33] *See Id.*, at 402.

[34] *See Id.*

[35] *See* Jeffrey W. Stempel, *A Better Approach to Arbitrability*, 65 TUL. L. REV. 1377, 1392-93 (1991).

[36] *See* Moses H. Cone Mem. Hosp. v. Mercury Const. Corp., 460 U.S. 1, (1983).

[37] 465 U.S. 1 (1984).

[38] *Id.*

[39] *See Id.*, at 5-6.

[40] *See Id.*, at 11-12.

[41] *Id.*, at 5-6.

[42] *See Id.*, 15-16.

[43] 470 U.S. 213 (1985)

[44] *See Id.*, at 217.

[45] *See Id.*

[46] 473 U.S. 614 (1985).

[47] *See Mitsubishi,* 473 U.S. at 632-33 (1985).

[48] *See* Jeffrey W. Stempel, *A Better Approach to Arbitrability*, 65 TUL. L. REV. 1377, 1392-93 (1991).

[49] *See* 35 USC § 294 (1996) (allowing patent claims in arbitration agreements).

[50] *See* Rodriguez De Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989).

[51] *See* Jeffrey W. Stempel, *A Better Approach to Arbitrability*, 65 TUL. L. REV. 1377, 1394 n.83 (1991).

[52] *See* Stewart E. Sterk, *Enforceability of Agreements to Arbitrate: An Examination of the Public Policy Defense*, 2 CARDOZO L. REV. 481, 482-83 (1981).

[53] 489 U.S. 468 (1989).

[54] *See Volt,* 489 U.S. at 478-79.

[55] *See Doctor's Associates v. Casarotto*, 116 S. Ct. 1652 (1996).

[56] *See* INSTITUTE FOR TRANSNATIONAL ARBITRATION, SCOREBOARD OF ADHERENCE TO TRANSNATIONAL ARBITRATION TREATIES 1 (April 1, 1996).

[57] *See Id,*

[58] *Id.*

[59] *See* New York Convention, Art. 2; Panama Convention, Art. 1. There are limited circumstances where the award can be challenged, but those are relatively difficult hurdles. Consequently, not all awards will be found to be finding by the courts of the jurisdiction where enforcement is sought, but the number of unenforced awards will be slight because of the standards of review of arbitrage awards. See New York Convention, Art. 5; Panama Convention, Art. 5.

[60] *See* New York Convention, Art. 5; Panama Convention, Art. 5.

[61] *See Id.*

[62] *See* ZPO § 1027 (requiring separate documents); ZPO § 1025(II) (discussing unequal bargaining power).

[63] *See* Jay R. Sever, *The Relaxation of Inarbitrability and Public Policy Checks on U.S. and Foreign Arbitration: Arbitration Out of Control?*, 65 TUL. L. REV. 1661, 1682-85 (1991).

[64] §§ 1025-1044 ZPO.

[65] § 1027 ZPO.

[66] § 1026 ZPO.

[67] *Compare* FAA, 9 USC §§ 1-16 *with §§* 1025-1048 ZPO.

[68] *See* § 1025 ZPO.

[69] *See* Ludwig Von Zumbusch, Comment, *Arbitrability of Antitrust claims Under U.S., German, and EEC Law: The International Transaction Criterion and Public Policy*, 22 TEX. INT'L. L.J. 291, 309 (1987).

[70] § 1025 ZPO; *see also* Ludwig Von Zumbusch, Comment, *Arbitrability of Antitrust claims Under U.S., German, and EEC Law: The International Transaction Criterion and Public Policy*, 22 TEX. INT'L. L.J. 291, 309 (1987).

[71] *See* Ludwig Von Zumbusch, Comment, *Arbitrability of Antitrust claims Under U.S., German, and EEC Law: The International Transaction Criterion and Public Policy*, 22 TEX. INT'L. L.J. 291, 309 (1987)

[72] *See* FAA, 9 USC § 2 (1996).

[73] *See* Doctor's Associates v. Casarotto, 116 S. Ct. 1652 (1996).

[74] *See* U.S. CONST, Art. I, § 8, cl. 3.

[75] *See* Bernhardt v. Polygraphic Co. of Am., 350 U.S. 198, 202-04 (1956); see also Perry v. Thomas, 482 U.S. 483, 489-90 (1987). **But see** Doctor's Associates v. Casarotto, 116 S. Ct. 1652 (1996). While *Bernhardt* has been distinguished, it is still controlling law for similar fact situations.

[76] *See* Perry v. Thomas, 482 U.S. 483, 489 (1987). *See also* Anne Brafford, Note, *Arbitration Clauses in Consumer Contracts of Adhesion: Fair Play or Trap for the Weak and Unwary?*, 21 J. CORP. L. 331, 343 (1996).

[77] *See* Jeffrey W. Stempel, *A Better Approach to Arbitrability*, 65 TUL. L. REV. 1377, 1383 (1991).

[78] *Id.*

[79] *See* Carnival Cruse Lines, Inc. v. Shute, 499 U.S. 585 (1991).

[80] *See generally* Mago v. Shearson Lehman Hutton, Inc., 956 F.2d 932 (9th Cir. 1991); Boice v. A.G. Edwards & Sons, 1988 WL 97966 (E.D. La. 1988).

[81] *See* Michael Z. Green, *Preempting Justice Through Binding Arbitration of Future Disputes: Mere Adhesion Contracts or a Trap of the Unwary?*, 5 LOY. CONSUMER L. REP. 112, 115 (1993).

[82] *Id,*

[83] *See* Jeffrey W. Stempel, *A Better Approach to Arbitrability*, 65 TUL. L. REV. 1377, 1383 (1991).

[84] 858 F.2d 905 (3d Cir. 1988).

[85] *See Hodes*, 858 F.2d at 907.

[86] *See generally* Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer, 115 S. Ct. 2322 (1995); Adams v. Merrill Lynch Pierce Fenner & Smith, 888 F.2d 696 (10th Cir. 1989).

[87] *See generally* Anne Brafford, Note, *Arbitration Clauses in Consumer Contracts of Adhesion: Fair Play or Trap for the Weak and Unwary?*, 21 J. CORP. L. 331, (1996); Jeffrey W. Stempel, *A Better Approach to Arbitrability*, 65 TUL. L. REV. 1377 (1991); Elizabeth P. Allor, Note, *Keating v. Superior Court: Oppressive Arbitration Clauses in Adhesion Contracts*, 71 CALIF. L. REV. 1239 (1983); Gregory R. Kim, Note, *Graham v. Scissor-Tail, Inc.: Unconscionability or Presumptively Biased Arbitration Clauses Within Adhesion Contracts*, 70 CALIF. L. REV. 1014 (1982).

[88] *See* Michael Z. Green, *Preempting Justice Through Binding Arbitration of Future Disputes: Mere Adhesion Contracts or a Trap of the Unwary?*, 5 LOY. CONSUMER L. REP. 112, 115 (1993); Stephen J. Ware, *Arbitration and Unconscionability After Doctor's Associates, Inc. v. Casarotto*, 31 WAKE FOREST L. REV. 1001, 1031-32 (1996); Gregory R. Kim, Note, *Graham v. Scissor-Tail, Inc.: Unconscionability or Presumptively Biased Arbitration Clauses Within Adhesion Contracts*, 70 CALIF. L. REV. 1014, 1026-27 (1982).

[89] *See* Anita Ramasasrty, *The Parameters, Progressions, and Paradoxes of Baron Bramwell*, 38 AM. J. LEGAL HIST. 322, 329 (1994).

[90] *See* Northwestern Nat. Ins. Co. v. Donovan, 916 F.2d 372, 377 (7th Cir. 1990).

[91] *See* Michael Z. Green, *Preempting Justice Through Binding Arbitration of Future Disputes: Mere Adhesion Contracts or a Trap of the Unwary?*, 5 LOY. CONSUMER L. REP. 112, 115-16 (1993).

[92] *See* Perry v. Thomas, 482 U.S. 483, 489 (1987); Moses H. Cone Mem. Hosp. v. Mercury Const. Corp., 460 U.S. 1, 24-25 (1983); *see also* Anne Brafford, Note, *Arbitration Clauses in Consumer Contracts of Adhesion: Fair Play or Trap for the Weak and Unwary?*, 21 J. CORP. L. 331, 340 (1996).

[93] *See* Perry v. Thomas, 482 U.S. 483, 492 n.9 (1987); Bernhardt v. Polygraphic Co. of Am., 350 U.S. 198, 203-04 (1956).

[94] *See* Michael Z. Green, *Preempting Justice Through Binding Arbitration of Future Disputes: Mere Adhesion Contracts or a Trap of the Unwary?*, 5 LOY. CONSUMER L. REP. 112, 113 (1993); Jeffrey W. Stempel, A Better Approach to Arbitrability, 65 TUL. L. REV. 1377, 1383 (1991). *See also* FAA, 9 USC § 2(1996); Perry v. Thomas, 482 U.S. 483, 489 (1987); Volt Info. Sciences v. Board of Trustees of Leland Stanford Jr. Univ., 489 U.S. 468, 479 (1989).

[95] *See* E. ALLEN FARNSWORTH, CONTRACTS § 4.28 (2d ed. 1990); Jeffrey W. Stempel, *A Better Approach to Arbitrability*, 65 TUL. L. REV. 1377, 1413-14 (1991); Anne Brafford, Note, *Arbitration Clauses in Consumer Contracts of Adhesion: Fair Play or Trap for the Weak and Unwary?*, 21 J. CORP. L. 331, 348 (1996); Gregory R. Kim, Note, *Graham v. Scissor-Tail, Inc.: Unconscionability or Presumptively Biased Arbitration Clauses Within Adhesion Contracts*, 70 CALIF. L. REV. 1014, 1025-26 (1982).

[96] *See* Anne Brafford, Note, *Arbitration Clauses in Consumer Contracts of Adhesion: Fair Play or Trap for the Weak and Unwary?*, 21 J. CORP. L. 331, 348-50 (1996).

[97] *See* Arthur A. Leff, *Unconscionability and the Code - The Emperor's New Clause*, 115 U. PA. L. REV. 485, 487 (1967).

[98] *Id.*

[99] *See* Arthur A. Leff, *Unconscionability and the Code - The Emperor's New Clause,* 115 U. PA. L. REV. 485, 487 (1967); Stephen J. Ware, *Arbitration and Unconscionability After Doctor's Associates, Inc. v. Casarotto*, 31 WAKE FOREST L. REV. 1001, 1030 (1996)

[100] *See* Richard Craswell, *Property Rules and Liability Rules in Unconscionability and Related Doctrines*, 60 U. CHI. L. REV. 1, 17-18 (1993).

[101] *See* Stephen J. Ware, *Arbitration and Unconscionability After Doctor's Associates, Inc. v. Casarotto*, 31 WAKE FOREST L. REV. 1001, 1016 (1996); Anne Brafford, Note, *Arbitration Clauses in Consumer Contracts of Adhesion: Fair Play or Trap for the Weak and Unwary?*, 21 J. CORP. L. 331, 349 (1996).

[102] *See* Richard Craswell, *Property Rules and Liability Rules in Unconscionability and Related Doctrines*, 60 U. CHI. L. REV. 1, 17-18 (1993); Arthur A. Leff, *Unconscionability and the Code - The Emperor's New Clause*, 115 U. PA. L. REV. 485, 487 (1967); Stephen J. Ware, *Arbitration and Unconscionability After Doctor's Associates, Inc. v. Casarotto*, 31 WAKE FOREST L. REV. 1001, 1018-28 (1996).

[103] *See* Richard Craswell, *Property Rules and Liability Rules in Unconscionability and Related Doctrines*, 60 U. CHI. L. REV. 1, 17-18 (1993).

[104] *See* Jeffrey W. Stempel, *A Better Approach to Arbitrability*, 65 TUL. L. REV. 1377, 1385 (1991); Gregory R. Kim, Note, *Graham v. Scissor-Tail, Inc.: Unconscionability or Presumptively Biased Arbitration Clauses Within Adhesion Contracts*, 70 CALIF. L. REV. 1014, 1026-27 (1982).

[105] *See* ProCD v. Zeidenberg, 908 F. Supp. 640, 650 (W.D. Wis. 1996).

[106] *See* Carnival Cruse Lines, Inc. v. Shute, 499 U.S. 585 (1991).

[107] 115 S. Ct. 2322 (1995).

[108] *See Id.*, 2325.

[109] *See Id.*

[110] *See Id.*

[111] *See Sky Reefer*, 115 S. Ct. at 2325.

[112] *See* Christine N. Schnarr, Recent Development, *Foreign Forum Selection Clauses Under COGSA: The Supreme Court Charts New Waters in the Sky Reefer Case*, 74 WASH. U. L.Q. 867, 871-72 (1996).

[113] *See* Indussa Corp. v. S.S. Ranborg, 377 F.2d 200, 203 (2d Cir. 1967).

[114] *See Id.*

[115] *See* Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer, 115 S. Ct. 2322, 2326 (1995); see also Christine N. Schnarr, *Recent Development, Foreign Forum Selection Clauses Under COGSA: The Supreme Court Charts New Waters in the Sky Reefer Case*, 74 WASH. U. L.Q. 867, 873 (1996).

[116] *See Sky Reefer*, 115 S. Ct. at 2330.

[117] *See Id.*, at 2328; *see also* Christine N. Schnarr, Recent Development, *Foreign Forum Selection Clauses Under COGSA: The Supreme Court Charts New Waters in the Sky Reefer Case*, 74 WASH. U. L.Q. 867, 874-75 (1996) (discussing reasoning behind Court's decision).

[118] *See* Christine N. Schnarr, Recent Development, *Foreign Forum Selection Clauses Under COGSA: The Supreme Court Charts New Waters in the Sky Reefer Case*, 74 WASH. U. L.Q. 867, 875 (1996).

[119] *See Id.*

[120] *See Id.*

[121] *See* New York Convention, Art. 2; Panama Convention, Art. 1.

[122] *See* New York Convention, Art. 5, § 2(b); Panama Convention, Art. 5, § 2(b).

[123] *See* H.R. Rep. No. 94-1476 at 79 (1976).

[124] 908 F. Supp. 640 (W.D. Wis. 1996), rev'd, 86 F.3d 1447 (7th Cir. 1996).

[125] *See Id.*, at 646-47.

[126] *See Id.*, at 650.

[127] *See Id.*, at 651.

[128] *See ProCD*, 908 F. Supp. at 654.

[129] *See Id.*, at 653.

[130] *See Id.*

[131] *See* ProCD v. Zeidenberg, 86 F.3d 1447, 1449 (7th Cir. 1996)(finding the district court's concerns regarding visibility of the license of no value and determining the enforceability exclusively on the generally applicable rules of law for contracts)

[132] *See Id.*

[133] *See Id.*, at 1450-51.

[134] *See* Michael Z. Green, *Preempting Justice Through Binding Arbitration of Future Disputes: Mere Adhesion Contracts or a Trap of the Unwary?*, 5 LOY. CONSUMER L. REP. 112, 115 (1993)

[135] *See* N & D Fashions, Inc. v. DHJ Indus., Inc., 548 F.2d 722, 727 (8th Cir. 1976); Stanley A. Klopp, Inc. v. John Deere, 510 F. Supp. 807, 811 (E.D. Penn. 1981); *see also* Michael Z. Green, *Preempting Justice Through Binding Arbitration of Future Disputes: Mere Adhesion Contracts or a Trap of the Unwary?,* 5 LOY. CONSUMER L. REP. 112, 114 (1993); Anne Brafford, Note, *Arbitration Clauses in Consumer Contracts of Adhesion: Fair Play or Trap for the Weak and Unwary?*, 21 J. CORP. L. 331, 356 (1996).

[136] *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 30 (1991); Anne Brafford, Note, *Arbitration Clauses in Consumer Contracts of Adhesion: Fair Play or Trap for the Weak and Unwary?,*

21 J. CORP. L. 331, 350 (1996).

[137] *See* Anne Brafford, Note, *Arbitration Clauses in Consumer Contracts of Adhesion: Fair Play or Trap for the Weak and Unwary?*, 21 J. CORP. L. 331, 350-53 (1996)

[138] *See* Anne Brafford, Note, *Arbitration Clauses in Consumer Contracts of Adhesion: Fair Play or Trap for the Weak and Unwary?*, 21 J. CORP. L. 331, 353 (1996) (citing JOHN RAWLS, A THEORY OF JUSTICE (1971)).

[139] *See Id.*, at 352.

[140] *See Id.*, at 354.

[141] *See Id.*

[142] *See* Michael Z. Green, *Preempting Justice Through Binding Arbitration of Future Disputes: Mere Adhesion Contracts or a Trap of the Unwary?*, 5 LOY. CONSUMER L. REP. 112, 115-16 (1993); Jeffrey W. Stempel, *A Better Approach to Arbitrability*, 65 TUL. L. REV. 1377, 1431-32 (1991).

[143] *See* E. ALLEN FARNSWORTH, CONTRACTS § 4.5, at 221-32 (2d ed. 1990).

[144] *See* Jeffrey W. Stempel, *A Better Approach to Arbitrability*, 65 TUL. L. REV. 1377, 1438-40 (1991).

[145] 116 S. Ct. 1652 (1996)

[146] *See* Casarotto v. Lombardi, 901 P.2d 596, 597 (Mont. 1995) *rev'd sub nom.* Doctor's Associates, Inc. v. Casarotto, 116 S. Ct. 1652 (1996).

[147] *See Id.*

[148] *See Casarotto*, 116 S. Ct. at 1656.

[149] *See Sky Reefer*, 115S. Ct. at 2327-28 (disregarding prohibitive costs of foreign arbitration proceedings); see also Christine N. Schnarr, Recent Development, *Foreign Forum Selection Clauses Under COGSA: The Supreme Court Charts New Waters in the Sky Reefer Case*, 74 WASH. U. L.Q. 867, 874 (1996)

[150] *See* 2 IAN R. MACNEIL, ET AL, FEDERAL ARBITRATION LAW § 19.3.2 (1994); *see also* Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer, 115 S. Ct. 2322, (1995); Carnival Cruse Lines, Inc. v. Shute, 499 U.S. 585, (1991); Stephen J. Ware, *Arbitration and Unconscionability After Doctor's Associates, Inc. v. Casarotto,* 31 WAKE FOREST L. REV. 1001, 1027 (1996) (citing .MACNEIL § 19.3.2).
