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Kaustuv M. Das

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FORUM-SELECTION CLAUSES IN CONSUMER CLICKWRAP AND BROWSEWRAP AGREEMENTS AND THE “REASONABLY COMMUNICATED” TEST

Kaustuv M. Das, Ph.D.

Abstract: Although forum-selection clauses in clickwrap and browsewrap agreements have been addressed in only a limited number of decisions, they are likely to become increasingly relevant with the growth of e-commerce. Courts that have enforced forum-selection clauses in clickwrap and browsewrap agreements have often done so without determining whether the consumer received notice of the clause. When courts have addressed notice, they have not used any uniform standard for determining adequacy of notice. Forum-selection clauses in clickwrap and browsewrap agreements further the policies underlying the Supreme Court’s decisions in *M/S Bremen v. Zapata Off-Shore Co.* and *Carnival Cruise Lines, Inc. v. Shute*, and courts should be willing to enforce such clauses. Even so, courts should make adequacy of notice a threshold question before enforcing forum-selection clauses in these agreements. In determining adequacy of notice, courts should adopt the two-pronged “reasonably communicated” test employed by courts examining the enforceability of limitations in other adhesion contracts. First, a court should examine the physical characteristics of the clickwrap or browsewrap agreement. Second, a court should consider extrinsic factors indicating the consumer’s ability to become meaningfully informed of the forum-selection clause. Only if the e-vendor meets the burden of showing that the forum-selection clause was reasonably communicated to the consumer should the court enforce the clause.

Dorothy, a resident of Kansas, subscribed to InterTrade, an online investment service.¹ The first time Dorothy visited InterTrade’s webpage, she was presented with numerous flashing signs and hyperlinks² pointing to the latest and greatest stock tips. A prominent button allowed her to download InterTrade’s stock analysis program. Dorothy failed to scroll down far enough to note a hyperlink labeled “Terms of Use,” one of many at the bottom of the webpage. Unfortunately, the downloaded program contained a computer virus that destroyed all the data on Dorothy’s computer. When she called to complain, Dorothy was informed that, according to InterTrade’s “Terms of Use,” all software available from InterTrade’s website comes with warranties limiting liability to the price of the software. Dorothy’s suit against InterTrade, in Topeka, Kansas, was dismissed because the “Terms of Use” webpage includes a clause, under “Miscellaneous,” stating that all suits arising

1. Hypothetical created by the author.

2. A hyperlink is “an underlined or otherwise emphasized word or phrase [on a webpage] that, when clicked with the mouse, displays another document.” WEBSTER’S NEW WORLD DICTIONARY OF COMPUTER TERMS 244 (6th ed. 1997).

from the use of InterTrade's services must be brought in Dade County, Florida. Although Dorothy may sue in Florida, she simply cannot afford the expense involved and is thus forced to forego her day in court.

As computer and Internet usage has increased, so has the prevalence of clickwrap and browsewrap³ agreements.⁴ Clickwrap agreements typically consist of a window containing the terms of the agreement that "pops up" on the computer screen when a user tries to download or install software.⁵ The user has to click on a button labeled "I AGREE" or "I ACCEPT" to continue.⁶ Browsewrap agreements appear in the form of a hyperlink on the vendor's website. Unlike clickwrap agreements, the terms of a browsewrap agreement are not displayed on the computer screen unless the user clicks on the hyperlink.⁷ Although courts have only recently started addressing browsewrap agreements,⁸ these agreements will likely become more important as e-vendors⁹ move to business models in which users are expected to download or use software online.

Clickwrap and browsewrap agreements frequently contain forum-selection clauses, along with other limitations and conditions.¹⁰ Courts have usually enforced forum-selection clauses in clickwrap agreements, but have frequently done so without considering whether the consumer

3. These agreements have also been called "web wrap" or "no click" agreements.

4. See, e.g., Zachary M. Harrison, Note, *Just Click Here: Article 2B's Failure to Guarantee Adequate Manifestation of Assent in Click-Wrap Contracts*, 8 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 907, 908-09 (1998).

5. Stephen T. Keohane, *Mass Market Licensing*, in PRACTICING LAW INSTITUTE, PATENTS, COPYRIGHTS, TRADEMARKS, AND LITERARY PROPERTY COURSE HANDBOOK SERIES 445 (2001).

6. See Harrison, *supra* note 4, at 908.

7. *Specht v. Netscape Communications Corp.*, 150 F. Supp. 2d 585, 588 (S.D.N.Y. 2001).

8. The term browsewrap appears to have been coined by Judge Coyle in *Pollstar v. Gigmania, Ltd.*, 170 F. Supp. 2d 974, 981 (E.D. Cal. 2000). The only other published opinions that have addressed such agreements are *Specht*, 150 F. Supp. 2d at 588, *Register.com v. Verio, Inc.*, 126 F. Supp. 2d 238, 245-46 (S.D.N.Y. 2000), and *Ticketmaster Corp. v. Tickets.com*, No. CV 99-7654 HLH(BQRX), 2000 WL 525390, at *3 (C.D. Cal. Mar. 27, 2000).

9. The term "e-vendors" is used to refer to companies and persons participating in commerce over the Internet ("e-commerce").

10. Although choice-of-law clauses are also common, this Comment is restricted to the enforceability of forum-selection clauses, primarily because the enforcement of contractual choice-of-law clauses has not been litigated as frequently. Interpretation of choice-of-law clauses, and the interplay between choice-of-law and forum-selection clauses, raise a number of interesting questions which are beyond the scope of this Comment. For an overview of these issues, see GARY B. BORN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 657-58, 663-64 (3d ed. 1996).

had notice of the clause.¹¹ Only one browsewrap case has addressed a forum-selection clause.¹² However, given the number of clickwrap cases involving forum-selection clauses and the increasing relevance of browsewrap agreements, it is probable that enforcement of forum-selection clauses in browsewrap agreements will become a significant issue.

Courts should be willing to enforce forum-selection clauses in both clickwrap and browsewrap agreements because doing so would be consistent with the Supreme Court's decisions in *M/S Bremen v. Zapata Off-Shore Co.*¹³ and *Carnival Cruise Lines, Inc. v. Shute*.¹⁴ Nevertheless, this Comment argues that in considering the enforceability of a forum-selection clause, courts should ask whether the consumer had adequate notice of the clause. To determine whether notice was adequate, courts should employ the two-pronged "reasonably communicated" test¹⁵ used in determining the enforceability of contractual limitations in passenger tickets. First, the court should examine the physical characteristics of the clickwrap or browsewrap agreement in question. Second, the court should consider extrinsic factors that indicate the consumer's ability to become meaningfully informed of the existence of the forum-selection clause. Only if the e-vendor can meet the burden of showing that the existence of the forum-selection clause was reasonably communicated to the consumer should the court enforce the clause.

Part I of this Comment describes both adhesion contracts and the common law duty to read. Part II discusses forum-selection clauses, the policies underlying the Supreme Court's decisions in *M/S Bremen* and *Shute*, and the relationship between notice and the enforcement of forum-selection clauses in adhesion contracts. Part III gives the details of the "reasonably communicated" test for determining adequacy of notice that has been employed by courts examining the enforceability of contractual limitations contained in adhesion contracts. Part IV focuses on the features of clickwrap and browsewrap agreements and courts' treatment of these agreements. Part V argues that courts should treat notice as a threshold question when considering forum-selection clauses in clickwrap and browsewrap agreements. When determining adequacy of

11. Judicial treatment of forum-selection clauses contained in clickwrap agreements is discussed in Part IV.B, *infra*.

12. *See Specht*, 150 F. Supp. 2d at 587.

13. 407 U.S. 1 (1972).

14. 499 U.S. 585 (1991).

15. *See infra* Part III.

notice, courts should employ the “reasonably communicated” test developed to determine the enforceability of contractual limitations in passenger tickets. Only if the e-vendor can show that the existence of the forum-selection clause was reasonably communicated to the consumer should the court enforce the clause.

I. ADHESION CONTRACTS AND THE COMMON LAW DUTY TO READ

Standard-form contracts are the dominant form of contracts in today’s society.¹⁶ Typically, a consumer contract is entered into using a standard form prepared by the vendor and assented to by the consumer.¹⁷ Commentators have conjectured that more than 99 percent of all contracts are standard-form contracts.¹⁸ Although some authors have used the terms “standard-form agreement” and “contract of adhesion” interchangeably,¹⁹ adhesion contracts are a special type of standard agreement.²⁰

The main feature that distinguishes adhesion contracts from other standard-form contracts is that they are usually presented on a “take it or leave it” basis.²¹ Lack of opportunity to negotiate terms,²² inequality of bargaining power,²³ and lack of other viable options²⁴ are all characteristics of adhesion contracts. Nevertheless, adhesion contracts are not automatically void or invalid because of these characteristics.²⁵

16. See Daniel T. Ostas, *Postmodern Economic Analysis of Law: Extending the Pragmatic Visions of Richard A. Posner*, 36 AM. BUS. L.J. 193, 226–27 (1998).

17. See E. ALLAN FARNSWORTH, *CONTRACTS* § 4.26, at 296 (3d ed. 1999).

18. W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529, 529 (1971).

19. Jeffrey A. Liesemer, Note, *Carnival’s Got the Fun . . . and the Forum: A New Look at Choice-of-Forum Clauses and the Unconscionability Doctrine After Carnival Cruise Lines, Inc. v. Shute*, 53 U. PITT. L. REV. 1025, 1027 n.14 (1992).

20. See FARNSWORTH, *supra* note 17, § 4.26, at 297; see also Slawson, *supra* note 18, 539–61 (addressing standard forms in which the recipient has manifested his or her assent in Part II; addressing adhesion contracts separately in Part III).

21. See FARNSWORTH, *supra* note 17, § 4.26, at 297.

22. See *Iwen v. U.S. West Direct, Inc.*, 977 P.2d 989, 995 (Mont. 1999).

23. See *Klos v. Polskie Linie Lotnicze*, 133 F.3d 164, 168 (2d Cir. 1997).

24. See *Rembert v. Ryan’s Family Steak Houses, Inc.*, 596 N.W.2d 208, 226 (Mich. Ct. App. 1999); Slawson, *supra* note 18, at 549.

25. *Hughes Training Inc. v. Cook*, 254 F.3d 588, 593 (5th Cir. 2001); *Marin Storage & Trucking, Inc. v. Benco Contracting & Eng’g, Inc.*, 107 Cal. Rptr. 2d 645, 653 (Cal. Ct. App. 2001); *Endsley v. City of Chicago*, 745 N.E.2d 708, 717 (Ill. App. Ct. 2001); *Conseco Fin. Corp. v. Wilder*, 47 S.W.3d

Their unambiguous terms are usually upheld unless the recipient of the adhesion contract can show that the contract is unfair, unduly oppressive, or unconscionable.²⁶ When considering unconscionability, courts look to whether the recipient of the contract had notice of the offending provision, whether the party that drafted the contract achieved agreement by fraud or overreaching, and whether alternatives existed for the recipient of the adhesion contract.²⁷

The general rule is that parties to standard-form contracts are not relieved of their duties simply because they did not read the terms contained therein.²⁸ The argument that “I did not read what I was signing” does not release a party from binding terms.²⁹ This rule prevents parties from avoiding enforcement simply by claiming that they did not read the contract.³⁰ Moreover, the duty to read extends to contracts in which assent is manifested by some alternative act other than signing.³¹

The Restatement (Second) of Contracts does not include a separate section on the duty to read,³² but instead it addresses the duty to read in its section on Standardized Agreements.³³ According to the Restatement, standard-form contracts should be “interpreted wherever reasonable as treating alike all those similarly situated, without regard to their knowledge or understanding of the standard terms of the writing.”³⁴ The Restatement further explains that vendors using standardized forms do not expect their customers to understand or even read the terms of the forms.³⁵ In fact, the advantages of standardization³⁶ would be lost if

335, 342 n.20 (Ky. Ct. App. 2001); *In re Oakwood Mobile Homes, Inc.*, 987 S.W.2d 571, 574 (Tex. 1999).

26. *See Bull HN Info. Sys., Inc. v. Hutson*, 229 F.3d 321, 331 (1st Cir. 2000); *Klos*, 133 F.3d at 169; *see also* RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. c (1981).

27. *Klos*, 133 F.3d at 169.

28. FARNSWORTH, *supra* note 17, § 4.26, at 297.

29. *See Heller Fin., Inc. v. Midwhey Powder Co.*, 883 F.2d 1286, 1292 (7th Cir. 1989).

30. *See* JOHN D. CALAMARI & JOSEPH M. PERILLO, THE LAW OF CONTRACTS § 9.41, at 377 (4th ed. 1998).

31. *See id.*

32. *Id.* § 9.44, at 389 (noting this change from the first Restatement of Contracts).

33. RESTATEMENT (SECOND) OF CONTRACTS § 211 (1981).

34. *Id.* § 211(2).

35. *Id.* § 211 cmt. b; *see also Mitchell v. Broadnax*, 537 S.E.2d 882, 898 (W. Va. 2000) (Starcher, J., concurring).

36. *See* RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. a (listing several advantages of using standardized form agreements); *see also ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1451 (7th Cir. 1996) (noting the advantages of standardized agreements listed in § 211 comment a as a basis for enforcing shrinkwrap agreement).

customers haggled over or sought legal counsel regarding standard terms.³⁷

However, recipients of standard-form agreements are not bound by “*unknown terms* which are beyond the range of reasonable expectations.”³⁸ The recipient is not bound by terms the drafter has reason to believe the recipient would not have agreed to, such as bizarre or oppressive terms.³⁹ Furthermore, when the recipient does not have an opportunity to read the terms or the terms are hidden from view⁴⁰—for example, terms that cannot be read without the aid of a magnifying glass—those terms will not become part of a standard-form agreement.⁴¹ Therefore, terms that are not readily visible can constitute “unknown terms,” and if the recipient would not have agreed to them, they do not bind the recipient despite the duty to read.

II. CONTRACTUAL FORUM-SELECTION CLAUSES

The U.S. Supreme Court’s decision in *M/S Bremen v. Zapata Off-Shore Co.*⁴² led most jurisdictions to abandon their historic opposition to forum-selection clauses.⁴³ In *Carnival Cruise Lines, Inc. v. Shute*,⁴⁴ the Supreme Court extended the enforceability of forum-selection clauses to adhesion contracts.⁴⁵ Although the Court’s decision in *Shute* has been

37. RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. b; *see also Mitchell*, 537 S.E.2d at 898.

38. RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. f (emphasis added); *see also Damer Motor Sales, Inc. v. Universal Underwriters Ins. Co.*, 682 P.2d 388, 396 (Ariz. 1984) (en banc) (adopting the approach in § 211 as a “sensible rationale for interpretation” of standard-form contracts used in the insurance and other industries).

39. *See* RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. f; *Darner*, 682 P.2d at 397.

40. RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. f; *Darner*, 682 P.2d at 397.

41. RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. f, illus. 7 (based on *California Tanker Corp. v. Todd Shipyards Corp.*, 206 F. Supp. 872, 873–74 (S.D.N.Y. 1962)).

42. 407 U.S. 1 (1972).

43. Although some states have specific statutes addressing forum-selection clauses, and two have even adopted the Uniform Computer Information Transactions Act (“UCITA”), which addresses clickwrap and browserwrap agreements, a detailed analysis of statutory approaches to forum-selection clauses is beyond the scope of this Comment. Currently only Montana and Idaho have *per se* statutory bars to enforcement of forum-selection clauses. *See* Walter W. Heiser, *Forum-Selection Clauses in State Courts: Limitations on Enforcement After Stewart and Carnival Cruise*, 45 FLA. L. REV. 361, 363 (1993); *see also* BORN, *supra* note 10, at 378–79; Francis M. Dougherty, Annotation, *Validity of Contractual Provisions Limiting Place of Court in Which Action May Be Brought*, 31 A.L.R. 4th 404 § 4[a] (1984 & Supp. 2001).

44. 499 U.S. 585 (1991).

45. *See id.* at 593.

severely criticized,⁴⁶ numerous state and federal decisions have followed the Court's lead and enforced forum-selection clauses in adhesion contracts.⁴⁷ However, even in *Shute*, the Court's enforcement of the forum-selection clause was dependent on the Shutes essentially conceding notice of the clause,⁴⁸ suggesting that notice is a prerequisite to enforcing a forum-selection clause contained in an adhesion contract.⁴⁹

A. *Forum-Selection Clauses Are Typically Prima Facie Valid*

Parties to a contract may include a forum-selection clause⁵⁰ for many reasons.⁵¹ They may specify the forum because of its expertise with the subject matter of the agreement, because the forum is convenient or neutral, or because specifying a forum minimizes litigation over the threshold question of jurisdiction.⁵² Of particular importance to e-vendors is the need to provide certainty as to the forum for litigating disputes.⁵³

Historically, exclusive forum-selection clauses were not enforced because courts held that such clauses were effectively an "ouster" of the court's jurisdictional powers.⁵⁴ The Supreme Court unequivocally rejected this argument in *M/S Bremen v. Zapata Off-Shore Co.*,⁵⁵ branding it a "vestigial legal fiction" at a time when all courts were overburdened and commerce was conducted on a world-wide basis.⁵⁶ The Court held that contractual forum-selection clauses were prima facie valid, based both on the "ancient concepts of freedom of contract" and

46. Heiser, *supra* note 43, at 365–66.

47. See Dougherty, *supra* note 43, at § 4[a].

48. See *Shute*, 499 U.S. at 590.

49. See *infra* Part II.C.

50. For the sake of simplicity, this Comment is restricted to the enforceability of exclusive forum-selection clauses; that is, forum-selection clauses that require litigation be brought only in the specified forum. Courts have also recognized arbitration clauses as specialized kinds of forum-selection clauses. See, e.g., *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974). However, arbitration clauses are beyond the scope of this Comment and the phrase "forum-selection clause" is reserved for exclusive, judicial, forum-selection clauses.

51. See EUGENE F. SCOLES ET AL., CONFLICT OF LAWS § 11.2, at 466 (3d ed. 2000).

52. *Id.*

53. See Darren L. McCarty, Note, *Internet Contacts and Forum Notice: A Formula for Personal Jurisdiction*, 39 WM. & MARY L. REV. 557, 559 (1998) ("Without further definition, doctrines of personal jurisdiction that seemed appropriate for a more mobile society may not be appropriate for a society that often interacts in complete ignorance of territorial boundaries. The lack of definition in these doctrines threatens unbounded state jurisdiction over anyone using the Internet.").

54. SCOLES ET AL., *supra* note 51, § 11.2, at 468.

55. 407 U.S. 1 (1972).

56. *Id.* at 12.

on the recently adopted Restatement (Second) of Conflict of Laws.⁵⁷ Therefore, the clauses were to be enforced by federal courts sitting in admiralty, unless enforcement would be unreasonable.⁵⁸

In addition to “unreasonable or unjust”⁵⁹ clauses, the Court rejected enforcement of clauses that were “overreaching,”⁶⁰ or were the product of “fraud, undue influence, or overweening bargaining power.”⁶¹ Similarly, if enforcement would contravene a “strong public policy” of the forum state, as declared by legislation or the courts, it should not be enforced.⁶² Finally, a clause should not be enforced if it is absurd—if it requires, for instance, “two Americans to resolve their essentially local dispute in a remote alien forum.”⁶³

Although the Supreme Court’s decision in *M/S Bremen* was a ringing endorsement of the enforcement of forum-selection clauses in negotiated contracts, it left a number of important questions unanswered.⁶⁴ In particular, it remained an open question whether forum-selection clauses would be enforced when they were contained in adhesion contracts.⁶⁵ The U.S. Supreme Court answered this question affirmatively by upholding a forum-selection clause in a cruise ticket in *Carnival Cruise Lines, Inc. v. Shute*.⁶⁶

57. *Id.* at 11. “The parties’ agreement as to the place of the action will be given effect unless it is unfair or unreasonable.” RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 80 (1971).

58. *See M/S Bremen*, 407 U.S. at 10.

59. *Id.* at 15.

60. *Id.*

61. *See id.* at 12.

62. *See id.* at 15.

63. *Id.* at 17.

64. For example, it was not clear whether the *M/S Bremen* decision would apply to federal courts sitting in diversity or deciding non-admiralty matters. SCOLES ET AL., *supra* note 51, § 11.3, at 470–71. A partial answer to the enforceability of forum-selection clauses in diversity cases was provided in *Stewart Organization v. Ricoh Corp.*, 487 U.S. 22, 32 (1988), which held that forum-selection clauses allowing transfer of diversity cases would be governed by 28 U.S.C. § 1404(a). However, the question of whether federal courts sitting in diversity should uphold forum-selection clauses that specify jurisdiction in state courts is still unanswered. *See* SCOLES ET AL., *supra* note 51, § 11.4, at 474–75. At least one commentator has stated that when a forum-selection clause creates exclusive jurisdiction in a state or foreign court, a federal court sitting in diversity will almost certainly dismiss or remand the case. *See generally* 17 JAMES WM. MOORE ET AL., MOORE’S FEDERAL PRACTICE § 111.04, para. [3][a] (3d ed. 1999).

65. *See* SCOLES ET AL., *supra* note 51, § 11.3, at 472. In *M/S Bremen*, the Court had noted that “[t]he choice of forum was made in an arm’s-length negotiation by experienced and sophisticated businessmen” *M/S Bremen*, 407 U.S. at 12.

66. 499 U.S. 585 (1991).

In *Shute*, the Court upheld the enforceability of the forum-selection clause contained in a cruise ticket,⁶⁷ because, inter alia, the passengers had “essentially conceded” notice of the clause.⁶⁸ The Shutes, a couple domiciled in Washington State, purchased tickets for a cruise departing from Los Angeles.⁶⁹ The lower left-hand corner of the face of each ticket warned that the tickets were subject to conditions of the contract on the last three pages of the ticket.⁷⁰ The contract stated that a passenger’s acceptance of the ticket would also constitute an acceptance of all of the terms of the contract.⁷¹ The contract specified that the exclusive forum for all disputes would be “a Court located in the State of Florida, U.S.A.”⁷²

Mrs. Shute was injured in a slip-and-fall accident while the cruise ship was in international waters off the coast of Mexico.⁷³ The Shutes filed suit in the Western District of Washington, claiming that Mrs. Shute’s injuries were the result of Carnival’s negligence.⁷⁴ The District Court dismissed the claim based on a lack of minimum contacts between Carnival and the State of Washington.⁷⁵ The Ninth Circuit reversed, finding sufficient contacts.⁷⁶ In addition, the court refused to enforce the forum-selection clause because the clause had not been freely bargained for and because enforcement would deprive the Shutes of their day in court.⁷⁷ The Supreme Court reversed again because the Shutes had “sufficient notice of the forum clause”⁷⁸ and Florida was not a “remote alien forum” because the accident had occurred off the coast of Mexico.⁷⁹ The Court also noted the lack of bad faith on Carnival’s part in selecting Florida as the exclusive forum for resolving disputes.⁸⁰

67. *Id.* at 597.

68. *Id.* at 590.

69. *Id.* at 587–88.

70. *Id.*

71. *Id.*

72. *Id.* at 588.

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.* The Ninth Circuit pointed to evidence that the Shutes were not physically or financially able to bring suit in Florida as independent justification for not enforcing the forum-selection clause. *Shute v. Carnival Cruise Lines, Inc.*, 897 F.2d 377, 389 (9th Cir. 1990).

78. *Shute*, 499 U.S. at 590.

79. *Id.* at 594.

80. *Id.* at 595.

B. *Policies Underlying the Enforcement of Forum-Selection Clauses in M/S Bremen and Shute*

In *M/S Bremen*, the Supreme Court held that “present-day commercial realities and expanding international trade”⁸¹ required forum-selection clauses in contracts governing international deals to be considered prima facie valid.⁸² Such clauses, by removing uncertainties about the proper forum for litigating international commercial deals, form “an indispensable element in international trade, commerce, and contracting.”⁸³ The Court noted that a great deal of uncertainty and inconvenience would arise if suit could be brought in every jurisdiction affected by the deal.⁸⁴

In *Shute*, the Court acknowledged that, unlike *M/S Bremen*, the forum-selection clause at issue was not the product of negotiations but was part of an adhesion contract.⁸⁵ However, the Court found that including a forum-selection clause in a cruise ticket was reasonable for the following three reasons: (1) a cruise line has a special interest in limiting the fora in which it can be sued because it is subject to litigation in several different fora;⁸⁶ (2) a forum-selection clause removes confusion about where suits can be brought, thus saving litigants the cost of determining the correct forum through pretrial motions;⁸⁷ and (3) passengers benefit from the clauses because the cruise line passes onto the passengers the savings it enjoys by limiting the fora in which it can be sued.⁸⁸ Although commentators have questioned the validity of the rationale offered by the *Shute* Court,⁸⁹ almost all states consider forum-selection clauses—even those contained in adhesion contracts—to be prima facie valid.⁹⁰

81. *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972).

82. *See id.*

83. *Id.* at 13–14.

84. *See id.* at 13.

85. *Shute*, 499 U.S. at 592–93 (observing that “[c]ommon sense dictates that a ticket of this kind will be a form contract the terms of which are not subject to negotiation”).

86. *Id.* at 593.

87. *Id.* at 594.

88. *Id.*

89. SCOLES ET AL., *supra* note 51, § 11.3, at 473.

90. *See supra* note 43 and accompanying text.

C. *In Examining Forum-Selection Clauses in Adhesion Contracts, Courts Have Looked to the Adequacy of Notice*

In *Shute*, the Court dispensed with the notice question quickly because the Shutes had not challenged the fact that the clause was reasonably communicated to them.⁹¹ The Court noted that the Shutes had conceded they had notice of the forum-selection clause,⁹² thus negating the necessity of any discussion of notice.⁹³ However, later decisions have noted that although notice “was not of great concern” to the *Shute* Court, “the tone of the case, nevertheless, suggests that notice is required.”⁹⁴

This interpretation is supported by the *Shute* dissent. The very first issue raised by Justice Stevens was whether the Shutes actually had notice of the forum-selection clause.⁹⁵ Given the placement of the clause, “only the most meticulous passenger” would have become aware of it.⁹⁶ Justice Stevens included a facsimile of the entire ticket to emphasize the improbability that the Shutes had notice of the clause.⁹⁷ This focus on notice supports the later emphasis on notice in similar cruise line ticket cases.⁹⁸

For example, in *Carnival Cruise Lines, Inc. v. Superior Court of Los Angeles County*,⁹⁹ the California Court of Appeals remanded the case because the trial court had not addressed the issue of notice.¹⁰⁰ As in *Shute*, the issue was whether forum-selection clauses contained in Carnival’s tickets precluded suits outside of Florida.¹⁰¹ Resolution of the issue would depend on whether the plaintiffs had sufficient notice of the clauses,¹⁰² but here the plaintiffs had not conceded sufficiency of notice.¹⁰³ The court held that a “forum-selection clause is unenforceable

91. *Shute*, 499 U.S. at 590.

92. *Id.*

93. *See id.*

94. *Miller v. Regency Maritime Corp.*, 824 F. Supp. 200, 202–03 (N.D. Fla. 1992).

95. *See Shute*, 499 U.S. at 597 (Stevens, J., dissenting).

96. *See id.*

97. *Shute*, 111 S.Ct. 1522, 1534–38 (pages unnumbered in the United States Reports).

98. *See, e.g., Effron v. Sun Lines Cruises, Inc.*, 67 F.3d 7, 9 (2d Cir. 1995) (listing cases in which the enforceability “of a forum-selection clause depend[ed] in the first instance upon whether its existence was reasonably communicated to the plaintiff”).

99. 286 Cal. Rptr. 323 (Cal. Ct. App. 1991) (decided after *Shute*).

100. *Id.* at 328.

101. *Id.* at 324.

102. *Id.*

103. *Id.* at 328.

as to any particular plaintiff if the court determines that such plaintiff did not have sufficient notice of the forum-selection clause prior to entering into the contract for passage.”¹⁰⁴ Thus, courts have interpreted *Shute* to imply that notice is required for enforcement of forum-selection clauses contained in adhesion contracts. In determining whether passengers had adequate notice of forum-selection clauses in passenger tickets, courts have employed the two-pronged “reasonably communicated” test.¹⁰⁵

III. THE “REASONABLY COMMUNICATED” TEST: EXAMINING CONTRACTUAL LIMITATIONS IN ADHESION CONTRACTS

Courts have noted that enforceability of a forum-selection clause contained in a passenger ticket depends on whether “its existence was reasonably communicated” to the passenger.¹⁰⁶ These courts have applied a two-pronged test to determine whether such contractual limitations were reasonably communicated. Although this test places the burden on the carrier to show that contractual limitations were reasonably communicated to passengers, the test does not relieve passengers of their common law duty to read. The “reasonably communicated” test has also been employed to examine the enforceability of contractual limitations contained in adhesion contracts in other situations.

A. *Evolution of the Two-Pronged “Reasonably Communicated” Test*

The requirement that carriers “reasonably communicate” contractual limitations to passengers evolved from the Second Circuit’s seminal decision in *Silvestri v. Italia Societa Per Azioni Di Navigazione*.¹⁰⁷ In an opinion by Judge Friendly, the court held that summary judgment for an Italian cruise line would be appropriate only if a clause in the passenger ticket, requiring written notice of injury within six months,¹⁰⁸ was incorporated into the contract for carriage.¹⁰⁹ Judge Friendly analyzed a series of cases that had upheld contractual limitations in passenger tickets

104. *Id.*; see also *Berman v. Cunard Line, Ltd.*, 771 F. Supp. 1175, 1177–78 (S.D. Fla. 1991) (refusing reconsideration of defendant’s motion to transfer because defendant had not controverted plaintiff’s claim that she was unaware of the forum-selection clause in the ticket).

105. See, e.g., *Ward v. Cross Sound Ferry*, 273 F.3d 520, 523 (2d Cir. 2001).

106. *Effron v. Sun Line Cruises, Inc.*, 67 F.3d 7, 9 (2d Cir. 1995); *Davidson v. Commodore Cruise Line, Ltd.*, No. 94-CV-73448-DT, 1995 WL 871120, at *2 (E.D. Mich. Feb. 28, 1995).

107. 388 F.2d 11 (2d Cir. 1968).

108. *Id.* at 12 n.1.

109. *Id.* at 13.

and found that the common thread running through them was that the “steamship line had done all it reasonably could” to inform the passenger of the contractual limitations.¹¹⁰ Because the Italian cruise line had not met this burden of proof,¹¹¹ the court reversed the lower court’s grant of summary judgment.¹¹²

The First Circuit formulated the two-pronged test for reasonable communication in *Shankles v. Costa Armatori, S.P.A.*¹¹³ The court explained that the first prong—consideration of the physical characteristics of the ticket—evolved out of courts’ concerns about enforcing fine print, “boilerplate” limitations in adhesion contracts.¹¹⁴ The second prong—consideration of extrinsic factors—acknowledges that passengers are unlikely to read all of the terms upon receipt of the ticket or during a pleasure cruise, but are likely to consult them in the event of a mishap.¹¹⁵ The *Shankles* court recognized that each prong is equally important in determining whether a contractual limitation was reasonably communicated to a passenger.¹¹⁶

Other circuits and lower courts have adopted the “reasonably communicated” test for determining whether a ticket gave adequate notice of terms and conditions affecting the legal rights of passengers.¹¹⁷ Under the first prong, a court must consider the physical characteristics of the ticket.¹¹⁸ These characteristics include features such as the size of the typeface, whether the existence of the terms is called to the passenger’s attention clearly and conspicuously, and the ease with which passengers can read the terms.¹¹⁹ Courts have often focused on whether there was a conspicuous warning on the face of the ticket alerting

110. *Id.* at 17.

111. *See id.* at 17 (citing *Hood v. Anchor Line (Henderson Bros.) Ltd.*, 1918 A.C. 837 (P.C. 1918), for the proposition that the burden is on the carrier to do all that is reasonably required to bring the terms to the notice of the passenger).

112. *See id.* at 18.

113. 722 F.2d 861 (1st Cir. 1983).

114. *See id.* at 863–64.

115. *Id.* at 865.

116. *Id.*

117. *Deiro v. Am. Airlines, Inc.*, 816 F.2d 1360, 1364 (9th Cir. 1987) (adopting the “reasonably communicated” test and noting that it has also been adopted by the Second, Fifth, and Sixth Circuits).

118. *Id.*

119. *See Shankles*, 722 F.2d at 864.

passengers to the contractual limitations inside the ticket.¹²⁰ Although the emphasis under this prong is on physical characteristics and readability, courts have nevertheless enforced forum-selection clauses in passenger tickets that were in fine print,¹²¹ even where part of the contract was smudged.¹²²

Under the second prong, a court must consider extrinsic factors that indicate the passenger's ability to become meaningfully informed about the contractual limitations.¹²³ These factors include how familiar the passenger is with the ticket, the time and inducement given to passengers to study the contractual provisions, and whether there are conditions outside of the ticket calling the contractual terms to the passenger's attention.¹²⁴ For example, when a passenger had a ticket only for two or three minutes, the First Circuit refused to uphold contractual limitations contained in the ticket.¹²⁵ However, the First Circuit upheld a one-year limitation on bringing suit contained in a different ticket because the passenger retained the ticket for four years after her trip and the limitations were pointed out to her attorney just two weeks after her accident.¹²⁶

A proper application of the "reasonably communicated" test involves a case-by-case analysis of both prongs of the test.¹²⁷ Although a ticket has to pass both prongs of the test,¹²⁸ when analysis of the first prong has left the question too close to call, courts have used a balancing test and allowed the second prong to determine the issue.¹²⁹ Thus, in *Deiro v. American Airlines, Inc.*,¹³⁰ the Ninth Circuit enforced a baggage liability limitation even though it doubted that notice of the limitation was clear and conspicuous.¹³¹ The court's decision was based on extrinsic factors,

120. See, e.g., *Effron v. Sun Line Cruises, Inc.*, 67 F.3d 7, 9 (2d Cir. 1995); *Shankles*, 722 F.2d at 865 (distinguishing between cases in which notice was "virtually nonexistent" and "where the ticket clearly and conspicuously alerts the reader to the presence of important terms and conditions").

121. See *Effron*, 67 F.3d at 9.

122. *Cross v. Kloster Cruise Lines, Ltd.*, 897 F. Supp. 1304, 1307 (D. Ore. 1995).

123. *Corna v. Am. Haw. Cruises, Inc.*, 794 F. Supp. 1005, 1008 (D. Haw. 1992).

124. See *id.*

125. See *Ward v. Cross Sound Ferry*, 273 F.3d 520, 525 (2d Cir. 2001).

126. *DeNicola v. Cunard Line Ltd.*, 642 F.2d 5, 11 (1st Cir. 1981).

127. *Shankles v. Costa Armatori, S.P.A.*, 722 F.2d 861, 866 (1st Cir. 1983).

128. See, e.g., *Gluckman v. Am. Airlines, Inc.*, 844 F. Supp. 151, 162-63 (S.D.N.Y. 1994) (finding summary judgment inappropriate based on the second prong, although the ticket passed the first prong of the test).

129. *Deiro v. Am. Airlines, Inc.*, 816 F.2d 1360, 1365 (9th Cir. 1987).

130. 816 F.2d 1360 (9th Cir. 1987).

131. *Id.* at 1364.

which weighed heavily in favor of reasonable communication of the terms.¹³²

B. The “Reasonably Communicated” Test Does Not Abrogate the Common Law Duty To Read

Although this test places the initial burden of showing that the clause was reasonably communicated to the passenger on the carrier,¹³³ it does not relieve the passenger of the duty to read the ticket.¹³⁴ In *Corna v. American Hawaii Cruises, Inc.*,¹³⁵ the plaintiff argued that she had never seen the ticket because her husband had it, and even if she had seen it, she could not have read it because her native language was Dutch.¹³⁶ The U.S. District Court for the District of Hawaii ruled that the duty to read applied to passenger tickets, and the plaintiff’s decision not to read the terms of the ticket did not relieve her of her obligations because the cruise line had met the initial burden of showing the terms were reasonably communicated.¹³⁷

C. The Two-Prong Test for Reasonable Communication Has Been Applied Outside the Passenger Ticket Setting

The two-prong test for reasonable communication has not been restricted to controversies involving contractual limitations in passenger tickets.¹³⁸ For example, in *Starlight Co. v. Arlington Plastics Machinery, Inc.*,¹³⁹ the U.S. District Court for the Northern District of California considered a forum-selection clause in a standard-form contract between

132. *See id.* at 1365.

133. *See Silvestri v. Italia Societa Per Azioni Di Navigazione*, 388 F.2d 11, 17 (2d Cir. 1968).

134. *Smith v. Doe*, 991 F. Supp. 781, 784 (E.D. La. 1998); *Corna v. Am. Haw. Cruises, Inc.*, 794 F. Supp. 1005, 1009 (D. Haw. 1992).

135. 794 F. Supp. 1005 (D. Haw. 1992).

136. *Id.* at 1009.

137. *Id.*; *see also Smith*, 991 F. Supp. at 784 (stating that failure or inability to read the terms does not relieve the passenger of contractual obligations in the ticket); *Cross v. Kloster Cruise Lines, Ltd.*, 897 F. Supp. 1304, 1309 (D. Or. 1995) (noting that plaintiff’s choice not to read the contractual terms did not render the forum-selection clause unenforceable).

138. *See, e.g., O’Brien v. Okemo Mountain, Inc.*, 17 F. Supp. 2d 98, 103 (D. Conn. 1998) (suit by Connecticut resident against Vermont ski resort for injuries suffered while skiing); *Nat’l Sch. Reporting Servs., Inc. v. Nat’l Sch. of Cal., Ltd.*, 924 F. Supp. 21, 24 (S.D.N.Y. 1996) (suit between franchisee and franchisor of information used to compare school districts).

139. No. C011121S1, 2001 WL 677908 (N.D. Cal. June 8, 2001).

two companies that made plastic bags.¹⁴⁰ The court employed the “reasonably communicated” test, and held that the physical characteristics of the contract as well as the extrinsic factors indicated adequate notice of the forum-selection clause.¹⁴¹

Courts have also applied the “reasonably communicated” test to forum-selection clauses in adhesion contracts. In *Sun Trust Bank v. Sun International Hotels Ltd.*,¹⁴² the U.S. District Court for the Southern District of Florida noted that disparity in bargaining power raises the question of whether forum-selection clauses in adhesion contracts were reasonably communicated to consumers.¹⁴³ Applying the two-pronged “reasonably communicated” test, the court found a forum-selection clause printed on the backside of a resort’s Guest Registration Form unenforceable.¹⁴⁴ In a very thorough application of the test, the court found that the forum-selection clause passed the first prong of the test because it was contained in a separate paragraph, it was printed in legible type, the language of the clause was sufficiently clear, and the registration form was presented to guests back-side up.¹⁴⁵ However, the clause failed the second prong of the test because the resort presented the registration form to guests at the last minute, guests were not given a meaningful opportunity to read and reject the clause, and the resort did not give prospective guests notice of the clause on its website.¹⁴⁶

IV. MASS MARKET LICENSING AGREEMENTS

The first mass market licenses¹⁴⁷ used in the computer industry were shrinkwrap agreements contained in the software’s physical packaging.¹⁴⁸

140. *Id.* at *1.

141. *Id.* at *3.

142. No. 00CV3741, 2001 WL 1736635 (S.D. Fla. Dec. 10, 2001).

143. *Id.* at *8.

144. *Id.* at *11.

145. *Id.* at *9.

146. *Id.* The court noted the resort’s website because guests could make reservations online, and in fact the plaintiff had done so. *Id.* at *1.

147. The term “mass market license” is taken from UCITA § 209 (2000). The pros and cons of UCITA have been vigorously argued, and are beyond the scope of this Comment. See generally Matthew J. Smith, Comment, *An Overview of the Uniform Computer Information Transactions Act: Warranties, Self-Help, and Contract Formation—Why UCITA Should Be Renamed “The Licensors’ Protection Act,”* 25 S. ILL. U. L.J. 389 (2001).

148. See Keohane, *supra* note 5, at 443. A shrinkwrap agreement is an unsigned license agreement included within the software box. The term refers to the practice of sealing software boxes by “shrinking” a clear cellophane wrapper around the box. *Id.* at 444.

However, with the increasing use of the Internet and downloadable software, shrinkwrap agreements have begun to give way to clickwrap and browsewrap agreements.¹⁴⁹ Courts have recognized significant differences between clickwrap and browsewrap agreements.¹⁵⁰ Forum-selection clauses in clickwrap agreements have been addressed on a few occasions, but without a coherent approach to the question of notice.¹⁵¹ Only one decision has addressed a forum-selection clause in a browsewrap agreement.¹⁵²

A. *Clickwrap and Browsewrap Agreements and Their Distinguishing Characteristics*

Clickwrap agreements came into use when computer vendors started loading software directly onto computer hard drives.¹⁵³ Initially, clickwrap agreements consisted of a notice, placed near the computer's power switch, stating that by switching the computer on the user was accepting the terms of the agreement.¹⁵⁴ Today, clickwrap agreements usually appear as a window, containing the terms of the agreement, which "pops up" on the computer screen the first time the consumer tries to install or use the software.¹⁵⁵ Sometimes they appear as a webpage containing the terms of the agreement.¹⁵⁶ The "click" in clickwrap refers to the fact that the user has to click on a button, typically marked "I AGREE" or "I ACCEPT," in order to continue installing or downloading

149. Although enforceability of shrinkwrap agreements is a source of significant litigation, such agreements are beyond the scope of this Comment. However, representative cases include *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1148 (7th Cir. 1997), *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1449 (7th Cir. 1996), *Klocek v. Gateway, Inc.*, 104 F. Supp. 2d 1332, 1335 (D. Kan. 2000), and *M.A. Mortenson Co. v. Timberline Software Corp.*, 140 Wash. 2d 568, 575, 998 P.2d 305, 308-09 (2000). See generally Mark A. Lemley, *Intellectual Property and Shrinkwrap Licenses*, 68 S. CAL. L. REV. 1239 (1995); Batya Goodman, Note, *Honey, I Shrink-Wrapped the Consumer: The Shrink-Wrap Agreement as an Adhesion Contract*, 21 CARDOZO L. REV. 319 (1999).

150. See, e.g., *Specht v. Netscape Communications Corp.*, 150 F. Supp. 2d 585, 593-94 (S.D.N.Y. 2001).

151. Courts' treatment of notice of forum-selection clauses in clickwrap agreements is addressed in Part IV.B, *infra*.

152. *Specht*, 150 F. Supp. 2d at 589.

153. Keohane, *supra* note 5, at 445.

154. *Id.*

155. See *id.*

156. Harrison, *supra* note 4, at 907-08.

the software.¹⁵⁷ Clickwrap agreements often contain forum-selection clauses.¹⁵⁸

Browsewrap agreements have become popular with the growth of e-commerce.¹⁵⁹ These agreements appear as hyperlinks on vendors' websites. A click on the hyperlink brings up webpages containing terms and conditions of the agreement.¹⁶⁰ A typical browsewrap agreement can be found at ZDNet.Com's website.¹⁶¹ A visitor to that site may not notice the phrase "Service Terms"¹⁶² among a host of other hyperlinks at the bottom of ZDNet.Com's website, especially because the hyperlinks at the bottom of the page are in much smaller font than that on the rest of the page.¹⁶³ Clicking on the hyperlink brings up the "ZDNet Terms & Conditions" webpage,¹⁶⁴ which states that "continued use of the [ZDNet Internet information service] constitutes your binding acceptance of these terms and conditions . . ." ¹⁶⁵ If the visitor were to scroll down to the ninth numbered paragraph, entitled "Miscellaneous," the visitor would find that he or she had assented to bringing any action to enforce the agreement in Manhattan, New York.¹⁶⁶

157. See, e.g., *id.* at 908; Jerry C. Liu et al., *Electronic Commerce: Using Clickwrap Agreements*, 15 No. 12 COMPUTER LAW. 10, 10 (1998). The user is also presented the opportunity to decline the terms of the agreement by clicking on matching "I DO NOT AGREE" or "I DECLINE" buttons. If the user selects this second option then the software is not installed or downloaded.

158. For examples of courts considering forum-selection clauses in clickwrap agreements, see, for example, *In re RealNetworks, Inc., Privacy Litigation*, No. 00 C 1366, 2000 WL 631341, at *1 (N.D. Ill. May 8, 2000) (clause stating "all unresolved disputes arising under this License Agreement shall be submitted to arbitration in the State of Washington"), *Koch v. Am. Online, Inc.*, 139 F. Supp. 2d 690, 692 (D. Md. 2000) (clause stating "exclusive jurisdiction for any claim or dispute resides in the courts of the Commonwealth of Virginia"), *1-A Equipment Co. v. ICode, Inc.*, No. 0057CV467, 2000 WL 33281687, at *2 (Mass. Dist. Ct. Nov. 17, 2000) (clause stating "exclusive venue for any litigation shall be in Virginia"), and *Caspi v. Microsoft Network, L.L.C.*, 732 A.2d 528, 529 (N.J. Super. Ct. App. Div. 1999) (clause stating "you consent to the exclusive jurisdiction and venue of courts in King County, Washington").

159. Dawn Davidson, Comment, *Click and Commit: What Terms Are Users Bound to When They Enter Web Sites?*, 26 WM. MITCHELL L. REV. 1171, 1173-74 (2000).

160. *Specht v. Netscape Communications Corp.*, 150 F. Supp. 2d 585, 588 (S.D.N.Y. 2001).

161. ZDNet is a clearing house for information related to computers and e-commerce maintained by Ziff Davis Co., at <http://www.zdnet.com> (last visited Apr. 30, 2002).

162. The term appears in the following sequence: [About Us](#) | [Support](#) | [Your Privacy](#) | [Service Terms](#) | [How to Advertise](#) | [ZDNet Jobs](#), at <http://www.zdnet.com> (last visited Apr. 30, 2002).

163. *Id.*

164. At <http://www.zdnet.com/filters/terms/> (last visited Apr. 30, 2002).

165. ZDNet Terms & Conditions para. 1.2, at <http://www.zdnet.com/filters/terms/> (last visited Apr. 30, 2002).

166. ZDNet Terms & Conditions para. 9, at <http://www.zdnet.com/filters/terms/> (last visited Apr. 30, 2002). The forum-selection reads: "the parties irrevocably consent to bring any action to enforce

Similarly, visitors to NBC.com's website¹⁶⁷ may not notice the hyperlink labeled "Privacy & TOS" among the list of hyperlinks the bottom of the webpage.¹⁶⁸ Unlike some other hyperlinks on NBC.com's webpage, the ones along the bottom of the page are not underlined.¹⁶⁹ Furthermore, even if a visitor to the site were able to figure out that TOS referred to "terms of service," they may be misled by the fact that clicking on the hyperlink brings up a page entitled "NBC Online Privacy Policy."¹⁷⁰ It is only upon scrolling down a number of screens that a visitor would find a statement specifying that: "USE OF THIS SITE SIGNIFIES YOUR AGREEMENT TO THE TERMS OF USE AND PRIVACY POLICY."¹⁷¹ Upon scrolling down further to the fifteenth numbered paragraph, labeled "Miscellaneous," a visitor would find that he or she had consented to exclusive jurisdiction in the courts of New York, New York, U.S.A.¹⁷²

There are three important differences between clickwrap and browsewrap agreements. First, in the case of clickwrap agreements, users have constructive notice of the terms of the agreements because they are presented with all the terms of the agreements prior to entering into the agreement.¹⁷³ However, with browsewrap agreements the terms of the agreement are displayed to users only if they click on the hyperlink that brings up the "terms and conditions" page.¹⁷⁴ Second, in order to carry out their primary purpose (e.g., downloading software or purchasing tickets online), users must acknowledge the presence of both the clickwrap agreement and the displayed terms by clicking on a button.¹⁷⁵ With a browsewrap agreement, users can carry out their primary purpose without ever clicking on the hyperlink that links to the "terms and

this Agreement in the federal or state courts located in New York, NY, the Borough of Manhattan." *Id.*

167. *At* <http://www.nbc.com/> (last visited Apr. 30, 2002).

168. The sequence is: FAQ | Contact Us | Contestants | Privacy & TOS | Tickets | PSNBC | TMYK | Studio Pass | Jobs, *at* <http://www.nbc.com> (last visited Apr. 30, 2002).

169. *Id.*

170. *At* http://www.nbc.com/nbc/footer/Privacy_Policy.shtml (last visited Apr. 30, 2002).

171. *Id.*

172. *Id.* The forum-selection clause specifies that the user "hereby consent[s] to the exclusive jurisdiction and venue of courts in New York, New York, U.S.A., regarding any and all disputes relating to this Agreement or your use of the Service."

173. *Specht v. Netscape Communications Corp.*, 150 F. Supp. 2d 585, 594 (S.D.N.Y. 2001).

174. *See id.*

175. *See id.* at 593-94.

conditions” page¹⁷⁶ and without ever seeing the agreement or its terms.¹⁷⁷ Finally, with a browsewrap agreement users may not even realize that a contract is being formed.¹⁷⁸ It is precisely because of these differences that courts have treated enforcement of these agreements differently.

B. Judicial Treatment of Forum-Selection Clauses in Clickwrap and Browsewrap Agreements

Few cases have addressed forum-selection clauses in clickwrap and browsewrap agreements. In these cases, courts have typically not treated notice as a threshold issue to enforcement of forum-selection clauses contained in clickwrap and browsewrap agreements. When these courts have addressed the issue of notice, they have looked to different factors in order to determine whether the agreement provided adequate notice of the forum-selection clause.

1. Courts Have Failed To Treat Notice as a Threshold to Enforcement of Forum-Selection Clauses in Clickwrap and Browsewrap Agreements

Most courts that have addressed the enforceability of forum-selection clauses contained in clickwrap agreements have found them to be enforceable.¹⁷⁹ However, none of these courts have treated notice as a threshold issue to the enforcement of forum-selection clauses in clickwrap agreements.¹⁸⁰ Even the two courts that recognized that

176. *See id.* at 594 (“[T]he user is not required to click on an icon expressing assent to the license.”).

177. *See id.*

178. *Id.* at 595.

179. Of the nine available opinions that have addressed the enforceability of forum-selection clauses contained in clickwrap agreements, seven enforced the clauses. *See Koch v. Am. Online, Inc.*, 139 F. Supp. 2d 690 (D. Md. 2000); *In re RealNetworks, Inc., Privacy Litig.*, No. 00 C 1366, 2000 WL 631341 (N.D. Ill. May 8, 2000); *Am. Online, Inc. v. Booker*, 781 So. 2d 423 (Fla. Dist. Ct. App. 2001); *1-A Equip. Co., Inc. v. ICode, Inc.*, No. 0057CV467, 2000 WL 33281687 (Mass. Dist. Ct. Nov. 17, 2000); *Caspi v. Microsoft Network, L.L.C.*, 732 A.2d 528 (N.J. Super. Ct. App. Div. 1999); *Groff v. Am. Online, Inc.*, No. PC 97-0331, 1998 WL 307001 (R.I. Super. Ct. May 27, 1998); *Barnett v. Network Solutions, Inc.*, 38 S.W. 3d 200 (Tex. Ct. App. 2001). In *Thompson v. Handa-Lopez, Inc.*, 998 F. Supp. 738 (W.D. Tex. 1998) the court found that the clause was not a forum-selection clause. Finally, in *Williams v. America Online, Inc.*, No. 00-0962, 2001 WL 135825 (Mass. Super. Ct. Feb. 8, 2001), the court held the clause unenforceable because of lack of notice.

180. *See, e.g., Koch*, 139 F. Supp. 2d at 694–95 (stating that forum-selection clauses are valid unless they are fundamentally unfair).

clickwrap agreements are standard-form contracts¹⁸¹ have held that forum-selection clauses in standard-form contracts are valid unless they are fundamentally unfair.¹⁸² Because courts have not treated notice as a threshold question to the enforcement of forum-selection clauses, a number of courts have enforced the clause with absolutely no discussion of notice.¹⁸³ In other decisions, the courts addressed the issue of notice only because it was raised by the plaintiff.¹⁸⁴ *Williams v. America Online, Inc.*¹⁸⁵ is the only decision in which a forum-selection clause in a clickwrap agreement was found unenforceable due to lack of notice.¹⁸⁶

Of the very few cases that have addressed browsewrap agreements,¹⁸⁷ only *Specht v. Netscape Communications Corp.*¹⁸⁸ has addressed the enforceability of a forum-selection clause. In *Specht*, the U.S. District Court for the Southern District of New York refused to enforce the forum-selection clause because Netscape had failed to ensure that users manifested assent to the terms of its license agreement,¹⁸⁹ but the court was also concerned about the lack of notice. Users were not notified of the terms of the agreement or even that a contract was being formed.¹⁹⁰ However, because the court held that users had not entered into a binding contract at all, it did not address the question of whether users had specific notice of the forum-selection clause.¹⁹¹

181. See, e.g., *Koch*, 139 F. Supp. 2d at 694; *Barnett*, 38 S.W.3d at 203.

182. See, e.g., *Koch*, 139 F. Supp. 2d at 694; *Barnett*, 38 S.W.3d at 203.

183. See, e.g., *Koch*, 139 F. Supp. 2d 690; *Booker*, 781 So. 2d 423; *I-A Equip. Co., Inc.*, 2000 WL 33281687.

184. See, e.g., *In re RealNetworks, Inc.*, 2000 WL 631341, at *5; *Williams*, 2001 WL 135825, at *1; *Caspi*, 732 A.2d at 532; *Groff*, 1998 WL 307001, at *2; *Barnett*, 38 S.W. 3d at 203–04.

185. No. 00-0962, 2001 WL 135825 (Mass. Super. Ct. Feb. 8, 2001).

186. *Id.* at *3.

187. It is difficult to know how many decisions have considered browsewrap agreements because courts do not always discuss the features of agreements they are considering. However, this author is only aware of four published opinions that have considered these agreements. See *Specht v. Netscape Communications Corp.*, 150 F. Supp. 2d 585, 594–95 (S.D.N.Y. 2001); *Pollstar v. Gigmania, Ltd.*, 170 F. Supp. 2d 974, 980 (E.D. Cal. 2000); *Register.com, Inc. v. Verio, Inc.*, 126 F. Supp. 2d 238, 245 (S.D.N.Y. 2000); *Ticketmaster Corp. v. Tickets.com, Inc.*, No. CV 99-7654 HLH(BQRX), 2000 WL 525390, at *1 (C.D. Cal. Mar. 27, 2000). Of these, only the first two used the term browsewrap (or a variant thereof).

188. 150 F. Supp. 2d 585 (S.D.N.Y. 2001).

189. *Id.* at 595.

190. *Id.* at 596.

191. *Id.*

2. *Courts Have Looked to Different Factors To Determine Whether There Was Adequate Notice of Forum-Selection Clauses Contained in Clickwrap and Browsewrap Agreements*

In *Groff v. America Online, Inc.*,¹⁹² a Rhode Island court relied on the common-law duty to read and held that the plaintiff was bound by the forum-selection clause contained in America Online's clickwrap agreement because he had effectively "signed" the agreement twice.¹⁹³ The court noted that plaintiff had not given any reason for his failure to read the terms of the agreement, and he could not claim ignorance of contract law because he had been a practicing lawyer for almost thirty years.¹⁹⁴ A Texas court reached a similar result in *Barnett v. Network Solutions, Inc.*,¹⁹⁵ relying on the common-law duty to read, and the fact that the plaintiff had scrolled past the forum-selection clause prior to accepting the agreement.¹⁹⁶

In *Caspi v. Microsoft Network, L.L.C.*,¹⁹⁷ a New Jersey court upheld a forum-selection clause¹⁹⁸ contained in a clickwrap agreement because the plaintiffs had sufficient notice of the clause.¹⁹⁹ The court relied on *Shute*, and noted that just as the Shutes could have read the fine-print clauses in their tickets, the plaintiffs in the case at bar could have scrolled through and read the terms contained in the clickwrap agreement.²⁰⁰ Because the forum-selection clause was presented in the same format as most of the other provisions in the agreement, the court found no evidence of an attempt to conceal or deemphasize the clause's provisions or present it unfairly.²⁰¹

In *Williams v. America Online, Inc.*,²⁰² a Massachusetts court refused to enforce the forum-selection clause contained in America Online's

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

193. *Id.* at *5.

194. *Id.*

195. 38 S.W.3d 200 (Tex. Ct. App. 2001).

196. *Id.* at 204.

197. 732 A.2d 528 (N.J. Super. Ct. App. Div. 1999).

198. The clause specified that the agreement was to be governed by the laws of the State of Washington, and that exclusive jurisdiction for all disputes arising out of the agreement would lie in the courts of King County, Washington. *Id.* at 529.

199. *Id.* at 533.

200. *Id.*

201. *See id.*

202. No. 00-0962, 2001 WL 135825 (Mass. Super. Ct. Feb. 8, 2001).

(AOL) “Terms of Service” agreement due to a lack of notice.²⁰³ The court was concerned about the fact that AOL’s software made changes to a subscriber’s computer before the clickwrap agreement was displayed.²⁰⁴ These changes were not reversed if the user cancelled the installation.²⁰⁵ Also, a subscriber had to override the default selection, “I AGREE,” in the clickwrap agreement twice before the terms of the service agreement were even displayed.²⁰⁶ Based on these two facts, the court held that plaintiffs did not have notice of the forum-selection clause in the agreement.²⁰⁷

In *In re RealNetworks, Inc., Privacy Litigation*,²⁰⁸ the U.S. District Court for the Northern District of Illinois held that a clickwrap agreement²⁰⁹ did provide adequate notice of a forum-selection clause.²¹⁰ The court was concerned that the clause was contained in a provision labeled “Miscellaneous” and RealNetworks did not call attention to the clause.²¹¹ However, because the font used for the forum-selection clause was the same as that used throughout the agreement, the clause was the final one in the agreement, and the user could scroll through and peruse the agreement to his or her “heart’s content,” the court found that the agreement provided adequate notice of the clause.²¹²

Courts have also looked to different factors to determine adequacy of notice in cases involving browsewrap agreements. In *Ticketmaster Corp. v. Tickets.Com, Inc.*,²¹³ the U.S. District Court for the Central District of California held that simply listing the terms and conditions on a home page did not provide enough notice to create a contract.²¹⁴ The court

203. *Id.* at *3.

204. *See id.* at *2–3.

205. *Id.* at *3.

206. *Id.* at *2. Based on this characterization of AOL’s “Terms of Service” agreement, it is arguable that this agreement is closer in spirit to a browsewrap agreement because the user is not presented with the actual terms of the agreement, and can click on “I Agree” without ever seeing any of the terms contained in the agreement. If nothing else, this decision points to courts’ reluctance to enforce forum-selection clauses if the vendor makes the process of viewing the clause too difficult.

207. *Id.* at *3.

208. No. 00 C 1366, 2000 WL 631341 (N.D. Ill. May 8, 2000).

209. *Id.* at *1.

210. *See id.* at *5.

211. *Id.*

212. *See id.* at *6

213. No. CV 99-7654 HLH(BQRX), 2000 WL 525390 (C.D. Cal. Mar. 27, 2000). Although this court did not expressly use the term browsewrap, it did distinguish the agreement on Ticketmaster’s website from shrinkwrap and clickwrap agreements. *Id.* at *3.

214. *See id.* at *3.

noted that users did not have to view these terms and conditions before proceeding to the page they were interested in.²¹⁵ Furthermore, users could view the terms and conditions only if they scrolled down the home page.²¹⁶ In contrast, in *Pollstar v. Gigmania, Ltd.*,²¹⁷ the U.S. District Court for the Eastern District of California expressed concern about the fact that the terms of the license agreement were not set forth on the home page, but could only be accessed by clicking on a hyperlink.²¹⁸ The court declined to rule on the enforceability of browsewrap agreements,²¹⁹ but did note that the hyperlink was not underlined, as is the norm, and was “in small gray print on gray background.”²²⁰ Thus, courts considering the enforceability of clauses contained in clickwrap and browsewrap agreements have not addressed the adequacy of notice consistently. Those courts that have considered the adequacy of notice have looked to different factors and have not adopted a consistent test for adequacy of notice, making it difficult for e-vendors and consumers to predict what a court might find determinative when deciding whether to enforce a forum-selection clause contained in a clickwrap or browsewrap agreement.

V. COURTS SHOULD ENFORCE FORUM-SELECTION CLAUSES IN CLICKWRAP AND BROWSEWRAP AGREEMENTS ONLY IF THE CLAUSE HAS BEEN “REASONABLY COMMUNICATED”

Courts should generally be willing to enforce forum-selection clauses in clickwrap and browsewrap agreements because the reasons underlying the U.S. Supreme Court’s enforcement of forum-selection clauses outlined in *M/S Bremen* and *Shute* also apply to clickwrap and browsewrap agreements.²²¹ Clickwrap and browsewrap agreements are adhesion contracts; thus, forum-selection clauses in such agreements should be subject to a threshold notice requirement. In determining the

215. *Id.*

216. *Id.*

217. 170 F. Supp. 2d 974 (E.D. Cal. 2000).

218. *See id.* at 981.

219. *Id.* at 982.

220. *Id.* at 981.

221. This Comment assumes that the forum-selection clauses presented in clickwrap and browsewrap agreements are not void for unconscionability. *See supra* notes 59–63 and accompanying text for the sorts of procedural and substantive unconscionability that can invalidate forum-selection clauses.

adequacy of notice provided by clickwrap and browsewrap agreements, courts should apply the “reasonably communicated” test developed by courts examining contractual limitations in passenger tickets. Only if an e-vendor can meet its burden of showing that the existence of a forum-selection clause contained in a clickwrap or browsewrap agreement was reasonably communicated to the consumer, should courts enforce that clause.

A. Enforcing Forum-Selection Clauses in Clickwrap and Browsewrap Agreements Serves the Policy Goals of M/S Bremen and Shute

The “present-day commercial realities and expanding international trade”²²² that justified enforcement of the forum-selection clause in *M/S Bremen* are also present in e-commerce. The number of people worldwide with home Internet access is approximately 474 million,²²³ and consumers in the United States spent over ten billion dollars online during the last three months of 2001.²²⁴ When combined with the fact that jurisdiction in e-commerce cases is particularly complicated because the Internet does not adhere to geographic boundaries,²²⁵ one can see why the *M/S Bremen* factors also apply to clickwrap and browsewrap agreements.

The three reasons the *Shute* Court found forum-selection clauses in adhesion contracts to be reasonable²²⁶ apply equally to e-vendors. E-vendors are similarly interested in limiting the fora in which they can be sued because, by the very nature of e-commerce, e-vendors are subject to suit in a number of different fora.²²⁷ At least one court has gone so far as to indicate that Internet advertising is directed at all states and meets the minimum contacts test for personal jurisdiction in each state.²²⁸

222. *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972).

223. Charles Arthur, *Worldwide Web Shrinks as Final Vestiges of Dot.Com Frenzy Work Their Way Out of System*, THE INDEPENDENT (LONDON), Jan. 4, 2002, at 5.

224. Christine Frey, *Consumers Push Online Sales Up 20% in 2001*, L. A. TIMES, Feb. 21, 2002, at C7.

225. See, e.g., Michael J. Weber, *Jurisdictional Issues in Cyberspace*, 36 TORT & INS. L.J. 803, 804 (2001); McCarty, *supra* note 53, at 574.

226. *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 593–94 (1991).

227. See *supra* note 53 and accompanying text.

228. See *Inset Sys., Inc. v. Instruction Set, Inc.*, 937 F. Supp. 161, 165 (D. Conn. 1996). Other jurisdictions have rejected such a broad definition of jurisdiction. See *generally* *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414 (9th Cir. 1997); *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997). For a detailed discussion of the issue of Internet jurisdiction, see Susan Nauss

Establishing a forum to litigate disputes—sparing litigants the expense of pretrial motions to determine the appropriate forum²²⁹—is also important in e-commerce. E-vendors may be subject to suit in as many fora as cruise lines. Although the final *Shute* rationale has been criticized,²³⁰ the idea that resulting savings will be enjoyed by consumers is more likely to hold true in e-commerce, where markets tend to be fairly competitive.²³¹ Therefore, because all the reasons for enforcing forum-selection clauses in passenger tickets apply equally to clickwrap and browsewrap agreements, courts should generally be willing to enforce forum-selection clauses in these agreements.

B. Adequacy of Notice Should Be a Threshold Question to Enforcing Forum-Selection Clauses Contained in Clickwrap and Browsewrap Agreements Because These Agreements Are Adhesion Contracts

Clickwrap and browsewrap agreements should be characterized as adhesion contracts.²³² As noted in *Specht v. Netscape Communications Corp.*,²³³ unless the user clicks the “Yes” or “I AGREE” button in a clickwrap agreement, the user is not able to proceed and installation of the software is aborted.²³⁴ Similarly, browsewrap agreements contain terms that preclude all negotiation,²³⁵ a principal feature of adhesion contracts.²³⁶ Inequality of bargaining power²³⁷ is illustrated by cases such as *Koch v. America Online, Inc.*,²³⁸ *Caspi v. Microsoft Network, L.L.C.*,²³⁹

Exon, *A New Shoe Is Needed To Walk Through Cyberspace Jurisdiction*, 11 ALB. L.J. SCI. & TECH. 1, 10–13 (2000).

229. *Shute*, 499 U.S. at 593–94.

230. See, e.g., Liesemer, *supra* note 19, at 1057–59.

231. See, e.g., *Northwestern Nat'l Ins. Co. v. Donovan*, 916 F.2d 372, 378 (7th Cir. 1990) (indicating that in competitive markets the savings in having prescribed forum are passed on, at least in part, to consumers).

232. Goodman, *supra* note 149, at 355 (arguing that shrinkwrap agreements should be analyzed using principles governing adhesion contracts). Goodman includes clickwrap and browsewrap agreements in the definition of shrinkwrap agreements. *Id.* at 319 n.3.

233. 150 F. Supp. 2d 585 (S.D.N.Y. 2001).

234. *Id.* at 594.

235. See, e.g., the ZDNet Terms & Conditions page, which states that “continued use of the [ZDNet Internet information service] constitutes your binding acceptance of these terms and conditions . . .” *Id.* at <http://www.zdnet.com/filters/terms> (last visited Apr. 30, 2002).

236. See *supra* notes 21–24 and accompanying text.

237. See *supra* note 23 and accompanying text.

238. 139 F. Supp. 2d 690 (D. Mar. 2000) (class action involving a clickwrap agreement).

239. 732 A.2d 528 (N.J. Super. Ct. App. Div. 1999) (class action involving a clickwrap agreement).

and *Specht v. Netscape Communications Corp.*,²⁴⁰ in which individual consumers faced large corporations. Finally, a lack of alternative viable options is probably best demonstrated by the fact that every Microsoft software product, whether downloadable or bought in a store, contains a clickwrap agreement. Significantly, Microsoft controls 93% of the desktop operating system market, 96% of all office productivity products, and 80% of all web browsers,²⁴¹ making it particularly difficult for a consumer to shop elsewhere. Hence, courts should characterize clickwrap and browsewrap agreements as adhesion contracts.

Adequate notice is a threshold question when enforcing forum-selection clauses in adhesion contracts.²⁴² Because clickwrap and browsewrap agreements can be characterized as adhesion contracts, courts should always address whether a consumer received adequate notice of a forum-selection clause contained in such an agreement. Only if the consumer received adequate notice should the clause be enforced.

C. *Courts Should Insist That E-Vendors “Reasonably Communicate” Forum-Selection Clauses to Consumers*

In determining the adequacy of notice, courts should hold e-vendors to the “reasonably communicated” standard developed by courts examining the enforceability of contractual limitations in passenger tickets. Courts should adopt a consistent framework for analyzing adequacy of notice. A consistent framework will lead to greater predictability in terms of what courts will find determinative when deciding whether to uphold a forum-selection clause contained in a clickwrap or browsewrap agreement.

The First Circuit’s reasoning for adopting the two-pronged test for reasonable communication²⁴³ also applies to clickwrap and browsewrap agreements. The first prong, a consideration of the physical characteristics of the ticket, evolved out of courts’ recognition that they were being asked to enforce terms, printed in fine print, in adhesion contracts.²⁴⁴ Clickwrap and browsewrap agreements can be treated as adhesion contracts that may also fail to call the existence of a forum-

240. 150 F. Supp. 2d 585 (S.D.N.Y. 2001) (class action involving a browsewrap agreement).

241. Michael A. Hiltzik & Jube Shiver, Jr., *Could Microsoft Grow Even Stronger, Larger?*, L.A. TIMES, Mar. 1, 2001, at C1.

242. See, e.g., *Effron v. Sun Line Cruises, Inc.*, 67 F.3d 7, 9 (2d Cir. 1995); *Sun Trust Bank v. Sun Int’l Hotels Ltd.*, No. 00CV3741, 2001 WL 1736635, at * 8 (S.D. Fla. Dec. 10, 2001).

243. See *Shankles v. Costa Armatori, S.P.A.*, 722 F.2d 861, 864–65 (1st Cir. 1983).

244. See *id.* at 863–64.

selection clause to the user's attention²⁴⁵ or, in the case of browsewrap agreements, may keep the clause hidden from view.²⁴⁶

The second prong, consideration of extrinsic factors that indicate the passenger's ability to become meaningfully informed of the contractual limitations, arose from courts' recognition that passengers are unlikely to read all of the terms included in a ticket upon receipt of the ticket or while on a pleasure cruise, but will consult them in the case of a mishap.²⁴⁷ It is just as likely that consumers who are presented with the terms of a clickwrap agreement will simply click assent without reading the terms presented to them,²⁴⁸ or that consumers presented with a browsewrap agreement will choose not to click on the hyperlink that would bring up the text of the agreement.²⁴⁹

Finally, courts that have considered the issue of notice in clickwrap and browsewrap agreements have examined the size of the typeface in which the forum-selection clause was presented.²⁵⁰ They have looked at the placement of the forum-selection clause within the agreement,²⁵¹ the clarity of the notice warning users of the existence of contractual terms and conditions,²⁵² the relative ease of accessing the terms of the agreement,²⁵³ and the users' ability to scroll through and read the terms of the agreement to their heart's content.²⁵⁴ They have even relied on extrinsic factors such as the plaintiff's familiarity with contract law.²⁵⁵ Thus, courts have already considered many of the factors that are considered by courts applying the "reasonably communicated" test, but have done so without formally adopting the test or applying it in a

245. See, e.g., *In re RealNetworks Inc.*, Privacy Litig., No. 00 C 1366, 2000 WL 631341, at *5 (N.D. Ill. May 8, 2000).

246. See, e.g., *Specht v. Netscape Communications Corp.*, 150 F. Supp. 2d 585, 594 (S.D.N.Y. 2001).

247. See *Shankles*, 722 F.2d at 865.

248. See *Goodman*, *supra* note 149, at 319 (suggesting that a typical consumer will not read the terms of a clickwrap agreement); *Harrison*, *supra* note 4, at 908-09.

249. Cf. *Specht*, 150 F. Supp. 2d at 594.

250. *Caspi v. Microsoft Network, L.L.C.*, 732 A.2d 528, 532 (N.J. Super. Ct. App. Div. 1999).

251. *In re RealNetworks, Inc.*, Privacy Litig., No. 00 C 1366, 2000 WL 631341, at *5 (N.D. Ill. May 8, 2000).

252. *Pollstar v. Gigmania, Ltd.*, 170 F. Supp. 2d 974, 981 (E.D. Cal. 2000).

253. *Williams v. Am. Online, Inc.*, No. 00-0962, 2001 WL 135825, at *2 (Mass. Super. Ct. Feb. 8, 2001).

254. *In re RealNetworks*, 2000 WL 631341, at *5.

255. *Groff v. Am. Online, Inc.*, No. PC 97-0331, 1998 WL 307001, at *5 (R.I. Super. Ct. May 27, 1998).

consistent manner. Adoption of the “reasonably communicated” test will bring greater predictability to the analysis of adequate notice.

The first prong of the test requires consideration of factors such as the size of the typeface used to print the terms, whether passengers were clearly alerted of the existence of the terms, and the ease with which passengers could read the terms. However, courts applying the “reasonably communicated” test have upheld forum-selection clauses that were in fine print²⁵⁶ or that were included under the heading “Miscellaneous.”²⁵⁷ Courts have also noted that this test does not abrogate passengers’ duty to read.²⁵⁸ Courts have not enforced contractual terms in tickets when the passenger had possession of the ticket for only a short time,²⁵⁹ when consumers were not given a meaningful opportunity to read and reject a forum-selection clause,²⁶⁰ or when nothing was done by the carrier to call attention to the importance of the terms and conditions contained in the ticket.²⁶¹ Based on these decisions, under the first prong of the “reasonably communicated” test, courts should require, as a minimum, that the clause be physically presented to the consumer and that the consumer be informed that the agreement contains important terms and conditions affecting his or her legal rights. Under the second prong, courts should require that the consumer at least be given a reasonable opportunity to read the terms.

“Reasonable communication” involves a case-by-case determination.²⁶² However, the terms of a clickwrap agreement, including its forum-selection clause, are displayed on the consumer’s computer screen²⁶³ and the consumer has a reasonable opportunity to read the terms.²⁶⁴ Therefore, forum-selection clauses contained in clickwrap agreements generally meet the minimum requirements of the “reasonably communicated” test as long as the consumer is alerted that

256. *See* *Effron v. Sun Cruise Lines, Inc.*, 67 F.3d 7, 9 (2d Cir. 1995).

257. *Starlight Co. v. Arlington Plastics Mach., Inc.*, No. C011121S1, 2001 WL 677908, at *4 (N.D. Cal. July 8, 2001).

258. *See* *Corna v. Am. Haw. Cruises, Inc.*, 794 F. Supp. 1005, 1009 (D. Haw. 1992); *Smith v. Doe*, 991 F. Supp. 781, 784 (E.D. La. 1998).

259. *Ward v. Cross Sound Ferry*, 273 F.3d 520, 525 (2d Cir. 2001).

260. *Sun Trust Bank v. Sun Int’l Hotels Ltd.*, No. 00CV3741, 2001 WL 1736635, at *11 (S.D. Fla. Dec. 10, 2001).

261. *Silvestri v. Italia Societa Per Azioni Di Navigazione*, 388 F.2d 11, 17 (2d Cir. 1968).

262. *Deiro v. Am. Airlines, Inc.*, 816 F.2d 1360, 1364 n.3 (9th Cir. 1987).

263. *Keohane*, *supra* note 5, at 445.

264. *In re RealNetworks, Inc., Privacy Litig.*, No. 00 C 1366, 2000 WL 631341, at *6 (N.D. Ill. May 8, 2000).

his or her rights are affected by the agreement. With a browsewrap agreement, the terms of the agreement are not displayed unless the consumer clicks on the hyperlink,²⁶⁵ making it a difficult decision whether browsewrap agreements meet the first prong of the test. However, factors under the second prong, such as whether the consumer is given a reasonable opportunity to read the terms of the agreement, the inducement given to consumer to read the terms, and the conspicuousness of the warning given to consumers that the agreement affects their legal rights, may tip the balance in favor of the browsewrap agreement meeting the minimum requirements of the “reasonably communicated” test.²⁶⁶

VI. CONCLUSION

Notice should be a prerequisite to enforcement of forum-selection clauses in adhesion contracts. Although enforcement of such clauses in clickwrap and browsewrap agreements would further the policies underlying *M/S Bremen* and *Shute*, courts should only enforce these clauses when the consumer has adequate notice of the forum-selection clause. In determining whether a consumer has adequate notice of the forum-selection clause in a clickwrap or browsewrap agreement, courts should apply the “reasonably communicated” test employed by courts examining the enforceability of limitations in other adhesion contracts. That is, courts should first examine the physical characteristics of the clickwrap or browsewrap agreement at issue. Second, they should consider extrinsic factors that indicate the consumer’s ability to be meaningfully informed of the existence of the forum-selection clause. Only if the e-vendor meets the burden of showing that the existence of a forum-selection clause contained in a clickwrap or browsewrap agreement was reasonably communicated to the consumer, should the court enforce the clause.

265. *Specht v. Netscape Communications Corp.*, 150 F. Supp. 2d 585, 594 (S.D.N.Y. 2001).

266. *See, e.g., Deiro v. Am. Airlines, Inc.*, 816 F.2d 1360, 1365 (9th Cir. 1987).