

## CONTRACTUAL CHOICE OF LAW IN CONTRACTS OF ADHESION AND PARTY AUTONOMY

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### INTRODUCTION

Ever since the concept of “contracts of adhesion” was introduced into the legal vocabulary in the United States in the early 20th century,<sup>1</sup> it has been widely used to refer to the standard contracts or standard form contracts in which the terms are drafted and presented by one party on a take-it-or-leave-it basis,<sup>2</sup> and the other party’s participation consists

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1. See Edwin Patterson, *The Delivery of A Life-Insurance Policy*, 33 HARV. L. REV. 198, 222 (1919) (addressing the issue of freedom of contract in life insurance contracts, Patterson pointed out that life-insurance contracts were contracts of “adhesion” because in these cases, the contract was drawn up by the insurer and the insured, who merely “adhered” to it, and had little choice as to its terms. Patterson then suggested that this expressive term seemed worthy of a place in our legal vocabulary). The concept of the contract of adhesion is not an American product, but rather originated in French civil law and was adopted by a majority of American courts after the California Supreme Court endorsed adhesion in 1962. See *Steven v. Fidelity & Casualty Co.*, 58 Cal. 2d 862, 882 (Cal. 1962) (reciting history of the concept).

2. See Todd Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1174, 1177 (1982). Rakoff tried to define the term “adhesion contract” by spelling out the following seven characteristics of an adhesion contract: (1) the document whose legal validity is at issue is a printed out form that contains many terms and clearly purports to be a contract; (2) the form has been drafted by, or on behalf of, one party to the transaction; (3) the drafting party participates in numerous transactions of the type represented by the form and enters into these transactions as a matter of routine; (4) the form is presented to the adhering party with the representation that, except perhaps for a few identified items (such as the price term), the drafting party will enter into the transaction only on the terms contained in the document. This representation may be explicit or may be implicit in the situation, but it is understood by the adherent; (5) after the parties have dickered over whatever terms are open to bargaining, document is signed by the adherent; (6) the adhering party enter into few transactions of the type represented by the form – few, at least in comparison with the drafting party; and (7) the principle of obligation of the adhering party in the transaction considered as a whole is payment of the money. *Id.*

of his mere “adherence” to the terms given.<sup>3</sup> It may not be logical to say that all standard contracts are necessarily adhesive, but all adhesion contracts use standard (or pre-printed) forms. In this sense, contracts of adhesion and standard contracts quite often are interchangeably used to mean the contracts that are formed through a fine-print form prepared by one party in advance.

The very nature of contracts of adhesion is that a contract as such is not a product of bargaining because it contains the pre-printed terms of one-sided control.<sup>4</sup> The economic impetus for the development of contracts of adhesion is the need for uniformity of contract terms that deal with the same products or services of the company in mass production and distribution and to help reduce possible risks facing the company under the terms of a contract.<sup>5</sup> On this ground, the economic analysis in favor of standard contracts argues that the use of standard contracts may make both sellers and buyers better off<sup>6</sup> because it is assumed, in a perfectly functioning market with complete information, that contracts will contain only efficient terms and the seller’s contract terms will benefit buyers as a class.<sup>7</sup> Thus, it is suggested that in the absence of external irregularities, the standard contracts shall be considered presumptively enforceable.<sup>8</sup>

Economic reason aside, the obvious practical importance of the use of standard contracts to sellers or firms is self-protection or minimization of possible risk.<sup>9</sup> It is typical that, when drafting contracts, the firms, through their lawyers, will try every effort to prevent others from possibly intruding into the interest of the firms, and will only consider how the firms’ business interests are to be effectively protected.<sup>10</sup> To that end, it would be ideal from the firms’ standpoint that the contracts

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3. See Albert Ehrenzweig, *Adhesion Contracts in Conflict of Laws*, 53 COLUM. L. REV. 1072, 1075 (1953).

4. See Karl Llewellyn, *Book Review on Prausnitz’s The Standardization of Commercial Contracts in English and Continental Law*, 52 HARV. L. REV. 700 (1939).

5. See Friedrich Kessler, *Contracts of Adhesion – Some Thoughts about Freedom of Contract*, 43 COLUM. L. REV. 629, 631 (1943).

6. See Robert Hillman & Jeffery Rachlinski, *Standard-Form Contracts in the Electronic Age*, 77 N.Y.U. L. REV. 429, 446 (2002).

7. Russel Korobkin, *Bounded Rationality, Standard Form Contracts and Unconscionability*, 70 U. CHI. L. REV. 1203, 1208, 1216 (2003).

8. See *id.* at 1208.

9. See E. ALLEN FARNSWORTH, *CONTRACTS* 285-286 (Aspen 4th ed. 2004).

10. See Edwin Richards, *Drafting Licenses to Guide Whether Potential Disputes Lie in Contract or Infringement*, 7 COMP. L. REV. & TECH. J. 45 (2003).

be prepared by the firm, in a pre-printed form, and entered into with others on a “take-it-or-leave-it” basis.<sup>11</sup>

As a legal instrument prescribing consensual rights and obligations of the parties, however, a contract is not a one-sided deal. A contract results from the bargain made on a free and voluntary basis between parties of equal footing. For that reason, the increasing use of contracts of adhesion has generated considerable debate on how contracts of adhesion should be dealt with and what rules for such contracts are needed.<sup>12</sup> For example, when handling contracts of adhesion, courts have a tendency to strike down the terms that are believed to be “unconscionable.”<sup>13</sup> One of the major concerns is, of course, the possible abuse of the use of standard contracts that are adhesive.

A recent development that has caused a considerable amount of controversies is the vast use of contracts of adhesion in the stream of e-commerce conducted on the Internet. In fact, the use of contracts of adhesion is becoming more frequent in e-commerce than in the traditional “paper world”. The most common contract forms that are employed electronically are so-called “click-wrap” agreements (“click-wraps”) and “browse-wrap” agreements (“browse-wraps”). Click-wraps refer to the electronic form agreements set up by one party to which the other party may assent by clicking on the “I agree” icon or button or by typing in a set of specified words.<sup>14</sup>

Distinct from click-wraps, browse-wraps are the electronic form agreements provided on the website in which the users can browse the terms and make a purchase or download without expressly manifesting assent to the terms.<sup>15</sup> In this context, browse-wraps are also termed as click-free agreements. But the terms will attach, or the users’ assent to the terms will be assumed, when certain actions, such as use of the

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11. For example, in contracts such as a loan, lease, real property (sold by the builders), insurance, license, employment, the terms except for very few items (price/premium/salary) are not open for negotiations.

12. See Rakoff, *supra* note 2. See also James White, *Autistic Contract*, 45 WAYNE L. REV. 1693, 1726-1731 (2000).

13. See Batya Goodman, *Honey, I Shrink-Wrapped the Customers: The Shrink-Wrap Agreements as an Adhesion Contract*, 21 CARDOZO L. REV. 319, 329 (2000).

14. See Christina L. Kunz, Maureen F. Duca, Heather Thayer & Jennifer Debrow, *Click-Through Agreement: Strategies for Avoiding Disputes on Validity of Assent*, 57 BUS. LAW. 401 (2002) [hereinafter referred to as Kunz, et al., *Click-Through Agreement*].

15. See Christina L. Kunz, John E. Ottaviani, Elaine D. Ziff, Juliet M. Moringillo, Kathleen M. Porter, & Jennifer C. Debrow, *Browse-Wrap Agreements: Validity of Implied Assent in Electronic Form Agreements*, 59 BUS. LAW. 279 (2003) [hereinafter referred to as Kunz et al., *Browse-Wrap Agreements*].

website or installation of software, are performed by the users.<sup>16</sup> In many cases, a “terms and conditions” hyperlink is placed somewhere on the web page that offers to sell goods or services and the hyperlink is normally hard to be noticed by any but the most cautious user.<sup>17</sup>

Another type of contract that is deemed adhesive and appears controversial as well involves “shrink-wrap” agreements. In the physical world, “shrink-wrap agreements” means the form agreements imposed in the retail software package that are covered in plastic or cellophane “shrink wrap.”<sup>18</sup> The agreements normally contain written licenses for the use of the software that become effective as soon as the customer tears the wrapping from the package. Although a majority of shrink-wrap agreements are related to software acquired off-the-shelf,<sup>19</sup> the term may also cover certain online purchases. Because in the shrink-wraps, the buyers (consumers) may know that terms are contained within the wraps at the time of purchase, but may only have the chance to read the terms after they open the plastic wraps, the transactions as such are being characterized by some as “money now, terms later” deals.<sup>20</sup>

All of these “wrap” agreements may appear facially different, however, these agreements share many common procedural and substantive aspects. First, these contracts are not entered into between the parties as a result of the meaningful negotiation that parties normally engage in during contract formation. Second, the agreements are drafted and provided by one party in a “read only” format that makes it impossible for the other party to “pick and choose” among the rights and obligations, and the other party’s only choice is to “take it or leave it.” Third, the other party’s assent to the terms of the agreement may be either absent or ambiguous. Finally, the other party’s legal consequences are either unknown or unpredictable. Therefore, a legitimate issue is whether there is any meaningful bargained for exchange, essential to the validity of the contract, between the parties entering into a “wrap” agreement.

An important issue this article addresses is which law will govern

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16. *See id.*

17. *See* Hillman & Rachlinski, *supra* note 6, at 464.

18. *ProCD, Inc. v. Zeidenberg*, 86 F. 3d 1447, 1449 (7th Cir. 1996).

19. *See* Goodman, *supra* note 13, at 320.

20. *See* Roger Bern, “Terms Later” *Contracting: Bad Economics, Bad Morals, and A Bad Idea for a Uniform Law, Judge Easterbrook Notwithstanding*, 12 J. L. & POL’Y 641, 648 (2004). *See also* Christopher Pitet, Note, *The Problem with “Money Now, Terms Later”*: *ProCD, Inc. v. Zeidenberg and the Enforceability of ‘Shrinkwrap’ Software Licenses*, 31 LOY. L.A. L. REV. 325, 339 (1998).

the “wrap” agreements, or in a broader sense, what would be the governing law for contracts of adhesion. More specifically, in contracts of adhesion, will a choice of law clause be enforceable? As a matter of fact, many, if not all, “wrap” agreements contain a choice of law provision that subjects the rights and obligations of the parties to a specific law or legal system.<sup>21</sup> An internationally accepted principle is that the parties to a contract have the autonomy to choose the law that governs their contract and the choice so made should be respected.<sup>22</sup> The question then is whether the choice of law clause in an adhesion contract that is provided by one party is a natural fruit of the autonomy of the parties.

More than a half century ago, Professor Albert Ehrenzweig examined a number of cases that involved contracts of adhesion and found that the party autonomy rule was inapplicable because these contracts did not result from equal bargaining. Thus, he concluded that in order to restore “freedom of contract,” rather than “freedom to adhere,” it was important to realize that “whatever the status of the principle of party autonomy in the conflicts law of contracts in general, this principle has no place in the conflicts law of adhesion contracts.”<sup>23</sup> Is Ehrenzweig’s observation still valid today?

In 1991, the Supreme Court, in *Carnival Cruise Lines, Inc. v. Shute*, took a position in favor of a forum selection clause in the cruise line’s passage contract ticket – a type of standard form contract printed on the back of the ticket.<sup>24</sup> In that case, although the Court emphasized that forum selection clauses contained in form passage contracts were subject to judicial scrutiny for fundamental fairness, the Court disagreed with

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21. For example, in a Microsoft “Window Defender License Agreement” (browsed on June 21, 2006), the choice of law provision reads as follows:  
United States: if you acquired the software in the United States, Washington State Law governs the interpretation of this agreement and applies to claims for breach of it, regardless of conflict of law principles. The laws of the state where you live govern all other claims, including claims under state consumer protection law, unfair competition law, and in tort.  
Outside United States: if you acquired software in any other country, the laws of that country apply.

22. See Ole Lando, *Contracts*, in INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW, 3 PRIVATE INTERNATIONAL LAW 3, 3 (Kurt Lipstein ed., J.C.B. Mohr 1976) (“The parties’ right to choose the law which governs an international contracts is so widely accepted by the countries of the world that it belongs to the common core of the legal systems.”). See also U.C.C § 1-301 (1977) (official comments).

23. See Ehrenzweig, *supra* note 3, at 1090.

24. *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991), *superseded by statute*, 46 U.S.C. App. § 183(c), *as recognized in* *Yang v. M/V Minas Yeo*, 1996 U.S. App. LEXIS 2235, at \*4 (9th Cir. 1996) (noting that the statute “discounts forum-selection clauses only in the passenger context”).

the court of appeals' determination that a non-negotiated forum selection clause in a form ticket contract is never enforceable simply because it is not the subject of bargaining.<sup>25</sup> Instead, the Court held that the forum selection clause in the cruise line's passage contract ticket was reasonable and enforceable. Would the *Carnival* ruling mean anything to the validity of the choice of law clause in contracts of adhesion?

In a highly debated case, *ProCD, Inc. v. Zeidenburg*,<sup>26</sup> decided in 1996, the Court of Appeals for the Seventh Circuit upheld a "shrink-wrap" license agreement against the buyer on the ground that the contract may be formed in another way, that is, the contract does not have to be formed when the buyer paid for the box of software selected from the shelf of the vendor and walked out of the store, rather it may be formed when the buyer used the software after having an opportunity to read the license at leisure.<sup>27</sup> The *ProCD* decision is regarded to have reversed the practice in the U.S. courts where shrink-wrap agreements were generally held invalid.<sup>28</sup> What may the *ProCD* approach implicate in respect to the concern about the autonomy of the parties in selecting governing law in contracts of adhesion?

In an attempt to promote the uniformity of the law governing software licenses, the National Conference of Commissioners on Uniform State Laws (U.C.C.U.S.L.) in 1999 adopted the Uniform Computer Information Transactions Act (known as UCITA).<sup>29</sup> The 2002 version of UCITA, provides that the parties, in their agreement, may choose the applicable law.<sup>30</sup> UCITA provisions allow the parties to choose the law of any state to resolve the disputes arising under the contract and UCITA does not require that the parties or the transaction have a relationship to the state whose law they select. Could this provision help the parties make an autonomy-based choice of law decision to govern their contracts that in most cases are "wrapped?"<sup>31</sup>

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25. *See id.* at 593.

26. *ProCD, Inc. v. Zeidenburg* 86 F. 3d 1447 (7th.Cir. 1996).

27. *See id.* at 1452.

28. *See Step-Saver Data Sys. Inc. v. Wyse Tech. and Software Link, Inc.*, 939 F.2d 91 (3d Cir. 1991).

29. *See* UNIF. COMPUTER INFO. TRANSACTIONS ACT (2002), available at <http://www.law.upenn.edu/bll/ulc/ucita/2002final.htm>.

30. *Id.* § 109.

31. Pursuant to § 109 of UCITA, the choice of law by the parties may govern the access contracts and electronic delivery. *Id.* The access contract is defined to mean a contract to obtain by electronic means access to, or information from, an information processing system of another person, or the equivalent of such access. *Id.* Electronic delivery refers to electronic transfer of possession or control. *See id.*

This article intends to analyze these issues from a contractual choice of law point of view. The article attempts to argue that contracts of adhesion do not conform to the notion of autonomy that underlies the choice of law by the parties and is incompatible with the principle of mutuality on which the power of the parties to make the choice of applicable law rests. The main theme of the article is to suggest that the choice of law clause in contracts of adhesion shall not take effect (although the clause may not necessarily be invalid), unless and until the other party (adherent) meaningfully agrees or a court scrutinizes the contract for the true assent of the adherent. The article proposes and advocates a “second chance” approach for the contractual choice of law in contracts of adhesion in order to protect the adherents’ interest that otherwise would be adversely affected.

Part II of this article begins with an analysis of the autonomy in selecting the governing law for the contract and also discusses the mutuality that is needed in the process of choice of law by the parties. Part III focuses on one-sided scenarios of contracts of adhesion, particularly the cohesive “wrap” agreements, and their incompatibility with mutuality-based autonomy in contractual choice of law. Part IV provides a critical view of the doctrines employed by courts in the United States to deal with contracts of adhesion, with a focus on the issue as to whether those doctrines would, to the extent that the parties’ assent is truly expressed, help ensure the autonomy that the parties are supposed to have in making a choice of law in contracts of adhesion. In Part V, the article addresses why adherents should have a “second chance” against an adhesive choice of law clause, and how the “second chance” is to be exercised.

The article concludes in Part VI by pointing out that given its uniqueness, the choice of law issue should be coped with separately from other parts of the contract. The basic argument is that for contracts of adhesion, though the time may not yet be ripe for a set of new rules to police the choice of law clause, adherents should not necessarily adhere to the choice of law made by the other party, but rather should be given a second chance to really make a choice, namely to either agree or disagree. Thus, as a general rule, a choice of law clause in an adhesion contract shall be presumed ineffective; and thus, unenforceable unless the adherent’s true assent is confirmed.

AUTONOMY AND MUTUALITY: THE UNDERPINNINGS OF  
CONTRACTUAL CHOICE OF LAW

In conflict of law literature, contractual choice of law is premised on the principle known as “party autonomy.”<sup>32</sup> The principle in its application has two fundamental and interrelated elements: autonomy and mutuality. The central importance of party autonomy is, of course, the autonomy, but the exercise of the autonomy must be based on mutuality. The reason is obvious: party autonomy is centered on the intention of the parties in freely negotiated contracts.<sup>33</sup> Therefore, the autonomy as to the contractual parties must be mutual.

Autonomy, as used in choice of law, is referred to as the freedom of parties to select through their agreement the law or legal system to which their contract is to be subject,<sup>34</sup> or as the liberty of the parties in choice of law.<sup>35</sup> The determination of choice is dependent on the intention of the parties and such intention may either be expressed in the form of a choice of law clause or choice of law agreement (express choice), or be implied in fact from the act of the parties (tacit choice).<sup>36</sup> A well-established rule in the conflict of laws is that the law chosen by the parties governs their contract and the choice will be respected absent obstacles to its enforceability.<sup>37</sup>

The concept of autonomy is derived from the principle of freedom of contract.<sup>38</sup> It is believed that by letting the parties choose which law governs their contract, the objectives of protecting the justified expectations of the parties and enabling the parties to foretell with

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32. See WILLIS REESE & MAURICE ROSENBERG, *CONFLICT OF LAWS, CASES AND MATERIALS* 1 (Griswold Cheatham et al. ed., Foundation Press 8th ed. 1984).

33. See LANDO, *supra* note 22, at 6.

34. See *id.* at 3.

35. See Henri Batiffol, Dean of the Faculty of Law, University of Lille, France, Lecture at the Summer Institute on International and Comparative Law sponsored by the University of Michigan: Public Policy and the Autonomy of the Parties: Interrelations Between Imperative Legislation and the Doctrine of Party Autonomy (Aug. 12, 1949), in *LECTURES ON THE CONFLICT OF LAWS AND INTERNATIONAL CONTRACTS DELIVERED AT THE SUMMER INSTITUTE ON INTERNATIONAL AND COMPARATIVE LAW, UNIVERSITY OF MICHIGAN, 1951*, at 68, 70.

36. See F. Mann, *The Proper Law of the Contract*, 3 *INT'L L. Q.* 60, 60 (1950). See also Walter Cook, “Contracts” and the Conflict of Laws: “Intention” of the Parties, 32 *ILL. L. REV.* 899, 917 (1938).

37. According to Professor Henri Batiffol of France, international contracts are governed according to the law prevailing in the greatest number of existing legal systems by a remarkable rule: the parties to such contracts are allowed to choose the law which will govern their transactions, and this rule of “party autonomy” is considered as highly satisfactory by all those who deem that liberty of individuals finally is the real end of law. See Batiffol, *supra* note 35, at 68.

38. See Mann, *supra* note 37, at 61. See also LANDO, *supra* note 22, at 15.

accuracy what their rights and liabilities are under the contract will be best attained. The idea is that giving parties the power of choice is in line with the fact that persons are free, within broad limits, to determine their own contractual obligations.<sup>39</sup> It follows that freedom of contract makes it possible for the parties to have the autonomy to determine the applicable law under which their contract will be governed.<sup>40</sup>

At present, freedom of contract is believed to have a two-faceted meaning. First, as has been generally proclaimed, the freedom of contract is the freedom of the parties to make an enforceable bargain.<sup>41</sup> In light of encouraging individual entrepreneurial activity, freedom of contract is viewed as a means to maximize the welfare of the parties and the good of society as a whole, and to accord to individuals a sphere of influence in which they can act freely.<sup>42</sup> The universal acceptance of freedom of contract is premised on the belief that a contract is the product of free bargaining by “parties who are brought together by the play of market and who meet each other on a footing of social and economic equality”<sup>43</sup> and, therefore, “no threat would result from the freedom of contract to the social order.”<sup>44</sup>

Second, as many have argued, is the freedom from contract. Here, the issue involved is whether a party may be freed from contractual liability arising in the absence of affirmative assent.<sup>45</sup> It is argued, at least by some, that freedom from contract is part of the human freedom the law wants to protect as it structures and maintains the institution of contract.<sup>46</sup> Although the connotation of freedom from contract may contain a wide range of contract related matters, e.g. pre-contractual liability, an important part, which is relevant here with regard to the contracts of adhesion, is the freedom from the obligations that were not expressly negotiated.

Whatever one may think about freedom of contract, the proposition that seems to be fundamental is that a contract is formed on a basis of

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39. See RESTATEMENT (SECOND) CONFLICT OF LAWS § 187 cmt. e (1971).

40. Charles Fried argued that preserving party autonomy should be the primary goal of contract law. See CHARLES FRIED, *CONTRACT AS PROMISE, A THEORY OF CONTRACTUAL OBLIGATION*, 1, 1-2 (Harvard 1981).

41. See FARNSWORTH, *supra* note 9, at 19.

42. See *id.* at 20.

43. See Kessler, *supra* note 5, at 630.

44. See *id.*

45. See Omri Ben-Shahar, *Forward: Freedom from Contract*, 2004 WIS. L. REV. 261, 263 (2004).

46. See Todd Rakoff, *Is “Freedom from Contract” Necessarily a Libertarian Freedom?* 2004 WIS. L. REV. 477, 477 (2004).

mutual assent and the assent must be manifested freely and voluntarily.<sup>47</sup> To achieve such an assent mutually, autonomy and mutuality are essential. The most important one is, of course, the autonomy. In Black's Law Dictionary, the word "autonomy" is defined as the right of self-government. As used in contracts, autonomy denotes the power of the parties to dispose of their rights and obligations at will, through the agreements reached between them.<sup>48</sup>

In fact, autonomy of the parties is now regarded as a common substitute for the traditional freedom of contract,<sup>49</sup> and in this context, autonomy and freedom almost become synonymous. It is not the intention of this author, however, to imply that the parties' autonomy is absolute. On the contrary, like freedom, autonomy may only be exercised within the boundary of law, which is not the subject of discussion here.

For purposes of making a contract, the autonomy of the parties can be evidenced by way of both substance and procedure. Substantively, the autonomy gives the parties, on a mutual basis, the freedom, among other things, to make or not to make the contract, to deal or not to deal with each other, to include or not to include in the contract certain terms or conditions, or to dissolve or continue their contractual relation. Thus, literally speaking, the right to contract is within the private domain of the parties and the courts should not be in any position to make the contract for the parties.<sup>50</sup> An important notion in this regard is that a person is supposed to know the contract that he makes.<sup>51</sup>

Unlike the substance of autonomy that involves what a contract should be as between the parties, the procedural matter of autonomy concerns how the parties' enter into the contract. Because a contract is basically a bargained-for-exchange between the parties,<sup>52</sup> the transaction requires that the parties have equal bargaining power. Thus,

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47. A classic view about freedom of contract is the concept of "liberty of contracting" described by Sir George Jessel in his judicial statement in 1875. According to Jessel, "men of full age and competent understanding shall have the utmost liberty of contracting, and their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of justice." *Printing & Numerical Registering Co. v. Sampson*, 19 L.R.Eq. 462, 465 (V.C. 1875). For general discussion about freedom of contract, see Mark Pettit, Jr. *Freedom, Freedom of Contract, and the "Rise and Fall,"* 79 B. U. L. REV. 263 (1999).

48. As Farnsworth points out, contract expressed "energetic self-interest," and the law that governed it expressed "the nature of contract by insisting that men assert their interests, push them, and fight for them, if they were to have the help of the state." FARNSWORTH, *supra* note 10, at 19.

49. *See id.*

50. *See* Rakoff, *supra* note 2, at 1181.

51. Kessler, *supra* note 5, at 630.

52. *See* 1 ARTHUR CORBIN, CORBIN ON CONTRACTS 157 (West 1952).

procedurally speaking, autonomy means that the parties freely express their intention and expect to get what they have bargained for without fear of interference from anyone. As between the parties, procedural autonomy implies that no party has the ability to force the other party into a contract and, likewise, no party has the power to force the other party to accept certain terms included in the contract.<sup>53</sup>

To the extent that the contract is a freely negotiated bargain, mutuality is the foundation underlying the bargain. Mutuality not only serves to establish a relationship between the parties during the bargaining process (i.e. to make a contract), but also helps to specify the status of the parties as a result of bargain (e.g. promisor or promisee).<sup>54</sup> Because of its importance in the course of contract making, a lack of mutuality may render a contract void.<sup>55</sup> Even in a unilateral contract, where the parties may not act in the way the parties normally do in a bilateral contract, mutuality may still be discernable in the sense that the other party (promisee) may have to satisfy a condition precedent in order for the contract to become effective. Hence, it is not counter-intuitive to say that the mutuality, generally speaking, is indeed the spirit of contract.

Although it seems difficult to precisely describe what mutuality is about in terms of content, mutuality may be used to indicate certain connections between the parties in different aspects of contract. In one place, for example, mutuality is said to include mutuality of assent, mutuality of consideration, mutuality of remedy, and mutuality of obligation.<sup>56</sup> It should be pointed out that no matter how the term is to be defined and classified, mutuality is a legal value that actually holds the parties together in a contract. More explicitly, a mutual expression of assent to the same terms is a decisive factor to the formation of a contract.<sup>57</sup> It may fairly be stated that because of the presence of mutuality between the parties, it is possible for their bargain take place.

Thus, what seems undisputable is that without autonomy and mutuality, the mutual assent of the parties could not possibly exist. And absent mutual assent, there would be no contract because it is commonly required that the mutual assent of both parties be present in order for the

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53. See Korobkin, *supra* note 7, at 1205.

54. See BRIAN BLUM, *CONTRACTS: EXAMPLES AND EXPLANATIONS*, 164 (Aspen 3d. ed. 2004).

55. See CALAMARI & PERILLO, *THE LAW OF CONTRACTS* 203 (West 4th ed. 1998).

56. See CORBIN, *supra* note 52, at 222.

57. See CALAMARI & PERILLO, *supra* note 55, § 2.1, at 25.

bargaining process to result in a contract.<sup>58</sup> A stated rule is that mutual assent is essential to a valid contract.<sup>59</sup> A popular metaphor that represents mutual assent is a “meeting of the minds,” which means that the parties agree on all of essential terms of the proposed transaction. Despite the difference in theoretical assertions about what kind of intention of the parties would matter in finding whether the parties have assented to an agreement,<sup>60</sup> it is generally held that to form a contract, there must be a bargain in which manifestation of mutual assent to the exchange is ascertained.<sup>61</sup>

Obviously, for contractual choice of law, autonomy and mutuality are of particular importance and have direct impact on the interests of the parties. On the one hand, the contractual choice of law constitutes part of the contract by which the parties will be bound, and in the mean time it provides a legal basis (the applicable law) for settlement of possible disputes. On the other hand, the contractual choice of law has the effect of subjecting the contract, as well as the parties, to a legal system under which the rights and obligations of the parties will be determined, and often the chosen legal system is that of a country foreign to one of the parties or even to both of them (e.g. a third country law). Therefore, it is crucial that the parties exercise their autonomy on a mutual basis in determining which law is going to govern their contract.

In choice of law, there are two theories that are aimed at characterizing the law chosen by the parties. One theory is called “party reference.” Pursuant to the “party reference” theory, the law chosen by the parties is regarded as the law of certain country or jurisdiction referred by the parties in their contract.<sup>62</sup> Then, when making their choice of law the parties submit their contract to the chosen forum.<sup>63</sup> The other theory is known as “incorporation.” Under the “incorporation” theory, to choose an applicable law by the parties is actually to incorporate the law of a chosen country or jurisdiction into

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58. See Samuel Williston, *Mutual Assent in the Formation of Contracts*, 14 ILL. L. R. 85 (1920).

59. *Lucy v. Zehmer*, 84 S.E.2d 516, 522 (Va. 1954).

60. There are two different doctrines that affect the determination of the intention of the parties, namely subjective doctrine and objective doctrine. Under the subjective doctrine, only the actual intention of the parties counts. The objective doctrine takes an opposite view that looks only to the external appearance of the parties' intention or apparent intention. For more discussion about the two doctrines, see Farnsworth, *supra* note 9, at 114-17.

61. RESTATEMENT (SECOND) OF CONTRACTS § 17(1) (1981).

62. See Lando, *supra* note 22, at 13.

63. See *id.*

the contract, and make it as a provision of the contract.<sup>64</sup> Pursuant to either theory, the autonomy and mutuality of the parties is deemed to be essential to making a choice of law for a contract.

The importance of autonomy and mutuality to the choice of law by the parties is also underscored by the “independence” of the choice of law. Here, the “independence” means that the choice of law clause or agreement is generally separated from the rest of the contract, especially when the validity of the contract becomes an issue. For instance, if for some reason the contract is deemed invalid under the forum’s laws, it may not necessarily render the choice of law clause or agreement invalid because the law chosen by the parties may have to be applied to determine, for example, the possible remedies of the parties, particularly when one party already received the benefit of the bargain from other party’s performance.<sup>65</sup> The “independence” of the choice of law clause is also relevant if the contract becomes illegal according to the *lex loci contractus* (law of place of contract), but may still be enforceable under the law chosen by the parties. In this situation, there is a rule that the applicable law chosen by the parties will control.<sup>66</sup>

To ensure that the parties have autonomy with regard to the choice of law in contract, and are able to deal with each other mutually, four issues need to be addressed. The first issue concerns whether the parties are brought together for the contract voluntarily and are willing to deal with each other without coercion. The second issue involves whether

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64. Section 187 (1) of the Conflict of Laws Restatement (2nd) adopts the incorporation theory by providing that “the law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue.” RESTATEMENT (SECOND) CONFLICT OF LAWS § 187(1) (1988 revisions). In the official comments on Section 187(1), it is further stated that “[t]he rule of this Subsection is a rule providing for incorporation by reference and is not a rule of choice of law. . . . In the alternative, they may incorporate into the contract by reference extrinsic material which may, among other things, be the provisions of some foreign law.” *Id.* at cmt. c.

65. In English private international law literature, a popular term indicating the law applicable to the contract is called the “proper law of contract,” which is defined as the law which the English or other court is to apply in determining the obligations under the contract. *See* CHESHIRE & NORTH, CHESHIRE’S PRIVATE INTERNATIONAL LAW 197 (Butterworth 8th ed. 1970). The subjective theory of the proper law regards the proper law as the legal system, which by their express or implied selection, the parties intend to apply. *See* F. Mann, *supra* note 36, at 60.

66. In English courts, for example, a contract that is valid by its proper law does not become unenforceable in England merely due to the illegality of the contract under the law of the place where the contract was made. *See* CHESHIRE & NORTH, *supra* note 65, at 226. Also, in China, for example, under 1999 Chinese Contract Law, if a contract is null and void, revoked or terminated, the validity of the dispute settlement clause which independently exists in the contract shall not be affected. *See* Article 57, Contract Law of China, available at [http://cclaw.net/lawandregulations/chinese\\_contract\\_law.txt](http://cclaw.net/lawandregulations/chinese_contract_law.txt).

there is a fair bargain between the parties and whether the bargain is based on free negotiation. The third issue deals with whether there is assent from the parties and whether the parties mutually manifest their assent. The fourth issue is whether the parties intend to have a certain law govern the contract and whether the application of that law, as well as the result of such application, are within the parties' reasonable expectations. A negative answer to any of these issues may cast serious doubt with respect to the parties' autonomy and mutuality.

In a freely negotiated contract that contains a choice of law clause, or in a freely negotiated choice of law agreement, a general assumption is that the autonomy and mutuality of the parties is fully or adequately exercised. But, in contracts of adhesion, both autonomy and mutuality are always the issue. It is not only because the presence of adhesion affects the contracting parties, as well as the contracting process, but also because such contracts are hardly made on a mutual basis and to a great extent reflect the autonomy of one party, and one party only.

#### CONTRACTS OF ADHESION AND "WRAPS": A DEFECTIVE BARGAIN AND ONE-SIDED AUTONOMY

The traditional dogma of contract contains at least two basic factors, promise and exchange, which are the prerequisites for the existence of a contract. Promise is a commitment to a future act or non-act. Or in more technical words, it is "a manifestation of intention to act or refrain from acting in a specific way, so made as to justify a promisee in understanding that a commitment has been made."<sup>67</sup> Exchange refers to a mutual dealing by which one party gets what he wants and gives the other party what is asked in return. Simply put, exchange is a process of bargaining where you give me that which I want and I give you that which you want.<sup>68</sup> Thus, once the parties exchange promises (bilateral) or when one party makes a promise and the other party agrees to perform in a particular manner (unilateral), a contract is formed (assuming that the promise is enforceable).

Making a promise is an exercise of the autonomy of the promisor because the promisor decides whether to make the promise, what to include in the promise, and to whom he will make the promise. Equally, acceptance depends on the autonomy of the promisee. The promisee's exchange of a promise with the promisor implies mutuality

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67. See RESTATEMENT (SECOND) OF CONTRACTS § 2(1) (1979).

68. See FARNSWORTH, *supra* note 9, at 6.

because the parties involved will benefit from the promises they have made to the other as a result of exchange. To guarantee that the parties get the benefit of their voluntary bargain, it is critical that there is a full exercise of autonomy as between the parties and that there is a bargain and the bargain is freely made. One important determinant, as often used by the courts, is whether the parties have equal bargaining power.

Like other contract terms, a contractual choice of law by the parties is also a bargain. Although the choice of law clause itself may not be a promise, it closely relates to the promise in that the chosen governing law will determine how the promise is to be enforced (contract performance), what the promise actually means (interpretation), and the resulting legal consequences if either party breaches the agreement (remedies). Therefore, it is very common that each party prefers to choose the law with which the party is most familiar. But as an outcome of a bargain, the applicable law that is chosen may be the law of the state or country of the promisor, the law of the state or country of the promisee, or the law of a neutral and unrelated state or country, which is not necessarily the law either party desires. In some cases, an international treaty may be selected to govern the contract. In other cases, the device of *dépeçage* (meaning to subject the different aspects of the contract to different legal systems) may be employed to try to satisfy the different needs of the parties.<sup>69</sup>

Contracts of adhesion, however, significantly alter the traditional process of contract formation. Here, a meaningful bargain between the parties does not exist. In an adhesion contract, the parties barely negotiate. In most cases, as noted, the terms and conditions that are presented to adherents are pre-printed and are basically non-negotiable. It is true that the contract, though adhesive, may not be formed without the signature of an adherent or other form indicating the adherent's consent. But, it does not necessarily mean that the adherent has full knowledge of the terms in the contract or the adherent will get what he has bargained for. The lack of a meaningful bargain between the parties or the lack of an opportunity by the parties to bargain, leaves the adherent in the position that he either accept the deal without changing any contractual terms or conditions, or there is no deal at all.

As a general pattern, what is obvious is that contracts of adhesion often take place where the bargaining power of the parties is unbalanced, where the supply of certain products or services is scarce, where adherents have special needs and the market is being monopolized in a

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69. See LANDO, *supra* note 22, at 8.

certain way, or where the market force clearly disfavors adherents.<sup>70</sup> In these circumstances, adherents normally do not have the leverage to bargain or to make an effective bargain. Of course, there are some other situations where standard terms result in an adhesive contract. For example, standard terms may result in an adhesive contract when a form contract is long and full of legal jargon, making the contract terms too complicated to be understood, and the adherent is in hurry.<sup>71</sup>

But, “wrap” agreements in the electronic form do not seem to follow this pattern. As a matter of fact, “wrap” agreements take a form that is unrelated to the actual status of adherents. In other words, the “wrap” agreements are generally used in terms of scope in the contract making process. For example, the unbalanced bargaining power of the parties may not be attributable to the adhesive nature of the contract. One peculiar characteristic of “wrap” agreements is that there is neither face-to-face dealing between the parties, nor negotiation between the parties, because everything is computerized through a well-designed software program that does not allow e-consumers to interact with the other party or a live agent of the other party.<sup>72</sup> Consequently, “wrap” agreements appear to be, at least facially, more adhesive because adherents have no opportunity to bargain for anything or to make a bargain.

Clearly then, as a party to an adhesion contract, an adherent is basically placed in a “no bargain” situation, and in many cases the adherent may only passively accept whatever is being offered and would have to bear whatever obligation is being imposed. Thus, it is highly questionable in a contract as such whether there is an exercise of autonomy, particularly with regard to the adherent. The issue further arising from this situation would be whether the parties have actually reached mutual assent as to the major terms and conditions of a contract or, in short, whether the adherent has truly assented to those terms and conditions.

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70. See Kessler, *supra* note 5, at 632.

71. See Hillman & Rachlinski, *supra* note 6, at 435. It has also been pointed out that there is one additional aspect of the situation that forms part of the popular conception of the contract of adhesion: the adhering party is in practice unlikely to have read the standard terms before signing the document and is unlikely to have understood them if he has read them. See also Rakoff, *supra* note 2, at 1179.

72. Hillman & Rachlinski, *supra* note 7, at 468.

A. *Inherent Defect in Adhesion Contracts: Lack of Meaningful Bargain*

A rudimentary concept of contract is that contractual liability is consensual.<sup>73</sup> Stemming from this concept is the settled legal principle that the formation of a contract requires the mutual assent of the parties.<sup>74</sup> The parties must manifest mutual assent during the bargaining process in order to form a contract.<sup>75</sup> Although, as noted, contract theorists have long debated whether the parties' assent should be determined subjectively or objectively,<sup>76</sup> the presence of the parties' assent, measured either against a subjective or an objective standard, nevertheless must be ascertained if a contract is to be found.<sup>77</sup>

Contracts of adhesion, however, do not conform to the norm of mutual assent because these contracts do not embody the "democratic consent of the parties."<sup>78</sup> Thus, in contracts of adhesion, there seems to be no legitimate basis for finding that the parties' assent has been mutually made. Consequently then, in contracts of adhesion, the process of bargaining is clearly defective because the mutuality of consent is missing and there is no meaningful bargain.

Yet, one may argue that despite the adhesive nature of a pre-printed standard contract, an adherent may choose not to enter into the contract, or in other words, the adherent still has the freedom from the contract. But freedom from a contract does not necessarily guarantee that one party would be able to fairly bargain with the other party when the contract is entered into between the parties. It has been pointed out that although parties are at liberty to refrain from entering into standardized transactions, the parties' contractual power, beyond that freedom, is exercised primarily in specifying deviation from the standardized plan, rather than in defining the obligation *ab initio* (from the beginning).<sup>79</sup>

Of course, the party's assent to the contract may be evidenced by the signature of the party on the contract document. But the signature, standing alone, does not indicate that the signing party has full knowledge of the contract terms.<sup>80</sup> When a party of little bargaining

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73. See Morris Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553, 558-562 (1933).

74. See *Newman v. Shiff*, 778 F.2d 460, 464 (8th Cir. 1985).

75. See FARNSWORTH, *supra* note 9, at 110.

76. See BLUM *supra* note 54, § 4.1, at 51-53.

77. See Rakoff, *supra* note 2, at 1185-1186.

78. See W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529, 542 (1971).

79. See Rakoff, *supra* note 2, at 1182.

80. It has been observed that for a standard contract, since it is common even for sophisticated

power, and hence little real choice, signs a commercially reasonable contract with little or no knowledge of its terms, it is hardly likely that he gave his consent to all of the terms, even if objectively manifested.<sup>81</sup> In this situation, judicial scrutiny of the fairness of the contract's terms would be warranted because the adherent has nothing to do with the drafting of the contract and the contract is not the result of a fair bargain.<sup>82</sup>

With regard to the choice of law provision in an adhesion contract, the adherent's signature on the contract by no means implies that the adherent's choice is meaningful. It is true that a choice of law clause is a contract term. This term, however, is different from other contract terms because a choice of law clause requires special knowledge or expertise in understanding the importance of the clause, as well as its legal consequences. Therefore, an adherent faced with a choice of law clause in an adhesion contract is vulnerable to inherent unreasonableness and unfairness. A major reason for such vulnerability is that the choice of law clause may subject the adherent to the laws of a jurisdiction that he has no familiarity with at all.

In "wrap" agreements, the vulnerability of adherents becomes even more evident. By clicking on a small icon that reads "I agree" or "I accept," the adherent (user) is entering into a contract. Sometimes, an adherent does not have to click on an icon, but simply downloads software which contains a notice saying, "by using this software, you agree to be bound by the terms and conditions of the software," through which the adherent may be deemed to have manifested consent to the contract.<sup>83</sup>

The question then is whether adherents have made a meaningful choice by clicking on an icon or downloading software.<sup>84</sup> In many cases, the answer would be negative as to the terms and conditions of the contract, and in most cases, if not all, the negative answer would apply to the choice of law clause. In fact, when clicking on "I agree," adherents may not even be aware that they are making a choice of law

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people not to read the fine print, the contract may not represent a knowing agreement on all of its terms. See STEVEN BURTON, PRINCIPLE OF CONTRACT LAW 255 (West 3d. ed. 1995).

81. Williams v. Walker-Thomas Furniture Co., 350 F.2d. 445, 449-450 (D.C. Cir. 1965).

82. See Ehrenzweig, *supra* note 3, at 1077, 1082.

83. See Kunz, et al., *Browse-Wrap Agreements*, *supra* note 15, at 279-281. See also Mark Budnitz, *Consumer Surfing for Sales in Cyberspace: What Constitute Acceptance and What Legal Terms and Conditions Bind the Consumer?*, 16 GA. ST. U. L. REV. 741, 746 (2000).

84. See Mark Lemley, *Shrinkwaps in Cyberspace*, 35 JURIMETRICS J. 311, 317 (1994).

that will apply to the determination of the rights and obligations arising from the online contract.

Those in favor of adhesion contracts from an economic viewpoint, however, argue that market force, under most circumstances, ensures that terms in form contracts are socially efficient and desirable for both buyers as a class and sellers as a class, and that without market failure, the consequentialist argument for non-enforcement of any contract terms, whether provided on a pre-printed form or offered on an adhesive basis, lacks merit.<sup>85</sup> They further argue that the scrutiny of the form terms is necessary only when buyers are not fully rational, but rather make decisions in a boundedly rational manner, which provides seller with an incentive to draft non-salient contract terms to their own advantage, whether or not such terms are efficient.<sup>86</sup>

Obviously and understandably, the economic theory on contracts of adhesion has a primary focus on market efficiency. This theory attempts to analyze the validity of adhesion contracts by treating the buyers (adherents) as a class, and suggests that courts' initial analytical step should be an analysis of whether a challenged contract term is salient to a significant number of buyers.<sup>87</sup> Therefore, according to the economic theory, absent fraud, duress, or significant third-party externalities, no judicial intervention is necessary with regard to contracts of adhesion.<sup>88</sup>

The economic theory may sound persuasive to the legitimacy of the existence of contracts of adhesion. But, when the choice of law becomes an issue, this theory does not seem to work. There are at least two reasons. First, choice of law is not a matter of the adherents as a class, but rather it is an individualized choice that requires specific determination. This is because the law of different jurisdictions involved is different and will result in different rights and obligations of the parties to the contract. Second, the choice of law term is not something that could be ensured by the market force to be both socially efficient and also beneficial to non-drafting party. Without the party's knowledge, the choice of law clause would not necessarily be rational.

The fact is that the vast use of contracts of adhesion has become common both in paper and electronic worlds, but the issue of mutuality apparently has been left out. For example, under the Uniform Commercial Code ("UCC"), a contract for the sale of goods may be

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85. See Korobkin, *supra* note 7, at 1207.

86. See *id.*

87. See *id.*

88. See *id.*

made in any manner sufficient to show agreement, including conduct by both parties, which recognizes the existence of such contract.<sup>89</sup> This provision is interpreted to permit contracts to be formed in other ways, including “wrap” agreements.<sup>90</sup> UCITA further allows a contract to be formed by the interaction of electronic agents,<sup>91</sup> meaning a computer program, or electronic or other automated means.<sup>92</sup> Both the UCC and UCITA open the door for “wrap” agreements, and make them a valid form of contract. But neither the UCC nor the UCITA address the parties’ mutuality of assent, based upon the fairness of the bargain, especially from the adherent’s standpoint, when he electronically enters in a contract.<sup>93</sup>

*B. Irrational Process in Adhesion Contracts: One-Sided Autonomy*

Since contract is a private affair for which the parties have the liberty to express their “energetic self-interest” and to assert such interest, push it, and fight for it,<sup>94</sup> it is important that the parties have the legal power, conferred by the law, to “make and receive enforceable promises, together with many of the consequences of having used that power.”<sup>95</sup> Hence, in the realm of contracts, rights and duties are determined by the agreement of the parties.<sup>96</sup>

It has been well stated that the main underlying purpose of the law of contracts is the realization of reasonable expectations that have been induced by the making of a promise.<sup>97</sup> To realize the reasonable expectations of the parties, there must be a rational process by which the parties are able to fully exercise their power to make a fair and meaningful bargain and create the contractual rights and obligations between them. In other words, the parties should have the autonomy to

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89. U.C.C. § 2-204 (2003).

90. *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1452 (7th Cir. 1996).

91. UCITA § 206 (Revised 2002).

92. *Id.* § 102(a)(27).

93. A relevant provision in UCITA is section 104(e), which is actually a cross reference pointing to the consumer protection law. Under section 104(e), if a consumer protection law addresses assent, consent, or manifestation of assent, the standard of assent, consent, or manifestation of assent under the consumer protection law applies and, subject to Section 905, may be accomplished electronically. Section 905 of UCITA deals with the federal Electronic Signature Global and National Commerce Act.

94. See FARNSWORTH, *supra* note 9, at 20.

95. See BURTON, *supra* note 80, at 1.

96. See Cohen, *supra* note 73, at 553.

97. See CORBIN, *supra* note 52, at 2.

decide what terms they include in their contract, and what terms they do not include in their contract.<sup>98</sup>

The rational process, however, may not be seen in contracts of adhesion, where one party dominates almost everything and the other party barely has any realistic opportunity to make a bargain. As noted, the most distinctive characteristics of an adhesion contract are that the contract does not result from equal bargaining and that the adherent must merely “adhere” to the terms tendered by the other party.<sup>99</sup> In most cases, the contractual intention of a party is but a more or less voluntary submission to terms dictated by the other party,<sup>100</sup> and when one party drafts the contract, the undickered for terms are apt to be one-sided.<sup>101</sup>

Because of the irrational process, in contracts of adhesion, the autonomy that is supposed to be equally enjoyed by both of the parties is twisted toward one side. It then necessarily raises a concern about the disproportionate private power of one party in particular and the maintaining of an unjust distribution of wealth and power in general.<sup>102</sup> In Professor Kessler’s words: “standard contracts in particular could thus become effective instruments in the hands of powerful industrial and commercial overlords enabling them to impose new feudal order of their own making upon a vast host of vassals.”<sup>103</sup>

Further, to allow the choice of law clauses that arise from one-sided autonomy to stand would aggravate the already unfair allocation of power and decrease the freedom of the parties to the contract. On the one hand, by relying on contracts of adhesion, businesses not only are empowered to choose the contract terms most favorable to them, but also have the privilege to select the law they wish to govern the contracts. On the other hand, adherents will have no choice but to adhere to terms that they otherwise may not agree to, and in the meantime will have to be bound by the already chosen governing law of which they may have no knowledge at all.<sup>104</sup>

An argument often inserted in this regard is the “duty to read” rule. Under this rule, a party is deemed as to have assumed the risk if he fails

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98. See Kessler, *supra* note 5, at 630.

99. See Ehrenzweig, *supra* note 3, at 1082.

100. See Kessler, *supra* note 5, at 632.

101. See BURTON, *supra* note 80, at 256.

102. See *id.* at 243.

103. See Kessler, *supra* note 5, at 640.

104. As Prof. Mueller pointed out, “[i]n less elegant but no less accurate language, a contract of adhesion is a contract that sticks the helpless consumer with standard form clauses that he might not have agreed to if he had actually had free choice.” See Addison Mueller, *Contracts of Frustration*, 78 YALE L. J. 576, 580 (1969).

to read the terms when entering into the contract.<sup>105</sup> The underlying rationale is that “one who refrains from reading a contract and in conscious ignorance of its terms voluntarily assents thereto will not be relieved from his bad bargain,” and “one who signs a contract has a duty to read it and is obligated according to its terms.”<sup>106</sup> It is also believed that the duty to read may not be an obligation, but a party may be bound by what he fails to read.<sup>107</sup>

For purposes of making a contract, the duty to read serves as a general rule that a party who signs a contract manifests assent to the contract and may not later deny it by complaining about not reading or not understanding the contract.<sup>108</sup> Even for standard form contracts, it is also held that “where a party to an agreement signs or otherwise manifests assent to a writing and has the reason to believe that like writings are regularly used to embody terms of agreements of the same type, he adopts the writing as an integrated agreement with respect to the terms included in the writing,” and “such a writing is interpreted wherever reasonable as treating alike all those similarly situated, without regard to their knowledge or understanding of the standard terms of the writing.”<sup>109</sup>

However, for the “duty to read” to be valid, there are certain assumptions. These assumptions mainly include: (a) there is no disparity of bargaining power between the parties to the contract;<sup>110</sup> (b) there is a genuine opportunity to read;<sup>111</sup> and (c) there exists a fair bargain as for the contract terms.<sup>112</sup> Unfortunately, in contracts of adhesion, those assumptions, as is often the case, are basically missing. In an adhesion contract, the adherent “is usually completely or at least relatively unfamiliar with the form and has scant opportunity to read it – an opportunity often diminished by the use of fine print and convoluted

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105. See CALAMARI & PERILLO, *supra* note 55, § 9.43, at 382.

106. *Williams v. Walker-Thomas Furniture Co.*, 198 A.2d 914, 916 (D.C. App. 1964).

107. See CALAMARI & PERILLO, *supra* note 55, § 9.41, n. 4, at 376. See also Rakoff, *supra* note 2, at 1185.

108. See CALAMARI & PERILLO, *supra* note 55, § 9.41, at 376.

109. RESTATEMENT (SECOND) OF CONTRACTS § 211 (1979).

110. See CALAMARI & PERILLO, *supra* note 55, § 9.43, at 388.

111. See *id.* § 9.45, at 391.

112. See Llewellyn, *supra* note 4, at 704 (“[W]here bargaining is absent in fact, the conditions and clauses to be read into a bargain are not those which happen to be printed on the unread paper, but are those which a sane man might reasonably expect to find on that paper.”).

clauses.”<sup>113</sup> And frequently, fine print contracts “are designed to discourage a careful reading.”<sup>114</sup>

In “wrap” agreements, users may hardly see any terms and conditions because most of them are hidden behind a link far below the icon of “I agree” or are “wrapped” in the little scroll box above the icon that requires a further browse-through. Consequently, when clicking on the icon, a user may not even be aware of the terms to which he would be subject. In this situation, some believe that “wrap” agreements are not really contracts at all because they are agreements over which the parties do not bargain and they are never expressly acknowledged by the parties.<sup>115</sup> Thus, the lack of an opportunity to review the terms or conditions in “wrap” agreements eventually makes the traditional common law “duty to read” meaningless.<sup>116</sup>

Because of the one-sided autonomy in contracts that are made on a “take-it-or-leave-it” basis, it is always highly questionable whether the parties have truly assented to be bound by the terms and conditions contained. For a choice of law clause, its rationality would not exist without the parties’ adequate assent. The adequacy of the assent to the choice of law in contracts is largely dependent on the parties’ full knowledge of the choice and their affirmative agreement to it. Unfortunately, as a general pattern, in contracts of adhesion, particularly “wrap” agreements, such knowledge and agreement are hardly present.

#### ENFORCEABILITY OF CONTRACTS OF ADHESION: UNSETTLED ISSUE

Today, there is a growing trend that the great majority of contracts are standard form contracts, especially in consumer transactions,<sup>117</sup> and as noted, the dominance of adhesive contracts over negotiated contracts in the course of business transactions has become a common phenomenon.<sup>118</sup> More strikingly, the evolution of contracts to accommodate electronic commerce has made “wrap” agreements the primary form of contract for internet transactions.<sup>119</sup> But the law regulating and governing contracts of adhesion is far from settled.

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113. See FARNSWORTH, *supra* note 9, § 4.26, at 286.

114. See BURTON, *supra* note 80, at 255.

115. See Lemley, *supra* note 84, at 317.

116. See Melissa Robertson, *Is Assent Still a Prerequisite for Contract Formation in Today's E-Economy?* 78 WASH. L. REV. 265, 272-275 (2003).

117. See Hillman & Rachlinski, *supra* note 6, at 431; See also Burton, *supra* note 80, at 255 (stating that most contracting today is done on standard form contracts).

118. See Korobkin, *supra* note 7, at 1203.

119. See Kunz, et al., *Browse-Wrap Agreement*, *supra* note 15, at 279.

The major issue is whether adhesive contracts are enforceable. Since contracts of adhesion have departed from the traditional notions of fair bargaining and mutuality of assent that are the essence of contracts,<sup>120</sup> the enforceability of contracts of adhesion inevitably becomes the center of discussion. One view is that the contracts of adhesion, like negotiated contracts, are *prima facie* enforceable.<sup>121</sup> Therefore, absent fraud, duress or significant third-party externalities, no judicial intervention is necessary.<sup>122</sup> Under this view, not all contracts of adhesion should be per se invalid.<sup>123</sup> Rather these contracts should be enforceable unless the contract in question results in unfairness.<sup>124</sup>

Others argue that the terms in contracts of adhesion are presumptively unenforceable.<sup>125</sup> It can be argued that because the parties lack actual contractual consent, contracts of adhesion are illegitimate by their very nature.<sup>126</sup> Another argument is that the enforceability of contracts of adhesion involves allocation of power and freedom between businesses and individuals,<sup>127</sup> and to enforce contracts of adhesion encroaches on the freedom of adherents because the adhesive terms are imposed on the transaction in a way no individual adherent can prevent.<sup>128</sup> In addition, it is suggested that courts should not enforce “wrap” agreements against adherents because the enforcement offends traditional principles of contract law.<sup>129</sup>

What is uncertain then is whether ordinary contract law applies to contracts of adhesion as well.<sup>130</sup> It has been observed that the common law of standardized contracts is highly chaotic because courts have been making efforts to protect the weaker contracting party, while apparently still trying to keep “the elementary rules” of the law of contracts intact.<sup>131</sup> This legal uncertainty today appears to become more eminent in the transactions that take place online.<sup>132</sup> Thus, there is an increasing

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120. See Robertson, *supra* note 116, at 296 (arguing that browse-wrap agreements stray too far from the basic contractual principles of notice and assent).

121. See Rakoff, *supra* note 2, at 1176.

122. See Korobkin, *supra* note 7, at 1207.

123. See Goodman, *supra* note 13, at 327.

124. See *id.*

125. See Rakoff, *supra* note 2, at 1176.

126. See Randy Barnett, *Consenting to Form Contracts*, 71 *FORDHAM L. REV.* 627, 645 (2002).

127. See Rakoff, *supra* note 2, at 1174.

128. See *id.* at 1237.

129. See Robertson, *supra* note 116, at 296.

130. See Rakoff, *supra* note 2, at 1284. See also Korobkin, *supra* note 7, at 1207.

131. See Kessler, *supra* note 5, at 633.

132. See Hillman and Rachlinski, *supra* note 6, at pp 430-432 (asserting that “lawmakers and theorists currently are debating the need for a new set of rules to support” the transactions on the

call for development of a new legal structure because contracts of adhesion are deemed to represent a different social practice from “ordinary” contract.<sup>133</sup>

In order to help cope with the Internet-based contracts of adhesions, namely “wrap” agreements, the American Bar Association (“ABA”) organized a working group in 1988 to conduct a two-part project on the validity of the assent process in electronic form agreements: one part focuses on click-through agreements and the other part on browse-through agreements. As a result, the working group produced a laundry list of suggestions to help in determining whether the parties to a contract validly and reliably assent to the terms of a browse-wrap agreement, and introduced a set of strategies for avoiding disputes on the validity of the mutual assent process.<sup>134</sup> Apparently, both the laundry list and the set of strategies were based on existing rules of law from cases and commentary. This group attempted to apply the “paper world” principles to the electronic contract setting.<sup>135</sup>

Courts vary in handling the validity issue of adhesion contracts, and the judicial distinction between enforceable and unenforceable contracts of adhesion is obscure and often confusing.<sup>136</sup> Struggling to seek the balance between the protection of consumers from being exploited by businesses and the promotion of market efficiency,<sup>137</sup> courts on the one hand recognize that standard terms don’t have the “bargain” required in an ordinary contract. On the other hand, the courts attempt to recognize

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Internet, and believing that although e-commerce changes some of the dynamics of standard-form contracting in interesting and novel ways and presents some new challenges, these differences do not call for the development of a radically different legal regime); See Budnitz, *supra* note 83, at 741-742 (arguing that the current contract rules are inadequate because they fail to address many issues that arise in Web-based consumer sales).

133. See Rakoff, *supra* note 2, at 1283-1284.

134. The list includes: (i) The user is provided with adequate notice of the existence of the proposed terms; (ii) The user has a meaningful opportunity to review the terms; (iii) The user is provided with adequate notice that taking a specified action manifests assent to the terms; and (iv) The user takes the action specified in the latter notice. See Kunz et al., *Browse-Wrap Agreements*, *supra* note 15, at 281. There are fifteen strategies divided into six groups: opportunity to review terms, display of terms, rejection of terms and its consequences, assent to terms, opportunity to correct errors, and keeping record to prove assent. See Kunz et al., *Click-Through Agreements*, *supra* note 14, at 402.

135. See Kunz et al., *Browse-Wrap Agreements*, *supra* note 15, at 281.

136. For the doctrine governing contract enforcement in general, it has long been criticized as vague, ill-defined, and easily muddled. See Hillman and Rachlinski, *supra* note 6, at 434.

137. See *id.* at 440 (“The ability of businesses to identify efficient allocation of risks also gives them the opportunity to exploit consumers by getting them to accept contract terms that inefficiently shift risks to consumers. . . .and a dilemma facing courts is that failing to enforce a standard term against consumers could undermine an efficient allocation of contractual risks.”).

that market forces could ensure that a mutually beneficial exchange is included in standard terms of the contract.<sup>138</sup> Indeed, in many cases courts have found it difficult to accommodate both concerns.<sup>139</sup> Also the objective and subjective theories of contract formation, to the extent that the parties' assent is ascertained, significantly complicate the process of determining the validity of contracts.<sup>140</sup>

In today's "paper world," there seems to be a general assumption that contracts of adhesion are enforceable.<sup>141</sup> Hence, it is said that courts have the tendency not to strike down terms of an adhesion contract, unless they believe businesses have gone too far.<sup>142</sup> But, how far is too far? A very common test used by courts to determine whether an adhesion contract should be enforced is the so-called "unconscionability" doctrine. This test now appears to have become the general principle that a court will not enforce a standard form contract if the contract is found unconscionable.<sup>143</sup>

With regard to "wrap" agreements, however, courts split widely. The assumption of validity does not seem to be as readily accepted by courts as it is normally accepted in the traditional "paper world."<sup>144</sup>

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138. *See id.* at 454-55.

139. *See* BURTON, *supra* note 80, at 256.

140. Whether assent should be determined on the basis of the parties actual or apparent intentions invoked one of the most significant doctrinal struggles in the development of contract law, that between the subjective and objective theories. *See* FARNSWORTH, *supra* note 9, § 3.6, at 114-117.

141. *See* Rakoff, *supra* note 2, at 1191.

142. *See* Hillman & Rachlinski, *supra* note 6, at 455.

143. *See* CALAMARI & PERILLO, *supra* note 55, § 9.39, at 372 (pointing out that in most of the cases in which unconscionability has been found, non-enforcement of a clause has been the result).

144. In federal courts for example, in some cases, courts have held the wrap agreements enforceable. *Person v. Google Inc.*, 456 F. Supp.2d 488, 495-97 (S.D.N.Y. 2006) (upholding forum selection clause in Google's AdWords users agreement); *Novak v. Overture Servs.*, 309 F. Supp. 2d 446, 458-59 (E.D.N.Y. 2004) (upholding click-through terms and conditions agreement); *Mortgage Plus, Inc. v. Docmagic, Inc.*, 2004 U.S. Dist. LEXIS 20145, at \*26-27 (D. Kan, 2004) (holding enforceable click-wrap license and forum selection clause within the license); *Davidson & Assoc., Inc. v. Internet Gateway*, 334 F. Supp. 2d 1164, 1177 (E.D. Mo. 2004) (upholding two click-wrap user agreements); *Freedman v. America Online, Inc.*, 294 F. Supp. 2d 238, 242 (D. Conn. 2003) (upholding AOL's forum selection clause); *Register.com, Inc. v. Verio, Inc.*, 126 F. Supp. 2d 238, 255 (S.D.N.Y. 2000) (enforcing a term within a browse-wrap agreement). In some other cases, courts have refused to enforce wrap agreements on the ground that the wrap agreements do not require users to affirmatively assent to the terms and conditions, and without assent no valid contract exists. *Laster v. T-Mobile USA, Inc.*, 407 F. Supp. 2d 1181, 1190 (S.D. Cal. 2005) (holding cellphone arbitration clause unconscionable); *Comb v. PayPal, Inc.*, 218 F. Supp. 2d 1165, 1177 (N. D. Cal. 2002) (rejecting a motion to compel arbitration because the user agreement was unconscionable); *Specht v. Netscape Communications Corp.*, 150 F. Supp. 2d 585, 596 (S.D.N.Y. 2001) (placing the enforceability of browse-wrap agreements into question); *Klocek v. Gateway, Inc.*, 104 F. Supp. 2d 1332, 1339-40 (D. Kan, 2000) (rejecting enforceability of shrink-wraps).

Courts are more concerned about whether the parties are able to adequately manifest their assent.<sup>145</sup> One reason is that the wrap agreements do not fit well within the bargain theory of conventional contract formation and, therefore, require fact-specific rulings highly dependent on the contract circumstances.<sup>146</sup> The other reason is that given the different environment of new dynamics of e-commerce in which most wrap agreements operate, it is often difficult to determine what conduct of the parties qualifies as a clear manifestation of assent.<sup>147</sup> Also, there is a doubt that current law is sufficient to guarantee the enforcement of wrap agreements.<sup>148</sup> As a consequence, there is lack of uniform consensus regarding enforceability of wrap agreements.<sup>149</sup>

It is important to note that the terms most commonly providing the impetus to challenge the enforceability of electronic standard form agreements are dispute resolution clauses.<sup>150</sup> The dispute resolution clauses in a contract are the clauses by which the contractual parties are to dispose of the disputes arising out of the contract in the way they agreed.<sup>151</sup> In commercial transactions, the dispute resolution clauses normally refer to three clauses: (a) arbitration clause providing for resolution of disputes through arbitration, (b) choice of forum clause designating a jurisdiction to which the disputes, if they arise, are to be submitted for adjudication, and (c) choice of law clause selecting an applicable law by which the contract in question will be governed.<sup>152</sup>

It has been observed that the dispute resolution clauses are the most significant terms of the contract, possibly determinative of the entire

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145. See Robertson, *supra* note 116, at 287.

146. See Zachary Harrison, *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. 908, 914 (1998).

147. See Budnitz, *supra* note 83, at 759.

148. See Bern, *supra* note 20, at 641, 649.

149. See Robertson, *supra* note 116, at 287 (suggesting that a uniform consensus regarding to the enforceability of browse-wrap agreement is needed).

150. See Kunz, et al., *Browse-Wrap Agreements*, *supra* note 15, at 280-281.

151. See Michael Gruson, *Governing Law Clauses in Commercial Agreements – New York's Approach*, 18 COLUM. J. TRANSNAT'L L. 323, 323 (1979) ("The parties to a commercial agreement have an understandable desire that the rights and obligations under the agreement be as well defined and predictable as possible.").

152. The choice of forum and choice of law may be contained in a single contract clause, and may also be provided separately. In *Nedlloyd Lines B.V. v. Superior Court*, for example, the dispute settlement clause in question read: "This agreement shall be governed and construed in accordance with Hong Kong law and each party hereby irrevocably submits to the exclusive jurisdiction and service of process of the Hong Kong courts." 834 P. 2d 1148, 1149 (Cal. S. Ct. 1992).

outcome of the negotiations.<sup>153</sup> In freely negotiated contracts, these clauses are the result of extensive bargaining. In contracts of adhesion, however, the dispute resolution clauses frequently become the means by which businesses maintain legal certainty and predictability to their own advantage. For example, the forum selection clause, which commonly appears in “wrap” agreements, is employed by the licensor to bring certainty to internet-based transactions that lack any fixed geographic location.<sup>154</sup>

In cases where courts address the enforceability of dispute resolution clauses in contracts of adhesion, one major issue is whether adherents have adequately manifested assent to the clauses. Quite often, in “wrap” agreements, the dispute resolution clauses are either unread by the users or the users are unaware of these clauses. Thus, to find adequate manifestation of assent in this regard, courts have to interpret what constitutes the required assent sufficient to render the dispute resolution clauses enforceable. With respect to “wrap” agreements, a common question is what clicking on “I agree” is supposed to mean.<sup>155</sup> In addition, enforceability largely depends on whether courts find these clauses to be fair and reasonable.

Unfortunately, although the reoccurrence of the issue of enforceability of dispute resolution clauses in adhesion contracts in both “paper” and “electronic” worlds is becoming more frequent, no consensus has yet developed as to the proper mechanism to deal with this issue.<sup>156</sup> In respect to adhesive choice of law, there is scarcely any established precedent or rule that has directly addressed it.<sup>157</sup> Most of

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153. See GEORGES DELAUME, LAW AND PRACTICE OF TRANSNATIONAL CONTRACTS 173 (Oceana 1988).

154. See Harrison, *supra* note 146, at 911.

155. See Barnett, *supra* note 126, at 637-638.

156. See *Person v. Google Inc.*, 456 F. Supp. 2d 488 (S.D.N.Y. 2006).

157. Courts often viewed the choice of law in light of reasonableness to apply the law so chosen rather than the parties’ true assent to the choice. For instance, in *Falbe v. Dell, Inc.*, No. 04-C-1425, 2004 WL 1588243 (N.D. Ill. July 14, 2004), Falbe ordered a computer over the telephone from Dell. When that computer arrived the packaging contained the “Terms and Conditions” of the sale, including a choice-of-law provision by which the Texas law was selected as governing law. Plaintiff, an Illinois resident who had purchased a computer from the defendant via telephone, disagreed and argued that Illinois law controlled. The U.S. District Court for the Northern District of Illinois did not examine the issue of Plaintiff’s consent to the choice, but instead, the court looked at whether the choice of law provision contravened Illinois public policy and whether the state chosen bore any reasonable relationship to the parties or the transaction. Another example is *Discover Bank v. Superior Court of Los Angeles*, 113 P.3d 1100 (Cal. 2005), where plaintiff, a credit card holder, brought a class action against Discover Bank, credit card issuer, for, among others, breach of contract. The contract between Plaintiff and Discover Bank had a Delaware choice-of-law agreement, and Discover Bank argued that under the agreement, Delaware law would

the cases where the dispute resolution in contracts of adhesion was at issue basically involved the choice of forum clause or arbitration clause.

A. *Doctrine of Unconscionability and its Application*

As noted, a popular doctrine that courts in the United States have been using to examine the enforceability of adhesive dispute settlement clauses or contracts of adhesion in general is the doctrine of unconscionability. Originally the doctrine of unconscionability was an equitable remedy in contract cases<sup>158</sup> and available mostly to refuse specific performance.<sup>159</sup> The unconscionability doctrine became a general rule applicable to all contracts for sale of goods in 1940s when it was adopted in section 2-302 of the U.C.C.<sup>160</sup> Later, this rule was extended to apply to all contracts through section 208 of Restatement (Second) of Contracts (1981).<sup>161</sup>

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apply. Although the Supreme Court of California did not address the choice of law issue and chose to remand the case on the determination of choice of law, it did offer certain comments as guidance for the lower court on remand. In its comments, the Supreme Court of California opined to have enforceability of the choice of law clause evaluated under the analytical approach of §187 of the Restatement (Second) of Conflict of Laws. According to the Supreme Court of California, the court must first determine (1) whether the chosen state has a substantial relationship to the parties or their transaction, or (2) whether there is any other reasonable basis for the parties' choice of law. If neither of these tests is met, there is the end of inquiry, and the court need not enforce the parties' choice of law. If however, either test is met, the court must next determine whether the chosen state's law is contrary to a fundamental policy of California. If there is no such conflict, the court shall enforce the parties' choice of law. If however, there is a fundamental conflict with California law, the court must then determine whether California has a "materially greater interest than the chosen state in the determination of the particular issue. If California has a materially greater interest than the chosen state, the choice of law shall not be enforced . . ." *Id.* at 173- 74. Once again, the Court did not make any inquiry about Plaintiff's adequate assent to the choice of law clause in the fine-printed agreement provided by the defendant.

158. See BLUM *supra* note 54, § 13.11.2, at 382.

159. See AMY KASTELY, ET. AL., CONTRACTING LAW, 609 (Carolina Academic Press 2d. ed. 2000).

160. Section 2-302 of the U.C.C. provides as follows (in 2003 amendment, the word "clause" was changed to "term"):

§ 2-302. Unconscionable Contract or Clause

If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

If it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.

U.C.C. § 2-302 (1998).

161. Section 208 of Restatement (Second) of Contracts Provides:

But neither section 2-302 of the U.C.C. nor section 208 of the Restatement is clear about what constitutes unconscionability, although both of them are intended to empower the courts to refuse a contract if the contract is found unconscionable, or to adjust the contract by removing or modifying the unconscionable provision in the contract.<sup>162</sup> According to the official comments to section 2-302 of the UCC, “the basic test is whether, in the light of the general commercial background and commercial needs of the particular trade or case, the term or contract involved is so one-sided as to be unconscionable under the circumstances existing at the time of the making of contract.”<sup>163</sup>

The leading case in which the unconscionability doctrine was illustrated and applied is *Williams v. Walker-Thomas Furniture Co.*<sup>164</sup> This case involves a series of purchases of household items under a standard form contract. Mrs. Williams, the purchaser, a single mother of seven children subsisting on public assistance with limited education, entered into an installment payment plan with Walker-Thomas purchasing several household items from it over the course of a five year period from 1957 through 1965. The terms of each purchase were provided in a printed form contract. In the contract, there was a “cross collateralization” clause that had the effect of keeping a balance due on every item purchased until the balance due on all items, whenever purchased, was liquidated.<sup>165</sup> As a result, the debt incurred at the time of the purchase of each item was secured by the right to repossess all the items previously purchased by the same purchaser, and each new item purchased automatically became subject to a security interest arising out of previous dealings.<sup>166</sup>

With an outstanding balance of One Hundred and Sixty-Four Dollars (\$164) Mrs. Williams purchased a stereo set that cost Five Hundred and Fourteen Dollars and Ninety-Five Cents (\$514.95). Mrs. Williams defaulted on her monthly payments because of her inability to pay. Walker-Thomas filed a complaint seeking replevin of all the items purchased from the very beginning. The Court of General Sessions

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If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result.

RESTATEMENT (SECOND) OF CONTRACTS § 208 (1981).

162. See BLUM, *supra* note 54, § 13.11.3, at 383.

163. See U.C.C. § 2-302 (1977) cmt.

164. 350 F.2d 445 (1965).

165. See *id.* at 447.

166. See *id.*

entered a judgment for Walker-Thomas and the District of Columbia Court of Appeals affirmed. On appeal to the United States Court of Appeals for the District of Columbia, the case was remanded for a determination of unconscionability.<sup>167</sup>

In this case, Judge Wright's majority opinion on the doctrine of unconscionability is influential. His opinion sets forth a two-pronged test of unconscionability. Under the test, unconscionability is to be determined by examining (1) whether there is an absence of meaningful choice on the part of the parties, and (2) whether the contract terms are unreasonably favorable to the other party.<sup>168</sup>

Since *Williams*, many courts have recognized this two-pronged test<sup>169</sup> and further developed it into a test that divides unconscionability into the categories of "procedural" and "substantive." Procedural unconscionability focuses on the formation process of contract to determine if in fact one party lacked any meaningful choice in entering into the contract.<sup>170</sup> Substantive unconscionability examines the contents or substances of the contract to determine whether the terms are unreasonably one-sided.<sup>171</sup>

As a general matter, unconscionability requires a showing that a contract is both procedurally and substantively unconscionable when made.<sup>172</sup> In determining whether a contract is unconscionable, courts often employ a sliding scale analysis with regard to the presence of the procedural and substantive components of unconscionability – that is, the more significant one is, the less significant the other need be.<sup>173</sup> In other words, if more of one is present, then less of the other is required.<sup>174</sup> Normally, a court will find a contract is unconscionable when the contract involves a combination of procedural and substantive defects. Either procedure or substantive unconscionability alone is not enough.<sup>175</sup>

The doctrine of unconscionability, however, has been attacked as "a term that has been defined only imprecisely, at best, and often not at

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167. *See id.* at 450.

168. *See id.* at 449-450.

169. *See* FERRIELL & NAVIN, UNDERSTANDING CONTRACTS 543 (LexisNexis 2004).

170. *Parilla v. IAP Worldwide Services VI, Inc.*, 368 F.3d 269, 276-77 (3d. Cir. 2004).

171. *Brower v. Gateway 2000*, 676 N.Y.S.2d 569, 574 (N.Y. App. Div. 1998).

172. For more discussion about procedural and substantive unconscionability, see Arthur Leff, *Unconscionability and the Code – the Emperor's New Clause*, 115 U. PA. L. REV. 485 (1967).

173. *Blake v. Ecker*, 113 Cal. Rptr. 2d 422, 433 (Cal. Ct. App. 2001).

174. *See* BLUM *supra* note 54, § 13.11.3, at 383 (Aspen 2004).

175. *See id.*

all.”<sup>176</sup> In fact, the issue of unconscionability is viewed and handled in courts through a factor-oriented analysis on a case-by-case basis.<sup>177</sup> A general holding is that a claim of unconscionability cannot be determined merely by examining the face of the contract, but will require an inquiry into its commercial setting, purpose, and effect, including the circumstances in which the contract was executed.<sup>178</sup>

Consequently, when making a determination of unconscionability, courts often rule differently and do not seem willing to establish any bright line.<sup>179</sup> For example, in some cases, contracts of adhesion are regarded as procedurally unconscionable,<sup>180</sup> while in other cases, it is held that a finding of procedural unconscionability may not be based solely on the adhesive nature of the contract.<sup>181</sup> Another example is the rule of duty to read. Although there is a tendency to treat the duty to read in contracts of adhesion differently from that in other contracts, there is no consistency in the legal authorities and, at times, there are different results in cases where the fact patterns are substantially similar.<sup>182</sup>

As for adhesive dispute resolution clauses specifically, the doctrine of unconscionability is being applied in the same way as it applied to regular contracts. But once again, the decisions are almost always made on an ad hoc basis and are at variance with each other. In *Comb v. Paypal*,<sup>183</sup> for example, plaintiffs who had funds removed from the bank by defendant, an electronic disbursement service supplier, sued defendant for violation of federal and state laws, seeking injunctive relief and related remedies on behalf of a purported nationwide class. Defendant moved to compel individual arbitration pursuant to the arbitration clause contained in the standard user agreement. In denying defendant's motion, the United State District Court for Northern District

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176. See ROBERT SCOTT AND JODY KRAUS, CONTRACT AND THEORY 554 (LexisNexis 3d. ed. 2002).

177. *In re Marriage of Gene M. Gudmundson and Geng Hui Gudmundson*, 955 P.2d 648, 653 (Mt. 1998) (“Unconscionability is to be determined by the district court on a case-by-case basis.”).

178. *Blake*, 113 Cal. Rptr. 2d at 433; See also *Wilson Trading Corp. v. David Ferguson, Ltd.* 23 N.Y. 2d 398, 403 (N.Y. 1968) (whether a contract or any clause of the contract is unconscionable is a matter for the court to decide against the background of the contract's commercial setting, purpose and effect).

179. See CALAMARI & PERILLO, *supra* note 55, § 9.40, at 373.

180. See *id.*

181. See *id.*; *Ting v. AT & T*, 182 F. Supp. 2d 902, 927-28 (N.D. Cal. 2002).

182. See CALAMARI & PERILLO, *supra* note 55, § 9.45, at 391.

183. *Comb v. Paypal, Inc.*, 218 F. Supp. 2d 1165 (N.D. Cal. 2002).

of California held that the arbitration clause was both procedurally and substantively unconscionable.<sup>184</sup>

On the procedural prong inquiry, the district court made it clear that a contract or clause is procedurally unconscionable if it is a contract of adhesion.<sup>185</sup> According to the court, a contract of adhesion is “a standard contract, which, imposed and drafted by the party of superior bargaining strength, regulates to the subscribing party only the opportunity to adhere to the contract or reject it,” and the user agreement and the arbitration clause at issue in this case met this definition.<sup>186</sup>

With respect to the substantive prong, the district court found the arbitration clause unconscionable on the following grounds: (a) it lacked mutuality of remedies because defendant alone possessed the right to make final decisions concerning a dispute; (b) it prohibited plaintiffs from consolidating their claims; (c) it could induce prohibitive arbitration fees; and (d) it limited the venue to the defendant’s backyard by requiring any arbitration to take place in Santa Clara County, California. The final factor appears to be yet another way by which the arbitration clause serves to shield defendant from liability instead of providing a neutral forum.<sup>187</sup>

The *Hubbert v. Dell Corp.* case,<sup>188</sup> however, went in a different direction. In that case, several purchasers of Dell computers filed a class action claim against Dell in Illinois. The purchases were made online through Dell’s website. The “Terms and Conditions of Sale,” which included an arbitration clause, were accessible by clicking on a blue hyperlink on each of the five web pages. Based on the arbitration clause, Dell moved to dismiss the action, or to compel arbitration. The Circuit Court, Madison County, denied Dell’s motion. On appeal, the Appellate Court of Illinois, Fifth District, reversed.

The appellate court held that a contract of adhesion is not automatically unconscionable. Therefore, merely including an arbitration clause in a contract of adhesion was insufficient to hold that the arbitration clause was procedurally unconscionable.<sup>189</sup> It was further held that the arbitration clause was not substantially unconscionable if there was no specific evidence that excessive fees and costs would actually be charged to effectively deny plaintiffs access to arbitration.

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184. *See id.* at 1177.

185. *See id.* at 1172.

186. *See id.*

187. *See id.* at 1173-77.

188. *Hubbert v. Dell Corp.*, 835 N.E.2d 113 (Ill. App. Ct. 2005).

189. *See id.* at 124.

Moreover, plaintiffs' argument that they were being deprived of a remedy because they were forced to arbitrate was insufficient to sustain the burden of proving that the arbitration clause was unconscionable.<sup>190</sup>

### B. *The "Carnival" Ruling and Fairness Standard*

In 1991, the Supreme Court, in *Carnival Cruise Lines, Inc. v. Shute*,<sup>191</sup> made an unusual foray into contract law<sup>192</sup> by addressing the issue of the validity of choice of forum clauses in contracts of adhesion. While expanding significantly the permissible use of contractual forum-selection clauses,<sup>193</sup> the Supreme Court did not base its analysis on the "unconscionability" doctrine, but rather the Court focused on the evaluation of "fundamental fairness," a standard that the Court established in *The Bremen v. Zapata Off-Shore Co.*,<sup>194</sup> a 1972 case in which the Court upheld a contractual choice of forum clause contained in a freely negotiated contract selecting a British court as the forum before which "any dispute arising must be treated."<sup>195</sup>

In the *Carnival* case, the Shutes, residents of Washington State, purchased, through an agent, a seven day cruise aboard Carnival's ship. Carnival, a Florida based Panamanian corporation, sent a "contract ticket" to the Shutes in the State of Washington. On the back of the fine print ticket, there was a forum selection clause in paragraph eight of the 25 total small printed paragraphs. The forum selection clause stated that all disputes arising out of or related to the contract would be litigated in Florida.<sup>196</sup>

During the cruise, Mrs. Shute was injured when she slipped on the wet deck during a guided tour of the ship's gallery. The Shutes sued Carnival in a federal district court in the State of Washington. The

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190. *See id.* at 125-126.

191. *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991), *superseded by statute*, 46 U.S.C. App. § 183(c), *as recognized in* *Yang v. M/V Minas Yeo*, 1996 U.S. App. LEXIS 2235, at \*4 (9th Cir. 1996) (noting that the statute "discounts forum-selection clauses only in the passenger context").

192. *See* FERRIEL & NAVIN, *supra* note 169, at 548.

193. *See* William Richman, *Carnival Cruise Lines: Forum Selection Clauses in Adhesion Contracts*, 40 AM. J. COMP. L. 977 (1992).

194. *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), *superseded by statute*, 28 U.S.C. 1404(a), *as recognized in* *Outokumpu Eng'g Enters. v. Kvaerner Enviropower*, 685 A.2d 724 (Del. Super. Ct. 1996).

195. *See id.* at 2.

196. On the ticket, Paragraph 8 provided that "all disputes and matters whatsoever arising under, in connection with or incident to this Contract shall be litigated, if at all, in and before a Court located in the State of Florida, U.S.A. to the exclusion of the Courts of any other state or country." *Carnival Cruise Lines*, 499 U.S. at 587-588.

district court dismissed claim on the ground of forum selection clause. The court of appeals reversed holding the forum selection clause invalid because it was not freely bargained for. The Supreme Court granted certiorari and reversed.<sup>197</sup>

The main tenet of the Supreme Court's *Carnival* ruling is its rejection of the view that adhesive forum selection clauses are invalid per se.<sup>198</sup> In an attempt to extend *Bremen* to cover adhesion contracts,<sup>199</sup> the Supreme Court refined its analysis of *Bremen* to account for the realities of form passage contracts by emphasizing that a non-negotiated forum selection clause in a form contract is subject to judicial scrutiny for fundamental fairness, but not necessarily unenforceable simply because it is not the subject of bargaining.<sup>200</sup>

In finding fundamental fairness, the Supreme Court centered its analysis on an evaluation of reasonableness. In holding the non-negotiated forum selection clause in question reasonable, the Court reasoned that: (1) a cruise line has a special interest in limiting the fora in which it potentially could be subject to suit; (2) the clause has the effect of reducing uncertainty and saving the parties and the courts time and expenses in ascertaining proper forum; and (3) the clause helps reduce fares, which reflect the savings that the cruise line enjoys by limiting the fora in which it may be sued.<sup>201</sup> In addition, the Court observed that there was neither a bad faith motive to use the forum selection clause as a means of discouraging cruise passengers from pursuing legitimate claims, nor was there any fraud or overreaching.<sup>202</sup>

A significant impact of the Supreme Court's *Carnival* ruling is that it opened the door widely to hold the "non-freely-bargained for" contracts prima facie valid and signaled that the adhesive nature of a contract is no longer a defense to enforcement of a forum selection agreement.<sup>203</sup> But the ruling is flawed in several aspects. First, it reversed the common law rule of subjecting terms in contracts of adhesion to scrutiny for reasonableness, but provided no sound basis for generalizing the validation of the adhesive choice of forum clauses. As

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197. *See id.* at 596.

198. *See Richman, supra* note 193, at 981.

199. In *Bremen*, the Supreme Court held that forum selection clauses are prima facie valid and should be enforced unless the enforcement would be unreasonable and unjust, or the clauses were invalid for such reasons as fraud or overreaching. *Bremen*, 407 U.S. at 10.

200. *Carnival Cruise Lines*, 499 U.S. at 593, 595.

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

202. *See id.* at 595.

203. *See Patrick Borchers, Forum Selection Agreement in the Federal Courts After Carnival Cruise: A Proposal for Congressional Reform*, 67 WASH. L. REV. 55, 90 (1992).

Justice Stevens in his dissenting opinion pointed out, the reduction of litigation costs does not suffice to render the choice of forum in the fine print on the back of ticket reasonable.<sup>204</sup>

Second, the *Carnival* ruling blurred the fundamental fairness standard set forth in *Bremen*. Under the *Bremen* rule, the lack of negotiation and the existence of unbalanced bargaining power is the basis for invalidating a forum selection clause.<sup>205</sup> By rejecting that basis, the *Carnival* ruling actually implies that it validates nearly all conceivable choice of forum clauses, no matter how unfair or adhesive.<sup>206</sup> As a result, the Supreme Court's sharp turn and convoluted doctrine in *Carnival* leaves lower courts now in disarray.<sup>207</sup>

Third, the validity per se rule, as applied to choice of forum clauses of an adhesive nature, imposes unreasonable, and often unfair, burdens on adherents. Under the *Carnival* ruling, a forum selection clause can bind the parties even where the agreement in question is a form consumer contract not subject to negotiation, and the party resisting the clause must overcome a substantial presumption in favor of enforcement.<sup>208</sup> This scenario, as a matter of fact, places consumers, already weak parties, in a much weaker position. The resulting disparity in the advantages between consumers and businesses has ultimately presented a need to call for congressional reform in order to strike a fair balance and to help eliminate various sources of confusion and traps for the unwary.<sup>209</sup>

Nevertheless, *Carnival* establishes a precedent governing the determination of enforceability of adhesive choice of forum clauses. But the question is whether the *Carnival* rule would also apply to the enforceability of choice of law clauses in adhesion contracts. In *Milanovich v. Costa Crociere, S.P.A.*,<sup>210</sup> the D.C. Circuit Court upheld a choice of law provision contained in a passenger ticket for a one-week Caribbean cruise on an Italian flag vessel owned by the defendant. Under the provision, Italian law was selected as the "ruling law of the

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204. *Carnival Cruise Lines*, 499 U.S. at 597-598 (Stevens, J. dissenting).

205. See Borchers, *supra* note 203, at 90; See also *Person v. Google Inc.*, 456 F. Supp. 2d 488 (S.D.N.Y. 2006) (holding that forum selection clause must be mandatory to be enforced). See also *Novak v. Overture Services, Inc.*, 309 F. Supp. 2d 446 (E.D.N.Y. 2004) (holding that forum selection clauses contained in Internet provider's user agreement are regularly enforced).

206. See Borchers, *supra* note 204, at 106.

207. See *id.* at 59.

208. *Freedman v. America Online, Inc.*, 294 F. Supp. 2d 238 (2003).

209. See Borchers, *supra* note 203, at 106.

210. *Milanovich v. Costa Crociere, S.p.A.*, 954 F. 2d 763, 769 (D.C. Cir. 1992).

contract.”<sup>211</sup> In reaching its decision, the Court held that under *Bremen* and *Carnival*, courts should honor a contractual choice of law provision in a passenger ticket unless the party challenging the enforcement of the provision can establish that enforcement would be “unreasonable and unjust.”<sup>212</sup>

Some then suggest that *Carnival* was the case where the Supreme Court held that the choice of law clause in contracts of adhesion should be enforced.<sup>213</sup> This suggestion seems to be misleading. First, in *Carnival*, the Supreme Court limited its discussion to the forum-selection clause contained in tickets and did not involve the choice of law issue.<sup>214</sup> Second, although choice of law and choice of forum are the problems arising from the overlap, or conflict, among laws or policies of different states or countries,<sup>215</sup> they are different in that the former deals with the selection of law designed to provide substantive rules of decision,<sup>216</sup> and the latter involves the right of particular court to adjudicate the case.<sup>217</sup>

Even in *Milanovich*, when applying *Carnival*, the D.C. Circuit Court cautiously pointed out that a preliminary question existed as to whether the choice of law clause was validly incorporated into the passage ticket.<sup>218</sup> According to the Court, the answer to the preliminary question depended on whether the clause had been “reasonably communicated” to the passenger.<sup>219</sup> Thus, the *Carnival* ruling that addresses the enforceability of forum selection clauses, without more, may not imply that the same ruling will equally apply to the determination of the fate of the choice of law clauses.

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211. *See id.* at 765.

212. *See id.* at 768.

213. *See* David Johnson, Susan Crawford, and Samir Jain, *Deferring to Contract Choices of Law and Forum to Protect Consumers (and Vendors) in E-Commerce*, (working draft, 1999), Chicago-Kent College of Law Internet Jurisprudence, available at <http://www.kentlaw.edu/cyberlaw/docs/draft/crawford.html>.

214. *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 587 (1991), *superceded by statute*, 46 U.S.C. App. § 183(c), *as recognized in* *Yang v. M/V Minas Yeo*, 1996 U.S. App. LEXIS 2235, at \*4 (9th Cir. 1996) (noting that the statute “discounts forum-selection clauses only in the passenger context”).

215. *See* DAVID P. CURRIE, HERMA HILL KAY & LARRY KRAMER, *CONFLICT OF LAWS, CASES-COMMENTS-QUESTIONS* 366 (6th ed. 2001).

216. *See id.*

217. *See* LEA BRILMAYER & JACK L. GOLDSMITH, *CONFLICT OF LAWS, CASES & MATERIALS* 445 (5th ed. 2002).

218. *Milanovich v. Costa Crociere, S.p.A.*, 954 F. 2d 763, 768 n.9 (D.C. Cir. 1992).

219. *See id.*

C. *The “ProCD” Decision and “Money Now, Terms Later” Approach*

A highly controversial case concerning enforcement of contracts of adhesion is *ProCD, Inc. v. Zeidenberg*,<sup>220</sup> where the United States Court of Appeals for the Seventh Circuit upheld the terms of a shrink-wrap agreement. The main thrust of the *ProCD* decision is its endorsement of a “money now, terms later” approach under which an adherent could be held to have agreed to the adhesive terms not available to him prior to or at the time of the purchase.<sup>221</sup>

In *ProCD*, the plaintiff, ProCD, Inc., spent millions of dollars creating a CD Rom telephone database that contains more than 3,000 telephone directories. The plaintiff, through vendors, sold the database called “Select Phone” to two groups of buyers: the general public for personal use at a low price (consumer package) and businesses at a higher price (business package). Defendant bought a consumer package from a retail store and resold the information in the Select Phone database online.<sup>222</sup>

Within the package box, there was a Single User License Agreement (“the Agreement”) that was wrapped in transparent plastic so that the buyer would be able to read the license only after he purchased the item.<sup>223</sup> The Agreement was mentioned outside of the box in “small print,” but did not “detail the specific terms of the license.”<sup>224</sup> Inside the box, the Agreement stated:

By using the discs and the listings licensed to you, you agreed to be bound by the terms of this License. If you do not agree to the terms of this License, promptly return all copies of the software, listings that you have been exported, the discs and the User Guide to the place where you obtained it.<sup>225</sup>

The Agreement prohibited the user from making the listings available in whole or in part to any other user.<sup>226</sup> The user then may only be able to see the agreement on the screen when the program was first installed and the “click” by the user on the “agree” button was required before proceeding.

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220. See *ProCD v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996).

221. See *Bern*, *supra* note 20, at 650.

222. See *ProCD*, 86 F.3d at 1449-1450.

223. See *ProCD v. Zeidenberg*, 908 F. Supp. 640, 644 (W.D. Wis. 1996), *rev'd*, 86 F.3d 1447 (7th Cir. 1996).

224. See *id.* at 654.

225. See *id.* at 644.

226. See *id.* at 645.

Based on the Agreement, ProCD filed a civil action for injunctive and monetary relief. Defendant moved for summary judgment. In granting defendant's motion, the United States District Court for the Western District of Wisconsin held that defendant was not bound by the "shrink-wrap" license included in the software because defendant never assented to it.<sup>227</sup> The Seventh Circuit reversed. With regard to the issue of whether buyers of computer software must obey the terms of shrink-wrap licenses, the court opined that shrink-wrap licenses are enforceable unless their terms are objectionable on grounds applicable to contracts in general.<sup>228</sup>

The defendant's major argument in *ProCD* was that the terms of the license agreement were not part of the purchase contract because they were not presented to him at the time of purchase.<sup>229</sup> The Seventh Circuit Court rejected this defense for the reason that transactions in which the exchange of money precedes the communication of detailed terms are common.<sup>230</sup> Thus, the court concluded that no contract had been formed until the defendant inspected the package, tried out the software, learned of the license and did not reject the goods.<sup>231</sup>

The Seventh Circuit Court in *ProCD* reversed the prior shrink-wrap jurisprudence in federal courts, which holds that the terms were not part of the bargained for exchange since consumers could only review the terms after making the purchase,<sup>232</sup> and laid a foundation for enforcement of these terms.<sup>233</sup> But, *ProCD*'s upholding of post-purchase terms, though seemingly innovative, is problematic.

First, *ProCD* confused the issue as to at what point the wrap terms would become part of the contract.<sup>234</sup> By permitting a contract to be formed at a time after the purchase is made, the Court indicates that in shrink-wrap agreements, an offeror (vendor) may invite acceptance by additional conduct after the purchase and propose limitation on the kind of conduct that constitutes acceptance.<sup>235</sup> From the offeree's (consumer's) perspective, terms that were not accessible to them at the time of purchase, because they were contained in the wraps, may

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227. See *id.* at 644.

228. The grounds given by the Court as an example included violation of a rule of positive law and being unconscionable. See *ProCD*, 86 F.3d. at 1449.

229. See *ProCD*, 908 F. Supp. at 654.

230. See *ProCD*, 86 F.3d. at 1451.

231. See *id.* at 1453.

232. See Goodman, *supra* note 13, at 337, 344.

233. See Hillman & Rachlinski, *supra* note 6, at 487.

234. See Harrison, *supra* note 146, at 926.

235. See *ProCD*, 86 F.3d at 1452.

become part of the contract when certain conduct amounting to acceptance takes place at a later time.<sup>236</sup>

Second, the rationale underlying *ProCD* rests on an assumption that the wrap terms are enforceable per se even if they are not the fruit of free bargain because “notice on the outside, terms on the inside, and a right to return the product for a refund if the terms are not acceptable” are “a means of doing business valuable to buyers and sellers alike.”<sup>237</sup> This methodology seems to suggest that the consumer’s right to return is determinative no matter how bizarre the inside terms are and how unconscionable the formation of the contract is.

Also, *ProCD* treated shrink-wrap agreements the same as regular contracts, thus ignoring the difference between contracts that are freely made and contracts that are adhesive. The “money now, terms later” approach clearly provides businesses (vendors), through the terms contained in the pre-meditated standard contract, with more advantages over adherents who may already be in the disadvantageous situation. Hence, as some have observed, *ProCD*’s “terms later” rule abandons the principle of impartial treatment of the contractual parties.<sup>238</sup>

It is conceivable that in many shrink-wrap agreements, the choice of law clause will be included.<sup>239</sup> Thus, *ProCD*’s “terms later” doctrine, if applied, would make the clause enforceable along with all other terms of the contract without considering whether the customer (adherent) has effectively assented to the clause. This indeed helps businesses strategically create a setting in which they can act purposefully for their own benefit, both from a business and legal perspective.<sup>240</sup>

#### D. UCITA Provision and “Bomb-Shelter” Legislation

Realizing the rapid growth of the modern digital economy, the American Law Institute (ALI) and the N.C.C.U.S.L. endeavored in 1990 to draft a compute information law known as U.C.C. Article 2B, with an attempt to create a set of rules for wrap agreements and other electronic licensing arrangements.<sup>241</sup> The draft Article 2B, which was finished in 1998, was intended to deal with the transactions that largely have never

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237. *See id.*

237. *See id.* at 1451.

238. *See Bern, supra* note 20, at 644.

239. *See Peter Swire, Of Elephants, Mice, and Privacy: International Choice of Law and the Internet*, 32 INT’L L. 991, 1023 (1998). *See also* William Woodward, *Finding the Contract in Contracts for Law, Forum and Arbitration*, 2 HASTINGS BUS. L.J. 1, 1-7 (2005).

240. *See Bern, supra* note 20, at 738-39.

241. *See Harrison, supra* note 146, at 912.

been covered by the U.C.C.<sup>242</sup> This effort, however, failed due to vigorous opposition from various sources.<sup>243</sup> Then in 1999, the N.C.C.U.S.L. turned Article 2B into UCITA, and approved it as a uniform law the same year.<sup>244</sup> In 2000, UCITA was enacted in Maryland and Virginia.<sup>245</sup>

As noted, UCITA embraces a provision that allows the parties to choose as applicable law to the contract any state law, regardless of the relationship between the state whose law is selected and the parties or their transactions.<sup>246</sup> This provision, on its face, has an effect of promoting unfettered party autonomy. But the problem is that “wrap” agreements are mostly adhesive and as such the choice of law clause in these agreements is actually made by one party. Thus, with respect to adherents, there will be no autonomy if they are offered no opportunity to make a choice.

The whole issue then is whether there is a reasonable framework under which the parties’ assent, especially the adherent’s assent, to the terms of a wrap agreement will be obtained. Under UCITA, a party’s assent is manifested if the party has an “opportunity to review” the terms, or manifests assent through certain conduct.<sup>247</sup> But UCITA is vague as to what would constitute an opportunity to review, and provides no rule to help ensure that there is such an opportunity.<sup>248</sup> Also, it is unclear whether the assent, as used in UCITA, refers to general assent to the terms as a whole or whether it includes specific assent to a particular term, e.g. a choice of law clause, as well.

In fact, although UCITA is claimed to help maintain a contextual and balanced approach<sup>249</sup> and present a careful blending of law drawn

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242. See the American Law Institute & National Conference of Commissioners on Uniform State Laws, Uniform Commercial Code Article 2B – Licenses, April 15, 1998, at 103.

243. Article 2B of U.C.C. was widely criticized as unduly favorable to licensors. See Harrison, *supra* note 146.

244. See AMERICANS FOR FAIR ELECTRONIC COMMERCE TRANSACTIONS, THE HISTORY OF UCITA, available at [http://www.ucita.com/what\\_history.html](http://www.ucita.com/what_history.html).

245. See *id.*

246. One restriction is that with regard to consumer contracts, the “choice is not enforceable . . . to the extent it would vary a rule that may not be varied by agreement under the law of the jurisdiction whose law would apply . . . in the absence of the agreement.” See UCITA § 109, *supra* note 29.

247. See *id.* §112(e).

248. The “opportunity to review” is stated in UCITA as making the terms “available in a manner that ought to call it to the attention of a reasonable person and permit review.” See *id.*

249. See Hillman & Rachlinski, *supra* note 6, at 491.

from a variety of sources,<sup>250</sup> it meets great criticism from the major consumer advocacy organizations in the United States. Because UCITA is deemed as being, among others, biased in favor of the software industry on the ground that numerous provisions in UCITA have changed current law to the detriment of consumers,<sup>251</sup> many strongly oppose its adoption.<sup>252</sup>

Perhaps the most defensive response against UCITA is the enactment of an anti-UCITA statute, known as “bomb shelter” legislation. Several states have already enacted “bomb shelter” legislation.<sup>253</sup> The very purpose of such legislation is to shield the citizens of a state from UCITA laws adopted in other states, and especially to void choice of law or choice of forum provisions in the UCITA-driven contracts for statewide residents and business.<sup>254</sup> Under “bomb shelter” legislation, a choice of law provision will be invalidated if the provision requires the wrap agreement to be interpreted according to the laws of the state that has adopted UCITA.<sup>255</sup>

Hence, although the UCITA choice of law provision seems to favor party autonomy and permit a contractual choice of applicable law without limitation on relationship, it actually offers one-sided autonomy in favor of the software industry. Therefore, its application is being excluded in the states that have passed “bomb shelter” legislation. The major concern is that under UCITA the software licensors could choose

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250. See Jerry Myers, *An Overview of the Uniform Computer Information Transactions Act*, 106 COM. L. J. 275, 347 (2001).

251. See Miriam Nisbet, President of AFFECT, *May 18, 2004 Letter to Senator Lorraine Berry*, available at <http://www.ucita.com>.

252. See *id.*

253. The states that have adopted “bomb shelter” legislation include Iowa (Iowa Code §554D.104), North Carolina (N.C. Gen. Stat. § 66-329), and West Virginia (W. Va. Code §55-8-15).

254. See Mary Baish, *Washington Brief* (Feb. 7, 2002), at <http://www.aallnet.org/aallwash/lu042002.html>.

255. For example, Iowa Code § 554D.125 provides:

A choice of law provision in a computer information agreement which provides that the contract is to be interpreted pursuant to the laws of a state that has enacted the uniform computer information transactions Act, as proposed by the national conference of commissioners on uniform state laws, or any substantially similar law, is voidable and the agreement shall be interpreted pursuant to the laws of this state if the party against whom enforcement of the choice of law provision is sought is a resident of this state or has its principal place of business located in this state. For purposes of this subsection, a “computer information agreement” means an agreement that would be governed by the uniform computer information transactions Act or substantially similar law as enacted in the state specified in the choice of law provision if that state’s law were applied to the agreement.

IOWA CODE § 554D.125 (2007) (italics in original).

the law of any state they wish to apply to the software license in wrap agreements and thus place the users (consumers) at their mercy.<sup>256</sup>

“SECOND CHANCE” APPROACH: A PROPOSED MECHANISM FOR A FAIR AND MEANINGFUL CHOICE OF LAW BY THE PARTIES IN CONTRACTS OF ADHESION

For purposes of conflict of laws, party autonomy is an internationally accepted basic principle applied to contractual choice of law.<sup>257</sup> It has been well established that the parties have the right to decide which law will govern their transactions.<sup>258</sup> For instance, in the European Union (“EU”), party autonomy is regarded as a fundamental right that is essential for the proper functioning of the EU member states’ internal market.<sup>259</sup> Under Article 3 of the 1980 Rome Convention,<sup>260</sup> parties are free to choose whichever law they like to govern their contracts.<sup>261</sup> Even in the United States, there is a rebuttable presumption in courts in favor of party autonomy in selecting the applicable law to contracts despite various limitations as well as a requirement for some connection between the transactions or the parties and the chosen law.<sup>262</sup>

Again, it is worth emphasizing that the general acceptance of party autonomy is premised upon the notion that the choice of law clause is freely negotiated and made between parties with equal footing.<sup>263</sup> The choice of law clause so made represents the true intention of the parties

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256. See Nisbet, *supra* note 251.

257. See Ian Baxter, *International Business and Choice of Law*, 36 INT’L & COMP. L.Q. 92, 93-96 (1987).

258. See Batiffol, *supra* note 35, at 68. See also Willis Reese, *Contracts and the Restatement of Conflict of Laws, Second*, 9 INT’L & COMP. L.Q. 531, 534 (1960) (stating party autonomy, or the power of the parties to choose the law governing a contract, is believed to a firmly established principle in most systems of law).

259. See H. Verhagen, *The Tension Between Party Autonomy and European Union Law: Some Observations on Igmars GB Ltd. v. Eaton Leonard Technologies Inc.*, 51 INT’L & COMP. L. Q. 135, 143 (2002).

260. The European Communities: Convention on the Law Applicable to Contractual Obligations. 1980 O.J. (C 027) 1492-1500.

261. See *id.* Art. 3.

262. See RALPH STEINHARDT, *INTERNATIONAL CIVIL LITIGATION: CASES AND MATERIALS ON THE RISE OF INTERMESTIC LAW* 229-230 (2002).

263. See 2 ERNST RABEL, *THE CONFLICT OF LAWS: A COMPARATIVE STUDY* 367 (Callaghan & Comp. 1947) (“[A choice of law] agreement is a true contract, having all requirements of a contractual engagement.”).

to be voluntarily bound by the law that they have chosen,<sup>264</sup> and such intention is expressed by the parties, or in certain cases could be presumed (or implied) from the terms of contract and the relevant surrounding circumstances.<sup>265</sup> Generally speaking, in the context of choice of law by the parties, the principle of “party autonomy” is viewed as the conflict of law aspect of freedom of contract.<sup>266</sup>

For contracts of adhesion, however, the parties are obviously not in equal positions in terms of negotiating the contractual terms and conditions, and there is hardly equal opportunity for the parties to manifest their intentions. Thus, to the extent that the intention of the parties should be determinative of the governing law of a contract, it is necessary that special attention be called to the choice of law issue if the contract involved is adhesive. It has been suggested that in the law of conflicts, we should be careful not to extend rules developed for parties with equal bargaining power to contracts in which a party merely adheres to the terms conceived by the other party.<sup>267</sup>

At a time, the courts of the United States, when dealing with contracts that were deemed not to result from equal bargaining, were inclined to invalidate choice of law clauses unfavorable to the adherents.<sup>268</sup> But since *Carnival*, where the United States Supreme Court enforced a clearly adhesive forum selection agreement, a specter has been raised that such agreements will be enforced routinely against adherents.<sup>269</sup> In addition, *ProCD* attempted to extend “routine enforceability” to wrap agreements. After *ProCD*, there appeared to have developed a presumption that the wrap agreements, though adhesive, are enforceable.<sup>270</sup>

But whatever the courts’ ruling on the enforceability of contracts of adhesion, the courts have not resolved the issue of adhesive choice of law. At first, as noted, *Carnival* is not a choice of law case and therefore, it is inappropriate to analogically apply *Carnival* to the

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264. See Note, Conflict of Laws: “Party Autonomy” in Contracts, 57 COLUM. L. REV. 553, 554 (1957) (Considerable attention on the part of legal scholars has centered around the question of the extent to which the intent of the parties should control the applicable law).

265. See MORRIS: THE CONFLICT OF LAWS 321-323 (D. McClean ed., Sweet & Maxwell 5<sup>th</sup> ed. 2000).

266. See *id.* at 321.

267. See Ehrenzweig, *supra* note 3, at 1077.

268. See *id.* at 1083. See also *supra* note 264, at 575. (“While no particular type of contract should be rigidly excluded, the facts of each case should be examined, with a presumption of adhesion, in insurance, loan, employment, transportation, and similar contracts.”).

269. See Borchers, *supra* note 203, at 56.

270. See Robertson, *supra* note 116, at 275-276.

enforceability of choice of law clauses in contracts of adhesion. In addition, *ProCD* had the effect of validating “wrap” agreements as a whole, but it is clearly not tenable that *ProCD* is a reasonable legal resource when adhesive choice of law becomes an issue, especially in the case where consumer’s expectations matter. Moreover, for many years, scholars have been focusing on what differentiates adhesive contracts from negotiated contracts, and have not been paying enough attention to particular adhesive contract provisions such as choice of law.<sup>271</sup> Consequently, many key questions concerning the enforceability of adhesive choice of law are not even asked in adhesion contract cases.<sup>272</sup>

The neglect to specifically address the choice of law issue in contracts of adhesion may have several causes. First, contractual choice of law is one of the most complicated areas in conflict of laws<sup>273</sup> and the complexity is being considerably aggravated by the increasing amount of business transactions over the internet.<sup>274</sup> Similarly, contracts of adhesion, particularly the Internet-based form contracts, not only change the dynamics of traditional contract formation, but also pose challenges to the way contracts are normally dealt with, which requires a rethinking of the existing general rules.<sup>275</sup>

Second, there is lack of a well-developed framework under which the contractual choice of law issue in adhesion contracts will be solved. For the party autonomy doctrine itself, it seems settled and decisive in theory, but is still deemed as not so clear in application.<sup>276</sup> As far as contracts of adhesion are concerned, their proper legal treatment remains in doubt although they are ubiquitous in modern commercial life.<sup>277</sup> In addition, the spread of wrap agreements in today’s business transactions and the concerns about the risks facing consumers have generated a

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271. See Woodward, *supra* note 239, at 46.

272. See *id.* (“Can a choice of law clause be considered ‘unconscionable’ if its effect is to deprive a plaintiff of a class action remedy? . . . Might the hidden effects of a choice of law provision violate a consumer’s reasonable expectations? . . . Are choice-of-law clauses binding if packed in with the product and seen, if at all, only after purchase? . . . Are they enforceable if they appear in browseware?”). *Id.* (internal quotations omitted).

273. See Morris Levin, *Party Autonomy: Choice-of-Law Clauses in Commercial Contracts*, 46 GEO. L. J. 260 (1958). See also Albert Ehrenzweig, *Contracts in the Conflict of Laws*, 59 COLUM. L. REV. 973 (1959).

274. See BRILMAYER & GOLDSMITH, *supra* note 217, at 840 (“The Internet is believed by many to raise intractable choice of law puzzles.”).

275. See Hillman & Rachlinski, *supra* note 6, at 432.

276. See Robert Johnston, *Party Autonomy in Contracts Specifying Foreign Law*, 7 WM. & MARY L. REV. 37, 38 (1966).

277. See Rakoff, *supra* note 2, at 1174.

great deal of debates among lawmakers and theorists on whether there is the need for a new set of rules regulating internet form contracts.<sup>278</sup>

Third, the judicial practices in dealing with the enforceability of adhesion contracts are confusing. In particular, courts are unclear as to how an adhesive choice of law provision should be treated differently from a non-adhesive one. In many cases, courts seem to be influenced by Karl Llewellyn's theory of "blanket assent"<sup>279</sup> and presume the adherents' assent to the adhesive terms as long as the terms are not unfair or unreasonable in presentation or substance regardless of whether the adherents may have ignored the details of the terms.<sup>280</sup> In other cases, courts simply apply the traditional choice of law rules to the adhesive choice of law provision without taking into consideration the difference between negotiated contracts and non-negotiated contracts.<sup>281</sup>

Once more, it is important to note that the core of party autonomy is to ensure that parties are free to provide in the contract that the rule of decision should be from the legal system of a designated country, and that this designation is respected and applied by the forum.<sup>282</sup> It is equally important to stress that the autonomy may only be exercised when the parties are able to make a fair and meaningful choice as to the law they wish to govern their transactions. Obviously, in contracts of adhesion, a fair and meaningful choice as such is, in general, absent.

Therefore, it is necessary to develop a mechanism under which the parties to an adhesive contract will be granted an equal opportunity to

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278. See Hillman & Rachlinski, *supra* note 6, at 430.

279. See KARL LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 369-370 (1960). For more discussion about Llewellyn's "blanket assent" theory and its impact, see Rakoff, *supra* note 2, at 1198-1206.

280. See Hillman & Rachlinski, *supra* note 6, at 455.

281. For example, in *Davidson & Associates, Inc. v. Internet Gateway*, 334 F.2d 1164 (7th Cir. 1964), plaintiff sued defendant for, among others, breach of End User License Agreement (E.U.L.A.). Under the choice of law provision on the EULA, the license agreement shall be deemed to have been made and executed in the State of California and any dispute arising hereunder shall be resolved in accordance with the law of California. The parties, however, disputed whether the contract should be governed by Missouri Law or California Law. Plaintiff was a California corporation and defendant company was based in St. Peters, Missouri. In reaching its decision for the application of California Law, the U.S. District Court, E.D. Missouri, Eastern Division held that when a contract contains a choice of law provision, the validity of that provision is governed by section 187 of the Restatement (Second) of Conflict of Laws (1971). Despite defendant's argument about the adhesive nature of the contract, the court opined that the relevant inquiry is whether the issue involved here is one that the parties could have resolved by mutual agreement. The court then concluded that under Missouri Law and the Restatement, this court would give to the reasonable expectations of the parties to the agreement and apply the law of the state chosen by the parties, California.

282. See Baxter, *supra* note 257, at 112.

make a fair and meaningful choice of law that governs the contract. For this purpose, this article proposes a “second chance” approach that is aimed at providing adherents with a meaningful way to express their assent to the choice of law contained in contracts of adhesion, whereby they will be bound.

Under the “second chance” approach, if an adhesive contract contains a choice of law clause or there is an adhesive choice of law agreement,<sup>283</sup> such clause or agreement will not be enforced until the adherent expresses no objection to the choice so made. In other words, if there is a dispute over the choice of law clause or agreement that is adhesive, the clause or agreement shall be set aside and the parties shall be allowed to make a new choice. To be more illustrative, the “second chance” approach consists of the following aspects:

1. The choice of law clause in an adhesion contract or an adhesive choice of law agreement shall not be enforced unless the adherent is aware of the choice and makes no express objection to it;
2. As a general rule, an adherent shall have the opportunity to be notified of the choice of law contained in the adhesion contract. The adherent’s objection will be assumed if no notice is given. The opportunity for notice, however, could be waived by the adherent, and the waiver, if made expressly, will be regarded as the adherent’s agreement to the choice;
3. If an adherent challenges the choice of law clause or agreement, the clause or agreement shall be set aside, and the parties may negotiate to choose the governing law for the contract;
4. If the parties fail to make the choice after negotiation, the contract shall be deemed to have no choice of law clause or agreement, and the choice of law rules for the determination of governing law in the absence of parties’ choice shall be applied.

In short, the “second chance” approach introduces a “valid but not necessarily enforceable” mechanism to help protect the reasonable interest of adherents with regard to the law to which they will be subject. On the one hand, the “second chance” approach does not presume that the adhesive choice of law clause is invalid. On the other hand, the

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283. Choice of law clause is the provision contained in the contract; while choice of law agreement is normally referred to as a provision separated from the text of the contract, but made for the contract.

approach provides a “waiting period” or “buffer time” before the clause becomes enforceable. During the waiting period, the adherents will have the chance to either agree to the choice or to reject it. In the meantime, the parties may negotiate for a new choice.

As discussed, in respect to the adhesive choice of law clause, the common concern is that there is lack of free negotiation or there is no opportunity for the parties to freely negotiate. The “second chance” approach will help solve this issue by allowing adherents to take a specific look at the choice of law clause contained in contracts of adhesion and make their own decision. Through the “second chance”, the free negotiation between the parties will be achieved and the parties’ autonomy will be exercised in a reasonable way as to the choice of law. In addition, the “second chance” approach provides a scheme under which adherents, with respect to governing law, will not be stranded by the “take-it-or-leave-it” deals they have entered into through a so-called “blanket assent” or by simply clicking on “I agree.”

Once again, it should be noted that the choice of law clause, though auxiliary to the main contract,<sup>284</sup> has its uniqueness in terms of legal consequences affecting the parties<sup>285</sup> and, therefore, deserves particular attention. Quite often, in regular contract cases, the choice of law is being separated out from the main contract and dealt with individually. In the past, United States courts have expressly recognized the desirability of special treatment for choice of law stipulations in adhesion contracts.<sup>286</sup> Despite the fact that such judicial desirability seems unclear at the present, courts sometimes still view the choice of law issue separately from the main contract.<sup>287</sup>

As mentioned, in *Milanovich*, the D.C. Circuit Court footnoted a concept of “reasonable communication” to the enforceability of choice of law clauses printed on passenger ticket. According to the Court, whether the choice of law clause was validly incorporated into the passenger ticket is a preliminary question to the determination of whether such a clause should be honored, and the incorporation was dependent on whether the clause had been “reasonably communicated”

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284. See RABEL, *supra* note 263, at 367.

285. See Reese, *supra* note 258, at 534 (“Parties do not customarily enter contracts without giving thought to the possible legal consequences of doing so.”). See also Levin, *supra* note 273, at 260 (“Everyone who engages in a multi-state contract . . . is affected by the perplexing question of determining the law governing the contract.”).

286. See Ehrenzweig, *supra* note 273, at 977.

287. In *Internet Gateway*, 334 F.2d 1164 (7th Cir. 1964), the court viewed the contract as a whole under the doctrine of “unconscionability” but singled out the choice of law clause and examined it under the Restatement approach.

to the passenger.<sup>288</sup> In this case, the court seemed to infer that the choice of law issue requires special consideration.

Unfortunately, the *Milanovich* case did not specifically address the “preliminary question” nor did it imply what would amount to reasonable communication or how it is to be determined. Nevertheless, the case raised a legitimate concern about a reasonable communication with adherents as to adhesive choice of law clause. The underlying notion seems to be that without reasonable communication there would be no real assent from adherents to such a clause.

In this respect, the “second chance” approach will help ensure that the choice of law clause in contracts of adhesion will be effectively communicated to adherents in a reasonable and meaningful manner. Even in the case where the adhesive contract itself is presumed enforceable, the choice of law clause will not be enforced unless and until adherents agree after the reasonable communication. This rule would protect adherents, in most cases consumers, from being dragged into a legal system they are not aware of in advance.

An obvious advantage of the “second chance” approach is to provide the adherents with double insurance in contracts of adhesion. At the beginning, an adherent may argue against the enforceability of the contract as a whole. If the argument fails, the adherent may then focus on the choice of law clause in the contract and decide whether or not to be bound by it because different law may lead to different results. The term “insurance” as used here means to enable the adherents to know of their choice and to predict the outcome.

Another advantage of the “second chance” approach is to avoid the flaws that are imbedded in the idea of fictitious “blanket assent.”<sup>289</sup> It will also help reduce the risks facing consumers in “wrap” agreements that they are deemed to have entered into by clicking an icon. Pursuant to the “second chance” approach, the enforceability of an adhesive choice of law clause requires a specific assent from adherents. Therefore, even if a consumer is held to have expressed assent to a fine printed boilerplate contract or a wrap agreement, such assent does not

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288. *Milanovich v. Costa Crociere, S.p.A.*, 954 F.2d 763, 768 (D.C. Cir. 1992).

289. The “blanket assent” is premised on the assumption that most adherents agree to be bound by unknown terms as long as the terms are not “unreasonable or indecent.” See Rakoff, *supra* note 2, at 1200. But it is highly questionable as to whether the “blanket assent” represents the “true assent” of the parties, even though the terms are not unreasonable from an objective point of view. Also there is a doubt that it is fair to hold the adherents bound by the terms unknown to them no matter how reasonable the terms are (not to mention that the seemingly reasonable terms may not be reasonable if reviewed subjectively).

apply to the choice of law clause or agreement unless the assent is specifically given.

In addition, the “second chance” approach helps balance the interests of businesses and consumers and, thus, helps realize the goal of consumer protection in contracts of adhesion. The “second chance” approach does not purport to invalidate the adhesive choice of law clause nor does it deny the legitimacy of the businesses’ decision to insert a choice of law clause in their favor. In the meantime, it protects adherents because the adherents have the opportunity to make a reasonable choice. In this respect, if the “second chance” approach is in place, there might well be no need to enact any “bomb shelter” legislation.

### CONCLUSION

Contractual choice of law in contracts of adhesion is indeed an issue that deserves particular attention. To the extent that more and more business transactions take place online, the need for developing a framework under which such issue will be effectively handled seems to become eminent because most of the online business activities more or less involve the standard form contracts that are adhesive in nature. A predominant question in this respect is how to make it possible for adherents to meaningfully select the law to which they will be subject in the contracts adhesive to them.

Under the existing choice of law rule, the parties have the autonomy to stipulate in their contract the law of a particular state or nation to govern the contract and the choice of law by the parties will be honored as required by the principle of party autonomy, except for the limitations imposed upon the parties by the law pertaining to questions that lie beyond the parties’ contractual power.<sup>290</sup> Such autonomy, however, does not readily exist in contracts of adhesion, not because of the operation of law but because of the one-sided structure of such contracts. From this perspective, the principle of party autonomy, as Ehrenzweig once pointed out, has indeed no place in contracts of adhesion.<sup>291</sup>

Given that the contractual choice of law in contracts of adhesion has departed from the traditional notion of the party autonomy doctrine that is designed to give the parties equal power to freely determine the

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290. See Reese, *supra* note 258, at 535.

291. See Ehrenzweig, *supra* note 3, at 1090.

law by which they agree to be bound,<sup>292</sup> the autonomy of the parties with regard to the choice of law in such contracts should be viewed in a non-traditional way. It might be debatable whether a new set of rules should be adopted, but there arises an increasing demand for a new mechanism under which the parties, adherents in particular, could make a fair and meaningful choice of the law that will govern their contract.

The “second chance” approach is the mechanism as such. It not only recognizes the validity of choice of law clause in contacts of adhesion, but also provides the adherents with an option either to adhere or not to adhere to the clause. The approach is intended to help establish a general rule that a choice of law clause in a contract of adhesion shall not be deemed enforceable prior to affirmation of the true assent of adherent.

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292. See Hessel Yntema, “Autonomy” in *Choice of Law*, 1 AM. J. COMP. L. 341, 343-345 (1952) (The Meaning of “Autonomy”).