

1-1-2019

Land of the Free Market: U.S. Companies Continue to Enjoy Greater Legal Protection than Consumers

Christopher LeBlanc
Suffolk University Law School

Follow this and additional works at: <https://dc.suffolk.edu/jtaa-suffolk>



Part of the [Litigation Commons](#)

Recommended Citation

24 Suffolk J. Trial & App. Advoc. 94 (2018-2019)

This Notes is brought to you for free and open access by Digital Collections @ Suffolk. It has been accepted for inclusion in Suffolk Journal of Trial and Appellate Advocacy by an authorized editor of Digital Collections @ Suffolk. For more information, please contact dct@suffolk.edu.

LAND OF THE FREE MARKET: U.S. COMPANIES CONTINUE TO ENJOY GREATER LEGAL PROTECTION THAN CONSUMERS

“The value of all things contracted for, is measured by the Appetite of the Contractors: and therefore the just value, is that which they be contented to give.” –Thomas Hobbes

I. INTRODUCTION

The proliferation of internet-based companies, and the increasingly one-sided terms of service to which users must “consent” before using services or making online purchases, have led to a clash between U.S.-based corporations and European Union (“E.U.”) governing bodies, like the European Commission (“E.C.”).¹ As the internet further blurs the borders between two of the world’s largest economic powers, web-based heavy hitters like Facebook, Google, Apple, and Amazon have run afoul of E.U. consumer protection regulations in recent years and cast light on the disparate approaches to consumer protection in business-to-consumer (“B2C”) contracts between the U.S. and the E.U.²

Although the E.U.’s Directive on Unfair Contract Terms—colloquially referred to as the “Unfair Contract Terms Directive” (“UCTD”)—and other jurisdiction-specific consumer protection statutes represent continued progress in the interest of economic justice and fairness for European consumers, the U.S. remains a recalcitrant holdout in the West, doubling down on a conservative tradition of contract jurisprudence.³

Through an empirical look at the terms of service of five of the largest U.S.-based internet-based companies, this Note highlights the disparity between the E.U.’s explicit prohibition on unfairness in offending

¹ See European Commission Press Release IP/17/631, The European Commission and Member States consumer authorities ask social media companies to comply with E.U. consumer rules (Mar. 17, 2017) (demanding changes to violative terms of use).

² See *id.* (explaining “unfair terms and conditions” contravene E.U. B2C contract directives); see also Sam Schechner, *Europe Targets U.S. Web Firms*, THE WALL STREET JOURNAL, Nov. 27, 2014 (showing E.U. member states’ desire for more regulation of U.S. tech superpowers).

³ See *infra* Section IV: Analysis (dissecting U.S. companies’ enjoyment of comparatively lax consumer protection jurisprudence).

terms of service clauses, while distinguishing those practices from withering domestic consumer protection doctrine.⁴

American and European consumer protection directives are primarily outgrowths of the doctrines of good faith and unconscionability, and formalize the notion that fundamentally “unfair” agreements should not be binding.⁵ Given the philosophical nature of “unfairness” at the core of the doctrine, and the relative lack of statutory or judicial guidance, the U.S. iteration of unconscionability has historically been notoriously difficult to define.⁶ The broad, indefinite nature of the concept has unfortunately led to judicial caution domestically, giving way to fact-intensive, ad hoc determinations of “unconscionability.”⁷ However, to adequately track the origins of the concept, a clear and unambiguous definition, although broad, is necessary.⁸

For purposes of this Note, I follow the definitional guidance of the Restatement (Second) of Contracts § 208, which defines an unconscionable contract as one in which there exists “gross inequality of bargaining power, together with terms unreasonably favorable to the stronger party.”⁹ There

⁴ See Jennifer S. Martin, *An Emerging Worldwide Standard for Protections of Consumers in the Sale of Goods: Did We Miss an Opportunity with Revised UCC Article 2?*, 41 TEX. INT’L L.J. 223, 273 (2006) (explaining 1999 Article 2’s revision does not sufficiently protect consumers); see also Robert L. Oakley, *Fairness in Electronic Contracting: Minimum Standards for Non-Negotiated Contracts*, 42 HOUS. L. REV. 1041, 1071-73 (2005) (highlighting fundamental distinctions in E.U. and U.S. approaches to consumer protection and internet contracts).

⁵ See Martin, *supra* note 4, at 239-46 (contrasting domestic use of unconscionability and good faith with European consumer protection legislation).

⁶ See, e.g., Per Gustafsson, *The Unconscionability Doctrine in U.S. Contract Law*, FACULTY OF LAW LUND UNIV. 3.6 (Fall 2010) (stating unconscionability lacks “clear definition”); Larry A. DiMatteo & Bruce Louis Rich, *A Consent Theory of Unconscionability: An Empirical Study of Law in Action*, 33 FLA. ST. U. L. REV. 1067, 1071-72 (2006) (citing descriptions of unconscionability in U.C.C. § 2-302 as “overly vague and indeterminate”); A.H. Angelo & E.P. Ellinger, *Unconscionable Contracts: A Comparative Study of the Approaches in England, France, Germany, and the United States*, 14 LOY. L.A. INT’L & COMP. L. REV. 455, 497 (1992) (explaining that U.C.C. § 2-302 provides little guidance in defining “unconscionability”); Arthur Allen Leff, *Unconscionability and the Code: The Emperor’s New Clause*, 115 U. PA. L. REV. 485, 487 (1967) (stating U.C.C. § 2-302 “makes nothing clear about the meaning of ‘unconscionable’”); Court decisions regarding unconscionability provide little direction. See Larry Bates, *Administrative Regulation of Terms in Form Contracts: A Comparative Analysis of Consumer Protection*, 16 EMORY INT’L L. REV. 1, 14 (2002) (arguing unconscionability precedent is “full of inconsistencies, contradictions, and lacks any sort of unifying theme”).

⁷ See Leff, *supra* note 6, at 496 (explaining lack of definition causes “ad hoc judicial determination” of unconscionability); see also Angelo & Ellinger, *supra* note 6, at 498 (highlighting historic “undercurrent of caution” in U.S. courts in cases involving unconscionability).

⁸ See Gustafsson, *supra* note 6, at 6 (outlining need for clear definition of unconscionability).

⁹ See RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. d [hereinafter § 208] (Am. Law Inst. 1981) (defining unconscionability in domestic context).

must also be a showing “that the weaker party had no meaningful choice, no real alternative, or no assent or appear to assent to the unfair terms.”¹⁰

In the foregoing sections, this Note outlines the substantive history of the concept of unconscionability from its origins in Europe to its incorporation into U.S. common law and its outgrowth and codification in E.U. consumer protection statutes.¹¹ Further, by applying prevailing E.U. consumer protection directives to the terms of service of five of the top U.S.-based internet companies, this Note highlights the growing disparity between U.S. and E.U. internet B2C contract practices.¹² In the interest of navigating jurisdictional nuances regarding consumer protection, the ensuing analysis provides an illustrative, non-exhaustive list of the types of terms in B2C service contracts which, although standard practice domestically, would lead to sanction and litigation abroad.¹³ Finally, this Note examines whether the U.S. “market-driven” consumer protection regulatory model is sufficiently responsive to meet the changing needs of domestic consumers in a global economy.¹⁴

II. HISTORY

The earliest origins of consumer protection doctrine were rooted primarily in the “freedom to contract.”¹⁵ A seventeenth century principle that parties to an agreement are free to agree to, alter, or decline any legal terms, “freedom to contract” is rooted in the most fundamental tenet of contract and treaty law—“pacta sunt servanda”: agreements must be kept.¹⁶

A. Tracking Unconscionability and Consumer Protection: The European Union

As the pan-European economy strengthened thanks in part to the “laissez faire” spirit of the era, the emerging middle class likely looked

¹⁰ See *id.* (defining unconscionability in U.S.).

¹¹ See *infra* Section II, Part A: *Tracking Unconscionability and Consumer Protection: The European Union* (tracking unconscionability doctrinal history).

¹² See *infra* Section IV, Analysis (examining distinctions between E.U. and domestic consumer protection practices).

¹³ See *infra* Section IV, Analysis (analyzing potentially violative terms of U.S. standard form consumer contracts).

¹⁴ See *infra* Section V, Conclusion (discussing whether U.S. regulatory model has responded to external pressures).

¹⁵ See Angelo & Ellinger, *supra* note 6, at 455 (describing origin of consumer protection).

¹⁶ See *id.* (examining history of contract).

favorably upon principles of economic freedom.¹⁷ With an emphasis on the “freedom” aspect of “freedom to contract,” European nations began to codify the first seeds of consumer protection doctrine.¹⁸

i. The United Kingdom Approach

By the time it found favor elsewhere in the continent, the “sanctity of contract” was already well established by English common law.¹⁹ Contemporary English cases showing deference to the principle that parties to an agreement should have equal freedom to agree or to alter the terms of an agreement also served as the first iterations of unconscionability doctrine.²⁰

First applied to instances in which young noblemen received “inadequate” consideration in sales of their birthrights, late seventeenth century English case law developed the principle that the court would not intervene in a contract freely entered into unless it involved “trading on a weakness of the expectant heir.”²¹ Likely an attempt to protect English nobility from the ill-advised actions of young heirs, by the early eighteenth century English courts showed increasing deference to principles of unconscionability in these contracts, eventually going so far as to establish that inadequacy of consideration alone was enough for a court to intervene.²²

Unfortunately, this broad use of unconscionability in equity, slanted heavily in favor of the landed class, led to a tepid judicial approach to expanding the doctrine to other areas of contract law.²³ In response to this judicial reticence, and in an effort to clarify unconscionability standards, Parliament enshrined its principles in the Money-Lenders Act of 1900 (“Money-Lenders Act”) and later in the Consumer Credit Act of 1974

¹⁷ See *id.* (tracking history of consumer protection).

¹⁸ See *id.* at 456.

¹⁹ See *id.* at 460.

²⁰ See *Earl of Chesterfield v. Janssen*, 28 Eng. Rep. 82, 86 (1750); see also *Batty v. Lloyd*, 23 Eng. Rep. 375 (1682) (focusing on freedom of contract). Unconscionability “may be apparent from the intrinsic nature and subject of the bargain itself; such as no man in his senses and not under a delusion would make on the one hand, and as no honest man would accept on the other; which are unequitable and unconscientious bargains.”

²¹ See *Angelo & Ellinger*, *supra* note 6, at 461-63 (describing history of English unconscionability doctrine).

²² See *id.* at 461 (Holding unconscionability was factor in “slanting of the doctrine in favor of the expectant heir.”).

²³ See *id.* at 463-64 (explaining cases revealing “the courts’ reticence to the development of generally applicable unconscionability rules”).

("Consumer Credit Act").²⁴ However, the narrow judicial approach to application of unconscionability in diverse areas of contract law persisted despite the courts' inclination to develop a concrete general doctrine.²⁵

Late into the twentieth century, courts continued to show reticence to expanding implementation of unconscionability beyond its statutory remit, as the English legislature cobbled together a disjointed unconscionability doctrine through various consumer protection statutes.²⁶

ii. The German Approach

As courts in the United Kingdom were on the way to establishing the groundwork for consumer protection doctrine in the eighteenth century, their Prussian counterparts had already made substantial inroads in laying a solid foundation for those same doctrines.²⁷ Unlike their British counterparts, the German legislature was among the first in Europe to codify those bases while paying careful attention to the concept of "freedom" as it relates to the bargaining process.²⁸

Given that the German legislature was relatively early to the statutory consumer protection party, a galvanized general statutory framework of unconscionability spawned a collection of case law that coherently articulates the status of unconscionability and consumer protection doctrine from its origin to memorialization in modern consumer protection statutes.²⁹

²⁴ See *id.* (tracking history of unconscionability in England); see also An Act to Amend the Law with Respect to Persons Carrying on Business as Money-Lenders, 1900, 63-64 Vict. 155, ch. 51 (Eng.) (outlining circumstances wherein courts may reopen lending contracts with "harsh or unconscionable" impact on borrowers); Consumer Credit Act, 1974, §§ 137-40 (articulating specific standards for fairness in lending contracts and defining ban on "extortionate" lending agreements).

²⁵ See Angelo & Ellinger, *supra* note 6, at 466 ("Indeed, a number of modern cases suggest that the English courts were favorably inclined to the notion of developing a general doctrine of setting aside unconscionable bargains."); see also *Lloyds Bank Ltd. v. Bundy* [1975] Q.B. 326 (Eng.) (seeking general unconscionability doctrine).

²⁶ See Angelo & Ellinger, *supra* note 6, at 470 (citing English courts' reticence to "rely on the concept of unconscionability"); see also Unfair Contract Terms Act, 1977, ch. 50 (U.K.) §§ 3, 4, 6(2), 7(2) (1977)(Eng.) [hereinafter Unfair Terms Act] (delineating consumer protections regarding unfair waiver provisions in business to consumer contracts); Landlord and Tenant Act 1987 (c. 31) (delineating tenants' rights against landlords); Employment Rights Act 1996 (c. 18) (codifying rights of employees in U.K.).

²⁷ See Angelo & Ellinger, *supra* note 6, at 455 (codifying freedom of contract in Prussian Code of 1794).

²⁸ See *id.* "Undertakings can give rise to [enforceable] rights only insofar as these undertakings are freely given." *Id.* (quoting Paragraph I 3.1 of the Prussian Code).

²⁹ See generally Angelo & Ellinger, *supra* note 6, at 482-94 (explaining implementation of Articles 138 and 242 of BGB from inception in 1896 to late 1970's).

The German statutory bases for the concept of unconscionability in contracts were first codified in 1896, principally in Articles 138 and 242 of the *Bürgerliches Gesetzbuch* (BGB), the German civil code.³⁰ Essentially, Article 242 established the “good faith” requirement, while Article 138 established the circumstances under which unconscionability issues occur, along with elements limiting the scope of the statute.³¹ Article 138(2) further mandates:

A legal transaction is void by which a person, by exploiting the predicament, inexperience, lack of sound judgement or considerable weakness of will of another, causes himself or a third party, in exchange for an act of performance, to be promised or granted pecuniary advantages which are clearly disproportionate to the performance.³²

Although Article 138(2) establishes a strong, clear foundation for unconscionability doctrine, it is limited, applying only to exploitative behavior in situations wherein the benefit drawn from the agreement is “clearly disproportionate.”³³ However, this pared down statutory construction lends itself to clear, efficient judicial analysis and implementation of the now codified doctrine of unconscionability.³⁴

Given their inherent lack of substantive negotiation, contracts utilizing “unfair standardized terms” drew significant criticism from German courts following the implementation of Articles 183 and 242.³⁵ The expansive case law that resulted was subsequently codified by the Standard Terms Act of 1976.³⁶

³⁰ See *id.* at 482-83 (outlining early consumer protection and unconscionability statutes).

³¹ See *id.* at 483 (providing detailed analysis of Article 138 revision). The revision of Article 138 establishes that contracts contravening public policy or exploiting the “distressed situation,” “carelessness,” or “inexperience” of another party will not be enforced. *Id.*

³² See *BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE]*, Aug. 18, 1896, BGBL.1 at 138 (Ger.) available at <https://www.gesetze-im-internet.de>. (outlawing exploitative terms in B2C contracts).

³³ See *id.*; see also Angelo & Ellinger, *supra* note 6, at 484 (stating that Article 138 “goes far” in establishing general concept of unconscionability).

³⁴ See generally Angelo & Ellinger, *supra* note 6, at 484-89. Angelo and Ellinger parse substantive verbiage of Article 138(2), primarily leaning on the *Bundesgerichtshof*, Germany’s highest civil appellate court, and legislative notes clarifying broader language of the statute, including the meanings of “need,” “carelessness,” “exploitation,” and “inexperience.” *Id.* While these definitions are superfluous in this analysis, their inclusion highlights the meticulous nature of the drafters and jurists who developed Germany’s statutory version of unconscionability over the course of roughly one hundred and twenty years. *Id.*

³⁵ See *id.* at 493 (noting disfavor of standard form contracts in Germany).

³⁶ See *id.* (describing origins of Standard Terms Act of 1976).

B. Tracking Unconscionability and Consumer Protection: The United States

Although the doctrine of unconscionability, and the consumer protection statutes that spring from it, have received disparate legislative and judicial treatment in the U.S. than in England, the concepts share a common origin.³⁷ In one of the most oft-cited early U.S. cases regarding the doctrine of unconscionability, the Supreme Court quoted the then 1750 English decision, *Earl of Chesterfield v. Janssen*, in an attempt to define the concept of unconscionability and establish precedent upon which subsequent unconscionability analyses would rely.³⁸

Unfortunately, the hazy articulation set forth in *Earl of Chesterfield* is arguably the only substantive piece of the unconscionability puzzle that American jurists borrowed from their English counterparts.³⁹ In subsequent cases examining unconscionability, American jurists attempted to develop a more satisfactory definition, adding concepts of “superior knowledge,” “unjust advantage,” “undue influence,” and unfairness that “shocks the conscience.”⁴⁰ Unfortunately, the nebulous definition of unconscionability developed by these early cases persisted in spite of piecemeal attempts at clarification.⁴¹ Further, the doctrine lacked adequate definition even after it was articulated by Karl Llewelyn in the first and subsequent iterations of the Uniform Commercial Code (“U.C.C”) 2-302.⁴²

³⁷ See *Hume v. United States*, 132 U.S. 406, 411 (1889) (citing *Earl of Chesterfield v. Janssen*, 2 Ves. Sr. 125, 155 (1750)) (establishing foundation of English unconscionability doctrine).

³⁸ See *Hume*, 132 U.S. at 411 (quoting *Chesterfield*), “[An unconscionable contract is one] such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other; which are inequitable and unconscientious bargains; and of such even the common law has taken notice”; see also Martin, *supra* note 4, at 228 (recognizing courts “frequently return to the definition cited in *Hume* [emphasis original]”).

³⁹ See Matthew S. Winings, *The Old, the Ignorant and the Downright Shameful* (Jan. 19, 2005) (unpublished manuscript), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=650822 (noting early American unconscionability decisions do little to develop adequate definition).

⁴⁰ See *Sheehan v. Erbe*, 77 A.D. 176, 180 (N.Y. App. Div. 1902) (articulating “superior knowledge” concept); see also, *Gadsby v. Gadsby*, 175 N.E. 495, 497 (Mass. 1931) (introducing “unjust advantage”); see also *Turner v. Pabst Brewing Co.*, 74 A.D. 106, 109 (N.Y. App. Div. 1902) (describing “undue influence” and unfairness that “shock[s] the conscience”).

⁴¹ See Paul Thomas, Note, *Conscionable Judging: A Case Study of California Courts’ Grapple with Challenges to Mandatory Arbitration Agreements*, 62 HASTINGS L.J. 1065, 1069-70 (2011) (acknowledging “hazy conception” defining early U.S. unconscionability doctrine).

⁴² See U.C.C. § 2-302(1) (1952 Official Draft) (“If the court finds the contract or any clause of the contract to be unconscionable, it may refuse to enforce the contract or may strike any unconscionable clauses and enforce the contract as if the stricken clause had never existed.”). The subsequent draft of § 2-302 did little to alter the definition, save for the addition of remedies limiting the effect of offending terms. See U.C.C. 2-302(1) (2005); see also Thomas, *supra* note 41 (focusing on nebulous articulations of unconscionability).

Even today, neither domestic statutes nor case law have developed satisfactory definitions of the concept of unconscionability.⁴³ As mentioned previously, this note will adhere loosely to the non-binding restatement definition when referencing American approaches to unconscionability.⁴⁴

III. FACTS

Until the 1980's, the jurisprudential distinction between U.S. and E.U. consumer protection doctrine was relatively shallow.⁴⁵ Compared to the modern view, U.S. courts and legislatures maintained a consumer-centric stance, while E.U. consumer protection doctrine, still relying on codified unconscionability doctrine, was somewhat stagnant.⁴⁶

However, at roughly the same time as E.U. consumer protection doctrine was roused from dormancy, contemporary U.S. doctrine experienced a radical philosophical shift away from a statutory "social regulation" approach, toward a "market-oriented" economic regulation model.⁴⁷ This philosophical shift coincided with a U.S. focus on litigation which relied on unclear, and often contradictory, precedent regarding the enforceability of contract terms disputed as "unfair."⁴⁸ Subsequently, courts have consistently ruled that, absent a showing of bad faith or unconscionability, contracts are presumed to be enforceable despite their onerous effect on consumers.⁴⁹ The lack of statutory guidance, in conjunction with the reliance on the already murky U.S. unconscionability doctrine, has led to a relatively low rate of consumer success in contesting the validity of seemingly unfair B2C contract terms.⁵⁰

⁴³ See Thomas, *supra* note 41 (explaining persistence of unconscionability ambiguity).

⁴⁴ See RESTATEMENT SECOND OF CONTRACTS § 208 cmt. d (defining "unconscionability").

⁴⁵ See Jane K. Winn & Mark Webber, *The Impact of EU Unfair Contract Terms Law on U.S. Business-to-Consumer Internet Merchants*, 62 BUS. LAW 209, 211 (2006) (describing trends in consumer protection jurisprudence in U.S. and E.U.).

⁴⁶ See *id.* (comparing consumer protection doctrine in late twentieth century).

⁴⁷ See *id.* (describing philosophical shift allocating more risk for consumers in business-to-consumer ("B2C") contracts).

⁴⁸ See *id.* (calling judicial guidance for most contract provisions "fragmentary or contradictory").

⁴⁹ See generally MICHAEL L. RUSTAD, GLOBAL INTERNET LAW, 415-19 (Jesse H. Choper et al. eds., 2nd ed. 2016) (outlining enforceable U.S. standard for B2C terms that would be unenforceable in E.U.).

⁵⁰ See Leff, *supra* note 6, at 496 (explaining inadequacy of ad hoc judicial determinations regarding unconscionability).

A. Current Binding European Consumer Protection Directives

As U.S. jurisprudence eschewed away from a social regulatory model, the shift in E.U. policy was markedly different, reaching a watershed moment in consumer protection with the passage of the UCTD in 1993, and its subsequent revision in 1999.⁵¹ Born out of a desire to prevent “significant imbalance in the parties’ rights and obligations” arising under B2C contracts, the UCTD lays out a non-exhaustive blacklist of contract terms that are considered unfair, and thus non-binding, for consumers.⁵² Among the terms that are ubiquitous in U.S. B2C internet contracts, but banned by the UCTD and subsequent consumer protection regulations are: choice of forum clauses, choice of law provisions, waiver of all seller warranties, browsewrap provisions, rolling contract provisions, mandatory arbitration clauses, anti-class action clauses, and limitations on remedies.⁵³

IV. ANALYSIS

The following subsections explore the language of the terms of use for five of the top U.S.-based internet companies, this includes: Amazon, Google, Facebook, Priceline Group, and Netflix.⁵⁴ The edicts from cogent E.U. statutes mentioned above will be applied to the terms of use to discern whether these titans of technology, and their respective counsel, should be concerned about the enforceability of these B2C contracts in the European marketplace.⁵⁵ Organized according to type of offending clause, this note

⁵¹ See Rustad, *supra* note 49, at 414 (“The U.S. market-based approach to terms of use is antithetical to the European consumer law, which provides consumers with minimum procedural and substantive protection.”).

⁵² See Council Directive 93/13, art. 3, 1993 O.J. (L 95) 29 (EC) [hereinafter “UCTD”] (outlining unfair terms in consumer contracts). The 1993 version of the UCTD was amended in 1999, which remains the binding precedent. *Id.* There was no substantive change between the 1993 and 1999 versions for our purposes. See Commission Regulation 2083/99, The Unfair Terms in Consumer Contracts Regulations, 1999 O.J. (L 177) 6, 10 (EU) [hereinafter *Rome I Regulation*] (prohibiting one-sided choice of law provisions).

⁵³ See Council Regulation 1215/2012, 2012 O.J. (L 351) 1 (EU) [hereinafter *Brussels Regulation*] (banning compulsory forum clauses); see also Council Regulation 593/2008, 2008 O.J. (L 177) 6, 10 (EU) [hereinafter *Rome I Regulation*] (prohibiting one-sided choice of law provisions).

⁵⁴ See *Leading Online Companies Ranked by Revenue in 2017*, STATISTA (last visited Oct. 27, 2018), <https://www.statista.com/statistics/277123/internet-companies-revenue/> (outlining top internet companies by revenue). These five companies were chosen based on market share in their respective industries, name recognition, and anecdotal frequency of use. References to other large internet corporations are included for illustrative or comparative purposes.

⁵⁵ See sources cited *supra* notes 52-54 (laying out expectations for corporations conducting business in E.U.). These comparisons are also meant to serve as a warning to attorneys representing businesses expanding their footprint in the E.U.

will examine the language of each of the companies' terms of service, and using language pulled directly from those terms of service, it seeks to determine which clauses would likely to lead to unenforceability of specific terms or of the contract as a whole in the European market.⁵⁶

A. "Browsewrap" Agreements

So-called "browsewrap" agreements are a somewhat recently created class of Terms of Use ("TOU") that base user "consent" to be bound by those terms on the mere fact that the user visits and "browses" the site.⁵⁷ Usually, these terms of service are not posted on a site's main page, requiring users to click a hyperlink to get to the terms to which they are purportedly bound.⁵⁸ Following suit with the Seventh Circuit Court's decision to uphold "shrinkwrap" contracts in *ProCD, Inc. v. Zeidenberg*, "browsewrap" contracts are generally held to be enforceable in the U.S.⁵⁹ Court determinations often turn on whether consumers have notice of the TOU.⁶⁰

Conversely, there is an outright prohibition on "browsewrap" terms in the E.U. following passage of the UCTD, which states that terms "irrevocably binding the consumer to terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract" are unenforceable.⁶¹

Priceline's TOU are illustrative of a common U.S. company browsewrap provision, stating in relevant part, "By accessing *any areas of this site*, users . . . agree to be legally bound without limitation, qualification, or change and to abide by these terms and conditions, which will constitute

⁵⁶ See generally Analysis *infra*; see also UCTD, *supra* note 52, at 8 ("Terms that are found unfair under the Directive are not binding for consumers.").

⁵⁷ See Rustad, *supra* note 49, at 227 (defining "browsewrap" agreements).

⁵⁸ See *id.* (examining enforceability of browsewrap agreements in U.S. caselaw).

⁵⁹ See *id.* (explaining precedential bases for browsewrap agreements); see also *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1449 (7th Cir. 1996) (holding shrinkwrap licenses found inside packaging enforceable provided they are not unconscionable).

⁶⁰ See Rustad, *supra* note 49, at 228 (requiring providers to "prove that the user has actual or constructive notice of the terms of use"); see also, e.g., *Van Tassell v. United Mktg. Grp., LLC*, 795 F. Supp. 2d 770, 792-93 (N.D. Ill. 2011) (finding arbitration clause unenforceable in browsewrap agreements due to protracted process to access terms); *Hines v. Overstock.com, Inc.*, 668 F. Supp. 2d 362, 367 (E.D.N.Y. 2009) (finding browsewrap agreement non-binding because consumer had no "actual or constructive" notice of terms); *Pollstar v. Gimania, Ltd.*, 170 F. Supp. 2d 974, 981 (E.D. Cal. 2000) (ruling "browsewrap" agreement unenforceable because of inconspicuous placement of hyperlink to terms).

⁶¹ See UCTD *supra* note 49, at Schedule 2(1)(i) (making browsewrap agreements unenforceable). The logic behind deeming "browsewrap" terms unenforceable is that users cursorily visiting websites likely do not have adequate time to acquaint themselves of the terms to which they are bound, even if there is notice of the terms of use on the home page. *Id.*

our Agreement ('agreement')" (emphasis added).⁶² Given the placement of the TOU hyperlink on Priceline's main page, as well as the fact that customers must "consent" to the terms before a purchase can be made, this clause would likely hold up in American courts.⁶³ Priceline is by no means alone in its use of these terms of dubious fairness, all five of the companies studied contained some iteration of a "browsewrap" agreement.⁶⁴ However, if consumers brought cases against any of these companies in the E.U., these provisions would likely be held unenforceable.⁶⁵

B. Pre-Dispute Mandatory Arbitration

Pre-dispute mandatory arbitration provisions ("arbitration provisions") require consumers to "consent" to have any future dispute arbitrated by a neutral third-party arbiter, waiving their rights to jury trial.⁶⁶ Arbitration provisions are popular among online social media companies as cost-saving measures.⁶⁷

Following the enactment of the Federal Arbitration Act ("FAA")—which preempts all state laws outlawing mandatory arbitration provisions—courts presume arbitration provisions to be enforceable as long as consumers have notice of the provision, have an opportunity to understand its contents, and "manifest assent" to the terms.⁶⁸ However, the enforceability of mandatory arbitration provisions is another significant point at which E.U.

⁶² See *Priceline.com LLC Web Site Terms & Conditions*, PRICELINE, https://www.priceline.com/static-pages/terms_en.html last visited (Oct. 1, 2018) (describing browsewrap terms)[hereinafter Priceline].

⁶³ See Rustad, *supra* note 49, at 228 (describing leniency of U.S. courts regarding browsewrap provisions, provided there is adequate notice).

⁶⁴ See, e.g., *Conditions of Use*, AMAZON, <https://www.amazon.com/gp/help/customer/display.html?nodeId=201909000> (last visited Oct. 3, 2017) ("By using Amazon Services, you agree to these conditions.") [hereinafter "Amazon"]; *Google Terms of Service*, GOOGLE, <https://www.google.com/policies/terms/> (last visited Oct. 25, 2017), ("By using our Services, you are agreeing to these terms.") [hereinafter "Google"]; *Netflix Terms of Use*, NETFLIX, <https://help.netflix.com/legal/termsofuse> (last visited Aug. 1, 2017) ("By using, visiting, or browsing the Netflix service, you accept and agree to these Terms of Use. If you do not agree to these Terms of Use, do not use the Netflix service.") [hereinafter "Netflix"]; *Statement of Rights and Responsibilities*, FACEBOOK, <https://www.facebook.com/terms.php> (last visited Jan. 30, 2015) ("By using or accessing the Facebook Services, you agree to this Statement, as updated from time to time in accordance with Section 13 below.") [hereinafter "Facebook"].

⁶⁵ See UCTD, *supra* note 49, at Schedule 2(1)(i) (outlawing browsewrap agreements).

⁶⁶ See Rustad, *supra* note 49, at 401 (defining arbitration provisions).

⁶⁷ See *id.* (describing corporate belief that arbitration is less expensive than litigation).

⁶⁸ See *id.* at 400 (explaining that "U.S. federal courts are inclined to enforce predispute mandatory arbitration clauses in consumer cases"); see also *PaineWebber, Inc. v. Bybyk*, 81 F.3d 1193, 1198 (2d Cir. 1996) (describing circumstances under which FAA will enforce arbitration provisions).

and U.S. consumer protection laws diverge, as these provisions are explicitly unenforceable under E.U. law.⁶⁹ Term (q) of the UCTD's Schedule 2 provides, in relevant part, that the a seller in a B2C contract cannot hinder consumers' right to "take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration"⁷⁰

Again, Priceline provides an example of a mandatory arbitration term that would be barred under the UCTD, stating in the "Mandatory Arbitration" section of its TOU that consumers "agree" that any dispute arising out of use of its services will be under exclusive jurisdiction of "final and binding arbitration administered by the American Arbitration Association."⁷¹ While this term clearly violates the UCTD, the remaining four companies' terms may well pass arbitration muster as their terms either include other options for dispute resolution in addition to "mandatory arbitration," or make no mention to arbitration at all.⁷²

C. Mandatory Class Action Waivers

As with pre-dispute arbitration, internet-based companies commonly incorporate mandatory class action waivers in their TOU's to protect against hefty damages that could be awarded to groups of consumers by sympathetic judges and jurors.⁷³ Also, as with arbitration provisions, mandatory class action waivers are broadly enforced in the U.S.⁷⁴ Similarly, these waivers are also likely prohibited in the E.U. by the UCTD.⁷⁵ Although less clear than with arbitration clauses, class action waivers also contravene the spirit of the UCTD's Regulation 5, which holds that clauses causing a "significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer" are considered *per se* unfair.⁷⁶ Given that class action waivers eliminate an avenue through which consumers are better able to combat sophisticated legal teams of large

⁶⁹ See UCTD *supra* note 52, at Schedule 2(1)(q) (outlawing mandatory arbitration provisions).

⁷⁰ See UCTD *supra* note 52, at Schedule 2(1)(q) (outlining E.U.'s prohibition on arbitration provisions).

⁷¹ See Priceline, *supra* note 62 (establishing Priceline's arbitration provision).

⁷² See sources cited, *supra* note 64 (describing various dispute resolution mechanisms). Amazon and Netflix both include "small claims court" provisions in their dispute resolution sections, while Google and Facebook buck the trend, making no mention of arbitration. *Id.*

⁷³ See Rustad, *supra* note 49, at 246 (describing types of clauses businesses employ to protect economic interests).

⁷⁴ See *id.* at 417 (explaining broad enforcement of class action waivers in U.S. courts).

⁷⁵ See UCTD, *supra* note 52, at Regulation 5 (disallowing clauses creating "significant imbalance" in parties' rights and obligations in agreement).

⁷⁶ See *id.* (imputing prohibition on mandatory class action waivers).

corporations, to the obvious disadvantage of consumers, it is probable that these types of provisions would not be enforceable in the E.U.⁷⁷

Amazon's TOU takes center stage in illustrating class action waivers, stating that the parties to the contract "agree that any dispute resolution proceedings will be conducted only on an individual basis and not in a class, consolidated or representative action."⁷⁸ Although Regulation 5 does not establish a "bright line" rule as effectively as other provisions of the UCTD, it is likely that the E.C. would find Amazon's clause creates a "significant imbalance" in the rights of the parties to the detriment of the consumer.⁷⁹

Netflix and Priceline also followed Amazon's lead by enacting similar provisions barring class actions.⁸⁰ However, in keeping with their trend of relative consumer-centrism, Google and Facebook again make no mention at all of class actions or waivers thereof.⁸¹

D. Rolling Contracts and Unilateral Changes to Terms

"Rolling" contracts are standard form instruments that allow businesses to unilaterally change contract terms after the initial formation of the agreement.⁸² Rolling contracts often include layered provisions making substantive changes binding either at the time the changes are published, or upon continued use of the website, service, or software.⁸³ In the U.S., courts have been increasingly willing to enforce "rolling" contract terms, provided that consumers receive "reasonable notice" and the opportunity to refuse the new terms and back out of the contract.⁸⁴

⁷⁷ See *id.* (outlining prohibitions on imbalanced terms).

⁷⁸ See Amazon, *supra* note 64 (establishing Amazon's class action waiver policy).

⁷⁹ See Rustad, *supra* note 49, at 417 (describing class action waivers as unfair to consumers).

⁸⁰ See Priceline, *supra* note 62 ("[N]o proceeding against Priceline, its affiliates, or any travel service providers or companies offering products or services through the site . . . may proceed as a class action."); see also Netflix, *supra* note 64 ("YOU . . . MAY BRING CLAIMS AGAINST [Netflix] ONLY IN YOUR . . . INDIVIDUAL CAPACITY, AND NOT AS A PLAINTIFF OR CLASS MEMBER IN ANY PURPORTED CLASS OR REPRESENTATIVE PROCEEDING") (emphasis in original).

⁸¹ See Google, *supra* note 64 (omitting class action waivers); see also Facebook, *supra* note 64 (abstaining from including class action waivers).

⁸² See Rustad, *supra* note 49, at 240 (defining "rolling" contract terms).

⁸³ See *id.* at 240-41 (describing "rolling" provision in Travelocity's terms of service).

⁸⁴ See *id.* (citing "recent trend in judicial decisions" upholding rolling contract terms); Maria Vittoria Onufrio and Michael L. Rustad, *Reconceptualizing Consumer Terms of Use for a Globalized Knowledge Economy*, 14 U. PA. J. BUS. L. 1085, 1129-30 (2012) (explaining reversal in trend of judgments striking down "shrinkwrap" and "rolling" contracts following *ProCD* decision); see also *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1149 (7th Cir. 1998); *ProCD, Inc.*,

However, contracts incorporating “rolling” terms likely violate several prohibitions laid out in Schedule 2—formerly the “Annex”—of the UCTD, including Terms (c), (i), (j), and (k).⁸⁵ Term (c) prohibits making contract terms “binding on the consumer whereas provision of services by the seller or supplier is subject to a condition whose realization depends on his will alone.”⁸⁶ Meanwhile, Term (i) precludes terms “irrevocably binding the consumer to terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract.”⁸⁷ Term (j), meanwhile, embargoes terms “enabling the seller or supplier to alter the terms of the contract unilaterally without a valid reason which is specified in the contract.”⁸⁸ Finally, Term (k) bans provisions “enabling the seller or supplier to alter unilaterally without a valid reason any characteristics of the product or service to be provided.”⁸⁹

Here again, we turn to Priceline as the standard-bearer for U.S.-style terms that would—or perhaps will—be problematic in much of the European market.⁹⁰ The preamble of Priceline’s terms of service states, “Priceline.com reserves the right, in its sole discretion, to amend, modify, or alter this Agreement at any time by posting the amended terms on this Site.”⁹¹ This term appears to have the effect of binding consumers based on unilateral action, listing no “valid reasons” for the change of the contract terms, and granting the consumer the opportunity to acquaint herself to those changes, likely violating Terms (c), (i), and (j) on its face.⁹² Given its fact-specific nature, a determination regarding whether Term (k) is violated would rest primarily on whether a “characteristic” of the service is altered in the event that Priceline changed its terms.⁹³ Given that this provision likely violates

86 F.3d at 1452; *Brower v. Gateway 2000*, 676 N.Y.S.2d 569, 575 (N.Y. App. Div. 1998) (upholding “rolling” adhesion contracts based on notice and manifestation of consent).

⁸⁵ See UCTD, *supra* note 52, at Schedule 2, Term (c), (i), (j), and (k) (prohibiting litany of provisions effectuating purposes of “rolling contracts”).

⁸⁶ See *id.* (prohibiting contracts in which stronger party has unilateral ability to cancel or perform).

⁸⁷ See *id.* (disallowing contracts immediately binding on consumers).

⁸⁸ See *id.* (outlawing seller ability to unilaterally change terms).

⁸⁹ See *id.* (banning seller ability to unilaterally alter service or product supplied).

⁹⁰ See PRICELINE, *supra* note 62, at Pmbl. (examining Priceline’s rolling contract provision).

⁹¹ See *id.* (laying out problematic Priceline rolling contracts clause).

⁹² See *id.* (examining problematic Priceline TOU); see also UCTD, *supra* note 52, at Schedule 2, Terms (c), (i), and (j) (laying out prohibited clauses present in Priceline’s TOU).

⁹³ See *id.* at Term (k). The inclusion of the qualifier “as to any of the *characteristics* of the product or service to be provided” links Term (k) to a determination as to whether a specific change to the terms would qualify as a change to a “characteristic” of the good or service in question. *Id.* (emphasis added). While the UCTD provides little guidance as to what constitutes a “characteristic,” the preceding use of the word “any” suggests that E.U. lawmakers wanted the provision to broadly apply to substantive changes to the terms. *Id.*

several of the UCTD's prohibitions against rolling contracts, the clauses likely would not stand up to E.C. scrutiny if challenged by an E.U. consumer.⁹⁴

Although Priceline's "rolling" terms align with its penchant for developing distinctly U.S.-flavored terms of use, Amazon and Google's terms use similar language, and are thus likely on equally unsteady footing in the E.U.⁹⁵ While this majority U.S. centrism is unsurprising, there seems to be a developing trend among the companies that have had prior run-ins with the E.C. to draft jurisdictionally-distinct terms of use, while also softening terms which would otherwise be binding in the U.S.⁹⁶ Facebook and Twitter have also inserted qualifiers into their "rolling" provisions, giving notice and allowing consumers time to apprise themselves of changes before new terms become binding.⁹⁷

E. Compulsory Choice-of-Law and Forum Selection

Among the most clearly violative common U.S.-style terms of service are choice-of-law and choice-of-forum provisions, which contravene explicit prohibitions laid out in E.U. statute.⁹⁸ As the monikers suggest, law and forum selection clauses are contract terms that determine which jurisdiction will exclusively hear any disputes arising from a contract, as well

⁹⁴ See Rustad, *supra* note 49, at 416 ("European Rolling Contracts in Consumer Licensing or Terms of use Violates the UCTD and Several Terms in [Schedule 2].").

⁹⁵ See Amazon, *supra* note 64 ("We reserve the right to make changes to our site, policies, Service Terms, and these Conditions of Use at any time"); see also Google, *supra* note 64 ("Google may also stop providing Services to you, or add or create new limits to our Services at any time . . . changes addressing new functions for a Service or changes made for legal reasons will be effective immediately. If you do not agree to the modified terms for a Service, you should discontinue your use of that Service.").

⁹⁶ See Facebook, *supra* note 64 (demonstrating trend); see also Twitter Terms of Service, TWITTER (hereinafter "Twitter") (Feb. 21, 2018), <https://twitter.com/en/tos>. Following E.C. warnings, Facebook developed bespoke terms of service for German users, while Twitter crafted more broad terms for E.U. users or users "otherwise outside the United States." See Facebook, *supra* note 64. Facebook, Twitter, and Netflix—which have had significant contact with the E.C. regarding tax rates and geofencing practices—have each also softened the language of some of their terms for domestic users. *Id.*

⁹⁷ See Facebook, *supra* note 64, at Section 13(1) ("We'll notify you before we make changes to these terms and give you the opportunity to review and comment on the revised terms before continuing to use our Services."); see also Twitter, *supra* note 96, at Section 6 ("We will notify you 30 days in advance of making effective changes to these Terms that impact the rights or obligations of any party. . . .").

⁹⁸ See Brussels, *supra* note 53, at Art. 15-17 (describing consumers' non-waivable right to home-court advantage in B2C litigation); see also Rome I, *supra* note 53, at Art. 6 (prohibiting one-sided choice of law provisions in B2C contracts); Rustad, *supra* note 49, at 415 (describing E.U. prohibition on choice of forum and choice of law provisions).

as the body of law that will bind the parties to those disputes.⁹⁹ Absent fraud, duress, unconscionability, lack of logical connection between the forum and the dispute, or violation of statute in the applicable jurisdictions, U.S. courts generally uphold choice-of-law and forum selection provisions in B2C contracts.¹⁰⁰

While it is well-established that choice-of-law and forum selection provisions are broadly enforceable in U.S. contracts, these clauses are clear violations of both the Brussels Regulation and the Rome I Regulation in the E.U.¹⁰¹ Given that stronger parties to contracts are likely better able to afford travel expenses to distant fora, Articles 15-17 of the Brussels Regulation grant non-waivable home venue rights to E.U. citizens in B2C contracts.¹⁰² Article 6 of the Rome I Regulation, meanwhile, prohibits one-sided choice-of-law provisions for E.U. citizens in B2C agreements.¹⁰³

Google's terms of service provide a prototypical example of choice-of-law and forum selection clauses in the U.S. context, providing in relevant part that:

All claims arising out of or relating to these terms or the Services will be litigated exclusively in the federal or state courts of Santa Clara County, California, U.S.A., and you and Google consent to personal jurisdiction in those courts . . . The laws of California, U.S.A., excluding California's conflict of laws rules, will apply to any disputes arising out of or relating to these terms or the Services.¹⁰⁴

⁹⁹ See *Governing Law and Choice of Forum Clauses Explained*, LEXISNEXIS, <https://www.lexisnexis.ca/en-ca/ihc/2017-03/governing-law-and-choice-of-forum-clauses-explained.page> (last visited Feb. 24, 2018) (defining choice of law and forum selection clauses).

¹⁰⁰ See, e.g., *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 586 (1991) (finding forum selection clauses not facially unfair simply due to lack of negotiation); *Hall v. Sprint Spectrum, L.P.*, 876 N.E.2d 1036, 1037 (2007) (upholding choice-of-law clause unless no relationship to parties or transaction in violation of public policy); *Caspi v. Microsoft Network, LLC*, 732 A.2d 528, 529 (1999) (holding forum selection enforceable absent fraud, "overweening bargaining power, or violation of public policy"). See also Onufrio, *supra* note 84, at 1167 ("Courts will only refuse to enforce choice-of-law agreements 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.") "The vast majority of U.S. courts enforce forum selection clauses even though in the real world few consumers appreciate that they are agreeing before the fact to litigate in a distant forum." Onufrio, *supra* note 84, at 1178.

¹⁰¹ See *Rustad*, *supra* note 49, at 416 (outlining E.U. prohibition on choice-of-law and forum selection provisions); see also Onufrio, *supra* note 84, at 1179 ("U.S. companies can assume that their choice-of-law and forum clauses are unenforceable in the Eurozone.").

¹⁰² See *Brussels*, *supra* note 53, at Art. 15-17 (granting non-waivable home-court advantage to E.U. citizens in B2C contract litigation).

¹⁰³ See *Rome I*, *supra* note 53, at Art. 6 (prohibiting one-sided choice-of-law provisions).

¹⁰⁴ See *Google*, *supra* note 64 (quoting Google's TOU).

These terms, while perfectly enforceable in the U.S., would clearly violate Articles 15-16 of the Brussels Regulation, as well as Article 6 of the Rome I Regulation.¹⁰⁵ Although in this instance Google adheres to the U.S. tradition of enforcement of these clauses, the companies' choice-of-law and forum selection provisions depart more from the current jurisdictional status quo than in any of the previously mentioned terms.¹⁰⁶ Netflix, for example, neglects to mention forum selection, while including a provision invalidating its own choice-of-law provisions if they contravene consumer protection laws in users' states of residence.¹⁰⁷

IV. CONCLUSION

In sum, modern E.U. consumer protection mandates are focused primarily on correcting the imbalance in bargaining power between businesses and consumers. Philosophically, and perhaps counterintuitively, these regulations do more to preserve the freedom to contract for all. Conversely, the U.S. market-driven approach to consumer protection fosters that imbalance, preserving and bolstering the freedom to contract of corporations, while eroding the same rights of consumers. This is not to say that consumers are less capable of entering into contracts with businesses by nature of an imbalance in bargaining power. Rather, given that a "bargained for exchange" is the lynchpin of contract formation, demeaning one party's voice in a bargain by allowing companies to unilaterally dictate terms to consumers demeans the bargain—and thus the contract—itself.

From a governmental standpoint, the world's two largest economies continue to diverge as the U.S. doubles-down on its market-driven regulatory approach, while the E.U. continues its tradition of statutory activism in the consumer protection arena, propping up consumers wherever possible. However, as a practical matter, U.S. businesses seem to be reacting to a European Commission flexing its relatively newfound authority on the world's economic stage. Placing pressure on e-titans like Google, Facebook,

¹⁰⁵ See sources cited, *supra* note 53 (outlining E.U. prohibition on choice-of-law and forum selection provisions); see also Rustad, *supra* note 49, at 415 (describing U.S.-style choice-of-law and forum selection provisions as unenforceable).

¹⁰⁶ See, e.g., Amazon, *supra* note 64 (allowing arbitration in home county of consumers); Facebook, *supra* note 64 (citing German law as binding for German consumers); Priceline, *supra* note 64 (setting county of consumers' "billing address" as small claims venue); Netflix, *supra* note 64, at Section 11 (including provision recognizing consumer protection laws in consumer states of residence).

¹⁰⁷ See Netflix, *supra* note 61, at Section 11 (including clause deferring to consumer protection statutes of users' home jurisdictions).

Twitter, and Amazon in the Eurozone has resulted in subtle changes to the way these companies interact with their customers domestically.

It remains unlikely that there are seismic changes to U.S. consumer protection law on the horizon. However, there may still be hope for U.S. consumers grappling with the American market-driven consumer protection tradition. As legal expenses make dozens of jurisdictionally bespoke terms of use untenable, more internet companies may slowly succumb to market pressures, gradually shifting the stream of domestic consumer protection doctrine back to its philosophical headwater.

Christopher LeBlanc