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In a digital world where e-commerce is rapidly growing, many contracts are now formed exclusively over the Internet.[1] Proponents of electronically formed contracts contend that they are necessary to facilitate the growth of the digital economy.[2] Many commentators, however, are concerned that current contract law is inadequate to accommodate this developing trend.[3] Courts generally uphold the enforceability of these contracts, particularly where one party must affirmatively accept the contractual terms by clicking on a link, usually labeled "I Accept These Terms."[4] Electronic contracts often contain a provision allowing a party to unilaterally modify or change the contractual terms, and many of these provisions do not require that party to give notice of future modifications.[5]

In *Margae, Inc. v. Clear Link Technologies*, the United States District Court for the District of Utah addressed whether one party may modify a contract simply by posting a new agreement on the Internet.[6] The original contract between Margae and Clear Link provided Clear Link with the unilateral right to modify "the terms and conditions" of the agreement.[7] Clear Link later exercised that right and added an arbitration clause in a new agreement that it posted on its Web site without providing notice to Margae.[8] The court ruled that the new agreement was enforceable because it was supported by valid consideration and was not unconscionable.[9] This case comment contends that the court's analysis as to the validity of the arbitration clause was inadequate, and that the court incorrectly held that a party may unilaterally insert an arbitration clause into an amended contract by posting the modifications on the Internet without giving notice to the other party.

Margae and Clear Link are both Internet marketing companies.[10] Margae's services include using its Web sites to generate sales leads for other companies.[11] In addition to its Internet marketing services, Clear Link sells products and services

1. Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age,* 77 N.Y.U. L. Rev. 429, 429–30 (2002).

2. *See id.* at 429–31. *See generally id.* at 463–75 (describing the benefits and challenges of electronic contracts).

3. *Id.* at 430–31. Recently, the Uniform Computer Information Transactions Act was drafted in an attempt to provide more certainty in the law of electronic contracts. Unif. Computer Info. Transactions Act (1999). As of 2008, the Act has only been adopted in two states, Virginia and Maryland. Va. Code Ann. §§ 59.1–501.1 to 59.1–509.2 (West 2009); Md. Code Ann., Com. Law §§ 22–101 to 22–816 (West 2009).

4. *See* Matthew A. Goldberg, *The Googling of Online Privacy: Gmail, Search-Engine Histories and the New Frontier of Protecting Private Information on the Web,* 9 Lewis & Clark L. Rev. 249, 255 n.33 (2005).

5. *Id.*

6. No. 2:07-CV-00916, 2008 WL 2465450 (D. Utah June 16, 2008).

7. *Id.* at *2.

8. *Id.* at *3.

9. *See id.* at *6–8.

10. *Id.* at *1–2.

11. *Id.* at *1.

provided by other companies.[12] Clear Link operates USDirect.com, a Web site that conducts marketing for DIRECTV.[13]

In May 2006, the parties entered into a written agreement for Margae to provide marketing services to Clear Link.[14] Margae was required to complete an application form on the USDirect.com Web site as a pre-requisite to becoming a Clear Link "Sales Partner."[15] As part of the online application process, Margae's principle representative clicked on a link labeled "I accept these terms," which was attached to an agreement titled "Sales Partner Terms of Agreement" (the "Partner Agreement").[16]

Significantly, the Partner Agreement included a broad modification provision.[17] The modification provision provided that Clear Link "may modify any of the terms and conditions contained in [the Partner Agreement], at any time and in [its] sole discretion, by posting a change notice or a new agreement on" the USDirect.com Web site.[18] The agreement also provided that if the sales partner continued to provide services following the posting of a new agreement, even without notice of the posting, the sales partner would be deemed to have accepted the modification.[19]

Clear Link posted a new agreement (the "Amended Agreement") on USDirect.com one month after the parties entered into the original agreement.[20] The Amended Agreement included a newly added arbitration clause.[21] This clause was not included

12. *Margae,* 2008 WL 2465450, at *1.

13. *Id.*

14. *Id.* at *2.

15. *Id.*

16. *Id.*; The Margae representative alleged that he experienced technical difficulties during the application process and was unable to complete the process himself. He further alleged that a Clear Link representative completed the application process for him. The court later determined, however, that the system was working properly at the time, that it was necessary for an applicant to click on the "I accept these terms" link before Clear Link would process the application, and, therefore, that the Margae representative clicked on that link. Margae, Inc. v. Clear Link Tech., No. 1:07-CV-00251, 2007 WL 3232570, at *5–7 (W.D.N.C. Oct. 11, 2007).

17. *Margae,* 2008 WL 2465450, at *2.

18. *Id.* at *5.

19. *Id.* The full modification clause in the Partner Agreement provided:

> We may modify any of the terms and conditions contained in this Agreement, at any time and in our sole discretion, by posting a change notice or a new agreement on this site. Modifications may include, for example, changes in the scope of available referral fees, fee schedules, payment procedures and Program rules. IF ANY MODIFICATION IS UNACCEPTABLE TO YOU, YOUR ONLY RECOURSE IS TO TERMINATE THIS AGREEMENT. YOUR CONTINUED PARTICIPATION IN THE PROGRAM FOLLOWING OUR POSTING OF A CHANGE NOTICE OR NEW AGREEMENT ON OUR SITE WILL CONSTITUTE BINDING ACCEPTANCE OF THE CHANGE.

Id.

20. *Margae,* 2008 WL 2465450, at *3.

21. *Id.*

in the original Partner Agreement.[22] Additionally, the arbitration clause went only one way: under the new provision Margae was required to arbitrate any of its claims against Clear Link, but Clear Link was under no corresponding obligation to Margae.[23] In March 2007, Margae and Clear Link had a dispute over certain services Margae performed on one of Clear Link's Web sites.[24] Subsequently, Clear Link stopped paying commissions owed to Margae but continued to benefit from the improvements Margae had made to its Web sites.[25]

Margae filed suit for breach of contract against Clear Link, seeking relief for Clear Link's alleged misuse of Margae's services.[26] In response, and pursuant to the new arbitration clause, Clear Link filed a motion to compel arbitration of all of Margae's claims against Clear Link.[27]

Applying Utah state contract law, the district court upheld the validity of the arbitration clause and granted Clear Link's motion to compel arbitration. [28] The court explained that Margae, through its representative, accepted the Partner Agreement, and therefore agreed to the modification provision contained therein.[29] The court found that Clear Link then properly modified the Partner Agreement to incorporate the arbitration clause by following the procedure set forth in the modification provision of the Partner Agreement.[30]

The court rejected Margae's three main arguments against enforcing the arbitration clause.[31] First, Margae argued that it did not accept the Amended Agreement because

22. *Id.*

23. *Id.* at *7.

24. *Id.* at *3.

25. *Id.*

26. *Margae,* 2008 WL 2465450, at *3. Margae originally filed suit in North Carolina state court. *Id.*

27. *Id.* Clear Link removed the lawsuit to the United States District Court for the Western District of North Carolina. *Id.* Clear Link moved to dismiss Margae's claims against the individual defendants and to compel arbitration of Margae's claims related to both SEO and affiliate marketing services. *Id.* In the alternative, Clear Link sought to transfer the lawsuit to Utah based on the venue clause of the Partner Agreement naming Utah as the most appropriate jurisdiction for any litigation. *Id.* The magistrate judge for the Western District of North Carolina found that Margae had effectively agreed to the Partner Agreement but did not address which types of services were governed by that Agreement. *Id.* at *4. The magistrate judge further left unanswered the validity of the arbitration clause in the Amended Agreement. *Id.* Ultimately, the magistrate judge recommended the case be transferred to Utah as agreed to by the parties in the venue clause of their contract. *Id.*

28. *Id.* at *6–8.

29. *Id.* at *7.

30. *See id.*

31. *Id.* at *6–8. Margae did not argue that modifying the agreement to include the arbitration clause was outside the scope of Clear Link's right to unilaterally modify the agreement pursuant to the modification provision. The modification provision appeared to contemplate changes in fees and work rules; however, this attack was not raised. In *Badie v. Bank of America*, the court narrowly construed a similar modification clause consistent with the implied duty of good faith and recognized implicit limitations on the scope and nature of the modifications authorized. Badie v. Bank of America, 79 Cal. Rptr. 2d 273, 291 (Cal. Ct. App. 1998).

it never affirmatively assented to it nor did it receive notice of its existence.[32] The court disagreed, ruling that Margae should have known about the modifications.[33] The court found that Margae, after agreeing to the terms of the modification clause contained in the original Partner Agreement, "should have monitored [the USDirect.com Web site] to determine whether any amendments had been posted."[34]

Second, the court rejected Margae's argument that there was no valid consideration for the Amended Agreement.[35] The court relied on *Johnson v. Morton Thiokol, Inc.*[36] to support its holding that a modified contract is supported by valid consideration when each party continues to perform its contractual obligations after the modification.[37] The court held that the contract modification adding the arbitration clause was supported by valid consideration because Margae continued to provide and be paid for its services after Clear Link posted the Amended Agreement on its Web site.[38]

Finally, the court rejected Margae's assertion that adding an arbitration clause without providing notice was unconscionable.[39] A party asserting that a contract term is unconscionable must prove both substantive and procedural unconscionability.[40] The court held that Margae failed to satisfy either prong of that two-part test.[41] Because the Partner Agreement was amended under its own terms and because Margae was unable to show that it was in an inferior bargaining position or that Clear Link was "overreaching or oppressi[ve],"[42] the court held that there was no showing of procedural unconscionability.[43]

The court also held that the arbitration clause was not substantively unconscionable.[44] The court stated that it was not unfair that Margae was required to pursue its equitable remedies through arbitration even without a corresponding binding obligation on Clear Link.[45] The court distinguished the case from cases

32. *Margae,* 2008 WL 2465450, at *6.

33. *Id.*

34. *Id.*

35. *Id.*

36. 818 P.2d 997 (Utah 1991).

37. *Margae,* 2008 WL 2465450, at *6.

38. *Id.* at *7.

39. *Id.* at *6–8.

40. *Id.* at *6. The court explained that the element of procedural unconscionability focuses on the manner in which the contract was formed, while substantive unconscionability focuses on the contents of the agreement. *Id.*

41. *Id.*

42. *Id.* at *7.

43. *Margae,* 2008 WL 2465450, at *7.

44. *Id.*

45. *Id.*

where courts did not enforce changes that corporations unilaterally made to their agreements with their consumers, noting that in this case each party was an "Internet-savvy" corporation.[46] Thus, the court found a valid and enforceable agreement between Margae and Clear Link to arbitrate their claims.[47]

This case comment contends that the court in *Margae* incorrectly ruled that a party may unilaterally modify a contract to include an arbitration clause by posting a new agreement on the Internet without notifying the other party. The case was wrongly decided because the court improperly found valid consideration for the Amended Agreement by relying on *Johnson v. Morton Thiokol, Inc.* The court also should have adopted an analysis similar to that used by New York state courts, which analyze the enforceability of arbitration clauses with more rigorous scrutiny. Based on this more rigorous analysis, the court in *Margae* should have held that the insertion of the arbitration provision without notice was unconscionable.

The court in *Margae* improperly relied on *Johnson* to support its finding that there was valid consideration for the Amended Agreement.[48] In *Johnson*, the court analyzed whether an employee continuing to work after his employer allegedly modified the original employment agreement constituted valid consideration for the new or changed terms.[49] There, the plaintiff claimed that he was wrongfully terminated after his employer modified their at-will employment relationship through the publication of and compliance with an employee handbook that effectively limited the employer's ability to terminate the relationship only for good cause.[50] The employee argued that because he continued working for his employer after the alleged modifications were made, the at-will relationship had transformed into an implied-in-fact contract governed by the handbook.[51]

The court in *Johnson* explained that continued performance of contractual obligations after modifications were made to a contract might, in certain circumstances, provide valid consideration for the new or changed provisions.[52] The court stated that "where an at-will employee retains employment with knowledge of new or changed conditions, the new or changed conditions may become a contractual obligation. In this manner, an original . . . contract may be modified or replaced . . . ."[53] The court added that "by continuing to stay on the job, although free to leave, the

46. *Id.* at *7.

47. *Id.* at *7–8.

48. Johnson v. Morton Thiokol, Inc., 818 P.2d 997, 1000 (Utah 1991). Note that the court in *Margae* cited *Johnson* for the proposition that "an employee accepted [the] modified contract by continuing to work after modification." *Id.* at *6. The court in *Johnson*, however, ultimately found that the original at-will relationship was not effectively modified. *Johnson*, 818 P.2d at 1002. The court found that the handbook expressed the employer's unambiguous intent not to modify the existing relationship. *Id.* at 1003.

49. *Johnson,* 818 P.2d at 1000–04.

50. *Id.* at 998–1000.

51. *Id.*

52. *Id.* at 1002.

53. *Id.*

employment supplies the necessary consideration for the [modification]."[54] Thus, the court suggested that continuing to perform contractual obligations will constitute valid consideration for changed provisions only when the party continues to perform after receiving notice of the modifications.[55]

The court in *Margae* improperly applied the holding of *Johnson* in finding that there was valid consideration for the Amended Agreement. Although Margae continued to perform its contractual obligations after the Amended Agreement was posted,[56] this alone was not sufficient consideration.[57] The court disregarded the fact that Margae did not receive notice of the modifications when it continued to perform its contractual obligations after Clear Link posted the Amended Agreement on its Web site.[58] Instead, the court reasoned that Margae should have known about the modified contract because the terms of the original contract imposed a duty on Margae to monitor Clear Link's Web site for updates.[59] The court's insistence that Margae was aware that Clear Link could modify the agreement at any time ignores the principle set forth in *Johnson* that a party must have actual knowledge of a modification for there to be valid consideration for a new agreement, even if each party continues to perform its contractual obligations after the modification is made.[60] Thus, the court should not have found valid consideration for the Amended Agreement based on the holding of *Johnson*.

In addition, the court's analysis of unconscionability was inappropriately cursory. The court should have shown greater appreciation both for the nature of asymmetrical arbitration agreements and for Clear Link's unilateral ability to add such a provision to the original contract terms. The court should have more rigorously scrutinized the facts and held that Clear Link's modification was both procedurally and substantively unconscionable.

When parties agree to arbitrate their claims they submit themselves to a very different system of dispute resolution than in the courtroom. Instead of a judge or jury hearing their case, it may be submitted to a small panel of arbiters or even just one arbiter.[61] The opposing party often has the right to choose one of the arbiters.[62] Sometimes the parties agree to follow the rules of a designated arbitration association, which likely will vary from certain court rules.[63] In addition, while the legal system

54. *Id.*

55. *See Johnson*, 818 P.2d at 1002.

56. *Margae,* 2008 WL 2465450, at *6.

57. *See Johnson*, 818 P.2d at 1002.

58. *Margae,* 2008 WL 2465450, at *6.

59. *Id.*

60. *See Johnson,* 818 P.2d at 1002.

61. *See* Stephen K. Huber, *Arbitration and Contracts: What Are the Law Schools Teaching?*, 2 J. Am. Arb. 209, 263 (2003).

62. *Id.* at 265.

63. *Id.* at 257.

generally favors alternative dispute resolution, that policy also recognizes the importance of being certain that the parties truly agreed to arbitrate.[64]

The right to apply to the courts to resolve a dispute is "[o]ne of the fundamental and essential constitutional rights of the citizen . . . ."[65] New York courts in particular have done an exemplary job of protecting this right because they analyze the enforceability of arbitration agreements with heightened scrutiny. In fact, "a special rule ha[s] been formulated in New York with respect to arbitration clauses, namely, that 'the agreement to arbitrate must be direct and the intention made clear, without implication, inveiglement, or subtlety.'"[66] One court has explained that an agreement to arbitrate should be executed "in a way that each party . . . will fully and clearly comprehend that the agreement to arbitrate exists[.]"[67] Another court indicated that the "threshold for clarity of agreement to arbitrate [might be] greater than with respect to other contractual terms."[68]

In *Margae*, the court only superficially reviewed whether the arbitration clause was substantively unconscionable. The court simply stated that it was not unfair that Margae was required to pursue its remedies in arbitration even though Clear Link was not similarly bound.[69] The court added that Margae's equitable remedies were still available; it just had to pursue them in arbitration.[70]

The principles for determining whether a contract clause is substantively unconscionable are fairly well settled. The Utah Supreme Court has explained that "substantive unconscionability is indicated by 'contract terms so one-sided as to oppress or unfairly surprise an innocent party . . .'"[71] or "'an overall imbalance in the obligations and rights imposed by the bargain . . . .'"[72] "Substantive unconscionability examines the relative fairness of the obligations assumed."[73] The court further explained that an "unconscionable contract [is] one in which 'no decent, fair-minded person would view the ensuing result without being possessed of a profound sense of injustice.'"[74]

The court in the present case upheld a conspicuous imbalance in one party being obligated to arbitrate its claims when the other party was not similarly bound. Other

64. *See In re* Doughboy Indus., Inc., 233 N.Y.S.2d 488, 492 (1st Dep't 1962).

65. W. Assurance Co. of Toronto v. Decker, 98 F. 381, 382 (8th Cir. 1899).

66. Windsor Mills, Inc. v. Collins & Aikman Corp., 101 Cal. Rptr. 347, 353, (Cal. Ct. App. 1972) (quoting *In re* Doughboy Indus., Inc., 233 N.Y.S.2d 488, 492 (1st Dep't 1962)).

67. Arthur Phillips Exp. Corp. v. Leathertone, Inc., 87 N.Y.S.2d 665, 667 (1st Dep't 1949).

68. *In re* Doughboy Indus., Inc., 233 N.Y.S.2d at 492.

69. *See Margae,* 2008 WL 2465450, at *7.

70. *Id.*

71. Res. Mgmt. Co. v. Weston Ranch & Livestock Co., 706 P.2d 1028, 1041 (Utah 1985) (quoting Bekins Bar V Ranch v. Huth, 664 P.2d 455, 462 (Utah 1983)).

72. *Id.* (quoting Bekins Bar V Ranch v. Huth, 664 P.2d 445, 462 (Utah 1983)).

73. *Id.*

74. *Id.* (quoting Carlson v. Hamilton, 332 P.2d 989, 991 (Utah 1958)).

courts, in California, for instance, do not tolerate that imbalance in the parties' obligations to arbitrate. There, in the case of arbitration agreements, a "modicum of bilaterality" is required.[75] Asymmetrical arbitration agreements, such as when one party is bound to arbitrate but the other party is not, are prohibited under California law as unconscionable.[76]

The court also failed to recognize the potentially detrimental effects of the unilateral modification provision as it applied to the arbitration clause. Clear Link could craft a completely one-sided arrangement. It could choose any forum, skew all the rules in its favor, and even appoint the sole arbiter, who would probably be its closest ally. California, in contrast, properly recognizes the severity of one party's right to unilaterally modify the terms of an arbitration agreement, as illustrated by the Ninth Circuit's decision in *Net Global Marketing, Inc. v. Dialtone*.

In that case, the fact that one party could unilaterally modify the terms of the parties' arbitration agreement rendered the arbitration agreement substantively unconscionable.[77] Dialtone e-mailed a service agreement to Net Global, which Net Global then approved and signed.[78] A provision in the agreement incorporated the terms of service on Dialtone's Web site into the service agreement between the parties.[79] The terms of service contained a mandatory arbitration provision, which required any dispute between the parties to be submitted to arbitration.[80] In addition, the terms of service contained a modification provision granting Dialtone the unilateral right to modify the terms of service simply by posting a new agreement on its Web site without notifying Net Global.[81]

The court explained that "[t]he unilateral modification 'pervade[s]' and 'taint[s] with illegality' the . . . agreement to arbitrate."[82] The court explained that "the unilateral modification clause renders the arbitration provision severely one-sided in the substantive dimension . . . ."[83] The court acknowledged that the degree of

75. *See* Armendariz v. Found. Health Psychcare Servs., Inc., 6 P.3d 669, 691–92 (Cal. 2000).

76. The Ninth Circuit, in *Net Global Marketing, Inc. v. Dialtone, Inc.*, cited to *Armendariz*, which cited to cases analyzing arbitration agreements in employment contracts. 217 Fed. App'x 598, 600 (9th Cir. 2007); *Armendariz*, 6 P.3d at 690–94. *See also* Kinney v. United HealthCare Services, Inc., 83 Cal. Rptr. 2d 348, 354 (Cal. Ct. App. 1999) ("[T]he unilateral obligation to arbitrate is itself so one-sided as to be substantively unconscionable."). The court in *Armendariz* highlighted that other courts have required a "reasonable justification for the arrangement—i.e., a justification grounded in something other than the employer's desire to maximize its advantage based on the perceived superiority of the judicial forum—such an agreement would not be unconscionable." *Armendariz*, 6 P.3d at 694. Without such justification courts assume that it is unconscionable. *Id.*

77. *Net Global Mktg., Inc.*, 217 Fed. App'x at 602.

78. Brief for Appellee at *7, *Net Global Mktg., Inc.*, 217 Fed. App'x 598.

79. *Id.*

80. *Id.* at *9–10.

81. *Id.* at 34.

82. *Net Global Mktg., Inc.*, 217 Fed. App'x at 602 (quoting Circuit City Stores, Inc. v. Adams, 279 F.3d 889 (9th Cir. 2002)).

83. *Id.* at 602.

unconscionability was tempered because Net Global was a commercial entity rather than a lay consumer.[84] In any event, the "effect of Dialtone's unilateral right to modify the arbitration clause is that it could, for example, craft precisely the sort of asymmetrical arbitration agreement that is generally prohibited under California law as unconscionable."[85]

The court's fear in *Net Global*—that a party will abuse its right to unilaterally modify the terms of an agreement—transpired in *Margae* when Clear Link added a material term, evidently beyond the scope of the parties' original intent.[86] Moreover, as stated above, the arbitration clause created a blatant imbalance in the obligations and rights between the parties by only requiring Margae to arbitrate its claims. This is precisely the sort of unjust result that the California court avoided in *Net Global* by holding that the arbitration agreement was unconscionable. Clear Link's modification exemplifies the potential for the abuse of a unilateral modification provision. California's stricter view toward this type of provision, even in a contract between two sophisticated corporations, is more appropriate to preserve the integrity of the parties' agreement.

The court's analysis in *Margae* completely disregarded the prominent asymmetry contained in the arbitration clause. The court also ignored the severity of Clear Link's right to unilaterally modify the terms of the arbitration clause. Under a stricter examination of the facts, the court should have ruled that the modification was substantively unconscionable.

The court also erred in not finding the arbitration clause procedurally unconscionable. The court's rationale that Clear Link's addition of the arbitration clause was not procedurally improper because it complied with the terms of the original contract's modification provision was very simplistic.[87] The court reasoned that posting a new contract on the USDirect.com Web site, which contained the arbitration clause without giving notice to Margae was not procedurally improper because the modification provision, by its terms, did not require any notice of future modifications.[88] The court

84. *Id.* at 601.

85. *Id.* at 602.

86. *See* discussion *infra* notes 95–97 and accompanying text.

87. The court also failed to recognize the additional implications of its analysis. By upholding the addition of a new material term, which was beyond the scope of the parties' original intent simply because Clear Link followed the procedures in the modification provision, the court has arguably granted Clear Link a limitless right to modify the parties' agreement. This opens the door to a strong argument that the entire Amended Agreement is illusory. In *Resource Management v. Weston Ranch & Livestock Co.*, the court explained, "where [one party] retains an unlimited right to decide the nature or extent of his performance, the promise is illusory and too indefinite for legal enforcement." *Res. Mgmt*, 706 P.2d at 1038. *See also* Badie v. Bank of America, 79 Cal. Rptr. 2d 273, 284–85 (Cal. Ct. App. 1998) (explaining why interpreting a unilateral modification provision to mean that one party may make any contractual changes so long as that it complies with the procedures set forth in a unilateral modification provision could render that agreement illusory).

88. *Margae,* 2008 WL 2465450, at *6.

also explained that both parties were sophisticated corporations and, therefore, Margae was not in an inferior bargaining position relative to Clear Link. [89]

The Utah Supreme Court, in *Resource Management Co. v. Weston Ranch & Livestock Co.*, outlined the principles for determining whether contractual provisions are procedurally unconscionable.[90] The court highlighted that the basic principle of unconscionability is the "prevention of oppression and unfair surprise."[91] There, the court explained that contracts offered on a "take-it-or-leave-it" basis are indicative of procedural unconscionability.[92] Other indicia of procedural unconscionability include deceitfully "minimizing key contractual provisions," "lack of opportunity for meaningful negotiation,"[93] and "whether the aggrieved party was compelled to accept the terms."[94]

Although Margae initially agreed that the contract could be modified, the court turned a blind eye to the underhanded manner in which Clear Link exercised its right to modify the Partner Agreement. [95] The court should have recognized that the addition of the arbitration clause was beyond the scope of the examples that were used in the Partner Agreement to illustrate the types of changes that might be made under the modification provision. These examples, such as changes to the fees and rules,[96] would have affected the regular commercial relationship between the parties, rather than changed the dispute resolution process.

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89. *Id*. at *7. Note that Margae originally agreed to the Partner Agreement, which contained a modification provision, by clicking on a link stating "I Accept These Terms." *Id.* at *2. Other online contracts containing similar unilateral modification clauses provide that the mere use of the Web site constitutes acceptance of the "Terms of Use" agreement contained on that Web site. Courts apply different standards for determining the enforceability of the contract provisions contained in these two types of contracts. *See generally* Goldberg, *supra* note 4.

90. *Res. Mgmt.,* 706 P.2d at 1040–43.

91. *Id*. at 1041.

92. *Id.* at 1042 (quoting Bekins Bar V Ranch v. Huth, 664 P.2d 462 (Utah 1983)).

93. *Id.* (quoting Bekins Bar V Ranch v. Huth, 664 P.2d 462 (Utah 1983)).

94. *Id.* (quoting *In re* Frederick's Estate, 599 P.2d 550, 556 (Wyo. 1979)).

95. The way Clear Link exercised its right to modify the Partner Agreement might also be categorized as a breach of the implied covenant of good faith and fair dealing. In *Badie*, the court explained that:

> The essence of the good faith covenant is objectively reasonable conduct . . . . Where . . . a party has the unilateral right to change the terms of a contract, it does not act in an "objectively reasonable" manner when it attempts to "recapture" a forgone opportunity by adding an entirely new term which has no bearing on any subject, issue, right or obligation addressed in the original contract and which was not within the reasonable contemplation of the parties when the contract was entered into. That is particularly true where the new term deprives the other party of the right to a jury trial and the right to select a judicial forum for dispute resolution.

Badie v. Bank of America, 79 Cal. Rptr. 2d 284, 296 (Cal. Ct. App. 1998) (quoting Lazar v. Hertz Corp., 191 Cal. Rptr. 849 (Cal. Ct. App. 1983)).

96. The modification clause in the Partner Agreement provides in relevant part:

> We may modify any of the terms and conditions contained in this Agreement, at any time and in our sole discretion, by posting a change notice or a new agreement on this

The terms of the Amended Agreement were especially surprising because Clear Link's modifications added an entirely new provision: an arbitration clause. This was not a case where, for example, the parties had initially agreed to arbitration and one party later decided that the parties would use a different organization to conduct the arbitration proceedings. Clear Link's exercise of its modification right was the initial formation of the arbitration "agreement." New York courts likely would not uphold an arbitration agreement formed in this manner.

As stated above, New York has a special rule for examining whether an agreement to arbitrate exists. One court has explained that an agreement to arbitrate should be executed "in a way that each party . . . will fully and clearly comprehend that the agreement to arbitrate exists."[97] Under this approach, posting a new contract containing an arbitration clause on a Web site without notifying the other party would probably be an insufficient method of executing an arbitration agreement. The New York rule properly appreciates the nature of arbitration agreements.

The court in *Margae*, however, upheld an agreement to arbitrate when one party was entirely unaware of the existence of any such provision. Moreover, using arbitration to resolve disputes was, evidently, outside the scope of the parties' original intent because it was not mentioned in the original Partner Agreement.

In addition, Margae was not in a position to negotiate the terms of the arbitration clause. The Amended Agreement was presented on a take-it-or-leave-it basis, as Margae's only recourse was to accept the change or abandon the profitable relationship. By making the change in the agreement after the parties had been performing over a period of time, Clear Link was able to take advantage of the fact that the business opportunity would likely serve to compel Margae to accept the change, even if it was aware of the modifications. Because Margae's option was limited to accepting the change or terminating the business relationship, any meaningful opportunity to negotiate was effectively eliminated.

The court's decision in Margae underscores the necessity for parties entering into contracts on the Internet to pay extremely close attention to the terms and conditions to avoid unexpected changes and defeated expectations. In *Margae,* the court enforced an arbitration clause unilaterally added pursuant to a modification provision by posting an amendment to a contract on the Internet without any notice. The court's decision was improper because the court misapplied the reasoning from *Johnson* to support a finding of consideration for the Amended Agreement. The court inappropriately ignored the fact that Margae never had notice of the modifications when it continued performing its contractual obligations. Furthermore, the court should have conducted a more rigorous examination of the arbitration clause similar to that conducted by California and New York courts. Under more rigorous scrutiny, the addition of an arbitration clause to the original contract without giving notice to

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site. Modifications may include, for example, changes in the scope of available referral fees, fee schedules, payment procedures and Program rules.

Margae, 2008 WL 2465450, at *5.

97. Arthur Phillips Export Corp. v. Leathertone, Inc., 87 N.Y.S.2d 665, 667 (1st Dep't 1949).

the other party should have been held both procedurally and substantively unconscionable. Thus, Clear Link's unilateral insertion of an arbitration clause and the entire Amended Agreement should have been held unenforceable. The decision in *Margae* demonstrates that parties conducting commerce on the Internet must be extremely careful when clicking the link "I Accept" because the terms agreed to today may be changed tomorrow.