

the License Agreement appeared in text that was visible only if a visitor scrolled down through the page to the next screen. If a visitor did so, he or she would see the following invitation to review the License Agreement: "Please review and agree to the terms of the Netscape SmartDownload software license agreement before downloading and using the software." Visitors were not required affirmatively to indicate their assent to the License Agreement by clicking on it, or even to view the License Agreement, before proceeding with a download of the software. But if a visitor chose to click on the underlined text in the invitation, a hypertext link would take the visitor to a web page entitled "License & Support Agreements." The first paragraph on this page read in pertinent part: "The use of each Netscape software product is governed by a license agreement. You must read and agree to the license agreement terms BEFORE acquiring a product. Please click on the appropriate link below to review the current license agreement for the product of interest to you before acquisition. For products available for download, you must read and agree to the license agreement terms BEFORE you install the software. If you do not agree to the license terms, do not download, install or use the software. . . ." A further click would be required before the visitor was brought to another web page containing the full text of the License Agreement. Among the terms of the License Agreement was a term requiring that virtually all disputes be submitted to arbitration in Santa Clara County, California, with the losing party paying all costs of arbitration. Several people who downloaded SmartDownload filed suit against Netscape because of a privacy issue with the software. Netscape moved to compel arbitration, claiming that the arbitration clause in the License Agreement was valid and enforceable. Was Netscape correct?

- ⑤ Netscape offered its SmartDownload software free of charge on its website. Visitors who wished to obtain SmartDownload from Netscape's website arrived at a page pertaining to the download of the software. On this page, there appeared a tinted box labeled "Download." By clicking on the box, a visitor initiated the download. The sole reference on this page to