

Second Circuit Holds that Uber's Arbitration Agreement with Its Users Is Enforceable Under California Law

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In a decision welcomed by the defense bar, the Second Circuit held that Uber and its former CEO could compel arbitration of an Uber user's claim alleging that Uber's software application allowed third-party drivers to unlawfully fix prices. The Second Circuit's decision provides helpful guidance to companies regarding the types of website disclosures that may be sufficient to put customers on notice of arbitration provisions in their contracts, at least under New York choice of law rules and Second Circuit precedent. *Spencer Meyer v. Uber Technologies, Inc., et al.*, Nos. 16-2750-cv, 16-2752-cv (2d Cir. Aug. 17, 2017).

Background

In support of its motion to compel arbitration, Uber submitted screenshots of the two screens that a user registering with a smart phone to use Uber's service would have seen during the registration process. The plaintiff here manually entered his name, email address, phone number and password. After clicking "Next," he advanced to a second screen labeled "Payment", where he could enter his credit card information or pay through other means. According to Uber's records, the plaintiff used a credit card, entered the payment information, and then clicked "Register" in the middle of the payment screen. Below the input fields on the payment screen was text advising plaintiff that "[b]y creating an account you agree to the [TERMS OF SERVICE & PRIVACY POLICY](#)," which was a hyperlink that was both in bright blue and underlined. If the user clicked on the hyperlink, it would take him to Uber's Terms of Service and Privacy Policy, which expressly stated: "You acknowledge and agree that you and Company are each waiving the right to a trial by jury or to participate as a plaintiff or class User in any purported class action or representative proceeding." The Terms of Service also provided that the American Arbitration Association would hear any dispute. Plaintiff declared that he did not read the Terms of Service, including the arbitration provision. Op. at 5-8.

Plaintiff originally sued only Uber's former CEO, but the district court granted his motion to join Uber as a necessary party. After the parties began to exchange discovery materials, defendants filed a motion to compel arbitration. The court denied the motion on the grounds that plaintiff did not have reasonably conspicuous notice of the Terms of Service and did not unambiguously assent to the terms. The district court did not reach issues such as waiver and whether the CEO, who was not a signatory, could enforce the arbitration agreement. The Second Circuit granted

interlocutory review under 9 U.S.C. § 16 and the district court stayed the case pending the appeal.

The Decision

Applying the Federal Arbitration Act, the Second Circuit conducted a de novo review and applied the familiar standards for a summary judgment motion based on the undisputed facts before the court, including that plaintiff's claims were covered by the arbitration provision of the Terms of Service. The Second Circuit agreed with the district court that California law governed the enforceability of the arbitration provision, and that California law and New York law are substantively similar for determining whether parties mutually assented to contract terms. It applied a standard that "only if the undisputed facts establish there is '[r]easonably conspicuous notice of the existence of contract terms and unambiguous of assent to those terms' will we find a contract has been formed." Op. at 16 (citing *Sprecht v. Netscape Commc'ns Corp.*, 306 F.3 17, 35 (2d Cir. 2002)).

The court then explained there is range of mechanisms for web-based contracts, from (1) "clickwrap" or "click-through" agreements, which require the user to click an "I agree" box after being presented with terms and conditions, to (2) "browsewrap" agreements, which post terms and conditions via a hyperlink but do not require affirmative assent by the user. While courts routinely uphold clickwrap agreements, the Second Circuit reasoned that the enforceability of a browsewrap agreement depends on whether the user has actual or constructive knowledge of the website's terms and conditions. Op. at 17-18. Here, the user fell within this range of agreements, the Second Circuit held, because although the user was not required to assent explicitly to the contract terms, he clicked a button marked "Register" underneath which the screen stated "By creating an Uber account, you agree to the TERMS OF SERVICE & PRIVACY POLICY," with hyperlinks to the policies so they could be reviewed. Although the Second Circuit had not previously issued a decision regarding the enforceability of these sorts of web-based contracts, other courts had applied Second Circuit precedent in upholding such agreements where the existence of their terms was reasonably communicated to the user. Op. at 19-20.

The court accepted plaintiff's representation that he was not aware of the existence of the Terms of Service or the arbitration provision, but in determining whether the provision was "reasonably conspicuous" the court applied the perspective of a "reasonably prudent smartphone user." Op. at 22. Noting the ubiquity of smartphones, the activities smartphone users engage in, and that text that is highlighted in blue and underlined is a hyperlink to another webpage where additional information is found, the court "conclude[d] that the design of the screen and language used render the notice provided reasonable as a matter of California law." Op. at 24. The court explained that the screen layout—the opinion includes

screenshots of what the screen would have looked like on plaintiff's Samsung Galaxy S5—as well as the fact that the hyperlink to the Terms of Service was provided simultaneously with enrollment, meant that a “reasonably prudent smartphone user would understand that the terms were connected to the creation of a user account.” The court emphasized that in light of this sort of constructive notice, it does not matter if the user chooses not to read the terms and conditions. Op. at 25-27. The court also rejected plaintiff's argument that placing the arbitration clause within the Terms and Conditions was a barrier to reasonable notice. Thus, the Uber App provided reasonably conspicuous notice of the Terms of Service as a matter of California law, the court reasoned.

The Second Circuit ruled that although plaintiff's assent to arbitration was not express, it was unambiguous in light of the objectively reasonable notice of the Terms and Conditions. In other words, the court held, a “reasonable user would have known that by clicking the registration button, he was agreeing to the terms and conditions accessible via the hyperlink, whether he clicked on the hyperlink or not.” Op. at 29. This was buttressed by the fact that the plaintiff had located and downloaded the Uber App, registered for an account, and provided his credit card information to create a forward-looking relationship with Uber—and the payment screen provided clear notice that terms and conditions governed that relationship. The court concluded that as a matter of law, plaintiff agreed to arbitrate his claims with Uber.

Since the facts regarding the arbitration provision and registration process were undisputed, the court did not remand to the district court for a trial on that issue. However, plaintiff had also argued that Uber waived its right to arbitrate by actively litigating the lawsuit. The Second Circuit determined that the waiver issue should be decided by the district court rather than in the arbitration, and for that reason remanded the case to the district court. (Plaintiff asked the Second Circuit to amend the decision to clarify that the district court may consider the issue of whether the payment screen was immediately replaced by a new screen that did not include any hyperlink to Uber's Terms of Service. The Second Circuit denied the motion but its order clarified that plaintiff may raise the issue in the district court without foreclosing defendants from arguing waiver.)

Conclusion

The Second Circuit's detailed analysis of both the web screens and the process for registration—as well as including as exhibits the screens evaluated in its decision—may provide guidance to companies that have web-based platforms and contracts for their users. For the plaintiffs' bar, the decision also provides clarity regarding the types of claims that may or may not survive a motion to compel arbitration in the Second Circuit.