Uber's Online Terms & Conditions Invoking Arbitration Receives 5 Stars

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I. Introduction

With smartphones, iPads, and tablets, consumers have instant access to a worldwide marketplace. Consumers are prompted to assent to the business' "terms and conditions"–the only thing standing in the way of their connection to the sharing economy. Whether giving it a cursory read or glossing over it entirely, some will accept the terms and conditions and often in the process agree to submit all of their disputes to arbitration. Whether the consumer read the terms and conditions or just clicked what was necessary to finalize the transaction, should they be bound to arbitrate any disputes? In the recent *Meyer v. Uber Technologies et al.* decision, the U.S. Court of Appeals for the Second Circuit answered that question in the affirmative. That "yes"—in conjunction with longstanding U.S. Supreme Court jurisprudence favoring arbitration—will go a long way toward reducing the runaway costs associated with class action lawsuits and provide internet user-based businesses assurances that their online terms and conditions that contain an arbitration provision will be enforced by U.S. Courts.

II. U.S. Courts Are Deferential to Arbitration

U.S. courts have proven quite deferential to arbitration: they will find any way to compel it. And this principle has been readily applied in the class action context. Indeed, in *AT&T Mobility LLC v. Concepcion*, the U.S. Supreme Court overturned a California law that forbid class-action waiver provisions, finding that it violated the U.S. policy favoring arbitration. The Court later handed down *American Express Co. et al. v. Italian Colors Restaurant et al.*, in which it sustained an arbitration provision that barred class-action lawsuits. And in 2015, the Supreme Court reaffirmed *Concepcion* in *DIRECTV, Inc. v. Imburgia*, a case that upheld a class-action waiver in a consumer utility arbitration agreement—effectively requiring plaintiffs to participate in individual arbitrations. All of these decisions not only reinforced the Federal Arbitration Act's mandate favoring arbitration but, more importantly, reduced the risk of expensive class action litigation. The recent decision in *Meyer v. Uber Technologies* will further reinforce this long-standing deference in favor of arbitration.

III. *Meyer v. Uber Technologies*—Arbitration Can Be Invoked Through "Reasonably Conspicuous" Online Terms and Conditions.

"Browsewrap" agreements generally post terms and conditions on a website via a hyperlink at the bottom of the screen, whereas "clickwrap" agreements generally require the user to click an "I agree" box after being presented with the terms and conditions. When assessing the sufficiency of Browsewrap agreements, courts will consider "whether the user has actual or constructive knowledge of a website's terms and conditions." Some wondered how consumers' confrontation with "browsewrap" might intersect with these seemingly well-established principles favoring arbitration. *Meyer v. Uber Technologies* answered that call.

In *Uber Technologies*, while plaintiff was registering for an account with the ride-sharing service Uber Technologies, he received a text on his smartphone that informed him that by continuing he was agreeing to Uber's terms of service, which included an agreement to arbitrate any disputes. Although Plaintiff did alleged he did not read the terms of service, he had the opportunity to do so prior to registration.

In upholding the sufficiency of the access to Uber's Terms and Conditions, the Second Circuit focused on the structure and design of the user interface notification, acknowledging that it was uncluttered and explicit: dark lettering on a light background. Moreover, the warning was clear with language in caps: "By creating an Uber account, you agree to the TERMS OF SERVICE & PRIVACY POLICY." The hyperlinks (blue and underlined) to the same appeared directly below the buttons for registration and the entire screen was visible at once—the user did not need to scroll beyond what was immediately visible to find the terms and conditions. Further, the notice of the Terms of Service was provided simultaneously to enrollment, thereby connecting the contractual terms to the services to which they applied.

The Second Circuit reasoned that "[a] reasonable user would know 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." This was notice that was "reasonably conspicuous" to a normal smartphone user and enough to find that plaintiff had assented to arbitration. Although the Court agreed that the plaintiff assented to arbitration, plaintiff is now arguing that Uber waived arbitration by litigating the case in federal court—an issue that will be further explored.

IV. Conclusion

The *Uber Technologies* decision should lend comfort to internet-based businesses in that they can successfully employ arbitration agreements electronically. However, businesses that deploy "clickwrap" or "browsewrap" functions should ensure that their terms and conditions are reasonably conspicuous so the user is aware of and can easily access them before assenting to the same.

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