

LITIGATION

COMMERCIAL >> ALERT

APPEALS COURT ENFORCES ARBITRATION CLAUSE IN HYPERLINKED TERMS & CONDITIONS

In an important decision concerning the enforceability of an arbitration clause included in a mobile app's Terms of Service, the federal appeals court in New York recently found that a reasonably prudent smartphone user would recognize that blue, underlined text within an Internet-linked app leads to another page where additional information can be found.

The U.S. Court of Appeals for the Second Circuit therefore held that a mobile app's registration screen, notifying the user that by registering, he or she will be bound by the app's "[Terms of Service](#)," is sufficient to bind that user to a contractual arbitration provision included in those Terms of Service, reversing the district judge's decision that determined such hyperlinked terms to be unenforceable.

BACKGROUND

As we discussed in a previous [Alert](#), in December 2015, Uber passenger Spencer Meyer brought a federal antitrust class action against Uber CEO Travis Kalanick, alleging a price-fixing conspiracy carried out using Uber's ride-pricing algorithm. Uber soon joined the case, and – citing the arbitration clause in its Terms of Service – moved to compel arbitration of all of Meyer's claims. Meyer argued that he never agreed to arbitration. Uber then referenced its Terms of Service on a "payment" screen within the app's registration process in a sentence beneath the "Register" button that read:

THE BOTTOM LINE

The Second Circuit's *Meyer* decision reaffirms the importance of well-crafted terms and conditions for companies interacting with consumers over the Internet and via mobile apps, and that for those terms to be enforceable, access to them must be presented in a manner clear and conspicuous enough for a reasonably prudent user to understand that he or she can access and review the terms and is also agreeing to be bound by them. Best practices include: linking to the terms on the same screen on which consumers enter payment or registration information; placing the link in close proximity to the "continue" or "register" button, visible without the need to scroll down; including an explicit statement that the user is agreeing to the terms by registering or paying; and formatting the link and associated statement in a prominent, high-contrast font, distant from any other text on the screen.

By creating an Uber account,
you agree to the
TERMS OF SERVICE & PRIVACY
POLICY.

Meyer asserted that this did not provide adequate notice during registration that he was agreeing to arbitrate if he proceeded.

Judge Jed Rakoff of the U.S. District Court for the Southern District of New York ruled in favor of Meyer. In refusing to enforce the arbitration clause, Judge Rakoff expressed general doubt as to

whether consumers can really be said to have "agreed" to provisions contained in lengthy, non-negotiable electronic terms and conditions. Judge Rakoff held that Uber's arbitration clause was not enforceable for a number of reasons, including:

- 1) The lack of an "I Agree" button or checkbox, indicating their assent to the Terms of Service;
- 2) The location of the Terms of Service on a page separate from the registration screen;

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- 3) The lack of prominence of the Terms of Service link;
- 4) The possibility that users might not understand what Terms of Service meant; and
- 5) The lack of prominence of the arbitration clause itself within the Terms of Service.

Dissatisfied with the district court's analysis, and believing users received adequate notice of the terms and the arbitration clause, Uber appealed.

THE DECISION OF THE COURT OF APPEALS

After carefully examining and analyzing the Uber app's registration screens, the three-judge panel of the Second Circuit reversed the decision and agreed with Uber. The court held that the reference to Uber's Terms of Service were clear and conspicuous enough that today's smartphone user would understand they needed to click the hyperlink to read those terms, and that they were agreeing to a contract by registering.

Noting that smartphones are today so prominent that "the proverbial visitor from Mars might conclude they were an important feature of human anatomy," and that consumers use their phones for an ever-growing list of activities, the court found that it "need not presume that the user has never

before encountered an app or entered into a contract using a smartphone." The court further found that "a reasonably prudent smartphone user knows that text that is highlighted in blue and underlined is hyperlinked to another webpage where additional information will be found." The court therefore held that Uber's registration process provided reasonable notice to users of the Terms of Service, and that by completing the process the user manifested consent to the terms. In so holding, the court relied on the:

- >> uncluttered layout of the payment screen on which the link was located, which included only fields for credit card information, buttons to pay via PayPal or Google Wallet and the notice containing the hyperlink to the terms;
- >> proximity of the notice to the registration button, all of which was visible on the screen without scrolling down;
- >> contrast of the notice's dark text against the white background of the payment screen; and
- >> fact that the notice was given at the same step in the process that the consumer had to click to register and pay, leading to an understating that the terms were connected to the creation of an account.

Acknowledging the state of commerce in the year 2017, the court pointed out that clicking on hyperlinked text "is the twenty-first century equivalent of turning over the cruise ticket" to find the terms of sale. The court further held that the arbitration clause itself was sufficiently prominent within the terms, as they bore a bold section heading and included bold text sufficient to set the clause apart from the rest of the lengthy contract terms.

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