

# LITIGATION

## COMMERCIAL >> ALERT

### ENHANCING THE LIKELIHOOD OF ENFORCEMENT OF A FORUM SELECTION CLAUSE IN AN ONLINE CONTRACT

Companies that do business with parties located in another nation, state or even county may include a “forum selection clause” in their contracts to provide the predictability, advantage or convenience of litigating any contract disputes in a specific court or arbitration forum. A recent decision from a New York state court underscores that, to be enforceable under New York law, a forum selection clause in an online contract must be “reasonably communicated” to the customer.

#### BACKGROUND

Swipe Ice Corp, Inc. (Swipe Ice), a company that sells technology products and accessories through various online storefronts, such as eBay.com and Amazon.com, filed suit against United Parcel Service (UPS) in New York state court for breach of contract. Swipe Ice alleged that UPS failed to deliver numerous packages in violation of the parties’ agreement (the Agreement), under which UPS agreed to provide Swipe Ice exclusive outgoing mail courier and package delivery services.

UPS moved to dismiss the complaint, arguing that the forum selection clause in the Agreement required Swipe Ice to bring its lawsuit in Georgia state or federal court. Specifically, UPS argued that the Agreement, which set forth various terms and conditions of UPS’s services, also incorporated by reference and provided a hyperlink to the Service Terms and Conditions.

#### THE BOTTOM LINE

Companies that include a forum selection clause in an online contract should make sure that they reasonably communicate the forum selection clause to their customers and vendors. Best practices include: (i) providing on an uncluttered screen a direct hyperlink to the terms and conditions that contain the forum selection clause on an uncluttered screen, where the hyperlink is visible without having to scroll down; (ii) formatting the hyperlink in a clear manner, such as by having the phrase “Terms and Conditions” in blue, underlined text against a bright white background; (iii) setting off the forum selection clause within the terms and conditions, such as with a heading in bold text; and (iv) requiring customers to affirm that they agree to the terms and conditions before they can continue using the website.

These Service Terms and Conditions contained a forum selection clause that made the U.S. District Court for the Northern District of Georgia or state court in the County of Fulton, Georgia the exclusive forum for “[a]ny legal suit, action or proceeding arising out of or relating to” the online Service Terms and Conditions.

Swipe Ice opposed UPS’s motion on several grounds, including that the online Service Terms and Conditions were difficult for a website user to find and, more specifically, that the forum selection clause was inconspicuous within the online Service Terms and Conditions.

>> continues on next page

## THE DECISION

The New York Supreme Court, Kings County, agreed with Swipe Ice, denied UPS's motion and permitted the action to proceed in New York court. The court then outlined three general principles regarding the enforceability of an online contract:

- 1) the website must be designed such that a "reasonably prudent user" is on inquiry notice of the terms of using the website;
- 2) the website's design and content must encourage the user to examine the terms "clearly available through the hyperlinkage"; and
- 3) the hyperlink to the agreement must not be "buried at the bottom of a webpage or tucked away in obscure corners of the website."

Under these principles, the court held that UPS's Georgia forum selection clause was unenforceable because UPS did not reasonably communicate or present the online Service Terms

and Conditions to Swipe Ice at the time that Swipe Ice accepted the Agreement. Further, the court found that the Service Terms and Conditions were not clearly available through the hyperlink provided in the Agreement, which directed the customer to UPS's general website and then required the customer to scroll to the bottom of the page in order to find the direct hyperlink to the Service Terms and Conditions. The court found that this design failed to encourage the customer to examine the Service Terms and Conditions.

In addition, while the New York Supreme Court, Kings County, did not explicitly identify this factor in its analysis, courts in general may consider that a contractual counterparty with no connection to a foreign forum would not have anticipated that it was agreeing to litigate disputes there, unless that agreement had been clearly communicated to it.

## FOR MORE INFORMATION

Neal H. Klausner  
Partner/Co-Chair  
212.468.4992  
[nklausner@dglaw.com](mailto:nklausner@dglaw.com)

Claudia G. Cohen  
Associate  
212.468.4838  
[ccohen@dglaw.com](mailto:ccohen@dglaw.com)

or the D&G attorney with whom you have regular contact.

---

[Davis & Gilbert LLP](#)  
212.468.4800  
1740 Broadway, New York, NY 10019  
[www.dglaw.com](http://www.dglaw.com)

© 2018 Davis & Gilbert LLP