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First Circuit Finds Uber's Arbitration Clause to Be Unenforceable Because the Hyperlink to the Clause Was Too Inconspicuous

Businesses utilizing online or smart phone app-based contracts containing arbitration clauses accessed by hyperlink should ensure that the link is very conspicuous and that the user is required to read the terms and click to acknowledge acceptance.

Last August, we wrote about *Meyer v. Uber Techs., Inc.*, 868 F.3d 66 (2d Cir. 2017), a key decision in which the United States Court of Appeals for the Second Circuit found Uber Technologies Inc.'s ("Uber") arbitration provision, which was wrapped into the Uber app's hyperlink-accessible "Terms and Conditions," was enforceable even though a user could register with Uber (and thereby agree to arbitration) without ever having to click on the hyperlink and scroll through the Terms and Conditions. (See *Second Circuit Issues Important Decision Strengthening the Enforceability of Digital Arbitration Agreements*, August 2017, available here.)

While *Meyer* was a victory for businesses utilizing online or app-based arbitration agreements, on June 25, 2018, the First Circuit Court of Appeals, in *Cullinane, et al v. Uber Technologies, Inc.*, No. 16-2023, went the other way and held that, under Massachusetts law, the identical arbitration provision at issue in *Meyer,* was not enforceable against the plaintiffs because Uber's "Terms of Service & Privacy Policy" hyperlink to the provision was not conspicuous enough to notify new users about what they were agreeing to, and/or that their creation of an Uber account would bind them to the linked terms including the arbitration provision.

BACKGROUND

In *Cullinane*, a putative class action by four Uber users alleging the company charged improper tolls on rides to Boston's Logan International Airport and other destinations, the First Circuit reversed the U.S. District Court of Massachusetts's decision granting Uber's motion to compel arbitration. Noting that the Massachusetts Supreme Court had not yet weighed in on the issue of what constitutes contract formation in "online agreements," the court looked to a Massachusetts intermediate appellate court decision providing that the inquiry is no different from the paper contract context—i.e., clauses in online agreements will be enforced "provided they have been reasonably communicated [to] and accepted" by the other party.

Applying the standard that, in *Meyer*, the Second Circuit stated should apply in the context of web-based contracts—i.e., that "clarity and conspicuousness are a function of

the design and content of the relevant interface,"—the First Circuit rejected Uber's argument that the Uber app's online presentation where the hyperlink was located was sufficiently conspicuous as to bind plaintiffs to arbitrate.

The court was swayed by the fact that users were not required to click a box stating that they agreed to the Terms of Service before continuing to the next screen, something that the court cited as "a common method of conspicuously informing users of the existence and location of terms and conditions." Additionally, the court refused to assess the conspicuousness of the hyperlink in a vacuum, and instead analyzed whether the link was conspicuous as compared to everything else around it. The court found that the link was not designed in a way that most users associate with hyperlinks (i.e., hyperlinks are "commonly blue and underlined."). Moreover, even though the hyperlink did possess some of the characteristics that make a term conspicuous (e.g., larger font, in bold, contrasting in color), the presence of other terms on the same screen with a similar or larger size, typeface, and with more noticeable attributes diminished the hyperlink's capability to grab the user's attention. In short, the court held that "[i]f everything on the screen is written with conspicuous features, then nothing is conspicuous." Finding the link inconspicuous, the court reversed the district court's decision and held that, because the plaintiffs were not reasonably notified of the terms of the agreement, they did not provide their unambiguous assent to those terms.

CONCLUSION

While *Cullinane, et al v. Uber Technologies, Inc.* seems to evince the sort of judicial hostility towards arbitration agreements that Congress enacted the Federal Arbitration Act to reverse, the Cullinane decision (like the Second Circuit's *Meyer* decision) provides valuable instructions on how to ensure enforceability of arbitration clauses in online/app-based contracts. *Cullinane* dictates that best practice now require ensuring: (1) that the link to the terms and conditions containing the arbitration clause is very conspicuous in the context of its surroundings (e.g., bold and colorful text is not enough if the rest of the page contains similar or more noticeable text), (2) that the registration, or analogous, process include a clear prompt directing users to read the terms and conditions, and (3) the user is required to unambiguously confirm his acceptance of the terms and conditions containing the arbitration clause by clicking a button.

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