Morgan Lewis

TECHNOLOGY MAY-RATHON

Protecting Your eCommerce Company with Enforceable Online Contracts and Class Action Waivers

May 16, 2019

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SECTION 01

INTRODUCTION AND ROADMAP

Class Actions and Arbitration

- Class action litigation is growing
  - Nearly 60% of US companies are facing class action lawsuits
  - Some of the most expensive and worrisome legal matters
- Class action waivers in arbitration agreements can provide an out
  - Companies that carefully craft and implement waivers in customer agreements and employee contracts avoid most, if not all, class action litigation

Whether to Use Arbitration and a Class Action Waiver

- Arbitration pros:
  - Less costly
  - Faster
  - Streamlined
  - Private
  - Avoid emotion-fueled jury verdicts
- Arbitration cons:
  - Limited appeal rights
  - Damages can be awarded without rigorous evidentiary proof
  - Harder to get summary judgment or dismissal at the outset
- Class action waivers have their own pros and cons
  - Avoid costly and time-consuming litigation, but can face multiple individual arbitrations that could be more expensive and time intensive than resolving the issue once in a class action

Presentation Roadmap

- The Federal Arbitration Act
- Courts' approaches to class action waivers in arbitration agreements
  - Supreme Court's *AT&T v. Concepcion* decision
- How to apply court standards in your own class action waivers
  - (1) Ensure you have an enforceable underlying agreement
  - (2) Get the language right
- Unique issues facing employers and financial services industries

SECTION 02

FEDERAL ARBITRATION ACT AND *AT&T V. CONCEPCION*

Federal Arbitration Act (FAA)

- Enacted in 1925
- Applies in state and federal courts to non-maritime transactions involving interstate commerce
- Section 2 – Most important for class action waivers in arbitration agreements
  - Any arbitration provision covered by the FAA "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract"
- "Shall be valid, irrevocable, and enforceable" is the preemption clause
  - Makes any rule or policy hostile to arbitration not enforceable as a matter of federal law

Savings Clause

- The next clause, "save upon such grounds as exist at law or in equity for the revocation of any contract," is known as the savings clause
- Preserves general contract defenses against arbitration agreements, such as:
  - Fraud
  - Duress
  - Unconscionability

State Courts

- Historically hostile towards class action waivers in arbitration agreements
- Often ruled per se unconscionable and unenforceable
- Frequently held arbitration agreements as a whole invalid, or, at the least, struck the class action waiver
- This animosity was in tension with the FAA → *AT&T v. Concepcion*

AT&T v. Concepcion, 563 U.S. 333 (2011)

- AT&T's arbitration agreement included a class action waiver
- California Supreme Court had invalidated all contractual class action waivers in its *Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005), decision
- Supreme Court held that state rules precluding class action waivers **do not apply** when those waivers are **in arbitration agreements**
  - However, the savings clause also applies, preserving state law contract defenses
- Impact:
  - Has been called "the decision that has launched a thousand motions"
  - In 2012 alone, courts in at least 76 putative class actions cited *Concepcion* when granting a motion to compel individual arbitration

SECTION 04

ENSURING YOU HAVE AN AGREEMENT

Online Contracting – Background

- Uniform Electronic Transactions Act (UETA)
  - Adopted by all states except three (IL, NY & WA)
  - Intended to limit barriers to electronic contracting consistent with record retention and substantive law requirements
  - Pertains to sales and lease transactions under Articles 2 and 2A of the UCC, but broader impact
  - Key rules: (1) record or signature cannot be denied legal effect because it is electronic; (2) contract cannot be denied legal effect because it is electronic; (3) if substantive law requires contract in writing, electronic record satisfies the requirement; and (4) if substantive law requires a signature, e-signature satisfies the requirement
  - But: If the contract cannot be stored or printed, it is not enforceable

Online Contracting – Background

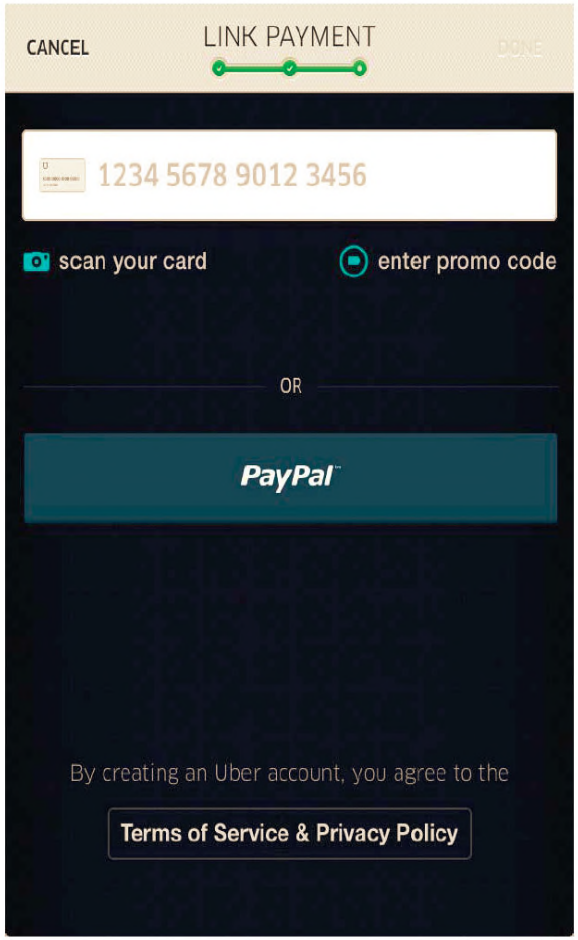
- Electronic Signatures in Global and National Commerce Act (E-Sign Act)
- Applies to transactions in or affecting interstate commerce
- Federal law intended to (1) grant legal validity to electronic signatures or contracts; (2) electronic records satisfy requirement of any substantive law that a contract be in writing
  - *"The term `electronic signature' means an electronic sound, symbol, or process, attached to or logically associated with a contract or other record and executed or adopted by a person with the intent to sign the record."*

Traditional Contract Principles Apply Online

- Offer: Manifestation of willingness to contract
  - Because there is no personal interaction, and contract might result automatically if someone accepts, be sure to define limitations and terms of offer
  - Define what act(s) will indicate acceptance
- Acceptance:
  - Consistent with the "mailbox rule," a contract is effective upon act or acceptance rather than acknowledgment or receipt
  - Acceptance can be communicated in a variety of ways
- Mutual Assent: Manifestation by both parties to be bound
  - Objective standard applies: What would a reasonable person conclude about the outward expressions of the parties?
  - What acts are required to indicate acceptance is a matter of significant litigation (e.g., click-through, click-wrap, browse-wrap, etc.)

Traditional Contract Principles Apply Online

- Remember, FAA Section 2 applies, preserving contract defenses
- Common contract problems:
  - Lack of mutual assent
  - Substantive unconscionability
  - Procedural unconscionability and adhesion
  - Proving it exists!
- Statute of frauds:
  - Intent is to provide reliable evidence of certain types of contracts
  - Require contract be in writing and signed by each party to the contract
  - May consider requiring signature/notary for certain special agreements, depending on the jurisdiction (e.g., wills, codicils, certain financial documents, etc.)
  - Even if statute of frauds does not apply, can you prove an online contract exists?


CANCEL
LINK PAYMENT
DONE
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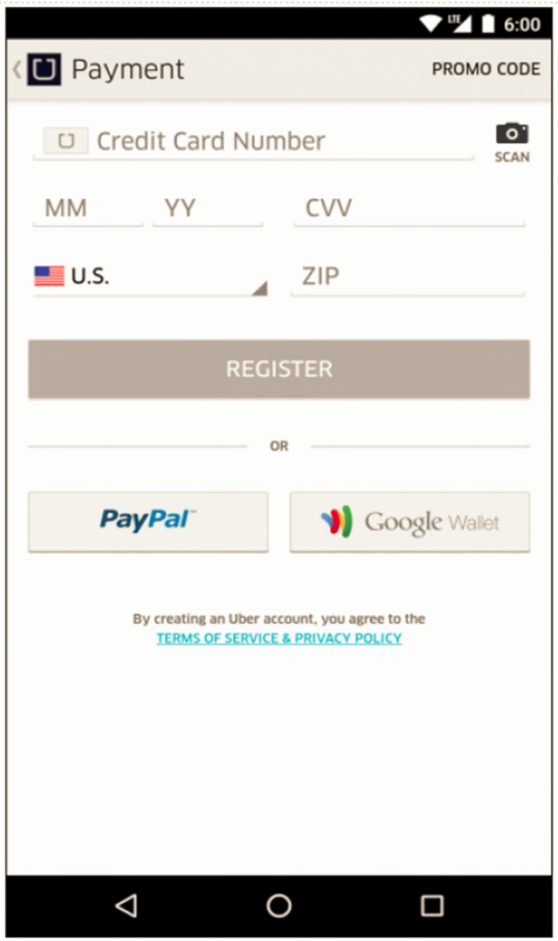
scan your card
enter promo code
OR
PayPal
By creating an Uber account, you agree to the
Terms of Service & Privacy Policy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Payment
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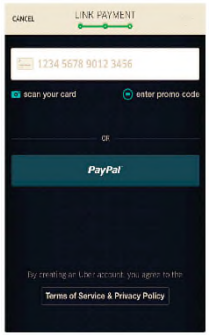
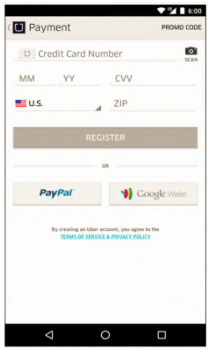
By creating an Uber account, you agree to the
TERMS OF SERVICE & PRIVACY POLICY

Battle of the Screens

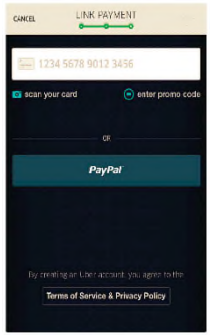


- *Cullinane v. Uber Technologies, Inc.*, 2016 WL 3751652 (D. Mass. 2016)
  - Held agreement enforceable
  - Screen gave plaintiffs reasonable notice that their agreement was subject to the terms
  - Signified assent by clicking "done" and using the service

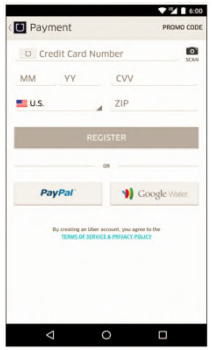


- *Meyer v. Kalnick*, 200 F. Supp. 3d 408 (S.D.N.Y. 2016)
  - Held no agreement formed
  - No "I agree" box and terms of service not prominently displayed = plaintiffs lacked "reasonably conspicuous notice"

Both Circuits Reversed



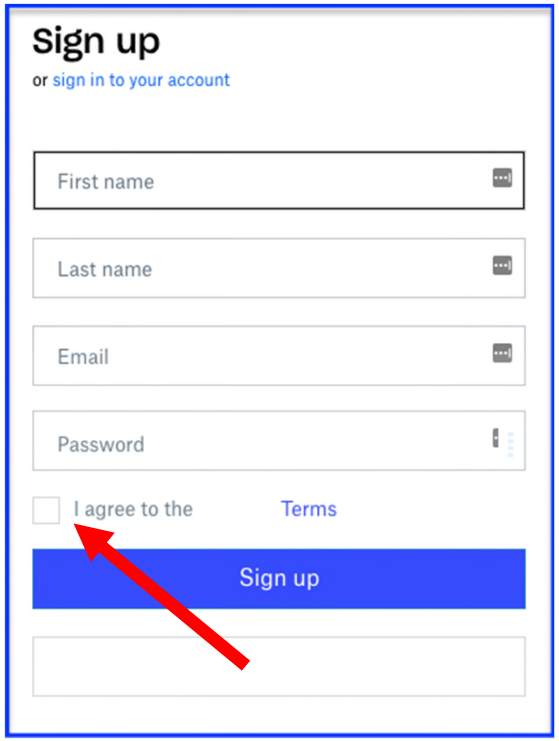
- *Cullinane v. Uber Techs., Inc.*, 893 F.3d 53 (1st Cir. 2018)
  - Held unenforceable
  - Terms only accessible through a hyperlink, but nothing indicated to the consumer that the text was indeed a working hyperlink
  - Hyperlink and accompanying language were not conspicuous enough

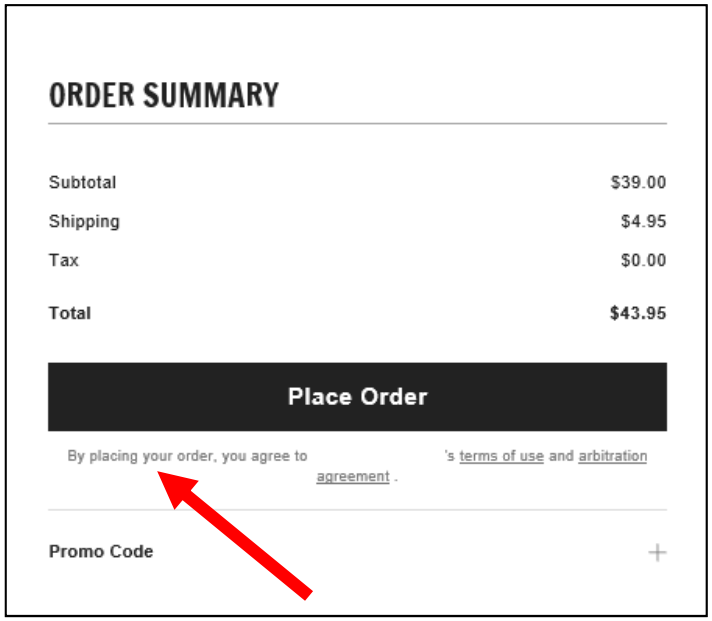


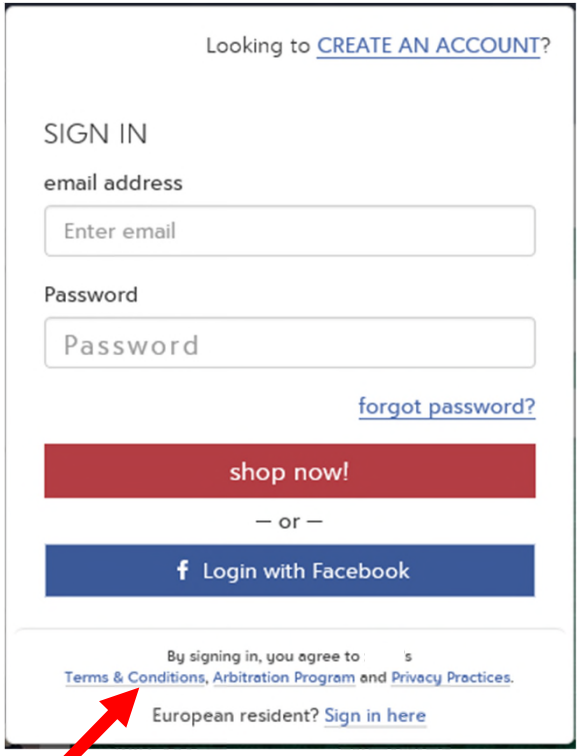
- *Meyer v. Uber Techs., Inc.*, 868 F.3d 66 (2d Cir. 2017)
  - Reasonable notice found
  - Screen uncluttered, no scrolling needed to find link to terms
  - Notice of terms along with the mechanism for accepting them were "temporally coupled"

Lessons from Uber

- Design a contract formation process that makes the agreement clear
- (1) Consider the contracting method itself
  - Written agreement with signature
  - Clickwrap
  - Scrollwrap
  - Modified clickwrap / login wrap
- (2) Content of the "call to action" language


Sign up
or sign in to your account
First name
Last name
Email
Password
I agree to the
Terms
Sign up


ORDER SUMMARY
Subtotal $39.00
Shipping $4.95
Tax $0.00
Total $43.95
Place Order
By placing your order, you agree to 's terms of use and arbitration agreement .
Promo Code


Looking to CREATE AN ACCOUNT?
SIGN IN
email address
Enter email
Password
Password
forgot password?
shop now!
— or —
Login with Facebook
By signing in, you agree to s Terms & Conditions, Arbitration Program and Privacy Practices.
European resident? Sign in here

Lessons from Uber

- Design a contract formation process that makes the agreement clear
- (1) Consider the contracting method itself
  - Written agreement with signature
  - Clickwrap
  - Scrollwrap
  - Modified clickwrap / login wrap
- (2) Content of the "call to action" language
- (3) Placement of the "call to action" language
- (4) Don't forget about font

SECTION 03

GETTING THE LANGUAGE RIGHT

Make Terms Consumer-Friendly

- Adding consumer-friendly terms to your agreement heads off unconscionability arguments
  - For example, the agreement upheld in *Concepcion* included terms that:
    - AT&T would pay the entire cost of arbitration
    - The arbitration would take place where the consumer was located or by phone or by written submission
    - The arbitrator was given no limitation on damages

Consider Scope

- Blanket arbitration is an understandable goal
- But consider the consumers, purchases, and actions you want the arbitration agreement to cover
- Making the scope of the agreement as broad as possible could be seen as unfair and even unconscionable (and therefore struck down under the savings clause)

Consider Scope

- At least one major consumer products company learned this lesson the hard way
- After a messy class action about product labeling, the company amended its website's terms of use to include an arbitration clause and class action waiver
- Agreement was very broad:
  - Covered anyone who used it's website, a resource from the website, or any product or service of the company
  - E.g., "liking" the company on Facebook or "pinning" a product on Pinterest = agreement to arbitrate and waive class action rights
- Resulted in an unforgiving *New York Times* article "When 'Liking' a Brand Online Voids the Right to Sue"
  - Although the media had mischaracterized the agreement, the company faced increasing backlash, and after just three days removed the arbitration provision and class action waiver
- Five years later, the company still has no arbitration agreement or class action waiver

Consider Scope

- Lessons learned:
  - Consumer groups, press, and the plaintiffs' bar are increasingly sophisticated about the use of arbitration provisions and unafraid to criticize companies that implement them
  - Always anticipate scrutiny and publicity following implementation
  - If you don't need certain categories of individuals to agree to your waivers, then don't make them agree
  - A reasoned, risk-calculated approach is better than an unenforceable, broad one

Mutuality

- Make sure the arbitration provision is mutual
  - Must apply to both parties
  - Do not reserve special rights for the company
- Example: real estate development company Toll Brothers
  - Fourth Circuit held its arbitration agreement unenforceable due to lack of mutuality
    - Agreement only discussed buyer's obligations
    - Buyers had to jump through extra hoops, like written notice and opportunity to cure
    - Only the buyer waived the right to a court proceeding
  - Company thought it was getting a great deal; instead, had its agreement struck down and was forced to litigate major class action

Arbitration Location

- Most commercial contracts specify that disputes must be resolved in a location convenient for the company (e.g., where headquartered)
- Consider instead stating that the arbitration will take place where the consumer is located, or providing the option of arbitrating by phone or written submissions
- Example: EZCorp.
  - Class action filed claiming their lending practices were unfair and deceptive
  - EZCorp. moved to compel arbitration and Plaintiff argued unconscionability
  - Court found arbitration agreement enforceable, noting that the buyer was given four choices for the arbitration's location: (1) the county of the consumer's residence, (2) within 30 miles from that county, (3) the county where the consumer submitted the loan application, or (4) "in such other place as shall be ordered by the arbitrator"

Additional Consumer-Friendly Considerations

- Costs
  - Consider having the company agree to pay for the filing and hearing costs
  - Makes it easier for a consumer with a small-dollar claim to pursue it individually
  - Also avoids unconscionability arguments
- Small Claims Court
  - Include an exception to the arbitration agreement for bringing individual claims in small claims court
  - Shows consumers and courts that the company is reasonable and not taking advantage of bargaining power
  - Some arbitration service providers (e.g., the American Arbitration Association) require that you give consumers this option

Put the Waiver in the Arbitration Agreement

- If you are going to use a class action waiver, you **must** put it in the arbitration agreement
  - They cannot be separate provisions
- Failure to integrate the waiver = losing the protection of FAA preemption
- Will instead be left with state law controlling, which often bans class action waivers in consumer contracts
- Result: class action litigation

SECTION 05

RECENT DEVELOPMENTS

Employment Contracts

- Years of debate over the relationship between the FAA and the National Labor Relations Act of 1935
  - FAA protects arbitration agreements
  - Section 7 of the NLRA arguably protected employee class action lawsuits as part of employees' right to concerted activity
- *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018)
  - Supreme Court ended the debate by holding the FAA controls and the NLRA **does not invalidate class action waivers in arbitration agreements**

Financial Services Industry

- Consumer Financial Protection Bureau issued a final rule in July 2017 banning class action waivers in arbitration agreements between financial services companies and their consumers
- House of Representatives passed a resolution to prevent the rule from taking effect
- Senate affirmed 51-50 with Vice President Mike Pence as tie-breaker

SECTION 06

FINAL TAKEAWAYS

Final Takeaways

Remember:

- (1) Get the language right
- (2) Get consent
- (3) Stay tuned

Morgan Lewis Technology May-rathon 2019

A full listing and of our tech May-rathon programs can be found at

https://www.morganlewis.com/topics/technology-may-rathon

Please be sure to tweet **#TechMayRathon**

Thank you.

Biography

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Ezra D. Church focuses his practice on class action lawsuits and complex commercial and product-related litigation, with particular emphasis on the unique issues facing retail, ecommerce, and other consumer-facing companies. Ezra also focuses on privacy and data security matters, and regularly advises and represents clients in connection with these issues. He is co-chair of Morgan Lewis's Class Action Working Group.

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Devin K. Troy serves clients across a diverse range of practice areas, including white collar litigation, complex commercial matters, antitrust litigation, and patent disputes. Her clients largely occupy the pharmaceutical and medical device industries. She is a member of Morgan Lewis's Class Action Working Group.

THANK YOU

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